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No 78931-2

SUPREME COURT OF THE STATE OF WASHINGTON

FILED
AUG 27 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON

VENNETTA GASPER AND TOMMYE MYERS

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND
HEALTH SERVICES

Petitioner.

RESPONDENTS' ANSWER

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I. ISSUES PRESENTED FOR REVIEW

The Thurston County Superior Court held that the “shared living rule”¹ is invalid on two bases: (1) because the rule violates the federal comparability requirements of 42 U.S.C §1396a (a)(10)(B)(i) and 42 C.F.R §440.240(b) and (2) because the rule violates choice of provider protections under 42 C.F.R. §431.51(a)(1) and RCW 74.39A.270(4). The Court of Appeals affirmed the Superior Court’s holding on the first ground, but not on the second. Petitioner (the Washington State Department of Social and Health Services) seeks review in this Court of the ruling finding a violation of federal comparability requirements. Respondents seek review of the ruling that the shared living rule does not violate state and federal requirements related to free choice of providers.

II. STATEMENT OF THE CASE

Vennetta Gasper receives in-home personal care services through the Medicaid Personal Care (MPC) Program; Tommye Myers receives in-home personal care services through the Community Options Program

¹ The regulation commonly referred to as the “shared living rule” was codified at WAC 388-72A-0095 when these cases were first heard in 2004. It is now codified at WAC 388-106-0130(3)(b).

Entry System (COPES) Program. Clerk's Papers (CP) at 24.² Both programs provide personal care services to recipients who may otherwise require care in a nursing home.

In February 2004, despite no improvement in the condition of either woman, the Department reduced the paid personal care for each by more than 30 hours per month. Gasper AR at 16 - 17, Myers AR at 4 - 5. The reductions were based on a new rule (the shared living rule) which imposed a mandatory, automatic and inflexible reduction in personal care hours for recipients who chose caregivers who reside with them. *Id.* Respondents challenged the rule's validity.

This challenge began with separate administrative hearings in 2004 and proceeded to Thurston County Superior Court. The Superior Court consolidated the cases and ruled in Respondents' favor, declaring the shared living rule invalid because it violates federal Medicaid comparability requirements and state and federal Medicaid free choice of provider requirements. CP at 259.

The Department appealed. The Court of Appeals, Division II, affirmed the Superior Court's decision that the shared living rule is invalid. It held that the rule violates federal Medicaid comparability requirements, but does not violate free choice of provider provisions.

² As in Petitioner's Petition for Review, the records of the administrative hearings are cited by name of the respondent, "AR", and the relevant page number(s).

The Department sought review from this Court on the basis that the case involves an issue of substantial public interest that should be determined by the Supreme Court. Respondents agree that this Court should review the case on this basis.

Respondents, like many disabled and elderly people, need caregivers³ to help them with basic activities of daily living such as bathing, dressing, shopping, housekeeping, meal preparation, and so on. Gasper AR at 52 – 73, Myers AR at 65 – 86. Both respondents live in the homes of their caregivers. CP at 258. For several years, the Department paid Respondents’ caregivers to help them with a variety of personal care needs, including shopping, meal preparation, and housekeeping. Gasper AR at 16, Myers AR at 23. After the shared living rule was adopted in 2004, the Department reduced their monthly personal care hours by 15%⁴. CP at 258. Their caregivers were no longer paid to provide shopping, meal preparation and housekeeping services. Gasper AR at 78, Myers AR at 91. The shared living rule creates an irrebuttable presumption that disabled and elderly people who live with their caregivers need 15% less help (i.e., personal care hours) than if they did not live with their caregivers. CP at 258. The Department attempts to justify this presumption by asserting that

³ The words “caregiver” and “provider” are used interchangeably in this Answer.

⁴ Petitioner has continued Respondents’ benefits without the shared living reduction pending the outcome of this case.

live-in caregivers can perform a client's shopping, housekeeping and meal preparation along with the caregivers' own. *See, e.g.*, CP 226 – 227.

Respondents are not asking the Department to pay for services that benefit anyone other than them. They agree that a caregiver should not be paid for work that benefits the caregiver. Some caregivers do perform the tasks of housekeeping, shopping or meal preparation for themselves at the same time as these tasks are performed for a client. This is not true for Respondents, however. CP at 258. And it is not true for many in-home care recipients who need special diets, extra laundry care due to incontinence, and additional help to address behavioral issues.

Respondents ask this Court to affirm the Court of Appeals' ruling that the shared living rule is invalid because it violates federal comparability requirements. Respondents ask this Court to reverse the Court of Appeals' ruling that the rule does not violate state and federal guarantees of free provider choice.

