MEMORANDUM

TO: **Interested People**

FROM: **Paula Roberts**

DATE: **April 9, 1999**

RE: **Setting Support When the Noncustodial Parent is Low Income**

Welfare reform efforts are predicated on the notion that poor mothers will become employed and the fathers of their children will pay child support. This combination of earnings and child support will make the family self-sufficient, eliminating the need for public assistance. However, recent research makes it apparent that a majority of the fathers whose children receive cash assistance are not able to pay substantial amounts of child support.[1] This has spawned interest in providing education, training and other services to these fathers to make it possible for them to be contributors to their children's well-being.

From a public policy standpoint, investment in such endeavors is legitimized by bringing those fathers into the formal child support system. That is, public dollars are invested in improving the employment prospects of these men so that they will provide, regular on-going formal cash support to their children. In the end, this will improve the lives of children and reduce the need for government-funded assistance. Fathers, state officials and advocates involved in these efforts have all identified child support issues which make attracting fathers into the formal system difficult. Among these are 1) unrealistic expectations of how much current support a low income father is actually able to pay; 2) establishment of arrears amounts which the father cannot pay; 3) problems with retroactive modification of arrearage amounts under the Bradley amendment: 4) state debt policies; and 5) arrearage policies which prevent family reunification.

Much could be written about each of these issues. In the absence of an in-depth evaluation, below is a description of innovative legal and policy choices currently in use which address some of the problems. Implementation of such policies would make it feasible for low income fathers to establish paternity/reenter their children's lives.

SETTING A CURRENT SUPPORT AWARD

Since 1988, each state has been required to develop and use income-based child support guidelines.[2] There are two primary mechanisms states use to accommodate very low income obligors in their guidelines :

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[1] One-half of the fathers of children receiving public assistance have incomes below $6,000 per year. Irwin Garfinkel, Sara S. McLanahan, and Thomas Hanson, *A Patchwork Portrait of Nonresident Fathers*, in IRWIN GARFINKEL, SARA MCLANAHAN, DANIEL MEYER AND JUDITH SELTZER, FATHERS UNDER FIRE, Russell Sage Foundation (New York 1998), p.48.

[2] 42 USC Section 667.

- adopting a guideline which provides a self-support reserve for a noncustodial parent.[3] The noncustodial parent's obligation is set based on income above the self-support reserve amount. This clearly protects low income obligors from having unrealistic obligations.

- excluding certain payments--especially means-tested public assistance-- from their definition of 'income"[4] The noncustodial parent's obligation is then set based on whatever countable income he has. For example, a noncustodial parent who receives SSI might have no countable income. If he received SSI and also had some income from a sheltered workshop program his obligation would be computed based on his earnings, but not his SSI.[5]

A father with no countable income may, nonetheless, have income imputed to him/her. In most states, tribunals are allowed to impute income in appropriate circumstances. Usually, the imputed amount will be based on the parents' earning capacity or previous work experience.[6] However, some states have adopted policies which limit the imputation of income when the noncustodial parent is disabled or incarcerated.[7] Indeed, the recent trend has been to examine actual earnings and income of the incarcerated parent rather than imputing income. [8]

That a parent has no income (real or imputed) does not necessarily mean that a support obligation will not be imposed. Some states impose mandatory minimum obligations even when a noncustodial parent has neither countable nor imputed income.[9] These guidelines are probably

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[3] See, e.g., MONT. ADMIN. RULE Section 46.30.1501 *et seq.*(1992). Delaware, Hawaii and West Virginia also use this form of guidelines.

[4] See, e.g., FLA. STAT. Section 61.30(2)(c)(1998)(TANF not counted as income); GA. CODE ANN. Section 19-6-15(b)(2)(1998)(needs-based public assistance not counted as income); CAL. FAMILY CODE Section 4058(c)(1998) (TANF, GA and SSI all excluded from definition of income). For more on this issue see, DIANE DODSON AND JOAN ENTMACHER, REPORT CARD ON STATE CHILD SUPPORT GUIDELINES (Women's Legal Defense Fund 1994), p.55.

[5] See, e.g., *In re Support of B. [Wisconsin v. Rose]*, 171 Wis.2d 617, 492 N.W.2d 350 (Wis. App. 1992); *Proudfit v. O'Neal* , 193 Mich. App. 608, 484 N.W. 2d 746 (Mich. App. 1992).

[6] See, e.g., *In re Interest of Tamika S.*, 3 Neb. App. 624, 529 N.W. 2d 147 (Neb. App. 1995); *In re Marriage of Chivaro*, 247 Mont. 185, 805 P 2d 575 (Mont. 1991). If the child is receiving TANF-funded assistance, federal law also requires the agency to request that the tribunal order the noncustodial parent to participate in appropriate work activities. 42 USC Section 666(a)(15(B). These activities include any type of public or private sector employment, on-the-job training, job skills directly related to employment, workfare, community service, and job search. 42 USC Section 607(d).

