

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 35678**

**IN THE FAMILY COURT OF WOOD COUNTY, WEST VIRGINIA**

**IN RE THE CHILDREN OF:**

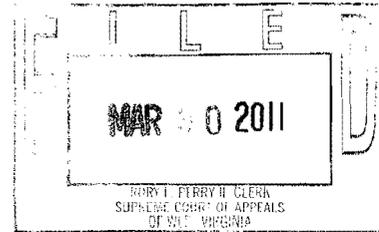
**MELISHA BOYD,  
PETITIONER, (now deceased)**

**and**

**JOHN E. CAPLINGER,  
RESPONDENT,**

**and**

**JANET HORNBECK,  
DONALD HORNBECK,  
CUSTODIAL PARTIES/Petitioners herein.**



**CIVIL ACTION NO. 97-D-133**

**RESPONSE BRIEF OF THE**  
**BUREAU FOR CHILD SUPPORT ENFORCEMENT**  
**TO APPEAL FILED BY**  
**JANET HORNBECK and DONALD HORNBECK**

**Kimberly D. Bentley, WWSB #6287**  
**Assistant General Counsel**  
**W. Va. Dept. of Health and Human Resources**  
**Bureau for Child Support Enforcement**  
**350 Capitol Street, Room 147**  
**Charleston, WV 25301-3703**  
**(304) 356-4660**

**TABLE OF CONTENTS**

STATEMENT OF FACTS AND PROCEEDINGS BELOW .....	3
STANDARD OF REVIEW .....	5
STATEMENT REGARDING ALLEGED ERRORS .....	5
POINTS AND AUTHORITIES .....	5
ARGUMENT REGARDING APPELLANTS' ASSIGNMENTS OF ERROR.....	9
<b>I.</b> <i>Appellants asserts that West Virginia law requires that payment           on a debt be allocated first to accrued interest, with any remaining           funds to be used to reduce principal.....</i>	9
<b>A.</b> <i>The Legislature has authorized the BCSE to promulgate policy               regarding the allocation of payments.....</i>	10
<b>B.</b> <i>The West Virginia Legislature has historically exhibited an intent               to reduce the accumulation of interest on support arrears.....</i>	13
<b>C.</b> <i>Support arrears are distinguished from consumer debts in               several manners.....</i>	16
<b>D.</b> <i>Statutory and case law prohibit the retroactive cancellation               or reduction of support arrears.....</i>	19
<b>II.</b> <i>Appellants' assertion that other states possess similar procedures           does not represent a current statement of the law.....</i>	21
CONCLUSION .....	24

## STATEMENT OF FACTS AND PROCEEDINGS BELOW

John Caplinger and Melisha Boyd are the parents of K.L.C., born May 9, 1995. By Order of June 24, 1997, John Caplinger was ordered to pay support for K.L.C. in the amount of \$149.39 per month commencing April 1, 1997.

Melisha Boyd was killed in an automobile accident on January 26, 2002. When Melisha Boyd died, Janet Hornbeck and Donald Hornbeck, the maternal grandparents, became administrators of Melisha's estate. They also took physical custody of K.L.C. and the infant son of Melisha Boyd. Consequently, the BCSE transferred the support obligation of John Caplinger to Janet Hornbeck effective February 14, 2002.

Janet Hornbeck and Donald Hornbeck used insurance proceeds and settlement funds resulting from Melisha's death to purchase a home. The remainder was placed in trust at Wesbanco for the children of Melisha Boyd, administered by Janet Hornbeck and Donald Hornbeck.

Effective August 31, 2007, the current support of John Caplinger was ended because K.L.C. now resides in his home four overnights each week. The Hornbecks continue to reside in the home with the infant son of Melisha Boyd. Pursuant to an agreement of the parties, K.L.C. visits with the Hornbecks three overnights each week.

During the litigation of the custody of K.L.C., the issue of arrears owed by John Caplinger was raised. The estate of Melisha Boyd now stands in her place to receive the past due child support owed by John Caplinger.<sup>1</sup> Pursuant of the laws of descent and distribution, the support arrears of Melisha Boyd owed from April 1997 to January 2002

---

<sup>1</sup> Although no pleading was timely filed to modify the obligation, John Caplinger claims that he resided in the home with Melisha Boyd and the child for much of the period prior to Melisha's death.

are paid to the Hornbecks, in their capacity as administrators of the estate. The BCSE's accounting reflected that, as of October 31, 2008, the amount of \$9,021.54 was owed to the estate of Melisha Boyd. The amount of \$9,304.63, as of October 31, 2008, was owed to Janet Hornbeck and Donald Hornbeck as support arrears for the period of February 2002 to August 2007.

