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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ELEANOR PACZKO
Plaintiff

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
Defendant

Case No: CV-16-868294

Judge: CAROLYN B FRIEDLAND

JOURNAL ENTRY

96 DISP.OTHER - FINAL

ORDER AND OPINION AFFIRMING THE DECISION OF THE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES.
O.S.J.
COURT COST ASSESSED TO THE PLAINTIFF(S).
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature Date

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CLERK OF COURTS
CUYAHOGA COUNTY

- 96
05/08/2017

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

ELEANOR PACZKO	)	CASE NO. CV-16-868294
	)	
Appellant,	)	JUDGE CAROLYN B. FRIEDLAND
	)	
vs.	)	
	)	
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES	)	ORDER AND OPINION
	)	
Appellee.	)	

This matter is before this Court as an Administrative Appeal from a decision of the Ohio Department of Job and Family Services ("ODJFS" or "Agency") to not include improperly transferred resources returned after September 29, 2015 when it recalculated Eleanor Paczko's ("Appellant") Restricted Medicaid Coverage Period ("RCMP"). The Appeal was timely filed and all issues have been fully briefed.

FACTUAL BACKGROUND

Appellant submitted an application to Medicaid for Aged benefits on May 4, 2015. As part of the application process, Appellant disclosed a transfer of $146,122.30 to an irrevocable trust for the benefit of Appellant's children, which ODJFS properly considered improper transfers of assets during the lookback period. On May 6, 2016, ODJFS determined that Appellant was eligible for Medicaid and approved the application, with an RCMP of 23.09 months, from April 2015 through part of March 2017. In 2015 and 2016, Appellant's children returned $89,227.38 to Appellant, which was used for her care and benefit.

Appellant requested a recalculation of the RCMP. The recalculation resulted in an adjusted RCMP of 18.2 months. However, the Agency's recalculation did not include any funds returned after September 29, 2015, the effective date of R.C. 5163.30. The State Hearing and

Ohio Administrative Decisions overruled Appellant's administrative appeals. Appellant fully exhausted her administrative remedies below and appealed to this Court pursuant to R.C. 5101.35(E).

LAW & ANALYSIS

The issue presented in this instant appeal surrounds a determination of which versions of Ohio Revised Code Section 5163.30 and Ohio Administrative Code Section 5160:1-3-07 applied to Appellant's request for recalculation of the RCMP based upon re-conveyances of assets.

Effective September 29, 2015, R.C. 5163.30 was amended to eliminate the provision that allowed for the recalculation of partial re-conveyances. R.C. 5163.30(C)(3), as amended, states:

> An institutionalized individual may be granted a waiver of all of the period of ineligibility if all of the assets that were disposed of for less than fair market value are returned to the individual or individual's spouse or if the individual or individual's spouse receives cash or other personal or real property that equals the difference between what the individual or individual's spouse received for the assets and the fair market value of the assets. Except as provided in division (C)(1) or (2) of this section, *no waiver of any part of the period of ineligibility shall be granted if the amount the individual or individual's spouse receives is less than the difference between what the individual or individual's spouse received for the assets and the fair market value of the assets.*

(Emphasis added). Pursuant to R.C. 5163.30(C)(3), with limited exceptions, partial re-conveyances no longer result in recalculation of an applicant's penalty period. However, the Ohio Administrative Code's corresponding amendment eliminating recalculation of partial re-conveyances was not effective until January 1, 2016. *See* 5160:1-3-07.2(M)(3), effective Jan. 1, 2016 ("A return of any amount less than the total value of all of the improperly transferred assets will have no effect on the period of restricted coverage as calculated under paragraph (I) of this rule."). The prior rule allowed for modification of the RMCP "[w]hen only part of the asset or its equivalent value is returned." OAC 5160:1-3-07(M)(3). Consequently, there was a several-month period where R.C. 5163.30(C)(3) and OAC 5160:1-3-07(M)(3) conflicted.

"Legislative authority is vested with the General Assembly." *Chambers v. St. Mary's School*, 82 Ohio St. 3d 563, 566, 1998-Ohio-184, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, paragraph one of the syllabus (1944). "The legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly's role as lawmaker." *Id.* at 567. "The introduction of a bill is a manifestation of public policy, which is determined primarily by the General Assembly." *Id.* at 566. "[A]dministrative rules do not dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code." *Id.* at 567. "'The purpose of administrative rulemaking is to facilitate an administrative agency's placing into effect a policy declared by the General Assembly in the statutes to be administered by the agency.'" *Id.* at 567, citing *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 47 (1990). "Administrative agencies may make only 'subordinate' rules." *Id.* at 566, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 342-343 (1944).

"Administrative rules are designed to accomplish the ends sought by the legislation that has been enacted by the General Assembly." *GMS Mgmt. Co. v. Ohio Civ. Rights Commn.*, 8th Dist. Cuyahoga No. 103941, 2016-Ohio-7486, ¶16, citing *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, ¶14. "'Rules promulgated by administrative agencies are valid and enforceable unless unreasonable or in conflict with statutory enactments covering the same subject matter.'" *Id.* The Medicaid director is delegated authority to "adopt rules as necessary to implement [the provisions of R.C. Chapter 5163]." R.C. 5163.02. "However, an administrative rule may not add to or subtract from a legislative enactment." *GMS Mgmt. Co.*, 2016-Ohio-7486 at ¶16, citing *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v.*

Ohio Bur. of Emp. Serv., 21 Ohio St.3d 5, 10 (1986). "If it does, the rule clearly conflicts with the statute, and the rule is invalid." *Id.*

Regardless of how Appellant attempts to phrase her argument, the determinative issue involves a conflict of law analysis. For the period of time between September 29, 2015 and January 1, 2016, R.C. 5163.30(C)(3) and OAC 5160:1-3-07(K)(3) were in direct conflict. Effective September 29, 2015, the General Assembly eliminated a commonly used technique to shorten the Restricted Medicaid Coverage Period. This technique is known as the "half-loaf" method. Upon the General Assembly's elimination of the half-loaf method, the Agency was tasked with implementing subordinate rules to carry out the change in policy. However, conflicting administrative rules in place when the General Assembly eliminated the use of half-loaf method are clearly invalid and unenforceable. *See Am. Legion Post 25*, 2008-Ohio-1261 at ¶14; *GMS Mgmt. Co.*, 2016-Ohio-7486 at ¶16. Otherwise, the Agency would be making rather than implementing General Assembly's enacted policy. OAC 5160:1-3-07 conflicted with R.C. 5163.30(C)(3), and therefore, the rule was invalid and unenforceable in this case.

