

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.	:	
	:	

**MOTION FOR RECONSIDERATION AND CLARIFICATION OF
APPELLEE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES**

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INTRODUCTION

The Ohio Department of Job and Family Services (“ODJFS”) does not seek reconsideration lightly, but does so here because the Court’s decision, while right on the principal issue, contains some language that has sown confusion. Specifically, the Court potentially undercut its ruling by questioning the validity of the only remedy available to the agency—namely, a “restricted coverage” period—to address what the Court *agreed* are improper transfers in this particular Medicaid-eligibility context. Ultimately, the decision is unclear on whether it has done so, because it both suggests the remedy might be unavailable, while simultaneously remanding to determine the *amount* of the remedy. Yet the remedy issue was never raised by Appellant Estate of Marcella Atkinson (“Atkinson”), so not only was it waived, but also the Court did not have the benefit of briefing on the issue. Moreover, this aspect of the Court’s opinion likely was driven by what the ODJFS now concedes was its own error, which the Court’s opinion recognized: The agency miscalculated the *amount* of penalty that should have applied to the improper transfer. It mistakenly penalized the entire value of the house-in-trust transfer, but should have looked to only the portion of that value that exceeded the Community Spouse Resource Allowance (CSRA). While Atkinson did not appeal that amount, arguing only that *no* improper transfer occurred at all, the agency agrees to waive that waiver and adjust the amount on remand. But it can do so only if the Court addresses the remedy issue.

Thus, the agency respectfully requests that the Court reconsider two aspects of its opinion. *First*, the Court should reconsider and clarify its discussion of the “restricted coverage” remedy, preferably to confirm that it is available, or at least to leave the issue open for remand. The relevant federal law, 42 U.S.C. 1396p (“1396p”), defines several transfers as proper or improper, and instructs States to remedy any improper ones by applying “restricted coverage”—

basically a delay until nursing-home benefits start—to account for any amount improperly transferred. Separately, a provision unique to the scenario here—a married couple with one spouse in a nursing home—says that after institutionalization, any transfers to (or for) the community spouse above the CSRA are improper. A supersession clause says that the CSRA provisions trump any Medicaid provision that is “inconsistent with” the CSRA rules. 42 U.S.C. 1396r-5(a)(i). Thus, the CSRA rules are an overlay defining *what transfers are improper*, but because nothing in the CSRA provisions establish any “inconsistent” remedy, 1396p’s restricted-coverage remedy remains available.

Although the remedy here was not at issue, the Court’s decision might suggest that the restricted-coverage remedy is not available *at all*, and, if so, that is wrong. In the context of questioning the *amount* of the restricted-coverage penalty—an error ODJFS admits—the Court also said that “we see no authority for applying the penalties of” 1396p, saying that the subpart establishing penalties “simply doesn’t pertain to 42 U.S.C. 1396r-5 transfers between spouses.” Opinion (“Op.”) ¶ 28. The Court likely meant only to question the *amount* of the penalty, because the Court’s *remand* suggests that the penalty is available. If not, the remand would serve no purpose. But some of the opinion’s language seems to suggest *no* availability. And the Court also pointed to a purported alternate remedy, but that “remedy” is both unavailable and irrelevant. Thus, as detailed below, any suggestion that the restricted-coverage remedy is unavailable should be removed, both for the substantive reason that it would be wrong, and for the procedural reason that it was never litigated.

Second, the Court should address its distinction of the federal *Hughes* case, which adopted a conflicting view of *when* the CSRA Transfer Cap begins. Because the common issue is *timing*, no distinction arises because of the type of asset involved, whether an annuity or

otherwise. The Court should acknowledge the conflict with *Hughes* or address the annuity issue quickly in its pending *Koenig* case. This issue arises much more frequently in the annuity context, so the agency and citizens alike need an answer to a growing problem.

ARGUMENT

A. The Court should clarify that the “restricted coverage” remedy is available to address improper transfers above the CSRA amount, or it should at least allow that un-litigated issue to be addressed on remand.

The Court’s remedy discussion requires clarification because the decision as it stands has sown confusion. First, ODJFS explains below why the decision is problematic, and why some response—whether adopting ODJFS’s view or at least expressly leaving it for remand—is needed. Second, ODJFS shows why the Court should simply adopt its view. Third, ODJFS notes that the alternate state-law remedy the Court identified is both unavailable and irrelevant.

