

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT ESTATE OF MARCELLA ATKINSON

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ARGUMENT

I. INTRODUCTION

Appellant Marcella Atkinson (“Mrs. Atkinson,”)¹ has demonstrated that the transfers of her family home first from a trust to Mrs. Atkinson, and later from Mrs. Atkinson to her husband, community spouse Mr. Raymond Atkinson, after institutionalization but before the initial determination of Medicaid eligibility, were proper under federal and state Medicaid provisions 42 U.S.C. 1396p(c)(2)(A)(i) and Ohio Admin. Code 5101:1-39-07(E)(1)(a).

In response, Appellee Ohio Department of Job and Family Services (“ODJFS” or the “Agency”) urges this Court to ignore persuasive authority from the federal Sixth Circuit Court of Appeals; to disregard plain statutory language in a federal Medicaid statute, 42 U.S.C. 1396r-5(f)(1); and to believe fanciful arguments as to allegedly devastating consequences of the interpretation the Atkinsons urge. As set forth below, the reading of the transfer rules the Atkinsons advocate is not just the only one that complies with principles of statutory construction, it is the view advocated and enforced for many years by the U.S. Department of Health and Human Services (“HHS”), the agency responsible for Medicaid. That reading provides that § 1396r-5(f)(1), the CSRA Transfer Rule (what the Agency calls the “CSRA Transfer Cap”), only applies *after* eligibility has been determined, and has no application here.

Far from pursuing a “loophole,” a “scheme,” or a “maneuver” (as ODJFS tries to characterize it), the Atkinsons engaged in responsible estate planning, and transferred property consistent with the rules and exemptions the statutes allow. This Court should reject the Agency’s results-oriented plea to disregard the statutory language, find that the court of appeals

¹ As noted previously, the named Appellant is the Estate of Marcella Atkinson, who is deceased. For clarity, this Reply Brief refers to Appellant as “Mrs. Atkinson,” or collectively with her deceased husband, the “Atkinsons”.

below erred in upholding the determination of an improper transfer, and remand this action for a proper recalculation of benefits.

II. ODJFS FAILS TO ESTABLISH THAT THE CSRA TRANSFER RULE DISALLOWS TRANSFERS BETWEEN SPOUSES PRIOR TO ELIGIBILITY.

As expected, ODJFS's primary argument against reversal of the lower court is that the Atkinsons' transfer violated a statutory limit in 42 U.S.C. 1396r-5(f)(1) (the "CSRA Transfer Rule") which, ODJFS claims, trumps the permissive treatment of spousal transfers of a home in 1396p(c)(2)(A)(i) (the "Medicaid Home Transfer Rule"), even for transfers that occur prior to the Medicaid eligibility determination. The Agency's argument, however, requires this Court to ignore persuasive Sixth Circuit authority, as well as the plain terms of the CSRA Transfer Rule.

A. The Sixth Circuit Decision in *Hughes v. McCarthy*, Which Allowed Unlimited Spousal Transfers Prior to the Eligibility Determination, Provides Apposite, Persuasive Authority That Should Govern This Case.

1. The *Hughes* Holding Is Persuasive and ODJFS Provides No Justification for This Court to Ignore or Contradict It.

The decision in *Hughes v. McCarthy*, 734 F.3d 473 (6th Cir. 2013), *cert. denied*, 134 S.Ct. 1765 (2014), which dealt with an issue analogous to this action and adopted exactly the reading the Atkinsons urge, is authoritative, and ODJFS provides no basis for this Court to ignore this persuasive authority on federal law from a federal court of appeals.