The Agency did not apply retroactively apply the January 1, 2016 version of OAC 5160:1-3-07.2. The conflicting provisions of OAC 5160:1-3-07 in effect when the General Assembly prohibited the half-loaf method were invalid and unenforceable, and therefore, OAC 5160:1-3-07.2 could not be applied retroactively. Instead, the Agency reviewed each re-conveyance under the law in effect at the time of the re-conveyance and refused to include transfers made after R.C. 5163.30(C)(3) eliminated inclusions of partial re-conveyances in the RMCP recalculation. The Agency's application of the law was prospective and proper.

The ODJFS correctly refused to consider the re conveyances that took place after September 29, 2015 when it recalculated Appellant's RMCP because R.C. 5163.30(C)(3)

prohibited consideration of partial re-conveyances as of September 29, 2015 (statute's effective date). The ODJFS's decision is supported by reliable, probative, and substantial evidence and is in accordance with law. Accordingly, the Decision is AFFIRMED.

It is so ordered:

Carolyn B. Friedland 5-9-17

Judge Carolyn B. Friedland Date

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IN RE ELEANOR PACZKO APPLICANT/APPELLANT	)	Case No. 16 CV 868294
-vs-	)	
	)	Judge: Carolyn B. Friedland
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES APPELLEE	)	
	)	MEDICAID CASE NO. 5104910525
	)	MEDICAID APPEAL Nos. 3107829 MED
	)	AGENCY: CUYAHOGA CDJFS
	)	**BRIEF OF APPELLANT**

ISSUES PRESENTED IN THE CASE

1. The Appellant, Ohio Department of Job and Family Services is in error in utilizing a September 29, 2015 effective date for Amended Ohio Administrative Code Section 5160:1-3-07;

2. The proper effective date of Amended Ohio Administrative Code Section 5160:1-3-07 is January 1, 2016;

3. The Appellant, Ohio Department of Job and Family Services is in error to apply Amended Ohio Administrative Code Section 5160:1-3-07 to cases filed before January 1, 2016;

STATEMENT OF THE CASE

The application for Medicaid for the Aged benefits was submitted in May 4, 2015 on behalf of the Appellant. On May 6, 2015, the Ohio Department of Job and Family Services, hereinafter the

Agency, mailed the Appellant an appointment letter for an interview to be conducted on May 12, 2015 at 9:30am. After all the interview, all verification were provided to the Agency. As part of the original application process, the Appellant disclosed the transfer of $146,122.30 to an Irrevocable Trust for the benefit of the children of the Applicant. The transfers to the Irrevocable Trust were properly considered improper transfers of assets during the lookback period. On May 6, 2016, one year after the application for benefits was originally filed, the Agency determined the Appellant had met all the eligibility requirements for Medicaid and approved the application, subject to a restricted period arising out of the improper transfer of resources. The approval of the case related back to April, 2015. The Agency properly calculated the Restricted Medicaid Coverage Period, hereinafter RMCP, from April, 2015 until February, 2017 with a partial penalty month of March, 2017. The calculation of the RMCP is made by dividing the total improper transfers by 6327. ($146,122/6327=23.09 months)

During the course of 2015 and 2016, the children returned $89,227.38 directly to the Appellant and the funds were used for her care and benefit. On May 3, 2016, the Appellant requested the recalculation of the Restricted Medicaid Coverage Period (hereinafter RMCP). The Agencuy declined to fully recalculate the Restricted Medicaid Coverage Period because all of the funds had not been returned to the Appellant. The Agency declined to consider any funds reconvened after September 29, 2015. The Appellant filed for a State Hearing based upon the refusal to recalculate the RMCP .

The State Hearing Officer issued a decision overruling the State Hearing Request. The premise of the State Hearing decision was the failure by the Appellant's children to return all the improperly transferred assets and found, effective September 29, 2015, there is no longer a recalculation for partial reconvened funds under ORC 5163.30(C)(3). The Hearing Officer made a finding the effective date of the change in the rule to be September 29, 2015. The State Hearings Officer clearly based their decision in the Ohio Revised Code effective date and not in the Ohio Administrative Rule effective

date.

Appellant appealed the decision of the Agency for refusing to fully and properly recalculate the period of restricted Medicaid coverage to the Ohio Department of State Hearings. A State Hearing Request was filed on June 21, 2016.

The State Hearing Decision, dated July 11, 2016, mailing date July 14, 2016, overruled the Appeal. On July 28, 2016 an Administrative Appeal request was filed with the Ohio Department of Job and Family Services. On August 2, 2016, the Ohio Administrative Appeal Decision was issued and Appellant has timely filed the instant appeal.

LAW AND ARGUMENT

ISSUES 1 AND 2

THE APPELLANT, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES IS IN ERROR IN UTILIZING A SEPTEMBER 29, 2015 EFFECTIVE DATE FOR AMENDED OHIO ADMINISTRATIVE CODE SECTION 5160:1-3-07;

THE PROPER EFFECTIVE DATE OF AMENDED OHIO ADMINISTRATIVE CODE SECTION 5160:1-3-07 IS JANUARY 1, 2016;

The Agency erred when they determined the effective date of Ohio Administrative Code §5160:1-3-07.2 was September 29, 2015. The clear language of the Ohio Administrative Code §5160:1-3-07 lists an effective date of January 1, 2016. The actions of the Agency are controlled and guided by the Ohio Administrative Code. During a State Hearing, the Hearing Officer is required to determine whether the Agency's has established by the preponderance of the evidence that the proposed actions are in accordance with the rules of the Ohio Administrative Code. Ohio Administrative Code § 5101:6-7-01(C)(1) The hearing officer erred in requiring compliance with the Ohio Revised Code Section and not the Ohio Administrative Code.