The remedy issue “arises”—but was not litigated—because the Court properly held that after the date of institutionalization, interspousal transfers are limited to the CSRA amount, so transfers above that amount are improper. Op. ¶¶ 24, 29. The Court could have stopped there, as the sole issue that Atkinson appealed was *whether* the disputed transfer was improper, which turned on whether the “CSRA Transfer Cap” applied at institutionalization (as ODJFS said) or only when Medicaid eligibility was declared (as Atkinson urged).

Instead, the Court addressed the remedy in a way that might suggest that the agency cannot impose restricted coverage at all. That would be mistaken.

1. The Court should revisit its remedy discussion because the decision is unclear and the issue was not litigated, so the Court should instead note that the remedy is available or should expressly remand the issue.

As an initial matter, ODJFS is unsure *whether* the Court intended to preclude entirely the restricted-coverage remedy, or to leave its availability for remand, so it seeks clarification. And

if the Court *did* intend to preclude it, ODJFS asks the Court to take back any such preclusion, and to instead expressly find it available or expressly remand the issue (as to its merits and/or the threshold issue of waiver).

The Court’s decision is unclear. On one hand, the Court repeatedly suggested that *no* restricted-coverage remedy is available, saying that “we see no authority for applying the penalties of 42 U.S.C. 1396p(c)(1)(E), which docked Raymond the entire amount of the value of his house, part of which already belonged to him. 42 U.S.C. 1396p(c)(1)(E) simply doesn’t pertain to 42 U.S.C. 1396r-5 transfers between spouses.” Op. ¶ 28. The Court also said “we see no authority for applying the penalty provisions of 42 U.S.C. 1396p to these facts.” *Id.* ¶ 30.

On the other hand, while that language seems conclusive *against* the remedy, the Court also remanded to reconsider the amount of the remedy. Op. ¶ 33. The Court questioned the imposed penalty’s *amount* for covering the whole house rather than part—which ODJFS admits was mistaken—and the Court “remand[ed] the cause to the trial court to apply 42 U.S.C. 1396r-5(c)(2)(B) and Ohio Adm. Code 5160:1-3-36.1(E) and *make adjustments accordingly if any are needed.*” *Id.* (emphasis added).¹ But the cited federal provisions concern only the amount of an improper transfer; they do not give a mechanism to address it. Thus, the 1396p restricted-coverage penalty, which was imposed, must be the one being “adjust[ed] accordingly.”

Or perhaps the Court intended that the adjusted amount be used in pursuing an *alternative* remedy—an independent collection action against the community spouse under Ohio Adm. Code

¹ This citation to the Ohio Administrative Code is the old one, and the rules were re-numbered after argument. Unfortunately, some online versions of the rules list the old-numbered rules as “rescinded,” which is true only in that the specific number was rescinded when the new numbers were adopted. All relevant rules remain in effect with identical wording, so the dissent was mistaken in stating that the rules were repealed. *See* Op. ¶ 45 (O’Neill, J., dissenting). Former Ohio Adm. Code 5160:1-3-36.1 is now Ohio Adm. Code 5160:1-3-06.4; former Ohio Adm. Code 5160:1-3-31 is now Ohio Adm. Code 5160:1-3-05.13; and former Ohio Adm. Code 5160:1-3-27.1 is now Ohio Adm. Code 5160:1-3-05.2.

5160:1-3-36.1(E)—but that cannot be the remand’s scope, for two reasons. First, as detailed below (at 10), that remedy is not available at all on facts such as these. Second, even if that remedy were available, it cannot be pursued *on remand*, as it would involve a different case against a different party. A separate action would have to be brought against the community spouse (here, Mr. Raymond Atkinson’s estate), while this case is between the agency and (the estate of) the institutionalized spouse, Medicaid recipient Mrs. Marcella Atkinson. *See* Ohio Adm. Code 5160:1-3-05.13(E); R.C. 5101.35(E). Further, because this is an administrative appeal under R.C. 5101.35, the only thing at issue is the agency’s action, so the only thing that *could* be addressed on remand is the amount of the restricted-coverage penalty under 1396p. That means that the Court’s remand inherently suggests that the remedy is available, in potential conflict with the overly broad language questioning its availability.

The above conflict is, without more, reason enough to clarify at least, and strong reasons exist for that clarification to be something *other* than a preclusion of the restricted-coverage remedy. That is, the Court should clarify that the remedy is available, or at least remand the issue to the trial court. But for several reasons, it should not preclude the remedy.