In the lower court, the Hornbecks sought to increase these arrears by requesting that the BCSE be ordered to apply payments first to interest, then to principal debt. An accounting was presented by Janet Hornbeck and Donald Hornbeck with all payments first applied to interest. It reflected a total arrears of \$22,974.91, as of October 31, 2008.

After a contested hearing, the Family Court ordered that it must follow the BCSE's accounting and awarded a total judgment of \$18,326.71, as of October 31, 2008, owed by John Caplinger. On appeal, the Circuit Court of Wood County ruled that the BCSE's calculation and application of payments (first to principal, then to interest) are proper and affirmed the Family Court's judgment.

The Hornbecks have filed the instant appeal to the Order of October 1, 2009. The issue presented by the Hornbecks is whether payments should be first applied to the unpaid principal or the unpaid interest on the past-due support arrears owed by John Caplinger. In response, John Caplinger filed his brief, raising additional issues on which he did not formally appeal.

## **STANDARD OF REVIEW**

“In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.” Syl. Pt. 1, *Staton v. Staton*, 624 S.E.2d 548 (W. Va. 2005).

## **STATEMENT REGARDING ALLEGED ERRORS**

The Bureau for Child Support Enforcement assigns no error to the Order entered October 1, 2009, by the Circuit Court of Wood County. The Order complies with the applicable law, regulation, and policy regarding the application of payments to reduce the support arrears.

## **POINTS AND AUTHORITIES**

11 U.S.C.S. § 523 (2007)

42 U.S.C.S § 657 (2011)

42 U.S.C.S. § 652 (2011)

42 U.S.C.S. § 654 (2011)

45 C.F.R § 302.51 (2009)

Ariz. Rev. Stat. § 25-510 (2011)

Cal. Code of Civ. Pro. 695.221 (2011)

Cal. Code of Civ. Pro. 695.220 (2011)

N.D. Cent. Code § 9-12-07 (1943)

N.D. Cent. Code § 14-08.1-05 (1997)

W. Va. Code § 46A-2-118 (2009)  
W. Va. Code § 46A-2-130 (2009)  
W. Va. Code § 46A-4-109 (2011)  
W. Va. Code § 48A-1-3 (1986)  
W. Va. Code § 48A-1-3 (1991)  
W. Va. Code § 48A-1-3 (1992)  
W. Va. Code § 48A-1-3 (1992)  
W. Va. Code § 48A-1-3 (1997)  
W. Va. Code § 48A-1-3 (2001)  
W. Va. Code § 48A-1A-33 (2000)  
W. Va. Code § 48-1-204 (2009)  
W. Va. Code § 48-1-244 (2009)  
W. Va. Code § 48-1-302 (2001)  
W. Va. Code § 48-1-302 (2002)  
W. Va. Code § 48-1-302 (2009)  
W. Va. Code § 48-1-302 (2006)  
W. Va. Code § 48-14-206 (2009)  
W. Va. Code § 48-14-401 (2009)  
W. Va. Code § 48-14-402 (2010)  
W. Va. Code § 48-14-404 (2010)  
W. Va. Code § 48-14-408 (2011)  
W. Va. Code § 48-14-502 (2009)  
W. Va. Code § 48-14-503 (2011)  
W. Va. Code § 48-14-801 (2009)

W. Va. Code § 48-14-802 (2009)

W. Va. Code § 48-15-201 (2009)

W. Va. Code § 48-15-209 (2009)

W. Va. Code § 48-18-101 (2011)

W. Va. Code § 48-18-105 (2011)

W. Va. Code § 48-18-113 (2009)

W. Va. Code § 48-18-117 (2009)

W. Va. Code § 48-18-118 (2009)

W. Va. Code § 48-18-129 (2011)

W. Va. Code § 56-6-29 (1923)

W. Va. Code § 56-6-31 (1981)

W. Va. Code § 56-6-31 (2006)

W. Va. Code § 61-5-29 (2011)

*Alley v. Stevens*, 209 Ariz. 426, 104 P.3d 157 (2005)

*Brand v. Brand*, 482 So.2d 236 (Miss. 1986)

*Bruce v. Steele*, 599 SE2d 883 (W. Va. 2004)

*Carter v. Carter*, 479 S.E.2d 681 (W. Va. 1996)

*Fuhr v. Fuhr*, 818 So.2d 1237 (Miss. Ct. App. 2002)

*Goff v. Goff*, 356 S.E.2d 496 (W. Va. 1987)

*In re Marriage of Gayer*, 326 Or. 436, 952 P.2d 1030 (1998)

*In re Marriage of Perez*, 35 Cal. App. 4<sup>th</sup> 77, 41 Cal. Rptr. 2d 377 (1995)

*Martin v. Martin*, 198 Ariz. 135, 7 P.3d 144 (Ct. App. 2000)

*Martin v. Rath*, 589 N.W.2d 896 (N.D. 1999)

*Shaffer v. Stanley*, 593 S.E.2d 629 (W. Va. 2003)

*Staton v. Staton*, 624 S.E.2d 548 (W. Va. 2005)

*Supcoe v. Shearer*, 204 W. Va. 326 (1998)

BCSE POLICY MANUAL 08000.15.15 (effective 7/1/09)

OCSE-AT-98-24 (1998)

## ARGUMENT REGARDING APPELLANTS' ASSIGNMENTS OF ERROR

***I. Appellants asserts that West Virginia law requires that payment on a debt be allocated first to accrued interest, with any remaining funds to be used to reduce principal.***

The Appellants assert that support arrears should be treated under the law like a civil judgment or consumer debt. In general, consumer debt means that the debtor accrues the debt then is responsible for making payment on the same. A consumer or bank debt is usually a product of the affirmative, voluntary act of the obligor to obtain credit. Throughout the entirety of a civil judgment, consumer credit card relationship, or a bank mortgage, the debt remains just that – a debt.<sup>2</sup>

There is a functional difference between a lending institution's collection of consumer debt and the BCSE's collection of support. A credit company or lending institution is in the business of making a profit when lending money and maintaining accounts. This profit is generated with the charging of interest. Thus, the governing laws are written with that goal in mind. The business of the BCSE benefits only the families for whom support is owed – not the BCSE. There is no monetary profit to be gained.

The West Virginia Supreme Court of Appeals has taken the opinion that public policy, not necessarily the court order, imposes an obligation on parents to support their child. "Child support payments are therefore not considered a debt, but rather a legal

---

<sup>2</sup> These categories of debt and all non-support debt will be referred to hereinafter as simply "consumer debt."

duty.” *Supcoe v. Shearer*, 204 W. Va. 326, 330 (1998), citing *Tamez v. Tamez*, 822 S.W.2d 688, 691 (Tex. App.--Corpus Christi 1991, writ denied). This is just the one example of this State’s opinion on support obligations.

In a support case, the Family Court establishes the support obligation which accrues on a regular basis, without further action by the obligee or obligor. The obligor is then expected to timely pay the support as a legal duty.

The Appellants assert that the law regarding application of payments in consumer debt should be applied to support arrears. With respect to the relevance to support arrears, this is an issue of first impression before this Court. However, the BCSE asserts that the existing statutes regarding support arrears are diametrically opposed to the statutes relating to consumer debt. The law of West Virginia mandates many differences in the collection, accrual, and enforcement of support obligations.

***A. The Legislature has authorized the BCSE to promulgate policy regarding the allocation of payments.***

The Bureau for Child Support Enforcement (BCSE) is a statutory agency, which is created to satisfy the requirements of Federal law. The Federal Office of Child Support Enforcement (OCSE) provides guidance and direction to the States in maintenance of child support programs to comply with Title IV-D of the Social Security Act.<sup>3</sup> West Virginia Code § 48-18-101 (2011) declares that the BCSE is statutorily designated as “the

---

<sup>3</sup> Title IV, Part D of the Social Security Act, is codified generally at 42 U.S.C. § 651 et seq.

single and separate organizational unit within the state to administer the state plan for child and spousal support according to 42 U.S.C. §§ 654 (3).”

Title IV-D imposes many requirements upon the BCSE. To comply with the requirements of the Title IV-D “State Plan,” the BCSE must provide that “amounts collected as support shall be distributed as provided in [42 U.S.C.S. § 657].” 42 U.S.C.S. § 654 (11)(A) (2011). The regulations require that payments shall first apply to the required support obligation for the month. 45 C.F.R. § 302.51 (2011). Amounts in excess of the required, or current, support obligation for the month “shall be treated as amounts which represent payment on the required support obligation for previous months.” *Id.* More clearly stated, the amount collected which exceeds the current support obligation shall be first paid to satisfy support arrears. 42 U.S.C.S. 657 (a) (2011).<sup>4</sup>

Federal law permits, but does not require, the accumulation of interest on support arrears. Obviously, if a state does not charge interest, then all payments would apply to principal. Thus, the Federal statute does not mandate the distribution of accrued interest on support arrears. The Federal Office of Child Support Enforcement advised that state law will determine when interest accrues and how interest is distributed.<sup>5</sup> OCSE-AT-98-24 (1998).

---

<sup>4</sup> The recipient of the support arrears depends on the receipt of TANF benefits in the month of receipt. This is not at issue in this case.

