2001

Steven Fisher v. Nanette Fisher, State of Utah, M. Dirk Eastmond : Intervenor Brief

Utah Court of Appeals

Steven Wade Fisher; Pro Se Petitioner.
Nanette Fisher. Pro se Respondent; Karma K. Dixon; Assistant Attorney General; Mark. L. Shurtleff; Attorney General; M. Dirk Eastmod; Appelle.

IN THE UTAH COURT OF APPEALS

STEVEN FISHER, Petitioner, vs. NANETTE FISHER, Respondent, STATE OF UTAH, Office of Recovery Services, Intervenor/Appellant, M. DIRK EASTMOND, Party-in-interest/Appellee/ Cross-Appellant.	)	Case No. 20010771-CA

INTERVENOR/APPELLANT'S REPLY AND ANSWER TO BRIEF OF APPELLEE/CROSS-APPELLANT

Intervenor/Appellant's reply to Appellee's response to Appellant's opening Brief and answer to Brief of Appellee/Cross-Appellant from Order entered August 24, 2001, in the Third Judicial District Court, Judge Timothy R. Hansen, overruling in part Commissioner Bradford's recommendation of February 26, 2001, and thereby allowing an attorney's lien to seize past due child support.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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REPLY BRIEF OF APPELLANT

I. THE *HAMPTON* DECISION SHOULD NOT BE APPLIED TO CHILD SUPPORT AS STATUTORILY REGULATED TODAY.

a. *Hampton* Should Be Read In Light of the 1935 Prevailing Theory of Alimony

The Court in its *Eastmond* decision relied on the 1935 Utah Supreme Court case of *Hampton v. Hampton*, 85 Utah 338, 39 P.2d 703 (Utah 1935), stating that "the Utah

Supreme Court has expressly allowed an attorney's lien to be satisfied from child support payments." *Eastmond v. Earl*, 912 P.2d 994, 997 (Utah Ct. App. 1996). In *Hampton*, the sole award was for alimony but this Court in *Eastmond* extrapolated that alimony also included child support. A brief review of *The Historical Background of Alimony Law and Its Present Structure*, a 1939 article written by Chester G. Vernier & John B. Hurlbut in 6, Law & Contemp. Probs. 197-200 (1939) reveals that at the time *Hampton* was decided, alimony had a much different meaning and content.

> Actually, however, the order for permanent alimony involved more than a mere judicial measurement of the husband's legal duty as husband to support the wife. If he acquired wealth from the wife by virtue of the marriage, he could not be compelled to disgorge, but that fact was of influence in fixing the amount of the award. Finally, in the minds of some of the judges at least, the notion of punishment depending upon the degree of the husband's moral delinquency played some part in the part of the process. [P]ermanent alimony to the guilty wife against whom the husband secured a separation was judicially unthinkable.

Id. at 199.

A second article in the same journal states: "Some courts arrived at the figure of one third of the husband's income as alimony by analogizing to dower." Edward W. Cooey, *The Exercise of Judicial Discretion in the Award of Alimony,* 6 Law & Contemp. Probs. 213, 221 (1939). It is interesting to note that a study done by The Institute of Law of Johns Hopkins University of the divorce court actions in Ohio and Maryland during 1933 found that "[i]n the 1458 cases in which the number of dependents and the size of the periodic payments were both known, the average award per actions was $9.04, figured

on a weekly basis." However, the study found that "[w]hen the award was made for the wife alone, she received $11.66." *Id.* at 214. If alimony was in fact an award which included child support, then one would expect that alimony awards for women with children would be higher than alimony awards for women without children. The study showed that just the opposite was true.

It appears from the statements of contemporaries to the *Hampton* decision that permanent alimony was analogous to effecting a division of property rather than providing support for the children of the parties. In addition, it appeared to serve as punitive damages to the wronged party. Further, it appears that the awards for women without children were traditionally higher than those awards for women with children indicating that the courts did not factor in additional money which we would now categorize as child support.

In light of the difference between what the *Hampton* court would have viewed as the nature of alimony as evidenced by the previously quoted journal articles and child support in its current form, *Hampton* should not be allowed to stand for the proposition that an attorney's lien can attach to a present day Order for child support.

b. Subsequent Legislative Enactments Render *Hampton* Inapplicable

If at the time *Hampton* was decided, the Court's ruling was that an attorney's lien could attach to alimony, that holding became the common law. If the Court's ruling was that an attorney's lien could attach to child support, that holding became common law.

Black's Law Dictionary 276 (6th ed. 1990) defines common law as consisting "of those principles, usage and rules of action applicable to government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature." (citing *Bishop v. U.S.*, 334 F. Supp. 415, 418 (D.C. Tex. 1971)).

Regardless of which holding *Hampton* stands for, the Legislature has pre-empted the common law on this point. In 1981, the Legislature enacted § 78-23-5(f) which specifically states that child support is exempt from execution. Also in 1981, the Legislature enacted § 78-23-6(1) which specifically states that alimony is exempt from execution. The enactment of these statutes while not explicitly pre-empting *Hampton* should be interpreted as doing so. Otherwise the statutes and common law principle contained in *Hampton* are in conflict.

> Sometimes courts, when facing the pre-emption question, find language in the... statute that reveals an explicit [legislative] intent to pre-empt [common] law. [ii] More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the ... statute's 'structure and purpose' or nonspecific statutory language, nonetheless reveal a clear but implicit pre-emptive intent.

Bishop v. Gentec, 2002 UT 36, ¶ 9, 48 P.3d 218 (citing *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103 (1996)).

> Therefore, we look to the statute's structure and purpose to determine whether it reflects an implied legislative intent to do so. We conclude that the state statute and the common law principle are in conflict and that the common law must necessarily give way to the statute.

