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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3520-11T4

S.L.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES AND ESSEX
COUNTY BOARD OF SOCIAL SERVICES,

Respondent-Respondent.

Argued October 23, 2013 – Decided September 2, 2014

Before Judges Fuentes, Simonelli and Haas.

On appeal from the Department of Human Services, Division of Medical Assistance and Health Services, Docket No. 0710458345-01.

Lawrence A. Leven argued the cause for appellant (Mr. Leven, attorney; Debra D. Tedesco, on the brief).

Jennifer L. Finkel, Deputy Attorney General, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Finkel, on the brief).

PER CURIAM

In December 2009, appellant S.L., then ninety-five years old, entered the Arbor Glen Care Center in Cedar Grove (Arbor

Glen), after she fell and fractured four ribs the previous month in a rehabilitation center in Florida, where she was transferred to recover from a mild stroke she had suffered in June 2009. S.L. was able to pay for her stay at Arbor Glen until she depleted her personal funds and other assets in August 2010.

S.L. applied for Medicaid assistance to cover the cost of her stay at Arbor Glen. The Essex County Board of Social Services, also referred to as the County Welfare Agency (CWA), approved her Medicaid application but imposed a 5.57 month ineligibility penalty. The CWA imposed this penalty because S.L. had made four monetary transfers or "gifts" to her children totaling $40,000 during a two-year period from December 2007 to March 2009. The CWA determined S.L. was eligible to receive Medicaid assistance effective January 18, 2011.

S.L. appealed the CWA's decision to the Division of Medical Assistance and Health Services (DMAHS) in New Jersey's Department of Human Services. The DMAHS Director transferred the case to the Office of Administrative Law for an evidentiary hearing before an Administrative Law Judge (ALJ). Based on the record developed at this hearing, which included S.L.'s testimony, who was by then ninety-seven years old, the ALJ issued an initial decision finding no legal or factual basis to alter the decision of the CWA.

The federal standards for Medicaid eligibility adopted by Congress under 42 U.S.C.A. § 1396p(c)(1)(B)(i), and codified in this State by the DMAHS under N.J.A.C. 10:71-4(a) and N.J.A.C. 10:71-4.10(j), create a rebuttal presumption that any assets disposed of by an institutionalized individual for less than fair market value during a period of sixty months before applying for Medicaid assistance is done to establish Medicaid eligibility. The ALJ found in her initial decision that S.L. failed to rebut this presumption. The DMAHS Director adopted the ALJ's decision without modification.

S.L. now appeals the Director's final decision to this court. Based on our standard of review of decisions made by state administrative agencies, we affirm. We derive the following facts from the record developed before the ALJ and any submissions made by the parties to the DMAHS Director.

I

S.L. was born in 1914. She and her husband had two children, a son H.L., and a daughter M.L. Appellant moved from New Jersey to Florida in 1981, the year after her husband died. She was then sixty-seven years old. She lived a fully independent life in an apartment in Florida from 1981 until 2002, when her son H.L moved in with her after his divorce.

Appellant testified at the hearing before the ALJ held on November 7, 2011. She responded to all questions posed to her in a lucid, narrative style. She explained that after her son moved in with her in 2002, he helped her perform daily tasks of living. He drove her "around, took me to the doctor, took me to the movies, took me shopping. He did a lot of errands for me."

Appellant transferred $10,000 to her son in December 2007. She also issued a check in the amount of $10,000 to her daughter H.L. a month later in January 2008. She characterized these gestures on her part as "gifts" to her children. When asked directly by her lawyer to explain the reasons for giving these gifts to her children, she explained:

> I had the money and I thought how nice it would be to see them spend it. . . . Well I thought it would be nice to see them enjoy the money that I had. I had everything I wanted.
>
> Q. When you gave them the first $20,000 you still had money for yourself right?
>
> A. Oh, yes, I didn't give them all my money.
>
> Q. When you gave them the money, the first money, did you think, "Well I have to give them this money because I am going to go into a nursing home," or anything like that?
>
> A. No, we never discussed nursing home. I was always the type of person I did everything myself [sic].

