1980

Concerned Parents of Step-Children, On Behalf of their Members and All Others Similarly Situated, and Janice Everill, Ellen Lehwalder and Linda Rey, On Behalf of themselves and All Others Similarly Situated v. Anthony Mitchell, Individually: and In His Capacity as Executive Director of the Utah Department of Social Services,: and Keith Oram, Individually and In His Capacity as Director of the office of assistance Payments Administration : Brief of Respondents

Utah Supreme Court

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BRUCE PLENK; Attorney for Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

CONCERNED PARENTS OF STEP-CHILDREN, on behalf of their members and all others similarly situated, and JANICE EVERILL, ELLEN LEHWALDER and LINDA REY, on behalf of themselves and all others similarly situated,

Plaintiffs/Appellants,

-v-

ANTHONY MITCHELL, individually and in his capacity as Executive Director of the Utah Department of Social Services, and KEITH ORAM, individually and in his capacity as Director of the Office of Assistance Payments Administration,

Defendants/Respondents.

Case No. 16870

BRIEF OF RESPONDENTS

Appeal from a Decision of the Third Judicial District Court for Salt Lake County, the Honorable James S. Sawaya, Presiding.

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NATURE OF THE CASE

This is an appeal from a decision of the Third Judicial District Court of Salt Lake County, Honorable James S. Sawaya presiding. Based on stipulated facts, the District Court granted Defendants' Motion for Summary Judgment, denied Plaintiffs' Motion for Summary Judgment and held that Defendants had not violated state or federal statutes or regulations in

terminating part of the state's welfare program.

RELIEF SOUGHT ON APPEAL

Respondents respectfully request this Court to affirm the ruling of the District Court.

STATEMENT OF FACTS

Respondents accept the Statement of Facts as set forth by Appellants with two reservations:

1. Federal regulations do not require that the obligation imposed on stepparents be "identical" with that imposed on natural parents, but rather that it be a law of "general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." (Emphasis supplied.)

2. The United States Department of Health, Education and Welfare has since receded from its objections to the Utah policy change.

ARGUMENT

POINT I

IT IS NOT ESTABLISHED THAT THE STATE HAS FAILED TO COMPLY WITH THE APPLICABLE FEDERAL REGULATIONS.

Appellants argue that the state statute on stepparent support, the Support of Stepchildren Act, fails to comply with

federal regulations and is therefore invalid. Because of this alleged invalidity, plaintiffs claim that the act was relied upon improperly to stop welfare payments to the plaintiffs' families; as a result, plaintiffs continue, all those whose welfare payments were terminated under the statute should be retroactively awarded payment from the time the funds were discontinued.

A. THE TRI-PARTITE TEST IS NOT A BASIS FOR STRIKING DOWN A STATE STATUTE.

In support of their argument, Concerned Parents of Stepchildren (C.P.S.) rely heavily upon the "tri-partite test" which is used by the Department of Health, Education and Welfare (H.E.W.) to evaluate the support obligations of step-parents in state implementation plans under the Aid to Families with Dependent Children (A.F.D.C.) program.

The so-called "tri-partite" test originated in H.E.W.'s brief amicus curiae to the United States Supreme Court in Lewis v. Martin, 397 U.S. 552 (1970). H.E.W. urged that compliance with this test was essential for a state to qualify for federal financial participation under the AFDC program. As set out in H.E.W. letter to defendants dated June 8, 1979, (Appendix 1 in Appellants' brief) the test sets out three separate criteria which a stepparent's support obligation must meet:

1. A duty of general applicability;

2. One which an obligor could be compelled by court order to fulfill even after he has deserted or abandoned the household; and

3. One which must exist regardless of whether the children would otherwise receive AFDC payments.

Appellants maintain that the Utah statute is invalid because it fails to meet the second part of the three-pronged test, that of "coextensiveness," and cite several differences between support obligations of stepparents and natural or adoptive parents in Utah to show that the support of step-children statute fails to meet H.E.W. regulations.

Of the five problem areas that appellants find in the support of stepchildren statute, appellant's brief at 9 through 11, the second and third were not found to violate the federal regulations by H.E.W. itself. And yet, appellants claim that great deference is due a federal agency in interpreting its own regulations, "unless there are compelling indications that it is wrong," Appellants' Brief at 11. The second problem area cited by appellants is the difference in ability to recover support obligations under Utah Code Annotated, Section 78-45-4.2. Although in her letter of June 8, 1979, the Regional Commissioner for H.E.W. disapproved of Section 78-45-4.2, this disapproval was withdrawn after further consideration in the official letter of notice dated August

3, 1979, (Appendix 2, Appellants' Brief).

