ELDER LAW RETREAT 2025

2025 Seminar Material

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ELDER LAW RETREAT 2025

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In cooperation with the New Jersey State Bar Association **Elder and Disability Law Section**

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The Fall of *Chevron* Deference and What it Means for the Practice of Elder Law in New Jersey in 2025

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What is *Chevron* Deference?

In 1984, the Supreme Court of the United States decided *Chevron USA v. Natural Resources Defense Counsel*, 467 *U.S.* 837 (1984). At its core, *Chevron* involved a dispute over the Environmental Protection Agency's interpretation of the Clean Air Act, specifically the definition of a "stationary source" of pollution. SCOTUS' landmark decision in *Chevron* established a two-prong test which determined the latitude or "deference" that federal judges were to give to agencies to interpret the statute they administer in the event of a dispute. The two-prong test is as follows:

1. Is the wording of the statute clear?
   - If the wording is clear – i.e. unambiguous, the agency is to follow the letter of the law
2. If the working of the statute is ambiguous, i.e. it has two (2) or more reasonable interpretations, the reviewing court must defer to the agency's choice in how to carry out the law if based on a permissible construction of the statute.

The purpose behind *Chevron* deference is that the agency, who are accountable to the elected officials, are better suited than federal judges to craft policies left open by Congress. At the time *Chevron* was decided, there was a perception that federal judges courts were inappropriately substituting their own judgment for that of agency experts when given the opportunity. *Chevron* deference was essentially SCOTUS scolding the lower courts inserting their own preferences and opinion under the guise of "interpreting the law".

How did SCOTUS End *Chevron Deference?*

In 2024, SCOTUS decided *Loper Bright Enterprises v. Raimondo,* No-22-451[1] (June 28, 2024). In *Loper Bright* a group of New Jersey commercial herring fisherman challenged a National Marine Fisheries Service (NMFS) after it promulgated a rule requiring them to pay for a government appointed inspector that cost the fisherman approximately $710/day to be on their boats. The purpose of the inspector was to make sure that "catch limits" established by the Magnuson-Stevens Act were not exceeded. The fisherman went to federal court and argued that the NMFS had no authority to force them to pay for the inspector. The district court disagreed, reasoning that the question had been left open for agency interpretation by Congress. Using the *Chevron* deference analysis, the district court deferred to NMFS's determination that the company is responsible for paying the inspector. The federal appeals court affirmed the district court. SCOTUS granted *cert*.

SCOTUS ultimately set aside *Chevron* deference determining that it is inconsistent with the federal Administrative Procedures Act (APA). In his decision, Chief Justice John Roberts opined that the APA directs courts to, "decide legal questions by applying their own judgment" and therefore, "makes clear that agency interpretation of statutes – like agency interpretations of the Constitution – are not entitled to deference under the APA."

[1] There was a companion case, *Relentless, Inc. et. al. v. Department of Commerce, et. al.* No-22-1219, involving fisherman from Rhode Island.

Roberts' opinion is decisive on the issue of whether agencies are better suited than courts to determining what statutory ambiguities mean, regardless if those ambiguities involve scientific or technical questions that fall under the umbrella of the agency's expertise. Roberts noted that "Congress expects courts handle technical statutory questions."

Roberts addressed the elephant in the room: stare decisis. As we all learned in law school, this Latin term means "let the decision stand" or "stand by things decided" and generally means that courts will follow their own precedent. Stare decisis provides predictability and stability in the legal system. Well, not so fast. Roberts says that stare decisis does not provide a reason to uphold *Chevron* deference because it is an "unworkable doctrine". Of course, stare decisis need not be applied when a decision is unworkable or badly reasoned. Roberts notes that *Chevron* is unworkable because it is so difficult to determine whether a statute is ambiguous. Roberts also noted that SCOTUS hasn't relied on *Chevron* in a long time (8 years) and has been tinkering with it too much.

All is not lost for agency deference – *Skidmore* deference survives.

Roberts notes that other cases decided on the basis of *Chevron* need not be overturned.

Roberts is not the only SCOTUS member who had something to say in *Loper Bright.* Justice Clarence Thomas wrote a concurring opinion stating that *Chevron* deference is inconsistent with the APA and the Constitutional division of powers. Thomas opined that *Chevron* required judges to give up their Constitutional power to exercise independent judgment.

Justice Neil Gorsuch wrote a 33- page concurrence.

Justice Elena Kagan authored a dissent in which she referred to the end of *Chevron* deference as a "jolt to the legal system." Justice Kagan noted that deference had been given to agencies for good reason: agencies are more likely to have technical expertise and knowledge. Justice Kagan noted that such expertise has kept food and drugs safer and air and water cleaner, and financial markets honest for 40 years.

So, What's the Big Deal?

The forecast post *Chevron* deference is chaos. As referenced above, in *Chevron*, SCOTUS admonished the lower courts for basically usurping agencies by inserting their own preferences and opinion under the guise of "interpreting the law". In *Loper Bright*, this vampire has been invited back in. Federal judges will once again be able take control away from the executive branch under the guise of interpreting the law when Congress has written an ambiguous statute. This is deemed problematic due to the sheer number of federal judges and the fact that their appointment has become increasingly partisan.

Additionally, Congress often builds some wiggle room into statutes because it expects the agencies to fill in the blank with its expertise.

The Brennan Center for Justice, a non-partisan law and policy institute, noted that federal agencies prevailed on challenges to their rule making only 70% of the time with *Chevron* deference in place.

The fall of *Chevron* deference is likely to result in the following:

- Regulatory instability and increased litigation
- Politicalization of regulations
- Increased inconsistency of outcomes
- Increased scrutiny of agency action leading to more rulemaking
- More action by States to fill gaps
- Increased costs associated with regulatory functions
- Slow down caused by the above

Areas expected to be hit the hardest:

- Environmental protections
- Healthcare
- Securities
- Tax
- Finance

What is "*Skidmore* Deference" and is it Still Relevant?

Skidmore v. Swift & Co., 323 *U.S.* 134 (1944), was a wage and hour dispute brought under the Fair Labor Standards Act. Plaintiffs were firemen, elevator operators, and relief fireman at the Swift & Company packing plant in Forth Worth, Texas. As part of their job, they were required to stay on site in the fire hall at the plant several days per week to respond to fire alarms after working their regular day shifts. While there at night, they could sleep and engage in personal activities. They just had to be available to respond to any fire alarms that occurred, which were infrequent. The employees were not paid for their "on call" time, only for the time they spent actually responding to fire alarms. The case was about whether they should have been paid for the "on call" time. SCOTUS reversed the lower courts and articulated a test for deferring to agency policies.

Unlike *Chevron*, *Skidmore* allows but does not require discretion. *Skidmore* allows the court consider agency regulations and promulgations based on the following factors:

1. The thoroughness evident in the agency's consideration;
2. The validity of the agency's reasoning;
3. The agency's consistency with early pronouncements; and
4. All of those factors which give the agency power to persuade, if lacking the power to control.

The POMS is usually given *Skidmore* deference. *See, Washington Department of Health Services v. Guardianship of Keffeler*, 537 *U.S.* 371 (2003) ("While these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect in closing the door on any

suggestion that the usual rules of statutory construction should get short shrift for the sake of reading 'other legal process' in abstract breadth. See *Skidmore* v. *Swift & Co.,* 323 *U.S.,* 134, 139-140 (1944)"

There has been a lot of discussion *Loper Bright* about whether *Skidmore* actually survived or whether it was just lip service. There has always been a sense that *Skidmore* is more of a "respect" than a "deference." Justice Kagan said during the *Loper Bright* oral argument, "*Skidmore* means, if we think you're right, we'll tell you you're right. So, the idea that *Skidmore* is going to be a backup once you get rid of *Chevron*, that *Skidmore* means anything other than nothing, *Skidmore* has always meant nothing."

Bloomberg recently did a study on post-*Loper Bright* agency interpretation cases (See article), and it appears that *Skidmore* has been sidelined as well.

What About New Jersey?

While *Loper Bright* will have far reaching consequences for federal agency action, the same will not be true of disputes over agency actions in New Jersey. The New Jersey Supreme Court has a long history of instructing lower courts to defer to the specialized expertise of administrative agencies when it comes to technical matters, as long as the agency's interpretation is not "plainly unreasonable." *See, Guild of Hearing Aid Dispensers v. Long,* 75 *N.J.* 544, 575 (1978), *In re Election Law Enf't Comm'n Advisory Op. No. 01-2008,* 201 *N.J.* 254, 262 (2010), *J.H. v. R&M Tagaliareni, LLC,* 239 *N.J.* 196, 216 (2019), *East Bay Drywall, LLC v. Dep't of Labor & Workforce Dev.,* 251 *N.J.* 477 (2022).

New Jersey Review of Administrative Decisions[2]

In New Jersey, judicial review of quasi-judicial agency determinations is limited. *Allstars Auto. Grp., Inc. v N.J. Motor Vehicle Comm'n*, 234 *N.J.* 150, 157 (2018) but are reviewed under and "enhanced deferential standard" *East Bay Drywall*.

The Appellate Division reviews agency decisions under the standard of "arbitrary and capricious." *Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n.,* 237 *N.J.* 465, 475 (2019). The determination of the agency will be sustained absent a clear showing that it was arbitrary, capricious, or unreasonable, or that it lacks fair support in the records. *Saccone v. Bd. Of Trs., Police & Fireman's Ret. Sys.*, 219 *N.J.* 369, 380 (2014).

The judicial review of agency action on appeal is limited to three (3) inquiries on appeal:

1. Whether the agency's action violates express or implied legislative policies (did the agency violate the law);
2. Whether the record contains substantial evidence to support the findings on which the agency based its actions; and

[2] The Appellate Division puts out Standards for Appellate Review. For a more comprehensive discussion with additional citations, see New Jersey Standards for Appellate Review, by Ellen T. Wry and Christina Oldenburg Hall, August 2022 Revision.
https://www.njcourts.gov/sites/default/files/courts/appellatestandards.pdf

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 a showing of the relevant factors. *Allstars Auto. Grp., at 157.*

If this criterion is met, substantial deference is owed to the agency's expertise and superior knowledge in a particular field. *In re Herrmann,* 192 *N.J.* 19, 28 (2007); *See, In re Request to Modify Prison Sentences,* 242 *N.J.*, 357, 390 (2020)("Wide discretion is afforded to administrative decisions of an agency's specialized knowledge.") Technical expertise is only deferred to in the subject matter area and in the fact-finding role. *Messick v. Bd. Of Rev.*, 420 *N.J. Super.* 321, 325 (App. Div. 2011).

The reviewing court is not bound by an agency's interpretation of a statute or a determination of a strictly legal issue outside of its charge. *Allstars Auto. Grp.* At 158.

New Jersey Review of Administrative Regulations

The court begins its judicial review of administrative regulations with a presumption that the regulation is valid and reasonable. *N.J. Ass'n of Sch. Admn'rs v. Schundler*, 211 *N.J.* 535, 548 (2012). The scope of the court's review is deferential and is generally limited to a determination of whether the rule is "arbitrary, capricious, unreasonable, or beyond the agency's delegated powers." *In re Amend. of N.J.A.C. 8:31b-3.31 & N.J.A.C. 8:31b-3.51*, 119 *N.J.* 531, 534-544 (1990). Additionally, "an administrative agency may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits." *GE Solid State, Inc.* v. *Dir., Div. of Taxation*, 132 *N.J.* 298, 306 (1993).

The burden of proving that the regulation is arbitrary, capricious, or unreasonable, is on the challenging party. *N.J. State League of Muns. v. Dep't of Cmty. Affairs,* 158 *N.J.* 211, 222 (1999). Court will follow the same three part test from *Allstars Auto. Grp.* outlined above when reviewing agency rule making:

1. Whether the agency's action violates express or implied legislative policies (did the agency violate the law);
2. Whether the record contains substantial evidence to support the findings on which the agency based its actions; 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 a showing of the relevant factors. *Allstars Auto. Grp., at 157*

"An agency's action must still rest on a reasonable factual basis, but its choice between two supportable, yet distinct, courses of action 'will not be deemed arbitrary or capricious as long as it was reached 'honestly and upon due consideration.'" *In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6,* 245 *N.J.* 462, 491 (2021). "Courts afford an agency 'great deference' in reviewing its 'interpretation of statutes within its scope of authority and its adoption of rules implementing' the laws for which it is responsible.'" *N.J. Ass'n of Sch. Adm'rs v. Schundler, supra* at 549. "That approach reflects the specialized expertise agencies possess to enact technical regulations and evaluate issues that rulemaking invites. *Schundler* at 549.

What About Taking an Appeal to Federal Court?

There are some appealable issues where the practitioner may wish to file in Federal Court. Due to certain Eleventh Amendment immunity protections, Federal Court is only an option if the relief you are seeking is *prospective* (limit of three (3) months of retroactive benefits can be obtained). *See, e.g., Ex Parte Young,* 209 *U.S.* 123 (1908). If you are seeking injunctive relief (example, enjoining the County from treating a DRA-compliant annuity as a resource), Federal Court may be a better option as it has historically been friendlier to annuities, and is faster.

Elder Law in the Age of AI: Friend, Foe, or Legal Sidekick?

Pamela A. Quattrone, Esq., MBA, CELA

What is Artificial Intelligence?

- Artificial intelligence (AI) refers to the field of computer science and technology that focuses on creating **machines and computer systems that can perform tasks typically requiring human intelligence**. These tasks include things like learning from data, reasoning, problem-solving, understanding natural language, and making decisions.
- In simpler terms, AI involves developing computer programs and systems that can **mimic human-like thinking and decision-making processes**, enabling them to solve complex problems and perform tasks without explicit, step-by-step programming. AI can be applied to automate processes, enhance decision-making, and improve overall efficiency.

Types of AI

- Reactive
  - E.g. Netflix recommendation system
- *Limited Memory*
  - Generative AI (ChatGPT)
  - Virtual assistants & chatbots (Siri, Alexa)
  - Self-driving cars
- Theory of Mind
  - Still in development
  - E.g. AI tutors, AI therapists, AI-powered wheelchairs
- Self-Aware
  - Strictly theoretical

Overview

- Should lawyers use AI?
- What application does AI have in elder law?
- What are the ethical considerations of using (or not using) AI in the practice of law?

Should Lawyers Use AI?

- We already are!
- We may be required to use it soon!
- Benefits:
  - Saving time (and fees)
  - Better data analysis
  - Improving accuracy and content (??)
- Risks:
  - Inaccuracy ("hallucinations")
  - Lack of professionalism
  - Confidentiality
  - Billing

Current Use by Attorneys

- Task Automation
  - Drafting, reviewing documents, summarizing
    - Document review in litigation
    - Legal research/analysis –Thomson Reuters CaseText/CoCounsel
    - Document Generation – Gavel
    - Contract analysis
    - Summarization
      - Documents – Adobe AI companion
      - Meetings – Zoom AI companion
    - Data organization/management/analysis – ChatGPT for Excel
    - Draft client communications
    - HR management/recruiting
    - Virtual assistant – ChatGPT, Co-Pilot, Gemini
    - Predict how a judge might rule based on data from past rulings

Use by Government Agencies

- CMS - https://ai.cms.gov
  - AI will play a key role in leveraging healthcare data to advance health equity, expand coverage, and improve health outcomes.
  - "Those who wish to engage in AI-related activities, as either a CMS employee, partner, or vendor, should be aware of federal policies regarding the application of AI."
  - CMS AI Resources:
    - Executive Order 13859: Maintaining American Leadership in Artificial Intelligence (2019)
    - OMB Memorandum M-21-06,"Guidance for Regulation of Artificial Intelligence Applications"
    - National Artificial Intelligence Act of 2020
    - The National Artificial Intelligence Initiative
    - CMS AI Playbook
    - HHS Trustworthy AI Playbook

Chatbots

- NJ Labor Department started chatbot in 2020 to answer most frequently asked unemployment-related questions
- Rutgers University State Policy Lab survey of SNAP websites in all 50 states revealed that 11 offer a chatbot (NJ does not)
- Missouri Department of Social Services – Genesys Cloud
  - Live text/chat resolves 50% of contacts without human assistance
  - Response time improved 44%

Medicaid Application Processing

- Medicaid Intelligent Redetermination Assistant(MIRA)
  - A solution designed to solve various aspects of the Medicaid "unwinding problem," and offers a comprehensive set of services powered by AI that help state governments better understand the size of their challenge, manage the data needed to solve it and assist agency staff and citizens with the various application and communication needs to re-enroll in health services.

- Deloitte systems
  - 25 states (including PA) have contracts with Deloitte worth over $6 billion to for software that reviews Medicaid applications/renewals
  - Federal complaint filed in January, 2024, alleging numerous errors resulting in inaccurate Medicaid eligibility determinations and loss of Medicaid coverage for eligible individuals in many states

Statement Review Software

- Docusomo
- FraudFindr

Ethical Considerations

- Competence
- Confidentiality
- Communication
- Candor, Accuracy and Truthfulness
- Supervisory Responsibilities
- Fees

Ethics Guidance

- ABA
- New Jersey RPCs and Supreme Court Guidance
- ACTEC

ABA Formal Opinion 512 (July 29, 2024)

- "As [Generative AI] tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients."
- "[B]ecause many of today's self-learning GAI tools are designed so that their output could lead directly or indirection to the disclosure of information relating to the representation of aa client, a client's informed consent is required prior to inputting information relating to the repre
- sentation into such a GAI tool…"
- "…merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient."

NJ Supreme Court Notice to the Bar

- Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers (January 24, 2024)
  - The Supreme Court Committee on Artificial Intelligence and the Courts
  - **AI does not change lawyers' duties** – "AI tools must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of legal practice."
  - No immediate amendments to the RPCs
  - For specific questions, call Attorney Ethics Hotline (609) 815-2924 or email Court-Use-of-AI.mbx@njcourts.gov

Competence

- Rule 1.1
  - A lawyer shall not:
    - (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
    - (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Confidentiality

- Rule 1.6 – Confidentiality of Information
- Rule 1.9(c) – Duties to Former Clients
- Rule 1.18(b) – Prospective Clients

Communication

- Rule 1.4

Candor, Accuracy & Truthfulness

- Rule 3.1 – Meritorious Claims & Contentions
- Rule 3.3 – Candor Toward the Tribunal
- Rule 4.1(a)(1) – Truthfulness in Statements to Others
- Rule 8.4(c) - Misconduct

Supervisory Responsibilities

- Rule 5.1 – Responsibilities of Partners, Supervisory Lawyers, and Law Firms
- Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants

Fees

- Rule 1.5

ACTEC

- Is it safe to use AI when creating estate planning documents?
  - Lacks personalized guidance and expertise of human attorney
  - Cost of fixing > initial savings
  - Confidentiality concerns

Tips for Using Generative AI

- Paid vs. Free
- Be specific
- How do I…? (e.g. in Excel, Word, etc.)
- I want to…give me instructions to… (e.g. create a firm profile on Facebook)
- Help with wording – make sure to specify tone and audience (e.g. professional, clients of elder law firm)
- Provide background details (e.g. I am an elder law attorney and want to write to my clients to….)
- Ask me questions if you need additional information
- Read privacy policy & talk to your IT professional!

Future Trends in AI and Elder Law

- Why can't clients just use AI to do their own planning?
- Why Medicaid agencies will be reluctant to use AI.

ChatGPT Medicaid Planning Example

I have a house and $100,000 in my bank account. I am married. I life in New Jersey. My spouse needs long-term care in a nursing home. How can we protect our assets and make him eligible for Medicaid?

ChatGPT response…

Elder Law and AI – Relevant Rules of Professional Conduct

1.1 Competence

A lawyer shall not:

- **(a)** Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
- **(b)** Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.4. Communication

- **(a)** A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.
- **(b)** A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- **(c)** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- **(d)** When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new paragraphs (a) and (d) adopted and former paragraphs (a) and (b) redesignated as paragraphs (b) and (c) November 17, 2003 to be effective January 1, 2004.

RPC 1.5. Fees

- **(a)** A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
    - **(1)** the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
    - **(2)** the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
    - **(3)** the fee customarily charged in the locality for similar legal services;
    - **(4)** the amount involved and the results obtained;
    - **(5)** the time limitations imposed by the client or by the circumstances;

    - **(6)** the nature and length of the professional relationship with the client;
    - **(7)** the experience, reputation, and ability of the lawyer or lawyers performing the services;
    - **(8)** whether the fee is fixed or contingent.
- **(b)** When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.
- **(c)** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
    - **(1)** any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
    - **(2)** a contingent fee for representing a defendant in a criminal case.
- **(e)** Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:
    - **(1)** the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
    - **(2)** the client is notified of the fee division; and
    - **(3)** the client consents to the participation of all the lawyers involved; and
    - **(4)** the total fee is reasonable.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new subparagraph (e)(2) added and former subparagraphs (e)(2) and (e)(3) redesignated as subparagraphs (e)(3) and (e)(4) November 17, 2003 to be effective January 1, 2004.

RPC 1.6. Confidentiality of Information

- **(a)** A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

- **(b)** A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
    - **(1)** from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
    - **(2)** from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
- **(c)** If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
- **(d)** A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
    - **(1)** to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
    - **(2)** to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
    - **(3)** to prevent the client from causing death or substantial bodily harm to himself or herself; or
    - **(4)** to comply with other law.
- **(e)** Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended, new paragraph (c) added, former paragraph (c) redesignated as paragraph (d), and former paragraph (d) amended and redesignated as paragraph (e) November 17, 2003 to be effective January 1, 2004; former subparagraph (d)(3) redesignated as subparagraph (d)(4) and new subparagraph (d)(3) adopted July 19, 2012 to be effective September 4, 2012.

RPC 1.9 Duties to Former Clients

- **(a)** A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

- **(b)** A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
    - **(1)** whose interests are materially adverse to that person; and
    - **(2)** about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

- **(c)** A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
    - **(1)** use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
    - **(2)** reveal information relating to the representation except as these Rules would permit or require with respect to a client.
- **(d)** A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (b) amended, and new paragraphs (c) and (d) added November 17, 2003 to be effective January 1, 2004.

RPC 1.18. Prospective Client

- **(a)** A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.
- **(b)** A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).
- **(c)** If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.

- **(d)** A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," and if no client-lawyer relationship is formed, is a "former prospective client."

Note: Adopted November 17, 2003 to be effective January 1, 2004.

$title = " RPC 2.1. Advisor"; include("includer.php"); ccheader($title); ccprebody(); ?>

RPC 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.

RPC 3.3. Candor Toward the Tribunal

- **(a)** A lawyer shall not knowingly:
    - **(1)** make a false statement of material fact or law to a tribunal;
    - **(2)** fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
    - **(3)** fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
    - **(4)** offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
    - **(5)** fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.
- **(b)** The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.
- **(c)** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- **(d)** In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 4.1. Truthfulness in Statements to Others

- **(a)** In representing a client a lawyer shall not knowingly:
    - **(1)** make a false statement of material fact or law to a third person; or
    - **(2)** fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
- **(b)** The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 5.1. Responsibilities of Partners, Supervisory Lawyers, and Law Firms

- **(a)** Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.
- **(b)** A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- **(c)** A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
    - **(1)** the lawyer orders or ratifies the conduct involved; or
    - **(2)** the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
- **(d)** No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate or holds some other comparable status with the firm.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended November 17, 2003 to be effective January 1, 2004; new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.

RPC 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- **(a)** every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.
- **(b)** a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- **(c)** a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
- **(1)** the lawyer orders or ratifies the conduct involved;
- **(2)** the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or
- **(3)** the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

- **(a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- **(b)** commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- **(c)** engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- **(d)** engage in conduct that is prejudicial to the administration of justice;
- **(e)** state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- **(f)** knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;
- **(g)** engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

NOTICE TO THE BAR

LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS

Artificial intelligence (AI) includes a variety of rapidly evolving technologies with significant capabilities as well as significant risks. In furtherance of its responsibility to uphold the highest level of professionalism among lawyers, the New Jersey Supreme Court seeks to balance the benefits of innovation while safeguarding against the potential harms of misuse. To that end, the Court here provides preliminary guidelines on the use of AI to support lawyers who practice in New Jersey and the clients who depend on those lawyers.

Supreme Court Committee on AI and the Courts

The Supreme Court Committee on Artificial Intelligence and the Courts, which includes private and public lawyers, as well as judges, Judiciary leaders, technologists, and experts in academia and media, recommended these initial guidelines to support lawyers in continuing to comply with the existing Rules of Professional Conduct (RPCs) and the Rules of Court.

The attached preliminary guidelines are intended to inform and assist lawyers in navigating their ethical responsibilities in light of the current and anticipated effects of AI -- in particular generative AI -- on legal practice.

Questions and Suggestions

Lawyers with specific questions about their own prospective conduct related to the use of AI should continue to seek direction from the Attorney Ethics Hotline at (609) 815-2924 or in writing to Court-Use-of-AI.mbx@njcourts.gov. As always, the identity of lawyers who pose such specific questions will remain confidential. However, the issues raised by such inquiries may inform the development of future, more detailed guidance regarding the ethical use of AI in the practice of law.

While these interim guidelines are effective immediately, the Supreme Court also invites comments and questions on the use of AI in legal practice, including suggestions of potential use cases for lawyers and the courts.

Questions regarding this notice should be directed to the Office of the Administrative Director of the Courts at (609) 376-3000. Written inquiries and any comments on the preliminary guidelines should be submitted via email to Comments.Mailbox@njcourts.gov.

Stuart Rabner
Chief Justice

Glenn A. Grant, J.A.D.
Acting Administrative Director

Dated: January 24, 2024

PRELIMINARY GUIDELINES ON NEW JERSEY LAWYERS' USE OF ARTIFICIAL INTELLIGENCE

Artificial intelligence (AI) refers to a machine-based system that can make predictions, recommendations, or decisions. AI systems use machine and human-based inputs to perceive environments, abstract such perceptions into models through automated analysis, and use model inference to formulate options. While various forms of AI have been widely used for years, the advent of generative artificial intelligence (Gen AI) -- a subset of AI in which machine-based systems create text or images based on predictive models derived from training with large datasets -- has elevated interest in and use of AI in legal and other professions. These preliminary guidelines refer generally to AI with the understanding that certain provisions relate primarily to generative AI. The ongoing integration of AI into other technologies suggests that its use soon will be unavoidable, including for lawyers. While AI potentially has many benefits, it also presents ethical concerns. For instance, AI can "hallucinate" and generate convincing, but false, information. These circumstances necessitate interim guidance on the ethical use of AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks.

Artificial Intelligence Does Not Change Lawyers' Duties

Lawyers in some jurisdictions improperly relied on Gen AI to generate content, which in some cases resulted in the submission to courts of briefs containing references to fake case law (which those lawyers did not check before or after submission). At the other end of the spectrum, reputable resources including LexisNexis and Westlaw promise to improve the quality of legal practice through the integration of AI to provide faster, more reliable legal research and writing assistance. Larger law firms are continuing to develop in-house AI systems while vendors are marketing AI-facilitated contract review and administrative support to smaller firms and solo practitioners. In this complex and evolving landscape, lawyers must decide whether and to what extent AI can be used so as to maintain compliance with ethical standards without falling behind their colleagues.

The core ethical responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet. AI

tools must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of legal practice. While AI does not change the fundamental duties of legal professionals, lawyers must be aware of new applications and potential challenges in the discharge of such responsibilities. As with any disruptive technology, a lack of careful engagement with AI could lead to ethical violations, underscoring the need for lawyers to adapt their practices mindfully and ethically in this evolving landscape. This notice highlights particular RPCs that may be implicated by the use of AI, with the understanding that such references are not intended to be exhaustive.

Accuracy and Truthfulness

A lawyer has a duty to be accurate and truthful. RPC 3.1 provides that a lawyer may not "assert or controvert an issue . . . unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous . . . ." RPC 4.1(a)(1) prohibits a lawyer from making a false statement of material fact or law. And RPC 8.4(c) states that it is misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Because AI can generate false information, a lawyer has an ethical duty to check and verify all information generated by AI to ensure that it is accurate. Failure to do so may result in violations of the RPCs.

Honesty, Candor, and Communication

RPC 3.3 requires a lawyer to uphold candor to the tribunal, including by not knowingly making "a false statement of material fact or law . . . ." or offering "evidence that the lawyer knows to be false . . . ." RPC 3.3(a)(1); RPC 3.3(a)(4). A lawyer who uses AI in the preparation of legal pleadings, arguments, or evidence remains responsible to ensure the validity of those submissions. While the RPCs do not require a lawyer to disclose the use of AI, such use does not provide an excuse for the submission of false, fake, or misleading content. The RPCs prohibit a lawyer from using AI to manipulate or create evidence and prohibit a lawyer from allowing a client to use AI to manipulate or create evidence. See, e.g., RPC 1.2(d); RPC 1.4(d); RPC 3.4(b).

RPC 1.2 provides that a lawyer must "abide by a client's decisions concerning the scope and objectives of representation . . . and as required by

RPC 1.4 shall consult with the client about the means to pursue them." RPC 1.4(b), in turn, provides that a lawyer must promptly comply with a client's reasonable requests for information, and RPC 1.4(c) provides that a lawyer must provide sufficient explanation for a client to make informed decisions regarding the representation. Those RPCs do not impose an affirmative obligation on lawyers to tell clients every time that they use AI. However, if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer's use of AI. As to client interactions, a lawyer can use AI to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . . ." consistent with RPC 1.4, but the lawyer must continue to oversee such communications to ensure accuracy.

Confidentiality

RPC 1.6 provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." To uphold this core duty, a lawyer must not only avoid intentional disclosure of confidential information but must also "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client." RPC 1.6(f). Today, the market is replete with an array of AI tools, including some specifically designed for lawyers, as well as others in development for use by law firms. A lawyer is responsible to ensure the security of an AI system before entering any non-public client information.

Prevention of Misconduct, Including Discrimination

A lawyer must not engage in misconduct, including "conduct involving dishonesty, fraud, deceit or misrepresentation;" "conduct that is prejudicial to the administration of justice;" and "conduct involving discrimination . . . ." RPC 8.4(c); 8.4(d); 8.4(g). Those duties are addressed in part by the ongoing requirements to ensure accuracy (and avoid falsification) of communications with clients and the court.

Oversight

Law firms and lawyers are responsible for overseeing other lawyers and nonlawyer staff, as well as law students and interns, as they may be held responsible for ethical violations by those individuals. See, e.g., RPC 5.1 (Responsibilities of Partners, Supervisory Lawyers, and Law Firms); RPC 5.2 (Responsibilities of a Subordinate Lawyer); RPC 5.3 (Responsibilities Regarding Nonlawyer Assistance). This requirement extends to ensuring the ethical use of AI by other lawyers and nonlawyer staff.

Conclusion

These preliminary guidelines are intended to assist lawyers in complying with the existing RPCs, which remain unchanged by the availability and use of AI. The references to specific RPCs are intended for illustration and not as an exhaustive list. For instance, the use of AI likely will affect lawyer billing practices and advertising. See, e.g., RPC 1.5 (Fees); RPC 7.2 (Advertising). Those and other specific applications can be addressed in future guidelines if and as needed.

NOTICE TO THE BAR

ARTIFICIAL INTELLIGENCE – (1) SUMMARY OF RESPONSES TO JUDICIARY SURVEY OF NEW JERSEY ATTORNEYS; (2) PLANS FOR NO-COST CONTINUING LEGAL EDUCATION PROGRAMS

As authorized by the Supreme Court, the Judiciary in April 2024 surveyed New Jersey attorneys regarding their knowledge, perception, and use of artificial intelligence (specifically generative artificial intelligence), in both personal and professional contexts. Based on the responses to the survey, the Judiciary plans to conduct a series of virtual continuing legal education courses on AI and generative AI that will be available to attorneys at no cost.

Survey Response Summary

More than 6,400 attorneys completed the survey, sharing areas of interest and concern, as well as preferences for education and training. In addition, responding attorneys also offered more than 1,800 narrative comments, which illustrated a broad spectrum of views and attitudes about generative AI technologies. The quantitative and qualitative data collected through the survey provide valuable insights about the current and potential future uses of generative AI in the practice of law in New Jersey. Additionally, the information gathered through this comprehensive outreach will inform the ongoing work of the Supreme Court Committee on Artificial Intelligence in the Courts.

Of the attorneys who completed the survey:

- More than half have been engaged in the practice of law for 20+ years.
- The most prevalent concerns about generative AI involved accuracy, ethical considerations, and lack of regulation.
- More than 60% indicated that they know "a little" about how generative AI works. Less than 20% of survey respondents reported having more than a little understanding of the functionality or application of generative AI.
- Only 14.5% of respondents stated that they currently use generative AI technologies in their legal practice.

- Nearly 80% of respondents have received no training on the use of generative AI in legal work.
    - Of those attorneys who have received training on AI, more than 80% indicated that such training increased their understanding of generative AI and what types of products generative AI can produce in the legal profession.
- Many attorneys reported a lack of available training on generative AI. Survey respondents expressed a preference for virtual training programs, followed by in-person workshops and AI-focused legal conferences.

Upcoming CLE Programs on Generative AI

Most survey respondents reported only a little knowledge and understanding of how generative AI technologies work and the legal products they can produce. Further, many survey respondents expressed wide-ranging practical and ethical concerns about these new technologies. To enhance attorneys' understanding of AI and to mitigate against potential missteps, the Judiciary will develop and present a series of CLE programs regarding AI at no cost to attendees. The first program to be presented will be an overview of ethical considerations related to the use of generative AI, as follows:

- **July 24, 2024 from 12 – 2:00 p.m.,** Artificial Intelligence Fundamentals and the Ethics of AI Use by Lawyers (via live Zoom webinar (which meets the "live instruction" requirements of BCLE Reg. 103:1(n)). Advance registration is required and can be completed at this link. This program will offer 2.0 credits in ethics/professionalism.

Details about this initial course and future programs will be posted on the Judiciary's website njcourts.gov.

Questions about this notice or the Supreme Court Committee on Artificial Intelligence and the Courts may be directed by email to Court-Use-of-AI.mbx@njcourts.gov.

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: June 11, 2024

An Estate Administration Hodge Podge

Presented By:
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I. Who do you represent

I have heard some attorneys claim to be representing "the estate," rather than the executor/administrator or one or more beneficiaries.

RPC 1.7. Conflict of Interest: General Rule

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text deleted and new text adopted November 17, 2003 to be effective January 1, 2004.

If you are representing "the estate" how do you address the issues of:

1. If an administration, who should be appointed and who should renounce if more than 1 person has a right to serve.
2. Accounts that are held in joint names with decedent and another person/beneficiary who may have been, or definitely was, added to decedent's account as a "convenance" instead of as a POA and the other person does not agree.
3. Making interim distributions to needy beneficiaries, either prior to, or after 9 months from date of death.
4. When to make distributions. Exactly at 9 months? Why wait 9 months?
5. Executor/administrator commissions. While our statute has a schedule with a presumption that the statutory rate is reasonable, it is subject to adjustment. How do you advise the beneficiaries that the statutory rate is appropriate when the executor/administrator did less work than you and got paid more?

N.J.S.A. §3B:18-14. Corpus commissions. Commissions on all corpus received by the fiduciary may be taken as follows:

5% on the first $200,000 of all corpus received by the fiduciary;

3.5% on the excess over $200,000 up to $1,000,000;

2% on the excess over $1,000,000; and

1% of all corpus for each additional fiduciary provided that no one fiduciary shall be entitled to any greater commission than that which would be allowed if there were but one fiduciary involved.

> Such commissions may be reduced by the court having jurisdiction over the estate only upon application by a beneficiary adversely affected upon an affirmative showing that the services rendered were materially deficient or that the actual pains, trouble and risk of the fiduciary in settling the estate were substantially less than generally required for estates of comparable size.
>
> Amended 1983, c.394, s.1; 2000, c.29, s.1.

6. Refunding Bonds & Releases and Waivers of Accounting.

7. Whether there should be an accounting, formal or informal, and if informal what is sufficient, and whether statements, receipts and other back-up information should be reviewed.

8. Et cetera, because this is not meant to be an exhaustive list.

II. Small Estate Administration

Under N.J.S.A. §3B:10-3, where the total value of the real and personal assets of the estate of an intestate individual is not in excess of $50,000, the surviving spouse or domestic partner is entitled to all the real and personal assets without administration. The assets of the estate up to $10,000 shall be free from all debts of the estate. After the surviving spouse or domestic partner executes an affidavit with the Surrogate, they will have all of the rights, powers, and duties of an administrator duly appointed for the estate. Consequently, they may be sued and required to account as if he had been appointed administrator by the Surrogate or the Superior Court.

The affidavit of the decedent's surviving spouse or domestic partner must state the following: that the value of the intestate's real and personal assets will not exceed $20,000, the decedent's residence at the time of his death, and specify the nature, location, and value of the decedent's real and personal assets. The affidavit shall be filed and recorded in the Surrogate's office or, if the proceeding is before the Superior Court, then in the office of the clerk of that court.

There is a similar mechanism in place for estates valued at less than $20,000. N.J.S.A. §3B:10-4 allows for probate to be avoided where the estate assets are less than $20,000 and there is no surviving spouse or domestic partner. In these cases, an heir (after obtaining consent in writing from the remaining heirs and submitting an affidavit)

will be entitled to receive the assets of the estate without having to post bond. The heir will have all the rights, powers, and duties of an administrator and may be sued or required to provide an accounting.

The affidavit must list the residence of the decedent, the names, relationship, and addresses of all heirs, and the nature, location, and value of assets.

III. New Jersey Inheritance Tax

The New Jersey Inheritance Tax return is due 8 months after the decedent's death. The time to file may be "automatically" extended for 4 months, and then an additional 2 months, using Form IT-EXT. The time to pay cannot be extended and 10% simple interest is charged on all late payments. An estimated payment can be made prior to filing the return on Form IT-PMT.

The New Jersey Inheritance Tax is based on the relationship of the person receiving the inheritance to the decedent.

Class A beneficiaries: There is no tax on spouses, domestic partners, issue (children, grandchildren, great grandchildren, etc.), stepchildren (but not step-grandchildren), mutually acknowledged child,[1] and lineal ancestors (parents, grandparents).

Class C beneficiaries: Siblings, daughters-in-law and sons-in-law have a $25,000 exemption. Above that amount, the tax rate starts at 11% and goes up to 17%.

Class D beneficiaries: Everyone else is a Class D beneficiary. If a Class D beneficiary is left less than $500 there is no tax. If a Class D beneficiary is left $500 or more the entire amount is taxed at rates starting at 15% and going up to 16%. For example, a Class D beneficiary inheriting $499 receives $499 (no tax). A Class D beneficiary inheriting $500 receives $425 ($500 times 15% equals $75 tax).

[1] Mutually Acknowledged Child: A person who had maintained a child-parent relationship with another person (usually a non-relative or indirect relative) beginning before the child's 15th birthday and continuing for at least 10 years. Such a relationship, when proven according to criteria established by the courts, entitles the person to be treated as a Class A beneficiary for Inheritance Tax purposes only. https://www.state.nj.us/treasury/taxation/inheritance-estate/definitions.shtml

Class E beneficiaries: Charities. There is no tax on charities.

NOTE: Non-resident decedent's heirs are subject to New Jersey Inheritance Tax on New Jersey real estate and New Jersey tangible personable property.

Exemptions from NJ Inheritance Tax:

Exemptions from New Jersey Inheritance Tax are set forth in N.J.S.A. §54:34-4. The primary exclusions are:

Life insurance proceeds receivable by a named beneficiary other than the estate are excluded from New Jersey Inheritance.

Transfers to a beneficiary having an aggregate value of less than $500.

Payments from the New Jersey Public Employees Retirement System, the New Jersey Teachers' Pension and Annuity Fund, and the New Jersey Police and Firemen's Retirement System.

Federal Civil Service Retirement benefits payable to a beneficiary other than the estate or the executor or administrator of a decedent's estate.

Annuities payable by the U.S. Government pursuant to the Retired Serviceman's Family Protection Plan or the Survivor Benefit Plan to a Beneficiary other than the estate or the executor or administrator of a decedent.

War risk insurance issued by the United States.

Additionally, non-New Jersey real estate is exempt from New Jersey Inheritance Tax (N.J.S.A. §54:34-1).

IV. New Jersey Inheritance (and Estate) Tax Lien Waivers

Form L-8 Self-executing waivers can NOT be used:

1. To release the New Jersey Inheritance Tax lien on real estate.
2. If the asset you want to use the L-8 for passes to other than a Class "A" beneficiary.

3. If any of the assets you wish to release pass into or through a trust, where the trust decides how the assets are distributed. Trusts can be testamentary or inter vivos. For the purposes of the L-8, it is not generally considered a "trust" when there is a bequest in the will to a Class "A" minor to be held in trust until he or she reaches a specific age. In all other cases, a full return must be filed with the Inheritance Tax Branch, even if the assets all appear to be passing to Class A beneficiaries.

4. If the asset passes by disclaimer.

5. If the asset passes to the Estate and any estate beneficiary is not a Class "A" beneficiary.

6. If the decedent died in 2018 and the taxable estate is more than $2,000,000.

Forms L-9 and L-9(A) For real estate, a simplified return, Form L-9 or L-9(A) must be filed, and the New Jersey Inheritance Tax Branch will issue the Waiver. The Waiver is then filed with the County Clerk (NOT the Register of Deeds) for the county where the PROPERTY is located. For decedent's dying in 2017 and earlier, the Form L-9(A) is used. For Decedents dying in 2018 and after Form L-9 is used.

The L-9 and L-9(A) can NOT be used if any of the prohibitions against using the L-8 are present (except that it is real estate).

Form L-4 Affidavit Requesting Preliminary Waivers: Resident Decedents What if you have all exempt beneficiaries, but some or all of the estate is passing into one or more trusts for their benefit and the trusts have only Class A beneficiaries or the non-Class A beneficiaries are remote, contingent beneficiaries? This is our form to get the waivers. Per the instructions: This form may be used when:

- A complete Inheritance or Estate Tax return cannot be completed yet; or
- All beneficiaries are Class A, but estate does not qualify to use Form L-8; or
- All beneficiaries are Class E, or Class E and Class A.

3B:22-4 Limitation of time to present claims of creditors to personal representative; discharge of personal representative where claim is not duly presented before distribution.

V. Distributions to Beneficiaries.

1. Creditors. Wait 9 months! Why wait 9 months? Until the 9 months has passed, you cannot determine if there are enough estate assets to pay all creditors and all beneficiaries, and the personal representative may be liable for distributions made in the wrong priority.

N.J.S.A. §3B:22-4. Creditors of the decedent shall present their claims to the personal representative of the decedent's estate in writing and under oath, specifying the amount claimed and the particulars of the claim, within nine months from the date of the decedent's death. If a claim is not so presented to the personal representative within nine months from the date of the decedent's death, the personal representative shall not be liable to the creditor with respect to any assets which the personal representative may have delivered or paid in satisfaction of any lawful claims, devises or distributive shares, before the presentation of the claim.

Amended 2004, c.132, s.84.

The personal representative **is personally liable** if they distributed prior to the end of the 9 month period, or after that period after notice of the claim without satisfying the claim.

2. Refunding Bonds & Releases. The personal representative is required to obtain a Refunding Bond & Release (N.J.S.A. §3B:23-24) before making distributions. Failing to do so may result in the personal representative being personally liable to late appearing creditors up to the amount they distributed.

3. Child Support Judgment Searches. The **ATTORNEY** is required to run a child support judgment search on each beneficiary receiving more than $2,000. N.J.S.A. §2A:17-56.23b(1)(b)(2): the attorney representing the prevailing party or beneficiary shall initiate a search of child support judgments, through a private judgment search company that maintains information on child support judgments, to determine if the prevailing party or beneficiary is a child support judgment debtor. The beneficiary is required to provide the beneficiary's full name, mailing address, date of birth, and Social Security number. Only the name and last 4 digits of the social security number are used in the search. If the results of the search show that the beneficiary does not have a Judgment for child support, the proceeds may be released to the beneficiary. If the

beneficiary does have a Judgment for child support, you must contact the Probation Division of the Superior Court to arrange for the satisfaction of the child support Judgment and notify the beneficiary of this. Once a warrant of satisfaction for the child support Judgment is issued, the Executor/Administrator is free to pay the balance of the inheritance to the beneficiary.

If the prevailing party or beneficiary is not represented by an attorney, the judgment search shall be initiated by the opposing attorney…

The statute exonerates the attorney from personal liability if the statute is followed. The converse, of course, is that the attorney

VI. Insolvent Estates.

An insolvent estate is one where the real and personal estate of the decedent is insufficient to pay debts.

The procedure to follow is in New Jersey Court Rule 4:91-1 Proceedings When Estate Is Insolvent:

(a) Complaint; Order to Show Cause. At any time after nine months following the date of decedent's death, the executor or administrator may commence an action in the Chancery Division, Probate Part, by a complaint stating that to the best of the executor or administrator's knowledge and belief, the real and personal estate of the decedent is insufficient to pay debts. The action shall proceed by order to show cause, which shall require the executor or administrator to give notice of the proceedings to the persons specified by R. 4:91-2 and shall set the date by which answers to the complaint or exceptions pursuant to R. 4:91-3 must be filed.

(b) Report of Claims; Account. The executor or administrator shall file with the complaint a list of creditors who have presented claims within nine months following the date of decedent's death, or which the executor or administrator intends to allow without requiring the submission of a formal claim, stating the amount of each claim, whether it has been allowed or rejected, whether it is entitled to a statutory priority, and whether the claim is based on judgment, bond, note, book account, or otherwise. The executor or

administrator shall also file with the complaint an account in the form required by R. 4:87-3.

(c) Judgment. The court may, on the presentation of the report of claims and the presentation of the account, adjudge the estate to be insolvent and determine the amount of each claim and its priority for payment.

The order of priorities is set in N.J.S.A. §3B:22-2 Order of priority of claims when assets insufficient:

If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

a. Reasonable funeral expenses;

b. Costs and expenses of administration;

c. Debts for the reasonable value of services rendered to the decedent by the Office of the Public Guardian for Elderly Adults;

d. Debts and taxes with preference under federal law or the laws of this State;

e. Reasonable medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

f. Judgments entered against the decedent according to the priorities of their entries respectively;

g. All other claims.

No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due. The commencement of an action against the personal representative for the recovery of a debt or claim or the entry of a judgment thereon against the personal representative shall not entitle such debt or claim to preference over others of the same class.

Amended 1989, c.248, s.8; 2004, c.132, s.82; 2005, c.304, s.47.

Notice that you cannot start the proceeding until 9 months from the date of the decedent’s death. If some creditors in a lower class have been paid, and there is not enough to fully pay the creditors in the higher priorities, or 100% to all the creditors in

the paid creditors' category, the executor/administrator is personally liable for the misapplied amounts.

Don't forget to serve the NJ Division of Taxation and the IRS through the US Attorney's office for our district. Currently, the main office is listed as 970 Broad Street, 7th Floor, Newark, NJ 07102.

Medicaid liens are not specifically addressed in the insolvent estate statute. N.J.S.A. §30:4D-7.2(d) provides it is either under d or c, depending on when they died:

> d. (1) A lien, claim or encumbrance imposed by this act shall be deemed a preferred claim against the recipient's estate and shall have a priority equivalent to that under subsection d. of N.J.S.3B:22-2.
>
> (2) In the case of a recipient who became deceased on or after the effective date of P.L.1995, c.289, a lien, claim or encumbrance imposed pursuant to this section shall be deemed a preferred claim against the recipient's estate and shall have a priority equivalent to that under subsection c. of N.J.S.3B:22-2.

New Jersey Medicaid Communication No. 10-08 (November 24, 2010), provides, in part, "No distribution can be made to heirs or creditors from the estate other than for reasonable funeral expenses, costs associated with the administration of the estate, debts owed to the Office of the Public Guardian for Elderly Adults, and claims with preference under federal or state law (e.g., IRS liens) that may be superior to Medicaid's (e.g. filed prior in time) without first satisfying the Medicaid program's lien."

VII. Qualified Disclaimers.

Internal Revenue Code § 2518 – Disclaimers

(a) General rule. For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined. For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—

(A) to the spouse of the decedent, or

(B) to a person other than the person making the disclaimer.

(c) Other rules. For purposes of subsection (a)—

(1) Disclaimer of undivided portion of interest. A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) Powers. A power with respect to property shall be treated as an interest in such property.

(3) Certain transfers treated as disclaimers. A written transfer of the transferor's entire interest in the property—

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)), shall be treated as a qualified disclaimer.

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CASE LAW UPDATE

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NJ SUPREME COURT DECISIONS

POD DESIGNATION OF SAVINGS BOND

In the Matter of the Estate of Michael D. Jones, Deceased
SUPREME COURT OF NEW JERSEY
259 N.J. 584

- Michael Jones designated his then-wife, Jeanine Jones, as the pay-on-death beneficiary of his U.S. savings bonds. They later divorced and entered into a DSA, which outlined the distribution of certain property and required Michael to pay Jeanine $200,000 in installments, but did not specifically mention the savings bonds. After Michael's death, Jeanine redeemed the bonds.
- Michael's estate argued that the bonds should count toward the $200,000 he owed Jeanine. The trial court judge issued a final order requiring Jeanine to pay money back to the estate and the Appellate Division reversed, holding "In sum, the judge erred as a matter of law in concluding that the bonds should be credited towards the estate's DSA obligation. Under the applicable federal regulations, Jeanine became the sole owner of the bonds upon Michael's death, and she was entitled to payment as the sole owner.
- The New Jersey Supreme Court **AFFIRMED** the Appellate Division's ruling that Jeanine's entitlement to the savings bonds was separate from Michael's obligations under the DSA.
- The NJ Supreme Court determined that the state law regarding revocation of non-probate transfers by divorce did not conflict with the federal law, and therefore federal preemption did not apply.
- The NJ Supreme Court found that Jeanine's interest in the bonds was not revoked by virtue of the DSA between Jeanine and Michael, as the DSA is completely silent on the bonds, stating:

> *The Department of the Treasury will not recognize "a judicial determination that impairs the rights of survivorship conferred by [the] regulations upon a co-owner or beneficiary." ... The trial court's holding here -- which assumed that Michael sought to divest Jeanine of the savings bonds by virtue of their divorce -- is exactly the type of judicial determination the federal regulations do not allow.*

ATTORNEY FEES FOR GUARDIANSHIP

In the Matter of the A.D., an alleged incapacitated person
SUPREME COURT OF NEW JERSEY
259 N.J. 337
Argued September 9, 2024 – Decided December 11, 2024

- In a guardianship action initiated by the Office of Adult Protective Services (APS), court-appointed attorney and court-appointed temporary guardian appealed from an order denying their respective applications for fees and costs.
- On June 2, 2020, an attorney representing APS of the Sussex County Division of Social Services filed a verified complaint seeking temporary and permanent guardianship of an alleged incapacitated and vulnerable adult. During the proceeding, it was determined that Hank no longer needed a guardian because he was receiving other assistance and his ability to function independently was greatly improving.
- The court ultimately appointed the Bureau of Guardianship Services as a limited guardian of the person and the parties applied for fees payable from APS in the amounts of $3,767.50 and $12,980 respectively—payment from the estate was impossible as Hank only received $671/month in SSD.
- The portion of the verified complaint which stated that APS bore "no responsibility for the costs and fees associated with the appointment of" an attorney or temporary guardian was crossed out by the Court without notice and without a hearing.
- While praising appellants for their "herculean efforts" and "remarkable results," the judge found APS had "acted in accordance with its mandate" and that "nothing in this matter provides the misfeasance by a state agency or otherwise extraordinary circumstances necessary to warrant fee-shifting of the court appointed attorneys' counsel fees to a state agency." The Appellate Division affirmed.
- On appeal to the N.J. Supreme Court, appellants argue the judge erred by misinterpreting In re Guardianship of DiNoia, 464 N.J. Super. 562, 567, 237 A.3d 951 (App. Div. 2019), and In re Farnkopf, 363 N.J. Super. 382, 389, 833 A.2d 89 (App. Div. 2003), and by requiring a finding of extraordinary circumstances or “state agency misfeasance” for an award of fees under Rule 4:86-4(e). The NJ Supreme Court found no misapplication of the law or abuse of discretion in the judge's denial of the fee applications and **AFFIRMED** the Appellate Division ruling.

ENTITLEMENT TO FAPE AFTER RECEIPT OF GED

Board of Education of the Township of Sparta v. M.N., on behalf of A.D.
SUPREME COURT OF NEW JERSEY
258 N.J. 333
Argued March 12, 2024 – Decided August 7, 2024

Parent of student with disabilities appealed the decision of the Department of Education Commissioner that adopted as final the ALJ's decision, 2021 WL 7629597, that granted the school district's motion for summary decision on its petition for declaratory ruling and determined that the State-issued diploma that student received was a regular high school diploma and that the student thus was no longer entitled to a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). The Supreme Court, Appellate Division, 2023 WL 3606292, affirmed. Parent petitioned for certification.

The Supreme Court held that a NJ State-issued diploma awarded based on passing the General Education Development test (GED) is not a regular high school diploma.
Judgment of the Appellate Division **REVERSED**.

- In September 2018, Fifteen-year-old student, A.D., transferred to and enrolled in the Sparta Township Public Schools for his sophomore year. Upon transfer, Sparta accepted A.D.'s IEP which was implemented due to A.D.'s having been determined to have a disability under the IDEA.
- In March 2019, A.D. began receiving home instruction; two weeks later, A.D.'s parents withdrew him from the Sparta High School. A.D. then tood ghe GED and passed, achieving the "Statewide standard score." That same month, A.D. re-enrolled at Sparta High School and again began receiving home instruction.
- The high school vice principal then informed A.D.'s parents that A.D. had "met New Jersey graduation requirements as the GED diploma serves as an equivalent to one received in a New Jersey high school." A.D.'s parents objected and he continued to receive services, including home instruction. In June 2018, A.D. withdrew from high school, selecting "entering the workforce" on the withdrawal form as the reason. A.D. briefly entered the Army but was medically discharged and tried to re-enroll in May 2021. This enrollment was denied, citing A.D.'s receipt of the State-issued high school diploma.
- A.D.'s, mother, M.N. requested a fair hearing at which the ALJ granted Sparta's motion for summary decision, determining that the State-issued diploma A.D. received was "not merely ... a GED" but was a "regular high school diploma" that was "fully aligned with State standards." This decision was adopted by the Commissioner of Education and affirmed by the Appellate Division.
- The NJ Supreme Court **REVERSED**. It held that a New Jersey State-issued diploma awarded based on passing the GED is not a "regular high school diploma" under 34 C.F.R. § 300.102(a)(3)(iv). Therefore, a student who receives such a State-issued diploma remains entitled to receive a free appropriate public education under the IDEA.
- The NJ Supreme Court highlighted that the IDEA defined state-endorsed diplomas as "a locally-issued document awarded to an exiting student indicating successful completion of high school graduation requirements." Meanwhile, state-issued diplomas are issued not by local school districts, but by the Commissioner, upon "[d]emonstration of the appropriate level of academic competency," including by "passage of the Tests of General Educational Development (GED) of the American Council on Education." DOE regulations define a "State-issued high school diploma" as "a high school diploma provided by the [DOE] to persons 16 years of age or older and no longer enrolled in school to document the attainment of academic skills and knowledge equivalent to a high school education."

APPELLATE DIVISION DECISIONS

GUARDIANSHIP: IMPOSITION OF CONTINUING CONDITIONS AFTER DISMISSAL

In the Matter of P.D.B.
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-2734-22
Argued September 11, 2024 -- Decided October 8, 2024

- In a guardianship action, M.M. (P.D.B.'s mother) sought guardianship of P.D.B., who would turn eighteen on December 17, 2020. P.D.B. opposed the guardianship and requested a jury trial in his Answer.
- The Chancery Division appointed a guardian ad litem (GAL) for P.D.B. and imposed several conditions, including mandatory therapy and meetings with the GAL. The GAL's initial reports indicated that while P.D.B. had some vulnerabilities, he was functioning well. The GAL initially recommended a limited guardian. A later 2023 report noted P.D.B's improved level of functioning and staunch opposition to the appointment of a guardian or having anything contact with M.M. (P.D.M. lived with his father.)
- M.M. withdrew her complaint in January 2023, citing difficulties in proving her case and the negative impact of the litigation on P.D.B. The trial court dismissed the complaint without a finding of incapacity, but imposed conditions on P.D.B., citing its parens patriae authority and concerns for P.D.B.'s well-being. The G.A.L. acknowledged the conflicting expert reports regarding P.D.B.'s competency and explained the possibility of the appointment of a special guardian to continue pursuing guardianship but did not recommend this. The GAL did believe P.D.B. was in imminent danger or a threat.
- The court dismissed the complaint with prejudice but imposed conditions for an additional two-year period: the GAL would meet with P.D.B. every six months and report to his parents; parents would pay GAL fees; GAL would continue having HIPAA authorization and participate in meetings with therapist; P.D.B. would continue therapy.
- The court denied P.D.B.'s motion for reconsideration but modified the order to only allow the parents to receive reports from the GAL rather than his parents and the court.
- P.D.B. filed an appeal. He contended that the conditions violated his constitutional rights and applicable New Jersey law. The American Civil Liberties Union of New Jersey, the American Civil Liberties Union, and the Community Health Law Project participated in the appeal as amici curiae and supported P.D.B.' s position, arguing that the conditions violated his due process and other rights.
- The Appellate Division reversed the Chancery Division's orders, stating that the court misapplied Rule 4:37-1(b) and its *parens patriae* authority and found that the conditions imposed did not serve to avoid duplicative litigation or preserve judicial efficiency, which is the purpose of the Rule. The Appellate Division emphasized that the trial court had made no finding of incapacity and therefore had no authority to impose conditions or

continue the GAL's appointment. If found that the conditions imposed by the Chancery judge violated P.D.B.' s right to self-determination, medical confidentiality, and due process.

DUTY OF CARE TO NON-CLIENT

Christakos v. Boyadjis
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-1107-23
Argued April 24, 2024 – Decided December 5, 2024

- Boyadjis, an estate planning attorney, was hired by Peter and Nicholas Christakos to draft new wills. Peter and Nicholas wanted their estates to pass to each other, and then to specific beneficiaries, including to Despina (Plaintiff), their sister-in-law. Despina's daughter, Helen, helped set up the initial meeting between the brothers and Boyadjis.
- Boyadjis made errors in drafting the wills, resulting in the estates not being distributed as intended. Litigation ensued over the probate of the flawed wills and a consent order was entered in probate court, admitting the flawed wills to probate, and distributing the estate. The final order provided that Peter's and Nicholas's claims or causes of action against defendant were assigned and transferred to Helen. The order also "specifically preserved" what is described as "Helen's unfettered right to assert claims against [defendant] on her behalf, [Despina's] behalf, and/or [Peter's and Nicholas's] behalves."
- Despina and Helen then brought a malpractice claim against Boyadjis, seeking damages for the diminution of the estate due to taxes and fees and for attorney fees spent on litigation. Defendant moved for and was denied summary judgment.
- The trial court found that Defendant owed Despina and Helena a duty of care. Defendant moved for leave to appeal from the court's orders.
- **The Appellate Court determined that Boyadjis owed a duty of care to Despina, as she was an intended beneficiary of the wills**. This duty arises when an attorney knows their services are intended to benefit a non-client. However, **the court found that Boyadjis did not owe a duty of care to Helen, as she was not an intended beneficiary and Helen's claim of legal malpractice was dismissed.**
    - "Thus, defendant owed a duty to Despina because defendant "had reason to foresee that the specific harm"—the loss of her entitlement to her rights as beneficiary in accordance with the decedent's intentions—claimed by Despina as result of defendant's errors." Thus, Despina's legal malpractice case could proceed.
    - Judicial Estoppel: The Appellate Court rejected Boyadjis's argument that the plaintiffs were judicially estopped from claiming malpractice due to the probate consent order.
    - Proximate Cause: The court found that there were disputed issues of material fact regarding whether Boyadjis's alleged malpractice proximately caused Despina's alleged damages, and that this issue needed to be decided by a jury.

John Miranda and Victor Miranda v. Alexander Rinaldi et al
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-3780-22
Argued September 9, 2024 – Decided October 1, 2024

- Modesto Miranda died, and his will named his daughter, Maria Miranda, as the sole beneficiary. Maria submitted the will for probate in August 2017 and received Letters Testamentary. Upon learning they had been disinherited, Modesto's sons, John and Victor Miranda, sought to contest the will.
- Around the same time, Victor retained defendants (Alexander Rinaldi and his law firm) to represent him in the will contest. A retainer agreement was sent to both Victor and plaintiff, but only Victor signed it. John's signature line was marked "N/A" and John later acknowledged he did not respond to nor sign the retainer agreement. Defendants sent a September 2017 letter to the wrong Surrogate Court indicating they represented both Victor and plaintiff. In January 2018, Defendants filed a Complaint on behalf of Victor challenging the Will (in the correct County), which was dismissed as untimely.
- John and Victor then brought this legal malpractice complaint against Defendants stemming from the untimely filing. During deposition, Defendants maintained that John was never their client, but always reprented by his long time attorney at the Lindabury firm (Sanchez). The Executor sent a notice of probate to Sanchez, and John stressed he was represented by Sanchez upon being deposed, and Sanchez created a caveat to for him to file. Sanchez also sent him a retainer agreement for the undue influence action.
- Defendants sought and were granted partial summary judgment against John to dismiss his claim, and the motion judge posited that the dispositive issue was whether defendants owed a duty to John, a non-client. "…[T]he judge explained that to establish such a duty, either the lawyer or the lawyer's client [must] invite the non-client to rely on the lawyer's opinion or provision of legal services," the "non-client so relies," and "the non-client [must] not [be] ... too remote from the lawyer to be entitled to protection."
- The Appellate Division affirmed. The court reasoned that while there was some evidence suggesting defendants initially believed they would represent both brothers, plaintiff's actions and testimony indicated he did not rely on defendants to represent him. The court emphasized that plaintiff had his own attorney, never signed defendants' retainer agreement, and was not named as a plaintiff in the initial complaint.

EXCLUDED CODICIL ADMITTED TO PROBATE

Bartek v. Losapio
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-3022-21
Argued January 10, 2024 – Decided January 7, 2025

John Losapio, Jr. (Junior) appeals from the Chancery Division's April 25, 2025 judgment in favor of Ann Christine Barteck, Executor of the Estate of John Losapio, Sr. (Senior), in which the court, after a bench trial, ordered that a copy of the January 14, 2016 codicil to Senior's will be admitted to probate and that title to the remainder interest of the property located at 108 North Street, Madison, be "reconveyed."

- Plaintiff, Ann Christine Bartek, sister of Decedent, transferred properties, including her residence at 108 North Street (the Madison Property), to her brother, John LoSapio, Sr. (Senior), while retaining a life estate. Plaintiff claimed Senior executed a codicil in January 2016, stating these properties would pass to the beneficiaries of her will if he predeceased her.
- Senior's health declined and he relied more upon Junior, causing Plaintiff concern regarding her prior estate plans. She made repeated requests to Senior to reconvey the property back to her which he agreed to do. Plaintiff's attorney advised against the reconveyance but created the deed. Junior prevented Plaintiff from visiting Senior to sign the new deed but Plaintiff eventually was able to visit Senior and the deed was signed.
- Junior brought suit against Plaintiff alleging undue influence on Senior. Concerned about the physical toll litigation would have on Senior, Plaintiff's attorney advised her to settle by conveying the property back to Senior, knowing the 2016 codicil would protect her. Senior died shortly thereafter.
- After Senior's death, his son, John LoSapio, Jr. (Junior), probated Senior's will but not the 2016 codicil, and the Madison Property passed to Junior and to 108 North Street LLC. Plaintiff sued to have the 2016 codicil admitted to probate and the property reconveyed.
- The trial court, after a bench trial, ruled in favor of the plaintiff, ordering the 2016 codicil to be admitted to probate and the property to be reconveyed. The court found the plaintiff's testimony and that of her witnesses to be credible, while finding the defendants' testimony to be contradictory and not credible. The court determined that the codicil met the legal requirements for a valid will and that Senior had the necessary testamentary capacity. The court also rejected the defendants' claim of undue influence.
- The Appellate court affirmed the trial court's decision, upholding the validity of the codicil, despite its mistaken reference to a 2006 will (which was a typo), stating:
    - *As a preliminary matter, we are satisfied the documentary evidence and testimony found credible by the court demonstrate the 2016 codicil satisfied the requirements of N.J.S.A. 3B:3-2(a). The codicil was signed by Senior and by two witnesses at the offices of McHugh, and McHugh notarized the signatures. Although the codicil does not refer to Senior's 2009 will, McHugh testified that was simply because Senior had not mentioned to McHugh that he had updated his will since the execution of the 2005 codicil, which referred to Senior's 2003 will. McHugh also testified the codicil's reference to a February 2006 codicil was a typographical error and that there was, in fact, no February 2006 codicil. Even if these errors constituted deficiencies in the formality of a writing intended to serve as a will, we have dispensed with technical formalities to effectuate the testator's intent. See In re Est. of Ehrlich, 427 N.J. Super. 64, 72-74 (App. Div. 2012).*
- The court also affirmed the reconveyance of the property back to Plaintiff.

ATTORNEY FEES

Matter of Estate of Mooney;
Clair J. Mooney v. Elizabeth Convery, Defendant-Respondent, Mary Stachowiak, Appellant
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-1576-22, A-1577-22
Submitted October 23, 2024 – Decided November 13, 2024

This case revolves around a legal fee dispute following a successful lawsuit against Elizabeth Convery for improperly taking funds from the Estate of John J. Mooney and from Claire J. Mooney, Decedent John Mooney's spouse.

- Mary Stachowiak, co-executrix of the Estate, sued Elizabeth Convery for misappropriating funds in two separate actions, which were not consolidated. During the litigation, Guardians ad litem were appointed for Claire, and Decedent's son, Johhny; a temporary administrator was also appointed. Relying on the testimony of an accounting expert, the judge found Elizabeth improperly exercised undue influence over her per parents, resulting in her taking $684,578 of their money for herself and her family and resulting in a judgment in favor of Mary/Claire and the estate.
- The Hellring firm submitted certification of services on behalf of Mary and the estate and Mary also sought reimbursement for fees f the accounting firm, Wiss & Company. Because he was concerned that payment of Mary's awarded fees and costs might result in "potentially depriving resources from [the] Estate for [Claire]'s care and maintenance," the judge ordered all funds toward the judgment to be paid to the Estate first, and only after the recovery of the full amount of the judgment, plus interest, should any fees and costs be paid to Mary. The trial court also determined that the requirement of a fund in court was met.
- The Appellate court determined there was no evidence in the record supporting the judge's concern that the payment of fees and costs awarded to Mary from a fund in court might negatively impact the ability to pay for Claire's future care and remanded to render fact findings relevant to the resources available for Claire's future care.
- The Appellate court also agreed with the trial court that Mary satisfied the burden for a fund in court because she litigated the matters for the benefit of all beneficiaries of the Estate, including Claire. As a result, the judge was required to perform the analysis set forth in Porreca v. City of Millville, stating:

> *As we stated in Porreca v. City of Millville:*
> *We view Rule 4:42-9(a)(2) as encompassing, in essence, a two-step process. First, the court must determine as a matter of law whether plaintiff is entitled to seek an attorney fee award under the fund in court exception as articulated in Henderson. If the court determines plaintiff has met the threshold, it then has the "discretion" to award the amount, if any, it concludes is a reasonable fee under the totality of the facts of the case. See R. 4:42-9(a)(2) (stating that a "court in its discretion may make an*

allowance out of such a fund ..."). [419 N.J. Super. 212, 227-28 (App. Div. 2011).]

ATTORNEY FEES & EXECUTOR COMMISSION WHERE UNDUE INFLUENCE BY EXECUTOR

In the Matter of the Estate of Allan D. Yorkowitz, Deceased
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-2835-22
Submitted August 27, 2024 – Decided September 4, 2024

- The deceased, Allan Yorkowitz, had a will naming Billy Perialis as executor and beneficiary of real estate, and Jeffrey Suckow as the residuary beneficiary. Perialis attempted to add a handwritten codicil to the will, which would have given his family $500,000. Suckow contested the codicil, claiming undue influence.
- The court voided the codicil, finding it was indeed the result of undue influence by Perialis. Suckow moved to remove Perialis as executor and for an order directing that he reimburse the estate for commission and counsel fees, which was denied. The court made reference to how close the estate was to being settled and the desire to avoid the cost of replacing the executor.
- A complaint was then filed by Perialis to approve the final estate accounting, to which Suckow filed an Answer and Exceptions and a counterclaim. The judge denied Perialis commission and allowed payment of his attorney fees without a statement of reasons.
- The issue on appeal and cross-appeal is confined the trial court's allocation of the parties' counsel fees, expert fees, and the court's disallowance of Perialis's executor commission.
    - Suckow asserts that because the court found that the codicil was the result of undue influence, Perialis attempted to expand his beneficial interest in the estate and should therefore be responsible for payment of all counsel fees and costs incurred by the parties for the ensuing litigation. that ensued. Suckow avers that Perialis caused financial damage to the estate from the codicil issue and Perialis should reimburse the estate for all counsel and expert fees incurred from it.
    - Perialis argues that he was obligated to bring the codicil to the Court's attention and the litigation included more than just a claim of undue influence.
- The Appellate Court found that the lower court's decisions were inconsistent and lacked sufficient explanations, particularly regarding the changes in fee allocations and the disallowance of Perialis's commission. The Appellate Court vacated the lower court's orders and remanded the case, directing the lower court to "specifically address anew the reasons for allowing or disallowing the various counsel fees, expert costs, and Perialis's commission."

STANDING OF GUARDIAN

Volpe v. Feeney and Dixon, LLP and Joseph Volpe; and Frank Volpe, Olivia Vetrano, and John Volpe
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-2835-22
Submitted August 27, 2024 – Decided September 4, 2024

This case involves a complex legal battle between siblings over their deceased mother's estate. The central figure, Anthony P. Volpe, M.D., appeals the dismissal of his claims against the law firm Feeney and Dixon, LLP (F&D) and his brother, Joseph Volpe.

- Mary T. Volpe and her husband, John Volpe, Sr., were moved to a nursing home after Mary suffered a fall in their Nutley home (John Sr. predeceased his wife while the action was pending). Their children, excluding Anthony, assisted with the creation of POA's for their parents utilizing the services of F&D, who also represented the agents under POA with the sale of their parents' home. The parents were then moved into the home of Vetrano, Anthony's sister.
- Anthony, concerned about his mother's care and the POAs' validity, obtained guardianship of Mary. Anthony also alleged large sums of Mary's funds were misappropriated by his siblings for their personal use. Anthony then filed a lawsuit on behalf of Mary alleging misappropriation of funds against all but one of his siblings and alleging malpractice against F&D. Mary passed away during the litigation.
- Joseph and F&D separately moved for summary judgment, asserting that Mary's death eliminated Anthony's standing to pursue claims on her behalf since the guardianship ended upon her death. F&D also asserted it owed no duty to plaintiff.
- The Appellate Court **AFFIRMED** the lower court ruling that Anthony lacked standing after his mother's death, stating that it is the decedent's personal representative, not the guardian, that is conferred with the same standing as decedent to sue and be sued.
- The Appellate Court also rejected the legal malpractice claim and rejected Anthony's argument that he had standing to "sue F&D in his individual capacity because "it was foreseeable" he would rely on F&D's advice or be affected by the firm's work."

ORAL CONTRACT OF DECEDENT

Matter of the Estate of Spitz-Oosse
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-0451-22
Submitted February 6, 2024 – Decided April 10, 2024

- Decedent's son, Brian Spitz, claimed his mother orally promised him her Paterson Property (or its sale proceeds) in exchange for his work at her company, Karroni Corporation, particularly for his work in resolving numerous violations at an Irvington property. Sheryl

Held, the executrix of Doris's estate, denied any such agreement. Doris's final will (2019 Will) intentionally disinherited Brian.

- The trial court heard testimony from Brian, his wife, his uncle, and Sheryl. Brian presented a written record of a conversation with Doris where he expressed concerns about the will's contents; Text messages between Brian and Sheryl were also presented. Doris had previously made a will in 2018 that did devise the Paterson property to Brian, but that will was revoked by the 2019 will. Sheryl testified that the will was changed due to Brian's absence from decedent's life.
- The trial court found Brian's evidence insufficient to prove the existence of an oral contract by "clear and convincing" evidence, which was the applicable standard of proof and also rejected Brian's unjust enrichment claim. The judge determined that there was nothing to be found that evidenced the existence of an oral contract.
- Brian appeals the August 31, 2022 order dismissing his counterclaims for breach of an oral contract and unjust enrichment, asserting that (1) the judge applied the wrong standard of proof; (2) the judge erred in not finding an oral contract and failing to find that Doris breached the oral contract by not providing proceeds to him upon its sale (which occurred prior to her death); and, (3) the judge erred by ignoring his claim of unjust enrichment.
- The Appellate Division addressed Brian's arguments that the trial court applied the wrong standard of proof and erred in not finding an oral contract or unjust enrichment and **AFFIRMED** the trial court's decision, confirming that the "clear and convincing" standard of proof was correctly applied. The Appellate Division agreed with the trial court's assessment of the evidence presented, and the credibility of the witnesses, finding that Brian's evidence, including testimony and written communications, did not meet this high standard. The Appellate Court also found no error in the trial court's rejection of the unjust enrichment claim.

UNDUE INFLUENCE

Matter of Estate of Maria Iannacco
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-1674-22
Submitted January 18, 2024 – Decided June 25, 2024

- Maria Iannacco had two sons, Aldo, Jr. Iannacco and Francesco Iannacco. At the time of Maria's death in January 2021, her son Aldo Jr. had resided with her for the prior 15 years. During 2019, Aldo, Jr.'s daughter, Bianca, moved into the upstairs apartment of Maria's home and she and Aldo, Jr. were primarily responsible for Maria's care, especially after the Covid-19 pandemic. Following Maria's death, her will was admitted to probate and Aldo Jr. was appointed executor.
- Maria's will left Aldo Jr. the bulk of the estate, $25,000 to each grandchild, and only $1 to Francesco. Francesco contested his mother Maria's 2020 will, alleging undue influence by his brother Aldo Jr., who was named Executor of her estate, and by his niece Bianca, who

was a named beneficiary of the estate. Francesco argued that a confidential relationship and suspicious circumstances surrounded the will's creation.

- The trial court held a bench trial, hearing testimony from various family members and the scrivener of the will, Harold Cook. Cook testified that Maria was lucid and clearly stated her intent to exclude Francesco due to estrangement. Testimony also indicated a strained relationship between Maria and Francesco, and detailed the care give to Maria by Aldo, Jr. and Bianci, which included driving Maria to food shopping or doctor appointments, and assisting her with her banking.
- The trial court found no evidence of a confidential relationship or undue influence and found the testimony of Cook and Maria's doctor to be credible and entered judgment in favor of defendants.
- On appeal, Francesco contends that the court failed to recognize the evidence of suspicious circumstances and a confidential relationship. The Appellate Court **AFFIRMED** the lower court's ruling, stating:

> *"Plaintiff identifies as purported evidence of suspicious circumstances the joint account, Aldo Jr. driving Maria to the appointment with Cook, and that Maria executed a new will months after Bianca had moved into the second-floor apartment. But those three things, especially when there was no suggestion of any financial impropriety and Aldo Jr. and other family members routinely drove Maria to appointments, do not outweigh the credible evidence Maria had expressed concerns about her relationship with plaintiff and wanted to change her will."*

DOCTRINE OF LACHES

Matter of Estate of Semple
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-3415-2023
Submitted October 18, 2023 – Decided July 31, 2024

This probate case centers on Oliver V. Short's appeal concerning the enforcement of a 2015 consent order related to the sale of a property held in a trust.

- Marie Semple created a trust (QPRT) in 2000, designating her children, including Oliver Short, as beneficiaries. After Marie's death in 2012, a dispute arose regarding the sale of the trust's residential property. A 2015 consent order was established, outlining the terms of the property sale and document sharing.
- Oliver Short claimed that the defendants failed to provide him with all the necessary closing documents as stipulated in the 2015 consent order. He filed a motion in 2022 to enforce the consent order, seeking to obtain the missing documents.
- The 2015 consent order required the defendants' counsel to provide copies of all sale-related documents to the plaintiffs' counsel within 24 hours or one business day of receipt. The property sale closed on March 31, 2015. Oliver Short's motion to enforce the consent order was filed in 2022, approximately seven years after the closing.

- The trial court denied the motion, citing the doctrine of laches, which prevents parties from asserting rights after an unreasonable delay. The closing attorney had passed away, and his law firm was closed by the time the motion was filed. The court also denied Oliver Short's reconsideration motion.
- The Appellate Division **AFFIRMED** the trial court's decision, finding no abuse of discretion in applying the doctrine of laches.
- The court emphasized the significant delay in Oliver Short's motion and the resulting prejudice to the defendants. The court stated that the plaintiff had ample opportunity to request the documents much sooner than he did. The court affirmed the orders denying Oliver Short's motion to enforce the consent order and his reconsideration motion. The court determined that the delay in his filling in the motion was unreasonable.

TRUST ACCOUNTING

In re: Estate of Rhoda Crane
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-3739-2022
Argued October 2, 2024 – Decided November 15, 2024

- Rhoda Crane passed away in July 2020, leaving no spouse or surviving descendants. Her Englewood property was held in Trust with Rhoda and her sister Joyce as co-trustees. In October 202, Joyce died, survived by her two children, plaintiff, Michael Crane and Jacqueline Crane. Under Rhoda's will, her residuary estate was to be paid to the trustees of Rhoda's Trust.
- Following the deaths of Rhoda and Joyce, there were multiple lawsuits filed in New York and New Jersey involving plaintiff and Jacqueline disputing the ownership of various properties, which resulted in the appointment of David Repetto as administrator of the estate and trustee of the Trust. Plaintiff filed a complaint seeking an order compelling an accounting from Repetto and here, appeals the court's denial of his application for an accounting, as well as denying his motion for reconsideration.
- In January 2021, one of Joyce's children, Michael Crane, sought his personal property he alleged was at the Englewood property and his counsel was permitted to inspect the residence for the missing items, which did not yield any results. Plaintiff then requested an accounting of the tangible property sold and distributed by the Estate, to which Repetto replied he would respond once plaintiff met his obligations under the court's numerous orders.
- Repetto retained Bernards Appraisal Associates to prepare a report (Bernards Report) of Rhoda's personal property contained in the Englewood property and the value of those items. After Bernards conducted an inspection in May 2021, it issued a 135-page report in July 2021, which was provide to the parties.
- Michael Crane filed a complaint seeking a formal accounting, alleging Repetto breached his fiduciary duty by refusing to provide necessary information and claiming that his

personal property, stored in Rhoda's residence, was missing and potentially worth more than his debt to the estate.

- The trial court denied Michael's request for a formal accounting, stating that Repetto had provided a sufficient informal accounting and dismissed Michael's complaint, finding his claims of missing property were unsupported. The court also denied Michael's motion for reconsideration.
- The Appellate Division **REVERSED** the trial court's decision, finding that the court misapplied its discretion, stating:

> *"Here, where decedent died over four years ago and Repetto was appointed administrator and trustee more than three years ago, an accounting is warranted at this juncture. Plaintiff has requested this information for a considerable period of time, and there is obviously a factual dispute as to which assets are part of the Estate and which were sold. Moreover, our decision is buttressed by N.J.S.A. 3B:31-67, which provides a "trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information ...." N.J.S.A. 3B:31-67, when read in conjunction with N.J.S.A. 3B:17-2, convinces us the court rested its decision on an impermissible basis."*

- The Appellate Court also stated that the trial court made improper credibility determinations without holding a hearing and the case was remanded for proceedings consistent with the appellate court's opinion.

VALIDITY OF ADOPTION OF INTESTATE HEIR

In the Matter of the Estate of R.S.
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-3452-2022
Argued October 8, 2024 – Decided October 31, 2024

This probate case involves a dispute over the administration of R.S.'s (decedent) estate. M.S., the decedent's adopted son, appeals an order appointing D.S., the decedent's brother, as the estate's administrator.

- M.S. was adopted in Russia by the decedent and his former spouse in 1994. Prior to the adoption's finalization, an adoption home study was completed by an adoption agency, which recommended the adoptive parents. Upon M.S.'s arrival in the United States, a certification of citizenship was issued by the U.S. government, which was signed by decedent as "father."
- M.S. had been estranged from decedent due to a history of sexual abuse, which led to the decedent's imprisonment though his parental rights were never terminated. The decedent died intestate in 2021.

- Plaintiff is the brother of the deceased, and he requested documentation regarding the adoption from M.S.'s counsel. There was no adoption proceeding in the U.S. nor a judgment of adoption from a U.S. Court. Plaintiff filed a complaint seeking to be declared as decedent' sole intestate heir and for appointment as administrator of the estate.
- In discovery, defendant provided additional documentation to plaintiff such as: (1) defendant's Russian passport; (2) defendant's IR-3 visa 3 ; (3) home study completed by the adoption agency; (4) letters of employment for decedent and the adoptive mother L.G. at the time of adoption; (5) criminal background checks for decedent and the adoptive mother; and (6) documentation of termination of birth mother's parental rights. Plaintiff also argued that N.J.S.A. 9:3-43.2, passed in 2005 (which clarifies the enforceability of a judgment of adoption in a foreign jurisdiction) did not apply retroactively.
- The trial court ruled that N.J.S.A. 9:3-43.2 did not apply retroactively, found insufficient information about the Russian adoption to confirm its legality, and appointed D.S. as estate administrator.
- The Appellate Division **REVERSED** the trial court's decision.
- The Appellate Court reasoned that since N.J.S.A. 9:3-43.2 was silent as to retroactivity, the court was to "apply the law in effect at the time it renders its decision." The court stated "[T]here are two exceptions to this general legal principle: "when doing so 'would result in manifest injustice or there is a statutory direction or legislative history to the contrary.' Neither of these exceptions apply here. … First, given our long-standing history of recognizing foreign adoption judgments for inheritance purposes, there would be no manifest injustice to applying the current law to this case. Second, there is no "statutory direction or legislative history to the contrary."
- The Appellate Court found that the requirements of N.J.S.A. 9:3-43.2 were met, as the decedent was a New Jersey resident, and M.S. obtained an IR-3 immigrant visa and U.S. citizenship based on the adoption. The court vacated the lower court order and **REMANDED** the matter for further proceedings consistent with its opinion.

LIFE ESTATE WITH EXPENSE SHARING AGREEMENT

Watts v. Farinella
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-1505-21
Submitted September 21, 2022 – Decided May 3, 2024

- Joseph A. Farinella conveyed a life estate in a waterfront home to his wife, Jana M. Watts, and named his children from a previous marriage as remaindermen. Shortly after, Joseph and Jana entered into an "Expense Sharing Agreement Following Death of Remainderman," outlining financial responsibilities for the property. The agreement stipulated that Jana would handle routine maintenance, while the remaindermen would cover "capital items" exceeding $5,000.
- Disputes arose regarding the costs of dredging a lagoon adjacent to the property and replacing a deteriorating bulkhead. Jana argued that these expenses constituted "capital

items" under the agreement, making the remaindermen responsible for payment. The remaindermen refused to contribute, claiming they were unaware of the agreement and that Jana, as the life tenant, was legally responsible for maintenance.

- Jana filed a complaint for breach of contract, waste, unjust enrichment and to quiet title.
- The trial court acknowledged the decedent's intent, as evidenced by the agreement and testimony from his lawyer and accountant, to have the remaindermen cover capital expenses. However, the court ruled that the decedent's intent could not override the legal responsibilities imposed on a life tenant to maintain the property and prevent waste and ruled in favor of the remaindermen.
- Jana appealed the lower court ruling, and the Appellate Court limited its discussion to Jana's argument that the court erred in finding the law required it to disregard decedent's intent as to how expenses were to be split between the life tenant and remainderman.
- The Appellate Division reasoned that the organizing principles of the rules governing donative transfers is "freedom of disposition. Property owners have nearly unrestricted right to dispose of their property as they please. … The rules governing relations between life estate holders and remainderman are not to the contrary. 'As a general rule, where the creator of the life estate **did not provide otherwise**, ordinary repairs, incident to the life tenancy and necessary to the property's preservation, must be made by the life tenant and at the life tenant's own expense.' 2 Thompson on Real Property, § 19.09 (Thomas ed. 2024) (emphasis added)."
- The Appellate Court found that the trial court erred in disregarding the decedent's intent, as expressed in the Expense Sharing Agreement and **REVERSED** and remanded for entry of judgment for plaintiff.

ADULT ADOPTION OF POTENTIAL TRUST BENEFICIARY

Matter of 1979 Inter Vivos Trust of Alfred and Mary Sanzari, Grantors, Dated June 1, 1979
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DOCKET NO. A-3612-21, A-3613-21, A-3614-21, A-3616-21
Argued May 13, 2024 -- Decided July 1, 2024
This case involves a dispute over the interpretation of two family trusts created by Alfred Sanzari, specifically whether Carl Sanzari, the adult adopted son of Ben Sanzari, qualifies as a beneficiary under the trusts' class gift provisions.

- Alfred Sanzari established two trusts (the 1979 Trust and the 1994 Trust) for the benefit of his son Ben and Ben's children. The trusts included "adopted children" in the class of beneficiaries. Ben later adopted Carl, who was the child of his second wife, around the time Carl turned 18 years old. Plaintiffs, the trustees, filed actions to exclude Carl from the trusts.
- The central issue was whether the term "adopted children" in the trusts encompassed Carl, who was adopted as an adult. The trial court applied the "stranger to the adoption" doctrine, which presumes against the inclusion of adult adoptees in class gifts unless there is evidence of the settlor's intent to include them. Defendants (Ben and Carl) argued that the

trust language was clear on its face since it included the "adopted child" language and that the doctrine did not apply.

- Plaintiffs argued that Carl's adoption was a scheme to obtain trust funds. The trial court denied defendants' summary judgment motion and ruled that the "stranger to the adoption" doctrine applied, placing the burden on defendants to prove Alfred's intent to include Carl. At trial, the court granted plaintiffs' motion, finding defendants failed to meet this burden.
- The Appellate Division **AFFIRMED** the trial court's orders.
- The Appellate Court stated Defendant's second argument created a question of first impression: "whether the "stranger to the adoption" doctrine applies to adult adoptees in cases where "child," "issue," and the like expressly includes child adoptees, but neither the trust itself nor the surrounding circumstances suggest the settlor contemplated adult adoption. The court upheld the trial court's application of the "stranger to the adoption" doctrine.
- The Appellate Court agreed that defendants failed to provide sufficient evidence of Alfred's intent to include Carl as a beneficiary.
- The appellate division also determined that the trial court did not err in denying the defendants' summary judgment motion.

SENIOR HOUSING

New Jersey Realtors v. Township of Berkeley
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-1384-22
Argued November 8, 2023 – Decided July 31, 2024

- Defendant Township of Berkeley (Township) appeals from the December 2, 2022, Law Division order granting summary judgment to plaintiff New Jersey Realtors (NJR). The order effectively invalidated Berkeley Township Ordinance No. 22-13-OA (the Ordinance), which amended certain land use provisions to limit property ownership in certain senior housing communities to persons aged fifty-five and older.
- NJR sued the Township after the Ordinance was enacted, arguing that such a restriction violated the Fair Housing Act (FHA), 42 U.S.C. § 3604(a), and the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-12(h), because both statutes prohibit discrimination based on familial status. According to NJR, by setting a minimum age for property ownership in retirement communities, the ordinance was discriminatory, and the restriction did not fall within the limited housing for older persons exemption. Finding that the ordinance violated the FHA and the NJLAD, the judge invalidated the ordinance.
- The Appellate Division **AFFIRMED,** holding that:
    - the ordinance, with its age restriction imposed on ownership, as opposed to occupancy, violated the FHA;
    - the ordinance violated the NJLAD;
    - the ordinance was preempted by the FHA and the NJLAD; and
    - alternatively, the ordinance was arbitrary and unreasonable.

- Relying on the plain language of those statutes – as well as letters from the New Jersey Department of Community Affairs (DCA) to the Township and New Jersey Realtors and responses to comments by the DCA to inquiries made during the rule-making process for regulations implementing the NJLAD – the Appellate Division ruled that the Township cannot require, or permit, discrimination in the ownership of age-restricted housing by requiring that owners be 55 or older.
- The Court noted that although municipal ordinances are entitled to a presumption of validity, they must be necessary to address a legitimate public need. The Court determined that the Township's ordinance was arbitrary, capricious and unreasonable because it unreasonably and irrationally exceeded the public need and unreasonably infringed upon the well-established and constitutionally protected right to own and sell property. The Appellate Court highlighted the inability of property to be addressed in estate planning and the smaller pool of potential buyers for properties having to be owned by older people. The Appellate Division directed that any future ordinance related to familial discrimination cannot restrict ownership of property, only occupancy.

COMPLEX TRUST DISPUTE

In the Matter of Thomas R. Tomei Trust
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-1660-21, A-1807-21, A-1808-21
Submitted December 19, 2023 – Decided February 27, 2025

This case involves a complex, long-standing legal battle within the Tomei family over the management of three trusts established for the benefit of Thomas Tomei (plaintiff) by his father, Vincent Tomei (defendant, now deceased).

- The parties cross-appealed from various orders issued by the trial court. Plaintiff alleged that defendant, as trustee, misappropriated trust funds, including unauthorized gifts to family members. The trial court granted summary judgment in favor of defendant and plaintiff's mother's estate, dismissing plaintiff's complaint with prejudice, and denying plaintiff's motion for reconsideration.
- On appeal, plaintiff challenged the adverse summary judgment and the denial of reconsideration, arguing that the trial court relied on forged trust instruments, failed to recognize genuine issues of material fact, and incorrectly applied the doctrines of laches and acquiescence. Defendant appealed the denial of his application for legal fees, arguing that the trial court's decision was contrary to applicable New Jersey and Pennsylvania law.
- The Appellate Division **AFFIRMED** the trial court's dismissal of most claims based on laches, finding that plaintiff's delay in pursuing claims resulted in prejudice to defendants due to lost records and defendant's incapacity.
- The Appellate Division **REVERSED** and **REMANDED** the dismissal of certain claims, including those seeking enforcement of a prior order and an accounting of the trusts, as well as claims related to fraud and trustee commissions, due to insufficient analysis by the trial court. Additionally, the court **AFFIRMED** the denial of defendant's counsel fee

application for the Davis law firm, finding no abuse of discretion, but **REVERSED** and **REMANDED** the denial of defendant's law firm's fee application due to the lack of findings by the trial court to support its denial of that application.

MEDICAID APPEALS

EXCESS INCOME OF ALF RESIDENT

I.M. v. Division of Medical Assistance and Monmouth County Division of Social Services
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-0150-23
Argued January 28, 2025 – Decided February 4, 2025

- Plaintiff appeals July 7, 2023 final agency decision denial of Medicaid benefits for excess income. Appellant resided at assisted living facility ("ALF") since 2016 and son made Medicaid application June 17, 2022 which documented Appellant's income and QIT.
- The County requested additional verifications by July 22, specifically requesting room and board rate, medical costs, and funding information for the QIT. County supervisor also called the ALF on July 13 seeking more medical expense information and was informed that appellant was care level two and med level two at a cost of $75 per day.
- On July 21, the County issued a decision denying Medicaid because the applicant's gross income of $8,993.45/month was sufficient to pay $75/day medical costs and referred to the information received directly from the ALF on July 13.
- Plaintiff requested a fair hearing at which the ALF Administrator testified that she was unable to say what portion of the daily room and board expenses were medical. The county supervisor testified that she confirmed the $75/day rate with the ALF Administrator. ALJ affirmed the County's denial, stating that the invoices from facility corroborated the $75 rate and that mail from ALF indicating $75 rate was incorrect did not sufficiently refute the County's evidence.
- The Appellate Division **AFFIRMED**, stating that Plaintiff's argument that the County should have excluded appellant's pension and annuity income was not timely disputed with the County, preventing consideration. Based on the County supervisor's testimony, the invoices and letter from the ALF, the Court was unpersuaded that the determination regarding the medical expense rate was unsupported, based on misinterpreted information or arbitrary, capricious and unreasonable.

CHILD SUPPORT TRUST NOT AVAILABLE RESOURCE

W.F. v. Morris County Department of Family Services
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-1271-22
Submitted April 22, 2024 – Decided May 30, 2024

- W.F. is represented by his guardian, in an appeal of a DMAHS final agency decision which reduced his Medicaid benefits by $60,000 because of Trusts deemed to be available assets.
- Prior to incapacity, W.F. entered into a property settlement agreement ("PSA") as part of a divorce judgment, to provide $23,400 in child support for his two minor children plus one-half of their college and other expenses.
- W.F. is a resident of Care One as a result of long-term alcoholism-related disease and his assets became insufficient to pay both Care One and his child support obligations. W.F. created an irrevocable Family Trust to benefit only the children, which was approved by the Court.
- W.F.'s guardian petitioned for Medicaid benefits and was informed that the trusts would be considered a gift to the children, prompting the reformation of the trust (by Court order) into three trusts, one for counsel fees and Care One, the other two for his children. The renewed Medicaid application was approved, however a transfer penalty was imposed due the money in the trusts being considered an available asset.
- At fair hearing, the ALJ found the transfers into to trust to be proper but the Commissioner disagreed and reinstated the transfer penalty.
- On appeal, W.F. argued that the child support payments legitimately satisfied debts that were certain and collectable under the divorce judgment and not designed to promote Medicaid eligibility.
- The **Appellate Division REVERSED AND REMANDED**, determining that the transfers were not a gift directed by WF or his guardian and were thus not "available" in calculating his Medicaid eligibility. The final agency decision was legally erroneous as well as arbitrary, capricious and unreasonable.

TRANSFER PENALTY

M.K. v. Division of Medical Assistance and Health Services and Morris County Office of Temporary Assistance
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION
DKT. NO. A-0578-23
Submitted February 5, 2025 – Decided March 13, 2025

- M.K. is in his forties, a resident of Troy Hills Center who suffers from multiple sclerosis and other conditions. M.K. filed his third Medicaid application in September 2022 and was approved with a 400-day ineligibility penalty due to $150,000 in asset transfers M.K. made

during the lookback period, including payments to "Xoom.com," loans to a family member and wire transfers to an attorney. M.K. requested a fair hearing and applied for an undue hardship waiver of this penalty.

- At fair hearing, M.K. did not testify but called the director of Troy Hills Center, who testified that M.K. would not be discharged to his home even though the facility would not receive payment, because it would not be a safe environment for him due to his needs. M.K. asserted that transfers were for the repayment of medical bills for treatment he received while in India.
- The ALJ (& DMAHS) upheld the transfer penalty decision and found M.K.'s evidence, a letter explaining the transfers, insufficient. They deemed it "uncorroborated hearsay" because the signers did not testify, and no supporting documents (loan agreements, medical bills) were provided. They also found that M.K. did not demonstrate that the assets were irrecoverable, or that he had made good faith efforts to recover them.
- The ALJ also denied the hardship waiver, finding that M.K. would continue to receive care at his facility, Troy Hills Center, even without Medicaid payments, (which was the testimony of the Administrator at the fair hearing).
- On appeal, the **Appellate Division AFFIRMED** the decision upholding the 400-day ineligibility penalty and the denial of the undue hardship waiver as reasonable and supported by the record.

AGENCY DECISIONS

FAILURE TO PRODUCE DOCUMENTS

M.A. v. Middlesex County Board of Social Services
OAL DKT. NO. HMA 0603-23

- This matter arises from a May 1, 2023 denial of Petitioner's Medicaid application due to M.A.'s failure to provide information that was necessary to determine eligibility.
- The County sought information regarding M.A.'s John Hancock life insurance policy, which was provided via a letter from John Hancock stating the value was $0. The County did not respond to an email seeking confirmation that the letter was sufficient. A subsequent RFD did not include a request for information regarding the John Hancock policy but the County denied eligibility due to the insufficiency of the John Hancock letter.
- The initial decision found the County's denial not appropriate and the ALJ stated that the record as a whole did not demonstrate M.A. failed to provide the verifications and there was an ongoing exchange of information between the parties, showing Petitioner's active attempt to comply.
- Initial Decision **ADOPTED.**

A.K. v. Division of Medical Assistance and Health Services and Middlesex County Board of Social Services

OAL DKT. NO. HMA 06749-2023

- This matter arises from the denial of Petitioner's Medicaid application for failure to provide information. Specifically, A.K. is a named beneficiary of their mother's Estate, for which the County sought a full accounting of the Estate.
- Petitioner's DAR argued that Petitioner is not entitled to anything under the Will as the Will does not distribute any asset. Petitioner provided no evidence that they took any steps to acquire the information requested and did not request an extension.
- Petitioner provided emails from the scrivener and a copy of the Trust document to the County but not to the ALJ. The ALJ affirmed the denial of Petitioner's Medicaid application.
- Initial Decision **ADOPTED.**

D.C. v. Monmouth Board of Social Services

OAL DKT. NO. HMA 02815-23

- This matter arises from D.C.'s appeal of a denial of his Medicaid eligibility for failure to provide documentation necessary to determine eligibility. The County's RFD requested various financial documents, including Fidelity investment account statements, trust information, and bank records by March 17, 2023. D.C.'s counsel provided answers and some documents on March 16, 2023 but requested an extension for others.
- The QIT Schedule A was submitted, but lacked banking information rendering the QIT invalid, resulting in a conclusion that D.C. was over the income limit. The County denied the extension and denied eligibility on March 23, 2023. A second application was filed and D.C. is now receiving benefits.
- The ALJ denied the appeal stating that applicants must provide all required application in a timely manner and no extension was warranted. Initial Decision was **ADOPTED.**

L.B. v. Essex County

OAL DKT. NO. HMA 11736-23

- This matter arises from L.B.'s appeal of two denials of Medicaid eligibility for failure to timely produce documentation verifying certain expenditures and assets. L.B. provided some documents but not all, and failed to provide an explanation for certain transactions.
- The County made several attempts to contact L.B. and the County allowed communication with L.B.'s daughter despite not receiving a DAR designation.
- The ALJ found that L.B.'s assertion that she was unaware of the County's need for further verifications was not credible, that no exceptional circumstances were present and the ALJ denied L.B.'s appeal.
- Initial Decision **ADOPTED.**

R.J. v. Gloucester Board of Social Services
OAL DKT. NO. HMA 03514-2023

- This matter arises from the denial of M.Z.'s Medicaid application due to his failure to provide information necessary to determine eligibility. The County sent a request for information the Petitioner's DAR, a nursing home representative, with a January 27, 2023 deadline and also sent a penalty letter, outlining the potential penalty as it related to certain withdrawals and transfers if information was not received by the deadline.
- Petitioner provided the County with many items but did not provide explanations regarding several deposits, a Wells Fargo account, and a vehicle resulting in the County denying eligibility. Petitioner argues that the RFD was received after the deadline which the County denied.
- The ALJ found Petitioner's testimony inconsistent and not credible. The ALJ found Petitioner's assertion of due process violations and exceptional circumstances to be unsupported by the evidence. The ALJ affirmed the denial of R.J.'s Medicaid eligibility. Initial Decision **ADOPTED.**

PERSONAL CARE ASSISTANCE (PCA) – PRIVATE DUTY NURSING (PDN)

M.S. v. Horizon New Jersey Health
3 OAL DKT. NO. HMA. 10405-2-23

- M.S. appeals the decision of Horizon to reduce his Private Duty Nursing services from sixteen hours per day, seven days per week, to ten hours per day, seven days per week.
- M.S. is seven years old and was born with severe medical conditions that require ongoing care. The PDN Acuity Tool assessment reflected a score suggesting 4-8 hours of PDN services; Horizon authorized 10 hours because of the 10 hour continuous overnight g-tube feeding M.S. requires.
- At fair hearing, Petitioner's nursing caretakers testified as did M.S's mother, who relayed that the assessment did not consider petitioner's situational criteria.
- The Court determined that While respondent testified that petitioner's situational criteria was considered in coming to its conclusion to reduce PDN hours, such consideration is not reflected on the PDN Acuity Tool and Schmidt's testimony did not explain how the situational criteria was taken into account in the analysis.
- The decision stated:

> "*Respondent relied heavily on S.S. providing care to petitioner, especially with her being a certified LPN and respiratory therapist. While S.S. certainly has more than adequate qualifications to care for petitioner, she is the sole wage earner in the household as her husband is disabled. She works five to seven days a week, ten to twelve hours per day. She also has to care for two additional minor children. S.S.'s husband is not a trained caregiver for petitioner and cannot be a trained caregiver due to his disabilities. Currently there are no other trained caregivers for petitioner in or outside the household.* ***However, even after taking the petitioner's social***

situation into account, such consideration does not demonstrate the need for sixteen hours of PDN services per day, rather petitioner's additional care needs can be properly provided by a trained caregiver."

- Initial decision **upheld the reduction of PDN hours**; No final decision published.

Z.A. v. Unitedhealthcare

3 OAL DKT. NO. HMA 1139

- Z.A., a 14-year-old child with several complex medical conditions, sought approval for increased PDN services. His parents requested 12 hours of PDN per weekday and 7 hours per weekend day. UnitedHealthcare (UH) approved only 9 hours per weekday and denied weekend services. The core issue was whether Z.A.'s medical needs justified the requested additional PDN hours.
- The ALJ found Petitioner is dependent on an anti-convulsion drug and rescue medication to manage his seizures, which can be severe. Z.A. has a younger brother with similar medical needs and Z.A.'s mother is the primary caregiver for both children. The ALJ found that UH did not adequately consider the impact of Z.A.'s brother's needs on his mother's ability to provide care.
- **The ALJ reversed UH's decision** denying the additional PDN hourse and directed UH to reevaluate Z.A.'s eligibility, considering the mother's ability to care for both children.
- Initial Decision **ADOPTED.**

M.S.M. v. United Healthcare

3 OAL DKT. NO. HMA 0134

- This matter concerns United Healthcare's (United) November 21, 2022 denial of a request for an increase of Petitioner's PDN hours to 16 hours per day, 7 days a week. The denial was based on the determination that the increase was not medically necessary.
- M.S.M. is a Medicaid recipient with a rare neurogenetic disorder (TBCK syndrome) who previously received 16 hours of PDN per day, 7 days a week. Respondent reduced the hours to 16 hours per day, Monday through Friday, with specific allocations for school and overnight hours, which was appealed and denied in a prior decision.
- Petitioner again requested those overnight hours be converted to daytime hours, and also requested an increase of weekend hours.
- The ALJ also determined that Petitioner "does not meet either test to justify the transfer of his daily overnight PDN services to daytime hours, along with an additional eight daytime weekend hours. Those hours can be and are now supplied by Petitioner's primary caregivers. PDN services cannot include respite or supervision, or serve as a substitute for routine parenting tasks, N.J.A.C. 10:60-5.4(f), and Petitioner has not proved any work-related or sibling care responsibilities which might preclude his mother performing her primary caregiver responsibilities during the hours in question."
- Initial Decision **ADOPTED.**

G.C. v. United Healthcare
OAL DKT. NO. HMA 10243-2023

- This matter arises from United Healthcare's (United's) assessment of Personal Care Assistance (PCA) hours for Petitioner. G.C. is a 48-year-old man with multiple sclerosis who currently receives 37 hours per week and requested additional hours, which was denied by United, resulting in this appeal.
- C.N. is Petitioner's mother and primary caretaker testified without requesting specific additional hours but with concerns that it will take something bad to happen to her son for hours to increase. Respondent testified that the assessment tool was administered accurately and resulted in a determination that 35.1667 hours were necessary which was confirmed by United's internal appeal process.
- The ALJ found the denial of additional PCA hours proper and found Petitioner failed to demonstrate the number of hours being provided was insufficient, that the additional hours were medically necessary, or that exceptional circumstances existed to warrant more hours. Initial Decision **ADOPTED.**

TRANSFER PENALTY

V.P. v. Ocean County Board of Social Services
3 OAL DKT. NO. HMA

- V.P. appeals a transfer penalty imposed due to a determination that V.P. transferred assets to her son for less than fair market value. V.P. contends she used assets to reimburse her son for repairs and renovations to her home. The County found the assets were a gift because there was no loan agreement and there were insufficient documentation of the son's expenditures.
- V.P.'s son, G.P. funded the renovations and V.P.'S nursing home costs by taking out a line of credit secured by a mortgage taken out on his mother's property. Petitioner produced a spreadsheet identifying each expenditure on the property and payment to facility. Numerous receipts were produced, few of which referenced the property directly.
- **ALJ AFFIRMED** the County's decision to impose the transfer penalty, stating that case law directs the need for clear documentation of loans, especially between family members. The ALJ found that Petitioner failed to provide "convincing evidence" that the payments to her son were legitimate reimbursements and emphasized the need for pre-existing agreements and clear documentation. No final decision yet published.

C.F. v. Atlantic County Department of Family and Community Development
OAL DKT. NO. HMA 06647-23

- This matter arises from Petitioner's appeal of a transfer penalty in the amount of $2,021.96. Petitioner argues the transfers were for purchases of clothing for fair market value and should not be penalized.

- The penalties were assessed based on two different purchases from Elderwear, which included the purchase of numerous articles of clothing, a watch, a Samsung tablet with keyboard, sneakers, and a television. The Agency had no research or documentation to show the items were not fair market value as it is "the applicant's burden to show that fair market value was provided."
- Petitioner was represented by an employee of Future Care who testified that C.F. wanted the items purchased and that C.F. was given the Elderwear catalog to give him ideas of what could be purchased. She did not give C.F. prices nor the option to purchase from anywhere else and stated that they have ordered from Eldercare in the past.
- Petitioner's representative also testified that "they were trying to get Medicaid eligibility for petitioner, and he was over the limit, so she went back to him to ask if there were other things he wanted to purchase with the money in his account."
- Initial Decision **ADOPTED.**

CLINICAL ELIGIBILITY

C.S. v. Office of Community Choice Options
OAL DKT. NO. HMA 11815-23

- This matter arises from Petitioner's appeal of the denial of clinical eligibility for Nursing Facility Level of Care (NFLOC) benefits.
- The Office of Community Choice Options (OCCO) determined that while C.S. has short term memory deficits and mild cognitive impairments, he was independent in all ADL's. Petitioner's sister provided testimony that directly contradicted OCCO's assessment, stating that C.S. needing regular reminders for ADL's, did not independently manage his finances, among other things, and argued that the assessment was insufficient as it did not verify C.S.'s self-reporting of his abilities. Petitioner also provided medical records demonstrating mild cognitive impairment and cerebral atrophy.
- The initial decision **DENIED** the appeal and upheld the County's denial of clinical eligibility; No final decision yet published.

L.L. v. Atlantic County Department of Family and Community Development
OAL DKT. NO. HMA 02375-23

- This matter arises from L.L.'s appeal of a 249 day transfer penalty imposed as a result of asset transfers. L.L. contests a portion of the transfer penalty, specifically 147 days or $55,200 that were related to renovation to her son's home to create a handicap-accessible space for L.L. to reside and the purchase of a storage shed for her belongings during the renovation.
- The ALJ determined that L.L.'s reimbursement to her son for the shed was a transfer for less than fair market value since the shed remains on the son's property, L.L. is now in a

long term care facility and the son (J.S.) and his wife benefit from the shed on the property rather than L.L.

- The ALJ also determined that further checks to J.S. were insufficient to rebut the presumption that the transfers were for a purpose other than Medicaid eligibility, thus the appeal was **DENIED;** No final decision published.

EXCESS INCOME / RESOURCES

B.L. v. Division of Medical Assistance and Health Services and Union County Board of Social Services

OAL DKT. NO. HMA 01491-2023

- This matter arises from the Union County's denial of Petitioner's Medicaid application for failure to provide necessary documentation, particularly for not providing the "actual Supplemental Needs Trust document (all pages) including Schedule A."
- Upon receipt of the initial RFD, Petitioner responded within the required time frame with a statement indicating the initial deposit into the Trust (eight years prior) was a distribution under the Last Will and Testament of L.L., petitioner's father. The response also indicated there were no other documents in B.L.'s possession, or otherwise available, responsive to the Agency's request. The Agency denied petitioner's application and this appeal followed. The County then requested the the actual SNT document including Schedule A.
- The ALJ **REVERSED** the Agency decision, stating: "It is clear from m my review of the documents and testimony presented at the hearing and I **FIND** that the Agency did not understand the Trust in question was a testamentary trust and not a stand-alone trust that would have been established by way of a separate and distinct trust document. I make this important finding based upon the Agency's second RIF requesting the "actual Supplemental Needs Trust document (all pages) including Schedule A". A "Schedule A" is typically attached to a stand-alone trust document and identifies the amount and the source of funds used to establish the trust."
- The ALJ also stated that the statement provided by Petitioner with the opening bank statement for the Trust account showing a single deposit of $69, 81. 30, was sufficient verification of the source of funds, since the bank does not retain copies of deposit checks going back that far.
- The Final Decision **ADOPTED** the Initial Decision in part, finding that the County improperly denied the application for failing to provide documentation necessary. The Commissioner **REVERSED** the Initial Decision determination that eligibility was established and **REMANDED** the matter to the County to process the application.

J.M. v. Division of Medical Assistance and Health Services and Ocean County Board of Social Services

OAL DKT. NO. HMA 06891-23

- This matter arises from J.M.'s appeal of the effective date of his Medicaid eligibility, which he argues should have been effective September 1, 2022 and not March 1, 2023.
- J.M. filed multiple Medicaid applications and his wife established QIT listing his pension and SSI as funding sources. J.M. deposited his pension income into the QIT from September 2022, he did not consistently deposit the entire SSI income payment into the QIT until March 2023.
- The ALJ denied the appeal and the Initial Decision was **ADOPTED.**

D.M. v. Camden County Board of Social Services

OAL DKT. NO. HMA 11736-23

- This matter arises from D.M.'s appeal of the County's denial of Medicaid benefits for being over the income limit and having assets exceeding the resource limits. D.M. applied for Medicaid and was asked by the County for additional information, specifically regarding pension income and a QIT, which it stated was improperly funded.
- The County denied eligibility for lack of a fully executed and corrected QIT agreement resulting in a denial of eligibility.
- The ALJ affirmed the decision, stating: "…a QIT may not be modified simply by exchanging pages within the document. The QIT is a legally binding, notarized document. It cannot be changed simply by exchanging pages in the document, a new or amended QIT would have to be created. The allegation by petitioner that the Board waived the issue, as it "did not request the whole document," is specious. If the QIT were modified, the petitioner would need to present the entire document to show all terms and conditions thereof. A party cannot simply change pages in a legally binding document." Initial Decision was **ADOPTED.**

J.S. v. Essex County Board of Social Services

OAL DKT. NO. HMA 13535-23

- This matter concerns Petitioner's appeal of the termination of his Medicaid benefits for being over-resourced. J.S. is 70 years old and receives Medicaid under ABD. The Agency determined that J.S. had resources exceeding the $4,000.00 limit based on his bank account balance.
- The ALJ found that J.S. receives financial help from family members and that the dates of the bank statements submitted for his redetermination did not match the calendar month. The ALJ determined that the Agency should have relied on the balance in the August bank statement, which was below the $4,000 limit.
- The ALJ **REVERSED** the Agency decision and determined J.S. was eligible for Medicaid benefits at the time of his application.

NOTICE OF DISCHARGE FROM SNF

B.M. v. Cheshire Home
OAL DKT. NO. HMA 06868-23

- This matter arises from a notice of intent to discharge Petitioner form Cheshire Home to another facility.
- An involuntary discharge requires 30-day written notice pursuant to 42 C.F.R. §483. 15(c)(4)(i) and must meet certain requirements pursuant to 42 C.F.R. §483. 15(c)(1)(i).
- Cheshire sought the involuntary discharge of B.M. due to an incident involving consumption of cannabis and tobacco contributing to B.M.'s being unresponsive while using a motorized wheelchair. The ALJ found that Cheshire did not provide B.M. with thirty-day notice prior to transfer, nothing in the record required a longer notice and that Cheshire failed to demonstrate proper documentation from a physician regarding the necessity of transfer.
- Initial Decision **ADOPTED.**

CITIZENSHIP

M.Z. v. Division of Medical Assistance and Health Services and Bergen County Board of Social Services
OAL DKT. NO. HMA 10260-23

- This matter arises from the denial of M.Z.'s Medicaid renewal application for failure to meet citizenship or immigration requirements.
- M.Z. is not a U.S. citizen and she had an application for asylum pending with the United States Citizenship and Immigration Services (USCIS) at the time of her renewal. The USCIS notice stated that the notice did not grant any immigration status or benefit.
- The ALJ The found that although Petitioner has applied for asylum, pursuant to the Immigration and Nationality Act, she has not provided documentation to prove that such status has been granted.
- The Final Decision **REMANDED** the matter, stating that Petitioner "argues and provides supporting evidence that she previously requested a copy of her case file. She indicates that she did not receive these records prior to the hearing; the record is unclear as to whether said file was provided to Petitioner by the BCBSS either prior to or during the underlying hearing in this matter. Petitioner also plausibly points to potential deficiencies in the original notice that the BCBSS provided in June 2022 informing her eligibility under a reasonable opportunity period. As a result of these omissions and/or deficiencies, Petitioner may have been unable to fully present arguments at the underlying hearing that could have supported her position."

SNAPSHOT DATE

G.B. v. Ocean County Board of Social Services
OAL DKT. NO. HMA 04752-2023

- This matter arises from issues regarding the snapshot date of June 2022 used by Ocean County BOSS to evaluate G.B.'s resources for compliance with Medicaid eligibility. Petitioner appeals the determination of a snapshot date of June 2022.
- G.B. was admitted to Complete Care on September 3, 2021, first as a resident of their assisted living facility and later transferred to the nursing facility.
- The PAS was completed on June 15, 2022 and established clinical eligibility. Petitioner applied for Medicaid on February 22, 2023.
- Petitioner contends that the snapshot date should be October 1, 2021, because he entered the assisted living facility in September 2021. Respondent contends that the Petitioner could not be considered "institutionalized" until the PAS had been completed.
- The ALJ cites to S.W. v. Cumberland County Board of Social Services, HMA 99815-20, June 4, 2020, which determined that a snapshot date does not hinge on when an applicant enters a Title XIX facility but rather is the date the PAS.
- The ALJ also determined that Petitioner was over resourced as of that date and **ADOPTED** the initial decision.

259 N.J. 584
Supreme Court of New Jersey.

In the MATTER OF the ESTATE OF Michael D. JONES, Deceased.

A-28 September Term 2023
|
088877
|
Argued September 10, 2024
|
Decided January 27, 2025

Synopsis

Synopsis

Background: Daughter filed complaint seeking, inter alia, appointment as administrator of father's estate and full accounting from father's former wife of all financial transactions involving father's accounts at time of his death and all items former wife removed from father's home. Former wife filed pleading and creditor's claim against estate alleging she was entitled to $100,000 under divorce settlement agreement. The Superior Court, Chancery Division, Camden County, appointed daughter administrator, ordered full accounting from former wife, granted summary judgment in favor of estate on former wife's claims, and denied former wife's motion for reconsideration. Former wife appealed. The Superior Court, Appellate Division, 477 N.J.Super. 203, 305 A.3d 525, reversed and remanded. Estate filed petition for certification, which was granted.

Holdings: The Supreme Court, Pierre-Louis, J., held that:

[1] New Jersey statute governing revocation of probate and non-probate transfers by divorce was not conflict preempted by federal regulations prohibiting interference with right of survivorship of savings bond co-owners;

[2] former wife's interest as designated pay-on-death (POD) beneficiary of savings bonds purchased by former husband was not automatically revoked by their divorce;

[3] former wife's interest was not revoked by virtue of their divorce settlement agreement; and

[4] divorce settlement agreement's catch-all provision did not compel equitable distribution of savings bonds.

Affirmed as modified.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Summary Judgment.

West Headnotes (12)

[1] Appeal and Error Review using standard applied below

Supreme Court reviews trial court's grant or denial of motion for summary judgment de novo, applying same standard used by trial court.

[2] **Appeal and Error** Summary Judgment

An appellate court reviewing a summary judgment order considers whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. N.J. Ct. R. 4:46-2(c).

[3] **Appeal and Error** Statutory or legislative law

Supreme Court reviews questions of statutory interpretation de novo, without deference to trial court's findings.

[4] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

When interpreting a statute, the Legislature's intent is paramount to a court's analysis, and the plain language of the statute is crucial to determining legislative intent.

[5] **Statutes** Plain language; plain, ordinary, common, or literal meaning

Statutes Extrinsic Aids to Construction

A court begins statutory construction with the plain language of the statute, resorting to extrinsic evidence only when there is ambiguity in the statutory language that leads to more than one plausible interpretation.

[6] **Appeal and Error** Construction, interpretation, and application in general

Appellate courts review contracts de novo, with no deference paid to the trial court's interpretation.

[7] **Contracts** Subject, object, or purpose as affecting construction

Contracts Intention of Parties

Contracts Extrinsic circumstances

Courts enforce contracts based on the intent of the parties, the express terms of the contract, surrounding circumstances, and the underlying purpose of the contract.

[8] **Divorce** Rights and liabilities as to property in general

Federal Preemption Finance, Banking, and Credit

New Jersey statute governing revocation of probate and non-probate transfers by divorce was not conflict preempted by federal regulations prohibiting interference with right of survivorship of savings bond co-owners; New Jersey statute did not conflict with federal survivorship regulations, as it incorporated and followed relevant federal regulations by explicitly deferring to express terms of a "governing instrument," which included savings bonds. U.S. Const. art. 6, cl. 2; N.J. Stat. Ann. § 3B:3-14; 31 C.F.R. §§ 353.7(a)(3), 353.15, 353.20(a), 353.70(c)(1).

More cases on this issue

[9] **Federal Preemption** Impossibility of complying with both state and federal law

"Conflict preemption" occurs when state and federal obligations are inconsistent, making it impossible to comply with both.

[10] **Divorce** Rights and liabilities as to property in general

United States Ownership and transfer

Former wife's interest as designated pay-on-death (POD) beneficiary of savings bonds purchased by former husband was not automatically revoked by their divorce; automatic revocation under New Jersey statute did not apply if there were contrary express terms of a "governing instrument," savings bonds were governing instruments, and federal regulations governing savings bonds did not allow automatic revocation of right of survivorship conferred by POD savings bonds. N.J. Stat. Ann. § 3B:3-14(a); 31 C.F.R. §§ 353.7(a)(3), 353.15, 353.20(a, b), 353.22(a), 353.70(c)(1).

[11] **Divorce** Property division and distribution

United States Ownership and transfer

Former wife's interest as designated pay-on-death (POD) beneficiary of savings bonds purchased by former husband during marriage was not revoked by virtue of their divorce settlement agreement; under federal regulations governing savings bonds, former wife became sole owner of bonds from moment of former husband's death, absent a valid transfer or removal of former wife's status as beneficiary, divorce settlement agreement was completely silent regarding bonds, and even if divorce settlement agreement's catch-all provision contemplated bonds, there was no suggestion that former husband took any steps to have bonds reissued in only his name or to provide evidence of divorce settlement agreement to Department of Treasury, as required by governing federal regulations. 31 C.F.R. §§ 353.20(a), 353.22(a), 353.23(a), 353.70(c)(1).

[12] **Divorce** Property division and distribution

United States Ownership and transfer

Divorce settlement agreement's catch-all provision stating that any marital asset "not listed below" belonged to party who had it currently in their possession did not compel equitable distribution of savings bonds purchased by former husband that former wife redeemed as pay-on-death (POD) beneficiary upon former husband's death, even though savings bonds were marital assets not listed in divorce settlement agreement that belonged to former husband at time divorce settlement agreement was executed and during his life, since under federal regulations governing savings bonds, former wife became sole owner of bonds the moment former husband passed away. 31 C.F.R. § 353.70(c)(1).

****925** On certification to the Superior Court, Appellate Division, whose opinion is reported at 477 N.J. Super. 203, 305 A.3d 525 (App. Div. 2023).

Attorneys and Law Firms

Thomas A. Whelihan argued the cause for appellant Shontell A. Jones (The Whelihan Law Firm, attorneys; Thomas A. Whelihan, on the briefs).

Michael Confusione argued the cause for respondent Jeanine Jones (Hegge & Confusione, attorneys; Michael Confusione, on the brief).

Opinion

JUSTICE PIERRE-LOUIS delivered the opinion of the Court.

***588** ****926** In this matter, we must determine whether an ex-spouse's rights as the pay-on-death beneficiary on her deceased ex-husband's U.S. savings bonds were superseded by the parties' divorce.

Decedent Michael Jones purchased U.S. savings bonds while he was married to Jeanine Jones. Michael designated Jeanine as the pay-on-death beneficiary for the savings bonds. [1] When the couple divorced, they entered into a divorce settlement agreement (DSA) that provided for the disposition of certain property but did not specifically list and dispose of the savings bonds. The DSA further required Michael to pay Jeanine a total of $200,000 over a period of time in installments.

After Michael's death, Jeanine redeemed the savings bonds, which were worth approximately $77,800. At the time of his death, Michael had paid Jeanine approximately $110,000 towards his $200,000 obligation under the DSA.

Michael's daughter from a previous relationship, Shontell Jones, who was the administrator of Michael's Estate, sought a determination that the Estate had fulfilled Michael's obligations under the DSA, arguing that the $77,800 in savings bonds and other cash ***589** Jeanine retrieved from Michael's accounts after his death counted toward the $200,000 Michael owed to Jeanine. The trial court agreed with the Estate and concluded that the savings bonds were part of the amount due to Jeanine under the parties' DSA and counted towards Michael's $200,000 obligation.

The Appellate Division reversed, finding that the DSA did not divest Jeanine of her rights to the savings bonds and that the trial court erred in applying state law to decide the disposition of the bonds instead of the federal regulations governing U.S. savings bonds.

We granted certification. For the reasons that follow, we affirm as modified the judgment of the Appellate Division which held that Jeanine's entitlement to the savings bonds was separate and apart from Michael's obligations pursuant to the DSA.

I.

A.

Jeanine and Michael married on June 16, 1990. In or around August 1990, Michael began purchasing Series EE federal savings bonds through his employer and listed Jeanine as the pay-on-death beneficiary. Jeanine was aware that Michael had purchased the bonds and that he had designated her as the pay-on-death beneficiary.

Jeanine and Michael separated in April 2016, and Jeanine moved out of their marital home. The two attempted to reconcile and preserve their marriage the following year but remained in their separate residences. According to Jeanine's deposition, their potential reconciliation was premised on certain stipulations, including couples counseling and Michael's promise to compensate Jeanine for his financial deficiencies as a husband during their marriage. To fulfill his agreed-upon obligation, Michael rendered $12,000 in payments to Jeanine between June and August 2017. The couple never attended counseling and ultimately did not reconcile.

***590** On October 19, 2017, Michael and Jeanine drafted a divorce settlement agreement to govern the terms of their divorce. On December 6, 2017, Jeanine ****927** officially filed for divorce. The final judgment of divorce -- which incorporated the DSA -- was entered on January 17, 2018.

The DSA provided that Michael would pay Jeanine a sum of $200,000, following a specific payment schedule, detailed as follows:

> (a) Thursday, October 19, 2017, [Michael] will deliver a personal check to [Jeanine in the amount of] $4,500.00 upon receipt of this notarized document.
>
> (b) Tuesday, November 20, 2017, [Michael] has agreed to deliver a second check to [Jeanine] in the amount of $45,500.00.
>
> (c) The remaining balance of $150,000.00 shall be delivered to [Jeanine] over the next three years beginning 2018. Each payment shall be in the amount of $50,000.00, payable by the end of each year ending December 2020.

The DSA also included provisions regarding the distribution of property, assets, and debt. Concerning the distribution of assets, Section 1 of the DSA stated:

> For an equitable division of marital property, assignment of non-marital property, and as for the payment of marital debts, the parties shall make the transfers, conveyances, and assignments in accordance with the terms, provisions, covenants as follows below. Any marital asset not listed below belongs to the party who has it currently in their possession.

Regarding personal property, the DSA provided: "Husband shall have exclusive use, possession, and ownership of all items titled in his name solely including cash on hand, cash in bank, [and] all personal affects ...." Additionally, the parties waived rights to the other's estate: "[t]he Wife will waive any and all rights to inherit part of the Estate of the Husband at his death, only if the Husband has fulfilled his financial obligation on or by December 31, 2020."

Pursuant to the terms of the DSA, Michael paid Jeanine approximately $110,000 between October 2017 and December 2019, in accordance with the DSA's payment schedule. [2]

***591** On November 9, 2019, Michael was admitted to the hospital. He suffered from a perforated ulcer and had to undergo emergency surgery. On November 14, 2019, while still in the hospital, Michael appointed Jeanine as power of attorney over his PNC bank account. There were no witnesses present when he signed the power of attorney document. That same day, Jeanine, utilizing her authority as power of attorney, withdrew $17,000 from Michael's PNC bank account. According to Jeanine, she retrieved that money to pay bills and manage Michael's household while he was in the hospital.

Michael died intestate on November 16, 2019. Jeanine later redeemed the Series EE federal savings bonds Michael purchased years prior for a sum of $77,864.40.

B.

On February 14, 2020, Shontell filed an amended complaint and order to show cause seeking numerous forms of relief, including appointment as administrator of Michael's Estate; an accounting from Jeanine of all financial transactions related to Michael's accounts at the time of his death; a full and complete accounting of items removed from Michael's home; and an order directing

Jeanine to vacate Michael's home and to pay the Estate rent from the day she took possession of Michael's home, as well as reimbursement for costs of utilities during her occupancy of Michael's home.

****928** In a June 12, 2020 order, the court granted Shontell's request to be appointed administrator of the Estate. The court also granted Shontell's requests for a full accounting from Jeanine, directed Jeanine to vacate Michael's home, and directed Jeanine to pay the Estate rent and utility costs for Jeanine's occupancy. Pursuant to the order, a hearing was scheduled regarding Jeanine's entitlements under the DSA.

Jeanine filed a creditor's claim seeking to be reimbursed for her expenditures on Michael's behalf as well as the $100,000 she claimed was still owed to her under the terms of the DSA. ***592** Shontell, in her capacity as administrator of Michael's Estate, filed a notice of rejection of Jeanine's claim pursuant to N.J.S.A. 3B:22-7. The Estate argued that Michael's financial obligations to Jeanine under the DSA had already been satisfied through her redemption of the federal savings bonds in the amount of $77,864.40. The Estate further continued to claim that Jeanine owed money to the Estate.

Following discovery, the Estate moved for partial summary judgment. At the conclusion of the April 23, 2021 hearing on the motion, the trial court found that the $200,000 Michael owed Jeanine under the terms of the DSA had been satisfied due to her redemption of the savings bonds. The trial court granted the Estate partial summary judgment. It dismissed with prejudice Jeanine's claim for additional payments pursuant to the DSA, determining that Michael's obligations were satisfied in full. The court reserved judgment on the Estate's claim for reimbursement in the amount of $16,864.40 from Jeanine.

Thereafter, Jeanine moved for reconsideration. At oral argument, Jeanine argued that the bonds were not specifically included in the DSA. Jeanine further asserted that federal rules regarding bonds governed because the regulations preempt any agreement between the parties. [3] The court denied Jeanine's motion for reconsideration, finding she was unable to establish that there was a palpable error or mistake. The court later entered an order requiring Jeanine to pay the Estate $27,862.70 and denied Jeanine's request for reimbursement of expenses she allegedly incurred on behalf of the Estate after Michael's death.

Jeanine appealed the order granting partial summary judgment as well as the order denying her motion for reconsideration. In re Est. of Jones, 477 N.J. Super. 203, 207, 305 A.3d 525 (App. Div. 2023). The Appellate Division, reviewing the grant of partial ***593** summary judgment de novo, reversed the trial court's judgment. Id. at 215-16, 218, 305 A.3d 525. The appellate court disagreed "with the judge's legal determinations regarding the interpretation of the DSA as well as the application of state law to the disposition of federal savings bonds in the circumstance of this case." Id. at 218, 305 A.3d 525. Furthermore, relying on Free v. Bland, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), as well as Yiatchos v. Yiatchos, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964), the Appellate Division found that in the circumstances presented here, the applicable state law was preempted by federal law. Id. at 224, 305 A.3d 525.

As such, the Appellate Division held that the value of the redeemed bonds should not be credited towards the Estate's DSA obligations because under the applicable federal regulations, Jeanine was the sole owner of the bonds at the time of Michael's death and was entitled to the payment. Id. at 227, 305 A.3d 525. In addition, the court stated that "[i]n the absence of any allegation ****929** of fraud or breach of trust, application of N.J.S.A. 3B:3-14 in this case, which allowed the estate to improperly avoid the consequences of the bonds' beneficiary registration, conflicts with the governing federal regulations under Free and Yiatchos and is therefore preempted." Ibid.

We granted the Estate's petition for certification. 256 N.J. 519, 310 A.3d 1245 (2024).

II.

A.

The Estate urges this Court to reverse the Appellate Division's judgment, asserting that the court overstepped its authority in its determination that the DSA did not resolve Jeanine's rights with respect to the bonds. The Estate also argues that the Appellate Division incorrectly concluded that federal savings bond regulations preempt N.J.S.A. 3B:3-14. The Estate asserts that the state statute is not preempted by the federal regulations and that ***594** N.J.S.A. 3B:3-14 "removed Jeanine as the beneficiary of the savings bonds after she and Michael divorced."

B.

Jeanine urges this Court to affirm the Appellate Division's decision that the bonds were not part of the $200,000 owed to her under the DSA. Jeanine now argues, however, that we should not find that preemption applies here. Rather, Jeanine contends that this Court should find that the exception to automatic revocation within N.J.S.A. 3B:3-14, which states, "[e]xcept as provided by the express terms of a governing instrument," governs this appeal. Jeanine asserts that the express terms of the governing instrument in this context are the federal rules and regulations governing the savings bonds. According to Jeanine, under that reading of the statute, Jeanine's beneficiary status would not have been automatically revoked upon divorce pursuant to the federal regulations.

III.

A.

[1] **[2]** We review a trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78, 276 A.3d 108 (2022). The appellate court considers "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Padilla v. Young Il An, 257 N.J. 540, 547, 315 A.3d 778 (2024) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)); see also R. 4:46-2(c). To reach that determination in this case, we must interpret both the relevant statutes and the DSA.

[3] **[4]** **[5]** We review questions of statutory interpretation de novo, without deference to the trial court's findings. ***595** Kocanowski v. Township of Bridgewater, 237 N.J. 3, 9, 203 A.3d 95 (2019). When interpreting a statute, the Legislature's intent is paramount to a court's analysis, and the plain language of the statute is crucial to determining legislative intent. DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005). We therefore begin our review with the plain language of the statute, resorting to extrinsic evidence only when "there is ambiguity in the statutory language that leads to more than one plausible interpretation." Ibid.

[6] **[7]** Appellate courts also review contracts de novo, with no deference paid to the trial court's interpretation. Kieffer v. Best Buy, 205 N.J. 213, 222, 14 A.3d 737 (2011). "[C]ourts enforce contracts 'based on the intent of the parties, the express ****930** terms of the contract, surrounding circumstances and the underlying purpose of the contract.' " In re County of Atlantic, 230 N.J. 237, 254, 166 A.3d 1112 (2017) (quoting Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118, 85 A.3d 947 (2014)).

B.

1.

At issue in this case is Jeanine's redemption of U.S. savings bonds. The U.S. Treasury holds the power to issue savings bonds, subject to the approval of the President. 31 U.S.C. § 3105(a). The Secretary of the Treasury has been delegated the authority to make prescriptions regarding the savings bonds issued, including the power to determine, amongst other things, "the form and amount of an issue and series;" "the way in which they will be issued;" "the conditions, including restrictions on transfer, to which they will be subject;" [and] "conditions governing their redemption." Id. at (c). Treasury regulations governing the "terms and conditions" of Series EE bonds are set forth in Part 353 of Title 31 of the Code of Federal Regulations. 31 C.F.R. § 353.0.

31 C.F.R. § 353.15 provides that "[s]avings bonds are not transferable and are payable only to the owners named on the bonds, except as specifically provided in these regulations and ***596** then only in the manner and to the extent so provided." One such exception through special provision is that "[a] bond may be registered in the name of one individual payable on death to another." 31 C.F.R. § 353.7(a)(3). The federal regulations also provide guidance on determining bond ownership upon the death of the bond owner:

> If the owner of a bond registered in beneficiary form has died and is survived by the beneficiary, upon proof of death of the owner, the beneficiary will be recognized as the sole and absolute owner of the bond. Payment or reissue will be made as though the bond were registered in the survivor's name alone. A request for payment or reissue by the beneficiary must be supported by proof of death of the owner.
>
> [Id. at .70(c)(1).]

To protect the right of survivorship that they confer, the regulations specify that the Treasury will not recognize judicial determinations that either "give[ ] effect to an attempted voluntary transfer inter vivos of a bond" or "impair[ ] the rights of survivorship conferred by these regulations upon a coowner or beneficiary." Id. at .20(a).

The Treasury, however, "will recognize a divorce decree that ratifies or confirms a property settlement agreement disposing of bonds or that otherwise settles the interests of the parties in a bond," and a savings bond may be reissued "to eliminate the name of one spouse as owner, coowner, or beneficiary or to substitute [their name] for that of the other spouse ... pursuant to the [divorce] decree." Id. at .22(a). "[I]f established by valid, judicial proceedings," the Treasury will also recognize claims "against an owner of a savings bond and conflicting claims of ownership of, or interest in, a bond between coowners or between the registered owner and the beneficiary." Id. at .20(b). To establish the validity of a judicial proceeding, a party must submit "certified copies of the final judgment, decree, or court order," with additional requirements applicable in certain circumstances. Id. at .23(a).

2.

N.J.S.A. 3B:3-14 governs the revocation of probate and non-probate transfers by divorce. As relevant here, the statute reads:

> ***597** a. Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division ****931** of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, a divorce or annulment:
>
> (1) revokes any revocable:
>
> (a) dispositions or appointment of property made by a divorced individual to his former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

[N.J.S.A. 3B:3-14(a)(1)(a).]

Another provision specifies that, for purposes of Section 3-14, " 'governing instrument' means a governing instrument executed by the divorced individual before the divorce or annulment." Id. at (b)(2). The general definitions section applicable to Title 3B of the New Jersey Statutes, in turn, defines a governing instrument to include "a deed, will, trust, insurance or annuity policy, account with the designation 'pay on death' (POD) or 'transfer on death' (TOD), security registered in beneficiary form with the designation 'pay on death' (POD) or 'transfer on death' (TOD)." N.J.S.A. 3B:1-1 (emphasis added). And it defines "security" to include, among other items, "any note, stock, treasury stock, [or] bond." Id. at -2; see also 15 U.S.C. § 77b(a)(1) ("[T]he term 'security' means any note, stock, treasury stock, security future, security-based swap, bond ....").

IV.

Having identified the relevant statutes, regulations, and legal principles, we turn to the arguments presented.

A.

[8] We begin with the argument -- advanced by both sides -- that, contrary to the Appellate Division's determination, N.J.S.A. 3B:3-14 does not conflict with and is therefore not preempted by the federal statutes and regulations that govern U.S. savings bonds. We agree with the parties that preemption is not an issue here.

***598** **[9]** The concept of preemption is derived from the Supremacy Clause of the United States Constitution, which establishes federal law as "the supreme Law of the Land" that takes precedence over any state laws to the contrary. Murphy v. NCAA, 584 U.S. 453, 477, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018); see U.S. Const. art. VI, cl. 2. The United States Supreme Court has identified three types of preemption: conflict, express, and field preemption. Murphy, 584 U.S. at 477, 138 S.Ct. 1461. As relevant here, conflict preemption occurs when state and federal obligations are inconsistent, making it impossible to comply with both. See Mut. Pharm. Co., Inc. v. Bartlett, 570 U.S. 472, 480, 133 S.Ct. 2466, 186 L.Ed.2d 607 (2013).

In Free v. Bland, the Court considered whether a Texas community property law -- under which a son, as his deceased mother's heir, would have an interest in U.S. savings bonds issued to both of his parents -- was preempted by the federal regulation prohibiting interference with the right of survivorship of bond co-owners. 369 U.S. at 664-65, 82 S.Ct. 1089. The Court found a conflict and held "that the state law which prohibits a married couple from taking advantage of the survivorship provisions of United States Savings Bonds merely because the purchase price is paid out of community property must fall under the Supremacy Clause." Id. at 670, 82 S.Ct. 1089.

The Court addressed a similar issue in Yiatchos v. Yiatchos, in which the deceased had purchased savings bonds with community property belonging to himself and his wife but had named his brother as the pay-on-death beneficiary. 376 U.S. at 307-08, 84 S.Ct. 742. The decedent's will ****932** "nam[ed] his wife as executrix and bequeath[ed] all cash and bonds owned by him at the time of his death to his brother, four sisters and a nephew," and the Washington state courts upheld the terms of the will. Id. at 308, 84 S.Ct. 742. Expanding on Free, the United States Supreme Court held that "the survivorship provisions of the federal regulations must control, preempting, if necessary, inconsistent state law which interferes with the legitimate exercise of the Federal Government's ***599** power to borrow money." Id. at 311, 84 S.Ct. 742. The Court found that at least half of the bonds -- and possibly all of the bonds, if the wife failed to show that she had not consented to the designation of the brother as beneficiary -- belonged to the brother, because Washington's community property law could not override federal survivorship provisions. Id. at 312, 84 S.Ct. 742.

Here, however, New Jersey law does not conflict with federal survivorship regulations. On the contrary, the statute explicitly defers to "the express terms of a governing instrument," N.J.S.A. 3B:3-14(a), and the pay-on-death U.S. savings bonds in dispute here, as regulated by the federal government that issued them, are the relevant "governing instruments," see N.J.S.A. 3B:1-1 to -2.

As noted above, the relevant federal regulations collectively prohibit the automatic revocation that might otherwise take place under Section 3-14(a). See 31 C.F.R. § 353.15 (setting forth basic rule of non-transferability); id. at .7(a)(3), .70(c)(1) (creating and establishing the terms of an exception to the no-transfer rule for a pay-on-death beneficiary); id. at .20(a) to (b) (protecting the right of survivorship conferred in pay-on-death bonds by invalidating judicial determinations giving effect to inter vivos transfers while recognizing claims "between coowners or between the registered owner and the beneficiary, if established by valid, judicial proceedings"); id. at .22(a) (allowing transfers upon the ratification or confirmation of a property transfer through a divorce decree and permitting reissuance of a bond "to eliminate the name of one spouse" or to substitute one spouse's name for the other).

[10] Because N.J.S.A. 3B:3-14(a) does not supersede the terms of a governing instrument, and because the terms of the bonds at issue here prevent the automatic revocation of a pay-on-death provision following a divorce, no such automatic revocation occurred under the exception set forth in Section 3-14(a). As the New Jersey statute incorporates and follows the relevant federal regulations, we agree with the parties that preemption does not apply here.

***600** B.

[11] We therefore turn to the Estate's argument that Jeanine's interest in the bonds was revoked by virtue of the DSA between Jeanine and Michael. We find that it was not.

Michael purchased the disputed bonds during his marriage to Jeanine and named Jeanine as the pay-on-death beneficiary. Thus, absent a valid transfer or removal of Jeanine's status as beneficiary, Jeanine became, from the moment of Michael's death, the sole owner of the bonds under 31 C.F.R. § 353.70(c)(1).

The Department of the Treasury permits the reissuance of bonds when a divorce decree ratifies or confirms "a property settlement agreement disposing of bonds or that otherwise settles the interests of the parties in a bond." 31 C.F.R. § 353.22(a). A party can establish the validity of the judicial proceedings by submitting certified copies of the final judgment, decree, or court order. Id. at .23(a).

****933** The DSA in this case, however, is completely silent regarding the bonds. Indeed, the Estate's own argument, to which we turn next, that the catchall provision in Section 1 of the DSA is the only place in which the savings bonds are contemplated, essentially concedes that the bonds are absent from the agreement. And the record contains no suggestion that Michael took any steps to have the bonds reissued in only his name or to provide evidence of the DSA to the Department of the Treasury as required by the regulations. See id. at .22(a), .23(a).

[12] The Estate argues that the DSA's broad catchall provision compels the equitable distribution of the U.S. savings bonds. That provision states that "[a]ny marital asset not listed below belongs to the party who has it currently in their possession." (emphasis added). The Estate is correct that the U.S. savings bonds, which were marital assets not listed in the DSA, belonged to Michael at the time the DSA was executed and during his life. The moment Michael passed away, however, Jeanine became the sole owner of ***601** the bonds as the pay-on-death beneficiary per 31 C.F.R. § 353.70(c)(1).

The Department of the Treasury will not recognize "a judicial determination that impairs the rights of survivorship conferred by [the] regulations upon a coowner or beneficiary." Id. at .20(a). The trial court's holding here -- which assumed that Michael sought to divest Jeanine of the savings bonds by virtue of their divorce -- is exactly the type of judicial determination the federal

regulations do not allow. The trial court's ruling impaired Jeanine's right of survivorship as beneficiary of the bonds based on nothing more than its assumption that Michael likely intended to do so. The trial court did so even though the terms of the parties' DSA -- which did not impair Jeanine's right -- should govern under both state law contract principles, see County of Atlantic, 230 N.J. at 254, 166 A.3d 1112, and the federal regulations that require clear expression in a divorce decree and further steps, like reissuance and proof of valid judicial proceedings, see 31 C.F.R. § 353.22(a), .23(a). In essence, the trial court's decision accomplished what N.J.S.A. 3B:3-14(a) declines to do through its deference to governing instruments: the decision created an automatic transfer of the bonds notwithstanding state and federal statutes and regulations preventing such a transfer. Thus, although we disagree that Section 3-14(a) is preempted by federal law, the Appellate Division correctly reversed the trial court's judgment.

Given that the DSA did not direct the disposition of the savings bonds, the bonds have no bearing on Michael's -- and later the Estate's -- obligation to pay Jeanine $200,000. The approximately $77,800 in savings bonds that Jeanine redeemed upon Michael's death should not have been credited against the $200,000 because the bonds were separate and apart from that obligation. Pursuant to the DSA, the Estate must make whatever payments remain to Jeanine of the $200,000 amount.

V.

For the foregoing reasons, the Appellate Division's judgment is affirmed as modified.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, WAINER APTER, FASCIALE, and NORIEGA join in JUSTICE PIERRE-LOUIS's opinion.

All Citations

259 N.J. 584, 328 A.3d 923

Footnotes

1 We refer to the relevant parties by their first names to avoid confusion. We intend no disrespect by this informality.

2 The record is unclear regarding the exact amount of money Michael paid Jeanine.

3 The record is not clear as to whether Jeanine had previously raised the issue of preemption or whether she raised the issue for the first time in her motion for reconsideration.

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259 N.J. 337
Supreme Court of New Jersey.

In the MATTER OF A.D., an alleged incapacitated person.

A-30/31 September Term 2023
|
088942
|
Argued September 9, 2024
|
Decided December 11, 2024

Synopsis

Synopsis

Background: County adult protective services provider filed complaint seeking to declare alleged incapacitated person incapacitated, appoint a temporary guardian to make decisions regarding medical and psychiatric treatment, and appoint a plenary guardian. The Superior Court, Sussex County, appointed an attorney for the alleged incapacitated person, appointed a temporary guardian, and after guardianship hearing, appointed nonprofit organization as limited guardian but denied court-appointed attorney's and temporary guardian's applications for fee awards. Court-appointed attorney and temporary guardian appealed and appeals were consolidated. The Superior Court, Appellate Division, 477 N.J.Super. 288, 306 A.3d 816, affirmed denial of fee applications. Court-appointed attorney and temporary guardian filed petitions for certification, which were granted.