The *Hughes* decision is on all fours with the dispute here. As in this case, the Sixth Circuit Court of Appeals was considering whether ODJFS was permitted to render a period of ineligibility for a transfer to the community spouse in an amount exceeding the CSRA, when that transfer happened *between* the snapshot date and the eligibility determination. As here, ODJFS claimed its actions were authorized by the CSRA Transfer Rule. ODJFS admits that although *Hughes* involved an annuity under 42 U.S.C. 1396p(c)(2)(B)(i), and this action involves a home

transfer under 42 U.S.C. 1396p(c)(2)(A)(i), the legal issue is identical. (Merit Brief of Appellee ODJFS (“Appellee Br.”) at 18.) The *Hughes* decision includes a thorough examination of the statutes at issue and an analysis of the different temporal periods in which the “unlimited spousal transfers” provision, and the provision allowing transfers only up to the CSRA, each apply. The *Hughes* court was unequivocal in its rejection of the district court’s approach in that case, and its rejection of the argument that 42 U.S.C. 1396r-5(f)(1) allows ODJFS to deem a spousal transfer an improper transfer when it occurs between institutionalization and eligibility. *Hughes*, 734 F.3d at 478.

The Agency’s complaint that the Sixth Circuit misunderstood or ignored its argument in *Hughes* is utterly irrelevant: the court speaks through its holding, and its holding resoundingly rejects ODJFS’s actions here:

When assets are transferred [to the individual’s spouse pursuant to 42 U.S.C. § 1396p(c)(2)] before the institutionalized spouse is determined eligible for Medicaid coverage, “the unlimited transfer provision of § 1396p(c)(2) controls, and a transfer penalty [is] improper under § 1396r-5(f)(1).”

Id. at 480, quoting *Morris v. Okla. Dep’t of Human Servs.*, 685 F.3d 925, 935 (10th Cir. 2012).

Ohio courts accord federal decisions on federal statutory issues persuasive weight. *State v. Burnett*, 93 Ohio St. 3d 419, 424, 755 N.E.2d 857, 862 (2001). ODJFS does not even attempt to distinguish *Hughes*, and offers no credible or persuasive reason to reject the well-reasoned authority provided by the *Hughes* court. This Court should follow that decision and find for the Atkinsons here.

2. The *Hughes* Court Was Persuaded by the Guidance of HHS, Which Advocated the Reading the Atkinsons Seek Here.

While ODJFS insists the *Hughes* court “got it wrong,” ODJFS fails to note that the *Hughes* court adopted the precise view of the HHS. The holding in *Hughes* is even more

persuasive in light of HHS's *amicus* brief in that case, which rejected ODJFS's reading of the federal statutes and urged the Sixth Circuit to adopt the position taken by the Atkinsons here. HHS's brief explains in detail HHS's longstanding reading of the federal statutes at issue – a reading which directly rejects the Agency's position here. *See* Brief for the United States Department of Health and Human Services as Amicus Curiae at 9-14, *Hughes v. McCarthy*, No. 12-3765 (6th Cir., June 28, 2013), ECF No. 66.²

Far from taking an irrational or unsupported position (or “getting it wrong”), the Sixth Circuit in *Hughes* adopted the reasoning and practice of the federal agency responsible for the administration of the Medicaid system. While ODJFS offers no credible reason the *Hughes* case should be discounted, this fact provides an additional basis on which this Court should find the *Hughes* decision persuasive, come to the same conclusion as the Sixth Circuit Court of Appeals, and reverse the lower court in this action. The tribunals below erred in concluding the Atkinsons engaged in an improper transfer justifying a period of ineligibility.

B. ODJFS's Statutory Argument Pursuant to the CSRA Transfer Provision, 42 U.S.C. 1396r-5(f)(1), Rests on Nothing More than What ODJFS Wishes the Statute Said.

Both parties agree that the crux of this case is the meaning of the CSRA Transfer Rule: does it operate to bar transfers exceeding the CSRA pre-eligibility, or does it address only transfers after eligibility? Yet tellingly, ODJFS does not purport to analyze the actual language of § 1396r-5(f)(1), what it calls the “CSRA Transfer Cap,” until page 24 of its Brief. That is because the statute's actual language does not support the Agency's argument as to what the statute means. Rather, the statute itself can only be read as allowing limited transfers up to the

² As set forth below in this Reply Brief, HHS's *amicus* brief not only contains a wholesale rejection of the Agency's argument, but also establishes the longstanding nature of HHS's position on this issue.

