

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

MARIANNE SAMMATARO

V.

ROBERT SAMMATARO

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No. 92-013-A

On Appeal from a Decision Entered
Against Plaintiff in
Washington County Family Court

BRIEF OF AMICI CURIAE

DARE (Direct Action for Rights and Equality),
Parents for Progress, Women for Women,
R.I. Chapter of National Association of Social Workers
Pathways Advisory Council, R.I. Working Women, and
Women's Advisory Commission

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BRIEF OF AMICI CURIAE

At issue in this case is the propriety of the trial justice's basing the decision to transfer custody from one fit parent to another "solely" upon the fact that the mother is a recipient of public assistance benefits.

Amici are groups whose members would be directly and adversely affected by this case, as well as groups whose advocacy efforts could be undermined, should the court's reasoning be upheld.

Identification of Interests of Amici

DARE (Direct Action for Rights and Equality) is a community organizing association composed of low-income people, most of whom are single mothers and/or recipients of Aid to Families with Dependent Children ("AFDC") benefits who have custody of their children. DARE serves as advocate for people seeking to obtain or retain public assistance.

Parents for Progress is an association of single parents, the great majority of whom receive AFDC. Most members are mothers who have care and custody of their children. The group seeks to promote AFDC recipients' ability to become self-sufficient; toward this end, it has identified as priorities improvement in child support collection/enforcement and provision of high-quality education, training and supportive services to AFDC recipients.

Women for Women is an association of recipients of AFDC, social workers, and other human service professionals. The group advocates for the rights of low income women, and its efforts focus on the AFDC program and on improvement of child support collection and enforcement.

DARE, Parents for Progress, and Women for Women are "welfare rights" groups working to remove barriers to assistance and to insure that people receive the public assistance to which they are entitled. The interest of these groups is obvious and immediate: if mothers may lose custody because they receive public assistance, the groups' members--AFDC recipients and custodial parents themselves--are at risk of losing custody.

The Rhode Island chapter of the National Association of Social Workers (NASW) is a professional association of social workers concerned with a wide variety of social-work and human services issues. Engaging in legislative and administrative advocacy, it directs a significant amount of its efforts to problems of public assistance recipients and other low-income Rhode Islanders.

The Pathways Advisory Council is a panel of human service professionals, social workers, members of the business community, and others appointed by the Department of Human Services. Its mission is to advise the DHS Director on the "Pathways to Independence" program, the state education and training program. Participation in Pathways is mandatory for many AFDC recipients.

All five of these groups share a concern that if mere status as a public assistance recipient is sufficient to justify a change in custody, women may be deterred from obtaining the benefits they

need and are entitled to. The Pathways Council also points out that foregoing AFDC benefits (for fear of losing custody) may also mean that mothers won't get the education and training they need to become self-sufficient, or may drop out in the middle of their Pathways program; such a result would undercut the purposes of the Pathways program.

Rhode Island Working Women is an education and advocacy group working to resolve issues faced by working women; chief among its concerns are sex discrimination and economic discrimination.

The state Women's Advisory Commission is charged with promoting equity for women and advising the Governor and the General Assembly on matters relating to the status of women in Rhode Island.

These groups believe that the decision in question is fundamentally sex-discriminatory and that, if it is allowed to stand, it will have far-reaching and devastating effects upon the women of this state.

QUESTIONS RAISED

Whether making receipt of public assistance a factor in custody determinations would be sex-discriminatory?

Whether making receipt of public assistance a factor in custody determinations unduly interferes with rights under the Social Security Act and frustrates the Act's purposes?

ARGUMENT

1. Making receipt of public assistance a factor in child custody determinations is sex-discriminatory.

Review of the record in this case makes it clear that the determinative factor in the decision to transfer custody was Ms. Sammataro's receipt of public assistance.

...[B]oth are fit and proper parents.... The Plaintiff, however, is presently a recipient of public assistance. On the public policy basis only, therefore, physical possession of the child is awarded to the [father]....

Trial Court Decision (hereafter, "Decision"), p.7.

- A. Women are much more likely to be poor and in need of public assistance than men.

For a variety of reasons, it is women, not men, who stand to lose if receipt of public assistance is to become a factor in child custody determinations. If adopted and endorsed by this court, the trial justice's reasoning would have a disproportionate impact upon women.

One reason for this is straightforward: it is primarily mothers, not fathers, who receive AFDC. Women and children make up the overwhelming majority of AFDC families. About 81% of AFDC recipients are households headed by women. Woods, Been, & Schulman, "Sex and Economic Discrimination in Child Custody Awards," 16 Clearinghouse Review 1130, 1132 (1983)(citation omitted)[hereafter, "Woods"].

