The Evolution of a Federal Family Law Policy under Title IV-A of the Social Security Act – The Aid to Families with Dependent Children Program

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THE EVOLUTION OF A FEDERAL FAMILY LAW POLICY UNDER TITLE IV-A OF THE SOCIAL SECURITY ACT—THE AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM

The Aid to Families with Dependent Children (AFDC) program, created over fifty-years ago, was one of several federal programs enacted under the original Social Security Act to protect the economic security of children in America. Unlike the other social security programs created under the 1935 legislation, which were perceived as a form of insurance, the primary objective of AFDC was to provide federal funding to assist states in financing mothers' aid pension programs. The legislative history suggests that Congress did not envision federalizing the operation of the AFDC program. Few mandatory federal eligibility requirements were imposed in the early

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1. The Aid to Families with Dependent Children program (AFDC) makes cash payments to families with needy dependent children who, by definition, are deprived of parental support. The original name Aid to Dependent Children was changed in 1962. See Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104(a)(2), 76 Stat. 173, 185 (codified as amended at 42 U.S.C. § 602 (1982)).


3. There were 11 broad social programs authorized under the original 1935 Act. In addition to the AFDC program, other provisions under the Act included a wide range of programs targeted at aged persons and blind persons, specialized services for crippled children, and other maternal and child health and welfare services. For a detailed discussion of the historical development of the Social Security Act, see Cohen, The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later, 68 MINN. L. REV. 379 (1983).

4. The significant difference Congress perceived between the AFDC program and the other social security programs was expressed in the remarks of Representative Doughton:

   The essential feature of the social security bill is that of social insurance against the principle hazards or risks which have caused American families to be dependent upon relief. These causes are well known: (1) unemployment, (2) old age, (3) lack of a breadwinner in families with young children, and (4) sickness... [Legislative bills] proposed to furnish protection against the risks arising out of old age and unemployment are usually called social insurance. Social insurance protects the worker and his family against dependency by enabling them... to build up reserves... during periods of unemployment and in old age. [Legislative bills to protect] the family with young children under 16 lacking a wage earner, is provided through Government funds rather than through social insurance.


5. See id. at 5476 (remarks of Rep. Doughton).
decades of the program and states retained major responsibility for the design and administration of the AFDC program.

Administration of the AFDC program reflected the philosophies and values embodied in the family and domestic relations laws of the individual states. The structure of the AFDC program was also molded, however, by its federal-state financing arrangement. The United States Supreme Court first labeled this financing scheme as "cooperative federalism" in King v. Smith. As the federal government's role in financing the AFDC program increased, so did its concomitant interest in imposing federal policy goals and direction. Thus, in view of recent attempts by Congress to curtail spiraling program costs, amendments to the AFDC statute have been enacted primarily to reduce the welfare rolls. The focus of recent amendments has been to meet the statutory objective of helping families "attain or retain capability for their maximum self-support and personal independence" through enactment of cost-saving welfare legislation. Significant numbers of single-parent families will inevitably receive welfare benefits

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6. The original Social Security Act set out certain administrative requirements as a condition of receipt of funds under the Act. The original statute required each state to demonstrate an intent to administer the AFDC program in conformity with certain state plan requirements upon approval by the administering federal agency. See Social Security Act, ch. 531, §§ 401-406.


13. 42 U.S.C. § 601 (1982) (other statutory objectives enumerated are: to encourage care of dependent children in their own homes or in the homes of relatives, and to help maintain and strengthen family life).

under the AFDC program. These families will enter the welfare system via the state that administers the program where they live.

Albeit indirectly, important family law matters are decided in determining a family's eligibility for public benefits under the AFDC program, both at the point of entry and throughout the family's participation in the system. Federal AFDC and child support enforcement provisions, as well as state welfare policies mirroring family and domestic relations laws of states, affect AFDC eligibility decisions made by states. The interplay of these rules under the scheme of cooperative federalism often produces incompatible results and serious implications for concerns such as family stability.

15. See OFFICE OF FAMILY ASSISTANCE, SOCIAL SECURITY ADMINISTRATION, U.S. DEPT OF HEALTH AND HUMAN SERV., SSA PUB. NO. 13-11731, FINDINGS OF THE MAY 1981-MAY 1982 AID TO FAMILIES WITH DEPENDENT CHILDREN STUDY (1985). During this period it was estimated that nearly 7.2 million children received AFDC, over 85% of them because of the absence of one parent from the home. Id. at 4. These families were predominantly headed by women and reflected the general trend toward increased numbers of female-headed households in the general population. Id. See also BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, SERIES P-60, NO. 149, MONEY INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1984, at 3 (1985).

When President Reagan proclaimed National Single Parent Day, 1984, he stated "[b]efore they are eighteen, about half of our Nation's children will have lived part of their lives with a single parent who strives to fill the role of both mother and father . . . ." President's Statement on Signing Proclamation No. 5166, 49 Fed. Reg. 10,919 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS A-29.


17. See 42 U.S.C. § 602(a)(26) (1982). This provision requires that an individual (usually a parent) assign any rights to child support to the state as a condition of receipt of AFDC. The individual must also cooperate with the state to establish paternity and secure support of any child born out of wedlock who is receiving AFDC. Failure to cooperate, without good cause, results in ineligibility for the parent but not the child. Both applicants and recipients of aid must meet this statutory requirement. Id.


19. See, e.g., 45 C.F.R. § 233.90(a)(1) (1985) ("The determination whether a child has been deprived of parental support or care . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent . . . . if the stepparent is legally obligated to support the child under [s]tate law . . . .").

