ORIGINAL

In the

Supreme Court of Ohio

ESTATE OF MARCELLA ATKINSON,	:	Case No. 2013-1773
Appellant,	:	On Appeal from the Knox County Court of Appeals, Fifth Appellate District
v.	:	
OHIO DEPARTMENT OF JOB AND FAMILY SERVICES,	:	Court of Appeals Case No. 13CA4
Appellee.	:	

APPELLEE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES' MEMORANDUM IN RESPONSE TO JURISDICTIONAL MEMORANDUM

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INTRODUCTION

Appellee Ohio Department of Job and Family Services ("ODJFS") agrees that the Court should accept jurisdiction over one issue presented in this case concerning the scope of a federal Medicaid-eligibility law addressing transfers of assets from a spouse in nursing-home care (the "institutionalized spouse") to the other spouse (the "community spouse"). Specifically, the Court should address *when* a certain statutory limit on transfers—i.e., any transfer above an amount called the Community Spouse Resource Allowance ("CSRA")—begins to apply: upon *institutionalization*, as the court below held, or only later when Medicaid *eligibility is granted*. The court below was right, but the U.S. Court of Appeals for the Sixth Circuit has decided the same issue differently, so this Court should address that conflict.

The other, narrower Medicaid-eligibility issue presented in this case—regarding the indirect transfer of a couple's house from a trust to the community spouse—does not require review, but ODJFS also does not object to review of that issue. The appeals court resolved the issue properly, as has another Ohio appellate district, so no conflict exists. But because the issue has now arisen again, and because the Court should hear this case to address the first, broader issue, the Court could address the narrower issue as an ancillary matter, for judicial efficiency.

Both issues arise within a complex web of state and federal laws governing Medicaid eligibility in the common scenario of a married couple where one spouse seeks Medicaid coverage for long-term institutional care. Medicaid provides health care to the needy, and the law tries to balance competing concerns in defining "needy" for such married couples. Before 1988, couples were treated as one economic unit, so they were often required to deplete virtually all resources before qualifying for nursing-home care for the institutionalized spouse, leaving the community spouse without sufficient resources to maintain the household. Congress enacted the Medicare Catastrophic Care Act (MCCA) to "protect community spouses from 'pauperization'

while preventing financially secure couples from obtaining Medicaid assistance." *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 480 (2002); *see* 42 U.S.C. 1396r-5. The MCCA does that by allocating the couple's resources into equal 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.* That allocation allows the community spouse to set aside an amount called the "Community Spouse Resource Allowance" (CSRA), up to an inflation-adjusted cap. 42 U.S.C. 1396r-5(f)(2). The MCCA also provides that, for both the initial eligibility determination and for ongoing compliance, certain forms of income or assets received by the community spouse are exempt from the CSRA cap, and thus need not be applied to the institutionalized spouse's care, while other resources are "countable."

In addition to the "countable resource" rules, the MCCA separately provides—and this is the part at issue here—that an institutionalized spouse may transfer resources to a community spouse, but only up to a "CSRA Transfer Cap" or "CSRA Cap." *See* 42 U.S.C. 1396r-5(f)(1). Transfers exceeding the cap are improper transfers, triggering a penalty of "restricted coverage," which means that an individual is immediately eligible for some Medicaid services, such as doctor visits, but is temporarily ineligible for other services, such as nursing-home care, until the amount of the improper transfer is exhausted for that care.

Here, ODJFS found, and the appeals court affirmed, that Marcella Atkinson, an institutionalized spouse, and her husband engaged in an improper transfer when they took their family home, which had been held in a trust for many years, and transferred it first to Mrs. Atkinson, and then to Mr. Atkinson. *See Estate of Atkinson v. Ohio Dep't of Job & Family Servs.*, 2013-Ohio-4352 ¶¶ 1-2, 31 (5th Dist.) ("App. Op."). They effected both transfers soon after Mrs. Atkinson entered a nursing home and applied for Medicaid, but before she was

declared eligible. Mrs. Atkinson (through her successor, her estate) claims that the transfer did not violate the CSRA Cap because, she says, the Cap does not apply until eligibility is granted. The Sixth Circuit recently adopted this view, *see Hughes v. McCarthy*, 734 F.3d 473, 475 (6th Cir. 2013), but *Hughes* does not bind this Court. Instead, it can and should decide this federal question for itself. *State v. Brandt*, 93 Ohio St. 3d 419, 424 (2001). *Hughes* improperly allows unlimited transfers by an institutionalized spouse, defeating the purpose of establishing a CSRA as of the institutionalization date, and also conflicts with the statutory scheme in several ways.

