

In the
Supreme Court of Ohio

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

**MERITS BRIEF OF
APPELLEE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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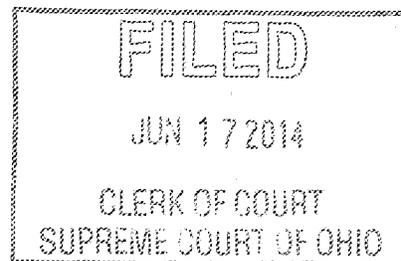


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INTRODUCTION

Marcella and Raymond Atkinson did not follow the rules, so the Ohio Department of Job and Family Services (“ODJFS”) properly followed state and federal law in restricting temporarily Marcella Atkinson’s Medicaid coverage to exclude nursing-home care. The rules at issue concern Medicaid eligibility for nursing-home care when one spouse enters a nursing home (the “institutionalized spouse”) and the other spouse remains at home in the community (the “community spouse”). The rules are designed to ensure that the community spouse retains sufficient, but not excessive, resources. That is because taxpayers are paying for the institutionalized spouse’s care, and they should not do so if the community spouse has significant resources that could be used for that care instead. Here, the Atkinsons shifted resources in a way that sought to shelter more than the amount allowed by state and federal law—an amount called the “Community Spouse Resource Allowance” or “CSRA”—so ODJFS rightly found an “improper transfer” and restricted coverage accordingly.

The Atkinsons’ transfer was improper, as shown below, and—as they notably seem to admit—it violated the CSRA law’s core purpose, by allowing community spouse Mr. Atkinson to keep more than the CSRA while taxpayers paid for his wife’s care. The Atkinsons do not deny that their scheme would have allowed Mr. Atkinson to keep more than the CSRA. And they do not deny—nor could they—that their view would allow couples to shelter *unlimited resources* through the same loophole, so that anyone, no matter how wealthy, could have Medicaid pay for one spouse’s care. The Atkinsons insist that they found a legitimate loophole. They acknowledge that the CSRA is calculated as of the date one spouse enters the nursing home—the “CSRA Snapshot Date”—but say that they may nevertheless transfer unlimited

resources to the community spouse after that date, up to the date that Medicaid eligibility is determined. But they are wrong: Transfers are limited starting on the CSRA Snapshot Date.

The timing issue here is critical to the entire CSRA system, and, indeed, essential to the basic idea of Medicaid—providing medical care only for the truly needy. While Medicaid law is especially complex in the scenario at issue—namely, a married couple where one spouse seeks Medicaid coverage for long-term institutional care—it is rooted in a common-sense goal of balancing competing concerns. The CSRA system is designed 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 law 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 ceiling. 42 U.S.C. § 1396r-5(f)(2). The law also provides that certain forms of income or assets received by the community spouse are exempt apart from the CSRA, 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 law separately provides—and this is at issue here—that an institutionalized spouse may transfer resources to a community spouse, but only up to a “CSRA Transfer 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 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 Transfer Cap because, she says, that Cap does not apply until eligibility is granted.

This is mistaken. The CSRA Transfer Cap applies pre-eligibility, starting from the date of institutionalization—also known as “CSRA snapshot date,” because the CSRA is calculated based on that date—for several reasons. First, no one disputes that the CSRA is calculated based on the couple’s financial picture as of that date, dividing the couple’s resources into two, so it only makes sense for interspousal transfers to be limited from that point. It makes no sense, by contrast, to establish a limit as of that date, but then have the limit not apply, and to have the date become irrelevant. Second, the law establishes a “fair hearing” process for couples to seek an adjustment of their CSRA. But, in the Atkinsons’ view, that process is a waste of time, because no couple would ever invoke it if they could simply “self-help” and transfer funds beyond the CSRA. Third, allowing such transfers violates not only these details, but undeniably eviscerates the entire purpose of the CSRA system. The CSRA sets a specific amount that the community spouse is entitled to retain, and the careful calibration of that amount is rendered meaningless if a loophole allows unlimited transfers to flow after the amount is set, leaving the community

spouse with a higher amount—while taxpayers foot the bill for one spouse’s care no matter how much the other spouse has.

To be sure, the Sixth Circuit recently adopted the Atkinsons’ view, but that court not only got the answer wrong, it also did not even review the right issue. *See Hughes v. McCarthy*, 734 F.3d 473, 475 (6th Cir. 2013). The *Hughes* court did not consider and reject ODJFS’s view that the CSRA Transfer Cap applied *as of the CSRA snapshot date*, or when institutionalization began. Instead, the court mistakenly described the State’s view as applying the CSRA Transfer Cap to a far-earlier date, the beginning of a five-year “look-back period” that applies to distinct non-CSRA improper-transfer rules not at issue. It understandably rejected *that* date, and it adopted the “eligibility determination date,” as, in its mistaken view, the only alternative date. Thus, the *Hughes* Court did not grapple with any of the above points regarding the significance of the CSRA snapshot date. Its reasoning is not persuasive, and this Court should not follow it.

Atkinson also says that the house transfer here was allowed under a provision addressing house transfers, but that provision does not immunize the transaction. First, the CSRA Transfer Cap applies to all transfers, regardless of type, so the fact that a house was transferred does not change the result reached from the first issue. Second, the house-specific rules do not immunize the transfer. 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 CSRA. Meanwhile, transferring the house after the CSRA snapshot, but before eligibility was determined, 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. That is equally wrong.

Consequently, the Court should affirm the appeals court and affirm ODJFS's decision that the Atkinsons performed an improper transfer. Therefore, ODJFS properly restricted Mrs. Atkinson's coverage temporarily.

STATEMENT OF THE CASE AND FACTS

This case applies a complicated legal framework to the Atkinsons' facts, and, although the parties dispute legal issues, much of the legal framework is undisputed. Therefore, ODJFS explains that undisputed framework here first, as background for understanding the Atkinsons' facts and for understanding the legal dispute in the Argument below.

A. Medicaid-eligibility rules for couples with one spouse in a nursing home are designed to provide the non-institutionalized spouse, or "community spouse," with adequate but not excessive resources.

The Medicaid laws that apply are best understood by first reviewing the general rules for Medicaid eligibility, and then looking to the specific rules for couples with one spouse in a nursing home.

1. Medicaid law examines both resources and recent transfers.

"The federal Medicaid program provides funding to States that reimburse needy persons for the cost of medical care." *Blumer*, 534 U.S. at 479. To obtain these funds, a State must submit a state Medicaid plan to the United States. The plan must cover certain categories of individuals and abide by numerous federal laws. *See Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1208 (2012). For Medicaid services like those at issue here, the federal government currently pays Ohio about 63% of the cost, leaving the State on the hook for the

remainder of this coverage. *See* 42 U.S.C. § 1396b; *see also* 77 Fed. Reg. 71420-422 (Nov. 30, 2013).

