# PUBLIC BENEFITS ISSUES IN DIVORCE CASES

## *A MANUAL FOR LAWYERS AND PARALEGALS*

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# *AN INTRODUCTION TO THE THIRD EDITION*

This volume was first written in the mid 1980's and was revised in 1994. It was designed to provide a template for state advocates to use in writing a manual for their own state. The basic issues were addressed, the relevant federal laws cited, and places where state law also needed to be checked were identified. When we decided to update the manual in 2000, we realized that for childless couples this model still works reasonably well. Hence Part II of the manual looks very much like its predecessors. Minor changes have been made where appropriate.

However, in the last four years, public benefits law for families with children has undergone dramatic revision. Federal law has significantly changed and states have been given a good deal more latitude in designing their cash and medical assistance programs. As a result, Part I of this volume needed considerable updating to reflect those changes and the need for practitioners to be much more aware of the importance of state law and policy.

Of particular note, is the fact that, before 1997, qualified families with children needing cash assistance were entitled to receive benefits from the Aid to Families with Dependent Children (AFDC) program. While there were minor state variations, the basic program eligibility rules were the same everywhere and were described in federal law and regulation. AFDC has now been replaced in every state by Temporary Assistance to Needy Families (TANF). TANF is a block grant program which provides federal money to states to use in assisting needy families. States then use the funds to design and implement their own programs. While there are a few federal rules, by-and-large, the states are free to set their own program rules and may even offer different programs in different parts of the state.

This is further complicated by the fact that, in order to receive federal TANF funds, states are required to spend a certain amount of their own money on programs for needy families. (This is commonly referred to as the state's Maintenance of Effort or MOE obligation.) States can combine their MOE money with TANF funds and run a single program. They can also use their MOE money to run a segregated program within TANF or offer a separate state program which has different rules than those applicable to TANF. Thus, while a family may be receiving cash assistance from the state, it may not be receiving TANF benefits. Since TANF-funded and MOE-funded programs may well have different rules, it is important for an advocate to know the source of the funds for the particular cash assistance program their client is participating in or anticipates using.

Yet another change is that there is no longer a universal name for every state's cash assistance program. Each state has its own name for the program funded by TANF dollars. For example, in Minnesota the program is called the Minnesota Family Assistance Program (MFIP) while in California it is called CalWORKS. In this volume, we will use the term "TANF program" but the reader needs to understand that his/her state program will likely have a different name.

In addition, AFDC recipients were automatically enrolled in Medicaid. This allowed advocates to focus on obtaining/retaining AFDC benefits for their clients; they did not need to worry about the different eligibility rules for the Medicaid program. This is not true for TANF

recipients. While some states have devised common application forms, families must qualify independently under the different rules for each program.

Finally, legal immigrants who once were able to qualify for AFDC, Food Stamps or Medicaid may no longer be able to do so. If a divorce involves an immigrant family, special care needs to be taken. These issues are complex and beyond the scope of this volume. Readers working with immigrant families need to involve immigration specialists when providing help to divorcing couples.[1]

In addition to these changes, there has been an expansion in health care coverage available to children. The Medicaid program now provides coverage to every child under the age of six whose family income is less than 133 percent of poverty as well as those between six and seventeen whose family income is below poverty. Many states provide Medicaid coverage to an even larger group of children. There is also a new State Children's Health Insurance Program (SCHIP) authorized by Congress in 1997. This program provides funds to each state to expand its Medicaid program and/or establish a separate health care program for uninsured children whose family income is above the state's Medicaid eligibility level. These changes make a big difference in how health care coverage is addressed in a support order.

The 2000 version of this manual reflects these changes in law and policy. With these changes, this manual, like its predecessors, seeks to guide a lawyer or paralegal through the workings of the federally-funded public assistance programs as they impact low-income clients. Awareness of these laws should help in devising a divorce agreement which will help needy children and their parents obtain whatever assistance they need to achieve at least a minimally adequate standard of living.

[1] The National Immigration Law Center is a good source of assistance. They can be reached through their web site at www.nilc.org or at (213) 639-3911.

# A ROADMAP FOR USING THIS MANUAL

Divorce is seldom an amicable process. For low-income families it can be especially traumatic as too little income and too few assets have to be distributed among two or more households. To ease this process, the services of a lawyer or paralegal or mediator can be very valuable. (For simplicity, lawyers and paralegals will be referred to as "readers" in this publication.)

To help their clients, readers need to be familiar with the unique support and property distribution issues that must be resolved when low-income public benefits recipients or potential recipients divorce. If one or more of the parties is currently receiving some form of public assistance (e.g., Food Stamps, Supplemental Security Income), the resolution of these issues has to be guided by knowledge of the rules of that public assistance program so that eligibility can be maintained. If one or more of the parties anticipate a need for post-divorce public assistance, familiarity with the eligibility rules of the particular program is also necessary so that the party can qualify for the needed help. If the parties use or plan on using several different public assistance programs, the situation is even more complicated because—as explained in more detail below-- the eligibility rules of the programs are not always consistent. An additional complication is that, for all but a few programs, there is now substantial state variation which makes interstate divorce cases particularly tricky. Finally, if children are involved, the custodial parent may be using the services of the state's child support enforcement agency. In some cases, that agency will have to be consulted before a binding agreement can be reached.

Due to the fact that the presence or absence of children makes a substantial difference in how the parties should proceed, this manual is divided into two parts. Part I describes the federal laws which affect low-income families with children. Chapter 1 discusses the role of the state child support enforcement agency. This chapter is essential reading. If the family is not receiving any form of public assistance and does not plan to apply for such aid, the reader can stop here. If the custodial parent currently receives or is planning to apply for TANF, Food Stamps, or Medicaid/SCHIP, the next three chapters should be read as appropriate.

Part II describes issues that more commonly arise for childless couples and those whose children are grown. Three programs (Supplemental Security Income, Social Security and Food Stamps) are discussed. The peculiar issues relating to spousal support and the distribution of assets are described.

A manual of this type can only give the reader an overview of the major issues. Because there is now so much state variation, research on particular state public assistance law and policy must be done. *Readers using this manual need to do a good deal of cross-checking with state law in order to be sure that they are providing good advice to their clients.*

A reader who does such checking and becomes familiar with the contents of this manual should be able to deal with the most common issues and be able to grasp their importance for divorcing families. The potential pay-off for low-income families is immense. Without the information contained in this manual, a family could unwittingly enter into a disastrous divorce

agreement. With the information contained herein, the reader can assist the parties in making thoughtful, prudent decisions for themselves and their children.

# PART I: ISSUES FOR FAMILIES WITH CHILDREN

## CHAPTER 1

## TITLE IV-D OF THE SOCIAL SECURITY ACT: THE GOVERNMENT'S CHILD SUPPORT ENFORCEMENT PROGRAM

### BACKGROUND

Since the mid-1970's, every state has operated a child support enforcement program to assist custodial parents to locate non-custodial parents, establish paternity (if necessary), obtain support orders, and enforce those orders.[2] The specifics of an acceptable system are described in Title IV-D of the Social Security Act.[3] For this reason, state programs are frequently referred to as "state IV-D programs" and the agencies that administer the programs are called "state IV-D agencies."

State IV-D agencies serve families that receive public assistance as well as non-public assistance families. Today, about sixty percent of single parent families use the services of their state IV-D agency. The other forty percent of families use private attorneys, other government programs (legal services agencies and local non-IV-D programs), or act pro se.[4]

The federal government provides substantial funds to the states for their state child support programs.[5] It also provides states with incentive funds to encourage them to improve program performance.[6] If a state does not operate a child support enforcement program consistent with federal law, it can loose federal funding for both its child support[7] and Temporary Assistance to Needy Families (TANF)[8] programs.

Over the years, Congress has used the existence of this federal funding to encourage states to adopt certain family laws. If they wish to continue to receive federal funds, states must enact and use the laws described below. Some of these laws are only required in cases using the services of the state IV-D agency. Others must be used in all cases, whether or not the family is using the state child support system. For this reason, each set of laws is described separately.

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[2] 42 U.S.C.A. Section 651 (West 1999).
[3] 42 U.S.C.A. Section 651 et. seq. (West Supp. 2000).
[4] There are approximately 21 million child support eligible children in the United States, 13.5 million of whom used the services of the IV-D system in 1995. Mathew Lyon, "Characteristics of Families Using Title IV-D Services in 1995" U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, May 1999, Table 1.
[5] The federal government funds 66% of the basic costs of the state child support programs. It provides an even higher level of funding for automation (80%) and the costs of genetic tests (90%). 42 U.S.C.A. Section 655, (West Supp. 2000).
[6] *Id.* Sections 658 and 658a.
[7] *Id.* Section 654.
[8] *Id.* Section 602(a)(2).

## THE UNIVERSAL REQUIREMENTS OF FEDERAL LAW

The following laws must be applicable in **all child support cases**, not just those cases where the parties are using the services of the state child support enforcement agency.

- **Establishing Paternity.** States must allow paternity to be established at least until the child's eighteenth birthday.[9] If paternity is an issue and one of the parties so requests, all the parties must submit to genetic tests.[10] States are also required to adopt simple acknowledgment processes for the voluntary establishment of paternity[11] and to resolve contested cases without a jury.[12]

- **Guidelines for setting child support awards.** Each state must have numeric guidelines for decisionmakers to use in setting child support awards. These guidelines must be a rebuttable presumption of the correct amount of child support to be ordered. Deviation from the guidelines is allowable only when the guidelines would yield a result that is unjust or inappropriate. If an order other than the guideline amount is to be entered, there must be specific findings on the record as to what the guideline amount would be, what the order actually is, why the deviation was allowed, and how the deviation serves the best interest of the child.[13]

- **Covering a child's health care needs.** Every order must include provisions addressing payment for the health care needs of the child. The issue must be addressed in the guidelines themselves and may be addressed elsewhere in state law. Health insurance and/or coverage of unreimbursed medical expenses must be explained in the support order.[14]

- **Enforcement of child support orders.** States must have a variety of mechanisms to enforce child support orders including income withholding (i.e., the support amount is deducted from the non-custodial parent's wages each pay period).[15]

## IMPORTANT FOR READERS

1. The state's child support guidelines will have to be used to determine the amount of cash support to be paid. If an amount other than the guideline is desired by the parties, the new amount must be justified on the record and should be in the best interest of the child. Since this is a high standard to meet, readers may want to encourage the parties to use the guidelines unless the situation is highly unusual.

[9] *Id.* Section 666(a)(5)(A).
[10] *Id.* Section 666(a)(5)(B)(i).
[11] *Id.* Section 666(a)(5)(C).
[12] *Id.* Section 666(a)(5)(I).
[13] 42 U.S.C. Section 667 (West 1991).
[14] *Id.* and 45 C.F.R. Section 302.56(c)(3) (1999).
[15] 42 U.S.C.A. Sections 666(a)(1)(A) (West Supp. 2000) (for IV-D cases) and 666(a)(8)(B) (for non-IV-D cases). In cases enforced through the IV-D system, there are an additional set of criteria which must apply. See, i*d.*, Section 666(b).

2. The parties must address the health care needs of the children. This can be done by determining whether either parent has access to dependents health insurance. If only one parent is able to provide adequate, affordable and accessible coverage to the child, then that parent should be ordered to provide the coverage. If both parents have such coverage, then the parent with the better/more affordable coverage should be ordered to provide the coverage. In either case, the reader should help the parties address the question of sharing the cost of any associated premiums, co-payments and deductibles as well as payment for any medical costs not covered by the insurance. If neither parent has access to coverage, then the possibility of enrolling the child in Medicaid or SCHIP should be considered. Since some states require premiums, co-pays or deductibles from SCHIP participants, this issue should be explored, and appropriate cost sharing provisions included in the order. (See Chapter 3 for more detail on this approach.)

3. Readers will need to explain that the law generally requires that child support payments be deducted from the obligated parent's income. "Income" means any form of periodic payment due to an individual (regardless of source) and includes wages, salaries, commissions, bonuses, worker's compensation, disability payments, payments made pursuant to a pension or retirement program and interest income.[16] The reader may need to explain this to the parties—especially the non-custodial parent—so that he/she understands that any kind of periodic income may be used to satisfy the support obligation.

   If the parties want payment through another method, the reader will have to help them structure this arrangement so that it will be acceptable to the court or administrative agency that will ultimately enter the order.

## SPECIFIC REQUIREMENTS APPLICABLE TO CASES IN THE STATE CHILD SUPPORT ENFORCEMENT SYSTEM

### *GENERAL PROGRAM REQUIREMENTS*

The state IV-D agency is responsible for running a program that meets federal standards.[17] This agency may administer the program through its own offices or contract some or all of the tasks out to local government units, courts, district attorneys, and the like.[18] Some state even use private companies (both for profit and non-profits) to run the program in a particular part of the state. *Each state is unique in this respect, and it is, very important for readers to obtain a good working knowledge of their state's system.* The following documents will prove useful in this effort: (1) a state IV-D organizational chart showing who has responsibility for what function; (2) a copy of the state IV-D plan and any attachments; and (3) any state statutes, regulations, or manuals used by those providing client services.

[16] *Id.* Section 666(b)(8).
[17] *Id.* Section 654(3).
[18] 45 C.F.R. Section 302.12(a)(2)(1999). *See also*, id. Sections 302.34 & 304.22.

## ***ELIGIBILITY FOR IV-D SERVICES***

It is also important to understand *who* is in the IV-D system and *why*.

