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No: 69938-5

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**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

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Fyodor Klimovich and Pelageya Klimovich

Petitioners,

v.

Washington State Department of Social and Health Services,

Respondent.

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**APPELLANT'S REPLY BRIEF**

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### **A. Restatement of The Case**

Ivan Kozorezov and Larisa Kozorezova provided services to beneficiaries Fyodor and Pelageya Klimovich. CP 4. Ivan and Larisa performed this job from 2005 through 2009 while employed with Chesterfield and other home care agencies. CP 3. By all accounts, they were effective providers. CP 3.

One DSHS case manager did not get along with them. So, when they transitioned from being employees of a contract provider to Individual Providers. Their case manager, Elena Bruk, did not get along with them. VRP Vol. X, p. 30-31, 39; CP 706-10. This personality conflict deepened until July 1, 2009, when Mr. and Mrs. Klimovich moved. Their contracts were cancelled because failing to update the beneficiaries' address threatens the health and safety of the beneficiaries. Petitioners argue that the true explanation is obvious, yet it doesn't support the position of the department.

#### **1. The July Concern**

Mr. and Mrs. Klimovich moved on July 1, 2009. CP 7.

Mrs. Klimovich, as well as Mr. Kozorezov & Mrs. Kozorezova, testified that DSHS was timely notified. *Id.* Their case manager denies receiving it. *Id.* The timeline as determined by the hearing adjudicators is as follows.

Ms. Bruk testified that her attention was first called to the move a piece of mail was returned indicating that Mr. and Mrs. Klimovich had changed addresses about two weeks later. CP 7. Ms. Bruk then testified that she called Mrs. Kozorezova, who gave an alternate explanation and was said to deny that Mr. and Mrs. Klimovich had moved. Mr. Bruk said she waited two weeks and drove past Mr. and Mrs. Klimovich's old house. VRP Vol. IV, pp. 47-49. Ms. Bruk followed up with Mrs. Kozorezova, who apologized for deceiving her, and explained that Mr. and Mrs. Klimovich were living next door to her and Ivan. CP 10. Mr. Kozorezov was not questioned and had no apparent involvement in the case manager's concern. Ms. Bruk did not visit the Klimovichs at their new home. The department concedes that there was no longer any reason to be concerned for their health, safety, and welfare once the new address was provided.

During this July episode, Mr. Kozorezov and Mrs. Kozorezova were caring for Mr. and Mrs. Klimovich while employed by Chesterfield. CP 7. DSHS has apparently never notified nor taken action against the contract provider Chesterfield about the case manager's concerns in July.<sup>1</sup>

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<sup>1</sup> In contrast, "no evidence was presented to establish that any conditions of the contract were breached by Ivan and Larisa Kozorezov during the effective dates of the contract." CP 5.

## **2. September Training; October Evidence Gathering; and November Approval**

In September 2009, DSHS trained Mr. Kozorezov and Mrs. Kozorezova to be Individual Providers. CP 12. Months after the episode, when the providers were vulnerable to cancellation of the contract, the DSHS case manager seized on the July concern as an excuse to terminate their contracts. CP 5.

In October, the case manager chose to follow up on the living situation of Mr. and Mrs. Klimovich. CP 1676. The purpose of the October visit was not the health, safety, and welfare of Mr. and Mrs. Klimovich; the purpose of this visit was to develop the evidence to justify the termination of Mr. and Mrs. Kozorezov's contract. CP 1649-52.

DSHS approved them to work as Individual Providers on November 1, 2009. CP 4; 12. Just eighteen days after Ivan and Larisa signed a contract as Individual Providers, they received notice that their contracts would be terminated for their conduct while they were employed by Chesterfield four months previously. CP 4-5.

DSHS admits in its opposition that the reason it waited four months to deprive Mr. and Mrs. Klimovich of their chosen Individual

Providers was because it needed to wait until it had unfettered control over the providers' employment to act. Resp. Br. 24.

