[Cite as *Vieth v. Ohio Dept. of Job & Family Servs.*, 2009-Ohio-3748.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Susan Vieth, Executor of the Estate of Warren Vieth,	:	
Appellant-Appellant,	:	No. 08AP-635
	:	(C.P.C. No. 07CVF-11-15746)
v.	:	(REGULAR CALENDAR)
Ohio Department of Job & Family Services,	:	
Appellee-Appellee.	:	

D E C I S I O N

Rendered on July 30, 2009

Cannizzaro, Fraser, Bridges, Jillisky & Streng, LLC, and *Don W. Fraser*; *Browning, Meyer & Ball, Co., LPA*, and *William J. Browning*, for appellant.

Richard Cordray, Attorney General, and *Mark W. Fowler*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by appellant, Warren Vieth, now Susan Vieth, Executor of the Estate of Warren Vieth, from a judgment of the Franklin County Court of Common Pleas, affirming the decision of appellee, Ohio Department of Job and Family Services ("the department"), denying appellant Medicaid vendor payments.

{¶2} The relevant facts of this case are not in dispute. On November 13, 2006, appellant was admitted to a medical institution; as of that date, the total value of available resources for appellant and his spouse, for purposes of calculating Medicaid eligibility, was $300,828.48.

{¶3} On January 29, 2007, appellant's spouse, Susan Vieth, purchased two annuities, one in the amount of $127,110.92, and the other in the amount of $13,814.51.[1] In all administrative hearings conducted in this matter, the department has agreed that the annuities at issue fully complied with the provisions of Ohio Adm.Code 5101:1-39-22.8, which became effective October 1, 2006.

{¶4} When appellant's spouse purchased the annuities, the maximum amount of the community spouse resource allowance ("CSRA") was $101,640. On April 12, 2007, appellant applied for Medicaid benefits, and the department subsequently conducted a resource assessment. On July 1, 2007, the Franklin County Department of Jobs and Family Services ("the agency") denied appellant Medicaid vendor payments based upon the agency's determination of an improper transfer of resources; specifically, the order provided: "Improper transfer of assets: Assets belonging to the couple, excluding the CSRA of $101,640.00, were put into annuities in the community spouse[']s name in order to make the institutionalized spouse eligible for Medicaid." In support of its determination, the agency cited the provisions of Ohio Adm.Code 5101:1-39-07.

{¶5} Appellant filed objections to the agency's denial of Medicaid vendor payments, and a state hearing officer conducted a hearing on the matter. The hearing

[1] The annuities were identified, in an administrative hearing memorandum, as commercial annuities issued by Jefferson Pilot LifeAmerica.

officer issued a report recommending that the objections be overruled on the basis that "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." On September 20, 2007, the state hearing authority reviewed the report and adopted the hearing officer's recommendation. Appellant filed an administrative appeal from the state hearing authority's decision, and, on October 26, 2007, the department affirmed the hearing decision.

{¶6} On November 19, 2007, appellant filed an appeal with the trial court from the decision of the department. By decision and entry filed June 30, 2008, the trial court affirmed the department's decision and dismissed appellant's appeal.

{¶7} On appeal, appellant sets forth the following single assignment of error for this court's review:

> THE REVIEWING COURT ERRED AS A MATTER OF LAW IN AFFIRMING APPELLEE'S DECISION TO DENY MEDICAID BENEFITS TO THE APPELLANT ON THE BASIS THAT O.A.C. 5101:1-39-07 PRECLUDES A COUPLE FROM CONVERTING COUNTABLE RESOURCES IN EXCESS OF THE CSRA INTO INCOME OF THE COMMUNITY SPOUSE WHICH IS NOT COUNTABLE IN DETERMINING MEDICAID ELIGIBILITY FOR THE INSTITUTIONALIZED SPOUSE BY PURCHASING IRREVOCABLE ACTUARIALLY SOUND COMMERCIAL ANNUITIES THAT FULLY COMPLY WITH O.A.C. 5101:1-39-22.8 FOR THE SOLE BENEFIT OF THE COMMUNITY SPOUSE.

