Table of Contents

November December Bench & Bar 2019 - Richard F. Dawahare

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The Sixth Circuit's 2017 decision in the landmark case D.O. s. Glitican secreted to conclusively resolve a controversial matter in Kennucky child wedfare law. Specifically, the D.O. court held that the Commonwealth of Kentucky must make 'Goster care maintenance payments' to relatives who agree to care for abused or neglected children, under certain circumstance, just as it makes to non-relative caregivers. But while some relatives started receiving these payments on behavior active caregivers. But while some relatives started receiving these payments on behavior and the control of the

THE LEGAL FRAMEWORK
The Sixth Circuits D.O. decision, and subsequent litigation and legislation, all arise
from the Child Welfare Act's foster parent
reimburement program. Specifically, when
Kentucky's Cabinet for Health and Family
Services (the Cabinet) removes children
from their home, federal law' commands
the Cabinet to make foster care maintenance payments on behalf of the children
to their substitute cangiven. 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's the child's
subsequent placement and care are the
responsibility of the Cabinet,' and that the
child is eligible for benefits.'

In addition to the factors set forth above, the substitute caregiver must be a "foster family home," defined as a home that is call licensed by the State in which it is instanted on, b) has been appreved by the agent of such State having responsibility for licensing homes of this type." Further, the contract of such State having responsibility for licensing homes of this type." Further, the contract of such state having responsibility for licensing homes of this type." Further, the contract have a state of permanency," a statutory concept that means a) the additional transmit of the statutory concept that means a) the state of the sta

adopted.

D. O. V. GLISSON

D.O. v. Glissor arose from the Cabine's failure to make these payments to a relation to make these payments to a relation to the control of the control of the Cabinet's temoral of two young brothers, D.O. and A.O., from their home due to partial neglect. The Cabinet located a great-annual neglect. The Cabinet control and great around the companion of Cabinet Post of the policy in favor of child placement with relatives, the Cabinet conducted a home evaluated and previously and provided the cabinet conducted a home evaluated and previously and provided the cabinet conducted a home evaluated and previously and provided the cabinet conducted a home evaluated and provided the cabinet conducted and previously and

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

The Sieth Circuit agreed with the family-first, the Court made the crucial finding that the Child Welfare Act confers an individual right to foster care minintenance payments, enforceable under 42 U.S.C. § 1983: Next, the Court evaluated RoS spe-cific entitlement to foster care payments by 1983: Next, the Court evaluated RoS spe-cific entitlement to foster care poyments by considering two of the statutorily imposed factors described above: a) whether the children had achieved permanency, and b) whether RoS is home constituted a foster bone 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," [1]he issue is whether the family court discharged the children from the Cabiner's care when it ordered the boys to liew with the aunt and closed the case." 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 fed-ral law because the Cabinet conducted as standard home evaluation and criminal background check on R.O. prior to delivering the children to her care. Thus, the Court concluded that, "[10] the extent the Cabinet's failure to make maintenance poyments must not the distriction between relative and variables "blane" care providers, it plainly vollates federal law."

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





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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. Has in the Cabinet's weit, the Court issued its initial Temporary Custody Order to the relative, and not the Cabinet, the family would not be eligible for maintenance.

not be eligible for maintenance.

On May 9, 2018, a new action was filed in the U.S. Datrict Court Eastern District of Kenntschy testing the Calbiner's position. The lawait, 13-6x. at a. a. Moine, was filed on behalf of 23 children and 16 relatives who challenged the Commonwealth's denial of foster care maintenance powments. The plaintiffs alleged that the Calbinet wrongly interpreted D.O. and that the Sind Circuit used the word "custody" much more broadly than the Calbinet, and that its true menting was simply shorthand for "placement and care responsibility," J.B.--K. is currently mader review by the Eastern District of Kentucky and may well ultimately result in another landmark appeal to the Sisth 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, includ-ing a new "service array" and a "child only" option for a relative to be a foster parent.

payments because "a court must have placed the child in CHFS custody."

However, child advocates have criticized these measures as being inconsistent with these measures as being inconsistent with federal law and providing significantly less compensation to relative caregivers than the federally mandated payments for approved

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 plain-tiffs' counsel in both D.O. and the J.B.-K cases discussed above. **BB**

ENDNOTES

1. 42 U.S.C. 5 672, "Foster care maintenance payments program," exact of part of the croming Child Willers Are of 1909.

2. Or pursonant to a viduality splicament agreement APLOSC 5 670 (AUCR)

3. 42 U.S.C. 5 670 (AUCR)

4. 42 U.S.C. 5 670 (AUCR)

5. 42 U.S.C. 5 670 (AUCR)

6. 42 U.S.C. 5 670 (AUCR)

6. 42 U.S.C. 5 670 (AUCR)

7. 6. 61 (Binn e. D. O. 138 S.C. 316 (2017), ort. Aucr)

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Last updated on December 02, 2019.



Table of Contents

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