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

VENETTA GASPER and TOMMYE MYERS,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Appellant.

**APPELLANT'S BRIEF IN ANSWER TO BRIEF OF AMICUS
CURIAE SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 775 IN SUPPORT OF RESPONDENTS**

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I. INTRODUCTION

Service Employees International Union, Local 775 (SEIU) has filed an amicus curiae brief in support of Respondents in which it urges this Court to affirm the trial court order invalidating the shared living rule. As set forth in Appellant's Motion To Strike,¹ portions of SEIU's brief and almost all of the declaration filed with it are improper because they rely on evidence that was not in the administrative record and not considered by the trial court. For the reasons set forth in Appellant's motion that evidence and any argument relating thereto should not be considered.²

However, the SEIU also argues that the decision below should be upheld on the basis of a legal theory that was not argued at either the administrative level or to the trial court, and was touched upon only cursorily by Respondents in their Brief, i.e. the assertion that "[t]he shared-living rule contravenes basic principles of procedural due process

¹ Motion to Strike Portions of Brief of Amicus Curiae Service Employees International Union, Local 775, in Support of Respondents and to Strike Portions of Declaration of Counsel in Support of Amicus Brief of SEIU Local 775 and Exhibits Thereto, filed September 20, 2005.

² As explained in Appellant's motion, the testimony that was excerpted in the appendix to SEIU's brief was from a Public Employment Relations Commission (PERC) hearing relating to an unfair labor practice complaint filed against the SEIU by the Governor and the Office of Financial Management. App. Mot. at p. 1, n.2. At the time the motion was prepared, the matter was pending a decision by the full PERC on SEIU's request for review of an initial hearing examiner decision upholding the complaint. *Id.* By order of October 12, 2005 the PERC has affirmed the hearing examiner's decision. A copy of the final order should be available in the near future from the PERC's Internet website, <http://www.perc.wa.gov/decision/default.htm>.

in Washington by creating an irrebuttable presumption”. Amicus Br. at 8.

The general rule, of course, is that an appellate court will not consider, never mind decide a case on the basis of, arguments that are raised by an amicus, particularly where the issue was not raised at the administrative level or at the trial court. *See, e.g. Pleas v. City of Seattle*, 49 Wn. App. 825, 827 n.1, 746 P.2d 823 (1987). Notwithstanding that general rule, this brief responds to SEIU’s constitutional argument.

II. ARGUMENT

A. **The Shared Living Rule Does Not Violate Either Due Process Or Equal Protection.**

Picking up on an argument raised by Respondents for the first time in their brief to this Court,³ SEIU contends that the shared living rule is an “irrebuttable presumption” that violates “principles of procedural due process.”⁴ Amicus Br. at 8. This contention reflects a misunderstanding of both the shared living rule and the case law applicable to the public assistance benefit context.

³ Respondent’s petitions for judicial review in the trial court alleged that application of the shared living rule violated equal protection. *See, e.g. CP 10 (Gasper)*. However the briefing to the trial court focused exclusively on their statutory arguments. Respondents first suggested a constitutional basis for challenging the shared living rule in their Reply Brief. Br. Resp’t. at 25, n.17. Even then, they framed the argument differently than does SEIU

⁴ As discussed more fully below, while SEIU’s labels its arguments in terms of “procedural due process”, the cases it relies on were, with two exceptions, decided on the basis of conflicts with federal regulations and implicated no constitutional provision. The two cases cited by in SEIU’s brief that do address constitutional issues do so in the context of equal protection analysis, not procedural due process.

