

ORIGINAL

IN THE SUPREME COURT OF OHIO

ESTATE OF MARCELLA ATKINSON,

Appellant,

v.

OHIO DEPARTMENT
OF JOB AND FAMILY SERVICES,

Appellee.

Case No.

13-1773

On Appeal from the Fifth District Court of
Appeals, Knox County

Court of Appeals
Case No. 13CA4

MEMORANDUM IN SUPPORT OF JURISDICTION

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SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF THIS CASE'S APPLICABILITY TO THE PUBLIC
OR GREAT GENERAL INTEREST1

STATEMENT OF THE CASE AND FACTS.....3

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW.....5

PROPOSITION #1: Ohio Admin. Code 5101:1-39-27.1 and 5101:1-39-07
permits the unlimited transfer of assets from an institutionalized spouse to the
community spouse prior to Medicaid eligibility and such transfer does not
constitute an improper transfer of assets that would result in a period of restricted
eligibility for Medicaid.....6

PROPOSITION #2: Federal Medicaid law permits the unlimited transfer of
assets from an institutionalized spouse to a community spouse prior to Medicaid
eligibility and such transfer does not constitute an improper transfer of assets that
would result in a period of restricted eligibility for
Medicaid.....10

CONCLUSION.....14

APPENDIX

Appendix A – January 10, 2012 Administrative Appeal Decision of the Ohio Department of Job and Family Services in *In Re Appeal of Marcella J. Atkinson.*, Docket Number AA-8859, Appeal 1721068

Appendix B – November 30, 2011 : State Hearing Decision of the Ohio Department of Job and Family Services Bureau of State Hearings in *In the matter of: Marcella J. Atkinson*, Appeal 1721068

Appendix C – Judgment Entry in *Estate of Marcella Atkinson v. Ohio Dept. of Job and Family Services*, Case Number 12AP06-0305, March 7, 2013.

Appendix D - Judgment in *Estate of Marcella Atkinson v. Ohio Dept. of Job and Family Services*, Case Number 13CA4, September 27, 2013.

EXPLANATION OF THIS CASE'S APPLICABILITY TO THE PUBLIC

OR GREAT GENERAL INTEREST

As senior citizens and the elderly become a larger portion of the population, the need for medical coverage provided by Medicare and Medicaid will continue to grow at a remarkable rate. According to the American Association of Retired Persons, the first of the baby boom generation reached what used to be known as retirement age in 2011, and for the next 18 years, boomers, who comprise 26% of the population, will be turning 65 at a rate of about 8,000 a day. This generational shift, coupled with medical advancements that allow people to live longer with debilitating conditions, requires an increased role for Medicaid in providing longterm care for those who can no longer afford the costs of such treatment.

This fact not only requires the state and federal governments to change their planning, it also necessitates new planning on the part of individuals. Estate planning decisions made years earlier can have significant, unforeseen impacts on the availability of care in the future. The interplay of state and federal law in the administration of Medicaid further complicates these plans.

This case presents a question with broad applicability to the interests of an aging public. As applied, the case asks specifically whether a home transferred from a revocable living trust established by both spouses or even one of the spouses to an institutionalized spouse, and subsequently transferred to the community spouse when an institutional spouse applies for Medicaid is considered an improper transfer under state and federal regulations. Taken more broadly, Appellant seeks to resolve the discrepancy between Medicaid regulations as written and

as enacted in a manner that could effect thousands of Ohioans.

More individuals are moving toward using revocable living trusts in their planning in order for their estate to pass without requiring probate administration. Ohio Elder Law §7:15 (2010); Baldwin's Ohio Prac. Merrick-Ripper Prob.L. §3:5(2009). In fact, the American Academy of Estate Planning Attorneys lists the revocable living trust as its number one estate planning technique. As an estate planning vehicle, the inter vivos trust has become common currency. *Second Bank-State St. Trust Co. v. Pinion*, 341 Mass. 366, 371 (1960). The National Network of Estate Planning Attorneys has found that most Americans now recognize that living trust-centered estate planning versus a traditional will is more suited for the modern, mobile society in which we now live.

As a matter of public policy, the prevalence of revocable trust requires that the relationship between Ohio's Medicaid laws and this popular estate planning tool be standardized. The interpretation advanced by the Ohio Department of Job and Family Services, that a transfer from a revocable living trust established by one or both spouses to a community spouse is an improper transfer under Ohio's Medicaid regulations, would have disastrous effects for coming generations of the aged and disabled. By holding that any transfer from a revocable trust is an improper transfer, these Ohioans are being penalized for proper estate planning. Additionally, in light of the decision allowing unlimited transfers of assets between spouses in *Hughes v. McCarthy*, the decision of the lower court is in conflict with Federal law. In order to standardize the law and prevent potential harm to thousands of Ohioans who have structured their assets with careful forethought, Appellant Marcella Atkinson requests this Court accept certiorari to reconcile the discrepancy between the state's rules and their application.

STATEMENT OF THE CASE AND FACTS

This is an appeal of the lower court's Judgment and Judgment Entry, which affirmed the Administrative Appeal Decision of Appellee the Ohio Department of Job and Family Services ("the Agency") that Mrs. Marcella Atkinson, the institutionalized spouse, was ineligible for Medicaid benefits for 8.92 months due to an alleged improper transfer of resources as a result of the transfer of her primary residence to her spouse. The Agency contends that this transfer was improper because the home had previously been owned by a revocable trust.

On June 2, 2000, Mrs. Atkinson and her husband transferred the couple's home (which they were residing in) into a revocable trust. (January 10, 2012 Administrative Appeal Decision, p. 2, which is attached as Appendix A; November 30, 2011 State Hearing Decision, p. 1, which is attached as Appendix B) ("Agency Decision"). Mrs. Atkinson was institutionalized on April 25, 2011 and a Medicaid application was submitted on June 16, 2011. (Appendix A, p. 2, and Appendix B, p. 1, Findings of Fact ¶ 2 & 3). On August 8, 2011, the home was removed from the revocable family trust and placed in Mrs. Atkinson's name and then on August 9, 2011, Mrs. Atkinson transferred the home into Mr. Atkinson's name. (Appendix A, p. 2, and Appendix B, p. 1, Findings of Fact ¶ 4).

In processing Mrs. Atkinson's Medicaid application, the agency incorrectly determined an improper transfer had occurred in the amount of \$53,750, which was the Auditor's True Value, and approved Medicaid with a restricted period of coverage for Medicaid effective 8/1/2011 through 3/31/12 with partial payment due of \$5566.00 for 4/2012. (Appendix B, p. 1 – 2, Findings of Fact ¶ 5).

The Agency's contention that the home had been improperly transferred was upheld by

the November 30, 2011 State Hearing Decision and by the January 10, 2012 Administrative Appeal Decision. (Appendix A&B). The basis for these decisions is not explicitly clear. The Administrative Appeal simply holds that “the agency correctly determined that the transfer of the home from the trust to the Community Spouse was improper and triggered the improper transfer period.” (Appendix B, p. 3). In its findings of fact, the State Hearing Decision found that the home was transferred first from the trust to Mrs. Atkinson and then from Mrs. Atkinson to her spouse. (Appendix B, p. 1, Finding of Fact ¶ 4). Despite this acknowledgement of the two distinct transfers, the State Hearing Decision suggests that the reason for the finding is because the home’s status in the revocable trust at the time of the first continuous period of institutionalization, which resulted in the value of the property being a countable resource and “artificially inflating” the value of resources so that the Community Spouse received a large amount of resources, results in an improper transfer when transferred to the Community Spouse from the trust. (Appendix B, p. 3). This reasoning clearly does not take into account the fact that there were 2 distinct transfers, neither of which was a transfer directly from a revocable trust to the Community Spouse. The decisions result in a finding that any transfer of a house from a revocable trust to an applicant for Medicaid and is subsequently transferred to their spouse, creates an improper transfer.

