

In the
Supreme Court of Ohio

ELAINE L. KOENIG, et al.,	:	Case No. _____
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
CYNTHIA C. DUNGEY, et al.,	:	
	:	Court of Appeals
Defendants-Appellants.	:	Case No. C-140111
	:	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANTS-APPELLANTS, THE OHIO DEPARTMENT OF JOB AND FAMILY
SERVICES AND ITS DIRECTOR, CYNTHIA C. DUNGEY**

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INTRODUCTION

In *Atkinson v. Ohio Department of Job and Family Services*, 2013-1773 (oral argument held on August 20, 2014), this Court accepted two propositions of law concerning transfers of resources by a married couple when one spouse has applied for Medicaid coverage of nursing-home care. That case and this one ask the same central question: whether certain transfers of resources by Medicaid applicants and their spouses may shelter potentially unlimited resources for one spouse while the state and federal governments pay for the other spouse's nursing-home care. In each case the Ohio Department of Job and Family Services ("ODJFS") determined that the transfers, made after one spouse entered a nursing facility but before he or she was determined eligible for Medicaid, triggered a transfer penalty consisting of temporarily restricted Medicaid coverage.

The first proposition of law under consideration in *Atkinson* is the only issue that Appellants ODJFS and its Director (hereinafter simply "ODJFS") appeal here. In both cases, Medicaid applicants and their spouses 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 in each case, the agency rightly found an "improper transfer" and imposed restricted coverage accordingly. This Court will determine in *Atkinson* whether the Community Spouse Resource Allowance amount limits transfers made after the date of institutionalization or "CSRA Snapshot Date," even if Medicaid eligibility has not yet been determined. Because the limit set by the CSRA applies, ODJFS should prevail in both *Atkinson* and here. Regardless, the Court should hold this case pending a decision in *Atkinson* because it presents the same issue.

STATEMENT OF THE CASE AND FACTS

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

This case is governed by the same statutes and rules as *Atkinson*. When a Medicaid applicant is institutionalized and has a spouse living in the community, a county agency, which initially determines Medicaid eligibility, conducts a resource assessment to determine the amounts that will be attributed to each spouse. *See* O.A.C. 5160:1-3-36; 42 U.S.C. 1396r-5(c); *see generally* *Wis. Dept. of Health & Family Servs. v. Blumer*, 534 U.S. 473, 482-484 (2002). The assessment is based on the couple's resources at the start of the institutionalized spouse's first continuous period of institutionalization (commonly referred to as the "snapshot date"). *See* O.A.C. 5160:1-3-36(A); 42 U.S.C. 1396r-5(c)(1)(A). The county attributes to each spouse a "spousal share" equal to one-half the couple's total combined countable resources. *See* O.A.C. 5160:1-3-36.1(C)(1); 42 U.S.C. 1396r-5(c)(1)(A). If the spousal share falls outside the State's minimum or maximum CSRA, the CSRA will equal that minimum or maximum. The CSRA is the resource amount that the community spouse is allowed to keep without affecting the applicant's eligibility. *See* O.A.C. 5160:1-3-36.1(C); 42 U.S.C. 1396r-5(c)(2); *see also* *Blumer*, 534 U.S. at 483 n.5. An applicant or spouse may seek a "fair hearing" to have the CSRA amount increased. *See* O.A.C. 5160:1-3-36.1(C)(6); 42 U.S.C. 1396r-5(e).

The CSRA is designed to balance dual purposes: to "protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Blumer*, 534 U.S. at 480. It is meant to allow a community spouse to retain a modest amount of resources and not force that spouse to reach the same level of poverty that an institutionalized spouse necessarily reaches in becoming "poor enough" for Medicaid, while not allowing a couple to shelter "too much" in resources in the community spouse's name. *Id.* at 479-80.

The CSRA provisions seek to achieve this goal by essentially treating a couple jointly, then separately, in two stages. First, the couple’s resources are considered together, regardless of whose name they are held in, and each spouse’s attributed “spousal share” is half of the joint countable resources. As explained above, the CSRA is either the spousal share or the CSRA minimum or maximum. Second, after that attribution split, the community spouse’s income and CSRA are not considered available to the institutionalized spouse when eligibility is determined. *Id.* at 480-81. Because this approach is unique to couples with one institutionalized spouse, Congress recognized that conflicts might arise between the CSRA provisions and other Medicaid-eligibility provisions. To resolve this conflict, it expressly provided that the CSRA provisions supersede all inconsistent Medicaid provisions:

(a) Special treatment for institutionalized spouses.