Under Medicaid, the State’s resource-eligibility determinations generally proceed in two steps. The State initially conducts a “resource” assessment to determine if the Medicaid applicant’s countable resources are low enough to qualify for Medicaid. If they are, the State then reviews the applicant’s recent asset transfers to determine if any transfers were “improper,” thus triggering restricted coverage for nursing-home care. Each of these steps—assessing resources and identifying improper transfers—contains special rules for couples with one spouse in a nursing home (as explained in Part A-2 below).

When considering an applicant’s resource-based eligibility for Medicaid, the State first identifies all of the applicant’s “resources.” *See* Ohio Adm. Code 5101:1-39-05(C)(1)¹; 42 U.S.C. § 1396a(a)(10)(A)(ii). “Resources” are defined as cash and other property that an individual and/or the individual’s spouse has an ownership interest in and has the legal ability to convert to cash and use for support. *See* Ohio Adm. Code 5101:1-39-05(B)(10); 42 U.S.C. § 1396p(h)(5). After accounting for relevant deductions and exemptions (such as an exemption for a home), the applicant’s resources may not exceed Ohio’s \$1500 eligibility limit. If they do, the State denies the application, allowing the applicant to re-file once the applicant’s resources fall below that amount. *See* Ohio Adm. Code 5101:1-39-05(B)(11)(a); 42 U.S.C. § 1396a(a)(10)(A)(ii)(I).

If an applicant is Medicaid-eligible, the State next determines whether the applicant has made any “improper transfers.” Those transfers—while they do not affect overall eligibility—

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, like the *Atkinsons*, uses the old numbers, for ease of comparison to the decision below and other decisions. *See Atkinson Br.* at 2 n.2.

temporarily affect the applicant's ability to obtain nursing-home coverage under Medicaid. If an applicant has transferred any resources during the five years before the date of the application (the so-called "look-back period"), the State must examine the transfers to decide whether they were "improper"—*i.e.*, whether resources were transferred for less than fair market value. *See* Ohio Adm. Code 5101:1-39-07(H); 42 U.S.C. § 1396p(c)(1). If so, the State imposes a period of restricted coverage, during which Medicaid will not pay for nursing-home care. *See* Ohio Adm. Code 5101:1-39-07(I); 42 U.S.C. § 1396p(c)(1)(A). The length of this restricted coverage corresponds to the number of months of nursing-home care that the improperly transferred resources would have paid for. *See* Ohio Adm. Code 5101:1-39-07(J)(2); 42 U.S.C. § 1396p(c)(1)(E).

This improper-transfer prohibition contains additional provisions. The one relevant here, referred to as the "Spousal Exemption," allows unlimited interspousal transfers during the look-back period. Specifically, it provides that "[a]n individual shall not be ineligible for medical assistance" under the improper-transfer rule for any assets that "were 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).

2. Special rules apply when one spouse is institutionalized, centering on the "Community Spouse Resources Allowance" (CSRA) system.

The Medicare Catastrophic Coverage Act of 1988 (MCCA) adopted special "spousal impoverishment" provisions, a "complex set of instructions" codified at 42 U.S.C. § 1396r-5 for the situation where a Medicaid applicant is institutionalized and has a spouse living in the community. *See Blumer*, 534 U.S. at 477. Congress passed the MCCA to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Id.* at 480.

Because the MCCA’s special rules apply in this unique setting, Congress recognized that the provisions could conflict with generally applicable Medicaid laws. To resolve any conflict, Congress provided that the MCCA’s provisions trump. Specifically, the MCCA states that, “[i]n determining the eligibility for medical assistance of an institutionalized spouse,” its “provisions . . . supersede any other provision” of Medicaid law that “is inconsistent with them.” 42 U.S.C. § 1396r-5(a)(1). The Act sets special rules both for determining an institutionalized spouse’s resources and for identifying improper transfers.

Attributing Resources. To determine an institutionalized spouse’s Medicaid eligibility, the State’s resource assessment initially calculates the amount of the couple’s countable resources. *See* Ohio Adm. Code 5101:1-39-36; 42 U.S.C. § 1396r-5(c); *see generally Blumer*, 534 U.S. at 482-84. The assessment is based on the couple’s resources at the time of institutionalization in a nursing home, not at the time of the Medicaid application. *See* Ohio Adm. Code 5101:1-39-36(A); 42 U.S.C. § 1396r-5(c)(1)(A).

After determining the couple’s total countable resources at institutionalization, the State attributes to each spouse a “spousal share”—one-half of this amount. *See* Ohio Adm. Code 5101:1-39-36.1(C)(1); 42 U.S.C. § 1396r-5(c)(1)(A). The community spouse generally may keep this spousal share—referred to here as the “Community Spouse Resource Allowance” or “CSRA”—without affecting the institutionalized spouse’s eligibility. *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. But if that spousal share falls outside the minimum or maximum CSRA amounts, the State sets the CSRA at that minimum or maximum. *See* Ohio Adm. Code 5101:1-39-36(C)(3); 5101:1-39-36.1(C)(3). The couple may seek to increase this CSRA through a “fair hearing” challenge in state proceedings. Ohio Adm. Code 5101:1-39-36.1(C)(6); 42 U.S.C. § 1396r-5(e)(2)(v).

Aside from the CSRA, the State treats all other resources as available to the institutionalized spouse. *See id.* § 1396r-5(c)(2); Ohio Adm. Code 5101:1-39-36.1(C)(4)(a)(iii). As with the general rules, if the institutionalized spouse's assigned share of resources exceeds the State's limit at the time of the application, the State denies the Medicaid application. *See* Ohio Adm. Code 5101:1-39-36.1(C)(4)(b). The institutionalized spouse remains ineligible for Medicaid until exhausting the remaining resources above the CSRA (except the \$1500)—regardless of which spouse's name those resources are held in. *See* 42 U.S.C. § 1396r-5(c)(2).

Determining Improper Transfers. The MCCA also sets a unique rule for transfers between spouses in a provision referred to here as the "CSRA Transfer Cap." *See* 42 U.S.C. § 1396r-5(f)(1). That provision says that "[a]n institutionalized spouse may, without regard to [the general improper-transfer section], transfer *an amount equal to the [CSRA]*, but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse." *Id.* (emphasis added). This CSRA Transfer Cap also notes that this transfer of funds up to the CSRA "shall be made as soon as practicable after the date of the initial determination of eligibility." *Id.*

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." 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 countable 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 can 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).