CSRA *after eligibility*; it has no application to the unlimited spousal transfers that comply with § 1396p(c)(2) prior to the determination of Medicaid eligibility.

1. The Supersession Clause in Section 1396r-5(a)(1) Does Not Apply Where Provisions Are Not Inconsistent.

The Agency places significant reliance on the supersession clause found in 42 U.S.C. 1396r-5(a)(1). Yet ODJFS ignores the obvious: the provisions of § 1396r-5 only supersede another provision of the title “*which is inconsistent with them.*” 42 U.S.C. 1396r-5(a)(1) (emphasis added). If there is no inconsistency, the supersession clause is irrelevant and has no application. Here, § 1396(p)(c)(2) does not conflict with the permissive CSRA Transfer Rule in § 1396r-5(f)(1) as to transfers before Medicaid eligibility.

2. A Prohibition on Pre-Eligibility Transfers Is Not Found Anywhere in the Language of Section 1396r-5(f)(1).

The Medicaid Home Transfer Rule in § 1396p(c)(2)(A)(i) unquestionably allows the transfer of the home between spouses in certain circumstances, with no temporal limits. Moreover, there is no inconsistency between that provision and § 1396r-5(f)(1) prior to eligibility because, despite ODJFS’s creative reading, the latter sets forth no prohibition on such transfers.

First, the language of the CSRA Transfer Rule is permissive – it *allows* certain transfers by its own terms, it does not prohibit them. *See* § 1396r-5(f) (“Permitting transfer of resources to community spouse.”) The Agency may ridicule that argument, but the Sixth Circuit Court of Appeals in *Hughes* recognized this distinction, which is undeniable from the terms of the statute. *See Hughes*, 734 F.3d at 479. Second, a limit on transfers after the first date of continuous institutionalization (the “snapshot date”) *is nowhere to be found in the statute’s language*. Congress could have specified that § 1396r-5(f)(1) would apply to transfers after the snapshot

date if that is what it intended. Other provisions of the statute run from “time of institutionalization” (CSRA computation, § 1396r-5(c)(1)); “initial eligibility determination” (§ 1396r-5(c)(2)); or “after eligibility for benefits established” (§ 1396r-5(c)(4)), indicating Congress made a conscious choice as to the date from which various provisions would run. Congress instead specified that § 1396r-5(f)(1) would allow certain limited transfers “after the date of the initial determination of eligibility.” To find that Congress actually intended the statute to apply in a completely different time period ignores its plain language.

3. The Agency’s Construction Argument – that The Statute Must Apply Both Pre-Eligibility and Post-Eligibility – Would Render the Actual Language Nonsensical.

ODJFS next argues that the fact that the first sentence of the CSRA Transfer Provision, § 1396r-5(f)(1), contains no reference to timing means there is no basis to apply a bar only at the later time (i.e., after eligibility). But this argument ignores the sentence that follows, which itself reveals that the transfer contemplated in the first sentence is in fact a *post-eligibility* transfer: “The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility” *Id.*

To appreciate the folly of the Agency’s argument, one need only fill in the words the Agency wants to imply – “before or after the date of the initial determination of eligibility” – into the first sentence. That reading shows how it would render the second sentence of § 1396r-5(f)(1) nonsense:

[Before or after the date of the initial determination of eligibility] [a]n institutionalized spouse may . . . transfer an amount equal to the community spouse resource allowance The transfer under the preceding sentence shall be made *as soon as practicable after the date of the initial determination of eligibility*

A well-established rule of statutory construction requires this Court to give meaning to every

word and clause of a provision, and this Court may not adopt a reading that renders certain provisions meaningless, inoperative, or redundant. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 19 (all words of a statute have effect, and none can be disregarded); *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370, (1948), paragraph five of the syllabus (statute may not be “restricted, constricted, qualified, narrowed, enlarged, or abridged”). Yet that is the result the Agency’s tortured construction argument as to § 1396r-5(f)(1) would deliver, as it would require this Court to ignore the temporal language that is actually part of the provision. This Court should reject that result, and find that the plain language of § 1396r-5(f)(1) provides that the statute applies only to transfers “after the date of the initial determination of eligibility,” and could not be applied to Mrs. Atkinson’s transfer of the home to Mr. Atkinson prior to the determination of eligibility here.

