ASSISTANT ATTORNEYS GENERAL
COUNSEL FOR
DEPARTMENT OF
HEALTH AND WELFARE

MRS. RUTH L. CROWLEY
ROBERT B. CALKINS
Eugene W. Murray
Ronald J. Cullenberg

GCW JSE

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04330

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To: Dean Fisher, M.D., Commissioner, Health and Welfare

From: Ronald J. Cullenberg, Assistant Attorney General

Subject: ACKNOWLEDGEMENT OF PATERNITY

Syllabus:

An unmarried father, living in the same household with a mother and child applying for AFDC, does not defeat the child's "dependent" status unless a statutory duty of support can be found.

Maine Revised Statutes provide four methods to establish the legal duty of support of a putative father:

(1) Subsequent marriage of the parents.
(2) Written acknowledgement of the father before a Justice of the Peace or Notary Public.
(3) Adoption by the father.
(4) Finding of paternity by a court of Law as the result of a paternity action.

The mother of a child applying for AFDC should be advised to use her legal surname and not the surname of the putative father.

Facts:

Applications for aid to families with dependent children have with increasing regularity come from unmarried mothers and fathers who live together. Since the unmarried father never officially acknowledges his paternity and since the unmarried mother has no reason or desire to institute paternity proceedings against the father, the Department of Health and Welfare is faced with the dilemma of whether to treat the unmarried father as simply a "man in the house" who, according to recent U. S. Supreme Court rulings, owes no duty of support thereby making the

children of the union "dependent" and thus eligible for aid to families with dependent children. The following is representative of such case histories:

> B. L.s real name is B. S., but she has lived with the father of the two children, R.L., apparently since the birth of the children. B. L. prefers to use the alias of L. for the childrens' sake. The childrens' names are also L. although B. L. and R. L. are not married they do live together and share the same expenses. B. L. has made an application for AFDC based on out-of-wedlock births.

QUESTIONS:

1. May the Department of Health and Welfare in determining eligibility for aid to families with dependent children take into consideration the assets and earnings of putative fathers who live with the mother and child(ren) in a married fashion though no marriage ceremony has yet been performed or is contemplated in the foreseeable future by the parties?

2. If the answer to question number one is in the negative, what steps may be taken to establish the duty of support of putative fathers?

3. May a mother making an application for AFDC benefits in the above described circumstances assume the surname of the putative father?

ANSWERS:

1. No.

2. See reasoning below.

3. No.

REASONING:

1. Recent case law has made it abundantly clear that states participating in aid to families with dependent children may not enlarge the requirements for AFDC eligibility adopted by the federal government. King v. Smith, 392

U. S. 309 (1968). The Federal Statute, 42 U.S.C. 606 (A), defines a "dependent" child as a "needy child who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . ." In King, supra, it was decided that the word "parent" as used in 42 U.S.C. 606 (A) is intended to include only those persons with a legal duty of support. This case over-ruled Alabama's "substitute father" regulation which required disqualification of otherwise eligible children if their mother cohabits with a man not under a legal duty to support the children under Alabama law. The Court denied Alabama the right to enlarge the definition of parent to include a "substitute father".

In the instant case the facts are reversed from King. The mother is not living with a 'mere paramour', but rather is now living and has lived for a number of years with the unofficially admitted father of the children. If it is assumed that the children would not be needy and would not eligible for AFDC if the income of the unofficial father was included in determining eligibility, should the department deny AFDC benefits on the grounds that the child is not dependent?

The Supreme Court has said that the "paramount goal of AFDC is the protection of the children" King, supra @ 325. It has not allowed the states to examine parental morals, see, Welfares "condition X", 76 Yale L. J. 1222, or even make the determination of the father's name a condition of eligibility Doe v. Shapiro, 300 F. Supp. 761 (Conn. 1969). In Doe it was held that although the State did have a valid interest in determining the name of the putative father it could not deny aid because of the mothers failure to disclose. The court reasoned that the name of the father was irrelvant to determine the childs need. Doe, supra, @ 764; see also, Eligibility Requirements Unrelated to Need: The Impact of King v. Smith, 118 U. Pa. L. Rev. 1219.

