SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

In the Matter of the Application of
DORIS PARKS AND GEORGE PARKS,

Petitioners,

-against-

WILLIAM R. MOON, as Commissioner of the DELAWARE COUNTY DEPARTMENT OF SOCIAL SERVICES,
and
ANTONIA C. NOVELLO, M.D., as Commissioner of the NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents.

Decision, Order & Judgment
Index No.: 1288/05

RJI No.: 52-24086-05

Present: Robert A. Sackett, JSC

Appearances: Martin Hersh, Esq.
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Honorable Eliot Spitzer
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Sackett, J.:

Petitioners seek an order declaring the Fair Hearing Decision dated January 25, 2005 null and void on the grounds that it is in error of established law, arbitrary and capricious and also

directing that George Parks be allowed to retain an excess community spouse resource allowance of no more than $266,748.84. The Department opposes the petition; the Delaware County Department of Social Services has not responded.

When one spouse is institutionalized (the "institutionalized spouse") and the other is not (the "community spouse"), in order to prevent the impoverishment of the community spouse, "the [Medicare Catastrophic Coverage Act (MCCA) (42 USC § 1396r-5)] requires that the community spouse be allotted a minimum level of monthly income referred to as the 'minimum monthly maintenance needs allowance' or 'monthly need' (*see* 42 USC § 1396r-5 [d] [3]; Social Services Law § 366-c [2] [h]). The community spouse is also granted a 'community spouse resource allowance' to protect him or her from being forced to spend down owned assets to qualify the institutionalized spouse for Medicaid (*see* 42 USC § 1396r-5 [f] [2]; Social Services Law § 366-c [2] [d]). Only resources of the couple in excess of the community spouse resource allowance are taken into account in determining the institutionalized spouse's eligibility (42 USC § 1396r-5 [c] [2])" (Matter of Golf v New York State Department of Social Services, 91 NY2d 656, 659-660 [1998]).

Pursuant to Social Services Law 366-c(8)(c) and 18 NYCRR 360-4.10(c)(7), if the combined income of both spouses is below the minimum income level, the community spouse is allowed to retain resources in excess of the ordinarily allowable resource amount. The social services district determines the community spouse resource allowance ("CSRA") in accordance with a statutory formula. Upon demonstration of inadequate income generated by the CSRA, the Department of Health is required to establish an excess community spouse resource allowance adequate to provide the minimum monthly maintenance needs allowance ("MMMNA") from the resources available to provide for institutional care.

The undisputed facts are that petitioners are husband and wife residing in Delaware County. Doris Parks, the institutional spouse, has been in a nursing home since October 2003; George Parks, the community spouse, resides at home. Doris applied for medicaid for herself on December 1, 2003, requesting assistance beginning with that month. George, who is incompetent, refused through his attorney-in-fact to make his income and resources available to his spouse, thus triggering the opening of a medicaid case for Doris. As of January 1, 2004, the

combined available resources of the couple were $363,458.84. Using the legally established formulation at that time, Delaware County Department of Social Services ("DSS") computed the CSRA for George to be $92,760.00 and his excess resources to be $266,748.84. As of January 1, 2004, DSS calculated Doris' resources to be $11,080.87 and her available income to be $181.88. DSS calculated that the total monthly income available to George was $1,617.99 ($181.88 from Doris and $1,436.11 from his resources). For the year 2004, the community spouse's MMMNA was statutorily set at $2,319.00, leaving George $701.01 short.

DSS further determined that Doris did not have to contribute any of her income toward the cost of nursing home services. However, Doris was advised that she must contribute her excess resources to the extent of $6,725.76 for past and current nursing home care. DSS later revised it's findings, computing Doris's excess resources as of December 1, 2003 to be $7,270.67 and determining that Doris was not eligible for medicaid assistance for the month of December, 2003.

A Fair Hearing to review these DSS determinations was held on September 22, 2004. The Fair Hearing Decision reversed the denial of eligibility December 2003 because there was an issue of whether the proceeds from the sale of Doris's automobile were properly considered Doris' resources; DSS was directed to reevaluate Doris's medicaid eligibility for that month.

The Decision further held that the law requires the State to increase the community spouse's resource allowance to the extent necessary to generate income to bring him up to the MMMNA. In that regard, the Commissioner determined that:

> "the amount of excess resources needed in this case would be the amount needed for the community spouse to purchase a single premium immediate life annuity which would generate sufficient monthly income to raise the community spouse to the MMMNA. These excess resources are intended for the purpose of purchasing an annuity contract to provide the additional income needed to raise the community spouse to the MMMNA after having added together the community spouse's income, any contribution from the [institutionalized spouse], and the interest income generated by the $92,760.00 resource allowance."

The Commissioner awarded George "an additional resource allowance in the amount necessary for the community spouse to purchase a single premium immediate life annuity which will

generate monthly income in an amount sufficient to raise total monthly income to the MMMNA." The Commissioner did not compute this amount, but left it up to DSS to determine the size of the necessary single premium immediate life annuity. In compliance with the Decision, DSS notified petitioners that it had obtained a quote in the amount of $47,034.17 for a single premium immediate life annuity based on the life expectancy of George which would generate monthly payments of $702.00 for life only.

