MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket Number Cum-17-494

Mabel Wadsworth Women's Health Center; Family Planning Association of Maine d/b/a Maine Family Planning and Primary Care Services; and Planned Parenthood of Northern New England,

Appellants

v.

Ricker Hamilton, Commissioner of the Department of Health and Human Services

Appellee

Appeal from the Cumberland County Superior Court

SUPPLEMENT OF LEGAL AUTHORITY

February 2, 2018

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EXHIBIT A

Jeannette R. v. Ellery

First Judicial District Court of Montana, Lewis and Clark County

May 22, 1995, Decided

Cause No. BDV-94-811

Reporter
1995 Mont. Dist. LEXIS 795 *

JEANNETTE R., on behalf of herself and all others similarly situated: SUSAN WICKLUND, M.D., JAMES H. ARMSTRONG, M.D., on behalf of themselves and their Medicaid-eligible patients, Plaintiffs, - v - NANCY ELLERY, as Administrator of Medicaid Services Division of the Montana Department of Social and Rehabilitation Services, in her individual and official capacities; PETER BLOUKE, as Director of the Montana Department of Social and Rehabilitation Services, in his individual and official capacities, and their successors, Defendants.

Judges: **[*1]** Honorable Judge Sherlock, DISTRICT COURT JUDGE.

Opinion by: Honorable Judge Sherlock

Opinion

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on cross-motions for summary judgment. The motions consider the validity of ARM 46.12.2002 (1)(e). That section provides as follows:

> (1)(e) Physician services for abortion procedures must meet the following requirements in order to receive medicaid payment:
> (i) The physician has found, and certified in writing, that on the basis of his/her professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient and must be on or attached to the medicaid claim; or
> (ii) The pregnancy is the result of an act of rape or incest and the certifications required by subsection (f) are attached to the claim form.
> (f) Medicaid will reimburse for abortions in cases of pregnancy resulting from an act of rape or incest only if:
> (i) the recipient certifies in writing that the pregnancy resulted from an act of rape or incest; and
> (ii) the physician certifies in writing either that;
> (A) the recipient has stated to the physician that she **[*2]** reported the rape or incest to a law enforcement or protective services agency having jurisdiction over the matter, or if the recipient is a child enrolled in a school, to a school counselor; or
> (B) in the physician's professional opinion, the recipient was and is unable for physical or psychological reasons to report the act of rape or incest.

Before proceeding further, it would be helpful to define what this case is and is not about.

At the outset, to dispel certain misconceptions that have appeared in this case, we must clarify the precise, narrow legal issue before this court.

> First, this case does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical consideration involved in a woman's individual decision whether or not to bear a child. Indeed, although in this instance the Legislature has adopted restrictions which discriminate against women who choose to have an abortion, similar constitutional issues would arise if the Legislature--as a population control measure, for example--funded Medical abortions but refused to provide **[*3]** comparable medical care for poor women who choose childbirth. Thus, the constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment.
> Second, contrary to the suggestion of the defendants and the dissent, the question presented is not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so; plaintiffs do not contend that the state would be required fund to fund abortions for poor women if the state had not chosen to fund medical services for poor women who choose to bear a child. Rather, we face the much narrower question of whether

> the state, having enacted a general program to provide medical services to the poor, may selectively withhold such benefits from otherwise qualified persons solely because such persons seek to exercise their constitutional right of procreative choice in a manner which the state does not favor and does not wish to support.

Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 780-781 (1981). (Emphasis **[*4]** added) (Hereinafter "funding ban.")

Stated differently, the issue in this case is if the state of Montana provides necessary medical services to indigent women who carry their pregnancies to /// term, may it deny it necessary medical services for a low income woman to exercise her right to an abortion?

Further, this case has nothing to do with indigent women who may seek an elective abortion. Rather, it deals with the state's right to restrict funding to necessary medical services for indigent women. Not at issue are nontherapeutic elective abortions. In other words, this case has nothing to do with abortions that are not medically necessary, as that determination is made by a physician.

FACTUAL AND PROCEDURAL BACKGROUND

The state of Montana participates in a joint federal- state medical care program called Medicaid, which provides certain medical services to low income people. Under Title XIX of the Social Security Act, 42 U.S.C. Section 1396, et seq., the federal government will pay a certain percentage of the cost of medical services provided by states that choose to participate in the Medicaid program. Although a state's participation in the program **[*5]** is optional, once a state chooses to participate, it must comply with the requirements of Title XIX. Montana's Medicaid program is administered by the Department of Social and Rehabilitation Services (the Department).

Since 1976, Congress has limited the extent to which Title XIX federal funds will reimburse the cost of abortions under Medicaid through what is commonly known as the Hyde Amendment. The current Hyde Amendment allows funding for abortions only in situations where the life of the mother is at risk or where the pregnancy is the result of rape or incest. A state that participates in the Medicaid program is not required to pay for abortions for which federal reimbursement is unavailable under the Hyde Amendment.

Plaintiffs filed a complaint in this Court on May 26, 1994, requesting declaratory and injunctive relief. Plaintiffs alleged that ARM 46.12.2002 (1)(e), Montana's administrative regulation regarding payment for abortion procedures under Medicaid, violates state and federal law and the Montana Constitution. At the time the complaint was filed, Montana's administrative regulation provided payment only for abortions where the mother's life was at risk.

This Court **[*6]** held a hearing on Plaintiffs' request for a preliminary injunction on May 31, 1994. Plaintiffs Susan Wicklund and James Armstrong testified and both parties presented oral arguments. On June 1, 1994, the Court issued an order stating that the regulation was inconsistent with the federal Hyde Amendment and ordered the Department to begin providing abortion services for victims of rape and incest as well as services in situations where the mother's life is at risk. This Court held that, although states generally do not need to provide services beyond that which is required by Title XIX, a state cannot be more restrictive in funding than Title XIX and the Hyde Amendment. Thus, the Court determined that the Montana regulation was in violation of both state and federal law and could not be enforced as written.

Since the Court's order of June 1, 1994, the Department has instituted rulemaking proceedings to amend this regulation to conform to the Hyde Amendment.

