CHAPTER ELEVEN – ENFORCEMENT OF SUPPORT OBLIGATIONS

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INTRODUCTION

After a child support order has been established, a child support agency must immediately begin managing and enforcing the order. This chapter discusses a wide range of case management and enforcement tools that are available to a child support agency. Many of these tools are or can be automated within statewide child support computer systems. Others involve submission of cases to the federal Office of Child Support Enforcement (OCSE) for enforcement with cooperation by federal agencies. Others require individualized attention by the child support attorney or agency.

In order to manage case arrears, federal regulations require state child support agencies to identify the date that a parent fails to make payments in an amount equal to the support payable for one month.[1] In cases where a noncustodial parent is paid on a weekly or bi-weekly basis, or the order is written in weekly or bi-weekly terms, the state must convert the weekly or bi-weekly amount to a monthly amount for the purpose of order administration. After this date is identified by the statewide computer system, enforcement must begin, either by initiating income withholding, if income withholding is not already in place,[2] or taking appropriate enforcement action.[3]

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[4] also required states to establish Statewide Disbursement Units (SDUs) for the collection and disbursement of payments under support orders.[5] An SDU is required to collect and disburse payments under support orders in all IV-D child support cases,[6] and in cases with orders entered on or after January 1, 1994, that are subject to income withholding.[7]

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[1] 45 C.F.R. § 303.6(b) (2019).
[2] 45 C.F.R. § 303.100(b)(1) (2019). All IV-D child support orders are subject to immediate income withholding unless there is good cause not to withhold, or a written agreement for an alternate arrangement is in place.
[3] 45 C.F.R. § 303.6(c) (2019).
[4] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 654a (2018)).
[5] 42 U.S.C. § 654b (2018).
[6] A IV-D case is any case where an application for services has been made under 45 C.F.R. § 302.33, or where the child is receiving benefits under Title IV-A or IV-E of the Social Security Act, Medicaid, or Supplemental Nutrition Assistance Program.
[7] 42 U.S.C. § 654b(a)(1) (2018). Many states have statutes or case law permitting direct payment between parties in non-IV-D cases with orders issued before January 1, 1994, or where there is a court-approved alternative arrangement. *See, e.g.*, Haw. Rev. Stat. § 576D-10(d) (2019); 750 Ill. Comp. Stat. 28/20(a)(1) (2019); N.Y. Dom. Rel. Law § 240(2)(b)(2) (McKinney 2019); N.Y. C.P.L.R. § 5242(c) (McKinney 2019); Tex. Fam. Code Ann. § 154.004(c)(2) (West 2018). *See*

For practical purposes, in many states, this means that all child support paid in a state must go through the SDU and any payments not processed through the SDU may not be credited as support payments.[8] Sometimes when the tribunal is attempting to determine arrears, an obligor will assert that payment has been made in a manner other than through the SDU or according to a previous tribunal order. Tribunals usually do not give obligors credit for payments made outside of the order's terms or not recorded through the SDU. Most states consider in-kind payments or cash paid directly to the child as gifts and, therefore, do not credit these payments against the child support obligation.[9] The child support attorney should verify the local jurisdiction's law or cases on this point as some courts will give credits under specified circumstances.[10]

CASE AND ARREARS MANAGEMENT

Case Management

Case management includes many strategies, beginning with a thorough review of the entire caseload to identify and separate paying cases from cases needing enforcement, and to identify and correct issues with systems, policies, procedures, or laws that may be interfering with enforcement. This review should include several actions, such as a match with Social Security Administration State Verification and Exchange System (SVES)[11] data to identify deceased noncustodial parents, as part of an overall review of cases that may qualify for closure under federal regulations.[12] The review should also identify cases where children have reached the age of majority and the current order is still in effect to

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also Doe v. Doe, 188 P.3d 782 (Haw. App. 2008) (mother had the right to void a direct payment arrangement with the father at any time and to apply to the CSEA for collection and disbursement of payments). Direct payment is not permitted by any state in IV-D cases.

[8] *See, e.g.*, Ohio Rev. Code Ann. § 3121.45 (2019) (any payment not made through the child support agency is deemed a gift); Wis. Stat. § 767.57 (2019) (all orders or judgments shall direct payments to be made through the Department or its designee).

[9] *See* Ariz. Child Support Guidelines (19) (S. Ct. Order 2018-116) (child support is to be paid in money. Gifts of clothing, etc. in lieu of money are not to be offset against the child support order except by court order). *See also Lurz v. Lurz*, 2010 Ohio 910, No. 93175, 2010 WL 877522 (Ohio Ct. App. Mar. 11, 2010); *Zedan v. Westheim*, 729 S.E.2d 765 (Va. App.2012), *aff'd* 741 S.E.2d 792 (Va. App. 2013) (father denied credit for tuition payments because there was no agreement between parents that such payments were in lieu of child support).

[10] *See Gallagher v. Gallagher,* 530 S.E.2d 913 (Va. App. 2000).

[11] The State Verification and Exchange System (SVES) is a data exchange system within the Social Security Administration. Through an interface with between SVES and FPLS, states have automated access to Title II (SSA benefits), Title XVI Supplemental Security Income (SSI) and Prisoner data, including date of death information for Title II and Title XVI recipients. *See* OCSE-DCL-11-05: Use of Social Security Information to Improve Performance (Apr. 11, 2011).

[12] 45 C.F.R. § 303.11 (2019). It is important to note that a case cannot be closed simply because a noncustodial parent is deceased. There must also be a finding that no further action, including a levy against the estate, can be taken. 45 C.F.R. § 303.11(b)(2) (2019).

determine whether the children are still eligible for current support.[13] Part of the case management review is to determine whether the obligor has multiple cases or orders for the same child in different states. Agencies can use the Federal Case Registry to search for that information. If the agency learns that multiple states have open cases involving the same obligor and support order, that information may impact the enforcement selected.[14] In the unlikely event the obligor has multiple current support orders for the same child, it may be necessary for the child support attorney to ask a tribunal to determine the validity of the orders, establish the controlling order, and reconcile arrears under the multiple orders.

Arrears Management

The ability to manage case arrears was improved when PRWORA required states to have a "single statewide automated data processing and information retrieval system." One of the functions of this system is to "control, account for, and monitor all the factors in the support collection and paternity determination process,"[15] which includes the automated maintenance and monitoring of accurate records of support payments.[16] Based on this requirement, statewide computer systems are designed to monitor cases for payments and implement automated enforcement mechanisms or alert workers when payments are not being made so that enforcement decisions can be made quickly. Statewide systems must also contain a state case registry that includes records of the amount of support owed, including arrearages, interest, and any late fees imposed on each case within the state.[17]

Effective arrears management requires accurate tracking and management of arrears accumulation. Federal law defines overdue support as "the amount of a delinquency pursuant to an obligation determined under a court order, or an order of an administrative process established under State law."[18] Child support arrears occur when the party ordered to pay periodic support either fails to make any payment or does not pay the entire amount for a designated period.[19] Arrears also can arise when the initial support order contains "support for a prior period" based on the obligor's past income, which may represent recoupment of payments the state made for the care of the child before the entry of the order; retroactive support, such as support back to the date of the child's birth; or a retroactive amount entered at the time the initial support order is established for costs such as genetic test costs or birthing costs. As discussed in

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[13] *See generally* Office of Child Support Enforcement, Managing Child Support Arrears: An Evolving Discussion Framework (July 2013).
[14] *See* OCSE-AT-17-07: Interstate Child Support Payment Processing (July 17, 2017).
[15] 45 C.F.R. § 307.10(b) (2019).
[16] 45 C.F.R. § 307.10(b)(14)(i) (2019).
[17] 42 U.S.C. § 654a(e)(4) (2018).
[18] 42 U.S.C. § 666(e) (2018).
[19] What constitutes a "designated period" for purposes of arrears calculation depends on the language of the support order.

more detail below, arrears may include interest on the unpaid obligation, depending on state or tribal law.

Case Stratification

Using information from automated systems, child support agencies sort cases based on payment status to identify nonpayment as soon as possible. An important tool for this analysis is case segmentation or case stratification. Using this approach at the earliest opportunity, a child support agency researches the caseload to identify the causes of the failure to pay.

Identifying the reasons for nonpayment is a very important step in returning a case to paying status. Early interventions, such as contact with the obligor, are critical in order to obtain current income information and identify any barriers to payment.

Case stratification categorizes obligors into distinct groups, such as those able and willing to pay; those able but unwilling to pay; those not able but willing to pay; and those not able and not willing to pay. For each category, the agency determines specific strategies and best practices for working with the parents.[20] Child support attorneys should participate in the development of such strategies.

Child support agencies can also use case stratification to identify cases with large arrears. They can then determine whether the obligors would benefit from employment outreach, education programs, or debt compromise programs. OCSE has encouraged state child support agencies to be creative in addressing arrears management and reduction, including referrals of delinquent obligors to Fatherhood Initiatives, job skills training, and welfare-to-work programs.[21]

The Role of the Tribunal in Arrears Management

Tribunals also play an important part in arrears management. Retroactive orders, for example, often go back to a child's date of birth, creating an arrearage in an initial order. The longer the period of retroactivity, the less likely that the current obligation or the arrears will ever be fully paid.[22] Orders containing

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[20] *See* Office of Child Support Enforcement, Managing Child Support Arrears: An Evolving Discussion Framework (July 2013).

[21] OCSE has many resources available to assist states with arrears management and case stratification. *See, e.g.*, OCSE-DCL-09-17: PAID In Full Practices Guide #9 (June 5, 2009); Office of Child Support Enforcement, Managing Child Support Arrears: An Evolving Discussion Framework (July 2013). S*ee also* Office of Child Support Enforcement, State Child Support Agencies with Debt Compromise Policies (Mar. 1, 2012); OCSE-IM-12-01: Alternatives to Incarceration (June 18, 2012); OCSE-PIQ-00-03: State IV-D Program Flexibility with Respect to Low Income Obligors (Sept. 14, 2000).

[22] *See* Dep't of Health and Human Services, Office of the Inspector General, The Establishment of Child Support Orders for Low Income Non-custodial Parents, 13 (July 2000), https://oig.hhs.gov/oei/reports/oei-05-99-00390.pdf. ("The longer the time for which non-custodial

"support for a prior period" often cause arrears to accumulate, as does the practice of imputing income and issuing default support orders based on incorrect or past income rather than current information. Child support attorneys can assist child support agencies and tribunals in reviewing state and tribal law to determine how best to avoid the accumulation of arrears.

Interest

Child support payments that become due and unpaid become judgments by operation of law.[23] As judgments, support arrears are entitled to interest in the same manner as other civil judgments, and interest becomes part of the child support obligation.[24] Many states charge interest on past-due child support obligations. They do so to put child support obligations on par with commercial debt. Interest also provides the child a measure of compensation for their loss caused by the tardiness of the child support payments.[25] States that charge interest often base the interest on set rates per year. For example, Colorado charges 12% per year, while Arizona and California charge 10%. In North Dakota, the interest rate is 8% and is equal to the prime rate as published in the Wall Street Journal on the first Monday in December of each year plus three percentage points and rounded up to the next one-half percentage point.[26] States that charge interest typically begin accrual on the day the child support payment becomes due and unpaid.[27]

In some states, the calculation of interest on child support arrears is mandatory,[28] while other states give courts discretion not to award interest if it

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parents are charged retroactive support, the less likely they are to make any payment on their child support order once established.").

[23] Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9103, 100 Stat. 1874, 1973.

[24] *Herzfeld v. Herzfeld*, No. 05-10-01298-CV, 2012 Tex. App. LEXIS 10102, 2012 WL 6061772 (Tex. App. Dec. 6, 2012).

[25] *See In re Giacomini*, 868 A.2d 283, 286 (N.H. 2005) ("Contrary to the respondent's contention that there is a 'punishment component' to 'interest damages,' an award of interest on a judgment already rendered respects first and foremost the time value of money. The time value of money is based upon the premise that its present value will increase over time due to inflation or market forces.").

[26] For a complete list of state policies on interest and interest rates, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Section F, Support Details, questions F.2 and F2.1 (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.

[27] *See, e.g.*, *In re A.L.S.*, 338 S.W.3d 59 (Tex. App. 2011). *Cf. In re Marriage of Westlund,* __ N.E.3d__ (Ill. App. Ct. 2020), 2020 IL App (1st) 190837 (trial court erred by calculating interest from date court issued an order determining total amount of child support arrearage instead of calculating interest beginning 30 days from due date of first unpaid installment as required by statute).

[28] *See, e.g.*, Tex. Fam. Code Ann. § 157.265 (West 2018); Tenn. Code Ann. § 36-5-101(f)(1) (2019). *See, e.g.*, *In re Marriage of Westlund,* __ N.E.3d__ (Ill. App. Ct. 2020), 2020 IL App (1st) 190837; *Bauckman v. McLeod,* 838 S.E.2d 208 (S.C. App. 2019) (family court erred in denying mother interest on child support arrearages because such interest was required as a matter of law even when the pleadings did not request such relief).

would be inequitable to award such interest.[29] A state's automated child support system must be programmed to calculate interest under state law, if applicable, and maintain charges associated with interest. Some state systems may be able to program or add other states' interest rates in their system for individual intergovernmental cases, so interest is automatically calculated on foreign child support orders with arrears.

Since the accrual of interest often contributes to the accumulation of arrears that remain unpaid, child support attorneys should review their state or tribal law regarding interest, as well as agency policy, to determine whether a case qualifies for arrears management and a reduction in accrual of interest on support assigned to the state. Keep in mind that legislation or case law may allow the obligee independently to calculate and seek interest on the child support arrears/judgment owed to the obligee.[30]

Spousal Support

A spousal support order is "a legally enforceable obligation assessed against an individual for the support of a spouse or former spouse who is living with a child or children for whom the individual also owes support."[31] Child support agencies must enforce spousal support orders if the agency is also enforcing a child support order, as long as the spouse is living in the same home with the child or children.[32] Federal funds are not available to establish spousal support orders. Nor are they available to enforce or modify spousal support orders, if there is no accompanying child support obligation.

A foreign country's request for enforcement of spousal support only will be enforced in the United States only in those states and other U.S. jurisdictions that elect to do so.[33] Only the state of Ohio has elected to enforce spousal-only orders for foreign reciprocating countries.[34]

Title IV-D child support agencies are not required to provide services to enforce spousal support only arrears. If the child support portion of an order that includes spousal support ends, it is the state's option as to whether the agency chooses to continue to provide services for the spousal support portion.

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[29] *See, e.g., Gibson v. Gibson*, 211 S.W.3d 601 (Ky. App. 2006); *Howard v. Howard*, 2012 Ky. App. Unpub. LEXIS 662, No. 2011-CA-000930-MR, 2012 WL 4037603 (Ky. App. Sept. 14, 2012).
[30] *See* Va. Code Ann. § 6.2-303 (2019); *Miederhoff v. Miederhoff*, 564 S.E.2d 156 (Va. App. 2002).
[31] 45 C.F.R. § 301.1 (2019).
[32] 45 C.F.R. § 302.31(a)(2) (2019).
[33] 42 U.S.C. § 654(32)(B) (2018). States do not receive FFP for these foreign spousal support cases. *See* OCSE-PIQ-04-01: Processing Cases with Foreign Reciprocating Countries (Mar. 31, 2004).
[34] *See, e.g.,* Ohio Rev. Code Ann. § 3125.05 (2019).

If a child support agency is enforcing a child and spousal support order, the agency is responsible for monitoring payments and calculating arrears for spousal support in the same manner required for child support orders. The same enforcement tools are available for the enforcement of spousal support if it is part of a child support order. Spousal support orders may also be part of the overall case and arrears management strategy.

TRIBAL SUPPORT ENFORCEMENT

Federal Requirements

A tribal child support program is required to include in its Title IV-D plan, "Tribal law, code, regulations and/or other evidence that provides for … [e]nforcement of child support obligations, including requirements that Tribal employers comply with income withholding."[35] If the tribe does not have written laws and regulations governing child support, a tribal child support agency may incorporate detailed descriptions of any tribal custom or traditions that have the force of law.

Other than income withholding, there is no federal requirement for tribes to enact any specific enforcement mechanism. Some tribes have adopted many of the same enforcement tools that are used by states, including the suspension of driver's licenses and fishing licenses.[36] Tribal courts often invoke non-punitive enforcement remedies, such as dispute resolution or admonishment by tribal elders.

Federal regulations require a tribal IV-D plan to indicate whether non-cash payments will be permitted to satisfy support obligations. If so, a tribal order allowing non-cash payments must also state the specific dollar amount of the support obligation and describe the type(s) of non-cash support that will be permitted to satisfy the underlying specific dollar amount of the support order. The tribal IV-D plan must provide that non-cash payments will not be permitted to satisfy assigned support obligations.[37]

Federal regulations detail the income withholding requirements that apply to tribes. Like states, tribes must provide for the following:

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[35] 45 C.F.R. § 309.90(a)(3) (2019). For more information about tribal child support programs, *see* https://www.acf.hhs.gov/css/child-support-professionals/tribal-agencies.
[36] Tribes that suspend driver's and other licenses include the Suquamish Tribe of Port Madison, in Suquamish, Washington, at STC § 9.6.27(g)(2018), the Lummi Nation in Bellingham, Washington, at LCL11.06.140(h) (2008), and the Tulalip Tribe in Tulalip, Washington, at TTC 4.10.380(8) and 4.10.390 (e) (2019).
[37] 45 C.F.R. § 309.105(a)(3) (2019).

- A tribal IV-D order must provide for income withholding as necessary for the obligor to comply with the order;

- There must be an amount withheld for current support, as well as an additional amount toward any arrears;

- The total amount withheld may not exceed the Consumer Credit Protection Act limits, but a tribe may provide for a lower limit;

- Where there is no immediate income withholding, the noncustodial parent is subject to withholding when there is an arrearage equal to one month's amount of support under the tribal support order;

- The tribal IV-D program must use the federal income withholding form;

- Income withholding must comply with the due process requirements of the tribe or tribal organization;

- The tribe must promptly refund amounts that have been improperly withheld and must promptly terminate withholding when there is no longer a current support obligation and all arrears have been satisfied; and

- The employer is liable for any amount not withheld that should have been withheld.[38]

Unlike states, tribes operating a IV-D program are not required to implement immediate income withholding in every order. Although tribal IV-D programs may choose to impose immediate income withholding, the regulations provide tribes flexibility:

> [W]e are persuaded that income withholding may not be appropriate in every circumstance. Many of the comments we received from Tribes indicated that other methods of collecting support owed are more effective than income withholding. In some instances, the noncustodial parent is brought before Tribal elders and asked to explain why child support payments are not being made. This may be enough to get the noncustodial parent to make payments. Therefore, we added language to § 309.110 providing flexibility in this area.[39]

45 C.F.R. § 309.110(h) allows exceptions to income withholding on a case-by-case basis if: (1) either the custodial or noncustodial parent demonstrates and the tribunal finds good cause not to require the income

[38] 45 C.F.R. § 309.110 (2019).
[39] Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638, 16,661 (Mar. 30, 2004).

withholding; or (2) a signed written agreement is reached between the custodial and noncustodial parent that provides for an alternative arrangement and is reviewed and entered into the record by the tribunal.