{¶8} R.C. 119.12 governs the standard of review for a court of common pleas in an administrative appeal, and provides in part:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial

> evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

{¶9} Under the provisions of R.C. 119.12, a common pleas court is required "to conduct two inquiries: a hybrid factual/legal inquiry and a purely legal inquiry." *Bartchy v. State Bd. of Edn.,* 120 Ohio St.3d 205, 2008-Ohio-4826, ¶37.

{¶10} An appellate court's review of the decision of the common pleas court is more limited, and involves a determination whether the trial court abused its discretion. *Steinfels v. Ohio Dept. of Commerce* (1998), 129 Ohio App.3d 800, 803. On purely legal questions, however, an appellate court's review is "plenary." Id.

{¶11} Appellant argues that the trial court erred in affirming the department's decision to deny him Medicaid vendor payments on the basis that Ohio Adm.Code 5101:1-39-07 precludes a married couple from converting countable resources in excess of the CSRA into income of the community spouse through the purchase of actuarially sound commercial annuities for the sole benefit of the community spouse. Appellant maintains that his spouse's purchase of the annuities was proper under both Ohio law (Ohio Adm.Code 5101:1-39-22.8) and federal Medicaid law, and that the application should have been approved. Appellant also challenges the department's position that the transfer of funds was improper, pursuant to Ohio Adm.Code 5101:1-39-07, because it was done without a hearing.

{¶12} By way of background, Congress established the Medicaid program in 1965 by adding Title XIX to the Social Security Act, 42 U.S.C. 1396 et seq., "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of

medical treatment for needy persons." *Harris v. McRae* (1980), 448 U.S. 297, 301, 100 S.Ct. 2671, 2680. The federal government shares the costs of Medicaid with states that elect to participate. *Atkins v. Rivera* (1986), 477 U.S. 154, 156-57, 106 S.Ct. 2456, 2458. Although participation in the Medicaid program is optional, "once a State elects to participate, it must comply with the requirements of Title XIX." *Harris* at 301, 100 S.Ct. 2680. Participating states are "required to develop reasonable standards for determining eligibility consistent with the act." *Kinasz-Regan v. Ohio Dept. of Job & Family Servs.,* 164 Ohio App.3d 458, 2005-Ohio-5848, ¶12. Ohio is a participant in the Medicaid program, and "has codified its eligibility requirements at R.C. 5111.01 et seq." Id.

{¶13} Prior to 1988, a married individual in a nursing home was essentially required to " 'spend down' all of the family assets to the relevant eligibility limits before he or she could become eligible for assistance." *Martin v. Ohio Dept. of Human Servs.,* (1998), 130 Ohio App.3d 512, 518. Congress enacted 42 U.S.C. 1396r-5 as part of the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), and this legislation "was designed, in part, to prevent the impoverishment of one spouse when the other enters a nursing home." Id. Because "[b]oth husband and wife could be reduced to poverty by medical expenses before either one of them could receive Medicaid assistance to pay for nursing home care * * * [t]he spousal impoverishment section of the MCCA, codified at Section 1396r-5, was enacted to remedy that situation." Id., citing *Mistrick v. Div. of Med. Assistance & Health Servs*. (1998), 154 N.J. 158, 168, 712 A.2d 188, 194.

{¶14} The MCCA "permits the spouse living outside the nursing home (designated the 'community spouse') to keep half of the couple's resources, generally, without affecting the eligibility of the spouse within the nursing home (designated the

'institutionalized spouse')." *Martin* at 518. After this "equal division, the community spouse's share must fit within certain minimum and maximum amounts that are indexed to inflation," and the adjusted amount is designated the CSRA. Id., citing 42 U.S.C. 1396r-5(f)(2). Any of the couple's resources not a part of the CSRA, and which are not otherwise excluded from consideration, are "deemed available to the institutionalized spouse," and "[t]he institutionalized spouse may then spend down any amount in excess of the eligibility levels to receive Medicaid benefits. *Martin* at 519.