Ohio has adopted a three step legislative process whereby an Ohio Revised Code Section may become a rule for an Administrative Agency to apply. First, the Ohio Legislature creates a statute relating to Medicaid. The second step states the Director of Medicaid is required to adopt rules necessary to follow through with the intent of the new Ohio Revised Code language pursuant to Ohio Revised Code § 5163.02. The final step is the promulgation of the rule and establishment of an effective date under Ohio Revised Code § 111.15. Only after the three step process have been followed may the Ohio Medicaid Caseworker apply the new rule to the application process and the case in general.

During 2015, the Ohio legislature adopted language intended to change the requirements of when a Medicaid beneficiary is entitled to the re-calculation of the restricted Medicaid coverage. The intent was to eliminate what has come to be known as Half-loaf reconvening of improperly transferred assets.

The revised Ohio Revised Code § 5163.30(C)(3) sets forth as follows:

> An institutionalized individual may be granted a waiver of all of the period of ineligibility if all of the assets that were disposed of for less than fair market value are returned to the individual or individual's spouse or if the individual or individual's spouse receives cash or other personal or real property that equals the difference between what the individual or individual's spouse received for the assets and the fair market value of the assets. **Except as provided in division (C)(1) or (2) of this section, no waiver of any part of the period of ineligibility shall be granted if the amount the individual or individual's spouse receives is less than the difference between what the individual or individual's spouse received for the assets and the fair market value of the assets.** (emphasis added)

This new language was passed into law on September 29, 2015. The next step in the process is for the Director of Medicaid to adopt the new rule. Ohio Revised Code § 5163.02 states:

> The medicaid director shall adopt rules as necessary to implement this chapter. The rules shall establish eligibility requirements for the medicaid program. The rules may establish requirements for applying for medicaid and determining and verifying eligibility for medicaid. The rules shall be adopted in accordance with section 111.15 of

the Revised Code.

The third step is the promulgation of the rule and adoption of an effective date of the new rule under Ohio Revised Code § 111.15, which state in part:

> (A) As used in this section:
>
> (1) "Rule" includes any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule. "Rule" does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code, any order respecting the duties of employees, any finding, any determination of a question of law or fact in a matter presented to an agency, or any rule promulgated pursuant to Chapter 119. or division (C)(1) or (2) of section 5117.02 of the Revised Code. "Rule" includes any amendment or rescission of a rule.
>
> (2) "Agency" means any governmental entity of the state and includes, but is not limited to, any board, department, division, commission, bureau, society, council, institution, state college or university, community college district, technical college district, or state community college. "Agency" does not include the general assembly, the controlling board, the adjutant general's department, or any court.
>
> (3) "Internal management rule" means any rule, regulation, bylaw, or standard governing the day-to-day staff procedures and operations within an agency.
>
> (B)(1) Any rule, other than a rule of an emergency nature, adopted by any agency pursuant to this section shall be effective on the tenth day after the day on which the rule in final form and in compliance with division (B)(3) of this section is filed as follows:
>
> (a) The rule shall be filed in electronic form with both the secretary of state and the director of the legislative service commission;
>
> (b) The rule shall be filed in electronic form with the joint committee on agency rule review. Division (B)(1)(b) of this section does not apply to any rule to which division (D) of this section does not apply.
>
> An agency that adopts or amends a rule that is subject to division (D) of this section shall assign a review date to the rule that is not later than five years after its effective date. If a review date assigned to a rule exceeds the five-year maximum, the review date for the rule is five years after its effective date. A rule with a review date is subject to review under section 106.03 of the Revised Code. This paragraph does not apply to a rule of a state college or university, community college district, technical college district, or state community college.
>
> If an agency in adopting a rule designates an effective date that is later than the effective date provided for by division (B)(1) of this section, the rule if filed as required by such division shall become effective on the later date designated by the agency.
>
> Any rule that is required to be filed under division (B)(1) of this section is also subject to division (D) of this section if not exempted by that division .

If a rule incorporates a text or other material by reference, the agency shall comply with sections 121.71 to 121.76 of the Revised Code.

(2) A rule of an emergency nature necessary for the immediate preservation of the public peace, health, or safety shall state the reasons for the necessity. The emergency rule, in final form and in compliance with division (B)(3) of this section, shall be filed in electronic form with the secretary of state, the director of the legislative service commission, and the joint committee on agency rule review. The emergency rule is effective immediately upon completion of the latest filing, except that if the agency in adopting the emergency rule designates an effective date, or date and time of day, that is later than the effective date and time provided for by division (B)(2) of this section, the emergency rule if filed as required by such division shall become effective at the later date, or later date and time of day, designated by the agency.

An emergency rule becomes invalid at the end of the one hundred twentieth day it is in effect. Prior to that date, the agency may file the emergency rule as a nonemergency rule in compliance with division (B)(1) of this section. The agency may not refile the emergency rule in compliance with division (B)(2) of this section so that, upon the emergency rule becoming invalid under such division, the emergency rule will continue in effect without interruption for another one hundred twenty-day period.

(3) An agency shall file a rule under division (B)(1) or (2) of this section in compliance with the following standards and procedures:

(a) The rule shall be numbered in accordance with the numbering system devised by the director for the Ohio administrative code.

(b) The rule shall be prepared and submitted in compliance with the rules of the legislative service commission.

(c) **The rule shall clearly state the date on which it is to be effective and the date on which it will expire**, if known.

(d) Each rule that amends or rescinds another rule shall clearly refer to the rule that is amended or rescinded. Each amendment shall fully restate the rule as amended.

If the director of the legislative service commission or the director's designee gives an agency notice pursuant to section 103.05 of the Revised Code that a rule filed by the agency is not in compliance with the rules of the legislative service commission, the agency shall within thirty days after receipt of the notice conform the rule to the rules of the commission as directed in the notice.

(C) All rules filed pursuant to divisions (B)(1)(a) and (2) of this section shall be recorded by the secretary of state and the director under the title of the agency adopting the rule and shall be numbered according to the numbering system devised by the director. The secretary of state and the director shall preserve the rules in an accessible manner. Each such rule shall be a public record open to public inspection and may be transmitted to any law publishing company that wishes to reproduce it. (emphasis added)

At the foot of the new Ohio Administrative Code § 5160:1-3-07.2 is a clear statement of the

three step requirement and the effective date of the rule change. The note appears:

History. Effective: 1/1/2016
Five Year Review (FYR) Dates: 01/01/2021
Promulgated Under: 111.15
Statutory Authority: 5162.03, 5163.02
Rule Amplifies: 5162.03, 5163.02

Until this three step process is completed, the new rule cannot be applied to any Medicaid cases.

In the instant case, the application for Medicaid for the Aged benefits was submitted in June, 2015, well before any changes were made to the Ohio Administrative Code regarding transferred assets. As part of the original application process, the Appellant disclosed the transfer of $146,122.3 for the benefit of the children. The Medicaid caseworker properly calculated a period of Restricted Medicaid Coverage from April, 2015 until February, 2017 with a partial penalty month of March, 2017. During the course of 2015 and 2016, the children returned $89,227.38 to the Appellant and the funds were used for her care and benefit.

At the time of the application, controlling law in Ohio was Ohio Admin. Code §5160:1-3-07(M)(4) which states:

> (M) Assets transferred for less than fair market value are returned to the individual.
>
> (4) **When only part of the asset or its equivalent value is returned, a restricted medicaid coverage period can be modified but not eliminated**. For the purpose of computing an overpayment under rule 5101:1-38-20 of the Administrative Code, the returned asset or its equivalent must be considered an available asset beginning in the month the asset was originally transferred.(emphasis added)

Pursuant to the language of OAC §5160:1-3-07(M)(4), Appellant is entitled to request a recalculation of the Restricted Medicaid Coverage Period. On May 3, 2016, the documentation was submitted to the Agency supporting the return of $89,227.38 from the children to the Appellant and a

request to recalculate the RMCP.

The caseworker declined to fully recalculate the Restricted Medicaid Coverage Period because all of the funds had not been returned to the Appellant. The caseworker declined to consider any funds reconvened after September 29, 2015.

The State Hearing Officer issued a decision overruling the State Hearing Request. The premise of the State Hearing decision was the failure by the Appellant's children to return **all** the improperly transferred assets and found, effective September 29, 2015, there is no longer a recalculation for partial reconvened funds under ORC 5163.30(C)(3). The Hearing Officer made a finding the effective date of the change in the rule to be September 29, 2015. The State Hearings Officer clearly based their decision in the Ohio Revised Code effective date and not in the Ohio Administrative Rule effective date. In doing so, the Hearing Officer has committed plain error. The Hearing Officer failed to find the actions of the Agency were in compliance with the Ohio Administrative Code.

ISSUE 3

The Appellant, Ohio Department of Job and Family Services is in error to apply Amended Ohio Administrative Code Section 5160:1-3-07 to cases filed before January 1, 2016

The caseworker committed further error by applying the 2016 amendment to Ohio Administrative Code § 5160:1-3-07.2 to a case with an application date of April, 2015. When the application was filed, a prior version of OAC 5160:1-3-07.2 was the controlling law. The prior version of OAC specifically allowed for a recalculation of the RMCP where funds were partially reconvened. The prior version of the OAC allowed for the recalculation without the full return of the funds. The

caseworker violated the Federal and Ohio Constitution when they apply the new rule to a case filed prior to the enactment of the new rule. The Federal and Ohio Constitution both disallow the retroactive application of the law unless the statute specifically allows for retroactive application. The State Hearing Officer committed plain error in failing to reverse the determination of the caseworker.

Ohio Revised Code § 1.48 simply states: "A statute is presumed to be prospective in its operation unless expressly made retrospective." Perhaps the most important practical constraint on retroactive civil legislation is the judicial presumption in favor of prospective application. Principles of equity and fairness demand that changes to laws, especially ones that effect substantive rights and responsibilities must be applied prospectively and retrospectively. Though this concept's precise formulation has varied, it has been repeatedly expressed by the Supreme Court:

> There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.
> 1 William J. Rich, Modern Constitutional Law §17:19, at 677 (3d ed. 2011)

Simply stated, as a general rule, legislation and administrative rules will not be interpreted to apply retroactively unless the language of the statute or regulation specifically require that result. Courts generally presume prospective as opposed to retroactive application of statute based upon fairness and principals of constitutional question avoidance.

Requiring a legislature to make clear its intent to apply a statute retroactively helps ensure that the legislature itself has determined that the benefits of retroactivity outweigh the potential for disruption and unfairness. Landgraf v. USI Film Prods., 511 U.S.244, 268 (1994). Retroactive legislation provisions may serve legitimate purposes, such as responding to emergencies, correcting

mistakes, preventing against the circumvention of new statutes during the time after it is proposed but before it is enacted and serving to advance health, welfare and safety. None of these is present in the current matter. Changing the rules as they relate to reconvened funds and the right to have the RMCP recalculated do not fall anywhere near any of those legitimate concerns.

Article II, § 28 of the Ohio Constitution prohibits the General Assembly form passing retroactive laws and protects vested rights from new legislative encroachments. Vogel v. Wells, (1991), 57 Ohio St. 3d 91, 99; 566 N.E. 2d 154, 162. The retroactivity clause nullifies those new laws that "reach back and create burdens, new duties, new obligations or new liabilities not existing at the time [the statute became effective]" Miller v. Hixson (1901), 64 Ohio St. 39, 51; 59 N.E. 749, 752.

The Ohio Supreme Court has articulated the procedure that a court should follow to determine when a law is being applied unconstitutionally retroactively. Bielat v. Bielat (2000), 87 Ohio St. 3d 350. The test for unconstitutional retroactivity requires the court

1. to determine whether the General Assembly expressly intended the statute to apply retroactively; and

2. Determine whether the statute is substantive, rendering it unconstitutionally retroactive as opposed to merely remedial.

Because Ohio R.C. § 1.48 establishes a presumption that statutes are prospective in operation, this Court must inquire into whether a statute may constitutionally be applied retrospectively continues only after a threshold finding that the General Assembly expressly intended the statute to apply retrospectively. State v. Cook (1998), 83 Ohio St. 3d, at 410; 700 N.E. 2d at 576. In the instant case, the Director of Medicaid specifically adopted an effective date of the regulation of January 1, 2016. The rule, as promulgated by the Director of Medicaid, is absolutely silent regarding retroactivity.

Therefore, it must be interpreted to have only prospective application.