In the June 1, 1994, preliminary order, this Court left unanswered the question of whether state law and the Montana Constitution require the state to fund all medically necessary abortions, rather than just those provided for **[*7]** in the Hyde Amendment. Both Plaintiffs and Defendants have moved for summary judgment on this further issue and that is the matter currently before the Court. The motions have been briefed by both parties and Plaintiffs also rely on the testimony from the preliminary injunction hearing and various affidavits.

Montana's Medicaid statute states that the program is "established for the purpose of providing necessary medical services to eligible persons who have need for medical assistance." Section 53-6-101 (1), MCA. Thus, not only must a patient be financially eligible for the program, but the desired services must be determined to be "medically necessary."

The statute provides that the program shall include certain services, for example, inpatient and outpatient hospital services, physicians' services, physician assistants' services, and federally qualified health center services. Section 53-6-101 (2), MCA. The statute also includes certain optional services which the "program may, as provided by department rule, also include . . . ." Section 53-6-101 (3), MCA.

ARM 46.12.2002 (e) states that **[*8]** "[p]hysician services for

abortion procedures must meet the following requirements . . . ." (emphasis added) Thus, by regulation, the Department has included abortion services within those types of services that the statute mandates be provided.

Plaintiffs base their contention that the state must provide Medicaid services for all medically necessary abortions on several theories. First, Plaintiffs argue that because Section 53-6-101(2)(e), MCA, mandates payment for physician's services and the Department's regulation states that abortion procedures are included as physician services, then the Department is violating the statute by not providing for all medically necessary abortions.

Second, Plaintiffs assert that the limitation on abortion services violates several provisions of the Montana Constitution including the right to privacy, the right to equal protection, and the right to equal protection in the administration of welfare benefits. Plaintiffs argue that the Medicaid limitation on abortion infringes on a woman's private choice of whether to carry a pregnancy to term or to have an abortion, which choice is a fundamental right. Because the **[*9]** state provides full coverage and services to women who choose to carry a pregnancy to term, but only provides abortion services in certain limited circumstances, Plaintiffs argue that the state is improperly influencing the constitutionally protected choice of whether or not to carry a pregnancy to term. Also, assert Plaintiffs, by offering a financial incentive to choose pregnancy over abortion, the state is violating the requirement that the government must remain neutral in its administration of welfare benefits.

In support of their position, Plaintiffs have filed a number of affidavits from doctors who provide abortion services and/or counselling, and also affidavits from Plaintiff Jeanette R. and other Medicaid eligible women who need or have needed abortions but could not receive Medicaid assistance to obtain them.

Affidavits provided by Plaintiffs from various doctors reveal that carrying a pregnancy to term can cause many physical and emotional complications such as diabetes, heart disease, hypertension, placenta previa, and abruptio placentae. A pregnancy can also aggravate preexisting physical and psychological conditions. Additionally, the medical costs associated with **[*10]** prenatal care and childbirth generally exceed the cost of an abortion procedure. The affidavits state that an abortion procedure is one of the safest surgical procedures, safer than carrying a pregnancy to term or even receiving a shot of penicillin, although the risks increase each week after the eighth week of pregnancy.

Because of the low number of abortion providers in Montana, many women must travel 100 miles or more to obtain services. Many women also must delay the procedure while they attempt to gather the necessary money. The cost of an abortion usually increases after a woman has passed the first trimester of a pregnancy and the medical risks also increase. Thus, a woman who must delay while trying to get the money and transportation for an abortion often finds that she must find additional funds because she has entered her second trimester and the procedure costs more. Also, many women who would have chosen abortion end up carrying the pregnancy to full term because they simply cannot obtain the necessary money.

Defendants set forth several arguments as to why the state does not have to fund all medically necessary abortions. First, the Defendants assert that the state **[*11]** is only required to provide abortion services to the extent that the federal government has agreed to assist with federal funding under the Hyde Amendment.

Second, Defendants argue that the limited funding of abortion does not violate the Montana constitutional right to privacy because the constitutional protection of a woman's right to choose abortion does not translate into a constitutional obligation for a state to subsidize abortions.

Third, limitations on abortion funding do not violate the equal protection provisions of the Montana Constitution under Article II, Section 4 or Article XII, Section 3 because, according to Defendants, these provisions still allow the legislature some discretion in determining what services to provide and there is a reasonable basis for the state to promote childbirth and the health of an unborn child.

Finally, Defendants argue that the funding limitation does not violate a woman's right to safety and happiness as stated in Article II, Section 3 of the Montana Constitution, because that provision does not guarantee that the state will provide "safety, health and happiness," but rather affords individuals the right to "seek" their own safety **[*12]** and happiness. There is no substantive right, contend Defendants, that the public treasury will provide for all the necessities of life for a person. Also, Defendants assert that the Medicaid abortion funding provisions do not discriminate against Medicaid eligible women on the basis of sex because this situation does not involve a distinction or preferential treatment for one sex over another. Rather, the distinction is between abortion and childbirth, involving varying benefits to one class of women as opposed to another class of women, based on a voluntary choice made a woman.

Both parties agree that this matter is ripe for summary judgment.

SUMMARY JUDGMENT STANDARD

Before reviewing the factual matter in particular, it would be helpful to review the standard that this Court will use in granting a motion for summary judgment. As all are aware, this Court cannot grant a motion for summary judgment if a genuine issue of material fact exists. Rule 56, M. R. Civ. P. Summary judgment encourages judicial economy through the elimination of unnecessary trial, delay, and expense. Wagner v. Glasgow Livestock Sale Co., 222 Mont. 385, 389, 722 P.2d 1165, 1168 (1986); Clarks Fork National Bank v. Papp, 215 Mont. 494, 496, 698 P.2d 851, 852-853 (1985); **[*13]** Bonawitz v. Bourke, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977). Summary judgment, however, will only be granted when the record discloses no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), M. R. Civ. P.; Cate v. Hargrave, 209 Mont. 265, 269, 680 P.2d 952, 954 (1984). The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. Kober v. Stewart, 148 Mont. 117, 417 P.2d 476 (1966).

The opposing party must then come forward with substantial evidence that raises a genuine issue of material fact in order to defeat the motion. Denny Driscoll Boys Home v. State, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987). Such motions, however, are clearly not favored. "[T]he procedure is never to be a substitute for trial if a factual controversy exists." Reaves v. Reinbold, 189 Mont. 284, 288, 615 P.2d 896, 898 (1980). If there is any doubt as **[*14]** to the propriety of a motion for summary judgment, it should be denied. Rogers v. Swingley, 206 Mont. 306, 670 P.2d 1386 (1983); Cheyenne Western Bank v. Young, 179 Mont. 492, 587 P.2d 401 (1978); Kober at 122, 417 P.2d at 479.

WHETHER THE ABORTION FUNDING RULE VIOLATES THE ENABLING STATUE

Plaintiffs argue that the abortion funding limitation in the administrative rule is invalid because it is inconsistent with the state Medicaid statute that requires funding of all medically necessary physician services. Plaintiffs contend that the Department has no rulemaking authority to eliminate or restrict medically necessary abortions from the program.

The Montana legislature has stated the purpose of the Montana Medicaid program as that "of providing necessary medical services to eligible persons who have need for medical assistance." Section 53-6-101 (1), MCA. The legislature further stated that the program is to be administered by the Department of Social and Rehabilitation Services under Title 53, chapter 6, MCA, and in accordance with Title XIX of the federal Social Security Act. Section 53-6-101 (1), MCA **[*15]** .

The statute authorizing services under the Medicaid program outlines a number of services that shall be included in the program, one of which is physicians' services. Section 53-6-101(2), MCA. The statute also outlines optional medical services that the program may provide for by departmental rule. Section 53-6-101(3), MCA.

It is clear that the Department considers abortion procedures to be in the category of physicians' services because the abortion funding limitation is included in a rule entitled "PHYSICIAN SERVICES, REQUIREMENTS" and states, in part, that "[p]hysician services for abortion procedures must meet the following requirements . . . ." ARM 42.12.2002 . (Emphasis added) Thus, abortion procedures are in the series of medical services that are specifically included in the Medicaid program rather than included through the rulemaking process of the Department.

The enabling statute also states that the Department must determine the amount, scope, and duration of provided services "in accordance with Title XIX . . . ." Section 53-6-101 (7), MCA. The Department, apparently, has interpreted **[*16]** this provision to mean that Medicaid services in Montana are to be limited to only those services specifically funded under Title XIX and thus has limited abortion funding to only those instances allowed under the federal Hyde Amendment. The Court disagrees with this interpretation.

The stated purpose of the Medicaid program is to provide all medically necessary services to those people who are eligible and need the services. The statute further states that physicians' services are specifically included in the program. The statute does not give the Department the authority to limit or eliminate those services enumerated under Section 53-6-101 (2), MCA, unless there are insufficient funds to provide medical assistance for all eligible people. See Section 53-6-101 (9), MCA.

Although the Department is instructed to administer the program "in accordance with Title XIX," this is not authority to limit funding of these required services. Rather, the Court believes that this directive is intended to tell the Department to make sure that the program provides at least those services included in Title XIX and to provide them in the **[*17]** manner directed by Title XIX. It does not tell the Department to limit those services to only those within Title XIX.

The problem here is that the funding ban operates as a sort of administrative Hyde amendment. The legislature can pass its own Hyde amendment if it wishes. However, it exceeds the

power of the Department for it to limit the services provided by the legislature.

The Court concludes that because the public policy behind Montana's Medicaid program is to provide to all eligible persons the ability to receive medically necessary services, which includes physician services for abortion procedures, the Department has exceeded its rulemaking authority by limiting the reasons for a woman to be allowed to receive an abortion beyond the general standard of "medically necessary."

Usually, if this Court could resolve a matter on statutory grounds, it would not resort to constitutional analysis. However, this Court feels that this issue is of such importance that these constitutional matters must be decided by the courts of the state of Montana at one time and not over a period of time. To do otherwise would only encourage a ping pong effect where this regulation might be changed **[*18]** by the legislature or by an administrative agency and come back to this Court or some other court for further review. This process could take years and would not be in the public interest.

RIGHT TO PRIVACY

Montana's constitutional right to privacy is stated as follows: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Constitution of the State of Montana, Art II, Section 10.

Throughout this order, the Court will be citing cases from numerous jurisdictions. Many of those cases talk about a right to privacy. However, none of those jurisdictions have such an explicit right to privacy as is contained in Montana's Constitution. Montana's right to privacy has been described by the Montana Supreme Court as the strongest right to privacy in the United States, exceeding even that provided by the federal constitution. See State v. Burns, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992). Montana's clearly articulated right to privacy distinguishes this case from almost any other case cited to this Court by either party.

Further, Montana's courts need not follow rulings **[*19]** of the United States Supreme Court if our own Constitution provides for more expansive rights than contained in that document. State v. Sierra, 214 Mont. 472, 476, 692 P.2d 1273, 1276 (1985).

The first question that we must answer is whether or not the right to privacy even applies in this case. In Roe v. Wade, 410 U.S. 113 (1973), the United States Supreme Court held that a woman's decision whether or not to terminate a pregnancy by abortion falls within a constitutionally protected zone of privacy. Id. at 153.

It certainly cannot be disputed that the right of privacy covers a variety of individual choices and issues. Certainly it could not be disputed that the decision whether or not to beget or bear a child is an extremely private decision. This involves the most intimate and private of human activities and relationships.

"If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 792 (Cal. 1981), **[*20]** quoting Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349 (1972).

This Court concludes that the right to privacy encompasses a woman's choice of whether or not to end her pregnancy. The question still remains, however, whether the challenged restriction infringes that right.

In Harris v. McRae, 448 U.S. 297 (1980), the United States Supreme Court upheld enactments not unlike those challenged here. In that case, the United States Supreme Court held that the government could not place obstacles in the path of a woman's exercise of freedom of choice. However, it need not remove obstacles not of its own creation, such as a woman's indigency. Id. at 316. This view has been followed by two state courts. See Doe v. Department of Social Services, 487 N.W.2d 166 (Mich. 1992) and Fischer v. Department of Public Welfare, 502 A.2d 114 (Pa. 1985).