Appellant has properly exhausted her administrative remedies. Pursuant to R.C. 119.12 and R.C. 5101.35; Appellant timely filed her Notice of Appeal to the Knox County Court of Common Pleas. The trial court affirmed the Administrative Appeal Decision on March 7, 2013. Appellant then appealed to the Court of Appeals of Ohio, Fifth Appellate District, Knox. The Fifth District Court of Appeals affirmed the Knox County Court of Common Pleas decision on

September 27, 2013. Appellant now files a discretionary appeal with the Supreme Court of Ohio.

ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW

Appellee's Decisions were contrary to law because the Agency erroneously found that Ohio Admin. Code 5101:1-39-07 and Ohio Admin. Code 5101:1-39-27.1 required that the transfer of the primary residence from herself to Raymond Atkinson, the community spouse, be treated as an improper transfer that led to restricted coverage.

"Restricted coverage" is the term used to indicate the period of time during which a Medicaid case is open but nursing home vendor payments will not be made. An "improper transfer" of assets is defined as the transfer by an individual of "a legal or equitable interest in a resource for less than fair market value for the purpose of qualifying for Medicaid, a great amount of Medicaid, or for the purpose of avoiding the utilization of the resource to meet medical needs or other living expenses." Ohio Admin. Code 5101:1-39-07(B)(5).

Both federal and state law govern the Medicaid program. The Medicare Catastrophic Coverage Act of 1988 ("MCCA"), 42 U.S.C. 1396 *et seq.*, set forth rules that must be followed in instances such as this. The MCCA and federal Medicaid Act contain spousal impoverishment provisions that permit the spouse living at home, or community spouse, to reserve some income and assets while the other spouse is on Medicaid. *Wisconsin Department of Health and Family Services v. Blumer* (2002), 534 U.S. 473, 478, 122 S. Ct. 962.

The aim of the MCCA was to protect community spouses from becoming impoverished while also barring couples from sheltering an excessive amount of resources in order to qualify for Medicaid. *Id.* at 480. To this end, the community spouse Resource Allowance ("CSRA"). *Id.*

at 478. The CSRA is the amount of countable resources that the spouse of a Medicaid recipient is permitted to keep. In essence, it is calculated by dividing the total countable assets by two. Ohio Adm. Code 5101:1-39-36.1(C)(1). "Countable Assets" here does not include certain assets such as an automobile, personal effects, household goods, and most notably, a home. 42 U.S.C. 1396r-5(c)(1)(A). A Medicaid applicant may generally transfer assets, including a home, freely to his or her spouse so long as they are solely for the spouses' benefit. 42 U.S.C. 1396p(c)(2). In order to qualify for Medicaid, the amount of countable resources in excess of the CSRA must be spent down to within the applicable resource limits in order for the applicant to be eligible for Medicaid benefits. *Blumer*, 534 U.S. at 482-3.

PROPOSITION #1: Ohio Admin. Code 5101:1-39-27.1 and 5101:1-39-07 permits the unlimited transfer of assets from an institutionalized spouse to the community spouse prior to Medicaid eligibility and such transfer does not constitute an improper transfer of assets that would result in a period of restricted eligibility for Medicaid.

In order to ensure that people are not able to transfer large amount of resources and immediately qualify for Medicaid, both the federal government and Ohio imposed a look-back period during which transfers prior to applying for Medicaid may result in a restricted period during which the applicant is not eligible for Medicaid. A transfer is defined under Ohio Admin. Code 5101:1-39-07(B) as an action that has the effect of changing an ownership of an asset from the individual to another person. A transfer is improper when the transfer is for less than full market value and is made for the purpose of qualifying for Medicaid. Ohio Adm. Code 5101:1-39-07(B)(5). When an improper transfer has been made within five years prior to the date of application for Medicaid coverage, a penalty period is calculated by dividing the value of all such transfers by the average monthly private pay rate for a nursing facility, thus creating a

number of months in which the applicant is ineligible for Medicaid coverage. Ohio Adm. Code 4101:1-39-0(J)2(a)-(d).

However, Ohio's own regulations permit transfers between spouses. Ohio Adm. Code 5101:1-39-07(E)(1)(a) specifically allows an individual to transfer the principal place of residence to the individual's spouse without the transfer being considered improper, subject to certain limitations on what that spouse may afterwards do with the property. This means that Appellee imposed a penalty on Appellant contrary to Ohio law for the transfer.

The regulations' definitions also supports the transfer. Ohio Admin. Code 5101:1-39-07(E) allows for the transfer of the home. For the purposes of that rule, the "home" is defined in Ohio Admin. Code 5101:1-39-31 as property that is still considered the individual's principal place of residence. Ohio Admin. Code 5101:1-39-31(B)(2), and as defined by the court in Paragraph 15, defines the home as any real property that the individual has an ownership interest in which serves as the individuals principal place of residence. Therefore, the 5101:1-39-07(E) exemption for transfers of the home does not incorporate the title requirements of the homestead exemption in Ohio Admin. Code 5101-39-31(C).

Ohio Admin. Code 5101:1-39-05 defines the term "resource." A resource is any property that the individual has an ownership interest in. This includes countable and exempt resources. When Ohio Admin. Code 5101:1-39-07 incorporates this definition of a "resource" from 5101:1-39-05. A home's status as countable or exempt has no bearing on the determination of an improper transfers.

Ohio Admin. Code 5101:1-39-07(B)(7) defines the term "individual" for the purpose of the improper transfer provisions. The Ohio Admin. Code defines an "individual" not just as the

applicant for benefits, but incorporates the applicant's spouse and any person who is acting in place of or acting at the direction of an applicant. Under this broad definition, actions taken by a trustee, who must act as the representative of the beneficiaries of a revocable trust, would be included under the definition of "individual."

The lower courts' opinions held that the transfer in question was improper because the home was owned by the revocable trust at the snapshot date. Ohio Admin. Code 5101:1-39-07, by its plain language, does not incorporate the ownership requirements of Ohio Admin. Code 5101:1-39-31(C). It does not require the home to be exempt in order for the transfer to the community spouse to be exempt. It only requires that it be the home under Ohio Admin. Code 5101:1-39-31, meaning that it be the appellant's principal place of residence which an individual has an ownership interest in. There should be no dispute that the Atkinson's held an ownership interest in the property in question as it was counted as a countable resource prior to the transfer. In order to be a resource, it is required for an individual to have an ownership interest in the property. Because Appellant and her spouse maintained the property in question as their principal place of residence and held an ownership interest in the property, there should be no question that the property in question was the "home" under Ohio Admin. Code 5101:1-39-07(E).