- Families receiving **TANF** must assign their child and spousal support rights to the state in which they receive benefits.[19] Unless good cause can be shown, such families are also required to cooperate with the state IV-D agency in establishing paternity and obtaining child support.[20] Failure to cooperate results in the family loosing at least 25% of its TANF grant: in some states, the family looses all assistance.[21] Since they are required to cooperate with the child support system, these families are usually automatically referred for services (i.e., they do not fill out an application)[22] and are not required to pay any fees or costs.[23]

- Families that, in the **past** received **TANF** (or AFDC benefits under the old program) continue to receive child support services (without the need to file an application or pay an application fee) unless they tell the state they no longer wish to receive such services.[24] These families may be asked to pay fees or costs for some services.[25]

- Families receiving **Medicaid** must assign their medical support rights to the state and (with the exception of pregnant women) must cooperate with the state child support agency (subject to a good cause exception) in establishing paternity and pursuing medical support.[26] These families also receive services automatically and without paying an application fee or costs.[27] Failure to cooperate makes the mother or other caretaker ineligible for benefits. The children, however, are eligible for Medicaid.[28]

- Depending on the state, families receiving **food stamps** may also be required to cooperate (unless they can establish good cause for failing to do so) with the state in establishing paternity and pursuing support. A recent change in federal law gives states

[19] 42 U.S.C.A. Section 608(a)(3). (West Supp. 2000). The major limitation on this assignment is that it cannot exceed the amount of benefits actually paid to the family. *Id.*
[20] *Id.* Section 654(29).
[21] *Id.* Section 608(a)(2).
[22] It should be noted that a few states and localities require a family to apply for IV-D services as a condition of TANF eligibility. In those states, the family will actually have to file an application. For example, Bay County, Florida requires pre-TANF application for IV-D services. See, Office of Child Support Enforcement, COMPENDIUM OF STATE BEST PRACTICES (5th edition) pg. FL2. (2000).
[23] 42 U.S.C.A. Section 654(6)(B) (West Supp. 2000).
[24] Unless there are no child support arrears owed to the state in the case, the family is usually better off staying in the IV-D system. This is because the federal rules on distribution now require that, when a collection is made, the state must first pay the family 1) current support; and 2) any pre-or post-assistance arrears owed to them. Only when these amounts are paid can the state claim any arrears owed to it. 42 U.S.C.A. Section 657(a)(2)(B) (West Supp. 2000). If the family drops out of the IV-D system, the state will leave the case open as an arrears-only case and, if it makes a collection, it will use the money to pay itself for the arrears owed to the state. The family will have no claim to the money. See, *Hill v. Ibarra*, 954 Fed.2d 1516 (10th Cir. 1992).
[25] 42 U.S.C.A. Sections 654(6)(B)-(E) (West Supp. 2000).
[26] 42 U.S.C.A. Section 1396k(a)(1) (West 1992).
[27] 42 U.S.C.A. Section 654(6)(B) (West Supp. 2000).
[28] 42 U.S.C.A. Section 1396k(a)(1) (West 1992).

this option.[29] If the state chooses this option, it must provide services to families at no cost.[30] If the head of the household fails to cooperate without good cause, then that individual is ineligible for benefits.[31] Other household members are eligible, however.

- Families that never received public assistance are also eligible for services.[32] The majority of these families have income below 200% of poverty and use the state services because they cannot afford a private attorney. They must actually apply for services and possibly pay an application fee.[33] They also will be charged fees for some services.[34]

Because there are special rules and constraints on those using the state's child support enforcement agency, a reader needs to know at the outset whether any of the parties are required to use, or is voluntarily using, the IV-D agency's services.

***WHAT SERVICES MUST BE PROVIDED***

To comply with federal law, a local IV-D program must offer an array of services. Among these services are the following:

- **Locating absent parents** through a search of local and state records to obtain a current home address, employer information, and information about the non-custodial parent's other income or assets.[35] In addition to searching all available records, states are required to establish and maintain a State Directory of New Hires. This Directory collects from employers the name, address, and social security number of all new employees no later than 20 days after hire.[36] New Hire records are matched against IV-D cases to obtain the most current information possible.

  If a search of state records is not successful, then the agency must search federal records through use of the Federal Parent Locator System (FPLS) which can access a wide variety of federal information as well as information provided to the federal government by state agencies.[37] The process of location must be undertaken whenever necessary to obtain or verify information and must be completed within 75 days of determining whether locator services are necessary.[38]

[29] 7 U.S.C.A. Section 2015(l) (West 1999). As of this writing, seven states report adopting this option. They are Idaho, Kansas, Maine, Michigan, Mississippi, Ohio, and Wisconsin.
[30] 42 U.S.C.A. Section 654(4)(A)(ii) (West Supp. 2000) and proposed 7 C.F.R. Section 273.11(q)(4), 64 Fed. Reg. 70951 (December 17, 1999).
[31] 7 U.S.C.A. Section 2015(l)(1) (West 1999).
[32] 42 U.S.C.A. Section 654(4)(A)(ii) (West Supp. 2000) and 45 C.F.R. Section 302.33 (1999).
[33] 42 U.S.C.A. Section 654(6). (West Supp. 2000). Some states charge a nominal fee, while others absorb the fee themselves. Others charge the maximum allowed by law ($25). Readers should check their state's policy.
[34] *Id.* See, also 45 C.F.R. Section 302.33(d) (1999).
[35] 42 U.S.C.A. Section 654(8) (West Supp. 2000) and 45 C.F.R. Sections 302.35 (1999).
[36] 42 U.S.C.A. Section 653a(b) & (h)(1) (West Supp. 2000).
[37] *Id.* Section 653.
[38] 45 C.F.R. Section 303.3(b)(3) (1999).

- **Establish paternity** through either a voluntary agreement or adjudication. If genetic tests are requested the agency must order such tests[39] and pre-pay the costs.[40] In a contested case, the papers must be filed within 90 days of locating the alleged father,[41] and most cases must be resolved within one year of service of process on him.[42]

- **Establish support orders** under the child support guidelines. The IV-D agency has 90 days from locating the absent parent or establishing paternity to obtain a voluntary agreement or file suit.[43]

- **Review and (if appropriate) modify support orders** at least once every 36 months unless neither parent requests a review.[44] The state may either adjust under the state child support guidelines, or apply a cost of living adjustment, or develop its own threshold for modification.[45] Whatever method is chosen, the need to provide health insurance for the child must be a ground for seeking a modification whether or not the cash order is subject to modification.[46] Each parent subject to an order must be notified of his or her right to request such a review.[47] If a parent requests a review, the state has 180 days to conduct a review and make the appropriate adjustment (if any).[48]

- **Enforcement of support orders** can be done through the use of income withholding, liens on personal property and financial assets, state income tax intercepts, and by withholding or suspending drivers, professional and recreational licenses of those who are not meeting their obligations.[49] In addition, the state can refer the case to the federal government for federal tax intercept [50]and passport revocation.[51] The primary source of collections, however, is income withholding.[52]

## IMPORTANT FOR READERS

1. Many people using the readers' services have assigned their support rights to the state and are therefore required to use the services of the state's child support enforcement agency. These include current TANF and Medicaid recipients. Others have not assigned their rights but either should (former TANF recipients) or must (some Food Stamp recipients) use that programs services. Still others may have applied for help and paid the

[39] 42 U.S.C.A. Section 666(c)(1)(A) (West Supp. 2000).
[40] *Id.* Section 666(a)(5)(B)(ii)(I). See, also 45 C.F.R. Section 303.5 as amended at 64 Fed. Reg. 6249 (Feb. 9, 1999).
[41] 45 C.F.R. Section 303.4(a)(1999).
[42] *Id.* Section 303.101(b)(2)(iii).
[43] *Id.* Section 303.4(d).
[44] 42 U.S.C.A. Section 666(a)(10) (West Supp. 2000). If the family receives TANF, the state may also request a review even if the parents do not.
[45] *Id.* Section 666(a)(10(A)(i).
[46] 45 C.F.R. Section 303.8(d) as modified at 64 Fed. Reg. 6250 (Feb. 9, 1999).
[47] 42 U.S.C.A. Section 666(a)(10)(C) (West Supp. 2000).
[48] 45 C.F.R. Section 303.8(e) as modified at 64 Fed. Reg. 6250 (Feb. 9, 1999). If the location of the non-custodial parent is unknown, the 180 days runs from the day he/she is located.
[49]42 U.S.C.A. Sections 654 (20) and 666(a) (West Supp. 2000) require states to have and use these and other enforcement tools.
[50] *Id.* Section 664.
[51] *Id.* Sections 654(31) and 652(k).
[52] *Id.* Sections 666(a)(8)(B) & (b)(3)(A).

appropriate fee. A reader should ask whether any party is using IV-D services as this has implications for how the case is to be handled and who may need to be involved in approving any divorce agreement.

2. The IV-D system can access a large number of state and federal data sources to obtain information about a noncustodial parent. His/her current home and work address, income, ability to provide health care coverage, and assets might all be obtained. If the family needs such information and is not using the services of the IV-D agency, the reader might advise them to apply for such services in order to use this feature of the system. Indeed, some states allow people to apply for locate-only services, obtain the needed information and then exit the IV-D system. A reader should become familiar with state policy in this area.

3. If paternity is an issue and genetic tests are required, the IV-D system has the ability to order such tests without having to go to court. Moreover, if the agency orders the tests, it will pay the costs up-front. For mothers who anticipate that paternity will be an issue and have failed to pursue the case because they cannot afford genetic testing, this part of the IV-D program can be very useful. Again, if the client is not already in the IV-D system, the reader might want to suggest that she sign up in order to take advantage of this aspect of the program.

4. After an order is entered, circumstances often change. One or both parties may have an increase or decrease in income sufficient to warrant modification of the order. Even if the order was entered *pro se* or with the use of a private attorney, a parent might want to then enter the IV-D system to take advantage of the free/low cost opportunity to have the order periodically reviewed.

5. Users of the IV-D system are strongly encouraged to use immediate income withholding as the enforcement method if the non-custodial parent has periodic income from any source. If one of the parties currently receives TANF or Medicaid, and both parties wish to enter a written agreement for payment through a means other than immediate income withholding, they may have to obtain the permission of the state IV-D agency.[53] The reader needs to make sure the parties understand this.

6. There are specific time frames within which IV-D cases must be processed. A reader should check with the IV-D agency handling the case to make sure that the agency is meeting these time frames.

With this general information in mind, we now turn to some specific issues of importance to those families with children which use or are likely to need some form of public assistance in the post-divorce period.

[53] 45 C.F.R. Sections 303.100(b)(1)(i) & (ii)(1999). Because such approval is a matter of state option, the reader needs to check state policy on this issue before informing the parties.

# CHAPTER 2

## TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF)

### AN OVERVIEW OF THE TANF PROGRAM

TANF is a block grant program that provides federal money to states so that they can set up programs for low income families with children.[54] States seeking this federal money submit a State Plan to the Secretary of the Department of Health and Human Services (HHS) explaining how they will use the funds and promising to abide by a handful of federal rules. HHS reviews these plans for basic compliance with those rules.[55]

There are a few federal limitations on the use of TANF funds. Important for our purposes are that the state cannot use TANF funds to provide assistance to:

- a family that does not include a pregnant woman or minor child.[56]
- a family that refuses to assign its child and spousal support rights to the state.[57]
- a teen parent who is not living in an adult-supervised setting[58] and (unless she has already graduated) attending school.[59]

TANF also places a high premium on moving participants quickly into the paid labor force. State programs, therefore, are required to have a high percentage of TANF families engaged in work or work-related activities.[60] Finally, with a few exceptions, states may not provide TANF–funded assistance to a family that includes an adult who has received benefits for more than five years during her/his lifetime.[61] States are free to set an even shorter period for the receipt of benefits and many have done so.

The rest of the TANF rules are largely left to the states.[62] States can set:

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[54] 42 U.S.C.A. Sections 601 et. seq. (West Supp. 2000).
[55] *Id*. Section 602. Federal regulations governing this program were issued April 12, 1999 and are found at 64 Fed. Reg. 17878-17931.
[56] 42 U.S.C.A. Section 608(a)(1) (West Supp. 2000).
[57] *Id*. Section 608(a)(3). To receive full benefits, the family must also cooperate with the state in pursuing those rights unless it can demonstrate good cause for failing to do so. *Id.,* Sections 608(a)(2)and 654(29). Deciding what constitutes "cooperation" and "good cause" is largely left to the state.
[58] *Id.* Section 608(a)(5).
[59] *Id.* Section 608(a)(4).
[60] *Id*. Section 607(c)(1).
[61] *Id*. Section 608(a)(7). Hardship exceptions can be granted to up to 20 percent of the caseload. See 45 C.F.R. Section 264.1(c), 64 Fed. Reg. 17897 (April 12, 1999). TANF-funded assistance may also be provided to families composed of only children for more than five years. The five year time limit begins running on children only when they reach the age of eighteen.
[62] State-specific information on many of these issues can be found on the State Policy Documentation project web site, www.spdp.com.

- **family composition rules**. States can serve only single parent families or they can serve both single-parent and two-parent families. They can also choose to offer some forms of assistance (e.g., employment related services) to the non-custodial parents of children receiving TANF.[63]

- **income tests.** TANF funds can only be spent on "needy" children and their families. Therefore, the state must develop an income test for deciding who is eligible for TANF benefits. However, states are fairly free to decide what that test will be. The test does not need to be the same statewide. Moreover, a state may choose to use different income tests for different parts of its program.

- **assets rules.** There is no federal law on assets, leaving this to state discretion. A state might greatly limit the amount of assets a family can have and still qualify for TANF-funded assistance. A state might also decide to have no assets test.

- **forms of assistance.** Assistance may be provided in the form of cash or it may be services of some kind (e.g., child care).[64] The exact mix is up to the state to decide.