{¶15} After the MCCA became effective, the Ohio General Assembly directed the Ohio Department of Human Services ("ODHS") "to 'establish standards consistent with federal law for allocating income and * * * resources' of an institutionalized spouse who applied for Medicaid benefits and his spouse." *George v. Ohio Dept. of Human Servs.,* 10th Dist. No. 04AP-351, 2005-Ohio-2292, ¶5, quoting R.C. 5111.011(F) (as enacted by Am.Sub.H.B. No. 672, effective Nov. 14, 1989). In response, ODHS "promulgated Ohio Adm.Code 5101:1-39-22 through 5101:1-39-222 to address the allocation and transfer of income and Ohio Adm.Code 5101:1-39-35 through 5101:1-39-362 to address the allocation and transfer of resources." *George* at ¶5. Ohio Adm.Code 5101:1-39-07(B)(5) defines an "improper transfer" to mean "a transfer on or any time after the look-back date * * * of a legal or equitable interest in a resource for less than fair market value for the purpose of qualifying for medicaid, a greater amount of medicaid, or for the purpose of avoiding the utilization of the resource to meet medical needs."

{¶16} Income allocation under the MCCA is "governed by [42 U.S.C.] §§ 1396r-5(b) and (d)." *Wis. Dept. of Health & Family Servs. v. Blumer* (2002), 534 U.S. 473, 480, 122 S.Ct. 962, 967. Those sections "exclude the community spouse's individual *income*

when determining whether the institutionalized spouse qualifies for Medicaid." *Houghton v. Reinertson* (C.A.10, 2004), 382 F.3d 1162, 1165 (emphasis sic). 42 U.S.C. 1396r-5(b)(1) provides that "no income of the community spouse shall be deemed available to the institutionalized spouse." Thus, the "community spouse's income is * * * preserved for that spouse and does not affect the determination whether the institutionalized spouse qualifies for Medicaid." *Blumer* at 480-81.

{¶17} 42 U.S.C 1396a(r)(2)(A) states:

> The methodology to be employed in determining income and resource eligibility for individuals under [various enumerated subsections], or (f) or under section 1905(p) [1396d(p)] may be less restrictive, and shall be no more restrictive, than the methodology –
>
> (i) in the case of groups consisting of aged, blind, or disabled individuals, under the supplemental security income program under title XVI * * *.

{¶18} On February 8, 2006, the Deficit Reduction Act of 2005 ("DRA"), Pub. L. No. 109-171, 120 Stat. 4 (2006), was signed into law. The DRA contains amendments to the Social Security Act "effecting broad changes to the laws governing Medicare and Medicaid coverage." *Public Citizen v. Clerk, United States District Court for District of Columbia* (D.D.C.2006), 451 F.Supp.2d 109, 110. Included among those changes were provisions regarding the treatment of annuities under the Medicaid program.

{¶19} 42 U.S.C. 1396p(c)(1) states in relevant part:

> (F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless—
>
> (i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance

paid on behalf of the institutionalized individual under this title [42 USCS §§ 1396 et seq.]; or

(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

(G) For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this title [42 USCS §§ 1396 et seq.] unless—

(i) the annuity is—

(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986 [26 USCS § 408]; or

(II) purchased with proceeds from—

(aa) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code [26 USCS § 408];

(bb) a simplified employee pension (within the meaning of section 408(k) of such Code [26 USCS § 408(k)]); or

(cc) a Roth IRA described in section 408A of such Code [26 USCS § 408A]; or

(ii) the annuity—

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

{¶20} 42 U.S.C. 1396p(e)(1) also contains a disclosure requirement. Specifically, the state must require that an individual's application for medical assistance for services "shall disclose a description of any interest the individual or community spouse has in an annuity * * * regardless of whether the annuity is irrevocable or is treated as an asset." Id.

