

[Cite as *Burden v. Ohio Dept. of Job & Family Servs.*, 2012-Ohio-1552.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Karen Burden,	:	
	:	
Appellant-Appellant,	:	
	:	No. 11AP-832
v.	:	(C.P.C. No. 10CVF-08-12006)
	:	
Ohio Department of Job and	:	(REGULAR CALENDAR)
Family Services,	:	
	:	
Appellee-Appellee.	:	
	:	

D E C I S I O N

Rendered on April 5, 2012

Jacob A. Schlosser, LLC, and Jacob A. Schlosser, for appellant.

Michael DeWine, Attorney General, and Henry G. Appel, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Appellant, Karen Burden ("Burden"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the order of appellee, the Ohio Department of Job and Family Services ("ODJFS"), terminating Burden's Ohio Medicaid Provider Agreement ("Provider Agreement"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On or about December 15, 2003, Burden executed a Provider Agreement, whereby she agreed to provide medical assistance services in accordance with the terms of the agreement, the Ohio Revised Code, Ohio administrative rules, and federal statutes and rules. Burden provided home aide services for Gary P. ("Gary"), who was a consumer of ODJFS' home and community-based medicaid waiver program. Gary was paralyzed from the neck down as the result of an automobile accident in 2000. Gary was totally dependent for his care and needed assistance with all aspects of daily living. Burden provided home aide services to Gary from shortly after his accident until his death on August 27, 2009.

{¶ 3} On January 29, 2010, ODJFS issued a Proposed Adjudication Order, informing Burden that it intended to terminate her Provider Agreement based upon violations of the Ohio Administrative Code. Burden requested a hearing with respect to the proposed termination, and the hearing was held on May 18, 2010. ODJFS presented testimony from Rosemary Walton, the Compliance Manager for the Clinical Operations Section with the Bureau of Long Term Care Services and Support, and from Charlene, Gary's sister-in-law. In addition to her own testimony, Burden presented testimony from Gary's friend, Kim Warren.

{¶ 4} On June 22, 2010, the hearing examiner issued a Report and Recommendation, in which he recommended that ODJFS terminate Burden's Provider Agreement. The hearing examiner found the following relevant facts. Gary had a life insurance policy in the amount of \$425,000 and was the owner of an Individual Retirement Account ("IRA"). In 2006, in response to a letter addressed to Gary, Burden told Gary that he needed to name a beneficiary for his life insurance policy. Gary signed a blank beneficiary designation form after Burden placed a pen in his hand, and Burden then inserted her own name on the form as sole beneficiary. Burden testified that Gary did not want to designate any member of his family as the beneficiary and instructed her to insert her own name as the beneficiary. On January 20, 2006, Gary designated Burden as the beneficiary of his IRA. After Gary's death, Burden received the proceeds of Gary's IRA, in the amount of \$5,627.41, and filed a claim for the insurance proceeds.

Burden subsequently filed an action in the Franklin County Court of Common Pleas seeking payment of the insurance proceeds.

{¶ 5} The hearing examiner concluded that Burden's conduct violated Ohio Adm.Code 5101:3-45-10(C)(7) and (D)(5) and that ODJFS was entitled to terminate the Provider Agreement pursuant to Ohio Adm.Code 5101:3-1-17.6(D)(10) and (13). At the time of Burden's alleged violations, former Ohio Adm.Code 5101:3-45-10 provided, in pertinent part, as follows:

(C) ODJFS-administered waiver service providers shall deliver services professionally, respectfully, and legally, and during the provision of authorized services, shall not engage in unprofessional, disrespectful or illegal behavior that includes, but is not limited to the following:

* * *

(7) Accepting, obtaining or attempting to obtain money or anything of value, including gifts or tips from the consumer, household members and family members of the consumer.

* * *

(D) ODJFS-administered waiver service providers shall not:

* * *

(5) Engage in behavior that constitutes a conflict of interest or takes advantage of or manipulates ODJFS-administered waiver program rules resulting in an unintended advantage for personal gain; or that has detrimental results for the consumer, their family, caregiver and/or another provider.

{¶ 6} At the relevant time, former Ohio Adm.Code 5101:3-1-17.6 provided as follows:

(D) ODJFS may propose termination * * * of a provider agreement at any time it is determined that continuation * * * of provider status is not in the best interest of consumers or the state of Ohio. The phrase "not in the best interest" shall include, but not be limited to, the following circumstances or occurrences:

* * *

(10) The provider fails to abide by or have the capacity to comply with the terms and conditions of the provider agreement, and/or rules and regulations promulgated by ODJFS.