20. See Roberts, In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System, 18 CLEARINGHOUSE REV. 1407 (1985); see also Johnson, Joint Custody Arrangements and AFDC Eligibility, 18 CLEARINGHOUSE REV. 2 (1984); Hagen & Hoshino, Joint Custody of Children and AFDC Eligibility, 59 SOC. SERV. REV. 636 (1985) (concluding that for poor divorced parents joint custody may jeopardize eligibility for AFDC); see generally Folberg,
This Comment will explore the significant historical and recent statutory changes to the AFDC provisions of the Social Security Act that impact upon family law policy. The impact of these statutory changes for AFDC families, the majority of whom are on the rolls because of the absence of one parent, will then be examined. Specifically, this Comment will consider the new issues raised by recently enacted AFDC amendments and certain federal child support enforcement provisions with respect to the definition of "dependent" child. From a state perspective, this Comment will also examine recent trends in state-enacted joint custody statutes and their implications for family eligibility under the AFDC program. The interplay of the federal statutory rules with the issues raised by state joint custody laws, in light of their potential long term impact on the majority of AFDC families, will be analyzed in an attempt to illuminate the need for congressional attention in this area. Finally, this Comment will conclude by advocating a need for greater assessment of the impact of social welfare legislation, like the AFDC program, on family stability before laws are enacted.

I. Significant Historical and Recent AFDC Statutory Changes and Their Impact on Family Law Policy

A. Who May Be a Dependent Child

States have been given considerable leeway within the federal statutory framework to tailor the structure of their AFDC programs. Early in the history of the program, state welfare regulations defining who may receive aid as a dependent child under a state's AFDC plan were heavily influenced by state family and domestic relation laws. These laws, including those covering emancipation of minors, marriage, and state-imposed duties of spousal and child support obligations, served as the basis for state welfare policies regarding deprivation of parental support. Vestiges of these laws...
The AFDC Program

figure prominently in the current AFDC program,\textsuperscript{26} despite the fact that federal laws addressing some areas would appear to preempt state law.\textsuperscript{27} In 1981, for example, Congress amended the federal AFDC statute to require the consideration of stepparent income by states in determining eligibility and further provided a uniform federal formula.\textsuperscript{28} However, this formula is not applied nationwide in the AFDC program, and Congress apparently found this acceptable.\textsuperscript{29} Several states deny AFDC benefits where the stepparent resides in the home based on state stepparent duty-to-support laws.\textsuperscript{30}

The original AFDC statute broadly defined the children eligible under the Social Security Act. States participating in the AFDC program could receive federal matching funds for aiding any child who is under the age of sixteen and living with a relative, and who is deprived of parental support or care because of death, continued absence from the home or physical or mental incapacity of a parent.\textsuperscript{31} In 1939, in an effort to clarify the purpose

\begin{itemize}
\item\textsuperscript{26} 45 C.F.R. § 233.90 (1985) states that a state plan under title IV-A shall provide that:
\begin{itemize}
\item (1) The determination whether a child has been deprived of parental support . . .
\end{itemize}
\begin{itemize}
\item will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's . . . parent and is legally obligated to support the child under State law of general applicability which require stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.
\end{itemize}
\item\textsuperscript{27} See Doolittle, \textit{supra} note 9, at 17-19. The author discusses Supreme Court constitutional analysis of the federal preemption doctrine in AFDC. He argues that "[t]he basic issue in preemption cases is whether state legislation unacceptably obstructs the accomplishment of the objectives of an act of Congress." \textit{Id.} at 17. In summary, the author predicts that the Supreme Court will rarely find the federal preemption doctrine a persuasive basis for invalidating state AFDC regulations because of potential conflict with federal legislation.
\item\textsuperscript{28} 42 U.S.C. § 602(a)(31) (1982). Under this formula, income of a stepparent residing in the home of an AFDC dependent child is deemed available after recognizing certain disregards of the stepparent's income for the support of the stepparent and other dependents.
\item\textsuperscript{29} 127 CONG. REC. 19,099 (1981) (statement of Sen. Dole that stepparent "proposal is intended to set a minimum level for stepparent responsibility, not to reduce the accountability of stepparents in those States that have an approved plan of stepparent responsibility").
\item\textsuperscript{30} 46 Fed. Reg. 46,750, 46,754 (1981). The Department of Health and Human Services, Social Security Administration, identified six states with stepparent laws of general applicability—Nebraska, New Hampshire, South Dakota, Utah, Vermont, and Washington. In these states a child is not deemed deprived of parental support where both a natural parent and stepparent live in the home, unless the stepparent is incapacitated (or unemployed if the state has elected to recognize unemployment as a condition of deprivation). In all other states where a stepparent lives in the home, a child is considered deprived because of the absence of one natural parent. Thus, a child living in these states will automatically pass the first prong of the AFDC eligibility test. The second prong of the test will require consideration of the stepparent's income using the federal formula. \textit{See supra} note 28.
\end{itemize}
of the program, Congress further required that a dependent child be “needy” in order to receive aid. Consequently, since the 1939 amendments, eligibility of a child under the AFDC program has been determined by applying a two-prong test. First, the child must be found by the state to be “dependent.” By the terms of the statute, “dependent” means that the child must be deprived of parental support or care. Second, the child must pass a “needs” test that requires an assessment of the child’s financial situation. Income available to the child is compared to a standard expressed in monetary terms that is established by the state as the amount necessary to maintain a hypothetical family at a subsistence level.

