



WISCONSIN LEGISLATIVE COUNCIL

LEGAL MEMORANDUM

Kinship Care Program

INTRODUCTION

This memorandum provides general background information about the kinship care program.

The kinship care program provides that a payment of \$215 per month is made under certain circumstances to a kinship care relative¹ of a child² who is providing “care and maintenance”³ for the child.

The kinship care program was created by 1995 Wisconsin Act 289, which also created the Wisconsin Works (W-2) Program. That act eliminated the Aid to Families with Dependent Children (AFDC) program, including the portion of the AFDC program that paid AFDC benefits to a non-legally responsible relative (NLRR) who was providing care for a child. The kinship care program is generally viewed as replacing the AFDC-NLRR program; however, the eligibility criteria vary significantly.

For the period from September 2000 through May 2001, kinship care payments were made on behalf of an average of 8,731 children monthly, including an average of 5,420 children in Milwaukee County.⁴

ADMINISTRATION

The kinship care program is administered by the county department of human services or county department of social services (county department) or, in Milwaukee County, by the

Department of Health and Family Services (DHFS). In addition, DHFS may enter into an agreement with the governing body of a federally recognized American Indian tribe or band (tribe) to administer the program within the boundaries of the tribe’s reservation. Currently, eight of the 11 tribes in Wisconsin administer kinship care.

APPROPRIATIONS

Kinship care is funded with federal temporary assistance for needy families (TANF) block grant funds, which are transferred to DHFS from the Department of Workforce Development. Based on a formula established by DHFS, the moneys are then allocated to counties, to DHFS for Milwaukee County, and to tribes. In general, the formula factors in the county and statewide caseloads and the total appropriations for the kinship care program. This funding may only be used for kinship care benefits and assessment costs; it is not available to the counties, DHFS, or tribes for other purposes.

If moneys will be unexpended, DHFS has established a process to reallocate money from one county and make it available to other counties. If the allocation to a county or a tribe is insufficient, the county or tribe may provide kinship care benefits by using its own resources.⁵ The issue of using waiting lists is discussed below.

CONDITIONS REQUIRED FOR PAYMENT

The following conditions must be met before payments are made to a kinship care relative:

1. The relative must apply for benefits and must cooperate in the application process, including applying for other forms of assistance for which the child may be eligible.
2. The county department, DHFS, or tribe must determine that:
 - There is a need for the child to be placed with the relative.
 - Placement with the relative is in the child's best interests.
 - The child meets one or more of the child in need of protection or services (CHIPS) or juvenile in need of protection or services (JIPS) criteria or would be at risk of meeting one or more of the CHIPS or JIPS criteria if the child were to remain in his or her home.⁶
3. The county department, DHFS, or tribe must conduct a criminal background investigation, as discussed below. The kinship care relative also must state that he or she does not have any arrests or convictions that could adversely affect the child or the relative's ability to care for the child. The relative must make similar statements about his or her employees or prospective employees who would have regular contact with the child and about any adult resident in the relative's home.
4. The relative must not be receiving long-term kinship care payments for the child. (The long-term kinship care program is briefly discussed below.)

5. The child must not be receiving federal supplemental security income or state supplemental payments.

The statutes require DHFS to promulgate administrative rules to provide assessment criteria for determining eligibility. DHFS is in the process of developing these rules. However, as of the date of this memorandum, the rules have not yet been promulgated.⁷

ANNUAL PLACEMENT REVIEW

The county department, DHFS, or tribe must review the placement at least once every 12 months to determine whether the conditions described above continue to exist. If they do not (for example, if the child is no longer meeting, or at risk of meeting, one or more of the CHIPS or JIPS criteria), then payments must be discontinued.

APPEAL PROCESS

If an application is not acted on promptly or is denied based on the grounds that an eligibility condition specified in items 1., 2., 4., or 5., above under "Conditions Required for Payment," has not been met, the applicant may petition DHFS for a review. The kinship care relative also may petition DHFS for a review if benefits are discontinued after a placement review. The petition must be filed within 45 days of the denial, failure to act, or discontinuation of benefits. DHFS must then provide the opportunity for a hearing.

This appeal process does not apply to denials based on a criminal background. That appeal process is described below.

CRIMINAL BACKGROUND INVESTIGATION

The county department, DHFS, or tribe must conduct a criminal background investigation of all of the following:

- The kinship care relative.
- The employees and prospective employees of the relative who have or would have regular contact with the child.
- Any other adult resident of the relative's home.

The investigation is to determine if any of these persons has any arrest or conviction that could adversely affect the child or the relative's ability to care for the child.

The investigation must be conducted after receipt of an application but may also be conducted at any other time the county department, DHFS, or tribe considers to be appropriate. The county department, DHFS, or tribe has the option of provisionally approving benefits based on the relative's statements (discussed above) while an investigation is pending.