Appellant was ninety-four years old at the time she made these initial gifts to her children totaling $20,000. Appellant testified she stopped driving in 2004 when she was ninety years old. She nevertheless continued to have a car titled in her name until 2009. On March 9, 2009, she issued a check in the amount of $10,000 to a Mazda automobile dealer in Florida, as a down payment for a car her son purchased in his name. She testified that she wanted to buy a new car, but could not purchase one in her name because she did not have an active driver's license, and the car she previously had in her name was by then ten years old. She testified her son drove her everywhere she needed to go: "We were almost like husband and wife. . . . He took me to the movies, we went together as a couple although it was my son." On March 13, 2009, appellant issued a check to her daughter for $10,000.

Appellant's $40,000 in gifts to her children were all reported to the Internal Revenue Service as permissible tax-free gifts. All of the these checks written by appellant were in her own handwriting. She was ninety-three years old when she wrote her first $10,000 check to her son in 2007, and ninety-five years old when she gave her daughter the final $10,000 gift in 2009.

According to appellant, during the two-year period she made these gifts to her children she was completely lucid and managed her own affairs. With respect to physical health, other than "a slight loss of peripheral vision," she was not suffering from any physically debilitating conditions and "had not been diagnosed with any chronic or long term illness." At the time she made these gifts to her children, appellant was receiving a monthly social security benefit in the amount of $1,608.56, and a monthly pension distribution in the amount of $285.56. After the transfers, she retained approximately $60,000 in her savings account.

As was her custom since moving to Florida, appellant visited her daughter in New Jersey in the summer of 2009. She flew by herself and expected to return to her home in Florida in autumn. Appellant testified that sometime after she arrived at her daughter's home in June 2009, she "felt funny one day and thought it was something I ate." After feeling "woozy," she said her daughter told her to "lay down, take care." Appellant submitted a certification in which she described in more detail the medical event that led to this legal dispute:

> The next day the headache was worse and my speech was slurred. My daughter drove me to the emergency room at Mountainside Hospital

in Montclair.[1] I was admitted to the hospital on June 27, 2009, with a minor stroke. I was discharged to Arbor Glen Care Center in Cedar Grove, where I stayed until July 11, 2009. This incident was totally unexpected and was medically impossible for me to anticipate its occurrence.[2]

I returned home to Florida on July 12, 2009 and it was determined by my physician, Dr. Green, that I needed rehabilitation therapy. I was admitted to Lakeview Center, in Delray, Florida until October 2009.

Upon my release in October [2009], I went home. In November 2009 I fell at home and broke four ribs. My children and I agreed I needed more care than they could provide because they both work full time. I did not want to have full time nursing assistance in my home. We decided I would return to New Jersey and live at Arbor Glen. I picked Arbor Glen because when I stayed there in July 2009 I liked the facility. In addition, it is only ten minutes from where my daughter lives.

When I gave my children the gifts I anticipated living in Florida with my son for the rest of my life. I wanted to give these monies to my children while I was alive in order to see them enjoy the money. I emphatically deny that these gifts were given to my children because I was

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[1] Mountainside Hospital is actually located in the Borough of Glen Ridge.

[2] At the time appellant was admitted to Mountainside, she was taking nine different types of medication, including oral medication for hypertension and high cholesterol. The hospital's discharge summary noted appellant also suffered from "carotid stenosis [which was] worked up several years ago at which time her primary care doctor felt that she was a poor surgical candidate, so there ha[d] been watchful waiting."

> anticipating going into a nursing home and giving away my assets to become eligible for Medicaid.

Appellant's daughter M.L. corroborated her mother's testimony. She testified that neither she nor her brother contemplated a nursing home as a probable place for appellant's care at the time she accepted the gifts. Both she and her brother were convinced their mother "would live out her life in Florida[.]"

