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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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CHRISTOPHER GASTON,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This is an appeal of an agency final order affirming Respondent Department of Social and Health Services' decision to terminate Appellant Christopher Gaston's medical benefits because he does not meet the Department's residency requirements.

The Department provides medical benefits to eligible individuals, and it is charged with establishing standards of eligibility. *See* RCW 74.09.500-.510. Medicaid benefits are composed of both state and federal funds and must be administered in a manner that is consistent with federal Medicaid law. *See* RCW 74.09.500-.510; *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). Federal law requires that medical benefits be provided to eligible individuals who are residents of Washington. *See* 42 C.F.R. § 435.403(a). To be considered a "resident," an individual must meet the requirements of WAC 388-468-0005.

When Mr. Gaston began receiving medical benefits from the Department in 1997, he resided fully in Washington. By June 2006, he spent the majority of his time living with his parents in Oregon; the Department determined that Mr. Gaston no longer met the residency requirements of WAC 388-468-0005 and terminated his benefits. *See* Verbatim Report of Tape Recorded Proceedings (May 24, 2007)

(RP) 18; Administrative Record (AR) 92. Mr. Gaston's parents are his legal guardians and they consistently listed him as a member of their Oregon household on forms submitted to the Department as part of his annual eligibility reviews. AR 35, 58, 73, 82, 99. According to his parents and sister, Mr. Gaston receives the majority of his *in-home* Medicaid Personal Care (MPC), another Medicaid public assistance benefit, in his Oregon home. AR 35, RP 51.

The Department's termination decision was upheld by final order of an Administrative Law Judge (ALJ) on May 24, 2007. AR 7-10. Mr. Gaston petitioned for judicial review, and the superior court, acting in its appellate capacity, affirmed the ALJ on April 18, 2008.

## II. RESTATEMENT OF THE ISSUES

1. **Are the ALJ's Findings of Fact supported by substantial evidence?**
2. **Did the ALJ correctly conclude that, under WAC 388-468-0005, Mr. Gaston is not a resident of Washington?**
3. **Does a Medicaid eligibility rule requiring recipients of public assistance medical benefits in Washington to be Washington residents violate a constitutional right to travel?**
4. **Was the Department's termination of Mr. Gaston's medical benefits "arbitrary or capricious," when it was based on substantial evidence and not an error of law?**

///

### III. RESTATEMENT OF THE CASE

#### A. Background Facts and Law.

The Department has promulgated rules governing eligibility for public assistance medical benefits, among them residency in Washington. *See* WAC 388-503-0505(3)(b). This matter involves application of WAC 388-468-0005, the Department rule used to determine whether an individual is a “resident” for purposes of eligibility for Medicaid medical benefits.

WAC 388-468-0005(11) states:

**For purposes of medical programs, a client's residence is the state:**

(a) Paying a state Supplemental Security Income (SSI) payment; or

(b) Paying federal payments for foster or adoption assistance; or

**(c) Where the noninstitutionalized individual lives when Medicaid eligibility is based on blindness or disability;**  
or

(d) Where the parent or legal guardian, if appointed, for an institutionalized:

(i) Minor child; or

(ii) Client twenty-one years of age or older, who became incapable of determining residential intent before reaching age twenty-one.

(e) Where a client is residing if the person becomes incapable of determining residential intent after reaching twenty-one years of age; or

(f) Making a placement in an out-of-state institution; or

(g) For any other institutionalized individual, the state of residence is the state where the individual is living with the intent to remain there permanently or for an indefinite period.

(emphasis added).

Mr. Gaston began receiving medical benefits from the Department in 1997 when he and his family were living fully in Vancouver, Washington. RP 18. In April 2003, he moved with his parents, Anne Lynne Gaston and George Gaston, from Washington to Oregon. RP 54. His mother testified that her son lived permanently in Oregon with her and his father until the “end of the summer in 2003.” *Id.* Mr. Gaston did not report this change of address, as required by WAC 388-418-0005.<sup>1</sup> On May 6, 2003, the Department received “returned mail,” which listed Mr. Gaston’s address as being in Oregon. RP 19.

On Eligibility Review forms submitted to the Department in 2003, 2004, 2005 and 2006, Mr. Gaston listed an Oregon mailing address and a Washington physical address. AR 57, 73, 82, 99. On each of these Eligibility Review forms, he is listed as a member of his parents’

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<sup>1</sup> In a benefits award letter dated July 25, 2002, Mr. Gaston was reminded of his obligation to report to the Department changes in his circumstances. AR 51.

household. AR 58, 73, 82, 99. It is undisputed that Mr. Gaston's parents have lived in Oregon continuously since 2003. The Department deemed Mr. Gaston eligible for medical benefits through June 30, 2006. AR 69, 76, 85.

On April 19, 2006, Pamela Wurtz, a Department employee with the Columbia River Community Services Office, requested clarification from the Health and Recovery Services Administration (HRSA), the arm of the Department that administers Medicaid benefits, whether Mr. Gaston met the residency requirements "per [Department] rules." AR 246. HRSA program manager, Mary Beth Ingram, concluded on June 9, 2006, that Mr. Gaston's benefits should be terminated as he was no longer a resident of Washington under WAC 388-468-0005. AR 247.

On May 9, 2006, the Department's Community Services Division received information from its Division of Developmental Disabilities (DDD) that Mr. Gaston was staying in Vancouver, Washington, just one night per week to facilitate his employment. RP 22. The rest of the time he was staying at the family home in Oregon. The Department then sent a "request for information" letter to Mr. Gaston stating, in relevant part, "[w]e need to know your work schedule, what days you are staying in Vancouver, who you are staying with, and what days you are staying in Oregon." AR 89. On or about May 9, 2006, Mr. Gaston's mother

reported to the Department that her son “stays in Vancouver 1 night per week when he has to work. The rest of the time he stays with [me] or his sister in Oregon.”<sup>2</sup> AR 44.

On May 14, 2006, Mr. Gaston’s mother sent a letter to the Department claiming that her son “generally stays in Vancouver two days a week at the residence of Dan and Linda Tarbell. When not at the Tarbells, [he] stays in Oregon with us or with his sister.” AR 91. At the fair hearing, the mother confirmed that this statement was accurate. RP 64; *see also*, RP 65-66. On June 8, 2006, the Department mailed a notice to Mr. Gaston informing him that his medical benefits would be terminated effective June 30, 2006. AR 92.

In a letter dated June 12, 2006, Mr. Gaston’s parents informed the Office of Administrative Hearings that Mr. Gaston “stays at his Washington residence (with friends) a couple days a week. When not staying in Vancouver, [he] resides in Oregon at either his parent’s [sic] home or his sister’s home.” AR 35.

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<sup>2</sup> Mr. Gaston challenges Ms. Wurtz’s statement for the very first time in his opening brief with this Court. *See* App. Br. at 8. Mr. Gaston did not object to the admission of the ACES note, an exhibit admitted at the administrative hearing, in which Ms. Wurtz documents the mother’s report. Thus, Mr. Gaston has waived the right to challenge that statement now. *See* RCW 34.05.554; *Kitsap County v. State Dep’t of Natural Res.*, 99 Wn.2d 386, 393, 662 P.2d 381 (1983). In any event, challenges to the substance of Ms. Wurtz’s statement go towards credibility and weight of the evidence, which is left to the trier-of-fact, in this case, the ALJ.

On September 7, 2006, more than two months after Mr. Gaston received his termination notice, the Department received a letter from Linda and Dan Tarbell stating that “[Mr. Gaston] resides with us [in Washington] two to four days a week depending on his schedule.” AR 102. Mr. Gaston’s mother testified that, in a normal work week, Mr. Gaston spends about two days in Vancouver. *See* RP 65-66.

Though termination of his MPC benefits is not at issue in this appeal, the place where Mr. Gaston receives these *in-home* benefits is relevant in determining where he lives.<sup>3</sup> Mr. Gaston’s sister is his in-home care provider under the MPC program, and it undisputed that she lives in Oregon. Mr. Gaston’s parents admitted that the majority of their son’s in-home care is provided in Oregon. AR 35. The sister confirmed this fact when she testified that Mr. Gaston’s in-home care is typically provided at his home in Portland, Oregon. RP 51.

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<sup>3</sup> Mr. Gaston’s MPC benefits were also terminated based on his inability to meet the residency requirement. AR 176-77. Review of the termination of those benefits is being separately appealed; an administrative hearing is pending in that case. The only issue considered by the ALJ in the present appeal was “[w]hether the Department correctly denied **medical assistance benefits** to [Mr. Gaston] on the basis that he was no longer a resident of the State of Washington” (emphasis added). AR 7. Nevertheless, Mr. Gaston improperly relies on an administrative review judge’s “Order of Remand” arising from his MPC appeal as though it were somehow binding on this Court in this case. *See* App. Br. at 6, n.1; CP 84-106. Since the “Order of Remand” is not part of the administrative record under review by this Court, it should be disregarded in its entirety. *See* RCW 34.05.558; *Den Beste v. State, Pollution Control Hearings Bd.*, 81 Wn. App. 330, 332, 914 P.2d 144 (1996).

Mr. Gaston did present some evidence to support his claim that he resides in Washington. He works in Vancouver, holds a Washington Identification Card, votes in Washington, and listed himself as a Washington resident on his 2005 federal 1040 tax form. However, the record also demonstrates that he spends the majority of his time and sleeps the majority of his nights in Oregon; receives the majority of his in-home care in Oregon; and is a member of his parents' Oregon household.

**B. Challenged Findings of Fact.**

Mr. Gaston assigns error to the following findings of fact, alleging that there is not substantial evidence to support them:

2. The Appellant lives at home with his mother and father who have been his legal guardians since August 2002.
3. The DDD staff became aware that the Appellant and his family had moved to the State of Oregon. As a result, the Appellant was terminated from the DDD program on the basis that he was no longer a resident of the state of Washington.
4. The Appellant's family moved in April 2003 to the State of Oregon. The Appellant continues to be under the guardianship of his parents and does reside in their home several days each week.
- ...
6. The Appellant stays with friends in Vancouver two to three days per week facilitating his ability to get to work.<sup>4</sup>

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<sup>4</sup> Mr. Gaston assigns error to FOF 5, but that Assignment of Error goes on to challenge the language in FOF 6. It is assumed that he is assigning error to FOF 6.

App. Br. at 1-2.