ODJFS interprets the CSRA Transfer Cap to apply to all interspousal transfers happening after the date of institutionalization, because that is the date identified to determine the community spouse’s spousal share (upon which the CSRA is calculated). *See* Ohio Adm. Code 5101:1-39-07(G); 42 U.S.C. § 1396r-5(c)(1), (f)(2)(A)(ii). By doing so, ODJFS treats the CSRA Transfer Cap as modifying the generally applicable “look-back date” under the improper-transfer section, which, as noted, considers all transfers made during the *five years before the date of the application*. *See* 42 U.S.C. § 1396p(c)(1)(B). The CSRA Transfer Cap, by comparison, considers only those spousal transfers occurring *after institutionalization*. During this special look-back period, Ohio treats any transfer to (or for) the community spouse that exceeds the CSRA as improper, unless the transfer is allowed after the state hearing for adjusting the CSRA. Specifically, Ohio’s rule says, “[a]ny 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.” Ohio Adm. Code 5101:1-39-07(G)(2). If such a

transfer occurs, it triggers the temporary restriction preventing nursing-home coverage. *See* Ohio Adm. Code 5101:1-39-07(I); 42 U.S.C. § 1396p(c)(1)(A).

As detailed below in the Argument, the Atkinsons take a different view of this CSRA Transfer Cap. The Atkinsons seem to acknowledge the CSRA Transfer Cap penalizes transfers between spouses above the CSRA at some point, but disagree with ODJFS on when this provision gets triggered. In the Atkinsons' view, federal law (namely, the Spousal Exemption) freely permits spousal transfers until the State finds the institutionalized spouse eligible for Medicaid. That occurs later than ODJFS's use of the earlier date—the CSRA Snapshot Date or date of institutionalization.

The facts of this case—and of the many others where the CSRA Transfer Cap applies—show why this difference of interpretation matters.

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, or "CSRA Snapshot Date." That amount included the value

of their home, because it was held in a trust at that time rather than in the personal name of either spouse. Trust assets are countable resources, 42 U.S.C. § 1396p(d), but a personally owned home is exempt from being counted (up to \$500,000), 42 U.S.C. § 1396p(f)(1)(A) and Ohio Adm. Code 5101:1-39-31(B)(3). 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.

In September 2011, the County issued a Medicaid Approval Notice with Restricted Medicaid Coverage Period. Atkinson Br. At 4. 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 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.

ARGUMENT

ODJFS properly found that the Atkinsons performed an improper transfer, because their transfer of the house into the sole possession of community spouse Raymond Atkinson was a transfer beyond his Community Spouse Resource Allowance amount, leaving him with more than that amount. That violated the CSRA Transfer Cap.

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.

First, the CSRA Transfer Cap does apply here, because it applies immediately upon the “date of institutionalization,” or CSRA Snapshot Date. The Cap’s effect is not delayed until Medicaid eligibility is determined.

Second, that result is not changed by the specifics of the house transfer here. The CSRA Transfer Cap applies regardless of the type of transfer. And, in any event, the transfer here is not immunized by the rules specific to houses.

Appellee ODJFS’s Proposition of Law No. 1:

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 or “CSRA Snapshot Date,” 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 Transfer Cap to the house transfer here. The Atkinsons’ opposing view is wrong. First, the CSRA Transfer Cap is essential to the entire CSRA system, which is designed to cap the amount that a community spouse such as Raymond Atkinson can set aside, and all other resources of the couple are to be used to pay for the institutionalized spouse’s care before the taxpayers pick up the tab. Second, the law’s text, structure, and purpose all show that transfers are limited immediately after the CSRA Snapshot Date (the date of institutionalization). Several aspects of the law, such as the date used for calculation and the “fair hearing” process available to adjust the CSRA amount, all show why the earlier date applies. Third, the Sixth Circuit’s *Hughes* decision was mistaken, as it addressed the wrong issue and failed to consider the CSRA Snapshot Date as the date at issue, but instead rejected a look-back date that no one advocated.

A. The CSRA system is designed to ensure that a community spouse retains the CSRA as an adequate amount, but no more, and the CSRA Transfer Cap is critical.

As explained in the Facts above, the CSRA system is designed to “to “protect community spouses from ‘pauperization’ while preventing financially secure couples from obtaining Medicaid assistance.” *Blumer*, 534 U.S. at 480. As the U.S. Supreme Court noted in *Blumer*, the provisions serving these goals are a “set of intricate and interlocking” statutes working together. While the statutes are complicated, only a few key components require review before reaching the timing issue at the heart of this case: (1) the basic idea of the CSRA and why the set amount is critical, (2) the subsection noting that the CSRA provisions trump all non-CSRA Medicaid provisions, and (3) the CSRA Transfer Cap’s importance to the entire system.

First, the basic idea of the CSRA is, again, to allow a community spouse to retain sufficient resources, while not allowing him or her to keep “too much,” so that taxpayers are not paying for care when a couple has significant resources. That balancing act, and how the CSRA serves the purpose, is best understood in light of the two extremes that occurred before its enactment. On one hand, if couples were treated as one economic unit, with all resources considered available to both individuals, the couple had to reach poverty before being eligible for Medicaid. That left the community spouse impoverished, but still needing to meet ordinary financial needs, while his or her spouse had her needs met in the nursing home. On the other hand, if couples were treated as two entirely independent individuals, with each owning the resources held in his or her name, then the opposite problem could occur. An extremely wealthy couple could simply put all of their resources, no matter how great, in the name of the community spouse. The institutionalized spouse could then qualify as “poor” and receive Medicaid, even if the community spouse had significant resources. That result violates the idea

that spouses owe each other support, so that each should pay for the other's needs, and it also violates the idea that Medicaid is for the truly needy.

The CSRA is designed to avoid those two extremes, and the core idea is that the CSRA sets an amount that policymakers considered a fair amount for the community spouse to set aside, with the rest then being available to pay for the other spouse's nursing care before Medicaid pays. Reasonable minds can differ over where the amount should be set, but the key point is that the law does set a formula for that amount. As detailed in the Facts above, the formula basically measures a couple's "available" resources, subject to various exemptions (such as the home, up to a certain amount). The formula then divides that amount in half, so that each spouse receives half as a spousal share. That amount is then adjusted (during the application process) to the current statutory floor or ceiling, and the result is the CSRA spousal share for the community spouse, or CSRA. *See Blumer*, 534 U.S. at 482 (citations omitted).

Conceptually, the CSRA system might be viewed as akin to an economic "divorce," though it is of course not accompanied by any legal divorce. Assets are divided equitably, adjustments are made, and after that, the government views the spouse applying for Medicaid as an individual. By first ensuring that the community spouse keeps a fair share, the system avoids both of the two extremes described above: spousal impoverishment and having a wealthy individual receive benefits.