Bishop, 2002 UT 36, ¶ 9.

The common law holding of *Hampton* must give way to the implied legislative intent contained in Utah Code Ann. § 78-23-5(f) or § 78-23-6(1). *Eastmond* should be overturned because permitting it to stand allows a common law holding to pre-empt a later-enacted statute or statutes.

II. EASTMOND'S STATEMENT THAT THE LEGISLATURE CONSIDERED EXEMPTING CHILD SUPPORT BUT CHOSE NOT TO DO SO IS UNSUPPORTED BY THE RECORD OR BY EVIDENCE.

While Eastmond makes the bold statement that "The Utah State Legislature has considered exempting child support from the pervasiveness of an attorney's lien but chose not to do so when it met and revised the Attorney Lien Statute ...", there is nothing in the record to substantiate such an assertion. Eastmond Brief at 15. Eastmond offers no evidence to support his allegation and therefore, such an allegation is without basis in fact.

III. EASTMOND'S INTERPRETATION OF THE "ALLOWABLE CLAIMS AGAINST EXEMPTION" STATUTE IS IN ERROR.

The State continues to assert that a conflict exists between *Eastmond* and the controlling statutes, Utah Code Ann. §§ 78-51-41, 78-23-5 and 78-23-10.

Both the State and Eastmond agree that the statute allowing an attorney to use a lien in an attempt to collect fees does not specifically address whether that lien can be executed upon child support. The statute simply allows "a lien upon the client's cause of action or counterclaim, which attaches to any settlement, verdict, report, decision, or

judgment in the client's favor and to the proceeds thereof in whosoever hands they may come...." Utah Code Ann. § 78-51-41 (1989).

There is no disagreement between the parties that Utah Code Ann. § 78-23-5(f) clearly states that "money or property received, and rights to receive money for property for child support" is property designated as exempt from execution. The disagreement between the parties exists as to the correct interpretation of Utah Code Ann. § 78-23-10, Allowable Claims Against Exempt Property. Eastmond interprets this statute as empowering him to levy against child support. The State asserts that the correct interpretation is that this statute specifically limits him from attaching child support.

Utah Code Ann. § 78-23-10(1) states that:

(a) A creditor may levy against exempt property of any kind to enforce a claim for:
  (i) alimony, support, or maintenance;
  (ii) unpaid earnings of up to one month's compensation or the full-time equivalent of one month's compensation for personal services of an employee; or
  (iii) state or local taxes

(b) A creditor may levy against exempt property to enforce a claim for:
  (i) the purchase price of the property or a loan made for the purpose of enabling an individual to purchase the specific property used for that purpose;
  (ii) labor or materials furnished to make, repair, improve, preserve, store, or transport the specific property; and
  (iii) a special assessment imposed to defray costs of a public improvement benefitting the property.

The subsection limits with clarity the five enumerated claims that allow a creditor to levy upon any kind of exempt property. An individual holding an attorney's lien is a

lien creditor. "A creditor who has acquired a lien on the property involved by attachment, levy or the like. . ." U.C.C. § 9-301 (1996). Therefore, since an attorney's lien is not one of the enumerated claims allowed to levy upon any kind of exempt property, it is prohibited from doing so.

Eastmond relies exclusively upon Utah Code Ann. § 78-23-10(2) to support his allegation that an attorney's lien is statutorily allowed to levy upon any kind of exempt property. Utah Code Ann. § 78-23-10(2) reads in its entirety as follows: "This section does not affect the right to enforce any statutory lien or security interest in exempt property." This provision is not a blanket authorization for all who hold either a security interest or statutory lien to levy upon any kind of exempt property. It merely reiterates that found within the statutes of this state are specific authorizations or limitations upon the various security interests or statutory liens and this specific section does not effect or abrogate those individual authorizations or limitations. The statute authorizing an attorney's lien does not specifically authorize execution against exempt property. Therefore, § 78-23-10(2) is not applicable to attorney's liens.

For example, Utah Code Ann. § 38-3-1 creates a lessor's lien, the type of which § 78-23-10(2) has in mind. The lessor's lien statute provides in particularity that "[e]xcept as hereinafter provided, lessors shall have a lien for rent due upon all nonexempt property of the lessee brought or kept upon the lease premises so long as the

lessee shall occupy said premises and for thirty days thereafter." On its face, it appears to prohibit a lessor from having a lien on any exempt property.

However, when we turn to Utah Code Ann. § 38-3-3, the lessor's lien statute allows the attachment of a lessor's lien to the personal property of the lessee which is upon the leased premises. A number of items of personal property are listed in the Exemption statute. The specific language of the lessor's lien make a provision for an occasion when a lessor's lien can attach to certain exempt property. A lessor's lien is not one of the five categories in which a creditor can attach exempt property as set forth in the Allowable Claims statute and as such could not attach any exempt property. However, there is a section of the lessor's lien statute which identifies a specific occasion wherein exempt property may be attached. Because of § 78-23-10(2), the provisions allowing a lessor's lien to attach to certain exempt property remain undisturbed.

A holder of an attorney's lien is a creditor. A creditor is bound by the provisions of § 78-23-10(1)(a). As a result, an attorney's lien cannot attach to child support because an attorney's lien is not one of the five enumerated claims that may levy against exempt property.

The statute authorizing attorney's liens does not contain specific provisions authorizing a levy upon any kind of exempt property. Therefore, there are no statutory rights to be protected and § 78-23-10(2) is not applicable.

The only reasonable interpretation of the Allowable Claims statute is that it serves to limit those claims upon which general secured creditors or holders of liens may levy on any exempt property. It also serves to insure that those secured creditors or holders of statutory liens who have statutory rights to enforce on exempt property are not effected.