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

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

In deciding whether anyone—including an institutionalized spouse—qualifies for Medicaid, the county reviews the applicant’s resources and also determines whether there have been any “improper transfers,” as those have a temporary effect on nursing-home coverage. If an applicant (or her spouse) has transferred any resources to a non-spousal third party during the sixty months before the first date on which the applicant is both institutionalized and has applied for Medicaid, the county examines the transfers to decide if they were “improper,” i.e., among other things, transferred for less than fair market value to qualify for Medicaid. *See* O.A.C. 5160:1-3-07(H); 42 U.S.C. 1396p(c). The sixty-month period is the “look-back period”; the date starting it is the “baseline date,” O.A.C. 5160:1-3-07(B)(3). Separately, as between spouses, the

CSRA limits transfers of resources between them. 42 U.S.C. 1396r-5(c)(1)(A). The dispute here concerns whether this “CSRA Transfer Cap” begins to apply at the “snapshot date” (the first date of institutionalization) or when eligibility is established.

If an improper transfer has occurred, a period of restricted coverage is calculated. *See* O.A.C. 5160:1-3-07(I); 42 U.S.C. 1396p(c)(1)(A). The length of the restricted-coverage period corresponds to the number of months of nursing-home care that the improperly-transferred resources would have covered, using the average monthly private pay rate for nursing-home care in Ohio. *See* O.A.C. 5160:1-3-07(J)(2); 42 U.S.C. 1396p(c)(1)(E).

Ohio Administrative Code 5160:1-3-07(G), the “Ohio Transfer Rule,” addresses the transfer of resources between (or for) spouses as it relates to the CSRA. The Rule says: “Any amount of a couple’s resources exceeding the CSRA may not be transferred to the community spouse or to another for the sole benefit of the community spouse unless permitted in a hearing decision issued under Chapter 5101:6-7 of the Administrative Code.” *See* O.A.C. 5160:1-3-07(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 resulting from a CSRA hearing, the transfer is presumed improper. *See* O.A.C. 5160:1-3-07(G)(4). Ohio Administrative Code 5160:1-3-07(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 Administrative Code 5160:1-3-07(C) and (G) effectuate 42 U.S.C. 1396r-5(c)(2), which mandates that all of a couple’s resources above the community spouse’s CSRA are considered available to the institutionalized spouse—meaning that they are

evaluated to see if the institutionalized spouse can pay (or still pay) for 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* O.A.C. 5160:1-3-36.1(C)(4).

B. Mr. Koenig’s Medicaid coverage was restricted because ODJFS found an annuity purchase by Mrs. Koenig to be an improper transfer.

On March 15, 2011, Mr. Koenig moved into a nursing care facility. *Koenig v. Dungey*, 2014-Ohio-4646, ¶ 11 (1st Dist.) (hereinafter “App. Op.”). Mr. Koenig applied for Medicaid on October 18, 2011. *Id.* The Hamilton County Department of Job and Family Services determined that, “[a]t the time of Mr. Koenig’s institutionalization, Mr. and Mrs. Koenig had countable Medicaid resources of approximately \$349,806. The agency determined that the CSRA for Mrs. Koenig was \$109,560.” *Id.*

Eight days after Mr. Koenig applied for Medicaid, Mrs. Koenig “purchased a single-premium annuity for \$121,783.56. The annuity provided immediate, monthly payments to Mrs. Koenig for five years” *Id.* ¶ 12. The county agency approved Mr. Koenig’s Medicaid application, but determined “that the annuity purchase constituted an improper transfer of resources to Mrs. Koenig.” *Id.* ¶ 13. Because of this improper transfer, the agency imposed restricted coverage from December 2011 through July 2013. *Id.*

Mr. Koenig 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. *Id.* ¶ 14. “Mr. Koenig then sought an administrative appeal within ODJFS under R.C. 5101.35(C). Prior to the release of the administrative decision upholding the state hearing decision, Mr. Koenig passed away.” *Id.*

C. The common pleas court reversed the agency decision, and the appeals court affirmed that reversal.

Mrs. Koenig filed an administrative appeal in the Hamilton County Court of Common Pleas as the administrator of Mr. Koenig’s estate. App. Op. ¶ 15. “The trial court concluded that ODJFS erred when it treated Mrs. Koenig’s purchase of the annuity as an improper transfer and erred in imposing a period of restricted coverage on Mr. Koenig’s Medicaid payments.” *Id.* ¶ 17. ODJFS appealed to the First District, which affirmed the trial court. The First District followed a non-binding federal case, *Hughes v. McCarthy*, 734 F.3d 473 (6th Cir. 2013), and determined that the CSRA Transfer Cap does not apply until after the applicant’s Medicaid eligibility has been determined. *Id.* ¶ 24. It held that “Mrs. Koenig’s annuity purchase with funds in excess of the CSRA was not an improper transfer when the transfer occurred after institutionalization, but preeligibility.” *Id.* ¶ 25.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case warrants review for the same reasons that this Court accepted review of *Atkinson v. Ohio Department of Job and Family Services*, 2013-1773. In *Atkinson* this Court is poised to resolve the very issue raised here: whether the CSRA Transfer Cap limits spousal transfers starting on the snapshot date, even if a Medicaid application has not yet been granted. *Atkinson* and this case involved different types of transfers, but the key issue is the same. In *Atkinson*, the Court will consider whether a transfer from a trust constitutes an improper transfer. Here, the transfer of marital resources was to purchase an annuity. But in both cases, the central issue is the *timing issue*: whether a couple can continue to transfer their resources to or for the community spouse, even those resources above the CSRA, after the snapshot date (i.e., the date of institutionalization) has passed but before Medicaid eligibility has been determined. The Fifth District decision under review in *Atkinson* adopted the view that the CSRA Transfer Cap applies