The Court in paragraph 31 mistakenly construed Appellant's argument and held that the home must be exempt as a resource for the transfer to be exempt from penalty in Ohio Admin. Code 5101:1-39-07(E) to apply. Appellant did not dispute that the homestead exemption did not apply while in the revocable trust. There is no support for this in the code. Ohio Admin. Code 5101:1-39-07(E) is not an exception for the transfer of an exempt property. Ohio Admin. Code 5101:1-39-07(E) does not reference the homestead exemption. The Court made an obvious error

in holding that the Ohio Admin. Code 5101:1-39-07(E) was an exception for the transfer of an exempt asset. The plain language of the statute does not require the homestead exemption to be applied for the Ohio Admin. Code 5101:1-39-07(E) exception to apply. It applies to transfers of the “home” which under 5101:1-39-31(C) is not always exempt.

The home, which was both the “home” and a countable resource when in the trust, was transferred from the trust to Appellant, and then to Appellant's spouse. The property, which was the “home” was transferred by the “individual”, to the Appellant's spouse. This transfer was the direct transfer of an asset of the individual to the spouse. Because the asset in question was the “home”, the plain language of 5101:1-39-07(E) makes an exception for this transfer.

Even if the court finds the argument below in regards to the Supremacy Clause and the Ohio Admin. Code 5101:1-39-07 (G) requirement unpersuasive, it still would not apply in this case because the transfer falls under the exceptions for transfers between spouses contained in Ohio Admin. Code 5101:1-39-07(E).

Because the transfer to Appellant's spouse falls under the Ohio Admin. Code 5101:1-39-07(E) exception, the Ohio Admin. Code 5101:1-39-07(G) provision should not apply. The result of holding otherwise would be to require a special hearing when any transfer under the exception was made. Appellant is unaware of any times when the State has allowed for such a transfer as falling under the exception, but required a hearing before granting the exception. This would fly in the face of common sense, as it would require a needless hearing to establish something, which is permitted by the plain language of the Ohio Administrative Code. Additionally, applying the hearing requirement in this way would be contra to the decision in *Hughes et al v. McCarthy*, 6th Cir., No. 12-3765 (October 25, 2013), which held that transfers in excess of the

CSRA provision are permitted prior to Medicaid eligibility, and the applying the Ohio Administrative Code requirements in this way would be more restrictive than federal law, as discussed below.

Because of this, the Court is correct in suggesting that the (G) requirements would not apply where the 5101:1-39-07(E) exception is utilized.

PROPOSITION #2: Federal Medicaid law permits the unlimited transfer of assets from an institutionalized spouse to a community spouse prior to Medicaid eligibility and such transfer does not constitute an improper transfer of assets that would result in a period of restricted eligibility for Medicaid.

Under the Supremacy Clause, state law must give way to federal regulations and may be no more restrictive than the federal provisions. *US. Const. Art. VI, cl. 2*. In addition to Ohio's rules permitting the transfer, 42 U.S.C. 1396p(c)(2)(A)(i) states that "an individual shall not be ineligible for medical assistance . . . to the extent that the assets transferred were a home and title to the home was transferred to the spouse of such individual." This statement should be sufficient to end the inquiry, but the Agency confuses the issue with arguments about the CSRA.

Despite the clear permissive language contained in 42 U.S.C. 1396p(c)(2)(A)(i), there is a restriction in federal law on transfers from one spouse to another made after the date of eligibility on which the Agency and some of the decisions below rely. *See* 42 U.S.C. 1396r-5 (prohibiting transfers exceeding the CSRA "after the date of the initial determination of eligibility). While the transfer of the home would be permitted under 42 U.S.C. 1396p(c)(2), it is necessary to emphasize and clarify that 42 U.S.C. 1396r-5 only applies to post-eligibility transfers and not to those made prior to a finding of eligibility; to interpret it otherwise would be to "[render] § 1396p(c)(2)(B)(i) superfluous." *Morris v. Okla. Dept. of Human Svcs.* (10th Cir. 2012), 685 F.3d 925. Because statutes should be construed to not contradict each other where possible, transfers

in excess of the CSRA are not improper if made before the determination of eligibility.

Federal law allows for an individual to transfer the primary residence to a spouse as part of the Medicaid qualification process. Even if this were a transfer that could be subject to 42 U.S.C. 1396r-5 and the CSRA limit, any transfer prior to the period of eligibility would not be so limited. Statutory construction, case law, and administrative policies all prevent this. Under federal law, as must be applied by the state, a transfer from a revocable trust to a spouse is not an improper transfer necessitating an ineligibility penalty.

The Supremacy Clause is implicated in this case because Ohio Admin. Code 5101:1-39-07(G) contains no distinction between *pre* and *post* eligibility transfers. Therefore, the Ohio Admin. Code is more restrictive than the federal Medicaid law and the Ohio Admin. Code 5101:1-39-07(G)(2) hearing requirement should be struck down under the Supremacy Clause.

The transfer of the home in this case was a pre-eligibility transfer, because as the court has stated the property was a countable resource while it held in the trust, which means Appellant had too many resources to be eligible for Medicaid. In other words, the home must have been removed from the trust for Appellant to be eligible. Therefore, the transfer from the trust was a pre-eligibility transfer which means that 42 U.S.C. § 1396r-5(f)(1) does not apply. The applicable statute here is 42 U.S.C. § 1396p(c)(2)(B)(i), which permits unlimited transfers between spouses without there being any resulting penalty period of ineligibility.

The Fifth Appellate District relied on *Hughes v. Colbert*, 872 F. Supp.2d 612, 622 to hold that Section 1396r-5's supersession clause, §1396r-5(a)(1), requires resolution of any inconsistency between it and §1396p(c)(2)(B) in the former clauses' favor. Decision pg. 13. However, *Hughes* has been overturned by the United States Court of Appeals for the Sixth

Circuit in *Hughes et al v. McCarthy*, 6th Cir., No. 12-3765 (October 25, 2013)[1].

In *Hughes v. McCarthy*, the Sixth Circuit held firstly that “An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that... (B) the assets [] (i) were transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse.” § 1396p(c)(2)(B)(i). *Id.* at pg. 4.

The court further held “Even assuming that § 1396r-5(f)(1) provides authority for a state to impose a period of ineligibility for a transfer that exceeds the CSRA,[2] the statutory language and its relationship with § 1396p(c) do not support the Ohio agency’s argument that § 1396r-5(f)(1) controls a transfer made before Medicaid eligibility is established. Thus § 1396p(c)(2)(B)(i) for pre-eligibility transfers because there is no inconsistency between the provisions.” *Id.* at pg. 9.

The court also agreed with *Morris* that “When assets are transferred “to the individual’s spouse or to another for the sole benefit of the individual’s spouse,” 42 U.S.C. § 1396p(c)(2)(B)(i), before the institutionalized spouse is determined eligible for Medicaid coverage, “the unlimited transfer provision of § 1396p(c)(2) controls, and [a] transfer penalty [is] improper [under § 1396r-5(f)(1)].”[3] *Morris*, 685 F.3d at 938.” *Id.*

The court reasons that their reading is supported by HHS’s guidance. “In its amicus brief, HHS explains that § 1396r-5(f)(1) “has nothing to say about the inter-spousal transfers that are permissible before a determination of eligibility.” *Id.* at pg. 10. The court went on to say that “HHS has taken the same position in a series of opinion letters issued to state plan administrators and to the public, reasoning that § 1396r-5(f)(1) does not conflict with and thus does not supersede, § 1396p(c)(2)(B), as the two provisions apply to different situation, before and after

eligibility is established.” Id.

The court also explained that “Congress declined to adopt language supporting the very construction of § 1396p(c)(2)(B)(i) that the Ohio agency now advances (that Congress intended a different result, one that would subordinate § 1396p(c)(2)(B)(i) to § 1396r-5(f)(1)’s CSRA transfer cap) is a “compelling” indication of its intent not to subordinate § 1396p(c)(2)(B)(i) to § 1396r-5(f)(1).” Id. at pg. 11.

In addition to the plain language of the statute and case law, the federal agencies tasked with interpreting Medicaid regulations have come to the same conclusion. The Centers for Medicare and Medicaid Services (CMS), the branch of the Department of Health and Human Services (HHS) tasked with overseeing administration of Medicaid by the states, has stated in multiple opinion letters that 42 U.S.C. 1396r-5 does not apply to pre-eligibility transfers, only to post eligibility transfers. Recognizing the CMS’s unique role in the administration of the joint federal-state program of Medicaid, the United States Supreme Court has recognized that courts should give unique deference to the agency’s determinations. *See, e.g., Blumer*, 534 U.S. At 485, 496-7.

[1] John B. McCarthy was substituted for Colbert as the Medicaid Director per the caption of the Sixth Circuit Decision.

[2] “A State ... may not provided for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection [(i.e. § 1396p(c))].” 42 U.S.C. § 1396p(c)(4). The provisions therein do no expressly include penalties for a transfer that exceeds the CSRA.

[3] The Supreme Court also has reference § 1396r-5(f)(1) with a post-eligibility understanding. *See Blumer*, 534 U.S. at 482 n.5.

Conclusion

Both Ohio law and federal law permit the transfer of a primary residence from an institutional spouse to a community spouse. The addition of a revocable trust should not complicate this situation. The Agency responsible for administering Ohio's Medicaid program has confused the simple statements in the law with needless limitations and complications of post-eligibility transfers, CSRA limitations, and pre-approval. It is therefore necessary that this Court act to clarify matters and protect Ohioans who have done estate planning which may now ultimately injure them.

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of the Notice of Appeal for Appellant Estate of Marcella Atkinson has been served by ordinary U.S. Mail service on Amy Goldstein, Attorney for Appellee, Ohio Attorney General, Health and Human Services Section, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215 this 12th day of November, 2013.



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IN THE SUPREME COURT OF OHIO

Estate of Marcella Atkinson,	:	Case No. _____
	:	
Appellant,	:	On Appeal from the Fifth District Court of
	:	Appeals, Knox County
v.	:	
	:	
OHIO DEPARTMENT	:	Court of Appeals
OF JOB AND FAMILY SERVICES,	:	Case No. 13CA4
	:	
Appellee.	:	

**APPENDIX TO MEMORANDUM IN SUPPORT
OF JURISDICTION OF APPELLANT ESTATE OF MARCELLA ATKINSON**

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
BUREAU OF STATE HEARINGS

ADMINISTRATIVE APPEAL SECTION

In Re Appeal of:

MARCELLA J. ATKINSON
THE LAURELS
13 AVALON RD
MT VERNON, OH. 43050

Docket Number:	AA-8859	
Appeal No(s)	1721068	MED
AG No.	5094050118	
Hearing Request Date:	10/14/2011	
Hearing Decision Date:	11/30/2011 / PMS	
Appeal Request Date:	12/13/2011	
Agency:	KNOX CDJFS	

Administrative Appeal Decision

Summary of Decision

You are appealing a November, 2011 agency Medicaid approval with restricted coverage after a determination that an improper transfer occurred. We agree with the hearing decision which overruled your appeal because the deed to the home was not in your name and it was not exempt.

Analysis

In your administrative appeal request, you suggest a statement of error that the decision was contrary to the weight of the evidence because you argue that the transfer of a revocable trust should be considered unearned income, not an improper transfer. Further, you argue that the value of the home should not be considered transferred in this case because countable resources are those remaining after all exemptions have been applied. As such, you argue that the treatment of the home in a LTCF services situation makes the value exempt.

Ohio Administrative Code 5101:1-39-27.1(C)(2) explains that a Category two: self-settled trust established after August 11, 1993 and which is a revocable trust is

considered a resource available to the individual. 1-39-27.1(B)(5) defines the individual as an applicant for or recipient of a medical assistance program. Payments from the trust to, or for the benefit of, the individual are considered unearned income and any other payments from the trust are considered an improper transfer subject to the rules prohibiting the improper transfer of resources. Further, for the value of the home to be exempt, when LTCF services, HCBS waiver, or PACE services are requested, the home must be the individual's or individual's spouse's principle place of residence.¹ Additionally, the deed to the home must be in the individual's or individual's spouse's name.² Also, the home must comply with the provisions of equity interest in the individual's home not exceeding the home equity limit.³ Lastly, the resources of both the institutionalized spouse and the community spouse are assessed to determine the couple's total countable resources existing at the beginning of the first continuous period of institutionalization.⁴

In your case, you and your spouse transferred ownership of your home into a revocable trust on June 2, 2000. You were later admitted to a long term care facility on April 25, 2011 and a Medicaid application was submitted on your behalf on June 16, 2011. On August 8, 2011, the property was removed from the revocable family trust and placed in your name by Quit Claim Deed. Then, on August 9, 2011, you transferred the home into your spouse's name by Quit Claim Deed.

This series of events shows that while your home was in a trust, the deed to the home was not in your name or your spouse's name, and it was not exempt. Once the

¹ Ohio Admin. Code 5101:1-39-31

² Ohio Admin. Code 5101:1-39-31

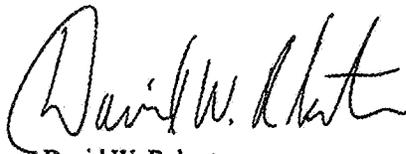
³ Ohio Admin. Code 5101:1-39-31

⁴ Ohio Admin. Code 5101:1-39-35

house was placed back into the Community Spouse's name, the home was exempt as a resource. Further, the resource assessment correctly included the home as an available resource because, at the time, the property was held in the revocable trust. Accordingly, the Agency correctly determined that the transfer of the home from the trust to the Community Spouse was improper and triggered the improper transfer period. As such, the hearing decision is correct.

DECISION

We therefore ORDER that the hearing decision is AFFIRMED.



David W. Robertson

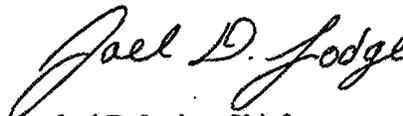
Administrative Appeal Officer

CONCUR:



Margaret E. Adams

Administrative Appeal Officer



Joel D. Lodge, Chief
Bureau of State Hearings

Chief Legal Counsel

Date of Issuance: January 10, 2012

Notice to Appellant

This Administrative Appeal decision is the final decision on this appeal from the state department of job & family services. It is binding on the department and agency, unless it is reversed or modified on appeal to the court of common pleas.

An Appellant who disagrees with this decision may appeal it to the court of common pleas pursuant to sections 119.12 and 5101.35(E) of the Revised Code. The Appellant shall mail the original notice of appeal to the department at the following address:

**Ohio Department of Job & Family Services
Office of Legal Services
30 E. Broad Street, 31st Floor
Columbus, OH 43215-3414**

The Appellant must also file a copy of the notice of appeal with the court of common pleas in the county in which the Appellant resides (Franklin County, if the Appellant does not reside in Ohio). Please note: Both the mailing to the department and the filing with the court must occur within thirty (30) calendar days of the date of issuance of this decision.