Holdings: The Supreme Court held that:

[1] the Adult Protective Services Act section governing payments for protective services does not authorize an attorney fee award against a county adult protective services provider in a guardianship matter;

[2] the statute authorizing a temporary guardian to receive reasonable fees does not authorize an attorney fee award against a county adult protective services provider in a guardianship proceeding;

[3] the Adult Protective Services Act section granting county adult protective services providers immunity in civil cases, unless their conduct is outside the scope of employment or constitutes a crime, actual fraud, actual malice, or willful misconduct, does not authorize an award of attorney fees against a provider in any circumstance; abrogating *In re Farnkopf*, 363 N.J. Super. 382, 833 A.2d 89;

[4] the rule providing that the court in a guardianship proceeding may allow a fee to the attorney for the party seeking guardianship, appointed counsel, or the guardian ad litem does not authorize attorney fee awards against county adult protective services providers under any circumstances, even if they have protracted the litigation; and

[5] the rule authorizing a court to fix the compensation of the attorney for the party seeking guardianship, appointed counsel, or the guardian ad litem, to be paid out of the estate of the alleged incapacitated person, does not authorize attorney fee awards against county adult protective services providers under any circumstances, even if they have protracted the litigation.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Attorney's Fees; Motion for Costs.

West Headnotes (18)

[1] Appeal and Error Attorney Fees

When the Supreme Court reviews a trial court's decision granting or denying an attorney fee application, that determination will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion.

[2] Appeal and Error Statutory or legislative law

When the Supreme Court addresses a trial court's construction of a statute, its review is de novo.

2 Cases that cite this headnote

[3] Statutes Plain Language; Plain, Ordinary, or Common Meaning

When addressing a trial court's construction of a statute, the Supreme Court looks to the Legislature's intent as expressed in the statute's plain terms.

[4] Appeal and Error Rules of court in general

The Supreme Court reviews de novo a trial court's interpretation of a court rule, applying ordinary principles of statutory construction to interpret the rule.

2 Cases that cite this headnote

[5] Costs, Fees, and Sanctions Necessity of Authorization for Award; "American Rule"

The “American rule” requires that litigants bear the cost of their own legal representation by prohibiting recovery of attorney fees by the prevailing party against the losing party.

1 Case that cites this headnote

[6] Costs, Fees, and Sanctions Necessity of Authorization for Award; "American Rule"

The American rule requiring litigants to bear the cost of their own legal representation by prohibiting the recovery of attorney fees by the prevailing party against the losing party is not absolute.

[7] Costs, Fees, and Sanctions Necessity of Authorization for Award; "American Rule"

If no exception to the American rule requiring litigants to bear the cost of their own legal representation by prohibiting the recovery of attorney fees by the prevailing party against the losing party applies, New Jersey's general public policy against fee awards governs.

1 Case that cites this headnote

[8] **Mental Health** Temporary guardian

Mental Health Appearance and representation by attorney; guardian ad litem

A court-appointed attorney in a proceeding concerning the guardianship of an alleged incapacitated person acts as an advocate for the interests of his client, serving as an independent legal advocate for the alleged incapacitated person and taking an active part in the hearings and proceedings, whereas a temporary guardian serves as the eyes of the court to further the alleged incapacitated person's best interests. N.J. Stat. Ann. § 3B:12-24.1(c); N.J. Ct. R. 4:86-4(a)(8).

[9] **Protection of Endangered Persons** Costs and fees

The Adult Protective Services Act section governing payments for protective services does not authorize an attorney fee award against a county adult protective services provider in a guardianship matter. N.J. Stat. Ann. §§ 52:27D-407, 52:27D-418.

[10] **Mental Health** Attorney fees

Protection of Endangered Persons Costs and fees

The statute authorizing a temporary guardian of an alleged incapacitated person to receive reasonable fees does not authorize an attorney fee award against a county adult protective services provider in a guardianship proceeding. N.J. Stat. Ann. § 3B:12-24.1(c)(9).

[11] **Mental Health** Attorney fees

Protection of Endangered Persons Costs and fees

The Adult Protective Services Act does not authorize an attorney fee award against a person or entity other than the estate in a guardianship matter. N.J. Stat. Ann. § 52:27D-406 et seq.

[12] **Municipal, County, and Local Government** Costs and fees

Protection of Endangered Persons Costs and fees

Public Employment Costs and fees

The Adult Protective Services Act section granting county adult protective services providers immunity in civil cases, unless their conduct is outside the scope of employment or constitutes a crime, actual fraud, actual malice, or willful misconduct, does not authorize an award of attorney fees against a provider in any circumstance; abrogating *In re Farnkopf*, 833 A.2d 89. N.J. Stat. Ann. § 52:27D-409(e).

[13] **Mental Health** Attorney fees

The statute authorizing a temporary guardian of an alleged incapacitated person to receive reasonable fees does not authorize an attorney fee award against a person or entity other than the estate in a guardianship matter. N.J. Stat. Ann. § 3B:12-24.1(c)(9).

[14] **Mental Health** Attorney fees

The phrase "or in such other manner as the court shall direct," as used in the rule authorizing a court to fix the compensation of the attorney for the party seeking guardianship, appointed counsel, or the guardian ad litem, if any,

to be paid out of the estate of the alleged incapacitated person or in such other manner as the court shall direct, does not create a new exception to the American rule requiring litigants to bear the cost of their own legal representation by prohibiting the recovery of attorney fees by the prevailing party against the losing party. N.J. Ct. R. 4:86-4(e).

1 Case that cites this headnote

[15] Mental Health Attorney fees

The rule providing that the court in a guardianship proceeding may allow a fee to the attorney for the party seeking guardianship, counsel appointed to represent the alleged incapacitated person, or the guardian ad litem in accordance with the rule authorizing a court to fix the compensation of the attorney for the party seeking guardianship, appointed counsel, or the guardian ad litem to be paid out of the estate of the alleged incapacitated person does not authorize attorney fee awards against county adult protective services providers under any circumstances, even if they have protracted the litigation. N.J. Ct. R. 4:42-9(a)(3).

[16] Mental Health Attorney fees

The rule authorizing a court to fix the compensation of the attorney for the party seeking guardianship, appointed counsel, or the guardian ad litem, if any, to be paid out of the estate of the alleged incapacitated person does not authorize attorney fee awards against county adult protective services providers under any circumstances, even if they have protracted the litigation. N.J. Ct. R. 4:86-4(e).

[17] Mental Health Compensation of Guardian or Committee

A lawyer asked to serve as counsel or guardian for an alleged incapacitated person in a guardianship proceeding should be told that the court anticipates the lawyer will serve pro bono if the estate lacks sufficient resources to pay the lawyer's fees. N.J. Stat. Ann. § 3B:12-24.1(c); N.J. Ct. R. 4:86-4(a)(8).

[18] Mental Health Temporary guardian

Mental Health Compensation of Guardian or Committee

In guardianship proceedings concerning an alleged incapacitated person, it is the court, not the county surrogate, who appoints counsel, determines whether a temporary guardian should be appointed, and addresses the question of compensation of the appointed counsel or temporary guardian. N.J. Stat. Ann. § 3B:12-24.1(c); N.J. Ct. R. 4:86-4.

****380** On certification to the Superior Court, Appellate Division, whose opinion is reported at 477 N.J. Super. 288, 306 A.3d 816 (App. Div. 2023).

Attorneys and Law Firms

Steven J. Kossup argued the cause for appellant Steven J. Kossup (Law Office of Steven J. Kossup, attorneys; Steven J. Kossup, on the briefs).

Brian C. Lundquist, Newton, argued the cause for appellant Brian C. Lundquist (Morris, Downing & Sherred, attorneys; Brian C. Lundquist, of counsel and on the briefs).

William G. Johnson, Dover, argued the cause for respondent County of Sussex Division of Social Services, Office of Adult Protective Services (Johnson & Johnson, Esqs., attorneys; William G. Johnson, of counsel and on the brief).

Stephen J. Slocum, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Jeremy Feigenbaum, Solicitor General, and Donna Arons, Assistant Attorney General, of counsel, and Stephen J. Slocum, on the brief).

Opinion

PER CURIAM

***343** ****381** In this guardianship action, a court-appointed attorney and temporary guardian for an "alleged incapacitated person" under Rule 4:86 sought awards of legal fees against an adult protective services provider. The trial court denied the fee applications, and the Appellate Division affirmed. In re A.D., 477 N.J. Super. 288, 297-302, 306 A.3d 816 (App. Div. 2023). We granted certification.

For the reasons explained below, we find no support in the governing statutes, the court rules, or our case law for the fee awards sought in this appeal, and we accordingly affirm the judgment of the Appellate Division.

I.

A.

This matter concerns an alleged incapacitated person whom the trial court and Appellate Division designated by the fictitious name "Hank" to preserve his privacy and maintain the confidentiality of the record. See id. at 290, 306 A.3d 816; R. 1:38-3(e).

In 1978, when he was sixteen years old, Hank sustained a traumatic brain injury. Hank lived with his father in his family home until his father's death in 2020. Left alone, and having never lived independently, Hank struggled to care for himself and maintain the home, which he did not own. He was referred to the Sussex County Division of Social Services, Office of Adult Protective Services (APS) for help in finding housing, financial assistance, and support services.

APS's investigation revealed that Hank had no assets and that his sole income -- $834.25 per month in Social Security income and disability benefits -- had been suspended. At APS's request, two physicians, one of them a board-certified psychiatrist, evaluated Hank's cognitive abilities and living conditions. Both opined that ***344** Hank was unable to live independently and that he required a permanent plenary guardian to generally oversee his personal and financial affairs, rather than a limited guardian whose role would be constrained to one or more categories of decision-making. Compare N.J.S.A. 3B:12-24.1(a) (describing a general, or plenary, guardian), with id. at (b) (describing a limited guardian).

On June 2, 2020, APS filed a verified complaint seeking: (1) a declaration that Hank was incapacitated and unable to manage his affairs; (2) the appointment of ****382** a temporary guardian with authority to make decisions regarding Hank's medical and psychiatric treatment; and (3) the appointment of a plenary guardian for Hank. Pursuant to Rule 4:86-2(b)(2), APS supported its claims with the certifications of the two physicians who had evaluated Hank. APS's complaint included detailed allegations regarding Hank's lack of assets, his limited income, and his inability to continue to live in his current housing. [1]

By order dated June 11, 2020, petitioner Steven J. Kossup was designated as Hank's court-appointed attorney, and petitioner Brian C. Lundquist was designated as Hank's temporary guardian for the duration of the guardianship proceedings. The form of order included two alternative provisions regarding the payment of the court-appointed attorney's fees, one stating that the attorney was "appointed pro bono (without cost)," and the other stating that the attorney "is to be paid" and that "the court may

direct that counsel be paid from the assets of the alleged incapacitated person or in such manner as the court shall direct." The second alternative, providing for the court-appointed attorney's fees to be ***345** paid, was checked. The order did not address fees incurred by the temporary guardian. It was signed by the Sussex County Surrogate, not the trial judge.

On September 8, 2020, Kossup submitted an interim report to the trial court. He explained that he concurred with the recommendations of the physicians retained by APS that a plenary guardian should be appointed for Hank based on Hank's current condition but noted that he and Lundquist had made progress in their efforts to arrange services for Hank. Kossup stated that the resolution of issues under consideration might affect his final recommendation regarding the appointment of a guardian.

In a certification dated February 17, 2021, Lundquist described his unsuccessful efforts to locate a state agency, private organization, or individual willing to serve as Hank's permanent plenary guardian. He noted that Hank was not yet old enough to be eligible for a guardianship overseen by the New Jersey Office of the Public Guardian.

Lundquist reported, however, that he and Kossup had taken critical steps to ensure that Hank had stable housing, financial assistance, medical care, and other necessary services. Lundquist stated that by virtue of their efforts and the work of several other individuals, Hank had moved into a new apartment financed in part by a New Jersey Department of Human Services housing assistance contribution. He advised the trial court that Hank's Social Security benefits had been restored and that Hank had access to services to help him with his financial affairs, medical care, and daily tasks. Lundquist asserted that because Hank had access to those services, he did not require a permanent plenary guardian. Lundquist recommended that Hank's current services, supervision, and benefits should continue.

In the wake of those developments, Kossup modified his original recommendation ****383** that the court appoint a plenary guardian and concurred with Lundquist's view that the trial court should instead order a limited guardianship.

***346** In preparation for the guardianship hearing to be conducted by the trial court, APS asked the two physicians who had recommended a plenary guardian to interview Hank a second time and provide updated recommendations. One of the physicians reiterated his original opinion that Hank's circumstances warranted a full guardianship. The other physician noted that Hank's situation had improved by virtue of the services provided to him but did not alter her recommendation that he required a plenary guardian. Given those recommendations, APS maintained its position that a permanent plenary guardian should be appointed for Hank.

At his own expense, Lundquist retained an expert psychologist to evaluate Hank. The psychologist opined in a report that Hank did not require the appointment of a plenary guardian but needed only "a limited guardianship in the legal and medical domains." Lundquist submitted the psychologist's report to the trial court.

B.

In advance of the guardianship hearing, Kossup and Lundquist submitted certifications setting forth the services that they had provided to Hank. Kossup certified that he spent 13.7 hours on the matter at a reduced rate of $275 per hour, for a total of $3,767.50.[2] Lundquist certified that he had spent 44 hours on the guardianship matter at a rate of $295 per hour, for a total of $12,980. He also included in his fee application a request to be reimbursed for his $1,500 disbursement to the expert he had retained on Hank's behalf and for other expenses in the amount of $532.18.

On July 22, 2021, the trial court conducted a guardianship hearing regarding Hank. Kossup and Lundquist argued that because of the services arranged for him, Hank required only a limited guardianship to assist him with legal and medical decisions. Hank consented to the appointment of a guardian for those purposes. Crediting the efforts of Kossup and Lundquist and the ***347** services provided for Hank, APS advised the court that it no longer sought a permanent plenary guardianship and agreed that a limited guardianship would meet Hank's needs.

Recognizing the "exceptional" work of Kossup and Lundquist and relying on the expert reports submitted by the parties, the trial court declined to appoint a plenary guardian for Hank. The court instead appointed a nonprofit organization as Hank's guardian, solely to assist him in legal and medical decision-making.

During the guardianship hearing, APS stated that it had no objection to the amount of the fees sought, but argued that it should not be responsible to pay any fee award. In a certification submitted after the hearing, APS's Director described the agency's limited budget and argued that fee awards against it in cases such as this would impact its ability to provide to its clients essential services like emergency safe housing, home health aides, and medical assessments.

In a second hearing held by the trial court to address the question of fees, APS restated its contention that the requested fee awards would compromise its ability to meet its clients' needs. APS asserted that Kossup and Lundquist, who knew that ****384** Hank had no assets when they accepted the court's appointments, could have declined those appointments. Kossup and Lundquist argued that because Sussex County's budget reflected millions of dollars in reserve funding and a surplus for the current year, the County had ample resources to pay the disputed fees notwithstanding APS's limited funding. They urged the court to order payment of their fees and to reimburse Lundquist for the expert fee he had incurred on Hank's behalf.

In a written statement of reasons accompanying its order, the trial court expressed its appreciation for the "significant efforts" of Kossup and Lundquist, which permitted Hank to secure needed services while maintaining his independence. The court noted, however, that APS had acted in accordance with its mandate under the Adult Protective Services Act (APS Act), N.J.S.A. 52:27D-406 to -426, and that this matter involved neither extraordinary ***348** circumstances nor agency malfeasance on the part of APS. The trial court found no basis in the APS Act for fee awards in the setting of this case.

The trial court also addressed the contention of Kossup and Lundquist that Rule 4:86-4(e) authorized the fee awards they sought. The court noted that the Legislature created APS to serve vulnerable adults and declined to construe Rule 4:86-4(e) to require APS to pay the fees of court-appointed attorneys in most or all cases, given the lack of any fee provision in the APS Act.

Accordingly, the trial court denied Kossup's application for an award of fees and Lundquist's application for an award of fees and costs.

C.

In separate appeals consolidated by the Appellate Division, Kossup and Lundquist challenged the trial court's decision. They argued that APS was responsible for the fees they incurred because it initially advocated for a full guardianship, not a limited guardianship, and that the trial court had misapplied Rule 4:86-4(e). Kossup additionally argued that the trial court was required to award fees by virtue of the Surrogate's June 11, 2020 order, in which the form provision stating that the court-appointed lawyer "is to be paid" had been checked.

The Appellate Division noted that in the APS Act, "the Legislature did not give courts the authority to order APS to pay fees under these circumstances." A.D., 477 N.J. Super. at 299, 306 A.3d 816. The appellate court construed both governing statutes -- the APS Act and the statute addressing temporary guardianships, N.J.S.A. 3B:12-24.1 -- to authorize fee awards only from the alleged incapacitated person's estate. Ibid.

The Appellate Division cited its prior holding in In re Farnkopf, 363 N.J. Super. 382, 403, 833 A.2d 89 (App. Div. 2003). In Farnkopf, the appellate court construed the APS Act's provision addressing provider immunity in civil cases, ***349** N.J.S.A. 52:27D-409(e), to bar any fee award absent evidence that the adult protective services provider or its employees acted outside the scope of their employment or engaged in conduct constituting "a crime, actual fraud, actual malice, or willful misconduct." 363 N.J. Super. at 403, 833 A.2d 89 (quoting N.J.S.A. 52:27D-409(e)). Applying Farnkopf, the Appellate Division here found no

evidence of misconduct by APS. A.D., 477 N.J. Super. at 300, 306 A.3d 816. To the contrary, the appellate court held that when APS initially concluded that Hank required a full guardianship -- a view premised on the physicians' ****385** recommendations and initially shared by Kossup -- it had acted appropriately. Ibid.

The Appellate Division rejected Kossup's argument that he was entitled to a fee award based on the provision in the Surrogate's June 11, 2020 order stating that Kossup "is to be paid." Id. at 300-01, 306 A.3d 816. The appellate court observed that the order was not signed by the trial court, but by the Surrogate, and did not view that order to support Kossup's claim. Ibid.

Accordingly, the appellate court affirmed the trial court's denial of both fee applications. Id. at 301, 306 A.3d 816.

D.

We granted the petitions for certification filed by Kossup and Lundquist. 257 N.J. 2, 311 A.3d 973 (2024); 257 N.J. 10, 311 A.3d 978 (2024). We also granted the application of the Attorney General to appear as amicus curiae.

II.

A.

Kossup argues that the Appellate Division improperly relied on the APS statute's provision addressing immunity from civil liability, N.J.S.A. 52:27D-409, in denying his fee application. He contends that the appellate court's ruling that the APS statute authorizes payment of a court-appointed attorney's legal fees only from the estate of the alleged incapacitated person contradicts ***350** Rule 4:86-4(e). Kossup adds that even if the trial court had the discretion to modify the Surrogate's order stating that he would be granted a fee award, he relied on that order to his detriment.

B.

Lundquist asserts that by virtue of the Appellate Division's decision, an attorney appointed to serve as a temporary guardian for an alleged incapacitated person must fully fund the guardianship action. He argues that this burden is particularly onerous for solo and small-firm practitioners. Lundquist faults APS for refusing to retreat from its position that Hank required a full guardianship for nearly a year, complicating the action and requiring him to retain an expert. He claims that APS's refusal to promptly modify its recommendation when Hank's circumstances improved warrants the requested fee awards.

C.

APS urges us to affirm the Appellate Division's decision. It contends that the Appellate Division correctly viewed the APS Act to preclude fee awards against it absent agency misconduct, and it argues that there is no conflict between that Act and Rule 4:86-4(e). APS asserts that if fees were awarded in cases such as this, it would be unable to implement the APS Act's mandate because its scarce resources would be diverted from client services to legal disputes.

D.

The Attorney General argues that appointed counsel in guardianship matters should be paid from the estate of the alleged incapacitated person if the estate has adequate funds and that, in other cases, counsel should ordinarily provide services pro bono. The Attorney General asserts that there may be exceptional circumstances such as misconduct by the adult protective services ***351** provider that might warrant a fee award but that there are no such circumstances in this appeal.

III.

A.

[1] When we review a trial court's decision granting or denying a fee application, ****386** that determination "will be disturbed only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317, 661 A.2d 1202 (1995); accord Hansen v. Rite Aid Corp., 253 N.J. 191, 212, 290 A.3d 159 (2023) (noting that an appellate court may reverse a fee determination when the "decision 'was based on irrelevant or inappropriate factors, or amounts to a clear error in judgment' " (quoting Garmeaux v. DNV Concepts, Inc., 448 N.J. Super. 148, 155-56, 151 A.3d 992 (App. Div. 2016))).

[2] **[3]** **[4]** When we address a trial court's construction of a statute, our review is de novo. Libertarians for Transparent Gov't v. Cumberland County, 250 N.J. 46, 55, 269 A.3d 427 (2022). In that inquiry, we look to the Legislature's intent as expressed in the statute's plain terms. Id. at 54, 269 A.3d 427 (citing DiProspero v. Penn, 183 N.J. 477, 492-93, 874 A.2d 1039 (2005)). We also review de novo a trial court's interpretation of a court rule, "applying 'ordinary principles of statutory construction' to interpret" the rule. DiFiore v. Pezic, 254 N.J. 212, 228, 296 A.3d 425 (2023) (quoting State v. Robinson, 229 N.J. 44, 67, 160 A.3d 1 (2017)).

B.

1.

[5] "At its essence, the American Rule requires that litigants 'bear the cost of their own legal representation' by prohibiting 'recovery of counsel fees by the prevailing party against the losing party.' " Boyle v. Huff, 257 N.J. 468, 479 n.1, 314 A.3d 793 (2024) (quoting ***352** Occhifinto v. Olivo Constr. Co., 221 N.J. 443, 449, 114 A.3d 333 (2015)). New Jersey courts "have traditionally adhered to the American Rule as the principle that governs attorneys' fees." Walker v. Giuffre, 209 N.J. 124, 127, 35 A.3d 1177 (2012). The American Rule underscores "New Jersey's strong public policy against shifting counsel fees." Innes v. Marzano-Lesnevich, 224 N.J. 584, 592, 136 A.3d 108 (2016).

[6] The American Rule, however, is not absolute. Rule 4:42-9(a) provides that "[n]o fee for legal services shall be allowed in the taxed costs or otherwise," but identifies eight exceptions to that rule. We have construed Rule 4:42-9(a) to generally codify "those specific instances where, in the absence of a separately enabling statute or contract, fee shifting is permitted." In re Est. of Folcher, 224 N.J. 496, 507, 135 A.3d 128 (2016) (quoting In re Est. of Vayda, 184 N.J. 115, 120, 875 A.2d 925 (2005)). In addition, there are "a few Court-sanctioned 'exceptions to the American Rule that are not otherwise reflected in the text of Rule 4:42-9' and that are not provided for via statute, court rule, or contract" -- a category that "defies any one ready descriptor but involves fiduciary breaches in certain settings." Ibid. (quoting Vayda, 184 N.J. at 121, 875 A.2d 925).

[7] If no exception applies, New Jersey's general public policy against fee awards governs, and the American Rule precludes a fee award to a party. Innes, 224 N.J. at 592, 136 A.3d 108.

This appeal requires that we address two exceptions to the American Rule. The first is the exception for "all cases where attorney's fees are permitted by statute." R. 4:42-9(a)(8); see also Hansen, 253 N.J. at 212, 290 A.3d 159 (noting that the

Legislature "has prescribed in certain settings the award of reasonable counsel fees to attorneys for prevailing parties"). The second is the exception prescribed by court rule that allows fee awards in specific probate actions, including guardianship proceedings in certain instances. R. 4:42-9(a)(3); R. 4:86-4(e). We consider each in turn.

***353 **387** 2.

The APS Act was enacted to protect vulnerable adults from abuse, neglect, and exploitation. See generally N.J.S.A. 52:27D-406 to -426. It is "a legislative response to the risks and dangers of abuse, neglect and exploitation faced by our older, infirm and vulnerable citizens, as well as all other adults" with physical or mental disabilities. Farnkopf, 363 N.J. Super. at 385, 833 A.2d 89.

The Act requires a county adult protective services provider such as APS in this matter to "initiate a prompt and thorough evaluation" of any "report that a vulnerable adult is being or has been the subject of abuse, neglect or exploitation." N.J.S.A. 52:27D-410(b). If the county adult protective services provider determines "that there is reasonable cause to believe that the vulnerable adult has been the subject of abuse, neglect or exploitation," the provider "shall determine the need for protective services." Id. at -411(a). A provider "may initiate appropriate legal action including, but not limited to, petitioning for guardianship or conservatorship." Id. at -416.

If the alleged incapacitated person is not represented by counsel, the court appoints counsel in the order scheduling a hearing. R. 4:86-4(a)(8). If "special circumstances come to the attention of the court by formal motion or otherwise," a temporary guardian, sometimes called a guardian ad litem, may also "be appointed to evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court." Id. at (d); see also N.J.S.A. 3B:12-24.1(c) (addressing the determination of whether a temporary guardian should be appointed).

[8] A court-appointed attorney and a temporary guardian fulfill "separate and discrete" roles. In re Mason, 305 N.J. Super. 120, 126, 701 A.2d 979 (Ch. Div. 1997). The attorney "acts as an 'advocate' for the interests of his client," serving as "an independent legal advocate for the alleged incompetent" and taking "an active part in the hearings and proceedings." Id. at 127, 701 A.2d 979; see also In re M.R., 135 N.J. 155, 173-75, 638 A.2d 1274 (1994) ***354** (noting a court-appointed attorney's responsibility to serve as an independent legal advocate for an alleged incapacitated person). A temporary guardian, in contrast, "serves 'as "the eyes of the court" to further the [client's] "best interests." ' " S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 278, 227 A.3d 1190 (2020) (alteration in original) (quoting Mason, 305 N.J. Super. at 127, 701 A.2d 979).

Both of the statutes that govern the guardianship proceeding in this matter provide for fee awards against the estate of the alleged incapacitated person. The APS Act authorizes a court to "order payments to be made by or on behalf of the vulnerable adult for protective services from his own estate," N.J.S.A. 52:27D-418, and defines "[p]rotective services" to include "legal ... services necessary to safeguard a vulnerable adult's rights and resources, and to protect a vulnerable adult from abuse, neglect or exploitation," id. at -407. The statute addressing temporary guardianships provides that a "temporary guardian, upon application to the court, shall be entitled to receive reasonable fees for his services, as well as reimbursement of his reasonable expenses, which shall be payable by the estate of the alleged incapacitated person or minor." N.J.S.A. 3B:12-24.1(c)(9).

[9] [10] [11] [12] Neither statute, however, authorizes an award of fees against an adult protective services provider such as APS. As the Appellate Division observed when it reversed a fee award against a provider in Farnkopf, N.J.S.A. 52:27D-418 "only permits the ordering of payments from the ****388** vulnerable adult's 'own estate,' " and "any authority to make such an award does not extend to compelling another litigant or any other person or party to bear such fees." 363 N.J. Super. at 403, 833 A.2d 89 (quoting N.J.S.A. 52:27D-418). The APS Act does not authorize a fee award against a person or entity other than the estate in a guardianship matter such as this one. [3]

***355 [13]** N.J.S.A. 3B:12-24.1 is similarly limited; it provides for fee awards against the estate but is silent as to awards against any other person or entity.

Accordingly, we concur with the Appellate Division's conclusion that there is no statutory basis for an award of fees against APS in this matter. See A.D., 477 N.J. Super. at 299-300, 306 A.3d 816. The exception to the American Rule set forth in Rule 4:42-9(a)(8) is thus inapplicable to this appeal.

3.

We next consider whether Rule 4:42-9(a)(3) and Rule 4:86-4(e) warrant a fee award in the setting of this appeal.

Rule 4:42-9(a)(3) provides that "[i]n a guardianship action, the court may allow a fee in accordance with R. 4:86-4(e) to the attorney for the party seeking guardianship, counsel appointed to represent the alleged incapacitated person, and the guardian ad litem." Rule 4:86-4(e) states that "[t]he compensation of the attorney for the party seeking guardianship, appointed counsel, and of the guardian ad litem, if any, may be fixed by the court to be paid out of the estate of the alleged incapacitated person or in such other manner as the court shall direct."

Kossup and Lundquist cite the Appellate Division's decision in In re Guardianship of DiNoia, 464 N.J. Super. 562, 565-69, 237 A.3d 951 (App. Div. 2019). There, the appellate court affirmed an order requiring APS to pay the legal fees of court-appointed counsel because APS had "protracted the litigation" by failing to supply required information in a timely manner and the court-appointed ***356** attorney contributed "exceptional efforts" on his client's behalf. Id. at 567-69, 237 A.3d 951. In DiNoia, the appellate court cited no authority for its conclusion that an adult protective services provider's delay in litigation and commendable work by a court-appointed attorney warrant a fee award in a guardianship matter. Ibid.

Relying on Rule 4:86-4(e)'s closing phrase, "or in such other manner as the court shall direct," Kossup and Lundquist urge the Court to expand the holding of DiNoia, and generally authorize fee awards against adult protective services providers.

[14] We decline to adopt the Appellate Division's holding in DiNoia, or to broaden that holding to generally authorize fee awards in settings such as this. The language of Rule 4:86-4(e), "or in such other manner as the court shall direct," does not create a new exception to the American Rule. The Legislature has not authorized ****389** fee awards in these cases against any entity but the alleged incapacitated person's estate. See N.J.S.A. 52:27D-418; N.J.S.A. 3B:12-24.1(c)(9). Indeed, the record indicates that APS does not have sufficient resources to pay the fees of court-appointed counsel and temporary guardians. The suggestion that this Court should order an increase in APS's funding ignores separation of powers principles. See N.J. Const. art. III, ¶ 1.

[15] **[16]** Accordingly, we do not construe Rule 4:42-9(a)(3) or Rule 4:86-4(e) to authorize fee awards against adult protective services providers under any circumstances, even if they have protracted the litigation. Instead, in matters in which the alleged incapacitated person's estate lacks the resources to pay fee awards, court-appointed attorneys and temporary guardians have traditionally represented their clients pro bono.

[17] **[18]** Kossup argues that in reliance on the order dated June 11, 2020, he reasonably anticipated that his fees would be paid. We have no doubt that the order's payment provision gave rise to confusion in this case. We caution trial judges handling guardianship matters that a lawyer asked to serve as counsel or ***357** guardian for an alleged incapacitated person should be told that the court anticipates the lawyer will serve pro bono if the estate lacks sufficient resources to pay the lawyer's fees. We also remind judges handling these matters that it is the court, not the Surrogate, who appoints counsel, determines whether a temporary guardian should be appointed, and addresses the question of compensation in accordance with Rule 4:86-4.

Finally, we acknowledge that Lundquist paid the fees charged by the expert psychologist whom he retained, and that he was not reimbursed for that substantial disbursement. We suggest that before retaining experts in a guardianship matter, temporary guardians serving pro bono raise the question of expert fees with the court and opposing counsel and determine whether resources are available to defray all or part of those fees.

In sum, our statutes, court rules, and case law do not support fee awards against adult protective services providers in the setting of this appeal. We hold that the trial court properly exercised its discretion when it denied the fee applications and that the Appellate Division ruled correctly when it affirmed the trial court's determination.

4.

We recognize the critical role of pro bono service in guardianship matters in which a vulnerable person is indigent. "Volunteering one's time and expertise to help people who need legal services that they cannot afford is in keeping with the finest traditions of the practice of law." In re Op. No. 17-2012, 220 N.J. 468, 484, 107 A.3d 666 (2014) (citing In re Guardianship of G.S., III, 137 N.J. 168, 175, 644 A.2d 1088 (1994)). Indeed, our Rules of Professional Conduct impose on each lawyer "a professional responsibility to render public interest legal service." RPC 6.1.

In certain settings, pro bono service in guardianship matters entitles New Jersey attorneys to an exception to the court-appointed representation requirements of Madden v. Township of Delran, 126 N.J. 591, 605-11, 601 A.2d 211 (1992). Rule 1:21-12(a) ***358** provides that "[a]ttorneys who certify that they have performed at least twenty-five (25) hours of voluntary (as distinct from court-appointed) qualifying pro bono service in New Jersey in the year ending on December 31 before the certification date" are exempt from court-appointed pro bono service under Madden ****390** for the following year, subject to requirements set forth in the court rule.

In a March 1, 2021 order addressing guardianships, we directed that the Madden exemption be available to attorneys "appointed by the court ... to serve in any of the following roles: (i) attorney for an alleged incapacitated person; (ii) [g]uardian [a]d [l]item in a guardianship matter; (iii) temporary pendente lite guardian ...; (iv) permanent guardian of an adjudicated incapacitated person; or (v) special medical guardian," if they "provide at least 25 hours of pro bono legal representation in adult guardianship matters in the course of one year." The Madden credit for guardianship proceedings recognizes the invaluable pro bono service of many members of our bar in these sensitive matters.

We acknowledge that the Madden exemption was not available to Kossup and Lundquist when they accepted their appointments. We share their concern that pro bono service in guardianship matters can impose substantial burdens on lawyers, particularly those who maintain solo or small-firm practices. We urge judges to consider the fair allocation of those burdens when they ask lawyers to serve as court-appointed counsel or guardians.

Here, the diligent efforts of Kossup and Lundquist to secure the services needed by Hank were crucial to the guardianship proceeding's successful outcome. By virtue of their expertise and diligence, the work of professionals at APS and other organizations, and the trial court's guidance, Hank is able to maintain his independence in a supportive and safe environment. We thank these attorneys for their exemplary work on Hank's behalf.

IV.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, PIERRE-LOUIS, WAINER APTER, FASCIALE, and NORIEGA join in this opinion.

All Citations

259 N.J. 337, 326 A.3d 378

Footnotes

1 In its complaint, APS alleged that it should bear no responsibility for the costs and fees incurred by Hank's court-appointed attorney and temporary guardian. Those allegations were deleted from a copy of the complaint that the Sussex County Surrogate returned to APS's counsel, and APS objected to the deletion of its allegations without its consent. We note that although Rule 4:86-3A(a) requires the Surrogate to "review the complaint to ensure that proper venue is laid and that it contains all information required by R. 4:86-2," the Rule does not authorize the Surrogate to delete allegations set forth in a guardianship complaint without the consent of the party that filed the complaint.

2 In his petition for certification, Kossup stated that he seeks an updated total of $5,225 in legal fees for his work on the matter.

3 Citing Farnkopf, 363 N.J. Super. at 403, 833 A.2d 89, the Appellate Division in this matter construed N.J.S.A. 52:27D-409(e) to authorize fee awards against an adult protective services provider if the provider's conduct or the conduct of its employees was outside the scope of their employment, or constituted a crime, actual fraud, actual malice, or willful misconduct. A.D., 477 N.J. Super. at 299-300, 306 A.3d 816. We disagree with that aspect of the Appellate Division's analysis. N.J.S.A. 52:27D-409(e) provides that APS and its employees are immune from civil liability "when acting in the performance of their official duties, unless their conduct is outside the scope of their employment, or constitutes a crime, actual fraud, actual malice, or willful misconduct." It does not expressly authorize an award of attorneys' fees in any circumstances.

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258 N.J. 333
Supreme Court of New Jersey.

BOARD OF EDUCATION OF the TOWNSHIP OF SPARTA, Sussex County,
Petitioner-Respondent,
v.
M.N., ON BEHALF OF A.D., Respondent-Appellant.

A-16 September Term 2023
|
088378
|
Argued March 12, 2024
|
Decided August 7, 2024

Synopsis

Synopsis

Background: Parent of student with disabilities appealed decision of the Department of Education Commissioner that adopted as final the ALJ's decision, 2021 WL 7629597, that granted school district's motion for summary decision on its petition for declaratory ruling and determined that the State-issued diploma that student received was a regular high school diploma and that student thus was no longer entitled to a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). The Supreme Court, Appellate Division, 2023 WL 3606292, affirmed. Parent petitioned for certification.

[Holding:] The Supreme Court, Wainer Apter, J., held that a New Jersey State-issued diploma awarded based on passing the General Education Development test (GED) is not a regular high school diploma.

Judgment of the Appellate Division reversed.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

West Headnotes (4)

[1] Education Eligibility; Nature of Impairment or Condition

A New Jersey State-issued diploma awarded based on passing the General Education Development test (GED) is not a "regular high school diploma," and therefore a student who receives such a State-issued diploma remains entitled to receive a free appropriate public education under the IDEA. Individuals with Disabilities Education Act § 601, 20 U.S.C.A. § 1400 et seq.; N.J. Stat. Ann. § 18A:50A-1; 34 C.F.R. § 300.102(a)(3)(iv); N.J. Admin. Code 6A:8-5.2(c).

[2] Administrative Law and Procedure Standard of review in general

When reviewing an administrative decision, the court reviews only (1) whether the agency followed 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 reached.

2 Cases that cite this headnote

[3] **Administrative Law and Procedure** Construction, interpretation, or application of law in general
Administrative Law and Procedure Review in general
Administrative Law and Procedure Review in general

Court reviews state agency's interpretation of federal statute or regulation de novo, owing no deference to state agency's interpretation of federal law.

1 Case that cites this headnote

[4] **Education** Free appropriate public education

Once a state accepts IDEA funds, eligible students with disabilities in that state acquire an enforceable substantive right to receive a free appropriate public education (FAPE). Individuals with Disabilities Education Act § 612, 20 U.S.C.A. § 1412(a)(1)(A).

****671** On certification to the Superior Court, Appellate Division.

Attorneys and Law Firms

Krista Haley Rue argued the cause for appellant (John Rue & Associates, attorneys; John Rue, on the briefs).

Katherine A. Gilfillan, Florham Park, argued the cause for respondent Board of Education of the Township of Sparta (Schenck, Price, Smith & King, attorneys; Katherine A. Gilfillan and Catherine Popso O'Hern, on the brief).

Matthew Lynch, Deputy Attorney General, argued the cause for respondent Commissioner of the Department of Education (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel, and Sadia Ahsanuddin, Deputy Attorney General, on the brief).

Christian R. Martinez argued the cause for amicus curiae Disability Rights New Jersey (Pashman Stein Walder Hayden, attorneys; Christian R. Martinez and CJ Griffin, on the brief).

Opinion

JUSTICE WAINER APTER delivered the opinion of the Court.

***335** In this case, we are asked to decide whether, under the Individuals with Disabilities Education Act (IDEA), a student with disabilities who received a State-issued diploma based on passing the General Education Development test (GED) is entitled to re-enroll in his local public high school to receive a free appropriate public education (FAPE).

The federal regulations implementing the IDEA state that a school district's obligation to provide a free appropriate public education does not apply to "[c]hildren with disabilities who have graduated from high school with a regular high school diploma." 34 C.F.R. § 300.102(a)(3)(i). Students with disabilities "who have graduated from high school but have not been

awarded a regular high school diploma," however, remain eligible to receive a free appropriate public education. Id. at (ii). The regulations define "regular high school diploma" as "the standard high school diploma awarded to the ****672** preponderance of students in the State that is fully aligned with State standards, or a higher diploma." Id. at (iv). They then further specify that "[a] regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma." Ibid.

[1] We hold that a New Jersey State-issued diploma awarded based on passing the GED is not a "regular high school diploma" under 34 C.F.R. § 300.102(a)(3)(iv). Therefore, a student who receives such a State-issued diploma remains entitled to receive a free appropriate public education under the IDEA. We therefore reverse the judgment of the Appellate Division.

I.

A.

In September 2018, when he was fifteen years old, A.D. transferred to and enrolled in the Sparta Township Public Schools, run ***336** by the Sparta Township Board of Education (together, Sparta), for his sophomore year. [1] At his previous school, A.D. was designated as having a disability under the IDEA and received special education services. When A.D. began attending Sparta High School, Sparta accepted his individualized education program (IEP), dated April 18, 2018, from his previous school.

In January 2019, Sparta informed A.D. that he was in danger of failing several classes. On or around March 11, 2019, Sparta implemented temporary home instruction for A.D. through a combination of online classes and in-person tutoring. Two weeks later, A.D.'s parents withdrew him from Sparta High School.

A.D. then took the GED and passed, achieving the "Statewide standard score" established pursuant to N.J.A.C. 6A:8-5.2(c). On April 29, 2019, A.D. thus received a State-issued high school diploma. That same month, A.D. re-enrolled at Sparta High School and again began receiving home instruction.

On May 22, 2019, the vice principal of the high school, Michael Lauricella, informed A.D.'s parents that A.D. "ha[d] met New Jersey graduation requirements as the GED diploma serves as an equivalent to one received in a New Jersey high school." Lauricella further advised that "[d]istrict services, including protections under the [IDEA] and home instruction services, cease upon receipt of a diploma" and that A.D.'s home instruction services would therefore be "discontinued effective immediately."

A.D.'s parents objected, and A.D. was permitted to continue receiving services, including home instruction, for the remainder of the 2018-2019 school year. A.D. attended Sparta High School, in person, at the start of the 2019-2020 school year as a high school junior. By February 2020, A.D. was again failing to complete his schoolwork, and the school district notified him that he was in danger of losing credit in four classes.

***337** In March 2020, Sparta stopped in-person instruction due to the COVID-19 pandemic. A.D. was issued a computer for remote learning. However, he did not attend remote classes or complete required assignments, and he earned no academic credit for the 2019-2020 school year. On June 8, 2020, M.N., A.D.'s mother, again withdrew A.D. from the high school, checking off "entering the workforce" as the reason for his withdrawal.

In September 2020, M.N. began the process of re-enrolling A.D. at Sparta High ****673** School. However, A.D. did not attend school that fall, and instead enlisted in the United States Army. A.D. was medically discharged from the army on December 16, 2020.

In May 2021, after in-person learning resumed at Sparta High School, M.N. again tried to re-enroll A.D.; he was eighteen years old at the time. Sparta denied the request, citing A.D.'s receipt of a State-issued high school diploma in April 2019.

B.

M.N., pro se, filed a parental request for a due process hearing with the New Jersey Department of Education (DOE) Office of Special Education Policy and Dispute Resolution, arguing that A.D. had only obtained a diploma based on passing the GED and requesting that her son be allowed to re-enroll in high school "in order for him to obtain [a] regular high school diploma." The Commissioner of the DOE (Commissioner) transferred the matter to the Office of Administrative Law (OAL).

Sparta then filed a Petition for Declaratory Ruling with the DOE Office of Controversies and Disputes, seeking a declaration that it was not obligated to re-enroll A.D. and that A.D.'s receipt of a State-issued diploma "foreclose[d] A.D.'s right to receive special education and related services from the District under both the IDEA and N.J.S.A. 18A:46-1.1 et seq. and the concomitant regulations." The Commissioner denied this request and transferred the matter to OAL.

***338** The Administrative Law Judge (ALJ) granted Sparta's motion for summary decision, determining that the State-issued diploma A.D. received was "not merely ... a GED" but was a "regular high school diploma" that was "fully aligned with State standards" under 34 C.F.R. § 300.102(a)(3)(iv). Therefore, the ALJ concluded, A.D. was no longer entitled to a FAPE. In reaching this conclusion, the ALJ relied on the Commissioner's decision in B.A. & J.H. ex rel. Minor Child M.A.A. v. Board of Education of Somerville, Commissioner Decision No. 201-09 (June 22, 2009). The ALJ then held a hearing on M.N.'s due process petition and dismissed the petition with prejudice.

M.N. appealed the ALJ's decision on Sparta's petition to the Commissioner. The Commissioner concurred with the ALJ that "A.D.'s diploma is a 'regular high school diploma' that is fully aligned with State standards and, therefore A.D. is no longer entitled to a free education in Sparta or any other New Jersey school district." According to the Commissioner, " 'through its acceptance of alternative measures' to obtain a diploma, 'particularly the GED program,' 'the State has ... recognized that means other than course/credit/assessment completion ... [can] satisfy the statutory and constitutional mandate and warrant issuance of a State-endorsed diploma so as to end a student's entitlement to' " a FAPE. (quoting B.A. & J.H. and citing N.J.A.C. 6A:8-5.1(a)).

The Commissioner further found that under N.J.A.C. 6A:8-5.2, there is "no distinction" between a State-endorsed diploma and "a State-issued diploma, such that both diplomas demonstrate that the student has completed an education that is fully aligned with State standards." The State Board of Education, the Commissioner concluded, "has recognized that students may complete their education in non-traditional ways," and a "State-issued diploma simply reflects such an alternate pathway" -- it is "in no way a lesser credential." The Commissioner therefore ****674** adopted the ALJ's decision on Sparta's petition as final. [2]

***339** C.

M.N. appealed the Commissioner's decision to the Appellate Division, arguing that the "ALJ and NJDOE erred by ignoring the federal regulation regarding regular high school diplomas for students eligible under [the] IDEA" and that their decisions were thus "at odds" with the IDEA. [3]

The Appellate Division affirmed, concluding that there was "no basis to undo DOE's policy determination." According to the Appellate Division, "[a]t the direction of the Legislature, the DOE promulgated regulations ... to establish graduation standards for public high school students." In doing so, "[t]he DOE ... concluded as a matter of education policy that students who are not ***340** enrolled in school and achieve a passing score on the GED shall be awarded a high school diploma. That specific

policy determination by the DOE represents the alignment with state standards required by 34 C.F.R. § 300.102(a)(3)(iv).” The Appellate Division therefore reasoned that Sparta was no longer required to provide A.D. with a FAPE.

D.

We granted M.N.’s petition for certification, limited to the question of whether the Appellate Division erred in holding that a State-issued high school diploma based on passing the GED is a “regular high school diploma” under the IDEA and its implementing regulations. See 256 N.J. 65, 304 A.3d 990 (2023). We granted leave to Disability Rights New Jersey (DRNJ) to appear as amicus curiae.

II.

M.N., on behalf of A.D., argues that “[t]he decision to deny A.D. reenrollment into Sparta High School, based solely on his obtaining a GED, directly conflicts with federal law and thus[ ] cannot stand.” In her briefing, M.N. states that “an irrevocable ****675** conflict exists between” N.J.A.C. 6A:8-5.2(c) and 34 C.F.R. § 300.102(a)(3)(iv), such that N.J.A.C. 6A:8-5.2(c) is preempted by the Supremacy Clause of the United States Constitution. At oral argument, however, M.N. clarified that this Court need not reach preemption if it finds that the State-issued diploma A.D. received is not a “regular high school diploma” under 34 C.F.R. § 300.102(a)(3)(iv). According to M.N., the diploma A.D. received “was nothing more than a general equivalency diploma under a different name.” In addition, M.N. asserts, it is “irrefutable” that a State-issued diploma is not received by “the preponderance of New Jersey high school students.” It is thus not a “regular high school diploma” under 34 C.F.R. § 300.102(a)(3)(iv), M.N. maintains, and A.D. remains entitled to a FAPE. M.N. cautions that affirming the Appellate Division's decision would mean that “New ***341** Jersey students -- like A.D. -- who have disabilities but who have passed the GED, will be prevented from” obtaining a FAPE “by school districts eager to limit their enrollment and expenses, in flagrant violation of the IDEA.”

Focusing on the plain language of 34 C.F.R. § 300.102(a)(3)(iv), DRNJ contends that “State-issued diplomas are not regular high school diplomas.” In DRNJ's view, that does not mean there is a conflict between N.J.A.C. 6A:8-5.2(c) and 34 C.F.R. § 300.102(a)(3). Instead, DRNJ explains, “both provisions can be applied harmoniously” by “recogniz[ing] and effectuat[ing]” the “critical distinction between receipt of a State-endorsed diploma and a State-issued diploma” under New Jersey statutes and regulations. According to DRNJ, that distinction was a deliberate legislative choice -- “[i]f the Legislature intended for a passing score on the GED exam to result in the issuance of a State-endorsed diploma, it could have expressly provided for that.” DRNJ likewise agrees with M.N. that if this Court were to find that a State-issued diploma is a “regular high school diploma” under the IDEA, it would permit “district boards of education[ ] to push children with disabilities to take the GED exam instead of completing high school.”

Sparta maintains that “the explicit language of the IDEA clearly demonstrates Congress’ intention to allow the states to continue to ... control the substantive content of the education imparted to their citizens including those standards which constitute graduation credentials which fully align with the State's academic standards.” Sparta emphasizes that New Jersey is entitled to set its own substantive academic standards for applicants to obtain high school diplomas, and the IDEA does not interfere with that right. Turning to the plain language of 34 C.F.R. § 300.102(a)(3), Sparta asserts that the definition of a regular high school diploma “contemplates an alternative high school diploma that is fully aligned with the State's academic standards.” According to Sparta, a State-issued high school diploma is just that: “aligned with the academic standards expected of all students.” Therefore, in Sparta's view, “[t]his is not a case of federal preemption,” ***342** and “the language of the State's statute and the federal regulation are not at odds.”

Like Sparta, the Commissioner emphasizes that federal law “broadly defers to state law to develop ... challenging state academic standards.” Although the Commissioner concedes that State-issued diplomas and State-endorsed diplomas are “separate and

distinct" under New Jersey law, he agrees with Sparta that the "awarded to the preponderance of students" language in 34 C.F.R. § 300.102(a)(3)(iv) includes State-issued high school diplomas because such diplomas are also "fully aligned with state standards." ****676** "[I]nterpreting the federal regulation ... to categorically exclude State-issued diplomas" from the definition of "regular high school diplomas," the Commissioner asserts, would frustrate the State's "important policy goal of assigning the same value to State-issued high school diplomas as State-endorsed ones so that students who need to obtain diplomas via that alternative path have the same employment, educational, and life opportunities as those who are capable of attaining diplomas from a specific school district."

III.

A.

[2] Our review of administrative decisions is limited. We review only "(1) whether ... the agency follow[ed] 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" reached. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157, 189 A.3d 333 (2018) (quoting In re Stallworth, 208 N.J. 182, 194, 26 A.3d 1059 (2011)).

[3] This case concerns "whether ... the agency follow[ed] the law." Ibid. In answering that question, we review a state agency's interpretation of a federal statute or regulation de novo, owing no ***343** deference to "a state agency's interpretation of federal law." G.C. v. Div. of Med. Assistance & Health Servs., 249 N.J. 20, 45, 262 A.3d 1195 (2021). [4]

B.

Congress enacted the Education for All Handicapped Children Act of 1975 (EAHCA), to "assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Pub. L. No. 94-142, § 3(c), 89 Stat. 773, 775. Nearly thirty years later, Congress found that "the educational needs of millions of children with disabilities were [still] not being fully met," partly because of "low expectations." 20 U.S.C. § 1400(c)(2), (4). It therefore made several changes to the law, and renamed it the Individuals with Disabilities Education Act (IDEA).

In the IDEA, Congress found that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." Id. at (c)(1). "[T]he education of children with disabilities can be made more effective," Congress declared, by "having high expectations ... and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible." Id. at (c)(5)(A). Congress additionally ***344** explained that although states and local school districts "are primarily responsible ****677** for providing an education for all children with disabilities," the federal government should "have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law." Id. at (c)(6). Congress therefore codified several purposes, including "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." Id. at (d)(1)(A).

[4] Congress enacted the IDEA pursuant to its power under the Spending Clause of the United States Constitution. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract" -- recipients of federal funds agree "to be bound by federally

imposed conditions." Id. at 296, 126 S.Ct. 2455 (alteration in original) (internal quotation marks omitted) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). The IDEA thus provides "federal funds to States in exchange for a commitment: to furnish a 'free appropriate public education' ... to all children with certain physical or intellectual disabilities." Fry v. Napoleon Cmty. Schs., 580 U.S. 154, 158, 137 S.Ct. 743, 197 L.Ed.2d 46 (2017) (quoting 20 U.S.C. § 1412(a)(1)(A)). Once a state accepts IDEA funds, eligible students with disabilities in that state acquire an "enforceable substantive right" to receive a FAPE. Smith v. Robinson, 468 U.S. 992, 1010, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984); accord Fry, 580 U.S. at 158, 137 S.Ct. 743.

In providing a FAPE, a state must, "[t]o the maximum extent appropriate," ensure that students with disabilities are educated in the "least restrictive environment" -- i.e., "with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A). The IDEA also requires ***345** that "special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when" required by "the nature or severity of the disability of a child." Ibid.

C.

The obligation to provide a FAPE applies generally "to all children with disabilities residing in the State between the ages of 3 and 21, inclusive." Id. at (1)(A). Under the IDEA's implementing regulations, however, "[t]he obligation to make FAPE available to all children with disabilities does not apply with respect to ... [c]hildren with disabilities who have graduated from high school with a regular high school diploma." 34 C.F.R. § 300.102(a)(3)(i). Students with disabilities "who have graduated from high school but have not been awarded a regular high school diploma" remain eligible to receive a FAPE. Id. at (ii).

The term "regular high school diploma"

> means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 1111(b)(1)(E) of the [Elementary and Secondary Education Act,] ESEA. A regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential.

****678** [Id. at (iv).] [5]

D.

New Jersey statutes and regulations recognize two types of high school diplomas: State-endorsed diplomas and State-issued diplomas.

***346** A "State-endorsed high school diploma" is awarded by "[d]istrict boards of education." N.J.A.C. 6A:8-5.2(a). "All students who meet State and local graduation requirements shall receive a State endorsed diploma ...." N.J.S.A. 18A:7C-4. "[S]tudents not meeting these standards" may not receive a State-endorsed diploma. Ibid. The DOE thus defines a "State-endorsed diploma" as "a locally-issued document awarded to an exiting student indicating successful completion of high school graduation requirements." N.J.A.C. 6A:8-1.3.

The DOE prescribes that "local graduation requirements," which must be met for a student to receive a State-endorsed diploma, must "prepare students for success in post-secondary degree programs, careers, and civic life in the 21st century." N.J.A.C. 6A:8-5.1(a). They must include, among other things: (1) "not fewer than 120 credits in courses designed to meet all of the [New Jersey Student Learning Standards]"; (2) "[l]ocal student attendance requirements"; (3) "[a]ny other requirements established by the district board of education"; and (4) demonstration of "proficiency by achieving a passing score on the [English language

arts] and mathematics components of the State graduation proficiency test" or an approved alternative proficiency assessment. Ibid. In the alternative, "[t]hrough the IEP process ... district boards of education may specify alternate requirements for a State-endorsed diploma for individual students with disabilities." Id. at (c).

State-issued diplomas, on the other hand, are issued not by local school districts, but by the Commissioner, and they do not require students to meet these same graduation requirements.

Pursuant to N.J.S.A. 18A:50A-1,

> [a] State-issued high school diploma shall be provided by the New Jersey Department of Education to persons 16 years of age or older and no longer enrolled in school to document the attainment of academic skills and knowledge equivalent to a high school education. Demonstration of the appropriate level of academic competency for receipt of the State-issued high school diploma shall include, but need not ***347** be limited to, passage of the Tests of General Educational Development (GED) of the American Council on Education. [6]

DOE regulations then set forth two separate paths to a State-issued diploma. "[T]he Commissioner shall award a State-issued high school diploma" "to individuals age 16 or older who are no longer enrolled in school": (1) "based on achieving the ****679** Statewide standard score [7] on the General Education Development test (GED) or other adult education assessments"; or (2) "based on official transcripts showing at least 30 general education credits leading to a degree at an accredited institution of higher education." N.J.A.C. 6A:8-5.2(c), (d). In both circumstances, a "State-issued high school diploma" is defined as "a high school diploma provided by the [DOE] to persons 16 years of age or older and no longer enrolled in school to document the attainment of academic skills and knowledge equivalent to a high school education." N.J.A.C. 6A:20-1.2.

IV.

With this background in mind, we hold that a State-issued diploma is not a "regular high school diploma" for purposes of the IDEA implementing regulations. Therefore, receipt of a State-issued diploma does not terminate this State's obligation to provide a free appropriate public education to a student eligible to receive one.

***348** A.

The IDEA regulations are clear -- a regular high school diploma is "the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma." 34 C.F.R. § 300.102(a)(3)(iv).

At oral argument, Sparta maintained that there is no evidence in the record as to whether a State-issued or a State-endorsed high school diploma is "awarded to the preponderance of students in the State." But the Commissioner conceded that "without a doubt ... more than a preponderance, probably the vast majority of students obtain high school diplomas in this State that are State-endorsed high school diplomas from local [school] districts."

The data support that concession. In 2022, out of all New Jersey students who entered high school four years earlier, 91.1% graduated and earned a State-endorsed high school diploma by completing local graduation requirements; 3.8% were still

enrolled in high school; and 5.1% had dropped out or were no longer enrolled in school. See Dep't of Educ., NJ School Performance Report: Graduation/Postsecondary (Graduation/Postsecondary Report), https://rc.doe.state.nj.us/2021-2022/state/detail/postsecondary?lang=EN (last visited July 9, 2024). In contrast, in that same year, a total of 1,050 students in New Jersey earned a State-issued diploma by passing the GED. See Dep't of Educ., New Jersey Adult Education: Reports, https://www.nj.gov/education/adulted/resources/reports/ (last visited July 9, 2024). Thus, under 34 C.F.R. § 300.102(a)(3)(iv), it is a State-endorsed, rather than a State-issued, diploma that is "the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards."

Both Sparta and the Commissioner argue that the phrase "that is fully aligned with State standards," is a "restrictive clause that must be read into the preceding part of the phrase." Therefore, according to the Commissioner and Sparta, both a State-endorsed and a State-issued diploma are "the standard high school diploma awarded to the preponderance of students in the State."

***349** ****680** That argument ignores the deliberate choice of our Legislature and the DOE, both in statute and regulation, to distinguish between State-issued and State-endorsed diplomas. And it overlooks that the phrase "the standard high school diploma" is singular. See, e.g., Niz-Chavez v. Garland, 593 U.S. 155, 166, 141 S.Ct. 1474, 209 L.Ed.2d 433 (2021) ("[T]he law seems to speak of the charging document as a discrete thing, using a definite article with a singular noun ('the notice')."); Sun Co., Inc. v. Zoning Bd. of Adjustment of Avalon, 286 N.J. Super. 440, 447, 669 A.2d 833 (App. Div. 1996) ("[W]e are satisfied that the use in Avalon's ordinance of the singular article 'the' modifying the term 'principal use' reflects an intent that there be but one principal use on the property."). Grammatically, both types of diplomas, which the Commissioner and Sparta agree are distinct for purposes of state law, cannot be "the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards." Only a State-endorsed diploma meets that requirement.

Even if that interpretation were not correct, the last sentence of the federal regulation specifies that "[a] regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential." 34 C.F.R. § 300.102(a)(3)(iv) (emphasis added). When a State-issued diploma is awarded "based on achieving the Statewide standard score on the General Education Development test (GED)," N.J.A.C. 6A:8-5.2(c), it is precisely the type of "general equivalency diploma" that does not qualify as a "regular high school diploma" under 34 C.F.R. § 300.102(a)(3)(iv).

For the first time at oral argument, the Commissioner asserted that the words "general equivalency diploma" in the federal regulation cannot refer to a diploma received after passing the GED because of an amendment to the regulation in 2017. Prior to 2017, 34 C.F.R. § 300.102(a)(3)(iv) stated that a regular high school diploma "does not include an alternative degree that is not fully ***350** aligned with the State's academic standards, such as a certificate or a general educational development credential (GED)." 34 C.F.R. § 300.102(a)(3)(iv) (2006) (emphasis added). In 2017, the United States Department of Education amended the regulation to read as it currently does, seeking to "incorporate the definition of 'regular high school diploma' currently included in section 8101(43) of the ESEA ... to ensure that 'regular high school diploma' has the same meaning under the IDEA and the ESEA, and the definition is consistently applied under both programs." Assistance to States for the Education of Children with Disabilities, 82 Fed. Reg. 29755, 29756 (June 30, 2017). [8]

In the Commissioner's view, because the regulation was changed from "a regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such ****681** as a certificate or a general educational development credential (GED)" to "[a] regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma," a general equivalency diploma cannot be a diploma awarded based upon passing the GED.

Generally, we will not consider arguments, like this one, that are raised for the first time at oral argument, and were never mentioned to the ALJ, the Commissioner, the Appellate Division, or even in briefing to this Court. See, e.g., State v. Legette, 227 N.J. 460, 467 n.1, 152 A.3d 887 (2017) (declining to consider an argument raised "for the first time on appeal"); ***351**

J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6, 252 A.3d 1052 (2021) (declining to consider arguments that were raised before neither the New Jersey State Parole Board nor the Appellate Division).

Even if we were to reach the DOE's belated assertion, we would find it meritless. There is no evidence in the administrative record to suggest that in seeking to align definitions between the IDEA and the ESSA, the United States Department of Education sought to substantively change a student's rights under the IDEA, such that where a student who obtained a State-issued diploma based on passing the GED previously remained entitled to enroll in high school to obtain a regular high school diploma, the amendment extinguished that right.

Indeed, the Commissioner has expressly conceded in other contexts that a State-issued diploma awarded upon passing the GED is a "general equivalency diploma" and not a "regular high school diploma" under 34 C.F.R. § 300.102(a)(3)(iv) and the ESSA. Under the ESSA, states that submit their high school graduation rates to the United States Department of Education "shall not include any student awarded a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential" among those students "who earned a regular high school diploma." 20 U.S.C. § 7801(23)(A)(ii)(II), (25)(A)(ii)(II) (emphasis added). If the Commissioner believed that a State-issued diploma awarded upon passing the GED was not a "general equivalency diploma," and was instead a "regular high school diploma" under the definition set forth in 34 C.F.R. § 300.102(a)(3)(iv) and the ESSA, the DOE should report students who obtain a State-issued diploma after passing the GED among those who "earned a regular high school diploma." It does not.

Instead, the DOE's own website reports that only "students who received a [S]tate-endorsed diploma" are included in graduation rates. See Graduation/Postsecondary Report. The DOE's own reporting thus contradicts its litigation position in this case.

***352** B.

We offer two additional comments. The ALJ, the Commissioner, and the Appellate Division all treated State-issued and State-endorsed high school diplomas interchangeably, relying on language from the Commissioner's previous decision in B.A. & J.H. The relevant passage from B.A. & J.H. reads:

> [A] State-endorsed high [school] diploma -- the credential signifying attainment of the skills and knowledge deemed necessary by the State of New Jersey for its students to be successful in their careers and daily lives -- can be earned not only by completing the specific course, credit and assessment requirements of N.J.A.C. 6A:8-5.1(a), but also by demonstrating academic skills and knowledge ****682** equivalent to such requirements through alternative means, specifically, ... by achieving the required scores on the General Educational Development (GED) test of the American Council on Education, N.J.A.C. 6A:8-5.2(c); N.J.A.C. 6:30-1.3.
>
> [Commissioner Decision No. 201-09, at *3 (emphases added).]

At the time of the Commissioner's decision in B.A. & J.H., in June 2009, that statement was correct. Today, it is not.

N.J.A.C. 6A:8-5.2(c) then provided that the Commissioner would award a "State-endorsed high school diploma based on achieving the Statewide standard scores for passage of the [GED], to individuals age [sixteen] or older who are no longer enrolled in school and have not achieved a high school credential." The following month, the regulation was amended, explicitly replacing the words "State-endorsed high school diploma" with "State-issued high school diploma." See 41 N.J. Reg. 1302(a) (April 6, 2009). Students who are not enrolled in school can thus no longer be awarded a State-endorsed high school diploma by "achieving the Statewide standard score" on the GED. Instead, the State, through its statutes and regulations, now recognizes differences between a State-endorsed and a State-issued high school diploma, and it allows for only a State-issued diploma based on passage of the GED.

Again, contrary to its litigation position in this case, the DOE has acknowledged as much in the past. As DRNJ points out, the State Board of Education has previously explained that a "State-issued diploma represents something different than the State-endorsed ***353** diploma" because a recipient of a State-issued diploma "is not considered a graduate of a New Jersey high school." Bd. of Educ., State Board of Education Comment/Response Form, Revised Qualifying Scores for State-Issued High School Diplomas 2 (Mar. 4, 2020). The Board further stated that "[i]ndividuals who take a high school equivalency assessment have not met all of the State and local high school graduation requirements needed for a State-endorsed diploma." Ibid. B.A. & J.H. thus does not help Sparta or the DOE here.

Finally, Sparta has repeatedly insisted that "this case invites the [C]ourt to substitute its ideas or ideals of educational policy for those to whom the [L]egislature has entrusted that task," and to become an "arbiter[ ] of curricular standards and assessments," judging "the quality of the actual diploma/education received." That is incorrect.

This case requires us to interpret and apply the plain language of federal and state statutes and regulations. That falls comfortably within a core judicial duty: construing the words of laws that the Legislature enacts and regulations that administrative agencies promulgate. See Goulding v. NJ Friendship House, Inc., 245 N.J. 157, 167, 244 A.3d 725 (2021) ("[C]ourts remain the 'final authorities' on issues of statutory construction and [need not] 'stamp' their approval of the administrative interpretation" (alteration in original) (quoting Koch v. Dir., Div. of Tax'n, 157 N.J. 1, 8, 722 A.2d 918 (1999))); Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Rev., 197 N.J. 339, 364, 963 A.2d 289 (2009) ("[A court's] duty is to construe and apply the statute as enacted." (quoting DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005))).

Despite Sparta's assertion, in interpreting and applying the words of federal and state statutes and regulations, we do not "wade into those areas of educational standards or policy which belong in the hands of educators" -- we simply enforce the educational standards and policies that ****683** have been enacted by Congress and the New Jersey Legislature and promulgated by ***354** the United States Department of Education and the Commissioner.

V.

In obtaining a State-issued diploma based on passing the GED, A.D. obtained a degree documenting "the attainment of academic skills and knowledge equivalent to a high school education." See N.J.S.A. 18A:50A-1. He did not, however, obtain a "regular high school diploma" under 34 C.F.R. § 300.102(a)(3). A.D. therefore remains entitled to receive a free appropriate public education, and Sparta remains required, under the IDEA, to provide him with one.

Accordingly, we reverse the judgment of the Appellate Division.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, FASCIALE, and NORIEGA join in JUSTICE WAINER APTER's opinion.

All Citations

258 N.J. 333, 318 A.3d 670

Footnotes

1 We use initials to protect A.D.'s identity.

2 The ALJ's decision on M.N.'s request for a due process hearing could only be appealed to the Superior Court of New Jersey or a federal district court. See 20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.514; N.J.A.C. 1:6A-18.3. M.N. therefore filed suit in federal court requesting, among other things, relief declaring that a State-issued diploma based on passing the GED is not a "regular high school diploma" under the IDEA, injunctive relief allowing A.D. to re-enroll at Sparta, and attorney's fees and costs. M.N. also moved for a preliminary injunction. In an unpublished opinion, the United States District Court for the District of New Jersey denied the motion, finding M.N. could not demonstrate irreparable harm because of the "availability of compensatory education," which places children with disabilities "in the same position they would have occupied but for the school district's violations of IDEA." (quoting Ferren C. v. Sch. Dist. of Phila., 612 F.3d 712, 718 (3d Cir. 2010)). However, the court stated that it "[did] not find the ALJ or Commissioner's decisions persuasive because each failed to analyze the full text of 34 C.F.R. § 300.102(a)(3)(iv)." According to the district court, although A.D.'s State-issued diploma met New Jersey's standards, the ALJ and the Commissioner "overlooked the last sentence of" 34 C.F.R. § 300.102(a)(3)(iv), "which indicates that a regular high school diploma does not include a general equivalency diploma or similar lesser credential." M.N. and A.D., the district court explained, had a likelihood of success on the merits because "a high school diploma based solely on passing a GED exam does not constitute a regular high school diploma under 34 C.F.R. § 300.102(a)(3)(iv)," and "A.D. [was] still entitled to a FAPE notwithstanding his [S]tate-issued diploma."

3 Sparta is thus incorrect in asserting that the Appellate Division was not "asked to interpret a federal statute or regulation." In her opening brief to the Appellate Division, M.N. quoted the text of 34 C.F.R. § 300.102(a)(3) in full and argued that the "ALJ and Commissioner's decisions [were] plainly at odds" with the text of the regulation.

4 The Appellate Division therefore erred when it stated that "[i]t is well settled that we defer to the DOE's expertise in interpreting federal ... statutes and regulations within its implementing and enforcing responsibility." We note that since the Appellate Division issued its decision, the United States Supreme Court held, in Loper Bright Enterprises v. Raimondo, that federal courts "may not defer" to a federal agency's interpretation of a federal statute even if the statute is ambiguous. 603 U.S. ——, 144 S. Ct. 2244, 2273, 219 L.Ed.2d 832 (2024). Although Loper Bright is not binding on this Court and we do not rely on it here, the Appellate Division did not explain why it was correct to defer to a state agency's interpretation of a non-ambiguous federal regulation that the state agency did not promulgate. No such deference is appropriate under our caselaw.

5 "[S]ection 1111(b)(1)(E) of the ESEA" refers to a provision codified as 20 U.S.C. § 6311(b)(1)(E), enacted by the Every Student Succeeds Act (ESSA). The ESSA reauthorized and amended the ESEA in 2015 and continues to govern general education policy for students from preschool through twelfth grade. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

6 The "GED Testing Service" is a joint venture between the American Council on Education and a private company called Pearson, "modeled to represent a public-private partnership." It has offered the GED "as a high school equivalency assessment" since 1942. See GED Testing Service®, Am. Council on Educ., https://www.acenet.edu/National-Guide/Pages/Organization.aspx?oid=20099b28-9016-e811-810f-5065f38bf0e1 (last visited July 9, 2024).

7 When A.D. received his State-issued diploma, the "Statewide standard score" for passage of the GED was "the minimum passing standard set by the respective test vendor [the American Council on Education] and accepted by resolution of the State Board of Education." N.J.A.C. 6A:20-1.4(a)(1)(i) (2013).

8 As earlier noted, the ESEA was reauthorized as the ESSA in 2015. Today, the ESSA provides that a "regular high school diploma"

> (A) means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 6311(b)(1)(E) of this title; and

(B) does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential.

[20 U.S.C. § 7801(43).]

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2024 WL 4441323
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF P.D.B., [1] an alleged incapacitated person.

DOCKET NO. A-2734-22
|
Argued September 11, 2024
|
Decided October 8, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. P-20-01811.

Attorneys and Law Firms

Kelly M. McGuire argued the cause for appellant P.D.B. (Disability Rights New Jersey, attorneys; Melissa Zeidler and Kelly M. McGuire, on the briefs).

Gomperts McDermott & Von Ellen, LLC and Manes & Weinberg, LLC, attorneys for respondent Margaret Marran (Marisa Lepore Hovanec and Beth C. Manes, of counsel and on the brief).

Weiss Law, LLC and Thomas F. Coleman (Spectrum Institute) of the California bar, admitted pro hac vice, attorneys for amici curiae Spectrum Institute, Easterseals New Jersey, The Arc of New Jersey, American Academy of Developmental Medicine and Dentistry, Quality Trust for Individuals with Disabilities, Inc., Mental Health Advocacy Services, New Jersey State Office of the Public Defender, Autistic Self Advocacy Network, Center for Estate Administration Reform, and Alternatives to Guardianship Project (Thomas F. Coleman and Nina E. Weiss, on the brief).

Elyla Huertas argued the cause for amici curiae American Civil Liberties Union of New Jersey, American Civil Liberties Union, and Community Health Law Project (American Civil Liberties Union of New Jersey Foundation, attorneys; Elyla Huertas, Alexander Shalom, and Jeanne LoCicero, on the brief).

Before Judges Currier, Marczyk and Torregrossa-O'Connor.

Opinion

PER CURIAM

***1** P.D.B. appeals from the February 9, 2023 order that, despite dismissing the guardianship complaint, nevertheless imposed continuing conditions upon him. Because there was no finding of incapacity under N.J.S.A. 3B:1-2 prior to the dismissal of the complaint, the Chancery Division no longer retained jurisdiction over P.D.B. Therefore, we reverse the February 9, 2023 order and subsequent April 24, 2023 order denying reconsideration.

P.D.B. turned eighteen on December 17, 2020. On December 10, 2020, P.D.B.'s mother, M.M., filed a verified petition to be appointed as P.D.B.'s guardian and to allow her to "engage in Medicaid planning" on P.D.B.'s behalf. The complaint included two certifications from medical professionals. In his answer, P.D.B. requested a jury trial.

The Chancery Division issued an order on January 19, 2021 appointing a guardian ad litem (GAL) for P.D.B. and granting the GAL access to P.D.B.'s medical records. The order further required P.D.B. to continue attending his weekly psychiatrist appointments as well as twice-a-week Zoom sessions with M.M. and compelled the parties to discuss reunification therapy. The judge also permitted M.M. to communicate with P.D.B.'s psychiatrist and ordered P.D.B. to cooperate with any evaluator retained by M.M.

The court subsequently granted the GAL authority to make P.D.B.'s educational decisions, including attending a high school IEP meeting, sharing the parents' positions at the meeting, and obtaining a recording of the meeting afterwards.

The GAL submitted a report to the court in October 2021. The GAL concluded that P.D.B. did not need a general guardian because he could make certain decisions himself. However, he recommended a limited guardian be appointed to make medical, financial, and educational decisions. The GAL advised that P.D.B. could participate in the decision making, but the final decisions in those areas should be made by a limited guardian.

In January 2023, the GAL submitted an updated report. He explained he had limited interactions with P.D.B. in the previous year and had recently visited the home where he lived with his father. [2] The GAL found P.D.B., who was then twenty years old, was appropriately dressed, and in the time between reports, did not have any law enforcement interactions, medical conditions, issues with substance abuse, attendance problems at school, or violent behavior or mental breakdowns. The GAL noted P.D.B. was "staunchly opposed" to the appointment of a guardian and having any contact with M.M.

The GAL noted P.D.B. had graduated from high school and was taking advanced psychology and English classes at the community college. P.D.B. told the GAL he had made friends at school, joined a club, and was improving his social awareness. The GAL observed P.D.B.'s communication and conversation skills had improved in the time he had known him. The GAL described P.D.B. as "direct, focused and articulate."

***2** The GAL stated P.D.B. was "consumed" by the litigation, which was causing him "tremendous anxiety and stress." P.D.B. described difficulty with sleeping and told the GAL "he lives in fear of being found to be incompetent." He also expressed concern that M.M. or a guardian may try "to have him committed to a mental institution."

Although the GAL noted P.D.B. had functioned well in his daily activities without a guardian for the prior two years and was accepting guidance from his father and others he trusted, nevertheless he thought P.D.B. had "psychiatric vulnerabilities" that could expose him to exploitation. The GAL left the issue of P.D.B.'s capacity and his need for a general guardian to a jury.

On January 30, 2023, M.M. withdrew her complaint. In her letter to the court, she stated that because of P.D.B.'s non-cooperation with her and the difficulty gathering information about his current level of functioning, she had "substantial concerns that she w[ould] not be able to meet her burden of proof." In addition, after reviewing the GAL's updated report and the psychiatrist's records, she believed the litigation was having a deleterious effect on P.D.B. and wanted to end the case.

Thereafter, the GAL advised the court there was no longer a plaintiff in the matter but acknowledged the conflicting experts' reports about P.D.B.'s competency. The GAL explained that in certain instances involving an alleged incompetent, a special guardian could be appointed to continue pursuing the guardianship, such as in In re Schiller, 148 N.J. Super. 168 (Ch. Div. 1977), where the court relied on its parens patriae jurisdiction.

However, the GAL did not recommend the court appoint a special guardian and did not believe P.D.B. was "in imminent danger or that he would be a threat to society without the appointment of a [g]uardian." He recommended the court dismiss the case with any stipulations it determined appropriate.

The court dismissed the complaint without prejudice in an oral decision on February 7, 2023, and a memorializing February 9, 2023 order. In the order, the court imposed the following conditions for an additional two-year period: the GAL would meet

with P.D.B. once every six months and provide a report to the court and P.D.B.'s parents regarding P.D.B.'s "school work (if any), social activities and medical circumstances, inclusive of his continued therapy"; the parents would equally pay for the GAL's future fees; the GAL would continue to have HIPPA authorization to communicate with P.D.B.'s therapist; P.D.B. would participate in the meetings with the GAL; and P.D.B. would continue attending therapy.

P.D.B. moved for reconsideration to eliminate the conditions imposed in the February 9 order. He contended the trial court exceeded its authority and violated his constitutional rights in imposing any conditions without a finding of incapacity and after the dismissal of the complaint. P.D.B. provided the court with executed documents appointing his father as power of attorney if P.D.B. became disabled, incapacitated, confined or detained by a foreign power, or disappeared, and designating his father, uncle, and father's friend as P.D.B.'s supporters to assist him in making decisions.

In a written decision issued April 24, 2023, and an accompanying order, the court denied the motion for reconsideration, but modified the order to require the GAL to submit his reports only to P.D.B.'s parents and not to the court.

***3** The court explained it relied on Dr. Jonathan Mack's updated report in dismissing the case. Dr. Mack, Psy.D., was appointed by the court after the parties presented conflicting expert reports regarding the issue of P.D.B.'s capacity. Dr. Mack concluded that P.D.B. did not have capacity but acknowledged his cognitive skills had improved since the time of the expert's first report.

The court also explained that Rule 4:37-1(b) permitted the imposition of conditions. The court stated this was an unusual case because there was sufficient information from P.D.B.'s mother and treating doctors to commence litigation for a guardianship. In addition, Dr. Mack found, in two reports, that P.D.B. did not have capacity. The court expressed concern about P.D.B.'s future mental health, but also noted the anxiety the litigation was causing him.

The court relied on its parens patriae authority to impose the conditions, stating the meetings with the GAL were intended to check on P.D.B.'s mental health and it was not appropriate to completely dismiss the case considering Dr. Mack's reports. Therefore, after revising the order as stated, the court denied reconsideration.

On July 14, 2023, the Chancery Division granted P.D.B.'s motion to stay enforcement of the February 9, 2023 order pending appeal.

On appeal, P.D.B. contends the imposition of conditions violates the New Jersey and United States Constitutions as well as applicable New Jersey law, and the court abused its discretion in requiring P.D.B. to comply with certain conditions after dismissing the complaint.

We granted leave to the American Civil Liberties Union of New Jersey, the American Civil Liberties Union, and the Community Health Law Project to appear as amicus curiae. They contend the court violated P.D.B.'s due process rights because he did not have notice or an opportunity to argue the conditions were inappropriate. They also contend the conditions were compelled speech contrary to P.D.B.'s First Amendment rights and violated his right to choose whether to receive medical care or not, in addition to violating the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134.

We also granted leave to Spectrum Institute, Easterseals New Jersey, The Arc of New Jersey, American Academy of Developmental Medicine and Dentistry, Quality Trust for Individuals with Disabilities, Inc., Mental Health Advocacy Services, New Jersey State Office of the Public Defender, Autistic Self Advocacy Network, Center for Estate Administration Reform, and Alternatives to Guardianship Project to appear as amici. The entities raised similar contentions and supported P.D.B.'s position.

In response, M.M. states she "takes no position" regarding the "legality of including conditions in orders of dismissal in a guardianship action." She defers to this court's determination but if the conditions are permitted, M.M. contends they were "reasonable and appropriate under the circumstances."

The issue before this court then is whether the trial court misapplied Rule 4:37-1(b) to support its authority in imposing conditions despite dismissing the complaint. "[W]e review the meaning or scope of a court rule de novo, applying 'ordinary principles of statutory construction to interpret the court rules.' " DiFiore v. Pezic, 254 N.J. 212, 228 (2023) (quoting State v. Robinson, 229 N.J. 44, 67 (2017)). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

***4** N.J.S.A. 3B:12-24 provides that a proceeding to determine capacity or for the appointment of a guardian can be conducted without a jury, unless a jury trial is demanded by the individual alleged to lack capacity or an individual on their behalf. Here, P.D.B. requested a jury trial to determine his incapacity.

N.J.S.A. 3B:12-24.1(a) explains a general guardian can be appointed if the individual meets the definition of N.J.S.A. 3B:1-2 and does not have the "capacity to govern [them]self or manage [their] affairs." N.J.S.A. 3B:1-2 defines an "[i]ncapacitated individual" as "an individual who is impaired by reason of mental illness or intellectual disability to the extent that the individual lacks sufficient capacity to govern himself and manage the individual's affairs." N.J.S.A. 3B:12-25 authorizes the Superior Court to appoint a guardian for an individual found to be incapacitated. The statute explains the court can consider "surrogate decision-makers" that were chosen by the incapacitated individual before they became incapacitated, such as through a durable power of attorney, health care proxy, or advance directive. Ibid.

Rule 4:86 also details the process of appointing a guardian and includes additional information, such as the requirements of a guardianship complaint and other accompanying documents and the rights of an incapacitated individual. According to Rule 4:86-4(d), a GAL may be appointed at any time before the entry of judgment when the court becomes aware of special circumstances. The GAL's role is to "evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court." Ibid. The GAL's function is to be " 'the eyes of the court' furthering the best interests of the [individual alleged to lack capacity]." S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 278 (2020) (quoting In re Mason, 305 N.J. Super. 120, 127 (Ch. Div. 1997)).

Rule 4:37-1(b) permits the voluntary dismissal of an action "at the plaintiff's instance ... by leave of court and upon such terms and conditions as the court deems appropriate." This court has explained that "[w]hether to dismiss with or without prejudice, whether to impose terms, and the crafting of terms that are fair and just in the circumstances, are all matters that lie within the court's sound discretion." Shulas v. Estabrook, 385 N.J. Super. 91, 97 (App. Div. 2006). However, "in exercising that discretion, the court is chiefly required to protect 'the rights of the defendant.' " Ibid. (quoting Burke v. Cent. R.R. Co. of N.J., 42 N.J. Super. 387, 397-98 (App. Div. 1956)).

The court's discretion regarding the terms of the dismissal extends to whether it is with or without prejudice and whether to award counsel fees. See Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 244 N.J. Super. 254, 258 (App. Div. 1990). As we have stated, "the obvious purport of our rule is to protect a litigant where a termination of the proceedings without prejudice will place him in the probable position of having to defend, at additional expense, another action based upon similar charges at another time." Shulas, 385 N.J. Super. at 97; see also Burns v. Hoboken Rent Leveling & Stabilization Bd., 429 N.J. Super. 435, 446 (App. Div. 2013) (explaining that "[d]espite the relatively scant judicial treatment of the contours of Rule 4:37-1, it is clear the purpose served by the rule is the prevention of 'intolerable manipulation of the [c]ourt's calendar and the defendants' resources.' ") (quoting Shulas, 385 N.J. Super. at 101).

***5** In its oral decision dismissing the complaint but imposing conditions, the trial court explained, after reviewing the GAL's recent report, Dr. Mack's updated report, and M.M.'s letter, it was not necessary to appoint a guardian to continue prosecuting the guardianship after M.M. withdrew her complaint. It reasoned Dr. Mack's report did not find P.D.B. to be cognitively incapacitated, but also opined P.D.B. should not be allowed to govern his affairs. The court also noted the GAL's conclusion that P.D.B. would not be in danger or a threat to society without the appointment of a guardian. Nevertheless, the court relied on Rule 4:37-1(b) to impose the stated conditions.

In its written decision denying reconsideration, the court acknowledged the purpose of Rule 4:37-1(b) as expressed in caselaw but reasoned "the plain language of the [Rule] does not limit the conditions to those circumstances." It reiterated the unusual nature of the case and that there was sufficient information presented to initiate the guardianship action. The court again noted Dr. Mack's two reports opining that P.D.B. lacked capacity. While "reluctantly willing to dismiss the matter," the trial court relied on its parens patriae authority to impose the conditions because "it believed strongly that some follow up is necessary."

After a careful review, we are satisfied the Chancery Division's order contravenes the purpose of Rule 4:37-1(b) because the imposed conditions did not serve to avoid duplicative litigation or to preserve judicial efficiency or efficiency of resources. Shulas, 385 N.J. Super. at 97; Burns, 429 N.J. Super. at 445-46. Rather, the court imposed the conditions because of its concern for P.D.B.

Well-meaning as that may have been, the court misapplied its discretion in compelling P.D.B. to continue to comply with certain conditions. As our Supreme Court has stated, "The parens patriae power of our courts derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability." In re Grady, 85 N.J. 235, 259 (1981). Here, there was no finding of incapacity as the scheduled trial had not occurred. Therefore, the court mistakenly exercised its parens patriae power. Under these circumstances, the court had no authority to impose intrusive, onerous conditions.

Once M.M. withdrew her complaint for guardianship, and the court declined to appoint a special guardian, there was no authority to continue the GAL's appointment. Although the court is authorized to appoint a temporary GAL pending a hearing on a guardianship petition, see N.J.S.A. 3B:12-24.1(c), a general or limited guardian can be appointed only after a finding of incapacity. N.J.S.A. 3B:12-24.1(a) to (b).

Furthermore, the imposed conditions violated P.D.B.'s right to self-determination as established implicitly under the New Jersey Constitution, Article I, Paragraph 1. The Supreme Court has long recognized this right and the clear public policy respecting the rights of all people, including the developmentally disabled. See In re M.R., 135 N.J. 155, 169-70 (1994). The conditions in the order of dismissal impermissibly usurped P.D.B.'s decision-making.

For similar reasons, the conditions infringed upon P.D.B.'s right to medical confidentiality, see Doe v. Poritz, 142 N.J. 1, 77-78 (1995), the protections afforded under the Health Insurance Portability and Accountability Act, Pub. L. 1996, ch. 104-91, and his right to due process, U.S. Const. amend. XIV, § 1; N.J. Const., art. I, ¶ 1. When a court acts under its parens patriae authority, its actions are still "bounded by constitutional procedural guarantees." In re Commitment of J.M.B., 197 N.J. 563, 598 (2009) (quoting In re Commitment of W.Z., 173 N.J. 109, 125-26 (2002)).

***6** Reversed and remanded for the court to vacate its stay and enter a dismissal of the complaint with prejudice. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4441323

Footnotes

1 Pursuant to Rule 1:38-3(e), we use initials to protect the confidentiality of the individuals in this guardianship proceeding.

2 P.D.B.'s parents were divorced prior to the guardianship proceedings.

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2024 WL 4982746
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

Despina Alice CHRISTAKOS and Helen Alexandra Christakos, Plaintiffs-Respondents,
v.
Anthony A. BOYADJIS, Esq., Defendant-Appellant.

DOCKET NO. A-1107-23
|
Argued April 24, 2024
|
Decided December 5, 2024

On appeal from an interlocutory order of the Superior Court, Law Division, Morris County, Docket No. L-0059-20.

Attorneys and Law Firms

Maximilian J. Mescall argued the cause for appellant (Mescall Law, PC, attorneys; James C. Mescall, of counsel; Maximilian J. Mescall, on the briefs).

Michael J. Paragano argued the cause for respondent (Nagel Rice, LLP, attorneys; Jay J. Rice and Michael J. Paragano, of counsel and on the brief).

Before Judges Vernoia and Walcott-Henderson.

Opinion
The opinion of the court was delivered by

VERNOIA, P.J.A.D.

***1** By leave granted, defendant Anthony A. Boyadjis appeals from orders denying his motions for summary judgment on plaintiffs Despina Alice Christakos's and Helen Alexandra Christakos's legal malpractice claim and for reconsideration of the order denying his summary judgment motion. Defendant argues the court erred by: rejecting his contention plaintiff could not sustain their legal malpractice claim because plaintiffs had never been his clients and he therefore did not owe any duty to them; finding plaintiffs were not judicially estopped from asserting he breached a legal duty owed to them based on the entry of a consent order in a related probate matter; and finding there were disputed issues of material fact precluding summary judgment based on his claim defendant's alleged malpractice proximately caused their alleged damages. Based on our de novo review of the record, the parties' arguments, and the applicable law, we affirm in part, reverse in part, and remand for further proceedings.

I.

We summarize the undisputed facts viewed most favorably to plaintiffs as the parties who opposed defendant's summary judgment motion. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Defendant is an attorney in New Jersey who practices estate planning. In July 2017, Helen emailed defendant asking if he could help her uncles, Peter Christakos and

Nicholas Christakos, "get their affairs in order," noting they may "want to re-do their wills." [1] She explained that eighty-seven-year-old Peter was "highly intelligent" and lived with ninety-six-year-old Nicholas, who suffered from dementia and was hard of hearing. She noted the brothers had never married, did not have children, and relied on neighbors to bring them food and supplies. Helen said she would be "happy to help facilitate ... communication or be[ ] a trustee ... if that's what they want." Otherwise, she was "fine being kept out of the loop if that's what they prefer[red]."

A week later, defendant visited the brothers at their home. Peter showed defendant his then-extant January 17, 2003 will and explained Nicholas had a mirror-image will that had been executed on the same date (the 2003 wills). In Peter's 2003 will, he had left his entire estate to Nicholas and, if Nicholas predeceased him, Peter left this estate in equal shares to his two other brothers per stirpes. If either of those brothers "die[d] without issue," that brother's share would pass to the "surviving brother, or their issue, if applicable." As noted, Nicholas's 2003 will was a mirror image of Peter's, with the only difference being that Nicholas left his entire estate to Peter in the first instance.

The 2003 wills did not make any provision for Despina, who is Helen's mother and Peter's and Nicholas's sister-in-law. In the 2003 wills Helen was designated as the fourth alternate executor and was otherwise a potential beneficiary as the child of James Christakos, who was one of Peter's and Nicholas's three other brothers.

***2** When Peter and defendant first met, Peter explained that he and Nicholas had outlived their remaining siblings and questioned what would happen if one brother were to predecease the other. Defendant incorrectly advised Peter that according to the 2003 wills, the children of their deceased siblings would become the beneficiaries. That advice was incorrect because under the 2003 wills, if one of the two surviving brothers predeceased the other, the deceased brother's estate would pass to the surviving brother.

During the discussion, Peter was adamant that his nieces and nephews should not inherit anything. Accordingly, Peter asked defendant to draft new wills for himself and Nicholas [2] so that the surviving brother would be the primary beneficiary of their respective estates, although he was unsure who he wanted to designate as the beneficiary of an alternate residuary bequest. According to defendant, Peter also asked him to serve as executor of the new wills.

On November 20, 2017, defendant again visited the brothers to further discuss their new wills. Peter expressed a strong desire to disinherit his nephews and nieces and considered alternative residuary bequests in equal shares to the brothers' neighbor, a church, and Despina. But Peter indicated that he wanted to consider the issue further.

In January 2018, defendant received an urgent call from Peter who, along with Nicholas, had been admitted to the hospital. Peter implored defendant to prepare the new wills immediately, explaining the sole beneficiary of the estate brothers' respective wills should be the surviving brother and the alternate residuary bequest should be split equally among their neighbor, the church, and Despina.

Defendant prepared a new will for each of the brothers and later met with each at the hospital. On January 3, 2018, Peter executed the new will defendant had drafted. Peter's 2018 will, however, did not devise his entire estate to Nicholas as Peter had requested and intended. Instead, the will devised only Peter's personalty to Nicholas and devised the remainder of the estate in equal shares to Despina, the neighbor, and the church. The 2018 will named defendant executor of Peter's estate.

On January 3, 2018, Nicholas did not execute his 2018 will. Defendant did not present the will to Nicholas for execution because Nicholas was unable to communicate, was non-responsive, and did not have the capacity to execute the will that day.

On April 7, 2018 Nicholas executed the 2018 will, which included the same error in Peter's will. Again, the will did not devise Nicholas's entire estate to Peter but instead devised only Nicholas's personalty to Peter, with the balance of his estate devised in equal shares to Despina, the neighbor, and the church. In his 2018 will, Nicholas designated defendant as the executor of his estate. Nicholas also executed a power of attorney granting defendant authority to act on his behalf.

While the brothers were in the hospital, the Passaic County Adult Protective Services Unit began an investigation to determine whether Nicholas required a guardianship. Two doctors issued reports recommending a guardianship because they had found Nicholas had "moderate to severe cognitive impairment" and was incapable of managing his own affairs.

Peter passed away on April 11, 2018. In the days following Peter's death, defendant spoke with Despina, reviewed Peter's 2018 will, and advised her that she would inherit under the will. As noted, although the wills accurately stated the surviving brother would receive the personalty of the other, the wills did not, as Peter had intended, provide for the entirety of his estate to pass to Nicholas. Thus, apart from his personalty, Peter's 2018 will left the three alternate residuary beneficiaries equal shares of the remainder of his estate.

***3** Despina advised defendant she believed there must be an error because that "was not what Peter [had] intended and ... she did not want any money because she wanted [Nicholas] to be taken care of." Despina explained that defendant told her "Peter and [Nicholas] were not close and Peter did not intend for his estate to be left to [Nicholas]." However, defendant later admitted to a scrivener's error in his preparation of the wills.

Helen filed a caveat challenging Peter's 2018 will for the purpose of ensuring that Nicholas was designated as the sole beneficiary of Peter's entire estate. Simultaneous with the proceedings challenging Peter's will, guardianship proceedings for Nicholas had commenced, and defendant was considered as his Nicholas's potential guardian. However, Bruce Glatter, a social worker assigned to Nicholas's case, submitted a certification to the court expressing concern over "the appropriateness of [defendant's] appointment" as Nicholas's guardian because defendant had prepared Nicholas's will in which defendant was appointed executor and the power of attorney "despite the fact that Nicholas had been suffering from dementia for several months." Glatter expressed concern Nicholas's 2018 will had "left nothing" to Peter, despite Peter having told Glatter it was the brothers' intentions to leave their estates to each other.

In July 2018, defendant filed an order to show cause and verified complaint seeking reformation of Peter's will to accurately reflect Peter's testamentary intent. The complaint sought entry of a final order: appointing defendant as executor of Peter's estate; reforming Peter's 2018 will to provide that Peter's entire estate would be devised to Nicholas; admitting the proposed reformed 2018 will to probate; and dismissing Helen's caveat.

In the guardianship proceedings, the court appointed an interim administrator of Nicholas's estate who met with Nicholas, his neighbors, his caretakers and aides, defendant, and plaintiffs. The administrator submitted a report concluding Nicholas lacked capacity to manage his affairs and therefore required a guardian. The administrator explained that she had met with Nicholas, he could not remember who defendant was but made it "very clear that he did not want his family ... involved in his life or in his home and especially not his finances" because "they wanted his money."

Nicholas's neighbors recalled the brothers "speaking negatively about their extended family" and being "adamant that they didn't want family involved in their financial and personal affairs." Plaintiffs, however, advised the interim administrator that they strongly believed a family member should be appointed as Nicholas's guardian, citing fears that fraud and theft had occurred "and must be uncovered." The administrator concluded that an independent person or entity should be appointed as Nicholas's guardian because the power of attorney had been "executed under suspicious circumstances" and Nicholas had clearly expressed that he did not want Helen or other family members to be involved in his affairs.

On October 2, 2018, Nicholas passed away. Less than a week later, Helen filed a caveat opposing the admission of Nicholas's 2018 will to probate. On November 21, 2018, defendant filed an order to show cause and verified complaint to probate Nicholas's 2018 will and for reformation of the will in the same manner he had requested in the action he had filed concerning Peter's will. The complaint alleged that defendant believed Nicholas had the necessary testamentary capacity when he signed the 2018 will and sought reformation of the will, dismissal of Helen's caveat, and admission of the reformed will to probate.

***4** Helen filed an answer to the complaint, asserting Nicholas did not have testamentary capacity when he executed the 2018 will and it therefore did "not reflect Nicholas's last wishes in material and substantial ways" because it had devised only Nicholas's personalty to Peter. Helen sought: denial of the defendant's request for admission of the 2018 will to probate; her appointment as executrix of Nicholas's estate; dismissal of defendant's complaint with prejudice; leave to assert counterclaims against defendant; an order compelling the testimony of the witnesses to Nicholas's execution of the will; and an award of costs and expenses.

During the Probate Part actions concerning Peter's and Nicholas's separate estates, the court appointed attorney Peter F. Weiss as "Administrator Pendente Lite" of the estates. On January 18, 2023, the court entered a consent order, resolving the Probate Part matters.

In pertinent part, the consent order: directed payments of $100,000 to the neighbor and church referenced in the wills; directed payments to the Administrator Pendente Lite of the estates; denied defendant's requests to be appointed as the executor of the estates; and appointed Helen as the Administrator C.T.A. of the estates. The order also provided that Despina was the sole residuary beneficiary of each estate, and the summary judgment record establishes that she received over $700,000 from the estates as a result. The consent order also admitted to probate Peter's and Nicholas's 2018 wills as modified by the court's order.

The order further provided that Peter's and Nicholas's claims or causes of action against defendant were assigned and transferred to Helen. The order also "specifically preserved" what is described as "Helen's unfettered right to assert claims against [defendant] on her behalf, [Despina's] behalf, and/or [Peter's and Nicholas's] behalves."

Plaintiffs, solely in their individual capacities and not on behalf of Peter, Nicholas, or their estates, later filed a complaint alleging legal malpractice against defendant. They alleged Despina had suffered damages based on a "diminution of the estate, due to penalties and expenses, [defendant's] executor fees and $200,000[ ] paid to the neighbors and church," and Helen had suffered damages in the form of "out of pocket litigation costs including attorney's fees for probate, guardianship and [the] malpractice case of approximately $429,467.57 as well as ongoing attorney's fees which at present are approximately $145,071.74."

Plaintiffs alleged defendant had engaged in legal malpractice by: failing to obtain a signed retainer agreement from Peter and Nicholas; incorrectly advising Peter that his 2003 will had devised his estate to his nieces and nephews thereby prompting Peter to execute the 2018 will; negligently preparing Peter's 2018 will in a manner inconsistent with his testamentary intent; and negligently preparing Nicholas's 2018 will because Nicholas had lacked testamentary capacity.

Following discovery, defendant moved for summary judgment, arguing plaintiffs could not sustain their burden of proving legal malpractice because: he did not owe plaintiffs a duty because they were nonclients; plaintiffs were judicially estopped from taking contradictory positions in the probate and legal malpractice actions; and there was no proximate cause between defendant's alleged errors and plaintiffs' claimed damages.

The court denied defendant's motion, finding defendant owed plaintiffs a duty "and the issue of breach, proximate cause, and damages is a question of fact for the jury to decide." Defendant moved for reconsideration of the order denying the summary judgment motion. The court denied the motion, finding it simply reprised arguments the court had rejected in the first instance.

***5** Defendant moved for leave to appeal from the court's orders. We granted defendant's motion. Defendant presents the following arguments for our consideration:

POINT I:

THE COURT BELOW ERRED WHEN DENYING THE SUMMARY JUDGMENT AND RECONSIDERATION MOTIONS, THEREBY ALLOWING NON-CLIENT PLAINTIFFS TO CONTINUE TO PURSUE A LEGAL MALPRACTICE CLAIM AGAINST [DEFENDANT].

A. Case Law Has Refined the "Foreseeability Test" in Probate Actions, Because Otherwise All Estate Attorneys Owe All Potential Heirs A Duty Which Would Open All Probate Attorneys to Legal Malpractice Claims from All Potentially Disgruntled Heirs.

B. Plaintiffs are Judicially Estopped From Asserting That [Defendant] Misinterpreted The Decedent's Intent When Drafting the 2018 Wills, Because They Probated Those Wills.

C. Plaintiffs Cannot Establish Proximate Cause For Their Damages, Because Non-Clients Are Not Permitted to Seek Legal Fees In A Malpractice Action, Their Sole Damages Are Legal Fees From The Probate Action, and Those Fees Would Not Have Accrued If They Had Not Intervened.

II.

We conduct a de novo review of the denial of a summary judgment motion, applying the same standard that governs the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). We determine " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, 142 N.J. at 536). We must draw "all legitimate inferences from the facts" in favor of the non-moving party, R. 4:46-2(c); Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016), but "summary judgment should be granted ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' " Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

Where a defendant moves for summary judgment based on the contention that the plaintiff lacks evidence sufficient to sustain a claim, analysis of the motion begins by "identifying the elements of the cause of action and the standard of proof governing th[e] claim." Bhagat v. Bhagat, 217 N.J. 22, 39 (2014). Defendant moved for summary judgment on plaintiffs' cause of action for legal malpractice, which is a claim "grounded in the tort of negligence.' " Nieves v. Off. of the Pub. Def., 241 N.J. 567, 579 (2020) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)).

To prove a legal-malpractice claim a plaintiff must establish "three essential elements: '(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.' " Morris Props., Inc. v. Wheeler, 476 N.J. Super. 448, 459 (App. Div. 2023) (quoting Jerista v. Murray, 185 N.J. 175, 190-91 (2005)). A plaintiff must "establish those elements by some competent proof." Ibid. (quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014)).

***6** In part, defendant moved for summary judgment based on the contention plaintiffs lacked evidence he owed a legal duty to them because they were not his clients. He contends the undisputed facts establish he served only as Peter's and Nicholas's attorney, plaintiffs were never his clients, and the court therefore erred as a matter of law by finding he owed plaintiffs a legal duty that supports their malpractice claim.

"It is well settled that whether a party owes a duty to another party is a question of law for the court to decide ...." Rivera v. Cherry Hill Towers, LLC, 474 N.J. Super. 234, 240 (App. Div. 2022); see also Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 73 (App. Div. 2000). Generally, the existence of an attorney-client relationship creates a duty that is "essential to the assertion of a cause of action for legal malpractice." Froom v. Perel, 377 N.J. Super. 298, 310 (App. Div. 2005). However, an attorney may owe a duty to a non-client "in limited circumstances." Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 213 (App. Div. 2014).

A determination of whether an attorney's "duty extends to non-clients is 'necessarily fact-dependent,' " Est. of Albanese v. Lolio, 393 N.J. Super. 355, 368 (App. Div. 2007) (quoting Est. of Fitzgerald v. Linnus, 336 N.J. Super. 458, 473 (App. Div.

2001)), depends on "the circumstances presented," ibid., and "is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform, ibid. (quoting Est. of Fitzgerald, 366 N.J. Super. at 467-68).

Our Supreme Court has held that the "grounds on which any plaintiff may pursue a malpractice claim against an attorney with whom there was no attorney-client relationship are exceedingly narrow" and have been "carefully circumscribed." Green v. Morgan Properties, 215 N.J. 431, 458 (2013); see also LoBiondo v. Schwartz, 199 N.J. 62, 101 (2009) (noting "the absence of a direct relationship between an attorney and a nonclient ordinarily negates the existence of a duty and, by extension, affords no basis for relief"). For example, circumstances that may support a finding an attorney owes a duty to exercise reasonable care to a non-client include those where "the attorneys know, or should know, that non-clients will rely on the attorney's representations and the non-clients are not too remote from the attorney's to be entitled to protection." Petrillo v. Bachenberg, 139 N.J. 472, 483-84 (1995).

Application of the principles explained in Petrillo "has engaged courts in evaluating whether the attorney invited a non-client's reliance." Banco Popular North Am. v. Gandi, 184 N.J. 161, 181 (2005). A determination of whether an attorney owes a duty to a nonclient requires an "inquiry ... which balances 'the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.' " Id. at 179 (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). And, as the Court has explained, "[i]f the attorney's actions are intended to induce a specific non-client's reasonable reliance on [the attorney's] representations, then there is a relationship between the attorney and the third party" supporting a finding of a duty, which, if breached, supports a legal malpractice claim. Id. at 180.

We have recognized additional circumstances permitting a determination that an attorney owes a duty to a non-client that is not dependent on the nonclient's reliance on the attorney's actions. In Estate of Albanese v. Lolio we explained that "[p]rivity between an attorney and a non-client is not necessary for a duty to attach 'where the attorney had reason to foresee the specific harm that occurred.' " 393 N.J. Super. at 368-69 (quoting Albright v. Burns, 206 N.J. 625, 633 (App. Div. 1986)).

***7** In Pivnick v. Beck, we observed that some states preclude a beneficiary under a will from asserting a legal malpractice claim against the attorney who drafted the will "based upon the lack of privity between the lawyer and the nonclient beneficiary," but we explained that "[i]n New Jersey, such a lack of privity argument in malpractice actions brought by beneficiaries would have little currency." 326 N.J. Super. 474, 482 (App. Div. 1999) (citing Petrillo, 139 N.J. at 483-84), aff'd, 165 N.J. 670, 671 (2000). In Pivnick we further rejected the defendant-attorney's claim that legal malpractice claims brought by putative beneficiaries of a trust against the attorney who prepared the trust documents should be limited to only those involving "a lawyer's negligence inhibiting the expressed intent of the testamentary document." Id. at 483. We deemed such a limitation "a drastic course" that "may eliminate worthy suits and cause injustice. Ibid. Thus, we recognized that an attorney who drafts a testamentary document that is inconsistent with the decedent's intent breaches a legal duty owed to a beneficiary who claims they are damaged as a result of the attorney's error. [3]

The Supreme Court affirmed our holding in Pivnick "substantially for the reasons stated in [our] opinion." 165 N.J. at 671. The Court also "add[ed] one additional source of authoritative support" for our holding, explaining the "Restatement (Third) of the Law Governing Lawyers § 51(3)(a) (Am. Law Inst. 1998)" provided that "a lawyer owes a duty of care 'to a nonclient ... when the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient." [4] Ibid.

The duty an attorney owes to a nonclient that the Court in Pivnick found in the Restatement (Third) (1998) remains in the current version. [5] The Restatement (Third) of the Law Governing Lawyers § 51(3) (Am. Law Inst. 2000) provides that a lawyer owes a duty of care:

> to a nonclient when and to the extent that: (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient; (b) such duty would not significantly impair the lawyer's

performance of obligations to the client; and (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

[Restatement (Third) (2000) § 51(3).]

***8** Comment f to Section 51(3) of the Restatement (Third) (2000) includes an illustration of an application of the principles set forth in the Subsection (3). The illustration provides:

Client retains Lawyer to prepare and help in drafting and execution of a will leaving Client's estate to Nonclient. Lawyer arranges for Client to sign the will before the proper number of witnesses, but Nonclient later alleges the Lawyer negligently wrote the will to name someone other than Nonclient as the legatee. Client's intent to benefit nonclient thus does not appear on the face of the will. Nonclient can establish the existence of a duty from Lawyer to Nonclient only by producing clear and convincing evidence that Client communicated to Lawyer Client's intent that Nonclient be the legatee.

[Restatement (Third) (2000) § 51(3) cmt. f, illus. 2.]

Measured against the foregoing principles, we affirm the court's determination defendant owed Despina a duty to correctly draft Peter's will such that when he passed away the entirety of his estate—and not just his personalty—was devised to Nicolas and to correctly draft Nicholas's will to reflect that if Peter did not survive him, the entirety of his estate was devised in equal shares to Despina, the neighbor, and the church. We recognize Despina did not present evidence establishing she had relied on any action, advice, or communication supporting a finding defendant owed her a duty under the Petrillo standard. 139 N.J. at 474; see also Banco Popular, 184 N.J. at 180-81.

However, we find defendant owed Despina a duty to prepare the wills in accordance with Peter's and Nicholas's intentions because defendant had been requested to draft wills that were intended to benefit Despina and the other beneficiaries in the precise manner the decedent brothers had intended. Thus, defendant owed a duty to Despina because defendant "had reason to foresee that the specific harm"—the loss of her entitlement to her rights as beneficiary in accordance with the decedent's intentions—claimed by Despina as result of defendant's errors. See Est. of Albanese, 193 N.J. Super. at 368-69. Defendant also owed Despina the identical duty we found, and the Supreme Court found, was due to the plaintiff in Pivnick, see 165 N.J. at 671; 326 N.J. Super. at 482-83, and is described in the Restatement (Third) (2000) § 51(3).[6] The court therefore correctly rejected defendant's claim he was entitled to summary judgment on Despina's legal malpractice claim based on any purported lack of a duty.

***9** The court, however, erred by similarly finding defendant owed a duty to Helen that supported her legal malpractice claim. Like Despina, Helen was never defendant's client and she did not present evidence supporting a finding defendant owed her a duty based on a claim she had relied on any advice, information, or other actions of defendant. See Petrillo, 139 N.J. at 474; see also Banco Popular, 184 N.J. at 180-81. Other than referring Peter and Nicholas to defendant and her involvement in arranging defendant's introduction to them as potential clients, Helen never retained defendant to provide legal services to her, communicated with him for the purpose of obtaining legal advice, or received any information, documents, or advice from defendant on which she could or did rely.

The record is also bereft of evidence that like Despina, Helen was an intended beneficiary in decedents' 2018 wills. Thus, unlike Despina, there is no evidence supporting a claim that defendant's alleged negligence in drafting the wills deprived Helen of a benefit to which she would have been entitled but for defendant's alleged errors. Thus, her malpractice claim is not founded on the duty recognized in Pivnick or prescribed in the Restatement (Third) (2000). 165 N.J. at 671; 326 N.J. Super. at 482-83. Nor does the record support a finding that defendant should have foreseen any injury to Helen resulting from the errors he made in drafting the wills. See Est. of Albanese, 393 N.J. Super. at 368-69 Indeed, the undisputed evidence established that in 2018 neither Peter nor Nicholas wanted their nieces and nephews to share in their estates. Thus, even if defendant had not erred, Helen would not have been a beneficiary of either Peter's or Nicholas's estates.

Helen claims defendant owed a duty to her because he had misadvised Peter about the manner in which their estates would have been distributed under their 2003 wills. She further claims that but for defendant's incorrect advice about the 2003 wills, decedents would not have executed the 2018 wills. Any incorrect advice defendant may have given about the 2003 wills was given to Peter, not Helen, and there is no evidence that Helen relied on it in such a manner as to support a legal malpractice claim by her, as a nonclient, against defendant under the Petrillo standard. 139 N.J. at 474; see also Banco Popular, 184 N.J. at 180-81.

Moreover, any claim that Peter and Nicholas decided in 2018 to change in their wills and devise their estates first to each other, and then to Despina, the neighbor, and church based on defendant's erroneous advice about the 2003 wills is based on pure conjecture. What is undisputed is that irrespective of Peter's and Nicholas's motivations for changing their wills in 2018, they did not intend to appoint Helen as the executor of their estates and they did not intend that she receive any portion of their estates as a beneficiary. Thus, Helen did not establish defendant owed her a duty under Pivnick or the Restatement (Third) (2000).

We also disagree with the court's analysis of the Stewart factors in its assessment of defendant's duty in their application to Helen's legal malpractice claim. 142 N.J. Super. at 593. Peter's and Nicolas's retention of defendant to prepare the 2018 was not intended to benefit Helen as a beneficiary or otherwise, and therefore it was not foreseeable that any error by defendant related to the wills would harm Helen. To the contrary, and as noted, Peter and Nicholas had made clear they did not want their nieces or nephews to share in their estates and therefore it was not foreseeable that any purported errors by defendant would harm Helen. See ibid. Again, we are not persuaded the evidence establishes any moral blame attendant to defendant's actions, and in balancing the factors, we find no evidence supporting a finding defendant owed a duty to Helen.

***10** For those reasons, we find no basis in the evidence supporting Helen's claim defendant owed her a duty as non-client such that she could sustain her burden of proving defendant breached a duty of care owed to her. We reverse the court's order denying defendant's motion for summary judgment on Helen's claim and direct entry of an order granting summary judgment to defendant on the claim.

We next address defendant's remaining arguments as they pertain to Despina's legal malpractice claim. We note, however, that for purposes of completeness, our determinations as to the remaining arguments would otherwise apply to Helen's claim.

Defendant claims he was entitled to summary judgment because plaintiffs' legal malpractice claim is founded on the contention that he "misinterpreted the decedents' intentions when drafting the 2018 [w]ills." Defendant argues plaintiffs are judicially estopped from asserting that the wills did not reflect the decedent's intentions because plaintiffs agreed to entry of the consent order in the Probate Part matters admitting the 2018 wills to probate. He claims the court erred by rejecting his reliance on the doctrine as a basis for his contention he was entitled to summary judgment.

We review a trial court's decision concerning the application of the doctrine of judicial estoppel for an abuse of discretion. In re Declaratory Judgment Actions Filed by Various Muns., Cnty. of Ocean, 446 N.J. Super. 259, 291 (App. Div. 2016). "The doctrine of judicial estoppel operates to 'bar a party to a legal proceeding from arguing a position inconsistent with the one previously asserted,' " Cummings v. Bahr, 295 N.J. Super. 374, 385 (App. Div. 1996) (quoting N.M. v. J.G., 255 N.J. Super. 423, 429 (App. Div. 1992)), and provides that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position ...," ibid. quoting (Newell v. Hudson, 376 N.J. Super. 29, 38 (App. Div. 2005)). The doctrine protects "the integrity of the judicial process," Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000) (quoting Eagle Found., Inc. v. Dole, 813 F.2d 798, 810 (7th Cir. 1987)), and "is designed to prevent litigants from 'playing fast and loose with the courts,' " Tamburelli Props. Ass'n v. Borough of Cresskill, 308 N.J. Super. 326, 335 (App. Div. 1998) (quoting Scarano v. Cent. R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953)).

We find no basis in the record supporting a finding the court abused its discretion by rejecting defendant's reliance on the doctrine of judicial estoppel as grounds for granting summary judgment on the legal malpractice claim. Defendant argues plaintiffs have

taken conflicting positions by "asserting in the probate action that the modified 2018 [w]ills reflected decedents' intent, while arguing" in support of their legal malpractice claim that defendant "frustrated their intent by drafting the 2018 [w]ills."

We reject defendant's argument because it ignores that plaintiffs' malpractice claim is founded on the contention that the 2018 wills were drafted in error. They do not contend the 2018 wills, as modified during the probate cases and as reflected in the consent order, were entered in error. Plaintiffs argued in the probate actions that defendant erred in drafting the wills—indeed, Helen filed caveats based on that precise claim—and defendant admitted the error in the probate action by seeking modification of the wills. The fact that the consent order corrected the errors, and plaintiffs agreed to its entry, does not establish anything other than plaintiffs correctly argued in the probate cases, as they assert in this one, that defendant erred by drafting the two wills in a manner not in accord with Peter's and Nicholas's intentions. Thus, there is no evidence that either plaintiff has taken in this action a position here different than one they had taken and prevailed on in the probate cases.

***11** Additionally, the summary-judgment record lacks any evidence plaintiffs have taken any action that is inconsistent with the integrity of the judicial system or have "play[ed] fast and loose" with the court. To the contrary, in addition to consistently arguing in both proceedings that defendant erred in drafting the 2018 wills, the consent order states directly that Helen and Despina had reserved their rights to pursue their personal claims against defendant. Most simply stated, there is nothing in the evidence presented by defendant supporting an application of the doctrine of judicial estoppel as a bar to the legal malpractice claim against defendant. The court did not abuse its discretion by rejecting defendant's argument to the contrary.

We find defendant's remaining argument, that the court erred by rejecting his claim that plaintiff had failed to present sufficient evidence establishing Despina suffered damages proximately caused by defendant's alleged negligence, to be without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). We note only that we agree with the motion court that the record presented reveals genuine issues of material fact precluding summary judgment based on defendant's claim.

Our disposition of defendant's arguments concerning the summary judgment order render it unnecessary to address defendant's claim the court erred by denying his motion for reconsideration.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4982746

Footnotes

1 For ease of reference and clarity we will use first names to refer to plaintiffs Despina Alice Christakos and Helen Alexandra Christakos, as well as decedents Peter Christakos and Nicohlas Christakos, because they share the same surname. We intend no disrespect in doing so.

2 Although Nicholas was present at the meeting between Peter and defendant, and at subsequent meetings, defendant rarely communicated directly with about Nicholas's intentions.

3 In Pivnick we also addressed an issue that is not pertinent here based on the summary judgment record—protecting the sanctity of a testamentary document in a legal malpractice suit in which it is claimed the attorney erred by drafting the document in a manner inconsistent with the decedent's intent. Id. at 484-85. We held that to protect the sanctity of the document and the standards applicable to obtaining a reformation of such a document, a putative beneficiary who sues the attorney-drafter of the document for malpractice must present clear and convincing evidence establishing the

document does not reflect the decedent's intent. Id. at 485. Our holding concerning the burden of proof applicable to such a legal malpractice claim is not an issue based on the summary-judgment record because defendant concedes he erred in drafting wills that did not reflect Peter's and Nicholas's testamentary intent. As such, based on the motion record, there is clear and convincing evidence defendant erred in drafting the wills and that the wills did not reflect decedents' intent.

4 The Court also cited to comment f to Section 51 of the Restatement (Third) (1998), noting that consistent with our holding Pivnick, where the attorney did not "exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third person must prove the client's intent by evidence that would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document." Ibid. (quoting Restatement (Third) (1998) § 51 cmt. f).

5 "The Restatement (Third) of The Law Governing Lawyers was adopted by the American Law Institute in 1998 and published in 2000." Banco Popular, 184 N.J. at 179 n.7.

6 Although unnecessary to our determination defendant owed a duty to Despina, we agree with the motion court's analysis of factors we found in Stewart v. Sbarro are pertinent to whether an attorney owes a duty to a nonclient. 142 N.J. Super. 581, 593 (App. Div. 1976). The transaction—defendant's drafting of the wills—was intended to benefit Despina as a beneficiary; it was foreseeable an error in drafting the wills in a manner inconsistent with Peter's and Nicholas's intentions would harm Despina; it was certain Despina would suffer harm if she did not obtain the full benefits of Peter's and Nicholas's intentions; and there is a close connection between defendant's errors and the harm Despina claims she suffered as a result of defendant's errors. See ibid. Although we are not persuaded the evidence establishes that any moral blame is attached to defendant's actions, a balancing of the factors, and the policy underlying the imposition of a duty to prevent future harm to beneficiaries of wills who are deprived of the full benefit of a testator's intention, support a finding defendant owed a duty of reasonable care in his preparation of the wills to Despina. See ibid. The court correctly rejected defendant's claim he was entitled to summary judgment on Despina's legal malpractice claim on that basis.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

John MIRANDA, Plaintiff-Appellant,
and
Victor Miranda, Plaintiff,
v.
Alexander J. RINALDI, and Salny, Redbord and Rinaldi, Counsellors at Law, Defendants-Respondents.

DOCKET NO. A-3780-22
|
Argued September 9, 2024
|
Decided October 1, 2024

On appeal from the New Jersey Superior Court, Law Division, Hunterdon County, Docket No. L-0136-20.

Attorneys and Law Firms

Shawn D. Edwards argued the cause for appellant (Maselli, Mills & Fornal, PC, attorneys; Paul J. Maselli, of counsel; Shawn D. Edwards, of counsel and on the briefs; Nicholas J. Loiodice, on the briefs).

John L. Slimm argued the cause for respondents (Marshall Dennehey, PC, attorneys; John L. Slimm and Jeremy J. Zacharias, on the brief).

Before Judges Gooden Brown and Chase.

Opinion

PER CURIAM

***1** In this legal malpractice action, plaintiff John Miranda appeals from a September 14, 2022, Law Division order granting summary judgment to defendants Alexander Rinaldi, and the law firm Salny, Redbord and Rinaldi, Counsellors at Law, and dismissing plaintiff's claims with prejudice. Plaintiff's claims stem from a will contest arising from plaintiff and his brother, Victor Miranda, [1] contesting their father's will that named their sister, Maria Miranda, as the sole beneficiary. We affirm.

I.

We glean these facts from the motion record, viewed in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

Plaintiff, Victor, [2] and Maria are the children of decedent Modesto Miranda, who died testate on June 5, 2017. After Modesto's death, Maria initiated the probate process for Modesto's 2014 Last Will and Testament (LWT) in Bergen County Surrogate Court. On August 8, 2017, the LWT was admitted to probate and letters testamentary were issued to Maria. Upon learning that

Modesto had disinherited them and named Maria as his sole beneficiary and executor of his will, plaintiff and Victor sought to contest the will and revoke the letters testamentary issued to Maria.

To that end, around August or September 2017, Victor retained defendants to provide legal representation on behalf of himself and plaintiff to set aside Modesto's will. As a result, defendants sent a retainer agreement dated September 13, 2017, addressed to Victor and plaintiff. In the agreement, defendant Rinaldi outlined the terms of the representation and asked Victor and plaintiff to "confirm the terms and conditions of [their] engagement of th[e] firm to represent [them] in relation to the [will contest] matter, prior to the initiation of services on [their] behalf." Only Victor signed and returned the retainer agreement to defendants. Plaintiff's signature line was crossed out and replaced with "N/A."

Nonetheless, in a September 14, 2017, letter, to the Morris County Surrogate, Rinaldi inquired as follows:

> Please be advised that this law firm represents Mr. Victor Miranda and Mr. John Miranda with regard to their deceased father, Modesto Miranda.
>
> In this regard, kindly advise if a Last Will and Testament has been probated on behalf of the decedent, Modesto Miranda, date of death of [June 2017] and if Letters Testamentary have been issued.
>
> ***2** Mr. Miranda's last known place of residency was ... Parsippany Township, ... Morris County, New Jersey.

Both Victor and plaintiff were copied on the letter.

After receiving no response, defendants contacted the Morris County Surrogate on or around December 11, 2017, and were advised that there was no will probated for Modesto in Morris County. Upon learning that Modesto had in fact resided with Maria in Bergen County prior to his death, on January 24, 2018, defendants filed a verified complaint in Bergen County on behalf of Victor, challenging the validity of Modesto's will. Plaintiff was not named as a plaintiff in the complaint, and an accompanying filing letter to the court specified that defendants "represent[ed] Mr. Victor Miranda." On September 26, 2018, represented by John J. DeLaney, Jr., from Lindabury, McCormick, Estabrook & Cooper, PC (the Lindabury firm), plaintiff moved to intervene in the Bergen County probate action.

Ultimately, the complaint was dismissed as untimely under Rule 4:85-1 because it was not filed within four months of Modesto's will being probated. Victor appealed and we affirmed the trial judge's dismissal. See In re Modesto Miranda, No. A-1117-18 (App. Div. Sept. 25, 2019). Thereafter, on April 1, 2020, plaintiff and Victor filed the complaint against defendants that is the subject of this appeal, alleging legal malpractice stemming from defendants' failure to timely file the probate action. The complaint alleged that Victor had informed defendants that Modesto was a "Bergen County resident" prior to defendants' September 14, 2017, inquiry to the Morris County Surrogate.

During discovery, several witnesses were deposed, including plaintiff. Defendants maintained that plaintiff was never defendants' client, but was always represented by his lawyers from the Lindabury firm, Carlos Sanchez and DeLaney. Critically, during his deposition testimony, plaintiff confirmed that "after [his] father passed away," he retained Sanchez from the Lindabury firm who sent a letter on his behalf to Victor and Maria on August 2, 2017, stating that plaintiff "ha[d] not received any notice of proceedings in the Bergen County Surrogate's [Court], nor ... seen a copy of [Modesto's] will." In response, "Maria sent an e-mail to ... Sanchez, giving him a copy of the notice of probate" for Modesto's will.

Further, plaintiff stressed that he was "represented by ... Sanchez" at the time, that Sanchez "ha[d] been [his] lawyer for [twenty-three] years," and that he "would never have signed any [retainer] agreement with anyone other than ... Sanchez." Plaintiff also testified that he "never went up to [defendants'] office" with Victor, "never entered into a retainer agreement with [defendants]," and was "never represented [by defendants] in the probate case."

Following discovery, defendants moved for partial summary judgment to dismiss plaintiff's claims. In opposition, plaintiff submitted a certification averring that "[f]or nearly two months" after his father's death, "no [w]ill was probated." As a result, he "consulted with [his] longtime attorney, Carlos Sanchez," who "prepared a caveat" for him to file with the Bergen County Surrogate. However, on August 7, 2017, when he went to file the caveat, he was told that "Maria [had] submitted [his] father's [w]ill for probate" "earlier that day." Upon receiving a copy of the will and discovering that his father "left nothing" to him or Victor, and "instead, left everything to Maria," plaintiff "immediately told" Victor and "[a]t the same time, ... showed the [w]ill to ... Sanchez and his partner, Mr. [DeLaney]" and "discussed their firm representing [his] interests" in a will contest "based on undue influence by ... Maria."

***3** According to plaintiff's certification,

> Sanchez sent [him] a retainer agreement on August 18, 2017[,] specifically for his representation of [plaintiff] in the anticipated undue influence lawsuit. [Plaintiff] did not sign th[e] fee agreement and ... never retained ... Sanchez to represent [him] in the undue influence lawsuit until the middle of 2018, after the lawsuit filed by ... [d]efendants had been dismissed.

Plaintiff certified further that:

> Shortly after [he] received the proposed fee agreement on August 18, 2017, from ... Sanchez's firm, Victor met with ... Rinaldi sometime between August 28, 2017[,] and September 6, 2017 ....
>
> Victor told [him] that in his meeting with ... Rinaldi, ... Rinaldi told him that only one lawyer was needed to represent the interests of both [plaintiff] and Victor in an undue influence lawsuit.

Plaintiff continued that "[o]n September 6, 2017, [he] received another email from ... Sanchez indicating that he had ... received a call from ... Rinaldi, who indicated that he, ... Rinaldi, was representing [plaintiff] in the undue influence lawsuit."[3] According to plaintiff, shortly thereafter, he received a copy of Rinaldi's September 13, 2017, retainer agreement signed by Victor as well as a copy of Rinaldi's September 14, 2017, inquiry to the Morris County Surrogate. Plaintiff acknowledged the " 'X' through [his] signature line and the letters 'n/a' " appearing on the retainer agreement but asserted that he did not make those notations, nor did he sign the retainer agreement.[4]

Plaintiff averred:

> Under the circumstances, that is, ... Rinaldi telling ... Sanchez he represents [plaintiff's] interest, ... Rinaldi sending the surrogate letter with a copy to [plaintiff], and ... Rinaldi including [plaintiff] in the Rinaldi [retainer agreement], and the statement by ... Rinaldi to [Victor] that only one attorney was needed to represent both [their] interests, [plaintiff] came to the understanding that [his] interests were being represented by ... [d]efendants.

***4** On September 14, 2022, the motion judge entered an order granting defendants' motion for partial summary judgment and dismissing plaintiff's claims with prejudice. In an oral decision placed on the record on September 13, 2022, the judge posited that the dispositive issue, which was a question of law, was whether defendants owed a duty to plaintiff, a non-client. In that regard, citing the applicable legal principles, the judge explained that to establish such a duty, "either the lawyer or the lawyer's

client [must] invite[ ] the non-client to rely on the lawyer's opinion or provision of legal services," the "non-client so relies," and "the non-client [must] not [be] ... too remote from the lawyer to be entitled to protection."

The judge found that the remoteness element was "not really at issue" because there was "some evidence to suggest" that "at one point in time," plaintiff expected that Rinaldi "was going to represent him and his brother." Focusing on the other two elements, representations and reliance, the judge explained:

> [T]here are some facts that would support the imposition of a duty here .... One is that [defendants] sent [plaintiff] a [September 13, 2017,] retainer agreement because they believed that the firm was going to represent both [plaintiff] and Victor in ... the probate claim ....
>
> ....
>
> The next day[,] [defendants] wrote a letter to the Morris County Surrogate stating that [they] represented both [plaintiff] and Victor.
>
> And then thirdly, [defendant] Rinaldi called ... Sanchez, who was at the time [plaintiff's] attorney, or had historically been his attorney. And I think at the time he was his attorney. And there was some representation apparently in that phone call that ... [defendant] Rinaldi intended to represent both brothers.

However, the judge stressed that that was the "extent of" the facts supporting the imposition of a duty. The judge then examined the undisputed events that occurred after Modesto's will was probated, from August 2017 until early 2018. According to the judge, this was the "most important time period" because "there [was] correspondence going back and forth ... between [plaintiff] and his counsel, ... Sanchez," and "discussion ... between [defendant] Rinaldi and ... Sanchez." The judge reasoned that during this critical time period, "[plaintiff] never spoke or met with ... [defendant] Rinaldi," nor did plaintiff ever "respond[ ]" to defendants' September 13, 2017, retainer agreement, "which was addressed to both [plaintiff] and Victor." Additionally, the judge pointed out that even before defendants' retainer agreement was sent, plaintiff received "a September 6, 2017[,] email from ... Sanchez ..., recommending that his long-term client retain him instead of [defendants]."

The judge further hypothesized that if plaintiff and Victor were "operating under th[e] assumption" that defendants were representing both of them, "why [was] the complaint [not] drafted on behalf of both" and why did neither brother complain when it was not. The judge reasoned:

> [T]he conclusion to be drawn from the lack of any comment from either one of them in the early days of the lawsuit that was filed in 2018 is that they both understood that ... Victor had retained [defendants] and [plaintiff] was going to be [represented] by ... Sanchez and ... the Lindabury firm.

Moreover, the judge highlighted that plaintiff was "not an unsophisticated individual" or "[an] inexperienced person who was[not] familiar with ... legal counsel." On the contrary, plaintiff "had ... Sanchez as his lawyer for a long time," "was well[-]acquainted with attorneys," and "knew the importance of being represented by counsel."

Finally, the judge related that in 2018, during the probate litigation, there were "lots of communications" between the parties, and "plenty of opportunit[ies] for [plaintiff]" to question whether defendants were representing him, but "[plaintiff] never d[id] that," which "reinforce[d]" the judge's conclusion that plaintiff did not rely on defendants' representation. Indeed, according to the judge, there was "zero evidence that [plaintiff] relied on [defendants] to draft a complaint on his behalf," or any evidence indicating that Victor "took steps to make sure that [defendants] represented both of their interests." The absence of evidence led the judge to conclude that plaintiff was not relying upon defendants to represent him. As such, "considering all the[ ] factors,

and focusing ... on fairness, foreseeability, the relationship between the parties, [and] public policy," the judge determined defendants did not owe plaintiff a duty and the absence of a duty was fatal to plaintiff's claim.

***5** In this ensuing appeal, plaintiff raises the following arguments for our consideration:

> THE LOWER COURT IMPROPERLY ENGAGED IN FAC[T]FINDING IN GRANTING [DEFENDANTS'] MOTION FOR SUMMARY JUDGMENT AGAINST [PLAINTIFF].
>
> A. The Lower Court Improperly Resolved Disputed Issues of Fact Concerning the Parties' Relationship.
>
> B. A Genuine Issue of Material Fact Exists as to Whether [Defendants] Represented [Plaintiff].
>
> C. The Court Gave Improper Weight to Events that Occurred After the Statute of Limitations Expired.
>
> D. Evidence Demonstrates that [Defendants] Breached their Duty to [Plaintiff].
>
> E. [Plaintiff] Presented Sufficient Evidence to Establish Proximate Causation.

II.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

> [I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. R. 4:46-2(c); see Brill[, 142 N.J. at 540]. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted. R. 4:46-2(c); see Brill, 142 N.J. at 540.
>
> [Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016).]

Where there is no material fact in dispute, "we must then 'decide whether the trial court correctly interpreted the law.' " DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions ...." MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018).

In determining whether the trial judge correctly interpreted the law, we begin by "identifying the elements of the cause of action and the standard of proof governing th[e] claim." Bhagat v. Bhagat, 217 N.J. 22, 39 (2014). "A legal malpractice claim is 'grounded in the tort of negligence,' " Nieves v. Off. of the Pub. Def., 241 N.J. 567, 579 (2020) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)), and "has three essential elements: '(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.' " Morris Props., Inc. v. Wheeler, 476 N.J. Super. 448, 459 (App. Div. 2023) (quoting Jerista v. Murray, 185 N.J. 175, 190-91 (2005)). A plaintiff must establish each element of a legal malpractice claim and "bears the burden of proving by a preponderance of competent credible evidence that injuries were suffered as a proximate consequence of the attorney's breach of duty." Sommers v. McKinney, 287 N.J. Super. 1, 9-10 (App. Div. 1996). "This burden is not satisfied by mere conjecture, surmise or suspicion." Id. at 10.

***6** "The question of whether a duty exists is a matter of law to be decided by the court." Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 73 (App. Div. 2000). Traditionally, the existence of an attorney-client relationship creating a duty is "essential to the assertion of a cause of action for legal malpractice." Froom v. Perel, 377 N.J. Super. 298, 310 (App. Div. 2005) (citing Conklin

v. Hannoch Weisman, 145 N.J. 395, 416 (1996)). Although courts have recognized a duty between an attorney and a non-client "in limited circumstances," Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 213 (App. Div. 2014), our Supreme Court has repeatedly emphasized that "the grounds on which any plaintiff may pursue a malpractice claim against an attorney with whom there was no attorney-client relationship are exceedingly narrow," Green v. Morgan Props., 215 N.J. 431, 458 (2013), and whether such a "duty extends to non-clients is 'necessarily fact-dependent,' " Est. of Albanese v. Lolio, 393 N.J. Super. 355, 368 (App. Div. 2007) (quoting Est. of Fitzgerald v. Linnus, 336 N.J. Super. 458, 473 (App. Div. 2001)).

As such, there are "relatively few situations" in which "a nonclient may file suit against another's attorney." LoBiondo v. Schwartz, 199 N.J. 62, 101 (2009). In Petrillo v. Bachenberg, 139 N.J. 472, 485 (1995), the Court recognized that "a lawyer's duty may run to third parties who foreseeably rely on the lawyer's opinion or other legal services." In that case, a real estate buyer was provided a misleading test report that was prepared by the seller's attorney and allegedly induced the buyer's purchase of the property. Id. at 474. In finding that the attorney had a duty to the buyer, the Court explained that "[t]he objective purpose of documents such as opinion letters, title reports, or offering statements, and the extent to which others foreseeably may rely on them, determines the scope of a lawyer's duty in preparing such documents." Id. at 485.

Applying that principle to the seller's attorney's report, the Court concluded that the attorney "should have foreseen that a prospective purchaser would rely on the ... report in deciding whether to sign a contract and proceed with engineering and site work." Id. at 487. Furthermore, by providing the report and subsequently representing the seller in the sale, the attorney "assumed a duty to [the buyer] to provide reliable information" and "[f]airness suggests that he should bear the risk of loss resulting from the delivery of a misleading report." Ibid. "Accordingly, attorneys may owe a duty of care to non-clients in situations in which the attorneys know or should know that the non-client would rely on the attorney's representations, and the non-client is not too remote from the attorney to be entitled to protection." Davin, L.L.C., 329 N.J. Super. at 74 (citing Petrillo, 139 N.J. at 483-84).

"[T]he rule announced in Petrillo has been applied rather sparingly, ... [but] [i]t is not ... the only basis on which [the Court] ha[s] recognized the potential for a direct claim against an attorney by a nonclient." Innes, 435 N.J. Super. at 213 (alterations and omissions in original) (quoting LoBiondo, 199 N.J. at 102). In Banco Popular N. Am. v. Gandi, 184 N.J. 161 (2005), an attorney was accused by the plaintiff bank of negligent misrepresentation, first by facilitating his client's asset transfer and second by "negotiating the terms of the ... loan and guaranty and ... issuing an opinion letter in connection therewith." Id. at 182-83. The Court noted that the bank's claims arising from the attorney's role in facilitating the transfer "exceed[ed] the reach of Petrillo in nearly every respect." Id. at 182. However, the Court held that the claims arising from the attorney's role in the negotiations could proceed. Id. at 186.

***7** In differentiating the claims, the Court explained that "the duty recognized in Petrillo arose because an attorney, engaged in dealings involving a non-client, made misrepresentations to the non-client knowing that they would induce her reliance." Id. at 182. The Court explained that the Petrillo Court "never suggested, even obliquely," that a duty arose in circumstances "involving no representations, no reliance, and a remote third party with whom the attorney had no relationship." Ibid. According to the Banco Popular Court, although the bank could make no claims against the attorney for facilitating the asset transfer because the attorney made "no representations to the [b]ank seeking to induce reliance, [and] the entire transaction was intended to be, and in fact was, carried out without the [b]ank's knowledge," the attorney's role in negotiations, on the other hand, "st[ood] on [a] different footing" because "representations in negotiations are made to induce reliance." Id. at 182-83.

In appropriate circumstances, "we have held that attorneys may owe a limited duty in favor of specific non-clients." Davin, L.L.C., 329 N.J. Super. at 74. See id. at 74-75 (collecting cases). "In determining whether a duty exists, the court must identify, weigh and balance the following factors: the relationship of the parties; the nature of the attendant risk; the opportunity and ability to exercise care; and the public interest in the proposed solution." Davin, L.L.C., 329 N.J. Super. at 73 (citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). "The determination of the existence of a duty ultimately is a question of fairness and policy." Ibid.

Here, we are satisfied there was no duty between defendants and plaintiff to sustain a cause of action for legal malpractice. Although defendants held themselves out as plaintiff's attorneys in the two September 2017 letters and in communicating with Sanchez, plaintiff's deposition testimony indisputably demonstrates that plaintiff did not rely on those communications and did not believe that defendants represented him. Plaintiff testified that he "would never have signed any [retainer] agreement with anyone other than ... Sanchez," his "[o]ngoing" attorney for at least "[twenty-three] years." Plaintiff also testified that he "never went up to [defendants'] office" with Victor, "never entered into a retainer agreement with [defendants]," and was "never represented [by defendants] in the probate case."

Although plaintiff's certification contradicted his deposition testimony, it is undisputed that plaintiff never signed defendants' retainer agreement and was not named as a plaintiff in the complaint. As the judge pointed out, if plaintiff actually believed defendants were representing him, one would logically expect that plaintiff, an individual who "was well[-]acquainted with attorneys" and "knew the importance of being represented by counsel," would have contacted defendants about the omission. Because there was no reliance by plaintiff, there was no duty imposed on defendants. See Petrillo, 139 N.J. at 483 (explaining "courts have imposed a duty on an attorney who prepares an instrument with the intent that third parties will rely on it").

On appeal, plaintiff argues "disputed issues of fact existed as to whether [defendants] invited [plaintiff] to rely on their opinion and whether [plaintiff] ... did." Plaintiff asserts the judge "should have denied [defendants'] motion for summary judgment to allow a jury to weigh the evidence concerning the first and second elements" required to establish a duty of care for legal malpractice claims because the nature of the parties' relationship was in dispute. Plaintiff contends that by granting the motion, the judge improperly determined a question of fact.

Generally, "[t]he determination of the existence of a duty is a question of law for the court." Singer v. Beach Trading Co., 379 N.J. Super. 63, 74 (App. Div. 2005) (quoting Petrillo, 139 N.J. at 479). However, if there is conflicting evidence regarding an attorney-client relationship, the existence of the relationship is an issue of fact and summary judgment is improper. See Froom, 377 N.J. at 311-12 (holding existence of attorney-client relationship could not be determined as a matter of law due to conflicting evidence as to the nature of the relationship).

***8** Parties usually establish the relationship by express agreement, but a relationship can also be implied by the parties' conduct. In re Palmieri, 76 N.J. 51, 58-59 (1978) (recognizing that attorney's acceptance of the professional responsibility "need not necessarily be articulated, in writing or speech but may, under certain circumstances, be inferred from the conduct of the parties"); Herbert v. Haytaian, 292 N.J. Super. 426, 436 (App. Div. 1996) (finding that a relationship is created when the "prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case").

Here, there is no dispute regarding the existence of an attorney-client relationship. Based on plaintiff's deposition testimony and conduct, there was neither an express nor an implied relationship. Although there was no attorney-client relationship, plaintiff could pursue a malpractice claim against defendants predicated on alternative grounds. However, plaintiff failed to satisfy the requisite elements to establish such a claim.

Plaintiff insists that disputed issues of fact exist to withstand summary judgment and the judge improperly weighed evidence against him. In opposing summary judgment, plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts," Triffin v. Am. Int'l Grp., Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992)), and must "do more than 'point[ ] to any fact in dispute' in order to defeat summary judgment," Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (alteration in original) (quoting Brill, 142 N.J. at 529). "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.' " Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005)). We are satisfied that there are no genuine issues of material facts in the record that would preclude summary judgment.

Based on our decision, we need not address plaintiff's remaining arguments, some of which are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4356344

Footnotes

1 Victor and John initiated the legal malpractice lawsuit against defendants, but Victor ultimately settled with defendants and is not participating in this appeal. Victor and defendants executed a stipulation of dismissal with prejudice on July 14, 2023, terminating the litigation as to all parties. Accordingly, the July 14, 2023, order identified in the notice of appeal afforded the required finality for plaintiff to appeal from the September 14, 2022, order. See R. 2:2-3(a)(1).

2 Because of the common surname, we use first names to avoid confusion and intend no disrespect.

3 In the September 6, 2017, email, Sanchez stated:

> I received a call from [Rinaldi] .... He tells me that Victor retained him and will include you in the will contest. He said you and Victor were his co-clients. That said, I still think you should have your own counsel and participate in the filing of the papers (at a lower cost to you with [defendants] taking point), but giving yourself the option of taking a position different from your brother (I thought you said he was a hot head lo[o]se cannon?). Even though your interests may be aligned now, in this kind of case, that changes, very quickly, and a lawyer representing multiple parties will be required to stop representing you both since he will be conflicted. That[is] bad for your case if it happens at a critical junction and will only serve to piss of[f] both of you. Let me know if you want me to do anything more on this.

4 In a certification submitted in support of plaintiff's opposition to defendants' motion for partial summary judgment, Victor averred that he signed the September 13, 2017, retainer agreement, returned it to defendants, paid the legal fees, and told plaintiff he "could pay [him] back."

2025 WL 37451
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Ann Christine BARTEK, Plaintiff-Respondent,
v.
John LOSAPIO, Jr., Individually, and as Executor of the Estate of John LoSapio, Sr., Deceased, and 108 North Street LLC, a New Jersey limited liability company, Defendants-Appellants.

DOCKET NO. A-3022-21
|
Submitted January 10, 2024
|
Decided January 7, 2025

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket No. P-002484-16.

Attorneys and Law Firms

Trautmann & Associates, LLC, attorneys for appellants (Gregg D. Trautmann, on the briefs).

Smith & Gaynor, LLC, attorneys for respondents (Thomas J. Gaynor, on the brief).

Before Judges Gummer and Walcott-Henderson.

Opinion
The opinion of the court was delivered by

WALCOTT-HENDERSON, J.S.C. (temporarily assigned).

***1** Defendants John LoSapio, Jr. (Junior), sued in his individual capacity and as executor of the estate of his father, John LoSapio, Sr.'s (Senior), and 108 North Street LLC appeal from the Chancery Division's April 25, 2022 judgment in favor of plaintiff Ann Christine Bartek, in which the court, after conducting a bench trial, ordered that a copy of a January 14, 2016 codicil to the February 6, 2003 last will and testament of Senior, be admitted to probate and that the title to the remainder interest of property located at 108 North Street in Madison be "reconveyed."

Plaintiff, who was Senior's sister, had conveyed certain properties, including her residence in Madison, New Jersey at 108 North Street (the Madison Property), to Senior subject to a life estate retained by her. [1] According to plaintiff, Senior in January 2016 had executed a second codicil to his will at her request, stating those properties would be conveyed to the living residuary beneficiaries in plaintiff's last will and testament if Senior predeceased plaintiff. At the time of Senior's death, however, the 2016 codicil, was not admitted to probate along with Senior's will. Instead, Junior attested that no codicil existed. Thus, the remainder interest in the Madison Property was conveyed to Junior and 108 North Street LLC under Senior's will.

Plaintiff filed suit in the Chancery Division against defendants seeking a judgment directing, among other things, that a copy of the 2016 codicil be admitted to probate and the remainder interest in the Madison Property be reconveyed by defendants to the living residuary beneficiaries in plaintiff's will. Following a three-day bench trial, the court entered a final judgment in favor

of plaintiff, ordering the codicil to be admitted to probate and title in the Madison Property be reconveyed. Defendants now appeal, contending the court erred in admitting a copy of the codicil to probate. For the following reasons, we affirm.

I.

The relevant facts are derived from the trial record and are substantially undisputed by the parties. In the late 1970s, plaintiff and her husband purchased the Madison Property and a property in Dover, New Jersey (the Dover Property). Plaintiff had resided on the Madison Property since 1978. Following the death of her husband in 2004, however, plaintiff became concerned with her financial security as she suffered from several medical conditions and feared her estate would be "wiped out with the cost of [her] long-term care."

Plaintiff sought estate-planning and asset-preservation services from Donald McHugh, an elder-law attorney. She first met with McHugh in 2005. Senior, with whom plaintiff "got along very well," accompanied plaintiff to her meeting with McHugh. At that meeting, McHugh explained there were certain techniques that would allow her to "qualify for Medicaid services." [2] In that regard, McHugh advised that it was standard practice for an individual to transfer the title of real property to a son or daughter who would inherit that property upon the individual's death while retaining a life estate in the property, thereby enabling the individual to continue residing at the property and to ensure the property would not be used to pay for medical expenses. Because plaintiff did not have any children, McHugh suggested plaintiff transfer the title to the Madison Property and Dover Property to a "trusted individual."

