IS LEPIS DEAD?

THE THREE-YEAR REVIEW OF CHILD SUPPORT

On January 1, 1994 Federal Law requires the most significant modification of New Jersey law that has been mandated by the ever increasing federalization of family law. It potentially will have a dramatic impact on Family Law practice as we now understand it. Scant consideration has been given to this issue by the Bar. It is preliminarily being reviewed by the Family Part Practice Committee and is under study by AOC. Under the Family Support Act of 1998, each state must adopt legislation requiring a three-year review of child support. As of this moment, how that review will take place, and its interaction with our existing substantive law, remains unclear. Yet, a common sense review of past history, and the reality that all Federal aid New Jersey receives under the Social Security Act is contingent upon compliance with the three-year review, leads inevitably to the conclusion that there will be a drastic evisceration of the privacy rights of supporting parents and a virtual abrogation of Lepis, the standard by which agreements have been negotiated for years.

A brief review of Federal involvement in child support enforcement is instructive. In 1973, when Congress recognized that the AFDC aid was costing the tax payers approximately $7.6 billion per year, Congress responded by passing Public Law 93-647, the Child Support and Paternity Act creating Title IV-D of the Social Security Act. The purpose of the legislation was to stimulate

states to obtain support from delinquent absent parents. States that fail to comply with the Act were to be penalized by having their AFDC aid reduced by 5%. States were also specifically required to have a plan meeting the following requirements:

A. Establishing a single agency to administer the program.

B. Establishing paternity and securing support for AFDC.

C. Locating absent parents.

D. Enforcing support orders.

E. Collecting and distributing child support payments.

In 1984, this program was amended by Public Law 38-378, the 1984 Child Support Amendments, which included major changes such as:

A. Requiring AFDC and non-AFDC families to be treated alike.

B. Strengthened enforcement remedies.

C. Established time frames for processing cases.

D. Restructured federal funding.

E. Require greater emphasis on interstate enforcement.

Until this time these programs primarily affected New Jersey administratively and did not impact on the State's substantive law. Yet, in 1986, the Bradley Amendment, Section 466(a)(9) of the Omnibus Budget Reconciliation Act (P.L. 99-509), required the

states to pass legislation that:

1. Prohibited retroactive modification of child support arrears.

2. Made payments under an order for child support to be considered a judgment by operation of law, thus entitling them to full faith and credit and not subject to retroactive modification.

The most significant modification occurred when Congress passed the Family Support Act (PL 100-485) whose major provisions were:

A. Child support guidelines were to be applied uniformly as a rebuttable presumption.

B. A periodic review and modification of orders. (emphasis added)

C. Immediate income withholding.

D. Performance standards for establishing paternity.

E. Automatic tracking and monitoring systems.

F. Standards for program operations.

Thus, the last two revisions to federal law eliminated our Court's discretion to vacate child support arrears. This resulted in a significant modification to New Jersey law. That modification took place for one simple reason - if it had not, New Jersey would have lost its Federal aid. Now, the mandated periodic review, embodied in N.J.S.A. 17-56.8, calls into question the continuing viability of Lepis after January 1, 1994, the date the review is

required to commence. The Statute provides, in pertinent part, as follows:

> Every complaint, notice or pleading for the entry or modification of an order of a court entered or modified which includes child support shall include a written notice to the obligor stating that the child support provision of the order shall be enforced by an income withholding upon the current or future income due from the obligor's employer or successor employers and upon the unemployment compensation benefits due the obligor and against debts, income, trust funds, profits or income from any other source due the obligor except as provided in section 3 of P.L.1981, c. 417(C.2A:17-56.9). The written notice shall also state that the amount of a IV-D child support order shall be reviewed and updated, as necessary, at least every three years. (emphasis added)

It is neither practical nor feasible to expect in Court reviews of every child support award every three years. The entire trend in Family Law has been to administrative action and it is reasonable to expect, if it is not a certainty, that the State will react to the statutory mandate by implementing some form of administrative review.