Because the law's retrospectivity fails under the first part of the test, no further argument is necessary and if must be applied prospectively. Nevertheless, the new regulation also fails under the test of the substantive test. When the Appellant submitted her application for Medicaid benefits and she disclosed the improper transfers, she was entitled to a recalculation of the RMCP under the law in effect at that time. At the time of the application, controlling law in Ohio was Ohio Admin. Code §5160:1-3-07(M)(4) which states:

> (M) Assets transferred for less than fair market value are returned to the individual.
>
> (4) **When only part of the asset or its equivalent value is returned, a restricted medicaid coverage period can be modified** but not eliminated. For the purpose of computing an overpayment under rule 5101:1-38-20 of the Administrative Code, the returned asset or its equivalent must be considered an available asset beginning in the month the asset was originally transferred. (emphasis added)

Pursuant to the language of OAC §5160:1-3-07(M)(4), Appellant is entitled to request a recalculation of the Restricted Medicaid Coverage Period. Under the interpretation of the Agency, this substantive right to have the RMCP recalculated after evidence of funds being returned to the Applicant by the children substantially changes the rights of the Appellant to Medicaid benefits. The Agency has changed her ability to correct the improper transfers of assets from an ability to protect approximately 50% of the funds to 0% of the transferred funds. The length of the RMCP remains as initially calculated and the Appellant is without a remedy. Her position and ability to realign funds has been remarkably and substantially changed to her detriment. This is not the clear expression of the Agency. The application of the new rule to applications filed prior to the effective date of the new regulation improperly punishes all Applicants currently serving a RMCP.

Based upon the argument presented above, the Appellant moves this Honorable Court to reverse the decision of the Agency, find the effective date of the revised Ohio Administrative Code §

5160:1-3-07.2 to be January 1, 2016 and shall apply only to applications submitted to Ohio Department of Job and Family Services after January 1, 2016 and remand the file for compliance by the Cuyahoga County Job and Family Services Department. The Decision of the Agency cannot be supported by the evidence, is in direct conflict with Ohio law, the Federal Constitution, the Ohio Constitution and is based in plain error. The Decision of the Agency is in violation of both the Federal and Ohio Due Process Clause of the respective Constitutions.

Respectfully submitted,

(s) *Richard A. Myers, Jr.*
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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Brief of Appellant has been sent to Ohio Department of Job & Family Services, Office of Legal Services, 30 E. Broad Street, 31st Floor, Columbus, Ohio 43215-3414 on August 29, 2016.

(s) *Richard A. Myers, Jr.*
RICHARD A. MYERS, JR. (0040164)

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ELEANOR PACZKO, Appellant, v. OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, Appellee.	:	Case No. CV-16-868294 Judge Carolyn B. Friedland

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BRIEF OF APPELLEE,
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

I. INTRODUCTION

Appellant Eleanor Paczko appeals from an Administrative Appeal Decision issued by Appellee, Ohio Department of Job and Family Services ("ODJFS"), which rejected Ms. Paczko's argument that she should have been allowed to shelter tens of thousands of dollars and thus receive more publicly-funded Medicaid benefits than she would otherwise receive, by using a Medicaid-planning technique that had been disallowed by an Ohio statute the previous year (and by an administrative rule earlier that same year). Because there was a several-month period when the ***statute*** disallowing this technique had gone into effect but the ***rule*** concerning this technique had not yet been amended, Ms. Paczko argues that the rule superseded the statute during that interval and that, therefore, the rule (and not the statute) should have been applied to her for transactions that took place then. This is wrong because, under Ohio law, when a rule conflicts with a statute, the statute controls.

According to Medicaid law, when a person applies for Medicaid and has recently given away countable resources, Medicaid[1] must impose a transfer penalty (called a period of restricted coverage) to essentially impute the wrongly-transferred amount back to the applicant. The result is that Medicaid will not pay for nursing-home care for the number of months that the resources could have paid for (though other Medicaid benefits are still covered). In recent years, Medicaid applicants and their attorneys have been attempting to circumvent this system and shelter assets (sometimes tens of thousands of dollars, as in this case) by engaging in a series of transactions that, they believed, would shorten their penalty period in such a way as to essentially allow them to have given away some resources with no actual penalty. This is known as the "half-loaf" method (*see* Appellant's Brief at 4 (unnumbered)).

In September 2015, the General Assembly did away with the half-loaf method by providing that a partial reconveyance would no longer have any effect on an applicant's original period of restricted coverage (with limited exceptions). *See* R.C. 5163.30(C)(3). After this statute went into effect, therefore, partial reconveyances could no longer result in a recalculation of an applicant's penalty period. *See id.*

Based on the effective date of the statute, the Cuyahoga County Department of Job and Family Services ("County") allowed all of Ms. Paczko's reconveyances that had been made before September 29, 2015, to be taken into consideration for purposes of calculating a shorter

[1] Ohio's Medicaid program is administered by the Ohio Department of Medicaid. However, by inter-agency agreement authorized by R.C. 5160.31(B)(2) and R.C. 5101.35(A)(1)(b), administrative appeals concerning benefits are decided by Ohio Department of Job and Family Services as the agent of the Ohio Department of Medicaid.

penalty period, and so Ms. Paczko's penalty period was shortened by about five months. *See* State Hearing Decision at 2.[2]

Ms. Paczko argues here that, since all of her reconveyances took place before the ***rule*** changed on January 1, 2016, all of them should have been taken into consideration as was allowed in the pre-2016 version of the rule. In other words, she argues that the statutory change in September 2015 had no effect until the rule itself changed in January 2016. According to Ms. Paczko, if there is a conflict between a Medicaid rule provision in the Ohio Administrative Code and a Medicaid statute in the Ohio Revised Code, the rule prevails. But she offers no authority for this proposition. Instead, she points to the process whereby rules are promulgated, which says nothing about rules being able to override conflicting statutes. *See* Appellant's Brief at 4-7.

ODJFS committed no error by refusing to change Ms. Paczko's penalty period based on partial reconveyances made after the statute went into effect. The Court should affirm because the Administrative Appeal Decision is supported by reliable, probative, and substantial evidence and is in accordance with law.

II. STATEMENT OF THE CASE AND FACTS

There is no dispute about the following facts. Ms. Paczko applied for Medicaid benefits with the County in May 2015. *See* Appellant's Brief at 1. She was eventually approved, with a penalty period—known as a period of restricted coverage—lasting 23 months because she had engaged in an improper transfer by giving $146,000 to an irrevocable trust during the "lookback period." *See* Appellant's Brief at 2.

