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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3058-12T4

J.P.,

Petitioner-Appellant,

v.

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

Respondents-Respondents.

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Submitted May 19, 2014 – Decided June 11, 2014

Before Judges Guadagno and Sumners.

On appeal from the Department of Human Services, Division of Medical Assistance and Health Services.

Hanlon Niemann, P.C., attorneys for appellant (Matthew D. Rasmussen, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent Division of Medical Assistance and Health Services (Melissa H. Raksa, Assistant Attorney General, of counsel; Kay R. Ehrenkrantz, Deputy Attorney General, on the brief).

PER CURIAM

J.P. (Judy)[1] appeals[2] the January 22, 2013 final agency decision of the Director of the Division of Medical Assistance and Health Services (DMAHS), upholding the decision of the Mercer County Board of Social Services (MCBSS), imposing a transfer penalty on Judy's application for Medicaid benefits. For the reasons that follow, we affirm.

Judy and H.P. (Harry) married in 1956 and had two daughters, N.B. (Nina) and S.P. (Sarah). In April 1996, Harry died and Judy borrowed $6,000 from Nina and her husband, M.B. (Marvin), for funeral expenses and a burial plot.

In May 1999, Judy borrowed $38,600 from Marvin and Nina. On June 4, 1999, the following document was prepared:

> I, [Judy], borrowed $6,000 in April of 1996 and $38,600 in May of 1999 from my Daughter and Son-in-Law, [Nina and Marvin]. In return for the loans, I agree to repay the princip[al] and interest at a customary annual rate. Repayment of princip[al] and interest will not occur until after I have sold my home . . . in Lawrenceville.

The document was signed by Judy only, and was not notarized or witnessed. On August 29, 2006, Judy sold her home for

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[1] We employ fictitious names for ease of reference.

[2] J.P. died in February 2012 and this appeal is brought by her daughter, N.B., and N.B.'s husband, M.B., pursuant to N.J.A.C. 1:10B-5.1.

$324,755.76, and purchased a condominium. The loan was not repaid.

In November 2009, Judy moved into a nursing home. The following month, Nina and Sarah sold Judy's condominium for approximately $160,000. Nina transferred some of the proceeds into an account titled "Mom's funds" and used the money to pay Judy's nursing home expenses. The remainder was placed in a separate joint account in the names of Nina and Marvin. Nina also began transferring funds from Judy's investment and bank accounts into a second joint bank account held by her and Marvin.

On July 12, 2010, Nina paid Sarah $5,040 from the "Mom's funds" account for alleged reimbursement of nursing care services. Marvin and Nina also withdrew funds from one of the joint accounts for Judy's nursing care leaving approximately $61,000 in the account.

On March 7, 2011, Nina applied for Medicaid benefits on behalf of Judy. The MCBSS determined that Judy's transfers to her daughters totaling $66,487.81 were made for less than fair market value within the five-year look back period. The MCBSS determined that Judy was eligible for Medicaid but because of the transfers, a nine-month and seven-day transfer penalty was imposed.

Judy appealed the transfer penalty and the matter was referred to the Office of Administrative Law (OAL). The administrative law judge (ALJ) determined that Judy's $5,040 check to Sarah was reimbursement for nursing services and $44,600 transferred from Judy's bank and investment accounts was repayment of loans.

The DMAHS Director rejected the ALJ's conclusions and reinstated the entire penalty amount. The Director concluded that Judy failed to prove that the $67,681.84 was not transferred to Nina and Sarah for the purpose of acquiring Medicaid eligibility. She noted that "[t]he transfers were done post-institutionalization for debts allegedly incurred pre-institutionalization, including one more than 15 years old [and] there is . . . no written evidence of the existence of the loan in the first place much less to support the terms allegedly agreed."

On appeal, Judy presents two arguments:

> POINT I
>
> DIRECTOR'S DETERMINATION TO OVERTURN THE ADMINISTRATIVE LAW JUDGE'S RULING UPHOLDING THE 1996 AND 1999 LOANS IS WITHOUT MERIT.
>
> POINT II
>
> THERE WAS SUFFICIENT EVIDENCE FOR THE COURT TO ADDUCE AN INTEREST RATE OR, IN THE ALTERNATIVE, THE COURT SHOULD HAVE HAD A

> SEPARATE HEARING ON THE "CUSTOMARY INTEREST RATE."

Our role in reviewing the decision of an administrative agency is limited. In re Stallworth, 208 N.J. 182, 194 (2011). In order to reverse an agency's judgment, we must find the agency's decision to be "arbitrary, capricious or unreasonable or . . . not supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980).

