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NO. 33088-1-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

VENETTA GASPER and TOMMIE MYERS,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF
SOCIAL AND HEALTH SERVICES,

Appellant.

BRIEF OF AMICUS CURIAE
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 775
IN SUPPORT OF RESPONDENTS

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ORIGINAL

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	3
I. THE SHARED LIVING RULE IMPOSES SUBSTANTIAL BURDENS ON CAREGIVERS	4
II. THE SHARED-LIVING RULE CONTRAVENES BASIC PRINCIPLES OF PROCEDURAL DUE PROCESS IN WASHINGTON BY CREATING AN IRREBUTABLE PRESUMPTION THAT RECIPIENTS WHO LIVE WITH THEIR CAREGIVERS NEED 15% FEWER PAID SERVICE HOURS THAN RECIPIENTS WHO DO NOT LIVE WITH THEIR CAREGIVERS	11
CONCLUSION	17

Federal Cases

<i>Dillingham v. I.N.S.</i> , 267 F.3d 996, 1009, 1010-1011 (9th Cir. 2001)	12
<i>Mothers & Childrens Rights Organization, Inc. v. Stanton</i> , 371 F.Supp. 298, 302-304 (D.C.Ind. 1973)	13, 15
<i>Stanley v. Illinois</i> , 405 U.S. 645, 656-57, 92 S.Ct. 1209, 31 L.Ed.2d 551 (1972)	11, 12

State Cases

<i>Anderson v. Morris</i> , 87 Wn.2d 706, 712, 558 P.2d 155 (1976)	12, 13, 15
<i>Drinkwitz v. Alliant Techsystems</i> , 140 Wn. 2d 291, 300, 996 P.2d 582 (2000)	7, 8
<i>Hausman v. Department of Institutions and Agencies, Division of Public Welfare</i> , 64 N.J. 202, 208-209, 314 A.2d 362 (N.J. 1974)	15, 16
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wash.2d 152, 159, 961 P.2d 371 (1998)	7

State Statutes

RCW 41.56	1
RCW 74.39A.220	1
Washington State's Minimum Wage Act, RCW 49.46	6

Federal Regulations

42 C.F.R. §431.51	9
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I. INTRODUCTION

Amicus Curiae, the Service Employees International Union, Local 775 ("Union" or "Local 775"), represents approximately 28,000 home care and nursing home workers in Washington ("caregivers"). Of this number, approximately 23,500 are paid directly by the Washington State Department of Social and Health Services ("DSHS") pursuant to programs authorized under federal and state law to provide services to needy disabled individuals ("clients" or "recipients") in their homes or in community settings rather than in institutions. Declaration of Counsel, attached hereto, ¶ 2.

Pursuant to RCW 74.39A.220 *et seq.*, these 23,500 workers are considered public employees solely for the purposes of collective bargaining under RCW 41.56. In August of 2002, these 23,500 workers voted 84% "yes" for representation by the Union, so they are now exclusively represented for the purposes of collective bargaining by Local 775. Declaration of Counsel, attached hereto, ¶ 3.

The instant lawsuit involves a DSHS policy, WAC 388-72A-095(1)(c), known as "the shared living rule." Under this rule, when a recipient of home and community services lives in the same household as the recipient's paid caregiver, a client's base hours of support -- i.e., the

number of caregiver hours which will be paid for by DSHS -- is reduced by approximately 15 percent. The reduction is justified by an irrebuttable presumption that a client who lives with another eligible client or receives program-funded services from someone living in the same residential unit will inevitably and invariably have certain household tasks performed for him or her even if DSHS refuses to pay to have those tasks performed.

The precise number of Union-represented employees who currently reside with the recipients to whom they are caregivers, and who would therefore be impacted by the shared living rule, is in dispute. At one point, DSHS estimated the number "shared living" workers at 12,680, which is roughly half of all potentially effected workers. *See* Decl. of Counsel, attached, Exhibit 1 (excerpt from DSHS web site).

The Union has submitted this *amicus curiae* brief in support of the Respondents' position in this matter because a ruling in favor of DSHS would have a substantial adverse impact on our members. Imposition of an irrebuttable presumption that a recipient's paid caregiver who lives in the same household as the recipient must be providing certain household tasks to the recipient may save DSHS money, but only by forcing our members to provide for free services they are morally and legally entitled to be compensated for.

As will be demonstrated below, the shared living rule gives our

members who currently reside with the recipient a choice of three alternatives. First, they can provide certain household tasks (such as meal preparation, housekeeping, and shopping) for the recipients of community or home services for free. Second, they can decline to provide those tasks and watch the recipient, who by definition is not being provided with enough caregiver hours to have these tasks performed for him or her, struggle with an inadequate amount of caregiver support. Third, our members can abandon their caregiving relationship with the recipient, leaving the recipient to fend for him or herself.