***2** Plaintiff did not decide anything regarding her estate at that initial meeting with McHugh. Instead, she discussed her options with Senior. According to plaintiff, Senior agreed, subject to certain conditions imposed by plaintiff, to serve as plaintiff's "trusted individual" such that the title to the properties would be conveyed to him subject to the life estate retained by plaintiff. Those conditions were that (1) Senior would reconvey the properties back to plaintiff at any time plaintiff desired; (2) Senior would own the properties if she predeceased him; and (3) the residuary beneficiaries in plaintiff's will would own the properties if Senior predeceased plaintiff.

Plaintiff and Senior informed McHugh of this agreement. To effectuate the agreement, McHugh prepared a supplemental needs trust agreement, two deeds, and a codicil to Senior's will. The trust agreement was executed in March 2005 and listed plaintiff as the beneficiary and Senior as a trustee. The deeds were executed on December 12, 2005, and transferred the properties to Senior subject to plaintiff's life estate.

The first codicil was executed on December 16, 2005, in the offices of McHugh. The codicil stated it was the "only [c]odicil to [Senior's] Last Will and Testament dated February 6, 2003," and supplemented Senior's will by adding the following:

> My sister, [plaintiff], conveyed to me her propert[ies] in Madison and Dover, New Jersey, subject to a life estate retained by her. If I shall predecease her, I disclaim that ownership and direct that ownership of both properties shall pass under the residuary provisions of the Last Will and Testament of [plaintiff], subject to her continuing life estate.

In 2007, plaintiff decided to sell the Dover Property. Accordingly, she asked Senior to reconvey the property to her and asked McHugh to prepare the necessary deed. Senior agreed to reconvey the property to her, and the deed was executed on March 6, 2007.

Thereafter, Senior contacted Elliot Goldstein, the attorney who had prepared his February 6, 2003 will. Senior wanted to revise his will to provide, among other things, that his estate would not be inherited by his three children, but only by Junior. According to Goldstein, in the process of revising Senior's will, Senior did not mention any deeds concerning the Madison Property or Dover Property, nor a codicil. Senior executed the revised will on January 9, 2009, at the offices of Goldstein.

The following year, Junior moved from Florida to Senior's home in Morris Plains after witnessing Senior fall a few times while visiting him. Junior's wife, Cherray LoSapio, subsequently moved there in 2011.

In 2015, Junior contacted Goldstein to prepare an advance medical directive for Senior, who had been spending increased amounts of time in hospitals and medical facilities due to physical infirmities. Goldstein sent the directive to Senior for his signature in December 2015. In 2016, Junior contacted James DeMartino, an attorney specializing in estate and long-term care planning, to provide services for Senior. Junior sought to have DeMartino provide Medicaid planning services for Senior because he was concerned that the cost of Senior's healthcare would deplete Senior's estate.

By 2016, plaintiff's physical condition had also worsened, and she again became concerned about having sufficient funds to pay for her healthcare and protect the Madison Property. She contacted McHugh to discuss the reconveyance of the Madison Property by Senior to her. McHugh advised against the reconveyance, pointing out that plaintiff "had already met the five-year Medicaid look-back period" and the reconveyance would "start the five years all over again."

***3** In the alternative, McHugh suggested a new codicil that would alleviate plaintiff's concerns. Accordingly, McHugh prepared a second codicil, which was executed at McHugh's offices on January 14, 2016. It is this codicil that is at issue in this appeal. That codicil stated it was the "only [c]odicil to [Senior's] Last Will and Testament dated February 6, 2003." It revoked Senior's codicil "dated February 9, 2006," and replaced it with the following:

> My sister, [plaintiff], conveyed her property in Madison, New Jersey to me during her lifetime, subject to a life estate retained by her. If I shall predecease her or upon my demise, I distribute ownership of that property, per capita and not per stirpes, to the living residuary beneficiaries in the Last Will and Testament of [plaintiff], namely, JOSEPH LO SAPIO, GABRIEL LO SAPIO, JR., NANCY SIBONA, VINCENT SIBONA, JR. and PATRICIA COREY.

That same day, McHugh faxed a copy of the codicil to Goldstein and gave the original codicil to Senior. To date, the original has not been located.

Despite the execution of the January 2016 codicil, plaintiff, in February 2016, asked Senior if he would reconvey the property to her. Senior agreed, and plaintiff asked McHugh to prepare the necessary deed. Plaintiff and Senior planned to execute the deed on March 29, 2016, at Morris Hills Center (MHC) where Senior was undergoing physical therapy. On the evening before, however, Junior and Cherray confronted plaintiff in her home. [3] According to plaintiff, Junior said he would not let Senior sign anything and told plaintiff she was "going to do things [Junior's] way."

The following day, plaintiff fell ill so she asked her brother Gabriel LoSapio to bring the deed to Senior for him to sign. Gabriel and the notary public who had accompanied him were prevented from seeing Senior at MHC because Junior had restricted access to Senior. Thus, Senior did not sign the deed.

The following day, on March 30, 2016, Senior signed a deed prepared by DeMartino in connection with the Medicaid planning DeMartino had been providing. That deed conveyed Senior's home to Junior under a "care-giver child exception" to the five-year look-back period for Medicaid (the Caregiver Agreement).

When plaintiff and McHugh learned that Junior had prevented Senior from signing the deed to reconvey the Madison property, McHugh advised plaintiff to remove Senior as a trustee of her supplemental needs trust as he was concerned Junior could "step in" for Senior. Plaintiff agreed, noting it was likely a good idea to remove Senior because he was "having problems physically and ... trouble getting around." Accordingly, on May 5, 2016, McHugh sent a letter to Senior advising him that he had been removed as a trustee due to his "incapacity and/or inability to act." Sometime thereafter, plaintiff spoke to Senior again about reconveying the Madison Property, and Senior agreed to do so. On June 8, 2016, plaintiff, her niece, and Peter Thurkauf, a notary public, visited Senior at MHC where he had returned for physical therapy. This time they were able to see Senior, and he signed the deed reconveying the Madison Property to plaintiff.

Subsequently, Junior learned of the conveyance and filed suit against plaintiff and McHugh in his capacity as power of attorney for Senior, who was unaware of the lawsuit. Junior alleged plaintiff, McHugh, and others exerted undue influence over Senior, who was incapable of understanding the June 2016 deed when he signed it. Concerned about the physical toll litigation would have on plaintiff, McHugh advised plaintiff to settle the lawsuit by conveying the Madison Property back to Senior since the 2016 codicil would protect her. Plaintiff heeded McHugh's advice and reconveyed the property to Senior on October 14, 2016, and the litigation brought by Junior was terminated.

***4** Less than ten days later, on October 23, 2016, Senior passed away. Thereafter, Junior probated Senior's 2009 will and attested there were no codicils to that will. He then conveyed forty percent of the remainder interest in the Madison Property to 108 North Street LLC and kept the remaining interest.

Plaintiff filed a two-count complaint in the Chancery Division against defendants in March 2017, for a judgment compelling the probate of the January 14, 2016 codicil to Senior's will and the creation of a constructive trust, alleging Junior had probated only his father's last will and testament and "wrongfully attested that there were no [c]odicils to the [w]ill."

The court conducted a three-day bench trial in September and October 2019. The court heard testimony from eight witnesses: Goldstein; McHugh; plaintiff; DeMartino; Thurkauf; Deborah McKay, a secretary at McHugh's law firm; Cherray; and Junior.

Goldstein testified about the services he had provided for Senior. He explained that he had prepared Senior's 2003 will and revised 2009 will. He testified that Senior had never mentioned any codicils or the deeds to the Madison Property and Dover Property. He further testified about the advance medical directive he had prepared for Senior in 2015. In that regard, he explained he had spoken to Senior over the phone in the process of preparing that directive and Senior "sounded fine." Moreover, Senior sounded "lucid," and Goldstein believed Senior was legally competent to sign the directive when Goldstein had sent it to him.

McHugh testified about the services he had provided to plaintiff and his observations of plaintiff and Senior. He testified that his client was plaintiff, not Senior. During his meetings with plaintiff and Senior in 2005, McHugh did not see any indication that plaintiff was pressuring Senior to sign the 2005 codicil, nor did he observe Senior "express any reason why he would not be competent" to sign the codicil. McHugh further explained he was present for the signing of the 2016 codicil and Senior appeared "fine" and "he understood what he was signing." McHugh testified that the reference to the "February 9, 2006" codicil in the 2016 codicil was a typographical error. Further, McHugh explained Senior had not mentioned the revised 2009 will, which is why the 2016 codicil still referred to Senior's 2003 will. He also testified that he had given Senior the original 2016 codicil and Senior never indicated that he had revoked or torn up that codicil. Finally, McHugh testified that Senior's physical disability, rather than his mental capacity, was the justification for Senior's removal as trustee of plaintiff's supplemental needs trust.

Plaintiff testified about her experiences with McHugh and her relationship with Senior. She explained she had chosen Senior to help her with the properties because they got along very well and because she believed he was a trustworthy person. According to plaintiff, Senior's physical and mental conditions at the signing of the 2005 codicil, which she witnessed, were "[p]erfectly fine" and he "understood everything." Similarly, plaintiff testified that Senior's mental capacity was fine, "as always," when he signed the 2016 codicil. Moreover, she explained Senior had always told her that the Madison Property was hers and that he was willing to reconvey the property to her at any time. She explained Senior was "perfectly fine mentally" when he signed the

June 2016 deed reconveying the Madison Property, and Senior had not indicated to her that he had ever revoked or destroyed the 2016 codicil. Plaintiff further explained that Senior was removed as trustee of her supplemental needs trust because he was having problems physically. She explained he was "physically incapable," but fine mentally.

***5** DeMartino testified about the services he had rendered for Senior and his interactions with Senior and Junior. He explained that he had provided Medicaid planning services to Senior. He testified that he had discussed the Madison Property with Senior and explained it would be against Senior's interests to reconvey that property because it would violate the five-year look-back rule. Nevertheless, Senior had called DeMartino roughly ten times stating he wanted the property to be transferred back to plaintiff. Indeed, DeMartino recalled Junior had expressed frustration over Senior's desire to reconvey the Madison Property to plaintiff. Finally, DeMartino testified he would not have prepared the Caregiver Agreement for Senior if he did not believe Senior was competent to sign it. According to DeMartino, in March 2016, Senior was "cognizant of what he was doing."

Thurkauf, the notary public, testified about Senior's signing of the June 2016 deed. He explained that he, Senior, plaintiff, and another witness were all present for the signing. Thurkauf testified that before Senior signed the deed, Thurkauf had read the title of the deed and its general terms to Senior and asked Senior if he wished to sign it.

Another witness, McKay, who was a secretary at McHugh's law firm, testified about Senior's signing of the 2016 codicil, which she had witnessed. She testified Senior "seemed fine" and that she recalled "nothing abnormal" about the signing.

Cherray testified about her observations of Senior's health beginning in 2011, when she moved into Senior's home, until 2016, when Senior passed away. She explained that she noticed a definite decline in Senior's health during that time. She testified that Senior had trouble "getting around, walking" and he "seemed to have a lot of trouble making decisions." According to Cherray, conversations with Senior "increasingly became more difficult" over those five years because he "had trouble focusing." She testified Senior had Parkinson's disease and was diagnosed with dementia, although she could not remember when Senior received that diagnosis. She explained that she had helped Senior with his day-to-day needs by preparing meals for him and helping him around the house.

Cherray also testified about the evening of March 28, 2016. She explained that she and Junior had visited plaintiff at her home after Senior had asked them to talk to plaintiff about the Madison Property because he wanted plaintiff to stop asking him to reconvey the property to her. According to Cherray, plaintiff yelled and threatened them after they had explained it was not in Senior's best interest to reconvey the Madison Property.

Junior testified about his time living with Senior and his observations of Senior's health. He explained that he used to live in Florida but moved in with Senior in 2010 after he had visited Senior and witnessed him fall twice while doing yardwork. He testified that in 2010, Senior's mental capacity was not as good as it used to be but that it got much worse over the next several years. He explained Senior's cognitive abilities gradually declined until eventually they were "so far gone that you couldn't even hold a conversation with him because it would be a very tedious thing to keep him on ... topic. And he didn't quite have a good understanding of things." According to Junior, Senior couldn't "grasp reality" during the last two years of his life. Indeed, he explained Senior had been diagnosed with dementia and that Senior had spent the majority of the last year of his life in medical centers. Junior, however, conceded that all of those medical stays were for physical issues, not mental ones. Further, he admitted that a mental competency exam had been performed on Senior during one of those stays and Senior had passed the exam. [4]

***6** Junior further testified about his and Cherray's visit with plaintiff on the evening of March 28, 2016. He confirmed Cherray's account of the events and explained he had asked plaintiff not to have Senior reconvey the Madison Property because it would ruin Senior's Medicaid planning. When plaintiff informed him that she was still going to ask Senior to sign the deed reconveying the property, Junior restricted who could visit Senior at MHC. He explained he had restricted access based on advice he had received from DeMartino.

On April 25, 2022, the court entered a final judgment in favor of plaintiff, directing that a copy of the 2016 codicil be admitted to probate and defendants to reconvey the remainder interest in the Madison Property.

The court's decision was supported by an eleven-page statement of reasons. The court explained that after "watch[ing] and consider[ing] the testimony and demeanor of all witnesses," it had found "all credibility determinations favored [plaintiff's] position." In that regard, the court found plaintiff's testimony to be "most credible and compelling" and "consistent with the documentary evidence." The court also found McHugh, Goldstein, DeMartino, Thurkauf, and McKay to be credible, noting their testimony "corroborated each other, [plaintiff's] testimony, and the documentary evidence." By contrast, the court found the testimony of Junior and Cherray contradictory and "largely not credible." The court explained neither Junior nor Cherray had any explanation for the contradictory documentary evidence showing Senior was competent in 2016.

Regarding the 2016 codicil, the court found it satisfied the requirements of N.J.S.A. 3B:3-2 and, therefore, was valid. In that regard, the court explained McHugh had testified credibly and in detail about the codicil and Senior's testamentary capacity, and DeMartino had testified Senior contacted him approximately ten times in 2016 to ensure the Madison Property would be conveyed to plaintiff. The court concluded any errors regarding the date of the 2005 codicil and Senior's 2009 will did not revoke Senior's "unequivocal intent as expressed in the 2016 [c]odicil," which was "clearly executed" after Senior's 2009 will. Moreover, the court found the fact that the original 2016 codicil could not be located did not create a presumption that Senior had revoked the codicil. The court explained the "record was replete with testimony regarding the execution of the 2016 [c]odicil and its contents and the intent of both Senior and [plaintiff]."

The court also rejected defendants' contention that plaintiff had exerted undue influence over Senior. The court explained plaintiff and Senior never lived together and it was Junior who had a special relationship with Senior. In that regard, the court noted Junior had "power of attorney, and later an advance care directive and [the] caregiver agreement, regarding Senior." In short, the court found defendants had "failed to make a prima facie showing of undue influence."

Defendants appealed. The court submitted an amplification dated April 25, 2022, under Rule 2:5-1(b) in response to defendants' notice of appeal. The amplification stated, "[t]he court noted that it could not locate its file for this matter." In its amplification, the court clarified that its trial exhibits were incorrectly boxed with another trial file during the period of time court staff did not have access to the courthouse because of the COVID-19 Pandemic restrictions and resulting closure of the courthouses. The court, however, clarified that prior to making its decision, it was in possession of the entire file, including all evidence and its own trial notes.

II.

***7** We first address defendants' challenge to the validity of the January 14, 2016 codicil. Our review of a judgment entered following a non-jury trial is limited. See D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013); Accounteks.Net, Inc. v. CKR Law, LLP, 475 N.J. Super. 493, 503 (App. Div. 2023). "We may not overturn the trial court's fact[-]findings unless we conclude that those findings are 'manifestly unsupported' by the 'reasonably credible evidence' in the record." Balducci v. Cige, 240 N.J. 574, 595 (2020) (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)).

This court also "defer[s] to the credibility determinations made by the trial court because the trial judge 'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.' " Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). By contrast, "[the] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and are reviewed de novo. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

"[A] court's duty in probate matters is 'to ascertain and give effect to the probable intent of the testator.' " In re Prob. of Will & Codicil of Macool, 416 N.J. Super. 533, 539 (App. Div. 2010) (quoting Fid. Union Tr. v. Robert, 36 N.J. 561, 564 (1962)). Accordingly, the court must "look to the language of the will to determine if the testator expressed an intent as to how the property should be distributed." In re Est. of Hope, 390 N.J. Super. 533, 539 (App. Div. 2007). A will "includes any codicil and testamentary instrument that ... revokes or revises another will." N.J.S.A. 3B:1-2; see also Kennedy v. Mockler, 38 N.J. Super. 35, 48 (App. Div. 1955) (explaining that a codicil is a "republication of the will, as modified by the codicil itself").

"The findings of the trial court on the issues of testamentary capacity and undue influence, though not controlling, are entitled to great weight since the trial court had the opportunity of seeing and hearing the witnesses and forming an opinion as to the credibility of their testimony." Gellert v. Livingston, 5 N.J. 65, 78 (1950). The court's factual findings "should not be disturbed unless they are so manifestly unsupported or inconsistent with the competent, reasonably credible evidence so as to offend the interest of justice." In re Will of Liebl, 260 N.J. Super. 519, 524 (App. Div. 1992). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P., 140 N.J. at 378.

When analyzing whether the testator executed a will with the requisite testamentary capacity, the "gauge ... is 'whether the testator [could] comprehend the property he [was] about to dispose of; the natural objects of his bounty; the meaning of the business in which he [was] engaged; the relation of each of the factors to the others, and the distribution that is made by the will.' " Liebl, 260 N.J. Super. at 424 (quoting In re Livingston's Will, 5 N.J. 65, 73 (1950)). Nevertheless, there is a "presumption that 'the testator was of sound mind and competent when he [or she] executed [it]." Ibid. (quoting Haynes v. First Nat'l State Bank, 87 N.J. 163, 175-76 (1981)). Indeed, "the law requires only a very low degree of mental capacity for one executing a will." Ibid. (citation omitted); see also Livingston's Will, 5 N.J. at 77 (explaining that the testator's "absent-mindedness or forget-fulness [did] not disclose a lack of testamentary capacity"). "The burden of establishing a lack of testamentary capacity is on one who contests the will being offered for probate." In re Est. of Fisher, 443 N.J. Super. 180, 199 (App. Div. 2015).

***8** N.J.S.A. 3B:3-2(a) addresses the technical requirements for wills, providing a valid will must be:

> (1) in writing;
>
> (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and
>
> (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.
>
> [N.J.S.A. 3B:3-2(a).]

Here, the court found the 2016 codicil satisfied the requirements of N.J.S.A. 3B:3-2(a) because it was signed by Senior, two witnesses — McKay and Diane Sagendorf — and notarized by McHugh. Moreover, the court found Senior had possessed the requisite testamentary capacity.

Defendants contend the court's findings were erroneous, noting the original 2016 codicil could not be located, and the copy of the codicil does not refer to Senior's 2009 will but rather his 2003 will and a February 2006 codicil. They also argue Senior suffered from dementia and, therefore, did not possess the requisite testamentary capacity in 2016 when plaintiff sought for him to reconvey the Madison Property. In that regard, defendants rely on Junior and Cherray's testimony stating Senior had been diagnosed with dementia and argue that the May 5, 2016 letter sent by McHugh to Senior regarding Senior's removal as trustee of plaintiff's supplemental needs trust highlighted Senior's "incapacity and/or inability to act."

As a preliminary matter, we are satisfied the documentary evidence and testimony found credible by the court demonstrate the 2016 codicil satisfied the requirements of N.J.S.A. 3B:3-2(a). The codicil was signed by Senior and by two witnesses at the

offices of McHugh, and McHugh notarized the signatures. Although the codicil does not refer to Senior's 2009 will, McHugh testified that was simply because Senior had not mentioned to McHugh that he had updated his will since the execution of the 2005 codicil, which referred to Senior's 2003 will. McHugh also testified the codicil's reference to a February 2006 codicil was a typographical error and that there was, in fact, no February 2006 codicil. Even if these errors constituted deficiencies in the formality of a writing intended to serve as a will, we have dispensed with technical formalities to effectuate the testator's intent. See In re Est. of Ehrlich, 427 N.J. Super. 64, 72-74 (App. Div. 2012).

Here, Senior reviewed and signed the 2016 codicil at McHugh's offices well after execution of his 2009 will. Moreover, the testimony of DeMartino, Senior's attorney whom the court found credible, reflected Senior's intention for the Madison Property to be reconveyed to plaintiff. DeMartino testified Senior had called him approximately ten times in 2016 stating he wanted the Madison Property transferred back to plaintiff.

Further, the fact that the original 2016 codicil could not be located did not create a presumption that Senior had revoked it. See Ehrlich, 427 N.J. Super. at 75 ("[T]here is no requirement in N.J.S.A. 3B3-3 that the document sought to be admitted to probate must be an original."). As the court noted, there was no evidence presented indicating that Senior had revoked or destroyed the 2016 codicil. McHugh and plaintiff testified that Senior had never indicated to them that he had revoked the codicil. We therefore agree with the court that defendants' argument is without merit.

***9** We also disagree with defendants' contention the court erred by finding Senior had not lacked testamentary capacity to execute the 2016 codicil. Here, the court relied on the testimony of several witnesses, including DeMartino, who testified that he had spoken to Senior in the Spring of 2016, Senior had contacted him ten times in the hospital to ensure the Madison Property was conveyed back to plaintiff, and, importantly that he had had a conversation with Junior outside the hospital room "wherein Junior expressed his frustration with his father's wish to reconvey the Madison property to [plaintiff]." The court found DeMartino's testimony credible. We defer to the court's credibility determinations as to witnesses, and defendants have presented no basis for us to conclude otherwise. Gnall, 222 N.J. at 428.

Because the credible testimony of McHugh, McKay, Goldstein, and DeMartino establish Senior was mentally capable of executing a legal document in 2016, we see no reason to disturb the court's findings. Those witnesses all testified that Senior either sounded or appeared mentally capable around December 2015 and during the early months of 2016. Indeed, DeMartino testified he would not have prepared the Caregiver Agreement for Senior if he did not believe Senior was competent to sign it and Senior, in fact, signed that agreement in March 2016, just two months after he had signed the 2016 codicil. Further, the court noted defendants did not present any expert testimony regarding any medical diagnoses Senior may or may not have had.

Even more persuasive, the court found defendants' claim Senior lacked testamentary capacity to execute the 2016 codicil was "belied by the record." Despite Junior's and Cherray's testimony to the contrary, progress notes from MHC dated April 1, 2016, state that Senior had passed a mental competency exam and was "competent and able to make his own decisions regarding his medical, financial and all other decisions." Although Senior had been removed as trustee of plaintiff's supplemental needs trust, both McHugh and plaintiff testified the basis of that removal was Senior's physical health, not his mental health. In fact, Junior conceded that Senior's hospital stays during the last year of his life were all due to physical, not mental, issues.

Based on this record, we reject defendant's arguments and conclude the court's findings of fact and its determination regarding the validity of the 2016 codicil and Senior's testamentary capacity are supported by the competent, credible evidence in the record. Balducci, 240 N.J. at 595. Accordingly, we find no error in the court's judgment and direction that the January 14, 2016 codicil be admitted to probate.

We next address defendants' arguments as to undue influence. As noted, "[i]n any attack upon the validity of a will, it is generally presumed that 'the testator was of sound mind and competent when ... execut[ing] the will.' " Haynes, 87 N.J. at 175-76 (quoting Gellert, 5 N.J. at 71). A will "may be overturned" where it is "tainted by 'undue influence.' " Ibid. "Undue influence, to vitiate a will, must be operative at the time the will is executed." Gellert, 5 N.J. at 76.

In a challenge to the validity of a will, "undue influence" is defined as a "mental, moral or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets ...." In re Est. of Stockdale, 196 N.J. 275, 302-03 (2008); see also Haynes, 87 N.J. at 176. Undue influence "denotes conduct that causes the testator to accept the 'domination and influence of another' rather than follow his or her own wishes." Id. at 303 (quoting In Re Neuman, 133 N.J. Eq. 532, 534 (E. & A. 1943)).

***10** The analysis of an undue-influence claim is governed by well-established principles. The party challenging the will bears the burden of proving undue influence. In re Est. of Folcher, 224 N.J. 496, 512 (2016). However, where "the will benefits one who stood in a confidential relationship to the [testator] and there are additional circumstances of a 'suspicious character present which require explanation,' " Rittenhouse's Will, 19 N.J. 376, 378-79 (1955), a presumption of undue influence arises, and the burden of proof shifts to the proponent of the will "to overcome the presumption," Stockdale, 196 N.J. at 303, ordinarily by a preponderance of the evidence. See Haynes, 87 N.J. at 177-78 (explaining the preponderance of the evidence standard generally applies to undue-influence claims arising from challenges to a will). [5]

Applying the requisite standard, we are satisfied the court thoroughly reviewed the evidence and legal arguments in finding in plaintiff's favor and properly rejected defendants' assertions of undue influence and suspicious circumstances surrounding the execution of the 2016 codicil, finding defendants had failed to make a prima facie showing of undue influence. As previously stated, the court found the credible testimony of plaintiff and McHugh established that Senior willingly signed the codicil, and the testimony of several other witnesses proved it was Senior's intent for the Madison Property to be reconveyed to plaintiff. It was of no moment that McHugh, plaintiff's attorney, had prepared the codicil and that plaintiff stood to gain from the codicil's admission to probate. The competent, credible evidence in the record does not support defendants' contention that plaintiff and Senior were in a confidential relationship and that suspicious circumstances existed surrounding the execution of the 2016 codicil. As the court noted, plaintiff and Senior did not live together, and in fact, it was Junior who lived with his father. Senior did not rely on plaintiff for any of his day-to-day needs. Rather, it was Junior who, along with Cherray, had been living with Senior and had been helping Senior with his day-to-day needs. Junior also had power of attorney, an advance care directive and a Caregiver Agreement regarding Senior.

McHugh testified that in his interactions with plaintiff and Senior, he had never represented himself to be Senior's attorney and in fact, Senior had his own attorney prepare his estate-planning documents. McHugh also testified that the 2016 codicil did not represent a drastic change to Senior's will. Indeed, the 2016 codicil is quite similar to the 2005 codicil and focuses only on the Madison Property. Defendants' arguments are unsupported by the record and the court's determinations regarding undue influence are supported by credible testimony and documentary evidence.

Defendants next argue that any enforceable agreement between plaintiff and Senior regarding the disposition of the Madison Property did not satisfy the requirements of N.J.S.A. 3B:1-4, which governs contractual arrangements relating to death:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate ... can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.
>
> ***11** [N.J.S.A. 3B:1-4.]

We conclude the court correctly ordered the copy of the 2016 codicil be admitted to probate, and the codicil speaks for itself. The codicil stated it was the "only [c]odicil to [Senior's] Last Will and Testament dated February 6, 2003." It revoked Senior's codicil "dated February 9, 2006," and replaced it with the following:

> My sister, [plaintiff], conveyed her property in Madison, New Jersey to me during her lifetime, subject to a life estate retained by her. If I shall predecease her or upon my demise, I distribute ownership of that property, per capita and not per stirpes, to the living residuary beneficiaries in the Last Will and Testament of [plaintiff], namely, JOSEPH LO SAPIO, GABRIEL LO SAPIO, JR., NANCY SIBONA, VINCENT SIBONA, JR. and PATRICIA COREY.

Lastly, defendants argue the denial of a new trial will result in a "miscarriage of justice shocking to the conscience of the court." An appellant is entitled to a new trial when the denial of a new trial "would result in a miscarriage of justice shocking to the conscience of the court." Township of Manalapan v. Gentile, 242 N.J. 295, 305 (2020) (quoting Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011)). Our Court has described a "miscarriage of justice" as the "pervading sense of 'wrongness' existing 'in the reviewing mind.' " Baxter v. Fairmount Food Co., 74 N.J. 588, 599 (1977) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). We find no basis to support defendants' argument in this record.

In sum, defendants offer no support for their contention the court erred in its decision given the testimony of most of the witnesses, the court's credibility findings and the lack of evidence provided in support of defendants' arguments, including that defendants offered no expert testimony about Senior's lack of capacity or undue influence, and no witnesses to support their claims Senior did not want to reconvey the Madison Property to plaintiff. Defendants also fail to address the key underlying fact that plaintiff and her sibling, Senior, had entered into an agreement that included the conveyance of plaintiff's properties to assist plaintiff with her estate planning. Moreover, it is undisputed that Senior had previously acquiesced to plaintiff's request that he reconvey to her the Dover Property when plaintiff needed money in 2007, a fact that is indicative of Senior's understanding that although plaintiff had conveyed these properties to him, it was their agreement that Senior would reconvey the properties — both the Dover and Madison properties — to plaintiff at any time she requested that he do so. Johnson, 42 N.J. at 162. We, therefore, disagree with defendants' contention the court erred by denying their motion for a new trial and affirm the court's order providing for the admission of the 2016 codicil to probate.

To the extent we have not expressly addressed any of defendants' arguments, it is because we have found they are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

***12** Affirmed.

All Citations

Not Reported in Atl. Rptr., 2025 WL 37451

Footnotes

1 We were advised plaintiff passed away on December 24, 2023, during this litigation. The record does not disclose whether a motion for leave to file and serve an amended complaint was ever made to permit an Administrator Ad Prosequendum to pursue the action on behalf of plaintiff's estate. Pursuant to Rule 4:34-1(a), in the event of the death of a plaintiff, "the action does not abate."

2 To be eligible for Medicaid in New Jersey, an applicant must generally have $2,000 or less in resources. N.J.A.C. 10:71-4.5(c). ("[P]articipation in the program shall be denied or terminated if the total value of an individual's resources

exceeds $2,000."). 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 or her support and maintenance." N.J.A.C. 10:71-4.1(b). If an applicant has disposed of assets within five years of applying for Medicaid or becoming institutionalized in certain facilities, the individual is ineligible for Medicaid's institutional level benefits. N.J.A.C. 10:71-4.10(a). The transfer of an asset for less than fair market value during the look-back period raises a rebuttable presumption that the asset was transferred for the purpose of establishing Medicaid eligibility. H.K. v. Dep't of Hum. Servs., 184 N.J. 367, 380 (2005) (citing N.J.A.C. 10:71-4.10(j)); see also 42 U.S.C. § 1396p(c)(1). To rebut that presumption, the applicant must 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).

3 We refer to Cherray and other members of the LoSapio family by their first names because they share the same last name. We intend no disrespect.

4 Progress notes from MHC dated April 1, 2016, state staff at MHC informed Junior of Senior's competency exam results. The notes indicate Senior was "competent and able to make his own decisions regarding his medical, financial and all other decisions."

5 In Haynes, the Court otherwise noted the preponderance of the evidence standard does not apply, and instead, a "heavier burden of proof" applies to rebut a presumption of undue influence where "the presumption of undue influence is so heavily weighted with policy that the courts have demanded a sterner measure of proof than that usually obtaining upon civil issues." 87 N.J. at 178 (quoting In re Week's Est., 29 N.J. Super. 533, 539 (App. Div. 1954)).

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2024 WL 4759143
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF the ESTATE OF John J. MOONEY, deceased.
Claire J. Mooney, by and through her guardian, John A. Conte, Jr., Plaintiff-Respondent,
v.
Elizabeth Convery, Defendant-Respondent.
Mary Stachowiak, Appellant.

DOCKET NOS. A-1576-22, A-1577-22
|
Submitted October 23, 2024
|
Decided November 13, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket Nos. P-000407-20 and C-000178-20.

Attorneys and Law Firms

Hellring Lindeman Goldstein & Siegal LLP, attorneys for appellant Mary Stachowiak (Sheryl E. Koomer and Corrine B. Maloney, on the briefs).

Meyerson, Fox & Conte, PA, attorneys for respondent John A. Conte, Jr. (Erik Topp, on the briefs).

Helen C. Dodick, Acting Public Guardian, attorneys for respondent John D. Mooney, Office of the Public Guardian (Jonathan A. Pfoutz, on the statements in lieu of brief).

Before Judges Mayer and DeAlmeida.

Opinion

PER CURIAM

***1** In these appeals, calendared back-to-back and consolidated for purposes of this opinion, appellant Mary Stachowiak appeals from an October 28, 2022 order awarding legal fees and costs incurred in obtaining a July 8, 2022 judgment in favor of Claire J. Mooney, individually and as beneficiary of the Estate of John J. Mooney (Estate), against Elizabeth Convery. [1] In the October 28, 2022 order, the judge awarded the sum of $221,255.65, representing legal fees and costs for services provided by the law firm of Hellring Lindeman Goldstein & Siegal, LLP (Hellring firm), and the sum of $46,479.50, representing accounting fees and costs for services provided by Wiss & Company (Wiss) in representing Mary. However, the October 28, 2022 order directed the payment of the awarded fees and costs after Elizabeth's payment of the full judgment amount in favor of Claire and the Estate rather than from a fund in court per Rule 4:42-9(a)(2). Mary also appeals from a December 16, 2022 order denying her motion for reconsideration of the October 28, 2022 order. [2]

For the reasons that follow, we reverse and remand the portion of the October 28, 2022 order requiring payment of Mary's legal fees, accountant's fees, and costs to be paid by Elizabeth rather than a fund in court under Rule 4:42-9(a)(2). However, we affirm

the amount of the ordered fees and costs for work done by the Hellring firm and Wiss. Based on our decision reversing and remanding a portion of the October 28, 2022 order, we reverse the December 16, 2022 order denying reconsideration.

We recite the facts from the trial before the probate court judge. John J. Mooney (decedent) [3] and Claire J. Mooney (collectively, the Mooneys) were married and had five children who survived into adulthood. [4]

Decedent's will named Elizabeth and Mary as co-executrixes of the Estate. Decedent's will also designated Elizabeth and Mary as co-trustees of a testamentary trust (Trust) created for Claire's benefit. The Mooneys also granted powers of attorney to Elizabeth and Mary.

***2** Because she suspected Elizabeth improperly withdrew funds belonging to the Estate and Claire, Mary filed two separate actions: a probate action on behalf of the Estate, Docket No. P-407-20, and a chancery action on behalf of Claire, Docket No. C-178-20. Mary filed a verified complaint and an order to show cause (OTSC) in each action. The matters were not consolidated. However, the same judge handled both actions and presided over the eventual bench trial.

On October 7, 2020, the judge entered an order appointing respondent John A. Conte, Jr., Esquire as Claire's guardian ad litem and Daniel J. Jurkovic, Esquire as Johnny's guardian ad litem.

Just before Thanksgiving 2020, Elizabeth filed responsive pleadings in both actions. The Bergen County Surrogate's Office (Surrogate's Office) ordered Mary serve the complaints, OTSC, and responsive pleadings by regular and certified mail on all interested parties, including the Mooneys' grandchildren. As a result, Mary's counsel bore the significant costs associated with photocopying and mailing fifty sets of pleadings. [5]

Due to the extended Thanksgiving holiday weekend, the Hellring firm lacked office staff to photocopy fifty sets of voluminous pleadings. To meet the deadline imposed by the Surrogate's Office, the Hellring firm engaged an outside company to duplicate the pleadings. The cost of photocopying was $3,846.32. The cost of mailing the pleadings to all interested parties was $595.55.

In a December 4, 2020 order, the judge revoked the powers of attorney that allowed Mary or Elizabeth to make decisions on Claire's behalf. As of December 4, the judge ordered Conte to make all healthcare decisions for Claire. He also ordered Repetto to act as the Estate's administrator and trustee of the Trust.

Around the time of the litigations, Claire, age eighty-six, suffered from dementia. Before trial, Conte filed a guardianship action to have Claire adjudicated as an incapacitated person and designate him as the guardian of Claire's person and property. The judge granted Conte's guardianship application on February 26, 2021. Additionally, between December 2020 and April 2021, with Conte's approval, Mary advanced $18,638.01 of her own money to pay some of her mother's expenses because Conte was unable to access Claire's funds.

The judge conducted a three-day bench trial. At trial, Lawrence Chodor, an accounting expert with Wiss, testified regarding the Mooneys' financial accounts. Chodor explained how Elizabeth improperly accessed her parents' accounts to make cash withdrawals, write checks to herself and her family members, and pay her personal bills and expenses. Chodor also discussed credit card payments, Amazon purchases, automobile expenses, mortgage payments, and other fees paid by the Mooneys on behalf of Elizabeth and her family.

Relying on Chodor's testimony, the judge found Elizabeth improperly exercised undue influence over her parents, resulting in Elizabeth taking $684,578.02 of her parents' money for herself and her family. Consequently, the judge entered a July 8, 2022 judgment in favor of Claire and the Estate and against Elizabeth in that amount. In a July 8, 2022 written statement of reasons, the judge explained it was not "in the best interest of [Claire]" to reinstate Mary as the Estate's executrix or trustee of the Trust. The judge noted Repetto "acted appropriately throughout [the litigations] and there [was] no reason to cause

further disagreement between and among the Mooney family members." Nothing in the July 8, 2022 judgment altered Repetto's continued representation of the Estate and Trust.

***3** The judge advised that a determination regarding the payment of fees and costs incurred in the litigations would be addressed after the parties filed supplemental information. However, he expressed "concern[ ] about the impact of any such [fee] award on the amounts available for the future care of [Claire]." Due to this concern, the judge requested input on the fee issue from all parties, including Conte and Repetto. He also stated he would "advise if oral argument [would] be held."

A few weeks after entry of the July 8, 2022 judgment, the Hellring firm submitted a certification of services seeking fees and costs associated with lawsuits filed for the benefit of the Estate and Claire. Sheryl E. Koomer, Esquire of the Hellring firm requested reimbursement for 273.30 hours of legal work at an hourly rate of $460. Corinne B. Maloney, Esquire of the Hellring firm requested reimbursement for 239.45 hours of legal work at an hourly rate of $425 per hour. In total, the Hellring firm requested $227,484.25, representing legal fees incurred from July 15, 2020 through May 18, 2022. The Hellring firm also requested costs for the same time period in the amount of $15,348.27. Additionally, Mary sought reimbursement for accountant services provided by Wiss, specifically Chodor's fees and costs associated with the litigations, in the amount of $46,479.50.

Elizabeth and Jurkovic opposed Mary's application for fees and costs. Conte and Repetto did not file opposition.

On August 2, 2022, prior to the judge's disposition of Mary's motion for fees and costs, Elizabeth's attorney informed Conte that Elizabeth lacked funds to pay the judgment amount. Jurkovic, on Johnny's behalf, sent a letter to the judge advising "it appear[ed] there [would] be no recovery of actual funds under the judgment." Under the circumstances, Jurkovic suggested the judge not order Mary's fees and costs be paid from a fund in court as allowed under Rule 4:42-9(a)(2).

On October 28, 2022, without conducting oral argument, the judge determined Mary was entitled to recover fees and costs, but the fees and costs should be paid by Elizabeth and not the Estate. The judge issued an October 28, 2022 written statement of reasons in support of his awarded fees and costs. In an October 28, 2022 order, the judge awarded the Hellring firm a total of $221,255.65, including legal fees and costs, and $46,479.50 in expert accounting fees to Wiss.

Mary filed a motion for reconsideration. In support of her motion, Mary certified that her parents wanted Claire to remain in her own home and be cared for if Claire was unable to care for herself. Further, Mary certified she would take all action necessary to ensure her mother remained in her own home with appropriate care. She also requested oral argument on the reconsideration motion. The judge did not conduct oral argument.

While the judge concluded Mary successfully created a fund in court as a result of prevailing in the litigations, he declined to award fees payable from the fund in court under Rule 4:49-2(a)(2). The judge explained that depletion of the fund in court by payment of Mary's awarded fees and costs might impact the ability to pay for Claire's future care. The judge stated the Estate was required to be fully reimbursed by Elizabeth before Mary collected any awarded fees and costs. In a December 16, 2022 order, the judge denied Mary's reconsideration motion.

On appeal, Mary challenges the October 28, 2022 order requiring the payment of her fees and costs only after the Estate and Claire received payment of the awarded judgment, in full, from Elizabeth. She also appeals from the judge deciding her fee and cost application and reconsideration motion without conducting oral argument. Additionally, Mary challenges the denial of her request to be reappointed as the Estate's executrix and trustee of the Trust.

***4** We first consider Mary's argument that the judge erred in deciding she could not collect the awarded fees and costs from a fund in court until the entire judgment was recovered by Claire and the Estate. We agree.

Because he was concerned that payment of Mary's awarded fees and costs might result in "potentially depriving resources from [the] Estate for [Claire]'s care and maintenance," the judge ordered all funds toward the judgment to be paid to the Estate first, and only after the recovery of the full amount of the judgment, plus interest, should any fees and costs be paid to Mary.

In his statement of reasons denying reconsideration, the judge stated:

> The argument that [Mary] should be allowed to collect legal fees from [Elizabeth] before [Claire] and the Estate are made whole ... is contrary to [Mary's] professed intent to protect [Claire]. Collection of the Judgment will make [Claire] whole. It is unseemly and unnecessary that [Mary] compete with [Claire] to collect potential limited monies from [Elizabeth]. As such, the court, as a matter of equity, concludes that the Judgment in favor of [Claire] and the Estate be paid first. If [Mary] collects any funds from [Elizabeth] prior to full payment of the Judgment, such funds are to be used to care for [Claire]. There will be more than sufficient time for [Mary] to collect the legal fees and costs from [Elizabeth] after the Judgment is fully paid by [Elizabeth].

New Jersey courts follow the American Rule, requiring all parties pay their own counsel fees. However, there are a few exceptions to this rule, including recovery of counsel fees and costs associated with probate actions. In re Farnkopf, 363 N.J. Super. 382, 395 (App. Div. 2003). Rule 4:42-9(a)(2) permits the court, in its discretion, to award counsel fees in probate actions to be paid out of a fund in court. When an executor or trustee commits the "pernicious tort" of undue influence, reasonable counsel fees and costs should be awarded to the prevailing party. In re Niles Trust, 176 N.J. 282, 296-300 (2003).

"[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). Substantial deference is accorded a trial court's fee award in a probate action. See In re Prob. of Alleged Will of Hughes, 244 N.J. Super. 322, 328 (App. Div. 1990). In awarding fees, the court has "broad discretion," but not "unbridled discretion." In re Clark, 212 N.J. Super. 408, 416 (Ch. Div. 1986).

Mary contends it was inequitable for the judge to conclude she could not recover any awarded fees and costs until Elizabeth fully paid the judgment in favor of Claire and the Estate. Mary further asserts there is no case law supporting the judge's decision.

According to Mary, the judge's decision required her to pursue Elizabeth, at Mary's sole expense, before she could hope to collect the awarded fees and costs. Mary argues the judge cited the potential financial impact on the availability of funds to pay for Claire's future care in declining to order payment of Mary's fees and costs from a fund in court. Mary claims the judge disregarded her certification stating she would take all necessary action to ensure Claire would be cared for in her own home as her parents wished. Further, Mary asserts the judge overlooked the fact that Mary advanced her own personal money to pay Claire's expenses when Conte was unable to gain access to Claire's funds.

***5** Based on our review of the record, we are satisfied the judge abused his discretion in declining to allow Mary to collect the awarded fees and costs until after the Estate and Claire were made whole. Nothing in the record substantiated a potential impact on Claire's future care if Mary's awarded fees and costs were paid from a fund in court. Nor is there any evidence in the record reflecting the amount of money presently held by the Estate and the Trust. Additionally, the record is devoid of any findings regarding the annual costs associated with Claire's future care.

Here, there is no evidence in the record supporting the judge's concern that the payment of fees and costs awarded to Mary from a fund in court might negatively impact the ability to pay for Claire's future care. Consequently, we remand to the trial court to render fact findings relevant to the resources available for Claire's future care, including but not limited to the following

issues: the amount of the funds presently held by the Estate and the Trust; the annual cost of Claire's future care; and whether the payment of Mary's awarded fees and costs from a fund in court would negatively impact Claire's future care.

We next consider Mary's argument that the judge abused his discretion in declining payment of her awarded fees and costs from a fund in court.

Rule 4:42-9(a)(2) permits fees in probate matters to be paid out of a fund in court. A fund in court applies "when it would be unfair to saddle the full cost ... upon the litigant for the reason that the litigant is doing more than merely advancing his own interests." Henderson v. Camden Cnty. Mun. Util. Auth., 176 N.J. 554, 564 (2003) (quoting Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 168 (1960)). "[W]hen litigants through court intercession create, protect or increase a fund for the benefit of a class of which they are members, in good conscience the cost of the proceedings should be visited in proper proportion upon all such assets." Sarner v. Sarner, 38 N.J. 463, 469 (1962). "The term 'fund in court' is one of art." Id. at 467. A fund in court applies where a party's "actions have created, preserved or increased property to the benefit of a class of which he [or she] is a member." Ibid.

As we stated in Porreca v. City of Millville:

> We view Rule 4:42-9(a)(2) as encompassing, in essence, a two-step process. First, the court must determine as a matter of law whether plaintiff is entitled to seek an attorney fee award under the fund in court exception as articulated in Henderson. If the court determines plaintiff has met the threshold, it then has the "discretion" to award the amount, if any, it concludes is a reasonable fee under the totality of the facts of the case. See R. 4:42-9(a)(2) (stating that a "court in its discretion may make an allowance out of such a fund ...").
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> [419 N.J. Super. 212, 227-28 (App. Div. 2011).]

Here, the judge determined Mary satisfied Henderson because she litigated the matters for the benefit of all beneficiaries of the Estate, including Claire. The judge found Mary litigated the probate and chancery actions to recoup assets wrongfully taken by Elizabeth from the Estate and Claire and to protect against Elizabeth's continued depletion of the remaining assets held by the Estate and the Trust.

Because Mary met her burden under Henderson, the judge was required to perform the analysis set forth in Porreca. His discretion was limited to an award, if any, of fees and costs that he concluded were reasonable. The judge did not have the discretion to direct payment of the judgment in full before Mary could recover her fees and costs absent evidence that payment of the awarded fees and costs impacted Claire's future care.

***6** We next consider Mary's argument that the judge abused his discretion in reducing the amount of the fees and costs awarded. We disagree except as to overlooking the fees requested for the Hellring firm's deposition-related services on August 3, 2021 and denying reimbursement of photocopying and mailing costs incurred when Mary served the initial pleadings on all interested parties as directed by the Surrogate's Office.

The parties submitted documentation and certifications in support of, and in opposition to, the requested fees and costs. The judge undertook a thorough analysis of the certifications provided by the Hellring firm. The judge concluded the hourly rates requested by the Hellring firm attorneys were reasonable. However, as part of his detailed analysis, the judge found many of the billings for legal services were duplicative, excessive, or involved administrative matters. The judge noted more than one attorney frequently performed the same or similar tasks. He also found attorneys took a longer than reasonable amount of time to complete certain tasks.

Based on his comprehensive review, the judge determined the duplicate, excessive, and unnecessary administrative billings totaled $63,614.50, or approximately twenty-eight percent of the total requested counsel fee amount. Thus, the judge reduced fees requested by the Hellring firm by $63,614.50 to arrive at a fee award of $163,869.75.

Additionally, the judge disallowed certain requested costs, including $595.55 for postage and $3,846.32 for photocopies. The judge found the Hellring firm failed to provide sufficient support for these costs. As a result, the judge reduced the amount of costs awarded by $4,441.87, or approximately twenty-nine percent, to $10,906.40.

Regarding the fees and costs for the services provided by Wiss, the judge allowed the entire amount requested because Chodor's testimony was pivotal to the judge's finding Elizabeth improperly depleted the Estate. He awarded Mary $46,479.50 as reimbursement for Chodor's fees associated with his accounting testimony in the litigations.

The factors to be considered by a court in awarding attorney's fees are discussed in Rendine v. Pantzer, 141 N.J. at 334-35. Among the factors in awarding attorney's fees is the amount of the lodestar, which is the appropriate hourly fee multiplied by the number of hours reasonably expended. Ibid. Hours that are "excessive, redundant, or otherwise unnecessary" are to be excluded. Id. at 335.

As the Court stated in Rendine:

> [T]he trial court's determination of the lodestar amount is the most significant element in the award of a reasonable fee because that function requires the trial court to evaluate carefully and critically the aggregate hours and specific hourly rates advanced by counsel for the prevailing party to support the fee application. Trial court[ ]s should not accept passively the submissions of counsel to support the lodestar amount:
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> > Compiling raw totals of hours spent, however, does not complete the inquiry. It does not follow that the amount of time actually expended is the amount of time reasonably expended. In the private sector, "billing judgment" is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority. Thus, no compensation is due for nonproductive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time.
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> ***7** [Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980).]
>
> [Ibid. (citation reformatted).]

Rule of Professional Conduct (RPC) 1.5(a)(1)-(4) provides the following additional factors to be considered in determining the reasonableness of an attorney fee: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; whether acceptance of the employment precluded other employment by the lawyer; the fee customarily charged in the locality for similar legal services; and the amount involved and the results obtained.

We discern no abuse of the judge's discretion in determining the Hellring firm unnecessarily assigned multiple attorneys to complete various legal tasks. Although the judge allowed billing by more than one Hellring firm attorney for some tasks, we are satisfied the judge properly exercised his discretion in determining certain tasks required only one attorney.

Nor did the judge abuse his discretion in concluding certain billing entries from the Hellring firm were excessive, duplicative, or administrative. The judge rendered detailed findings in support of his reduction of fees requested by the Hellring firm. Because we discern no manifest abuse of discretion in the judge's reductions in the hours expended by various individuals at the Hellring firm as duplicative, excessive, or administrative, we decline to disturb the amount of the awarded fees.

However, based on our review of the record, it appears the judge overlooked time billed by the Hellring firm for preparing for and taking a deposition on August 3, 2021. According to the record, an attorney with the Hellring firm attended a deposition lasting more than five hours on that date. However, the judge did not award any fees associated with this deposition. Thus, we remand the issue for the judge to address the omission.

Mary also challenges the judge's rejection of her request to recover certain photocopying and mailing expenses. The Surrogate's Office required Mary serve the substantial pretrial submissions on all interested parties by a specific date. That date coincided with the extended Thanksgiving holiday weekend. Because the Hellring firm lacked staff to photocopy and prepare the voluminous submissions that weekend, counsel incurred significant photocopying and mailing charges to meet the deadline.

The judge requested Mary provide a detailed billing invoice associated with the photocopy and postage charges, and she did so. The judge found the Hellring firm failed to provide sufficient support for those expenses.

On her motion for reconsideration, Mary provided receipts related to the photocopy and postage charges. However, the judge overlooked these costs in his statement of reasons on reconsideration.

Rule 4:42-8 permits reasonable costs to be awarded to prevailing parties. Because the Surrogate's Office specified a date for mailing the pretrial submissions to all interested parties, which coincided with the long holiday weekend, we are satisfied the costs associated with the photocopies and postage were reasonable and the judge abused his discretion by failing to reimburse these costs.

***8** In summary, we affirm the judge's rejection of certain costs and fees associated with the Hellring firm's legal services as duplicative, excessive, or administrative. However, on the issue of fees associated with the Hellring firm attending a five-hour deposition on August 3, 2021, we remand the issue for the judge to award reasonable fees associated with this task. Additionally, regarding the costs associated with the photocopying and mailing of pretrial submissions to all interested parties as ordered by the Surrogate's Office, we reverse the judge's denial of reimbursement for those expenses.

Because we are remanding the issue of whether Mary may be paid out of a fund in court, we direct the judge to correct the omission regarding reimbursement for fees associated with the deposition on August 3, 2021 and disallowing recovery of costs associated with photocopying and mailing the pretrial submissions to all interested parties.

We next address Mary's argument that the judge abused his discretion in declining to conduct oral argument on the original fee application and her motion for reconsideration. Under Rules 1:6-2(d) and 5:5-4(a)(1), oral argument should be granted unless the matter involves pretrial discovery or is directly addressed to the calendar. Oral argument should be granted when "significant substantive issues are raised and argument is requested." Palombi v. Palombi, 414 N.J. Super. 274, 285 (App. Div. 2010) (quoting Mackowski v. Mackowski, 317 N.J. Super. 8, 14 (App. Div. 1998)). Denial of oral argument when a motion presents a substantive issue "deprives litigants of an opportunity to present their case fully to a court." Ibid. (quoting Mackowski, 317 N.J. Super. at 14).

Mary contends she was entitled to oral argument on her application. While there is no evidence in the record that Mary requested oral argument on her initial request for fees and costs, Mary requested oral argument on her reconsideration motion. The judge never articulated reasons for denying Mary's request for oral argument on the reconsideration motion. Additionally, if the judge had granted oral argument, Mary would have had an opportunity to address the judge's concerns.

We next address Mary's argument that the judge erred in declining to reinstate her as the Estate's executrix and trustee of the Trust. First, neither the July 8, 2022 judgment nor the October 28, 2022 order referred to a request by Mary to be reinstated in these fiduciary roles. Rather, in a footnote to his written statement of reasons in support of the July 8, 2022 judgment, the judge found it was not in Claire's best interest to reinstate Mary as executrix of the Estate or trustee of the Trust to avoid "further disagreement between and among the Mooney family members."

We review orders on appeal, not a judge's legal reasoning. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169 (App. Div. 2005). Nothing in the July 8, 2022 judgment or the October 28, 2022 order addressed Mary's request to be reinstated to her prior fiduciary positions. Thus, we decline to address the issue.

However, even if we considered Mary's argument on this issue, a judicial decision against reinstating her as the Estate's executrix or the Trust's trustee would not amount to an abuse of discretion. When the judge awarded fees and costs in his October 28, 2022 order, Mary became a creditor of the Estate. However, Mary was also a beneficiary of the Estate. Because of Mary's dual roles—creditor and beneficiary—her interests would have conflicted with the interests of the Estate's other beneficiaries.

In sum, we remand for a determination as to the Estate's assets, the costs and expenses associated with Claire's future care, and whether the Estate has sufficient funds to pay Mary's fees and costs from a fund in court prior to Elizabeth's satisfaction of the entire judgment in favor of Claire and the Estate. In addition, we affirm the judge's award of fees, but remand for the judge to correct the omission to consider the Hellring firm's August 3, 2021 billing entry. Further, we reverse and remand for the judge to award costs associated with the photocopying and mailing of the pretrial submissions to all interested parties.

***9** Affirmed in part, remanded in part, and reversed in part. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4759143

Footnotes

1 Because several individuals share the same last name, we refer to them by their first names. No disrespect is intended.

2 Mary also purports to appeal from a footnote in the judge's written decision issued with the July 8, 2022 order declining to reinstate her as the Estate's executrix. The removal of Mary and Elizabeth as co-executrixes for the Estate was the subject of a December 4, 2020 order. The December 4, 2020 order appointed David M. Repetto, Esquire to serve as the temporary administrator of the Estate and temporary trustee of a trust created for Claire's benefit. Repetto served in those capacities throughout the litigations.

3 John J. Mooney died on June 16, 2020. A few months prior to his death, decedent was adjudicated an incapacitated person and Elizabeth was appointed as his legal guardian.

4 The children are Mary, Elizabeth, Johnny, Kathleen, and Noreen. Johnny was adjudicated an incapacitated person. Noreen passed away in September 2021.

5 Each set of the pleadings contained 6,353 pages.

2024 WL 4038396
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF the ESTATE OF Allan D. YORKOWITZ, Deceased.

DOCKET NO. A-2835-22
|
Submitted August 27, 2024
|
Decided September 4, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Middlesex County, Docket No. 265728.

Attorneys and Law Firms

Charles C. Berkeley, attorney for appellant/cross-respondent Jeffrey Suckow.

Lindabury, McCormick, Estabrook & Cooper, PC, attorneys for respondent/cross-appellant Billy Perialis (Steven Backfisch and Donald C. Pierce, of counsel and on the brief).

Before Judges DeAlmeida and Marczyk.

Opinion

PER CURIAM

***1** Defendant Jeffrey Suckow appeals from the Chancery court's orders dated November 3 and 9, 2021, February 15, 2022, and February 8, 2023. Plaintiff Billy Perialis cross-appeals from the court's February 8, 2023 and April 13, 2023 orders. Based on our review of the record and the applicable legal principles, we vacate the orders on appeal and remand for proceedings consistent with this opinion.

I.

Decedent Allan Yorkowitz died testate on May 28, 2019. In July 2019, the Middlesex County Surrogate admitted decedent's will to probate and issued Perialis letters testamentary. Yorkowitz's August 2018 will devised certain real estate to Perialis and named him executor of the estate. Suckow was the sole residuary beneficiary under Yorkowitz's will. In September 2019, Perialis filed a verified complaint seeking to admit Yorkowitz's handwritten codicil, dated February 24, 2019, to probate. In November 2019, Suckow filed a caveat to the codicil. The disputed codicil provided, among other bequests, that Perialis's family would receive $500,000 in cash from the estate.

Following a three-day trial in July 2021, the court issued an order voiding the codicil, finding it was the result of undue influence exerted by Perialis upon Yorkowitz. Although the court determined the codicil was authored by the decedent and was written with testamentary intent, it found Perialis failed to meet his burden to overcome the presumption of undue influence.

Suckow subsequently moved to remove Perialis as executor and direct that Perialis reimburse the estate for commissions, counsel fees, and costs paid on his behalf from the estate. On November 3, 2021, the court denied Suckow's request to remove

Perialis as executor, finding the estate was "mostly settled, and removing and replacing an executor would create unnecessary expenses" for the estate. The court further denied Suckow's request for Perialis to reimburse the estate for his commission and counsel fees. The court also determined both parties' counsel fees and litigation costs would be paid by the estate. On November 9, 2021, the court amended the order adjusting certain dollar amounts set forth in the November 3, 2021 order.

In December 2021, Suckow moved for reconsideration of the November 9, 2021 order. On February 15, 2022, the court denied the application. The court amended the amounts for counsel fees payable to Perialis's attorneys, David Foltz and Joseph Triarsi. The court also ordered the estate to bear the costs related to Perialis's medical expert, Dr. Samuel Herschkowitz, and his handwriting expert, John Paul Osborn. The court further ordered Perialis to file a formal accounting when the estate was closed.

In August 2022, Perialis filed a formal accounting with the Surrogate's Office. In September 2022, Perialis filed a verified complaint to settle the formal accounting. Suckow filed an answer, exceptions, and a counterclaim in November 2022. On February 8, 2023, the trial court entered an order denying the commission payable to Perialis and a portion of the counsel fees paid to Perialis's attorney Triarsi. The court also denied reimbursement for Perialis's expert Dr. Herschkowitz. The court, however, allowed fees payable to Perialis's handwriting expert Osborn. Moreover, despite Suckow's application asking the court to deny Foltz's attorney fees, the court ordered that Foltz's attorney fees were to be paid. The court did not provide a statement of reasons for the February 8, 2023 order.

***2** Perialis moved for reconsideration of the February 8, 2023 order. The court rendered an oral decision, described more fully below, denying Perialis's motion. The decision was embodied in the court's April 13, 2023 order.

II.

The issues before us on this appeal and cross-appeal are confined to the trial court's allocation of the parties' counsel fees, expert fees, and the court's disallowance of Perialis's executor commission.

In a will contest, the allowance of counsel fees and costs under Rule 4:42-9(a)(3) [1] is discretionary. Rendine v. Pantzer, 141 N.J. 292, 317 (1995). "[F]ee determinations by trial [judges] will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine, 141 N.J. at 317). Similarly, the allowance of commissions under N.J.S.A. 3B:18-13 and -14 is a discretionary determination which will not be disturbed unless there has been an abuse of discretion. See In re Est. of Moore, 50 N.J. 131, 149 (1967). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

A.

Suckow argues the court erred by declining to direct Perialis to reimburse the estate for all counsel fees and costs incurred for the litigation regarding the codicil that was voided based upon the court's finding of undue influence. Suckow contends the court erred by not properly applying In re Will of Landsman, 319 N.J. Super. 252 (App. Div. 1999), and In re Niles Trust, 176 N.J. 282 (2003). Suckow asserts that given the court's determination the codicil was the result of undue influence, Perialis attempted to expand his beneficial interest in the estate beyond what he received under the will. Therefore, he argues Perialis should be responsible for payment of all counsel fees and costs incurred by the parties as a result of the litigation that ensued. Because of the financial damage Perialis caused the estate by litigating over the codicil, Suckow maintains it was not equitable that the trial judge refused to direct Perialis to reimburse the estate for all counsel fees and expert costs incurred.

Accordingly, Suckow requests that we reverse the trial court's determination and require Perialis to reimburse the estate for: 1) counsel fees and costs in the sum of $88,215.67 paid to David Foltz, Esq., for the codicil litigation; 2) counsel fees and costs in the sum of $98,551.87 paid to Karen K. Saminski, Esq., for the codicil litigation; 3) counsel fees and costs in the sum of $77,343.75 paid to Charles Berkeley, Esq.; and 4) $2,800 paid to Perialis's handwriting expert Osborn.

***3** Perialis counters that the trial court properly exercised its discretion in ordering the parties' legal fees and costs to be paid from the estate. He asserts Suckow misconstrues the holdings of Landsman and Niles, and that neither case created a brightline rule that would divest the trial court of discretion when a codicil is voided due to undue influence. Perialis contends that Suckow is seeking a remedy "tantamount to charging the losing part[y] with the prevailing part[y's] counsel fees," Niles, 176 N.J. at 296, which Perialis claims is contrary to New Jersey's public policy against fee-shifting and our courts' adoption of the " 'American Rule,' which prohibits recovery of counsel fees by the prevailing party against the losing party" unless authorized by statute, court rule, or contract. In re Est. of Vayda, 184 N.J. 115, 120 (2005) (quoting Niles, 176 N.J. at 294). He maintains the court properly shifted the fees of all parties to the estate under Rule 4:42-9(a)(3). Perialis asserts the trial court properly distinguished Niles because Perialis, unlike the parties in Niles who unduly influenced the decedent, was not a stranger to the testator and did not carry out a scheme to place himself into a position to seize control of his assets. See Niles, 176 N.J. at 286. He notes decedent empowered him under his will, and there was no finding that he used his undue influence to become the estate's executor.

Perialis further asserts the court properly exercised its discretion in permitting the parties' legal fees to be paid from the estate and that the court properly distinguished the Landsman case because the court found that this was a "well-contested matter." See Landsman, 319 N.J. Super. at 252. Because the court found that both parties had reasonable cause for contesting the validity of the codicil, and that Perialis was obligated to bring the codicil to the Surrogate's attention, the court noted the "[l]itigation involved more than just a claim for undue influence," as Suckow had also challenged whether the decedent wrote the codicil and whether it was intended to express testamentary intent. In short, he notes the court properly applied Rule 4:42-9(a)(3) and rationally explained its finding that both Niles and Landsman were distinguishable.

B.

Perialis asserts in his cross-appeal that the trial court abused its discretion when it disallowed his executor commission, a portion of the estate's legal fees, and the fees for Dr. Herschkowitz in its February 8 and April 13, 2023 orders. He contends the court failed to provide an adequate statement of reasons and that its holding was inconsistent with earlier rulings on the same issue which approved the very same costs. He asserts there was "always going to be a fight over the [c]odicil," and whether the codicil was submitted initially with the will in July 2019, or separately in September 2019, was inconsequential. Perialis emphasizes the trial court had previously determined it was reasonable for him to bring the codicil to the Surrogate's attention and that he had an obligation to do so.

Perialis asserts the trial court acted arbitrarily in disallowing his executor commission contrary to the thorough and well-reasoned decision initially entered on February 15, 2022. He contends it was "incongruent" for the court to say that Perialis had an obligation to bring the codicil to the Surrogate's attention, but at the same time, penalize him for doing so. Moreover, the court noted Perialis's actions were done at the advice of his attorney at the Triarsi law firm. He further contends the court did not square its ruling that his undue influence was "significant" with its earlier findings that his conduct did not rise to the level demonstrated in Niles or Landsman or the court's prior finding Yorkowitz had not been "maliciously deceived" or defrauded.

Perialis next contends the court failed to provide adequate findings of fact when it disallowed a portion of the estate's legal fees and the fees for Dr. Herschkowitz. He asserts there is no explanation as to why the court allowed fees for his handwriting expert but not for his medical expert. He further contends the court gave an insufficient explanation for disallowing counsel fees to the Triarsi firm. Rather, the court simply stated the Triarsi firm's fees exceeded "the agreed amount to represent the [e]state." He contends the court did not provide a specific finding regarding any retainer agreement. He notes the retainer stated, "[a]t this time, it is impossible to tell exactly how much time and effort will be required," but that the fees would be capped at three

percent of the total gross estate. The cap provision, however, was qualified by the disclaimer: "[i]f there is no litigation ... or other complications, which require an abnormal amount of work." Perialis states that the Triarsi firm reasonably exceeded the three-percent cap given the involved litigation regarding the codicil.

***4** Suckow maintains the court properly exercised its discretion by disallowing Perialis's commission, the Triarsi firm's additional fees, and the expert fees of Dr. Herschkowitz.

C.

We begin by observing that Rule 1:7-4(a) requires that "[t]he court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right ...." Findings of fact and conclusions of law are also required "on every motion decided by [a] written order[ ] ... appealable as of right." Schwarz v. Schwarz, 328 N.J. Super. 275, 282 (App. Div. 2000) (quoting R. 1:7-4(a)). Without a statement of reasons, "we are left to conjecture as to what the judge may have had in mind." Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990). "Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Ibid.

To be sure, a trial court may revisit its prior interlocutory decisions. "[W]here ... litigation has not terminated, an interlocutory order is always subject to revision where the judge believes it would be just to do so." Lombardi v. Masso, 207 N.J. 517, 536 (2011). "[T]he trial court has the inherent power, to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987). However, "once the judge has determined to revisit a prior order, he needs to do more than simply state a new conclusion. Rather, he must apply the proper legal standard to the facts and explain his reasons." Lombardi, 207 N.J. at 537. The issue before us is that the court's rationale for its decision to deny Perialis's commission, Triarsi's counsel fees, and the expert fee of Dr. Herschkowitz was either not adequately explained, or it appears to undermine the court's prior decision —also before us on appeal—to allow for Perialis's attorney Foltz and expert Osborn to be paid by the estate.

We are mindful of the time and effort the court expended in the underlying trial and the multiple post-trial applications. However, the court did not provide sufficient reasons for portions of its decision and did not reconcile certain aspects of its February 8 and April 13, 2023 decisions with its prior rulings in this matter.

We cannot determine the court's rationale for denying reimbursement of the expert fee for Dr. Herschkowitz. The February 8, 2023 order denying his fees did not contain a statement of reasons. The subsequent motion for reconsideration also did not address the reason for denying Dr. Herschkowitz's fee. Moreover, it is not clear why the court granted Perialis's request for fees associated with his handwriting expert Osborn but not for Dr. Herschkowitz.

Next, in initially approving Perialis's commission, Foltz's and Triarsi's counsel fees, and reimbursement for Perialis's handwriting and medical experts in its oral opinion in February 2022, the court minimized the significance of its undue influence finding against Perialis at trial. The court "found ... both parties had reasonable cause for contesting the validity of the ... codicil." It further noted the matter was "well[-]contested," and it determined it was "appropriate that the legal fees of both [parties] be paid out of the estate pursuant to Rule 4:42-9(a)[(3)]." In distinguishing Niles and Landsman, the court noted the "[l]itigation involved more than just a claim for undue influence" and also involved the authenticity of the codicil and "whether it was intended to be a codicil."

***5** The court also determined "it was reasonable" for Perialis to have brought the codicil to the court's attention. The court found Perialis's conduct did not justify having him pay for Suckow's attorney fees or bearing his own attorney fees. Importantly, the court noted, "[d]espite the [c]ourt['s] finding that [Yorkowitz was] ... undu[ly] influence[d] ... the [c]ourt did not find [Yorkowitz]

to be maliciously deceived or [subject to] fraudulent [conduct].” It noted Perialis's actions were “clearly distinguishable from the [elaborate] schemes [perpetrated] by the parties in Niles and Landsman.”

However, in addressing Perialis's motion for reconsideration of the court's February 8, 2023 order denying Perialis's commission, certain fees for the Triarsi firm, and the expert fee for Dr. Herschkowitz, the court noted in its March 2023 oral opinion that it had an “opportunity to reflect on what actually transpired.” The court noted there was “quite a bit of waste and damage to the estate as a result of ... Perialis’[s] behavior. The ... undue influence ... was very significant and ... actually triggered the whole litigation, and ... this [c]ourt found very troubling ... the misrepresentation on the part of ... Perialis to the [S]urrogate's office.” The court further observed Perialis's “behavior generated really costly waste to the estate,” and it could not find he was entitled to his commission based on the undue influence finding and his misrepresentation. The oral opinion did not discuss the Triarsi firm, but the order noted the firm's additional counsel fees were denied “as the fees exceed[ed] the agreed amount to represent the [e]state.”

“When a trial court makes mutually contradictory findings of fact, it creates doubt in appellate disposition as to the applicable finding thus requiring reversal when the contradictory findings are implicated in the trial court's ultimate disposition of the matter.” Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:7-4 (2024) (citing State in the Int. of D.M., 238 N.J. 2, 22 (2019)). Here, the court did not adequately set forth a basis for its ruling. We cannot reconcile the court's February 2022 findings with its March 2023 findings. We are therefore constrained to remand for the court to provide a proper statement of reasons pursuant to Rule 1:7-4 for the various orders on appeal in this matter. To the extent the court changed its mind regarding the significance of its finding that Perialis unduly influenced Yorkowitz and the conduct of Perialis and the Triarsi firm in delaying the submission of the codicil on both the award of Perialis's commission and Triarsi's fees, we cannot determine the impact, if any, on its prior decision allowing for Foltz's and Triarsi's fee reimbursement from the estate. We also cannot discern whether the court continues to believe that Niles and Landsman are “clearly distinguishable.” Nor can we determine why the court ordered reimbursement for one of Perialis's experts but not the other.

In short, the court should specifically address anew—in the context of first clarifying its seemingly inconsistent findings regarding the relative significance and impact of its undue influence finding—the reasons for allowing or disallowing the various counsel fees, expert costs, and Perialis's commission. Our decision remanding this matter should not be construed as an opinion on the merits of either party's arguments.

Vacated and remanded for proceedings in accordance with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4038396

Footnotes

1 Rule 4:42-9(a)(3) provides that in a probate action, “[i]f probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate.” In accordance with this rule, courts may allow counsel fees to the contestant in a will dispute “[e]xcept in a weak or meretricious case.” In re Prob. of Will & Codicil of Macool, 416 N.J. Super. 298, 313 (App. Div. 2010) (alteration in original) (quoting In re Reisdorf, 80 N.J. 319, 326 (1979)).

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2024 WL 4824372
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Anthony P. VOLPE, M.D., individually and as guardian of the person and property of Mary T. Volpe, Plaintiff-Appellant,
v.
FEENEY AND DIXON, LLP, and Joseph Volpe, Defendants-Respondents,
and
Frank Volpe, Olivia Vetrano, and John Volpe, Defendants.

DOCKET NO. A-1364-22
|
Argued October 23, 2024
|
Decided November 19, 2024

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3706-18.

Attorneys and Law Firms

Scott B. Piekarsky argued the cause for appellant (Offit Kurman, PA, attorneys; Scott B. Piekarsky, of counsel and on the briefs).

Benjamin J. DiLorenzo argued the cause for respondent Feeney & Dixon, LLP (Bressler, Amery & Ross, attorneys; Diana C. Manning and Benjamin J. DiLorenzo, on the brief).

Gary Wm. Moylen argued the cause for respondent Joseph Volpe.

Before Judges Rose and Puglisi.

Opinion

PER CURIAM

***1** This appeal arises from a protracted and contentious dispute among siblings. After he was appointed guardian of their mother, Mary T. Volpe, plaintiff Anthony P. Volpe, M.D., individually, and on her behalf, filed the present Law Division action for conversion and fraud against all but one of his siblings (individual defendants) and Feeney and Dixon, LLP (F&D), the law firm that represented his parents in the April 2017 sale of their home. The complaint also asserted a legal malpractice claim against F&D. Pertinent to this appeal, Mary died while the present action was pending. [1]

Plaintiff now appeals from a December 12, 2022 Law Division order, denying reconsideration of two June 24, 2022 orders that granted the summary judgment dismissal of his amended complaint against defendants Feeney and Dixon, LLP (F&D) and Joseph Volpe. [2] The motion judge determined, upon Mary's death, plaintiff lacked standing to act on her behalf and his individual claims were not supported by the facts alleged in the complaint. The judge also rejected plaintiff's malpractice claim against F&D on the merits. After de novo review of the motion record, Comprehensive Neurosurgical, P.C. v. Valley Hosp., 257 N.J. 33, 71 (2024), we affirm.

I.

Although the motion record is voluminous, the pertinent events are easily summarized. We therefore highlight the relevant facts in the light most favorable to plaintiff as the non-moving party. See ibid.

In June 2016, Mary and her husband, the parties' father, John Volpe, Sr., were moved into a nursing home after Mary suffered a fall in their Nutley home.[3] Thereafter, Vetrano, Joseph, and Frank moved their parents to Vetrano's home in Manahawkin. Plaintiff opposed the move, opining his mother needed full-time care.

In February 2017, Frank retained F&D to assist in the sale of his parents' Nutley home. There is no evidence to suggest F&D ever met with, or spoke to, Mary or John Sr. Instead, F&D prepared durable powers of attorney (POA), permitting Frank to facilitate the sale as his parents' attorney-in-fact. The POAs gave Frank broad power to conduct affairs on his parents' behalf, including to "sell and convey real or personal property" and "deposit and withdraw funds" from their bank accounts. The POAs are dated February 17, 2017, signed by Mary and John Sr. before two witnesses, and notarized. Frank presented the executed POAs to F&D at a later date. It is undisputed that F&D did not witness or otherwise participate in the execution of the POAs.

***2** Pursuant to the POAs, Frank signed the contract of sale for his parents' home on February 23, 2017, and executed the closing documents after the sale in April 2017. The proceeds were made payable to John Sr. and Mary and deposited into their joint bank account, over which Frank had access.

Concerned about Mary's healthcare while she resided in Vetrano's home, and her capacity to execute the POA, plaintiff and his brother, Michael Volpe, filed a petition for guardianship in the Chancery Division in June 2017.[4] Following receipt of the report of Mary's court-appointed attorney, in February 2018, the Chancery judge entered a judgment of incapacity and appointed plaintiff guardian of Mary and her estate. Among other provisions, the guardianship judgment revoked Mary's prior POAs and permitted plaintiff to file a Medicaid application on Mary's behalf.

Plaintiff filed his initial complaint in May 2018 and an amended complaint the following month, adding factual allegations. Plaintiff asserted the individual defendants misappropriated "large sums" of Mary's funds "without proper authorizations for their personal use" while Mary was living with Vetrano. Further, plaintiff alleged F&D failed to verify the POAs' validity, enabling the individual defendants to sell their parents' home.

In January 2019, plaintiff applied for Medicaid benefits on Mary's behalf. Medicaid approved the application in September 2020, but placed a $108,168 lien on Mary's estate. Plaintiff agreed to make a voluntary payment toward the lien if the present lawsuit resolved in his favor.

On March 31, 2021, Mary died leaving no assets in her estate. Thereafter, plaintiff sought to probate a will Mary executed on March 24, 1997. The will bequeathed Mary's estate to John Sr., but provided should John Sr. predecease Mary, her estate would pass to all her children. Unbeknownst to plaintiff, twenty years later, on March 23, 2017, Mary executed another will: revoking the 1997 will; removing plaintiff and Michael as beneficiaries; removing plaintiff as an executor; and naming Joseph, Frank, John Jr., and Vetrano as co-executors of Mary's estate.

Plaintiff filed a complaint in probate court in August 2021, seeking among other relief, to: serve as the temporary administrator of Mary's estate; continue the present lawsuit; invalidate the 2017 will based on Mary's "lack of capacity or as the product of undue influence"; and admit the 1997 will to probate. Having failed to prevail in the will contest, plaintiff is not the personal representative of Mary's estate.

After the close of discovery, F&D and Joseph separately moved for summary judgment, asserting Mary's death terminated plaintiff's standing to pursue any claims on his mother's behalf as the guardianship terminated as a matter of law upon her death. F&D further argued it owed no duty to plaintiff.

Following oral argument, the motion judge issued cogent statements of reasons that accompanied the June 24, 2022 orders granting summary judgment. The judge squarely addressed the issues raised in view of well-established legal principles. The same judge thereafter denied plaintiff's reconsideration motion after hearing argument. The judge issued a well-reasoned rider and memorializing order on December 12, 2022. [5]

***3** On appeal, plaintiff maintains he had standing to sue on Mary's behalf because as her guardian, he was obligated to continue "to account for [her] funds and assets" after her death according to N.J.S.A. 3B:12-64(b), especially in view of the Medicaid lien against her estate. He also argues he had standing to sue F&D in his individual capacity because "it was foreseeable" he would rely on F&D's advice or be affected by the firm's work. Citing various factual "disputes" among the parties, plaintiff claims summary judgment was prematurely granted. Plaintiff asserts no specific challenges to the judge's reconsideration determination.

We review a decision on summary judgment employing the same standard as the motion court. We therefore review the record to determine whether there are material factual disputes and, if not, whether the undisputed facts viewed in the light most non-moving party, nonetheless entitle the movant to judgment as a matter of law. Comprehensive Neurosurgical, 257 N.J. at 71; see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995); R. 4:46-2(c). We owe no deference to the trial court's legal analysis. Comprehensive Neurosurgical, 257 N.J. at 74.

Based on our de novo review of the record, we reject plaintiff's argument that he had standing to pursue the present action following Mary's death. Simply stated, a guardian's authority and responsibility terminate upon the death of the ward. N.J.S.A. 3B:12-64(a)(2); see also Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 153 (2002) (concluding the guardian had standing to file a divorce complaint on the ward's behalf, but lacked standing to sign the final consent judgment of divorce because the ward's death during the pendency of the litigation terminated the guardianship).

Further, following the ward's death, the decedent's personal representative – not the guardian – is conferred with the same standing as the decedent to sue and be sued on all claims that survive death. N.J.S.A. 3B:10-25; see also N.J.S.A. 3B:1-2 (including executors and administrators within the definition of "[p]ersonal representative"). We conclude, as did the motion judge, plaintiff – who was not appointed Mary's personal representative following her death – lacked standing to pursue her complaint upon her death.

Nor are we convinced by plaintiff's contention that his duty as guardian to account for Mary's assets after her death conferred a right to pursue the complaint, individually and on her behalf, notwithstanding the termination of the guardianship by operation of law. A guardian's powers and duties following the ward's death are limited. Specifically, "termination does not affect the guardian's liability for prior acts, nor the guardian's obligation to account for funds and assets of the ward." N.J.S.A. 3B:12-64(b). "Upon termination of the guardianship, pursuant to N.J.S.3B:12-64 the guardian, after the allowance of his final account, shall pay over and distribute all funds and properties of the former ward or to the estate of the former ward in accordance with the order of the court." N.J.S.A. 3B:12-63; see also Gay v. Stengel, 61 N.J. Super. 411, 420 (App. Div. 1960) (holding the death of the ward "terminated the powers and duties as guardian, except to account and turn over to [the ward's] personal representative the balance remaining in his hands after the accounting had been approved by the Chancery Division").

Although Mary's death did not absolve plaintiff from liability for a final accounting and distribution of her remaining funds to her personal representative under N.J.S.A. 3B:12-64(b), the statute did not confer authority to pursue the present action as her guardian. Nor did plaintiff's obligation to account to Medicaid on Mary's behalf during the guardianship confer an individual right of standing upon plaintiff following Mary's death. Any claim to recover or expend funds must be made by the executor

or personal representative of Mary's estate. See N.J.S.A. 3B:10-25; N.J.S.A. 3B:1-2; see also R. 4:26-1 (stating the "real party in interest" must bring a claim before the court).

***4** We also reject plaintiff's argument that he had standing to sue F&D in his individual capacity because "it was foreseeable" he would rely on F&D's advice or be affected by the firm's work. Similar to the motion judge, we conclude the record is devoid of any evidence establishing a duty of care by F&D.

To present a prima facie legal malpractice claim, a plaintiff must establish "(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of damages the damages claimed by the plaintiff." Jerista v. Murray, 185 N.J. 175, 190-91 (2005) (quoting McGrogan v. Till, 167 N.J. 414, 425 (2001)). The imposition of a duty to a non-client is construed narrowly. See Green v. Morgan Props., 215 N.J. 431, 458 (2013) (holding "the grounds on which any plaintiff may pursue a malpractice claim against an attorney with whom there was no attorney-client relationship are exceedingly narrow").

Whether a legal duty exists is a matter of law for the court to decide. Petrillo v. Bachenberg, 139 N.J. 472, 479 (1995). In making this determination, "the court must identify, weigh and balance the following factors: the relationship of the parties; the nature of the attendant risk; the opportunity and ability to exercise care; and the public interest in the proposed solution." Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 73 (App. Div. 2000); Est. of Fitzgerald v. Linnus, 336 N.J. Super. 458, 473 (App. Div. 2001) (finding that whether a duty extends to a non-client is "necessarily fact-dependent"). The ultimate question is one of fairness. Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 213 (App. Div. 2014).

We have recognized "[p]rivity between an attorney and a non-client is not necessary for a duty to attach 'where the attorney had reason to foresee the specific harm which occurred.' " Ibid. (quoting Est. of Albanese v. Lolio, 393 N.J. Super. 355, 368-69 (App. Div. 2007)). In limited circumstances, a duty to a non-client has been found when the attorney knew, or should have known, the non-client would rely on the attorney's representation and the non-client was "not too remote from the attorneys to be entitled to protection." Ibid. (quoting Petrillo, 139 N.J. at 483-84).

For example, we have imposed third-party liability on attorneys for negligent acts or omissions when third-party reliance on such acts was foreseeable. See, e.g., Atl. Paradise Assocs., Inc. v. Perskie, Nehmad & Zeltner, 284 N.J. Super. 678, 685-86 (App. Div. 1995) (recognizing a cause of action by the plaintiff-purchasers against the defendant law firm where the plaintiffs relied on misrepresentations in public offering statement). As the Court has made clear, however, if the attorney does nothing to induce reliance by a third party, there is no relationship between the attorney and non-client. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 181 (2005).

In the present matter, there is no basis for plaintiff's legal malpractice claim against F&D. The law firm neither represented plaintiff nor undertook any action to induce his reliance in the performance of its representation of Mary. At deposition, plaintiff acknowledged he never spoke with anyone from F&D. He was not involved in the sale of the Nutley home and he had no interest in the sale proceeds, which were paid to Mary and John Sr. The harm plaintiff alleges in his individual capacity are costs for Mary's medical care, which he rendered voluntarily, and legal fees in the ensuing actions he brought. As plaintiff is "too remote" from F&D "to be entitled to [their] protection," Lolio, 393 N.J. Super. at 368-69, we conclude as did the motion judge "at no point in time did F&D owe a legal duty to [p]laintiff."

***5** To the extent not addressed, any remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4824372

Footnotes

1 Because many of the parties share the same surname, following the initial mention of their full names, we use their first names for clarity. We intend no disrespect in doing so.

2 The December 12, 2022 order also granted the separate motions of plaintiff's brothers John Volpe and Frank Volpe, dismissing the complaint against them. We glean from the record, "the remaining claims against all remaining defendants" were dismissed when plaintiff failed to appear for the June 27, 2022 trial date. John, Frank, and Vetrano are not parties to this appeal.

3 John Sr. predeceased Mary while the action was pending; he was not a party to the present action. John Sr.'s full name appears in the record as John M. Volpe and John Louis Volpe. Consistent with the parties' briefs, we use John Sr. to avoid confusion with his son, defendant John Volpe, although there is no indication in the record that father and son used Sr. and Jr. designations.

4 Michael was not a party in the present action and, as such, he is not a party to this appeal.

5 Joseph moved to intervene as co-executor of Mary's estate to pursue the legal malpractice claim against F&D, but his motion was denied. Joseph did not appeal from the January 4, 2023 order. The Estate and its personal representatives are not parties to this appeal.

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2024 WL 1546837
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF the ESTATE OF Doris SPITZ-OOSSE, deceased.

DOCKET NO. A-0451-22
|
Argued February 6, 2024
|
Decided April 10, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. P-000374-21.

Attorneys and Law Firms

Craig S. Provorny argued the cause for appellant Brian Spitz (Herold Law, PA, attorneys; Craig S. Provorny, of counsel and on the briefs; Mikhail Sterlin, on the briefs).

Lawrence Andrew Joel argued the cause for respondent Sheryl Held (Joel and Joel, LLP, attorneys; Lawrence Andrew Joel, of counsel and on the brief; Richard A. Joel, on the brief).

Before Judges Whipple, Enright and Paganelli.

Opinion

PER CURIAM

***1** Brian Spitz appeals from an August 31, 2022 order dismissing his counterclaims for breach of an oral contract and unjust enrichment following a two-day bench trial. We affirm.

This matter concerns a family dispute involving Brian's [1] claims against his mother's, Doris Spitz-Oosse's, estate. The executrix of the estate is Sheryl Held, Brian's sister and Doris's daughter. At trial, Brian; his wife, Kimberly; and his uncle, Murray, testified on Brian's behalf. Sheryl testified on behalf of the estate.

We glean the facts and procedural history from the trial court record. For a time, the family resided in Paterson (Paterson Property) and eventually moved to Fair Lawn (Fair Lawn Property). When the family moved to the Fair Lawn Property, Doris retained the Paterson Property as a rental property.

In 1980, Doris and Brian's uncle, Solomon, started a company called Karroni Corporation. [2] Karroni was a property management company—holding and renting properties. Brian testified he worked for Karroni from the age of sixteen or seventeen to the age of twenty-one; from 1982 through 1987. He claimed Doris "verbally promised [him] a [ten percent] future interest in Kar[r]oni ... in exchange for his work," but she later told him "they were not going to honor the ten percent." Brian testified he left Karroni in 1987 because, among other reasons, he had not received an ownership interest. Nonetheless, Brian explained he returned to Karroni in 1988 for six months. He later left the company after being injured.

Brian testified he again returned to Karroni in 1992 after Solomon's death. He explained a Karroni property located in Irvington (Irvington Property), had 800 Department of Community Affairs (DCA) violations. There was no written evidence of the violations produced at trial. Brian claimed he returned to Karroni to handle the violations. He explained:

> What [Doris] was doing was, she told me that, since she could not afford to pay me, because it had to be put back into the building for renovation work to abate the violations and satisfy the DCA, that she would leave me the Paterson [P]roperty that I grew up in as compensation....
>
> So me and [Doris] came up with the agreement and she offered that she would leave me the property. And, I said, since you[are] deriving income from it, I go, I do[no]t want you to turn the property to me immediately. I go, you can leave me the property in your [W]ill when you pass. This way you[wi]ll have no need for the assets. And the other part of the agreement was that, if she decided she did[not] want to keep the property any longer and sold the property, she would turn the proceeds over to me.

Brian testified that he "would[no]t have been able to" go back to Karroni "without compensation if [he] had not been promised the Paterson [P]roperty in the [W]ill or the proceeds of the sale." Brian contends he received no pay, money or compensation between 1992 and 2000. He also testified that he never received "payment vouchers or pay stubs"; 1099s; or W-2s from Karroni.

***2** Kimberly testified that Brian returned to work for Karroni without pay and she and Brian lived off of her salary. She also testified she understood Brian would be compensated with the Paterson Property. She stated she never had any discussion with Doris about the purported agreement.

Uncle Murray testified he knew "there was some sort of agreement" but he did not know the details. He stated there "was just an understanding that there[wa]s this whole kind of notion of sweat equity; that [Brian would] put in a lot of time and effort and ... eventually be rewarded for that." Further, Uncle Murray testified he thought "probably [Doris] mentioned it" and "[p]otentially at some point Brian mentioned it." He did not recollect the details and explained Doris generally talked about business but she "certainly" did not talk to him about details.

Sheryl testified she was not involved with and never worked for Karroni but recalled conversations about Karroni around the house. She stated there was never an agreement or oral contract between Doris and Brian, and that Brian "just conjured [it] up."

Brian testified that he and Doris had no further discussions from 1992 through 2000 about her leaving him the Paterson Property. However, he stated they spoke about her Will on several occasions. He requested to see "excerpts" of the Will, to confirm she kept her word; or "permission to contact her attorney to find out [w]hat was done and she did have a [W]ill in effect." Doris did not comply with these requests.

The Irvington Property was sold in 2000 for $200,000. Brian explained he received some of the money left after the sale of the Irvington Property. Also, he testified that Doris told him "she was very grateful to [him] for helping her," and he could take the money in their Karroni account "as a small token." However, he explained Doris later took some of the money, so he only received a "portion of it."

Moreover, Brian testified that since Doris kept putting him off about her Will, he distanced himself from her. He explained he severed their relationship and had no contact with Doris from 2000 to 2009. Brian testified he rekindled his relationship with Doris in 2009, and he and Doris had a normal relationship from 2009 through 2019.

In September 2018, Doris executed a Last Will and Testament (2018 Will). She "revoke[d] all prior Wills and Codicils" and "specifically devise[d]" the Paterson Property to Brian. There was no mention of the devise being part of an oral contract with Brian. Doris also devised the Fair Lawn Property to Sheryl. Although Brian never saw the 2018 Will until after Doris's passing, he understood the Will reflected his agreement with Doris.

Sheryl testified Doris:

> always said she was fortunate to have two houses. She had two children. She was going to ask her son which house he wanted so there would be no problems. Brian said Paterson. [Doris] said fine. That's from my mother's own mouth.

In August 2019, Brian met with Doris and demanded that she show him her Will. He explained he needed to write out his side of the conversation because Doris was "extremely deaf." The writing provided:

> How are you feeling? I know you fell in the bathroom, I let Murr[a]y + Jane know!
>
> Kim and the girls want me to come stay here for a week or two to try to get you back on track! Also [three] times a day is not enough for checking you[r] sugar! But it's better than once a day[.]
>
> ***3** I'm going to give you something to read and I need an answer before I leave, remember I don't want to see anything bad to happen to you and I want to help you we're all concerned about you and your health!!!
>
> I'm sorry to have to bring this up but have you really done your [W]ill as you told me you have!
>
> Because if not we need to attend to it so me and your daughter don't have issues!!!
>
> **** [3]
>
> That is not what you said it was supposed to be Fair Lawn house 50/50 and Paterson house 100% me.
>
> Please be honest what you said just now was that Fair Lawn was 100% hers and I get Paterson.
>
> ****
>
> Thank you cause I just don't want the extra stress of fighting with them and who is executor!
>
> I'm sorry I have to do this but over the course of your illness you've told me several different things on top of the list is your [W]ill as per our talks over the years[.] [Y]ou have told me several different versions of your [W]ill but have never shown me it, as you had agreed to. At this point because of your past track record of keeping your word, you need to do as you promised and prove that you actually did what you said you would! If you[are] not going to actually prove it[,] today will be the last day you see me!!! I'm sorry but I can't trust you!!! I'll give you till Friday morning to do so! If you have no intention of doing this tell me now. Doris never showed Brian her Will. Brian and Doris never saw each other or communicated with one another after the August 2019 meeting.

Sheryl testified that following Doris and Brian's conversation, Doris called her crying, and she went to Doris's house. Sheryl explained she exchanged text messages with Brian in the presence of Doris. Brian testified he did not explain what was going on with Doris in the messages. He testified that Sheryl was never part of the business and he was not going to bring her into something Doris could explain.

However, in one of the text messages Brian stated:

> Write on a piece of paper to tell you what our agreement was I have nothing to hide you can even ask [Uncle] Murray because he was the one who [t]ried to act kind[of] like a moderator.

Sheryl responded with:

> All right, is this about houses. Truth is, she has two houses and two children. She told me she asked you what house you wanted and you said Paterson.

Sheryl continued:

> She said she did[no]t promise you anything when I asked her.

Brian responded:

> Very well tell her no matter what she is my mother and I wish her no harm but tonight was the last time I[wi]ll be over.

In October 2019, Doris executed another Last Will and Testament (2019 Will) providing she "revoked all prior Wills and Codicils" and "intentionally made no provision ... for ... [Brian] and [her] daughter-in-law ... and specifically disinherit[ed] them, not for lack of love and affection but for personal reasons known only to [her]."

Sheryl testified Doris

> changed the [W]ill because basically throughout [her] life and when [Doris] really needed [Brian], he was not around.... [Doris] reflected and decided to change her [W]ill. Because she did[no]t want [Brian] to have anything because of the way he treated her his whole life.

In April 2021, Doris sold the Paterson Property. Sheryl and Uncle Murray testified Doris did not want Brian to know about the sale. Sheryl explained Brian and Doris were estranged and Doris was afraid of Brian's reaction. Uncle Murray testified Doris did not tell him why she did not want Brian to know about the sale. Brian was unaware of the sale of the Paterson Property and did not receive the sale proceeds. On May 27, 2021, Doris passed away, leaving the 2019 Will in place.

***4** In June 2021, Brian filed a caveat against the granting of letters testamentary or the admitting to probate of the 2019 Will. In July 2021, Sheryl filed a verified complaint for probate of the 2019 Will and removal of the caveat. The Deputy Surrogate executed an Order to Show Cause requiring parties of interest to appear and show cause why a judgment should not be entered:

(A) admitting the 2019 Will to probate; (B) appointing Sheryl as executrix of the Estate of Doris, subject to qualification with the Bergen County Surrogate; and (C) removing the caveat.

In September 2021, Brian filed an answer to the complaint and a counterclaim alleging two counts—undue influence and lack of capacity. In January 2022, he filed an amended answer and counterclaim to include counts for breach of oral contract and unjust enrichment. In July 2022, the undue influence and lack of capacity counts were dismissed from Brian's counterclaim, by stipulation, and the caveat was withdrawn. The remaining counts, breach of an oral contract and unjust enrichment, were tried on August 2 and 3, 2022.

In assessing the trial testimony, the judge stated he was able to observe the witnesses and their demeanor. He stated he understood the testimony would be, "in a family sort of way," "slanted or tilted or bias[ed] in one direction," because "[e]verybody ha[d] their own self-interest."

In addition to the testimony, the judge considered the writing from Brian and Doris's conversation in August 2019, and stated the writing did not mention the purported contract. Further, he noted Brian's writing stated, "you have told me several different versions," and questioned why Brian would have mentioned "several different versions if they had an oral contract."

Further, the judge reviewed Brian and Sheryl's text messages. He also reviewed the 2018 Will and stated it only revealed a "donative intent" and did not mention a contract or agreement.

Applying the "clear and convincing" burden of proof, the judge determined:

> There is nothing that I could find that even evidences this agreement, much less by clear and convincing evidence.

On appeal, Brian contends the judge erred by: (1) applying the wrong standard of proof; (2) not finding an oral contract between him and Doris, and failing to find Doris breached the contract by not providing him with the proceeds of the sale of the Paterson Property; and (3) ignoring his claim of unjust enrichment.

Appellate courts apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 594 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). In an appeal from a non-jury trial, appellate courts "give deference to the trial court that heard the witnesses, sifted the competing evidence, and made reasoned conclusions." Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015). "The general rule is that findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). Further, ordinarily, appellate courts should not disturb a trial court's credibility findings. See Mountain Hill, LLC v. Twp. Comm. of Twp. of Middleton, 403 N.J. Super. 146, 193 (App. Div. 2008) (citations omitted) ("[Appellate courts] are not in a good position to judge credibility and, ordinarily, should not make new credibility findings.").

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Therefore, "[w]hether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div. 2004).

***5** "A contract arises from offer and acceptance, and must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.' " Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (citations omitted). "Thus, if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an

enforceable contract." Ibid. (citations omitted). Where the parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable. Ibid. (citations omitted).

To establish a claim for breach of contract, a party must prove four elements:

> first, that the parties entered into a contract containing certain terms; second, that [the] plaintiff did what the contract required [the plaintiff] to do; third, that [the] defendant did not do what the contract required [the defendant] to do, defined as a breach of the contract; and fourth, that [the] defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff.
>
> [Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019) (alterations in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016)).]

"To establish a claim for unjust enrichment, 'a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust.' " Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007) (quoting VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994)). "That quasi-contract doctrine also 'requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights.' " Ibid. (quoting VRG Corp., 135 N.J. at 554).

Brian argues the judge erred by applying the wrong burden of persuasion at trial. He contends: (1) "the trial court applied a much higher burden of proof to its analysis of the existence of a contract between [Brian] and [Doris] than the 'clear and convincing' standard set forth in N.J.S.A. 2A:81-2"; and (2) the trial court abused its discretion by applying an incorrect burden of proof, "clear and convincing,"[4] instead of the required "preponderance of the evidence"[5] standard that applies when there is performance of an agreement; relying on Deutsch v. Budget Rent-A-Car, 213 N.J. Super. 385 (App. Div. 1986). These arguments are unavailing.

***6** Initially, on both days of trial, Brian's counsel confirmed the applicable standard of proof was by "clear and convincing evidence." Counsel did not limit the application of the standard to particular issues or claims. On appeal, Brian argues any "contention the parties stipulated to a standard of 'clear and convincing evidence' for the entire case ... is contrary to the record," citing to his post-trial "proposed findings of fact and conclusions of law." Our review of the post-trial submittal does not reveal Brian sought to apply the lesser burden. Instead, he contended the estate's Statute of Frauds (SOF) argument "may not apply" or Brian and Doris's purported agreement might be outside the SOF because of Brian's performance. We are satisfied Brian did not raise the issue of varying burdens of proof at trial. Moreover, we conclude, as we explain below, the argument is unavailing because Brian's burden of persuasion was by "clear and convincing" evidence as a matter of law.

The Dead Man's Act, N.J.S.A. 2A:81-2, provides:

> In a civil action that is commenced or defended ... by a personal representative on behalf of a decedent, any other party who asserts a claim or an affirmative defense against the ... personal representative, that is supported by oral testimony of a promise, statement, or act of ... the decedent, shall be required to establish the same by clear and convincing proof.
>
> [(emphasis added).]

Therefore, under the Dead Man's Act, Brian's burden of persuasion—as to the alleged oral contract between him and Doris, and his claim for unjust enrichment—was by "clear and convincing proof."

In addition, Brian's claim for contractual compensation, based either on the transfer to him of the Paterson Property or the payment to him of the proceeds of the sale of the Paterson Property, implicates the "clear and convincing" standard under the SOF.

Under N.J.S.A. 25:1-13:

> An agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another shall not be enforceable unless:
>
> a. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and transferee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or
>
> b. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence.
>
> [(emphasis added).]

Therefore under N.J.S.A. 25:1-13(b), Brian's burden of persuasion to establish Doris orally agreed to "transfer an interest" or to "hold an interest" in the Paterson Property for him was by "clear and convincing evidence."

We recognize Brian argues his oral agreement with Doris dates to 1992. At that time, the SOF provided:

> No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:
>
> ....
>
> d. A contract for sale of real estate, or any interest in or concerning the same.
>
> [N.J.S.A. 25:1-5.]

While the predecessor statute, N.J.S.A. 25:1-5, was silent on the evidential burden, our courts required evidence by the "clear and convincing" standard. See Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 164 (App. Div. 1960).

Nonetheless, Brian argues the " 'preponderance of the evidence' standard ... applies when there is part performance of an agreement" and under Deutsch, "[t]he appropriate standard for proving a contract that has been fully performed by one of the parties is 'preponderance of the evidence.' " This argument fails.

In Epstein v. Fleck, the court stated:

> In every case, in order to take the case out of the [SOF] on the ground of part performance, irrespective of other questions, two things are requisite: [t]he terms of the contract must be established by the proofs to be clear, definite, and unequivocal, and the acts relied on as part performance must be exclusively referable to the contract.
>
> ***7** [141 N.J. Eq. 486, 488 (E. & A. 1948) (emphasis added) (quoting Cooper v. Colson, 66 N.J. Eq. 328, 330 (E. & A. 1904)).]

Similarly, in Young v. Sabol, the court held "[t]he obligation of plaintiff [wa]s to prove by clear, cogent and convincing evidence an oral agreement .... such [that] part-performance ... [would] exclude the operation of the [SOF]." 4 N.J. 309, 312 (1950) (citing Epstein, 141 N.J. Eq. at 486; White v. Risdon, 140 N.J. Eq. 613, 614-15 (Ch. 1947); Poloha v. Ruman, 137 N.J. Eq. 167 (Ch. 1945); Hufnagel v. Scholp, 138 N.J. Eq. 16 (Ch. 1946); Laune v. Chandless, 99 N.J. Eq. 186 (Ch. 1926)). Therefore, it has long been established that to avoid the operation of the SOF a party is required to present "clear and convincing" evidence.

Moreover, Brian's reliance on Deutsch to provide the lesser "preponderance of the evidence" standard is misplaced. In Deutsch, we held "the [SOF] will not prevent enforcement of an oral agreement relating to real property if part performance provides a reliable indication that the parties have made an agreement of the general nature sought to be enforced." 213 N.J. Super. at 388.

In Deutsch, we did not directly address the burden of persuasion. Nonetheless, we cited to Restatement (Second) of Contracts § 129 cmt. b (Am. Law Inst. 1981) which provided "[t]he evidentiary element can be satisfied by painstaking examination of the evidence and realistic appraisal of the probabilities on the part of the trier of fact; this is commonly summarized in a standard that calls upon the trier of the facts to be satisfied by 'clear and convincing evidence.' "

Moreover, we cited to Cauco v. Galante, where the Court recognized, "the long established principle that in order to sustain part performance of a parol contract conveying an interest in real estate sufficiently to take the contract out of the [SOF,] the parol agreement must be clearly proved as to its terms and subject matter." 6 N.J. 128, 138 (1951) (emphasis added); see also Grabow v. Gelber, 138 N.J. Eq. 586, 591 (Ch. Ct. 1946) (emphasis added) ("[T]o take the agreement out of the operation of the [SOF,]" there must be "convincing proof."). Consequently, under the performance exception to the SOF, Brian's burden was by "clear and convincing" proof.

Therefore, as a matter of law, Brian's burden of persuasion was by "clear and convincing" evidence.

Next, we consider Brian's argument that the judge erred in not finding an oral contract between him and Doris, and failing to find Doris's breach of the contract by not providing him with the proceeds of the sale of the Paterson Property. We agree with the judge that Brian failed to sustain his burden by "clear and convincing" evidence to warrant this relief.

The judge discounted the witnesses' testimony as it was "slanted or tilted or bias[ed]" and was infused with everyone's "self-interest." We perceive no reason to "disturb [the judge's] credibility findings." Mountain Hill, 403 N.J. Super. at 193.

Further, as the judge noted, while the 2018 Will provided for the devise of the Paterson Property to Brian, it failed to indicate anything regarding the purported oral agreement between Brian and Doris. In addition, Brian's one-sided writing of his conversation referenced the Fair Lawn and Paterson properties and how those properties would be devised between Brian and Sheryl. However, the writing was silent regarding an oral agreement between Brian and Doris.

***8** Moreover, while Brian mentioned an undefined "agreement" in the text message to Sheryl, Doris denied any "promises" were made but acknowledged he wanted the Paterson Property. Brian did not reassert the existence of a purported agreement between him and Doris, but, instead, stated "very well" and severed his relationship with Doris.

Therefore, Brian's evidence fell short of "clearly and convincingly" establishing the existence of an oral contract between him and Doris to devise him the Paterson Property or the proceeds of the sale of the Paterson Property in exchange for his work at the Irvington Property. Thus, we conclude the judge properly found there was no "clear and convincing" evidence of an oral contract between Brian and Doris, and therefore, conclude there could be no breach.

Lastly, Brian argues the judge erred by ignoring his claim of unjust enrichment. We disagree. The judge's factual findings regarding this claim are fully addressed and supported in the record.

In accord with the Dead Man's Act, it was Brian's burden to establish his unjust enrichment claim by "clear and convincing" evidence. He was required to establish Doris "received a benefit and that retention of that benefit without payment would be unjust." Iliadis, 191 N.J. at 110.

However, Brian acknowledged there was no written evidence of his employment with Karroni. In the absence of any written evidence of employment, or any other evidence of employment; and with the judge's credibility findings regarding the witnesses' testimony on this claim, Brian failed to meet his "clear and convincing" burden to warrant relief on his unjust enrichment claim.

Any remaining arguments raised by Brian are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2024 WL 1546837

Footnotes

1 Since Brian shares the same surname as other individuals involved in this matter, we use first names for the parties, as well as other individuals named in the opinion. No disrespect is intended.

2 The record reflects two spellings: "Karroni" and "Karoni."

3 "****" reflects an apparent gap in the conversation.

4 Clear and convincing evidence is evidence that produces in your mind[ ] a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause you to come to a clear conviction of the truth of the precise facts in issue. The clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes you to be convinced that the allegations sought to be proved are true.

[Model Jury Charges (Civil), 1.19, "Burden of Proof—Clear and Convincing Evidence" (rev. Aug. 2011).]

5 The term "preponderance of the evidence" means that amount of evidence that causes you to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true. If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue.

[Model Jury Charges (Civil), 1.12H, "Preponderance of the Evidence" (approved Nov. 1998).]

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2024 WL 3153174
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF the ESTATE OF Maria IANNACCO, deceased.

DOCKET NO. A-1674-22
|
Submitted January 18, 2024
|
Decided June 25, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. P-000410-21.

Attorneys and Law Firms

Traina & Traina, attorneys for appellant Francesco Iannacco (Jack A. Traina, on the briefs).

DeMarco & DeMarco, attorneys for respondents Aldo Iannacco a/k/a Aldo Iannacco, Jr. and Bianca Martinelli (Patrick C. DeMarco, on the brief).

Before Judges Accurso and Gummer.

Opinion

PER CURIAM

***1** In this probate case, a son challenges the validity of his mother's last will and testament. Plaintiff Francesco Iannacco filed an action contending the 2020 will of his mother, Maria Iannacco, was the product of undue influence by defendant Aldo Iannacco, Jr., Maria's other son whom she named as the executor of her estate and as a beneficiary, and Bianca M. Martinelli, Aldo Jr.'s daughter, also a beneficiary named in the will. [1] Following a bench trial, the trial court entered judgment in favor of defendants and dismissed plaintiff's complaint with prejudice.

Plaintiff argues the court erred in not finding suspicious circumstances or the existence of a confidential relationship between his mother and defendants and in failing to recognize certain issues concerning the preparation of the will. Because the court's factual and credibility findings were based on substantial credible evidence and its legal conclusions were correct, we affirm.

I.

Maria, an Italian immigrant, passed away on January 18, 2021. She was married to Aldo Iannacco, Sr, who passed away in 2011. They had two sons, Francesco and Aldo Jr. In 1990, they had reciprocal wills, dividing the marital estate in equal halves between their sons. Plaintiff has a daughter, Giada Iannacco, and a son, Fabio Iannacco. Aldo Jr. has a son, Aldo V. Iannacco, and a daughter, Bianca.

On February 5, 2020, Maria executed a last will and testament. In that will, Aldo Jr. was designated the executor and trustee of Maria's estate. The beneficiaries were her sons and grandchildren with each grandchild receiving $25,000, plaintiff receiving

$1, and Aldo Jr. receiving the rest of the estate. Notary public Maureen E. Brady executed the will, stating Maria and witnesses Cook and his paralegal had "subscribed, sworn to and acknowledged" it before her.

From the late 1970's until her death, Maria lived in a house located in Elmwood Park, New Jersey. At the time of her death, Aldo Jr. had been living there for approximately fifteen years. During the fall of 2019, Bianca moved into a second-floor apartment in the house with her brother and her husband. Aldo Jr. and Bianca were primarily responsible for the care and supervision of Maria's health and wellness, especially after the outbreak of COVID-19.

Following Maria's death, the 2020 will was admitted to probate. The surrogate issued letters testamentary to Aldo Jr. on April 16, 2021. On August 11, 2021, plaintiff filed a verified complaint, seeking to invalidate the 2020 will based on alleged undue influence and to remove Aldo Jr. as executor.[2] After discovery, the court conducted a two-day trial. During the trial, several witnesses testified.

***2** Attorney Harold Cook, who prepared the 2020 will, testified about his February 5, 2020 meeting with Maria. He did not speak with defendants before preparing the 2020 will. Cook described Maria as being "fine," "lucid," and "pretty sharp." He recalled she was "an elderly woman" but otherwise did not remember what she looked like. He did not ask her to provide a form of identification. According to Cook, Maria had an Italian accent, but they had no trouble communicating. Maria appeared to read the will after it was prepared; he also read the will to her. The bulk of her estate was her two-family home. When he asked her how she would like to leave her estate, she told him she wanted to exclude plaintiff, indicating they had had a falling out and she had been estranged from him for about three years. She told him she wanted to make some specific bequests to her grandchildren and leave her house to Aldo Jr., with whom she had a close relationship.

Bianca testified that when she moved into the second-floor apartment, Maria told her she had been attempting to contact her attorney to make changes to her will but had not been able to reach him. Maria asked her for a reference to an attorney. In January 2020, Maria asked her again for a reference; Bianca's friend, whose mother worked for Cook as a paralegal, recommended Cook. Bianca called Cook's office to make an appointment, telling his staff Maria wanted to draft a will. According to Bianca, Maria told her she was upset with plaintiff, explaining that on the rare times he visited her, he would push her to create a power of attorney and wanted her to give him more money because Aldo Jr. lived at the house. Bianca testified Maria had told her she and plaintiff had a "final fight" when she refused to sign a power of attorney. Bianca recalled that when Maria broke her ribs in 2019, plaintiff did not visit or call her and had not spoken to her since them.

Bianca acknowledged Maria did not drive and said she would go food shopping or to doctors' appointments "with us" or other friends or relatives or would pay for a ride. According to Bianca, Maria opened a joint bank account in 2020, put Bianca's and Aldo V.'s names on the account, and deposited $18,000 in the account with instructions they use the funds to pay for her funeral and other after-death expenses and then retain the rest.

Fabio and Giada testified plaintiff had a close relationship with Maria, Maria could speak English and could read basic English, and had said she wanted to divide her estate equally between her sons. Fabio conceded the relatives who lived in Maria's house did more for Maria in terms of "day-to-day activities" and scheduling appointments beginning in 2019.

Plaintiff testified about the 1990 will, conversations with Maria when his father was ill about evenly dividing her estate, Maria's refusal to sign the power of attorney, her blindness in one eye and difficulty reading, and her ability to read English. He described their relationship and his involvement in her life in 2019 and earlier. He testified that after Bianca moved into her house, he gave his brother's contact information to Maria's doctor and told Maria because she had other family living in the house, he wanted to focus on his own job search. He admitted that for various reasons he wasn't as active in giving comfort, support, or assistance to Maria in 2020 as he had been before. According to plaintiff, from March 2020 until she was hospitalized in 2021, he spoke with Maria "sporadically," once a week or every other week. When asked for the basis of his claim Bianca had exercised undue influence over Maria, plaintiff conceded he had "no idea" what Bianca may have said to Maria and pointed out

Maria had prepared a new will two months after Bianca moved into the second-floor apartment. He described Maria as being dependent, weak, and on oxygen and stated his belief "most likely they exerted the desire to basically control her ...."

***3** Aldo Jr. testified that beginning in the latter part of 2019, Maria had complained about plaintiff not calling her. He testified she had told him plaintiff stopped talking to her after he demanded to be her executor and she refused. He confirmed beginning in November 2019, his "household" became responsible for taking Maria to doctor appointments. He testified he had driven her to the appointment with Cook at her request, had not discussed her will with her, and had waited in his truck while she met with Cook. He described his mother as being "independent," other than not being able to drive and needing help maintaining the property. He testified she read the local newspaper and cookbooks.

Dr. Peter Carrazzone, Maria's doctor, described Maria as having an accent, but he had no problem understanding her. He testified she had told him she was upset about her relationship with plaintiff and had problems trying to reach him. Julian Cucco, Maria's nephew, testified plaintiff's family was not present on Christmas Eve 2019 as they had been on past Christmas Eves and that Maria had complained at the end of 2019 that plaintiff did not visit. Angela Giordano Morra, the sister of plaintiff's wife, testified Maria had told her more than once that she had changed her will because of the way plaintiff "was behaving towards her, not contacting her, just basically alienating her." Maria complained about plaintiff not coming to the hospital and removing himself as an emergency contact on the hospital registry.

On October 13, 2022, the court placed a decision on the record and entered an order finding in favor of defendants. On November 16, 2022, the court entered another order correcting some spelling errors in the prior order and confirming that the terms and conditions of that order remained in effect. In a January 3, 2023 order, the court denied plaintiff's fee application.

In its October 13, 2022 decision, the court acknowledged "many of the witnesses have their own self-interest" but found Cook's and Carrazzone's credible testimony supported the conclusion something had changed in Maria's relationship with plaintiff. The court found taking Maria to appointments and "doing things you do with an elderly parent" were not sufficient to prove the elements of an undue-influence claim and that to conclude otherwise in this case would be "sheer speculation." The court held no confidential relationship existed between the decedent and defendants and no suspicious circumstances surrounded the execution of the will. Accordingly, the court found the will was not the product of undue influence and entered judgment in favor of defendants. This appeal followed.

II.

Our "review of a judgment following a bench trial is limited." Accounteks.net, Inc. v. CKR Law, LLP, 475 N.J. Super. 493, 503 (App. Div. 2023) (quoting Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). "The trial court's factual findings are entitled to deference on appeal so long as they are supported by sufficient credible evidence in the record." Ibid. (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)). "Deference is particularly appropriate when the court's findings depend on credibility evaluations made after a full opportunity to observe witnesses testify, Cesare v. Cesare, 154 N.J. 394, 412 (1998), and the court's 'feel of the case.' " Accounteks.net, 475 N.J. Super. at 503 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). By contrast, the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and are reviewed de novo on appeal. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

***4** Those core principles apply equally in will contests. See Gellert v. Livingston, 5 N.J. 65, 78 (1950) ("The findings of the trial court on the issues of testamentary capacity and undue influence, though not controlling, are entitled to great weight since the trial court had the opportunity of seeing and hearing the witnesses and forming an opinion as to the credibility of their testimony."); In re Will of Liebl, 260 N.J. Super. 519, 524 (App. Div. 1992) (a trial court's factual findings "should not be disturbed unless they are so manifestly unsupported or inconsistent with the competent, reasonably credible evidence so as to offend the interests of justice").

"A challenger can set aside a decedent's will ... on the basis of undue influence." In re Est. of Folcher, 224 N.J. 496, 512 (2016). Our Supreme Court has explained that "undue influence is a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets[.]" In re Est. of Stockdale, 196 N.J. 275, 302-03 (2008). Undue influence "denotes conduct that causes the testator to accept the 'domination and influence of another' rather than follow his or her own wishes." Id. at 303 (quoting Haynes v. First Nat'l State Bank, 87 N.J. 163, 176 (1981)). The undue influence must exist at the time the will was executed. Ibid.

"Ordinarily, the burden of proving undue influence falls on the will contestant." Ibid. Nevertheless, "if the will benefits one who stood in a confidential relationship to the testator and if there are additional 'suspicious' circumstances, the burden shifts to the party who stood in that relationship to the testator." Ibid. "In general, there is a confidential relationship if the testator, 'by reason of ... weakness or dependence,' reposes trust in the particular beneficiary, or if the parties occupied a 'relation[ship] in which reliance [was] naturally inspired or in fact exist[ed].' " Ibid. (alterations in original) (quoting In re Hopper, 9 N.J. 280, 282 (1952)). "[T]he mere existence of family ties does not create ... a confidential relationship." Est. of Ostlund v. Ostlund, 391 N.J. Super. 390, 401 (App. Div. 2007) (quoting Vezzetti v. Shields, 22 N.J. Super. 397, 405 (App. Div. 1952)).

Suspicious circumstances may arise from a "drastic change in the testamentary dispositions" of the testator. Haynes, 87 N.J. at 177. Although evidence of suspicious circumstances can be "slight," the contestant of a will must present some evidence establishing suspicious circumstances. Stockdale, 196 N.J. at 303. If the challenger of the will successfully shifts the burden of proof to the proponent of the will, "[t]hat burden can be overcome based on proof of no undue influence by a preponderance of the evidence." Folcher, 224 N.J. at 512.

Plaintiff contends the court failed to recognize the weight of "competent, relevant and reasonably credible evidence" of suspicious circumstances and a confidential relationship. To the contrary, the court considered the evidence presented at trial it found credible and concluded plaintiff had failed to prove the elements of an undue-influence claim. Because that conclusion was supported by credible evidence and a correct interpretation of the law, we have no basis to reverse the court's decision.

Plaintiff identifies as purported evidence of suspicious circumstances the joint account, Aldo Jr. driving Maria to the appointment with Cook, and that Maria executed a new will months after Bianca had moved into the second-floor apartment. But those three things, especially when there was no suggestion of any financial impropriety and Aldo Jr. and other family members routinely drove Maria to appointments, do not outweigh the credible evidence Maria had expressed concerns about her relationship with plaintiff and wanted to change her will. Plaintiff even testified he had chosen to be less involved in Maria's life since the latter part of 2019.

***5** Plaintiff faults Cook for not asking for Maria's identification. But plaintiff didn't include in his complaint a cause of action based on forgery. In fact, he alleged in his complaint, "On or about February 5, 2020, Decedent executed a Last Will and Testament" and attached a copy of the 2020 will to the complaint. He didn't testify the signature on the 2020 will wasn't Maria's, didn't present a handwriting expert to establish a forgery, and didn't present any testimony from the notary and other witness. Plaintiff faulted Cook for not retaining a translator to provide Maria with a copy of the will in Italian or to read it to her in Italian. But plaintiff did not include in his complaint a cause of action based on lack of capacity. And there is no evidence Maria did not understand the will when she read it or when Cook read it to her or that it did not reflect her expressed testamentary intent.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2024 WL 3153174

Footnotes

1 Because some of the parties and people involved in the case share a last name, we use their first names for ease of reading and to avoid confusion. We mean no disrespect in doing so.

2 Plaintiff also sought a formal accounting, even though a year had not yet passed since the surrogate issued letters testamentary to Aldo Jr. See N.J.S.A. 3B:17-2 (a representative "shall not be required to account until after the expiration of 1 year after his appointment"). In the answer to the complaint, Aldo Jr. agreed to perform an informal accounting.

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2024 WL 3594359
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF the ESTATE OF Marie SEMPLE a/k/a Marie K. Semple, deceased.

DOCKET NO. A-3415-21
|
Submitted October 18, 2023
|
Decided July 31, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Union County, Docket No. Q-1569.

Attorneys and Law Firms

Oliver V. Short, appellant pro se.

Chiesa Shahinian & Giantomasi, PC, attorneys for respondent Tremain Stanley have not filed a brief.

Before Judges Gummer and Walcott-Henderson.

Opinion

PER CURIAM

***1** In this probate case, plaintiff Oliver V. Short appeals from orders denying his motion to enforce certain aspects of a 2015 consent order and his subsequent reconsideration motion. Perceiving no abuse of discretion in the court's application of the doctrine of laches in denying plaintiff's motion to enforce, we affirm.

On July 18, 2000, Marie Semple executed a document entitled "Marie Semple Qualified Personal Residence Trust" (QPRT), creating an irrevocable trust and transferring into the trust certain residential property she owned. The QPRT directed the trustee, on Marie's death, to distribute the principal of the trust's estate to Marie's children: Harry Semple, Kathryn Susan Semple Romano, Roger Semple, and plaintiff. [1] Marie died in 2012.

In a verified complaint, plaintiff and Harry sued Roger and Kathryn, individually and in Kathryn's capacities as Executor of Semple's estate and trustee of the Marie Semple Family Dynasty Trust Agreement of 2000 and purported trustee of the QPRT. They alleged Kathryn had engaged in a series of improper actions, including refusing to sell the residential property in the trust's estate in accordance with the QPRT.

In a March 11, 2015 consent order, the parties affirmed they wanted to sell the property and gave Kathryn the authority to execute documents required to complete the sale and plaintiff and Harry agreed to withdraw any objection they had to the finalization of the sale of the property. The consent order contained the following provisions:

> 4. Plaintiffs' counsel will receive, within twenty[-]four hours, or one business day of receipt by defendants' counsel, whichever is sooner, copies of all documents, including documents that defendant, Kathryn Susan Semple Romano executed in her fiduciary capacity with respect to the sale of the property.

5. To expedite completion of the sale, defendants' attorney, Budd Larner P.C. may act as closing attorney for the sale of the property. Plaintiffs hereby waive any conflict of interest for the sole purpose of said representation of the parties and to effectuate final sale of the property. Plaintiffs shall be provided with copies of all closing documents in accordance with paragraph 4 herein.

6. Counsel for both parties are hereby granted permission to communicate with the realtor, in writing and with copy to counsel for the other side.

The court and the parties' attorneys executed the consent order. Steven K. Warner, Esq., of Ventura, Miesowitz, Keogh & Warner, P.C. (Ventura), executed it on behalf of plaintiff and Harry; David R. Tawil, Esq., of Budd Larner, P.C., executed it on behalf of defendants.

The property sale closed on March 31, 2015. In a March 31, 2015 email to Warner, Tawil, Amanda Wolfe, Esq., of Ventura, Tremain Stanley, Esq., of Budd Larner, and others, Frank A. Biancola of Budd Larner stated the closing had concluded and "[a]ttached is a copy of the fully executed closing statement."

***2** In a May 5, 2015 email, Wolfe advised Warner that plaintiff had "requested the documents we received regarding the sale of the property. Here are the documents that I have received and a few emails that seemed particularly relevant." Later that day, she sent an email to plaintiff, Harry, and Warner, stating "[a]ttached please find the documents I've received regarding the sale and an email from Mr. Biancola regarding the title company dictating who would be obligated to sign." She asked plaintiff to "[p]lease let us know if you have any difficulty opening any of the files." The email attachments are not in the record. They are described in the email as "signed hud1," "carbon monoxide," "signed rider," "signed contract," "Short Semple Bakka Bircsak Contract title requirements," and "Certification."

In a May 20, 2015 email, Wolfe asked Biancola for "copies of the final, witnessed, contract documents executed by Ms. Romano." She acknowledged her firm might have had some of those documents but stated "we would like a final set that includes all relevant documents." On the same day, Wolfe forwarded to plaintiff and Harry a copy of that email and stated she would forward his responses and that she had attached a copy of the deed.

In a September 11, 2015 email to Biancola, plaintiff asserted the documents he had received were "draft, undated, unsigned versions of electronic documents." He requested from Biancola "[a] single bound photo static copy of original fully executed documents inclusive of all closing document [sic] with appropriate tabs for each document" and "[a] cover letter that certifies that these document [sic] are final, fully executed, and all inclusive (riders, disclosures, deed, reports, or any other reference or inferred documents, etc.)." In a September 14, 2015 response, Biancola told plaintiff he had been "involved only with the closing of the sale of the subject premises" and he knew "nothing" about the "on-going" litigation. He advised him he would reach out to Stanley and Tawil and that someone would get back to him.

This case was dismissed in June 2016.

In a February 5, 2019 email, plaintiff asked Biancola to "provide the Affidavit of Legal Title" and "a copy of a deed that conveys legal title to your client or confirm none exists." He sent a follow-up email on March 30, 2019, requesting "a physical, bound, copy of the closing documents." In an April 4, 2019 email, Biancola denied some of the statements plaintiff had made in his emails, stated he and his firm had not been authorized by their former client to provide any documentation to him, and suggested plaintiff obtain the documentation from his lawyer, Warner, who had received the documentation and had approved it and the handling of the closing.

On March 16, 2022, plaintiff emailed Lisa Brophy of the Union County Surrogate's Office and Biancola, stating his intention to file a motion regarding the copies of the closing documents. In an email sent the next day, plaintiff advised Brophy he had learned

Biancola was deceased and Budd Larner was no longer in business. Brophy responded, telling plaintiff she thought the closing documents had been provided to his counsel Warner, suggesting he contact Warner and providing Warner's email address.

Between March 20, 2022, and March 25, 2022, plaintiff exchanged emails with former Budd Larner attorneys, asking for "copies of the client file." Those lawyers told plaintiff Budd Larner had ceased operations in 2019, the file was not in their possession or Budd Larner's storage facility, and he should contact the attorney who had represented him.

On March 24, 2022, plaintiff moved "to enforce litigants' rights and declaratory judgment." He sought an order enforcing paragraphs 4, 5, and 6 of the March 11, 2015 consent order. Plaintiff addressed his notice of motion to attorney Stanley, whom he identified as "defendant."

***3** On April 28, 2022, the court entered an order with an attached legal analysis, denying plaintiff's motion. The court found the case had been dismissed in June 2016, Budd Larner no longer existed, Stanley worked for a different law firm and had represented she did not have the closing documents, and plaintiff's lawyer or plaintiff pro se could have sought "a post judgment motion for violation of litigant's rights" in 2015 after the alleged violation of the consent order. [2] Citing the equitable maxim "Equity aids the vigilant, not those who sleep on their rights," the court held plaintiff's motion was barred by the doctrine of laches. In a June 10, 2022 order, the court denied plaintiff's subsequent reconsideration motion. This appeal followed.

"Whether laches should be applied depends upon the facts of the particular case and is a matter within the sound discretion of the trial court." Fox v. Millman, 210 N.J. 401, 418 (2012). Thus, we review the application of the doctrine of laches for an abuse of discretion. United States v. Scurry, 193 N.J. 492, 504 (2008). We also review a trial court's order on a reconsideration motion under an abuse-of-discretion standard. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)) (internal quotation marks omitted).

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Therefore, "[w]hether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div. 2004).

"The doctrine of laches applies when there is neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." Zilberberg v. Bd. of Trs., Tchrs.' Pension & Annuity Fund, 468 N.J. Super. 504, 513 (App. Div. 2021). "[L]aches is the failure to assert a right within a reasonable time resulting in prejudice to the opposing side .... The key factors are the length of delay, reasons for delay, and change of position by either party during the delay." Clarke v. Clarke ex rel. Costine, 359 N.J. Super. 562, 570 (App. Div. 2003). "Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned." Knorr v. Smeal, 178 N.J. 169, 181 (2003). The time requirements for laches to apply "are not fixed but are characteristically flexible." Lavin v. Bd. of Educ. of Hackensack, 90 N.J. 145, 151 (1982).

The trial court did not abuse its discretion in denying plaintiff's motion based on its application of the doctrine of laches. The consent order plaintiff now seeks to enforce required the production of documents "within twenty[-]four hours, or one business day of receipt by defendants' counsel, whichever is sooner." The closing occurred on Tuesday, March 31, 2015. If plaintiff did not receive the documents "within twenty[-]four hours, or one business day of receipt by defendants' counsel," he could have moved for relief by the end of that week or the next week or by the end of the month or year. He could have moved for relief in May 2015 after attorney Wolfe's efforts to obtain the documents were, as alleged, unsuccessful or in September 2015 after plaintiff's efforts were unsuccessful. He could have moved before the case was dismissed in June 2016.

***4** By the time plaintiff filed this motion, the case had been dismissed for nearly six years, the closing attorney had died, his firm had been dissolved for nearly three years, and none of the other attorneys contacted had a copy of the file. The prejudice is palpable, and plaintiff's delay is unexplained.

Perceiving no abuse of discretion in the court's application of the doctrine of laches, we affirm the April 28, 2022 order denying plaintiff's motion to enforce litigant's rights and the June 10, 2022 order denying plaintiff's reconsideration motion.

To the extent we have not otherwise commented on them, we have duly considered plaintiff's other arguments and conclude they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2024 WL 3594359

Footnotes

1 Because some of the individuals involved in this case share the name Semple, we use their first names to reference them for clarity. We intend no disrespect by doing so. We refer to Oliver V. Short as "plaintiff"; he is the only plaintiff who filed this appeal.

2 Plaintiff faults the trial court for not considering other pleadings and motions, asserting they "are no different tha[n] the motion filed in 2022 ... they were only labeled differently." But plaintiff did not demonstrate he had submitted those other pleadings and motions to the trial court with his 2022 motion, thereby making them part of the motion record, and did not include complete copies of them in the appellate record. See Harris v. Middlesex Cnty. Coll., 353 N.J. Super. 31, 48 (App. Div. 2002) (citing Rule 2:5-4(a), court holds "[a]ppellate [c]ourt will not consider evidentiary material which was not part of a record below").

2024 WL 4799553
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

IN RE ESTATE OF Rhoda CRANE, Deceased.

DOCKET NO. A-3739-22
|
Argued October 2, 2024
|
Decided November 15, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket No. P-000138-23.

Attorneys and Law Firms

Brian R. Selvin argued the cause for appellant Michael E. Crane (Greenbaum, Rowe, Smith & Davis LLP, attorneys; Darren C. Barreiro, of counsel and on the briefs; Brian R. Selvin and Olivier Salvagno, on the briefs).

Kathleen M. Lee argued the cause for respondent David M. Repetto, Esq. (Harwood Lloyd, LLC, attorneys; Kathleen M. Lee, of counsel and on the brief).

Before Judges Marczyk and Torregrossa-O'Connor.

Opinion

PER CURIAM

***1** Plaintiff Michael Crane [1] filed an order to show cause and verified complaint seeking an order compelling an accounting from David M. Repetto, Esq., the court-appointed administrator CTA [2] of the Estate of Rhoda Crane (Estate) and trustee of Rhoda's Revocable Trust (Trust). Plaintiff appeals from the trial court's May 18, 2023 order denying his application for an accounting and the July 14, 2023 order denying his reconsideration motion. Based on our review of the record and the applicable principles, we reverse and remand for proceedings consistent with this opinion.

I.

We glean from plaintiff's verified complaint that Rhoda died in July 2020. She left no spouse or surviving descendants. At the time of her death, she lived in a residence in Englewood. Title to the Englewood property was held in the Trust, with Rhoda and her sister, Joyce Crane, as co-trustees. In October 2020, Joyce died and was survived by her two children, plaintiff and Jacqueline Crane. Under Rhoda's will, her residuary Estate was to be paid to the trustees of Rhoda's Trust.

In January 2021, the court appointed Repetto as administrator of Rhoda's Estate and trustee of her Trust. [3] In February 2021, plaintiff's counsel was permitted to inspect the Englewood property to search for plaintiff's personal property, which he believed was located there. [4] The inspection did not yield any of the personal property plaintiff claimed was missing.

Thereafter, plaintiff requested an accounting of the tangible property sold and distributed by the Estate and the Trust. Repetto indicated he would respond "once [plaintiff] has met all of his obligations under the court's numerous orders and the February 4, 2022 [j]udgment." [5] Plaintiff's counsel subsequently advised Repetto that despite plaintiff being a debtor of the Estate, Repetto was required to "promptly" respond to a beneficiary's reasonable request for information under N.J.S.A. 3B:31-67.

In March 2023, plaintiff filed a verified complaint seeking a formal accounting. Plaintiff claimed the value of his missing property is "potentially" worth more than the amount he owes the Estate. Plaintiff further alleged "Repetto's refusal to comply with the law and his fiduciary duty ma[d]e such a determination impossible."

***2** Repetto responded that plaintiff had "been told numerous times that the vast majority of the Estate expenses were legal fees occasioned by [plaintiff's] conduct." Repetto also asserted plaintiff was advised "countless times" about the identification of the items located at Rhoda's Englewood property. [6] Repetto contended plaintiff had "constantly expanded" the list of items he claimed he owned and stored in the Englewood residence that were not contained in the Bernards Report. Repetto further noted he had been forced to commence several lawsuits in New York to remove plaintiff from multiple New York properties jointly owned by Rhoda and Joyce. He claimed despite court rulings that plaintiff had no ownership interest in either property, he had been "unlawfully converting rents from tenants." Repetto further asserted plaintiff misappropriated the Estate's assets and continues to deplete them by preventing the sale of the New York properties.

In denying plaintiff's application for a formal accounting, the trial court stated:

> In this complaint, plaintiff[ ] contend[s], without any support whatsoever, that ... [m]any of his possessions stored in his aunt's home ... were missing. There's no statement of what items were missing.... There's just that vague statement that ... many of his possessions were missing.

The court also addressed plaintiff's claim that Repetto breached a fiduciary duty:

> [P]laintiff insists that ... Repetto is in breach of his fiduciary duty under N.J.S.A. 3B:31-67 and may have actually ... converted these unspecified possessions; in other words, ... Repetto sold these possessions.
>
> In opposition, ... Repetto provided a detailed certification, including a comprehensive personal property appraisal report that included a detailed description of all the personal property in the residence when he took possession....
>
> ... Repetto has provided a comprehensive and exhaustive informal accounting of everything that was in the residence and all the personal property contained in the residence.
>
> [P]laintiff's ... claims are focused on his completely unsupported [assertions] that he was storing millions of dollars worth of Bruce Springste[e]n memorabilia in his aunt's home, including lyrics sheets that were hanging on a wall, $6 million worth of guitars and $60,000 in car parts.
>
> ... Repetto's comprehensive response details that no such items were in the house upon his appointment. His response includes photographs of the room where plaintiff contends the lyric sheets were displayed, showing that there were no such lyric sheets in that room anywhere.
>
> Most importantly, plaintiff doesn't provide even a shred of evidence to support his claim that these items were in the home; not a certification, not a picture, not an appraisal, not an insurance rider....

> A formal accounting is not required in every case. Pursuant to Rule 4:87-1(b), an accounting may be ordered in appropriate circumstances. And N.J.S.A. 3B:17-2 also provides for an accounting to be ordered, but it certainly doesn't require an accounting in every case.

Accordingly, the court denied plaintiff's application for a formal accounting and dismissed the complaint with prejudice.

In June 2023, plaintiff moved for reconsideration. In his motion and supporting certification, plaintiff argued that the trial court had misapplied the law governing an interested party's right to compel an accounting, erred in determining that Repetto's filings constituted an informal accounting, and made erroneous determinations of fact. The court denied the motion on July 14, 2023.

***3** This appeal followed.

II.

A.

Plaintiff argues the trial court misinterpreted N.J.S.A. 3B:17-2 by finding he was not entitled to an accounting as a matter of right. He contends the statute requires an administrator to provide an accounting after one year. Plaintiff further argues that the court erred in resting its decision, in part, on Rule 4:87-1(b), which is not applicable in this case. Repetto counters the court properly found that N.J.S.A. 3B:17-2 and Rule 4:87-1 do not mandate a court to compel an accounting. Rather, it is left to the discretion of the judge.

Plaintiff notes he did not file a detailed complaint because he was not asking the court to determine at this juncture whether any assets were missing or who may be responsible for any unaccounted-for property. [7] Rather, plaintiff requested Repetto provide an accounting to inform plaintiff of the assets that remain in the Estate's possession and those that were sold.

Plaintiff argues Repetto submitted a certification outlining certain assets that came into his possession but did not advise the court regarding the disposition of the assets or provide a description of those assets that have not yet been sold. Accordingly, he maintains the court wrongly concluded plaintiff had been provided with an "exhaustive informal accounting." Instead, plaintiff asserts the information Repetto provided was more akin to an inventory under N.J.S.A. 3B:16-1 to -8 rather than an actual accounting. Plaintiff further argued the court incorrectly and prematurely required plaintiff to prove the existence and value of the missing property when those issues are more properly addressed in response to a formal accounting by way of exceptions —if there is a challenge to the formal accounting.

Plaintiff next asserts Repetto failed to comply with Rule 4:87-3(b), which governs the form of accounts to be submitted in a formal accounting and provides that all accounts shall include the following:

> (1) a full statement or list of the investments and assets composing the balance of the estate in the accountant's hands, setting forth the inventory value or the value when the accountant acquired them and the value as of the day the account is drawn, and also stating with particularity where the investments and assets are deposited or kept and in what name;
>
> (2) a statement of all changes made in the investments and assets since they were acquired or since the day of the last account, together with the date the changes were made;
>
> (3) a statement as to items apportioned between principal and income, showing the apportionments made;
>
> (4) a statement as to apportionments made with respect to transfer inheritance or estate taxes;

(5) a statement of allocation if counsel fees, commissions and other administration expenses have been paid out of corpus, but the benefits of the deductions from corpus have been allocated in part or in whole to income beneficiaries for tax purposes; and

***4** (6) a statement showing how the commissions requested, with respect to corpus, are computed, and in summary form the assets or property, if any, not appearing in the account on which said commissions are in part based.

Plaintiff contends Repetto breached his fiduciary duty because he only partially complied with Rule 4:87-3(b)(1), by not providing the full inventory value for each asset and not referencing every asset that came into his possession. Moreover, Repetto failed to provide any other information to address the other sections of the rule. He argues that his status as a debtor does not change his status as a beneficiary of the Estate and does not alleviate Repetto's responsibilities to him under the statute. Furthermore, he maintains an accounting would benefit and protect all beneficiaries from potential breaches by a court-appointed fiduciary.

Repetto counters the trial court properly determined plaintiff "effectively received an accounting." Moreover, because plaintiff was involved in running Rhoda's business, he "certainly knows the identities and values of her properties."

Plaintiff argues alternatively that even if a formal accounting is discretionary, the court should have exercised its discretion given there are substantial questions raised in the conflicting verified complaint and Repetto's certification. Moreover, the certification was "derived to a great extent on information gleaned from others, rather than from first-hand knowledge." In short, plaintiff concludes that despite the court's ruling, plaintiff still "has no information as to what was sold, how much money was obtained in connection with the sales, and the disposition of the funds."

B.

Given a probate judge's broad powers, we review a determination made by that judge for an abuse of discretion. See In re Est. of Hope, 390 N.J. Super. 533, 541 (App. Div. 2007) ("Remedies available to courts of equity 'are broad and adaptable.' " (quoting In re Mossavi, 334 N.J. Super. 112, 121 (Ch. Div. 2000))); see also Wolosoff v. CSI Liquidating Tr., 205 N.J. Super. 349, 360 (App. Div. 1985). "The exercise of ... discretion will be interfered with by an appellate tribunal only when the action of the trial court constitutes a clear abuse of that discretion." Salitan v. Magnus, 28 N.J. 20, 26 (1958). A trial court decision will only constitute an abuse of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.' " United States ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (alteration in original) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

N.J.S.A. 3B:17-2 provides: "A personal representative may settle his account or be required to settle his account in the Superior Court. Unless for special cause shown, he shall not be required to account until after the expiration of [one] year after his appointment."

N.J.S.A. 3B:31-67(a), Duty to Disclose and Discretion to Periodically Report, in turn, states:

> A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of a trust.

***5** We recognize the challenges the court faced in managing this protracted litigation. Nevertheless, upon careful review, we conclude the trial court misapplied its discretion in denying the request for an accounting on the grounds that plaintiff had received an "informal accounting" and an "explanation of all the items that were in the residence." The trial court's decision in large measure was based on its understanding that Repetto provided plaintiff the functional equivalent of a formal accounting. However, this informal accounting falls short of what would be provided in a formal accounting pursuant to Rule 4:87-3(b). At best, it appears Repetto provided an inventory of the assets that were, at one time, in possession of the Estate.

Repetto asserts plaintiff "has all [of the] relevant information regarding the Estate" but does not reconcile that statement with his October 2022 letter to plaintiff wherein he states, "I will discuss the personal property issues with [plaintiff] once he has met all of his obligations under the court's numerous orders ... and has vacated the [New York properties]." Moreover, Repetto asserts without citation to the record that he advised plaintiff "numerous times that the vast majority of Estate expenses were legal fees occasioned by [plaintiff's] conduct."

Plaintiff contends, as evidenced by Repetto's October 2022 letter, that he was not advised what tangible property was sold, the sales price of the assets, what assets remain in the Estate, what happened to the cash and securities that existed at the time of Rhoda's death, and what happened to the proceeds from the sale of the property. Additionally, plaintiff claims he was never advised about the legal expenses incurred by Repetto and was not required to accept the representation that the vast majority of those expenses were related to fees expended as a result of plaintiff's conduct. The disposition of the Estate's assets and Repetto's counsel fees would both be an integral part of a formal accounting under N.J.S.A. 3B:17-2(a) and Rule 4:87-3(b) to which plaintiff is entitled under the facts of this case.

Here, where decedent died over four years ago and Repetto was appointed administrator and trustee more than three years ago, an accounting is warranted at this juncture. Plaintiff has requested this information for a considerable period of time, and there is obviously a factual dispute as to which assets are part of the Estate and which were sold. Moreover, our decision is buttressed by N.J.S.A. 3B:31-67, which provides a "trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information ...." N.J.S.A. 3B:31-67, when read in conjunction with N.J.S.A. 3B:17-2, convinces us the court rested its decision on an impermissible basis.

Repetto justified his denial of plaintiff's request for an accounting by arguing the amount of assets sold by the Estate is a fraction of what plaintiff owed in the judgment. Moreover, Repetto contends plaintiff knows how much was in the accounts for which he now seeks an accounting because he had control of the accounts at some point following Rhoda's death. At oral argument before us, Repetto's counsel conceded she was not arguing that an accounting would never be appropriate in this matter and plaintiff could later apply for a formal accounting. However, counsel argued "right now is not the time for an accounting" because of the ongoing litigation between the parties. We disagree.

Merely because the sale of the Estate's assets was significantly less than the amount plaintiff owes the Estate does not justify the denial of the accounting. Again, plaintiff is seeking an accounting, in part, to determine if the Estate disposed of his personal property, which he asserts is of considerable value. We are further unpersuaded that the accounting must await the conclusion of the ongoing litigation between the parties because there was no explanation proffered as to how an accounting would somehow prejudice the Estate in the litigation. In addition, Repetto has not provided any controlling authority to suggest that a debtor of the Estate is not entitled to an accounting under Rule 4:87-3(b).

***6** It also appears the court made credibility findings regarding the conflicting verified complaint and Repetto's certification. Without conducting a hearing, the court could not properly make a determination that there was no merit to plaintiff's claims. Moreover, those findings should be made following a formal accounting, if necessary, if there are exceptions filed by plaintiff. At that time, if a hearing is required, the court can resolve the conflicting accounts of what property was part of the Estate when Repetto was appointed and how it was disposed.

In light of our determination, we need not address the broader question of whether N.J.S.A. 3B:17-2 requires the court to compel an accounting as a matter of right.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4799553

Footnotes

1 Because certain parties share a common last name we refer to them in this opinion by their first names. We intend no disrespect.

2 CTA is short for "cum testamento annexo" (Latin for "with the will attached"), which indicates the administrator was appointed by a court because the named executor became unavailable. See In re Est. of Gerhardt, 336 N.J. Super. 157, 166 (Ch. Div. 2000).

3 The appointment arose in separate litigation. Following the deaths of Rhoda and Joyce, there were multiple lawsuits filed in New York and New Jersey involving plaintiff and Jacqueline disputing the ownership of various properties, which resulted in Repetto's appointment.

4 Plaintiff's counsel inspected the property due to a restraining order entered against plaintiff, in favor of Jacqueline, prohibiting plaintiff from personally entering the property.

5 The court awarded Repetto, as administrator and substitute trustee, a judgment against plaintiff in the amount of $2,440,702 in February 2022.

6 As part of his administration of the Estate, Repetto retained Bernards Appraisal Associates to prepare a report (Bernards Report) of Rhoda's personal property contained in the Englewood property and the value of those items. After Bernards conducted an inspection in May 2021, it issued a 135-page report in July 2021, listing 350 items with a total value of $61,245. The report was provided to plaintiff and Jacqueline. Repetto certified the Englewood property was later sold in November 2021.

7 Plaintiff further notes the court overlooked Repetto's certification, which set forth the specific assets plaintiff claims were missing, along with a letter from plaintiff detailing the property not contained in the Bernards Report's inventory.

End of Document

2024 WL 4633364
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF the ESTATE OF R.S., [1] deceased

DOCKET NO. A-3452-22
|
Argued October 8, 2024
|
Decided October 31, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. 277696.

Attorneys and Law Firms

Ryan Patrick Campi argued the cause for appellant M.S. (Graziano & Campi, LLC, attorneys; Kathleen McCormick Campi and Ryan Patrick Campi, of counsel and on the briefs).

Mark D. Miller argued the cause for respondent D.S. (Dubeck & Miller, attorneys; Mark D. Miller, of counsel and on the brief).

Before Judges Firko and Augostini.

Opinion

PER CURIAM

***1** In this probate matter, defendant M.S. appeals from a July 13, 2023 order appointing plaintiff D.S. as administrator of the Estate of R.S., defendant's adoptive father (decedent). After careful review of the record and applicable law, we reverse and remand.

I.

Defendant was born in 1993 in Moscow, Russia. In 1994, he was adopted in Russia by decedent and his former spouse L.G. At the time of the adoption, both parents lived in New Jersey. Before the adoption in Russia was finalized, an adoption home study was completed by Better Living Services, an adoption agency approved to place children for adoption within New Jersey. The agency recommended decedent and L.G. as qualified adoptive parents.

On September 30, 1994, after defendant had been adopted in Russia, he became a United States citizen. A certification of citizenship was issued by the United States government, signed by the U.S. Commissioner of Immigration and Naturalization granting defendant citizenship pursuant to "Section 341 of the Immigration and Nationality Act." [2] This certificate was signed by decedent as "father." Under the Act, a person derives citizenship "through the naturalization of a parent ..." 8 U.S.C. § 1452(a).

Plaintiff is the decedent's brother, and their parents were K.S. and G.S. Decedent died on February 17, 2021, and his mother, K.S. had passed away approximately a year before. At the time of decedent's death, his mother's estate had not been settled. In her will, K.S. left a portion of her estate to decedent. Plaintiff was named executor of K.S.'s estate.

Defendant had been estranged from his father, the decedent, for many years due to a history of sexual abuse. After an investigation into the sexual abuse allegations, decedent was arrested and charged with sexual assault. In 2011, decedent was sentenced to ten years imprisonment. That same year, decedent and L.G. divorced. Neither decedent nor L.G.'s parental rights to defendant were ever terminated.

After decedent's death in February 2021, defendant's counsel advised plaintiff that defendant would become the administrator of decedent's estate. Plaintiff requested a copy of defendant's adoption paperwork from Russia to confirm that decedent was defendant's adoptive father. Defendant's counsel provided plaintiff with defendant's certificate of citizenship, which was signed by decedent as his father.

Plaintiff, who resided out of state, retained local counsel and requested further documentation of decedent's adoption of defendant, specifically, the judgment of adoption. Defendant's counsel provided a copy of the Russian certification of adoption translated to English. There were no adoption proceedings in New Jersey and no judgment of adoption from a court in the United States.

Not satisfied with the adoption documentation provided, plaintiff filed a verified complaint on November 2, 2022, seeking to be declared as decedent's sole intestate heir and appointed as administrator of decedent's estate. Defendant filed an answer and counterclaim asserting he was the legal heir as decedent's adopted son, and provided the certificate of citizenship, certificate of Russian adoption, and the post-adoption Russian birth certificate with English translation.

***2** As discovery progressed, defendant provided additional documentation to plaintiff such as: (1) defendant's Russian passport; (2) defendant's IR-3 visa [3] ; (3) home study completed by the adoption agency; (4) letters of employment for decedent and the adoptive mother L.G. at the time of adoption; (5) criminal background checks for decedent and the adoptive mother; and (6) documentation of termination of birth mother's parental rights.

On June 2, 2023, the court conducted a telephonic conference to address plaintiff's request to take depositions "to find out what exactly happened in – Russia in 1993 ...." The parties disputed whether there was sufficient proof that defendant was decedent's legal child for inheritance purposes. Plaintiff argued that the controlling statute, N.J.S.A. 9:3-43.2, went into effect in 2005, and had no retroactive applicability to this case. Defendant argued that there was no evidence to suggest that he was illegally or inappropriately adopted, especially since he had been granted U.S. citizenship based upon the adoption. The court reserved its decision on the validity of defendant's adoption.

On July 13, 2023, the court concluded that N.J.S.A. 9:3-43.2 did not apply retroactively to this case. The court further found it did not have sufficient information about defendant's adoption in Russia to confirm that defendant was legally adopted by decedent. As such, plaintiff was appointed as the administrator of decedent's estate. This appeal followed.

II.

We review issues of law de novo and "owe no deference to an interpretation of law by the trial court[.]" R.K. v. F.K., 437 N.J. Super. 58, 61 (App. Div. 2014) (quoting M.S. v. Millburn Police Dept., 197 N.J. 236, 246 n.10 (2008)). A trial court's findings of fact, however, are binding on appeal when supported by "adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Invs. Ins. Co. of America, 65 N.J. 474, 484 (1974). "Because there is no genuine issue of material fact on this record," we review de novo the court's determination that N.J.S.A. 9:3-43.2 does not apply retroactively as well as the court's conclusion that there was insufficient basis to conclude that M.S. was legally adopted. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

Defendant contends that the court erred in finding that he had not established that he was legally adopted by decedent. Specifically, he asserts that N.J.S.A. 9:3-43.2 was in effect at the time the court rendered its decision in this matter and is therefore applicable to this case. Defendant further asserts the court erred in concluding that there was insufficient information regarding his adoption in Russia.

A.

***3** In 2005, N.J.S.A. 9:3-43.2 was enacted clarifying the enforceability of a final judgment of adoption of a foreign jurisdiction in New Jersey:

> A final judgment of adoption granted by a judicial, administrative or executive body of a jurisdiction or country other than the United States shall have the same force and effect in this State as that given to a judgment of adoption entered by another state, without additional proceedings or documentation if:
>
> (a) the adopting parent is a resident of this State; and
>
> (b) the validity of the foreign adoption has been verified by the granting of an IR-3 immigrant visa, or a successor immigrant visa, for the child by the United States Citizenship and Immigration Services.

The intent of the Legislature in enacting this statute was to clarify New Jersey law regarding foreign adoptions and simplify the process for recognizing adoptions occurring in foreign countries. Press Release, Off. of the Governor, Codey Signs Bill Recognizing Foreign Adoptions, at 1 (April 29, 2005) (on file with N.J. State Law Library). With the enactment of N.J.S.A. 9:3-43.2, "[f]amilies will no longer have to go through a process of re-adopting their children who are already recognized by the federal government as U.S. citizens." Ibid.

The statute is silent as to its retroactive application. We recognize the "general principle of statutory construction that courts favor the prospective application of statutes." Phillips v. Curiale, 128 N.J. 608, 615 (1992) (citing Twiss v. State, 124 N.J. 461, 466 (1991)). However, "a court is to apply the law in effect at the time it renders its decision." Id. at 616 (citing Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 711 (1974)). There are two exceptions to this general legal principle: "when doing so 'would result in manifest injustice or there is a statutory direction or legislative history to the contrary.' " Ibid.

Neither of these exceptions apply here. Bradley, 416 U.S. at 711. First, given our long-standing history of recognizing foreign adoption judgments for inheritance purposes, there would be no manifest injustice to applying the current law to this case. Second, there is no "statutory direction or legislative history to the contrary." Ibid.

Long before the Legislature enacted N.J.S.A. 9:3-43.2, our Supreme Court recognized New Jersey's public policy favoring the recognition of foreign adoption decrees even "under laws differing from our own" as to descent and distribution of property. Zanzonico v. Neeld, 17 N.J. 490, 498 (1955). The Supreme Court reasoned that it has been "firmly established" in New Jersey's "decisional law that adoption decrees entered in foreign jurisdictions would be upheld" for purposes of inheritance. Id. at 494 (citing In re Finkenzeller's Estate, 105 N.J. Eq. 44 (Prerog. 1929), aff'd 107 N.J. Eq. 180 (E. &A. 1930)). It is also well-established in New Jersey that adopted children have the right of inheritance from their adoptive parents. Ibid. (citing N.J.S.A. 9:3-9). Thus, in 1955, the Court held that,

> in accord with traditional concepts of comity and in the exercise of due regard for the welfare of the adopted child, [we] have accorded recognition to foreign adoption decrees for inheritance purposes, subject only to two conditions which pertain generally to the recognition of any foreign judgment: (1) that the foreign court had jurisdiction to fix the status of the child with respect to the adoptive parents, and (2) that the recognition of the foreign decree will not offend the public policy of our own State.

***4** [Id. at 495 (citing In re Finkenzeller's Estate, 105 N.J. Eq. at 46).]

Here, both requirements under the holding of Zanzonico have been satisfied. The Russian court had jurisdiction to "fix the status" of defendant who was born in Russia and was residing there at the time of the adoption petition. According to Russian documents, after defendant's birth, the birth mother abandoned him, and he was placed at a Russian orphanage. Russian authorities notified the birth mother on July 15, 1993, and October 11, 1993, of her right to visit the child at the orphanage. Following these notices, the birth mother's parental rights to defendant were terminated as of November 9, 1993. There is no indication in any of the Russian documents that defendant's birth mother named his birth father.

The Order of the Government of Moscow dated April 1, 1994 permitted defendant's adoption by decedent and L.G. The post-adoption Russian birth certificate identified decedent as defendant's father. These Russian documents clearly establish that Russia had jurisdiction to address defendant's legal relationship with his birth parent and subsequent adoption by decedent and L.G.

Further, plaintiff points to no public policy that would be contravened by recognizing the Russian adoption. To the contrary, failing to recognize and give effect to the Russian adoption, which occurred over thirty years ago and has been validated by the granting of an IR-3 visa and United States citizenship, would offend the public policy of New Jersey which gives full faith and credit to such foreign adoption decrees under these circumstances. U.S. Const. art. IV, § 1. "There is no public policy in New Jersey against such legitimation[ ] or acknowledgment[ ]" of this adoption decree. In re Estate of Spano, 49 N.J. 263, 269 (1967).

Our analysis turns next to applying the requirements set forth in N.J.S.A. 9:3-43.2 to the facts of this case, and whether there is sufficient evidence to recognize the adoption judgment of Russia. Without specifying, the court found that it did not have sufficient information regarding the adoption that took place in Russia to validate the adoption decree. Based upon our review of the record, we are satisfied that there is substantial, credible evidence to support the recognition of the Russian adoption decree.

In determining whether to give a foreign judgment full force and effect in New Jersey, N.J.S.A. 9:3-43.2 requires only that (a) the adopting parent is a resident of New Jersey; and (b) the foreign adoption has been verified by the granting of an IR-3 immigrant visa, or a successor immigrant visa, for the child by the United States Citizenship and Immigration Services.

Contrary to plaintiff's assertions, there is no requirement that the court be provided with a description of the events that occurred in Russia at the time of the adoption. Plaintiff argues that the court did not have any description of the events that occurred in Russia, and that L.G. testified during her deposition that she and her former spouse took "bribes" or gifts to Russia to facilitate the process. Specifically, she explained they were told to bring five hundred dollars' worth of electronics and cosmetics, and they also brought pediatric medicine. L.G. further explained that she and her former spouse followed the instructions of the adoption agency and complied with all requirements in processing defendant's adoption. The Russian government approved the adoption and subsequently, the United States recognized the adoption by granting defendant U.S. citizenship.

***5** Applying the statutory requirements to this case, there is no dispute that the adoptive parents, decedent and L.G., were residents of New Jersey in 1994 when the Russian adoption judgment was issued. Defendant, as a child, was granted an IR-3 immigrant visa, which was attached to his Russian passport, and he was granted United States citizenship based upon the foreign adoption.

Next, under N.J.S.A. 9:3-43.2, "the validity of the foreign adoption [is] verified by the granting of an IR-3 immigrant visa ...." The only document required by the statute to verify the foreign adoption is the IR-3 visa, which defendant obtained and provided a copy to the court and counsel. There has been no challenge to the IR-3 visa, defendant's citizenship, or the adoption over the past thirty years. Only now does plaintiff challenge the admissibility and authenticity of defendant's IR-3 visa because it does not have an apostille [4] and contends it is not self-authenticating pursuant to N.J.R.E. 902. These arguments are without merit.

B.

N.J.R.E 901 addresses the requirement of authentication or identification of an item as a "precedent to admissibility." State v. Hannah, 448 N.J. Super. 78, 89 (App. Div. 2016). N.J.R.E. 901 provides,

> To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims.

Authentication only requires " 'a prima facie showing of authenticity[.]' " Hannah, 448 N.J. Super. at 89 (citing State v. Tormasi, 443 N.J. Super. 146, 155 (App. Div. 2015)).

N.J.R.E. 902 identifies "items of evidence [that] are self-authenticating and ... require no extrinsic evidence of authenticity in order to be admitted[.]" N.J.R.E. 902(b) identifies domestic public documents that qualify as self-authenticating:

> A document (1) bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or possession thereof, or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution, or (2) purporting to bear a signature affixed in an official capacity by an officer or employee of such an entity, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer had the official capacity and that the signature is genuine.
>
> [N.J.R.E. 902(b).]

To qualify as a self-authenticating document, the IR-3 visa must bear a seal of the United States and a signature purporting to be an attestation or execution, or alternatively, a signature affixed in an official capacity. After reviewing the IR-3 visa, the court did not address whether the IR-3 visa was sealed and signed or signed and certified. Thus, the court did not make a finding as to whether the document qualified as self-authenticating and is therefore admissible. Rather, the court generally found the information regarding the Russian adoption insufficient. The record before us is unclear as to whether the court, upon reviewing the IR-3 visa, found the necessary indicia for it to qualify as a self-authenticating document.

Alternatively, under N.J.R.E. 901, there is ample evidence to support a finding that the IR-3 visa is what it purports to be. For example, defendant's IR-3 visa bears an identification number, which is also contained on defendant's U.S. certificate of citizenship as the INP Registration Number, issued by the Department of Justice's Commissioner of Immigration and Naturalization. Further, defendant's U.S. certificate of citizenship bears the signature of the U.S. Commissioner of Immigration and Naturalization.

***6** Moreover, defendant provided additional, extrinsic evidence confirming his birth and adoption by decedent and L.G., including: (1) the Russian certificate of adoption with an apostille and English translation; (2) defendant's Russian birth certificate with a notarized English translation; (3) defendant's birth certificate in English identifying decedent and L.G. as parents with official seal affixed; (4) home study completed by Better Living Services, the adoption agency with a Russian translation; (5) statement of abandonment of child by birth mother with English translation; (6) termination of birth mother's parental rights with English translation; (7) Order of Government of Moscow allowing the adoption of defendant by decedent and his wife, dated April 1, 1994 with English translation; and (8) a Memo by the U.S. Embassy outlining the evidence required "for the U.S. Embassy in Moscow to process an immigrant visa for [the] adopted child."

The home study conducted prior to the adoption in Russia was completed by a licensed adoption agency, Better Living Services, approved by New Jersey to place children for adoption within the state. These additional documents lend further corroborating proof of the genuineness of the IR-3 visa.

Plaintiff argues that defendant did not request an evidentiary hearing to establish the authenticity of the documents; however, nor did plaintiff. He received the documents from defendant well in advance of the hearing on June 2, 2023, and he had sufficient time to investigate their authenticity. Plaintiff offered no extrinsic evidence to raise any question as to their validity.

A trial court in its function as gatekeeper determines admissibility of proofs and may rely on hearsay reports to make such determinations. State v. Torres, 253 N.J. 485, 511 n.5 (2023) (citing N.J.R.E. 104(a)(1); State v. Bacome, 440 N.J. Super. 228, 239 n.7 (App. Div. 2015), rev'd on other grounds, 228 N.J. 94 (2017)). Thus, even if the IR-3 visa were not deemed admissible as self-authenticating, the credible evidence in the record supports the admissibility of the IR-3 visa under N.J.R.E. 901.

Applying the statute to this case is consistent with settled law and public policy and does not contravene the substantive rights of the parties. However, even if we agreed with the court's determination that N.J.S.A. 9:3-43.2 should not be applied retroactively to this matter, our case law, specifically the holding in Zanzonico, supports the recognition of the Russian adoption decree under these circumstances. Zanzonico, 17 N.J. at 494-98.

In sum, the court erred in not applying N.J.S.A. 9:3-43.2 or decisional law to recognize the Russian adoption decree. The court also erred in not accepting the documentation of defendant's IR-3 visa to establish the validity of his adoption. Based upon our careful review of the competent evidence presented, we conclude the court's findings that there was insufficient evidence to validate the Russian adoption was against the weight of the credible evidence.

We are satisfied that sufficient information was before the court to validate and recognize the Russian adoption decree pursuant to both decisional law and N.J.S.A. 9:3-43.2. Thus, we reverse and vacate the July 13, 2023 order and remand the matter for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2024 WL 4633364

Footnotes

1 We use initials in this matter to protect confidentiality and privacy of the parties. R. 1:38-3(d)(10), (11) and (16).

2 See 8 U.S.C. § 1452.

3 IR-3 visas, along with IR-2, IH-3, IR-4, and IH-4 visas, are "immigrant visas adopted children may receive." In re Adoption of D.G.J., 277 A.3d 1204, 1210, n.12 (2022) (citing https://www.uscis.gov/adoption/bringing-your-internationally-adopted-child-to-the-united-states/your-new-childs-immigrant-visa/your-new-childs-immigrant-visa). See generally Telegram from U.S. Sec'y of State to All Diplomatic and Consular Posts (June 16, 2001), reprinted in State Dept. Reminds Posts About Classification of Orphans Under Child Citizenship Act, 78 Interpreter Releases 1077 (2001) ("The IR-3 visa classification signifies that the orphan has been adopted abroad prior to the issuance of the immigrant visa. In order to issue an IR-3 visa, the adjudicating officer must be satisfied that the adoption was both legal in the country where it occurred and valid for U.S. immigration purposes.").

4 An apostille is special seal signifying proof of a document's genuineness. See N.J.R.E. 902(c).

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2024 WL 1949532
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

Jana M. WATTS, Plaintiff-Appellant,
v.
Joseph F. FARINELLA and Nicole Farinella, Defendants-Respondents.

DOCKET NO. A-1505-21
|
Submitted September 21, 2022
|
Decided May 3, 2024

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-0488-18.

Attorneys and Law Firms

Gillin-Schwartz Law, LLC, attorneys for appellant (Joseph Christoph Gillin-Schwartz, on the briefs).

Fox Rothschild LLP, attorneys for respondents (Adam Busler, on the brief).

Before Judges Accurso and Vernoia.

Opinion

***1** The opinion of the court was delivered by

ACCURSO, P.J.A.D.

Plaintiff Jana M. Watts is the life tenant in possession of a waterfront home in Middle Township conveyed to her by her husband, Joseph A. Farinella, two months after he purchased the property and four years prior to his death in 2017. Defendants are his two children from a prior marriage, Joseph F. Farinella and Nicole Farinella, two of the three current remaindermen. [1] Plaintiff appeals following a two-day bench trial from the trial court's refusal to enforce a cost sharing agreement between herself and her late husband, the original remainderman, entitled "Expense Sharing Agreement Following Death of Remainderman."

Although convinced by the testimony of the decedent's lawyer, a longtime friend who drew the Agreement, and the decedent's accountant, a friend and business partner who advised him on it, that it was the decedent's intent to require the remaindermen to assume the costs of all "capital items," i.e., capital expenses over $5,000 during plaintiff's life tenancy, the trial court held "the decedent's intent cannot override the legal responsibilities imposed by our common law and statutes" on the life tenant to "maintain the property and avoid waste." Because that is an incorrect statement of the law, as it is the decedent's donative intent that controls the allocation of the costs of maintaining the property between plaintiff and the remaindermen during plaintiff's life tenancy, we reverse.

As we write only for the parties who are familiar with the facts and the history of the litigation, we limit our discussion to those points critical to our disposition of the case. When the decedent purchased the shore house, he and plaintiff were living together in plaintiff's home in High Bridge, as they had for fifteen years. The property, which they initially intended to use only as a

summer home, is on a lagoon surrounded by a dozen or so houses leading to Muddy Hole and a channel to the intracoastal waterway and the Great Sound. It includes a dock and a boat slip.

Shortly after executing the life estate deed, the decedent and plaintiff entered into the "Expense Sharing Agreement Following Death of Remainderman," the express purpose of which was to "set forth the various items of financial responsibility concerning the Property during the term of [plaintiff's] Life Tenancy in the Property ... following and only following, the death of [the decedent]."[2] The Agreement provides its terms "shall be binding upon and inure to the benefit of [the decedent's] heirs, successors and assigns as regard their interest in the Property as set forth in the life estate deed."[3]

***2** There are two operative paragraphs of the agreement. Paragraph 2 is captioned "[Plaintiff's] Responsibilities Following [The Decedent's] Death," and provides that for the balance of plaintiff's life following the decedent's death, she "shall be responsible for items generally associated with life tenants in property." The items include:

a. All repairs concerning the Property and all maintenance items so that the Property shall be kept in good condition and state of repair, reasonable wear and tear excepted.

b. All rents and charges for water and sewer and other similar items which are or may be assessed or imposed upon the Property.

c. All utility charges including, but not limited to, electricity, heating, air conditioning and HVAC.

d. All homeowner's insurance charges, including casualty and liability insurance[,] as well as such additional items as [plaintiff] and [the decedent] shall agree.

e. All real property taxes and assessments imposed upon the Property by any governmental authority.

f. All items concerning the Property for which Life Tenants are generally responsible under the law of the State of New Jersey.

Paragraph 3 is captioned "[The Decedent's] Successors' Responsibilities," and provides that "[f]ollowing [the decedent's] death and during the balance of plaintiff's life, [the decedent's] successors, including his estate and its beneficiaries and distributees, shall be responsible for items generally associated with remainder interests in property, including but not limited to:

a. Maintaining in good working order all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other similar facilities on or placed upon the property.

b. Keeping the foundation, floors, walls, ceilings, windows, doors and roof reasonably watertight, rodent proof and in good repair.

c. All capital items arising with regard to the Property determined by and consistent with generally accepted accounting principles consistently applied, as well as all capital items for which remaindermen are generally responsible under the laws of the State of New Jersey."

Although aware their father had gifted plaintiff a life estate in the shore house, and that he intended for them and plaintiff's daughter to inherit the house following plaintiff's death, neither defendant had been aware of the cost sharing agreement or its terms prior to the issues giving rise to this litigation — that is, the neighbors' agreement to dredge the lagoon and the deteriorating condition of the home's bulkhead.

Albacore Lagoon is a short stub off Muddy Hole leading to Great Channel and the intracoastal waterway. Lagoon residents had for several years preceding these events endured an increasing amount of sediment in the lagoon, preventing them from using their boats during low tides. The decedent chafed at not being able to use his boat as he liked. He was active in the association

formed to maintain the lagoon and participated on the subcommittee charged with exploring options for dredging the waterway to restore its former depth.

Unfortunately, the dredging project did not get underway prior to the decedent's passing in March 2017. In January 2018, the homeowners voted unanimously to hire a company to dredge the lagoon, agreeing to evenly share the $650,000 cost. As part of the project, the homeowners could arrange to have the dredging company dredge their boat slips, at their own cost. Plaintiff elected that option. She paid just over $46,000 for her share of the dredging, including for the home's boat slip. The contract also included a "maintenance dredge" scheduled for 2022, for which plaintiff would be responsible for another $13,000 to $15,000.

***3** Several residents joined together to replace their aging bulkheads at the same time, hoping to lower the costs. The decedent's pre-purchase home inspection prepared in 2013, reported the home's bulkhead was in poor condition, leaning outward with corrosion and deterioration of the metal fasteners and connectors evident. The inspector recommended an inspection "by a qualified specialist performing an in-water inspection." Plaintiff got an estimate of $33,000 to replace the bulkhead in 2017, not including permitting fees or engineering drawings. She planned instead to repair the bulkhead at roughly a third of the cost subject to the thoughts of the remaindermen.

In February 2018, plaintiff sent an email to defendants and her daughter with "a heads up" that

> [o]ur Albacore Lagoon Association has voted unanimously to go forward with the dredging. That means at low tide, there will be 3ft of water in the lagoon, so everyone can take their boats out anytime and enjoy full benefits of the lagoon. This will also add value to the house in the years to come ... which is great for all of you. The dredging is slated to begin in September. Looks like my portion is $42,000, which includes dredging of the boat slip.
>
> Bulkhead — many homeowners are getting brand new bulkheads which needs to get done before the dredging. My quote was $33,000 ... they would have to pull the whole bottom deck up and the steps ... what a mess. And way too much money. I had Bob Geiske come and look at it and he can "shore it up" for only $9000 to $10,000. He said it would last another 20 years. I believe that's the way to go, unless you all think differently.
>
> Obviously the timing of this is not the best on these capital improvements, but it is something that we will have to deal with. Ultimately this improvement will have a positive impact on the value of the property in the future, especially down the road when it [is] yours.
>
> Because this transaction is above my pay grade, I had my attorney look over the agreements and dredging details. When I hear back from him, I'll let you know or have him email you all directly with the specifics.
>
> If you have any questions, let me know.

In response, plaintiff received an email not from defendants, who were then in their mid-twenties, but from their mother stating, "[t]he children have asked me to discuss this matter on their behalf." Defendants' mother wrote that she did "not believe these types of improvements are related to the deed that runs with the house," and asked plaintiff to share "any discussions or input from an attorney" as they'd "like some clarification about it." Plaintiff responded that her attorney "has all the particulars and will put something together." She also noted that "[t]his would be covered under the Shared Expense agreement that [decedent] had made up," attaching it to her email.

Two months later, plaintiff's counsel wrote to defendants and plaintiff's daughter about the dredging and the bulkhead, "two items that require attention under the terms of the Expense Sharing Agreement." Plaintiff's counsel contended both the dredging project and the bulkhead repair constituted capital items under the agreement and would thus be their responsibility as remaindermen and expressed plaintiff's willingness to discuss the matter in the hope it could be resolved amicably.

After defendants refused to contribute, plaintiff seven months later filed a four-count complaint to quiet title [4] and for breach of contract, waste and unjust enrichment. Defendants filed an answer, counterclaims for waste and breach of the implied covenant of good faith and fair dealing, and a third-party complaint for contribution against plaintiff's daughter, who defaulted. The trial court entered summary judgment for defendants on plaintiff's breach of contract claim, finding defendants were not parties to the agreement, were unaware of its existence, and that neither plaintiff nor "the decedent had any authorization to bind either defendant." The court rejected plaintiff's contention that the agreement was intended to supplement and be incorporated into the life estate deed to plaintiff, finding that even if true, it did not confer on plaintiff a cause of action for breach of contract against defendants. The parties' remaining claims were reserved for trial.

***4** Although several witnesses testified for both sides, the critical testimony came from the decedent's lawyer and accountant, both of whom the court found extremely credible. The lawyer testified he'd known the decedent for about ten years, and that they had been friends before the decedent became his client. He also became a friend of plaintiff's at the same time, describing the couple as "two lovely people." According to the attorney, the decedent had two reasons for giving plaintiff a life estate in the shore house: it provided her "a place to stay for the rest of her life," and it made the asset, which the decedent had purchased for $575,000 in cash — "about all he had" — more unattractive to potential creditors.

Specifically, the attorney testified the decedent had been a homebuilder, but by the time he purchased the shore house, he was sick, winding down his business, and worried he might face "liability from a couple of real estate deals that were not going well." By burdening the shore house with a life estate, the decedent, according to his lawyer, "was killing two birds with one stone." He was "making a testamentary conveyance in effect by the creation of the remainder interest," and "protecting ... himself and [plaintiff], and his eventual beneficiaries from what he was concerned about with liabilities" by making the asset more unattractive to any would-be creditors.

As to the Expense Sharing Agreement, the lawyer testified it was the decedent's unequivocal intent to have plaintiff be responsible only for the regular maintenance expenses of the shore house, and to have defendants and plaintiff's daughter, who "would come into one hundred percent ownership one day," "accept the responsibilities [for capital items] from day one." According to the lawyer, the decedent, who had a law degree and long experience in business, viewed the shore house as "a gift" to his children and stepdaughter, the remaindermen, and believed that "[w]ith the benefits go the burdens."

The decedent also advised that he'd provided defendants "a buffer" from the hit of having to absorb their share of capital items for the house by giving them "some cash." According to the lawyer, "[t]hat's what the man wanted to do." And he "was comfortable with the whole thing," in that plaintiff "was taken care of" and he wasn't "throwing [defendants] to the wolves financially." Defendants had the proceeds of his life insurance, and they and plaintiff's daughter "were going to own [the shore house] equally."

The lawyer testified the decedent was also comfortable that defendants and his stepdaughter would accept that "[s]hould anything go seriously wrong in a capital sense, it was their responsibility." According to the lawyer, the only reason defendants weren't advised of the Expense Sharing Agreement prior to the decedent's death is that he was adamant about not wanting his former wife, with whom "he had a bad relationship," to "become involved in any of this," telling the lawyer, "[i]t's just going to be trouble."

Appearing to confirm their father's expectation, one of the defendants, the decedent's daughter, then thirty-years-old, testified she would be willing to help with any of the repairs for which she was responsible as a remainderman, which she understood to mean capital expenses and "maintaining the structure of the house." She wasn't sure how those items were defined for the shore house, however, and wanted more information. She also testified she and her brother had each received about $350,000 in life insurance proceeds following their father's death.

The accountant testified he'd met the decedent in 1989 or 1990, as a client of the accounting firm where he was working. The two became friends, and in 2000 teamed up to build some homes together, with the decedent responsible for the construction

and the accountant responsible for the financing. According to the accountant, the decedent was "a smart guy," who had a very good relationship with both plaintiff and his children. The accountant was likewise a friend of plaintiff's.

***5** The accountant had discussed the decedent's plan for the shore house with the decedent on several occasions, most recently in 2016 when the decedent told the accountant that the decedent had decided to make plaintiff's daughter a remainderman with an equal share to his children. The accountant testified to his understanding of the difference between repairs or ordinary maintenance and capital improvements "consistent with generally accepted accounting principles," by relying on the Internal Revenue Code's definition of capital expenditures, opining that replacement or repair of a bulkhead costing over $5,000 would be a capital expense, as would the replacement of a roof, or the dredging of a lagoon to provide better access to a dock adjacent to the property.

After hearing the testimony over the course of two days and reviewing the post-trial briefing, the court found plaintiff was sixty-five years old with a life tenancy in the shore house and defendants and plaintiff's daughter were remaindermen. The court also found defendants each received close to $350,000 from a life insurance policy taken out by the decedent and that "[t]he decedent intended for the defendants to 'step up to the plate' in the event capital expenses arose, i.e., items deemed a capital expense for accounting purposes to be the responsibility of the defendants." The court accepted the accountant's testimony of the definition of a capital expense under the Internal Revenue Code and found that both the bulkhead repair or replacement, if over $5,000, and the dredging, which "provides better access to the attached dock" and "enhances the property value" qualified as capital expenses.

The court found the attorney's testimony "clear, unequivocal and consistent as to the decedent's intent [that the remaindermen bear responsibility for capital expenses during plaintiff's life tenancy] as well as to how the documents were drafted to reflect the decedent's intent." It further found the accountant's testimony corroborated that of the attorney's, and that both enjoyed the decedent's confidence in their personal and professional relationships. Notwithstanding, the court found "the decedent's intent, as expressed by credible witnesses, cannot defeat the legal rights and responsibilities imposed by the law" on the life tenant to keep the premises in good repair and not permit waste.

The court found, as a matter of law, that "[t]he life tenant is inured with specific rights and responsibilities that cannot be supplanted by the decedent." The court further found that defendants were not aware "of the decedent's attempts to place financial responsibility on them while he was alive." Declaring that equity follows the law, the court found "in favor of the defendants ... as their obligations are established clearly by statutes and precedent."

The court was further satisfied that plaintiff as a life tenant cannot assert a cause of action for waste against defendants and is unable to establish the elements of an unjust enrichment claim. The court dismissed all of defendants' counterclaims and declared the third-party complaint against plaintiff's daughter moot as a result of the dismissal of plaintiff's claims.

Plaintiff appeals the trial court's decision dismissing her waste and unjust enrichment claims and asserts that even if neither theory is one under which she can compel contribution from the defendants, the Expense Sharing Agreement and the testimony the court found credible establish the decedent intended defendants and plaintiff's daughter to assume responsibility for capital items exceeding $5,000, such as dredging the lagoon and boat slip and the repair or replacement of the bulkhead during plaintiff's life tenancy. Plaintiff contends the court erred, as a matter of law, by expressly disregarding the decedent's intent and holding defendants' can enjoy their remainder interests free of the conditions imposed by the decedent. We agree.

***6** Final determinations by the trial court following a bench trial "are subject to a limited and well-established scope of review." Seidman v. Clifton Sav. Bank, SLA, 205 N.J. 150, 169 (2011). We will not overturn the court's "factual findings and legal conclusions ... unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid. (quoting In re Tr. Created By Agreement Dated Dec. 20, 1961, 194 N.J. 276, 284 (2008)). That means "[w]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." 160 West Broadway Assocs., LP v. 1 Memorial Drive, LLC, 466 N.J. Super. 600, 610

(App. Div. 2021) (quoting Mountain Hill, LLC v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (alteration in original)). Our review of the trial court's legal conclusions, of course, is plenary. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Because we think it beyond peradventure that plaintiff failed to state a claim for waste and unjust enrichment, we limit our discussion to her argument that the court erred in finding New Jersey law required it to disregard decedent's intent as to how expenses were to be split between the life tenant and his successor remaindermen.

We begin our analysis by addressing defendants' assertion that we should affirm the trial court's decision because plaintiff failed to establish her claims of waste and unjust enrichment — the only two claims she has appealed — and ignore her claims about the decedent's intent, a consideration not relevant to either of those claims. Although that argument would ordinarily be persuasive, it cannot carry the day here.

Defendants open their brief to this court asserting that plaintiff "commenced this litigation" to compel them to pay "for (1) the costs to dredge the lagoon and boat slip adjacent to the Property (the 'Dredging Project') and (2) the costs to install a new bulkhead on the Property (the 'Bulkhead Project')." Likewise in its opinion, the trial court wrote that "defendants frame the salient issue as whether plaintiff has the ability to compel defendants to: (1) reimburse plaintiff for the cost of dredging the lagoon and boat slip adjacent to the property; and (2) pay for a new bulkhead."

Those statements make clear to us that was the case the court heard — whether plaintiff could compel defendants to pay for the dredging and the bulkhead. Although the complaint may have been more artfully pled as a declaratory judgment action to resolve the parties respective obligations for capital expenses during plaintiff's life tenancy,[5] we cannot escape that was the case the parties tried and the court squarely resolved in holding "the decedent's intent cannot override the legal responsibilities imposed by our common law and statutes" on the life tenant to "maintain the property and avoid waste."

Neither the Court Rules nor our case law allows us to sidestep review of that ruling by limiting our consideration to the causes of action alleged in the complaint and ignoring the issue the parties determined to try to conclusion. See R. 4:9-2 ("When issues not raised by the pleadings and pretrial order are tried by consent or without the objection by the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order."); 68th St. Apts., Inc. v. Lauricella, 142 N.J. Super. 546, 561 n.3 (Law Div. 1976) (noting a legal theory not advanced in the pleadings or pretrial order but fully aired at trial and in the post-trial briefs, is properly relied on in determining the issues), aff'd o.b. 150 N.J. Super. 47 (App. Div. 1977).

***7** Thus, the sole issue on appeal is whether plaintiff can compel defendants and her daughter, the remaindermen, to reimburse plaintiff for the cost of the dredging and repair or replacement of the bulkhead in accordance with the Expense Sharing Agreement. The trial court, although satisfied "[t]he decedent intended for the defendants to 'step up to the plate' in the event capital expenses arose" for the shore house; that the Expense Sharing Agreement was drafted to reflect decedent's wishes and accurately conveyed the decedent's intent that during plaintiff's life tenancy the remaindermen bear responsibility for capital expenses, that is "any amount over $5,000 paid out for ... permanent improvements or betterments made to increase [its] value," including amounts expended for restoration; and that both the dredging and the repair or replacement of the bulkhead, if exceeding $5,000, would qualify as capital expenses, found it could not give effect to that intent because the decedent's intent could not supplant the responsibilities imposed by law on life tenants.

Our law, however, is to the opposite. The shore house property was the decedent's gift, first to plaintiff, his wife and longtime companion, for her life and then over to defendants, his children, and plaintiff's daughter, his stepdaughter, in fee, each having one-third interest. It has long been the law in this State that the court's primary goal in interpreting a will, a trust or other donative document "is to fulfill the settlor's intent." In re Trust of Nelson, 454 N.J. Super. 151, 158 (App. Div. 2018).

New Jersey follows the Restatement approach that "[t]he organizing principle of ... donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please." Restatement (Third) of Prop.:

Wills and Donative Transfers § 10.1, cmt. a (Am. L. Inst. 2003). The comment to section 10.1 explains "this fundamental principle by stating two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor's intention; and (2) that the donor's intention is given effect to the maximum extent allowed by law." [6] Ibid. And in determining that intent, "all relevant evidence, whether direct or circumstantial, may be considered, including the text of the donative document and relevant extrinsic evidence." In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 282 (2008) (quoting Restatement (Third) Prop. § 10.2).

The rules governing relations between life estate holders and remainderman are not to the contrary. "As a general rule, where the creator of the life estate did not provide otherwise, ordinary repairs, incident to the life tenancy and necessary to the property's preservation, must be made by the life tenant and at the life tenant's own expense." 2 Thompson on Real Property, § 19.09 (Thomas ed. 2024) (emphasis added). See Tichenor v. Mechanics & Metals Nat'l Bank, 96 N.J. Eq. 560, 561 (Ch. 1924) (looking to the testator's intent to determine whether a life tenant permitted under the terms of a will to live "rent free, but at her own expense for the upkeep thereof," was to "be charged with the payment of taxes and other charges against the property"); see also Kruse v. Meissner, 136 N.J. Eq. 209, 211 (E. &A. 1945) (determining whether the testator in bequeathing to the defendant "the right to occupy and enjoy the use of my house ..., without cost or hindrance to him in any way," intended the defendant to collect the rents from the upstairs apartment without paying "any of the operating or maintenance charges of the premises").

***8** Although there is no question but that "[a] life tenant generally has the duty to keep the property in as good repair as when his estate began, not excepting ordinary wear and tear," Burlington Cnty. Trust Co. v. Kingsland, 18 N.J. Super. 223, 233 (Ch. Div. 1952), the rule applies only if the owner has not specified some other intent; see Restatement (First) of Prop.: Estates for Life § 141 (Am. L. Inst. 1936) ("The creator of an estate for life can increase or decrease the duties described in §§ 138 [Duty Not to Diminish Market Value of Subsequent Interests], 139 [Duty Not to Permit Deterioration of Land or Structures], and 140 [Duty Not to Make Changes in the Premises] by manifesting an intent to that effect in the creation of such estate."). See also A.M. Swarthout, Annotation, Rights and Duties of Life Tenant and Remainderman (Income and Corpus) with Respect to Repairs and Improvements, 175 A.L.R. 1434 (1948) ("A number of recent cases illustrate ... that the question whether the cost of repairs shall be borne by the life tenant or the remainderman is entirely within the control of the creator of the successive estates.").

The draft Restatement (Fourth) of Prop.: Liability for Waste § 5.1 (Am. L. Inst., Tentative Draft No. 3, 2002), makes the role of waste as "gap-filler" explicit: "Waste has always been understood to be a default rule, i.e., a background rule that parties are free to alter by agreement." [7] Id. at cmt. b. The comment continues: "Consistent with this intent-based focus on waste, the common law recognizes that acts or conduct that would otherwise constitute waste may be authorized by an appropriate provision in the instrument creating the interest so as to relieve the party of liability." Ibid. Today, "the issues covered by the action for waste are usually resolved ... by interpreting a lease, trust, or other legal instrument." [8] Id. at cmt. a.

As we have no quarrel with the trial court's fact-findings, and no doubt it correctly interpreted the decedent's intent expressed in the Expense Sharing Agreement, based on the credible evidence adduced at trial, that the decedent intended the remaindermen to bear the cost of capital expenses over $5,000 during plaintiff's life tenancy — and provided defendants a fund out of which to do so — we reverse the order on appeal and remand for the entry of judgment for plaintiff. The court should also reinstate and adjudicate defendants' third-party complaint for contribution against plaintiff's daughter. We do not retain jurisdiction.

Reversed.

All Citations

Not Reported in Atl. Rptr., 2024 WL 1949532

Footnotes

1 The third remainderman is Taylor Watts, plaintiff's daughter from a prior marriage.

2 The Agreement states that during the time the decedent remains the remainderman, he "shall be primarily responsible for all Property expenses during the course of his life."

3 The life estate deed states only that in the event the decedent predeceased plaintiff, the full fee interest at her death would vest in the decedent's "heirs, successors and/or assigns." Defendants were not specifically named. The Will the decedent executed in 2000 — and two subsequent codicils — make their remainder interests explicit.

4 The life estate deed the decedent gave plaintiff in 2014 made her tenancy defeasible on the termination of their relationship, as specifically set forth in subsection D, paragraph 2 "Terms and Conditions of Life Estate." In November 2016, four months before his death and six months after his second codicil adding plaintiff's daughter as a remainderman, the decedent recorded another deed. This second deed, which was simply captioned "Deed," not "Life Estate Deed" as was the first deed, states: "The grantor grants and conveys (transfers ownership of) to Grantee all Grantor's right, title and interest in the property described below." The deed continues:

> Grantor's right, title and interest in the property are as described in a certain Life Estate Deed between Grantor and Grantee dated February 10, 2014, and recorded with the Cape May County Clerk March 4, 2013 in Deed Book 3571, page 591. All other provisions concerning ownership of the property as set forth in Paragraph 2 of said Life Estate Deed are hereby affirmed and ratified and all ownership interests described in said Paragraph 2 shall be unaffected hereby.

The court rejected plaintiff's testimony that the decedent intended to convey the property to her outright by the second deed based on its granting clause. Instead, the court accepted decedent's attorney's testimony that the decedent intended only to eliminate his ability to terminate plaintiff's life estate by his second deed. Because plaintiff has not appealed the decision that limits her interest in the property to a life estate, we do not consider whether the court's construction of the second deed is correct, beyond noting if that was indeed the decedent's intent, there would certainly have been plainer ways of expressing it. See Estate of Colquhoun v. Estate of Colquhoun, 88 N.J. 558, 562 (1982) (noting "merger occurs upon uniting greater and lesser estates in the same person unless intent to the contrary"); Trenton Potteries Co. v. Blackwell, 137 N.J. Eq. 113, 116 (Ch. 1945) (expressing Judge Jayne's view that "[i]t is not of the nature of courts of equity to nourish the force of outworn formulas. The efficient and equitable process of inquiry to-day is to scrutinize the whole instrument in quest of the true intentions of the parties rather than to attribute predominant significance to some formal division of the document.").

5 Plaintiff notes she included in her claim for relief in her complaint a request for judgment that "[d]efendants are responsible for the cost of dredging and bulkhead repair, which are both capital items."

6 The comment to section 10.1 explains "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law," such as those "provisions promoting separation or divorce; impermissible racial or other categoric restrictions; [and] provisions encouraging illegal activity." Restatement (Third) of Prop. § 10.1 cmt. c.

7 For a cogent explanation of the scattering of the related topics of life estates, wills and donative transfers and liability for waste across the First, Third and Fourth Restatements, see Thomas W. Merrill, The Restatement of Property: The

Curse of Incompleteness, in The American Law Institute: A Centennial History 203 (Andrew S. Gold & Robert W. Gordon eds., 2023).

8 Although we do not disagree with the entry of summary judgment to defendants on plaintiff's breach of contract claim, that ruling does not preclude plaintiff's enforcement of the decedent's allocation of capital expenses between herself and the remaindermen attendant to the decedent's right to dispose of the shore house property as he chose.

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2024 WL 3249366
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF the 1979 INTER VIVOS TRUST OF ALFRED AND MARY SANZARI, GRANTORS, DATED JUNE 1, 1979.
In the Matter of Ben F. Sanzari Trust, Alfred F. Sanzari, Grantor, Dated October 11, 1994.

DOCKET NO. A-3612-21, A-3613-21, A-3614-21, A-3616-21
|
Argued May 13, 2024
|
Decided July 1, 2024

On appeal from the Superior Court of New Jersey, Chancery Division, Bergen County, Docket Nos. P-000562-19 and P-000029-20.

Attorneys and Law Firms

Jane A. Grinch argued the cause for appellant/cross-respondent Carl Sanzari (Cullen and Dykman, LLP, attorneys; Jane A. Grinch, of counsel and on the briefs; Steven Siegel, on the briefs).

Cynthia A. Cappell argued the cause for appellant/cross-respondent Ben Sanzari (Law Offices of Cynthia A. Cappell, LLC, attorneys; Cynthia A. Cappell and Christina Cooper, of counsel and on the briefs).

Joseph B. Fiorenzo argued the cause for respondents/cross-appellants David Sanzari and Frank Huttle (Sills Cummis & Gross, PC, attorneys; Joseph B. Fiorenzo, of counsel and on the briefs; Stephen M. Klein, on the briefs).

Before Judges Gilson, DeAlmeida, and Berdote Byrne.

Opinion

PER CURIAM

***1** In these four consolidated appeals, defendants Ben [1] and Carl Sanzari appeal from orders that excluded Carl, Ben's adopted son, as a beneficiary of two family trusts. Plaintiffs, David Sanzari and Frank Huttle, in their capacity as trustees of two trusts created by Alfred Sanzari for the benefit of Ben, brought two declaratory judgment actions against Ben and his adopted son Carl to exclude Carl from class gifts intended for Ben's children. The central dispute before us is whether the trust language, which includes the term "adopted children" in the class gifts, encompasses Carl, who was adopted as an adult.

The trial court denied defendants' summary judgment motions and concluded the "stranger to the adoption" doctrine applied a presumption against an adult adoptee's inclusion in a class gift. Consistent with the doctrine, it placed the burden on defendants to overcome that presumption with evidence of probable intent on the settlors' part to include Carl. Accordingly, at trial, defendants presented their evidence first. At the end of defendants' case, plaintiffs moved for judgment pursuant to Rule 4:37-2(b) and Rule 4:40-1. The trial court granted plaintiffs' motion.

Defendants appeal, arguing the trial court erred in denying them summary judgment and in granting a directed verdict to plaintiffs. Additionally, Ben, who is deaf and legally blind, argues his disabilities were not adequately accommodated at trial, in violation of his due process rights.

Plaintiffs, who sought to demonstrate a "scheme" by Carl's mother, (Ben's second wife) and Carl's biological father to have Carl included in the trust class gifts, cross-appeal from orders granting motions to quash various subpoenas and from related trial rulings excluding evidence of the motive for Carl's adoption as an adult.

Having reviewed the arguments of the parties and the applicable law, we affirm all the trial court's orders because defendants' motion for summary judgment was correctly denied, and the "stranger to the adoption" doctrine placed the burden of probable intent upon defendants. Defendants failed to meet their burden and the trial court correctly granted judgment to plaintiffs.

I.

We glean the following facts from the record. Alfred founded a successful real estate business, Alfred Sanzari Enterprises (ASE), in 1945. Alfred and his wife, Mary "wanted nothing more than this business ... to be carried on by their family." Alfred and Mary had three children: "Freddie," Ben, and David. Alfred and Mary began estate planning as early as 1976, when Alfred first met with attorneys to discuss placing ASE's properties into an inter vivos trust. They executed the first trust (the 1979 Trust) on June 1, 1979. Alfred and Mary continued to revise their estate plan over the years, resulting in the 1992 Last Will and Testament of Mary A. Sanzari, the 1992 Last Will and Testament of Alfred Sanzari, and a second trust (the 1994 Trust), which also held ASE assets. Only Alfred, not Mary, was the grantor of the 1994 Trust.

***2** The 1979 and 1994 Trusts provide a residuary class gift to each child of Ben and to each grandchild of Ben as a secondary beneficiary. In relevant part, the 1994 Trust provides:

> 2.2 Trust Estate.
>
> The Trust Estate shall be administered as one trust during the life of the Settlor's son, BEN F. SANZARI, (hereinafter "BEN") and continue upon his death until the youngest of his children living on the date of this indenture reaches the age of twenty-five (25) years old, (hereinafter referred as the "Division Date"), and shall be administered as follows:
>
> ....
>
> (d) Division Date. Upon the Division Date as defined in Section 2.2, the balance of property remaining in the Trust Estate, subject to the adjustment set forth in Section 2.2(c)(ii), shall be divided into as many equal shares as shall be necessary to create one such share for the Surviving Spouse and for each child of BEN who shall be then living or who is then deceased [(hereinafter "Beneficiary" or "Beneficiaries")], but has left one or more living descendants (hereinafter referred to as "Second Beneficiary" or "Second Beneficiaries").

Section 6.8 of the 1994 Trust, governing the trust's construction, states: "As used herein, wherever this context requires or permits ... the words 'children' and 'issue' shall include adopted children as though they were Settlor's natural born children and/or issue."

The 1979 Trust provides:

> (d) Upon the death of the Beneficiary [(Ben)] and the death or remarriage of BARBARA SANZARI, the present wife of the Beneficiary, the balance of the trust property, including any accumulated income and corpus accretions, shall thereupon be divided into as many equal shares as there are children of the Beneficiary then living ... and deceased children of the Beneficiary leaving issue then living .... Such shares of deceased children leaving issue then living shall be further divided per

stirpes. The children and the issue of deceased children entitled to shares hereunder are all hereinafter collectively referred to as "Secondary Beneficiaries" and individually referred to as "Second Beneficiary".

....

(f) All references herein to "issue", "child" or "children" shall be deemed to refer only to issue, child or children born of lawful wedlock or legally adopted.

The trusts did not expressly address whether they included adopted adults. At the time the 1979 Trust was executed, Ben was thirty-two years-old and had three young children with his then-wife Barbara. By 1994, Ben was forty-seven years-old and had a fourth child with Barbara.

The parties agree the trusts were created to keep ASE in the family. Ben conceded at trial that his "father would not provide any interest in his business to someone who was not sufficiently connected with the Sanzari family." Additionally, Alfred's firstborn, Freddie, who had "his own businesses with his wife," was not given any interest in the trusts, and neither was Freddie's wife or daughter. Notes from Alfred and Mary's estate planning admitted at trial indicate Alfred intended that "control of the properties should always be kept away from the wives of Ben and David." And although Ben's three daughters were given interests in ASE, Ben testified Alfred insisted that one of David's sons, or Ben's youngest biological son, Alfred Louis, "be the successor trustee who would be involved in managing the business assets."

***3** The trusts were also intended to ensure that Ben, who is legally blind and was born deaf, would remain financially secure notwithstanding his physical limitations. Huttle and David were appointed trustees to carry out those tasks.

From 2002 until mid-2005, Carl's mother Karina worked as a nurse's assistant for Alfred and Mary. Before Alfred's death on December 11, 2005, Alfred interacted with the minor Carl approximately five times, and knew him only as his nursing assistant's son. Ben did not meet Carl until two years after Alfred's death.

Karina began working as an aide and housekeeper for Ben in 2007. That same year, Ben's first wife Barbara filed for divorce. The divorce was finalized on December 6, 2007. Ben and Karina married six months later, and Carl moved in with the couple. Prior to the wedding, Karina and Ben entered into a prenuptial agreement pursuant to which Karina waived any interest in the trusts or trust-owned property. The agreement states Ben "has four children," Karina "has one child," and provides "[t]he parties mutually intend that each shall be free to provide for his or her child(ren) from Separate Property as each deems fit, both during the parties' lives and in their estate plans, freely and without consideration of interests or claims of the other spouse."

Ben testified Carl spent time with his step-grandmother, Mary, prior to her death. He testified Carl and Mary "interact[ed] a lot," he visited Mary with Carl every Sunday and "[s]ometimes Saturdays," and they would go out to eat together. Ben described Mary as "affectionate" toward Carl, "always greet[ing] him good morning and hug[ging] him," and said Mary had told Carl she loved him.

Ben testified Mary treated Carl as she did her other grandchildren, including making a monetary Christmas gift to Carl in 2009 from the 1979 Trust. However, on cross-examination, Ben admitted the $20,000 gift to Carl was made at his own suggestion and decision, and David — not Mary — as trustee of the trust, accepted his suggestion and signed the check. Carl testified he did not know whether Mary "had any role whatsoever with respect to the" check. Ben testified 2009 was the first time Carl received one of the Christmas checks.

Mary, who had suffered several serious health problems for years — including vision problems necessitating multiple eye surgeries and a liver transplant — became "very sick" by the end of 2009 with heart and lung problems. Mary died on February 23, 2010.

Ben alleged for the first time at trial that shortly before Mary's death, in December of 2009, he told Mary he wanted Carl to become a "part of the trust," and she agreed. He claimed the only person he ever spoke to around that time about adopting Carl or including him in the trust was Mary.

Ben testified Alfred and Mary created trusts for each of Ben's children, and either Alfred and Mary together, or Mary alone after Alfred passed, created trusts for the benefit of each of Ben's grandchildren within a couple months of their births. However, in the twenty-one-month span between Ben's marriage to Karina and Mary's death, Mary did not create a trust for Carl. Nor did she amend her will to bequeath anything to Carl.

On October 13, 2017, Ben, at age seventy, adopted Carl, then eighteen years-old. Plaintiffs filed two verified complaints, one for each of the trusts, seeking declaratory relief.

II.

***4** Initially we note defendants claim to appeal from the orders denying them summary judgment prior to trial. However, all of the notices of appeal and case information statements filed by defendants under all relevant docket numbers identify only the May 5, 2022 orders of judgment as the orders being appealed. Although the orders denying summary judgment are not identified, we address them for the sake of completeness.

The Trial Court's Order Denying Summary Judgment to Defendants.

In reviewing summary judgment orders, we employ a de novo standard of review and apply the same standard employed by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Accordingly, we determine whether the moving party has demonstrated there are no genuine disputes as to any material fact and, if so, whether the facts, viewed in the light most favorable to the non-moving party, entitle the moving party to a judgment as a matter of law. R. 4:46-2(c); see also Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

"A dispute of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.' " Gayles by Gayles v. Sky Zone Trampoline Park, 468 N.J. Super. 17, 22 (App. Div. 2021) (quoting Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017)).

In its written opinion, the trial court rejected defendants' argument that the trusts were clear on their faces, Carl automatically qualified as a beneficiary because of the "adopted child" language, and there was no need for the court to consider the doctrine of probable intent. The court found genuine issues of material fact existed as to the probable intent of Alfred and Mary, noting in particular that Huttle, who drafted the 1994 Trust, testified at deposition, based on his discussions with both settlors, they "did not want anyone who is not a blood relative of the Sanzari family to control any of the real estate then owned or thereafter acquired by the [t]rusts." The court also rejected defendants' argument that plaintiffs were seeking to have the trusts reformed, rather than interpreted, to exclude Carl. We agree.

The plain language of both trusts refers only to adopted "children." In the legal context, "child" refers to "[a]n unemancipated person under the age of majority." Black's Law Dictionary 299 (11th ed. 2019). [2] More colloquially, "child" refers to a "recently born person." Mirriam-Webster's Collegiate Dictionary 214 (11th ed. 2020). The plain language of both trusts provides that a child adopted by Ben would constitute a "child" or "issue" within the meaning of the trusts. Ben testified there was only one adoption known in the family prior to his adoption of Carl as an adult, which occurred when Alfred's brother Gene and his wife adopted an infant after they were unable to conceive. Ben testified he had no insights into the purposes of either trusts. He testified he did not "know the reason behind [his] parents establishing a trust for [him]" and "they never talked to [him] about

it." Defendants offered no evidence regarding Alfred's or Mary's purpose in including the term "adopted children" in the trusts. We conclude the trial court did not err in denying summary judgment to defendants.

The Stranger to the Adoption Doctrine.

***5** Defendants further argue the court erred in applying the "stranger to the adoption" doctrine to place the burden of proving probable intent on them.

When interpreting a trust our aim is to ascertain the probable intent of the testator or settlor. In re Est. of Payne, 186 N.J. 324, 335 (2006). In doing so, courts "employ presumptions," In re Tr. Under Agreement of Vander Poel, 396 N.J. Super. 218, 226 (App. Div. 2007), established by "impulses ... common to human nature," Fidelity Union Tr. Co. v. Robert, 36 N.J. 561, 565 (1962).

"The 'stranger to the adoption' doctrine is a well-established, judicially-created doctrine." In re Tr. for the Benefit of Duke, 305 N.J. Super. 408, 427 (Ch. Div. 1995). Historically, New Jersey courts acknowledged "a presumption that an adopted child could not take property under an instrument created by someone other than the adoptive parent unless the instrument itself indicated a specific intent that the adopted child should take." Id. at 427-28. "In 1953, the Legislature eliminated the 'stranger to the adoption' doctrine as it related to minors," but not "as it relates to the adult adoption statute." Id. at 429.

The adult adoption statute, provides, in relevant part:

> c. All rights, privileges and obligations due from the parents by adoption to the person adopted and from the person adopted to them and all relations between such person and them shall be the same as if the person adopted had been born to them in lawful wedlock, including the right to take and inherit intestate personal and real property from and through each other.
>
> Except, however, that:
>
> a. The person adopted shall not be capable of taking property expressly limited by a will or any other instrument to the heirs of the body of the adopting parent or parents, nor property coming on intestacy from the collateral kindred of the adopting parent or parents by right of representation; ....
>
> [N.J.S.A. 2A:22-3.]

Although the latter provision provides that an adopted adult cannot take if the trust is limited to "heirs of the body," otherwise referred to as "[t]he 'stranger to the adoption' provision," Duke, 305 N.J. Super. at 427, the judicial doctrine is broader than the statute and includes situations in which an instrument executed by a stranger to the adoption does not make specific provision for a specific adoptee.

In In re Estate of Griswold, the court observed the distinction between an adopted child and an adopted adult: "[t]here was at the time no reason for testator or his counsel to think about the possibility of either of his sons" – both of whom were beneficiaries – "adopting an adult." 140 N.J. Super. 35, 47 (Cnty. Ct. 1976). Although it could be presumed the testator would not have drawn a distinction between a natural child and an adopted child, the court thought it "clear" the testator would have strongly disapproved of diverting the assets of the trust by allowing an adopted adult to have a share "even though a stepson-in-law." Id. at 47-48. The Griswold court explained the rationale for distinguishing between adult and child adoptees:

> The adoption of children and the adoption of adults involve quite different considerations and different factors of policy and require and receive different treatment. The basic purpose of child adoption is to provide and protect the welfare of children, to provide homes and families and security for homeless children, and to provide children for couples who desire to have children to love and raise and maintain. A substantial factor here is the duty and obligation of support and maintenance.
>
> ***6** In an adult adoption the relation between the parties is different, the motivation can be quite varied, and such adoptions are treated differently in the statutes. Adoption of adults is ordinarily quite simple and almost in the nature of a civil contract....

> The complete severing of the relation to natural parents is not accomplished in an adult adoption; the relation remains in New Jersey as to inheritance in case of intestacy of the natural parents.
>
> [Id. at 51-52.]

In In re Estate of Nicol, 152 N.J. Super. 308, 319 (App. Div. 1977), we "thoroughly agree[d]" with that reasoning, stating:

> It is one thing to ascribe to a testator a contemplation of the possibility of that which has come to be relatively commonplace, namely, the adoption of a child at some time in the future by a member of the family or other relative, or any other prospective beneficiary under a will. Frequently, in such cases, the child is acquired in infancy, although the child may be older where a spouse adopts a stepchild. In both instances, however, the child is reared as one's own by the adopting parent and is recognized as such among the family and friends.
>
> But it is quite another matter where the adopted person is an adult. ... One would be hard-pressed to ascribe to a testator, in the absence of any expression thereon or of clarifying attendant circumstances, a probable intent to include an adopted adult among the children or issue of a testamentary beneficiary. It is extremely unlikely that a testator would foresee the likelihood that his or her child, or any other prospective beneficiary, might at some time in the future adopt an adult. It is equally improbable that an adopted adult would be embraced in the bosom of the family members other than the adopting parent, as would an adopted child.

Notably, although Nicol suggests an "older" adopted stepchild would normally be seen as the adoptive parent's "own" child, id. at 319, the "stranger to the adoption" doctrine applied nonetheless where the stepchild was a minor when the stepparent-stepchild relationship began, but an adult when adopted. Id. at 311, 320.

In Vander Poel, we considered the circumstance of a stepchild, Jane, later adopted as an adult, and her entitlement to proceeds from a trust created for her adoptive father by his mother. 396 N.J. Super. at 222-26. The trust in question provided that after the father's death, trust income was to be distributed to the settlor's living issue, which the trust defined "only as 'lawful issue.' " Id. at 222. When the trust was created, Jane's father was single and childless. Ibid. Soon after, he married Jane's mother, who had Jane from a prior marriage, and the couple later had biological children. Ibid. Her father discussed adopting Jane, and consulted with an attorney, but struggled to identify the best jurisdiction in which to effectuate the adoption, because the family had emigrated. Id. at 223-24. The adoption did not occur until several years after Jane turned eighteen. Id. at 224.

As in Nicol, we determined Jane was "subject to the 'stranger to the adoption' presumption." Id. at 232. In analyzing the settlor's probable intent, we observed the settlor "never established a separate trust for Jane as she did with each of the other children" and subsequent to Jane's adoption "specifically excluded adoptees from sharing in [a second] trust and her will." Id. at 234. Thus, not only did Jane not overcome the "stranger to the adoption" presumption, but the facts affirmatively "point[ed] to the probable intention by [the settlor] to keep [her family] fortune within bloodlines." Ibid.

***7** Ben and Carl both argue the "stranger to the adoption" doctrine does not apply pursuant to N.J.S.A. 2A:22-3(c)(a) because 1) the trusts did not limit class beneficiary status to Ben's "heirs of the body"; and 2) because they specifically included adoptees. We are unpersuaded. Whether a trust specifically uses the term "heirs of the body" is not the controlling language. As previously noted, the "stranger to the adoption" doctrine is judicially created and is broader than the statute. The presumption is not limited to cases where the trust explicitly uses the term "heirs of the body." For example, in Vander Poel, the term used was "issue" and we concluded the presumption still applied. 396 N.J. Super. at 232.

Defendant's second contention arguably creates a question of first impression: whether the "stranger to the adoption" doctrine applies to adult adoptees in cases where "child," "issue," and the like expressly includes child adoptees, but neither the trust itself nor the surrounding circumstances suggest the settlor contemplated adult adoption.

In arguing "the [t]rusts expressly authorized beneficiary status to Ben's adoptees" and that this "should end the judicial inquiry," defendants rely on In re Estate of Fenton, 386 N.J. Super. 404, 416 (App. Div. 2006). Their reliance is misplaced. Fenton concerned the validity of an adult adoption, not the probable intent of a testator. Id. at 412-13, 421-22. The plaintiffs, adult adoptees seeking to take pursuant to a trust, filed suit against defendant trust beneficiaries for a declaration that the judgment pursuant to which they were adopted remained in effect "and was valid for all purposes." Id. at 411. The trust indirectly at issue in Fenton expressly defined "child, children and issue" to include "an adopted child." Id. at 408. The trial court held the adult adoptions were valid, recognizing that was "the only real issue before the trial court," but also concluded the trust "conferred on each trust beneficiary, including [the plaintiffs' adoptive parent], the right to adopt children, which included both adults and minors, as provided by Maryland law." Id. at 412-13.

On appeal, we affirmed. Id. at 422. With respect to the trust, we reiterated it was governed by Maryland law, which, unlike New Jersey, "presume[s] all adult adoptees are included in class gifts to children." Id. at 421.

Fenton is inapplicable because we had no occasion to decide or apply New Jersey law regarding the rights of adult adoptees. As we have made clear, when applying New Jersey law adult and child adoption are two different processes, with different purposes, requirements, and consequences. Nicol, 152 N.J. Super. at 319; Griswold, 140 N.J. Super. at 51-52. New Jersey's statutes, unlikely Maryland's, expressly presume a lack of intent to include adult adoptees because of the legal and social differences between adult and child adoptions.

In sum, the trust language regarding adopted children cannot on its face be read as an expression of intent to include adult adoptees. Nothing else in the language of either trust or the surrounding circumstances suggests adult adoptees were meant to be included in the class.

Defendants' Proffered Evidence of Probable Intent.

Motions for judgment at the close of a plaintiff's case, R. 4:37-2(b), and motions for judgment at the close either "of all the evidence or at the close of the evidence offered by an opponent," R. 4:40-1, are governed by the same standard: "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied." Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (alteration in original) (quoting Est. of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)). "The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Perez v. Professionally Green, LLC, 215 N.J. 388, 407 (2013) (quoting Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969)).

***8** Again, the aim of a court interpreting a trust is to ascertain the probable intent of the settlor or testator. Payne, 186 N.J. at 335. By statute,

> [t]he intention of a settlor as expressed in a trust, or of an individual as expressed in a governing instrument, controls the legal effect of the dispositions therein and the rules of construction expressed in N.J.S. 3B:34 through N.J.S. 3B:3-48 shall apply unless the probable intent of such settlor or of such individual, as indicated by the trust or by such governing instrument and relevant circumstances, is contrary.
>
> [N.J.S.A. 3B:3-33.1(b).]

When interpreting a trust or similar instrument, courts must give "primary emphasis to [the settlor's] dominant plan and purpose as they appear from the entirety of [the trust] when read and considered in light of the surrounding facts and circumstances." Payne, 186 N.J. at 335 (quoting Fidelity Union Tr. Co., 36 N.J. at 564-65).

"The settlor's probable intent deserves vindication to bar unintended takers, as well as to protect intended beneficiaries." In re Tr. of Nelson, 454 N.J. Super. 151, 164 (App. Div. 2018). We reject a plain meaning approach to trust interpretation and may

engage in the probable intent inquiry even where a document is clear on its face, and will consider extrinsic evidence to aid in determining probable intent. Id. at 163; Payne, 186 N.J. at 335. Extrinsic evidence the court may consider is "not limited to what was known to the testator at the time of the execution of the" instrument. In re Est. of Baker, 297 N.J. Super. 203, 210 (App. Div. 1997). Our Supreme Court instructs us to "strain toward effectuating the testator's probable intent to accomplish what he would have done had he envisioned the present inquiry." Payne, 186 N.J. at 335 (quoting In re Est. of Branigan, 129 N.J. 324, 332 (1992)) (internal quotation marks omitted).

Here, in its written decision granting plaintiffs' motion for judgment, the court had shifted the burden of proof to defendants to demonstrate Carl, an adult adoptee, was an intended secondary beneficiary to the trusts. The court concluded defendants did not meet that burden, noting Ben and Carl were not able to provide any testimony as to the meaning of the term "adopted children" as set forth in the trusts. Alfred knew Carl only as his nurse's assistant's son, when Karina was employed to care for him and Mary; defendants' assertion that Mary treated Carl as a grandson was based largely on a single monetary Christmas gift from Mary to Carl in 2009, which Ben acknowledged was actually made by David at Ben's request; Mary's will made specific bequests to all of her grandchildren but not to Carl, even though he was known to her; and Mary created trusts for each of her biological grandchildren but not for Carl.

The court also found defendants' testimony about the loving and genuine relationship between Ben and Carl not relevant, ruling that "such love and affection is not attributable to Alfred and Mary and does not support defendants' contentions regarding the probable intention of Alfred and Mary." Finally, the court rejected Ben's testimony that he told Mary in 2009 he intended to adopt Carl and wanted him to be included as a secondary beneficiary, finding it inconsistent with Ben's testimony that he never reviewed the trusts prior to Mary's death, and as legally insufficient, "self-serving" testimony pursuant to the Dead Man's Act, N.J.S.A. 2A:81-2. Thus, the court concluded defendants "failed to present evidence as to the probable intent of Alfred and/or Mary sufficient to overcome the presumption of the 'stranger to the adoption' doctrine."

***9** Ben argues on appeal the trial court failed to give reasonable inferences to defendants, and thus, did not appropriately apply the standard applicable on a motion for judgment. Ben contends the trial court improperly disregarded similar language regarding child adoptees in other testamentary instruments executed by Alfred and Mary, as well as notes and draft documents recorded by their attorneys. None of Ben's examples specifically include adult adoptees or mention adult adoption. Moreover, the trusts make no mention of adult adoptees. Although Ben posits this evidence as conspicuously missing any proof of a "secret intention to limit or restrict beneficiary status to only certain types of adoptees," we view it as the absence of an expression of intent to specifically include adult adoptees in a class gift.

Ben also argues the trial court ignored evidence of "Carl's personal interactions with Alfred and Mary and, in particular, Mary's treatment of Carl as a member of the Sanzari Family." Ben contends this evidence permitted an inference that "Alfred and Mary not only intended any legal adoptee of Ben be treated as a class beneficiary under the [t]rusts ... but also that Alfred and Mary intended that Carl, in particular, be treated as a class beneficiary under the [t]rusts."

Defendants are entitled to the benefit of only "reasonabl[e]" inferences. Roach, 164 N.J. at 612. It is not reasonable to infer from their interactions any intent by Alfred to specifically include Carl as a class beneficiary when Alfred knew Carl only as his employee's son. It likewise is not reasonable to infer Mary treated Carl like Ben's other children, when the undisputed evidence demonstrates Mary did not create a trust for Carl or bequeath anything to Carl in her will, as she did for Ben's other children. And not all Sanzari family members were included in the two trusts: Freddy, his wife, and children were specifically excluded. Even if Mary "treat[ed] Carl as a member of the Sanzari family," that fact is insufficient to support an inference that she intended Carl to become a secondary beneficiary.

Finally, Ben argues the court discounted undisputed evidence of a "loving relationship" between Ben and Carl in finding that "such love and affection is not attributable to Alfred and Mary and does not support [d]efendants' contentions regarding the probable intention of Alfred and Mary." Ben contends "the existence of a loving parent-child relationship is highly relevant to the 'stranger to the adoption' inquiry" because the doctrine considers whether the adoptive parent's "sole purpose" in adopting

is to secure financial benefits for the adoptee, citing In re the Est. of Comly, 90 N.J. Super. 498, 503 (Cnty. Ct. 1966), and Fenton, 386 N.J. Super. at 418, itself discussing Comly.

The Comly court held that "[w]hile undeniably it is the policy of the Legislature to place adopted children on a level with natural children, such a policy should not be used to permit the adoption of adults for the sole purpose of giving them an interest in property." 90 N.J. Super. at 503. The court also said more generally that:

> If any adult that [the adoptive parent] chose to adopt qualified as a "child" under the will [at issue], then, in effect, [the adoptive parent] would have a power of appointment over the property and could lessen the shares of his natural children as much as he pleased without any obligation on his part to provide and care for the adopted "child."
>
> [Id. at 503.]

This, the court said, was "obviously" not the intent of our Supreme Court in deciding In re Est. of Coe, 42 N.J. 485 (1964), when it held adopted children qualified as "children" within the meaning of an instrument. Comly, 90 N.J. Super. at 503. Comly and Fenton do not support Ben's argument. A genuine, loving basis for an adult adoption alone is insufficient to overcome the presumption against adult adoptees. Nothing in our decision today precludes Carl from inheriting from Ben.

The Trial Court's Accommodations.

***10** Finally, Ben argues the trial court failed to provide reasonable accommodations to him during trial for his known disabilities, which he alleged affected his ability to understand the proceedings. Ben's contention is not supported by the record, and he does not state what specific accommodations the trial court failed to afford him. The record demonstrates the court limited trial testimony to approximately two and a half hours each day at Ben's request, so as not to exhaust him, and provided four ASL interpreters at all times. It also granted trial adjournments twice to accommodate Ben so he could vacation and ensured he had visibility of his interpreters. We discern no merit in Ben's argument regarding a lack of accommodation by the trial court.

Plaintiffs' appeals are rendered moot by our affirmance. To the extent we have not addressed a parties' argument, we are satisfied they lack sufficient merit to warrant discussion in our opinion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2024 WL 3249366

Footnotes

1 Because of the common surname, we refer to some the parties by their first names. We intend no disrespect.

2 New Jersey statutes generally compare children to individuals who have reached the age of majority, noting the disaffirming effect minority has on the ability to transact, contract, or participate in certain enumerated activities. See, e.g., N.J.S.A. 9:17B-1 to -4 (the age of majority statute, which governs legal capacity to contract, sue and be sued, serve on juries, marry, and adopt children; and disallowing children from participating in those activities).

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479 N.J.Super. 379
Superior Court of New Jersey, Appellate Division.

NEW JERSEY REALTORS, Plaintiff-Respondent,
v.
TOWNSHIP OF BERKELEY, Defendant-Appellant.

DOCKET NO. A-1384-22
|
Argued November 8, 2023
|
Decided July 31, 2024

Synopsis

Synopsis

Background: Nonprofit trade association brought action against township challenging validity of ordinance that limited ownership in certain senior housing communities to persons aged 55 and older, arguing that such restriction, by limiting property ownership rather than occupancy, amounted to discrimination based on familial status in violation of the Fair Housing Act (FHA) and the New Jersey Law Against Discrimination (NJLAD). The Superior Court, Law Division, Ocean County, granted summary judgment in favor of association and invalidated ordinance. Township appealed.

Holdings: Addressing issues of first impression, the Superior Court, Appellate Division, Gooden Brown, P.J.A.D., held that:

[1] the ordinance, with its age restriction imposed on ownership, as opposed to occupancy, violated the FHA;

[2] the ordinance violated the NJLAD;

[3] the ordinance was preempted by the FHA and the NJLAD; and

[4] alternatively, the ordinance was arbitrary and unreasonable.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Declaratory Judgment.

West Headnotes (35)

[1] Appeal and Error Review using standard applied below

The Superior Court, Appellate Division, reviews the trial court's grant of summary judgment de novo under the same standard as the trial court.

[2] **Appeal and Error** Review for correctness or error

On review of the trial court's grant of summary judgment, where there is no material fact in dispute, the Superior Court, Appellate Division, must decide whether the trial court correctly interpreted the law.

[3] **Appeal and Error** De novo review

Appeal and Error Deference given to lower court in general

The Superior Court, Appellate Division, reviews issues of law de novo and accords no deference to the trial judge's legal conclusions.

[4] **Appeal and Error** Statutory or legislative law

Issues of statutory construction are subject to de novo review.

[5] **Statutes** Intent

Court's role when interpreting a statute is to determine and give effect to the legislature's intent.

[6] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

Statutes Related provisions

To achieve the goal of statutory interpretation, that is, to give effect to the legislature's intent, courts look first to the plain language of the statute, attributing to statutory words their ordinary meaning and significance and reading them in context with related provisions so as to give sense to the legislation as a whole.

[7] **Statutes** Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language

If statutory text has a clear meaning, that meaning controls.

[8] **Statutes** Construction based on multiple factors

Statutes Relation to plain, literal, or clear meaning; ambiguity

If the plain language of a statute is ambiguous or leads to an absurd result or to a result at odds with the objective of the overall legislative scheme, then court will analyze extrinsic sources such as legislative history to best determine legislative intent.

[9] **Administrative Law and Procedure** Construction

Courts interpret a regulation in the same manner that they would interpret a statute.

[10] **Civil Rights** Sale; vendor and purchaser

Civil Rights Lease or rental; landlord and tenant

Under the Fair Housing Act (FHA), discrimination in the sale or rental of housing on the basis of familial status is strictly prohibited. 42 U.S.C.A. § 3604.

[11] **Civil Rights** Discrimination by reason of marital, parental, or familial status

To address concerns regarding the impact of prohibiting housing discrimination based on familial status in retirement communities, where elderly residents had bought or rented homes with the expectation that they would be able to live without the noise and hazards of children, Congress expressly exempted qualified housing for older persons from compliance with the Fair Housing Act (FHA). 42 U.S.C.A. §§ 3604, 3607(b).

[12] **Civil Rights** Discrimination by reason of marital, parental, or familial status

Housing-for-older-persons exemptions from the Fair Housing Act (FHA) permit communities satisfying certain requirements to discriminate on the basis of familial status. 42 U.S.C.A. §§ 3604, 3607(b).

[13] **Civil Rights** Discrimination by reason of marital, parental, or familial status

Housing-for-older-persons exemptions to the Fair Housing Act (FHA) apply to three types of housing, namely, housing for persons 55 years of age or older, housing provided under certain state or federal programs specifically designed and operated to assist elderly persons, and housing intended for, and solely occupied by, persons 62 years of age or older. 42 U.S.C.A. §§ 3604, 3607(b).

[14] **Civil Rights** Discrimination by reason of marital, parental, or familial status

Township ordinance that limited ownership in certain senior housing communities to persons aged 55 and older violated the Fair Housing Act (FHA); although, on its face, the FHA did not expressly permit or preclude an age-restricted community from limiting home ownership to persons 55 years of age or older, the statute did, subject to certain exemptions, prohibit discriminatory acts, including refusing to sell a dwelling to any person, discriminating against any person in terms or conditions of sale, or indicating any preference with respect to sale based upon familial status, ordinance's restriction on ownership in age-restricted communities discriminated on the basis of familial status, and FHA's housing-for-older-persons exemption permitted restrictions on occupancy, not ownership, regarding persons aged 55 and older, and so exemption did not expressly permit restriction on ownership embodied in ordinance. 42 U.S.C.A. §§ 3604, 3607(b)(2)(C).

More cases on this issue

[15] **Civil Rights** Discrimination by reason of marital, parental, or familial status

Discrimination on the basis of familial status does not violate the Fair Housing Act (FHA) if the housing-for-older-persons exemption applies. 42 U.S.C.A. §§ 3604, 3607(b)(1).

[16] **Civil Rights** Housing

As a general matter, the primary goal of the Fair Housing Act (FHA) is to limit discrimination in the housing arena. 42 U.S.C.A. § 3604.

[17] **Civil Rights** Discrimination by reason of marital, parental, or familial status

Township ordinance that limited ownership in certain senior housing communities to persons aged 55 and older violated the New Jersey Law Against Discrimination (NJLAD); although the NJLAD and its attendant regulations only delineated occupancy restrictions and made no mention of ownership restrictions, plain reading of amended regulation clarified that housing-for-older-persons exemption applied only to occupancy, not ownership, such that, in light of text and underlying purpose of the NJLAD, any age restriction imposed on ownership in planned residential retirement communities was a discriminatory practice that violated the NJLAD on the basis of familial status. N.J. Stat. Ann. §§ 10:5-5(mm), 10:5-12(h); N.J. Admin. Code 13:15-1.2(a), 13:15-1.5.

More cases on this issue

[18] **Municipal, County, and Local Government** State Preemption of Local Laws in General

A court may declare a municipal ordinance invalid if it is preempted by superior legal authority.

[19] **Municipal, County, and Local Government** Occupation of field; field preemption

Preemption analysis calls for answer initially to whether field or subject matter in which municipal ordinance operates, including its effects, is the same as that in which the state has acted, and if not, then preemption is clearly inapplicable.

[20] **Municipal, County, and Local Government** State Preemption of Local Laws in General

For municipal ordinance to be preempted, it is not enough that the legislature has legislated upon the subject.

[21] **Municipal, County, and Local Government** Occupation of field; field preemption

If field or subject matter in which municipal ordinance operates, including its effects, is the same as that in which the state has acted, then five questions should be considered to determine whether the ordinance is preempted by state law: (1) whether the ordinance conflicts with state law, either because of conflicting policies or operational effect; that is, whether ordinance forbids what the legislature has permitted or permits what the legislature has forbidden, (2) whether the state law is intended, expressly or impliedly, to be exclusive in the field, (3) whether the subject matter reflects a need for uniformity, (4) whether the state scheme is so pervasive or comprehensive that it precludes coexistence of municipal regulation, and (5) whether the ordinance stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature.

[22] **Federal Preemption** Civil Rights

Zoning and Planning Other particular cases

Township ordinance that limited ownership, as opposed to occupancy, in certain senior housing communities to persons aged 55 and older was preempted by the Fair Housing Act (FHA) and the New Jersey Law Against Discrimination (NJLAD); ordinance conflicted with, and violated, both the FHA and the NJLAD, the federal and state laws were intended to be exclusive in the field, the subject matter reflected a need for uniformity, schemes established by the federal and state laws were so pervasive or comprehensive that they precluded coexistence of municipal regulation, and ordinance stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and the state legislature, respectively. 42 U.S.C.A. § 3604(a); N.J. Stat. Ann. § 10:5-12(h).

More cases on this issue

[23] **Municipal, County, and Local Government** Occupation of field; field preemption

Local action is preempted when the legislature intended its own actions, whether it exhausts the field or touches only part of it, to be exclusive.

[24] **Municipal, County, and Local Government** As to validity

When reviewing municipal action, courts apply a presumption of validity and reasonableness to adopted ordinances, which is derived from the New Jersey Constitution. N.J. Const. art. 4, § 7, para. 11.

[25] **Municipal, County, and Local Government** Judicial role in general

When reviewing the validity of a municipal ordinance, courts do not pass on the wisdom of the ordinance; that is exclusively a legislative function.

1 Case that cites this headnote

[26] **Municipal, County, and Local Government** As to validity

Party challenging municipal ordinance bears the burden of showing that the ordinance, in whole or in application to any particular property, is arbitrary, capricious, or unreasonable.

[27] **Municipal, County, and Local Government** As to validity

Presumption of validity accorded municipal ordinances embodies the principle that the police power of the state may be invested in local government to enable local government to discharge its role as an arm or agency of the state and to meet other needs of the community. N.J. Const. art. 4, § 7, para. 11.

[28] **Municipal, County, and Local Government** As to validity

Presumption of validity accorded municipal ordinances is not without restraint.

1 Case that cites this headnote

[29] **Municipal, County, and Local Government** Cities and municipal corporations in general

Municipal, County, and Local Government Local powers as granted or delegated by state

Local municipality is but a creature of the state, capable of exercising only those powers granted to it by the legislature.

[30] **Municipal, County, and Local Government** As to validity

Presumption of validity accorded municipal ordinances is only a presumption and may be overcome or rebutted not only by clear evidence aliunde, but also by a showing on its face or in the light of facts of which judicial notice can be taken, of transgression of constitutional limitation or the bounds of reason.

[31] **Zoning and Planning** Constitutional and Statutory Provisions

Municipal Land Use Law (MLUL) authorizes municipalities to regulate the use of land and buildings within their borders. N.J. Stat. Ann. §§ 40:55D-1 et seq.

[32] Perpetuities Suspension of Absolute Power of Alienation

Restraints on the alienation of property are generally disfavored as a matter of public policy.

[33] Zoning and Planning Source and Scope of Power

Zoning enabling acts authorize local regulation of land use and not regulation of identity or status of owners or persons who occupy land.

[34] Municipal, County, and Local Government Use and maintenance of property

Right to own and dispose of real property is subject to reasonable exercise of police power. U.S. Const. Amend. 14; N.J. Const. art. 1, § 1.

[35] Zoning and Planning Residential facilities and daycare

Township ordinance that limited ownership, as opposed to occupancy, in certain senior housing communities to persons aged 55 and older was not a valid and reasonable exercise of police power but, instead, was an arbitrary, capricious, and unreasonable infringement upon the constitutionally protected right to own and sell property, which exceeded the scope of township's authority; although township posited that enforcement of restriction could accomplish a worthwhile purpose by addressing rampant house-flipping and speculation by non-owner occupants, the persons to whom alienation was prohibited could be substantial, namely, the very seniors that township sought to protect, by preventing owners over age 55 from transferring title to non-qualifying family members, a common practice in estate planning, and ordinance would adversely affect every owner's ability to sell by limiting the pool of eligible buyers. U.S. Const. Amend. 14; N.J. Const. art. 1, § 1.

More cases on this issue

****114** On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0991-22.

Attorneys and Law Firms

Christopher J. Dasti argued the cause for appellant (Dasti & Associates, PC, attorneys; Christopher J. Dasti, of counsel and on the briefs; Jeffrey D. Cheney, on the briefs).

Barry S. Goodman, Iselin, argued the cause for respondent (Greenbaum, Rowe, Smith & Davis LLP, attorneys; Barry S. Goodman and Conor J. Hennessey, of counsel and on the brief).

Before Judges Haas, Gooden Brown, and Natali.

Opinion

The opinion of the court was delivered by

GOODEN BROWN, P.J.A.D.

***386** This appeal requires us to determine the validity of a local ordinance restricting ownership at certain senior housing communities. ***387** Defendant Township of Berkeley (Township) appeals from the December 2, 2022, Law Division order granting summary judgment to plaintiff New Jersey Realtors (NJR). The order effectively invalidated Berkeley Township Ordinance No. 22-13-OA (the Ordinance), which amended certain land use provisions to limit property ownership in certain senior housing communities to persons aged fifty-five and older. NJR sued the Township after the Ordinance was enacted, arguing that such a restriction violated the Fair Housing Act (FHA), 42 U.S.C. § 3604(a), and the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-12(h), because both statutes prohibit discrimination based on familial status. According to NJR, by setting a minimum age for property ownership in retirement communities, the ordinance was discriminatory, and the restriction did not fall within the limited housing for older persons exemption. Finding that the ordinance violated the FHA and the NJLAD, the judge invalidated the ordinance. We agree and affirm.

I.

The facts are undisputed. On March 29, 2022, the Township amended and supplemented multiple sections of Chapter 35, the "Land Development" section of the Township's municipal code, by enacting the Ordinance. The Ordinance changed existing land use provisions that required occupancy of age-restricted units by persons aged fifty-five years or older, to now require ownership of such units by persons aged fifty-five or older within certain retirement communities.

Specifically, the Ordinance amended the definition of "Planned Residential Retirement Community" (PRRC) under Section 35-101.1 to read as follows:

> "PRRC[ ]" shall mean a community having one ... or more parcels of land with a contiguous total acreage of at least one hundred ... acres except within the RGR Zone which must have a continuous total acreage of at least forty ... acres, forming a land block to be dedicated ****115** to the use of a planned retirement community; through its corporation, association or owners, the land shall be restricted by bylaws, rules, regulations and restrictions of record, and services for the benefit of permanent residents of communities which mandate that in accordance with 24 [C.F.R. §] 100.306[(a)(4)], 24 [C.F.R. §] 100.[306(a)(5)] and 24 [C.F.R. §] 100.[306(a)(6)] only persons fifty-five ... years of age and older, along with either ***388** their respective spouse or domestic partner, or otherwise if expressly authorized by the PRRC's bylaws, rules, regulations and restrictions of record, shall purchase a Lot or Living Unit in a PRRC to assure that the PRRC does not have its age-restricted status pursuant to 42 U.S.C. [§§ 3601 to 3631] revoked and otherwise which require that residents comply with the provisions, stipulations and restrictions regarding senior communities allowing occupancy of units by persons fifty-five ... years of age or older, as contained in the Federal Fair Housing Act, as amended in 1988. Ownership of the residential units and the area comprising a PRRC may be in accordance with the provisions of N.J.S.A. 45:22A-21[to -56], or the ownership may be as is commonly referred to as "fee simple" with open space to be maintained through assessment against property owners within the confines of the community.
>
> [(Emphasis added).]

Next, the Ordinance amended Section 35-101.12 to state that:

> The maintenance of the green areas, private roadways, driveways, common courtyards, recreational areas, lakes and other improvements not intended to be individually owned shall be provided by an association organized under the Nonprofit Corporation Statute of the State of New Jersey (Title 15) and formed for that purpose. The applicant shall, in the form restrictions and covenants to be recorded, provided that title to the aforesaid enumerated areas shall be conveyed to the association, whose members shall be owners of lots who are only persons fifty-five ... years of age or older, along with either their respective spouse or domestic partner, or other interests, or to such other persons as a majority of the members shall

> designate from time to time by duly adopted bylaws. Such restrictions and covenants shall mandate that in accordance with 24 [C.F.R. §] 100.306[(a)(4)], 24 [C.F.R. §] 100.306[(a)(5)] and 24 [C.F.R. §] 100.306[(a)(6)] only persons fifty-five ... years of age or older, along with either their respective spouse or domestic partner, or otherwise if expressly authorized by the PRRC's bylaws, rules, regulations and restrictions of record, shall purchase a Lot or Living Unit in a PRRC to assure that the PRRC does not have its age-restricted status pursuant to 42 U.S.C. [§ 3601 to 3631] revoked and further provide that the same shall not be altered, amended, voided or released, in whole or in part, without the written consent of the Township of Berkeley by resolution duly adopted at a regular meeting of the Township Council and except upon proper notice being given by the applicant or any other party in interest to all owners of lots in the PRRC.
>
> [(Emphasis added).]

Finally, Section 35-101.14(c) was amended as follows:

> The documents shall be forwarded to the Board and shall be subject to the review of the Board and of the Township Council as to their adequacy in ensuring that the community shall be constituted so as to be consistent with the purposes ****116** and requirements of this section, including the mandate that in accordance with 24 [C.F.R. §] 100.306[(a)(4)], 24 [C.F.R. §] 100.306[(a)(5)] and 24 [C.F.R. §] 100.306[(a)(6)] only persons fifty-five ... of age or older, along with either their respective spouse or domestic partner, or otherwise if expressly authorized by the ***389** PRRC's bylaws, rules, regulations and restrictions of record shall purchase a Lot or Living Unit in a PRRC to assure that the PRRC does not have its age-restricted status pursuant to 42 U.S.C. [§ 3601 to 3631] revoked. The proposed documents and restrictions shall indicate a comprehensive and equitable program for the orderly transition of control over the homeowners' association from the applicant or the developer to the actual homeowners in the community.
>
> [(Emphasis added).]

On May 11, 2022, NJR filed a complaint in lieu of prerogative writs against the Township seeking an order declaring the Ordinance "invalid and unenforceable" on the grounds that limiting property ownership, rather than occupancy, violated federal and state law. In the complaint, NJR asserted that the Ordinance violates the FHA and the NJLAD because both statutes prohibit familial status discrimination, which the Ordinance violates by setting a minimum age for property ownership in PRRCs, and the restriction does not fall within the statutory exemption. See 42 U.S.C. § 3604(a); N.J.S.A. 10:5-12.5(a). According to the complaint, the Ordinance is preempted by the FHA and the NJLAD, is arbitrary, capricious, and unreasonable, and violates the State Constitution, N.J. Const. art. 1, ¶ 1. [1]

On August 12, 2022, NJR moved for summary judgment. In support, NJR relied on a July 5, 2017, letter from the Commissioner of the Department of Community Affairs (DCA) responding to NJR's inquiries on the legality of restricting home ownership in age-restricted communities. The letter stated:

> [DCA] has received your correspondence regarding age-restricted communities limiting the ownership of homes to those over the age of [fifty-five] or [sixty-two]. At my direction, staff reviewed the current federal and state law regarding age-restricted communities with regards to ownership and occupancy.
>
> Our research yielded the results you expected. Both the federal and state laws limit the age of the occupants of the home in age-restricted communities, not the age of the owner of the home. Therefore, age-restricted communities cannot prohibit the sale of a home based on the owner's age. However, they may require ***390** the owner or purchaser to certify that the units will be occupied by a person that meets the age restriction.

Additionally, in response to a request from the Township's Administrator for clarification of the July 5, 2017, letter, in an October 26, 2017, letter, the DCA Commissioner informed the Township in pertinent part:

> I am writing in response to your letter requesting clarification, and additional information, regarding my letter dated July 5, 2017, which dealt with the ownership of housing units in age-restricted communities. That letter was written in response

> to a question from [NJR]. In that letter, I indicated that while federal and State law permit, in certain instances, ****117** a community to restrict occupancy to persons based on age, those laws do not include similar language regarding the owners of units in such communities. That conclusion was based on a review of the applicable statutes.
>
> In your letter, you raise several questions. First, you inquire as to whether my letter was meant to suggest that a community could, in fact, restrict the age of owners, but that communities are not currently doing so. That is not what my letter was stating; rather, as noted above, age-restricted communities may restrict the occupants, but not the owners of units, based on age.

On December 2, 2022, following oral argument, the judge entered an order granting NJR's motion and invalidating the Ordinance. In an oral decision, the judge determined that the Ordinance could not survive the challenge because it conflicted with the FHA and the NJLAD by "restrict[ing] ownership," not occupancy, "of people who are over [fifty-five]." The judge acknowledged the DCA letters, noting that "the [DCA] made a specific finding that ... the exception ... under the [FHA] and the [NJLAD] ... relates to occupancy and [not] ownership." The judge also ruled that the Ordinance concerned an "area that has been preempted by ... design on the federal and state level ... [and] ... conflicts with the housing regulations and the scheme to provide ... age-restricted housing." Finally, the judge commented on the "unintended consequences" of the Ordinance, which included preventing an older owner from transferring title to the property to a non-qualifying younger person "for purposes of estate planning." This appeal followed.

On appeal, the Township argues the judge "improperly granted [NJR's] motion for summary judgment as the Ordinance is constitutional ***391** and neither invalidated nor preempted" by the FHA or the NJLAD.

II.

[1] "[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199, 129 A.3d 1069 (2016). That standard is well-settled.

> [I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. R. 4:46-2(c); see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995). On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted. R. 4:46-2(c); see Brill, 142 N.J. at 540, 666 A.2d 146.
>
> [Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366, 142 A.3d 742 (2016).]

[2] **[3]** Where there is no material fact in dispute, as here, "we must then 'decide whether the trial court correctly interpreted the law.' " DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333, 64 A.3d 579 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494, 935 A.2d 769 (App. Div. 2007)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions ...." MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312, 189 A.3d 914 (App. Div. 2018).

[4] **[5]** **[6]** **[7]** **[8]** **[9]** The issue before us involves the interpretation of the FHA and the ****118** NJLAD. Issues of "statutory construction" are also subject to "de novo" review. Cashin v. Bello, 223 N.J. 328, 335, 123 A.3d 1042 (2015). In interpreting a statute, our Supreme Court recently provided the following guidance:

> Our role when interpreting a statute "is to determine and give effect to the Legislature's intent." DYFS v. A.L., 213 N.J. 1, 20, 59 A.3d 576 (2013).
>
> To achieve that goal, "we look first to the plain language of the statute," ibid., attributing to statutory words "their ordinary meaning and significance and read[ing] them in context with related provisions so as to give sense to the ***392** legislation

as a whole," DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005) (citations omitted). If the statutory text has a clear meaning, that meaning controls, but if the plain language is ambiguous or leads "to an absurd result or to a result at odds with the objective of the overall legislative scheme," then we will analyze extrinsic sources such as legislative history to best determine legislative intent. DCPP v. Y.N., 220 N.J. 165, 178, 104 A.3d 244 (2014).

[N.J. Div. of Child. Prot. & Permanency v. B.P., 257 N.J. 361, 374, 313 A.3d 905 (2024) (alteration in original).]

" '[W]e interpret a regulation in the same manner that we would interpret a statute.' " In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 542, 139 A.3d 1146 (2016) (quoting US Bank, N.A. v. Hough, 210 N.J. 187, 199, 42 A.3d 870 (2012)).

[10] Under the FHA, 42 U.S.C. § 3604, discrimination in the sale or rental of housing on the basis of familial status is strictly prohibited. See Seniors Civ. Liberties Ass'n v. Kemp, 761 F. Supp. 1528, 1541 (M.D. Fla. 1991) ("[T]he Fair Housing Amendments Act of 1988 applies to both rental and ownership housing."). To that end, subject to certain exemptions, 42 U.S.C. § 3604 makes it unlawful to "refuse to sell or rent[,] ... or otherwise make unavailable or deny, a dwelling to any person;" "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental[,] ... or in the provision or services or facilities in connection therewith;" and "[t]o make, print, or publish ... any notice, statement, or advertisement, with respect to the sale or rental ... that indicates any preference, limitation, or discrimination" based upon familial status. "The Act defines the term 'familial status' as 'one or more individuals (who have not attained the age of [eighteen] years)' living with a parent or legal guardian." Massaro v. Mainlands Section 1 & 2 Civic Ass'n, 3 F.3d 1472, 1476 (11th Cir. 1993) (quoting 42 U.S.C. § 3602(k)).

[11] **[12]** "Members of Congress determined the need for such legislation based on studies and hearings indicating that families with children were having difficulty securing housing because of age limitations." Ibid. To address concerns regarding the impact of prohibiting housing discrimination based on familial status in retirement communities, "where elderly residents had bought or rented homes with the expectation that they would be able to live ***393** without the noise and hazards of children," ibid., Congress expressly exempted qualified housing for older persons from compliance. Specifically, 42 U.S.C. § 3607(b) provides that "[n]othing in [the FHA] .... regarding familial status appl[ies] with respect to housing for older persons." See Seniors Civ. Liberties Ass'n, 761 F. Supp. at 1541 ("In short, it was the legislature's intent to open up all forms of housing to parents with children under [eighteen] except those that are designed for older persons and qualify for an exemption." (Emphasis omitted)). As such, "[t]he housing for older persons exemptions ****119** permit communities satisfying certain requirements to discriminate on the basis of familial status." Balvage v. Ryderwood Improvement & Serv. Ass'n, Inc., 642 F.3d 765, 769 (9th Cir. 2011).

[13] The housing for older persons exemptions "apply to three types of housing, including, as relevant here, housing for persons [fifty-five] years of age or older." Ibid. [2] To qualify for the exemption, the housing must be:

(C) intended and operated for occupancy by persons [fifty-five] years of age or older, and—

(i) at least [eighty] percent of the occupied units are occupied by at least one person who is [fifty-five] years of age or older;

(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—

(I) provide for verification by reliable surveys and affidavits; and

(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

[42 U.S.C. § 3607(b)(2)(C).]

***394** Noticeably, the exemption only addresses "occupancy" and is silent on whether it is permissible to restrict ownership to persons fifty-five or older. Ibid. The Code of Federal Regulations (CFR), which governs the application of the exemption, also makes no mention of ownership, and instead explains how the eighty percent occupancy requirement can be satisfied, 24 C.F.R. § 100.305, how a housing facility or community must demonstrate its intent to operate as housing designed for occupancy for persons fifty-five years of age or older, 24 C.F.R. § 100.306, and how to verify compliance with the eighty percent occupancy requirement, 24 C.F.R. § 100.307.

To date, New Jersey courts have not expressly addressed whether age-related ownership restrictions are permitted under the FHA. Other jurisdictions have rendered tangential decisions without tackling the issue head on. Some courts appear to treat ownership and occupancy restrictions synonymously, while other courts warn that ownership restrictions infringe upon constitutionally protected property rights. For example, in Balvage, where defendant homeowners' association restricted "ownership and residence ... to persons ... [fifty-five] years of age or older," the "sole issue" in the lawsuit filed by residents alleging discriminatory housing practices in violation of the FHA was whether defendant was "exempt from the FHA's prohibitions on familial status discrimination under ... the housing for older persons exemptions set out in § 3607(b)." 642 F.3d at 776.

In contrast, in Duvall v. Fair Lane Acres, Inc., 50 So. 3d 668, 671 (Fla. Dist. Ct. App. 2010), a Florida appellate court reversed a trial court order that an age restriction imposed on homeowners by a homeowners' association "was a restriction on occupancy and not a restriction on ****120** 'property rights.' " In determining that "the judgment constituted an unlawful taking of property rights," id. at 669, the court reasoned:

> To impose a limitation on who can use and enjoy property is a direct restriction on the Homeowners' ownership rights in their properties. See Black's Law Dictionary 1215 (9th ed. 2009) (defining "ownership" as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to ***395** others"). Similarly, to restrict the ability to transfer property by imposing an obligation to seek the approval of the Association is an improper infringement on the Homeowners' property rights. These property rights are constitutionally protected, and the trial court erred in ordering the Homeowners to sign the Agreement by which they would be required to surrender these rights. See [Dep't of Law Enf't v. Real Prop., 588 So. 2d 957, 964 (Fla. 1991)] ("Property rights are among the basic substantive rights expressly protected by the Florida Constitution. Art. I, § 2, Fla. Const.").
>
> [Duvall, 50 So. 3d at 671 (first alteration in original).]

[14] Other than the ownership restriction, based on the FHA's plain language, the Ordinance meets the requirements of the housing for older persons exemption. See 42 U.S.C. § 3607(b)(2)(C). The Ordinance defines and restricts PRRCs to the required level of occupancy by residents aged fifty-five years or older, clearly expressing the intent to create housing for older persons. In fact, NJR does not dispute that the PRRCs would otherwise comply with the FHA's occupancy threshold requirements. Instead, NJR asserts the Ordinance is "facially discriminatory" as a matter of law and "violative of the [FHA]." NJR invites us to construe the FHA's silence on ownership as a prohibition against it, reasoning that if the ability to regulate ownership is not explicitly permissible, it is "inherently discriminatory" because of the "discriminatory impact it would have on people who are protected under the [FHA] on the basis of familial status."

"We have scrupulously required that state and municipal regulations conform to the [FHA]." United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 48, 777 A.2d 950 (App. Div. 2001). On its face, 42 U.S.C. § 3604 does not expressly permit or preclude an age-restricted community from limiting home ownership to persons fifty-five years of age or older. However, subject to certain exemptions, it does prohibit discriminatory acts, including refusing to sell a dwelling to any person, discriminating against any person in the terms or conditions of sale, or indicating any preference with respect to the sale based upon familial status. See ibid.

[15] **[16]** Discrimination on the basis of familial status does not violate the FHA if the housing for older persons exemption ***396** applies. See 42 USC § 3607(b)(1). Critically, the FHA's housing for older persons exemption permits restrictions on occupancy, not ownership, to persons fifty-five years and older. Thus, the exemption does not expressly permit the restriction on ownership embodied in the Ordinance. "As a general matter, the primary goal of the [FHA] is to limit discrimination in the housing arena." Putnam Fam. P'ship v. City of Yucaipa, 673 F.3d 920, 931 (9th Cir. 2012). Considering both the text and the underlying purpose of the FHA, we can reach only one conclusion. Because the exemption does not apply and the Ordinance's restriction on ownership in age-restricted communities discriminates on the basis of familial status, we conclude ****121** that the Ordinance violates 42 U.S.C. § 3604 and is therefore unlawful.

[17] We reach a similar conclusion with respect to the NJLAD. Like the FHA, the NJLAD prohibits housing discrimination on the basis of familial status, with an exception for qualified housing for older persons. N.J.S.A. 10:5-12(h); 10:5-5(n) ("[No] provision under this act regarding discrimination on the basis of familial status appl[ies] with respect to housing for older persons.").

Pertinent here, the NJLAD defines housing for older persons [3] as housing that is:

> (3) intended and operated for occupancy by at least one person [fifty-five] years of age or older per unit. In determining whether housing qualifies as housing for older persons under this paragraph, the Attorney General shall adopt regulations which require at least the following factors:
>
> (a) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
>
> (b) that at least [eighty] percent of the units are occupied by at least one person [fifty-five] years of age or older per unit; and
>
> ***397** (c) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons [fifty-five] years of age or older.
>
> [N.J.S.A. 10:5-5(mm)(3).]

Similar to the CFR, our State regulations provide more detailed guidance on the qualifications for the housing for older persons exemption. N.J.A.C. 13:15-1.5. Still, both the NJLAD and its attendant regulations only delineate occupancy restrictions and make no mention of ownership restrictions. N.J.S.A. 10:5-5(mm); N.J.A.C. 13:15-1.5. However, in 2019, N.J.A.C. 13:15-1.2(a) was amended to state that "[n]othing in the requirements of [the housing for older persons regulations] shall be construed to restrict the age of any purchaser or grantee of housing who does not reside in, or intend to reside in, such housing."

The amendment was added after the Division on Civil Rights (DCR) received public comments concerning retirement communities restricting occupancy:

> Commenters [two] through [thirty-three] expressed substantially similar concerns regarding the requirements for an exemption to the [NJLAD's] ban on housing discrimination based on familial status. The commenters assert that some entities operating and managing housing communities restricted to occupancy by persons [sixty-two] or over as defined in N.J.A.C. 13:15-1.4, or restricted to occupancy by persons [fifty-five] and over as defined in N.J.A.C. 13:15-1.5, are restricting the ages of the owners as well as the occupants. These commenters note that State law and [f]ederal law restrict the ages of the occupants, but do not restrict the ages of non-occupant owners of such properties. The commenters request amendment of the ****122** rule to clarify that individuals under the ages of [fifty-five] or [sixty-two] can purchase a home in age-restricted communities "so long as they certify the occupants of that home will be over the age of [fifty-five] or [sixty-two]." One commenter specifically requested adding clarifying language to N.J.A.C. 13:15-1.4(a) and 1.5(d).

[51 N.J.R. 216(a).]

DCR responded as follows:

> DCR agrees that the [NJLAD's] definitions of housing for older persons address only the ages of the occupants of any housing, and do not address the ages of non-occupant owners of such housing. Accordingly, as adopted, DCR has added clarifying language to N.J.A.C. 13:15-1.2(a) to prevent any inaccurate interpretation of the [NJLAD] or the rule. DCR declines, however, to add the provision "so long as they certify that the unit will be occupied by persons [fifty-five or sixty-two] years of age or over" to the rules. Such a certification is already required by a New Jersey statute governing age-restricted communities, which is administered by ***398** [DCA]. See N.J.S.A. 45:22A-46.2. However, no such certification is required by the [NJLAD]. To ensure consistency with the relevant language in the [NJLAD], DCR has determined that N.J.A.C. 13:15-1.2, rather than N.J.A.C. 13:15-1.4 and 1.5, should be changed.
>
> [51 N.J.R. 216(a).]

A plain reading of N.J.A.C. 13:15-1.2(a) clarifies that the housing for older persons exemption applies only to occupancy, not ownership. Thus, considering the text and the underlying purpose of the NJLAD, we conclude that any age restriction imposed on ownership in PRRCs is a discriminatory housing practice that violates the NJLAD on the basis of familial status. As such, we agree with the judge that the Ordinance violates the NJLAD and is therefore unlawful.

[18] Given our analysis, we are also convinced that the Ordinance is preempted by the FHA and the NJLAD. "[A] court may declare an ordinance invalid if it ... is preempted by superior legal authority." Rumson Ests., Inc. v. Mayor of Fair Haven, 177 N.J. 338, 351, 828 A.2d 317 (2003) (internal citation omitted); see United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 88 N.J. 317, 343, 443 A.2d 148 (1982) (commenting that "[w]hen a state statute has preempted a field by supplying a complete system of law on subject, an ordinance dealing with the same subject is void"), rev'd on other grounds, 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984).

[19] **[20]** In Overlook Terrace Management Corp. v. Rent Control Board, our Supreme Court explained that "[p]reemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." 71 N.J. 451, 461, 366 A.2d 321 (1976) (citing Summer v. Teaneck, 53 N.J. 548, 554, 251 A.2d 761 (1969)).

> Preemption analysis calls for the answer initially to whether the field or subject matter in which the ordinance operates, including its effects, is the same as that in which the State has acted. If not, then preemption is clearly inapplicable. An affirmative answer calls for a further search for "[i]t is not enough that the Legislature has legislated upon the subject ...."
>
> [Ibid. (alteration in original) (citations omitted) (quoting Summer, 53 N.J. at 554, 251 A.2d 761).]

***399** **[21]** If the threshold question is answered affirmatively, then five questions should be considered to determine whether ****123** a municipal ordinance is preempted by state law:

> 1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
>
> 2. Was the state law intended, expressly or impliedly, to be exclusive in the field?
>
> 3. Does the subject matter reflect a need for uniformity? ....
>
> 4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
>
> 5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

[Id. at 461-62, 366 A.2d 321 (citations omitted).]

[22] **[23]** Consideration of the Overlook factors leads us to conclude that the Ordinance is preempted by the FHA and the NJLAD. Based on our earlier analysis, it is apparent that the Ordinance conflicts with the FHA and the NJLAD, the interpretation of which is the very issue before us. Application of that factor alone weighs heavily in favor of preemption. The remaining factors are met as well. "Local action is preempted when the Legislature intended 'its own actions, whether it exhausts the field or touches only part of it, to be exclusive.' " Essex Cnty. Corr. Officers PBA Loc. No. 382 v. Cnty. of Essex, 439 N.J. Super. 107, 121, 106 A.3d 1238 (App. Div. 2014) (quoting Mack Paramus Co. v. Mayor & Council of Paramus, 103 N.J. 564, 573, 511 A.2d 1179 (1986)).

Finally, although not reached by the judge, we address whether the Ordinance is a valid and reasonable exercise of police power or an arbitrary, capricious, and unreasonable act that exceeds the scope of the Township's authority. NJR maintains that the Ordinance is arbitrary and capricious because it "has no justifiable purpose, does not address any alleged problem (it instead creates problems), and goes well beyond any public need, in contradiction of established [f]ederal and State laws." According to NJR, the Ordinance would "harm existing unit owners within PRRCs by artificially suppressing the value of their property" because potential buyers would be significantly limited by the age restriction.

***400** The Township counters that the Ordinance is "reasonably calculated" to address "a local concern: rampant house-flipping and speculation by non-owner occupants, including corporations and persons under [fifty-five] years of age, which is making communities unaffordable for the very persons they are intended to serve – seniors on fixed incomes." The Township argues that the Ordinance is well within the scope of its authority to address this problem by "remov[ing] those unprotected classes of speculators from the classes of persons eligible to own units within [PRRCs]."

[24] **[25]** **[26]** "[W]hen reviewing a municipal action, we apply a presumption of validity and reasonableness to adopted ordinances" and "do not 'pass on the wisdom of the ordinance; that is exclusively a legislative function.' " Timber Glen Phase III, LLC v. Twp. of Hamilton, 441 N.J. Super. 514, 523, 120 A.3d 226 (App. Div. 2015) (quoting Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 290, 777 A.2d 334 (2001)). The party challenging the ordinance bears the burden of showing that "the ordinance, 'in whole or in application to any particular property,' is arbitrary, capricious or unreasonable." Ibid. (quoting Pheasant Bridge, 169 N.J. at 289-90, 777 A.2d 334).

This presumption of validity is derived from our State Constitution:

> ****124** The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.
>
> [N.J. Const., art. IV, § 7, ¶ 11.]

[27] **[28]** **[29]** **[30]** The presumption "embodies the principle that the police power of the State may be invested in local government to enable local government to discharge its role as an arm or agency of the State and to meet other needs of the community." Inganamort v. Ft. Lee, 62 N.J. 521, 528, 303 A.2d 298 (1973). However, the presumption is not without restraint.

> ***401** On the other side of the coin is the postulate that a local municipality is but a creature of the State, capable of exercising only those powers granted to it by the Legislature[, Wagner v. Mayor & Mun. Council of City of Newark, 24 N.J. 467, 132 A.2d 794 (1957)], and the equally important truism that the presumption of validity referred to is only a presumption and may be overcome or rebutted not only by clear evidence aliunde, but also by a showing on its face or in the light of facts of which judicial notice can be taken, of transgression of constitutional limitation or the bounds of reason. [Guill v. Mayor &

Council of City of Hoboken, 21 N.J. 574, 581, 122 A.2d 881 (1956); State v. Wittenberg, 50 N.J. Super. 74, 78, 141 A.2d 52 (App. Div. 1957).]

[Moyant v. Borough of Paramus, 30 N.J. 528, 534-35, 154 A.2d 9 (1959) (emphasis omitted).]

See also Dome Realty, Inc. v. Paterson, 83 N.J. 212, 225-26, 416 A.2d 334 (1980) (establishing "a three-part analysis for determining the propriety of an exercise of legislative authority by a municipality," including "whether any delegation of power to municipalities has been preempted by other State statutes dealing with the same subject matter").

[31] In the area of land use, the Municipal Land Use Law (MLUL) authorizes municipalities to regulate the use of land and buildings within its borders. See N.J.S.A. 40:55D-1 to -163. Nonetheless, our courts have grappled with the competing interests of municipalities and property owners and have recognized that restrictions imposed by municipalities "must respect the constitutionally protected right to own and alienate property." Ocean Cnty. Bd. of Realtors v. Twp. of Long Beach, 252 N.J. Super. 443, 455, 599 A.2d 1309 (Law Div. 1991).

On the one hand, our courts have recognized the right of a municipality to "secure and maintain 'the blessings of quiet seclusion' and to make available to its inhabitants the refreshment of repose and the tranquility of solitude." On the other hand, our courts have consistently invalidated ordinances which unnecessarily and excessively restrict the use of private property.

[Id. at 449-50, 599 A.2d 1309 (citation omitted) (quoting Berger v. State, 71 N.J. 206, 223, 364 A.2d 993 (1976)).]

[32] As such, we have held that neither the express nor implied powers of municipal regulation suggest "the power to ... deny an owner a substantial attribute of ownership and possession of real estate," or allow "an impermissible arrogation of governmental power." ***402** ****125** Repair Master, Inc. v. Borough of Paulsboro, 352 N.J. Super. 1, 10-11, 799 A.2d 599 (App. Div. 2002). To that end, restraints on the alienation of property are generally disfavored as a matter of public policy:

It is firmly established that the policy of the law is against the imposition of restrictions upon the use and enjoyment of land and such restrictions are to be strictly construed. Restrictions tend to protect property, but they also impair alienability. Nor will equity aid one man to restrict another in the use of his[or her] land unless the right to restrict is made manifest and clear in the restrictive covenant.

[Hammett v. Rosensohn, 46 N.J. Super. 527, 535, 135 A.2d 6 (App. Div. 1957).]

[33] Indeed, our case law has consistently supported "the fundamental, if not immutable, principle that 'zoning enabling acts authorize local regulation of "land use" and not regulation of the "identity or status" of owners or persons who occupy the land.' " Tirpak v. Borough of Point Pleasant Beach Bd. of Adjustment, 457 N.J. Super. 441, 443, 200 A.3d 921 (App. Div. 2019) (quoting 5 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 81.7 (4th ed. 2005)); see also DeFelice v. Zoning Bd. of Adjustment, 216 N.J. Super. 377, 381, 523 A.2d 1086 (App. Div. 1987) ("[A] zoning board is charged with the regulation of land use and not with the person who owns or occupies the land.").

[34] This wariness of ownership restrictions stems from the constitutionally protected right to "own and dispose of real property, a right that is within the protective scope of the Fourteenth Amendment to the United States Constitution and Article I, § 1 of the New Jersey Constitution." Upper Deerfield Twp. v. Seabrook Hous. Corp., 255 N.J. Super. 218, 224, 604 A.2d 972 (App. Div. 1992). Although that right "is subject to the reasonable exercise of the police power," id. at 224-25, 604 A.2d 972, where there are extreme limitations on the right of ownership of private property, we have not hesitated to invalidate an ordinance. See, e.g., United Prop. Owners Assoc. v. Borough of Belmar, 185 N.J. Super. 163, 170-71, 447 A.2d 933 (App. Div. 1982) (invalidating provisions of ordinance precluding temporary or seasonal rentals on residential property as defined in the ordinance as "impermissibly arbitrary" and constituting "an unreasonable restraint on the use of private ***403** property"); see also Upper Deerfield Twp., 255 N.J. Super. at 219, 225, 604 A.2d 972 (invalidating ordinance "requiring the seller of land containing a structure to obtain a certificate of occupancy prior to sale regardless of its intended use by the prospective buyer" where "its

literal application to every sale of real estate containing a structure reaches beyond the legitimate police power concerns of the municipality and becomes confiscatory").

In such situations, we have stressed that the appropriate inquiry in a case involving ownership restrictions "is whether the Township ordinance enacted under the police power, affecting private rights as it does, evidences a public need that justifies governmental action and whether the restrictions imposed unreasonably and irrationally exceed the public need." Id. at 225, 604 A.2d 972.

[35] Applying that standard, we conclude the Ordinance unreasonably infringes upon the well-established and constitutionally protected right to own and sell property and the restriction unreasonably and irrationally exceeds the public need. See United Prop. Owners Assoc., 185 N.J. Super. at 170, 447 A.2d 933 (recognizing that "an extreme limitation on rights of ownership of private property" will be found to be arbitrary). Although the Township posits that enforcement of the restriction ****126** could accomplish a worthwhile purpose, the persons to whom alienation is prohibited could be substantial and impactful. As the judge pointed out, the restriction could impact to a significant degree the very seniors the Township seeks to protect by preventing owners over the age of fifty-five from transferring title to non-qualifying family members, a common practice in estate planning. Additionally, the Ordinance would adversely affect every owner's ability to sell by limiting the pool of eligible buyers.

On an alternative basis, we therefore invalidate the Ordinance on the ground that it is arbitrary and unreasonable. We do not believe the Legislature has imbued municipalities with the power to restrict ownership at senior housing communities as contemplated in the Ordinance and, as we stated in Repair Master, Inc.,

> ***404** This is a power we simply will not infer in light of the evidence and the history of our land use and occupancy jurisprudence. If this power is conferred on municipalities, we think it should be the result of legislative deliberation and evaluation of all the complex considerations, not from a judicially-created attempt to accommodate a single, though doubtlessly sincere, municipal effort. The problem could be compounded if other municipalities were to take this route and seek an arguably more desirable occupancy mix. Specific legislative approval should be a precondition to the exercise of a power we consider a radical regulatory development.
>
> [352 N.J. Super. at 14, 799 A.2d 599.]

Affirmed.

All Citations

479 N.J.Super. 379, 322 A.3d 110

Footnotes

1 Article I, Paragraph 1 of the New Jersey Constitution provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

2 "Although not relevant here, the exemptions also include (1) housing provided under certain state or federal programs specifically designed and operated to assist elderly persons and (2) housing intended for, and solely occupied by, persons [sixty-two] years of age or older." Balvage, 642 F.3d at 769 n.2 (citing 42 U.S.C. § 3607(b)(2)(A)-(B)).

3 Although not relevant here, the exemptions also include (1) housing provided under certain State or federal programs "specifically designed and operated to assist [elderly] persons;" and (2) housing "intended for, and solely occupied by, persons [sixty-two] years of age or older." N.J.S.A. 10:5-5(mm)(1), (2).

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1660-21
A-1807-21
A-1808-21

IN THE MATTER OF THOMAS R. TOMEI TRUST.

———————————————————

Submitted December 19, 2023 – Decided February 27, 2025

Before Judges Gooden Brown and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Camden County, Docket No. CP-0120-2013.

Ritigstein Law and Obermayer Rebmann Maxwell & Hippel, LLP, attorneys for appellant Thomas R. Tomei in A-1660-21 (Michael D. Ritigstein, Matthew A. Green, and Lars J. Lederer, on the briefs).

Ciardi Ciardi & Astin and Paul A. Bucco (Davis Bucco Makara & Dorsey), attorneys for appellant Vincent H. Tomei in A-1807-21 and A-1808-21 (Albert A. Ciardi, III, and Paul A. Bucco, on the brief).

Ciardi Ciardi & Astin and Paul A. Bucco (Davis Bucco Makara & Dorsey), attorneys for respondent Vincent H. Tomei in A-1660-21 (Albert A. Ciardi, III, and Paul A. Bucco, on the brief).

DiMarino, Lehrer & Collazo, PC, attorneys for respondent Estate of Marie L. Tomei, in A-1660-21, join in the brief of respondent Vincent H. Tomei.

Ritigstein Law and Obermayer Rebmann Maxwell & Hippel, LLP, attorneys for respondent Thomas R. Tomei in A-1807-21 and A-1808-21 (Michael D. Ritigstein and Lars J. Lederer, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

This is an intra-familial dispute dating back to 2013 between a son, plaintiff, Thomas Tomei; his father, defendant, Vincent Tomei; and his mother's estate, the Estate of Marie Tomei, (collectively, defendants), over the management of three trusts. The trusts were established to provide benefits to plaintiff. Vincent,[1] who passed away on April 28, 2023,[2] was the trustee.

Plaintiff was the president and general manager of H&H Manufacturing, Inc. (H&H), a Pennsylvania company that manufactured industrial equipment. H&H has been wholly owned by Tomei family members and their affiliated trusts for many years. Over the years, plaintiff's trusts received distributions

[1] Because of the common surname, we refer to the parties using first names and intend no disrespect.

[2] On November 14, 2023, we granted Vincent's motion to substitute the Estate of Vincent Tomei as the proper party. Nonetheless, we will continue to refer to Vincent throughout this opinion.

from H&H in excess of $70 million, and gradually acquired a controlling ownership interest in H&H. As a result of disputes in H&H's management, plaintiff sued defendants for breach of fiduciary duty, alleging Vincent misappropriated trust funds by, among other things, providing gifts from his trusts to various family members, including plaintiff's children, without his consent.

The trial judge ultimately granted defendants summary judgment in orders dated May 13, 2021, dismissing plaintiff's complaint with prejudice. In an August 3, 2021 order, the judge denied plaintiff's motion for reconsideration. Although the judge granted defendants summary judgment, she denied Vincent's ensuing motion for counsel fees to two different law firms in orders entered on January 24, 2022.

In these back-to-back appeals, which we consolidate for purposes of issuing a single opinion, the parties appeal from the respective adverse orders. In A-1660-21, plaintiff challenges the summary judgment dismissal of his complaint and denial of reconsideration[3] on various grounds, arguing that the

[3] Although plaintiff identifies the order denying reconsideration in his notice of appeal, plaintiff presents no legal argument relating to the denial of the motion. As a result, plaintiff has effectively waived the argument on appeal. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) ("An issue that is not briefed is deemed waived upon appeal.").

judge relied on trust instruments that were forgeries, failed to recognize genuine issues of material fact, incorrectly dismissed plaintiff's claims for fraud and gross negligence, and erroneously found that plaintiff's claims were barred by the statute of limitations and laches. In A-1807-21 and A-1808-21, Vincent argues the judge's denial of his counsel fee applications is contrary to New Jersey and Pennsylvania jurisprudence governing counsel fee awards as well as the language of the trust documents.

Based on our review of the extensive record and the applicable legal principles, we affirm in part, reverse in part, and remand for further proceedings.

I.

We glean these facts from the record. On July 19, 1976, Vincent established the irrevocable Thomas R. Tomei Special Trust (the Special Trust), with Vincent as settlor and individual trustee, and plaintiff as beneficiary. Vincent managed the trust, though William E. Bierlin, Jr., was named as an independent trustee, and Herbert I. Berkowitz, then a young intern working for Vincent, as successor independent trustee.

The trust specified that the trustees would "hold," "manage," and "invest" trust property for plaintiff's benefit. It included a limitation on liability, stating:

> No [t]rustee shall incur any personal liability of any character whatsoever by reason of any matter or thing

> of whatsoever nature which may occur in connection with the administration of this [t]rust, save only liability arising from gross negligence, willful default or fraud.

Further, according to the terms, the situs of the trust "shall be within the Commonwealth of Pennsylvania," and the "[d]eed shall be interpreted and construed according to the laws of [Pennsylvania]."

On the same day, July 19, 1976, Vincent established a second trust for plaintiff's benefit, the irrevocable Thomas R. Tomei Special Trust # 2 (the Special Trust # 2). The Special Trust # 2 was almost identical to the Special Trust and Vincent was again the trustee.

On August 18, 1983, plaintiff and Vincent established a third trust, the irrevocable Thomas R. Tomei Trust (the 1983 Trust). Once again, plaintiff was the beneficiary and Vincent was the trustee, and the trust specified that Vincent, as trustee, would "hold," "manage," and "invest" certain trust property for plaintiff's benefit.

The trust also included a limitation on liability, stating:

> No [t]rustee shall incur any personal liability of any character whatsoever by reason of any matter or thing of whatsoever nature which may occur in connection with the administration of the [t]rust or any fund created hereunder, save only liability arising from gross negligence, willful default or fraud.

All three trusts include identical language under the heading "Administrative Powers of Trustees," providing that the trustee is authorized

> [t]o employ accountants, agents, attorneys, employees, investment counselors and other representatives, to act without independent investigation upon their recommendations and to determine and pay their compensation and expenses out of this [t]rust.

Plaintiff began working for H&H in 1972, prior to the creation of the trusts, and Vincent served on H&H's Board of Directors since 1976, when the first two trusts were established. H&H's principal place of business is in Delaware County, Pennsylvania. Plaintiff became president of H&H around 1984 and was responsible for its daily operations, while Vincent, an accountant by trade, managed the company's financial affairs. Since 1984, Tomei family members or trusts whose beneficiaries are Tomei family members owned H&H in varying share percentages and plaintiff, Vincent, and Marie, reportedly the corporate secretary, were all signatories on H&H's business accounts. The precise percentages of ownership interests and shares held by each family member have been the subject of other litigation, albeit tangentially.[4]

[4] See, e.g., H&H Mfg. Co. v. Tomei, No. A-4209-19 (App. Div. Dec. 29, 2021); H&H Mfg. Co. v. Bucco, No. A-2913-21 (App. Div. Nov. 13, 2023); H&H Mfg. Co. v. Tomei, No. A-1309-22 (App. Div. Apr. 17, 2024).

Beginning around 1990, H&H became very profitable, earned income of several million dollars per year, and typically distributed almost all of its annual income to shareholders for tax purposes, totaling in excess of $82 million since 1989. With plaintiff's consent, his H&H distributions were paid to Vincent as trustee of plaintiff's three trusts. In turn, Vincent made transfers from H&H to plaintiff's trust accounts.

Around 1994, plaintiff bought out his family members' interests in H&H, except for Marie's, and, as a result, his trusts gradually obtained an increasing number of H&H shares. Using the proceeds from plaintiff's buy-out, Vincent established trusts for several family members, including trusts for plaintiff's children, Thomas Tomei II and Lynn Tomei, as well as trusts for his other son, Mark Tomei, and Mark's children, Matthew and Michael Tomei.[5] Thereafter, on unspecified dates, Vincent made countless transfers and gifts from plaintiff's trusts to these family members.

As of 2006, plaintiff's 1983 Trust contained 94.69% of H&H shares. The vast majority of funds held on behalf of the trusts were held in accounts at Oppenheimer & Co., Inc. (Oppenheimer) or Charles Schwab & Co. (Schwab).

[5] Although they were not named as parties in the trial court proceedings, plaintiff's notice of appeal lists Mark Tomei, Thomas Tomei II, and Lynn Tomei as respondents.

During Vincent's management of plaintiff's trusts, it is undisputed that their value increased significantly.

Beginning around 2012, plaintiff and Vincent had disagreements about the management and operation of H&H. In 2012, plaintiff observed a fax printout in Vincent's office showing millions of dollars in the trust accounts of other family members, causing him to suspect that his H&H distributions had been misappropriated. As a result, plaintiff directed that his H&H distributions be paid to him directly, rather than to Vincent as trustee.

Fueled by the disagreements, on June 3, 2013, Vincent, who claimed to be acting as H&H's primary voting shareholder by virtue of Marie's shares, terminated plaintiff's employment with H&H over plaintiff's objection. Thereafter, on June 17, 2013, Vincent and H&H, later joined by Marie as an intervenor, filed a complaint against plaintiff in the Court of Common Pleas, Delaware County, Pennsylvania (Delaware County court), alleging, among other things, that plaintiff had breached his fiduciary duties to the company. Plaintiff filed a counterclaim for breach of fiduciary duty in the operation of H&H. The lawsuit commenced years of litigation and a receiver was appointed to operate H&H in the interim.

In 2017, following a bench trial, the Delaware County court found that plaintiff's termination at the June 3, 2013, shareholder meeting was void and invalidated his termination. The court found that Vincent's and Marie's claims were barred on equitable grounds because they were rooted in Vincent's own immoral or illegal acts. Specifically, the court found that Vincent forged and fabricated H&H records by "creating multiple sets of H&H share books, manufacturing meeting minutes, and unilaterally submitting [a]rticles of [a]mendment to the Pennsylvania Department of State without authorization to do so."[6]

Pertinent to this appeal, the Delaware County court found that the two trusts created in 1976 expired in 2016 and 2017, respectively. Multiple versions of the trusts were produced during the litigation. One version of the Special Trust provided that the duration of the trust would be forty-one years, at which time plaintiff could withdraw the principal and undistributed income. This version of the trust did not specifically identify plaintiff's children. Another

[6] The Delaware County court also dismissed all claims Vincent asserted on H&H's behalf, concluding Vincent lacked standing to sue on behalf of H&H because H&H's board of directors never approved the filing of the lawsuit. H&H subsequently sued Vincent in the New Jersey Superior Court, Law Division, asserting claims for damages it allegedly sustained as a result of the improper Delaware County action.

version of the trust provided that the duration of the trust would be twenty years and made reference to plaintiff's two children who were not yet born in 1976. A third version of the trust included a forty-year duration and also made reference to plaintiff's yet-unborn children. The Delaware County court apparently concluded that the forty-year and forty-one-year versions were effective.

Regarding the 1983 Trust, plaintiff's version provided that the duration of the trust would be twenty years, concluding on August 18, 2003, at which time the principal and undistributed income would be paid to plaintiff. It also provided that the situs of the trust was New Jersey and that it should be interpreted and construed under the laws of New Jersey. In contrast, Vincent's amended version provided that the duration of the 1983 Trust would be thirty years, concluding on August 18, 2013, that the situs of the trust was Pennsylvania, and that it should be interpreted and construed under the laws of Pennsylvania. The Delaware County court held that the version of the 1983 Trust with a twenty-year term and a situs in New Jersey was effective. The Pennsylvania appellate court affirmed the Delaware County court's decision, H&H Mfg. Co. v. Tomei, No. 1196-EDA-2018, 2019 WL 2226096, at *1 (Pa. Super. Ct. May 22, 2019), and the Pennsylvania Supreme Court denied further review, H&H Mfg. Co. v. Tomei, 224 A.3d 1263 (Pa. 2020).

Meanwhile, plaintiff filed a verified complaint against Vincent on June 12, 2013, in the New Jersey Superior Court, Chancery Division, to confirm the termination of the 1983 Trust, to compel an accounting, to impose resulting and constructive trusts, and for injunctive relief. By order entered on June 18, 2013, the New Jersey Superior Court judge directed Vincent to turn over to plaintiff the assets in the 1983 Trust, namely, the stock in H&H, and to provide an accounting. Consistent with plaintiff's position, the judge found that the 1983 Trust had terminated on August 18, 2003, and imposed a resulting trust on any assets accrued after that date. Vincent was removed as trustee of the Special Trust and Special Trust # 2, and Charles P. Bowes was appointed successor trustee of both.

Vincent appealed, alleging error in the judge's finding that the 1983 Trust terminated in 2003, instead of 2013. On August 28, 2014, we issued an unpublished opinion in In re Thomas R. Tomei Trust, No. A-5075-12 (App. Div. Aug. 28, 2014), reversing and remanding for a plenary hearing to determine the termination date for the 1983 Trust. In lieu of a plenary hearing, on January 21, 2015, the judge entered an order reflecting the parties' agreement that the 1983

Trust terminated on August 18, 2003, and that New Jersey law would apply.[7] Notwithstanding the consent order, the trust assets were not immediately distributed.

Thereafter, on July 29, 2015, plaintiff filed an amended verified complaint against Vincent and Marie, which is the operative complaint that is the subject of this appeal. The complaint contained nineteen counts, most of which were directed at Vincent and predicated on the allegation that Vincent engaged in fraudulent conduct as the trustee of plaintiff's trusts and committed illegal acts without plaintiff's knowledge or consent.

Specifically, in count one, plaintiff sought enforcement of the June 18, 2013 order directing Vincent to distribute to plaintiff the assets of the 1983 Trust and provide an accounting of that trust. Plaintiff also sought an accounting for his other trusts.

In count two, plaintiff alleged improper transfers from the 1983 Trust to the Special Trust and sought an order directing Bowes, the new trustee of the Special Trust, to distribute from the Special Trust all funds transferred there from the 1983 Trust since August 18, 2003.

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[7] Although the January 21, 2015 order only references the termination date of the trust, a February 5, 2015 order that was not provided in the record confirms that New Jersey law would apply to the 1983 Trust.

In count three, plaintiff sought an order confirming the termination of the Special Trust as of July 19, 1996, and imposing a resulting trust on its assets from that date forward. In count five, he sought an order requiring Vincent to produce a full and valid version of the Special Trust # 2.

Counts four and six through thirteen alleged improper conduct by Vincent as trustee of the Special Trust during an unspecified period, through transfers of funds out of the Special Trust. Specifically, in count four, plaintiff alleged improper transfers from the Special Trust to the Special Trust #2, and sought an order directing Bowes, the new trustee of the Special Trust #2, to turn over all funds transferred to the Special Trust #2 after its purported termination on July 19, 1996, alleged to be in excess of $17 million.

In count six, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to his son's trust, alleged to be approximately $985,286.[8] In count seven, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to his daughter's trust, alleged to be approximately $569,660.

In count eight, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to his brother Mark's trust, alleged to be

[8] We round all monetary amounts to the nearest dollar.

approximately $85,005. In count nine, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to another one of Mark's trusts, alleged to be approximately $7,296.

In count ten, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to the trust of his nephew, Matthew, alleged to be approximately $153,282. In count eleven, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to Matthew's special trust, alleged to be approximately $30,356. In count twelve, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to the trust of his other nephew, Michael, alleged to be approximately $9,990.

In count thirteen, plaintiff sought an order turning over the funds transferred from plaintiff's Special Trust to his mother Marie, alleged to be approximately $58,243.

Counts fourteen through sixteen alleged improper transfers of H&H funds by Vincent, during an unspecified period when 94.69% of the shares in H&H were owned by the 1983 Trust and later by plaintiff individually. The complaint also alleged that at no time has the Special Trust or the Special Trust #2 held an ownership interest in H&H.

Specifically, in count fourteen, plaintiff sought an order directing Vincent to account for his distribution of H&H funds of approximately $21 million to an account held in the name of the Special Trust at Oppenheimer, and approximately $600,000 to an account held in the name of the Special Trust at Schwab.

In count fifteen, plaintiff sought an order directing Vincent to account for his distribution of H&H funds of approximately $2.6 million to an account held in the name of the Special Trust #2 with Oppenheimer.

In count sixteen, plaintiff sought an order directing Vincent to account for his distribution of H&H funds of approximately $98,404 to an account at Oppenheimer; $238,416 to an account at Oppenheimer; $350,000 to an account at Oppenheimer; $1,950,000 to an account at an unknown institution; $15,041,477 to unknown accounts; $1,625,000 to an account at an unknown institution; $42,000 to an account at an unknown institution; and $3,613,742 to an account at an unknown institution.

In count seventeen, plaintiff sought an order holding Vincent liable for fraud, specifically alleging that Vincent altered signature pages of certain trusts, made transfers from plaintiff's trusts benefitting other parties, and directed

payments from H&H to third parties.[9] Plaintiff further alleged fraud predicated on Vincent's failure to distribute the assets of the 1983 Trust as required by the court's June 18, 2013 order.

In count eighteen, plaintiff sought an order declaring that Vincent was not entitled to any commissions for serving as trustee of plaintiff's trusts due to his breach of fiduciary duty by "commingling assets both between [plaintiff's t]rusts and trusts held for the benefit of third parties." Plaintiff also cited Vincent's admission during a January 24, 2014, deposition that he breached his fiduciary duty as trustee "by withholding funds from [plaintiff's trusts] based on his unfounded belief [that plaintiff] embezzled H&H funds."

In count nineteen, plaintiff sought counsel fees, again citing Vincent's admission during the deposition as to the breach of his fiduciary duty. In each count, except counts one, five, and eighteen, plaintiff also sought to surcharge Vincent for any losses associated with his actions.

Vincent and Marie filed separate answers to plaintiff's amended complaint and Vincent filed a counterclaim for counsel fees, citing only New Jersey law.[10]

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[9] Although this count did not expressly allege gross negligence, the trial court considered this count as if it included such allegations without objection from the parties.

[10] Vincent filed an amended answer that did not seek counsel fees.

Plaintiff's subsequent motion to file a second amended complaint to add the trusts of family members alleged to have received unauthorized distributions was denied by the trial court.

On September 9, 2016, while both the Delaware County and the New Jersey Superior Court litigation were pending, the trial court entered a judgment of diminished legal capacity as to Vincent, appointing Mark as his limited guardian. Two doctors certified that Vincent was "unfit and unable to govern himself and manage his affairs" because of dementia. One doctor opined that Vincent did not have the capacity to be deposed or testify at a trial. Vincent agreed that a guardian was necessary.

Although the judgment provided that Vincent was "not fully incapacitated," it stated he was "unfit and unable to govern himself and manage all of his affairs." According to the judgment,

> Vincent [was] presently engaged in a number of litigation matters in courts in Pennsylvania and New Jersey against his older son, [plaintiff], regarding the family-owned business, [H&H], and certain family trusts in which [plaintiff] is the alleged beneficiary, but does not have the capacity to continue to participate in, assist his counsel, or testify in litigation matters[.]

Nonetheless, the judgment specified that Vincent was capable of managing his and Marie's "personal financial affairs, including but not limited

to management of their money, investment portfolio, real and personal property, and other assets." Marie died on March 21, 2017.

The parties retained forensic accounting experts, who reviewed the company's history and the trusts' activities and prepared reports. Vincent and Marie retained Dana Trexler Smith, of EisnerAmper LLP, who issued an initial report on August 10, 2017. Smith reviewed the books and records of H&H, as well as annual accountings for the 1983 Trust from 1983 through 2014, the Special Trust from 1995 through 2014, and the Special Trust # 2 from 2009 through 2014. She acknowledged that her conclusions were limited because documentation was unavailable for certain periods.

Smith concluded that since 1991, H&H distributed $82,340,290. Of that, $74,311,763 was paid for plaintiff's benefit either to his trusts or to plaintiff and his wife[11] directly, and $7,895,111 was paid to various other Tomei shareholders. She confirmed that all H&H checks paid to Vincent as trustee of plaintiff's trust accounts were actually deposited into those accounts. Smith issued two reply reports and two supplemental reports, and later provided a certification in support of defendants' summary judgment motion, concluding

[11] Plaintiff's wife, Jannette Tomei, was employed by H&H as the bookkeeper.

that after comparing the H&H distributions with what was actually deposited into accounts for plaintiff's benefit, she was unable to reconcile only $52,435.

Smith separately considered the net transfers into and out of plaintiff's trusts. She issued a supplemental report concluding that a net of $4,401,800 was transferred out of plaintiff's various trust accounts, including $2,285,267 to plaintiff himself, $1,926,133 to his children, and $173,347 to his parents. In addition, $17,053 was paid from plaintiff's trusts to Mark's family.

Plaintiff retained John P. Sullivan, of Sullivan Strategic Certified Public Accountants, who issued an initial report on December 27, 2017. As to H&H's distributions, Sullivan concluded that H&H distributed $82,420,064 since 1989. He initially relied on Smith's finding that $74,311,763 was actually paid for plaintiff's benefit, but concluded that $76,730,297 should have been paid for plaintiff's benefit, leaving a "shortfall" of $2,418,534 owed to plaintiff.

After plaintiff directed Sullivan to analyze the available documentation with the firm Forensic Resolutions, Inc., and without relying on Smith's calculations, Sullivan issued a supplemental report concluding that plaintiff's trusts were actually owed $5,421,433. Sullivan explained that due to the lack of available documentation prior to 2000, he utilized certain filed tax returns that Smith did not. Separately, Sullivan confirmed that the various accounts for

Vincent, Marie, Lynn, Thomas II, Mark, Matthew, and Michael included numerous unexplained deposits, withdrawals, and transfers.

Simultaneously, plaintiff retained Erik Ringoen, a forensic accountant, of Forensic Resolutions, Inc., who issued a supplemental report on March 11, 2021.[12] Ringoen examined plaintiff's trust accounts, as well as those of the Tomei family members, from June 1, 2000, through December 31, 2014, and compared them with the distributions from H&H. Ringoen concurred with Sullivan that there was an "unexplained difference" of $5,421,433 in purported distributions from H&H missing from plaintiff's various trust accounts. Ringoen issued additional reports concluding that there were at least 323 unexplained deposits into the various Tomei family members' accounts. He concluded that Vincent failed to maintain sufficient records for his activities as trustee.

Over plaintiff's objection, Vincent moved for summary judgment, seeking dismissal of plaintiff's amended complaint. The Estate of Marie joined Vincent's motion. Vincent asserted that plaintiff's claims failed and were time-barred under Pennsylvania's five-year statute of limitations. See 20 Pa.C.S. § 7785(b)(1.1). He also asserted that all three trust documents limited his liability

[12] It appears that Forensic Solutions, Inc., prepared an original report dated May 3, 2019, that was not provided in the record.

to instances of gross negligence. Further, in a supporting certification and during his deposition, Vincent averred that his actions materially increased the value of plaintiff's trusts, plaintiff fully participated in the management and investment strategy of the trusts, and plaintiff approved the transfers and gifts to family members, particularly the gifts to his children. In that regard, Vincent referred to a 2014 text message from plaintiff to Lynn in which plaintiff wrote, "I put almost every dollar into your trust." In her deposition, Lynn confirmed receiving the text message from plaintiff.

Vincent certified that plaintiff received annual reports and K-1 forms[13] from the trusts showing Vincent's actions. Additionally, the information was included on plaintiff's personal tax returns, which listed the income received from his trusts. Further, as president of H&H, plaintiff was charged with knowledge of the company's annual distributions. As such, plaintiff saw the tax returns and the K-1 forms for H&H, showing distributions paid from H&H to his trusts.

To support his motion, Vincent relied on a 1983 power of attorney (POA) giving him broad authority to manage plaintiff's affairs. Vincent also relied on

[13] A K-1 form is a federal tax document used to report income, losses, and dividends for a business's shareholders.

a 2001 release agreement (2001 Release) confirming that plaintiff actively participated in the management of the trusts, approved of all activities, and made independent investment decisions.

As to the former, on August 19, 1983, plaintiff allegedly executed a POA appointing Vincent as his "true and lawful attorney" with "full power and authority" to "execute, acknowledge and deliver any writing and to do, perform and transact each and every other act that [plaintiff] personally could lawfully do, perform or transact." The POA specified that plaintiff's intention was to confer upon Vincent "the most comprehensive power possible" in connection with the "management and conduct of all of [plaintiff's] estate and affairs." Among the acts authorized were the ability to make "deposits" and "withdrawals" in any account; to "create a trust for [plaintiff's] benefit" and "to transfer to such trust at any time . . . any or all property owned by [plaintiff]"; the power to "make gifts"; and the ability to act "with respect to any . . . interest" plaintiff held. The POA was signed by plaintiff and witnessed by Marie and a notary public.

Plaintiff disputed the POA, testifying at his deposition that he did not recall signing the document and could not "say . . . for sure" whether he had ever given Vincent power of attorney. He testified that he did not meet the notary of

the purported 1983 POA until 2014, and the notary herself confirmed that she did not recall meeting with plaintiff at the time the POA was purportedly signed. Although plaintiff could not recall signing the POA, he explained that "the time frame" was during "the height of [his] divorce" and acknowledged that Vincent "was probably" trying "to keep money from [his] wife."

Regarding the 2001 Release, on June 6, 2001, in order to "become more actively involved in the investment strategy of the [t]rusts," plaintiff signed an "Approval, Release, and Indemnity Agreement," absolving Vincent of any liability in connection with his investments. The 2001 Release was intended to "induc[e] the trustees of the [1983 Trust and the Special Trust] to make such investments with the assets of the trust which [plaintiff] desires be made" and to "release[] and relinquish[] all claims which [plaintiff] may have against the trustees with respect to the same and . . . to indemnify and hold harmless the trustees of and from any and all liability to which they may be subjected on account of their implementing [plaintiff's] investment choices." Critically, the 2001 Release provided that plaintiff was "fully familiar" with the trusts' activities and that he "approve[d] in all respects" the "investments" made. Plaintiff did not dispute signing the 2001 Release.

To further support his summary judgment motion, Vincent submitted an affidavit prepared by Mark, who was also a former H&H shareholder and board member. In the affidavit, Mark affirmed that plaintiff had detailed knowledge of his trusts and Vincent's management of them. Mark explained that he had several conversations with plaintiff about his trusts. Mark also averred that plaintiff "knew of, directed, and approved the transfer of assets from his trust accounts to various trust accounts of other family members." Mark further confirmed that H&H and plaintiff's trusts filed annual tax returns and plaintiff received yearly K-1s from the trusts. He also certified that certain transfers were part of a "cash management system" for H&H, and sometimes involved "asset swaps for tax purposes."