If you have questions about appealing to a court, contact your attorney, local legal aid society, or bar association. If you want information about free legal services, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888.

cc:

Director, KNOX CDJFS
SUVERB, SARVEP, Bureau of State Hearings
ELIZABETH A DURNELL
THOM L. COOPER COMPANY L.P.A.
36 W MAIN ST
PO BOX 747
CENTERBURG, OH, 43011

**OHIO DEPARTMENT OF JOB AND FAMILY SERVICES
BUREAU OF STATE HEARINGS**

In the matter of:

MARCELLA J. ATKINSON
THE LAURELS
13 AVALON RD
MT VERNON, OH. 43050

<u>Case Number:</u>	<u>County:</u>	
5094050118	KNOX	
<u>Appeal:</u>	<u>Program:</u>	<u>Disposition:</u>
1721068	MED	OVERRULED
No Compliance Required		
<u>Decision Date:</u>	11/30/2011	
<u>Request Date:</u>	10/14/2011	
<u>Hearing Officer:</u>	PAMELA SARVER	

State Hearing Decision

ISSUE SECTION

Appeal No. 1721068 Medicaid for the aged: The issue on appeal is whether the Knox County Department of Job and Family Services correctly determined an improper transfer resulting in a restricted period of coverage for the Appellant's Medicaid for the aged (MED).

After careful consideration of the evidence and regulations that apply, I find the determination of restricted period of coverage due to an improper transfer is correct. Therefore, this appeal should be overruled.

PROCEDURAL MATTERS

On 9/29/2011, the Agency mailed the Appellant a Medicaid approval notice with restricted Medicaid coverage and a restricted Medicaid coverage period determination notices. She requested a state hearing on 10/14/2011. The hearing was scheduled for and duly conducted on 11/21/2011. The Appellant was represented by her authorized representative which is her attorney. The Agency was represented by Mary Jane Pribonic. An oath was administered and taken by all parties presenting testimony.

FINDINGS OF FACT

1. On 6/2/2000, the Appellant and her spouse transferred ownership of their home (which they were residing in) into a revocable trust.
2. On 4/25/2011, the Appellant was admitted to a long term care facility.
3. On 6/16/2011 an application was submitted for Medicaid for the appellant.
4. On 8/8/2011, by Quit Claim Deed, the homestead property removed from the revocable family trust and placed in the Appellant's name and then on 8/9/2011, the Appellant, by Quit Claim Deed, transferred the home into her spouses name.
5. Agency considered an improper transfer occurred and the agency then approved Medicaid with a restricted period of coverage for the Medicaid

STATE HEARING DECISION CONTINUATION

effective 8/1/2011 through 3/31/2012 with partial payment due of \$5566.00 for 4/2012.

6. Agency mailed notice of determination on 9/29/2011.

CONCLUSIONS OF POLICY

A category two trust is a self-settled trusts, established on or after August 11, 1993 and meets all of the following criteria, the assets of the individual were used to form all or part of the corpus of the trust and the trust was not established by a will and the trust was established by the individual, the spouse of the individual, a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or on behalf of the spouse of the individual, or a person, including a court or administrative body, acting at the direction or upon the request of the individual or the spouse of the individual. This is a revocable trust and both the Appellant and Agency agree on this. A revocable trust in this category are treated as follows, the corpus of the trust is considered a resource available to the individual and payments from the trust to, or for the benefit of, the individual are considered unearned income and any other payments from the trust are considered an improper transfer subject to the rules prohibiting the improper transfer of resources. Ohio Administrative Code (OAC) 5101:1-39-27.1 (2006)

Treatment of the home when LTCF services, HCBS waiver or PACE services are requested, for the value of the home to be exempt, the home must be the individual's or the individual's spouse principal place of residence and the deed to the home must be in the individual's or individual's spouse name and the home must comply with the provisions of the equity interest in the individual's home not exceeding the home equity limit. OAC 5101:1-39-31 (2007).

The following types of transfers are presumed to be improper transfers for less than fair market value that reduces the individual's resources and brings the value of their remaining resources within the resource limitation and any transfer that has the effect of safeguarding future eligibility by divesting the individual of property that could otherwise be sold and the proceeds then used to pay for support and medical care for the individual. OAC 5101:1-39-07 (2006)

On 6/2/2000, the Appellant and her spouse (the community spouse) transferred the home into a revocable living trust. The home and the trust were both jointly owned by the institutionalized spouse and the community spouse. The home was the principal place of residence before she entered the LTCF. The home was valued at \$53,750.00. The appellant was institutionalized on 4/25/2011. On 8/8/2011, the home was transferred to the Appellant and then on 8/9/2011, the home was transferred to the community spouse.

For the home to be considered exempt for the purposes of Medicaid nursing home vendor payment, the home must be the individual's or the individual's spouse principal place of residence, the deed to the home must be in the individual's or individual's spouse name, and the individual's equity in the home must not exceed the home equity limit provisions in the rule.

While the home was in the trust, the deed to the home was not in the appellant's name or his spouse's name, and was not exempt. Once the house was placed back into the Community Spouse's name, the home was exempt as a resource. The Agency determined that the transfer of

STATE HEARING DECISION CONTINUATION

the home from the trust to the Community Spouse was improper and triggered the improper transfer period. The appellant argues that the transfer from the trust to the spouse is not improper pursuant to the provisions of OAC 5101:1-39-07(E) (2006) and OAC 5101:1-39-27.1 (2006).

OAC 5101:1-39-35 (2006) defines a resource assessment as "the process where the resources of both the institutionalized spouse and the community spouse are assessed to determine the couple's total countable resources existing at the beginning of the **first continuous period of institutionalization.**" (Emphasis added.) The resource assessment correctly included the home as an available resource because, at the time, the appellant's homestead property was held in the revocable trust. Because the home was considered included in the resource assessment, the Community Spouse's resource allowance reflected the increased value of the couple's resources. OAC 5101:1-39-31 (2007) By including the home in the resource assessment and then removing it from the resources by transferring it to the Community Spouse, the couple was attempting to artificially inflate the value of the resources so that the Community Spouse received a larger CSRA, and therefore more of the couple's assets.

During the hearing it was agreed by both the Agency and the Appellant's authorized representative that all figures on the resource assessment and worksheet were correct, so the amounts are not an issue, just the restricted Medicaid coverage.

Therefore, the determination made by the agency is affirmed.

HEARING OFFICER'S RECOMMENDATION

Based on the record and Agency policy before me, I recommend that appeal # 1721068 should be overruled.

FINAL ADMINISTRATIVE DECISION AND ORDER

Since I find that the Hearing Officer's recommendation is supported by policy and the evidence, I hereby adopt the recommendation. Thus, appeal #1721068 is overruled.

Betsy West Suver

Betsy West Suver
Hearing Authority

November 30, 2011

Notice to Appellant

This is the official report of your hearing and is to inform you of the decision and order in your case. All papers and materials introduced at the hearing or otherwise filed in the proceeding make up the hearing record. The hearing record will be maintained by the Ohio Department of Job and Family Services. If you would like a copy of the official record, please telephone the hearing supervisor at the COLUMBUS District hearing section at 1-866-635-3748.

STATE HEARING DECISION CONTINUATION

If you believe this state hearing decision is wrong, you may request an administrative appeal by writing to: Ohio Department of Job and Family Services, Bureau of State Hearings, P.O. BOX 182825, Columbus, OH 43218-2825 or fax: (614) 728-9574. Your request should include a copy of this hearing decision and an explanation of why you think it is wrong. Your written request must be received by the Bureau of State Hearings within 15 calendar days from the date this decision is issued. *(If the 15th day falls on a weekend or holiday, this deadline is extended to the next work day.)* During the 15-day administrative appeal period you may request a free copy of the tape recording of the hearing by contacting the district hearings section.