- **cash benefit levels.** If a state decides to provide cash assistance, it is free to set the amount at any level it wishes.[65]

As noted above, when a custodial parent applies for TANF, the parent must assign any support rights he/she has to the state.[66] The state's child support enforcement agency (see Chapter I) will then pursue the non-custodial parent to establish a support order if none is in place or to enforce the existing order.[67] If the family receives TANF-funded *cash* assistance,[68] child support collected on its behalf will first be split between the state and the federal government.[69] The state may then retain its share, give its share to the family, or split the money between itself and the family. Most states either keep the money or split it with the family. In the

[63] For a discussion of coverage for non-custodial parents, see the Preamble to the final TANF Regulations, 64 Fed. Reg. 17720-17878 (April 12, 1999)

[64] See, 45 C.F.R. Section 260.31, 64 Fed. Reg. 17880 (April 12, 1999).

[65] The broad range of state choice here is demonstrated in a chart recently prepared by the Congressional Research Service. According to this chart, in January 2000, cash benefits for a family of 3 ranged from a low of $164 in Alabama to a high of $923 in Alaska. The median was $421. A CRS Report for Congress, WELFARE REFORM: FINANCIAL ELIGIBILITY RULES AND CASH ASSISTANCE AMOUNTS UNDER TANF (June 14, 2000).

[66] 42 U.S.C.A. Section 608(a)(3) (West Supp. 2000).

[67] *Id*. Section 654(4).

[68] The term "cash" is defined in federal regulations to encompass cash, payments, vouchers and other forms of benefits designed to meet the families ongoing basic needs. It also includes supportive services (e.g., transportation and child care) for families which are not employed. 45 C.F.R. Section 260.31(a), 64 Fed. Reg. 17880 (April 12, 1999). If the assistance is in a form other than cash, the rules are somewhat different. This will be explored further below.

[69] 42 U.S.C.A. Section 657(a)(1) (West Supp. 2000). The rate of the split depends on the state's Medicaid matching rate. *Id*. Section 657(c) So, for example, if $100 is collected by a state with a 75% Medicaid match rate, the state will be eligible to keep $25 and $75 will go to the federal government.

latter case, typically the family receives about $50 and this amount is also disregarded in calculating the family's TANF eligibility and assistance amount.[70]

If the family receives its TANF-funded assistance in a form other than cash,[71] distribution is somewhat different. Here, the family will receive its current support.[72] Since this is an important distinction, readers need to become familiar with it and discuss with their TANF-recipient clients the option of moving to some form of non-cash assistance if this is possible or appropriate.

There is a further complication of which readers also need to be aware. In order to receive federal TANF funds, states are required to spend a certain amount of their own money on programs for needy families. (This is commonly referred to as the state's Maintenance of Effort or MOE obligation.) States can combine their MOE money with TANF funds and run a single program. In that case, the program and distribution rules described above apply. States can also use their MOE money to run a segregated program within TANF. In that case, the TANF participation, work, and child support requirements and distribution rules still apply but federal time limits do not. Alternatively, the state can use its MOE money to fund a separate state program in which none of the TANF restrictions or rules (including child support distribution) apply. A family might have the option of participating in an MOE-funded program that allows them to retain all of the child support paid on their behalf. *Thus, it is extremely important for readers to become familiar with the structure of their state's TANF/MOE program.* If the state offers a segregated or separate MOE program, the structure and rules of that program should be identified so that clients can assess the full range of options open to them.

## THE INTERACTION OF TANF AND SOME MAJOR FAMILY LAW ISSUES

There are some interactions between TANF and family law of which the reader needs to be particularly conscious. Five of the most important ones are discussed below.

### PATERNITY

Sometimes when a married couple separates, questions are raised concerning the paternity of their children. Some—but not all-- states allow the issue to be raised in divorce proceedings. If the reader is handling a divorce case for a TANF family in a state which allows the paternity issue to be raised, then the divorce case may need to be coordinated with TANF and IV-D.

[70] See, Roberts, Paula, *State Policy re Pass-Through and Disregard of Current Month's Child Support Collected for Families Receiving TANF-Funded Cash Assistance* (January 1, 1999) available at www.clasp.org for a state-by-state breakdown of policy.

[71] Federal regulations define TANF-funded aid in the form of nonrecurring payments to deal with an emergency, work subsidies paid directly to an employer, supportive services (e.g., transportation and child care) to working families, refundable earned income tax credits, IDA contributions or distributions, services that don't provide basic cash income (e.g., job counseling), and certain transportation benefits to be non-cash assistance. 45 C.F.R. Section 260.31(b), 64 Fed. Reg. 17880 (April 12, 1999).

[72] OCSE Action Transmittal 98-24, pp. 10-11. This Action Transmittal can be viewed on the OCSE web site at www.acf.dhhs.gov/programs/cse/poldoc.

Remember from Chapter 1, that if a parent is receiving TANF, she/he is required to cooperate with the state child support agency in establishing paternity. If the issue comes up in a divorce case, a mother receiving TANF-funded assistance would presumably be required to defend a paternity refutation by her husband in order to be considered cooperative. If genetic testing is desired to resolve the issue, then the IV-D agency can issue an order for such testing and will pre-pay the costs. The custodial parent should be advised that failure to cooperate in testing could affect her/his TANF eligibility.

## CUSTODY

### *PARENTAL CUSTODY*

Between divorcing parents, there are three basic custody arrangements: joint physical custody, joint legal custody, and sole custody. Sole custody and joint legal custody are both viable options for families receiving/seeking TANF-funded assistance. Either of these arrangements leaves the child living with a custodial parent and thus the unit meets the basic TANF eligibility requirement that there be a child in the home. However, joint legal custody arrangements must be carefully constructed to make clear that a) the child has one home; and b) one designated parent has physical custody of the child and primary responsibility for daily care. That parent will then be/remain TANF-eligible.

Whether joint physical custody is possible remains to be seen. A state could tailor its TANF rules to allow this, but it is not clear that any state has or will do so. In the past, such arrangements have been problematic. It is, therefore, probably wise to avoid joint physical custody arrangements for TANF families.[73]

Another option is split custody. This option is available in families with two or more children: one or more can be placed in the custody of their mother while the others are placed with their father. In that way, two single-parent households are created and if the children are under 18, and the other income and assets tests are met, each household could receive TANF benefits. Some parents might want to explore this option.

Whatever custody arrangement is chosen, the reader should advise the parents that it is very unwise to *informally* switch custody when the children are receiving TANF benefits. The child support order remains in effect until changed. Since it cannot be retroactively modified,[74] the support obligation continues until the affected parent seeks to have it changed. Moreover, unless the former custodial parent officially withdraws from TANF, the former non-custodial/new custodial parent may find himself/herself aggressively pursued by the state IV-D agency for TANF reimbursement.

### *NON-PARENTAL CUSTODY*

When neither parent is willing or able to assume custodial responsibility for the child, the parents may want to place the child with a third party. If that party will need TANF-funded assistance for the child, the parents need to know what rules—if any—the state has for providing

[73] ***Dorsey v. Dep't of Soc. Welfare***, 144 Vt. 614, 481 A.2d. 1055 (1984).
[74] 42 U.S.C.A. Section 666(a)(9) (West Supp. 2000).

such assistance to children who are not living with their parents**.** The main concern here is whether the state requires the third party to be a blood relative. In the AFDC program, there were requirements that the third party be a relative in order to receive assistance for the child. Some states retained these requirements while others did not. The reader needs to check state policy on this point.

If the parents decide to give custody of the child to a person who then receives TANF benefits for the child, the reader should advise them that the state can (and probably will) pursue both of them for child support.

## VISITATION

Parents should generally be free to set a visitation schedule appropriate under the circumstances. It should be noted, however, that in the AFDC program there were some states that had policies that made it difficult for parents to set up daily visitation schedules. Readers should check to make sure that these policies have not been carried over into the TANF program. If they have, then visitation will need to be tailored accordingly.

Another issue that needs to be addressed is **extended visitation** (e.g., for the entire summer). Federal law says that the state cannot provide TANF-funded assistance to child who is expected to be out of the household for 45 or more consecutive days. It allows the state to set a different period, reducing the time to 30 days or expanding it to 180 days.[75] Federal law also allows the state to grant good cause exceptions to this rule.[76] Readers need to identify what option (if any) the state has chosen and tailor visitation accordingly. If state law is silent, then the 45 day federal rule is a guide to the appropriate limit. With the limit in mind, the issue of extended visitation can then be addressed so that the child's TANF grant can continue.

The reader should also note that if all of the children are out of the home at the same time, the custodial parent may become ineligible for benefits. (Remember a basic TANF eligibility condition is that there be a child in the home.) Thus, if there is more then one child in a family, and extended visitation is contemplated, it may be worth considering having the children visit their non-custodial parent at different times. In that way, there will always be at least one child at home with the custodial parent insuring her/his continued TANF eligibility.

The reader should also advise the custodial parent that she/he must notify the state when it is clear that a child is or will be absent from the home for longer than the allowable period.[77]

## CHILD SUPPORT AWARDS

Under federal law, every state must have numeric guidelines for setting child support awards.[78] These guidelines must be used unless the decision maker finds that the result would be unjust or inappropriate based on the best interest of the child.[79] If the guidelines are not used, the

[75] *Id*. Section 608(a)(10)(A)(West Supp.2000).
[76] *Id.* Section 608(a)(10(B).
[77] *Id.* Section 608(a)(10)(C).
[78] 42 U.S.C.A. Section 667 (West 1991) & 45 C.F.R. Sections 302.56(a) & (b)(1999).
[79] *Id*,C.F.R. Section 302.56(g).

reason for deviation must be stated on the record.[80] Thus, parents will generally be agreeing to awards under the guidelines. If they wish to agree to a lower amount or payments not in cash, they must consider the following:

### *FUTURE TANF RECIPIENTS*

If neither party currently receives TANF, they may want to consider the merits of an award that is wholly or partially paid through vendor payments. Recall that, in a state which does **not pass through or disregard** child support payments collected on behalf of TANF families, the family gets no economic benefit when cash support is paid. The state keeps the money and shares it with the federal government to reimburse for assistance provided to the family. However, if money does not go to the family, there is nothing for the government to take. So, a family might pursue an award equal to the guideline amount but with the non-custodial parent meeting the obligation through vendor payments (e.g., making mortgage payments on the house, paying the day care provider directly, paying the utility bills). In this case, the parties would not have to seek and justify a deviation from the child support guidelines. They would, however, have to seek an order that allows payment through a means other than immediate income withholding. However, since they are not TANF-recipients, they do not have to seek permission to use this approach.

In states which **do pass through and disregard** some cash support to families, an order combining cash and vendor payments might be considered. The cash amount could be equal to the state pass-through/disregard and be enforced through income withholding while the rest of the obligation could be met through vendor payments. That would maximize the economic benefit to the family.

However, the parents need to be aware that once the family receives TANF, the state agency may try to modify the order and have all payments made in cash. Also, before using this strategy, readers need to check and be sure that the state TANF rules exclude vendor payments from the definition of income.

### *CURRENT TANF RECIPIENTS*

If the custodial parent is receiving TANF at the time the agreement is negotiated, the state agency should be informed and given the opportunity to appear in the divorce proceeding. As assignee of support, they probably have a right to veto an agreement for less than the guideline amount or one that sets up a vendor payment arrangement (see discussion above). Of course, if the agency does not appear, their rights may be deemed waived.

## PROPERTY DISTRIBUTION

Generally, low income people have few assets to distribute when they divorce. However, there are occasions when a divorcing family does have some assets or property. Since there are no federal rules in this area, readers will have to look to state law to determine how to proceed.

[80] *Id.*

If the state has adopted an assets limit, then the divorce agreement should take this into account and keep the TANF or potential TANF families situation in mind. Readers should also check for any rules the state has on exemptions. For example, if there is a family home and the TANF/potential TANF client would like to keep that home, she/he may be able to do so if the state has no assets test or if it has an assets test but exempts the family home from consideration as an asset. On the other hand, if there is an assets test and no homestead exemption, the client will have to consider whether retaining the home or keeping TANF eligibility is more important.

## IMPORTANT FOR READERS

Putting all of these considerations together is no easy task. Moreover, readers will be dealing with divorce clients in a variety of different situations. To assist readers in charting the proper course, some common situations and their implications are described briefly below.

1. **Custodial parents currently receiving TANF-funded cash assistance who wish to continue receiving such assistance**. These individuals are likely to be those with severe barriers to employment, those with substance abuse issues, or victims of domestic violence. Despite the TANF time limits, they need to continue to receive cash assistance for an extended period so that they can address the problems they face. They need to know that:

   - ❖ they must retain custody of at least one child (or be pregnant) in order to meet that basic TANF eligibility requirement. Sole custody or joint legal custody are the preferable forms of custody. Joint physical custody should be avoided unless the state's TANF program rules recognize such custody arrangements and provide TANF eligibility for families using them.

   - ❖ visitation arrangements can be set as appropriate. Unless the state has law or policy to the contrary, regular contact (including daily contact) between the non-custodial parent and the child is acceptable. However, extended visitation periods should be avoided as they raise problematic TANF eligibility problems.

   - ❖ there is a limit on the amount of income they can have and retain TANF eligibility. Thus, the size of the child support award matters. If the custodial parent has other income (e.g., wages) the combination of that income and child support might make her/his family ineligible for TANF. If the noncustodial parent is affluent, the child support award alone might make the family ineligible. Clients in this situation might want to seek an award of less than the guideline amount. However, this will be difficult given the need for agency approval.