To determine whether a child is deprived of parental support or care because of the absence of one parent, the state must apply a federal standard that requires both a qualitative and quantitative analysis of the nature of the parent’s absence. Although the language of the federal regulation regarding absence has been virtually unchanged throughout the history of the

33. See 45 C.F.R. § 233.90(c)(1)(i) (1985) (“The phrase ‘needy child . . . deprived by reason of’ requires that both need and deprivation of parental support or care exist in the individual case.”).
34. 42 U.S.C. § 606 (1982). Section 606 states in part that “[t]he term ‘dependent child’ means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home . . . .” Id.
35. See 42 U.S.C. § 602 (1982). Under the AFDC statute, states must adopt standards of assistance by which the child’s and any caretaker relative’s needs are measured. The standards are commonly referred to as the need and payment standards. See generally 45 C.F.R. § 233.20 (1985).
36. See generally 45 C.F.R. § 233.20 (1985). Eligibility and payment amounts for AFDC are determined by measuring income of the specified number of children and caretakers (referred to as an assistance unit) against these standards. If the income of the assistance unit is less than the standards of assistance adopted by the state, the assistance unit is eligible for payment under the state’s AFDC program. This is an oversimplification of the eligibility and payment determination process. It is solely intended to illustrate that eligibility under the AFDC program is established using a two-part process.
The United States Supreme Court has consistently acknowledged the broad discretion of states in determining the standard of need and the level of benefits. For a summary of various Court decisions recognizing the AFDC eligibility test, see Heckler v. Turner, 470 U.S. 184, 189 n.3 (1985).
37. The standard discussed at 45 C.F.R. § 233.90 states that:

Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as to interrupt or to terminate the parent’s functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent’s performance of the function of planning for the present support or care of the child.

AFDC program, its interpretation has undergone a metamorphosis to accommodate the general changing patterns of family life. For example, the early version of the regulation clearly contemplated that the typical family situation would involve a parent, usually the father, who deserts the family and whose location is unknown, and consequently, neither provides support for the child nor acts as a parent figure. The reality of the families who participate in AFDC program today does not fit this scenario, nor does this scenario typically depict the general plight of single parent families. Nearly fifty percent of the children receiving AFDC benefits due to absence of a parent live in homes headed by a mother who was never married to the child's father. Only about nineteen percent of AFDC children have been

38. Federal AFDC regulations were incorporated in the HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION prior to official transfer to the Code of Federal Regulations. See 36 Fed. Reg. 3660 (1971). An early version of the provision of the HANDBOOK, dated Nov. 4, 1946, interpreted continued absence as follows:

3422.2 Interpretation—Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care under the following circumstances:
1. When the parent is out of the home;
2. When the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child; and
3. When the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child.

A child comes within this interpretation if for any reasons his parent is absent, and this absence interferes with the child's receiving maintenance, physical care, or guidance from his parent, and precludes the parent's being counted on for support or care of the child. For example: The child's father has left home, without forewarning his family, and the mother really does not know why he left home, nor when or whether he will return. Within this interpretation of continued absence the State agency in developing its policy will find it necessary to give consideration to such situations as divorce, pending divorce, desertion, informal or legal separation, hospitalization for medical or psychiatric care, search for employment, employment away from home, service in the armed forces or other military service, and imprisonment.

39. See generally Johnson, supra note 20; see also Hagen & Hoshino, supra note 20 (noting the growing trend toward awarding custody to both parents rather than one).
40. See supra note 38.
classified as eligible because of desertion of one parent.\textsuperscript{44}

Moreover, the absent parent in today's AFDC program is likely to be making some child support payments on behalf of the child\textsuperscript{45} and is encouraged to establish contact with the family.\textsuperscript{46} Consequently, the current interpretation of what constitutes continued absence has little resemblance to the rule adopted in the early AFDC program.\textsuperscript{47} Under the early rule, if an absent parent voluntarily provided child support payments or visited the children on a regular basis, the family usually lost its AFDC eligibility.\textsuperscript{48} In the above situation, the child would be deemed not deprived of parental support or care because the absent parent provided maintenance or guidance to the child.\textsuperscript{49}

State welfare agencies and courts alike have reached differing conclusions on what constitutes "absence" for purposes of AFDC eligibility.\textsuperscript{50} However, the one consistent conclusion reached by the majority of courts regarding absence is that where state welfare agencies apply impermissible presumptive standards to decide the question, the courts will not as a matter of law recognize them.\textsuperscript{51} The determination of absence principally involves resolving the factual questions of whether a parent's absence is such that it "interrupts or terminates the parent's functioning as a provider of maintenance, physical care or guidance of the child, and the known or indefinite duration of the

\textsuperscript{44} Id.


\textsuperscript{46} \textit{See supra} note 39.

\textsuperscript{47} \textit{See supra} note 38.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} \textit{See, e.g.}, Shannon v. Department of Human Servs., 157 N.J. Super. 251, 384 A.2d 899 (1978) (upholding merits of agency decision to terminate AFDC benefits because of mother's admission that father frequently visited child; but reversed on other grounds); Pellman v. Heim, 87 N.M. 410, 534 P.2d 1122 (1975) (reversing agency decision terminating AFDC benefits where divorced father maintained regular pattern of visitation).

\textsuperscript{51} \textit{See, e.g.}, Hughes v. Adult & Family Servs. Div., 58 Or. App. 478, 648 P.2d 1324 (1982). In this case, which involved a husband and wife who were separated, the Oregon Court of Appeals recognized the state welfare agency's regulation presuming absence, for purposes of AFDC, in situations where there was evidence of a parent's incarceration, or a pending divorce, legal separation, or paternity action. However, the court denied "absence" status of the father because he was not continually out of the home. \textit{Id.} at 1327. \textit{But see} Freeman v. Lukhard, 465 F. Supp. 1269 (E.D. Va. 1979) (upholding agency regulation that presumed absence of a parent without regard to maintenance, physical care or guidance if absence is caused by divorce, desertion, incarceration, deportation, or inability to establish paternity).
absence precludes the parent's performance of his/her function in planning for the present support or care of the child."

