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Opinion No. 00-027

Title IV-D Child Support Enforcement: Welfare Eligibility, Custody and Privilege Issues

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**QUESTIONS**

1. Is a caretaker relative, as defined by Tenn. Code Ann. § 71-3-123, with physical but not legal custody of a minor child eligible to receive welfare benefits for himself and the child from the Tennessee Department of Human Services?
2. If the caretaker relative is the child's father, can the child support enforcement (Title IV-D) agency obtain an order of support for the minor child without first obtaining an order awarding the father legal custody of the child?
3. May a trial court compel the Title IV-D agency to produce information concerning the caretaker relative who is receiving welfare or other state benefits?
4. Is it a misdemeanor for the Title IV-D agency to disseminate any information concerning the caretaker relative who is receiving welfare or other state benefits?
5. Is there an attorney-client privilege between the Title IV-D attorney and the caretaker relative who is receiving welfare or other state benefits?
6. May a trial court compel the Title IV-D agency to produce the court file compiled by the agency's attorney and her support staff without violating either the attorney-client privilege, the work product doctrine, or some other provision of law?
7. May a trial court compel the Title IV-D agency's attorney or her support staff to testify against the caretaker relative in any court proceeding?

## OPINIONS

1. Yes. A caretaker relative, including the biological father, who has merely physical custody of his child is eligible to receive welfare benefits from the Department of Human Services whether or not he has legal custody of the child. Tenn. Code Ann. § 71-3-123 does not require a caretaker relative to acquire court ordered legal custody of the child as a prerequisite to the receipt of welfare benefits.

2. Yes. The child support enforcement (Title IV-D) agency may obtain an order of support for the minor child without first obtaining an order awarding the father legal custody of the child.

3. Yes. Subject to the provisions of Tenn. Code Ann. § 71-1-131, the trial court may compel the Title IV-D agency to produce certain records in a Title IV-D case.

4. Yes. Except as permitted in Tenn. Code Ann. §§ 71-1-117, 71-1-118, 71-1-121 and 71-1-131, it is a misdemeanor to knowingly violate the provisions restricting the disclosure of information set forth in Tenn. Code Ann. § 71-1-131. It would be a violation of the statute to knowingly distribute any information about the caretaker other than for purposes directly connected with the administration of the welfare or child support enforcement programs.

5. No. The Board of Professional Responsibility for the Tennessee Supreme Court has previously issued a formal ethics opinion (90-F-123) in which it found that there is no attorney-client relationship between the Title IV-D agency attorney and the recipient of services. Additionally, Tenn. Code Ann. § 71-3-124(d) specifically provides that there is no such attorney-client relationship.

6. No. Except as provided in Tenn. Code Ann. § 71-1-131(a)(7), the trial court may not compel the Title IV-D agency to produce the court file compiled by its attorney and the attorney's support staff. Such a requirement could also violate the attorney-client privilege between the agency attorney and the Department of Human Services as well as the work product doctrine.

7. Yes. As provided in Tenn. Code Ann. § 71-1-131(a)(7)(B), a trial court may compel a Title IV-D agency attorney or the agency's support staff to testify against the caretaker in appropriate cases.

## ANALYSIS

### I.

You have inquired as to whether a caretaker relative, as defined by Tenn. Code Ann. § 71-3-123, with physical, but not legal custody, of a minor child is eligible to receive welfare benefits for

himself and the child from the Tennessee Department of Human Services. The definitions of a “caretaker relative” and “dependent child” are set forth in Tenn. Code Ann. § 71-3-153(a)(2) and (5). According to the statutory definitions:

(2) “Caretaker relative” means the father, mother, grandfather or grandmother of any degree, brother or sister of the whole or half-blood, stepfather, stepmother, stepbrother, stepsister, aunt or uncle of any degree, first cousin, nephew or niece, the relatives by adoption within the previously named classes of persons, and the biological relatives within the previous degrees of relationship, and the legal spouses of persons within the previously named classes of persons even if the marriage has been terminated by death or divorce, with whom a child is living;

