Arizona Supreme Court

STATE OF ARIZONA *ex relatio* Dep't of Economic Security, Petitioner-Appellee *vs.* JACK HAYDEN Respondent-Appellant.	No. CV 04-0303 PR Court of Appeals No. 1 CA-CV 03-0036 Maricopa County Superior Court No. DR 0000-139604 BRIEF OF *AMICI CURIAE* KEVIN LE CLAIR AND TONY RUSSELL

ON A PETITION FOR REVIEW TO THE COURT OF APPEALS, DIVISION ONE

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Arizona Supreme Court

State ex rel. *D.E.S*. vs. *Jack Hayden*

No. CV 04-0303 PR

BRIEF OF *AMICI CURIAE* KEVIN LE CLAIR AND TONY RUSSELL

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What "Administrative Remedy"?

A. A Theoretical Disquisition Regarding What State Legislation "Can" Or "Cannot" Effect, With Respect To "Any Administrative Remedies," Was Neither Required For, Nor Usefully Supplied By The Court Of Appeals In Announcing, The Decision Of The Case Of *State* ex rel. *D.E.S. vs. Jack Hayden*.

> "The State contended that Federal Title IV-D permits a state to collect arrearages 'by any administrative remedies available until all arrearages are paid, with or without a written judgment.' " * * * [W]e hold that A.R.S. § 25-503 (I) can preclude untimely judicial recovery but cannot prohibit parallel administrative recoupment of the underlying debt." *State* ex rel. *D.E.S. v. Hayden*, Court of Appeals slip opinion at p. 3, ¶ 6 and p. 10, ¶ 16.

To the extent the Court of Appeals' *Hayden* opinion addresses the general (and essentially moot) question: "Does expiration of the time within which a primary creditor might have initiated proceedings to obtain judgment on her claim necessarily bar the State's invocation of any administrative remedy in pursuit of its derivative rights to enforce the same claim?" it represents an undertaking to render an advisory opinion. The question which the Court of Appeals ought to have required the parties before it in the *Hayden* case to address themselves, and to which it should have confined its own decision, was only: "Did expiration of the time within which a primary creditor might have initiated proceedings to obtain judgment on her claim necessarily bar the State's invocation of the particular remedy which it invoked in the proceedings below in pursuit of its derivative rights to enforce the same claim?"[1]

That question, in turn, can only be answered with reference to the particular remedy which the State actually invoked in the *Hayden* trial court proceeding. It would appear, from ¶ 4 at pp. 2-3 of the Court of Appeals' slip opinion,[2] that in procuring the

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1. Cf. *Armory Park v. Episcopal Community Services*, 148 ARIZ. 1, 6, 712 P.2D 914 (1985); *Uhlmann v. Wren*, 97 ARIZ. 366, 390, 401 P.2D 113 (1965).

2. "On October 29, 1984, the Arizona Department of Economic Security (ADES) filed a request to file an assignment of rights to support on the child's behalf. According to the request, ADES was providing public assistance to Mother and child in the form of Aid to Families of Dependent Children (AFDC), and Mother had accordingly assigned the child's right to child support to the State."

wage assignment which Hayden challenged the State relied upon ARIZ.REV.STAT. § 25-504 (B), which provides that "[a] person obligated by an order to pay support … , the person to whom support … is ordered to be paid," in title IV-D and non-Title IV-D cases, or the D.E.S.,

> in a title IV-D case may file a … request with the clerk of the superior court requesting the clerk to issue an ex parte order of assignment for support or spousal maintenance. The ex parte order of assignment may include a payment for current support and any other support, current spousal maintenance, spousal maintenance arrearages and interest on spousal maintenance arrearages.

Exactly what is "administrative" (as opposed to "judicial") about this remedy is not immediately clear. Though not a magistrate, the clerk of the superior court is certainly a member and officer of the court. (In any event, before the proceeding described in this statute could be an "administrative" proceeding in the relevant sense, the clerk of the superior court would have to be an executive, as opposed to a judicial, officer of government.) A judicial mechanism does not become "administrative" merely because an executive officer or agency of government invokes it (e.g., if the Department of Transportation files a complaint to take land by eminent domain with the clerk of the superior court, the condemnation action thus initiated is a judicial proceeding, and very different from an administrative proceeding before that Department).

