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January 16, 2015

Office of Child Support Enforcement
Administration for Children and Families
United States Department of Health and Human Services
370L'Enfant Promenade, SW
Washington DC 20447

Attention: Director, Policy Division

Re: Comments on proposed rule at 79 Fed. Reg. 68548, Flexibility, Efficiency and Modernization in Child Support Enforcement Programs, RIN 0970-AC50

Dear Sir or Madam:

Thank you for the opportunity to comment on these proposed regulations. The Empire Justice Center will be focusing our comments on sections of the regulations which affect the low income individuals served by our office and the legal services offices that we serve. In particular, our comments will focus on the changes to the child support guidelines, the treatment of incarceration, the enforcement provisions, including job services, the medical support provisions and the expansion of SSI garnishment protection to concurrent cases. In addition, we make a recommendation regarding an issue not addressed in the proposed regulations – the problem of interest on arrears.

The Empire Justice Center

The Empire Justice Center is a not-for-profit law firm with offices in Rochester, Albany, White Plains, Yonkers and Central Islip, New York. The Empire Justice Center provides support services, such as research, case assistance and the coordination of statewide training and substantive law task forces to civil legal service attorneys across New York State. We also represent low-income individuals, as well as classes of New Yorkers, in a wide range of poverty law areas in a wide variety of civil matters including public benefits, child support, Medicaid, consumer, immigration, social security and employment.

Comments

Decades ago, the Empire Justice Center participated actively in the development of New York State's child support guidelines and were supportive of the need for standards that would lead to the establishment of fair and equitable support orders. For many low income custodial parents, the guidelines meant that child support became a reliable source of income to support their children. Over time, however, troubling patterns have emerged for some low income non-custodial parents, particularly those with mental or physical disabilities, and those who are or who have been incarcerated, and who now face significant struggles with overwhelming and unaffordable arrears.

Additionally, because of the strong enforcement provisions of the Child Support Standards Act, noncustodial parents in low wage jobs and disabled or retired individuals receiving social security benefits (many of whom have arrears-only orders because their children are now adults), suffer under income executions that leave them without enough money to live on.

The proposed regulations, which focus on actual earnings and income, are an important step toward realistic and affordable payments. We are particularly grateful that your rulemaking recognizes the research and data on the economic status of most of those who owe child support arrears and that these uncollectable arrears drive non-custodial parents away from the labor market and their children.

With this in mind, we make the following comments:

302.56(b)(5) – Prohibition on the treatment of incarceration as voluntary unemployment (pp. 68553-55, 68580):

The provision that would prohibit the treatment of incarceration as voluntary unemployment in both establishing and modifying support orders is critically important, even in a state like New York which has modified its earlier "no justification"

rule. Prior to October 13, 2010, the rule in New York was that support orders could not be modified downward while a person is incarcerated because an incarcerated parent's current financial hardship is solely the result of his wrongful conduct. *Knights v. Knights,* 71 N.Y 2d 865 (1988). Although our Family Court Act was amended to modify this rule, the rule only applies prospectively to orders after the statute's effective date. *Baltes v. Smith,* 111 A.D. 3d 1072 (Third Dep't 2013) and only to modifications. N.Y. Fam. Ct. Act 451(3)(a); *Commissioner v. Jessica M.D.* 31 Misc. 3d 490 (Franklin County 2011) (*income imputed based on $8 per hour earnings prior to incarceration in case establishing an order against an incarcerated mother in favor of the local social services district to which support had been assigned*).

We therefore strongly support this regulation, because it applies to both establishing and modifying orders of support.

We recommend that the language be amended to provide that the rule applies to modifications **regardless of when the underlying order was entered** to avoid the inequitable situation in New York that permits modification only of more recent orders.

We recommend that, in order **to protect victims of domestic violence** and those who are owed money by individuals incarcerated for nonpayment who do have the means and ability to pay child support that the final regulation read:

> (5) Provide that incarceration may not be treated as voluntary unemployment in establishing or modifying support orders, regardless of the date the order was entered, ***provided that such incarceration is not the result of nonpayment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment."***

302.56(c) – Guidelines for Setting Child Support Awards (pp. 68553-55, 68580): **With some caveats,** we **support** the requirement that the guidelines

> **-** must take actual earnings and income of the non-custodial parent into account;
>
> **-**must take the parent's subsistence needs into account and require that any amount ordered for support be related to actual earnings or evidence of ability to pay such as inconsistency between the non-custodial parents claimed income and assets and the standard of living;