(5) “Dependent child” means, except as otherwise stated herein, a child **living with a caretaker relative if the child is deprived of parental support** due to death of a parent, continued absence of a parent from the home, physical or mental incapacity of a parent, or unemployment or underemployment of either or both parents and if the child’s legally responsible relatives are not able to provide adequate care and support of such child without temporary assistance;

Tenn. Code Ann. § 71-3-153(a)(2) and (5). (Emphasis supplied). Here the emphasis is on whether the child is living with the caretaker relative, and whether the child is deprived of parental support. No consideration is given to who has legal custody of the child. Tenn. Code Ann. § 71-3-154(a) sets forth the standards for eligibility for public assistance benefits. According to the statute:

(a) A family shall be eligible for temporary assistance pursuant to this part if:

(1) **A dependent child resides in this state with a caretaker relative in that family**, or an individual who applies for temporary assistance is pregnant, or as otherwise defined by the department;

(2) The family meets income standards based upon the standard of need for a family based upon its size and income and based upon resource limits as determined by the department in its rules;

(3) The family members are engaged in full-time or part-time employment, and other training or other

work preparation activities as set forth in subsection (g), except as exempted by §§ 71-3-151 - 71-3-165 or by rule of the department;

(4) The caretaker relative has agreed to and complies with a personal responsibility plan as developed by the department in accordance with subsection (h); and

(5) The family or individual of the family is otherwise eligible pursuant to federal or state laws or regulations.

Tenn. Code Ann. § 71-3-154(a). (Emphasis supplied). Nothing in the eligibility standards requires the caretaker relative to obtain an order of legal custody prior to becoming eligible to receive welfare benefits for himself or for the child.<sup>1</sup> *State ex rel. Helms v. Rasch*, 698 P.2d 559 (Wash. Ct. App. 1985); *Cf. Ottman v. Fisher*, 319 A.2d 56, 57 (Me. 1974)(AFDC awarded to woman who had admitted children to her home and assumed responsibility for them even though she was their first cousin once removed); *Smith v. Puett*, 506 F.Supp. 134, 140, 144 (M.D. Tenn. 1980)(Tennessee regulation requiring putative father of a nonmarital child (or his relatives) to legitimate child before becoming eligible for AFDC benefits held in violation of the Social Security Act). In fact, a federal regulation provides that the caretaker relative can receive benefits so long as the caretaker exercises responsibility for the care and control of the child even though legal custody is held by another party. 45 C.F.R. §233.90(c)(1)(v)(B)(2). Thus, there is no such eligibility requirement for welfare benefits. The Department of Human Services would not have the authority to deny the application for welfare benefits of an otherwise eligible applicant merely because the caretaker relative did not have a court order awarding him legal custody of a dependent child.

## II.

You have also inquired as to whether the child support enforcement (Title IV-D) agency can obtain an order of support for the minor child without first obtaining a court order awarding the caretaker relative legal custody of the child. There is no such requirement in either federal or state law. In fact, 42 U.S.C. § 654(4)(A)(i) and (ii) require the State of Tennessee to provide child support enforcement services both to children who are recipients of public assistance benefits as well as to any other children, upon request and application. Similar provisions are also included in Tenn. Code Ann. § 71-3-124(a)(3) and (c)(1). Demonstration of an award of legal custody is not required to receive such services. The federal statutes which define the scope of child support enforcement

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<sup>1</sup>PRWORA, popularly known as “welfare reform,” made sweeping changes in the laws regulating the poor. It abolished Aid to Families with Dependent Children (AFDC) and created the Temporary Assistance for Needy Families (TANF) program. AFDC had provided cash payments to indigent families based upon national eligibility standards and a uniform federal definition which created an entitlement for recipients. TANF eliminated national eligibility standards and abolished the national entitlement to aid. Under the TANF program, states are given federal block grant money with the authority to design their own public assistance programs. *Kansas v. United States*, 24 F.Supp.2d 1192, 1194 (D. Kan. 1998). Thus, we have focused on state requirements for TANF eligibility.

services that a state must provide under Title IV-D of the Social Security Act do not include any services for custody or visitation issues. *See* 42 U.S.C. §§ 654, 666. Nor have we found any Tennessee legal authority that requires a demonstration of legal custody before a Tennessee court can enter an order of support for a minor child.

