
E.A. v. Union County Board of Social Services
Cite as 11 *N.J.A.R.* 140

E.A.,
Petitioner,
v.
**UNION COUNTY BOARD
OF SOCIAL SERVICES,**
Respondent.

Initial Decision: December 9, 1987

Final Agency Decision: January 22, 1988

Approved for Publication by the Department of Human Services:
August 25, 1988

SYNOPSIS

Petitioner appealed respondent's denial of an application for AFDC benefits on behalf of a minor child, S.H., because of insufficient degree of blood relationship between petitioner and the child. The matter was transmitted to the Office of Administrative Law for a hearing.

Petitioner stated when she applied for AFDC that she was a third cousin to S.H. The application was denied because, under *N.J.A.C.* 10:81-3.11(a)1, a third cousin is not considered a parent-person and is not eligible to receive AFDC for a child. At the hearing, the administrative law judge determined on the basis of evidence that E.A. and S.H. were actually first cousins once removed, rather than third cousins. Their relationship was of the fifth degree.

N.J.A.C. 10:8-3.11(a)1 provides that a relative may be recognized as a parent person for the purpose of receiving AFDC on behalf of a child living with a relative if the relationship is one of those listed in the regulation. A first cousin is among the relatives listed. The New Jersey regulation also encompasses relatives of preceding generations denoted by the prefixes "grand" and "great." However, federal regulations construe as eligible relatives those denoted by the prefix "great-great" as well. The administrative law judge concluded that the New Jersey regulation must be interpreted as if the prefix "great-great" were included, since eligibility must be measured by federal standards. A great-great aunt would be in the fifth degree of kinship, the same degree as a first cousin once removed. Therefore, the administrative law judge concluded that petitioner was eligible to apply as a parent-person for AFDC benefits on behalf of S.H. A first cousin once removed and persons of preceding generations as denoted by the prefix great-great have equal eligibility to be designated a parent-person because they are both of the fifth degree of kinship.

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The denial of petitioner's application for AFDC assistance was reversed. The administrative law judge ordered that petitioner be afforded an opportunity to complete an application for benefits and, if petitioner is found to be eligible, benefits shall be issued retroactive to the date of the original application.

Upon review, this initial decision was adopted by the Division of Public Welfare.

Alfred Donnarumma, Esq., for petitioner (Union County Legal Services Corp.)
Carol McMahon, Income Maintenance Specialist and **Catherine Avino**, Income Maintenance Worker, appeared for the Union County Board of Social Services, pursuant to *N.J.A.C.* 1:1-5.4(a)3

FOLEY, JR., ALJ:

On November 18, 1987, a hearing was held and concluded on the propriety of respondent's denial on October 13, 1987, of petitioner's application as a non-needy parent-person for \$162 AFDC benefits on behalf of a minor child, S.H. The basis for the denial was a lack of blood relationship between petitioner and the child.

Ms. Carol McMahon testified for respondent that she is an income maintenance specialist for the Union County Board of Social Services. She said that on October 13, 1987, petitioner came to the agency to apply for assistance for a child named S.H. Petitioner stated to the worker, Ms. Avino, that she was a third cousin to S.H. The application was denied because under *N.J.A.C.* 10:81-3.11(a)1, a third cousin is not considered a parent-person and is not eligible to receive AFDC for a child. Notice of denial was sent to petitioner on October 14, 1987.

The witness stated that subsequently petitioner called Ms. Avino who explained the situation to her. Petitioner at that time stated that she was not a third cousin but was a second cousin. Ms. Avino told her that the regulation still applied.

Catherine Avino testified that she is an income maintenance worker for the Union County Board of Social Services. She said the only change she would make was that she contacted petitioner after she received the fair hearing notice in order to try to resolve the case and she sent her a copy of the regulation which explained that eligibility was limited to first cousins. When petitioner initially applied for

benefits on October 13, 1987, she said she was a third cousin. When the witness and petitioner spoke on the telephone on November 7, 1987, the witness said she stated that she was a second cousin. The witness said that when petitioner told her the relationship was that of third cousin, she told her she would not be eligible, and so the entire application was not completed.