4. The Cases Cited by ODJFS Provide No Support for ODJFS’s Reading of the CSRA Transfer Rule.

The Agency’s claim that “several courts” have adopted ODJFS’s view of the CSRA Transfer Rule rings hollow when the cited cases are examined. (*See* Appellee Br. at 28.) First, the lower court’s ruling in this case lacks any legal foundation, as it rested on the now-reversed district court decision in *Hughes*, and is entitled to no consideration whatsoever. The unreported decision in *Burkholder* involved a transfer *after* eligibility, which makes the case critically distinguishable from the Atkinsons’ pre-eligibility transfer here. *Burkholder v. Lumpkin*, No. 3:09CV01878, 2010 U.S. Dist. LEXIS 11308, at *13-17 (N.D. Ohio 2010). The CSRA Transfer Rule in 1396r-5(f)(1) expressly operates as to post-eligibility transfers, and thus *Burkholder* does not help ODJFS here. The decisions in *McNamara* and *Feldman* engaged in no statutory construction whatsoever (a fact that did not escape the *Hughes* court when it found

those cases unpersuasive). See *McNamara v. Ohio Dep't of Human Servs.*, 139 Ohio App.3d 551, 557 (2d Dist. 2000); *Feldman v. Dep't of Children and Families*, 919 So.2d 512, 516, (Fla.Dist.Ct.App.2005.).

The particularized facts at issue in the *Williams* and *H.K.* cases are similarly distinguishable. In *Williams v. Ohio Dep't of Job and Family Servs.*, 3d Dist. No. 8-11-18, 2012-Ohio-4659, the couple involved transferred their home to a trust less than a month before the application for Medicaid, and then transferred the home directly from the trust to the community spouse days before the wife entered a nursing home (and the family also made other disallowed transfers to relatives). *Id.* at ¶ 3. The court found that home transfer to the husband in *Williams* did not qualify for the home transfer exemption in Ohio Admin. Code 5101:1-39-07(E)(1), because the home had been moved directly from the trust to the community spouse, and not from one spouse to another. *Id.* at ¶ 29. The Atkinsons' transfer was materially different, in that their home had been in trust for more than a decade, and moreover, Mrs. Atkinson (not the trust) transferred the property to her husband. In the New Jersey *H.K.* case, the court invalidated a couple's entry into a court-approved property settlement attendant to a "divorce from bed and board," which the court found was a collusive support agreement to allow the husband to move income to his community spouse under the ruse of "alimony." *H.K. v. Div. of Med. Assist. & Health Servs.*, 878 A.2d 16, 19-20, 379 N.J. Super 321, 325-28 (N.J.Super.App.Div.2005).

None of these cases involve the precise facts here: a series of transfers that comply with the Medicaid rules that exempt the transfers as proper, which occurred prior to the eligibility determination. These cases do not provide a basis to reject the statutory interpretation adopted by the *Hughes* court, and used regularly by HHS, which provides that the spousal transfer

provisions of the Medicaid permissible transfer rules in § 1396p(c)(2)(A) allow unlimited transfers between spouses prior to eligibility, unaffected by the post-eligibility CSRA Transfer Rule in 42 U.S.C. 1396r-5(f)(1).

C. The Agency’s Overwrought Policy Arguments Are Completely False, As HHS Has Interpreted the Medicaid Rules to Allow Unlimited Spousal Transfers Before Eligibility for More Than a Decade.

Unable to find support in the language of the statutes and regulations at issue, the Agency relies on the tortured argument that Mrs. Atkinson seeks a statutory interpretation that “undercuts” the “entire CSRA system.” (Appellee Br. at 26.) ODJFS’s argument in this regard ignores not only the distinct purposes of the Medicaid Home Transfer Rule and the CSRA Transfer Rule, but also the long-standing interpretation of the respective statutes by HHS. Thus, the statutory interpretation advanced by Mrs. Atkinson in this case – and previously adopted by the Sixth Circuit in *Hughes* – is hardly a novel one and should be adopted by this Court.