In a letter to Respondent Anthony Mitchell dated November 23, 1979, (Attached as Appendix 1, hereto), the Assistant Regional Commissioner for Family Assistance explained:

> In correspondence dated August 3, 1979, the regional office had deleted previous objections to that section and the present position of the regional office remains the same. This is based on our analysis which concluded that the stepparent's right to reimbursement from a natural/ adoptive parent does not lessen his obligation to support his stepchildren as otherwise provided for under Utah law.

The third difference between stepparent support obligations and those of natural or adoptive parents claimed by appellants as a violation of H.E.W. regulations, the liability for children aged 18 to 21 when ordered by a court in a divorce proceeding, Appellants' Brief at 10, was not cited at all as a difficulty by H.E.W. after its careful scrutiny of the Utah legislation. Are appellants unwilling to give to H.E.W. the deference which they urge this court to give?

Concerning the other objections to the Support of Stepchildren Act, respondents submit that 45 C.F.R. 233.90(a) does not require a "coextensive" obligation. The word "co-extensive" is not used in 45 C.F.R. 233.90(a). The federal regulation requires only that the stepparent's duty of support be "to the same extent" as that of a natural or adoptive

parent. There is a significant difference between these terms. "Coextensive" means "having the same scope or boundaries; occupying the same space or period of time." Webster's Third New International Dictionary, copyright 1976, at 439. There is an apparent connotation of identical time (duration) and space (limits). Obviously the support obligation of a stepparent cannot be identical either as to time (duration) or space (scope) to that of a natural parent. An obligation "to the same extent" however is a different thing. To the same extent means to the same degree or limit. See Webster's Third New International Dictionary, supra at 805. It is obvious that this expression must be applied in the context of the particular situation involved and not as an absolute standard.

This distinction is not just a play on words. The significance of such distinction was recognized in the case of Archibald v. Whaland, 555 F.2d 1061 (1st Cir. 1977).

Appellants criticize the use of Archibald v. Whaland, supra, first because it is "one of only two cases ever decided that upheld a state procedure as consistent with the requirements of 45 C.F.R. §233.90(a)." Appellants' Brief at 13. It should hardly need pointing out that each state is given considerable leeway in how it implements the federal AFDC program. The court decisions on whether the particular state statutes comply with the federal statutes

and regulations turn on the manner that the individual states have chosen to implement the federal plan. The number of cases falling on either side of the question is therefore irrelevant to this question; the significant matter is rather, whether the particular case is helpful in analyzing the Utah statutes.

In their effort to discredit the use of this case, appellants misrepresent the issue, as "whether exclusion of stepchildren from the New Hampshire criminal non-support statute violated the 'coextensiveness' test." The court itself stated that the fact that the criminal penalty could not be applied to stepparents was not determinative; in the court's words, "[t]he more crucial difference in the analysis" involved the statutes which imposed the legal obligation in the first place - the Uniform Civil Liability for Support Act, which was enforceable against both stepparents and natural parents. Archibald v. Whaland, 555 F.2d 1061 at 1066 (emphasis supplied). That H.E.W. agreed with New Hampshire that the obligations of stepparents and natural parents were essentially similar is not a primary question: we're dealing with two different offices of H.E.W., each of whom makes its own determinations, and moreover, the reason respondents rely on the case here is because of the reasoning, which is sound, and the underlying similarities

in the facts between Utah and New Hampshire, which should result in a similar determination in this case. That H.E.W. came to a different determination at a different time and a different place is of little moment.

In Archibald, the Circuit Court was reviewing a district court determination that stepchildren were not protected "to the same extent" as natural children because stepparents were not covered by New Hampshire domestic relations laws which require natural parents to continue the support of their children after legal separation, pending and after divorce. The review court held that "to the same extent" does not mean "identical and coextensive". The court stated:

> Recalling our discussion of King v. Smith, supra, and Lewis v. Martin, supra, we believe the court's teaching in these cases to be that the support function served by AFDC itself could only be replaced by a breadwinner with the "approximate" support obligation of a natural parent. Were all of the obligations to be identical and coextensive, the effect would be a compulsory requirement on all states participating in AFDC (and all states do participate) to have civil support, criminal support, and divorce and separation laws treating natural, adoptive, and stepparents equally in all respects. We can discern no interest of national welfare policy that requires such pervasive monitoring of state domestic relations laws.

555 F.2d 1066.

In Lewis v. Martin, supra, the fountainhead case in which 45 C.F.R. 233.90(a) was sustained by the Supreme

Court, a similar "approximation" test was suggested. Nothing is said in Lewis v. Martin relating to an "identical" or "coextensive" degree of support. The court concluded that it was reasonable for H.E.W. to require that the stepparent support obligation be to the same extent as a natural or adoptive parent and then stated:

> Any lesser duty of support might merely be a device for lowering welfare benefits without guaranteeing that the child would regularly receive the income on which the reduction is based, that is to say, it would not approximate the obligation to support placed on and normally assumed by natural or adoptive parents.

