

IN THE SUPREME COURT OF OHIO

ESTATE OF MARCELLA ATKINSON,	:	CASE NO. 2013-1773
	:	
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.	:	

**RESPONSE OF APPELLANT ESTATE OF MARCELLA ATKINSON TO APPELLEE'S
MOTION FOR RECONSIDERATION AND CLARIFICATION**

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INTRODUCTION

Appellant Estate of Marcella Atkinson (“Appellant”) files this Response to the Motion for Reconsideration and Clarification filed by Appellee Ohio Department of Job and Family Services (“Appellee”). In its Motion, Appellee asks for reconsideration of two components of the Court's existing decision. First, Appellee asks the Court to reconsider its finding that the remedy sought by Appellee is not appropriate under the law. Second, Appellee asks the Court to address the conflict between the decision in this case and the Sixth Circuit’s decision in *Hughes v. McCarthy*, 734 F.3d 473 (6th Cir. 2013). While Appellant agrees that the Court should address the conflict with *Hughes*, that conflict should be resolved in Appellant’s favor. In the alternative, the Court should reject Appellee’s stated bases for reconsideration and suggested clarifications.

With respect to the conflict between this Court’s decision and *Hughes*, Appellant agrees with Appellee that the legal issue decided in *Hughes* is the same as the timing issue central to this case – regardless of type of asset being transferred. As result, Appellant urges the Court to reconsider its prior decision and find that *Hughes*, which remains good law in the Sixth Circuit, is dispositive of the issues in this case and requires judgment in favor of Appellant. In the event the Court does not vacate its prior decision and enter a decision consistent with *Hughes*, the Court was correct to limit its holding in this case to deal expressly with the house transfer issue. Throughout this proceeding, Appellee attempted to re-litigate the annuity issues in *Hughes*, but these issues would be better addressed in a case dealing expressly with annuities. The issue in this case involved the home which is an asset granted special consideration under the law. The Court should reject Appellee’s request to use this case to expand the Court’s existing opinion to govern annuities.

With respect to the remedy available to Appellee in this case, the law on this issue is clear and, therefore, the Court was free to raise the issue *sua sponte*. The Court considered the relevant law and correctly found that there were substantial problems with the Appellee's preferred remedy. As Appellant demonstrates below, if this Court's ruling on supersession stands, the imposition of a restricted Medicaid coverage period would result in double penalization and would be in direct conflict with the "Supersession Clause." Finally, it is not for the Court to determine the wisdom of the legislatively implemented remedies available to Appellee. If Appellee believes the available remedies are inadequate to achieve the objectives of the Medicaid program, Appellee is free to pursue changes through the legislative process. It is not the Court's duty to rewrite the applicable federal statutes in order to meet Appellee's purported policy goals.

ARGUMENT

A. The Court Should Reconsider and Vacate Its Existing Decision and Issue a Decision Consistent with *Hughes*.

The parties have agreed throughout this proceeding that *Hughes* is not inapposite: the timing issue in this case is the same as the issue presented in *Hughes* and conclusively decided by the Sixth Circuit. Appellee has asked the Court to confront the conflict created by the Court's existing decision and the decision in *Hughes*, and this conflict should be resolved in Appellant's favor. The Court's existing decision will create havoc in the Medicaid system by distinguishing, with no legal basis, the timing issue previously resolved by *Hughes*. In doing so, the Court has ignored a federal appellate court's reasoned interpretation of the applicable federal laws, as well as the long-established opinion of the Department of Health and Human Services, which the Sixth Circuit expressly requested and relied upon. The Court's existing decision will cause Ohio citizens to be treated differently, and more harshly, than the citizens of other states under the

same rules and regulations regarding asset transfers. However, a finding that *Hughes* was wrongly decided (the result urged by Appellee) does not resolve the problems created by the conflict. *Hughes* remains the law of the Sixth Circuit, and will continue to be applied by the federal judiciary and bind Appellee across that jurisdiction. The practical result will be a patchwork of statutory interpretation in which litigants in the Sixth Circuit (including the Northern and Southern Districts of Ohio) will be subjected to different rules than litigants in Ohio's state courts. The only reasonable resolution of this conflict is the Court's recognition that *Hughes* was correctly decided and the adoption of *Hughes*' holdings in this case. Further, Appellant disagrees with the Court's finding that the "Supersession Clause" of 42 U.S.C. 1396r-5 applies in this case. As set forth in Appellant's briefs, and consistent with the decision in *Hughes*, there are no inconsistencies in the relevant statutory language that would require the application of the "Supersession Clause."

If, however, the Court declines to vacate its existing decision and adopt the holding of *Hughes*, the Court should find that the remedy sought by the Appellee is barred, and limit its existing decision to the facts of this case.

B. If the "Supersession Clause" Applies, the "Restricted Coverage" Remedy Is Barred and the Proper Remedy Is Provided by the "Spousal Refusal" Provisions.