In *Simone v. State*, the Superior Court of New Jersey, Appellate Division, found that the plaintiff lived in the same five-family apartment building as her spouse's parents. The plaintiff's spouse, the father of two of her children, left the premises following their separation, but subsequently returned to live with his parents. He never visited the children or contributed financially to their support. The state argued that it was ipso facto lack of deprivation due to absence if both parents lived at the same address. The court rejected the state's argument, concluding that such evidence showed merely an opportunity of the absent parent to exercise parental responsibility by his proximity to the family, but that such an opportunity did not automatically defeat AFDC eligibility. The court held that it was improper for the state to conclude that a spouse's residence in the same building, although in a different apartment, negated any interruption or termination of the parent's functioning as a provider. Accordingly, the court reversed the state administrator's decision to reduce the plaintiff's AFDC benefits.

The *Simone* decision is in harmony with another decision on the issue of absence for AFDC purposes. In *Burrus v. Department of Human Services*, the Superior Court of New Jersey, Appellate Division, held that a pattern of frequent visitations by a nonresident parent, although relevant in the determination of eligibility, is not a sole reason for termination. The plaintiff in *Burrus*, a single parent, resided with her mother, who assisted in the care of the child while the plaintiff attended school. The child's father visited the child at least three times a week. When the plaintiff indicated to the welfare department that she was contemplating living with the father of the child and inquired as to how this living arrangement would affect her AFDC grant, the welfare agency terminated benefits on the grounds that "there was no absence nor deprivation of parental support or care within the meaning of AFDC requirements." The *Burrus* court reasoned that although visits are relevant, they are not dispositive in the determination of

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54. Id. at 233, 465 A.2d at 1227-29.
55. Id. at 235, 465 A.2d at 1230.
56. Id. at 235, 465 A.2d at 1230.
57. See, e.g., Burrus, 194 N.J. Super. at 60, 476 A.2d at 285.
58. See id. at 60, 476 A.2d at 285.
59. Id. at 68, 476 A.2d at 288.
60. Id. at 61, 476 A.2d at 286.
The court noted that the agency must also consider whether the absent parent continues to contribute to the basic maintenance and care of the child. The court stated that "[w]hile [the father] may visit the child a few times each week and may exhibit pride and love toward the infant, that 'continuing relationship' does not constitute performance of parental functions." The Burrus court, therefore, concluded that the father did not provide the requisite maintenance and guidance.

The Simone and the Burrus cases illustrate one view of the proper approach to the factual determination of whether, for AFDC purposes, a child is deprived because of an absent parent. In both cases, the decisions turned on the visits by the nonresident parent in determining the existence of a continuing relationship with the AFDC family. An opposing view is expressed in Hughes v. Adult & Family Services Division. In this case, the Court of Appeals of Oregon upheld the state welfare agency's decision to terminate AFDC benefits because the father visited the child regularly, was found to have stored personal items at the mother's home, and occasionally cared for the children. The welfare agency terminated aid, finding that there was no "valid separation" since the spouse was not continually absent for thirty days. The court concluded that the state correctly applied a two-prong test under the Oregon regulation in determining deprivation due to absence. The first prong of the test required that the parent be out of the home for thirty days. Since the evidence established that the father was not continually out of the home for thirty days, the court concluded that the state was not required to reach the second prong of the test, namely, that absence precluded the father's functioning as a provider of maintenance, physical care, or guidance.

It is now well settled in the AFDC program that the mere receipt of child support on a regular basis from a noncustodial parent is an insufficient ground to consider the child not deprived of parental support because the absent parent provides maintenance.

61. Id. at 66, 476 A.2d at 288.
62. Id., 476 A.2d at 288.
63. Id. at 68, 476 A.2d at 288.
64. Id. at 68, 476 A.2d at 289.
67. Id. at 480, 648 P.2d at 1327.
68. Id. at 479, 648 P.2d at 1326.
69. Id., 648 P.2d at 1326.
70. Id., 648 P.2d at 1326.
child support enforcement,\footnote{Lukhard, 465 F. Supp. 1269 (E.D. Va. 1979) (child eligible only if absent parent provides no maintenance).} an AFDC payment is not terminated by a collection of child support from the noncustodial parent unless the payment exceeds the income standards set by the state.\footnote{See 42 U.S.C. § 651 (1982).}

\section*{B. AFDC and the Child Support Enforcement Program}

The original federal child support enforcement program was created in response to two main concerns in the AFDC program: (1) the increasing welfare rolls, by the early 1970's, as a result of absent fathers failing to pay child support, and (2) the increasing congressional dissatisfaction with state initiatives to enforce child support obligations.\footnote{Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (1975) (codified as amended at 42 U.S.C. §§ 651-660 (1982)). See S. Rep. No. 1356, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8147.} Congress believed that the national welfare problem was exacerbated by the nonsupport of children. It was also concerned with increasing federal expenditures in the AFDC program. As a result, Congress launched the federal government into an area traditionally regarded as a state concern.\footnote{See S. REP. No. 1356, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8133.} The primary purposes of the federal child support enforcement program are to obtain support from the absent parent, to use such collections to reimburse the state for AFDC payments, and to pay any excess amounts to AFDC families.\footnote{S. REP. No. 1356, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8151.}