This Court feels that the Montana Constitution affords a greater degree of protection to the right of privacy than does the federal constitution as interpreted by Harris v. McRae. Indeed, the McRae decision has been criticized by some of America's leading **[*21]** constitutional scholars. See Abortion Funding Conundrum, Lawrence Tribe, 99 Harv. L. Rev. 330, 338 (1985).

Also, the majority of state courts that have reviewed similar issues have generally held that although a state need not subsidize any of the costs associated with child bearing or with health care generally, once a state enters the constitutionally protected area of choice, protected in Montana by the right of privacy, the state must do so with genuine indifference or neutrality. See Moe v. Secretary of Administration and Finance, 417 N.E.2d 387, 402 (Mass. 1981); Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981); Women's Health Center of West Virginia v. Panepinto, 446 S.E.2d 658 (W. Va. 1993); Planned Parenthood Association v. Department of Human Resources 663 P.2d 1247 (Or. App. 1983); Right to Choose v. Byrne 450 A.2d 925 (N.J. 1982); and Doe v. Maher, 515 A.2d 134 (Conn. Super. Ct. 1986).

Although many times the articulated purpose of a regulation such as the one we are facing here is that of encouraging normal child birth, most courts have realized that **[*22]** regulations such as this, although they do encourage normal child birth, also have the purpose of discouraging abortion. This Court refers to the Massachusetts court:

> As an initial matter, the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to "achieve with carrots what [it] is forbidden to achieve with sticks." L. Tribe, American Constitutional Law, Section 15-10 at 933 n.77 (1978). We are therefore in agreement with the views expressed by Justice Brennan, writing in dissent to Harris v. McRae, supra at 333, 100 S. Ct. at 2703-2704 (1980): "In every pregnancy, [either medical procedures for its termination, or medical procedures to bring the pregnancy to term are] medically necessary, and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with [those] procedure[s]. But under [this restriction], the Government **[*23]** will fund only those procedures incidental to childbirth. By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, [this restriction] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in Roe v. Wade."

Moe v. Secretary of Administration at 402.

Having decided that this issue is protected by the right of privacy and having further determined that the right of privacy is violated by this regulation, the Court must weigh the state's interest in the regulation. As noted in our Constitution, the right of privacy cannot be infringed without the showing of a compelling state interest. In this case, the state was unable to present the Court with a compelling state interest. At one point, the state even contended that the interest being served here was the state's need to represent the anti-abortion views of a portion of its population. No court could ever accept such a view. To do so would allow the state to justify almost any action imaginable on the basis that some of its citizens felt it was **[*24]** appropriate.

It is obvious that the regulation does nothing to further the state's interest in maternal health. The only state interest involved here is the interest in preserving potential life. That interest is certainly a legitimate one, but the United States Supreme Court has held though that interest may be present throughout a woman's pregnancy, it is not really compelling until fetal viability exists, or the last three months of pregnancy. See Moe at 403. Since this regulation does not limit itself to those situations where the interest of the fetus is compelling, the regulation violates Montana's right to privacy. The mother's interest in necessary medical care for her own health must outweigh the state's interest in encouraging potential life, at least until the last three months of the pregnancy.

Here it is important to note that the right we are talking about is not an assurance of governmental funding of abortion. Rather, we are talking about the right to privacy, which is the right to be left alone. That right protects the individual from undue governmental interference. See Right to Choose v. Byrne at 935 n.5 and Moe v. Secretary of Administration and Finance at 398. **[*25]** In other words, although the state is under no obligation to fund an individual's choice to a right of privacy, once it has entered an area that is covered by the zone of privacy, the state must be neutral.

"[O]nce government enters the zone of privacy surrounding a pregnant woman's right to choose, it must act impartially. In that constitutionally protected zone, the state may be an umpire, but not a contestant." Byrne at 935 n.5.

In the first two trimesters of a pregnancy, the state's interest in the potential life of the fetus is not compelling. See Myers at 795.

Other justifications put forth by the state similarly suffer from the same problem. The state argues that the regulation in question recognizes the high cost of birth to indigent women and is an attempt to lessen that burden. Further, the state argues that its regulation focuses on the health needs of fetuses and newborn children. While this may be true, and both purposes are certainly laudable, in so doing, the state has interfered with a woman's right of privacy and her right to protect her own health.

By this regulation, the state improperly subordinates the woman's right to choice and to health to the lesser **[*26]** state interest in a nonviable fetus. Since the state is apparently bound and determined to enter this area, it must do so with neutrality; this the state has not done. Therefore, this Court concludes that the regulation in question violates Article II, Section 10 of the Montana Constitution.

EQUAL PROTECTION

Plaintiffs contend that the funding restriction mentioned above also violates Montana's guarantee of equal protection contained in Article II, Section 4 of the Montana Constitution

which provides as follows:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas. (Emphasis added)

Under Montana law, if a classification is based upon a suspect class or infringes upon a fundamental right, the government has the burden of proving that the rule is justified by a compelling state interest. See Matter of Wood, 236 Mont. 118, 123-124, 768 P.2d 1370, 1374 (1989). **[*27]** Here, the regulation does infringe upon a fundamental right. That fundamental right is the right to privacy. Further, a woman has a fundamental right to control her body and her destiny. She also has a fundamental right as to whether or not to choose if she is to have an abortion. See Byrne at 934.

In this case, some women are excluded from benefits to which they are otherwise entitled solely because they seek to exercise a constitutional right. Women are asked to make this sacrifice to their health, even though a doctor has certified that an abortion procedure may be medically necessary, solely in order to further the state's interest in potential human life. The denial of equal protection is clear. The state has taken the class of indigent pregnant Medicaid eligible women and divided them. One class, who needs medically necessary treatment (an abortion) are not entitled to help from the state. However, another class (those women for whom child birth is a medically necessary treatment) are entitled to state financial help.

There is no question but that the state's interest in potential human life is legitimate. However, to say that it always outweighs the mother's interest in **[*28]** her own health is not acceptable. The funding restriction imposed by the state of Montana gives the state's interest priority at the expense of the mother's health.

For similar holdings that similar abortion funding restrictions violate equal protection provisions, see Byrne and Maher.

