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The Bradley Amendment: Prohibition Against Retroactive Modification of Child Support Arrearages

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Summary

The Bradley Amendment prohibits the retroactive State modification of child support arrearages. Under current law, no matter what the circumstances, a State cannot modify delinquent child support obligations. The Amendment has come under criticism by noncustodial parent advocacy groups because of the inflexibility of its application. Supporters of the Amendment argue that it prevents affluent parents from avoiding delinquent child support obligations. Pending legislation in the 106th Congress, while not repealing the Amendment, would have the effect of modifying the application of the Amendment under certain circumstances.

Background

The Bradley Amendment (“Amendment”)¹ is a 1986 amendment to Title IV of the Social Security Act which prohibits the retroactive modification of child support arrearages.² The Amendment language was contained in S. 2706,³ the “Sixth Omnibus Reconciliation Act, 1986,” and was introduced in an earlier bill by Senator William

¹ Pub. L. 99-509, Title IX, § 9103(a), 100 Stat. 1973 (Oct. 21, 1986). Codified at 42 U.S.C. § 666 (a)(9).

² Within the context of the Amendment, a child support arrearage is a past due, unpaid child support obligation.

³ S. 2706, 99th Cong., 2d Sess. (1986).

Bradley,⁴ from whom the Amendment takes its name. The House bill⁵ was enacted in place of the Senate bill, as the Omnibus Budget Reconciliation Act of 1986.⁶ Although originally the House bill did not contain a provision regarding retroactive child support modifications, the Senate bill language was added to the House bill following the conference.⁷

The Amendment currently states:

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2) is (on and after the date it is due)--

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced,

(B) entitled as a judgment to full faith and credit in such State and in any other State, and

(C) not subject to retroactive modification by such State or by any other State;

except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the other obligor.⁸

The practical effect of this provision is not to allow the retroactive modification by any State of an existing child support arrearage. While most commentators focus on the States' inability to reduce child support arrearages retroactively, the Amendment also prevents the States from retroactively *increasing* child support arrearages.⁹

It is instructive to examine the legislative history in order to determine the Congressional intent underlying the enactment of the Amendment. The Senate Report

⁴ Senator Bradley and Senator Russell Long introduced S. 2404, the "Interstate Child Support Act," a bill to prohibit the retroactive modification of child support arrearages, on May 5, 1986. (S. 2404, 99th Cong., 2nd Sess. (1986)). There was no formally introduced amendment to S. 2706 which contained the Amendment language.

⁵ H.R. 5300, 99th Cong., 2d Sess. (1986).

⁶ Pub. L. 99-509, 100 Stat. 1874 (Oct. 21, 1986).

⁷ H. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 272 (1986).

⁸ 42 U.S.C. § 666(a)(9).

⁹ While this situation would probably be unusual, the dramatic improvement in the financial circumstances of a noncustodial parent (perhaps through winning a lottery) might encourage a desire to retroactively raise child support arrearages.

examined the current law concerning child support arrearages. It noted that certain States allowed a child support award to be retroactively modified. In these States, the administrative entity or court was able to reduce or nullify arrearages.¹⁰ The Amendment added a new requirement to the child support enforcement program under title IV of the Social Security Act which the States were required to meet in order to be in compliance with the program. In order to meet this new requirement, State laws relating to child support orders must prohibit changes to those orders which were effective on a retroactive basis. The Report language states:

The Committee recognizes that a person's financial circumstances change. The noncustodial parent may lose his or her job or face other circumstances that cause him or her not to be able to afford the original child support award. The amendment is not intended to prevent changes in future child support payments if the financial situation of the noncustodial parent changes. What the Committee is seeking to prevent is the purposeful noncompliance by the noncustodial parent, because of his hope that his child support obligation will be retroactively forgiven.¹¹

The Report language further states that if the noncustodial parent's financial circumstances change because of unemployment, illness, or other reasons, the Amendment puts the burden on the noncustodial parent to notify the custodial parent and the court or entity which issued the child support order of the noncustodial parent's changed financial circumstances and the noncustodial parent's intention to have his/her child support order modified. No modification would be allowed before the date of this notification.¹² The House Conference Report¹³ language reinforced the intentions of the Senate Report and used language nearly identical to that contained in the Senate Report.

Regulations have been promulgated which are consistent with the provisions of the Amendment.¹⁴ The Federal Register release accompanying the final regulation reflects the legislative history.¹⁵

Application of the Amendment

It is beyond the scope of this report to evaluate the success or failure of the Amendment within the context of the collection of child support arrearages. Numerous commentators have focused upon the lack of flexibility in the Amendment's notification requirements. Proponents of a repeal or revision of the Amendment cite two particular situations involving arrearages incurred by noncustodial parents. One case involved a noncustodial father who was held hostage in Kuwait for almost five months and who was, therefore, unable to comply with the Amendment's notification procedures. Following his

¹⁰ S. Rep. No. 348, 99th Cong., 2d Sess. 155 (1986).

¹¹ *Id.*

¹² *Id.*

¹³ H. Conf. Rep. No.1012, 99th Cong., 2d Sess. 272 (1986).