When child support orders are inappropriately based on incorrect imputations, non-custodial parents rapidly accrue arrears that they are not able to pay. Our office is particularly concerned with income that is imputed to individuals who have been found

to be disabled by the Social Security Administration. Our office has been involved in unsuccessful litigation and we have supported another legal services program in similarly unsuccessful litigation in attempts to argue that the receipt of Supplemental Security Income (SSI) should be a bar to the imputation of earned income to disabled individuals in receipt of SSI. See *Hurd v. Hurd,* 303 A.D. 2d 928 (4th Dep't 2003); *Meyer v. Meyer,* 305 A.D.2d 756 (3rd Dep't 2003).

The proposed regulations will likely require a different result in these cases. However, to make this rule absolutely clear, and because SSI is needs-based program which requires a finding of inability to work for a period of at least 12 months, and because the disability test for Social Security Disability (SSD) is the same as that for SSI (42 U.S.C. §423(d); 20 C.F.R. §§ 404.1505 & 416.905),

We recommend that a sentence be added to the proposed regulation stating that the receipt of SSI or combined SSI and SSD benefits establishes a prima facie case that the individual does not have the ability to pay child support unless the presumption of insufficient means and inability to work is successfully rebutted by submission of opposing evidence.

The proposed rule requires only "actual" income to be considered, except where there is "other evidence of the ability to pay, such as testimony that income or assets are not consistent with a noncustodial parent's current standard of living" §302.56(c)(4) (proposed) or where the noncustodial parent may be capable of making support payments but "may not make support payments because they are unwilling to do so." Federal Register, 97:221 (Nov. 17, 2014), 68555. In cases, often involving domestic violence, where one parent refuses to comply with discovery, does not fully disclose earnings and income, or engages in other bad faith tactics, earnings and income may be appropriately imputed to the other parent. On this point, we believe the Proposal could provide more specific definitions of "income" so that judges have more guidance when imputing in these cases. **We recommend** looking to New York law for detailed language related to income and imputed earnings contained in N.Y. Fam. Ct. Act § 413 (McKinney); N.Y. Dom. Rel. Law § 240 (McKinney).

302.56(h) **Parenting Time** (68556, 68580)

This provision permits child support awards to recognize parenting time provisions pursuant to State child support guidelines or when both parents have agreed to the parenting time provisions. **We cannot support this provision given the numerous complexities and family history dynamics involved with determining safe and appropriate parenting time, particularly where a history of domestic violence is present.** While the fact finder may need information about the family's custodial arrangements to determine support awards, providing a parenting agreement to be negotiated and determined as part of a child

support proceeding is misplaced. Substance abuse, domestic violence, child abuse and neglect, criminal histories, disabilities, and mental health concerns, are but a few of the challenges finders of fact may have to navigate to approve safe and appropriate parenting time agreements. Even where there appears to be mutual consent, these factors must be considered before a court may approve an order. In domestic violence cases, abusers wield coercive control over the victim and what may appear to be mutual agreement may, in fact, be an agreement obtained out of fear and unequal bargaining power. Custody and visitation issues are complicated and require time and judicial training. Further, in New York, parents are provided the right to counsel in custody cases but such right is not given in support matters. Therefore, this provision may impact how this right to counsel would be provided.

At a minimum, if such provision is included in the final rule , it should require that each case be carefully and safely screened for past family offense and criminal cases involving domestic violence and excludes such cases from this provision a history of domestic violence is identified, even where there appears to be mutual consent

303.6(c)(4),(5) **Enforcement of support obligations** (68557-59,68581)

> Civil contempt proceedings must take subsistence needs and actual income into account.
>
> Purge amount to avoid incarceration must be taken into account actual earnings and there must be a written evidentiary finding that the non-custodial parent has the actual means to the pay the amount from his or her current income or assets.

Our office has worked with legal services programs that represent disabled clients on SSI and Social Security benefits who are held in contempt for non-payment even though their income is below New York's self-support reserve (135% of poverty – New York Family Court Act § 413 (1)(b)(6)). Similarly, these individuals are asked to pay purge amounts which are beyond their needs to pay. Once incarcerated, these individuals lose their SSI benefits and they are released with no means of support. Until their benefits are reinstated (which sometimes requires the assistance of legal services organizations) they are at risk of homelessness and inability to obtain needed medications. In one county, after an SSI recipient attempted suicide after being incarcerated for his inability to pay support, the director the mental health association spearheaded an effort to ask for diversion programs for people with mental illness since the jail didn't have the resources to monitor people with mental illness.