   - ❖ once a child support order is in place, if a collection is made, most or all of the money (depending on state policy) will be retained by the government. In light of this, they might want to pursue an award, equal to the guideline amount, which is a) paid solely through vendor payments; or b) a combination of cash and vendor payments. This is feasible, however, only in states which allow vendor payment and in which the IV-D agency would sign off on such an order.

- ❖ there is (or is not) an asset limit for TANF families. The size of any limit as well as any assets which are not counted toward the limit (exempt assets) need to be considered in dividing the parties property.

2. **Custodial parents currently receiving TANF-funded non-cash assistance who wish to continue receiving such assistance.** These individuals are most likely working parents who are receiving child care or transportation subsidies and/or participating in education or counseling programs, and/or receiving other support services. They want to retain TANF eligibility so they can continue to participate in these programs or receive these services. These individuals need to know:

   - ❖ they must retain custody of at least one child (or be pregnant) in order to meet that basic TANF eligibility requirement. Sole custody or joint legal custody are the preferable forms of custody. Joint physical custody should be avoided unless the state's TANF program rules recognize such custody arrangements and provide TANF eligibility for families using them.

   - ❖ visitation arrangements can be set as appropriate. Unless the state has law or policy to the contrary, regular contact (including daily contact) between the non-custodial parent and the child is acceptable. However, extended visitation periods should be avoided as they raise problematic TANF eligibility problems.

   - ❖ there is a limit on the amount of income they can have and retain TANF eligibility. Thus, the size of the child support award matters. If the custodial parent has other income (e.g., wages) the combination of that income and child support might make her/his family ineligible for TANF. If the noncustodial parent is affluent, the child support award alone might make the family ineligible. Clients in this situation might want to seek an award of less than the guideline amount. However, they will need state approval to do so.

   - ❖ once a child support order is in place, if a collection of current support is made, some of the money will go to the family. As a result, maximizing the size of the cash support award (so long as it does not put them over the income eligibility limit) is desirable.

   - ❖ there is (or is not) an asset limit for TANF families. The size of any limit as well as any assets which are not counted toward the limit (exempt assets) need to be considered in dividing the parties property.

3. **Families receiving assistance from an MOE-funded program who wish to continue receiving such assistance.** These families are likely to be ones which have reached their TANF time limit and still need cash assistance. They may also be families where the parent works part-time or episodically. Some states provide cash assistance to these families out of TANF funds in months where the parent is not working (or working less than a certain number of hours) and provide benefits from MOE funds in months where the family is working at the required level. How to

advise these families depends greatly on the structure of the state program and whether it is a segregated program or a separate state program. Readers will have to consult the income, asset and other eligibility rules of their state program for guidance. The one clear rule is that:

- ❖ they must retain custody of at least one child (or be pregnant) since to qualify as MOE, the state money must be spent on families with children.

4. **Families not receiving TANF-funded assistance who believe they will need to apply in the near future.** These will generally be poor two-parent families that have not been eligible for assistance in the past because the state does not help two parent families or helps only a very discrete set of such families. Splitting up will enable one or both parents to seek TANF-funded assistance. Also in this category are single-parent families whose income has greatly diminished as a result of the family break up. These families may need TANF or MOE-funded assistance while they stabilize economically. These families need to know all of the basic rules in number 1 above. In addition, they need to know:

   - ❖ the distinction between cash assistance and other forms of assistance. Some of these families may be able to get by with wages, child support and non-cash assistance. Since the latter form of assistance is not time-limited this can be a real advantage. Also, since families receiving non-cash assistance get their monthly child support, they can be in a better financial position using this form of aid.

   - ❖ whether the state offers any form of MOE programs that might better suit the family needs or has rules that better fit the families circumstances. For example, a state might have an MOE program with more generous asset limits than its TANF program. This might allow a custodial parent to take assets (e.g., the family home), she/he might not otherwise be able to take in the property settlement.

5. **Families receiving TANF or MOE-funded assistance who wish to leave the program in the near future.** These will generally be families with some income other then public assistance. In a state which offers a single program funded with TANF and MOE money, the family may want to leave the program before their life-time eligibility limit is reached. In that way, they can preserve eligibility for a time in the future when they may be in greater need. These families:

   - ❖ can disregard many of the TANF eligibility, income and asset rules as they plan to leave the program.

   - ❖ will probably want to maximize the amount of cash support they obtain as they will need this money to make up for lost benefits. They may even want to seek an order in excess of the guidelines amount. If they can demonstrate that this is in the best interest of the child, they may be able to obtain such an order.

6. **Couples receiving TANF who anticipate a need for both parents to continue to receive benefits**. A couple who anticipate that each parent will need to continue receiving assistance needs to consider all of the issues described in number 1 above. In addition, they need to consider:

   - ❖ if they have only one child, one of them will have to give up TANF eligibility. In this case, the possibility that some other alternative (General Assistance) is available to one of the parents needs to be explored.

   - ❖ if they have more than one child, they should consider split custody. If one of the children goes to one parent and the other(s) go to the other parent each new household will contain at least one child and thus meet the basic TANF or MOE program requirements.

7. **Non-custodial parents whose children are receiving TANF.** Readers may also be representing non-custodial parents whose ex-spouse and children receive TANF. These parents need to know the following:

   - ❖ in some states, the noncustodial parent is responsible to reimburse the state for the full amount of assistance provided. This obligation is often referred to as "state debt" and exists separate and apart from the child support obligation. In such states, the child support paid will offset (in whole or in part) the state debt. For example, if a family receives $400 a month in TANF and the non-custodial parent pays $200 in child support, he will still owe $200 in state debt. This amount, however, cannot be collected through the child support system. The state will have to collect it through whatever other means it uses to collect money owed to the state.[81]

   - ❖ in other states, the amount of the state debt is limited to the amount of the child support order. If the noncustodial parent pays support regularly and on time each month, he will have no other obligation to the state. Moreover, when his/her family leaves TANF all the support paid will go to them as there will be no arrears owed to the state.

   - ❖ if support is not paid, it becomes arrears and the state will pursue him for the full amount (plus interest in many states). A state can pursue this debt even after the children have reached the age of majority.

   - ❖ there are a number of ways a state can collect arrears. It can attach wages, intercept state and local tax refunds, garnish worker's compensation and social security benefits as well as pensions and the like. Thus, if he has any source of regular income the money will likely be collected.

[81] OCSE Action Transmittal 97-17 p. 23 (October 21, 1997).

# CHAPTER 3

## FOOD STAMPS FOR FAMILIES WITH CHILDREN [82]

### AN OVERVIEW OF THE FOOD STAMP PROGRAM

The Food Stamp Program (FSP) provides assistance to eligible households in purchasing food at authorized stores.[83] The amount of food stamps an eligible family receives depends on its size, income and certain expenses. At one time the program gave people coupons to use in lieu of cash. Today, many states provide FSP participants with debit cards that can be used in the check out line to pay for their food purchases.

Food stamps constitute a major part of the household budget of many families. In 2000, in the continental United States, a family of two may get as much as $238 a month in food stamp benefits, a family of four can receive up to $434, and a family of six might receive $618 a month in assistance. In Alaska, Hawaii, Guam and the Virgin Islands, the amounts are even higher. Thus, obtaining/maintaining food stamp benefits may be a very high priority for clients.

If all of a household's members receive TANF benefits, that household is automatically eligible to participate in the FSP.[84] Thus, if the reader has worked with the family to secure/retain TANF eligibility and benefits, there is generally no reason to be concerned about separate FSP eligibility issues.[85] However, if the family is not participating in a TANF-funded program (or anticipates leaving that program in the near future) it may need food stamps and will want to consider strategies to obtain/retain FSP eligibility.

At the outset, it is worth noting that, if their household meets certain *income, asset and work participation* requirements, single people, childless couples, and families with children are all potentially eligible for food stamps.[86] Thus, upon divorce or separation, a two-parent household that previously received food stamps can become two separate households, each of which can receive a food stamp allotment as long as each continues to meet the basic eligibility rules. Conversely, a two-parent household not previously eligible for the FSP may break into separate households one or both of which are now FSP eligible.

[82] The rules for families containing an elderly, blind or disabled member are somewhat different. Since these families are likely to be singles or childless couples participating in SSI or Social Security, the Food Stamp Program rules for them are contained in Part II of this manual. If the reader is working with a divorcing family which contains both children and an elderly, blind or disabled member, then both of the food stamp sections of this manual need to be consulted. This section is written for the families in which there are no elderly, blind or disabled members.

[83] 7 U.S.C.A. Sections 2011 et. seq. (West 1999).

[84] *Id*. Section 2014(a).

[85] Note that, even if a TANF household has assets above the allowable FSP level, if those assets are under the state TANF limit, the family is still eligible for food stamps. *Id*. Section 2014(j).

[86] *Id*. Section 2012(i).

There are **national rules** in a number of important areas.[87] These are described below. (Because the FSP statute is written in terms of "households", that term will be used in the discussion. The reader should understand that a single person is a household of one, a couple is a household of two, and a parent plus a child or children is a household of two or more depending on the number of children.) The basic federal rules are:

- **income tests**. Households wishing to participate in the FSP must meet both a *gross* income test and a *net* income test. Gross income is all of the household's cash income minus certain exclusions.[88] Gross income must be less than 130% of the federal poverty line.[89] Then, there are a number of deductions which a household is allowed to take to determine its net income. These include a standard deduction, earned income, and a dependant care deduction, as well as a deduction if the family has unusually high housing costs.[90]

  If a household member is legally required to pay child support, the amount paid can also be deducted from gross income.[91] Net income must be less than the poverty line in order for the household to be income eligible.[92]

- **assets.** A household can have up to $2,000 in countable assets and be eligible to participate in the FSP. [93] This includes the value of boats, snowmobiles and airplanes used for recreational purposes. It also includes vacation homes or mobile homes used for vacation purposes. Savings or retirement accounts must also be counted as assets.[94] An automobile which is used to produce income or one used to transport a physically disabled household member is not counted. Any other licensed vehicle is counted but only to the extent that its fair market value exceeds $4650.[95]

- **work requirements.** With some exceptions,[96] unless there is a waiver in place, every physically and mentally fit member of an FSP household who is between the ages of 15 and 60 must register for employment, participate in any offered employment and training program, and accept any job offered which pays at least the minimum

[87] Different rules do apply in Puerto Rico, the Northern Mariana Islands and American Samoa. See, *id*. Sections 2028 and 2033. There are also some states which have obtained waivers of the federal rules, both in the federal statute itself (Minnesota and Washington) and through the food stamp waiver process. See, especially *id*. Section 2035. Thus, readers also need to check to see if there are any special rules operative in their state.
[88] The statute lists a number of income sources that are not included and readers should consult the statute if they are trying to determine exactly what the family's gross income for FSP purposes is. 7 U.S.C.A. Section 2014(d) (West 1999).
[89] *Id*. Section 2014(c)(2).
[90] *Id*. Section 2014(e).
[91] *Id*. Section 2014(e)(4).
[92] *Id*. Section 2014(c)(1).
[93] *Id*. Section 2014(g). See, also 7 C.F.R. Section 273.8(b)(1999).
[94] 7 U.S.C.A. Section 2014(g)(2)(B) (West 1999).
[95] *Id*. Sections 2014(g)(2)(B)(iv) and 2014(g)(2)(C).
[96] Those already working at least 30 hours per week, caring for a child under the age of six or an incapacitated person, attending school at least half-time, or participating in a drug or alcohol treatment program are exempt. *Id*. Section 2015(d)(2). Exception is also made in areas of high unemployment.

wage.[97] If the head of household fails to comply with this rule, he/she is ineligible for assistance. The state has the option to deny assistance to the entire household.[98]

For households composed of single persons or childless couples who are between the ages of 18 and 50, there are an additional set of restrictions related to work. Unless these persons are a) employed at least 20 hours per week; b) participating in a qualified work program; or c) medically certified as physically or mentally unfit for employment, they can receive food stamps for only 3 months in any 36 month period.[99]

There are also a number of important areas in which states have **discretion**. Three of the most important of these are in the child support area. They are:

- **a state option to require *custodial* parents to cooperate with their state child support agency in establishing paternity and obtaining child support**. If a state elects this option, it must provide IV-D services (see Chapter 1) to the family at no cost. Unless the custodial parent can establish good cause for failure to do so, he/she must then cooperate with the child support agency. Failure to do so makes that parent ineligible to participate in the FSP. As a result, the families' benefits will decrease.[100]

- **a state option to require *non-custodial* parents to cooperate with their state child support agency in establishing paternity and paying child support.** If the state chooses this option, it must provide IV-D services to the non-custodial parent at no cost. Thereafter that parent must appear at interviews when requested to do so, provide any requested documents, cooperate with genetic testing, and pay child support as ordered. Failure to do so makes the non-custodial parent ineligible for food stamps.[101]

- **a state option to disqualify *non-custodial* parents who do not pay their child support from participating in the FSP**. If the state chooses this option, it can deny benefits to a non-custodial parent in any month in which that parent is delinquent in his child support payments. This does not apply, however, if a court is allowing the individual to delay payment or if the individual has worked out a repayment plan and is complying with that plan.[102] Moreover, proposed federal rules make it unlikely that a state will actually be able to implement this provision unless its child support system is highly automated.

[97] *Id*. Section 2015(d)(1)(A).
[98] *Id*. Section 2015(d)(1)(B).
[99] *Id*. Section 2015(o)(2). There are some limited exceptions to this rule. See *id*. Sections 2015(o)(4) and 2015(o)(6).
[100] *Id.* Section 2015(l). See, also, proposed federal regulation 7 C.F.R. Section 273.11(q), 64 Fed. Reg. 70949 (December 17, 1999).
[101] 7 U.S.C.A. Section 2015(m) (West 1999). See, also proposed federal regulation 7 C.F.R Section 273.11(r), 64 Fed. Reg. 70951 (December 17, 1999).
[102] 7 U.S.C.A. Section 2015(n) (West 1999). See, also proposed 7 C.F.R. Section 273.11(s), 64 Fed. Reg. 70951 (December 17, 1999).