The Union believes that imposition of these equally unacceptable alternatives on our members is justified neither by law nor social policy. For the reasons set forth below, we urge affirmance of the decision of the trial court in this matter.

ARGUMENT

I. THE SHARED LIVING RULE IMPOSES SUBSTANTIAL BURDENS ON CAREGIVERS

The key thing to understand about the impact of the shared-living rule on caregivers is that it constitutes an irrebuttable presumption that a client who lives with another eligible client or receives program-funded services from someone living in the same residential unit will inevitably

and invariably have certain household tasks performed for him or her even if DSHS refuses to pay to have those tasks performed.

The problem with this irrebuttable presumption is that it, like all irrebuttable presumptions, is not grounded in any type of reality. The Union is not claiming that the extent to which the client will be receiving necessary household services from someone living in the same household is not an appropriate basis for adjusting the number of hours of service DSHS should pay for with regard to that client. The shared-living rule does not adjust the number of hours of service based on the extent to which these services are already being provided to the client, however. Instead, it simply dictates that the client's caregiver will not be compensated for those services, and lets the chips fall where they may.

There is no evidence in the record that the premise of the shared living rule, which is that 15% of the tasks performed by live-in caregivers are tasks that benefit the caregiver as well as the client, is true in the majority of cases, much less in every case. In every circumstance where in excess of 85% of the tasks performed by live-in caregivers benefit only the client, however, when this presumption is applied, the caregiver is essentially being forced to work for the client without compensation.

The burden of this policy therefore falls, not only on the client, but also on the caregivers. When DSHS reduces the number of service hours allocated to a client by 15%, the caregiver has only three choices, all bad.

First, the caregiver can provide for free those household tasks (such as meal preparation, housekeeping, and shopping) that benefit only the client for which the caregiver previously received compensation. The caregiver is still providing services exclusively for the client, he or she is simply not being paid for that work. This result not only would violate Washington State's Minimum Wage Act, RCW 49.46 *et. al.*, it simply cannot be reconciled with Washington State's "long and proud history" of being a pioneer in the protection of workers. *See Drinkwitz v. Alliant Techsystems*, 140 Wn. 2d 291, 300, 996 P.2d 582 (2000).¹

As a practical matter, implementation of the shared living rule has already imposed this cost on Local 775's members. In his testimony before a Public Employment Relations Commission hearing examiner regarding an unfair labor practice charge filed by Local 775 against DSHS, Local 775 President David Rolf cited DSHS' own published communications to explain the Union's estimate that half of the entire

¹ *See also Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 159, 961 P.2d 371 (1998) (Washington's "comprehensive legislative system with respect to wages indicates a strong legislative intent to assure payment to employees of wages they have earned").

bargaining unit experienced approximately an 11.5% pay cut as a result of the shared living rule. *See* Decl. of Counsel, Exhibit 2 (Rolf, Tr. 171-173). Again according to DSHS's own calculations, this is the equivalent of an \$18 to \$20 million dollar reduction in wages being paid to the Union's members, without any corresponding reduction in the amount of work being performed by those members. *Id.*²

Second, the caregiver could decline to provide the household tasks the caregiver previously provided and allow the recipient, who by definition is not being provided by DSHS with enough caregiver hours to have these tasks performed for him or her, to endure having an inadequate amount of caregiver support. While DSHS may contemplate without blanching this level of indifference towards the human needs of clients, our members cannot, will not and should not willingly stand by and permit such suffering.³

Third, our members could abandon their caregiving relationships

² *See also* Decl. of Counsel, Ex. 3 (testimony of Bill Moss, DSHS office chief for home and community programs within the home and community services division of DSHS's aging and disability service administration, confirming that the projected cost of repealing the shared living rule would be in the \$18-22 million range) (Tr. 347-348).

³ In fact, a caregiver is not free to simply walk out on a client when the caregiver's compensated hours expire. Such conduct could expose a caregiver to an investigation by Adult Protective Services, and an adverse finding could end a caregiver's career in the long-term care industry. *See* Decl. of Counsel, Ex. 4 (Tr. 227).

with the recipients, leaving the recipients to fend for themselves. This is, sadly, the most likely scenario, in situations where the shared-living rule causes a 15% downward adjustment in the number of hours of services for the recipient even though the recipient's actual needs for services are not being reduced by that proportion by the caregiver's performance of household tasks the caregiver would be performing in any event.