Where there is no immediate income withholding, the federal regulations provide that the income of the noncustodial parent must be subject to withholding, at the earliest, on the date on which the parent is past-due one month's amount of support.[40]

Federal regulations define income, for purposes of the tribal IV-D program, as "any periodic form of payment due to an individual regardless of source, except that a Tribe may expressly decide to exclude per capita, trust, or Individual Indian Money (IIM) payments."[41] Some tribes that earn income from sources such as gaming, land settlements or claims, or natural resource activities have chosen to distribute a part of that income on a per capita basis to enrolled tribal members. Some tribes allow income withholding from these per capita distributions,[42] while others do not. The response to comments when the regulation was finalized highlights the importance of tribal sovereignty:

> This allows Tribes the flexibility to exclude specific categories of payments from this definition, including per capita payments, trust income, and gaming profit distributions. We have not required Tribes to withhold the Tribal benefits (casino profits, oil, and mineral rights) of obligors. We refer here to the businesses owned by the Tribe and the profits thereof. In respect for Tribal sovereignty, we have determined that it is not appropriate in this regulation to directly affect Tribal management of Tribes' own resources.[43]

Federal regulations do not require tribes to enact the Uniform Interstate Family Support Act (UIFSA) as a condition of receiving federal funds. Employers on tribal reservations are therefore not required to honor a direct income withholding from a state child support agency. However, a tribal child support agency is responsible for receiving and processing income withholding orders

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[40] 45 C.F.R. § 309.110(i) (2019).
[41] 45 C.F.R. § 309.05 (2019).
[42] *See* Nottawaseppi Huron Band of the Potawatomi § 8.17-7. *See also State of North Carolina, ex. Rel. Julia A. Maney v. Billy R. Maney,* CV 99-558, Cherokee Supreme Court Eastern Band of Cherokee Indiana (Cherokee May 27, 2005); *Cutting v. Quidgeon*, No.CV-05-0112, 1 M.C.T.R.33 (Mohegan Tr. Ct. June 21, 2005); *Cramer v. Greene, Jr.,* No. CV-05-0135 (Mohegan Tr. Ct. Nov. 1, 2005) (court ordered withholding from per capita distributions to satisfy child support arrears); *Dallas v. Oneida*, Docket No. 03-AC-027 (Oneida App. Comm. App. Ct., Mar. 24, 2004). *Accord Fort McDowell Yavapai Nation v. Haynes,* No. TR-2002-144 [28] (Yavapai Nation Sept. 19, 2003) (court noted that per capita distributions were forfeited upon arrest for specified criminal offenses and were first subject to "…child support, tribal loans, and any other tribal payments and reimbursements to the Nation…" prior to placement of the forfeited funds in a separate account designated for government programs dealing with the specified crimes).
[43] Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638, 16,661 (Mar. 30, 2004).

from states, tribes, and other entities. The agency must also ensure that withholding orders are properly and promptly served on employers within the tribes' jurisdiction.[44]

Tribes do not currently have a way to submit tribal cases directly to OCSE for federal tax refund offset. Tribes do have the ability, however, to enter into cooperative agreements with states to submit these cases for offset.[45] If a tribe enters into such an agreement with a state, a copy of the agreement must be included in the tribal IV-D plan, and the agreement must state that the tribe will comply with all safeguarding requirements with respect to federal tax refund offset.[46]

Although tribes are not required to enact UIFSA, they are required to follow the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA).[47]

Recognition of Tribal and State Orders

Tribes must recognize valid state support orders, and states must recognize valid tribal orders.[48]

Full Faith and Credit. In 1994, Congress enacted the Full Faith and Credit for Child Support Orders Act (FFCCSOA).[49] It applies to Indian country (as defined by 18 U.S.C. § 1151), states of the United States, the District of

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[44] 45 C.F.R. § 309.110(n) (2019). *See also* Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638, 16,662 (Mar. 30, 2004).
[45] 45 C.F.R. § 309.60(b) and (c) (2019); 45 C.F.R. § 309.145(f) (2019).
[46] *See* OCSE-PIQ-18-03: Federal Tax Refund Offset, Administrative Offset, and Passport Denial for Tribes (Sept. 26, 2018).
[47] Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994), (codified as amended at 28 U.S.C. § 1738B (2018)).
[48] *See Alaska v. Central Council of Tlingit and Haida Indian Tribes of Alaska,* __ P.3d __ (Supreme Court of the State of Alaska Mar. 25, 2016) (A federally recognized Alaska Native tribe adopted a process for adjudicating the child support obligations of parents whose children are members of the tribe or are eligible for membership, and it operated a Title IV-D federally funded child support agency. The Tribe sued the State and won a declaratory judgment that the Tribe's inherent rights of self-governance include subject matter jurisdiction to adjudicate child support for children who are members of the Tribe or eligible for Tribal membership. The order also required the State to treat Central Council's tribal courts and the Tribal Child Support Unit as it would any other state's courts and child support enforcement agency under UIFSA and the regulations connected to Title IV-D. The Supreme Court affirmed, holding that Central Council's tribal courts have inherent sovereign authority to exercise non-territorial subject matter jurisdiction over child support matters and thus are "authorized tribunals" for purposes of UIFSA. The Supreme Court did not address the issue of personal jurisdiction, which it held must be decided on a case by case basis.).
[49] Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994), (codified as amended at 28 U.S.C. § 1738B (2018)).

Columbia, the Commonwealth of Puerto Rico, and U.S. territories and possessions.[50] The Act requires the appropriate parties of such jurisdictions to:

- Enforce, according to its terms, a child support order made consistently with FFCCSOA by a court or an agency of another state [as noted, the Act defines "state" to include "Indian country" as defined by 18 U.S.C. § 1151]; and

- Not seek or make a modification of such an order except in accordance with FFCCSOA.

Therefore, tribes and states must recognize and enforce each other's valid child support orders, i.e., orders entered with appropriate subject matter and personal jurisdiction.[51] There is no federal directive regarding how such recognition must occur. Many tribes use a type of registration process for enforcement purposes under FFCCSOA.

Uniform Interstate Family Support Act. The Uniform Interstate Family Support Act 2008 (UIFSA) defines a "state" as "a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession under the jurisdiction of the United States. The term includes an Indian nation or tribe."[52] Although UIFSA includes tribes within the definition of "state," there is no federal requirement that a tribe enact UIFSA as a condition of receiving Title IV-D funds.

Jurisdiction to Enforce

Cases involving enforcement of child support orders often raise jurisdictional issues between tribal and state courts. State and tribal child support attorneys should be familiar with the appropriate analysis to determine jurisdiction.[53] Attorneys also need to be conscious of license to practice law issues. An attorney is not able to participate in a legal proceeding in a state or tribal court unless the attorney has met that forum's requirements for admission or a limited appearance.[54]

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[50] *See* OCSE-AT-02-03: Applicability of the Full Faith and Credit for Child Support Orders Act to States and Tribes (May 28, 2002).
[51] *See also* 45 C.F.R. 309.120(b) (2019). *See, e.g., Hanson v. Grandberry*, Puyallup Tribal Court (No. CV 98-004 June 8, 1999) (http://www.Tribal-institute.org/opinions/1999.NAPU.0000008.htm). *See also Smith v. Hall*, 707 N.W.2d 247 (N.D. 2005).
[52] Uniform Interstate Family Support Act § 102(26) (2008).
[53] *See* OCSE-IM-07-03: Tribal and State Jurisdiction to Establish and Enforce Child Support (2007).
[54] *See, e.g.,* Application for Admission of Licensed Attorney to Practice before the Mashantucket Pequot Tribal Court, http://www.mptnlaw.com/docs/LICENSED%20ATTORNEY%20BAR%20APPLICATION%2012-2012.pdf (last visited Feb. 7, 2021); Attorney Application for Certificate of Practice for Shoshone

Tribal child support attorneys who want the assistance of a state child support agency in enforcing a tribal order can seek registration of the order for enforcement under UIFSA. Because UIFSA defines "State" to include Indian tribes, a support order issued by a tribe is enforceable in the state as soon as it is registered for enforcement; there is a presumption that the registered order is valid. If the obligor wishes to challenge the validity of the registered order, they must do so within the 20-day time limit for raising a challenge. If there is no timely challenge to the registration, the tribal order and stated arrears will be confirmed. The state agency can enforce the order available under state law.

State child support attorneys who want the assistance of a tribal child support agency in enforcing a state order can forward the order to the tribal agency and request recognition of the order pursuant to FFCCSOA. The tribal agency will comply with tribal law concerning recognition of a foreign order. After a tribal tribunal recognizes the state support order, a tribal child support attorney can then seek enforcement of the order and arrears pursuant to tribal law.[55]

Sometimes the receipt of tribal benefits will impact the state enforcement of a state support order. A Florida court held that the noncustodial parent was not required to pay child support because the custodial parent and the children, who were all enrolled members of the Seminole Tribe of Florida, had received substantial per capita payments from the tribe as well as other benefits such as free health care.[56]

SPECIFIC ENFORCEMENT REMEDIES

There are many different enforcement remedies available to state child support agencies, but not available to private parties, private attorneys, or tribes. Many remedies are mandatory and can be automated within the child support agencies' statewide computer systems. Where an agency has discretion to use a remedy, the enforcement method used in a particular case will depend on the facts of the case.

The child support attorney can help the child support agency develop policies and procedures regarding the most appropriate enforcement remedy for various types of cases. The attorney can also assist in the child support agency's

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and Arapaho Tribal Court, https://www.windrivertribalcourt.com/admission-to-practice/ (last visited Feb. 7, 2021).

[55] *See generally* Native American Rights Fund, National Indian Law Library, https://www.narf.org/nill/resources/index.html (last visited Feb. 7, 2021). For more information about tribal and state jurisdiction in enforcement scenarios, *see* Chapter Thirteen: Intergovernmental Child Support Cases.

[56] *Cypress v. Jumper*, 990 So. 2d 576 (Fla. Dist. Ct. App. 2008). *See also* Marsha A. Zug, *Dangerous Gamble: Child Support, Casino Dividends, and the Fate of the Indian Family*, 36 Wm. Mitchell L. Rev. 738 (2010) (arguing that the holding in the *Cypress* case sets a dangerous precedent and harms Indian families).

review of the facts of a particular case, can provide input on the most appropriate use of state or tribal law, and can help determine the most effective enforcement remedy. This is especially important in cases of domestic violence or where there is a safety risk. In such cases, the attorney should also consult with the obligee to determine the risk involved based on the use of a discretionary enforcement option. If the case is in court or before an administrative tribunal and the attorney has conducted discovery, information about the obligor's employment history and assets can further inform the enforcement strategy.[57]

Income Withholding

In federal fiscal year 2019, collections from income withholding represented approximately 72% of total child support payments.[58] Thus, income withholding is by far a child support agency's most effective enforcement remedy.

Legislative history. Although traditional wage garnishment orders were used for many years, garnishments sometimes required the consent of the obligor and were temporary in nature. The Child Support Enforcement Amendments of 1984[59] introduced the concept of implementing income withholding, for all cases, on the date when the noncustodial parent has failed to make payments equal to the amount of support due for one month. That law provided for advance notice to the noncustodial parent prior to implementation of the withholding and the opportunity for a mistake of fact hearing.[60] The Family Support Act of 1988[61] took income withholding a step further by making income withholding mandatory for all child support orders, regardless of whether support payments on the case were in arrears. The law still allowed for an exception to immediate income withholding for "good cause" or where parties had a written agreement providing for alternative arrangements.[62]

PRWORA extended income withholding to all child support orders, without the need for additional administrative or judicial action, whether or not an arrearage existed.[63] It broadened the definition of income for withholding purposes to include "any periodic form of payment due to an individual,

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[57] For more information, *see* Chapter Four: Ethical and Regulatory Requirements Governing Attorneys in the Child Support Program and Chapter Five: Location of Case Participants and Their Assets.
[58] See Office of Child Support Enforcement, Preliminary Report FY 2019, Table P-28 and Table P-29.
[59] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305.
[60] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 3(b), 98 Stat. 1305, 1308 (codified at 42 U.S.C. § 666(b)(4)(A) (2018)). *See also* 45 C.F.R. § 303.100(d) (2019).
[61] Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343.
[62] Family Support Act of 1988, Pub. L. No. 100-485, § 101, 102 Stat. 2343, 2344 (codified at 42 U.S.C. § 666(a)(8)(B)(i) (2018)). *See also* 45 C.F.R. § 303.100(b) (2019).
[63] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 314, 110 Stat. 2105, 2212 (codified at 42 U.S.C. § 666(a)(8)(B) (2018)). *See also* 45 C.F.R. § 303.100(g) (2019).

regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest."[64] PRWORA also required states to grant administrative authority for the child support agency to initiate income withholding.

PRWORA also required states, as a condition of receiving federal funds, to enact UIFSA[65] and its direct income withholding provision. Under UIFSA, an income withholding notice/order can be sent directly to an employer in another state, without involving a tribunal or the child support agency in the second state[66] and without regard to whether the employer does business in the state that issued the notice/order.

In IV-D cases where income withholding is not immediate, including those cases where the order predates the statutory date of November 1, 1990, and those cases subject to a court's finding of good cause or to a written agreement, an income withholding must be initiated when the arrears owed is at least equal to one month's support amount. Additionally, the noncustodial parent can request that income withholding be initiated earlier, or the child support agency can determine, after a request from the custodial parent, that income withholding would be appropriate.[67]

In cases where income withholding is not immediate, the noncustodial parent is entitled to notice regarding the commencement of the withholding; the amount of overdue support, if any; the amount of income to be withheld; that the withholding is binding not only on the current employer but on all subsequent employers; the right to contest the withholding; and the information necessary for the employer to begin withholding. Should the noncustodial parent wish to contest the withholding, the only issue that the tribunal can consider is a mistake of fact (i.e., an incorrect amount or incorrect individual).[68]

Federal Consumer Credit Protection Act. The Federal Consumer Credit Protection Act (CCPA) limits the amount that can be withheld from an individual's disposable earnings.[69] It is important to note that the CCPA applies to employers and that payment to non-employees, such as independent

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[64] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 314(b), 110 Stat. 2105, 2212.
[65] *See* Unif. Interstate Family Support Act (2008), https://www.uniformlaws.org/viewdocument/final-act-with-comments-120?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb&tab=librarydocuments (last visited Feb. 7, 2021).
[66] For more information about UIFSA and direct income withholding, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[67] 45 C.F.R. § 303.100(c) (2019).
[68] 45 C.F.R. § 303.100(d) (2019).
[69] Consumer Credit Protection Act, Pub. L. No. 90-321, § 303, 82 Stat. 146, 163 (1968), as amended by the Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501(e), 91 Stat. 126, 161 (codified at 15 U.S.C. § 1673(b) (2018)).

contractors, are not covered by this act. The CCPA defines earnings as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." It goes on to define disposable earnings as "that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld."[70] Required deductions typically include state, federal, local, Social Security, and Medicare taxes.[71] Courts have addressed the issue of multiple withholding orders and the contrast between garnishment limits under state law and limits under the CCPA.[72]

Under the CCPA, the total amount withheld from disposable earnings for both current support and arrears cannot exceed specified limits. Federal law provides that if the arrears are owed for 12 weeks or more, withholding is limited to:

- 55% of the individual's disposable earnings if the individual is supporting another spouse or other dependents; or
- 65% of the individual's disposable earnings otherwise.[73]

If there are no arrears, or if arrears are owed for less than 12 weeks, withholding is limited to:

- 50% of the individual's disposable earnings if the individual is supporting another spouse or other dependents; or
- 60% of the individual's disposable earnings otherwise.[74]

The Office of Management and Budget (OMB)-approved standard income withholding form, discussed below, contains a notice to the employer/income withholder describing the CCPA restrictions on the amounts that may be withheld, including any fees.[75] Note that a child support order may exceed the CCPA limit for a particular individual, but this does not affect the employer's obligation to adhere to federal law regarding the CCPA limits. If the CCPA limits restrict how much an employer can withhold, arrears will continue to accrue unless the individual pays the difference out of other funds.[76] Attorneys should

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[70] Consumer Credit Protection Act, Pub. L. No. 90-321, § 302(a), (b), 82 Stat. 146, 163 (1968).
[71] *See, e.g.*, *White v. White*, 878 N.E.2d 854 (Ind. App. 2007).
[72] *See, e.g.*, *McNabb v. State ex rel. Rhodes*, 890 So. 2d 1038 (Ala. App. 2003) (where four withholding orders existed, the total withheld was limited by the CCPA, not a state statute with a lower threshold).
[73] 15 U.S.C. § 1673(b)(2) (2018).
[74] *Id*.
[75] 42 U.S.C. §§ 666(a)(8)(B), 666(b)(6)(A)(ii) (2018).
[76] *See Cramblett v. Cramblett*, 2006 Ohio 4615, 2006 Ohio App. LEXIS 4578 (Ohio App. Sept. 1, 2006) (although the court reversed the trial court and remanded the case because it did not have enough information on the noncustodial parent's disposable income, the Court of Appeals held

also check their jurisdiction's statutes and case law because some states prohibit the attachment of direct deposited earnings if the employer has already garnished disposable earnings up to the CCPA limits.[77]

The Department of Labor (DOL) addressed the question of whether 18 specific types of lump sum payments by employers to employees are considered earnings for garnishment purposes.[78] The DOL opinion notes: "The fact that lump-sum payments may occur only occasionally or one time does not alone render them outside the scope of earnings under the CCPA. Indeed, bonuses are often infrequent or given only one time, but the statute plainly includes them as earnings. 15 U.S.C. § 1672(a). Thus, the compensatory nature of the payment, i.e., whether the payment is for services provided by the employee, rather than the frequency of the payment, is determinative under 15 U.S.C. §1672(a)."

DOL concluded that three types of lump sum payments from employers to employees are not considered earnings for garnishment or income withholding purposes: 1) buybacks of company shares, 2) worker's compensation for medical reimbursement, and 3) wrongful termination insurance settlements for compensatory and punitive damages. Because they are not considered earnings, the CCPA limits do not apply; an employer can withhold 100% of a lump sum that is not subject to the CCPA limits.[79] However, all the other 15 specified lump sum payments by employers are considered earnings and therefore subject to the CCPA withholding limits. Note: Child support attorneys should check their jurisdiction's statutes and case law; although DOL does not consider the three types of lump sum payments as earnings subject to the CCPA limits, some jurisdictions may prohibit their garnishment or attachment.

OMB-approved standard income withholding form. Most of the success of income withholding is due to a standard form that must be used to enforce "all child support orders which are initially issued in the State on or after January 1, 1994."[80] OCSE first promulgated the form in 1998 as a result of PRWORA. It has revised the form periodically since that time.[81]

The OMB-approved Income Withholding Notice/Order (IWO) form is valid throughout the U.S. and its territories; it must be used by all entities including

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that the CCPA does not put limits on the amount of support that can be ordered, but only limits the amount that can be withheld).

[77] *See* Va. Code Ann. § 34.32 (2019).

[78] Dept of Labor, Advisory Opin. CCPA2018-1NA (Apr. 12, 2018). *See also* OCE-IM-18-06: DOL Opinion on Consumer Credit Protection Act and Lump Sum Payments (May 2, 2018).