Petitioners assert that the decision is in error because: 1) it forces George to deplete his owned resources by purchasing an annuity which will generate monthly payments consisting of return of **principal and income**; 2) this allocation will not generate the necessary **income** to meet the MMMNA; 3) it unlawfully requires DSS to determine the amount of the annuity sufficient to produce the appropriate enhanced CSRA, when only the Department is authorized to establish the enhanced CSRA (see SSL 366-c[8][c];18 NYCRR 360-4.10[c][7]); 4) this method of computing the enhanced CSRA deviates from the prior policy of the Department and is not supported by legislation or regulation duly promulgated and filed, nor is the need for the deviation from prior policy explained in the decision.

Respondents do not dispute that through 2004, the Department arrived at the enhanced 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 e.g.* Matter of the Appeal of Thomas D., 5/20/2004, FH #4062835Y; Matter of the Appeal of James T., 9/17/2004, FH case #4150239M; Matter of the Appeal of Charles C., 8/15/2003, FH case #3909199P). In fact, in Matter of the Appeal of Charles C. the Department specifically rejected the single premium immediate life annuity method of enhancing the CSRA, stating that "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;" the Department concluded that until such time as there is a change in law by the legislature, the requirement of the purchase of an annuity in order to achieve the MMMNA is not authorized. There has been no change in Federal or State law which would support this change in methodology. The Department did not explain its departure from past policy in the Fair Hearing Decision herein nor, to this Court's knowledge, in any other decision applying the same

methodology. 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 Delivery Service, Inc. (66 NY2d 516 [1985]).

Respondents argue that the decision does not direct petitioner to purchase the single premium immediate life annuity; it merely increases the CSRA by an amount which such an annuity would cost. This argument begs the point. The Department has chosen to link the increased CSRA to a specific form of investment which yields a monthly payment equal to the shortfall. The Department ignores the facts that the purchase of such an annuity requires depletion of petitioner's resources and the payments on such an investment consist of **principal** and interest.

The Court agrees with petitioners that the Department has not merely changed its interpretation of law. 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. Further, in order to generate monthly income of $702.00, the excess CSRA established by DSS of $47,034.17 would have to earn annual interest at a rate of 17.9 %, which is unavailable in today's market. The Department's choice of investment to determine the amount of excess CSRA is without rational basis as the purchase of such an investment product would deplete petitioner's assets; and, neither the product nor the amount of money required to purchase the product, would generate sufficient income to meet the statutory mandate.

Finally, the Department held in Matter of the Appeal of James T. (*supra*) that 3.2% annually was a reasonable rate of return in computing the CSRA (*see also* Matter of Hoffman v Weiner, Sup. Ct., Erie County, Siwek, J., December 2, 2005, Index No.12005 9080). Applying that rate of return to George's resources will not meet the MMMNA. Consequently, a transfer from Doris to George of $8,500.00, the proceeds of the sale of Doris' automobile, should be allowed and those funds included in George's assets. George's resources will still be below a level which will generate the MMMNA. Doris' resources as of December 1, 2003 will be $2,626.47, making her eligible for medicaid as of December 1, 2003.

The record reflects that Doris has consented to contribute so much of her Social Security income as shall be required to augment George's income to the meet his MMMNA.

Consequently, the Court need not reach the issue raised in the seventh cause of action.

Accordingly, the Court finds that the Fair Hearing Decision dated January 25, 2005 is arbitrary, capricious, lacks a rational basis and is in error of law to the extent set forth above. The petition is granted and the Fair Hearing Decision dated January 25, 2005 is hereby declared null and void.

The Court further finds that in consideration of the undisputed evidence of the resources and income of petitioner George Parks as established at the hearing and herein, petitioner George Parks' CSRA is raised to the full amount of his excess resources as of January 1, 2004 as computed by DSS, that is $266,748.84.

Petitioners have also requested costs, disbursements, attorneys fees and sanctions. The Court hereby determines that sanctions are not merited. However, petitioners are entitled to costs, disbursements, and attorneys fees pursuant to 42 U.S.C. 1988 (*see* Houssman v Cirby, 96 AD2d 244[1983]). Counsel for petitioners is directed to submit an affidavit of services within two weeks of the date this decision on notice to respondents.

Therefore, it is

ORDERED & ADJUDGED that the petition is granted as above set forth with costs.

This shall constitute the decision, order and judgment of the Court. The original Decision, Order & Judgment and all papers are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

SO ORDERED & ADJUDGED.

Dated: Monticello, New York
February 14, 2006

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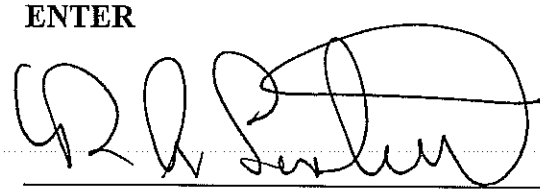

HON. ROBERT A. SACKETT, JSC

Papers considered:

Order to show cause dated May 11, 2005, verified petition dated May 10, 2005, affirmation of Martin Hersh, Esq. Dated May [no day], 2005; verified answer dated September 2, 2005, affirmation of Daniel Tarantino, Esq. Dated August 31, 2005; reply of Martin Hersh, Esq. Dated September 27, 2005, supplemental affidavit of Martin Hersh, Esq. Dated December 7, 2005.