

## **Payments To Relative And Fictive Kin Caregivers Under The D.O. v. Glisson Ruling**

In out-of-home care cases, the Cabinet for Health and Family Services (CHFS) provides certified foster parents a per diem for each foster child in their care. Depending on the child's age, the basic per diem ranges from \$24.10 to \$26.20.<sup>1</sup> Until recently, the cabinet did not consider relative and fictive kin caregivers eligible for these payments because they were not required to meet the certified foster parent standards detailed in state regulations.<sup>2</sup>

In October 2017, the US 6<sup>th</sup> Circuit Court of Appeals ruled in *D.O. v. Glisson* that federal law does not distinguish between relative and nonrelative foster care providers and that Kentucky must pay relative and fictive kin caregivers in the same manner it pays nonrelative certified foster parents. Furthermore, the court found that section 672(a) of the 42 U.S.C. restricts the children who are entitled to receive per diem in two ways:

First, the child must be in the Cabinet's custody; once the child is adopted or placed in a permanent guardianship, the Act no longer requires maintenance payments. 42 U.S.C. § 672(a)(2)(B). Second, the child must be placed in a licensed or approved "foster family home." Id. § 672(a)(2)(C).<sup>3</sup>

CHFS used these findings to establish the following criteria for relative and fictive kin foster care per diem eligibility:

1. A court must have placed the child in CHFS custody during the current removal episode,
2. A court must *then* have granted temporary (not permanent) custody to the relative or fictive kin during the current removal episode, and
3. CHFS must have approved the home by conducting a home study and background check.<sup>4</sup>

In February 2018, the cabinet issued a press release encouraging relative and fictive kin caregivers to contact the CHFS Kinship Support Hotline if they believed they met eligibility requirements.<sup>5</sup> As of May 30, 2018, the hotline had received over 14,700 calls.<sup>6 a</sup>

After the cabinet's press release, the Legislative Research Commission's Constituent Services office began receiving calls from relative and fictive caregivers who had been denied the foster care per diem under *D.O. v. Glisson*.

When Program Review staff contacted the cabinet in early April, Department for Community Based Services (DCBS) staff were unable to provide detailed information about the eligibility cases they had handled because they were still working on automating the process, which

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<sup>a</sup> Some calls were from the same relative or fictive caregiver making multiple inquires.

should be completed in June 2018. Based on interviews with cabinet officials and a review of cases referred to LRC Constituent Services, the basic process seems to be as follows.

When a caregiver calls the hotline, DCBS assigns a specialist to review the case. Because DCBS cannot query court rulings of individual cases in its computer system, determining eligibility often requires field personnel to travel to the presiding courthouse to examine court documents. CHFS requires that an eligibility determination be made within 45 days.<sup>7</sup> If the cabinet begins recording the date and ruling of court actions in its database, as detailed in Recommendation 1.2 of the Program Review foster care report, the time it takes to make an eligibility determination could be reduced.

To be eligible under criterion 1, it must be documented that a court gave custody of the child to CHFS sometime during the current removal episode. This most often occurs when a DCBS social service worker submits a petition to remove a child and the court issues an Emergency Custody Order or when the court grants custody to the cabinet during a Temporary Removal Hearing. An example of a circumstance where the relative would not be eligible under this criterion involves a case where a grandmother could no longer take care of the children in her care, so CHFS petitioned the court to place the child with fictive kin. Although the cabinet was involved in this case, it never had custody of the children, so the fictive kin would not be eligible for payments.

The cabinet has interpreted criterion 2 to mean that a relative or fictive caregiver must have temporary custody when they first contacted the CHFS hotline. Program Review staff examined cases where relative caregivers had previously had temporary custody, but at the time they contacted the cabinet they had been awarded permanent custody, which means CHFS denied their eligibility for the foster care per diem under *D.O. v. Glisson*. There could be circumstances where the caregiver is initially eligible, but later is awarded permanent custody, at which time the foster care per diem would end.

Eligibility under criterion 3 is self-explanatory. Program Review staff have only seen one case that was denied based on lack of approval of the home study or background check.

Although the cabinet has stated it is willing to reconsider eligibility determinations if the caregiver can produce evidence of factual error, it said that its interpretation of the *D.O. v. Glisson* ruling is not appealable. The only recourse a relative or fictive caregiver has is to bring a court action against the cabinet.

As of May 30, 2018, DCBS has informed 1,083 relative and fictive kin caregivers that they are eligible for foster care per diem in accordance with the *D.O. v. Glisson* ruling and 349 have signed an agreement with CHFS.<sup>89</sup>

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<sup>1</sup> Adria Johnson. Testimony. Meeting of the Interim Joint Committee on Appropriations and Revenue. Frankfort. Nov. 20, 2017.

<sup>2</sup> Elizabeth Caywood. "RE: DO v Glisson questions." Email to Chris Hall. May 29, 2018.

<sup>3</sup> *D.O. v. Glisson*, 847 F. 3d 374, 384 (2017)

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<sup>4</sup> Elizabeth Caywood and Christa Bell. Department for Community Bases Services. Interview. April 12, 2018.

<sup>5</sup> Doug Hogan. *State Providing Financial Assistance To Family Foster Caregivers*. Cabinet for Health and Family Services. Feb. 13, 2018

<sup>6</sup> Elizabeth Caywood. "RE: data question." Email to Chris Hall. May 30, 2018.

<sup>7</sup> Doug Hogan. *State Providing Financial Assistance To Family Foster Caregivers*. Cabinet for Health and Family Services. March 5, 2018.

<sup>8</sup> Elizabeth Caywood. "RE: data question." Email to Chris Hall. May 30, 2018.