At the time appellant entered Arbor Glen in December 2009, she had approximately $60,000 in savings. She initially paid for her stay out of these personal funds until they were depleted in August 2010. She applied for Medicaid assistance that same month. The CWA approved her application effective January 18, 2011, subject to an ineligibility penalty of 5.57 months due to the "uncompensated value of transferred funds (40,000, given to children)[.]"

II

In the Initial Decision upholding the CWA's determination, the ALJ found it was not "unreasonable that [appellant] wanted to give her children money while she was alive[.]" However, noting appellant's age, health issues, and lifestyle restrictions, the ALJ concluded appellant had not overcome the

presumption that Medicaid eligibility was a factor in her decision to transfer assets to her children.

Appellant filed exceptions to the ALJ's decision with the Director of the DMAHS, claiming that her previous medical issues were neither chronic nor debilitating, and stemmed only from a minor stroke she had in 1999. Appellant emphasized that she established her health and vitality when she testified at the hearing before the ALJ at age ninety-seven. She argued she satisfied her burden to rebut the regulatory presumption because the CWA could not produce any evidence that undermined the credibility of her testimony that she was not contemplating applying for Medicaid assistance during the two-year look-back period between 2007 and 2009. Finally, appellant argued to the Director that the ALJ partly relied on a letter dated May 27, 2011, claiming she had a significant mobility impairment in 2006. Appellant asserts she was not aware of this letter, and it was not produced to her lawyer before she testified.

In a Final Agency Decision dated February 3, 2012, the Director adopted the Initial Decision of the ALJ, finding the record showed appellant was not in "excellent health" at the time she made these gifts to her children. The Director determined appellant had not met her burden to rebut the presumption that these gifts were intended to accelerate

appellant's eligibility for Medicaid assistance and upheld the penalty period imposed by the CWA.

III

As an appellate court, we have a limited standard of review of decisions made by a State administrative agency. Circus Liquors, Inc. v. Middletown Twp., 199 N.J. 1, 9 (2009). We must "'determine whether the administrative action was arbitrary, capricious or unreasonable.'" E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 348 (App. Div. 2010) (quoting Burris v. Police Dep't, Twp. of W. Orange, 338 N.J. Super. 493, 496 (App. Div. 2001)). We are bound to uphold the determination of an administrative agency as long as it is supported by "substantial credible evidence in the record as a whole." Ibid. (citing Circus Liquors, supra, 199 N.J. at 10).

The burden of showing the agency acted in an arbitrary, capricious, or unreasonable manner rests on the party opposing the administrative action. Id. at 349 (citing In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div.), certif. denied, 188 N.J. 219 (2006)). It is not the function of the reviewing court to substitute its independent judgment on the facts for that of an administrative agency. In re Grossman, 127 N.J. Super. 13, 23 (App. Div.), certif. denied, 65 N.J. 292 (1974).

We must also "'defer to an agency's technical expertise, its superior knowledge of its subject matter area, and its fact-finding role,'" and therefore are "obliged to accept all factual findings that are supported by sufficient credible evidence." Futterman v. Bd. of Review, 421 N.J. Super. 281, 287 (App. Div. 2011) (quoting Messick v. Bd. of Review, 420 N.J. Super. 321, 325 (App. Div. 2011)). Although we are not bound by an agency's interpretation of law, we accord a degree of deference when the agency interprets a statute or a regulation that falls "within its implementing and enforcing responsibility." Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001). Our authority to intervene is limited to "those rare circumstances in which an agency action is clearly inconsistent with the agency's statutory mission or with other state policy." Futterman, supra, 421 N.J. Super. at 287.