Tenn. Code Ann. § 71-3-124(a) provides that the recipient of public assistance benefits automatically assigns to the state by operation of law the right to collect any support due to any member of the assistance unit. The recipient of such benefits is required to cooperate with the state in locating the absent parent(s), establishing a support obligation, and enforcing the support obligation. Tenn. Code Ann. § 71-3-124(e)(1). In the absence of good cause, failure to cooperate can result in the loss of part or all of the caretaker relative's benefits. Tenn. Code Ann. § 71-3-124(e)(1), (2), and (3). Because of the automatic assignment of rights of all members of the assistance unit, including the child(ren), no order awarding legal custody is required. Parents have a responsibility to support their children regardless of who has legal custody. Tenn. Code Ann. § 34-11-102. Any persons who provide necessities to the children of another have a long recognized common law right to be reimbursed for such necessities regardless of who has legal or even physical custody of the children. *Hurline v. Hutchins*, 978 S.W.2d 938, 941 (Tenn. Ct. App. 1997); *Gardner v. Flowers*, 529 S.W.2d 708, 710 (Tenn. 1975); *Burden v. Burden*, 313 S.W.2d 566, 571 (Tenn. Ct. App. 1957); *Owen v. Watson*, 8 S.W.2d 484, 485 (Tenn. 1928). Even if there were a requirement that a caretaker relative obtain an order of legal custody before being eligible for child support enforcement services, the IV-D agency would not be required to prove that the obligee or the child had properly applied for or was properly receiving Title IV-D child support enforcement services in order to obtain an order of support for the minor child(ren) in question. Tenn. Code Ann. § 71-3-124(c)(2).

### III.

Generally, under Tenn. Code Ann. § 71-1-131, the records of the Department of Human Services, its contractors or agents (hereinafter collectively referred to as the "Department") shall be confidential, shall not be subject to public inspection, and shall not be used in judicial, administrative or legislative proceedings or for law enforcement activities when "concerning the provision of Title IV-D child or spousal support services," unless there is a specific exception for the disclosure of such information elsewhere in the statute. Tenn. Code Ann. § 71-1-131(a)(1)(A) & (B). Nevertheless, under specific circumstances, the trial court may compel the Title IV-D agency to produce certain records in a Title IV-D case.<sup>2</sup>

Additionally, the Department is expressly authorized to disclose information contained within Title IV-D records "for purposes directly connected with the establishment of paternity or the

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<sup>2</sup>Although most Title IV-D information is sealed against public inspection and can be disclosed only through judicial or administrative compulsion, Tenn. Code Ann. § 71-1-117 permits public inspection of the names of all recipients of public welfare grants and the amount of each grant per month, to be broken down and available by county. However, such inspection may only take place at either the Commissioner's office or, for the list of recipients of the particular county only, at the county office of the Department of Human Services. The records in question may not be copied, and may not be used for any political or commercial purpose. Tenn. Code Ann. § 71-1-118.

establishment, modification, or enforcement of child or spousal support.” Tenn. Code Ann. § 71-1-131(a)(1)(C). Subject to certain statutory exceptions, the Department also has express authorization to disclose information which it in its sole discretion determines is directly connected with: administration of the state plan; investigations, prosecutions, or administrative proceedings pursuant to administration of the plan; administration of any other federally funded assisted program; suspected instances of physical or mental injury, sexual abuse, exploitation or negligent or maltreatment of a child receiving services under the plan; child support payment records of a child support obligor; or inquiries from legislative representatives concerning enforcement of individual child support obligations. Tenn. Code Ann. § 71-1-131(a)(2)(A) - (F).