## THE INTERACTION OF THE FSP AND SOME MAJOR FAMILY LAW ISSUES

There are a number of interactions between the FSP and family law of which the reader needs to be conscious. Five of the most important ones are discussed below.

### PATERNITY

Sometimes when a married couple divorces, questions are raised about the paternity of one or more of their children. Some—but not all states—allow the issue to be raised in the divorce proceedings. If the issue comes up in a state which allows paternity to be raised and one or both parents is receiving food stamps, the first question the reader should ask is whether either parent is subject to a FSP child support cooperation obligation. If one or both parents is subject to such a requirement, then he/she needs to be told that she/he must cooperate and submit to genetic testing if asked to do so.

If the state has not chosen to impose a FSP child support cooperation requirement, the custodial parent may, nonetheless, be receiving services from the state IV-D program (see Chapter 1). If so, that parent should be told of the possibility that the IV-D agency will pay for genetic tests. If that parent is not in the IV-D system, he/she might want to apply for such services so that the cost of initial genetic testing will be born by the state.

### CUSTODY

Between divorcing parents, there are three basic custody arrangements: sole custody in one of the parents, joint legal custody, and joint physical custody. When a family participating in the FSP breaks up, one of the parents can take sole custody of the child(ren) or the parents can agree to have joint legal custody. However, joint legal custody arrangements must be carefully constructed to make clear that a) the child has one home; and b) one designated parent has physical custody of the child and primary responsibility for daily care. That parent will then receive FSP benefits reflecting the fact that the child is a member of his/her household. The other parent may then qualify as a FSP household of one.

Joint physical custody, however, is problematic. The child cannot be a member of two households so someone will have to determine which household gets the child's food stamp allotment. The confusion a state agency may experience when processing food stamp applications in such cases could lead to the denial of food stamps to the children.[103] In addition, such arrangements may lead to conflict between the parents over which one can include the child in his/her food stamp household. Such conflicts should be avoided whenever possible. Joint physical custody arrangements should therefore be avoided.

Another option is split custody. This option is available in families with two or more children: one or more can be placed in the custody of their mother while the others are placed with their father. In that way, two single-parent households are created and each may be FSP eligible. Given the restriction on FSP participation for individuals those between the ages of 18

[103] ***Barnes v. Dept. of Public Welfare***, 426 A. 2nd 1287 (Pa. Comm. Ct. 1981).

and 50 who do not have children in their households discussed above, this may be an option worth considering for many families.

When neither parent is willing or able to assume custodial responsibility for the child, the parents may want to place the child with a third party. That is acceptable and the child can receive benefits as part of that third parties household.[104] However, the parents need to know that, if the state chooses to impose a food stamp cooperation requirement on custodial parent households, it can subject non-parent custodians to the same obligation as it applies to parents. Thus, the person into whose care they entrust their child may be required to pursue them for child support.

## VISITATION

Parents should generally be free to set a visitation schedule appropriate under the circumstances. Liberal visitation, even daily contact between the child and a non-custodial parent, poses no threat to food stamp eligibility. Here the parties have great flexibility.

## CHILD SUPPORT

Usually, the non-custodial parent's support obligation will be set under the state's child support guideline. (See Chapter 1) Child and spousal support payments made in cash directly to a Food Stamp household are considered income for food stamp eligibility purposes.[105] Every dollar of support paid reduces the custodial parent family's coupon allotment by approximately thirty cents.

However, if an order or other legally binding agreement specifies that payments for expenses such as rent, mortgage, car loan, or child care, are to go directly to a third party (a landlord, bank, provider) rather than the custodial parent, such money will not be counted as income and the household's food stamp allotment will not be reduced.[106] Such a direct payment arrangement must be specified in the order or support agreement. In the absence of such a provision, if the non-custodial parent simply pays a third party what is owed, that payment is considered income to the custodial parent.[107] Thus, the parties may want to maximize the food stamp allotment of the custodial parent by agreeing to the guideline amount but specifying that payment will be made directly to a third party and incorporating this agreement in the order.

If, after divorce, both households will need food stamps, this is especially important to consider. Remember that, the non-custodial parent can take a dollar-for-dollar deduction from gross income for all child support paid pursuant to an order. (See discussion above). He can get credit for both cash given to the custodial parent and cash given to others pursuant to the child support order.[108] So by structuring the right mix of cash and non-cash support, both parents can maximize their food stamp allotment. However, it is very important that the support order detail

[104] 7 U.S.C.A. Section 2012(I) (West 1999).
[105] *Id*. Section 2014(d). See, also, 7 C.F.R. Section 273.9(b)(2)(iii) (1999).
[106] *Id*. Section 273.9(c)(1)(vi). Note that the payment must go to a vendor and be used to pay for something of value. The non-custodial parent can't just deposit the money in the custodial parent's bank account, for example.
[107] 7 U.S.C.A. Section 2014(g)(2)(C) (West 1999). See, also,7 C.F.R. Section 273.9(c)(1)(vi)(C) (1999).
[108] *Id*. Section 273.9(d)(7).

the exact arrangements to be followed. There is no deduction from household income, and therefore no increase in the Food Stamp allotment of the non-custodial parent, for support payments that the non-custodial parent is not legally obligated to make.

## DISPOSITION OF MARITAL ASSETS

In the Food Stamp Program, a family can have two thousand dollars ($2,000) worth of nonexempt resources (assets) and still qualify for benefits.[109] Moreover, certain types of property, such as the family's home and surrounding land, are not counted toward this limit.[110] If property was purchased with the intent to build a home thereon, but the home has not been built, the lot is also exempt.[111] Further, for FSP purposes, states are required to exempt household goods and personal effects.[112] They must also exclude the cash value of life insurance policies and one burial plot per household member.[113] Income-producing property that actually produces income consistent with fair market value and tools or machinery essential to the employment or self-employment of a family member are also not to be considered.[114] Farm equipment or land against which a lien has been placed as a result of taking a business loan and which the household is prohibited from selling under the terms of the lien or security agreement will be excluded from consideration as a resource.[115]

Finally, vehicles (e.g., cars, trucks) may be totally excluded, whatever their value, if they are used primarily for income-producing activities, or to transport a physically-disabled household member.[116]

Thus if the divorcing family's assets meet the definition of exempt resources, they are free to allocate them in any way they wish without worrying about their effect on food stamp eligibility. Even if both new households anticipate needing food stamps, there will be no problem.

However, some families may have countable resources and will need to decide how to allocate them. Typically, these will be a car and a bank account.

If a car is not exempt under the provisions described above, its fair market value must be determined. That portion of the fair market value that exceeds $4,650 will be counted as a resource.[117] If the vehicle is not the only car in the household, not used to go to work or training or to seek work, and not exempt for any of the reasons above, the vehicle will also be subject to

[109] 7 U.S.C.A. Section 2014(g) (West Supp. 1999).
[110] 7 C.F.R. Section 273.8(e)(1).
[111] *Id.* Note that the home to be built must be a primary residence, however. The value of land to build a second home is counted.
[112] *Id.* Section 273.8(e)(2).
[113] *Id.*
[114] *Id.* Sections 273.8(e)(4) and (5).
[115] *Id.* Section 273.8(e)(15).
[116] 7 U.S.C.A. Section 2014(g)(2)(C) (West 1999). See, also 7 C.F.R. Section 273.8(h)(1).
[117] 7 U.S.C.A. Section 2014(g)(2)(B)(iv) (West 1999).

an equity test. For cars subjected to an equity test, the greater of the equity value or the fair market value in excess of $4650 will be counted as a resource.[118]

Thus, if there are two vehicles to dispose of, it is possible for the custodial parent to take one and the non-custodial parent to take the other. If the custodial parent receiving one is planning to apply for food stamps, s/he should take the vehicle with a fair market value of less than $4650. If this is not possible, s/he should only consider taking vehicle with a fair market value which is less than $6649 (making the countable amount less than $2,000). However, in order to keep within the resource limit, before accepting such a vehicle, s/he should consider how other resources would be divided.

Some divorcing couples may have a bank account or other liquid assets. These will have to be disposed of. For FSP purposes, these will be considered as a resource.[119] Thus, if their value is less that the $2,000 limit and, when combined with other nonexempt resources, does not put the household over the limit, either party may take them without affecting FSP eligibility. If their value exceeds the resource limit, the parties will have to be careful. The Food Stamp Program has a specific provision prohibiting the transfer of assets to obtain or retain eligibility.[120] Such knowing transfer can bar the household from participating in the program for up to one year. One possible option here is to use the asset to set up an educational trust fund for the children. Trust funds are exempt resources so long as they meet the rather detailed criteria of the regulations.[121] In some situation this may be the desirable solution.

## IMPORTANT FOR READERS

Readers are likely to encounter several different scenarios. Special concerns for each are described below.

1. **Divorcing couples with children currently participating in the FSP.** Since two-parent families are eligible to participate in the FSP, the reader is likely to encounter situations where a two parent FSP family is divorcing. Since they were low income when they were together, it is quite likely that each parent will want to continue receiving food stamp benefits post-divorce. These families should be advised that:

   - ❖ they are generally free to establish custody and visitation arrangements as they see fit. Sole custody, joint legal custody and split custody are all viable options.

   - ❖ child support should be established in an amount to be determined under the state guidelines. Where appropriate, consideration should be given to having some or all of the support paid through vendor payments. This decision should be clearly specified in the order itself.

[118] 7 C.F.R. Section 273.8(h)(5) (1999).
[119] *Id.* Section 273.8(c)(1).
[120] 7 U.S.C.A. Section 2015(h) (West 1999). See, also 7 C.F.R. Section 273.8(i) (1999).
[121] *Id.* Section 273.8(e)(8).

- ❖ since they are already FSP eligible, their non-exempt assets are below the $2,000 limit. Thus, they should be able to distribute their assets between them in any way they please.

- ❖ once the non-custodial parent begins paying monthly support, he/she should be sure to take the child support income deduction. In that way, he/she will receive a larger allotment than if he/she did not claim the deduction.
- ❖ depending on the state, one or both parents may now be required to use the services of the state child support program and to cooperate with that program in making sure that support is paid regularly and on time.

- ❖ depending on the state, the non-custodial parent will be ineligible for food stamp benefits if he/she does not keep current on the support obligation.

2. **Divorcing couples with children not currently participating in the FSP in which the custodial parent anticipates the need to obtain FSP benefits.** A divorcing family's income must now be split between two households. In the majority of cases (85%), the mother takes custody of the children. Too often, her household's income is at or near the poverty line while his income is well above this level. A reverse scenario sometimes plays out when the father takes custody of the children. In either case, a parent and children who previously did not need food stamps now need to participate in the FSP. These parents need to know:

   - ❖ they are generally free to establish custody and visitation arrangements as they see fit. Sole custody, joint legal custody and split custody are all viable options.

   - ❖ child support will be established in an amount to be determined under the state guidelines. Where appropriate, an order exceeding the guidelines amount might be sought. However, if the child support plus other income exceeds 130% of the poverty line, the custodial parent's household will not be FSP eligible. This needs to be considered.

     Whatever the amount, consideration should also be given to having some or all of the support paid through vendor payments. This decision should be clearly specified in the order itself.

   - ❖ the distribution of assets should be carefully considered. First, all exempt assets should be identified. The custodial parent can take these assets and still participate in the FSP. Then, the value of other assets should be determined. She/he may take up to $2,000 worth of non-exempt assets and should feel free to do so.

   - ❖ depending on the state, the custodial parent may be subject to a child support cooperation requirement. If she/he is, then the custodial parent will have to participate in the state's IV-D program.

3. **Divorcing couples with children not currently participating in the FSP in which both parents anticipate the need to obtain FSP benefits.** There are a significant number of two-parent families with moderate incomes who do not participate in the FSP. When these families divorce, both households may need FSP benefits. These parents need to know:

   - ❖ they are generally free to establish custody and visitation arrangements as they see fit. Sole custody, joint legal custody and split custody are all viable options. If the non-custodial parent is between the ages of 18 and 50 and has a checkered work history, the advantages of split custody so that that parent is not limited to 3 months of benefits in every 36 month period, might be considered.

   - ❖ child support will generally be established in an amount to be determined under the state guidelines. Where appropriate, an order providing for vendor payment of some or all of the support should be considered.

   - ❖ the distribution of assets should be carefully thought through. First, all exempt assets should be identified. Both parents can take one or more of these assets and still participate in the FSP. Then, the value of non-exempt assets should be determined. If the amount is less than $4,000, each parent can take a pro rata share or divide them in some other way so that neither household ends up with non-exempt assets in excess of $2,000. Each needs to understand that this approach is necessary in order to obtain FSP benefits. If non-exempt assets exceed $4,000, then, after the split, one of the parents will be ineligible for FSP benefits. To avoid this problem, the parents might wish to use the excess to purchase exempt assets which can be distributed between them. Alternatively, one of the parents might take an asset, sell it, and use the proceeds to pay bills before applying for food stamps. These approaches would be far preferable to a transfer of the asset to a third party.

   - ❖ depending on the state, one or both parents may be required to use the services of the state IV-D program and to cooperate with that program in the collection and payment of support.

# CHAPTER 4

# MEDICAID AND SCHIP

## AN OVERVIEW OF THE MEDICAID PROGRAM

Medicaid[122] provides a range of health care services to eligible adults and children. Those wishing coverage apply for Medicaid and, if found eligible, are issued a Medicaid card. The card functions like an insurance card. When a beneficiary presents his or her Medicaid card to a provider who serves Medicaid patients, the provider furnishes care and bills the Medicaid agency for the cost.

There are a number of different types of people and families who are potentially eligible for Medicaid. Federal law provides a base *income test* at which a qualified individual or family must be served. In some cases, states are free to serve individuals or families with income above this level. The basic categories are:

- most families that currently receive TANF-funded assistance[123] and (for up to one year) a significant number of families leaving TANF due to employment.[124]

- families that are not TANF eligible but would have been eligible for AFDC under the rules in existence on July 16, 1996.[125] (below this will be referred to as the "AFDC rule")

- pregnant women whose family income is less that 133% of the federal poverty line. States have the option of covering pregnant women with family income up to 185% of the poverty line.[126]

- children under the age of six whose family income is less than 133% of the federal poverty line. States have the option of covering young children with family incomes up to 185% of the poverty line.[127]

- children born after September 30, 1993 who are under age 19 and have family incomes beneath 100% of the federal poverty level.[128]

[122] 42 U.S.C.A. Sections 1396 et seq. (West 1992 and West Supp. 2000).
[123] 42 U.S.C.A. Section 1396a(10(A)(i)(I) (West Supp. 2000). However, eligibility is not automatic and these families do have to apply for Medicaid. It does not come automatically as a result of qualifying for TANF-funded assistance.
[124] *Id*. Section 1396r-6.
[125] *Id.* Section 1396u. States can make the rules even more liberal, but they cannot make them more restrictive.
[126] *Id.* Section1396a(a)(10)(A)(i)(III). Note that if the woman is currently childless and unmarried, the poverty level for a family of one applies.
[127] *Id*. Section 1396a(a)(10)(A)(i)(VI).
[128] *Id*. Section 1396a(a)(10)(A)(i)(VII).

- ❖ low income families that need help paying their medical bills can also be covered at state option.[129] These medically needy individuals must spend-down to the Medically Needy Income Level (133% of the highest TANF payment rates for families of the same size) by incurring medical expenses equal to the excess in order to be eligible for Medicaid.[130]

These coverage options are important for three reasons. *First*, if the family's post-divorce income will be below the poverty level but too high for TANF, the custodial parent and the children may still be eligible for Medicaid under the AFDC rules. *Second,* if the AFDC rule is not met, then—depending on their age--some or all of the children may be eligible for Medicaid coverage. *Third*, readers may want to inform divorcing low-income couples that some benefits may be available to them if they stay together. For example, parents may be divorcing because they think it is the only way to get medical care for a chronically-ill child – and would stay together if they knew their child could still get Medicaid.

In addition to income, states can look at a family's *assets.* Whether to do so and what to count are generally matters of state discretion.[131] The only federal limits are that the resource standard for a pregnant woman may not be more stringent that the corresponding SSI resource standard, while the resource standard for a child may not be more stringent than the state's TANF standard.[132] *Readers should become familiar with state law on this issue, in particular to determine whether there are resource limitations for Medicaid purposes, which will be relevant to a divorcing couple*.

Medicaid families are required to *assign* their medical support rights to the state.[133] Unless he/she can establish good cause for failing to do so, the custodial parent must also *cooperate* with the state IV-D agency to establish paternity and enforce the children's medical support rights.[134] Failure to do so makes the custodial parent ineligible for Medicaid, unless she is pregnant.[135] Pregnant women are automatically exempt from the child support cooperation requirement.[136]

One important feature of the Medicaid program is that participants can have dual coverage. That is they can have private coverage and participate in Medicaid. Thus, if a parent has private insurance available but it does not cover all of the children's needs, then the private coverage can pay for covered services and the Medicaid program can pay for those services not covered by the private plan.[137]

[129] *Id.* Section 1396a(a)(10)(A)(ii).
[130] *Id.* Section 1396b(f)(1)(B)(i).
[131] *Id.* Section 1396a(l)(3)(A).
[132] *Id.* Sections 1396a(1)(3)(B) & (C).
[133] 42 U.S.C.A. Section 1396k(a)(1)(A) (West 1992).
[134] *Id.* Section 1396k(a)(1)(C), See, also 42 U.S.C.A. Section 654(29) (West Supp. 2000).
[135] 42 U.S.C.A. Section 1396k(a)(1) (West 1992).
[136] *Id.* Section 1396k(a)(1)(B).
[137] That is the reason that Medicaid has an assignment provision and requires states to pursue other coverage as discussed above.

## AN OVERVIEW OF THE SCHIP PROGRAM

SCHIP is a new program which provides health care coverage to children who are not eligible for Medicaid and do not have access to private health care coverage.[138] The federal government provides money to states to set up programs for these children. A state can use these funds to expand its Medicaid program, set up a separate program, or do both. Within broad limits, states set income and asset rules for participating families. *The reader needs to consult state law and policy to determine the type of coverage and eligibility requirements applicable in the state for children to be SCHIP eligible.*

In addition to the eligibility rules, there are two important distinctions between Medicaid and SCHIP. *First*, federal law does not require SCHIP participants to assign their medical support rights to the state or to cooperate with the state in enforcing those rights. States are free to impose a cooperation requirement in their program, and a few have done so. In most states, however, the family is not required to cooperate with the IV-D agency or use its services. *The reader needs to check state policy on this.*

*Second*, federal law does not allow dual participation in SCHIP and private coverage. If a child has private coverage as defined in the Health Insurance Portability and Accountability Act (HIPPA), he/she cannot participate in SCHIP whether the program is a Medicaid expansion or a separate state program. So, if either parent has access to limited or expensive dependents coverage, and this coverage is provided to the child, then the child is ineligible for SCHIP. If the parents drop the coverage, the child may still not be eligible (or may have to wait several months to obtain SCHIP coverage).[139]

## THE ROLE OF THE IV-D AGENCY IN MEDICAID CASES

If a family is currently receiving Medicaid, they will automatically receive services from the state IV-D agency.[140] That agency will try to determine whether the non-custodial parent has access to private health care coverage through his/her employment or union membership. If he/she does, the child support agency will likely seek to have the support order issued or modified with a requirement that the parent put his/her children on the coverage.[141] If there are premium costs associated with the coverage, the amount of cash support may be diminished so that the combination of cash support and health care premiums does not exceed the non-custodial parent's ability to pay. *This issue is generally dealt with in the state's child support guidelines so the reader should consult these to determine the potential impact.*

If the non-custodial parent is ordered to provide private coverage and fails to do so, the IV-D agency will enforce the order by communicating directly with the employer, requiring the

[138] Pub. Law 105-33 (the Balanced Budget Act of 1997), Section 4901, creating Title 21 of the Social Security Act. The original legislation has been amended twice. The full text of the statute can be found at the HHS web site www.hcfa.gov/init.

[139] Whether the child has to wait may depend in part on the structure of the state SCHIP program. If it is a Medicaid expansion, then there should be no waiting period. However, if it is a separate SCHIP program, then there likely will be some waiting period.

[140] 42 U.S.C.A. Section 654(4)(A)(i)(III) (West Supp 2000).

[141] 42 U.S.C.A. Section 652(f) (West Supp. 2000). See, also 45 C.F.R. Sections 302.80(b) and 303.31 (1999).

child to be placed in coverage, and ordering the employer to deduct any premiums from the non-custodial parents income.[142] All states now have laws which prohibit employers and insurer's from denying coverage to a child under the parent's plan on the basis that the child was born out-of-wedlock, was not claimed on the parent's federal income tax return, or does not reside with the parent or in the insurer's service area.[143] In addition, once the child is enrolled, the insurer or employer may not dis-enroll the child unless a) it has written evidence that the support order is no longer in effect; or b) it has written evidence that the child is enrolled in comparable coverage as of the date of dis-enrollment; or the c) employer has eliminated family health coverage for all its employees.[144] In addition, the insurer must provide the custodial parent with the information necessary to obtain benefits, must permit the custodial parent or the provider to submit claims without the approval of the non-custodial parent, and must make payment on claims directly to the custodial parent, provider, or state agency.[145]

When neither party has access to private insurance the IV-D agency will seek to have language included in the order which requires the non-custodial parent to provide such coverage if and when it becomes available to him/her.[146] This way, the parties later won't have to seek modification of the order to cover the issue.

## THE ROLE OF THE IV-D AGENCY IN SCHIP CASES

Since most states do not impose a child support cooperation requirement on families participating in SCHIP, the IV-D agency may have no involvement in a particular case. Alternatively, the custodial parent may have applied for IV-D services to pursue child support for the children. In that case, the IV-D agency will seek to establish a support order that includes provision for the child's health care needs as described above. If an order is already in place and does not address the health care needs of the children, the agency may seek to modify the order so that health care is addressed. If private insurance coverage is available, the agency will seek to enroll the children in that coverage. If there is an order for private coverage and the non-custodial parent has not complied with it, then the agency will enforce the order. The same enforcement mechanisms available to Medicaid families (discussed above) will be available to SCHIP families.

*Note that, if the agency successfully enrolls the child in private coverage, the child will then be ineligible for SCHIP*. If the private coverage is not as comprehensive as that available through SCHIP, and the child needs more comprehensive services, this can be a problem. A problem can also arise if the services available though the private coverage are not geographically accessible to the child. For example, if the non-custodial parent has HMO coverage in California and the child lives in Massachusetts, then (unless the HMO has a cooperative agreement with an HMO close to the child), the child will not be able to obtain most services. Some parents may wish to avoid using the IV-D system for this reason.

[142] *Id.* Section 303.31(b)(7). See, also 42 U.S.C.A. Sections 1396g-1(a)(2)(B) and 1396g-1(a)(3)(D) (West Supp. 2000).
[143] *Id*. Section 1396g-1(a)(1).
[144] *Id*. Section 1396g-1(a)(2)(C).
[145] *Id*. Section 1396g-1(a)(5).
[146] 45 C.F.R. Section 303.31(b)(2) (1999).

## IMPORTANT FOR READERS

It is very important for the reader to check with the parties to see if the family or any of its members currently participate in Medicaid or SCHIP. If not, does the family anticipate the need to do so post divorce?

In addition, the reader should ascertain whether the non-custodial parent has access to dependent's health care coverage through his/her employment or some other group policy. It may also be useful to know whether the custodial parent has access to dependent's health care coverage. Depending on the answers to these questions, the reader may be faced with one of the following scenarios:

1. **The entire family currently participates in the Medicaid program.** In this case, the status, income, and assets tests have already been met. If one of the parents has access to private insurance, the IV-D agency should already have addressed this issue. Hence, there are no basic income or asset questions to address. The one issue that might arise is that both parents wish to remain in the Medicaid program. This may be impossible if one parent has custody of all the children. The custodial parent will very likely continue to qualify under whatever rule gives the family its current eligibility (e.g., the AFDC rule discussed above, the post-TANF rule, the medically needy program). However, unless she is a pregnant female or under age 19, there is no way that the non-custodial parent can qualify for Medicaid. Given this, if appropriate, the parents may want to consider split custody. If each post-divorce household contains children, the chances of finding a way to retain Medicaid eligibility are greater. For example, if the family has a child with serious medical problems and a healthy child, if one parent takes custody of the sick child, that parent and child might qualify as medically needy. The other parent and the well child might qualify under the AFDC rule.

2. **The family does not participate in the Medicaid program but one or more of the children do**. In this situation, one or more of the children in the family qualifies for Medicaid by virtue of age and family income. In this situation, the family also meets the state's asset test (if any). In addition, the IV-D agency should have already explored the availability of private health care coverage through one of the parents. In this scenario, it is most likely that the child or children will continue to be Medicaid eligible post-divorce. However:

   - there may be an opportunity to provide Medicaid coverage to the custodial parent. That parent may not have qualified when the family was together, but she/he might be eligible post-divorce if his/her income is reduced enough to make the entire household eligible under the AFDC rule. Thus, the reader might want to look at the conditions for AFDC eligibility and construct the child support and asset distribution accordingly.

   - there may be an opportunity to make another child or children in the household Medicaid eligible. Even if the custodial parent can't be covered, it may be that, by

properly structuring an agreement, a non-Medicaid child in the household can now be covered. For example, assume the family's current income is 110 percent of poverty. The four-year old in the household is covered by Medicaid because family income is below 133 percent of poverty. However, the eight year old in the household is not covered because the state only covers those children in families with income below 100 percent of poverty. If the child support coupled with other custodial parent family income is reduced below 100 percent of poverty, the eight year old will now qualify for coverage. The four year old will also be eligible for continuing coverage once he reaches age 6. Thus, the child support amount should be considered and–if it would put the family slightly over 100 percent of poverty—an amount lower than the guideline might be sought. The slight diminution in cash may be worth obtaining health care coverage for both children.

3. **The children currently participate in the SCHIP program.** Since they already qualify for SCHIP, it is likely that they will continue to be eligible post-divorce. However, the reader should check the state's income and assets rules (if any) for SCHIP eligibility to make sure that nothing in the divorce agreement makes the children ineligible. The major issue to watch for here is the situation where the non-custodial parent has access to dependent's coverage and the coverage is either inadequate or inaccessible to the child. Obtaining this coverage is not in the child's best interest as it would make him/her ineligible for SCHIP.

   - ❖ if the family is not using the IV-D system and is not required to do so by the SCHIP rules, the custodial parent should be advised of the potential hazard of using the IV-D system. Recall, that IV-D is required to pursue dependant's coverage available to the non-custodial parent and enforce an order requiring such coverage to be provided. As soon as the child is enrolled in the private coverage, he/she will no longer be SCHIP eligible. So long as the family stays out of the IV-D system, this problem will not arise.