1. The Medicaid Home Transfer Rule Is Entirely Consistent With the CSRA Transfer Rule.

While ODJFS would like to read a “cap” into the pre-eligibility transfers expressly authorized by 42 U.S.C. 1396p(c)(2), no such limit exists. The reason for this is simple: the amount of an asset transfer between spouses after institutionalization but before eligibility has little, if any, effect on Medicaid eligibility. Upon the institutionalization of one spouse, the assets of *both* spouses are pooled together and deemed to be available to the institutionalized spouse for purposes of the initial determination of eligibility. *See* 42 U.S.C. 1396r-5(c)(1)(A)(i). Thus, it makes no difference for initial eligibility purposes whether assets, including a house, are owned in the name of institutionalized spouse or the community spouse. It logically follows that there is no need for a “cap” on pre-eligibility transfers between spouses because eligibility will be determined based on the couple’s collective assets. The fact that the CSRA Transfer Rule,

therefore, does not operate to limit the transfer of assets between the Atkinsons prior to the initial determination of Medicaid eligibility is of no consequence to the issue of initial eligibility. For the Agency to argue otherwise would render the CSRA Transfer Rule meaningless because its application to pre-eligibility transfers would have no practical effect.

Consistent with Mrs. Atkinson's argument in this case and the Sixth Circuit's decision in *Hughes*, however, the CSRA Transfer Rule does have meaning when its application is limited to transfers that occur post-eligibility, at which point only the institutionalized spouse's resources are counted to determine continued eligibility when benefits are reassessed. *See* 42 U.S.C. 1396r-5(c)(4). If, for example, the institutionalized spouse received an inheritance or some other material asset after eligibility was determined, continued eligibility could be compromised if the relevant resource eligibility limit is exceeded. The CSRA Transfer Rule permits the institutionalized spouse to transfer such excess resources – up the amount of the CSRA – to the community spouse “as soon as practicable after the date of the initial determination of eligibility.” *See* 42 U.S.C. 1396r-5(f)(1). This provision allows the institutionalized spouse to avoid an adverse effect on her continuing eligibility in the future due to receipt of additional funds after the initial eligibility determination.

Rather than recognize the practical differences between pre- and post-eligibility transfers, the Agency conflates the two distinct categories of transfers in an effort to obtain a result that is not supported by the statutory language. Mrs. Atkinson urges this Court to adopt the only statutory interpretation that makes sense given the treatment of assets both before and after initial eligibility is determined.

2. HHS Has Expressly Adopted Mrs. Atkinson's Statutory Interpretation.

Although the Agency goes to great lengths to attempt to distinguish this case from *Hughes*, the Sixth Circuit already has addressed the issue dispositive to this case and did so with the benefit of HHS's opinion. In fact, as noted above, the Sixth Circuit in *Hughes* requested that HHS file an *amicus* brief to address, among other issues, whether a transfer of assets from institutionalized spouse to community spouse after institutionalization but before eligibility can be deemed improper under the CSRA Transfer Rule. See Request for Amicus or Letter Statement, *Hughes v. McCarthy*, No. 12-3765 (6th Cir. April 10, 2013), ECF No. 56. Notably, HHS confirmed that ODJFS had it wrong with respect to transfers authorized by § 1396p(c)(2):

The statute specifically exempts from penalty any transfer from one spouse to another, or, from an individual to a third party for the sole benefit of the individual's spouse, and places no limit on the value of the assets that can be transferred. Although the express authorization of transfers from institutionalized spouses to community spouses is limited in [the CSRA Transfer Rule], this provision is operative only *after* the institutionalized spouse has been determined to be eligible for Medicaid.