As noted earlier, the state has not been able to advance a compelling interest for its regulation. Thus, the regulation does violate Montana's constitutional guarantee of equal protection of the law.

MISCELLANEOUS

Since the Court has ruled on two constitutional and one statutory ground that the regulation is illegal and unconstitutional, there is no reason for this Court to address Plaintiffs' other contentions.

This Court also needs to emphasize that it has not made any use of the various supplemental filings that Plaintiff's attorney has provided. Plaintiffs' attorney has provided this Court with supplemental evidence after the close of the hearing and this Court has not considered those items.

Finally, this Court again must emphasize that this decision does not conclude that the state of Montana must fund elective, nontherapeutic abortions. All this decision says is that when the state **[*29]** of Montana begins conferring benefits in a constitutionally protected area, it must do so in an even handed and neutral manner. It is clear that the state need not fund nontherapeutic elective abortions. Neither need it fund medically necessary abortions under the Medicare Act if it did not fund child birth services. However, this is an area the state of Montana has chosen to enter and in doing so there are certain constitutional restrictions that must be obeyed.

Based on the above, IT IS HEREBY ORDERED that ARM 46.12.2002 (1)(e) is declared to be invalid as being violative of Montana's right to privacy, Montana's guarantee of the right to equal protection of the laws, and in violation of the statutory authority of the Department.

DATED this _____ day of May, 1995.

DISTRICT COURT JUDGE

EXHIBIT B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Jane Doe et al.,
Plaintiffs

v.

Robert Wright, Director,
Illinois Department of Public
Aid, Defendant

NO. 91 CH 1958

ORDER

This matter coming before the Court for ruling on the parties' Cross-Motions for summary judgment, the parties appearing through counsel, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Cross-Motion for Summary Judgment is granted, on the grounds that 305 ILCS 5/5-5 and 5/6-1 and their accompanying regulations are in violation of the Constitution of the State of Illinois.

2. Defendant is hereby enjoined from enforcing 305 ILCS 5/5-5 and 5/6-1 and their accompanying regulations ~~to the extent that~~ insofar as they deny reimbursement for abortion necessary to protect a woman's health although not necessary to preserve her life.

3. Defendant is ordered to provide reimbursement through the State's medical assistance programs for abortions necessary to protect a woman's health.

4. Defendant's Cross-Motion for Summary Judgment is denied.

ENTER: DEC 2 1994 ....., 19.....

Judge ..... Judge's No.

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printed on recycled paper

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

EXHIBIT C

STATE OF VERMONT

CHITTENDEN COUNTY, ss.

JANE DOE On behalf of herself and all others similarly situated v. VERONICA CELANI, Commissioner of the Department of Social Welfare	CHITTENDEN SUPERIOR COURT DOCKET NO. S81-84CnC

OPINION AND ORDER

The Plaintiff seeks to enjoin the Defendant from denying Medicaid coverage to indigent Vermonters for medically necessary abortions.

The parties have submitted the case to the Court for a final decision on the legal issues raised by the pleadings and the Stipulation of Facts filed September 3, 1985.

On January 27, 1984, this Court preliminarily enjoined the Commissioner from denying Medicaid coverage to the named Plaintiff for a medically necessary abortion. On September 28, 1984, the preliminary injunctive relief was continued and extended to cover the class that Plaintiff represents. This class is defined as:

> [a]ll indigent pregnant women in Vermont who qualify for Medicaid and whose pregnancy is not life threatening but for whom an abortion is medically necessary and who desire an abortion.

The Commissioner's denial of Medicaid was based upon Department of Social Welfare Regulation M617, which states:

> Providers will be reimbursed by Vermont Medicaid for abortions performed only under circumstances for which Federal Financial Participation is available.

Regulation M617 was adopted after the passage of the so-called Hyde Amendment to a federal appropriations bill. In its current version the Hyde Amendment limits federal reimbursement for abortions to situations where the life of the woman would be endangered if the fetus were carried to term.

Except for the restriction contained in Regulation M617 Vermont provides Medicaid coverage for all medically necessary non-experimental procedures and the Federal Government reimburses the State pursuant to Title XIX of the Social Security Act, 42 U.S.C.A. §§1396 - 1396q (West 1983 & Supp. 1985). But for the provisions of the Hyde Amendment, medically necessary abortions would qualify for reimbursement under the joint Federal-State Medicaid program according to the terms of both Title XIX and 33 V.S.A. §§2901-2903. Prior to passage of the first Hyde Amendment the Vermont Department of Social Welfare provided Medicaid coverage for medically necessary abortions.

Even without Regulation M617, Vermont would still receive full reimbursement for all medically necessary services, except non-life threatening abortions. See, e.g. Moe v. Secretary of Administration, 417 N.E.2d 387, 391 (Mass. 1981).

Plaintiff and all other members of the class by categorical definition are eligible for Medicaid. Plaintiff has one non-functioning kidney and one partially functioning transplanted

kidney. In Plaintiff's case, the continuation of her pregnancy posed serious medical risks. Her physician indicated that these risks included adverse effects on the viability of her transplanted kidney from spontaneous abortion; serious complications directly related to the pregnancy, such as, high blood pressure and seizures resulting from a further decrease in the functioning of her transplanted kidney (which is only partly functional) and, finally, kidney failure which would require dialysis treatment to sustain her life. This medical opinion was confirmed by a second physician. Both doctors indicated that an abortion was medically necessary.

The adoption of Regulation M617 sets up the only exception to the clearly established public policy of providing health care services to the indigent for all conditions requiring medically necessary non-experimental procedures. Indeed, it is clear that Regulation M617 is not so much an exception to the stated public policy of providing medically necessary services to the indigent, as it is a complete negation of that policy as it relates to one medically necessary service.

Vermont passed its medical assistance program, 33 V.S.A. §§2901 - 2904 in 1967 under Title XIX of the Federal Social Security Act. Title XIX was passed

> [f]or the purpose of enabling each State, as far as practicable under the conditions in such state, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, ...

42 U.S.C.A. §1396.

The Commissioner reads into the Vermont statute which

provides for a medical assistance program a federal appropriations restriction which opposes the legislative goal of the program.