397 U.S. at page 567 (Emphasis added.)

Even assuming the word "coextenstive" is a legitimate synonym for the expression "to the same extent," itis interesting to note that at least one court has found said word to mean something less than identical. In the case of Kelley v. Iowa Department of Social Services, 197 N.W.2d 192 (Iowa 1972), the court held that it is immaterial that a stepparent may have the power to leave the family and terminate his obligation of support, and that so long as the stepparent has a support obligation while living with the stepchild the law is of general applicability and his obligation is conextensive with the natural parent's obligation. Id. at 199.

The "tri-partite" test was neither referred to by the Supreme Court in the Lewis decision nor specifically

adopted in that case. At least two courts and perhaps the United States Supreme Court by implication, have excised one or more of the criteria. See Kelley v. Iowa Department of Social Services, supra, appeal dismissed, 409 U.S. 813, and Archibald v. Whaland, supra.

In the letter to defendant Anthony Mitchell of June 8, 1979, the Acting Regional Commissioner for the Department of Health, Education and Welfare acknowledged that the Department is considering whether to modify its policy in relation to the treatment of stepparents but "unless a decision to change the present policy is made, which has not yet occurred, the Department is still following the 'tri-partite' test." (See Appendix 1, Appellants' Brief). To rule in favor of petitioners on the basis of strict adherence to the "tri-partite" test, when the test is neither statute nor regulation, and when it is under review by H.E.W. itself, seems unfair and unjustified.

B. THE UTAH AMENDED PLAN DOES COMPLY WITH 45 C.F.R. 233.90(a).

Petitioners charge that respondents "concede that the terms of Utah Code Annotated, Section 78-45-4.1 did not meet the requirements of 45 C.F.R. 233.90(a)" because respondents urged the Utah legislature to make certain changes in the Support of Stepchildren Act. Respondents do not and have not conceded that the recently passed legislation violates

any federal law. In order to prevent the loss of vital federal funding, without which the children in their care might be seriously disadvantaged, respondents have suggested certain changes to the legislature. That action was taken because of the continued disagreement between the Department of Social Services and H.E.W. and the increasingly technical criticism which the Utah Department of Social Services was experiencing from the H.E.W. Regional Office. That action to insure the preservation of its programs cannot be construed as an admission.

Appellants also state that the "agency interpretation of the Social Security Act and its own rules coincides with the arguments of Appellants...." Appellants' Brief at 12. Two instances have already been discussed herein where that is not the case. Appellants do not clearly delineate which of the differences they note in stepparent versus natural or adoptive parent support obligations under the Utah statutes go to the general applicability and "coextensiveness" tests. Respondents will therefore assume that appellants adopt the analysis of H.E.W. and show why that analysis is incorrect.

45 C.F.R. 233.90(a) requires that a State plan under Title IV-A of the Social Security Act must provide that determination of eligibility for assistance will be made only in relation to a stepparent who is (1) ceremonially married to the child's natural or adoptive parent, and (2) legally obligated

to support the child under state law of general applicability which requires the stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. The Utah plan amendment utilized the same language verbatim. The issue is whether or not the Utah State law is of general applicability.

The Utah Uniform Civil Liability for Support Act, Sections 78-45-1 et seq., Utah Code Annotated 1953, as amended 1979, included stepparent within the definition of "parent" and defined "stepparent" as a person ceremonially married to the child's natural or adoptive parent. It also provided that a stepparent shall have the same duty of support as a natural or adoptive parent, provided that upon the termination of the marriage or "in cases where there is a filed pending divorce action with separation or a legal separation" the support obligation will be as if the marriage had never taken place.

The Supreme Court in Lewis v. Martin, supra, agreed that it was reasonable to require the state law to be of "general applicability" in order to provide a solid assumption for estimating funds actually available to the child. In the Archibald case, supra, the court discusses the term in the context of special exceptions or exclusions. It states that if the statute applies to all natural, adoptive and stepparents, is not "tailored to welfare," and covers

children of all ages, it is a state law of "general applicability," concluding that

> We think that the requirement of "general applicability" focuses on arbitrary limitations which make it clear that the duty of support is defined not in terms of the stepparent relationship, but primarily in terms of welfare eligibility.