[79] *See* Office of Child Support Enforcement, Bonus/Lump Sum Reporting – Answers to Employers' Questions (Feb. 5, 2019).

[80] 42 U.S.C. §§ 666(a)(8)(B), 666(b)(6)(A)(ii) (2018).

[81] This form is OMB 0970-0154. The most recent version was distributed to child support agencies via OCSE-AT-20-13: 2020 Revisions to the IWO Form and Instructions (Oct. 1, 2020). The forms and instructions may also be accessed through the OCSE forms page, https://www.acf.hhs.gov/css/form/income-withholding-support-iwo-form-instructions-sample.

state, tribal, and territorial child support agencies, courts, tribunals, attorneys, and private individuals.[82] The form may not be altered by any entity and all text must appear in the same order as that of the OMB-approved form. All employers and income withholders must honor the IWO, as long as it is regular on its face. Instructions to the form identify when the IWO must be rejected and returned to the sender. Examples include if the IWO directs payments to be sent to an entity other than a state disbursement unit; if the form is altered or contains invalid information; if the amount to withholding is not a valid amount; and if a copy of the underling order is required and not included.[83] The IWO contains certain basic information, such as:

- The names of the parties and the child;
- The name, address, and federal tax identification number of the employer or income withholder;
- Remittance information;
- A statement that the amount withheld, including fees, may not exceed the limit set by the federal Consumer Credit Protection Act;[84]
- An indication whether this notice is announcing the beginning of withholding, a change of the amount being withheld, or the end of withholding;
- The amount to withhold for current support, past-due support, medical support, and/or other specified amounts;
- The amount to prorate withholding for different pay frequencies;
- A statement that for tribal orders, the amount that can be withheld cannot exceed the amount allowed under the law of the issuing tribe; and
- Additional information about withholding priorities, combining payments, reporting the withholding date, withholding for an employee

[82] 45 C.F.R. § 303.100(e) (2019); 45 C.F.R. § 309.110(l) (2019). *See also* OCSE-AT-20-13: 2020 Revisions to the IWO Form and Instructions (Oct. 1, 2020)
[83] *See* OCSE-AT-20-13: 2020 Revisions to the IWO Form and Instructions (Oct. 1, 2020) For non-IV-D orders, the SDU only accepts and processes payments, providing a record of payments to interested parties, i.e., no enforcement remedies are taken.
[84] 15 U.S.C. § 1673(b) (2018). The federal limit is 50% of the disposable earnings if the obligor is supporting another family and 60% of the disposable earnings if the obligor is not supporting another family. However, those limits increase by 5% – to 55% and 65% – if the arrears are greater than 12 weeks.

with multiple orders, procedures in the event of employee termination, lump sum payments, liability, and anti-discrimination.

Compliance with Income Withholding Notice/Order. Employers or other income withholders who receive an IWO are required to comply with the terms on the form.[85] This includes information on procedures an income withholder should use when receiving multiple income withholding notices/orders for an employee with multiple support orders. In this situation, an employer must honor all orders to the greatest extent possible, giving priority to current support over payments on arrears and complying with the limits of the CCPA.[86] If the required support amounts are greater than the amount of income available to fully comply with all orders, state or tribal law determines how the available amount should be allocated.[87]

There is an exception to the requirement that an employer withhold earnings upon receipt of an IWO. If support – current and/or arrears – is required to be withheld from retirement earnings managed by an employer retirement plan under the Employee Retirement Income Security Act of 1974 (ERISA),[88] the ERISA plan administrator may reject an IWO. When that happens, the child support agency may need to seek assistance from the child support attorney, as a Qualified Domestic Relations Order (QDRO) is required to access the parent's retired income.[89] Preparation of a QDRO requires obtaining the mandatory plan specifications and preferred model plan format from the plan administrator, drafting the documents precisely to the plan requirements, and obtaining the plan administrator's pre-approval of the QDRO. This is done before the QDRO is submitted to the appropriate court for approval. Once approved by the court, the QDRO is then submitted to the administrator for processing against the parent's retired earnings. The QDRO may attach earnings for child and spousal support and arrears and is effective upon approval by the plan administrator. It is prospective only. Because employees may retire without notice to the dependents, it is wise for the child support attorney to enter a QDRO as quickly as possible, so that when retiree benefits begin, dependents receive payments of current support and any arrears owed.

With the exception of drafting a QDRO, where needed, child support attorneys are usually not involved with income withholding since it is an automated process. Even if there is an employee challenge based on mistake of fact, most states resolve the challenge through administrative proceedings. If state law allows an appeal from the administrative decision to a court or tribunal,

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[85] *See In re Marriage of Hundley*, 125 N.E.3d 509 (Ill. App. 2019) (employer is not allowed to challenge the validity of the underlying order. Nor can the employer challenge whether the support amount is correct; only the obligor can raise that challenge.).
[86] *See* OCSE-AT-20-13: 2020 Revisions to the IWO Form and Instructions (Oct. 1, 2020).
[87] *See, e.g.,* Colo. Rev. Stat. § 14-14-111.5(6)(b) (2019); Tex. Fam. Code Ann. § 8.207 (West 2018).
[88] Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001 – 1461 (2018)).
[89] *See* 26 U.S.C. § 414(p) (2018).

child support attorneys may be required to defend the agency action. Child support agencies usually also seek attorney assistance when an employer fails to comply with an income withholding form or illegally discriminates against an employee because of income withholding. An agency may also seek help from its attorneys if the withholding is against income that is not considered earnings.

National and State Directory of New Hires. The most critical step in automating income withholding was the establishment of a State Directory of New Hires (SDNH) in each state[90] and the National Directory of New Hires (NDNH).[91] Established by PRWORA, the NDNH accepts reports from employers, via the SDNH, on each newly hired or re-hired employee. These reports contain the employee's name, address, and Social Security number; date that the employee first performed work for pay; and the employer's name, address, and federal tax identification number. PRWORA requires that employers report such information within 20 days of the hire date;[92] however, some states may have shorter timeframes.

Employers report this information to the state, which has five business days to enter the information into the SDNH. The state child support agency runs a match between SDNH data and information in the State Case Registry (SCR)[93] to determine whether an individual has a child support order.[94] After a match occurs, the state has two business days to issue an automated income withholding to the employer and three business days to report the information to the NDNH.[95]

Withholding from government benefits. Federal law requires all states to include worker's compensation and disability payments within the definition of income subject to withholding.[96] Many states include other government benefits as well. Child support attorneys should be familiar with their jurisdiction's definition of income for withholding purposes to advise the child support agency on the correct procedures to follow for withholding against a government benefit.

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[90] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 313, 110 Stat. 2105, 2209 (codified at 42 U.S.C.S. § 653a (2018)).
[91] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 316(i), 110 Stat. 2105, 2216 (codified at 42 U.S.C. § 653(i) (2018)).
[92] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 313(b), 110 Stat. 2105, 2209 (codified at 42 U.S.C.S. § 653a (2018)).
[93] A State Case Registry is a database that each state must maintain. It contains certain required data elements for every case within that state's statewide automated system. *See* 42 U.S.C. § 654a(e)(1) (2018).
[94] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 316, 110 Stat. 2105, 2216 (codified at 42 U.S.C. § 653a (2018)).
[95] 42 U.S.C. § 653a(f), (g) (2018).
[96] *See* 42 U.S.C. § 666(b)(8) (2018).

Attorneys should also be familiar with which federal benefits are ***not*** subject to withholding.[97]

Unemployment compensation. In cases with child support arrears, federal law requires intercepting or seizing periodic or lump sum payments from benefits, including unemployment compensation.[98] Regulations also require child support agencies to work with the State Workforce Agency (SWA)[99] in their state to identify individuals who have applied for or are receiving unemployment benefits and who have child support obligations.[100] The regulations further require a state child support agency to enter into a written agreement with the SWA in its state regarding the withholding of unemployment compensation due individuals who have unmet child support obligations being enforced by the child support agency.[101]

Many states accept withholding orders for unemployment benefits directly from other jurisdictions.[102] Other states have fully automated their process for unemployment withholding within their statewide automated system, requiring another jurisdiction to send a limited services withholding order to the child support agency for entry into its automated system.[103] Still other states require the opening of an intergovernmental case.[104] Federal regulations require each child support agency to take action, in conjunction with its SWA, to support and facilitate the two-state enforcement approach.[105]

When collecting arrears that are due to the state, a state cannot suspend withholding from unemployment benefits when the obligor is receiving that income because of a public health crisis.[106] However, federal law allows that state to reach an agreement with the obligor to have specified amounts withheld from the unemployment compensation otherwise payable to such individual and to submit a copy of the agreement to the state agency administering the unemployment compensation law.[107] In the absence of an agreement, the law

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[97] *See* OCSE-PIQ-09-01: Garnishment of Federal Payments for Child Support Obligations (Aug. 25, 2009) and related chart.
[98] 42 U.S.C. § 666(c)(1)(G)(i)(I) (2018).
[99] These agencies were previously known as State Employment Security Agencies.
[100] 45 C.F.R. § 302.65(c) (2019).
[101] 45 C.F.R. § 302.65(b) (2019).
[102] States accepting direct income withholding against unemployment benefits include Georgia, Indiana, Massachusetts, Michigan, Minnesota, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, and Wisconsin.
[103] States with fully automated processes for withholding from unemployment benefits include Arizona, Mississippi, and Texas.
[104] For more information about intergovernmental cases, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[105] 45 C.F.R. § 302.65(c)(5) (2019).
[106] Office of Child Support Enforcement, COVID-19: Frequently Asked Questions for Child Support Programs.
[107] 42 U.S.C. § 654(19) (2018).

requires the initiation of legal process to withhold support from the unemployment compensation.

Worker's compensation benefits. Federal law includes worker's compensation benefits in the definition of "income" for purposes of income withholding.[108] States must withhold support from worker's compensation benefits that an obligor may receive. Many states permit income withholding orders for worker's compensation benefits to be sent directly to the state Worker's Compensation Department or to the insurer issuing the payments, while other states require a two-state process.[109] As noted earlier, worker's compensation for medical reimbursement is not considered earnings subject to CCPA limits.[110] Therefore, an employer may withhold 100% of such payments if needed to comply with a child support order.

Social Security benefits. Generally, Social Security Disability Insurance (SSDI) payments are not subject to attachment or other legal process.[111] There is an exception for child support. SSDI benefits are subject to income withholding or other legal process for child support because the benefits are based on remuneration for employment.[112] Child support workers can access the State Verification and Exchange System (SVES) database to identify obligors who are receiving SSDI benefits to initiate income withholding.

In addition to monthly benefits, the Social Security Administration will often issue a retroactive lump sum retirement or disability benefit payment to a recipient. The payment relates back to the date of the application and approval for monthly benefits. If the recipient or the other parent has applied for an SSDI benefit for a dependent child of the obligor at or during the pendency of the obligor's application, that child will also receive a retroactive lump sum payment, as well as an ongoing monthly benefit. Some courts credit the arrears of an obligor by the amount of the retroactive lump sum paid to the obligor's dependent child[113] Courts have also addressed the issue of a credit when there is no

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[108] 42 U.S.C. § 666(b)(8) (2018).
[109] The majority of- states permit direct income withholding of Worker's Compensation benefits. For a complete list of state responses to this question, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Section G, Income Withholding, question G9 (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.
[110] *Supra*, notes 78 and 79.
[111] 42 U.S.C. § 407(a) (2018).
[112] 42 U.S.C. §§ 659(a), (h)(1)(A)(ii)(I) (2018); 5 C.F.R. § 581.103(c)(1) (2019).
[113] *See, e.g., Brown v. Brown*, 849 N.E.2d 610 (Ind. 2006) (a noncustodial parent was entitled to credit for a retroactive lump sum payment made to the child, if a modification of the ongoing support was pending during the social security application process); *Scott v. Scott*, 810 S.E.2d 439 (S.C. Ct. App. 2018) (family court did not err in refusing to apply the child's excess Social Security benefits to the father's pre-disability arrearage and in crediting him for the lump-sum payments when it dismissed all of his arrearage that accumulated after the date he was deemed disabled).

arrearage.[114] Child support attorneys should check their jurisdiction's statutes and case law.

When a child receives SSDI benefits due to a parent's disability, these are called derivative benefits. State law and courts vary in the impact of such benefits against an obligor's support obligation. A child's receipt of SSDI derivative benefits factors into many child support guidelines and thus impacts the initial establishment or modification of a support award. For example, when a child receives SSDI derivative benefits due to the obligor's disability, and the obligor has a support obligation, most state child support guidelines that expressly address such benefits include those payments made to the child as income to the obligor. The rationale is that the Social Security benefits paid to the child represent substituted income that is otherwise due to the disabled obligor. In turn, these states give the obligor a dollar-for-dollar credit for the SSDI derivative child benefits against the obligor's support obligation. The rationale is that, because the benefits represent substitute income, they are also substitute support.[115]

Where the SSDI derivative child benefit exceeds the disabled obligor's support obligation, state support guidelines take various approaches. Many provide that the support obligation is set at zero dollars,[116] and any "excess" SSDI derivative benefit continues to go to the custodial parent for the child's benefit. In addition, a few states have express language providing that the dependent benefits cannot be applied toward future support obligations or reimbursed to the obligor.[117]

Sometimes the child support guidelines also address the impact of SSDI derivative benefits on arrears. A few states have express language providing that the benefits cannot be used as a credit against any arrears owed by the disabled

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[114] *See, e.g., Y.H. v. M.H.*, 235 Cal. Rptr. 3d 663 (Cal. Ct. App. 2018) ("If we were to limit a payor's credit entitlement to only situations of 'unpaid support,' we would encourage disabled payors who nonetheless have the ability to pay support, to terminate child support payments in anticipation that potential future social security disability payments will eventually make up the shortfall. That would leave the child without child support during this interim."); *In re Marriage of Stephenson and Papineau*, 358 P.3d 86 (Kan. 2015) (in reversing the Court of Appeals decision, the Kansas Supreme Court held that the district court erred in not recognizing its discretion to grant a credit to a child support obligor who is current on child support when a lump-sum payment of accumulated social security disability insurance derivative benefits duplicates the obligor's support payment.). *See also Rathbone v. Corse,* 124 A.3d 476 (Vt. 2015) (crediting social security disability insurance derivative benefits against past child support obligations – applying the credit retroactively – is not the same as retroactively modifying them in violation of 42 U.S.C. § 666(a)(9)(c) (2018).

[115] *See, e.g.,* Idaho R. Fam. L.P. 126; Va. Code Ann. § 20-108.2(C) (2019).

[116] *See* D.C. Code § 16-916.01 (2020).

[117] *See* Ariz. Child Support Guidelines (26)(b) (S. Ct. Order 2018-08); Idaho R. Fam. L. P. 126(F); Md. Code Ann., Fam. Law § 12-204(j)(2)(ii) (2019); Mont. Admin. R. 37.62.144(1)(b) (2020); N.D. Admin. Code § 75-02-04.1-02(10) (2019).

obligor.[118] In contrast, some states expressly provide that the benefits may be used as a credit against child support arrears.[119] Some states provide that the excess cannot be used as a credit against any arrears that accrued prior to the parent's disability, but may be used as a credit against any arrears that accrued subsequent to the date of the parental disability.[120] A few states also address the crediting of SSDI derivative child benefits against arrears where there is a modification pending due to the disability.[121]

Because of the variances in state law and court decisions, it is important for child support attorneys to know how their jurisdiction treats SSDI derivative benefits and lump sum payments made to the child, or to the obligee on behalf of the child, with regard to an obligor's support obligation and arrears.

In contrast, Supplemental Security Income (SSI) benefits are not attachable for child support purposes. Federal law and regulations specifically prohibit withholding of this income, due to its nature as a means-tested benefit, not one based on remuneration for employment.[122] This prohibition continues even after the benefits are deposited into the recipient's bank account. Sometimes a disabled obligor receives concurrent SSI and either SSDI or SSR benefits under Title II because the obligor qualifies for the means-tested SSI benefit on the basis of their income and assets, but also qualifies for the SSDI or SSR benefits because of employment credits. Because the obligor meets the SSI means-tested criteria and receives the same benefit amount as a SSI beneficiary, a child support agency is not allowed to garnish the SSDI or the SSR portion of the benefit from the obligor's financial account.[123] However, if an

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[118] See Ariz. Child Support Guidelines (26)(b) (S. Ct. Order 2018-08); Ga. Code Ann. § 19-6-15(f)(3)(D) (2019); Mont. Admin. R. 37.62.144(1)(b); Okla. Stat. tit. 43, § 118B(G)(3)(b) (2019); Tenn. Comp. R. & Regs. 1240-2-4-.04(3)(a)(5)(iii)(II) (2019).

[119] *See* Va. Code Ann. § 20-108.2(C) (2019). *See also Mosley v. Mosley*, 520 S.E.2d 412 (Va. App. 1999) (after reviewing Virginia law on SSD derivative benefits, court denied father current or future credits against spousal support arrears for social security benefits that exceeded his child support obligation).

[120] *See* Ky. Rev. Stat. Ann. § 403.211(15) (West 2019); Md. Code Ann., Fam. Law § 12-204(j)(2)(i) (2019).

[121] The District of Columbia guidelines provide: "If the judicial officer finds that SSDI derivative benefits were paid to a child subject to the support order prior to the filing of the petition to establish or motion to modify child support, these benefits shall be credited toward any retroactive child support or accumulated arrears owed pursuant to the support order." D.C. Code § 16-916.01 (2020). In contrast, Oklahoma leaves it to the court's discretion to determine if, under the circumstances of the case, it is appropriate to credit social security benefits paid to the custodial person prior to a modification of child support against the past-due child support obligation of the noncustodial parent. Okla. Stat. tit. 43, § 118G (2019).

[122] 42 U.S.C. § 407(a) (2018); 42 U.S.C. § 659(h)(2) (2018); 5 C.F.R. § 581.104(j) (2019). *See also* OCSE-DCL-13-06: Garnishment of Supplemental Security Income Benefits (Feb. 27, 2013).