Unlike some other jurisdictions, Vermont does not prefer childbirth over abortion as a matter of public policy. Defendant advances two reasons for Regulation M617. She maintains that without federal reimbursement she does not have administrative authority to fund medically necessary procedures for which federal reimbursement is unavailable. She also maintains that funding medically necessary abortions in non-life-threatening pregnancies would increase the State's financial contribution to the Medicaid program due to the denial of federal reimbursement.

It should be noted that under the facts as stipulated, if in one year all 264 abortions are paid for entirely out of state funds at a normal cost of $200.00, the cost to the State would be $52,800.00. If federal funding were available at the rate of 67.06 percent, which it is not, savings to the State would be $35,407.68. If those 264 pregnancies went to term and resulted in normal births, at a cost of $1,225.00, the total cost would be $323,400.00. With federal reimbursement available at 67.06 per cent the cost to the State of these procedures would be $106,527.96. Thus, the cost to the State of funding live births with federal reimbursement is slightly over three times the cost of State funding for abortions without federal funding.

The State has failed to demonstrate a connection between the regulation and the only public purpose claimed, that of saving money. The regulation's sole demonstrable effect is to negate the purpose of the enabling statute under which it was

promulgated. The only purpose to which Regulation M617 relates rationally is to favor childbirth over abortion. But the State disavows this as public policy of the State of Vermont. [1] This disavowal leaves the Commissioner with no rational reason for retaining or enforcing Regulation M617.

Clearly the Federal Constitution as interpreted by the United States Supreme Court in Harris v. McRae, 448 U.S. 297 (1980), does not provide protection to Plaintiff in this situation. The question therefore is whether or not Regulation M617 impermissibly impinges upon some protection afforded or right guaranteed by the Vermont Constitution. See, State v. Badger, 141 Vt. 430, 438 (1982).

Initially it should be noted that the Vermont Constitution provides more protection for the individual than the United States Constitution, and delineates rights not recognized or guaranteed by that document. These textual differences provide a valid basis for independent analysis, and a determination that greater protection is provided by the Vermont Constitution. State v. Jewett, 146 Vt. 221 (1985).

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[1] Were the state to assert favoring childbirth over abortion as a public policy Regulation M617 would fall as an impermissible infringement of constitutionally guaranteed rights. Beecham v. Leahy, 130 Vt. 164, 169 (1972); see, Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Moe v. Secretary of Administration, 417 N.E.2d 387 (Mass. 1981); Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 352, 172 Cal.Rptr 866, 625 P.2d 770 (1981); but see, Fischer v. Commonwealth, 502 A.2d 114 (Pa. 1985); cf. Planned Parenthood Association v. Department of Human Resources, 687 P.2d 785 (Ore. 1984).

Article One of Chapter One of the Vermont Constitution provides: "That all men are born equally free and independent and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending of life, liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; . . ."

The language in Article One was obviously influenced by that portion of the United States Declaration of Independence which states: "We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. . . ."

It is significant that the United States Constitution contains no such language.

It is perhaps more significant that Article One of the Vermont Constitution is not an isolated statement in that document. Several other articles in Chapter One deal with equality and protection of rights, including Articles Four, Five, Six, Seven, Nine and Eighteen.

Of particular relevance is Article Seven, which provides in relevant part

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community;. . . .

Greater protection for the individual under the Vermont

Constitution also derives from the nature of state government exercising its reserved sovereign power to promote and protect the health and welfare of its inhabitants. See, Jewett at 227. The Ninth and Tenth Amendments of the Federal Constitution, recognizing the concern for the federal-state balance of power, explicitly recognize that additional rights and protections are retained by the people as inhabitants of the states. See, Id.

The Vermont Bill of Rights was adopted prior to the existence of the United States Constitution, and was retained in the Constitution of the State of Vermont after the United States Constitution was adopted and ratified in the state. The retention, unaltered in substance, of additional human rights guarantees and constraints on governmental action indicates a deliberate and still enduring intent on the part of Vermont to recognize greater protections and benefits for its inhabitants under the rule of law than those recognized federally. The Vermont Supreme Court has "never intimated that the meaning of the Vermont Constitution is identical to the federal document. Indeed, [it has] at times interpreted our constitution as protecting rights which were explicitly excluded from federal protection." Badger at 449.

While the Federal Constitution establishes minimum levels below which states cannot go in treating individuals, it has never been questioned but that states can, and often do, afford persons within their jurisdiction more protection for individual rights. See, e.g. McRae at 311, n. 16, PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). States are free to provide

additional protections by statute, and are obligated to do so by the terms of their own constitutions. "[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977).

It is this Court's duty and function to examine for constitutionality and to determine the precise meaning of our own constitutional provisions provided "no federal proscriptions are transgressed," In re E.T.C., 141 Vt. 275, 278 (1982); and obligation to determine the constitutional validity of the regulation in question. Badger at 449; Vermont Woolen Corporation v. Wackerman, 122 Vt. 219, 225 (1960).

Article Seven protects individuals against the discriminatory provision of government benefits by proscribing any particular emolument or advantage granted to only part of a community, whether or not that benefit affects fundamental rights. Article One gives constitutional stature to individuals' unalienable rights to health in the form of happiness, safety and the ability to enjoy life. Article One also protects individuals against discriminatory government treatment affecting fundamental constitutionally protected rights.

The safety of all Vermonters is promoted by the ready availability of adequate health care and the delivery of necessary health services. There is, therefore, a direct relationship between the availability of medically necessary services and the constitutionally guaranteed unalienable right to pursue and

obtain happiness and safety and to enjoy life. Health is central to personal safety and happiness. From medical well-being one may well say all other benefits flow. Faced with a threat to one's health, one's safety is integrally at risk. When one seeks a health service which is medically necessary, one is seeking, by definition, what is indispensable for the protection of one's health and safety. In a health care provider's judgment, a medically necessary service is essential for the treatment of a condition which if left untreated would affect adversely one's health.

This case does not present an issue involving the freedom of choice to obtain an abortion so much as it concerns an unequal protection by the State of indigent inhabitants' unconstitutionally protected right to personal health, safety and happiness. At issue is the constitutional validity of Regulation M617 when tested against the constitutionally protected fundamental right to personal safety and the constitutional prohibition against unequal provision of governmental benefits.

