RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6116-07T1

A.P.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL
ASSISTANCE AND HEALTH
SERVICES and BERGEN COUNTY
BOARD OF SOCIAL SERVICES,

Respondents-Respondents.

M.P.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL
ASSISTANCE AND HEALTH
SERVICES and BERGEN COUNTY
BOARD OF SOCIAL SERVICES,

Respondents-Respondents.

Argued September 15, 2009 - Decided October 19, 2009

Before Judges Carchman and Lihotz.

On appeal from the Division of Medical Assistance and Health Services, Agency Docket No. 02200-09192-01.

Janet B. Lurie argued the cause for appellants (Law Office of Janet B. Lurie,

attorneys; Beth L. Barnhard, of counsel; Ms. Lurie, on the brief).

Dianna Rosenheim, Deputy Attorney General, argued the cause for respondent Division of Medical Assistance and Health Services (Anne Milgram, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Rosenheim, on the brief).

Respondent Bergen County Board of Social Services has not filed a brief.

PER CURIAM

The questions presented on appeal relate to the construction and application of Medicaid regulations. Petitioners A.P. and M.P. appeal from a determination of the Director of the Division of Medical Assistance and Health Services (DMAHS), which affirmed the imposition of a penalty period of Medicaid ineligibility, as calculated by the Bergen County Board of Social Services (BCBSS). The Director concluded petitioners' execution of a deed conveying their interests in a family home was an impermissible transfer of resources. Following our review, we reverse and remand for further proceedings.

The essential facts are undisputed. M.P., A.P. and A.B. are siblings. M.P. was born developmentally disabled. She and A.P. resided in the family home. In 1973, following their parents' death, A.P. became M.P.'s primary caretaker. The

family home was devised, pursuant to their parents' will, which stated:

> We give and devise to our daughters, [A.P.] and [M.P.], our real property[1] . . . for life, HOWEVER, in the event our daughter [M.P.] predeceases [A.P.], then at said time, our real property . . . is hereby devised to our daughter, [A.P.] . . . .
>
> In the event our daughter, [A.P.], predeceases [M.P], we hereby direct that our daughter, [A.B.] shall provide all the necessary care needed by our daughter [M.P.], and in that event, we do hereby devise our real property . . . to our said daughter, [A.B.] . . . .

In 1980, A.P., as the executrix of her parents' will, "executed deeds on the property to effectuate a minor subdivision." The property encompassed two and one-half lots on the municipal tax map. At some point thereafter, the numeric portion of the street address was changed from "190" to "186-190."

A.P.'s health began to decline, making her unable to continue as M.P.'s principal caregiver. On October 26, 1984, in a proceeding for guardianship, the court appointed A.P. and A.B.

---

[1] The will provisions also referenced another parcel of rental realty. The excess rental income after payment of expenses was minimal. Upon the death of M.P. or A.P., this property was to be devised to other siblings and was not considered in this matter.

as co-guardians, granting them the power to manage M.P.'s financial affairs. This included the life estate in the family home.[2]

When A.P.'s health deteriorated further, arrangements were made for A.B. to care for her siblings. On March 21, 1985, A.P., as executrix of the parents' estate and as co-guardian for M.P., along with A.B., as co-guardian for M.P., executed a mortgage encumbering the family home. The mortgage required the sum of $75,000, along with ten percent interest per year, to be paid on demand to A.B.[3] upon the sale of the family home. The mortgage additionally provided:

> The holder of this Mortgage Note [A.B.] is to construct a dwelling on the property owned by the undersigned, and is to occupy said dwelling and is to pay [her] proportionate share of all taxes, and is to pay the costs of all utilities and the costs of hazard insurance.
>
> . . . .
>
> The undersigned further agree with the Holders of said Mortgage Note that the undersigned . . . will never, for any reason, institute legal proceedings to evict

[2] The order inadvertently identifies the appointments as "guardians ad litem." However, all parties agreed that the designation was in error.

[3] A.B.'s spouse was also a mortgagee. He passed away prior to the 2007 transfer of the family home. For ease we refer solely to A.B. as the mortgagee.

> the holders of this Mortgage Note from that portion of the dwelling which is to be constructed on said premises, and neither will the undersigned claim any rights of possession of same, however, upon the sale of the entire premises, the holders of said Note will vacate said premises upon payment of the principal and interest.
>
> The holder of this Mortgage is to occupy the newly constructed portion of said premises and is to pay the proportionate share of taxes and all utility costs.
>
> And, it is further agreed that, if there shall be any change in the ownership of the mortgaged property, then and in such event, the aforesaid principal sum with accrued interest shall, at the option of the Mortgagee, become due and payable immediately . . . .

