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ALAMEDA COUNTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Gail Ellis, Ryan Hall, Mark Beckwith, Alberta
Bachman, Christine Adams, Jerome Bourard, and
James Moss,

PETITIONERS,

vs.

John Wagner, Director of the California
Department of Social Services, California
Department of Social Services, David Maxwell-
Jolly, Director of California Department of Health
Care Services, California Department of Health
Care Services

RESPONDENTS.

NO. *109* 09484051

Petition for Writ of Mandate

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Introduction

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2 1. This action challenges a policy and practice of respondents, the California Department of
3 Social Services and associated defendants, of excluding anyone convicted of a felony at any time from
4 serving as an In-Home Supportive Services ("IHSS") provider. In-Home Supportive Services is a
5 program of immense importance to both the recipient and the providers: under it, care givers or
6 providers, assist poor aged, blind, or disabled recipients to live in the community and avoid being placed
7 in an institution. Welfare and Institutions Code section 12300 subdivision (a) (provides services to those
8 who "cannot safely remain in their homes... unless these services are provided.") (all further citations are
9 to the Welfare and Institutions Code, unless otherwise indicated).

10 2. In 2009 the Legislative Analyst estimated that 44% of the more than 430,000 IHSS recipients
11 were cared for by a parent, spouse or child. The named petitioners reflect this. Petitioner Ellis, with a
12 felony conviction followed by probation 18 years ago, has served as her severely disabled son's IHSS
13 provider for 16 years. Petitioner Adams, with a felony conviction more than a quarter-century ago, has
14 served as the IHSS provider for her severely disabled mother for more than eight years. Petitioner
15 Bachman, has served as her mother's IHSS provider for three years but has worked as a provider for 20
16 years, and was convicted, with no further incidents, more than 33 years ago.

17 3. Under the Department's new policy, all these individuals and others throughout the State will
18 be permanently disqualified from a task they have been performing for years. The California Legislature
19 has not authorized the Department's policy. Between 2005 and the present, the California Legislature
20 enacted measures that specify, quite similar to federal law, that a person convicted of offenses against
21 government health care programs or child or elder abuse were ineligible to serve as IHSS providers for
22 10 years. Section 12305.81 subd. (a). In case the Department missed the point, the Legislature took the
23 unusual step of writing most of the contents of the IHSS provider enrollment form into statutory law
24 (section 12301.81 subds. (a)(1)) to (a)(4)) and even expressly specified that IHSS recipients could elect to
25 employ persons as providers if not convicted of an offense specified by the Legislature in section
26 12305.81. Section 112301.6 subd. (e)(5)(B)(ii). The Department's policy challenged here unlawfully
27 deprives recipients of this right and unlawfully deprives providers of their right to follow their profession
28 and care for a loved one.

Petitioners

1
2 5. Petitioner Alberta Bachman ("Bachman") is a resident of Sacramento, California. She is 66
3 years of age and has worked as an IHSS provider for over the past 20 years. For the past three years she
4 has worked as the IHSS provider for her mother who is 90 years of age. In 1976 Bachman was convicted
5 of a felony, grand theft. Bachman has not been arrested or convicted since that time. Bachman has
6 attempted to obtain additional clients to serve as an IHSS provider but has been unable to do so because
7 respondents' enrollment form for IHSS providers states that persons are ineligible for provider status if
8 ever convicted of a felony crime and requires a statement under penalty of perjury that the applicant has
9 never been convicted of any felony crime.

10 6. Petitioner Gail Ellis ("Ellis") is a resident of Salinas California. For over the past 16 years,
11 Ellis has served as the IHSS provider for her son, whose judgment is severely impaired as a result of
12 frontal lobe damage and borderline mental retardation. In 1993 Ellis was convicted of a felony, grand
13 theft, and placed on probation. Other than the arrest leading to this conviction, Ellis has never been
14 arrested or convicted of any offense.

15 7. Petitioner Ryan Hall ("Hall") is a resident of Alameda County California. For over the past five
16 years, Hall has served as one of the IHSS providers for petitioner Mark Beckwith. In 2004 Hall was
17 convicted of a felony, third degree assault, in the State of Washington while on a short trip and sentenced
18 to 18 months probation which Hall completed in Alameda County. Petitioner Beckwith is aware of
19 Hall's criminal record and wrote the Court in the Washington case on behalf of Hall.

