

ORIGINAL

IN THE SUPREME COURT OF OHIO

RUTH M. SMITH,

Appellant,

v.

OHIO DEPARTMENT OF JOB AND  
FAMILY SERVICES,

Appellee.

Case No. 13-1143

On Appeal from the Logan County Court of  
Appeals, Third Appellate District

Court of Appeals Case No. 8-12-18

---

**APPELLEE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES'  
MEMORANDUM IN OPPOSITION TO JURISDICTION**

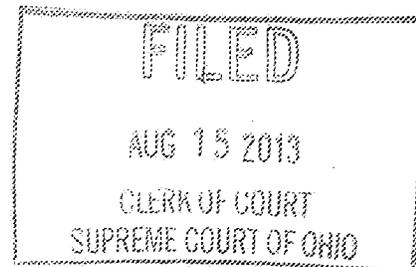
---

Thom L. Cooper\* (0029169)  
Elizabeth Durnell (0084081)  
*\*Counsel of Record*  
Cooper, Adel & Associates, L.P.A.  
36 W. Main Street, P.O. Box 747  
Centerburg, Ohio 43011  
800-798-5297; 740-625-5080 fax  
ldurnell@cooperandadel.com

*Counsel for Appellant*  
*Ruth M. Smith*

MICHAEL DEWINE (0009181)  
Attorney General of Ohio  
Amy R. Goldstein\* (0015740)  
*\*Counsel of Record*  
Senior Assistant Attorney General  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215  
614-466-8600; 614-466-6090 fax  
amy.goldstein@ohioattorneygeneral.gov

*Counsel for Appellee*  
*Ohio Department of Job and Family Services*



## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
INTRODUCTION.....	1
STATEMENT OF CASE AND FACTS.....	2
A.    Individuals and their spouses can retain only limited resources to be eligible for Medicaid.....	2
B.    Mr. Smith transferred joint resources to himself in excess of his CSRA cap and Mrs. Smith’s Medicaid coverage was restricted for that reason.....	6
C.    On judicial review, the common pleas court upheld the agency decision, and the appeals court affirmed in an unpublished summary judgment entry.....	7
THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST.....	8
A.    This case is not of public or great general interest because it is not subject to publication as legal authority. This Court’s discretionary jurisdiction should be reserved for the review of decisions with precedential value.....	8
B.    None of the issues Mrs. Smith raises warrant review in the context of this case.....	9
ARGUMENT IN OPPOSITION TO APPELLANT’S PROPOSITIONS OF LAW.....	10
Appellee ODJFS’s Proposition of Law No. 1 (responding to Smith’s Proposition 1):.....	10
<i>The Ohio rule regarding inter-spousal transfers of a home (Ohio Adm. Code 5101:1-39-07(E)(1)(a)) does not prevent the pre-eligibility transfer of a house from a revocable trust to a community spouse from being considered improper, to the extent the transfer exceeds the CSRA cap in 42 U.S.C. §1396r-5(f).</i> .....	10
A.    Smith does not support her claim that Ohio Adm. Code 5101:1-39-27.1 prevents the transfer of the house to Mr. Smith from being an improper transfer.....	10
B.    The transfer of the house from the Trust to Mr. Smith falls outside of the exception in Ohio Adm. Code 5101:1-39-07 for home transfers between spouses and must be read <i>in pari materia</i> with the Trust Rule, which prohibits this transfer.....	11
Appellee ODJFS’s Proposition of Law No. 2 (responding to Smith’s Proposition 2):.....	12
<i>The federal statute regarding inter-spousal transfers of a home (42 U.S.C. §1396p(c)(2)(A)) does not prevent the pre-eligibility transfer of a house from a revocable trust to a community spouse from being considered improper, to the extent the transfer exceeds the CSRA cap in 42 U.S.C. §1396r-5(f).</i> .....	12

Appellee ODJFS’s Proposition of Law No. 3 (responding to Smith’s Proposition 3): .....14

*While a Medicaid applicant is not required to formally rebut the presumption of improper transfer if there has been no improper transfer, the transfer here was improper.....14*

CONCLUSION.....15

CERTIFICATE OF SERVICE

## INTRODUCTION

This case is not worthy of review because the lower court's decision, issued as an unpublished summary judgment entry, is controlling only between the parties. It is not available online, so no court will see it as authority, nor will the public see it as guidance for estate planning. Thus, it does not warrant review, as it does not present a question of public or great general interest. It is simply a private ruling. See Judgment Entry, App. D to Smith Jur. Mem.