Unable and unwilling to maintain the previous level of caregiving at a 15% reduction in pay, caregivers will be forced, for their own benefit and for the benefit of the client, to give care to clients with whom they do not reside.⁴

Thus, clients will be deprived of their first choice of caregiver. In addition to explicitly violating 42 C.F.R. §431.51, which guarantees clients their free choice of provider, as has been demonstrated by Respondents, this defeats the crystal clear intent and purpose of that federal regulation.

Moreover, to the extent that DSHS could legitimately reduce the number of hours of services a client is to receive based on the synergistic advantages of having the client live with his/her caregiver, that

⁴ Not surprisingly, this appears to be the case with both of the clients whose cases are before this Court. Both of their caregivers have stated that they simply cannot afford to continue providing care at the significantly reduced rate DSHS has proposed to pay. Gasper AR 47, 50; Myers AR 64.

opportunity will be lost (and with it potential cost savings to DSHS). It is ironic indeed that a DSHS rule justified on the basis of cost savings will have the perverse effect of discouraging clients and caregivers from residing each other, therefore eliminating the cost savings that DSHS could otherwise legitimately obtain from such cohabitation.

Finally, caregivers will be forced to separate from clients with whom they may well have a close and longstanding relationship. Such a forced separation will often have a host of negative consequences for both caregivers and clients.⁵

II. THE SHARED-LIVING RULE CONTRAVENES BASIC PRINCIPLES OF PROCEDURAL DUE PROCESS IN WASHINGTON BY CREATING AN IRREBUTABLE PRESUMPTION THAT RECIPIENTS WHO LIVE WITH THEIR CAREGIVERS NEED 15% FEWER PAID SERVICE HOURS THAN RECIPIENTS WHO DO NOT LIVE WITH THEIR CAREGIVERS

It is a well-known axiom that "[p]rocedure by presumption is always cheaper and easier than individualized determination." *Stanley v. Illinois*, 405 U.S. 645, 656-57, 92 S.Ct. 1209, 31 L.Ed.2d 551 (1972). Such a procedure is not, however, a legitimate substitute for case-by-case determinations where important rights are at stake.

⁵ Thus, to give just one example, if Ms. Gasper's caregiver is forced by the shared living rule to find a different client outside of the caregiver's home, Ms. Gasper will be forced to move out of her caregiver's home. Gasper AR 47, 50.

In *Stanley*, for example, the U.S. Supreme Court concluded that an Illinois policy of irrebuttably presuming that unmarried fathers were unfit to merit custody of their children lacked a rational basis, violated equal protection, and required the state to provide such fathers with a fitness hearing prior to making such a determination. In so doing, the Court rejected the state's claim that unmarried fathers are so seldom fit as parents that Illinois should not be required to "undergo the administrative inconvenience of inquiry." *Id.* at 656.

Similarly, in *Dillingham v. I.N.S.*, 267 F.3d 996, 1009, 1010-1011 (9th Cir. 2001), the Ninth Circuit Court of Appeals, even though it was applying a "relaxed scrutiny" test, rejected the U.S. government's decision establishing an irrebuttable presumption against the validity of foreign expungements as unacceptably overbroad, in light of an alien's substantial interest in avoiding deportation, as well as the government's minimal (or nonexistent) incremental burden in verifying that his or her conviction was expunged.

According to the Washington State Supreme Court, this doctrine applies directly to presumptions imposed and implemented by DSHS. *See, e.g., Anderson v. Morris*, 87 Wn.2d 706, 712, 558 P.2d 155 (1976) (presumption by DSHS that once an amount of money is received by recipient and is under his or her control, it is "currently (actually)

available" to meet the needs of the recipient, "would be improper and inconsistent with the federal regulations only if it were conclusive").

The shared living rule at issue here is precisely the type of "mandatory presumption" the Court in *Anderson* indicated would be improper. Unlike the presumption in the *Anderson* case, which could be rebutted with a proper factual showing, DSHS's presumption that a recipient with a live-in caregiver need only have that caregiver be allocated 85% of the service hours that would otherwise be necessary cannot be rebutted no matter how factually inaccurate the presumption may turn out to be.

A very similar rule was struck down on precisely this basis in *Mothers & Childrens Rights Organization, Inc. v. Stanton*, 371 F.Supp. 298, 302-304 (D.C.Ind. 1973), cited with approval in *Anderson, supra*, 87 Wn.2d at 712. In that case, which dealt with benefits being provided under the Aid to Families with Dependent Children program ("AFDC"), the state adopted the presumption that a nonrecipient of such benefits living in a household with one or more recipients was contributing "one equal share of the household expenses."