On cross-examination, Ms. McMahon stated that she never traced the blood lineage between S.H. and E.A. back to a common relative.

E.A. testified that she resides at 601 Lincoln Street in Linden. Counsel for petitioner then moved into evidence a table of consanguinity and a paternal family tree for S.H.

Petitioner testified she applied for AFDC benefits for S.H. who has been in her care and custody since September 1987. S.H. is 6 years old. She came into E.A.'s custody as a result of a telephone call she received from S.H.'s mother, M.H., who asked her if she would take care of S.H. for awhile because she, M.H., lives with her mother who is ill and M.H. does not have sufficient room as she and her other children live in one room. The witness said that S.H.'s mother is not at present in a position to take care of S.H. herself.

S.H.'s father (B.C.) is ill. He has seizures, his walking is impaired and he will soon have an operation on his hip. He is aware that S.H. is in petitioner's custody and he has no objection to it. B.C.'s mother is M.C. and his father is J.C. J.C. is the brother of P.C., petitioner's father. M.C., formerly M.D., is the sister of R.D., who is petitioner's mother.

S.H.'s mother is M.H. (There is no geneological chart for the maternal side of S.H.'s family). M.H.'s father is I.D. who is the brother of M.D. and R.D. Petitioner's mother's brother is the father of S.H.'s mother (M.H.).

Counsel for petitioner argued that according to the table of consanguinity, the relationship between S.H. and petitioner, if it is as described by petitioner, is that of first cousin once removed and not second or third cousin.

Counsel for petitioner, in explaining the connection between the table and the family tree, started with the box marked "person deceased" in the table which he said would be S.H. ("person deceased" is, in this case, the person at which a determination of descent should begin). The next step up to parents would be B.C. Another step up to grandfather would be J.C. (grandparents). A lateral step to her grandfather's brother, which would be her great uncle, would be a lateral step to the right on the table, which on the family tree would

be a step to the left over to P.C. Then, a step down from great uncles and aunts on the table would be to the box marked "first cousins once removed" which, on the family tree, would be a step down to E.A., the petitioner. Therefore, the relationship is quite clearly one as described by petitioner of first cousin, not second or third cousin, but first cousin once removed.

Looking at the table, one sees that the difference between first cousins and second cousins is deduced according to the degrees of consanguinity and the degrees are counted up to a common ancestor and then back down to the relative. As to the table and S.H., from S.H., labeled here as "person deceased," the first degree of relationship is the step up to the parents. The second degree is the step up to the grandparents. The third degree is the step up to the common relatives, the great grandparents. The fourth degree is the step back down to the great uncles or aunts, and the fifth degree is the step down to first cousins once removed.

The relatives of cousins of five degrees are first cousins once removed. Second cousins, moving another step down, are six degrees removed. Thus, in the instant matter there is clearly the relationship of a first cousin. There are different types of first cousins. There are first cousins and there are first cousins once removed. The relationship here is clearly not, because the degree of relationship is the fifth, that of second cousins.

Petitioner testified that she remembered going to the welfare agency to apply for AFDC for S.H. but she did not remember the exact date. Ms. Avino asked her about her relationship with S.H. and she told her she thought they were third cousins. She told Ms. Avino that the mother of S.H. and she were first cousins. She said she might have told Ms. Avino that her relationship with S.H. was that of third cousins.

The witness said that subsequently Ms. Avino telephoned her and asked her why she had requested the hearing. She said that maybe there was a statement made about a second cousin at that time, but she did not recall.

Petitioner testified that the day after she applied, she returned to the agency to try to speak to Ms. Avino but she was not permitted to do so. She intended to tell her that B.C. is her double first cousin—two sisters married two brothers.