Mrs. Smith's request for jurisdiction in her case attempts to revisit another house-and-trust improper transfer case involving application of Ohio Medicaid eligibility rules by the Ohio Department of Job and Family Services. (The new Ohio Department of Medicaid now oversees Medicaid). On March 27, 2013, this Court declined to accept jurisdiction in that case. *Helen Williams v. Ohio Department of Job and Family Services*, 2012-Ohio-4659, *appeal not accepted*, 134 Ohio St. 3d 1507, 2013-Ohio-1123. Mrs. Smith's Memorandum in Support of Jurisdiction repeats the *Williams* one near-verbatim, and she even cites paragraphs in the *Williams* appellate decision as if it were the decision on appeal now. But it is not. *Smith*, decided as an unpublished summary order, is not a good vehicle to revisit these issues.

Moreover, that is especially so when better vehicles exist. As detailed below, a pending Fifth District case (*Atkinson v. Ohio Dep't of Job and Family Services*) involves a similar house-and-trust improper transfer (involving the same counsel and not on an accelerated calendar), so that case could be here soon. And a federal Sixth Circuit case, *Hughes v. McCarthy*, has already been argued on the same threshold Medicaid issue about the cap on spousal transfers.

Moreover, as in *Williams*, none of Appellant Ruth Smith's propositions of law are worthy of review. Mrs. Smith's first proposition purports to implicate two Ohio Medicaid-eligibility rules, but Mrs. Smith has not made any substantive arguments regarding the first proposition. Her third proposition of law is simply a tautology. It assumes that the Smith's house-and-trust

transaction does not create an “improper transfer” and then asks the Court to declare such transactions need not comply with an administrative rule in order to rebut their impropriety.

Smith’s second proposition of law appears to raise the only potentially review-worthy issue, but even that fails, as it involves the more general question of whether an institutionalized spouse can transfer resources to the community spouse beyond the limits set by Congress. However, the actual issue that Mrs. Smith argues under that general proposition is substantially narrower. And because Mrs. Smith never raised the narrow issue in the common pleas court (and the record does not contain the supporting documentation she references), she waived her right to raise the issue in the appeals court. Further, that is the issue raised in the pending federal case. Thus, that issue does not warrant review in *this case*.

For these reasons and others below, the Court should decline jurisdiction over this appeal of a summary unpublished appellate decision.

### STATEMENT OF CASE AND FACTS

#### **A. Individuals and their spouses can retain only limited resources to be eligible for Medicaid.**

When a Medicaid applicant is institutionalized and has a spouse living in the community, the County<sup>1</sup> conducts a resource assessment to determine the amounts that will be allocated between the community spouse and the institutionalized spouse. See Ohio Adm. Code 5101:1-39-36; 42 U.S.C. 1396r-5(c). See also, generally, *Wis. Dept. of Health & Family Servs. v. Blumer*, 534 U.S. 473, 482-484 (2002). The assessment is based on the couple’s resources at the time of the institutionalized spouse’s first continuous period of institutionalization, not at the time the institutionalized spouse applies for Medicaid. See Ohio Adm. Code 5101:1-39-36(A); 42 U.S.C. 1396r-5(c)(1)(A). The County allocates to each spouse a “spousal share” equal to one-

---

<sup>1</sup> “County” refers to the county Department of Job and Family Services that makes the initial determination of Medicaid eligibility. Ohio Adm. Code 5101:1-37-01(B)(1), 5101:1-38-01(C).

half the couple's total combined resources. See Ohio Adm. Code 5101:1-39-36.1(C)(1); 42 U.S.C. 1396r-5(c)(1)(A). The resource amount that the community spouse is allowed to keep is the Community Spouse Resource Allowance, or CSRA. See Ohio Adm. Code 5101:1-39-36.1(C); 42 U.S.C. 1396r-5(c)(2). See also *Blumer*, 534 U.S. at 483, n.5.<sup>2</sup> If the CSRA share falls outside the state's minimum or maximum CSRA, the CSRA will be adjusted to that minimum or maximum. This CSRA amount may be increased following a challenge in a "fair hearing." See Ohio Adm. Code 5101:1-39-36.1(C)(6); 42 U.S.C. 1396r-5(e). The CSRA concept enacted in the Medicare Catastrophic Coverage Act of 1988 ("MCCA"). See *Blumer*, 534 U.S. at 477-480.

The initial CSRA calculation is subject to a minimum and maximum. See Ohio Adm. Code 5101:1-39-36(C)(3). This effectuates the dual purposes of the CSRA provisions, which Congress enacted to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Blumer*, 534 U.S. at 480; see also 42 U.S.C. 1396r-5. These provisions achieve this result by allocating a couple's countable resources into shares for each spouse, with a goal of ensuring that "the community spouse has a *sufficient—but not excessive*—amount of income and resources available." *Id.* (emphasis added).

That allocation allows the community spouse to keep a limited amount of the couple's resources. See 42 U.S.C. 1396r-5(f)(2). Congress enacted the provisions in 1396r-5 because of the "unintended consequences" that had flowed from the previously-existing Medicaid

---

<sup>2</sup> *Blumer* notes here that the technical definition of CSRA in 42 U.S.C. 1396r-5(f)(2) differs from the way that term is generally used. Under the federal statute, it is defined as the amount of resources that the institutionalized spouse may transfer (without penalty) to the community spouse in order to bring the community spouse's resource level up to the amount he is allowed to retain as his share of the couple's total resources. *Id.* at 483 n.5. In other words, it is a sort of "gap-filler" to help the community spouse obtain his share of the resources by the time all is said and done. The popular usage, however, defines CSRA as simply the amount of the couple's resources that are allocated to the community spouse before the remainder is considered available to the institutionalized spouse. *Id.* ODJFS has followed the popular usage in its rules, as court opinions (such as *Blumer*) usually do. This usually does not affect the discussion, but ODJFS notes it for clarity.

provisions. See *Blumer*, 534 U.S. at 480. Before the MCCA, a couple's jointly-held assets, along with income of either spouse, were considered available to the institutionalized spouse. But States usually did not treat resources held in only the community spouse's name as available to the institutionalized spouse. See *id.* at 479-480. Therefore,

[m]any community spouses were left destitute by the drain on the couple's assets necessary to qualify the institutionalized spouse for Medicaid and by the diminution of the couple's income posteligibility to reduce the amount payable by Medicaid for institutional care. . . . Conversely, couples with ample means could qualify for assistance when their assets were held solely in the community spouse's name.

*Id.* at 480. The new CSRA provisions directed that all of the couple's resources be considered together, regardless of whose name they are held in; that each spouse's "spousal share" would be half of the joint resources; and that the community spouse's income not be considered available to the institutionalized spouse when eligibility is determined. *Id.* at 480-481.

Because special rules apply for an applicant who is an institutionalized spouse and do not apply to other Medicaid-eligibility contexts, Congress resolved any potential conflicts by expressly providing that the CSRA provisions supersede all inconsistent Medicaid provisions. The controlling federal statute states:

**Treatment of income and resources for certain institutionalized spouses**

(a) Special treatment for institutionalized spouses.

(1) Supersedes other provisions. In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1)), ***the provisions of this section supersede any other provision of this title*** (including sections 1902(a)(17) and 1902(f) [42 USCS § 1396a(a)(17) and (f)]) which is inconsistent with them.

42 U.S.C. 1396r-5(a)(1) (emphasis added). Thus, no other Medicaid provisions can trump the CSRA provisions.

In deciding whether anyone—including an institutionalized spouse—qualifies for Medicaid, the County reviews the applicant's resources and also determines whether there have

been any “improper transfers,” as those have a temporary effect on nursing-home coverage. If an applicant (or her spouse) has transferred any resources during the sixty months before the first date of both institutionalization and application<sup>3</sup> (called the “look-back period”), the County must examine the transfers to decide whether they were “improper,” i.e., among other things, transferred for less than fair market value to qualify for Medicaid. See Ohio Adm. Code 5101:1-39-07(H); 42 U.S.C. 1396p(c).