SIEU argues that “[t]he shared-living rule contravenes basic principles of procedural due process in Washington by creating an irrebuttable presumption.” Amicus Br. at 8. This argument is without support.⁵

As an initial matter, the cases cited by SEIU do not support its contention. In none of the cases cited by SEIU was a due process violation found as a result of a state’s Medicaid agency creating an “irrebuttable presumption.” In *Mothers and Children’s Rights Org., Inc. v. Stanton*, 371 F. Supp. 298 (N.D. Ind. 1973) and *Hausman v. Dept. of Institutions and Agencies, Division of Public Welfare*, 64 N.J. 202, 314 A.2d 362 (1974), the courts held that a Medicaid agency’s irrebuttable presumption violated federal Aid to Families with Dependent Children (AFDC) regulations; constitutional issues were not addressed in any of those decisions. Further, in *Anderson v. Morris*, 87 Wn.2d 706, 712, 558 P.2d 155 (1976), the Washington Supreme Court upheld a DSHS regulation, noting in dicta that “[t]he presumption used by DSHS *would* be improper and inconsistent with federal regulations only *if* it were

⁵ By SEIU’s logic, nearly every state policy decision can be viewed as creating an irrebuttable presumption. The state law that restricts issuance of drivers’ licenses to individuals sixteen years old or older could be viewed as creating an irrebuttable presumption that those under sixteen lack the judgment and skill required to safely operate a motor vehicle. Because of the state’s policy decision restricting issuance of drivers’ licenses to those sixteen years old or older, a fourteen year old who in fact does possess the judgment and skills necessary to operate a motor vehicle is excluded from being issued a drivers’ license and has no opportunity to rebut this presumption with evidence showing the he or she possesses the requisite judgment and skill.

conclusive.” SEIU has pointed to no federal regulation in the long-term care context comparable to the AFDC regulations at issue in those three cases.

Only two cases cited by SEIU address constitutional issues. In the first, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) the Supreme Court invalidated Illinois’ presumption that unwed fathers were unfit to be awarded custody of their children when the children’s mother died. The court noted that similarly situated married fathers would maintain custody absent a showing that they were unfit, but that unmarried fathers did not have an opportunity to demonstrate their fitness for custody. The Supreme Court held that “denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.” *Stanley*, 405 U.S. at 658.

However, as pointed out in Appellant’s Reply Brief, at p. 12, n.4, the Supreme Court declined to apply the holding in *Stanley* and the two cases cited by Respondents⁶ in the context of public assistance benefits, observing that “[u]nlike the claims involved in *Stanley* and *LeFleur*, a noncontractual claim to receive funds from the public treasury enjoys no

⁶ *Cleveland Board of Education v. LeFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L.Ed.2d 52 (1974) and *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973), both cited in Br. Res’t. at p. 25, n.17.

constitutionally protected status.” *Weinberger v. Salfi*, 422 U.S. 749, 772, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

Salfi involved a challenge to a provision of the Social Security Act that withheld benefits to a surviving spouse of a covered worker unless the marriage had taken place at least nine months prior to the worker’s death. While acknowledging that the rule had a reasonable goal—to prevent the use of sham marriages to obtain Social Security benefits—the lower court, relying on *Stanley*, *Lefleur*, and *Vlandis*, had invalidated the nine month requirement “because it presumed a fact which was not necessarily or universally true”, at 768, i.e. that any marriage occurring less than nine months before the worker’s death was a sham.

The Supreme Court reversed, and based its decision on a long line of cases articulating the constitutional standard for statutes and regulations establishing requirements for receipt of social welfare benefits. The *Salfi* Court began its analysis with the observation that

[t]he standard for testing the validity of Congress' Social Security classification was clearly stated in *Flemming v. Nestor*, 363 U.S., at 611, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 [1960]

'Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as (Social Security), we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.'

Id. at 768. The Court also noted that in *Richardson v. Belcher*, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971), it had upheld a provision of the Social Security Act that required an offset against disability benefits of state-paid workers' compensation payments but did not require a similar offset of payments under private disability insurance, stating the governing principle as follows:

If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

Id. at 769 (quotation marks and citation omitted). Further, the *Salfi* Court re-iterated with approval the following statement from *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970), where the Supreme Court rejected a claim that Maryland welfare legislation violated the Equal Protection Clause:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.

