

[Cite as *Rodefer v. Colbert*, 2015-Ohio-1982.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

VELMA RODEFER

Plaintiff-Appellant

v.

MICHAEL COLBERT, DIRECTOR,
OHIO DEPARTMENT OF
JOB AND FAMILY SERVICES, et al.

Defendants-Appellees

:

Appellate Case No. 2014-CA-3

Trial Court Case No. 2013-CV-487

(Civil Appeal from
Common Pleas Court).

OPINION

Rendered on the 22nd day of May, 2015.

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HALL, J.

{¶ 1} The estate of Velma Rodefer appeals from the trial court’s judgment affirming a decision of the defendants-appellees, Ohio Department of Job and Family Services (ODJFS) and its director, Michael Colbert, regarding Rodefer’s application for Medicaid benefits.¹ Rodefer contends the trial court’s decision, which focused on the value of a life estate for purposes of determining Medicaid eligibility, is not supported by reliable, probative, and substantial evidence, and is not in accordance with law.

{¶ 2} We conclude that the trial court’s judgment upholding the ODJFS decision to delay Rodefer’s Medicaid benefits is in accordance with law. ODJFS was not required to follow its administrative regulation regarding calculation of life estates for Medicaid purposes when the regulation could not be applied as written. It had discretion to follow the State Medicaid Manual on this point. Additionally, we note that Rodefer has not challenged the part of the trial court’s judgment dismissing her civil claims against ODJFS and Colbert. Accordingly, the trial court’s judgment will be affirmed.

I. Facts and Course of Proceedings

{¶ 3} In August 2013, Rodefer filed a notice of administrative appeal and a complaint for declaratory and injunctive relief in Darke County Common Pleas Court. The notice of appeal and complaint named ODJFS and its director, Colbert, as defendants. The notice of appeal related to an administrative decision of ODJFS, which

¹ Velma Rodefer died during the pendency of this appeal. On March 23, 2015, the executor of her estate, Kenneth J. Rodefer, filed a motion to substitute Velma Rodefer’s estate as the plaintiff-appellant. Upon due consideration, the motion to substitute parties is hereby sustained. For purposes of our analysis, however, we will continue to refer to Velma Rodefer as if she remained a party.

had upheld a restriction on Rodefer's Medicaid coverage. Specifically, ODJFS concluded that she had transferred a life interest in real estate to her son for less than fair market value within five years prior to her application for Medicaid benefits. ODJFS found that the life estate should be valued at \$117,012 rather than the \$22,000 paid by Rodefer's son. In addition, ODJFS restricted Rodefer's nursing home vendor pay from January 2013 through March 2014, with a partial month of restricted coverage in April 2014.

{¶ 4} In arriving at fair market value for the transferred life estate, ODJFS relied on Medicaid Eligibility Procedure Letter (MEPL) #68. The letter was dated November 1, 2012, and contained a life estate valuation table that had not been incorporated into the Ohio Administrative Code. Under this table, a figure of .26955 was used to calculate the value of the life estate, based on Rodefer's age at the time (91). This figure was derived from tables that had been provided in the State Medicaid Manual (SMM). The parties did not dispute the overall value of the real estate, which had been assessed by the Darke County Auditor at \$434,100. Multiplying this amount by .26955 resulted in a value for the life estate of approximately \$117,012.

{¶ 5} Rodefer's position was that she had calculated the value of the life estate by applying a rule that ODJFS had established in Ohio Adm.Code 5101:1-39-32(F)(5), which required ODJFS to "multiply the equity value of the property by the product that corresponds to the life estate owner's age on the life estate table as defined in 26 C.F.R 20.2031-7 as in effect on April 1, 2005." According to Rodefer, using this life estate table resulted in a remainder figure of .95193. Based on this remainder interest, the ultimate value for the life estate would be approximately \$20,867.²

² \$434,000 x .95193 (the remainder interest) = \$413,232.81. This amount was then

{¶ 6} Count one of Rodefer's complaint alleged that ODJFS's decision was not supported by reliable, probative, or substantial evidence. Counts two, three, and four alleged violations of the state and federal constitutions and asked for a permanent injunction. In court five, Rodefer sought a declaratory judgment that Ohio Adm. Code 5101:1-39-32 was the only properly-enacted rule and that MEPL #68 had no force and effect. Finally, count six alleged that appellees' attempts to deny Rodefer a meaningful hearing violated her right to substantive and procedural due process.

{¶ 7} On December 27, 2013, the trial court granted appellees' motion to dismiss. It agreed with appellees that an administrative appeal and a civil action could not be incorporated into one action. In addition, the trial court upheld the decision of ODJFS. The trial court concluded that while ODJFS had incorrectly relied on MEPL #68, the error was harmless because the life estate multiplier in Ohio Adm. Code 5101:1-39-32 was similar to the multiplier used in MEPL #68. However, the trial court granted Rodefer leave to file an amended complaint adding additional parties and noted that its order was not a final appealable order.

{¶ 8} Subsequently, in January 2014, the trial court reconsidered its decision. It noted that the life estate valuation tables it previously had used from Ohio Adm. Code 5101:1-39-32 were not in effect at the time of Rodefer's transaction. Nonetheless, the trial court still upheld the ODJFS decision. In this regard, it concluded that ODJFS had complied with the overriding requirement that fair market value must be paid in all financial transactions where an individual ultimately seeks public assistance. The trial

subtracted from \$434,100 to arrive at the life estate valuation of \$20,867.19.

court further held that ODJFS could resort to valuation methods beyond those in Ohio Adm. Code 5101:1-39-32, including other life expectancy tables. The court reiterated that its decision was not a final appealable order and held that Rodefer had permission to file an amended complaint adding additional parties.

{¶ 9} Rodefer filed a notice of appeal on January 24, 2014. That same day, she also dismissed all claims not decided by the trial court's order, pursuant to Civ.R. 41(A)(1). Rodefer did not at any time file an amended complaint adding other parties.

{¶ 10} On March 18, 2014, appellees moved to dismiss this appeal for lack of a final appealable order, and Rodefer replied to the motion. Attached to her response was an entry that the trial court had filed on March 18, 2014. In the entry, which was labeled "Order of Voluntary Dismissal Without Prejudice," the trial court dismissed the claims that had not been decided by its entries in December 2013 and January 2014. Alternatively, the trial court granted Rodefer's motion to amend her notice of administrative appeal and to withdraw counts two through six.

{¶ 11} Appellees subsequently filed a second motion to dismiss with our court, arguing that the trial court lacked jurisdiction to dismiss the action while this appeal was pending. Appellees also again argued that we lacked jurisdiction because there was no final appealable order. In July 2014, we filed a decision overruling appellees' motion to dismiss the appeal. We concluded that the trial court's order was a final appealable order because it resolved all claims between the parties, and no other claims or parties, thereafter, were part of the action after the trial court rendered its decision. *See Rodefer v. Colbert*, 2d Dist. Montgomery No. 2014-CA-3 (July 28, 2014), p. 9. With these facts in mind, we turn now to Rodefer's assignment of error.

II. Did the Trial Court Err in Upholding the Agency's Decision?

{¶ 12} Rodefer's sole assignment of error states: "The Decision by the Appellee, Upheld by the Trial Court, Is Not Supported by Reliable, Probative, and Substantial Evidence, and Is Not in Accordance with Law."

{¶ 13} Rodefer presents four issues under this assignment of error. First, she contends ODJFS and the trial court erred by failing to apply Ohio Adm. Code 5101:1-39-32(F), which she claims is "the only enacted rule applicable to this case," to value the life estate. Second, she asserts that MEPL #68 cannot be used to value the life estate because it was not promulgated in accordance with statutory rule-making requirements. Third, she maintains that the trial court erred in finding ODJFS's reliance on MEPL #68 improper yet still upholding the agency's decision. Fourth, she argues that she cannot be deemed to have transferred her life estate to qualify for Medicaid because she sold it in compliance with ODJFS rules.

A. Standard of Review

{¶ 14} "An appeal from an administrative appeal decision of the Director of the Job and Family Services Agency may be taken in the court of common pleas pursuant to R.C. 119.12." *Gruber v. Ohio Dept. of Job & Family Serv.*, 153 Ohio App.3d 6, 2003-Ohio 2528, 790 N.E.2d 800, ¶ 12 (6th Dist.). "Under R.C. 119.12, the court of common pleas must review an agency order to determine whether 'the order is supported by reliable, probative, and substantial evidence and is in accordance with law.'" *Id.* "An

appellate court, on the other hand, is limited to determining whether the common pleas court abused its discretion in reviewing the evidence in support of the administrative order.” *Id.*, citing *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707, 590 N.E.2d 1240 (1992). (Other citation omitted). “Issues of law, however, are reviewed de novo.” *Gruber* at ¶ 12, citing *Sohi v. Ohio State Dental Bd.*, 130 Ohio App.3d 414, 421, 720 N.E.2d 187 (1st Dist.1998). The case before us does not involve disputed facts. Instead, the issues are ones of law. As a result, we will review the matter de novo.

B. Analysis

{¶ 15} At the outset, we observe that the trial court’s January 2014 reconsideration decision was of no effect. As noted in our decision overruling appellees’ motion to dismiss this case for lack of a final appealable order, the trial court originally granted judgment in favor of appellees on December 27, 2013 but gave Rodefer leave to file an amended complaint. However, Rodefer did not then, nor did she thereafter, amend the complaint to add parties. Instead, she filed a motion to reconsider. She also timely appealed from the trial court’s order, by filing a notice of appeal on January 24, 2014.

{¶ 16} Although the trial court stated that its order of December 27, 2013 was not a final appealable order, the order was final when the trial court entered judgment in favor of appellees on all pending claims. *Rodefer*, 2d Dist. Montgomery No. 2014-CA-3, at p. 9.³ We previously have stressed that motions for reconsideration of final orders are not

³ We did state in our prior decision that the January 10, 2014 order was a final appealable order because it resolved all claims. However, the order of December 27, 2013 also resolved all claims between the parties. This distinction makes no difference

recognized in Ohio law. Thus, trial courts lack jurisdiction to modify prior final orders, absent the use of recognized methods for modifying such orders, like motions for Civ.R. 60(B) relief. *Allread v. Allread*, 2d Dist. Darke No. 2011-CA-14, 2012-Ohio-2093, ¶ 11-12. In the case before us, even though the trial court informed the parties that its order was not final, the label given to an order is not conclusive. An order can be final even if a court states that it is not.