If an improper transfer has occurred, then a period of restricted coverage is calculated. See Ohio Adm. Code 5101:1-39-07(I); 42 U.S.C. 1396p(c)(1)(A). The length of the restricted-coverage period corresponds to the number of months of nursing-home care that the improperly-transferred resources would have covered, using the average monthly private pay rate for nursing home care in Ohio. See Ohio Adm. Code 5101:1-39-07(J)(2); 42 U.S.C. 1396p(c)(1)(E).

The improper-transfer question—that is, whether such a transfer occurred—is distinct from the inquiry into whether an applicant has too many resources to qualify for Medicaid. These two distinct questions cannot co-exist; they are consecutive inquiries. That is so because the County does not even examine transfers to see if they were improper unless the County first determines that the applicant has few enough resources to qualify for Medicaid. See, e.g., Ohio Adm. Code 5101:1-39-05(B)(11); Ohio Adm. Code 5101:1-39-36.1(C)(4)(a).

Ohio Adm. Code 5101:1-39-07(G) addresses the transfer of resources between spouses as it relates to the CSRA. The rule says: “Any amount of a couple’s resources exceeding the CSRA may not be transferred to the community spouse or to another for the sole benefit of the community spouse unless permitted in a hearing decision issued under Chapter 5101:6-7 of the Administrative Code.” See Ohio Adm. Code 5101:1-39-07(G)(2). (That provision refers to the “fair hearing” under 42 U.S.C. 1396r-5(e), mentioned above.). If resources above the CSRA

---

<sup>3</sup> This is known as the “baseline date.” Ohio Adm. Code 5101:1-39-07(B)(3).

have been transferred in this way without a CSRA hearing, the transfer is presumed improper. See Ohio Adm. Code 5101:1-39-07(G)(4).

These provisions in Ohio Adm. Code 5101:1-39-07(G) effectuate 42 U.S.C. 1396r-5(c)(2), which mandates that all of a couple's resources above the community spouse's CSRA are considered available to the institutionalized spouse—meaning that they are evaluated to see if the institutionalized spouse can pay (or still pay) for his own care. If that over-CSRA amount is more than the individual eligibility limit, the application is denied. If it is not over the limit, the application may be granted. See Ohio Adm. Code 5101:1-39-36.1(C)(4).

The CSRA provisions were intended, in part, to prevent persons with the means to pay for their own care from sheltering their assets to qualify for publicly-funded nursing-home care. See *Blumer*, 534 U.S. at 479-480 (recognizing this purpose of CSRA limits); *McNamara v. Ohio Dept. of Human Servs.*, 139 Ohio App. 3d 551, 555, 558 (2d Dist. 2000) (same); *Burkholder v. Lumpkin*, N.D. Ohio No. 3:09CV01878, 2010 LEXIS 11308, ¶ 17 (Feb. 9, 2010) (The legislation [42 U.S.C. 1396r-5] does “not permit institutionalized spouses to transfer assets above the CSRA to the community spouse while taxpayers pay the institutionalized spouses nursing home costs.”)

**B. Mr. Smith transferred joint resources to himself in excess of his CSRA cap and Mrs. Smith's Medicaid coverage was restricted for that reason.**

On November 3, 1999, Mrs. Smith and her husband, Frank Smith, transferred their house out of their individual names and into a revocable living trust (the “Trust”). AAR<sup>4</sup> p. 1. On June 25, 2010, Mrs. Smith was institutionalized. *Id.* Less than four months later, on October 15, 2010, and before Mrs. Smith applied for Medicaid, Mr. Smith transferred the house (then valued at \$88,500) from the Trust to himself. *Id.* Mrs. Smith applied for Medicaid on January 14, 2011. *Id.*

---

<sup>4</sup> The record certified by ODJFS in this case is in two parts. The first part is an Administrative Appeal Record (“AAR”) consisting of Bates-stamps pages 1 through 54. The second part is a State Hearing Decision Record (“SHR”) consisting of pages 1 through 81.