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[2] The State Hearing Decision is found at pages 1-6 of the second part of the Certified Record, filed September 19, 2016. The record contains: (1) the 37-page Administrative Appeal Hearing Record Certification and (2) the 39-page Initial Hearing Record Certification.

In May 2016, a year after applying, Ms. Paczko requested that the County recalculate (and shorten) her penalty period based on the fact that $89,000 of the improperly-transferred amount had been reconveyed to her through payments made over the course of the year since she had applied. *See id.* While it had been true in the past that an applicant could make such a request and have her penalty period shortened based on the partial reconveyance of resources that she had improperly transferred, in September 2015 the General Assembly had enacted a statutory provision prohibiting this (*see* R.C. 5163.30(C)(3)). The change in the corresponding Medicaid rule (Ohio Adm.Code 5160:1-3-07.2) became effective January 1, 2016. *See* Appellant's Brief at 3-4. Ms. Paczko asked that all of her reconveyances, some of which had happened before September 29, 2015, and all of which had been completed by January 1, 2016, be the basis for the recalculation by the County. *See* Appellant's Brief at 7-8. But the County decided that it could count only the reconveyances that had occurred before the statute's effective date, September 29, 2015. *See* Appellant's Brief at 2.

Ms. Paczko appealed that determination pursuant to R.C. 5101.35(B), resulting in a State Hearing Decision that affirmed the County's decision. *See* Appellant's Brief at 3. She appealed to the ODJFS Director, under R.C. 5101.35(C), and the Administrative Appeal Decision likewise affirmed. *See id. See also* Administrative Appeal Decision (Admin. App. Hrg. Rec. at 1-5).

Ms. Paczko then appealed to this Court, under R.C. 5101.35(E), arguing that the pre-2016 administrative rule provision should have been applied even though it plainly (as Ms. Paczko admits) conflicted with a Medicaid statute in the Ohio Revised Code that addressed the very point at issue here. *See* Appellant's brief at 2-4, 11.

III. STANDARD OF REVIEW

Appeals from administrative appeal decisions issued by ODJFS are authorized by R.C. 5101.35(E), which incorporates most of R.C. 119.12. *See* R.C. 5101.35(E). The review required by R.C. 119.12 is a restricted one. The court's inquiry is limited to deciding whether the agency's decision is supported by reliable, probative, and substantial evidence and is in accordance with law. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992); R.C. 119.12(M). If the decision meets these criteria, it *must* be affirmed. *See Brown v. Ohio Dept. of Job and Family Servs.*, 8th Dist. Cuyahoga No. 92008, 2009-Ohio-1096, ¶ 10.

The Ohio Supreme Court has further described this inquiry as follows:

> The evidence required by R.C. 119.12 can be defined as follows: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, 63 Ohio St.3d at 571 (footnotes omitted).

The review required by R.C. 119.12 is not a trial *de novo* or an appeal solely on questions of law, but if there are factual issues the court conducts a hybrid review by appraising witness credibility, the probative character of the evidence, and the weight thereof. *See Lies v. Veterinary Medical Bd.*, 2 Ohio App.3d 204, 207, 441 N.E.2d 584 (1st Dist. 1981) (quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280, 131 N.E.2d 390 (1955)). The court may reevaluate the credibility of the evidence, with "due deference to the administrative resolution of evidentiary conflicts." *See Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980)

(*per curium*); *Seith v. Ohio Real Estate Comm.*, 129 Ohio App.3d 432, 434, 717 N.E.2d 1169 (8th Dist. 1998).

In addition, a court must give due deference to the agency's construction of a statute or rule enforced by the agency. *See Leon v. Ohio Bd. of Psych.*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223 (1992) (citing *Lorain City Bd. of Educ. v. State Emp. Rel. Bd.*, 40 Ohio St.3d 257, 533 N.E.2d 264 (1988)). Reviewing courts should follow the construction given by the agency unless it is unreasonable or impermissible. *See Leon, supra*; *Morning View Care Center—Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 533, 2002-Ohio-2878, 774 N.E.2d 300 (10th Dist.); *Seith* at 437; *In re Senders*, 110 Ohio App.3d 199, 209 (8th Dist. 1996).

Because there are only legal issues and no factual disputes in this appeal, this Court's review is de novo, subject to the appropriate deference to be afforded to the agency's construction of statutes and rules that it enforces.

IV. ARGUMENT

A. Under Ohio law, if a rule conflicts with a statute, the statute controls.

As the Eight District Court of Appeals recently confirmed, if an administrative rule conflicts with a statute, "the rule is invalid." *See GMS Management Co., Inc. v. Ohio Civil Rights Commn.*, 8th Dist. Cuyahoga No. 103941, 2016-Ohio-7486, ¶ 17 (Oct. 27, 2016). This makes sense because "[a]dministrative rules are designed to accomplish the ends sought by the legislation that has been enacted by the General Assembly." *See id.* at ¶ 16 (citations omitted). "Therefore, '[r]ules promulgated by administrative agencies are valid and enforceable unless unreasonable or in conflict with statutory enactments covering the same subject matter.'" *Id.* (citing *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008–Ohio–1261, ¶ 14) (further citations omitted). *See also Hoffman v. State Medical Board of Ohio*,

113 Ohio St.3d 376, 2007-Ohio-2201, ¶ 17.

As Ms. Paczko concedes, the statutory provision eliminating the half-loaf method went into effect on September 29, 2015. *See* Appellant's Brief at 4. This means that, starting September 29, 2015, any contrary provisions in the administrative rules could no longer govern. *See GMS Management, supra; Am. Legion Post 25, supra.* Contrary to Ms. Paczko's position, the conflicting rule provisions did ***not*** remain the law in Ohio until such time as the rule was formally amended or rescinded.

Imagine what would happen under Ms. Paczko's theory if, say, the Ohio Supreme Court or the United States Supreme Court issued a decision saying that a Medicaid eligibility requirement used by some States was contrary to federal Medicaid law. Would that mean that Ohio's Medicaid program could not immediately issue guidance to the county departments, so that the law would be applied correctly going forward? Of course not. States must follow federal Medicaid law in order to participate and receive federal funds, and they are at risk of being fined and otherwise sanctioned if they do not comply with it. *See, e.g.*, 42 U.S.C. 1396c; 42 C.F.R. 430.35. Ms. Paczko would tell Ohio's Medicaid program that, until such time as it could get a new or amended rule drafted and all the way through the rulemaking process to an effective date (a process that the Medicaid program cannot unilaterally control, *see* R.C. 119.03), the program would be powerless to enforce Medicaid law as announced by the high court. That is not—and cannot be—the law. Thus, neither is it true that, as Ms. Paczko wrongly argues, an Ohio administrative rule provision remains in effect and valid until it is rescinded or amended even if a superior authority (such as a newly enacted statute in the Ohio Revised Code) states the contrary.

