

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re ) Fair Hearing No. 10,732  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare terminating her A.N.F.C. benefits. The issue is whether the petitioner was an "eligible caretaker relative" of an "eligible child" within the meaning of the pertinent regulations.<sup>1</sup>

FINDINGS OF FACT

The facts are not in dispute. Until June, 1991, the petitioner lived with and was the sole custodian and caretaker of her eleven-year-old son. The petitioner and the child's father were never married. In April, 1991, a custody order was entered giving the petitioner legal custody of the child with the father having visitation rights one evening and one overnight per week.

On June 18, 1991, the father did not return the child from an overnight visit and filed a "Relief from Abuse" petition against the petitioner in Family Court alleging that the petitioner had neglected the child. The Court entered an ex-parte order finding "abuse"<sup>2</sup> by the petitioner and granting the father temporary custody, and setting a further hearing in the matter for June 27, 1991.

A brief hearing was held on the matter on June 28, 1991. At that time the Court orally continued the matter to July 10, 1991 and continued custody with the father. The Court's docket entries show that on July 3, 1991, the parties stipulated to continue the matter until August 5, 1991, and the Court approved. On July 9, 1991, the Court, apparently on its own, cancelled the August 5, 1991, hearing date and, sometime later, the hearing was rescheduled for October 24, 1991. All the while, the father continued to have legal and physical custody of the child.

Sometime in July, 1991, the Department notified the petitioner that her A.N.F.C. grant would close as of August 1, 1991, because the child no longer resided in her home.

A full custody hearing was held in Family Court on October 24, 1991, after which temporary custody remained with the father until the Court issued its opinion. In a decision dated December 2, 1991, the Court returned permanent custody of the child to the petitioner. However, the child refused to return to live with the petitioner and remained with the father. Apparently S.R.S. became involved and proceedings in Juvenile Court were initiated. However, on March 19, 1992, the parties stipulated that the petitioner would "relinquish custody" of the child to the child's father. On March 27, 1992, the Family Court incorporated the terms of the parties' stipulation into an Order giving the father custody of the child.

The petitioner concedes that she did not have legal

custody of the child from June 18 through December 2, 1991, and again after March 27, 1992, and that she has not had physical custody of the child since June 18, 1991. However, she maintains that she remained eligible for A.N.F.C. after July 31, 1991, because she continued to "maintain a home" for the child.

It does not appear that the child's father or anyone else applied for or received A.N.F.C. in the child's behalf at any time during the period in question.

ORDER

The Department's decision is affirmed.

REASONS

W.A.M. § 2242.2 defines an "eligible parent" for A.N.F.C. as "an individual who . . . lives in the same household with one or more eligible . . . children." W.A.M.

§ 2302.1 includes the following provision regarding "residence":

Federal and State law (section 406 of the Social Security Act; 33 VSA 2701 and 2702) require that, 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(s), unless the child is committed by a Juvenile Court to the care and custody of the Commissioner of Social Welfare and placed in foster care (ANFC-FC).

A relative may apply and be found eligible to receive ANFC on behalf of a child who is not yet in the home; receipt of such assistance shall be conditioned on the child's coming to live with the relative within 30 days after receipt of the first payment.

"Home" is defined by W.A.M. § 2302.12 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.

The board has held that the "key factor" in determining eligibility under the above regulations is whether the parent has "continued responsibility for day to day care of the child." Fair Hearing No. 9282. In this case there can be little argument that as of June 18, 1991, the day the petitioner lost both physical and legal custody of the child to the child's father, the petitioner ceased to have such "continued responsibility."<sup>3</sup>

The petitioner's argument that "temporary" orders of custody should not sever A.N.F.C. eligibility appears to rely largely on court cases in which children have been temporarily removed from a recipient's home and placed in the custody of a social services agency. See petitioner's Memorandum pp. 2-3.<sup>4</sup> These cases can be readily distinguished from the situation herein, where one natural parent of a child loses legal and physical custody of that child to the other natural parent. Clearly, as of June 18, 1991, it was the child's father--not the petitioner--who had both legal and physical responsibility for the care and control of the child.