{¶21} Effective October 1, 2006, Ohio Adm.Code 5101:1-39-22.8, pertaining to the disclosure and treatment of annuities for purposes of the Medicaid program, was amended. Ohio Adm.Code 5101:1-39-22.8(C), patterned after 42 U.S.C. 1396p, sets forth eligibility criteria for annuities, and states in relevant part:

> (1) For any annuity purchased or annuity transaction completed on or after February 8, 2006, the purchase or transaction must be treated as the disposal of an asset for less than fair market value as outlined in rule 5101:1-39-07 of the Administrative Code unless:
>
> (a) The state of Ohio is named as the remainder beneficiary in the first position for the total amount of medical assistance furnished to the individual; or
>
> (b) The state of Ohio is named as such a beneficiary in the second position for the total amount of medical assistance furnished to the individual after the community spouse or minor or disabled child, and is named in the first position for the total amount of medical assistance furnished to the individual if such spouse or a representative of such child disposes of any such remainder for less than fair market value.
>
> * * *
>
> (3) For any annuity purchased on or after February 8, 2006, the purchased annuity must be irrevocable, non-assignable, and actuarially sound as determined by the life expectancy tables published by the office of the actuary of the social security administration * * *; and provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.

{¶22} For an annuity listed above to be "considered actuarially sound, the total amount of proceeds must be designed to be dispersed in equal monthly payments with no anticipated lump sum payment." Ohio Adm.Code 5101:1-39-22.8(C)(3)(a). Further, Ohio Adm.Code 5101:1-39-22.8(C)(3)(c) states: "Any annuity not providing fixed, monthly payments will be treated as a countable resource. Once annuitized, the annuity will be considered an exempt resource."

{¶23} Thus, under Ohio law, an annuity purchased after February 8, 2006, will be treated as the transfer of an asset for less than fair market value, as outlined under Ohio Adm.Code 5101:1-39-07, *unless* the state is named the beneficiary in the first or second position (depending upon whether the individual's community spouse, or minor or disabled child, is named in the first position) to the extent medical assistance benefits are furnished. Additionally, an annuity must be irrevocable and non-assignable, actuarially sound, and provide for payments in equal amounts.

{¶24} In the instant case, the department acknowledges that the DRA changed the law with regard to annuities to provide that, in certain circumstances, the purchase of annuities will not be treated as an improper transfer. The department maintains, however, that the DRA did not change how the CSRA is calculated, or how spousal resources are treated for Medicaid eligibility purposes, and the department contends it was proper to deny appellant Medicaid vendor payments where the funds transferred to purchase the annuities were in excess of the CSRA.

{¶25} Several federal courts have addressed the treatment of commercial "irrevocable immediate annuities" (similar to the annuities purchased in the instant case) in the context of Medicaid eligibility requirements. In one of the earliest cases, *Mertz v.*

Houstoun (E.D.Pa.2001), 155 F.Supp.2d 415, the applicant's spouse purchased actuarially sound annuities for fair market value, but the Secretary of the Pennsylvania Department of Public Welfare ("DPW") nevertheless penalized the applicant based upon the agency's determination that the purchase of the annuities constituted a transfer of assets for purposes of qualifying for Medicaid assistance. The applicant subsequently filed an action in federal court for declaratory and injunctive relief.

{¶26} In *Mertz,* the court noted that federal law "provides for a period of ineligibility predicated upon a transfer of assets during the look back period only for transfers made for less than fair market value and even then subject to certain exceptions." Id. at 425, citing 42 U.S.C. 1396p(c)(1)(A) and (c)(2). In considering the nature of an actuarially sound irrevocable commercial annuity, the court held that, "[b]ecause at the time of application neither spouse has an ownership interest in the funds used to purchase such an annuity, the funds are not a countable resource in calculating the CSRA." Id. at 426. Further, the court held, "[t]he return on the annuities is not countable as federal law provides that no income of the community spouse may be deemed available to the institutionalized spouse." Id. at 426-27, citing 42 U.S.C. 1396r-5(b)(1). The court found that the agency's attempt to "penalize transfers made for fair market value and for the sole benefit of a spouse upon a finding they were also made to qualify for benefits" constitutes a practice "inconsistent with federal law." Id. at 426, fn.13. The court concluded that "a couple may effectively convert countable resources into income of the community spouse which is not countable in determining Medicaid eligibility for the institutionalized spouse by purchasing an irrevocable actuarially sound commercial annuity for the sole benefit of the community spouse." Id. at 427.

