Table of Contents

November December Bench & Bar 2019 - Richard F. Dawahare

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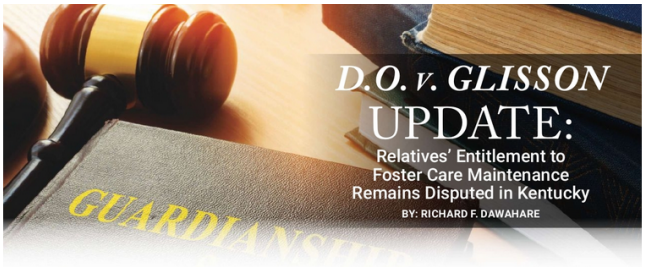

D.O. v. GLISSON UPDATE:

Relatives' Entitlement to Foster Care Maintenance Remains Disputed in Kentucky

BY: RICHARD F. DAWAHARE

The Sixth Circuit's 2017 decision in the landmark case *D.O. v. Glisson* seemed to conclusively resolve a controversial matter in Kentucky child welfare law. Specifically, the *D.O.* court held that the Commonwealth of Kentucky must make "foster care maintenance payments" to relatives who agree to care for abused or neglected children, under certain circumstances, just as it makes to non-relative caregivers. But while some relatives started receiving these payments on behalf of the children under their care, many have not. As explained below, this issue remains hotly debated (and litigated), and warrants close attention from family law practitioners and children's advocates.

THE LEGAL FRAMEWORK

The Sixth Circuit's *D.O.* decision, and subsequent litigation and legislation, all arise from the Child Welfare Act's foster parent reimbursement program. Specifically, when Kentucky's Cabinet for Health and Family Services (the Cabinet) removes children from their home, federal law[1] commands the Cabinet to make foster care maintenance payments on behalf of the children to their substitute caregivers. The relevant law imposes several conditions on such payments, including (among other things) a judicial finding that removal is in the best interests of the child,[2] that the child's subsequent placement and care are the responsibility of the Cabinet,[3] and that the child is eligible for benefits.[4]

In addition to the factors set forth above, the substitute caregiver must be a "foster family home," defined as a home that is: a) licensed by the State in which it is situated or, b) has been *approved* by the agency of such State having responsibility for licensing homes of this type.[5] Further, the child must not have attained "permanency," a statutory concept that means a) the child is returned to his or her parent, or b) the court issues a permanent custody order to the relative foster parent, or c) the child is adopted.

D.O. V. GLISSON

D.O. v. Glisson arose from the Cabinet's failure to make these payments to a relative foster care provider on behalf of two children. The case involved the Cabinet's removal of two young brothers, D.O. and A.O., from their home due to parental neglect. The Cabinet located a great-aunt, co-plaintiff R.O. In keeping with the policy in favor of child placement with relatives, the Cabinet conducted a home evaluation and criminal background check, and it approved R.O.'s home as a suitable placement for the boys.

R.O., however, could not afford to care for both boys, resulting in their separation. R.O. sought the same foster parent maintenance payments from the Cabinet that non-relatives were getting to avoid this tragic separation. The Cabinet denied her request, claiming that she did not qualify.

The family sued, contending that the Child Welfare Act, 42 U.S.C. 672(a), required the state to provide foster care maintenance payments on behalf of the children to relative foster caregivers such as herself. The family further claimed that Kentucky's failure to make the payments violated federal statutes and the Equal Protection and Due Process clauses of the United States Constitution.

The Sixth Circuit agreed with the family.[6] First, the Court made the crucial finding that the Child Welfare Act confers an individual right to foster care maintenance payments, enforceable under 42 U.S.C. § 1983.[7] Next, the Court evaluated R.O's specific entitlement to foster care payments by considering two of the statutorily imposed factors described above: a) whether the children had achieved permanency, and b) whether R.O.'s home constituted a foster home under the meaning of the statute.

As to the permanency issue, the *D.O.* court found that "there [wa]s no doubt that the Cabinet obtained responsibility for the children when" it removed them from their home. In the court's view, "[t]he issue is whether the family court discharged the children from the Cabinet's care when it ordered the boys to live with the aunt and closed the case."[8] Finding that Kentucky law determined permanency, and that the record under review was inconclusive, the *D.O.* Court remanded for a determination of this factual question.

