NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION-FAMILY PART
MERCER COUNTY
DOCKET NO. FD-11-1012-06

MERCER COUNTY BOARD OF SOCIAL SERVICES, o/b/o CASSANDRA D. RICKS,
Plaintiff,

Civil Action

v.

DECISION

REVEL FOWLER, defendant,
and CRYSTAL FOWLER,
Intervenor.

Thomas Sumners, Esq.
Office of the Board Counsel
Attorneys for Mercer County Board of Social Services

Lawrence Lustberg, Esq.
Melanca Clark, Esq.
Gibbons P.C.
Attorneys for Crystal Fowler

Leslie Chappo, Esq.
Central Jersey Legal Services, Inc.
Attorneys for Cassandra D. Ricks

David Perry Davis, Esq.
Attorney for Revel Fowler

Argued: August 2, 2007

Opinion Issued: December 4, 2007

OSTRER, J.S.C.

The main question presented in this case is whether the plaintiff, Mercer County Board of Social Services can exclude a child from the determination of public assistance

Fowler decision

payments to the child's family, and at the same time retain child support provided by that child's father for her sole care. The court finds that it may not, based on its reading of the applicable law, particularly in view of well-founded principles of child support law, and constitutional prohibitions against taking of property without just compensation.

PROCEDURAL HISTORY

This case began as an emergent appeal September 9, 2006 from a recommended decision of a child support hearing officer, in a suit by the Mercer County Board of Social Services on behalf of Cassandra Ricks against Revel Fowler. Effective May 18, 2006, MCBSS sought child support from Mr. Fowler, for his and Ms. Ricks's daughter, Crystal. Mr. Fowler, then appearing pro se, sought an immediate appeal pursuant to Rule 5:25-4.

At that initial hearing, Mr. Fowler asserted that he had been providing direct support to the mother, Cassandra Ricks, before the Mercer County Board filed suit. He objected that if he were compelled to pay child support through Probation as proposed by the hearing officer, then his daughter would not receive the benefit of his payments, inasmuch as the mother has assigned all child support to

MCBSS, and the child -- the mother's second -- was subject to the so-called "family cap." Without reference to any legal authority, Mr. Fowler argued that it was unfair and unjust to require him to pay child support to the Board, thereby denying his daughter the benefit of his support.

The court reserved decision and found that Mr. Fowler's complaint apparently raised an issue of constitutional dimension. The court found two federal court decisions that addressed similar issues, albeit with disparate results. Compare Williams v. Humphreys, 125 F. Supp. 2d 881 (S.D. Ind. 2000) (holding that Indiana law requiring TANF recipient to assign child support paid by non-custodial parent of child excluded from cash benefits under the "family cap" results in unconstitutional taking of child's property), with Williams v. Martin, 283 F. Supp. 2d 1286 (N.D. Ga. 2003) (holding to the contrary applying Georgia law).

The court then endeavored to find pro bono counsel for the various parties, so that the issue could be properly and thoroughly presented to the court. The court recognized that there conceivably could arise a conflict between the interests of the mother - who sought cash assistance for herself and her other child - and the capped child, Crystal, whose interest was in maximizing support

for herself. Ultimately, the Gibbons firm volunteered to represent the child, Crystal Fowler, and was appointed to represent Crystal by case management order entered December 21, 2006. Later, David Perry Davis, Esq., agreed to represent the father, Revel Fowler; and Central Jersey Legal Services agreed to represent the mother, Cassandra Ricks.

The court did not formally enter an order permitting the child to intervene. In retrospect, that appears to be an oversight. Therefore, the court on its own motion has herewith shall enter an order nunc pro tunc, permitting the child to intervene and appointing Lawrence Lustberg as guardian ad litem, with the power to represent her interests in this proceeding only.

After all the parties were represented, a period of discovery followed. Upon the conclusion of discovery, Crystal filed a motion for summary judgment June 1, 2007, seeking an order declaring that the assignment of Revel Fowler's child support to MCBSS violated state and federal constitutional prohibitions against public taking of property without just compensation, and was void as an unlawful waiver of a child's right to support.

Ms. Ricks's attorneys filed a short letter dated June 12, 2007 stating that Ms. Ricks had become employed, was

likely to soon become ineligible for TANF benefits. The court was asked to "provide a reasonable child support arrears number if awarded to Welfare so that our client can maximize the child support she will receive directly on behalf of Crystal." Ms. Ricks's counsel wrote that "my client disputes that she receives the level of direct financial support from Mr. Fowler he indicates," but no cognizable evidence to this effect was provided. See 1:6-6 (requiring cognizable evidence on motions).

On July 5, 2007, MCBSS filed a notice of cross-motion for summary judgment, seeking an order dismissing the claims of Crystal Fowler and Revel Fowler that child support payments should go to Cassandra Ricks, instead of the Board, for the benefit of Crystal.

The court held oral argument on August 2, 2007 and received post-argument supplemental submissions on August 16, 2007.

STATEMENT OF FACTS

WORK FIRST NEW JERSEY PROGRAM

The following facts are undisputed:

1. The Work First New Jersey program ("WFNJ") is New Jersey's welfare assistance component of Federal Temporary Assistance to Needy Families ("TANF")

established by the Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"). See N.J.S.A. 44:10-55; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 1; MCBSS Brief, ¶ 1.

2. WFNJ provides cash assistance to eligible families as well as non-cash "supports" to enable families to obtain and retain employment. The parties do not dispute that WFNJ also provides emergency assistance to eligible families who are homeless or close to homeless or are experiencing a related emergency, "and there is no other source of support available." See N.J.A.C. 10:90-6.3; N.J.A.C. 10:90-6.1; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 2; MCBSS Brief, ¶ 2.

3. New Jersey's Department of Human Services' Division of Family Development supervises the WFNJ program at the state level. It is also undisputed that county welfare agencies administer cash assistance and social services at the local level. See MCBSS Revised Interrogatory Response, Question 1; see also MCBSS Brief, ¶ 4; L. Lustberg, Statement of Undisputed Material Facts, ¶ 4.

4. MCBSS is one of twenty-one county welfare agencies responsible for providing economic and social services under the WFNJ program. It is undisputed that MCBSS expended $33,504,197 in administrative costs and disbursements for the WFNJ program; of that total, $15,985,290 was expended on cash assistance, $7,169,625 on emergency assistance, $629,719 for work supports, and $9,719,563 on administrative costs. See MCBSS Revised Interrogatory Response, Question 3. See also MCBSS Brief, ¶ 5; L. Lustberg, Statement of Undisputed Material Facts, ¶ 5.

5. WFNJ benefits are provided to single needy parents with at least one child under the age of eighteen, or under the age of twenty-one, if enrolled in specified educational programs. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 6; MCBSS Brief, ¶ 6.

6. Financial eligibility for the receipt of WFNJ benefits is determined through an assessment of a family's income and assets, including salaries, spousal support, unemployment compensation, and bank accounts. See N.J.A.C. 10:90-3.1; N.J.A.C. 10:90-3.9; N.J.A.C. 10:90-3.10; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 8; MCBSS Brief, ¶ 8.

7. Initial financial eligibility for WFNJ benefits is determined by comparing the total countable income of the family with the maximum income allowed for that family's size in accordance with Schedule I in N.J.A.C. 10:90-3.3. It is undisputed that if the family has income equal to or less than the maximum allowable income level, then initial financial eligibility exists. See N.J.A.C. 10:90-3.1; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 9; MCBSS Brief, ¶ 9.

8. The Schedule I cash assistance amounts only cover children present in the household on the date when the assistance unit files the WFNJ application. (hereinafter "the child exclusion" or "family cap").[1] It is undisputed that under this provision, each child born into a family in which any family member is receiving welfare is excluded from the calculation of cash benefits. See N.J.A.C. 44:10-61; N.J.A.C. 10:90-

[1] The court attaches no import to the choice of short-hand reference for the provision, although the basis for the parties' respective preference is obvious. The child's attorneys favor "child exclusion" to emphasize its view that the provision denies benefits to the child born more than ten months after benefits begin. The Board's attorneys favor "family cap" to emphasize that the provision caps the total benefits paid to the family, which includes the additional child. Thus, the provision is both a "child exclusion" and a "family cap." Yet, as discussed in detail below, the Legislature expressly provided that the added child is denied benefits, describing the child as a "person for whom cash assistance has not been received." N.J.S.A. 44:10-61(c).

2.18; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 10; MCBSS Brief, ¶ 10.

