House
Legislative
Analysis
Section

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LATE FEE ON CHILD SUPPORT ARREARAGE

House Bill 4498 as enrolled
Public Act 141 of 1995
Second Analysis (6-28-95)

Sponsor: Rep. Willis Bullard, Jr.
House Committee: Judiciary and Civil Rights
Senate Committee: Judiciary

THE APPARENT PROBLEM:

According to friend of the court records, a large number of people required by circuit court orders to make support payments to former spouses or custodial parents fail to make these support payments in a timely fashion. As a result, the party who was to have received this support must find other means by which to meet his or her daily living costs. Many times, this drives the spouse or custodial parent to rely upon one form or another of public assistance.

Section 3 of the Support and Visitation Enforcement Act says that a support order which is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date each support payment is due, with the full force, effect, and attributes of a judgment in this state. In Langford v. Langford (196 Mich App 297), decided October 19, 1992, the court of appeals said that "it is clear that the adoption of section 3 means that the arrearage on a support order is a judgment from the time that amount falls due, and that interest is to run on this amount as it would with any other civil judgment." The court held that effective July 6, 1987 (the effective date of the language in question), statutory interest must be added to support arrearage orders entered after that date. The court said that it was not a matter on which a trial court's discretion could be brought to bear.

The Revised Judicature Act sets forth a relatively complex formula for statutory interest on money judgments in civil actions not involving a written instrument. That interest rate is set every six months, and is equal to one percent plus the average interest rate paid at auctions of five-year U.S. Treasury notes during six months preceding July 1, and January 1, compounded annually.

Many, while agreeing with the court that interest should be charged on overdue support payments, believe that matters should not be left to stand as they are. For one thing, to use the existing formula for the calculation of interest strikes many as unnecessarily complicated. Further, the court did not specify who is to add and collect the required interest, and opinions differ over whether such duties may be assumed to lie with the friend of the court or whether the collection of interest requires separate court action initiated by each support recipient. There is no explicit statutory mechanism for enforcing or collecting interest on support orders. Further, some assert that a charge of interest would raise unexpected tax consequences for the party receiving the interest.

Legislation has been proposed to clarify matters, place the gist of Langford into statute, and to encourage the payers to make their support payments in a timely fashion.

THE CONTENT OF THE BILL:

The bill would amend the Support and Visitation Enforcement Act to charge a fee on overdue child support payments. Under the bill, the friend of the court (FOC) would be required to add a fee of eight percent to past due child or spousal support payments. This fee would be calculated biannually and would be added to the accrued support arrearage on January 1 and July 1 of each year. Support amounts ordered by the court under the Paternity Act but incurred prior to the effective date of the court's order would not be subject to this fee.

The bill would also require that when the FOC received any money as a payment of support it would be applied first to the current monthly

support, and then to the support arrearage, including fees accumulated under the bill. For the purpose determining whether a fee was owed or of calculating the fee amount, a support payment would not be considered paid until actually received by the FOC.

MCL 552.602 et al.

FISCAL IMPLICATIONS:

According to the Department of Social Services, the friend of the court agencies might incur additional administrative costs, which are subject to DSS funding. However, the bill could result in savings if more payers are motivated to meet their child support obligations. No data is available from which to estimate how effective the late fee may be in promoting compliance. The department can retain 45 percent of collections of child support in AFDC cases to offset the state share of costs in the AFDC program. That retained amount becomes part of AFDC collections on which the department can receive a federal incentive payment at the current rate of 6 percent. In non-AFDC cases, support collections also add to the amount which qualifies for federal incentive payments. (5-2-95)

ARGUMENTS:

For:

In situations where the payer of family support fails to make timely payments, the payment loses value during the period of the delay. The addition of a late fee attempts to make support recipients whole by giving the benefit of the payer's delay to the payee. It will also provide an incentive to payers to pay promptly. By requiring that an eight percent fee be added to overdue support payments, the bill would codify the decision of the court of appeals in Langford.

Against:

People who fail to meet their support obligations usually fail because they cannot afford to make payments in the set amount. The current system demonizes noncustodial parents (usually men) and sets up support obligations that are unfair and amount to an excessively high percentage of the payer's income. The addition of a late fee would further exacerbate this problem.

Response:

People who fail to pay their court-ordered support cost taxpayers money by forcing those who are relying on that support to seek state aid of one sort or another to make ends meet. The party responsible for payment of support should be penalized for failing to make the required payments in a timely fashion. Hopefully, the threat of being required to pay an additional fee for delaying support payments will force the payer to treat support payments in the same fashion as he or she would treat bills from other creditors, who apply penalties or add interest for late payments.