Separately, Atkinson says that the house transfer here was allowed under a provision addressing house transfers, but that provision does not immunize this particular transaction because the Atkinson house was a trust asset, not a house that Mrs. Atkinson owned directly. The maneuver here would otherwise allow the Atkinsons to have it both ways. Keeping the house in a trust until after their CSRA was established drove up the CSRA amount, because if the house had been directly owned, it would not have counted as a resource for purposes of determining the CSRA, which would have reduced Mr. Atkinson's total CSRA. Meanwhile, transferring the house after the CSRA snapshot, but before an eligibility determination, without penalty, would allow Mr. Atkinson to essentially receive all of the couple's assets, by receiving the house itself *and* receiving other assets up to a CSRA that already reflects the house's value.

In sum, the Court should address the CSRA issue, and it need not, but could, address the house-transfer issue.

STATEMENT OF THE CASE AND FACTS

A. Medicaid applicants and their spouses can retain only limited resources to be eligible for Medicaid, and asset-transfer rules reinforce the limits.

When a Medicaid applicant is institutionalized and has a spouse living in the community, a county agency, which initially determines Medicaid eligibility, 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;[1] 42 U.S.C. 1396r-5(c); *see 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 (commonly referred to as the "snapshot date"), 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-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 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. If the CSRA falls outside the State's minimum or maximum CSRA, the CSRA is adjusted to that minimum or maximum. An applicant may seek a "fair hearing" to have the CSRA amount increased. *See* Ohio Adm. Code 5101:1-39-36.1(C)(6); 42 U.S.C. 1396r-5(e).

The CSRA is designed to balance dual purposes: to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Blumer*, 534 U.S. at 480. It is meant to allow a community spouse to retain a modest amount of resources and not force the spouse to reach the same level of poverty that an institutionalized spouse necessarily reaches in becoming "poor enough" for Medicaid, while not allowing a couple to shelter "too much" in resources in the community spouse's name. *Id.* at 479-480.

The CSRA provisions seek to achieve this goal by essentially treating a couple jointly, then separately, in two stages. First, the couple's resources are considered together, regardless of

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[1] Ohio's regulations were re-numbered on October 1, 2013, changing sections numbered 5101:1-39-xx to 5160:1-3-xx, with the final "xx" numbers and letters staying the same. This brief uses the old numbers, for ease of comparison to the decision below and other decisions.

whose name they are held in, and each spouse's "spousal share" is half of the joint resources. Second, after that 50-50 split, the community spouse's income and resources are not considered available to the institutionalized spouse when eligibility is determined. *Id.* at 480-481. Because this approach is unique to couples with one institutionalized spouse, Congress recognized that conflicts might arise between the CSRA provisions and other Medicaid-eligibility provisions. To resolve this conflict, it expressly provided that the CSRA provisions supersede all inconsistent Medicaid provisions:

> (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 USC 1396a(a)(17) and (f)]) which is inconsistent with them.

42 U.S.C. 1396r-5(a)(1) (emphasis added).

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 to a non-spousal third party during the sixty months before the first date on which the applicant is both institutionalized and has applied for Medicaid, the county examines the transfers to decide if 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). The sixty-month period is the "look-back period"; the date starting it is the "baseline date," Ohio Adm. Code 5101:1-39-07(B)(3). Separately, as between spouses, the CSRA Cap governs all transfers of resources between them. The dispute here concerns whether this cap begins after the "snapshot date" (the first date of

institutionalization), according to ODJFS, or after eligibility is established, according to Atkinson. 42 U.S.C. 1396r-5(c)(1)(A).

If an improper transfer has occurred, 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. This 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), the "Ohio Transfer Rule," 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 have been transferred without approval after a CSRA hearing, the transfer is presumed improper. *See* Ohio Adm. Code 5101:1-39-07(G)(4). Ohio Adm. Code 5101:1-39-07(C)(2) provides that "any transfer that has the effect of safeguarding future

eligibility by divesting the individual of property that could otherwise be sold and the proceeds used to pay for support and medical care for the individual" is presumed to be improper.

The provisions in Ohio Adm. Code 5101:1-39-07(G) and (C) 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 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).