* * *

(13) The provider, by any act or omission, has negatively affected the health, safety, or welfare of the medicaid consumers or the fiscal or programmatic integrity of the medicaid program.

{¶ 7} The hearing examiner concluded that Burden, in the course of her professional duties, accepted, benefited, and attempted to gain additional money from Gary and that her actions violated Ohio Adm.Code 5101:3-45-10(C)(7). The hearing examiner also concluded that Burden's concomitant positions as a caregiver and a knowing beneficiary on Gary's life insurance policy was a conflict of interest that resulted in personal gain for Burden and a detriment to Gary's family, in violation of Ohio Adm.Code 5101:3-45-10(D)(5). The hearing examiner determined that ODJFS was entitled to terminate Burden's Provider Agreement under Ohio Adm.Code 5101:3-1-17.6(D)(10) and (13) because Burden failed to abide by the terms of her Provider Agreement when she became a beneficiary of Gary's life insurance policy, accepted the proceeds of Gary's IRA, and sought the proceeds of Gary's life insurance policy. Although Burden filed timely objections to the hearing examiner's Report and Recommendation, ODJFS overruled her objections and adopted the Report and Recommendation as its adjudication order on August 13, 2010.

{¶ 8} Burden filed a timely notice of appeal to the Franklin County Court of Common Pleas pursuant to R.C. 119.12 and 5111.06. Burden asserted that the ODJFS order was not supported by reliable, probative, and substantial evidence and was not in accordance with the law. The trial court disagreed and affirmed ODJFS' order on September 14, 2011. The trial court specifically addressed only the application of Ohio Adm.Code 5101:3-45-10(C)(7) and rejected Burden's arguments that that rule is unconstitutional as applied and exceeds the scope of the enabling legislation. The trial court also concluded that Burden lacked standing to assert Gary's constitutional rights.

II. ASSIGNMENTS OF ERROR

{¶ 9} Burden filed a timely notice of appeal to this court and now asserts the following assignments of error:

[I.] The trial [c]ourt committed prejudicial error by affirming and failing to vacate the August 13, 2010 Order of [ODJFS], which Order terminated [Burden's] Medicaid provider agreement.

[II.] The trial [c]ourt committed prejudicial error by denying [Burden's] motion to admit additional evidence.

III. DISCUSSION

{¶ 10} In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. In applying this standard, the trial court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

{¶ 11} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707 (1992). In reviewing the court of common pleas' determination that an agency's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Id.*, citing *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). On the question whether the agency's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

A. First Assignment of Error: ODJFS' Order

{¶ 12} In her first assignment of error, Burden argues that the trial court erred by affirming the ODJFS order. Before addressing Burden's specific arguments, we briefly

consider ODJFS' argument that we must affirm the judgment because Burden did not challenge ODJFS' finding that her conduct constituted a conflict of interest in violation of Ohio Adm.Code 5101:3-45-10(D)(5) and, therefore, waived any challenge to that finding. ODJFS held that Burden's behavior created a conflict of interest because "she stood in the position of a care giver who was obligated and paid to provide for [Gary's] health and welfare and yet [was] destined to gain in the event of his death."

{¶ 13} Burden did challenge ODJFS' finding of a conflict of interest in the trial court. Her notice of appeal stated that, "since the alleged [Ohio Adm.Code 5101:3-45-10(C)(7)] violation is not valid, the *other alleged [Ohio Adm.Code] violations* fail since they are based on the alleged (C)(7) violation." (Emphasis added.) Her notice of appeal also incorporated her arguments and objections before ODJFS. In her objections to the Report and Recommendation, Burden argued that the "'conflict of interest' [r]ule" was inapplicable to these facts and proscribes only active conduct, and, in her reply brief, Burden argued that Ohio Adm.Code 5101:3-45-10(D)(5) was unconstitutional and that there was no violation of that rule. In her brief to the trial court, Burden argued that "there was no finding which explained the 'conflict of interest' allegation" and that "the 'conflict of interest' legal conclusion was not supported by any facts or reasons." Accordingly, we conclude that Burden did not waive a challenge to ODJFS' conflict of interest finding either before ODJFS or the trial court.

