CLASP

CENTER FOR LAW AND SOCIAL POLICY

MEMORANDUM

TO: Interested People

FROM: Paula Roberts and Michelle Jordan

DATE: November 25, 2003

RE: Recent Cases on a Variety of TANF/Child Support Issues

REPORTED CASES

In the last three years there have been a number of reported cases dealing with the child support program and its relationship to the federal welfare program, Temporary Assistance for Needy Families (TANF). Summarized below are cases that deal with issues commonly faced by child support clients and their attorneys.

SETTING SUPPORT AWARDS

Counting Supplemental Security Income (SSI) as Income in Establishing or Enforcing a Support Award

Marrocco v. Giardino, 767 A. 2d 720 (Conn. 2001)—It was reversible error to require a father whose sole source of income was SSI to pay child support out of that income.

Department of Public Aid ex. rel. Lozada v. Rivera, 755 N.E. 2d 548 (Ill. App. 2001)—SSI payments cannot be the basis of parents' child support payments.

Ward v. Ward, 763 N.E. 2d 480 (Ind. App. 2002)—SSI recipients cannot be held in contempt for failure to comply with child support orders.

Establishment and Modification of Child Support Obligations During Incarceration

Holt v. Geter, 809 So. 2d 68 (Fla. Dist. Ct. App. 2002)—Even though the obligor is incarcerated and has no ability to earn income, a support order should be established and arrears allowed to accumulate. When the obligated parent leaves prison, he may make arrangements to pay.

CREDIT FOR SOCIAL SECURITY DEPENDENTS BENEFITS

In re Nichols, 51 S.W.3d 303 (Tex. App. 2000)—An obligor is to receive credit for Veterans and Social Security payments made on behalf of his children.

Ley v. Forman, 800 A.2d 1 (Md. Ct. Spec. App. 2002)—Trial court erred in crediting child's Social Security Disability Insurance benefits against the father's child support obligation. This was a case in which an amount above the guidelines had been ordered and the appellate court held that the lower court must articulate why the credit would not harm the child.

Tash v. Tash, 801 A.2d 436 (N.J. Super. Ct. App. Div. 2002)—The children's mother was dead and they were in the custody of their maternal grandparents. The court found that, in applying the guidelines to determine the father's support obligation, the Social Security benefits received by the children on account of their mother's death should be subtracted from the cost of raising the children. The remaining costs should then be prorated between the father and the grandparents.

Merritt v. Merritt, 73 P.3d 878 (Okla. 2003)—A mother was entitled to an equitable credit against her child support obligation in the amount of social security disability payments which the Social Security Administration (SSA) paid directly to the child as a consequence of the mother's disability. In this case, the child had turned 18 before the benefits were paid so the SSA made a lump sum payment directly to the adult child.

USE OF VARIOUS ENFORCEMENT METHODS

License Revocation

In re Hopper, 991 P.2d 960 (Mt. 1999)—Suspension of drivers, hunting and fishing, and electrician's licenses were appropriate remedies to force fathers to pay arrears owed for children even though they are no longer minors.

Tindall v. Wayne County Friend of the Court, 269 F.3d 533 (6th Cir. 2001)—The state attempted to revoke the delinquent obligor's license to practice law. He then brought action in federal court challenging the constitutionality of the license revocation statute and alleging that several other parts of Michigan's system were also unconstitutional. On motions for summary judgment, the district court abstained in part and granted relief in part. The Sixth Circuit, citing *Sevier v. Turner,* 742 F.2d 262 (6th Cir. 1984) held that the lower court should have abstained and dismissed the entire case.