9. The family cap does not apply to children born within ten months of the family's application for benefits, N.J.S.A. 44:10-61(e); N.J.A.C. 10:90-2.18(a),(8), or children born as the result of rape, incest, or domestic violence. See N.J.S.A. 44:10-61(f); N.J.A.C. 10:90-2.18(a)(4); see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 11; MCBSS Brief, ¶ 11.

10. The child exclusion applies to children born even after the family has ceased to receive assistance if the birth of the baby occurs within a year of any members of the assistance unit's receipt of WFNJ assistance, should the family reapply for assistance. See N.J.A.C. 10:90-2.18(a)(8); see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 12; MCBSS Brief, ¶ 12.

11. A family with a child subject to the child exclusion may "earn back" an increase in its grant amount if adult family members become employed. It is undisputed that in such cases, an employed family member's countable income is compared for eligibility purposes with the appropriate assistance unit size, and the appropriate benefit payment level is based on

the family size, including the child subject to the child exclusion. See N.J.A.C. 10:90-2.18; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 14; MCBSS Brief, ¶ 14.

12. Under WFNJ, the Commissioner is charged with the responsibility of establishing a standard of need and a benefit level for all families receiving welfare benefits. N.J.S.A. 44:10-42; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 15; MCBSS Brief, ¶ 15.

13. The standard of need is the minimum amount of money determined to be necessary to enable recipients to maintain a decent and healthy standard of living. It is undisputed that regulations require that it be based on the actual cost of housing, food, and other essentials. See N.J.S.A. 44:10-34; In re Petition for Rulemaking, 117 N.J. 311, 318-322 (1989). See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 16; MCBSS Brief, ¶ 16.

14. New Jersey's standard of need increases with each additional family member. See N.J.A.C. 10:69-10.2; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 17; MCBSS Brief, ¶ 17.

15. New Jersey's standard of need is as follows: one person-- $1,566 per month; two persons -- $1,811; three persons - $2,310; four persons - $3,026; five persons - $3,271; six persons - $3,849; seven persons - $4,094; eight persons - $4,339; more than eight persons - $245 for each additional person. See N.J.A.C. 10:84-1.6; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 18; MCBSS Brief, ¶ 18.

16. The amount of benefits that are payable each month under WFNJ depends on the number of people in the family and, in general, the amount of assistance paid to a family increase with each additional family member. See N.J.A.C. 10:90-3.3. Schedules I & II; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 19; MCBSS Brief, ¶ 19.

17. The current benefit levels under WFNJ are as follows: one person -- $162 maximum per month; two persons -- $322 maximum per month; three persons -- $424 maximum per month; four persons -- $488 maximum per month; five persons -- $552 maximum per month; six persons -- $616 maximum per month; seven persons -- $677 maximum per month; eight persons -- $728 maximum per month; more than eight persons - add $50 for each additional person. N.J.A.C. 10:90-3.3; see also L.

Lustberg, Statement of Undisputed Material Facts, ¶ 20; MCBSS Brief, ¶ 20.

18. The Department of Human Services, Division of Family Development, Office of Child Support Services ("OCSS") administers New Jersey's child support program and oversees the delivery of child support services which involves various state entities including the family division of the judiciary, county prosecutors and the county welfare agencies, as required by Title IV-D of the Federal Social Security Act. 42 U.S.C.A. § 651, et seq. Specifically, Title IV-D requires that each state create a program to locate non-custodial parents, establish paternity, establish and enforce child support obligations, and collection and distribute support payments. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 28; MCBSS Brief, ¶ 28.

19. Child support obligations are calculated pursuant to the methodology set forth in Rule 5.6(a) and Appendix I of New Jersey's Child Support Guidelines. The guidelines, in determining support awards, take into account both the child's needs and the parents' incomes and assets. The guidelines are to be used as a rebuttable presumption in calculating child support

and are applied unless a party proves to the court that circumstances exist which make the award specified by the Guidelines inappropriate in a specific case. See R. 5.6(a); see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 29; MCBSS Brief, ¶ 29.

20. The premise of New Jersey's child support guidelines is that "child support is a continuous duty of both parents, 2) children are entitled to share in the income of both parents, and 3) children should not be the economic victim of divorce or out-of-wedlock birth." See R. 5.6(a) Appendix IX-A, ¶1; N.J.S.A. 2A:34-23(a); L. Lustberg, Statement of Undisputed Material Facts, ¶ 30; MCBSS Brief, ¶ 30.

21. Child support received by a parent, whether distributed by the Office of Child Support or provided directly to the guardian/parent, includes the expectation that the guardian/parent is spending the support award for the benefit of the child. See R. 5.6(a) Appendix IX-A, ¶ 7(j); see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 31; MCBSS Brief, ¶ 31.

22. When an adult applies for or receives assistance through the WFNJ program, she or he must assign

certain rights of child support over to the state. See N.J.S.A. 44:10-49; N.J.A.C. 10:110-6.1; N.J.A.C. 10:90-16.2(b) (hereinafter "The Assignment Provision"). However, as discussed below, this court interprets the statute to not require assignment of the right to support for a child subject to the cap. However, it is undisputed that the Board has interpreted and implemented the provision based on its reading that the provision requires assignment of child support rights of all children in the assistance unit, including a "capped child."

23. Under the Assignment Provision as applied by the Board, if an adult applicant is owed child support, the State is entitled to keep all but the first $50 of the support for each month in which child support is collected. This so-called "pass-through" payment is provided to the family receiving cash assistance. See N.J.S.A. 44:10-39; N.J.A.C. 10:110-6.2; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 33; MCBSS Brief, ¶ 33.

24. MCBSS does not pay "pass-through" child support amounts to families receiving assistance in benefit periods in which no child support is collected. See Exhibit A, MCBSS Revised Interrogatory Response,

Question 8. See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 35; MCBSS Brief, ¶ 35.

25. The New Jersey Family Support Payment Center handles retained child support monies. See Exhibit A, MCBSS Revised Interrogatory Response, Question 4. See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 38; MCBSS Brief, ¶ 38.

26. During the fiscal year 2006, MCBSS collected $3,419,537 in child support on behalf of WFNJ recipients in Mercer County. Of that total, 93% was withheld, and only 7%, or $248,108 was distributed to MCBSS WFNJ recipients in the form of "pass-through" payments. See Exhibit B, MCBSS Supplemental Interrogatory Response, CSP Disregard Payment Report. See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 39; MCBSS Brief, ¶ 39.

27. Child support amounts withheld by New Jersey are used to reimburse the State and Federal governments for WFNJ/TANF costs. See 42 U.S.C.A. § 657 (a)(1), (c)(3); N.J.A.C. 10:110-17.1. See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 40; MCBSS Brief, ¶ 40.

The following facts are effectively undisputed, inasmuch as MCBSS has failed to present anything more than an unsubstantiated denial of the movant's supported allegations. See Spiotta v. Wm. H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div.), certif. denied, 37 N.J. 229 (1962) (party opposing motion for summary judgment bears burden to submit proof that facts are not as movant asserts).

28. New Jersey pays at most 18% of its own need standard to families who qualify for welfare benefits. See N.J.S.A. 44:10-45; N.J.A.C. 10:69-10.2; N.J.A.C. 10:90-3.3; see also L. Lustberg, Statement of Undisputed Material Facts, ¶ 21; MCBSS Brief, ¶ 21.

29. As an example, while New Jersey concedes in its standard of need that a family of four eligible recipients requires at least $1,127 per month to meet its subsistence needs, the benefit for that family under New Jersey regulations is never more than $488, where no family member is subject to the child exclusion provision. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 22; MCBSS Brief, ¶ 22.

30. Even when the family receives a grant for the full number of children in the household, a family that must rely on public assistance does not receive

enough income to meet the children's basic needs. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 23; MCBSS Brief, ¶ 23.

31. The relative value of cash assistance received by eligible families in New Jersey has fallen significantly over time. It is effectively undisputed that the annual maximum WFNJ cash grant alone for a family of three in 2006, $5,800, would leave that family 65% percent below the 2006 poverty level of $16,000 for a family of that size. It is effectively undisputed that in 1970, an annual welfare grant brought a family of three above the poverty level. See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 24; relying on D, Livio Susan, "Try Living on $422 a month," Say Welfare Hike Advocates, Star Ledger, May 25, 2007 (noting that despite a rise in inflation of 78% cash assistance amounts have not been raised since 1987); Annual Update of the HHS Poverty Guidelines, 71 Fed. Reg. 3848 (Jan. 24, 2006), and Legal Services of New Jersey, Hard Times Amid Prosperity: A Current Profile of Poverty in New Jersey (1990) at 20; MCBSS Brief, ¶ 24.

