

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 9, 2005 Session

**SHARON ANN COSBY v. STATE OF TENNESSEE DEPARTMENT
OF HUMAN SERVICES**

**Appeal from the Chancery Court for Davidson County
No. 02-3711-I Irvin H. Kilcrease, Jr., Chancellor**

No. M2003-02696-COA-R3-CV - Filed September 12, 2005

The Tennessee Department of Human Services decided that a divorced mother of four was not eligible for assistance under the State's Families First Program because she and her former husband shared equal residential placement time with the children. After exhausting her administrative appeals, the mother filed a complaint for judicial review of the department's decision. The trial court affirmed the department's action. Because the denial of eligibility was based on a departmental policy not promulgated as a rule under the Administrative Procedures Act, we reverse.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Theresa-Vay Smith, Oak Ridge, Tennessee, for the appellant, Sharon Ann Cosby.

Paul G. Summers, Attorney General and Reporter; Pamela A. Hayden-Wood, Senior Counsel, for the appellee, State of Tennessee, Department of Human Services.

OPINION

Sharon Ann Cosby and her husband divorced in 1999. The final decree awarded Ms. Cosby and her husband joint legal and physical custody of the couple's four minor children, "with co-parenting" as set forth in an attached parenting plan. Under that parenting plan, the residential schedule provided for the children to alternate residences on a weekly basis and allocated residential time on holidays. The children changed residences every Sunday at 5:00

p.m. Neither parent was ordered to pay child support, but each parent paid all the children's expenses during the time they stayed with that parent.

In May of 2002, Ms. Cosby went to the Claiborne County office of the Department of Human Services ("DHS") for review of her eligibility for food stamps.¹ While there, she learned that she might be eligible for assistance under the State's "Families First" program. *See* Tenn. Code Ann. § 73-3-151 to 71-3-165. Under that program, a family that includes a "caretaker relative" and a dependent child or children may be entitled to receive monthly financial assistance for the benefit of such child or children for a limited period of time as well as other assistance designed to further the goal of self-sufficiency.

A caseworker reviewed Ms. Cosby's situation and found that despite the equal division of residential time between the mother and father, Ms. Cosby met the statutory definition of a caretaker relative. The caseworker also determined that the family met the DHS income guidelines and concluded that Ms. Cosby was entitled to receive Families First benefits on her children's behalf.

DHS accordingly awarded the mother benefits in the monthly amount of \$264. Perhaps more important than the cash benefit, a determination of Families First eligibility also made recipients such as Ms. Cosby eligible for TennCare/Medicaid, adult basic education, job training, daycare, and other benefits designed to help them obtain and keep gainful employment.

Shortly thereafter, the caseworker's supervisor advised him to re-examine Ms. Cosby's file in light of a manual created by DHS for Families First. The manual contained a discussion of how to deal with joint custody after divorce, a subject which is not specifically mentioned in the Families First statutes or in DHS rules. After reviewing the manual, the caseworker terminated Ms. Cosby's benefits effective June 30, 2002. DHS sent a notice to Ms. Cosby telling her that "Your Families First will stop on June 30, 2002." The reason given for the termination of benefits was "[t]here are no children in the home that meet the rules for Families First."²

The mother requested a fair hearing of the administrative decision.³ A hearing officer assigned by DHS conducted the hearing, in which both DHS and Ms. Cosby were represented by counsel. On August 27, 2002, the hearing officer issued an initial order which stated that the Claiborne County office acted correctly in "closing" Ms. Cosby's Families First case. The hearing officer specifically found that DHS had closed the case because of a policy in the Families First Manual that dealt with joint custody situations.

¹ At the time of the hearing, Ms. Cosby was still receiving food stamps for her family and continued to qualify for that assistance.

² The notice also stated, "The rule we are going by is SR1-46-.02." This rule defines "filing unit" and "assistance group," which are terms used for the group of individuals for whom Families First assistance is authorized. An assistance group must include at least one dependent child. Tenn. Comp. R. & Regs. 1240-1-46-.02 (2). (Rev. Feb. 2003).

³ In an appeal summary prepared by DHS employees, the reason of "No eligible children living in the home" was explained. First, it was stated that since Ms. Cosby had custody of the children 50% of the time and they alternated homes weekly, Ms. Cosby did not meet the "absence deprivation factor." Further, "This is based on a Families First State Manual under section 'living in the home with a relative', which states on joint custody cases the parent must have custody for extended periods of time to qualify based on absence."

Ms. Cosby then filed a petition for reconsideration of the initial order. The Director of Administrative Review upheld the hearing officer's decision and made the order final on October 15, 2002.