Furthermore, most complaints which assert that payers are unable to pay are unsubstantiated. When pressed by the courts, almost all come up with the money owed. Failure to pay is more often based on the payer's lack of desire to take responsibility for his or her offspring or former spouse than on a lack of funds.

If the payer is truly unable to pay, the current system allows the payer to seek an adjustment of the support order due to a change in the payer's ability to pay. It is the payer's responsibility to contact the FOC to seek an adjustment. The responsibility for failing to get a modification should not fall on the shoulders of the party who is supposed to be receiving the support or upon the taxpayers.

Rebuttal:

The assertion that payers are able to pay because they are able to come up with funds when threatened with jail time is unwarranted. The payments made in such situations are state-sponsored extortion; the fact that someone can pay when coerced does not imply that he or she can pay on a regular basis, but rather shows that the individual has friends and/or family who are willing to pay to keep him or her out of jail.

Against:

Often, failure to pay child support correlates to a failure of the custodial parent to grant visitation. Forcing the payer to pay a fee takes away the payer's ability to attempt to enforce the right to visitation by withholding support.

Response:

If the payer is not receiving visitation, there are appropriate avenues to enforce that aspect of the

court's order as well. Refusing to pay support under such circumstances only deprives the child of money needed to provide food, clothing, shelter and other necessities of life.

Against:

It would be better to give the courts the discretion to order the addition of such a fee where warranted, rather than making it automatic. That way, the law would accommodate individual extenuating circumstances while continuing to employ the threat of late fee charges as a lever with which to pry loose overdue support payments. To require application of a late fee to all back support would create situations where payers who could not pay would face ever-growing arrearages, and where friends of the court would face additional administrative costs in calculating and attempting to collect uncollectible late fees. Further, if late fees are to be mandatory rather than discretionary, the rate charged should be lower, so as to prevent undue hardship.

Response:

The eight percent fee proposed by the bill is not out of line with what other states are charging. To employ a lower rate would reduce the incentive to pay on time.

Against:

The bill presents a number of difficulties of implementation. A fee is to be charged on past due support payments, but it is not clear whether "past due support" is to include overdue support plus previously-charged fees, or only back support payments. Further, like Langford, the bill is not explicit on who is to collect the fee or how it is to be distributed; presumably, the fee amounts would be added and collected by the FOC, but if so, companion amendments to the Friend of the Court Act would be advisable. And, this would no doubt require increased technical support and additional staff. How would the additional expenses and staff requirements be funded?

Against:

The bill raises a number of additional questions: Would a fee applied under this section become a fixed judgement as per the Langford decision? If the amount of support is raised by court order would the fee be applied retroactively for the increased amount? Would a fee be applied in situations where an arrearage has accrued under a temporary or interim support order? Would a payer's failure to pay statutory fees also be penalized? Further, the bill fails to confront issue of medical and confinement expenses. (Confinement expenses are the costs incurred for the birth of a child, usually applied in paternity cases.) In some cases medical expenses are agreed upon in the court's order. Would the fee also be applied to a payer's failure to meet such obligations? If so, would these amounts be treated as wholly unpaid when a payment is missed or would only the late payment be penalized?

Against:

According to the Department of Social Services, use of the word "fee" to describe the penalty calculated on the past due support poses several potentially serious problems. Federal law and regulations prescribe requirements for the imposition of late payment fees on overdue support. The provisions in the bill as enrolled are in conflict with the federal law and regulations as follows:

*The bill sets the fee at an annual rate of eight percent, while federal law requires that a late payment fee be no less than three percent nor more than six percent of the overdue support.

*The bill calculates the fee on January 1 and July 1 of each year. Federal law requires that late payments be calculated as arrearages accrue.

*The bill's fee is added to support arrearages giving it the same collection priority as a support arrearage. Federal law requires that fees may only be collected after the full amount of current and overdue support have been paid.

*Under the bill, the fee is payable to the support recipient, either the custodial parent or the state (where the support has been assigned to the Department of Social Services). Federal law requires that fees must reduce expenditures claimed under the Title IV-D child support program and may be retained by local jurisdictions making the collection.

As a result of these conflicts, the bill creates a potential for noncompliance with the federal requirements which could result in a loss of federal funding for the state's Title IV-D child support program, and a reduction in federal funding for the AFDC program.

Against:

Given the risk of tax consequences for the payee, further investigation should be made to answer the question of which term ("interest", "additional support", "penalty", or "fee") should be used to describe the amount added to the arrearage. A number of other states already have similar systems in place and an investigation into which term provokes the minimum response from the IRS is warranted before the language is put into law.