32. The operation of the child exclusion and other modifications to New Jersey's welfare program has

resulted in fewer poor children receiving benefits. For example, in 1996, 199,000 poor children in New Jersey received welfare assistance. It is effectively undisputed that by 2006, that number had dropped 66% to 67,000, despite the fact that the number of children in families living below the poverty line saw a comparative decrease of only 20% over the same time period. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 25; MCBSS Brief, ¶ 25.

33. Recipients of WFNJ benefits, upon application or redetermination of benefits must sign an "Agreement to Repay" in the event of the receipt of income or resources. See N.J.S.A. 44:10-64; N.J.A.C. 10:110-16.1; See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 26; MCBSS Brief, ¶ 26.

The parties dispute the following facts, although they are not material to the court's decision:

34. Crystal claims that there are "few exceptions" to the 60-month cumulative time limit on the provision of WFNJ cash assistance to eligible families pursuant to N.J.S.A. 44:10-72 and N.J.A.C. 10:90-2.3. Crystal states that this time limit applies whether or not the assistance was received in consecutive months. See L.

Lustberg, Statement of Undisputed Material Facts, ¶ 3. MCBSS denies this fact and objects to the use of "few exceptions" because in the history of MCBSS' application of these laws, no family has been removed from cash assistance because they exceeded the 60-month cumulative time limit. See MCBSS Brief, ¶ 3; Barbara Buckley, Certification.

35. Crystal claims that the "unreimbursed assistance amount" that a WFNJ recipient is obligated to repay is defined as unreimbursed "money payments in cash, checks, or warrants immediately redeemable at par to eligible families." See L. Lustberg, Statement of Undisputed Material Facts, ¶ 27; MCBSS Revised Interrogatory Response, Question 14. MCBSS denies this and argues that "unreimbursed assistance" is defined as the cumulative amount of assistance paid to a family for all months which has not been repaid by assigned support collection, and that the term "assistance paid to the family" for child support enforcement collection purposes, means money payments in cash, checks, or warrants immediately redeemable at par to eligible families under a state plan approved under Title IV-A. See MCBSS Brief, ¶ 27; Exhibit A, Interrogatory answer to question 14 by MCBSS, of the

Certification of Melanca Clark, Esq. in support of Crystal Fowler's Motion for Summary Judgment.

36. Crystal argues that the State retains any remaining child support (i.e. whatever remains after the first $50 of child support is paid to the family), and that it applies that amount towards the current cash assistance amount provided to the assisted family for the month in which it received support. Crystal also argues that any child support that remains after accounting for the current month's assistance payment is retained by the State to apply to the amount of unreimbursed cash assistance provided to the family in all preceding months of assistance. See N.J.A.C. 10:10-110-16.1; L. Lustberg, Statement of Undisputed Material Facts, ¶ 34. In response, MCBSS argues that the child support payments that are limited to the arrears set forth in the Court's Support Order and continues until TANF benefits are paid. After TANF benefits cease, reimbursement is obtained through arrears payment by the non-custodial parent. See Exhibit A, Interrogatory answer to question #14 by MCBSS, of the Certification of Melanca Clark, Esq. in support of Crystal Fowler's Motion for Summary Judgment; MCBSS Brief, ¶ 34.

37. Crystal claims that for families currently receiving WFNJ assistance, New Jersey is entitled to withhold child support that was owed to a member of that family both before and during the assistance period, up to the amount of unreimbursed assistance. See N.J.A.C. 10:110-16.1; N.J.A.C. 10:110-17.1; L. Lustberg, Statement of Undisputed Material Facts, ¶ 36. MCBSS denies this fact and argues that the child support payments are limited to the arrears set forth in the Court's Support Order and continues until TANF benefits are paid. After TANF benefits cease, reimbursement is obtained through arrears payment by the non-custodial parent. See Exhibit A, Interrogatory answer to question #14 by MCBSS, of the Certification of Melanca Clark, Esq. in support of Crystal Fowler's Motion for Summary Judgment; MCBSS Brief, ¶ 36.

38. Crystal claims that New Jersey is entitled, up to the amount of unreimbursed assistance, to withhold child support paid to families after they have stopped receiving WFNJ assistance; that the State can keep child support paid after the WFNJ assistance period, up to the amount of unreimbursed assistance, if the support was due to a family during the WFNJ assistance period; that the State can also keep child support, up

to the amount of unreimbursed assistance, whenever owned or paid to a family, if the child support is collected in the form of a federal tax offset collection. See N.J.A.C. 10:110-17.1; L. Lustberg, Statement of Undisputed Material Facts, ¶ 37. Again, MCBSS denies this claim and argues that the child support payments are limited to the arrears set forth in the Court's Support Order and continues until TANF benefits are paid. After TANF benefits cease, reimbursement is obtained through arrears payment by the non-custodial parent. See Exhibit A, Interrogatory answer to question #14 by MCBSS, of the Certification of Melanca Clark, Esq. in support of Crystal Fowler's Motion for Summary Judgment; MCBSS Brief, ¶ 37.

IMPACT OF INTERSECTION OF ASSIGNMENT OF CHILD SUPPORT AND CHILD EXCLUSION PROVISION ON CRYSTAL FOWLER

The following facts are undisputed:

39. Crystal Fowler born on December 5, 2005, is the infant child of Cassandra Ricks and Revel Fowler. See Exhibit E, MCBSS, as Assignee of Cassandra Ricks v. Revel Fowler, Complaint of Support, May 18, 2006. L. Lustberg, Statement of Undisputed Material Facts, ¶ 41; MCBSS Brief, ¶ 41. Crystal was previously known

as Crystal Hernandez, bearing the surname of someone who was previously, but erroneously, believed to be her father.

40. Crystal presently resides with her mother, Cassandra Ricks, and her sister Diamond Williams, born June 26, 2001, in a shelter. See Exhibit F, Affidavit of Shelter Arrangement, February 7, 2007 and Exh. K, Application and Affidavit for Work First New Jersey, L. Lustberg, Statement of Undisputed Material Facts, ¶ 42; MCBSS Brief, ¶ 42.

41. Cassandra Ricks is the primary caretaker of her children and is currently unemployed. See Exhibit G, WFNJ Temporary Deferrals for Cassandra Ricks; L. Lustberg, Statement of Undisputed Material Facts, ¶ 43; MCBSS Brief, ¶ 43.

42. Cassandra Ricks has been a recipient of WFNJ assistance since June 2003. See Exhibit A, MCBSS Revised Interrogatory Response, Question 14; L. Lustberg, Statement of Undisputed Material Facts, ¶ 44; MCBSS Brief, ¶ 44.

43. Because Crystal was born more than 10 months from the date of Ms. Ricks's entry into the WFNJ program, she is subject to the child exclusion or family cap. Thus, it is undisputed that the State does

not pay Cassandra Ricks any additional cash assistance for the support of Crystal Fowler. See Exhibit H, MCBSS, Case Record Action, December 13, 2005; L. Lustberg, Statement of Undisputed Material Facts, ¶ 45; MCBSS Brief, ¶ 45.

44. Despite the fact that there are two children in the family, Ms. Ricks receives a monthly benefit of $322, the WFNJ cash assistance benefit level set for a family of two. See Exhibit I, MCBSS, Case Record Action for Cassandra Ricks, February 8, 2007; L. Lustberg, Statement of Undisputed Material Facts, ¶ 46; MCBSS Brief, ¶ 46.

45. There is a 60-month cumulative time limit on the provision of WFNJ cash assistance to eligible families pursuant to N.J.S.A. 44:10-72 and N.J.A.C. 10:90-2.3. If Ms. Ricks continues to receive WFNJ monthly assistance for consecutive months, then she will reach her cumulative 60-month time limit on the receipt of benefits in June of 2008. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 50.

46. Upon applying for WFNJ assistance, and for every re-determination of benefits, Cassandra Ricks signed a release of her rights to support for herself and any family member. See Exhibit K, Cassandra Ricks

Application and Affidavit for WFNJ, February 7, 2007 (stating "I (we) understand that upon signing this application, I (we) assign to the County Welfare Agency any right to support, including any arrears that have accrued, from any other person for myself or any other family member for whom I (we) am (are) applying for receiving aid."). See L. Lustberg, Statement of Undisputed Material Facts, ¶ 51; MCBSS Brief, ¶ 51.

47. Cassandra Ricks also signed an "Agreement to Repay." See Exhibit L, Cassandra Ricks Agreement to Repay, February 7, 2007. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 52; MCBSS Brief, ¶ 52.

48. As of May 2007, the total unreimbursed assistance was $14,342. See Exhibit A, MCBSS Revised Interrogatory Response, Question 14; L. Lustberg, Statement of Undisputed Material Facts, ¶ 53; MCBSS Brief, ¶ 53.

49. Revel Fowler, the father of Crystal Fowler, is presently employed at UPS, at a monthly salary of $1,675 and receives health insurance benefits. See Exhibit C, Revel Fowler Interrogatory Response; L. Lustberg, Statement of Undisputed Material Facts, ¶ 56; MCBSS Brief, ¶ 56.

50. Revel Fowler also pays $78 per month in an income deduction for health insurance for Crystal Fowler. See Exhibit C, Revel Fowler Interrogatory Response; L. Lustberg, Statement of Undisputed Material Facts, ¶ 58; MCBSS Brief, ¶ 58.

51. A child support hearing officer recommended entry of an order of support for the care of Crystal Fowler against Revel Fowler in the amount of $83 per week, and $10 per week in arrears ($376 per month total) effective May 18, 2006, under FD-11-1012-06. See Exhibit A, MCBSS Revised Interrogatory Response, Question 13; Exhibit M, Child Support Hearing Officer Referral Form, September 20, 2006; L. Lustberg, Statement of Undisputed Material Facts, ¶ 59; MCBSS Brief, ¶ 59. However, Mr. Fowler sought an appeal from that order to the court, pursuant to Rule 5:25-4. The basis of that appeal was Mr. Fowler's objection to the assignment of his child support payments to the Board.

52. Of this $376 monthly amount to be paid by Revel Fowler, only $50 of the amount would be passed through to Cassandra Ricks for the support of Crystal Fowler, according to the Board's interpretation of the assignment provision. Close to 90% of the payment

would be kept by the state. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 60; MCBSS Brief, ¶ 60.

53. The ability of MCBSS to collect and withhold Revel Fowler's child support payments may extend beyond the time that Cassandra Ricks receives WFNJ assistance. See N.J.A.C. 10:110-17.1. See also L. Lustberg, Statement of Undisputed Material Facts, ¶ 61; MCBSS Brief, ¶ 61.

54. Pending the outcome of this case, Revel Fowler has been ordered to pay $50 directly to Ms. Ricks, starting May 1, 2007. See Exhibit O, MCBSS o/b/o Cassandra Ricks v. Revel Fowler, FD-11-1012-06, Case Management Order of Judge Ostrer, April 27, 2007; L. Lustberg, Statement of Undisputed Material Facts, ¶ 62; MCBSS Brief, ¶ 62.

The parties dispute the following facts, but resolution is not material to the court's resolution of the motion and cross-motion:

55. Crystal claims that the $322 monthly benefit amount provides less than 11% of the amount Crystal's family needs for a minimally decent standard of living for an adult and three children as defined under New Jersey's Standard of Need. See N.J.A.C. 10:84-1.6; L.

Lustberg, Statement of Undisputed Material Facts, ¶ 47. MCBSS denies this fact and states that in addition to TANF cash assistance, Crystal's family receives food stamps, emergency housing assistance, child care, and transportation to meet their living needs. See MCBSS Brief, ¶ 47.

56. Crystal claims that her mother's only income is the cash assistance she receives from MCBSS in the amount of $322 per month. See Exhibit J, History Memo for Cassandra Ricks, February 6, 2007; L. Lustberg, Statement of Undisputed Material Facts, ¶ 48. MCBSS denies this claim and asserts that Cassandra Ricks also receives $50 pass-through from child support payments. See MCBSS Brief, ¶ 48.

57. Crystal claims that the monthly benefit amount her mother received provided less than 11% of the amount her family needs for a minimally decent standard of living for an adult and three children as defined under New Jersey's Standard of Need. See N.J.A.C. 10:84-1.6; L. Lustberg, Statement of Undisputed Material Facts, ¶ 49. MCBSS denies this claim and states that in addition to TANF cash assistance, Crystal's family receives food stamps, emergency housing assistance, child care, and

transportation to meet their living needs. See MCBSS Brief, ¶ 49.

58. Crystal claims that the portion of Cassandra Rick's unreimbursed assistance attributable to assistance before Crystal's birth is $9,398. See Exhibit A, MCBSS Revised Interrogatory Response, Question 14; L. Lustberg, Statement of Undisputed Material Facts, ¶ 54. MCBSS denies this fact to the extent that the statement implies that as of May 7, 2007 MCBSS will receive $9,398 in reimbursement from Cassandra Ricks. In accordance with the proposed court order dated September 20, 2006, the amount of arrears or assistance to be reimbursed was $1,494 based upon an effective date of May 8, 2006. See Exhibit M, Certification of Melanca Clark, Esq. in support of Crystal Fowler's Motion for Summary Judgment; MCBSS Brief, ¶ 54.

59. Crystal also claims that MCBSS cannot determine the value, if any, of WFNJ benefits received on behalf of Cassandra Ricks and/or Crystal Fowler for emergency assistance received since February, 2007, childcare, transportation, or Medicaid. See Exhibit A, MCBSS Revised Interrogatory Response, Question 12; L. Lustberg, Statement of Undisputed Material Facts, ¶

55. MCBSS denies this claim and asserts that the $6,847 in emergency assistance was received by Ms. Ricks for the benefit of her entire family. See Certification of Barbara Buckley; MCBSS Brief, ¶ 55.

The following facts are effectively undisputed:

60. Crystal also claims that her father, Revel Fowler spends approximately $270 per month directly for Crystal's care. See Exhibit C, Revel Fowler Interrogatory Response. Revel Fowler's monthly expenditures on the child include approximately $100 in housing costs, approximately $80 for clothing, approximately $30 on diaper and baby-related hygiene items, and approximately $60 on toys and books. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 57. MCBSS denies these claims merely on the ground that there allegedly is insufficient proof documenting the amount Revel Fowler claims he has spent for Crystal's care. Furthermore, MCBSS argues that it is unclear how he spends approximately $100 in housing cost for Crystal when she is in the primary custody of her mother, Cassandra Ricks. MCBSS Brief, ¶ 57. However, MCBSS provides no cognizable evidence disputing Mr. Fowler's claim. For example, MCBSS

provides no certification from Ms. Ricks denying receipt of these benefits. Nor does MCBSS provide circumstantial evidence that would bring into question Mr. Fowler's claim - such as an analysis of his monthly income, and spending that would allegedly leave no room for the claimed $270 in spending. Thus, there is no genuine issue of material fact as to Mr. Fowler's claims. They must be taken as true on this motion record.

61. Mr. Fowler also claims that he will not be able to continue providing Crystal Fowler with $270 a month in direct support if he is required to pay child support under the order proposed on September 20, 2006. Crystal's counsel notes that this information was provided to Melanca Clark in a conversation with Revel Fowler and his counsel on May 30, 2007, and that an affidavit from Mr. Fowler certifying this fact is forthcoming. See L. Lustberg, Statement of Undisputed Material Facts, ¶ 63; MCBSS Brief, ¶ 63.

62. For the time period December 1, 2005 - June 27, 2007, MCBSS has paid a total of $3,197.20 for Crystal's Medicaid claims. Yet, the Board conceded at oral argument that it is not entitled to reimbursement for those payments.

DISCUSSION

The standard for summary judgment is well settled. See R. 4:46-2; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). A court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill, 142 N.J. at 528-29 (quoting R. 4:46-2). In this case, the material factual issues are undisputed. The issue is one of law and statutory construction. Therefore, it is ripe for summary judgment. See, e.g., Hudson Envtl. Servs., Inc. v. N.J. Prop. Liab. Ins. Guar. Ass'n, 372 N.J. Super. 284, 297 (Law Div. 2004) (purely legal issue ripe for summary judgment); Clark v. Degnan, 163 N.J. Super. 344, 368 (Law Div. 1978), aff'd as modified, 83 N.J. 393 (1980) (same).

Upon reviewing the federal and state law governing the assignment of child support benefits, the court holds that New Jersey law does not compel assignment of Crystal Fowler's child support. This statutory interpretation is consistent with the law governing child support, which

includes the principle that child support belongs to the child and may not be waived by a parent. This interpretation also avoids a constitutional infirmity, consisting of a taking of Crystal Fowler's property. The court will first analyze the statutory language, and then discuss its relationship to child support law, and the constitutional issues that bear upon statutory interpretation.