[7] See, Frank Wozniak, *Loss of Income Due to Incarceration as Affecting the Child Support Obligation*, 27 A.L.R. 5th 540 (1995).

[8] *Bendixen v. Bendixen*, 962 P.2d 170 (Ala. 1998); *State ex.rel. Dept. of Econ. Sec. v. McEvoy*, 191 Ariz. 350, 955 P.2d 988 (Ariz. App. 1998).

[9] Colorado, the District of Columbia, Indiana, Iowa, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Rhode Island, South Carolina, Utah, Vermont, Washington, and Wyoming all have mandatory minimum orders of a specific dollar amount. LAURA MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION

illegal.[10] Even if they were not, the better practice, would be to have guidelines which set a presumptive minimum award which can be rebutted or leave the award to the tribunal's discretion.[11] In discretionary states, tribunals do not generally order support if the parent has no ability to pay.[12]

ESTABLISHING ARREARAGES

At the time a current support order is established, the tribunal will usually set an arrears amount as well. The arrears represents the amount of support which should have been paid during the period between parental separation and the establishment of a formal award. One important point here is that it is the position of the federal government that whether or not to establish an arrearage amount is a matter of state, not federal, law.[13] Thus, states could adopt policies in which they do not seek arrears from low income obligors in public assistance cases.

If a state does wish to establish arrears, it is supposed to do so using the state's child support guidelines. Again, federal guidance on this point is clear.[14] If states choose to set arrears, they are to do so applying the guidelines to "either the current earnings and income at the time the order is set, or the obligor's earnings and income during the prior period."[15] Thus, federal law provides great flexibility to states to set realistic/no arrears for low income fathers.

Even when the state does not take advantage of this federal guidance, there are other possible approaches to take which limit the amount of arrears a low income father might be expected to pay. They include:

- adopt guidelines that provide a self-support reserve for the non-custodial parent. (See

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AND APPLICATION, Aspen Law and Business Press (Maryland 1996), Section 4.07, Table 4-8, pp. 4-48 to 4-49.

[10] See, e.g., *Rose on behalf of Clancy v. Moody*, 629 NE 2d 378, 607 N.Y.S. 2d 906, 83 NY 2d 65 (1993), cert denied 114 S. Ct. 1837, 511 US 1084, 128 L.Ed. 2d 464 (1994); *Velazquez v. State*, 226 A.D. 2d 141, 640 N.Y.S. 2d 510 (App. Div. 1996); *In re Marriage of Gilbert*, 88 Wash. 362, 945 P.2d 238 (Wash. App. 1997) . Not all courts have taken this view, however. See, e.g., *Douglas v. Alaska*, 880 P.2d 113 (1994); *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994). See, also *Glenn v. Glenn*, 848 P.2d 819 (Wyo. 1993); *In re Marriage of Okonkwo*, 525 N.W. 2d 870 (Iowa App. 1994). Plaintiffs in these latter cases did not present Supremacy Clause arguments to the court. Had they done so, the result might well have been different. Federal law and regulations require that the guidelines be rebuttable and mandatory minimum orders preclude rebuttal and therefore contravene the federal statute and implementing regulations. See 56 *Fed. Reg*. 22337 (May 15, 1991).

[11] LAURA MORGAN, *supra*, n.10, Section 4.07, Table 4-8, pp.4-48 to 4-49.

[12] See, e.g., *Hannah v. Hannah*, 582 So. 2d 1125 (Ala. Civ. App. 1991); *Schneider v. Schneider*, 473 N.W. 2d 329 (Minn. App. 1991).

[13] OCSE Action Transmittal 93-04 (March 22, 1993), p.2. "The award of back support is not required under federal rules but may be appropriate in accordance with state law."

[14] OCSE Action Transmittal 93-04, *supra* n. 14, p.2. "... there must be one set of guidelines developed by a State and uniformly applied as a rebuttable presumption in setting all child support awards. This would include application of the guidelines to establish support awards for prior periods.(emphasis in original)

[15] Id. At least one court has found that the burden of establishing income for the prior period is on the obligor. *Missouri ex. Rel.. Anderson v. Sutton*, 807 S.W. 2d 152 (Mo. App. 1991).

above.) Then even if the guidelines are applied retroactively, the amount owed may be zero or a very small amount.

- set the retroactive award outside the guidelines. Federal law makes clear that courts/administrative agencies are free to deviate from the guidelines when the result is "unjust or inappropriate". 42 USC Section 667(b)(2). The only requirement is that the decision maker state for the record why the deviation occurred. This power can be used to limit retroactive awards in appropriate cases.