The Logan County Department of Job and Family Services approved Medicaid coverage for Mrs. Smith effective November 1, 2010, but found that Mrs. Smith had incurred a 14.69 month period of restricted coverage for nursing home vendor payment. AAR p. 11. It determined that the transfer of the \$88,500 house from the Trust to Mr. Smith (which, in addition to the resources already allocated to him, totaled \$176,947.71<sup>5</sup>) exceeded his CSRA of \$95,685.76 and was thereby improper. *Id.* at pp. 11-12.

Mrs. Smith never requested a hearing to increase the amount of Mr. Smith's CSRA. Instead, she requested an administrative hearing (called a "state hearing") to challenge the imposition of the period of restricted coverage. The State Hearing Decision, issued by ODJFS, upheld the County's decision; however, it reduced the restricted period of Medicaid coverage to 13.49 months.<sup>6</sup> See AAR pp. 11-17. Mrs. Smith then appealed the State Hearing Decision to the next level of administrative review within ODJFS, called an "administrative appeal." The resulting Administrative Appeal Decision affirmed the state hearing decision's determination that the transfer of the house from the Trust was an improper transfer. See AAR p. 4. Mrs. Smith then appealed to common pleas court and to the appeals court, under R.C. 119.12 and 5101.35.

**C. On judicial review, the common pleas court upheld the agency decision, and the appeals court affirmed in an unpublished summary judgment entry.**

On appeal, the Logan County Court of Common Pleas rejected all of Mrs. Smith's assignments of error and affirmed ODJFS's decision in all respects. Upon appeal, the Third District placed Mrs. Smith's case, *sua sponte*, on the accelerated calendar pursuant to App. R. 11.1 and the Third District Local Rule 12. These rules authorize the court to issue a brief,

---

<sup>5</sup> The County updated the Smiths' resource assessment using the value of the couple's resources of \$88,447.71 as of January 14, 2011, the date of Mrs. Smith's Medicaid application. That amount, plus the transferred house's value (\$88,500), is \$176,947.71. *Id.* at pp. 3-4.

<sup>6</sup> The number of months of restricted coverage was reduced to match the reduction in the amount by which the resources ultimately received by Mr. Smith exceeded his CSRA. AAR at p. 15.

unpublished decision. App. R. 11.1 (E), Local Rule 12(5).<sup>7</sup> Such a summary judgment entry has no precedential value. The decision controls only the parties and cannot be cited as legal authority under this Court's Rule 3 of Rules for the Reporting of Decisions. Judgment Entry at 1. Further, the *Smith* entry is not available on either LEXIS or Westlaw; it does not have an official Ohio citation; and it is not posted on this Court's or the Third District's websites. (All sources last checked August 5, 2013). Thus, it cannot be found, other than by going to the courthouse, and it cannot be used by anyone, other than the Smiths, for any reason.

### **THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

For the reasons below, this case does not warrant the Court's review.

- A. This case is not of public or great general interest because it is not subject to publication as legal authority. This Court's discretionary jurisdiction should be reserved for the review of decisions with precedential value.**

The restricted nature of the *Smith* decision is reason enough to deny review, as a private, hard-to-find ruling cannot be of public or great general interest. Mrs. Smith has failed to present any reason why this Court should consider a case that concerns only her private interests. No member of the general public will be affected by the *Smith* case, and the decision cannot influence future court decisions.

The only reason to review the case would be to provide guidance to other parties, not to erase the decision below, but that purpose can be served by reviewing other cases. For example, a similar house-and-trust improper transfer case is pending in the Fifth District, and that will lead to a published opinion on the issues presented here. That case is scheduled for oral argument on August 22, 2013. *Estate of Marcella Atkinson v. Ohio Department of Job and Family Services*, 5th Dist. (Knox County) No. 13CA000004. That will also offer the Court the views of the Fifth

---

<sup>7</sup> While the Local Rules generally have lettered subsections followed by numerical subparts, missing from Local Rule 12 is a reference to subsection (A).

District, which would show either a growing consensus, if it agrees with the Third District, or could lead to conflict certification, if it disagrees.

