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IVERNA M. HARMS, BY AND THROUGH NANCY D. FANGMEIER, HER ATTORNEY IN FACT AND NEXT FRIEND, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEE.

824 N.W.2d 772

Filed January 8, 2013. No. A-12-170.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law: Appeal and Error.** An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded with directions.

Daniel L. Werner, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and John L. Jelkin for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

The Nebraska Department of Health and Human Services (DHHS) determined that Iverna M. Harms was required to contribute $665.38 per month toward her medical care under Medicaid. The district court affirmed the determination of DHHS, and Harms appeals. For the following reasons, we

reverse the judgment of the district court and remand the cause with directions.

BACKGROUND

In 1992, Harms and her husband, who is now deceased, conveyed their farm property to their daughter, Nancy D. Fangmeier, subject to a life estate. At that time, Harms and her husband were living in the house on the farm. Under the terms of the life estate, Harms and her husband were responsible for the payment of taxes, insurance, upkeep, and repairs. The legal description of the property includes farmland, a house, a grain bin, and miscellaneous outbuildings.

In 2001, Harms and her husband negotiated a lease of the farmland while they remained in the home. The lease provided that the tenant could occupy and use for agricultural purposes 160 acres of farmland and 85 acres of pasture. It also provided that "the grain bin on the property is considered" part of the agreement and could be used by the tenant. The house and other outbuildings are not specifically mentioned in the lease; however, throughout the relevant time period, the tenant used the land surrounding the house to enter the property, park farm machinery, and obtain access to the toolshed and barn. The land was leased at $60 per acre for farm ground and $1,000 for the pasture. The lease required the tenant to spray the pasture for noxious weeds and keep the fences surrounding the pasture in good condition.

In 2009, Harms moved to an assisted living facility, and the house has since remained unoccupied. Harms depleted her other investments, and she applied for Medicaid benefits on May 11, 2010. Her application was approved on June 1. To calculate Harms' 2009 net income, DHHS took the $10,600 Harms received in cash rent from the lease and deducted her expenses for insurance in the amount of $644 and property taxes in the amount of $3,799.65. After factoring in Harms' Social Security income, the cost of her room and board at the assisted living facility, and an amount for her personal needs, DHHS determined that Harms was eligible for Medicaid assistance and that her share of the cost was $665.38 per month.

DHHS did not deduct all of the expenses Harms had listed on her 2009 federal tax return for the farm. These additional expenses included $84 for machine work, $1,465 for depreciation of a lawnmower and trailer to mow the grass around the buildings, $382 for gasoline for mowing and Fangmeier's drive to the property to perform maintenance and repairs, $500 for labor paid to Fangmeier, $598 for repairs and maintenance of the lawnmowers and toolshed, $381 for supplies such as parts and rodent control, and $30 for truck expenses. Harms also requested that the following expenses not included on the 2009 tax return be deducted: $1,026.82 for 2009 electrical expense paid in January 2010 for the outside yardlight and grain bin, $252 for extermination, $240 for tax preparation, and any legal fees. The additional expenses total approximately $4,958.82.

An administrative hearing was conducted on August 27, 2010, in which Harms requested that the additional expenses noted above be deducted from the rental income.

Fangmeier, who is Harms' attorney in fact through a power of attorney, testified that the disallowed expenses related to the upkeep of the farm premises, not to the upkeep of the house, and should have been deducted from Harms' income. Fangmeier testified that the expenses Harms requested be deducted were necessary for the production of farm income and that if Harms is not allowed to deduct these expenses, then she will not be able to afford to pay for the upkeep of the farm premises in addition to her portion of Medicaid.

Fangmeier testified regarding the various expenses sought to be deducted. She indicated that the $1,026.82 paid for electricity in 2009 resulted in part from the use of an outside light which prevents vandalism of the buildings and in part from electricity used in the grain bin by the tenant. The DHHS social service worker testified that she was not aware that the electricity was, in part, used by the tenant for the drying of grain. However, she testified that because the lease does not indicate that electricity will be provided to the tenant, she probably would not deduct that expense even though use of the grain bin is specified in the lease.