{¶ 14} The trial court did not specifically address Ohio Adm.Code 5101:3-45-10(D)(5), but it did specifically overrule Burden's "assigned errors" and hold that ODJFS' order was supported by reliable, probative, and substantial evidence and was in accordance with law. Burden's broad first assignment of error challenges the entirety of the trial court's affirmance, including issues not specifically addressed by the trial court. Although ODJFS aptly notes that Burden's appellate brief contains no argument with respect to Ohio Adm.Code 5101:3-45-10(D)(5), if we determine that the trial court appropriately affirmed the ODJFS order based upon Ohio Adm.Code 5101:3-45-10(C)(7), the question of whether she also violated Ohio Adm.Code 5101:3-45-10(D)(5) or waived that issue is irrelevant and moot.

{¶ 15} We now turn to Ohio Adm.Code 5101:3-45-10(C)(7), which Burden maintains includes "two different and completely opposite prohibitions." Ohio Adm.Code 5101:3-45-10(C)(7) prohibits a provider, "during the provision of authorized services * * * [from] engag[ing] in unprofessional, disrespectful or illegal behavior that includes, but is not limited to * * * [a]ccepting, obtaining or attempting to obtain money or anything of value, including gifts or tips from the consumer, household members and family members of the consumer." Burden contends that the prohibition against "attempting to obtain" anything of value creates a fault rule, whereas the prohibition against "[a]ccepting [or] obtaining" anything of value creates a no-fault rule. While conceding that the fault rule is reasonable and necessary, Burden argues that the no-fault rule unreasonably punishes a provider who is innocent of wrongful conduct.

{¶ 16} The plain language of Ohio Adm.Code 5101:3-45-10(C)(7) does not suggest consideration of the provider's motive or intention and does not support Burden's ascription of a fault/no-fault distinction. While the prohibition against accepting or obtaining anything of value may apply to conduct that is not intentionally wrongful, we reject Burden's assertion that Ohio Adm.Code 5101:3-45-10(C)(7) contains two clear, opposing prohibitions that must be distinguished for purposes of this appeal. Indeed, the rule is concerned not with the consumer's reasons for relinquishing something of value, but with the provider's conduct in accepting, obtaining or attempting to obtain it.

{¶ 17} Burden argues that she did not violate Ohio Adm.Code 5101:3-45-10(C)(7) because she did not accept, obtain or attempt to obtain anything of value from Gary during her provision of authorized services. Burden maintains that the revocable beneficiary designation created only an expectancy interest during Gary's lifetime, had value only upon Gary's death, and did not constitute "anything of value" during her service to Gary. The interpretation of administrative rules presents a question of law, to which we apply a plenary review. *Longterm Lodging, Inc. v. Ohio Dept. of Human Servs.*, 10th Dist. No. 98AP-1509 (Sept. 30, 1999).

{¶ 18} The hearing examiner concluded that Burden, in the course and scope of her professional duties, accepted and attempted to obtain something of value from Gary,

in violation of Ohio Adm.Code 5101:3-45-10(C)(7). The hearing examiner stated as follows:

While providing medical assistance to a vulnerable and dependent consumer and while in a position of trust, Burden was named as a beneficiary of Gary P's IRA and Gary P's insurance policy. At Gary P's death, Burden accepted in excess of \$5,000.00 from Gary P's IRA and is attempting to collect \$425,000.00 from Gary P's insurance policy.

The trial court deferred to ODJFS' interpretation of Ohio Adm.Code 5101:3-45-10(C)(7) and stated as follows:

While [Burden] has argued that her involvement was simply receiving a future gift or interest, the life insurance beneficiary designation occurred several years prior to the patient's death. It is not a meritorious or reasonable argument to say that such a designation had no value, even if only as an alienable expectancy. Accordingly, the Court finds that ODJFS' interpretation of its own regulation was quite reasonable under the circumstances and must be afforded deference when applied to the uncontroverted facts adduced at the administrative hearing.