I. PROCEEDINGS IN THE TRIAL COURT

Having exhausting her administrative remedies, Ms. Cosby sought judicial review of the Department's decision by filing a complaint in the Davidson County Chancery Court. *See* Tenn. Code Ann. § 4-5-322(b)(1). She argued that DHS's decision to terminate her benefits was based solely upon the informal joint custody policy found in the Families First Manual, which had never been promulgated as a rule pursuant to the Administrative Procedures Act. Consequently, she asked the court to declare the joint custody policy void and to enjoin DHS from using the policy to refuse assistance to her and her children. DHS answered, denying that Ms. Cosby was entitled to the relief she sought.

On September 17, 2003, the trial court filed a Memorandum Opinion which adopted the DHS hearing officer's Findings of Fact. The court found that while DHS did rely on the Families First Manual to arrive at its decision, the policy in the Manual and the decision to close Ms. Cosby's Families First case were "consistent with the promulgated rules of the Department of Human Services."⁴

The court's Final Order, filed on October 9, 2003, incorporated its Memorandum Opinion by reference, affirmed the DHS administrative decision, and dismissed Ms. Cosby's petition for judicial review. This appeal followed.

II. DIFFERENCE IN RULES AND POLICIES

The primary basis for Ms. Cosby's appeal is her contention that the decision by DHS was made on the basis of a policy found in the Family First Manual, not on a statute or administrative rule, and that a mere departmental policy cannot be used to deny her benefits. It is undisputed that DHS relied upon a section of the Family First Manual in determining that Ms. Cosby was ineligible for Family First benefits, and the hearing officer specifically found, "the Department closed the Appellant's Families First case because of the policy listed on page 71 of the Families First Manual"

DHS argues that it was not necessary that the policy relied upon be promulgated as a rule pursuant to the Uniform Administrative Procedures Act ("APA"). Among other things, the APA sets out the procedures every agency must follow in promulgating rules related to its duties and

⁴ The court specifically found that the portions of the Manual used merely restated the rules concerning the eligibility requirements with respect to parental deprivation. "The manual does not set forth any policy or rule that differs or adds to the promulgated policy of DHS." The court cited and quoted a rule on continued absence of a parent from the home, specifically Tenn. Comp. R. & Regs. 1240-1-3-3.1 (4), citing to the administrative record (Tr.p.126). The court found that the parents equally shared time with the children as well as care and control of and financial responsibility for them. "Therefore, under both the definition promulgated by DHS and the language in the policy manual, there is no primary residential parent and no parental deprivation by the absence of the father."

functions.⁵ Tenn. Code Ann. § 4-5-201 et seq. DHS is specifically authorized to promulgate rules regarding the Families First Program by Tenn. Code Ann. § 71-3-157(e).

Agency or department rules are meant to implement the statutes establishing the authority and duties of the agency, and they must be promulgated in accordance with the APA. “Any agency rule not adopted in compliance with the provisions of this chapter shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose.” Tenn. Code Ann. § 4-5-216; *Mandela v. Campbell*, 978 S.W.2d 531, 533 (Tenn. 1998) (“Failure to promulgate a rule as contemplated by the UAPA renders the rule void”). DHS acknowledges that the policy in question was not promulgated as a rule. Therefore, the policy used as the basis for DHS’s denial of eligibility herein could not be used for that purpose, being void and of no effect, if it was required to be promulgated using APA mandated procedures.

Consequently, the question before us is whether the policy in the Families First Manual meets the statutory definition of a rule that must be promulgated in compliance with APA requirements. A rule is defined as “an agency statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency.” Tenn. Code Ann. § 4-5-102(10). There are stated exceptions to this general definition, and agency policy statements that fall within one of the exceptions are not “rules” subject to APA rulemaking procedures. *Mandela*, 978 S.W.2d at 534. The policy at issue herein clearly affects private rights and privileges, so is not subject to the exception for statements affecting only the internal management of state government. Tenn. Code Ann. § 4-5-102(10)(A).

DHS relies on another of those exceptions, which excludes from the definition of “rule” “[g]eneral policy statements which are substantially repetitious of existing law.” Tenn. Code Ann. § 4-5-102(10)(D). DHS argues, “Because the Families First Manual provisions discussed are general policy statements substantially repetitious of existing law, they are not required to be adopted as rules under the UAPA.”

To determine whether the policy relied on to deny Ms. Cosby eligibility for Families First benefits is substantially repetitious of existing law, we must review the relevant statutes and APA - promulgated rules and compare the requirements found therein with the policy. We begin with the statutes.

