

Sum

SHORT FORM ORDER AND JUDGMENT

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**In the Matter of
VIRGINIA KAISER,**

TRIAL PART: 50

Petitioner,

INDEX NO.: 4668/06

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

-against-

**MOTION DATE: 5-1-06
SUBMIT DATE: 7-10-06
SEQ. NUMBER - 001**

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

Respondents.

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The following papers have been read on this motion:

**Notice of Petition, dated 3-17-06.....1
Memorandum of Law in Support, dated 3-17-06.....2
Verified Answer and Objections, resp.
Comm. NYS Dept.of Health, dated 6-14-06.....3
Verified Answer and Objections, resp.
Comm. Nassau Cty. Dept. Social Svs., dated 6-14-06....4
Reply, dated 7-6-06.....5**

Upon the foregoing papers it is ordered and adjudged that this petition brought pursuant to Article 78 of the Civil Practice Law and Rules is granted and the decision after Fair Hearing is vacated. The petitioner's income shall be deposited in the Supplemental Needs Trust established for the benefit of her daughter, Stephanie Kaiser, in accord with and as directed in the order and judgment of the Court (Stack, J.) dated September 7, 2004, and such income shall not be considered as part of the petitioner's Net Available Monthly Income available to support her cost of care.

This is a proceeding to set aside a decision after a Fair Hearing affecting the calculation of the Net Available Monthly Income ("NAMI") available to pay for the petitioner's cost of care at the A. Holly Patterson Extended Care Facility. Specifically, the petitioner alleges, *inter alia*, that the determination of the designee of respondent Commissioner of the N.Y.S. Department of Health, Susan M. Grimes, to the effect that NAMI had to include income previously earmarked for deposit into the Supplemental Needs Trust ("SNT") established for her disabled daughter, was arbitrary and capricious and in violation of law. The Court agrees.

The essential facts are not disputed. The petitioner, Virginia Kaiser, was found to be an Incapacitated Person, and Debra Isler, Esq. was appointed guardian for her personal needs and property management pursuant to Article 81 of the Mental Hygiene Law (*Matter of Virginia K. [Isler]*, Nassau County index no. 27636-I-04, Sept. 7, 2004 [Stack, J.]). Virginia Kaiser currently resides in the nursing home noted above. Under Justice Stack's Order and Judgment ("Article 81 judgment") – which she directed to be served on the Nassau County

Attorney's Office and the Nassau County Department of Social Services – an application for Medicaid and Medicaid planning were referenced, and as part thereof an SNT was to be established for her adult disabled daughter, Stephanie Kaiser. The Article 81 judgment provided that “the income of VIRGINIA KAISER shall be deposited into the [SNT] for the benefit of Stephanie Kaiser, the Adult Disabled Child of Virginia Kaiser...” The Nassau County Department of Social Services (“NCDSS”), respondent herein, never sought to intervene or to appeal from the Article 81 judgment.

Isler, as Guardian, made submissions to the NCDSS in order to complete the Medicaid application, which included a copy of the Article 81 judgment. Ultimately, she received a budget statement that all of her ward's income (less certain small deductions) was to be paid to the A. Holly Patterson Extended Care Facility as NAMI. Isler requested a recalculation for a “zero dollar NAMI” to allow deposit of Social Security and pension benefits into the SNT in accord with the directions contained in Justice Stack's judgment. She also provided a copy of a judgment in another Article 78 proceeding (“*Correri* decision”), which also concerned such a request in a case with nearly identical facts. This was done to convince NCDSS – whose Commissioner was a respondent in that case as well – that what Isler sought was correct under the law.¹

NCDSS disagreed, and Isler was advised by way of letter from the Director of Medicaid for Nassau County that her request would not be granted, and that the *Correri* decision was not applicable to other Medicaid determinations. A Fair Hearing was held

¹ *Matter of Correri*, Nassau County index no. 17372/04 (May 19, 2005) [Covello, J.].

before Susan Grimes, designee of the respondent Commissioner of NYS Department of Health, and on November 18, 2005 she issued a decision based solely on an issue of law. In relevant part, she found as follows:

“...Appellant [petitioner] submitted documentation into the hearing that the Appellant’s income is being deposited into the supplemental needs trust. Such income deposited into the trust is exempt from any of the transfer provisions for purposes of Medical Assistance. However, in order to be exempt as income, the income must [be] diverted to a trust for the Appellant’s benefit. By letter dated September 23, 1997, the Department of Health clarified Administrative Directive 96 ADM 8, and provided that neither the Administrative Directive, nor the Regulations allow for the diversion of income to a trust for the benefit of any other individual. Therefore, the Agency’s determination... must be affirmed.

Appellant contended that a prior fair hearing on the same issue resulted in the Agency determination [being] reversed in an Article 78 proceeding. However, the result of that proceeding does not reflect the current policy of the Department of Health. Appellant’s contention is without merit.

DECISION

The Agency’s determination... of the Appellant’s contribution toward the cost of the Appellant’s care is correct.