Further, Eastmond would have this Court rely on *Lundy v. Cappuccio*, 54 Utah 420, 181 P. 165 (Utah 1919), to support his assertion that his attorney's lien allows him to seize child support collected by the Office of Recovery Services before it is disbursed to the custodial parent. It is not possible to determine from the text of the case whether the attorney's lien in *Lundy* sought to attach exempt or nonexempt property. Indeed, the case concerns offsetting judgments and credits to be given as a result.

Eastmond states that *Lundy* "supports the concept that the attorney's lien attaches to the judgment and proceeds thereof 'in whatsoever hands they may come.'" Eastmond Brief at 21. The issue before the Court is not whether an attorney's lien attaches to proceeds but rather whether an attorney's lien attaches to proceeds which by statute are exempt from execution. The State requests this Court to find that, under current statutes, an attorney's lien cannot attach to child support and to thereby overturn *Eastmond.*

IV. THE STATE IS BOUND BY FEDERAL REGULATIONS AND WILL BE HELD TO STRICT COMPLIANCE.

The State is bound by 42 U.S.C.A. § 654(11)(B) which provides that: "any payment required to be made under section 656 or 657 of this title to a family shall be made to the resident parent, legal guardian, or caretaker relative having custody of or

responsibility for the child or children[.]" If a family is receiving cash assistance from certain State welfare programs, the State is authorized by federal statute to retain a portion of child support it collects as reimbursement. The State is prohibited from disbursing child support collected except as stated above. [A copy of 42 U.S.C.A. § 654 appears in Addendum A.]

Furthermore, the State will be held to the following:

> (a) A State will be subject to a financial penalty and the amounts otherwise payable to the State under title IV-A of the Act will be reduced in accordance with § 305.66:
>
> (1) if on the basis of:
>
> (i) ....
>
> (ii) ....
>
> (iii) The results of an audit under § 305.60 of this part, the State failed to substantially comply with one or more of the requirements of the IV-D program, as defined in § 305.63; and
>
> ....
>
> (c) The payments for a fiscal year under title IV-A of the Act will be reduced by the following percentages: (1) One to two percent for the first finding under paragraph (a) of this section; (2) Two to three percent for the second consecutive finding; and (3) Not less than three percent and not more than 5 percent for the third or a subsequent consecutive finding. The reduction will be made in accordance with the provisions of *45 CFR 262.1(b)-(e)* and *262.7*.

45 C.F.R. § 305.61 (2002). [A copy of 45 C.F.R. § 305.61 appears in Addendum A.]

The federal agency which administers the Title IV-D support enforcement program under the Secretary of Health and Human Services is the Office of Child Support Enforcement. The Denver Office of that agency was contacted and asked to give an opinion as to whether allowing an attorney's lien to intercept and redirect payment of child support or alimony that is being collected through the Office of Recovery Services would be considered non-compliance. The State was notified by e-mail from Diane Degenhart, Program Specialist of that same office that, in her opinion, it would be considered non-compliance.

Like the court system, federal agencies do not normally issue official, before-the-fact opinions but rather rule on a case-by-case basis after the fact. While not an official opinion, the information transmitted to the State by Ms. Degenhart should not be summarily dismissed.

In addition, the State included in its original brief, *Hodges v. Shalala*, 121 F. Supp. 2d 854, 860 (D.S.C. 2000), as proof that the Secretary of Health and Human Services takes seriously **any and all** violations of federal requirements. It also serves to illustrate the magnitude of the penalties involved. The State of South Carolina brought action against the Secretary of Health and Human Services seeking injunctive and declaratory relief to prevent the loss of millions of dollars in federal funding with respect to its inability to meet conditions imposed pursuant to Child Support Enforcement Act upon its acceptance of federal funds. The United States District Court concluded that the

Secretary did not have discretion to amend the statutory penalty structure for the State's noncompliance and granted summary judgment as requested by the Secretary. The court stated:

> The federal laws state clearly and unequivocally that, as a condition of the State's participation in the TANF Program, it must establish and operate the child-support enforcement systems at issue. *See* 42 U.S.C. §§ 654-55 (1998). On the basis of the record in this case, the State has not denied that it was aware that a failure to meet the requirements of *Title IV-D* would cause a withdrawal of funding. Indeed, the State's knowledge of the nature and gravity of the *Title IV-D* conditions is evidenced by its long and close cooperation with the United States in an effort to meet its obligations.

Id. at 875.

The State of South Carolina argued, and it was not disputed, that the failure to comply was the fault of a third party. Regardless of the origin of the noncompliance, noncompliance still resulted in the loss of millions in federal funding.

Notwithstanding what the State has previously asserted and cited, Eastmond believes that these requirements and subsequent penalties for noncompliance are only "conjecture and speculation to support its argument that it might lose such funding if it is required to honor the statutory attorney's lien." Eastmond Brief at 18. The State has not conjured up the regulations and does not speculate when faced with the reality that many states have learned for themselves the devastating consequences of noncompliance. *Hodges* stands as a clear warning to Utah.

V. NOTWITHSTANDING FEDERAL PROHIBITIONS, ALLOWING ANY ATTORNEY TO USE STATE MONEY FOR HIS OWN PRIVATE GAIN IS AGAINST PUBLIC POLICY.

Eastmond bases his argument that the Office of Recovery Services, funded by taxpayer money, should be his private collection agency on curious reasoning: "Otherwise, attorney's [sic] would be hesitant to take on case [sic] such as Respondent's out of fear on [sic] not being compensated, which could lead to attorney's [sic] declining to represent such individuals, such as Respondent who had no assets against which Appellee could rely upon to be paid out of other than the child support owed to Respondent." Eastmond Brief at 16.

