RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2759-13T4

J.G.,

Petitioner-Appellant,

v.

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

Respondents-Respondents.

Argued telephonically January 28, 2016 –
Decided April 22, 2016

Before Judges O'Connor and Rothstadt.

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

Vincent N. Macri argued the cause for
appellant (McHugh & Macri, attorneys; Mr.
Macri and Adrienne J. Burke, on the brief).

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

PER CURIAM

The estate of J.G.[1] appeals the Division of Medical Assistance and Health Services' (DMAHS) February 10, 2014 final decision reversing the initial decision of an administrative law judge (ALJ), who held the Morris County Board of Social Services (Board) erred when it eliminated J.G.'s wife's community spouse maintenance needs allowance. For the reasons that follow, we affirm.

I

J.G. (husband) and M.G. (wife) were married in 1959. Due to his disability from Alzheimer's disease and diabetes, the husband moved into an assisted living facility on December 4, 2008. By April 2011, he needed long-term nursing care and moved into a nursing home in Morris County. On September 27, 2011, the husband submitted an application to the Board for Medicaid benefits, to be effective September 1, 2011.

Before providing additional facts, we review the applicable law. Medicaid is a federally established, state-administered program, Estate of F.K. v. Div. of Med. Assistance & Health Servs., 374 N.J. Super. 126, 133-34 (App. Div.), certif. denied,

[1] J.G. died during the pendency of this appeal. Although we have not received a substitution of party, see Rule 4:34-1, counsel represents J.G.'s wife, M.G., is pursuing the appeal as executrix of J.G.'s estate.

184 N.J. 209 (2005), "designed to provide medical assistance," at public expense, "to individuals 'whose income and resources are insufficient to meet the cost of necessary medical services,'" N.M. v. Div. of Med. Assistance & Health Servs., 405 N.J. Super. 353, 359 (App. Div.) (quoting 42 U.S.C.A. § 1396), certif. denied, 199 N.J. 517 (2009). States are not required to participate in the program but those that do must comply with Title XIX of the Social Security Act and the regulations adopted by the Secretary of Health and Human Services. Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 166 (1998). New Jersey participates in the program pursuant to the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5. In our State the DMAHS administers the program. N.J.S.A. 30:4D-7.

Medicaid provides "medical assistance to needy persons who are institutionalized in nursing homes as a result of illness or other incapacity." M.E.F. v. A.B.F., 393 N.J. Super. 543, 545 (App. Div.), certif. denied, 192 N.J. 479 (2007). That assistance is intended to be a resource of last resort, N.J.S.A. 30:4D-2, and reserved only for those applicants who have a financial as well as medical need for assistance – that is, those whose income and assets fall below a certain threshold,

N.E. v. Div. of Med. Assistance & Health Servs., 399 N.J. Super. 566, 572 (App. Div. 2008).

Married couples applying for benefits were once required to "spend down the entirety of their [combined] resources in order for one of them to qualify for Medicaid," resulting in the "virtual impoverishment of the spouse who remained in the community." Cleary ex rel. Cleary v. Waldman, 167 F.3d 801, 805 (3d Cir.), cert. denied, 528 U.S. 870, 120 S. Ct. 170, 45 L. Ed. 2d 144 (1999). To correct that situation, Congress enacted the Medicare Catastrophic Coverage Act of 1988 (MCCA), Pub. L. No. 100-360, 102 Stat. 683, the "spousal impoverishment provisions" of which, 42 U.S.C.A. § 1396r-5, were meant to "end the pauperization of the community spouse by allowing that spouse to protect a sufficient, but not excessive, amount of income and resources to meet his or her own needs while the institutionalized spouse was in a nursing home at Medicaid expense." Mistrick, supra, 154 N.J. at 169-70 (citing H.R. Rep. No. 100-105 (II), at 65 (1988), reprinted in 1988 U.S.C.C.A.N. 857, 888).

First, these provisions "shelter[] from diminution a standard amount of [the community spouse's] assets," referred to as the community spouse resource allocation (CSRA), which is deemed unavailable to the institutionalized spouse for purposes

of evaluating his or her eligibility for benefits. Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 478, 482-83, 122 S. Ct. 962, 966, 968-69, 151 L. Ed. 2d 935, 943, 945-46. To determine the CSRA, the total of all of the couple's assets is calculated as of the date of the institutionalized spouse's institutionalization. 42 U.S.C.A. § 1396r-5(c)(1)(A)(i). One half of this total is then allocated to each spouse. 42 U.S.C.A. § 1396r-5(c)(1)(A)(ii). The one-half share allocated to the community spouse is subject to a ceiling, see 42 U.S.C.A. § 1396r-5(f)(2)(A); 42 U.S.C.A. § 1396r-5(g). At the time of appellant's application, a community spouse was entitled to preserve a maximum of $113,640 in resources without defeating the institutionalized spouse's eligibility.