III. THE FAMILIES FIRST STATUTES

The Families First Program⁶ was enacted by the Tennessee General Assembly in 1996 to reform the program of economic assistance to needy families. Tenn. Comp. R.& Regs. 1240-1-

⁵ The procedures for valid rulemaking include public notice of the proposed rule, opportunity for comment, a public hearing, and approval by the attorney general. Such procedures allow persons affected by proposed rules to make their voices heard in favor of or in opposition to such rules and to make such suggestions for changes.

⁶ The Families First Act of 1996 is codified in Tenn. Code Ann. §§ 71-3-152 through 71-3-165. Tenn. Code Ann. § 71-3-151.

45-01. The program, like its federal counterpart,⁷ was designed to help families in need achieve self-sufficiency and to discourage long-term reliance on government welfare. Hence, most assistance under the program is temporary. Tenn. Code Ann. § 71-3-153(a)(1).⁸

The requirements for Families First eligibility are set out in Tenn. Code Ann. § 71-3-154(a), which provides that a family is eligible for temporary assistance if: (1) a dependent child resides in this state with a caretaker relative in that family; (2) the family meets certain income requirements; (3) the family members are employed or preparing for employment; and (4) the caretaker agrees to a personal responsibility plan.⁹

There is no dispute in this case regarding the last three requirements. DHS does not contest that Ms. Cosby is employed full time,¹⁰ nor does it dispute that the family meets the financial eligibility requirements. There is similarly no assertion that Ms. Cosby would not agree to the required plan. At issue is the requirement that in order for a family to be eligible for temporary assistance a dependent child must reside with a caretaker relative in that family.

Further explanation of this eligibility requirement is found in Tenn. Code Ann. § 71-3-153, which contains a set of definitions of terms that have a specific and limited meaning within the context of the program. Thus, a “caretaker relative” means an individual who is closely related to a dependent child by blood or marriage, including a mother, and with whom the child is living. Tenn. Code Ann. § 71-3-153(a)(2). “Family” means “the eligible unit of children and parent(s) or caretaker relative(s) residing in a common residence.” Tenn. Code Ann. § 71-3-153(a)(6).

For our purposes, the applicable definition of dependent child is especially relevant:

a child living with a caretaker relative if the child is deprived of parental support due to the death of a parent, continued absence of a parent from the home, physical or mental incapacity of a parent, or unemployment or underemployment of either or both parents and if the child’s legally responsible relatives are not able to provide adequate care and support of such child without temporary assistance.

Tenn. Code Ann. § 71-3-153(a)(5).

IV. ANALYSIS

⁷ The federal Personal Responsibility and Work Opportunity Reconciliation Act (Public Law 104-193, Title IV), widely known as the Welfare Reform Act.

⁸ With limited exceptions, a family may continuously receive Families First benefits for no more than eighteen months at a time, with a lifetime limit of not more than sixty months. Tenn. Code Ann. §§ 71-3-154(d) and 71-3-157(f).

⁹ In addition to these statutory requirements, a family must be otherwise eligible pursuant to federal or state laws or regulations. Tenn. Code Ann. § 71-3-154(a)(5). This requirement is not at issue in this case.

¹⁰ Ms. Cosby was not employed at the time she applied, but the caseworker testified that the employment requirement can be met by something other than current employment. In any event, by the hearing, Ms. Cosby was employed full time at a day care center where she worked 40 hours per week and earned \$5.15 per hour.

In this appeal, DHS argues that it properly terminated Ms. Cosby's Families First benefits based on provisions in the Family First Manual entitled "Living in the Home of a Relative" and "Deprivation." Although the argument is framed in reference to the policies in the manual, in essence, DHS argues that Ms. Cosby's family does not meet the requirements, established by statute and APA-promulgated rule, that (1) the child actually live with the caretaker relative and (2) that the child be deprived of parental support and care. In the case before us, the first requirement relates to absence of the child from the home of the caretaker relative, and the second relates to absence of a parent from the home of the child.

We have previously set out the statutes regarding eligibility for Families First eligibility. In arguing that any manual provision or policy applied to deny Ms. Cosby benefits was only a restatement of existing law, DHS also relies on a number of rules promulgated pursuant to its authority regarding operation of the Families First Program. We will consider those rules that we determine actually apply¹¹ to Families First eligibility and to the issues herein.