The Social Services Law provides that in determining the Medicaid eligibility of an institutionalized individual, a local agency may not include an applicant’s assets (defined by both statute and regulation as “all income and resources”²) transferred to “the individual’s child who is blind or disabled, or to a *trust established solely for the benefit of such child or ... to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled*” (Social Services Law § 366.5(d)(3)(ii)(C),(D) [emphasis supplied]). This is consistent with federal law (42 USC § 1396p (c)(2)(B)(iii)). The regulations promulgated by the Department of Social Services similarly contain such an exception (18 NYCRR § 360-

² Social Services Law § 366.5(d)(1)(I); 18 NYCRR § 360-4.4(c)(2)(i)(a).

4.4(c)(2)(iii)(c)(1)(iii)).

The State Commissioner's Designee's statement that the income must be diverted to a trust for the Medicaid recipient's benefit to be exempt ignores the statute's clear language that such an exception also exists if the trust exists for the benefit of the recipient's disabled child. This was the conclusion reached by Justice Covello in *Correri*, with which the undersigned agrees.³

Respondents now argue, however, that even assuming that income deposited into a trust established for the benefit of the Medicaid recipient's disabled child should not be counted for Medicaid eligibility, *Correri* was nevertheless incorrectly decided because it failed to distinguish between eligibility and post-eligibility budgeting. They claim that another regulation, 22 NYCRR § 360-4.9, applies to the petitioner, and, consistent with federal rules addressing the subject of post-eligibility income deductions for institutionalized persons without a spouse in the community,⁴ contains no provision for deducting income that is placed in a trust excepted from consideration for eligibility purposes. In that regard, the respondent points to the State Medicaid Manual, at section 3259.7, subsection C 5, for the proposition that income going into the trust should be included for purposes of calculating income that should be used for the cost of care after eligibility has been established.

This argument finds absolutely no support in the law or regulations applicable to the trust at issue here. In effect, endorsing this position would permit such an "exception" trust

³ As Justice Covello's decision has been made a part of the record of this proceeding, this Court will not repeat his reasoning and the authority upon which he relied, but instead refers the parties thereto.

⁴ Respondent State Commissioner cites 42 CFR §§ 435.725 and 435.832.

to be established, but would then permit the income stream that would form its corpus to be choked off by requiring that income to be applied to the settlor's cost of care – leaving the trust an empty and meaningless shell. If that had been the Legislature's intent, "income" would have to be excluded as part of the settlor's assets for purposes of funding the trust, as "income," by its very nature, and as recognized by State regulations, can be recurring (*see* 18 NYCRR § 360-4.3(b)(1)).

There is no statutory provision to which the respondents can point that requires this classic bureaucratic Catch-22, or even suggests it. Indeed, such a statute would be contrary to federal law and Social Services Law § 366.5(d)(3)(ii), eviscerating trusts that depend on income where the settlor's income could not cover both a contribution to the total cost of care and the contributions to the trust. 22 NYCRR § 360-4.9 simply does not address income flowing into these permitted trusts and make the distinction urged by the respondents. The section of the Medicaid Manual cited above, while of some authoritative weight, does not specifically address the type of trust at issue. Even if it had, on its own it must be found insufficient to support the respondents' position absent some explanation as to how this would be consistent with the law and regulations that permit recurring income to fund "exception" trusts. While construction of statutes and regulations by an agency responsible for their administration generally will be upheld if not irrational or unreasonable, there is little basis for relying on any special competence or expertise of the agency where the matter is one of pure statutory construction and analysis (*Matter of Gaffney v Village of Mamaronenck*, 21 AD3d 1031 [2005]; *Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.*, 14 AD3d 553 [2005]).

In that regard, it is a basic rule of construction that statutes and regulations are to be harmonized, and not interpreted in a way that would leave one section without meaning or force (McKinney's Cons. Laws of New York, Book 1, Statutes, § 98; *Matter of Albano v Kirby*, 36 NY2d 526, 530). The State Commissioner Designee's decision would do the reverse, and thus cannot stand.

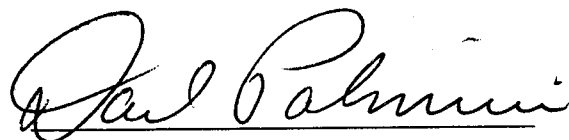
The Court would also add that, as noted above, NCDSS was on notice of the Mental Hygiene Article 78 proceeding and of Justice Stack's judgment, and took no action. Implicit in this response (or lack thereof) was that it and the County Attorney's office knew what Justice Stack had in mind about disposition of Virginia Kaiser's income, and found nothing that would require an objection.

Finally, the Court disagrees with the respondents that any result other than dismissal of the petition requires a transfer to the Appellate Division on a substantial evidence question. As noted by Justice Covello in his decision, the petition turns on issues of law and no such transfer need be made under such circumstances (*see, e.g., Matter of CVS Discount Liq. v New York State Liq. Auth.*, 207 AD2d 891 [1994]).

This shall constitute the Decision, Order and Judgment of this Court.

ENTER

DATED: July 24, 2006



HON. DANIEL PALMIERI

Acting Supreme Court Justice

ENTERED

JUL 28 2006

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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