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Short Form Order

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

In the Matter of ANTHONY F. CORRERI,

Petitioner,

for a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

COMMISSIONER OF THE N.Y.S.
DEPARTMENT OF HEALTH, and
COMMISSIONER OF NASSAU COUNTY
DEPARTMENT OF SOCIAL SERVICES.,

Respondents.

TRIAL/IAS, PART 22
NASSAU COUNTY

Index No.: 017372/04

Motion Seq. No.: 001

Motion Date: 04/26/05

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The following paper read on this motion:

- Notice of Petition x
- Verified Answers and Objections..... x x
- Memorandum of Law..... x

Petition pursuant to Article 78 of the CPLR for an order reversing the Amended Decision After Fair Hearing of the designee of the Commissioner of the New York State Department of Health, Philip Nostramo, dated September 23, 2004, and directing the Commissioner to direct the Nassau County Department of Social Services to comply with the Decision After Fair Hearing of the Commissioner's designee, Susan Grimes, dated June 18, 2004, is granted.

Petitioner is an 88 year old resident of the White Oaks Nursing Home in Woodbury, New York. On September 30, 2003 petitioner applied for medicaid benefits to cover the cost of his nursing home care. On January 21, 2004 he transferred all of his assets, including his net available monthly income ("NAMI"), consisting of social security and pension income totaling

\$3,118.13 per month, to a Supplemental Needs Trust, which he established for the benefit of his daughter, Jeanne Pollicelli, who is disabled. On April 7, 2004 the Nassau County Department of Social Services accepted his application but prepared a patient budget which determined his NAMI to be \$3118.13 and requiring him to contribute that amount towards his nursing home expenses.

On June 9, 2004 petitioner received a Fair Hearing to challenge this determination and on June 18, 2004 the Commissioner's designee, Susan Grimes, issued her Decision After Fair Hearing reversing the agency's determination regarding their requirement that the petitioner contribute his transferred income towards his nursing home expenses. Thereafter, the New York State Department of Health, which supervises the local departments of social services throughout the state with regard to their handling of applications for medicaid assistance, sought reconsideration of the June 18, 2004 decision and provided the Commissioner's new designee, Philip Nostramo, with a copy of a letter dated February 6, 2004 which had been requested by the Director of the New York State Office of Medicaid Management, Betty Rice, and received from Glenn Stanton, the Acting Director of the Disabled and Elderly Health Programs Group of the Federal Department of Health and Human Services, Center for Medicare and Medicaid Services, opining that only the income and resources of the medicaid applicant placed in a trust for the benefit of the applicant could be exempted from consideration and that the petitioner's income was therefore not exempt as it was placed in such a trust for the benefit of his daughter. Mr. Nostramo then issued an Amended Decision After Fair Hearing reversing the June 18, 2004 decision of Ms. Grimes and reinstating the agency's determination that the petitioner's income was not exempt and that he be required to contribute this amount towards his nursing home expenses. This Article 78 proceeding ensued.

The scope of the Court's authority to review the agency's determination in this matter is limited to an inquiry as to whether respondents' decision was rationally based on the record before it or whether that it was arbitrary or capricious. (*Rockland Medilabs Inc. v. New York State Dept. of Social Services*, 186 AD2d 953) The Court may not substitute its judgment for that of respondents. (*Hoffman v. Town Bd. of Town of Queensbury*, 255 AD2d 752; *Matter of Karanja v. Perales*, 163 A.D.2d 264, lv. denied 76 N.Y.2d 715)

Social Services Law § 366(5)(d)(1)(I) provides:

"assets" means all income and resources of an individual and of the individual's spouse, including income or resources to which the individual or the individual's spouse is entitled but which are not received because of action by: the individual or the individual's spouse; a person with legal authority to act in place of or on behalf of the individual or the individual's spouse; a person acting at the direction or upon the request of the individual or the individual's spouse; or by a court or administrative body with legal authority to act in place of or on behalf of the individual or the individual's spouse or at the direction or upon the request of the individual or the individual's spouse.

Department of Social Services Regulation 18 NYCRR 360-4.4(c)(2)(i)(a) implements the Social Services Law in virtually identical language. Social Services Law § 366(5)(d)(3)(ii)© further provides:

In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual or the individual's spouse for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services for the period of time specified in subparagraph four of this paragraph. Notwithstanding the provisions of this subparagraph, an individual shall not be ineligible for services solely by reason of any such transfer to the extent that:
the assets:

were transferred to the individual's child who is blind or disabled, or to a trust established solely for the benefit of such child.

Department of Social Services Regulation 22 NYCRR 360.4-4(c)(2)(iii)(c)(iii) also implements the Social Services Law in nearly identical language. The Decision After Fair hearing issued June 18, 2004 clearly applied the plain language of the Social Services Law and the regulations promulgated thereunder. The Social Services Law and the ensuing regulations were designed to implement federal law regarding medicaid eligibility. 42USC 1396p (c)(2)(B)(iii) regarding transfers of assets provides:

Taking into account certain transfers of assets:
An individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that the assets--
were transferred to, or to a trust (including a trust described in subsection (d)(4) of this section) established solely for the benefit of, the individual's child described in subparagraph (A)(ii)(II), or...

Subparagraph (A)(ii)(II) of the code describes children under age 65 who are blind or disabled.

The respondents have never challenged petitioner's claim that his daughter so qualifies.

The Amended decision dated September 23, 2004 relied on a letter dated February 6, 2004 from an acting director at the Centers for Medicare and Medicaid Services as to an interpretation he placed on the federal statute which flies in the face of both the plain language of the federal code and the plain language of New York State law and regulations. The respondents point to no statute or regulation of either the federal or state government which supports its interpretation. Such informal opinion letters are entitled to but slight deference (*Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655; *Reno v. Koray*, 515 U.S. 50, 61, 115 S.Ct. 2021) and only to the extent that those interpretations have the "power to persuade". (*Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161; *Madison v. Resources for Human Development, Inc.*, 233 F.3d 175)

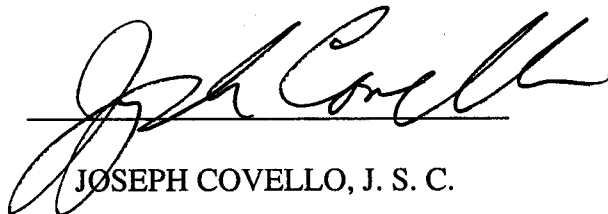
Accordingly, the Court finds that the Amended Decision After Fair Hearing dated

September 23, 2004 was arbitrary and capricious as it is, on its face, contrary to the law and regulations which govern medicaid eligibility. The decision is therefore reversed and the Commissioner is directed to comply with the terms of the Decision After Fair Hearing dated June 18, 2004. In as much as the Court's resolution of this petition turns on issues of law, the application to transfer this matter to the appellate division is denied. (*Matter of Ideal Corp. v New York State Tax Commn.*, 132 AD2d 419, lv denied 71 NY2d 804; *CVS Discount Liquor, Inc. v. New York State Liquor Authority*, 207 AD2d 891; *Dubb Enterprises Inc. v. New York State Liquor Authority*, 187 AD2d 831)

This constitutes the decision and order of the court.

This concludes this proceeding.

Dated: May 19, 2005



JOSEPH COVELLO, J. S. C.

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ENTERED
MAY 26 2005
NASSAU COUNTY
COUNTY CLERK'S OFFICE
BY FILE