In contrast, plaintiff denied that he materially participated in the management of his trusts. In one deposition, plaintiff stated that he and Vincent never discussed the trust agreements. In another deposition, he stated that he never discussed transfers to his daughter with Vincent or Marie. Plaintiff also denied receiving annual reports, tax returns, or K-1s for his trusts. Nonetheless, he confirmed in a deposition that as president of H&H, he saw "the amounts that came out of H&H" which were paid to Vincent as trustee for deposit into plaintiff's trusts. Further, he testified at a deposition that he sometimes served

as bookkeeper of H&H, and was always aware of the payments made to Vincent as trustee. In yet another deposition, plaintiff acknowledged that he had "some say" in how trust assets were invested. He testified that he "regularly" asked for and received statements showing the balances in the 1983 Trust held at Oppenheimer. He also admitted that he sometimes went online to access "all" the trust accounts at Oppenheimer.

Nonetheless, to support his fraud claim, plaintiff pointed to the multiple versions of trust documents to show that Vincent manipulated the trusts for his own purposes. For example, the notary who executed the 1983 Trust later testified in the Delaware County court that the signature pages attached to Vincent's version of the 1983 Trust and plaintiff's version of the 1983 Trust were "the same page." In a January 2014 deposition, Vincent acknowledged that multiple versions of certain trust documents existed because he had recreated documents following a flood at his home.

The trial judge heard oral argument on defendants' summary judgment motion on May 10, 2021, and granted the motion in orders entered on May 13, 2021.[14] In an oral opinion placed on the record on May 14, 2021, the judge accepted Vincent's argument that laches applied to bar counts one through

[14] The judge entered separate orders for Vincent and the Estate of Marie.

sixteen. According to the judge, because plaintiff failed to use due diligence in evaluating Vincent's conduct, it was unfair to bring this belated action. The judge found defendants were prejudiced by the fact that certain documents were lost or destroyed, including by virtue of the flood at Vincent's home. The judge also found prejudice caused by Vincent's inability to testify about conversations that occurred forty years earlier following the entry of the judgment of diminished legal capacity and the appointment of a guardian.

Further, the judge relied on the equitable doctrines of "acquiescence and consent," finding that as father and son, plaintiff had the ability to study Vincent's management of his finances, but "decided he was[not] going to do anything about it even though he had all the tools at his fingertips." The judge pointed to the annual H&H tax returns to support her finding that plaintiff had "a lot of paper evidence at his disposal which he may have chosen not to look at." Thus, the judge concluded that during the trust term, plaintiff "acquiesced in the[] actions because he was interested in protecting his assets."

Regarding count seventeen alleging fraud, the judge found that plaintiff failed to show any evidence that Vincent made material factual misrepresentations. Explaining that the doctrine of laches also applied, the judge concluded that plaintiff had not met his "burden . . . to show that Vincent

ha[d] committed fraud." Similarly, the judge found that plaintiff presented no evidence of gross negligence. On the contrary, the judge found that Vincent "wisely managed and invested" the funds in plaintiff's trusts, making "a lot of money" for plaintiff's trusts, and that plaintiff never questioned Vincent's investment strategy.

To support her ruling, the judge pointed to the POA, the 2001 Release, and plaintiff's text message to Lynn stating that he put "every dollar" in her trust as evidence that plaintiff "authorized Vincent to make any and all transfers as Vincent deemed fit," "knowingly gave Vincent absolute discretion to conduct his affairs," and acquiesced to Vincent's actions. The judge, however, did not expressly address counts eighteen and nineteen. Subsequently, the judge denied plaintiff's motion for reconsideration in an order and oral opinion entered on August 3, 2021. The judge determined that plaintiff failed to meet the standard for reconsideration and merely reiterated the "same arguments" raised earlier.

After prevailing in his summary judgment motion, Vincent filed separate applications for counsel fees. Specifically, over plaintiff's objection, the law firms of Ciardi Ciardi & Astin (Ciardi law firm), and Davis Bucco Makara & Dorsey (Davis law firm) each filed an application for counsel fees. The Ciardi law firm represented Vincent in connection with the summary judgment motion

and sought a total of $188,948, consisting of $179,945 in fees and $9,003 in costs for the period March 9, 2021, through May 19, 2021. In support, Vincent argued that Rule 4:42-9(a)(2) "allows fiduciaries to pay counsel fees out of trust accounts entrusted to them," and N.J.S.A. 3B:14-23(*l*) permits fiduciaries to "employ and compensate attorneys for services rendered to the estate or trust or to a fiduciary in the performance of the fiduciary's duties."

The Davis law firm represented Vincent throughout this litigation as well as the Pennsylvania litigation and sought a total of $1,872,135 in fees and costs for the period November 2013 through May 2021. The Davis law firm invoices showed at least eight attorneys working on this matter, but many of the entries pertained to the Delaware County litigation. To support the fee application, Vincent advanced the identical legal arguments made in the Ciardi law firm's application.

On January 24, 2022, the judge entered an order denying both the Ciardi and Davis law firms' applications. In support, the judge placed a single oral opinion on the record on January 26, 2022, though the opinion only addressed the Davis law firm's application. In the opinion, the judge rejected Vincent's claim that the "fund[-]in[-]court" exception in Rule 4:42-9(a)(2) applied to the Davis law firm's application. Relying on In Re Prob. of Alleged Will of

Landsman, 319 N.J. Super. 252, 272 (App. Div. 1999), the judge explained that to recover counsel fees under the fund-in-court exception, the claimant must have "aided directly in creating, preserving or protecting the fund," but that did not occur here. The judge also cited In re Trust Dec. 20, 1961, 399 N.J. Super. 237 (App. Div. 2006), for the proposition that the fund-in-court exception applied where a litigant's efforts benefitted others. However, here, the "lawsuit was generated by [plaintiff] because of the alleged and perceived misconduct[and] misappropriation of Vincent" and Vincent was "preserving . . . his own interest" and "protecting his reputation" in the action. Therefore, the judge concluded that the Davis law firm's work did not benefit the trust itself but rather Vincent alone.

Turning to the language in the trusts, the judge found that the language permitted an award of fees only "in administration of the trust," not in the adversarial litigation at issue here. Finally, the judge concluded that Vincent failed to demonstrate that the fees, rates, and scope of work were reasonable. The judge found that the Davis law firm's application sought "legal fees in large part for the Pennsylvania litigation, where Vincent was found to have committed fraud and acted in bad faith." Further, the judge found that the amount sought was "exorbitant" and the parties failed to heed the judge's warning throughout

the litigation "that there was an over-expenditure of time, effort and legal fees" through the filing of repetitious motions. The judge concluded that the American Rule was applicable and that each party should pay their own counsel fees. Accordingly, she denied the fee application. These appeals followed.

II.

In A-1660-21, we first address plaintiff's challenge to the judge entering summary judgment on defendants' behalf.

We review the trial court's summary judgment ruling "de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). That standard is well-settled.

> [I]f the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—"together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. R. 4:46-2(c); see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted. R. 4:46-2(c); see Brill, 142 N.J. at 540.
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> [Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citation reformatted).]

"The very object of the summary judgment procedure . . . is to separate real issues from issues about which there is no serious dispute." Shelcusky v. Garjulio, 172 N.J. 185, 200-01 (2022). Where there is no material fact in dispute, "we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), overruled on other grounds by Wilson ex rel. Manzano v. City of New Jersey, 209 N.J. 558, 562-63 (2012)). "We review issues of law de novo and accord no deference to the trial judge's [legal] conclusions . . . ." MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 312 (App. Div. 2018).

Plaintiff argues the judge erred in granting summary judgment because she erroneously found that his claims are barred by the equitable doctrine of laches in light of his consent and acquiescence.

Broadly, laches is "'a defense developed by courts of equity' to protect defendants against 'unreasonable, prejudicial delay in commencing suit.'" SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 580 U.S. 328, 333 (2017) (quoting Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 667, 678 (2014)). Under New Jersey law, "[l]aches is an equitable doctrine, operating

as an affirmative defense that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party." Fox v. Millman, 210 N.J. 401, 417-18 (2012) (quoting Cnty. of Morris v. Fauver, 153 N.J. 80, 105 (1998)).

"Unlike the mechanical application of a fixed time prescribed by a statute of limitations," id. at 418, "[w]hether laches should be applied depends upon the facts of the particular case and is a matter within the sound discretion of the trial court," Mancini v. Twp. of Teaneck, 179 N.J. 425, 436 (2004) (alteration in original) (quoting Garrett v. Gen. Motors Corp., 844 F.2d 559, 562 (8th Cir.), cert. denied, 488 U.S. 908 (1988)). The test for laches is not what the plaintiff knows but what the plaintiff "might have known by the use of the means of [available] information . . . with the vigilance which the law requires." Enfield v. FWL, Inc., 256 N.J. Super. 502, 521 (Ch. Div. 1991) (quoting Cameron v. Penn Mut. Life Ins. Co., 116 N.J. Eq. 311, 314 (Ch. 1934)). As such, "[l]aches is not excused by simply saying 'I did not know.'" Cameron, 116 N.J. Eq. at 314.

Similarly, under Pennsylvania law, in order to prevail on an assertion of laches, a "respondent[] must establish: a) a delay arising from petitioner's failure to exercise due diligence; and[] b) prejudice to the respondent[] resulting

from the delay." In re Est. of Scharlach, 809 A.2d 376, 382-83 (Pa. Super. Ct. 2002) (quoting Sprague v. Casey, 550 A.2d 184, 187 (Pa. 1988)). As in New Jersey, laches in Pennsylvania may bar a suit in equity where a comparable suit at law would not be barred by an analogous statute of limitations. United Nat'l Ins. Co. v. J.H. Fr. Refractories Co., 668 A.2d 120, 124-25 (Pa. 1995).

Further, in Pennsylvania:

> The party asserting laches as a defense must present evidence demonstrating prejudice from the lapse of time. Such evidence may include establishing that a witness has died or become unavailable, that substantiating records were lost or destroyed, or that the defendant has changed his [or her] position in anticipation that the opposing party has waived his [or her] claims.
>
> [Commonwealth ex rel. Baldwin v. Richard, 751 A.2d 647, 651 (Pa. 2000) (citation omitted).]

And, as in New Jersey, laches under Pennsylvania law is tested not by what a plaintiff actually knows, but by what the plaintiff "might have known[,] by the use of the means of information within his [or her] reach with the vigilance the law requires." Taylor v. Coggins, 90 A. 633, 635 (Pa. 1914) (quoting Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co., 31 A. 484, 485 (Pa. 1895)).

Applying these principles, we agree with the judge that the doctrine of laches bars the bulk of plaintiff's claims. It is undisputed that Pennsylvania law

governed the Special Trust and Special Trust # 2 while New Jersey law governed the effective version of the 1983 Trust. In holding that laches barred plaintiff's claims in counts one through sixteen, the judge did not explicitly apply either state's law in her analysis. However, because the longstanding equitable doctrine of laches is virtually identical in both New Jersey and Pennsylvania, both requiring an inexcusable delay resulting in prejudice, the outcome would be the same irrespective of the state law applied.

Relying on Elias v. Elias, 237 A.2d 215, 217 (Pa. 1968), plaintiff asserts that because his claims do not violate the Pennsylvania statute of limitations, the doctrine of laches cannot lawfully apply inasmuch as "laches follows the statute of limitations."[15] Elias admittedly acknowledged that "[l]acking fraud or

[15] In that regard, plaintiff argues his claims were timely under the Pennsylvania statute of limitations for actions against trustees set forth in 20 Pa. Cons. Stat. § 7785(a), which provides:

> (1) A beneficiary is barred from challenging a transaction or asserting a claim against a trustee for breach of trust if:
>
> > (i) the trustee provided the beneficiary at least annually with periodic written financial reports concerning the trust;
> >
> > (ii) the transaction was disclosed in a report to which subparagraph (i) refers or such

concealment the general rule is that laches follows the [s]tatute of [l]imitations."

Id. at 217. However, the Elias court also observed:

> We said in First Nat'l Bank of Pittston v. Lytle Coal Co., 3 A.2d 350, 351 (Pa. 1939):
>
> > "Equity will not lend its aid to one who has slept upon his [or her] rights until the original transaction is obscured by lapse of years and death of parties[,] Kinter v. Commonwealth Trust Co., 118 A. 392, 393

> report provided sufficient information so that the beneficiary knew or should have known of the potential claim or should have inquired into its existence;
>
> (iii) in the [thirty] months after a report to which subparagraph (ii) refers was sent by the trustee to the beneficiary, the beneficiary did not notify the trustee in writing that the beneficiary challenges the transaction or asserts a claim and provides in writing the basis for that challenge or assertion; and
>
> (iv) all reports were accompanied by a conspicuous written statement describing the effect of this paragraph.

Plaintiff argues his claims do not violate the Pennsylvania statute of limitations because Vincent did not meet the statutory requirements as trustee. In support, plaintiff asserts he "did not receive financial reports as to the [t]rusts' investments or regular financial statements identifying the funds held by the . . . 1983 Trust." However, given the undisputed evidence of plaintiff's access to and receipt of financial statements, plaintiff's argument is unpersuasive and unavailing.

> (Pa. 1922), and where a party having the right to set aside a transaction stands by and sees another dealing with the property in a manner inconsistent with his [or her] alleged claim and makes no objection, a delay of six years will bar a suit in equity."

[237 A.2d at 217 (citations reformatted).]

More recently, in Kern v. Kern, 892 A.2d 1, 9 (Pa. Super. Ct. 2005), the court explicitly held that the application of the doctrine of laches in Pennsylvania "does not depend on a mechanical passage of time." The Kern court specifically recognized that "the doctrine of laches may bar a suit in equity where a comparable suit at law would not be barred by an analogous statute of limitations." Ibid.

In dismissing counts two, four, and six through thirteen based on laches, the judge correctly determined there was clear prejudice arising from plaintiff's delay in pursuing the claims implicated by Vincent's management of the trusts going back as far as 1976. The undisputed facts show that plaintiff should have known of the transfers from his trusts and failed to act in a timely manner, resulting in prejudice to defendants' ability to defend the case occasioned by Vincent's incapacity, Marie's death, and lost trust records.

Specifically, over the years, plaintiff had sufficient access to the trust records and admitted occasionally going online to access "all" of his trust

accounts at Oppenheimer as well as receiving statements from Oppenheimer showing trust balances. In addition, the plain language of the 2001 Release, which plaintiff admitted signing, indicated his full awareness and approval of the trust affairs before 2001, and his intention to "become more actively involved" in the trust affairs thereafter. Further, the text message from plaintiff to his daughter confirmed his awareness and approval of transfers to her trusts. Based on these facts, reasonable diligence dictates that plaintiff should have known of the transfers he now disputes in this matter.

The judge also properly dismissed count five based on laches. Count five sought an order requiring Vincent to produce a valid version of the Special Trust # 2. In his amended complaint, plaintiff alleged transfers of H&H funds to the Special Trust # 2 on unspecified dates. However, plaintiff confirmed that he saw "the amounts that came out of H&H" which were paid to Vincent as trustee for deposit into his various trusts, including the Special Trust # 2. Further, the assets of the Special Trust # 2 were held, at least in part, at Oppenheimer, where plaintiff admitted checking the online information for "all" his accounts. Plaintiff's failure to timely seek the relief sought and resulting prejudice to defendants justify dismissal under the doctrine of laches.

Plaintiff argues the judge erred in granting summary judgment when Vincent's versions of the trust documents were clearly forged. Although the judge made passing reference to certain trust terms, she did not expressly address disputes among the various versions of the trusts. Nonetheless, any such disputes are immaterial to the judge's finding of laches. Equally unavailing is plaintiff's contention that the judge erred in relying on the exculpatory language contained in the purportedly forged trust instruments because the judge did not expressly rely on the exculpatory language in granting summary judgment but on the doctrine of laches as applied to the parties' conduct throughout the trusts' existence.

Likewise, we agree with the judge's ruling dismissing for laches counts fourteen through sixteen, which alleged improper transfers of H&H funds by Vincent, separate from the trust funds. As with the trust transfers, the record clearly reflects that plaintiff should have known of the transfers from H&H and failed to timely act. Plaintiff was undisputedly aware of H&H's distributions dating back to the 1980s, as he served as its president and signatory, and even admitted to serving as its bookkeeper at times. He knew that Vincent routinely transferred funds from H&H, and saw the annual K-1 forms showing

distributions from H&H. Once again, his delay resulted in prejudice to defendants' ability to defend the case.

In the Matter of Mosery, 349 N.J. Super. 515, 516-17 (App. Div. 2002), we held that laches was inapplicable to a mother's claim to her deceased husband's estate where their sons had assured her in the face of the husband's inter vivos transfer of his major assets to them that she would be taken care of financially and litigation was unnecessary. We reasoned that the defense of laches was "not regarded with favor" where the parties stood in a "confidential relation" as that of parent and child. Id. at 523 (quoting Weisberg v. Koprowski, 17 N.J. 362, 378 (1955)). However, the circumstances in this case are plainly distinguishable because the parties' relationship included no such assurances by Vincent.

Plaintiff further argues the judge erred in finding that he consented and acquiesced to Vincent's actions over the course of many years. Acquiescence may serve as a bar to equitable relief. Casey v. Brennan, 344 N.J. Super. 83, 118 (App. Div. 2001). In New Jersey, acquiescence to a trustee's actions occurs where "the [beneficiary] knew all of the facts, understood his [or her] legal rights and acted deliberately in not objecting to an investment to which [the beneficiary] knew, or should have known[,] that he [or she] had a right to

object." Pa. Co. for Ins. on Lives & Granting Annuities v. Gillmore, 142 N.J. Eq. 27, 43-44 (Ch. 1948). Acquiescence can also arise in a corporate setting involving "the conduct of a stockholder in sitting by or acquiescing in the wrongful conduct of the corporation which[] may, under certain circumstances, preclude the shareholders from obtaining remedies to which they otherwise might have been entitled." Casey, 344 N.J. Super. at 118 (citing Kahn v. Household Acquisition Corp., 591 A.2d 166, 176 (Del. 1991)).

Similarly, in Pennsylvania, "a beneficiary who consents to an act or omission by the trustee which would constitute a breach of trust cannot hold him [or her] liable for the consequences of the act or omission if the beneficiary had full knowledge of all relevant facts and of his [or her] legal rights." Zampetti v. Cavanaugh, 176 A.2d 906, 910 (Pa. 1962). Further, a beneficiary believing a trustee's action is improper has an affirmative duty to speak. In re Macfarlane's Est., 177 A. 12, 15 (Pa. 1935). And, where a shareholder has acquiesced in mismanagement, the shareholder cannot object to the conduct. Erny v. G.W. Schmidt Co., 47 A. 877, 881 (Pa. 1901).

Here, plaintiff raises material factual disputes regarding whether he consented and acquiesced to Vincent's conduct in connection with the management of his trusts and the H&H distributions. Plaintiff asserted he and

Vincent never discussed the trust agreements, and that he never discussed transfers to Lynn with Vincent or Marie. Plaintiff also disputed assertions that he allowed transfers between his trusts as part of a cash management system for H&H or that his receipt of records or tax returns from H&H affirmatively proved that he acquiesced in the management of his trusts or the transfers from H&H.

Summary judgment is inappropriate "where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, 142 N.J. at 529 (quoting R. 4:46-2(c)). Had consent and acquiescence been the only bases for the judge's grant of summary judgment, we would agree with plaintiff that reversal was warranted. However, notwithstanding these disputed material facts, the claims were properly dismissed based on laches because even if plaintiff did not actually know of the conduct, he should have known.

Plaintiff also argues the judge erred in granting summary judgment based on the power of attorney because it is a forgery. "A power of attorney is an instrument in writing by which one person, as principal, appoints another as his [or her] agent and confers upon him [or her] the authority to perform certain specified acts or kinds of acts on behalf of the principal." Kisselbach v. Cnty. of Camden, 271 N.J. Super. 558, 564 (App. Div. 1994) (quoting Bank of Am.,

Nat'l Tr. & Sav. Ass'n v. Horowytz, 104 N.J. Super. 35, 38 (Cnty. Ct. 1968)). "But a power of attorney of course is not an instrument of gift. In itself, it is no more than the term, power of attorney, imports—an authorization to the attorney to act for the principal." State v. Kennedy, 61 N.J. 509, 512 (1972).

Here, the judge failed to acknowledge the dispute of fact concerning the validity and authenticity of the power of attorney that plaintiff did not recall signing and alleged was a forgery. Instead, the judge presumed the validity of the document as an additional basis to dismiss the claims. Nonetheless, the error is of no moment because we review the grant of summary judgment de novo and we have concluded that dismissal of counts two and four through sixteen based on the doctrine of laches was legally justified without considering the POA.

We reach a different conclusion as to counts one and three. Count one sought enforcement of the June 18, 2013, order directing Vincent to convey the assets of the 1983 Trust and to provide an accounting of the 1983 Trust. Separately, count one sought an accounting of the Special Trust and Special Trust # 2. The judge failed to specifically analyze plaintiff's demands for relief in connection with the 1983 Trust to which he was already entitled by virtue of the June 18, 2013 order. Because plaintiff promptly raised the claim in his amended 2015 complaint, laches is no bar to the relief sought. On the other

hand, the June 18, 2013 order did not address count one's request for an accounting of the Special Trust and Special Trust # 2. We therefore reverse and remand as to count one. On remand, the judge should consider whether laches applies to plaintiff's request for an accounting of the Special Trust and Special Trust # 2.

Count three sought an order confirming the termination of the Special Trust as of 1996, imposing a resulting trust on its assets, and surcharging Vincent for any losses since that time. The judge failed to specifically analyze count three's claims and instead broadly dismissed them for laches. Regardless of the version of the Special Trust applied, the trust has terminated because the longest version contained a forty-one-year term, which expired in 2017, four years after plaintiff initially filed this action. Because the Special Trust did not terminate until after the action was filed and plaintiff is the undisputed beneficiary of the trust and entitled to the trust corpus upon its termination, we conclude the doctrine of laches does not apply to count three and the judge should have considered plaintiff's demand for a resulting trust to effectuate the termination of the trust. Accordingly, we reverse and remand as to count three.

We also reverse and remand as to counts seventeen through nineteen. Count eighteen sought an order providing that Vincent was not entitled to any

commission as trustee, and count nineteen sought an award of counsel fees for plaintiff. However, the judge failed to address either count in her oral opinion. Rule 1:7-4(a) requires that on every motion decided by a written order that is appealable as of right, the court "shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law." See Curtis v. Finneran, 83 N.J. 563, 569-70 (1980) ("Failure to perform that duty 'constitutes a disservice to the litigants, the attorneys and the appellate court.'" (quoting Kenwood Assocs. v. Bd. of Adjustment of Englewood, 141 N.J. Super. 1, 4 (App. Div. 1976))). Because the judge failed to explain her findings and conclusions, we are constrained to reverse and remand as to counts eighteen and nineteen.

Turning to count seventeen, which alleged fraud in connection with Vincent's actions as trustee and in relation to H&H distributions, the judge dismissed the count, finding that plaintiff failed to show any evidence that Vincent committed fraud.[16] In New Jersey, to establish a prima facie case of common law fraud, a plaintiff must show: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its

[16] Although plaintiff's amended complaint did not allege gross negligence, the judge also found that plaintiff presented no evidence of gross negligence.

falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Allstate N.J. Ins. Co. v. Lajara, 222 N.J. 129, 147 (2015) (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 172-73 (2005)). Similarly, in Pennsylvania, fraud requires proof of "an intentional representation (or omission), of a material fact, made falsely, with an intent to mislead a [party], that the [party] relied upon to their detriment." In re Passarelli Fam. Tr., 242 A.3d 1257, 1269 (Pa. 2020).

Here, there are disputes of fact regarding fraud Vincent may have committed by altering trust documents and making improper transfers of funds. At a minimum, plaintiff submitted evidence suggesting that Vincent made material misrepresentations by altering signature pages on certain documents, including the power of attorney, and identifying plaintiff's unborn children by name on trust documents. He also provided evidence of Vincent's various transfers to others using funds from plaintiff's trusts, which he alleged to be fraudulent. Critically, the Delaware County court's finding that Vincent forged and fabricated H&H records provides further indicia of possible fraud in this separate but related proceeding. Given the disputed facts as to whether Vincent committed fraud, we reverse and remand as to count seventeen. Although the judge referenced laches in connection with this count, she did not explicitly find

it as a basis for dismissal. On remand, the judge should consider whether the claims in count seventeen may be subject to the laches bar.[17]

III.

In A-1807-21 and A-1808-21, we address plaintiff's challenge to the judge's denial of Vincent's applications for counsel fees.

We will disturb a trial court's determination on counsel fees "only on the rarest occasions, and then only because of a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995); accord Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001). However, such determinations are not entitled to any special deference if the judge "misconceives the applicable law, or misapplies it to the factual complex." Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (holding that a "trial court's interpretation

[17] Plaintiff correctly points out that in her May 14, 2021 oral opinion, the judge mistakenly found that he had failed to seek the return of the funds from the alleged recipients, including his children's trusts, by naming certain Tomei family trusts as defendants. Indeed, plaintiff's motion to file a second amended complaint to add the trusts of his family members that allegedly received distributions was denied on September 8, 2017. Although the judge's factual conclusion was incorrect, the error was harmless in light of the judge's ruling on laches. See R. 2:10-2 ("Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . .").

of the law and the legal consequences that flow from established facts are not entitled to any special deference"). Still, where case law, statutes, and rules are followed and the judge makes appropriate findings of fact, a fee award is entitled to substantial deference. Yueh v. Yueh, 329 N.J. Super. 447, 466 (App. Div. 2000).

New Jersey generally follows the American Rule, which provides that each party must pay his or her own counsel fees. Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016). Under the American Rule, litigants generally are responsible for their own counsel fees unless otherwise authorized by statute, court rule, or a contract. Mason v. City of Hoboken, 196 N.J. 51, 70 (2008).

Pertinent to this appeal, Rule 4:42-9(a)(2) permits fees to be awarded:

> Out of a fund in court. The court in its discretion may make an allowance out of such a fund, but no allowance shall be made as to issues triable of right by a jury. A fiduciary may make payments on account of fees for legal services rendered out of a fund entrusted to the fiduciary for administration, subject to approval and allowance or to disallowance by the court upon settlement of the account.

"Fund in court" is an equitable term of art. Henderson v. Camden Cnty. Mun. Util. Auth., 176 N.J. 554, 564 (2003). "The fund[-]in[-]court exception generally applies when a party litigates a matter that produces a tangible economic benefit for a class of persons that did not contribute to the cost of the

litigation." Henderson, 176 N.J. at 564. The exception applies "when it would be unfair to saddle the full cost [of the litigation] upon the litigant for the reason that the litigant is doing more than merely advancing his [or her] own interests." Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 168 (1960); accord Henderson, 176 N.J. at 564.

Accordingly, "when litigants through court intercession create, protect or increase a fund for the benefit of a class of which they are members, in good conscience the cost of the proceedings should be visited in proper proportion upon all such assets." Sarner v. Sarner, 38 N.J. 463, 469 (1962). A "pot of money" or actual fund in the possession of the court is not required. Trimarco v. Trimarco, 396 N.J. Super. 207, 215 (App. Div. 2007); accord Henderson, 176 N.J. at 564; Sarner, 38 N.J. at 468. "It is sufficient if, as a result of the litigation, the fund is brought under the control of the court." Trimarco, 396 N.J. Super. at 215-16.

For example, in Henderson, a customer of the Camden County Municipal Utilities Authority (CCMUA) filed a class action challenging the imposition of compound interest on delinquent accounts. 176 N.J. at 558. The Court concluded that compound interest was not permitted and applied its decision directly to the plaintiff and prospectively to other CCMUA customers. Id. at

561-63. The Court awarded the plaintiff reasonable counsel fees under the fund-in-court doctrine because, as a result of its decision, CCMUA customers no longer would be charged compound interest. Id. at 565-66. Thus, the fund-in court-doctrine applied because those customers received an economic benefit as a result of the plaintiff's lawsuit. Ibid.

Similarly, the exception has been applied in derivative actions brought by a stockholder on behalf of the corporation. Sarner, 38 N.J. at 468-69 (quoting Sunset Beach, 33 N.J. at 169). Courts have also approved an award of counsel fees under the exception where a lawsuit by taxpayer plaintiffs resulted in an indirect benefit to all Atlantic City taxpayers. Tabaac v. City of Atl. City, 174 N.J. Super. 519, 537-38 (Law Div. 1980). Likewise, the exception applies in a suit to "construe a will or a trust agreement" because the estate or trust fund is "the subject-matter of the litigation and for that reason under the control of the court." Trimarco, 396 N.J. Super. at 216 (quoting Cintas v. Am. Car & Foundry Co., 133 N.J. Eq. 301, 304 (Ch. 1943), aff'd in part, rev'd in part, 135 N.J. Eq. 305 (E. & A. 1944)). However, the fund-in-court exception does not apply when a party litigates a private dispute for its own personal gain. Sunset Beach, 33 N.J. at 168.

As for counsel fee awards dictated by contractual terms, it is true that trustees are "entitled to the advice and help of counsel in the performance of their duties." Gardner v. Baldi, 24 N.J. Super. 228, 232 (Ch. Div. 1952). However, a trustee has "no right to subject the trust fund unnecessarily to charges for counsel and attorney's fees." Holcombe v. Holcombe's Ex'rs, 13 N.J. Eq. 415, 416 (Ch. 1861). In Mears v. Addonizio, 336 N.J. Super. 474, 476-77 (App. Div. 2001), a trustee-bank sought court approval for counsel fees which resulted from the bank's participation in litigation involving the trust. We noted that the trust permitted the trustee to retain counsel "for the administration of the trust estate," but affirmed the denial of fees because the trustee-bank had employed attorneys to engage in "litigation beyond the administration of the trust estate." Id. at 478, 481.

With certain exceptions not applicable here, "all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a)." R. 4:42-9(b). RPC 1.5(a) requires that "[a] lawyer's fee shall be reasonable." This reasonableness requirement applies in all cases regarding fees, not just cases governed by a fee-shifting statute. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21-22 (2004).

> The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.
>
> [RPC 1.5(a).]

Applying these principles to Vincent's counsel fee application for the Davis law firm in A-1808-21, we discern no abuse of discretion in the judge's denial of counsel fees. Unlike Henderson, where the plaintiff sued on behalf of a class that ultimately received a benefit, 176 N.J. at 565-66, Vincent did not

participate in the litigation as an advocate for plaintiff, the beneficiary of the trust. On the contrary, Vincent participated to protect his own interests and to defend allegations for breach of fiduciary duty against him individually. His victory on summary judgment was one of personal gain, as contemplated by Sunset Beach, 33 N.J. at 169-70, and did not yield any financial benefit for others. Thus, in denying Vincent's request for counsel fees, the judge properly concluded that this case does not fall within the fund-in-court exception.

We are also satisfied that the judge properly rejected Vincent's argument that the language of the trusts permitted a counsel fee award. The judge considered the trust language purporting to authorize an award of fees and found that the language permitted an award only "in administration of the trust," not the adversarial litigation at issue here.

Vincent further argues that fees are authorized here under N.J.S.A. 3B:14-23(*l*), which provides:

> In the absence of contrary or limiting provisions in the judgment or order appointing a fiduciary, in the will, deed, or other instrument or in a subsequent court judgment or order, every fiduciary shall, in the exercise of good faith and reasonable discretion, have the power:
>
> . . . .

> To employ and compensate attorneys for services rendered to the estate or trust or to a fiduciary in the performance of the fiduciary's duties[.]

However, the statute is inapplicable because it contemplates an award of counsel fees only in "the absence of contrary or limiting provisions" in the trust documents. N.J.S.A. 3B:14-23. Here, the limiting provisions in the trust documents appearing under the heading "Administrative Powers of Trustees" undermine Vincent's argument. Indeed, a trustee's role depends "primarily upon the terms of the trust." Branch v. White, 99 N.J. Super. 295, 306 (App. Div. 1968). The terms are determined by the settlor's intention at the time of the trust's creation. Coffey v. Coffey, 286 N.J. Super. 42, 53 (App. Div. 1995). Thus, "the primary inquiry must be to ascertain the intent of the settlor from the language of the instrument itself." In re Trust for the Benefit of Duke, 305 N.J. Super. 408, 418 (Ch. Div. 1995), aff'd, 305 N.J. Super. 407 (App. Div. 1997). Here, the trusts' language provides that the trustee is authorized to employ attorneys in the administration of the trusts, not defending against allegations of misconduct against him individually.

We are also convinced that the judge properly denied the fee application after finding the fees to be unreasonable and violative of RPC 1.5(a). In addition to the factors identified in RPC 1.5(a) that inform the assessment of

reasonableness, the application clearly included charges from the Delaware County court litigation, which was an entirely separate matter.

Vincent argues for the first time on appeal that the judge erred in failing to apply Pennsylvania law, which permits fees and costs incurred by a trustee to be chargeable to the trust. In support, Vincent relies on In re Browarsky's Est., 263 A.2d 365, 366 (Pa. 1970), where the Court stated that "whenever there is an unsuccessful attempt by a beneficiary to surcharge a fiduciary the latter is entitled to an allowance out of the estate to pay for counsel fees and necessary expenditures in defending himself [or herself] against the attack." (quoting In re Wormley's Est., 59 A.2d 98, 100 (Pa. 1948)).

This court "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Because Vincent did not raise this issue before the trial judge and it is not jurisdictional in nature or implicates the public interest, we decline to consider the argument. Even if we considered the application under Pennsylvania law, both New Jersey and Pennsylvania require reasonableness in any award of

counsel fees. RPC 1.5(a); see Browarsky's Est., 263 A.2d at 366 (noting estate was "obligated to pay the reasonable costs" of litigation). Thus, even under Pennsylvania law, Vincent's application still fails as unreasonable because it included numerous charges associated with an entirely separate matter.

Vincent makes identical arguments in connection with his counsel fee application for the Ciardi law firm in A-1807-21. However, the judge made no findings with respect to Ciardi's fee application and gave no reason for denying the application. As a result, we are constrained to reverse and remand for the judge to make findings of fact and conclusions of law in accordance with Rule 1:7-4(a).

To the extent we have not addressed a particular argument, it is because the argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In sum, we affirm the judge's order granting summary judgment to defendants on counts two and four through sixteen in A-1660-21. However, we reverse and remand the judge's order granting summary judgment on counts one, three, and seventeen through nineteen in A-1660-21. We affirm the judge's order denying Vincent's counsel fee application for the Davis law firm in A-

1808-21. However, we reverse and remand the judge's order denying Vincent's fee application for the Ciardi law firm in A-1807-21.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

2025 WL 384366
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

I.M., Petitioner-Appellant,
v.
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES and
Monmouth County Division of Social Services, Respondents-Respondents.

DOCKET NO. A-0150-23
|
Argued January 28, 2025
|
Decided February 4, 2025

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

Attorneys and Law Firms

Chelsea-Lee Hanke argued the cause for appellant (Archer Law Office, attorneys; Chelsea-Lee Hanke and Brandie M. Tartza, on the briefs).

Elizabeth M. Tingley, Deputy Attorney General, argued the cause for respondent Division of Medical Assistance and Health Services (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Elizabeth M. Tingley, on the brief).

Before Judges Susswein, Perez Friscia and Bergman.

Opinion

PER CURIAM

***1** Appellant I.M. appeals from the July 7, 2023 final agency decision of the Assistant Commissioner of the Division of Medical Assistance and Health Services (Division), which affirmed the Monmouth County Division of Social Services' (County) denial of her Medicaid benefits. We affirm.

I.

Since 2016, appellant has resided at Sunnyside Manor, an assisted living facility. At the time, she suffered from various medical ailments, including chronic obstruction pulmonary disease, diabetes, hypertension, and impaired short-term memory. Appellant authorized her son pursuant to a power of attorney to act on her behalf. Appellant's son applied for Medicaid benefits from the County on her behalf. On March 31, 2022, a Sunnyside administrator completed the assisted living/adult family care referral form for appellant's County application for Managed Long Term Services and Supports (MLTSS) Medicaid program benefits. The form listed appellant's necessary daily living assistance and her medication care needs.

On June 17, appellant filed a New Jersey FamilyCare Aged, Blind, Disabled Program application for Medicaid benefits with the County. Her submission documented that she had created an irrevocable qualified income trust and included financial

information. The County requested that appellant submit additional verifications information by July 22. It specifically requested appellant provide the Sunnyside room and board rate, "medical costs," funding information for the trust, and a verification of financial transactions. The County's verification stated that appellant's failure to provide the information "w[ould] cause [her] application to be denied." A County supervisor thereafter called Sunnyside, seeking more medical expense information. An administrator at Sunnyside advised the supervisor that appellant's medical expense rate was $75 per day. The supervisor requested written verification, and on July 13, Sunnyside's administrator provided a letter confirming that appellant was "a care level [two patient] and med level [two patient] at a cost per day of [$]75."

On July 21, the County issued its eligibility decision denying appellant's Medicaid application for MLTSS program benefits because appellant's "total gross income of $8,993.45 per month (Social Security $2,314.10 for 2022 + Pension $1,393.64 + Annuity $5,285.71) [wa]s sufficient to pay the daily charge of '$75 per day' ($2,325 per month) [to] Sunnyside ... for administration of medication and for help." (Emphasis omitted). The County's decision further stated the $75 medical expense "daily charge rate was provided to this office on [July 13,] 2022 by Sunnyside."

On July 26, 2022, after receiving the County's denial, appellant's counsel emailed Sunnyside seeking clarification as to the "daily rate" and requesting appellant's "2022 bills." A Sunnyside billing department employee responded that the $75 rate was not correct. The same day, appellant sent the County Sunnyside's billing invoices for 2022, which included charges for: room and board, ranging from $176.25 to $255 per day; "[a]ssistance with [d]aily [l]iving ... at $40 per day"; "[m]edication management ... at $35 per day"; and "[g]eneral store" charges that varied each month. In May 2022, appellant's room and board rate decreased because she moved from a one-bedroom to a studio.

***2** On August 4, appellant requested a hearing. On August 19, the Division acknowledged appellant's hearing request and transferred the matter to the Office of Administrative Law (OAL).

On March 7, 2023, an Administrative Law Judge (ALJ) held a hearing. Sunnyside's co-owner and operator testified that Sunnyside's base level room and board rate included medical costs that are "the same for every resident and only var[y] upon the size of the[ir] apartment." He was "[un]able to say what portion" of the daily room and board expenses "[were] medical" and asserted that the invoices did not accurately delineate appellant's daily medical expenses. The County's supervisor testified that she personally confirmed appellant's medical expense rate of $75 per day with Sunnyside's administrator, and she "tried her best to make sure that the billing numbers provided to her were accurate."

On April 14, after the parties filed summation briefs, the ALJ issued an initial decision affirming the County's denial. The ALJ first highlighted that "[appellant] d[id] not contest ... her gross monthly income was $8,993.45." The ALJ then found appellant's gross monthly income exceeded the $2,523 MLTSS Medicaid income cap, and Sunnyside's invoices listed a medical expense rate totaling $75 per day. She noted while eligible Medicaid recipient's medical costs at assisted living facilities are covered, appellant offered no evidence of a different medical expense rate, and appellant's offered daily medical expense rate included room and board, which was precluded from reimbursement. The ALJ explained assisted living facilities are considered community-based services available to Medicaid eligible recipients, but individuals are responsible for paying their room and board costs.

On April 20, appellant filed written exceptions to the ALJ's decision. On July 7, the Assistant Commissioner for the Division issued a final agency decision, which adopted the ALJ's initial decision and separately found appellant's Sunnyside assisted living facility "medical cost was $75 per day." The Assistant Commissioner noted that appellant had submitted a letter to the County stating her daily rate was $330. She referenced that appellant provided the County with Sunnyside's invoices from January 2022 through May 2022, which included room and board rates ranging from $176.25 to $255. The invoices also included four described rate amounts.

Appellant had first argued before the ALJ that the County's decision was "based on an erroneous view of what medical expenses are," and "[s]econd, it [was] based on a fundamental misapprehension of how billing and care at an assisted living facility ...

works." The ALJ was unpersuaded by appellant's arguments. In affirming the denial, the Assistant Commissioner found it relevant that Sunnyside had affirmatively told the County supervisor that the medical expense rate was $75 per day. After noting appellant and Sunnyside disputed the $75 rate, the Assistant Commissioner found appellant's submitted invoices from Sunnyside to the County delineated the cost of "[a]ssistance with [d]aily [l]iving ... at $40 per day" and "[m]edication management ... at $35 per day," corroborating the medical expenses. She further found Sunnyside's billing employee's email to appellant dated July 26, 2022, which indicated the $75 rate provided to the County was an incorrect reimbursement rate, did not sufficiently refute the County's evidence and noted appellant provided no invoice or cost breakdown. Further, the Assistant Commissioner indicated appellant received an income of $8,933.45 per month. Because Medicaid does not cover assisted living room and board costs, and appellant's income far exceeded the monthly cost of her medical expenses of "approximately $2,250 per month," the Assistant Commissioner affirmed the denial.

***3** On appeal, appellant contends reversal is warranted because: (1) the Assistant Commissioner and ALJ incorrectly determined appellant's gross monthly income, as her pension and annuity income are deposited monthly into a qualified trust created consistent with the requirements of 42 U.S.C. § 1396p(d)(4)(B), which precludes the income from consideration when calculating her monthly gross income and placing her below the eligibility limit; (2) the Assistant Commissioner's reliance on Sunnyside's administrative representative's $75 daily medical expense rate was insufficient, and the Assistant Commissioner's failure to properly consider the testimony of credible witnesses regarding medical costs was arbitrary, capricious, and unreasonable; (3) the room rate was misinterpreted when determining medical costs, and thus, the Assistant Commissioner's decision, which adopted the ALJ's initial decision, was arbitrary, capricious, and unreasonable; (4) requiring Sunnyside to provide an itemized breakdown of charges on its invoice was unsupported, lacks fair support in the record, and is unreasonable given the regulatory framework governing assisted living facilities; (5) services provided to appellant at Sunnyside Manor were necessary medical services; (6) requiring appellant to provide an itemized medical expense and room and board expense breakdown of charges at Sunnyside's assisted living facility for Medicaid coverage lacks fair support in the record and is a misinterpretation of the Medicaid reimbursement framework; (7) the Assistant Commissioner incorrectly relied on C.M. v. Middlesex County Board of Social Services, No. HMA 9650-19, 2020 N.J. AGEN LEXIS 123 (May 12, 2020) and G.T. v. Division of Medical Assistance & Health Services and Gloucester Board of Social Services, No. HMA 7855-12, final decision (Dec. 19, 2012) when finding appellant ineligible for Medicaid; and (8) the Assistant Commissioner's "actions constitute improper rulemaking, violating Medicaid statutes and administrative procedure."

II.

"This court's review of [the Division's] determination is ordinarily limited." C.L. v. Div. of Med. Assistance & Health Servs., 473 N.J. Super. 591, 597, 284 A.3d 860 (App. Div. 2022). "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.' " R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 261, 83 A.3d 868 (App. Div. 2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27, 17 A.3d 801 (2011)). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 349, 990 A.2d 701 (App. Div. 2010) (alteration in original) (quoting In re Arenas, 385 N.J. Super. 440, 443-44, 897 A.2d 442 (App. Div. 2006)).

"Deference to an agency decision is particularly appropriate where interpretation of the [a]gency's own regulation is in issue." I.L. v. N.J. Dep't of Hum. Servs., Div. of Med. Assistance & Health Servs., 389 N.J. Super. 354, 364, 913 A.2d 122 (App. Div. 2006). "Nevertheless, we are 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.' " C.L., 473 N.J. Super. at 598, 284 A.3d 860 (quoting R.S., 434 N.J. Super. at 261, 83 A.3d 868). Moreover, "[i]f our review of the record shows that the agency's finding is clearly mistaken, the decision is not entitled to judicial deference." A.M. v. Monmouth Cnty. Bd. of Soc. Servs., 466 N.J. Super. 557, 565, 247 A.3d 925 (App. Div. 2021) (first citing H.K. v. N.J. Dep't of Hum. Servs., 184 N.J. 367, 386, 877 A.2d 1218 (2005), then citing L.M. v. Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490, 659 A.2d 450 (1995)). The same is true "where an agency rejects an ALJ's findings of fact." Ibid.

"[I]t is well recognized that 'Medicaid, enacted in 1965 as Title XIX of the Social Security Act, [42 U.S.C. §§ 1396 to 1396w-8], is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services.' " G.C. v. Div. of Med. Assistance & Health Servs., 249 N.J. 20, 26, 262 A.3d 1195 (2021) (quoting Atkins v. Rivera, 477 U.S. 154, 156, 106 S.Ct. 2456, 91 L.Ed.2d 131 (1986)); see also 42 U.S.C. § 1396-1. "Participation in the Medicaid program is optional for states; however, 'once a State elects to participate, it must comply with the requirements' of the federal Medicaid Act and federal regulations adopted by the Secretary of Health and Human Services in order to receive federal Medicaid funds." D.C. v. Div. of Med. Assistance & Health Servs., 464 N.J. Super. 343, 354, 235 A.3d 1036 (App. Div. 2020) (quoting Harris v. McRae, 448 U.S. 297, 301 (1980)).

Pursuant to the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5, the Division is responsible for administering Medicaid in our State. N.J.S.A. 30:4D-4. The Division is required to manage the State's Medicaid program in a fiscally responsible manner. See Dougherty v. Dep't of Hum. Servs., Div. of Med. Assistance & Health Servs., 91 N.J. 1, 4-5, 10, 449 A.2d 1235 (1982) (remanding back to the agency to consider the public interest and the "increasing social demands for limited public resources"). "[T]o be financially eligible, the applicant must meet both income and resource standards." In re Est. of Brown, 448 N.J. Super. 252, 257, 153 A.3d 242 (App. Div. 2017); see also A.M., 466 N.J. Super. at 566, 247 A.3d 925 ("Because Medicaid funds are limited, only those applicants with income and non-exempt resources below specified levels may qualify for government-paid assistance."); N.J.A.C. 10:71-3.15; N.J.A.C. 10:71-1.2(a).

***4** "Individuals qualify for MLTSS by meeting established Medicaid financial requirements ... contained in N.J.A.C. 10:69, 70, 71, or 72." N.J.A.C. 10:60-6.2(a). A local County Welfare Agency (CWA) "exercise[s] direct responsibility in the application process to ... [r]eceive applications." N.J.A.C. 10:71-2.2(c)(2). A CWA is defined as "that agency of county government, that is charged with the responsibility for determining eligibility for public assistance programs, including [Aid to Families with Dependent Children] - Related Medicaid, Temporary Assistance to Needy Families (TANF), the Food Stamp Program, NJ FamilyCare and Medicaid." N.J.A.C. 10:71-2.1. CWAs are charged with evaluating an applicant's eligibility for Medicaid benefits. N.J.S.A. 30:4D-7; N.J.A.C. 10:71-2.2(a); N.J.A.C. 10:71-3.15(a).

"The process of establishing eligibility involves a review of the application for completeness, consistency, and reasonableness." N.J.A.C. 10:71-2.9. Applicants must provide the CWA with specific verifications, which are identified for the applicant. See N.J.A.C. 10:71-2.2(e)(2). The CWA is responsible for "[a]ssisting [an] applicant in exploring their eligibility for assistance," N.J.A.C. 10:71-2.2(c)(3), and "[m]aking known to the applicant the appropriate resources and services both within the agency and the community, and, if necessary, assist in their use," N.J.A.C. 10:71-2.2(c)(4). The applicant is required to "complete, with the assistance from the CWA if needed, any forms required by the CWA as a part of the application process." N.J.A.C. 10:71-2.2(e)(1). While the applicant is "the primary source of information," the CWA is responsible for making "the determination of eligibility and to use secondary sources when necessary, with the applicant's knowledge and consent." N.J.A.C. 10:71-1.6(a)(2). The applicant is responsible for cooperating fully with the verification process if the CWA has to contact the third-party in reference to verifying the value of the applicant's resources. N.J.A.C. 10:71-4.1(d)(3)(i). The agency may perform a collateral investigation to "verify, supplement or clarify essential information." N.J.A.C. 10:71-2.10(b).

III.

We first address appellant's argument that the Assistant Commissioner erroneously determined her gross monthly income was $8,933.45 and the daily medical expense rate at Sunnyside. Specifically, appellant contends the Assistant Commissioner should have excluded appellant's pension and annuity income, which was deposited into an irrevocable qualified income trust in compliance with 42 U.S.C. § 1396p(d)(4)(B), when reviewing her Medicaid eligibility, because that income was excludable from the gross monthly income calculation for Medicaid eligibility. Appellant posits that her gross monthly income would have been below the MLTSS Medicaid income eligibility cap if the Assistant Commissioner correctly excluded her pension and annuity income.

"Normally, we do not consider issues not raised below at an administrative hearing." In re Stream Encroachment Permit, Permit No. 0200-04-0002.1 FHA, 402 N.J. Super. 587, 602, 955 A.2d 964 (App. Div. 2008) (citing Bryan v. Dep't of Corr., 258 N.J. Super. 546, 548, 610 A.2d 889 (App. Div. 1992)). Appellate courts generally refrain from considering an appellant's arguments not advanced and fully litigated below because it is unfair to the adverse party and limits a full review. See Abbott v. Burke, 119 N.J. 287, 390, 575 A.2d 359 (1990). Accordingly, we decline to consider issues not raised below when an opportunity for such a presentation was available unless the questions raised on appeal concern jurisdiction or matters of great public interest. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973); see also Zaman v. Felton, 219 N.J. 199, 226-27, 98 A.3d 503 (2014) (recognizing claims that are not presented to a trial court are inappropriate for consideration on appeal).

***5** Here, appellant failed to dispute her gross monthly income before the County or ALJ, a fact not noted in appellant's brief. See R. 2:6-2(b) (requiring when a point was "not presented below a statement to that effect shall be included in parenthesis in the point heading"). The County's denial decision specifically stated appellant's gross income was $8,933.45. Thus, the County notified appellant of its gross income determination and afforded an opportunity to challenge the decision before the ALJ. A review of the hearing transcript and appellant's post-trial summation brief to the ALJ confirms appellant advanced no arguments regarding the County's determination of appellant's gross income.

For the sake of completeness, we note the ALJ's decision specifically indicated there were no facts presented that put appellant's monthly gross income, which "included $2,314.10 in Social Security benefits, $1,393.64 from a Public Employees' Retirement System pension[,] and an annuity for $5,285.71," in dispute. It is uncontroverted that before its denial of appellant's application, the County had sent appellant a verification letter requesting records regarding her trust and financial transactions. Appellant's failure to timely contest the County's gross income determination precluded the County a fair opportunity to request further financial information and funding verification, deprived the County from litigating the issues, and prevented the ALJ from addressing the issues on the merits at the hearing. For these reasons, we discern no reason to disturb the Assistant Commissioner's final decision.

We next consider appellant's argument that the Assistant Commissioner erred in her determination of appellant's daily medical expenses at Sunnyside. It is undisputed that Sunnyside provided appellant with necessary medical services, and the County is the agency charged with determining appellant's Medicaid eligibility for the MLTSS program benefits. We are unpersuaded by appellant's contention that the Assistant Commissioner's determination of appellant's daily medical costs of $75 per day at Sunnyside was: unsupported by credible evidence in the record; based on misinterpreted information; and was arbitrary, capricious, and unreasonable. After a review of the record, we discern no error in the Assistant Commissioner's adoption of the ALJ's findings and independent determination that Sunnyside's administrator's letter and invoices established that appellant's "medical cost was $75 per day."

Appellant does not dispute that while Medicaid applicants may be eligible for assisted living facility medical care expenses under the MLTSS program, they must pay for room and board themselves. See 42 C.F.R. § 441.310(a)(2) (prohibiting expenditure for "cost of room and board" unless an exception applies). When determining appellant's daily medical expenses, the Assistant Commissioner acted within her discretion in relying upon the supervisor's testimony regarding her conversation with Sunnyside's administrator, Sunnyside's confirming letter, and its invoices. It is clear in administrative proceedings that the parties are not bound by the formalities of the Rules of Evidence. N.J.A.C. 1:1-15.1(c), -15.5 (a) to (b); see also Weston v. State, 60 N.J. 36, 51, 286 A.2d 43 (1972) (explaining that "[h]earsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony," but "for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it"). All of Sunnyside's invoices specifically stated that appellant's "[a]ssistance with [d]aily [l]iving" cost was $40 per day, and her "[m]edication [m]anagement" cost was $35 per day, which corroborated Sunnyside's administrator's statement and confirming letter that stated appellant's daily medical expenses totaled $75.

***6** Appellant has cited no authority for her contention that the County was required to accept Sunnyside's full daily rate charged, which included room and board, in determining her Medicaid eligibility. Stated another way, appellant has cited no legal authority supporting her contention that the County was required to accept the entirety of her daily costs at Sunnyside as attributable solely for medical expenses. Further, her assertion that there was no requirement "to provide an itemized breakdown of [medical expense] charges" is in direct contradiction with N.J.A.C. 10:71-2.2(e)(2)'s requirement for applicants to assist "in securing evidence that corroborates [their] statements."

Finally, we discern no error in the Assistant Commissioner's reference to C.M. v. Middlesex County Board of Social Services, 2020 N.J. AGEN LEXIS 123 (May 12, 2020) and G.T. v. Division of Medical Assistance & Health Services and Gloucester Board of Social Services, HMA 7855-12, final decision (Dec. 19, 2012). The Assistant Commissioner made sufficient independent findings substantially supported by the record. Appellant's argument that the Assistant Commissioner's final decision constituted improper rulemaking is also without merit. The Assistant Commissioner's exclusion of Sunnyside's room and board costs, as an assisted living facility, and determination of medical expenses per day based on the evidence submitted was in keeping with the Division's policy position and in accordance with federal law. See 42 U.S.C. § 1396n(d)(1) (allowing an authorized state Medicaid plan to "include as 'medical assistance' ... part or all of the cost of home or community-based services (other than room and board) ... provided pursuant to a written plan of care" to individuals over sixty-five years old); see also Div. of Med. Assistance & Health Servs., Medicaid Commc'n No. 18-10, Pre-eligibility Medical Expenses (PEME) for Nursing Homes and Assisted Living Facilities 2 (2018) ("Medicaid does not cover room and board for individuals living in [assisted living] facilities and any cost associated with room and board cannot be included in the claim for PEME."). For these reasons, we discern no bases to disturb the Assistant Commissioner's final decision.

To the extent that we have not addressed appellant's remaining contentions, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2025 WL 384366

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2024 WL 2764408

Superior Court of New Jersey, Appellate Division.

W.F., Petitioner-Appellant,

v.

MORRIS COUNTY DEPARTMENT OF FAMILY SERVICES, Respondent-Respondent.

DOCKET NO. A-1271-22

|

Submitted April 22, 2024

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Decided May 30, 2024

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

Attorneys and Law Firms

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Johnson & Johnson, attorneys for respondent Morris County Department of Family Services (William G. Johnson, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent Division of Medical Assistance and Health Services (Melissa H. Raksa, Assistant Attorney General, of counsel; Laura N. Morson, Deputy Attorney General, on the brief).

Before Judges Sabatino and Marczyk.

Opinion

PER CURIAM

***1** This appeal involves the computation of an incapacitated person's available assets for purposes of Medicaid eligibility.

A.P.D.,[1] the guardian of W.F., appeals a November 29, 2022, final agency decision of the Division of Medical Assistance and Health Services ("the Division" or "DMAHS") reducing W.F.'s Medicaid benefits by over $60,000 because of trusts the Division deemed to be his available assets. For the reasons that follow, we reverse and remand.

I.

W.F., who is now in his late fifties, has been living for many years in a Care One nursing home and is incapacitated by a long-term alcoholism-related disease. A.P.D. was appointed guardian of his property in October 2019.

About a decade before he became incapacitated, W.F. entered into a property settlement agreement ("PSA") as part of the divorce judgment with his ex-wife. Under the PSA, W.F. agreed to pay $23,400 annually in child support to his ex-wife for their two minor children, plus one-half of their future college and other specified expenses.

After W.F. became ill, his assets were insufficient to pay both his debts to Care One and his child support and college expense obligations. To address the children's support needs, A.P.D. created a trust (the "Family Trust"). The Probate Part of the Chancery

Division approved the trust. Notably, the trust is irrevocable, and the funds must be used only for the needs of the children and not W.F.'s personal needs.

As W.F.'s guardian, A.P.D. petitioned the Morris County Department of Family Services ("MCDFS") for Medicaid benefits. MCDFS informally notified A.P.D. that the trust would be considered a gift to W.F.'s children, prompting A.P.D. to seek reformation of the trust in the Chancery Division. At the suggestion of the Guardian ad Litem ("GAL") for the children, the Chancery judge approved division of W.F.'s assets through trusts into three equal shares: one-third for counsel fees and Care One, one-third for W.F.'s minor son, and one-third for W.F.'s minor daughter. The Chancery judge ordered the funds for the children into new trusts for their benefit.

A.P.D. then renewed his application to MCDFS concerning W.F.'s Medicaid eligibility. MCDFS maintained its position that the funds were "available" to W.F. and approved the application with a "transfer penalty" proportionately reducing his benefits.

W.F. then requested what is known under N.J.A.C. 10:49-9.13 as a "fair hearing" before the Office of Administrative Law to challenge MCDFS's partial rejection of his petition. After two days of hearings, an administrative law judge ("ALJ") found: (1) MCDFS waived its right to object to the propriety of the transfer; and (2) nevertheless, the transfer was proper. However, the Division's Assistant Commissioner disagreed with the ALJ's findings and issued the final agency decision reinstating the transfer penalty.

On appeal, W.F. principally argues [2] that the Division misinterpreted N.J.A.C. 10:71-4.10(e)(1) to conclude that the reformation of the Family Trust to partially satisfy W.F.'s outstanding child support obligations had been improperly executed at his behest to expedite his Medicaid eligibility. W.F. contends the child support payments legitimately satisfied debts that are certain and collectable under the divorce judgment entered in the Family Part of the Chancery Division. He submits they are not liabilities of a speculative amount he assumed by entering a post-incapacitation improper contract designed to promote Medicaid eligibility.

II.

***2** The subject matter before us concerns the rules and regulations of the Medicaid program. "Medicaid was enacted in 1965 as Title XIX of the Social Security Act, and is a joint federal and state program to provide a safety net for payment of medical bills for low-income individuals who are elderly, blind or disabled." W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 36 (App. Div. 2007). "Medicaid is the only government program for payment of long-term nursing home care." Ibid. Among other requirements for states to participate, "[e]ach participating state must adopt a plan that 'includes "reasonable standards ... for determining eligibility for and the extent of medical assistance ... [that is] consistent with the objectives" of the Medicaid program.' " Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 166 (1998) (alterations in original).

"New Jersey has elected to participate in the Medicaid program by enacting the New Jersey Medical Assistance and Health Services Act. N.J.S.A. 30:4D-1 to -19.1. [DMAHS] has the responsibility for administering the program." Ibid. (citing N.J.S.A. 30:4D-3(c)).

Medicaid eligibility is limited in this state to individuals whose "resources" total no more than $2,000. N.J.A.C. 10:71-4.5(c). "Resources" are defined to include "any real or personal property which is owned by the applicant ... and which could be converted to cash to be used for his or her support and maintenance." N.J.A.C. 10:71-4.1(b).

Only "available" resources are counted in determining eligibility. N.J.A.C. 10:71-4.1(c). A resource is considered "available" to an applicant if "[t]he person has the right, authority or power to liquidate real or personal property or his or her share of it." N.J.A.C. 10:71-4.1(c)(1). Resources "which are not accessible to an individual through no fault of his or her own" are excluded from the eligibility determination. N.J.A.C. 10:71-4.4(b)(6). "Resource eligibility is determined as of the first moment of the first day of each month." N.J.A.C. 10:71-4.1(e).

Even if an individual is otherwise eligible for Medicaid, New Jersey regulations impose a transfer penalty of ineligibility if the applicant (or his or her spouse) has disposed of assets at less than fair market value at any time during or after the sixty-month "look-back" period. N.J.A.C. 10:71-4.10(a).

"Any applicant or beneficiary may rebut the presumption that assets were transferred to establish Medicaid eligibility 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) (emphasis added). Further, the Medicaid "[a]gency determination pursuant to client rebuttal shall be as follows:

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.

3. The agency's determination shall not include an evaluation of the merits of the applicant's stated purpose of transferring assets. The determination shall only deal with whether or not the applicant has proven that the transfer was solely for some purpose other than establishing Medicaid eligibility.

4. The final determination regarding the purpose of the transfer shall be made at a supervisory level at the county welfare agency and shall be documented in the case record.

***3** 5. The applicant shall be sent a notice of the decision, which shall include information on his or her right to a fair hearing in accordance with N.J.A.C. 10:49–10.

[N.J.A.C. 10:71-4.10(l).]

When an applicant fails to rebut the presumption that a transfer was motivated by Medicaid eligibility, the transfer penalty will not be applied if one of the six enumerated exceptions applies. N.J.A.C. 10:71-4.10(e)(1) to (6). W.F. does not rely on any of those exceptions here.

If the transfer penalty is ultimately imposed, applicants may contest that determination through a fair hearing before an ALJ. N.J.A.C. 10:49-10.3(b), N.J.A.C. 10:49-10.6. After the hearing, the ALJ will issue an "initial decision" that may be adopted or rejected by the "DMAHS' head" as the "final decision" that "shall be binding on ... DMAHS." N.J.A.C. 10:49-10.12.

III.

In reviewing the Division's final agency decision in this case, we recognize that we owe considerable deference to its expertise in the program it administers. Decisions by DMAHS limiting Medicaid eligibility are subject to a "limited scope of review [as] the final determination of a State administrative agency." W.T., 391 N.J. Super. at 35. "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.' " R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 261 (App. Div. 2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)).

That said, we review the agency's determinations on questions of law de novo. "[W]e are 'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.' " C.L. v. Div. of Med. Assistance & Health Servs., 473 N.J. Super. 591, 598 (App. Div. 2022) (quoting R.S., 434 N.J. Super. at 261). "[W]hen an agency's decision is plainly mistaken, in the interest of justice we will decline deference to its decision." W.T., 391 N.J. Super. at 36.

Guided by these principles, we conclude the Assistant Commissioner's decision reversing the ALJ's ruling in favor of W.F. misapplied the legal standards of eligibility to the circumstances of this case, and, moreover, was arbitrary and capricious.

It was unreasonable for the Division and its county affiliate, MCDFS, to classify the court-ordered transfer as a "gift," when W.F. had no true control over the funds in question. W.F.'s child support and college obligations were already court-ordered when the transfer was proposed. At the time of the transfer, W.F. was incapable of earning future income and possessed fewer funds than could satisfy the child support obligations. The minor children were entitled to payment under DeCeglia v. Estate of Colletti, 265 N.J. Super. 128, 140 (App. Div. 1993).

The Chancery Division's finding of such an entitlement by the children in this case is evidenced by its express recognition that W.F.'s guardian A.P.D. "was not in a position to formally consent on behalf of [W.F.]." Moreover, the only parties from which the Chancery Division sought and obtained consent for the transfer were the holders of the two obligations with claims to the entirety of W.F.'s assets, i.e., his children and Care One, the latter as the medical institution providing him with services and housing.

***4** The Division is incorrect that the reformation of the Family Trust ordered by the Chancery judge was a "gift" by W.F. warranting imposition of a transfer penalty. Notably, N.J.A.C. 10:71-4.10(c) imposes a transfer penalty if "an individual" has gifted assets during the look-back period. That same regulation defines "individual" to include the applicant for benefits, their spouse or guardian, and "[a]ny person including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse." N.J.A.C. 10:71-4.10(b)(1)(iv) (emphasis added).

Here, the Chancery judge did not enter an order granting W.F. the relief requested by his guardian, i.e., to reform the Family Trust "into a self-settled special needs trust for [W.F.'s] sole benefit with a 'pay back' provision to Medicaid." Rather, the Chancery judge adopted a proposal by the GAL for the minor children to order the division of the assets of the Family Trust into thirds: one-third to satisfy legal fees and other debts (for which the agency has not imposed a transfer penalty), and two-thirds into trusts to pay child support obligations for the children (for which the agency imposed a transfer penalty). The transfer was not ordered at the behest of W.F.—the "individual" under N.J.A.C. 10:71-4.10(b)(1) who must have made the purported gift.

The record therefore shows that the allocation of the trust assets into separate trusts for the children was requested by the GAL, not W.F. W.F.'s guardian had asked for the entirety of the Family Trust assets to be transferred to a new "self-settled personal needs trust." Accordingly, it was unreasonable for the Division and MCDFS to penalize W.F. for "gifting" assets that, in reality, were transferred by a court order contrary to his guardian's own request.

The inapplicability of a transfer penalty to the trust reformation in this context also aligns with N.J.A.C. 10:71-4.10(k), which specifies a "[c]ourt-ordered transfer (when the court is not acting on behalf of, or at the direction of, the individual or the individual's spouse)" is a "factor[ ], while not conclusive, [that] may indicate that the assets were transferred exclusively for some purpose other than establishing Medicaid eligibility."

Simply stated, the Division has misconceived the nature of the Chancery judge's reformation of the Family Trust into trusts to benefit the two children. The payments were not a gift directed by W.F or his personal guardian. As such, as a matter of law, they were not "available" assets in calculating W.F.'s Medicaid eligibility. The final agency decision was legally erroneous. Moreover, the decision was arbitrary, capricious, and unreasonable.

Consequently, we reverse the final agency decision and the associated imposition of the transfer penalty. We remand for a recalculation of the amounts owed, in a manner consistent with our decision. We do not retain jurisdiction.

Reversed and remanded.

All Citations

Not Reported in Atl. Rptr., 2024 WL 2764408, Med & Med GD (CCH) P 308,098

Footnotes

1 We use initials to protect the privacy interests of W.F. and his guardian.

2 W.F. does not contest the Assistant Commissioner's rejection of the ALJ's waiver finding.

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2025 WL 798911
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

M.K., Petitioner-Appellant,
v.
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES and MORRIS COUNTY OFFICE OF TEMPORARY ASSISTANCE, Respondents-Respondents.

DOCKET NO. A-0578-23
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Submitted February 5, 2025
|
Decided March 13, 2025

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

Attorneys and Law Firms

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Johnson & Johnson, attorneys for respondent Morris County Office of Temporary Assistance (John A. Napolitano, Morris County Counsel and William G. Johnson, Specialty County Counsel, on the brief).

Before Judges Mayer and Rose.

Opinion

PER CURIAM

***1** Petitioner M.K. appeals from a September 7, 2023 final agency decision of the Department of Human Services (DHS), Division of Medical Assistance and Health Services (DMAHS), assessing a 400-day ineligibility penalty on his Medicaid benefits and denying an undue hardship waiver of the penalty. The Assistant Commissioner of DMAHS upheld an initial decision by an Administrative Law Judge (ALJ), following a Medicaid fair hearing. We affirm.

I.

We summarize the pertinent facts and procedural history from the record reviewed by the Assistant Commissioner of DMAHS. M.K. is in his late forties, suffers from multiple sclerosis and other conditions, which have rendered him bedridden. M.K. was admitted to Troy Hills Center, a skilled nursing facility, in May 2022.

In September 2022, M.K. filed his third [1] application for Medicaid benefits with the Morris County Office of Temporary Assistance (MCOTA). On December 8, 2022, he was approved for Medicaid, with an effective date of October 1, 2022. However, MCOTA assessed an ineligibility penalty of 400 days, from October 1, 2022 to November 4, 2023, due to asset transfers M.K. made within five years of his application for Medicaid benefits. The transfers totaled $150,000: $5,000 to "Xoom.com"; [2] two checks, $60,000 and $45,000, for a "Loan" to S.V., a family member; and two wire transfers, $18,000 and $22,000, to an attorney.

Thereafter, in December 2022, M.K. filed an administrative appeal and requested a Medicaid fair hearing to contest the transfer penalty. He also applied for an undue hardship waiver of the penalty.

In February 2023, MCOTA denied the undue hardship waiver, finding "it has not been demonstrated the prongs needed for undue hardship were met." M.K. appealed the denial and requested a fair hearing and more definite statement of reasons on February 15, 2023. He further requested consolidation of his appeal of the transfer penalty and appeal of the undue hardship waiver denial. The matter was transmitted to the Office of Administrative Law (OAL) and both appeals were consolidated.

A one-day hearing was held before the ALJ in May 2023. MCOTA presented the testimony of its paralegal specialist and moved various documents into evidence. M.K. did not testify, but called the executive director of Troy Hills Center as a witness on his behalf. [3]

MCOTA's specialist explained the ineligibility penalty was imposed against M.K. because the identified transfers "were not adequately shown to have been used on [his] behalf." In particular, the specialist testified M.K. provided a "typewritten note" to explain the transfers, signed by himself; his wife, N.R.; his wife's brother, P.R.; and P.R.'s wife, S.V. The note stated the $60,000 and $45,000 checks were to reimburse S.V. for "healthcare expenses" paid on M.K.'s behalf while he was in India and for helping M.K.'s mother "with financial needs." However, the note did not reference any promise to reimburse the funds. The specialist stated MCOTA never received a loan agreement executed between M.K. and his family members, any medical bills incurred while M.K. was in India, nor any proof that any other expenses were paid on behalf of M.K. by his family members. She also stated M.K. never supplied documentation to explain the $18,000 and $22,000 wire transfers.

***2** Regarding the undue hardship waiver, the specialist testified there was no indication M.K. was not receiving adequate care at Troy Hills Center and no information that M.K. "did anything other than voluntarily transfer" the identified funds. The specialist explained the waiver was denied due to M.K.'s failure to establish the waiver requirements.

Troy Hills Center's executive director explained discharging M.K. to his home would not "be deemed safe" and therefore M.K. would remain at the facility during the ineligibility period, even though the facility would not receive payment. She further explained M.K. would still receive the care he required.

On June 7, 2023, the ALJ issued an initial decision upholding the transfer penalty and denying the undue hardship waiver. Regarding the transfer penalty, the ALJ reasoned M.K. failed to rebut the presumption the transfers totaling $150,000 were made to establish Medicaid eligibility. She characterized the letter as "uncorroborated hearsay" and acknowledged "[n]o testimony was presented at the hearing by any of the individuals who signed [the] letter." The ALJ further noted M.K. never provided "a loan agreement relating to these transactions, nor any medical bills or other documentary evidence illustrating the cost for any medical treatment received in India." Therefore, M.K. failed to show the transfers "were made exclusively for a purpose other than to qualify for Medicaid benefits."

As to the undue hardship waiver, the ALJ reasoned there was no evidence the transfer penalty "would deprive M.K. of medical care such that his health or life would be endangered." Furthermore, the ALJ determined "[M.K.] failed to demonstrate that any of the transferred assets here were ever beyond M.K.'s control and could not be recovered." Specifically, the ALJ noted M.K. did not show any effort to recover the transferred funds and there was insufficient evidence to support a finding they could not be recovered.

M.K. filed exceptions to the ALJ's initial decision. In her September 7, 2023 final decision, the Assistant Commissioner of DMAHS concurred with the ALJ's finding that M.K. "failed to account for $150,000 of transfers made." She agreed the individuals who drafted the letter did not testify at the hearing and therefore the letter was "unsubstantiated hearsay." She acknowledged while hearsay evidence is admissible before the OAL, the findings of fact "cannot be supported by hearsay alone." Furthermore, she stated "[n]o contracts, invoices, receipts, bills, or other evidence of expenditures" were provided to substantiate M.K.'s claims. The Director also upheld the denial of the undue hardship waiver, largely for the reasons set forth by the ALJ. This appeal followed.

II.

Our role in reviewing agency decisions is significantly limited. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018). "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.' " R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 261 (App. Div. 2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). In determining whether agency action is arbitrary, capricious, or unreasonable, our role is restricted to three inquiries:

> ***3** (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [Ibid.]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the person challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006); see also Lavezzi v. State, 219 N.J. 163, 171 (2014).

A reviewing court "affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi, 219 N.J. at 171 (quoting City of Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980)). That presumption is particularly strong when an agency is dealing with specialized matters within its area of expertise. See Newark, 82 N.J. at 540. "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, 340 (App. Div. 2009) (quoting Levine v. State, Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)). "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)).

Medicaid is a federally created, state-implemented program governed by the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5. DMAHS is the State agency that administers the New Jersey Medicaid program. N.J.S.A. 30:4D-5. An individual seeking Medicaid benefits must submit an initial application to the county board of social services, which is reviewed for compliance with the regulatory requirements. N.J.A.C. 10:71–1.1; N.J.A.C. 10:71–2.2(b). An applicant's income and resources must fall below certain limits to be deemed eligible for Medicaid benefits. See 42 U.S.C. § 1396; 42 U.S.C. § 1396a(a)(10)(A).

A.

We first address the imposition of the asset transfer penalty assessed against M.K. To discourage applicants from depleting assets for the sole purpose of becoming eligible for benefits, "[a]n applicant who transfers or disposes of resources for less than

fair market value during a sixty-month look-back period before the individual becomes institutionalized or applies for Medicaid is penalized for making the transfer." A.M. v. Monmouth Cnty. Bd. of Soc. Servs., 466 N.J. Super. 557, 566 (App. Div. 2021); see also N.J.A.C. 10:71-4.10(a); H.K. v. Div. of Med. Assistance & Health Servs., 184 N.J. 367, 380 (2005). The imposition of the penalty is intended to maximize Medicaid resources for those truly in need. See Est. of DeMartino v. Div. of Med. Assistance & Health Servs., 373 N.J. Super. 210, 219 (App. Div. 2004).

Transfers made within the sixty-month look-back period "are presumed to be improperly motivated to obtain Medicaid eligibility." W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 37 (App. Div. 2007). An applicant can rebut this presumption "by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof rests with the applicant. Ibid. In determining whether the applicant has successfully rebutted the presumption, the agency "shall not include an evaluation of the merits of the applicant's stated purpose of transferring assets. The determination shall only deal with whether or not the applicant has proven that the transfer was solely for some purpose other than establishing Medicaid eligibility." N.J.A.C. 10:71-4.10(l)(3).

***4** Guided by these principles, we address M.K.'s contention that DMAHS erred in approving the transfer penalty because the "transfers were repayment of a valid debt." He asserts the funds were reimbursements to close family friends who loaned him money so he could receive medical care in India. M.K. also argues DMAHS improperly concluded that evidence of a formal loan agreement between him and his family members was necessary, because family members "often pay expenses for each other" without a written agreement.

Based on our review of the record, we agree M.K. did not offer sufficient evidence to meet his burden of showing the suspect funds were transferred for a purpose other than to qualify for Medicaid. See N.J.A.C. 10:71-4.10(j). The only evidence M.K. submitted to explain the transfers was the letter signed by individuals who did not testify before the ALJ. Although hearsay evidence is admissible in OAL contested cases, "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b).

However, M.K. failed to present a loan agreement, medical bills incurred in India, or testimony from his family members at the fair hearing. Additionally, he presented no testimony concerning the $18,000 and $22,000 wire transfers to an attorney in June 2022. We conclude the final agency decision's assessing an asset transfer penalty against M.K. was reasonable and supported by the record. See R. 2:11-3(e)(1)(D).

B.

We turn to M.K.'s argument he qualified for an undue hardship waiver of the transfer penalty. An applicant can apply for an exception to the transfer penalty if he can establish the penalty causes an undue hardship to himself. N.J.A.C. 10:71-4.10(q). The applicant must "provide sufficient documentation to support the request for an undue hardship waiver." Ibid. An undue hardship exists when:

> i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and
>
> ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.
>
> [N.J.A.C. 10:71-4.10(q)(1).]

An applicant must satisfy both prongs to qualify for the waiver. Ibid. When the penalty "merely causes the applicant/beneficiary an inconvenience or restricts his or her lifestyle," no undue hardship exists. N.J.A.C. 10:71-4.10(q)(2).

To meet the first prong of the undue hardship waiver, an application must demonstrate imposition of the transfer penalty "would deprive the applicant ... of medical care such that his or her health or his or her life would be endangered." N.J.A.C. 10:71-4.10(q)(1)(i). M.K. asserts analysis of the first prong turns on "what would happen if the applicant were discharged" from a healthcare facility, due to the inability to pay. He argues if he were discharged from Troy Hills Center, he would be unable to otherwise pay for necessary healthcare, thus endangering his health. He further contends DMAHS did not consider this possibility in its analysis, thereby rendering the first prong of the waiver "meaningless." M.K. argues public policy reasons support this interpretation as denial of the waiver creates a hardship for healthcare facilities because they are not paid during the penalty period. We disagree.

***5** The proper analysis under N.J.A.C. 10:71-4.10(q)(1)(i) is whether the penalty "would deprive the applicant[ ] of medical care such that his or her health or his or her life would be endangered." The record establishes M.K. would not be discharged from his facility even though the transfer penalty rendered him unable to pay for the services provided. Indeed, M.K.'s own witness testified Troy Hills Center was incapable of discharging him due to the health risk posed, and he would continue to receive the facility's services regardless of M.K.'s ability to pay for those necessary services. M.K. offered no further evidence to support a finding he would be deprived of necessary care in view of the transfer penalty.

To satisfy the second prong of the waiver, an applicant must "irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant ... shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred." N.J.A.C. 10:71-4.10(q)(1)(ii).

Because we conclude M.K. failed to meet the first prong of the undue hardship waiver, we need not consider the second prong. See N.J.A.C. 10:71-4.10(q)(1) (stating both requirements must be met to establish undue hardship). For the sake of completeness, however, we have considered M.K.'s argument.

M.K. argues he demonstrated the transferred funds cannot be recovered because they were payment of a valid debt, for which he has no legal recourse. He argues "voluntary payment of money for services" rendered is not recoverable. He therefore contends there is no remedy at law or equity for his recovery of the transferred assets.

Before the agency, M.K. failed to present any evidence, other than his unsupported assertions he was unable to recover the funds. In his appellate appendix, M.K. included a certification from his authorized representative, to demonstrate the transferred assets cannot be recovered. Because his representative's certification was not presented to the agency for consideration, it is inappropriate for consideration on appeal. See Zaman v. Felton, 219 N.J. 199, 226-27 (2014). We conclude, as did DMAHS, M.K. failed to satisfy the second prong.

C.

Lastly, M.K. argues DMAHS failed to address his due process arguments. He argues MCOTA's February 1, 2023 denial letter altered the plain terms of N.J.A.C. 10:71-4.10(q)(1)(ii), because MCOTA asserted M.K. failed to "pursue" rather than "exhaust" administrative remedies to recover the transferred funds. M.K. claims MCOTA's change in language from "exhaust" to "pursue" was "self-serving." He claims he "had no reason to believe that he may be required as a condition of eligibility to pursue (let alone exhaust) remedies 'available at law or equity' " until he received the notice of denial. He argues there was no remedy he could have "pursued" to recover the funds. He also contends this notice violated due process because it did not include an adequate statement of reasons.

"Administrative agencies must 'articulate the standards and principles that govern their discretionary decisions in as much detail[ ] as possible.' " Van Holten Grp. v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990) (quoting Crema v. N.J. Dep't of Env't Prot., 94 N.J. 286, 301 (1983)). Although an agency has broad prerogative to determine how the case will proceed, the adjudication process must still "operate fairly and conform with due process principles." In re Kallen, 92 N.J. 14, 25 (1983) (quoting Laba v. Bd. of Educ. of Newark, 23 N.J. 364, 382 (1957)).

Having considered M.K.'s contentions in view of the record, we are satisfied the Assistant Commissioner provided adequate reasons for denying the undue hardship waiver, addressing both prongs of the waiver under N.J.A.C. 10:71-4.10(q)(1). The failure to meet the second prong was based on M.K.'s inability to provide sufficient evidence to demonstrate that any good faith efforts were made to recover the assets transferred. N.J.A.C. 10:71-4.10(q)(1)(ii) clearly requires the applicant to so demonstrate.

***6** To the extent M.K. argues no remedies are available to him, he failed to provide sufficient credible evidence for the agency to reach this conclusion. The agency's decision was reasonable and supported by the record and M.K. has not demonstrated the decision was arbitrary, capricious, or unreasonable. See Lavezzi, 219 N.J. at 171; see also R. 2:11-3(e)(1)(D).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2025 WL 798911

Footnotes

1 In August 2022, M.K. applied for Medicaid benefits twice, but his application was denied both times. He did not contest those denials.

2 M.K. does not dispute the $5,000 transfer to Xoom.com.

3 For reasons that are unclear from the record, the transcript provided on appeal does not include the executive director's direct testimony and only includes a portion of her cross-examination, which follows the transcriber's notation that there was a "pause in recording." In its responding brief, DMAHS notes the missing portion of the transcript, but M.K. fails to explain the omission.

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DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

B.M.,	:	
	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
	:	
v.	:	**FINAL AGENCY DECISION**
	:	
CHESHIRE HOME,	:	**OAL DKT. NO. HMA 06868-2023**
	:	
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Exceptions were filed by the Respondent on January 17, 2024. Procedurally, the time period for the Agency Head to render a Final Agency Decision is April 5, 2024, in accordance with an Order of Extension.

This matter arises from the notice of intent to discharge Petitioner from Cheshire Home (Cheshire) to another facility. For the reasons that follow, I agree with the Initial Decision's finding that Cheshire failed to provide adequate notice of the involuntary discharge, and failed to adequately document in the Petitioner's medical record that a discharge was necessary.

The regulations surrounding an involuntary discharge lie at the federal level as they apply to all nursing facility residents regardless of payor source. Federal law is clear that a "nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless—. . . **(iii) (I)** for transfers or

discharges effected on or after October 1, 1989, notice of the resident's right to appeal the transfer or discharge under the State process established under subsection (e)(3) of this section." 42 U.S.C. § 1396r. That subsection requires "a fair mechanism, meeting the guidelines established under subsection (f)(3) of this section, for hearing appeals on transfers and discharges of residents of such facilities; but the failure of the Secretary to establish such guidelines under such subsection shall not relieve any State of its responsibility under this paragraph." 42 U.S.C. § 1396r(e)(3). In turn the Centers for Medicare and Medicaid Services' (CMS) regulations regarding the adequacy of the notice require certain conditions be met. 42 C.F.R. § 483.15(c). The federal regulations require that notice be given in writing no less than thirty days prior to the date of discharge or transfer. 42 C. F.R. 483. 15(c)(4)(i).

Moreover, a resident cannot be transferred unless:

> **(A)** The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
> **(B)** The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
> **(C)** The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
> **(D)** The health of individuals in the facility would otherwise be endangered;
> **(E)** The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
> **(F)** The facility ceases to operate.
>
> 42 C.F.R. § 483.15(c)(1)(i)

Additionally, when a resident is transferred under any of the provisions enumerated in paragraphs (c)(1)(i)(A) through (F) of 42 C.F.R. § 483.15, the facility "must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider." 42

C.F.R. § 483.15(c)(2). Such documentation must include the "basis of the transfer," and state "the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s)." Id. at (i)(A) to (B). When the transfer is made under paragraph (c)(1)(A) or (B) then the documentation must be made by the "resident's physician." Id. at (ii)(A). However, when the transfer is made under paragraph (c)(1)(i)(C) or (D) then all that is required is that the documentation be made by "a physician." Id. at (ii)(B).

The Petitioner was first admitted to Cheshire on December 20, 2021 due to a gunshot wound. The Petitioner is diagnosed with quadriplegia, C-1-C4 complete (G82.51), neuromuscular dysfunction of bladder, unspecified (N31,9), neurogenic bowel, not elsewhere classified (K59, 2), neuralgia and neuritis, unspecified (M79, 2), fusion of spine, cervicothoracic region (M43, 23), other hypertension (195-89), adjustment insomnia (F51, 02), other chronic pain (G89, 29), major depressive disorder, recurrent, unspecified (F33, 9), essential primary hypertension (110), and nicotine dependence, unspecified, uncomplicated (F17, 200). (R-7.) Cheshire initially sought the involuntary transfer of Petitioner due to an incident that occurred on January 19, 2023 where the petitioner's consumption of cannabis and tobacco contributed to Petitioner being unresponsive while using his motorized wheelchair.

On February 1, 2023, Cheshire requested approval form the New Jersey Department of Human Services (NJ DHS), Office of Community Choice (OCCO) for an involuntary transfer of the Petitioner because "[Petitioner] continues to make poor choices concerning [their] health and [their] use of recreational drugs." (R-2.) On April 18. 2023, Petitioner was advised by Leah A. Rogers, the Quality Assurance Coordinator for the Division of Aging Services, NJDHS, that an involuntary transfer to Allaire Rehab and Nursing had been approved based upon "the welfare and safety of the beneficiary or other

residents." (R-3.) Then on April 26, 2023, George Zeitler, the Executive Director of Cheshire gave the Petitioner notice of his impending involuntary transfer to occur on May 18, 2023 because the Petitioner "continued to deny that problems exist and refused help from the professional staff." (R-4.)

The Administrative Law Judge (ALJ) found in the Initial Decision that Cheshire's transfer notice was not valid, as it did not provide Petitioner with a thirty-day notice prior to the date of transfer as required by 42 C.F.R. 483.15(c)(4)(i). The ALJ further found that nothing in the record shows that any of these circumstances required less than a thirty-day notice. Additionally, the ALJ found Cheshire failed to demonstrate that it had properly documented Petitioner's file with an attestation from a physician regarding the necessity of a transfer as required by 42 C.F.R 483.15(c)(2)(ii)(B).

Here the notice was dated April 26, 2023, and proposed a discharge on May 18, 2023. (R-4.) While the notice from the Division of Aging Services, NJDHS, dated April 18, 2023, was within the thirty-day requirement, the thirty-day notice requirement must be made by the "facility" as per 42 C.F.R. § 483.15 (c)(4)(i). Furthermore, N.J.A.C. 8:85-1.10(g) requires that prior to issuing a discharge notice to a Medicaid recipient or an individual pending a Medicaid determination "the [nursing facility] shall submit to the [Long Term Care Field Office] a written notice with documentation of its intention and reason for the involuntary transfer of a Medicaid beneficiary from the facility." Only when "the [Long Term Care Field Office] determines that an involuntary transfer is appropriate, the beneficiary and/or the beneficiary's authorized representative shall be given thirty days' prior written notice by the [nursing facility] that a transfer is proposed by the [nursing facility] and that such transfer will take effect upon completion of the relocation program." The Long Term Care Field Office (LTCFO) is now known as the Office of Community Choice Options (OCCO).

The regulations do provide that the thirty-day time period may be shortened to "as soon as practicable" prior to the transfer when:

> **(A)** The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;
> **(B)** The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;
> **(C)** The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;
> **(D)** An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or
> **(E)** A resident has not resided in the facility for 30 days.

42 C.F.R. § 483.15(c)(4)(ii)

However, the notice from Cheshire alleges, "the Interdisciplinary Team met with you on several occasions to offer you assistance with ongoing issues of our concern. You continue to deny that problems exist and refused help from the professional staff." These allegations are ambiguous, vague and not sufficiently clear to allow the Petitioner to defend his position. Nothing in the record shows any of these circumstances that permit less than thirty days' notice.

Furthermore, a transfer under 42 C.F.R. § 483.15(c)(1) requires documentation in the resident's file from either "a physician" or "the resident's physician", depending on the grounds for transfer, attesting to the necessity of the transfer. See 42 C.F.R. § 483.15(c)(2)(B). There is no such documentation in the record.

Cheshire filed exceptions in this matter on January 17, 2024. In the exceptions, Cheshire first argues it did provide proper notice pursuant to 42 C.F.R. 483.15(c)(4)(i) which requires notice is given "at least 30 days before the resident *is* transferred or discharged." (emphasis added). Cheshire claims Petitioner's Fair Hearing appeal, filed on May 5, 2023, stayed the involuntary discharge and satisfied the thirty-day requirement. However, this argument is without merit. While the transfer was stayed due to Petitioner's Fair Hearing request filed on May 5, 2023, it is not proper to count the days after the stay

towards the thirty-day notice requirement. The facility has the responsibility to provide a proper notice of transfer, and the Petitioner's decision to file a fair hearing appeal does not relieve the facility of providing that notice.

Cheshire also claims in the exceptions that the ALJ failed to address the provisions of N.J.A.C. 8:85-2.21, which covers discharge procedures for specialized care nursing facilities (SCNF). Cheshire is an SCNF. (R-9.) This regulation states: "the beneficiary shall be discharged upon achievement of maximum benefit from the specialized programming and maximum level of functioning and when the individual's condition can be appropriately managed in the community or other forms of institutional care. Id. at (e)(1). However, the Petitioner reaching "maximum benefit" was never articulated as a reason for transfer in Cheshire's notice dated, April 26, 2023. In fact, in the Initial Decision the ALJ referenced Cheshire's counsel issuing a brief a week before the hearing that changed the reasoning for the transfer. The ALJ was correct in referencing 42 C.F.R. 483.15(c)(6)[1], and finding that the change of reasoning deprived the Petitioner the opportunity to refute their basis of transfer, depriving them of their due process rights

In the exceptions, however; Cheshire argues that the reason for the discharge was not changed because Cheshire provided notice to the OCCO on February 1, 2023, which merely stated, "[Petitioner's] behavior is affecting [their] welfare" and "[Petitioner] continues to make poor choices concerning his health and recreational drugs." In the exceptions Cheshire also references the discharge notice that stated, "[y]ou continued to deny that problems exist and refused help from the professional staff." Cheshire then argues that aforementioned language amounts to Cheshire's giving notice that the

[1] 42 C. F.R. 483. 15(c)(6) specifically states, "If the information in the notice changes prior to effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available."

involuntary transfer is based on how the Petitioner's behavior impacted his rehabilitation capabilities. Cheshire also claims that their letter to OCCO, the discharge notice, and the Fair Hearing itself focuses on Petitioner's welfare as it relates to their rehabilitation. This claim is erroneous and without merit.

First, the letter to the OCCO is not proper notice to the Petitioner of the transfer or the reason of transfer. This letter went to the OCCO, not the Petitioner. The facility is required to give notice of the transfer and reason for transfer to the Petitioner directly at least thirty days before the transfer. Second, the Fair Hearing itself cannot be notice of the reason of discharge. Cheshire's argument that the Fair Hearing is notice of the reason of transfer is nonsensical as the Petitioner needs to receive notice of involuntary transfer and the reason why they are being transferred, before the Fair Hearing, so they can properly prepare. Finally, the notice of intent to transfer given to Petitioner on April 26, 2023 merely stated, "[y]ou continued to deny that problems exist and refused help from the professional staff." Such a statement is not consistent with the Respondent's claim that the Petitioner is being transferred because they have achieved maximum benefit from Cheshire's care. The ALJ correctly found that the reason for transfer was changed in the brief. In the exceptions, Cheshire argues that the submission of a pre-hearing brief is common practice. However, there is no requirement for an ALJ to accept a brief. An ALJ may order briefs after the hearing is concluded, based on their discretion. However, all evidence is at the discretion of the ALJ, and here there is no reversible error for not including Cheshire's brief in evidence, and no reason to believe it was excluded arbitrarily or capriciously.

Even if Petitioner reaching "maximum benefit" was articulated as a reason for transfer in Cheshire's notice dated, April 26, 2023, in the Initial Decision the ALJ found that they could not determine if the Petitioner had met the maximum rehabilitation that

Cheshire could offer based upon the testimony presented. In the exceptions, Cheshire stated that Lauren Rosario, Cheshire's Director of Rehabilitation and Occupational Therapy, testified at the hearing that Petitioner had met their rehabilitation goals. While Rosario is not a physician, Cheshire argues that Rosario has a Master's Degree in Occupational Therapy and is qualified to make the determination as to when rehabilitation goals are met because N.J.A.C. 8:85-2.21(e)(1) does not explicitly require a physician to make this determination.

Although Rosario stated that Petitioner has met their maximum potential in their testimony, they also testified to numerous facts that contradict that conclusion. Rosario testified that while Petitioner has made great progress in addressing their goals they have not met their goals of self-feeding, clothing, cleaning and extended balancing within a frame. Rosario also acknowledged that the Petitioner has not met their goals of dressing and washing themselves. On cross examination, Rosario further acknowledged the absence of progress in holding a cup, feeding themselves, and the inability to stand within a frame. ID at 4-5. As such, Ms. Rosario's testimony indicates that the Petitioner has not achieved the "maximum level of functioning" from Cheshire as required under N.J.A.C. 8:85-2.21(e)(1) for a discharge. The records provided by Cheshire are merely attendance and medication records. Cheshire failed to provide any actual occupational therapy records in support of Rosario's testimony that Petitioner has met their maximum benefit.

Nonetheless, even if Ms. Rosario's testimony and the record evidenced that the Petitioner had achieved maximum benefit, that would not satisfy the thirty-day notice requirement prior to an involuntary transfer pursuant to 42 C.F.R. § 483.15.

Due to the timing deficiencies in the notice as well as Cheshire's failure to adequately document in the Petitioner's medical record that a discharge was necessary, I hereby concur with the Initial Decision's findings that the transfer notice was invalid as

it did not comply with the thirty-day notice requirement, and that Cheshire failed to properly document the Petitioner's file with a physician's attestation that the transfer was necessary.

Thus, for the reasons set forth in the Initial Decision and set forth above, I hereby ADOPT the Initial Decision in this matter.

THEREFORE, it is on this 27th day of March 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

M.A.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 06036-2023**
AND HEALTH SERVICES AND	:	
MIDDLESEX COUNTY BOARD	:	
OF SOCIAL SERVICES,	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision is January 11, 2024, in accordance with an Order of Extension.

This matter arises from a May 1, 2023, denial of Petitioner's Medicaid application due to Petitioner's failure to provide information that was necessary to determine eligibility. Petitioner appealed the denial of their application and a hearing was held on September 11, 2023.

Both the County Welfare Agency (CWA) and the applicant have responsibilities with regard to the application process. N.J.A.C. 10:71-2.2. Applicants must complete any forms required by the CWA; assist the CWA in securing evidence that corroborates his or her statements; and promptly report any change affecting his or her circumstances. N.J.A.C. 10:71-2.2(e). The CWA exercises direct responsibility in the application process to inform applicants about the process, eligibility requirements, and their right to a fair hearing; receive applications; assist applicants in exploring their eligibility; make known the appropriate resources and services; assure the prompt accurate submission of data; and promptly notify applicants of eligibility or ineligibility. N.J.A.C. 10:71-2.2(c) and (d). CWAs must determine eligibility for Aged cases within forty-five days and Blind and Disabled cases within ninety days. N.J.A.C. 10:71-2.3(a) and 42 CFR § 435.912. The timeframe may be extended when documented exceptional circumstances arise preventing the processing of the application within the prescribed time limits. N.J.A.C. 10:71-2.3(c). The regulations do not require that the CWA grant an extension beyond the designated time period when the delay is due to circumstances outside the control of both the applicant and the CWA. At best, an extension is permissible. N.J.A.C. 10:71-2.3; S.D. v. DMAHS and Bergen County Board of Social Services, No. A-5911-10 (App. Div. February 22, 2013).

Medicaid Communication No. 10-09 (November 24, 2010), also addresses the processing of Medicaid applications and provides in pertinent part:

> If additional verifications are needed and the applicant or their representative does not respond to the worker's request after a time period, as specified by the Agency, an additional request for information must be sent informing the applicant of what documentation is still needed in order to determine their eligibility. This letter will also inform the applicant or their representative that if the information is not received within the specified time period from the receipt of the request, the case will be denied.
>
> It should be understood that exceptional circumstances can arise in determining eligibility for Medicaid. Therefore, if the applicant or their

> representative continues to cooperate in good faith with the Agency, an extension of the time limit may be permitted. These exceptional circumstances shall be documented in the case record.
>
> If the applicant or their representative continues to fail to provide the requested information, or fails to act within the spirit of cooperation, a denial letter with applicable New Jersey Administrative Code citations must be sent to the applicant.

In the present matter, on January 30, 2023, Petitioner filed a Medicaid application with Middlesex County Board of Social Services. R-A. On February 1, 2023, the County sent a letter to Petitioner requesting additional information, which included statements for a John Hancock IRA account, with current balance and verifications for all deposits and/or withdrawals[1]. R-B. When these documents were not provided to the County, on February 27, 2023, the County sent a second request for information letter requesting the same information that was listed in the February 1, 2023, letter. R-B. This second request for information letter required Petitioner to provide the requested documents by March 13, 2023. Ibid. On March 6, 2023, Petitioner provided the County with a December 12, 2022, letter from John Hancock which stated that the contract value was $0, the surrender value was $0, and that the policy had been surrendered as of the December 12th date. R-E. After submitting the John Hancock document, Petitioner followed up with an email to the County caseworker to confirm that the only remaining documents that the County still needed were the Wells Fargo statements. P-C. The County did not respond to this email. ID at 10. On March 29, 2023, the County sent a third request for information letter to Petitioner. P-D. This letter was different than the previous two requests and it did not request information about the John Hancock IRA account. Ibid. Since there was no mention of the John Hancock account in this third request for information letter, Petitioner concluded that the County found the December 12th John Hancock letter to be

[1] Ultimately, all other documents were supplied, leaving only the John Hancock documents at issue. ID at 10.

acceptable. ID at 6. On May 1, 2023, the County denied Petitioner's Medicaid application for failing to provide information required to determine Petitioner's eligibility. R-C. The County's position was that the December 12th John Hancock letter was insufficient because it did not state the date the policy was surrendered and where the money went. ID at 10.

The Initial Decision found that the County's denial of Petitioner's application was not appropriate. Ibid. The Administrative Law Judge stated that the record as a whole did not demonstrate that Petitioner failed to provide the verifications requested in the February 1, 2023 and the February 27, 2023, letters. ID at 10-11. Additionally, the Administrative Law Judge pointed out that there was an ongoing exchange of information between the parties and Petitioner was actively attempting to comply with the County's requests. ID at 11.

I FIND that the County inappropriately denied the application of Petitioner. I agree with the Initial Decision and specifically with the reasons stated above. Additionally, it is important to highlight that the County must accurately inform an applicant what verifications are outstanding when they send a request for information letter. There cannot be any ambiguity. Here, the County sent a request for information letter that asked for documents related to the John Hancock account, Petitioner provided a document that they reasonably believed satisfied the request, and then the County issued a new request for information letter that did not mention the John Hancock account. As the Administrative Law Judge stated, it was certainly reasonable for Petitioner to believe the John Hancock request had been satisfied. ID at 6. For the County to then move forward and deny the application is inappropriate.

Thus, based on the record before me and for the reasons enumerated above, I hereby ADOPT the Initial Decision and FIND that the denial of Petitioner's application

was inappropriate and the County should process Petitioner's January 30, 2023, application to determine if Petitioner is eligible for Medicaid benefits. This Final Agency Decision should not be construed as making any findings regarding Petitioner's eligibility.

THEREFORE, it is on this 8th day of JANUARY 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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INITIAL DECISION

OAL DKT. NO. HMA 06749-2023

AGENCY DKT. N/A

A.K.,

Petitioner,

v.

MIDDLESEX COUNTY BOARD OF SOCIAL

SERVICES,

Respondent.

Chani Gellis, Designated Authorized Representative for petitioner, pursuant to N.J.A.C. 1:10B-5.1

Kurt Eichenlaub, Human Service Specialist 3, for respondent, pursuant to N.J.A.C. 1.1-5.4(a)(3)

Record Closed: October 31, 2023 Decided: November 8, 2023

BEFORE **REBECCA C. LAFFERTY**, ALJ:

STATEMENT OF THE CASE

352 Petitioner, A.K., appeals the decision of the Middlesex County Board of Social Services (respondent or Agency) denying petitioner's Medicaid application for failure to provide verifications pursuant to 42 CFR 435.952

Agency Final Decision. The issue is whether petitioner is entitled to Medicaid benefits.

PROCEDURAL HISTORY

By letter, dated July 17, 2023, petitioner's Designated Authorized Representative (DAR), Chani Gellis, was advised that petitioner's Medicaid application was denied for failing to provide the requested verifications pursuant to 42 CFR 435.952. (R-1, Exhibit C.) Petitioner, through his DAR, requested a fair hearing, and the matter was transmitted by the Division of Medical Assistance and Health Services (DMAHS) to the Office of Administrative Law (OAL) where it was filed on July 28, 2023, as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

At the first scheduled telephonic hearing date of September 14, 2023, the parties engaged in a conference. The parties were working towards a resolution, and it was agreed that a telephonic status conference would be scheduled for October 12, 2023. At the scheduled telephonic status conference of October 12, 2023, the parties were unable to resolve the matter and requested that it be scheduled for a hearing.

The hearing was conducted on October 31, 2023, via Zoom audio/video technology. The record closed on that date.

FACTUAL DISCUSSIONS AND FINDINGS

Testimony

For respondent:

Kurt Eichenlaub (Eichenlaub), Human Service Specialist 3, testified on behalf of the Agency. A.K. completed a new Medicaid application on June 6, 2023. (R-1, Ex. A.) The Agency sent A.K. a Request for Information letter (RFI) on June 8, 2023, which among other information and items, requested that a full accounting of the Estate of G.K. (Estate) be provided to the Agency by June 22, 2023. (R-1, Exhibit B.) The Agency did not receive an accounting of the Estate and denied A.K.'s application by letter, dated July 17, 2023. (R-1, Exhibit C.) All other information and documents requested in the RFI were timely received by the Agency. To date, the Agency has not received an accounting of the Estate. The Last Will and Testament of G.K. (Will) provides that a full accounting is to be provided to each beneficiary annually. (R-1, Exhibit D, page 5.) Eichenlaub testified that the Agency needs to determine if A.K. received anything from the Estate, or if A.K. will receive anything from the Estate in the future, in order to evaluate transfers for eligibility purposes. He stated that no extensions were ever requested by A.K. during the review process.

For petitioner:

Chani Gellis (Gellis), DAR, testified on behalf of A.K. A.K. has been in a nursing home facility since August of 2021 and has been trying to obtain Medicaid coverage since that time. Her office provided the Agency with proof of the annuity income, bank account statements, a copy of the Will, and a trust document, for its review. The crux of Gellis' argument is that A.K. is not actually entitled to anything under the Will as the will does not distribute any assets. Gellis indicated that her office made every effort to contact the personal representative named in the Will, B.L., as well as the alternate personal representatives named in the Will, E.L. and J.D., to no avail. There was some initial communication with B.L., but she was very ill and communication was lost, and no contact was made with either E.L. or J.D. All communication was via phone calls, and there is no documentation of attempts to speak with any of the personal representatives.

Additionally, Gellis testified that her office also tried to contact the office of the attorney who drafted the Will and was advised via email that the attorney did not represent the personal representative and therefore had no information on any accountings of the Estate[1]. Gellis testified that all assets are accounted for, and the Agency has a copy of all of the bank statement so they can see all of the money that goes in and out of the account. Gellis was unaware of the date on which G.K. passed or if the Will was ever probated. No investigation was ever done in terms of contacting state or county agencies or courts to determine if and when the Will was probated.

Factual Findings

Based upon the testimonial and documentary evidence presented in this matter, I **FIND** the following as **FACTS**:

1. A.K. completed a new Medicaid application on June 6, 2023. (R-1, Ex. A.)

2. A.K. is the son of G.K. and is named as a descendant of G.K. in the Will. (R-1, Exhibit D, page 1.)

3. The Will directs that all of G.K.'s Estate is to be put in the Trust created on the same day as the Will. (R-1, Exhibit D, page 1.)

4. The Will identifies B.L. as the personal representative of the Estate, and E.L. and J.D. as alternate personal representatives of the Estate. (R-1, Exhibit D, page 3.)

5. A.K. did not provide any information or accounting of the Estate from the attorney who drafted the Will, any of the named personal representatives, or from any county or state agencies or courts.

6. The Will provides that a full accounting is required to be provided to each beneficiary annually. (R-1, Exhibit D, page 5.)

7. The Agency sent A.K. a RFI on June 8, 2023, which among other information and items, requested a full accounting of the Estate. (R-1, Exhibit B.)

8. The RFI gave a deadline of June 22, 2023, for all outstanding information and documentation to be provided to the Agency. (R-1, Exhibit B.)

9. A.K. failed to provide an accounting of the Estate requested in the June 8, 2023 RFI which was required by the Agency to determine eligibility in a timely manner.

10. To date the Agency has not received an accounting of the Estate.

11. All other information and documents requested in the RFI were timely received by the Agency.

12. No extensions were ever requested by A.K. during the review process.

13. The Agency denied A.K.'s Medicaid application on July 17, 2023[2]. (R-1, Exhibit C.)

LEGAL ANALYSIS AND CONCLUSION

The Medicaid program is a cooperative Federal-State venture established as Title XIX of the Social Security Act. 42 U.S.C. §1396 et. seq. It "is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." L.M. v. Division of Medical Assistance & Health Services, 140 N.J. 480, 484 (1995) (citations omitted).

DMAHS and the Commissioner of the Department of Human Services are required by the regulations to establish policy and procedures for the Medicaid application process and supervise the operation of, and compliance with, the policy and procedures. N.J.A.C. 10:71-2.2(b). DMAHS is required to manage the State's Medicaid program in a fiscally responsible manner, considering the public's interest in "increasing social demands for limited public resources." Dougherty v. Dept. of Human Services, Div. of Medical Assistance & Health Services, 91 N.J. 1, 10 (1982). The local County Welfare Agency (CWA) is charged with the responsibility to evaluate a Medicaid applicant's eligibility. N.J.A.C. 10:71-2.2(c); N.J.A.C. 10:71-3.15.

A Medicaid applicant must satisfy all legal requirements to be found financially and clinically eligible for Medicaid. N.J.A.C. 10:71-3.1. Both the CWA and the applicant have responsibilities regarding the application process. N.J.A.C. 10:71-2.2. A Medicaid applicant shall complete the required application

forms; assist the CWA in securing evidence that corroborates the statements contained in the application; and promptly report any changes affecting the applicant's circumstances. N.J.A.C. 10:71-2.2(e), N.J.A.C. 10:71-3.1. The CWA exercises direct responsibility in the application process to: inform applicants about the process and eligibility requirements and their right to a fair hearing; receive applications; assist applicants in exploring their eligibility; make known the appropriate resources and services; assure the prompt accurate submission of data; and promptly notify applicants of eligibility or ineligibility. N.J.A.C. 10:71-2.2(c) and (d).

The primary source of the information to be provided comes the individual making the application for Medicaid. N.J.A.C. 10:71-1.6(a)(2). The CWA is responsible for rendering its determination of eligibility and utilizing secondary sources, when necessary. N.J.A.C. 10:71-1.6(a)(2). The CWA is not limited in utilizing secondary sources. It is required to verify the value of an applicant's resources through appropriate and credible sources, and if questioning the applicant's verifications, or if the CWA believes the identification of resources is incomplete, the CWA "shall verify the applicant's resource statements through one or more third parties." N.J.A.C. 10:71-4.1(d)(3). The CWA must act reasonably in providing notice of alternative documents sought and when seeking alternative verifications. N.J.A.C. 10:71-1.6(a)(2); N.J.A.C. 10:71-2.10. State agencies "must turn square corners" when exercising their statutory responsibilities when dealing with members of the public. W.V. Pangborne & Co. v. N.J. Dept. of Transportation, 116 N.J. 543, 561-562 (1989).

A CWA has forty-five days to process an application for the aged who are seeking Medicaid, and ninety days to process an application for the blind and disabled. N.J.A.C. 10:71-2.3(a); N.J.A.C. 10:71-3.9(a)(1). The timeframe may be extended when "documented exceptional circumstances arise" preventing the processing of the application within the prescribed time limits. N.J.A.C. 10:71-2.3(c). The CWA's decision to grant an extension beyond the designated time period is discretionary, not mandatory, and the CWA must demonstrate that the delay resulted from one of the following:

1. Circumstances wholly within the applicant's control;

2. A determination to afford the applicant, whose proof of eligibility has been inconclusive, a further opportunity to develop additional evidence of eligibility before final action on his or her application;

3. An administrative or other emergency that could not have reasonably been avoided; or;

4. Circumstances wholly outside the control of both the applicant and CWA.

N.J.A.C. 10-71-2.3; S.D. vs. DMAHS and Bergen County Board of Social Services, No A-5911-10 (App. Div. February 22, 2013).

Here, the respondent deemed petitioner ineligible for Medicaid for failing to provide required verifications. The RFI, dated June 8, 2023, requested among other items, a full accounting of the Estate, of which petitioner is a listed beneficiary. To date, petitioner through his DAR, Gellis, has not provided an accounting of the Estate, or satisfactory documentation that petitioner has not received any assets from the Estate and will not be entitled to receive any assets from the Estate in the future. Email(s) from the office of the attorney who drafted the Will, as well as a copy of the Trust document, have been provided to the respondent for review, but none of those documents were submitted to this Tribunal for consideration as part of the hearing. Therefore, for the reasons set forth above, I **CONCLUDE** that respondent's denial of petitioner's application for Medicaid was appropriate as petitioner failed to submit the necessary verifications in order to determine Medicaid eligibility.

ORDER

Based upon the foregoing, it is **ORDERED** that the decision of respondent denying petitioner's application for Medicaid is **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty□five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B□10.

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Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3 November 8, 2023

DATE **REBECCA C. LAFFERTY**, ALJ

Date Received at Agency:

Date Mailed to Parties:

RCL/tat

APPENDIX

WITNESSES

For petitioner

Chani Gellis, DAR

For respondent

Kurt Eichenlaub, Human Service Specialist 3

EXHIBITS

For petitioner

None

For respondent

R-1 Fair Hearing Packet consisting of Exhibits A through E

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1 Gellis indicated that the emails were given to the County to review. No emails were provided to this Tribunal for consideration.

2 According to N.J.A.C. 10:71-2.3, the review period for Medicaid applications for the aged is forty-five days from the date of application, which in this matter, would have been July 21, 2023, rather than July 17, 2023, however this issue is moot as the documentation requested has still not been provided to the Agency to date.

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
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SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

D.C.,	:	
	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
	:	
v.	:	**FINAL AGENCY DECISION**
	:	
MONMOUTH COUNTY BOARD OF SOCIAL SERVICES,	:	**OAL DKT. NO. HMA 02815-23**
	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is February 12, 2024, in accordance with an Order of Extension.

This matter arises from the Monmouth County Board of Social Services' (MCBSS) March 23, 2023 denial of Petitioner's Medicaid application for failure to provide documentation necessary to determine eligibility. Based upon my review of the record, I hereby ADOPT the findings and conclusions of the Administrative Law Judge.

Both the County Welfare Agency (CWA) and the applicant have responsibilities

with regard to the application process. N.J.A.C. 10:71-2.2. Applicants must complete any forms required by the CWA; assist the CWA in securing evidence that corroborates his or her statements; and promptly report any change affecting his or her circumstances. N.J.A.C. 10:71-2.2(e). The CWA exercises direct responsibility in the application process to inform applicants about the process, eligibility requirements, and their right to a fair hearing; receive applications; assist applicants in exploring their eligibility; make known the appropriate resources and services; assure the prompt accurate submission of data; and promptly notify applicants of eligibility or ineligibility. N.J.A.C. 10:71-2.2(c) and (d). CWAs must determine eligibility for Aged cases within 45 days and Blind and Disabled cases within 90 days N.J.A.C. 10:71-2.3(a) and 42 CFR § 435.912. The time frame may be extended when documented exceptional circumstances arise preventing the processing of the application within the prescribed time limits. N.J.A.C. 10:71-2.3(c). The regulations do not require that the CWA grant an extension beyond the designated time period when the delay is due to circumstances outside the control of both the applicant and the CWA. At best, the extension is permissible. N.J.A.C. 10:71-2.3; S.D. v. DMAHS and Bergen County Board of Social Services, No. A-5911-10 (App. Div. February 22, 2013).

Here, on January 25, 2023, Petitioner through his counsel David B. Nathan, Esq., filed a Medicaid application with MCBSS. On March 3, 2023, MCBSS sent a letter requesting additional information necessary to determine Petitioner's eligibility. More specifically, MCBSS requested: 1) a copy of the John Hancock investment quarterly account statements, 2) proof of a Qualified Income Trust, 3) verifications of current and prior residences, 4) copy of deeds to properties owned, tax statements or HUD-1 form if the property was sold, and explanation of mortgage payments, 5) current pension award letter from Fidelity and Raytheon, 7) bank statements and 8) explanation for certain bank

transactions and verification of ownership. R-7. On March 16, 2023, Petitioner provided some, but not all of the verifications requested by MCBSS. R-8.

On March 23, 2023, MCBSS denied Petitioner's application for "failure to supply corroborating evidence necessary to determine eligibility, as requested at [the] time of application" on January 25, 2023 and by letter dated March 3, 2023.[1] R-7. The denial letter stated the following verifications remained outstanding: 1) complete copy of the schedule A for the Qualified Income Trust (QIT) and 2) statements. R-1. As for the QIT information, the schedule A form provided by Petitioner was blank, which resulted in the QIT being invalidated and rendered Petitioner's income over the income limit. R-6a. The request for "statements" was unclear since MCBSS did not specify which statements remained outstanding. Ibid. However, in its closing summation, MCBSS identified the missing statements as the cash surrender value for the John Hancock policy account #2913 and Fidelity statements for account #1577. R-8.

The Initial Decision determined that Petitioner failed to provide MCBSS with complete information about his assets and income. I concur. Petitioner failed to meet his burden showing the documentation MCBSS alleges remained outstanding at the time of the denial was submitted prior to the March 17, 2023 deadline. Here, MCBSS specifically advised what documentation was necessary to process Petitioner's application and determine eligibility. Without the requested documentation, MCBSS would be unable to make a determination related to Petitioner's eligibility and appropriately denied Petitioner's application.

---

[1] The Initial Decision notes that Petitioner's counsel filed a second application for Medicaid which corrected all outstanding issues. Petitioner is currently receiving benefits. The approval of the second application has no bearing on the denial of Petitioner's January 25, 2023, application since that application was appropriately denied for failure to timely provide all requested documentation.

MCBSS held open Petitioner's application for 57 days. The Medicaid application is the first point of contact with the receiving agency wherein Petitioner is instructed to provide all financial and relevant documentation. On March 3, 2023, MCBSS sent a letter requesting additional information that had not been provided which was needed to process Petitioner's application for Medicaid. Here, Petitioner was required to provide all requested documentation by the March 17, 2023 deadline. Petitioner, through his counsel, did not fulfill the request made by MCBSS in his March 16, 2023 submission. According to the evidence, Petitioner did make a request for an extension in his March 16, 2023 submission. However, there is nothing in the record that shows counsel reached out to MCBSS prior to his submission date to explain challenges in obtaining the information, or to provide an update about when the documentation would be provided. As such, no exceptional circumstances existed in this matter that would have necessitated such an extension.

Accordingly, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision and FIND that MCBSS's denial of Petitioner's application was appropriate in this matter as Petitioner failed to provide specific information relating to the John Hancock policy account #2913, Fidelity statements account #1577 and exceeded income levels based on the invalidated QIT, which remained outstanding when Petitioner's Medicaid application was denied.

THEREFORE, it is on this 1st day of FEBRUARY 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

carol grant OBO
Jennifer Langer Jacobs

Digitally signed by carol grant OBO Jennifer Langer Jacobs
Date: 2024.01.31 14:46:02 -05'00'

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOs. HMA 00900-24 and

3 HMA 02330-24

AGENCY DKT. NO. 0710571157

(CONSOLIDATED)

L.B.,

Petitioners,

v.

ESSEX COUNTY DIVISION OF FAMILY ASSISTANCE & BENEFITS,

Respondent.

L.B. petitioner appearing pro se

Rebecca Smith, Family Services Worker, for respondent under N.J.A.C. 1: -1-5.4(a)(3)

Record Closed: April 17, 2024 Decided: April 26, 2024

BEFORE **NANCI G. STOKES,** ALJ:

STATEMENT OF THE CASE

368 The Essex County Division of Family Assistance and Benefits (Essex) denied the petitioner's July 2023 renewal for Medicaid's Managed Long-Term Services and Supports (MLTSS) program because the petitioner failed to timely provide all requested verifications, despite Hudson's reconsideration of materials the petitioner later supplied. Should the denial stand? Yes. An applicant must supply timely verifications to establish their Medicaid eligibility. N.J.A.C. 10:72-2.3(a).

PROCEDURAL HISTORY

Essex issued two denials to L.B. concerning her July 2023 Medicaid renewal, determining that she failed to supply necessary eligibility verifications: one on October 17, 2023, and a second on December 5, 2023.

On November 15, 2023, petitioner appealed the October 17, 2023, termination.

On December 20, 2023, petitioner appealed the December 5, 2023, denial.

The Division of Medical Assistance and Health Services (DMAHS) transmitted the case regarding the December 5, 2023, denial to the Office of Administrative Law (OAL), where it was filed on January 23, 2024, as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to-15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to-13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. The OAL docketed that transmittal as HMA 00900-24.

3 On March 18, 2024, the OAL scheduled the case before me on April 4, 2024. At that time, both parties needed to submit additional materials. I rescheduled the case for a hearing on April 17, 2024.

However, DMAHS transmitted the case regarding the October 17, 2023, termination to the Office of Administrative Law (OAL), where it was filed on February 21, 2024, as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to-15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to-13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6. The OAL docketed

that transmittal as HMA 02330-24. On April 15, 2024, the OAL scheduled that case for a hearing before another administrative law judge (ALJ) on May 1, 2024.

As both cases involved the same Medicaid renewal, the same parties, and interrelated issues, I consolidated the cases with the parties' consent at the start of the hearing on April 17, 2024. Thus, this decision memorializes the consolidation absent a separate order to facilitate consistency and a timely hearing in both cases. See N.J.A.C. 1:1-14.6 (providing an ALJ with broad authority to conduct cases, including rulings or actions needed for expeditious and fair conduct of proceedings); N.J.A.C. 1:1-17.3 (standards for consolidation).

Essex provided additional materials on April 4, 2024. Petitioner supplied multiple documents on April 11, 2024, and April 16, 2024.[1]

3 On April 17, 2024, I conducted the consolidated hearing and closed the record.

FINDINGS OF FACT

Based on the testimony the parties provided, and my assessment of its credibility, together with the documents that the parties submitted, and my assessment of their sufficiency, I **FIND** the following as **FACT**:

On July 10, 2023, Essex sent petitioner a Medicaid renewal packet requesting L.B., like all beneficiaries, to supply income information by August 8, 2023, including recent bank statements for all accounts. (P-5.) L.B. was seventy-four years old and received $1,568 monthly in Social Security retirement benefits. (R-1.)

Indeed, Essex explained that it must verify all sources of income and resources under the Medicaid program to assess financial eligibility. See Medication Communication No. 22-04; N.J.A.C. 10:72-2.3.

However, Essex did not receive the requested income information sought in the renewal letter by August 8, 2023. Thus, on September 25, 2023, Essex sent a Notice for Verification seeking bank statements from three banks, Citibank, TD, and Chase, and an MCU credit union by October 9, 2023.

On October 12, 2023, Essex received some banking documentation but was still missing statements from Citibank. Essex first denied petitioner's application on October 17, 2023, terminating her case on October 31, 2023, having not received all requested

banking documentation. That letter is state-generated and does not specify the verifications missing. Still, the denial advises petitioner to supply the missing materials for consideration or file a new application if unable to provide the materials within ninety days of the termination date.

Since Essex received some documentation it sought, the assigned family service worker, Rebecca Smith, reviewed the items L.B. sent. Based on her review, Essex sent a second Notice of Verification on October 18, 2023, seeking the missing Citibank statements and a letter of explanation concerning multiple monthly cash and Zelle deposits into L.B.'s Chase account due November 1, 2023. Specifically, Smith printed the letter and placed the letter for posting in the mailroom, as with all other Essex mailings.

Thus, Essex provided the petitioner with additional information and an opportunity to supply the missing information despite the October 17, 2023, termination. Essex asserts it can reconsider a verification denial once, and then it must deny the case if materials remain missing. However, the petitioner maintains that she did not receive the October 18, 2023, letter. Yet, the petitioner supplied the missing Citibank statements after the October 18, 2023, letter.

Essex also made multiple attempts to reach petitioner and her daughter by telephone. Essex documents phone contacts with clients, their attempts to contact clients, and actions taken in the WeCare portal (WeCare). WeCare also allows an applicant or others to contact Essex about a case. WeCare includes multiple entries for this case. F.N. also tried to reach a caseworker on several occasions. L.B. did not designate her daughter as an authorized representative (DAR), but L.B. allowed F.N. to assist her with her Medicaid application and these appeals.

Notably, on October 25, 2023, F.N. called about the October 17, 2023, denial. On October 26, 2023, a supervisor documented leaving a voicemail message for L.B.'s daughter explaining what information was missing: the Citibank statements and letter of explanation for Zelle and cash deposits in L.B.'s Chase account. On November 27, 2023, Essex received the Citibank statements but no letter of explanation. Another caseworker tried to reach L.B. by phone on November 30, 2023, to no avail.

Upon reconsideration of December 5, 2023, Essex again denied L.B.'s Medicaid case. Undeniably, Essex received no letter of explanation regarding the cash and Zelle deposits necessary to determine L.B.'s financial eligibility before December 5, 2023,

On December 26, 2023, WeCare reflects that a female supervisor spoke with the client, L.B. According to the WeCare note documenting that call, L.B. told the administrator that she would send the letter of explanation. L.B. remembers speaking with a woman from Essex but recalls no details of the call, including the date or substance of the call. F.N. called on December 26, 2023, maintaining that her mother supplied all requested statements. (R-1 and P-4.)

Still, Essex received no letter of explanation before L.B.'s appeals or within ninety days of the October 31, 2023, termination date. Instead, on April 15, 2024, the petitioner first presented a letter of explanation for the deposits drafted by her daughter, N.F. (P-7.) Petitioner asserts that Essex should have sent a second letter about the Chase account explanation or done more to alert her about what was missing. Although the petitioner denies receiving the October 18, 2023, letter, I do not **FIND** it credible that she and her daughter were unaware of the need to explain the Zelle or cash deposits, even if they were unclear about what to explain. Instead, Essex tried several times to advise L.B. and F.N. what was still missing and documented those attempts in the normal course of business. Thus, I **FIND** that a preponderance of the evidence demonstrates that the petitioner was aware of the need for further verification.

Notably, the April 15, 2024, letter was not part of the materials reviewed or received by Essex when processing the case, and Essex maintains that it must be part of a new application. Indeed, petitioner acknowledges that she presented the letter for a new application, if necessary. Thus, I give no weight to this document as to the propriety of Essex's earlier actions in these cases, and it is not evidence I consider. Similarly, N.F. supplied current bank statements, which have no bearing on this decision for the same reason but would be part of Essex's review of a new application. (P-6.)

LEGAL ANALYSIS AND CONCLUSION

Congress created the Medicaid program under Title XIX of the Social Security Act. 42 U.S.C. §§1396 to 1396w. The federal government funds the program that the states administer. Once the state joins the program, it must comply with the Medicaid statute and federal regulations. Harris v. McRae, 448 U.S. 297, 300 (1980). New Jersey participates in Medicaid through the New Jersey Medical Assistance and Health Services Act (Act). N.J.S.A. 30:4D-1 to -19.5.

The Commissioner of the Department of Human Services (DHS) promulgated regulations implementing New Jersey's Medicaid programs to explain each program's scope and procedures, including income and resource eligibility standards. See, e.g., N.J.A.C. 10:71-1.1 to -9.5 (Medicaid Only); N.J.A.C. 10:72-1.1 to -9.8 (Special Medicaid Programs); E.S. v. Div. of Med. Assistance and Health Servs., 412 N.J. Super. 340, 347 (App. Div. 2010).

The Act established the Division of Medical and Health Services (DMAHS) within the DHS to perform the administrative functions concerning Medicaid program

372 participation. Bergen Pines County Hosp. v. New Jersey Dep't of Human Serv., 96 N.J. 456, 465 (1984); see also N.J.S.A. 30:4D-4, -5.

County welfare agencies (CWA), such as Essex, assist [DMAHS] in processing applications for Medicaid and determining whether applicants have met the income and resource eligibility standards." Cleary v. Waldman, 959 F. Supp. 222, 229 (D.N.J.1997), aff'd, 167 F.3d 801 (3d Cir.), cert. denied, 528 U.S. 870 (1999). Significantly, an applicant bears the burden of establishing eligibility for Medicaid benefits. D.M. v. Monmouth Cnty. Bd. of Soc. Servs., HMA 6394-06, Initial Decision (April 24, 2007), adopted, Dir. (June 11, 2007), http://njlaw.rutgers.edu/collections/oal/.

N.J.A.C. 10:72-2.3(a) requires Essex to verify all eligibility factors. Under N.J.A.C. 10:72-4.4, Essex determines income eligibility under the Aged, Blind, and Disabled (ABD) program using the income eligibility standards within N.J.A.C. 10:71-5.1 to -5.9, with certain exceptions. Similarly, Essex's resource eligibility determination follows resource standards at N.J.A.C. 10:71-4.1 to -4.11 according to N.J.A.C. 10:72-4.5.

Under N.J.A.C. 10:71-5.1(b), income is "receipt, by the individual, of any property or service which he or she can apply, either directly or by sale or conversion to meet his or her basic needs for food or shelter." The CWA must consider all income, whether cash or in-kind in determining eligibility, unless such income is exempt under the provisions of N.J.A.C. 10:71-5.3. Ibid. Generally, income in kind is any support or maintenance in kind from a person other than a responsible relative for the applicant's housing, utilities, food, or basic needs. See N.J.A.C. 10:71-5.4(a)12. All income unless specifically excluded is includable in the determination of countable income. N.J.A.C. 10:71-5.4(a).

The Medicaid regulations also explain that the valuation of resources held in accounts is "its equity value." N.J.A.C. 10:71-4.1(d). The CWA considers liquid and non-liquid resources in determining eligibility unless such resources are excluded under the provisions of N.J.A.C. 10:71-4.4(b). Thus, the CWA often needs information from the applicant to verify financial eligibility and determine if any exclusions may apply.

Notably, an applicant is the primary source of information and must cooperate with the agency in securing evidence to corroborate their statements. N.J.A.C. 10:72-

1.4(a)2, N.J.A.C. 10:72-2.3. Further, a CWA must seek verification of questionable information provided by an applicant. N.J.A.C. 10:72-2.3(c).

Under Medicaid Communication No. 22-04, updating Medicaid Communication No. 10-09, and 42 CFR 435.952 (c)(2), if a verification results in a discrepancy, insufficient information, or an error, the CWA will send a Request for Information (RFI) letter. The RFI letter will allow the applicant fourteen days to respond. See Medicaid Communication No. 22-04. If the CWA receives no response, it will deny the application for failure to provide information under 42 CFR 435.952 (c)(2). The CWA may send an additional RFI letter if the applicant's response to the first RFI prompts the need for further outreach, as Essex did here. Here, I **CONCLUDE** that Essex, as a courtesy, reviewed the late materials it received but could not confirm L.B.'s eligibility without an explanation of the deposits, which it requested. Indeed, despite several attempts to address the letter of explanation with petitioner and her daughter, Essex did not receive one until these appeals.

Still, the regulations governing Medicaid recognize that there may be "exceptional cases" when an applicant cannot produce the required information timely. See e.g., N.J.A.C. 10:71-2.3(c) (permitting an extension of time to issue an eligibility determination when the applicant did not produce information due to exceptional "[c]ircumstances wholly beyond the control of both the applicant and the [CWA]"). Yet, at best, an extension is permissible, not required. Ibid.; S. D. v. Division of Med. Assistance & Health Servs. and Bergen County Bd. of Social Services, 2013 N.J. Super. Unpub. LEXIS 393 (February 22, 2013); see also J.D. v. Div. of Med. Assistance & Health Serv., No. HMA 3564-14, Initial Decision (June 26, 2104) http://njlaw.rutgers.edu/collections/oal/, adopted, Dir. (July 29, 2014) https://www.state.nj.us/humanservices/providers/rulefees/decisions/dmahs2014.html, (finding that a guardian's difficulty in obtaining requested documents because of non-cooperation from the applicant's family and financial institutions did not constitute extraordinary circumstances).

Here, L.B. requests that Essex excuse her from timely supplying the explanation she later provided well beyond processing timeframes because she was unaware of Essex's need for further verifications. However, I found that L.B. was aware that she needed to explain the deposits into the Chase account. Thus, I **CONCLUDE** that exceptional circumstances are not present to excuse L.B.'s earlier failure and that she must supply a new application. See, e.g. Chalmers v. Shalala, 23 F.3d 752 (1994) (holding that while many applicants seeking public assistance often have limited abilities in the application process due to disabilities, this does not alone excuse or diminish their responsibilities over resources).

Therefore, I **CONCLUDE** that L.B.'s failure to provide verifications for her Medicaid redetermination made her ineligible and that **L.B.'s appeal should be DISMISSED.**

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that L.B. is ineligible for Medicaid because she failed to supply necessary verifications and that her appeal is hereby **DISMISSED**.

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. §1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.

3 April 26, 2024

Date Record Closed: _____

Date Filed with Agency:

Date Sent to Parties:

ljb

APPENDIX

WITNESSES

For Petitioner:

L.B.

F.N.

For Respondents:

Rebecca Smith, FSW

EXHIBITS

For Petitioner:

P- 1 Email dated April 11, 2024, with MCU statements

376 P- 2 Email dated April 11, 2024, with Chase statements

P-3a Email dated April 11, 2024, with Citibank statements

P-3b Email dated April 11, 2024, with additional Citibank statements

P-4 Screenshots of WeCare

P- 5 Email dated April 11, 2024, with attachments

P- 6 Email dated April 15, 2024, with current bank statements

P- 7 April 15, 2024, letter

For Respondent:

R-1 Fair Hearing packet

R-2 Denial letters and RFIs

1 The petitioner tried to provide materials by email on April 4, 2024, but the OAL could not open the items and requested that the petitioner resubmit the documents in a different format.

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

R.J.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
	:	**OAL DKT. NO. HMA 05074-2023**
GLOUCESTER COUNTY	:	
BOARD OF SOCIAL SERVICES	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is May 2, 2024, in accordance with an Order of Extension.

This matter arises from the May 12, 2023 denial of Petitioner's Medicaid application due to his failure to provide information that was necessary to determine eligibility. Based upon my review of the record, I hereby ADOPT the findings and conclusions of the Administrative Law Judge (ALJ).

Both the County Welfare Agency (CWA) and the applicant have responsibilities with regard to the application process. N.J.A.C. 10:71-2.2. Applicants must complete

any forms required by the CWA, assist the CWA in securing evidence that corroborates his or her statements, and promptly report any change affecting his or her circumstances. N.J.A.C. 10:71-2.2(e). The CWA exercises direct responsibility in the application process to inform applicants about the process, eligibility requirements, and their right to a fair hearing; receive applications; assist applicants in exploring their eligibility; make known the appropriate resources and services; assure the prompt accurate submission of data; and promptly notify applicants of eligibility or ineligibility. N.J.A.C. 10:71-2.2(c) and (d). CWAs must determine eligibility for Aged cases within 45 days and Blind and Disabled cases within 90 days N.J.A.C. 10:71-2.3(a) and 42 CFR § 435.912. The time frame may be extended when documented exceptional circumstances arise preventing the processing of the application within the prescribed time limits. N.J.A.C. 10:71-2.3(c). The regulations do not require that the CWA grant an extension beyond the designated time period when the delay is due to circumstances outside the control of both the applicant and the CWA. At best, the extension is permissible. N.J.A.C. 10:71-2.3; S.D. v. DMAHS and Bergen County Board of Social Services, No. A-5911-10 (App. Div. February 22, 2013).

Here, an application for Medicaid was filed on the Petitioner's behalf with the Gloucester County Board of Social Services (Gloucester County) on April 18, 2023. On April 27, 2023, Gloucester County sent a Request for Information (RFI) to the Petitioner's designated authorized representative (DAR), requesting documentation that was required to process the Petitioner's application and determine Medicaid eligibility. (R-3, P. 19-25.) The deadline for submission of the requested documentation was noted in the RFI as May 11, 2023. Most of Gloucester County requested information was the same that the Petitioner failed to provide in the first two Medicaid applications[1], including explanations

[1] The Petitioner's first Medicaid application was filed on January 10, 2023 and denied on

related to the Petitioner's Wells Fargo account (#5733), verifications for several deposits, and answers to questions surrounding a vehicle purchase. The Petitioner's Medicaid application was denied on May 12, 2023 for failure to provide the required information. Then, on May 19, 2023, Gloucester County received a letter from DAR's counsel representing that the Petitioner did not receive the RFI until May 16, 2023. ID at 3.

During the Fair Hearing, the Petitioner set forth numerous arguments, specifically: Gloucester County violated Petitioner's due process rights by failing to provide the requisite notice; exceptional circumstances existed that rendered the denial contrary to state and federal law; that Gloucester County committed error by failing to accept the Petitioner's self-attestation regarding his income; that Gloucester County failed to assist the Petitioner in obtaining pension verifications; and that the Petitioner is entitled to a de novo hearing of the evidence present in processing his Medicaid applications. ID at 13.

First, the Petitioner argued a due process violation had occurred because the April 27, 2023 dated RFI and the May 12, 2023 denial letter were sent to the Petitioner's DAR instead of the DAR's counsel. Ibid. In the Initial Decision, the ALJ found that there was no evidence of a deprivation of due process. Id. at 14. Janelle Thomas, regional finance coordinator for the Deptford Center, was the recorded DAR on this case. The April 27, 2023 RFI was sent to the care of Thomas. Counsel spoke to Gloucester County on April 27, 2023 and was instructed to submit a separate DAR form. However, counsel submitted a letter of representation instead. In this letter, counsel stated they represent the Deptford Center, not the DAR, and attached a copy of the November 2022 DAR form naming Thomas as DAR. Ibid. This is in contrast to the appearance counsel entered in the second application, in which they specifically state to represent Thomas in her capacity

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January 31, 2023 for failure to provide requested information. Petitioner's second Medicaid application was filed on February 6, 2023, and denied on March 10, 2023.

as DAR, not the Deptford Center. The DAR also testified that even when a counsel is involved in a case, they continue to be the point of contact with Gloucester County, and that they forward any correspondence that comes in to counsel. In the Initial Decision, the ALJ found that Gloucester County appropriately sent the RFI and denial letter to the DAR, and even if it was an error, it does not rise to the level of deprivation of due-process rights under the facts of this case. Ibid.

Next, the Petitioner argued that no leeway was provided despite the existence of exceptional circumstances. Ibid. Specifically, Petitioner claimed the following as exceptional circumstances: the late receipt of the RFI; that the DAR and DAR's counsel immediately brought the late receipt to Gloucester County 's attention; and the fact they requested time to provide the required documentation, but were denied. Ibid. In furtherance of this claim, the Petitioner cited follow-up documentation that was sent to Gloucester County on May 22, 2023 and May 25, 2023, and asserted that the documentation provided on these dates was responsive to the April 27, 2023 RFI. Id. at 14-15.

In the Initial Decision, the ALJ found that counsel was directly informed of the outstanding information still needed to determine the Petitioner's Medicaid eligibility on April 27, 2023, that most of the financial information that had been requested in the first two applications was still outstanding, and that counsel needed to submit a new DAR naming the law firm as the DAR, none of which occurred. Id. at 15. Despite the May 22, 2023 and May 25, 2023 submissions, documentation was still outstanding. As such, the ALJ found that no exceptional circumstances existed that would warrant the continued processing of the Petitioner's application beyond the May 11, 2023 deadline. Id.

The Petitioner also argued that Gloucester County 's refusal to accept their self – attestation was in contravention of Medicaid Communication No. 20-04 (Med-Com. 20-

04) and 42 C.F.R. § 435.952 (2023). Id. While Med-Com. 20-04 allows for Eligibility Determining Agencies (EDAs), like Gloucester County, to accept self-attestation of income and resources during the duration of the COVID-19 emergency period, such an allowance is not mandatory and was intended for situations where a Petitioner's income and/or resources cannot be verified by normal means. Id. at 15-16. Similarly, federal regulations that allow for self-attestation of eligibility criteria, do so as an exception, not a rule, and are determined on a "case-by-case basis" for situations where "documentation does not exist at the time of application," or not "reasonably available." 42 C.F.R. § 435.952 (2023). The regulation lists homelessness, domestic violence and natural disasters, as examples of when an exception for self-attestation would be warranted. Ibid. In the Initial Decision, the ALJ found that it was reasonable for Gloucester County to refuse to accept the Petitioner's self-attestation in regard to income. ID at 16.

Next, the Petitioner argued that Gloucester County had a duty to assist the Petitioner by using collateral contacts to obtain verifications/documentation that was not available to Petitioner, and failed to do so, despite the DAR requesting assistance. Ibid. However, in the Initial Decision, the ALJ found that no assistance was requested in this application. Furthermore, even if assistance was requested, financial documentation is not something Gloucester County would be able to assist in obtaining anyway. The responsibility to obtain financial documentation lies solely with Medicaid applicant. The information requested by Gloucester County was mainly banking information, workers' compensation documents, and proof of removal from a lease. Gloucester County does not have any legal authority to obtain these documents. Id. at 16-17.

Finally, in regard to the Petitioner's argument that they were entitled to a De Novo Hearing, the ALJ found in the Initial Decision that this argument was without merit as the

Petitioner was provided with a Fair Hearing on the denial of the Medicaid application. ID at 17.

The Initial Decision upholds the denial and I concur. Both the CWA and the applicant have responsibilities with regard to the application process. N.J.A.C. 10:71-2.2. Gloucester County 's request for information made on April 27, 2023 was clear and unambiguous. Petitioner failed to provide the requested information within the requisite time period set forth in the RFI.

Gloucester County was responsible for determining whether Petitioner's resources exceeded the resource limit to qualify for benefits. N.J.A.C. 10:71-4.1(a). Unless specifically excluded, all resources are considered when determining Medicaid eligibility. N.J.A.C. 10:71-4.1(b). The missing information regarding the Petitioner's Wells Fargo account and a vehicle purchase were germane to Petitioner's eligibility determination, and the documentation was necessary for Gloucester County to process Petitioner's application and determine if the Medicaid eligibility requirements were met. Petitioner's failure to provide the requested documentation appropriately resulted in the denial of the application. Further, and as noted by the ALJ, an extension of time in order to provide the requested information was not requested, and even so, no exceptional circumstances were presented in this matter that would have necessitated an extension of time to provide same, pursuant to N.J.A.C. 10:71-2.3(c).

Thus, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision's conclusion that Gloucester County properly denied Petitioner's application.

THEREFORE, it is on this 26th day of APRIL 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

3 OAL DKT. NO. HMA 10405-2023

AGENCY DKT. NO. N/A

M.S.,

Petitioner,

v.

HORIZON NEW JERSEY HEALTH,

Respondent.

_____

Holly Gerena, LPN, Insurance Case Manager, Star Pediatric Home Care Agency,

for the petitioner pursuant to N.J.A.C. 1:10-5.1

Maria Marrero, Esq., for the respondent, Horizon New Jersey Health

Record Closed: March 11, 2024 Decided: March 26, 2024

BEFORE **REBECCA C. LAFFERTY**, ALJ:

STATEMENT OF THE CASE

M.S. (M.S. or petitioner) appeals the decision of Horizon (respondent or Horizon) to reduce his Private Duty Nursing (PDN) services from sixteen hours per day, seven days per week, to ten hours per day, seven days per week. PDN services have continued at sixteen hours per day, seven days per week pending this appeal. At issue is whether the reduction of PDN hours is appropriate.

PROCEDURAL HISTORY

By letter, dated August 17, 2023, respondent advised petitioner that his PDN services were being reduced from sixteen hours per day, seven days a week, to ten hours per day, seven days a week, effective September 2, 2023. (R-1.) Petitioner submitted a request for an internal appeal, and respondent's determination to reduce PDN services was affirmed by MES Peer Review Services by letter, dated September 5, 2023. (R-2.) By letter dated September 8, 2023, petitioner was advised of the outcome of the internal appeal. (R-3.) Petitioner filed an external appeal, and by decision dated September 20, 2023, Maximus Federal Services Inc. (Maximus) upheld respondent's decision to reduce petitioner's PDN services. (R-4.)

Petitioner filed a request for a fair hearing and this matter was transmitted by the Division of Medical Assistance and Health Services to the Office of Administrative Law (OAL) where it was filed on October 5, 2023, pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was conducted via zoom technology on January 5, 2024, and the record closed. The record was reopened on January 23, 2024, for

additional documentation and testimony. Additional testimony was heard on March 11, 2024, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

Testimony

For respondent:

Kimberly Schmidt (Schmidt), Registered Nurse (RN), testified on behalf of Horizon.

January 5, 2024 Testimony

Schmidt has a bachelor's degrees in nursing and business and has been an RN for thirty years. She has been with Horizon for ten years - starting as a case manager, and subsequently working in utilization review, which is where she has been for the last four years. As a utilization reviewer, she reviews nursing notes and letters of medical necessity from treating physicians to review the amount of PDN services being provided to a particular patient. In addition to reviewing the medical documentation, she also takes into account additional medical needs (i.e. can the patient communicate, how often are vitals taken, number of medications, how severe are the medications, how are medications administered, nutrition, mobility/ambulation) and social considerations (i.e. custodial care).

Schmidt completed a review of M.S.'s PDN services on or about August 16, 2023. (R-5, page 4.) Her notes reflect that she considered the following diagnoses in her review: Vacteryl-VSD; solitary left kidney; microtia right ear; hemifacial microsomia; anal atresia, vertebral anomalies; hypoplastic right thumb; tethered cord s/p laminectomy; imperforate anus; colostomy takedown 1/19/18, GT; neurogenic

bladder; iron deficiency; and torticollis. She reviewed the letters of medical necessity (R-7) and nursing progress notes provided by M.S.'s providers and completed the PDN Acuity Tool. (R-6.) M.S. received a score of twenty-five on the PDN Acuity Tool, which correlates to four to eight hours of PDN services per day, seven days per week. (R-6.) The PDN Acuity Tool reflects that M.S. was given credit for the following items: clinical assessment two to three times every four hours; communication impairment; bowel and bladder incontinence at least daily; medication administration less often than every four hours; nebulizer treatment and management every four to twenty-four hours; enteral nutrition (pump or bolus) administration of feeding, residual check, adjustment or replacement of tube, and assessment and management of complication; gastrostomy tube care; activities of daily living (ADL) support needed for more than four hours per day to maximize a patient's independence; communication deficit management; immobilizer management with removal and replacement every eight hours or more often; aspiration precautions, monitoring, and management; clinical monitoring and management while attending activities outside of the home environment; and supervision of licensed practical nurse or aide. All diagnoses set forth in the letters of medical necessity were accounted for in completing the PDN Acuity Tool.

Schmidt noted that the nursing notes submitted by the provider did not mention chest physiotherapy. Additionally, the nursing notes stated that M.S. could ambulate on his own. She also noted that when in school, the school provides PDN services to M.S. at their expense. The range of points that M.S. fell within was 19 to 27.5 points, which equated to four to eight hours of PDN services per day. Horizon's medical director reviewed M.S.'s records and the PDN review and determined that it would be appropriate to provide PDN services ten hours per day, seven days a week because M.S. receives a ten-hour continuous gastrostomy tube (g-tube) feed overnight that requires monitoring to prevent aspiration. It was also determined that Horizon would provide a two-week transition where PDN services would continue to be provided sixteen hours per day, seven days per week, and then be reduced to ten hours per day, seven days per week. Schmidt further noted that the daytime feedings for M.S. are bolus feedings that are given in under an hour compared to the continuous evening feeding.

Schmidt stated that all caregivers are provided training by hospital staff prior to a patient's discharge to ensure proper care. It is standard practice for nursing agencies to provide two weeks of nursing notes for review when a new authorization

is submitted. Nursing agencies can always submit additional notes if there are any changes in care. In this case, the nursing agency has not sent supplemental nursing notes for review and consideration. Schmidt emphasized that along with two weeks of nursing notes, Horizon also reviews the letters of medical necessity and the 485-treatment plan with the doctor's orders which covers three months.