Second, the CSRA provisions, because they are tailored to the unique scenario of a married couple with one spouse in a nursing home, trump any of the many provisions that apply to Medicaid eligibility generally. Congress recognized that conflicts might arise between the CSRA provisions and other Medicaid-eligibility provisions, so it enacted a "supersession clause," which provides that the CSRA provisions supersede anything else in Medicaid law:

(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). This supersession rule is important, because many other aspects of Medicaid law include similar notions, governing things such as transfers of resources to parties other than spouses, or governing spousal transfers before the CSRA system is triggered, and so on.

Third, a critical part of the CSRA system is not just how it is established, but how it is maintained—through the CSRA Transfer Cap. The Cap provision authorizes transfers to the community spouse, if needed, so that he or she ends up with the CSRA. Such transfers are needed, for example, if the couple’s assets are primarily held in the name of the institutionalized spouse. And, in authorizing such transfers, the provision limits any other transfers. Specifically, it provides:

(f) Permitting transfer of resources to community spouse.

In general. An institutionalized spouse may, *without regard to [Section 1396p(c)(1)]*, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order. . . .

42 U.S.C. § 1396r-5(f)(1) (emphasis added). Again, the first sentence in this provision allows a transfer from the institutionalized spouse to (or for) the community spouse to bring the community spouse’s resources up to his CSRA, and exempts that transfer from the reach of Section 1396p(c)(1), which contains provisions that would otherwise impose a penalty period (or “restricted coverage”) due to an improper transfer. So the first sentence tells us that a transfer to

the community spouse up to the CSRA is allowed. The second sentence says that this permitted transfer should take place reasonably soon after eligibility has been established. That means, of course, that the transfer contemplated by this provision is the only one, as it would make no sense to allow repeat transfers that give the community spouse *more* than the allowed CSRA.

The timing issue in this case, detailed in Part B below, arises against this backdrop. The timing issue exists because the CSRA amount is calculated based on the “date of institutionalization,” typically when one spouse moves into a nursing home. It is also called the “CSRA Snapshot Date,” because the agency takes a “snapshot” of the couple’s financial picture as of that date, and calculates the CSRA based on that date. As the Atkinsons rightly note, that CSRA Snapshot Date often precedes, by months or even years, the actual determination of Medicaid eligibility. *See Atkinson Br. at 1.* That is, the usual sequence is for someone to move into a nursing home, and then apply for, and obtain, Medicaid some weeks, months, or even years later. Thus, that gap allows for the possibility that couples will transfer resources in the time between dates. That date difference has great consequences for a given couple, as it did for the Atkinsons, and for the system as a whole. In ODJFS’s view, the CSRA Transfer Cap must apply from the CSRA Snapshot Date, both because the law’s text and structure says so, and because any other reading undercuts the entire premise of the system.

B. The CSRA Transfer Cap applies from the date of institutionalization, or CSRA Snapshot Date, as shown by several parts of the law and by its overall purpose.

The parties agree that the timing issue is the heart of the case. ODJFS agrees with the Atkinsons that the legal issue here is the same regardless of whether the transfer involves the two-step house transfer here, funds used to purchase an annuity as in *Hughes*, “general assets,” or anything else. *See Atkinson Br. at 8.* The parties also agree that the laws here result in “distinct temporal periods,” *id. at 7*—a period in which spousal transfers are not limited by the

CSRA system and its CSRA Transfer Cap, and a period in which such transfers are limited by the rule. The parties disagree over when the second period starts: ODJFS says the CSRA-limited period starts with the *CSRA Snapshot Date*, and the Atkinsons say it does not start until *Medicaid eligibility* is determined. ODJFS is right, for several reasons.

1. The CSRA timing issue arises against a backdrop of non-CSRA Medicaid laws, such as the distinct transfer limits that apply during the five-year look-back period.

While the ultimate timing issue here is about the CSRA's Transfer Cap, that issue must be understood in light of a distinct timing period, not directly at issue, called the "look-back period," which has its own set of non-CSRA transfer limits. When any individual applies for Medicaid and is institutionalized—even if the applicant is unmarried, and thus not covered by the CSRA scheme—the agency reviews that applicant's financial transactions for the preceding five years, or the "look-back period." *See* Atkinson Br. at 2; 42 U.S.C. § 1396 p(c)(1); Ohio Adm. Code 5101:1-39-07(B)(9). That look-back period is measured from the "baseline date," which is the date that the individual has *both* applied for Medicaid and is institutionalized. *See* Atkinson Br. at 2; 42 U.S.C. § 1396 p(c)(1)(B); Ohio Adm. Code 5101:1-39-07(B)(3).

Notably, that "baseline date," requiring both application and institutionalization, is distinct from the CSRA Snapshot Date, which is solely the date of institutionalization. Here, for example, Mrs. Atkinson was institutionalized on April 25, 2011, so that was the Atkinson's CSRA Snapshot Date. She applied for Medicaid on June 16, 2011, so that later date was her "baseline date," and her look-back period accordingly began five years earlier, on June 16, 2006. Further, she was later declared eligible for Medicaid on September 29, 2011. Her timing was typical, so her "look-back period," in retrospect, ran for about four years and ten months before her CSRA Snapshot Date.

During the five-year look-back period, a complicated set of provisions governs transfers that may be considered “improper,” with exemptions that immunize some transactions from being improper. Generally, any transfer of money or assets for less than fair market value is improper, and results in restricted Medicaid coverage. *See* Atkinson Br. at 2; 42 U.S.C. § 1396p(c)(1)(A); Ohio Adm. Code 5101:1-39-07(I)-(K). That means that an applicant cannot merely give away her funds to children, grandchildren, or friends in the years before her Medicaid application, and if she does, her coverage will be restricted.

Significantly, though, the improper-transfer rules that govern the look-back period allow (with conditions not at issue here) unlimited transfers from the applicant to her spouse, for the spouse’s sole benefit, under the Spousal Exemption. *See* 42 U.S.C. § 1396p(c)(2)(B)(ii). Also, the transfer of a primary residence is allowed between spouses. 42 U.S.C. § 1396p(c)(2)(A)(i).

The limits and exemptions under the look-back period are not at issue in the case *directly*, as noted above. But they frame the CSRA debate because, in ODJFS’s view, the CSRA rules supersede the general look-back scheme—including the allowances for spousal transfers—once the CSRA Snapshot Date arrives. By contrast, the Atkinsons seek to apply the look-back period’s Spousal Exemption, allowing unlimited transfers, beyond the CSRA Snapshot Date, and even beyond the Medicaid application date (or “baseline date”), until the Medicaid eligibility date. As shown below, ODJFS’s use of the CSRA Snapshot Date is the right approach.

2. The CSRA Transfer Cap applies from the CSRA Snapshot Date, as only that reading gives life to the Snapshot Date itself, the supersession clause, the fair hearing process, and the Rule itself.