Each attorney in this State makes a choice based on many factors when deciding whether or not to represent an individual or entity. The client's ability to pay is usually just one of the factors considered. Eastmond suggests it is the only factor. This hyperbole does a great disservice to the many attorneys who serve the needs of the citizens of Utah often at great personal cost.

Eastmond has failed to provide this Court with any case law contrary to *Shipman v. City of New York Collection Unit*, 703 N.Y.S.2d 389 (N.Y. 2000). In addition, the State is not aware of any case law in any jurisdiction contrary to *Shipman*.

The Court in *Shipman* found that even though the attorney had represented the mother in a paternity and child support action which gave rise to his lien, his lien could not attach to child support. However, the Court in *Shipman* specifically ruled on the issue

of whether the support collection unit has the legal duty to redirect child support payments and concluded: "[t]he support collection unit does not have a legal duty to disburse any portion of the child support funds in its possession to an attorney asserting an attorney's lien." *Id.* at 396. Permitting Eastmond to use the Office of Recovery Services as his own private collection agency at taxpayer expense is a violation of federal regulations and would result in severe penalties affecting those citizens who can least afford to bear the burden. It would also defeat the public policy basis for the creation of Title IV-D programs.

CONCLUSION

The *Eastmond v. Earl* decision should be overturned. The basis for the decision is the 1935 *Hampton* case involving alimony which this Court has extrapolated to also mean child support. Alimony does not include child support today and did not include child support at the time *Hampton* was decided. *Hampton* does not stand for the proposition that an attorney's lien can attach to child support as statutorily regulated today.

Hampton was decided in 1935. If the common law holding derived from that decision was that an attorney's lien could attach to alimony, then the Legislature pre-empted the common law holding by enacting § 78-23-6(1) in 1981, which exempts alimony or separate maintenance. If the common law holding derived from the *Hampton* decision was that an attorney's lien could attach to child support, then the Legislature pre-empted the common law holding by enacting § 78-23-5(f) in 1981. In either case, the

Legislature has pre-empted the common law and when there is a conflict between the common law and the statute, the common law must give way to the statute.

The Court should overturn *Eastmond* because it has the authority to overturn its prior decision when it would result in more good than harm and would resolve the existing conflict among statutes. The conflict exists as a result of Eastmond's interpretation of § 78-23-10(2). It is not logical to believe that the Legislature would enact a statute that specifically excludes alimony and child support from execution, enact a statute which enumerates only five instances in which a creditor may levy on any exempt property, and then enact a third statute which nullifies the first two. Eastmond's interpretation of § 78-23-10(2) is in error.

Allowing an attorney's lien to intercept child support arrears will have a devastating impact on the participants in IV-D programs. The State stands in jeopardy of losing vast amounts of federal funding if an attorney is permitted to use a taxpayer-funded agency for his private gain because it is a direct violation of federal regulations and violates the public policy underlying these programs. The Court should make it clear that state and federal Title IV-D funds cannot be used to collect the fees of private attorneys and allow the State to continue to be in compliance with the federal regulations. All of this may be accomplished by overturning *Eastmond.*

ANSWER BY INTERVENOR/APPELLANT TO CROSS-APPEAL

STATEMENT OF JURISDICTION

This is an appeal from a final order entered August 24, 2001, wherein the trial court determined that the attorney's lien could attach to the past due child support arrearages, but not to the ongoing support. Under Utah Code Ann. § 78-3-4(6) (Supp. 2000), appeals from final orders in domestic cases, handled by the district court, are taken to the Court of Appeals as directed by Utah Code Ann. § 78-2a-3(2)(h) (Supp. 2000).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

a. Issue:

1. Whether the District Court was correct in ruling that Appellee's attorney's lien may not attach to current or future child support because ongoing or future child support is the right of the child.

SUMMARY OF ARGUMENT

There are no specific statutes to support the District Court ruling, but it is well-settled in Utah case law that ongoing or future child support cannot be waived, bargained away, or compromised in any manner by the parents because such support is the right of the child.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT AN ATTORNEY'S LIEN CANNOT ATTACH TO ONGOING OR FUTURE CHILD SUPPORT.

A. Ongoing or future child support belongs to the child.

Eastmond seeks to overturn the District Court's ruling prohibiting him from attaching his attorney's lien to ongoing or future child support payments. It is well-settled in the case law of this State that "the right of minor children to support cannot be bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents." *Hills v. Hills,* 638 P.2d 516, 517 (Utah 1981) (citations omitted).

Eastmond's lien arose as a result of an agreement entered into between Eastmond and Nanette Fisher whereby he agreed to provide certain services and she agreed to pay certain fees. The children of Mrs. Fisher were not parties to the agreement. Mrs. Fisher cannot by any method barter, extinguish or assign future or ongoing child support. It is not hers. The right to receive ongoing or future child support belongs to the child. "Although child support is payable to the custodial parent, the right to child support belongs to the child." *State v. Sucec,* 924 P.2d 882, 886 (Utah 1996) (citations omitted).

CONCLUSION

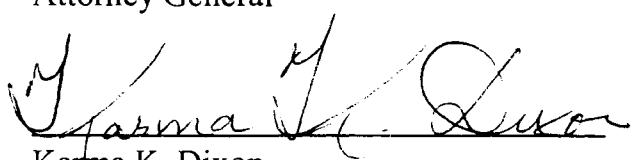
Eastmond's attorney's lien is based on a contractual agreement he had with Nanette Fisher. Nanette Fisher cannot barter away or in any way extinguish her children's right to receive child support. Eastmond has no contract or agreement with the

children whose right it is to receive ongoing or future child support. The District Court is correct in ruling that Eastmond cannot use an attorney's lien arising out of an agreement with the mother to attach child support that belongs to the children. The District Court ruling should be affirmed.