### **3. Regulations Specify Reasons for Termination**

DSHS regulations restrict the state's ability to act to cancel the contract of its Individual Providers. Cancellation is permitted where the health, safety, and welfare of a beneficiary is clearly threatened by the conduct of the Individual Provider, as in instances of abuse or neglect. WAC 388-71-0551.<sup>2</sup> It is permitted to cancel a contract if an Individual Provider's other obligations interfere with his or her ability to care for the beneficiary. WAC 388-71-0546. It is permitted to cancel a contract for "default or convenience" according to the contract's terms. WAC 388-71-0556.

DSHS terminated the contracts with both of Mr. and Mrs. Klimovich's chosen Individual Providers due to an easily remedied and harmless miscommunication with one of the providers and a growing discord between the both Individual Providers and the case manager.

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<sup>2</sup> DSHS emphasizes the fact that the regulations disclaim the list as being non-exclusive (i.e., "include, but are not limited to" the following ...). However, under the doctrine of *esjudum generis* as a canon of statutory construction, wherever a law lists specific things and then refers to them in general, the general statements apply only to the same kind of things that were specifically listed. *Bowie v. Dep't of Revenue*, 171 Wn. 2d 1, 12 (2011).

**B. DSHS waited until it had unfettered control to act.**

DSHS claims that it should not be “chastised for not terminating Ivan’s and Larisa’s contracts sooner, because the contracts did not even take effect until November 1, 2009.” (Opposition Br. p. 24). This fails to take into account is that, during the interim between July 29 and November 1, 2009, Ivan and Larisa continued to be the care providers for Mr. and Mrs. Klimovich as employees of Chesterfield. CP 3. It also fails to account that the Department voluntarily trained Ivan and Larisa to be Individual Providers in September 2009, and unhesitatingly contracted with them on November 1, 2009, only eighteen days prior to terminating the contracts. CP 4. It fails to take into account that contracts of Individual Providers are governed under the same contracts and regulations as ones with its home health care companies, like Chesterfield. RCW 74.39A.010 *et seq.* Continuing with Ivan and Larisa as Chesterfield employees, separately training them, then accepting their applications as Individual Providers for the purpose of terminating their contracts for old concerns is not a good faith basis to deny Fyodor and Pelageya Klimovich of their preferred providers.

**C. The Individual Providers lost their character four months later in a matter of eighteen days**

DSHS approved Ivan and Larisa to work as Individual Providers on November 1, 2009. CP 4; 12. In order to be contract as an Individual Provider, a person must demonstrate the character, competence, or suitability necessary to protect the client's health, safety, and well-being. WAC 388-71-0551. Nothing happened subsequent to Ivan and Larisa's signing of the Individual Provider contract that violated the regulations or contract terms. CP 5. In other words, having decided that Ivan and Larisa demonstrated the ability to be Individual Providers, the department later changed its mind for conduct that had occurred four months before and while employees of a company that was neither notified nor sanctioned for the same concern.

Had DSHS attempted to terminate the contracts of Ivan and Larisa when they were with Chesterfield, it would have encountered resistance. Ms. Hatalaskaya testified that Ivan and Larisa were attentive, careful care providers. [VRP Vol. VI, p. 112 ("those people love each other and they wouldn't be able to get better care than from their ... children.")] The company could have shown that there had been no complaints against Ivan and Larisa, and that as care providers, they had not committed any infractions to generate any form of internal discipline. *Id.* In short,

DSHS's attempts to regulate Ivan and Larisa's contracts while at a home healthcare agency would have been futile. Furthermore, if DSHS was concerned about the quality of care being provided by Chesterfield, it would have acted to censure the company as well as the providers. There is no evidence that it did this.

DSHS waited until its power over Ivan and Larissa was unfettered by an intervening employer before using the old concern to terminate the contracts, and the concern raised is not supported by the contract or the regulation. DSHS is not acting in good faith.

