

her parents were resolved. A copy of that order is attached hereto as Exhibit 1 and incorporated herein by reference.

4. Subsequent to this order, the guardian ad litem approved an arrangement whereby the child spent four days and one night per week with the petitioner (from 7:00 a.m. to 8:00 p.m. on Wednesday and Thursday and from Saturday morning to Sunday night). The rest of the time, six nights and three days, she spent at her grandmother's home. During the periods of time her child is with the petitioner, she provides her with food, clothing, shelter, and her other needs.

5. The child's grandmother did not apply for ANFC benefits on behalf of the child.

6. Sometime in May of 1990, the petitioner's own mother, who is an employee of the Department of Social Welfare, reported to the Department that petitioner's child was in the "custody" of her paternal grandmother by Court order. Based on that information, the matter was discussed with the petitioner who confirmed the arrangement set out in paragraph 4 above. Although the Department never obtained or saw a copy of the Court order, it concluded that the petitioner was ineligible for ANFC because "there are no eligible children in the home." She was so notified by a letter dated May 29, 1990.

7. Since the Court order was issued, the petitioner's criminal charge has been resolved and the petitioner will

not be incarcerated. The final hearing on custody is expected to occur before the end of September and the petitioner is still aggressively seeking sole and permanent custody of her child. The petitioner's mother-in-law has indicated that she does not intend to seek permanent custody of the child for herself.

ORDER

The Department's decision is reversed.

REASONS

The Department's regulations require that in order to "be eligible for public assistance (ANFC), a dependent child shall be living with a relative in a residence maintained as a home by such relative. . ." W.A.M. § 2302.1 The petitioner's ANFC benefits were properly terminated only if the Department can show that the petitioner's child is no longer living with her in a residence maintained as a home by her for that child.

In the regulations regarding "residence" (W.A.M. § 2302, et seq.), "home" is further defined as follows:

A home is defined as the family setting maintained, or in process of being established, in which the relative assumes responsibility for care and supervision of the child(ren). However, lack of a physical home (i.e. customary family setting), as in the case of a homeless family is not by itself a basis for disqualification (denial or termination) from eligibility for assistance.

The child(ren) and relative normally share the same household. A "home" shall be considered to exist, however, as long as the relative is responsible for care and control of the child(ren) during temporary absence of either from the customary family setting.

W.A.M. 9 2302.12

Under the Department's regulations then, the child will be found to be "living" with her mother if the mother has established a family setting in which she assumes responsibility for the care and supervision of her child. The Department does not dispute that the petitioner has maintained a home for her child in the past and continues to maintain a physical setting for the care of that child. However, the Department argues that the mother is no longer responsible for the child's care and supervision.

In advancing its argument, the Department, relying on prior decisions of the Board, looks to the assignment of legal custody as the touchstone in determining who has responsibility for the care and supervision of a child. In this case, the Department interprets the Court's order "placing" the child with the grandmother as a grant of legal custody to that relative which transfers to the grandmother the right to supervise and care for the child. That grant, although temporary has lasted for over one month, a fact which the Department finds significant. The transfer of that legal responsibility away from the petitioner, the Department argues, prevents the petitioner's household from meeting the criteria in the regulations which defines a child's "home".

The Board has held in certain cases that "legal" responsibility for a child is the key feature in determining whether a child should be found to be living in a home.

However, in each of those cases, the child has been temporarily or involuntarily absent from the home. See Fair Hearing Nos. 5553, 5683, 6345, 7337, and 7534. Legal custody becomes important in those cases because the parent cannot demonstrate that he or she is actually providing day to day care or supervision when the child is not at the physical setting for some reason but, nevertheless, continues to have the legal responsibility to provide a home to which the child can return. The latter is proved through a showing of a legal duty to continue to provide that home.

The facts here present quite a different situation. It appears that by "placing" the child temporarily with her grandmother the Court, if not explicitly granting her custody, is, nevertheless, implying that the grandmother will take over the "legal" responsibility for the care and control of the child until such time as the Court can get information it needs to determine whether either of the child's parents will be the permanent custodian. If the child had then actually gone to live with her grandmother on a full-time basis, it might then have been argued that all responsibility for the day to day care had been assumed by the grandmother and that the child could no longer be found to be living with the mother. In that case, both legal and actual responsibility would be merged, creating no issue under the regulations.²

However, after about a month of weekend visits, the child returned to the mother's home for extensive weekday

"visits" which required the petitioner to assume actual responsibility for the daily care and supervision of her daughter during over half of the child's waking hours, even though someone else had the ultimate "legal" obligation to supervise and care for the child. In this situation, the focus in determining where the child lives must be on the assumption of actual responsibility for the child in the home, if the prime purpose of the ANFC program--to promote the well-being of the child--is to be carried out. W.A.M. 9 2000 Without money in the house, the mother indisputably cannot feed, clothe or house her daughter during the four days and one night each week she cares for her.

The fact that the petitioner actually provides care for her daughter does not in and of itself dispose of this matter because the legal custodian also provides some actual care. It must, therefore, be determined which home is the primary residence for welfare purposes. Fair Hearing No. 9521 There is no set formula for making this determination, instead an assessment must be made on a case by case basis.

Often, a Court will make this determination in its ruling and in most cases, an award of legal custody combined with at least half-time physical care would be dispositive of the issue. The facts in this case, however, do not fall so neatly into this category.

This case involves a custody change which was intended to be very temporary and which varied the prior status quo in which the child legally and actually lived in her

mother's home. In addition, the guardian ad litem was given unfettered discretion to return the child to the mother's actual care which was done on a half-time (or more) basis. There is every reason to believe, based on the grandmother's intentions and the temporary nature of the order, that the child will not remain in the grandmother's custody any longer than is absolutely necessary. One impediment to the return of the child, the mother's potential incarceration, has recently been resolved and it is likely that other issues will be resolved in the near future. There is no reason to believe that the current half-time arrangement will continue and that the prior full-time living arrangement may quite possibly be restored at a final hearing. All of these factors militate in favor of finding that the child's primary home for ANFC purposes is with the mother.

Finally, unlike other "joint-custody" type cases, the custodians here are not actually "battling" over primary household status. The child's mother is not "facing off" against a relative with equal claim, (usually the father) but rather is making the only claim for household status, with the only possible contender being a more distant relative, the grandmother. Of considerable significance is the fact that the child's grandmother has not sought ANFC assistance during the last four to five months when she has been the legal custodian of the child and has indicated no intention to do so. In fact, there is nothing to indicate

that the grandmother asserts any claim to primary household status at all for ANFC purposes, arguably making this issue moot.

For all the above reasons, the petitioner's child should be found to be "living" in the petitioner's home for ANFC eligibility purposes. If the child's grandmother or anyone else applies for ANFC on the child's behalf, a reassessment of the primary home situation can be made at that time.

FOOTNOTES

¹The Court order was obtained and produced after the hearing at the request of the hearing officer.

²If the Court's order had been more explicitly closed-ended, even this transfer might not have defeated the mother's claim to provision of the home due to the very temporary nature of the order. The Department's "30 day" policy has been previously rejected by the Board as arbitrary. See Fair Hearing No. 7534.

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