The State respectfully requests oral argument and a published opinion.

Respectfully submitted this 2nd day of October, 2002.

MARK L. SHURTLEFF
Attorney General



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CERTIFICATE OF DELIVERY

I hereby certify that on the 2nd day of October, 2002, I caused two true and correct copies of the foregoing Intervenor/Appellant's Reply and Answer to Brief of Appellee/Cross-Appellant to be served by first-class mail, postage prepaid, on each of the following:

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DATED this 2nd day of October, 2002.

Karma K. Dixon
Assistant Attorney General
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Appellant/Intervenor

Addenda

Addendum A

42 USCA § 654
42 U.S.C.A. § 654

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 7--SOCIAL SECURITY
SUBCHAPTER IV--GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES
PART D--CHILD SUPPORT AND ESTABLISHMENT OF PATERNITY

Current through P.L. 107-203, approved 7-24-02

§ 654. State plan for child and spousal support

A State plan for child and spousal support must--

(1) provide that it shall be in effect in all political subdivisions of the State;

(2) provide for financial participation by the State;

(3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan;

(4) provide that the State will--

(A) provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan with respect to--

(i) each child for whom (I) assistance is provided under the State program funded under part A of this subchapter, (II) benefits or services for foster care maintenance are provided under the State program funded under part E of this subchapter, (III) medical assistance is provided under the State plan approved under subchapter XIX of this chapter, or (IV) cooperation is required pursuant to section 6(l)(1) of the Food Stamp Act of 1977 (7 U.S.C. 2015(l)(1)), unless, in accordance with paragraph (29), good cause or other exceptions exist;

(ii) any other child, if an individual applies for such services with respect to the child; and

(B) enforce any support obligation established with respect to--

(i) a child with respect to whom the State provides services under the plan; or

(ii) the custodial parent of such a child;

(5) provide that (A) in any case in which support payments are collected for an individual with respect to whom an assignment pursuant to section 608(a)(3) of this title is effective, such payments shall be made to the State for distribution pursuant to section 657 of this title and shall not be paid directly to the family, and the individual will be notified on a monthly basis (or on a quarterly basis for so long as the Secretary determines with respect to a State that requiring such notice on a monthly basis would impose an unreasonable administrative burden) of the amount of the support payments collected, and (B) in any case in which support payments are collected for an individual pursuant to the assignment made under section 1396k of this title, such payments shall be made to the State for distribution pursuant to section 1396k of this title, except that this clause shall not apply to such payments for any month after the month in which the individual

ceases to be eligible for medical assistance;

(6) provide that--

(A) services under the plan shall be made available to residents of other States on the same terms as to residents of the State submitting the plan.

(B) an application fee for furnishing such services shall be imposed on an individual, other than an individual receiving assistance under a State program funded under part A or E of this subchapter, or under a State plan approved under subchapter XIX of this chapter, or who is required by the State to cooperate with the State agency administering the program under this part pursuant to subsection (l) or (m) of section 2015 of Title 7, and shall be paid by the individual applying for such services, or recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and shall be considered income to the program), the amount of which

(i) will not exceed $25 (or such higher or lower amount (which shall be uniform for all States) as the Secretary may determine to be appropriate for any fiscal year to reflect increases or decreases in administrative costs), and

(ii) may vary among such individuals on the basis of ability to pay (as determined by the State),

(C) a fee of not more than $25 may be imposed in any case where the State requests the Secretary of the Treasury to withhold past-due support owed to or on behalf of such individual from a tax refund pursuant to section 664(a)(2) of this title,

(D) a fee (in accordance with regulations of the Secretary) for performing genetic tests may be imposed on any individual who is not a recipient of assistance under a State program funded under part A of this subchapter, and

(E) any costs in excess of the fees so imposed may be collected--

(i) from the parent who owes the child or spousal support obligation involved; or

(ii) at the option of the State, from the individual to whom such services are made available, but only if such State has in effect a procedure whereby all persons in such State having authority to order child or spousal support are informed that such costs are to be collected from the individual to whom such services were made available;

(7) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials and Indian tribes or tribal organizations (as defined in subsections (e) and (l) of section 450b of Title 25) (A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan;

(8) provide that, for the purpose of establishing parentage, establishing, setting the amount of, modifying, or enforcing child support obligations, or making or enforcing a child custody or visitation determination, as defined in section 663(d)(1) of this title, the agency administering the plan will establish a service to locate parents utilizing--

(A) all sources of information and available records; and

(B) the Federal Parent Locator Service established under section 653 of this title,

and shall, subject to the privacy safeguards required under paragraph (26), disclose only the information described in sections 653 and 663 of this title to the authorized persons specified in such sections for the purposes specified in such sections;

(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State--

(A) in establishing paternity, if necessary;

(B) in locating a noncustodial parent residing in the State (whether or not permanently) against whom any action is being taken under a program established under a plan approved under this part in another State;

(C) in securing compliance by a noncustodial parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children with respect to whom aid is being provided under the plan of such other State;

(D) in carrying out other functions required under a plan approved under this part; [FN1] and

(E) not later than March 1, 1997, in using the forms promulgated pursuant to section 652(a)(11) of this title for income withholding, imposition of liens, and issuance of administrative subpoenas in interstate child support cases;

(10) provide that the State will maintain a full record of collections and disbursements made under the plan and have an adequate reporting system;

(11)(A) provide that amounts collected as support shall be distributed as provided in section 657 of this title; and

(B) provide that any payment required to be made under section 656 or 657 of this title to a family shall be made to the resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children;