The Department’s express authorization to disclose under the aforementioned circumstances is subject to certain restrictions: when a protective order has been issued or when disclosure could reasonably result in physical or emotional harm to the party or to the child. Tenn. Code Ann. § 71-1-131(a)(3)(A)(i) & (ii). Further, specific limitations apply to disclosure of financial information or information contained in a consumer report. Tenn. Code Ann. § 71-1-131(a)(4) & (5). Finally, any release of records must be pursuant to a written order issued by a judicial or administrative tribunal and must be served personally on the Commissioner of the Department of Human Services or the Commissioner’s designee -- disclosure cannot be compelled by subpoena. Tenn. Code Ann. § 71-1-131(a)(7)(A)(i).

#### IV.

Except as discussed in answer to the previous question or as permitted in Tenn. Code Ann. §§ 71-1-117, 71-1-118, 71-1-121 and 71-1-131, it is a misdemeanor to knowingly violate the provisions of Tenn. Code Ann. § 71-1-131 restricting the disclosure of information. Thus, it would be a misdemeanor to knowingly distribute any information about the caretaker other than for purposes directly connected with the administration of the welfare or child support enforcement programs. It is also a misdemeanor to copy lists of welfare recipients made available for public inspection or to use such lists for political or commercial purposes. Tenn. Code Ann. § 71-1-118. In addition to the exceptions discussed in answer to the previous question, authorized counsel for either an applicant for public assistance, a current recipient of public assistance, or a past recipient of public assistance is entitled to access to all public assistance records concerning the recipient. Tenn. Code Ann. § 71-1-121.

#### V.

The Board of Professional Responsibility for the Tennessee Supreme Court has previously issued formal ethics opinion 90-F-123 in which it found that there is no attorney-client relationship between the Title IV-D agency attorney and the applicant for services. A copy of the opinion is attached for your convenience. Instead, the attorney-client relationship is between the IV-D agency attorney and the Tennessee Department of Human Services. Further, Tenn. Code Ann. § 71-3-124(d) specifically provides that:

(d) The provision of services under a child support enforcement program which includes services by an attorney or an attorney's representative employed by, under contract to, or representing the department shall not create an attorney-client relationship with any party other than the state. Attorneys employed by or under contract to the department shall have an affirmative duty to notify individuals applying for child support services or aid to families with dependent children (AFDC) recipients or recipients of any successor program providing temporary assistance whose rights to support have been assigned, who contact or are contacted by the attorney or other child support enforcement program staff that any legal services provided by the child support enforcement program are solely on behalf of the state, and that no incidents of the lawyer-client relationship, including the confidentiality of lawyer-client communications, exist between the attorney and the applicant or recipient. No such duty shall exist when the applicant for services is another governmental agency acting on behalf of an individual and there is no direct contact between the child support enforcement program and the individual seeking support.

## VI.

Except as provided in Tenn. Code Ann. § 71-1-131(a)(7), the trial court may not compel the Title IV-D agency to produce the "court file" compiled by its attorney and the attorney's support staff. Such a requirement could also violate the attorney-client privilege between the agency attorney and the Department of Human Services as well as the work product doctrine.

According to Tenn. Code Ann. § 71-1-131(a)(7)(A):

(7) (A) (i) Except as released pursuant to subdivision (a)(2) by the department, its contractors or agents, and except as prohibited by subdivisions (a)(3), (a)(4), (a)(5) and (a)(6), **the records or portions of records or testimony of current or former employees, agents or contractors of the department concerning the Title IV-D child support program** may be released only pursuant to a written order for their disclosure issued by a judicial or administrative tribunal and served personally upon the commissioner of human services or the commissioner's designee at least five (5) business days prior to the date designated for disclosure. A subpoena shall not be sufficient to obtain the disclosure of Title IV-D child support records. Unless waived by the department, any order for disclosure not properly served shall be void and of no effect whatsoever.

(ii) Except as necessary for use in a judicial proceeding or an administrative proceeding concerning a Title IV-D child or spousal support matter in which such records must be disclosed, and for any appeal therefrom, any records of the Title IV-D child support program which may be ordered disclosed pursuant to this subdivision for use in any other civil or criminal judicial or other administrative proceeding must also have a written protective order issued by the court or administrative law judge or hearing officer and served upon the commissioner of human services prior to the release of the records pursuant to this subdivision. The protective order shall state that there will be no further disclosure beyond the necessary use by the tribunal and the parties for the conduct of those proceedings. **The department shall not be required to disclose any records until the receipt of the protective order by the department or its designee.**

Tenn. Code Ann. § 71-1-131(a)(7)(A). (Emphasis supplied).

Even though there is no attorney-client relationship between the applicant or recipient of child support enforcement services and the IV-D attorney, there is such a relationship between the Title IV-D attorney and the Department of Human Services. The Title IV-D attorney has an ethical duty to preserve the confidences and secrets of the Department as the attorney would for any other client. Rule 8, Rules of the Tennessee Supreme Court, Disciplinary Rule 4-101. The department has an evidentiary privilege, as would any other client, to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney. The privilege also permits the attorney to refuse to testify as to communications from the client to the attorney, unless the privilege is waived by the client. Tenn. Code Ann. § 23-3-105 contains the testimonial attorney-client privilege in Tennessee. It provides as follows:

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

Tenn. Code Ann. § 23-3-105. Thus, a trial court could not enter a blanket order requiring the Title IV-D attorney to produce her “court file” without regard to its contents without violating or requiring the attorney to violate the attorney-client privilege.

In general, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, even if inadmissible at trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tennessee Rule of Civil Procedure 26.02(1). The work product doctrine is an exception to the otherwise broad scope of discovery. It allows a party to obtain through discovery documents and tangible things otherwise discoverable and prepared in anticipation of litigation or for trial by or for another party or that party's representative, including his attorney or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Tennessee Rule of Civil Procedure 26.02(3). In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Tennessee Rule of Civil Procedure 26.02(3).

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. Tennessee Rule of Civil Procedure 26.02(3). The rule defines a statement previously made as either "(A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded." Tennessee Rule of Civil Procedure 26.02(3). Finally, Tennessee Rule of Civil Procedure 26.02(4) contains restrictions on the discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of the rule and acquired or developed in anticipation of litigation or for trial. Such information may only be obtained by complying with the requirements set forth in the rule.

Accordingly, a blanket requirement that the Title IV-D attorney produce the "court file" compiled by the attorney and her support staff would violate the attorney-client privilege between the attorney and her client, the Department of Human Services, to the extent that it required the revelation of confidential communications between the two or the revelation of the client's confidences or secrets. Such a requirement would also constitute a violation of the work product doctrine to the extent that it failed to comply with the requirements of Tennessee Rule of Civil Procedure 26.02(3) or (4). Even if opposing counsel made the required showing to justify the production of work product from the Title IV-D attorney's file, the court would still be required to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of the attorney or other representative of a party concerning the litigation. Finally, the court would still have to comply with the requirements of Tenn. Code Ann. § 71-1-131 as to any information in the Title IV-D attorney's court file that was not subject to the attorney-client privilege or the work product doctrine.

**VII.**

As provided in Tenn. Code Ann. § 71-1-131(a)(7)(A), (B) & (C), a trial court may compel a Title IV-D agency attorney or the agency's support staff to testify against the caretaker in appropriate cases. Tenn. Code Ann. § 71-1-131(a)(7)(B) & (C) provide as follows:

(B) The department may comply with a properly served order issued by a state or local judicial or administrative tribunal pursuant to this subdivision by sending copies of pertinent portions of the record requested, or by sending an abstract of the pertinent information from its computer records or other records, in a sealed envelope addressed to the court or administrative body or the person taking a deposition, together with an affidavit of an authorized agent of the department attesting to the authenticity of the record, unless the court or administrative body, for good cause shown, enters an order in the record requiring the attendance of a department, contractor or agent employee at the proceeding.

(C) The department, its contractors or agents may file a motion to quash or modify any subpoena or order for disclosure issued by any judicial or administrative tribunal or by any legislative entity, and no records shall be disclosed pursuant to any subpoena or order until the conclusion, including appeal, of the proceedings seeking to quash or modify the subpoena or order.

Providing the requirements of the statute are met, a trial court may compel a Title IV-D agency attorney or the agency's support staff to testify against the caretaker in appropriate cases.

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