<sup>5</sup> OCSE Action Transmittal 98-24: QUESTION 21: Does a State that charges interest on arrearages, which by statute is considered "child support" have the option to apply collections in excess of current support to either the interest first or to the arrearages first? ANSWER 21: Interest on arrearages would also be classified as an arrearage payment. State law would determine when the interest accrued and it would be distributed as any other arrearage accruing during that time period (i.e. pre-assistance, during-assistance, or post-assistance arrearages). State law would also determine whether the original arrearage or the interest accrued for that

The West Virginia Legislature has codified that the BCSE will comply with the requirements of the Federal law. *W. Va. Code §§ 48-18-113 (a), 48-18-129 (b) (2011)*.<sup>6</sup> The BCSE is further statutorily authorized to promulgate rules that are necessary to ensure that the State is awarded Federal funds to prevent substantial harm to the public interest by ensuring that child support is collected and disbursed. *W. Va. Code § 48-18-105 (19) (2011)*.<sup>7</sup> More important, the Legislature has specifically pronounced that **“...the bureau shall have the following power and authority: (1) To establish policies and procedures for obtaining and enforcing support orders...according to this chapter.”** *W. Va. Code § 48-18-105 (1) (2011)* (emphasis added).

Pursuant to this authority, the BCSE has established the policies and procedures contained in the BCSE Policy Manual which are used in the administration of the State’s IV-D program. The support distribution hierarchy of the BCSE Policy Manual § 08000.15.15 (effective 07/01/09)<sup>8</sup> meets the Federal requirement that current support must be paid first. *45 CFR § 302.51 (2009)*. Then, the BCSE policy requires payments to be first applied to principal arrears. Thus, the accumulation of interest is decreased.

---

time period was paid first, but States must determine the ownership and distribution of such collections in accordance with sections 402(a)(8) and 457 of the Act and OCSE-AT-97-17.

<sup>6</sup> *W. Va. Code § 48-18-129 (b) (2011)* states, “Insofar as such actions are consistent with the laws of this State granting authority to the bureau and the commissioner, the bureau shall comply with such requirements and standards as the Secretary of the federal Department of Health and Human Services may have determined, as of the effective date of this section, to be necessary for the establishment of an effective program for locating obligors, establishing paternity, obtaining support orders and collecting support payments.”

<sup>7</sup> The BCSE is primarily funded by federal monies to administer the Title IV-D program.

<sup>8</sup> This policy was initially effective 11/1/93 and was known as BCSE Policy Manual 08000.30.25. Effective 7/1/02, this policy was known as BCSE Policy Manual 08000.20.15. Throughout policy revisions, the policy of applying payments first to principal has remained unchanged.

***B. The West Virginia Legislature has historically exhibited an intent to reduce the accumulation of interest on support arrears.***

Unlike some other areas of the law, the West Virginia Legislature has been repeatedly, actively involved in the statutes relating to interest on support arrears. When West Virginia's Title IV-D program began, it did not have a mechanism or requirement for calculating interest. Thus, no interest was charged or collected.

West Virginia Code § 48A-1-3 (20)(A) was amended in 1991 to add that "...the amount of unpaid support shall bear interest from the date it accrued, at a rate of ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time." *W. Va. Code § 48A-1-3 (20)(A) (1991)*. Although that statute instituted the accrual of interest, the BCSE remained unable to calculate interest.

In 1992, the Legislature expanded the definition of "support" to specifically include interest. *W. Va. Code § 48A-1-3 (20) (1992)*.<sup>9</sup> Based on the new mandate, the Implementation Coordinator in the *Brinkley* matter moved the United States District Court for the Southern District of West Virginia to enter an Order dated December 3, 1992, which commanded that the BCSE shall include accrued interest in the future calculation of all unpaid support. The Order stated that interest shall be calculated pursuant to *W. Va. Code § 48A-1-3 (1992)* and § 56-6-29 (1923), which specifically

---

<sup>9</sup> While the statutory citation for the definition of "support" has changed from *W. Va. Code § 48A-1-3 (1992)* to § 48A-1A-29 (1996) to § 48-1-244 (2001), the substantive definition remains the same today.

permits compound interest. To comply, the BCSE then implemented a policy of charging compound interest with payments allocated first to principal.

A few years later, the Legislature again took notice of the interest on support arrears. This time, they revised the interest provision to prospectively terminate the calculation of compound interest by the BCSE. *W. Va. Code § 48A-1-3 (1997)*.<sup>10</sup> The termination of compound interest was specific to support arrears. West Virginia Code § 56-6-29 was undisturbed and still permits compound interest on certain judgments and decrees. For support arrears, simple interest shall accrue on only outstanding principal for all periods after July 9, 1995. With that drastic change in the law, there was still no directive to alter the BCSE's practice of first paying principal.