On cross-examination, Schmidt explained that when reviewing a case, Horizon reviews what the nurses are actually doing as reflected in their notes. When a new authorization is submitted for review, the nursing agency submits nursing notes for review. If M.S. was not receiving treatment for asthma during the timeframe for which records were provided for Horizon's review, or if nurses did not document treatments (such as chest physiotherapy), then credit cannot be given on the PDN Acuity Tool. M.S. did receive credit for being on routine asthma medications and nebulizer treatments as both were listed in the nursing notes. Application of over-the-counter products for the skin is not considered a skilled nursing need because it is not wound care – a nurse need not be present for an over-the-counter application; a trained caregiver can apply such ointments. Thus, M.S. was not given any points for skin wounds on the PDN Acuity Tool. Schmidt testified that the nursing documentation for M.S. did not list him as having any cardiac issues for the period that she reviewed. Schmidt stated that supervision of M.S. while he is walking and bathing, while not a skilled need, was taken into account in the Activities of Daily Living (ADL) section. The PDN Acuity Tool also takes into consideration the number of caregivers.

March 11, 2024 Testimony

In completing the PDN Acuity Tool, Schmidt reviewed the Home Health Certification and Plan of Care, dated August 4, 2023, prepared by M.S.'s treating physician, Dr. Mary Mathew. (R-12.) The document contains M.S.'s diagnoses, medications, limitations, and the orders and treatments that the doctor wants the nurses to follow. (R-12.) All of which are reflected in the PDN Acuity Tool.

Schmidt also reviewed four letters of medical necessity submitted by M.S.'s different providers: (1) Children's Hospital of Philadelphia (CHOP), dated August 2, 2023, prepared by Kelsey Olinik, MSN, CPNP, Advanced Practice Nurse (APN) (R-

13); (2) Williamstown Pediatric Practice, dated August 15, 2023, prepared by Dr. Mary Mathew (R-14); (3) Williamstown Pediatric Practice, dated August 24, 2023, prepared by Dr. Mary Mathew (R-15); and (4) Urology for Children, dated February 16, 2023, prepared by Michelle Sheel, MSN, APN-C (R-16). Everything in all four of these letters is reflected in the PDN Acuity Tool that was completed by Schmidt.

Additionally, Schmidt reviewed the nursing notes provided by Star Pediatrics for the period of July 31, 2023, through August 14, 2023. (R-17.) The nursing notes reflect the services being provided in the home. Everything in the nursing notes is reflected in the PDN Acuity Tool that was completed by Schmidt.

Furthermore, Schmidt reviewed the PDN Acuity Tool assessment that was completed in 2019 by a different Horizon nurse and compared it to her assessment from 2023. (R-18.) As part of her comparison Schmidt reviewed: the Home Health Certification and Plan of Care, dated June 4, 2019, prepared by Dr. Mary Mathew (R-9); letter of medical necessity from Dr. Jennifer Panganiban (CHOP) (R-10); and the Horizon NJ Health Private Duty Nursing (PDN) Extended Authorization Request from 2019 (R-11). The differences between the 2019 and 2023 PDN Acuity Tool assessments are: M.S. was previously receiving medication every two hours; M.S. had a NG tube in 2019, but he has a g-tube now; and M.S. is not receiving physical or occupational therapies at home, he now receives those at school. Schmidt noted that the 2019 and 2023 PDN Acuity Tools have different scales and point systems. In 2019, M.S. received a score of 31.5 points within a range of 31 - 36.5 points, which equated to 12 to 15.9 PDN hours. Using the 2023 PDN Acuity Tool, M.S. received a score of 25 points within a range of 19 - 27.5 points, which equates to 4 to 8 PDN hours. Schmidt agreed that in 2019, M.S.’s score was on the low end of the 12 to 15.9 hours range, and in 2023 his score was in the middle of the 4 to 8 hours range for PDN services. Schmidt stated that assessments are usually completed every ninety days, but pandemic guidelines did not permit the reduction of PDN services until 2023.

Schmidt testified that when the school requires a nurse for a student during school hours, such nursing services are paid for by the school. She also stated that the reason that Horizon is authorizing ten hours of PDN services is because of the continuous feeding via g-tube overnight.

Horizon also considers social circumstances in their evaluations. Schmidt testified that in the 2023 reassessment, Horizon noted that M.S.'s father is disabled and that there are a total of three minor children in the home, including M.S. There is nothing additional to be accounted for in the 2023 PDN Acuity Tool in terms of the social circumstances.

For petitioner:

Dr. Mary Mathew, M.D. (Dr. Mathew), Williamstown Pediatric Practice, testified on behalf of the M.S. Dr. Mathew has been the treating physician for M.S. since September 25, 2018. Dr. Mathew testified that M.S. is a seven-year-old boy born with many congenital problems. His diagnoses include but are not limited to: scoliosis (for which he has had several surgeries including a rod correction and spinal fusion); a g-tube; asthma that requires nebulizer treatments; a difficult airway; reflux that can trigger asthma attacks; and an insufficient thoracic cavity, which affects his breathing and for which the pulmonologist recommended a vest to make his cough more productive in order to clear chest secretions (this diagnosis is from November 2023).

M.S. requires assistance with the following tasks: sitting and walking to maintain safety as his spine is non-flexible; wiping himself after bowel movements; and monitoring for choking when eating by mouth. Additionally, M.S. requires nursing care both at home and at school. M.S. is expected to miss significant amounts of school for recovery after procedures and illnesses in the next year.

On cross-examination Dr. Mathew agreed that if there was a change in M.S.'s plan of care, her office would submit a new authorization to respondent for consideration of the change in circumstances. She agreed that M.S.'s condition has improved over the last three years with good parental involvement. She further stated that there is no plan in place now to discontinue g-tube feedings, but eating by mouth is "a good skill for M.S. to progress on". She also testified that while a trained caregiver can read a pulse oxygen machine, they may not be able to assess other issues such as breathing rate. She also stated that if M.S.'s asthma is triggered and nebulizer treatments are required, then he needs a skilled nurse to use the nebulizer,

read the oxygen values, and know when the nebulizer is not enough and further treatment is required.

Florette Stewart, RN (Stewart), testified on behalf of M.S. She is one of the nurses who cares for M.S. at home. She has cared for M.S. for two or three years and she has been a RN for thirty years. She described M.S.'s general condition and stated that the various symptoms he experiences can be related to the time of year and he is often at risk for dehydration, specifically in the summer months. She stated that application of ointment for skin irritation is not enough, a stoma powder must also be applied. In her opinion, the redness in the perianal area caused by leaking bowel movements is Stage 2 redness, not Stage 1. Additionally, the area around where the g-tube connects becomes red, which is more pronounced in the summer, although it is currently red.

Stewart added that the nutrition that M.S. receives by mouth is less than ten percent of his daily nutritional intake, he has a poor appetite and is dependent upon the g-tube feedings. When his pulse oximeter reading is at ninety-seven percent, they institute nebulizer treatments, chest physiotherapy, and sometimes antibiotics because they do not want the readings to go below ninety-seven percent. M.S. experiences frequent nosebleeds during the daytime hours. While M.S. can ambulate on his own, he is unable to look down and requires assistance. In her opinion, changes in M.S.'s breath sounds would not be noticed by a trained caregiver, nor would a trained caregiver know where to listen after a nebulizer treatment. To make matters more complicated, M.S. does not complain, and his symptoms are not always obvious. They have additional medications on hand to administer if he is coughing or wheezing, has reflux, or if they need to increase his appetite. M.S. is a frequent "sweater", which necessitates more frequent changing and sometimes causes skin issues near the g-tube opening.

When she starts her shift with M.S., she always repositions him and elevates his head. She also vents his g-tube to release gas from his stomach for comfort. There is a communication log for all the nurses to leave the latest update for the next nurse coming on shift. M.S.'s father does not fully understand M.S.'s medical condition and she does not receive medical reports from M.S.'s father. M.S. does not complain and thus the assessments done by the nursing staff are how they determine how to treat him because he does not verbalize his symptoms.

On cross-examination, Stewart agreed that the redness in the perianal area is not considered a pressure sore. His wounds are open but superficial, not subcutaneous. Stewart agreed that S.S. is a Licensed Practical Nurse (LPN) and respiratory therapist and is qualified to provide treatments. The nebulizer treatments were adjusted in the last few months due to illness – M.S. has been receiving the sick protocol which includes antibiotics and more frequent inhalers. Stewart agreed that M.S. tolerates feedings well and has only vomited once. Stewart stated that M.S.'s father is not educated as a trained caregiver and is often ill himself.

Natalie Hall, RN, (Hall), Director of Nursing for Star Pediatrics, testified on behalf of M.S. Hall has a Bachelor of Science in Nursing and is the Director of Nursing at Star Pediatrics, which provides PDN services to M.S. When M.S. is not in school, his care during the daytime hours is an issue. It is not always safe for M.S. to be in school and exposed to germs, but if he stays home, then he has no nursing care. She feels that it is important for M.S. to have someone who can provide safe care for M.S. while S.S. works as her husband is disabled and does not work.

M.S. does not eat enough food by mouth to be sustainable. M.S. is ambulatory but he needs a trained nurse with him at all times to assess his condition if he falls. Hall feels that losing daytime nursing hours is a disservice to his overall health – he is only showing improvement because of the hours of nursing that is provided to him.

On cross-examination, Hall stated that Star Pediatrics provides PDN services to M.S. from 11 p.m. to 7 a.m. daily, and on non-school days they provide PDN services from 7 a.m. to 4 p.m. When M.S. attends school, the school provides nursing services from 8 a.m. to 3:15 p.m. Hall testified that M.S. needs skilled monitoring to prevent increased injury due to his complicated medical situation, non-skilled training is not enough. She also stated that having a trained caregiver to fill in if there is not a nurse available on a specific day is different than utilizing a trained caregiver regularly in place of a skilled nurse. It is Hall's professional opinion that M.S. needs sixteen hours per day of PDN services. Her primary concern is that if M.S. is not provided skilled nursing care on non-school days, it could lead to more illness and hospitalizations. She stated that the care her agency provides for M.S. keeps him safe at home and out of the hospital, which is a better quality of life. She agreed that his condition has improved due to the PDN services and if those services are reduced, she believes that M.S.'s condition will deteriorate.

S.S., mother of M.S., testified on behalf of M.S.

January 5, 2024 Testimony

S.S. has been caring for M.S. since he was sixteen months old and adopted him in 2019. M.S. has gross limitations that he will have his entire life (i.e. unable to wipe himself after toileting). M.S. does not desire to eat, and the bulk of his meals are given via g-tube.

Not just anyone can care for M.S. Monitoring his intake and output requires knowledge and skill. S.S. went on to state that there are three important aspects to take into consideration regarding the care of M.S.: (1) he requires vigilant caretakers to properly assess his condition and to know his signs and symptoms; (2) caretakes must know and understand all his diagnoses; and (3) M.S. is not trusting of those that he is unfamiliar. As such, he will not verbalize his condition to anyone outside of his family and usual caregivers.

There is a gap of time from when the nurse leaves at 4 p.m. and S.S. gets home from work at 7:30 p.m. M.S.'s father is not able to provide care such as changing and diapering during that gap in time because he is permanently disabled and on medication that may alter his mental state. She feels that reducing PDN services will be detrimental to M.S.'s condition.

S.S. has worked full-time as a respiratory therapist since 1999 and must continue to work to provide for her family. She is a dedicated mother and caregiver to M.S. whether it be sitting in the hospital during his surgeries or being on the phone to listen to a doctor's appointment. M.S. is her first priority.

On cross-examination, S.S. testified that the g-tube feeding requires skill and the activities leading up to diaper changes require skill, such as determining skin integrity and what to do if there is blood in the diaper. She agreed that if M.S. does not eat enough food by mouth, that the g-tube feedings will be increased to compensate.

March 11, 2024 Testimony

S.S. stated that M.S. has gone through a lot of changes since 2019. He was previously receiving outpatient speech and physical therapy; occupational therapy was done in school. He has not been receiving physical therapy because he is recuperating from recurrent spinal surgeries, but it is being revisited and he does have a standing prescription for outpatient physical therapy. M.S.'s feeding has not changed, it is just a g-tube rather than an NG tube, and therefore aspiration precautions have not changed.

The makeup of M.S.'s household includes S.S., S.S.'s husband (who is permanently disabled), her nineteen-year-old grandson and three minor children including M.S. The ages of the three children are seven, nine and ten years old. Other than M.S., none of the children are disabled. S.S.'s husband is not able to provide trained caregiver duties but is able to assist with driving M.S. to appointments. There are no other adults that assist S.S. other than the assigned nurses. S.S.'s mother used to assist her, but she is in her eighties, frail, and unable to assist now. S.S. works six days a week. Her hours range from twelve hours a day for three days to ten hours for two days.

Factual Findings

Based upon a review of the documentary evidence, and having considered the testimony of the witnesses, I **FIND** the following as **FACTS**:

M.S. is a seven-year-old child born with severe medical conditions, which include: congenital malformation syndrome; abnormalities of breathing; gross motor and speech delays; rod lengthening every three to four months; Vacteryl-VSD; solitary left kidney; microtia right ear; hemifacial microsomia; anal atresia, vertebral anomalies; hypoplastic right thumb; tethered cord s/p laminectomy; vertebral fusion (T10-L2); imperforate anus; g-tube; neurogenic bladder; iron deficiency; and torticollis. (R-7, and R-12 through R-14.)

The PDN Acuity Tool completed in August 2023 reflects that M.S. was given credit for the following items: clinical assessment two to three times every four hours; communication impairment; bowel and bladder incontinence at least daily; medication administration less often than every four hours; nebulizer treatment and management every four to twenty-four hours; enteral nutrition (pump or bolus) administration of feeding, residual check, adjustment or replacement of tube, and assessment and management of complication; gastrostomy tube care; ADL support needed for more than four hours per day to maximize a patient's independence; communication deficit management; immobilizer management with removal and replacement every eight hours or more often; aspiration precautions, monitoring, and management; clinical monitoring and management while attending activities outside of the home environment; and supervision of licensed practical nurse or aide. (R-6.)

M.S. is not on mechanical ventilation, does not have a tracheostomy, does not have a need for deep suctioning, does not currently receive around-the-clock nebulizer treatments with chest physiotherapy, does not suffer from a seizure disorder or require emergency administration of anti-convulsants, does not require routine blood draws, infusions, or intravenous care, and does not require skilled wound care. It is undisputed that M.S.'s condition, while serious, has generally improved, he no longer requires an NG tube, and the colostomy has been reversed. He can now attend school.

M.S. receives the majority of his nutrition through the g-tube. He receives a continuous overnight feed over a ten-hour period for which supervision is required to prevent aspiration. (R-7, page 1, and R-12 through R-14.) He also receives bolus feedings through a g-tube during daytime hours, which take less than an hour each. Additionally, he receives his medication via the g-tube. M.S. is working on eating food by mouth, but there is no specific transition plan in place for weening him off the g-tube feedings.

Currently, the respondent is providing PDN services to M.S. sixteen hours a day, seven days a week. When M.S. attends school, the school provides nursing services to M.S. M.S.'s household consists of his adoptive parents, two minor siblings, and an adult sibling. M.S.'s mother, S.S., is an LPN and respiratory therapist and the only wage earner in the household. She works anywhere from five to seven days a week, and her shifts are ten or twelve-hour shifts. She is the only trained caregiver for M.S. because her husband is permanently disabled, and her mother is elderly and unable to assist anymore. When M.S. is not in school and nurses are not available, S.S. must use Family Medical Leave Act time in order to care for M.S.

3 On the August 2023 reassessment, M.S. scored twenty-five points on the PDN Acuity Tool, which is just above the mid-range for receiving four to eight hours of PDN services per day. (R-6.) However, respondent has authorized ten hours of PDN services per day because M.S. receives the ten-hour continuous feed through his g-tube overnight.

The letters of medical necessity submitted for respondent's review in connection with the August 2023 reassessment state that the providers are requesting PDN services sixteen hours a day, seven days a week for M.S., but other than mentioning his feeding regimen, do not specifically set forth what additional skilled nursing care is required to be rendered to M.S. during the extra six hours of PDN services being requested. (R-7, and R-12 through R-15.)

Credibility

It is the obligation of the factfinder to weigh the credibility of the witnesses in determining the ultimate issues. Credibility is the value that a factfinder gives to a witness's testimony. "Credibility involves more than demeanor. It [contemplates] the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Inferences may be drawn concerning the witness' expression, tone of voice. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super.

103 (App. Div. 1968). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)).

In assessing credibility, the interests, motives or bias of a witness are relevant, and a factfinder is expected to base decisions of credibility on his or her common sense, intuition, and experience. A factfinder "is not bound to believe the testimony of any witness, in whole or in part." State v. Muhammad, 182 N.J. 551, 577 (2005) (internal quotation marks omitted.) Rather, they "may reject what in their conscientious judgment ought to be rejected and accept that which they believe to be credible." Ibid. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Five witnesses testified in this matter – Schmidt, Dr. Mathew, Stewart, Hall, and S.S. I had the opportunity to hear the testimony of all the witnesses, observe their demeanor, and review the documentation submitted into evidence. In so doing, I found all witnesses to be knowledgeable, credible and sincere in their testimony as it relates to M.S. Having said that, I gave greater weight to Schmidt's testimony given the level and detail of documentary evidence that was presented as to why a reduction in services was warranted. Notably, much of Dr. Mathew's testimony discussed future issues rather than current issues, and thus, was speculative and did not address the accuracy of the current assessment.

LEGAL DISCUSSION AND CONCLUSION

The Medicaid program is a cooperative Federal-State venture established as Title XIX of the Social Security Act. 42 U.S.C. §1396, et seq. Eligibility for Medicaid is governed by regulations adopted in accordance with the authority granted to the Division of Medical Assistance and Health Services (DMAHS) and the Commissioner of the Department of Human Services. N.J.S.A. 30:4D-7. The DMAHS and

Commissioner are required to establish a policy and procedures for the Medicaid application process and shall supervise the operation of, and compliance with, the policy and procedures. N.J.A.C. 10:71-2.2(b).

Individuals who are under the age of twenty-one, who are enrolled members in a Medicaid/NJ FamilyCare program, and who require PDN services which can be provided at home may be referred for PDN services through their managed care organization, such as respondent. N.J.A.C. 10:60-5.3(a). PDN means "individual and continuous nursing care, as different from part-time or intermittent care, provided by licensed nurses in the home to beneficiaries . . ." under certain Medicaid programs. N.J.A.C. 10:60-1.2; N.J.A.C. 10:60-5.1(b).

The regulations specify the requirements for an individual to be eligible for PDN: The individual must exhibit a severity of illness that requires complex skilled nursing interventions on an ongoing basis, which is outlined as:

1. "Ongoing" means that the beneficiary needs skilled nursing intervention 24 hours per day/seven days per week.

2. "Complexity" means the degree of difficulty and/or intensity of treatment/procedures.

3. "Skilled nursing interventions" means procedures that require the knowledge and experience of licensed nursing personnel, or a trained primary caregiver.

[N.J.A.C. 10:60-5.3(b).]

The coverage of PDN services is appropriate only when further requirements are satisfied. N.J.A.C. 10:60-5.3(c). The limits, duration, and setting of PDN is set forth as follows:

1. Private duty nursing shall be provided for eligible FFS beneficiaries in the community only and not in hospital inpatient or nursing facility settings.

2. DMAHS shall determine and approve the total PDN hours for reimbursement, in accordance with N.J.A.C. 10:60-5.2(b).

3. The determination of the total EPSDT/PDN hours approved shall take into account the primary caretaker's ability to provide care, as well as alternative sources of PDN care available to the caregiver, such as medical day care or a school program.

4. In emergency situations, for example, when the sole caregiver has been hospitalized, DMAHS may authorize, for a limited time, additional hours beyond the authorized amount.

5. DMAHS may also approve, for a limited time, additional hours when a change in the child's medical condition requires additional training for the primary caregiver to address changes in the care needs of the beneficiary.

[N.J.A.C. 10:60-5.4(a).]

The medical necessity for PDN services shall be based upon, but may not be limited to, the following criteria:

1. A requirement for all of the following medical interventions:

i. Dependence on mechanical ventilation;

ii. The presence of an active tracheostomy; and

iii. The need for deep suctioning; or

2. A requirement for any of the following medical interventions:

i. The need for around-the-clock nebulizer treatments, with chest physiotherapy;

ii. Gastrostomy feeding when complicated by frequent regurgitation and/or aspiration; or

iii. A seizure disorder manifested by frequent prolonged seizures, requiring emergency administration of anti-convulsants.

[N.J.A.C. 10:60-5.4(b)]

Once medical necessity for PDN has been established, the following situational criteria are applied when determining the extent of the need for PDN services and the authorized hours of service:

1. Available primary care provider support;

i. Determining the level of support should take into account any additional work related or sibling care responsibilities, as well as increased physical or mental demands related to the care of the beneficiary;

2. Additional adult care support within the household; and

3. Alternative sources of nursing care.

[N.J.A.C. 10:60-5.4(c).]

Here it is undisputed that petitioner has multiple, significant medical conditions that previously warranted the authorization of PDN services for sixteen hours per day, seven days per week since at least 2019. Respondent is seeking to reduce the PDN hours for petitioner from sixteen hours per day to ten hours per day to allow for PDN services for the entirety of the overnight feeding. The number of hours of PDN must

match the amount of skilled nursing care tasks petitioner needs performed by a nurse.

By all accounts, petitioner is progressing positively, no longer requiring a colostomy or NG tube. He currently attends school where the school provides nursing care during school hours. He still requires a ten-hour continuous g-tube feeding overnight with aspiration precautions in place, assistance with ambulating, and assistance with toileting and diapering. There was a lack of testimony on petitioner's behalf as to what other "skilled nursing care" was required. The testimony presented revolved around tasks that a trained caregiver can provide. Specifically, petitioner is not on mechanical ventilation, does not have a tracheostomy, does not have a need for deep suctioning, does not currently receive around-the-clock nebulizer treatments with chest physiotherapy, does not suffer from a seizure disorder or require emergency administration of anti-convulsants, does not require routine blood draws, infusions, or intravenous care, does not require skilled wound care, and no longer has an NG tube or colostomy.

While respondent testified that petitioner's situational criteria was considered in coming to its conclusion to reduce PDN hours to petitioner, such consideration is not reflected on the PDN Acuity Tool and Schmidt's testimony did not explain how the situational criteria was taken into account in the analysis. Respondent relied heavily on S.S. providing care to petitioner, especially with her being a certified LPN and respiratory therapist. While S.S. certainly has more than adequate qualifications to care for petitioner, she is the sole wage earner in the household as her husband is disabled. She works five to seven days a week, ten to twelve hours per day. She also has to care for two additional minor children. S.S.'s husband is not a trained caregiver for petitioner and cannot be a trained caregiver due to his disabilities. Currently there are no other trained caregivers for petitioner in or outside the household. However, even after taking the petitioner's social situation into account, such consideration does not demonstrate the need for sixteen hours of PDN services per day, rather petitioner's additional care needs can be properly provided by a trained caregiver. Therefore, I **CONCLUDE** that respondent's decision to reduce PDN services from sixteen hours per day, seven days per week, to ten hours per day, seven days per week is **AFFIRMED.**

ORDER

It is **ORDERED** that respondent's determination to reduce petitioner's PDN hours from sixteen hours per day, seven days per week, to ten hours per day, seven days per week per week is **AFFIRMED.** Petitioner's appeal is **DISMISSED.**

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 26, 2024

DATE **REBECCA C. LAFFERTY,** ALJ

Date Received at Agency:

Date Mailed to Parties:

RCL/tat

APPENDIX

WITNESSES

For petitioner:

S.S.

Dr. Mary Mathew, Williamstown Pediatric Practice

Florette Stewart, RN

Natalie Hall, RN, Director of Nursing, Star Pediatric Home Care Agency

For respondent:

Kimberly Schmidt, RN, Utilization Management Reviewer, Horizon

EXHIBITS

For petitioner:

None

For respondent:

R-1 Correspondence from Horizon NJ Health, dated August 17, 2023

R- 2 Peer Rev.ew Report from MES Peer Review Services, dated September 5, 2023

R-3 Correspondence from Horizon NJ Health, dated September 8, 2023

R-4 Correspondence from Maximus Federal Services, Inc., dated September 20, 2023

R-5 Authorization Case Summary Report

R-6 PDN Acuity Tool

R-7 Letters of Medical Necessity

R-8 Horizon Blue Cross Blue Shield of New Jersey Manual Section 31C.096 – Private Duty Nursing

R-9 Home Health Certification and Plan of Care, dated June 4, 2019

R-10 Letter of Medical Necessity from Children's Hospital of Philadelphia, dated August 20, 2019

R-11 Horizon NJ Health Private Duty Nursing (PDN) Extended Authorization Request for April 29, 2019 to July 27, 2019

R-12 Home Health Certification and Plan of Care, dated August 4, 2023

R-13 Letter of Medical Necessity from Children's Hospital of Philadelphia, dated August 2, 2023

R-14 Letter of Medical Necessity from Williamstown Pediatric Practice, dated August 15, 2023

R-15 Correspondence from Williamstown Pediatric Practice, dated August 24, 2023

R-16 Correspondence/visit note from Urology for Children, dated February 16, 2023

R-17 Nursing notes from Star Pediatrics for the period July 31, 2023, through August 14, 2023

R-18 PDN Acuity Tool, dated August 28, 2019

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

Z.A.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
UNITEDHEALTHCARE,	:	**OAL DKT. NO. HMA 11393-23**
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this matter, consisting of the Initial Decision, the documents in evidence and the contents of the Office of Administrative Law (OAL) case file. Neither party filed exceptions to the Initial Decision. Procedurally, the time period for the Agency Head to render a Final Agency Decision is May 28, 2024, in accordance with an Order of Extension.

This matter arises from **UnitedHealthcare's** (UHC) September 20, 2023, rejection of **Petitioner's** request to be provided Private Duty Nursing (PDN) services twelve hours per weekday and seven hours per weekend day. UHC approved nine hours per weekday and denied the request for the weekend hours. Based upon my review of the record, I hereby ADOPT the Initial Decision which reversed **UHC's decision denying the additional**

three hours of PDN services during weekdays and seven hours during weekend days and directed UHC to reevaluate Petitioner's eligibility for those services.

Petitioner is a 14-year-old child who is diagnosed with Lennox-Gastaut syndrome, Knobloch syndrome, attention deficit hyperactivity disorder, autism, polymicrogyria, and seizure activity. ID at 2-3. Under the program, children under the age of 21 years old are eligible to receive any medically necessary service, including PDN. Licensed nurses, employed by a licensed agency or healthcare services firm approved by Division of Medical Assistance and Health Services, may provide PDN services in the home to beneficiaries receiving managed long-term support services (MLTSS) and Early and Periodic Screening, Diagnostic, and Treatment services (EPSDT) beneficiaries. N.J.A.C. 10:60-1.2, N.J.A.C. 10:60-5.1(a),(b).

PDN services are defined as "individual and continuous nursing care, as different from part time or intermittent care, provided by licensed nurses in the home. . ." N.J.A.C. 10:60-1.2. To be considered in need of EPSDT/PDN services, "an individual must exhibit a severity of illness that requires complex intervention by licensed nursing personnel." N.J.A.C. 10:60-5.3(b). "Complex" means the degree of difficulty and/or intensity of treatment/procedures." N.J.A.C. 10:60-5.3(b)(2). "Ongoing" is defined as "the beneficiary needs skilled nursing intervention 24 hours per day/seven days per week." N.J.A.C. 10:60-5.3(b)(1). The regulations define "skilled nursing interventions" as "procedures that require the knowledge and experience of licensed nursing personnel, or a trained primary caregiver." N.J.A.C. 10:60-5.3(b)(3).

Patient observation and monitoring alone do not qualify for this type of care. N.J.A.C. 10:60-5.4(d). However, the regulations addressing the medical necessity for private duty nursing services state that patient observation, monitoring, recording and assessment may constitute a need for private duty nursing services provided that the

beneficiary is ventilator dependent, has an active tracheostomy and needs deep suctioning. N.J.A.C. 10:60-5.4(b)(1). Medical necessity may also be established if the individual needs around-the-clock nebulizer treatments, with chest physiotherapy; gastrostomy feeding when complicated by frequent regurgitation and/or aspiration; or a seizure disorder manifested by frequent prolonged seizures, requiring emergency administration of anti-convulsants. N.J.A.C. 10:60-5.4(b)(2). However, private duty nursing cannot be used purely for monitoring in the absence of a qualifying medical need.

Once medical necessity for PDN services has been established, the following criteria are applied when determining the extent of the need for PDN services and the authorized hours of service:

1. Available primary care provider support
    a. Determining the level of support should take into account any additional work related or sibling care responsibilities, as well as increased physical or mental demands related to the care of the beneficiary
2. Additional adult care support within the household, and
3. Alternative sources of nursing care

N.J.A.C. 10:60-5.4(c)

Dr. Sorrentino, who specializes in newborn intensive care and pediatrics, testified for UHC. ID at 5. Dr. Sorrentino testified that although Petitioner has daily seizures, they are brief, not prolonged or continuous, do not occur in clusters, and do not require recovery medications. Ibid. Dr. Sorrentino also found it relevant that there was no record of emergency room visits for acute seizure activity and there were no recent hospitalizations. Ibid. Dr. Sorrentino testified that Petitioner's family members were able to care for him but that he was not aware that another child in the household also received PDN services for similar medical needs. Ibid.

Petitioner's father, S.A., testified that Petitioner's doctor prescribed VNS, which is a super magnet that is swiped over Z.A.'s pacemaker, to help him breathe. ID at 5-6. If the VNS does not work, Nayzilam medication is sprayed into his nose to stop the seizure. ID at 6. S.A. testified that as a result of some seizures, Petitioner has fallen and hit his face on the ground, knocked out teeth, and he almost lost an eye. Ibid. S.A. testified that in mid-December 2023, he notified the doctor that Petitioner was having cluster seizures daily and around 15 seizures throughout the day at that time, requiring the use of both the VNS and Nayzilam. Ibid. S.A. also testified that they have been directed by the doctor to not rush Petitioner to the emergency room. ID at 7. During the hearing, S.A. produced a January 16, 2024, letter from Dr. Bergqvist which stated that Dr. Bergqvist's team strives to keep Petitioner out of the emergency room to avoid hospital-associated complications and to reduce costs. Ibid. It went on to say that ER staff do not have the expertise to manage Petitioner's day-to-day epilepsy symptoms. Ibid. S.A. explained the situation in their home and stated that since Petitioner's younger brother has almost the same disorders, the children's needs cause the conditions at home to be "total chaos." Ibid.

Lastly, Ms. Hall, R.N., who is the Director of Nursing for the company which provides PDN services for Petitioner, testified that because Petitioner drops when having seizures, Petitioner can, and has, sustained physical injuries. ID at 8. Additionally, due to both children having developmental and behavioral disabilities, they engage in self-harm. Ibid. Ms. Hall testified that it is very challenging for Petitioner's mother to continuously monitor and assess both children. Ibid.

The Administrative Law Judge (ALJ) found that Petitioner is dependent upon a VNS and an anti-convulsion drug to control Petitioner's cluster seizures, which are unrelenting and recurring. ID at 13. The ALJ also found that there was no evidence in the record that UHC considered the impact of Petitioner's brother and his care needs

upon Petitioner's mother's ability to provide care. Ibid. The Initial Decision went on to state that Dr. Sorrentino acknowledged that he was not aware of the other child's medical needs and their impact upon Petitioner's mother's ability to care for Petitioner. Ibid. The regulation requires careful consideration of this information to determine the appropriate number of PDN hours and appropriate services. Ibid. Therefore, the Initial Decision ordered that the decision of UHC denying the three additional hours of PDN services during weekdays and seven hours during weekend days was reversed and that UHC must reevaluate Petitioner's eligibility after conducting a thorough assessment of Petitioner's mother's ability to care for both children. Ibid.

Less than two weeks after the Initial Decision was provided to UHC, counsel for Respondent submitted a letter to the Division of Medical Assistance and Health Services stating that UHC reassessed Petitioner and that Petitioner had been approved for 56 hours of PDN hours (eight hours per day, seven days a week). The letter stated that the assessment considered the Petitioner's primary care provider's ability to care for the Petitioner and Petitioner's brother, in accordance with the Initial Decision.

It is clear that N.J.A.C. 10:60-5.4(c) required UHC to take into account any sibling care responsibilities when evaluating the amount of support the primary care provider is able to provide. Dr. Sorrentino testified that he was not aware Petitioner had a sibling with similar medical needs and the impact it had upon the primary care provider's ability to care for Petitioner. Therefore, UHC failed to properly evaluate Petitioner's request to be provided Private Duty Nursing services twelve hours per weekday and seven hours per weekend day.

Accordingly, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision and FIND that reversing UHC's decision to deny the requested hours and ordering UHC to reevaluate Petitioner's eligibility for the

requested hours was appropriate. As it appears UHC has already reassessed Petitioner in accordance with the Initial Decision, UHC shall formally inform Petitioner of UHC's decision to approve 56 hours of PDN services per week so that Petitioner is afforded their appeal rights.

THEREFORE, it is on this 24th day of MAY 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED and UHC shall assess Petitioner's current condition within four weeks of this decision to determine Petitioner's present medical necessity for PDN services.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

3 OAL DKT. NO. HMA 1139

Agency Final Decision3-23

AGENCY DKT. NO. N/A

Z.A.,

Petitioner,

v.

UNITEDHEALTHCARE,

Respondent.

S.A., for petitioner, pursuant to N.J.A.C. 1:10-5.1

Evelyn Devine, Esq., for respondent (Devine Timoney Law Group, attorneys)

Record Closed: February 6, 2024 **Decided:**3 February 26, 2024

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner Z.A. is a minor who receives in-home private duty nursing (PDN) services. His parents, on his behalf, requested approval of PDN services to be provided twelve hours per weekday and seven hours per weekend day. Respondent UnitedHealthcare (UH) approved only nine hours per weekday and denied the request for PDN services during weekend days. Petitioner seeks three additional hours of PDN services per weekday and seven hours per weekend day.

PROCEDURAL HISTORY

UnitedHealthcare notified petitioner of its decision on September 20, 2023, and petitioner filed a timely appeal. The Division of Medical Assistance and Health Services (DMAHS) transmitted this matter to the Office of Administrative Law, where it was filed on October 26, 2023, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A telephonic hearing was conducted on January 16, 2024, and the record remained open until February 6, 2024, to permit petitioner to supplement the record. The record closed February 6, 2024.

FACTUAL DISCUSSION

The following, taken from testimony and the documentary evidence, is undisputed.

On behalf of petitioner Z.A., his father S.A. requested approval of PDN services to be provided twelve hours per weekday and seven hours per weekend day. UH approved only nine hours per weekday and denied the request for PDN services during weekend days. UH determined that Z.A.'s needs could be met with PDN services nine hours per day, five days per week, while he is in school. R-5 at UHC077.[1] This decision was based on UH's findings that Z.A. does not need mechanical support to breathe or supplemental oxygen and that he tolerates oral feedings well. Although his seizures occur daily, they are brief, and rescue medications are not required. Ibid.

Z.A. is fourteen years old and has several diagnoses: Lennox-Gastaut syndrome,[2] Knobloch syndrome,[3] attention deficit hyperactivity disorder, autism, polymicrogyria, and seizure activity. R-7 at UHC094. "Current issues/complaints/symptoms" are identified on UH records as seizure activity, behavioral disturbance secondary to autism, and impaired vision affecting the right eye "secondary to [history] of detached retina."[4] Ibid. A "seizure log" recorded that he had seizures five times in July 2023. Two occurred on the same day. Their duration was from twelve to thirty-three seconds. R-8 at UHC139.

3 An August 10, 2023, nursing assessment noted, "For seizures lasting [more than] 30 seconds or clusters of infantile spasms [more than] 20 minutes, hold VNS [vagus nerve stimulator] magnet over VNS site for 2 seconds and then swipe downwards. This may be performed a maximum of 3 times per minute. There are currently no restrictions on how many times the VNS may be used each day." R-8 at UHC130. For seizures lasting longer than "5 minutes or any cluster seizure [more than] 10 minutes, Nayzilam[5] is administered nasally." Id. at UHC135. Additional instructions addressed procedures if Z.A. were "still seizing 10 minutes later." Ibid. The nurse who was "present at [child's] side to care for all [his] medical needs"

reported five seizures "so far this month during nursing hours, with three requiring the use of the magnet. Nurse and mom deny the use of Nayzilam within the past month." Ibid.

3 The August 10, 2023, nursing assessment noted that Z.A. is at risk for an injury due to "unsteady gait and [history] of seizures and right eye blindness. His wheelchair or Rifton chair seatbelt is secured [ ] and brakes are used during transfers which are usually done by two people. [He] has a gait belt and a helmet for use when he ambulates. A neck pillow and desk pillow are used when he is s[e]ated doing schoolwork to prevent head injury during drop seizures. Nurse Fay and mom denies [sic] any injury this month." Ibid.

Dr. David Sorrentino, UH's medical director, made the initial decision regarding Z.A.'s eligibility for PDN services. He noted that Z.A. attended school during weekdays and a person who was authorized to provide skilled nursing care was present during school hours. Any medical needs that Z.A. might have during the school day would thus be addressed by this person. The record that he reviewed did not indicate that a parent or other person was unavailable to assist the child at home. R-5 at UHC077.

Maximus, an independent entity, reviewed UH's determination and found that the additional hours requested by petitioner were "not medically necessary because the requested hours are in excess of [Z.A.'s] skilled care needs." R-3 at UHC015. Maximus noted in its October 24, 2023, determination letter that Z.A. requires internasal medication for seizures lasting more than five minutes or for a cluster of seizures lasting longer than ten minutes. However, he had not required this in the two months preceding the determination letter. Maximus also wrote that Z.A. "has not had any hospitalizations or emergency department visits in the past two months, and he eats a ketogenic diet by mouth." Id. at UHC018. Also, his "seizures are intractable and will occur in the presence or absence of private duty nursing." Ibid. Z.A. "resides with trained personal caregivers who can monitor for breakthrough seizures, apply his [VNS,] administer his oral medications, and attend to his ADLs that do not require skilled private nursing to accomplish." Ibid.

Maximus found "there is no evidence to support improved clinical outcomes with shift private duty nursing in the home compared to parental caregiver care in children with refectory epilepsy and vagal nerve stimulators." Id. at UHC018. There is "no evidence in the medical literature reviewed that demonstrates improved clinical outcome in complex chronic conditions or epilepsy with private duty skilled shift nursing in the home. . . . [T]he approved 9 hours per day, 5 days per week of private duty nursing are sufficient to facilitate [Z.A.'s] school attendance[6] and the additional hours requested are not medically necessary." Ibid.

For respondent:

Dr. David Sorrentino specializes in newborn intensive care and pediatrics. He explained that in making decisions concerning provision of PDN services, he considers the patient's medical history and information provided by medical care providers, including the nurses who work in the home, case managers' assessments, as well as social needs that impact the family's ability to care for the patient.

Under the controlling regulations, for PDN services to be approved, seizures must be frequent, persistent, clustered, and prolonged, and rescue medications must also be required. While Z.A. has daily seizures, they are brief, not prolonged or continuous, do not occur in clusters, and do not require recovery medications. Also, Z.A. does not require the other medical interventions that are prerequisites to PDN services, such as use of mechanical support or a nebulizer to breathe, oxygen monitoring, or tube feedings. It was also relevant that there was no record of emergency room visits for acute seizure activity and there were no recent hospitalizations. The majority of his needs could be provided by a home health aide, not a skilled nurse.

Dr. Sorrentino highlighted that Z.A.'s family members are able to care for him. He was not aware that another child in the household received PDN services for similar medical needs.

For petitioner:

S.A., Z.A.'s father, provided an explanation about Z.A.'s condition from Z.A.'s doctor, Christina Bergqvist, M.D., of CHOP's Division of Neurology, Pediatric Regional Epilepsy Program/Ketogenic Diet Program. Dr. Bergqvist wrote, "[Z.A.] has chronic static encephalopathy secondary to diffuse brain malformation resulting in Lennox-Gastaut syndrome and intellectual disability, autism spectrum disorder and treatment-resistant epilepsy. Children with Lennox-Gastaut syndrome have daily seizures. They do not become seizure free." P-3 at 2. The doctor prescribed VNS, a super magnet that is swiped over Z.A.'s pacemaker, to help him breathe. If VNS does not work, Nayzilam medication is sprayed into his nose to stop the seizure.

It is impossible to anticipate when a seizure will occur. Z.A. has cluster seizures, which are worse when he is ill. They have occurred off and on, in five minute "spurts," for hours over a period of a week. Drop seizures are dangerous. Z.A. has fallen and hit his face on the ground. He has also knocked out his teeth, and he almost lost an eye.

S.A. provided an example of Z.A.'s seizures. He wrote the following to Z.A.'s doctor on December 13, 2023: "[Z.A.] started having cluster seizures yesterday morning. The VNS was not effective so we administered Nayzilam and kept him home from school. This morning around the same time, 5[:00] a.m., he had a cluster of seizures, VNS, and Nayzilam. The seizures are short 1 second but kept coming. He unfortunately goes through this every winter." P-2 at 1. He added, "Morning seizure clusters don't stop until I give him Nayzilam. I give him Nayzilam after half hour and seizures slow down and stop after 15 minutes. He still has around 15 seizures through the day." Id. at 2. S.A. noted that the VNS is used after the first seizure and again ten minutes later. Nayzilam is administered after a half hour. Ibid.

Dr. Bergqvist explained the "VNS protocol for seizures" in a report following her September 8, 2023, evaluation of Z.A.:

> 1. As soon as the seizure starts, place the magnet over the generator in the left chest area and hold it in place for 2-3 seconds. Remove the magnet from the chest and this will trigger an extra burst of stimulation that will last 60 seconds.
>
> 2. If the seizure continues for a full minute, you may use the magnet again using the same technique to send an additional 60 seconds of stimulation. If the seizure persists, you may repeat the process a third time so that 3 swipes of the magnet are performed, each 60 seconds apart.
>
> 3. For uncomfortable or painful stimulation[,] place the magnet over the generator in the left chest area. Tape the magnet to the chest and contact our office.
>
> [P-1.]

S.A. and Z.A.'s mother N.A. have been directed to not rush Z.A. to the emergency room. S.A. produced a January 16, 2024, letter from Dr. Bergqvist in which she further explained the treatment protocol:

> Our goal is to minimize seizures and minimize side effects from the treatments. [Z.A.] has failed numerous medications and is currently treated with multiple medications, a VNS device and the ketogenic diet. His seizures are managed by myself (Dr. Berggvist, his epileptologist) and the ketogenic diet team at CHOP via frequent visits to our outpatient clinic, MyCHOP messaging, and phone calls for urgent matters.
>
> When [Z.A.'s] parents contact us, his seizure activity symptoms are triaged and responded to by his care team of nurses, the ketogenic diet team, and myself and/or another provider who are experts in his condition. If his seizures are increasing to the point of concern of status epilepticus, [Z.A.'s] parents have directions to administer his rescue medication and present to the emergency department if there is no response to the treatment. This is the standard of care as stipulated by the International League Against Epilepsy for children with treatment-resistant epilepsy.
>
> We strive to keep [Z.A.] out of the emergency room to avoid hospital-associated complications and reduce costs. Furthermore, while ER staff are well-equipped to handle acute seizure emergencies such as status epilepticus, they do not have the expertise to manage his day-to-day epilepsy symptoms. That being said, an increase in [Z.A.'s] seizures are preferably and effectively managed via outpatient clinic visits, MyCHOP messaging, and or phone calls.
>
> [P-3 at 2.]

S.A. works during the day. N.A.'s ability to care for Z.A. at home is complicated by the needs of Z.A.'s younger brother, who has almost the same disorder as Z.A.[7] A private duty nurse from a different provider helps care for the younger brother. N.A. cannot safely care for the two children, as their needs cause the conditions at home to be "total chaos." The boys' health has declined; they no longer walk; they fall out of chairs; and Z.A. is uncooperative and combative. Both children vomit regularly, fight about the food they will eat, defecate when they have seizures, and sometimes refuse their medications. N.A.'s inability to properly care for both boys has led to emergencies, as they have fallen and needed stitches. The nurse helps keep the child from standing and helps prevent falls while he uses the bathroom. Injuries are more likely to occur without a nurse present.

Natalie Hall, R.N. is the Director of Nursing for Starr Pediatrics, which provides PDN services for Z.A. Because Z.A. is non-verbal, he must be continuously monitored to ascertain if he is about to have a seizure and take appropriate protective steps in advance of a seizure. Because Z.A. drops rather than remains in place when he seizes, he can sustain physical injuries. Thus, his physical condition must be assessed and any injuries must be addressed. Also, both boys have developmental and behavioral disabilities and they engage in self-harm. It is very challenging for N.A. to continuously monitor and assess both boys.

A Home Health Certification and Plan of Care signed by Hall on August 17, 2023, reports that Z.A. is at risk for injury due to drop seizures and impaired sight in the right eye. R-8 at UHC117. He lost sight in his right eye due to an injury from a drop seizure. Id. at UHC118.

At the close of her testimony, Hall stated that she would provide a log of Z.A.'s seizures. The log reports multiple seizures per day during nineteen days in December 2023.[8] P-4. For example, on December 1, 2023, Z.A. had three seizures lasting ten, ten, and nine seconds. The log indicates that the VNS and nasal spray medication were used each time. On December 8, 2023, he had four seizures, one of which lasted one minute, thirty-four seconds. The VNS was swiped twice and the nasal spray was used. On December 11, 2023, he had fifteen seizures, most of which lasted one second. He had eighteen seizures on December 12, 2023; most were one second long while one was twenty-one seconds. He had thirteen seizures on December 20, 2023. Ibid.

ADDITIONAL FINDINGS

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

S.A. testified credibly. He is clearly extremely concerned about the health and welfare of his son. His testimony about his son's condition, treatment protocol, and the doctor's direction that they avoid emergency room visits was corroborated by the doctor's reports.[9] Also, UH medical records identify protocols for Z.A.'s cluster seizures, and thus corroborate S.A.'s testimony in this regard. The nursing assessment corroborated that the seizures can last for multiple minutes, individually or in clusters, and that the rescue medication is to be used after a specified period of time. S.A. also credibly described the circumstances in his household. With two children suffering from the same conditions, it is extremely difficult for N.A. to properly monitor and respond to both their needs. Nurse Hall credibly corroborated that it is extremely difficult to adequately monitor and respond to the boys' medical needs and

420 that they are at risk of significant injury when they have seizures. A UH nursing assessment corroborated that Z.A. is at risk of injury.

Dr. Sorrentino credibly testified that he relied upon the information that was available to him. He candidly acknowledged that he did not know that another child in the home suffered from a similar condition.

Having considered the testimony and documentary evidence and the credibility of the witnesses, I **FIND** the following as **FACT**. Z.A. suffers from cluster seizures for which his doctor prescribed a VNS device and rescue medication. The medical documentation produced by UH and Z.A.'s doctor indicates that the seizures can be expected to persist and that the responses—VNS and rescue medication—are linked to the amount of time that has passed. Z.A.'s seizures can cause him to fall; he sustained a serious injury while falling during a seizure. Z.A.'s doctor discouraged emergency room visits and detailed the protocol his parents are to utilize in lieu of and prior to any such visits.

I also **FIND** as **FACT** that Z.A.'s mother must also care for his brother, who has similar medical conditions, at the same time she cares for Z.A. The boys present the same concerns, including but not limited to a seizure disorder and risk of injury during seizures, and behavioral disabilities. In evaluating Z.A.'s application for PDN services, UH and Maximus did not consider this information. Rather, they cited N.A.'s ability to care for Z.A. as support for their determination. Further, while they cited the absence of emergency room visits, Z.A.'s doctor directed his parents to address emergencies in other ways.

LEGAL DISCUSSION AND CONCLUSION

The Medicaid program is a cooperative Federal-State venture established as Title XIX of the Social Security Act. 42 U.S.C. §1396, et seq. Eligibility for Medicaid is governed by regulations adopted in accordance with the authority granted to the Division of Medical Assistance and Health Services (DMAHS) and the Commissioner of the Department of Human Services. N.J.S.A. 30:4D-7. The DMAHS and Commissioner are required to establish a policy and procedures for the Medicaid application process and shall supervise the operation of, and compliance with, the policy and procedures. N.J.A.C. 10:71-2.2(b).

Home care services are administered to individuals who are determined to be eligible for such programs. N.J.A.C. 10:60-1.1(a). PDN services are a form of home care services provided to beneficiaries under the age of twenty-one, who live in the community, and whose medical condition and treatment plan justify the need for such services. N.J.A.C. 10:60-1.1(b)(3); 10:60-1.2. PDN means "individual and continuous nursing care, as different from part-time or intermittent care, provided by licensed nurses in the home to beneficiaries . . ." under certain Medicaid programs. N.J.A.C. 10:60-1.2; N.J.A.C. 10:60-5.1(b).

Individuals who are under the age of twenty-one, who are enrolled members in an NJ Family Care program, and who require PDN services which can be provided at home may be referred for PDN services through their managed care organization, such as UH. N.J.A.C. 10:60-5.3(a). The regulations specify the requirements for an individual to be eligible for PDN: The individual must exhibit a severity of illness that requires complex skilled nursing interventions on an ongoing basis, which is outlined as:

1. "Ongoing" means that the beneficiary needs skilled nursing intervention 24 hours per day/seven days per week.

2. "Complexity" means the degree of difficulty and/or intensity of treatment/procedures.

3. "Skilled nursing interventions" means procedures that require the knowledge and experience of licensed nursing personnel, or a trained primary caregiver.

[N.J.A.C. 10:60-5.3(b).]

The coverage of PDN services is appropriate only when further requirements are satisfied. N.J.A.C. 10:60-5.3(c). The limits, duration, and setting of PDN is set forth as follows:

1. Private duty nursing shall be provided for eligible FFS beneficiaries in the community only and not in hospital inpatient or nursing facility settings.

2. DMAHS shall determine and approve the total PDN hours for reimbursement, in accordance with N.J.A.C. 10:60-5.2(b).

3. The determination of the total EPSDT/PDN hours approved shall take into account the primary caretaker's ability to provide care, as well as alternative sources of PDN care available to the caregiver, such as medical day care or a school program.

4. In emergency situations, for example, when the sole caregiver has been hospitalized, DMAHS may authorize, for a limited time, additional hours beyond the authorized amount.

5. DMAHS may also approve, for a limited time, additional hours when a change in the child's medical condition requires additional training for the primary caregiver to address changes in the care needs of the beneficiary.

[N.J.A.C. 10:60-5.4(a).]

The medical necessity for PDN services shall be based upon, but may not be limited to, the following criteria:

1. A requirement for all of the following medical interventions:

i. Dependence on mechanical ventilation;

ii. The presence of an active tracheostomy; and

iii. The need for deep suctioning; or

2. A requirement for any of the following medical interventions:

i. The need for around-the-clock nebulizer treatments, with chest physiotherapy;

ii. Gastrostomy feeding when complicated by frequent regurgitation and/or aspiration; or

iii. A seizure disorder manifested by frequent prolonged seizures, requiring emergency administration of anti-convulsants.

[N.J.A.C. 10:60-5.4(b)]

Once medical necessity for PDN has been established, the following criteria are applied when determining the extent of the need for PDN services and the authorized hours of service:

1. Available primary care provider support;

i. Determining the level of support should take into account any additional work related or sibling care responsibilities, as well as increased physical or mental demands related to the care of the beneficiary;

2. Additional adult care support within the household; and

3. Alternative sources of nursing care.

[N.J.A.C. 10:60-5.4(c).]

Here, Z.A. is dependent upon a VNS and an anti-convulsant drug to control his cluster seizures, which are unrelenting and recurring. UH and Maximus determined that additional hours of PDN assistance are unnecessary because Z.A.'s mother is able to provide the care he needs. However, there is no evidence in the record that they considered the impact of Z.A.'s brother and his care needs upon his mother's ability to provide this care. Indeed, Dr. Sorrentino acknowledged that he was not aware of the other child's medical needs and their impact upon his mother's ability to care for Z.A. The undisputed evidence in the record indicates that it is extremely difficult to care for both children and that the younger brother's medical needs cause the mother to be pulled away from Z.A. The regulation requires careful consideration of this information to determine the appropriate number of PDN hours and appropriate services. Given the absence of this analysis, I **CONCLUDE** that UH's determination is unsupported by the evidence in the record.

ORDER

It is therefore **ORDERED** that the decision of UnitedHealthcare denying three hours of PDN services during weekdays and seven hours during weekend days is **REVERSED.** UH is directed to reevaluate Z.A.'s eligibility for these services after having conducted a thorough assessment of N.A.'s ability to care for both children.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

424 This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty□five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B□10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked “Attention: Exceptions.” A copy of any exceptions must be sent to the Judge and to the other parties.

February 26, 2024

DATE **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: 3 February 26, 2024

Date Mailed to Parties: 3 February 26, 2024

APPENDIX

List of Witnesses

For petitioner:

S.A.

Natalie Hall, R.N.

For respondent:

David Sorrentino, M.D.

List of Exhibits

For petitioner:

P-1 CHOP Ketogenic Team Follow-Up Evaluation report

P-2 Messages between S.A. and CHOP staff, December 13, 2023, through December 14, 2023

P- 3 January 16, 2024, letter from Christina Bergqvist, M.D.

P-4 Seizure log, December 2023

For respondent:

R-1 Hearing notice

R-2 Hearing request

R-3 External appeal documents

R-4 Internal appeal documents

R-5 Initial denial letter

R-6 ICUE notes

R-7 Assessments

R-8 Clinical records

R-9 Regulations, forms, policies

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[1] UH also approved seven hours per weekend day from September 9, 2023, through October 4, 2023. Ibid.

2 Lennox-Gastaut syndrome is a type of childhood epilepsy that “causes multiple types of seizures that can lead to permanent brain damage. That damage often results in learning difficulties and other disabilities. Possible treatments include medication, implanted devices, ketogenic diet and brain surgery.” Lennox-Gastaut Syndrome (LGS): Symptoms & Treatment (clevelandclinic.org) (last visited February 22, 2024). It is “a particularly severe type of epilepsy” because it causes multiple types of seizures, some of which are “more likely to cause severe injuries.” Ibid. It “very commonly causes severe brain damage, leading to learning difficulties and developmental setbacks. That means children with this condition may permanently lose part or all of some abilities they’d already learned, such as walking or talking.” Ibid. It is “rare that medications alone can completely stop seizures.” Ibid.

3 “Knobloch syndrome is characterized by severe vision problems and skull defects. The most common features include extreme nearsightedness (high myopia), recurrent retinal detachment, and occipital encephalocele.” Knobloch syndrome – About the Disease – Genetic and Rare Diseases Information Center (nih.gov) (last visited February 22, 2024).

4 These diagnoses are listed in a September 12, 2023, assessment. R-7 at UHC094. An August 10, 2023, “Pediatric Skilled Assessment Form” lists a primary diagnosis of epilepsy and “other diagnoses” of “other reduction deformities of the brain; other encephalopathy; moderate intellectual disabilities; Autism Spectrum Disorder; Lennox-Gestaut syndrome; Restlessness and agitation; [and] blindness-right eye category 3.” R-8 at UHC122.

[5] Nayzilam nasal spray “is a prescription medicine used for the short-term treatment of seizure clusters (also known as acute repetitive seizures) in patients 12 years of age and older.” What Is NAYZILAM® (midazolam) nasal spray, CIV? (last visited February 22, 2024). It is categorized as an anti-convulsant. Nayzilam: Seizure Medication Uses, Side Effects, Dosage (medicinenet.com) (last visited February 22, 2024).

6 Z.A. "might require a nurse to administer his [VNS] or rescue medication." Id. at UHC018.

7 An assessment report by UH indicates the younger brother “also has disabilities to include Lennox-Gastaut Syndrome, Convulsive Status Epilepsy secondary to Knobloch Syndrome r/t gene mutation Dysphagia, Abnormal weight loss [with] feeding difficulties.” R-7 at UHC096.

[8] The log contains no entries for weekend days, Christmas Day, or New Years' Eve. Of the remaining days, Z.A. had no seizures on December 4, 2023. He had multiple seizures each of the other recorded days.

9 Medical records are hearsay but may be admissible as business records unless they contain findings that involve diagnosis of complex medical conditions when the diagnosis is in issue. Nowacki v. Comty. Med. Ctr., 279 N.J. Super. 276, 282–283 (App. Div. 1995), certif. denied 141 N.J. 95 (1995). Here, Z.A.'s diagnosis is not at issue. See also N.J.R.E. 803(c)(6).

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Governor

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Lt. Governor

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DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
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SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

M.S.M.,

PETITIONER,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND UNITED HEALTHCARE,

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 01341-23

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the OAL case file, the documents in evidence and the Initial Decision in this matter. As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the Office of Administrative Law (OAL) case file, and the documents filed below. Petitioner filed exceptions in the Initial Decision. Procedurally, the time period for the Agency Head

to render a Final Agency Decision is March 11, 2024 in accordance with an Order of Extension.

The matter concerns United Healthcare's (United) November 21, 2022 denial of a request for an increase in Petitioner's private duty nursing (PDN) hours. Petitioner previously received PDN services sixteen hours per day, seven days per week. In 2022, United reduced Petitioner's PDN services to sixteen hours per day Monday to Friday, and eight hours per night on Saturday and Sunday. (J-1). Petitioner appealed United's reduction of PDN hours. (R-13). In the Final Decision dated September 13, 2022, the DMAHS adopted the Initial Decision upholding United Healthcare's reduction of PDN hours. The Final Decision found that the reduction of PDN services was appropriate under N.J.A.C. 10:60-5.4. Id. Thereafter, in November 2022, Petitioner's mother again requested an increase in PDN hours to sixteen hours per day from 6a.m.-10 p.m., seven days per week, or an additional 8 hours of PDN hours on weekends, which Respondent denied on November 21, 2022. (R1-5, at 1). The denial was upheld by internal and external reviews dated December 23, 2022, and January 20, 2023. (R1-3; R1-4). Petitioner's internal and external appeals were denied as not medically necessary, and because Petitioner's family is available to assist him. (R1-4, R1-3). Thereafter, a subsequent reassessment was performed in June 2023 again approving 16 hours per day Monday through Friday and 8 hours per night on weekends. (R3-3).

After concluding internal and external administrative review, this matter was transmitted to the Office of Administrative Law (OAL) on February 14, 2023. The matter was heard remotely on April 17, June 21, June 22, June 26, and June 27, 2023. The record was closed on September 18, 2023, and the OAL issued an Initial Decision on December 11, 2023. The Administrative Law Judge (ALJ) reviewed all of the medical evidence provided during the fair hearing and listened to the testimony of Petitioner's four

fact witnesses and Respondent's expert witness. The ALJ determined that no medical necessity was shown to warrant an increase in PDN hours. The ALJ also determined that Petitioner does not meet either test to justify the transfer of his daily overnight PDN services to daytime hours, along with an additional eight daytime weekend hours. Those hours can be and are now supplied by Petitioner's primary caregivers. PDN services cannot include respite or supervision, or serve as a substitute for routine parenting tasks, N.J.A.C. 10:60-5.4(f), and Petitioner has not proved any work-related or sibling care responsibilities which might preclude his mother performing her primary caregiver responsibilities during the hours in question. Based upon my review of the record, I hereby ADOPT the Initial Decision affirming United's decision not to increase Petitioner's PDN hours.

Private duty nursing services are defined as "individual and continuous nursing care, as different from part- time or intermittent care, provided by licensed nurses in the home. . ." N.J.A.C. 10:60-1.2. To be considered in need of EPSDT/PDN services, "an individual must exhibit a severity of illness that requires complex intervention by licensed nursing personnel." N.J.A.C. 10:60-5.3(b). "Complex" means the degree of difficulty and/or intensity of treatment/procedures." N.J.A.C. 10:60-5.3(b)(2). "Ongoing" is defined as "the beneficiary needs skilled nursing intervention 24 hours per day/seven days per week." N.J.A.C. 10:60-5.3(b)(1). The regulations define "skilled nursing interventions" as "procedures that require the knowledge and experience of licensed nursing personnel, or a trained primary caregiver." N.J.A.C. 10:60-5.3(b)(3).

The regulation addressing the limitation and duration of PDN services states that the determination of the total EPSDT/PDN hours approved shall take into account the primary caretaker's ability to care, as well as alternative sources of PDN care available to the caregiver, such as medical daycare or a school program. N.J.A.C. 10:60-5.4.

The regulations addressing the medical necessity for private duty nursing services state that patient observation, monitoring, recording and assessment may constitute a need for private duty nursing services provided that the beneficiary is ventilator dependent, has an active tracheostomy, and needs deep suctioning. N.J.A.C. 10:60-5.4(b)(1).

Petitioner is a seven-year-old who has a rare neurogenesis disorder – TBCK syndrome. Petitioner is eligible for PDN services pursuant to the federally mandated Early Periodic Screening Diagnosis and Treatment (EPSDT).

Petitioner resides at home with his mother and his twenty-one-year-old sister. Petitioner's twenty-five-year-old sister previously served as his Personal Preference Program (PPP) provider for forty–two hours per month until she resigned on May 14, 2023. Both sisters help Petitioner's mother with his breathing treatment, feeding, and nebulizer treatment during the day. Petitioner's mother has been unemployed since 2021 and is Petitioner's primary caretaker. Petitioner's mother has been trained in the care of Petitioner. (R1-7 at 1). Additionally, Petitioner attends school five days per week with PDN services, all year long. The intention of PDN services is to support-not to replace-the skilled care provided to Petitioner by family members or school programs. Petitioner's mother is his primary caregiver and is available to be Petitioner's primary caregiver. Petitioner's sisters also help their mother to take care of Petitioner.

I agree with ALJ finding that Petitioner's medical records show that Petitioner is not on mechanical ventilation, he does not have a feeding tube, and he does not have a tracheostomy, and does not need deep suctioning. Petitioner's doctors agree that Petitioner has not had a seizure since 2018 and has not been hospitalized for any seizures. Petitioner's seizure disorders are controlled with medication administered by the nurse while Petitioner is at school and at home by Petitioner's mother.

Petitioner argues in their exceptions that the Initial Decision was flawed. Petitioner asserts that Petitioner's mother does not know how to auscultate and she does not know what to listen for when listening through a stethoscope. Petitioner further asserts that Petitioner's 21-year-old sister is available only three days a week to provide any help. Petitioner also states in exceptions that after the hearing, Petitioner had several ER visits and hospitalization for respiratory issues and seizure disorders and was granted sixteen hours of PDN per day from 6 a.m. to 10 p.m. seven days per week. [1] However, based on the Division's review of the record, including the Initial Decision and the medical assessments and record admitted into evidence in this matter, we find that nothing raised in Petitioner's exceptions would have materially affected the clinical necessity determination at issue in this matter or the outcome of the Initial Decision.

The child's care needs determine the amount of PDN services and when the hours permitted can be used. Petitioner has not shown that it is medically necessary for him to have PDN services during the day on the weekends. Petitioner may request a personal care assistant (PCA) assessment should non-skilled personal care services be needed during the period of time that PDN services are not medically necessary.

Thus, for the reasons stated above, I find that Petitioner does not meet the criteria as required N.J.A.C. 10:60-5.4 for increased PDN hours as those hours can be and are now supplied by Petitioner's primary caregivers.

I hereby ADOPT the Initial Decision.

---

[1] The assessment at issue relates to Petitioner's medical needs at the time of the assessment and subsequent hospitalizations may affect Petitioner's future needs for PDN services; however, they do not affect the assessment at issue in this matter.

THEREFORE, it is on this 11th day of March 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

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STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

G.C.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
United Healthcare,	:	**OAL DKT. NO. HMA 10243-2023**
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is March 18, 2024, in accordance with an Order of Extension.

This matter arises from United Healthcare's (United) assessment of Personal Care Assistance (PCA) hours for Petitioner. Petitioner had requested an increase from thirty-seven PCA hours per week to fifty PCA hours per week. Based upon United's assessment, it was determined that thirty-five hours of PCA services were medically necessary, and United denied Petitioner's request for fifty PCA hours per week.

PCA services are non-emergency, health related tasks to help individuals with activities of daily living (ADLs) and with household duties essential to the individual's health and comfort, such as bathing, dressing, meal preparation and light housekeeping. The decision regarding the appropriate number of hours is based on the tasks necessary

to meet the specific needs of the individual and the hours necessary to complete those tasks. The regulations provide that PCA services are only warranted when the beneficiaries are "in need of moderate, or greater, hands-on assistance in at least one activity of daily living (ADL), or, minimal assistance or greater in three different ADLs, one of which must require hands-on assistance." N.J.A.C. 10:60-3.1(c). Additionally, instrumental activities of daily living (IADL) "such as meal preparation, laundry, housekeeping/cleaning, shopping, or other non-hands-on personal care tasks shall not be permitted as a stand-alone PCA service." N.J.A.C. 10:60-3.1(c)1. The assessments use the state-approved PCA Nursing Assessment Tool (PCA Tool) to calculate the hours.

Petitioner is an adult with multiple sclerosis whocurrently receives thirty-seven PCA hours per week. Petitioner filed a request for additional hours. (R-3.) On July 10, 2023, Janki Patel-Jain, MSN, RN used United's PCA Tool to complete an assessment of the Petitioner. This assessment resulted in a determination of 35.1667 PCA hours per week. (R-1.) United conducted an internal appeal on August 18, 2023, and agreed with the initial assessment. At the hearing, David Sorrentino, M.D. the Conflict Care Medical Director for United testified regarding the assessment performed by Nurse Patel-Jain, using the PCA Tool. Dr. Sorrentino went through each ADL and agreed with the assessment. He also stated that while the results of the assessment were for 35.1667 PCA hours per week, the Petitioner had been receiving thirty-seven hours, and that his PCA hours should remain at that level.

Pursuant to N.J.A.C. 10:60-3.9, in order to receive PCA services, a registered nurse must perform an assessment on the beneficiary to determine the appropriate number of hours of care that the beneficiary needs. To conduct the assessment, the nurse has to fill out a PCA assessment form that is approved by the State and addresses how many minutes of assistance the beneficiary needs in the following areas: "Supportive

service/living environment needs;" "Cognitive/mental status;" "Ambulation/mobility;" "Ability to transfer;" "Ability for feed himself or herself;" "Ability to bathe himself or herself;" "Ability to toilet himself or herself;" "Ability to perform grooming and dressing task;" "Ability to perform housekeeping and shopping tasks;" and "Ability to perform laundry tasks." N.J.A.C. 10:60-3.9(b)(1). Generally, PCA services are limited to forty hours per week, and can only be increased upon a showing of "exceptional circumstances." N.J.A.C. 10:60-3.8(g).

In this case, Nurse Patel-Jain completed an assessment using the state-approved PCA tool on July 10, 2023. (R-1.) In the assessment, Nurse Patel-Jain reviewed all the areas required by N.J.A.C. 10:60-3.9(b)(1), and determined that the Petitioner qualified for 2110 minutes, or 35.1667 hours of PCA services. Ibid. The Administrative Law Judge (ALJ) found in the Initial Decision that United utilized the state-approved PCA tool appropriately to determine the number of PCA hours the Petitioner needed and upheld the denial for an increase in PCA hours. This assessment was also reviewed by Dr. Sorrentino, who testified that the assessment was "valid and appropriate."

Based upon my review of the record and for the reasons set forth in the Initial Decision, I hereby ADOPT the findings and conclusions of the ALJ and FIND that United properly denied Petitioner's request for additional PCA hours in this matter. The evidence in the record shows that Petitioner's needs can be met with the thirty-seven hours of PCA services he is already receiving every week. Petitioner failed to demonstrate that the number of PCA hours awarded by United were insufficient to meet Petitioner's needs, that United did not appropriately utilize the state-approved PCA tool, that the need for additional hours of PCA services were medically necessary, or that exceptional circumstances exist to warrant more than the thirty-seven hours per week of PCA services the Petitioner was already receiving.

Thus, for the reasons set forth in the Initial Decision and set forth above, I hereby ADOPT the Initial Decision in this matter.

THEREFORE, it is on this 12th day of March 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

3 OAL DKT. NO. HMA 03517-23

AGENCY DKT. NO. N/A

V.P.,

Petitioner,

v.

OCEAN COUNTY BOARD

OF SOCIAL SERVICES,

Respondent.

_____

Michael Heinemann, Esq., for petitioner (Law Office of Michael Heinemann, PC)

Kaila Reilly, Human Services Specialist 3, for respondent, pursuant to N.J.A.C. 1:5-4(a)(3)

Record Closed: March 18, 2024 Decided: April 8, 2024

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner V.P. appeals the imposition of a transfer penalty imposed by respondent Ocean County Board of Social Services (respondent or Board) because it determined she transferred assets for less than fair market value.

Petitioner contends that she used her assets to reimburse her son for repairs and renovations to her home that he and others performed. The home was in disrepair, and the repairs and renovations caused the value of the home to increase. After petitioner paid back her son with the proceeds of the house sale, she had enough money left to pay for her nursing home for several months.

The Board found that the assets were transferred as a gift because, essentially, a loan repayment agreement did not precede the transfers, and the son's expenditures were not adequately documented. The Board also argues that petitioner would have realized the same net gain had the repairs not been made and the house been sold in its pre-renovation condition.

PROCEDURAL HISTORY

Petitioner was notified of the Board's determination by way of a February 23, 2023, notice. Petitioner filed a timely appeal, and the Division of Medical Assistance and Health Services (DMAHS) transmitted this matter to the Office of Administrative Law (OAL), where it was filed on April 27, 2023, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was conducted on September 29, 2023, and the record remained open for the production of additional documents by petitioner. The Board agreed to review the new documents, and the parties agreed to discuss them by October 27, 2023. During a November 8, 2023, status conference, the parties were directed to submit post-hearing briefs by December 6, 2023. As more information and testimony were needed, the hearing was continued on January 22, 2024. Petitioner was directed to further supplement the record by February 21, 2024. Petitioner did not submit the requested documents until March 18, 2024, after which the record closed.

FACTUAL DISCUSSION

Because the following is undisputed, I **FIND** it as **FACT**:

Petitioner V.P. was admitted to a long-term care facility on February 4, 2020, and resided there during the times relevant to this matter. R-1 at 3. Prior to moving to the nursing facility, she resided at [redacted], Oradell, New Jersey ("Oradell house"). She applied for Medicaid Managed Long Term Services and Supports (MLTSS) on November 23, 2022. Her designated authorized representative (DAR) Miriam Abramson submitted the application for her.[1] R-1.

Petitioner owned her house outright. Based upon the 2020 tax assessment, the fair market value of the Oradell house was $402,959.01. R-21. On July 13, 2020, Total Home Inspection Services, LLC, issued an inspection report for the Oradell house for petitioner's son G.P. P-2. It listed multiple items that required repair because they were "considered to be Material Defects as defined by N.J.A.C. 13:40 Home Inspection Regulations." Id. at 3.

A mortgage was recorded for the Oradell house on October 28, 2021. It listed V.P. as the borrower and petitioner's son G.P. as the lender and provided that, "in exchange for a loan that [she] received, [V.P.] promise[d] to pay up to . . . $400,000 . . . plus interest . . . ." R-6. On December 6, 2021, petitioner's home was sold for $651,000. R-7. The Closing Disclosure form reports that $397,512.60 was due to G.P. as payoff for his loan. Ibid.

In support of the MLTSS application, Abramson wrote that the inspection report for V.P.'s home showed that it "was in dire condition and needed major work. [P.] Properties[2] was hired to handle and oversee all construction to prepare it for sale." R-4. She supplied "[i]nvoices to support all work done on the house to prepare it for sale —from both [G.P.] as well as other contractors." Ibid. She added:

> [G.P.] took out a loan of 400k for his mother to make sure she had enough funds to pay the Nursing Home and construction costs of her home. He took the loan out in his

> name and made all the monthly loan payments. Enclosed is the chart showing all Fedwire Payments from [G.P.] to his mother.[3] As seen on this spreadsheet, he transferred it all to his mother in increments as she needed to cover her expenses. Then, when the home finally did sell, [G.] got back the amount of the loan he had taken out.
>
> [Ibid.]

3 From January 30, 2020, to September 21, 2021, G.P. deposited funds into V.P.'s bank account. They totaled $371,500. R-8 at 1.

Abramson produced a spreadsheet that listed "all the expenses that [V.P.] paid using the money from her son [G.P.]." R-8 at 2−3. The date of each transaction, account number, check number or other transaction method, and dollar amount of each transaction is listed. The transactions, which totaled $372,322, included payments to the nursing facility, the Borough of Oradell Tax Office, and six contractors. R-8; P-4.

Petitioner produced invoices or receipts for purchases, for various dates in 2020 and 2021, which purportedly document his purchases for the construction work. P-4. Multiple Home Depot receipts document the items that were purchased; however, few clearly identify the item[4] and none indicate that the items were purchased for work at the Oradell House.[5] Several other receipts/invoices do not reference the Oradell house.[6] The other invoices or receipts that reference the Oradell house were issued by subcontractors.

Petitioner produced the following documents to explain the $14,511.67 and $23,358.46 payments to G.P.

- An undated form marked "proposal and acceptance" recorded that $14,511.67 was paid by check number 749 for "materials reimbursement." No further information is provided concerning the materials and the terms of the reimbursement. The document was signed by G.P. R-12 at 4.

- An undated “proposal and acceptance” form that recorded that $23,358.46 was paid by check number 709 for “material reimbursement.” The document is not signed and does not detail the materials or reimbursement terms. R-12 at 6.

- An undated “Proposal” from [P.] Properties to V.P. It listed the following proposed work to be done at the M. Street house. R-12 at 2. The work was described as “renovation of entire house” and listed numerous tasks, including:

- “Clean out, demo, replace rotten sills, ceiling, paneling, lighting, [electric], painting, trim, hardware, flooring[.]”
- Construction management.
- Order, receive all materials.
- “[I]nspections/permits/landscaping/planting of trees and shrubs[;] making mulch beds/maintain premises.”
- Three baths, new walls, tile, floors, lighting, and vanities.
- New kitchen; remove and replace the floors and cabinetry; install and receive appliances.
- Venting for the dryer.
- New porch on the rear of the house.
- Replace termite stairs in the garage.
- Stucco and paint the garage.
- Manage hiring.
- “Estimate and supervision of all subs.”
- The following note was written at the bottom of the proposal: “$147,348.90 Paid Ck # 716.”

The payment date was not included on the invoice.

- A promissory note that purports to memorialize a $400,000 loan to petitioner by G.P. P-1. It provides that interest will be calculated monthly beginning on January 30, 2020,[7] and that the note is secured by the Oradell house. It further provided, “This is a line of credit bridge loan with a maximum of 400000 [sic] dollars furnished in draws as needed in order to finance expenses until transfer of property to [G.P.] is complete.” Ibid. G.P. signed the document on January 11, 2021.[8] Neither V.P. nor her daughter signed it.

- 3 A June 15, 2020, Real Estate Purchase Agreement between petitioner and G.P. for the sale of the Oradell house for $428,000, with an intended closing date of on or before June 30, 2021. P-3. G.P. agreed to purchase the property in its then-current state, with the exception that petitioner was responsible for repairing all “deficiencies including but not limited to replacing kitchen and baths, roofing/siding, windows, driveway, stairs, sidewalks, patio, furnace, air conditioning, as well as remove all overgrown trees, shrubs and regrading of sink holes, clearing out of property and all other repairs deemed necessary to complete sale.” Ibid. Neither party signed the document, although G.P. initialed each page. Ibid. G.P. initialed and signed a disclosure form concerning lead-based paint on June 15, 2020. Ibid. A receipt indicates that K.P. accepted a $1,000 earnest money deposit on June 15, 2020. Ibid.

Kaila Reilly, human services specialist 3, acknowledged that G.P. coordinated the rehabilitation of V.P.’s home and that he deposited money into her bank account that was used to pay for her nursing home and contractors who performed work on her house. R-8. The Board imposed a transfer penalty because, although it reviewed each of the receipts for purchases made for the house repair, they did not equate to the lump sums V.P. paid to G.P. ($14,511.67, $23,358.46, and $147,348.90). The Board could not determine which expenditures or services were being reimbursed. Also, V.P.’s payments to G.P. were not made close in time to G.P.’s expenditures. Absent a reimbursement agreement that was established before the work was done, the payments are considered to be gifts.

The Board calculated the transfer penalty by adding the three checks from V.P. to G.P. ($14,511.67, $23,358.46, and $147,348.90) and the payment made to G.P.

after from the proceeds of the sale of V.P.'s house ($397,512.60). The sum was $582,731.63, from which $371,500, the amount G.P. transferred to V.P., was deducted. The remainder, $211,231.63, is the amount that is subject to a transfer penalty. R-13.

ADDITIONAL FACTUAL FINDINGS

Testimony

For petitioner:

G.P. testified that he has been a professional contractor for fifty years. When V.P. left her home, to move to a long-term care facility, she had medical bills and no money. She needed to sell her house to have funds to pay for her care.

G.P. obtained a $400,000 line of credit from his bank and secured it against the $400,000 mortgage on the petitioner's home. He borrowed money from the line of credit and used it to fund the cost of her care at the nursing facility and the house repairs. With respect to the agreement between petitioner and G.P., G.P. testified that a loan agreement was signed. Also, the mortgage was filed late due to the COVID-19 pandemic.

G.P. and fifteen to twenty contractors whom he hired made the repairs. V.P. wrote three checks for the work: $14,511.67 and $23,358.46 were to reimburse the cost of materials or services G.P. purchased directly. G.P. gave the Board every receipt for the materials; the sum of all receipts for expenditures for items other than contractors should equal these two payments. $147,348.90 was owed to G.P. for his labor. He did not detail the work he performed or his hourly rate of pay on the invoice for his work. He did not enumerate or describe the work he performed in detail or his rate of pay. He acknowledged that he did not charge an hourly rate. V.P. did not have to pay him until the house sold.

Before he repaired V.P.'s house, he obtained price information about comparable houses from realtors, not appraisers. A comparable home that had been

454 “100 percent repaired” would sell for $425,000. V.P.’s home was in “total disrepair.” It was purchased in 1958, and repairs were never done. A home-inspection report indicated that it required a full renovation, including roofing, siding, the kitchen, three bathrooms, and the driveway. In its state of disrepair, it was estimated to sell for $250,000. He considered this a “red flag” because it was “the cheapest home in town.” He did not think it would have “looked good” for Medicaid purposes had he purchased the house for $250,000 or $300,000. Because this occurred during the COVID-19 pandemic, he believed repairs were required because no one was buying homes in disrepair at that time. He thus determined to repair the home prior to its sale.

When G.P. received information about a comparable home valued at $425,000, he signed a contract to purchase his mother’s house for that amount. He intended to flip it. As his line of credit was “maxed out,” he decided to take the house as repayment. The value of the house increased to $599,000 during the pandemic. G.P. feared that, if he were to purchase the house then, it would not appear to the Board to be an arm’s length transaction. However, he needed to be paid, and there was no contract for him to be paid the money he was owed. When the house sold for $651,000, his mother received more money than she would have had he purchased it for $425,000 or for $250,000, which is the amount he estimated it would sell for had no repairs been made.

Ultimately, V.P. received $71,670.94 from the sale of the house after G.P. was reimbursed for the $397,512 mortgage and his $147,348.90 bill. She also received the benefit of nursing-home facilities that G.P. paid for from February 6, 2020, to November 30, 2021.

K.P. agreed with G.P.’s recitation of the facts. Their goal was to generate more money to pay for V.P.’s nursing facility. K.P. paid for the nursing facility for a year.

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.” In re Estate of Perrone, 5 N.J. 514, 522 (1950). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other

testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor and tone.[9] I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony. 455

G.P. and K.P. testified directly about their intention to assist their mother. The Board does not dispute that G.P. repaired V.P.'s home and that it sold for significantly more than it would have had it not been repaired. G.P. and K.P.'s assertions about their intention to help their mother are reasonable and credible. However, contrary to G.P.'s testimony, there was not a loan agreement. The promissory note produced by petitioner was not signed by petitioner or K.P. It includes provisions concerning the calculation of interest beginning on January 30, 2020, but G.P. did not sign the document until January 11, 2021. Also, the June 15, 2020, Real Estate Purchase Agreement between petitioner and G.P. for the sale of the Oradell house for $428,000, with an intended closing date of on or before June 30, 3021, was not signed by either party (although G.P. initialed each page). G.P.'s representations concerning preexisting written agreements are not credible.

Accordingly, based upon my consideration of the testimony and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** as **FACT** that petitioner did not enter into an agreement concerning the repair or purchase of her home, or reimbursement of G.P., prior to the sale of her home. I further **FIND** as **FACT** that petitioner did not demonstrate that the sum of the receipts and invoices for his purchases equaled $14,511.67 and $23,358.46. Also, the form that was marked "proposal and acceptance," which recorded that $14,511.67 was paid by check number 749 for "materials reimbursement," was not dated. No further information is provided concerning the materials and the terms of the reimbursement. The "proposal and acceptance" form that recorded that $23,358.46 was paid by check number 709 for "material reimbursement" was also not dated, was not signed, and does not detail the materials or reimbursement terms. The "Proposal" from [P.] Properties to V.P. for work to be done to the house was also undated. Further, G.P. did not explain or document how his bill for $147,348.90 was calculated.

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 10:71-4.10(a), an individual shall be ineligible for institutional-level services through the Medicaid program if he or she (or his or her spouse) has disposed of assets at less than fair market value at any time during or after the sixty-month period immediately prior to the date the individual became institutionally eligible for Medicaid. A resource transferred during this period raises a rebuttable presumption that the resource was transferred to establish Medicaid eligibility. N.J.A.C. 10:71-4.10(j); H.K. v. State of New Jersey, Dep't of Human Servs., Div. of Med. Assistance & Health Servs., 184 N.J. 367, 380 (2005). The burden rests with the applicant to prove or rebut the presumption that the asset was transferred exclusively or solely for purposes other than Medicaid eligibility. The transfer may be rebutted by factors that indicate that the resources were transferred exclusively for some other purpose, including traumatic onset of disability, unexpected loss of earlier resources, or unexpected loss of income. N.J.A.C. 10:71-4.10(j).

It is petitioner's burden to establish by "convincing evidence" that the monies transferred during the look-back period were not disposed of as a means of establishing Medicaid eligibility or to leave a legacy to others while obtaining public funds for healthcare support. N.J.A.C. 10:71-4.10(e)(6) provides that a transfer penalty shall not apply upon a successful showing that:

> i. The individual intended to dispose of the assets at either fair market value or for other valuable consideration;
>
> ii. The assets were transferred exclusively for a purpose other than to qualify for medical assistance; or
>
> iii. All assets transferred for less than fair market value have been returned to the individual.

The presumption that assets were transferred to establish Medicaid eligibility is considered successfully rebutted only if the applicant demonstrates that the asset was transferred exclusively for some other purpose. N.J.A.C. 10:71-4.10(l)(1). If the applicant had some other purpose for transferring the asset but establishing Medicaid eligibility appears to have been a factor in the decision to transfer, the presumption is

not considered successfully rebutted. N.J.A.C. 10:71-4.10(l)(2). "The agency's determination shall not include an evaluation of the merits of the applicant's stated purpose of transferring assets. The determination shall only deal with whether or not the applicant has proven that the transfer was solely for some purpose other than establishing Medicaid eligibility." 3 N.J.A.C. 10:71-4.10(l)(3).

The Medicaid regulations and the cases that interpret them stress the need for "convincing evidence" concerning payments made within the look-back period. This flows from the policy underlying the transfer-penalty rule: "Congress's imposition of a penalty for the disposal of assets or income for less than fair market value during the look-back period is intended to maximize the resources for Medicaid for those truly in need." E.S. v. DMAHS, 412 N.J. Super. 340, 344 (App. Div. 2010) (citing Estate of DeMartino v. Div. of Med. Assistance & Health Servs., 373 N.J. Super. 210, 219 (App. Div. 2004), certif. denied, 182 N.J. 425 (2005).

The Medicaid regulations address transfers of assets that were purportedly made as compensation for work or services provided by a family member. N.J.A.C. 10:71-4.10(b)(6)(ii) provides:

> In regard to transfers intended to compensate a friend or relative for care or services provided in the past, care and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation. Thus, a transfer of assets to a friend or relative for the alleged purpose of compensating for care or services provided free in the past shall be presumed to have been transferred for no compensation. This presumption may be rebutted by the presentation of credible documentary evidence preexisting the delivery of the care or services indicating the type and terms of compensation. Further, the amount of compensation or the fair market value of the transferred asset shall not be greater than the prevailing rates for similar care or services in the community. That portion of compensation in excess of the prevailing rate shall be considered to be uncompensated value.
>
> [Emphasis added.]

458 In J.P. v. Division of Medical Assistance & Health Services, 2014 N.J. Super. Unpub. LEXIS 1367 (June 11, 2014),[10] a county board of social services imposed a penalty because funds were transferred from the petitioner's bank account to her daughter during the look-back period. The petitioner, who resided in a nursing facility at the time the transfers were made, claimed that she borrowed money from her daughter twice, and the funds were transferred to pay back the loans. The only evidence of the loans was an unnotarized, unwitnessed document that was signed by only the petitioner. The document stated that the first loan was made three years prior to the date of the document, and the second loan was made one month prior. The petitioner agreed to pay back the amounts she borrowed and "interest at a customary interest rate" after she sold her home. The interest rate was not defined. The petitioner sold her home seven years after she signed the agreement. She did not repay the loans. Rather, she purchased a condominium that cost less than the proceeds of her home sale. She moved into a nursing facility three years later, which was thirteen and ten years after the two loans were made. The daughter who made the loans sold the condominium and transferred some of the proceeds to her bank account. The Appellate Division affirmed the transfer penalty because there was "insufficient evidence of the existence of the loan or the terms of repayment allegedly agreed to by" the petitioner. Id. at *6. The court wrote:

> Although [the petitioner] 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 [the petitioner] who is no longer available to authenticate it. In addition . . . there is no indication as to what the interest rate would be, and . . . 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 [the petitioner] sold her house in 2006 she did not repay the loan as the note provided, and [her son-in-law and daughter] did not enforce the term.
>
> [Id. at *7.]

The court thus concluded, "Because there is doubt as to the existence or validity of the agreement, the presumption cannot be said to have been rebutted. [The

petitioner's] proofs are hardly 'convincing evidence' that the money was transferred for some other purpose." Id. at *8.

In M.C. v. DMAHS, 2016 N.J. Super. Unpub. LEXIS 2651 (App. Div. December 13, 2016),[11] the Appellate Division again addressed an appeal of a penalty in which the appellant claimed that she loaned the transferred funds to her daughter. During the hearing before the Office of Administrative Law, the daughter testified that her mother loaned her money to help her avoid foreclosure of her home. The daughter also testified that she paid back the loan. The ALJ found that the daughter's testimony about the loan was not credible because "there was no documentation supporting its issuance and repayment. He concluded that [the appellant] did not overcome the presumption that the transfers were for the purpose of obtaining Medicaid eligibility; thus, failing to demonstrate the transfers were for [the appellant's] benefit." Id. at *6−7. The Appellate Division agreed, noting that the appellant "merely assert[ed]" that the transfer was a loan. Id. at *8. "The record is devoid of convincing evidence that the assets were transferred exclusively for a purpose other than to establish Medicaid eligibility. There is also no documentary proof that the loan was repaid . . . ." Id. at *8−9.

With respect to whether a loan was "bona fide," in A.J. v. DMAHS and Sussex County Board of Social Services, 2 011 N.J. AGEN LEXIS 867 (Dec. 22, 2011), the DMAHS Director referenced a Third Circuit decision:

> Where, as here, the transactions occur between related entities rather than at arms' length, they are subject to particular scrutiny because the control element suggests the opportunity to contrive a fictional debt. Thus, a transaction must be measured against an objective test of economic reality and characterized as a bona fide loan only if its intrinsic economic nature is that of a genuine indebtedness.
>
> [Geftman v. Comm'r of IRS, 154 F.3d 61, 68 (3d Cir. 1998) (internal quotations and citations omitted).]

The Director applied this analysis to an appeal of a transfer penalty in which the petitioner transferred money to her children and characterized the transfers as loans, which were unsecured by promissory notes.

These cases demonstrate the consequences of failing to document a financial transaction. Moreover, if the terms of a transaction are established, the failure to meet those terms is also relevant.

While G.P. and K.P. testified credibly with respect to their goal of assisting their mother, and it is entirely reasonable that they would seek to maximize the value of her home to do this, they did not produce the information required by the controlling regulation. There is no preexisting agreement providing that petitioner would pay G.P. for his labor or his expenditures. Rather, she and G.P. signed a mortgage agreement, which resulted in G.P. receiving a sizeable percentage of the house-sale proceeds. Further, I **FIND** as **FACT** that G.P. did not demonstrate that the sum of the receipts and invoices for his purchases equaled $14,511.67 and $23,358.46. He also did not explain or document how his bill for $147,348.90 was calculated. Despite substantial efforts to discern this information from the record, it could not be ascertained.

I recognize that G.P. and K.P. sought to generate money to help pay for their mother's care. Nonetheless, for all of the foregoing reasons, I am constrained to **CONCLUDE** that petitioner has not established by a preponderance of the credible evidence that the payments to G.P. ($14,511.67, $23,358.46, and $147,348.90) constituted repayment of a bona fide loan that is exempt from imposition of a transfer penalty.

ORDER

Based upon the foregoing, the decision of the Ocean County Board of Social Services imposing a Medicaid transfer penalty is **AFFIRMED**.

I **FILE** my initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration. This recommended decision may be adopted, modified, or rejected by the **ASSISTANT COMMISSIONER**, who is authorized to make a final decision in this case. If the **ASSISTANT COMMISSIONER** does not adopt, modify, or reject this

decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision becomes a final decision under N.J.S.A. 52:14B-10(c).

Within seven days from the date on which this recommended decision is mailed to the parties, any party may file written exceptions at **ASSISTANT COMMISSIONER, DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

---

3 April 8, 2024

DATE **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: 3 April 8, 2024

Date Mailed to Parties: 3 April 8, 2024

JL/sb/mg

APPENDIX

Witnesses

For petitioner:

G.P.

K.P.

For respondent:

Kaila Reilly, HSS3

Exhibits

For petitioner:

P-1 Promissory Note

P-2 Inspection Report

P-3 Real Estate Purchase Agreement

P-4 Receipts/invoices

For respondent:

R-1 Application

R-2 DAR form

R-3 POA paperwork

R-4 DAR cover letter

R-5 Request for information

R-6 Mortgage, October 28, 2021

R-7 Closing documents, December 6, 2021

R-8 List of payments, G.P. to V.P.

R-9 Bank statements

R-10 Bank statements

R-11 Bank statements

R-12 Checks written to G.P.

R-13 Penalty notification, February 23, 2023

R-14 Reconsideration request, March 13, 2023

R-15 Eligibility notification, March 16, 2023

R-16 Regulation

R-17 Emails

R-18 Bank statements

R-19 Asset calculation

R-20 Investment statement

R-21 Tax assessments

R-22 Nursing facility ledgers

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[1] V.P.’s daughter K.P. was awarded power of attorney for V.P. on August 18, 2021. R-3.

2 [P.] Properties was operated by V.P.'s son, G.P. The company bore the family's last name.

[3] 2 From January 30, 2020, to September 21, 2021, G.P. deposited funds totaling $371,500 into V.P.'s bank account. R-8 at 1.

4 Some include handwritten explanations such as “finish elec plumbing,” “landscape,” or “finish.” Id. at 198, 202, 208.

[5] See, e.g., P-4 at 2−4, 6−166, 180−386, 411−413, 450−55. Other receipts from Lowe's also do not clearly state the items that were purchased, what they were used for, and that they were purchased for work performed at the Oradell house. Id. at 377. Some list the customer as G.P. and/or [P.] Properties. Id. at 411, 413.

6 See e.g., P-4 at 172, 180, 190−91, 378, 426, 427. A Cooper Electric ship ticket lists items that were shipped to a contractor in Morristown, New Jersey. Handwritten notes reference “Kevin Beattie Elec.” and the Oradell house and note that a payment was made by check number 707. Id. at 378. Also, several of these invoices did not identify the check number. Rather, this information was written on the copies of the invoices.

[7] The last 0 in “2020” is written by hand; it appears to be written over a typed number.

8 His signature was notarized.

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9 I was unable to observe the witnesses' physical demeanor because the matter was conducted telephonically.

10 This decision is unpublished and not binding. It is referenced here for guidance and because the DMAHS Assistant Commissioner relied upon it.

[11] This decision, while providing guidance, is unpublished and thus not binding.

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

C.F.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND ATLANTIC COUNTY DEPARTMENT OF FAMILY AND COMMUNITY DEVELOPMENT,	:	**OAL DKT. NO. HMA 06647-2023**
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision dated December 22, 2023, and the Office of Administrative Law (OAL) case file. Petitioner filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is March 21, 2024, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By letter dated July 20, 2023, the Atlantic County Department of

Family and Community Development (Atlantic County) granted Petitioner's May 12, 2023, Medicaid application with eligibility as of May 6, 2023. However, a penalty of 5 days was assessed resulting from the transfer of assets, totaling $2,021.96. The transfer of assets was related to two different purchases from Elderwear: one on April 26, 2023, for $1,689.62 and the other on April 27, 2023, for $332.34. ID at 8.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

In the present matter, Petitioner, through their Designated Authorized Representative (DAR), submitted a Medicaid application to Atlantic County on May 12, 2023. ID at 8. Petitioner was found eligible as of May 1, 2023, but Atlantic County issued a five-day penalty for transfers in the amount of $2,021.96. Ibid. The penalty was assessed based on two different purchases from a company called Elderwear; one on April 26, 2023, for $1,689.62 and the other on April 27, 2023, for $332.34. Ibid. On April 26, 2023, Josh Rosenberg, an administrator at the nursing home, placed an order for the following items:

Samsung tablet	$499.99
Keyboard & mouse combo for tablet	$54.99
Ansten headphones with docking station	$164.99
Men's black half elastic waist pants	$32.99
Men's blue half elastic waist pants	$32.99
Cap	$14.99
Belt	$18.99
Men's black Propet Viator sneakers	$95
39" smart TV with remote	$424.99
Men's beard trimmer	$100
Television wall mount	$100

ID at 8-9.

The next day, on April 27, 2023, Rosa Palmer, a social worker at the nursing home, placed an order for the following items:

2xl Nylon windbreaker with snaps	$44.99
Two 2XL solid men's dress shirts	$71.98
Timex watch	$89.99
Six pairs of diabetic socks	$43.50
XL men's flannel pajama bottoms	$24.99
Flashlight	$24.99

ID at 9. The invoices for the purchases do not provide a specific description of each item that was purchased. ID at 9.

Yetti Roth, a Future Care employee based out of their Lakewood, New Jersey office, spoke with Petitioner on the telephone sometime before the orders were placed to give him ideas as to what he could purchase. Ibid. She did not discuss prices with Petitioner and Petitioner was not provided an alternate to Elderwear. Ibid. Petitioner was not shown a catalog with pictures or prices to inform Petitioner of exactly what Petitioner was ordering or the cost. Ibid. Ms. Roth testified that the orders were placed because they were trying to get Medicaid eligibility for Petitioner and Petitioner was over the limit. Ibid.

The Initial Decision discussed the invoices from Elderwear and concluded that they lacked specificity as to precisely what was purchased by Petitioner to make a determination as to fair market value. ID 7-8. The Initial Decision went on to state that it is inherently suspect that Elderwear has no website, catalog, or price list that could be reviewed and that Petitioner did not establish that the transfers were for fair market value. Ibid. The Initial Decision found that resources in the amount of $2,021.96 were transferred during the look-back period, which created a rebuttable presumption that the resources were transferred to establish Medicaid eligibility. ID at 11. Ultimately, the Administrative Law Judge concluded that Petitioner did not rebut the presumption that the transfers were done for the purpose of qualifying for Medicaid and affirmed the imposition of the five-day penalty period from May 1, 2023, to May 5, 2023. ID at 11-12.

Petitioner filed exceptions to the Initial Decision. In summary, Petitioner takes exceptions to the Administrative Law Judge's 1) finding that the invoices from Elderwear lack specify as to precisely what was purchased by petitioner to make a determination as to fair market value, 2) determination that Petitioner did not establish that the transfers were for fair market value, 3) determination that it is the applicant's burden to show that the items were purchased for fair market value, and 4) that the cases cited by Petitioner

were inapplicable to the facts of this case and that they pre-date the Deficit Reduction Act.

I FIND that Petitioner did not overcome their burden to establish that the purchases were for fair market value and therefore the transfer penalty assessed by Atlantic County was appropriate. N.J.A.C. 10:71-4.10(c) states that the fair market value of the asset shall be ascertained and fully documented. Subsection 4.10(e)(6) goes on to state that the application of a transfer penalty shall not apply when a satisfactory showing is made, to the State, that the individual intended to dispose of the assets either at fair market value or for other valuable consideration. When a transfer of assets is made during the look-back period, a rebuttable presumption is created. N.J.A.C. 10:71-4.10(j). It is Petitioner's obligation to present evidence to rebut that presumption and establish fair market value. I agree with the Initial Decision that the Eldercare invoices lacked specificity as to precisely what was purchased by Petitioner to make a fair market value determination.

Thus, based on the record before me and for the reasons enumerated above, I hereby ADOPT the Initial Decision and FIND that the transfer penalty imposed on the two purchases totaling $2,021.96 was appropriate.

THEREFORE, it is on this 15th day of MARCH, 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 11815-23

AGENCY DKT. N/A

C.S.,

Petitioner,

v.

OFFICE OF COMMUNITY CHOICE

OPTIONS,

Respondent.

_____

C.D., Designated Authorized Representative, on behalf of C.S.,

petitioner, appearing pursuant to N.J.A.C. 1:10B-5.1

Suzanne Ragone, Fair Hearing Liaison, for respondent, appearing pursuant to

N.J.A.C. 1:1-5.4(a)(3)

Record Closed: March 11, 2024 Decided: March 26, 2024

BEFORE CATHERINE A. TUOHY, ALJ:

STATEMENT OF THE CASE

Petitioner, C.S., appeals the denial of clinical eligibility for Nursing Facility Level of Care (NFLOC) benefits. Respondent alleges that petitioner is no longer clinically eligible because he no longer meets the NFLOC qualifications in accordance with N.J.A.C. 8:85-2.1. At issue is whether petitioner is entitled to Medicaid benefits.

PROCEDURAL HISTORY

By letter dated August 15, 2023, petitioner was notified by the respondent, Department of Human Services, Division of Aging Services, that he was not clinically eligible for NFLOC in a nursing facility or the community because he did not meet the NFLOC qualifications in accordance with N.J.A.C. 8:85-2.1 and New Jersey's NJ Family Care Comprehensive Demonstration, Section 1115. (R-1, Exhibit 6.) Petitioner filed a request for a fair hearing, and the matter was transmitted by the Division of Medical Assistance and Health Services (DMAHS) to the Office of Administrative Law (OAL) where it was filed on November 2, 2023, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. A hearing was conducted telephonically on March 11, 2023, and the record closed.

FACTUAL DISCUSSIONS AND FINDINGS

Suzanne Ragone, fair hearing liaison, testified on behalf of the respondent. She is the fair hearing liaison for the Department of Human Services, Division of Aging Services, Southern Regional Office of Community Choice Options (OCCO). The Managed Long Term Care Services and Supports (MLTSS) program provides nursing facility care and home and community-based services to elderly and disabled individuals through a managed care delivery system. NFLOC is the clinical eligibility requirement for new and continued enrollment in the MLTSS program. MLTSS clinical eligibility is established by N.J.A.C. 8:85-2.1 (R-1, Exhibit 1) and the New Jersey (NJ) FamilyCare Comprehensive Demonstration Adult Waiver. (R-1, Exhibit 1A.) Individuals enrolled in MLTSS are subject to annual redeterminations to validate clinical eligibility. Typically, the inability to validate nursing facility level of care is based on an NJ FamilyCare Managed Care Organization (MCO) face-to-face standardized needs-based assessment. The State would then conduct an in-person reassessment to make a clinical eligibility determination.

Based on contractual requirements to reassess MLTSS continued eligibility on an annual basis, Aetna, the MCO, submitted documentation indicating an inability to validate clinical eligibility for C.S. The case was then assigned to OCCO staff nurse Carolyn Martine, R.N. for reassessment to determine the clinical eligibility for nursing level of care, which was conducted on August 15, 2023, at his home. Through the OCCO assessment process, C.S. was determined not clinically eligible for NFLOC in a nursing facility or the community pursuant to N.J.A.C. 8:85-2.1 (R-1, Exhibit 1), NJ FamilyCare Comprehensive Demonstration, Section 1115 (R-1, Exhibit 1A) and the OCCO NJ Choice Assessment completed by Ms. Martine on August 15, 2023. (R-1, Exhibit 5.) C.S. was advised of the determination and his right to appeal. (R-1, Exhibit 6.) Options counseling was provided to C.S. as indicated in the interim plan of care. (R-1, Exhibit 5, pages 37−39).

3 N.J.A.C. 8:85-2.1 indicates that individuals requiring NFLOC services may have unstable medical, emotional/behavioral, and psychosocial conditions that require ongoing nursing assessment, intervention and/or referrals to other disciplines for evaluation and appropriate treatment. Typically, adult NFLOC residents have severely impaired cognitive abilities and related problems with memory deficits and problem solving. These deficits severely compromise personal safety and, therefore, require a structured therapeutic environment. NFLOC residents are dependent on several activities of daily living (ADL) (bathing, dressing, toilet use, transfer, locomotion, bed mobility and eating). Therefore, to qualify for the MLTSS program, individuals must require assistance with their ADL as set forth in N.J.A.C. 8:85-2.1.

Eligibility for NFLOC is defined as an adult (ages twenty-one and older) individual must be clinically eligible for MLTSS services when the individual's standardized assessment demonstrates that the individual satisfies any one or more of the following three criteria:

a. The individual:

i. Requires limited assistance or greater with three or more activities of daily living;

ii. Exhibits problems with short-term memory and is minimally impaired or greater with decision making ability and requires supervision or greater with three or more activities of daily living;

iii. Is minimally impaired or greater with decision making and, in making himself or herself understood, is often understood or greater and requires supervision or greater with three or more activities of daily living.

Therefore, consumers in NJ are required to be dependent in several ADLs, for example, bathing, dressing, toilet use, transfer, locomotion, bed mobility and eating. Dependency in ADLs may have a high degree of individual variability, and performance of an ADL can go from independent to totally dependent. However, the client must have some degree of dependency in several ADLs, which is more than two, to meet the clinical eligibility requirements for the NJ FamilyCare Comprehensive Demonstration Adult Waiver. Carolyn Martine, R.N. met with petitioner in his home to perform the NJ Choice Assessment (R-1, Exhibit 5) on August 15, 2023. His sister and DAR, C.D. was present for the assessment, as was his cousin and caregiver, P.C.

Ms. Martine observed petitioner transfer from a standing to a sitting position independently. He told Ms. Martine that he does not use an assisted device for ambulation. Ms. Martine observed C.S. ambulating without an assisted device, and his gait was steady. C.S. reported that he makes his own daily decisions and is able to structure his day independently, making decisions about self-care activities. He reported that he rides his bike uptown to Penns Grove. C.S. does have short-term memory deficits, as evidenced by his inability to recall three unrelated items posed to him after five minutes. C.S. has no procedural memory problems, as evidenced by his statement that he can shower and dress himself. C.S. recited the steps involved in making a tuna sandwich. C.S. has no situational memory problems, as evidenced by his familiarity with his living environment and ability to identify significant family members in his life. C.S. was able to understand and make himself understood throughout the assessment. C.S. stated he gets Mom's Meals, and his cousin helps him with his meals. C.S. stated that he is capable of doing light housekeeping, the dishes and dusting when reminded by his caregiver. C.S. stated he does his laundry. C.S. stated he manages his finances and knows how to use the phone without assistance. C.S. stated his cousin takes him shopping, and he is able to select the items off the shelf and pay for them unassisted. He can get in and out of the car without assistance. C.S. stated that his cousin puts his medication in a pill box, and he takes it when scheduled. C.S. stated he is independent with eating, personal hygiene, bathing, dressing, toilet transfers, toilet use, bed mobility, transfers, walking and locomotion. C.S.'s caregiver stated she reminded him to shower last night, but C.S. remembered to shower this morning without being reminded.

The OCCO assessment is not diagnosis-driven; it is a need-based assessment. Dependency in more than two ADLs is required for clinical eligibility. Since petitioner, by his own admission and based on the assessment by Nurse Martine, is independent in all of his ADLs, he is not clinically eligible for NFLOC.

Carolyn Martine, R.N. prepared a narrative report in connection with her OCCO NJ Choice assessment. (R-1, page 34.) C.S. is a sixty-five-year-old male who resides

alone in a single-family home. She evaluated him in his home in the presence of his sister and cousin. When she first arrived, she observed C.S. walking down the hallway after coming from his shower and walking into the dining room. She observed petitioner transfer from a standing to a sitting position independently. He told Ms. Martine that he does not use an assisted device for ambulation. Ms. Martine observed C.S. ambulating without an assisted device, and his gait was steady. C.S. reported that he makes his own daily decisions; he is able to structure his day independently and make decisions about self-care activities. He decides when to wake up and when to eat. He reported that he rides his bike uptown to Penns Grove and told Ms. Martine that he just rode it yesterday. His sister confirmed that he rides his bike uptown alone. C.S. has short-term memory deficits, as evidenced by his inability to recall three unrelated words posed to him after five minutes. C.S. has no procedural memory problems, as evidenced by his statement that he can shower and dress himself. C.S. stated he likes tuna sandwiches and recited the steps involved in making a tuna sandwich. C.S. has no situational memory problems, as evidenced by his familiarity with his living environment and ability to identify significant family members in his life such as his sister and cousin. C.S. was able to understand and make himself understood throughout the assessment. C.S. stated he gets Mom's Meals, and his cousin helps him with his meals. C.S. stated that he is capable of doing light housekeeping, doing the dishes, dusting, tidying up and making his bed when told to do so by his caregiver. C.S. stated he does his laundry. C.S. stated he manages his finances and knows how to use the phone without assistance. C.S. stated his cousin takes him shopping, and he is able to select the items off the shelf, place them on the conveyor belt and pay for them unassisted. He can get in and out of the car without assistance. C.S. stated that his cousin puts his medication in a pill box, and he takes it when scheduled. C.S. stated he is independent with eating, personal hygiene, bathing, dressing, toilet transfers, toilet use, bed mobility, transfers, walking and locomotion. C.S.'s caregiver stated she reminded him to take a shower last night, but C.S. remembered to shower this morning without being reminded. Petitioner said he is continent of bladder and bowel. He knows how to get to the bank and where Penns Grove is.

The assessment has a cognition component. (R-1, page 25.) Ms. Martine indicated that petitioner was independent in his cognitive skills for decision-making regarding tasks of daily life, for example, when to get up or have meals, which clothes to wear or activities to do. His decisions were consistent, reasonable and safe. She indicated that he had a memory problem regarding short-term memory and the ability to remember items after five minutes. Ms. Martine indicated that his procedural memory was okay as he could perform all or almost all steps in a multitask sequence without cues, that is getting dressed and making a sandwich. His situational memory was adequate in that he recognized caregivers' names and faces of frequently encountered people and knew the location of places regularly visited. (R-1, page 25.)

Ms. Martine also asked the caregiver who said she does not assist him with his activities of daily living. She does not bathe him, dress him, toilet him, or assist him with transfers, walking, locomotion or eating.

C.D. testified on behalf of petitioner. She was present on August 15, 2023, for the OCCO assessment, as was her cousin and C.S.'s caregiver, P.C.. She did not confirm that her brother rides his bike uptown alone. She can confirm that is what C.S. told Ms. Martine, but C.D. and P.C. stated that they have never seen C.S. ride his bike to Penns Grove, which is nearby. He does have a bike, but anytime he needs to go somewhere, he is taken there by P.C. in the car. C.D.'s main concern is that her brother can do all of his ADLs, but he has cognitive deficits and needs to be reminded to take his medicine, change his clothes, eat his food and take a shower. Her brother does not eat tuna, and when he was asked how to make a sandwich, he just said he gets the bread and the tuna and does not put anything on it. She does not believe that is how you explain how to make a sandwich.

C.D. said that C.S. was reminded to take a shower the morning of the assessment. Ms. Martine arrived and was sitting in the dining room when she saw C.S. walking down the hallway. He was late to the meeting because he forgot to take a shower. Their appointment was at 10:00 a.m. He did not arrive at the dining room until 10:15 a.m. He will tell you he remembered, but he did not. He could not remember the three words, blue, pen and bed, when Ms. Martine asked him. He only remembered them when she gave him clues for each one.

Petitioner does not take care of his finances. Since February 2023, C.D. has handled his finances and paid his bills. She has his checkbook and pays his mortgage and utilities. He has a bank card and can walk to a local ATM to make cash withdrawals using his PIN. Since August, he has been issued four new ATM cards because he cannot remember the PIN; he has had to get a new card and PIN each time.

C.D. felt that Ms. Martine's assessment was not accurate because she did not ask the family members to verify the information. Ms. Martine relied on C.D.'s brother's self□reported statements which were not accurate. C.D. admitted that C.S. can physically do all of the activities of daily living, but he must be reminded.

P.C. testified that C.S. will not take a bath on his own or do his laundry. He will tell you he took a shower, but he did not. If he has a doctor's appointment, she tells him to shower before she takes him there in her car. He will then take a shower and call her when he is ready to go. He can dial her number and use the phone. She takes him to the grocery store. She has never seen him ride his bike. He can walk to a local bank and withdraw money with his ATM card.

Discussion

Petitioner produced medical records from Inspira Health, Woolwich Neurology for an October 19, 2023, visit. (P-1.) The chief complaint was memory impairment,

and the assessment indicates “Mild cognitive impairment.” An MRI of the brain was done on December 21, 2023. The findings were: “Cerebral parenchyma: There is an old infarction of the left parietal lobe with encephalomalacia. This was similar to the prior study. There are background changes of cerebral atrophy.” (P-1, pages 5−6.) Neuropsychological testing was ordered. Should further neuropsychological testing reveal more significant cognitive impairment or should petitioner’s condition worsen and he become dependent in several of his ADLs, petitioner can reapply for Medicaid.

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, I **FIND** as **FACT** that C.S. is mildly cognitively impaired and has short-term memory deficits. I further **FIND** as **FACT** that C.S. is independent in all of his ADL, including eating, personal hygiene, bathing, dressing upper body, dressing lower body, transfer toilet, toilet use, bed mobility, transfer, walking and locomotion, as indicated in the NJ Choice Assessment OCCO, dated August 15, 2023. (R-1, Exhibit 5.)

LEGAL ANALYSIS AND CONCLUSION

OCCO’s denial relies upon N.J.A.C. 8:85.2.1, which states, in pertinent part:

> a. Eligibility for nursing facility (NF) services will be determined by the professional staff designated by the Department, based on a comprehensive needs assessment that demonstrates that the beneficiary requires, at a minimum, the basic NF services described in N.J.A.C. 8:85-2.2.
>
> 1. Individuals requiring NF services may have unstable medical, emotional/behavioral, and psychosocial conditions that require ongoing nursing assessment, intervention and/or referrals to other disciplines for evaluation and appropriate treatment. Typically, adult NF residents have severely impaired cognitive and related problems with memory deficits and problem solving. These deficits severely compromise personal safety and, therefore, require a structured therapeutic environment. NF residents are dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating).

The New Jersey FamilyCare Comprehensive Demonstration provides that eligibility for NFLOC is defined as an adult (ages twenty-one and older) individual must be clinically eligible for MLTSS services when the individual’s standardized assessment demonstrates that the individual satisfies any one or more of the following three criteria:

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a. The individual:

i. Requires limited assistance or greater with three or more activities of daily living;

ii. Exhibits problems with short-term memory and is minimally impaired or greater with decision making ability and requires supervision or greater with three or more activities of daily living;

iii. Is minimally impaired or greater with decision making and, in making himself or herself understood, is often understood or greater and requires supervision or greater with three or more activities of daily living.

[R-1, page 6.]

Therefore, consumers in NJ are required to be dependent in several ADLs, for example, bathing, dressing, toilet use, transfer, locomotion, bed mobility and eating. Dependency in ADLs may have a high degree of individual variability, and the performance of an ADL can go from independent to totally dependent. However, the client must have some degree of dependency in several ADLs, which is more than two, to meet the clinical eligibility requirements for the NJ FamilyCare Comprehensive Demonstration Adult Waiver.

To qualify for a nursing facility level of assistance, the applicant must have deficits in at least three of the ADLs mentioned above, and/or severe cognitive impairments that compromise their personal safety. The credible evidence demonstrated that C.S. has mild cognitive impairment with his short-term memory but is capable of independently performing all of his ADLs and therefore is not in need of NFLOC.

I **CONCLUDE** that C.S. does not meet the criteria set forth at N.J.A.C. 8:85.2.1 for NFLOC, and therefore, the decision of OCCO is **AFFRIMED**.

ORDER

Based upon the foregoing, the respondent's denial of clinical eligibility for NFLOC in a nursing facility or in the community is **AFFIRMED**. The petitioner's appeal is **DISMISSED**.

I **FILE** my initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration. This recommended decision may be adopted, modified, or rejected by the **ASSISTANT COMMISSIONER**, who is authorized to make a final decision in this case. If the **ASSISTANT COMMISSIONER** does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision becomes a final decision under N.J.S.A. 52:14B-10(c).

Within seven days from the date on which this recommended decision is mailed to the parties, any party may file written exceptions at **ASSISTANT COMMISSIONER, DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3 March 26, 2024

DATE **CATHERINE A. TUOHY**, ALJ

Date Received at Agency: 3 March 26, 2024

Date Mailed to Parties: 3 March 26, 2024

CAT/kd/mh/jm

APPENDIX

WITNESSES

For petitioner

C.D.

P.C.

For respondent

Suzanne Ragone

Carolyn Martine

EXHIBITS

For petitioner

P-1 Neurology records of 10/19/23, MRI report, fair hearing transmittal information (thirteen pages)

P-2 Petitioner's typed statement disputing denial annexed to fair hearing request (two pages)

For respondent

R-1 Respondent's fair hearing packet (fifty-two pages)

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 02375-23

AGENCY DKT. NO. N/A

L.L.,

Petitioner,

v.

ATLANTIC COUNTY DEPARTMENT OF FAMILY AND COMMUNITY DEVELOPMENT,

Respondent.

Michael Heinemann, Esq., for petitioner (Law Office of Michael Heinemann, P.C., attorneys)

Alysia J. Remaley, Assistant County Counsel, for respondent (James F. Ferguson, Atlantic County Counsel, attorneys)

Record Closed: January 11, 2024 Decided: January 30, 2024

 BEFORE **KIMBERLEY M. WILSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, L.L., appeals the determination of the respondent, Atlantic County Department of Family and Community Development (Agency), establishing an effective date of eligibility for the Medicaid program and setting a transfer penalty. The Agency found that L.L. was eligible for Medicaid benefits on December 1, 2022, and imposed a transfer penalty of $93,348.81 or 249 days from December 1, 2022, to August 6, 2023. L.L. contends that $55,200, or 147 days, of the transfer penalty is incorrect.

PROCEDURAL HISTORY

On or around November 3, 2022, L.L., through her designated authorized representative (DAR), completed a NJ FamilyCare Aged, Blind, Disabled Programs Application (Application). (R-1 at 2-18.) On January 20, 2023, the Agency found L.L eligible for Medicaid benefits effective December 1, 2022, and assessed a transfer penalty of 249 days from December 1, 2022, to August 6, 2023. (Id. at 19.) On January 20, 2023, L.L. requested a fair hearing. The New Jersey Division of Medical Assistance and Health Services (DMAHS) transmitted the matter to the Office of Administrative Law (OAL), where it was filed as a contested case on March 17, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

After the original hearing date was adjourned, the hearing was held on November 17, 2023. The record remained open to allow the parties to provide summation briefs, which were provided on January 8, 2024. The record closed on January 11, 2024.

FACTUAL DISCUSSION AND FINDINGS

The following **FACTS** are not in dispute, and I so **FIND**:

1. On or around February 5, 2020, L.L. signed an agreement with Freddy Macc Construction LLC (Freddy Macc) to renovate J.S.'s[1] garage. (R-1 at 61-63.) The first deposit for the construction work was $20,000. (Id. at 63.) This agreement does not include any information regarding the reason for or purpose of the renovations. (Id. at 61-63.)

2. On or around December 2, 2021, L.L., as tenant, and J.S., as landlord, entered into a Lease from December 1, 2021, to November 30, 2022, in which L.L. would lease a bedroom plus access to common areas of property at an address in Egg Harbor, New Jersey (Property) for $1,200 in rent, $1,100 of which was for groceries and utility payments and $100 for rent. (Id. at 49-52.) The Lease was automatically renewable for three years as long as L.L. wished to live at the Property. (Ibid.)

3. On or around April 25, 2022, L.L. was admitted to a long-term care facility. (Id. at 69.)

4. On or around November 3, 2022, L.L., through her DAR, completed a NJ FamilyCare Aged, Blind, Disabled Programs Application (Application). (Id. at 2-18.)

5. On or around December 14, 2022, the Agency sent a letter to L.L, through her DAR, indicating that the Agency determined that L.L. transferred assets of $91,476.81. (Id. at 42-45.)

6. On or around December 15, 2022, J.S. prepared a letter to the Agency stating that L.L. sold her Florida trailer to relocate to New Jersey to be closer to family to assist her with her ADLs[2]. (Id. at 47.) The plan was to sell L.L.'s trailer and use the funds to renovate the Property to create a space where she could live. (Ibid.) According to J.S., allowing L.L. to live with him would keep L.L. out of a long-term care facility and allow her to live in the community for three more years. (Ibid.)

7. In the December 15, 2022, letter, J.S. indicated that L.L. paid rent for $1,200 on December 1, 2021; January 6, 2022; and February 3, 2022. (Ibid.) J.S. also indicated that L.L. paid for a storage shed to house her belongings during the renovations to J.S.'s home. (Id. at 47, 55.) L.L. reimbursed J.S. for the cost of that storage shed. (Ibid.) According to an invoice dated December 23, 2019, from Billy Perryman's in Millville, L.L. paid $3,551.82 for a 10'x16' A-frame shed. (Id. at 55.)

8. On or around January 6, 2023, the Agency sent a letter to L.L. on behalf of her DAR, indicating that the Agency determined that L.L. transferred assets of $93,348.81 and was unable to determine the penalty start date. (Id. at 38-40.)

9. On or around January 20, 2023, the Agency sent a letter to L.L. indicating that she was eligible for Medicaid benefits effective August 7, 2023, after a transfer penalty of 249 days, from December 1, 2022, to August 6, 2023. (Id. at 19.)

10. L.L. contests five transfers which are: (i) Check 1221 payable to J.S. for $3,500, with "shed" written in the memo section (Id. at 21); (ii) Check 1223 payable to Freddy Macc for $22,000, with "deposit building" written in the memo section (Id. at 23); (iii) Check 1228 payable to Freddy Macc for $20,000, with the Property address written in the memo section (Id. at 24); (iv) Check 1237 payable to Freddy Macc for $8,000 (Id. at 26), with the Property address and "construction" written in the memo section; and (v) Check 1238 payable to Freddy Macc for $1,700, with "roof" written in the memo section (Id. at 28). Those transfers total $55,200, or 147[3] days of the transfer penalty.

Testimony

For respondent:

Mary Lange (Lange), administrative supervisor for the Agency's Long-Term Medicaid Care Unit, indicated that upon the Agency's inquiry about L.L.'s ownership interest in the Property, it found that she had no ownership interest in the Property. Id. at 64-68.

The shed that L.L. purchased remained on the Property after L.L. began living at a long-term care facility. J.S. did not reimburse L.L. for the shed or for the cost of the renovation to the Property after L.L. began living at a long-term care facility. Lange did not believe that the shed purchase or the renovation to the Property was designed to benefit L.L.

Lange did not believe L.L. received fair market value for the payments for the shed or the cost of the renovation at the time the payments were made because L.L did not have an ownership interest in the Property. This is the reason why the Agency assessed a transfer penalty, and the Agency does not have any discretion on this determination. The information that L.L. provided to the Agency did not establish that the transfers were made for a purpose other than to establish Medicaid eligibility.

The Agency's transfer penalty also included five transfers for $1,200 each from L.L. to J.S. for rent that was paid after L.L. began living at a long-term care facility. Id. at 40.

For petitioner:

J.S. testified that his mother L.L. lived in Florida and owned a home there. In December 2019, L.L. sold her home in Florida and moved to New Jersey so that she could be closer to her grandchildren and great-grandchildren. L.L. did not have any apparent health issues when she moved to New Jersey.

Before her move to New Jersey, L.L. asked J.S. to purchase a shed on the Property to house L.L.'s belongings. L.L. repaid J.S. for the cost of the shed.

496 J.S. and his wife were the only New Jersey family members who had sufficient room in their home to accommodate L.L., and when L.L. decided to move from Florida to New Jersey, J.S.'s family, including J.S. and his wife, decided that L.L. would live with them. Before the renovation, there was no room for L.L. to live at the Property, because all of the bedrooms at the Property were occupied. Freddie Macc was supposed to convert a portion of the garage at the Property into space for L.L. to live. The renovation design included enclosing two bays of the garage and creating a doorway into the home, among other work. The renovation design was handicap accessible because L.L. used a walker.

For about five months, during the renovation of the garage at the Property, L.L. lived in a winter rental in Ocean City, until May, and afterwards, L.L. moved to the Property. There was no room for a shed at L.L.'s rental in Ocean City. There was no discussion about L.L.'s eligibility for Medicaid when they decided to renovate the Property, and J.S. did not consult with an attorney or Medicaid professional to discuss how the renovation at the Property would affect L.L.'s eligibility for Medicaid.

J.S. said the renovation and the shed benefited L.L., and they would not have renovated the Property if L.L. had not moved to New Jersey. He also would not have constructed a shed on the Property but for L.L.'s move to New Jersey. J.S. expected that L.L. would continue to live with him at the Property for the rest of her life but a subsequent illness requiring L.L. to live in a long-term care facility changed his expectation.

When L.L. moved into the Property, the renovations to the garage had not been completed, and she lived in J.S.'s son's bedroom. J.S.'s son slept on the couch in the living room. From the time that L.L. moved into the Property, it took several months before the renovation was completed, and she did move into that renovated space in late 2020. Freddie Macc never completed the renovation at the Property so that J.S. could obtain a certificate of occupancy. Freddie Macc walked away from the project, and Don Colton completed the work on the addition. This work was completed after L.L. was hospitalized.

L.L. lived in the renovated space until March 2022, and lived with J.S. in the Property for about two years. All aspects of the construction were completed in 2023. The addition is not presently being used. L.L.'s cat still lives in the renovated space.

Factual findings:

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. "A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp, 53 N.J. Super. 282, 287 (App. Div. 1958).

Having had the opportunity to hear the witnesses and review the documentation presented by all parties, I accept the testimony of Lange and J.S. as credible. Lange's testimony was direct, consistent and professional, particularly as it pertains to the Agency's review of all information submitted to it to rebut the presumption that the five transfers at issue were made to establish Medicaid eligibility. Similarly, J.S.'s testimony about L.L.'s move from Florida to New Jersey and the purchase of the shed and renovation to the Property was consistent. I note, however, that J.S.'s testimony was not always specific as to time and other details relevant to the renovations to the Property.

Accordingly, I **FIND** the following additional **FACTS**:

1. Before her move to New Jersey, L.L. asked J.S. to purchase a shed on the Property to house L.L.'s belongings. L.L. repaid J.S. for the cost of the shed.

2. L.L. did not have an ownership interest in the Property at the time she transferred funds to Freddie Mac to renovate the Property.

3. The shed that L.L. purchased remained on the Property after L.L. began living at a long-term care facility.

4. J.S. did not reimburse L.L. for the shed or for the cost of the renovation to the Property after L.L. began living at a long-term care facility.

5. The Agency's transfer penalty also included five transfers for $1,200 each from L.L. to J.S. for rent that was paid after L.L. began living at a long-term care facility.

6. In December 2019, L.L. sold her home in Florida and moved to New Jersey.

7. L.L. moved to the Property after her Ocean City rental ended in May 2020, and she moved into the renovated space at the Property in late 2020.

8. L.L. lived in the renovated space until March 2022, and lived with J.S. in the Property for about two years. All aspects of the renovation was completed in 2023.

LEGAL ANALYSIS AND CONCLUSIONS

Medicaid is a cooperative Federal-State venture established by Title XIX of the Social Security Act. 42 U.S.C §1396, et seq. It is "designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." Atkins v. Rivera, 477 U.S. 154, 156 (1986); see also 42 U.S.C. §1396-1; N.J.S.A. 30:4D-2. The New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5, created New Jersey's Medicaid program and DMAHS to perform administrative and operational functions related to the program. See N.J.S.A. 30:4D-4.

Medicaid MLTSS "provides comprehensive services and supports" to eligible participants, including those residing in an assisted living facility, nursing home, community residential service or at home. See https://www.state.nj.us/humanservices/dmahs/home/mltss.html. This program covers care management, home delivered meals, assisted living, community residential services and nursing home care, among other services. Ibid. Individuals qualify for Medicaid MLTSS based on their finances, specifically their monthly income and assets, along with a clinical necessity requirement. Ibid.

A penalty of ineligibility for Medicaid will be assessed when assets are transferred for less than fair market value, during or after the sixty-month look-back period. N.J.A.C. 10:71-4.10(a); N.J.A.C. 10:71-4.10(b)(9)(iv). The penalty period of ineligibility is determined by the total value of the assets transferred, divided by the average monthly cost for a private patient in a nursing home in the state. N.J.A.C. 10:71-4.10(m)1.

A conveyance of funds made during the look-back period raises a rebuttable presumption that the resource was transferred to establish Medicaid eligibility. N.J.A.C. 10:71-4.10(j); H.K. v. State of New Jersey, Dep't of Human Servs., DMAHS, 184 N.J. 367, 380 (2005). The burden of proof to rebut the presumption is upon the applicant. N.J.A.C. 10:71-4.10(j). "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." N.J.A.C. 10:71-4.10(l)1. "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." N.J.A.C. 10:71-4.10(l)2. The determination of whether the transfer was made to qualify for Medicaid does not include a consideration of the merits of the transfer, but whether the applicant has proven that the asset was transferred exclusively for some other purpose. N.J.A.C. 10:71-4.10(l)(3).

The five transfers at issue, specifically Check 1221 payable to J.S. for $3,500, Check 1223 payable to Freddy Macc for $22,000, Check 1228 payable to Freddy Macc for $20,000, Check 1237 payable to Freddy Macc for $8,000 and Check 1238

payable to Freddy Macc for $1,700, fall under one of two categories, which are the shed on the Property or the renovations to the Property. I will address each in turn.

Check 1221

At L.L.'s request, J.S. purchased a shed for L.L.'s personal belongings before L.L. moved from Florida to New Jersey. L.L. reimbursed J.S. for the cost of the shed. This shed remains on the Property, and J.S. has not paid L.L. for the shed. By definition, this is a transfer for less than fair market value. N.J.A.C. 10:71-4.10(a). When L.L. paid J.S. for the cost of the shed, she received nothing in return. J.S. does not have an ownership interest in the shed, and now that L.L. resides in a long-term care facility, J.S. and his wife benefit from the shed on the Property, rather than L.L.

For these reasons, I **CONCLUDE** that the transfer penalty that the Agency assessed for this transaction is appropriate.

Check 1223, Check 1228, Check 1237 and Check 1238

L.L. wrote these four checks, totaling $51,700, to Freddie Macc, and three of the checks included notations that could be construed to be related to the renovations to the Property, such as "building deposit," "construction," or "roof." The evidence in the record, however, does not provide conclusive proof that these funds were transferred for a purpose other than Medicaid eligibility.

First, the February 5, 2020, contract with Freddy Macc lists both L.L. and J.S.'s wife, and it provides no information regarding the purpose of the renovation at the Property. Second, the only written agreement between L.L. and J.S. is the December 2, 2021, Lease. While the Lease includes the terms of L.L.'s living arrangement at the Property, it is important to note that L.L. had been living at the Property for over a year, since approximately June 2020, before J.S. and L.L. reduced this arrangement to a writing. This time lapse does not provide conclusive proof that the funds were transferred for a reason other than Medicaid eligibility. To add to the lack of clarity,

L.L. continued to pay J.S. rent under the Lease for a period of time after L.L. was admitted to a long-term care facility in April 2022.[4]

Finally, and most importantly, each time that L.L. wrote these checks to Freddy Macc, she received nothing in return, let alone fair market value, for the money she spent. L.L. received no ownership interest in the Property at that time, and she still does not have an ownership interest in it.

Counsel for L.L. cites to J.J. v. Div. of Med. Assistance and Health Servs., OAL Docket No. HMA 08979-2022, Final Decision (June 5, 2023), in support of the general proposition that "construction to accommodate a Medicaid applicant in their child's home is not considered a transfer for less than fair market value." Pet. Br. 3. The problem here is that outside of J.S.'s testimony, there is no conclusive evidence to show that this is exactly what L.L. attempted to accomplish.

I applaud J.S. and his family for all that they did to accommodate L.L. in their home when she wished to move from Florida to New Jersey. Testimony in the record included statements that J.S.'s son slept on the couch once L.L.'s rental in Ocean City ended so that L.L. could sleep in his room while the renovations were under way. This is a level of sacrifice and love that is commendable. The evidence, however, is not sufficient to rebut the presumption that these funds were transferred for a purpose other than Medicaid eligibility. I **CONCLUDE** that the transfer penalty that the Agency assessed for these four transactions is appropriate. I further **CONCLUDE** that the Agency did not err in assessing a transfer penalty of $55,200, or 147 days.

ORDER

Based upon the foregoing, the Agency's decision that L.L. was eligible for Medicaid MLTSS benefits on December 1, 2022, and imposing a transfer penalty of 249 days from December 1, 2022, to August 6, 2023, is hereby **AFFIRMED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES,** the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty□five days, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B□10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF FAMILY DEVELOPMENT, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked “Attention: Exceptions.” A copy of any exceptions must be sent to the judge and to the other parties.

January 30, 2024

DATE **KIMBERLEY M. WILSON,** ALJ

Date Received at Agency:

Mailed to Parties:

KMW/cb

APPENDIX

WITNESSES

For petitioner

For respondent

Mary Lange

EXHIBITS

For petitioner

None

For respondent

R-1 Fair Hearing Packet containing the following documents:

- NJ FamilyCare Aged, Blind, Disabled Programs Application dated November 3, 2022
- Letter and Transfer Sheet from the Agency to L.L. regarding Medicaid eligibility dated January 20, 2023
- Copies of checks from L.L.
- Letter from the Agency to L.L. regarding potential transfer penalty dated January 6, 2023
- Emails between the Agency and L.L.'s designated authorized representative dated January 6, 2023
- Letter from the Agency to L.L. regarding potential transfer penalty dated December 14, 2022
- Emails between the Agency and L.L.'s DAR dated December 13, 2022, and December 14, 2022
- Email between the Agency and L.L.'s DAR dated December 20, 2022, with a letter dated December 15, 2022, from J.S. to the Agency; copy of transfer sheet with handwritten notes; Lease between L.L. and J.S.;

504 email and receipt from L.L.’s designated authorized representative dated December 14, 2022, regarding $1,005 check; receipt from Billy Perryman’s regarding shed

- Emails from L.L.’s designated authorized representative regarding L.L.’s automobile dated December 22, 2022, and December 23, 2022
- Emails from L.L.’s designated authorized representative dated November 28, 2022, and November 29, 202; contract between L.L. and Freddy Macc; Deed and ownership documents for the Property
- Nursing home admission documents for L.L., including copies of checks for payment

[1] J.S. is L.L.'s son.

506

2 Activities of daily living.

[3] The daily divisor the Agency used was $374.39.

4 During the hearing, counsel for L.L. objected to the admissibility of this information on cross-examination, arguing that the hearing was limited to the five transfers totaling $55,200. I overruled the objection, indicating that because counsel for L.L. discussed these transfers during his direct examination of J.S., counsel for the Agency could ask questions regarding L.L.'s rent payments to J.S. after her admission to a long-term care facility.

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

B.L.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**ORDER OF RETURN**
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 01491-2023**
AND HEALTH SERVICES AND	:	
UNION COUNTY BOARD OF	:	
SOCIAL SERVICES	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to file a Final Agency Decision is March 21, 2024, in accordance with an Order of Extension.

This matter arises from the Union County Board of Social Services (Union County) July 19, 2022, denial of Petitioner's April 1, 2022, Medicaid application for failure to provide documentation necessary to determine eligibility. A Fair Hearing was held on May 11, 2023, and the record was closed on August 13, 2023. An Initial Decision was

entered on December 20, 2023, reversing Union County's denial of Petitioner's application.

Both the County Welfare Agency (CWA) and the applicant have responsibilities with regard to the application process. N.J.A.C. 10:71-2.2. Applicants must complete any forms required by the CWA; assist the CWA in securing evidence that corroborates his or her statements; and promptly report any change affecting his or her circumstances. N.J.A.C. 10:71-2.2(e). The CWA exercises direct responsibility in the application process to inform applicants about the process, eligibility requirements, and their right to a fair hearing; receive applications; assist applicants in exploring their eligibility; make known the appropriate resources and services; assure the prompt accurate submission of data; and promptly notify applicants of eligibility or ineligibility. N.J.A.C. 10:71-2.2(c) and (d). CWAs must determine eligibility for Aged cases within forty-five days and Blind and Disabled cases within ninety days. N.J.A.C. 10:71-2.3(a) and 42 CFR § 435.912. The timeframe may be extended when documented exceptional circumstances arise preventing the processing of the application within the prescribed time limits. N.J.A.C. 10:71-2.3(c). The regulations do not require that the CWA grant an extension beyond the designated time period when the delay is due to circumstances outside the control of both the applicant and the CWA. At best, an extension is permissible. N.J.A.C. 10:71-2.3; S.D. v. DMAHS and Bergen County Board of Social Services, No. A-5911-10 (App. Div. February 22, 2013).

In the present matter, after reviewing the application, on June 22, 2022, Union County sent a request for information letter to Petitioner asking for several items, including all pages from the "actual Supplemental Needs Trust document (all pages) including Schedule A," and "a written statement and supporting documentation, including, but not limited to, copies of checks, deposit slips, etc. which verify the source of verification of the

source of deposit of $69,181.30 on January 17, 2014 for the UBS account (B.L. Trust)." ID at 2. On July 17, 2022, Union County denied Petitioner's application for two reasons. Ibid. First, Union County stated that Petitioner failed to submit the "actual Supplemental Needs Trust document (all pages) including Schedule A." The second reason was because Petitioner's failure to submit "verification of the source of deposit of $69,181.30 on January 17, 2014 for the UBS account (B.L. Trust)." Ibid. Union County went on to state:

> The actual trust document and verifications of the initial deposit of $69,181.30 are required in order to determine if the trust is Medicaid compliant. The submitted UBS statements are not sufficient. A copy of the check is also required to determine the source of these funds. Therefore, B.L.'s application for the MLTSS Nursing Home program has been denied effective 7/19/2022 for failure to provide requested documentation.
> ID at 3 and R-2.

The Initial Decision found that Union County's request for information letter made it clear that they did not understand the difference between a testamentary trust and a stand-alone trust that would have been established by way of a separate and distinct trust document. Ibid. A Schedule A is typically attached to a stand-alone trust document and identifies the amount and the source of funds used to establish the trust. Ibid. In a testamentary trust, the trust is created by the estate of the decedent and therefore there is no Schedule A. Ibid. The amount of the trust can only be determined directly from the Last Will and Testament if the trust is funded by a specific monetary amount. Ibid. Petitioner's trust document defined the amount as fifty percent of the estate, and the actual amount used to initially fund the Trust could not be determined until Petitioner's estate was finalized. Ibid. Therefore, there was no Trust document other than the Will and no Schedule A to be provided to Union County. Ibid.

The Initial Decision goes on to state that during the Fair Hearing, Union County came to understand that there was no other trust document outside the Will, and that they had already been provided with the Will. Ibid. Union County maintained that it would still need proofs responsive to the second part of the request for information letter in order to grant Petitioner's application. Ibid.

The Initial Decision found that Petitioner's Designated Authorized Representative, Peter Jaques, Esq., fully responded to the second portion of the request for information letter by providing the Agency everything it asked for that existed at the time. ID at 2-3. Mr. Jaques, Esq.'s July 9, 2022 response to the letter provided copies of the UBS Bank Statement for the initial deposit of $69,181.30 into the B.L. Trust account on January 17, 2014, from a single "non-local" check. ID at 3. In the accompanying statement from Mr. Jaques, Esq., he verified and confirmed the initial deposit "represented the distribution to the trust under the last will and testament of B.L.'s father, L.L." He also made the clear representation there were no other documents responsive to the request for documents which verify the source of the funds, except the initial bank statement described above. Ibid. Mr. Jaques, Esq. testified that the Trustee could not locate a copy of the initial check, that he requested a copy from UBS Bank, and was informed by the bank that it did not retain checks or deposit slips as far back as 2014. Ibid.

The Initial Decision holds that the statement provided by Mr. Jaques, Esq. in conjunction with the production of the opening bank statement for the Trust account showing a single deposit of $69,81.30, was sufficient verification of the source of funds, since the bank does not retain copies of deposit checks going back that far. ID at 5.

The Initial Decision concluded that Union County's July 17, 2022 denial of benefits should be reversed and that the requested benefits should be granted. ID at 6.

I FIND that Union County improperly denied Petitioner's July 17, 2022 application for the reasons stated in the Initial Decision.

I REJECT the Initial Decision's findings that Petitioner established eligibility. As Union County denied Petitioner's application for failing to provide the documentation that was necessary to determine eligibility, an eligibility determination related to Petitioner's application would need to be completed prior to being determined.

I am RETURNING this matter to Union County to process Petitioner's application. If it is determined, after further review, that Petitioner's application should still be denied, Union County is directed to issue a determination letter with appeal rights that specifically sets forth the basis for the denial. Petitioner will then have the opportunity to appeal that determination through the fair hearing process.

THEREFORE, it is on this 19th day of MARCH, 2023,

ORDERED:

That the Initial Decision is hereby ADOPTED in part and REVERSED in part and the matter is RETURNED to Union County to process Petitioner's application in accordance with this decision.

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
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SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

J.M.,

PETITIONER,

v.

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

RESPONDENTS.

ADMINISTRATIVE ACTION

FINAL AGENCY DECISION

OAL DKT. NO. HMA 06891-23

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the OAL case file, the documents in evidence, and the Initial Decision in this matter. Neither Party filed exceptions to the Initial Decision in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is May 30, 2024 in accordance with an Order of Extension.

The matter arises regarding Petitioner's March 15, 2023 application whereas the Ocean County Board of Social Services (Ocean County) approved Petitioner's eligibility for Medicaid benefits with an effective date of March 1, 2023. The issue presented here is whether Ocean County correctly determined Petitioner's Medicaid eligibility date.

On March 15, 2023, Petitioner filed an application with Ocean County for the New Jersey FamilyCare Aged, Blind, Disabled Medicaid Managed Long-Term Services and Supports Program (MLTSS) through their representative[1]. (R-1.) On March 23, 2023, Ocean County sent a request for information (RFI) asking for Petitioner's current bank statements for all accounts including the Qualified Income Trust (QIT). (R-2). On July 5, 2023, Ocean County approved Petitioner's application for Medicaid benefits with an effective date of March 1, 2023 after receiving all requested information. (R-3.) The July 5, 2023 notice was appealed requesting an earlier effective date of September 1, 2022[2].

The matter was scheduled for hearing on August 29, 2023, and October 6, 2023, but Petitioner requested adjournments. The parties appeared by phone on November 14, 2023 and advised that the facts were not in dispute so the hearing was adjourned and a schedule for Petitioner's proposed motion for summary decision was set. On January 2, 2024, Petitioner's representative filed a motion for summary decision and on January 8, 2024, Ocean County submitted its response. Petitioner did not file a reply. ID at 2.

The Administrative Law Judge (ALJ) found that Petitioner failed to prove that Ocean County erred in its decision to approve their application for Medicaid with an

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[1] March 15, 2023 application was Petitioner's third application for Medicaid benefits. Petitioner's two previous applications, dated October 18, 2022, and November 9, 2022, were denied but Petitioner did not appeal the denials.

[2] In their initial request for a hearing, Petitioner appealed the amount of the spousal resource allowance, but neither party presented any information or exhibits on this issue.

effective date of March 1, 2023. The ALJ also found that Petitioner failed to prove that the QIT was properly funded prior to March 2023 making Petitioner income eligible prior to March 1, 2023, and/or as early as September 1, 2022, pursuant to N.J.A.C. 10:71-2.2, -5.1, -5.4, and -5.6. ID at 9. The ALJ further found that even if the QIT had been properly funded prior to March 2023, Petitioner would only be eligible for three months of retroactive coverage, not for coverage as early as September 2022. ID at 5.

Based upon my review of the record, I hereby adopt the findings, conclusions, and recommended decision of the ALJ with regard to Petitioner's eligibility date.

The New Jersey Medicaid program is administered by DMAHS pursuant to the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5. Through its regulations, DMAHS establishes "policy and procedures for the application process" N.J.A.C.10:71-2.2(b). To be financially eligible, the applicant must meet both income and resource standards. Income eligibility is based on an examination of all earned and unearned income which has or will be received during the month for which the application is made, beginning with the first day of such month. N.J.A.C. 10:71-5.2(b)(1). All income, whether in cash or in-kind, shall be considered in the determination of eligibility, unless such income is specifically exempt under the provisions of N.J.A.C. 10:71-5.3. The local county welfare agencies (CWA) evaluate Medicaid eligibility. N.J.S.A. 30:4D-7a; N.J.A.C.10:71-1.5, 2.2 (c).

An applicant who would otherwise be over-income may place excess income in a QIT also known as a "Miller Trust". New Jersey received federal authority to begin using QITs on December 1, 2014. The Miller Trust was created so that people who require care or disabled with excess income can still become eligible for Medicaid benefits. The DMAHS addressed this in Medicaid Communication No.14-15, dated December 19, 2014 (Med. Comm. No.14-15) which provided in part:

QIT are Trust documents tied to a special bank account. The primary function of a QIT is to disregard an individual's income above 300% of the Federal Benefit Rate (FBR). In order for this income to be disregarded, it must be deposited monthly into the QIT bank account. Checks deposited into the QIT bank account must include the entire amount of the income.

In addition to the requirement that checks deposited into the QIT "must include the entire dollar amount of that income source," the QIT document must contain the following provisions:

- The QIT must contain only income of the individual;
- The QIT must not contain resources such as money from the sale of real or personal property or money from a savings account;
- The QIT must be irrevocable;
- The QIT must have a trustee to manage administration of the Trust and expenditures from the Trust as set forth in federal and state law;
- New Jersey must be the first beneficiary of all remaining funds up to the amount paid for Medicaid benefits upon the death of the Medicaid recipient;
- Income deposited in the QIT can only be used for the specific Post-Eligibility Treatment of Income and to pay for the Medicaid beneficiary's cost share.

