STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 10,166
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the Department of Social and Rehabilitation Services' decision to terminate child care subsidy payments made on behalf of the petitioner's ward. The issue is whether the Department may include the income of a child's guardian when determining financial eligibility.

FINDINGS OF FACT

1. On March 21, 1990, the petitioner became the sole legal guardian of her then one-and-a-half-year-old niece through the Washington County Probate Court. A copy of the certificate of appointment and "power and obligation" form which accompanied it are attached as Exhibit 1 and incorporated herein by reference.

2. Prior to the guardianship proceedings, the child had resided with her own mother and was supported through the ANFC program. The child's mother, however, was addicted to drugs and could no longer care for her. As the child's natural father's parental rights had previously been terminated, the care of the child was assumed, first by her grandmother and, eventually, by her aunt, the petitioner in this matter.

3. The petitioner's niece has lived in her household along with the petitioner's husband and their own small daughter since December of 1989. She receives $419.00 per month from ANFC payments as her sole source of support. She has no other resources of any kind. The niece is treated in every respect as if she were a daughter in the family.

4. Because both the petitioner and her husband work full-time, both their daughter, who is one-and-a-half, and their niece, who is now two-and-a-half, go to day care homes on weekdays. The total cost of the weekly day care for both little girls is $140.00. $75.00 of that amount is for the niece's care. The girls do not go to the same day care home.

5. When the petitioner first incurred this additional day care cost for her niece, she applied for and was granted a full subsidy from SRS to pay that amount. Only the niece's income (which is only non-countable ANFC) and neither the petitioner's nor her husband's income was used to determine eligibility for this subsidy.

6. The petitioner was required to file a "re-application" every six months for the subsidy. When she filed in December of 1990, she received a notice from SRS dated December 10, 1990, advising her that "your family is not eligible for SRS subsidized child care payments effective December 31, 1990" because "your income exceeds the maximum for a family of four".

7. Upon further inquiry, the petitioner learned that upon this application, her income and that of her husband had been used to calculate eligibility for a day care subsidy instead of just the niece's income as had been the prior method. This method was based upon new regulations adopted by SRS since her last application.

8. The petitioner's gross weekly income is $296.40 (or $1,274.52 monthly) and her husband's gross is $438.00 weekly (or $1,883.40 monthly) which results in a combined monthly gross income of $3,180.00 ($734.40 x 4.33). The couple own their own home on which they have an $838.00 per month mortgage. They own one vehicle which is a late model Ford Bronco II.

9. The petitioner does not dispute that inclusion of her income and her husband's income makes her over income under the Department's eligibility standards. She asserts, however, that it was wrong for the Department to consider anyone's income in the family except the niece's own income, and failing that argument, at the very least, her husband's income should not have been included because he is not related to her niece and was not appointed her guardian. She asserts that loss of the day care subsidy will cause a severe financial hardship to the family, which actually takes home $2,535.00 per month.

ORDER

The Department's decision is reversed and remanded for a calculation of eligibility based only on the petitioner's

income.

REASONS

Under the Department's regulations, eligibility for day care services depends on the income of the applicant family. "Family" is defined in the regulations as follows:

Family

Means two or more persons residing in the same household, at least one of whom is a primary caretaker. Family members temporarily absent from the household, for whom the family claims financial responsibility for tax purposes, are considered members of the family for the purpose of establishing income and family size but are not considered as family members for the purpose of determining the need for service.

Family configurations include:

1. Married primary caretakers and their resident children;

2. Unmarried primary caretakers and their child(ren) in common;

3. A primary caretaker and her/his own child(ren) and an unrelated male or female;

4. Unmarried primary caretakers, their children in common and one or more children who are the legal responsibility of only one of the adults in the household.

SRS, Child Care Services Regulations ə 4031

Income eligibility standards are further defined as follows:

Income Eligibility Standards

1. Families must have monthly gross income at or below the levels given in the Child Care Subsidy Schedule.

2. In determining the eligibility of a family in which a child is residing with only one of his/her primary caretakers and with an "unrelated" male or female, eligibility is established based on the income of the primary caretaker only, and the unrelated male or female is not considered to be a member of the household.

3. In determining the eligibility of a family in which a child(ren) is residing with both of his/her unmarried or married primary caretakers, eligibility is established based on the income of both of those primary caretakers.

4. In determining the eligibility of a family in which some of the children within the same "family" are the legal responsibility of one primary caretaker and some of the children are the legal responsibility of both primary caretakers separate determinations may be made based on the income of each primary caretaker.

SRS, Child Care Services Regulation ∋ 4034

Prior to November 1, 1990, the definition of "primary caretaker" did not include a person who was acting as the legal guardian of the child. Because legal guardian was not included in the definition of primary caretaker, the Board previously held that income of persons meeting that definition was not includible in calculating the family monthly income for eligibility purposes. See Fair Hearing No. 8081. However, on the above date, new regulations went into effect which changed that definition:

Primary Caretaker

The biological, adoptive or foster parent(s) of a child or the child's legal guardian or other person legally responsible for the child's welfare.

SRS, Child Care Services Regulation ∋ 4031

It was the adoption of this regulation which prompted the Department to notify the petitioner that her family's income must now be included in calculating her eligibility for day care support services. The petitioner challenges that decision and that the inclusion of "legal guardian" in this regulation is contrary to the statutory and common law of this state which does not require legal guardians to support their wards. For this reason, the petitioner argues, the regulations should be struck down.