{¶ 17} Nonetheless, since Rodefer timely appealed from the December 27, 2013 order, the appeal is properly before us. In its reconsideration decision, the trial court recognized an error in its December 27, 2013 decision. Specifically, the court concluded that it had erred by applying the current version of the Ohio Administrative Code, which was changed in 2013 to be consistent with the life expectancy tables in SMM 3258.9. Although we potentially could reverse the trial court's judgment based on this recognition of an error, an appellate court must " 'affirm the judgment if it is legally correct on other grounds, that is, it achieves the right result for the wrong reason, because such an error is not prejudicial.' " *Reid v. Wallaby's Inc.*, 2d Dist. Greene No. 2011-CA-36, 2012-Ohio-1437, ¶ 52, quoting *Reynolds v. Budzik*, 134 Ohio App.3d 844, 846, fn. 3, 732 N.E.2d 485 (6th Dist.1999). Accordingly, we must examine the trial court's judgment to ascertain whether it can be upheld on other grounds.

{¶ 18} As noted above, Rodefer's first three arguments are (1) that ODJFS did not properly enact MEPL #68, (2) that ODJFS was required to apply the standards in Ohio Adm. Code 5101:1-39-32(F)(5), which resulted in a life estate valuation of \$20,867 for

to the resolution of the matter because the notice of appeal was timely filed with respect to both orders.

Medicaid eligibility purposes, and (3) that the trial court erred in upholding ODJFS's life estate valuation despite the agency's improper reliance on MEPL #68. To resolve these issues, we must examine the pertinent statutory and administrative framework.

{¶ 19} “The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. § 1396 et seq. (1976 ed. and Supp. II), for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX.” *Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). “A participating state is required to develop reasonable standards for determining eligibility consistent with the Act.” *Howell v. Ohio Dept. of Job & Family Servs.*, 7th Dist. Belmont No. 08 BE 25, 2009-Ohio-1510, ¶ 15, citing 42 U.S.C. 1396a(a)(17). {¶ 20} Rodefer applied for Medicaid assistance in late November 2012, after transferring her life estate in real property to her son in June 2012. At the time of her application, R.C. Chapter 5111 governed participation in Medicaid.⁴ By statute, the director of ODJFS (now the Medicaid Director) was permitted to adopt rules in accordance with R.C. 111.15, including rules for making determinations of eligibility for Medicaid. See R.C. 5111.01(D).⁵ In addition, R.C. 5111.02 required

⁴ After the events at issue in this case, R.C. Chapter 5111 was repealed, and Medicaid participation was then governed by R.C. Chapter 5162. Some administrative regulations have also been renumbered. For example, current provisions pertaining to life estates as resources and valuation of life estates are now contained in Ohio Adm. Code 5160:1-3-32. References in our opinion are to the provisions of the Ohio Revised Code and the Ohio Administrative Code that were in effect when Rodefer filed her application.

⁵ Effective September 10, 2012, R.C. 5111.01 was amended, and transferred administration of the Medicaid program to the Office of Medical Assistance, which was a

ODJFS to adopt or amend rules under R.C. Chap. 119, and provided that the agency's "rules shall be consistent with federal and state law."

{¶ 21} When Rodefer applied for Medicaid, Ohio Adm. Code 5101:1-39-05(C) provided that ODJFS was required to evaluate the value of all resources held by an individual. "Resources" were defined as "cash, personal property, and real property an individual and/or the individual's spouse has an ownership interest in, has the legal ability to access in order to convert to cash (if not already cash), and is not legally prohibited from using for support and maintenance." Ohio Adm. Code 5101:1-39-05(B)(10). Ownership interests in real property included either legal title or equitable interests. *Id.* at (B)(10)(a).

{¶ 22} The resource limit for an individual qualifying for Medicaid was \$1,500. Ohio Adm. Code 5101:1-39-05(B)(11)(a). Some types of property were exempt, and the resource assessment included only "countable resources," which were defined as "those resources remaining after all exemptions have been applied." Ohio Adm. Code 5101:1-39-05(B)(3). One such exemption was provided by Ohio Adm. Code 5101:1-39-05(C)(6)(a), which stated that: "[i]f an individual owns property that affects

work unit within ODJFS. See R.C. 5111.01(A) and (B), as amended by 2012 Am.Sub. H.B. No. 487, Section 101.01. At that time, the amendments gave the Medical Assistance Office and its director the ability to take all actions formerly required of ODJFS and its director, by statute, rule or contract, and provided that the Office's rules would be binding on other agencies that administered Medicaid programs. *Id.* However, it is unclear whether this transition had occurred by the time Rodefer applied for assistance because the uncodified law accompanying the amendments indicates that notwithstanding the amendments, the Office of Medical Assistance would not replace ODJFS until the replacement was approved by the United States Centers for Medicare and Medicaid Service, "if such approval is needed." *Id.* at 2012 Am.Sub. H.B. 487, Section 751.03. In addition, Rodefer's appeal was handled by ODJFS. Therefore, we assume that ODJFS was the entity responsible for administering the Medicaid program at the time of her application and appeal. The parties have not indicated otherwise.

eligibility and the property has not been sold, it will not be counted as an available resource as long as the individual continues to list the property for sale at an amount equal to the market value determined by the county auditor.” However, in order to establish this status, the individual had the burden of complying with certain requirements in Ohio Adm. Code 5101:1-39-05(C)(6)(c).⁶

{¶ 23} An improper transfer was defined as “a transfer on or any time after the look-back date, as defined in paragraph (B)(9) of this rule, 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 or other living expenses.” Ohio Adm. Code 5101:1-39-07(B)(5).⁷ “Fair market value” was defined as “the going price, for which real or personal property can reasonably be expected to sell on the open market, in the particular geographic area involved.” Ohio Adm. Code 5101:1-39-05(B)(6).

{¶ 24} Between 2006 and 2013, Ohio Adm. Code 5101:1-39-32(F) provided, with respect to life estates, that:

The value of a life estate is calculated as follows:

- (1) The administrative agency must first determine the value of the property as established by the county auditor. If a valuation by a county auditor is unavailable, the value shall be based upon a valuation by the

⁶ Rodefer attached documents to her administrative appeal indicating that the property had been placed for sale with a real estate agent, but the documents did not comply with the requirements for obtaining an exemption under the Ohio Administrative Code.

⁷ There is no dispute that the transfer date in this case was within the period for improper transfers. See Ohio Adm. Code 5101:1-39-07(B)(3) and (9).

appropriate governmental agency charged with the responsibility for valuation of real property.

(2) The administrative agency must deduct from the value of the property all liens and encumbrances that have been placed against the property.

(3) The administrative agency must deduct from the value of the property all liens and encumbrances that have been placed against the life estate.

(4) After the deductions, the balance is the equity value of the property.

(5) The administrative agency must multiply the equity value of the property by the product that corresponds to the life estate owner's age on the life estate table as defined in 26 C.F.R 20.2031-7 as in effect on April 1, 2005.

Ohio Adm. Code 5101:1-39-32(F).⁸

{¶ 25} We note that 26 C.F.R. 20.2031-7, as it existed on April 1, 2005, set forth Internal Revenue regulations and tables pertaining to valuation of annuities, interests for life or term of years, and remainder or reversionary interests. In this regard, 26 C.F.R. 20.2031-7(d)(1) provided:

* * * [I]f the valuation date for the gross estate of the decedent is after April

⁸ Prior to the time that the ODJFS regulations were amended in 2006, Ohio Adm. Code 5101:1-39-32 actually contained tables that would have used a .24692 figure for calculating the life estate interest of a 91-year old person. However, when the regulation was amended, the life estate table was removed, and the reference to the Internal Revenue tables in 26 C.F.R. 20.2031-7 was inserted into Ohio Adm. Code 5101:1-39-32.

30, 1999, the fair market value of * * * life estates, terms of years, remainders, and reversionary interests is the present value determined by use of standard or special section 7520 actuarial factors. These factors are derived by using the appropriate section 7520 interest rate and, if applicable, the mortality component for the valuation date of the interest that is being valued. For purposes of the computations described in this section, the age of an individual is the age of that individual at the individual's nearest birthday.

T.D. 8886, 65 FR 36908, 36929, effective June 12, 2000.⁹

{¶ 26} Another provision, 26 C.F.R. 20.2031-7(d)(2)(ii), further stated:

Ordinary remainder and reversionary interests. If the interest to be valued is to take effect after a definite number of years or after the death of one individual, the present value of the interest is computed by multiplying the value of the property by the appropriate remainder interest actuarial factor (that corresponds to the applicable section 7520 interest rate and remainder interest period) in Table B (for a term certain) or the appropriate Table S (for one measuring life), as the case may be.

Id.

{¶ 27} The language in the current regulation is similar, other than the fact that Table S contains interest rates ranging from .02% and .14%, whereas the table in effect in 2005 used interest rates ranging from 4.2% to 14%. This is consistent with the statutory

⁹ The regulation that was in effect when Rodefer applied for Medicaid, and is still currently in effect, contains the same language, except that the valuation date is “on or after May 1, 2009.” See 26 C.F.R. 20.2031-7(d)(1).

dictate in 26 U.S.C. 7520 that the Secretary of the Internal Revenue Service must “revise the actuarial tables used in valuing interests dependent on mortality experience not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision.” *Id.* at 39608.¹⁰

{¶ 28} According to the current Table S, .95193 is the remainder factor to be applied using a 1.2% interest rate for a 91-year-old person. As previously noted, that would mean Rodefer had a life estate interest valued at \$20,867.19. Instead of using the table in its own regulation, however, ODJFS calculated the value of her life estate by referencing MEPL #68.¹¹

{¶ 29} ODJFS contends the reference in its own regulation was erroneous, and that life estates, instead, should be valued in accordance with SMM 3258.9(A). According to ODJFS, the Centers for Medicare and Medicaid Services (CMS) instruct state Medicaid programs to value life estates using this section of the SMM.

{¶ 30} Section 3258.9(A) of the SMM states that:

In determining whether a penalty is assessed because of a life estate and how long that penalty should be, compute the value of the asset transferred and the value of the life estate, and calculate the difference

¹⁰ Rodefer indicated before the ODJFS that the applicable interest rate for her life estate was 1.2%. ODJFS did not challenge this interest rate during the administrative proceedings.

¹¹ Using the lowest interest rate in effect in the 2005 table (4.2%) would result in a life estate valued at \$65,679.33, as the remainder factor for a 91 year-old person at that rate in Table S was .84870. See T.D. 8886, 65 FR 36908, 36931. ($\$434,100 \times .84870 = \$368,420.67$. $\$434,100 - \$368,420.67 = \$65,679.33$). This interest rate was significantly higher than the rate in effect when Rodefer’s life estate was valued.

between the two.