First, the remedy issue was never challenged below, so it was waived. Atkinson argued at every stage below, and in this Court, solely that the challenged transfer was not “improper” and was instead allowed. She never argued alternatively that the remedy was not allowed even if the transfer was improper. The Court should find the issue waived here. If the Court thinks the issue should be reviewed in another case, it should identify it as open, but not rule on it.

Second, because the issue was not before the Court, the Court did not have the benefit of briefing on it, and ODJFS was denied its right to brief it. Those concerns are independent of Atkinson’s waiver, as they implicate the process and fairness of the decisionmaking. The Court

is best served when parties brief and argue an issue. That, too, is reason to delete any conclusions reached without that benefit. It is also unfair to ODJFS—and to the taxpayers who fund its programs—to eliminate a key part of the Medicaid process without hearing ODJFS’s view. As shown below in Part A-2, the merits of the issue are on ODJFS’s side, as the restricted-coverage remedy is not “inconsistent” with the CSRA provisions’ additional limits on what transfers are improper. Even if the Court finds ODJFS’s showing on that score unconvincing for some reason, it is indisputable that the Court did not assess whether the provisions are “inconsistent,” but simply suggested that the supersession clause in the CSRA provisions superseded *all* of 1396p. That is wrong as a matter of process, at least, if not as a matter of result as well.

If the Court is concerned about affirming the remedy’s availability, and is willing to overlook Atkinson’s waiver, it should at least modify its decision to expressly identify the issue as left for remand. That way, the trial court could fully examine the issue, and it can be appealed from there if necessary. ODJFS suggests, in addition, that if the Court remands the merits of the issue, it ought also to remand the threshold question of waiver, to give ODJFS a chance to at least brief that issue as well.

In sum, to the extent that the Court may have precluded the availability of the restricted-coverage remedy, it did so without briefing and reached the wrong conclusion. The Court should clarify that it did not do so, or should choose now not to reach such a result. Even better would be for the Court to affirm that the remedy *is available*, for the reasons below.

2. The CSRA supersession clause overrides only those Medicaid provisions that are “inconsistent,” and nothing about the restricted-coverage remedy of Section 1396p is inconsistent with the CSRA’s limit on interspousal transfers after the date of institutionalization.

As noted above, it is unclear whether the Court conclusively precluded the restricted-coverage remedy, but such a result would be mistaken. The Court’s seemingly preclusive statements are conclusory, resting on the CSRA provisions’ supersession clause, but the Court never reviewed what that clause says, nor did it apply that clause’s test to the provisions at issue. The Court said “pursuant to the supersession clause, 42 U.S.C. 1396r-5, 42 U.S.C. 1396p does not apply to this case.” Op. ¶ 24. But the supersession clause does not simply say that Section 1396p does not apply; it says that “inconsistent” provisions do not apply—and nothing about 1396p’s restricted-coverage remedy is inconsistent with the CSRA’s Transfer Cap.

First, the supersession clause’s plain text shows that Congress intended only for *some* provisions to be superseded—the “inconsistent” ones—so it knew that other Medicaid provisions would apply alongside the special CSRA provisions of 42 U.S.C. 1396r-5. The clause says

(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 U.S.C. § 1396a(a)(17) and (f)] which is inconsistent with them.*

42 U.S.C. 1396r-5(a)(1) (emphases added). Thus, Section 1396p’s remedy provision is superseded *only if the provisions are inconsistent*. The Court did not find the provisions inconsistent, as it did not even cite the inconsistency test or ask the question.

Second, the text and structure of the two provisions show that no inconsistency is possible; to the contrary, the CSRA Transfer Cap *requires* the maintenance of Section 1396p’s remedy to have meaning. Section 1396p defines many types of transfers as proper or improper, including ones to spouses or others, and it governs the five-year pre-application period called the

“lookback” period. Section 1396p also *requires* States to impose “restricted coverage,” or a delay in coverage for nursing-home care, as a remedy for improper transfers.

Separately, Section 1396r-5 concerns treatment and protection of income, treatment of resources, the fair-hearing process for disputes, and calculation of the CSRA. As the Court properly held, the CSRA provisions, by calculating the CSRA amount as of the date of institutionalization and authorizing a transfer to ensure that the community spouse is left with the CSRA amount, *limits* any interspousal transfers that go beyond the CSRA and occur after the date of institutionalization. Op. ¶ 24. In other words, the CSRA provisions define another type of improper transfer, or, put another way, limit spousal transfers that are otherwise allowable under Section 1396p so that they are allowed only up to the CSRA amount.