If the "Supersession Clause" applies, the restricted coverage remedy is barred by 42 U.S.C. 1396r-5 ("1396r-5"). The imposition of a restricted coverage period would result in an unfair and unintended double penalty on Medicaid applicants and their spouses.

1. The Court was free to raise and rule on remedy issues *sua sponte*.

Despite Appellee's argument to the contrary, there is nothing inherently contradictory with the Court's finding that a certain transfer was impermissible, while also finding that the penalty imposed by Appellee was the incorrect remedy. The Court is not bound to a binary

decision, that the finding of an improper transfer under Ohio Adm.Code 5160:1-3-07(I)¹ was appropriate, or a finding that the transfer was permitted. The Court acted within its discretion to make a determination that the relevant statute did not permit the transfer and that the penalty imposed by Appellee was improper. Further, Appellee seeks to confuse the issue by arguing that the Court's ordered remand conflicts with its holding. Appellee argues that the remedy provided by statute is available only in an action against a person who is not party to this litigation, namely the Estate of Raymond Atkinson. There is no conflict or contradiction in this instance. The proper remedy found under the "Spousal Refusal" provisions is not a conflict requiring resolution by this Court but, rather, is an issue appropriate for the lower court to decide on remand. The Court's role is not to ensure that Appellee achieves its objective in this case, but to ensure that the law is applied correctly by Appellee.

2. If 1396r-5 supersedes 1396p, the penalty provisions of 1396p are unavailable to Appellee.

The relevant provisions of the Ohio Administrative Code, 1396r-5, 42 U.S.C. 1396p ("1396p") clearly indicate the "restricted coverage" remedy is not available. Indeed, 1396r-5 does not provide this remedy for transfers in excess of the CSRA, and expressly states at 1396r-5(c)(2) that resources in excess are to be considered available to the institutionalized spouse. The provisions of 1396p, which were written prior to the adoption of 1396r-5, were written to exclude transfers between spouses. All references to a transfer by the individual include a reference to a transfer by the spouse, and any transfer between spouses would not seem to fall under the rules. *See* 42 U.S.C. 1396p(c)(1)(A). It is difficult to understand how assets which are expressly to be considered available under 1396r-5(c)(2) could be disposed of for less than fair market value. The rules also specifically exclude transfers of the home between spouses. *See* 42

¹ For the purposes of this brief, Appellant is utilizing the updated numbering system of the Ohio Administrative Code used by Appellee in its Motion.

U.S.C. 1396p(c)(2)(A). In order to accomplish Appellee's goal, it would require the express provisions permitting the transfer between spouses to be eliminated and the repeated references to the individual's spouse to be modified. It is not for the Court to fundamentally rewrite a statutory provision in this fashion. Had Congress intended to provide this remedy, the legislature could have expressly included this remedy in 1396r-5. Thus, the Court's existing decision minimizes conflict within the statute.

3. The imposition of a restricted coverage period would result in an unfair and unintended double penalty on Medicaid applicants and their spouses.

Appellee's argument that failing to impose a restrictive transfer penalty renders the Community Spouse Resource Allowance ("CSRA") cap meaningless is incorrect. In fact, as discussed below, the result of Appellee's proposed interpretation would be to double penalize such transfers, and possibly leave the spouse penniless. The true purpose of the CSRA cap is to prevent the community spouse from retaining assets in excess of the CSRA. This provision is enforced by delaying eligibility for the institutionalized spouse until the assets of the community spouse have been reduced to the CSRA level. Any prohibition on transfers between spouses serves to reiterate this point, that assets may not be sheltered by transferring them between spouses. The CSRA cap, therefore, is not rendered meaningless by a failure to impose a restricted Medicaid coverage period, as Appellee would withhold eligibility until the assets transferred to the community spouse were spent down or permissibly disposed of by the community spouse. *See* 42 U.S.C. 1396r-5(c)(2), (c)(4), (f) (considering all assets above the CSRA as available to the institutionalized individual). If the community spouse would refuse to do either, Appellee, pursuant to Ohio Adm.Code 5160:1-3-06.4(E), could force the community spouse to make such resources available to pay for institutionalization.

Much of the confusion relating to this issue is due to the unique issues present when

dealing with houses, which are afforded exempt status under Medicaid rules when not held in trust. Under the above analysis, so long as the house remained in the trust, where it was a countable resource, eligibility could not be granted by Appellee. The act of removing the asset from the trust effectively “spent down” the asset by making it exempt, allowing eligibility to occur. The fact that Mr. Atkinson retained what would be referred to colloquially as an “asset” or a “resource” confuses the fact that, under the Medicaid rules, he did not retain an asset or resource in excess of the CSRA, as the asset was exempt once removed from the trust. To better illustrate the application of these rules, a simple example involving money is appropriate. If a couple possesses only \$100,000 in a checking account at the time of first institutionalization, the CSRA will be set at \$50,000. The purpose of 42 U.S.C. 1396r-5(c)(2) is to ensure that, despite 1396p's permission to make unlimited transfers between spouses, the couple does not shelter the full \$100,000 by transferring the account to the community spouse's name. Under 1396r-5, Medicaid eligibility would not be approved until the excess \$50,000 is spent down or properly disposed.