1. TANF Beneficiaries Are Not Compelled To Assign Child Support For "Capped" Children

This court concludes that New Jersey law does not require TANF beneficiaries to assign child support payable for children subject to the family cap. To the extent that the Mercer County Board of Social Services requires such assignments, its actions are ultra vires and void. Consistent with federal law, New Jersey law has compelled the assignment of child support intended for children who receive cash assistance - previously called AFDC and now TANF. However, inasmuch as the family cap denies Crystal Fowler cash assistance, neither federal nor New Jersey law compel the assignment of her child support.

The assignment of child support benefits originates in federal law. States receiving certain federal grants in

aid are required to compel assignment of child support for children receiving public assistance. The federal mandate states:

> A State to which a grant is made under section 403 [42 U.S.C. § 603] shall require, as a condition of providing assistance to a family under the State program funded under this part [42 U.S.C. §§ 601 et seq.], that a member of the family assign to the State any rights the family member may have (on behalf of the family member or of any other person for whom the family member has applied for or is receiving such assistance) to support from any other person, not exceeding the total amount of assistance so provided to the family, which accrue (or have accrued) before the date the family ceases to receive assistance under the program.
>
> [42 U.S.C.A. § 608(a)(3)(A)].

This provision only "mandates that states require children who receive TANF assistance to assign their child support payments to the state." Williams v. Martin, 283 F. Supp. 2d 1286, 1292 (N.D. Ga. 2003). "[C]hildren subject to the family cap cannot be deemed to be 'receiving such assistance.'" Williams v. Humphreys, 125 F. Supp. 2d 881, 885 (S.D. Ind. 2000) (quoting 42 U.S.C.A. § 608(a)(3)(A)). But see Williams v. Martin, supra, 283 F. Supp. 2d at 1293 (declining to decide "whether the 'capped' children received TANF assistance").

Two federal courts agree that the federal law neither requires nor prohibits states from compelling assignment of child support payments for a capped child. Ibid.; Williams v. Humphreys, supra, 125 F. Supp. 2d at 885-86 (same). "Section 608(a)(3) does not expressly authorize states to require assignment of child support for children not receiving TANF assistance, but the provision also does not affirmatively prohibit … [a state] from imposing the requirement." Williams v. Martin, supra, 283 F. Supp. 2d at 1293.

Moreover, there is nothing in the federal law that requires assignment of child support payments due for children receiving governmental benefits other than those funded through Part A of Title IV of the Social Security Act, that is, "assistance to a family under the State program funded under this part [42 U.S.C.A. §§ 601 to 619]." 42 U.S.C.A. § 608(a)(3)(A). Part A of Title IV is entitled "Block Grants to States for Temporary Assistance to Needy Families" and provides block grants to states to assist them in providing TANF benefits. The states may also use their grants "in any manner that is reasonably calculated to accomplish the purpose of this part." 42 U.S.C.A. § 604. But, aside from paying for administrative costs common to Food Stamps and Medicaid, Part A block

grants are not used to pay for benefits under the Medicaid program, which is authorized by 42 U.S.C.A. § 1396, or the Food Stamp program, which is authorized by 7 U.S.C.A. § 2015(l)(1). See Arizona v. Thompson, 281 F.3d 248 (D.C. Cir. 2002) (addressing common administrative costs of the TANF, Medicaid and Food Stamp programs).

Consistent with the federal statute, New Jersey law since 1980 required assignment of the "right to support" of children who received AFDC. L. 1980, c. 172, § 1. Prior to its repeal in 1997, the statute provided:

> [A]pplication for or receipt of aid to families with dependent children shall operate as an assignment, pursuant to Titles IV-A and IV-D of the Social Security Act, to the county welfare agency of any rights to support from any other person that the applicant or recipient may have on his own behalf or on behalf of any other family member for whom the applicant or recipient is applying for or receiving assistance.
>
> [N.J.S.A. 44:10-2, repealed by L. 1997, c. 38, § 17].

By its terms, the repealed section required a beneficiary to assign child support payments for a child only if that child received assistance. The court reaches this conclusion for two reasons. First, the scope of the New Jersey assignment was apparently intended to be no broader than that required by the federal law, inasmuch as

the statute to refers to "an assignment, pursuant to Titles IV-A and IV-D of the Social Security Act . . . ." Ibid. (emphasis added). And, as noted above, the Social Security Act required only assignment of child support for those receiving assistance, although it neither required nor prohibited broader assignments.

Second, the New Jersey provision just quoted expressly referred to assignments of child support payments for the benefit of recipients of assistance. The applicant assigned two forms of support. The applicant or recipient assigned "rights to support . . . that the applicant or recipient may have on his own behalf . . . ." Also, the applicant or recipient assigned support of other family members, but only if those family members also received assistance. The applicant or recipient assigned "rights to support . . . on behalf of any other family member for whom the applicant or recipient is applying for or receiving assistance." Ibid. (emphasis added). As used in the context of the paragraph, "assistance" meant "aid to families with dependent children."

Under the family cap, which was first enacted in 1991, the applicant or recipient could not apply for or receive additional assistance, in the form of additional aid to

families with dependent children ("AFDC"), for a child born while the family was already receiving AFDC benefits.

> The Commissioner of Human Services shall . . . revise the schedule of benefits to be paid to a recipient family . . . by eliminating the increment in benefits under the program for which that family would otherwise be eligible as a result of the birth of a child during the period in which the family is eligible for AFDC benefits . . . .
>
> [L. 1991, c. 526, § 1, codified at N.J.S.A. 44:10-3.5, and repealed by L. 1997, c. 38, § 17].

This proposal sparked considerable controversy. Many opponents of the proposal asserted that it punished the new-born child, and proponents, including the principal bill sponsor, then-Assemblyman Wayne Bryant, asserted that it simply imposed financial discipline on an AFDC-recipient similar to that imposed on middle class parents, who must decide whether they can afford another child. See, e.g., Colloquy between Assemblyman Bryant and then-Public Advocate Wilfredo Caraballo, Public Hearing before Assembly Health and Human Services Committee, Assembly Bills Nos. 4700, 4701, 4702, 4703, 4704, 4705 (July 30, 1991) at 7-15. Although the bill language referred to capping the family's total benefit, the legislative history reflected an understanding that the language denied benefits for the

capped child. In addressing the fiscal impact of the family cap, the fiscal estimate to the legislation noted, "[H]ow much would be saved by not providing AFDC benefits for the child cannot be readily determined." Legislative Fiscal Estimate to Assembly Bill 4703 (Sept. 12, 1991).

The 1991 package of welfare reform legislation did not amend the pre-existing assignment provision. As a result, read together, the plain meaning of the pre-existing assignment provision and the then-new family cap provision was that the applicant or recipient was not required to assign support for the capped child because the capped child was not "receiving assistance." Cf. Williams v. Humphreys, supra, 125 F. Supp. 2d at 885 (construing comparable federal language to the effect that "children subject to the family cap cannot be deemed to be 'receiving such assistance.'").

If the Legislature intended a different result, it could have expressly required assignment of child support for capped children by amending the plain language of N.J.S.A. 44:10-2, which was in effect at that time and required assignment only of the rights to support of children "applying for or receiving assistance." The Legislature did not do so. Nor has this court found any indication in the legislative history of the 1991 enactment

that reflected a specific intention to require assignment of child support due a child while denying that child the benefit of additional cash assistance.

This court recognizes that the trial court in C.K. v. Shalala, 883 F. Supp. 991, 1009-11 (D.N.J. 1995), aff'd sub nom. C.K. v. N.J. Dep't of Health and Human Servs., 92 F.3d 171, 191-92 (3d Cir. 1996) opined that the family cap enacted in 1991 did not deny benefits to the capped child, but simply spread the fixed and pre-existing level of benefits among a larger family unit, including the capped child. Therefore, the trial court held that the family cap did not violate section 402 of the Social Security Act [42 U.S.C.A. § 602(a)(10)(A)] as it then existed, which required that states furnish AFDC benefits to all eligible individuals. The Court of Appeals agreed, in dictum, that the family cap did not deprive eligible individuals of benefits in violation of section 402. 92 F.3d at 191. However, the Court of Appeals also recognized that the family cap could deprive an otherwise eligible family of any and all AFDC benefits; by contrast, a maximum benefit payment regulation would never result in a total exclusion of benefits. Thus, the court distinguished Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), which upheld the maximum benefit regulation,

stating that "so long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." 397 U.S. at 481, 90 S. Ct. at 1159, 25 L. Ed. 2d at 499. Moreover, in the final analysis, the Third Circuit rejected the claim that the family cap violated section 402 because the Secretary had waived section 402. 92 F.3d at 192. Lastly, this court is not bound by an intermediate federal court's interpretation of state law. Cf. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 79-80 (1990) (lower federal court interpretation of federal law not binding on state court).

Our State Supreme Court also addressed the issue of whether capped children receive benefits. Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 336 (2003). The court addressed the issue in the course of rejecting an equal protection claim that the family cap unlawfully discriminated against capped children, by denying them benefits enjoyed by children who, by happenstance, were born before them in the same family. The court observed that in fact, the family as a whole is denied additional cash assistance when a new child is born under the family cap. "All of the children in the family unit share presumably in the total amount of cash assistance

available, as is the case in other similarly situated family units." Ibid.

Yet, this court does not find that these observations decide the issue of whether the Legislature intended child support payments for the capped child to be paid to the county welfare agency to reimburse it for payments that would have been made even if the capped child were never born. The Court's analysis in Sojourner A. did not address the statutory language of the assignment and family cap provisions, which support this court's interpretation. Ibid. The Court addressed whether a pre-cap child and a post-cap child experienced disparate treatment that violated equal protection guarantees. The Court concluded they did not because, as a practical matter, the two classes of children were likely to share in their mother's income and enjoy non-disparate treatment. That was an empirical analysis of how the children were likely actually to live and not an interpretation of specific legislative language. Therefore, the Court's statement does not resolve the issue before this court: the Legislature's intent and whether, as a threshold matter, the law compels assignment of child support payments for the capped child.

New Jersey's assignment provision was revised as part of the 1997 welfare reform. L. 1997, c. 14. However, this

court concludes that the new provision, like the prior one, does not require assignment of support for the capped child. Indeed, the family cap provision was revised as well in a way that supports the conclusion that the capped child does not receive benefits, contrary to the view of the trial court in C.K. v. Shalala, supra. The new assignment provision states:

> The signing of an application for benefits under the Work First New Jersey program shall constitute an assignment of any child support rights pursuant to Title IV-D on behalf of individual assistance unit members to the county agency. The assignment shall terminate with respect to current support rights when a determination is made by the county agency that the person in the assistance unit is no longer eligible for benefits. The determination of the amount of repayment to the county agency and distribution of any unpaid support obligations that have accrued during the period of receipt of benefits shall be determined by regulation of the commissioner in accordance with federal law.
>
> [L. 1997, c. 14, § 6, codified at N.J.S.A. 44:10-49].

The language differs in several respects from the prior assignment provision. It was clear under the prior law that the assignment was pursuant to federal law; but the rights to support were not. The prior law referred to an "assignment, pursuant to Titles IV-A and IV-D of the

Social Security Act, to the county welfare agency of any rights to support." N.J.S.A. 44:10-2, repealed by L. 1997, c. 38, § 17. On the other hand, in the 1997 statute, the phrase "pursuant to Title IV-D" appears after the words "assignment of any child support rights." Thus, there is ambiguity: does the phrase "pursuant to Title IV-D" modify "child support rights," or does it modify "assignment"? Consistent with prior law, and absent any indication of contrary legislative intent, the court would resolve this ambiguity by concluding that "pursuant to Title IV-D" describes the "assignment," not the "child support rights."

Indeed, it would be contrary to existing law to read "pursuant to Title IV-D" to modify "child support rights." The right to child support in New Jersey does not arise from Title IV-D of the Social Security Act. It arises from the common law, and from N.J.S.A. 2A:34-23, which authorizes child support awards incidental to matrimonial actions, and N.J.S.A. 9:2-3, which authorizes actions for the care and maintenance of a child of unmarried parents living separately. See, e.g., Greenspan v. Slate, 12 N.J. 426, 430 (1953) (stating parent has a common law duty to support child); L.V. v. R.S., 347 N.J. Super. 33, 40 (App. Div. 2002) (same); Grotsky v. Grotsky, 58 N.J. 354, 356 (1971) (parent's duty to support a child is legal and moral

duty now grounded in N.J.S.A. 2A:34-23 for married parents).

On the other hand, Title IV-D addresses the assignment in the context of defining the contents of state plans. 42 U.S.C.A. § 654(5); see also N.J.S.A. 44:10-44 (defining "Title IV-D" to mean "the provisions of Title IV-D of the federal Social Security Act governing paternity establishment and child support enforcement activities and requirements."). In resolving this ambiguity, the court should reject a literal interpretation of individual statutory terms when it would lead to results inconsistent with the statute's overarching purpose. Couri v. Gardner, 173 N.J. 328, 339 (2002). This court therefore concludes that the Legislature intended no substantive change in law, notwithstanding (1) the "pursuant to" language refers only to Title IV-D and not to both Title IV-D and Title IV-A; and (2) the "pursuant to" language appears after the words "child support rights" as opposed to the word "assignment."

This conclusion is supported by the legislative history of the 1997 amendments, which indicates that the Legislature intended no substantive change to the family cap provisions. Rather, it appears that the Legislature's principal goal was to comply with recently adopted federal law changes, which imposed time limits on assistance.

"Many of the provisions of this bill . . . are intended to implement requirements which the State must adopt under the recently enacted federal welfare reform law, Pub. L. 104-193, the 'Personal Responsibility and Work Opportunity Reconciliation Act of 1996.'" Assembly Policy and Regulatory Oversight Committee, Statement to S.36 (Second Reprint)(Feb. 10, 1997) at 5.

As for the family cap provisions, the Legislature apparently simply sought to continue existing law. "WFNJ continues the 'family cap' provision under the State's AFDC program that a recipient is not entitled to receive an increase in cash solely as a result of parenting an additional child . . . ." Legislative Fiscal Estimate to S. 36 (First Reprint) (Dec. 3, 1996) at 1; see also Id. at 3 ("The current State policy of denying additional assistance due to the birth of a child while a family is receiving assistance would be continued."). The Fiscal Estimate did not address any change in revenue based on these provisions, belying any intent to change the law. "Approximately 400 to 500 cases monthly are affected by this provision [the family cap provision], though the amount of assistance saved is not readily known." Ibid. The only change to the family cap noted in the legislative history was the provision that the cap would not apply to

children born as a result of rape or incest. Senate Human Resources Committee Statement to S.36 (First Reprint) (Nov. 18, 1996) at 3 ("The committee also amended the bill to exempt a child born as a result of rape or incest from the 'family cap' provisions of section 7 with respect to eligibility for cash assistance benefits.")

The 1997 provision does not include the limiting language of the previous provision, N.J.S.A. 44:10-2, that the assignment was made on behalf of a "family member for whom the applicant or recipient is applying for or receiving assistance." Yet, the limitation is nonetheless implied, because the assignment under the 1997 law terminates when cash assistance benefits terminate, and the capped child is never eligible for those benefits in the first place. A careful reading of the statute supports this conclusion.

The statute provides, "The assignment shall terminate with respect to current support rights when . . . . the person in the assistance unit is no longer eligible for benefits." N.J.S.A. 44:10-49 (emphasis added). The language is person-specific. It refers to "the person" -- not the family or household -- who is eligible for benefits. This contrasts with the notion offered by the trial court in C.K. v. Shalala, supra, discussed above,

that the capped child enjoys benefits by partaking in the fixed benefits of the household. 883 N.J. at 991. On a person-specific level, the capped child is not eligible for benefits.

The term "benefits" means "any assistance provided to needy persons and their dependent children . . . under the Work First New Jersey Program." N.J.S.A. 44:10-44. See also N.J.S.A. 44:10-57 (same). The "Work First New Jersey Program" in turn means the "program established by pursuant to P.L. 1997, c. 38 [N.J.S.A. 44:10-55 to 70]." N.J.S.A. 44:10-44. The Work First New Jersey Program replaced the AFDC and General Assistance programs, as well as emergency assistance for "AFDC recipient families" and GA recipients.

> The [Work First New Jersey] program shall replace programs which were in effect prior to . . . [WFNJ's] enactment . . . including: aid to families with dependent children (AFDC) pursuant to P.L. 1959, c. 86 (C. 44:10-1 et seq.) and emergency assistance for AFDC recipient families; general public assistance (GA) pursuant to P.L. 1947, c. 156 (C. 44:8-107 et seq.), emergency assistance for GA recipients, and the GA employability program; and the Family Development Initiative established pursuant to P.L. 1991, c. 523 (C. 44:10-19 et seq.).
>
> [N.J.S.A. 44:10-58(b)].

Thus, the term "benefits" in N.J.S.A. 44:10-49 means TANF and emergency assistance for TANF recipient families.

However, the capped child is ineligible for TANF, which replaced AFDC. The family cap provides that "[t]he level of cash assistance benefits payable to an assistance unit with dependent children shall not increase as a result of the birth of a child during the period in which the assistance unit is eligible for benefits." N.J.S.A. 44:10-61(a).

The 1997 version of the family cap provision itself also supports the court's conclusion that no assignment is required because the capped child does not receive benefits, contrary to the view in C.K. v. Shalala, supra, that a capped child under the old family cap received benefits in the form of a share of the fixed benefits previously available to the household. The 1997 family cap contemplates that a capped child is a "person for whom cash assistance has not been received." N.J.S.A. 44:10-61(c).

> In the case of an assistance unit with dependent children in which the adult or minor parent recipient gives birth to an additional child during the period in which the assistance unit is eligible for benefits . . . the commissioner shall provide that in computing the amount of cash assistance benefits to be granted to the assistance unit, the following shall be deducted from the monthly earned income of each employed person in the assistance unit: those earned income disregards provided for under section 4 of P.L. 1997, c. 13 (C. 44:10-37); and

> after application of the earned income disregards, the total countable income shall be compared for eligibility purposes and subtracted for cash assistance benefit calculation purposes from the eligibility standard for the assistance unit size, adjusted to include any person for whom cash assistance has not been received due to the application of the provisions of subsection a. of this section [which states that the level of cash assistance shall not increase as a result of the birth of a child during the period in which the assistance unit is eligible for benefits].
>
> [N.J.S.A. 44:10-61(c) (emphasis added)].

Lastly, the statute's repayment provision supports the court's foregoing interpretation of the assignment provision. The law requires a beneficiary to repay the county agency from certain funds. N.J.S.A. 44:10-64. Ms. Ricks assumed that repayment obligation. See Cert. of Melanca Clark, 6/1/07, Exh. L. Yet, the statute only contemplates repayment of benefits awarded for a particular child.

> Whenever a parent or relative with whom a dependent child is living applies for or is receiving benefits for that child, and it appears that there is pending entitlement to payment to the child or to either or both of his parents of funds arising from a claim or interest legally or equitably owned by the child or by either or both of his parents … the county agency may, as

> a condition of eligibility or continuation of eligibility for benefits, require either or both parents, or relative, to execute a written promise to repay, from the funds anticipated, the amount of benefits to be granted from the date of entitlement to that payment.
>
> [N.J.S.A. 44:10-64(b)(1) (emphasis added)].

However, as it relates to Crystal, Ms. Rick neither applied for, nor received benefits "for that child." Therefore, there is no obligation to repay the Board from funds due to Crystal.

2. The Court's Interpretation Is Consistent With A Child's Right To Support.

The obligation to provide for the maintenance of a child has long been a principle of common law. Greenspan v. Slate, 12 N.J. 426, 430 (1953); L.V. v. R.S., 347 N.J. Super. 33, 40 (App. Div. 2002). It is also a long-standing and fundamental principle of New Jersey law that the right to child support belongs to the child. Kopak v. Polzer, 4 N.J. 327, 333 (1950); Ordukaya v. Brown, 357 N.J. Super. 231, 241 (App. Div. 2003); L.V. v. R.S., supra, 347 N.J. Super. at 41. A parent may not waive a child's rights to support. Kopak v. Polzer, supra, 4 N.J. at 333 ("child cannot be prejudiced by an agreement between the parents");

L.V. v. R.S., supra, 347 N.J. Super. at 41; Marinetti v. Hickman, 261 N.J. Super. 508, 512 (App. Div. 1993) ("[T]he right to child support cannot be waived by the custodial parent."); Gulick v. Gulick, 113 N.J. Super. 366, 371 (Ch. Div. 1971) ("[T]he conscience of equity will not permit present needs of children to be limited by the agreement of the [parties]."). See also Johnson v. Bradbury, 233 N.J. Super. 129 (App. Div. 1989) (unwilling parents compelled to provide support for college by child).

Consistent with these principles, the court should avoid reading the statute to require Ms. Ricks to assign child support for Crystal. An assignment would amount to a prohibited waiver of support of the child, in derogation of the common law duty of support. Such an interpretation should be disfavored, as being in derogation of the common law. See Hirsch v. Tushill, Ltd., 110 N.J. 644, 647 (1988) (statute providing for recovery of costs in derogation of common law should be strictly construed). Absent a clear and plain expression of legislative intent to authorize assignment of a capped child's right to support, such a reading should be rejected. See White v. Township of North Bergen., 77 N.J. 538, 559 (1978) ("A strict construction of a statute in derogation of the

common law requires that the legislative intent be clearly and plainly expressed in order to effectuate a change.").

The court recognizes that a parent can bargain away the right to receive support from a natural parent where a responsible third-party voluntarily agrees to accept the obligation. Bengis v. Bengis, 227 N.J. Super. 351, 361 (App. Div. 1987) ("nothing prevents a natural parent from assigning that duty to a financially responsible consenting third party"). Yet, this court rejects the argument (although not raised by the Board) that, as in Bengis, Cassandra Ricks has waived her right to receive support for Crystal from Mr. Fowler, and assigned Mr. Fowler's payments to the Board of Social Services, in return for the payment of TANF benefits to her family from the Board. Bengis does not control because the Board has not assumed the duty to support Crystal Fowler. Indeed, the statute expressly recognizes that benefits are not paid for Crystal, who is a "person for whom cash assistance has not been received" due to the Family Cap. N.J.S.A. 44:10-61(c). Indeed, Bengis recognizes that "where the welfare of children is concerned, the court has discretion, reasonably exercised, to reject" an agreement assigning support of a child. 227 N.J. Super. at 362. Given its interpretation of the statute, this court need not reach the issue of whether, in

the exercise of such discretion, the assignment of Crystal's child support would be rejected as contrary to the child's welfare.

Thus, consistent with the principle that the right to support belongs to the child, and cannot be traded or waived, the court construes the statute so as not to require assignment of Crystal's right to support from her father.

3. The Court's Interpretation Avoids An Unconstitutional Taking.

In this court's view, as explained below, the assignment of Crystal's right to child support would likely violate the federal and state constitutional prohibitions against the taking of private property for public use without just compensation. U.S. Const. amends. V and XIV; N.J. Const. art. I, ¶ 20; see also Littman v. Gimello, 115 N.J. 154, 161, cert. denied, 434 U.S. 934, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989) (New Jersey and federal rights against governmental taking without just compensation are coextensive). However, this court need not decide the issue, as this court's interpretation avoids such a constitutional infirmity. And such a statutory interpretation is favored. See In re Bd. of Educ. v. Town

of Boonton, 99 N.J. 523, 539 (1985), cert. denied sub nom. Kramer v. Pub. Employment Relations Comm'n, 475 U.S. 1072, 106 S. Ct. 1388, 89 L. Ed. 2d 613 (1986) (stating that court has "clear duty . . . to construe the statute in a manner that would uphold its constitutionality if it is reasonably susceptible to such a construction."); Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983) ("When a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery' and through appropriate construction restore the statute to health."); N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 75 (1980) ("court has the power to engage in 'judicial surgery' or the narrow construction of a statute 'to free it from constitutional doubt'"); Camarco v. City of Orange, 61 N.J. 463, 466 (1972) (affirming construction of ordinance so as to render it constitutional, based on "fair assumption that the wishes of the legislative body would be furthered by upholding its proscriptive goals to the extent constitutionally permissible.").

In deciding whether a person has suffered an unconstitutional taking of property, the United States Supreme Court has recognized that a court must engage in a fact-intensive inquiry. Penn Cent. Transp. Co. v. City of

New York, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). The Supreme Court has held that a court must consider the economic impact and character of the governmental action. Ibid. A court must consider "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . ." Id. at 124. A court must also evaluate "the character of the governmental action." Ibid.

> A 'taking' may more readily be found when the interference with property can be characterized as a physical invasions by government . . . than when interference arises from some public program adjusting the benefits and burden of economic life to promote the common good.
>
> [Ibid.]

Applying the Penn Central test, this court finds that a mandatory assignment to the Board of Social Services of all but $50 a month of the child support due from Crystal's father would run afoul of the takings clause. In reaching this conclusion, the court finds most persuasive the reasoning in Williams v. Humphreys, supra, wherein the district court found unconstitutional the assignment of child support for a capped child under Indiana law. 125 F. Supp. 2d 881. Like the court in Williams v. Humphreys,

this court finds distinguishable the decision in Bowen v. Gilliard, 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987), which upheld the constitutionality of North Carolina's program of mandatory assignment of child support. The North Carolina program addressed in that case did not involve a family cap; and each child was counted as the benefit level rose with the addition of each new child. Ibid.