Even if they do not receive AFDC, women are much more likely to be poor than men. In 1989 the median income for men was \$19,893, while for women it was about half that, or \$9,624. Bureau

of the Census, U.S. Dept. of Commerce, Current Population Reports, Series P-60, No. 172, Money Income of Households, Families, and Persons in the United States: 1988 and 1989, at 100-101, Table 24 [hereafter "Money Income"].

Female-headed families with children fare much worse. They and their children are more likely to be living in poverty than all other families. In 1990, of all families with children under 18, 7.8% of married-couple families and 18.8% of male-headed households were living below the poverty line, compared to 44.5% of female-headed households. Bureau of the Census, U.S. Dept. of Commerce, Current Population Reports, Series P-60, No. 175, Poverty in the U.S.: 1990, at 20, Table 4 (1991).

Additional studies show that women and children suffer a marked decline in income and standard of living immediately after divorce or separation, while men generally experience a marked increase.^{1/} The results of a Census Bureau study suggest that family income available to children drops 37% immediately following the father's departure. Bureau of the Census, U.S. Dept. of Commerce, Current Population Reports, Series P-70, No. 23, Family Disruption and Economic Hardship: The Short-Run Picture for

^{1/} The breakup of an intact family through divorce or separation is the major factor triggering the opening of an AFDC case. Committee on Ways and Means, U.S. House of Representatives, 101st Congress, 2nd Session, WMCP: 101-29, Overview of Entitlement Programs, 1990 Green Book, at 602 (1990).

Children, at 13 (1991).^{2/}

Studying the economic effects of divorce in California, Weitzman found a more radical disparity; post-divorce, men experienced a 42% improvement in standard of living, while women experienced a 73% decrease. L. Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," 28 U.C.L.A. L. Rev. 1181, 1250-51 (1980).

Women are still discriminated against in the workplace, and this, of course, contributes to the likelihood that they will live in poverty. Most working women are "...clustered in a limited number of low status, low-paying jobs," Weitzman, supra at 1229. They receive lower wages than men in general and, even when working comparable jobs, are paid less.

Nationwide, a woman who works full-time earns a median income of \$19,639, compared to a man's median wages of \$28,422. Money Income, supra at 108 & 112, Table 26. In Rhode Island in 1988 the typical divorcing father had a median income of \$22,000, while the mother's was only \$12,200. Financial Impact of Divorce, at 28.

It also appears that because of their low earnings, many single mothers will remain at or near the poverty line even if they work full-time. See U.S. General Acctg. Office, Report to Congressional Committees, GAO/HRD 91-62, Mother-Only Families: Low Earnings Will Keep Many Children in Poverty, at 3 (1991) [hereafter,

^{2/} Estimates in R.I. are that the standard of living of non-custodial parents improves by about 36%, while that of the average custodial family (parent and one child) drops by about 23%. Advisory Committee on Women in the Courts, Report on the Financial Impact of Divorce in Rhode Island, at 22, 23 (1991)[hereafter, "Financial Impact of Divorce"].

Mother-Only Families]. The GAO concluded that low education and little work experience led to a low earning potential. The value of the earnings was further diluted by the high cost of day care, which the GAO estimated to amount to 21% to 25% of income for low-income households that pay for care. Mother-Only Families at 5.

Another factor contributing to low-income status is inadequate (or non-existent) child support.^{3/} Despite some improvements in the child support collection, children are not receiving the support they need.^{4/}

Child support enforcement is still low. Nationwide, only about 59% of mothers with children even have support orders. For low-income women the figures are even lower: only about 44% of women below the poverty level have support orders. Bureau of the Census, U.S. Dept. of Commerce, Current Population Reports, Series P-23, No. 167, Child Support & Alimony: 1987, at 3, Table B (1990). ["Child Support & Alimony"].

Only about a third of all women with children under 21 received any payment. Poor families did even worse: of female-headed families living below poverty, only one-quarter received any support. Committee on Ways and Means, U.S. House of

3/ The record in the case at bar suggests that Mr. Sammataro did not pay support to the family. See Transcript, p. 13, 20. In any case, it appears that the court did not order any direct support. Exh. 2, 1/23/91 court order.

4/ Noncustodial parents "continue to pay a relatively small percentage of the costs of child rearing," due to relatively low guidelines amounts and to a high rate of noncompliance with court orders. Financial Impact of Divorce, at 6.

Representatives, 101st Congress, 2nd Session, WMCP: 102-44, Overview of Entitlement Programs, 1992 Green Book, at 714, Table 4 (1992).

Of those with awards, only about about half the families were actually due payments. Id. at 713-14. Only three-quarters of that group received any payments; about half of those women received the full amount due, and 25% of those with support owing received no payments at all. Id.