As a matter of law, the petitioner's proposition is very well-founded. There is no case or statutory law in Vermont which indicates that a legal guardian is in any way legally responsible to provide for her ward out of her own funds. The statute at 14 V.S.A. ə 2797 speaks only of the duty of managing the estate of the ward out of her own funds as does the forms given to the petitioner by the probate court. The Department has pointed to some reported cases in other jurisdictions where close relatives acting as guardians could not recover from the ward's estate when they provided for their wards out of their own pockets in such a way that their provision appeared to be a gift. However, even if those cases applied in Vermont, the petitioner here has certainly not undertaken to provide for the ward out of her own pocket as her application for and receipt of ANFC benefits for the child clearly shows. In any event, these rare exceptions do not undermine the

general principle previously adopted by this Board that in Vermont guardians do not have a duty to support their wards. See Fair Hearing No. 10,170.

That finding, however, does not resolve the legal controversy here. That is because, unlike the General Assistance or ANFC programs, the day care subsidy program is not a program which provides persons with the basic means of support. Rather, the day care subsidy program helps families who need assistance with day care in order to work, by giving those families some assistance on a sliding scale basis. The statute authorizing these payments states:

> (a) A child care services program is established to subsidize, to the extent that funds permit, the costs of child care for families that need child care services in order to obtain employment, to retain employment or to obtain training leading to employment. Families seeking employment shall not be entitled to participate in the program for a period in excess of one month, unless that period is extended by the Commissioner.
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> (b) The subsidy authorized by this section shall be on a sliding scale basis. The scale shall be established by the Commissioner, by rule, and shall bear a reasonable relationship to income and family size. The lower limit of the fee scale shall include families whose gross income is up to and including 100% of the federal poverty guidelines. The upper income limit of the fee scale shall be neither less than 80% nor more than 100% of the state median income adjusted for the size of the family. The scale shall be structured so that it encourages employment.
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> 33 V.S.A. ∋ 3511 (emphasis supplied)

The eligibility criteria in the regulations reflect and emphasize the statutory goal of helping families:

> A child care services subsidy can be authorized to any family if the primary caretaker(s) have a "service need" and meet income eligibility standards".
>
> SRS, Child Care Services Regulations ∋ 4032

> A service need exists when child care is necessary to support a goal of "self-support" or "protection" or "family support".
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> SRS, Child Care Services Regulations ∋ 4032

The entire focus of the statute and regulations is the support of the working caretaker, not the basic support needs of children. Therefore, the petitioner's legal obligations to the ward have little relevance to deciding this matter. This new regulation, although abolishing a former practice of the Department, of excluding guardians' income based on silence in the regulations, actually gives a guardian an expressed right, which did not exist before, to receive help with the day care costs of a ward, if the guardian needs such help to work. As the statute existed before, a guardian actually had no enforceable right under the regulations to be considered as a caretaker. (Although as a matter of policy, assistance was usually given to guardians by the Department.)

As it is the caretaker who is applying for assistance, and not the child, it stands to reason that the caretaker's income, whether that person is a parent or a guardian, must be taken into consideration when determining eligibility for day care subsidies. It cannot, therefore, be concluded

that the Department's regulation requiring consideration of a caretaker guardian's income is in violation of any law.[1]

The validity of the general regulation itself having been resolved in favor of the Department, the petitioner argues in the alternative that only her income and not that of her husband's should be included in the calculation because he is an "unrelated" male as described in ə 4034(2) above. The petitioner argues that since he is not a blood relative he does not meet that definition. That argument is quite unpersuasive. The word "unrelated" as it is used in this regulation and commonly understood, must mean a person living in the household who is not in the petitioner's family, such as a boarder. There is no reason to adopt such a specialized and restrictive reading of that term so as to exclude a person who is clearly related by marriage to the caretaker.

However, paragraph (4) of that same regulation (ə 4034 set out above) does contain a provision which allows the Department to only consider the actual income of the child's "caretaker" if there are other members of the family who are not legally responsible for the child. Consistent with that regulation is the general eligibility regulation cited above at ə 4032 which allows subsidies to be authorized if the "primary caretaker(s). . . meet income eligibility standards".

The facts in this matter show that the petitioner's

husband is neither the biological, adoptive or foster parent of the child whose care will be subsidized, nor is he the child's legal guardian or other person legally responsible for the child's welfare. The petitioner's husband was not appointed legal guardian of the child and has no other relationship with her which would give rise to any legal responsibility for her. Therefore, it was error to use his income to figure the caretaker's (which is his wife only) eligibility for these services. If the petitioner's income alone is used to calculate the amount of assistance she would receive, it would appear that she would be eligible to receive about an 85% subsidy of her day care expenses. See Regulation ə 4035. However, the matter is remanded to the Department for an exact calculation.

FOOTNOTES

[1]The regulations also include foster parents and adoptive parents in the definition of "primary caretaker" but specifically exclude those persons' income as follows:

4. A foster family whose service need is based on the special need(s) of a foster child or service need of the foster parent(s), is eligible for a subsidy for the care of a foster child at 100% of the state established rate, regardless of the foster parent(s) income.

5. A primary caretaker whose service need is based on the special need(s) of a child for whom they are receiving an adoption subsidy or the service need of the adopting parent, the adopting parent(s) is eligible for a subsidy for the care of the adoptive child at 100% of the state established rate, regardless of income.

Child Care Services

Regulations ə 4034.1 (4) and (5)

The petitioner has not raised an equal protection argument here and would undoubtedly have a difficult burden in so doing. Undoubtedly, the Department would advance its desires to further encourage families who care for children

through state foster care and adoption programs as a rationale for the distinction. The considerations in private guardianships are somewhat different.

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