Other changes to reduce the accrual and collection of interest on support obligations have been enacted by the Legislature. The creation of an amnesty program was codified in West Virginia Code § 48A-1-3 (c) (2001).<sup>11</sup> This program was given a specific date of existence, commencing January 1, 2001, and terminating December 31, 2001. During that period, an obligor and obligee could agree to the waiver of interest on support arrears so long as the entire amount of support arrears would be extinguished within twenty-four months. The Court must approve and enter an Order regarding the circumstances, amounts of interest waived by the obligee, and the arrangement by which the obligor would pay the support arrears. In paid in full at the conclusion of twenty-four months, the interest is forever waived. If not paid in full, all interest is

---

<sup>10</sup> W. Va. Code § 48-2-37 also recites the interest of 10%. This section has no reference to W. Va. Code § 56-6-31 as was contained in W. Va. Code § 48A-1-3 (1996).

<sup>11</sup> This amendment to W. Va. Code § 48A-1-3 was effective June 9, 2000. All provisions of W. Va. Code § 48A-1-3 were re-codified at W. Va. Code § 48-1-302 (2001) effective April 14, 2001.

reinstated as well as the addition of interest accrued within the twenty-four month period. *W. Va. Code § 48-1-302 (c) (2001)*.

Although the amnesty program was initially intended to be short-lived, the Legislature found it fitting to indefinitely extend the availability of the amnesty program. They revised the statute in 2002 to remove the limiting dates. Now, the amnesty program continues to be available to all parties. *W. Va. Code § 48-1-302 (c) (2002)*. In the recent session, the West Virginia Legislature passed House Bill 3134 on March 12, 2011, which extends the potential time period for payment of support arrears under the amnesty program to sixty months.<sup>12</sup>

Effective January 2, 2007, the Legislature changed the interest rate contained in § 56-6-31 from ten percent per annum to a variable rate, calculated annually. *W. Va. Code § 56-6-31 (a) (2006)*. Simultaneously, West Virginia Code § 48-1-302 was amended to remove all reference to the rate specified in *W. Va. Code § 56-6-31 (1981)*.<sup>13</sup> *W. Va. Code § 48-1-302 (2005)*. Notwithstanding any other provisions of the Code, the interest on support arrears will be calculated at ten percent per annum. Clearly, the Legislature intended to sever any further connection between the interest provisions of Chapter 56 and Chapter 48.

Curiously, *W. Va. Code § 48A-1A-33 (2000)* and its recodification at § 48-1-204 (2001) never contained a reference to *W. Va. Code § 56-6-31 (1981)*. It plainly mandated that, “The amount of unpaid support shall bear interest ...at a rate of ten

---

<sup>12</sup> This bill is awaiting the signature of Governor Tomblin as of the date this brief was prepared.

<sup>13</sup> *W. Va. Code § 48-2-37 (1995, 2000)* stated, “if an obligation to pay interest arises under this chapter and the rate is not specified, the rate is that specified in section thirty-one [§ 56-6-31]...” In the recodification, *W. Va. Code § 48-2-37 (2000)* was removed, presumably due to its similarity to *W. Va. Code § 48-1-302*.

dollars upon one hundred dollars per annum.” To recite similar provisions in three separate statutes indicates the Legislature’s avid opinion of the interest on support arrears.

Again, the Legislature decided in 2008 to revise the interest rate on support arrears. This time, they reduced the interest on support arrears to five percent per annum.<sup>14</sup> *W. Va. Code § 48-1-302 (a) (2008)*. Since the introduction of interest into the support program, the Legislature has consistently revised or enacted laws which benefit the obligor. Furthermore, despite the frequency of legislative amendment, the BCSE’s policy of applying payments to principal first has never been altered by the Legislature.

***C. Support arrears are distinguished from consumer debts in several manners.***

Due to the Federal requirements of a Title IV-D program, the West Virginia Legislature has enacted remedies for the collection of support which are drastically different than the remedies available for the collection of judgments involving a mortgage, consumer loan, or civil decree.

The non-payment of support can warrant the obligor to be incarcerated until the receipt of a support payment in the amount determined by the Family Court or until the expiration of 180 days, whichever happens first. *W. Va. Code §§ 48-14-502 (5), 48-14-503 (2011)*. Criminal contempt proceedings and criminal non-support charges can be

---

<sup>14</sup> In the recent legislative session, *W. Va. Code § 48-1-204* was also amended to reflect the correct interest of five percent per annum.

prosecuted in the Circuit Court for the failure to pay support. *W. Va. Code § 61-5-29 (2011)*. No such loss of liberty can be affected by the failure to pay consumer debts.