{¶ 19} A court should accord considerable deference to an agency's interpretation of rules the agency is charged with administering. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382 (1994). Burden argued to the trial court that the beneficiary designations did not constitute gifts because they were revocable and did not create a vested interest during Gary's lifetime, but Ohio Adm.Code 5101:3-45-10(C)(7) is not limited to the acceptance of gifts. Rather, it prohibits "[a]ccepting, obtaining or attempting to obtain * * * *anything* of value, including gifts." (Emphasis added.) R.C. 1.03 defines "anything of value" broadly to, inter alia, include money, bills, notes, goods, chattels, rights in action, and "[e]very other thing of value." R.C. 1.03 does not limit the definition of "anything of value" to present, vested interests. For example, the definition includes "[a]ny interest in realty, including * * * present and future, contingent or vested interests" and "[a]ny promise of future employment." Thus, neither the revocability of the beneficiary designation nor the fact that Burden was not entitled to collect under Gary's insurance policy prior to his death renders the designation valueless, per se.

{¶ 20} We conclude that the trial court did not err by deferring to ODJFS' reasonable interpretation of Ohio Adm.Code 5101:3-45-10(C)(7) and by concluding that Burden accepted, obtained or attempted to obtain something of value from Gary during her provision of authorized services. Burden knew that she was listed as the sole beneficiary of Gary's life insurance policy several years prior to his death. It was not unreasonable for ODJFS and the trial court to conclude that the beneficiary designation constituted something of value and that, at the very least, Burden attempted, during her provision of authorized services, to obtain something of value from Gary, regardless of the purity of her motives or intentions.

{¶ 21} Beyond arguing that her conduct did not violate Ohio Adm.Code 5101:3-45-10(C)(7), Burden also challenges the validity of the rule itself, arguing first that it exceeds the scope of the enabling authority granted by the General Assembly. Administrative rules are a means for accomplishing a legislative end. *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47 (1990). If an administrative rule exceeds the statutory authority granted by the General Assembly, "the agency has usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution." *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, ¶ 24. The enabling authority here is R.C. 5111.85(B)(6), which authorizes the director of job and family services to adopt rules that establish "[s]afeguards for the health and welfare of medicaid recipients receiving services under a medicaid waiver component." Burden maintains that ODJFS exceeded its authority by prohibiting no-fault conduct within Ohio Adm.Code 5101:3-45-10(C)(7) because such a prohibition does not safeguard consumers' welfare, which is commonly defined as "[w]ell-being in any respect; prosperity." *Black's Law Dictionary* (9th Ed.2009).

{¶ 22} ODJFS employee Rosemary Walton testified regarding the medicaid waiver programs that ODJFS administers and regarding the relevant provisions of the Ohio Administrative Code. She testified that Ohio Adm.Code 5101:3-45-10 was promulgated after the federal government "came down hard" on ODJFS in 2002 for not "assur[ing] [consumers'] health and welfare," a requirement to ODJFS' receipt of federal matching funds. (Tr. 30-31.) According to Walton, "health and welfare" encompasses

not only physical health, but also emotional and financial welfare. She explained that consumers in the waiver program are vulnerable—physically, emotionally, and mentally. The federal audit that resulted in the promulgation of Ohio Adm.Code 5101:3-45-10 revealed instances of financial exploitation of consumers by care providers. Examples of financial exploitation included providers coercing consumers to give gifts and providers borrowing money from consumers. Walton stated, "[W]e saw lots of trends with borrowing money, doing things that maybe people knew they were wrong, *maybe they did not know they were wrong*. But we found that our rules were not robust enough at the time to deal with what was cropping up." (Emphasis added.) (Tr. 36.)

{¶ 23} Ohio Adm.Code 5101:3-45-10 was promulgated, in part, to safeguard vulnerable consumers' financial welfare from providers, regardless of the providers' knowledge of misconduct or the providers' intentions. As the trial court recognized, a consumer's dependence upon a provider may skew the relationship and require safeguards to protect the consumer's welfare. Neither R.C. 5111.85 nor the policy concerns underlying Ohio Adm.Code 5101:3-45-10 supports Burden's argument that only intentional, wrongful conduct by a provider endangers a medicaid recipient's welfare. Accordingly, we agree with the trial court that Ohio Adm.Code 5101:3-45-10(C)(7) does not exceed the enabling authority granted by the General Assembly.

{¶ 24} We now turn to Burden's arguments that Ohio Adm.Code 5101:3-45-10(C)(7) is unconstitutional as applied in this case because it impaired Gary's rights of freedom of contract and to freely dispose of his property. ODJFS responds that Burden lacks standing to raise Gary's constitutional claims and also disputes her contention that the rule is unconstitutional as applied.