**C. Procedural History.**

Mr. Gaston requested a fair hearing to challenge the termination of his medical benefits. Mr. Gaston requested and received numerous continuances of the hearing date. *E.g.*, AR 13-15, 17, 20-21, 23, 27-34. A hearing was held on May 24, 2007, with the focus primarily on where Mr. Gaston spends the majority of his time. Following the hearing, the ALJ affirmed the Department's termination decision. AR 7-8. Mr. Gaston appealed to the superior court, which upheld the ALJ's final order. Mr. Gaston now appeals the order affirming the ALJ.

**IV. ARGUMENT**

**A. Standard of Review.**

In reviewing an agency final order, the court of appeals sits in the same position as the trial court and applies the standards of the Administrative Procedure Act (APA), RCW 34.05.001-.903, directly to the administrative record. *Heinmiller v. Dep't. of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995); *Tapper v. State Employ. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Seatoma Convalescent Ctr. v. DSHS*, 82 Wn. App. 495, 511, 919 P.2d 602 (1996).

The appellant has the burden of proving that the agency's final order is invalid. See RCW 34.05.570(1)(a); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). To be granted relief under the APA, the appellant must show that he has been substantially prejudiced by the agency action. See RCW 34.05.570(1)(d); *Peacock v. Public Disclosure Comm'n*, 84 Wn. App. 282, 286, 928 P.2d 427 (1996). The court can reverse the ALJ's decision if: (1) it is based on insufficient evidence or error of law; (2) it violates a constitutional right; or (3) it is arbitrary or capricious. See RCW 34.05.570(3)(a), (d), (e) and (i); see also, *Tapper*, 122 Wn.2d at 402.

**B. The ALJ's Findings of Fact Are Supported By Substantial Evidence.**

Substantial evidence is "evidence of sufficient quantum to persuade a fair-minded person of the truth of the declared premises." *Heinmiller*, 127 Wn.2d at 607; *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citing *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). A reviewing court is "highly deferential" to the findings set out in the agency's final order. *ARCO v. Utilities & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

A reviewing court looks at the whole record and considers “the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-372, 859 P.2d 610 (1993). If there are sufficient facts in the record from which a reasonable person could make the same findings as the ALJ, the court should uphold the ALJ’s findings. *Callecod*, 84 Wn. App. at 676. This is so even if the reviewing court would make different findings from its reading of the record. *Id.*

Here, there is substantial evidence to support each of the challenged findings of fact. Mr. Gaston assigns error to Finding of Fact 2, claiming that there is insufficient evidence to support the finding that he lives with his parents in Portland. App. Br. at 1. Numerous admissions made by Mr. Gaston do not support this claim. His mother reported to the Department that her son spends only one night per week in Vancouver, and spends the remaining time—the majority of each week—with his parents or with his sister in Oregon. AR 44. The Gastons submitted two letters admitting that their son stays only two days per week in Vancouver and the remaining time in Oregon with them or with his sister. AR 35, 91.

The parents consistently designated their son as a member of their Oregon household on Eligibility Review forms. AR 57, 73, 82, 99. The mother testified that Mr. Gaston spends on average two days per week in Vancouver. RP 65-66. The sister testified that the majority of her brother's in-home personal care is provided at his home in Portland. RP 51. The evidence submitted by the family members alone constitutes substantial evidence that Mr. Gaston lives with his parents in Oregon. Therefore, Finding of Fact 2 is supported by substantial evidence.

Mr. Gaston also challenges Finding of Fact 3, asserting that substantial evidence does not exist to support the finding that he moved from Washington to Oregon. App. Br. at 1. Mr. Gaston misunderstands this finding. The ALJ merely found that, "[t]he DDD staff became aware that the Appellant and his family had moved to the State of Oregon. As a result, the Appellant was terminated from the DDD program on the basis that he was no longer a resident of the state of Washington." AR 7. Mr. Gaston may disagree with *DDD's* underlying conclusion that he moved to Oregon, but it is undisputed that *DDD* arrived at that conclusion, and that it terminated his MPC benefits on that basis. This finding is supported by substantial evidence in the record.

Mr. Gaston next assigns error to Finding of Fact 4, which states that "[t]he Appellant's family moved in April 2003 to the State of Oregon.

The Appellant continues to be under the guardianship of his parents and does reside in their home several days each week.” AR 7. Mr. Gaston contends that there is insufficient evidence in the record to support a finding that he resides in his parents’ home several days each week. App. Br. at 1-2. As explained above, Mr. Gaston’s parents submitted two letters admitting that when their son is not staying in Washington (one or two nights each week), he stays with them or with his sister in Oregon. Mr. Gaston was also listed as a member of his parents’ Oregon household on numerous Eligibility Review forms submitted to the Department by the parents. Additionally, he receives a majority of his *in-home* care in Oregon. This evidence supports the ALJ’s Finding of Fact 4.

Mr. Gaston assigns error to Finding of Fact 6, which states: “[t]he Appellant stays with friends in Vancouver two to three days per week facilitating his ability to get to work.” App. Br. at 1; AR 7. As explained above, both Mr. Gaston’s parents and the friends he stays with in Vancouver, submitted letters to the Department admitting this fact. *See* AR 35, 91, 102. His mother also testified that, because of the difficulty of transporting Mr. Gaston to Vancouver for his job, he stays with the Vancouver friends anywhere from two to four days per week. *See* RP 54, 58. This evidence supports the ALJ’s Finding of Fact 6.

Mr. Gaston essentially asks this Court to re-weigh the credibility of the evidence. The crux of his challenge is Findings number 2 and 4 that, when taken together, result in a factual determination that Mr. Gaston “lives” in Oregon with his parents. AR 7. He argues this is incorrect because, in his view, there is no evidence in the record to show that he “lives” in Oregon. *See* App. Br. at 32 (“the record contains substantial un rebutted evidence supporting the legal conclusion that Mr. Gaston resides in Washington.”). Mr. Gaston unsuccessfully made this same unsupported argument before the superior court:

[JUDGE HICKS]: So, it’s your position there’s not even a scintilla of evidence that he’s an Oregon resident?

[MR. GASTON’S COUNSEL]: Correct, which is why we filed a motion for summary judgment. **There were no material facts in dispute.**

RP (April 18, 2008), at 22 (emphasis added).<sup>5</sup>

The record belies his claim. There is substantial evidence in the record to support the ALJ’s that finding that Mr. Gaston “lives” in Oregon.<sup>6</sup>

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<sup>5</sup> For the Court’s convenience, the transcript of the April 18, 2008 hearing before Judge Hicks, including his oral opinion, is attached hereto as Appendix A.

<sup>6</sup> There is no evidence in the record to suggest that Mr. Gaston could not continue working in Vancouver or participate in social activities there if Oregon, as opposed to Washington, paid his medical benefits. Because Medicaid benefits are generally uniform in application among the states, Mr. Gaston likely would receive the same or similar benefits in Oregon. However, he has not applied for benefits in Oregon. *See* App. Br. at 9. Thus, the allegation that the Department is forcing Gaston to “choose between necessary Medicaid services and visiting his family in Oregon” is without merit.

Where there is conflicting evidence in the record, deference should be given to the ALJ, the trier-of-fact who judged the credibility of the witnesses, in light of her knowledge of the case and all of the evidence presented. *See Kraft v. Dep't of Soc. & Health Servs.*, No. 26189-1-III, 2008 WL 2649492, at \*5 (Wash. Ct. App. July 8, 2008) (reviewing courts do not evaluate witness credibility or re-weigh the evidence); *Affordable Cabs, Inc. v. Employ. Sec. Dep't*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004) (appellate court will not substitute its judgment for that of the agency regarding witness credibility or the weight of evidence). Here, the evidence that Mr. Gaston is a resident of Oregon is substantial. There is simply no basis to set aside the ALJ's findings.

**C. The ALJ Properly Applied WAC 388-468-0005 In Determining that Mr. Gaston is not a Resident of Washington for Purposes of Eligibility for Medical Benefits.**

An appellate court engages in a *de novo* review of conclusions of law and application of the law to the facts. *Tapper*, 122 Wn.2d at 402-03; *Terry v. Employment Sec. Dep't.*, 82 Wn. App. 745, 748-49, 919 P.2d 111 (1996). This court can modify conclusions of law only if the ALJ “erroneously interpreted or applied the law.” *See* RCW 34.05.570(3)(d); *Heinmiller*, 127 Wn.2d at 601. Although the court may substitute its own judgment for that of the ALJ or agency, it accords “substantial weight” to the ALJ's and agency's interpretations of the law. *Heinmiller*, 127 Wn.2d

at 601; *Seatoma*, 82 Wn. App. at 512. “An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts.” *D.W. Close Co., Inc. v. Washington State Dep’t of Labor & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008) (quoting *Pacific Wire Works v. Dep’t of Labor & Indus.*, 49 Wn. App. 229, 236, 742 P.2d 168 (1987)).

**1. The ALJ Properly Applied WAC 388-468-0005(11), The Rule Governing Residency Requirements For Medical Programs.**

WAC 388-468-0005 delineates factors that the Department considers in determining whether an individual is a resident of Washington for purposes of eligibility for cash, food, and medical benefits. In this case, the ALJ concluded that, in determining whether Mr. Gaston is a resident of Washington, WAC 388-468-0005(11) is the applicable subsection. AR 8 (Conclusion of Law 5). This subsection applies solely to medical programs. *See Washington Cedar & Supply Co. v. Dep’t of Labor & Indus.*, 137 Wn. App. 592, 608, 154 P.3d 287 (2007) (specific provisions control over general regulations).

WAC 388-468-0005(11), in relevant part, states:

For purposes of medical programs, a client's residence is the state:

...

(c) Where the noninstitutionalized individual lives when Medicaid eligibility is based on blindness or disability; or

(d) Where the parent or legal guardian, if appointed, for an institutionalized:

(i) Minor child; or

(ii) Client twenty-one years of age or older, who became incapable of determining residential intent before reaching age twenty-one.

(e) Where a client is residing if the person becomes incapable of determining residential intent after reaching twenty-one years of age . . . .

The ALJ concluded that “where [Mr. Gaston’s] legal guardians have moved to another state, his residency has moved with them.” AR 8 (Conclusion of Law 5). Mr. Gaston contends that the ALJ relied only on subsection (11)(d), which applies to institutionalized individuals, and that the rule does not otherwise apply to him. App. Br. at 2. A closer reading of the rule, however, shows that subsection (11) applies to both institutionalized and noninstitutionalized recipients of medical benefits. Nowhere in her conclusions of law did the ALJ state that she was relying solely on subsection (d) of WAC 388-468-0005(11) when she concluded that Mr. Gaston’s residency follows his parents, *i.e.*, his legal guardians.