{¶27} In a recent decision, *James v. Richman* (C.A.3, 2008), 547 F.3d 214, the issue before the court was whether the cost of a commercial annuity, payable to the appellee Medicaid applicant's wife and purchased shortly before the applicant submitted his application for benefits, should be treated as an available resource. The DPW found that the commercial annuity, even though irrevocable and non-transferable, was an available resource that put the couple over the Medicaid resource eligibility limits. In response, the plaintiff, James, filed a request with the district court for a temporary restraining order and for a preliminary injunction. The district court granted the requested relief, finding the DPW erred in treating the annuity as an available resource.

{¶28} The DPW appealed the district court's decision to the Third Circuit Court of Appeals. In *James,* the court first addressed whether the DPW erred in treating a non-revocable, non-transferable annuity as an available resource for purposes of calculating Medicaid eligibility. The court, construing federal regulations, held that the DPW "cannot use a methodology that is more restrictive than that used by the SSI (Supplemental Security Income) Program," meaning that the agency "can not treat as available resources any assets that the SSI regulations would not treat as available resources." Id. at 218.

{¶29} The court in *James* at 218, then considered the treatment of annuities under the Supplemental Security Income ("SSI") regulations, holding in relevant part:

> [The SSI regulations] provide that "if an individual has the right, authority or power to liquidate the property, or his or her share of the property, it is considered a[n] (available) resource." 20 C.F.R. § 416.1201(a)(1). The SSI Program Operations Manual System (POMS) gives the example of jointly owned stock subject to a legally binding agreement that neither owner will sell without the consent of the other, and

> explains that such stock is not an asset unless the co-owner has consented to its sale. POMS SI 01110.115. The POMS makes it clear that the "power to liquidate" referred to by the regulation is not simply the *de facto* ability to accomplish a change in ownership of an asset, but must also include the power to do so without incurring legal liability.

(Footnote omitted.)

{¶30} The court determined that James "lacks such power to change ownership in her annuity," as the annuity "states on its face that it 'may not be surrendered, transferred, collaterally assigned, or returned for a return of the premium paid.' " Id. Further, the court noted, even if the DPW was correct that James "has the *de facto* ability to effect a change in ownership of the annuity, she cannot do so without breaching the contract and incurring legal liability," and, thus, "the annuity cannot be treated as an available resource." Id.

{¶31} Having found that the annuity could not be treated as an available resource, the court in *James* at 219, next addressed and rejected the DPW's contention that granting eligibility for individuals in the applicant's situation would undercut the purpose of Medicaid, holding:

> We begin by noting that Medicaid is established through an exhaustive set of statutes that thoroughly detail what benefits are to be available and to whom they should be provided. See 42 U.S.C. § 1396 *et seq*. In this context, we do not create rules based on our own sense of the ultimate purpose of the law being interpreted, but rather seek to implement the purpose of Congress as expressed in the text of the statutes it passed. See *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001) (explaining that the role of the courts in interpreting a statute is to give effect to Congress's intent, and that it is presumed that Congress expresses its intent through the language of a statute). As discussed above, an irrevocable, non-alienable annuity does not fit the statutory definition of an available resource. In addition, Congress provided a detailed set of rules governing transactions that it considered suspicious, and the purchase of an annuity is not

> among them. 42 U.S.C. § 1396p(c). We simply cannot allow a denial of eligibility if there is no statutory justification for that denial. Such justification is lacking here.

(Footnote omitted.)

{¶32} In the present case, the parties do not dispute that the two annuities at issue comply with the eligibility criteria of Ohio Adm.Code 5101:1-39-22.8, including requirements that the state be named the remainder beneficiary in the first or second position (Ohio Adm.Code 5101:1-39-22.8(C)(1)(a) and (b)), and that the annuity be "irrevocable, non-assignable, and actuarially sound" (Ohio Adm.Code 5101:1-39-22.8(C)(3)).