A close reading of the recent Supreme Court cases suggests that the department would be precluded from denying AFDC benefits solely on the grounds that the child is not "dependent" where the father has never married the mother, adopted the child or acknowledged his paternity before a Justice of the Peace or a Notary Public. Today courts are interpreting welfare legislation so that it is no longer regarded as charity to give only to "deserving poor, but is now a right to which all eligible persons are entitled." Stoddard v. Fisher, 330 Fed. Supp. 566 (1971) at 567. There is no need to cite the numbers of cases holding that rights of individuals may not be infringed upon without the minimum precautions of a fair and impartial hearing.

A separate section of the AFDC statute, 42 USC 602(A) (17), does focus on programs for establishing paternity. It requires that State assistance programs include procedures to establish paternity and secure support for children born out of wedlock. The Maine plan includes 22 M.R.S.A. 3755 which in essence gives the department the power to collect information regarding "persons asserted to be owing an obligation of support" Id. and make it available to public officials and agencies of this State for the purpose of enforcing liability for support.

Neither the mother nor putative father in this case has attempted to conceal the paternity of the children. In fact the opposite is true. The AFDC application form contains the name of father and his earning capabilities. Under Maine law the father of a child who is born out of wedlock is liable to the same extent as the father of a child born in wedlock, i.e., for the reasonable expense of the education and necessary support of the child, and also, for reasonable counsel fees, for the prosecution of paternity proceedings; 19 M.R.S.A. 271. Section 272 authorizes the department as "The public authority chargeable by Law with the support of the child" to initiate an action to determine paternity. Thus Section 272 applies only if the department can

not legally claim that the putative father has a legal duty to support. Section 271 would allow the State to recoup payments if the putative father was later proven the real father. However, until such a determination of legal duty of support is made the department should consider children in these cases "dependent". This would be in line with Federal policy which requires that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals". 42 U.S.C. § 602 (A) (10).

2. Under King the word "parent" for AFDC purposes is synonymous with "legal duty of support". Thus, the issue now becomes a matter of determination of where that legal duty of support lies with respect to putative fathers.

Under common law, as applied in Maine, the putative father owed no duty of support to his illegitimate children. The duty imposed is, wholly statutory. Thut v. Grant, 281 A. 2 d 1 (Me. 1971). 19 M.R.S.A. 271 clearly imposes the duty of support of a child born out of wedlock on the father. Unfortunately, this statute does not define who shall be considered the "father". Another section, 18 M.R.S.A. 1003, does provide three methods by which a child may be legitimated. These include marriage by the parents, written acknowledgement of paternity by the father before a Justice of the Peace or Notary Public, or adoption by the father. Although section 1003 is functionally a part of the laws of descent and distribution its application is neither expressly nor implicitly limited to heirship.

Maine case law does not reveal any further methods of determining paternity other than the paternity action itself.

The duty of support of the father of children born out of wedlock as imposed by Maine Law is in derogation of the common law. Generally it has been held that such statutes must be construed strictly. It must be concluded, therefore, that the language in 19 M.R.S.A. 272 referring to "the laws of this State" means only those statutory methods which are currently effective. At present this is 18 M.R.S.A. 1003.

3. It would be improper to advise that a name other than a person's legal name should be used on an application form. This would be true even though as in the case at hand the social worker knew the woman's real name and the use of the unmarried father's surname might work to the applicants disadvantage. 22 M.R.S.A. 3756 should be kept in mind since it does allow the department to bring a Civil Action against persons obtaining funds as a result of any false statements, misrepresentations, or concealment of assets. The use of unmarried father's surname would under slightly different circumstances invite litigation.

RJC/vw

Ronald J. Cullenberg
Assistant Attorney General