Notably, the CSRA Transfer Cap provides no remedy or enforcement mechanism of its own. That is, while Section 1396r-5 provides an extra rule against certain transfers, nothing in the Section says what to do if a transfer occurs in violation of the rule. Thus, it provides no conflicting *remedy* to be “inconsistent” with the default improper-transfer remedy of Section 1396p. And nothing about a rule defining an additional improper transfer is itself inconsistent with the normal remedy for other improper transfers.

Indeed, the absence of any remedy suggests that Congress intended for Section 1396p’s usual remedy to apply to violations of Section 1396r-5’s CSRA Transfer Cap. Indeed, the restricted-coverage provisions appear to be the only way that the CSRA Transfer Cap—which, as this Court agrees, starts applying at institutionalization rather than at the eligibility-determination date—can be enforced under current law. Without that remedy, this critical restriction has no remedy at all, and surely that is not what Congress intended.

This harmony between Section 1396p's remedy and Section 1396r-5's CSRA Transfer Cap contrasts with the inconsistency that the Court correctly found does exist between other parts of Section 1396p and Section 1396r-5. For example, the provisions in Section 1396p(c)(2) that otherwise would seem to allow *unlimited* transfers of resources to (or for the "sole benefit" of) a community spouse after institutionalization, and before the applicant's eligibility determination, must yield to the CSRA limits. But nothing about imposing restricted coverage for an improper transfer conflicts with the provisions defining post-institutionalization transfers beyond the CSRA to be improper transfers. And again, the remedy is *needed* as the only one available. (The Court mentioned another possible remedy contained in an Ohio regulation, but as explained below, that remedy is both unavailable and irrelevant.)

All of the above shows that the restricted-coverage remedy is not precluded as "inconsistent" with the CSRA's Transfer Cap, so the Court should not have precluded it, if that is what the Court meant. Moreover, while the Court should at least eliminate any suggestion of preclusion and remand the issue, it can and should simply state that the remedy is available.

Separately, although ODJFS objects to categorical elimination of the restricted-coverage remedy, it does not oppose, and in fact concedes, the adjustment of the *amount* of the remedy or penalty imposed upon Atkinson. As the Court noted, the amount of the improper transfer was likely less than the entire value of the house, as initially determined. That means that the restricted-coverage period should be shortened. To be sure, Atkinson never raised this issue, and has thus waived it, but ODJFS waives any objection based on waiver. On remand, ODJFS will work with Atkinson's estate to ensure that Mr. Atkinson's full CSRA is accounted for, and that only the relevant part of the house value is counted as the amount of the improper transfer. The adjusted improper-transfer amount in this case should equal—at most—the difference between

(1) Mr. Atkinson’s CSRA plus Mrs. Atkinson’s resource maximum of \$1500² and (2) the sum of the values of the improperly transferred house and any other, countable resources held by either spouse when the agency decided Mrs. Atkinson’s eligibility.

3. The other remedy the Court mentioned—an independent collection action under Ohio Adm.Code 5160:1-3-06.4(E)—is both unavailable and irrelevant.

While the Court may have undercut the availability of the proper restricted-coverage remedy, it separately suggested that the State could “remedy” an improper transfer in violation of the CSRA Transfer Cap by instead pursuing a collection action under Ohio Adm. Code 5160:1-3-06.4(E). *See Op.* ¶¶ 3, 18, 31, 33 (The Court cited the rule’s older number, Ohio Adm. Code 5101:1-3-36.1.) The Court never said whether the purported availability of that other remedy affected its view of the availability of the restricted-coverage remedy, or whether its mention of this other remedy was simply an observation on an issue not raised or briefed by either party. In any case, the Court was mistaken, because the independent-collection remedy is not available in this litigation, or in any similar CSRA improper-transfer case, and even if it were somehow available, it is irrelevant to the issue of restricted coverage.

First, the collection action is unavailable here because it can be used to reach only countable resources currently held by the community spouse. *See Ohio Adm. Code 5160:1-3-06.4(C)(4)* (showing the calculation of the amount to be considered—and thus ultimately to be made—“available” to the institutionalized spouse is to be comprised only of “countable” resources). No one disputes that the house here was an *exempt* resource, not a countable one, when Mr. Atkinson held the deed after the transfers. *See Ohio Adm. Code 5160:1-3-*

² While the CSRA maximum was \$60,000 when the CSRA statute was enacted, *see Op.* ¶ 17 (O’Neill, J., dissenting), the maximum is now \$119,220 (as the maximum is increased annually). *See ODM Medicaid Eligibility Procedure Letter* (Jan. 15, 2015), available at <http://www.odjfs.state.oh.us/lpc/calendar/fileLINKNAME.asp?ID=MEPL95> (visited 9/3/2015). *See also* 42 U.S.C. 1396r-5(f)(1)(A)(2) & (g).

