

<b>Matter of Baez v Commissioner of Social Servs.</b>
2009 NY Slip Op 31093(U)
April 23, 2009
Supreme Court, New York County
Docket Number: 400026/0p
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: SHAFER  
Justice

PART 8

CANDIDO BAEZ

INDEX NO. 400026/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

- v -

Commissioner of Social Services

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is granted

and the cross-motion is denied in accord with the annexed memorandum.

**FILED**

APR 24 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/23/09

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

**PRESENT: HON. MARILYN SHAFER**  
*Justice*

**PART 8**

In the Matter of the Application of,

INDEX NO. 400026/0p

CANDIDO BAEZ,

MOTION DATE \_\_\_\_\_

Petitioner,

MOTION SEQ. NO. 001

For a Judgment Under Article 78 of the Civil Practice Law and Rules

-against-

COMMISSIONER OF SOCIAL SERVICES, HUMAN RESOURCES ADMINISTRATION, Office of Child Support Enforcement,

Respondent.

**FILED**  
APR 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK  
PAPERS NUMBERED

The following papers, numbered 1 to 4, were read on this petition:

Order to Show Cause – Affidavit – Exhibits

1,2

Cross-Motion – Affirmation – Exhibits

3

Opposition to Cross-Motion

4

**Cross-Motion:**     **Yes**     **No**

**Upon the foregoing papers, it is ordered that the petition is granted and the cross-motion is denied:**

Petitioner, who is incarcerated, challenges a final Support Collection Unit Determination for Child Support owed for petitioner's children, who have not resided in the State of New York for almost 20 years.

### Background

Petitioner has been in prison for 20 years and will not be eligible for parole until 2018.

In 1986, petitioner filed an application for an order of paternity and to provide child support to his two children. He was ordered to pay \$30.00 per week. He made only a few payments before he was arrested, on March 24, 1989, and sentenced to an indeterminate prison term of nineteen years to life. Sometime in 1990, the children moved, with their mother, Olga Moreno, to another state without providing a forwarding address.

Petitioner made continued and unsuccessful efforts to modify the Child Support order until he was granted a hearing, in July, 2008, which terminated the 1986 Child Support Order *nunc pro tunc* to 2006, without prejudice to arrears. Ms. Moreno has never made any request for child support and never appeared in any of the Family Court proceedings.

Following the hearing, petitioner was advised that he owed over \$30,000 in arrears. It is this determination sought to be reviewed.

Respondent cross-moves to dismiss or, in the alternative, to submit an answer to the petition.

### Discussion

Judicial review in an Article 78 proceeding is limited to a determination of whether the

administrative action complained of is arbitrary and capricious or lacks a rational basis. (*In re Application of Chelrae Estates, Inc v State Division of Housing and Community Renewal, Office of Rent Administration*, 255 AD2d 387, 389 [1<sup>st</sup> Dept. 1996] citing *Matter of Pell v Board of Education*, 34 NY2d 222, 230-231 [1974]) An Article 78 proceeding is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and “[t]he function of the court . . . is to determine . . . whether the determination had a rational basis in the record. (*In re Application of HLV Associates v Aponte*, 223 AD2d 362, 363 [1<sup>st</sup> Dept. 1996] citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1<sup>st</sup> Dept. 1982]) Courts are not permitted to substitute their judgment for that of the administrative agency where the decision is rationally based on the record. (*In re Application of Royal Realty Co v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 [1<sup>st</sup> Dept. 1990]; *Matter of Levine v New York State Liq Auth*, 23 NY2d 863, 864 [1969][“Judicial review of an administrative action is limited to the record made before the agency”])

This Court finds that pursuit of a judgment which was never requested and will never be satisfied in favor of children who are no longer minors is arbitrary and capricious.

Respondent argues that neither the respondent nor the custodial parent acquire an ownership interest in child support funds which are collected for the exclusive benefit of the infant child. (*Shipman v City of New York Support Collection Unit*, 183 Misc 2d 478 [Bronx Cty 2000]) This Court cannot therefore extinguish the arrears without either Ms. Moreno or the subject children being heard. (*DaVia v St Denis*, 107 Misc2d 750 [Onondaga Cty 1980])

This Court finds respondent has misconstrued the *DaVia* reasoning which denied the

petition of the Support Collection Unit to terminate support orders with neither party appearing. Here, petitioner has made the request for termination regarding children whose location has been unknown for almost 20 years. The statute specifically provides that, where the location of the recipient remains unknown for more than two years, unclaimed funds shall be returned to the payor. (*Social Service Law § 111-h (5)*) Any collection would, therefore, be subject to refund, rendering this proceeding meaningless.

We have considered the other arguments of the parties and find them to be without merit.

Conclusion

Accordingly, it is

ORDERED that the petition is granted; and it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED the petitioner's request for administrative review of his support account be returned to the Human Resources Administration, Office of Child Support Enforcement for reconsideration in conformance with this decision.

This reflects the decision and order of the court.

Dated: 4/23/09

*[Signature]*  
J.S.C.

**FILED**  
APR 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION