S245395

In the

Supreme Court

of the

State of California

ANGIE CHRISTENSEN,
Plaintiff and Respondent,

v.

WILL LIGHTBOURNE, as Director, etc.,
Defendants and Appellants.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION TWO · CASE NO. A144254
SAN FRANCISCO COUNTY SUPERIOR COURT · CASE NO. CPF-12-512070
HONORABLE ERNEST H. GOLDSMITH, JUDGE

COMBINED APPLICATION OF HARRIETT BUHAI CENTER FOR FAMILY LAW FOR PERMISSION TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE BRIEF* IN SUPPORT OF RESPONDENT [RULE 8.520(f)]

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STATEMENT OF INTEREST (Rule 8.520(f)(3))

The Harriett Buhai Center for Family Law (the Center) is a public-interest law firm that provides free family law assistance to over 800 very poor persons and 700 children each year. The well being of poor children is one of the cornerstones of the Center's mission. And from the standpoint of our practice, nothing is more challenging than securing minimal support for children of vulnerable families.

For this reason, the Center has been at the forefront of efforts to assure an effective, consistent and equitable child support system. Based on our day to day experience, we are convinced that the position of the Department of Public Social Services is inconsistent with the Legislature's intent that the same basic standards should apply to the child support requirements of the Family Code and the child support safety net of the CalWORKS program. We believe that the Court of Appeal decision not only harms children, but undermines confidence in the equity of child support policies generally.

UTILITY OF OUR SUBMISSION (Rule 8.520(f)(3))

Having reviewed the legislative and policy history of the issue before the Court, the Center believes that inadequate attention has been given to the actual legislative intent expressed in Thompson-Maddy-Ashburn Welfare-to-Work Act of 1997. Stat. 1997 ch. 270. The Court of Appeal's assertion that the Welfare-to-Work Act "adopted a new method

for calculating cash aid payments and amounts" (15 Cal.App.5th 1239, 1245) is an oversimplification, The attached brief presents a detailed analysis of the language and legislative history that is not reflected in the record or in the briefs filed to date.

IMPORTANCE OF THE ISSUE (Rule 8.520(f)(3))

"[T]he family unit is of fundamental importance to society in nurturing its members, passing on values, averting social problems and providing the secure structure in which citizens live out their lives." Welfare & Institutions Code §11205. This finding and declaration was adopted in 1982. It was not changed in the 1997 legislation. It remains in the Code today. But the characteristics of a "family unit" have changed. This case highlights one of the most significant of those changes.

Angie Christensen and Bruce Christensen are part of a complex family unit including children from multiple partners. Social scientists refer to this phenomenon as multi partner fertility (MPF). Whatever the incidence of MPF families when the Welfare to Work Act passed in1997, research indicates that this family structure has become more and more common.[1] The exact extent to which California children live in MPF

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[1] See, Guzzo, Karen. B. (2014) New partners, more kids multiple partner fertility in the United States, *Annals of the American Academy of Political and Social Science*, 654(1):66-86, Table 1 doi 10.1177/000271621452557. Cancian Maria and Daniel R. Mayer (2012) Who owes what to whom? Alternative approaches to child support policy in the context of multipartnered fertility. *Social Service Review* 46:85-101.

families has not been measured. Estimates vary widely.[2] In disadvantaged populations available data suggests that MPF complicates child support policy for as many as 40% of minor children.[3] Whatever one thinks of the drivers of this phenomenon, two principles should be obvious (1) parents have a duty to support *all* of their children no matter where they reside, and (2) the law should not penalize children of multipartner relationships.

The policy at issue in this case discriminates against MPF children precisely because one of their custodial parents is discharging his law-imposed duty to support noncustodial children of another relationship.[4] Lawyers may argue about what is and is not "income" for statutory purposes, but the hard fact remains: the Department's policy denies children like the children in this case assistance they objectively *need* to maintain even a substandard level of subsistence.[5]

While the number of children affected by the Department's policy can only be estimated, there is little doubt that the number is substantial. An estimated 1.8 million California children live in families whose income

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[2] *See* Guzzo, *supra*, Table 1
[3] See Guzzo at 72-75, Cancien and Meyer at 597-600
[4] It is undisputed that if Bruce Christensen moved out of the family unit, the Christensen children would be entitled to CalWORKS benefits, and Christensen's duty to all of his children would be calculated consistently under the statewide guideline.
[5] "Substandard" according to Welfare & Institutions Code §11452 with §11450.

is below the federal poverty line.[6] Of these about half rely on CalWORKS for their support.[7] Preliminary studies suggest that 40% of poor children are likely to have MPF parents. According to these best-available statistics, it is evident that the Department's policy denies assistance to about 400,000 objectively needy California children.

The attached brief was researched and authored by staff and volunteers of Harriett Buhai Center for Family Law. No monetary contribution was made to Harriett Buhai Center for Family Law intended to fund the preparation or submission of the brief.

September 7, 2018

Respectfully submitted,

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[6] Public Policy Institute of California, *Child Poverty in California*, July 2018. http://www.ppic.org/publication/child-poverty-in-california/

[7] California Department of Social Services, CalWORKS Annual Summary, January 2016: California Families on the Road to Self Sufficiency at 4 Table IA, http://www.cdss.ca.gov/cdssweb/entres/pdf/CW_AnnualSummary2016.pdf

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INTRODUCTION

When plaintiff Angie Christensen applied for public assistance for her family, she was denied because her family's income was deemed to be too high. The income determination was based on a Department of Social Services policy that allocated to her family's income the child support her husband pays for children from prior relationships who live in different homes.

The Department's policy wasn't always like that, however. In fact, for 30 years it was just the opposite. Under the prior policy, support for children in another household specifically did *not* count towards the payor's family income. We refer to this policy as the "Child Support Allocation." The dispositive issue thus is whether the Department erred in reversing its long-standing policy. It did.

The policy change occurred in 1998 when the Department misapprehended action taken a year earlier by the Legislature. The Court of Appeal in this case said the Legislature at that time had established "a new method for calculating cash aid amounts." *Christensen v. Lightbourne* (2018) 15 Cal.App.5th 1239, 782 [223 Cal.Rptr.3d 779]. With respect, a careful review of the legislative history reveals that the Legislature did no such thing.

The Court of Appeal did not analyze the statutory language or the history of the policies involved. Such an analysis reveals that the

Legislature did not substitute a wholesale, comprehensive overhaul of the system for calculating a family's income to determine if a family qualifies for public assistance. At the least, there is no evidence that the Legislature then intended to supplant the Department's Child Support Allocation policy.

Indeed, the Department's 30-year-old policy was consistent with how the Legislature required — and still requires — the treatment of support payments for out-of-household children in guidelines that determine appropriate amounts of court-ordered child support. Those support payments were — and still are — excluded in calculating the payor's capacity to provide support for additional children for whom he or she is also responsible. Family Code, § 4059(e).

The Department and the Court of Appeal pointed to Welfare and Institutions Code §11451.5 as proof of the Legislature's intent to eliminate the Department's Child Support Allocation policy.[8] But that statute does not mention and has nothing to do with child support. Instead, it concerns the Earned Income Exemption, which, as the name suggests, exempts a certain amount of earnings from the calculation of a family's income in determining public assistance eligibility.

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[8] All citations are to the Welfare and Institutions Code except as otherwise noted.

The Earned Income Exemption had a long history and the Child Support Allocation was no part of that history. Each policy was based on its own logic and purpose. There is nothing in the legislative record indicating an intent to treat the two together.

Further, it is unreasonable to believe that the Legislature would have nullified the Department's Child Support Allocation policy by enacting a statute that says nothing about child support, especially when that policy complemented a policy the Legislature expressly codified in its court-ordered child support guidelines. The Legislature would not have taken so dramatic an action so obliquely.

The Legislature had no reason to, and did not, abrogate the Department's Child Support Allocation policy. The Department was wrong in thinking the Legislature had done so, and the Court of Appeal erred in not finding the Department's elimination of the Child Support Allocation to be an abuse of discretion. This Court should reverse the Court of Appeal's judgment.

ARGUMENT

I. COURT-ORDERED CHILD SUPPORT PAYMENTS WERE NEVER TREATED AS "FAMILY INCOME" WITHIN THE MEANING OF WELFARE & INSTITUTIONS CODE §11450.

Eligibility for assistance to a needy family pursuant to CalWORKS is governed by §11450 of the Welfare & Institutions Code. That section defines need by deducting "the family's income, exclusive of any amounts considered exempt as income" from the "maximum aid" standard established by the Legislature. This case turns on the proper construction of that term -- "family income."

A. ORIGIN OF THE CHILD SUPPORT ALLOCATION.

"Income," as used in §11450, has always been a term of art. There have always been attributions of income, allocations of income, and exemptions of income.[9] From at least 1968 forward, as a matter of California law, court-ordered child support payments were "allocated" to the family receiving the payments. Meaning that such payments were not recognized as "family income" of the payor's family.

Although a matter of California policy, the Child Support Allocation required federal permission. Federal law at the time required that in determining need a state was required to "take into consideration any other

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[9] An example of an attribution is the attribution of a sponsor's income to an immigrant family unit. §11008.135. An example of allocation is the allocation of a portion of the income of parent under the stepparent rule. Cf. §11008.14, 45 C.F.R. 233.20 (a)(3)(xiv)(C). One example of an exemption is the income earned by a full time student. See, §11008.15.

income and resources of *any child or relative claiming aid*." 53 Stat 1379 (1939) [Emphasis supplied]. Federal administrators, however, interpreted this requirement to allow states -- at their discretion --- to *allocate* income to the dependents living outside the assistance unit. The Department of Health, Education and Welfare ("HEW") published this policy for comment on July 17, 1968 as follows:

> If [state] policies provide for *allocation* of the individual's income as necessary for support of his dependents, such *allocation* shall not exceed the total amount of their needs as determined by the statewide standard. 33 F.Reg. 10,230 (July 17, 1968) (Emphasis supplied.)

After comment, state option to allocate support payments was confirmed by regulation issued on January 29, 1969. 34 F.Reg.1395. It then read as follows:

> If agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their needs as determined by the statewide standard.
>
> 34 F.Reg.1395 [former 45 C.F.R. §233.20(a)(3)(ii)(b)]

The first available documentation of California's implementation of this option provided as follows:

> Deduction [from income] for support of a child or spouse not in the home, paid on court order, shall be made not to exceed three months if the parent requests review of the order. If, upon review, the court orders continued support payments, the amount of the court order shall be deducted until the order is changed.

DEPARTMENT OF SOCIAL WELFARE, Manual of Policies and Procedures ("MPP) 44-113.241 (Effective 7/1/68) [10]

B. ORIGIN OF THE EARNED INCOME EXEMPTION.

It may or may not be coincidental that the foregoing state and federal regulations were published coincident with implementation of the original "Earned Income *Exemption*." The terms of the exemption were then as follows:

> A State plan for aid and services to needy families with children *must...*
>
> (7) ...provide that the State agency *shall*, in determining need, take into consideration any other income or resources of any child or relative claiming aid.
>
> (8) provide that, in making the determination, the State agency --
>
> (A) *shall* with respect to any month disregard ---
>
> (i) ...
>
> (ii) in the case of earned income of a dependent child [or] a relative receiving such aid and any other individual (living in the same house with such relative or child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month.

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[10] Archives of the MPP as of any specific date are not readily available. The July 1968 version of 44-113.241 is available at the Los Angeles County Law Library, call no. KFC600.A29 C351. Relevant excerpts are attached to this brief. The Court should take judicial notice of this material, it being an official regulation of the Department. Evidence Code §§ 452-53; Govt. Code §18576; *Christensen v. Lightbourne* (2017) 15 Cal.App.5th 1239, 1248 n.9 [223 Cal.Rptr.3d 779]

81.Stat. 881 (1967) [former 42 U.S.C. §602(a)(7)-(8)] [Emphasis supplied]

C. THE CHILD-SUPPORT ALLOCATION OPERATED IN PARALLEL WITH THE EARNED INCOME EXEMPTION.

In implementing the 1967 Social Security amendments, the regulators always drew a clear line between the "Earned Income *Exemption*" and the "Child Support *Allocation*." The Earned Income Exemption was implemented in subsection (a)(11) of the regulation. 45 C.F.R. §233.20(a)(11). 34 F.Reg. 1396 (January 29, 1969). That subsection was titled "Disregard of income and resources applicable only to AFDC." Its terms were *mandatory*.

The Child Support Allocation, on the other hand, was authorized in subsection (a)(3). Subsection (a)(3) was titled "Income and resources." 34 F.Reg. 1395. According to the logic of that subsection, court-ordered child support payments were not considered as "income" of "the *child or relative claiming aid*." Period. Or, to be more precise, the states were allowed the *discretion* to allocate income to the dependents who actually received the beneficial use of child support payments.

The MPP did not use the term "allocation." It referred to the Child Support Allocation as a "deduction from net income." MPP 44-113.241. This is consistent with the fact that the Manual was a practical guide to eligibility workers, not a legal analysis. The phrasing of the MPP could not

change the legal substance. The only source of the Department's authority to make the 44-113.241 "deduction" was the discretion to "allocate" the payor's income authorized in 45 C.F.R. §233.20(a)(3)(ii)(b).

Terminology aside, it is clear that the Department did not consider the Child Support Allocation as an element of the Earned Income Exemption. Instructions for administration of the Earned Income Exemption were included in MPP 44-111.2 (entitled "Exemption of Earned Income-General"). MPP 44.111.23 (dealing with the Earned Income Exemption) was entitled "Family Exemption."

The Child Support Allocation was implemented separately in 44-113.24 entitled "Other Deductions from Net Income." Paragraph 44-113.241 dealing with the Child Support Allocation specified that this "deduction" was "*in addition to* the deductions described above" and applied to "income from any source."

Clearly, the Department recognized from the beginning that the Child Support Allocation (44-113.241) was separate and distinct from the Earned Income Exemption (44-111.23).

D. AMENDMENTS OF THE EARNED INCOME EXEMPTION WERE NEVER INTENDED TO AFFECT THE CHILD SUPPORT ALLOCATION.

Over the next twenty years, Congress and the Legislature repeatedly tinkered with the exact terms of the Earned Income Exemption. In its original version, the exemption was applied after deducting "expenses

reasonably attributable to the earning of income." 81 Stat 881; 45 C.F.R. 233.20(a)(3)(iv). In the Welfare Reform Act of 1971, our Legislature added a new section (§11451.6) to the Welfare & Institutions Code. Stats. 1971 ch 578, §28.1. It provided that in California, "expenses reasonably attributable to earning income" would be limited to $50 a month. This provision was later declared invalid as inconsistent with federal law. See, *Conover v. Hall* (1974) 11 Cal.3d 842 [114 Cal.Rptr. 642]. Relevant to this case is the fact that while the Legislature clearly intended to limit the scope of the Earned Income Exemption, it took no action to rescind or cutback the Child Support Allocation even though it had unquestioned authority to do so.

In 1981, there was another review of the Earned Income Exemption, this time at the federal level. Section 402(a)(8) of the Social Security Act was amended to set four- and twelve-month limits on the Earned Income Exemption. 95 Stat 843-44. If the Child Support Allocation was an element of the Earned Income Exemption, the 1981 amendment *obligated* the Department to begin counting child support payments as "income" after four or twelve months. However, this was never done, or even suggested. By 1981, the Child Support Allocation and the Earned Income Exemption had been operating on parallel but separate tracks for over a decade. There was no confusion of one with the other by Congress, by the Legislature,

and, up to that point, by the Department. Each had its own logic and each served a different purpose.