An obligor can be denied his passport when support arrears exceed \$2,500.00. *42 U.S.C.S. § 652 (k) (2011)*. Upon proper petition, the Family Court can revoke or suspend an obligor's drivers license or business license to enforce the payment of support arrears.<sup>15</sup> *W. Va. Code § 48-15-209 (2009)*. In addition, the BCSE can intercept the Federal and State income tax refunds of an obligor for the payment of support arrears. *W. Va. Code §§ 48-18-117, 48-18-118 (2009)*.

Current support and support arrears can be collected directly from the income of the obligor by income withholding. *W. Va. Code § 48-14-404 (2010)*. In fact, EVERY order of support is considered to provide that income withholding will be the method of payment for support, in the absence of good cause. *W. Va. Code §§ 48-14-401, 48-14-402 (2010)*. No exemptions from wages, other than mandatory tax deductions, are permitted in the collection of support arrears. Statutory limits of collection for support arrears range from 40% to 65% of an obligor's income. *W. Va. Code § 48-14-408 (2011)*. Within those limits, the amount of income withholding can be increased to collect greater amounts for support arrears. *W. Va. Code §§ 48-14-801, 48-14-802 (2009)*.

While unpaid support arrears become decretal judgments by operation of law, the law prohibits garnishment for consumer debt prior to judgment by the Court. *W. Va. Code §§ 48-1-204, 46A-2-118 (2009)*. Thus, the creditor must proceed to the Court, obtain a judgment, and then make a specific request for garnishment of the debtor's wages. Even then, the creditor's collection amount is limited to 20% of the debtor's

---

<sup>15</sup> *W. Va. Code § 48-15-201 (2009)* lists the many licenses which can be denied, revoked, suspended, or restricted due to the non-payment of support arrears.

wages, if exemptions are not claimed by the debtor to further reduce the collection. *W. Va. Code § 46A-2-130 (2011)*.

Even the statute regarding the garnishment for consumer debt recognizes the priority of support arrears. *W. Va. Code § 46A-2-130 (4) (2009)*.<sup>16</sup> The Legislature has clearly mandated that payment of support arrears takes priority over any other legal process under the laws of this State against the same income. *W. Va. Code § 48-14-206 (2009)*. Thus, support will always be paid before civil judgments.

*W. Va. Code § 46A-4-109 (2011)* provides that consumer debts and civil judgments are dischargeable in bankruptcy. Thus, they become uncollectable. However, support arrears are non-dischargeable in bankruptcy. *11 U.S.C. § 523 (a)(5) (2007)*. This includes interest accrued on support arrears as interest is included in the definition of “support.” *W. Va. Code § 48-1-244 (a) (2011)*.

Accordingly, it is clear that the Legislature intended that support arrears be treated differently than consumer debt. The law regarding collection of support arrears is not an undeveloped area that would require this Court to turn to a wholly unrelated area of law for guidance.

---

<sup>16</sup> *W. Va. Code § 46A-2-130 (4) (2009)* states, “No garnishment governed by the provisions of this section will be given priority over a voluntary assignment of wages to fulfill a support obligation, a garnishment to collect arrearages in support payments, or a notice of withholding from wages of amounts payable as support, notwithstanding the fact that the garnishment in question or the judgment upon which it is based may have preceded the support-related assignment, garnishment, or notice of withholding in point of time or filing.”

***D. Statutory and case law prohibit the retroactive cancellation or reduction of support arrears.***

Support arrears vest as they accrue. *Carter v. Carter*, 479 S.E.2d 681, 685 (W. Va. 1996). For this reason, this Court has held that a Court cannot retroactively modify support so as to cancel or alter accrued installments of support. *Goff v. Goff*, 356 S.E.2d 496, 501 (W. Va. 1987). Because interest is considered support, the accrued interest on support arrears would likewise vest and cannot be cancelled or altered by the Court. W. Va. Code §§ 48-1-244 (a), 48-1-204 (2011).

This support obligation of John Caplinger began in 1997. Despite the accumulation of arrears, the issue of the BCSE's distribution hierarchy was not raised in any proceeding until June 2, 2008 – over six years after Melisha Boyd's death, over six years after the support obligation became owed to the Hornbecks, and almost a year after the support obligation to the Hornbecks ceased. Changing John Caplinger's obligation at this point violates the principles of laches and estoppel.

A retroactive modification of arrears would necessarily result if this Honorable Court accepts the proposition of the Appellants to apply payments of support arrears first to interest. The effects would reach far beyond the instant case. Tens of thousands of obligors would instantly have their support arrears dramatically increased.

If the BCSE applied the monies paid to interest first, the principal would remain at its highest amount and the interest would continue to accumulate. Such a retroactive modification would be an unfair detriment to the obligor, making it much more difficult to pay off the arrears. Of course, this theory might benefit the child – if the child does

not reside with the obligor. In the instant case, the Appellants' theory does not benefit the subject child.