In the case of a **non-marital** child there are additional options. Here, because the father is not necessarily on notice that he has a child (and hence a support obligation), the reasons for being careful about setting retroactive support for low income obligors are even stronger. The choices include:

- limiting support liability so that it is prospective only. A variation on this is used in Kentucky where, unless paternity is established within 4 years of the child's birth, there can be no retroactive support.[16]

- limiting the number of years the state will go back in seeking support. Maine, for example, prohibits going back more than six years.[17]

- applying equitable principles such as laches and estoppel to prohibit a state from going for back support when the father has been available and the state just hasn't acted on the case.[18]

Developing these or similar approaches in the setting of current support obligations and arrears is critical because, as described below, once such obligations are established, it is very difficult to modify them retroactively. Getting it right the first time is better than trying to fix a problem once it has been created.

THE BRADLEY AMENDMENT

If a noncustodial parent has an order, then the Bradley Amendment applies and the order is not retroactively modifiable.42 USC Section 666(a)(9). However, that is not the end of the discussion. There are policies which states can adopt for use when application of Bradley would be unjust. Among these are:

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[16] KY. REV. STAT. ANN. Section 406.031(1) (Michie/Bobbs-Merrill 1996).

[17] ME. REV. STATS. ANN. Tit. 19, Section 273 (Supp.1990).

[18] See, e.g., *State v. Garcia*, 187 Ariz. 527, 931 P.2d 427 (Ariz. App. Div. 2 1996)(laches applies to state which waited several years to establish paternity and collect public assistance arrears from a man who was at all times available to be sued); *Wigginton v. Kentucky ex.rel. Caldwell*, 760 S.W.2d 885 (Ky. App. 1988) (laches defense allowed when paternity action brought 15 years after child's birth); *Oregon v. Kitchens*, 93 Or. App. 685, 763 P.2d 1196, *cert.* denied 493 U.S. 809 (1988)(estoppel against the state which had waited 10 years after public assistance assignment to bring paternity action).

- use of a general state law which allows the parties to compromise a judgment. While the Bradley Amendment requires states to make the arrears a judgment by operation of law, most states have statutes of general applicability which allow the parties to a judgment to compromise that judgment. Thus, the parents (and the state if it holds an assignment) can agree to lower the amount or wipe out the judgment. According to the guidance which accompanied the federal regulations promulgating the Bradley Amendment , this is perfectly acceptable. The only caution is that the compromise must be done pursuant to general state law: a law which only allowed compromise only of child support judgments would run afoul of Bradley. 54 Fed.Reg. 15764 (April 19, 1989). This position was also stated in Policy Information Question 89-2 (February 14, 1989).[19] It was recently reaffirmed in PIQ 99-03 (March 22, 1999).[20]

- amnesty programs for obligors whose support has been assigned to the state. Using the reasoning described above, PIQ -89-2, also acknowledges that state amnesty programs do not violate the Bradley Amendment. OCSE notes that, as the assignee, the state can compromise any arrears owed to it under an AFDC, foster care, or Medicaid assignment. Since this is so, the state could run an amnesty program as to any arrears owed to it. (OCSE cautions that it does not like this approach and hopes that " application [will] be limited to the most intransigent cases involving large arrears.")

- use of statutes which cap the amount of arrears which can accumulate. For example, New York has a statute which says that if the obligor's income is below the poverty line, no more than $500 in arrears can accumulate. (This doesn't run afoul of Bradley since there is no modification of arrears involved.)

- use of statutes which automatically suspend support obligations for the incarcerated.[21] A common problem is that a dad who is subject to a support order based on his pre-incarceration income is jailed. He is unaware of/ unable to modify the award downward based on his new situation. North Carolina has a statute which suspends obligations of those who are incarcerated. (Again there is no Bradley Amendment problem because there is no modification.)

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[19] According to this PIQ: "The federal statute at 42 USC Section 666(a)(9) provides that any child support payment is on and after the date it is due a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, and not subject to retroactive modification. Such support judgments may be compromised or satisfied by specific agreement of the parties on the same grounds as exist for any other judgment in the State. Consequently, in a non-AFDC case where no arrearages have been assigned to the state the obligee may agree to a settlement for an amount which is less than the accrued arrearages. Judgments involving child support arrears assigned to the state under Titles IVA, I'VE, and XIX of the Social Security Act, of course, may not be compromised by an agreement between the obligee and obligor unless the state, as assignee also approves such a settlement."

[20] The PIQ states "A State could accept less than the full payment of arrearages assigned to the State on the same ground that exists for the compromise and settlement of any judgment in the State."

[21] See, e.g. N.C. GEN. STAT. 50-13.10(d)(4). This statute suspends the obligation (and thus no arrears accrue) when an obligated parent is incarcerated, not participating in a work release program, and has no resources from which to pay support. In other words, where there was an ability to pay because the obligated had income and resources, that parent would still have to pay. But, if such resources did not exist, unrealistic arrearages would not accrue.