In this case, petitioner has the burden of proving by a preponderance of the believable evidence that respondent's denial of her application as a non-needy parent-person for ADPC benefits on

behalf of S.H., on the ground that S.H. was her third cousin, was incorrect, *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962). She contends that her relationship with S.H. is that of first cousins once removed based on undisputed testimony as to their lineage. She also relies on the case of *Ottman v. Fisher, et al.*, 319 *A.2nd*, 56 (Sup. Jud. Ct. of Me. 1974) which she contends holds that a first cousin once removed is an AFDC relative specifically because it is a fifth degree relative; that is, she is a first cousin once removed from S.H. and that is the reason she is entitled to receive \$162 a month in AFDC benefits on behalf of S.H.

Respondent contends that its denial was based on petitioner's statements, first, that the relationship was of third cousins and then, that of second cousins and that under *N.J.A.C.* 10:81-3.11(a)1, neither a third cousin nor a second cousin is considered a parent-person and, therefore, such an individual is not eligible to receive AFDC benefits for a child. Respondent contends that the regulation refers to first cousins, but not to second or third cousins.

The choice of accepting or rejecting the testimony of witnesses rests with me, the initial trier and finder of the facts. I must make a reasonable choice, *Hornauer v. Div. of Alcoholic Beverage Control*, 40 *N.J. Super.* 501, 506 (App. Div. 1956). I have listened to the testimony of the witnesses, have observed their demeanor, have assessed their credibility, have reviewed the exhibits and have considered the legal and factual arguments of the parties. All witnesses testified in a straightforward and candid manner and no credibility problems exist. While I am convinced that petitioner told Ms. Avino on October 13, 1987, that the relationship that existed between herself and S.H. was that of third cousins and that on November 7, 1987, she told her the relationship was that of second cousins, I am convinced from having observed petitioner at the hearing that she was unlearned as to the degrees of relationship in the paternal family tree of S.H. Counsel for petitioner very clearly elicited from his client the degrees of relationship and proved by the table of consanguinity and the family tree that the relationship of petitioner, E.A., and S.H., is that of first cousins once removed, of the fifth degree, and I so **FIND** this as a **FACT**.

The applicable New Jersey regulation is *N.J.A.C.* 10:81-3.11(a)1 which provides:

In AFDC-C, the term "parent" shall refer to the natural and/or adoptive parent(s) or parent-person(s).

1. By law, in AFDC-C certain relatives shall be recognized as taking the place of a parent. The term "parent-person" is used to designate one or more such relatives who include those of half-blood, *those persons of preceding generations denoted by prefixes "grand," and "great,"* brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, *first cousin,* nephew or niece. Such relative must be one with whom the dependent child is living in a place of residence in New Jersey maintained by one or more such relatives as his/her or their own home [emphasis added].

In *Ottman*, Marie Ottman assumed actual custody and support of three minor children who were related to her only as first cousins once removed. Her application for AFDC was at first granted and later withdrawn by Health and Welfare Commissioner Dean Fisher, of the state of Maine. In *Ottman*, the children's mother and father had been divorced and custody of the children had been awarded to the father. Marie Ottman took the children into her home and assumed responsibility for their support when the father was admitted to a mental institution. The children's mother's whereabouts were unknown.

The initial ruling of the Commissioner, favorable to Ottman, was that the three children were "first cousins once removed" of Ottman and that as such Ottman qualified as an AFDC recipient on behalf of the children. The Commissioner determined that a "first cousin once removed" was intended as a proper recipient of a grant for eligible children on the basis that such a person is recognized as being in as close kinship as one designated "great-great."

This determination of the Commissioner was reversed approximately two months later pursuant to a letter the Commissioner received from the Commissioner of the regional office of the U.S. Department of Health, Education and Welfare in Boston.

The Maine Commissioner of Health and Welfare then held a second fair hearing in Ottman's case and reversed his initial decision and closed the grant. Ottman appealed to the Superior Court and the presiding justice remanded the case to the Commissioner for action not inconsistent with the Superior Court's ruling that:

... a first cousin once-removed is in the fifth degree and that a second cousin is in the sixth degree and therefore a first cousin once-removed is not the same as a second cousin. Therefore, by inference, a first cousin includes a first cousin once-removed. And finally, it is wholly consistent with the purpose of the statute that a first cousin once-removed be included within the breadth of the statute. 319 A.2nd 56, 59 (Sup. Jud. Ct. of Me. 1974)

Commissioner Fisher appealed to the Supreme Judicial Court of Maine which considered the issue concerning whether first cousins once removed may be included in the class of relatives eligible to receive Maine AFDC payments on behalf of dependent children.