**B. None of the issues Mrs. Smith raises warrant review in the context of this case.**

The narrow issue that Mrs. Smith argues in support of her second proposition of law (that is, whether there is a distinction between pre- and post-eligibility transfers of joint resources to the community spouse) was never raised in the trial court and has thus been waived. See Jur. Mem. at 11. The appeals court did not mention this issue, nor was it obligated to do so. It follows that this Court should not wish to exercise its discretion to review an issue that was never considered below. See *Huff v. FirstEnergy Corp.*, 130 Ohio St. 3d 196, 2011-Ohio-5083, ¶ 21 n.4. Mrs. Smith concedes that federal law prohibits transfers “exceeding the CSRA ‘after the date of the initial determination of eligibility.[.]’”) *Id.*, citing 42 U.S.C. §1396r-5. Also, Mrs. Smith is not claiming that all pre-eligibility resource transfers should be permitted, only those pre-eligibility transfers of a house from a revocable trust to a community spouse. *Id.*, citing 42 U.S.C. §1396p(c)(2)(A)(i).

Instead of addressing the very narrow issue presented in Smith’s second proposition, the Court should allow the Sixth Circuit Court of Appeals to address the issue in the appeal of *Hughes v. McCarthy* (6th Cir. No. 12-3765). *Hughes*, argued on March 7, 2013, is a better vehicle for review of the broader question of whether an institutionalized spouse can transfer resources over the CSRA cap to the community spouse. In *Hughes*, the district court specifically stated that even if federal annuity laws applied (the court held that they did not) those laws “would be superseded by the CSRA laws that cap a community spouse’s share of a couple’s resources.” *Hughes*, 872 F.Supp.2d 612, 621 (N.D. Ohio 2012). Thus, a decision in *Hughes* appeal may resolve the narrow issue that Mrs. Smith argues in support of her second proposition of law, as well as the larger issue of the CSRA cap that she attempts to raise in that proposition.

In light of *Hughes*, this Court may duplicate resources to reach the same result, or if the Court disagrees, may put this Court in the position of conflicting with the federal court governing Ohio on a federal-law issue. Either outcome can and should be avoided by declining jurisdiction.

Alternatively, this Court could revisit whether to accept a more suitable Ohio case. As noted above, *Atkinson*, another house-and-trust improper transfer case, is pending in the Fifth Judicial District and is scheduled for argument on August 22, 2013. *Atkinson* is not on the accelerated calendar, so it will result in a full opinion that could lead to an appeal to this Court, but without the problems inherent in this one.

In addition, this is a poor vehicle to address Mrs. Smith's first and third propositions, because of the private nature of the decision below. Those issues are whether Ohio Medicaid laws permit a house-trust transfer that artificially increases the CSRA or, respectively, whether Mrs. Smith was obligated, pursuant to Ohio Adm. Code 5101:1-39-07(D), to rebut the presumption of improper transfer. Again, these propositions are merely *Williams* again, but this time, there is merely a summary judgment entry of no precedential value for this Court to review.

For all these reasons, the Court should not review the summary entry at issue here.

## ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

### Appellee ODJFS's Proposition of Law No. 1 (responding to Smith's Proposition 1):

*The Ohio rule regarding inter-spousal transfers of a home (Ohio Adm. Code 5101:1-39-07(E)(1)(a)) does not prevent the pre-eligibility transfer of a house from a revocable trust to a community spouse from being considered improper, to the extent the transfer exceeds the CSRA cap in 42 U.S.C. §1396r-5(f).*

#### **A. Smith does not support her claim that Ohio Adm. Code 5101:1-39-27.1 prevents the transfer of the house to Mr. Smith from being an improper transfer.**

While Mrs. Smith says Ohio Adm. Code 5101:1-39-27.1 (the "Trust Rule") prevents the transfer contemplated in her first proposition from being considered improper, she never explains

how or why. Further, such an argument fails because the Trust Rule expressly states that transfers like the one in this case are improper. See Ohio Adm. Code 5101:1-39-27.1(C)(2)(f)(i).