[123] 45 C.F.R. § 307.11(c)(3)(i) (2019), and technical amendments to the "Flexibility, Efficiency, and Modernization in Child Support Final Rule" to include noncustodial parents who receive concurrent SSI and SSR benefits within 45 C.F.R. § 307.11(c)(3)(i), 85 Fed. Reg. 35,201, 35,208 (June 9, 2020).

obligor only receives an SSDI or SSR benefit, the state may continue to garnish these benefits.[124] If the state is unable to obtain information regarding concurrent SSI/SSDI or SSI and SSR benefits in advance and inappropriately garnishes the disabled obligor's benefits from the obligor's financial account, the system must return these funds to the obligor within five business days after the child support agency determines there has been an incorrect garnishment.[125] Federal regulations give states the option to prevent garnishment of the concurrent SSI and SSDI or SSR payments through an income withholding order and return funds incorrectly withheld in accordance with 45 C.F.R. § 303.100(a)(8) when deemed appropriate. According to OCSE's response to comments, this optional provision gives states "flexibility regarding concurrent SSI and SSDI or SSR benefits in cases involving noncustodial parents living at or below the subsistence level."[126]

While some earlier courts allowed SSI to be used in the calculation of child support, these cases have been criticized, and the majority view is that SSI payments should not be considered income in calculating a child support award.[127] These courts have held that SSI is a form of public assistance intended to protect the recipient from poverty.[128]

Electronic Income Withholding Order (e-IWO). An automated way for states to send income withholding orders to employers is through the electronic income withholding order (e-IWO) process using OCSE's portal. Employers may acknowledge receipt of the e-IWO and inform state agencies of upcoming bonus payments and terminations of employment. States are required to transmit income withholding orders using electronic means when requested by the employer.[129]

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[124] 85 Fed. Reg. 35,201, 35,205 (June 9, 2020).
[125] 45 C.F.R. § 307.11(c)(3)(ii) (2019), and technical amendments to the "Flexibility, Efficiency, and Modernization in Child Support Final Rule" to include noncustodial parents who receive concurrent SSI and SSR benefits within 45 C.F.R. § 307.11(c)(3)(ii), 85 Fed. Reg. 35,201, 35,208 (June 9, 2020).
[126] 85 Fed. Reg. 35,201, 35,205 (June 9, 2020).
[127] *See, e.g.*, *Watrous v. Watrous*, No. FA044000497S, 2009 WL 2450738 (Conn. Super. Ct. 2009) (when noncustodial parent receives SSI, the court cannot deviate from the guidelines based on the best interest of the child to order SSI income to be used to pay support); *Burns v. Edwards*, 842 A.2d 186 (N.J. Super. Ct. App. Div. 2004). *But* s*ee Bailey v. Fischer*, 946 So. 2d 404 (Miss. Ct. App. 2006) (SSI can be considered as part of a child support order when the parties have an agreement to do so).
[128] *See also Macarro v. Giardino*, 767 A.2d 720 (Conn. 2001); *State of Kansas ex rel. Sec'y, Kansas State Dep't of Social and Rehab. Servs. v. Moses*, 186 P.3d 1216 (Kan. App. 2008) (trial court did not abuse its discretion when it terminated the noncustodial parent's child support obligation because his only income was SSI).
[129] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 306, 128 Stat. 1919, 1949 (2014).

EFT/EDI payment processing. States often require that payments processed through the SDU be sent to the intended recipient electronically. This method of payment requires a recipient to provide an account number for a financial institution where the payment will be deposited. If a recipient does not have a financial institution account, states usually provide a debit card to which the agency deposits support payments. Child support agencies using EFT/EDI payment processing usually do so for intergovernmental, as well as intrastate, cases because it ensures that payments reach families more quickly.[130]

Defense Finance and Accounting Service. The Defense Finance and Accounting Service (DFAS) is an agency of the United States Department of Defense under the direction of the Under Secretary of Defense. DFAS processes the pay for military members of the Army, Navy, Air Force, and Marines who are on active duty, in the reserves, and retired from the military. It also processes the pay for civilian DoD employees[131] and members of the National Guard who have been activated into federal service.[132] The Coast Guard processes its own payroll for active duty, reservists, and retired members. In most support enforcement cases involving a military member, the child support agency should send the OMB-approved *Income Withholding Order/Notice for Support* to the appropriate payroll office. Note that DFAS is able to receive electronic income withholding orders and send withheld earnings electronically (EFT); all state child support agencies are processing withholdings in that manner.[133] DFAS also processes income withholding orders directed to several civilian federal agencies. These agencies include the Department of Defense, Department of Energy, Department of Health and Human Services, Department of Veterans Affairs, and the Broadcasting Board of Governors.[134] The same statutory CCPA limits and exemptions apply to withholding from military earnings.

Income withholding in intergovernmental cases. Income withholding is an effective enforcement tool for intergovernmental child support cases. There are two income withholding options in the intergovernmental context: interstate income withholding in the traditional two-state case and direct income

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[130] *See* Office of Child Support Enforcement, SDU and State EFT Contacts and Program Requirements Matrix (Aug. 17, 2020).
[131] Note that civilian retirement pay is processed by the Office of Personnel Management (OPM) and not DoD/DFAS.
[132] DFAS maintains a website with information regarding its services at https://www.dfas.mil/ (last visited Feb. 6, 2021). It includes information on child support garnishments.
[133] For more information on child support cases involving military or veteran obligors, *see* Chapter Fourteen: Military Parents.
[134] *See* Defense Financing and Accounting Service, https://www.dfas.mil/ (last visited Feb. 6, 2021). For a complete list of contact and address information of federal agencies for income withholding orders and medical support notices, *see* Office of Child Support Enforcement, Federal Agency Income Withholding and Medical Support Contact Information (Jan. 15, 2019).

withholding when one state enforces an order without opening an intergovernmental case.

Interstate income withholding. The Child Support Enforcement Amendments of 1984 first required the use of interstate income withholding.[135] This legislation required states to extend their income withholding systems to include withholding from income derived within the state in cases where the support orders were issued in other states. Because state child support agencies were limited to sending withholding orders to employers that were doing business within their state, states had to use a two-state process to request interstate income withholding. The initiating child support agency used the Uniform Reciprocal Enforcement of Support Act (URESA)[136] to request enforcement of a support order by a responding state agency. After that order was recognized by the responding state, the responding child support agency enforced it through income withholding using its laws and procedures. Federal regulations require that the responding child support agency send withheld payments to the initiating state's support disbursement unit.[137]

Direct income withholding. At the time of the Child Support Enforcement Amendments of 1984, URESA provided no authority to send income withholding orders directly to an out-of-state employer, and there was no requirement for employers to honor such direct requests. URESA was superseded by UIFSA. Pursuant to federal legislation, all states have enacted UIFSA (2008).[138] UIFSA includes provisions for direct income withholding.[139] Under this remedy, an income withholding order issued by a state, as defined by UIFSA (2008), can be sent directly to an obligor's employer, or other income source, in another state. An employer must comply with the out-of-state withholding order, regardless of whether it does business in the issuing state. It must treat the order as if it were issued by a tribunal in the employer's state, as long as it is regular on its face.[140]

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[135] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 3(b), 98 Stat. 1305, 1306 (codified at 42 U.S.C. § 666(b)(9) (2018)).

[136] The Uniform Reciprocal Enforcement of Support Act (URESA) was originally promulgated in 1950 and greatly improved the enforcement of child support cases across state lines. However, over time, its limitations became more evident. It has been replaced by the Uniform Interstate Family Support Act (UIFSA), https://www.uniformlaws.org/viewdocument/final-act-with-comments-120?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb&tab=librarydocuments.

[137] *See* 45 C.F.R. § 302.32(b)(1) (2019); 45 C.F.R. § 303.7(d)(6)(v) (2019).

[138] The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 321, 110 Stat. 2105, 2221 required states to enact UIFSA (1996) as a condition of receiving federal funds. UIFSA was subsequently amended in 2001 and 2008. In 2014 Congress required states to enact UIFSA (2008) as a condition of receiving federal funds. *See* Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1944-45 (2014).

[139] *See* Unif. Interstate Family Support Act §§ 501–506 (2008). All states have enacted UIFSA (2008).

[140] Unif. Interstate Family Support Act § 502(b) (2008).

The employer must also continue to comply with the order until it receives notice to stop withholding from the issuing child support agency.[141] Federal regulations require state child support agencies to consider using one-state remedies, including direct income withholding, to enforce a support obligation against a parent living in a different state.[142] When a state child support agency sends a direct income withholding order/notice to an out-of-state employer, the agency cannot change the address to which payments are sent; the remittance address must be the address of the SDU specified in the underlying support order.[143]

Change of payment location. Where neither party to the case still lives in the state that issued the controlling support order, questions often arise as to where support payments should be sent. UIFSA (2008) requires the employer receiving a direct income withholding order issued by a state to comply with the terms of the income withholding order, including the address to which the payments are to be forwarded.[144]

In order to expedite support payments to an obligee who has relocated, UIFSA provides a mechanism to formally change the SDU receiving payments. Pursuant to Section 319, if "neither the obligor, nor the obligee who is an individual, nor the child" resides in the state that issued the controlling order, a support enforcement agency may request a change in the payment location so that support payments are made to the SDU in the state where the obligee is receiving child support services. There is no requirement that a support enforcement agency make a request under Section 319. For a number of reasons, a request may not be the most effective or appropriate case processing activity.[145] However, if a support enforcement agency in the state where the obligee is receiving services makes a request for a change in payment location, and the prerequisites under Section 319 are met, the order-issuing state must act upon that request. Depending upon how the issuing state has enacted Section 319(b), either the support enforcement agency or the tribunal in the order-issuing state must (1) direct that the support payments be made to the support enforcement agency in the state in which the obligee is receiving services; and (2) issue and send to the obligor's employer a conforming income withholding order or an administrative notice of change of payee, reflecting the redirected payments:

> States may choose whether only the tribunal that issued the support order may order redirection of support payments or the support enforcement agency of the state that issued the support

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[141] 45 C.F.R. § 303.100(e)(iv) (2019). For more information about direct income withholding, UIFSA, and intergovernmental child support remedies in general, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[142] 45 CFR § 303.7(c)(3) (2019); 45 CFR § 303.100(f)(2) (2019).
[143] *See* Office of Child Support Enforcement, How to Complete an Income Withholding for Support Order: A Guide to the IWO and Instructions (Oct. 1, 2017).
[144] Unif. Interstate Family Support Act § 502(c) (2008).
[145] *See* OCSE-AT-17-07: Interstate Child Support Payment Processing (Jul. 17, 2017).

> order is also authorized to render such an order. Under either approach, the request for such redirection may be made only by a Title IV-D support enforcement agency subject to federal regulations regarding payment of child support through a state disbursement unit. The basic idea is that redirection of payments will be facilitated, with the proviso that the issuing tribunal be kept informed as to the disposition of the payments made under its order.[146]

In order to ensure that all states involved have an accurate accounting record, UIFSA (2008) further directs the support enforcement agency receiving redirected payments from another state to furnish to a requesting party or tribunal of the other state a certified statement of the amount and dates of all payments received.[147] There is an OMB-approved form for agencies to use to make a Section 319 request for change in the payment location.[148]

Federal Collections and Enforcement Program

The Federal Collections and Enforcement Program is comprised of a set of automated enforcement tools, and therefore usually does not require attorney involvement unless there is an appeal or challenge to the agency action to a court or tribunal. This program collects past-due support through a single submission procedure that activates a number of enforcement remedies:

- Federal income tax refund offset;
- Federal administrative offset;
- U.S. passport denial;
- Multistate Financial Institution Data Match (MSFIDM);
- Federal insurance match; and
- Debt inquiry service.

States are required to submit all cases that meet the criteria for federal income tax refund offset to OCSE for collection through the OCSE debtor file. In addition, states must have procedures in place to participate in the passport

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[146] Comment to Unif. Interstate Family Support Act § 319 (2001) when the 2001 amendments to UIFSA added subsection (b).
[147] Unif. Interstate Family Support Act § 319(c) (2008). For more information about UIFSA and intergovernmental case processing, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[148] *See* Child Support Agency Request for Change of Support Payment Location Pursuant to UIFSA § 319.

denial program and MSFIDM. Federal administrative offset, federal insurance match, and the Debt Inquiry Service are optional programs.[149]

Federal Tax Refund Offset. The Federal Tax Refund Offset Program collects child support arrears from the federal income tax refunds of obligors who have been ordered to pay child support. The program is a cooperative effort between OCSE, the Internal Revenue Service (IRS), the Bureau of the Fiscal Service (Fiscal Service) of the Department of Treasury, and state child support agencies.

Legislative history. The Omnibus Budget Reconciliation Act of 1981 first authorized the IRS to withhold federal income tax refunds, in whole or in part, to satisfy delinquent support obligations.[150] Originally this was restricted to child support debts owed in public assistance cases. With passage of the Child Support Enforcement Amendments of 1984, the federal intercept program was extended to all IV-D child support cases.[151]

Procedure. For purposes of the federal tax refund offset program, only past-due[152] support qualifies for offset. For cases where the support has been assigned, there must be at least $150 in past-due support.[153] For non-TANF or Medicaid-only cases, the past-due support must be at least $500, and the offset may include past-due spousal support for the parent with whom the child is living, as long as the same support order includes both the parent and the child.[154]

Statewide computer systems must identify cases meeting these offset requirements as part of the requirement to maintain information pertaining to delinquency and enforcement actions.[155]

Advance notice. Noncustodial parents must be notified in writing before their cases can be submitted to Fiscal Service for offset. This written notification is known as a Pre-Offset Notice. Either the child support agency or OCSE, if the

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[149] *See* Office of Child Support Enforcement, Overview of the Federal Collections and Enforcement Program (Feb. 1, 2019).
[150] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2331(a), 95 Stat. 357, 860 (codified at 42 U.S.C. § 664(a)(1) (2018)).
[151] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 21, 98 Stat. 1305, 1322 (codified at 42 U.S.C. § 664(a)(2) (2018)).
[152] 45 C.F.R. § 301.1 defines "past-due support" as "the amount of support determined under a court order or an order of an administrative process established under State law for support and maintenance of a child, or of a child and the parent with whom the child is living, which has not been paid."
[153] 45 C.F.R. § 303.72(a)(2) (2019).
[154] 45 C.F.R. § 303.72(a)(3) (2019). The Deficit Reduction Act of 2005 deleted the requirement for a child to be a minor at the time of submission. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7306, 120 Stat. 4, 145. *See also* OCSE-IM-18-01: Minimum Requirement for OCSE Debtor File Submittals (Jan. 25, 2018).
[155] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7306, 120 Stat. 4, 145; 45 C.F.R. § 307.10(b)(4)(i) (2019).

child support agency and OCSE agree, sends the notice.[156] This notice informs the noncustodial parent of the right to contest the state's arrearage determination; the right to request an administrative review by either the submitting state or, at the noncustodial parent's request, the state with the order on which the referral is based; and the procedures and timeframes for contacting the child support agency to request administrative review. The notice also informs the noncustodial parent of procedures to protect any portion of the refund due the noncustodial parent's spouse.[157]

Notice at offset. At the time the offset is processed, Fiscal Service issues an offset notice to the noncustodial parent advising that the offset has taken place. The offset notice states that Fiscal Service has applied all or part of the noncustodial parent's federal payment to a debt that is owed to the government agency or agencies listed on the notice. The offset notice identifies the source of the offset that is collected, the amount of the payment offset, the primary and secondary tax filers' information, and state contact information supplied to OCSE by the submitting state through the submittal and update process. The notice also includes instructions for ensuring that any joint filer receives their portion of the refund.[158]

Injured spouse claims. The spouse of a noncustodial parent does not have a duty to pay support for the noncustodial parent's child from another relationship.[159] For this reason, if the noncustodial parent and the spouse file a joint tax return, the portion of the tax refund attributable to the spouse is not subject to intercept. If an intercept includes an amount owed to the spouse, that spouse, defined as the "injured spouse," may request relief directly from the IRS.[160] In order to claim their portion of the refund, the injured spouse must file an *Injured Spouse Allocation* form.[161] The IRS encourages the filing of this form at the time of tax return filing to prevent the unintended intercept of any amount owed to the unobligated spouse. States may delay distribution of a joint return tax offset until notified that the unobligated spouse's proper share of the refund has been paid or for a period not to exceed six months from notification of the offset, whichever is shorter.[162]

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[156] 45 C.F.R. § 303.72(e)(1) (2019).
[157] 45 C.F.R. § 303.72(e)(1)(iv) (2019).
[158] 45 C.F.R. § 303.72(e)(2) (2019).
[159] An exception might be when the spouse has adopted the child, or otherwise undertaken a parent-child relationship.
[160] 45 C.F.R. § 303.72(f)(2) (2019).
[161] IRS Form 8379 (Rev. Nov. 2016), https://www.irs.gov/pub/irs-pdf/f8379.pdf.
[162] 42 U.S.C. § 664(a)(3)(B) (2018); 45 C.F.R. § 303.72(h)(5) (2019).

Request for review by the noncustodial parent. In addition to the notice requirements for noncustodial parents, federal regulations allow noncustodial parents to contest offsets in intrastate cases[163] and intergovernmental cases.[164]

In intrastate cases, if the noncustodial parent requests a review, the child support agency must notify the noncustodial parent of the time and place of the review; in non-TANF cases, the custodial parent must also receive such notice. In cases where the issue is a joint return that has not yet been offset, the child support agency must inform the noncustodial parent that Fiscal Service will notify the noncustodial parent's spouse of the steps to take at the time of the offset in order to secure the portion of the refund due him or her. If the refund has been offset, the child support agency will refer the noncustodial parent to the IRS.[165]

If the review results in an adjustment to the amount referred for offset, there are specified procedures the state must follow to make the adjustment. If the amount is deleted or decreased, the state will advise OCSE of the modification to the amount. If the intercepted amount exceeds the amount of past-due support, the child support agency must take the necessary steps to refund the excess amount to the noncustodial parent, and the spouse in the case of a joint return, as soon as possible.[166]

For intergovernmental cases, the noncustodial parent may request a review in either the submitting state or the state with the order.[167] If the noncustodial parent requests a review in the submitting state, the review procedure is identical to that used in intrastate cases.[168] If the matter cannot be resolved by the submitting state and the noncustodial parent requests an administrative review in the state that issued the order on which the referral for offset was based, the submitting state must notify the issuing state and provide that state with sufficient information to conduct the review, within 10 days of the noncustodial parent's request for a review.[169] The state with the order must send a notice to the noncustodial parent of the time and place of the review; in non-TANF cases, the custodial parent must also receive such notice. The state with the order must conduct the review and make a decision within 45 days of the receipt of notice and information from the submitting state.[170] The issuing state must send notice of any deletion or reduction to the submitting state. The

[163] 45 C.F.R. § 303.72(f) (2019).
[164] 45 C.F.R. § 303.72(g) (2019).
[165] 45 C.F.R. § 303.72(f)(1), (2) (2019).
[166] 45 C.F.R. § 303.72(f)(3), (4) (2019). The agency must also submit a state payment transaction to OCSE.
[167] 45 C.F.R. § 303.72(e)(1)(ii) (2019).
[168] 45 C.F.R. § 303.72(g)(1) (2019).
[169] 45 C.F.R. § 303.72(g)(2) (2019).
[170] 45 C.F.R. § 303.72(g)(3) (2019).

submitting state is bound by the issuing state's decision and required to refund any amount ordered by the issuing state.[171]

Child support attorneys should check their jurisdiction's laws regarding the right to an appeal from the administrative review. If the agency wants to appeal and has standing to do so, the attorney will need to meet filing deadlines. Depending on state law, some appeals of administrative hearings on intercepts are on the record and not *de novo.* If the appeal is on the record, the attorney must obtain a certified copy of the administrative decision, a transcript of the hearing, and all underlying documents and timely file this record with the court. If the hearing is on the record, the court is limited solely to hearing arguments that the administrative tribunal failed to follow its own procedures. If the appeal is *de novo,* then the attorney must present evidence to establish the validity of the agency interception.

Distribution.[172] A child support agency must distribute federal tax refund offset collections according to federal law.[173] Prior to passage of the Deficit Reduction Act of 2005 (DRA),[174] federal tax refund offset collections were applied first to assigned support in cases with arrears.[175] The DRA permits states to elect additional options that allow payment of 100% of collected support to families.