The next documented review of the Child Support Allocation occurred shortly thereafter. Concerned that some states were allowing abuse, HEW initiated a thoroughgoing review of the Child Support Allocation. The notice of rulemaking issued November 16, 1984 explained as follows:

> States have been permitting income to be *allocated* to meet the need of a wide variety of persons. ... In order to assure that an individual's income is used primarily to support the members of his or her own family who are in the assistance unit, we propose to revise the existing provisions on the amounts of income that may be *allocated* and the persons for whom income may be *allocated.* The proposed [amendment] restricts the income *allocation* provision to permit *allocation* only for the individual's own needs...the needs of others who are or could be claimed as dependents for determining Federal personal income tax liability, or those whom the individual is legally obligated to support. Within this limitation, States may elect which dependents to include for coverage. The amounts which may be *allocated* and the individuals for whom income may be *allocated* are consistent with similar provisions regarding the income of stepparents and alien sponsors. In specifying the amount of income which would be considered available to an assistance unit, the Congress made certain provisions to assure that stepparents and alien sponsors would retain sufficient income to meet their own needs and the needs of their dependents. ... Since these are amounts that Congress has determined are reasonable, we have adopted them as the maximum amounts that may be allocated in other similar circumstances." 49 F.Reg 45561 (November 16, 1984) [Emphasis supplied].

> The revised regulation reads, in relevant part:

> In determining financial eligibility and the amount of the assistance payment all remaining income (except unemployment compensation received by an unemployed principal earner)...

> (a)(3)(ii)(C) States may have policies which provide for *allocating* an individual's income for his or her own support if the individual is not applying for or receiving assistance; for the support of other individuals living in the same household but not receiving assistance; and for the support of other individuals living in another household. Such other individuals are those who are or could be claimed by the individual as dependents for determining Federal personal income tax liability, or those he or she is legally obligated to support.
>
> 45 C.F.R. §233.20 (a)(3)(ii)(C) [Emphasis supplied.][11]

The 1984 restudy of §233.20 is a significant moment. At the very least, the federal notice of rulemaking required the Department (and even the Legislature) to verify once again that that California's Child Support Allocation was permitted under the Social Security Act. It was perfectly clear that the California rule was invalid if it was deemed an element of the Earned Income Exemption. *Shea v. Vialpando* (1974) 416 U.S. 251; *Conover v. Hall, supra,* 11 Cal.3d 842. The Child Support Allocation was valid *only* insofar as it was, and was meant to be, an allocation of income as permitted (but not required) by the federal regulation. But there had never been any doubt that the Child Support Allocation was exactly that.

The Department was once again required to determine the boundaries of the Earned Income Exemption in 1993. California obtained a federal waiver of the 1981 restrictions on the duration of the Earned Income

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[11] The 1984 federal regulations continued to differentiate between the Child Support Allocation authorized in sub-§233.20(a)(3)(ii)(C) and earned income disregards which were outlined in sub-part (a)(11).

Exemption. This authority was implemented by adding §11255 to the Code which provided:

> The department *shall* implement the waiver obtained from the federal government to allow the thirty dollars ($30) and one-third income disregard to be continued without regard to the 12-month and 4-month limitations for income earned after April 31, 1993.
>
> Stats. 1993, ch. 69, §21 p. 964 [Emphasis supplied]

Section 11255 represented a material enhancement of the Earned Income Exemption. Its design and purpose was identical to the design and purpose of §11451.5. Yet no one suggested that §11255 repealed the Child Support Allocation by implication. Section 11255, like federal Earned Income Exemption, was a welfare-to-work incentive. The Child Support Allocation was based on a fundamentally different logic: equitable division of the support capacity of a parent responsible for support of children in different homes. There was no logical connection of the allowance of one with a repeal of the other.

II. THE 1997 LEGISLATURE DID NOT INTEND TO REPEAL THE CHILD SUPPORT ALLOCATION.

Now we come to the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1997 (PRWORA, 110 Stat. 2105) and California's corresponding Thompson-Maddy-Ashburn Welfare-to-Work Act of 1997 (hereafter AB 1542).[12] The primary concern of PRWORA was

[12] It is important to note the scope of the Welfare to Work Act. It consisted of 188 sections affecting 293 provisions of five different codes. It