In its Motion, Appellee asks the Court to create a rule under which not only would Medicaid eligibility be denied in the above situation, but there would be a restricted Medicaid coverage period imposed as well. What Appellee fails to make clear is that, pursuant to Ohio Adm.Code 5160:1-3-07, that penalty would not begin running until the excess \$50,000 is spent down. Therefore, in the hypothetical described above, Appellee would seek to impose a 7.9 month restricted period on individuals after requiring they spend down the additional \$50,000 in order to be resource eligible. This could require such individuals to spend the entirety of what should have been the community spouse's share before eligibility can exist.

Alternatively, under Ohio Adm.Code 560:1-3-06.4(D), the community spouse could

refuse to share the assets with his spouse. In this example, a double penalty still exists. Appellee seeks authority to impose a penalty and delay full approval of the application, in spite of the specific rule to the contrary that approval be granted without regard to assets where a spouse refuses to share assets in excess of the CSRA. Ohio Adm.Code 5160:1-3-06.4(E) permits Appellee to take action against the community spouse to recover the amount that should have been shared. Under Appellee's interpretation, Appellee is permitted to recover twice for the same action, once from the institutionalized spouse in the form of withholding payment until the end of the restricted Medicaid coverage period, and again from the community spouse through a collection action. The Court's existing decision correctly illuminates and resolves the inherent conflicts in Appellee's tortured reading of the relevant statutory language.

It is not the Court's duty to impose a remedy not intended by Congress. The Court's decision preserves the ultimate goal of the CSRA provision – namely, it prevents the community spouse from holding assets in excess of the CSRA. The exempt status of the home makes the imposition of an improper transfer even more illogical, as it had no resource value once removed from trust, and would never have been used to pay for care so long as Mr. Atkinson resided in and did not dispose of the home. The purpose of the improper transfer rule is to prevent the disposal of assets that could be used to pay for care, which is not at issue here. Appellee's attempt to broaden the scope of the improper transfer rules should be rejected by the Court.

4. If the Court finds that a restricted Medicaid coverage period should be imposed, the penalty should be limited to the amount of the institutionalized spouse's share in the property that was above the CSRA.

The Court correctly found that the penalty imposed by Appellee in this case was improper. While it is clear that there is no statutory support for the imposition of a restricted Medicaid coverage period, a remedy which would directly conflict with the plain language of 1396r-5, the Court correctly reasoned that even if a restricted Medicaid coverage period was the

correct remedy, Appellee should recalculate the restricted coverage period. This point was conceded by Appellee and, if the remedy of a restricted coverage period is available, it should cover only Mrs. Atkinson's one-half interest in the home and, further, only that portion which would have been an asset in excess of the CSRA.

C. If the Court's Existing Order Stands, the Holding Is Correctly Limited to the Facts of this Case and Should Not Be Extended to Annuities.

In the event the Court does reconsider its decision and read the statute in a manner consistent with *Hughes*, the Court has rightly limited its existing decision to the unique facts presented in this case. Appellant agrees that the timing issues presented in the *Hughes* case are similar to the case at hand. That similarity, however, justifies a decision consistent with *Hughes*, not a more expansive holding inconsistent with *Hughes* and beyond the factual distinctions present in this case. Furthermore, a retraction of the Court's distinguishing treatment of *Hughes* would compel a fundamentally different result to this case, namely a holding in favor of the Appellant. Therefore, the uniquely complicated facts in this case, including the implication of trust rules, the exception to the general exemption of the home when held in trust, and the CSRA rules, render the Court's existing decision properly limited to those facts. The extension of the Court's holding to annuities, which are governed by their own specific sets of rules, would be inappropriate. Arguments and analysis of the peculiarities of annuities should be reserved for a case involving those particular assets.

CONCLUSION

The Court should resolve the conflict between its existing decision and *Hughes* by reconsidering and vacating its existing decision, and reverse the decision of the Fifth District Court of Appeals consistent with the Sixth Circuit's decision in *Hughes*. In the event the Court's existing decision stands, the Court should deny Appellee's Motion and decline to permit the imposition of a restricted Medicaid coverage period. Additionally, the Court should deny Appellee's request to extend the Court's existing decision to annuities or other situations factually distinguishable from this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing, *Response of Appellant Estate of Marcella Atkinson to Appellee's Motion for Reconsideration and Clarification*, was served by First Class United States Mail, postage prepaid, and email upon the following this 18th day of September, 2015:

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