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# AFDC ENCOUNTERS JOINT CUSTODY: BUSINESS AS USUAL IS NOT THE SOLUTION

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*In the fifty years since its enactment, Aid to Families with Dependent Children (AFDC) has become increasingly difficult to administer efficiently and equitably. Most recently, this increasing complexity is illustrated by eligibility determinations for divorced families having joint custody of the children. A recent national survey of state agencies administering AFDC programs reveals a diversity of approaches in determining eligibility under the continued absence requirement for joint custody situations. As illustrated by these joint custody cases, the meaningfulness as well as the usefulness of the continued absence requirement for AFDC eligibility has become increasingly questionable in terms of responding to the welfare of financially needy children. Additionally, the continued absence requirement appears to negate the potential advantages of joint custody for poor families by precluding financial assistance from the AFDC program.*

The welfare of children was a developing concern at the turn of the century and led to such social reform activities as the 1909 White House Conference on Child Dependency, the establishment of the Children's Bureau, the passage of the Maternity and Infancy Act (better known as the Sheppard-Towner Act), and the enactment of mother's aid or widow's pensions in many states. These child welfare concerns culminated in the enactment of Aid to Dependent Children as part of the original Social Security Act passed by Congress in 1935. At the time, most children were considered dependent

because of the loss of their father through death. The original impetus for the Aid to Dependent Children program was directed toward "fatherless and other 'young' families without a breadwinner" (Report of the Committee on Economic Security, 1935, p. 25). In order to be eligible for benefits, the program required that a child be both financially needy and deprived of parental support or care. The chief concern was for children who had lost their father through death. Loss of paternal support or care because of divorce, separation, or unwed parenthood was not a frequent occurrence and, thus, not a common reason for receiving program benefits.

In more recent years, this pattern of eligibility based on deprivation of parental support has reversed itself. With the growth in coverage provided through the social insurance provisions of the Social Security Act, children who lose a breadwinner through death often are provided financial support through survivors' benefits. Now, the majority of AFDC children are eligible under the deprivation of parental support or care requirement because of the continued absence of the parent from the home due to divorce, separation, desertion, or unwed parenthood. Given these changing reasons for deprivation of parental support or care, the administration of AFDC has become more difficult.

The continued absence of the parent from the home requirement poses increasingly difficult problems in the administration of AFDC because determining what constitutes continued absence has become increasingly complex. This difficulty is most clearly illustrated when a divorced parent who has joint physical custody of the children applies for AFDC. This article examines the trend toward the joint custody of the children following a divorce, reviews the federal regulations for "continued absence", and illustrates the administrative difficulties for determining AFDC eligibility in these circumstances.

### JOINT CUSTODY

During the past several years, the joint custody of children following divorce has become an increasingly popular

option for parents. Because it allows both parents to continue an on-going relationship with the child, joint custody is promoted as serving the best interests of the child. Currently over one half of the states have a joint custody option in their divorce statutes. These statutes are highly varied, however, and range from initiation of a joint custody arrangement by the parents to a presumption by the court that joint custody is the preferred arrangement unless the parents request an alternative custody situation.

The term "joint custody" is ambiguous and subject to several interpretations. It may refer strictly to a sharing of legal custody by the parents. This insures that each parent has a say in major decisions related to the child's education, medical care, and religious training. More commonly, joint custody, sometimes called co-parenting, refers to shared legal custody as well as to shared physical possession and control of the child. The actual physical possession and control of the child thus fluctuates between the parents. This arrangement allows for a great deal of flexibility in meeting the needs of the child. Ideally, bitter custody disputes between the parents are avoided and the child maintains a meaningful relationship with both parents. The actual arrangements for physical custody may range from the more traditional divorce arrangement of living with one parent and visiting with the other to spending equal amounts of time living with both parents. It is this latter joint physical custody arrangement which has the greatest potential for conflicting with the AFDC eligibility requirement that the child be deprived of parental support or care due to continued absence.

#### THE FEDERAL REGULATIONS

Deprivation of parental support or care due to continued absence of the parent from the home exists, according to the federal regulations, "when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes count-

ing on the parent's performance of the function of planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and may have left only recently or some time previously. . . ." (45 C.F.R. 233.90 (c)(1)(iii) 1982).

The federal legislation for AFDC also requires that the child be living with specified relatives. The meaning of living with a given relative "in a place of residence maintained . . . as his . . . own home" is specified in the federal regulations as being "a home in the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, even though either the child or the relative is temporarily absent from the customary family setting" (45 C.F.R. 233.90(c)(1)(V)(B) 1982).

The AFDC eligibility for a child who is in the joint custody of both parents is not addressed in the federal regulations nor have federal policy interpretations on the matter been particularly helpful to the state public welfare agencies (Hagen and Hoshino, 1985). The federal policy interpretations issued by the regional offices of the Social Security Administration simply reiterate that the states are required to apply the same criteria of deprivation and "living with" to all AFDC applicants, regardless of the custody arrangement. The federal examples given for joint custody, however, deny AFDC eligibility if the child is physically with one parent for five days and with the other for two, or if the child is physically in the home of each parent for portions of each month. Such absences are not regarded as continuous and both parents are considered to be exercising their parental function.