Constitutionality. Federal tax refund offset has been challenged in both state and federal courts. Originally, obligors raised issues of denial of due process based on notice requirements and on an interpretation of the earned income tax credit portion of a federal income tax return.[176] As courts routinely upheld the validity of federal tax refund interception, obligors have raised questions pertaining to the definition of the term "past-due support." Courts have held that a supporting parent must fall behind in their ordered payments before having their federal tax refund intercepted. The issue often arises in the context of a modification when the court orders that a modification take effect retroactively. Courts have found that, although the obligor was in arrears based on the entry of a modified order, he was not in arrears as the term "past-due support" was defined by 42 U.S.C. § 664.[177]

Administrative Offset. Unlike federal tax refund offset, administrative offset is an optional program for states. Authorized by the Debt Collection

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[171] 45 C.F.R. § 303.72(g)(6), (7) (2019).
[172] For additional information on distribution, *see* Chapter Three: State, Local, and Tribal Roles in the Child Support Program.
[173] 42 U.S.C. § 657 (2018).
[174] Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.
[175] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7301, 120 Stat. 4, 141.
[176] *See, e.g.*, *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851 (1986).
[177] *See, e.g.*, *Kenck v. Montana, Child Support Enforcement Div.*, 315 P.3d 957 (Mont. 2013); *In re R.C.T.*, 294 S.W.3d 238 (Tex. App. 2009).

Improvement Act of 1996 (DCIA),[178] this program allows the interception of a wide range of recurring and one-time federal non-tax payments to enforce past-due child support. Because it is an optional enforcement tool, state child support agencies may exercise discretion in determining whether such enforcement action is appropriate during a public health crisis.[179]

Payments eligible for administrative offset at 100% include payments to private vendors who perform work for a government agency and miscellaneous payments, such as expense and travel reimbursements owed to federal employees or payments from agricultural subsidies. Federal retirement payments are currently being offset at 25%; however, if an income withholding is in place, states should exclude the case from retirement administrative offset.[180] Federal salary payments, though eligible for offset subject to limits set by the Consumer Credit Protection Act,[181] are not currently being intercepted at the federal level, so states should continue to use income withholding for noncustodial parents who receive federal salaries. Payments of attorney fees paid to a plaintiff who prevails in litigation against the U.S. government under the Equal Access to Justice Act[182] are also eligible for administrative offset.

The DCIA and federal regulations make some payments ineligible for this program, including Veterans Affairs disability benefits, federal student loans, some Social Security payments, Railroad Retirement payments, Black Lung benefits, and payments made under certain programs based on financial need, such as Supplemental Security Income.[183] Others are exempted by action of the Secretary of the Treasury.[184]

A case is eligible for an administrative offset when the obligor owes at least $25 and is at least 30 days delinquent in their child support obligation, although states have the option of setting a higher threshold. Persons who owe

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[178] Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (codified at 31 U.S.C. § 3716 (2018)).
[179] *See* Office of Child Support Enforcement, COVID-19: Frequently Asked Questions for Child Support Programs.
[180] For more information about administrative offset, *see* OCSE-AT-10-04: Collection and Enforcement of Past-Due Child Support Obligations (June 11, 2010). *See also* Office of Child Support Enforcement, Overview of the Federal Collections and Enforcement Program (Feb. 1, 2019).
[181] 15 U.S.C. § 1673(b)(2)(A), (B) (2018).
[182] Equal Access to Justice Act, Pub. L. No. 96-481, § 201, 94 Stat. 2321, 2325 (1980) (codified at 5 U.S.C. § 504 (2018)); 28 U.S.C. § 2412 (2018). For more information about offset from these payments, *see* OCSE-PIQ-12-01: Administrative Offset of Attorney Fees under the Equal Access to Justice Act (June 29, 2012).
[183] *See* 31 U.S.C. § 3716(c)(3) (2018); 31 C.F.R. § 285.1(i) (2019). *See also* OCSE-AT-10-04: Collection and Enforcement of Past Due Child Support Obligations (June 11 2010).
[184] The Fiscal Service website has a Treasury Offset Program page, https://fiscal.treasury.gov/top/how-top-works.html (last visited Feb. 6, 2021). A complete list of the exempt payments may be found at https://fiscal.treasury.gov/files/dms/dmexmpt.pdf.

child support debts subject to administrative offset are notified by the same notice used for federal tax refund offset purposes.[185] Administrative offset cases are submitted through the same process as federal tax refund offset cases. When a match occurs between the records of persons who owe child support debts and the payment records for federal payees, Fiscal Service will offset the amount, and OCSE will transmit the money to the state. Fiscal Service sends a notice to the obligor at the time of offset, explaining the offset and referring the parent to the local child support agency for more detail.

Administrative offsets can be contested. Either party, or the child support agency of the state that issued the underlying support order, can initiate a challenge in the state that submitted the offset request. While there is no mandated court review in the event of a challenge, there is authorization for a review in the manner prescribed by the state.[186]

Passport denial. Passport denial is another effective enforcement tool. Any obligor with a IV-D child support case submitted to OCSE for past-due child support with arrears greater than $2500 is eligible for the passport denial program. If the certified individual owes arrears greater than $2,500 and is not excluded from the program, OCSE submits the obligor to the State Department for passport denial.[187] The State Department denies passports at the time of application for anyone certified by OCSE and reported to the State Department. The State Department may also revoke, restrict, or limit a passport issued previously to such individual[188]

Although an obligor is automatically removed from passport denial when the arrears balance is reduced to zero, the individual is not automatically removed when the debt drops below $2500. The decision to remove or exclude an obligor is based on state policies and procedures. Child support attorneys often participate in the development of such policies. If the state has multiple cases for the obligor, it must exclude all cases. If more than one state certified the individual for passport denial, all of the states must remove or exclude the individual from the program before a passport can be issued.

After a child support agency refers a case to the State Department, if the obligor applies for a new or renewed passport, they receive notice of the denied application from the State Department.[189] The notice provides the specific

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[185] 31 C.F.R. § 285.1(h) (2019).
[186] 31 U.S.C. § 3716(a)(3) (2018); 42 U.S.C. § 659(c)(2) (2018).
[187] A state may exclude a case from passport denial by setting an exclusion indicator for the case. For more information about Passport Denial and the Federal Income Tax Offset program, *see* Office of Child Support Enforcement, FPLS Federal Offset Program Technical Guide (Dec. 10, 2012). *See also* Office of Child Support Enforcement, Overview of the Passport Denial Program (Dec. 5, 2017).
[188] 42 U.S.C. § 652(k) (2018); 22 C.F.R. § 51.60(a)(2) (2019).
[189] 42 U.S.C. § 652(k)(2) (2018); 22 C.F.R. § 51.65(a) (2019).

reasons for the denial or revocation and advises the applicant to contact the listed state child support agency for further information. The notice also contains instructions on how the obligor can notify the passport agency after the individual makes appropriate arrangements for payment with the child support agency.[190]

An obligor can plan with the state child support agency to pay the past-due amount. The state may then contact OCSE to remove the case from passport denial status after appropriate payment arrangements are made. It is important to note that there is no procedure to contest submission in the enabling legislation for the passport denial program, although states are required to provide notice to individuals and give them an opportunity to contest the delinquency determination.[191] Depending upon state procedures, a child support attorney may or may not be involved in the review process when there is a challenge.[192]

States may submit an emergency release to OCSE for an obligor for the following situations:

- Death or medical emergency of an immediate family member (verification is required);
- Erroneous submittal (a state submitted to OCSE an obligor with an incorrect SSN); or
- Mistaken identity (a match at the State Department resulted in the denial of a passport for child support reasons even though the obligor was not submitted to OCSE).

The State Department makes the final determination on whether to process as an emergency release.

Limited validity passports may be issued for direct and immediate return, only to the United States, when a passport is denied or revoked outside of the United States. Every U.S. citizen is entitled to return to the United States even if the citizen cannot make satisfactory payment arrangements with the state(s) to repay their past-due child support when the passport is denied. The length of time the limited validity passport is valid can vary from a few days to several months and is determined by the U.S. Embassy or Consulate officer. If the obligor wishes

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[190] *See* 22 C.F.R. § 51.65(a) (2019).
[191] 42 U.S.C. § 654(31) (2018).
[192] *Cf. Montgomery Co. Office of Child Support Enforcement ex rel, Cohen v. Cohen*, 192 A.3d 788 (Md. Ct. Spec. App. 2018) (circuit court erred in ordering the agency to release its block on a father's passport. It infringed on the state executive branch's authority to carry out its mandatory duty under 42 U.S.C. § 652(k) and violated the separation principles under the state constitution by ordering the agency to reverse its certification prior to any administrative review by the Child Support Administration as required by law.).

to travel again internationally, the obligor must apply for a replacement passport and pay the regular fee. The new application will be subject to the same adjudication as before.

After an obligor is removed from the passport denial program and receives their passport, it will be either five or 10 years in most instances before the obligor can be denied again even if they fail to comply with the release agreement.[193] Therefore, child support agencies should review all available facts and potential enforcement tools with the child support attorney before reaching an agreement.

Multistate Financial Institution Data Match (MSFIDM). PRWORA added the Financial Institution Data Match (FIDM) process to the list of enforcement tools available to state child support agencies. The statute requires states to enter into agreements with financial institutions doing business in the state in order to develop and operate a data match system where information about financial institution accounts is matched against obligors who owe past-due support to the state.[194] States use this information to place liens on the accounts by sending notice to the financial institutions involved, which then must freeze the amount and send it to the child support agency to fulfill the unpaid support amount.[195]

For FIDM purposes, financial institutions include:

- A depository institution, or institution-affiliated party, as defined in the Federal Deposit Insurance Act;[196]
- A federal or state credit union; and
- Benefit associations, insurance companies, safe deposit companies, money market mutual funds, or similar entity authorized to do business in the state.[197]

Accounts for this purpose include demand deposit accounts, checking accounts or negotiable withdrawal order accounts, savings accounts, time deposit accounts, and money-market mutual fund accounts.[198]

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[193] For more information about passport denial, *see* OCSE-AT-10-04: Collection and Enforcement of Past Due Child Support Obligations (June 11, 2010).
[194] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 372, 110 Stat. 2105, 2254 (codified at 42 U.S.C. § 666(a)(17) (2018)).
[195] 42 U.S.C. § 666(a)(17)(A)(ii) (2018).
[196] 12 U.S.C. § 1813(c) (2018).
[197] 42 U.S.C. § 669a(d)(1) (2018).
[198] 42 U.S.C. § 666(a)(17)(D)(ii) (2018).

The Child Support Performance and Incentive Act of 1998[199] amended the FIDM process to authorize OCSE to act as a conduit between states and financial institutions doing business in two or more states to facilitate a centralized, quarterly data match. This process is known as multistate FIDM (MSFIDM). State child support agencies use the same file that certifies obligors for federal income tax refund offset to submit obligors for MSFIDM. OCSE transmits the file to multistate financial institutions which compare the child support data to their accounts and transmit matches with account information back to OCSE. OCSE then transmits the data returned by the multistate financial institutions to the appropriate state(s). Based on the information from OCSE, state child support agencies can issue liens or levies to attach and seize the assets belonging to the obligor.

Thrift Savings Plans. Thrift Savings Plans (TSP) are tax deferred retirement savings and investment plans for federal civilian employees and members of the military. Although TSP is not considered a financial institution, the Federal Retirement Thrift Investment Board, which administers TSP, now returns TSP matches to OCSE, using the MSFIDM process. TSP has over 4.6 million participants, making this a valuable new source of information for collecting past-due support owed by federal employees and members of the military.[200]

When a state receives a TSP match, it must submit specific documents and follow TSP's legal process.[201]

Federally Assisted State Transmitted (FAST) Levy. OCSE worked with states and multistate financial institutions to develop an automated freeze/seize process. FAST Levy allows states and multistate financial institutions to exchange FIDM freeze/seize documents electronically through a single, centralized location. The process, which began in 2013, uses special electronic withhold request and response records.[202]

Federal Insurance Match Program. Another matching program that uses the federal income tax refund offset file is the Federal Insurance Match Program. This program began in 2005 when Congress authorized the FPLS to begin comparing information on individuals owing past-due child support with

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[199] Child Support Performance and Incentive Act of 1998, Pub. L. No.105-200, § 406, 112 Stat. 645, 671.
[200] Office of Child Support Enforcement, Thrift Savings Plan Match Information (May 11, 2018). *See also* Office of Child Support Enforcement, Thrift Savings Plan Questions & Answers for OCSE (Jun. 25, 2019).
[201] *See* Office of Child Support Enforcement, Thrift Savings Plan TSP-CS-1 form (Jun 2016). For complete information on the legal process for TSP, *see* Thrift Savings Plan, Court Orders and Powers of Attorney (Sep. 2014), https://www.acf.hhs.gov/css/form/thrift-savings-plan-income-withholding-order-state-agencies-form-and-instructions.
[202] *See* Office of Child Support Enforcement, FAST Levy Overview (June 9, 2016).

information maintained by insurance companies regarding insurance claims, settlements, awards, and payments.[203] Under the program, OCSE returns the matches to the state child support agency. Participating states may establish an arrears threshold where claims information is matched only to those obligors owing arrears above that amount. States also can specifically exclude a case from insurance match by setting an exclusion indicator for the case.[204] Although this program is voluntary, 53 out of 54 jurisdictions were participating in 2019.[205]

There are three ways for a state to receive insurance payout information about obligors owing past-due child support. These are:

- The federal insurance match program described above;[206]
- The Child Support Lien Network (CSLN);[207] and
- Specific state law.[208]

After a state agency receives information on a match, it can use state laws and procedures to attach the funds to repay past-due child support. Attorney involvement will depend upon state law and procedures.

Debt inquiry service. Using the OCSE Child Support Portal, the Debt Inquiry Service compares insurance information to the OCSE's debtor file, which contains data on noncustodial parents owing past-due support. The insurer may submit information in advance for individuals who have made a claim or will receive an insurance award, settlement, or payments. Matched information is

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[203] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7306, 120 Stat. 4, 145 (codified at 42 U.S.C. § 652(l) (2018)).
[204] For more information on setting the exclusion indicator, *see* Office of Child Support Enforcement, FPLS Federal Offset Program Technical Guide (Dec. 10, 2012).
[205] For detailed information by state on Insurance Match, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Section M, Insurance Match (Mar. 1, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.
[206] 42 U.S.C. § 652(l) (2018).
[207] CSLN is a network of 30 states and the District of Columbia that houses a database of obligors owing past-due child support, updated on a monthly basis by participating agencies. The database is used to intercept insurance settlements to pay delinquent child support obligations owed to children and families. *See* http://www.childsupportliens.com/index.php (last visited Feb. 7, 2021).
[208] *See, e.g.,* Mass. Gen. Laws ch.175, § 24D (2019) (before an insurance company can pay a claim, it must check with the child support agency to determine whether the claimant owes child support, and withhold and send any amount of support due to the child support agency in response to a Lien Notice from that agency). *See also* N.Y. Ins. Law § 340 (2019); Okla. Stat. tit. 56, § 237B (2019); Or. Rev. Stat. § 25.643 (2019); 23 Pa. Cons. Stat. Ann. § 4308.1 (2019).

sent to the state child support agencies responsible for collecting the past-due support.[209] This allows child support agencies to quickly attach those benefits.

There may be a few instances when the agency needs attorney assistance in attaching insurance benefits. The first may occur if a pre-attachment notice is sent to the obligor that allows for a contest to the attachment. In states that administratively attach benefits, the contest may consist of an informal agency review of arrears with the obligor with no further opportunity to contest. However, if there is an appeal process to a court or an administrative tribunal from the informal agency review, the attorney may need to be involved in that appeal.

A second instance that may require attorney involvement is when the insurer contests the attachment because the law of the state where the insurer is located prohibits part or all of the attachment. The attorney may need to negotiate the allowed portions of the attachment between the agency and the insurer.

A third opportunity for attorney involvement occurs if the obligor refuses to settle their insurance claim in anticipation of the agency's taking 100% of the distribution because of arrears owed to the state. In that case, the child support attorney will need to facilitate a settlement with the obligor, or his attorney, the agency, and the insurer. In order to encourage a settlement of the claim, the agency may agree for the obligor to receive a percentage of the distribution and the agency to receive the balance.

State Tax Refund Offset

The Child Support Enforcement Amendments of 1984 required states, as a condition of receiving federal funds, to initiate a state tax refund offset program.[210]

All states that have an income tax have enacted setoff statutes authorizing the state revenue agency to withhold tax refunds due individuals who owe any liquidated debt (a judgment by operation of law or an adjudicated sum) to a state child support agency.[211] The procedure is nearly identical to the federal tax refund offset procedure, with the state revenue agency performing a role similar to the IRS. Child support attorneys are not involved in the submission process,

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[209] Office of Child Support Enforcement, *Debt Inquiry Service for Insurers Using the Child Support Services Portal: Presentation* (Aug. 8, 2014).
[210] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified at 42 U.S.C. § 666(a)(3) (2018)).
[211] As of 2019, there are seven states that have no state income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. *See* the Office of Child Support Enforcement, Reference Guide, Section J, Support Enforcement, question J1.1 (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.

but – depending on state law and procedures – may be involved if there is a challenge to the offset.

Judicial challenges to state tax refund offset began almost as soon as states began the state offset process. Oregon, which had a state tax refund offset program predating the federal requirement, first met with a challenge as early as 1978. In *Brown v. Lobdell*[212] the Oregon Supreme Court found that the state tax intercept procedure withstood all constitutional challenges. Since that time, other state courts have also upheld the constitutionality of the process, which is now well settled.[213]

Within certain parameters, each state has discretion to tailor the criteria for its state tax refund offset program.[214] The state must establish procedures that provide that any amount submitted for state income tax refund offset is verified and accurate, and that the appropriate state agency is notified of any significant reductions in the amount referred for collection by state income tax refund offset. States must send an advance notice to the obligor advising him or her of the referral for offset and providing notice of the right to contest the referral.[215] In cases in which medical support rights have been assigned and where collections represent specific dollar amounts designated in the support order for medical purposes, the child support agency must also send advance notice to the obligee that amounts offset will be distributed according to federal regulations.[216] These processes provide due process for the obligor and provide a procedure to protect any interest the spouse of the obligor may have in the refund, if the return was a joint filing.[217]

IRS Full Collection

The IRS full collection process[218] can be a useful tool in cases where all other collection and enforcement options have been unsuccessful. It may be useful in situations where the obligor is self-employed and has assets, or is a U.S. citizen living abroad who owns property in the United States. Under this process, a state IV-D director may certify a Title IV-D child support case that contains a valid administrative or child support order with arrears of $750 or more to the appropriate OCSE regional representative. A child support agency should

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[212] *Brown v. Lobdell*, 585 P.2d 4 (Or. App. 1978).
[213] *See, e.g.*, *Wightman v. Franchise Tax Bd.*, 202 Cal. App. 3d 966, 249 Cal. Rptr. 207 (1988); *Knisley v. Bowman*, 656 F. Supp. 1540 (W.D. Mich. 1987).
[214] 42 U.S.C. § 666(a)(3) (2018); 45 C.F.R. §§ 303.6(c)(3), 303.102(a)(2) (2019).
[215] 45 C.F.R. § 303.102(e) (2019).
[216] 45 C.F.R. § 303.102(d) (2019). The federal regulations at 45 C.F.R. § 302.51(c) and 42 C.F.R. § 433.154 provide that such collections will be forwarded to the Medicaid agency for distribution as follows: The Medicaid agency will first distribute money to itself in an amount equal to State Medicaid expenditures for the individual on whose right the collection was based, then to the federal government in an amount equal to the federal share of State Medicaid expenses minus any incentive payment, then to the beneficiary.
[217] 45 C.F.R. § 303.102(c)(3) (2019).
[218] 42 U.S.C. § 652(b) (2018).

carefully review the facts of a case being considered for this process with the child support attorney to determine whether this tool is appropriate for the case.