(12) provide for the establishment of procedures to require the State to provide individuals who are applying for or receiving services under the State plan, or who are parties to cases in which services are being provided under the State plan--

(A) with notice of all proceedings in which support obligations might be established or modified; and

(B) with a copy of any order establishing or modifying a child support obligation, or (in the case of a petition for modification) a notice of determination that there should be no change in the amount of the child support award, within 14 days after issuance of such order or determination;

(13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments and provide that information requests by parents who are residents of other States be treated with the same priority as requests by parents who are residents of the State submitting the plan;

(14)(A) comply with such bonding requirements, for employees who receive, disburse, handle, or have access to, cash, as the Secretary shall by regulations prescribe;

(B) maintain methods of administration which are designed to assure that persons responsible for handling cash receipts shall not participate in accounting or operating functions which would permit them to conceal in the accounting records the misuse of cash receipts (except that the Secretary shall by regulations provide for exceptions to this requirement in the case of sparsely populated areas where the hiring of unreasonable additional staff would otherwise be necessary);

(15) provide for--

(A) a process for annual reviews of and reports to the Secretary on the State program operated under the State plan approved under this part, including such information as may be necessary to measure State compliance with Federal requirements for expedited procedures, using such standards and procedures as are required by the Secretary, under which the State agency will determine the extent to which the program is operated in compliance with this part; and

(B) a process of extracting from the automated data processing system required by paragraph (16) and transmitting to the Secretary data and calculations concerning the levels of accomplishment (and rates of improvement) with respect to applicable performance indicators (including paternity establishment percentages) to the extent necessary for purposes of sections 652(g) and 658 of this title;

(16) provide, for the establishment and operation by the State agency in accordance with an (initial and annually updated) advance automated data processing planning document approved under section 652(d) of this title, of a statewide automated data processing and information retrieval system meeting the requirements of section 654a of this title designed effectively and efficiently to assist management in the administration of the State plan, so as to control, account for, and monitor all the factors in the support enforcement collection and paternity determination process under such plan;

(17) provide that the State will have in effect an agreement with the Secretary entered into pursuant to section 663 of this title for the use of the Parent Locator Service established under section 653 of this title, and provide that the State will accept and transmit to the Secretary requests for information authorized under the provisions of the agreement to be furnished by such Service to authorized persons, will impose and collect (in accordance with regulations of the Secretary) a fee sufficient to cover the costs to the State and to the Secretary incurred by reason of such requests, will transmit to the Secretary from time to time (in accordance with such regulations) so much of the fees collected as are attributable to such costs to the Secretary so incurred, and during the period that such agreement is in effect will otherwise comply with such agreement and regulations of the Secretary with respect thereto;

(18) provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury as set forth in section 664 of this title, and take all steps necessary to implement and utilize such procedures;

(19) provide that the agency administering the plan--

(A) shall determine on a periodic basis, from information supplied pursuant to section 508 of the Unemployment Compensation Amendments of 1976, whether any individuals receiving compensation under the State's unemployment compensation law (including amounts payable pursuant to any agreement under any Federal unemployment compensation law) owe child support obligations which are being enforced by such agency; and

(B) shall enforce any such child support obligations which are owed by such an individual but are not being met--

(i) through an agreement with such individual to have specified amounts withheld from compensation otherwise payable to such individual and by submitting a copy of any such agreement to the State agency administering the unemployment compensation law; or

(ii) in the absence of such an agreement, by bringing legal process (as defined in section 659(i)(5) of this title) to require the withholding of amounts from such compensation; and

(20) provide, to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the procedures which are prescribed in or pursuant to such laws;

(21)(A) at the option of the State, impose a late payment fee on all overdue support (as defined in section 666(e) of this title) under any obligation being enforced under this part, in an amount equal to a uniform percentage determined by the State (not less than 3 percent nor more than 6 percent) of the overdue support, which shall be payable by the noncustodial parent owing the overdue support; and

(B) assure that the fee will be collected in addition to, and only after full payment of, the overdue support, and that the imposition of the late payment fee shall not directly or indirectly result in a decrease in the amount of the support which is paid to the child (or spouse) to whom, or on whose behalf, it is owed;

(22) in order for the State to be eligible to receive any incentive payments under section 658 of this title, provide that, if one or more political subdivisions of the State participate in the costs of carrying out activities under the State plan during any period, each such subdivision shall be entitled to receive an appropriate share (as determined by the State) of any such incentive payments made to the State for such period, taking into account the efficiency and effectiveness of the activities carried out under the State plan by such political subdivision;

(23) provide that the State will regularly and frequently publicize, through public service announcements, the

availability of child support enforcement services under the plan and otherwise, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained and will publicize the availability and encourage the use of procedures for voluntary establishment of paternity and child support by means the State deems appropriate;

(24) provide that the State will have in effect an automated data processing and information retrieval system--

(A) by October 1, 1997, which meets all requirements of this part which were enacted on or before October 13, 1988; and

(B) by October 1, 2000, which meets all requirements of this part enacted on or before August 22, 1996, except that such deadline shall be extended by 1 day for each day (if any) by which the Secretary fails to meet the deadline imposed by section 344(a)(3) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996;

(25) provide that if a family with respect to which services are provided under the plan ceases to receive assistance under the State program funded under part A of this subchapter, the State shall provide appropriate notice to the family and continue to provide such services, subject to the same conditions and on the same basis as in the case of other individuals to whom services are furnished under the plan, except that an application or other request to continue services shall not be required of such a family and paragraph (6)(B) shall not apply to the family;

(26) have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including--

(A) safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, or to establish, modify, or enforce support, or to make or enforce a child custody determination;

(B) prohibitions against the release of information on the whereabouts of 1 party or the child to another party against whom a protective order with respect to the former party or the child has been entered;