The state agencies have not found this interpretation helpful in responding to the diversity of joint custody arrangements. Instead, the state agencies have found it necessary to develop their own guidelines for eligibility determination in instances of joint custody, assuming the other eligibility criteria are met. With each state attempting to be

responsive to this new social trend of joint custody and still remain concerned with the welfare of children, a variety of interpretations have emerged in determining eligibility in joint custody cases.

### DETERMINING ELIGIBILITY

A recent national study on each state's policies regarding AFDC and joint custody surveyed all 54 public welfare units administering AFDC programs (Hagen and Hoshino, 1985). Twelve of the responding 51 agencies already have developed a formal policy for dealing with eligibility determination in cases with joint custody arrangements. Most of the states with a formal policy evaluate each case individually to determine if there is continued absence of a parent and/or if the child is deprived of parental support. In general, a child who spends 50 percent or nearly 50 percent of each week or month with each parent would be considered ineligible for AFDC. However, deprivation due to continued absence may exist, and therefore AFDC eligibility, if the child spends two or more months with one parent and then two or more months with the other. Beyond this, however, a great deal of variation in the bases for eligibility exists among the states.

In handling joint custody cases, with or without a formal policy, states overwhelmingly rely on a case-by-case determination with particular emphasis given to the child's actual situation. The decree granting joint custody is not accepted as evidence that joint custody exists in fact. Although the federal regulations regarding continued absence of a parent are central in eligibility determinations, states vary in the emphasis placed on such elements as residing in the home, with whom the child lives, who is the primary caretaker, the degree of deprivation of parental support or care, and interruption or termination of parental functioning. Based on survey responses, key factors in eligibility determination appear to be the amount of time the child spends with each parent, the parental functioning, and the child's residence. The current practice allows for a great deal of administrative discretion in making eligibility determinations in joint custody

cases. Often, determining parental functioning and the child's primary caretaker is a matter of judgment. Such determinations are time consuming as well as expensive and must be made without the advantage of guidelines because the actual arrangements are highly individualized.

The complexity of administering AFDC in joint custody cases is compounded by children alternating between parents on a semi-weekly, weekly, bi-weekly, and monthly basis. Additionally, case examples from survey respondents mentioned the child going from one state to another, further complicating eligibility determination. In another arrangement, the parents alternated residing in the child's home on a weekly or bi-weekly basis. As the respondent noted, "it is very difficult to determine which parent is 'absent' from the home."

The complexity of AFDC eligibility determination for joint custody cases is further illustrated in welfare fair hearings or welfare appeals. Twenty-eight percent of the responding units have had hearings focusing on joint custody. Although the actual number of hearings has been relatively small, one or two hearings for most states, their potential significance in the issue should not be overlooked. As a respondent pointed out: "... the absence of federal regulations has placed the entire burden of policy development upon the state agency. In this case, the policy may well be determined through a fair hearing decision or court order."

A review of selected hearing decisions from several states raises a number of interesting points. In one situation, a hearing officer overruled a denial for assistance based on a custody arrangement in which a child spent time equally with each parent on alternate weeks. The hearing officer found eligibility to exist based on a factual determination of the child's primary custodial parent who assumed financial responsibility for the child and maintained the child's primary residence. In the opinion, the officer noted that "the department's present position would appear to deny the potential benefits of joint custody to children of certain low-

income parents." Another hearing decision pointed out that "no time limit has been established in the regulations concerning the actual living arrangements of the child in the home. In the absence of such a time criteria the mere fact that the child lives with one of the parents 50 percent of the time does not cause [the appellant] to be ineligible for AFDC assistance." Both decisions are in direct opposition to guidelines used by several states.

Determining the child's primary "home" was crucial in another decision. While acknowledging that the child spent 40 percent of the time with the father, the hearing officer deemed the child's home to be the mother's because the child lived there the majority of the time. Further, the officer stated: "The AFDC regulations do not anticipate that children may have more than one home at one time. The father has been continuously absent from their mother's home for almost three years and this test of deprivation is met."

Respondents to the survey were asked to give their opinions and general views on the joint custody situation. Thirty-five (69 percent) of the respondents answered this section of the questionnaire. Ten of the respondents viewed joint custody as a positive trend because the child's overall interest may be better served. A joint custody arrangement helps preserve the child's relationship with each parent and does not relegate one parent to an outsider. Some of these respondents, however, went on to note not only the increased complexity of eligibility determination for AFDC but also the potential harm to the child which may result. By jeopardizing eligibility for AFDC because deprivation of parental support or care cannot be established, the child may be potentially harmed if both parents have limited income. While the child's emotional well-being may be served, the financial well-being of the child may be compromised.