A.B. sold her house and used $75,000 of the proceeds to construct an addition to the family home. She moved into the addition in 1985, and has resided there since that date. We were informed at argument that since this appeal was filed, M.P. passed away.

M.P. was approved for New Jersey Care Medicaid Program (NJCMP) benefits on September 1, 1989. The NJCMP benefits were converted to Supplemental Security Income (SSI) Medicaid effective June 1, 1992. The SSI Medicaid benefits were converted to Institutional Medicaid, and M.P. was admitted to a State operated convalescent center on October 18, 2006.

A.P. executed a durable power of attorney appointing A.B. her attorney in fact. On behalf of A.P., A.B. applied for New Jersey Care Program Assistance (NJCPA). A.P.'s eligibility for NJCMP benefits was approved on January 1, 1997. The NJCMP benefits were converted to Institutional Medicaid, see N.J.A.C. 10:71-3.14(a), and A.P. was admitted to a State operated convalescent center on January 3, 2007.

On March 22, 2007, as A.P.'s attorney in fact and M.P.'s co-guardian, A.B. executed a deed transferring the family home from her siblings to herself. The recited consideration was one dollar. Nothing in the deed's recitals limits the transfer to something less than a fee simple interest. In fact, the deed states: "The purpose of this deed is to transfer title to [A.B.]." During the administrative proceeding, petitioners suggested the deed transferred the life estates of M.P. and A.P., as that was the only ownership interest they held.[4] When the BCBSS became aware of the conveyance, it deemed an uncompensated transfer of assets, pursuant to Medicaid rules, occurred. The BCBSS imposed a transfer penalty, setting a period of Medicaid ineligibility, and sought repayment of $44,129.64, representing benefits previously provided to A.P.,

[4] The BCBSS calculated and petitioners stipulated to the values of the respective life estates as follows: A.P. - $44,129.64; and M.P. - $83,080.30.

and $19,642.36 representing benefits previously provided to M.P. The agreed fair market value of the family home on the date of transfer was $430,000.

Petitioners challenged the BCBSS determination, arguing the transfers were permitted, pursuant to N.J.A.C. 10:71-4.10.[5] DMAHS assigned the matters to the Office of Administrative Law for a contested case hearing. See N.J.S.A. 52:14B-1 to -15. The Administrative Law Judge (ALJ) consolidated the matters.

After a plenary hearing, the ALJ dismissed the petitions, concluding M.P.'s and A.P.'s interests in the family home were not exempt resources and the transfers to A.B. were for less than fair market value and not excluded from imposition of a transfer penalty. Specifically, the ALJ: (1) determined A.B.'s residence was separate from her siblings and her "living circumstances d[id] not meet the requirements that the sibling was residing in the home with the institutionalized person"; and (2) concluded A.B.'s mortgage interest was not an "equity interest" in the reality. N.J.A.C. 10:71-4.10(d)(3).

The Director adopted the ALJ's initial decision as the final agency determination. This appeal ensued.

---

[5] Petitioners cite to N.J.A.C. 10:71-4.7(d)(3), which applies to transfers prior to August 11, 1993. The language in the two regulations is identical.

Petitioners argue the Director's determination that the siblings reside in separate dwellings was factually inaccurate, and the conclusion that the outstanding mortgage held by A.B. was not an equity interest in the family home, sufficient to invoke the exemption from penalty set forth in N.J.A.C. 10:71-4.10(d)(3), was legally incorrect.

"The scope of our review of an agency decision, whether viewed as an adjudicative action or the interpretation and application of a statute or regulation, is limited." I.L. v. N. J. Dep't of Human Servs. Div. of Med. Assist. & Health Servs., 389 N.J. Super. 354, 364 (App. Div. 2006); see also N.J. Tpk. Auth. v. Am. Fed'n of State, County & Mun. Employees, Council 73, 150 N.J. 331, 351 (1997) (stating substantial deference is generally accorded to the interpretation an agency gives a statute that it is charged with enforcing). An agency's interpretation of the operative law and its own rules and regulations is entitled to prevail as long as it is not "plainly unreasonable." Metromedia, Inc. v. Dir., Div. of Tax'n, 97 N.J. 313, 327 (1984). We do not substitute our judgment for the expertise of an agency, as long as its action is statutorily authorized and not otherwise defective. In re Union County Reg'l High Sch. Dist. No. 1, 168 N.J. 1, 10 (2001) (citations omitted). "However, when an agency's decision is plainly

mistaken, in the interest of justice we will decline deference to its decision." W.T. v. Div. of Med. Assist. and Health Servs., 391 N.J. Super. 25, 36 (App. Div. 2007) (citing P.F. v. N.J. Div. of Dev'l Disabilities, 139 N.J. 522, 530 (1995)); see also In re Taylor, 158 N.J. 644, 658 (1999) (advising an appellate court is not bound by the agency's interpretation of a statute or its determination of a strictly legal issue).