555 F.2d at 1065.

The Archibald case specifically separates the "general applicability" requirement from the "to the same extent" requirement as phases one and two of its inquiry. In other words, whether the state law requires the stepparent to support the child to the same extent as the natural or adoptive parent does not determine whether the statute has general applicability, and is a separate concern. The H.E.W. analysis has commingled these two considerations in the instant situation and concluded that since in its opinion the stepparent does not have a coextensive duty with the parent, then the state law does not have general applicability. In the Kelley case, supra, the court had little difficulty in concluding that the law was one of general applicability so long as the stepparent has the same duty of support as the parent while living with the stepchild. 197 N.W.2d at 199. As the Utah statute absolves the support obligation only when the stepparent has both filed divorce and separated it would appear that the Utah circumstance is the same as that involved in the Kelley case.

> our decision, a very small tail would indeed be wagging a very large dog. Unless absolutely identical and coextensive support obligations are envisaged by the regulation, this de minimis descrepancy should not determine the issue of compliance with 45 CFR 233.90(a).

Archibald, supra, at 1066.

The distinction is de minimis as a practical matter for the following reasons:

When considering the allowance of stepparent income, two separate aspects are involved: (1) the eligibility of the family group for AFDC and (2) the amount of the grant to be received. The child qualifies for assistance only if he has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent. 42 U.S.C. 606(a). The amount of assistance depends upon the income and resources of the child or any other individual (including stepparents) living in the same home as the child. 42 U.S.C. 602(a)(7). Consideration of stepparent income under 45 C.F.R. 233.90(a) becomes critical therefore not so much in determining eligibility but in determining amount of assistance. It follows that the question of "coextensiveness" of support obligation is really of little practical importance since regardless of such test the actual contribution of either parent or stepparent while living with the child can be included in determining the amount of assistance to be given. An abstract concern as to the exact

Respondents conclude, therefore, that since the Utah statute applies to all stepparents, covers children of all ages, and does not depend on welfare eligibility, the statute is of general applicability. The fact that the stepparent may terminate his obligation by filing for divorce and separating from his wife is, as stated in the Kelley case, immaterial in relation to the question of general applicability.

Any post-separation distinction between the support obligation of the stepparent and the parent is de minimis both as to legal and practical consequences.

The distinction is legally de minimis because it really has no effect on the application of 45 C.F.R. 233.90(a).

The Kelley case, supra, seems to say that any disparity in support obligations between natural parent and stepparent upon leaving the home is legally inconsequential. In the Archibald case, supra, the court says that even if the disparity is not inconsequential, it is certainly irrelevant when it is considered that when a stepparent leaves the family, the AFDC program becomes available. The point is succinctly stated by the Archibald case as follows:

> We see no reason of welfare policy that would make post-separation support obligations germane to the question of compliance with 45 CFR 233.90 (a) which deals with the requirements to be met if AFDC is not to be available....
>
> Nevertheless, if the differential in support obligation of such limited scope were to control

"coextensive" duration of the stepparents obligation is in fact irrelevant, since once the stepparent leaves the home his contribution is no longer pertinent in establishing or in determining the amount of assistance. Truly, the only critical period as to the required similarity of the parent and stepparent obligation under 45 C.F.R. 233.90(a), particularly in relation to a "reasonable" "solid assumption" of income as spoken of in the Lewis v. Martin case, supra, such as would justify discontinuance of statewide stepchild assistance program, is during the time the stepparent is in the home.

In fact, from this standpoint in regard the amount of assistance, it becomes clear that the precise proviso in the Utah statute under attack is in reality a saving grace of the Act. If the stepparent's support obligation survives his separation from the family then there may be a time, at least pending new application, when the stepparent is in fact making no contribution and the child in need receives no assistance because the stepparent's contribution is assumed.

It should also be noted that the number of stepparents who would fall in the tiny crack of stepparents who have "filed for divorce with separation" (the group being used by H.E.W. to disqualify the State plan) would be a small fraction of the stepparents involved in the stepchild assistance program.

The post-separation distinction between parent and stepparent as to support obligation in the state statute is both legally, and as a practical matter, de minimis, and it does not destroy the general applicability of the statute.

Even if this court should find that in some way respondents erred in compliance with the relevant federal statutes or rules, the proper course for the court to take is to leave the remedy to H.E.W. 42 U.S.C. § 604(a) provides:

> § 604. Deviation from plan
>
> (a) Stoppage of payments
>
> In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—
>
> . . . .
>
> (2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 602(a) of this title to be included in the plan;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until he is so satisfied he shall make no further payments to such

State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

This is the proper remedy for the violations alleged by appellants, and H.E.W. may be presumed to have satisfied itself at this point that such sanctions are not necessary. Appellants do not even assert now that the statute imposing a duty of support on stepparents is unconstitutional. They do not, nor can they, dispute the power of the Utah legislature to impose a duty of support upon stepparents. They merely assert that the manner in which the duty was imposed did not comply with certain technical requirements of the federal government relating to the public assistance programs. Indeed, appellants do not appear to be in the narrow categories potentially deprived of the benefits as a result of lack of "coextensiveness." Rather they merely object to the overall result of the imposition of the duty upon stepparents. They have no valid claim to a remedy in this Court, and the matter of failure to comply with H.E.W. regulations should be left to H.E.W.