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III. ARGUMENT

A. This case involves an issue of substantial public interest that should be determined by the Supreme Court.

We agree with the Department that this case meets the requirements of RAP 13.4(b)(4). Although the record does not establish how many recipients of long term care services are impacted by the shared living rule, we have no reason to disagree with the Department's assertion that approximately 10,000 recipients (about 40%) live with their providers. *Petition for Review* at 7.

As the Court is aware, another case involving the validity of the shared living rule has already been accepted for review. *David J. Jenkins v. Department of Social and Health Services*, Washington Supreme Court Cause No. 78652-6. Since Mr. Jenkins receives personal care services under the COPES program, resolution of the *Jenkins* case "will not necessarily address the extent to which the shared living rule may be applied" to the other personal care programs administered by the Department. *Petition for Review* at 7.⁵

⁵ A ruling in the *Jenkins* case would also lack statewide applicability because Mr. Jenkins filed his challenge in King County. Under RCW 34.05.570(2) a King County resident may obtain a declaratory judgment invalidating an agency rule only upon filing the request for declaratory relief in the Thurston County Superior Court.

In the instant case, the Court of Appeals invalidated the rule based on the “comparability requirement” of 42 U.S.C §1396a (a)(10)(B). This statute requires a state that chooses to participate in the Medicaid program to ensure that medical assistance provided to any categorically needy individual “shall not be less in amount, duration, or scope than assistance provided to any other categorically needy individual.” *Gasper/Myers Court of Appeals Opinion* at p. 9; *Gasper v. DSHS*, 132 Wn.App.42, 53-54; 129 P.3d 849 (2006). While the Department argues that the shared living rule does not violate comparability, it does concede that it must provide services that are comparable to MPC recipients. *Petition for Review* at 14. The Department contends, however, that the comparability requirement is waived for COPES recipients. *Petition for Review* at 9. The Court can address validity of the shared living rule in relation to the two major in-home care programs, COPES (Ms. Myers) and MPC (Ms. Gasper) only if the Court accepts review of the instant case.⁶

The Department focuses on the financial impact to the state if the rule is found invalid. *Petition for Review* at 7-8. This case involves an issue of substantial public interest for Ms. Gasper and Ms. Myers because of what is at stake for them, and thousands of others similarly situated.

⁶ The 2 remaining in-home care programs, including the state-funded Chore program, have negligible enrollments of less than 75 recipients as of May 2006. See Appendix A-1 attached hereto which is a Department document indicating the number of recipients of Chore services and the Medically Needy In-Home (MNI) Waiver program in May 2006.

Ms. Gasper will be forced to move from the home where she has lived for over 7 years if the shared living rule is upheld. Gasper AR at 47 and 50. The Department indicates that it will hire an outside provider for Ms. Gasper in its Petition for Review at p. 11, FN 7, but this ignores the reality of Ms. Gasper's situation. Ms. Gasper does not have a familial relationship with her caregiver, Linda Green, and will have to move from Ms. Green's home if the shared living rule is upheld. Gasper AR at 46 - 47. Having an outside provider come to Mr. Green's home to care for Ms. Gasper is not an option. *Id.* Ms. Myers will also lose her provider of choice (her son) because he will have to seek work outside the home to ensure that his family has adequate income. Myers AR at 64. Ironically, if Ms. Myers hires an outside provider to come into her son's home, the Department will not reduce her personal care hours by 15%.

The impact of the shared living rule on Respondents is inconsistent with the purpose and intent of home and community based long term care. Ms. Gasper, who is 67 years old and developmentally disabled, would be forced to leave the Green home. Gasper AR at 46 – 47. Ms. Myers, who is 76 years old, will be forced to accept assistance with intimate personal care from a provider not of her choosing. Myers AR at 56. Respondents believe that many other elderly and disabled persons across the state will face similar painful changes if the shared living rule is upheld.

B. The Court of Appeals' decision regarding free provider choice should be reversed.

The Court of Appeals held that Respondents' right to select the people who will provide their care is not absolute. *Gasper/Myers Court of Appeals Opinion* at 14; *Gasper* at 57. The Court of Appeals cites two primary situations in which this right is abrogated: 1) where a provider is unqualified, and 2) where a provider is unwilling. In this case, Respondents' providers are qualified and willing, and paying them 15% less than a provider with whom they do not live will result in Respondents losing the people they chose to provide their care.