If you want information on free legal services but don't know the number of your local legal aid office, you can call the Ohio State Legal Services Association, toll free, at 1-800-589-5888, for the local number.

Aviso a la Apelante

Esta es la decisión estatal administrativa de su caso. Todos los documentos y materiales presentados como prueba en la vista o de otra manera radicados componen el récord administrativo. El récord administrativo será mantenido por el Ohio Department of Job and Family Services.

Si usted cree que esta decisión estatal administrativa es errónea, usted puede solicitar una apelación administrativa escribiendo al: Ohio Department of Job and Family Services, Bureau of State Hearings, P.O. Box 182825, Columbus, Ohio 43218-2825 o facsímil (614) 728-9574. Su solicitud debe indicar por qué usted piensa que la decisión administrativa es errónea. Usted puede completar la solicitud de apelación incluida con esta decisión. Su solicitud escrita o formulario de apelación tiene que ser recibido por el Bureau of State Hearings dentro de los 15 días calendario desde la fecha en que esta decisión es expedida. (Si el 15to. día recae sobre un fin de semana o un día feriado, esta fecha límite es extendida al próximo día laborable). Durante el período de 15 días de apelación administrativa, usted o su representante pueden solicitar una copia gratuita del récord administrativo y de la grabación de la vista llamando al Bureau of State Hearings al 1-866-635-3748 (seleccione la opción 1 del menú principal).

Si usted quiere información sobre servicios legales gratuitos pero no sabe el número de su oficina local de servicios legales, usted puede llamar al Ohio State Legal Services Association, gratuitamente, al 1-800-589-5888, para el número local.

ELIZABETH A DURNELL
THOM L. COOPER COMPANY L.P.A.
36 W MAIN ST
PO BOX 747
CENTERBURG, OH, 43011

STATE HEARING DECISION CONTINUATION

Appendix

Appellant

1. Appeal Summary
2. State Hearing Request

Agency

- A. Appeal Summary
- B. Restricted Medicaid Coverage and Determination notices
- C. Resource Worksheet
- D. Quit-Claim Deed and Fiduciary Deed

IN THE COURT OF COMMON PLEAS, KNOX COUNTY OHIO
117 EAST HIGH STREET, SUITE 201
MOUNT VERNON, OHIO 43050

ELIZABETH A DURNELL
COOPER ADEL & ASSOCIATES LPA
36 W MAIN STREET
CENTERBURG OH 43011

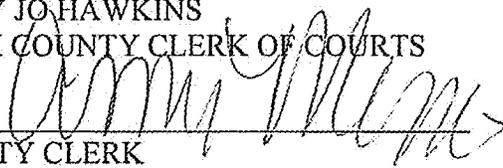
NOTICE OF JOURNAL ENTRY FILING

IN ACCORDANCE WITH THE HOLDING IN ATKINSON V GRUMMAN OHIO CORPORATION (1998), 37 OHIO ST. 3D 80, THE CLERK OF COURTS SHALL SERVE NOTICE OF THE ENTRY OF ANY FINAL APPEALABLE ORDER OR JUDGMENT, WITHIN THREE (3) DAYS OF THE ENTRY, UPON EVERY PARTY WHO IS NOT IN DEFAULT FOR FAILURE TO APPEAR.

THIS NOTICE SHALL SERVE ONLY AS A NOTIFICATION OF THE FILING OF AN ORDER/JUDGMENT ENTRY AND IS NOT A DETERMINATION OF WHETHER THE SAME IS A FINAL APPEALABLE ORDER OF JUDGMENT.

YOU ARE HEREBY NOTIFIED THAT
AN ORDER/JUDGMENT ENTRY HAS BEEN
FILED AND JOURNALIZED IN THE CASE
LISTED BELOW ON March 7, 2013
12AP06-0305, ESTATE OF MARCELLA J ATKINSON vs. OHIO DEPARTMENT OF
JOB AND FAMILY SERVICES

MARY JO HAWKINS
KNOX COUNTY CLERK OF COURTS

BY: 
DEPUTY CLERK
DATED: 3/7/2013

CC: AMY R GOLDSTEIN
THOM L COOPER

IN THE COURT OF COMMON PLEAS
KNOX COUNTY, OHIO

FILED
KNOX COUNTY PLEAS
COURT OF COMMON PLEAS
2013 MAR -7 PM 1:26
MARY JO HENNING
CLERK OF COURTS

ESTATE OF MARCELLA ATKINSON

APPELLANT,

-vs-

OHIO DEPT. OF JOB AND FAMILY SERVICES

APPELLEE.

Case No. 12AP06-0305

Judge Otho Eyster

JUDGMENT ENTRY

This matter came before the Court on an administrative appeal, Appellant appealing the January 10, 2012, Administrative Appeal Decision of the Ohio Department of Job and Family Services.

The Court having considered the briefs submitted (with exhibits) and the applicable law finds the decision of the Ohio Department of Job and Family Services approving Medicaid with restricted coverage after a determination that an improper transfer occurred is supported by a preponderance of substantial, reliable, and probative evidence on the whole record. The Court further finds the Department's decision is not unconstitutional, illegal, arbitrary, capricious or unreasonable, and it is

ORDERED the January 10, 2012, Administrative Appeal Decision of the Ohio Department of Job and Family Services is affirmed, and it is

ORDERED further Appellant's request for Oral Hearing is denied. Costs to Appellant.

IT IS SO ORDERED.


Otho Eyster, JUDGE
Close Code 18

cc:
Elizabeth A. Durnell, Esq.
Thom L. Cooper, Esq.
Amy Goldstein, Senior Assistant Attorney General

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

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Appendix D

FILED

SEP 27 2013

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
KNOX COUNTY, OHIO

ESTATE OF MARCELLA ATKINSON :

Plaintiff-Appellant :

-vs- :

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES :

Defendant-Appellee :

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Craig R. Baldwin, J.

Case No. 13CA4

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas, Case No. 12AP06-0305

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

APPEARANCES:

For Plaintiff-Appellant

THOM L. COOPER
ELIZABETH DURNELL
36 West Main Street
Centerburg, OH 43011

For Defendant-Appellee

AMY R. GOLDSTEIN
Health and Human Services Section
30 East Broad Street
26th Floor
Columbus, OH 43215-3400

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Farmer, J.

{¶1} On June 2, 2000, Marcella Atkinson and her husband transferred their home into a revocable trust. Mrs. Atkinson was placed into a long term care facility on April 25, 2011, and a Medicaid application was submitted on June 16, 2011. On August 8, 2011, the home was removed from the revocable trust and placed in Mrs. Atkinson's name. The next day, the home was transferred to Mr. Atkinson.

{¶2} Appellee, Ohio Department of Job and Family Services, determined an improper transfer occurred and approved Medicaid for August 1, 2011 through March 31, 2012 with partial payment due of \$5,566.00 for April 2012.

{¶3} Mrs. Atkinson requested a state hearing. By decision dated November 30, 2011, the state hearing upheld the determination. Mrs. Atkinson appealed the decision. By decision dated January 10, 2012, the administrative appeal affirmed the decision.