However, when Ivan and Larisa were required to contract with DSHS as Individual Providers, the balance of power shifted. DSHS had plenary authority to interpret its regulations as it saw fit, and to use this power to terminate the contracts.

Washington courts have emphasized that the timing of the decision to terminate an employment relationship is an important factor in determining whether the termination was justified, or whether it was wrongful. *See, e.g., Estevez v. Faculty Club of the Univ. of Washington*, 129 Wn. App. 774, 799 (2005) (where temporal connection links protected activity and termination, rebuttable presumption arises that termination was wrongful). Here, DSHS waited to act until it was free of the problematic obstacle of Chesterfield's protection, until it had absolute

discretion over the contract of Mr. and Mrs. Klimovich's providers, to terminate them. This should give rise to a presumption that the termination of the contracts was motivated by interests apart from a concern for the health, safety, and welfare of the petitioners.

**D. The department did not produce the envelope.**

Ms. Bruk claims that she first learned of the potential issue of Mr. and Mrs. Klimovich's whereabouts on July 14, 2009, when an envelope was returned containing a forwarding address. CP 7. The envelope was not offered into evidence. However, another DSHS employee, Ms. Phaly Won, testified that envelopes had been returned to DSHS, and that this was due to incorrect addresses that had been on file with the department. VRP Vol. VI, p. 103-105. Those envelopes were being sent to 208 NE 125<sup>th</sup> Street, Shoreline, Washington - an address which does not exist. VRP Vol. VI, p. 90. Ms. Won testified that changes of address are noted on forms filled out by DSHS case workers – in this case Ms. Bruk. *Id.* Ms. Won testified that Ms. Bruk, negligently or intentionally, input the wrong data on the address form. Ms. Bruk, therefore, was highly motivated to find an alternate explanation for the lack of a correct address.

The returned mail was the catalyst. The Commissioner stated that “if Ms. Bruk had not discovered the move, it is unclear how long the Department and Chesterfield would have been unaware of the Appellants’

physical residence.” CP 9. However, the envelope was never offered. Ms. Bruk’s testimony conflicts with that of Ms. Won. It is petitioners’ theory of the case that Ms. Bruk set out to sabotage her Individual Provider relationship with her daughter and son-in-law. The Commissioner’s conclusion that Ivan and Larisa failed to notify the department of the move, and that this failure jeopardized the health, safety, and well-being of the Petitioners is not supported by substantial evidence given the other problems with the case manager’s interests and testimony. The department does not address the issue of the missing envelope. The matter should be reversed, or remanded to the department for further investigation on this matter.

**E. Ms. Bruk did not have a “reasonable, good faith belief” that Ivan and Larisa could not meet the care needs of Mr. and Mrs. Klimovich.**

In order to deprive Mr. and Mrs. Klimovich of their chosen Individual Provider, the case manager must have had a “reasonable, good faith belief” that Ivan and Larisa “will be unable to appropriately meet the care needs of the consumer.” RCW 74.39A.095(8). Ivan and Larisa have faithfully cared for their family members for nearly five years. CP 3. No complaints were ever raised that could not be resolved, and, prior to this episode, there were no doubts that they appropriately met the care needs of their clients. In fact, the record indicates that Ivan and Larisa consistently

took great care to ensure that their wards were well looked after. CP 5; 716; 733; 736; 910; etc.

In addition, the “jeopardy” claimed by DSHS is theoretical and was cured without harm.<sup>3</sup> DSHS knew of an alternative address to investigate when Ms. Bruk received an envelope with the forwarding address. The department took no steps whatsoever to ensure that Mr. and Mrs. Klimovich were being cared for until October 2009, a month before signing the persons they blamed for jeopardizing the well-being of the petitioners to individual contracts. When they did, it was for the purpose of building evidence against the providers, not for the well-being of Mr. and Mrs. Klimovich.

