CASE NO. S-01-001265

IN THE SUPREME COURT OF NEBRASKA

TYLESHA L. MASON and FERNANDEZ MASON, by and through LISA CANNON , as their next friend; HANNAH WHITE, by and through CRYSTAL D. WHITE, as her next friend; SIMEYON EVANS, by and through ANDREA EVANS, as his next friend,

Appellees,

v.

THE STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and RON ROSS, Director,

Appellant.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

The Honorable Paul D. Merritt, District Judge

APPELLANT'S REPLY BRIEF

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I.

THE APPELLEES CITE TO NUMEROUS STATISTICS THAT WERE NOT PRESENTED AT TRIAL; THEREFORE, THEY SHOULD NOT BE CONSIDERED IN THIS APPEAL.

The Appellees, starting on page fourteen (14) of their appellate brief, cite to a plethora of sources that explain and provide statistics of various costs of living and money provided through welfare. Nowhere in the record do these statistics and facts appear. The Appellees did not produce any of this information at trial. The Appellees cannot introduce new evidence in this case at the appellate level. All of the statistics are open to interpretation, and none of them have been checked for their accuracy. This begs the question of their relevancy. Because the Appellees did not take the time to attempt to introduce these various ten pages of statistics at trial, these pages of the Appellees' brief should be stricken. The appellate court is not in a position to hear new evidence; the Appellees had a chance to bring forth this evidence at trial, and did not do so. As such, the Appellants will not entertain arguments based on the new evidence contained in pages fourteen (14) through twenty-four (24).

II.

NEB. REV. STAT. § 68-1724(2)(b) (Reissue 1996) IS UNAMBIGUOUS, AND APPLIES TO THE APPELLEES.

The Appellees argue that the family cap provision does not apply to them because of the phrase "participation in the program." This is simply not correct. The Welfare

Reform Act applies to both Employment First participants and Non-Time Limited participants. It is obvious from the verbiage in the statutes that the Act applies to more than one group of people. Specifically, Neb. Rev. Stat. § 68-1724(2)(b) states that "cash assistance conditions under the Welfare Reform Act shall be as follows. . . " and then applies the family cap to recipient families. The statute does not say that the family cap provision applies only to Employment First recipients. Simply stated, the statute applies to all recipient families, regardless of which program they are participating in. This is what the words of the statute say. If the Legislature did not want the family cap to apply to those families who are not in the Employment First program, it could have put words to that effect in the statute. As the statute stands, the family cap provision applies to all ADC recipients, not just those who are in the Employment First program.

Further, the Appellees argue that because Neb. Rev. Stat. § 68-1709 (Reissue 1996) states that the State has a goal of providing "continuing assistance" to those families who are unable to work due to disability, those families cannot be subject to the family cap provision. The statute does say that "continuing assistance" is a goal of the State for families who have disabled parents who are unable to work. However, "continued assistance" does not mean *additional assistance*. Also, "continuing assistance" does not necessarily mean the $71 per month increase. It can include things like Medicaid, food stamps, and child care expenses, all of which are provided to the recipient family when a child is born. This is the kind of "continuing assistance" that the statute is referring to, not only the $71 grant. Applying the family cap provision to the Appellees does not violate the policy of providing "continuing assistance" to the Appellees.

Looking at the words of the Welfare Reform Act, it is clear and unambiguous that the family cap provision is to apply to all recipient families, not just the Employment First participants. It includes the Non-Time Limited participants as well. As such, the district court was clearly wrong in holding that the statute does not apply to the Appellees.

III.

THE INTENT OF THE LEGISLATURE WAS TO INCLUDE ALL RECIPIENT FAMILIES UNDER THE FAMILY CAP PROVISION.