This minor child now resides in the home of John Caplinger four overnights each week. Therefore, John Caplinger supports the child the majority of the time, presumably supplying her with adequate food, shelter, and education. Requiring John Caplinger to pay interest first, then principal, would take a larger amount of money from the child's household and would take longer to pay because principal would not be reduced until the ever-growing interest was retired.<sup>17</sup> This would undoubtedly create a hardship for the child in his home.

Taking more money out of the household will reduce the funds available to support the child and harm the minor child.<sup>18</sup> The Appellants' argument is simply inequitable in this case. Furthermore, the theory would result in a vastly inequitable result in all other cases to which it would be applied, if accepted by this Court.

---

<sup>17</sup> Only support arrears owed to Melisha Boyd would be the property of Melisha Boyd's estate. *See Costello v. McDonald*, 473 S.E.2d 736 (W. Va.1996). Support arrears accrued January 2002 to September 2007 belong to the Appellants as the caretakers of the child. Neither the trust, the estate, nor the child will benefit from the collection of those arrears.

<sup>18</sup> As noted in the Statement of Facts, John Caplinger has filed a responsive brief which raises numerous issues which he apparently did not appeal. Among these are arguments that he did in fact support the child during the period of arrears owed to Melisha Boyd. The BCSE respectfully suggests that a case with such factual disputes would seem an awkward choice to implement the sweeping changes suggested by the Appellants. These standards would then inequitably be applied to tens of thousands of support obligors.

**II. Appellants' assertion that other states possess similar procedures does not represent a current statement of the law.**

The Appellants identified five states which have addressed the issue of allocation of support payments. Further, the Appellants assert that these five states have applied the rule which directs payment of interest before reduction of principal.<sup>19</sup> However, Appellants have not presented a complete and accurate picture.

The first example presented by the Appellants is *In re Marriage of Perez*, 35 Cal. App. 4<sup>th</sup> 77, 41 Cal. Rptr. 2d 377 (1995). In 1995, the California court ruled that, after payment to current support, the interest balance should first be reduced. However, effective January 1, 2009, the California Legislature enacted a revision of the California Code of Civil Procedure 695.221. Now, the California law clearly requires that support payments first be applied to principal, and then payment may apply to interest. In contrast, California Code of Civil Procedure 695.220 (2011) specifically differentiates that money received in satisfaction of a money judgment, which is NOT a support judgment, will be credited to court fees, then interest, and lastly the principal amount of the judgment. Thus, it is clear that California now has decided to follow the same rule as West Virginia.

The Court of Appeals of Arizona was ahead of California in changing its law. The Appellants cites *Martin v. Martin*, 198 Ariz. 135, 7 P.3d 144 (Ct. App. 2000) to support its proposition. However, Arizona Legislature renounced its use of the "United States

---

<sup>19</sup> The Appellants appears to concede that the Federal regulations require allocation to the current month's support, if the support obligation is still in effect.

Rule” later in the same year.<sup>20</sup> Now, pursuant to Ariz. Rev. Stat. § 25-510 (A)(4) (2011), payments made after November 30, 1998, are applied to principal arrearage first and to interest arrearage second. The Arizona Court applied this statute in *Alley v. Stevens*, 209 Ariz. 426, 104 P.3d 157 (2005). Like West Virginia and California, Arizona has enacted this statute to apply exclusively to support arrears.

The North Dakota Court addressed the child support arrears in *Martin v. Rath*, 589 N.W.2d 896 (N.D. 1999). In that decision, North Dakota first determined whether its judgment statute applied to the support installment judgments which result as a matter of law. *N.D. Cent. Code § 9-12-07 (1943)*; *N.D. Cent. Code § 14-08.1-05 (1997)*. The Court decided that the automatic support judgments, once reduced to a docketed judgment, are subject to the provisions of *N.D. Cent. Code § 9-12-07 (1943)*. This statute requires the support payments to apply first to any interest due on the earliest maturing child support payment, and then to any principal due on that payment, with any excess going to the next earliest maturing support payment, first to interest then principal. Accordingly, North Dakota’s process is not the “interest before everything else” policy being advocated by the Appellants.