05.13(D)(1). Indeed, that is how the problem here arose in the first place—the house was counted at the snapshot date, which inflated the CSRA, but then was not counted at the time of the eligibility determination because it was exempt. *See* Op. ¶¶ 8, 13. So the collection action could not be used to pursue the house here, as it is now exempt.

Second, the collection-action remedy would also be unavailable in another common type of improper transfer in violation of the CSRA, namely, a purchase of an annuity (or similar instrument) for the community spouse. That is again because the collection action can reach only countable resources actually held by the community spouse. In the annuity scenario, one or both spouses purchased an annuity using resources that—at least in part—were in the couple’s possession on the snapshot date and were part of the resources “available” to the institutionalized spouse. This means that the “resource” in question—the funds or other assets used to purchase the annuity—is not in the community spouse’s possession but rather has been transferred away to the annuity issuer. (And the income stream produced by the annuity generally is not a “resource” under the Medicaid provisions.) So the collection action is not available.

And even if the community spouse also separately has in his possession his CSRA—say, in cash—the collection action could not likely reach that cash, either, because the action cannot leave a community spouse with less in resources than the amount of his CSRA. *See* Ohio Adm. Code 5160:1-3-06.4(E).

So the collection action under Ohio Adm. Code 5160:1-3-06.4(E) is simply not an option for CSRA improper-transfer cases in general. Once a resource above the CSRA (which should have been made available to the institutionalized spouse under Section 1396r-5) is improperly transferred to or for the community spouse, effectively leaving that spouse with more than the

CSRA, the State must be able to respond by imposing restricted coverage. Otherwise, applicants will face no penalty for such improper transfers, and will thus be incentivized to do so.

Third, as noted in Part A-1 above, even if a collection action were somehow available in such cases, it is not a remedy that the lower courts could “apply” on remand here. *See Op.* ¶ 33. Any such collection action would be an independent, new action filed against a *community* spouse. It would not be before a court hearing an appeal like this one, which is taken by the *institutionalized* spouse under R.C. 5101.35 against the decision-making agency. *See Ohio Adm. Code 5160:1-3-05.13(E); R.C. 5101.35(E).*

Finally, even if an independent-collection-action remedy were available, any such availability would be irrelevant to the question whether Section 1396p’s restricted-coverage remedy is available to address improper transfers in violation of Section 1396r-5’s CSRA Transfer Cap. That is so because the latter question is a purely federal question of Congress’s intent. The issue is whether anything about Section 1396p’s remedy is “inconsistent” with 1396r-5’s CSRA’s provision. That question is not affected by whether an Ohio regulation somehow adds another remedy, as any such Ohio remedy would not create an “inconsistency” between the federal provisions, nor would Congress have intended to eliminate a remedy nationwide because Ohio has a regulation creating a remedy.

B. The Court should address the conflict between this case and *Hughes* on the timing issue of when the CSRA Transfer Cap applies, whether in this case or *Koenig*.

Because the Court should reconsider to address the remedy issue, it should, while reconsidering, also address more fully the conflict between this decision and the federal Sixth Circuit’s decision in *Hughes v. McCarthy*, 734 F.3d 473 (6th Cir. 2013). Alternatively, the Court should resolve the conflict as soon as practicable in the pending case of *Koenig v. Dungey*, Case No. 2015-0034, held and stayed for this case.

The Court’s decision conflicts with *Hughes* because both concerned the *timing* issue of when the CSRA Transfer Cap starts to apply—whether it applies starting on the date of institutionalization or not until the eligibility-determination date. *See Hughes*, 734 F.3d at 478-79, 480 (citing 42 U.S.C. 1396r-5(f)(1) and 1396p(c)(2)(B)); *compare* Op. ¶ 17; Op. ¶ 7 (stating question presented); ¶ 25 (summarizing Atkinson’s argument). In this case, both parties agreed that the issue was the same as in *Hughes*, and each side here advocated a different answer.