B. Mrs. Atkinson's Medicaid coverage was restricted because ODJFS found the house transfer to Mr. Atkinson to be above the CSRA Transfer Cap and not authorized by the house-transfer rules.

The Atkinsons effected a two-step house transfer that ODJFS found improper. Over a decade earlier, on June 2, 2000, Marcella and Raymond Atkinson had transferred their house out of their individual names and into a revocable living trust (the "Trust"). App. Op. ¶ 17. On April 25, 2011, Mrs. Atkinson moved into a nursing home or "long term care facility." *Id.* Mrs. Atkinson applied for Medicaid on June 16, 2011. *Id.* On August 8, 2011, the Trust, through Mrs. Atkinson and her husband as trustees, transferred the house (then valued at $53,750) by quitclaim deed from the Trust to Mrs. Atkinson. *Id.* The next day, August 9, 2011, Mrs. Atkinson transferred the house by quitclaim deed to her husband. *Id.*

The Atkinsons' combined resources were $98,320 on April 25, 2011, the first date of Mrs. Atkinson's institutionalization. Resource Assessment Worksheet, Administrative Appeal Record ("AAR") at 16. The Knox County Department of Job and Family Services (the "County") thus calculated Mr. Atkinson's CSRA as $49,160, or one-half of the joint resources. *Id.*, AAR at 18-19.

On September 28, 2011, the County issued a Medicaid Approval Notice with Restricted Medicaid Coverage Period. AAR at 13. The County found that the two-step house transfer was an improper transfer. Mrs. Atkinson was therefore ineligible for Medicaid nursing-home vendor payments for the period August 1, 2011, through March 31, 2012, with a partial-month penalty of $5,566 in April. App. Op. ¶ 17; *see* Ohio Adm. Code 5101:1-39-07(B)(12). That period was based upon the amount of the improper transfer, $53,750, or the value of the asset transferred.

The Atkinsons did not seek a hearing to increase the CSRA amount. Instead, Mrs. Atkinson requested an administrative hearing (called a "state hearing") to challenge the imposition of the period of restricted coverage. ODJFS's State Hearing Decision upheld the County's decision. App. Op. ¶ 3. Mrs. Atkinson appealed 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. *Id.* Mrs. Atkinson then appealed to common pleas court and to the appeals court, under R.C. 119.12 and 5101.35. *Id.* ¶¶ 4-5.[2]

C. Both the common pleas court and the appeals court upheld the agency decision.

The Knox County Court of Common Pleas and the Fifth District Court of Appeals both affirmed ODJFS's decision. App. Op. ¶¶ 4, 35. The appeals court relied on the federal district court decision in *Hughes*, which had agreed with ODJFS that the CSRA Transfer Cap applied upon institutionalization. *Id.* ¶ 32 (citing *Hughes v. Colbert,* 872 F.Supp.2d 612 (N.D. Ohio 2012)). The court concluded that the Atkinsons' transfer of the house from the Trust to Mrs. Atkinson was not improper alone, App. Op. ¶ 22, but found the next-day transfer of the house

[2] Mrs. Atkinson died on September 13, 2011, about five months before her appeal to common pleas court was filed. That action was dismissed and the Estate of Marcella Atkinson filed a new appeal. App. Op. ¶ 4. That second appeal is now this case, with the Estate as Appellant, but for simplicity, ODJFS refers to the party as Mrs. Atkinson or the Atkinsons.

from Mrs. Atkinson to her husband *was* improper because it transferred assets to Mr. Atkinson above his CSRA, *id.* ¶ 31. It also found Ohio Adm. Code 5101:1-39-07(C)(2) was violated because the house (which had been a trust asset) was not used for Mrs. Atkinson's benefit and should not have been treated as an exempt resource under Ohio Adm. Code 5101:1-39-31 because it had been held in trust. *Id.* ¶¶ 30-31.

THIS CASE PRESENTS A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

A. Review is warranted to address the conflict between federal and state courts on whether the CSRA Transfer Cap applies from the "snapshot" date after institutionalization, or whether unlimited transfers are allowed until Medicaid eligibility has been established.