   - ❖ if the custodial parent is already using the IV-D system and is not required to do so, the issue should be explained so that the custodial parent can decide whether he/she wishes to remain in the system.

4. **The children do not currently participate in SCHIP and they do not have access to private coverage.** If the non-custodial parent has access to adequate, accessible, and affordable coverage and has failed to put the children on this coverage, then the reader should seek to establish an order requiring that such coverage be provided. Then, either the reader or the IV-D agency should enforce the order**.**

However, if the non-custodial parent cannot provide such coverage, the reader should consider structuring the divorce agreement so that the children can be covered by SCHIP. For this reason, the reader needs to become familiar with the state's income and assets rules for the SCHIP program. By drafting the agreement in light of these rules, the reader can determine the amount of child support and distribution of assets which is most likely to allow the children to be eligible for this coverage.

# PART II: ISSUES FOR CHILDLESS COUPLES

# CHAPTER 5

## SUPPLEMENTAL SECURITY INCOME (SSI)

### OVERVIEW OF THE PROGRAM

The SSI program provides cash income to persons who are 65 years of age or older, or who are disabled or blind. These persons must also have very low income and very few resources.[147] Many states supplement this federal benefit for some SSI recipients. SSI recipients also automatically qualify for Medicaid[148] and Food Stamps.[149] Thus structuring an agreement that allows one or both ex-spouses to qualify for SSI also guarantees them access to health care and assistance in meeting their nutritional needs.

### MARITAL STATUS ISSUES

If one or both members of a divorcing couple receive SSI, they should notify the Social Security Administration (SSA) within ten days after the end of the month in which one spouse moves out of the family home.[150] If the couple received benefits based on the age or disability of both spouses, each can continue to receive individual SSI benefits as long as all other eligibility criteria are met. They can also each receive Medicaid and Food Stamps. The amount of SSI and Food Stamps will be based on the fact they are now single individuals.

However, if one spouse moves into the household of another person, his or her newly calculated SSI benefits will be reduced by one-third if the person with whom s/he lives provides food and shelter.[151] For example, suppose a couple was receiving $1,000 per month in SSI because the husband was aged and the wife was blind. They separate, notify SSA, and now each receive $600 per month. The wife then moves in with an adult daughter. Her SSI benefit would then be $400 per month ($600-$200).

This reduction rule does not apply if the SSI recipient has an ownership interest in the home, pays rent or makes pro rata contributions to meet household expenses. It also does not apply if all members of the household in which the SSI recipient lives receive public assistance.[152]

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[147] Eligibility requirements and program guidelines are codified at 42 U.S.C Sections 1382(a) et. seq and 20 C.F.R Section 416 et. seq. (1999)
[148] 42 U.S.C.A. Section 1396a(a)(10)(i)(II) (West Supp. 2000).
[149] 7 U.S.C.A. Section 2014(a) (West 1999).
[150] 20 C.F.R. Sections 416.708(b) & 416.714(a) (1999). If they live together until divorce, they must report the divorce within ten days of it becoming final. *See* 20 C.F.R. Sections 416.714(g) & 416.714(a)(1) (1999).
[151] *Id.* Sections 416.1130 & 416.1131.
[152] *Id.* Section 416.1132(c).

## IMPORTANT FOR READERS

1. Members of SSI households must report separation or divorce to the Social Security Administration within ten days of the end of the month in which the separation or divorce occurs.

2. Choosing to live in the house of another after the divorce or separation results in a one-third reduction in SSI payments unless the recipient has an ownership interest in the home, pays rent or makes pro rata contributions to meet household expenses. Readers need to be sure the divorcing parties understand this and make judgments about their living arrangements accordingly.

### INCOME ISSUES

If a person has countable income in excess of the SSI benefit, he or she is ineligible for SSI assistance.[153] Cash spousal support payments are considered to be countable income for purposes of SSI eligibility determination and grant calculation.[154] If support payments are irregular and less that $20 per month, however, they will not be counted as income.[155]

In-kind support and vendor payments are also countable income in the SSI system.[156] For example, if the parties agree that a spouse will make in-kind spousal support payments in the form of monthly food purchases, the presumed value of such purchases (equal to one-third of the federal SSI benefit) will be counted as income unless the recipient can show that the actual value is lower.[157] Likewise, if one ex-spouse agreed to pay the monthly mortgage, that would also be treated as income.

However, certain types of medical support are not counted. These include:

1. Medical care and services that are provided free of charge or are paid for directly to the provider by someone else;[158]

2. Cash provided under a health insurance policy as payment for purchases already made. This would occur, for example, when an SSI claimant paid for prescription drugs and is then reimbursed for their cost by the health insurance company;[159]

3. Direct payment of medical insurance premiums by anyone on the recipient's behalf.[160]

[153] *Id*. Section 416.202(c).
[154] 42 U.S.C. Section 1381a(a)(2)(E). See, also 20 C.F.R. Section 416.1121(b) (1999).
[155] Id. Section 416.1124(c)(6).
[156] *Id*. Section 416.1102.
[157] *Id*. Section 416.1140.
[158] *Id*. Section 416.1103(a)(1).
[159] *Id*. Section 416.1103(a)(5).
[160] *Id*. Section 416.1103(a)(6).

It would then be advantageous for a support agreement involving a spouse who receives or is planning to apply for SSI to include payment by the other spouse of private health insurance premiums, or to specify that the other spouse will pay a certain monthly or annual amount to a medical care provider for services needed by the disabled former spouse. This type of support would not be counted as income and would guarantee the disabled former spouse access to health services not covered by Medicaid. Any other form of support would be counted.

## IMPORTANT FOR READERS

1. Cash spousal support payments are counted as income under the SSI eligibility system and will reduce the grant amount dollar-for-dollar. In-kind income and vendor payments by a former spouse will also be treated as income.

2. Medical care or services paid for by another, insurance reimbursement for medical expenses, and medical insurance premiums paid by another do not count as income.

3. A support agreement could provide valuable exempt income to the SSI applicant/recipient in the form of payment for medical services or insurance premiums after divorce. All other forms of income will be counted and used to reduce the SSI grant. The reader needs to be sure the parties are aware of this.

### RESOURCE RESTRICTIONS

An SSI recipient can have up to $2,000 in countable resources.[161] Countable resources include cash and other liquid assets. They also include non-exempt real and personal property that an individual owns and could convert to cash.[162]

Countable resources are classified as liquid or non-liquid. Liquid resources are those which can be converted to cash within 20 days. They include stocks, bonds, life insurance, bank accounts and certificates of deposit. Non-liquid resources cannot be converted to cash as quickly and include non-exempt household goods and automobiles, machinery and livestock.[163]

Some resources are not counted for purposes of SSI eligibility. They include:

- The family home. If the home is sold, the proceeds from the sale are not counted if the money is used to purchase another home within three months;[164]

- One vehicle, if its' fair market value is less than $4,500. A vehicle will also be excluded from consideration, regardless of its value, if it is necessary for the employment of an eligible individual or a member of that individual's household, if it is used for transportation to treatment of a specific or regular medical problem, or if it has been modified by or for transportation of handicapped individual;[165]

[161] *Id*. Section 416.1205(c).
[162] *Id*. Sections 416.1201(b) & (c).
[163] *Id*.
[164] *Id*. Section 416.1212.
[165] *Id*. Section 416.1218.

- Household goods and personal effects with an equity of less than $2,000;[166]
- Property essential to self-support if its equity is less than $6,000;[167]
- Life insurance with a cash surrender value of less than $1,500;[168]
- Burial spaces for a recipient and immediate family members and funds up to $1,500 set aside for burial expenses;[169]
- Such resources as are necessary for a blind or disabled person to engage in an approved plan for achieving self-support;[170] and
- Cash or an in-kind replacement received from any source to repair or replace an excluded resource that was lost, damaged or stolen will be excluded if used for that purpose within nine months of receipt.[171]

## IMPORTANT FOR READERS

1. The elderly in particular may have accumulated assets over their lifetime. In divorce these assets will have to be divided.
2. SSI recipients can have very few countable assets. Therefore, it is important to maximize the non-countable assets going to the SSI applicant/recipient ex-spouse.
3. The property described above is exempt and therefore can be taken by the SSI or potential SSI spouse without defeating SSI eligibility.

## CONDITIONAL SSI

Conditional SSI payments can be made to a person who meets all eligibility criteria but has non-liquid resources that are worth more than the resource limits. To receive conditional payments, a claimant agrees to sell the non-liquid property within a prescribed grace period and repay the government for the payments when the excess resources are sold. However, no conditional payments can be made if the claimant has liquid resources with a value that exceeds one-fourth of the applicable annual federal benefit. For example, if a 67-year old divorced with no income has $600 in a bank account pursuant to the divorce agreement, and takes title to the family boat which is worth $4,000, she can receive SSI if she agrees to sell the boat and repay the SSI upon its sale.[172]

[166] *Id*. Section 416.1216(b).
[167] *Id*. Section 416.1220.
[168] *Id*. Section 416.1230.
[169] *Id*. Section 416.1231.
[170] *Id*. Section 416.1225.
[171] *Id*. Section 416.1232.
[172] *Id.* Section 416.1240(a).

There is one exception to this rule. Excess real property will not be counted for conditional benefit purposes if it is jointly owned and sale of the property by the SSI applicant/recipient would cause undue hardship to the other because of loss of housing.[173] The property must serve as the principal place of residence for the other owner and its loss must mean no other housing is readily available to the displaced owner/occupant.[174] For example, if the ex-spouses retain title to the family home as joint tenants and the SSI-eligible husband moves out leaving the ex-wife the right to live in the house, the ex-husband will not be required to sell the house in order to receive conditional SSI.

Excess real property will also not be counted toward a recipient's resource limit for conditional eligibility purposes if the recipient's reasonable efforts to sell it are unsuccessful during the nine-month conditional benefit period.[175] Reasonable efforts to sell the property during the nine-month conditional benefit period include the following:

1. Except for gaps of no more than one week, an individual must attempt to sell the property by listing it with a real estate agent or by undertaking to sell it himself;[176]

2. Within 30 days of signing a conditional benefits agreement, and absent good cause for not doing so, the individual must list the property with an agent or begin to advertise it in appropriate local media, place a "For Sale" sign on the property or otherwise show the property to interest parties on a continual basis;[177]

3. The individual must accept any reasonable offer to buy and has the burden of demonstrating that an offer was rejected because it was not reasonable.[178]

**TRANSFER OF RESOURCES**

If a claimant gives away or sells a countable resource for less than fair market value, the difference between the ascribed fair market value and the amount of compensation received is considered to be a resource.[179] This amount is referred to as uncompensated value and counts toward the resource limit for a period of 24 months from the date of transfer.[180] The Social Security Administration presumes that the resource was transferred to establish SSI eligibility unless the claimant can furnish convincing evidence of a different purpose for the transfer.[181] This rule applies to transfers made even before the date of application. In determining eligibility, the administering agency will examine transfers in which the claimant was involved in the two years preceeding the date of application for benefits.

[173] *Id*. Section 416.1245(a).
[174] *Id*.
[175] *Id*. Section 416.1245(b)(1).
[176] *Id*. Section 416.1245(b)(3)(i).
[177] *Id*. Section 416.1245(b)(3)(ii).
[178] *Id*. Section 416.1245(b)(3)(iii).
[179] *Id*. Section 416.1246(a)(1).
[180] *Id*.
[181] *Id*. Section 416.1246(e).

However, if counting the uncompensated value of the asset will result in an undue hardship this rule will not apply.[182] Undue hardship exists when: (a) an individual alleges that failure to receive SSI benefits would deprive the individual of food and shelter; and (b) the monthly federal benefit (plus the federally-administered state supplementary benefit level) exceeds the sum of the individual's monthly income and resources.[183]

These rules should make a divorcing spouse who will need SSI wary of transferring property to the other spouse unless there is a clear *quid pro quo* in the divorce agreement.

**IMPORTANT FOR READERS**

1. Certain resource, such as the family home and a car with a value of less than $4,500 will not be counted toward the resource limit. A settlement agreement should maximize the amount of these kinds of resources going to the SSI applicant/recipient spouse.

2. The SSI applicant/recipient spouse can also have countable resources of up to $2,000 and continue to qualify for SSI. If s/he takes more than $2,000 worth of countable resources in a divorce agreement, s/he will not be SSI-eligible.

3. Non-liquid resources which recipients are not able to sell within the prescribed grace period will not be counted toward the resource limit if the recipient has made reasonable, good faith efforts to sell the property. However, the rules are so complicated that, if possible, the SSI spouse should avoid excess resources.

4. Resources given away or sold for less than the value assessed by the Social Security Administration are presumed to have been transferred to obtain SSI eligibility. The difference in value will be counted toward the resource limit for a period of 24 months unless such counting would result in undue hardship to the recipient. Thus, the settlement agreement should clearly spell out the reasons certain property is being transferred so that no questions can be raised.

[182] *Id*. Section 416.1246(d)(2).
[183] *Id*. Section 1246(d)(3).

# CHAPTER 6

# SOCIAL SECURITY BENEFITS

## OVERVIEW OF THE PROGRAM

Unlike any of the benefit programs previously described, Old Age Survivors Disability Insurance (commonly called Social Security) is a contributory insurance program rather than a needs-based entitlement system. In order to qualify for Social Security benefits, an elderly or disabled person must have worked and have had the appropriate amount of Social Security deductions withdrawn from earnings during the course of employment.[184] An examination of the duration and amount of these deductions will produce a determination as to whether an applicant is currently or fully insured and therefore eligible for benefits. Fully insured people who have reached the age of 62 or who, due to a physical or mental disability, are no longer able to engage in substantial gainful activity, qualify for monthly benefits which are computed on the basis of past earnings and Social Security contributions. Income and resources do no affect eligibility. Therefore, unlike in any of the programs discussed in other chapters, the divorcing parties here need not worry about the amount of cash support (alimony) ordered or resource issues. There are some other issues they do need to be aware of, however.