ODJFS’s view is straightforward: The CSRA Snapshot Date marks the beginning of the entire CSRA scheme, so the same date used to calculate the CSRA is also used to enforce the Transfer Cap limit set by the system. The Atkinsons, by contrast, admit that the CSRA is

established based on the Snapshot Date, but says that the amount does not mean anything yet, as transfers above and beyond that amount may continue until Medicaid eligibility is determined. They do not deny, nor could they, that their view results in allowing a community spouse such as Raymond Atkinson to keep an amount higher than the CSRA. But, they say, the system allows that, and they accuse ODJFS of seeking a policy-based result that is not supported by the actual provisions. They are wrong, as the detailed provisions point to ODJFS's view on their own terms—though it is of course notable that only ODJFS's view enforces the system's purpose, as the contrary view allows couples to shelter *unlimited* resources in the window between the CSRA Snapshot Date and Medicaid eligibility determination.

First, no one disputes that the CSRA is calculated *based on* the date of institutionalization, or CSRA Snapshot Date, and in ODJFS's view, that alone is enough. As the Atkinsons acknowledge, the CSRA is calculated by taking a snapshot of the couple's financial picture as of the date of institutionalization, regardless of whether the Medicaid application is submitted weeks, months, or even years later. Atkinson Br. at 1, 3. That does not mean that the CSRA is actually calculated *on* that date, but is later calculated looking *at* the picture that existed on that date. If the Medicaid application is submitted two years later—*i.e.*, if the couple pays for nursing-home care out-of-pocket or through insurance before seeking Medicaid coverage—the system looks back to recreate the picture that existed on the CSRA Snapshot Date. To make things easier, the system allows a couple to submit paperwork for a CSRA assessment immediately after institutionalization, even if they know that any Medicaid application is far off, or even if they do not know if they will ever apply for Medicaid. That allows for easier assessment of the data, as opposed to later recreation. And it allows a couple to plan whether to seek any adjustment of its CSRA, under the fair hearing process explained below.

Because the CSRA is established as of the CSRA Snapshot Date, that date makes the most sense conceptually as the starting point for the CSRA Transfer Cap, even before looking at other details and at practical consequences. The Snapshot Date is when the system separates the couple, previously one economic unit, into two individuals. The community spouse “walks away” with the CSRA amount, and from that point, the spouses can no longer freely transfer assets to each other without consequences. The Spousal Exemption under the earlier look-back period makes sense, because an individual “giving” money to his or her spouse is not transferring money away from the economic unit; but once they are two units, everything changes. Equally important: The contrary view means that the Snapshot is taken, but it is meaningless, as it has no effect until some later time, by which point the picture has changed. Having the CSRA Snapshot be the basis for CSRA enforcement just makes sense.

Second, the Supersession Clause has meaning if the CSRA Transfer Cap applies from the CSRA Snapshot Date, but it has little if any meaning if the Transfer Cap does not apply until after Medicaid eligibility. In ODJFS’s view, the CSRA-applicability period overlaps with the look-back period, because the look-back period runs until the Medicaid application, and the CSRA period starts pre-application. So here, for example, the Atkinsons’ look-back period applied without any CSRA overlay for four years and ten months, and then both applied for two months between the CSRA Snapshot Date (April 25, 2011) and the Medicaid application date (June 16, 2011). The Supersession Clause, in ODJFS’s view, ensures that the CSRA’s Transfer Cap, by allowing interspousal transfers only up to the CSRA amount, supersedes the look-back period’s general allowance for unlimited spousal transfers under the Spousal Exemption.

But if the CSRA Transfer Cap does not even apply until after Medicaid eligibility is granted, its application does not overlap with any five-year look-back period, as the look-back

ends before the CSRA system applies any limits. At most, perhaps the Atkinsons could argue that the “look-back period” although focused on a *look back*, continues to apply *post-eligibility*, so the Supersession Clause applies to that period. But that leaves little to no work for the Supersession Clause to do, as it is rare for a spouse in nursing-care to acquire further assets to transfer, so there is little to limit.

Third, the fair hearing process, along with an initial resource-assessment appeal process, supports ODJFS’s view, while the contrary view leaves these processes meaningless. After the agency assesses the couple’s joint resources, the couple can contest the assessment in a hearing after application. *See* 42 U.S.C. § 1396r-5(c)(1)(B) & (e)(2)(A). Separately, after the CSRA is established, a “fair hearing” process allows one or both spouses in the couple to challenge any of the critical determinations affecting eligibility, including the spousal-share determination and the CSRA determination. *See* 42 U.S.C. § 1396r-5(e)(2). Any challenge to the CSRA determination is put on a fast track. *See id.* At a CSRA hearing, the challenger has the burden of showing that the CSRA is too low to bring the community spouse’s monthly income up to the “minimum monthly maintenance needs allowance” (which is a minimum income amount to which the community spouse is entitled to the extent that the couple has income and resources sufficient to meet it, *see* 42 U.S.C. § 1396r-5(d)(3)). *See* 42 U.S.C. § 1396r-5(e)(2)(C). The *Blumer* decision concerned details of this process.

That “fair hearing” process is rendered irrelevant by the Atkinsons’ view because no rational couple would bother to invoke a process that *might* allow them a higher CSRA, if they could instead merely transfer unlimited assets to the community spouse, beyond the CSRA, without penalty, and thereby allow the community spouse to retain more of the couple’s joint resources than the CSRA. That is, if a couple is unhappy with the CSRA calculation by the

agency, they can merely take any amount they want and transfer it anyway, as long as they do so before a Medicaid-eligibility determination. Notably, a couple need not even turn to a process like the multi-step house-trust transfer here. They can simply buy the community spouse an annuity for any amount after the CSRA Snapshot Date is set, but before eligibility is granted. (The annuity approach works because, under provisions not at issue here, annuity income to the community spouse is exempt. Thus, an annuity purchase timed between the CSRA Snapshot Date and eligibility determination, if the Transfer Cap did not yet apply, would convert countable resources into exempt income, as in *Hughes*.)

Fourth, the terms of the CSRA Transfer Cap itself support ODJFS, not the Atkinsons. The Rule is, to be sure, phrased in the permissive, saying that an “institutionalized spouse *may*, without regard to [Section 1396p(c)(1)], transfer an amount equal to” the CSRA. 42 U.S.C. § 1396r-5(f)(1) (emphasis added). But that permission, coupled with the following sentence’s directive to achieve “[t]he transfer” “as soon as practicable” presupposes that only one transfer occurs, up to the CSRA, so other transfers are barred. *Id.*

Moreover, the text says *nothing* about a limit being triggered pre-eligibility or post-eligibility, so it provides no basis for having a bar that applies only at the later time, without applying at the earlier time. Indeed, the Atkinsons seem to argue two points in the alternative: that the limit applies only post-eligibility, or that the Cap provision provides no limit at all, ever. *See Atkinson Br.* at 9. They note that the language “is permissive, not prohibitive,” and say that “even if 42 U.S.C. § 1396r-5(f)(1) provides some authority for imposition of a period of ineligibility for a transfer that exceeds the CSRA, the language of the statute provides no support for the position that the CSRA Transfer Rule applies *before* Medicaid eligibility is established.” *Id.* To the extent that they admit a post-eligibility limit, but not a pre-eligibility limit, they must

admit that the permissive language is indeed prohibitive by implication, or no prohibition arises anywhere in the statute, if not in this clause.

Alternatively, to the extent they argue that *no* limit arises, ever, the Atkinsons have a bigger problem with their reading: It renders the entire transfer provision, and thus the CSRA, superfluous. That is, in ODJFS's view, a view that applies the CSRA Transfer Cap only post-eligibility is so weak as to be virtually worthless. But a view that says it actually has no transfer cap at all, at any time, means that the provision is literally meaningless. Nor is it any answer to say that the provision still exists to *permit* transfers, but not to bar them. That is so because the general Spousal Exemption would still allow interspousal transfers, if the transfer provision in the CSRA were never enacted. In other words, no need exists to *allow* transfers "equal to the" CSRA if unlimited transfers are still allowed. But if this rule *limits* transfers, as ODJFS says, then allowing transfers up to that limit makes sense.

On top of all this, the CSRA Transfer Cap includes a clause allowing the limited transfer "without regard to" the general look-back rules under 42 U.S.C. § 1396p(c)(1). That means, in ODJFS's view, it trumps everything in Section 1396p(c), including allowances for transfers along with competing limits. But if the Atkinsons are right, that clause means nothing.

Notably, while the Atkinsons' view of unlimited transfers renders several provisions truly superfluous, as detailed above, they mistakenly claim that ODJFS's view "would render the provisions permitting unlimited transfers between spouses superfluous." Atkinson Br. at 7. That is wrong, because the Spousal Exemption applies during the entire five-year look-back period, so it still works for all of that time period except for any overlapping time after the CSRA Snapshot Date. Here, that means the Spousal Exemption covered four years and ten months. In other cases, that time might be shorter or longer, but it is certainly significant. Without that Spousal

Exemption, transfers to spouses could be limited for all those years, as they are to non-spouses (other than under other specific exemptions). Thus, ODJFS's view renders nothing superfluous, but the Atkinsons' view does.

In sum, several provisions all point to applying the CSRA Transfer Cap from the CSRA Snapshot Date, as a logical matter of having all the parts work together, before even reaching the point that only ODJFS's view serves the purpose of the entire CSRA system.

3. The entire CSRA system is undercut unless the CSRA Transfer Cap applies from the CSRA Snapshot Date, as later transfers allow couples to unilaterally transfer unlimited amounts beyond the CSRA.

Finally, ODJFS's view of the timing issue is right not only because it works best with the many detailed provisions outlined above, but also because only ODJFS's view serves the purpose behind the CSRA system: ensuring that community spouses retain sufficient, but not excessive, resources, with the CSRA amount serving as the measure of "sufficient." The Atkinsons' view allows couples to shelter literally unlimited amounts while having taxpayers pick up the nursing-home tab.

The Atkinsons' facts illustrate the point. Their combined resources were \$98,320 on April 25, 2011, their CSRA Snapshot Date. (That includes the value of their home, as detailed in Proposition 2 below. No one disputes that their home was properly *included* in the resource assessment, because it was then held in a trust. Trust assets of any type are included, and the usual homestead exemption for residences applies only to a home owned directly by the couple or either spouse.) Thus, Mr. Atkinson's spousal share was \$49,160, or one-half of the joint resources. He kept all of the non-house resources, amounting to less than that \$49,160 CSRA, and he *also* received the house, valued at \$53,750. In other words, he sought to keep everything, leaving *nothing* to Mrs. Atkinson to contribute to her care before Medicaid would pay.

Notably, the Atkinsons' bright-line view—that no limits apply until Medicaid eligibility is determined—means that a couple can shelter unlimited amounts if it wishes. For example, in *Hughes*, the couple purchased an annuity for \$175,000 for the community spouse, using joint resources after the CSRA Snapshot Date. *Hughes*, 734 F.3d at 477. Nothing in the Atkinsons' view would prevent couples from sheltering as much as they have, while qualifying for Medicaid to pay for nursing care. That view undercuts the purpose of the entire system.

To all this, the Atkinsons seem to say only that the loophole really is there, so they are entitled to use it. That is, they do not deny that their view would allow them to keep more than the CSRA, and they do not deny that it would allow unlimited asset-sheltering by any couple. They simply assert that their view is the right reading of the text. That would mean either that Congress meant to allow a loophole that undercuts all their handiwork, or Congress just goofed, and left a gaping hole in the system. The Atkinsons accuse ODJFS of asking the Court to impose a policy-based result to close such a loophole.

But ODJFS does not ask the Court to invoke policy to close any loophole, because in its view, no such loophole exists, for all the reasons above. If, however, any ambiguity remains in the statutes, such absurd results are enough to be a tiebreaker, and to resolve any such ambiguity in favor of serving the statute's undisputed purpose. That is especially so here, where parties plan their affairs around the system. This is not an area in which parties simply pursue transactions for other purposes, and then the legal system comes along and deals with them. No one doubts that parties sensibly and understandably engage in "Medicaid planning" along with other estate planning. In that regard, everything changes once a spouse enters a nursing home. Before that point, even within the look-back period, a couple likely does not know which one will first enter nursing care, so any planning must be balanced in light of that uncertainty. But

after one spouse is institutionalized, it is easy, under the Atkinsons' view, to shift *all* resources to the community spouse, leaving the institutionalized spouse immediately eligible for Medicaid. That is not what Congress intended, and not what the law says.