In short, the half-loaf method was no longer allowed in Ohio by law after September 29, 2015. Therefore, neither the County nor ODJFS erred in refusing to recalculate Ms. Paczko's

restricted-coverage period based on partial reconveyances made ***after*** September 29, 2015. Therefore, the Administrative Appeal Decision should be affirmed.

B. The law was not applied retroactively to Ms. Paczko. It was applied only prospectively, and Ms. Paczko had no vested right in the governing law remaining unchanged.

Ms. Paczko wrongly argues that allowing the agency decision to stand would be allowing the unconstitutional retroactive application of the law to her. *See* Appellant's Brief at 8-12. But nothing here even suggests a retroactive application. Once the prohibition went into effect in September 2015, there was no longer any right to have partial reconveyances change a period of restricted coverage.

ODJFS agrees that the approval or denial of a Medicaid application is to be based on the law in effect at the time of the application and of the facts being considered for that application. But a decision on a request for a recalculation of an original penalty is separate from the Medicaid-application decision itself. Ms. Paczko concedes that the original 23-month penalty period imposed on her was "properly calculated" and that the reconveyances happened after application. *See* Appellant's Brief at 2. Applying the new statutory provision to a request made months after that provision went into effect (and a year after the Medicaid application was made), based on events that took place after application, is a ***prospective***—not retroactive—application of law.

Ms. Paczko's timing error is evident in these statements in her brief:

> When the Appellant submitted her application for Medicaid benefits and she disclosed the improper transfers, she was entitled to a recalculation of the [penalty period] under the law in effect at that time. At the time of the application, the controlling law in Ohio was [the previous version of the rule]...

Appellant's Brief at 11. Notice that Ms. Paczko has omitted the fact that her recalculation request was made in 2016, a full year after application. Her statements suggest that everything happened simultaneously, when she applied in May 2015. But that is simply not the case, as she herself admits. *See id.* at 1-2. Between the application date and the request date, the law changed to prohibit partial reconveyances from being used to alter restricted-coverage periods. Ms. Paczko is wrong to insist that she was entitled to have the law as it had formerly existed applied to her May 2016 recalculation request for transactions that took place after the law had changed.

To the extent that Ms. Paczko believes she is entitled to freeze all parts of Medicaid-eligibility law as of the date of her application, so that all of her future actions would have to be evaluated in light of a former set of laws and rules, she is mistaken. "[N]o person has a vested right to the law remaining unchanged." *See Pack v. Osborn*, 117 Ohio St.3d 14, 2008-Ohio-90, ¶ 12 (citations omitted). True, the *Osborn* court held that the date of application controls which law applies; but that was because the issue there was whether the impact of a trust on someone's Medicaid eligibility was governed by the law in effect at the (earlier) time of the trust's formation or by the law in effect at the (later) time of the Medicaid application. *Osborn* did not involve an applicant seeking a modification of her original Medicaid eligibility status based on transactions occurring after the date of her application. The principle for which *Osborn* stands is that Medicaid law may and does change over time (*see id.* at ¶ 10) and that the law in effect when the Medicaid-based event takes place is what governs. Ms. Paczko's request was not made at application but, rather, a year later, when what she wanted was no longer permitted by Ohio law. Each partial repayment was evaluated based on the law in place at the time. There was no agency error in the agency's refusal to take into account those repayments made after the statutory change.

The bottom line is that the elimination of the half-loaf method was applied prospectively, not retroactively. One's claimed reliance on current law, along with an expectation that the law will remain in place long enough to reap some planned future benefit, cannot by itself show an impermissible retroactive application of the law. There would have to be a vested right to something or a new disability must be attached to past transactions. *See State ex rel. Shady Acres Nursing Home, Inc. v. Rhodes*, 7 Ohio St.3d 7, 10 (1983). A person who merely hopes to become eligible in the future for a public benefit (like Medicaid nursing-home coverage at a certain time) based on the expectation that the law will remain unchanged does not thereby acquire a vested right in that benefit. *See Harding Pointe v. Ohio Dept. of Job & Family Servs.*, 10th Dist. Franklin No. 13AP-258, 2013-Ohio-4885, ¶ 40 (Nov. 5, 2013) (citations omitted) (rejecting argument by a Medicaid provider that it had a vested right to be paid its Medicaid rate as calculated under the preceding Medicaid reimbursement system).

And without a vested right in the first place, a later change in law will not be deemed to attach a new disability to a past transaction unless the past transaction created at least a "reasonable expectation of finality." *See id.* (citations omitted). *See also State v. Cook*, 83 Ohio St.3d 404, 412, 1998-Ohio-291. There can be no vested right to Medicaid law remaining unchanged, because there can be no reasonable expectation of finality based on a hope that Medicaid laws will not change. Medicaid is known to be a highly-regulated area, with frequent changes to the laws and rules. *See Osborn* at ¶ 10. And this presents no constitutional issues, as "[t]he state has the right to enact, amend and repeal" Medicaid laws. *See id.* at ¶ 41. Once the General Assembly chooses to change a Medicaid law, any right that someone had under the previous law disappears. *See id.* (citation omitted).

Thus, a Medicaid applicant cannot succeed on a claim of improper retroactive application of law on the grounds that the law changed to preclude what she had been planning to do but had not yet done. Ms. Paczko's argument on this point therefore fails.

V. CONCLUSION

For the above reasons, the Court should affirm the Administrative Appeal Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 2, 2016, the foregoing Brief of Appellee was electronically filed with the Court and a true and accurate copy of the Brief was sent the same day via U.S. Mail, postage prepaid, to Richard A. Myers, Jr., 4700 Rockside Road, Suite 620, Independence, Ohio 44131, Counsel for Appellant.