20 8. Petitioner Mark Beckwith ("Beckwith") is a resident of Alameda County California and is 52
21 years of age. He has received services under the IHSS program for more than thirty years. Beckwith has
22 spinal muscular atrophy II, cannot sit up unless his neck is supported, has very little use of his hands, and
23 needs assistance eating, sitting, dressing, bathing and using the toilet. Beckwith has found that finding a
24 capable care provider is difficult and time consuming and that many care providers do not have the
25 training or patience to provide effective services for him and does not want to lose Mr. Hall as a provider.

26 9. Petitioner Rick Molnar ("Molnar") is a resident of Long Beach, California. For over the past
27 five years, Molnar has been the IHSS provider for a personal friend and recovering stroke patient who he
28 has known for over two decades. In 1969 or 1970 Molnar was convicted of an offense that was then

1 classified a felony, possession of marijuana. Other than this "conviction" and a misdemeanor conviction
2 for driving under the influence in 1979, Molnar has not been convicted or arrested at any time.

3 10. Petitioner Jerome Brouard ("Brouard") is a resident of Long Beach California. Brouard has
4 been the IHSS provider for his mother for the past five years. In 1997, Brouard was involved in an
5 altercation and convicted of a felony, assault with a deadly weapon, and placed on probation which he
6 completed. Brouard has not been convicted of any offense since that time. .

7 11. Petitioner Christine Adams ("Adams") is a resident of Fresno, California. Adams has been
8 the IHSS provider for her severely disabled mother for more than seven years. Prior to 1984, when
9 Adams was 19, she was convicted of a felony, vehicular manslaughter with gross negligence, after
10 drinking and crashing into a tree resulting in the death of a friend with whom she had been drinking.
11 Adams successfully completed three years of probation and performed 500 hours of community service.

12 12. Petitioner James A. Moss ("Moss") is a resident of Joshua Tree, California. Moss has been an
13 IHSS provider for over eight years. Moss currently serves as the IHSS provider for two persons who are
14 authorized, in total, approximately 60 hours of IHSS services per month. Moss is seeking additional
15 IHSS clients but cannot find employment as an IHSS provider for new clients because respondents'
16 enrollment form must be completed by providers acquiring new consumers and the form requires a
17 statement, under penalty of perjury, that the applicant has never been convicted of any felony crime. In
18 October of 1999 Moss was convicted of a felony, receiving money under false pretenses. Moss has not
19 been arrested or convicted since that time.

20 13. Petitioners Bachman, Ellis, Hall, Beckwith, Molnar, Brouard, Adams, and Moss each bring
21 this action on her or his own behalf and as a citizen concerned for the proper performance of a public
22 duty in an area of general public interest. Specifically, each petitioner seeks to require respondents to
23 perform their statutory and constitutional duties in accord with the California constitution and laws.

24 Respondents

25 14. Respondents: Respondent John Wagner is the director of California Department of Social
26 Services of the State of California. Respondent California Department of Social Services is a Department
27 of the California State government. Respondent David Maxwell-Jolly is the Director of the California
28 Department of Health Care Services. Respondent California Department of Health Care Services is a

1 Department of the California State government and is the single state agency responsible for
2 administering the Medicaid program in California ("Medi-Cal"). Respondents (hereafter collectively
3 referred to as "Department") are charged with, inter alia, (i) assuring compliance with California and
4 federal laws and regulations regarding the granting or denial of IHSS provider status to persons seeking
5 to become IHSS providers or to continue as IHSS providers and the information required by, and the
6 instructions for the completion of, IHSS Program Provider Enrollment Forms, and (ii) insuring that the
7 Department's policies and practices in those respects are consistent with the California and federal
8 constitutions and laws.

9 Jurisdiction and Venue

10 15. This Court has jurisdiction over this matter pursuant to Code of Civil Procedure section 1085
11 and venue is proper under Code of Civil Procedure section 401.

12 16. Prior to the Department's change in October of 2009, IHSS providers were not required by the
13 Department or counties to disclose whether they had been convicted of any felony and were not
14 disqualified from acting as IHSS providers based on the fact they had been convicted of a felony at any
15 time.

16 17. The Medi-Cal Disclosure Statement and Provider Agreements used by the California
17 Department of Health Care Services for provider disclosures under the general Medi-Cal program do not
18 require the disclosure of all felony convictions and do not indicate individuals will be denied Medi-Cal
19 provider status if convicted of any felony at any time.

20 18. Respondents have adopted an unlawful policy and practice pursuant to which respondents
21 permanently exclude all persons convicted of a felony at any time from IHSS provider status and require
22 applicants for renewed or new provider status to complete forms indicating they have not been convicted
23 of a felony at any time.