POINT II

RESPONDENTS HAVE SUBSTANTIALLY COMPLIED WITH THE APPLICABLE NOTICE AND FAIR HEARING REQUIREMENTS.

The requirements for notice and hearing where state agencies intend to discontinue or reduce family assistance are laid out in four steps in 45 C.F.R. § 205.10(a)(4)(iii):

> When changes in either State or Federal law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes
>
> (1) a statement of the intended action,
>
> (2) the reasons for such intended action,
>
> (3) a statement of the specific change in law requiring such action and
>
> (4) a statement of the circumstances under which a hearing may be obtained and assistance continued.

(Emphasis added, and numerals inserted for clarity.)

The Utah Assistance Payments Administration sent out the following notice on May 10, 1979, pursuant to the passage of the Support of Stepchildren statute by the legislature:

> Effective May 31, 1979, your financial and medical stepchild assistance case will be discontinued. The reason for this closure is because of a change in the Utah law which becomes effective May 3, 1979. (Vol. II, Sec. 232)
>
> You may be eligible for other types of assistance including Food Stamps, Medical Assistance, Aid to Families with Dependent Children for the entire family, or restricted

> state stepchild program. If you wish to apply for any of these programs, contact your local Assistance Payments Office at 2835 South Main PO Box 15729, Salt Lake City, Utah 84115, Phone 582-5200.
>
> A fair hearing request will not be granted unless you feel the reason for the closure action was for other than the change in state law.
>
> If you have any questions regarding this notice, please contact the office listed above.

Although simple and straight forward, this notice met each of the requirements of the regulations. First, it states the intended action, discontinuance of financial and medical stepchild assistance, and second, gives the reason--the change in the Utah law. Third, the specific change in the law is cited, Volume II, section 232 of the Financial Assistance Regulations of the Assistance Payments Administration.

The fourth of the provisions requires "a statement of the circumstances under which a hearing may be obtained and assistance continued." (Emphasis supplied.) The "and" suggests that both the hearing and continuing assistance are necessary, and a hearing which does not lead to continuing assistance would not need to be mentioned in the notice. 45 C.F.R. § 205.10(a)(5) states:

> An opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance ... or medical

> assistance is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance. A hearing need not be granted when either State or Federal law require automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.

The only exception to the rule that hearings are not required is when there is an appeal in the case of an incorrect grant computation. This subsection also sheds light on the fourth provision of 45 C.F.R. § 205.10(a)(4)(iii). For a hearing leading to continued assistance, there must have been an incorrect grant computation. The next to last sentence of the May 10 notice sent by the Assistance Payments Administration states, "[a] fair hearing request will not be granted unless you feel the reason for the closure action was for other than the change in state law." This is just what the federal regulations provide - no hearing unless for an incorrect grant computation.

45 C.F.R. 205.10(a)(6) states:

> If the recipient requests a hearing within the timely notice period:
>
> (i) Assistance shall not be suspended, reduced, discontinued or terminated, ... until a decision is rendered after a hearing, unless:
>
> (A) A determination is made at the hearing that the sole issue is one of State or Federal law and not one of incorrect grant computation;

Both (a)(5) and (a)(6) predicate the holding of a hearing on a request for a hearing by the welfare recipient. And yet, appellants have never met even this fundamental threshhold requirement for a hearing.

The failure to bring this case under the federal provisions should block further consideration of appellants' claims.

Appellants rely on Budnicki v. Beal, 450 F.Supp. 546 (E.D. Pa. 1978), a case which involved widespread cheating and abuse of a state orthopedic shoe program. Pennsylvania understandably wished to terminate the program which was optional under federal regulations, but lost its case in federal district court. Appellants cite the case for the contention that failure to comply with federal regulations requires a reinstatement of the terminated program. However, the case is distinguishable from the present matter. First, the only notice given of the termination of the Pennsylvania program was in a news circular; no notice of termination was sent to any of the welfare recipients. The court does not state that a timely request for a hearing is not still necessary under its decision, provided adequate notice is given. In that case, of course, no such hearing request was possible since no notice was given initially. In the case at hand, however, timely notice was sent, and appellants failed

to make the necessary hearing request.