{¶33} As noted above, federal courts interpreting provisions of the Medicaid law dealing with the treatment of annuities have rejected state agency arguments that actuarially sound commercial annuities, purchased for fair market value, and for the sole benefit of the community spouse, constitute countable resources in calculating the CSRA for purposes of Medicaid eligibility. See *Mertz*; *James*. Other courts have reached similar determinations. See *Dean v. Dept. of Health & Social Servs.* (Del.Super.Ct.2000), No. 00A-05-006 (community spouse's purchase of standard, commercial irrevocable annuity constitutes exempt resource for purposes of determining CSRA and Medicaid eligibility); *Estate of F.K. v. Div. of Med. Assistance & Health Servs.* (N.J.Super.Ct.App.Div.2005), 374 N.J. Super. 126, 143, 863 A.2d 1065, 1075 (holding that state regulation capping the amount of funds an applicant for Medicaid benefits may use to purchase an irrevocable and non-assignable commercial annuity for the benefit of community spouse at the CSRA limit "is invalid because it is inconsistent with federal law").

{¶34} Finding persuasive the analysis of federal Medicaid law as set forth in *Mertz* and *James*, we agree with appellant's contention in the instant case that funds used to purchase an actuarially sound, non-revocable, non-transferable commercial annuity, for the sole benefit of the community spouse, are not countable resources for Medicaid eligibility purposes. This determination, however, does not end our analysis.

{¶35} Under the facts of *James,* the spouse purchased her annuity prior to the enactment of the DRA (of 2005). In the instant case, both parties have submitted, as supplemental authority, cases involving the treatment of annuities that were purchased after the effective date of the DRA. Specifically, appellant relies upon a federal decision, *Weatherbee v. Richman* (D.C.W.Pa.2009), 595 F.Supp.2d 607, while the department cites in support of its position a New Jersey Superior Court decision, *N.M. v. Div. of Med. Assistance & Health Servs.* (N.J.Super.Ct.App.Div.2009), 964 A.2d 822.

{¶36} At issue in both of those cases was the interpretation of one particular DRA provision, 42 U.S.C. 1396p(e)(4). For purposes of context, we set forth the entire language of 42 U.S.C. 1396p(e) as follows:

> (e) (1) In order to meet the requirements of this section for purposes of section 1902(a)(18) [42 USCS § 1396a(a)(18)], a State shall require, as a condition for the provision of medical assistance for services described in subsection (c)(1)(C)(i) (relating to long-term care services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

> (2) (A) In the case of disclosure concerning an annuity under subsection (c)(1)(F), the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual. Nothing in this paragraph shall be construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.
>
> (B) In the case of such an issuer receiving notice under subparagraph (A), the State may require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn from the amount that was being withdrawn at the time of the most recent disclosure described in paragraph (1). A State shall take such information into account in determining the amount of the State's obligations for medical assistance or in the individual's eligibility for such assistance.
>
> (3) The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.
>
> (4) Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).

{¶37} In *Weatherbee,* the plaintiff-spouse, Theodore Weatherbee, was admitted to a nursing facility on September 1, 2006, and a resource assessment by the state's DPW determined that the plaintiff had $442,696.05 in available resources to pay for nursing facility services. On November 29, 2006, the plaintiff's wife purchased a single premium immediate irrevocable annuity, which contained an endorsement restricting assignment or transfer of the policy. The plaintiff then filed an application for medical assistance benefits, but the DPW denied eligibility after determining that the payment stream from the Jefferson-Pilot annuity was an available resource. The plaintiff subsequently filed a complaint for declaratory and injunctive relief with the district court,

seeking a declaration that the DPW misinterpreted federal law with respect to the plaintiff's right to Medicaid benefits.

{¶38} Both parties in *Weatherbee* raised the issue of the import of the decision in *James,* with the DPW contending that *James* was distinguishable because the annuity was purchased prior to February 8, 2006, the effective date of the DRA. The DPW argued that, under the DRA, Congress specifically amended the law to permit the DPW to count the payment stream from an annuity as a resource, citing 42 U.S.C. 1396p(e)(4), which became part of legislative changes to Medicaid law as a result of the DRA. The DPW further argued that the payment stream from the plaintiff's annuity was a resource under SSI standards.