Fangmeier's testimony indicated that the expenses for mowing and gasoline enable Harms to keep the property in good repair, provide areas for the tenant to park equipment on the farmsite, and keep the property safe. Fangmeier and her husband mow the property around all of the buildings, which takes "over an hour and a half" to complete with two mowers. Fangmeier estimated that if any of the cost is attributable to the mowing of the yard which is by the house, it would be a minor amount.

Fangmeier testified that the cost of repairs made to the machine shed was necessary because the insurance company would not insure the building unless it was repaired. The shed is available for use by the tenant.

Finally, Fangmeier testified that rodent control and extermination were required on the property because of rodents drawn to the grain bin. The tenant complained about rats in the barn and around the grain bin. Harms paid for poison, and eventually, she needed to hire someone to spray for rodents.

Following the administrative hearing, the hearing officer affirmed DHHS' original calculation method and Harms' share of the Medicaid costs. Harms appealed to the district court for Lancaster County. A hearing was held on October 26, 2011, and the district court affirmed the decision of DHHS on January 30, 2012. The court found that the tenant paid rent only for the use of the pasture and farmland. The court found that the other parts of the property do not produce income, despite the tenant's "occasional use" of the yard, grain bin, and outbuildings. The court also found that Harms' duty to maintain the house, yard, and outbuildings as part of her life estate is unrelated to her rental income and should not be deducted.

ASSIGNMENT OF ERROR

Harms assigns, consolidated and restated, that the district court erred when it failed to deduct certain expenses relating to her life estate.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure

Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[4,5] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.* An appellate court accords deference to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent. *Id.*

ANALYSIS

Under the Nebraska Administrative Code, income resulting from a life estate is considered unearned income and expenses specified as a condition of the life estate are deducted from gross income. See 469 Neb. Admin. Code, ch. 2, § 010.01H (2009). The amount of net income in turn determines the level of Medicaid benefits to which an applicant is entitled. See 469 Neb. Admin. Code, ch. 2, § 010 (2009). In this case, the deed conveying the farm real estate to Fangmeier reserved a life estate interest for Harms subject to the payment of taxes, insurance, upkeep, and repairs. In its calculation of Harms' net income, DHHS deducted expenses only for insurance and property tax from the income received from the lease.

Harms argues that additional expenses should have been deducted from the lease income for maintenance, repairs, and electricity, which she is required to provide as a condition of the life estate and as part of her responsibilities under the lease. DHHS argues that these expenses may not be deducted because they do not relate to the lease income.

The example that DHHS relied upon comes from a page of the "[DHHS] Manual," which page was entered as an exhibit and states in part as follows:

> Example 1: Client in a nursing home has a life estate interest in a farm and a house in town. The house in town is not being rented out, but a grandson is living there rent free. The farm is being rented out for an annual cash rent total of $8,000. There is a copy of this cash rent agreement in the case file. The real estate taxes on the farm are $1,500 per year. The insurance on the farm is $500 per year.
>
> We do not allow any expenses on the house in town because it is not producing any income. The farm net income is:
>
> $8,000 cash rent – $2,000 (taxes and insurance) = $6,000 divided by 12 = $500 per month.
>
> Total countable monthly unearned life estate income is $500 per month.

In the foregoing example, there are two separate and distinct pieces of property that are situated at different locations: one that is subject to a lease and another that is not. In the present case, the property lines are not so distinct. The farmland is one contiguous piece of property, consisting of the farm ground, pasture, house, and various outbuildings.

The real estate taxes allowed as a deduction by DHHS are for the entire tract of real estate. Likewise, the property insurance, allowed as a deduction by DHHS in its entirety, includes coverage for the house, barn, toolshed, garage, and grain bin. The grain bin is specifically included as part of the lease, and there was evidence presented that the barn, toolshed, garage, and surrounding land were also used by the tenant. The electricity does not power the house, but, rather, is used to provide outside lighting to the property, including part of the land in the lease, to protect it from vandalism. The electricity also is used in the grain bin which is used by the tenant per the lease.