The CSRA Transfer Cap issue warrants review to resolve the conflict among state and federal courts. Before the Sixth Circuit decided *Hughes*, several Ohio state and federal courts, including the district court's decision in *Hughes,* recognized that the CSRA Transfer Cap limits interspousal transfers as of the snapshot date, even if a Medicaid application has not yet been granted. *See Williams v. Ohio Dep't of Job and Family Servs.*, 2012-Ohio-4659 ¶ 43 (3rd Dist.) (federal CSRA provision prohibiting the transfer of assets to the community spouse applies and is consistent with ODJFS' interpretation of Ohio Adm. Code 5101:1-39-07(G)(2), which also precludes transfers of the couple's resources to the community spouse above the CSRA); *McNamara v. Ohio Dept. of Human Servs.*, 139 Ohio App. 3d 551, 558 (2nd Dist. 2000) (interpreting CSRA provisions to allow an unlimited transfer to or for community spouse will render CSRA limit "a nullity"); *Hughes,* 872 F.Supp.2d 612.[3] In addition, Ohio's Transfer Rule

[3] The above decisions directly involve the issue presented here, and sufficiently show a conflict. In addition, other cases follow the above cases where bound, or address the issue indirectly, further showing the need for review. For example, a federal district court adopted ODJFS's view in general, albeit in a case involving a post-eligibility transfer. *See, e.g., Burkholder v. Lumpkin,* 2010 WL 522843, *7 (N.D. Ohio Feb. 9, 2010). After Ohio's Third District decided *Williams,* two common pleas court in that district have followed it, *Bachelder v. Ohio Department of Job and Family Servs.,* Marion C.P. No. 12CV0102 (Jan. 24, 2013), and *Smith v. Ohio Department of*

supports ODJFS's view, so, as Atkinson confirms, her view of the federal law means that the Ohio regulation "should be struck down under the Supremacy Clause." Jur. Mem. at 11.

While different cases involve different types of transfers, whether assets to or from trusts (as here) or annuity purchases (as in *Hughes*), the common issue is the *timing issue*: whether a couple can continue to transfer their combined resources, even if above the CSRA Transfer Cap, after the snapshot date (i.e., the date of institutionalization) has passed but before eligibility has been established. Atkinson here squarely claims that the "restriction in federal law on transfers from one spouse to another" is, in her view, one that applies only "after the date of eligibility," Jur. Mem. at 10, and she invokes *Hughes* in support, *id.* at 11-12. The decision below squarely rejected that view, applying the limit from ODJFS's starting point. App. Op. ¶ 32.

The split between the decision below and *Hughes* is perhaps best confirmed by the fact that the decision below relied upon the earlier federal district court decision in *Hughes*—the decision that the Sixth Circuit reversed. *See id.* That split therefore requires this Court's review, so that ODJFS and Ohio's state courts know which view to follow.

As explained below in the merits discussion, ODJFS urges that the Sixth Circuit was wrong for several reasons, including that the Sixth Circuit did not truly address its real argument, but misperceived the argument and rejected a strawman. But ODJFS acknowledge that *Hughes* creates concerns for Ohio's state courts in addressing this recurring situation, so it agrees with Atkinson that review is warranted.

Job and Family Servs,. Logan C.P. No. 11 10 0428 (October 22, 2012). The Third District followed *Williams* in affirming *Smith,* but did so in an unpublished, non-citable summary order, not available online, and this Court declined review in Case No. 13-1143. In addition, two appeals courts have said they rejected ODJFS's application of the CSRA Transfer Cap, but they did so in decisions that improperly conflated the transfer rules with the separate rules governing countable resources. See *Rorick v. Ohio Dep't of Job and Family Servs.*, 2010-Ohio-5571 ¶ 25 (1st Dist.); *Vieth v. Ohio Dep't of Job and Family Servs.*, 2009-Ohio-3748 ¶ 46 (10th Dist.).

B. The house-from-trust transfer may not independently warrant review, but ODJFS does not object to review of the issue, in light of its now-recurrence and the need to address the first issue.

ODJFS does not object to consideration of the issue that Atkinson puts first, regarding the two-step transfer of the Atkinsons' house from a trust ultimately to Mr. Atkinson, but it notes that consideration of the issue is not needed here. Equally strong reasons exist to deny jurisdiction over this issue until another day, if review is ever needed, but the case is close enough that ODJFS expresses no support or objection.

On one hand, the issue has recurred a few times recently. ODJFS notes that it opposed review in *Williams,* when only one appeals court had addressed the issue, Case No. 12-2178, and again in *Smith,* as that was not only from the same district, but involved a non-public non-precedential order, Case No. 13-1143. This third time might seem to suggest that guidance would be useful, as the issue could recur further in appeals courts, and, indeed, at least one other case pending in a common pleas court within the Fifth District.