{¶39} In considering whether the DPW properly treated the income stream from the annuity as an available resource, the court in *Weatherbee* framed the central issue as "whether the meaning attributed to 42 U.S.C. § 1396p(e)(4) by the DPW is supportable under well-established rules of statutory construction." *Weatherbee* at 615. The court in *Weatherbee* at 616, rejected the DPW's reliance on that provision, holding in relevant part that:

> [T]he language of 42 U.S.C. § 1396p(e)(4), when viewed in the context of the subsection as well as pertinent provisions of the Medicaid Act, is unambiguous and does not support the DPW's reading of it. By its terms, 42 U.S.C. § 1396p(e)(4) expressly limits its effect to "this subsection." It does not purport to alter the well-established rule under the Medicaid Act, contained in 42 U.S.C. § 1396r-5, that "no income of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C. § 1396r-5(b)(1). Indeed, 42 U.S.C. § 1396r-5(a)(1) provides that, "[i]n determining the eligibility for medical assistance of an institutionalized spouse . . ., the provisions of this section supersede any other

> provision of this subchapter . . . which is inconsistent with them."

{¶40} In *N.M.* at 824, the Superior Court of New Jersey took the opposite position, finding that, under 42 U.S.C. 1396p(e)(4), the value of an annuity purchased for the sole benefit of the community spouse "may now be considered in determining Medicaid eligibility." In so holding, the court cited congressional testimony that the DRA was enacted to "close loopholes in the federal statutory provisions governing the Medicaid program." Id. at 827. The court also relied upon a publication of the Center for Medicaid and Medicare Services, entitled " 'Changes in Medicaid Annuity Rules under the Deficit Reduction Act of 2005,' " which stated in part: "The State may take into consideration the income or resources derived from an annuity when determining eligibility for medical assistance or the extent of the State's obligations for such assistance." *N.M.* at 828 (emphasis omitted).

{¶41} We note that the court in *N.M.* cursorily acknowledged the decisions in *James* and *Weatherbee,* but did not discuss the analysis applied by either of those courts. Specifically, the court deemed *James inapplicable* because it was decided prior to the enactment of the DRA, and found no precedential value to *Weatherbee* on the basis "there is no indication that opinion will be approved for publication." *N.M.* at 828, fn. 5. Furthermore, the *N.M.* court found significant the fact the parties in *N.M.* stipulated that the income stream from the annuity could be sold on the open market, leading the court to conclude that "this annuity is considered assignable." Id. at 829.

{¶42} Upon review, we find more reasonable the interpretation and analysis of 42 U.S.C. 1396p(e)(4) as set forth in *Weatherbee,* which relies specifically upon the statutory

language itself. In considering that language, the court found that "42 U.S.C. § 1396p(e)(4) simply makes clear that which would otherwise be implied. Namely, that disclosing the purchase of an annuity and naming the state as a remainder beneficiary will not, in and of itself, *prevent* a state from denying eligibility for income or resources derived from an annuity." Id. at 616-17 (emphasis sic). The court noted, by way of example, that "[a] state could * * * deny eligibility for a variety of reasons including, but not necessarily limited to, lack of an actuarially sound annuity or where the income from the annuity was not solely for the benefit of the community spouse." Id. at 617. The court found it "incongruous for 42 U.S.C. 1396p(e)(4) to have the meaning ascribed to it by the DPW," as "Congress delineated earlier in the subsection those additional requirements with which a Medicaid applicant must comply in order to *successfully* transfer assets, without penalty, to an irrevocable annuity." Id. (emphasis sic.) Rather, the court deemed it "unreasonable to assume that Congress would have intended to take with one hand (i.e., through the operation of 42 U.S.C. § 1396p(e)(4)) that which it had just given with the other," concluding that "if Congress had intended to 'ring the death knell' for otherwise compliant annuities, it would have said so. It did not." Id.