Additionally, the mowing and related expenses include upkeep for the land used by the tenant, and Fangmeier testified that any amount which is related to the house is minimal.

Additionally, the cost of the extermination and related expenses were directly linked to the tenant's use of the land and were completed at the request of the tenant. There was no evidence presented which contradicted these assertions.

In reaching its decision, DHHS partially relied upon the fact that the allocation of these additional expenses was not contained in the lease as support for its determination that they were unrelated to the rental income. However, this focus is misplaced. Clearly, Harms as lessor was paying for these additional expenses as associated costs of maintaining the premises as a whole for the benefit of the lessee. Although the lease does not specify who is responsible for these expenses, it is clear that Harms has implicitly agreed to do so and has, in fact, done so for a number of years.

While deference is to be given to DHHS' interpretation of the regulation in question, we find that its interpretation of the regulation based upon the example in the manual is clearly erroneous, because the example is not consistent with the facts presented in the instant case. In this case, the evidence shows that the expenses submitted by Harms are specified as a condition of the life estate granted to Harms and are reasonably necessary to maintain the income-producing portion of her life estate. Further, DHHS' own approach to the expenses in this case is inconsistent, because it allowed some expenses associated with the entire premises, not just the farm ground and pasture, while disallowing other such expenses. Specifically, the deduction for real estate taxes and property insurance allowed by DHHS was for the entire premises, including the house and outbuildings. The failure to allow a deduction for expenses for maintenance, repairs, and electricity for the premises which are utilized by and for the benefit of any tenants is inconsistent and arbitrary. Accordingly, we find that the district court erred in affirming the determination by DHHS that expenses for maintenance, repairs, and electricity should not be deducted from Harms' lease income.

CONCLUSION

The district court erred when it affirmed DHHS' determination that Harms' expenses for maintenance, repairs, and

electricity should not be deducted from her income when computing her share of medical expenses under Medicaid. The judgment of the district court is reversed, and the cause is remanded with directions to reverse the determination made by DHHS and to remand the cause to DHHS for a determination of benefits consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ESTATE OF DONNA MAE HANSEN, BY AND THROUGH ITS SPECIAL ADMINISTRATOR, PEGGY ANN WIMER, AND ESTATE OF GEORGE ALFRED HANSEN, BY AND THROUGH ITS SPECIAL ADMINISTRATOR, PEGGY ANN WIMER, APPELLANTS, V. DONALD L. BERGMEIER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALBERTA J. BERGMEIER, DECEASED, APPELLEE.

825 N.W.2d 224

Filed January 8, 2013. No. A-12-186.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
3. **Decedents' Estates: Claims.** The Nebraska Probate Code provides two methods of presenting a claim against a decedent's estate: Under Neb. Rev. Stat. § 30-2486(1) (Reissue 2008), a claim can be presented by filing a written statement thereof with the clerk of the probate court, or under § 30-2486(2), a claim can be presented by commencing a proceeding against the personal representative in any court which has jurisdiction.
4. **Decedents' Estates: Liability: Damages.** The potential liability of a decedent, without establishment of liability and amount of damage, does not constitute a direct legal interest in the estate of the deceased.
5. **Decedents' Estates: Limitations of Actions: Insurance.** The time limits under Neb. Rev. Stat. § 30-2485 (Cum. Supp. 2012) for presentation of claims are not applicable when the recovery sought is solely limited to the extent of insurance protection.
6. **Decedents' Estates: Limitations of Actions: Liability: Insurance: Notice.** A claimant who has a claim for the proceeds of a decedent's liability insurance under Neb. Rev. Stat. § 30-2485(c)(2) (Cum. Supp. 2012) is entitled to have the