On the other hand, recurrence alone is no need for review, when the courts below are consistently getting it right, in ODJFS's view. As explained further in the merits section below, the house issue is adequately covered by the rules, and it would be absurd for couples to be able to artificially inflate their CSRA amounts by keeping a house in a trust, and then pull it back out without penalty when that purpose is achieved. *Williams* demonstrates that point even more sharply, as the couple there placed their home in a trust just weeks before institutionalization and application, pulling it back out just days later. 2012-Ohio-4659 ¶¶ 3, 6.

Here, Atkinson's claim revolves solely on her argument that the house was transferred from the trust to Mr. Atkinson, the community spouse, in two "distinct transfers," so that immunizes each separate transaction, in her view. Jur. Mem. at 4. But, as the appeals court

properly noted, the relevant rule bars "any direct or indirect method of disposing of an interest in property." App. Op. ¶ 24 (citing Ohio Adm. Code 5101:1-39-07(C)).

Although the issue might not be worth review on its own, review might be efficient here, given the need to review the CSRA issue, but that, too, is a close call. On one hand, the court could perhaps resolve both issues at once. On the other hand, the CSRA issue is a complex one, and the case might better proceed if focused on that issue, and the house issue can be left to another case, if review of the lower-court consensus is ever needed.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

Appellee ODJFS's Proposition of Law No. 1 (responding to Atkinson's Proposition 2):

> *Under federal and state Medicaid law, the Community Spouse Resource Allowance amount established under 42 U.S.C. 1396r-5 applies to all interspousal transfers after the date of institutionalization, even if Medicaid eligibility has not yet been determined, and transfers above the CSRA Transfer Cap after that date are "improper transfers."*

The Fifth District was right when it followed the district court's decision in *Hughes* and applied the CSRA Cap to the house transfer here, and Atkinson's opposing view is wrong.

Atkinson is mistaken in saying that the transfer was not improper simply because it occurred before she was determined to be eligible for Medicaid; she is wrong in saying that the CSRA Transfer Cap does not apply until eligibility. The statute's plain language does not exempt pre-eligibility transfers, *see* 42 U.S.C. 1396r-5(f)(1), and, as Atkinson says, the Ohio rule does not either, Jur. Mem. at 11. Nor would it be sensible to read such an exception into the statute, as doing so would render the CSRA Cap virtually meaningless. Medicaid applicants could simply transfer unlimited amounts of resources to their spouses, as long as they did so before eligibility was determined—even, as Atkinson did here, after both institutionalization and after applying for Medicaid. That contradicts the core idea of allowing community spouses to retain some resources, but not too much—as Atkinson's bright-line view would allow *unlimited*

transfers in that last-minute context. This case is a textbook example of how it undercuts the core premise of the CSRA. The Atkinsons' view would allow Mr. Atkinson to receive *all* of the Atkinsons' combined assets ($49,160 CSRA *plus* the $53,750 house), as opposed to a half-share ($49,160) of the assets owned ($98,320) on the snapshot date.

The Sixth Circuit's *Hughes* decision was also wrong, but notably, the *Hughes* court never truly grappled with or rejected ODJFS's view, but instead misapprehended its argument and rejected a view it never advanced. True, the court said that the CSRA Cap applies only after eligibility is established, as Atkinson urges here. *Hughes,* 734 F.3d at 475. But it did not compare that view to ODJFS's view that the limit starts to apply ***only at institutionalization.***

Instead, the Sixth Circuit, in discussing "pre-eligibility" application of the CSRA Cap, took that to mean applying the Cap for the entire five-year look-back period that is invoked in other parts of the scheme for other purposes, *see* 42 U.S.C. 1396p. *Id.* at 480. The Court reasoned that applying the CSRA Cap over that period would render "superfluous" several parts of that latter statute, 42 U.S.C. 1396p, as that statute immunizes several types of transfers from being improper. *Id.* (citing *Morris v. Okla. Dept. of Human Servs.*, 685 F.3d 925 (10th Cir. 2012) (taking same approach when party did advance the full look-back period as applicable)). But in ODJFS's view, that latter statute applies to immunize those transfers over the five-year look-back period up until the institutionalization date, so that statute is not superfluous if, as here (and as typical), the institutionalization date precedes eligibility by much less than five years, such as the three to four months here. And to the extent the periods overlap, the CSRA statute's supersession clause confirms that the CSRA provision trumps others. *See* 42 U.S. 1396r-5(a)(1). The *Hughes* court further confirmed that it addressed the look-back strawman when it cited an amendment that Congress never enacted, which would have applied the CSRA to the entire look-

back period. *Hughes,* 734 F.3d at 481. The court said that the rejected proposed amendment would have accomplished the "very construction" of the law that ODJFS supports, *id.,* but that is simply not so. ODJFS urges the modest, but critical, coverage of the CSRA from the institutionalization date, not for the entire five-year look-back period.