## CONCLUSIONS AND DISCUSSION

The continued absence of the parent from the home as a requirement for AFDC eligibility may work to the disadvan-



tage of financially needy children and their caretakers if the parents jointly share the physical custody of the children on a regular basis. Once again, the eligibility requirements for AFDC, and the state interpretations of these requirements, may be viewed as contributing to family instability. In this instance, AFDC policy may subvert a divorced couple's attempt, or the court's attempt, to provide for the child's best interest by continuing the child's relationship with both parents. The policies may contribute to the development of families with only one active parent instead of allowing both parents to continue functioning in their parental roles. In other words, the policies may foster the development of single-parent families instead of one-parent households, an important distinction for divorced families made by Ahrons (1980). If the parents persist in their efforts to develop one-parent households rather than single-parent families, the family is, in effect, penalized by being denied AFDC eligibility. The only alternative for many of these families is the state or local general assistance program, a program designed for short-term use, often with significantly lower levels of financial assistance.

The issue of joint custody and AFDC eligibility poses a difficult and perplexing situation for public welfare agencies as they attempt to balance the federal requirements with changing patterns of family need while efficiently administering the AFDC program. Charged with accurately and efficiently administering a program designed for needy children within the requirements and guidelines of the federal government, the state is confronted with developing an equitable policy to handle the needs of children in joint custody.

The most frequently proposed alternatives for welfare reform are negative income tax plans and work-and-welfare strategies. Both the Nixon and Carter administrations have proposed plans in these categories. President Nixon's Family Assistance Plan, an example of the negative income tax approach, called for a federally financed and administered cash assistance program for all families with dependent children whose income fell below a specified level. Unlike AFDC, this

plan would have included two parent families with children. The problem of determining whose income or what portion of income should be credited with supporting the child in joint custody would remain, however.

President Carter's proposal for welfare reform, The Program for Better Jobs and Income, represents a work-and welfare strategy. This proposal created two categories, the non-working poor, including the aged, blind, disabled, and single parents with young children, and the working or employable poor. President Carter's plan, unlike previous proposals, included all low-income individuals as well as families. Under this plan, joint custody arrangements would have complicated determining which parent was to be regarded as the single parent. It would appear, however, that either or both parent would have been able to benefit since the program proposed inclusion of all low-income individuals and families.

Both the Nixon and Carter plans presumably would have removed the need for any eligibility criteria regarding deprivation of parental support or care and continued absence of the parent from the home. In part, then, the current difficulty in determining eligibility in instances of joint custody would have been eliminated. To the extent that approaches to welfare reform include two parent families and remove any eligibility criteria regarding deprivation of parental support or care and continued absence of the parent from the home, the current difficulty in determining eligibility in instances of joint custody is eliminated and a more equitable plan is created. Any program in which eligibility is determined strictly on the basis of financial need would help reduce the complex, and sometimes discretionary, nature of eligibility determinations.

A more fundamental change in the traditional approach to income maintenance would be a move away from means-tested programs to programs based on assumed or attributed need. In this context of AFDC and joint custody, an assumed need alternative is a children's allowance program. Children's allowances, which have been adopted in all indus-

trialized countries except the United States, provide cash benefits directed to all children as beneficiaries. Although need would not have to be established, it again would appear necessary in joint custody cases to determine which parent would receive the payment, or a portion of the payment, on the child's behalf.

An alternative for assisting women with children, including divorced women, is to prevent poverty in the first place. A recently proposed comprehensive strategy for service to AFDC families included child support enforcement as well as increased job opportunities and adequate pay for women, the latter two regarded as sufficient to prevent poverty for many families (Miller, 1983, p. 610). The inequality in earning power has been regarded as the primary explanation for the overrepresentation of women in welfare programs (DiNitto and Dye, 1983, p. 208). While greater attention to the enforcement of child support can be expected in the near future, equality in the labor market for women is a more distant prospect. All three measures, however, not only would help prevent poverty but also would reduce the economic hardships that may be imposed by having the joint custody of a child.

During the fifty years since its enactment, AFDC has become an increasingly complex and difficult program to administer equitably and efficiently. Although the tremendous growth in the program during the past twenty years is partly responsible, a key role also has been played by the changing family structure in American society. As the AFDC program has attempted to respond to this changing situation, the meaningfulness and utility of the continued absence requirement for eligibility has become increasingly questionable in terms of responding to the welfare of financially needy children. By potentially excluding those children in joint custody arrangements, the continued absence requirement negates the benefits of allowing children to maintain relationships with both parents. The diversity in state interpretations of the continued absence requirement and the amount of administrative discretion necessary to determine eligibility in

joint custody situations further contribute to the inequities of the AFDC program. A reexamination of the continued absence requirement is in order if the welfare of all children is to be addressed by the AFDC program. Basing AFDC eligibility solely on financial need according to a national standard would help promote greater equity within the AFDC program.

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