The Court in that case stated:

In practice the defendants make this presumption irrebuttable, and in so doing they cause needless conflict with the federal program and standards. **By not permitting**

rebuttal of the presumption, defendants insure that significant, immediate harm will be done to many assistance groups, since the presumption frequently will not reflect the true underlying circumstances.... This harm is needless since, as more fully developed below, the lesser action of establishing a rebuttable presumption adequately protects legitimate state interests and at the same time protects the paramount interest of the dependent child.... [N]o balancing is required since by including an irrebuttable presumption of contribution, the defendants' practice, with no justification appearing, conflicts with the paramount goal of protecting needy children.... **In sum, to the extent that defendants' actual practice includes an irrebuttable presumption that nonrecipients pay one equal share of household expenses, that practice is inequitable.**

371 F.Supp. at 304 (emphasis added).⁶

⁶ The Court in *Stanton* also persuasively rejected the argument that an irrebuttable presumption regarding the relationship between recipients and non-recipients of benefits was no different than any other rough estimate or approximation used by the government in allocating benefits. It stated:

The argument is made that defendants' irrebuttable presumption is no different from the many rough estimates used by a state in calculating the costs of a given amount of needed goods, which estimates by definition cannot hold true in all cases, but which are nevertheless acceptable under federal law. See *Wyman* [*Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970)], *supra*. An example of such an estimate is that a family will need a certain number of pairs of shoes per year at a cost of a specified sum per pair. Even assuming such estimates are everywhere acceptable, the present factual situation as a practical matter is significantly different, and thus warrants the special treatment this court has given it. Cf. *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973). The shoe-type calculation merely involves estimates of impersonal economic forces generally and constantly at play in the state, while the calculations here challenged involve estimates regarding the relationship of a particular assistance group to a particular nonrecipient member of the household.

371 F. Supp. at 304.

The same point was made in *Hausman v. Department of Institutions and Agencies, Division of Public Welfare*, 64 N.J. 202, 208-209, 314 A.2d 362 (N.J. 1974), also cited with approval in *Anderson, supra*, 87 Wn.2d at 712. In that case, the Court noted:

The United States Supreme Court has long since held, in *King, supra* (392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118), and *Lewis, supra* (397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561), that **a state may not, by statute or regulation, conclusively presume that a 'man in the house' or other non-eligible member of the household is bearing his share of the household expenses or contributing to the living costs of the welfare recipients so as to permit the reduction of benefits to them.** To do so when that is not the fact, as in this case, means that the cost of living remains the same for the assistance recipients as when they alone comprised the household, but the benefits received are less and not enough to meet it. Consequently the dependent child-the primary object of the program-suffers. While the state has a legitimate interest in doing its utmost to see that assistance payments are not diverted from the intended needy recipients to the support of non-eligibles and is free to determine its own standard of need-the foundation of its argument here-such cannot be accomplished by arbitrary means resulting in unjustified reduction of subsistence to the child.

314 A.2d at 366 (emphasis added).

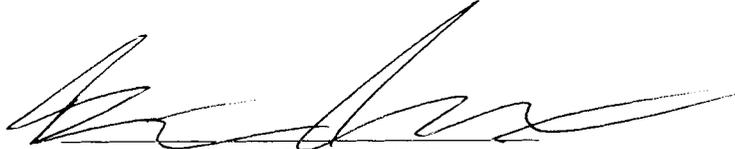
Just like a presumption that a non-eligible member of a household is bearing his/her share of household expenses, the shared living rule accomplishes "by arbitrary means" an unjustified deprivation of benefits towards certain clients, without regard to the actual facts of a given situation. In no meaningful way, moreover, is the shared living rule

distinguishable from the AFDC cases cited above. Just as the presumption in those cases has been ruled improper, the presumption in the case at bar should likewise be struck down as arbitrary and inequitable.

CONCLUSION

For the foregoing reasons, the Union asks this Court to affirm the decision of the trial court below.

Respectfully submitted this ^{13th} day of September, 2005.



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CERTIFICATE OF SERVICE

On the 12th day of September 2005 I caused the foregoing document to be filed via legal messenger with:

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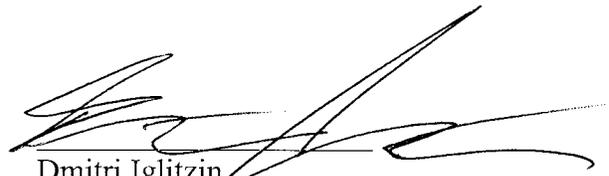
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