Prior to our examination of petitioners' arguments presented on appeal, we identify the Medicaid statutes and regulations that inform our review.

Medicaid "is an optional cooperative program in which '[t]he Federal Government shares the costs . . . with States that elect to participate in the program'" to provide medical assistance to the poor. Mistrick v. Div. of Med. Assist. & Health Servs., 154 N.J. 158, 165-66 (1998)(quoting Atkins v. Rivera, 477 U.S. 154, 156-57, 106 S. Ct. 2456, 2458, 91 L. Ed.2d 131, 137 (1986)). "States that choose to participate are required to comply with Title XIX of the Social Security Act [Title XIX], and the regulations adopted by the Secretary of Health and Human Services." Id. at 166 (citing 42 U.S.C.A. § 1396a). "The states have significant discretion to design programs, but those programs must be consistent with federal

law." A.K. v. Div. of Med. Assist. and Health Servs., 350 N.J. Super. 175, 178-79 (App. Div. 2002) (citations omitted).

New Jersey has elected to participate in the Medicaid program by enacting the New Jersey Medical Assistance and Health Services Act (Act), N.J.S.A. 30:4D-1 to -19.1, administered by the Department of Human Services [DHS], N.J.S.A. 30:4D-3(c) through DMAHS,[6] N.J.S.A. 30:4D-3(e), 4:D-3(i)(8)(f). The Legislature authorized the Commissioner of the DHS to enact rules and regulations, issued through DMAHS, to comply with the requirements of Title XIX and implement the State's Medicaid programs. N.J.S.A. 30:4D-5 and N.J.S.A. 30:4D-7. Each county Board of Social Services effectuates the provision of Medicaid benefits to eligible participants. N.J.A.C. 10:71-1.5.

The benefits provided by the Act are specified as "last resource benefits notwithstanding any provisions contained in contracts, wills, agreements or other instruments." N.J.S.A. 30:4D-2. Consequently, eligibility for Medicaid requires that an applicant not have resources of more than $2,000 per month. N.J.A.C. 10:71-4.5(a)(1) and N.J.A.C. 10:71-4.5(c).

The regulations address eligibility criteria, N.J.A.C. 10:71-3.1 to -3.16, and specifically discuss the levels of

[6] N.J.S.A. 30:4D-3(f) defines "Medicaid" as the New Jersey Medical Assistance and Health Services Program.

allowable income, N.J.A.C. 10:71-5.1 to -5.9, and permissible available resources, N.J.A.C. 10:71-4.1 to -4.11, used to determine eligibility. Resources include "any real or personal property which is owned by the applicant . . . and which could be converted to cash to be used for his/her support and maintenance." N.J.A.C. 10:71-4.1(b).

Medicaid is the only government program for payment of long-term nursing home care. Mistrick, supra, 154 N.J. at 166. To discourage applicants from disposing of assets for the sole purpose of becoming eligible for Medicaid nursing home facility services, regulations impose a period of ineligibility to an applicant receiving an institutional level of benefits who transfers resources for less than fair market value during a thirty-six month look-back period. N.J.S.A. 30:4D-3(i)(15)(b); N.J.A.C. 10:71-4.10(a); see also 42 U.S.C.A. § 1396p(c)(1)(A) (providing "if an institutionalized individual . . . disposes of assets for less than fair market value . . . , the individual is ineligible for medical assistance for services" for a penalty period). Through the county boards of social services, DMAHS reviews applications to assure compliance with the eligibility criteria and scrutinizes each applicant's transfer of assets to prevent the utilization of Medicaid "to avoid payment of their

fair share for long-term care." W.T., supra, 391 N.J. Super. at 37.

Transfers made within the look-back period "are presumed to be improperly motivated to obtain Medicaid eligibility." Ibid. However, an applicant retains the right to rebut the presumption. N.J.A.C. 10:71-4.10(j). If the presumption is not rebutted, the State imposes a transfer penalty, calculating the period of ineligibility following a transfer of an available resource. N.J.A.C. 10:71-4.10(b)(4) and 10:71-4.10(c).[7]

Generally, a principal residence would not be considered an available resource when determining Medicaid eligibility. N.J.A.C. 10:71-4.4(b)(1). Additionally, certain transfers of a principal residence to specified persons will not result in an imposed penalty period of ineligibility. N.J.A.C. 10:71-4.10(d). Regulations defining these exempt transfers ensure that certain family members will not lose their home when another family member obtains Medicaid coverage. Ibid.