To what extent § 15-504 (B) contemplates an act on the part of the clerk of court which is strictly *ministerial* is an entirely different question; and in any event, the State has not questioned the authority of the superior court to entertain Hayden's motion asking the court to supervise, review and/or correct the clerk's initial ministerial act.

B. What "Federal Title IV-D" Plainly Evinces Is A Congressional Intent To Make The State's Collection Remedies Derivative From And Therefore Defined And Delimited By The Custodial Parent's Collection Remedies.

Presumably, "Federal Title IV-D," as used in the State's briefs and the Court of Appeals' opinion, has the same meaning as that given to the phrase "Title IV-D," as used in ARIZ.REV.STAT. T. 25, Ch. 5, by statutory definition, to wit, "title IV-D of the social security act." ARIZ.REV.STAT. § 25-500 (11).

Technically, there is no federal legislation properly identified as "title IV-D of the social security act." The Legislature undoubtedly meant to refer to the United States Code, Title 42 (Public Health and Welfare), Chapter 7 (Social Security), Subchapter IV (Grants To States For Aid And Services To Needy Families With Children And For

Child-Welfare Services), Part D (Child Support and Establishment of Paternity), 42 U.S.C. §§ 651 through 669b.

Subchapter IV, Part D (of Chapter 7 of Title 42, U.S.C.) contains only one provision that even remotely approaches "permitting a state to collect arrearages" as the State (and by implication the Court of Appeals) assert "Federal Title IV-D" does; specifically:

> The support rights assigned to the State pursuant to section 608 (a)(3) of this title[3] or secured on behalf of a child receiving foster care maintenance payments shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes. 42 U.S.C. § 656 (a) (1).

Here, the reference to "collection … under all applicable State and local processes" may well be taken to comprehend all collection mechanisms established by existing state law. It clearly does not, however, mandate the creation of, much less create, any new, different or expanded collection mechanism.

Moreover, Congress *could* have enacted: (a.) that the if the state receiving federal grant-in-aid funds under Subchapter IV makes a disbursement from such funds to provide support for a child which a parent of the child had been judicially ordered to provide but had failed to provide, such receiving-and-disbursing state thereby acquires a federal right to recoup the disbursement from the parent; or (b.) that in order to receive federal grant-in-aid funds under Subchapter IV, a state must establish state laws securing its right to recoup such disbursement under the same circumstances. In other words, Congress need not have made any connection whatever between the state ability to collect recoupment from one (presumably non-custodial and non-supporting) parent which 42 U.S.C. § 656 (a) (1) is clearly intended to ensure and *any* "support right" initially belonging to or collectible by another family member. But what Congress did, instead, was plainly to provide for the state's acquisition, under the posited circumstances, of the very "support

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3. 42 U.S.C. § 608 (a) (3), compelling any state receiving a grant-in-aid under what used to be known as the Aid For Dependent Children program to "require, as a condition of providing assistance to a family … , that a member of the family assign to the State any rights the family member may have … to support from any other person, not exceeding the total amount of assistance so provided to the family."

rights" which had antecedently belonged to the other (presumably, custodial) parent, *through the familiar legal mechanism of assignment*.

If the law of assignment were not the modest, workaday and uniform feature of Anglo-American jurisprudence which in fact it is, a judge or lawyer reading 42 U.S.C. §§ 608 (a) (3) and/or 656 (a) (1) for the first time would surely find himself musing, "Does this mean the rights of the state-assignee are defined by the state's law of assignment? Or are we now to seek out and mark the bounds of a 'federal common law' of assignment?" However, the law of assignment being a relatively non-controversial known quantity, we would reach the same result, for present purposes, whether we turned to Arizona law or federal common law.