Recognizing that many of our inhabitants are not in a position to financially pursue happiness and safety and to enjoy life, it has long been the policy of the state to provide the necessities of life to qualified indigent persons. See, e.g. 33 V.S.A. Chap. 38, §3001(4).

Congress recognized the financial burden such programs place on the states, and provided for reimbursement to the

states which established appropriate assistance programs, e.g. 42 U.S.C.A. §§1396 - 1396q.

Consistent with the objectives of providing greater access to health care for indigents, a state is free under federal law "to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable." McRae at 311, n.16. Although this Court does not rely on federal law in reaching its decision it does note that no federal proscriptions have been transgressed in arriving at a decision. See, In re E.T.C. at 278.

The purpose of these assistance programs is to place the indigent in a position to obtain services on an equal basis with those more fortunate people who can obtain these services for themselves. The Vermont Medicaid program was established to "furnish medical assistance [to those] . . . whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C.A. §1396; 33 V.S.A. §2901.

Regulation M617 singles out one necessary medical service and denies access to indigents for reasons which have nothing to do with promoting access to health care. Regulation M617 discriminates not only against indigents versus non-indigents, but between indigents seeking the medical procedure in question and those indigents seeking any other medically necessary service, all of which are reimburseable to providers by the State. More particularly Regulation M617 creates a single instance where the availability of reimbursement is conditioned on whether a woman's life or her health is threatened.

Regulation M617 impinges directly on the constitutionally guaranteed right to safety. It increases the danger to health by precluding access by indigents to a necessary medical procedure. It also treats Vermonters unequally by singling out small group of people for denial of access to medically necessar care.

Once the State has established a program of emoluments and advantages to a community of Vermonters, under Article Seven, it must ensure that the establishment and administration of that program is carried out for the common benefit, protection and security of that community. This prohibits discrimination among the provision of benefits once those benefits are being provided

The Vermont Supreme Court has set a standard under Article by which to measure the constitutionality of regulatory legislation. See, State v. Ludlow Supermarkets, Inc., 141 Vt.261 (1982 The Court's general concern was "with the propriety of the legislature's exercise of its general police power, and whether that power has been exercised so as to affect all citizens equally." Ludlow Supermarkets at 265. That concern generated the following constitutional tests. "[I]nequalities [in impact] are not fatal with respect to constitutional standards if the underlying policy supporting the regulation is a compelling one, and the unbalanced impact is, as a practical matter, a necessary consequence of the most reasonable way of implementing that policy." State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 265 (1982).

> Classifications are permissible only
>
> if a case of necessity can be established for overriding the prohibition of Article 7 by reference to the 'common benefit, protection, and security of the people.'
>
> Given the breadth of the police power, . . .its exercise, even in the presence of other generalized restraints on state action, may be supported if premised on an appropriate and overriding public interest.

Id. at 268.

The Commissioner has failed to establish a case of necessity by failing to show any compelling public policy which Regulation M617 implements. She has failed to establish any rational basis for the regulation. The only necessary consequence of Regulation M617, besides favoring childbirth over abortion, is piecemeal and selective dismantling of the legislative policy of providing medical assistance.

"[The] objective of favoring one part of the community over another is totally irreconcilable with the Vermont Constitution." Ludlow Supermarkets at 269. Once benefits are granted to a part of the community they must further a goal independent of the preference awarded. Id. This proposition applies to the selective withholding of benefits. One person's preference is another person's discrimination. Medical assistance furthers the independent goals of improving the level of health of Vermonters and lessening the impact of economic inequalities on the protection of fundamental rights to health, safety and enjoyment of life. By contrast, Regulation M617 bears no rational relation to any independent public policy goal.

The Commissioner maintains that under §§2901 and 2902 of the Vermont Medical Assistance Act, that state Medicaid funds can only be used to pay for services for which federal reimbursement is available. She argues that because the Hyde Amendment limits Medicaid funds to the states under Title XIX, by state law the Commissioner must follow suit. However, state law compels the opposite conclusion.

A Court's primary object in interpreting a statute is to ascertain and give effect to legislative purpose. Paquette v. Paquette, 146 Vt. 83, 86 (1985).

Absent compelling indications that administrators' construction is wrong the Court must follow those conclusions. Petition of Village of Hardwick Electric Department, 143 Vt. 437, 444 (1983), so long as they are "'reasonably related to the purposes of the enabling legislation.'" Farmers Production Credit Association of South Burlington v. State of Vermont, 144 Vt. 581, 584 (1984)[quoting Committee to Save the Bishop's House, Inc. v. Medical Center Hospital of Vermont, Inc., 137 Vt. 142, 150 (1979)].

3 V.S.A. §203 provides that "[t]he commissioner or board at the head of each department herein specified shall exercise only the powers and perform the duties imposed by law on such department." This statute together with 3 V.S.A. §212, (which creates and enumerates the various administrative departments) have been construed by the Vermont Supreme Court to mean that "the Legislature has established that authority in an administrative

department cannot arise through implication. An explicit grant of authority is required." Miner v. Chater, 137 Vt. 330, 333 (1979).

33 V.S.A. §2901 empowers the Commissioner of the Department of Social Welfare to administer a medical assistance program under Title XIX of the Social Security Act. Section 2901 provides that the Commissioner shall issue regulations not in conflict with federal regulations under Title XIX of the Social Security Act. It does not preclude the Commissioner from taking measures to protect individuals' health above and beyond federal ones.

33 V.S.A. §2902 provides: "In determining whether a person is medically indigent, the commissioner shall prescribe and use the minimum income standard or requirement for eligibility which will permit the receipt of federal matching funds under Title XIX of the Social Security Act."

Regulation M617 negates the clear legislative intent of the Vermont Medical Assistance Act, thereby providing compelling indications that the Commissioner has erred in her construction of the statute. A regulation such as M617 which creates an unjust result and which also runs contrary to a clear legislative purpose goes against the "fundamental rule in regard to any statute that no unjust or unreasonable result is presumed to have been contemplated by the Legislature." Nolan v. Davidson, 134 Vt. 295, 299 (1976).