The department argues that the Court should not consider the Klimovichs’ attempts to “excuse” the purported failure to provide notice to DSHS by pointing out the multitudinous ways the Department could have discovered the whereabouts of Mr. and Mrs. Klimovich before the end of July. However, this argument does not relate to the conduct of the providers, but to the reasonableness of DSHS’ conclusion that the health, safety, and welfare of its beneficiaries was in jeopardy. The department’s

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<sup>3</sup> The department argues that the petitioners “were at risk when their whereabouts were unknown to the Department,” because Ms. Bruk and Ms. Heeney said so. Respondent’s Br., p. 21. This bootstrapping argument should be disregarded.

actions were not motivated by a concern for Mr. and Mrs. Klimovich, but by a desire to punish or single-out Ivan and Larisa, not a concern for the health, safety, and welfare of Mr. and Mrs. Klimovich.<sup>4</sup>

The department suggests that, regardless of its actions, Ivan and Larisa had a duty to report the move, and they neglected this duty. However, this argument overlooks the fact that termination of an Individual Provider's contract *must* be based on conduct that jeopardizes the health, safety, or well-being of the DSHS beneficiary. RCW 74.39A.095(7); WAC 388-71-0546. The department's actions do not support that conclusion here. Mr. and Mrs. Klimovich were at all times in good hands with their chosen providers and family members, and the department concedes that, other than their address, they were well cared for.

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<sup>4</sup> The department faults the petitioners for failing to cite to authority prescribing a certain period of time to conduct a home visit following a purported failure to notify it of a move. Such authority is unnecessary, as the standard set forth in the regulations and the statute is whether the conclusion that the health, safety, and welfare of the consumer is in jeopardy is reasonable and in good faith. WAC 388-71-0546. DSHS's conduct is inconsistent with any such concern, so the conclusion was not reasonable or in good faith. Any such finding would be without substantial evidence.

**F. The conduct in question does not justify depriving the petitioners of the services of their chosen providers, and does not justify the taking of Ivan and Larisa’s property interest in continued employment.**

The department argues that the failure to change the address is sufficient grounds for termination of the contract, and that Larisa’s alleged statement denying the move is simply additional grounds. The petitioners’ position is that the decision was based on personality conflict, that the department reached back in time for an excuse as against Larisa, and it terminated Ivan without substantial evidence.<sup>5</sup>

The department agrees that the termination of Ivan’s contract should be considered separately from the termination of Larisa’s, but that the misunderstanding regarding the whereabouts of its wards meets the significant threshold provided in the department’s regulations. The decision below, however, does not distinguish between Ivan and Larisa in establishing the basis for its legal conclusion that termination was proper: “[T]he evidence established that the Kozorezovs have been unable to communicate appropriately with the Department. The most egregious

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<sup>5</sup> The department argued that Larisa’s untruthfulness constitutes a violation of former WAC 388-71-0515(6). However, civil service employees who can be discharged only for cause have a constitutionally protected property interest in their employment and are entitled to due process upon termination. *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997), (citing *Board of Regents v. Roth*, 408 U.S. 564, 578, (1972); *Danielson v. City of Seattle*, 108 Wn.2d 788, 796 (1987)).

example of this occurred when the Kozorezovs ... failed to notify the Department that the Appellants had moved, *and then* Larisa Kozorezov[a] actively deceived Ms. Bruk ... *This act* breached the trust that must exist between the Department and care providers ...” AR 89 (emphasis added). Ivan was absolved of any fault for the supposed deception; there are inadequate grounds to support the termination of his contract. Failing to change an address, assuming he failed, does not jeopardize the health, safety, and welfare of the clients; failing to change of address does not justify the termination of Ivan’s contract with DSHS under the statutes or the regulations.<sup>6</sup>

Even if Larisa was untruthful, terminating her employment is an improper remedy, as it is not a ground identified in the statute or regulation.<sup>7</sup> Ivan’s transgression, if any, was less severe, and farther removed from any recognized grounds, which are limited to neglect and intentional injury. *See Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42, 47 (2007) (The language of an unambiguous regulation is given its plain and ordinary meaning unless legislative intent indicates to the contrary).