Several courts, considering the text and its purpose together, have adopted ODJFS's view on this precise issue, or have otherwise rejected similar evasions of the CSRA to shelter additional amounts. *See, e.g.*, App. Op. ¶ 32 (citing *Hughes v. Colbert*, 872 F. Supp. 2d 612, 622 (N.D. Ohio 2012) (supersession clause controls; community spouse may not take more than CSRA from couple's resources); *rev'd sub. nom Hughes v. McCarthy*, 734 F.3d 473 (6th Cir. 2013); *Burkholder v. Lumpkin*, Case No. 3:09CV01878, 2010 U.S. Dist. Lexis 11308, at *13-17 (N.D. Ohio 2010) (supersession clause controls; allowing community spouse to have more than CSRA in resources would render CSRA limit meaningless); *McNamara v. Ohio Dept. of Human Servs.*, 139 Ohio App.3d 551, 557 (2d Dist. 2000) (same); *Feldman v. Dept. of Children and Families*, 919 So.2d 512, 516, 2005 Fla. App. Lexis 19679 (Fla. Dist. Ct. App. 1st Dist.) (same); *H.K. v. Div. of Med. Assist. and Health Servs.*, 379 N.J. Super. 321, 327-28, 878 A.2d 16, 19-20, 2005 N.J. Super. 238 (N.J. Super. App. Div.) (same); *Williams v. Ohio Dept. of Job and Family Servs.*, 2012-Ohio-4659, 2012 Ohio App. Lexis 4097, ¶ 43 (Ohio App. 3rd Dist. 2012) (citing *Burkholder* with approval regarding the effects of the CSRA statute's supersession clause).

To be sure, the Sixth Circuit in *Hughes* reached the opposite conclusion, as have other courts. However, as detailed below, the *Hughes* Court got it wrong.

C. The Sixth Circuit's *Hughes* decision was wrong, as it addressed the wrong question.

Much of the Atkinsons' case relies on the authority of *Hughes*, in which the U.S. Court of Appeals for the Sixth Circuit held, as Atkinson urges, that the CSRA Transfer Cap does not apply until after Medicaid eligibility is established. *Hughes*, 734 F.3d at 475. ODJFS

acknowledges that the Sixth Circuit reached that result, and it acknowledges that the Sixth Circuit holding, if correct, would apply here, as the legal issue is the same, and nothing changes due to the factual difference between the house transfer here and the annuity purchase in *Hughes*. The *Hughes* decision was simply wrong, and most important, the *Hughes* court never truly grappled with or rejected ODJFS's view that the CSRA Transfer Cap applies after the CSRA Snapshot Date. It instead rejected a strawman argument that ODJFS never made. As an initial matter, this Court of course is not bound by *Hughes*. State courts are "not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court." *State v. Burnett*, 93 Ohio St. 3d 419, 424 (2001). Of course, the Supremacy Clause of the U.S. Constitution binds state supreme courts to decisions of the U.S. Supreme Court on questions of federal statutory or constitutional law. *Id.*; see *State ex rel. Painter v. Brunner*, 128 Ohio St. 3d 17, ¶ 46 (2011). But, as this Court held in *Burnett*, that duty to follow the U.S. Supreme Court does not extend to decisions of lower federal courts. *Burnett*, 93 Ohio St. 3d at 424. State courts "will, however, accord those decisions some persuasive weight." *Id.* Of course, "persuasive weight" applies only if the decision is persuasive.

Here, *Hughes* is not persuasive, and its reasoning is plainly wrong, regardless of its outcome, because it indisputably misconstrued ODJFS's argument and rejected an argument that ODJFS never raised. ODJFS argued there, as here, that the CSRA Transfer Cap applies starting from the CSRA Snapshot Date, or *date of institutionalization*. The Sixth Circuit initially acknowledged that ODJFS's argument was based on the date of institutionalization. *Hughes*, 734 F.3d at 478. But in its analysis, the court inexplicably treated the argument as if ODJFS sought to apply the cap from a much earlier point, namely, from the *start of the distinct five-year "look-back" period*, discussed above at 20, 25-26, which federal law establishes for review of

various transfers of assets. The Sixth Circuit’s reasoning compared that look-back date to the Medicaid-eligibility date—ignoring the date of institutionalization—and held, based on that reasoning, that the Medicaid-eligibility date controlled. The Sixth Circuit held that the CSRA Transfer Cap could not apply to a pre-eligibility transfer because, in its view, such application would render “superfluous” the Spousal Exemption, which allows unlimited spousal transfers during the five-year look-back period. *See Hughes*, 734 F.3d at 480 (citing 42 U.S.C. § 1396p(c)(B)(2)(i)). In the Sixth Circuit’s view, the provision allowing such unlimited transfers would have no work to do at all if the CSRA Transfer Cap limited such transfers throughout the same entire look-back period.

The court was right that such an extended application of the CSRA Transfer Cap would render the other provision ineffective, but ODJFS never argued for applying it throughout *the look-back*, only after *institutionalization*. This potentially leaves months or even years when the unlimited-spousal-transfer provision could apply in a given case, without any CSRA-based cap. Thus, the unlimited-transfer provision is not at all rendered superfluous. It is merely superseded under certain circumstances, as Congress intended. *See* 42 U.S. § 1396r-5(a)(1) (CSRA provisions supersede any other, inconsistent provisions). Thus, not only did the Sixth Circuit’s reasoning miss the mark, but its reasoning shows that it considered the wrong argument.

The rest of the Sixth Circuit’s reasoning also flowed from the same mistaken premise, rejecting the same strawman argument. For example, the Sixth Circuit said that it was agreeing with a Tenth Circuit decision addressing what it saw as the same issue. *Hughes*, 734 F.3d at 480 (citing *Morris v. Okla. Dept. of Human Servs.*, 685 F.3d 925 (10th Cir. 2012)). But the issue in *Morris* was, unlike in *Hughes*, whether the transfer limit could be applied to the *entire* look-back period. *Hughes*, 734 F.3d at 480. And the Sixth Circuit in *Hughes* further confirmed its

misapprehension of the issue when it recounted legislative history concerning a rejected proposal in Congress to place a CSRA-based transfer limit in the federal statute governing improper transfers generally, *i.e.*, a proposal to apply the CSRA-based limit on spousal transfers during the *entire* look-back period. *See Hughes*, 734 F.3d at 481. The Sixth Circuit incorrectly said that the rejected provision would have accomplished the “very construction” of the law that the ODJFS was arguing. *Id.* That leaves no doubt that the Sixth Circuit thought ODJFS was advocating application of the CSRA Transfer Cap during the entire look-back period, but again, ODJFS never argued that. It argued only that the Cap starts applying *only* at institutionalization, not at the beginning of the look-back period.

Finally, by addressing and rejecting a strawman argument about the look-back period, the Sixth Circuit failed entirely to address the affirmative points that ODJFS raised to show why the date of institutionalization is the right date to begin applying the transfer limit, including all of the text-based points that ODJFS raises here. *See* above at 20-25. ODJFS noted to the Circuit that the CSRA is indisputably assessed based on the CSRA Snapshot Date, or date of institutionalization, and it makes no sense to take that snapshot then if that snapshot never governs anything. ODJFS also noted that it makes no sense 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.