{¶4} Subsequent to the administrative appeal decision, Mrs. Atkinson passed away. On June 8, 2012, appellant, the Estate of Marcella Atkinson, appealed the decision to the Court of Common Pleas. By judgment entry filed March 7, 2013, the trial court affirmed the administrative appeal decision.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE AGENCY'S FINDING IN THE STATE HEARING DECISION DATED NOVEMBER 30, 2011 AND ADMINISTRATIVE APPEAL DECISION DATED JANUARY 10, 2012 OF AN IMPROPER TRANSFER IS NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE. TWO DISTINCT TRANSFERS

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OCCURRED, FIRST FROM A REVOCABLE TRUST TO THE INSTITUTIONALIZED INDIVIDUAL, AND A SECOND TRANSFER FROM THE INSTITUTIONALIZED INDIVIDUAL TO THE COMMUNITY SPOUSE. BOTH TRANSFERS ARE SPECIFICALLY PERMITTED IN THE LAW."

II

{¶7} "APPELLEE'S JANUARY 10, 2012 ADMINISTRATIVE APPEAL DECISION AND NOVEMBER 30, 2011 STATE HEARING DECISION ARE NOT IN ACCORDANCE WITH LAW AS THE LAW SPECIFICALLY ALLOWS FOR TRANSFERS OF TRUST ASSETS TO AN APPLICANT FOR MEDICAID UNDER OHIO ADM. CODE 5101:1-39-27.1, AND SPECIFICALLY ALLOWS FOR A MEDICAID APPLICANT TO TRANSFER THE HOME TO THE COMMUNITY SPOUSE UNDER OHIO ADM. CODE 5101.1-39-07(E)."

III

{¶8} "APPELLEE'S JANUARY 10, 2012 ADMINISTRATIVE APPEAL DECISION AND NOVEMBER 30, 2011 STATE HEARING DECISION ARE NOT IN ACCORDANCE WITH LAW AND UNSUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AS THE AGENCY POINTS TO NO CODE PROVISION WHICH PROHIBITS THE INCREASING OF THE CSRA."

IV

{¶9} "APPELLEE'S JANUARY 10, 2012 ADMINISTRATIVE APPEAL DECISION AND NOVEMBER 30, 2011 STATE HEARING DECISION ARE NOT IN ACCORDANCE WITH LAW AS THEY VIOLATE THE SPOUSAL IMPOVERISHMENT SECTIONS OF THE FEDERAL MEDICAID STATUTE."

I, II, III, IV

{¶10} Appellant claims the trial court erred in determining that appellee's administrative decision was supported by reliable, probative, and substantial evidence and was not contrary to law. We disagree.

{¶11} The applicable standard of review in an appeal from an administrative agency is governed by R.C. 119.12 which states the following:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

{¶12} In *Our Place, Inc. v. Ohio Liquor Control Commission*, 63 Ohio St.3d 570, 571 (1992), the Supreme Court of Ohio explained the following:

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. (Footnotes omitted.)

{¶13} As stated by this court in *Fire v. Ohio Department of Job & Family Services*, 163 Ohio App.3d 392, 2005-Ohio-5214, ¶ 19 (5th Dist.):

"The appellate court's review is even more limited than that of the trial court. While it is incumbent on the trial court to examine the evidence, this is not a function of the appellate court." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. On an appeal pursuant to R.C. 119.12, an appellate court shall review evidentiary issues to determine whether the common pleas court abused its discretion in determining whether the agency decision was supported by reliable, probative, and substantial evidence. *Id.* Issues of law, however, are reviewed de novo. *Sohi v. Ohio State Dental Bd.* (1998), 130 Ohio App.3d 414, 421, 720 N.E.2d 187.

{¶14} In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶15} Without opinion, the trial court found appellee's decision was correct in that an improper transfer occurred with the Quit Claim Deed of the home by Mrs.

Atkinson, the institutionalized spouse, to Mr. Atkinson, the community spouse. See, Judgment Entry filed March 7, 2013.

{¶16} The January 10, 2012 administrative appeal decision affirming the state hearing decision found the following:

In your case, you and your spouse transferred ownership of your home into a revocable trust on June 2, 2000. You were later admitted to a long term care facility on April 25, 2011 and a Medicaid application was submitted on your behalf on June 16, 2011. On August 8, 2011, the property was removed from the revocable family trust and placed in your name by Quit Claim Deed. Then, on August 9, 2011, you transferred the home into your spouse's name by Quit Claim Deed.

This series of events shows that while your home was in a trust, the deed to the home was not in your name or your spouse's name, and it was not exempt. Once the house was placed back into the Community Spouse's name, the home was exempt as a resource. Further, the resource assessment correctly included the home as an available resource because, at the time, the property was held in the revocable trust. Accordingly, the Agency correctly determined that the transfer of the home from the trust to the Community Spouse was improper and triggered the improper transfer period. As such, the hearing decision is correct.

{¶17} The undisputed facts are set forth in the November 30, 2011 state hearing decision and are undisputed for this appeal:

FINDINGS OF FACT

1. On 6/2/2000, the Appellant and her spouse transferred ownership of their home (which they were residing in) into a revocable trust.

2. On 4/25/2011, the Appellant was admitted to a long term care facility.

3. On 6/16/2011 an application was submitted for Medicaid for the appellant.

4. On 8/8/2011, by Quit Claim Deed, the homestead property [was] removed from the revocable family trust and placed in the Appellant's name and then on 8/9/2011, the Appellant, by Quit Claim Deed, transferred the home into her spouses (sic) name.

5. Agency considered an improper transfer occurred and the agency then approved Medicaid with a restricted period of coverage for the Medicaid effective 8/1/2011 through 3/31/2012 with partial payment due of \$5566.00 for 4/2012.

6. Agency mailed notice of determination on 9/29/2011.

{¶18} In its appellate brief at vii, appellant poses four issues for our review:

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1. Is the transfer of the home from a revocable trust to the Institutionalized Spouse an improper transfer under Ohio Adm. Code 5101:1-39-07 and Ohio Adm. Code 5101:1-39-27.1?

2. Is the transfer of the home from the Institutionalized Spouse to the Community Spouse an improper transfer under Ohio Adm. Code 5101:1-39-07?

3. Does the Ohio Adm. Code prohibit actions, which increase the value of the Community Spouse Resource Allowance?

4. Does the Agency's decision violate the spousal impoverishment provisions of 42 U.S.C. §1396?

{¶19} In considering the assignments of error, we will address these issues set forth by appellant.

{¶20} Appellant argues the transfer of the home from the revocable trust to the institutionalized spouse was not an improper transfer. As noted by the administrative appeal decision, the revocable trust was a Category two self-settled trust. See, Ohio Adm.Code 5101:1-39-27.1(C)(2). As a result, the "corpus of the trust is considered a resource available to the individual" and "[p]ayments from the trust to, or for the benefit of, the individual are considered unearned income." See, Ohio Adm.Code 5101:1-39-27.1(C)(2)(b)(i) and (ii). Payments from a trust include any disbursement from the principal or income of the trust, including "actual cash, non-cash or property disbursements, or the right to use and occupy real property." See, Ohio Adm.Code 5101:1-39-27.1(B)(8).

An "individual" is defined as "an applicant for or recipient of a medical assistance program." See, Ohio Adm.Code 5101:1-39-27.1(B)(5).

{¶21} Therefore, the August 8, 2011 Quit Claim Deed from the trust to the institutionalized spouse was unearned income to that spouse. As such, it could have remained as an asset of the institutionalized spouse to be used for her benefit and would have been a resource available to her.