In a footnote concerning this issue (*Ottman*, at 57-58) the Court stated that:

In order to be eligible for AFDC, the children on whose behalf the grant is made must, among other requirements, be living with their "father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece." 42 *U.S.C.A.* §606(a)

The Department of Health, Education and Welfare has interpreted this section to include:

Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great. 45 *C.F.R.* 233.90. [Specifically, this refers to 45 *C.F.R.* 233.90(c)(1)(v)(A)(1).]

The Maine Department of Health and Welfare has adopted a similar interpretation, as set out in the Maine Public Assistance Payments Manual, Chap. II, Sec. C:

Specified relatives who may apply for and receive assistance on behalf of the child are:

. . . .
(4) Legal grandfather, grandmother, uncle or aunt or the same relatives of preceding generations as denoted by prefixes of great and great-great, or first cousin, nephew or niece

The Supreme Judicial Court of Maine also noted that:

By the civil method of determining kinship, 18 *M.R.S.A.* §1002, a "first cousin once-removed" does stand in the same degree to the subject (fifth) as does a great-great aunt or uncle 319 *A.2nd*, at 58.

The court further stated that it agreed with the conclusion of the presiding Justice in the Superior Court that such relatives, that is, a first cousin once-removed, are permissible recipients under the Maine statute and regulations.

The designations "first cousin," "first cousin once-removed," and "second cousin," despite varying meanings in lay usage, describe legal relationships of the fourth, fifth and sixth degree, respectively, by the civil law method of computing kinship. 23 *Am. Jur.* 2d, Descent and Distribution, Sec. 60. *Id.*, at 63.

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We do find, however, that the difference in one degree between first cousins and first cousins once removed does not *ipso facto* exclude the latter class from the AFDC program.

Payments to other relatives in the fifth degree of kinship, *e.g.*, great-great aunts and uncles, are permitted under both the federal and Maine regulations. It is thus clear that the regulations embody no flat prohibition upon AFDC payments to relatives beyond the fourth degree. First cousins once removed cannot, therefore, be excluded for the sole reason that they exceed by one degree first cousins *per se*, as appellant suggests. *Ibid.*

The court concluded that:

It is clear that Maine has adopted through 22 *M.R.S.A.* §3741, the same goals for its AFDC program as those adopted by Congress. *Westberry v. Fisher*, 297 *F. Supp.* 1109, 1114 (D.Me. 1969). Those goal are stated in 42 *U.S.C.A.* §601 which provides that AFDC is

(F)or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in each State, to needy dependent children and their parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

We interpret this broad statement of benevolent purpose in light of the United States Supreme Court's recognition that

(T)here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need. *King v. Smith*, *supra*, 392 *U.S.* 309, 318, 88 *S. Ct.* 2128, 2134, 20 *L. Ed.* 2d 1118, 1126.

Within this latitude exercisable by the State of Maine, and consistent with the liberal design of the AFDC program as it exists in Maine, we hold, as did the court below, that Mrs. Ottman's AFDC payments must be continued. 319 *A.2nd*, at 64.

The applicable New Jersey regulation, *N.J.A.C.* 10:81-3.11(a)1, must be examined not only in light of the *Ottman* decision, but more particularly in the manner in which the Department of Health, Education and Welfare has interpreted 42 *U.S.C.A.* §606(a) at 45 *C.F.R.* 233.90(c)(1)(v)(A)(1). The pertinent portion of that regulation states:

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(v) "Living with [a specified relative] in a place of residence maintained as his own home." (A) A child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

- (1) Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes, of grand, great, or great-great [emphasis added].

N.J.A.C. 10:81-3.11(a)1 sets forth those relatives who may be designated "parent-person" including, among others, as "those persons of preceding generations denoted by prefixes "grand" and "great." The regulation does not extend to "great-great" as does 45 *C.F.R.* 233.90(c)(1)(v)(A)(1) which is the Department of Health, Education and Welfare's interpretation of 42 *U.S.C.A.* §606(a).