ODJFS does not know, of course, why the Sixth Circuit misread its argument, as its brief in that court plainly referred to the date of institutionalization, and never invoked the much-earlier start of the look-back period as the starting point. But whatever the reason, the Sixth Circuit’s decision indisputably shows that it rejected the look-back date, and that it never considered ODJFS’s true argument. For that reason, *Hughes* is not persuasive, and this Court should not follow it.

That discounting of *Hughes* is critical, not only because the Atkinsons rely on it heavily by name, but also because much or all of its reasoning—such as the claim that ODJFS’s view renders the Spousal Exemption superfluous—echoes *Hughes*’s flawed reasoning. Without *Hughes*, the Atkinsons have little or nothing to offer.

For all these reasons, the CSRA Transfer Cap applies from the CSRA Snapshot Date, or date of institutionalization, not from the determination of Medicaid eligibility.

Appellee ODJFS's Proposition of Law No. 2:

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. If the Court rules for ODJFS on Proposition 1, as it should, then the Atkinsons cannot win on the claim that Ohio Adm. Code 5101:1-39-27.1 prevents the transfer of the house to Mr. Atkinson from being an improper transfer.**

As explained above, the CSRA Transfer Cap applies, after the CSRA Snapshot Date, to *all* asset transfers, regardless of the type of asset transferred. Consequently, if the Court rules for ODJFS on Proposition 1, as it should, it need not reach ODJFS's Proposition 2. Indeed, the Atkinsons are not clear on whether they argue their own Second Proposition as an alternative, or as merely an application of their First Proposition. Much of their Second Proposition folds in reliance upon their hope to win the first point. *See* Atkinson Br. at 16-18 (relying on Supremacy Clause argument, which in turn relies on federal law reading their way).

And their actual Second Proposition is phrased identically to their first, except it substitutes the Ohio regulation regarding improper transfers in place of the federal statute cited in their First Proposition. That is, their Proposition is not based on the house-specific regulations; those are discussed in the body of the argument, but the Proposition is tied to the general timing principle in the First Proposition.

Moreover, the CSRA provision's Supersession Clause means that it trumps any other federal law, and the Supremacy Clause would override any conflicting state law *if* state law somehow supported the Atkinsons while the timing issue supported ODJFS.

Consequently, the Atkinsons cannot prevail unless they win the timing issue, and they cannot.

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.

Even on its own terms, the Atkinsons' argument is wrong regarding the specific house transfers. They claim that Ohio Adm. Code 5101:1-39-07(E) allows Mr. Atkinson 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. The Atkinsons cannot have it both ways. They want 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 the Atkinsons then seek the benefit of the homestead exemption to apply to the transfer, 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. If the house remained in trust throughout, it would be counted as a resource, but its full value could not be given to Mr. Atkinson. Instead, the house's value, by being included in the total joint resource amount, would be split into spousal shares. Here, that means the total resources of \$98,320 (including the \$53,750 home value) would be split into spousal shares of \$49,160 each, and Mr. Atkinson could keep \$49,160

as his CSRA. Alternatively, if the home were never in trust—or if it were removed before the CSRA Snapshot Date—its value would be exempt from being counted as a resource, so the couple’s joint resources would have been \$44,570 (that is, \$98,320 minus the \$53,750 home value). The spousal shares would have been half of that, or \$22,285. The house could have been transferred freely to Mr. Atkinson, so he would have ended up with the house plus about \$22,000 of the non-house resources. But the third path here—having the house in trust for the CSRA Snapshot Date, but removing it between the Snapshot and eligibility—gave him everything, if the transfer were proper. The higher joint resource amount of \$98,320 led to the \$49,160 CSRA, allowing him to keep all of the non-house resources of \$44,750, plus later receive the house, too. In other words, he received not just more than the CSRA, but received all of the couple’s assets, with nothing for Mrs. Atkinson to contribute to her care.

ODJFS rightly looked at the two-step transfer as a whole. First, 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”); *see also* Ohio Adm. Code 5101:1-39-27.1(C)(2)(f)(i) (describing such transfers as improper); *see Williams*, 2012-Ohio-4659, ¶¶3-6, 33-36 (finding improper transfer where couple moved home into trust weeks before resource assesment and removed it a week later).

The Atkinsons say that ODJFS seeks to elevate a policy result over the various provisions’ precise meaning, but they are wrong. As the Fifth District noted below, Ohio

regulations define transfers—and thus possible improper transfers—to include “any direct or indirect method of disposing of an interest in property.” App. Op. ¶ 24 (citing Ohio Adm. Code 5101:1-39-07(B)(14)). Using a two-step process, rather than a one-step process, easily falls under the definition of “indirect” method of transfer. Moreover, as the Fifth District also noted, Ohio’s general improper-transfer regulation says that the rules “may not be applied inconsistently with the rules setting limits on [the] CSRA.” App. Op. ¶ 29 (citing Ohio Adm. Code 5101:1-39-07(G)(4)). Here, the Atkinsons used the process in a way that artificially inflated their CSRA, and would have allowed Mr. Atkinson to retain more than his CSRA. They thus seek to apply the rules “inconsistently” with the CSRA limits.

Moreover, the provision that would otherwise allow the first transfer standing alone—the transfer from the trust to Mrs. Atkinson—allows the transfer only when “for the benefit of the individual” (Mrs. Atkinson). 42 U.S.C. § 1396p(d)(3)(A)(ii). But the transfer was not for her benefit, because she held the home for just a day before giving it to Mr. Atkinson, rendering the transfer improper. *See* 42 U.S.C. § 1396p(d)(3)(A)(ii).

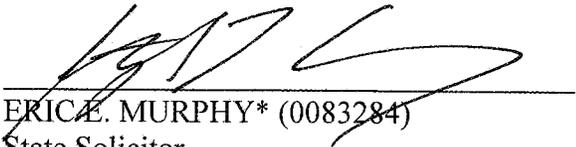
Consequently, the transfer here broke the rules as written, not, as the Atkinsons charge, some hypothetical rules that ODJFS seeks. And again, nothing about the house-transfer rules can overcome the CSRA Transfer Cap, as explained in ODJFS’s Proposition 1.

CONCLUSION

For these reasons, the Court should affirm the decision below, affirming that ODJFS correctly found an improper transfer and correctly restricted Mrs. Atkinson's nursing-home coverage.

Respectfully submitted,

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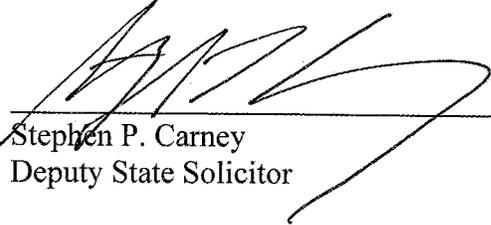
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merits Brief of Appellee Ohio Department of Job and Family Services was served by U.S. mail this 17th day of June, 2014, upon the following counsel:

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