In determining whether agency action is arbitrary, capricious, or unreasonable, we must examine:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [In re Carter, 191 N.J. 474, 482-83 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

We will affirm an agency decision so long as it is supported by the evidence, even if we may question the wisdom of the decision or would have reached a different result. Id. at 483; see also In re Herrmann, 192 N.J. 19, 28 (2007); In re Polk, 90 N.J. 550, 578 (1982) ("The Court has no power to act

independently as an administrative tribunal or to substitute its judgment for that of the agency."). This is particularly true when the issue under review is directed to the agency's special "expertise and superior knowledge of a particular field." Herrmann, supra, 192 N.J. at 28.

To be eligible for Medicaid benefits, all includable income and resources of an applicant must fall below certain limits. See 42 U.S.C.A. § 1396; 42 U.S.C.A. § 1396a(a)(10)(A); see also N.M. v. Div. of Med. Assistance & Health Servs., 405 N.J. Super. 353, 359 (App. Div.), certif. denied, 199 N.J. 517 (2009). To discourage applicants from disposing of assets for the sole purpose of becoming eligible for Medicaid, all property transfers for less than fair market value and made within sixty months before the application are scrutinized. N.J.A.C. 10:71-4.10(a). A transfer of resources for less than fair market value creates a presumption that the assets were transferred to establish Medicaid eligibility. N.J.A.C. 10:71-4.10(i)(1). To rebut that presumption, the burden lies on the applicant to present "convincing evidence that the assets were transferred exclusively (that is solely) for some other purpose." N.J.A.C. 10:71-4.10(j).

N.J.A.C. 10:71-4.10(l) also specifies that:

> 1. The presumption that assets were transferred to establish Medicaid eligibility shall be considered successfully rebutted only if the applicant demonstrates that the asset was transferred exclusively for some other purpose.
>
> 2. If the applicant had some other purpose for transferring the asset, but establishing Medicaid eligibility appears to have been a factor in his or her decision to transfer, the presumption shall not be considered successfully rebutted.

We are satisfied that the record contains sufficient, credible evidence to support the Director's decision that there is insufficient evidence of the existence of the loan or the terms of repayment allegedly agreed to by Judy. The Director carefully considered the evidence of the existence of a loan, the claimed interest rate, and the testimony of all witnesses including Judy's daughter and her neighbor.

Although Judy did produce a note allegedly written in 1999 during the time of the second loan, it was not executed contemporaneously with the lending of the money and bears only a signature purportedly made by Judy who is no longer available to authenticate it. In addition, as the ALJ conceded, there is no indication as to what the interest rate would be. And the Director noted there are no dates specified for the loans and no provision for how the repayment would be structured.

Significantly, the parties did not enforce the few terms of the loan that were actually defined until after they started paying for nursing care ten to fifteen years later. When Judy sold her house in 2006 she did not repay the loan as the note provided, and Marvin and Nina admitted that they did not enforce the term.

In addition, there is no evidence that Judy and Sarah entered into a service contract for her nursing services. "[C]are and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation." N.J.A.C. 10:71-4.10(b)(6)(ii). As the Director stated, there is no evidence of the care "time frames, no hours and no rate that even supports how the payment was calculated."

If "establishing Medicaid eligibility appears to have been a factor in his or her decision to transfer, the presumption shall not be considered successfully rebutted." N.J.A.C. 10:71-4.10(l)(2). The burden is on Judy's representatives to rebut the presumption that the transfers were for the purpose of establishing Medicaid eligibility. Because there is doubt as to the existence or validity of the agreement, the presumption cannot be said to have been rebutted. Judy's proofs are hardly

"convincing evidence" that the money was transferred for some other purpose. See N.J.A.C. 10:71-4.10(j).

Judy's argument that the Division's ruling must be reversed because it is contrary to the finding of the ALJ is without merit. We owe substantial deference to the decisions of an administrative agency, not the findings of an ALJ. An ALJ is given special deference by an agency and a reviewing court only regarding credibility determinations made based on live testimony. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). An agency head is free to "adopt, reject or modify" an ALJ's recommended decision, N.J.S.A. 52:14B-10(c), Clowes, supra, 109 N.J. at 587, so long as the agency gives due consideration to the ALJ's findings, bases its decision on substantial evidence in the record, and indicates how it weighed that evidence. N.J. Dep't of Pub. Advocate v. N.J. Bd. of Pub. Utils., 189 N.J. Super. 491, 500 (App. Div. 1983).

We find Judy's remaining arguments to lack sufficient merit to warrant further discussion in our opinion. R. 2:11-3(e)(1)(E).

Affirmed.