A state's request for IRS full collection must be signed by the state IV-D director and include the following:

- Sufficient information to identify the obligor;
- Copies of all court or administrative orders;
- The amount owed;
- A statement of whether the amount has been submitted for federal income tax refund offset;
- A statement explaining the efforts made by the child support agency to collect the amount and why those efforts were not successful;
- The date of any previous requests for full collection;
- A statement that the agency agrees to pay for the costs of collection; and
- Information about assets the obligor may own.[219]

The OCSE Regional Program Manager[220] reviews the request to determine whether it meets the above requirements and, if it does, forwards it to the Secretary of the Treasury. After submission to the Secretary of the Treasury, the IRS will use collection and enforcement methods for the support case like those used for any other debt owed to the IRS.[221]

After a case has been submitted, the child support agency must immediately notify the Regional Office of any change to the amount due, the nature or location of assets, or the address of the obligor.[222]

Financial Institution Data Match

As noted earlier, PRWORA required a state, as a condition of receiving federal funds, to enter into agreements with financial institutions doing business in the state, in order to develop and operate a data match system where information about financial institution accounts is matched against obligors who

[219] 45 C.F.R. § 303.71(e) (2019).
[220] Additional information on the responsibilities of OCSE Regional Offices can be found in Chapter Two: The Federal Role in the Child Support Program.
[221] 26 U.S.C. § 6303 (2018).
[222] 45 C.F.R. § 303.71(g)(1) (2019).

owe past-due support to the state.[223] Financial institutions are not liable under any federal or state law to any person for disclosing data match information to the state child support agency or its designated representative; encumbering or surrendering any assets held by the financial institution in response to a notice of lien or levy issued by the state child support agency; or taking any other action in good faith to comply with the financial institution data match.[224]

Each state has laws, policies, and procedures that define terms, establish parameters, and govern the execution of FIDM liens and levies. These typically include the lien threshold, lien duration, exemptions from FIDM, priorities, handling of joint accounts, and due process requirements. Child support attorneys must be familiar with these laws, policies, and procedures to support the FIDM process. Also, depending on state law, administrative or judicial hearings may occur as part of the due process afforded obligors or other account holders. Hearings afforded other account holders are typically for the purpose of determining the amount of funds in the account that may be the property of the other account holder and thus not subject to attachment. Child support attorneys will often be called upon to play a role in these hearings.

Many states have joined together to develop a consortium to facilitate the FIDM process between states and financial institutions doing business in only one state. To avoid the expense and duplication of effort required by each state developing a separate FIDM match process, the consortium pools resources to provide FIDM data matching for all member states.[225]

License Revocation

As a condition of receiving federal funds, Congress requires a state to have laws to withhold, suspend, or restrict the use of drivers' licenses, professional and occupational licenses, and recreational and sporting licenses of individuals owing overdue support.[226] Licenses can also be affected when the obligor fails to comply with subpoenas or warrants related to paternity or child support proceedings. States have discretion in determining which cases are most appropriate for license revocation or suspension.

Because the license revocation program follows state law, practices vary across the country. Some states have automated the process of driver's license

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[223] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 372, 110 Stat. 2105, 2254 (codified at 42 U.S.C. § 666(a)(17) (2018)).
[224] 42 U.S.C. § 666(a)(17)(C)(iii) (2018).
[225] *See* the Interstate Data Exchange Consortium (IDEC), http://www.idec-fidm.com/idec/overview.aspx (last visited Feb. 7, 2021).
[226] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 369, 110 Stat. 2105, 2251 (codified at 42 U.S.C. § 666(a)(16) (2018)).

suspension,[227] while others require a petition by the obligee.[228] Some states permit an obligor with a suspended license to obtain a limited license for employment or other reasons.[229] What is consistent, however, is that this remedy is intended to be a coercive tool, not a punitive measure. The goal is not to punish obligors for nonpayment of support by depriving them of license privileges. Rather, the hope is that once an obligor receives notice of the state's intention to affect the license, the individual will contact the child support agency to negotiate payment of the outstanding amount.

In most instances, there is not a large role for a court or an attorney to play in connection with state license revocation programs, unless an obligor challenges the intended action. Most challenges to license suspension or revocation have been on grounds of due process and have involved commercial or individual driver's licenses.[230] Courts have consistently held that state license revocation statutes do not violate due process rights because they are based on a rational policy interest. The attorney may also be called upon to assist in negotiating any payment in return for lifting a suspension.

There may also be occasion where the attorney is representing the agency on an appeal initiated by the agency. In *State, Dept. of Social Services in Interest of L.P. v. F. P.*,[231] the Louisiana Department of Social Services argued that a juvenile court judge had erred by removing the hold on an obligor's driver's license, simply upon the obligor's request during a hearing. The appellate court agreed. As a general rule, a person aggrieved by the action of a state agency must exhaust all administrative remedies before being entitled to judicial review. The Louisiana legislature had given the state administrative authority to suspend licenses for nonpayment of child support. In the instant case, the obligor had not timely objected to the suspension of his license, requested an administrative hearing, or otherwise availed himself of the administrative remedies. The appellate court concluded that the juvenile court was not authorized to rescind the administrative license suspension without requiring compliance with the specific procedures set forth in Louisiana law.

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[227] *See, e.g.*, Ohio Admin. Code § 5101:12-55-25(E)(2) (2019).
[228] *See, e.g.*, Fla. Stat. § 61.13015 (2019).
[229] *See, e.g.*, Minn. Stat. § 171.186 (2019).
[230] *See, e.g., Wheeler v. Idaho Dep't of Health and Welfare*, 207 P.3d 988 (Idaho 2009) (a driver's license is not an exempt property interest under state law); *State ex rel. Com'r of Human Servs. v. Buchmann*, 830 N.W.2d 895 (Minn. Ct. App. 2013) (suspension of the defendant's commercial driver's license does not destroy any ability he might have to pay child support or support himself); *Amunrud v. Bd. of Appeals*, 143 P.3d 571 (Wash. 2006) (defendant did not have a fundamental economic right to work as a taxi driver). *See also Office of Child Support ex rel. Stanzione v. Stanzione*, 910 A.2d 882 (Vt. 2006) (driver's license suspension does not violate the noncustodial parent's free exercise of her religious beliefs).
[231] 140 So. 3d 328 (La. Ct. App. 2014).

Liens and Levy

Federal law requires states, as a condition of receiving federal funds, to provide that a lien, in the amount of overdue support, arises by operation of law against an obligor's real and personal property.[232] Methods for creating and executing on those liens, however, are subject to state law. It also is important to note that federal law requires states to give full faith and credit to the lien of another state, as long as "the state agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the State[.]" Note, however, that state "rules may not require judicial notice or hearing prior to the enforcement of such a lien."[233]

Definition of lien. A lien places a restriction on real and personal property owned by an individual. It allows the person to retain possession of the property but prevents transfer of clear title to the affected property by prohibiting the recording agency from issuing a new title or deed or by providing that all subsequent interests in the property will be subject to the lien.

Lien creation. Although child support liens arise by operation of law, a lien needs to be perfected before it can take effect. Although a caseworker may discover the existence of property upon which a lien can be placed during an intake interview, it is often the attorney who learns such information during discovery or a hearing. Most states require an affirmative act to perfect a lien. This might be as simple as recording a transcript of the support order or judgment in the appropriate office or registry of public records. This is usually the recorder of deeds for real property and the title agency for personal property. Other states may require the filing of a certified copy of the support order and, perhaps, an affidavit specifying the amount claimed to be due as of the date of recording. The agency may seek legal assistance in drafting the affidavit. In many states, a lien must be filed in the county where the property is located or where the obligor is located.

Some states maintain a centralized registry for liens and thus keep track of all liens that are filed. North Dakota, for example, has a centralized lien registry created on an interactive website by the child support agency. This registry contains information on all obligors in the state. After an obligor is listed on the registry, any real or titled personal property owned or later acquired by the obligor is subject to the lien.[234]

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[232] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 368, 110 Stat. 2105, 2251 (codified at 42 U.S.C. § 666(a)(4)(A) (2018)).
[233] 42 U.S.C. § 666(a)(4)(B) (2018). For more on intergovernmental enforcement, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[234] N.D. Cent. Code § 35-34.02.1. (2019). *See also* Haw. Rev. Stat. § 576D-10.5 (2019); Idaho Code Ann. § 7-1206 (2019).

Personal property liens may also be filed in central locations, such as the office of the Secretary of State or the state Department of Motor Vehicles if the property is a vehicle.

After a lien is perfected, it creates a "cloud on the title" that requires the obligor to satisfy the lien by paying the amount designated. In real property transfers, the potential purchaser or lender usually discovers the lien through a title search conducted by the title insurance company. Potential purchasers and lenders may discover a lien on personal property by checking the designated central registry or by observing a notation on the title of the property.[235] Some courts maintain a judgment/lien registry which can be searched by the owner's name to discover liens on real property.

Lien as an enforcement tool. Liens can be useful collection remedies in appropriate cases, especially if the property has equity. However, a lien on real property that is mortgaged for more than the value of the property will not result in getting payment of child support. Likewise, personal property, such as an automobile or a boat, may not be worth enough to cover the cost of forcing the sale by means of execution. When the obligor wants to sell or transfer property subject to a lien, the child support agency – in consultation with a child support attorney – should carefully consider the options. It might not be advantageous to object to the transfer, particularly if the sale or loan is likely to produce funds from which a substantial payment on the support arrearage can be made. If the transfer is a sale, it is likely that the obligor has some equity in the property after prior lienholders (i.e., mortgagees) are paid off, otherwise the sale price would not be acceptable to the obligor. If the transfer is a loan or second mortgage, sometimes a portion of the loan proceeds can be applied to the child support obligation. The lien holder or child support agency, subject to the lien holder's approval, may also condition the release agreement on payment of all or a substantial portion of the arrearage. If a partial release is drafted, it releases the lien on the property, but does not absolve the debtor from any remaining arrears not paid by the property transfer. The child support attorney often works closely with agency workers in deciding the best way to proceed in a case.

Duration of liens. Liens are creatures of statute, so they have various lifespans depending on state law. After a lien is created, it remains a cloud on the title as security for the child support judgment until it is released, becomes dormant, or expires. State statutes specify the duration of liens. These statutes typically also prescribe a method to extend or "revive" the lien.[236] Assuming a case warrants continuation of the lien as security for payments, the lien should be revived before its expiration. Failure to revive the lien might allow the obligor to dispose of property without having to apply the sale proceeds to their

[235] For a complete list of state lien policies and laws, *see* the Office of Child Support Enforcement, Intergovernmental Reference Guide, Section J, Support Enforcement, question J2 (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.
[236] *See, e.g.*, Kan. Stat. Ann. § 60-2418 (2019).

arrearage. It may be helpful for child support attorneys to participate in training child support staff or developing procedures to ensure the agency has, and follows, a process for reviving a lien where appropriate.

Satisfaction and release. Most lien statutes allow for a voluntary lien release by the lien holder and establish a procedure whereby the obligor can petition the rendering tribunal for an order releasing the lien if the lien holder refuses to execute a voluntary release. The release can be general or limited to specific property. To obtain a court order releasing the lien, the obligor generally must post a bond, provide other security, or satisfy the tribunal that releasing the lien will not leave the obligee in an insecure position.[237]

A lien expires of old age when it is not renewed or perfected within the time prescribed by statute. Liens in Alabama, for example, expire after 20 years.[238]

In cases where public assistance is not an issue, the child support attorney should confer with the lienholder to determine whether to release the lien based on the best terms available. Where the lienholder is the state, the child support attorney should confer with the state official with the authority to execute a release on behalf of the state.

After an agreement is reached, a third party is usually involved in the transfer (i.e., a real estate agent or closing attorney) who is willing to act as escrow agent to facilitate the exchange of the lien release for the payment. This allows the judgment to be paid and the lien to be lifted as part of the same transaction, thereby diminishing any insecurity the subsequent purchaser might have regarding the validity of the title.

A lien release is a contract and, like any other contract, must be drafted carefully so that it embodies the entire agreement entered between the parties. Lien releases are often the product of negotiations that can be quite unique. Thus, it is crucial that forms be tailored to the specific case, and that child support agencies involve the child support attorney in the negotiation and drafting of each agreement and release. A poorly drawn lien release could be construed as a satisfaction of the entire judgment or a limitation of the lien holder's right to use other remedies to enforce any arrears that might remain.

In addition to executing lien releases, a judgment creditor is occasionally asked to enter a formal "satisfaction of judgment" with the tribunal that entered the order. A formal satisfaction is the only way a judgment debtor in such a situation can obtain a clear record. The lienholder generally can enter the satisfaction by affidavit or in person under oath. Any future review of the

[237] *See, e.g.*, Wis. Stat. § 779.08 (2019).
[238] Ala. Code § 6-9-190 (2019).

judgment record by a title searcher or abstractor would indicate that the lien has been released.

Levy and execution. In rare cases, a child support agency may consider using the state's writ of execution and levy process to force the sale of a piece of real or personal property. Because this process is statutory, the exact procedure will vary from state to state. The child support attorney should carefully research state law about filing for a writ of execution and the facts of the case to determine, in consultation with the lien holder, whether it would be cost effective to execute on the lien. Points to consider include the cost of appraisals and sheriff's fees for the sale balanced against the value of and equity in the property, the difficulty in locating and correctly identifying the personal property, and any storage costs for the personal property that accrue while waiting for the sheriff's sale.

Exemptions. In most states, certain types of a judgment debtor's property are exempt from levy or sale. The exemptions are established by statute and generally protect tools of the obligor's trade, books, family heirlooms, and similar items. Many states also allow the judgment debtor a homestead and an automobile exemption in limited amounts.[239]

Many states have enacted statutes providing that the normal exemptions do not apply to protect delinquent obligors. The underlying theory is that exemptions are designed to protect the judgment debtor's ability to provide for their family and should not be applied to frustrate the obligee's attempt to force payment of child support.

Consumer Reporting Agencies

PRWORA recognized the role Consumer Reporting Agencies (CRA) play in enforcement. Consumer reporting agencies are defined by federal law as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."[240] This definition includes third party verification of employment companies. The term "person" includes government agencies.[241]

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[239] *See* N.D. Cent. Code § 28-22-02 (2019); Tenn. Comp. R. & Regs. § 1240-2-5.08 (2019); Wash. Rev. Code § 6.15.010 (2019).
[240] 15 U.S.C. § 1681a(f) (2018). *See* OCSE-DCL-16-01: Guidance about Third-Party Verification of Employment Providers (Feb. 5, 2016).
[241] 15 U.S.C. § 1681a(b) (2018).

Under PRWORA, child support agencies must periodically report unpaid child support arrears to recognized CRAs.[242] The reported information includes the name of the delinquent obligor and the amount of the child support arrears. The OCSE Federal Tax Refund Offset program includes a statement in pre-offset notices that warns the obligor that child support arrearages are subject to being reported to credit bureaus as a delinquent debt. The law requires that states provide the obligor with due process, as set out by state law, which generally provides a period of time to contest the arrears calculation. Reporting arrears to a CRA does not encumber a particular asset, but it often results in payments when the obligor needs to refinance or purchase real or personal property, apply for a security clearance, or apply for credit.

The second remedy under PRWORA related to CRAs is the result of an amendment to the Fair Credit Reporting Act. CRAs must furnish to a child support agency, upon request, a consumer report for the purpose of determining an obligor's ability to pay and setting the appropriate amount of a child support order. The child support agency must provide the obligor with at least a 10-day notice prior to the request.[243] State child support agencies have found consumer reports to be excellent sources for locate information.[244]

Contempt

A contempt action is a method of enforcement that should be used only when other enforcement tools have been ineffective, or are unavailable, and where there is evidence of ability to pay. For example, contempt may be appropriate for the delinquent, self-employed obligor for whom income withholding is not a possibility. Also, unlike other enforcement actions, contempt is always a judicial remedy. Therefore, the child support attorney always plays a role.

There are two types of contempt – civil and criminal. Civil contempt differs from criminal contempt in both purpose and constitutional protections.[245] If the purpose and character of the penalty imposed by the court is remedial and designed to produce compliance with the court order, the contempt is classified as civil. If a contempt is civil, then a subsequent hearing to determine whether a defendant has purged the contempt, usually by paying the purge or submitting an acceptable payment plan, is also civil.[246]

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[242] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 367, 110 Stat. 2105, 2251 (codified at 42 U.S.C. § 666(a)(7)(B) (2018)).
[243] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 352, 110 Stat. 2105, 2240 (codified at 15 U.S.C. § 1681b(a)(4) (2018)).
[244] For more detail on locating individuals, *see* Chapter Five: Location of Case Participants and Their Assets.
[245] *See, e.g., State on behalf of Mariah B. v. Kyle B.,* 906 N.W.2d 17 (Neb. 2018).
[246] *See Liming v. Damos*, 979 N.E.2d 297 (Ohio 2012).

If the purpose of the penalty, however, is punitive and designed to punish a person for disobeying a court order, the contempt is classified as criminal. For example, a sentence of imprisonment is remedial if the contemnor remains imprisoned unless and until they perform the act required by the court; but if the sentence is imprisonment for a definite period without a purge clause, it is punitive. Also, as a rule, a fine is remedial if paid to the complainant, but punitive if paid to the court. Finally, if contempt is classified as criminal, then the U.S. Constitution affords greater safeguards in the contempt proceeding including the requirement that the offense be proved beyond a reasonable doubt.[247] Furthermore, "if both civil and criminal relief are imposed in the same proceeding, then the criminal feature of the order is dominant and fixes its character for purposes of review."[248]

Obligors have challenged the use of contempt on constitutional grounds in the child support context. Opponents assert that the imposition of the contempt sanction violates the constitutional prohibitions against slavery, involuntary servitude, and imprisonment for a debt. The courts, however, have struck down such challenges.

The California Supreme Court's opinion in *Moss v. Superior Court*[249] provides an example of the rationale for rejecting the constitutional argument: "[T]here is no constitutional impediment to the use of the contempt power to punish a parent who otherwise lacking monetary ability to pay child support, willfully fails and refuses to seek and accept available employment commensurate with the parent's skills and abilities."[250]

Civil contempt. Most often when contempt is used to enforce a child support order, it is civil contempt because the goal is usually to obtain payment of the support. Federal regulations require child support agencies to establish guidelines for the use of civil contempt.[251] The United States Supreme Court case of *Turner v. Rogers*[252] (hereinafter referred to as *Turner*) highlighted many civil contempt issues, especially ability to pay and right to counsel. These issues, as well as others, are discussed below.

Screening cases. Determining whether a case is appropriate for civil contempt should be a collaboration between child support workers and the child support attorneys. Through case stratification and fact analysis by child support workers, child support agencies can identify cases where enforcement tools,

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[247] *Hicks v. Feiock*, 485 U.S. 624 (1988). *See also In re C.C.S.*, No. M2007-00842-COA-R3-JV, 2008 Tenn. App. LEXIS 758, 2008 WL 5204428 (Tenn. Ct. App. 2008).
[248] *Hicks v. Feiock,* 485 U.S. at 638 n.10, citing *Nye v. United States*, 313 U.S. 33, 42–43 (1941) (*quoting Union Tool Co. v. Wilson*, 259 U.S. 107, 110 (1922)).
[249] *Moss v. Superior Court*, 17 Cal. 4th 396, 950 P.2d 59 (1998). *See also Child Support Enforcement Agency v. Doe*, 125 P.3d 461 (Haw. 2005).
[250] *Moss v. Superior Court*, 950 P.2d 59, 64 (Cal. 1998).
[251] 45 C.F.R. § 303.6(c)(4), (5) (2019).
[252] *Turner v. Rogers*, 564 U.S. 431 (2011).

such as income withholding and license suspension, may not be effective. Child support attorneys, however, play a critical role in the contempt process by further screening cases. After potential contempt cases are identified, and before proceeding with a civil contempt action, child support attorneys should carefully review each contempt case to determine whether the obligor has the "actual and present" ability to comply with the order. The attorney should make sure the evidence supports the agency's assertion that the obligor had the ability to pay the order at the time it was due ***and*** has the actual and present ability to comply with a purge order resulting from a finding of contempt. This screening is especially important when the underlying order is based on imputed income.[253]

The Court in *Turner* discussed the importance of the use of forms to obtain financial information from a defendant. This can be most useful prior to the hearing to decide whether to bring contempt charges.

Initial filing. In most jurisdictions, the contempt process is initiated by filing a motion for an order to show cause. The court handles the motion *ex parte*. In virtually all jurisdictions, the court can grant the motion and issue an order to show cause without even an informal hearing. Most courts require the motion to be supported by an affidavit from the payee, a certified record from the state SDU or the local child support agency if it has access to the fiscal records, or a certified copy of the clerk's payment record.

Notice requirements. The obligor must have actual notice of the date and time of the hearing on the order to show cause. "[D]ue process requires that the alleged contemnor receive full and unambiguous notification of the accusation of contempt."[254]

In addition to notice of the date and time of the hearing, it is important that the notice adequately inform the obligor of the purpose of the hearing. The allegation contained in the motion for order to show cause and the language transferred to the order itself must be specific enough to allow the obligor to prepare a defense at the show cause hearing. The Supreme Court in *Turner* emphasized the importance of notifying the defendant that "his 'ability to pay' is a critical issue in the contempt proceeding."[255] Therefore, child support attorneys should work with their agencies to make sure the agency-drafted legal contempt

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[253] For more on the attorney's role in screening cases for contempt, *see* OCSE-AT-12-01: *Turner v. Rogers* Guidance (June 18, 2012). *See also* OCSE-IM-12-01: Alternatives to Incarceration (June 18, 2012).

[254] *In re Reed*, 901 S.W.2d 604 (Tex. App. 1995). *See also In re Contemnor Caron*, 744 N.E.2d 787 (Ohio 2000).

[255] *Turner v. Rogers*, 564 U.S. 431, 447 (2011). *See also Dep't of Revenue Child Support Enforcement v. Grullon,* 147 N.E.3d 1066 (Mass. 2020) (defendant was not provided the *Turner* procedural safeguards, nor did the department follow its own policy, in accordance with federal regulations, where father did not receive notice that his ability to pay was a critical issue in the contempt proceeding),

forms clearly advise the obligor that their ability to pay will be a major component of the hearing. Forms drafted by child support attorneys or legal staff must convey the same information.

State rules of civil procedure provide the standards for service of process. The Federal Rules of Civil Procedure, which often serve as a guide to state rules, permit service of process by "delivering a copy of each to an agent authorized by appointment or by law to receive service of process,"[256] in addition to delivery "to the individual personally."[257] Using "restricted delivery" so that the addressee must personally sign for the mail might be preferable. If the obligor fails to appear, the tribunal might not entertain a motion for, or issue, a bench warrant or *capias* warrant unless proof of actual notice is shown.

Bench warrants. In most states, the court can issue a bench warrant or a *capias*, directing the sheriff to arrest a defendant who is served with an order to show cause and fails to appear at the hearing.[258] The procedure after the defendant is apprehended varies. If the judge or quasi-judicial decision-maker is available, many tribunals will notify the attorneys that the defendant has been brought in on the bench warrant, and a hearing on the order to show cause will commence as soon as counsel can convene. If the decision-maker who will hear the show cause hearing is not available, another decision-maker will hold a preliminary hearing for the purpose of setting bail to secure the defendant's appearance at the show cause hearing. Some tribunals routinely follow the latter procedure, even when the appropriate judge or quasi-judicial decision-maker is available. Some courts will release the obligor on personal recognizance, especially if there was a reasonable explanation for the failure to appear at the contempt hearing.

Ability to pay. As the Supreme Court noted in *Turner*, the critical incarceration-related question at the contempt hearing is whether the supporting parent is able to comply with the support order.[259] The Court also noted that, where civil contempt is at issue, "the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case . . . (State may place the burden of proving inability to pay on the defendant)."[260] In some states, after an initial prima facie showing of nonpayment, the burden of proof shifts to the alleged contemnor.[261] The Supreme Court of Mississippi has held, for example, that the respondent must show an inability to pay or present some other defense; this proof must be clear

[256] Fed. R. Civ. P. 4(e)(2)(C). *See also, e.g.*, *Estate of Moss*, 204 Cal. App. 4th 521, 139 Cal. Rptr. 3d 94 (2012) (service of process on the attorney of record was sufficient).
[257] Fed. R. Civ. P. 4(e)(2)(A).
[258] *See, e.g.*, Pa. R. Civ. P. 1910.13-1.
[259] *Turner v. Rogers*, 564 U.S. 431, 445 (2011).
[260] *Turner v. Rogers*, 564 U.S. 431, 442 (2011) (citing *Hicks v. Feiock*, 485 U.S. 624 at 637-641 (1988)).
[261] *See, e.g., Kolenic v. Kolenic*, 109 N.E.3d 582 (Ohio Ct. App. 2018).

and convincing, and it must rise above a state of doubtfulness.[262] Nebraska has held that a child support order calculated in accordance with the applicable guidelines creates a presumption that the parent was able to pay the amount so ordered during the time period subject to contempt; the burden of both production and persuasion is on the alleged contemnor to show the present inability to comply.[263] Wisconsin has held that the alleged contemnor bears the burden of proving both that he was unable to satisfy the debt and that the failure was not intentional. [264]

The Court in *Turner* stressed that the respondent must have an opportunity to respond to questions about their financial status during the hearing.[265] The child support attorney can present evidence of ability to pay by examining the obligor regarding their payment of discretionary expenditures such as car payments, cell phone bills, cable television or streaming service fees, and cigarettes and alcohol. Such personal expenses should not come before the obligation to support one's children. The child support attorney should also examine the obligor to determine efforts made to seek and obtain suitable employment or the cause of a voluntary reduction of income.[266] Some obligors have contended that a contempt sanction based on their failure to seek and accept available employment commensurate with their skills or abilities or based on a voluntary reduction of income constitutes involuntary servitude. Courts have rejected this argument.[267]

Turner requires that the trial court make an express finding regarding the respondent's ability to pay as established during the contempt hearing.[268] If the

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[262] *Kennedy v. Kennedy*, 650 So. 2d 1362 (Miss. 1995). *See also Stribling v. Stribling*, 960 So. 2d 556 (Miss. Ct. App. 2007) (the obligor failed to persuade the court that she was unable to pay the support and was therefore incarcerated).

[263] *State on behalf of Mariah B. v. Kyle B.,* 906 NW.2d 17 (Neb. 2018).

[264] *See Findley v. Gibbons*, 815 N.W.2d 407 (Wis. Ct. App. 2012) (the burden of proof in a contempt case is on the defendant to prove he was unable to satisfy the debt and that the failure was not intentional). *Accord Kolenic v. Kolenic*, 109 N.E.3d 582 (Ohio Ct. App. 2018) (trial court did not err in concluding the contemnor failed to establish an inability to pay defense where he had been terminated from two jobs for cause and was responsible for the decrease in his income).

[265] *See Dep't of Revenue Child Support Enforcement v. Grullon*, 147 N.E.3d 1066 (Mass. 2020) (defendant was not provided the *Turner* procedural safeguards, where father filled out a financial disclosure form but judge did not provide the father with an opportunity to respond to statements and questions about his financial status).

[266] For more discussion on contempt, *see* the discussion herein.

[267] *See, e.g., Child Support Enforcement Agency v. Doe*, 125 P.3d 461 (Haw. 2005). Defendants have also argued that imprisonment on a criminal contempt sanction violates the constitutional prohibition against imprisonment for debt. Courts have also rejected this argument. *See, e.g., People v. Likine,* 823 N.W.2d 50 (Mich. 2012), *aff'g People v Adams*, 683 N.W.2d 729 (Mich. App. 2004).

[268] *See Dep't of Revenue Child Support Enforcement v. Grullon*, 147 N.E.3d 1066 (Mass. 2020) (defendant was not provided the *Turner* procedural safeguards, where the judge failed to make

court finds the obligor is in contempt, the terms set for purging the contempt should also be within the obligor's ability to comply.

Right to counsel. Due process requires that the defendant have the opportunity to be represented by counsel in criminal cases and in criminal contempt cases.[269] The *Turner* decision dealt with whether an indigent defendant has the right to paid counsel in the context of civil contempt hearings.[270] In reaching its conclusion, the Court narrowed the question even further: Does the Due Process Clause of the Fourteenth Amendment require the appointment of legal counsel for an indigent defendant in a civil contempt case where there is a possibility of incarceration and the custodial parent or opposing party is not represented by counsel? Although the Court held that a state does not necessarily need to provide counsel in this situation, if an available set of fundamentally fair, substitute procedural safeguards is in place,[271] the absence of such safeguards could be problematic. It is therefore critical that child support agencies and attorneys note what the Court considered to be "substitute procedural safeguards." For example, the Court said that there must be notice to a defendant that their ability to pay is a "critical issue" in the contempt proceeding.

A significant point in the *Turner* case is that the decision does not deal with the more typical situation where the opposing side, or the state, has counsel present for the contempt hearing. Additional or alternative procedures may be constitutionally required where one side is represented by counsel. State law may, for example, require the appointment of counsel in both civil and criminal contempt cases.[272] In addition, the decision does not address cases where support has been assigned.[273] Nor does it address "what due process requires in an unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'"[274]

Even if a jurisdiction has what it believes are stringent and fundamentally fair substitute procedural safeguards in place, child support agencies and

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an express finding that the father had the ability to pay and seemed to decide about incarceration because the judge thought the noncustodial parent had a "poor attitude.").

[269] *See Cooke v. United States*, 267 U.S. 517, 537 (1925); *United States v. Dixon*, 509 U.S. 688, 696 (1993).

[270] *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

[271] *Turner v. Rogers*, 564 U.S. 431 (2011).

[272] *Cf. State on behalf of Mariah B. v. Kyle B.,* 906 N.W.2d 17 (Neb. 2018) (a finding of indigency for purposes of appointment of counsel does not preclude a finding that the contemnor is able to pay the purge amount set by the court. "[T]he inability-to-pay threshold for determining that the contemnor lacks the keys to his or her own jail cell is higher than the indigence threshold for appointing counsel.").

[273] *Turner v. Rogers*, 564 U.S. 431, 449 (2011).

[274] *Turner v. Rogers*, 564 U.S. 431, 449 (2011).

attorneys should carefully review the contempt process in their jurisdiction considering the Court's decision.[275]

Elements of contempt. Generally, there are five elements required for a finding of civil contempt:

- Continuing personal and subject matter jurisdiction in the tribunal that is holding the show cause hearing;
- The existence of a valid support order;
- Knowledge of the order by the obligor;
- Ability of the obligor to comply; and
- Willful noncompliance by the obligor.[276]

The basis for personal and subject matter jurisdiction will usually be cited in the pleadings filed with the court. Personal jurisdiction, which requires minimum contacts with the forum, can be clearly established if the obligor is served within the state.[277] Subject matter jurisdiction, which is the authority of the tribunal to hear the contempt action, is established in the state Constitution or state code. Traditionally, citing the original order underlying the contempt action, the residence of the parties, and the court's authority to hear the matter as established by state law will meet jurisdictional requirements.

The child support attorney can usually establish the obligor's knowledge of the order by reference to the support order itself, which often will note the presence of the obligor, or their attorney, at the hearing that produced the order. If the order does not contain such a reference, the court file should contain the court clerk's certificate of mailing, which creates a rebuttable presumption of service.[278] In states where personal service is required, this may also act as a presumption. Court files will often contain a returned copy of the proof of personal service. The attorney can establish nonpayment by entering the records maintained by the child support agency.[279] To verify the payment records, it may be necessary to take testimony from the obligee or a representative of the child

[275] *See* OCSE-AT-12-01: *Turner v. Rogers* Guidance (June 18, 2012).
[276] *See, e.g., Kirwan v. Kirwan,* 202 A.3d 458 (Conn. App. Ct. 2019)*; In re Marriage of Hinnen*, 845 N.W.2d 719 (Iowa Ct. App. 2014); *State on behalf of Mariah B. v. Kyle B.,* 906 N.W.2d 17 (Neb. 2018).
[277] *See Burnham v. Superior Court of California*, 495 U.S. 604 (1990).
[278] *Jones v. Jones*, 428 P.2d 497 (Idaho 1967).
[279] *See Interest of N.V.R.,* 580 S.W.3d 220 (Tex. App. 2019).

support agency. It may be possible to substitute an affidavit from the state SDU or child support agency in lieu of live testimony.[280]

Purge requirements and commitment. If the tribunal finds the defendant in contempt, it has the authority to set conditions that allow the contemnor to purge themselves of contempt. The purge requirements, however, must serve a remedial aim, must be clearly specified, and should be reasonably related to the cause or nature of the contempt.[281] The contemnor should be able to fulfill the purge conditions.[282] The purge conditions should also be based on an obligor's ability to pay, rather than some standard criteria such as a percentage of the arrearage.[283] Purge conditions may include payment of all or part of an arrearage amount, participation in an employment program, or other required activities.[284] Within these limits, the court's discretion in setting the purge requirements is very broad.[285] Child support attorneys should advocate for appropriate purge amounts or requirements based on the facts of the particular case.[286] Federal regulations

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[280] *See, e.g.,* Va. Code Ann. § 20-60.2 (2019) (Copies of support payment records maintained by the Department of Social Services, when certified over the signature of a designated employee of such entity, shall be considered to be satisfactorily identified and shall be admitted in any proceeding as *prima facie* evidence of such transactions. Additional proof of the official character of the person certifying such record or the authenticity of his signature shall not be required.).
[281] *See Nienaber v. Commonwealth ex rel. Mercer,* 594 S.W.3d 232 (Ky. Ct. App. 2020). *See also McCollum v. Indiana Family & Soc. Servs. Admin.,* 82 N.E.3d 368 (Ind. Ct. App. 2017) (trial court's sanction of 150 weeks of imprisonment, to be served on work release, was improper because it was punitive in nature, rather than coercive as civil sanctions must be. "It was inconceivable that a trial court could properly sanction the mother in a civil contempt proceeding with a longer prison sentence than the maximum she could have received if charged criminally.").
[282] *See, e.g., Carter v. Hart,* 240 So. 3d 863 (Fla. Dist. Ct. App. 2018); *Hying v. Hying*, 816 N.W.2d 351 (Wis. Ct. App. 2012). *See also State on behalf of Mariah B. v. Kyle B*., 906 N.W.2d 17 (Neb. 2018) (the contemnor's inability to comply with purge terms cannot be voluntarily created, for example by not diligently seeking a job at one's earning potential).
[283] *See, e.g*., *State on behalf of Mariah B. v. Kyle B*., 906 N.W.2d 17 (Neb. 2018) (when a purge order involves payment of money, the sum required to purge oneself of contempt must be within the contemnor's ability to pay within the time period provided in the order, taking into consideration the assets and financial condition of the contemnor and his or her ability to raise money.).
[284] *See Nienaber v. Commonwealth ex rel. Mercer,* 594 S.W.3d 232 (Ky. Ct. App. 2020) (although in child support civil contempt cases courts typically set monetary purges, there is no prohibition against the use of non-monetary purges. In this case, however, the appellate court did not consider it error for the trial court to fail to consider a requirement that the contemnor complete a substance abuse program where it was unclear whether such a program would compel the contemnor to pay her child support or compensate the Commonwealth for its loss.).
[285] *See United States v. Bright*, 596 F.3d 683 (2010). *But see Thompson v. Thompson,* 187 A.3d 259 (Pa. Super. Ct. 2018) (trial court imposed an illegal sentence in violation of the appellant's due process rights when it entered an order incorporating terms of the parties' agreement that included an acknowledgment of civil contempt and a suspended sentence of six months incarceration if the obligor failed to make agreed upon payments. Pennsylvania law requires the trial court to determine if the alleged contemnor has the present ability to pay and to set a purge amount; it does not contemplate future ability to pay, allow for an indefinitely suspended sentence, or provide for incarceration without a purge amount.).
[286] *Rose v. Rose*, 481 U.S. 619 (1987).

require that the agency provide the court with information sufficient for the court to make a factual determination of the noncustodial parent's ability to pay the purge amount or to comply with the purge conditions.[287]

Generally, the fine or imprisonment continues until the contemnor complies with the purge requirements.[288] In a civil contempt proceeding, a fixed term without the possibility of purging is clearly not proper.[289] Furthermore, due process may require that a civil contemnor be released when confinement has lost its coercive force, but the contemnor has the burden of proving that there is not a substantial likelihood that continued confinement would accomplish its coercive purpose.[290]

Criminal contempt. While the same act may give rise to both civil and criminal contempt charges, each confers distinct procedural rights. The distinction between civil and criminal contempt is crucial. Criminal contempt is punitive in nature[291] and therefore has limited use in the child support arena. A strictly penal sanction can be imposed only where the defendant is provided essential due process protections, including explicit information regarding the criminal nature of the complaint and potential for incarceration.[292] These due process rights also include an impartial judge, the right to present a defense, the right to call witnesses, and, in some jurisdictions, the right to counsel and a trial by jury.

A criminal contempt proceeding is considerably more complicated than a civil contempt proceeding. Initiation of the proceeding may require a more formal notice than is provided the civil contemnor in the motion and order to show cause, although a formal indictment is not necessary. The possibility of an indigency hearing, a jury trial, and a change of judge makes the process potentially a very long one. The evidentiary hurdles are difficult to overcome without knowledgeable witnesses. For these reasons, child support agencies rarely, if at all, use criminal contempt as an enforcement remedy.