The court then ruled that R.O. was an approved foster care provider under federal law because the Cabinet conducted a standard home evaluation and criminal background check on R.O. prior to delivering the children to her care. Thus, the Court concluded that, "[t]o the extent the Cabinet's failure to make maintenance payments turns on the distinction between relative and non-relative foster care providers, it plainly violates federal law."[9]

On remand, the Cabinet conceded that the family court did not place the children in permanent custody. And that was it, R.O. had won and would be entitled to the payments, and potentially, so would thousands of others. Children's-rights advocates celebrated the decision because it encouraged relative placement.

POST-D.O. IMPLEMENTATION AND CONTROVERSY

The Cabinet, however, took a more-limited interpretation of *D.O.* By March 2018, the Cabinet sent many relatives denial letters stating that they were not eligible for the payments because "a court must have placed the child in CHFS custody."

That is, the Cabinet had interpreted the Sixth Circuit's use of the word "custody" to mean that a court order of temporary custody was now a requirement for foster care maintenance payment eligibility. Thus, in the Cabinet's view, if the Court issued its initial Temporary Custody Order to the relative, and not the Cabinet, the family would not be eligible for maintenance.

On May 9, 2018, a new action was filed in the U.S. District Court Eastern District of Kentucky testing the Cabinet's position. The lawsuit, *J.B-K. et al. v. Meier*, was filed on behalf of 23 children and 16 relatives who challenged the Commonwealth's denial of foster care maintenance payments. The plaintiffs alleged that the Cabinet wrongly interpreted *D.O.* and that the Sixth Circuit used the word "custody" much more broadly than the Cabinet, and that its true meaning was simply shorthand for "placement and care responsibility." *J.B.-K* is currently under review by the Eastern District of Kentucky and may well ultimately result in another landmark appeal to the Sixth Circuit.

Meanwhile, *D.O.* has not gone unnoticed by the Kentucky General Assembly. On April 1, 2019, legislators enacted new procedures and options for caregiver relatives, including a new "service array" and a "child only" option for a relative to be a foster parent. However, child advocates have criticized these measures as being inconsistent with federal law and providing significantly less compensation to relative caregivers than the federally mandated payments for approved foster homes

In sum, *D.O.* guarantees the full protection of federal child welfare law for children in relative foster care by assuring their entitlement to foster care maintenance payments. However, the full and long-term legacy of *D.O.* remains to be seen.

In full disclosure, the author acted as plaintiffs' counsel in both *D.O.* and the *J.B.-K* cases discussed above. BB

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ABOUT THE AUTHOR

RICHARD F. DAWAHARE has enjoyed a multi-faceted career since graduating from the University of Kentucky College of Law in 1979. He first worked as a merchant in the retail industry, starting with Macy's and then 26 years with Dawahare's until the company's closing in the fall of 2008.

He then began his legal career as a solo practitioner focusing on family and elder law. He serves as a Guardian ad Litem for children in DNA Court (Dependency, Neglect and Abuse), and represents wards and families in adult guardianship proceedings. He also does veterans' disability appeals and is a pro bono volunteer for the Fayette County Bar Association and AppalReD (Appalachian Research and Defense), representing former Eric Conn clients.

Dawahare recently won a significant victory for children and their relative foster parents in a case that went to the United States Supreme Court, *D.O. v. Glisson*, 847 F.3d 374 (6th Cir. 2017) cert. denied 138 S.Ct. 316 (2017).

ENDNOTES

1. 42 U.S.C. § 672, "Foster care maintenance payments program," enacted as part of the crowning Child Welfare Act of 1980.
2. Or pursuant to a voluntary placement agreement with the child's parent. 42 U.S.C. § 672(a)(2)(A).
3. 42 U.S.C. § 672(a)(2)(B)(i).
4. 42 U.S.C. § 672(a)(3).
5. 42 U.S.C. § 672(c).
6. *D.O. v. Glisson*, 847 F.3d 374 (Cir. 2017), cert. denied *Glisson v. D.O.*, 138 S.Ct. 316 (2017).
7. *Id.* at 380.
8. *Id.* at 381.
9. *Id.* at 383.

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Print

Table of Contents

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