{¶ 25} Generally, a litigant must assert his or her own rights, not the rights of third parties. *N. Canton v. Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, ¶ 14. The United States Supreme Court stated the reasons for the general rule in *Singleton v. Wulff*, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), as follows:

First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is

successful or not. * * * Second, third parties themselves usually will be the best proponents of their own rights. The courts * * * should prefer to construe legal rights only when the most effective advocates of those rights are before them.

An exception to the general rule exists, however, when a claimant (1) suffers his or her own injury in fact, (2) possesses a sufficiently close relationship with the person who possesses the right, and (3) shows a hindrance to the possessor's ability to protect the right. *E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, ¶ 22, citing *Kowalski v. Tesmer*, 543 U.S. 125, 129-30, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004). Burden argues that she meets the requirements of *E. Liverpool* and is, therefore, entitled to assert Gary's constitutional rights in this matter.

{¶ 26} The trial court rejected Burden's position that she has standing to assert Gary's constitutional rights in this administrative appeal and noted that, were those rights not extinguished by his death, Gary's estate would have standing to assert them. The trial court nevertheless found that Ohio Adm.Code 5101:3-45-10(C)(7) was not unconstitutional as applied here. We agree that, even assuming Burden's standing to raise the constitutional challenges, Ohio Adm.Code 5101:3-45-10(C)(7) is not unconstitutional as applied in this case.

{¶ 27} Burden's first constitutional argument asserts that the no-fault prohibition in Ohio Adm.Code 5101:3-45-10(C)(7) impaired Gary's right to freely dispose of his property. "It is axiomatic that a grantor may dispose of his or her property in any manner chosen so long as the disposition is not prohibited by law or public policy." *Young v. Ohio Dept. of Human Servs.*, 76 Ohio St.3d 547, 550 (1996). The rights to acquire, use, and dispose of property are essential attributes of private property ownership and are protected by due process. *Gabel v. Miami E. School Bd.*, 2d Dist. No. 07-CA-16, 2007-Ohio-6590, ¶ 51 (Grady, J., concurring), citing *Terrace v. Thompson*, 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255 (1923). Unless a statute or rule restricts the exercise of fundamental rights, courts apply a rational-basis test when reviewing it on due process grounds. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 49. A statute or rule survives rational-basis scrutiny if it bears a real and substantial relationship to the public health, safety, morals or general welfare of the

public and it is not unreasonable or arbitrary. *Id.* Burden maintains that the no-fault prohibition in Ohio Adm.Code 5101:3-45-10(C)(7) lacks a rational basis and is arbitrary and unreasonable.

{¶ 28} The trial court held that Ohio Adm.Code 5101:3-45-10(C)(7) does not restrain a consumer's disposition of property. As the trial court recognized, the rule does not prohibit a consumer from designating his or her medicaid provider as a life insurance beneficiary, nor does it void any such designation. The rule does not operate as a restraint on the insured's property right. To the contrary, the rule affects only the provider's ability to accept the benefit while continuing to operate under a Provider Agreement with ODJFS. By executing a Provider Agreement, the provider contractually agreed with ODJFS to act in accordance with ODJFS rules, like Ohio Adm.Code 5101:3-45-10(C)(7). The trial court found that the rule speaks precisely to the circumstances ODJFS deemed improper, as discussed above, and created, at most, a de minimis chilling effect on a consumer's ability to freely dispose of his or her property. We agree.

{¶ 29} Burden's other constitutional argument asserts that Ohio Adm.Code 5101:3-45-10(C)(7), as applied here, impaired Gary's constitutional freedom of contract. Both Article I, Section 10 of the United States Constitution and Article II, Section 28 of the Ohio Constitution recognize and protect the freedom of contract and preclude the legislature from passing laws that impair the obligation of contracts. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 9-10. " 'Although a state legislature can not pass laws impairing contracts, yet [it] may regulate them, prescribe their form, their effect, and the mode of their discharge.' " *Teegardin v. Foley*, 76 Ohio Law Abs. 545 (10th Dist.1956), quoting *Smith v. Parsons*, 1 Ohio 236 (1823).