Therefore **we support these requirements** which would avoid these unjust results.

Job services as an enforcement tool – The Empire Justice Center **cannot support this regulation as written.**

Our organization and others have seen mandatory referrals to job services used in a punitive way. For example, one of our clients, a single parent, was sued by the social services district when her son was placed in a group home after a psychiatric hospitalization. The parent, who was also the caretaker of young children still at home, suffered from a psychiatric disability and had been told by her treating psychiatrist that she was not able to work. Nevertheless, she was threatened with incarceration if she did not participate in a job services program, and but for our intervention, would have been incarcerated.

However, we could support a job services provision if it were made more robust to include the following:

1. Participation in job services should be voluntary, not punitive;
2. Job services should be part of a comprehensive program that includes legal services to assist with order modification, and license restoration.
3. Incentives such as forgiveness of state owed arrears should be part of the process. In 2010, New York State ran a pilot arrears forgiveness program which did not receive much attention because participation in it was low. See 08 ADM-12, available at: http://otda.ny.gov/policy/directives/2008/ADM/08-ADM-12.pdf Among those who did participate, however, just over $545,000 in state owed arrears were eliminated. Most of the successful participants were in programs that included case management. Many important lessons were learned from this pilot, such as ways to improve outreach, which should inform future efforts. The most effective pilots included partnerships with local civil legal services programs to assist with modification of orders and restoration of licenses.
4. **Subsidized employment should be an allowable job service,** because as pointed out in the comments on the Center on Law and Social Policy, such employment improves workforce attachment makes its participants real workers. The subsidized employment program which was funded in 2009-10 under the American Recovery and Reinvestment Act resulted in the employment of more than 260,000 low income adults and youth in paid jobs.

303.8 – Review and Adjustment (pp. 68559-60, 68582):

> Notice of right to request a review and adjustment when the IV-D agency has knowledge that a parent is incarcerated; options for states to initiate review and adjustment when the non-custodial parent has been incarcerated.

We support this provision because in our experience, many incarcerated parents do not know that if they do not request modification of their orders upon incarceration, they will not be able to have them retroactively adjusted. These parents end up with crush large arrears which result in large garnishments (55-65% of income) which makes survival on a low wage job impossible.

303.11(B)(9) – Allows states to close a case when a noncustodial parent's sole income is SSI, including those individuals who receive concurrent SSI and SSD. (pp. 68560-61, 68582):

For the reasons set forth in our comments to 302.56(c) (above), and 307.11(c)(3)(i),(ii) (below)**, we strongly support this provision.** When the case is open, it is more likely that SSI or SSD benefits in bank accounts will be garnished. We often speak with legal services advocates whose clients receive only SSI or SSI and SSD, who have had their Social Security garnished or their bank accounts containing SSI and SSD frozen. Getting the restraint or garnishment lifted is time consuming and causes great financial hardship to the obligor.

303.31 – Securing and Enforcing Medical Support Obligations, particularly the provision that the term Medical Support can be defined as Medicaid and Child Health Plus. (pp. 68564-65, 68585-85):

We strongly support the proposed changes that would allow Medical Child support orders to take Medicaid and CHIP coverage into account, rather than requiring that children be covered by private insurance that is often more expensive, less comprehensive and geographically inconvenient. It is most important that our child support policies maximize children's access to affordable health insurance that allows them to utilize health care providers that are convenient to them.

307.11(c)(3)(i),(ii) – Functional Requirements for Computerized Support Enforcement (Expanding SSI protection to concurrent cases) (pp. 68569-70, 68586):

Supplemental Security Income (SSI) is a federal needs-based benefit provided to disabled and elderly individuals. Title II of the Social Security Act provides a benefit to disabled or retired workers in an amount based on the earnings of the individual, and is paid without regard to the current income of the recipient. Many low wage workers who

are now disabled or retired have a low or erratic earnings history which results in their Title II benefits below the need based standard of SSI. When Title II recipients in this situation have no other income and resources below the SSI eligibility level, they are thereby entitled to an SSI supplement that will bring them up to the SSI level.