Even though the father obtained custody under a "temporary order", as of June 18, 1991, the length of time he would continue to retain custody was entirely a matter of speculation. Upon obtaining even temporary custody of the child on June 18, 1991, had the father applied for A.N.F.C. he surely would have been found eligible under W.A.M. §§ 2242.2, 2302.1, and 2302.12, supra. Federal regulations are clear that A.N.F.C. benefits cannot be paid concurrently to caretaker relatives of the same child who reside in different homes. 45 C.F.R. § 233.90(c)(2)(i). The fact that the father did not, in fact, apply for A.N.F.C. does not alter the conclusion that the petitioner was ineligible for benefits during this period.

Even though the petitioner maintains she continued to "maintain a home" for the child during his absence, it must be concluded that, under the circumstances (i.e., a court order that had changed custody of the child to his natural father until further order of the court), she did so in the hope--rather than in a legally-entitling expectation--that the child would be returned to her in the near future. Contrary to the petitioner's assertion, as of June 18, 1991, the Department (and the board) had no factual or legal basis whatsoever to "presume" that the petitioner would "continue to be responsible for the child for the purposes of maintaining a home" or that the child's absence from the petitioner's home would, indeed, be "temporary." (See petitioner's memorandum, p. 2.)

One can sympathize with a parent with limited income and resources who, by losing legal custody of a child, loses not only physical custody of the child, but also the means (via continued eligibility for A.N.F.C.) to provide a "home" for that child (and, perhaps, herself) in the future. This is a problem that the Family Courts can and should consider when they make temporary custody orders.<sup>5</sup> In this case, however, it was the Court--not the Department--that determined that the petitioner would no longer have day to day care and responsibility for the child. The Department and the board simply cannot be placed in the position of having to judge the merits of one parent's claim to custody by determining how long a "temporary order" of custody is likely to remain in effect. Once a court has awarded custody to another parent or caretaker relative--even on a "temporary" basis--and once that other parent or relative has assumed physical custody of the child, the regulations (supra) are clear that the parent who has lost custody is no longer eligible for A.N.F.C.<sup>6</sup>

The Department's decision is, therefore, affirmed.<sup>7</sup>

FOOTNOTES

<sup>1</sup>Copies of Memoranda submitted by the parties were considered to the Board.

<sup>2</sup>15 V.S.A. § 1101 includes "neglect" under the definition of "child abuse."

<sup>3</sup>The petitioner cited the board's ruling in Fair Hearing No. 9282 as support for her position herein. However, in Fair Hearing No. 9282 the board's decision was

based entirely on the petitioner's collateral attack on the legal validity of an out-of-state custody order--not on the fact that the order was "temporary."

<sup>4</sup>These cases raised the issue of whether the social services agencies involved were following federal regulations requiring that such agencies strive to reunify families. See 42 U.S.C. § 671(a)(15). (One of the cases cited by the petitioner, Roberts v. Perales, 545 NYS 2d 665 [1989], was recently reversed on appeal. Id., 573 NYS 2d 76 [App. Div. 1991].)

<sup>5</sup>It might also constitute the basis of a claim against S.R.S. in cases where it has removed a child from an A.N.F.C. household (see footnote 4, supra).

<sup>6</sup>For the petitioner, who denied abusing the child and who was ultimately vindicated in court, the result herein appears harsh. However, one must also consider the ramifications if the shoe were on the other foot. If the petitioner was the parent who had obtained "temporary custody" after a finding of abuse, should she not be eligible for A.N.F.C. during a protracted legal battle that follows such a "temporary" order--whether or not she is ultimately awarded "permanent" custody?

<sup>7</sup>The petitioner did not reapply for A.N.F.C. after December 2, 1991; and the petitioner's attorney orally informed the hearing officer that the petitioner does not wish to separately argue A.N.F.C. eligibility as of December 2, 1991--the date of the Family Court's Order that returned custody of the child to her. Therefore, the board need not, and this decision does not, consider whether by virtue of that Order the petitioner was eligible for A.N.F.C. as of that date.

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