Petitioners maintain they have fully complied with the requisites of N.J.A.C. 10:71-4.10(d)(3), and the Director's

[7] "The transfer penalty is calculated by dividing the uncompensated portion of the transferred resource by the monthly average cost of nursing home care in this State." W.T., supra, 391 N.J. Super. at 37; N.J.S.A. 30:4D-3i(15)(b); N.J.A.C. 10:71-4.10(c).

determination to the contrary must be reversed. Specifically, petitioners assert the family home was one residence with common living areas not "separate dwellings," and the mortgage held by A.B. qualified as an "equity interest." We first examine the factual challenge.

A.B. testified before the ALJ. She acknowledged she and her husband provided the funds to construct the "addition to the [family] house" and stated she currently resided in the residence, along with "two tenants." This latter comment was not explained further.

The ALJ's finding, adopted by the Director, that "there is nothing in the record to indicate that A.B. actually resided in the same dwelling space as A.P. and M.P." is technically correct because there was no testimony or other evidence describing the layout of the home or the addition. It is unclear whether the dwelling space was structurally common, whether the addition was attached to the original family home or whether there were multiple buildings on the lots. The record is virtually silent on whether A.B. resided in a separate dwelling space apart from A.P. and M.P. or in the same home.

The Director suggested "the mortgage clearly states that the mortgagees shall build and occupy a dwelling on the property and pay the proportionate share of expenses." This misstates

the express recitals in the document, which provide A.B. "is to occupy the newly constructed portion of said premises and is to pay the proportionate share of taxes and utility costs." (Emphasis added). We find the language ambiguous and insufficient to sustain the Director's findings that A.B. "resides in a separate residence located on the same property" and her relationship is "more accurately described as a neighbor."

Deference to an agency's factual findings is appropriate only when the findings are "supported by substantial credible evidence in the record." Tlumac v. High Bridge Stone, 187 N.J. 567, 573 (2006) (citing Bradley v. Henry Townsend Moving & Storage Co., 78 N.J. 532, 534 (1979)). Because it is unsupported, we reject the Director's finding regarding the nature of the siblings living arrangement.

We recognize the burden of proving the nature of the living arrangements rests with A.B. However, our review satisfies us the inquiry during the administrative hearing was narrowed to proofs regarding the legal issue. Thus, we are persuaded the deficits in the record on this issue, i.e., whether A.B. held an equity interest in the family home, result not because the information does not exist but because petitioners were led to

the mistaken belief that presentation of such evidence was not necessary.

The Director additionally dismissed the petitions after concluding A.B. did not hold an equity interest in the family home. BCBSS advances the position that A.B.'s mortgage is not an equity interest but an investment. Petitioners argue A.B.'s mortgage is a qualifying equity interest, and the Director incorrectly disregarded the guidance on this issue provided by the Social Security Administration's (SSA) Program Operations Manual System (POMS). We briefly review these positions.

"The POMS represent 'the publicly available operating instructions for processing Social Security claims.'" Kelley v. Comm'r of Soc. Sec., 566 F.3d 347, 350 n.7 (3d Cir. 2009)(quoting Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385, 123 S. Ct. 1017, 1025, 154 L. Ed. 2d 972, 986 (2003)). Although the POMS provide only SSA guidance and "these administrative interpretations are not products of formal rulemaking," "they nevertheless warrant respect." Keffeler, supra, 537 U.S. at 385, 123 S. Ct. at 1026, 154 L. Ed. 2d at 986.

Petitioners cite POMS sections SI 0110.515 (A)(2)(b), which defines an "equitable ownership" in real property,[8] and SI 01110.515 (C)(3), which suggests "an equitable ownership interest in [a] home" may be acquired by "making mortgage payments or paying property taxes"; "making or paying for additions to a shelter"; or "making improvements to a shelter."

Although the POMS reference Social Security eligibility and our examination centers on the applicability of Medicaid transfer penalties, similarities in the programs' structure suggest consideration of the POMS could provide appropriate guidance. For example, POMS SI 01150.122(A)(2), applicable to 42 U.S.C.A. § 1382b(c)(1)(C)(i)(III), discusses ineligibility for SSI following the transfer of assets in language remarkably similar to N.J.A.C. 10:71-4.10(d).[9] Nevertheless, the POMS

---

[8] POMS section SI 0110.515 (A)(2)(b), states: "An equitable ownership interest is a form of ownership that exists without legal title to property. It can exist despite another party's having legal title (or no one's having it)."