Subsection (11)(c), which applies to noninstitutionalized individuals, provides that the client’s residence is “**where the noninstitutionalized individual lives** when Medicaid eligibility is based

on blindness or disability . . . .” (emphasis added). It is undisputed that Mr. Gaston is not institutionalized and his medicaid eligibility is based upon a disability. App. Br. at 38.

The rules do not define the term “where the noninstitutionalized individual lives.” However, the ALJ found, based on substantial evidence, that Mr. Gaston lives in Oregon. Mr. Gaston has lived with his parents/guardians in Oregon since 2003, and the record demonstrates that he lives with them the majority of the time. This is not a case where Mr. Gaston’s parents are out-of-state guardians with whom he has no connection with other than “ward-guardian” relationship; rather, he lives—at least primarily—in Oregon with his legal guardians.

The fact that his parents/guardians moved to Oregon was merely one factor in determining that he is no longer a resident of Washington. Other factors in the record are that Mr. Gaston receives the majority of his *in-home* care in Oregon and he was consistently listed as a member of his parents’ Oregon household on Eligibility Review forms. As such, in this case, residency does legally follow that of his out-of-state guardians; the record demonstrates that he actually lives with them in Oregon. Thus, the ALJ properly concluded that Mr. Gaston, who “lives” up to six days each week with his parents/guardians in Oregon, is not a Washington resident.

**2. The ALJ Properly Applied WAC 388-468-0005(1)(a) To Determine That Mr. Gaston Does Not Reside In Washington.**

Mr. Gaston argues that the ALJ erred in what he terms her “refusal to apply Section 2 of WAC 388-468-0005 . . . .” App. Br. at 2. Mr. Gaston contends that he should be considered a Washington resident under WAC 388-468-0005(1)(a), which provides that a resident is a person who “**lives in Washington** and intends to continue living here permanently or for an indefinite period of time . . . .” (emphasis added). However, Mr. Gaston fails to recognize that subsection (1)(a) sets out a two-part test. First, the individual must “live” in Washington. The Department proceeds to the second part (*i.e.*, does the person intend to continue living in Washington) only if the first part of the test is met. The ALJ found, based on substantial evidence, that Mr. Gaston “lives” in Oregon with his parents. Thus, the second part of the test is not relevant, and does not need to be considered because Mr. Gaston does not “live” in Washington.<sup>7</sup>

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<sup>7</sup> Mr. Gaston claims the ALJ “*sua sponte*” required him to “attend the hearing and express his intention to reside in Washington” to establish his residency in Washington. App. Br. at 33. This misstates the ALJ’s conclusion. The ALJ merely concluded that, absent Mr. Gaston stating where he intends to reside, *she* is not permitted to make that assumption. AR 8 (Conclusion of Law 6). While Mr. Gaston made cursory arguments that extrinsic evidence can be used to show where he intends to live, this issue was not briefed for the ALJ, and is irrelevant where, as here, the ALJ determined that he “lives” in Oregon.. *E.g.*, AR 5, 203.

**3. The Department’s “Clarification” Process Was Based on Accurate Information and Did Not Violate Mr. Gaston’s Due Process.**

Mr. Gaston contends that the Department erred when a regional employee, Pamela Wurtz, sought and received clarification from HRSA program management regarding whether Mr. Gaston met the residency requirements of WAC 388-468-0005. App. Br. at 14, 24-28. Regional employees occasionally seek guidance from policy managers regarding application of rules to the facts of a given case. Contrary to Mr. Gaston’s claim, the clarification request was based on accurate information and did not violate his due process.

The evidence, which was admitted without objection, was that the Department caseworker, Ms. Wurtz, asked a program manager whether, under the facts of this case and the rule set forth in WAC 388-468-0005, Mr. Gaston was a resident of Washington and eligible for medical benefits. AR 246-47. In her clarification request, Ms. Wurtz reported that Mr. Gaston spent the majority of his time in Oregon—as many as six days per week—information verified by Mr. Gaston’s mother. AR 247. Program management determined that he did not meet the requirements of WAC 388-468-0005 and that his benefits should be terminated. AR 247. The clarification process was not based on inaccurate information. Mr. Gaston seemingly argues that his “constitutional right to due process”

was violated when Ms. Wurtz asked for guidance from program management, because, in his view, the process which led to the determination that he did not meet the requirements of WAC 388-468-0005, was “informal.” *See* App. Br. at 25, 28. Understandably, he cites no authority for this proposition. Due process requires that an individual receive timely and adequate notice before *termination* of benefits. *See Goldberg v. Kelley*, 397 U.S. 254, 261, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Mr. Gaston received the notice and opportunity for hearing required by *Goldberg*. Due process does not require timely and adequate notice of the internal process of *evaluating* whether to terminate benefits.

To be sure, Mr. Gaston received a termination notice on or about June 9, 2006, effective June 30, 2006. AR 92-95. After numerous continuances at the request of Mr. Gaston were granted, a hearing was eventually held on May 24, 2007. The Department paid Mr. Gaston’s medical benefits while the administrative appeal was pending. At the hearing, he was provided an opportunity to present evidence, examine witnesses, and make oral arguments. Mr. Gaston was afforded notice of the termination, and provided an opportunity to be heard before his benefits were terminated. The Department did not violate Mr. Gaston’s due process through its decision-making process.

**4. Where Mr. Gaston “Lives” Is A Question Of Fact, Not A Question Of Law; Even If It Is A Question Of Law, There Was No Error Committed By The ALJ.**

Mr. Gaston argues that where he “lives” is a question of law, not a question of fact and, thus, this Court should review the finding that he “lives” in Oregon under a *de novo* standard. He confuses the factual question of where he “lives” with the broader legal question of whether he is a “resident” under WAC 388-468-0005. In an attempt to bolster his argument, Mr. Gaston relies on a review judge’s decision in his MPC appeal. App. Br. at 28-29, n.3. Not only is this clearly outside the record and irrelevant to the Court’s review in this case, Mr. Gaston misunderstands what that review judge said. *See* CP 102. The Department agrees with the review judge that WAC 388-468-0005, as with any rule, is a “legal standard.” But, the question of where Mr. Gaston “lives” requires a factual inquiry, particularly when there is conflicting evidence in the record. The review judge did not state that, where Mr. Gaston “lives” is a legal issue.

Even if the Court reviews the question of where Mr. Gaston “lives” under a *de novo* standard, it should defer to the ALJ’s reasonable interpretation of that term. *D.W. Close Co.* 143 Wn. App. at 129. Mr. Gaston cites a number of cases for the proposition that a person may be deemed to “live” in a given place even if he stays there only

temporarily. *E.g.*, *State Farm Mut. Auto Ins. Co. v. Ruiz*, 134 Wn.2d 713, 722-23, 952 P.2d 157 (1998) (interpreting undefined insurance contract term “living with” the insured to include “living or dwelling in fact on a permanent or temporary basis”).<sup>8</sup> App. Br. at 30-32. While that may be true, the issue at bar is where Mr. Gaston “lives” for purposes of Medicaid eligibility.

Under Mr. Gaston’s theory, he would be eligible for benefits in two states, as he asserts that he “lives” in two states. His brief takes great liberty with the context of facts connecting him to Oregon when he argues that the majority of weekly time and nights spent in Oregon are merely family “visits.” The evidence showed otherwise.

The Department was authorized—and required—to look at the evidence and, based on that evidence and on WAC 388-468-0005, to conclude that Mr. Gaston’s residence is where he *primarily* “lives.” Mr. Gaston is simply not a resident of Washington under WAC 388-468-0005.

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<sup>8</sup> Mr. Gaston improperly relies on two unpublished decisions of the court of appeals – *State v. Gardner*, 133 Wn. App. 1014 (2006), and *Dammarell v. Dammarell*, 96 Wn. App. 1031 (1999). *See* GR 14.1; *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 549, 13 P.3d 240 (2000) (“RCW 2.06.040 prohibits our publication of cases lacking precedential value and our case law holds that such cases do not become part of the common law of our state.”).

**D. Neither The Department Rule Nor The Final Order Imposes A Durational Residency Requirement; Nor Do They Abridge A Medicaid Applicant Or Recipient's Right To Travel.**

Mr. Gaston confuses a bona fide residency requirement with a durational residency requirement. App. Br. at 19-24. “Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period.” *Dunn v. Blumstein*, 405 U.S. 330, 334, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). While courts have invalidated laws that condition receipt of benefits on a minimum period of residence within a jurisdiction, they “have been careful to distinguish such durational residence requirements from bona fide residence requirements.” *Martinez v. Bynum*, 461 U.S. 321, 325, 103 S. Ct. 1838, 75 L. Ed. 2d 879 (1983).

Here, Mr. Gaston acknowledges that WAC 388-468-0005 does not—on its face—impose a durational residency requirement. Indeed, WAC 388-468-0005(2) states that, “[a] person does not need to live in the state for a specific period of time to be considered a resident.” However, Mr. Gaston contends that the specific order entered by the ALJ in his case, in effect, imposes a durational residency requirement. He relies primarily on two United States Supreme Court decisions: *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974) and

*Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

In *Mem'l Hosp.*, the Court struck down an Arizona statute that required one year of residence in the county as a condition to receiving medical care at county expense. *Mem'l Hosp.*, 415 U.S. at 251. Counties were charged with the responsibility of providing medical care to indigents who were ill. *Id.* at 252. The statute required the indigent to have been a resident of the county for the 12 preceding months in order to be eligible for care. *Id.* The Court found that this statute infringed upon the fundamental right to travel and declared it unconstitutional. *Id.* at 269.

Similarly, in *Shapiro*, the Court evaluated the constitutionality of several statutes that required a one-year waiting period for new residents before they could qualify for welfare benefits. *Shapiro*, 394 U.S. at 621. The Court struck down the “waiting period” statutes as impermissibly infringing upon applicants’ right to interstate travel and declared them unconstitutional. *Id.* at 642. However, the Court pointed out that “the residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance . . . .” *Id.* at 636. The parties did not question the States’ right to impose bona fide residency requirements.

In both *Shapiro* and *Mem'l Hosp.*, unlike the present case, the offending laws conditioned receipt of public assistance not only residency, but also on having resided within a state for 12 months prior to applying for benefits. Both *Mem'l Hospital* and *Shapiro* involved statutes that, on their faces, contained one-year waiting periods; WAC 388-468-0005 does not. Moreover, those cases involved the ingress of applicants into a new state, and the new state's denial of benefits based on the applicant's failure to meet the new state's one-year waiting period requirement. Washington has no waiting period requirement.