(C) prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child. [FN2]

(D) in cases in which the prohibitions under subparagraphs (B) and (C) apply, the requirement to notify the Secretary, for purposes of section 653(b)(2) of this title, that the State has reasonable evidence of domestic violence or child abuse against a party or the child and that the disclosure of such information could be harmful to the party or the child; and

(E) procedures providing that when the Secretary discloses information about a parent or child to a State court or an agent of a State court described in section 653(c)(2) or 663(d)(2)(B) of this title, and advises that court or agent that the Secretary has been notified that there is reasonable evidence of domestic violence or child abuse pursuant to section 653(b)(2) of this title, the court shall determine whether disclosure to any other person of information received from the Secretary could be harmful to the parent or child and, if the court determines that disclosure to any other person could be harmful, the court and its agents shall not make any such disclosure;

(27) provide that, on and after October 1, 1998, the State agency will--

(A) operate a State disbursement unit in accordance with section 654b of this title; and

(B) have sufficient State staff (consisting of State employees) and (at State option) contractors reporting directly to the State agency to--

(i) monitor and enforce support collections through the unit in cases being enforced by the State pursuant to section 654(4) of this title (including carrying out the automated data processing responsibilities described in section 654A(g) of this title); and

(ii) take the actions described in section 666(c)(1) of this title in appropriate cases;

(28) provide that, on and after October 1, 1997, the State will operate a State Directory of New Hires in accordance with section 653a of this title;

(29) provide that the State agency responsible for administering the State plan--

(A) shall make the determination (and redetermination at appropriate intervals) as to whether an individual who has applied for or is receiving assistance under the State program funded under part A of this subchapter, the State program under part E of this subchapter, the State program under subchapter XIX of this chapter, or the food stamp program, as defined under section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. 2012(h)), is cooperating in good faith with the State in establishing the paternity of, or in establishing, modifying, or enforcing a support order for, any child of the individual by providing the State agency with the name of, and such other information as the State agency may require with respect to, the noncustodial parent of the child, subject to good cause and other exceptions which--

(i) in the case of the State program funded under part A of this subchapter, the State program under part E of this subchapter, or the State program under subchapter XIX of this chapter shall, at the option of the State, be defined, taking into account the best interests of the child, and applied in each case, by the State agency administering such program; and

(ii) in the case of the food stamp program, as defined under section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. 2012(h)), shall be defined and applied in each case under that program in accordance with section 6(l)(2) of the Food Stamp Act of 1977 (7 U.S.C. 2015(l)(2));

(B) shall require the individual to supply additional necessary information and appear at interviews, hearings, and legal proceedings;

(C) shall require the individual and the child to submit to genetic tests pursuant to judicial or administrative order;

(D) may request that the individual sign a voluntary acknowledgment of paternity, after notice of the rights and consequences of such an acknowledgment, but may not require the individual to sign an acknowledgment or otherwise relinquish the right to genetic tests as a condition of cooperation and eligibility for assistance under the State program funded under part A of this subchapter, the State program under part E of this subchapter, the State program under subchapter XIX of this chapter, or the food stamp program, as defined under section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. 2012(h)); and

(E) shall promptly notify the individual and the State agency administering the State program funded under part A of this subchapter, the State agency administering the State program under part E of this subchapter, the State agency administering the State program under subchapter XIX of this chapter, or the State agency administering the food stamp program, as defined under section 3(h) of the Food Stamp Act of 1977 (7 U.S.C. 2012(h)), of each such determination, and if noncooperation is determined, the basis therefor;

(30) provide that the State shall use the definitions established under section 652(a)(5) of this title in collecting and reporting information as required under this part;

(31) provide that the State agency will have in effect a procedure for certifying to the Secretary, for purposes of the procedure under section 652(k) of this title, determinations that individuals owe arrearages of child support in an amount exceeding $5,000, under which procedure--

(A) each individual concerned is afforded notice of such determination and the consequences thereof, and an opportunity to contest the determination; and

(B) the certification by the State agency is furnished to the Secretary in such format, and accompanied by such supporting documentation, as the Secretary may require;

(32)(A) provide that any request for services under this part by a foreign reciprocating country or a foreign country with which the State has an arrangement described in section 659a(d) of this title shall be treated as a request by a State;

(B) provide, at State option, notwithstanding paragraph (4) or any other provision of this part, for services under the plan for enforcement of a spousal support order not described in paragraph (4)(B) entered by such a country (or subdivision); and

(C) provide that no applications will be required from, and no costs will be assessed for such services against, the foreign reciprocating country or foreign obligee (but costs may at State option be assessed against the obligor); and

(33) provide that a State that receives funding pursuant to section 628 of this title and that has within its borders Indian country (as defined in section 1151 of Title 18) may enter into cooperative agreements with an Indian tribe or tribal organization (as defined in subsections (e) and (l) of section 450b of Title 25), if the Indian tribe or tribal organization demonstrates that such tribe or organization has an established tribal court system or a Court of Indian Offenses with the authority to establish paternity, establish, modify, or enforce support orders, or to enter support orders in accordance with child support guidelines established or adopted by such tribe or organization, under which the State and tribe or organization shall provide for the cooperative delivery of child support enforcement services in Indian country and for the forwarding of all collections pursuant to the functions performed by the tribe or organization to the State agency, or conversely, by the State agency to the tribe or organization, which shall distribute such collections in accordance with such agreement.

The State may allow the jurisdiction which makes the collection involved to retain any application fee under paragraph (6)(B) or any late payment fee under paragraph (21). Nothing in paragraph (33) shall void any provision of any cooperative agreement entered into before August 22, 1996, nor shall such paragraph deprive any State of jurisdiction over Indian country (as so defined) that is lawfully exercised under section 1322 of Title 25.