/s/ Rebecca L. Thomas
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Assistant Attorney General

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IN RE ELEANOR PACZKO APPLICANT/APPELLANT	)	Case No. 16 CV 868294
-vs-	)	
	)	Judge: Carolyn B. Friedland
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES APPELLEE	)	
	)	MEDICAID CASE NO. 5104910525
	)	MEDICAID APPEAL Nos. 3107829 MED
	)	AGENCY: CUYAHOGA CDJFS
	)	**REPLY BRIEF OF APPELLANT**

The Common Pleas Court is charged with the review of an Appeal from an Administrative Agency appeal decisions. The standard for review is an inquiry into whether the Agency decision is supported by reliable, probative and substantial evidence and is in accordance with the law. *Our Place, Inc. v. Ohio Liquor Control Comm.*, (1992) 63 Ohio St. 3d. 570, 571; 589 N.E. 2d 1303. The Common Pleas Court must review both the evidence and the law for compliance. The decision of the Administrative Agency must comply with both parts of this test or it is subject to reversal during the Common Pleas Court review.

The Appellant is not arguing conflict of law in this case. The Appellant has asserted the error on the part of the Agency is the failure to comply with the procedure adopted by the Ohio Legislature on the promulgation of Agency Rules. Ohio has adopted a three step legislative process whereby an Ohio Revised Code Section may become a rule for an Administrative Agency to apply. First, the Ohio

Legislature creates a statute relating to Medicaid. The second step states the Director of Medicaid is required to adopt rules necessary to follow through with the intent of the new Ohio Revised Code language pursuant to Ohio Revised Code § 5163.02. The final step is the promulgation of the rule and establishment of an effective date under Ohio Revised Code § 111.15. Only after the three step process have been followed may the Ohio Medicaid Caseworker apply the new rule to the application process and the case in general. The Ohio Department of Job and Family Services, Department of Medicaid, (Agency) is controlled by the Ohio Administrative Code.

The Appellant holds the decision of the State Hearing Officer as well as the Administrative Agency Appeal is in violation of Ohio law regarding the procedure on rule adoption. The Agency clearly has the authority to change the rules governing the Ohio Medicaid Application process and eligibility. It must, at the same time, comply with the rules laid out for the implementation of the change to the Medicaid application process. Appellant is simply stating, the General Assembly properly complied with the process including the provision to adopt an effective date for the amended rule. The effective date adopted is January 1, 2016. Until this three step process is completed, the new rule cannot be applied to any Medicaid cases, new or pending.

The Agency erred to apply the Amended Ohio Administrative Code § 5160:1-3-07 to Applications filed before January 1, 2016. The Appellee is correct in stating the controlling law at the time of the application for Medicaid benefits remains the applicable law to the Application. *Pack v. Osborn*,(2008) Ohio St. 3d 14. At the time of the application, controlling law in Ohio was Ohio Admin. Code §5160:1-3-07(M)(4) which states:

> (M) Assets transferred for less than fair market value are returned to the individual.
>
> (4) **When only part of the asset or its equivalent value is returned, a restricted medicaid coverage period can be modified but not eliminated**. For the purpose of computing an overpayment under rule 5101:1-38-20 of the Administrative Code, the returned asset or its equivalent must be considered an available asset beginning in the

month the asset was originally transferred.(emphasis added)

Pursuant to the language of OAC §5160:1-3-07(M)(4), Appellant is entitled to request a recalculation of the original Restricted Medicaid Coverage Period (RMCP). Based upon the amount of funds returned to the Appellant during the RMCP, the RMCP is shortened. This decade old practice has been nicknamed "half-loaf" planning. The caseworker issued the Agency's decision on April 6, 2016, nearly one year after the application was filed. The Agency determined the period of RMCP to run from April, 2015 to March, 2017. On May 3, 2016, approximately three weeks after receiving the Agency calculation of RMCP, documentation was submitted to the Agency supporting the return of $89,227.38 from the children to the Appellant and a request to recalculate the RMCP. All funds returned to the Appellant took place in 2015. The Agency declined the Application to fully recalculate the case based upon the recent change in the Ohio Administrative Code. Because the controlling law at the time of the application continues to apply to the case, the Agency was in error in refusing to fully recalculate the case. The actions of the Agency substantively altered the rights of the party.

The rule of prospective operation is particularly true when the change impinges on substantive rights of an applicant. Prior to the change in the Ohio Administrative Code on January 1, 2016, parties were entitled to returning a portion of the funds and requesting the recalculation of the case. This decade old process was nicknamed "half-loaf" planning. It has been widely used to preserve a portion of an applicant's life savings after admission into a nursing home. The Medicaid asset limit is $2,000. Any applicant with $2,001 is denied assistance. Further, Medicaid expects an applicant to pay for all their non-medical care expenses with $50.00 per month. The practice of "half-loaf" planning arose to create a discretionary funds to help meet the non-medical care expenses of the applicant. The actions of the General Assembly may end the practice of "half-loaf" planning, but only as to applications filed on or after the effective date of the new rule. To rule otherwise would substantially alter the treatment

of transferred assets and substantively alter the rights of the applicant. To allow length of the RMCP to remain as initially calculated leaves the Appellant is without a remedy. Her position and ability to realign funds has been remarkably and substantially changed to her detriment by the rule change as applied by the Agency. This is not the clear expression of the General Assembly. The application of the new rule to applications filed prior to the effective date of the new regulation improperly punishes all Applicants currently serving a RMCP.

Based upon the argument presented above, the Appellant moves this Honorable Court to reverse the decision of the Agency, find the effective date of the revised Ohio Administrative Code § 5160:1-3-07.2 to be January 1, 2016 and shall apply only to applications submitted to Ohio Department of Job and Family Services after January 1, 2016. This Honorable Court should further remand the file for compliance by the Cuyahoga County Job and Family Services Department. The Decision of the Agency cannot be supported by the evidence, is in direct conflict with Ohio law, the Federal Constitution and the Ohio Constitution. The Decision of the Agency is based in plain error.

ORAL HEARING IS REQUESTED

The Appellant hereby requests an oral hearing on this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Brief of Appellant has been sent to Ohio Department of Job & Family Services, Office of Legal Services, 30 E. Broad Street, 31st Floor, Columbus, Ohio 43215-3414 on December 15, 2016.

(s) *Richard A. Myers, Jr.*

RICHARD A. MYERS, JR. (0040164)