Appellants cite Curtis v. Page, No. 78-732 (N.D. Fla. Apr. 13, 1978, Appendix 4 of Appellants' brief), for the proposition that a failure to specifically state the change in the law renders a state's notice inadequate. No reference to any change in the law was made in the notice in that case. Utah's notice, on the contrary, does state the specific change in the law, as discussed above.

There is nothing in the apparently complete and self-contained statement of 45 C.F.R. § 205.10(a)(5) indicates to the state administrator attempting to deal with the complex and murky federal regulations that (5) might be modified by 45 C.F.R. §205.10(a)(6) and that he must read further before drawing up his state's notice of termination or reduction. At least one court has criticized 45 C.F.R. §205.10(a)(6) for its ambiguity. Budnicki v. Beal, supra, at 553. Although respondents maintain that they have substantially complied with the federal regulations, if some mistake was made, there was certainly a good faith attempt to follow the provisions.

Both Turner v. Walsh, 535 F.Supp. 707 (W.D. Mo., 1977), and Viverito v. Smith, 421 F.Supp. 1305 (S.D.N.Y. 1976), also cited by appellants, indicate that in the final analysis, a court's remedy for any failure to comply with the federal requirements necessitates a weighing of the equities involved

in each case. Certainly in the case before the court, involving as it does, over two million dollars in retroactive payments alone, not to mention the substantial expense, time, and difficulty in reopening the 1800 cases involved, and its threat to the fundamental doctrine of leaving appropriations questions to the legislative branch, should weigh heavily against the remedy appellants seek.

In all the C.F.R. provisions discussed herein, the common theme of notice and hearing presupposes "agency action," a term used in 45 C.F.R. §§ 205.10(a)(4)(iii), 205.10(a)(5), and 205.10(a)(6). The underlying difficulty is that the agency was simply implementing a recent legislative enactment. No benefits were terminated because of "agency action." Rather they were terminated because of legislative action. To grant fair hearings on the issue of wether stepparent assistance should have been terminated for these plaintiffs would be to set the hearing decision-maker above the legislature, a result that clearly makes no sense in our system.

If the court should remand the case for new notice by the Assistance Payments Administration, even that action would be of little help to appellants, who would still need an appropriation from the legislature in order to receive any benefits. This illustrates the reason that no hearings were held by the agency in the first place - there was no real alternative to the action taken.

POINT III

DEFENDANTS HAVE SUBSTANTIALLY COMPLIED WITH ALL APPLICABLE PROVISIONS OF THE UTAH RULE-MAKING ACT.

Appellants claim that respondents failed to comply with the procedures of the Utah Rule-Making Act (Utah Code Annotated, Section 63-46-1, et seq.) in terminating assistance to the stepchildren. Appellants have not shown any authority supporting their claim that the conditions and circumstances faced by the respondents did not justify use of the emergency procedure. An examination of the relevant provisions of the Code is in order here.

> (1) Prior to the adoption, amendment, or repeal of any rule, the agency shall:
>
> (a) Give notice of its intended action. This notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, the reasons for the proposed rule, and the time when, the place where, and the manner in which interested persons may present their views regarding it. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings and shall be published in the bulletin to be published by the state archivist as provided in section 63-46-7. The state archivist shall maintain for notice of rule making a list of names and addresses of persons who request mailed notice of agency rule making as required by this act. Except as provided in subsection (2), (3), and (4) of this section, no action shall be taken by the agency until at least twenty days have elapsed following such mailing and publication of this notice.

(b) Afford all interested persons reasonable opportunity to participate in rule making by submitting data, views, or arguments, either orally or in writing, as determined by the agency. In the case of substantive rules, an opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or an agency, or by an association having not less than 25 members if requests are made in writing within fifteen days after the mailing and publication of the last notice of rule making. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within thirty days thereafter, shall issue a concise written statement of the principal reasons for and against its adoption, incorporating in this statement its reasons for overruling the considerations urged against its adoption.

(2) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule without providing the notice required by subsection (1) of this section and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days, but the adoption of an identical rule under subsection (1) of this section is not precluded.

(3) If an agency finds that any of the rule-making procedures required by this section are impracticable, unnecessary, or contrary to the public interest with respect to the adoption and filing of a particular rule or a particular designated type or class of rules, it may, to the minimum extent require by that finding, proceed without compliance with this section to adopt and file such rule or rules, if

> the agency adopts and files with the rule or rules a written statement of findings and reasons for such action which shall be published in the bulletin along with the rule or rules.

Utah Code Annotated, Section 63-46-5.