The criminal background investigation is conducted with the assistance of the Wisconsin Department of Justice (DOJ). If a person being investigated is not a resident of Wisconsin (or has been a nonresident within the five years preceding the application) or if records provide a reasonable basis for further investigation, the county department or DHFS must require fingerprinting. DOJ may submit the fingerprint cards to the Federal Bureau of Investigation.

CRIMINAL BACKGROUND

Although subject to the appeal process described below, kinship care payments must be

denied if the kinship care relative has been convicted of any of the following crimes or had any of the following penalties imposed in Wisconsin or under a similar law in another state or under federal law:

- Felony conviction under ch. 961, Stats. (Uniform Controlled Substances Act).
- Penalties imposed under any of the following statutes: ss. 939.62 (habitual criminality); 939.621 (certain domestic abuse offenses); 939.63 (use of a dangerous weapon); 939.64 (use of a bulletproof garment while committing a felony); 939.641 (concealing identity while committing a crime); and 939.645, Stats. (hate crime).
- Convictions under ch. 940, Stats. (crimes against life and bodily security), *except* ss. 940.291 (failure by a peace officer to render aid) and 940.34, Stats. (failure by an individual to aid a victim or report a crime).
- Convictions under ch. 944, Stats. (crimes against sexual morality), *except* s. 944.36, Stats. (solicitation of drinks by an employee from a customer), and the following crimes if the violation was 20 or more years prior to the investigation: ss. 944.30 (prostitution); 944.31 (patronizing prostitutes); and 944.33, Stats. (pandering).
- Convictions under ch. 948, Stats. (crimes against children), *except* ss. 948.45 (contributing to truancy); 948.63 (receiving property from a child); and 948.70, Stats. (tattooing a child).

In addition, a kinship care relative is prohibited from employing anyone who would have regular contact with the child or from permitting any adult to be a resident of his or her home if

the employee or adult has been convicted of such crimes or had such penalties imposed.

CRIMINAL BACKGROUND APPEAL PROCESS

A person who is denied kinship care payments or who is prohibited from employing a person or from permitting an adult to reside in his or her home because the person, employee, or adult resident has been convicted of any of these crimes or had any of these penalties imposed may request a review of the denial or prohibition. In a county, other than Milwaukee County, the review is conducted by the director of the county department. In Milwaukee County, the review is conducted by the person designated by the Secretary of Health and Family Services. If a tribe is administering kinship care, the review is conducted by the person designated by the tribe.

The person conducting the review must consider whether the record includes any arrests, convictions, or penalties that are likely to adversely affect the child or the ability of the kinship care relative to care for the child. The reviewer must consider all of the following factors and may consider other factors:

- The length of time between the date of the arrest, conviction, or penalty and the date of the review.
- The nature of the violation or penalty and how that affects the relative's ability to care for the child.
- Whether making an exception of the denial or prohibition would be in the child's best interests.

If the reviewer determines that the record does not include any arrests, convictions, or penalties that are likely to adversely affect the child or the relative's ability to care for the child, the reviewer may approve kinship care payments or

may permit the relative to employ the person or allow the person to be an adult resident in the home.

This criminal appeal process will sunset on the day after publication of the 2001-03 biennial budget act unless that act or an intervening act provides for its continuation. (A provision has been included in the pending 2001-03 budget bill to eliminate the sunset provision and maintain the individual's right to request a review of the denial.)

WAITING LISTS

The statutes are ambiguous as to whether kinship care is an entitlement program. If it is an entitlement, benefits must be paid if eligibility criteria are met, regardless of whether the allocation of moneys is sufficient. If it is not an entitlement, then waiting lists are permissible if allocations to a county, DHFS, or tribe are not sufficient to provide benefits and the county or tribe does not choose to supply any additional funding necessary to provide benefits.

DHFS has directed counties and tribes not to place a child on a waiting list if a court has ordered that the child be placed with the relative. (Approximately 25% of kinship care cases are court-ordered cases.) For non-court-ordered cases, DHFS has issued guidelines supporting the use of waiting lists.⁸ However, the statutes do not distinguish between court-ordered kinship care and non-court-ordered kinship care.

RELATION TO LONG-TERM KINSHIP CARE

The long-term kinship care program, created by 1995 Wisconsin Act 105, bears many similarities to the kinship care program. For example, payments are made from the same appropriation, the payment amounts are identical, the same entities administer the

programs, and the definitions of “kinship care relative” and “long-term kinship care relative” are the same.

However, the eligibility criteria vary significantly. Long-term kinship care is available only to a relative who has been appointed as the child’s long-term guardian under s. 48.977, Stats. This may occur only if certain criteria are met, including an adjudication of the child as CHIPS (or JIPS based on being uncontrollable), court-ordered placement with the relative for at least one year, and an expectation that the child will continue to be placed with that relative for an extended period of time or until reaching adulthood.