Passport Revocation

Weinstein v. Albright, 261 F. 3d 127 (2d Cir. 2001)—The obligor was informed by the New York child support agency that he was more than $5,000 in arrears and that, if he failed to pay, certain actions (including revocation of his passport) could be taken. He did not pay. Thereafter, he applied for a new passport. His application was denied and his current passport was revoked. He challenged the State Department's failure to provide him with a hearing on the denial/revocation, alleging this violated the due process guarantees of the 5th and 14th Amendments. The court found no denial of due process since he had been afforded notice and an opportunity to contest the amount owed by the state of New York. Since he did not avail himself of this right, the state certified the amount to the U.S. Department of Health and Human Services (HHS), which certified it to the State Department. At that point, the State Department's act was a ministerial duty, and a hearing would have been both unnecessary and unproductive. The court also rejected his equal protection argument.

Eunique v. Powell, 302 F.3d 971 (9th Cir. 2002)—Pursuant to federal law and regulations, the obligor was denied a passport since she was in excess of $5,000 in arrears on her support obligation. She challenged the statute as a violation of her 5th Amendment due process right to travel internationally. The 9th Circuit held that the right to international travel differs from the right to interstate travel which is virtually unqualified. The lesser right to international travel can be circumscribed by a statute that passes the "rational basis" test. The statute in question easily passes this test because there is a reasonable fit between the governmental purpose (making sure parents support their children) and the means chosen to advance that purpose.

Credit Bureau Reporting

Hasbun v. County of Los Angeles, 323 F. 3d 801 (9th Cir. 2003)—Hasbun was over $62,000 in arrears on his child support. As part of its enforcement efforts, the child support agency obtained his credit report from Experian. He sued the agency and Experian, alleging a violation of 15 USC § 1681b(a)(4). The agency argued that it was a judgment debtor within the meaning of the statute. It was therefore entitled to request (and Experian was required to furnish) the report under 15 USC § 1681b(a)(3). The district court agreed and the 9th Circuit affirmed. The Court noted that its ruling was consistent with Federal Trade Commission's interpretation of the statute, as well, in the only reported case, *Baker v. Bronx-Westchester Investigations, Inc.,* 850 F. Supp. 260 (SDNY 1994). It held that subsection (a)(4) applies only when the agency seeks a credit report for the purposes of establishing a support order. It does not apply when the agency seeks to enforce an order.

Uniform Interstate Family Support Act

Harding v. Harding, 121 Cal. Rptr. 2d 450 (Cal. App. 2002)—The court found the Full Faith and Credit for Child Support Orders Act (FFCCSOA) and

California's version of the Uniform Interstate Family Support Act (UIFSA) to be constitutional.

CONSTITUTIONALITY OF THE IV-D PROGRAM

Kansas v. Shalala, 214 F.3d 1196 (10th Cir. 2000)—Kansas argued that the child support provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 exceeded Congressional authority pursuant to the Spending Clause of the United States Constitution (Article 1, Section 8), as well as the 10th Amendment. Applying the analysis in *South Dakota v. Dole*, the 10th Circuit upheld the District Court for the District of Kansas and found the provisions to be constitutional.

Hodges v. Thompson, 311 F.3d 316 (4th Cir. 2002), cert denied 72 Law Week 3230 (October 7, 2003*)*—South Carolina challenged the HHS threat to cut off TANF and child support program funds for the state's failure to meet the automation requirements of Title IV-D or to have a State Disbursement Unit (SDU). The District Court upheld the law and the 4th Circuit affirmed.

TANF-RELATED ISSUES

Family Cap

Williams v. Humphries, 121 F.Supp. 2d 881 (S.D. Indiana 2000)—This class action challenged the state's right to require a child support assignment for a child who was excluded from TANF due to the state's family cap policy. The court ruled that the assignment was an unconstitutional taking of the child's private property for a public use without compensation. The court provided permanent injunctive relief and ancillary notice relief to the class.

Child Support Assignment and Public Assistance Debt

Brown v. Mississippi Dept. of Human Services, 806 So.2d 1004 (Miss. 2000)—The mother assigned her child support rights to the state as a condition of AFDC receipt. She believed that the state collected an amount in excess of the amount it had paid out in benefits and sought an accounting. The state challenged her standing to sue, alleging that the assignment constituted a waiver of her rights. The Mississippi Supreme Court held that the assignment is limited and does not extinguish the assignor's rights. She was entitled to an accounting and to recover monies collected in excess of that necessary to reimburse the state for benefits provided.