The average amount of support paid is rather low. In 1989 the mean amount received nationwide by all those due support was \$2,995. Id. at 714. The mean amount received by women below poverty was even lower: only \$1,673. Child Support and Alimony, at 5.

One study in Rhode Island found support awards in R.I. to be higher than the national average: \$3328 per child in 1988. Financial Impact of Divorce, at 15. It is worth noting that even if this amount were paid in full and when due, it would still be low enough that a mother and one child would be eligible for AFDC; in Rhode Island the maximum monthly grant for a family of two is \$449.

Despite the relatively low median amount of support paid, women with support awards have "significantly lower" poverty rates than those without awards. The poverty rate for women with support awards is 25.4%, while the rate for those without awards is 46.1%. Child Support & Alimony at 5-6. Given these figures, it should be no surprise that "...whether or not a women receives child support can become a major determinant of whether or not she applies for public assistance." Weitzman, supra, at 1255.

In fact, support can make the difference between poverty and non-poverty for many families. One study showed that about

one-third of divorced and separated women who didn't receive support fell below the poverty level, while only 12% of those who received support did so. Id.(citation omitted).

The foregoing figures show that, even before a custody order is entered, women are at a distinct economic disadvantage. Their wages, in general, are only a percentage of men's wages; even if working full-time, they will often be unable to lift themselves out of poverty. It is mothers, not fathers, who most often live with and have custody of the children, and yet single-parent households headed by women are statistically much more likely to be living at or below poverty than any other households.

Immediately upon divorce or separation, a woman's standard of living is likely to drop precipitously. After separation, women are often in transitional states^{5/}--between jobs, in need of training, job-hunting, and/or awaiting child support. Support may not be ordered; even if it is ordered, the father may not pay, may pay only erratically, or may make only partial payments.

In order to provide for their children and to meet the costs of basic necessities, some women need to apply for public assistance. Men, on the other hand, will seldom find themselves

5/ Due to economic factors, women usually face more decisions and changes than men, and this can penalize them when, for instance, judges use the transition period as evidence of lack of "stability." N. Polikoff, "Gender & Child-Custody Determinations," Families, Politics, & Public Policy, 183-202, at 189 (I. Diamond, ed., 1983)[hereafter, "Polikoff"].

needing to apply for AFDC; they are more likely to already have a job and to be earning much more than women when the family breaks up, and are less likely to be caring for children.

These figures plainly show that if receipt of public assistance becomes a factor in custody determinations, it will be sex-discriminatory in effect.

B. Neither receipt of public assistance nor relative wealth is a permissible factor in custody determinations.

Amici believe that the record makes it abundantly clear that the trial justice's decision in this case was based solely upon Ms. Sammataro's status as a public assistance recipient, and not upon, for instance, economic factors or the relative wealth of the parties.^{6/} It is well-established, however, that custody

^{6/} Counsel for amici are aware of no other cases in which receipt of public assistance was so explicitly made the sole determinative factor. The judge made it clear that the transfer was made "solely" because Ms. Sammataro received assistance. See Decision, p. 7. He made no findings which would indicate he believed that her income was insufficient to support the child or that her care was inadequate, and nothing in the record would support such a finding. While the judge cited "public policy" considerations, he did not identify them. Amici believe that those considerations consisted of the alleged interest of the taxpayers in reducing welfare rolls; such interests have no place in custody determinations.

decisions based upon relative wealth discriminate against women.

Economic factors are important in custody determinations because the judge must ensure that the custodial parent can provide the child with the basic necessities of life. However, the earning power of a single mother is usually inferior to that of the father. When a judge uses economic factors to determine which parent will be awarded custody of the child, the father will have an advantage in most cases.

Comment, "The Changing Family & the Child's Best Interests: Current Standards Discriminate Against Single Working Mothers in California Modification Cases," 26 Santa Clara L. Rev. 759-84, 777 (1986).

When financial ability is used as a criterion in awarding custody, either explicitly or implicitly, it will almost always work to the father's advantage.

Polikoff, supra at 189.

Recognizing the sex-discriminatory effect of using economic factors in custody disputes, courts in other states have reversed custody orders based upon relative wealth, ruling that it is not a proper factor in custody determinations.

Reversing an order taking custody from the primary caretaker mother (an unemployed, high school graduate AFDC recipient) and placing it with the employed, college-graduate father, the Wisconsin Supreme Court found that the lower court had relied upon an "impermissible factor"--the relative wealth of the parents.^{7/}
Gould v. Gould, 116 Wis. 2d 493, 342 N.W. 2d 426, 429-31 (1984).

^{7/} The lower court in Gould had not based its decision explicitly upon the mother's receipt of AFDC; instead, it referred to parental "values" and on the greater opportunities the father could provide. 342 N.W. 2d at 429.