Instead, Washington requires that recipients of public assistance medical benefits at taxpayer expense be residents of Washington. Thus, Medicaid recipients must meet the bona fide residency requirements of WAC 388-468-0005. *See* 42 C.F.R. § 435.403(a) ("The agency must provide Medicaid to eligible residents of the State"); *see also*, WAC 388-503-0505(3)(b). Bona fide residency requirements have long been recognized as permissible. *E.g.*, *Mem'l Hosp.*, 415 U.S. at 255 (recognizing the validity of appropriately defined and uniformly applied bona fide residency requirements); *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 647, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976) (upholding continuing residency requirement and reiterating the

distinction between a requirement of continuing residency and a requirement of prior residency of a given duration).

Mr. Gaston claims the Department’s “decision [to terminate his benefits] creates a suspect and discriminatory classification of individuals with disabilities,” and argues that the Department must present a “compelling state interest to substantiate terminating [his] benefits based on the amount of time he spends exercising his constitutional right to travel.”<sup>9</sup> *See* App. Br. at 20-21. This argument is misplaced.

First, the Department rule does not create a “classification” of disabled individuals. Second, even it did, Mr. Gaston’s argument fails to acknowledge that the Supreme Court has expressly held that individuals with disabilities are not a “suspect class” for purposes of equal protection challenges. Rather, “classifications based on disability violate [equal protection] if they lack a rational relationship to a legitimate governmental purpose.” *Tennessee v. Lane*, 541 U.S. 509, 522, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004); *see also*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). Even if Mr. Gaston had presented a cognizable equal protection claim on the basis

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<sup>9</sup> The usual challenge to a durational residency requirement is presented as an equal protection claim. For example, in *Shapiro*, the Court found that there were two similar classes of individuals being treated differently by the states: (1) those who were residents of the state for one year or more; and (2) those who were residents of the state for less than one year. *Shapiro*, 394 U.S. at 627. Since this infringed upon the residents’ fundamental right to travel, the Court applied strict scrutiny review. *Id.*

of a disability, the Department's actions would be subject only to a rational basis standard. Assuming, solely for sake of argument, that the rule creates a classification based on disability, the requirement that disabled individuals receiving Medicaid funds, paid for in substantial part by Washington taxpayers, should be Washington residents has a rational basis.

Mr. Gaston also relies on a federal district court decision, *Duffy v. Meconi*, 508 F. Supp.2d 399 (D. Del. 2007), for the proposition that the Department's decision impermissibly restricts his right to travel. In *Duffy*, the plaintiff resided in an intermediate care facility for the mentally retarded in North Carolina. *Id.* at 401. Because she was institutionalized and became incapable of stating her intent on where to reside before her 21st birthday, her residence was deemed the same as her parents. *Id.* at 402. Her parents moved from North Carolina to Delaware and applied for benefits on her behalf in Delaware. *Id.* at 401.

Delaware denied the application because it did not consider plaintiff to be a resident there. *Id.* at 402. The plaintiff brought a lawsuit alleging that Delaware's refusal to pay benefits until she physically moved there acted as a monetary obstacle that infringed upon her right to travel. *Id.* at 402. The court granted plaintiff's motion for summary judgment, finding that Delaware's denial of benefits until the plaintiff physically

relocated to Delaware was an infringement of her fundamental right to travel. *Id.* at 407.

*Duffy* is distinguishable from the present case. First, *Duffy* involved an individual who was planning to enter a new state, but the new state denied benefits because that individual had not been physically present in the new state for a specified duration of time. The opposite has occurred here: Mr. Gaston *moved out* of Washington to Oregon, but continued to seek benefits from Washington. Second, the court acknowledged that Delaware, as with any State, has the right to limit Medicaid benefits to actual residents, *i.e.*, to impose bona fide residency requirements. *Id.* at 403.<sup>10</sup> The Department is simply seeking to limit Medicaid at Washington taxpayers' expense to actual residents of Washington, which it is authorized and required to do. *See* WAC 388-503-0505(3)(b); 42 CFR 435.403(a); *Mem'l Hosp.*, 415 U.S. at 255.

**E. Neither The Department's Action Nor The ALJ's Final Order Is Arbitrary Or Capricious.**

Mr. Gaston also argues that the Department's action and the final order is arbitrary and capricious. App. Br. 1-3. As an initial matter, RCW 34.05.546, in relevant part, states that "[a] petition for review **must** set forth: (7) [t]he petitioner's reasons for believing that relief should be

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<sup>10</sup> Notably, the plaintiff did not question Delaware's right to limit payment of Medicaid benefits to actual residents—which is what the Department has done here. *See Duffy v. Meconi*, 395 F. Supp.2d 132, 139-40 (D. Del. 2005).

granted . . . ” (emphasis added). Here, Mr. Gaston did not allege that the Department’s action or the final order was arbitrary or capricious in his Petition for Review, First Amended Petition for Review, or his Second Amended Petition for Review. As such, he should be precluded from raising this issue in this Court.

Nevertheless, even if this Court considers this issue, the final order is clearly not arbitrary or capricious. An act is arbitrary or capricious only if it is a “wilful and unreasonable action, without consideration and regard for facts or circumstances.” *Friends of Columbia Gorge, Inc. v. Forest Practices Appeals Bd.*, 129 Wn. App. 35, 57, 118 P.3d 354 (2005) (quoting *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 769, 49 P.3d 867 (2002)).

When an act is alleged to be arbitrary or capricious, “[t]he scope of court review should be very narrow . . . and one who seeks to demonstrate that action is arbitrary and capricious must carry a heavy burden.” *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Hillis*, 131 Wn.2d at 383.

Here, based on substantial evidence and in light of the governing rules, the ALJ found that Mr. Gaston does not live in Washington. Both the Department and the ALJ considered evidence submitted by Mr. Gaston's parents, that he "lives" with them most of the time, receives the majority of his in-home care in Oregon, and is a member of their Oregon household. The ALJ concluded that under WAC 388-468-0005, Mr. Gaston is not a resident of Washington. Mr. Gaston simply has not shown that this was a "wilful and unreasonable action, without consideration and regard for facts or circumstances."

Mr. Gaston additionally argues that the ALJ's refusal to apply subsection (2) of WAC 388-468-0005 was arbitrary and capricious. App. Br. at 2. That subsection states: "(2) [a] person does not need to live in the state for a specific period of time to be considered a resident." WAC 388-468-0005(2) (emphasis added). Mr. Gaston glosses over the fact that, while the Department cannot have in place a requirement that an individual have "lived" in Washington for a specified duration of time before applying for benefits, it can and must have in place a requirement that the individual actually "live" in Washington.

Mr. Gaston claims that "WAC 388-468-0005(11), as interpreted by the ALJ, presumes incapacity and resolves [sic] Mr. Gaston's residency automatically follows that of his guardians" and that such interpretation is

arbitrary or capricious. App. Br. at 2. The ALJ did not “presume incapacity.” Instead, the ALJ ruled that “[t]here is a true question regarding [Mr. Gaston’s] competency.” She did not rule that he is presumed incapacitated and to suggest so misstates the ALJ’s Conclusions of Law 5 and 6.

Furthermore, as stated above, because subsection (11) applies specifically to residency for medical benefits, the ALJ applied the proper subsection. The ALJ did not “automatically” find that Mr. Gaston’s residency follows that of his guardians. Rather, the ALJ found, based on substantial evidence, that Mr. Gaston “lives” in Oregon with his parents, not in Washington.

Mr. Gaston also asserts that Conclusion of Law 6 was arbitrary or capricious because he was “required to appear at the hearing and express his intention to reside in Washington in order to establish his residency in Washington.” App. Br. at 2. However, as stated above, the issue of intent is not relevant because the ALJ determined that Mr. Gaston does not “live” in Washington.

Finally, Mr. Gaston contends that the ALJ’s reliance on the use of the “informal clarification” or the decision-making process of the Department was arbitrary or capricious. App. Br. at 3. It is unclear what Mr. Gaston is referring to, because nowhere in her final order does the

ALJ state that she relied on the thought process or analysis of the Department workers to reach her decision.

**F. Even If Mr. Gaston Prevails, His Request for Attorney’s Fees, Costs, and Expenses on Appeal Should Be Denied.**

RAP 18.1(a) provides that, “[i]f applicable law grants to a party the right to recover reasonable attorneys fees or expenses on review . . . the party must request the fees or expenses as provided in this rule . . . .” A “party must devote a section of its opening brief to the request for the fees or expenses.” RAP 18.1(b). “Mere inclusion of a request for fees and costs in the last line of the conclusion in a brief is not sufficient” to satisfy the requirements of RAP 18.1(b). *Johnson v. Cash Store*, 116 Wn. App. 833, 850-51, 68 P.3d 1099 (2003) (citing *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 710, n. 4, 952 P.2d 590 (1998)). In *Johnson*, the prayer for relief in respondent’s brief requested, in relevant part, that the court, “award the Respondent reasonable costs and attorney fees pursuant to RCW 26.18.160.” *Johnson*, 116 Wn. App. at 851. No section of her brief was devoted to a request for fees. *Id.*

Here, like the respondent in *Johnson*, Mr. Gaston makes a cursory request for “costs, fees and other expenses pursuant to RCW 4.84.350 and RCW 74.08.080 . . . .” in the last line of the conclusion of his brief. App. Br. at 41. While he does cite statutes, he fails to devote any

substantive section of his brief to his request for fees and costs. In so doing, he has not complied with RAP 18.1(b) or *Johnson*. As such, even if Mr. Gaston prevails, this Court should deny his request for costs, fees and expenses on appeal.

## V. CONCLUSION

The final order upholding the Department's termination of Mr. Gaston's medical benefits should be affirmed. It is based on substantial evidence in the record, is supported by appropriate law, properly applies bona fide residency requirements, and is not arbitrary or capricious. This Court should deny Mr. Gaston's request for fees and costs.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of October, 2008.