Salfi, 422 U.S. at 769. (quotation marks and citation omitted)

Finally, the *Salfi* Court rejected the suggestion that the Constitution requires an individualized determination as to the validity of marriages, rather than the bright line nine-month rule in the Act.

Nor is it at all clear that individual determinations could effectively filter out sham arrangements, since neither marital intent, life expectancy, nor knowledge of terminal illness has been shown by appellees to be reliably determinable. [Further T]he administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. In this sense, the duration-of-relationship requirement represents not merely a substantive policy determination that benefits should be awarded only on the basis of genuine marital relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determinations.

Id. at 782-84. The *Salfi* Court concluded that “[t]he Constitution does not preclude such policy choices as a price for conducting programs for the distribution of social insurance benefits.” *Id.* at 785.

Like the appellees in *Salfi*, both Respondents and the SEIU argue that the shared living rule “sweep[s] more broadly than the evils with which [it] seek[s] to deal,” i.e. avoiding the use of Medicaid funds to pay for services that benefit non-Medicaid eligible persons. Just as Congress’s choice of a bright line rule regarding marriages was determined by the *Salfi* Court to be constitutionally acceptable, the Department’s shared

living rule comports with both due process and equal protection requirements.

In the second case cited by amicus, *Dillingham v. I.N.S.*, 267 F.3d 996, 1010 (9th Cir. 2001), the 9th Circuit held that an Immigration and Naturalization Service (I.N.S.) policy that created an irrebuttable presumption that foreign expungement orders were invalid violated equal protection guarantees. The only rationale offered by the federal government for the differential treatment of aliens convicted in U.S. courts and those convicted abroad was the “added administrative difficulty in verifying that an alien's [non-U.S.] conviction has indeed been validly expunged, and that he or she in fact complied with the requirements of the foreign expungement statute.” *Dillingham*, 267 F.3d at 1008. The 9th Circuit held that this “unquantifiable or de minimis” governmental interest when compared to the alien’s “substantial” liberty interest in avoiding deportation did not satisfy even rational basis review. *Id.*, at 1009.

As between these two cases, the instant case is much more like *Salfi* than *Dillingham*. Like *Salfi* this case involves a “noncontractual claim to receive [benefits that are paid] from the public treasury,” *Salfi*, 422 U.S. at 722, where individualized determinations would be both inefficient, consume resources that otherwise can be used to provide

services, and contrary to the legislative directive to develop a uniform system.

Unlike *Dillingham* this case does *not* involve a substantial deprivation of liberty (deportation “visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.” *Dillingham*, 267 F.3d at 1010, (quotation marks and citation omitted)). The Respondents here will lose no services because of the shared living rule—the services will be performed either by the live-in caregiver or others in the living unit on behalf of the entire household, or be performed at the Department’s expense by a caregiver who comes into the home.

Finally, immigration and deportation decisions are by their nature susceptible to individual determinations, whereas standard eligibility guidelines for public assistance benefits—such as the shared living rule at issue here—are by far the norm in the social welfare context, where an individualized determination of “actual need” in any particular context is inherently difficult if not impossible to achieve on a consistent basis. Because of these significant differences, the *Dillingham* case is inapposite here.

As discussed below and in Appellant’s merits briefing, the shared living rule is a part of a mechanism that determines long-term care

recipients' different levels of need for paid assistance, a mechanism that is rationally related to the state's legitimate interest in making a need-based allocation of its finite resources. SEIU's contention that the shared living rule violates the Constitution should be rejected.