Companion amendments to the AFDC program were enacted at the same time as the child support enforcement provisions.\footnote{Social Services Amendments of 1974, § 101(a), 88 Stat. 2348, 2349, 2359-60 (codified as amended at 42 U.S.C. § 602(a)(26)-(28) (1982)). See S. REP. No. 1356, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8151.} States were required to operate a state child support enforcement program as a condition of federal AFDC funding.\footnote{S. REP. No. 1356, 93d Cong., 2d Sess. 4, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 8133. See 11 WEEKLY COMP. PRES. DOC. 20 (Jan. 13, 1975) (President's statement upon signing Social Service Amendments of 1974). Then President Ford expressed some reservations as he signed the child support enforcement bill into law. He stated that while he agreed with the objectives of collecting child support payments, he believed certain provisions went too far by injecting the federal government into domestic relations. 11 WEEKLY COMP. PRES. DOC. 20 (Jan. 13, 1975).} Under the statute, individuals seeking AFDC assistance are required to cooperate with the state through the child support enforcement program to establish paternity and obtain support from the absent
Recently, Congress has reaffirmed its commitment to an active federal role in child support enforcement, but now as a federal-state partnership. Because many viewed the federal child support enforcement program as successful, but believed there was a need to increase state administrative efficiency and to strengthen collection activity, Congress passed the Child Support Enforcement Amendment of 1984 to improve enforcement of child support obligations.

One of the key concerns raised during the congressional debates of the 1984 bill was the issue of visitation rights by noncustodial parents. Congressional action would appear to support and encourage contact with the family by the noncustodial parent in general; however, there is evidence that Congress had little notion of the implications of the nexus between enforcement of visitation rights and AFDC eligibility. Too much visitation by the

79. 42 U.S.C. § 602(a)(26) (1982) provides that:
[A]s a condition of eligibility . . . each application or recipient will be required—
(A) to assign the State any rights to support from any other person such applicant may have . . . in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and . . .
(B) to cooperate with the State (i) in establishing . . . paternity of a child . . . (ii) . . . in obtaining any other payments or property due such applicant or . . . child . . .

Id.

82. See Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. § 651 (Supp. III 1985)). During the 1984 congressional debates of the statutory amendments, reported data showed that about $8.8 billion in child support payments had been collected as a result of the federal child support enforcement program. Of this amount $3.8 billion was collected on behalf of AFDC families and as a result nearly 32,000 cases had been removed from the AFDC rolls. However, it was also estimated that overdue payments for AFDC-related child support totaled $9 billion and were increasing at a rate of $1.5 billion each year. See 130 Cong. Rec. S4807 (daily ed. April 25, 1984) (remarks of Sen. Domenici).
84. In a colloquy between Sen. Jespen and Sen. Dole regarding the impact of the child support enforcement legislation in states with joint custody statutes, Sen. Dole stated:
[T]here is nothing in the Finance Committee amendments which would prevent States from moving in the direction of joint custody or shared parental duties. The Finance Committee believes that these are areas of domestic law which are properly in the jurisdiction of the States. Nothing in the bill or in the committee amendments should be construed as altering that fact. . . . [A] number of studies . . . indicate that
noncustodial parent of an AFDC child has rendered the child ineligible because the child was not considered deprived of parental support or care. It remains to be seen, in light of the diversity of state welfare policies and decisions by courts regarding the definition of "dependent child" in the AFDC program, whether, in the context of the welfare system, there is adequate flexibility to recognize and promote policies like joint custody or shared parenting which require meaningful involvement of the absent parent with the family.

II. MODERN TRENDS IN JOINT CUSTODY AND IMPLICATIONS FOR FAMILY ELIGIBILITY UNDER THE AFDC PROGRAM

Several commentators have discussed extensively the problem that joint custody arrangements pose for AFDC families. When an application is made on behalf of a child, the state welfare agency must establish that the child is deprived of parental support. If the reason for deprivation is continued absence of a parent, and there has been court ordered joint custody or an informal joint custody arrangement, then the custodial AFDC parent (usually the mother) has the burden of proving that the parent's contact, if any, is insignificant.

The dilemma for the AFDC family becomes obvious when viewed from the different perspectives of the goals of the federal and state governments. It is clear that because of the potential for denial of AFDC benefits, the

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85. See Freeman v. Lukhard, 456 F. Supp. 1269 (E.D. Va. 1979). In this case, the federal district court upheld termination of AFDC benefits on behalf of two children whose father visited the children daily, discussed their care with the mother, and provided milk and diapers for the children.

86. See, e.g., Pellman v. Heim, 87 N.M. 410, 534 P.2d 1122 (1975) (reversing agency decision terminating AFDC benefits where divorced father maintained regular pattern of visitation); Shannon v. Department of Human Servs., 157 N.J. Super. 251, 384 A.2d 899 (1978) (upholding merits of agency decision to terminate AFDC benefits because of mother's admission that father frequently visited child; but reversed on other grounds). See generally Johnson, supra note 20; Hagen & Hoshino, supra note 20 (noting the growing trend toward awarding custody to both parents rather than one).

87. See generally Johnson, supra note 20, at 2; Hagen & Hoshino, supra note 20, at 636.

88. See supra note 87; see also 45 C.F.R. § 233.90 (1985).

89. See, e.g., Cook, California's Joint Custody Statute in Joint Custody and Shared Parenting 168-83 (J. Folberg ed. 1984) (author suggests that state was motivated to enact joint custody statute to deter divorcing parents who would be prone to pursue sole custody out of vindictiveness, leverage, or extortion). Congress acknowledged that joint custody arrangements encouraged regular patterns of payment of child support obligations. 130 CONG. REC. S4804 (daily ed. April 25, 1984) (statement of Sen. Grassley).
AFDC family must discourage meaningful contact with the noncustodial parent, even though state governmental policies promote and enforce such contact. Moreover, Congress has expressed the view that enforcement of both visitation rights and the pursuit and collection of child support payments should be of equal priority to the states.