The Court said that *Hughes* was distinct because that case involved annuities, which have special provisions under Section 1396p, while this case involves a house—but that distinction does not withstand scrutiny. In both cases, the common timing issue is whether the CSRA Transfer Cap applies at all between the date of institutionalization and the date of eligibility determination, regardless of what type of asset is being transferred.

This Court correctly concluded that, in light of 42 U.S.C. 1396r-5, an institutionalized spouse or a married couple cannot simply transfer unlimited amounts of resources to or for the benefit of a community spouse between the date of institutionalization and the eligibility-determination date. *See* Op. ¶ 24.³ Rather, transfers during that period are subject to the

³ The Court should also clarify that it meant what it said in paragraph 24, in which it stated its holding as applying the Transfer Cap Rule from the date of *institutionalization*. At other points, the Court alternatively referred to the time of “application,” *see, e.g.*, Op. ¶¶ 1, 3, 33, but no theory of the case leads to *application* as a starting point. Atkinson urged the later eligibility determination date, and nothing in the statutory text or any reasoning points to application. The date of institutionalization is the date that federal law mandates as the “snapshot” date; that is, the couple’s financial picture is assessed as to that date and used to calculate the CSRA. *See* 42 U.S.C. 1396r-5(c)(1). The Court may have equated the application date with the date of institutionalization based on the idea that those events occur simultaneously. While that may be true sometimes, often a Medicaid application is filed weeks or months or even years later. Therefore, because the Court’s holding and reasoning were tied rightly to the date of institutionalization, the Court should harmonize its language in the other paragraphs to reflect that date.

Transfer Cap. The Sixth Circuit, on the other hand, concluded that there is *no* limit on such transfers until the date of eligibility determination. *See Hughes*, 734 F.3d at 480.

To be sure, the fact that *Hughes* involved annuities also raised separate annuity-specific questions under 42 U.S.C. 1396p(c)(1)(F) and (G). But those issues have nothing to do with the CSRA Transfer Cap question, which was addressed in *Hughes* separately from the annuity-specific questions there and is central here. Indeed, the Court’s reasoning here is not resource-specific, but deals with *when* the CSRA Transfer Cap applies to all improper transfers. *See, e.g.*, Op. ¶ 24 (correctly concluding, with non-resource-specific language, that “transfers between spouses are not unlimited after the snapshot date and before Medicaid eligibility [is determined]) and ¶ 29 (similarly non-resource-specific conclusion); *see also id.* ¶ 25 (“agree[ing] with the state on the CSRA limits on transfers”).

Consequently, the Court’s distinction of *Hughes* does not hold, and the laudable goal of avoiding unnecessary conflict cannot be met, as the conflict is necessary. In particular, the Court’s reliance on Section 1396p’s special treatment of annuities does not work. Other items are also specially treated under Section 1396p—such as spousal transfers during the five-year lookback period—but that different treatment yields to the more specific CSRA system. Moreover, the Court’s reliance on Section 1396p to distinguish *Hughes* does not square easily with the Court’s declaration (discussed in Part A above) that Section 1396p does not apply at all in CSRA cases.

Thus, the Court should say clearly that it disagrees with *Hughes*. Moreover, acknowledging that conflict is necessary to resolve a more important problem—the uncertainty in lower Ohio courts over the Ohio answer to the question. Lower Ohio courts need this Court’s

guidance, and so does ODJFS, and so do individual Ohioans planning their affairs. A final answer for Ohio courts, even if it conflicts with a mistaken federal court, is preferable.

Alternatively, ODJFS asks that the Court set a briefing schedule soon for the pending *Koenig* case (No. 2015-0034) so the issue may be resolved there. *Koenig* is an annuity case, so it undoubtedly is the same as *Hughes*. Because the need for resolution is strong and urgent, ODJFS urges the Court to move *Koenig* forward quickly. The Court may also wish to consider staying its decision on this Motion so that it could decide the Motion together with *Koenig*, to eliminate any gap or conflict between the two cases.

CONCLUSION

For these reasons, the Court should reconsider its decision by affirming (or clarifying) that the Transfer Cap applies generally to over-CSRA transfers to or for community spouses between institutionalization and eligibility determination and that ODJFS correctly restricts nursing-home coverage as a consequence of an improper transfer. Alternatively, the Court should leave the penalty question open on remand so that it can be fully and fairly aired then.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Reconsideration and Clarification of Appellee Ohio Department of Job and Family Services was served by U.S. mail this 8th day of September 2015 upon the following counsel:

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A courtesy copy was also sent to counsel in *Koenig v. Dungey*, Case No. 2015-0034:

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