B. This Case Is About Services To Medicaid Clients, Not Compensation For Medicaid Providers

Much of SEIU's brief consists of its description of the "burden" that the shared living rule allegedly places on its members. There is no doubt that in-home caregivers provide a beneficial service to their clients, and that they often face difficult choices between the desire to take care of a friend or loved one and other employment opportunities that may be available to them. However, caregivers' choice to participate as a provider under any of the four long-term care programs at issue here is no different from that of other Medicaid providers, and the case law is well-settled that Medicaid providers do not have rights to any particular level of compensation.⁷ Thus, any "burden" imposed on caregivers by the shared living rule is irrelevant to the question of the validity of the shared living rule.

The Department is charged with the responsibility to husband the state's finite public assistance resources in order to provide benefits to eligible persons on a consistent and cost effective basis statewide. *See*

⁷ *See, e.g. Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004), discussed in App. Repl. Br. at 15, and *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005) (*pet. for rehearing pending*) (rejecting *inter alia* Medicaid providers' claim for enhanced compensation level).

RCW 74.39.005; 74.39A.007. The Department fulfills this responsibility by making need-based resource allocation decisions, providing personal care assistance benefits to individuals based on their need as determined by a comprehensive assessment of their circumstances. *See generally* WAC 388-106 (formerly WAC 388-72A). The Department has the exclusive “authority to establish a plan of care for each [client] and to determine the hours of care that each [client] is eligible to receive.” RCW 74.39A.270(6)(a).

In order to make this need-based allocation of finite resources to thousands of long-term care clients, and to determine the number of long-term care hours for which individual clients are eligible, the Department assesses clients based on two broad factors: (1) their medical condition/functional and cognitive abilities (which determines the nature and amount of assistance they require) and (2) the presence of informal supports, i.e. friends or family members who provide some assistance (which determines the amount of paid assistance that the Department provides to cover the need left unfilled by such informal supports). The shared living rule is part of the latter factor, and recognizes that certain

tasks, which benefit a household generally, constitute informal supports that obviate to some degree the need for paid assistance.⁸

The effect on care providers, whether positive or negative, is not a factor that the Department considers in making its resource allocation decisions based on client need.⁹ In fact, the Department is legally obligated to consider *only* the needs of the client in making its determination of the number of long-term care hours that a client will receive. See RCW 74.39.005(2); 74.39A.007(3).

The Department's CARE assessment system, including the shared living rule, is designed to identify the number of hours each client is eligible to receive. Whether the shared living rule is legally valid, therefore, depends solely on whether the rule is reasonably related to the statutory purpose of providing a program of assistance that is cost effective, administered on a consistent basis and supplements, but does not supplant, informal supports otherwise available to clients. The effect the

⁸ It is worth noting that the survey conducted by the Department in developing the CARE assessment reflected that in-home caregivers devoted between 33% and 42% of their time to such tasks as cleaning, food preparation and shopping, and laundry. SHS-0001-4 (rule-making file). While this could have provided a justification for a much larger adjustment of the base hours, the shared living rule reflects only a 15% reduction in the total number of hours. Thus, caregivers continue to receive some compensation for those services, though perhaps not as much as they would like.

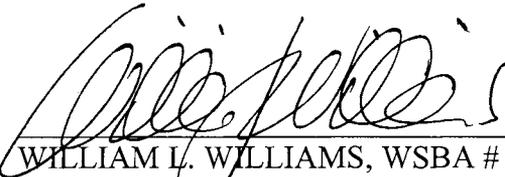
⁹ The Department is no more required to take into consideration the effect its resource allocation decisions will have on the economic circumstances of caregivers in the long-term care context than it would be required to consider the effect a decision to cover a particular surgical procedure will have on the economic fortunes of surgeons in the more traditional medical assistance context.

shared living rule might have on care providers is not in any way determinative of whether the rule is valid.

III. CONCLUSION

For the reasons set forth above and in Appellant's Brief and Reply Brief, the Court should reverse the decision of the trial court and remand with instructions to affirm the decisions of the DSHS Board of Review.

RESPECTFULLY SUBMITTED this 17th day of October, 2005.



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

DATED this 17th day of October, 2005, at Lacey, WA.

[Signature]