CREDIT(S)
2002 Electronic Update

(Aug. 14, 1935, c. 531, Title IV, § 454, as added Jan. 4, 1975, Pub.L. 93-647, § 101(a), 88 Stat. 2354, and amended Aug. 9, 1975, Pub.L. 94-88, Title II, § 208(b), (c), 89 Stat. 436; May 23, 1977, Pub.L. 95-30, Title V, § 502(a), 91 Stat. 162; June 9, 1980, Pub.L. 96-265, Title IV, § 405(b), 94 Stat. 463; Dec. 28, 1980, Pub.L. 96-611, § 9(a), 94 Stat. 3571; Aug. 13, 1981, Pub.L. 97-35, Title XXIII, §§ 2331(b), 2332(d), 2333(a), (b), 2335(a), 95 Stat. 860, 862, 863; Sept. 3, 1982, Pub.L. 97-248, Title I, §§ 171(a), (b)(1), 173(a), 96 Stat. 401, 403; July 18, 1984, Pub.L. 98-369, Div. B, Title VI, § 2663(c)(14), (j)(2)(B)(x), 98 Stat. 1166, 1170; Aug. 16, 1984, Pub.L. 98-378, §§ 3(a), (c) to (f), 5(b), 6(a), 11(b)(1), 12(a), (b), 14(a), 21(d), 98 Stat. 1306, 1310, 1311, 1314, 1318, 1319, 1320, 1324; Dec. 22, 1987, Pub.L. 100-203, Title IX, §§ 9141(a)(2), 9142(a), 101 Stat. 1330-321, 1330-322; Oct. 13, 1988, Pub.L. 100-485, Title I, §§ 104(a), 111(c), 123(a), (d), 102 Stat. 2348, 2349, 2352, 2353; Oct. 12, 1995, Pub.L. 104-35, § 1(a), 109 Stat. 294; Aug. 22, 1996, Pub.L. 104-193, Title I, § 108(c)(11), (12), Title III, §§ 301(a), (b), 302(b)(2), 303(a), 304(a), 312(a), 313(a), 316(g)(1), 324(b), 332, 333, 342(a), 343(b), 344(a)(1), (4), 370(a)(2), 371(b), 375(a), (c), 395(d)(1)(D), (2)(B), 110 Stat. 2166, 2199, 2204, 2205, 2207, 2209, 2218, 2223, 2230, 2233, 2234, 2236, 2252, 2254, 2256, 2259, 2260; Aug. 5, 1997, Pub.L. 105-33, Title V, §§ 5531(a), 5542(c), 5545, 5546(a), 5548, 5552, 5556(b), 111 Stat. 625, 631, 633, 635, 637; Dec. 14, 1999, Pub.L. 106-169, Title IV, § 401(g), (h), 113 Stat. 1858.)

[FN1] So in original. The semicolon should probably be a comma.

[FN2] So in original. The period probably should be a semicolon.

<General Materials (GM) - References, Annotations, or Tables>

45 CFR § 305.61
45 C.F.R. § 305.61

CODE OF FEDERAL REGULATIONS
TITLE 45--PUBLIC WELFARE
SUBTITLE B--REGULATIONS RELATING TO PUBLIC WELFARE
CHAPTER III--OFFICE OF CHILD SUPPORT ENFORCEMENT (CHILD SUPPORT ENFORCEMENT PROGRAM), ADMINISTRATION FOR CHILDREN AND FAMILIES, DEPARTMENT OF HEALTH AND HUMAN SERVICES
PART 305--PROGRAM PERFORMANCE MEASURES, STANDARDS, FINANCIAL INCENTIVES, AND PENALTIES

Current through July 19, 2002; 67 FR 47660

§ 305.61 Penalty for failure to meet IV-D requirements.

(a) A State will be subject to a financial penalty and the amounts otherwise payable to the State under title IV-A of the Act will be reduced in accordance with § 305.66:

(1) If on the basis of:

(i) Data submitted by the State or the results of an audit conducted under § 305.60 of this part, the State's program failed to achieve the paternity establishment percentages, as defined in section 452(g)(2) of the Act and § 305.40 of this part, or to meet the support order establishment and current collections performance measures as set forth in § 305.40 of this part; or

(ii) The results of an audit under § 305.60 of this part, the State did not submit complete and reliable data, as defined in § 305.1 of the part; or

(iii) The results of an audit under § 305.60 of this part, the State failed to substantially comply with one or more of the requirements of the IV-D program, as defined in § 305.63; and

(2) With respect to the immediately succeeding fiscal year, the State failed to take sufficient corrective action to achieve the appropriate performance levels or compliance or the data submitted by the State are still incomplete and unreliable.

(b) The reductions under paragraph (c) of this section will be made for quarters following the end of the corrective action year and will continue until the end of the first quarter throughout which the State, as appropriate:

(1) Has achieved the paternity establishment percentages, the order establishment or the current collections performance measures set forth in § 305.40 of this part;

(2) Is in substantial compliance with IV-D requirements as defined in § 305.63 of this part; or

(3) Has submitted data that are determined to be complete and reliable.

(c) The payments for a fiscal year under title IV-A of the Act will be reduced by the following percentages:

(1) One to two percent for the first finding under paragraph (a) of this section;

(2) Two to three percent for the second consecutive finding; and

(3) Not less than three percent and not more than 5 percent for the third or a subsequent consecutive finding.

(d) The reduction will be made in accordance with the provisions of 45 CFR 262.1(b)-(e) and 262.7.

<General Materials (GM) - References, Annotations, or Tables>

45 C. F. R. § 305.61

45 CFR § 305.61

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