¹⁴ 45 C.F.R. § 303.206 (2000).

¹⁵ 54 F.R. 15,758-15,762 (1989).

release, he was arrested¹⁶ for nonpayment of child support.¹⁷ The second case involved an individual who was incarcerated for murder. Following his release and exoneration, he was arrested¹⁸ for nonpayment of child support.¹⁹ Obviously, the hostage in Kuwait was in no position to comply with the notification provisions of the Amendment. Legal and factual questions arise as to the ability of the prisoner to comply with the provisions of the Amendment.²⁰ Another consideration is that the Amendment provides that an “appropriate agent” can perform the notification procedure. Such an agent might be a relative or a lawyer. Although the use of an agent does not necessarily resolve all instances when a parent is unavailable to comply with the notification provisions of the Amendment, it does provide an option which may be able to be utilized under certain circumstances.

Various noncustodial parental advocacy groups have encouraged the repeal of the Amendment or the enactment of an amendment to the Amendment. One such group is the Alliance for Non-Custodial Parental Rights Legislative Action Center.²¹ Other commentators and advocates do not want changes made to the Amendment. A spokesperson for the Center for Law and Social Policy stated that if the Amendment were repealed, it would “provide an incentive for guys who can pay but are determined not to.”²² Arguments can be made for the repeal/modification of the Amendment, as well as for the retention of the Amendment in its current form.

Judicial interpretations of the Amendment have examined its applicability under certain specific sets of circumstances. For example, the court determined that a child support award, established after a trial, but made effective as of the first day of the day of the divorce trial, was not a retroactive modification of a child support obligation, as prohibited by the Amendment.²³

Another judicial interpretation of the Amendment prohibited a trial court from ordering a father to pay child support retroactively to the date prior to the filing of his application to modify child support.²⁴ Other cases have applied the Amendment to very

¹⁶ The arrest of the parent in arrears was a State action, not required by the Amendment.

¹⁷ Associated Press File, Dec. 15, 1990.

¹⁸ See note 14.

¹⁹ Cheryl Wetzstein, *Child-Support-Law amendment comes to attention of Hill*, Wash. Times, April 27, 1999, at A8 (cited to afterward as “Wetzstein”).

²⁰ Presumably the prisoner was not employed during his incarceration; it is possible that he might have complied with the notification requirements and requested a modification of his child support order through his legal counsel. However, the factual and legal circumstances surrounding this situation are uncertain, so no definitive conclusion can be made.

²¹ This group’s website is located at [<http://www.ancpr.org>]. The group provides model letters to write to federal legislators to request a modification and/or repeal of the Amendment.

²² Wetzstein.

²³ *Mallamo v. Mallamo*, 280 N.J. Super. 8, 654 A.2d 474 (1995).

²⁴ *Dean v. Dean*, Neb.App. 1996, 552, N.W.2d 310 (1996).

specific cases involving child support and arrearages.²⁵ It does not appear that there have been constitutional challenges to the Amendment.

Legislative Activity

It does not appear that Congress has ever given serious consideration to a repeal of the Amendment. However, legislative proposals in the 106th Congress, if enacted, would have the effect of modifying the application of the Amendment in certain circumstances.

Title 5 of H.R. 4678²⁶ provides funding for grants to public and private entities for demonstration projects designed to: promote marriage, promote successful parenting, and help poor fathers obtain better jobs. Under the proposed fatherhood grant program, the panel awarding the grants would give preference to entities that had a written agreement with the Child Support Enforcement agency in which the agency would cancel child support arrearages owed to the State by the father, if the father was maintaining a regular child support payment schedule or was living with his children. Although this provision does not repeal the Amendment, it would allow retroactive modification of child support obligations for noncustodial fathers who were living in a community covered by the grant, if the grantee had the above-mentioned agreement with the Child Support Enforcement agency and the father was either paying child support on a regular basis, or had reunited with his children.²⁷ A similar provision is contained in H.R. 3073²⁸ which was passed by the House on November 10, 1999.²⁹

²⁵ *State ex rel. Dept. of Human Services v. Flo*, Iowa, 1991, 477 N.W. 2d 383 (1991); *Comer v. Comer*, 14 Cal. 4th 504, 927 P.2d 265 (1996); *Hunter v. Thompson*, 151 Wis. 2d 556, 445 N.W.2d (1989).

²⁶ 106th Cong., 2d Sess. (2000).

²⁷ The bill remains under Committee consideration and was referred to: 1) the House Ways and Means Committee, where it was referred to the Subcommittee on Human Resources where a Mark-up Session was held on June 27, 2000 and from where the bill was forwarded back to the Full Committee and where a Committee Mark-up was held and where it was ordered to be reported on July 19, 2000; 2) the House Judiciary Committee where it was referred to the Subcommittee on Immigration and Claims from where it has not emerged; and 3) the House Education and Workforce Committee from where it has not emerged.

²⁸ Fathers Count Act of 1999 (1999).

²⁹ The bill was received in the Senate, read twice and referred to the Committee on Finance from where it has not emerged.

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