There is no overwhelming consensus among family law professionals that joint custody following divorce is in the best interest of all children. Nevertheless, the trend has been for states to enact joint custody statutes. There are currently at least thirty-one states with some form of a joint custody statute. The courts have also figured significantly in the emergence of joint custody as the preferable arrangement over the traditional approach of sole custody.

There are essentially three different legislative approaches to state joint custody.

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90. See Johnson, supra note 20; Hagen & Hoshino, supra note 20.
93. See, e.g., Elkin, Joint Custody: In the Best Interest of the Family in Joint Custody and Shared Parenting 11-15 (J. Folberg ed. 1984). The author states that "[t]he distinguishing feature of joint legal custody is that both parents retain legal responsibility and authority for the care and control of the child, much as in an intact family. Joint custody basically means providing each parent with an equal voice in the children's education, upbringing, religious training, nonemergency medical care, and general welfare." Id. at 6. Joint physical custody (as distinguished from joint legal custody) refers to the sharing of residential care of the child usually on a regular basis. See id. at 7. Many other definitions are found in the literature. See generally Joint Custody and Shared Parenting (J. Folberg ed. 1984).
94. See generally Joint Custody and Shared Parenting (J. Folberg ed. 1984).
custody statutes. 97 One commentator classified the legislative models as: (1) the option approach, (2) the preference approach, and (3) the presumptive approach. 98 Under the option approach, a joint custody statute provides the court with the discretion to consider joint custody as one of several alternatives. 99 The preference model varies from the option approach in that the statute requires the court to give a preference for joint custody over sole custody. 100 Under the presumptive approach, the state statute establishes a presumption that joint custody is always in the best interest of the child. 101

The presumptive approach is typified by the California joint custody statute. 102 One provision of the statute specifically addressed the issue of joint custody as it relates to eligibility for AFDC benefits. 103 The statute provides that in joint custody situations "the court may specify one parent as the primary caretaker and one home as the primary home for the purposes of determining eligibility for public assistance." 104 The California joint cus-

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98. See Schulman & Pitt, supra note 97, at 211.

99. See ALASKA STAT. §§ 25.20.060, 25.20.090, 25.20.100 (1983); see also Sherry v. Sherry, 622 P.2d 960 (Alaska 1981) (the Supreme Court of Alaska held that a custody agreement (based on the state's joint custody statute) that automatically shifted custody in certain situations from one parent to another should have been conditioned upon prior court approval).

100. See MONT. CODE ANN. §§ 40-4-223 to 40-4-224 (1984); see, e.g., Cameron v. Cameron, 197 Mont. 226, 641 P.2d 1057 (1982) (Montana Supreme Court vacated trial court's award of sole custody to father following failure by parents to agree to a plan of care under a joint custody order).


102. CAL. CIVIL CODE § 4600.5(a) (West Supp. 1986) states that "[t]here shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child . . . for the purpose of determining the custody of the minor child or children of the marriage." Id. See Lemon, Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5, 11 GOLDEN GATE L. REV. 485 (1981) (the 1984 amendments to the California joint custody statute were an effort to provide greater specificity in joint custody orders and to provide more direction to judges in decisionmaking). See generally Zimmerman, The Problems of Shared Custody, 4 CAL. LAW. 25 (1984).

103. CAL. CIVIL CODE § 4600.5(h) (West Supp. 1986). See also 45 C.F.R. § 233.90(c) (1)(v) (1985) ("Living with [a specified relative] in a place of residence maintained . . . as his . . . own home.").

104. Section 4600.5(h) states: "In making an order of joint physical custody or joint legal custody, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purposes of determining eligibility for public assistance." CAL. CIVIL CODE § 4600.5(h) (West Supp. 1986).
today statute represents one state’s efforts to address the modern concerns of state domestic relations laws and their impact on families receiving AFDC benefits.

It is noteworthy that a bill was introduced in Congress to require state courts to consider the approach of joint custody preference over sole custody. The bill proposed to require joint custody preference as a condition of federal funding of states’ AFDC programs. In view of the myriad of related AFDC issues that have not been resolved, it is urged that any such similar measures should be carefully weighed in light of the family law goals intended to be achieved.

The related problem of joint custody arrangements for AFDC recipients may have a correlation to the variations in joint custody statutes. This issue is one that should be closely examined. There is no evidence, despite the proliferation of written materials on the subject, that adequate consideration has been given to the potential impact joint custody laws may have on AFDC families, particularly when faced with court custody proceedings initiated in the context of the federal child support enforcement program.

A. The Interplay of AFDC and Child Support Enforcement Programs: A Hindrance to Family Stability?

As previously noted, the AFDC program Congress envisioned over a half-century ago faces a vastly different cultural reality today. While Congress continues to pay lip service to the notion of the state’s exclusive jurisdiction on matters of domestic relations, the AFDC program has evolved into a federal program impacting important family law matters.

As evinced by the myriad of provisions that Congress has considered in an effort to revamp and improve the AFDC program, there is no simple or single approach to the problems of the AFDC program. It is crucial that Congress take a more active approach in assessing the impact of social legislation, such as the AFDC program, on family stability.