Federal law makes the income of SSI and Title II recipients exempt from "execution, levy, attachment, garnishment or other legal process." 42 U.S.C. §407 (Title II); 42 U.S.C. §407 (Title II); 42 U.S.C. §1383(d)(1)(SSI). However, 42 U.S.C. §659(a) provides that §407 does not protect OASDI benefits from legal process for the collection of child support. Thus, as far as child support is concerned, the exemption in §407 protects only SSI. See *Mariche v. Mariche,* 758 P. 2d 745 (Sup.Ct., Kansas, 1988).

As a result, individuals who have a work history that qualifies them for Title II benefits and have child support arrears, fare much worse than individuals whose only income is SSI, because between 55-65% the Title II benefits are subject to garnishment. (New York Civil Practice Law and Rules §5241(g)(1)).

These individuals often contact legal services programs for assistance, but there is little we can do.

> In 2013, an individual presented himself at an upstate legal services program after just having been awarded Social Security Disability and SSI. Shortly after receiving his benefits, a garnishment for child support in the amount of $5 05 per month was taken from his $777 monthly SSD benefit, leaving him with only $272 per month in SSD in addition to his $39 monthly SSI payment. Although the legal services program immediately filed a modification petition on his behalf, it took months for the matter to be scheduled, heard and decided, and by the time the order was modified, the individual had been evicted for non-payment of rent. He also had to forgo prescription medications because he was unable to afford the Medicaid part D copayments. **This proposed regulatory change would provide her great relief.**

New York does have an administrative process which allows very low income individuals (at or below 135% of poverty for one person regardless of household size) to protect Title II benefits from garnishments for the administrative add-on (18 NYCRR 347.9(e)). This process provides some assistance when individuals are aware that they can make the request. But that process does not protect Title II from garnishments imposed to collect the current support order, court-ordered payments on arrears or additional amounts imposed by other states.

One upstate legal services program is currently trying to assist a 42 year old woman who suffers from post-traumatic stress disorder as a result of severe domestic violence as well as other mental health conditions. She is in receipt of Social Security Disability benefits in the amount of $477 per month and $351 in SSI. However, $285 per month (60% of her SSD) is being garnisheed for support arrears related to a time when her children were in foster care in Texas. Because the garnishment order was issued by Texas, there is no way to use New York's administrative process to provide her with any relief. **This proposed regulatory change would provide her great relief.**

We therefore strongly support the proposed regulation that would require that automated enforcement systems be identify computer systems expand SSI protections to concurrent cases because it would assure a modicum of security to the elderly and disabled who owe child support arrears.

We strongly support the provision which would require that wrongly garnished funds be returned within two working days since the hardship imposed upon those whose benefits are taken is very severe.

One matter not addressed – Interest on Arrears

We urge the Office of Child Support enforcement to consider one issue that is not addressed in the regulations, but which is another source of overwhelming debt to many low income parents – interest on arrears. Particularly, we ask that you issue a rule that clarifies that the prohibition on modification of arrears does not apply to interest on those arrears. This would be consistent with your focus on making orders consistent with the actual ability to pay.

In New York State the child support debt of noncustodial parents can balloon to astronomical amounts because our statutory interest rate on arrears, once the matter has been reduced to judgment, is 9%. (New York Civil Practice Law and Rules § 5004). Federal guidance is needed as to whether the federal statutory bar on the reduction of arrears applies to statutory interest, particularly when the parent against whom the interest is accruing is disabled. The continued accrual of interest for someone who does not have the ability to pay can be crushing. In many cases brought to our attention, the interest portion of the debt exceeds by far the amount of the arrears.

One recent Empire Justice Case involved a custodial parent who incurred child support arrears prior to successfully suing for custody against her children's father. Although she was able to terminate the order when the children were returned to her, because the order had been reduced to judgment, interest continued accruing on the arrears owed to the social services district. Shortly after the children were returned to her, the mother, who by that time had found gainful employment, was seriously injured in a car accident. Unable to work, she and her children became recipients of public assistance and the Child Support Enforcement Bureau ceased all collection efforts. However the amount of arrears continued to grow because of the interest. The parent tried to modify the order to have the accruing interest on arrears suspended. The Family Court denied her request, even though the social services district consented to the relief. The matter was not resolved until the case was appealed to Appellate Division of the New York State Supreme Court. Nassau County v. Schaap, _____ A.D. 3d _____(Second Dep't, 12/31/14).

We recommend that the regulations clarify that the prohibition against modifying arrears does not apply to the interest on the arrears when the debtor parent does not have the ability to pay.

Thank you for the opportunity to comment on these regulations. Please feel free to contact me if you have any questions or need additional information.

Very truly yours,

s/ Susan C. Antos

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