While it has not yet been determined how that review will take place, the following is my own prediction as to what will occur based on interviews with the involved parties and a review of a related administrative review already occurring. Certainly, the prerequisite for any review is an exchange of financial information which does not automatically occur under Lepis. How then will the administrator, whether an employee of AOC, a county probation department or some other State agency, obtain financial

information? My best guess is that the administrative review will not be done by AOC but by a state agency, i.e. the Executive not the Judicial branch.

A review of Jane T. Hill's September 26, 1990 memo is instructive. Mr. Hill, the Deputy Attorney General assigned to the Division of Family Development with the Department of Human Services, while advising me that he has not rendered a formal opinion on the three-year review issue, has concluded that under Federal Law (26 U.S.C. 6013(1)(6)(A)(i)), the Secretary of Health and Human Services may obtain otherwise confidential IRS information concerning delinquent payers. This information release was authorized to improve enforcement procedures relating to child support. Thus, it is reasonable to foresee a similar procedure which ultimately will involve an automatic release by some Executive branch department of financial information. This release will occur in response to an administrative request to implement the mandated review. Notice will probably not be provided to the taxpayer of the request for information. Once the agency has the information, it will do an analysis under the child support guidelines to see whether there should be a modification of child support. Once that determination is made, presumably a notice will be sent for a hearing. It is not certain if that hearing will take place administratively or in the Family Part.

What may very well occur is that once the application for modification is brought, either in the administrative setting or in Family Court, that the remaining portions of Lepis will still be

applied. In that way, proponents of the three-year review will contend that the State's substantive law is still being followed. That, of course, ignores the reality of Lepis Stage I which, as a practical matter, will no longer exist. Of course, one must question the continuing viability after January 1, 1994 of Lepis Stage I applications made directly in Court since those recipient spouses are being treated differently than IV-D recipients who have their rights determined administratively without regard to Lepis Stage I requirements.

It seems fundamentally unfair to have similar classes of people having their rights determined by a completely different legal framework. Thus, if an equal protection argument is made, it may well be successful. Ultimately, there will have to be uniformity. Since it is a certainty that New Jersey will lose federal aid if three-year reviews do not occur, the likely result is foreseeable. Thus, after January 1, 1994, Lepis Stage I applications may no longer be required, or even legally permissible.

Interestingly, according to sources at AOC, studies across the country from states already using a three-year federal review have found that only 10% of those cases that are reviewed result in any modification. That is either a comment on the degree to which actual incomes are underreported or a keen note as to why dependent spouses need effective lawyers to have their rights and children's rights vindicated.

While it has not yet been determined how the review will

occur, it is the position of the Division of Family Development (part of the Executive Branch) that they are entitled to receive tax returns directly from the Department of the Treasury or from the Department of Labor where wage information on employees must be filed. If people are self-employed, it would seemingly have to be the Treasury Department for there to be adequate review. As of the preparation of this article, neither I nor AOC has been able to discover an Attorney General's opinion providing this authorization. Presumably, the Attorney General will have to review these issues in the near future since there will have to be significant lead time to prepare for these administrative reviews in eleven months.

The statute requires a review of all IV-D recipients. It is a common misconception that a IV-D recipient is someone on welfare. Federal guidelines define a IV-D recipient as someone receiving child support through probation and who opts for IV-D services. The option form typically utilized by a probation department (and significantly does not even yet include the three-year review) is attached. To exercise the option, a recipient need only pay $5. Given the rules and existing case law mandating payments through probation, it is fairly obvious that virtually all individuals paying support will be subject to automatic disclosure of their income regardless of changes in circumstances and without resort to establishment of a prima facie change in circumstances (Lepis Stage I). Attorneys wishing to insulate their clients from a three-year review should attempt to provide for payments not to be made

through the probation department or contractually attempt, in the face of an argument that such provision would violate public policy, to require the recipient not to opt for IV-D services.

While it is uncertain how these new procedures will ultimately be implemented, it is clear they represent major changes in the practice of law. If Lepis principles still apply at Stage II, arguments that the passage of three years alone establishes a public policy mandating modification, must fail since Lepis will still have some viability. Yet, even if that argument fails, automatic review can easily be had, without regard to law or utilization of attorneys, by simply insisting on payments through probation and the payment of a modest fee.