The filing unit definition (F.U.D.) rule is just one example of legislation in part enacted to achieve federal savings. Its purpose was to close a per-

106. Id.
107. See generally Steinman, Joint Custody: What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications in Joint Custody and Shared Parenting 111 (J. Folberg ed. 1984).
109. See, e.g., infra note 137.
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ceived loophole in the program. The impact upon other important aspects of the program involving family life, however, was not taken into consideration. There is no indication that Congress gave any consideration to the impact of the F.U.D. rule and whether it was in harmony with the goals of the child support enforcement program.111

One of the goals of the original child support enforcement program was to collect sufficient child support to remove the family from the rolls.112 The F.U.D. provision of 1984, in an effort to reach income received by the household that was previously not counted, forces individuals onto the AFDC rolls.113 The interplay of the AFDC and federal child support enforcement programs create conflicting goals toward ensuring family stability.114

Moreover, because of the F.U.D. rule, for the first time in the history of the AFDC program it can be advantageous for some AFDC custodial parents to claim, whether or not credibly, frequent contact by the noncustodial parent. If the AFDC custodial parent proves that, as a result of visits by the nonresident parent, the child is not deprived, then the child is not required to be included in the filing unit.115 Consequently, the child, by definition, would not fall within the statute, and his/her income would not be counted.116 As a result, the AFDC family unit is placed back into the position it would have been prior to the F.U.D. rule. This is a curious effect that Congress probably did not contemplate when it sought to close a loophole through enactment of the filing unit definition rule.


114. Id. at 165. While a discussion of the merits of the filing unit definition rule as public welfare policy is not within the scope of this Comment, there are other important questions with respect to its impact on family law goals which are considered. See generally Gorrie v. Heckler, 606 F. Supp. 368, 373 (D. Minn. 1985) (suggesting that government’s financial interest in reducing welfare costs must be weighed in relation to other controlling factors). The Gorrie court imposed an injunction against the government because “plaintiffs risked irreparable harm to their family structure.” Id.

115. Frequent visits, as substantiated by case law, can produce a showing that the absent parent provides support, maintenance or guidance to the child. See, e.g., Pellman v. Heim, 87 N.M. 410, 534 P.2d 1122 (1975) (reversing agency decision terminating AFDC benefits where divorced father maintained regular pattern of visitation); Shannon v. Department of Human Servs., 157 N.J. Super. 251, 384 A.2d 899 (1978) (upholding merits of agency decision to terminate AFDC benefits because of mother’s admission that father frequently visited child; but reversed on other grounds).

116. 42 U.S.C. § 606 (1982). Section 606 states in part that “[t]he term ‘dependent child’ means a needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home . . . .”
B. The Filing Unit Definition Rule: Creating a New AFDC Dependent Child?

The F.U.D. rule is one of several AFDC statutory amendments enacted in the Deficit Reduction Act of 1984 (DEFRA)\textsuperscript{117} that Congress labeled as program improvements.\textsuperscript{118} The F.U.D. rule requires states to include, in an application for AFDC benefits, the parents of the dependent child and all minor dependent siblings living with the dependent child.\textsuperscript{119} Under prior law, the parent could elect to exclude some members of the family to avoid counting their income.\textsuperscript{120} These were usually minor children who received child support or social security benefits.\textsuperscript{121} Where the child's income would reduce the family's benefit by an amount greater than the amount payable in benefits it was generally more financially advantageous to the family to exclude the child and thereby exclude consideration of his income in determining the AFDC benefit amount.\textsuperscript{122}

The DEFRA statute specifically provides for an exclusion of the first fifty dollars of child support received.\textsuperscript{123} Absent any commentary in the legislative history, however, it is unclear whether this exclusion was intended to deal with other extenuating circumstances associated with the receipt of child support which were not envisioned with respect to social security benefits.\textsuperscript{124} There is no comparable exclusion for social security benefits although both types of payments were discussed in relation to the problem of


[A] State plan for aid and services to needy families with children must . . . provide that in making the determination . . . with respect to a dependent child . . . the State agency shall (except as otherwise provided . . .) include—

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination . . . .

\textit{Id.}

\textsuperscript{120} See S. REP. NO. 300, 98th Cong., 1st Sess. 165 (1983).
\textsuperscript{121} Id.
\textsuperscript{122} Id.

family maximization of income.\textsuperscript{125} Determination of the proper treatment of both child support payments and social security benefits received by co-resident siblings of AFDC children has been the subject of litigation and raises important questions regarding family law goals.\textsuperscript{126}

Family law commentators have consistently urged governmental policies that enhance the health and welfare of children and the family.\textsuperscript{127} The Supreme Court in \textit{King v. Smith}\textsuperscript{128} declared that the "paramount goal" of the AFDC program is to maintain and strengthen family life.\textsuperscript{129} Other courts have articulated that the goal of the AFDC program is to promote family solidarity\textsuperscript{130} and to preserve the family unit.\textsuperscript{131} Yet it has been suggested that "[d]espite a generalized cultural piety about family life, American government has been notable for a lack of social policies in support of the family as an institution."\textsuperscript{132} The interplay of the F.U.D. rule in AFDC and the child support enforcement program brings this problem into focus.