[9] 42 U.S.C.A. § 1382b(c)(1)(C)(i)(III) provides:

> (C) An individual shall not be ineligible for benefits under this subchapter . . . by reason of . . . a disposal of resources by the individual . . . , to the extent that--
>
> (i) the resources are a home and title to the home was transferred to--
>
> . . . .

(continued)

clearly state determination of a claimed equitable ownership interest is reserved to a court of equity, POMS SI 01110:515(c), thus implicating a review of State law.

As to respondent's suggestion, it is neither disputed nor relevant to our determination that the mortgage is an investment. In our view, the parties' arguments and the Director's decision have overlooked fundamental issues, which must be determined prior to concluding whether this transfer was subject to a penalty.

An ownership interest in real property is transferred by deed. N.J.S.A. 46:3-13; H.K. v. State, 184 N.J. 367, 382 (2005). The property interests held by M.P. and A.P. were life estates, and thus, subject to alienation. N.J.S.A. 46:3-5. We note A.P. also held a contingent remainder interest in the fee but this interest was never valued. The pledge of repayment, set forth in the mortgage document, encumbered the property interests held by each mortgagor. These facts figure

---

(continued)

> (III) a sibling of the transferor who has an equity interest in such home and who was residing in the transferor's home for a period of at least 1 year immediately before the date the transferor becomes an institutionalized individual[.]

prominently when calculating the period of ineligibility for transfers made during the look-back period.

In determining whether a penalty shall be assessed in the case of a transfer involving a life estate, the value of the life estate, as calculated, pursuant to N.J.A.C. 10:71-4.10(b)(6)(iii), is computed by determining its fair market value. "Fair market value" is determined using "generally available market information, if [the home is] sold at the prevailing price at the time it was actually transferred." N.J.A.C. 10:71-4.10(b)(6). If the family home were sold, the mortgage obligation would be satisfied. Thus, the value to be considered when calculating the applicability of a penalty is the net value of the home after satisfaction of the indenture.

Additionally, calculation of the penalty period tracks 42 U.S.C.A. § 1396p(c)(1)(E) and is calculated by determining a fraction where the "cumulative uncompensated value of all assets transferred" on or after the look-back date is "divided by the average monthly cost of nursing home services" in New Jersey. N.J.A.C. 10:71-4.10(m)(1) (emphasis added). "Uncompensated value" is defined as "the difference between the fair market value at the time of the transfer (less any outstanding loans, mortgages or other encumbrances on the asset) and the amount of consideration received for the asset." N.J.A.C. 10:71-

4.10(b)(7) (emphasis added). "If the asset was jointly owned" at the time of transfer, the uncompensated value "shall be only the individual's share of that value[.]" Ibid.

Each of the definitional sections discussed above reference transfers examined, pursuant to N.J.A.C. 10:71-4.1(d). Ibid. Therefore, although the penalty period is determined, in part, by the appraised value of the property, as of the date of transfer, H.K., supra, 184 N.J. at 382, it also must account for any valid encumbrance, which limits the actual value of the interests of the transferor.

The mortgage was executed by A.P. in March 1985, long before any thought of the need for nursing home care arose. Twenty-two years later, the initial $75,000 mortgage debt, accompanied by the applicable interest, has grown to a substantial obligation, which by our calculations subsumes the value of the siblings' life estates and the expected value of the contingent remainder interest held by A.B.[10] If the mortgage debt exceeded the fair market value of the transferred interests, the uncompensated value would be zero, precluding imposition of a transfer penalty.

[10] Using a ten percent interest rate, the amortization of $75,000 from March 1985 to March 2007 equals $610,520.62.

The Director likely was skeptical of A.B.'s transfer of the family home on behalf of her siblings to herself. Without question, the transfer required scrutiny to safeguard the proper disposition of taxpayer funds. N.J.A.C. 10:71-4.10(a). Moreover, the transfer appeared to dispose of assets for the purpose of assuring eligibility for institutional Medicaid and was a transfer within the look-back period. N.J.A.C. 10:71-4.10(a) and N.J.A.C. 10:71-4.10(b)(6)(iii). Nevertheless, consideration must be made of all facts and circumstances attendant to the parties' interests and actions, including the financial reality that no remaining unencumbered value existed when the transfer was effectuated.

In light of the unsubstantiated factual finding that the siblings resided in separate residences, and the failure to recognize the impact of the mortgage debt when determining the applicability of a transfer penalty, we remand this matter for additional determination consistent with our determination.

Reversed and remanded.