Here, Petitioner established a QIT with TD Bank on September 1, 2022 because their income exceeds the income limit of $2,742 for MLTSS. Petitioner provided a complete trust agreement to Ocean County on November 18, 2022. As shown on Schedule A of the QIT, the amount Petitioner sought to be excluded by the QIT was listed as Petitioner's pension and social security payment. ID at 4. Per the QIT transaction transcripts, until March of 2023, Petitioner only deposited their pension correctly into the QIT from September 2022 to the present. (R-4.) However, Petitioner failed to deposit their SSI into the QIT properly in 2022. In some months Petitioner deposited only half of

their SSI into the QIT account or deposited more than their SSI into the QIT account with additional resources such as cash from unnamed sources. It was not until March 2023 that Petitioner properly funded the QIT and deposited his entire SSI payment.

I agree with the ALJ that Petitioner failed to prove that QIT was properly funded until March of 2023. The funds designated for inclusion in the QIT, as set forth in Schedule A to the QIT document, and the funds actually deposited into the account, as confirmed by the QIT bank statements, must match.

Here, Petitioner chose to establish a QIT where it specifically directed that their pension and SSI. However, Petitioner failed to properly deposit their SSI into the QIT until March of 2023. The QIT transaction transcripts confirmed that Petitioner did not fund the QIT account as dictated by the terms of the trust prior March 1, 2023.

Thus, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision's conclusions. Ocean County correctly determined that the earliest eligibility date that can be given was March 1, 2023 as Petitioner did not properly fund the QIT until March 2023, the first month that the entire amount of pension and SSI were deposited into the QIT.

THEREFORE, it is on this 28th day of MAY 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 11736-23

AGENCY DKT. NO. N/A

D.M.,

Petitioner,

v.

CAMDEN COUNTY BOARD

OF SOCIAL SERVICES,

Respondent.

_____

Jacqueline Srour, Esq., appearing for petitioner (Law Office of Simon P. Wercberger, LLC, attorneys)

Botonya Y. Harris, Human Services Specialist 3, appearing pursuant to N.J.A.C. 1:1-5.4(a)(3) for respondent

Record Closed: February 29, 2024 Decided: March 20, 2024

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

Petitioner, D.M., appeals the denial of NJ FamilyCare Aged, Blind, Disabled Program (Program) benefits by respondent Camden County Board of Social Services

522 (Board) based on being over-resourced/having assets exceeding the standard pursuant to N.J.A.C. 10:71-5.1.

PROCEDURAL HISTORY

3 On May 17, 2023, petitioner applied for Program benefits with the assistance of an authorized representative, Esti Bleier (Bleier). On October 11, 2023, respondent denied the application, stating, "Individual's income exceeds the standard. N.J.A.C. 10:71-5.1. Individual's resources/assets exceeds [sic] the standard. N.J.A.C. 10:71-4.1." The petitioner filed a timely request for a fair hearing. The matter was transmitted to the Office of Administrative Law, where it was filed as a contested case on November 2, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

3 On December 20, 2023, Jacqueline Srour, Esq., entered her appearance for the petitioner. A number of telephone conferences and hearing dates were scheduled. The matter was heard on January 16, 2024. The record was held open pending receipt of closing submissions and was closed on February 29, 2024.

FACTUAL DISCUSSION

Testimony

For respondent:

Botonya Y. Harris (Harris), Human Services Specialist 3, testified to the Board's efforts in processing the petitioner's application. The petitioner's designated authorized representative (DAR),[1] Bleier, submitted the application for NJ FamilyCare Aged, Blind, Disabled Program (NJFC) on May 17, 2023 (R-1).

The Division reviewed the application on June 22, 2023, and sent a Request for Information (RFI) letter on the same date[2] detailing the documents necessary to determine petitioner's eligibility (R-3). The RFI requested verification of "petitioner's pension for the gross amount" (stated to be $2,077.60 per month) and information on "Initiat[ing] the QIT process" (Qualified Income Trust) (R-3). The QIT dated May 9, 2024, stated that funding was by Social Security in the amount of $658.00. On July 6, 2023, pages 1 and 6 of a QIT noted "updated 7/1/2023" (R-4) were uploaded to the Division of Medical Assistance and Health Services (DMAHS) Medicaid Portal under the description of "*request for information*." 3 Only pages 1 and 6 were provided with an update to funding, stating Office of Personnel Management (OPM) $2,306.72. This submission to the

Medicaid Portal prompted the Board to send a second RFI letter dated July 31, 2023[3] (R-5). The Board advised that there was an issue with both the QIT written agreement and the QIT bank account. The RFI stated:

> The QIT is being funded improperly and we cannot grant eligibility until the month it is fully funded correctly. Only income that is over the Medicaid income limits is to be deposited in the QIT monthly. Please review QIT guidelines and correct as you are currently over income.

The petitioner had income from two sources. One income source was the Social Security Administration (SSA) and the other was the OPM.

The gross monthly income from the OPM in its letter of June 14, 2023, stated that petitioner's pension was $2,858.00. The 2023 Managed Long Term Services and Supports (MLTSS) DMAHS income standard is $2,742.00. Petitioner's representative opted to fund the QIT with the income from Social Security (R-4). Petitioner's representative later changed the income going into the QIT bank account from SSA to OPM.

The Board was not provided with the fully executed and corrected QIT written agreement showing the change from SSA to OPM income.

The Board also showed that on April 30, 2024, petitioner had $20,281.87 in her checking account and $600.21 in a holiday account. The total amount was reduced by a payment of $12,783.25 for prepaid funeral expenses; $658.00 SSA; and $2,277.608 OPM, for a balance of $15,718.85 with a remaining balance of $7,333.63 documenting that she is over-resourced.

3 On October 11, 2023, a letter denying petitioner was sent, as she was over-income and over-resourced.

On cross-examination Harris clarified that the eligibility date being used was May 1, 2023. Questioning regarding August eligibility was made by Srour. Harris also clarified that additional information was requested on July 31, 2023 (after submission of pages 1 and 6 of the QIT on July 6) asking for clarification on the QIT.

Harris was asked about petitioner's documentation, specifically, about deposits in August 2023 and dates of funding.

524 **For petitioner:**

Mendy Simmonds (Simmonds) has worked with Medicaid applications for the past eighteen months for Future Care Consultants (including D.M.) and is the current DAR for petitioner. He was asked about the OPM payment and deductions for tax. The net amount plus federal income tax is what was funded in August 2023. He stated that the second RFI did not ask for a full second QIT or schedule "A"—only the funding.

On cross-examination, Simmonds testified further on the schedule "A" and the issue of a new full QIT document. A new schedule "A" was sent, as the old schedule documented improper funding.

On redirect examination, Simmonds was questioned about the income levels from the letter of May 17, 2023, and realized that there was a funding problem of the QIT up to August 2023.

There was a continuing issue as to Srour asserting that if funding was correct the petitioner would receive services for August, while Harris stated that the documents stated that correct information needed to be presented in order to avoid denial for August services.

Findings

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as probable in the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954); Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or

because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

One of the issues raised by Srour is that the Board did not request the other pages of the QIT in July 2023, therefore the Board cannot raise concerns of the other pages—there cannot be an allegation that this was a new QIT document, as the Board did not ask for the other documents. If the Board wanted the full document, it could have asked for it, but did not.

I accept the testimony of the witnesses as credible, and based upon the credible evidence submitted, I **FIND**:

1. The petitioner was born in 1937, and in 2023 was seeking MLTSS services.

2. Her application was filed by DAR Bleier, who was replaced by Simmonds, an employee of Future Care. No allegations as to the authorization of either party were made.

3. Jacqueling Srour, Esq., entered her appearance for petitioner on December 20, 2023.

4. On May 17, 2023, an NJ FamilyCare Aged, Blind, Disabled Program application was submitted to respondent. (R-1.)

5. On June 22, 2023, an initial request was sent to petitioner seeking additional information. This verification had a deadline of July 6, 2023. (R-1.)

6. On July 31, 2023, a second request was sent seeking additional information. This verification had a deadline of August 6, 2023.

7. Upon review of this submission by respondent it was determined that it was deficient. On October 11, 2023, a denial notification was sent to the petitioner specifying the reason for denial of the application.

LEGAL ANALYSIS AND CONCLUSION

The issue here is whether respondent properly denied petitioner's application for Medicaid benefits based upon petitioner failing to provide all the documents requested by the Board and being over-resourced.

Medicaid is a federally created, state-implemented program designed, in broad terms, to ensure that people who cannot afford necessary medical care are able to obtain it. 42 U.S.C. § 1396-1, et seq., Title XIX of the Social Security Act. Medicaid provides "medical assistance to the poor at the expense of the public." DeMartino v. Div. of Med. Assistance & Health Servs., 373 N.J. Super. 210, 217 (App. Div 2004) (quoting Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 165 (1998)); Atkins v. Rivera, 477 U.S. 154, 156 (1986); 42 U.S.C. § 1396-1. Medicaid is intended to be a funding of last resort for those in need. N.J.S.A. 30:4D-2. Although a state is not required to participate in the Medicaid program, once a state elects to participate, it must comply with the Medicaid statute and federal regulations. 42 U.S.C. § 1396a. New Jersey participates in the Medicaid program pursuant to the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1, et seq. The DMAHS is the State agency designated, pursuant to 42 U.S.C. § 1396a(5), to administer the New Jersey Medicaid program. N.J.S.A. 30:4D-7. The petitioner is seeking Medicaid benefits under the NJFC program.

NJFC "resources criteria and eligibility standards of this section apply to all applicants and beneficiaries." N.J.A.C. 10:71-4.1(a). The petitioner's information revealed the existence of multiple assets that petitioner potentially had access to. As the county welfare agency (CWA) receiving the petitioner's application, the Board was responsible for determining the petitioner's "income and resource eligibility" for benefits. N.J.A.C. 10:71-3.15(a). Here, the Division sought verifications for fifty-two items initially, then five items, and then clarification on a PNC account. (R-1.) These requests were plain on each request's face as to what was requested.

The CWA and the applicant share responsibility in the application process. N.J.A.C. 10:71-2.2. The CWA exercises direct responsibility in the application process to inform applicants about the purpose and eligibility requirements for the Medicaid program, of their rights and responsibilities under its provisions, and of their right to a fair hearing; receive applications; assist applicants in exploring their eligibility; make known the appropriate resources and services; and assure the prompt and accurate

submission of eligibility data to the Medicaid status files for eligible persons and prompt notification to ineligible persons of the reason(s) for their ineligibility. N.J.A.C. 10:71-2.2(c). Applicants must provide the CWA with verifications requested. N.J.A.C. 10:71-2.2(e). Failure to provide required verifications constitutes grounds for denial of the application for medical benefits. D.M. v. DMAHS, HMA 06394-06, Initial Decision (April 24, 2007), adopted, Dir. (June 11, 2007), https://njlaw.rutgers.edu/collections/oal/; see, e.g., R.B. v. Ocean Cnty. Bd. of Soc. Servs., 2 020 N.J. AGEN LEXIS 438 (Jan. 18, 2020) (finding that applicant's failure to provide requested information on resource accounts prior to stated deadline for denial of benefits justified denial of Medicaid eligibility). In this regard, "[d]ocumentary sources of evidence present factual information recorded at some previous date by a disinterested party"; documentary sources including "certificates, legal papers, insurance policies, licenses, bills, receipts, notices of RSDI benefits, and so forth" provide important substantiating evidence to support an applicant's eligibility. N.J.A.C. 10:71-3.1(b)(1). Importantly, "[e]ligibility must be established in relation to each legal requirement to provide a valid basis for granting or denying medical assistance." N.J.A.C. 10:71-3.1(a).

Here, on June 22, 2023, and July 31, 2023, the Board made specific requests of the petitioner in order to determine the petitioner's eligibility for benefits. The request provided the petitioner with a clear deadline by which to comply. The petitioner did supply documentation in response to the Board RFI's, but the Board states that the information contained therein was insufficient. The Board's allegation is well founded, to wit, a QIT may not be modified simply by exchanging pages within the document. The QIT is a legally binding, notarized document. It cannot be changed simply by exchanging pages in the document, a new or amended QIT would have to be created. The allegation by petitioner that the Board waived the issue, as it "did not request the whole document," is specious. If the QIT were modified, the petitioner would need to present the entire document to show all terms and conditions thereof. A party cannot simply change pages in a legally binding document.

It is clear that failure to comply in a timely manner would result in the application being denied in accordance with N.J.A.C. 10:71-2.2. When the requested verifications were not provided within the deadline, and the Board could not evaluate the "new" QIT, the Board properly denied the petitioner's application on October 11, 2023. (R-1 at 20–24.)

528 I **CONCLUDE** that, in light of the foregoing, the Board acted in good faith in processing the petitioner's application. The information—specifically regarding funding of the QIT—was not sufficient in its details to provide the information needed by the deadline set by the Board, and, accordingly, the Board denied the application.

I **CONCLUDE** that because the petitioner did not provide the Board with complete information about her QIT and financial assets so that the Board could determine whether she was eligible for NJFC benefits by October 11, 2023—nor did the petitioner request an extension—the application for Medicaid benefits was properly denied by the Board on that date.

ORDER

I **ORDER** that the Board's determination to deny the petitioner's eligibility for Medicaid benefits is hereby **AFFIRMED**, and that the petitioner's appeal is hereby **DISMISSED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified, or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty□five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B□10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked “Attention: Exceptions.” A copy of any exceptions must be sent to the judge and to the other parties.

March 20, 2024

DATE **CARL V. BUCK III**, ALJ

Date Received at Agency:

Date to Parties:

CVB/ tat

APPENDIX

WITNESSES

For petitioner:

Mendy Simmonds, DAR

For respondent:

Botonya Y. Harris, Human Services Specialist 3

EXHIBITS

For petitioner:

P-1 Packet

For respondent:

R-1 Medicaid Application

R-2 Designation of Authorized Representative

R-3 Request for Information June 22, 2023

R-4 NJFamilyCare uploaded verification

R-5 Request for Information July 31, 2023

R-6 DMAHS Income Standards 2023

R-7 NJFamilyCare resource verification

R-8 Medicaid Eligibility Worksheet

R-9 Denial Letter

[1] DAR form of May 4, 2023.

2 With response date of July 6, 2023.

3 With response date of August 14, 2023.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 13535-23

AGENCY DKT. NO. N/A

J.S.,

Petitioner,

v.

ESSEX COUNTY BOARD

OF SOCIAL SERVICES,

Respondent.

J.S., pro se

Charity Achonye, Family Service Worker-Office of Special Services Division of Family Assistance and Benefits, for Respondent, (Essex County Board of Social Services),

Record Closed: April 9, 2024 Decided: April 30, 2024

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

536 Petitioner, J.S., appeals the decision of Essex County Board of Social Services (Agency), terminated his Medicaid benefits because he had excess resources under N.J.A.C. 10:71-4.5.

PROCEDURAL HISTORY

On November 8, 2023, the Agency notified J.S. that his Medicaid benefits would be terminated effective November 30, 2023, because the Agency determined that J.S. had resources in excess of $4,000.00 under N.J.A.C. 10:71-4.5(c). On November 27, 2023, J.S. filed a request for a fair hearing with the State of New Jersey, Department of Human Services, Fair Hearing Unit, Division of Medical Assistance and Health Services (DMAHS).

DMAHS transmitted this matter to the Office of Administrative Law (OAL), where it was filed on December 6, 2023, as a contested case. N.J.S.A. 52:14B-1 to-15; N.J.S.A. 52:14F-1 to-13. As this matter was filed with DMAHS after October, 2, 2023, the Initial Decision made herein is deemed adopted as the final agency decision of DMAHS pursuant to its Order of October 2, 2023.

The OAL Clerk's Office initially scheduled this matter for a telephone hearing for March 11, 2023. On said date, a telephonic conference was held, and J.S. requested an adjournment in order to seek legal representation. The matter was then rescheduled for March 25, 2024, for a telephone hearing. On March 25, 2024, J.S. appeared and there was no appearance for the Agency.

The matter was then rescheduled for a telephone hearing, on April 9, 2024, at 11:30AM, and a request for a Spanish speaking interpreter was made to the Agency. On April 9, 2024, J.S. appeared, and no one appeared for the Agency. J.S. wished to proceed with the hearing, nevertheless, and the fair hearing was conducted on said. The record closed on April 9, 2024.

FINDINGS

As the Agency made no appearance at the hearing, and having heard the testimony of J.S. and the documents received in evidence, I **FIND** the following to be **FACTS** herein:

J.S. is seventy (70) years old and receives Medicare benefits. Since 2020, J.S. was receiving Medicaid benefits under as in The NJ FamilyCare Aged, Blind, Disabled (ABD) Programs. J.S. applied for renewal of his Medicaid benefits on July 31, 2023 (R-1). On November 8, 2023, the Agency determined that J.S. was over the $4,000.00 resource limit for individuals in ABD

Programs, because J.S. had countable resources of $4,260.96, maintained in his bank account at Wells Fargo Bank in July 2023. (R-1).

J.S. receives monthly Social Security Administration retirement benefits (SSA) of $1,215 (R-1). J.S. owns a residential home that has been in foreclosure for several years. As part of his plan to avoid the loss of his home, J.S. applied for a modification of his mortgage with his mortgage lender. On or about October 2022, J.S. filed for Chapter 13 Bankruptcy protection. As part of the Chapter 13 Bankruptcy Plan, he pays $1,063.90 to the mortgage lender and $194 to the Chapter 13 Bankruptcy Trustee (P-1, P-2 and P-3).

J.S. testified that he receives monthly deposits in his bank account from his brother-in-law “Ga.” in the amount of $1,100.00 and his sister-in-law “Gr.” in the amount of $300.00, which monies were then used to pay the mortgage lender, and the Chapter 13 Trustee (P-1 to P-3). Ga. passed away in February 2023, and thereafter Gr. and for a short time J.S.’s son, “Ro." made monthly contributions toward the mortgage and Chapter 13 Trustee payments. Said contributions were deposited in J.S.’s bank account (P-1, P-2 and P-4).

As part of his fair hearing appeal, and as requested by the Agency, J.S. produced Wells Fargo bank statements for the months of July 2023 through November 2023 (P-2). A review of the bank statements provided by J.S. reveals that each monthly statement does not commence on the first day of the respective month. The ending balance for the Wells Fargo bank statements for the months of July 2023, when J.S. applied for Medicaid and November 2023, when the Agency denied his Medicaid application is as follows:

- July statement is for the time period June 9 to July 19. The beginning balance was $4,260.96, and the ending balance was $3,721.54;
- August statement is for the time period July 11 to August 7. The beginning balance was $3,721.54, and the ending balance was $2,539.67.
- September statement is for the time period August 8 to September 8. The beginning balance was $2,539.67, and the ending balance was $#,516.00.
- October statement is for the time period September 9 to October 6. The beginning balance was $3,516.00, and the ending balance was $2,420.87.
- November statement is for the time period October 7 to November 7. The beginning balance was $2,420.87.

[P-2]

LEGAL ANALYSIS AND CONCLUSION

The Commissioner of the New Jersey Department of Human Services has adopted regulations governing participation in New Jersey's Medicaid program, including income and resource eligibility standards. N.J.A.C. 10:71-1.1 to -9.5. If the total value of an individual's resources exceeds $2,000, that individual is ineligible for the Medicaid program. N.J.A.C. 10:71-4.5(c).

In New Jersey, Medicaid is called NJ FamilyCare, and specific to the elderly, it is called NJ FamilyCare Aged, Blind, Disabled (ABD) Program, which J.S. qualifies under. The allowable resource standard for J.S. as an ABD program participant is $4,000. Pursuant to N.J.A.C. 10:72-3.4(a), a person who is sixty-five years or older and meets all eligibility criteria under the ABD Program is eligible for Medicaid benefits:

I **CONCLUDE** that J.S. satisfies the definition of an individual qualifying as an Aged, Blind Disabled program for Medicaid in New Jersey, and that the allowable resource standard for him is $4,000.

The regulations provide that only resources that are "available" to the applicant are to be considered in the determination of Medicaid eligibility. A resource is available when "[t]he person has the right, authority or power to liquidate real or personal property," or when "[r]esources have been deemed available to the applicant." N.J.A.C. 10:71-4.1(c)(1), (2). This includes "income to which the individual is entitled but does not receive due to action or inaction by the individual or the individual's spouse." N.J.A.C. 10:71-4.10(b)(3).

Resources that are classified as "excludable," however, "shall not be considered either in the deeming of resources or in the determination of eligibility." N.J.A.C. 10:71-4.4(a). Excludable resources include "the value of resources which are not accessible to an individual through no fault of his or her own." N.J.A.C. 10:71-4.4(b)(6). I **CONCLUDE** that the monies deposited in J.S.'s bank account by Ga., Gr., and Ro., are not excludable, as J.S. had access and control of the same.

Resource eligibility is determined by the total of all countable resources as of the "first moment of the first day of the month" N.J.A.C. 10:71-4.5(a)(1). See also N.J.A.C. 10:71-4.1(e). In order to be eligible for Medicaid at the time of his application on July 31, 2023, J.S. had to have resources under the standard of $4,000, as of that first moment of that month. Here, the record discloses that the July 2023 Wells Fargo bank statement is for the time period June 9 to

July 10, and the August 2023 bank statement is for the time period July 11 to August 7. Therefore, I **CONCLUDE** that the "first day of the month" under N.J.A.C. 10:71-4.5(a)(1) shall be June 9, 2023, for the July bank statement and July 11 for the August statement.

The record reflects that the July bank statement discloses a balance of $4,260.96, on the first day of the statement (June 9), and the August bank statement discloses a balance of $3,721.54, on the first day of the statement (July 11). The Agency has determined, and I have found, that J.S.'s maximum allowed resource amount is $4,000 for an ABD Medicaid recipient. Based upon the record before me, I **CONCLUDE** that at the time J.S. applied for Medicaid benefits under the ABD plan on July 31, 2023, the Agency should have relied upon the balance contained in J.S.'s bank statement for August, which is for the time period July 11 to August 7. I further **CONCLUDE** that since the balance in J.S.'s bank statement on July 11 was $3,721.54, the same is under the ABD resource amount of $4,000, and therefore, J.S. would have qualified for Medicaid benefits.

Consequently, I **CONCLUDE** that J.S. is not over the applicable resource limit of $4,000 for ABD program participants in New Jersey at the time of his application on July 31, 2023, and the Agency's decision on November 8, 2023, denying J.S.'s Medicaid application of July 2023, is **REVERSED.**

ORDER

I **ORDER** that petitioner, J.S. is resource eligible for Medicaid Only benefits under N.J.A.C. 10:71-4.5, and the Agency's decision on November 8, 2023, denying J.S.'s Medicaid application of July 2023, is **REVERSED.**

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. §1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.

April 30, 2024

DATE **JULIO C. MOREJON**, ALJ

Date Received at Agency: April 30, 2024

Date E-Mailed to Parties: April 30, 2024

lr

APPENDIX

WITNESSES

For Petitioner:

J.S.

For Respondent:

No appearance

EXHIBITS

For Petitioner:

P-1 Letter from J.S. dated March 21, 2024, in Spanish addressed the undersigned

P-2 Wells Fargo Bank Statements for July through November 2023

P-3 Postal Money Orders

For Respondent:

R-1 Fair Hearing Summary Report, and other documents provided by the Agency

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

M.Z.,

PETITIONER,

v.

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

RESPONDENTS.

ADMINISTRATIVE ACTION

ORDER OF REMAND

OAL DKT. NO. HMA 10260-23

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision, the Office of Administrative Law (OAL) case file, and the documents filed below. Petitioner filed Exceptions to the Initial Decision. Procedurally, the time period for the Agency Head to render a Final Agency Decision is February 26, 2024 in accordance with an Order of Extension.

This matter arises from the Bergen County Board of Social Services' (BCBSS) July 12, 2023 determination letter, which terminated Petitioner's Medicaid benefits, effective July 31, 2023, for not meeting citizenship requirements. Petitioner appealed the BCBSS's determination. The Division of Medical Assistance and Health Services (DMAHS) transmitted the matter to the Office of Administrative Law (OAL), where it was filed on October 3, 2023, as a contested case. On November 16, 2023, the Court heard testimony from the BCBSS's representative and Petitioner's brother, who is acting as Petitioner's representative in this matter.

The Initial Decision in the matter found that the BCBSS was correct to terminate Petitioner's Medicaid benefits, as Petitioner is not an alien, lawfully admitted for permanent residence after having been present in the United States for five years. The Initial Decision additionally found that although Petitioner has applied for asylum, pursuant to the Immigration and Nationality Act, she has not provided documentation to prove that such status has been granted. Based upon the record below, I concur with the Initial Decision's conclusion that Petitioner has not to date successfully demonstrated that termination of Petitioner's Medicaid benefits was inappropriate in this matter.

However, in Petitioner's Exceptions filed to the Initial Decision, she argues and provides supporting evidence that she previously requested a copy of her case file. She indicates that she did not receive these records prior to the hearing; the record is unclear as to whether said file was provided to Petitioner by the BCBSS either prior to or during the underlying hearing in this matter. Petitioner also plausibly points to potential deficiencies in the original notice that the BCBSS provided in June 2022 informing her eligibility under a reasonable opportunity period. As a result of these omissions and/or deficiencies, Petitioner may have been unable to fully present arguments at the underlying hearing that could have supported her position.

Accordingly, I am REMANDING the matter to OAL for BCBSS to provide Petitioner with her the case file and give Petitioner the opportunity to present her arguments after a full review of the documentation contained therein. Additionally, upon remand, Petitioner shall present documentation showing any past or present immigration status that may be relevant to her continued eligibility for Medicaid benefits. As part of this process, Petitioner shall also provide all documentation and status updates related to all applications that she has made and are pending/were denied with the U.S. Citizenship and Immigration Services (USCIS).

Thus, for the reasons set forth above, I hereby ADOPT the Initial Decision.

THEREFORE, it is on this 26th day of FEBRUARY 2024,

ORDERED:

That the Initial Decision is hereby REMANDED in accordance with this decision.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

G.B.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
OCEAN COUNTY BOARD	:	**OAL DKT. No. HMA 04752-2023**
OF SOCIAL SERVICES,	:	
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is March 21, 2024 in accordance with an Order of Extension.

This matter arises from issues regarding the "snapshot" date of June 2022 used by Ocean County Board of Social Services' (OCBSS) to evaluate Petitioner's resources for compliance with Medicaid eligibility, and its denial for Petitioner's failure to provide requested documentation within the allotted timeframe.

By way of background, Petitioner was admitted to Complete Care at Bey Lea on September 3, 2021. Petitioner was first admitted to the assisted living facility and later transferred to the nursing facility. On February 22, 2023, Petitioner completed a Medicaid application, but was not clinically approved until June 15, 2022, the day the pre-admission application (PAS) was completed.[1] R-4. OCBSS completed its resource assessment using the June 2022 snapshot date and Petitioner's Medicaid application was denied on May 12, 2023 because the combined resources of Petitioner and his spouse exceeded the standard. R-2. See also N.J.A.C. 10:71-4.1.

Petitioner contends that the snapshot date should be October 1, 2021 because he entered the assisted living facility in September 2021. Petitioner's Letter Brief p. 2. Respondent disagrees, and contends it was required to use the June 2022 snapshot date since that is the date the PAS was performed which established clinical eligibility. Services provided in an assisted living facility are not considered to be institutional. Federal law requires that States provide institutional nursing home services. See 42 USCA § 1396a(a)(10). Assisted living services are not required services, but can be provided under a home and community based waiver either under 1915(c) or 1115. See Medicaid Assisted Living Services, Government Accountability Report (GAO) https://www.gao.gov/assets/690/689302.pdf. A continuous period of institutionalization is determined by admission to a Title XIX facility for a period of 30 consecutive days. N.J.A.C. 10:71-4.8(a). See also 42 1396r-5(h)(1). Petitioner's snapshot occurred in June

[1] This is Petitioner's second application. The first application was filed on October 28, 2022 and was denied for failure to provide information and over resources.

2022 when he was deemed clinically eligible for the level of care provided in a nursing home.

The Initial Decision concluded that the proper snapshot date was June 2022. The Initial Decision also concluded that Petitioner could not be considered "institutionalized" until the PAS had been completed. Two recent cases cited in the Initial Decision are specific to the snapshot issue presented in this matter. The first case, S.W. v. Cumberland County Board of Social Services, HMA 99815-20, final decision, (June 4, 2020), https://njlaw.rutgers.edu/collections/oal/final/hma00815-20_2.pdf determined the snapshot date does not hinge on when an applicant enters a Title XIX facility. Rather, is it the date of the PAS that an individual can be considered institutionalized for Medicaid purposes. The second case, H.H. v. Burlington County Board of Social Services, HMA 4848-2019, final decision (Dec. 27, 2019), https://njlaw.rutgers.edu/collections/oal/final/hma04848-19_1.pdf, determined that the snapshot date is the date the PAS is performed. Accordingly, I FIND that OCBSS was correct to use the June 2022 date when determining Petitioner's resources.

In addition to establishing clinical eligibility, the Medicaid applicant must meet the requirements for financial eligibility. When determining whether an institutionalized individual with a spouse is eligible for Medicaid benefits, applicants follow specific rules that assess the allowable resources and allowable income of the institutionalized and the community spouse. The amount of resources that the couple is permitted to retain is based on a snapshot of the couple's total combined resources as of the beginning of the continuous period of institutionalization. See Mistrick v. DMAHS and PCBOSS, 154 N.J. 158, 171 (1998); 42 U.S.C.A. § 1396r-5(c)(1)(A); N.J.A.C. 10:71-4.8(a)(1). The

community spouse is permitted to keep the lesser of: one-half of the couple's total resources or the maximum amount set forth in N.J.A.C. 10:71-4.8(a)(1). This is called the Community Spouse Resource Allowance (CSRA). Resources above that amount must be spent down before qualifying for benefits.

A review of Petitioner's combined resources as of the snapshot date shows the following assets: 1) Wells Fargo account # 0864 for $40.96, 2) Wells Fargo account #3421 for $12.49, 3) Wells Fargo account # 6288 for $51,764.32, 4) Wells Fargo account #6360 for $7,644.52, 5) Lincoln life insurance $12,718.46 and 6) Prudential life insurance $14,267.00 totaling $86,447.75. R-3. In June 2022, OCBSS informed Petitioner that he would be eligible for Medicaid when the total combined resources were equal to $45,223.87, and that the combined resources had to be reduced before the first moment of the first day of the month to establish eligibility. R-4. Here, although Petitioner believes the snapshot date should be October 1, 2021, he is not seeking eligibility dating back to March 2023, the date resources were spent down. Petitioner's Letter Brief p. 4. Instead, Petitioner seeks to establish eligibility in May 2023.[2] Ibid.

I agree with the denial of Petitioner's application based upon a finding that Petitioner's combined resources exceeded the standard using the PAS date of June 2022, Petitioner and his wife were over resources in accordance with the standard when OCBSS conducted its review for eligibility.

Accordingly, for the reasons set forth in the Initial Decision and set forth above, I hereby ADOPT the Initial Decision's findings that OCBSS's denial of Petitioner's application for being over resources was appropriate in this matter.

---

[2] Petitioner had a remaining balance of $21,094.50 as of September 6, 2023.

THEREFORE, it is on this 19th day of MARCH 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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PORZIO
BROMBERG&NEWMAN P.C.

Fair Hearing Trends

Presented by
Ms. Ryann M. Siclari, Esq., LL.M. (Elder Law), CELA
Principal – Porzio, Bromberg, and Newman

*Certified by the ABA Accredited National Elder Law Foundation

- 40 is the new 30
- Black is the new Red
- Initial Decisions are the new Final Agency Decisions

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. § 1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

Full text of N.J.S.A. 52:14B-10 – Attachment 1

LEGAL NOTICE

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Notice of time-limited waiver to accept Initial Decisions as Final Agency Decisions for certain eligibility-related fair hearings.

issuing a Final Agency Decision. The state requested this temporary authority apply to a specific subset of fair hearing requests for all member populations, specifically those where an applicant or beneficiary has been denied or terminated from enrollment for: 1) being over income; 2) being over resources; or 3) failing to provide requested information. This means that in these types of cases, the Initial Decision will become the Final Agency Decision without further review by DMAHS.

Full Notice – Attachment 2

Trend #1

CHECK THE BOX INTIAL DECISIONS

- Income Eligibility
- Resource Eligibility
- Failure to Provide

Income Eligibility

5

Medicaid Only

Excess Income Appeal

N.J.A.C. 10:71-5

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application due to excess income under N.J.A.C. 10:71-5.6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has been established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has not been established.

Income check the box – Attachment 3

Income Eligibility

...

I **FIND** that petitioner's:

Earned income is $5,562.45 (N.J.A.C. 10:71-5.2, -5.4);

Unearned income is $547 (N.J.A.C. 10:71-5.2, -5.4);

Income exclusions total $0 (N.J.A.C. 10:71-5.3);

Countable income totals $6,109.45 (N.J.A.C. 10:71-5.4(b)); and

The applicable income eligibility standard is $3,588 (N.J.A.C. 10:71-5.6).

III.

☑ I **CONCLUDE** that petitioner is over the applicable income limit and is therefore income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ I **CONCLUDE** that petitioner is not over the applicable income limit and is therefore income **ELIGIBLE** for Medicaid Only benefits as of _____ (fill in date of eligibility) under N.J.A.C. 10:71-5.6.

Income check the box – Attachment 3

Income Eligibility

7

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

The above earned income amount includes earned income for both petitioner, T.H. ($2,768.87), and B.H. ($2,793.59). B.H. is T.H.'s nineteen year-old son who is a household member. The income eligibility standard that applies is that for a four-person household (two adults and two children).

Income check the box – Attachment 3

Income Eligibility

ORDER

I **ORDER** that:

☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.

☑ Petitioner is income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ Petitioner is income **ELIGIBLE** for Medicaid Only benefits as of _____ under N.J.A.C. 10:71-5.6.

Income check the box – Attachment 3

Resource Eligibility

Medicaid Only

Excess Resources Appeal

N.J.A.C. 10:71-4

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application due to excess resources under N.J.A.C. 10:71-4.5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has been established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has not been established.

Resource check the box – Attachment 4

Resource Eligibility

II.

I **FIND** that petitioner's **available and countable resources** total $0
(N.J.A.C. 10:71-4.1, -4.2; *see also* N.J.A.C. 10:71-4.6 and -4.8 for married individuals).
The applicable **resource eligibility standard** is $2,000 (N.J.A.C. 10:71-4.5).
Petitioner's **date of resource eligibility** is 10/01/2023 (N.J.A.C. 10:71-4.5) (fill in if resources under applicable standard).

III.

☐ I **CONCLUDE** that petitioner is over the applicable resource limit and is therefore resource **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-4.5.

☑ I **CONCLUDE** that petitioner is not over the applicable resource limit and is therefore resource **ELIGIBLE** for Medicaid Only benefits as of 10/01/2023 (fill in date of eligibility) under N.J.A.C. 10:71-4.5.

Resource check the box – Attachment 4

Resource Eligibility

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

Petitioner relies on AM v. DMAHS, OAL Dkt. No. HMA 8525-05, 2006 N.J. Agen. Lexis. 586 Final Decision (June 26, 2006) that concluded a Special Needs Trust of which petitioner was a beneficiary is an excludable resource pursuant to N.J.A.C. 10:71-4.4 (b)(6), which states the value of resources which are not accessible to an individual through no fault of his or her own are excludable. Under the Special Needs Trust petitioner was not the grantor, the trust was not funded by any of the petitioner's assets, a trustee other than petitioner has the sole discretion to disburse the trust funds, petitioner could not compel the distribution of the corpus or income and petitioner was not the beneficiary of any remaining funds upon the trust's termination. Under these facts there is no obligation to meet all of the criteria of N.J.A.C. 10:71-4.11 (g) as respondent asserts in order for the assets to be excludable. The intent of the regulation is to reach assets of the individual applying for Medicaid when they have been placed in Trust by that individual or someone acting with legal authority on behalf of the individual. See also A-1271-22 - W.F. vs. Morris County Department of Family Services Division of Medical Assistance and Health Services (because a court-ordered trust reformation by which the applicant's assets (see continuation sheet attached)

Resource check the box – Attachment 4

Failure to Provide

12

Medicaid Only

Failure to Verify Eligibility Appeal

N.J.A.C. 10:71-2.2 and -2.3

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application for failure to provide the following evidence of eligibility under N.J.A.C. 10:71-2.2(e):

H&R Block statements and the location where his social security benefits were deposited

Failure to Provide check the box – Attachment 5

Failure to Provide

13

II.

☑ I **FIND** that petitioner did not timely provide all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a), and that no exceptional circumstances exist under N.J.A.C. 10:71-2.3(c); therefore, I **CONCLUDE** that the Medicaid Only application must be **DENIED** under N.J.A.C. 10:71-2.2(e).

☐ I **FIND** that petitioner did not timely provide all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a), but that exceptional circumstances exist under N.J.A.C. 10:71-2.3(c); therefore, I **CONCLUDE** that the time limit for verification must be **EXTENDED** under N.J.A.C. 10:71-2.3(c).

☐ I **FIND** that petitioner did not timely provide all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a); exceptional circumstances exist under N.J.A.C. 10:71-2.3(c); and petitioner has since provided all the required documentation; therefore, I **CONCLUDE** that the Medicaid Only application must be **PROCESSED** to determine eligibility under N.J.A.C. 10:71.

☐ I **FIND** that petitioner timely provided all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a); therefore, I **CONCLUDE** that the Medicaid Only application must be **PROCESSED** to determine eligibility under N.J.A.C. 10:71.

Failure to Provide check the box – Attachment 5

Failure to Provide

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

Petitioner reapplied for benefits on February 17, 2024. Petitioner was approved for benefits effective February 1, 2024, retroactive to November 1, 2023. Petitioner seeks benefits to October 1, 2023, and argues he had an exceptional circumstance wherein obtaining the H & R Block bank statements were out of his control.

Respondent argues that petitioner requested an extension, but did not detail the issues he had obtaining the records. At the time of denial, statements where the petitioner's social security was deposited as well as missing bank statements from December 27, 2018, to January 2023 were not received. I agree.

Failure to Provide check the box – Attachment 5

Failure to Provide

15

ORDER

I **ORDER** that:

- ☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.
- ☑ Petitioner is **INELIGIBLE** for Medicaid Only under N.J.A.C. 10:71-2.2(e).
- ☐ Respondent must **EXTEND** the time limit for verification under N.J.A.C. 10:71-2.3(c).
- ☐ The case be **RETURNED** to respondent for respondent to **PROCESS** the application to determine eligibility under N.J.A.C. 10:71.

Failure to Provide check the box – Attachment 5

CHECK THE BOX INTIAL DECISIONS

Transfer of Resources

Transfer of Resources

17

Medicaid Only

Transfer of Assets Penalty Appeal

N.J.A.C. 10:71-4.10

STATEMENT OF THE CASE

Respondent imposed a penalty of 35 months and 23 days on petitioner for the alleged transfer of the following assets for less than fair market value within the five-year lookback period under N.J.A.C. 10:71-4.10:

$30,000 on March 9, 2019, January 11, 2019, January 4, 2020 and January 5, 2021;

$32,000 on January 4, 2022; $33,250 on January 20, 2023; and $227,408.02 for properl

([redacted]e, Edgewater Park).

Transfer of Resources check the box – Attachment 6(1)

Transfer of Resources

II.

☑ I **FIND** that petitioner improperly transferred $ 185, 250 in assets within the lookback period under N.J.A.C. 10:71-4.10(a), and that petitioner did not rebut the presumption that the transfer was made to qualify for Medicaid under N.J.A.C. 10:71-4.10(j) and (k); therefore, I **CONCLUDE** that petitioner is subject to a penalty of 16 months and 2 days of Medicaid ineligibility under N.J.A.C. 10:71-4.10, and that the effective date is February 1, 2023.

☐ I **FIND** that petitioner did not transfer assets for less than fair market value within the lookback period under N.J.A.C. 10:71-4.10(a); therefore, I **CONCLUDE** that petitioner is not subject to a transfer penalty under N.J.A.C. 10:71-4.10.

☐ I **FIND** that petitioner transferred assets solely for a purpose other than to qualify for Medicaid under N.J.A.C. 10:71-4.10(j) and (k); therefore, I **CONCLUDE** that petitioner is not subject to a transfer penalty under N.J.A.C. 10:71-4.10.

☐ I **FIND** that petitioner qualifies for an undue hardship exception under N.J.A.C. 10:71-4.10(q); therefore, I **CONCLUDE** that petitioner is not subject to a penalty under N.J.A.C. 10:71-4.10.

Transfer of Resources check the box – Attachment 6(1)

Transfer of Resources

19

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

Medical records support that J.D. suffered traumatic brain injury that has progressively worsened, has seizures, and wound healing problems. She requires assistance with bathing, toileting, transferring, dressing, bed mobility and locomotion. Her son, T.D., has provided home care for her and has lived with her for at least two years prior to 2011. T.D. brings J.D. to her medical appointments.

Transfer of Resources check the box – Attachment 6(1)

Transfer of Resources

Upon review of the documents contained in the OAL file, it is unclear from the record what assets were transferred for less than fair market value during the 60-month look back period. Here, the Administrative Law Judge (ALJ) failed to provide a recommended decision that contains findings of fact or conclusions of law, and failed to include any documentary evidence or testimony in the Initial Decision that would allow for a determination as to the transfer penalty imposed.

To settle the record, I am remanding the matter to the OAL for a recommended decision that sets forth a reason for the decision and request that the record be further developed by providing proof of the alleged transfer of assets in the amount of $30,000,

Remand – Attachment 6(2)

Problems?

21

- Failure to Fact Find
  - N.J.S.A. 52:14B-10(c) – If an agency head "reject[s] or modif[ies] any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record."
- Failure to Make Credibility Determinations
  - "[G]enerally it is not for [an appellate court] or the agency head to disturb [an ALJ's] credibility determination, made after due consideration of the witnesses' testimony and demeanor during the hearing." J.L. v. DMAHS and Middlesex County Board of Social Services, A-1413-21 (App. Div. Dec. 2022).
- Remands
- Appellate Division – Arbitrary and Capricious?
- Wonky Results

Problems?

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

N/A

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

N/A Facts & No Facts – Attachment 7

Trend #2

RECURRING ISSUES IN FAIR HEARING DECISIONS

Trend # 2 – Recurring Issues

OCCO – Clinical Eligibility

- Basic Rule: Pre-Admission Screen (PAS) completed by OCCO using NJ Choice Assessment Tool
- NJAC 10:166-2.1 (formerly NJAC 8:85) - beneficiary requires, at a minimum, the basic NF services described at N.J.A.C. 10:166-2.2
  - severely impaired cognitive and related problems with memory deficits and problem solving
  - 2.2 isn't very helpful
- 1115 Demonstration Waiver is more helpful
  - Requires limited assistance or greater with three or more activities of daily living
  - Exhibits problems with short-term memory and is minimally impaired or greater with decision making ability and requires supervision or greater with three or more activities of daily living and/or
  - Is minimally impaired or greater with decision making and, in making himself or herself understood, is often understood or greater and requires supervision or greater with three or more activities of daily living.

NJAC 10:166 2.1 & 2.2; page 41/42 of Waiver – Attachment 8

Trend # 2 – Recurring Issues

25

OCCO – Clinical Eligibility

- What are we seeing: Denials of Clinical Eligibility (A LOT)
- Why? Unwinding of COVID flexibilities.
  - Stopped doing PAS Screenings/ Did them only telephonically.
- B.L. v. OCCO (HMA 07115-2024)
  - Soiled themselves and needed help cleaning the floor, anxiety/nervousness.
- B.T. v. OCCO (HMA 01696-2024)
  - Partial cognitive defect with their short-term memory, needs prompting to shower

OCCO Denials – Attachment 9

Trend # 2 – Recurring Issues

OCCO – Clinical Eligibility

- D.U. v. OCCO (HMA 01728-2024)
  - Hearing loss, incontinence, and experiences tremors in their hand. Daughter testified he exaggerated his independence.
  - New assessment – tremors progressed which caused difficulty with ambulation and unsteady gait – cane for stability.

Common Thread of these cases?

No evidence.

No expert testimony.

Nothing to contract the OCCO nurse assessment.

OCCO Denials – Attachment 9

Trend # 2 – Recurring Issues

27

Real Property

- Basic Rule: NJAC 10:71-4.1(d)
- The equity value of real property is the tax assessed value of the property multiplied by the reciprocal of the assessment ratio as recorded in the most recently issued State Table of Equalized Valuations.

N.J.A.C. 10:71-4.1 – Attachment 10

Trend # 2 – Recurring Issues

28

Real Property

- What if the house is in disrepair and is sold for less than FMV?
  - Get an appraisal (see L.D. v. DMAHS & Middlesex County, HMA 02621-2021).
- But what if they don't get an appraisal ahead of time?
  - Get a retroactive appraisal (see D.M. v. DMAHS & Cumberland County, HMA 09682-23; and L.N. v. DMAHS & Middlesex County, HMA 06054-24)
- But don't do a side deal, list is on the open mark (See J.T. v. DMAHS & Middlesex County, HMA 01650-23)*

* Great summary of case law on real property

Real Property cases – Attachment 11

Trend # 2 – Recurring Issues

29

Transfers for Less than Fair Market Value

- Basic Rule:
- Transfers for less than fair market value during the look pack period result in transfer penalty. N.J.A.C. 10:71-4.10(c).
  - Penalty Divisor Decreased to $402.74 effective 4/1/25
- Applicant can rebut presumption that assets were transferred to establish Medicaid eligibility by presenting 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 – Attachment 12

Trend # 2 – Recurring Issues

Loans/Reimbursements

- Nothing has changed…
- Loans/Agreements Need to be in writing before hand.
- Reimbursements need to be documented, correct amount, and timely.
  - JT acct closed and JT kept for shared expenses. No Agreement. (C.L. v. DMAHS & Ocean County, HMA 03925-24)
  - Paid joint living expenses on credit card and applicant gave money for credit card payment. No agreement. (CT v. DMAHS & Atlantic County, HMA 02870-23).
  - Paid family for caregiving expenses they covered. No Agreement. (M.K. v. DMAHS & Morris County, A-0578-23).

Loans/Reimbursement Cases – Attachment 12

Trend # 2 – Recurring Issues

31

Fraud

- Road Map to rebut presumption:
  - C.T. v. DMAHS & Morris County (HMA 04165-23) - $96,1460 penalty.
    - Applicant won $5,000,000 and transferred large amounts to claim.
    - Reported fraud to police.
    - Report alone is not sufficient– not conclusive.
    - Remanded to provide other. Listed examples:
      - Bank records, internal fraud investigation reports, attempts to cancel checks, live testimony of witnesses who were involved with finances, law enforcement.
  - D.Q. v. DMAHS & Middlesex Cty (HMA 06406-23) - $98,404 penalty.
    - Daughter took money unauthorized and were forged.
    - No handwriting expert, failed to notify authorities, failed to initiate an investigation.

Fraud – Attachment 13

Questions?

Ryann M. Siclari, Esq.
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www.pbnlaw.com

Attachment 1

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JUSTIA

Go to Previous Versions of this Section

2024 New Jersey Revised Statutes Title 52 - State Government, Departments and Officers Section 52:14B-10 - Evidence; judicial notice; recommended report and decision; final decision; effective date.

Universal Citation:
NJ Rev Stat § 52:14B-10 (2024)

Previous Next

52:14B-10 Evidence; judicial notice; recommended report and decision; final decision; effective date.

10. In a contested case:

(a) (1) The parties shall not be bound by rules of evidence whether statutory, common law, or adopted formally by the Rules of Court. All relevant evidence is admissible, except as otherwise provided herein. The administrative law judge may, in his discretion , exclude any evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion. The administrative law judge shall give effect to the rules of privilege recognized by law. Any party in a contested case may present his case or defense by oral and documentary evidence, submit rebuttal evidence and conduct such

cross-examination as may be required, in the discretion of the administrative law judge, for a full and true disclosure of the facts.

(2) Where the case involves a permitting or licensing decision of the Department of Environmental Protection, the department shall be required to produce and certify a permitting record within 30 days after the filing of the contested case. This deadline may be extended by an administrative law judge upon the unanimous agreement of the parties. The production and certification of the department's permitting record, in accordance with this paragraph, shall not limit the ability of the parties to further supplement the record.

(b) Notice may be taken of judicially noticeable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the specialized knowledge of the agency or administrative law judge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The experience, technical competence, and specialized knowledge of the agency or administrative law judge may be utilized in the evaluation of the evidence, provided this is disclosed of record.

(c) All hearings of a State agency required to be conducted as a contested case under this act or any other law shall be conducted by an administrative law judge assigned by the Director and Chief Administrative Law Judge of the Office of Administrative Law, except as provided by this amendatory and supplementary act. A recommended report and decision which contains recommended findings of fact and conclusions of law and which shall be based upon sufficient, competent, and credible evidence shall be filed, not later than 45 days after the hearing is concluded, with the agency in such form that it may be adopted as the decision in the case and delivered or mailed, to the parties of record with an indication of the date of receipt by the agency head; and an opportunity shall be afforded each party of record to file exceptions, objections, and replies thereto, and to present argument to the head of the agency or a majority thereof, either orally or in writing, as the agency may direct.

Unless the head of the agency or a party requests that the recommended report and decision be filed in writing, the recommended report and decision of the administrative law judge may be filed orally in such appropriate cases as prescribed by the director and if a transcript has been requested pursuant to subsection (e) of section 9 of P.L.1968, c.410 (C.52:14B-9).

An administrative law judge may file a recommended report and decision in the form of a checklist in such appropriate cases and formats as prescribed by the director after consultation with each State agency.

The head of the agency, upon a review of the record submitted by the administrative law judge, shall adopt, reject or modify the recommended report and decision no later than 45 days after receipt of such recommendations. In reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record. Unless the head of the agency modifies or rejects the report within such period, the decision of the administrative law judge shall be deemed adopted as the final decision of the head of the agency. The recommended report and decision shall be a part of the record in the case. For good cause shown, upon certification by the director and the agency head, the time limits established herein may be subject to a single extension of not more than 45 days. Any additional extension of time shall be subject to, and contingent upon, the unanimous agreement of the parties.

(d) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated and shall be based only upon the evidence of record at the hearing, as such evidence may be established by rules of evidence and procedure promulgated by the director.

Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. The final decision may incorporate by reference any or all of the recommendations of the administrative law judge. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith by registered or certified mail to each party and to his attorney of record.

(e) Except where otherwise provided by law, the administrative adjudication of the agency shall be effective on the date of delivery or on the date of mailing, of the final decision to the parties of record whichever shall occur first, or shall be effective on any date after the

date of delivery or mailing, as the agency may provide by general rule or by order in the case. The date of delivery or mailing shall be stamped on the face of the decision.

(f) The head of an agency may order that, in certain appropriate cases, the recommended report and decision of the administrative law judge shall be deemed adopted, immediately on filing thereof with the agency, as the final decision of the head of the agency. The appropriate cases shall be described in a written order issued by the head of the agency, filed with the director, and made available to the public as a government record. The order shall not include any contested case for which the head of the agency is specifically required by State or federal law to review the recommended report and decision and adopt the final decision. The head of the agency may revise or revoke an order, issued pursuant to this subsection, whenever it is deemed appropriate. The order shall apply to all appropriate contested cases commenced with the agency after the order's issuance and until the order is rescinded or modified. In such appropriate contested cases, the head of the agency shall not have the opportunity to reject or modify the administrative law judge's recommended report and decision pursuant to subsection (c) of this section and the final decision by the administrative law judge shall comply with the requirements of and shall be given the same effect as a final decision of the head of the agency pursuant to subsection (d) of this section.

(g) Whenever the parties in a contested case stipulate to the factual record, and agree that there are no genuine issues of material fact to be adjudicated, the head of the agency may, in his discretion, render a final agency decision on the matter without obtaining the prior input of, or a recommended report and decision from, an administrative law judge.

L.1968, c.410, s.10; amended 1971, c.217, s.4; 1978, c.67, s.8; 1993, c.343, s.3; 2001, c.5, s.4; 2013, c.236, s.2.

‹ Previous Next ›

Attachment 2

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LEGAL NOTICE

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

Notice of time-limited waiver to accept Initial Decisions as Final Agency Decisions for certain eligibility-related fair hearings.

TAKE NOTICE that on June 9, 2023, the Department of Human Services, Division of Medical Assistance and Health Services (DMAHS) requested a waiver from the United States Department of Health and Human Services (HHS), Centers for Medicare and Medicaid Services (CMS) under section 1902(e)(14)(A) of the Social Security Act (the Act). The waiver is intended to protect NJ FamilyCare beneficiaries in addressing the challenges the state faces as part of a transition to routine operations following the end of the continuous enrollment condition described under section 6008(b)(3) of the Families First Coronavirus Response Act (FFCRA). Such waivers are time-limited and are meant to promote enrollment and retention of eligible individuals by easing the administrative burden states may experience in light of systems limitations and challenges.

New Jersey anticipates severe operational and systems challenges in the timely completion of eligibility and enrollment actions, including conducting fair hearings, due to an unprecedented caseload of renewals that the state will need to process, coupled with significant staffing shortages that the state currently faces. Accordingly, New Jersey requested that CMS provide authority under section 1902(e)(14)(A) of the Act to temporarily permit the state to adopt certain recommended fair hearing decisions of the Office of Administrative Law (OAL) (Initial Decisions) as Final Agency Decisions without further agency review, rather than DMAHS conducting a routine review of all Initial Decisions and issuing a Final Agency Decision. The state requested this temporary authority apply to a specific subset of fair hearing requests for all member populations, specifically those where an applicant or beneficiary has been denied or

terminated from enrollment for: 1) being over income; 2) being over resources; or 3) failing to provide requested information. This means that in these types of cases, the Initial Decision will become the Final Agency Decision without further review by DMAHS.

By letter dated July 28, 2023, CMS granted New Jersey's request under section 1902(e)(14)(A) of the Act. Under the approval, New Jersey is required to follow the standard fair hearing process for all other fair hearing requests. This authority will be implemented beginning October 2, 2023 and will remain effective until DMAHS issues a subsequent order terminating the authority pursuant to N.J.A.C. 1:1-18.9(c).

A copy of this Notice is available for public review at the Medical Assistance Customer Centers, County Welfare Agencies, and the Department's website at:

http://www.state.nj.us/humanservices/providers/grants/public/index.html.

Attachment 3

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 05745-2024

T.H.

Petitioner,

v.

Burlington County Board of Social Services

Respondent.

Medicaid Only

Excess Income Appeal

N.J.A.C. 10:71-5

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application due to excess income under N.J.A.C. 10:71-5.6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has been established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has not been established.

II.

I **FIND** that petitioner's:

Earned income is $5,562.45 (N.J.A.C. 10:71-5.2, -5.4);

Unearned income is $547 (N.J.A.C. 10:71-5.2, -5.4);

Income exclusions total $0 (N.J.A.C. 10:71-5.3);

Countable income totals $6,109.45 (N.J.A.C. 10:71-5.4(b)); and

The applicable income eligibility standard is $3,588 (N.J.A.C. 10:71-5.6).

III.

☑ I **CONCLUDE** that petitioner is over the applicable income limit and is therefore income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ I **CONCLUDE** that petitioner is not over the applicable income limit and is therefore income **ELIGIBLE** for Medicaid Only benefits as of _____ (fill in date of eligibility) under N.J.A.C. 10:71-5.6.

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

The above earned income amount includes earned income for both petitioner, T.H. ($2,768.87), and B.H. ($2,793.59). B.H. is T.H.'s nineteen year-old son who is a household member. The income eligibility standard that applies is that for a four-person household (two adults and two children).

The application date was February 4, 2024, so the DMAHS income eligibility standards effective January 1, 2024 (not January 1, 2023), are the correct standards to utilize in this matter. Thus, the correct applicable income eligibility level is $3,588, and not $3,450 as testified to by the respondent.

Petitioner asserted that her income changed by the time the denial was issued. T.H. was advised to reapply if her circumstances have changed.

OAL Dkt. No. HMA 05745-2024

ORDER

I **ORDER** that:

☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.

☑ Petitioner is income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ Petitioner is income **ELIGIBLE** for Medicaid Only benefits as of _____ under N.J.A.C. 10:71-5.6.

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. § 1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.

06/19/2024
DATE

Rebecca C. Lafferty
Rebecca C. Lafferty, ALJ

Date Record Closed: 06/18/2024

Date Filed with Agency: _____

Date Sent to Parties: _____

OAL Dkt. No. HMA 05745-2024

APPENDIX

Witnesses

For Petitioner:

T.H.

For Respondent:

Catherine Kadar, Paralegal Specialist

OAL Dkt. No. HMA 05745-2024

Exhibits

For Petitioner:

None

For Respondent:

R-1 Fair Hearing packet (consisting of thirteen pages)

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Attachment 4

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 01779-24

D.M.

Petitioner,

v.

Monmouth County Division of Social Services

Respondent.

Medicaid Only

Excess Resources Appeal

N.J.A.C. 10:71-4

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application due to excess resources under N.J.A.C. 10:71-4.5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has been established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has not been established.

OAL Dkt. No. HMA 01779-24

II.

I **FIND** that petitioner's **available and countable resources** total $0 (N.J.A.C. 10:71-4.1, -4.2; *see also* N.J.A.C. 10:71-4.6 and -4.8 for married individuals). The applicable **resource eligibility standard** is $2,000 (N.J.A.C. 10:71-4.5). Petitioner's **date of resource eligibility** is 10/01/2023 (N.J.A.C. 10:71-4.5) (fill in if resources under applicable standard).

III.

☐ I **CONCLUDE** that petitioner is over the applicable resource limit and is therefore resource **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-4.5.

☑ I **CONCLUDE** that petitioner is not over the applicable resource limit and is therefore resource **ELIGIBLE** for Medicaid Only benefits as of 10/01/2023 (fill in date of eligibility) under N.J.A.C. 10:71-4.5.

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

Petitioner relies on AM v. DMAHS, OAL Dkt. No. HMA 8525-05, 2006 N.J. Agen. Lexis. 586 Final Decision (June 26, 2006) that concluded a Special Needs Trust of which petitioner was a beneficiary is an excludable resource pursuant to N.J.A.C. 10:71-4.4 (b)(6), which states the value of resources which are not accessible to an individual through no fault of his or her own are excludable. Under the Special Needs Trust petitioner was not the grantor, the trust was not funded by any of the petitioner's assets, a trustee other than petitioner has the sole discretion to disburse the trust funds, petitioner could not compel the distribution of the corpus or income and petitioner was not the beneficiary of any remaining funds upon the trust's termination. Under these facts there is no obligation to meet all of the criteria of N.J.A.C. 10:71-4.11 (g) as respondent asserts in order for the assets to be excludable. The intent of the regulation is to reach assets of the individual applying for Medicaid when they have been placed in Trust by that individual or someone acting with legal authority on behalf of the individual. See also A-1271-22 - W.F. vs. Morris County Department of Family Services Division of Medical Assistance and Health Services (because a court-ordered trust reformation by which the applicant's assets (see continuation sheet attached)

PAGE 2 CONTINUATION SHEET

were put into new trusts for the benefit of his children was not a "gift" directed by the applicant but was instead approved by a chancery judge at the behest of the children's guardian ad litem to satisfy the applicant's child support obligations under a prior divorce judgment).

OAL Dkt. No. HMA 01779-24

ORDER

I **ORDER** that:

☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.

☐ Petitioner is resource **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-4.5.

☑ Petitioner is resource **ELIGIBLE** for Medicaid Only benefits as of 10/01/2023 under N.J.A.C. 10:71-4.5.

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. § 1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.

06/06/2024
DATE

MARY ANN BOGAN , ALJ

Date Record Closed: 05/20/2024

Date Filed with Agency: 06/06/24

Date Sent to Parties: 06/07/24

OAL Dkt. No. HMA 01779-24

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

None

OAL Dkt. No. HMA 01779-24

Exhibits

For Petitioner:

P-1 NJFC MLTSS Denial Letter, dated January 8, 2024

P-2 Order of Judgment, Monmouth County Superior Court Chancery Division Probate Part, filed and dated October 28, 2005

P-3 Refunding Bond and Release, dated January 24, 2006

P-4 Deed, dated March 10, 2006

P-5 Settlement Statement, dated December 24, 2020

P-6 Promissory Note, dated August 15, 2020

P-7 Bank of America Bank Summary, dated October 28, 2005

P-8 Verified Complaint, Superior Court Chancery Division Probate Part, Monmouth County, filed and dated September 12, 2005

For Respondent:

R-1 Initial letter sent to D.M. from Monmouth County Board of Social Services, dated October 23, 2020

R-2 Renewal notice sent to D.M. from Monmouth County Board of Social Services, dated April 21, 2023

R-3 Returned completed Renewal with documents, received on May 9, 2023

R-4 Initial RFI sent to D.M. from Monmouth County Board of Social Services, dated June 1, 2023

R-5 Documents received on June 26, 2023 in response to RFI, dated June 1, 2023

R-6 Termination letter sent to D.M. from Monmouth County Board of Social Services, dated August 17, 2023

(see continuation sheet)

APPENDIX CONTINUATION SHEET

R-7 Second RFI sent to D.M. from Monmouth County Board of Social Services, dated August 17, 2023

R-8 Documents received on October 26, 2023, including reforming from father's Last Will and Testament to SNT and SNT trust corpus

R-9 MES System showing D.M. was opened from September 1, 2023 – September 30, 2023

R-10 Reconsideration Letter (due to over resource) sent to D.M. from NJ Family Care, dated January 10, 2024

R-11 N.J.A.C. 10:71-2.2

R-12 Letter to J.M. from State of New Jersey, Department of Health, dated August 20, 2020

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Attachment 5

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 04179-24

W.D.

Petitioner,

v.

ATLANTIC COUNTY DEPARTMENT OF FAMILY AND COMMUNITY DEVELOPMENT,

Respondent.

Medicaid Only

Failure to Verify Eligibility Appeal

N.J.A.C. 10:71-2.2 and -2.3

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application for failure to provide the following evidence of eligibility under N.J.A.C. 10:71-2.2(e):

H&R Block statements and the location where his social security benefits were deposited

OAL Dkt. No. HMA 04179-24

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing is established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing is not been established.

II.

☑ I **FIND** that petitioner did not timely provide all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a), and that no exceptional circumstances exist under N.J.A.C. 10:71-2.3(c); therefore, I **CONCLUDE** that the Medicaid Only application must be **DENIED** under N.J.A.C. 10:71-2.2(e).

☐ I **FIND** that petitioner did not timely provide all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a), but that exceptional circumstances exist under N.J.A.C. 10:71-2.3(c); therefore, I **CONCLUDE** that the time limit for verification must be **EXTENDED** under N.J.A.C. 10:71-2.3(c).

☐ I **FIND** that petitioner did not timely provide all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a); exceptional circumstances exist under N.J.A.C. 10:71-2.3(c); and petitioner has since provided all the required documentation; therefore, I **CONCLUDE** that the Medicaid Only application must be **PROCESSED** to determine eligibility under N.J.A.C. 10:71.

☐ I **FIND** that petitioner timely provided all the required documentation under N.J.A.C. 10:71-2.2(e) and -2.3(a); therefore, I **CONCLUDE** that the Medicaid Only application must be **PROCESSED** to determine eligibility under N.J.A.C. 10:71.

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

Petitioner reapplied for benefits on February 17, 2024. Petitioner was approved for benefits effective February 1, 2024, retroactive to November 1, 2023. Petitioner seeks benefits to October 1, 2023, and argues he had an exceptional circumstance wherein obtaining the H & R Block bank statements were out of his control.

Respondent argues that petitioner requested an extension, but did not detail the issues he had obtaining the records. At the time of denial, statements where the petitioner's social security was deposited as well as missing bank statements from December 27, 2018, to January 2023 were not received. I agree.

OAL Dkt. No. HMA 04179-24

ORDER

I **ORDER** that:

☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.

☑ Petitioner is **INELIGIBLE** for Medicaid Only under N.J.A.C. 10:71-2.2(e).

☐ Respondent must **EXTEND** the time limit for verification under N.J.A.C. 10:71-2.3(c).

☐ The case be **RETURNED** to respondent for respondent to **PROCESS** the application to determine eligibility under N.J.A.C. 10:71.

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. § 1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.

June 28, 2024
DATE

JOAN M. BURKE , ALJ

Date Record Closed: June 25, 2024

Date Filed with Agency:

Date Sent to Parties:

OAL Dkt. No. HMA 04179-24

APPENDIX

Witnesses

For Petitioner:

Mimi Berkowitz, Designated Authorized Representative

For Respondent:

Mary Lange, Administrative Supervisor, MLTSS

OAL Dkt. No. HMA 04179-24

Exhibits

For Petitioner:

P-1- Fair hearing Packet (106 Pages)

Closing Summation Brief

For Respondent:

R-1 Fair hearing Packet (21 Pages)

Closing Summation Brief

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Attachment 6

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 11886-2024

J.D.

,

Petitioner,

v.

Burlington County Board of Social Services,

Respondent.

Medicaid Only

Transfer of Assets Penalty Appeal

N.J.A.C. 10:71-4.10

STATEMENT OF THE CASE

Respondent imposed a penalty of 35 months and 23 days on petitioner for the alleged transfer of the following assets for less than fair market value within the five-year lookback period under N.J.A.C. 10:71-4.10:

$30,000 on March 9, 2019, January 11, 2019, January 4, 2020 and January 5, 2021; $32,000 on January 4, 2022; $33,250 on January 20, 2023; and $227,408.02 for propert ([redacted]e, Edgewater Park).

OAL Dkt. No. HMA 11886-2024

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has been established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has not been established.

II.

☑ I **FIND** that petitioner improperly transferred $185, 250 in assets within the lookback period under N.J.A.C. 10:71-4.10(a), and that petitioner did not rebut the presumption that the transfer was made to qualify for Medicaid under N.J.A.C. 10:71-4.10(j) and (k); therefore, I **CONCLUDE** that petitioner is subject to a penalty of 16 months and 2 days of Medicaid ineligibility under N.J.A.C. 10:71-4.10, and that the effective date is February 1, 2023.

☐ I **FIND** that petitioner did not transfer assets for less than fair market value within the lookback period under N.J.A.C. 10:71-4.10(a); therefore, I **CONCLUDE** that petitioner is not subject to a transfer penalty under N.J.A.C. 10:71-4.10.

☐ I **FIND** that petitioner transferred assets solely for a purpose other than to qualify for Medicaid under N.J.A.C. 10:71-4.10(j) and (k); therefore, I **CONCLUDE** that petitioner is not subject to a transfer penalty under N.J.A.C. 10:71-4.10.

☐ I **FIND** that petitioner qualifies for an undue hardship exception under N.J.A.C. 10:71-4.10(q); therefore, I **CONCLUDE** that petitioner is not subject to a penalty under N.J.A.C. 10:71-4.10.

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

Medical records support that J.D. suffered traumatic brain injury that has progressively worsened, has seizures, and wound healing problems. She requires assistance with bathing, toileting, transferring, dressing, bed mobility and locomotion. Her son, T.D., has provided home care for her and has lived with her for at least two years prior to 2011. T.D. brings J.D. to her medical appointments.

OAL Dkt. No. HMA 11886-2024

ORDER

I **ORDER** that:

☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.

☑ Petitioner is subject to a transfer **PENALTY** of 16 months and 2 days under N.J.A.C. 10:71-4.10.

☐ Petitioner is **NOT** subject to a transfer penalty under N.J.A.C. 10:71-4.10.

I **FILE** my initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration. This recommended decision may be adopted, modified, or rejected by the **ASSISTANT COMMISSIONER**, who is authorized to make a final decision in this case. If the **ASSISTANT COMMISSIONER** does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision becomes a final decision under N.J.S.A. 52:14B-10(c).

Within seven days from the date on which this recommended decision is mailed to the parties, any party may file written exceptions at **ASSISTANT COMMISSIONER, DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 27,2024 — Kim C. Belin

DATE — Kim C. Belin, ALJ

Date Record Closed: 11/15/2024

Date Filed with Agency: November 27, 2024

Date Sent to Parties: 11/27/2024

OAL Dkt. No. HMA 11886-2024

APPENDIX

Witnesses

For Petitioner:

Alan Turtz, M.D.

Thomas [redacted]

For Respondent:

None

OAL Dkt. No. HMA 11886-2024

Exhibits

For Petitioner:

P-19 Dr. Turtz's Certification

P-25 Medical records from Dr. Turtz

P-34 Alan R. Turtz Curriculum Vitae

For Respondent:

None

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

GREGORY WOODS
Assistant Commissioner

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

J.D.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**ORDER OF REMAND**
BURLINGTON COUNTY BOARD OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES,	:	**OAL DKT. No. HMA 11886-2023**
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the OAL case file, the documents in evidence, and the Initial Decision in this matter. Neither party filed exceptions to the Initial Decision. Procedurally, the time period for the Agency Head to render a Final Agency Decision is February 27, 2025, in accordance with an Order of Extension.

This matter concerns the transfer penalty assessed against Petitioner. Based on the limited evidence provided, Burlington County Board of Social Services (Burlington County) imposed a penalty of 35 months, 23 days for the transfer of assets within the five-year lookback period. N.J.A.C. 10:71-4.10. ID at 1. More specifically, the transfers in question include: 1) "$30,000 on March 9, 2019, January 11, 2019, January 4, 2020, and January 5, 2021, 2) $32,000 on January 4, 2022, 3) $33,250 on January 20, 2023, and $227,408.02" for the property located in Edgewater Park, New Jersey. Ibid. The Initial

Decision upheld the transfer penalty and determined that Petitioner transferred a total of $185,250 in assets and determined that the period of ineligibility should be 16 months and 2 days.[1] ID at 2. The Initial Decision also determined that Petitioner failed to rebut the presumption that the transfer was made to qualify for Medicaid. Ibid. Lastly, the Initial Decision determined that:

> J.D. suffered traumatic brain injury that has progressively worsened, has seizures, and wound healing problems. She requires assistance with bathing, toileting, transferring, dressing, bed mobility and locomotion. Her son, T.D., has provided home care for her and has lived with her for at least two years prior to 2011. T.D. brings J.D. to her medical appointments. Ibid.

Upon review of the documents contained in the OAL file, it is unclear from the record what assets were transferred for less than fair market value during the 60-month look back period. Here, the Administrative Law Judge (ALJ) failed to provide a recommended decision that contains findings of fact or conclusions of law, and failed to include any documentary evidence or testimony in the Initial Decision that would allow for a determination as to the transfer penalty imposed.

To settle the record, I am remanding the matter to the OAL for a recommended decision that sets forth a reason for the decision and request that the record be further developed by providing proof of the alleged transfer of assets in the amount of $30,000, $33,250 and $227,408.02 imposed by Burlington County. Currently, the file is missing documents entered as evidence such as medical records from Dr. Turtz designated as P-25 and Certification of Dr. Turtz designated as P-19. ID at 5. Upon production of the missing documents, evidentiary proofs and recommended decision based in law and fact,

[1] The ALJ's imposition of 16 months, 2 days appears to modify the period of ineligibility established by Burlington County, which was 35 months, 23 days. ID at 1, 2.

the matter with the complete case file should be returned to the agency to render a Final Agency Decision.

The Initial Decision is hereby REVERSED and REMANDED for a recommended decision that contains finding of facts and conclusions of law, and to further develop the record with documentary evidence for consideration of the transfer penalties imposed against Petitioner.

THEREFORE, it is on this 24th day of FEBRUARY 2025,

ORDERED:

That the Initial Decision is hereby REVERSED and the case REMANDED as set forth above.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance
and Health Services

Attachment 7

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 08274-2024

J.H.,

Petitioner,

v.

BURLINGTON COUNTY BOARD OF SOCIAL SERVICES,

Respondent.

Medicaid Only

Excess Income Appeal

N.J.A.C. 10:71-5

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application due to excess income under N.J.A.C. 10:71-5.6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has been established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has not been established.

II.

I **FIND** that petitioner's:

Earned income is $1,733.20 (N.J.A.C. 10:71-5.2, -5.4);

Unearned income is $_____ (N.J.A.C. 10:71-5.2, -5.4);

Income exclusions total $_____ (N.J.A.C. 10:71-5.3);

Countable income totals $_____ (N.J.A.C. 10:71-5.4(b)); and

The applicable income eligibility standard is $1,732.00 (N.J.A.C. 10:71-5.6).

III.

☑ I **CONCLUDE** that petitioner is over the applicable income limit and is therefore income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ I **CONCLUDE** that petitioner is not over the applicable income limit and is therefore income **ELIGIBLE** for Medicaid Only benefits as of _____ (fill in date of eligibility) under N.J.A.C. 10:71-5.6.

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

N/A

ORDER

I **ORDER** that:

☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.

☑ Petitioner is income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ Petitioner is income **ELIGIBLE** for Medicaid Only benefits as of _____ under N.J.A.C. 10:71-5.6.

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. § 1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.

08/21/2024
DATE

Rebecca C. Lafferty
Rebecca C. Lafferty, ALJ

Date Record Closed: 08/21/2024

Date Filed with Agency: _____

Date Sent to Parties: _____

OAL Dkt. No. HMA 08274-2024

APPENDIX

Witnesses

For Petitioner:

J.H.

For Respondent:

Christine Gwin, Supervisor, Legal Department

Exhibits

For Petitioner:

None

For Respondent:

R-1 Fair Hearing packet (nineteen pages)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 09685-2024

G.P.

Petitioner,

v.

MIDDLESEX COUNTY
BOARD OF SOCIAL SERVICES,

Respondent.

Medicaid Only

Excess Income Appeal

N.J.A.C. 10:71-5

STATEMENT OF THE CASE

Respondent denied petitioner's Medicaid Only application due to excess income under N.J.A.C. 10:71-5.6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

☑ I **FIND** that petitioner or petitioner's representative is **AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has been established.

☐ I **FIND** that petitioner or petitioner's representative is **NOT AUTHORIZED** to pursue this appeal; therefore, I **CONCLUDE** that standing has not been established.

OAL Dkt. No. HMA 09685-2024

II.

I **FIND** that petitioner's:

Earned income is $77.95 (N.J.A.C. 10:71-5.2, -5.4);

Unearned income is $1,691 (N.J.A.C. 10:71-5.2, -5.4);

Income exclusions total $20 (N.J.A.C. 10:71-5.3);

Countable income totals $1,748.95 (N.J.A.C. 10:71-5.4(b)); and

The applicable income eligibility standard is $1,704 (N.J.A.C. 10:71-5.6).

III.

☑ I **CONCLUDE** that petitioner is over the applicable income limit and is therefore income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ I **CONCLUDE** that petitioner is not over the applicable income limit and is therefore income **ELIGIBLE** for Medicaid Only benefits as of _____ (fill in date of eligibility) under N.J.A.C. 10:71-5.6.

ADDITIONAL FINDINGS OF FACT/CONCLUSIONS OF LAW

ORDER

I **ORDER** that:

☐ Petitioner's appeal is **DISMISSED** because petitioner has no standing.

☑ Petitioner is income **INELIGIBLE** for Medicaid Only benefits under N.J.A.C. 10:71-5.6.

☐ Petitioner is income **ELIGIBLE** for Medicaid Only benefits as of _____ under N.J.A.C. 10:71-5.6.

I **FILE** this initial decision with the **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**. This recommended decision is deemed adopted as the final agency decision under 42 U.S.C. § 1396a(e)(14)(A) and N.J.S.A. 52:14B-10(f). The **ASSISTANT COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** cannot reject or modify this decision.

If you disagree with this decision, you have the right to seek judicial review under New Jersey Court Rule 2:2-3 by the Appellate Division, Superior Court of New Jersey, Richard J. Hughes Complex, PO Box 006, Trenton, New Jersey 08625. A request for judicial review must be made within 45 days from the date you receive this decision. If you have any questions about an appeal to the Appellate Division, you may call (609) 815-2950.

10/09/2024
DATE

Judith Lieberman
JUDITH LIEBERMAN, ALJ

Date Record Closed: 09/18/2024

Date Filed with Agency: 07/18/2024

Date Sent to Parties: 10/09/2024

OAL Dkt. No. HMA 09685-2024

APPENDIX

Witnesses

For Petitioner:

None

For Respondent:

Carrie Flanzbaum, Human Service Specialist 3

Betsy Abreu, Human Service Specialist 3

OAL Dkt. No. HMA 09685-2024

Exhibits

For Petitioner:

For Respondent:

Attachment 8

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N.J.A.C. 10:166-2.1

This file includes all Regulations adopted and published through the New Jersey Register, Vol. 57 No. 5, March 3, 2025

NJ - New Jersey Administrative Code PAW ET Table of Contents TITLE 10. HUMAN SERVICES CHAPTER 166. LONG-TERM CARE SERVICES SUBCHAPTER 2. NURSING FACILITY SERVICES

§ 10:166-2.1 Nursing facility services; eligibility

(a) Eligibility for nursing facility (NF) services will be determined by the professional staff designated by the Department, based on a comprehensive needs assessment that demonstrates that the beneficiary requires, at a minimum, the basic NF services described at N.J.A.C. 10:166-2.2.

1. Individuals requiring NF services may have unstable medical, emotional/behavioral and psychosocial conditions that require ongoing nursing assessment, intervention and/or referrals to other disciplines for evaluation and appropriate treatment. Typically, adult NF residents have severely impaired cognitive and related problems with memory deficits and problem solving. These deficits severely compromise personal safety and, therefore, require a structured therapeutic environment. NF residents are dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating).

i. Children requiring NF services exhibit functional limitations identified either in terms of developmental delay requiring nursing care over and above routine parenting or are limited in terms of specific age-appropriate physical and cognitive activities, functional abilities (ADL) or abnormal behavior, as demonstrated by performance at home, school or recreational activities.

(1) Children who have achieved developmental milestones within appropriate time frames and who require only well child care and/or treatment of acute, time limited illnesses or injuries shall not be eligible for NF services.

2. NF residents shall be those individuals who require services which address the medical, nursing, dietary and psychosocial needs that are essential to obtaining and maintaining the highest physical, mental, emotional and functional status of the individual. Care and treatment shall be directed toward development, restoration, maintenance, or the prevention of deterioration. Care shall be delivered in a therapeutic health care environment with the goal of improving or maintaining overall function and health status. The therapeutic environment shall ensure that the individual does not decline (within the confines of the individual's right to refuse treatment) unless the individual's clinical condition demonstrates that deterioration was unavoidable.

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licensing rules at N.J.A.C. 8:39. Reimbursement of NF services is discussed at N.J.A.C. 10:166-3.

(c) NF services shall be delivered within an interdisciplinary team approach. The interdisciplinary team shall consist of a physician and a registered professional nurse and may also include other health professionals as determined by the individual's health care needs. The interdisciplinary team performs comprehensive assessments and develops the interdisciplinary care plan.

History

HISTORY:

Recodified from N.J.A.C. 10:63-2.1 and amended by R.2005 d.389, effective January 17, 2006.
See: 36 N.J.R. 4700(a), 37 N.J.R. 1185(a), 38 N.J.R. 674(a).
In introductory paragraph (a), substituted "professional staff designated by the Department", substituted "beneficiary" for "recipient" and changed reference to "N.J.A.C. 8:85-2.2"; in (a)1, added "(bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating)"; in (b), added "and Senior Services" and changed reference to "N.J.A.C. 8:85-3".
Amended by R.2007 d.391, effective December 17, 2007.
See: 38 N.J.R. 4795(a), 39 N.J.R. 5338(a).
In the introductory paragraphs of (a) and (a)1, substituted "that" for "which"; and in the introductory paragraph of (a)1, deleted the last two sentences.

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Document: N.J.A.C. 10:166-2.2

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N.J.A.C. 10:166-2.2

This file includes all Regulations adopted and published through the New Jersey Register, Vol. 57 No. 5, March 3, 2025

NJ - New Jersey Administrative Code PAW ET Table of Contents TITLE 10. HUMAN SERVICES CHAPTER 166. LONG-TERM CARE SERVICES SUBCHAPTER 2. NURSING FACILITY SERVICES

§ 10:166-2.2 Delivery of nursing services

(a) The NF shall provide 24-hour nursing services in accordance with the Department's minimum licensing standards set forth by the Standards for Licensure of Long-Term Care Facilities, N.J.A.C. 8:39, incorporated herein by reference, employing the service-specific case mix system to classify recipients with similar care requirements and resource utilization. The NF shall provide nursing services by registered professional nurses, licensed practical nurses and nurses aides based on the total number of residents multiplied by 2.5 hours per day; plus the total number of residents receiving each of the following services, as more fully described at (f) below:

1.	Wound care	0.75 hour per day
2.	Tube feeding	1.00 hour per day
3.	Oxygen therapy	0.75 hour per day
4.	Tracheostomy	1.25 hours per day
5.	Intravenous therapy	1.50 hours per day
6.	Respiratory services	1.25 hours per day
7.	Head trauma stimulation; and advanced neuromuscular or orthopedic care	1.50 hours per day

(b) The NF level of nursing care means services provided to Medicaid beneficiaries who are chronically or sub-acutely ill and require care for these entities, disease sequela or related deficits.
(c) The NF level of nursing care shall incorporate the principles of nursing process, which consists of ongoing assessment of the beneficiary's health status for the purpose of planning, implementing and

evaluating the individual's response to treatment.

1. In his or her capacity as coordinator of the interdisciplinary team, the registered professional nurse, who has primary responsibility for the beneficiary, shall perform, beginning on the day of admission, a comprehensive assessment of the beneficiary to provide, communicate and record within the MDS: baseline data of physiological and psychological status; definition of functional strengths and limitations; and determination of current and potential health care needs and service requirements.

i. In addition to clinical observations and hands-on examination of the Medicaid beneficiary, the licensed nurse shall review the HSDP and any available transfer records. The assessment data shall be coordinated by the registered professional nurse with oral or written communication and assessments derived from other members of the interdisciplinary team and shall be consistent with the medical plan of treatment. The initial comprehensive assessment (MDS) shall be completed no later than 14 days after admission and on an annual basis thereafter. If there is a significant change in the beneficiary's status, the NF shall complete a full comprehensive assessment involving the MDS. The registered professional nurse shall analyze the data and utilize the resident assessment protocols (RAPs), or other screening tools as provided by the CMS RAI for completing the comprehensive assessment, to focus problem identification, structure the review of assessment information and develop an interdisciplinary care plan that documents specific interventions unique to the individual, which define service requirements and facilitate the plan of treatment.

2. The interdisciplinary care plan shall identify and document the beneficiary's problems and causative or contributing factors and is derived from the comprehensive assessment. The plan shall be coordinated and certified by the registered professional nurse with active participation of the Medicaid beneficiary and/or significant other. The scope of the plan shall be determined by the actual and anticipated needs of the Medicaid beneficiary and shall include: physiological, psychological and environmental factors; beneficiary/family education; and discharge planning. The care plan shall be a documented, accessible record of individualized care which reflects current standards of professional practice and includes:

i. Identified problems (needs) and contributing factors;

ii. Specific and measurable objectives (outcomes) which provide a standard for measurement of care plan effectiveness;

iii. The plan of care shall emphasize interventions which prevent deterioration, maintain wellness and promote maximum rehabilitation; and

iv. The initial interdisciplinary care plan shall be completed and implemented within 21 days of admission and shall be reviewed regularly and revised as often as necessary, according to all significant changes in a beneficiary's condition and to attainment of and/or revisions in objectives as indicated. Review and appropriate revision shall be done at least every three months and whenever the clinical status of the beneficiary changes significantly or requires a change in service provision.

3. Implementation of the interdisciplinary care plan and delivery of nursing care shall be documented within nursing progress (clinical) notes, which shall establish a format for recording significant observations or interaction, unusual events or responses, or a change in the Medicaid beneficiary's condition, which requires a change in the scope of service delivery. Specific reference shall be made to the beneficiary's reactions to medication and treatments, rehabilitative therapies, additional nursing services in accordance with N.J.A.C. 10:166-2.2(a), observation of clinical signs and symptoms, and current physical, psychosocial and environmental problems. Nursing entries shall be made as often as necessary, based on the Medicaid beneficiary's condition and in accordance with the standards of professional nursing practice.

4. Assessment review is the process of ongoing evaluation of health service needs and delivery. Nursing actions shall be analyzed for effectiveness of care plan implementation and achievement of objectives. The registered professional nurse, along with the Medicaid beneficiary and/or significant other, shall participate with the team in the ongoing process of evaluation, reordering priorities,

setting new objectives, revision of plans for care and the redirection of service delivery.

i. The assessment review process shall be conducted quarterly. Conclusions shall be documented on the MDS quarterly review, and the interdisciplinary care plan shall be updated to provide a comparison of the Medicaid beneficiary's previous and present health status, and to outline changes in service delivery and nursing interventions. The assessment review shall identify the effectiveness of, and the Medicaid beneficiary's response to, therapeutic interventions, and, whenever possible, the reason for any ineffectiveness in beneficiary responses.

(d) Restorative nursing is a primary component in the NF level of nursing care. Restorative nursing addresses preventable deterioration and is directed toward assisting each beneficiary to attain the highest level of physical, mental, emotional, social and environmental functioning. Restorative nursing functions shall include:

1. Supervision, direction, assistance, training or retraining in all phases of activities of daily living to promote independence or growth, and to develop or restore function to the extent the individual is able (bathing, dressing, toileting, transfers and ambulation, continence, and feeding);

2. Discharge planning which focuses on assessment of the caregiving potential of the resident, family or significant other. The nurse shall, along with other members of the interdisciplinary team, extend the assessment beyond the needs of the resident to include assessment of the caregivers' ability to provide long-term care and their need for information on normal growth, development or aging; care needs; medication and treatment; home safety and the need for additional supports, both formal and informal, in preparation for the resident's return to the community;

3. Proper positioning of the individual in bed, wheelchair or other accommodation to prevent deformities and pressure sores;

4. Program of bowel and bladder retraining for incontinence, in accordance with the individual's potential for restoration;

5. Range of motion exercises, active and passive, as necessary;

6. Follow-up care as required for physical therapy, occupational therapy and/or speech-language pathology services;

7. Follow-up care as required for uncomplicated plaster care; assistance with adjustment to and use of prosthetic and/or orthotic devices;

8. Routine care and maintenance of ostomies (that is, cleansing and appliance change and instruction for self care);

9. Resident education relative to health care, special diet, and, if ordered by the physician, self-administration of medication;

10. Encouragement of resident participation in, and monitoring resident response to, individual or group activities and therapies for psychosocial maintenance and restoration; and

11. In a NF providing care to children, the application of the principles of growth and development in planning, implementing and evaluating care needs; consideration of the child's physical and developmental functioning with respect to his/her need for recreational and educational stimulation and growth; and application of behavior modification techniques in the management of developmental and disability-related behavior problems.

(e) The 2.5 hours of nursing care provided shall also include, but not be limited to, the following nursing procedures, therapies and activities:

1. Safe and appropriate administration of medications;

2. Emergency care (for example, oxygen, injections, resuscitation);

3. Observation, recording, interpretation and reporting of vital signs, height and weight;

4. Intake and output recording, as clinically indicated;

5. Catheter care including intermittent or continuous bladder irrigations, intermittent catheterizations, and use of other drainage catheters;

6. Preparations for laboratory procedures and collection of laboratory specimens;

7. Telephone pacemaker or electrocardiogram checks;

8. Terminal illness management, when there is need for supportive services and intensive personal care;

9. Heat or cold treatments as ordered by the physician;

10. Risk determination for pressure sores using a standardized assessment instrument and implementation of necessary preventive measures as clinically indicated (for example, mattress overlays or cushions, positioning schedule, range of motion, nutrition support, skin care and skin checks);

11. Care of Stage I and II pressure sores, as follows:

i. A Stage I pressure sore is an area of redness which does not respond to local circulatory stimulation. It involves the epidermis. No break in the skin is evident;

ii. A Stage II pressure sore is a partial thickness, loss of skin layers with epidermis and possibly dermis involvement. A shallow ulcer or blister appears, and the site is free of necrotic tissue;

iii. An individual who enters the NF without pressure sores should not develop them unless the individual's condition demonstrates pressure sores were unavoidable. Treatment of superficial skin tears, wounds, excoriations and lesions shall be included in the 2.5 hours of care;

12. The long-term care of a simple stabilized tracheostomy with minimal care and supervision by licensed staff;

13. Uncomplicated administration of respiratory therapies requiring minimal staff assistance, direction, and supervision;

14. Protection of individuals through the appropriate use of universal precautions, in accordance with Centers for Disease Control guidelines published in the Morbidity and Mortality Weekly Report, volume 38, number 5-6 (Centers for Disease Control, Atlanta, GA 30333);

15. Appropriate use of restraints (physical and/or chemical), in accordance with the physician's order and N.J.A.C. 8:39 licensure standards, and clinically appropriate measures to guarantee the safety of individuals (for example, side rails);

16. Observation, supervision and recording of basic nutritional states for maintenance of current health status and prevention of deficiencies;

17. Observation, supervision and instruction concerning special dietary requirements during ongoing adjustment to treatment regimen for diagnosed medical conditions;

18. Nursing treatment, observation and/or direction of mental status impairment which necessitates nursing supervision and intervention (for example, marked confusion and/or disorientation in one, two, or three spheres (time, place and/or person), marked memory loss, severe impairments in judgment); and

19. Emotional support and counseling on an ongoing basis, and during adjustment to impaired physical and mental states, including observation for changes in affect and mood which may require special precautions and/or therapies.

(f) Nursing services requiring additional nursing hours pursuant to (a)1 through 7 above, in excess of those services included in NF level of nursing care as that term is described in (b) through (e) above, are described at (f)1 through 7 below. An individual beneficiary may require one or more additional nursing services, however, each category of additional nursing service may only be counted once for each individual beneficiary.

1. Wound care (0.75 hour per day), which includes, but is not limited to, ulcers, burns, pressure sores, open surgical sites, fistulas, tube sites and tumor erosion sites. In this category are Stage II pressure sores encompassing two or more distinct lesions on separate anatomical sites, Stage III and Stage IV pressure sores.

i. Tube site and surrounding skin related to ostomy feeding is not to be counted as an additional nursing service unless there are complicating factors such as: exudative, suppurative or ulcerative inflammation which require specific physician prescribed intervention provided by the licensed nurse beyond routine cleansing and dressing.

ii. Stage III and Stage IV are defined as follows:

(1) Stage III. The wound extends through the epidermis and dermis into the subcutaneous fat and is a full thickness wound. There may be inflammation, necrotic tissue, infection and drainage and undermining sinus tract formation. The drainage can be serosanguinous or purulent. The area is painful.

(2) Stage IV. The pressure wound extends through the epidermis, dermis, and subcutaneous fat into fascia, muscle and/or bone. Eschar, undermining, odor and profuse drainage may exist.

(3) Other wounds which may be categorized under wound care as defined in (f)1 above include:

(A) Open wounds which are draining purulent or colored exudate or which have a foul odor present and/or for which the individual is receiving antibiotic therapy;

(B) Wounds with a drain or T-Tube;

(C) Wounds which require irrigation or instillation of a sterile cleansing or medicated solution and/or packing with sterile gauze;

(D) Recently debrided ulcers;

(E) Wounds with exposed internal vessels or a mass which may have a proclivity for hemorrhage when dressing is changed (for example, post radical neck surgery, cancer of the vulva);

(F) Open wounds, widespread skin disease or complications following radiation therapy, or which result from immune deficiencies or vascular insufficiencies; and

(G) Complicated post-operative wounds which exhibit signs of infection, allergic reactions or an underlying medical condition that affects healing.

2. Tube feeding (1.00 hour per day), which includes nasogastric tubes, percutaneous feedings and the routine care of the tube site and surrounding skin of the surgical gastrostomy, provided that all non-invasive avenues to improve the nutritional status have been exhausted with no improvement; NF staff shall document in the clinical record the non-invasive measures provided, the individual's poor response and the medical condition for which the feedings are ordered; and the feedings are providing the individual with either 51 percent or more calories per day, or 26 to 50 percent calories and 501 milliliters or more of enteral fluid intake per day.

i. Feeding tubes that do not meet the dietary administration and nutritional support criteria as stated in (f)2i or ii above are covered under NF level of nursing care and are not counted as an additional nursing service.

3. Oxygen therapy (0.75 hours per day), which includes the provision of episodic oxygen therapy to increase the saturation of hemoglobin (Hb) without risking oxygen toxicity in beneficiaries with airway obstructive conditions such as asthma, chronic obstructive pulmonary disease or heart failure. The beneficiary requires frequent, recurring, and ongoing pulse oximetry monitoring. The licensed nurses assess lung function and the beneficiary's symptoms that require intervention by the physician, physician assistant or advanced practice nurse.

4. Tracheostomy (1.25 hours per day), which includes:

i. New tracheostomy sites;

ii. Complicated cases involving either symptomatic infections or unstable respiratory functioning; or

iii. Frequent, recurring, and ongoing suctioning.

5. Intravenous therapy (1.50 hours per day), which includes (b)5i, ii, or iii below, provided that, when clinically indicated, intravenous medications are appropriately and safely administered within prevailing medical protocols; and, if intravenous therapy is for the purpose of hydration, NF staff shall document in the clinical record all preventive measures and attempts to improve hydration orally, and the individual's inadequate response.

i. The administration and maintenance of clinically indicated therapies by the NF, as ordered by the physician, such as total parenteral nutrition, clysis, hyperalimentation, and peritoneal dialysis;

ii. The administration of fluids or medications by the NF, as ordered by the physician, by means of lines or ports such as central venous lines, Hickman/Broviac catheters, or heparin locks and the flushing and dressing thereof; or

iii. The flushing and dressing of lines or ports such as central venous lines, Hickman/Broviac catheters, or heparin locks, by the NF, as ordered by the physician, for an identified treatment purpose and usage timeframe.

6. Respiratory services (1.25 hours per day), which includes the provision of respiratory services as to which the individual is dependent upon licensed nursing staff to administer, such as positive pressure breathing therapy, Bilevel Positive Airway Pressure (BiPAP), Continuous Positive Airway Pressure (CPAP) or aerosol therapy. The use of hand-held inhalation aerosol devices, commonly referred to as "puffers", is not included in this add-on service.

7. Head trauma stimulation; and advanced neuromuscular or orthopedic care (1.50 hours per day), as follows:

i. Care of head trauma is directed toward individuals who are stable (have plateaued) and can no longer benefit from a rehabilitative unit or unit for specialized care of the injured head. Individuals shall have access to and periodic reviews by such specialists as a neurologist, neuropsychologist, psychiatrist and vocational rehabilitation specialist, in accordance with their clinical needs. There shall also be contact with appropriate therapies, such as physical therapy, speech-language pathology services and occupational therapy. The distinguishing characteristic for add-on hours for head trauma is the necessity for ongoing assessment and follow-up by licensed nursing personnel focusing on early identification of complications, and implementation of appropriate nursing interventions. Nursing protocols may be initiated which are specifically designed to meet individual needs of head injured individuals. The nurse may also supervise a coma stimulation program, when this need is identified by the interdisciplinary team.

ii. Advanced neuromuscular care needs will be identified by the physician for individuals during an unstable episode or where there is advanced and progressive deterioration in which the individual requires observation for neurological complications, monitoring and administration of medications or nursing interventions to stabilize the condition and prevent unnecessary regression.

iii. Advanced orthopedic care is the care of plastered body parts with a pre-existing peripheral vascular or circulatory condition requiring observations for complications and monitoring and administration of medication to control pain and/or infection. Such care also involves additional measures to maintain mobility; care of post-operative fracture and joint arthroplasty, during the immediate subacute post-operative period involving proper alignment; teaching and counseling and follow-up to therapeutic exercise and activity regimens. Individuals in this group shall be identified by the physician as needing advanced orthopedic care. If the requirement for advanced orthopedic care exceeds 30 days, clinical need must be demonstrated and clearly documented by the interdisciplinary team.

History

HISTORY:

Recodified from N.J.A.C. 10:63-2.2 and amended by R.2005 d.389, effective January 17, 2006.
See: 36 N.J.R. 4700(a), 37 N.J.R. 1185(a), 38 N.J.R. 674(a).
Rewrote the section.
Amended by R.2011 d.121, effective April 18, 2011.
See: 42 N.J.R. 1793(a), 43 N.J.R. 961(c).
In the introductory paragraph of (c), inserted a comma following "process"; in the introductory paragraph of (c)1, and in (c)1i and (c)4i, substituted "MDS" for "SRA" throughout; and in (c)1i, inserted ", or other screening tools as provided by the CMS RAI for completing the comprehensive assessment,", and substituted "that" for "which".

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5. DEMONSTRATION PROGRAMS AND BENEFITS

Individuals affected by, or eligible under, the demonstration will receive benefits based on criteria as outlined in the Table A above. Individuals may receive additional benefits specifically authorized in demonstration expenditure authorities as described below.

5.1. **FamilyCare Plan A.** Individuals enrolled in FamilyCare Plan A receive Medicaid state plan services. The state provides Personal Care Assistance, Medical Day and adult dental in its state plan package.

5.2. **FamilyCare Plan B.** Individuals enrolled in FamilyCare Plan B receive the Title XXI, benefit package, for children and families with income between 133-150% FPL. Benefits provided under this package echo the benefits provided in Plan A.

5.3. **FamilyCare Plan C.** Individuals enrolled in FamilyCare Plan C receive the Title XXI benefit package, for children and families with income between 150-200% FPL. Benefits provided under this package echo the benefits provided in Plan A.

5.4. **FamilyCare Plan D.** This plan provides benefits to children and families with income between 200-350% FPL. Individuals enrolled in FamilyCare Plan D receive Title XXI benefits provided in this package echo the most widely sold commercial package in the state.

5.5. **NJFC Alternative Benefit Plan.** The state's FamilyCare ABP is for individuals in the New Adult Group, ages 21-64. The ABP provides medical and behavioral health services; including additional mental health and substance use disorder services. All Medicaid state plan benefits are included. Services are provided via managed care with the exception of mental health and substance use disorder services, which are provided Fee-for-Service (FFS). There are no cost-sharing requirements in the ABP.

5.6. **Managed Long Term Services and Supports Program.** The MLTSS program provides home and community-based services to elderly and disabled individuals through a managed care delivery system.

a. **Operations**: The administration of the MLTSS Program is through DMAHS in conjunction with the Division of Aging Services (DoAS) and the Division of Developmental Disability Services (DDS).

b. **Eligibility**:

i. Meets Nursing Facility (NF) Level of Care (LOC) defined as:

1. An adult (ages 21 and older) individual must be clinically eligible for MLTSS services when the individual's standardized assessment demonstrates that the individual satisfies any one or more of the following three criteria:

a. The individual:

i. Requires limited assistance or greater with three or more activities of daily living;

ii. Exhibits problems with short-term memory and is minimally impaired or greater with decision making ability and requires supervision or greater with three or more activities of daily living; and/or

iii. Is minimally impaired or greater with decision making and, in making himself or herself understood, is often understood or greater and requires supervision or greater with three or more activities of daily living.

ii. A child (ages birth through 20) must be clinically eligible for MLTSS services when:

1. The child exhibits functional limitations, identified in terms of developmental delay or functional limitations in specific age-appropriate activities of daily living, requiring nursing care over and above routine parenting and meets one of the following nursing care criteria:

a. Medical and/or intense therapeutic services for the medically complex child who exhibits a severe illness that requires complex skilled nursing interventions 24 hours per day, seven days per week.

b. Skilled Nursing Services must be based upon, but not limited to, at least one of the following:

i. Dependence on mechanical ventilation;

ii. The presence of an active tracheostomy;

iii. The need for deep suctioning;

iv. The need for around-the-clock nebulizer treatments with chest physiotherapy;

v. Gastrostomy feeding when complicated by frequent regurgitation and/or aspiration; or is on continuous feeding for more than 4 hours at a time;

vi. A seizure disorder manifested by frequent prolonged seizures requiring emergency administration of anticonvulsant medication in the last four months; and/or

vii. Medical and/or intense therapeutic services for the technology dependent child who requires a medical device that the Federal Food and Drug Administration has classified pursuant to 21 C.F.R. 860.3, as amended and supplemented, as a life-supporting or life-sustaining device that is essential to, or that yields information that is essential to, the restoration or continuation of a bodily function important to the continuation of human life.

Attachment 9

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

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Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

B.L., PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND OFFICE OF COMMUNITY CHOICE OPTIONS, RESPONDENT.	:	**OAL DKT. NO. HMA 07115-2024**

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is October 31, 2024, in accordance with an Order of Extension.

The matter arises from the New Jersey Office of Community Choice Options (OCCO) March 27, 2024 denial of clinical eligibility for Nursing Facility Level of Care under N.J.A.C. 8:85-2.1. Petitioner was assessed on March 26, 2024 by Shray Williams, RN, RSN, (Williams) to determine their eligibility for nursing facility level of care. ID at 2.

In order to receive Long-Term Care Services, Petitioner had to be found clinically eligible. The mechanism for this is a pre-admission screening (PAS) that is completed by

"professional staff designated by the Department, based on a comprehensive needs assessment which demonstrates that the recipient requires, at a minimum, the basic nursing facility services described in N.J.A.C. 8:85-2.2." N.J.A.C. 8:85-2.1(a); See also, N.J.S.A. 30:4D-17.10, et seq. Individuals found clinically eligible "may have unstable medical, emotional/behavioral and psychosocial conditions that require ongoing nursing assessment, intervention and/or referrals to other disciplines for evaluation and appropriate treatment. Typically, adult nursing facility residents have severely impaired cognitive and related problems with memory deficits and problem solving. These deficits severely compromise personal safety and, therefore, require a structured therapeutic environment. Nursing facility residents are dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating)." N.J.A.C. 8:85-2.1(a)1.

Valerie Hilder, RN, (Hider), Fair Hearing Liaison Supervisor testified on behalf of the OCCO. Hider testified that on the date of the assessment, the Petitioner was able to report their birth date and social security number, was able to explain their daily routine, reported that they were independent in their daily decision-making and routine, their memory was reported as intact with no memory deficits (remembered three words given to them), and there were no procedural or situational memory deficits that Williams was able to illicit. ID at 3. Hider further stated that it was reported by Williams that the Petitioner understood and expressed themselves without difficulty, and that the Petitioner reported that they were independent with all activities of daily living (ADLs), which was verified with a licensed practical nurse and with Mary Ann Barbato, RN, the Director of Nursing (Barbato). Ibid. Barbato reported to Williams that B.L. had some incidents of soiling themselves, but they were able to clean himself and only required assistance with cleaning the floor. Ibid.

The Petitioner was determined not clinically eligible for Nursing Facility Level of Care in a nursing facility or the community pursuant to N.J.A.C. 8:85-2.1, the NJ FamilyCare Comprehensive Demonstration, Section 1115, and the OCCO NJ Choice Assessment completed by Williams on March 26, 2024. Ibid. Clinical eligibility was specifically denied because the Petitioner does not require assistance with three ADLs. Ibid.

Here, Petitioner was assessed by an OCCO nurse and it was determined that they did not meet nursing home level of care, as they did not need hands-on assistance in any activities of daily living (ADLs), and were found to not suffer from any cognitive deficits. Id. at 8. In the Initial Decision the Administrative Law Judge (ALJ) found that while the Petitioner suffers from anxiety and nervousness, their short and long-term memories are intact and they are capable of independently performing all of their ADLs. The ALJ found that the credible evidence in the record indicated that the Petitioner did not meet the clinical eligibility criteria to qualify for nursing facility level of care, and that the Petitioner failed to present any evidence to contradict this determination. Ibid. I agree with the Initial Decision. While the Petitioner suffers from anxiety and nervousness, their short and long-term memories are intact and they are capable of independently performing all of their ADLs. Ibid.

Thus, for the reasons stated above, I FIND that Petitioner was properly denied clinical eligibility by the OCCO's assessment. The record does not contain any evidence that contradicts the March 26, 2024 assessment. The Petitioner does not need hands-on assistance in any ADLs, and does not suffer from any cognitive deficits. Accordingly, the Initial Decision appropriately affirmed the denial of benefits based on OCCO's assessment, finding that Petitioner did not meet the clinical criteria for nursing facility-level services.

Thus, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision in this matter.

THEREFORE, it is on this 25th day of October 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance and Health Services

PHILIP D. MURPHY
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TAHESHA L. WAY
Lt. Governor

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STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

B.T.,	:	
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PETITIONER,	:	**ADMINISTRATIVE ACTION**
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v.	:	**FINAL AGENCY DECISION**
	:	
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 01696-24**
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AND HEALTH SERVICES AND	:	
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OFFICE OF COMMUNITY CHOICE	:	
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OPTIONS,	:	
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RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Neither party filed exceptions in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is August 15, 2024, in accordance with an Order of Extension.

This matter arises from the Division of Aging Services' (DoAs) January 18, 2024 denial of clinical eligibility under N.J.A.C. 8:85-2.1. (R-5). Petitioner was receiving

Managed Long-Term Services and Support (MLTSS) since November 2019 at a long term care facility. ID at 2. Due to the pandemic, the Office of Community Choice Options (OCCO) could not complete a clinical eligibility assessment until April 2023, and Petitioner remained in the facility through continuing Medicaid benefits. ID at 2-3. On January 18, 2024, an assessment was conducted by registered nurse, C.B., at the facility where Petitioner resided. ID at 3. As a result, OCCO determined that Petitioner was ineligible for nursing home level of care finding that Petitioner had a partial deficit in their short-term memory and is not dependent on physical assistance with three or more Activities of Daily Living (ADL). The Initial Decision upheld the denial as the Administrative Law Judge (ALJ) found that Petitioner had not established that Petitioner satisfied the clinical criteria for Medicaid. I agree with the ALJ's findings.

In order to receive Long-Term Care Services, Petitioner had to be found clinically eligible. The mechanism for determining clinical eligibility is a pre-admission screening (PAS) that is completed by "professional staff designated by the Department, based on a comprehensive needs assessment which demonstrates that the recipient requires, at a minimum, the basic NF (nursing facility) services described in N.J.A.C. 8:85-2.2." N.J.A.C. 8:85-2.1(a). See also, N.J.S.A. 30:4D-17.10, et seq.

Individuals found clinically eligible "may have unstable medical, emotional/behavioral and psychosocial conditions that require ongoing nursing assessment, intervention and/or referrals to other disciplines for evaluation and appropriate treatment. Typically, adult NF residents have severely impaired cognitive and related problems with memory deficits and problem solving. These deficits severely compromise personal safety and, therefore, require a structured therapeutic environment.

NF residents are dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating)." N.J.A.C. 8:85-2.1(a)1.

Further, pursuant to NJ FamilyCare Comprehensive Demonstration, Section 1115 adult (ages twenty-one and older) individuals must be clinically eligible for MLTSS services when the individuals' standardized assessment demonstrates that the individuals satisfied any one or more of the following three criteria:

a. The individuals:

i. Requires limited assistance or greater with three or more activities of daily living;

ii. Exhibits problems with short-term memory and is minimally impaired or greater with decision making abilities and requires supervision or greater with three of more activities of daily living;

iii. Is minimally impaired or greater with decision making and, in making himself or herself understood, is often understood or greater and requires supervision or greater with three or more activities of daily living. [1]

Here, the nursing assessment noted that Petitioner was independent in eating, personal hygiene, bathing, dressing lower and upper body, ambulating and toileting. (R-5). The assessment also stated that Petitioner was alert, oriented, and was noted to have short-term memory problems, which was made evident when Petitioner could only recall two of the three unrelated items posed to Petitioner, within a five-minute period. Ibid. There was no procedural or situational memory issues as Petitioner was able to recite steps and what to do in case of a fire. Ibid.

M.G., director of admissions at Sterling Manor, testified that she disagreed with the

[1] New Jersey FamilyCare Comprehensive Demonstration Approval Period: April 1, 2023 through June 30, 2028.

decision as Petitioner is diagnosed with schizophrenia, impulsive disorder, autism, and severe sexual preoccupation. ID at 4. She testified that Petitioner needs prompting and supervision because when Petitioner is upset, they have violent outbursts. Ibid. At times Petitioner hits their head against the wall and needs prompting to take medication, dress, and bathe. Ibid. K.C., who is a Community Advocate and Investigator with the Long-Term Care Ombudsman Office, testified that based on her observation Petitioner has poor impulse control, and when Petitioner is upset, they need to be redirected. She also testified that Petitioner dresses inappropriately and needs supervision with taking medication. Ibid.

The Initial Decision held that Petitioner has a partial cognitive defect with their short-term memory, can independently dress, toilet and eat, can get in and out of bed without assistance, ambulates independently, and can shower without assistance but needs prompting. ID at 6. The ALJ stated that pursuant to N.J.A.C. 8:85-2.1, Petitioner does not fall within any of the criteria which are required for clinical eligibility for nursing home level of care and therefore fails to meet the criteria for nursing facility level of care. Ibid.

I concur with the ALJ's determination that according to the evidence presented, Petitioner does not meet the clinical criteria for Medicaid as outlined in N.J.A.C. 8:85-2.1 or the New Jersey FamilyCare Comprehensive Demonstration. Petitioner demonstrates the ability to independently perform their ADLs and only has a partial cognitive defect with their short-term memory.

Thus, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision in this matter.

THEREFORE, it is on this 15th day of AUGUST 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance and Health Services

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
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SARAH ADELMAN
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GREGORY WOODS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

D.U.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
OFFICE OF COMMUNITY CHOICE	:	**OAL DKT. NO. HMA 01728-2024**
OPTIONS,	:	
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is August 1, 2024, in accordance with an Order of Extension.

The matter arises from the New Jersey Office of Community Choice Options (OCCO) January 9, 2024 denial of clinical eligibility for Nursing Facility Level of Care under N.J.A.C. 8:85-2.1. Petitioner was assessed on January 3, 2024 by Carolyn Martine, RN/RSN, Community Choice Counselor for OCCO to determine their eligibility for nursing facility level of care. ID at 2. Nurse Martine advised the Petitioner that they were not clinically eligible for Nursing Facility Level of Care, in a facility or in the

community, by letter dated January 9, 2024. Petitioner filed a fair hearing request, and a hearing was conducted by the OAL on April 10, 2024. Ibid.

In order to receive Long-Term Care Services, Petitioner had to be found clinically eligible. The mechanism for this is a pre-admission screening (PAS) that is completed by "professional staff designated by the Department, based on a comprehensive needs assessment which demonstrates that the recipient requires, at a minimum, the basic nursing facility services described in N.J.A.C. 8:85-2.2." N.J.A.C. 8:85-2.1(a); See also, N.J.S.A. 30:4D-17.10, et seq. Individuals found clinically eligible "may have unstable medical, emotional/behavioral and psychosocial conditions that require ongoing nursing assessment, intervention and/or referrals to other disciplines for evaluation and appropriate treatment. Typically, adult nursing facility residents have severely impaired cognitive and related problems with memory deficits and problem solving. These deficits severely compromise personal safety and, therefore, require a structured therapeutic environment. Nursing facility residents are dependent in several activities of daily living (bathing, dressing, toilet use, transfer, locomotion, bed mobility, and eating)." N.J.A.C. 8:85-2.1(a)1.

Here, Petitioner was assessed by an OCCO nurse and it was determined that they did not meet nursing home level of care, as they did not need hands-on assistance in any activities of daily living (ADLs), and was found to not suffer from any cognitive deficits. ID at 2. At the time of the assessment, the Petitioner stated that they were independent in eating, showering, dressing, toilet use, bed mobility, and ambulation. Id. at 3. Nurse Martine testified that the Petitioner suffers from hearing loss, incontinence, and experiences tremors in their hand. Martine did not note any issues with short term memory. Ibid. The Petitioner's daughter, L.C., was present during the assessment. Id.

at 2. At the Fair Hearing, L.C. testified that the Petitioner exaggerated his independence for Nurse Martine.

L.C. requested that another assessment be performed, and on March 28, 2024, the Petitioner was examined by Gwendolyn Lupton, APN. Id. at 3. Nurse Lupton noted that the Petitioner was incontinent, and his tremors had progressed, which caused difficulty with ambulation and fine motor movements. Also, due to his Meniere's disease, he had an unsteady gait at times. Ibid. Lupton recommended that the Petitioner use a cane for stability. Ibid.

In the Initial Decision the Administrative Law Judge (ALJ) found that the credible evidence in the record indicated that the Petitioner did not meet the clinical eligibility criteria to qualify for nursing facility level of care, and that the Petitioner failed to present any evidence to contradict this determination. Id. at 5. The ALJ further found that the March 28, 2024 assessment was not relevant because it was performed after the assessment that led to the denial of clinical eligibility, and was presented without any corroborating medical testimony. Ibid. The ALJ also stated that even though the Petitioner did not qualify for nursing facility-level services as of the date of the assessment, they should explore other assistance options, as explained by the OCCO, and if their condition changes, should request a reassessment. Ibid.

Thus, for the reasons stated above, I FIND that Petitioner was properly denied clinical eligibility by the OCCO's assessment. The record does not contain any evidence that contradicts the January 3, 2024 assessment. While the Petitioner's tremors and Meniere's disease may be increasing, they do not need hands-on assistance in any ADLs, and do not suffer from any cognitive deficits. Accordingly, the Initial Decision appropriately affirmed the denial of benefits based on OCCO's assessment, finding that Petitioner did not meet the clinical criteria for nursing facility-level services.

Thus, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision in this matter.

THEREFORE, it is on this 23rd day of July 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance and Health Services

Attachment 10

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N.J.A.C. 10:71-4.1

This file includes all Regulations adopted and published through the New Jersey Register, Vol. 57 No. 5, March 3, 2025

NJ - New Jersey Administrative Code PAW ET Table of Contents TITLE 10. HUMAN SERVICES CHAPTER 71. MEDICAID ONLY SUBCHAPTER 4. RESOURCES

§ 10:71-4.1 Financial eligibility standards; resources

(a) The resources criteria and eligibility standards of this section apply to all applicants and beneficiaries.

(b) Resources defined: For the purpose of this program a resource shall be 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).

(c) Availability of resources: In order to be considered in the determination of eligibility, a resource must be "available." A resource shall be considered available to an individual when:

1. The person has the right, authority or power to liquidate real or personal property or his or her share of it;

2. Resources have been deemed available to the applicant (see N.J.A.C. 10:71-4.6 regarding deeming of resources); or

3. Resources arising from a third-party claim or action are considered available from the date of receipt by the applicant/beneficiaries, his or her legal representative or other individual acting on his or her legal behalf in accordance with the following definition and provisions.

i. Definition of "availability of resources in third-party situations": In third-party situations in which applicants/beneficiaries have brought an action or made a claim against a third party who is or may be liable for payment of medical expenses related to the cause of the action or claim, funds are considered available or countable at the moment of receipt by the applicant/beneficiary, his or her legal representative, guardian, relative or any person acting on the applicant's/beneficiary's behalf.

Such funds should be considered available or countable at the earliest date of receipt by any of the aforementioned entities.

(1) In determining resource eligibility in accordance with N.J.A.C. 10:71-4.5(a), those funds actually available to the applicant/beneficiary or any person acting on his or her behalf as of the first day of the month subsequent to the month of receipt shall be considered a countable resource, unless otherwise excluded (see N.J.A.C. 10:71-4.4).

(2) If a bona fide lien or judgment exists against such funds, making all or some portion of the funds inaccessible to the applicant/beneficiary, CSSAs shall deduct the encumbrances and consider the remaining amount as a countable resource.

(3) If between the date of receipt of such moneys and the first day of the subsequent month the applicant/beneficiary pays outstanding medical expenses and/or other expenses, the CSSA shall consider only the funds remaining after such payment as a countable resource.

(d) Evaluation of resources: The value of a resource shall be defined as the price that the resource can reasonably be expected to sell for on the open market in the particular geographic area minus any encumbrances (that is, its equity value).

1. Real property:

i. Sole ownership: When the eligible individual is sole owner and has the right to dispose of the property, the total equity value (see (d)1iv below) shall be counted toward the resource maximum.

ii. Joint ownership or ownership in common: Under joint ownership or ownership in common, the equity value of the property shall be divided by the number of owners and the eligible individual's share counted toward the resource maximum.

iii. Ownership by the entirety: Ownership by the entirety (or tenancy by the entirety) refers to property owned by a husband and wife whereby each member has ownership interest in the whole property which is indivisible. When a married couple (either one or both are eligible) is living together, the total equity value of all nonexempt property shall be counted toward the resource maximum. The same policy shall apply to an eligible couple who have been separated less than six months. If the eligible couple has been separated for six months or more, one half of the value represents a resource to each individual. If one spouse is institutionalized and the other spouse resides in the community, the extent to which either spouse has ownership of the property shall be included pursuant to N.J.A.C. 10:71-4.8.

(1) When an eligible individual and an ineligible spouse own nonexempt property by the entirety and the couple is separated for a full calendar month, the cooperation of both owners is necessary to ascertain resource value. If the ineligible owner expresses willingness to dispose of the property, then its value is divided by the number of owners. If there is no such willingness by the ineligible owner, then no value may be assigned to the property. (See also N.J.A.C. 10:71-4.4(b)6 regarding situations in which a co-owner refuses to liquidate.)

iv. Equity value: The equity value of real property is the tax assessed value of the property multiplied by the reciprocal of the assessment ratio as recorded in the most recently issued State Table of Equalized Valuations, less encumbrance, if any. The Table is available from the State of New Jersey, Department of the Treasury, Trenton, New Jersey 08625.

v. Substantial equity value: Individuals seeking benefits with respect to nursing facility services or other long-term care services who have an equity interest in their home that exceeds $ 750,000 (as indexed) shall not be eligible for benefits.

(1) Effective January 1, 2011, the home equity limits shall be indexed to the Consumer Price Index - Urban (CPIU) annually and rounded to the nearest thousand. The annual adjustment shall be published as a notice of administrative change in the New Jersey Register. As of January 1, 2011 the excess home equity limit is $ 758,000.

2. Savings and checking accounts: When a savings or checking account is held by the eligible individual with other parties, all funds in the account are resources to the individual, so long as he or she has unrestricted access to the funds (that is, an "or" account) regardless of their source. When the individual's access to the account is restricted (that is, an "and" account), the CSSA shall consider

a pro rata share of the account toward the appropriate resource maximum, unless the client and the other owner demonstrate that actual ownership of the funds is in a different proportion. If it can be demonstrated that the funds are totally inaccessible to the client, such funds shall not be counted toward the resource maximum. Any question concerning access to funds should be verified through the financial institution holding the account.

3. Verification of value: The CSSA shall verify the equity value of resources through appropriate and credible sources. Additionally, the CSSA shall evaluate the applicant's past circumstances and present living standards in order to ascertain the existence of resources that may not have been reported. If the applicant's resource statements are questionable, or there is reason to believe the identification of resources is incomplete, the CSSA shall verify the applicant's resource statements through one or more third parties.

i. Responsibility of applicant: If the third-party contact is required in accordance with the provisions above, the applicant shall cooperate fully with the verification process. If necessary, the applicant shall provide written authorization allowing the CSSA to secure the appropriate information.

(e) Resource eligibility: Resource eligibility is determined as of the first moment of the first day of each month. If an individual or couple is resource ineligible as of the first moment of the first day of the month, subsequent changes within that month in the amount of countable resources will not affect the original determination of ineligibility. If resource eligibility is established as of the first moment of the first day of the month, resource eligibility is established for the entire month regardless of any increase in the amount of countable resources.

1. This policy applies equally to individuals and couples in the month of application. Regardless of the date of application, resource eligibility is determined as of the first moment of the first day of that month.

2. If, prior to the first moment of the first day of the month, the applicant or beneficiary has drawn a check (or equivalent instrument) on a checking or similar account, the amount of such check shall reduce the value of the account. The value of such accounts shall not be reduced by any unpaid obligations for which funds have not already been committed by the drafting of a check.

i. When checks have been drawn on an account, the CSSA shall review the appropriate account registers or check stubs to ascertain the actual balance as of the first moment of the first day of the month. Full documentation of such circumstances is required.

(f) No portion of a cash reward provided to any individual by the Division for providing information about fraud and/or abuse in any program administered in whole or in part by the Division shall be included in the computation of income for financial eligibility purposes.

1. In order for the cash reward to continue to be excluded, the funds shall be separately identifiable (that is, not commingled with other funds or assets), but held in a separate account. Any increase in the value of the excluded cash reward shall also be excluded.

History

HISTORY:

Amended by R.1986 d.97, effective April 7, 1986 (operative May 1, 1986).
See: 17 N.J.R. 2954(a), 18 N.J.R. 691(a).
(c)3 added.
Amended by R.1986 d.165, effective May 5, 1986 (operative June 2, 1986).
See: 17 N.J.R. 2524(a), 18 N.J.R. 985(b).
(e) added.
Amended by R.2000 d.415, effective October 16, 2000.
See: 32 N.J.R. 2565(a), 32 N.J.R. 3844(a).

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Substituted references to beneficiaries for references to recipients and substituted references to CBOSSs for references to CWAs throughout.

Amended by R.2001 d.199, effective June 18, 2001.

See: 32 N.J.R. 2021(a), 33 N.J.R. 2195(a).

In (d)1i, substituted "(d)1iv" for "(d)iv" preceding "below"; in (d)1ii, substituted "shall" for "must"; in (d)1iii, added the last sentence.

Amended by R.2002 d.124, effective April 15, 2002.

See: 33 N.J.R. 4188(a), 34 N.J.R. 1546(a).

Added (f).

Amended by R.2012 d.025, effective February 6, 2012.

See: 43 N.J.R. 804(a), 44 N.J.R. 230(a).

In (b), substituted "him or her" for "him/her" and "his or her" for "his/her"; in (c)1, deleted a comma following "authority", and substituted a semi-colon for a colon at the end; in (c)3i(2) and (c)3i(3), substituted "CWA" for "CBOSS"; added (d)1v; in (d)2, inserted a comma following the second occurrence of "individual", and substituted "CWA" for "CBOSS"; rewrote (c)3; and in (e)2i, substituted "CWA" for "CBOSS".

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Attachment 11

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SHEILA Y. OLIVER
Lt. Governor

SARAH ADELMAN
Acting Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

L.D.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 02621-2021**
AND HEALTH SERVICES AND	:	
MIDDLESEX COUNTY BOARD	:	
OF SOCIAL SERVICES,	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is January 18, 2022, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By letter dated February 17, 2021, the Middlesex County Board of Social Services (MCBSS) advised Petitioner that a penalty of 191 days was assessed on her receipt of Medicaid benefits resulting from the transfer of assets, totaling $68,425.38 for less than

fair market value, during the five-year look-back period. The transfer of assets stem from the sale of Petitioner's property for $34,000.36 less than fair market value and transfers to Petitioner's daughter and power of attorney (POA), M.S., and to "cash," totaling $34,425.02.

The Initial Decision determined that Petitioner had shown that a portion of the transfers were reimbursements for Petitioner's expenses, and reduced the penalty imposed in relation to those expenses. The Initial Decision, however, found that Petitioner had failed to rebut the presumption that the remaining transfers and the sale of Petitioner's property for less than fair market value were done for the purposes of qualifying for Medicaid benefits. Based upon my review of the record, I hereby ADOPT in part and REVERSE in part the findings and conclusions of the Administrative Law Judge (ALJ).

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide

that "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." N.J.A.C. 10:71-4.10(i)2.

On December 28, 2020, a Medicaid application was filed on Petitioner's behalf by M.S. and attorney Jason Alguram, Esq. R-1. At the time of the application, Petitioner was residing in a nursing facility. ID at 2. MCBSS determined that Petitioner was eligible for Medicaid benefits; however, through a letter dated February 17, 2021, Petitioner was advised that she was being assessed a transfer penalty totaling $68,425.38, as a result of transfers made for less than fair market value during the look-back period. R-2. Specifically, MCBSS advised that the sale of Petitioner's property for $215,000 on April 27, 2016 was completed for $34,000.36 less than fair market value. Ibid. MCBSS determined that the fair market value of Petitioner's property at the time of its sale was $249,000.36. MCBSS further determined that Petitioner made several unverified withdrawals from her Wells Fargo bank account totaling $34,425.02. Ibid. MCBSS provide a list of the unverified transactions at issue, which were dated from December 31, 2016 through September 21, 2020.[1] Ibid.

As it relates to the sale of Petitioner's property, M.S. testified that the property was sold "as is" because it needed substantial repairs and there was insufficient money to pay for the necessary remodeling costs." ID at 4. The property was not appraised prior to the sale. Ibid. The fair market value of a property 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. Absent a certified appraisal, the value of a resource

[1] The Initial Decision notes that Petitioner provided MCBSS with information regarding some of the transfers originally at issue, and MCBSS revised the list of transfers that were subject to the penalty. ID at 3. While the February 17, 2021 letter from MCBSS contained thirty-two transfers, the Initial Decision provides a list of only twenty-one transfers. R-2 and ID at 7. Accordingly, it appears that only the twenty-one referenced transfers, totaling $14,875 and issued between December 31, 2016 and November 7, 2019, are at issue in this matter. However, I note that it is unclear from the record whether MCBSS removed the remaining eleven transactions from the imposed penalty.

is considered "the price that the resource can reasonably be expected to sell for on the open market in the particular geographic area minus any encumbrances (that is, its equity value)." N.J.A.C. 10:71-4.1(d). The equity value of real property is "the tax assessed value of the property multiplied by the reciprocal of the assessment ratio as recorded in the most recently issued State Table of Equalized Valuations, less encumbrances, if any. . . ." N.J.A.C. 10:71-4.1(d)1iv. MCBSS determined that the equity value of the property at the time it was sold was $249,000.36.[2]

Petitioner provided a letter, dated March 9, 2021, from Thomas Campbell, the listing relator for the sale, who stated that the property was listed on the Garden State Multiple Listing Service and "[t]he property did need updating throughout, especially in the kitchen and bathroom." P-2. He stated that he believed the property was sold at market value. Ibid. Mr. Campbell did not testify at the hearing in this matter and accordingly, his letter is considered hearsay. While hearsay evidence shall be admissible during contested cases before the OAL some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. N.J.A.C. 1:1-15.5(b). The finding of fact cannot be supported by hearsay alone. Rather, it must be supported by a residuum of legal and competent evidence. Weston v. State, 60 N.J. 36, 51 (1972). No other documentation supporting Petitioner's contention that the property was in need of repairs has been provided to support either M.S.'s testimony or the contents of Mr. Campbell's letter. Absent a certified appraisal for the property and documentary evidence to support Petitioner's contention that the property was in a deteriorated condition at the time of the sale and could not be sold for

[2] The tax assessed value of the property when it was sold in April 2016 was $68,500. That amount divided by .2751, which is the Middlesex County assessment ratio for Woodbridge Township, New Jersey in the State Table of Equalized Valuations, results in a valuation of $249,000.36. See State of New Jersey, Department of the Treasury, Division of Taxation, Table of Equalized Valuations, Middlesex County, 2016, http://www.state.nj.us/treasury/taxation/lpt/lptvalue.shtml.

$249,000.36, I concur with the ALJ and FIND that the fair market value of the property at the time of its sale was $249,000.36. I further FIND that Petitioner has failed to present any documentation to support a finding that the sale of the property for less than the fair market value determined by MCBSS was solely for any reason other than to establish Medicaid eligibility.

As it relates to the remaining transfers at issue, M.S. testified that she would purchase items for Petitioner and then reimburse herself from her Petitioner's account. ID at 2. M.S. further stated that she paid a companion approximately $400 per week to stay with Petitioner and drive Petitioner to doctors' appointments and other locations while Petitioner resided in the community. Ibid. M.S. further stated that she paid for personal care services for Petitioner through a program offered by her employer, where funds to pay a company called Bright Horizons were taken directly from M.S.'s paychecks. Id. at 5. M.S. testified that check number 2160 was a gift to her daughter for helping to care for Petitioner; check number 2231 was written to M.S. on November 7, 2019, after Petitioner moved to a new nursing facility, and "[a]lthough it was likely written to reimburse M.S. for expenditures on behalf of [P]etitioner, M.S. could not identify expenditures;" and check number 2200 was written on November 25, 2018 to M.S.'s fiancé to reimburse him for Amazon purchases he made on Petitioner's behalf. Id. at 6.

M.S. provided bank statements and cashed checks/withdrawal receipts related to the transfers at issue. P-3 and P-5. While some of the checks had handwritten notations, the notations were not originally noted on the checks when they were issued and are only written on the copies of the checks for the purposes of the present matter. Ibid. M.S. additionally provided some documentation related to expenditures she alleged to have made on Petitioner's behalf. She produced documentation for five prescriptions in Petitioner's name, dated between July 22, 2019 and August 7, 2019, totaling $41.62. P-1. She additionally provided Walmart and JC Penney receipts showing various items, such as a nightlight,

nightgown, and ointment alleged to have been purchased for Petitioner. P-1. M.S.'s credit card statements provided show various purchases; however it is unclear what transactions allegedly relate to Petitioner, as no cooperating documentation was provided. Lastly, M.S. provided emails from Bright Horizons showing that a payment of $34 was made on July 13, 2019 and three $36 payments were made on August 10, 2019, August 13, 2019, and August 14, 2019, respectively.[3] Ibid.

Based upon the documentation presented and M.S.'s testimony on Petitioner's behalf, the ALJ determined that Petitioner had failed to explain the nature of the majority of the transactions at issue. Specifically, the ALJ noted that no documentation was provided to support M.S.'s testimony that check number 2200 was for Amazon purchases for Petitioner nor was any documentation provided to check number 2142 that was allegedly provided to "granddaughter's friend." ID at 11. Moreover, no documentation was provided showing the purpose of any of the withdrawals that were issued to "cash." Ibid. However, the ALJ found that Petitioner had demonstrated that M.S. expended money on Petitioner's behalf for the Walmart purchases on August 16, 2019, totaling $10.87, and August 26, 2019, totaling 12.32, as well as the payment for Petitioner's five prescriptions on July 22, 2019 and August 7, 2019, totaling $41.62, and the payments to Bright Horizons on July 13, 2019, August 10, 2019, August 13, 2019, and August 14, 2019, totaling $142. The ALJ determined that the imposed penalty in this matter should be reduced by the above-referenced amounts. I disagree.

While M.S. provided documentation related to expenditures that she allegedly made on Petitioner's behalf, there is no nexus between any of these alleged expenditures and the transfers at issue. All of the expenditures noted in the Initial Decision occurred between July and August 2019. The only transfer still at issue that occurred around or after the dates that

[3] The Initial Decision provides that the emails show five payments to Bright Horizons. ID at 9. However, an email from August 10, 2019, showing a $36 payment, was provided twice. P-1. Accordingly, there were only four payments to Bright Horizons shown.

these expenditures took place was check number 2231 in the amount of $530, which was issued on November 7, 2019. M.S. testified that she could not explain what this check was for or what alleged reimbursements this check covered. While M.S. may have paid for items for Petitioner, there is nothing in the record to show that Petitioner agreed to reimburse M.S. for these alleged payments or that any of the transfers at issue were made to reimburse these expenditures. Moreover, as Petitioner's POA, M.S. had access to Petitioner's bank account, and she appears to have executed all of the unverified transfers in this matter on Petitioner's behalf. It is unclear then why Petitioner's expenses were not paid directly from Petitioner's account. Without adequate documentation showing a nexus between the transfers and alleged reimbursements, Petitioner cannot now claim that the unverified transfers at issue should be offset by random purchases allegedly made on Petitioner's behalf. Accordingly, I FIND that Petitioner failed to demonstrate that all the unverified transfers from Petitioner's Wells Fargo's bank account were made for a purpose other than to qualify for Medicaid benefits.

Thus, based upon my review of the record and for the reasons set forth herein, I hereby ADOPT in part and REVERSE in part the ALJ's recommended decision, as set forth above. Further, I FIND that Petitioner has failed to rebut the presumption that the transfers at issue in this matter were made in order to establish Medicaid eligibility, and, therefore, the imposed penalty period is appropriate.

THEREFORE, it is on this 18th day of JANUARY 2022

ORDERED:

That the Initial Decision is hereby ADOPTED in part and REVERSED in part, as set forth herein.

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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Governor

TAHESHA L. WAY
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Commissioner

GREGORY WOODS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

D.M.,

PETITIONER,

v.

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

RESPONDENTS.

ADMINISTRATIVE ACTION

ORDER OF RETURN

OAL DKT. NO. HMA 09682-23

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the OAL case file, the documents in evidence, and the Initial Decision in this matter. Neither party filed exceptions. Procedurally, the time period for the Agency Head to render a Final Agency Decision is July 12, 2024 in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits by the Cumberland County Board of Social Services (Cumberland County.) The issue presented here is whether Cumberland County correctly imposed a penalty of 196 days totaling $73,468.63.

On June 1, 2022, Petitioner applied for Medicaid with Cumberland County while they resided in Cumberland County Manor, a nursing facility. On March 8, 2020, Petitioner sold their home for $255,000. (P-31.) The home was located in an age-restricted development in Florence Township. The Florence Township tax assessor valued the home at the time of sale at $324,100. (P-25.) Cumberland County determined that the fair market value (FMV) of the house was $328,468.63 utilizing information from New Jersey government database. By letter dated September 6, 2022, Cumberland County granted Petitioner's June 2022 Medicaid application with eligibility as of June 1, 2022. However, a penalty of 196 days was assessed resulting from a transfer of assets, totaling $73,468.63, for less than fair market value during the five-year lookback period. (P-4.) Petitioner appealed the Medicaid eligibility transfer penalty of 196 days imposed by Cumberland County for the sale of their home for less than the fair market value. A telephonic hearing was conducted on May 17, 2023. The Administrative Law Judge (ALJ) reversed the 196-day transfer penalty. ID at 10. On September 7, 2023, the matter was remanded solely to allow Petitioner the opportunity to provide sufficient credible evidence to support the conclusion that the sale price of the home was the fair market value of the home because there was no record to support that conclusion. ID at 2.

Thereafter, on March 20, 2024, a new hearing was conducted in accordance with the remand. Prior to the hearing, Petitioner offered the appraisal of M.G. (M&M Valuations and Consulting, Inc.), a certified real estate appraiser, in support of the fair market value of the property being $250,000 as of March 20, 2020. (P-2.) At the hearing,

Cumberland County acknowledged receipt of the retroactive appraisal and did not object to the appraisal being admitted into the record. (R-3.) Additionally, at the hearing J.S. Esq., attorney for Petitioner's Designated Authorized Representative (DAR) and S.S. of Future Care Consultants testified on behalf of Petitioner as to the condition of the property at the time of sale and that the offer accepted was the highest and best offer. ID at 4-5.

The ALJ found that Cumberland County properly calculated the fair market value by multiplying the tax-assessed value of the property by the reciprocal of the assessment ratio at the time of application without the certified appraisal or other evidence. The ALJ also found that Petitioner's witnesses credibly testified that due to the condition of the property, the offer accepted was the highest and best offer. The ALJ reversed the penalty period noting the appraisal of the certified real estate appraiser that the fair market value of the property as of March 20, 2020, was $250,000 and finding that Petitioner did not sell the home for less than fair market value to establish eligibility. ID at 11. I concur that based on the certified appraisal, that Petitioner did not sell the home for less than fair market value.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification."

Ibid. Congress's imposition of a penalty for the disposal of assets for less than the fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

The fair market value of a property 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. Absent a certified appraisal, the value of a resource is considered "the price that the resource can reasonably be expected to sell for on the open market in the particular geographic area minus any encumbrances (that is, its equity value)." N.J.A.C. 10:71-4.1(d). The equity value of real property is "the tax assessed value of the property multiplied by the reciprocal of the assessment ratio as recorded in the most recently issued State Table of Equalized Valuations, less encumbrances, if any. . .." N.J.A.C. 10:71-4.1(d)1iv.

Here, Petitioner did not provide a certified appraisal at the time of the initial application. Therefore, Cumberland County correctly determined at the time that Petitioner sold their home for less than fair market value, and assessed a penalty of 196 days. Cumberland County, relying on N.J.A.C. 10:71-4.1(d)(1)(iv), determined the tax assessed value of the property to be $328,468.63. However, during the initial May 17, 2023 hearing, Petitioner argued that the tax assessed value was not an accurate indicator

of the home's fair market value because the home was in poor condition, and the price the home was sold for, $255,000, was for fair market. While the ALJ found that the property was in poor condition at the time of the sale and therefore, the sale price was the fair market value of the property, there was no credible documentary evidence in the record to show the condition of the property at the time of the sale, such as the cost of any repair that the property needed, or a certified appraisal of the property prior or subsequent to the sale of the property.

Pursuant to the remand, on February 28, 2024, Petitioner provided the real estate appraisal of M.G., a certified real estate appraiser. Per M.G., the fair market value of the property as of March 20, 2020, was $250,000. (P-2.) The certified real estate appraisal established that the fair market value of the house was almost the same as what it was sold for. The appraiser obtained details of the condition of the property from the listing information, pre-sale photos of the interior of the property, and documentary evidence of the cost. Although J.S., Esq., attorney for Petitioner's DAR, and S.S. of Future Care Consultants, testified as to the state of the property at the time of the sale, S.S. was not appointed as Petitioner's DAR until April 15, 2022. Therefore, it is unclear how either S.S. as the attorney for the DAR, or J.S. had firsthand knowledge of the state of the property when it was sold in March 2020, more than two years before Petitioner appointed S.S. as their DAR. Notwithstanding this unclear testimony, the appraisal obtained is sufficient to establish the fair market value of the home at the time of the sale.

Based on the record before me, Petitioner established sufficient evidence to overcome the tax assessment and establish that Petitioner's property was sold for fair market value. To that end, I hereby ADOPT the Initial Decision's conclusion that Petitioner's property was sold for fair market value and RETURN the matter to Cumberland County to issue a reversed determination letter.

THEREFORE, it is on this 1st day of JULY 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance and Health Services

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Lt. Governor

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Commissioner

GREGORY WOODS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

L.N.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,	:	**OAL DKT. NO. HMA 06054-2024**
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is August 5, 2024, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By letter dated May 25, 2023, the Middlesex County Board of Social Services (Middlesex County) granted Petitioner's April 14, 2023 Medicaid application with eligibility as of June 19, 2023. ID at 2. By letter dated May 26, 2023, Middlesex County notified Petitioner that a transfer penalty of 138 days was assessed, resulting from the

transfer of assets totaling $51,907.73. Id. at 3. The transfer of assets stems from the sale of Petitioner's property for $69,915.46 less than fair market value and a gift of $16,950. Ibid. The subject property was owned by the Petitioner and their brother. Ibid. As such the realized profit of $69,915.46 was divided into two equal shares of $34,957.71, which represents the amount the Petitioner is entitled to. The $34.957.73 is added to the gift amount of $16,950 for a total of $51,907.73. Ibid.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

The Petitioner's brother and power of attorney, D.N. testified at the fair hearing that the property in question was in poor condition, including "graded wiring", holes in the floor, roof damage from Hurricane Sandy, water damage that led to buckling in the cement wood paneling from the 1960s that was buckling, plumbing that was failing and backed up drains. ID at 4. D.N. further testified that a realtor was not used during the sale of the home because that would require an inspection, and that he did not have the money to do repairs on the house. Ibid. The home was ultimately sold to a developer in 2019. Ibid.

Jose Tavarez, a certified residential real-estate appraiser with over twenty-three years of experience, also testified as a qualified expert in the area of real-estate appraisals. Id. at 5. At D.N.'s request, Tavarez performed a retroactive appraisal of the property in question. As part of his November 15, 2023, appraisal, Tavarez interviewed D.N., reviewed details from the township records, and conducted a drive-by of the property. Tavarez also looked at comparable homes in the immediate area, made his adjustments, and assessed the value of the property at $120,000. Ibid. While Middlesex County used the 2020 tax assessed value of the property of $188,700 as the fair market value of the house, Tavarez testified that a tax assessment is simply a mass appraisal of an entire area where little time is spent on the individual property. Conversely, Tavarez actually went to the property to conduct his appraisal. Ibid. He further testified that the town's records showed that the home had not been renovated or updated since the family purchased the property in 1960, and that the home was built in 1900. Importantly, Tavarez had photographs from the property record from when the home was sold on February 14, 2019. These picture revealed the "economic age," as Tavarez explained, which related to the long-lived items such as the roof, furnace, and boiler. Ibid.

In the Initial Decision, the Administrative Law Judge (ALJ) found the testimony of D.N. as credible as to the condition of the property. Id. at 6. The ALJ also found the testimony of Tavarez as credible, as Tavarez was an experienced professional in the real-estate industry and his explanations of the market analysis and assessment of the property's fair market value was rational and reasonable. Ibid. The ALJ further found that Tavarez had no connection to petitioner or D.N. beyond his professional relationship, and there was no motivation or bias to misrepresent the facts. Ibid. Based on the condition of the property, Tavarez estimated the value to be $120,000. Ibid. It was sold to a developer for $120,000, which the ALJ found was reasonable. Ibid. I agree with the Initial Decision. Ibid.

In D.H. v. DMAHS and Camden County Board of Social Services, initial decision, 2017 N.J. AGEN LEXIS 164 (March 16, 2017), adopted, 2017 N.J. AGEN LEXIS 1474 (April 24, 2017), an administrative law judge reversed a transfer penalty and determined that a petitioner had rebutted the presumption that a property was transferred for less than fair market value. The ALJ found that the home in that case was in need of substantial repair and renovation, and that the fair market value was confirmed by a certified real-estate appraiser. The Director of DMAHS adopted the initial decision and noted:

> While the tax assessed value of a home is not necessarily an accurate reflection of the price that the property "can reasonably be expected to sell for on the open market in the particular geographic area" absent credible independent evidence, the regulation provides for a uniform determination of the value of property, which can be a subjective art.
>
> [2017 N.J. AGEN LEXIS 1474 (emphasis added).]

The Director found that the property appraisal and the corroborating testimony of the certified real-estate appraiser provided sufficient evidence to overcome the tax assessment and establish that the property sold for fair market value. Ibid.

The property in this matter sold for $120,000, which is the fair market value of the property confirmed by the experienced certified real-estate appraiser. Id. at 11. The retroactive appraisal was based not only on information from D.N., but also the photos of the interior property, a drive-by view of the exterior of the property, and the appraiser's independent market analysis of comparable homes. Ibid. Middlesex County assessed the property's fair market value at $188,700 using the Table of Equalized Valuation. Middlesex County did not take into account that at the time of sale the property needed substantial repairs. According to N.J.A.C. 10:71-4.1(d), the equity value of a property is "the price that the resource can reasonably be expected to sell for on the open market in the particular geographic area minus any encumbrances." A certified real-estate appraiser established that the property was valued at $120,000 at the time of sale, which is congruent to the price the property actually sold for. As such, it was transferred at the fair market value. Therefore, I find that the petitioner successfully rebutted the presumption that the property was transferred for less than fair market value to establish Medicaid eligibility, and should not be subject to the $34,957.73 transfer penalty.

Thus, for the reasons set forth above and those contained in the Initial Decision, I hereby ADOPT the Initial Decision in this matter.

THEREFORE, it is on this 31st day of July 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance and Health Services

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STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

J.T.,	
PETITIONER,	**ADMINISTRATIVE ACTION**
v.	**ORDER OF REMAND**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES,	**OAL DKT. NO. HMA 01650-2023**
RESPONDENTS.	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is February 1, 2024, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By letter dated February 8, 2023, the Middlesex County Board of Social Services (MCBSS or County) granted Petitioner's December 29, 2022, Medicaid application with eligibility as of January 1, 2023; however a penalty of 56 days was assessed resulting from the transfer of assets totaling $21,300.65 for less than fair market value during the five-year look-back period. R-B. The transfer of assets stemmed from

the sale of Petitioner's home for $110,000.00, less than the fair market value of $131,919.52 (assessed value $121,300/.9195 assessment ratio). R-C.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

Additionally, pursuant to N.J.A.C. 10:71-4.1(d), the value of a resource is defined as "the price that the resource can reasonably be expected to sell for on the open market

in the particular geographic area minus any encumbrances (that is, equity value)." Pursuant to N.J.A.C. 10:71-4.1(d)(1)(iv), "the equity value of real property is the tax assessed value of the property multiplied by the reciprocal of the assessment ration as recorded in the most recently issued State Table of Equalized Valuations, less encumbrance, if any." However, the tax assessed value does not necessarily reflect the fair market value of real property. R.M. v. DMAHS and Ocean Cnty. Bd. Soc. Servs., HMA 2677-01, Dir., adopted DMAHS (May 3, 2002) http://njlaw.rutgers.edu/collections/oal/; C.D. v. DMAHS and Warren Cnty. Bd. Of Soc. Servs., HMA 5564-11, Initial Decision (September 26, 2011), adopted, Dir. (December 23, 2011), http://njlaw.rutgers.edu/collections/oal/ (adopting valuation of transferred home for fair market value at less than the tax assessed value).