In \textit{Sherrod v. Hegstrom},\textsuperscript{133} a class action suit before the United States District Court for the District of Oregon, plaintiffs alleged that the F.U.D. rule discouraged family stability and promoted the break-up and disintegration of the family. One AFDC plaintiff claimed she had excluded her two oldest children from the welfare rolls because they were supported by the father. When the father learned that the children were on welfare he took steps to obtain legal custody of the children and eventually had his court

\textsuperscript{127} See generally \textit{American Families: Trends and Pressures, 1983: Hearings on Examination of the Influence that Governmental Policies Have on American Families Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. (1973)}.
\textsuperscript{128} 392 U.S. 309 (1968).
\textsuperscript{129} \textit{King}, 392 U.S. at 325.
ordered support obligation rescinded.134

Child custody law is not so principled as to assure that, in a custody action, the stigma of welfare will not be considered in the choice between parents. In Mandelstam v. Mandelstam,135 the Court of Appeals of Kentucky held that if a natural parent is not capable of providing the minimum acceptable standards of care for the child, he will be deemed “unfit, unsuitable or unqualified,” and his custody will not be considered to be in the best “interests” of the child.136 AFDC custodial parents are especially vulnerable to child custody challenges because of the initiation of court proceedings in the context of the child support enforcement program.137

Gilliard v. Kirk,138 a class action filed in the United States District Court for the Western District of North Carolina, challenged the validity of the application of the F.U.D. rule to co-resident siblings who were previously independently supported because of child support payments received from their absent parents. The plaintiffs in Gilliard were children who qualified for AFDC benefits by the traditional showing of deprivation and need. Their siblings, as a consequence of receiving child support payments from their noncustodial parents, did not receive AFDC benefits.139 With the enactment of the F.U.D. rule, the state required the inclusion of the independently supported siblings of the AFDC children in determining AFDC eligibility on the basis that they too were needy, dependent children.140

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136. Id. In Mandelstam, the Court of Appeals of Kentucky refused to award custody of a six-year-old child to the divorced father after the mother suffered a severe mental condition. The father, a doctor of internal medicine, was determined incapable of providing the child with the minimum acceptable standard of care because his plan for custody of the child was to hire a maid to take care of the child during work hours. Although the facts are not welfare related, the holding suggests that one cannot predict what factors a court will consider in a finding of unfitness.
138. 633 F. Supp. 1529 (W.D.N.C. 1986) (held AFDC statute invalid because it infringed on rights to familial association guaranteed under the United States Constitution), rev'd sub nom. Gilliard v. Bowen, appeal docketed, No. 86-564 (U.S. Sept. 29, 1986). The Gilliard court found that as a result of the F.U.D. statute, Congress expressly "pre-empted state child support laws in so far as those laws restrain the use and distribution of child support income ...."
139. Id. at 1551. The court noted that the "pre-emption of state law represents an unconstitutional taking that deprives the children of their entitlement to child support simply because they live with a needy mother and half-siblings." Id. at 1553. The court concluded that the assignment of child support money to the state represented a deprivation of property in violation of the due process and equal protection clauses of the fourteenth amendment. Id.
140. See Gilliard, 633 F. Supp. at 1564 (the state complied with the federal statutory re-
Thus, following the F.U.D. statute, the income of the independently supported children was considered available to the family in the determination of AFDC eligibility.141 The district court invalidated the federal statute, concluding that the effect of the F.U.D. rule was an unlawful taking of the child’s income from the absent parent.142 The court further declared that “the federal scheme has . . . overpowered state family law, and has undermined traditional understandings of family values and duties.”143

The claims repeatedly made in these cases are that the AFDC-F.U.D. rule operates as a powerful disincentive upon the noncustodial parent to pay child support, thereby weakening family ties.144 In the context of a growing state movement to encourage involvement with the family by the noncustodial parent, the question remains whether this is an achievable goal for the AFDC family.145

III. CONCLUSION

The determination of deprivation in AFDC due to lack of parental support is a factual determination that reflects state welfare agency policies and state laws. Accordingly, the recent state trend in favor of joint custody could potentially impact state interpretation of the meaning of continued absence. At the very least, joint custody situations may adversely impact the AFDC eligibility determination because of the potential difficulty in deciding whether continued absence exists in such custody arrangements. The above analysis suggests that the federal and state statutes involved create requirements. See also Deficit Reduction Act of 1984, Pub. L. No. 98-369, tit. VI, § 2640, 98 Stat. 1145 (codified at 42 U.S.C. § 602(a) (Supp. III 1985)).

141. Once a child receiving child support becomes a member of the AFDC assistance unit, the state gains access to the child support because of the federal requirement that all such payments be assigned to the state. See 42 U.S.C. § 602(a)(26) (1982); see supra note 17 for a more detailed discussion of this requirement.

142. See Gilliard, 633 F. Supp. at 1529. The Gilliard court rejected the government’s argument that the F.U.D. rule caused no harm to the plaintiff’s because it merely recognized and reflected current family financial practices of pooling resources. Id. at 1557. The Supreme Court recently relied on a similar argument and upheld a Food Stamp statute requiring certain family members to file for benefits as a family unit. In Lyng v. Castillo, 106 S. Ct. 2727 (1986), the Court observed that close relatives who share a home together, almost by definition, tend to purchase and prepare meals together. Id. at 2728.

143. Gilliard, 633 F. Supp. at 1532-33. The Gilliard court found that the F.U.D. statute is a disincentive for absent parents to honor their duty to support their children. The evidence, the court noted, showed that absent fathers rebelled against the system by withholding child support that was no longer exclusively available for their children. Id. at 1559.

144. See, e.g., id. at 1540 (The Gilliard court observed that absent fathers’ reaction to the filing unit requirement have ranged from rebellion against the system by refusing to continue to pay child support to withdrawing from their children’s lives by no longer visiting.).

145. See supra note 95 for a listing of states enacting joint custody statutes.
conflicting goals toward ensuring family stability. The AFDC program has gradually transformed into myth the traditional notion that family law matters are the exclusive province of the states and not the federal government. Yet, Congress has not addressed directly or adequately important family law questions arising in the context of the AFDC legislative process. Finally, it is critical that Congress focus on the conflict between state and federal social welfare legislation that provides monetary benefits to families on the one hand, and their deleterious impact upon traditional ideas of family life and its goals on the other hand.

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