The value of the asset transferred is computed by using the regular Medicaid rules for determining the value of assets. To calculate the value of the life estate, use the life estate table below (from POMS SI 01140.120). Determine the value of the life estate by multiplying the current market value of the property by the life estate factor that corresponds to the grantor's age. The value of the life estate is then subtracted from the value of the asset transferred to determine the portion of the asset that was transferred for less than fair market value. Or, if only the value of the transferred portion is needed, multiply the current market value of the asset by the remainder factor.¹²

State Medicaid Manual, General and Categorical Eligibility Requirements, <http://cms.hhs.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html?DLPage=1&DLSort=0&DLSortDir=ascending> (Accessed Sept. 18, 2014).

{¶ 31} The tables referenced in SMM 3258.9(A) specify a .26955 factor, which is the factor that ODJFS used. Application of this factor results in a \$117,012 valuation for Rodefer's life estate. Recognizing the difference in its own regulation, ODJFS issued MEPL #68 on November 1, 2012, and instructed all Medicaid Eligibility Manual Holders to use the table provided in SMM rather than the tables in 26 C.F.R. 20.2031-7. ODJFS

¹² POMS SI 01140.120 refers to the Life Estate and Remainder Tables (SI 01140.120) in the Social Security Program Operations Manual System (POMS). These tables, which are unisex, also use a .26955 figure for valuing the life estate of a 91-year-old person. See Social Security POMS, SI 01140.120 Life Estate and Remainder Tables, <https://secure.ssa.gov/poms.nsf/lnx/0401140120> (Accessed Sept. 18, 2014).

stated that this was not a policy change, but was simply a “clarification” of an incorrect policy reference. The change was made retroactive to October 15, 2012.

{¶ 32} On appeal, Rodefer insists that ODJFS could not change its regulation without complying with requirements for promulgating administrative rules, that ODJFS therefore was required to apply the standards in Ohio Adm. Code 5101:1-39-32(F)(5), and that no alternative life estate valuation methodology could be used. For its part, the trial court opined that the “literal valuation of the life estate [\$117,012] based on tables not properly incorporated into the Ohio Administrative Code was improper.” January 10, 2014 Decision on Reconsideration, p. 4. However, the trial court concluded that ODJFS could use other methods of calculating value. It also held that the value established by ODJFS was reasonable and supported by the law.

{¶ 33} Upon review, we agree that the life estate value established by ODJFS was reasonable and supported by law. We reach this conclusion, however, based on reasoning that differs somewhat from the trial court’s and possibly even from that of ODJFS. As set forth above, Rodefer argues that life estate valuation must comply with Ohio Adm. Code 5101:1-39-32(F) which, during the relevant period, stated:

(5) The administrative agency must multiply the equity value of the property by the product that corresponds to the life estate owner’s age on the life estate table as defined in 26 C.F.R. 20.2031-7 *as in effect on April 1, 2005*.

(Emphasis added).

{¶ 34} Rodefer maintains that 26 C.F.R. 20.2031-7 requires calculation of value by applying 26 C.F.R. 20.2031-7(d), which is titled “Actuarial values on or after May 1, 2009” and which, in turn, refers to Internal Revenue Code section 7520. In particular, section (d)

dictates that “the fair market value of * * * life estates * * * is the present value determined by the standard or special section 7520 actuarial values.” Rodefer’s argument continues by stating:

The Section 7520 interest rate for June 2012, the time of the sale of the life estate was 1.2%. * * * *

* * *

At the 1.2% interest rate applicable to June 2012, the Table S remainder factor for a 91-year-old is .95193. Consequently, the life estate factor is .04807. Applied to the Auditor’s valuation of the farm land at issue, Mrs. Rodefer’s life estate is correctly valued at \$20,867.19 ($\$434,100 \times .04807$). (Appellant’s brief at 6-7).

{¶ 35} In our view, Rodefer’s method of calculation is simply wrong for at least three reasons. First and foremost, 26 C.F.R. 20.2031-7, then or now, does not contain a “life estate table” as referenced in Ohio Adm. Code 5101:1-39-32(F)(5). There are multiple tables associated with 26 C.F.R. 20.2031-7, but none are specifically titled a “life estate” table. The associated tables also contain a grid of both multiple interest rates and ages of the owner of a life interest. It is not possible to apply those tables simply by “multiply[ing] the equity value of the property by the product that corresponds to the life estate owner’s age on the life estate table,” as directed by Ohio Adm. Code 5101:1-39-32(F)(5). A separate interest rate calculation, nowhere mentioned in the regulation, must be applied. Contrarily, the State Medicaid Manual *does* contain a factor for value of the life estate of a 91-year-old, .26955, which *can* be applied as Ohio Adm. Code 5101:1-39-32(F)(5) requires without an additional interest rate calculation.

{¶ 36} The second reason Rodefer's calculation does not comply with Ohio Adm. Code 5101:1-39-32(F)(5) is that she applies a 1.2 percent interest rate that was published in June 2012, and "Actuarial Table S and Table 2000CM where the valuation date is on or after May 1, 2009" (Appellant's brief at 6), which did not exist as of April 1, 2005, the date of effect to which Ohio Adm. Code 5101:1-39-32(F)(5) limits application of 26 C.F.R. 20.2031-7. Section 20.2031-7 in effect on April 1, 2005 did not have the interest rate of 1.2 percent utilized by Rodefer for her calculation. At that time, the chart interest rates started at 4.2 percent and progressed up to fourteen percent. Thus, if Ohio Adm. Code 5101:1-39-32(F)(5) is limited to 26 C.F.R. 20.2031-7 *as in effect on April 1, 2005*, Rodefer's use of a 1.2 percent interest rate is wrong because it did not exist in 2005. It is accurate to state that 26 C.F.R. 20.2031-7 directs one to section 7520 of the Internal Revenue Code which, in turn, directs one to the periodically-changing interest rates, but, again, Ohio Adm. Code 5101:1-39-32(F)(5) makes no reference to floating interest rates.

{¶ 37} The third reason Rodefer's argument is incorrect is that Ohio Adm. Code 5101:1-39-32(F)(5), intended to facilitate a federal program, fails in that effort if her interpretation prevails. The State Medicaid Manual provides directives to the states for implementation and administration of the program. SMM 3258.9(A) contains instructions for valuing life estates when determining eligibility requirements. The section includes the applicable "LIFE ESTATE AND REMAINDER INTEREST TABLE," which at one time had been included in 26 C.F.R. 20.2031-7. In fact, the manual's life estate table states: "(See 26 C.F.R. 20.2031-7 and 49 FR Vol. 49 No. 93/5-11-84.)" *Id.* The table did appear as "Table A" in 26 C.F.R. 20.2031-7 in 1984, and it now has been moved to 26 C.F.R. 20.2031-7A, where it also appears as "Table A." However, the current Code of

Federal Regulations version of the table indicates that it applies to estate evaluation for transfers “[a]fter November 30, 1983 and [b]efore May 1, 1989.” That limitation did not appear in the 1984 version, but that was obviously before any changes that may have been made effective May 1, 1989. The current SMM iteration of the same Table in SMM 3258.9(A) contains no such temporal limitation, and the same table appears in the Social Security Program Operations Manual System (POMS) at POMS SI 01140.120 without temporal limitation. Given the directives from the federal government’s administration of its program, we conclude that Ohio Adm. Code 5101:1-39-32(F)(5), although likely intended to implement SMM 3258.9(A), is inconsistent with the program directive. Accordingly, we see no error when the ODJFS made a decision consistent with the federal directives and SMM 3258.9(A) to evaluate Rodefer’s life estate for purposes of Medicaid eligibility.

{¶ 38} We recognize that the State is permitted to deviate from the federal methodology to determine eligibility for Medicaid. But when Ohio Adm. Code 5101:1-39-32(F)(5) refers to a table that does not exist in the referenced regulation, and it refers to a calculation method that is different from the federal regulation (i.e., no reference to an interest rate adjustment), we cannot conclude that Ohio Adm. Code 5101:1-39-32(F)(5) was written to deviate from the federal methodology. Moreover, we have not found another state that fails to include the SMM method as at least part of its calculation process, except perhaps Alabama. Notably, however, Alabama Adm. Code 560-X-25-.06(3)(b) makes the same mistake that Ohio Adm. Code 5101:1-39-32(F)(5) makes. Alabama’s section 560-X-25-.06(3)(b) requires taking the market value of the property and then “multiplying that value by the appropriate life estate or remainder factor,

based upon the age of the individual, set forth in the Life Estate and Remainder Tables, 26 C.F.R. §20.2031.7.” That is the same error we addressed with respect to Ohio Adm. Code 5101:1-39-32(F)(5) above. Therefore, we believe ODJFS was correct to apply federal methodology.

{¶ 39} In short, ODJFS was faced with a regulation that cannot be applied as written and is just plain wrong. Accordingly, ODJFS assessed the value of Rodefer’s life estate using the same methodology that appears in the State Medicaid Manual. Although the trial court applied different reasoning, it too arrived at a life estate value of \$117,012. For the reasons set forth above, we find that ODJFS’s order is supported by reliable, probative, and substantial evidence, and the trial court did not abuse its discretion or make an error of law in upholding the administrative decision.

{¶ 40} In her last argument, Rodefer contends she cannot be deemed to have transferred the life estate to qualify for Medicaid because she properly sold it in compliance with ODJFS rules. We disagree. Rodefer’s assertion rests on the premise that she received fair market value for the life estate using the valuation method found in Ohio Adm. Code 5101:1-39-32(F)(5), which we rejected above. Rodefer also reasons that she did not sell the life estate to qualify for Medicaid or to avoid using the asset’s value to pay for her care because she in fact paid for her care with the sale proceeds. The problem, however, remains that Rodefer sold the life estate for less than fair market value, as properly determined by ODJFS, thereby avoiding utilizing the full value of that resource to provide for her care.

{¶ 41} As a final matter, ODJFS has raised an issue with respect to the trial court’s dismissal of Rodefer’s claims that did not result from the administrative

proceeding, i.e., claims for declaratory judgment, violation of due process, and so forth. ODJFS argues that it and Colbert are not proper parties because ODJFS and Colbert were no longer responsible for administering the Ohio Medicaid Program as of September 10, 2012. ODJFS also contends Rodefer cannot circumvent the administrative appeal process by filing an original action.

{¶ 42} We need not address the foregoing matters because Rodefer’s lone assignment of error challenges only the trial court’s action upholding ODJFS’s decision to delay her Medicaid benefits. She has not alleged error based on the dismissal of her remaining claims.

III. Conclusion

{¶ 43} Rodefer’s sole assignment of error is overruled, and the judgment of the Darke County Common Pleas Court is affirmed.

.....

DONOVAN, J., concurs.