Basing custody awards upon the relative affluence of one of the parents would in effect discriminate against women...Such a consideration will discriminate not only against women who work inside the home full time fulfilling the important, traditional role of homemaker but also against women who work outside the home and generally have less earning power than men.

Gould, supra, at 431, n. 2 (citations omitted).

Other courts have made similar findings. In Brooks v. Brooks, 319 Pa. Super. 268, 466 A.2d 152, 156 (1983), the court stated as follows:

...[T]he sole permissible inquiry into the relative wealth of the parties is whether either parent is unable to provide adequately for the child; unless the income of one party is so inadequate as to preclude raising the children in a decent manner, the matter of relative income is irrelevant.

See also Linda R. v. Richard E., 561 N.Y.S.2d 29, 33, 152 A.D. 2d 48, (1990)(custody determinations must be gender-neutral in result and expression); Burchard v. Garay, 42 Cal.3d 531, 724 P.2d 486, 491-92 (1986); Garska v. McCoy, 167 W.Va. 59, 278 S.E.2d 357, 360 (1984); Albergottie v. James, 470 A.2d 266, 272 (D.C. App. 1983); S.G.E.. v. R.L.J., 527 S.W. 2d 698, 703 (Mo.App. 1975)(best interests of child can't be determined on basis one parent more affluent than the other). The Albergottie court said:

We would strongly reject any suggestion that there exists in custody matters a presumption that favors the wealthier parent or disfavors a parent who had received public assistance....

Albergottie, supra, at 272. [The court affirmed the custody order, finding that the mother's finances did, indeed, result in neglect and inability to care for the child, who had been sleeping on the floor and moving from home to home. Id. at 272.]

Commentators have noted an increasing trend toward basing custody orders upon economic factors.

The courts are minimizing the past commitment and value of the day-to-day care of children...given by the primary caretaker, usually the mother....Instead, courts are emphasizing the importance of the greater economic resources and the lifestyle of the other parent....

Woods, supra, at 1130. Woods found that the use of such economic criteria was increasingly undercutting the sex-neutral 'best interests of the child' standard. Id. at 1130.

One aspect of this trend is the courts' use of economic criteria in order to achieve reduction of welfare caseloads.

For many women, the court's motivation is to remove them from the welfare rolls. It is significant that courts increasingly prefer even a stranger paid for by the father as the daily caretaker, to that of the mother who is on public assistance.

Id. at 1131. See also, Polikoff, supra, at 190, also finding a desire to reduce the welfare rolls underlying custody decisions.

The decision at bar is certainly part of this trend. The judge made explicit his motivation to reduce the welfare rolls, and apparently shared the belief that as long as the father "made arrangements" for the child's care, any caretaker would do. See Decision, at 13. Commentators have noted that out-moded ideas about sex roles can underlie the assumption that any caretaker will do. A custodial father who turns a significant amount of child care over to another woman, often his mother,

...is not hurt in judicial evaluation because judges do not really expect men to perform 'mothering', and this delegation of responsibility is considered normal....

Polikoff, supra, at 190. Such reasoning comes dangerously close to

an assumption that mothers are "fungible". Id.

Some courts recognize that issuing a child support order is a better way of addressing the relative imbalance of income: if money is the problem, increased child support can be the answer.

While the economic well-being of children of divorced parents must be provided for, it is best achieved by the court's making appropriate child support and maintenance awards and by focusing judicial resources on enforcement of awards and not by considering financial ability as a criterion of custody.

Gould, supra, at 431. Accord, Burchard at 492 ("...the remedy is to award child support, not to take away custody.")

In Gould and Albergottie, it appeared that the mother had to turn to AFDC partly because the father failed to pay support. The record in the instant case shows that Ms. Sammataro and her daughter were not receiving child support,^{8/} although it does not reveal why, or whether that fact prompted the need to apply for AFDC.

It was improper for the lower court to have made receipt of assistance a factor. The court's error is particularly distressing in view of the fact that, for reasons not apparent of record, the family court did not order Mr. Sammataro to pay support to the family. Instead of taking custody from Ms. Sammataro and suspending the support obligation, the court should have ordered and enforced an adequate support order.

^{8/} See Transcript 58-60; Exh. 2. The court ordered that support be paid into an escrow account; such orders obviously provide no financial benefit to the family. The entry of orders not providing for payment of current support is a mystifying, but apparently not unusual phenomenon. The R.I. Advisory Committee on Women in the Courts noted the "curious" finding that there was an increase in support orders which failed to specify a dollar amount. In approximately 22% of orders, the amount of support was "left open". Financial Impact of Divorce at 14.