**B. The transfer of the house from the Trust to Mr. Smith falls outside of the exception in Ohio Adm. Code 5101:1-39-07 for home transfers between spouses and must be read *in pari materia* with the Trust Rule, which prohibits this transfer.**

At the heart of Mrs. Smith's argument is the contention that a transfer from a trust of a trust asset, which happens to be a house, is the same as the spouse-to-spouse transfer of an exempt home that would be permitted by Ohio Adm. Code 5101:1-39-31 and carved out as an exception in Ohio Adm. Code 5101:1-39-07(E). The result would allow Mr. Smith to receive *all* of the couple's combined resources in this instance *without regard to the CSRA cap*. That is exactly what the federal and state statutory schemes were designed to prevent. See *Williams, Burkholder, McNamara, Hughes*, and related discussion at pp. 3-7 above. And it is for this reason that Mrs. Smith ultimately fails in her attempts to twist the definitions of "home," "individual," and "resource."

The carve-out in Ohio Adm. Code 5101:1-39-07(E) for the "home" must be read *in pari materia* with Ohio Adm. Code 5101:1-39-27.1, which concerns the treatment of trusts. It is not to be read in a vacuum. Mrs. Smith cannot have it both ways: A trust with a home in it that inflates the value of the couple's combined resources, resulting in an enhanced CSRA, and the benefit of the homestead exemption as if the home had never been transferred into the trust.

The transfer of the house in and out of a trust is not equivalent to a non-trust transfer among spouses. A transfer in and out of a trust can (and, in this case, did) increase a spouse's CSRA, whereas a transfer between spouses without a trust does not do so. AAR at 3. Therefore, the two transactions (the transfer of a house between spouses and the transfer of a house in and out of a trust) are fundamentally different. ODJFS may permit the first type of transaction without penalty (transfers of a house between spouses not involving a trust) while imposing a

period of restricted coverage upon the second type of transaction (transfers of a house in and out of a trust). This follows federal Medicaid law.

The significance of the above is that Mr. Smith was *not* free to do whatever he wanted with an asset of the trust without consequence, regardless of the fact that the asset at issue was the couple's home. He was also not free to convert this trust asset into something for his own benefit, making the asset no longer available to the couple to pay for Mrs. Smith's care. In this sense, the case does not turn upon the fact that the asset was a house; it would have been equally improper for Mr. Smith to have transferred *any* asset of the trust, whether cash or other property, to himself.

Mrs. Smith's claims are thus untenable. She challenges the imposition of restricted coverage, claiming that federal law gives a married, institutionalized Medicaid applicant the right to transfer *unlimited* assets to her spouse until she applies for Medicaid. If the house had simply been left in the name of Mrs. Smith and her husband, the husband would have qualified for the marital home exemption, but his CSRA would have been decreased by half the value of the house. Having received the benefit of the transfer of the house into the trust (i.e., an increased CSRA), the Smiths cannot now complain about the consequences of the transfer.

**Appellee ODJFS's Proposition of Law No. 2 (responding to Smith's Proposition 2):**

*The federal statute regarding inter-spousal transfers of a home (42 U.S.C. §1396p(c)(2)(A)) does not prevent the pre-eligibility transfer of a house from a revocable trust to a community spouse from being considered improper, to the extent the transfer exceeds the CSRA cap in 42 U.S.C. §1396r-5(f).*

The appeals court correctly determined that the transfer of the house from the Trust to Mr. Smith was presumed to be improper pursuant to Ohio Adm. Code 5101:1-39-07(G)(2) & (4). When it was transferred to Mr. Smith, the house was not exempt because it was owned by the Trust. See Ohio Adm. Code 5101:1-39-31(C); 5101:1-39-05(B)(3); State Medicaid Manual

§3259.6(F) (placement of the home of an institutionalized individual in a trust results in the home becoming a countable resource); 42 U.S.C. §1396p(d)(3) & (h)(5) (same). Therefore, the house was properly included as a resource when calculating Mr. Smith's CSRA.