There is no authority holding that the severe budgetary limitations experienced by respondents as a result of legislative decisions did not justify resort to the emergency provisions outlined in Utah Code Annotated, Section 63-46-5(2) as contained above. The difficulty in appellants' position becomes apparent upon the realization that following the rule-making procedure would be a useless exercise and a waste of agency funds and time unless such action could have changed the result. If the agency involved had the power to continue the assistance to the stepchildren, the effect would be to give the agency through its rule-making process, primacy over the legislative process. The obligation of the agency is to follow the statutes and guidelines of the legislature. The power of the purse is an inherent power of the legislative branch, and the legislative power is vested in the House of Representatives and Senate, Utah Constitution, Article VI, Section 1(1), and no person charged with responsibilities of one branch of government shall exercise functions appertaining to the others. Utah Constitution, Article V, Section 1. The Utah Budgetary Procedures Act, Utah Code Annotated, Section 63-38-1 et seq., outlines the procedures to be followed in

the budgetary process. Utah Code Annotated, Section 63-38-1 (2) provides:

> In providing that certain appropriations are to be expended in accordance with a schedule or other restriction, ... it is the intent of the legislature to limit thereby the amount of money to be expended from each such appropriations item for certain specified purposes. Each such schedule shall be a restriction or limitation upon the expenditure of the respective appropriation made,....

The intent of the Utah Constitution and the Budgetary Procedures Act is to clearly delineate the powers of government and to carefully prevent improper expenditures. The result pressed for by appellants is illogical, upsets the procedures of government, and should not be entertained by this Court. The rule-making process in this instance served the sole purpose of translating the legislative mandate of Senate Bill 54 and its related budget cuts into the format of the Department's eligibility manual.

Even had the Department started earlier with its rule-making process and gone through the regular procedure rather than the emergency procedure, the result was still a foregone conclusion because the legislature had cut off the funds for the program at issue.

The rule-making process offered no potential restoration of the several million dollar appropriation which the legislature had deleted for stepchild assistance.

Without the appropriation the executive officials were powerless to maintain the program. But, even through the emergency rule-making process there was an opportunity for the plaintiffs to register their views. There has been no indication whatsoever that the named plaintiffs or any potential member of the plaintiff class attempted to exercise any prerogatives in the rule-making process at the time the new rule was announced in the rule-making bulletin of May 1. Plaintiffs did not even file this lawsuit until the 31st of May, 1979, which raised a serious question as to the timeliness of their request in seeking relief against the initial implementation of the rule-making. Any injunctive relief invalidating the rule-making process would be equitable in nature, but plaintiffs simply did not file a timely action for this kind of equitable relief. The actual process of terminating the stepchild assistance program was substantially completed long before the 31st of May. Issuing checks for the month of June was a process that would have required several weeks of preparation. It could not have been done overnight as plaintiffs seem to believe.

POINT IV

THIS COURT LACKS THE POWER TO COMPEL A STATE AGENCY TO FUND A PROGRAM RETROACTIVELY.

If the Court grants the retroactive benefits that appellants seek, it will in effect be making a new budgetary appropriation in clear contravention of the intent of the legislature in passing the Support of Stepchildren Act. Senator Kay S. Cornaby, who was the sponsor of Senate Bill 54, indicated in his floor discussion of the statute just before it was passed overwhelmingly in the Senate and later by the House, that the intent of the measure was to reduce unnecessary expenditures to those who don't really need the money to support their stepchildren. Citing the fact that the statute was designed to prevent the abuse of public tax funds by awarding it to parents whose income was already adequate, Senator Cornaby stated that the bill would save an estimated two million dollars in state funds and four and a half million dollars in federal appropriations. He concluded by saying, "We ought to be able to save that money, especially in this era of concern about excessive expenditures in state government." (Utah State Senate Floor Discussion, January 17, 1979.) The tenor of the remarks by Representative LaMont Richards in House discussion is very similar and evidences a concern that many parents whose incomes were in the middle to upper middle ranges were receiving funds in violation of the intent of the stepchildren support program.

See Utah House of Representatives Floor Discussion, February 6, 1979.

The power of appropriation is one of the fundamental powers delegated to the legislature. By its very nature it involves balancing of competing political considerations and is therefore inherently a job for elected representatives. This budgetary power includes not only the right to appropriate, but the right not to appropriate for a given program. If the money necessary to achieve the result desired by appellants is awarded, then less money will be available for the needs which the legislature found more pressing. It is not within the province of the court to determine the relative merits of different spending proposals, especially when not all the information necessary for such a decision is before the Court. In this case, the legislature expressly refused to grant the money. The Utah Constitution, in Article V, Section 1 provides that there is to be no such overstepping of bounds by members of the different branches of the state government.

As James Bryce said in comments on the structure of the federal government, but which are equally apropos here: "There remains the power which in free countries has long been regarded as the citadel of parlimentary supremacy, the power of the purse. Congress has the sole right of raising money and appropriating it to the service of the state." The American Commonwealth, 158 (1905).