ROBERT M. MCKENNA  
Attorney General



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SCOTT T. MIDDLETON, WSBA #37920  
Assistant Attorney General  
Attorneys for Respondent

FILED  
COURT OF APPEALS  
DIVISION II

OCT -7 PM 12:14

STATE OF WASHINGTON  
BY Wendy Kenyon  
DEPUTY

**CERTIFICATE OF SERVICE**

I, *Wendy Kenyon*, am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I certify that on October 6, 2008, I served a copy of the **BRIEF OF RESPONDENT** upon the persons listed below as follows:

**Attorneys for Appellant**

EMILY COOPER  
REGAN BAILEY  
DISABILITY RIGHTS WASHINGTON  
315 5<sup>TH</sup> AVE S, STE 850  
SEATTLE WA 98104-2691

- By United States Mail**
- By Legal Messenger – ABC Legal Services
- By Facsimile
- By E-Mail PDF
- By Federal Express

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 6th day of October, 2008, at Tumwater, Washington.

  
WENDY KENYON  
Legal Assistant

# **APPENDIX A**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF THURSTON

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CHRISTOPHER GASTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	NO. 07-2-01782-5
STATE OF WASHINGTON,	)	
DEPARTMENT OF SOCIAL AND	)	
HEALTH SERVICES,	)	
	)	
Defendant.	)	
	)	

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VERBATIM REPORT OF PROCEEDINGS

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BE IT REMEMBERED that on April 18, 2008, the above-entitled matter came on for hearing before the HONORABLE RICHARD D. HICKS, Judge of Thurston County Superior Court.

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Reported by: Aurora Shackell, RMR CRR  
Official Court Reporter, CCR# 2439  
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For the Defendant:         SCOTT T. MIDDLETON  
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Olympia, WA 98504-0124

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1           THE COURT: All right. This is the  
2 case of Gaston versus the Department of Social  
3 and Health Services. It's a case actually that  
4 I've seen before, because we had an earlier  
5 argument regarding a stay. We didn't have the  
6 transcript at that time, but we do have the  
7 transcript now, which I've read. And I've also  
8 reviewed the exhibits. So I'm now ready to  
9 listen to arguments.

10           I should say for the non-lawyers here,  
11 this is in the nature of an appeal. Even  
12 though, in my general jurisdiction capacity, I  
13 sit as a trial judge and take evidence, listen  
14 to testimony and make credibility  
15 determinations, under the administrative law of  
16 the State of Washington, as the lawyers know,  
17 those credibility determinations are made by a  
18 hearing officer at the administrative hearing  
19 level, and my role here is not to weigh  
20 credibility, but to see if there was  
21 substantial evidence from which she, in this  
22 case, could have made the decision she made on  
23 the facts and whether or not she's made a clear  
24 error of law or, on policy matters, whether the  
25 decision was somehow arbitrary and capricious.

1 I don't want to make too fine a point of  
2 it. We could also talk about the standards of  
3 applying the law to the facts. But the point  
4 I'm trying to make for the non-lawyers that I  
5 see here present is that this is not a  
6 reargument on the credibility of those people  
7 who testified. All right. Please continue.

8 MS. COOPER: Great. Good afternoon,  
9 Your Honor. We are here to discuss whether the  
10 Department has met its burden of proof at the  
11 administrative hearing and established  
12 sufficient facts for the administrative law  
13 judge to conclude that Mr. Gaston is not a  
14 resident of Washington State. I am here on  
15 behalf of Mr. Gaston, who is here in the  
16 courtroom, and, ultimately, this a question of  
17 mixed law and fact.

18 As the record reflects, for 16 years,  
19 Mr. Gaston has established a community and a  
20 home in Vancouver, Washington.

21 THE COURT: Well, they lived there  
22 13 years, and then his mother and father moved  
23 to Portland.

24 MS. COOPER: That's correct, in 2003.  
25 And in that time, Mr. Gaston has established

1 over a decade connection at his employer with  
2 support from an Area Work Incentive Coordinator  
3 that's supplied through Washington State, as  
4 well as medical providers, as well as social  
5 ties through parks and recreation. The only  
6 major change in the 16-year period, as you  
7 said, Your Honor, is, in 2003, his elderly  
8 parents moved across the river and retired in  
9 Portland.

10 THE COURT: But, also, his sister, who  
11 he spends some time with and is a considerable  
12 care giver, also lives in Oregon.

13 MS. COOPER: You're correct. And the  
14 sister is not just a considerable care  
15 provider; she's, in fact, his Medicaid personal  
16 care provider. If you look at the regulations,  
17 Washington State specifically looks at Portland  
18 as a recognized border city, and, for medical  
19 programs, receiving medical coverage in  
20 Portland is the same as receiving medical  
21 assistance in the State of Washington. And  
22 that cite is WAC 388-501-0180. And I've got a  
23 copy, if you'd like.

24 THE COURT: That was referred to.

25 MS. COOPER: Yes, it was. What wasn't

1 referred to, because this issue was bifurcated  
2 sua sponte, was the Medicaid personal care  
3 under the DDD benefits. And that also has a  
4 regulation that recognizes Portland as a border  
5 city, again treating it the same as receiving  
6 services within the State of Washington.

7 So the ultimate question again is  
8 whether the record -- the facts in the record  
9 meet the legal standard for resident. And the  
10 WAC for resident has 12 factors. In that  
11 hearing and in the briefing, we focus on three  
12 important factors. The first is a resident is  
13 someone who lives in Washington and currently  
14 intends to reside in Washington permanently or  
15 for an indefinite period of time.

16 The second is someone who enters the  
17 state with a job commitment.

18 The third is that a person does not need  
19 to live in the state for a specific period of  
20 time.

21 And so when we look at those three  
22 provisions of the multi-factor approach in the  
23 residency regulation, there is evidence in the  
24 record that shows that Mr. Gaston spends two to  
25 three days a week at his home in Vancouver.

1 This is where he has his own bedroom, he keeps  
2 his things, he receives his mail. Again --

3 THE COURT: Where he stays with the  
4 Tarbells on the Tuesdays and Thursdays when he  
5 works and sometimes Wednesday?

6 MS. COOPER: Wednesdays, Thursdays and  
7 sometimes the weekends, depending on his social  
8 engagements with parks and recreation.

9 THE COURT: Right.

10 MS. COOPER: This is also -- Vancouver  
11 is also where he's had the same job for over  
12 12 years with a 96-percent attendant rate.  
13 Again, his accomplishments at work in large  
14 part are due to his job coach and AWIC, who is  
15 funded through the State of Washington.

16 THE COURT: Here's my question: I  
17 don't think anybody denies or argues that he  
18 shouldn't qualify for assistance and that he  
19 should be made to give up this job which has  
20 been so important to his life for, as you say,  
21 over 12 years, and that is a big part of his  
22 life. When in Vancouver, he established this  
23 relationship with the Parks and Recreation  
24 Department. He particularly likes, as I recall  
25 the record, the dancing and so on that's

1 involved. His Medi-Care providers were  
2 originally established in Vancouver, and just  
3 because his parents became Oregon residents,  
4 which is across the river, doesn't necessarily  
5 mean he should be required to change doctors  
6 and so on. But why, if his guardians are  
7 Oregon residents and even though he's not  
8 institutionalized but in the community, why  
9 can't he get all of these same benefits through  
10 Oregon the way he gets them through Washington?

11 MS. COOPER: You brought up the  
12 interesting part of institutionalized, which I  
13 want to get to. But your question is --

14 THE COURT: Well, I don't think the  
15 Department relied on that. I think the  
16 administrative law judge understood the  
17 distinction between an institutionalized  
18 individual and a non-institutionalized, but she  
19 did refer to subsection (d) of that rule, I  
20 think, not -- she didn't even refer to  
21 subsection (d) of the rule; she referred to the  
22 rule in its totality and used it as tool  
23 analogy.

24 But my question to you is: The mystery  
25 to me here is, the most important thing should

1 be to keep this incapacitated but worthwhile  
2 individual working, enjoying the same benefits  
3 that he's enjoying. Why can't that happen  
4 through Oregon or Idaho, if his residency were  
5 changed to Idaho and it was a  
6 Lewiston/Clarkston type of situation; Lewiston  
7 being in the State of Idaho, Clarkston being in  
8 the State of Washington, whenever there's these  
9 border cities? I'm not clear what's driving  
10 this case. Because it's been two years now,  
11 and it doesn't appear there's been any attempt  
12 to see if he can't get this same identical  
13 situation through Oregon, since so much of it  
14 is backed by federal funding.

15 MS. COOPER: I think the answer to  
16 that question, Your Honor, is the fact that  
17 this is a unique individual with unique  
18 disabilities that it took the family 16 years,  
19 and so why -- it's not something that could be  
20 kept if he became suddenly an Oregon resident,  
21 which we don't agree he has in this case. We  
22 think the facts show, if anything, his  
23 commitments to Washington are far greater than  
24 someone simply visiting his family who have  
25 retired a few miles down river. I think what

1 is at issue is that he wouldn't have the  
2 supportive job and work environment if not a  
3 Washington resident. He would not be able  
4 to --

5 THE COURT: So let me -- I didn't see  
6 this in the record, but you're saying the  
7 record contains information that, if he's found  
8 to be an Oregon resident, he'll lose his job?

9 MS. COOPER: What is in the record is  
10 a declaration from his job coach and the  
11 benefit planner through social security, which  
12 is funded through Washington State PM works.

13 THE COURT: So that's a nonresponsive  
14 answer. Would he lose his job just because his  
15 residency was changed in Oregon?

16 MS. COOPER: No, he would not lose his  
17 job. He would lose the support work  
18 environment. He would lose the support. So  
19 for someone with a disability who can't  
20 necessarily walk in the door and pick up tasks  
21 and run with them as, say, you and I would,  
22 this is someone with a disability who, because  
23 of his disability, the work requires that  
24 supported work environment that he receives as  
25 a Washington resident. And just because he

1 has --

2 THE COURT: So Oregon doesn't have  
3 anything like that?

4 MS. COOPER: They might, but I'm not  
5 sure if they can provide services in the State  
6 of Washington. These are Area Work Incentive  
7 Coordinators that are based -- that are  
8 administered through each state office.

9 THE COURT: But the main support  
10 person is his older sister -- or I don't know  
11 if she's older or not, but the sister.

12 MS. COOPER: Who is a Medicaid  
13 personal care partner in a border state. And  
14 so, again, I think, in this case, if we were  
15 talking about a truck driver or someone who  
16 spent a lot of time out of state, we wouldn't  
17 be considering these issues. I think what it  
18 boils down to is the intent and the fact we  
19 have a person with a disability that may have a  
20 hard time articulating intent. But if  
21 Mr. Gaston stood up and said, "I intend to be a  
22 Washington resident for an indefinite period of  
23 time," he meets the requirements.

24 And what we argued at the administrative  
25 level is that he demonstrated that intent, and

1 to treat him differently or to say that his  
2 residency follows that of his guardians  
3 discriminates against him because he's not able  
4 to say those things, like a truck driver, like  
5 a migrant farm worker.

6 In the hearing, we referred to the case  
7 called Shapiro that referred to the right to  
8 travel, it's a constitutionally protected  
9 right, and how that shouldn't be infringed upon  
10 based upon the amount of time you spend in a  
11 state.

12 THE COURT: That's 394 US 618 from  
13 1969.

14 MS. COOPER: Correct. And in this  
15 State, in the case of Macias, which is 668 P.2d  
16 1278, what they talk about is the State can  
17 infringe a penalty, they cannot deny the basic  
18 necessities of life -- here, medical  
19 assistance -- simply because the amount of time  
20 someone spends within a state. It impinges on  
21 his right to travel. Again, the only thing  
22 that changes about Mr. Gaston is he visits his  
23 family. If you look, on the one hand, in  
24 Oregon, he visits his family; in Washington, he  
25 has a job, he has a medical provider, and both

1 of those are key to be being a Washington  
2 resident. If his residency changed, we're not  
3 sure if Oregon benefits would pay for a  
4 Washington provider or a Washington AWIC.  
5 There's not information on that. And so to  
6 simply ask someone to start over after 16 years  
7 when he's 41, his parents are elderly --

8 THE COURT: He's 42, but go ahead.

9 MS. COOPER: Correct. He is 42. It's  
10 been a long time. He is 42. And to ask that,  
11 to start over, simply because he visits his  
12 family across state lines not only violates the  
13 regulation but violates his right to --  
14 constitutional right to travel.

15 Which brings me to the first error, Your  
16 Honor. You mentioned that the conclusion of  
17 law where the judge found that the more  
18 applicable section was section 11, that the  
19 immediate sentence is, "The undersigned  
20 concludes that where the appellants's legal  
21 guardians have moved to another state, his  
22 residency has moved with him." And again, that  
23 is basically applying subsection 11(d), which  
24 led to the fact that Mr. Gaston's residency  
25 follows that of his guardians. But he's not

1 institutionalized, and so that is an error of  
2 law to apply that subsection.

3 THE COURT: How do you respond to the  
4 government's argument, because you've made this  
5 in several places, that we're not relying and  
6 the administrative law judge did not rely on  
7 subsection 11(d); she did rely in part but not  
8 totally on subsection 11, which doesn't  
9 precisely fit the factual situation that we  
10 have here, but she never said her decision was  
11 determinative on subsection (d) in that part of  
12 section 11. But it's like making a straw man  
13 and then knocking it down. That is not their  
14 position.

15 MS. COOPER: That's correct. And I  
16 think the State is misguided in saying that  
17 wasn't the subsection that the ALJ relied upon.  
18 Because if you look at subsection 11, none of  
19 the other (a) through (d) -- the only one that  
20 applies to Mr. Gaston is (d). Subsection (a)  
21 is about SSI. The other is about foster or  
22 adoption. 11(c) is about blindness or  
23 disability. It's only subsection (d) that  
24 would apply to Mr. Gaston's case, and so it's  
25 clear that the ALJ essentially applied

1 subsection 11(d). They conflated 11(d) into  
2 that conclusion of law. There's no other  
3 subsection of 11 that would apply to  
4 Mr. Gaston.

5 And so that is the primary error of law  
6 that we have. And if you look at the intent of  
7 the Washington State legislature, not only do  
8 they -- is this subsection misapplied, but if  
9 you look at the intent of the legislature with  
10 guardianship in general, its guardians are  
11 established to help an individual with a  
12 disability present their rights, without taking  
13 away their autonomy and without taking away  
14 their choice. And that -- the guardianship  
15 intent statute, RCW 11.88.005, where the  
16 legislature recognizes that people with  
17 incapacities have unique abilities and that  
18 they may need someone to help exercise their  
19 rights. However, their liberty and autonomy  
20 should not be restricted through the  
21 guardianship process, only to the minimum  
22 extent necessary.

23 And it seems like here, just because  
24 Mr. Gaston has a guardian, suddenly, his  
25 residency follows that. It strips him of his

1 autonomy and choice to be a Washington  
2 resident. And so I think it not only violates  
3 the residency regulations but also the  
4 guardianship regulations, and I think,  
5 ultimately, it discriminates against him  
6 because he has a disability and because --

7 THE COURT: Would he be able to stay  
8 here if his mother and sister move to  
9 Connecticut?

10 MS. COOPER: I think that's a good  
11 question, and I think it's something they're  
12 considering as establishing that level of  
13 support. It's not in the record, but I happen  
14 to know they're looking at adult family homes  
15 in the State, so that whether they move to  
16 Connecticut or they pass away, again, because  
17 they're elderly, that Chris has the support  
18 systems he's worked so hard to create and won't  
19 face institutionalism.

20 Because that's what we're looking at,  
21 because we're looking at individual choice and  
22 autonomy that has been here demonstrated versus  
23 stripping him of those rights if something  
24 happened to mom and sister, he would have the  
25 community supports necessary to maintain his

1     autonomy and individual residency in Washington  
2     State.

3             So the second error that I want to  
4     discuss today is that the Department failed to  
5     meet its burden of proof showing that  
6     Mr. Gaston does not meet the residency  
7     requirements. The only two pieces of evidence  
8     that the Department has consistently relied  
9     upon is the amount of time that Mr. Gaston  
10    spends in Washington, which, again, violates  
11    the residency requirements, and a clarification  
12    from their administrative office --

13            THE COURT: There's a little bit of a  
14    mixup here. The federal case law makes clear  
15    that they can't rely on durational  
16    requirements, but that's usually in the context  
17    of you have to be here 30 days or 90 days or  
18    120 days. That's different than saying you  
19    come to work here two days a week, and, on  
20    those days, you stay overnight with a friend,  
21    but the rest of the time, you're with your  
22    family members in Oregon, your guardian and  
23    your payee living in Oregon. Isn't there  
24    something different about that kind of a  
25    recognition of duration than how long you have

1 to be domiciled to establish residency in a  
2 state, which would be contrary to federal law?

3 MS. COOPER: I think that it's not  
4 different. I think where it's consistent is  
5 that the State does have the power to confine  
6 public services to residents, but it doesn't  
7 allow them to establish arbitrary barriers,  
8 time periods in which someone needs to be here,  
9 especially as it relates to basic necessities  
10 of life.

11 Here, we're not talking about college  
12 tuition, we're not talking about being able to  
13 get a hunting license. We're talking about the  
14 basic necessities of life, medical assistance  
15 in particular. And if you look at the federal  
16 law regarding Medicaid, same thing, durational  
17 requirements are rejected. You're not allowed  
18 to say that someone cannot be a resident,  
19 cannot receive basic necessities like medical  
20 assistance simply because of the amount of time  
21 they spend in a state. That goes beyond what a  
22 State can -- the State's powers. At that  
23 point, it infringes on the constitutional right  
24 to travel.

25 THE COURT: Here's something that's

1 not in the record, it occurred to me: How is  
2 he treated on his parents', who are his  
3 guardians, Oregon income state tax return?

4 MS. COOPER: That, I'm not sure, and  
5 it's not in the record.

6 THE COURT: Okay. Please continue.

7 MS. COOPER: Okay. We mentioned  
8 durational requirements for public benefits and  
9 the power of the State to confine. I think  
10 what we have here, though, is consistently  
11 they've relied on the amount of time and this  
12 clarification request based on the amount of  
13 time. And what's interesting about that  
14 clarification is that it goes above and beyond  
15 the regulation. And anytime the Department  
16 interprets regulation or speculates the intent  
17 of a regulation, that's usually struck down.  
18 If they want to promulgate a new rule, if they  
19 want to add something like they're trying to do  
20 here, they need to change the regulation and go  
21 through rule-making procedures as required by  
22 RCW 34.05.

23 Here, they have not done that. They've  
24 applied this ad hoc policy regarding time to  
25 Mr. Gaston, which not only doesn't meet the

1 residency requirements, but it also infringes  
2 on his right to travel.

3 And it's for these reasons that we think  
4 that the facts clearly show that the commitment  
5 that Mr. Gaston has with Washington State far  
6 exceeds simply visiting his retired parents  
7 across the river.

8 THE COURT: So even if a judge in my  
9 position were to see that the facts  
10 preponderate, that is, more likely than not  
11 he's a Washington resident and not an Oregon  
12 resident, would I reverse, as long as there was  
13 substantial evidence to support the decision  
14 made by the administrative law judge, even if  
15 it was less than a preponderance?

16 MS. COOPER: The preponderance of the  
17 evidence is the standard at hearing, and what  
18 we have argued is that the Department hasn't  
19 met it.

20 THE COURT: Yes, but what's the  
21 standard for me?

22 MS. COOPER: Appellate relief can be  
23 granted here if the agency order was not based  
24 on substantial evidence.

25 THE COURT: Right, and I'm asking,

1 isn't it the case that substantial evidence can  
2 be less than a preponderance?

3 MS. COOPER: Correct. Generally, the  
4 standard is articulated as the ability to  
5 persuade a rational person of the truth of the  
6 declared premise. And so if the premise is  
7 Mr. Gaston is a resident of Washington State,  
8 what we have is, in Oregon, he visits his  
9 family. In Washington, we have a job, we have  
10 medical providers, and we have social  
11 commitments, which all tie into his Washington  
12 residency.

13 Those things could not be maintained if  
14 he were not found a Washington resident. So if  
15 you look it as commitments, a rational person  
16 is going to say, just like a truck driver, just  
17 like a traveling salesman or migrant worker,  
18 this is someone who is allowed through the  
19 constitution to travel through state lines.  
20 Simply because he goes a few miles south across  
21 the river to see his parents, a rational person  
22 is not going to say suddenly that makes him an  
23 Oregon resident.

24 In fact, if we applied this standard,  
25 this 12-factor standard, let's just say, in

1 this utopia, it's Oregon --

2 THE COURT: So it's your position  
3 there's not even a scintilla of evidence that  
4 he's an Oregon resident?

5 MS. COOPER: Correct, which is why we  
6 filed a motion for summary judgment. There  
7 were no material facts in dispute. It's simply  
8 a question of law, are the facts sufficient to  
9 show he is a resident. And we feel that it is,  
10 if you look at the law. If you look at this ad  
11 hoc policy, well, I mean, maybe that's their  
12 basis. But, again, that's beyond the law.  
13 They need to go through rule making procedures,  
14 and they need to follow the law. And that's  
15 why the law exists and not policies that the  
16 Department decides to come up with to save  
17 money.