WELBAUM, J., dissenting:

{¶ 44} I very respectfully dissent.

{¶ 45} As an initial matter, I agree with Rodefer that ODJFS could not rely on MEPL #68, because ODJFS failed to comply with the requirement in R.C. 5111.01(D) and R.C. 5111.02 that agency rules must be adopted in accordance with R.C. 111.15 and R.C. Chap. 119. At the time MEPL #68 was issued, R.C. 111.15 contained various filing requirements for proposed rules or changes in rules. R.C. Chap. 119 also contained various requirements for promulgating rules. However, there is no evidence that ODJFS complied with any of these requirements with respect to MEPL #68. The letter was also

not a “clarification” – it was a substantive change in how life estates would be valued. Accordingly, MEPL #68 was invalid and could not be used to calculate the value of Rodefer’s life estate. See *B&T Express, Inc. v. Pub. Util. Comm.*, 145 Ohio App.3d 656, 667, 763 N.E.2d 1241 (10th Dist.2001) (holding that an agency’s failure to comply with R.C. 111.15’s filing requirements renders its regulations invalid). The majority opinion does not address this point.

{¶ 46} In support of its position that Rodefer’s calculation of her life estate is invalid, the majority opinion makes three points: (1) that 26 C.F.R. 20.2031.7, then or now, does not contain a “life estate table” as referenced in Ohio Adm.Code 5101:1-39-32(F); (2) that Rodefer used an incorrect interest rate of 1.2%; and (3) that if Rodefer’s interpretation prevails, Ohio’s regulation would be inconsistent with the “directives” of the federal Medicaid manual and, would, therefore, fail to facilitate the federal program, which uses a different valuation rate. I disagree, and will address each point separately.

(A) The Presence of Life Estate Tables

{¶ 47} As was noted, the majority’s first point is that 26 C.F.R. 20.2031.7, then or now, does not contain a “life estate table” as referenced in Ohio Adm.Code 5101:1-39-32(F). See Majority Opinion, ¶ 35. I disagree.

{¶ 48} The summary for T.D. 8826, 65 FR 36908, as promulgated on June 12, 2000 (and in effect on April 1, 2005, or the date Ohio’s regulation references), provides that “This document contains *final regulations relating to the use of actuarial tables in valuing annuities, interests for life or terms of years, and remainder or reversionary*

interests.”

(Emphasis added.) *Id.* at Summary.

{¶ 49} These regulations amended 26 C.F.R. 20.2031-7. See T.D. 8886, 65 FR 36908-01, Par. 13. As amended, and in effect on April 1, 2005, 26 C.F.R. 20.2031-7(d)(2)(ii)(2000) stated that *Table S* shall be used to calculate the present value of a life estate for “one measuring life.” (Emphasis added.) According to the regulation, the value of a life estate is computed by multiplying the value of the property by the appropriate remainder interest, using *Table S*. (Emphasis added.) *Id.*

{¶ 50} In this regard, 26 C.F.R. 20.2031-7(d)(2)(iii), as in effect on April 1, 2005, further states as follows:

If the interest to be valued is the right of a person to receive the income of certain property, or to use certain nonincome-producing property, for a term of years or for the life of one individual, the present value of the interest is computed by multiplying the value of the property by the appropriate term-of-years or life interest actuarial factor (that corresponds to the applicable section 7520 interest rate and term-of-years or life interest period). Internal Revenue Service Publication 1457 includes actuarial factors for an interest for a term of years in Table B and for the life of one individual in Table S (for one measuring life when the valuation date is after April 30, 1999). However, term-of-years and life interest actuarial factors are not included in Table B in paragraph (d)(6) of this section or Table S in paragraph (d)(7) of this section. If Internal Revenue Service Publication 1457 (or any other reliable source of term-of-years and life interest actuarial

factors) is not conveniently available, an actuarial factor for the interest may be derived mathematically. This actuarial factor may be derived by subtracting the correlative remainder factor (that corresponds to the applicable section 7520 interest rate and the term of years or the life) in Table B (for a term of years) in paragraph (d)(6) of this section or in Table S (for the life of one individual) in paragraph (d)(7) of this section, as the case may be, from 1.000000.

T.D. 8886, 65 FR 36908-01, at Par. 13 [26 C.F.R. 20.2031-7(d)(2)(iii)(2000)].

{¶ 51} Table S in 26 C.F.R. 20.2031-7 (2000) states that it is “Based on Life Table 90CM Single Life Remainder Factors Applicable After April 30, 1999 (Interest rate).” *Id.* at Par. 13.

{¶ 52} Thus, the regulation as effective in April 2005 does contain a life table by which a life estate can be calculated. As subsection (d)(2)(iii) indicates, the value of the life estate can be calculated by subtracting the remainder factor from 1.000000. To use an example from the table, the remainder interest at 4.2% is .84870. Multiplying that factor against the value of the property involved in this case (\$434,100), results in a remainder interest of \$368,420.67 \$434,100 minus \$368,420.67 equals \$65,679.33.

{¶ 53} If .84870 is subtracted from 1.000000, the life estate interest is .15130. If \$434,100 is multiplied by .15130, the life estate interest is \$65,679.33. Thus, the same result occurs.

{¶ 54} The majority opinion notes that the regulation still in effect contains the same language, with the exception that it applies to life estates with a valuation date on or after May 1, 2009. See Majority Opinion, ¶ 25, fn. 9. Thus, then, or now, the regulation

contains a life estate table, i.e., a table that can be used to calculate the value of a life estate. And, as discussed below, even if one uses the higher interest rate in the 2000 regulation of 4.2%, Rodefer's life estate would be valued at significantly less than the ODJFS valuation of \$117,012.

B. Interest rate of 1.2%

{¶ 55} The majority opinion's second argument is that Rodefer used an incorrect interest rate of 1.2%. This interest rate was based on the applicable interest rate published in June 2012 and Table S, which applies to valuations after May 2009. The majority opinion contends that the interest rate in effect in April 2005 was between 4.2% and 14%. This is based on the fact that Ohio's regulation [Ohio Adm.Code 5101:1-39-32(F)] refers to 26 C.F.R. 20.2031-7 "as in effect on April 1, 2005" and on the fact that Ohio's regulation does not refer to "floating interest rates." See *Majority Opinion*, ¶ 36.

{¶ 56} As an initial matter, I note that ODJFS did not raise this argument in the administrative proceedings. As a result, this point is either waived or we cannot consider it on appeal, since ODJFS failed to challenge the applicable interest rate in the administrative proceedings. *Berning v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 11AP-837, 2012-Ohio-2991, ¶ 10.

{¶ 57} However, even if we could consider a challenge to the interest rate, I disagree with the majority opinion. In the first place, I do not agree that Ohio's regulation has to specifically refer to "floating interest rates." Ohio's regulation indicates that

valuation is governed by 26 C.F.R. 20.2031-7, as in effect on April 1, 2005.

{¶ 58} The summary for the regulation in effect at the time states that:

These regulations will effect [sic] the valuation of inter vivos and testamentary transfers of interests dependent on one or more measuring lives. Section 7520 of the Internal Revenue Code of 1986 (Code) was enacted by section 5031 of the Technical and Miscellaneous Revenue Act of 1988 and was effective on May 1, 1989. *These regulations are necessary because section 7520(c)(3) directs the Secretary to revise the actuarial tables used in valuing interests dependent on mortality experience not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision. This document contains amendments to the regulations revising certain tables used for the valuation of partial interests in property under section 7520 to reflect the most recent mortality experience available.*

(Emphasis added.) T.D. 8886, 65 FR 36908-01, Summary.

{¶ 59} Thus, at the time Ohio's regulation was enacted, it was understood that the mortality tables in 26 C.F.R. 20.2031-7 would be revised at least once every ten years to take into account the most recent mortality experience. When Ohio Adm.Code 5101:1-39-32(F) was enacted, the drafters would necessarily have been aware of this requirement.

{¶ 60} Furthermore, 26 C.F.R. 20.2031-7(d)(2)(ii) (ordinary remainder and reversionary interests), as in effect on April 1, 2005, refers twice to "the applicable section 7520 interest rate" as the appropriate factor to be used. (*"These factors are derived by*

*using the appropriate section 7520 interest rate and, if applicable, the mortality component for the valuation date of the interest that is being valued * * *.*") Emphasis added.) T.D. 8886, 65 FR 36908-01, at Par. 13. Likewise, 26 C.F.R. 20.2031-7(d)(2)(iii) (ordinary term of years and life interests) also refers twice to the "applicable section 7520 interest rate." *Id.*

{¶ 61} The wording of the statute in question (26 U.S.C. 7520) has not changed since it was enacted in November 1988, and states that:

For purposes of this title, the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be determined – (1) under tables prescribed by the Secretary, and (2) *by using an interest rate (rounded to the nearest 2/10ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls.*

26 U.S.C. 7520. Thus, the statute (Section 7520) has contemplated the use of floating interest rates since 1988. Again, the drafters of Ohio's regulation would have (or should have) been aware of this fact.

C. Federal "Directives"

{¶ 62} The majority's final argument is that if Rodefer's interpretation prevails, Ohio's regulation would be inconsistent with the "directives" of the federal Medicaid manual and, would, therefore, fail to facilitate the federal program, which uses a different valuation rate. This is the same argument that ODJFS makes on appeal, i.e., that the SMM is "binding." The majority facially disclaims this position and concedes that Ohio

can deviate from the federal manual. Majority Opinion at ¶ 38. However, the effect of the majority's decision is to make the SMM binding, and to allow Ohio to deviate from its own regulation, without having properly enacted a substitute regulation.

{¶ 63} Notably, “[t]he federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid plan. State Medicaid plans must, however, comply with applicable federal law and regulations. See 42 U.S.C. § 1396c; 42 C.F.R. § 430.0.” (Citation omitted.) *Shakhnes v. Berlin*, 689 F.3d 244, 247 (2d Cir. 2012). As we previously observed, Ohio codified this requirement at R.C. 5111.02.

{¶ 64} The applicable federal law of Medicaid is codified in various places. For example, 42 U.S.C. 1396a(a)(18) requires state plans for medical assistance to comply with the provisions of 42 U.S.C. 1396p “with respect to * * * transfers of assets* * *.” (Footnote omitted.) In turn, 42 U.S.C. 1396p(c)(1)(a) requires state plans to include provisions pertaining to ineligibility for services where assets are transferred for less than fair market value on or after the pertinent look-back period. 42 U.S.C. 1396a(r)(2) also “permits the states to use a methodology for determining Medicaid income eligibility that is the same as or less restrictive than the methodology used in determining income eligibility for Supplemental Security Income (SSI).” *State of Ga., Dept. of Medical Assistance, By and Through Toal v. Shalala*, 8 F.3d 1565, 1567 (11th Cir.1993).

{¶ 65} Thus, as a participating state, Ohio would have been required to decide resource eligibility by using methodology no more restrictive than what would be used in the supplemental security income program for aged persons in Ohio. This necessarily means that Ohio could also choose to use *less restrictive* methodology. Under 42

U.S.C. 1396a(r)(2)(B), “methodology is considered to be ‘no more restrictive’ if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.”

{¶ 66} Ohio is not the only state to use life expectancy tables or valuations that differ from those in the SMM. For example, Alabama, like Ohio, uses the tables in 26 C.F.R. 20.2031.7 to value life estates. See Al. Adm. Code 560-X-25-.06(3)(b). Iowa regulations provide for valuation of life estates using expectancy tables containing the same value as the SMM, but only “in the absence of other evidence.” Iowa Adm. Code 441-75.13(249A)(2)(e). In addition, Vermont uses the Social Security Life Estate Table in POMS SI 01140.120 (which corresponds to the SMM table), but also allows individuals to submit evidence supporting another method of establishing the fair market value of a life estate. In the latter event, the department will make a decision about which method it will use. See Vt. Adm. Code 12-3-224:29.09(d)(2) and 12-3-212:4252.2.

{¶ 67} The SMM, which ODJFS describes as “binding” on ODJFS, was “not promulgated under the notice and comment provisions of the Administrative Procedure Act and thus does not ‘have the force and effect of law.’ ” *Hobbs ex rel. Hobbs v. Zenderman*, 579 F.3d 1171, 1186, fn. 10 (10th Cir.2009), quoting *Ramey v. Reinertson*, 268 F.3d 955, 963 (10th Cir.2001). Notably, although the SMM itself states in the foreword that it is “binding,” this is only the agency’s statement of the effect of its own interpretation.

{¶ 68} In this regard, the Supreme Court of the United States has observed that:

An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. *Auer v.*

Robbins, 519 U.S. 452, 461-463, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

An interpretation of an ambiguous statute may also receive substantial deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Deference in accordance with *Chevron*, however, is warranted only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). Otherwise, the interpretation is “entitled to respect” only to the extent it has the “power to persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

Gonzales v. Oregon, 546 U.S. 243, 255-256, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006).

{¶ 69} Various courts have concluded that the SMM provides “guidance” to the states, and is not entitled to *Chevron* deference. See, e.g., *McDonald v. Illinois Dept. of Human Servs.*, 406 Ill.App.3d 792, 802, 952 N.E.2d 21(Ill.App.2010) (SMM is “a federal manual that provides guidance to state employees”); *New Jersey Hospice and Palliative Care Org. v. Guhl*, 414 N.J.Super. 42, 53-54, 997 A.2d 298 (N.J.Super.A.D.2010) (SMM is not entitled to *Chevron* deference); *Dillingham v. North Carolina Dept. of Human Resources*, 132 N.C.App. 704, 709, 513 S.E.2d 823 (N.C.App.1999) (“federal manual * * * provides interpretive guidelines for the states to assist in the administration of the Medicaid program”); *Dempsey ex rel. Dempsey v. Dept. of Pub. Welfare*, 756 A.2d 90, 96 (Pa.Cmwth.2000) (SMM provision is simply a “guideline to aid caseworkers”);

Heffelfinger v. Department of Pub. Welfare, 789 A.2d 349, 353 (Pa.Cmwlth.2001); *Estate of F.K. v. Div. of Med. Assistance And Health Servs.*, 374 N.J.Super. 126, 142, 863 A.2d 1065 (N.J.Super.A.D.,2005) (applying less deferential *Skidmore* review to SMM and opinion letters of CMS); and *Sai Kwan Wong v. Doar*, 571 F.3d 247, 256 (2d Cir.2009) (applying *Skidmore*, rather than *Chevron* deference to CMS’s “nonlegislative interpretation”).¹³

{¶ 70} In contrast to the case before us, the state administrative agency in *Heffelfinger* argued that it was not required to follow a transmittal letter issued by CMS’s predecessor, because the letter was only a guideline. Instead, the agency contended that “the actual regulations that must be adhered to in determining MA eligibility” were those set forth in the Pennsylvania administrative code. *Heffelfinger* at 352. The agency also argued that its own “policy clarification” (which the applicant for benefits had attempted to rely on), could not form the basis of a decision, because it was not “a duly promulgated regulation.” *Id.* at 353. In concluding that the applicant was ineligible for benefits, the court of appeals agreed that the agency was required to follow its own duly-enacted regulations, and not either the SMM or the policy clarification that the agency had issued after it promulgated its regulation. *Id.*

{¶ 71} In *Skidmore*, the Supreme Court of the United States stated that an administrative agency’s:

rulings, interpretations and opinions * * * while not controlling upon the

¹³ Some courts have found the SMM to be binding. However, the citation offered for this conclusion is the statement in the SMM’s own foreword that it is “binding” on state agencies. See, e.g., *Armando D. v. Shewry*, 124 Cal.App.4th 13, 24, fn. 11, 21 Cal.Rptr.3d 66, 74 (Cal.App.2004), and *In re Pooled Advocate Trust*, 813 N.W.2d 130, 145 (S.D.2012) (both citing to the SMM foreword).

courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140, 65 S.Ct. 161, 89 L.Ed. 124.

{¶ 72} In analyzing this point, I begin with the fact that Medicaid is a “ ‘cooperative federal-state program’ that is jointly financed with federal and state funds for those states that choose to participate.” *Howell v. Ohio Dept. of Job & Family Servs.*, 7th Dist. Belmont No. 08 BE 25, 2009-Ohio-1510, ¶ 15, quoting *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 501, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). Participating states must “develop reasonable standards for determining eligibility consistent with the Act.” *Id.*, citing 42 U.S.C. 1396a (a)(17).

{¶ 73} “To qualify for federal funds, States must submit to a federal agency (CMS, a division of the Department of Health and Human Services) a state Medicaid plan that details the nature and scope of the State's Medicaid program. It [a State] must also submit any amendments to the plan that it may make from time to time. And it must receive the agency's approval of the plan and any amendments. Before granting approval, the agency reviews the State's plan and amendments to determine whether they comply with the statutory and regulatory requirements governing the Medicaid program.” *Douglas v. Independent Living Center of Southern California, Inc.*, ___ U.S. ___, 132 S.Ct. 1204, 1208, 182 L.Ed.2d 101 (2012).

{¶ 74} Ohio's regulation pertaining to the use of the life tables, Ohio Adm. Code 5101:1-39-32, was adopted in 2006, and was effective until its amendment in 2013. The parties have not discussed the submission of plan amendments during this time, but I presume submission of a plan amendment, and approval by CMS, would have been required when Ohio amended its former regulation pertaining to the use of life tables in 2006. Despite this fact, CMS apparently never indicated to ODJFS that its regulation was inconsistent with the SMM. This failure to consistently enforce its manual, if indeed, that manual were deemed binding, militates against giving persuasive power to Section 3258.9 of the SMM.

{¶ 75} Furthermore, the website of CMS places the SMM and other manuals under the sub-heading of "Guidance."¹⁴ I also note that the SMM does not articulate its reasoning for choosing a particular type of life estate valuation table, when other alternatives clearly exist.

{¶ 76} In view of the above factors, I see no reason to accord particular deference to the SMM life estate tables. Ohio was not precluded from adopting its own regulations, and there is no indication that the rule it chose to adopt was unreasonable. The rule is also not ambiguous, insofar as it directs applicants to a specific section of the Code of Federal Regulations. "The interpretation of statutes and administrative rules should follow the principle that neither is to be construed in any way other than as the words demand." (Citations omitted.) *Morning View Care Center-Fulton v. Ohio Dept. of Human Serv.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶ 36 (10th Dist.).

¹⁴ <http://cms.hhs.gov/Regulations-and-Guidance/Regulations-and-Guidance.html> (Accessed Oct. 8, 2014). Although the heading on the website refers to Regulations and Guidance, manuals are listed under the subheading of "Guidance."

Accord State ex rel. Baroni v. Colletti, 130 Ohio St.3d 208, 2011-Ohio-5351, 957 N.E.2d 13, ¶ 18.

{¶ 77} In this regard, ODJFS argues that it cannot be required to follow its own regulation because the life estate table in 26 C.F.R. 20.2031-7(d) does not apply to transfers after May 1, 2009. According to ODJFS, 26 C.F.R. 20.2031-7(d) requires valuation pursuant to a federal statute, 26 U.S.C. 7520, which does not contain life estate tables. Again, however, I disagree.

{¶ 78} As was noted, Ohio Adm. Code 5101:1-39-32(F)(5) states that the “agency must multiply the equity value of the property by the product that corresponds to the life estate owner’s age on the life estate table as defined in 26 C.F.R 20.2031-7 as in effect on April 1, 2005.” As was also previously stressed, these life estate tables provide single remainder factors to be applied after April 30, 1999, but use interest rates higher than those in effect in 2012, when Rodefer’s transfer was valued. Furthermore, contrary to the contention of ODJFS, 26 C.F.R. 20.2031-7(d), in its current state, requires use of the interest rate determined by 26 U.S.C. 7520 (which in this case was 1.2%), and, “if applicable, the mortality component for the valuation date of the interest that is being valued.” 26 C.F.R. 20.2031-7(d)(7) also provides tables (Actuarial Table S and Table 2000CM) to be used “where the valuation date is on or after May 1, 2009.” (Emphasis added.) Under subsection (d)(7), these tables “must be used in the application of the provisions of this section where the section 7520 interest rate computation is between .02 and 14 percent.” Because the interest rate in this case was within those parameters, the actuarial tables (S and 2000CM) would apply.

{¶ 79} Accordingly, I would decline to uphold the trial court’s conclusion that

ODJFS was allowed to apply a valuation for Rodefer's life estate other than the valuation dictated by the provision in the Ohio Administrative Code that was then in effect. To the contrary, ODJFS had to use the valuation method set forth in Ohio Adm. Code 5101:1-39-32(F)(5), i.e., it was required to "multiply the equity value of the property by the product that corresponds to the life estate owner's age on the life estate table as defined in 26 C.F.R 20.2031-7 as in effect on April 1, 2005." As was noted, ODJFS never questioned the accuracy of Rodefer's interest rate calculation; instead, ODJFS contended that it was entitled to follow the procedure set forth in MEPL #68 and, alternatively, the procedure in Section 3258.9 of the SMM.

{¶ 80} During its discussion of this last point, the majority opinion refers to the Life Estate and Remainder Interest Table, which is at the end of Section 3258.9A of the SMM. Section 3258.9A discusses "Treatment of Certain Kinds of Transfers for Less Than Fair Market Value," and states that:

The value of the asset transferred is computed by using the regular Medicaid rules for determining the value of assets. To calculate the value of the life estate, use the life estate table below (from POMS SI 01140.120).

{¶ 81} As the majority notes, the Life Estate and Remainder Table at the end of Section 3258.9A contains a reference to 26 C.F.R. 20.2031-7 and 49 FR Vol. 49 No. 93/5-11-84 (although not to any specific table in those sources). The SMM was published in November 1994, and has not been updated since.

{¶ 82} The majority observes that the reference in the SMM is to an estate table that appeared as "Table A" in 26 C.F.R. 20.2031-7 in 1984. Majority Opinion at ¶ 37. (Again, the SMM does not refer to any specific table.) In addition, the majority contends

that the referenced table has now been moved to 26 C.F.R. 20.7031-7A, where it also appears as Table A. *Id.* The majority further states that the current C.F.R. version of Table A indicates that it applies to estate evaluation for transfers after November 1, 1983 and before May 1, 1989. *Id.* Finally, the majority notes that this time limitation did not appear in the original version in 1984, but that it was obviously in effect before any changes made in 1989. *Id.*

{¶ 83} Based on the fact that the current SMM iteration of the 1984 table in Section 3258.9A and the Social Security Program Operations Manual's iteration of the table have no temporal limitations, the majority opinion concludes that Ohio's regulation, although likely intended to implement the SMM, is of no force, to the extent it is inconsistent with the SMM. Again, I disagree, for several reasons. First, as was noted above, Ohio's version does not have to be consistent with the federal law, as long as it is not more restrictive.

{¶ 84} Second, Ohio's regulation specifically refers to 26 C.F.R. 20.2031-7, not to 26 C.F.R. 20.2031-7A. 26 C.F.R. 20.2031-7A first came into existence in June 1994, with an earlier effective date of May 1, 1989. At the time, the Department of the Treasury finalized and adopted amendments that had been published in the Federal Register on November 2, 1992. See T.D. 8540, 59 FR 30100-01 Summary, Supplementary Information, Background, and Par. 20. Again, Ohio would have been aware of this fact when Ohio's regulations were amended in 2006 to specifically refer to 26 C.F.R. 20.2031-7. See Majority Opinion at ¶ 24, n. 8. In 2006, 26 C.F.R. 20.2031-7A had been in effect for about 12 years. Thus, if Ohio had intended to refer to 26 C.F.R. 20.2031-7A instead of 26 C.F.R. 20.2031-7, the drafters of Ohio's regulation could have done so.

However, they did not.

{¶ 85} Third, review of the history of 26 C.F.R. 20.2031-7 and 26 C.F.R. 20.2031-7A indicates that the purpose for adopting 26 C.F.R. 20.2031-7A in 1994 and periodically amending both regulations to include dates on the tables, i.e., 1989, 1999, 2009, and so forth, was to comply with requirements that the mortality tables be updated to reflect more current data and experience, and to reflect current interest rates. From this perspective, I note that the valuation table in the SMM reflects values that are inconsistent with current economic data, since they use a very high standard interest rate that equates to 10% – a rate that has been inconsistent with and substantially higher than 120 percent of the Federal midterm rate for many years. The interest rate is also inflexible, unlike the Section 7520 rates that have been used since 1988.

{¶ 86} In contrast, the current version of 20.2031-7, which has been in effect since 2009, contains more realistic interest rates that begin at .02%. See 26 C.F.R. 20.2031-7(d)(7) (Table S). These rates are also flexible, and have been since 1988, prior to the adoption of Ohio's regulation.

{¶ 87} The majority opinion additionally fails to consider the following history of 26 C.F.R. 20.2031-7 and 26 C.F.R. 20.2031-7A, which began in 1958. I will discuss this history by referring to the particular changes that were made at various dates, beginning with 1958.

1. 1958

{¶ 88} 26 C.F.R. 20.2031-7 was originally codified in June 1958, as part of the adoption of income tax regulations. See T.D. 6296, 1958-2 C.B. 432, 1958 WL 60428,

Par. 1, 26 C.F.R. 2031-7 (1958). Under this regulation, Section 20.2031-7 pertained to valuation of annuities, life estates, terms for years, remainders and reversions. *Id.* There was no 20.2031-7A at the time. See T.D. 6296, 1958-2 C.B. 432, 26 C.F.R. 20.2031-7 (1958).

{¶ 89} In 1958, Section 20.2031-7(a)(2) provided that:

The present value of an annuity, life estate, remainder or reversion determined under this section which is dependent on the continuation or termination of the life of one person is computed by the use of Table I in paragraph (f) of this section.

Id. Table I bears the heading: "Table, single life, 3½ percent, showing the present worth of an annuity, of a life interest, and of a remainder interest." *Id.* The table uses a factor of .08520 for a life estate of a 91 year old person. *Id.* (Applying this formula to the case before us would result in a fair market value of \$36,985.32 for Rodefer's life estate.) (\$434,100 times .08520 equals \$36,985.32.)

B. 1970

{¶ 90} 26 C.F.R. 20.2031-7 was next amended in December 1970. See T.D. 7077, 1970-2 C.B. 183, 1970 WL 123196. As amended, the regulation stated that:

(a) In general. (1) For estates of decedents dying on or before December 31, 1970, except as otherwise provided in this subparagraph, the fair market value of annuities, life estates, terms for years, remainders, and reversions is their present value determined under this section. For

estates of decedents dying after December 31, 1970, the fair market value of annuities, life estates, terms for years, remainders, and reversions is their present value determined under § 20.2031-10.

Id. at Par. 2.

{¶ 91} Subsection (a) (2) was not amended, meaning that Table I would still be used for persons dying prior to December 31, 1970. For decedents dying after December 31, 1970, new section 26 C.F.R. 20.2031-10(a)(2) provided that the present value of a life estate dependent on the continuation of the life of one person would be determined using Table A(1) or (A)(2) in 26 C.F.R. 20.2031-10(f). *Id.* at Par. 3. These tables were classified by sex, and (A)(2), pertaining to women, provided for 6 percent interest and a life estate factor of .15301 for a 91-year old woman. See T.D. 7077, 1970-2 C.B. 183, Par. 3, Table A(2). The remainder interest in that case would be .84699. *Id.* Application of these factors would result in a value of about \$66,421.64 for Rodefer's estate. (.15301 times \$434,100 equals \$66,421.64).

C. 1984

{¶ 92} The next amendment occurred on May 11, 1984, which is the date referenced after the end of Section 3258.9 of the SMM. See T.D. 7955, 49 FR 19973-02. As was noted, the SMM was published in November 1994 and has not been updated since.

{¶ 93} The 1984 change in 26 C.F.R. 20.2031-7 was made because "the interest rate used in constructing the tables *no longer reflects prevailing interest rates.*" (Emphasis added.) *Id.* at Summary.

{¶ 94} As amended, 26 C.F.R. 20.2031-7 (1984) provided that:

(a) In general. (1) Except as otherwise provided in this paragraph (a)(1), for estates of decedents dying after November 30, 1983, the fair market value of annuities, life estates, terms for years, remainders, and reversions is their present value determined under this section. * * *

(a)(2) The present value of an annuity, life estate, remainder, or reversion determined under this section which is dependent on the continuation or termination of the life of one person is computed by the use of Table A in paragraph (f) of this section.

T.D. 7955, 49 FR 19973-02, at Par. 12.

{¶ 95} In 1984, there was still no 20.2031-7A. Under table A at that time, a 10% interest rate was used. The factor applied to the life estate of a 91-year old person was .26955. The 1984 regulation adopted the rules that had been proposed by publication in the federal register at 48 FR 50087 on October 31, 1983. That document offers the following explanation:

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under sections 52, 170, 642, and 664; the Temporary Income Tax Regulations under the Employee Retirement Income Security Act of 1974 (26 CFR Part 11) under section 414; the Estate Tax Regulations (26 CFR Part 20) under sections 2031 and 2055; and the Gift Tax Regulations (26 CFR Part 25) under sections 2512, 2522, and 2523 of the Internal Revenue Code of 1954 (Code). *The proposed regulations contain tables based on a 10 percent discount and income*

factor. This percentage rate reflects the average annual rate paid on U.S. Government obligations of 10 year maturity rounded to the nearest whole percent. These tables will replace the 6 percent tables currently in the regulations. The proposed tables contain factors for valuing annuities, life estates, terms for years, remainders, and reversions. In addition, the proposed tables eliminate the distinction between male and female mortality and provide for tables which are gender neutral.”

(Emphasis added.) Proposed Rules 48 FR 50087-01, (October 13, 1983), Background.

{¶ 96} Based on the prevailing economy at the time, a higher interest rate of 10% was used, replacing the 6% interest rate that had previously been used. This ultimately resulted in a higher factor, .26955, being applied for purposes of valuing the fair market value of a life estate. Thus, even in 1984, the interest rate was being adapted to the annual rate paid on U.S. government obligations, which fluctuated.

D. Enactment of 26 U.S.C. 7520 in 1988

{¶ 97} Subsequently, in November 1988, Congress enacted 26 U.S.C. 7520, which required life estates, remainders, annuities, and so on, to be valued under tables prescribed by the Secretary of the Internal Revenue Department, and to be valued “by using an interest rate (rounded to the nearest 2/10ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls.” 26 U.S.C. 7520(a)(2).

{¶ 98} The statute also contained the following requirements: (1) the tables “shall contain valuation factors for a series of interest rate categories”; (2) the Secretary was

required to prescribe initial tables within three months of the effective date of the statute; (3) the initial tables must be revised no later than December 31, 1989 in order to account for the most recent mortality experience; and (4) thereafter, the tables had to be revised at least every ten years to account for the most recent mortality experience available. 26 U.S.C. 7520(c)(1),(2), and (3).

{¶ 99} This statute imposed new requirements for valuing life estates, including using floating interest rates, valuation factors for a series of interest rate categories, and revision of the mortality tables at least every ten years. Again, the drafters of Ohio's regulation would have been aware of the existing requirements of floating interest rates and the update every ten years, when they enacted Ohio's regulation in 2006.

E. 1994

{¶ 100} In June 1994, the regulations were amended to add 26 C.F.R. 20.2031-7A. T.D. 8540, 59 FR 30100-01, Par. 20. The June 1994 amendments had an effective date of May 1, 1989, and finalized and adopted amendments that had been published in the Federal Register on November 2, 1992. *Id.* at Summary and Background. It is clear that 26 C.F.R. 20.2031-7A was added in 1994 to serve as a repository for the prior regulation that had covered previous mortality and interest rates. 26 C.F.R. 20.2031-7A was headed "Valuation of annuities, interests for life or term of years, and remainder or reversionary interests for estates of decedents for which the valuation date of the gross estate is before May 1, 1989." *Id.* at Par. 20-21.

{¶ 101} The heading of 26 C.F.R. 20.2031-7 was now listed as "Valuation of annuities, interests for life or term of years, and remainder or reversionary interests for

estates of decedents for which the valuation date of the gross estate is after April 30, 1989.” *Id.* at Par. 22.

{¶ 102} With respect to the earlier effective date, the material accompanying the regulations indicates that:

These regulations are generally effective in the case of annuities, interests for life or terms of years, and remainder or reversionary interests created after April 30, 1989. The regulations provide certain transitional rules intended to alleviate any adverse consequences resulting from the statutory amendments. Several principal provisions of the regulations were announced in Notice 89-24, 1989-1 C.B. 660 (which announced the change from the 10 percent fixed rate of interest to the section 7520 floating rate of interest), and Notice 89-60 (which announced the change in mortality tables) (See §601.601(d)(2)(ii)(b) of the Statement of Procedural Rules). A transitional rule in the final regulations provides that, for valuation dates of transfers after April 30, 1989, and before June 10, 1994, a transferor can rely on Notice 89-24 or Notice 89-60 in valuing the transferred interest.

T.D. 8540, 59 FR 30100-01, at Effective Dates.

{¶ 103} As was noted, 26 C.F.R. 20.2031-7A first appears at this time and is labeled “Actuarial Tables Applicable Before May 1, 1989.” *Id.* at Par. 20-21. This was obviously required, since, in 1988, 26 U.S.C. 7520 required periodic revisions to the tables going forward. However, the prior method of valuing estates would also have to be preserved. The table previously used (Table A) was carried over and was attached to

20.2031-7A – again, making sense since the applicable interest rate for valuations after 1989 would not be appropriate to valuations that occurred prior to 1989, i.e., the interest rate could be higher or lower than the interest rate that had been previously used.

{¶ 104} This interpretation is reflected in the regulation. For example, 26 C.F.R. 20.2031-7A(a)(1994) provides for an interest rate of 4% to be applied to life estates for which the valuation date is prior to January 1, 1952. *Id.* at Par. 20. Likewise, for estates valued between December 31, 1951 and January 1, 1971, the interest rate would be 3.5% and life contingencies were to be taken from U.S. Life Table 38, as set forth in former 20.2031-7. *Id.* [26 C.F.R. 20.2031-7A(b) (1994)]. For life interests valued between December 31, 1970 and before December 31, 1983, an interest rate of 6% per year was used, and life contingencies were determined as to each male and female, based on values set out in Table LN, contained in former 26 C.F.R. 20.2031-10. *Id.* [26 C.F.R. 20.2031-7A(c) (1994)]. Notably, these are the same interest rates and criteria previously applied, and are the same rates and tables contained in the 2009 version of 20.2031-7A for those time periods.

{¶ 105} Again, this is consistent with the fact that the mortality tables now had to be revised at least every ten years. As to valuations occurring before the most recent update, the prior regulations would apply, and were codified in 26 C.F.R. 20.2031-7A. Valuations occurring after the most recent ten-year update would be governed by 26 C.F.R. 20.2031-7.

{¶ 106} Thus, the 1994 regulations re-designate former 26 C.F.R. 20.2031-7 as 20.2031-7A, paragraph (d), and contain a re-designation table that “indicates the old CFR unit numbers for 20.2031-7 and the corresponding new CFR unit numbers for

20.2031-7(A)(d).” T.D. 8540, 59 FR 30100-01, at Par. 21. The headings for Tables A, B, and LN were also revised. *Id.* Table A was now designated “Single Life, Unisex, 10 Percent – Table Showing the Present Worth of An Annuity, of a Life Estate, and a Remainder Interest – Applicable for Transfers After November 30, 1983, and Before May 1, 1989.” *Id.* Again, this is the interest rate that was previously applied for that time period.

{¶ 107} The 1994 regulations add a new 26 C.F.R. 20.2031-7, and the heading of that section reads “Valuation of annuities, interests for life or term of years, and remainder or reversionary interests for estates of decedents for which the valuation date of the gross estate is after April 30, 1989.” *Id.* at Par. 22. Subsection (a) of the new 20.2031-7 indicates that fair market value for estates valued after April 30, 1989 is to be determined in accordance with subsection (d) of that section.

{¶ 108} Subsection (d)(1) of the new 26 C.F.R. 20.2031-7 further indicates that if the valuation date is after April 30, 1989, valuation will be based on the applicable section 7520 interest rate and, if applicable, the mortality component for the valuation date of the interest being valued. Subsections (d)(2)(i) through (iv) discuss specific interests such as charitable remainder trusts, ordinary remainder and reversionary interests, ordinary term of years and life interests, and annuities.

{¶ 109} In particular, subsections (d)(2)(ii) and (iii) indicate that remainders and life interests for one measuring life will be valued by using table S. Table S provides factors for interest rates between 4.2% and 14%. The applicable remainder factor for a 91-year old person at 4.2% is .85058 and at 14% is .63121. T.D. 8540, 59 FR 30100-01, at Par. 22, Table S.

{¶ 110} The regulation further states that:

However, term-of-years and life interest actuarial factors are not included in Table B or Table S in §20.2031-7(d)(6) of this chapter. If Internal Revenue Service Publication 1457 (or any other reliable source of term-of-years and life interest actuarial factors) is not conveniently available, an actuarial factor for the interest may be derived mathematically. This actuarial factor may be derived by subtracting the correlative remainder factor (that corresponds to the applicable section 7520 interest rate and the term of years or the life) in Table B (for a term of years) or in Table S (for the life of one individual) in §20.2031-7(d)(6), as the case may be, from 1.000000.

Id. at Par. 22 [26 C.F.R. 20-2031-7(d)(iii) (1994)].

{¶ 111} In other words, the factor for a life interest for a 91 year-old person at 4.2% interest would be 1.000000 minus .85058, or .14942. *Id.* at Table S. This would result in a valuation of about \$64,548.12 for Rodefer's estate. (.14942 times \$434,100 equals \$64,548.12). On the high end, the factor for a life interest at 14%, would be 1.000000 minus .63132, or .36868. *Id.* Using the high end interest rate, this would result in a valuation of about \$160,043.98 for Rodefer's life estate.

{¶ 112} As was noted, the SMM was adopted in November 1994, and the life interest table in Section 3258.9 references 26 C.F.R. 20.2031-7 – not 26 C.F.R. 20.2031-7A. This may have been sloppy draftsmanship, since the new regulations had been adopted by the Treasury Department several months before, in June 1994. However, as was noted by the majority, the SMM table also references 49 FR 49 No.

93/5-11-84 – which is a reference prior to the 1994 amendments. Again, however, the SMM does not refer to a specific table in 26 C.F.R. 20.2013-7.

F. 1999

{¶ 113} The next amendments occurred on April 30, 1999. Amendments were “necessary because section 7520(c)(3) directs the Secretary to update the actuarial tables to reflect the most recent mortality experience available.” T.D. 8819, 64 FR 23187-01, Summary. These regulations were effective May 1, 1999, and at that time, both final and temporary regulations were adopted. *Id.*

{¶ 114} First, 26 C.F.R. 20.2031-7A was revised. The title now was “Valuation of annuities, interests for life or term of years, and remainder or reversionary interests for estates of decedents for which the valuation date of the gross estate is before May 1, 1999.” *Id.* at Par. 17. Subsection (e) was added, providing for valuation of estates when the valuation date was after April 30, 1989 and before May 1, 1999. *Id.*

{¶ 115} The revised 26 C.F.R. 20.2031-7A directed individuals to use the 7520 interest rate and Table S (single life remainder factors where the date was after 4/30/89 and before 5/1/99.) *Id.* Again, this is consistent with the fact that the prior regulation would need to be maintained for historical purposes when the tables were updated no more than ten years later. However, although the table headings were slightly revised, there was no change in the content of the tables themselves. *Id.*

{¶ 116} The April 1999 amendments also added Temporary 20.2031-7T. *Id.* at Par. 14-15. Subsections (a) through (b) were reserved. *Id.* at Par. 19. The temporary addition states that:

(c) Actuarial valuations. The present value of annuities, life estates, terms of years, remainders, and reversions for estates of decedents for which the valuation date of the gross estate is after April 30, 1999, is determined under paragraph (d) of this section. * * *

* * *

(d) Actuarial valuations after April 30, 1999 – (1) In general. Except as otherwise provided in paragraph (b) of this section and §20.7520-3(b) (pertaining to certain limitations on the use of prescribed tables), if the valuation date for the gross estate of the decedent is after April 30, 1999, the fair market value of annuities, life estates, terms of years, remainders, and reversionary interests is the present value determined by use of standard or special section 7520 actuarial factors. These factors are derived by using the appropriate section 7520 interest rate and, if applicable, the mortality component for the valuation date of the interest that is being valued. See §§20.7520-1 through 20.7520-4.

(2) Specific interests

* * *

(ii) Ordinary remainder and reversionary interests. If the interest to be valued is to take effect after a definite number of years or after the death of one individual, the present value of the interest is computed by multiplying the value of the property by the appropriate remainder interest actuarial factor (that corresponds to the applicable section 7520 interest rate and remainder interest period) in Table B (for a term certain) or the

appropriate Table S (for one measuring life), as the case may be. Table B is contained in §20.2031-7(d)(6) and Table S (for one measuring life when the valuation date is after April 30, 1999) is contained in paragraph (d)(7) of this section and in Internal Revenue Service Publication 1457. For information about obtaining actuarial factors for other types of remainder interests, see paragraph (d)(4) of this section.

(iii) Ordinary term-of-years and life interests. If the interest to be valued is the right of a person to receive the income of certain property, or to use certain nonincome-producing property, for a term of years or for the life of one individual, the present value of the interest is computed by multiplying the value of the property by the appropriate term-of-years or life interest actuarial factor (that corresponds to the applicable section 7520 interest rate and term-of-years or life interest period). Internal Revenue Service Publication 1457 includes actuarial factors for an interest for a term of years in Table B and for the life of one individual in Table S (for one measuring life when the valuation date is after April 30, 1999). However, term-of-years and life interest actuarial factors are not included in Table B in §20.2031-7(d)(6) or Table S in paragraph (d)(7) of this section. If Internal Revenue Service Publication 1457 (or any other reliable source of term-of-years and life interest actuarial factors) is not conveniently available, an actuarial factor for the interest may be derived mathematically. This actuarial factor may be derived by subtracting the correlative remainder factor (that corresponds to the applicable section 7520 interest

rate and the term of years or the life) in Table B (for a term of years) in §20.2031-7(d)(6) or in Table S (for the life of one individual) in paragraph (d)(7) of this section, as the case may be, from 1.000000. * * *

* * *

(7) Actuarial Table S and Table 90CM where the valuation date is after April 30, 1999. Except as provided in §20.7520-2(b) (pertaining to certain limitations on the use of prescribed tables), the following Table 90CM and Table S (single life remainder factors applicable where the valuation date is after April 30, 1999) and Table B, Table J, and Table K contained in §20.2031-7(d)(6), must be used in the application of the provisions of this section when the section 7520 interest rate component is between 4.2 and 14 percent.