The first Penn Central factor - the economic impact of the assignment - would favor a finding of a taking if the New Jersey law were construed to require assignment of Crystal Fowler's child support. Of the $83 a week or $357 a month that Mr. Fowler is obliged to pay in child support, the Board of Social Services seeks to divert all but $50 a month. True, the $50 pass-through renders the New Jersey system slightly less onerous than the Indiana program found unconstitutional in Williams v. Humphreys. Indeed, the district court noted that New Jersey passes through $50 while Indiana did not. 125 F. Supp. 2d at 887, n.4. Yet, the impact of the assignment is nonetheless substantial. Absent the assignment of Mr. Fowler's child support, Ms. Ricks would receive the cash assistance grant of $322, plus $357 child support from Mr. Fowler, for a total of $679 a month. With the assignment, Ms. Ricks would receive $322,

plus a pass-through of $50, for a total of $372. This is a substantial $307 or forty-five percent reduction in Ms. Ricks's income.

Viewed from the perspective of Crystal, the economic impact is even more substantial. See Bowen v. Gilliard, supra, 483 U.S. at 606, 107 S. Ct. at 3020, 97 L. Ed. 2d at 504 ("[I]n evaluating the economic impact of the assignment, it is important to remember that it is the impact on the child, not on the entire family unit, that is relevant."). Absent the assignment, $357 would be provided for her benefit through child support. This payment may result in incidental benefits to the mother. See Zazzo v. Zazzo, 245 N.J. Super. 124, 131 (App. Div. 1990), certif. denied, 126 N.J. 321 (1991) (stating that the law is not offended if a custodial parent reaps "some incidental benefit . . . from the roof expenses component of child support"). Nonetheless, the support is intended for the child's benefit, not the mother or the general family fund. See R. 5:6A, Appendix IX-A, ¶ 7(j) ("These guidelines assume that the obligee is spending the support award for the benefit of the child or children."). Thus, in New Jersey, it would be unjustified to conclude, as the Court did in Bowen, that "the typical AFDC parent will have used the support money as part of the general family fund even

without its being transferred through AFDC." 483 U.S. at 607, 107 S. Ct. at 3020, 97 L. Ed. 2d at 505.

With the assignment, only $50 out of the $357 is passed through. This has an even more substantial impact on Crystal, by reducing her support by $307, or eighty-six percent. Even if one were to accept the notion that she shares pro rata in the pre-existing benefit granted the family of $322, that sharing would yield $107 ($322 ÷ 3) for her. That $107 plus $50 totals $157, which is $200 less than the support payable by her father - a fifty-six percent reduction in support. Moreover, at least according to governing regulations, as noted above in the fact section, the Board may lay claim to Mr. Fowler's support payments even after the mother stops receiving cash assistance, until any cash assistance has been reimbursed.

Unlike in Bowen v. Gilliard, there is no comparable mitigating increase in benefits as a result of the additional child. The Court in Bowen found that the loss of the support payments was mitigated in part "by the extra AFDC benefits that are received by the inclusion of an additional family member in the unit . . . ." 483 U.S. at 607, 107 S. Ct. at 3020, 97 L. Ed. 2d at 505. By contrast, in New Jersey, the family cap freezes benefits. True, as in Bowen, $50 is passed through. Ibid. (noting

also that the loss of support is mitigated "by the extra $50 that the family receives as a result of the assignment"). However, as noted above in the fact section, in New Jersey, unlike in North Carolina, the pass-through would only occur if the $357 is collected in the first place. Therefore, New Jersey, unlike North Carolina, would bear no risk of non-payment from Mr. Fowler. The Bowen Court noted that the loss of support was also mitigated by the fact that "the State . . . is bearing the risk of nonpayment." Ibid. By contrast, New Jersey bears no such risk.

The assignment of child support payments in this case would also interfere with "distinct investment-backed expectations" - the second Penn Central factor. In Bowen v. Gilliard, supra, the Supreme Court noted that under North Carolina law, the right to child support was "not a property right of the child." 483 U.S. at 607, 107 S. Ct. at 3020, 97 L. Ed. 2d at 505. Also, child support amounts were subject to modification. Id. at 607, 107 S. Ct. at 3021, 97 L. Ed. 2d at 505.

By contrast, under New Jersey law, the right to support belongs to the child, as discussed above. Kopak v. Polzer, supra, 4 N.J. at 333; Ordukaya v. Brown, supra, 357 N.J. Super. at 241; L.V. v. R.S., supra, 347 N.J. Super. at

41. The amount of support is certainly subject to modification. Lepis v. Lepis, 83 N.J. 139, 151-52 (1980). Yet, the payor must show a substantial and permanent change in circumstances. Innes v. Innes, 117 N.J. 496, 504 (1990) ("Temporary circumstances are an insufficient basis for modification."). Moreover, even then, a reduction may not be awarded if the needs of the child predominate. See, e.g. Lissner v. Marburger, 394 N.J. Super. 393, 404-05 (Ch. Div. 2007) (denying request for reduction in child support based on payor's voluntary retirement). A child in New Jersey has a legal expectation that her parents will support her, based on the parent's common law and statutory obligation to pay support. Greenspan v. Slate, supra, 12 N.J. at 430; L.V. v. R.S., supra, 347 N.J. Super. at 40. Thus, this court finds persuasive the district court's conclusion in Williams v. Humphreys based on comparable Indiana law that mandatory assignment of child support constitutes interference with a distinct investment-backed expectation. "Because Indiana children have a clear right to child support, depriving a child of some or all of her child support payments interferes with the child's property interest." 125 F. Supp. 2d at 888.

Finally, the character of the governmental action - the third Penn Central factor -- favors a finding that the

assignment constitutes a taking of Crystal's property. The Board of Social Services seeks to compel Crystal's mother to forfeit all but $50 a month of Crystal's support from her father, in return for no enhancement whatsoever of support from the Board of Crystal. As noted above, Crystal is a "person for whom cash assistance has not been received." N.J.S.A. 44:10-61(c). Therefore, this court finds persuasive the analysis in Williams v. Humphreys that the assignment in Bowen v. Gilliard was permitted because there was a rough exchange between the state and the child. In other words, in return for the assignment, the child was included in a family unit whose assistance increased as a result of the child's addition to the family. 125 F. Supp. 2d at 888.

By contrast, under New Jersey's family cap as under Indiana's family cap, there is no increase in assistance. As the district court observed,

> Under the Indiana family cap program, there simply is no comparable exchange, rough or otherwise, between the State and the excluded child. In 'return' for the excluded child's assignment of support payments, the family's overall benefits do not change at all. By mandate of Indiana law, those benefits are calculated without taking into account the excluded child's needs.
>
> [Ibid.]

The same can be said of the assignment under New Jersey law. The pass-through of $50 of Crystal's own support does not avoid a conclusion that the third Penn Central factor favors a finding of a taking. The $50 pass-through simply reduces the amount of Crystal's loss on her side of the ledger. There is still "no comparable exchange" because the State of New Jersey offers Crystal nothing on the other side of the ledger.

In sum, in applying the Penn Central factors, the compulsory assignment of Crystal's support from her father would constitute an unconstitutional taking of her property without compensation. As noted above, the statute can be construed to avoid the compulsory assignment and this constitutional infirmity. Therefore, this court finds that the New Jersey statute does not compel assignment of child support for a capped child.

4. Conclusion as to Assignment.

For the reasons stated above, the court finds that the statute does not compel Cassandra Ricks to assign to the Mercer County Board of Social Services any child support payments due from Revel Fowler for his daughter, Crystal Fowler. The assignment obtained from Cassandra Ricks is

therefore void, as it was obtained without statutory authority.

5. Implementation of Decision.

Therefore, Mr. Fowler shall pay child support, consistent with the determination of the child support hearing officer, directly to Ms. Ricks. He shall pay $83 a week by wage garnishment directly to the obligee effective May 18, 2006, which is the date of filing of the application for child support by the Board on behalf of Ms. Ricks. Mr. Fowler shall also pay an additional $10 a week toward arrears. Probation shall calculate the arrears that have accrued since the obligation to pay child support, and provide its report to the parties. Probation shall credit Mr. Fowler with direct payments to Ms. Ricks of $270 a month prior to the initial proposed order of the child support hearing officer, September 20, 2006. It shall also credit Mr. Fowler with the $50 direct payments made to Ms. Ricks pursuant to this April 27, 2007 order.

The parties shall have fourteen days after receipt of Probation's calculation to register any objections to the arrears calculation. Absent any objections, the arrears calculation shall become final.