18 THE COURT: Do you agree with, it  
19 would be improper for me to weigh the  
20 credibility of the testimonial evidence?

21 MS. COOPER: No. I think there is  
22 deference to the testimonial evidence and to  
23 the ALJ's finding of fact. However, if it's a  
24 mixed question of law and fact, it is in your  
25 discretion to review that de novo.

1 THE COURT: Wouldn't I still make the  
2 factual findings subject to the substantial  
3 evidence law -- substantial evidence rule, and  
4 then apply the clear error of law to the law  
5 part, but I would still make the application, I  
6 wouldn't change the standard for finding or  
7 relying on facts.

8 MS. COOPER: Correct, unless that was  
9 the mixed question of law or fact, and, in this  
10 case --

11 THE COURT: That's what I'm saying,  
12 when it's a mixed question, because courts have  
13 been confused as to what's a fact and what's a  
14 legal principle. Someone will say, well, the  
15 legal principle is right and the facts are  
16 right, but there's been an error in how the  
17 legal principle is applied to the facts.

18 MS. COOPER: Correct.

19 THE COURT: But in making those fine  
20 subtle dichotomies, it doesn't change the rule  
21 for testing whether or not there's substantial  
22 evidence to support a factual finding.

23 MS. COOPER: Correct. And so the  
24 question here is did the Department bring  
25 substantial evidence to show that Mr. Gaston is

1 not a Washington resident.

2 THE COURT: Right, but your position  
3 is there's not even a scintilla of evidence  
4 that he is.

5 MS. COOPER: Correct. I think that  
6 the evidence far outweighs and meets the  
7 standard that's promulgated in this state.

8 THE COURT: All right. Thank you.

9 MS. COOPER: Thank you.

10 THE COURT: Is it Mr. Meredith? That  
11 was Ms. Cooper, correct?

12 MS. COOPER: Correct, Emily Cooper.

13 THE COURT: Middleton?

14 MR. MIDDLETON: Yes, Scott Middleton  
15 on behalf of the State, Your Honor. Good  
16 afternoon. The primary issue in this case is  
17 whether Mr. Gaston is a resident of Washington  
18 under WAC 388-468-0005. And the ALJ found,  
19 based on substantial evidence in the record,  
20 that he is not a resident under that WAC. Her  
21 decision was not premised upon any reversible  
22 errors of law, and her decision does not impose  
23 any durational residency requirement on  
24 Mr. Gaston.

25 THE COURT: That rule 11 really

1 doesn't address the situation we have here.

2 MR. MIDDLETON: Well, the Department  
3 is well settled that agencies actually do, in  
4 fact, have the right to reasonably interpret  
5 their own regulations and should be given  
6 considerable deference in doing that. And with  
7 respect to where Mr. Gaston lives, which is  
8 what I believe this is really coming down to,  
9 viewing the case in the totality of the  
10 circumstances, and making a decision that his  
11 primary residence for purposes of benefits in  
12 Oregon is a reasonable interpretation of their  
13 own regulation.

14 THE COURT: And so is it an  
15 interpretation of subsection (d), as Ms. Cooper  
16 argues or something else?

17 MR. MIDDLETON: Well, the findings --

18 THE COURT: After all, subsection (d)  
19 only applies to institutionalized incapacitated  
20 persons.

21 MR. MIDDLETON: Subsection (d) only  
22 applies to -- you're absolutely correct, only  
23 applies to institutionalized individuals, but,  
24 as Ms. Cooper correctly acknowledged, in de  
25 novo review, which is what this court would

1 have on issues of law, this court can modify  
2 conclusions of law, as long as there is a  
3 substantial record in order to arrive at that  
4 finding.

5 THE COURT: I didn't understand what  
6 you just said.

7 MR. MIDDLETON: Reviewing -- it's well  
8 settled that reviewing courts can affirm on  
9 other grounds, in this case, modify the  
10 conclusion of law. If this court were to  
11 determine that subsection 11(d) was, in fact,  
12 applied and that that application was an error  
13 of law, this court under de novo review can  
14 nevertheless modify the conclusions and affirm  
15 on other grounds.

16 THE COURT: Well, my impression from  
17 reading the administrative law judge's decision  
18 was that, although she relied in part on  
19 subsection 11 of the rule, that she did not  
20 specifically rely on subsection (d).

21 MR. MIDDLETON: Yeah. She did not --

22 THE COURT: Is that different, or  
23 maybe I've got it wrong?

24 MR. MIDDLETON: She did not cite to  
25 subsection 11(d). And while she did use some

1 language, I would concede that, at least in  
2 some part, as you acknowledge, she did rely at  
3 least by analogy, that -- you know, in applying  
4 subsection 11(d). But these are not just his  
5 legal guardians; these are his parents. These  
6 are the individuals that provide his Medicaid  
7 personal care. These are individuals that have  
8 submitted eligibility reviews swearing under  
9 penalty of perjury that Mr. Gaston is a member  
10 of their Oregon household.

11 So there are -- so the findings of fact  
12 are supported by substantial evidence, and when  
13 you apply those to where Mr. Gaston lives, at  
14 least what is his primary residence, this court  
15 should affirm.

16 THE COURT: How about Ms. Cooper's  
17 argument on time duration? We don't have a  
18 case exactly like this, but in the federal  
19 cases in which durational requirements were set  
20 out by states, they were struck down. But as I  
21 pointed out in my questioning to her, that  
22 usually involved, well, you usually have to be  
23 a resident of this state for X number of days.  
24 She says, well, the principle should also apply  
25 for someone who goes back and forth, in this

1 case on a regular basis and spends somewhere  
2 two to four days in each state.

3 MR. MIDDLETON: Well, those cases,  
4 Shapiro and Maricopa County, which Mr. Gaston  
5 primarily relies on in making his durational  
6 residency argument, distinguishes -- at least  
7 Shapiro distinguished between a State's right  
8 to impose a bona fide residency requirement,  
9 and, on the other hand, requires somebody to  
10 have been a bona fide resident for X amount of  
11 time, in those cases, one year, before they can  
12 even apply for benefits.

13 And so, in this case, Title 74 requires  
14 the Department to comply with all federal rules  
15 and regulations to assure that future Medicaid  
16 funding is maximized, and federal regulations  
17 require that the state provide medical  
18 assistance to all eligible residents. And so  
19 the Department, from that directive, both from  
20 our legislature and from the federal  
21 government, has enacted WAC 388-468-0005. And  
22 it's significant that, in the regulation at  
23 issue here, where she's -- where Ms. Cooper is  
24 referring to the State, cannot set any specific  
25 amount of time that you have to live here in

1 order to receive benefits. That's absolutely  
2 correct.

3 But what the regulation provides is that  
4 you actually have to be found to have lived in  
5 Washington in order to be eligible for  
6 benefits.

7 THE COURT: So I'm trying to see if  
8 this is responsive to my question. The last  
9 thing you said, I think, is responsive, and  
10 that is that you have to first establish that  
11 you're a used the word bona fide resident, and  
12 I agree with that. And then you say you  
13 don't -- what causes you to lose it then? It  
14 can't be lost if you travel back and forth in a  
15 border state? Like in this case, we're talking  
16 about Vancouver, Washington, and Portland,  
17 Oregon. But Kansas City is in two states.

18 MR. MIDDLETON: I think, Your Honor,  
19 that we have to look at, and I think the  
20 Department, in fact, reasonably did this, is  
21 look at the totality of the circumstances and  
22 make a determination upon where somebody lives  
23 based on the totality of the circumstances, not  
24 just the amount of time that Mr. Gaston spends  
25 in Oregon versus the amount of time he spends

1 in Washington, but also the fact that his  
2 Medicaid personal care providers, these are the  
3 individuals that provide his in-home care --

4 THE COURT: But if that's the  
5 argument, why isn't Ms. Cooper's position even  
6 stronger because he's got his long-term medical  
7 providers in Washington, he's got this  
8 long-term relationship with the recreation and  
9 parks department of the City of Vancouver, so  
10 he has a set of support personnel there. Why  
11 then doesn't that strengthen her arguments?

12 MR. MIDDLETON: Well, I think that  
13 that is a credibility determination for the  
14 court -- for the ALJ to have made to weigh the  
15 evidence. I think those are certainly factors  
16 that could support his residency in Washington.  
17 But when weighed against these other factors,  
18 which are based on substantial evidence in the  
19 record, the ALJ correctly found that he lives  
20 in Oregon under this totality of the  
21 circumstances, that he is, in fact, at least a  
22 primary resident of the State of Oregon.

23 THE COURT: On this same record that  
24 we have in front of us, if the ALJ had found  
25 that his residency remained in Washington,

1 should I have upheld that?

2 MR. MIDDLETON: I think that's a  
3 critical finding here, Your Honor. And to  
4 address your question, I think the critical  
5 issue in this case is where does Mr. Gaston  
6 live. And I think that comes down to the  
7 finding of fact by the ALJ. And if she had  
8 found that, based on these totality of the  
9 circumstances and all the evidence that was  
10 presented, that that would be entitled  
11 deference, just as I'm saying that her decision  
12 in our favor should be entitled deference.  
13 It's a credibility issue.

14 THE COURT: The answer would be yes.

15 MR. MIDDLETON: The answer to that  
16 question would be yes.

17 THE COURT: Okay. Let's see if you're  
18 consistent.

19 MR. MIDDLETON: Because I believe that  
20 the critical issue here is where does he live.  
21 And so, in this case, the question as to where  
22 he lives is a finding of fact, and I believe  
23 that the ALJ is entitled to deference, because  
24 there is substantial evidence in the record to  
25 support that finding. It's not just, you know,

1 the amount of time he spends in one state  
2 versus another, but his in-home care providers  
3 are his parents, and they have acknowledged  
4 that the majority of his in-home care services  
5 are provided in the State of Oregon. And  
6 they've also made representations in the  
7 eligibility reviews in 2004, 2005 and 2006,  
8 they swear under penalty of perjury that he is  
9 a member of their Oregon household. So when we  
10 put the totality of the circumstances together  
11 and weigh all this evidence, we arrive at a  
12 conclusion that there is substantial evidence  
13 to support the key finding in this case.