Second, the spousal impoverishment provisions allow the community spouse to retain an income sufficient to meet his or her minimum monthly maintenance needs while "liv[ing] independently in the community," Cleary, supra, 167 F.3d at 803, at an amount established pursuant to state Medicaid regulations as his or her minimum monthly maintenance needs assessment (MMMNA). 42 U.S.C.A. § 1396r-5(d)(3); M.E.F., supra, 393 N.J. Super. at 546. If the community spouse cannot reach the MMMNA with his or her own income, a monthly deduction, referred to as the community spouse monthly income allowance or CSMIA, is taken

from the institutionalized spouse's income and paid to the community spouse to satisfy the difference. 42 U.S.C.A. § 1396r-5(d)(1)(B); N.E., supra, 399 N.J. Super. at 574-75. The institutionalized spouse is then required to contribute to the cost of his care from his own income, less the CSMIA and certain other adjustments not at issue here before any Medicaid funds will be applied toward the institutionalized spouse's care. H.K. v. Div. of Med. Assistance & Health Servs., 379 N.J. Super. 321, 324 n.2 (App. Div.), certif. denied, 185 N.J. 393 (2005).

Here, the husband's application to the Board revealed his gross monthly income was $3,513.41 (comprising of pension and Social Security income) and his wife's gross monthly income was $1,345 (consisting solely of Social Security income). Although a complete copy of the application is not in the record, it is not disputed the couple's assets, referred to as resources,[2] totaled $301,752.06 as of December 4, 2008, the date of the husband's initial institutionalization.

In April 2012, the Board determined the husband was eligible for assistance effective September 1, 2011 under

[2] A resource is defined as "cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a). Similarly, New Jersey regulations define a resource as "any real or personal property which is owned . . . and which could be converted to cash." N.J.A.C. 10:71-4.1(b).

Medicaid's "Medically Needy" program, see N.J.A.C. 10:71-4.11(h). The Board also determined the wife's monthly income of $1,345 did not enable her to meet her MMMNA of $2,484.60; thus, the husband was required to give the wife a CSMIA payment of $1,139.60 per month out of his monthly income. If the husband had not been required to make a CSMIA to the wife, the money would have been paid to the nursing home.

Significantly, before the husband submitted his application for Medicaid benefits, the wife purchased a single premium annuity for $196,729.27. The wife paid for the annuity by using $113,640 of her anticipated CSRA and a gift of $83,089.27 from her and the husband's children. Neither the children's gift nor the annuity she acquired was disclosed on the husband's application for Medicaid benefits. A copy of the annuity contract is not in the record but it is not disputed the contract date is August 30, 2011; the contract provides the wife is to receive, commencing September 1, 2011, $1,824.38 per month for a term of ten years; and that the interest rate on the annuity is 2.5 percent.

In May 2012, the Board conducted a periodic review of the husband's eligibility, and sought and received information from both the husband and wife pertaining to their incomes and the wife's expenses; however, the wife again failed to disclose the

fact she was receiving annuity payments. For reasons not pertinent here, the Board found she was entitled to an increase of her CSMIA to a total of $1,767.77 per month, effective March 1, 2012.

In September 2012 the Board conducted another periodic review of the husband's eligibility, again requesting financial information from the husband and wife. At that time, the wife revealed she was receiving a "monthly stipend" of $1,824.38 from the annuity. After obtaining additional information about the annuity, the Board determined the annuity payments were income and that because such income provided the wife with sufficient funds to enable her to meet her minimum needs, discontinued the CSMIA from the husband. Thereafter, the nursing home demanded $14,142.16 in funds the wife had received in her CSMIA, claiming this sum would have been paid to it but for the fact the husband concealed the annuity payments from the Board.