Moreover, the *Hughes* court failed entirely to address several arguments ODJFS raised that were tied to the institutionalization date. For example, it makes no sense to take a "snapshot" as of institutionalization, which the law plainly provides, if that snapshot never governs anything. And it is odd to allow an entire hearing process to increase the CSRA amount for good cause after that initial date, if the amount imposes no restriction and can still be ignored.

In sum, the CSRA Transfer Cap applies from institutionalization, not eligibility.

Appellee ODJFS's Proposition of Law No. 2 (responding to Atkinson'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 Transfer Cap in 42 U.S.C. 1396r-5(f).*

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

Mrs. Atkinson says Ohio Adm. Code 5101:1-39-27.1 (the "Trust Rule") prevents the transfer here from being considered improper, but 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 to Mr. Atkinson falls outside the exception in Ohio Adm. Code 5101:1-39-07 for home transfers between spouses and must be read together with the Trust Rule, which prohibits this transfer.

At the heart of Mrs. Atkinson's argument is the claim that Ohio Adm. Code 5101:1-39-07(E) allows her husband to receive both a CSRA, inflated by the value of the house in trust, *and* to later receive the house once it is transferred out of the trust. That would allow Mr. Atkinson

to receive *all* of the couple's combined resources *without regard to the CSRA Cap.* That is exactly what the federal and state statutory schemes were designed to prevent.

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. Atkinson cannot have it both ways. She wants the home-in-trust to inflate the value of the couple's combined resources, and thus the CSRA. That inflation occurs because the homestead exemption renders a directly-owned home as a non-countable resource, so a home is normally excluded from the resource assessment entirely. Putting it in a trust renders it countable, i.e., increases resources. But Atkinson then seeks the benefit of the homestead exemption to apply to the transfer and after, as if the home had never been transferred into the trust. In other words, a home always in trust throughout the process, or never in trust, would not yield the double benefit that Atkinson seeks. Because the Atkinsons converted their home to a trust asset, it was outside the homestead exemption. ODJFS merely followed suit consistently by treating it as any other trust asset, meaning that the later transfer of a jointly held trust asset into Mr. Atkinson's ownership amounted to an improper transfer of the couple's resources to him. *See Stafford v. Id. Dep't of Health and Welfare*, 145 Idaho 530, 538 (2008) (describing same type of house-and-trust transfer as "a sleight of hand that does not comport with Medicaid law").

CONCLUSION

For these reasons, the Court should accept jurisdiction over the CSRA issue, and ODJFS expresses no view as to review of the house-from-trust transfer issue.

Respectfully submitted,

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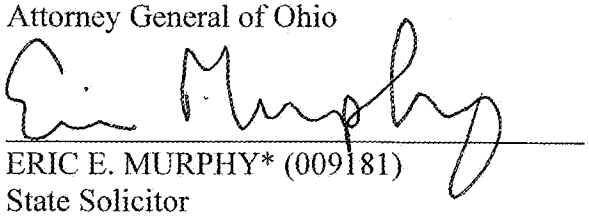

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Response to Jurisdictional Memorandum was served by U.S. mail this 12th day of December, 2013, upon the following counsel:

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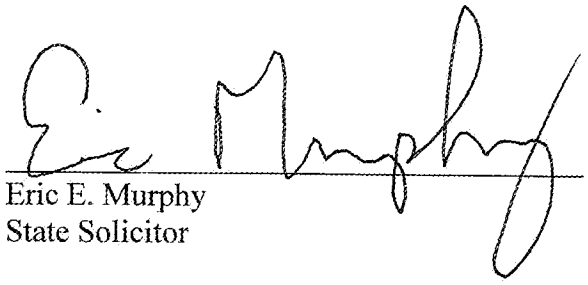

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