This \$89,500 resource was transferred from the Trust to Mr. Smith for \$0. AAR, p. 12. At the time of the transfer, Mr. Smith' CSRA would have been one-half to the couple's combined resources of \$88,447.71. *Id.*, p. 2.<sup>8</sup> Smith never requested a hearing to request permission to transfer resources in excess of Mr. Smith's CSRA. Because the amount of the transferred resource exceeded Mr. Smith's CSRA, it was presumed to be an improper transfer pursuant to Ohio Adm. Code 5101:1-39-07(G)(2) & (4).

Smith says that the transfer should not be considered improper because it was made before she was determined to be eligible for Medicaid and is therefore not subject to the CSRA cap. But the CSRA statute's plain language, however, has no exception for pre-eligibility transfers. See 42 U.S.C. §1396r-5(f). The legislative history of the CSRA cap also contains no such exception. Nor would it make sense to read such an exception into the statute, as a policy matter, as reading such an exception into the statute would render the CSRA cap meaningless. Medicaid applicants could transfer unlimited amounts of resources amounts, as long as they did so before applying for Medicaid. That contradicts Congress's intent—an intent shown in the statute's legislative history and recognized by the U.S. Supreme Court and all Ohio federal courts that have examined the issue. See H.R. Rep. 100-105, pt. 2, 100th Cong., 2d Sess., at 73-74 (1987), *reprinted in* U.S.S.C.A.N. 857, 896-97. See also *Blumer*, 534 U.S. at 479-480; *McNamara*, 139 Ohio App. 3d 551, 555, 558 (2d Dist. 2000); *Burkholder*, *supra* at ¶¶ 15-17; *Hughes v. Colbert*, 872 F.Supp.2d ---; 2012 U.S. Dist. Lexis 74044 \* 24 (S.D. Ohio 2012). And

---

<sup>8</sup> The CSRA minimum in 2011 was \$21,912, not the \$59,554 cited in the Administrative Appeal Decision. See ODJFS Medicaid Eligibility Procedure Letter No. 52, January 1, 2011.

it would be senseless to apply the CSRA cap only to post-eligibility transfers. As noted above, one purpose of the CSRA cap is to prevent couples with the means to pay for at least some of the institutionalized spouse's care from hiding all of their money from state Medicaid programs by shifting it to the community spouse. *Id.* But by the time an institutional spouse is eligible for Medicaid, he or she has less than \$1,500 in countable resources. Ohio Adm. Code 5101:1-39-05(B)(11). Therefore, in most cases, institutional spouses have virtually no resources to transfer. Congress would not have needed to limit transfers from the institutional spouse to the community spouse in situations where the institutionalized spouse has virtually no resources.

**Appellee ODJFS's Proposition of Law No. 3 (responding to Smith's Proposition 3):**

*While a Medicaid applicant is not required to formally rebut the presumption of improper transfer if there has been no improper transfer, the transfer here was improper.*

Mrs. Smith's third proposition of law asks whether a Medicaid applicant must rebut the presumption that a transfer is improper when no transaction has been presumed to be improper. See Smith Jur. Mem. at 13-14. The answer to this question is obviously, "no." If a transaction does not create an improper transfer, there is no presumption of impropriety to rebut. The plain language of Ohio Adm. Code 5101:1-39-07(D) & (E) says so and requires no further comment by this Court. The problem, though, is that Smith's proposition *presumes* the issue that she lost below. In contrast to her presumption, the transfer of the house to Mr. Smith was, as explained above, improper, because the value of this non-exempt resource exceeded Mr. Smith's CSRA.

## CONCLUSION

For all of these reasons, the Court should decline jurisdiction over this appeal.

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Attorney General of Ohio



Amy R. Goldstein\* (0015740)

*\*Counsel of Record*

Senior Assistant Attorney General

30 East Broad Street, 26th Floor

Columbus, Ohio 43215

614-466-8600; 614-466-6090 fax

amy.goldstein@ohioattorneygeneral.gov

*Counsel for Appellee*

*Ohio Department of Job and Family Services*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction was served by U.S. mail this 15th day of August, 2013, upon the following counsel:

Thom L. Cooper  
Elizabeth Durnell  
Cooper, Adel & Associates, L.P.A.  
36 W. Main Street  
P.O. Box 747  
Centerburg, Ohio, 43011

Counsel for Appellant  
Ruth M. Smith

  
Amy R. Goldstein (0015740)