The Court of Appeals cites *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 100S. Ct. 2467, 65 L. Ed. 2d 506 (1980) and *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 178 (2nd Cir. 1991) for the proposition that recipients cannot choose to receive care from an unqualified provider or can be forced to relocate to receive care from a qualified provider. In *O'Bannon*, the state revoked Town Court Nursing Center's license due to violations of resident health and safety regulations. Petitioners filed suit to challenge the license revocation. *O'Bannon* at 775 - 776, 2470 - 2471. In *Kelly Kare*, the home health care provider and its patients brought an

action seeking to enjoin the county from terminating the provider's Medicaid reimbursement contract on a “without cause” basis. *Kelly Kare* at 172. Respondents do not dispute the Department’s right to deny payment to an unqualified provider or a provider with whom the Department does not have a contract. But all parties agree that Ms. Green and Mr. Myers are appropriate, qualified providers, and they have current contracts with the Department to provide personal care services. Gasper AR 4, Myers AR 4. The Court of Appeals’ reliance on the Department’s authority to abrogate free provider choice when a provider is unqualified or when the provider does not have a contract with the Department is misplaced in this case.

The Court of Appeals’ citation to *Antrican v. Buell*, 158 F.Supp.2d 663 (E.D.N.C. 2001) is also misplaced. In *Antrican*, a class of plaintiffs asserted that Medicaid rates were so low that few North Carolina dentists wished to participate in the Medicaid program. They challenged those low rates, *inter alia*, on the basis that the low reimbursement rates violated Medicaid recipients’ right to free provider choice under 42 U.S.C.A §.1396a(a)(23)(A). *Antrican* held that 42 U.S.C.A §.1396a(a)(23)(A) does not “encompass the right to free access to doctors unwilling to service

Medicaid patients.” *Id.* at 671.⁷ In other words, free provider choice is not violated if Medicaid rates are too low to attract enough providers willing to enter into a contract with a state to provide services to Medicaid recipients. This is not the case here. Respondents’ providers are willing to provide services to Respondents, and they have contracts to do so.

Unlike *Antrican*, Washington’s hourly rates for in-home care providers has attracted a sufficient number of people, including Respondents’ caregivers, to provide Medicaid-funded services to eligible persons. And, unlike *Antrican*, the Department *reduces* the number of personal care hours it awards to *Respondents* based on the fiction that Respondents’ needs are less because they live with their providers. The *Antrican* plaintiffs would only be in the same situation as Respondents if they had had access to dentists qualified and willing to care for them, but the state paid for only 85% of the dental care they needed even though their need for dental care *was no different* than other needy persons for whom the state paid 100%.

⁷ The plaintiffs in *Antrican* prevailed before the District Court on other grounds and survived the state’s motion to dismiss there. The state appealed. The 2nd Circuit reversed the District Court and granted the state’s motion to dismiss on jurisdictional grounds only. The 2nd Circuit did not reach the merits of the District Court’s dismissal of Plaintiff’s free choice of provider claim.

Respondents ask this Court to reverse the Court of Appeals and hold that the shared living rule does violate Respondents' right to choose the person they prefer to take care of them.

IV. CONCLUSION

Respondents agree this Court should review their case because it presents an issue of substantial public interest that should be determined by the Supreme Court. Respondents request that this Court hold the shared living invalid under both federal comparability requirements and federal and state requirements guaranteeing free choice of provider.

RESPECTFULLY SUBMITTED this 7th day of August, 2006.

Attorneys for Gasper/Myers:


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Meagan J. MacKenzie, WSBA 21876


COLUMBIA LEGAL SERVICES
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PROOF OF SERVICE

I certify that I hand-delivered a true and correct copy of the foregoing Respondents' Answer to William L. Williams and Michael M. Young, Assistant Attorneys General, at 670 Woodland Square Loop SE, Lacey WA 98503 on August 7, 2006.

I certify that I served a true and correct copy of the foregoing Respondents' Answer on Dmitri L. Iglitzin at Schwerin, Campbell & Barnard, 18 W Mercer Street., Ste. 4001 Seattle, WA 98119-3971 by US mail, postage prepaid on August 7, 2006.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Signed at Olympia, Washington on August 7, 2006.



Amy L. Crewdson

APPENDICES

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| Chore Services and Medically Needy In-Home (MNI) Waiver Recipients as of May 2006 | A-1 |
| RCW 34.05.570 | A-2 |