Brief for the United States Department of Health and Human Services as Amicus Curiae at 10, *Hughes v. McCarthy*, No. 12-3765 (6th Cir. June 28, 2013), ECF No. 66 (emphasis in original). HHS further advised the Sixth Circuit that this position is consistent not only with the Centers for Medicare & Medicaid Services' State Medicaid Manual but also with the position taken by HHS in letters to state administrators and the public dating back to 2001. See *id.* at 11-12. Thus, the interpretation urged by Mrs. Atkinson in this case is hardly novel – it has been endorsed by HHS for over a decade. Far from a result that would undermine the Medicaid system, Mrs. Atkinson asks for a decision from this Court consistent with the recent opinion and longstanding practice of HHS – the federal agency charged as the guardian of the Medicaid system.

ODJFS fought this battle barely one year ago and lost. Both the Sixth Circuit and HHS

agree that pre-eligibility transfers between spouses are not subject to the CSRA Transfer Rule and cannot result in a period of restricted coverage. The Agency is well aware that the federal agency responsible for the statutes at issue has taken this exact position in a case in which ODJFS was a party. It is disingenuous at best for the Agency to now claim that Mrs. Atkinson is advocating for a result that would critically undermine the system. Accordingly, this Court should reverse the decision of the court of appeals.

III. THE AGENCY CANNOT DEMONSTRATE THAT EITHER TRANSFER BY THE ATKINSONS WAS IMPROPER, OR THAT THE ATKINSONS DID NOT MEET THE TERMS OF OHIO'S HOMESTEAD EXEMPTION.

The Agency remains unable to articulate how the transfer of the Atkinson's home was improper under Ohio's Medicaid regulations. The Agency cannot transform two permissible transactions into a single improper transfer to impose a period of restricted coverage on the Atkinsons. This outcome-oriented approach ignores the language of the statutes and regulations at issue. Further, ODJFS's proposed interpretation of Ohio's Homestead Exemption would be inconsistent with the federal Medicaid Home Transfer Rule. Principles of federal supremacy prohibit this result. In either instance, the Court should reject the Agency's argument and reverse the decision of the lower courts.

A. The Agency Fails to Demonstrate That Either Transfer Was Improper.

There can be no dispute that the first transfer of the Atkinsons' home – from the revocable trust to Mrs. Atkinson – was proper. Indeed, the court of appeals expressly found that “[i]f the home had remained in the institutionalized spouse's name after the August 8, 2011 transfer [from the trust to Mrs. Atkinson], it would not have been an improper transfer.” (App. 15.) Despite failing to dispute the first transfer at any point in the proceedings below, the Agency now claims that the first transfer should be viewed as improper under the federal statute governing trusts because the transfer was not for Mrs. Atkinson's benefit. (Appellee Br. at 36.)

Similar to ODJFS's interpretations of the Medicaid Home Transfer Rule and CSRA Transfer Rule, this argument does not hold water. Even accepting the Agency's *post hoc* characterization of the first transfer,³ the Agency's claim is refuted by the very statute on which it relies.

The Agency claims that 42 U.S.C. 1396p(d)(3)(A)(ii) would allow the transfer of the home from the trust to Mrs. Atkinson "only when for the benefit of the individual (Mrs. Atkinson)." (Appellee Br. at 36.) This is not true. The federal statute regarding revocable trusts actually reads: "payments from the trust to *or* for the benefit of the individual shall be considered income of the individual." 42 U.S.C. 1396p(d)(3)(A)(ii). Even accepting that the first transfer was not for Mrs. Atkinson's benefit, which Mrs. Atkinson disputes, the transfer undoubtedly was *to* Mrs. Atkinson. Thus, the Agency's curiously selective reference to the federal trust rule does not operate to invalidate the first transfer of the couple's home from the trust to Mrs. Atkinson.