The Commissioner interprets the statute to mean that she

has the power to withhold medical assistance based simply on the availability of federal funding. Nowhere does the statute so provide or imply. The fact that federal grants to state programs established under federal law can be limited and shaped by Congressional policies does not give state administrators power to ignore the mandate of state statutes. "[U]nder our constitutional system, administrative agencies are subject to the same checks and balances which apply to our three formal branches of government. An agency must operate for the purposes and within the bounds authorized by its enabling legislation, or this Court will intervene." In re Agency of Administration, State Buildings Division, 141 Vt. 68, 75 (1982). An administrative desire to synchronize funding with that reimburseable with federal funds, simply because a federal statute restricts reimbursement, is not within authorized bounds when that action is not expressly permitted by the enabling legislation.

Section 2902 merely says that the state definitions of a medically indigent person must be the same as federal guidelines provide in order for matching funds to be available. Section 2902 does not address limitations on medically necessary procedures for which a state may provide reimbursements to providers. Section 2902 only limits the "who" receiving medical assistance, it provides no authority for limiting the "what" of medically necessary services based on availability of federal funding.

Both Title XIX and 33 V.S.A. §§2901 and 2902 predate the Hyde Amendment and therefore cannot have contemplated that the

language at issue could have applied to limit funding based on selected procedures rather than on levels of income and resources. Indeed, Title XIX and 33 V.S.A. Chapter 36 were passed initially on a premise of universal access to all medically necessary procedures. The aberration to this universality, as embodied in the Hyde Amendment and Regulation M617 does nothing but further a social policy couched in terms of favoring childbirth over abortion at the expense of the health of the mother, which is antithetical to the medical assistance purpose of protecting health by equalizing and facilitating universal access to all medically necessary health care.

Nothing in Chapter 36 of 33 V.S.A. or Title XIX of the Federal Social Security Act suggests that federal matching funds for all other medically necessary services would be endangered if the State should choose independently to fund procedures for which federal funds are unavailable. The Commissioner points to no authority, state or federal, which compels the conclusion that independent state funding beyond that matched by federal funding endangers federal funding already available. There is no mandate in federal law which prohibits states from funding medically necessary abortions where the life of the mother is not threatened. The reverse, if anything, was implied by the Roe v. Wade, 410 U.S. 113 (1977), decision and its progeny. Maher v. Doe, 432 U.S. 464 (1977) and McRae held that no federal obligation existed to fund the right protected by the Federal Constitution to choose an abortion. Despite these holdings, the freedom of states to fund such abortions was explicitly

acknowledged, McRae at 311, n.16.

State funding for medically necessary abortions under Vermont's medical assistance program would have no effect on forfeiture of state eligibility for federal funds for reimbursable medical procedures. Therefore, Regulation M617 has no sound fiscal basis in light of the law and the facts stipulated to by the parties and adopted by the Court.

The only effect which the limitation on federal reimbursement embodied in the Hyde Amendment has, is to not provide federal reimbursement to abortions in instances of non-life threatening pregnancies. Absent Regulation M617, and despite the Hyde Amendment, Vermont would still receive federal reimbursement for a percentage of the costs of all other medically necessary services. See Moe v. Secretary of Administration and Finance, 417 N.E.2d 387, 391 (Mass. 1981)["Thus, the relief sought here would not jeopardize Federal reimbursement for other services provided by the Massachusetts Medicaid program."]

The onus is not on the Commissioner to find authority to fund medically necessary abortions, that funding is mandated by the language and purpose of the Medical Assistance Act and Title XIX. The onus on her is to provide a purpose for Regulation M617 which is expressly authorized and reasonably related to the purpose of medical assistance, Farmer's Production Credit Association at 584, Miner at 333. Patently that relation is missing and Defendant is exercising power beyond that delegated to her under the enabling act.

Regulation M617 operates contrary to the purpose of the Vermont Medical Assistance Act. "Article 5 of the bill of rights of this state expressly reserves to the legislature the right to regulate this [police] power. . . . But in exercising this right, the legislature cannot deprive a citizen of an essential right secured by the bill of rights or constitution,. . . ." State v. Hodgson, 66 Vt. 134 (1893), aff'd 168 U.S. 262 (1897). This exercise of administrative power violates Article Five of Chapter One of the Vermont Constitution in two ways. First, Regulation M617 impinges on the exclusive power of the Legislature to regulate the police power. Second, Regulation M617 exercises police power so as to deprive certain Vermonters of their constitutionally guaranteed rights to health and safety, and does so in a discriminatory manner.

Regulation M617 violates Vermont Constitutional principles of separation of powers and the accountability of officers of government to the people. The Commissioner's violation of 3 V.S.A. §§203 and 212 violates the principle of Chapter I, Article Six that to exercise authority which creates policy there must first be accountability to the people via popular elections, see, Welch v. Seery, 138 Vt. 126, 128 (1980). The cases decided under Chapter II, §2, 5 and 6, reach the same conclusions of unconstitutionality based on principles of separation of powers. State v. Auclair, 110 Vt. 147 (1939); Village of Waterbury v. Melendy, 109 Vt. 441 (1938). By contrast to Article Six of Chapter I, these Chapter II sections allow

direct recourse to the courts in the event of their violation.

The Commissioner's expansion of her authority with a result contrary to the purpose envisioned for that statute by the Legislature violates the separation of powers required by the Vermont Constitution in Chapter II, §5. Cf., State v. Jacobs, 144 Vt. 70, 75 (1984).

Plaintiff has failed to establish grounds to take her out of the scope of the general Vermont rule that attorneys' fees are not recoverable as an element of damages. Albright v. Fish, 138 Vt. 585, 590-91 (1980). Therefore, Plaintiff's request for attorneys' fees is denied.

ORDER

This Court finds Department of Social Welfare Regulation M617 unconstitutionally null and void. IT IS THEREFORE ORDERED: The State of Vermont, through its Department and Commissioner of Social Welfare is permanently enjoined from enforcing Regulation M617 or any other regulation which purports to deny reimbursement for medically necessary abortions.

Dated at Burlington, Vermont, this 23rd day of May, 1986.

Hilton H. Dier, Jr.
SUPERIOR JUDGE