A. Child Living in Home of Relative

The manual section entitled "Living in the Home of a Relative" deals with the requirement that a dependent child live with a specified relative and states that the determinative factors are "where the child actually lives and who has care and control of the child." This is consistent with the rules regarding Families First eligibility, *e.g.*:

Usually, the child continuously shares the same household with the applicant relative. A child is considered to be living in the relative's home as long as the applicant/relative continues to provide care and control of the child even though circumstances may require temporary absence of either the child or the relative from the customary family setting.

Tenn. Comp. R. & Regs. ch. 1240-1-47-.20(2).

The manual also states that in joint custody situations, care and control must be established and that DHS must make that determination on a case by case basis. "Care and control" is not at issue in this appeal. The caseworker did an independent investigation and

¹¹ DHS has cited, relied on, and attached to its brief a set of rules entitled "Non-Financial Eligibility Requirements - Families First Program" (part of the rules of DHS Family Assistance Division), Tenn. Comp R. & Regs. 1240-1-47-.01 *et seq.* (1997), that were in effect at the time of the application, initial approval, and subsequent termination of benefits herein. (Those rules were later revised or superseded, effective September of 2002). Those rules and some others by their terms and titles clearly apply to the Families First Program. *See* Tenn. Comp R. & Regs. 1240-1-45 through 1240-1-56. DHS has also cited, quoted, and relied on rules found in other chapters of the DHS Family Assistance Division rules, even where those rules by their terms and titles clearly apply to programs other than Families First. We presume this is explained by the statement that DHS had incorporated into the Families First Program some rules that existed prior to the creation of Families First for application in other programs. Having consulted the citations supporting that statement, it is clear that specified pre-existing rules were incorporated into the Families First rules. Tenn. Comp. R. & Regs. 1240-1-1-.01(7). The list of chapters specifically incorporated is limited and does not include the rules on non-financial eligibility. We will rely solely on those rules clearly applicable to Families First. This makes no material difference to the merits of DHS's arguments or to our decision.

determined on the facts he found that Ms. Cosby had care and control of the children.¹² His decision in that regard was not reversed or overturned by his supervisors. At the administrative hearing, DHS did not challenge this determination by the case worker. To the contrary, DHS argued that the issue in the case was not “care and control,” but instead was “deprivation.”

Consequently, DHS cannot now be heard to argue that Ms. Cosby and her family were ineligible for assistance because the children were not living in the home of a relative caretaker. DHS denied eligibility on the basis the children were not deprived of parental support and care.

B. Deprivation of Parental Support and Care

The hearing officer held that DHS’s decision was based a specific joint custody policy in the Families First Manual. He found that the caseworker testified that, without application of joint custody policy at issue, Ms. Cosby would be eligible for Families First benefits. That finding is supported in the record. The determinative provision is labeled in the manual as an “Exception” to the general policy statement on “Living in the Home With a Relative” and states:

When there is a situation of **joint custody**, the case manager must look at each situation on a case by case basis. **If the child lives with both parents, then deprivation must exist based on incapacity or unemployed parent policy unless the child lives with each parent for extended periods.**¹³ In that case, the child may meet the deprivation by absence criteria and would be eligible to be included in the home of the parent with whom he/she resides at the time of application. When the child goes to live with the other parent, eligibility ceases to exist with the first parent. (emphasis added.)

Although Tenn. Code Ann. § 71-3-153(a)(5) includes three bases for a child being deprived of parental support, and consequently a dependent child, the quoted manual provision or policy disallows one of those bases where the residential schedule of a child of divorced parents places the child with each parent for something other than or less than “extended periods.” The disallowed basis is “continued absence of a parent from the home.”

The question before us is whether the policy that was used to deny eligibility to Ms. Cosby’s family and which disallows absence of a parent as the reason for a child’s deprivation of parental support and care is substantially repetitious of statutes and rules. Clearly, the relevant statute allows for three bases upon which a child can be deprived of parental support and care.

¹² The caseworker who initially interviewed Ms. Cosby found that she met the definition of caretaker relative because she was the one who exercised care and control over the children, as defined in Tenn. Comp. R. & Regs. ch. 1240-1-47-.20(3), which provides “A relative has care and control of a child if he/she is providing day to day care, support, supervision, and has major responsibility for these parental obligations.” The caseworker found that the mother was the parent who took the children for their health checkups, dental appointments, and immunizations, and that she was listed as the children’s primary contact at their elementary school. The mother also regularly saw the children while they were in the father’s custody. She worked at the daycare center where the children were cared for, and she sometimes went to their school to have lunch with them.

¹³ There is no contention that Ms. Cosby’s family would qualify under either incapacity of a parent or unemployment of a parent.

We can find no statutory authority for excluding one of those bases. Any legal authority for the policy must be found, if at all, in the relevant rules promulgated by DHS.