Similarly, the Agency fails to demonstrate that the second transfer of the home – from Mrs. Atkinson to her spouse – was improper. As set forth in Mrs. Atkinson's Merit Brief, this transfer falls squarely within the Homestead Exemption contained in Ohio Administrative Code 5101:1-39-07(E)(1)(a). The Agency's only argument to the contrary is that these two independently permissible transfers must be viewed together in some two-rights-make-a-wrong fashion. As described above, the only authority the Agency cites to characterize the transfers as "sleight of hand" is easily distinguishable. For example, the couple in *Williams* placed their home in trust merely weeks before the wife applied for Medicaid benefits. 2012-Ohio-4659, ¶¶ 3-4. Here, the Atkinsons' home had been in trust since 2000 – over a decade before

³ The only basis for the Agency's assertion that the first transfer was not for Mrs. Atkinson's benefit is that Mrs. Atkinson subsequently transferred the home to her husband. The Agency makes no argument that the first transfer, taken alone, is improper.

institutionalization, application, or eligibility. (App. 20-21, 24.) In *Williams*, house was transferred from the trust directly to the *community spouse* prior to institutionalization. 2012-Ohio-4659, ¶ 6. In contrast, the Atkinson's house was transferred from the trust to Mrs. Atkinson – a transaction expressly authorized by the language of 42 U.S.C. 1396p(d)(3)(A)(ii) conveniently omitted by the Agency in its brief.

Thus, far from sleight of hand, the Atkinsons relied on the applicable statutes and regulations as they are written. If the Agency is concerned about the result of two sequential proper transfers of the Atkinsons' home, the proper remedy is the legislative or administrative process by which to amend the applicable rules. Instead, ODJFS is asking this Court to legislate from the bench to avoid a result for which rules currently provide. As this Court has recognized repeatedly:

A fundamental principle of the constitutional separation of powers among the three branches of government is that the legislative branch is the ultimate arbiter of public policy. It necessarily follows that the legislature has the power to continually create and refine the laws to meet the needs of the citizens of Ohio.

Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21; *see also Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶ 54 (“This court will not [invade the province of the legislature] and must leave it to the General Assembly to rewrite the statute if it deems it necessary.”). The Atkinsons should not be punished for engaging in responsible advanced planning in conformance with the letter of existing law. The Agency's true complaint lies with the current state of the rules, not the Atkinsons' reliance on them. Accordingly, this Court should reverse the decision of the court of appeals.

B. Ohio's Homestead Exemption Must Be Applied Consistently with the Federal Medicaid Home Transfer Rule.

Regardless of the Agency's proposed interpretation of the applicable Ohio regulations, principles of federal supremacy require reversal of the decision below. ODJFS agrees that, pursuant to the Supremacy Clause, federal Medicaid statutes must "override any conflicting state law." (Appellee's Br. 33.) Notwithstanding this principle, the Agency claims that the Ohio Administrative Code prohibits a transfer that, as set forth above, is expressly authorized by the Medicaid Home Transfer Rule. Although states are permitted to promulgate Medicaid rules and regulations, each state must comply with the requirements of the federal program as a condition of its receipt of federal funds. *See Harris v. McRae*, 448 U.S. 297, 301, 100 S.Ct 2671, 65 L.Ed.2d 784 (1980). The Agency may not seek to prohibit through Ohio's regulatory scheme what the federal Medicaid statutes expressly authorize. Here, the Medicaid Home Transfer Rule expressly authorizes the transfer the couple's home from Mrs. Atkinson to her husband. Accordingly, the Court should reverse the decision of the court of appeals and reject the Agency's efforts to contravene the Medicaid Home Transfer Rule.

IV. CONCLUSION

For the foregoing reasons and those set forth in Mrs. Atkinson's Merit Brief, this Court should conclude that both federal law and Ohio law permit the transfer of a primary residence from an institutionalized spouse to a community spouse without penalty prior to a determination of Medicaid eligibility. Accordingly, this Court should reject the finding of an improper transfer warranting a period of ineligibility, reverse the decision of the lower court upholding the Agency determination, and remand this matter for a correct award of benefits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing, *Reply Brief of Appellant Estate of Marcella Atkinson*, was served by First Class United States Mail, postage prepaid, upon the following this 7th day of July, 2014:

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A handwritten signature in black ink, appearing to read 'D. E. B. R. Q.', is written over a horizontal line.

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