

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,567 &

) 13,568

Appeal of)

INTRODUCTION

The petitioners in these consolidated appeals are ex-spouses with two children who appeal separate determinations by the Department of Social Welfare that they are not eligible for ANFC benefits for those children. The petitioner father of the children appeals a determination that he is no longer eligible for benefits because he does not have legal custody of the children. The petitioner mother, who is represented by an attorney, appeals both the Department's initial decision to grant ANFC benefits to her ex-husband and a subsequent decision to deny reinstatement of the benefits to her due to her husband's continued receipt of ANFC benefits pending appeal. Although the issues are different, they arise from the same facts and the matter was consolidated at hearing upon the consent of all parties.

FINDINGS OF FACT

1. The petitioners were divorced on April 6, 1992. Subsequently, on July 5, 1994, the family court issued a custody order based upon the parties' stipulations

which is attached hereto as Exhibit No. One and incorporated herein by reference. Neither party disputes that sole physical responsibility for the two children (now aged five and three) was placed with the mother by that decree. At all times relevant to this appeal, the Department was aware of the existence of this court order.

2. It appears that the petitioners had substantially complied with the decree until October of 1994 when the older child had an accident which required his mother to attend him at the hospital for over a week and at home for a couple of weeks thereafter. At that time, the younger child stayed with her father most of the time. Following that event, the mother, who was then over seven months pregnant, was ordered to bedrest by her doctor in order to avoid a premature delivery due to the stress of her son's accident. She agreed to let both children stay with their father for a longer period of time. During the month of November, the children spent about five days with her. Her third child was born December 8, 1994,

some three weeks earlier than expected. Following the delivery, the children spent a few days with her. She agreed to let her ex-husband keep the children again because they both had bronchitis and she feared infecting the new baby. She spent four days with them just before Christmas. In January, she spent about eight days with them. During this time, the mother gave the father boxes of food from the WIC program, at least \$20 in cash for food for the children, \$30 in Food Stamps, \$14 for medication and ample clothing, diapers and baby wipes.

3. In late January of 1995, the Department received an anonymous report that the children were no longer living with the children's mother. In response to that report the Department requested information from the children's mother and father.

4. On February 3, 1995, the Department received a letter from the mother substantially outlining the events in paragraph two. She stated that her ex-husband had been helping her out while she was in a difficult situation and that she would not have let the children go to his home if she had known that he was "setting her up" to get the ANFC.

While she admitted that she agreed to increased time at the father's home, she made it clear that she was angry that her husband was trying to claim principal physical responsibility and was trying to get her ANFC payments.

5. The father responded in a statement prepared by the father's live-in girlfriend dated February 7, 1995, detailing the amount of time the children were at his home. His claim was essentially the same as set forth in paragraph two.

6. On February 28, 1995, the mother was informed by the Department that her ANFC grant would close effective March 16, 1995, because her children were no longer in the home. The father was not sent a simultaneous notice granting his benefits, apparently because the Department wished to see if the mother would appeal the denial. When no appeal had arrived in the first ten days after the notice had been sent (the time period in which continuing benefits can be requested), the worker assumed that the mother did not object. On March 13, 1995, the father was informed that he had been found eligible for ANFC effective March 16, 1995.

7. The mother did not appeal the decision within the first ten days because she did not think it would do any good. She did, however, contact Vermont Legal Aid and got a representative to help her. The parties convened a conference with the Department on March 24, 1995, to try to work things out. The mother made it clear at that time that she wanted to return to the prior living schedule. The father informed the Department that on March 20, 1995, he had filed a motion with the Court to get full legal and physical custody of his children. However, he agreed to return to the old schedule and to let the mother have the ANFC grant. The mother did file an appeal of the denial on April 3, 1995.

8. Concluding that the original physical housing arrangement for the children had been resumed, the Department notified the father that his ANFC benefits would be terminated on April 16, 1995, because the children were no longer in his home. The father, reneging on the March 24 agreement, appealed that determination and has received continuing benefits since that time.

9. On April 11, 1995, the Court denied the father's motion to change custody without a hearing on the merits because he had failed to utilize the mediation procedures set out in paragraph 4 of the parties' order.

10. Following these decisions and appeals, the parties, whose demeanor towards each other is disturbingly hostile and uncommunicative, continued to do some sparring over placement of the children. On April 15, 1995, the father failed to bring the children home after a visitation and as of May 9, 1995, still had the children in his care. The father has no telephone and the mother cannot call out long distance on her phone. The mother has no transportation and lives some twenty miles from the father. They have had some trouble communicating, not only because of their limited access to transportation and telephones, but also because of their embittered attitudes towards each other. It appears that since the beginning of the year, the mother has, at times, left the children with the father in a rather cavalier fashion, often with little notice and for her own convenience rather than out of necessity. It also appears at times that the mother has made less than aggressive efforts to have the children returned to her. Nevertheless, by the first week of May she had enlisted the aid of the sheriff to have her children returned and had filed a motion for contempt with the family court. In mid-May a few days after the hearing, the hearing officer was informed by the parties that the children had been voluntarily returned by the father to the mother's home.

11. Although the Department agrees that the children are in the physical custody of their mother, they have refused to grant her ANFC benefits because they are required to pay benefits to the father pending the resolution of his appeal. They will not pay benefits to two households simultaneously for the same children.