"As an assignee, appellant can stand in no better position than the assignor. … An assignment cannot alter the defenses or equities of a third party." *Stephens v. Textron, Inc.*, 127 ARIZ. 227, 230, 619 P.2D 736 (1980) (holding that since assignor was barred by statute of limitations, so was plaintiff-assignee); accord, *Lawson v. Arnold*, 137 ARIZ. 304, 306, 670 P.2D 409 (App. Div. 2 1983). "An assignee steps into the shoes of her assignor. She 'can stand in no better position than the assignor' and '[a]n assignment cannot alter the defenses or equities of the third party.'" *K.B. v. State Farm Fire & Cas. Co.*, 189 ARIZ. 263, 267, 941 P.2D 1288, 1292 (App. Div. 1 1997); accord, *Business Fin'l. Services. v. Butler & Booth Dev.*, 147 ARIZ. 510, 512 711 P.2D 649 (App. Div. 1 1985). "[I]f the right of the assignor would be . . . unenforceable against [the obligor] if no assignment had been made, the right of the assignee is subject to the infirmity." RESTATEMENT (SECOND) OF CONTRACTS § 336 (1) (1981). *Independent Nat. Bank v. Westmoor Elec*., 164 ARIZ. 567, 571, 795 P.2D 210 (App. Div. 1 1990) (Defendant debtor was "correct in arguing that as an account debtor, it [was] entitled to assert against the assignee any claims and defenses arising out of its contract with the assignor that it would have been able to assert against the assignor itself. This principle is well established both by statute and by case law.")

The effect of an assignment "by operation of law" rather than by contract is essentially the same. See, e.g., *State v. Garcia*, 187 ARIZ. 527, 529-30, 931 P.2D 427 (App. Div. 2 1996) (defense of laches which defendant non-custodial parent could raise against collection of child-support arrearage could also be raised against collection

attempts by Department of Economic Security as parent's statutory assignee)[4]; *Carpenter v. Superior Court*, 101 ARIZ. 565, 567, 422 P.2D 129 (1966) ("[T]he rights of a judgment-creditor of an insured are no greater than those of the insured, in whose shoes he stands. Petitioner, as garnishor, obtained no rights in the policy superior to those of his judgment debtor, the insured").

Two recent Circuit Court opinions affirm that an assignee can acquire no greater rights than those possessed by the assignor himself at the time of assignment − apparently, as a matter of a federal common law of assignment. *Nova Info. Systems v. Greenwich Ins.*, 365 F.3D 996, 1003 (11th Cir. 2004) (rights of indemnitor-assignee, who reimbursed passengers after prepaid cruises were cancelled, as against surety on "Passenger Vessel Surety Bond" posted pursuant to 46 U.S.C. § 817e(a)); *Medtronic A.V.E. v. Advanced Cardiovascular Sys.*, 247 F.3D 44, 60 (3rd Cir. 2001) (rights under various patent assignments).

Since the State in *Hayden* claimed precisely the status of the assignee of an original creditor whose enforcement of her claim would admittedly be time-barred, under a correct reading of the applicable law the invocation by the State-assignee of the remedy which it actually invoked in *Hayden* would likewise be time-barred.

RESPECTFULLY SUBMITTED this 17th day of March, 2005.

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4. But see *In re Paternity of Gloria v. Vallejo*, 194 ARIZ. 201, 204, 979 P.2D 529 (App. Div 1 1999) (accord with *State v. Garcia*, cited in text, but "the party asserting the defense must prove the required elements of laches against the State itself" rather than the assignor).

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Rule 14 (b), ARIZ.R.CIV.APP.PROC., I hereby certify that: (1.) This brief uses proportionally spaced, 14 pt., roman, non-script typefaces, except that a slightly smaller typeface is used in tables and for footnotes and page footers and slightly larger typefaces are used for certain headings; (2.) Its word count is approximately _____ words; and (3.) This brief otherwise complies with the requirements of said Rule.

DATED: February 28, 2005.

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that two (2) copies of the foregoing Brief were served upon each of the following:

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