{¶43} As observed by the court in *Weatherbee* at 616, 42 U.S.C. 1396p(e)(4), by its terms, limits its effect to "this subsection." The "subsection" at issue, 42 U.S.C. 1396p(e), pertains specifically to new disclosure requirements under the DRA, and we find persuasive the *Weatherbee* court's holding that this amendment, when viewed in context, does not alter the long-standing rule under 42 U.S.C. 1396r-5 (preserving the community spouse's income from eligibility requirements). Thus, we do not find that

amendments brought about by enactment of the DRA undermine the rationale of *James* or *Mertz.*

{¶44} One other case, *McNamara v. Ohio Dept. of Human Servs.* (2000), 139 Ohio App.3d 551, merits discussion, as it was relied upon by the trial court in this case, and is also cited by the department. In *McNamara,* the Montgomery County Court of Appeals affirmed a trial court decision which affirmed an agency determination finding the appellant ineligible to receive Medicaid payments for a period of 30 months on the basis that appellant and her spouse had improperly transferred most of their assets to a "spousal annuity trust." Id. at 552. In its decision, the court concluded that "the amount of funds that one person may transfer to his or her spouse under Section 1396p(c)(2)(B) is limited to the maximum amounts the community spouse may retain under the CSRA provision in Section 1396r-5(f)." Id. at 557.

{¶45} *McNamara,* however, which pre-dated the DRA, did not involve a commercial annuity, as in the instant case, but, rather, a "spousal annuity trust" (which was purchased for less than fair market value). Thus, the court in *McNamara* rejected the appellant's argument that her trust should be "treated under the rules governing annuities found in Ohio Adm.Code 5101:1-39-228." *McNamara* at 558. Specifically, the court held that "[d]espite Mrs. McNamara's assertions to the contrary, Ohio Adm.Code 5101:1-39-228 relates to commercially purchased annuities and not to 'annuitized' trusts like the one established by the McNamaras." Id., citing former Ohio Adm.Code 5101:1-39-228(B) (" '[w]hen an individual purchases an annuity, the individual generally pays to the entity issuing the annuity [e.g., a bank or insurance company] a lump sum of money, in return for which the individual is promised regular payments of income in certain amounts' ").

(alterations sic.) The court also cited a letter from a representative of the Health Care Financing Administration distinguishing an "annuitized" trust from a " 'standard' or commercially purchased annuity since a standard annuity requires actual purchase of a commodity, *i.e.,* the annuity itself, and upon completion of the transaction, the buyer no longer owns the funds used to purchase it." Thus, while we do not find *McNamara* dispositive of the issues in this case, we observe that *McNamara* specifically distinguished between an annuitized trust and a commercial trust for purposes of considering whether such assets are considered exempt or non-exempt resources.

{¶46} In the present case, the annuities at issue, purchased for the sole benefit of the community spouse, were in compliance with the provisions of Ohio Adm.Code 5101-1-39-22.8, and we find the department's position that the purchases constituted an improper transfer of resources in excess of the CSRA to be inconsistent with federal law. See *Mertz* and *James*. We therefore find no merit to the department's argument that, because the purchase of the annuities resulted in an improper transfer of resources, the transaction was subject to the hearing requirements under Ohio Adm.Code 5101:1-39-07(G)(2), which states in part: "[a]ny 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." We note that Ohio Adm.Code 5101:1-39-22.8(C)(1), (2), and (3), pertaining to eligibility criteria for "any annuity purchased or annuity transaction completed on or after February 8, 2006," is silent as to a hearing requirement (unlike the provisions of Ohio Adm.Code 5101:1-39-22.8(C)(4), which addresses the treatment of annuities purchased *prior* to February 8, 2006).

{¶47} Accordingly, we find that the trial court erred in affirming the order of the department, denying Medicaid vendor payments, and we sustain appellant's single assignment of error.

{¶48} Based upon the foregoing, the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law, consistent with this decision.

Judgment reversed and cause remanded.

BRYANT and SADLER, JJ., concur.

_____