The husband requested the Board to reconsider its decision that the annuity payments constituted income, but the Board declined to change its decision. The husband sought a "fair hearing," see 42 U.S.C.A. 1396r-5(e)(2), and DMAHS transmitted the matter to the Office of Administrative Law, where the matter was deemed a contested case. See N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following the review of evidence and arguments from counsel, the ALJ determined the wife's monthly annuity payment comprised of taxable interest income in the amount of $45.60, but that the remainder of the annuity payment represented a return of principal on the wife's CSRA and thus was not income. The ALJ concluded the Board's decision to discontinue the CSMIA, thus compelling the wife to resort to what was predominately the principal of her CSRA for her support, was arbitrary and capricious. The Director of DMAHS issued a final agency decision rejecting the ALJ's initial decision and finding that for the purpose of determining whether the wife required a CSMIA, the annuity payments constituted income.

II

Appellant's principal argument on appeal is that, with the exception of $45.60 in interest income, the annuity payments were not income but merely a return of principal on her CSRA, to which she was entitled to retain. Therefore, appellant contends, the CSMIA should not have been discontinued.

Our review of an agency decision is limited. R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 260-61, (App. Div. 2014). "An administrative agency's decision will be upheld 'unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in

the record.'" Id. at 261 (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 25 (2011)).

"'Deference to an agency decision is particularly appropriate where the interpretation of the [a]gency's own regulation is in issue.'" Ibid. (quoting I.L. v. N.J. Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 389 N.J. Super. 354, 364 (App. Div. 2006)). "Nevertheless, 'we are not bound by the agency's legal opinions.'" A.B. v. Div. of Med. Assistance & Health Servs., 407 N.J. Super. 330 (App. Div.) (quoting Levine v. State Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)), certif. denied, 200 N.J. 210 (2009). "Statutory and regulatory construction is a purely legal issue subject to de novo review." Ibid. (citing Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

Here, the parties do not quarrel with the accuracy of the Board's calculations of the CSRA, MMMNA, or CSMIA. The sole issue is whether the annuity payments were income. If these payments were income, then the wife did not require a CSMIA from the husband as the monthly annuity payments of $1,824.38 clearly exceeded the monthly CSMIA of $1,139.60. The husband's eligibility to receive Medicaid benefits is not in issue.

First, we note that even if we accepted appellant's argument the annuity payments were predominantly the return of

principal on the wife's CSRA, we cannot overlook the fact that the annuity was also purchased with substantial gift monies, which are not part of the CSRA, a fact appellant does not address. Second, and more important, 42 U.S.C.A. § 1382a(a)(2)(B) explicitly provides that income includes "any payments received as an annuity, pension, retirement, or disability benefit." 42 U.S.C.A. § 1382a(a)(2)(B) (emphasis added); see also Blumer, supra, 534 U.S. at 486, 122 S. Ct. at 970, 151 L. Ed. 2d at 948 (counting a monthly annuity payment as part of a Medicaid applicant's income).

Appellant argues N.J.A.C. 10:71-5.3(a)(1) provides authority that annuity payments purchased with a resource such as a CSRA must be considered a return of that resource as opposed to income. This regulation provides in pertinent part:

> (a) Only the following income shall be excluded in the determination of countable income. Income exclusions shall be applied to unearned income first, then to earned income as appropriate. Exclusions shall be applied in the order of their appearance in this section.
>
> 1. Monies received as a result of the sale of a resource shall be excluded. These monies shall be treated as a resource (see N.J.A.C. 10:71-4.2 and N.J.A.C. 10:71-4.4(b)8ii).

Appellant contends that because the $113,640 comprising the wife's CSRA was a resource and was sold to purchase the annuity,

the monies received from that sale (in the form of annuity payments) must be "excluded in the determination of countable income" and thus the annuity payments are not income. We disagree. N.J.A.C. 10:71-5.3(a) pertains to countable income, which is that income used to determine Medicaid eligibility, not income that is available to the community spouse to determine if his or her minimum monthly needs are being met.

Given the definition of income in the Medicaid statute, we conclude the annuity payments were properly determined to be income. Appellant's reliance upon N.J.A.C. 10:71-5.3(a) is unavailing, as this provision pertains to the determination of an applicant's eligibility and not to whether the community spouse's income was such that he or she required a CSMIA from the institutionalized spouse. As the annuity payments were income and exceeded the amount of the CSMIA the husband was paying, the Board appropriately discontinued the CSMIA. We are satisfied there is sufficient credible evidence in the record supporting the Director's decision and that it was not arbitrary, capricious or unreasonable.

To the extent any argument raised by appellant has not been explicitly addressed in this opinion, it is because we are satisfied the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION