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## PENALTY ON CHILD SUPPORT ARREARAGE

House Bill 4498 (Substitute H-2)  
First Analysis (5-9-95)

Sponsor: Rep. Willis Bullard, Jr.  
Committee: Judiciary and Civil Rights

### ***THE APPARENT PROBLEM:***

According to friend of the court records, a large number of people required by circuit court orders to make support payments to former spouses or custodial parents fail to make these support payments in a timely fashion. As a result, the party who was to have received this support must find other means by which to meet his or her daily living costs. Many times, this drives the spouse or custodial parent to rely upon one form or another of public assistance.

Section 3 of the Support and Visitation Enforcement Act says that a support order which is part of a judgment or is an order in a domestic relations matter is a judgment on and after the date each support payment is due, with the full force, effect, and attributes of a judgment in this state. In Langford v. Langford (196 Mich App 297), decided October 19, 1992, the court of appeals said that "it is clear that the adoption of section 3 means that the arrearage on a support order is a judgment from the time that amount falls due, and that interest is to run on this amount as it would with any other civil judgment." The court held that effective July 6, 1987 (the effective date of the language in question), statutory interest must be added to support arrearage orders entered after that date. The court said that it was not a matter on which a trial court's discretion could be brought to bear.

The Revised Judicature Act sets forth a relatively complex formula for statutory interest on money judgments in civil actions not involving a written instrument. That interest rate is set every six months, and is equal to one percent plus the average interest rate paid at auctions of five-year U.S. Treasury notes during six months preceding July 1, and January 1, compounded annually.

Many, while agreeing with the court that interest should be charged on overdue support payments,

believe that matters should not be left to stand as they are. For one thing, to use the existing formula for the calculation of interest strikes many as unnecessarily complicated. Further, the court did not specify who is to add and collect the required interest, and opinions differ over whether such duties may be assumed to lie with the friend of the court or whether the collection of interest requires separate court action initiated by each support recipient. There is no explicit statutory mechanism for enforcing or collecting interest on support orders. Further some question that a charge of interest would raise unexpected tax consequences for the party receiving the interest.

Legislation has been proposed to clarify matters, place the gist of Langford into statute, and to encourage the payers to make their support payments in a timely fashion.

### ***THE CONTENT OF THE BILL:***

The bill would amend the Support and Visitation Enforcement Act to place a penalty on overdue child support payments. Under the bill, the friend of the court (FOC) would be required to add a penalty of 8 percent to past due child or spousal support payments. This penalty would be calculated biannually and would be added to the accrued support arrearage on January 1 and July 1 of each year. Support amounts ordered by the court under the Paternity Act but incurred prior to the effective date of the court's order would not be subject to this penalty.

The bill would also require that when the FOC received any money as a payment of support it would be applied first to the current monthly support, and then to the support arrearage, including the penalty accumulated under the bill. For the purposes of calculating the penalty, a

House Bill 4498 (5-9-95)

support payment would not be considered paid until actually received by the FOC.

MCL 552.602 et al.

### ***FISCAL IMPLICATIONS:***

According to the Department of Social Services, the friend of the court agencies might incur additional administrative costs, which are subject to DSS funding. However, the bill could result in savings if more payers are motivated to meet their child support obligations. No data is available on which to estimate how effective the penalty may be in promoting compliance. The department can retain 45 percent of collections of child support in AFDC cases to offset the state share of costs in the AFDC program. That retained amount becomes part of AFDC collections on which the department can receive a federal incentive payment at the current rate of 6 percent. In non-AFDC cases, support collections also add to the amount which qualifies for federal incentive payments. (5-2-95)

### ***ARGUMENTS:***

#### ***For:***

In situations where the payer of family support fails to make timely payments, the payment loses value during the period of the delay. The addition of a penalty attempts to make support recipients whole by giving the benefit of the payer's delay to the payee. It will also provide an incentive to payers to pay promptly. In requiring interest or a penalty to be added to overdue support payments, the bill would codify the decision of the court of appeals in Langford.

#### ***Against:***

People who fail to meet their support obligations usually fail because they cannot afford to make payments in the set amount. The current system demonizes noncustodial parents (usually men) and sets up support obligations that are unfair and amount to an excessively high percentage of the payer's income.

#### ***Response:***

People who fail to pay court-ordered support cost taxpayers money by forcing those who are relying on the support to seek state aid of one sort or another to make ends meet. The party responsible for payment of the support should be penalized for failing to make the required payments in a timely

fashion. Hopefully, such a penalty will force the payer to treat the support payment in the same fashion as he or she would treat other bills which either penalize or add interest for late payment.

Furthermore, most complaints that an payer is unable to pay are unsubstantiated. When pressed by the courts, almost all come up with the money owed. Failure to pay is more often based on the payer's lack of desire to take responsibility for his or her offspring or former spouse.

If the payer is truly unable to pay, the current system allows the payer to seek an adjustment of the support order due to a change in the payer's ability to pay. It is the payer's responsibility to contact the FOC to seek an adjustment. The responsibility for failing to get a modification should not fall on the shoulders of the party receiving the support or on the taxpayers.

#### ***Rebuttal:***

The assertion that payers are able to pay because they are able to come up with funds when threatened with jail time is unwarranted. The payments made in such situations are state-sponsored extortion; the fact that someone can pay when coerced does not imply that he or she can pay on a regular basis, but rather shows that the individual has friends and/or family who are willing to pay to keep him or her out of jail.

#### ***Against:***

Often, failure to pay child support correlates to a failure of the custodial parent to grant visitation. Forcing the payer to pay a penalty takes away the payer's ability to attempt to enforce the right to visitation by withholding support.

#### ***Response:***

If the payer is not receiving visitation, there are appropriate avenues to enforce that aspect of the court's order as well. Refusing to pay support under such circumstances only deprives the child of money needed to provide food, clothing, shelter and other necessities of life.

#### ***Against:***

It would be better to make the ordering of such a penalty at the discretion of the court, rather than automatic. That way, the law would accommodate individual extenuating circumstances while continuing to employ the threat of penalty charges as a lever with which to pry loose overdue support payments. To require a penalty on all back support would create situations where payers who could not

pay face ever-growing arrearages, and where friends of the court would face additional administrative costs in calculating and attempting to collect uncollectible penalty payments. Further, if penalty charges are to be mandatory rather than discretionary, the rate charged should be lower, so as to prevent undue hardship. **Response:**

The eight percent penalty proposed by the bill is not out of line with what other states are charging. To employ a lower rate would reduce the incentive to pay on time.

**Against:**

The bill presents a number of difficulties of implementation. Penalty is to be charged on past due support payments, but it is not clear whether "past due support" is to include overdue support plus previously-charged penalty, or only back support payments. Further, like Langford, the bill is not explicit on who is to collect the penalty or how it is to be distributed; presumably, penalty amounts would be added and collected by the FOC, but if so, companion amendments to the Friend of the Court Act would be advisable. And, this would no doubt require increased technical support and additional staff. How would the additional expenses and staff requirements be funded?

**Against:**

The bill raises a number of additional questions: Would a penalty applied under this section become a fixed judgement as per the Langford decision? If the amount of support is raised by court order would the penalty be applied retroactively for the increased amount? Would a penalty be applied in situations where an arrearage has accrued under a temporary or interim support order? Would a payer's failure to pay statutory fees also be penalized? Further, the bill fails to confront issue of medical and confinement expenses. (Confinement expenses are the costs incurred for the birth of a child, usually applied in paternity cases.) In some cases medical expenses are agreed upon in the court's order. Would the penalty also be applied to a payer's failure to meet such obligations? If so, would these amounts be treated as wholly unpaid when a payment is missed or would only the late payment be penalized?

**Against:**

Given the risk of tax consequences for the payee, further investigation should be made to answer the question of which term ("interest", "additional support", or "penalty") should be used to describe

the amount added to the arrearage. A number of other states already have similar systems in place and an investigation into which term provokes the minimum response from the IRS is warranted before the language is put into law.

**POSITIONS:**

The Department of Social Services supports the bill. (5-8-95)

The State Bar Association, Family Law Section, supports the bill, with the recommendation the increased amount of payment be described as "additional support" rather than "penalty." (5-8-95)

The Friend of the Court Association has not yet taken a position on the bill. (5-8-95)

The National Organization for Women, Michigan Conference has not yet taken a position on the bill. (5-8-95)

The National Congress for Men and Children, Michigan Chapter opposes the bill. (5-4-95)

The Capitol Area Fathers for Equal Rights opposes this bill. (5-4-95)