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MEMORANDUM

TO: Interested People

FROM: Paula Roberts

DATE: October 6, 2004

RE: Litigation Success on the Issue of Recoupment of Child Support Overpayments

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As many of you know, Ohio advocates have been in the forefront of litigation involving child support distribution issues. A major case is *Gamble v. Ohio Department of Job and Family Services*, No. C-1-03-452 in the United States District Court for the Southern District of Ohio, Western Division. On June 23, 2004, the court granted in part and denied in part the defendants' motion to dismiss the case. The court found that the Eleventh Amendment barred monetary relief against the state and its officials. It also barred declaratory and injunctive relief against the state, but the Eleventh Amendment did not bar such relief against state officials. A decision regarding the effect of the Eleventh Amendment on the county that administers the program is pending.

Plaintiffs' counsel then successfully moved for a preliminary injunction to stop the state from recouping erroneous overpayments of child support. The court addressed both the substantive issues and the issue of plaintiffs' standing under *Blessing v. Freestone*, 520 US 329 (1997). As these are both critical issues for low-income families, the court's decision is discussed below.

BACKGROUND

States typically collect child support from non-custodial parents, log-in the payments, and send a government check to the family indicating it represents child support collected for the family. Sometimes mistakes are made or circumstances change, and families receive money in error. Such errors are referred to as "overpayments." Some common causes of overpayments are:

- Money is collected from the wrong person. The person then challenges the collection and wins. The wrongfully collected money is returned to the challenger.

- Payment goes to the wrong family. This occurs when there is a mix-up in names or case numbers. It can also occur when the non-custodial parent is involved in multiple cases, and the whole payment goes to one family rather than being allocated between families.

- The money is collected through a federal income tax refund intercept which is later deemed to be erroneous. Typically these cases involve joint tax returns filed by the non-custodial parent and his/her new spouse. If the spouse successfully claims that some or all of the refund belongs to him/her, then the money goes back to that spouse.

- The support check bounces. If the non-custodial parent is paying directly, the check might be returned for insufficient funds. If an unstable employer is making the payment pursuant to a wage withholding order, the check might also be dishonored.

In any of these cases, since the state has already disbursed the funds, the state is out the money unless it can somehow recover it from the family. Many states try to accomplish such recoupment by withholding a portion of the family's subsequent child support payments. Ohio, for example, takes 20 percent from each current support payment until the overpayment has been fully reimbursed.

However, federal law requires that all current child support be given to the family. 42 USC §657(a)(2) and (a)(3). Thus, federal guidance allows such recoupment only if it is voluntary and will not impose undue financial hardship. Office of Child Support Enforcement PIQs 02-01 and 03-02. Before a state begins recoupment, therefore, it must inform families of this fact. If the family does not voluntarily agree, then recoupment cannot proceed. The PIQs also allow the state to imply consent if the state sends at least three notices and gets no response from the family.

In the *Gamble* case, plaintiffs are former public assistance recipients and thus distribution is governed by 42 USC §657(a)(2). They alleged that Ohio does not follow federal distribution law and is in violation of the federal constitution and law as well as provisions of the Ohio Administrative Code, OH ADC §5101:1-31-12(I).

APPLICABILITY OF *BLESSING*

Before going to the merits, the court was required to address the plaintiffs' right to sue under § 1983. In *Blessing v. Freestone*. 520 US 329 (1997), the Supreme Court established three factors for courts to look at in determining whether a particular statute gives rise to a federal right: 1) did Congress intend the provision in question to benefit the plaintiff; 2) is the right sufficiently specific to be enforceable; and 3) does the statute unambiguously impose a binding obligation on the state. 520 US at 340-341.

The Court found plaintiffs met all three prongs of the *Blessing* test. It noted that the plaintiff's essential claim is that their money was retained by the state without due process and in violation of a specific federal statute 42 USC §657(a)(2).

> Such a claim clearly meets the three-prong test to show a federal right set forth in *Blessing* because 1) by setting forth a specific manner in which money was to be distributed to AFDC recipients Congress must have intended to benefit them as no other class would receive a benefit, 2) §657 is not vague or amorphous since it gives an in-depth explanation of how the money is to be distributed, and 3) the statute commends the state to follow the distribution rules by saying that a state "shall" pay out the money by the rules set forth in the statute. *Slip Opinion* at 7-8, note 5.

The Court also noted that *Blessing* itself mentions the possibility of a suit under §657 in regards to the disbursement of support collected. Id.

SUBSTANTIVE DECISION

There are four factors a court considers in deciding whether to issue a preliminary injunction. The first is the likelihood of success on the merits. The Court began by acknowledging that plaintiffs have a property interest in their child support payments. This interest is protected by the Due Process clause of the federal constitution. *Slip Opinion* at 8. The extent of due process protection is determined pursuant to the three-part test laid out by the Supreme Court in *Mathews v. Eldridge*, 424 US 319 (1976). Specifically,

- **The private interest at stake.** The Court found that the plaintiffs here had a significant interest. They will be short of funds to meet their basic needs if support is not available.

- **The risk that the procedures used will lead to erroneous results and the probable value of the suggested remedy.** When it determines that an overpayment has occurred, Ohio sends custodial parents a notice and gives them four options for repayment, one of which is consent to recoupment. The notice does not say that repayment by this method is voluntary. The Court found that this leads to a high risk that parents will not understand that consent is optional and that "they will have their property taken away to make up for the State's erroneous overpayment without understanding what has come to pass." *Slip Opinion* at 9.

- **The governmental interests affected.** The Court determined that the governmental interest was in making sure that funds are allocated to the proper parties and in according its citizens all the protections guaranteed by the Constitution. It noted that the state was still free to sue the parent to recoup the overpayment, or obtain consent. Thus, it was not without an avenue to collect its money in accord with due process.

In short, the plaintiffs were likely to prevail on the merits.

Plaintiffs also met the other three criteria for obtaining a preliminary injunction. The Court found that plaintiffs were likely to suffer irreparable harm without their much-needed child support payments. It also found that there was no harm to the state as it still had legal methods available to pursue the overpayment. Indeed, “enjoining defendants from taking Plaintiff’s next support payment without consent merely forces Defendant to operate through the proper procedural channels.” *Slip Opinion* at 10. Finally the Court noted that it was in the public interest that, before the government takes the property of its citizens, it provide a “transparent, consistent and predictable system that upholds the rights secured by the Constitution.” *Slip Opinion* at 11.