CLIENTS AUTHORIZED IN HCS AND AAAs

Month of Service: May 2006

| Service | SSPS | Region 1 | Region 2 | Region 3 | Region 4 | Region 5 | Region 6 | TOTAL |
|-------------------------------|---------------|----------|----------|----------|----------|----------|----------|--------|
| CHORE | | | | | | | | |
| IP Hrly | 4201/58 | 7 | 2 | 1 | 5 | - | 6 | 21 |
| Att. Care | 4205/45 | - | - | - | - | - | - | - |
| Agency | 4221 | 4 | - | 1 | 6 | 2 | 4 | 17 |
| State ARC 4323/24/73 | | | | | | | | |
| | | 6 | 1 | - | - | 1 | - | 8 |
| MEDICAID PERSONAL CARE | | | | | | | | |
| AFH | 4508/72 | 61 | 52 | 174 | 288 | 117 | 111 | 803 |
| ARC | 4509/74 | 154 | 36 | 47 | 112 | 112 | 28 | 489 |
| IP Hourly | 4501/59 | 1,355 | 688 | 799 | 2,041 | 1,127 | 1,287 | 7,297 |
| IP Monthly/Day | 4504/05/61/63 | - | - | - | - | - | - | - |
| Agency | 4521/57/81/83 | 520 | 256 | 581 | 2,127 | 496 | 433 | 4,413 |
| Cluster Pilot | 4582 | - | - | 3 | - | - | - | 3 |
| State AFH 4711/13/72 | | | | | | | | |
| | | 1 | - | 1 | 2 | 2 | 1 | 7 |
| COPEs | | | | | | | | |
| PACE | 5201 | - | - | - | 236 | - | - | 236 |
| Asst. Living | 5205/75 | 857 | 649 | 525 | 785 | 518 | 1,116 | 4,450 |
| AFH | 5210/11/71 | 349 | 201 | 585 | 957 | 282 | 488 | 2,862 |
| ARC | 5226/28/73 | 169 | 75 | 98 | 84 | 219 | 147 | 792 |
| Spec Dem BH | 5227 | 80 | 85 | 130 | 8 | 73 | 100 | 476 |
| IP Monthly/Day | 5253/54/62/67 | - | - | - | - | - | - | - |
| IP Hourly | 5256/69 | 1,402 | 1,027 | 1,151 | 1,051 | 1,293 | 1,707 | 7,631 |
| Agency | 5257/81/83 | 1,410 | 743 | 1,241 | 1,594 | 1,108 | 1,378 | 7,474 |
| Cluster Pilot | 5282 | - | - | 22 | - | - | - | 22 |
| MNR WAIVER | | | | | | | | |
| Asst. Living | 5405/75 | 22 | 20 | 21 | 42 | 17 | 25 | 147 |
| AFH | 5411/71 | 12 | 8 | 26 | 59 | 16 | 20 | 141 |
| ARC | 5428/73 | 6 | 3 | 4 | 4 | 3 | 2 | 22 |
| Spec Dem BH | 5427 | 5 | 9 | 7 | - | 6 | 13 | 40 |
| MNI WAIVER | | | | | | | | |
| Agency | 5583 | 3 | 2 | 3 | 2 | - | 3 | 13 |
| IP Hourly | 5556/69 | 2 | 5 | 2 | 3 | 2 | 3 | 17 |
| APS (3 MONTH MAXIMUM) | | | | | | | | |
| IP Hourly | 4403/4404 | - | - | - | - | - | - | - |
| Agency | 4421 | - | - | - | - | - | 2 | 2 |
| AFH | 4413 | - | - | - | - | - | - | - |
| ARC/EARC | 4424/4428 | - | - | - | - | - | - | - |
| Asst. Living | 4430 | - | - | - | - | - | - | - |
| In-Home Services | X61 | 4,703 | 2,723 | 3,804 | 6,829 | 4,028 | 4,823 | 26,910 |
| AFH | X62 | 423 | 261 | 786 | 1,306 | 417 | 620 | 3,813 |
| ARC | X63 | 420 | 209 | 286 | 208 | 414 | 290 | 1,827 |
| Assisted Living | X64 | 879 | 669 | 546 | 827 | 535 | 1,141 | 4,597 |
| PACE | X65 | - | - | - | 236 | - | - | 236 |
| TOTALS | | 6,425 | 3,862 | 5,422 | 9,406 | 5,394 | 6,874 | 37,383 |
| ADULT DAY HEALTH | | | | | | | | |
| ADH INTAKE | | - | - | - | - | - | - | - |
| ADH SERVICE | | 1 | - | 9 | 128 | 8 | 11 | 157 |

| SUMMARY BY FUNDING SOURCE | | |
|--------------------------------|---------------|----------------|
| Total Chore/St-Only/APS: | 55 | 0.15% |
| Total COPEs: | 23,707 | 63.42% |
| Total MPC: | 13,005 | 34.79% |
| Total MN Waivers: | 380 | 1.02% |
| Total PACE: | 236 | 0.63% |
| Total Core Services: | 37,383 | 100.00% |
| New APS Investigations: | 939 | |

23,707

350

30

2

10,473

RCW 34.05.570

Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts

and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

Notes:

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

Effective date -- 1989 c 175: See note following RCW 34.05.010.