The Court in *Ottman* stated that:

A state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. *Townsend v. Swank, supra*, 404 *U.S.* 282, 286, 92 *S. Ct.* 502, 505, 30 *L. Ed.* 2d 448, 453. 319 *A.2nd*, at 61.

Additionally, the Court in *Ottman* quoted Mr. Justice Douglas in *Carleson v. Remillard*, stating that the Social Security Act:

... places on each State participating in the AFDC Program the requirement that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. "Eligibility," so defined, must be measured by federal standards. 406 *U.S.* 598, 600, 92 *S. Ct.* 1932, 1934, 32 *L. Ed.*2d 352, 355 (1972) *Ibid.*

Since eligibility must be measured by federal standards and federal standards include prefixes of not merely grand and great, but also great-great, *N.J.A.C.* 10:81-3.11(a)1 in setting forth prefixes grand and great but not great-great, did not satisfy the federal standard as interpreted by the Department of Health, Education and Welfare.

N.J.A.C. 10:81-3.11(a)1 must be interpreted as if the designation "great-great" were included and, so read, the holding of *Ottman* and the interpretation of the Department of Health, Education and Welfare in 45 *C.F.R.* 233.90(c)(1)(v)(A)(1) would lead to the conclusion that I now draw that a first cousin once removed is a permissible recipient under the New Jersey regulation and must be included within the breadth of the regulation for AFDC payments. Payments to

relatives in the fifth degree of kinship, *e.g.*, great-great aunts and uncles, are permitted under the federal regulation. Petitioner and S.H. are first cousins once-removed, also in the fifth degree of kinship. *Ottman*, at 65. A first cousin once-removed and persons of preceding generations as denoted by the prefix great-great are equal and stand on the same footing because they are of the fifth degree of kinship.

My holding is that petitioner E.A. has standing as a relative in the fifth degree of kinship in the relationship of first cousin once removed, fifth degree, to S.H., to apply as a parent-person for AFDC benefits on behalf of S.H. The record reveals that the application of petitioner was not completed. Since I **CONCLUDE** that petitioner has standing as a first cousin once removed to apply as a parent-person for AFDC benefits on behalf of S.H., it is **ORDERED** that petitioner, E.A., be afforded an opportunity to file a complete application with respondent, Union County Board of Social Services, following which a determination of eligibility will be made, and it is further **ORDERED** that petitioner, E.A., shall not be found ineligible to receive AFDC benefits on behalf of S.H. as a parent-person on the ground that the relationship between petitioner, E.A., and S.H. is that of first cousins once removed. It is further **ORDERED** that should it be determined that petitioner is eligible, AFDC benefits shall be retroactive to October 13, 1987.

It is therefore **ORDERED** that the denial of petitioner's application for AFDC assistance for S.H. of October 13, 1987, be **REVERSED** and it is further **ORDERED** that a new application be taken by respondent from petitioner which is not inconsistent with this initial decision.

This recommended decision may be adopted, modified or rejected by the **ACTING DIRECTOR OF THE DIVISION OF PUBLIC WELFARE, MARION E. REITZ**, the designee of the Commissioner of the Department of Human Services, Drew Altman, who by law is empowered to make a final decision in this matter.

**FINAL DECISION BY THE ACTING DIRECTOR OF THE
DIVISION OF PUBLIC WELFARE, MARION E. REITZ:**

Having reviewed the Initial Decision and any exceptions or replies submitted, I hereby adopt the decision of the Administrative Law Judge in the above captioned case as the Final Decision.

The agency action denying petitioner's application for Aid to Families with Dependent Children (AFDC) benefits based on a lack of blood relationship between petitioner and the child is reversed.

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Upon receipt of this decision the agency will reopen petitioner's AFDC application and proceed to a determination of eligibility based on factors other than the relationship between petitioner and the child in her custody. If petitioner is found to be AFDC eligible, AFDC benefits shall be issued retroactive to October 13, 1987, the original date of application.

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