upon institutionalization, but the opinion of the First District below held the opposite and would allow these transfers to occur with no cap until a determination of Medicaid eligibility. Because the opinion below is directly opposed to another appellate court opinion now under review, this Court should grant review of this case and hold pending *Atkinson*.

ARGUMENT

Appellant's Proposition of Law:

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

The First District was mistaken in ruling that, because the annuity purchase occurred before Mr. Koenig was determined eligible for Medicaid, the purchase was not an improper transfer. The federal statute's plain language does not exempt pre-eligibility transfers, *see* 42 U.S.C. 1396r-5(f)(1), and the Ohio Transfer Rule does not, either. Nor would it be sensible to read such an exception into the law, as doing so would render the CSRA Transfer Cap virtually meaningless. Medicaid applicants and their spouses could simply invest and preserve unlimited amounts of resources for the community spouses, as long as they did so before eligibility was determined—even, as the Koenigs did here, after one spouse has both been institutionalized and applied for Medicaid. That contradicts the core idea of allowing community spouses to retain some resources, but not too many—as the First District's ruling would allow *unlimited* asset sheltering in that last-minute context. The First District's rule would allow the community spouse of a Medicaid applicant to receive *all* of the couple's combined assets, entirely circumventing the CSRA provisions.

The Sixth Circuit decision on which the First District relies was also wrong. But notably, in *Hughes v. McCarthy*, the court never truly grappled with or rejected ODJFS's view, but

instead misapprehended its argument and rejected a view it never advanced. True, the court said that the CSRA Transfer Cap applies only after eligibility is established, as the First District held below. *Hughes*, 734 F.3d at 475. But it did not compare that view to ODJFS’s view that the limit starts to apply *only at institutionalization*.

Instead, the Sixth Circuit, in discussing “pre-eligibility” application of the CSRA Transfer Cap, took that to mean applying the Cap for the entire five-year look-back period that is invoked in other parts of the scheme for other purposes, *see* 42 U.S.C. 1396p. *Id.* at 480. That court reasoned that applying the Cap over that whole period would render “superfluous” several parts of that latter statute, 42 U.S.C. 1396p, as that statute immunizes several types of transfers from being improper, even if made during the five-year look-back period. *Id.* (citing *Morris v. Okla. Dept. of Human Servs.*, 685 F.3d 925 (10th Cir. 2012) (taking same approach when party did argue that the full look-back period is applicable)). But in ODJFS’s view, that statute does apply to immunize those transfers during the look-back period up until the institutionalization date, so that statute is not superfluous if, as here (and as is typical), the institutionalization date precedes eligibility by much less than five years. And to the extent the periods overlap, the CSRA statute’s supersession clause confirms that the CSRA provision trumps others. *See* 42 U.S. 1396r-5(a)(1). The *Hughes* court further confirmed that it was addressing the look-back strawman when it cited an amendment that Congress never enacted, which would have applied the CSRA to the entire look-back period. *Hughes*, 734 F.3d at 481. The court said that the rejected proposed amendment would have accomplished the “very construction” of the law that ODJFS supports, *id.*, but that is simply not so. ODJFS urges the modest, but critical, application of the CSRA Transfer Cap starting only at the institutionalization date, not for the entire five-year look-back period.

Moreover, the *Hughes* court failed to address several arguments ODJFS raised that were tied to the institutionalization date. For example, it makes no sense to take a “snapshot” as of institutionalization, which the law plainly requires, if that snapshot never governs anything. And it would be odd for Congress to create and mandate an entire hearing process that can allow an applicant or spouse to obtain a good-cause CSRA increase if the CSRA amount actually imposes no restriction and can be evaded simply by purchasing an annuity or engaging in some other asset-sheltering transaction to benefit the community spouse.

In sum, the CSRA Transfer Cap applies starting at institutionalization, not at the eligibility-determination date. The resolution of this issue should determine the outcome of this case, just as it will determine *Atkinson*.

CONCLUSION

The Court should accept jurisdiction over this case and hold it pending the decision in *Atkinson v. Ohio Department of Job and Family Services*, 2013-1773 (oral argument held on August 20, 2014).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendants-Appellants, The Ohio Department of Job and Family Services and its Director, Cynthia C. Dungey, was served by U.S. mail this 6th day of January, 2015 upon the following counsel:

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