Mississippi Court’s decision of *Fuhr v. Fuhr*, 818 So.2d 1237 (Miss. Ct. App. 2002), is cited by the Appellants. However, this case merely recites that the “Brand method” governs the application of support arrears payments to interest first. The Mississippi Court determined in *Brand v. Brand*, 482 So.2d 236 (Miss. 1986), that payments should first be applied to aggregate interest of the oldest outstanding support

---

<sup>20</sup> The “United States Rule” refers to the holding in *Woodward v. Jewell*, 11 S.Ct. 784 (1891), wherein the Supreme Court calculated mortgage payments first to interest in order to reach the requisite amount in controversy for jurisdiction of the appeal. Although there is no substantive discussion of the application of payments in this case, some states have utilized this “United States Rule” to apply payments first to interest.

payment; thereafter sums paid should be applied to the principal amount of the unpaid monthly support obligations in order of their seniority. *Brand*, 482 So.2d at 238. This determination was not attributed to any existing case or statute. Again, the decisions in Mississippi were based upon the lack of a law or policy which governs the hierarchy of the distribution of support arrears payments, which West Virginia does possess.<sup>21</sup>

The Appellants also cite the Oregon case of *In re Marriage of Gayer*, 326 Or. 436, 952 P.2d 1030 (1998). The Oregon Court found no applicable statute for this case of first impression. Thus, they followed the common law that, in the absence of contrary statute or agreement of the parties, the payment of a debt first applies to interest. In footnote 9, the Oregon Court acknowledged that the child support agency has the statutory authority to promulgate rules. Although the Oregon agency had an administrative rule which matches 45 CFR § 302.51, they did not have a rule to further delineate the application of payments between interest and principal. This case is clearly distinguishable because West Virginia does, in fact, have the BCSE Policy Manual, which directs the distribution hierarchy of the support arrears payments.<sup>22</sup> Essentially, four of the five states referenced by the Appellants do not follow the rule advocated by the Appellants. Further, the Appellants argue to this Court to apply the rulings of other states which *do not* relate to support. The Texas and Maine cases are wrongful death suits.<sup>23</sup> The case from Nebraska is a civil judgment.<sup>24</sup> The Washington

---

<sup>21</sup> See W. Va. Code §§ 48-18-101, 48-18-105, 48-18-113 (2011); BCSE Policy Manual 08000.15.15 (effective 7/1/09).

<sup>22</sup> See W. Va. Code §§ 48-18-101, 48-18-105, 48-18-113 (2011); BCSE Policy Manual 08000.15.15 (effective 7/1/09).

<sup>23</sup> *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006); *Carter v. Williams*, 792 A.2d 1093 (Me. 2002).

case is a condemnation proceeding.<sup>25</sup> The Appellants fails to recognize that West Virginia has already pronounced that it treats support arrears significantly different than other debts.

### **CONCLUSION**

Logically, consumer debt and banking laws should not apply to BCSE's procedures for the distribution of support payments. In the world of child support, interest is charged as an incentive to make timely support payments. Unlike banking and consumer debt, the BCSE does not seek to make a profit by the accrual of interest.

The area of domestic relations law is a well-developed area. It is not necessary or appropriate to apply rules from an entirely separate area to the rules governing families. The BCSE is charged by Federal and State law to promulgate policies and procedures which further the goal of providing financial support for children. This includes the allocation of all payments first to current support.

West Virginia law makes great distinctions between support arrears and consumer debts. Many options are available for the collection of support which are not permitted for any other debt. With the exception of the amnesty program, the law does not permit a compromise of support arrears, even by agreement.

The West Virginia Legislature has repeatedly addressed the issue of interest on support arrears. All of the amendments have resolved to reduce the burden of interest

---

<sup>24</sup> *Camp v. Camp*, 709 N.W.2d 696 (Neb. 2006).

<sup>25</sup> *State v. Trask*, 990 P.2d 976 (Wash. 2000).

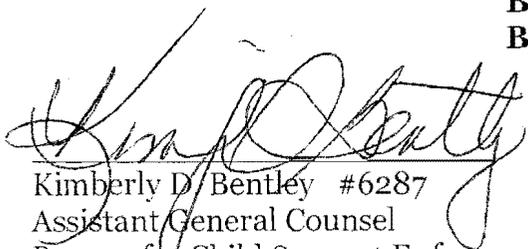
on support obligors. The Legislature has never disturbed the BCSE's policy of allocating payment first to principal, then to interest.

The statutory and case law of West Virginia prohibits the retroactive modification of support arrears by the Court. Such arrears are vested at accrual. Clearly, West Virginia support laws are intended to encourage and affirm the payment of support.

For the reasons stated herein, the BCSE asserts that the lower courts of Wood County did not err or abuse their discretion. They applied the appropriate law in the correct manner. It would be contrary to the laws of West Virginia and the Federal regulations to require the BCSE to follow banking principles and consumer laws. Furthermore, such a change would affect tens of thousands of obligors having support obligations in West Virginia orders.

WHEREFORE, the Bureau for Child Support Enforcement prays that the Court will AFFIRM the Orders of Wood County.

**Bureau for Child Support Enforcement,  
By Counsel**



Kimberly D. Bentley #6287  
Assistant General Counsel  
Bureau for Child Support Enforcement  
350 Capitol Street, Room 147  
Charleston, WV 25301-3703  
(304) 558-3780