{¶ 30} The Supreme Court of Ohio has applied the tri-part test set forth in *Energy Res. Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983), to determine the existence of an unconstitutional impairment of the freedom of contract. *See Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764. The first step in that test requires the court to ask " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Res. Group* at 411, quoting *Allied Structural Steel Co. v.*

Spannaus, 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). If so, the court must determine whether the government has "a significant and legitimate public purpose behind the regulation." *Energy Res. Group* at 411. If the court affirmatively answers that question, it will then inquire "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' " (Brackets sic.) *Id.* at 412, quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

{¶ 31} Contrary to Burden's assertion, Ohio Adm.Code 5101:3-45-10(C)(7), as applied in this case, has not substantially impaired Gary's contractual relationship or his contractual right to designate a beneficiary. In *Aetna Life Ins. Co. v. Schilling*, 67 Ohio St.3d 164, 167 (1993), the Supreme Court of Ohio recognized an insured's contractual right to have his insurer pay death benefits to a designated beneficiary and the insurer's corresponding contractual obligation to pay the beneficiary. The facts of this case, however, are in stark contrast to the facts in *Aetna*.

{¶ 32} *Aetna* involved application of former R.C. 1339.63, which became effective May 31, 1990. That statute provided, in part, that a spouse's designation of the other spouse as a beneficiary is revoked by operation of law as a result of a divorce, dissolution of marriage or annulment. In *Aetna*, the decedent designated his wife as the beneficiary on a group life insurance policy made available to him as a benefit of his employment in 1975. In 1977, the decedent and his wife divorced. The decedent died in 1990, before R.C. 1339.63 became effective, and his ex-wife remained the named beneficiary for his life insurance benefits. The Supreme Court of Ohio held that retroactive application of R.C. 1339.63 in that case "would essentially change the contract which existed prior to the effective date of the statute [and] would impermissibly impair the obligation of contract." *Id.* at 167. There, application of R.C. 1339.63 would have impermissibly interfered with the decedent's contractual rights because it would operate to revoke his beneficiary designation.

{¶ 33} Here, in contrast to the scenario in *Aetna*, operation of Ohio Adm.Code 5101:3-45-10(C)(7) did not operate to revoke Gary's beneficiary designation. As stated

above, Ohio Adm.Code 5101:3-45-10(C)(7) did not preclude Gary from designating Burden as a beneficiary on either his life insurance policy or his IRA, nor did the rule preclude the insurance company or the bank from fulfilling its obligation to pay in accordance with Gary's beneficiary designation. The rule, which effectively required Burden to choose between accepting those benefits and maintaining her Provider Agreement, did not impair Gary's constitutional right to contract. Therefore, the trial court appropriately rejected Burden's challenge to Ohio Adm.Code 5101:3-45-10(C)(7) as an unconstitutional impairment to Gary's freedom of contract.

{¶ 34} Having concluded that the trial court did not err by rejecting Burden's constitutional challenges or by affirming ODJFS' finding that Burden violated Ohio Adm.Code 5101:3-45-10(C)(7), we overrule Burden's first assignment of error.

B. Second Assignment of Error: Additional Evidence

{¶ 35} By her second assignment of error, Burden argues that the trial court erred by denying her motion to admit additional evidence. Burden moved the trial court to admit her affidavit, executed on October 27, 2010, along with a journal entry from the Franklin County Probate Court, purportedly filed on October 8, 2010, dismissing a complaint for concealment against Burden filed by the administrator of Gary's estate.

{¶ 36} R.C. 119.12 provides, in pertinent part, that, unless otherwise provided by law, the common pleas court is confined to the record as certified by the agency. The court may, however, "grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." R.C. 119.12. Newly discovered evidence under R.C. 119.12 refers to evidence that existed at the time of the administrative hearing; it does not refer to evidence created after the hearing. *Beach v. Ohio Bd. of Nursing*, 10th Dist. No. 10AP-940, 2011-Ohio-3451, ¶ 16. The decision to admit additional evidence lies within the trial court's discretion, but only after the court determines that the evidence is newly discovered and could not have been ascertained prior to the agency hearing with reasonable diligence. *Id.*

{¶ 37} Because both Burden's affidavit and the probate court's journal entry were created after the agency hearing in this case, the trial court found that neither fell within

the definition of newly discovered evidence contemplated by R.C. 119.12. Accordingly, the trial court did not err by denying Burden's motion for the admission of additional evidence, and we overrule Burden's second assignment of error.

IV. CONCLUSION

{¶ 38} Having overruled both of Burden's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and KLATT, J., concur.