ORDER

The decision of the Department terminating benefits of the petitioner mother is reversed. The decision granting benefits to the petitioner father should be reversed. The subsequent decision terminating the father's benefits should be affirmed.

REASONS

This dispute requires a decision as to which parent was eligible to receive ANFC benefits on behalf of their children at specific periods of time. Under the DSW regulations, an eligible parent is defined as an individual who "lives in the same household with one or more eligible biological, step or adopted children." W.A.M. § 2242.2 In this case, both parents live from time to time with their eligible, biological children. However, as ANFC can only be paid to one eligible household (42 U.S.C. § 609(a), 45 C.F.R. § 233.90(c)(2)), the Board has adopted a standard of paying only the parent who is "either 'living with' the child or serving as the primary provider of the child's care and control--or both." Fair Hearing No. 10,999.

This question often arises in the context of a joint custody decree where neither parent has been designated as a physical custodian and a factual determination must be made as to which home the child spends more time in. Fair Hearing Nos. 5553, 9521, 11,182. In this case, however, the Court has determined which parent is to provide physical care and control over the children and has so stated in its decree.

The family court gave the mother sole responsibility of physical custody over her children. She has continued to provide a home for her children and to care for them when they are not at their father's home. She has made it very clear that she does not wish to relinquish that designation to her ex-husband. In that circumstance, it is inappropriate for the Department to make a different determination as to which parent has physical control and care and is providing the primary home. Not only could such action

interfere with the order of the Court by making it difficult for the custodial parent to provide support, but could also falsely lead the non-custodial parent into believing that he has a right to retain custody of the children, as appears to have happened in this matter.

The correct course for the Department to have taken when presented with this evidence was to ask the custodial parent whether she would consent to the transfer of ANFC benefits to the non-custodial parent. If she indicated her refusal to consent, the Department should have referred the father to the family court to seek a change of physical custody. It was not appropriate to have paid him any ANFC benefits, particularly on so flimsy a basis as a letter from him alleging days and hours that the children were at his home.

Nothing above should be construed, however, as an obligation to continue paying the custodial parent if the children do not appear to live with her any more. (This is quite a different consideration from choosing between warring parents.) The regulations do not allow payments to households where there are no eligible children. W.A.M. 2242. However, the regulations do allow for continued payment of benefits in certain circumstances:

A recipient of ANFC assistance, or an individual acting on behalf of a caretaker relative unable to do so, shall notify the District Director of any physical separation of caretaker and child(ren) which continues or is expected to continue for 30 days or more. Eligibility shall continue when the following conditions are met:

1. The recipient relative or caretaker or, in cases of subsequent separation of parents receiving assistance as a two parent family, the other recipient parent continues or supervises continuing care and supervision of eligible child(ren); and
2. A home is maintained for the child(ren) or for return of the recipient relative or caretaker within six months; and
3. Eligible family members have continuing financial need.

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W.A.M. 2224

This regulation allows the mother to continue to receive ANFC benefits even if her children are separated from her for as long as six months as long as she supervises the continuing care and supervision of her children and maintains a home for them. In this matter, by court decree, the petitioner continues to have supervision of her children's physical care and control. The facts show that she did continue to manage their needs and did continue to maintain a home for them. For these reasons, she was eligible to continue to receive benefits.

Finally, the question has arisen as to whether the Department can pay retroactive ANFC benefits to the mother which have already been paid to the father either due to the initial error or due to his request for continuing benefits. The obvious answer to this question is yes. The father was not eligible for those benefits. They were all paid to him in error and are recoverable by the Department:

Overpayments of assistance whether resulting from administrative error, client error, or payments made pending a fair hearing which is subsequently determined in favor of the Department, shall be subject to recoupment. Recovery of an overpayment can be made through repayment by the recipient of the overpayment . . .

W.A.M. 2234.2

W.A.M. § 2218.2 governing continued assistance pending appeals reiterates the concept that benefits made pending appeal are recoverable as an overpayment if the recipient is determined to be ineligible.

The Department argues that in spite of the reason for the payment, a second payment cannot now be made to the indisputably eligible household. In support of its position, the Department relies on the federal regulation mandating federal matching funds for:

(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a) (1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative . . .

45 C.F.R. § 233.90(c)(2)

The term "payment" itself is used as a term of art and defined in the Department's own regulations as follows:

Eligibility and payment is the process through which individuals in need of assistance furnished through Department programs may request and receive, if eligible such assistance . . . (Emphasis supplied)

W.A.M. § 2201

Payment refers to the form, frequency and method by which benefits become available to eligible individuals for their use. (Emphasis supplied)

W.A.M. § 2202

The term of art "payment" is thus firmly linked with eligibility payments. Given those definitions, the term payment in the federal regulation must restrict duplicative payments made due to a duplicate finding of eligibility, not payments made to ineligible persons due to mistakes or due process requirements. See e.g. as W.A.M. § 2118.2 which require benefits to be paid to persons who meet a deadline for appeal, regardless of their actual eligibility for the program.

The construction of 45 C.F.R. § 233.90(c)(2) offered by the Department is inconsistent with and thwarts the purpose of the ANFC program to assist dependent children. See W.A.M. § 2200. It must be rejected in favor of a constructive which carries out the purpose of the program. This decision requires the Department to pay the mother who was the only person eligible for benefits at all times herein and to attempt recoupment of amounts paid to the father either through Departmental error or the continuing benefits provision.

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