In general, because of the previous, extensive court involvement in a case (adjudicating CHIPS and appointing the relative as the long-term guardian), the initial assessment of a long-term kinship care case does not involve the determinations that are required for kinship care. However, there must be an inspection of the long-term kinship care relative’s home, an interview with the relative, and a determination that long-term placement with the relative is in the child’s best interest.

Other differences between the two programs include a less extensive annual review for the long-term kinship care program and a different process for dealing with the results of a criminal background investigation. In contrast to the kinship care program, there is no automatic denial of long-term kinship care benefits based on certain convictions or penalties; rather, the director of the county department (or, in Milwaukee County, the person designated by the Secretary of Health and Family Services, or the person designated by a tribe) must determine whether any arrests, convictions, or penalties are likely to adversely affect the child or the long-term kinship care relative’s ability to care for the child.

A relative cannot simultaneously receive kinship care payments and long-term kinship care payments for caring for a child but may do so sequentially. For example, a person could receive kinship care payments, then become the child’s long-term guardian and be converted to a long-term kinship care payment.⁹

RELATION TO FOSTER CARE

Foster care payments are made to a licensed foster parent who is caring for a child. The payments are made if: (a) a court has placed the child with the foster parent; or (b) the child has been placed with the foster parent on a voluntary basis.¹⁰ (However, voluntary placements in foster care are limited to six months.) The amount of the foster care payment is based on: (a) the age of the child (basic maintenance rate); (b) whether the child needs more than the usual amount of care and supervision because of emotional, behavioral, or physical characteristics or personal care needs (supplemental maintenance rate); and (c) whether the child has extreme needs (exceptional maintenance rate). Foster care payments are greater than kinship care payments.

A relative cannot simultaneously receive kinship care payments and foster care payments for caring for a child. If a kinship care relative applies for and receives a license to be a foster parent, the relative is eligible for foster care payments, rather than kinship care payments, if: (a) a court has placed the child with the relative; or (b) the child has been placed with the relative on a voluntary basis for up to six months.

This memorandum was prepared on July 17, 2001, by Joyce L. Kiel, Senior Staff Attorney.

¹ A “kinship care relative” is a “stepparent, brother, sister, stepbrother, stepsister, first cousin, nephew, niece, aunt, uncle or any person of a preceding generation as denoted by the prefix of grand, great or great-great, whether by blood, marriage or legal adoption, or the spouse of any [such person], even if the marriage is terminated by death or divorce.” [s. 48.57 (3m) (a) 2., Stats.]

² Under the kinship care program, “child” means a person who is either: (a) under 18 years of age; or (b) 18 years old, a full-time student in good academic standing at a secondary school or its vocational or technical equivalent, and reasonably expected to complete his or her program of study and be granted a high school or high school equivalency diploma. [s. 48.57 (3m) (a) 1., Stats.]

³ The statutes do not define “care and maintenance.” At a minimum, it means that the child is living in the relative’s home.

⁴ As discussed below, this also includes children for whom long-term kinship care benefits were paid.

⁵ The pending 2001-03 budget bill provides that if the appropriation is insufficient to provide kinship care payments to all persons who are eligible, DHFS may request the Secretary of Administration to supplement the appropriation. The bill provides that the Secretary may do so unless the Joint Committee on Finance (JCF) schedules a meeting within 14 working days after the Secretary notifies JCF of the proposed supplementation and disapproves the proposed supplementation.

⁶For a child who is 18 years old and attending high school, the child must meet, or be at risk of meeting, one or more of the CHIPS or JIPS criteria if the child were under 18. CHIPS criteria are set forth in s. 48.13, Stats., and include such grounds as abandonment, abuse, or neglect; JIPS criteria are set forth in s. 938.13, Stats., and include such grounds as uncontrollable or runaway juveniles.

⁷ Clearinghouse Rule 99-071 was referred to the Legislature on July 9, 2001. It would create ch. HFS 58, Wis. Adm. Code, relating to kinship care.

⁸After the passage of 1995 Wisconsin Act 289 which eliminated AFDC payments to non-legally responsible relatives, DHFS notified county departments and tribes that cases being converted from AFDC-NLRR benefits to kinship care benefits could not be placed on a waiting list.

⁹Because DHFS does not require counties to separately report long-term kinship care cases, those cases are included in the report of kinship care cases. Thus, no data is readily available about the number of long-term kinship care cases.

¹⁰ As distinguished from a court-ordered placement, a voluntary placement is made with the consent of a child’s parent or guardian and the consent of the child if the child is 12 years of age or older. A county department, DHFS, Department of Corrections, or licensed child welfare agency may place the child or negotiate or act as an intermediary for the placement.

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