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<sup>6</sup> Ivan was reprimanded by the department for asking questions at the orientation, and the department used his curiosity as a ground for termination. CP 12.

<sup>7</sup> *See supra*, n.1.

**G. Violations of WAC 388-71-0515 do not constitute grounds for termination under WAC 388-71-0540.**

The department's regulations provide specific examples of conduct that would justify termination of a contract. The list is not exclusive, although it does provide an insight into the type of conduct that the department is concerned about: physical or mental abuse, neglect, failure to medicate, inability to tend to the needs of the beneficiaries, etc. WAC 388-71-0546; 71-388-0556. In its opposition, the department claims that Individual Providers have a duty to "notify the case manager immediately when the client enters a hospital, or moves to another setting," and notes that this duty originates in former WAC 388-71-0515(6).

However, the department goes on to note that conduct establishing grounds for termination is found in other regulations listed in WAC 388-71-0540. These other regulations are WAC 388-71-0546, 388-71-0551, and 388-71-0556. Thus, while an Individual Provider may be required to keep the department informed of the move of their wards (if such a move constitutes another "setting"), failure to do so does not constitute grounds for termination unless it jeopardizes the safety of the DSHS recipient. The dangers pointed to by the department – that Mr. and Mrs. Klimovich's phone was disconnected, for example – do not constitute a credible threat to their well-being. There is no showing that any action or inaction on the

part of Ivan or Larisa jeopardized the health and safety of Mr. and Mrs. Klimovich. The terminations were improper.

#### **H. Conclusion**

Mr. and Mrs. Klimovich's health, safety, and well-being were never jeopardized by the conduct of Ivan and Larisa, even accepting each finding of fact as true. The conclusion is untenable, as no reasonable mind could conclude that the conduct complained of would justify the termination of a contract with the state.

Furthermore, the conclusions reached by the Commissioner are inconsistent with the actions of the department and the facts of the case. By the end of July, 2009, DSHS knew all the facts necessary to determine the fitness of Ivan and Larisa as Individual Providers. It proceeded to train them, to take them through orientation, and to sign a contract between September and November, 2009. Only after signing them to this contract did it decide to terminate their contract, despite no new evidence of any wrongdoing whatsoever since the training and the signing of the contract. The decision to terminate Mr. and Mrs. Klimovich's Individual Providers was not a good faith, reasonable belief that the Providers were jeopardizing their well-being.

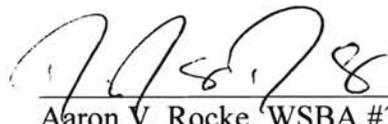
Mrs. Klimovich seeks the reinstatement of Ivan and Larisa as her care providers. She is comfortable with them. They are attentive of her

needs. They are responsible for her health and safety. She regrets any inconvenience caused by the Department's perception of Ivan and Larisa's failure to keep them informed of her whereabouts for four brief weeks in 2009. However, she is more confident in the ability of Ivan and Larisa, who have consistently looked after her, than she is in the state, who claims to have been concerned for her well-being, but did nothing to ensure her welfare for four months after the actions it considered a threat to her health and safety.

The department lacked reasonable grounds to fear for the health, safety, and well-being of the petitioners. This Court should reverse the Commissioner's decision upholding the termination, and reinstate Ivan and Larisa as Mrs. Klimovich's Individual Provider.

Respectfully submitted this 9th day of September, 2013.

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**Declaration of Service**

I caused a copy of the foregoing Opening Brief to be served on the following in the manner indicated below:

**Via Personal Service to:**  
Diane L. Dorsey  
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800 Fifth Avenue, Suite 2000  
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on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 9<sup>th</sup> day of September, 2013, at Seattle, Washington.

  
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Sarah Borisc, Legal Assistant