Applicable rules define a dependent child as “A needy child age 17 or younger who is deprived of parental support or care because at least one parent is dead, absent, physically or mentally incapacitated, or unemployed.” Tenn. Comp. R. & Regs. 1240-1-45-.02(10). Further,

A child who is otherwise eligible for Families First must be found to be in need by Families First standards and to be deprived of parental support and/or care. Deprivation must be due to any one of the following:

(3) Continued absence from the home in which the child lives of one or both parents;

Tenn. Comp. R. & Regs. 1240-1-45-.23.

The rule on “Absence of a Parent” provides:

(1) A child may be determined to be deprived of parental support by reason of the absence of one or both parents from the home in which the child lives.

(b) If the facts establish the allegedly absent parent has a separate living arrangement from the child(ren) for whom Families First is requested and is not providing support sufficient to meet the child’s needs, absence can be considered to exist.

(2) Absence from the home may exist due to any of the following:

(a) Divorce of natural parents and only one or no parent remains in the home with the child(ren);

(3) When Absence Exists.

(a) Continued absence will be considered to exist when at least one parent is out of the home and the nature of the absence:

1. Interrupts or terminates the parent’s functioning as a provider of maintenance, physical care or guidance for the child; and
2. The known or indefinite duration of the absence precludes counting on the parent to perform his/her function in planning for the present support/care for the child.

(4) Duration of Absence. The absence does not have to exist for a specific period of time. However, when it is evident that the absence will terminate before the application can be processed and payment made, the condition of continued absence is not met.

Tenn. Comp. R. & Regs. 1240-1-45-.26.

We find nothing in these rules regarding deprivation of parental support or care that disallows a finding of deprivation based on parental absence in the situation where divorced parents are awarded joint custody. We note that such a rule would be inconsistent with other rules since legal custody is not a determinative factor in other contexts. As used in the rules, and therefore presumably in the policy, “joint custody” is defined as “[l]egal custody of a child held simultaneously by two or more persons. Usually, joint custody is granted to parents of children when the parents are divorced.” Tenn. Comp. R. & Regs. 1240-1-45-.02(19). Thus, joint custody does not refer to physical custody or residential placement schedule and does not necessarily reflect where the child actually lives.

Even if we were to interpret “joint custody” as equal residential parenting time, contrary to the definition adopted by rule by DHS, there is nothing in the rules that precludes eligibility based on parental absence in that situation. It is clear that the rules contemplate that absence of a parent can be caused by divorce. Rather than establishing a per se preclusion of one of the statutory bases for parental deprivation, the rules set out factors to be applied in consideration of the facts of an applicant family’s situation. DHS did not engage in consideration of those factors herein. Consequently, we decline to do so. The issue before us is whether DHS could apply a policy that was not promulgated as a rule to deny eligibility, because that is what DHS did, not whether it could have applied the considerations in the rules to deny eligibility.

Even though we need not decide whether DHS could have determined that Ms. Cosby and her family were ineligible for Families First assistance on the basis of the statutes and rules, we note there is some question about DHS’s interpretation of the policy or manual provision itself. Essentially, DHS found and asserts that since the parents alternated custody of the children each week, it could not be said that the children lived with each parent for “extended periods.” Under questioning during oral argument, the attorney for the State conceded that the equal division of time between the parents was not necessarily a barrier to eligibility. She stated that eligibility might not have been a problem if the parties alternated custody every month or longer.¹⁴ Residential schedules in parenting plans are to be designed to meet the needs of the children and to encourage each parent to maintain a loving, stable, and nurturing relationship with the children. Tenn Code Ann. §36-6-404(b). A trial court that orders or approves a plan with parental residences alternating weekly does so presumably because that schedule best meets the needs of the children. Many would be dismayed to learn that such a decision would deprive children of financial assistance otherwise available if a different schedule were adopted.

¹⁴ There was some indication in the testimony and comments as well as filings in the administrative hearing that part of the problem was the fact that the computer system used by Families First generates monthly checks for recipients. There is thus an imperfect match between the computer’s programming and periods of custody of less than one month.

In summary, we find that the informal joint custody policy in the DHS manual is not “a general agency policy statement substantially repetitive of existing law.” Consequently, it cannot be applied to deny eligibility for Families First assistance to Ms. Cosby and her family.

V.

The order of the trial court is reversed. The decision of the Department of Human Services to terminate Families First assistance to Ms. Cosby and her children is also reversed. The costs are taxed to the Tennessee Department of Human Services.

PATRICIA J. COTTRELL, JUDGE