{¶22} In resolving the first issue, we find the transfer from the revocable trust to the institutional spouse alone was not an improper transfer.

{¶23} Appellant also argues the transfer from the institutionalized spouse to the community spouse was exempt and not an improper transfer. An improper transfer is defined in Ohio Adm.Code 5101:1-39-07(B)(5) as follows:

An "improper transfer" means a transfer on or any time after the look-back date, as defined in paragraph (B)(9) of this rule, of a legal or equitable interest in a resource for less than fair market value for the purpose of qualifying for medicaid, a greater amount of medicaid, or for the purpose of avoiding the utilization of the resource to meet medical needs or other living expenses.

{¶24} A transfer is defined in Ohio Adm.Code 5101:1-39-07(B)(14) as, "any action or failure to act which has the effect of changing an ownership interest of an asset from the individual to another person, or of preventing an ownership interest the individual would otherwise have enjoyed. This includes any direct or indirect method of

disposing of an interest in property." Improper transfers are defined in Ohio Adm.Code 5101:1-39-07(C) as follows:

(C) The following types of transfers are presumed to be improper transfers for less than fair market value:

(1) Any transfer that reduces the individual's resources and brings the value of their remaining resources within the resource limitation;

(2) Any transfer that has the effect of safeguarding future eligibility by divesting the individual of property that could otherwise be sold and the proceeds then used to pay for support and medical care for the individual;

(3) Any transfer of income-producing real property; or

(4) Any transfer by an individual of an exempt home as defined in Chapter 5101:1-39 of the Administrative Code, whether prior to or after the Medicaid application date.

(5) For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the consideration received for the asset must have a monetary value.

(6) A transfer for love and consideration is not considered a transfer for fair market value. Clear and convincing evidence is required to rebut the presumption that it is an improper transfer.

{¶25} Appellant argues, without addressing the "unearned income" designation, the transfer was of the residential home and therefore was exempt from the

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presumption of improper transfer. However, for the home to be exempt, the deed must be in the individual's name or spouse's name. See, Ohio Adm.Code 5101:1-39-31(C)(1)(b). At the baseline date, the home was in neither the institutionalized spouse's nor the community spouse's name. The homestead exemption does not qualify for either the August 8 or 9, 2011 transfers.

{¶26} If the home had remained in the institutionalized spouse's name after the August 8, 2011 transfer, it would not have been an improper transfer because it was the home of the community spouse provided that the transfer was for his sole benefit. See, Ohio Adm.Code 5101:1-39-07(E)(1)(a).

{¶27} The home was included as a resource because it was in the revocable trust. Once the August 9, 2011 transfer occurred, the home was removed from resources available to the institutionalized spouse, and the community spouse received a larger CSRA (community spouse resource allowance) and more of the couple's assets. Arguably, if the home had always been in the institutionalized spouse's name and was the couple's residence, the transfer would not have been improper; that is, if all of this had been accomplished prior to the baseline date and not some two months later.

{¶28} Pursuant to Ohio Adm.Code 5101:1-39-07(B)(10)(d) and (14), all transfers "after the baseline date must be examined to determine if they are improper and subject to a restricted Medicaid coverage period" and whether they included "any direct or indirect method of disposing of an interest in property."

{¶29} The CSRA was determined at a one-time date, the time of institutionalizing on April 25, 2011. See, Ohio Adm.Code 5101:1-39-36(A). Any transfer

that causes an increased CSRA for the community spouse is governed by Ohio Adm.Code 5101:1-39-07(G)(4):

(G) Any transfer between spouses in order to comply with the medicaid community spouse resource allowance (CSRA) computed pursuant to Chapter 5101:1-39 and Chapter 5101:6-7 of the Administrative Code may not be applied inconsistently with the rules setting limits on CSRA or the minimum monthly maintenance needs allowance (MMMNA).

(4) Transfer in excess allowed by this rule must be presumed an improper transfer.

{¶30} By transferring the home after having been given the benefit of it in the computation of CSRA, appellant violated Ohio Adm.Code 5101:1-39-07(C)(2) cited above.

{¶31} We conclude the August 9, 2011 transfer was improper and Ohio Adm.Code 5101:1-39-07(C)(2) prohibits the increase of the CSRA.

{¶32} Lastly, appellant argues appellee's decision and reasoning violated 42 U.S.C. § 1396. Pursuant to the federal cases addressing the spousal impoverishment provision, we find no violation by appellee in this case. See, *Hughes v. Colbert*, 872 F. Supp.2d 612, 622 (N.D.Ohio 2012), wherein the United States District Court for the Northern District of Ohio held:

In Count II of the Complaint (*ECF No. 1*), Plaintiffs claim that 42 U.S.C. § 1396p(c)(2)(B)(i) allows institutionalized spouses to transfer unlimited assets to their community spouse without the transaction being considered an improper transfer. *ECF No. 1 at ¶ 37*. This Court, however, has already rejected that argument in a case involving an inheritance. *Burkholder*, 2010 WL 522843. The plaintiff in *Burkholder* argued that 42 U.S.C. § 1396p(c)(2)(B)(i) allowed for unlimited transfers. After examining the statutory language, legislative history and relevant case law, the court held that while § 1396p(c)(2)(B)(i) authorizes, generally, transfers to spouses, 42 U.S.C. § 1396r-5(f)(1) precludes the transfer of assets to the community spouse beyond the CSRA. Section 1396r-5's supersession clause, § 1396r-5(a)(1), requires resolution of any inconsistency between it and § 1396p(c)(2)(B) in the former clause's favor. *Id.* at *2. The Court makes a similar finding in the case at bar.

{¶33} Upon review, we find the trial court did not err in affirming the administrative appeal decision.

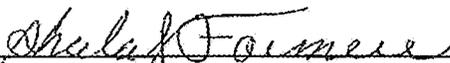
{¶34} Assignments of Error I, II, III and IV are denied.

{¶35} The judgment of the Court of Common Pleas of Knox County, Ohio is hereby affirmed.

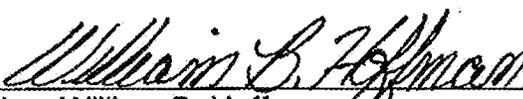
By Farmer, J.

Hoffman, P.J. and

Baldwin, J. concur.



Hon. Sheila G. Farmer



Hon. William B. Hoffman



Hon. Craig R. Baldwin

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IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED

SEP 27 2013

ESTATE OF MARCELLA ATKINSON

Plaintiff-Appellant

-vs-

OHIO DEPARTMENT OF
JOB AND FAMILY SERVICES

Defendant-Appellee

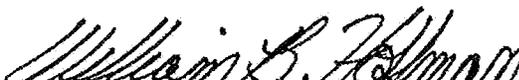
COURT OF APPEALS
KNOX COUNTY, OHIO

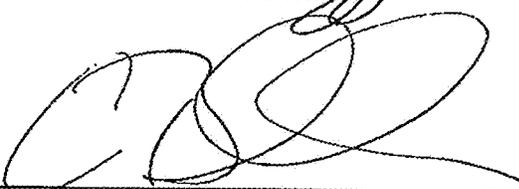
JUDGMENT ENTRY

CASE NO. 13CA4

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio is affirmed. Costs to appellant.


Hon. Sheila G. Farmer


Hon. William B. Hoffman


Hon. Craig R. Baldwin