It is not proper to permit those who have lost a legislative battle to hurry into court to require the extensive expenditure of money which they couldn't get in the proper forum in the first place. Granting the remedy appellants seek in effect gives the Court power that not even the Governor has; the Governor may reject an entire act of the legislature, but even he, with his powers to propose the budget, cannot turn a non-appropriation into an appropriation. See the Budgetary Procedures Act, Utah Code Annotated, Sections 63-38-1 et seq. The power of the purse is one of the most basic prerogatives given to the legislative branch, and concerns all of the legislature's deliberations. The framers of our system of government never intended the legislative bodies to become mere bookkeepers for the courts. In his discussion of the proper role of the judiciary, Alexander Hamilton wrote in Federalist Paper No. 78, "The judiciary has no influence over the sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever."

Merely by way of example of the difficulty inherent in a proposed fiscal appropriation by the judiciary, in Lovett v. U.S., 66 F.Supp. 142 (Ct. Cl., 1945), the court ruled that, although three individuals had a right to be paid for their federal employment, (in the light of a congressional appropriations measure providing that government

employees not be paid their salaries unless Congress confirmed their continued employment) it could not order Congress to appropriate or the Treasury to pay the money. No money was paid the employees, deserving though they were, until the House finally passed a bill awarding them their salaries.

CONCLUSION

The Support of Stepchildren Act complies substantially with the Social Security Act and federal regulations and was properly used to terminate welfare benefits to appellants. As the correspondence between respondents and the regional commissioner for the Department of Health, Education and Welfare indicates, Utah has done everything in its power to comply with the federal regulations. The act, as amended in the most recent legislative session, has received no further objection from H.E.W.

The implementation of the act also substantially complied with the federal notice and hearing provisions and with the Utah Administrative Procedure Act.

The analysis and remedy suggested by appellants is impractical and violates fundamental state constitutional doctrines. The proper remedy in the matter, if any was necessary, was for H.E.W. to take. It has seen fit to take

no action. Respondents respectfully submit that the most judicious course for this Court to follow is to affirm the considered opinion of the district court.

Dated this 12th day of June, 1980.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

PAUL M. TINKER
SHARON PEACOCK
Assistant Attorneys General

Attorneys for Respondents

HEALTH, EDUCATION, AND WELFARE
REGION VIII
FEDERAL OFFICE BUILDING
1961 STOUT STREET
DENVER, COLORADO 80294

OFFICE OF THE EXECUTIVE DIRECTOR

NOV 26 1979

Re these other issues

NOV 23 1979

SOCIAL SECURITY ADMINISTRATION

RECEIVED

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UTAH STATE OFFICE
OF ATTORNEY GENERAL

Dr. Anthony W. Mitchell
Executive Director
Department of Social Services
150 West North Temple
Salt Lake City, Utah 84103

Dear Dr. Mitchell:

This is to confirm a telephone conversation between Mr. Keith Oram and Ms. Barbara Costa, held on November 7, 1979. The subject of that conversation was revisions proposed to be made to Utah Senate Bill 54, "Support of Stepchildren."

Mr. Oram had earlier requested regional office's opinion on whether the original language contained in Section 78-45-4.2 could be retained. In a letter dated October 26, 1979, Mr. Oram had transmitted a copy of proposed revisions for Senate Bill 54, designed to overcome previous HEW objections to the "Support of Stepchildren" law. One of the proposed revisions was the deletion of Section 78-45-4.2.

The regional office response was that Section 78-45-4.2 could be retained in its original language. In correspondence dated August 3, 1979, the regional office had deleted previous objections to that section and the present position of the regional office remains the same. This is based upon our analysis which concluded that the stepparent's right to reimbursement from a natural/adoptive parent does not lessen his obligation to support his stepchildren as otherwise provided for under Utah law.

Please be advised that this correspondence relates only to the regional office's position on Section 78-45-4.2 and that our analysis of the remainder of Senate Bill 54 has not yet been completed. We will advise you as soon as that process has been completed and at that time, will provide you with our position on the total bill.

Your cooperation in this matter is appreciated.

Sincerely,

Leza Gooden

Leza Gooden
Assistant Regional Commissioner
Family Assistance

cc: Keith Oram
Paul Tonks
Frank Mathews

cc: Associate Commissioner for Family Assistance
Central Office

MAILING CERTIFICATE

I hereby certify that I mailed two true and exact copies of the Brief of Respondents, postage prepaid, to Bruce Plenk, Utah Legal Services, Inc., Attorneys for Appellants, at 352 South Denver Street, Salt Lake City, Utah, 84111, on this the 12th day of June, 1980.

Sandra Sundquist