The legislative history regarding the Welfare Reform Act is voluminous. The Legislature spent a long time trying to iron out areas of the Welfare Reform Act prior to its passage. The Appellees cite to a few quotes from the legislative history that are not supportive of the family cap provision. As a matter of fact, there were a couple of amendments made that would have stricken the family cap provision altogether. However, these amendments did not pass, and ultimately the family cap provision was codified. While there is some discussion in the legislative history that did not support the family cap provision, it is important to point out some of the legislative history that explains the family cap provision.

For example, Senator Bohlke stated during floor debate that:

> I think we need to realize, and Senator Dierks just asked Senator Rasmussen if it was only the cash that would be taken away, and that's true. The point that I think we have to remember is for the protection of children, they would still get extra food stamps, the child care subsidies, the energy assistance payments and the Medicaid. . . . But certainly we are concerned about continuing to provide food, heat, medicaid,

medical, and child care. That continues on, and I think that's very important to recognize that. It is merely the $71 that is taken away. . . .

Floor Debate, LB 1224, 93rd Legis., 2nd Sess., March 29, 1994.

Further, Senator Rasmussen, one of the principal introducers of this bill, stated candidly the reasoning behind the family cap provision:

> This is not a policy about discouraging welfare families from having lots of children . . . But the fact of the matter is what we have to try and sort out here is who is responsible? Who is responsible? It is not a matter of saying that we will not care or support for these children, but it's a matter of saying who will support these children. . . . What I think the principle here is that we must decide upon is who shall be responsible for this child? Shall it be the state, or shall it be the parents? And, with that, you will vote your conscience on this policy.

Floor Debate, LB 1224, 93rd Legis., 2nd Sess., March 29, 1994.

One of the underlying policies behind the family cap provision is personal responsibility. This policy is reiterated in *N.B. v. Sybinski*, 724 N.E.2d 1103 (Ind. Ct. App. 2000), when the State of Indiana was challenged for their family cap provision. The State of Indiana claimed various purposes for the family cap provision.

> 1) Giving birth is an issue of personal responsibility; 2) giving birth to an additional child may create further barriers to financial independence and self-sufficiency; 3) families should consider the financial and personal responsibility involved in having

a child; and 4) eliminating the automatic increase in benefits places welfare recipients on par with working families.

724 N.E.2d at 1106.

The court in this case found that the family cap provision was constitutional, and summary judgment was upheld in favor of the state of Indiana.

The issue of personal responsibility was also addressed by the 3rd Circuit in *C.K. v. New Jersey Dept. of Health and Human Svcs.*, 92 F.3d 171 (3rd Circ. 1996). In this case, DHS conceded that the family cap provision might be "harsh," however, the purpose of the family cap provision was to encourage responsibility by parents in deciding whether to have additional children while receiving welfare. 92 F.3d at 180. This court also held that the family cap provision was constitutional, and was upheld in the state of New Jersey.

This policy of making welfare recipients personally responsible rings through the Nebraska provision as well. Senator Rasmussen stated that was a purpose. It does not follow to apply the family cap provision in a way that does not promote this policy. The Appellees, not just the Employment First participants, should be held personally responsible for their decisions to have children while on welfare. The family cap provision must apply uniformly and fairly to all recipients of ADC, not just those in the Employment First program, in order to further the underlying policy of personal responsibility.

CONCLUSION

In conclusion, the Appellants respectfully request that this Court overrule the decision of the district court and find in favor of the Appellants, and dismiss the Appellees' Petition with prejudice.

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PROOF OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, Dianne Garza, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon the Appellees by depositing said copies in the United States Mail, postage-paid, addressed to Appellees' counsel of record, Rebecca L. Gould, Nebraska Appleseed Center for Law in the Public Interest, 941 "O" Street, Suite 105, Lincoln, NE 68508.

DATED this 10th day of May, 2002.

Dianne E. Garza
Affiant

Subscribed in my presence and sworn to before me this 10th day of May, 2002.

GENERAL NOTARY-State of Nebraska
HEATHER A. LEUSCHEN
My Comm. Exp. Dec. 5, 2003

Heather A. Leuschen
Notary Public

15-638-11