As previously stated, the County determined that Petitioner sold their home for less than fair market value, and assessed a penalty period of 56 days. The County, relying on N.J.A.C. 10:71-4.1(d)(1)(iv), determined the tax assessed value to be $131,919.52. During the fair hearing, Petitioner's son and power of attorney, Jo.T. testified that after his mother broke her hip he had to quickly sell her home and find her a nursing home. ID at 4. The facility required a specific amount of money for his mother to remain. Ibid. His goal was to sell the house quickly and get as much money as possible. Ibid. As the house needed work, he contacted "We Buy Ugly Homes" to try and sell the home and to avoid paying the 6 percent realtor fee, among other reasons. ID at 5. Jo.T. spoke with three to four potential buyers and received offers, ultimately agreeing to the highest offer of $110,000. Ibid. Jo.T. testified that he did not know any of the bidders, anyone from "We Buy Ugly Homes" or the buyer. Ibid. Petitioner had a licensed real estate broker testify during the fair hearing. The broker had worked as a real estate agent/broker for twenty years in the applicable county and had experience in the specific community where

the house was located. ID at 6. He testified that he had no reason to dispute the $115,000 appraisal amount and that he came to this amount by pulling his own comparable sales from the same period of time as the sale of the house occurred. Ibid. On cross-examination the broker confirmed that he had never been to the property and that he had no personal knowledge of the condition of the home at the time of sale. Ibid. Petitioner also had a certified real estate appraiser testify that he conducted a retroactive appraisal, and as to how he arrived at the $115,000 fair market value of the house. Ibid. The appraiser outlined the deteriorated physical condition he believed the house to be in, looked at comparable sales, drove by the home after it had been renovated and sold, and he reviewed Google "street views" of the property from 2018/2019. ID at 7. The appraiser acknowledged that he received his information regarding the deteriorated physical condition of the property from Jo.T., did not see the property at the time of the sale, and he had no personal knowledge of the alleged deficiencies. Ibid.

When presented with a case where the County has determined there was a transfer of assets within the look-back period, there is a two-step analysis. First, the court looks at whether or not the asset was transferred for fair market value. See N.J.A.C. 10:71-4.10(c). If it is determined that the asset was transferred for less than fair market value, the Court then analyzes whether Petitioner has overcome the burden to establish that the transfer was exclusively for some purpose other than to qualify for Medicaid. See N.J.A.C. 10:71-4.10(j).

WAS THE TRANSFER FOR FAIR MARKET VALUE

In this matter, the County determined that the fair market value of the home was $131,919.52, based on the tax assessed value. Petitioner argued that the tax assessed value was not an accurate indicator of the home's fair market value because the home was in poor condition, and the price the home was sold for, $110,000, was for fair market

value. Additionally, Petitioner relied on an appraisal that was conducted approximately four years after the sale of the home. When analyzing how to determine fair market value for this particular set of circumstances, the Administrative Law Judge recited the facts of two previous decisions, D.H. v. Camden Co. and J.W. v. Camden Co.

In D.H. v. Camden County Board of Social Services, HMA 18715-16, Initial Decision (March 16, 2017), adopted Dir. April 24, 2017 <http://njlaw.rutgers.edu/collections/oal/>, Petitioner argued that the home was sold for approximately $75,000 less than the tax assessed value because the home was in deplorable condition and it had been occupied by hoarders. The realtor who listed the home on the open market testified that he made a thorough examination of the property prior to listing it and determined that the condition was deplorable. A certified real estate appraiser testified that he performed a retroactive appraisal based on a physical analysis of the property and improvements, a locational analysis of the neighborhood and city, and an economic analysis of the market for similar properties. Photographs of inside the home in the months preceding the sale were submitted as exhibits by Petitioner. The property was listed by a disinterested experienced realtor on the open market and the highest and best offer was accepted by Petitioner. The Initial Decision stated that the certified real estate appraisal and the other credible evidence established that the fair market value of the house was almost exactly what it sold for. Additionally, the Administrative Law Judge found that Petitioner rebutted the presumption that the house was transferred for less than fair market value to establish Medicaid eligibility. The Final Agency Decision adopted the Initial Decision and stated that Petitioner provided sufficient evidence to overcome the tax assessment and establish that Petitioner's property was sold for fair market value.

In J.W. v. Camden County Board of Social Services, HMA 00366-16, Initial Decision (November 4, 2016), adopted Dir. December 8, 2016 <http://njlaw.rutgers.edu/collections/oal/>, Petitioner argued that the home was sold for approximately $52,000 less than the tax assessed value because the house was in deplorable condition and in need of extensive repairs. The house was placed on the open market but Petitioner was unable to sell it and eventually sold the home to a family member. During the fair hearing, Petitioner submitted photos and a video documenting the condition of the house when sold; receipts for extensive repairs that the new owner had done to the house; and comparable sales listings from www.realtor.com. Additionally, the new owner testified that he received a letter from the insurance company that stated if the roof was not replaced, he would not be able to obtain insurance coverage. A certified licensed appraiser testified that he performed a retroactive appraisal, approximately two years after the sale of the home, to determine the value of the property at the time of the sale. His evaluation included a physical inspection of the premises, a review of the photographs and videos, which he considered authentic, and an analysis of comparable sales. The County contended that they were bound to use the tax assessed value because the appraisal was produced approximately two years after the sale of the property. The Initial Decision stated that Petitioner rebutted the presumption that the transfer was made to establish Medicaid eligibility, and had provided sufficient evidence that the property was not transferred for less than fair market value. The Final Agency Decision adopted the Initial Decision and stated that while the tax assessed value is often the best indicator of the value of real property, instances where this is not the case must be supported by other competent evidence of the value the property would command on the open market.

In addition to D.H. and J.W., a third case bears mentioning. In J.S. and W.S. v. Camden County Board of Social Services, HMA 10521-13, Initial Decision (March 6, 2014), adopted Dir. May 21, 2014 <http://njlaw.rutgers.edu/collections/oal/>, Petitioners argued that the house was sold for approximately $117,000 less than the tax assessed value because the property had termite and structural damage, and needed substantial renovations. Before the home could be listed on the open market through MLS, Petitioners' real estate agent found two interested cash investors, one of whom purchased the home for $78,500. The purchaser, the owner of a company who purchases and renovates homes for resale, testified that he took photographs before, during and after the extensive renovations, which were admitted into evidence. He also testified that he spent $40,000 repairing the property and sold it for $150,350 approximately eleven months after purchasing it from Petitioners. Lastly, he stated that the tax assessed value of $202,400 could not be accurate because he could not even sell the newly renovated home for his original listing price of $170,000. A certified general appraiser with twenty years of experience testified that he did a retrospective appraisal of the property and concluded the value was $77,000. He utilized photographs and available public information to appraise the property. The Initial Decision stated that the credible evidence established that the fair market value of Petitioners' residence at the time of the sale was approximately $77,000, and therefore, was not transferred for less than fair market value. The Final Agency Decision adopted the Initial Decision in its entirety.

In the matter at hand, in the Initial Decision, the Administrative Law Judge appears to rely on D.H. and J.W. because, like in the present matter, they both had retroactive appraisals. A more nuanced look at those cases will identify an important difference between those cases and the present matter. In both D.H. and J.W., the property 1) was listed on the open market and 2) the petitioners presented photos and/or videos of the

property during the time the home was sold. Here, Petitioner's son, Jo. T., saw a sign for "We Buy Ugly Homes" and decided to contact them instead of hiring a real estate agent to place the home on the open market through the MLS system, or at a minimum, placing the home on the open market himself. Only allowing a few buyers connected to "We Buy Ugly Homes" to make offers on the home is only exposing the home to a small sliver of the open market and therefore cannot be considered the open market for purposes of establishing fair market value of the home pursuant to N.J.A.C. 10:71-4.1(d). Additionally, based on the record before me, it does not appear that Petitioner provided the Court with any pictures or videos of the condition of the home prior to the sale. The only evidence presented of the deteriorated condition was testimony from Jo. T., an interested party. In the two cases relied on by the Administrative Law Judge, along with J.S. and W.S., the Judge heard testimony of disinterested parties who saw the deplorable conditions of the home prior to the sale of the home, reviewed pictures or videos of the deplorable conditions of the home prior to the sale of the home, or both[1]. In a situation where the petitioner is arguing the fair market value of the home is less than the assessed value because of the deteriorated condition of the home, merely obtaining a retroactive certified appraisal that relies solely on self-serving statements of the petitioner, their power of attorney, etc. to provide a description of the deteriorated condition[2], as is the case in this matter, is not sufficient to establish the fair market value of the home.

There is nothing in the record that indicates Petitioner did not have any pictures, videos, or documents showing the condition of the property at the time of the sale. Petitioner will be provided the opportunity to provide pictures, videos, documents, and/or independent testimony to show the condition of the property at the time of the sale.

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[1] See also V.B. v. Burlington County Board of Social Services, HMA 01071-2020, Initial Decision (March 30, 2021), adopted Dir. June 24, 2021 <http://njlaw.rutgers.edu/collections/oal/>.

[2] Page 3 of the appraisal (Exhibit P-2) states that the property "is being appraised with the extraordinary assumption the dwelling was in poor condition…".

DID PETITIONER OVERCOME THE BURDEN

As mentioned above, "[t]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[I]f 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." N.J.A.C. 10:71-4.10(i)2. N.J.A.C. 10:71-4.10(k) further states:

> (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:
>
> 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.

Jo. T. testified that in 2019 his mother was in good health but forgetful and on one occasion she got lost while driving to the dentist. ID at 4. He also testified that he had talked to her about moving into an assisted living facility. Ibid. In February 2019 she broke her hip and after the surgery she was unable to return home, prompting the sale of her house. Ibid. In the Initial Decision, the Administrative Law Judge found that the record supported that the reason the property was sold quickly in April 2019 using "We Buy Ugly Homes" was the sudden onset of Petitioner's medical condition. ID at 12. Relying on this record, the Administrative Law Judge concluded that Petitioner rebutted the presumption that the property was transferred for less than fair market value to establish Medicaid

eligibility. ID at 13. It appears N.J.A.C. 10:71-4.10(k) was misstated in the Initial Decision. More specifically, on page 10 of the Initial Decision, subsection (k)(1)(i) is misquoted by stating that the presence of the traumatic onset of disability may indicate that the assets were transferred exclusively for some other purpose other than to establish Medicaid eligibility. This is the opposite of what subsection (k)(1)(i) states. If Petitioner had transferred the asset *before* the traumatic onset of a disability, that could help support Petitioner's argument that it was transferred exclusively for some other purpose. Here, Petitioner transferred the asset *immediately after* the traumatic onset of a disability. The facts presented cannot successfully overcome Petitioner's burden to prove the asset was transferred solely for some other purpose other than to qualify for Medicaid. Therefore, the findings made in the Initial Decision that Petitioner overcame the presumption that the transfer at issue was for the purposes of establishing Medicaid eligibility, is not supported by the record.[3]

Based upon my review of the record and for the reasons set forth herein, I hereby REVERSE the Initial Decision in this matter and REMAND the matter to clarify the record, as detailed herein.

THEREFORE, it is on this 29th day of JANUARY 2023,

ORDERED:

That the Initial Decision is hereby REVERSED and REMANDED, as set forth herein.

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

[3] It should be noted that this matter is being remanded to allow Petitioner to provide evidence, if any, as to the deteriorated condition of the home at the time of sale to establish the fair market value of the home, not to provide additional testimony to overcome the burden as discussed in this section.

Attachment 12

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N.J.A.C. 10:71-4.10

This file includes all Regulations adopted and published through the New Jersey Register, Vol. 57 No. 5, March 3, 2025

NJ - New Jersey Administrative Code PAW ET Table of Contents TITLE 10. HUMAN SERVICES CHAPTER 71. MEDICAID ONLY SUBCHAPTER 4. RESOURCES

§ 10:71-4.10 Transfer of assets

(a) The provisions of this section shall apply, effective June 18, 2001, only to persons who are receiving an institutional level of services, including individuals who are receiving services under a 42 U.S.C. § 1915(c) home and community care waiver under Medicaid, or who are seeking that level of service, and who have transferred assets on or after August 11, 1993. An individual shall be ineligible for institutional level services through the Medicaid program if he or she (or his or her spouse) has disposed of assets at less than fair market value at any time during or after the 60-month period immediately before:

1. In the case of an individual who is already eligible for Medicaid benefits, the date the individual becomes an institutionalized individual; or

2. In the case of an individual not already eligible for Medicaid benefits, the date the individual applies for Medicaid as an institutionalized individual.

(b) The following definitions shall apply to the transfer of assets:

1. Individual means:

i. The individual him or herself who is applying for benefits;

ii. The individual's spouse;

iii. A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse;

iv. Any person including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

2. An institutionalized individual, for the purposes of this chapter, is a person who is receiving care in a Medicaid certified nursing facility, intermediate care facility for the mentally retarded (ICFMR), or a licensed special hospital (Class C) or Title XIX psychiatric hospital (if under the age of 21 or age 65

and over). For purposes of this chapter, an institutionalized individual shall also include a person seeking benefits under a home or community care waiver program. An institutionalized individual shall not include a person who is receiving care in an acute care general hospital.

3. Assets shall include all income and resources of the individual and of the individual's spouse. Assets shall also include income and resources which the individual or the individual's spouse is entitled to but does not receive because of action or inaction by the individual or the individual's spouse; or by any person, including a court or administrative body with the legal authority to act in place of or on behalf of the individual or the individual's spouse; or any person, including a court or administrative body, acting at the direction of or upon the request of the individual or the individual's spouse. Examples of actions that would cause income or resources not to be received shall include, but shall not be limited to:

i. Irrevocably waiving pension income;

ii. Waiving the right to receive an inheritance, including spousal elective share pursuant to N.J.S.A. 3B:8-10;

iii. Not accepting or accessing injury settlements;

iv. Tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of an individual who is a plaintiff; and

v. Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony.

4. Resources, for the purpose of asset transfer, shall include all resources, both included and excluded, in accordance with the provisions of this chapter. For example, the transfer of a home, even if it is serving as the individual's principal place of residence, shall be subject to the transfer of assets provisions.

5. Income, for the purposes of this section, shall have the same definition as found in N.J.A.C. 10:71-5. In determining whether a transfer of assets involves countable income, the income disregards in N.J.A.C. 10:71-5 shall be applied.

6. Fair-market value shall be 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. Value shall be based on the criteria for evaluating assets as found in N.J.A.C. 10:71-4.1(d).

i. In determining whether or not an asset was transferred for fair-market value, only tangible compensation, with intrinsic value shall be considered. For example, a transfer for "love and affection" shall not be considered a transfer for fair market value.

ii. In regard to transfers intended to compensate a friend or relative for care or services provided in the past, care and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation. Thus, a transfer of assets to a friend or relative for the alleged purpose of compensating for care or services provided free in the past shall be presumed to have been transferred for no compensation. This presumption may be rebutted by the presentation of credible documentary evidence preexisting the delivery of the care or services indicating the type and terms of compensation. Further, the amount of compensation or the fair market value of the transferred asset shall not be greater than the prevailing rates for similar care or services in the community. That portion of compensation in excess of the prevailing rate shall be considered to be uncompensated value.

iii. Under a life estate, an individual who owns property transfers the ownership of that property to another individual, while retaining for the rest of his or her life, or the life of another person, certain rights to that property. A life estate entitles the owner of the life estate to possess, use and obtain profits from the property, as long as he or she lives, although actual ownership of the property has passed to another individual. In a transaction involving a life estate, a transfer of assets is involved. In determining whether a penalty shall be assessed in the case of a transfer involving a life estate, the value of the asset transferred and the value of the life estate shall be computed. The value of the asset transferred is computed by determining the fair market value. The value of the life estate is calculated in accordance with the life estate table published by the Centers for Medicare and Medicaid

Services (CMS) at 49 FR Vol. 49 No. 93, 5-11-84 and 26 CFR 20.2031-7. The value of the life estate is determined by multiplying the current market value of the property by the life estate factor that corresponds to the grantor's age. The value of the life estate is then subtracted from the value of the asset transferred to determine the portion of the asset that was transferred for less than fair market value. If only the value of the transferred portion is needed, the current market value of the asset is multiplied by the remainder factor. The transfer in which a life estate is retained shall be considered a transfer for less than fair market value whenever the value of the asset transferred is greater than the value of the rights conferred by the life estate. The purchase of a life estate interest shall be treated as a transfer of assets for less than fair market value unless the purchaser actually lives in the home for at least one full year after the date of purchase.

7. Uncompensated value (UV) shall be 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. If the asset was jointly owned before disposal, the UV considered shall be only the individual's share of that value (see N.J.A.C. 10:71-4.1(d)). If the individual is seeking institutional services or applying for an institutional level of services and has a spouse residing in the community, the UV considered shall be either spouse's share of that value (see N.J.A.C. 10:71-4.8).

8. In order for a transfer of assets to be considered to be for the sole benefit of a spouse, disabled child or disabled individual under the age of 65, for the purposes of this subchapter, the transfer shall have been arranged in such a way that no individual except the spouse, disabled child or disabled individual under age 65 can, in any way, benefit from the assets transferred either at the time of the transfer, or at any time in the future. For the purpose of this subchapter, the person administering the funds shall only be compensated for the reasonable costs that can be directly attributable to the administration of the funds and for compensation for that administration. In no event shall such compensation exceed the amounts allowed by law for the administration of trusts. The transfer of asset penalty exemption for transfers made for the sole benefit of the spouse, disabled child or disabled individual under the age of 65 does not impact the treatment of a trust pursuant to N.J.A.C. 10:71-4.11.

i. If the transfer instrument provides that there are beneficiaries other than a blind or disabled child, or a disabled individual under the age of 65, the sole benefit requirement shall not have been met if the instrument fails to provide that the State shall be the first remaining beneficiary of residual funds prior to disbursement to any other beneficiary.

9. The look-back period shall be 60 months.

i. In the case of an individual who is already eligible for Medicaid benefits, the look-back period shall be the 60-month period prior to the date the individual becomes institutionalized.

ii. In the case of an individual not already eligible for Medicaid benefits, the look-back period shall be the 60-month period prior to the date the individual applied for Medicaid as an institutionalized individual.

iii. When a portion of a trust is treated as a transfer, the look-back period shall be 60 months from the date the individual applied for Medicaid as an institutionalized individual, or for a non-institutionalized individual, the date the individual applied for Medicaid, or, if the date the transfer was made is later, then the date the transfer was made (see N.J.A.C. 10:71-4.11(e)1iii).

iv. Penalties of ineligibility shall be assessed for transfers which take place during or after the look-back period. Periods of ineligibility cannot be imposed for resource transfers which take place prior to the look-back period.

(c) If an individual or his or her spouse described in (a) above (including any person acting with power of attorney or as a guardian for such individual) has sold, given away or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period, the following steps shall be taken and shall be fully documented in the case record:

1. The fair market value (FMV) of the asset shall be ascertained;

2. The amount of compensation received by the individual for the transfer shall be determined. The uncompensated value (UV) shall be 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. If the asset was jointly owned before disposal, the UV considered shall be only the individual's share of that value (see N.J.A.C. 10:71-4.1(d)). If the individual is seeking institutional services or applying for an institutional level of services and has a spouse residing in the community, the UV considered shall be either spouse's share of that value (see N.J.A.C. 10:71-4.8);

3. The amount of the UV, if any, shall be added to the amount of the other countable resources;

4. The period of ineligibility for institutional level services that would result from the asset transfer shall be determined (see N.J.A.C. 10:71-4.10(*l*));

5. In all cases where the amount of uncompensated value would result in a period of ineligibility, the applicant shall be notified of the determination via Form PA-13. The Form PA-13 shall advise the applicant that he or she may rebut the presumption that an asset was transferred at less than fair market value in order to qualify for Medicaid coverage for institutional level care (see (i) below).

(d) The provisions of this section shall apply whether or not the asset would have been considered excluded or exempt at the time of its disposal or transfer. However, an individual shall not be ineligible for an institutional level of care because of the transfer of his or her equity interest in a home which serves (or served immediately prior to entry into institutional care) as the individual's principal place of residence and the title to the home was transferred to:

1. The legally married spouse of the individual;

2. A child of the institutionalized individual who is under the age of 21 or a child of any age who is blind or totally and permanently disabled. In the event that the child does not have a determination from the Social Security Administration of blindness or disability, the blindness or disability shall be evaluated by the Disability Review Team of the Division of Medical Assistance and Health Services, in accordance with N.J.A.C. 10:71-3.13;

3. A brother or sister of the institutionalized individual who already had an equity interest in the home prior to the transfer and who was residing in the home for a period of at least one year immediately before the individual becomes an institutionalized individual; or

4. A son or daughter of the institutionalized individual (other than described in (d)2 above) who was residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual and who has provided care to such individual which permitted the individual to reside at home rather than in an institution or facility.

i. The care provided by the individual's son or daughter for the purposes of this subchapter shall have exceeded normal personal support activities (for example, routine transportation and shopping). The individual's physical or mental condition shall have been such as to require special attention and care. The care provided by the son or daughter shall have been essential to the health and safety of the individual and shall have consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and insuring the safety of the individual.

(e) The application of a transfer penalty as set forth in this section shall not apply when:

1. The assets were transferred to a trust established for the sole benefit of an individual under 65 years of age who is disabled as defined by the Social Security Administration;

2. The assets were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;

3. The assets were transferred from the individual's spouse to another for the sole benefit of the individual's spouse (see N.J.A.C. 10:71-4.10(b) 7);

4. The assets were transferred to the community spouse subsequent to the application for Medicaid in accordance with N.J.A.C. 10:71-4.8(a)3;

5. The assets were transferred from the individual or individual's spouse to the individual's child who is blind or permanently and totally disabled.

i. In the event that the child does not have a determination from the Social Security Administration of blindness or disability, the blindness or disability will be evaluated by the Disability Review Unit of the Division of Medical Assistance and Health Services in accordance with the provisions of N.J.A.C. 10:71-3.13; or

6. A satisfactory showing is made, to the State that:

i. The individual intended to dispose of the assets at either fair market value or for other valuable consideration;

ii. The assets were transferred exclusively for a purpose other than to qualify for medical assistance; or

iii. All assets transferred for less than fair market value have been returned to the individual.

(f) In determining whether an asset was transferred for the sole benefit of a spouse, child or disabled individual as defined in N.J.A.C. 10:71-4.10(b) 8, the transfer shall be accomplished via a written instrument of transfer, such as a trust document, which legally binds the parties to a specific course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. Moreover, the written instrument shall state that the State of New Jersey shall be the first remaining beneficiary. A transfer without such a document shall not be considered to have been made for the sole benefit of the spouse, child or disabled individual.

(g) When the asset was transferred at fair market value, the application shall be processed as usual. No special procedure shall be required.

(h) When the uncompensated value of transferred assets would result in no period of ineligibility for long-term care level services, the application shall be processed as usual.

(i) When the uncompensated value of transferred assets results in a period of ineligibility for long-term care level services, eligibility for long-term care services shall be denied and the procedures below shall be followed:

1. The applicant shall be notified via Form PA-13 that there has been a transfer of assets for less than fair market value, the amount of the uncompensated value and the length of the penalty period. The Form PA-13 shall state that the law presumes that a transfer of assets at less than fair market value is for the purpose of establishing Medicaid eligibility for long-term level care services.

2. The applicant shall be advised that he or she may rebut the presumption that the transfer of assets was for the purpose of establishing Medicaid eligibility (see (j) below).

(j) Any applicant or beneficiary may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose. The applicant shall be assisted in obtaining information when necessary. However, the burden of proof shall rest with the applicant. When the applicant expresses the desire to rebut the presumption that he or she transferred assets to establish Medicaid eligibility, the procedures below shall be followed.

1. The applicant's statement concerning the circumstances of the transfer shall be included in the case record. The statement shall include, but need not be limited to, the following:

i. The applicant's stated purpose for transferring the asset;

ii. The applicant's attempt to dispose of the asset at fair market value;

iii. The applicant's reasons for accepting less than the fair market value for the asset;

iv. The applicant's means of and plans for, supporting himself or herself after the transfer; and

v. The applicant's relationship, if any, to the person(s) to whom the asset was transferred.

2. The applicant shall be asked to submit any pertinent evidence (for example, legal documents, realtor agreements, and relevant correspondence) with regard to the transfer.

3. Statements shall be taken from other individuals, if such statements are material to the decision. The statement shall indicate if such individual has or had a relationship with the applicant and the extent of the relationship (that is, related by blood or marriage, friendship).

(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:

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.

(*l*) Agency determination pursuant to client rebuttal shall be as follows:

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.

3. The agency's determination shall not include an evaluation of the merits of the applicant's stated purpose of transferring assets. The determination shall only deal with whether or not the applicant has proven that the transfer was solely for some purpose other than establishing Medicaid eligibility.

4. The final determination regarding the purpose of the transfer shall be made at a supervisory level at the county social services agency and shall be documented in the case record.

5. The applicant shall be sent a notice of the decision, which shall include information on his or her right to a fair hearing in accordance with N.J.A.C. 10:49-10.

(m) For the purposes of this subchapter, the penalty period shall be the period of time during which payment for long-term care level services is denied. An institutionalized individual who is ineligible for payment of long-term care services as a result of an asset transfer shall be precluded from eligibility, but shall be entitled to ancillary services if otherwise eligible.

1. In accordance with 42 U.S.C. § 1396p(c)(1)(E), the penalty period for asset transfer shall be the number of months equal to the total, cumulative uncompensated value of all assets transferred by the individual, on or after the look-back date, divided by the average monthly cost of nursing home services in the State of New Jersey adjusted annually in accordance with the change in the Consumer Price Index-All Urban Consumers, rounded up to the nearest dollar. The annual adjustment to the average cost of nursing home services in New Jersey shall be published as a notice of administrative change in the New Jersey Register. As of November 2009, the average monthly cost is $ 7,282. The penalty period shall begin with the date of the resource transfer. As of November 2009, the current daily divisor is $ 239.41. A penalty shall be calculated for partial months of ineligibility. There shall be no limit on the length of the penalty period.

i. For the purpose of determining a penalty period, the transfer of real property shall be considered to have occurred the date the title is recorded or registered with the appropriate office.

ii. When calculating the penalty period, all of the whole months are calculated first, using the monthly average in (m)1 above; then remaining days are calculated using the daily divisor. The resulting figures will provide the length of the penalty period in months and days.

2. In the case of an asset transfer which occurs during an existing asset transfer penalty period, the penalty for the subsequent transfer shall not begin until the expiration of the previous penalty period.

3. When assets have been transferred in amounts and/or frequencies that would make the calculated penalty periods overlap or structured to run consecutively, the uncompensated value of all the asset transfers shall be added together and divided by the average cost of nursing home care. This will result in a single penalty period, beginning on the first day of the month in which the first transfer was made. For example: An individual transfers $ 15,000 in January, $ 15,000 in February, and $ 15,000 in March. Calculated individually, the penalty periods would overlap. Because the three penalty periods overlap, each of the asset transfers shall be added together and divided by the average cost of nursing home care creating a single penalty period beginning on January 1.

4. When assets have been transferred in such a way that the penalty periods would not overlap, or are not structured to run consecutively, each asset transfer shall be treated as a separate event, each with its own penalty period. For example: An individual transfers $ 15,000 in January, $ 15,000 in November and $ 15,000 in March of the following year. The penalty period for the January transfer would be January and February. The penalty for the November transfer would be November and December. The penalty period for the March transfer would be March and April of the following year.

(n) When an individual's income is given or assigned in some manner, such gift or assignment shall be considered an asset transfer. The following standards shall be used to determine the penalty period:

1. Income, in order to be considered transferred, shall have been irrevocably assigned or otherwise unavailable to the individual. If income has been waived or deferred and that waiver or deferral can be reversed, the waived or deferred income shall be considered available to the individual, regardless of whether the income is actually received, and shall be counted in the determination of eligibility.

2. In the event an individual gives up his or her rights to receive a lump sum payment or transfers a lump sum payment in the month it is received, the period of ineligibility shall be based on the amount of the lump sum payment to which he or she was otherwise entitled.

3. In the event a stream of income (that is, income received on a regular basis), such as a pension, is transferred, the county social services agency shall make a determination of the total projected amount of income that has been transferred, based on the individual's life expectancy. This determination shall be based on the most recent life expectancy tables published by the Centers for Medicare and Medicaid Services. In determining the projected amount, the county social services agency shall strictly adhere to the life expectancy tables without adjustment for the individual's medical condition or other factors. The projection shall be based on the value of the income at the time of transfer and there shall be no attempt to account for future cost-of-living adjustments over the life expectancy of the individual.

4. In determining if there has been a transfer of income, the county social services agency need not ascertain the individual's spending habits over the appropriate look-back period. Unless there is a reason to believe otherwise, the county social services agency shall assume that the individual's income was legitimately spent on the normal costs of living. The county social services agency may ask questions of the applicant and/or the applicant's representative concerning past and present sources and levels of income and whether the individual has transferred income to others.

(*o*) When an asset is held by an individual in common with another person or persons via joint tenancy, tenancy in common, joint ownership, or similar arrangements, the asset (or the affected share of the asset) shall be considered to be transferred by the individual when any action is taken, either by the individual or any other person, that reduces or eliminates the individual's ownership or control of the asset.

1. If the addition of another name to the ownership of an asset does not change the individual's ownership interest, the action does not constitute a resource transfer. For instance, if another name is added to an individual's account with the term "or," the individual shall not be considered to have transferred assets since he or she continues to have unrestricted access to the funds. In the event the newly added owner subsequently withdraws the funds from the account, that action shall be considered to be a transfer by the individual. The transfer shall be considered to have occurred on the date that the funds are withdrawn from the account.

2. If the addition of another name to the ownership of an asset restricts the individual's access, right to sell or otherwise dispose of the asset (for example, the addition of another name requires that the new co-owner(s) agree to the sale or disposal of the asset where no such agreement was necessary before), the addition of the name shall constitute a transfer of assets. The transfer shall be considered to have occurred on the date that the additional name was added to the account. In the case of real property for the purpose of this chapter, if another name is added to a deed, the transfer shall be considered to have occurred the date the new deed is recorded.

3. N.J.A.C. 10:71-4.1 shall apply to determine what portion of a jointly owned resource is presumed to belong to the individual. Any portion belonging to the individual that is withdrawn by another owner shall be considered a transfer of assets. If the individual can satisfactorily establish that the withdrawn funds were, in fact, the sole property of, and were contributed to the account by the other owner, and thus never belonged to the individual, the withdrawal of those funds shall not result in the imposition of an asset transfer penalty.

(p) Annuity provisions shall be as follows:

1. Any annuity purchase in which the entity issuing the annuity is not a commercial financial institution shall be considered to be a transfer of an asset in order to qualify for Medicaid benefits, regardless of the terms of the annuity payout. The entire amount transferred into such an annuity shall be the amount considered in determining eligibility.

2. Any commercial annuity purchased which is not actuarially sound, based on the life expectancy of the individual (as set forth in life expectancy tables published by the Centers for Medicare and Medicaid Services) or term certain (the length of payout is specified and payment does not terminate upon the death of the annuitant) shall be considered to be a transfer of an asset in order to qualify for Medicaid benefits. In the event that an annuity is not actuarially sound at the time of purchase, the amount that shall be considered to have been transferred at less than fair market value shall be that proportion of the annuity purchase price which is not actuarially sound. This shall be the same proportion as the amount by which the pay-out period exceeds the life expectancy of the individual at the time of the annuity purchase. (Life expectancy divided by the pay-out period of the annuity multiplied by the purchase amount of the annuity is subtracted from the total amount of the annuity to determine the uncompensated value.)

(q) Upon imposition of a period of ineligibility for long-term care level services because of an asset transfer, the county social services agency shall notify the applicant/beneficiary of his or her right to request an undue hardship exception. An applicant/beneficiary may apply for an exception to the transfer of asset penalty if he or she can show that the penalty will cause an undue hardship to him- or herself. The applicant/benefi-ciary shall provide sufficient documentation to support the request for an undue hardship waiver to the county social services agency within 20 days of notification of the transfer penalty. Within 30 days of receipt of such documentation, the CSSA shall issue notice to the applicant/beneficiary of its determination.

1. For the purposes of this chapter, undue hardship shall be considered to exist when:

i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and

ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

2. Undue hardship shall not exist when the application of a transfer penalty merely causes the applicant/beneficiary an inconvenience or restricts his or her lifestyle.

3. In the event that a waiver of undue hardship is denied, neither the Department of Human Services, the Department of Health and Senior Services, nor the county social services agencies shall have any obligation to take any action to assure that payment of services is provided during the penalty period.

4. If the request for undue hardship consideration is denied by the CSSA, the CSSA shall notify the applicant of the denial and that the applicant may request a fair hearing in accordance with the provisions of N.J.A.C. 10:49-10.

History

HISTORY:

New Rule, R.2001 d.199, effective June 18, 2001.
See: 32 N.J.R. 2021(a), 33 N.J.R. 2195(a).
Petition for Rulemaking.
See: 35 N.J.R. 1456(a), 2532(b).
Amended by R.2004 d.401, effective November 1, 2004.
See: 36 N.J.R. 922(b), 36 N.J.R. 4982(a).
In (m), rewrote 1, and substituted "$ 15,000" for "$ 12,000" throughout 4.
Amended by R.2006 d.133, effective November 6, 2006.
See: 37 N.J.R. 3774(a), 37 N.J.R. 4505(a), 38 N.J.R. 4712(a).
In (m)1, substituted "2005" for "2003" and substituted "$ 6,525" for "$ 6,050"; and deleted (p)2i.
Petition for Rulemaking.
See: 39 N.J.R. 2157(a), 2660(a), 4453(a).
Petition for Rulemaking.
See: 42 N.J.R. 1434(a), 1918(a), 2645(a).
Amended by R.2012 d.025, effective February 6, 2012.
See: 43 N.J.R. 804(a), 44 N.J.R. 230(a).
Rewrote the section.

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
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SARAH ADELMAN
Commissioner

GREGORY WOODS
Assistant Commissioner

DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

C.L.,	
PETITIONER,	**ADMINISTRATIVE ACTION**
v.	**ORDER OF RETURN**
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES AND OCEAN COUNTY BOARD OF SOCIAL SERVICES,	**OAL DKT. No. HMA 03925-2024**
RESPONDENTS.	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. No exceptions were filed in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is January 16, 2025, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By a letter dated January 31, 2024, Ocean County Board of Social Services (Ocean County) approved Petitioner's November 6, 2023, application, but assessed a penalty of 14 days on the receipt of Medicaid benefits resulting from a transfer

of assets totaling $5,694.54 for less than fair market value during the five-year look-back period. R-8.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

By way of background, on November 6, 2023, Petitioner's Designated Authorized Representative, S.K. filed a Medicaid application on behalf of Petitioner. R-1.

Accordingly, November 6, 2023, serves as the baseline date that triggers the look back period. During its review for eligibility, Ocean County determined that within this timeframe, a transfer of assets totaling $5,694.54 was made in resources for less than fair market value and assessed a 14-day period of ineligibility. R-6. The transfer in question involves the closing transaction of PNC bank account number xxxx85 which held $5,694.54 in an account jointly owned by Petitioner and S.S., Petitioner's sister and Power of Attorney. ID at 3, R-5. During the Office of Administrative Law hearing, S.S. testified that she provides financial support for Petitioner to include Petitioner's monthly cell phone bill and Petitioner's daughter's cell phone bill. ID at 3. S.S. also testified that she regularly ordered groceries to be delivered to the home where Petitioner and her mother resided. Ibid. S.S. further testified that although the grocery expenses were not itemized, the groceries were "split 50/50" with their mother. Ibid. Lastly, S.S. testified Petitioner owes more than the amount S.S. transferred to herself when the joint account was closed. Ibid. When Petitioner testified during the hearing, Petitioner agreed with the testimony of S.S. and testified that "she owes S.S. a lot of money for the financial support provided to her by S.S." ID at 4.

The Administrative Law Judge (ALJ) determined that Petitioner did demonstrate that "a small portion" of the assessed penalty totaling $979.15 was based on fair market value. ID at 9. The Initial Decision also determined that the appropriate penalty amount should be "$4,715.39 for less than fair market value, and the penalty period is twelve days from November 1, 2023, to November 12, 2023." Ibid. I agree to the extent that the transfer penalty should exclude expenditures made for Petitioner's cell phone bill only.[1] However, any recalculation of the total penalty and correlating days of ineligibility should

[1] According to the evidence, Petitioner's daughter's phone bill was included with Petitioner's monthly Verizon phone bill under area code 908. ID at 3.

be conducted by Ocean County. As such, the modified calculations should be established by Ocean County to determine the appropriate penalty amount and days of ineligibility after removing payments for the cost of Petitioner's cell phone bill during the relevant period.

As to the remainder of the penalty not excluded, it is well established that the transfer of an asset jointly held with another person shall be considered transferred by the individual when action is taken. N.J.A.C. 10:71-4.10(o). In addition, transfers of assets to a friend or relative for care or service provided free in the past are presumed to have been delivered without compensation. N.J.A.C. 10:71-4.10(b)(6)(ii). If payment is to be made there must be a preexisting written agreement to pay for such services at the relevant market rate. Here, there is nothing in the record to show that Petitioner and S.S. entered into a prior written agreement for the services provided by S.S. during the relevant timeframe.

Thus, based upon my review of the record, and for the reasons set forth herein, I hereby ADOPT in part the ALJ's recommended findings that a transfer penalty should be imposed and RETURN the matter to Ocean County to recalculate the total penalty amount and number of days of ineligibility in accordance with the modified penalty amount determined. Specifically, upon return, Ocean County shall provide a detailed breakdown that excludes the amount paid towards Petitioner's portion of the Verizon phone bill. This information is essential for clarification of the appropriate penalty.

THEREFORE, it is on this 14th day of JANUARY 2025,

ORDERED:

That the Initial Decision is hereby ADOPTED in part as set forth above.

That the Initial Decision is hereby RETURNED in part as set forth above.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance
and Health Services

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PHILIP D. MURPHY
Governor

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GREGORY WOODS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

C.T.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 02870-23**
AND HEALTH SERVICES AND	:	**(ON REMAND HMA 06883-22)**
ATLANTIC COUNTY DEPARTMENT	:	
OF FAMILY AND COMMUNITY	:	
DEVELOPMENT,	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services (DMAHS), I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Neither party filed exceptions in this

matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is November 18, 2024, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. Specifically, Petitioner appealed a 154-day transfer penalty imposed by the Atlantic County Department of Family and Community Development (Atlantic County) due to the transfer of assets in the amount of $57,740.11. The matter was transmitted to the Office of Administrative Law (OAL) and a hearing was held on November 14, 2022. The Administrative Law Judge (ALJ) issued a December 1, 2022, Initial Decision finding that Petitioner transferred assets exclusively for a purpose other than to qualify for Medicaid benefits.

Thereafter, on March 1, 2023, the Assistant Commissioner for the Division of Medical Assistance and Health Services issued an Order of Remand reversing that finding and remanding for testimony and documentary evidence regarding the fair market value of the transfers in question. Accordingly, a hearing was held on April 23, 2024, to allow Petitioner to submit financial evidence. In the August 20, 2024, Initial Decision, the ALJ upheld the transfer penalty finding that Petitioner had not presented any evidence explaining the transfers as requested through the Order of Remand. For the reasons set forth herein, I concur.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer

penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than the fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

In the present matter, Petitioner filed a Medicaid application on April 30, 2022. R-1 at 2-10. Atlantic County found Petitioner eligible for Medicaid as of March 1, 2022 but imposed a transfer penalty of 154- days for transfers in the amount of $57,740.11 during the five years prior to Petitioner filing for Medicaid. R-1 at 11. Petitioner claimed that the transfer of assets, made to their long-term girlfriend, R.S., were not intended to affect Medicaid eligibility, asserting that they paid R.S.'s credit card bills as part of shared

household expenses. While Petitioner and R.S. shared a household, they never married.[1] The financial documents show regular monthly payments by Petitioner on statements from a Costco Anywhere Visa Card by Citibank that was in R.S.'s name. The charges varied from grocery stores to Amazon to restaurants ranging from $650 to $3,117. R-1&2. On Remand, it was ordered that Petitioner provide testimony and documentary evidence on overall household expenses; establish a breakdown of expenses paid by both Petitioner and R.S.; provide proof of payments made by R.S. for household expenses; and clarify the rationale behind using R.S.'s credit card for payments instead of Petitioner's own accounts.

At the OAL hearing following Remand, Petitioner's son, D.T. testified that Petitioner used these funds to pay Petitioner's shared living expenses with R.S. but did not know why Petitioner paid R.S.'s credit card statements. ID at 4. No written agreement or credible testimony was presented regarding Petitioner's and R.S.'s financial arrangements or overall cost of living and monthly household expenses. Accordingly, the ALJ found that Petitioner failed to provide clear documentation or testimony regarding the financial arrangements with R.S. that would justify the payment made towards R.S.'s credit card as legitimate shared expenses.

Furthermore, Petitioner has a history of Parkinson's Disease and underwent unsuccessful surgery, leading to a decline in ability to work and a reasonable expectation of requiring Medicaid benefits. ID at 2.

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[1] When Petitioner applied for Medicaid, Petitioner correctly noted that they were single and accordingly they were evaluated as a single individual. Consequently, Petitioner cannot avail themselves of N.J.A.C. 10:71-4.10 (e) which allows spouses to freely transfer assets back and forth.

I agree with the ALJ's findings and conclusions. The cumulative lack of convincing evidence and documentation presented by Petitioner leads to the conclusion that the Order of Remand was not satisfied. Petitioner did not present any written agreement or clear documentation outlining how household expenses were shared, leaving Atlantic County unable to evaluate the legitimacy of the assets transferred. Further, Petitioner failed to demonstrate that the payments made to R.S.'s credit card represented fair market value or were necessary for shared living expenses, thereby not overcoming the presumption that these transfers were made to establish Medicaid eligibility. Without clear and credible evidence to substantiate Petitioner's claims, the imposition of the transfer penalty remains valid and justified.

Thus, based upon my review of the record and for the reasons set forth herein, I hereby ADOPT the ALJ's initial decision. Further, I FIND that Petitioner has failed to rebut the presumption that the transfers at issue in this matter were made in order to establish Medicaid eligibility, and, therefore, the imposed penalty period is appropriate.

THEREFORE, it is on this 15th day of NOVEMBER 2024

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods

Gregory Woods, Assistant Commissioner
Division of Medical Assistance and Health Services

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RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0578-23

M.K.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES and MORRIS COUNTY OFFICE OF TEMPORARY ASSISTANCE,

Respondents-Respondents.

———————————————————

Submitted February 5, 2025 – Decided March 13, 2025

Before Judges Mayer and Rose.

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

Stotler Hayes Group, LLC, attorneys for appellant (Jacqueline A.F. Richardson, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent Division of Medical Assistance and Health Services (Sookie-Bae Park, Assistant Attorney

General, of counsel; Laura N. Morson, Deputy Attorney General, on the brief).

Johnson & Johnson, attorneys for respondent Morris County Office of Temporary Assistance (John A. Napolitano, Morris County Counsel and William G. Johnson, Specialty County Counsel, on the brief).

PER CURIAM

Petitioner M.K. appeals from a September 7, 2023 final agency decision of the Department of Human Services (DHS), Division of Medical Assistance and Health Services (DMAHS), assessing a 400-day ineligibility penalty on his Medicaid benefits and denying an undue hardship waiver of the penalty. The Assistant Commissioner of DMAHS upheld an initial decision by an Administrative Law Judge (ALJ), following a Medicaid fair hearing. We affirm.

I.

We summarize the pertinent facts and procedural history from the record reviewed by the Assistant Commissioner of DMAHS. M.K. is in his late forties, suffers from multiple sclerosis and other conditions, which have rendered him bedridden. M.K. was admitted to Troy Hills Center, a skilled nursing facility, in May 2022.

In September 2022, M.K. filed his third[1] application for Medicaid benefits with the Morris County Office of Temporary Assistance (MCOTA). On December 8, 2022, he was approved for Medicaid, with an effective date of October 1, 2022. However, MCOTA assessed an ineligibility penalty of 400 days, from October 1, 2022 to November 4, 2023, due to asset transfers M.K. made within five years of his application for Medicaid benefits. The transfers totaled $150,000: $5,000 to "Xoom.com";[2] two checks, $60,000 and $45,000, for a "Loan" to S.V., a family member; and two wire transfers, $18,000 and $22,000, to an attorney.

Thereafter, in December 2022, M.K. filed an administrative appeal and requested a Medicaid fair hearing to contest the transfer penalty. He also applied for an undue hardship waiver of the penalty.

In February 2023, MCOTA denied the undue hardship waiver, finding "it has not been demonstrated the prongs needed for undue hardship were met." M.K. appealed the denial and requested a fair hearing and more definite statement of reasons on February 15, 2023. He further requested consolidation

[1] In August 2022, M.K. applied for Medicaid benefits twice, but his application was denied both times. He did not contest those denials.

[2] M.K. does not dispute the $5,000 transfer to Xoom.com.

of his appeal of the transfer penalty and appeal of the undue hardship waiver denial. The matter was transmitted to the Office of Administrative Law (OAL) and both appeals were consolidated.

A one-day hearing was held before the ALJ in May 2023. MCOTA presented the testimony of its paralegal specialist and moved various documents into evidence. M.K. did not testify, but called the executive director of Troy Hills Center as a witness on his behalf.[3]

MCOTA's specialist explained the ineligibility penalty was imposed against M.K. because the identified transfers "were not adequately shown to have been used on [his] behalf." In particular, the specialist testified M.K. provided a "typewritten note" to explain the transfers, signed by himself; his wife, N.R.; his wife's brother, P.R.; and P.R.'s wife, S.V. The note stated the $60,000 and $45,000 checks were to reimburse S.V. for "healthcare expenses" paid on M.K.'s behalf while he was in India and for helping M.K.'s mother "with financial needs." However, the note did not reference any promise to reimburse the funds. The specialist stated MCOTA never received a loan agreement

[3] For reasons that are unclear from the record, the transcript provided on appeal does not include the executive director's direct testimony and only includes a portion of her cross-examination, which follows the transcriber's notation that there was a "pause in recording." In its responding brief, DMAHS notes the missing portion of the transcript, but M.K. fails to explain the omission.

executed between M.K. and his family members, any medical bills incurred while M.K. was in India, nor any proof that any other expenses were paid on behalf of M.K. by his family members. She also stated M.K. never supplied documentation to explain the $18,000 and $22,000 wire transfers.

Regarding the undue hardship waiver, the specialist testified there was no indication M.K. was not receiving adequate care at Troy Hills Center and no information that M.K. "did anything other than voluntarily transfer" the identified funds. The specialist explained the waiver was denied due to M.K.'s failure to establish the waiver requirements.

Troy Hills Center's executive director explained discharging M.K. to his home would not "be deemed safe" and therefore M.K. would remain at the facility during the ineligibility period, even though the facility would not receive payment. She further explained M.K. would still receive the care he required.

On June 7, 2023, the ALJ issued an initial decision upholding the transfer penalty and denying the undue hardship waiver. Regarding the transfer penalty, the ALJ reasoned M.K. failed to rebut the presumption the transfers totaling $150,000 were made to establish Medicaid eligibility. She characterized the letter as "uncorroborated hearsay" and acknowledged "[n]o testimony was presented at the hearing by any of the individuals who signed [the] letter." The

ALJ further noted M.K. never provided "a loan agreement relating to these transactions, nor any medical bills or other documentary evidence illustrating the cost for any medical treatment received in India." Therefore, M.K. failed to show the transfers "were made exclusively for a purpose other than to qualify for Medicaid benefits."

As to the undue hardship waiver, the ALJ reasoned there was no evidence the transfer penalty "would deprive M.K. of medical care such that his health or life would be endangered." Furthermore, the ALJ determined "[M.K.] failed to demonstrate that any of the transferred assets here were ever beyond M.K.'s control and could not be recovered." Specifically, the ALJ noted M.K. did not show any effort to recover the transferred funds and there was insufficient evidence to support a finding they could not be recovered.

M.K. filed exceptions to the ALJ's initial decision. In her September 7, 2023 final decision, the Assistant Commissioner of DMAHS concurred with the ALJ's finding that M.K. "failed to account for $150,000 of transfers made." She agreed the individuals who drafted the letter did not testify at the hearing and therefore the letter was "unsubstantiated hearsay." She acknowledged while hearsay evidence is admissible before the OAL, the findings of fact "cannot be supported by hearsay alone." Furthermore, she stated "[n]o contracts, invoices,

receipts, bills, or other evidence of expenditures" were provided to substantiate M.K.'s claims. The Director also upheld the denial of the undue hardship waiver, largely for the reasons set forth by the ALJ. This appeal followed.

II.

Our role in reviewing agency decisions is significantly limited. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018). "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.'" R.S. v. Div. of Med. Assistance & Health Servs., 434 N.J. Super. 250, 261 (App. Div. 2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). In determining whether agency action is arbitrary, capricious, or unreasonable, our role is restricted to three inquiries:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> [Ibid.]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the person challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006); see also Lavezzi v. State, 219 N.J. 163, 171 (2014).

A reviewing court "affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi, 219 N.J. at 171 (quoting City of Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980)). That presumption is particularly strong when an agency is dealing with specialized matters within its area of expertise. See Newark, 82 N.J. at 540. "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, 340 (App. Div. 2009) (quoting Levine v. State, Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001)). "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)).

Medicaid is a federally created, state-implemented program governed by the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5. DMAHS is the State agency that administers the New Jersey Medicaid program. N.J.S.A. 30:4D-5. An individual seeking Medicaid benefits must submit an initial application to the county board of social services, which is reviewed for compliance with the regulatory requirements. N.J.A.C. 10:71–1.1; N.J.A.C. 10:71–2.2(b). An applicant's income and resources must fall below certain limits to be deemed eligible for Medicaid benefits. See 42 U.S.C. § 1396; 42 U.S.C. § 1396a(a)(10)(A).

A.

We first address the imposition of the asset transfer penalty assessed against M.K. To discourage applicants from depleting assets for the sole purpose of becoming eligible for benefits, "[a]n applicant who transfers or disposes of resources for less than fair market value during a sixty-month look-back period before the individual becomes institutionalized or applies for Medicaid is penalized for making the transfer." A.M. v. Monmouth Cnty. Bd. of Soc. Servs., 466 N.J. Super. 557, 566 (App. Div. 2021); see also N.J.A.C. 10:71-4.10(a); H.K. v. Div. of Med. Assistance & Health Servs., 184 N.J. 367, 380 (2005). The imposition of the penalty is intended to maximize Medicaid

resources for those truly in need. See Est. of DeMartino v. Div. of Med. Assistance & Health Servs., 373 N.J. Super. 210, 219 (App. Div. 2004).

Transfers made within the sixty-month look-back period "are presumed to be improperly motivated to obtain Medicaid eligibility." W.T. v. Div. of Med. Assistance & Health Servs., 391 N.J. Super. 25, 37 (App. Div. 2007). An applicant can rebut this presumption "by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof rests with the applicant. Ibid. In determining whether the applicant has successfully rebutted the presumption, the agency "shall not include an evaluation of the merits of the applicant's stated purpose of transferring assets. The determination shall only deal with whether or not the applicant has proven that the transfer was solely for some purpose other than establishing Medicaid eligibility." N.J.A.C. 10:71-4.10(l)(3).

Guided by these principles, we address M.K.'s contention that DMAHS erred in approving the transfer penalty because the "transfers were repayment of a valid debt." He asserts the funds were reimbursements to close family friends who loaned him money so he could receive medical care in India. M.K. also argues DMAHS improperly concluded that evidence of a formal loan agreement

between him and his family members was necessary, because family members "often pay expenses for each other" without a written agreement.

Based on our review of the record, we agree M.K. did not offer sufficient evidence to meet his burden of showing the suspect funds were transferred for a purpose other than to qualify for Medicaid. See N.J.A.C. 10:71-4.10(j). The only evidence M.K. submitted to explain the transfers was the letter signed by individuals who did not testify before the ALJ. Although hearsay evidence is admissible in OAL contested cases, "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b).

However, M.K. failed to present a loan agreement, medical bills incurred in India, or testimony from his family members at the fair hearing. Additionally, he presented no testimony concerning the $18,000 and $22,000 wire transfers to an attorney in June 2022. We conclude the final agency decision's assessing an asset transfer penalty against M.K. was reasonable and supported by the record. See R. 2:11-3(e)(1)(D).

B.

We turn to M.K.'s argument he qualified for an undue hardship waiver of the transfer penalty. An applicant can apply for an exception to the transfer penalty if he can establish the penalty causes an undue hardship to himself. N.J.A.C. 10:71-4.10(q). The applicant must "provide sufficient documentation to support the request for an undue hardship waiver." Ibid. An undue hardship exists when:

> i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and
>
> ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.
>
> [N.J.A.C. 10:71-4.10(q)(1).]

An applicant must satisfy both prongs to qualify for the waiver. Ibid. When the penalty "merely causes the applicant/beneficiary an inconvenience or

restricts his or her lifestyle," no undue hardship exists. N.J.A.C. 10:71-4.10(q)(2).

To meet the first prong of the undue hardship waiver, an application must demonstrate imposition of the transfer penalty "would deprive the applicant . . . of medical care such that his or her health or his or her life would be endangered." N.J.A.C. 10:71-4.10(q)(1)(i). M.K. asserts analysis of the first prong turns on "what would happen if the applicant were discharged" from a healthcare facility, due to the inability to pay. He argues if he were discharged from Troy Hills Center, he would be unable to otherwise pay for necessary healthcare, thus endangering his health. He further contends DMAHS did not consider this possibility in its analysis, thereby rendering the first prong of the waiver "meaningless." M.K. argues public policy reasons support this interpretation as denial of the waiver creates a hardship for healthcare facilities because they are not paid during the penalty period. We disagree.

The proper analysis under N.J.A.C. 10:71-4.10(q)(1)(i) is whether the penalty "would deprive the applicant[] of medical care such that his or her health or his or her life would be endangered." The record establishes M.K. would not be discharged from his facility even though the transfer penalty rendered him unable to pay for the services provided. Indeed, M.K.'s own witness testified

Troy Hills Center was incapable of discharging him due to the health risk posed, and he would continue to receive the facility's services regardless of M.K.'s ability to pay for those necessary services. M.K. offered no further evidence to support a finding he would be deprived of necessary care in view of the transfer penalty.

To satisfy the second prong of the waiver, an applicant must "irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant . . . shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred." N.J.A.C. 10:71-4.10(q)(1)(ii).

Because we conclude M.K. failed to meet the first prong of the undue hardship waiver, we need not consider the second prong. See N.J.A.C. 10:71-4.10(q)(1) (stating both requirements must be met to establish undue hardship). For the sake of completeness, however, we have considered M.K.'s argument.

M.K. argues he demonstrated the transferred funds cannot be recovered because they were payment of a valid debt, for which he has no legal recourse. He argues "voluntary payment of money for services" rendered is not recoverable. He therefore contends there is no remedy at law or equity for his recovery of the transferred assets.

Before the agency, M.K. failed to present any evidence, other than his unsupported assertions he was unable to recover the funds. In his appellate appendix, M.K. included a certification from his authorized representative, to demonstrate the transferred assets cannot be recovered. Because his representative's certification was not presented to the agency for consideration, it is inappropriate for consideration on appeal. See Zaman v. Felton, 219 N.J. 199, 226-27 (2014). We conclude, as did DMAHS, M.K. failed to satisfy the second prong.

C.

Lastly, M.K. argues DMAHS failed to address his due process arguments. He argues MCOTA's February 1, 2023 denial letter altered the plain terms of N.J.A.C. 10:71-4.10(q)(1)(ii), because MCOTA asserted M.K. failed to "pursue" rather than "exhaust" administrative remedies to recover the transferred funds. M.K. claims MCOTA's change in language from "exhaust" to "pursue" was "self-serving." He claims he "had no reason to believe that he may be required as a condition of eligibility to pursue (let alone exhaust) remedies 'available at law or equity'" until he received the notice of denial. He argues there was no remedy he could have "pursued" to recover the funds. He also contends this

notice violated due process because it did not include an adequate statement of reasons.

"Administrative agencies must 'articulate the standards and principles that govern their discretionary decisions in as much detail[] as possible.'" Van Holten Grp. v. Elizabethtown Water Co., 121 N.J. 48, 67 (1990) (quoting Crema v. N.J. Dep't of Env't Prot., 94 N.J. 286, 301 (1983)). Although an agency has broad prerogative to determine how the case will proceed, the adjudication process must still "operate fairly and conform with due process principles." In re Kallen, 92 N.J. 14, 25 (1983) (quoting Laba v. Bd. of Educ. of Newark, 23 N.J. 364, 382 (1957)).

Having considered M.K.'s contentions in view of the record, we are satisfied the Assistant Commissioner provided adequate reasons for denying the undue hardship waiver, addressing both prongs of the waiver under N.J.A.C. 10:71-4.10(q)(1). The failure to meet the second prong was based on M.K.'s inability to provide sufficient evidence to demonstrate that any good faith efforts were made to recover the assets transferred. N.J.A.C. 10:71-4.10(q)(1)(ii) clearly requires the applicant to so demonstrate.

To the extent M.K. argues no remedies are available to him, he failed to provide sufficient credible evidence for the agency to reach this conclusion. The

agency's decision was reasonable and supported by the record and M.K. has not demonstrated the decision was arbitrary, capricious, or unreasonable. See Lavezzi, 219 N.J. at 171; see also R. 2:11-3(e)(1)(D).

Affirmed.

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

M.C. Harley

Clerk of the Appellate Division

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Attachment 13

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

State of New Jersey
DEPARTMENT OF HUMAN SERVICES
Division of Medical Assistance and Health Services
P.O. Box 712
Trenton, NJ 08625-0712

SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

C.T.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
DIVISION OF MEDICAL ASSISTANCE	:	**OAL DKT. NO. HMA 04165-2023**
AND HEALTH SERVICE AND	:	
MORRIS COUNTY OFFICE OF	:	
TEMPORARY ASSISTANCE,	:	
RESPONDENT.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law (OAL) case file. Exceptions were filed by the Petitioner on February 28, 2024. Procedurally, the time period for the Agency Head to render a Final Agency Decision is May 23, 2023, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By letter dated May 2, 2020, Morris County Office of Temporary Assistance (Morris County) found Petitioner otherwise eligible for Medicaid, but imposed a 237 day[1] period of ineligibility on their receipt of benefits as a result of transfers totaling $91,460 for less than fair market value during the look-back period. ID at 2.

[1] In the Initial Decision the penalty is initially stated as seventy-seven days. This is a

In determining Medicaid eligibility for someone seeking institutionalized benefits, federal law mandates that Medicaid impose a five-year look-back period to determine if the applicant has made any transfers of assets for less than fair market value. 42 U.S.C. 1396p(c)(1)(B)(i). If a transfer of asset occurs, a penalty is calculated wherein no payment may be made for nursing facility care. 42 U.S.C. 1396p(c)(1)(E)(I); see also N.J.A.C. 10:71-4.7.10(m). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid. The federal law was amended in 2006 to require states impose penalties based on the number of days and prohibited excluding any partial days assessed. See 42 U.S.C. 1396p(c)(1)(E)(iv)(providing a "[s]tate shall not round down, or otherwise disregard any fractional period of ineligibility"). As such, Congress made it clear that all penalties, including minimal transfers resulting in a few days of ineligibility, must be imposed.

A transfer made during the look-back period raises a rebuttable presumption that the resource was transferred for the purpose of establishing Medicaid eligibility. N.J.A.C. 10:71-4.10(j)(1); H.K. v. State of New Jersey, Dep't of Human Servs., Div. of Med. Assistance and Health Servs., 184 N.J. 367, 380 (2005). The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption

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typo which is corrected throughout the rest of the Initial Decision.

is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

The Initial Decision affirmed the imposition of the transfer penalty, finding that Petitioner's representatives failed to provide any testimony from a source with direct information concerning the transfers at issue to rebut the presumption that the assets were transferred to establish Medicaid eligibility. Based upon my review of the record, I hereby REVERSE the findings and conclusions of the Administrative Law Judge (ALJ) and REMAND the matter for additional proceedings in accordance with this decision.

The transfers at issue were made to several individuals whose identities and addresses cannot be located. ID at 3. The Petitioner contends that these were not genuine transfers and went to unidentified third parties who defrauded the Petitioner. Morris County contends that they are still obligated to assume the money was used for personal purposes and impose a penalty because there was no closure to the criminal investigation. Ibid.

In the Initial Decision, the ALJ found that while the Petitioner made a good faith effort to rebut the presumption by providing the Police Incident Report, (P-1), and Investigation Reports, (P2-P3), no witnesses were called that could explain and discuss the suspicious transactions resulting in $91,460 in unexplained withdrawals from Petitioner's accounts. ID at 6. Further finding, there was no live testimony from someone involved either in handling Petitioner's finances, and/or local authorities or a representative from the skilled nursing facility where Petitioner resided. Ibid. The ALJ also found that while the documentation provided by the Petitioner indicates that the Petitioner filed a report of fraud it is not conclusive on its own that a fraud took place and

it does not rise to "convincing evidence that the assets were transferred exclusively" for a purpose other than qualifying for Medicaid. Ibid.

In the filed exceptions, Petitioner's counsel argues that there was no reason to require testimony because the Petitioner provided a written police report. The Incident Report accounted for approximately $40,000 of the $91,460 transferred in this case and states that Officer K.H. responded to a report of theft by J.M. a representative of Brookside Senior Citizens Apartments. (P1) J.M. advised the officer that large withdrawals from the Petitioner's account were noticed during a monthly financial audit. When questioned, the Petitioner claimed that they were contacted numerous times about winning a $5,000,000.00 prize and that they had to transfer money to claim. Ibid. The report states that J.M. advised Officer K.H. that the Petitioner mailed over 11 checks equaling about $40,000.00. Ibid. According to the Incident Report, Officer K.H. "advised" the Petitioner to not send any more money, and "informed" them that they did not win a prize and that the money was being transferred fraudulently. Ibid. Officer K.H. concluded the Incident Report by stating that they were forwarding a copy of the Incident Report to the investigative division for further review. Ibid. The Incident Report is dated September 23, 2021 and indicates that that the transfer at issue were made during a sixteen-month time period, going back to May 2020. Ibid. The language of the Incident Report is clear that the report itself is not a conclusion that the transfers at issue in this case were transferred based on fraud. In fact, Officer Hawthorne states in the report that the report is being sent to the investigation division for further review. Furthermore, the Incident Report is based on a report of transfers totaling about $40,000.00. However, the transfers at issue in this case total $91,460.00.

The submitted incident report memorialized a report of fraud and is not clear evidence that fraud or a scam did in fact take place. Nor is the incident report, on its own

clear, evidence that the funds at issue were transferred exclusively for a purpose other than qualifying for Medicaid. However, there may be stronger evidence available the Petitioner could provide that could potentially demonstrate that the transfers at issue in this matter were fraudulent and stemmed from a scam. Consequently, I am REMANDING the matter to give Petitioner the opportunity to provide credible documentary evidence, including but not limited to bank records related to fraud reports, internal fraud investigation reports, and attempts to cancel checks. The Petitioner should also provide live testimony, including but not limited to witnesses who were involved in handling the Petitioner's finances, local law enforcement authorities involved in the investigation, or a representative from the skilled nursing facility in which the Petitioner resided. The Petitioner should also address why the alleged fraudulent transfers at issue in this case were only reported sixteen months after the first transfer was made.

THEREFORE, it is on this 22nd day of May 2024,

ORDERED:

That the Initial Decision is hereby REVERSED and REMANDED in accordance with this decision.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services

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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

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SARAH ADELMAN
Commissioner

JENNIFER LANGER JACOBS
Assistant Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES

D.Q.,	:	
PETITIONER,	:	**ADMINISTRATIVE ACTION**
v.	:	**FINAL AGENCY DECISION**
MIDDLESEX COUNTY BOARD	:	**OAL DKT. NO. HMA 06406-2023**
OF SOCIAL SERVICE AND	:	
DIVISION OF MEDICAL ASSISTANCE	:	
AND HEALTH SERVICES	:	
RESPONDENTS.	:	

As Assistant Commissioner for the Division of Medical Assistance and Health Services, I have reviewed the record in this case, including the Initial Decision and the Office of Administrative Law case file. No exceptions were filed by either party in this matter. Procedurally, the time period for the Agency Head to render a Final Agency Decision is May 30, 2024, in accordance with an Order of Extension.

This matter arises from the imposition of a transfer penalty on Petitioner's receipt of Medicaid benefits. By letter dated May 9, 2023, Middlesex County Board of Social Services (Middlesex County) approved Petitioner's January 17, 2023 application, but assessed a penalty of 823 days on the receipt of Medicaid benefits resulting from a transfer of assets totaling $308,463.12 for less than fair market value during the five-year

look-back period.[1] R-1. Petitioner, however, only challenges $98,404 of the $308,463.12 transfer penalty imposed. See Petitioner's Letter of Memorandum at p. 1.

In determining Medicaid eligibility for someone seeking institutionalized benefits, counties must review five years of financial history. Under the regulations, "[i]f an individual . . . (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period," a transfer penalty of ineligibility is assessed. N.J.A.C. 10:71-4.10(c). "A transfer penalty is the delay in Medicaid eligibility triggered by the disposal of financial resources at less than fair market value during the look-back period." E.S. v. Div. of Med. Assist. & Health Servs., 412 N.J. Super. 340, 344 (App. Div. 2010). "[T]ransfers of assets or income are closely scrutinized to determine if they were made for the sole purpose of Medicaid qualification." Ibid. Congress's imposition of a penalty for the disposal of assets for less than fair market value during or after the look-back period is "intended to maximize the resources for Medicaid for those truly in need." Ibid.

The applicant "may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose." N.J.A.C. 10:71-4.10(j). The burden of proof in rebutting this presumption is on the applicant. Ibid. The regulations also provide that "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." N.J.A.C. 10:71-4.10(i)2.

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[1] The total number of days Petitioner has been penalized is based on the total transfer penalty of $308,463.12 rather than the $98,404 being challenged by Petitioner.

On January 17, 2023, Petitioner filed an application for Medicaid. R-1, Ex. A. Accordingly, January 17, 2023 serves as the baseline date that triggers the look back period. Within this timeframe, Petitioner made transfers totaling $308,463.12 in resources for less than fair market value. Here, however, Petitioner challenges only $98,404 of the transfer penalty imposed. According to Petitioner's former counsel, J.W.C, Esq. (J.W.C.) Petitioner's daughter, D. made unauthorized withdrawals from two of Petitioner's Providence bank accounts, namely accounts #3466 and #3339 without Petitioner's knowledge or consent. R-1, Ex. D. J.W.C alleges these unauthorized withdrawals occurred from February 16, 2018 through June 1, 2022. Ibid. J.W.C further alleges that $67,225 was withdrawn from account #3466 and $31,179 was withdrawn from #3339 totaling $98,404. Ibid. Lastly, J.W.C concedes that $36,189 and $57,933 were gifted to D. during that same timeframe. Ibid. In a letter dated February 2, 2024, Petitioner's relative and current attorney, F.T. alleges that Petitioner had no knowledge about the checks that D. allegedly forged and cashed from these accounts totaling $98,404 until the bank notified Petitioner and Petitioner's husband, R.Q. that the account had been overdrawn.

Additionally, by letter dated October 31, 2023, J.S. of Provident bank explained that D. began cashing checks in 2018. See Petitioner's Memorandum of Law, Exhibit D. J.S. further explained that when D. presented a check to be cashed, the bank would call Petitioner for permission to cash the check and each time D. presented a check, Petitioner authorized the transaction. Petitioner's explanation to the bank was that D. was ill and needed the money for medical bills. J.S. alleges that it was suggested that Petitioner pay D.'s providers directly, but Petitioner informed them that D. "liked to take care of things on her own." Lastly, J.S. alleges that at the end of 2021, the bank informed Petitioner's

husband, R.Q. that D. had made numerous withdrawals from Petitioner's bank accounts, but did not return to cash any other checks after January 2022. Ibid.

During the Office of Administrative Law proceeding, Petitioner provided testimony from Petitioner's husband R.Q. and produced certifications which primarily stated that D. was an addict.[2] R.Q. testified that he was unaware that D. had forged checks until the bank notified them. Petitioner believed that D. had a medical condition, which is why Petitioner provided D. with financial assistance to pay medical bills. Petitioner alleges to have had no knowledge about the forgeries until after D. had passed. ID at 6.

Petitioner relies on B.H. v. Camden County Board of Social Services, 2019 N.J. AGEN LEXIS 1221 (Feb. 19, 2019) to show that criminal activity may rebut the presumption that an asset was improperly transferred as a gift. Petitioner's reliance on B.H. is misplaced. In B.H., Petitioner claimed her spouse, P.H. made transfers to pay prostitutes as part of a blackmail scheme. Id. at 6. The B.H. court determined that B.H. had "the burden to establish by convincing evidence the existence of the scheme to financially exploit P.H." Id. The B.H. court also determined that Petitioner's reasons for failing to initiate a criminal investigation must be weighed against New Jersey's policy interest to be the source of last resort. Id. Ultimately, the B.H. court determined that B.H. had not met her burden despite alleging being the victim of a crime. Like, B.H. the Petitioner in the current matter alleges to have been a victim of a criminal offense. However, the weight of the evidence presented fails to support this proposition. Accordingly, I FIND that Petitioner failed to demonstrate that the funds at issue, totaling $98,404 were made solely for a purpose other than to qualify for Medicaid benefits.

The Initial Decision determined that "petitioners verbal permission to Provident Bank to allow D. to cash checks that Petitioner had not herself written served to negate

[2] D. died from a drug overdose on June 2, 2022.

any rebuttal to the presumption that the resource was transferred for the purpose of establishing Medicaid eligibility." See ID at 8. The Initial Decision also determined that Petitioner has failed to meet Petitioner's burden of proving "that the $98,404 in checks bearing Petitioner's name and cashed by her daughter D. [was] not transferred as gifts by Petitioner to D." ID at 9. The Initial Decision further determined that Petitioner has failed to rebut the statutory presumption that these funds were transferred for the purpose of establishing Medicaid. Ibid. Lastly, the Initial Decision found that Petitioner's reliance on B.H. was unfounded. I agree. The transfers at issue in this matter stem from Petitioner's transfer of assets totaling $308,463.12 for less than fair market value during the five-year look-back period. Petitioner is only contesting $98,404 of the transfer penalty which they argue is the amount of written checks cashed by D. However, Petitioner failed to present any evidence to corroborate that D. forged 82 checks without Petitioner's knowledge or consent. Petitioner also failed to present a handwriting expert to show that the checks presented to the bank had been forged, failed to provide evidence of Petitioner's drug addiction, failed to notify the authorities about this alleged crime, and failed to initiate an investigation. In addition, the letter from J.S. of Providence Bank solidifies the fact that each time the bank contacted Petitioner about D.'s attempt to cash a check, Petitioner gave verbal authorization to the bank to cash the checks D. presented. Based on the evidence presented, Middlesex County was correct to impose the transfer penalty of 823 days on the receipt of Medicaid benefits resulting from a transfer of assets totaling $308,463.12 for less than fair market value during the five-year look-back period.

Thus, based upon my review of the record and for the reasons set forth herein, I hereby ADOPT the ALJ's recommended decision, as set forth above. Further, I FIND that Petitioner has failed to rebut the presumption that the transfers at issue in this matter

were made in order to establish Medicaid eligibility, and, therefore, the imposed penalty period is appropriate.

THEREFORE, it is on this 25th day of MAY 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED, as set forth herein.

Gregory Woods OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance
and Health Services

NJSBA ELDER LAW COMMITTEE

Estate Planning and Ethical Considerations for Avoiding Probate Litigation and Malpractice and Ethics Claims

Presented by:
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PROBATE LITIGATION CLAIMS

LACK OF TESTAMENTARY CAPACITY
&
UNDUE INFLUENCE

They often work in tandem with each other…

TESTAMENTARY CAPACITY

WHAT IS REQUIRED?

Very low degree of capacity...

- 18 or older, of sound mind
- Know assets to some degree
- Know family relations
- Know life/business activities
- Know to whom estate is to pass

GAUGING CAPACITY

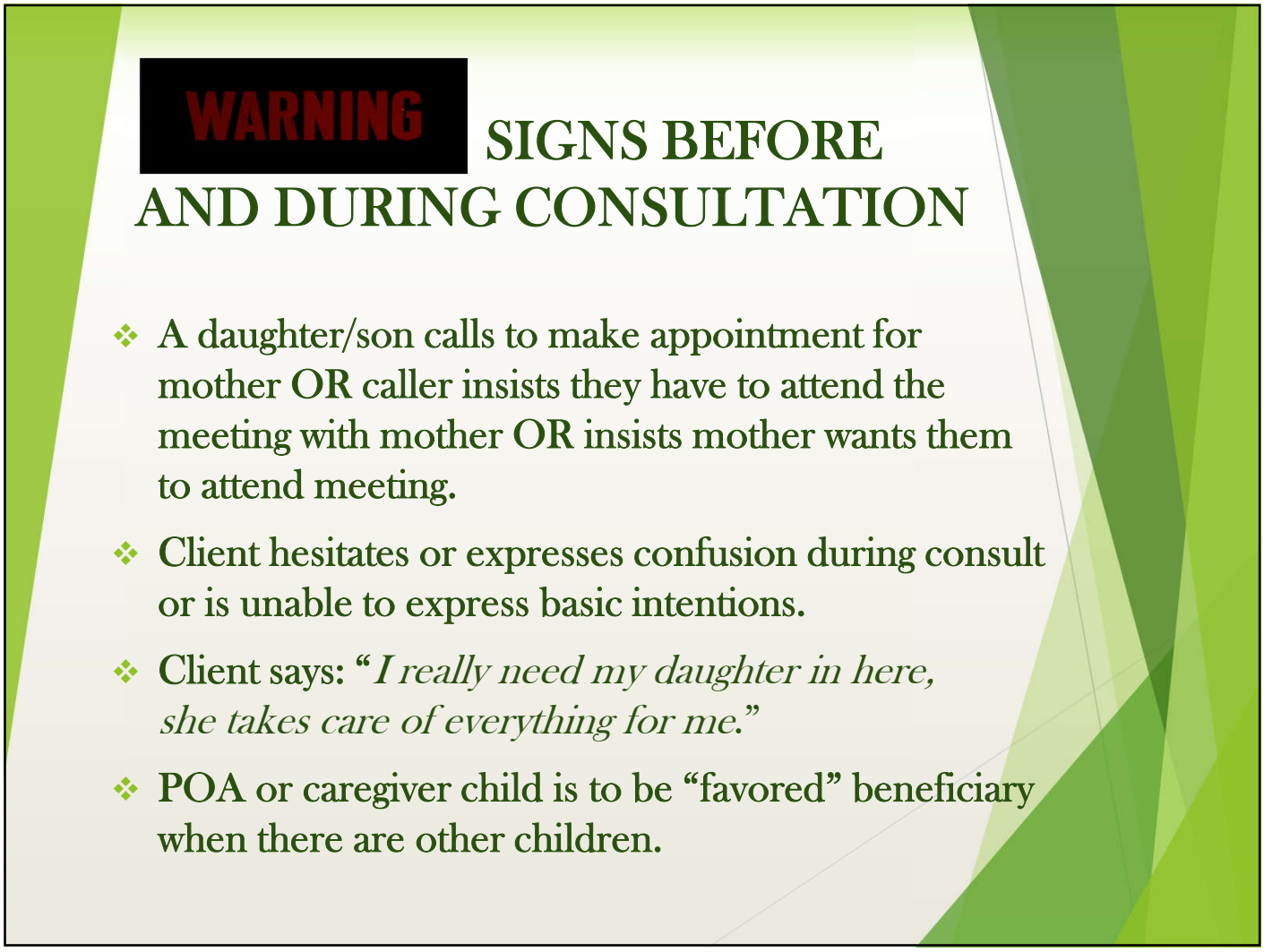
- WHEN? At initial consultation and further meeting, if there are doubts.
- WHO present? CLIENT and YOU
- WHAT inquiries to make?
  - Ask for basic information – name, address, phone, email, date of birth, place of birth, social security number, names spouse, children, grandchildren, siblings, etc.
  - Engage in general chit chat above current events, likes, dislikes, sports, etc.
  - Explore more details regarding assets, disposition of assets
  - If doubts, pose some questions from MMSE.

IF YOU STILL DOUBT CAPACITY. . .

RUN AWAY – decline representation!!!

DO NOT obtain physician opinion letter!

Imagery via https://giphy.com


WARNING
SIGNS BEFORE AND DURING CONSULTATION
A daughter/son calls to make appointment for mother OR caller insists they have to attend the meeting with mother OR insists mother wants them to attend meeting.
Client hesitates or expresses confusion during consult or is unable to express basic intentions.
Client says: "I really need my daughter in here, she takes care of everything for me."
POA or caregiver child is to be "favored" beneficiary when there are other children.

UNDUE INFLUENCE (UI)

DEFINITION:

- Mental, moral or physical exertion by another
- Destroys "free agency of a testator"
- Prevents testator from following own mind
- Accepts domination and influence of another

RAISING THE PRESUMPTION OF UI – must show:

- Confidential Relationship
- Suspicious Circumstances

CONFLICT OF INTEREST

WARNING

- POA or caregiver is either present client or former client and is to be "favored" beneficiary.
- Dramatic change in testamentary disposition in favor of POA or caregiver as beneficiary.
- Conflict on part of attorney is "fraught with a high potential for undue influence, generating a strong presumption [of undue influence]."
- Higher burden of proof to overcome presumption – clear and convincing.
- NEED for "independence and undivided loyalty, owing professional allegiance to no one but the testator."

See *Haynes cited on page 7 of materials*

PRACTICE TIPS

- Meet privately with client – in person is always best.
- Make appointments directly with the client.
- Avoid telephone consult – could be "coached" responses from persons present with client.
- If will execution is to be in hospital or LTC, you or staff attorney should always be present.
- DO NOT give will to third party to take to client to sign.
- Reschedule a signing if you must BUT DO NOT leave it to an outsider or your paralegal to handle it on your behalf.
- KEEP POA as far away from your office as possible.

PRACTICE TIPS

- Determine "WHY" a client is making a certain disposition or disinheriting a "natural object of bounty" person and document your file.
- REASON should not appear in the Will. Opens door for contest.
- DO NOT take instructions for changes to a will from anyone other than your client.
- Obtain copies of prior wills to compare against present desires.
- DO NOT videotape meetings or signings.
- Hope your client does not provide videos to you.

MALPRACTICE & ETHICS

ATTORNEY LIABILITY

Non-client beneficiary can sue for damages resulting from estate planning which does not comply with professional standards.

- to preclude claims would be "a drastic course [which] may eliminate worthy suits and cause injustice."

  Pivnick v. Beck, 326 *N.J. Super* 474 (App. Div. 1999).

  St. Pius X House of Retreats v. Camden Diocese, 88 N.J. 571 (1982). *See other cases cited in materials.*

MALPRACTICE & ETHICS

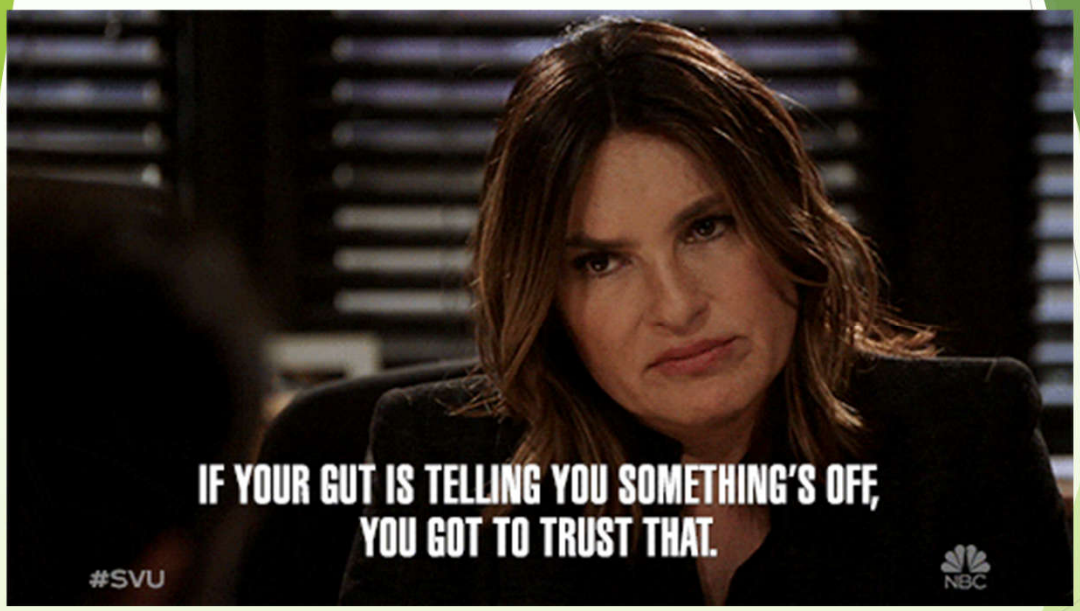
HIGHER STANDARD FOR "SPECIALISTS"

An attorney's conduct in rendering estate planning services "*should be judged not only against the practices of attorneys, in general, but against the practices of other estate planning practitioners.*"

Celluci v. Bronstein, cited page 10 of materials.

RPCs Primarily Applicable

- RPC 1.1 Competence
- RPC 1.6 Confidentiality of Information
- RPC 1.4(c) Reasonable explanation to client in order to make informed decision for representation
- RPC 1.4(d) Advise client of limitations on the lawyer's conduct.
- RPC 1.7 Conflict of Interest – concurrent conflict.



Imagery via https://giphy.com

Civil Litigation and Criminal Remedies on Behalf of the Wronged Elder

Rubin M. Sinins
Certified Civil and Criminal Trial Attorney

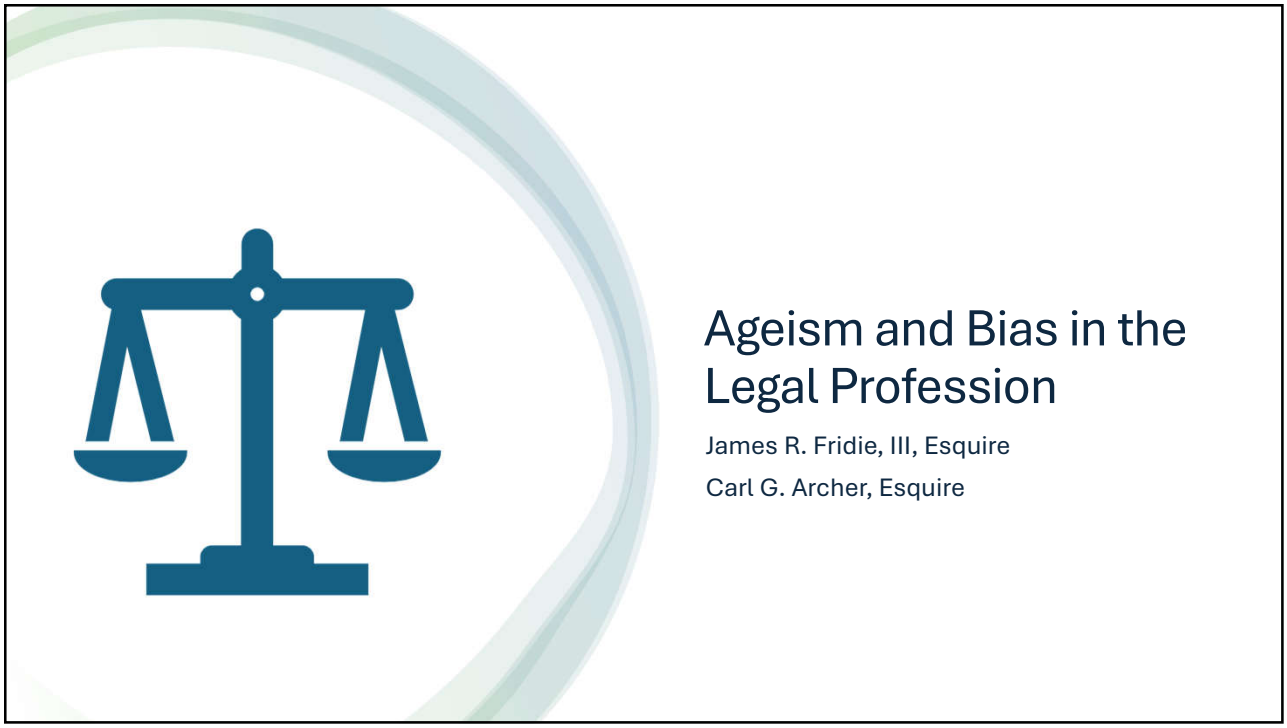
I. **<u>Civil Litigation for the Wronged Elder</u>** – When to Pursue and What to Expect

A. Orders to Show Cause with Various Relief
B. Injunctions
C. Accountings
D. Restitution
E. Damages
F. Attorney's Fees
G. Restraining Order Proceedings

II. **Criminal Referrals for the Elder Victim** – When to Pursue and What to Expect

A. County Prosecutor Offices
B. Federal Prosecutors
C. Referrals to Law Enforcement

III. **Strategic and Practical Considerations When Pursuing Remedies**


Ageism and Bias in the Legal Profession
James R. Fridie, III, Esquire
Carl G. Archer, Esquire

1

Origination of the Term

- Doctor Robert N. Butler, Founder of the National Institute on Aging, coined the term "ageism" in an interview in 1969.
- Dr. Butler's focus was on discrimination and stereotyping of the aging population and did not mean the term to apply to everyone.
- In the last 60 years, the term ageism has grown to include any discrimination against any age group due to age.

See Also:
Lev, S., Wurm, S., & Ayalon, L. (2018). Origins of ageism at the individual level. *Contemporary perspectives on ageism*, 51-72, and Nelson, T. D. (2015). Ageism. In *Handbook of prejudice, stereotyping, and discrimination* (pp. 337-353). Psychology Press.

2 Types of Bias

Explicit Bias:

Generally what people mean when they are thinking about prejudice.

An overt and conscious bias.

Implicit Bias:

Merrium-Webster defines it as, "a bias or prejudice that is present but not consciously held or recognized.

See Also:
Amodio D, Ratner K. A memory systems model of implicit social cognition. *Curr Dir Psychol Sci.* 2011;20(3):143-148, and Killen, M., McGlothlin, H., & Henning, A. (2008). Explicit judgments and implicit bias. *Intergroup attitudes and relations in childhood through adulthood*, 126-145.

Fighting Implicit Bias

- Implicit bias is often more difficult to combat that explicit bias.
- By its very definition, an individual with an implicit bias is not aware of that bias and cannot take steps to counteract it.
- To combat an implicit bias, it must first be recognized and turned into an explicit bias.
- **Most Age Bias is Implicit.**

See Also:
Giannetta, T., Cerfoglio, A., & Miller, M. (2023). Eliminating Bias in the Courtroom? A Content Analysis of Judges' Opinions Regarding Implicit Bias Training. *The University of Memphis Law Review, 54(1).* 1-41, and O'Rese, J. K., Mike, E. V., & Elam, A. R. (2021). Beyond implicit bias to explicit action. *JAMA ophthalmology*, *139*(12), 1283-1284.

How Does Ageism Manifest?

See Also:
Bytheway, B., & Johnson, J. (1990). On defining ageism. *Critical Social Policy*, *10*(29), 27-39, Cuddy, A. J., Fiske, S. T., & Nelson, T. D. (2002). Ageism: Stereotyping and prejudice against older persons, and Levy, S. R., & Apriceno, M. (2019). Ageing: The role of ageism. *OBM Geriatrics*, *3*(4), 1-16.

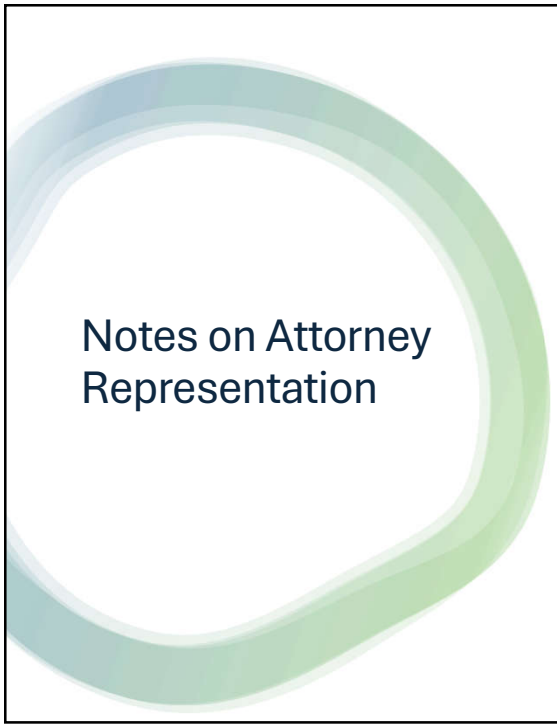
- Huge and growing population of elders (>64)
- Stereotypes on aging – physical and mental health
- Common terms serve to emphasize these stereotypes
- On the other side – infantilizing the elderly
- Can elderly people actually get the "benefit" of a bias?

6

Age Bias in the Courtroom

- As a Plaintiff – hesitancy to speak up and navigate
- As a Defendant – sympathy, weakness
- As a Witness - credibility as to recall
- As a Juror – attention span? Open minds?
- As an Attorney – forgetful? Off track?
- As a Judge – well, Judges are perfect

See Also:
Dunlap, E. E., Golding, J. M., Hodell, E. C., & Marsil, D. F. (2007). Perceptions of elder physical abuse in the courtroom: The influence of hearsay witness testimony. *Journal of Elder Abuse & Neglect*, *19*(3-4), 19-39, Syme, M., & Schippers, D. (2018). EXAMINING AGEISM IN THE COURTROOM: A CASE OF ALLEGED SEXUAL ABUSE. *Innovation in Aging*, *2*(Suppl 1), 932, Wasarhaley, N. E., & Golding, J. M. (2017). Ageism in the courtroom: mock juror perceptions of elder neglect. *Psychology, Crime & Law*, *23*(9), 874-898, and Wong, O. M. (2012), and Book Review: Elders on Trial: Age and Ageism in the American Legal System. *Marquette Elder's Advisor*, *6*(2), 361.

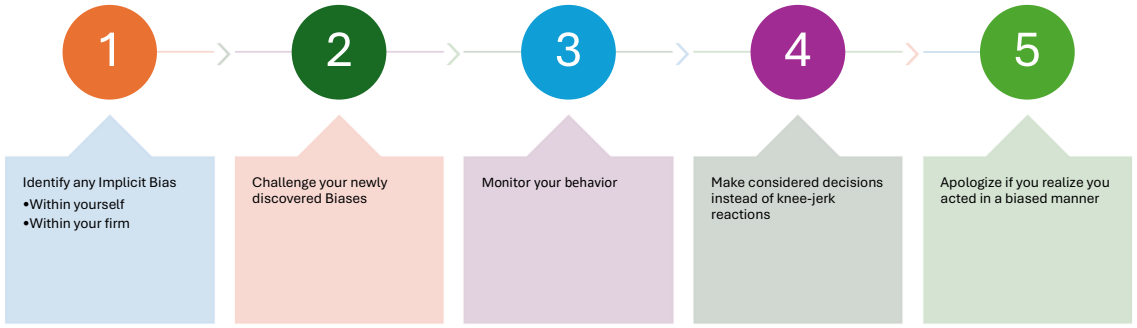


Notes on Attorney Representation

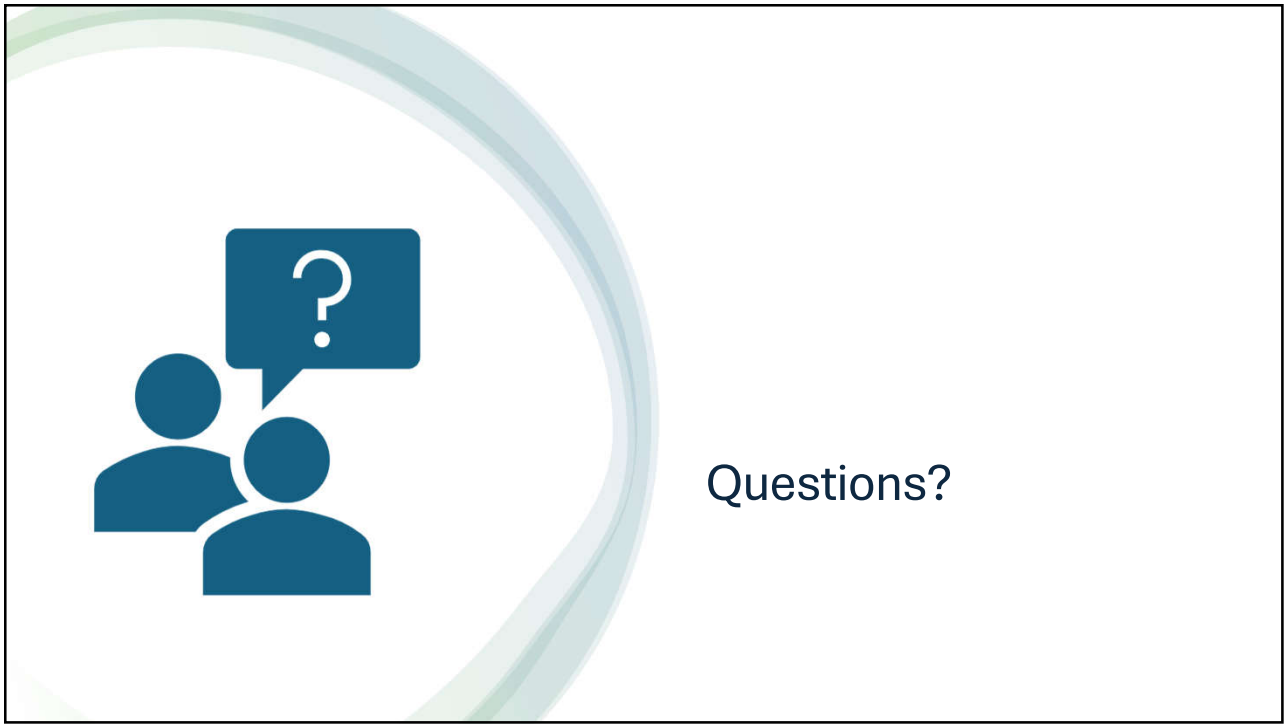
- How do you work with elderly clients, and how is that different than younger clients?
- Capacity evaluations?
- Remember who your client is
- Appropriate preparation involves anticipating and combating bias in the representation – this is not condoning it

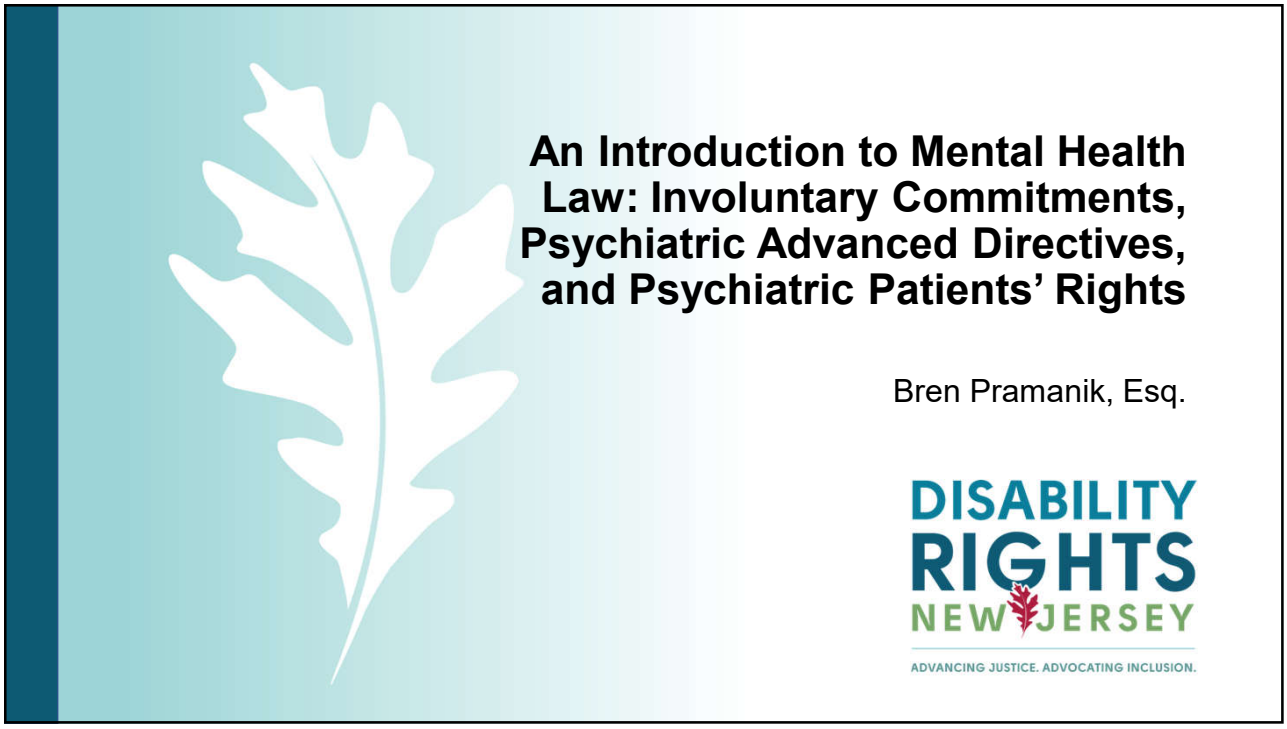
See Also:
Love, H. L. (2019). *Age and Ageism in the Assessment of Witnesses*. University of Toronto (Canada), and Williams, P. A. (2016). *Ageism on Trial: Examining the Relationships Between Prosecutor Characteristics, Professional Practices, and Behavior Towards Older Adult Victims*. Widener University.

How to Combat Age Bias In Yourself



See Also:
Allen, R. N., & Harris, D. (2018). # SocialJustice: Combatting Implicit Bias in an Age of Millennials, Colorblindness & Microaggressions. *U. Md. LJ Race, Religion, Gender & Class*, *18*, 1, and De Houwer, J. (2019). Implicit bias is behavior: A functional-cognitive perspective on implicit bias. *Perspectives on Psychological Science*, *14*(5), 835-840.


Questions?


An Introduction to Mental Health Law: Involuntary Commitments, Psychiatric Advanced Directives, and Psychiatric Patients' Rights
Bren Pramanik, Esq.
DISABILITY RIGHTS NEW JERSEY
ADVANCING JUSTICE. ADVOCATING INCLUSION.

1

Today's Agenda

- Overview of Disability Rights New Jersey
- Psychiatric Advanced Directives and Supported Decision Making
- Mental Health Disabilities and Older Adults
- Involuntary Commitment in New Jersey
- Rights of Psychiatric Patients

Disability Rights New Jersey

New Jersey's designated Protection and Advocacy System under federal law. 42 U.S.C. § 15041; 42 U.S.C. § 10801; 29 U.S.C. § 794e. Our mission is to preserve and advance the human, civil, and legal rights of people with disabilities.

- Authority to access, monitor, and investigate places where people with disabilities live and receive services.
- Legal teams advocate for the rights of people with disabilities through individual representation, education and training, public facing reports, and systemic litigation.

Self-Determination

- The ability to make one's own choices
- Identifying goals and determining how to reach those choices
- This does not mean the individual must make decisions without the input from others (e.g., parents, friends)
- These skills take time to develop for everyone

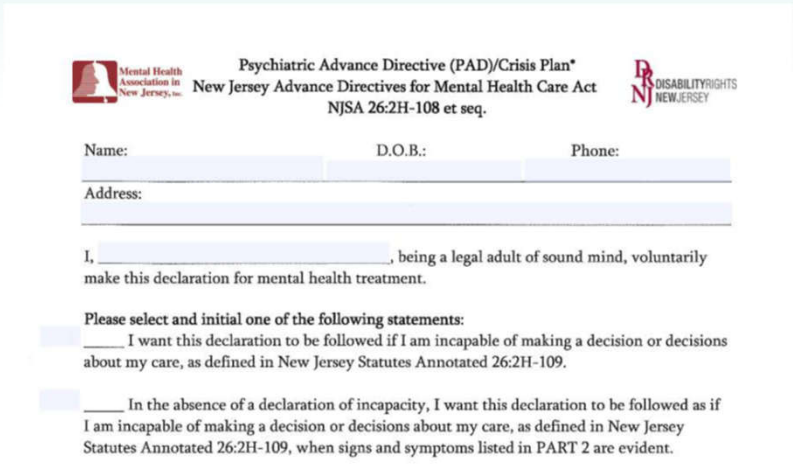
What is capacity?

- General Test: Does the person have the capacity to make reasonable decisions?
  - Not whether the person's decisions are in fact responsible
- Adults are presumed legally competent unless adjudicated "incapacitated" by a court
- Just because someone is older and/or has a disability, does not mean they lack capacity

Psychiatric Advanced Directives and Supported Decision Making

- Psychiatric Advance Directive ('PAD') is a document that details instructions on an individual's psychiatric treatment in the event that individual is in crisis and lacks the capacity to make informed decisions about their care.
- PAD is drafted when an individual is not in crisis and has the capacity to make decisions about their care.
- PAD may also authorize another person to act as a proxy decision maker for the individual in the event that the individual is in crisis and lacks the capacity to make informed decisions about their care.

Psychiatric Advanced Directives and Supported Decision Making



Psychiatric Advance Directive (PAD)/Crisis Plan*
New Jersey Advance Directives for Mental Health Care Act
NJSA 26:2H-108 et seq.

Name: D.O.B.: Phone:

Address:

I, _____, being a legal adult of sound mind, voluntarily make this declaration for mental health treatment.

Please select and initial one of the following statements:

_____ I want this declaration to be followed if I am incapable of making a decision or decisions about my care, as defined in New Jersey Statutes Annotated 26:2H-109.

_____ In the absence of a declaration of incapacity, I want this declaration to be followed as if I am incapable of making a decision or decisions about my care, as defined in New Jersey Statutes Annotated 26:2H-109, when signs and symptoms listed in PART 2 are evident.

New Jersey Advance Directives for Mental Health Care Act of 2007

Disability Rights New Jersey and MHANJ developed PAD template

Psychiatric Advanced Directives and Supported Decision Making

• A PAD may expressly authorize, or place restrictions, on the representative's authority.

For example: a PAD may permit a representative to consent to the individual's admission to a psychiatric facility (see also N.J.S.A. § 26:2h-107(a)(6)); a PAD may expressly bar a representative from consenting to the individual's admission to a psychiatric facility (see also N.J.S.A. § 26:2H-110(a)(2)); or a PAD may enumerate certain psychiatric facilities where the representative can consent to an individual's commitment (see also N.J.S.A. §§ 26:2h-105, 107 (b)(1)).

Psychiatric Advanced Directives and Supported Decision Making

- New Jersey Department of Human Services' Division of Mental Health and Addiction Services ("DMHAS") contracted with the U.S. Living Will Registry to create a secure, online registry of PADs accessible only to mental healthcare providers.
- Providers can locate an individual's PAD through a centralized location if the individual is in crisis.

Mental Health Disabilities and Older Adults

Pre-admission Screening and Resident Review (PASRR)

- Part of Nursing Home Reform Act which was part of the Omnibus Budget Reconciliation Act of 1987
- Established standards for nursing homes, rights of nursing home residents, and the PASRR process.
- All states are required to have a PASRR program that complies with the federal regulations under 42 C.F.R. §§ 483.100-138. These programs must be specified in each state's Medicaid State Plan.
- Under federal law, the PASRR process must (1) identify individuals who might be admitted to or reside in a nursing facility (NF) who have a serious mental illness (SMI), or an intellectual disability or a related condition (ID/RC); (2) consider both NF and community placements for such individuals and recommend NF placement only if appropriate; and (3) identify specific needs that must be met for individuals to thrive, whether in a NF or the community.

Mental Health Disabilities and Older Adults

Behavioral Management Nursing Homes

- Provides specialized long-term care for residents with severe behavior management problems, such as combative, aggressive, and disruptive behaviors.
- There are five in the state of New Jersey: Preferred Care at Absecon, Christian Health Care Center, Silver Healthcare Center, Morris View Healthcare Center, and Preakness Healthcare Center.

Mental Health Disabilities and Older Adults

Designated Behavioral Health Units

- Department of Health authorized with an expedited certificate of need application pursuant to N.J.A.C. § 8:33-5.1(b)(1)
  - Alaris Health at Cedar Grove and Hamilton Plaza
- Authorized after the closure of Woodland Behavioral and Nursing Center
- Behavioral management, crisis intervention and prevention, family counseling and support, individual and group psychotherapy, medication monitoring, peer support, psychiatric services, structured socialization, substance use disorder treatment and counseling, supportive counseling, therapeutic recreation for cognitive and emotional functioning, and individual/family education of self-care to promote optimum level of health in preparation for discharge to a less restrictive environment.

Involuntary Commitment in New Jersey

- Involuntary commitment standard:
  - (1) the patient is mentally ill;
  - (2) the mental illness causes the patient to be dangerous to self or others or property as defined by N.J.S.A. §§ 30:4-27.2(h) and -27.2(i); and
  - (3) appropriate facilities or services are not otherwise available. (See NJ R. 4:74-7 (b) (3)(A)).

Involuntary Commitment in New Jersey

Temporary Court Order:

- The court will issue a temporary court order if there is probable cause to believe that a person needs inpatient treatment requiring involuntary commitment, pending an initial commitment hearing.
- The court must schedule the initial commitment hearing within 20 days of when the screening certificate took effect. (See NJ R. 4:74-7(c)).

The Initial Commitment Hearing:

- The initial hearing must be held within 20 days from the initial inpatient admission. (See N.J.S.A. § 30:4-27.12(a)).
- Right to an attorney. (See N.J.S.A. § 30:4-27.12(d) and NJ R. 4:74-7(e)).

Rights of Psychiatric Patients

The Patients' Bill of Rights N.J.S.A. § 30:4-24.2

(1) To be free from unnecessary or excessive medication.
(2) Not to be subjected to experimental research, shock treatment, psychosurgery or sterilization, without the express and informed consent of the patient after consultation with counsel or interested party of the patient's choice.
(3) To be free from physical restraint and isolation.
(4) To be free from corporal punishment.
(5) To privacy and dignity.
(6) To the least restrictive conditions necessary to achieve the purposes of treatment

*Not exhaustive

Contact Us for More Information:

We are located at:

210 South Broad Street, Third Floor

Trenton, New Jersey 08608

We can be reached at:

800-922-7233 (NJ Only)

609-292-9742

advocate@disabilityrightsnj.org

Visit us online: DisabilityRightsNJ.org


@disabilityrightsnewjersey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@disabilityrightsnewjersey

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NJ Sharing Network
saving lives through organ and tissue donation
DONATE LIFE
A Donate Life Organization
Catherine DeAppolonio, Esq.
GENERAL COUNSEL AND GOVERNMENT AFFAIRS
To Honor. To Remember. To Give Hope.

1

Connect to purpose…

Katie Elizabeth Baldwin

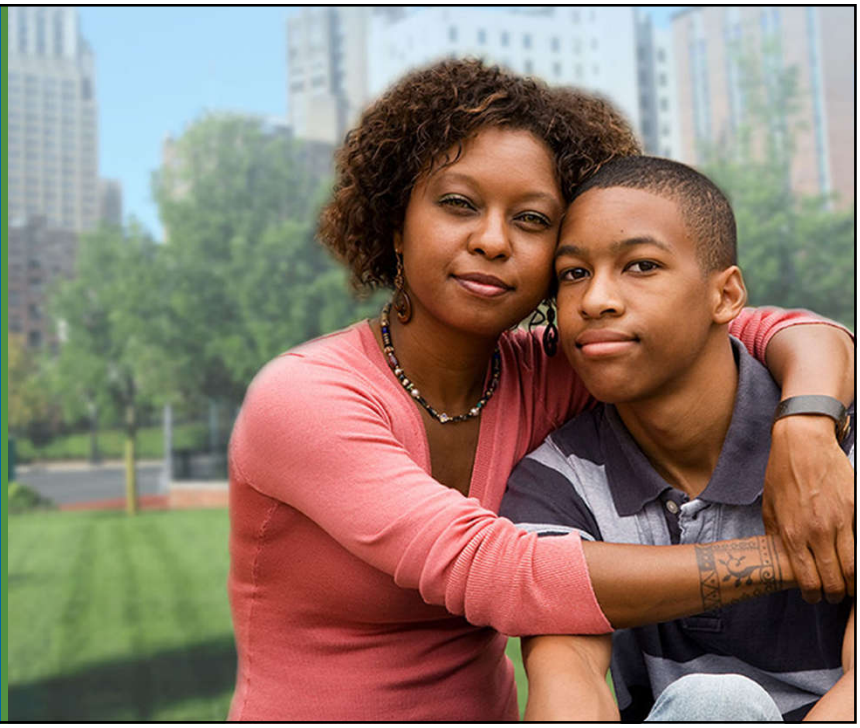
—◇—

Do not stand at my grave and weep;
I am not there. I do not sleep.
I am a thousand winds that blow.
I am the diamond glints on snow.
I am the sunlight on ripened grain.
I am the gentle autumn rain.
When you awaken in the morning's hush
I am the swift uplifting rush
Of quiet birds in circled flight.
I am the soft stars that shine at night.
Do not stand at my grave and cry;
I am not there. I did not die.

To Honor. To Remember. To Give Hope.

Our Mission

To Save and Enhance Lives Through Organ and Tissue Donation



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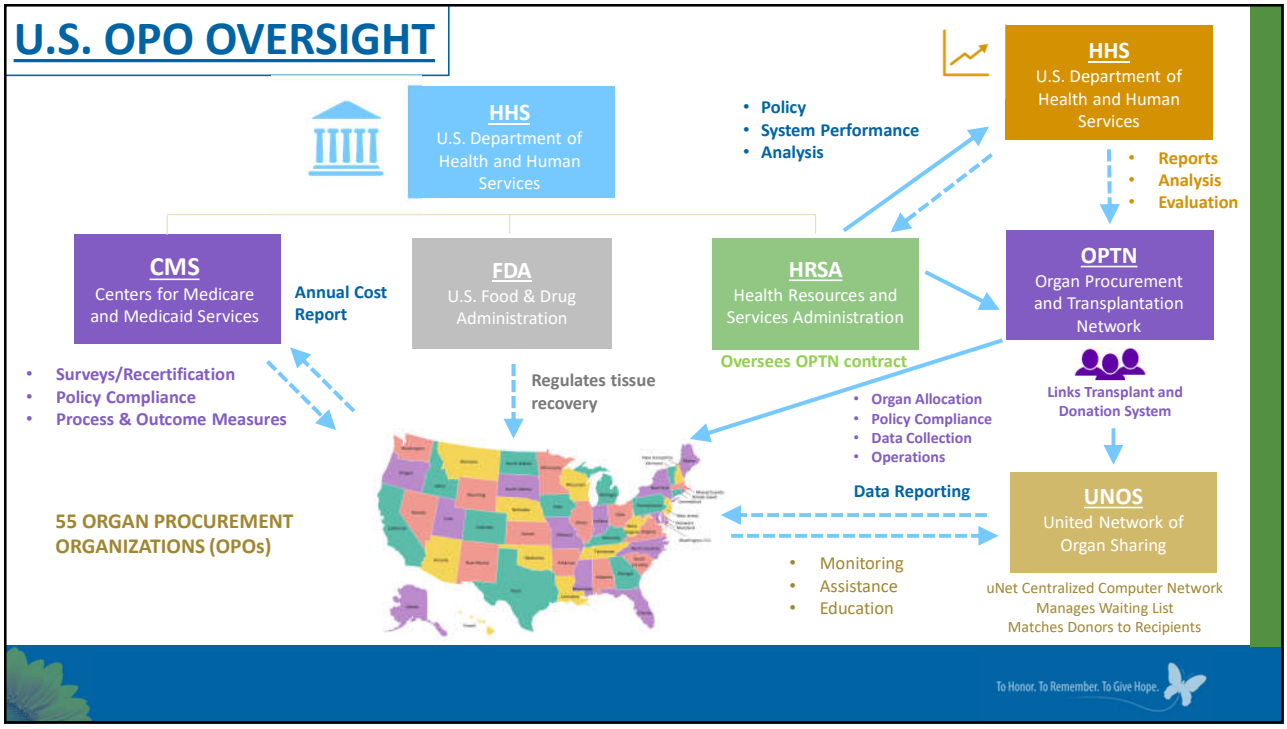
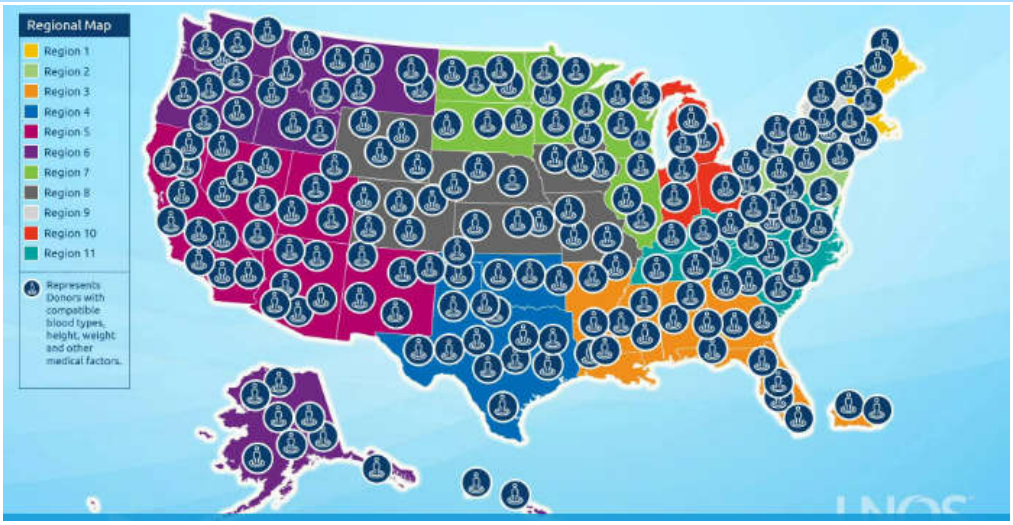
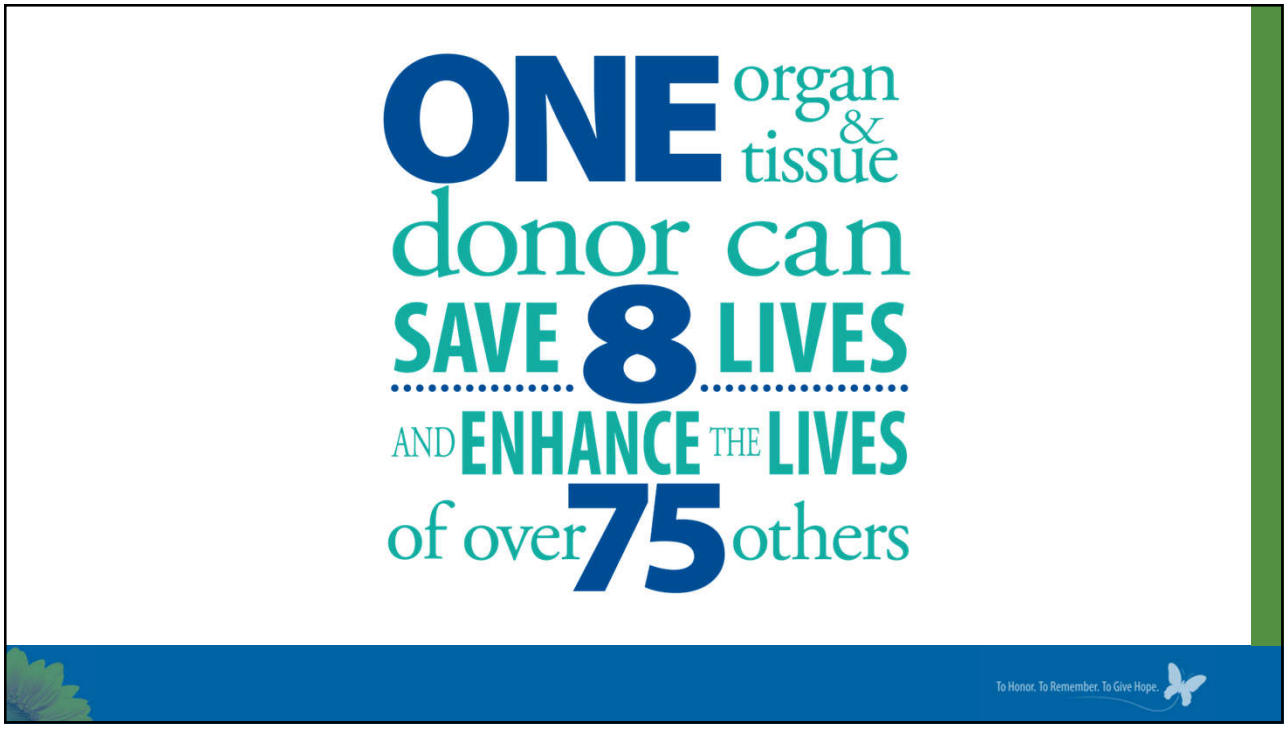

U.S. OPO OVERSIGHT
HHS
U.S. Department of Health and Human Services
• Policy
• System Performance
• Analysis
HHS
U.S. Department of Health and Human Services
• Reports
• Analysis
• Evaluation
CMS
Centers for Medicare and Medicaid Services
Annual Cost Report
FDA
U.S. Food & Drug Administration
HRSA
Health Resources and Services Administration
OPTN
Organ Procurement and Transplantation Network
• Surveys/Recertification
• Policy Compliance
• Process & Outcome Measures
Regulates tissue recovery
Oversees OPTN contract
Links Transplant and Donation System
• Organ Allocation
• Policy Compliance
• Data Collection
• Operations
55 ORGAN PROCUREMENT ORGANIZATIONS (OPOs)
Data Reporting
UNOS
United Network of Organ Sharing
• Monitoring
• Assistance
• Education
uNet Centralized Computer Network
Manages Waiting List
Matches Donors to Recipients
To Honor. To Remember. To Give Hope.

4

Organ Allocation: UNOS Waitlist




ONE organ & tissue
donor can
SAVE 8 LIVES
AND ENHANCE THE LIVES
of over 75 others
To Honor. To Remember. To Give Hope.

6

Organs that can be donated

Heart

Liver

Kidneys (2)

Lungs (2)

Pancreas

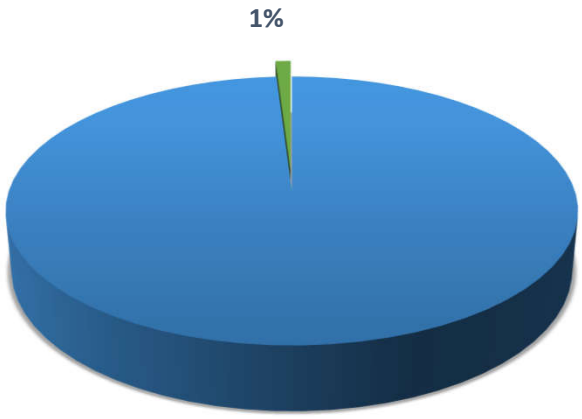
Intestines

Darryl Price
Double-Lung Recipient

To Honor. To Remember. To Give Hope.

7

The Rare Opportunity for Organ Donation



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8

Tissue that can be donated

Corneas

Bone

Heart Valves

Skin

Ligaments

Tendons

Michele Brugger
Tissue Recipient

To Honor. To Remember. To Give Hope.

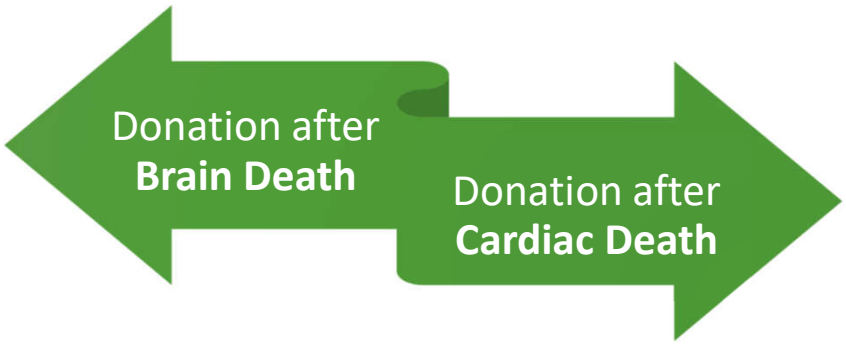
9

Referral/Timely Notification

- Hospitals must refer all deaths to the OPO.
- Within one hour of death

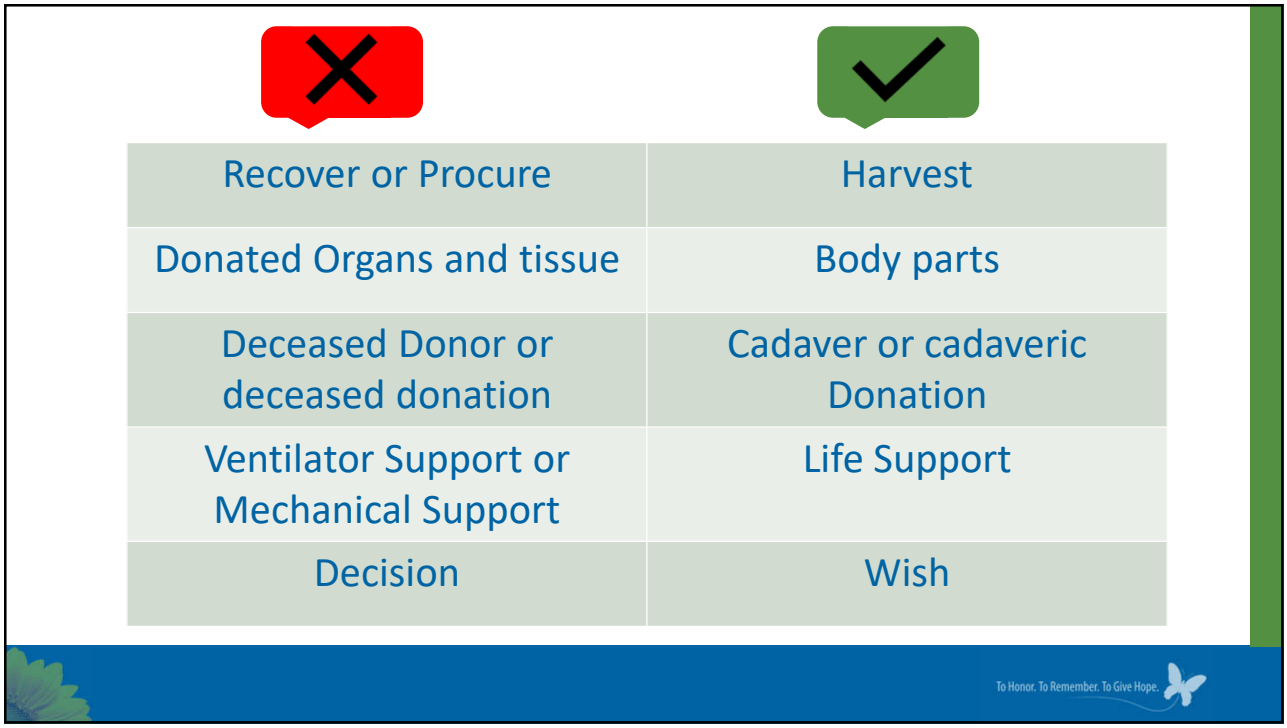
- Hospitals must refer all imminent deaths to the OPO
- call within one hour on all vented patients if they meet any of the following:
  - Glasgow coma scale of 5 or less
  - 2 or more cranial nerve reflexes absent
  - Discussion of withdrawal but prior to the withdrawal of any life sustaining therapies, EOLD

Two Avenues to Organ Donation



To Honor. To Remember. To Give Hope.

11



Recover or Procure	Harvest
Donated Organs and tissue	Body parts
Deceased Donor or deceased donation	Cadaver or cadaveric Donation
Ventilator Support or Mechanical Support	Life Support
Decision	Wish

Uniform Anatomical Gift Act (UAGA)

First adopted by Congress in 1968

-recommended all states adopt it

-Substantially similar in each state

New Jersey - *N.J.S.A. 26:6-66 et seq.*

Who, What, Why and How of Anatomical Donations

To Honor. To Remember. To Give Hope.

13

Legislation

N.J.S.A. 26:6-81 Procedure for donor to make anatomical gift.

5. a. A person may make an anatomical gift and thereby become a donor:

(1) by authorizing a statement or symbol indicating that the donor has made an anatomical gift to be imprinted on the donor's driver's license or identification card;

(2) in a will;

(3) during a terminal illness or injury of the donor, by any form of communication addressed to at least two adults, at least one of whom shall be a disinterested witness; or

(4) as provided in subsection b. of this section.

b. A donor or other person authorized to make an anatomical gift pursuant to section 4 of this act may make a gift by a donor card or other record signed by the donor or other person making the gift or by authorizing that a statement or symbol indicating that the donor has made an anatomical gift be included on a donor registry.

First Person Designation

N.J.S.A. 26:6-84(a)

"…a person other than the donor shall be prohibited from making, amending, or revoking an anatomical gift of a donor's body or part if the donor made an anatomical gift…"

Drafting considerations:

I wish to make an anatomical gift.

-permit temporary intervention (ie. mechanical ventilation) to maximize gift of donation

I wish for all life sustaining treatment to be removed.

Three Choices

YES – I give

NOT RIGHT NOW – I Leave the Decision to Others

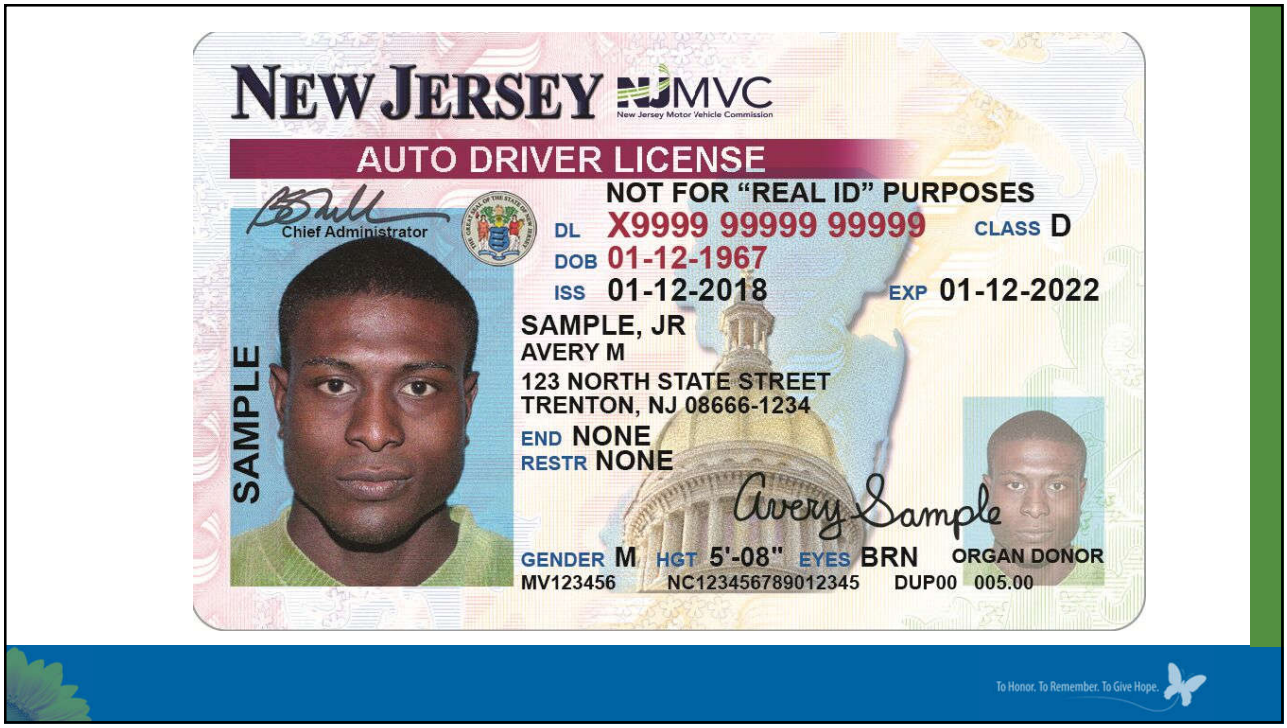
I Refuse to Give

Registry

Motor Vehicle Commission

https://registerme.org/

To Honor. To Remember. To Give Hope.


NEW JERSEY
NJMVC
New Jersey Motor Vehicle Commission
AUTO DRIVER LICENSE
Chief Administrator
NOT FOR "REAL ID" PURPOSES
DL X9999 99999 99999
CLASS D
DOB 01-12-1967
ISS 01-12-2018
EXP 01-12-2022
SAMPLE, JR
AVERY M
123 NORTH STATE STREET
TRENTON, NJ 08666-1234
END NONE
RESTR NONE
SAMPLE
Avery Sample
GENDER M
HGT 5'-08"
EYES BRN
ORGAN DONOR
MV123456
NC123456789012345
DUP00 005.00
To Honor. To Remember. To Give Hope.

19

NJ Anatomical Gift Act

The revocation, suspension, expiration, or cancellation of a driver's license or identification card upon which an anatomical gift is indicated shall not invalidate the gift.

N.J.S.A. 26:6-81(5)(c)

What if someone is not registered?

- ❑ Approach for Donation
- ❑ Designated Requestor
- ❑ Consultation with HCT

Notification

"The OPO representative or the Designated Requestor, if any, shall attempt to notify an appropriate person … to advise him or her of the gift."

- **Primary Goal: to eliminate surprise, flush out contrary indications**
- **Secondary Goal: foster acceptance and create pathway to benefit from altruism, silver lining**

Working through the LNOK List

"Reasonably available, willing and able to act in timely manner…."

LNOK for Authorization

Level of priority

1. Healthcare proxy, durable power of attorney or representative
2. Spouse, domestic partner, civil union partner
3. Adult child or children
4. Either parent

LNOK - continued

5. Adult sibling
6. Related by blood marriage, adoption or exhibited special care and concern for donor
7. Legal guardian
8. Person(s) having authority to dispose of body, including hospital administrators

Administrative Authorization

Any other person having the authority to dispose of the decedent's body, including the administrator of a hospital in which the decedent was a patient ... In the absence of actual notice of contrary indication by the decedent, **the administrator shall make an anatomical gift** of the decedent's body or part.

NJSA 26:6-85

To Honor. To Remember. To Give Hope.

Maintaining Donation Potential
Non-Withdrawal and Testing

The hospital shall not withdraw measures necessary to maintain the suitability of a gift until the OPO has had the chance to advise the hierarchy of the donation option.

NJSA 26:6-89

To Honor. To Remember. To Give Hope.

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Statutory Immunity

A person or entity **shall be immune** from liability for actions taken in accordance with or in a good faith attempt to act in accordance with the provisions of this Act or the applicable anatomical gift law of another state.

NJSA 26:6-91

About the Panelists…

Carl G. Archer, Certified as an Elder Law Attorney by the National Elder Law Foundation, is the Managing Attorney of Archer Law Office in Hamilton, New Jersey. He concentrates his practice in Medicaid applications and litigation, veterans' pension applications, guardianships, estate planning and administration, and related litigation.

Mr. Archer is Past Chair of the New Jersey State Bar Association Elder & Disability Law Section, Past President of the New Jersey Chapter of the National Academy of Elder Law Attorneys and Treasurer of Jersey Cares, and organization that increases civic engagement by volunteering and staffing volunteer projects in urban areas throughout New Jersey. He serves on the Board of New Jersey Advocates for Aging Well and was appointed by the Governor to the New Jersey Task Force on Abuse Against the Elderly and Disabled. He has also provided *pro bono* legal assistance through Legal Services of New Jersey to low-income caregivers in need as is the recipient of several honors.

Mr. Archer is a graduate of Rutgers University and Rutgers School of Law-Camden, and completed a judicial clerkship in Somerset County.

Beth L. Barnhard, Certified as an Elder Law Attorney by the ABA-accredited National Elder Law Foundation, is Counsel to Schenck Price Smith & King, LLP with offices in Florham Park, Sparta and Paramus, New Jersey, and New York City. She concentrates her practice in elder and disability law, including Medicaid asset and preservation planning, Medicaid applications, Medicaid appeals, Medicaid divorce, capacity counseling, guardianships and protective arrangements, estate administration, probate and fiduciary litigation, and special needs planning.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, Ms. Barnhard is Past Chair of the New Jersey State Bar Association's Elder & Disability Law Section and Past President of the National Academy of Elder Law Attorneys' New Jersey Chapter (NAELA-NJ). She is Chair of the NAELA-NJ Litigation Committee and has been a member of the national NAELA Litigation Committee. Ms. Barnhard has served on the Board of Directors of the Community Health Law Project and Disability Rights New Jersey. Prior to attending law school, she worked as a rehabilitation aide and staff interpreter at a psychiatric vocational rehabilitation center, and also worked as a freelance American Sign Language interpreter for the deaf and deaf-blind.

Ms. Barnhard was named the NAELA-NJ Member of the Year in 2020. She has lectured on elder law issues for ICLE.

Ms. Barnhard received her B.S., *cum laude*, from Ithaca College and her J.D. from Western New England College of Law. She also has a Specialty Certification in American Sign Language Interpreting.

Jonathan Bressman is a senior level attorney at Archer Law Office in Florham Park, New Jersey. His practice is primarily focused in estate planning and estate administration, special needs planning, Medicaid eligibility planning and tax matters.

Admitted to practice in New Jersey, Mr. Bressman has been a member of the National Association of Elder Law Attorneys (NAELA), the American Bar Association's Real Property, Probate & Trust Law and Taxation Sections, and the New Jersey State Bar Association's Real Property, Probate & Trust Law, Elder Law and Taxation Sections. He has lectured for ICLE, the New Jersey Society of Certified Public Accountants and local organizations, schools and brokerage firms.

Mr. Bressman received his B.A. from Lehigh University, where he was elected to *Sigma Tau Delta*, and his J.D. from Temple University School of Law.

Catherine DeAppolonio is Corporate Compliance Officer at NJ Sharing Network in New Providence, New Jersey, and is responsible for the identification, evaluation and treatment of risk within the organization. She directs all legal aspects of policies and procedures, and educates staff as needed.

Admitted to practice in New Jersey, Ms. DeAppolonio spent 16 years in private practice where she focused in civil litigation, employment defense, public entity defense and law enforcement defense. She has appeared in state and federal courts, and is a former member of the District XII Ethics Committee. She has supported organ donation since her best friend and college roommate became an organ donor after her sudden death at age 20.

Ms. DeAppolonio received her J.D. from Albany Law School, Union University.

Brenda Lee Eutsler is the sole Shareholder of Brenda Lee Eutsler & Associates, P.A. in Cherry Hill, New Jersey. She concentrates her practice in probate and estate administration, estate and trust litigation, estate planning, guardianships, elder law and residential real estate. She also provides mediation services in litigation matters.

Ms. Eutsler is Past President of the Camden County Bar Association and Foundation, and served for 10 years as Co-Chair of the Camden County Bar Association Probate & Trust Committee. She is Co-Chair of the New Jersey State Bar Association Women in the Profession Committee and has served on the District IV Ethics Committee. Prior to becoming a lawyer she worked as an estates and trusts paralegal and also served as Deputy Surrogate of Camden County for 5 years.

An adjunct professor at Rutgers Law School-Camden and Faculty Advisor for the Estates & Trusts Society, Ms. Eutsler is a frequent lecturer for state and county bar associations, and coordinates the Wills for Heroes Program presented annually by the CCBA and Rutgers Law Estates and Trusts Society, which prepares free Wills and estate planning documents for first responders. She is the recipient of the Joseph M. Nardi, Jr. Distinguished Service Award from the Rutgers Law School-Camden Alumni Association, the Professional Lawyer of the Year Award bestowed by the Camden County Bar Association and several other honors.

Ms. Eutsler received her B.S., *summa cum laude*, from Rutgers University Business School and her law degree, *cum laude*, from Rutgers University Law School-Camden.

James R. Fridie III is the founder and owner of Fridie Law Group in Voorhees, New Jersey, a full-service litigation firm with a concentration in family law, criminal law, elder law, trusts and

estates, and municipal court matters (including DWI and moving violations). He appears in Superior and municipal courts throughout the state but mostly in central and southern New Jersey.

Mr. Fridie is admitted to practice in New Jersey and before the United States District Court for the District of New Jersey. He is a member of the New Jersey State, Camden County and Burlington County Bar Associations, and is the recipient of several honors.

Mr. Fridie received his B.A. from Howard University and his J.D. from Penn State's Dickinson School of Law.

Daniel J. Jurkovic, Certified as an Elder Law Attorney by the National Elder Law Foundation, is a solo practitioner in Rutherford, New Jersey. His practice areas include elder law, guardianships, Medicaid planning, Medicaid qualification, disability planning, estate planning and estate administration.

Admitted to practice in New Jersey and New York, Mr. Jukovic has been a member of the New Jersey State Bar Association and is a former Secretary of the Association's Elder and Disability Law Section. He has lectured for ICLE, the National Business Institute, Lorman Educational Services, the New Jersey State Bar Association, county bar associations and numerous local social and civic organizations.

Mr. Jurkovic received his B.A. from Thomas Edison State College, his M.S. in Industrial and Labor Relations, with a specialization in Negotiating Strategy, from Cornell University, and his J.D. from Pace University School of Law, where also received his Certificate in Health Law Policy.

Bren Pramanik is the Acting Litigation Manager and Managing Attorney of the Institutional Rights Team at Disability Rights New Jersey in Trenton, New Jersey. The team engages in individual and systemic litigation, policy work and education to protect the rights of individuals living in institutional settings in New Jersey.

Mx. Pramanik's team published a report of individuals with intellectual and developmental disabilities in nursing homes, and filed a federal *Olmstead* lawsuit related to New Jersey's psychiatric hospitals. They have experience litigating in federal and state court, and writing legal analysis and legal education materials for a variety of audiences. Prior to working with Disability Rights New Jersey, they worked as an Assistant Public Defender for the Office of the Public Defender of New Jersey.

Mx. Pramanik received their B.A. from Rider University, where they were selected to several honor societies, and their J.D. from Villanova University's Charles Widger School of Law, where they were President of the Law School's Merit Scholarship Honor Board. They clerked for the Honorable Joseph L. Rea, New Jersey Superior Court, Criminal Division, Middlesex County.

Pamela A. Quattrone, MBA, Certified as an Elder Law Attorney by the ABA-accredited National Elder Law Foundation, is a Partner in Rice & Quattrone, P.C. with offices in Cherry Hill and Linwood, New Jersey. She concentrates her practice in estate, tax and long-term care planning; estate administration; guardianship; and litigation related to these areas. She has experience

drafting several estate planning instruments, including Wills, trusts, durable powers of attorney and advanced directives for health care.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey, Ms. Quattrone has been a member of the New Jersey State, Gloucester County and Camden County Bar Associations, and the National and New Jersey Academies of Elder Law Attorneys. She has been a contributor to FamilyAffaires.com, an online resource which provides expert content to families in transition, and is the author of "The Potential Pitfalls of Giving Away Your Assets" and "Time Share Headaches: What Happens to My Time Share When I Die?" She has lectured for community organizations.

Ms. Quattrone received her B.S. from Rowan University, her M.B.A. from the University of Denver Daniels College of Business and her J.D. from the University of Denver Sturm College of Law. During law school she was an editor of the *Transportation Law Journal* and an Honors Law Intern for the United States Securities and Exchange Commission's Central Regional Office in Denver, Colorado.

Ryann M. Siclari, Certified as an Elder Law Attorney by the ABA-accredited National Elder Law Foundation, is counsel to Porzio, Bromberg & Newman, P.C. in Morristown, New Jersey, and a member of the Wealth Preservation Group. She concentrates her practice primarily in elder and disability law, including long-term care, government benefits planning and advocacy, estate and trust administration, and estate planning. She counsels the aging and disabled or their families regarding the goals of having sufficient health care coverage, the ability to age in place and preserving assets against possible long-term care costs.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey, Ms. Siclari is also a Veterans Administration Accredited Attorney. She is Past Chair of the New Jersey State Bar Association's Elder Law Section, where she has also served as Roundtable and Legislative Coordinator, and is a former Trustee of the New Jersey Chapter of the National Academy of Elder Law Attorneys (NAELA). She has lectured on elder law topics to attorneys and community organizations.

Ms. Siclari received her B.A., *magna cum laude*, from the University of Alaska, Fairbanks, and her J.D., *magna cum laude*, from Widener University School of Law, where she was Styles Editor of *The Delaware Journal of Corporate Law* and the recipient of the Dean's and Outstanding Service Awards. She received her LL.M. in Elder Law, with Distinction, from Stetson University College of Law.

Rubin M. Sinins, Certified as a Civil and Criminal Trial Attorney by the Supreme Court of New Jersey, is a Partner in Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. in the firm's Springfield, New Jersey, office. He concentrates his practice in the defense of complex investigations, civil complaints and criminal charges; and the prosecution of civil claims including fraud, breach of contract, wrongful termination, whistleblower actions, invasion of privacy, defamation, wrongful death, personal injury and sexual abuse.

Mr. Sinins is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern District of New York, the Third Circuit Court of Appeals and the United States Supreme Court. A Fellow of the American College of Trial Lawyers, he is Past President of the Essex County Bar Association, Past Chair of the ECBA

Judicial and Prosecutorial Appointments Committee and serves as the Essex County member of the Statewide Judicial and Prosecutorial Appointments Committee of the New Jersey State Bar Association. Mr. Sinins is also a member of the Supreme Court of New Jersey Board on Attorney Certification and its Board on Continuing Legal Education. Past Chair of the District V-B Ethics Committee, he served as Co-Chair of the New Jersey Association for Justice's Criminal Section for 15 years.

Mr. Sinins has lectured extensively on litigation matters at continuing legal education programs for bar associations and other organizations. He is the recipient of the Legal Leadership Award bestowed by the American Civil Liberties Union of New Jersey Foundation as well as several other honors.

Mr. Sinins received his B.A. and M.A. from the University of Pennsylvania and his J.D. from the George Washington University National Law Center, where he was Notes Editor of the George Washington Law Review. He served as research associate to the Honorable A. Leon Higginbotham, Chief Judge (now retired) of the Third Circuit Court of Appeals.

Jacqueline Yarmo is an associate with Pashman Stein Walder Hayden P.C. in Hackensack, New Jersey. She concentrates her practice in elder law, guardianship, asset preservation (with or without Medicaid applications) and estate planning and administration.

Prior to joining Pashman Stein, Ms. Yarmo worked with Fink Rosner Ershow-Levenberg Marinaro LLC, Mandelbaum Barrett, P.C., The Law Office of Sharon Rivenson Mark, Esq., Central Jersey Legal Services and the Jewish Association Serving the Aging Community Guardian Program (New York City). She has been involved in the Verona Schools Community Association and the Music Parents Association.

Ms. Yarmo received her B.F.A. from Boston Conservatory and her law degree, *cum laude*, from Rutgers Law School. She was a law clerk to the Honorable Randal C. Chiocca, Chancery Division, Passaic County.

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