IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

PLANNED PARENTHOOD OF THE GREAT NORTHWEST,	)	
Plaintiff,	)	
v.	)	
WILLIAM J. STREUER, ET AL.,	)	
Defendants.	)	
	)	Case No. 3AN-14-04711 CI

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Defendant Department of Health & Social Services (DHSS) promulgated a Medicaid regulation modifying eligibility for state funding of abortions. Plaintiff Planned Parenthood challenges the regulation as excluding medically necessary abortions, distinctly from all other medical procedures. To avoid equal protection infirmity, DHSS urges an expansive interpretation of the regulation. Should Alaskan women seeking state-funded abortions be governed by a regulation subject to differing interpretations for the pre-hearing period, or should the 12-year status quo ante endure during that brief interim?

II. STATEMENT OF FACTS

In 2001 the Alaska Supreme Court held that a DHSS regulation limiting Medicaid-funded abortions to instances of rape, incest, or risk of maternal

death violated the equal protection clause of the Alaska constitution.[1] The gist of the decision was that once the state opted to provide health coverage to an indigent population, it could not discriminatorily exclude medically necessary abortions. But the Court did not require the state to fund elective, as opposed to medically necessary, abortions.

Since then Planned Parenthood, the state's principal provider of abortion services, has operated without an explicit, detailed regulatory definition of what constitutes a medically necessary abortion. But in August of 2013 DHSS proposed a clarifying definition of medical necessity:

> [I]n [the physician's] professional medical judgment the abortion procedure was medically necessary to avoid a threat of serious risk to the physical health of the woman from continuation of her pregnancy due to the impairment of a major bodily function including but not limited to one of the following . . . [2]

A list of 22 qualifying conditions, plus a non-specific catch-all provision, followed. The regulation took effect on February 2, 2014.

III. APPLICABLE LAW

A temporary restraining order preserves the status quo pending further legal proceedings.[3] If the moving party faces imminent irreparable harm, and the opposing party does not, the bar to injunctive relief is modest: the moving

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[1] *Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001)

[2] 7 AAC 160.900(d)(30) (effective February 2, 2014).

[3] *Martin v. Coastal Villages Fund*, 156 P.3d 1121, 1126 (Alaska 2007); *see also L. A. Unified Sch. Dist. v. U.S. Dist. Ct.*, 650 F.2d 1004, 1009 (9th Cir. 1981).

party need only raise "serious and substantial questions going to the merits of the case."[4] But if the moving party faces less than irreparable harm, or the non-moving party would be substantially harmed by an injunction, a heightened standard applies: the movant must demonstrate clear probable success on the merits.[5]

IV. DISCUSSION

DHSS argues that the new regulation does little to alter the status quo ante wherein physicians gauged an abortion's medical necessity at their unfettered expert discretion. But the new regulation significantly circumscribes that discretion: it requires a threat of serious risk to physical health from the pregnancy, caused by impairment of a major bodily function. Before the regulation, a physician was free to more expansively conclude that, for example, a pregnancy amounted to a significant life stressor that globally impacted a woman's emotional wellbeing and hence her health writ large. DHSS is clearly raising the bar by specifying the medical grounds upon which a physician determines an abortion is medically necessary. The issue in this case is whether DHSS has raised the bar too high.

When Planned Parenthood challenged a DHSS regulation limiting Medicaid abortions to instances of rape, incest, or risk of death, the Supreme Court held that the state must instead fund all medically necessary abortions.

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[4] *See State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270 (Alaska 1992); *see also City of Kenai v. Friends of Recreation Ctr.*, 129 P.3d 452, 456 (Alaska 2006).

[5] *See State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991).

The Court ruled invalid DHSS's narrow criteria. But the Court only overruled that high bar; it did not elucidate a precise distinction between an elective abortion and one sufficiently imbued with negative health impacts to qualify as "medically necessary." The Court did, in passing, note that a bipolar woman might regulate her condition with drugs incompatible with safe fetal development; such a woman, if unable to herself fund an abortion, would be forced to either abstain from the medication that rendered her life coherent, or risk damage to the fetus.[6]

The DHSS regulation addresses that dilemma awkwardly at best. Its general provision requires a serious threat to *physical* as opposed to mental health, due to impairment of a major bodily function. Its psychiatric-specific category is parallel: "A psychiatric disorder that places the woman in imminent danger of medical impairment of a *major bodily function* if an abortion is not performed." The logical consequence of abstaining from bipolar medication would be resumption of mood swings that deteriorate the quality of and coping capacity for daily life. But that undeniably serious consequence does not fairly amount to "impairment of a major bodily function if an abortion is not performed." Seemingly the regulation's drafters have failed to address a situation explicitly identified by the Supreme Court as cognizable medical justification for an abortion.

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[6] *State, Dep't of Health & Soc. Servs.* at p. 908.

DHSS, recognizing this vulnerability, argues that the court should construe the regulation, contrary to its wording, to include a maternal medication incompatible with fetal health as qualification for a Medicaid-funded abortion. The parties have not extensively briefed the issue, and the court is unable to predict its outcome. But it is clearly a serious issue going to the merits.

Another on the list of qualifying conditions is "diabetes with acute metabolic derangement or severe end organ damage." In his affidavit, Dr. Jan Whitefield avers that a pregnant diabetic can face pregnancy-related health detriments that are serious but that do not satisfy the DHSS standard.[7] DHSS argues that notwithstanding the specificity of the diabetic provision, inclusion of less serious diabetic conditions can be inferred from either the general or catch-all provisions. Prior to an evidentiary hearing the court has but a scant basis to evaluate the matter.

Planned Parenthood raises serious issues going to the merits of the validity of regulation. Some of its patients will likely suffer harm if they are denied abortion funding under a standard later determined to be incorrect under the strict scrutiny the Supreme Court applies to women's reproductive rights. They may be forced to delay an abortion while they raise funds, until it becomes riskier; or they may be forced to carry to term against their medical and practical best interests.

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[7] Pl.'s Mot. for TRO, ex. 2 at 5.

DHSS has tolerated a status quo of relatively unfettered physician discretion for twelve years since the Supreme Court's 2001 overruling of its prior attempt to propound an acceptable standard. It implausible that a delay of a few months until an evidentiary hearing is held will unduly burden the DHSS interest in minimizing Medicaid expense. Accordingly, Planned Parenthood qualifies for a temporary restraining order.

V. ORDER

The court grants Planned Parenthood's Motion for a Temporary Restraining Order enjoining the challenged regulation from taking effect pending the outcome of a hearing on a permanent injunction. The parties stipulated at oral argument to transform any temporary restraining order into a preliminary injunction for purposes of efficiency; absent objection from either party in five days, the court so orders.

DATED at Anchorage, Alaska this 4th day of February, 2014.

John Suddock
Superior Court Judge

I certify that on 2/4/2014
a copy of the above was e-mailed
to each of the following at their
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