Diggs v. North Carolina, 578 S.E. 2d 666 (N.C. App. 2003)—A mother sought a declaratory ruling by the state's Department of Health and Human Services (DHHS) that the state's practice of creating one Unreimbursed Public Assistance (UPA) account, even when the family contained children with different non-

custodial parents (in this case her three children and a niece), was illegal. DHHS upheld its policy and the mother appealed. The lower court reversed DHHS. However, the appellate court reversed the lower court, finding that the mother was not presently aggrieved by the practice and therefore was not eligible for a declaratory ruling from DHHS under North Carolina law. The appellate court sent the case back with instructions to remand to DHHS and order it to vacate its declaratory ruling.

UNREPORTED CASES

In addition to the cases listed above, there have been a number of cases that have not yet been officially reported. Some are still in litigation while others have been settled. Others are being appealed. A detailed description of many of these cases can be found on the National Center for Youth Law (NCYL) website in a document, compiled by former NCYL staff member Sarah Kurtz, entitled *Litigation Survey 2002*. The information below updates those cases that had not been fully litigated at the time of this 2002 survey.

Arrington v. Fuller, No. 2001 (Middle Dist. Ala.)—This class action challenges the state's failure to timely and accurately process, distribute, and disburse child support payments. Plaintiffs also challenge the state's failure to provide notice of payment and the practice of taking a fee from the child support collected. Plaintiffs filed a motion for summary judgment in June 2003, but no action has been taken on this motion to date. Trial has been postponed twice and counsel are waiting for a new date. Updates on the litigation, as well as copies of some of the papers, can be found at www.alchildsupport.com.

Kemp v. Hawaii, No. 98-3815-08 (Haw. Cir. Ct July 16, 2003)—This class action challenged the state's process for processing and distributing child support. A trial was held in September 2002. The judge upheld the state process in some respects, but found that the state had a fiduciary duty to account for and disburse money it had collected but not sent to the parents to whom it was owed. (This money is often referred to as "undistributed collections.") The state has appealed the decision. In the meantime, it has distributed about $2 million to the class.

Walters v. Weiss, No. 4:01 CV 00628 JM (E.D. Ark October 15, 2003)—This class action challenges the state's failure to timely and accurately process, distribute, and disburse child support payments. Plaintiffs also challenge the state's failure to provide notice of payment and the practice of taking a fee from the child support collected. The District Court has granted the defendant's summary judgment finding that the IV-D statute does not create individually enforceable rights under the standard laid down in *Blessing v. Freestone,* 520 US 329 (1997). An appeal has been filed in the 8th Circuit.

State ex. rel. ACES v. Ohio Dept. of Job and Family Services No. 01APD02-0246 (Ct. Of Apps. Of Ohio, 10th Dist.)—This suit challenged the state's failure to

properly implement family-first distribution of support to post-assistance families in accordance with 42 USC § 657 (a)(2). As a result, the governor issued an executive order and the legislature made funds available to fund payments to those whose support had been wrongfully retained. The suit was then dismissed. About $20 million has been sent to families to date.

Williams v. Martin, No. 1:01-CV-3342 TWT (N.D. Ga. Sept. 22, 2003)—Georgia's TANF program includes a family cap policy. The policy requires custodial parents to assign the capped child's support rights to the state. Georgia is also a "fill-the-gap" budgeting state. Pursuant to these policies, if the state actually collects assigned support, it passes some or all of it through to the family. Plaintiffs challenged the assignment requirement, alleging that it violated federal law (42 USC § 608) and amounted to an unconstitutional taking of the child's property. A federal district court disagreed, holding that—since the child ultimately receives some or all of the money—the practice neither violates federal law nor amounts to an unconstitutional taking.