THE STATE DEBT ISSUE

In addition to a child support obligation, the noncustodial parent may also be incurring a debt to the state for public assistance given to his family. "State debt" is distinct from "child support" but the two are often confused.

When a child support order has *been established*, many states (e.g. North Carolina) have (and all states should) adopt a policy that the state debt can be no larger than the child support obligation. So, if the child support obligation is set under the guidelines at $50 per month and the father pays that amount, no state debt accrues. If the order is $50 and the father doesn't pay, then the state debt is $50 per month. The viability of this approach is recognized by federal regulations. 45 CFR Sections 302.50(a)(2) and (b)(2).

A more difficult issue arises when there is no court order. In many states, the state establishes a "state debt" equal to the amount of assistance provided to the family for the period when there was no order in place. The state then tries to collect this state debt through the IVD system. A number of courts have found this to be illegal. *Jackson v. Rapps*, 947 F.2d 332 (8th Cir. 1991); *Mushero v. Ives*, 949 F.2d 513, 517 n.1 (1st Cir. 1991). And, see *Missouri ex rel. Anderson v. Sutton*, 807 S.W.2d 152 (Mo. App. 1991); *Dept. of Human Services v. Huffman*, 332 S.E.2d 866 (W.Va. 1985); *Weihe v. Handley*, 389 NW 2d 754 (Minn. App. 1984); *Nicollet County v. Larson*, 421 NW 2d 717 (Minn. 1988); *Dept. of Health and Rehabilitative Services v. Hatfield*, 522 So. 2d 61 (Fla Dist. Ct. App. 1988). All states could/should adopt a policy limiting state debt to the retroactive child support ordered once an order has been set.

In addition, states can adopt policies making it clear that a sate debt does not arise if the responsible parent is also a recipient of public assistance. For example, Vermont law provides this and also provides that the state cannot pursue a debt previously incurred by a responsible parent while that parent receives public assistance or SSI. That same law also explicitly authorizes the state to enter into stipulations with the responsible parent to limit the amount of the debt.[22]

COLLECTING CHILD SUPPORT ARREARS FROM REUNITED FAMILIES

On occasion, a couple will separate and, during the period of separation, the custodial parent and the children receive TANF-funded assistance. During the separation, the noncustodial parent will likely be responsible for child support (either under a support order or because under state law non-custodial parents are responsible for the financial support of their children). If that parent does not meet this obligation, arrears accumulate. These arrears are owed to the state under the public assistance assignment. At some point, the parents reunite, the custodial parent and children no longer receive public assistance, and the child is supported by both parents in a nuclear family. However, the state may pursue the child support arrears owed to the government. The result is that the reunited family has fewer resources to provide for their childrens' current needs. In low income families, the children suffer. The strain of meeting current obligations and paying arrears may also cause the reunited family to split again. This too negatively affects the

[22] VT. STAT. ANN. Tit. 33, Section 3903.

children.

To deal with this problem, some states have adopted statutes which preclude pursuit of arrears owed to the state in cases where a low income family has reunited. For example, Vermont law forbids pursuit of assigned arrears owed to the state by a reunited family unless the family's total income exceeds 225 percent of the federal poverty line.[23] Other jurisdictions have adopted flexible policies under which the state agency can write off the child support arrears owed by reunited families.[24]

Legally, it appears that there is no reason why more states could not take one of these approaches. Federal law requires states to take an assignment of support rights from TANF families "not exceeding the total amount of assistance provided to the family". 42 USC Section 608(a)(3) (1996). This language places a *ceiling* on the amount of money a state can claim under the assignment but not a floor. This leaves the state free to claim no support (or a diminished amount of support) for the public assistance period if it so chooses.

It is also worth noting that the original Clinton Administration welfare reform bill specifically authorized special consideration for reunited families with incomes below 200 percent of poverty. The bill contained a section which provided that if 1) arrears were owed by an absent parent who later married or remarried the custodial parent; and 2) the custodial parent and the child or children to whom the support is owed live(s) in the new household, then the once absent parent could apply to the state for forgiveness of the arrears. The state was then authorized to either 1) cancel the debt; or 2) suspend collection of the debt for the duration of the marriage and cancel it if the parents are still together when support was no longer owed. While this language was not contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), the language of 42 USC Section 608(a)(3) quoted above allows states to adopt a similar policy. It seems unlikely that the Administration would question a state which did so.

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All of the policy options discussed in this paper are open to states under current law. Perhaps if more states were aware that they had these options, more would have good policy in this area.

[23] VT. STAT. ANN. Tit. 33, Section 4106(e). See, also VT. STAT. ANN. Tit. 33, Section 3902(b).

[24] See, e.g., WASH. ADMIN. CODE Section 388-14-385.