APR 2 8 2006

STEPHEN A. FERRADINO
JUSTICE

STATE OF NEW YORK
SUPREME COURT CHAMBERS
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KIMBERLY A. CROW
SECRETARY TO JUSTICE

April 27, 2006

Pierro & Associates, LLC
20 Corporate Woods Blvd.
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Jeffrey M. Dvorin, Esq.
Eliot Spitzer, Attorney General
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Re: Giaquinto v. Commissioner of NYS DOH
RJI No. 01-06-ST6334
Index No. 7220-05

Dear Counselors:

Enclosed please find a Decision and Judgment signed by the Hon. Stephen A. Ferradino in regard to the above. All papers, including this Decision and Judgment, are being returned to the attorney for the petitioner. The signing of this Decision and Judgment shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

If you have any questions, please contact Chambers.

Very truly yours,

Kimberly A. Crow
Secretary to Hon. Stephen A. Ferradino

Encl.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
DOMINIC GIAQUINTO,

Petitioner,

For a Judgment Pursuant to
CPLR Article 78

DECISION and JUDGMENT
RJI # 01-06-ST6334
Index # 7220-05

-against-

COMMISSIONER OF NEW YORK STATE
DEPARTMENT OF HEALTH AND THE
COMMISSIONER OF THE MONTGOMERY
COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondents.

APPEARANCES

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STEPHEN A. FERRADINO, J.

Petitioner commenced this CPLR Article 78 proceeding to review a determination which denied his Medicaid application and the directive of the New York State Department of Health (NYSDOH) to purchase a single premium life annuity to generate sufficient monthly income for the benefit of petitioner's wife. Petitioner alleges the determination of NYSDOH is arbitrary and capricious. The NYSDOH opposes the

petition. Respondent, Commissioner of the Montgomery County Department of Social Services (MCDSS) has not opposed the petition.

The petitioner and his wife are residents of Montgomery County. In June 2004, petitioner became institutionalized (the "institutionalized spouse") and his wife (the "community spouse") remained in the marital residence. In a notice dated November 8, 2004, MCDSS determined petitioner was not eligible for Medicaid for nursing facility services as of August 2004 as he had excess resources in the amount of $54,032.66 and excess income in the amount of $124.48. Petitioner requested a fair hearing on November 16, 2004. On April 14, 2005, NYSDOH affirmed the decision of MCDSS denying the Medicaid application for excess resources. However, NYSDOH remanded the matter to MCDSS and directed it to determine the community spouse resource allowance (CSRA) by utilizing the purchase of a single premium life annuity to generate sufficient income to provide the minimum monthly maintenance needs allowance (MMMNA) for the community spouse.

To prevent the impoverishment of the community spouse the Medicare Catastrophic Coverage Act requires the community spouse be allotted a minimum level of monthly income refereed to as the "minimum monthly needs allowance" (MMMNA) *see*, 42 USC § 1396r-5[d][3]; Social Services Law § 366-c[2][h]. The community spouse is also entitled to a "community spouse resource allowance" (CSRA) to protect him or her from being forced to spend down his or her assets to qualify the institutional spouse for Medicaid. *see*, 42 USC § 1396r-5 [f][2]; Social Services Law § 366-c[2][d]. Income permitted to be transferred from the instutionalized spouse to the community spouse, known as the "community spouse monthly income allowance (CSMIA), is not utilized in

calculating the institutionalized spouse's income to offset nursing home or other medical costs. *see*, 42 USC § 1396r-5(d)(1). Only resources of the couple in excess of the community spouse resource allowance are taken into account in determining the institutionalized spouse's eligibility. *see*, 42 USC § 1396r-5[c][2]. The community spouse must be left with a sufficient amount of resources.

Petitioner alleges by insisting that he purchase a single premium immediate life annuity in order to increase the CSRA and to provide his wife with sufficient MMMNA is a new rule created by NYSDOH and is in violation of the New York State Procedure Act. Petitioner alleges that the NYSDOH had failed to comply with the procedures and requirements of the State Administrative Procedure Act (SAPA) § 202.

Respondent contends that the directive of NYSDOH to utilize a single premium life annuity is done on a "case by case basis and represents an interpretation of the existing statutory requirements". Respondent alleges that by directing the usage of an annuity to increase the CSRA for the community spouse does not establish a new rule. Respondent alleges the annuity method is not an across-the-board policy but rather one of several methods that can be utilized in establishing an excess resource allowance.

The judicial standard of review of administrative determinations pursuant to CPLR Article 78 is whether the determination is arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken "without sound basis in reason and . . . without regard to the facts." *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis. *Heintz v. Brown*, 80 NY 2d

998 (1992). The reviewing court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law. *Matter of Flacke v. Onondaga Landfill System*, 69 NY 2d 355 (1987); *Akpan v. Koch*, 75 NY 2d 561 (1990).