Our state participates in the federal Medicaid program under the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5. 42 U.S.C.A. § 1396a(a)(5) designates the New Jersey Department of Human Services to administer the New Jersey Medicaid program through DMAHS. N.J.S.A. 30:4D-5, -7; N.J.A.C. 10:49-1.1. Locally, CWAs are required to evaluate Medicaid eligibility. N.J.A.C. 10:71-2.2(a); N.J.A.C. 10:71-3.15. To establish eligibility, the applicant must:

> 1. Complete, with assistance from the CWA if needed, any forms required by the CWA as a part of the application process;
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> 2. Assist the CWA in securing evidence that corroborates his or her statements; and
>
> 3. Report promptly any change affecting his or her circumstances.
>
> [N.J.A.C. 10.71-2.2(e).]

"Medicaid is an intensely regulated program." H.K. v. State, 184 N.J. 367, 380 (2005). N.J.A.C. 10:71-4.5(c) provides that at the time of application, an individual will not be able to participate if his or her resources[3] exceed $2,000.

An individual may not be eligible for Medicaid if he or she has "disposed of assets at less than fair market value[4] at any

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[3] Resources are defined as:

> any real or personal property which is owned by the applicant (or by those persons whose resources are deemed available to him or her, as described in N.J.A.C. 10:71-4.6) and which could be converted to cash to be used for his or her support and maintenance. Both liquid and nonliquid resources shall be considered in the determination of eligibility, unless such resources are specifically excluded under the provisions of N.J.A.C. 10:71-4.4(b).
>
> [N.J.A.C. 10:71-4.1(b).]

[4] Fair Market Value is "an estimate of the value of an asset, based on generally available market information, if sold at the prevailing price at the time it was actually transferred." N.J.A.C. 10:71-4.10(b)(6). A transfer for "love and affection" (continued)

time during or after the 60-month ["look-back"] period[.]" N.J.A.C. 10:71-4.10(a). A transfer during the look-back period gives rise to a rebuttable presumption that it was made to establish Medicaid eligibility. N.J.A.C. 10:71-4.10(j).

Medicaid subjects applicants who have made such transfers to a penalty calculated according to a specific formula. N.J.A.C. 10:71-4.10(m); E.S., supra, 412 N.J. Super. at 345. The penalty is a "period of time during which payment for long-term care level services is denied." N.J.A.C. 10:71-4.10(m). The applicant may rebut the presumption "by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose. . . . [T]he burden of proof shall rest with the applicant." N.J.A.C. 10:71-4.10(j).

The presumption that transfers were made to establish Medicaid eligibility may be rebutted only by showing that a transfer was made for some exclusive other purpose. Specifically:

> (k) The presence of one or more of the following factors, while not conclusive, may indicate that the assets were transferred exclusively for some purpose other than establishing Medicaid eligibility for long term care services:

(continued)
is not considered a transfer for fair market value. N.J.A.C. 10:71-4.10(b)(6)(i).

> 1. The occurrence after transfer of the asset of:
>
> i. Traumatic onset of disability;
>
> ii. Unexpected loss of other assets which would have precluded Medicaid eligibility; or
>
> iii. Unexpected loss of income which would have precluded Medicaid eligibility;
>
> 2. Court-ordered transfer (when the court is not acting on behalf of, or at the direction of, the individual or the individual's spouse); or
>
> 3. Evidence of good faith effort to transfer the asset at fair market value.
>
> [N.J.A.C. 10:71-4.10(k).]

Against this legal backdrop, we discern no basis to interfere with the Director's final decision upholding the 5.57 month ineligibility penalty imposed by the CWA based appellant's four monetary transfers or "gifts" to her children totaling $40,000 during a two-year period from December 2007 to March 2009. We are mindful that our society is at a pivotal point as it faces the challenges associated with the great number of "baby-boomers" who are reaching an age that has traditionally been viewed as "elderly."

Due to great medical advancements and other technological innovations, we are in the process of redefining the traditional meaning of "elderly." Our Legislature should seriously consider

whether it is truly in the best interests of a just society to penalize a parent for trying to give her children a small part of resources she and her husband accumulated over a lifetime of work. Unfortunately, that public policy decision is not for this branch of government to make.

Affirmed.