14 THE COURT: Okay. Thank you.

15 MR. MIDDLETON: Thank you, Your Honor.

16 THE COURT: I think I know where I'm  
17 going to go, but, in the spirit of our custom,  
18 Ms. Cooper, if you would like a brief reply, I  
19 would allow that.

20 MS. COOPER: Please. Thank you, Your  
21 Honor. I have three main points to reply. The  
22 first is the Department talks about the  
23 totality of the circumstances, and the error of  
24 law that I think we most want you to look at is  
25 the fact that what happened here in the

1 administrative level is the administrative law  
2 judge disregarded the other sections and said  
3 she didn't find them applicable. The  
4 durational -- the part that prohibits  
5 durational requirements, she disregarded. The  
6 part about intent to be a resident, which we  
7 had substantial evidence on the record of, and  
8 the fact he enters the state with a job  
9 commitment, she disregarded those and instead  
10 applied erroneously on a subsection that does  
11 not apply to Mr. Gaston. And in this error,  
12 she not only disregarded applicable portions of  
13 the law, but she favors the residency of his  
14 guardians, creating a discriminatory impact  
15 and infringing on his right to travel.

16 The other issue I wanted to bring up is  
17 that the concept of where Mr. Gaston lives is a  
18 mixed question of law and fact. It's  
19 applications of the facts to the law, does he  
20 meet the requirement under the residency  
21 regulation to show that he lives here. That is  
22 something that is subject to de novo review.  
23 What happened in this case is she conflated  
24 11(d) with a finding of fact to show he lives  
25 with his guardians in Oregon. You could not

1 make that finding without going to 11(d).

2 And then finally --

3 THE COURT: Why can't she use  
4 subsection 11 in its totality as an analogy  
5 since it doesn't specifically address the  
6 situation that we have here?

7 MS. COOPER: What I think is erroneous  
8 is we do have applicable subsections, so that's  
9 why I don't think you can apply it. We have  
10 subsection one and subsection two, which do  
11 apply to Mr. Gaston to disregard those in favor  
12 of his guardian's intent as an error of law.

13 The second thing, the Department  
14 distinguishes Shapiro and Maricopa County;  
15 however, the other case we relied on regarding  
16 interstate travel is the case of Duffy, and in  
17 that case, the plaintiff didn't even reside in  
18 the state two to four days. This is someone  
19 entering the state, and, there, the court said,  
20 the State's ability to confine social -- public  
21 services based on the amount of time someone  
22 spends in the state does not apply to  
23 penalizing them essentially because they  
24 haven't spent sufficient time in the state for  
25 benefits.

1           And then, finally, the point I'd like to  
2 make is that, here in Washington, if anything,  
3 they have anticipated the right to travel in  
4 those border city WACs. It says you can  
5 receive Medicaid personal care. You can  
6 receive medical care. Washington State has  
7 alluded to that. And for the State to say  
8 we're going to penalize you because you're  
9 going to visit family in another state and some  
10 of that family has provided some benefits there  
11 is inconsistent with the law and should not be  
12 upheld.

13           THE COURT: Okay. Thank you. When we  
14 heard the argument on the stay, my recollection  
15 of my comments there was that there was an  
16 attack on the factual findings made by the  
17 administrative law judge, but it was being  
18 presented to me before the transcript had even  
19 been produced, and so how could I review that?  
20 And the argument was, well, look at the  
21 exhibits, and I have looked at the exhibits.  
22 But, now, I have the advantage of a transcript,  
23 and when I look at the transcript, there are  
24 some parts of the transcript that I have to say  
25 that I can't quite agree with Ms. Cooper,

1 artfully and eloquently as she puts forth her  
2 argument -- and I suppose that's somewhat  
3 patronizing, but she did do a good job -- that  
4 there isn't a scintilla of evidence that the  
5 administrative law judge could rely on. For  
6 instance, in the transcript portion of this, at  
7 page 51 of 72, at line 20, when the sister, who  
8 is the payee, is being questioned, the question  
9 is, "So for the times that he's not attending  
10 those functions, where is care provided then?"  
11 What does the sister answer? She says,  
12 "Typically, at his home in Portland." Now,  
13 that's her saying his home is in Portland, not  
14 Vancouver, Washington.

15 Now, later, I think this is his mother,  
16 "If it's his normal workweek, he would be  
17 expected -- how long would he be expected to be in  
18 Washington, two days?" Answer from the mother,  
19 "Correct." So he's in Washington two days.

20 Then I'm referred to Exhibit 16.  
21 Exhibit 16 is a letter from the mother and  
22 father signed by the mother, Lynn Gaston, and  
23 it says, "I'm providing the following  
24 information you requested regarding my son,  
25 Christopher Gaston's, work schedule, Tuesday

1 and Thursday for eight hours each day.  
2 Although Christopher's schedule varies from  
3 week to week, he generally stays in Vancouver  
4 two days a week at the residence of Dan and  
5 Linda Tarbell. When not at the Tarbells, Chris  
6 stays in Oregon with us or with his sister."

7 Now, where I agree with Ms. Cooper, I  
8 guess would be fair to say and why I put the  
9 question I did to Mr. Middleton -- is that  
10 correct?

11 MR. MIDDLETON: Yes.

12 THE COURT: -- is that I think there  
13 are facts on both sides of the issue here. I  
14 think an administrative law judge with  
15 integrity could have said, "Looking at the  
16 totality of the facts, some of which show he's  
17 in Oregon and some of which show he's in  
18 Washington, I find that, even though his  
19 parents have moved to Oregon, that he should  
20 still be treated as a Washington resident," and  
21 if she had made that ruling, I don't think I  
22 would reverse her.

23 But under these facts, three of which  
24 I've just specifically referenced, those facts  
25 are substantial in the sense that that evidence

1     inducted, which means that an administrative  
2     law judge could deduct from those facts,  
3     listening to the credibility of the mother and  
4     the sister -- what they both testified to under  
5     oath and the letters they submitted on their  
6     own letterhead, that his residence is truly in  
7     Oregon, even though he maintains his job in  
8     Washington and other support activities, such  
9     as his deep and consistent involvement with the  
10    Vancouver Recreational and Parks Department and  
11    the fact his medical providers which he's had a  
12    long time remain in Washington, and there would  
13    be no reason to change them because he's moved  
14    across the river to Oregon.

15            So I don't think I can with integrity  
16    say there's not substantial -- for the  
17    non-lawyers here, the word "substantial" here  
18    doesn't mean more, a lot. It's more like  
19    Plato's idea of an atom. It's if there's  
20    sufficient information inducted from the  
21    outside world that it creates a stepping place  
22    where you can make logical deductions or  
23    factual inferences from that information that's  
24    inducted. Is it substantial enough, is it just  
25    whimsical, the will-o'-the-wisps, or is there a

1 substantial enough piece of factual material  
2 that you can make logical deductions from that,  
3 even though I were to say there's more material  
4 on the other side of the question. I should  
5 not be reversed if I were to say I find there's  
6 more facts that show he's in Washington more  
7 than in Oregon, but even though the  
8 preponderance of the facts show he's in  
9 Washington as a residence, there is substantial  
10 enough evidence that I should not disturb the  
11 fact finder's credibility determination in her  
12 finding that there is sufficient facts for her  
13 to logically conclude or factually infer that  
14 he is an Oregon resident.

15 Now, that's what the law is, I believe,  
16 in Washington and how it's properly understood.  
17 So I think that's the situation that I'm in  
18 here. I think that the administrative law  
19 judge could have gone either way on this. But  
20 the way she went, listening to everybody's  
21 testimony, which there isn't a lot of, but also  
22 relying on some of these exhibits, is there is  
23 more than a scintilla of evidence without me  
24 ruling whether it's a preponderance or not.  
25 I'm saying, even if it's not, even if the

1 preponderance is the other way, there is  
2 substantial enough evidence that she could  
3 logically make the deductions she made from the  
4 evidence that was inducted and the factual  
5 inferences from the elemental facts that were  
6 admitted.

7           So I do think this turns on these  
8 factual determinations and not these fine legal  
9 points that I think are properly argued by both  
10 Ms. Cooper and Mr. Middleton, insofar as there  
11 shouldn't be a durational requirement. We know  
12 about that. I find that subsection 11 of the  
13 rule does not specifically cover this  
14 situation. I do think, though, in a situation  
15 where the rule is not specific, that the Court  
16 should give some deference to the Department's  
17 own understanding of the rule as promulgated,  
18 even if it isn't directly on point. The  
19 administrative law judge did not hang her  
20 decision on subsection (d), so I can't find  
21 that there is a clear error of law here.

22           So I am in a position, whereas I said  
23 before, I think we should all be working to  
24 keep Christopher doing exactly what he's doing,  
25 and I can't imagine a reasonable person

1 listening to all of this and learning about  
2 Christopher would want to change his situation.  
3 At the same time, I think he's an Oregon  
4 resident, or at the least amount. I can't say  
5 that the administrative law judge who found  
6 he's an Oregon resident made either an error of  
7 law or her factual determinations weren't  
8 supported by substantial evidence as I define  
9 it here.

10 If the Court of Appeals or the Supreme  
11 Court is going to change how we trial judges  
12 should understand what the words "substantial  
13 evidence" mean, I'll follow whatever the higher  
14 authority is. But looking at Professor  
15 Anderson's article, Professor Aronson's  
16 article, doing administrative law cases for  
17 20 years, this is the way it is so far.

18 So the case is well done. I frankly  
19 imagine that it won't stop here, and if it  
20 does, here's another little, what some people  
21 may think is an anomaly in the law in the State  
22 of Washington: The Court of Appeals, if it  
23 goes there, and I think it might go, could care  
24 less what I say. They will look at the record  
25 themselves, make their own determination, and

1 they will give no deference, zero deference, to  
2 the trial judge. That's the rules they operate  
3 under, and I'm not offended by that, but that's  
4 what the rule is. But how I understand my role  
5 and my obligation, I don't think the burden of  
6 proof has been met here, even though the  
7 quality of the work -- and I know this is  
8 patronizing but I also think it's a fair  
9 statement -- the quality of the work here is  
10 very good. But I don't think the burden of  
11 proof has been met here. So I'm denying it.

12 And if you want to move quickly, maybe  
13 you can agree on a short order since I don't  
14 have to make particular findings but this  
15 denial, and you can move upstream quicker, if  
16 you want.

17 MR. MIDDLETON: I have a proposed  
18 order.

19 THE COURT: If you could both sign it,  
20 it can be given to the clerk, and I'll sign it  
21 in chambers.

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