## HOW A DIVORCED SPOUSE QUALIFIES FOR SOCIAL SECURITY AS A BENEFICIARY OF THEIR FORMER SPOUSE'S INSURANCE

If one of the divorcing spouses is eligible for Social Security benefits that person's ex-spouse may also be eligible for Social Security.[185] Federal regulations contain specific instructions as to who qualifies for these ex-spouse's benefits.[186] To receive the wife's or husband's share of such benefits, the regulations require that the ex-spouse:

1. Is the insured's divorced wife or husband;

2. Was validly married to the insured under state law;

3. Was married to the insured for at least ten years before the divorce became final;

4. Is not married;

5. Is 62 years of age or older; and

6. Is not entitled to Social Security benefits greater than the ex-spouses benefit, based upon his or her own earnings history.

[184] 42 U.S.C. Section 401 et. seq.
[185] *Id*. Section 402(b)(1).
[186] 20 C.F.R. Section 404.331 (1999).

A divorced spouse's benefits will continue as long as the insured remains alive and entitled to benefits. The ex-spouse's monthly benefit is equal to half of the insured former spouse's primary insurance amount.[187]

## ENFORCEMENT OF A CHILD SUPPORT OR ALIMONY AWARD AGAINST AN OASDI RECIPIENT

If a recipient has a legal obligation to provide spousal support, his or her benefits are subject to garnishment or other legal processes designed to satisfy that support obligation.[188] The parties might want to consider a voluntary agreement to have the spousal support withheld as to facilitate payment.

## IMPORTANT FOR READERS

1. A spouse age 62 or older can receive the husband's or wife's portion of OASDI benefits after divorce if s/he is not eligible for benefits in his/her own right. However, s/he must have been married to the insured for at least ten years prior to the divorce. If the reader is dealing with an older couple who are seeking a divorce that would become final shortly before the ten years elapse, the reader should advise them of the OASDI marital duration requirement. Spousal support should be increased to reflect the fact that Social Security benefits will not be available or the divorce should be delayed until the ten-year duration requirement is met.

2. Alimony obligations can be enforced through attachment or garnishment of OASDI benefits. The parties should be made aware of this and the advisability of a withholding agreement should be explored.

[187] *Id.* Section 404.333.

[188] 42 U.S.C. A. Section 659(a)(1) (West Supp. 2000). Note that this provision overrides the anti-garnishment provision otherwise applicable to social security benefits. Id. Section 407.

# CHAPTER 7

## FOOD STAMPS FOR FAMILIES WITHOUT CHILDREN[189]

### AN OVERVIEW OF THE FOOD STAMP PROGRAM

The Food Stamp Program (FSP) provides assistance to eligible households in purchasing food at authorized stores.[190] To be eligible, a household must meet certain *income, asset, and work participation* requirements.[191] The amount of food stamps an eligible household receives depends on its size, income and deductions. At one time the program gave people coupons to use in lieu of cash. Today, many states provide FSP participants with debit cards which they use in the check out line to pay for their food purchases. In a few states, the elderly and SSI recipients actually get their benefits in cash.

A FSP household can be a single person or a childless couple. A single person can receive up to $130 in benefits per month in the continental United States while a couple can receive up to $238 in assistance. Upon divorce a two person household that previously received Food Stamps can become two separate households, each of which can receive a food stamp allotment as long as each continues to meet the basic eligibility rules. Conversely, a two-person household not previously eligible for Food Stamps may break into separate households one or both of which are now FSP eligible.

At the outset, it should be noted that SSI recipients are automatically eligible for food stamps.[192] If the reader has worked with a couple to insure SSI coverage, then food stamps will also be available. Other singles and childless couples are eligible only if they meet program rules in a number of important areas.[193] The rules for elderly and disabled persons are somewhat different than those applicable to other households. Since the focus of this part of the manual is on the childless, elderly and disabled, these rules will be described below.

- **income tests**. Households containing an elderly or disabled member that wish to participate in the FSP must meet net income at or below the poverty line.[194] To determine net income for such households, start with household's cash income. Then subtract the applicable exclusions[195] and deductions.[196] Of particular importance to the elderly and disabled are the excess medical and excess shelter deductions.[197]

[189] This chapter will address issues relevant to those who have no minor children. If a single person or couple has minor children, then Chapter 3 of this manual should be consulted.
[190] 7 U.S.C.A. Sections 2011 et. seq. (West 1999).
[191] *Id*. Section 2012(i).
[192] *Id.* Section 2014(a)
[193] Different rules do apply in Puerto Rico, the Northern Mariana Islands and American Samoa. See, *id*. Sections 2028 and 2033.
[194] *Id.* Section 2014(c)(1).
[195] The statute lists a number of income sources that are not included and readers should consult the statute if they are trying to determine exactly what the family's net income for FSP purposes is. *Id*. Section 2014(d).
[196] *Id.* Section 2014(e).
[197] *Id*.

- **assets.** If a member of the household is 60 or over, then the household can have up to $3,000 in countable assets.[198] Countable assets include the value of boats, snowmobiles and airplanes used for recreational purposes. They also include vacation homes or mobile homes used for vacation purposes. Savings or retirement accounts must also be counted as assets.[199] An automobile which is used to produce income or one used to transport a physically disabled household member is not counted. Any other licensed vehicle is counted but only to the extent that its fair market value exceeds a certain limit.[200]

- **work requirements.** Many FSP program participants are subject to work requirements. However, those 60 or over and those who are not physically or mentally fit are exempt from such requirements.[201] In addition, some FSP program participants can only receive benefits for 3 out of every 36 months. Those over age 50 or certified to be medically or physically unfit are exempt from this limitation as well.[202]

## THE INTERACTION OF THE FSP AND SOME MAJOR FAMILY LAW ISSUES

There are a number of interactions between the FSP and family law which the reader needs to be conscious of. Three of the most important are discussed below.

### SPOUSAL SUPPORT

At its discretion, a court may order one party to pay the other spousal support. The rules on this and the amounts are a matter of state law and practice and the reader needs to familiarize him/her self with the laws of the state.

If spousal support is ordered, it will generally be deemed income to the recipient.[203] However, if an order or other legally binding agreement specifies that payments for expenses such as rent, the mortgage, or a car loan, are to go directly to a third party (a landlord or bank, rather than the ex-spouse, such money will not be counted as income and the ex-spouse's food stamp allotment will not be reduced.[204] Such a direct payment arrangement must be specified in the order or support agreement. In the absence of such a provision, if the paying ex-spouse simply pays a third party what is owed, that payment is considered income to the recipient spouse's household.[205]

[198] *Id*. Section 2014(g)(1).
[199] *Id*. Section 2014(g)(2)(B).
[200] *Id*. Sections 2014(g)(2)(B)(iv) and 2014(g)(2)(C).
[201] *Id.* Section 2015(d)(2)(1)(A).
[202] *Id*. Section 2015(o)(3).
[203] Note that spousal support paid under a court order is not deductible from the income of the person who pays it. In this regard, it is different from child support.
[204] 7 C.F.R. Section 273.9(c)(1)(vi) (1999).
[205] 7 U.S.C.A. Section 2014(g)(2)(C) (West 1999). See, also, 7 C.F.R. Section 273.9(c)(1)(vi)(C) (1999).

## DISPOSITION OF MARITAL ASSETS

If a food stamp household contains a person over age 60, the household can have three thousand dollars ($3,000) worth of nonexempt resources (assets) and still qualify for benefits.[206] Certain types of property, such as the family's home and surrounding land, are not counted toward this limit.[207] If property was purchased with the intent to build a home thereon, but the home has not been built, the lot is also exempt.[208] Further, for FSP purposes, states are required to exempt household goods and personal effects.[209] They must also exclude the cash value of life insurance policies and one burial plot per household member.[210] Income-producing property that actually produces income consistent with fair market value and tools or machinery essential to the employment or self-employment of a family member are also not to be considered.[211] Farm equipment or land against which a lien has been placed as a result of taking a business loan and which the household is prohibited from selling under the terms of the lien or security agreement will be excluded from consideration as a resource.[212] Finally, vehicles (e.g., cars, trucks) may be totally excluded, whatever their value, if they are used primarily for income-producing activities, or to transport a physically-disabled household member.[213] Thus if the divorcing family's assets are all exempt, they are free to allocate them in any way they wish without worrying about their effect on FSP eligibility.

However, some families may have non-exempt resources and will need to decide how to allocate them. Typically, these will be a car and a bank account.

If a car is not exempt under the provisions described above, its fair market value must be determined. That portion of the fair market value that exceeds $4,650 will be counted as a resource.[214] If the vehicle is not the only car in the household, not used to go to work or training or to seek work, and not exempt for any of the reasons above, the vehicle will also be subject to an equity test. For cars subjected to an equity test, the greater of the equity value or the fair market value will be counted as an asset.[215]

Thus, if there are two vehicles to dispose of, it is possible for the ex-husband to take one and the ex-wife to take the other. The party planning to apply for or retain FSP eligibility should take the vehicle with a fair market value of less than $4,650. If this is not possible, s/he should only consider taking vehicle with a fair market value which is less than $6,650 (or $7,650 if the taking person is age 60 or over). However, in order to keep within the resource limit, before accepting such a vehicle, s/he should consider how other resources would be divided.

[206] 7 U.S.C.A. Section 2014(g). (West Supp. 1999).
[207] 7 C.F.R. Section 273.8(e)(1) (1999).
[208] *Id.*
[209] *Id.* Section 273.8(e)(2).
[210] *Id.*
[211] *Id.* Sections 273.8(e)(4) and (5).
[212] *Id.* Section 273.8(e)(15).
[213] 7 U.S.C.A. Section 2014(g)(2)(C) (West 1999). See, also 7 C.F.R. Section 273.8(h)(1) (1999).
[214] 7 U.S.C.A. Section 2014(g)(2)(iv) (West 1999).
[215] 7 C.F.R. Section 273.8(h)(5) (1999).

Some divorcing couples may have a bank account or other liquid asset. For Food Stamp purposes, this will be treated as an asset.[216] Thus, if it is less that the $2,000/$3,000 limit and, when combined with other nonexempt resources, does not put the household over the limit, either party may take it without affecting FSP eligibility. If the sum exceeds the resource limit, the parties will have to be careful. The Food Stamp Program has a specific provision prohibiting the transfer of assets to obtain or retain eligibility.[217] Such knowing transfer can bar the household from participating in the FSP for up to one year. It might be better to use the funds to purchase an exempt asset or assets to divide between the parties or use the funds to establish a trust fund.

## IMPORTANT FOR READERS

Readers are likely to encounter several different scenarios. Special concerns for each are described below.

1. **Divorcing couples already participating in the FSP.** Since childless couples are eligible to participate in the FSP, the reader is likely to encounter situations where a two-person FSP family is divorcing. Since they were low income when they were together, it is quite likely that they will be low-income when the separate and that each person will want to continue receiving food stamp benefits. These individuals should be advised that:

   - ❖ spousal support might be ordered. Where appropriate, consideration should be given to having some or all of the support paid through vendor payments. This decision should be clearly specified in the order itself.

   - ❖ since they are already FSP eligible, their non-exempt assets are below the $2,000/$3,000 limit. Thus, they should be able to distribute their assets between them in any way they please.

2. **Divorcing couples not currently participating in the FSP in which one partner anticipates the need to obtain FSP benefits.** A divorcing family's income must now be split between two households. One of the partners may have income low enough to need food stamps even though he/she has not needed them in the past. These individuals need to know:

   - ❖ spousal support might be established. However, if the spousal support plus other income minus applicable exemptions and deductions exceeds the poverty line, the ex-spouse will not be FSP eligible. This needs to be considered in deciding whether to pursue spousal support.

     If such support is pursued, consideration should also be given to having some or all of the support paid through vendor payments. This decision should be clearly specified in the order itself.

[216] *Id*. Section 273.8(c)(1).
[217] 7 U.S.C.A. Section 2015(h) (West 1999). See, also 7 C.F.R. Section 273.8(i) (1999).

- ❖ the distribution of assets should be carefully considered. First, all exempt assets should be identified. The FSP-needing ex-spouse can take these assets and still participate in the FSP. Then, the value of other assets should be determined. She/he may take up to $2,000 /$3,000worth of non-exempt assets and should feel free to do so.

3. **Divorcing couples not currently participating in the FSP in which both parties anticipate the need to obtain FSP benefits.** There are a significant number of two-parent families with moderate incomes who do not participate in the FSP. When these families divorce, both households may need FSP benefits. These individuals need to know:

   - ❖ spousal support might be ordered. Where appropriate, an order providing for vendor payment of some or all of the support should be considered.

   - ❖ the distribution of assets should be carefully thought through. First, all exempt assets should be identified. Both ex-partners can have one or more of these assets and still participate in the FSP. Then, the value of non-exempt assets should be determined. If the amount is less than $2,000/$3,000 each ex-partner can take a pro rata share. Each needs to understand that this approach is necessary in order to obtain FSP benefits. If non-exempt assets exceed $4,000,/$6,000 then one of the partners will be ineligible for FSP benefits. Th ex-partners may wish to use the excess to purchase exempt assets which can be distributed between them. Alternatively, one of the partners might take an asset, sell it, and use the proceeds to pay bills before applying for food stamps. These approaches would be far preferable to a transfer of the asset to a third party.

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