T.D. 8819, 64 FR 23187-01, at Par. 19. [26 C.F.R. 20-2031-7T (1999)].

{¶ 117} For a 91-year old woman at an interest rate of 4.2%, the remainder factor is .84870 under Table S. At 14% interest, the remainder factor is .62659. *Id.* Subtracting these items from 1.000000, as directed, results in life estate factors, respectively, of .15130, and .37341. Use of these figures would result in valuations of Rodefer's estate, respectively, of \$65,679.33 and \$162,097.28.

G. 2000

{¶ 118} Final regulations were adopted in June 2000, and were effective on June 12, 2000. See T.D. 8886, 65 FR 36908-01, Summary. The introductory information

states that:

This document contains final regulations relating to the use of actuarial tables in valuing annuities, interests for life or terms of years, and remainder or reversionary interests. These regulations will effect [sic] the valuation of inter vivos and testamentary transfers of interests dependent on one or more measuring lives. Section 7520 of the Internal Revenue Code of 1986 (Code) was enacted by section 5031 of the Technical and Miscellaneous Revenue Act of 1988 and was effective on May 1, 1989. *These regulations are necessary because section 7520(c)(3) directs the Secretary to revise the actuarial tables used in valuing interests dependent on mortality experience not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision. This document contains amendments to the regulations revising certain tables used for the valuation of partial interests in property under section 7520 to reflect the most recent mortality experience available.*

* * *

On April 30, 1999, the IRS published in the Federal Register (64 FR 23187 and 64 FR 23245) temporary regulations and a notice of proposed rulemaking by cross reference to temporary regulations (REG-103851-99) under sections 642, 664, 2031, 2512, and 7520 relating to the use of actuarial tables in valuing annuities, interests for life or terms of years, and remainder or reversionary interests. No written comments responding to the notice of proposed rulemaking by cross reference to temporary

regulations were received and, thus, no hearing was held. This document adopts, with no substantive changes, final regulations with respect to this notice of proposed rulemaking by cross reference to temporary regulations.

(Emphasis added.) *Id.* at Summary and Supplementary Information, Background.

{¶ 119} Consistent with the previous move of historical valuation information to 26 C.F.R. 20.2031-7A, the final regulations indicate that historical information about valuation for years prior to April 30, 1999 would be found in 26 C.F.R. 20.2031-7A. See T.D. 8886, 65 FR 36908-01, at Par. 12 [26 C.F.R. 20.2031-7(c)]. For valuations after April 30, 1999, the present value of annuities, life estates, terms of years, remainders, and reversions for estates of decedents were to be determined under subsection 20.2031-7(d). *Id.* at Par. 12 [26 C.F.R. 20.2031-7(d)].

{¶ 120} The final regulations were basically the same as the temporary regulations, and were basically the same as the prior regulations on the subject. Again, 26 C.F.R. 20.2031-7(d)(7)(2000) requires use of the applicable 7520 interest rate and Table S where the “Section 7520 interest rate component is between 4.2 and 14 percent.” *Id.* Using the figures in these tables results in a .15130 life interest for a 91-year old at a 4.2% interest rate, and a .37341 life interest at the highest interest rate of 14%. *Id.* at Table S.¹⁵ Under these formulas, Rodefer’s life estate would be valued at \$65,679.33 at 4.2%, and at \$162,097.28 at 14%. Notably, even if the 4.2% interest rate is used (which both ODJFS and Rodefer agree is too high), the value of Rodefer’s life estate would only be \$65,679.33, which is significantly lower than the \$117,012 valuation assigned by

¹⁵ In Table S, the remainder interest at 4.2% for a 91-year old is .84870. 1 minus .84870 equals .15130. Likewise, the remainder interest at 14% for a 91-year old is .62659. 1 minus .62659 equals .37341.

ODJFS.

H. 2009 and 2011 (Temporary and Final Regulations)

{¶ 121} The most recent versions of 26 C.F.R. 20.2031-7 and 26 C.F.R. 20.2031-7A were adopted in August 2011. See T.D. 9540, 76 FR 49570-01, Summary. Previously, temporary regulations with the same general provisions had been adopted in May 2009. *Id.* at Supplementary Information, Background. Again, valuations for dates before the current revision of the mortality tables would now be determined by reference to 26 C.F.R. 20.2031-7A, rather than 26 C.F.R. 20.2031-7. *Id.* at Par. 13 [26 C.F.R. 20.2031-7(c) (2011)]. Under both the temporary and final regulations, the interest rates were reduced to reflect current conditions. Specifically, under Table S, the interest rates now ranged from .2 percent to 14%. *Id.* at Par. 13 [26 C.F.R. 20.2031(d)(7), and Table S (2011)].

{¶ 122} Thus, the version of 26 C.F.R. 20.2031-7 that was in effect when Rodefer's life estate was valued in 2012, stated that:

(d) Actuarial valuations on or after May 1, 2009 – (1) In general. Except as otherwise provided in paragraph (b) of this section and § 20.7520-3(b) (pertaining to certain limitations on the use of prescribed tables), if the valuation date for the gross estate of the decedent is on or after May 1, 2009, the fair market value of annuities, life estates, terms of years, remainders, and reversionary interests is the present value determined by use of standard or special section 7520 actuarial factors. These factors are derived by using the appropriate section 7520 interest

rate and, if applicable, the mortality component for the valuation date of the interest that is being valued.

* * *

(2) Specific interests * * *

* * *

(ii) Ordinary remainder and reversionary interests. If the interest to be valued is to take effect after a definite number of years or after the death of one individual, the present value of the interest is computed by multiplying the value of the property by the appropriate remainder interest actuarial factor (that corresponds to the applicable section 7520 interest rate and remainder interest period) in Table B (for a term certain) or in Table S (for one measuring life), as the case may be. Table B is contained in paragraph (d)(6) of this section and Table S (for one measuring life when the valuation date is on or after May 1, 2009) is contained in paragraph (d)(7) of this section and in Internal Revenue Service Publication 1457. * * *

(iii) Ordinary term-of-years and life interests. If the interest to be valued is the right of a person to receive the income of certain property, or to use certain nonincome-producing property, for a term of years or for the life of one individual, the present value of the interest is computed by multiplying the value of the property by the appropriate term-of-years or life interest actuarial factor (that corresponds to the applicable section 7520 interest rate and term-of-years or life interest period). Internal Revenue Service Publication 1457 includes actuarial factors for a remainder interest

after a term of years in Table B and after the life of one individual in Table S (for one measuring life when the valuation date is on or after May 1, 2009). However, term-of-years and life interest actuarial factors are not included in Table B in paragraph (d)(6) of this section or Table S in paragraph (d)(7) of this section (or in § 20.2031-7A). If Internal Revenue Service Publication 1457 (or any other reliable source of term-of-years and life interest actuarial factors) is not conveniently available, an actuarial factor for the interest may be derived mathematically. This actuarial factor may be derived by subtracting the correlative remainder factor (that corresponds to the applicable section 7520 interest rate and the term of years or the life) in Table B (for a term of years) in paragraph (d)(6) of this section or in Table S (for the life of one individual) in paragraph (d)(7) of this section, as the case may be, from 1.000000. * * *

T.D. 9540, 76 FR 49570-01, at Par. 13 [26 C.F.R. 20.2031-7(d)(1)-(2) (2011)].

{¶ 123} Consistent with the prior regulations, 26 C.F.R. 20.2031-7(d)(7) (2011) also stated that:

Actuarial Table S and Table 2000CM where the valuation date is on or after May 1, 2009. Except as provided in § 20.7520-2(b) (pertaining to certain limitations on the use of prescribed tables), for determination of the present value of an interest that is dependent on the termination of a life interest, Table 2000CM and Table S (single life remainder factors applicable where the valuation date is on or after May 1, 2009) contained in this paragraph (d)(7) and Table J and Table K contained in paragraph (d)(6)

of this section, must be used in the application of the provisions of this section when the section 7520 interest rate component is between 0.2 and 14 percent.

Id.

{¶ 124} Again, under this scenario, the remainder factor for a 1.2% interest rate for a 91-year old person (which was not challenged by ODJFS) would be .95193. This results in a valuation of about \$20,867 (\$434,100 minus \$413,232). Subtracting .95193 from 1.000000, as indicated by 26 C.F.R. 20-2031-7(d)(2)(iii)(2011) for a life estate, results in a life estate factor of .04807. Multiplying \$434,100 by this factor results in the same valuation, i.e., approximately \$20,867. This is the valuation amount that Rodefer's attorney used before ODJFS and in the trial court, and the value should have been accepted by the trial court.

{¶ 125} In view of the above discussion, I very respectfully submit that the majority opinion is incorrect. The intent of the Internal Revenue regulations regarding valuation of annuities, life estates, remainders, and so on, is to have the valuations stay in line with evolving information about mortality statistics and interest rates. This was true even in 1984, when valuation was tied to the annual rate paid on U.S. government obligations. Whether one applies the content of the regulation as it currently exists or the regulation in effect in 2005, the intent is to use the interest rate in 26 U.S.C. 7520 because that is the most accurate indication of what the present value of a life estate or a remainder interest would be. The only difference between the regulation in effect in 2005 and the regulation in effect in 2011, when Rodefer's estate was valued, is that Table S was updated to reflect more current interest rates. There has been no substantive change in the regulations –

and 26 C.F.R. 20.2031-7 provides a more accurate way of valuing interests than the SMM life estate table, which uses outdated interest rates from 1984. These outdated rates in the SMM reflect a high interest rate that is not consistent with changing economic conditions and mortality statistics, and also do not allow for flexibility based on changes in these criteria. And, as noted, even if one applies the higher interest rate of 4.2% in the regulation as in effect in 2005, Rodefer's estate would have been valued at significantly less than the valuation assigned by ODJFS.

{¶ 126} Accordingly, for the reasons stated, I very respectfully dissent.

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