24 19. On or October 5, 2009, respondents issued All County Letter number 09-52 (hereafter "ACL
25 09-52") to all California County Welfare Directors. A true copy of ACL 09-52 is attached hereto as
26 exhibit 1 and incorporated herein by this reference. ACL 09-52 advised the Directors that the Department
27 had adopted new provider enrollment form and requirements for IHSS providers. All person seeking to
28 become providers, by July 1, 2009, and all existing providers, by July 1, 2010, must complete an IHSS

1 provider enrollment form and undergo a criminal record check by the California Department of Justice.

2 Exh. 1 at 3. A copy of the new enrollment form, labeled SOC 426 was attached to ACL 09-52.

3 20. ACL 09-52 instructs the County Welfare Directors that unspecified "federal Medicaid and
4 State Medi-Cal statutes and regulations provide that any person who has ever been convicted of a felony
5 crime or certain serious misdemeanor crimes is ineligible to be a provider of Medicaid/Medi-Cal funded
6 services." Exhibit 1 at 3. The IHSS provider enrollment form attached to ACL 09-52 states that
7 individuals are ineligible to be IHSS providers if they have "ever been convicted of a felony crime or
8 certain serious misdemeanor crimes." SOC 426, p. 1 attached to Exhibit 1. The provider enrollment form
9 also requires a statement under penalty of perjury from the applicant or provider that he or she has
10 "never been convicted of any felony crime" and "never been convicted of a serious misdemeanor crime."
11 SOC 426, p.3 attached to Exhibit 1.

12 21. Respondents' unlawful policy and practice will cause irreparable harm and injury to
13 petitioners and other IHSS providers and recipients by (i) preventing petitioners and other individuals
14 who have been convicted of a felony, some of whom obtain their sole means of support from serving as
15 IHSS providers, from serving as IHSS providers; (ii) preventing petitioners and other providers from
16 preventing the institutionalization or decline in mental functioning or health of a recipient due to the loss
17 of financial resources, the inability to obtain, or the delay in obtaining a substitute provider.

18 Legal Claims

19 22. Respondents policy and practice is not required by federal or California law, is unauthorized,
20 and violates section 12301.6 and the equal protection and due process provisions of the California
21 Constitution. To the extent that any provision of California law authorizes or requires permanent
22 exclusion of persons convicted of any felony from IHSS provider status, that provision is unconstitutional
23 under the equal protection and due process guarantees of the California Constitution.

24 23. At all times relevant to this section, respondents have had a clear, mandatory duty and
25 prohibition imposed by section 12301.6 and the California Constitution.

26 24. Petitioners in each of them are directly and beneficially interested in having the respondents
27 comply with all applicable provisions of law and legal duties, as set forth herein.

28 25. Unless compelled by this Court to refrain from acts as required by law, respondents will

1 continue to refuse said duties and continue to violate the law, and petitioners will be injured as a result.

2 Prayer for Relief

3 WHEREFORE, Petitioners pray for relief as follows:

4 1. Issue an alternative or peremptory writ commanding respondents to rescind and set aside
5 respondents' policy reflected in ACL 09-52 that persons convicted of a felony at any time are ineligible
6 to become or remain IHSS providers and immediately issue to County Welfare Directors and all IHSS
7 providers and recipients a notice informing them of this change in policy and informing them that the
8 mandatory conviction disqualification provisions for IHSS providers are limited to the convictions
9 specified in section 12301.6 and that any actions taken on the basis of the policy reflected in ACL 09-52
10 are null and void and must be set aside;

11 2. Issue an alternative or peremptory writ commanding respondents to rescind and set aside
12 respondents' policy reflected in ACL 09-52 and SOC-426 that persons seeking provider status are
13 required to disclose whether they have ever been convicted of a felony and immediately issue to County
14 Welfare Directors and all IHSS providers and recipients a notice informing them of this change in policy
15 and informing them that the provider enrollment form (SOC-426) attached to ACL 09-52 is incorrect
16 and should not be used and that persons disqualified from provider status or discouraged from applying
17 for provider status due to the mandatory conviction exclusion should be contacted and advised that the
18 disqualification was incorrect.

19 3. Pending judgment issue a writ of mandate enjoining respondents from continued enforcement
20 of the policy of disqualifying all persons convicted of a felony from provider status and from continued
21 use of SOC-426;

22 4. For an award of reasonable attorneys fees and costs;

23 5. Such other and further relief the Court considers proper.

24 Dated: *MDV, 12, 2009*

Peter Sheehan
Peter Sheehan
Attorney for Petitioners