"When the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." *Matter of Flacke v. Onondaga Landfill System, supra, 363*. Moreover, in order to maintain the limited nature of review, it is incumbent upon the court to defer to the agency's construction of statutes and regulations that it administers as long as that construction is not irrational or unreasonable. *Albano v. Kirby* 36 NY 2d 526 (1975). The Court must give deference to and not substitute its judgment for factual evaluations within the agency's area of expertise. *Matter of Rodriguez v. Perales*, 86 NY 2d 361 (1995).

The Medicare Catastrophic Coverage Act provides protection for the community spouse from pauperization as a result of the institutionalization of his or her spouse. *Matter of Golf v. N.Y.S. Dept. of Social Services*, 91 NY 2d 656 (1998). The Act provided for an allowance to the community spouse's income in order to bring the community spouse's income up to a minimum monthly needs allowance specified in the statute. *see*, USC § 1396r-5[d]; *Schachner v. Perales*, 85 NY 2d 316 (1995).

Prior to 2005, the NYSDOH calculated the CSRA by determining the amount of assets which were required to generate interest or dividend income sufficient to provide the community spouse with the MMMNA. *see, Matter of the Appeal of Thomas D.*, 5/20/2004, FH#4062835Y; *Matter of Appeal of James T.*, 9/1/2004, FH case

#4150239M; *Matter of the Appeal of Charles C.*, 8/15/2003, FH case #3909199P. In *Matter of the Appeal of Charles C.*, the NYSDOH determined

> The Agency argued that $50,000 in resources would be sufficient to make up the shortfall in the community spouse's monthly income, reasoning that the community spouse could purchase an annuity for $50,000 that would generate monthly income of $416.67 per month based upon the community spouse's life expectancy of 10.24 years. While the argument is novel, there is absolutely no legal support in statute or regulation that would direct a community or institutionalized spouse to pursue a particular type of investment vehicle in order to maximize his or her return on investment. Accordingly, until such time as the legislature acts, the Agency argument must be dismissed without merit. (emphasis added)

The Department of Health clearly stated that it lacked any legal basis or authorization to direct a community or institutionalized spouse to purchase a particular type of investment. In this action, the NYSDOH has not explained its change of methodology in the calculation of the CSRA for the community spouse . When an agency alters its prior policy and interpretation of law, it must explain its reasons for doing so or its determination shall be reversed on the law as arbitrary. *Matter of Charles A. Field Deliver Service, Inc.*, 66 NY 2d 516 (1985).

NYSDOH's determination that the community spouse may attain the MMMNA with the purchase of a singe premium immediate annuity lacks a rational basis, is arbitrary and capricious and has no basis in law. *Hoffman v. Comm'r of the Erie Cty. Dep't of Soc. Servs. & Commr'r of the New York State Dep's of Health,* Erie County Special Term, Donna Siwek, J.S.C., dated December 2, 2005. Furthermore, "the Department has exceeded its legal authority because as pointed out in its prior ruling in *Matter of Charles C. (supra)*, it has no authority to direct petitioner to pursue a particular investment." *Parks v. Moon, et al,* Sullivan County Special Term, Robert A.

Sackett, J.S.C., dated February 14, 2005. After a review of the record, the Court concludes that the directive of the respondent to utilize a single premium life annuity to attain the MMMNA is arbitrary and capricious and lacks a rational basis. The Fair Hearing Decision dated November 8, 2004 and the determination of NYSDOH dated April 14, 2005 are hereby vacated.

Petitioner also seeks costs, disbursements and attorney fees pursuant to 42 USC §§ 1983, 1988. Petitioner is hereby awarded costs, disbursements and attorney fees. *Houssman v. Cirby*, 96 AD 2d 244 (1983). The attorney for petitioner is to submit an affidavit of services within two weeks from the date of this decision on notice to respondents.

The CPLR Article 78 petition is granted. Any relief not specifically granted is denied. This decision shall constitute the order and judgment of the Court. The original papers shall be forwarded to the attorneys for the petitioner for filing and entry.

Dated: April 27, 2006

Malta, New York

STEPHEN A. FERRADINO, J.S.C.

Papers Received and Considered:

Notice of Petition dated December 5, 2005

Verified Petition dated December 5, 2005 with attached exhibits

Petitioner's Memorandum of Law dated January 27, 2006 with attached exhibits

Verified Answer dated February 9, 2006 with attached exhibits

Respondents' Memorandum of law dated February 10, 2006

Affirmation of Louis W. Pierro, Esq. dated February 16, 2006 with attached exhibits