Despite these drawbacks, there are occasions when criminal contempt may be useful. For example, where a high-income obligor is repeatedly and

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[287] 45 C.F.R. 303.6(c)(4)(ii) (2019).
[288] *See Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006).
[289] *Hess v. Hess*, 409 N.E.2d 497 (Ill. App. 1980). *See Marks v. Tolliver*, 839 N.E.2d 703 (Ind. App. 2005) (an order requiring incarceration of an obligor for contempt is legally allowable only when the obligor has a way of avoiding the incarceration by paying support). *But see In re Paternity of Jo. J.*, 992 N.E.2d 760 (Ind. App. 2013) (incarceration was appropriate in this case since the obligor had repeatedly been found in contempt but had continually failed to pay support. He had had the opportunity to purge himself and avoid contempt in the past).
[290] *Alexander v. Alexander*, 742 S.W.2d 115 (Ark. App. 1987).
[291] *See, e.g., Nienaber v. Commonwealth ex rel. Mercer,* 594 S.W.3d 232 (Ky. Ct. App. 2020); *Unger v. Unger,* 834 S.E.2d 649 (N.C. App. 2019).
[292] *See State ex rel. Farris v. Bryant*, No. E2008-02597-COA-R3-CV, 2011 Tenn. App. LEXIS 84, 2011 WL 676162 (Tenn. Ct. App. 2011).

willfully failing to comply with a child support order, a child support attorney may recommend a criminal contempt action.

Criminal Nonsupport

In some instances, civil actions are not successful in collecting child support due. In the more egregious cases, the attorney might want to pursue criminal charges against the delinquent obligor. There are criminal offenses for nonsupport of children at both the state and federal level.

State actions. All states have some form of state-specific criminal statutes that relate to the failure to pay support in purely intrastate cases.[293] The standard of proof in these cases is high, as in all violations of the penal code; that is, proof beyond a reasonable doubt. Sanctions also vary widely, depending upon whether the offense is a felony or misdemeanor. In Oregon, for example, criminal nonsupport is a Class C felony with a penalty of five years in jail and a fine of up to $125,000.[294] In Connecticut and Hawaii, however, criminal nonsupport is a misdemeanor, with only a possible one year jail sentence.[295] In some states, the attorneys who establish and enforce child support obligations in civil court are district or prosecuting attorneys who have discretion to file criminal charges against an obligor.[296] Other states have a referral process where the child support attorney refers the case to the district attorney or prosecutor to review for criminal prosecution. Lastly, some states appoint child support attorneys as special prosecutors solely for the purpose of bringing an action under the state criminal nonsupport statute.

Because civil remedies such as income withholding, tax refund offset, and negotiated payment agreements are still the most effective tools for collecting support, criminal nonsupport proceedings should only be used in limited cases. Local law or child support agency policy may require that all available civil remedies be exhausted prior to resorting to criminal prosecution. Where civil remedies have proven unsuccessful or where the obligor has been evading civil remedies, a criminal charge of nonsupport may be effective in bringing about payment. State law defines the elements of the crime.[297] It does not violate due

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[293] *See, e.g.*, 750 Ill. Comp. Stat. 16/15 (2019); Mich. Comp. Laws § 750.165 (2019); N.Y. Penal Law § 260.06 (McKinney 2019).
[294] Or. Rev. Stat. § 163.555 (2019).
[295] Conn. Gen. Stat. § 53-304 (2019); Haw. Rev. Stat. § 709-903 (2019).The statute in Hawaii punishes "persistent nonsupport." Commentary accompanying the section makes it clear the legislature believes criminal sanctions are intended only as a last resort.
[296] In Texas, for example, the state child support agency is within the state Office of the Attorney General. Therefore, attorneys working within that office are Assistant Attorneys General.
[297] For a comprehensive list of state criminal nonsupport statutes and sanctions, *see* National Conference of State Legislatures, Criminal Nonsupport and Child Support (Jun 8, 2015), https://www.ncsl.org/research/human-services/criminal-nonsupport-and-child-support.aspx (last visited Feb. 7, 2021).

process if the state statute requires the defendant to prove the affirmative defense of inability to provide support for good cause.[298]

Federal criminal actions. The Child Support Recovery Act of 1992 (CSRA) made it a federal misdemeanor to willfully fail to pay a past-due child support obligation for a child who resides in another state.[299] While federal prosecutions proved somewhat successful under the CSRA, the simple misdemeanor penalties provided for in CSRA did not have the force to deter serious violators. As a result, Congress passed the Deadbeat Parents Punishment Act (DPPA) in 1998.[300] The DPPA makes it a felony offense to travel interstate or internationally to evade a child support obligation that has remained unpaid for longer than one year or is greater than $5,000.[301] In addition, the law covers the willful failure to pay any child support obligation for a child living in another state if the obligation has remained unpaid for a period longer than two years or is greater than $10,000.[302] A second or subsequent violation of 18 U.S.C. § 228(a)(1) becomes a felony.

Venue/jurisdiction. According to the DPPA, venue is appropriate in the district where either the child or the obligor resides, or in any other district with jurisdiction otherwise provided for by law.[303] This includes any district in which a child support order was entered.

Defenses. Defendants have offered several defenses as legal challenges to criminal nonsupport. They have ranged from contesting venue and jurisdiction to alleging a violation on constitutional grounds of the Commerce Clause. Federal appellate courts, however, have routinely upheld the constitutionality of criminal nonsupport, the CSRA, and the DPPA.[304]

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[298] *State v. Meacham,* 470 S.W.3d 744 (Mo. 2015), *citing Patterson v. New York*, 432 U.S. 197 (1977).
[299] Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified at 18 U.S.C. § 228(a)(1) (2018)).
[300] Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (codified at 18 U.S.C. § 228 (2018)).
[301] 18 U.S.C. § 228(a)(2) (2018).
[302] 18 U.S.C. § 228(a)(3) (2018).
[303] 18 U.S.C. § 228(e) (2018).
[304] *See, e.g., United States v. Kerley*, 416 F.3d 176 (2d Cir. 2005) (defendants cannot collaterally attack the subject matter jurisdiction of the state court in a federal DPPA action); *United States v. Ballek*, 170 F.3d 871 (9th Cir. 1999) (in a misdemeanor case, defendant was not entitled to a jury trial, regardless of the amount of restitution ordered)*; United States v. Edelkind*, 525 F.3d 388 (5th Cir. 2008) (because criminal nonsupport is a continuing offense, the statute of limitations does not apply); *United States v. King*, 276 F.3d 109 (2d Cir. 2002) (appellate court concluded that nothing in *United States v. Morrison*, 529 U.S. 598 (2000), or any other Supreme Court case, undermined the court's prior conclusion in *United States v. Sage*, 92 F.3d 101 (2d Cir. 1996), that the obligation to pay money across state lines is a thing in interstate commerce, and that the failure to meet such an obligation can be regulated under the Commerce Clause);

Penalties upon conviction. If a defendant is charged with a misdemeanor and the obligation has remained unpaid for longer than one year, or is greater than $5,000, the noncompliant individual is subject to imprisonment of up to six months, fines, and restitution in an amount equal to the total unpaid support amount existing at the time of sentencing.[305]

For felony offenses, or a second or subsequent misdemeanor, the maximum penalty is up to two years imprisonment, or five years of probation, a fine of up to $250,000, and mandatory restitution in an amount equal to the total unpaid support obligation existing at the time of sentencing.[306]

The DPPA requires all sentencing courts to order mandatory restitution pursuant to 18 U.S.C. § 3663A, in an amount equal to the total unpaid child support obligation existing at the time of sentencing.[307] The total unpaid child support obligation includes the total amount of arrears, even if the arrearage began to accumulate long before the charging period.[308] Interest on a child support obligation depends on the law of the state entering the order.[309] Restitution orders under the DPPA are governed by the Mandatory Victims Restitution Act of 1996[310] (MVRA). As such, they are enforceable by the Government under the Federal Debt Collection Procedures Act of 1990 (FDCPA),[311] including its garnishment provisions. Once the court enters a restitution order, a custodial parent cannot "wipe out" the defendant's restitution obligation by waiving his obligation to pay the arrearages. Allowing the defendant and victim to negotiate a settlement violates the public policy behind the MVRA.[312]

United States v Faasse, 265 F.3d 475 (6th Cir. 2001) (the CSRA is constitutional under the Commerce Clause).

[305] 18 U.S.C. § 228(c)(1), (d) (2018). *See also United States v. Craig,* 181 F.3d 1124 (9th Cir. 1999) (a restitution order, imposed under the CSRA, can cover the entire amount of unpaid support owed by a delinquent obligor, and not just the arrearages that accrued during the period specified in the indictment. The court also permitted restitution for the full amount owed, without an inquiry into ability to pay). *See also United States v. Hanna*, 630 F.3d 505 (7th Cir. 2010) (the restitution amount from the sentencing report was upheld, even though the defendant made a payment after the date of the report).

[306] 18 U.S.C. § 228(c)(2), (d) (2018).

[307] 18 U.S.C. § 228(d) (2018).

[308] *United States v. Brand*, 163 F.3d 1268 (11th Cir. 1998).

[309] *See United States v. Stephens*, 374 F.3d 867 (9th Cir. 2004) (the District Court correctly required the defendant to pay interest on the past-due child support obligation).

[310] *See* Title II, subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 201 -211, 110 Stat. 1223, 1227 - 1241.

[311] *See* Title XXXVI of the Crime Control Act of 1990, Pub. L. No. 101-647, § 3601, 104 Stat. 4789, 4933.

[312] *See United States v. Berner,* 3:08-CR-30036-MAM, 2018 U.S. Dist. LEXIS 33519, 2018 WL 1137059 (D.S.D. 2018) (the fact that the custodial parent "forgave" the defendant's remaining arrearages and the child support agency closed its case and stopped enforcement was not an allowable basis for quashing a garnishment under the FDCPA).

Federal sentencing guidelines do not apply. This is important because it allows the penalty to be uniquely tailored to suit the nonsupport offense. For example, a defendant might be required to serve the full five-year probation that is available.[313] Additionally, it is a standard condition of probation that a defendant pay any ongoing child support obligation. A probationary period may also include a requirement that the defendant serve nights or weekends in jail for up to one year to be followed by four years of probation.[314]

Extradition. If a defendant has been tried and convicted of the felony offense of nonpayment of child support and flees the jurisdiction, they are subject to extradition as with any federal offense.

After the defendant has been arrested based on an extradition request, the requesting state shall be placed on notice and is required to make arrangements within 30 days to have the defendant returned to the state where the conviction was made. If no arrangements are made within the prescribed 30 days, the defendant may be released.[315]

Project Save our Children. Project Save our Children (PSOC) is a collaboration between the federal Department of Health and Human Services, the Office of Inspector General; the Federal Department of Justice; OCSE; and the states to locate noncustodial parents and refer cases for federal prosecution under the CSRA or the DPPA.[316] This project was developed in order to assist states with their most difficult locate and criminal nonsupport cases.[317] If a child support agency believes an intergovernmental case may be appropriate for this project, the agency prepares the case and forwards it to the attorney to review the PSOC screening and referral criteria. If a case qualifies, the child support agency and the state PSOC coordinator may forward it to the OCSE PSOC coordinator.

- PSOC Locate. The PSOC program has access to various federal enhanced locate tools. A child support attorney will certify that a case prepared by the agency appears appropriate for criminal nonsupport and that all state and FPLS locate resources have been exhausted prior to referral to PSOC for locate. If accepted, PSOC will use the enhanced locate tools to determine the whereabouts of the obligor. After the obligor is located, the case is returned to the state for local criminal prosecution.[318] Often a finding and order of civil contempt in the state court will suffice for the PSOC process.

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[313] 18 U.S.C. § 3561(c)(2) (2018).
[314] 18 U.S.C. § 3563(b)(10) (2018).
[315] Many states have similar extradition procedures for criminal nonsupport.
[316] 18 U.S.C. § 228(a)(1), (a)(3), (c)(2) (2018).
[317] *See* OCSE-AT-11-01: Project Save Our Children (PSOC) Procedures (Jan. 26, 2011).
[318] *See* Office of Child Support Enforcement, State Request for PSOC Locate Services (Form & Instructions).

- PSOC Criminal Nonsupport. The PSOC program can assist a state by investigating and pursuing federal criminal nonsupport for intergovernmental cases where all other enforcement remedies have been exhausted. Before a case is referred for PSOC criminal nonsupport, the child support agency must prepare and the attorney must verify that the case meets all the statutory criteria for a federal criminal nonsupport case; the child support agency must exhaust all available and reasonable alternative remedies.[319] If a case is accepted for PSOC criminal nonsupport, it will be investigated and prosecuted using PSOC project resources.

Posting Bonds

The Child Support Enforcement Amendments of 1984 required states, as a condition of receiving federal funds, to enact and use "procedures which require that a noncustodial parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such noncustodial parent of the proposed action and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State)."[320]

Like most enforcement remedies, bonds are not appropriate in every case. Pursuant to federal regulation, child support agencies should review cases individually to determine if this is an appropriate remedy.[321] Most state policies generally take into account such criteria as the payment record of the obligor and the availability and success of other enforcement remedies.

A child support attorney might successfully combine bonds with other enforcement remedies. For example, when an obligor is found to be in civil contempt, it might be appropriate for the attorney to request that a bond be ordered to secure future payments. Bonds can also be used in lien releases. To secure the release of a lien on real or personal property, the attorney can request that the obligor be required to post a surety or bond. If the obligor continues to ignore a support obligation, the bond or surety can be liquidated or released by the court and distributed as support. The obligor can be given the opportunity to present evidence regarding compliance.

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[319] *See* OCSE-AT-11-01: Project Save Our Children (PSOC) Procedures (Jan. 26, 2011). *See also* Office of Child Support Enforcement, State Referral: Federal Criminal Prosecution for Non-Support (18 U.S.C. § 228), Project Save Our Children (Form & Instructions).
[320] Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 3(b), 98 Stat. 1305, 1307 (codified at 42 U.S.C. § 666(a)(6) (2018)) .
[321] 45 C.F.R. § 303.104(c) (2019).

Enforcement Against Non-Recurring Income

Lump sum payments. Sometimes a delinquent obligor receives lump-sum payments, and income withholding is not an effective enforcement tool to reach such payments. Federal law requires states, as a condition of receiving federal funds, to provide the child support agency with administrative authority to intercept or seize lump-sum payments from a state or local agency – including unemployment compensation, worker's compensation, and other benefits – in addition to judgments, settlements, and lotteries to satisfy a delinquent obligor's arrears and any current support obligation.[322] Child support agencies have varying remedies to attach lump sum payments, such as a rule to show cause for civil contempt with a request that the court have the obligor turn over the sum; withhold and deliver orders; state intercepts; or a request for assistance from another state where the sum is located. If the payment is located in a second state, that state can attach the funds from a financial institution, retirement account, or other fund; sell property through foreclosure; or levy on assets and attach the net proceeds.[323]

Probate court actions. In a case where a child support agency has learned that an obligor is about to inherit money and has determined the jurisdiction where the deceased person lived, the child support attorney should contact the child support office or probate court in that jurisdiction to determine whether a probate has been filed for the deceased. If the deceased had a small estate, some probate procedures may not be necessary.[324] If the deceased had no will, the law permits courts to appoint an administrator from a series of classes of individuals who may file to be the administrator of the estate.[325] If the deceased had a will, it will be necessary to contact the executor of the will to determine the amount of the inheritance and how to assert a claim against the estate. If the jurisdiction is in the same location as the attorney, local procedures should determine the nature of the action that can be taken to attach any funds the obligor may inherit. If the jurisdiction is not in a location where the attorney is licensed to practice, the child support agency in the local jurisdiction should be able to assist with the filing of actions.

States' case law, statutes, and local procedural rules vary and will govern the process for filing any claim against an estate. For example, in some states, only an individual has standing to file a claim against an estate; the child support agency lacks standing. In other states, the agency may limit probate actions due to resource issues. If the child support agency is not able to file a claim for child support arrears against an estate, the obligee may want to do so personally or through counsel, with the child support agency providing a certified statement of

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[322] *See* 42 U.S.C. § 666(c)(1)(G) (2018).
[323] *Id*. For additional information, see the discussion on MSFIDM, Federal Insurance Match, FAST Levy, and Levy and Execution herein.
[324] *See, e.g.,* Va. Code Ann. § 64.2-508 (2019).
[325] *See, e.g.,* Va. Code Ann. § 64.2-502 (2019).

arrears or a certified copy of a lien and an updated certification of arrears. The child support arrears constitute a judgment, which may have priority over other claims/debts. Similar processes would occur if the obligor is the deceased person. Child support arrears remain a judgment against the estate. If permitted, the child support agency should file a claim against the estate.

Interpleader actions. Like probate actions, actions to intervene in court cases where an obligor has received or will receive a settlement or award require research by the child support attorney to determine the jurisdiction where the action is taking place. After this is determined, local law and practice will govern the kind of intervention action that the attorney can file. Also, like probate actions, if the attorney is not licensed to practice in the jurisdiction of the action, the local child support agency should be able to assist with any filing. Some states have specific laws relating to actions in probate or other courts on behalf of minor children.[326]

Attachment of lottery and gambling winnings. Federal law requires states to have laws requiring state lottery commissions or gaming licenses to attach or withhold child support from an obligor's winnings if the state has a lottery.[327] A child support attorney should research the laws in their jurisdiction to determine the specific lottery or gaming license requirements that apply when seeking to attach winnings within the jurisdiction if the child support agency does not have an automated intercept process.

Attachment of unclaimed funds. Another enforcement tool is the attachment of unclaimed funds held by a state that may be claimed by an obligor. Some states have developed automated or other procedures to match information on obligors who owe child support arrears against lists of people who have filed claims to receive unclaimed funds.[328] Some states publish a list of unclaimed funds annually, which is a more time-intensive search tool. The child support attorney should research what process is available in their state for enforcing child support arrears against such funds.

Other Remedies

States have implemented alternative enforcement remedies against obligors when traditional methods are unsuccessful. Alternative enforcement measures include vehicle booting, wanted posters or advertisements, and sheriff sweeps. These alternative remedies should be considered with caution because they can have limited usefulness. Although sting operations are sometimes used by child support agencies, stings and other deceptive practices may undermine the credibility of the child support program and reduce the willingness of obligors

[326] *See, e.g.*, Fla. Stat. § 744.301 (2019).
[327] *See, e.g.*, Idaho Code Ann. § 56-203E (2019); 230 Ill. Comp. Stat. 5/27.2 (2019).
[328] *See, e.g.*, Ohio Rev. Code Ann. § 3123.88 (2019).

to cooperate with, or request assistance from, child support agencies. In addition, child support attorneys should carefully consider their ethical obligations if participating in any type of sting operation.[329]

If a child support attorney suspects that an obligor has transferred property with the intent to defraud and avoid a child support debt, the attorney may be able to file an action to reverse the transfer of property from the obligor to the other person. Most states have enacted a version of the Uniform Fraudulent Transfer Act.[330]

Hard to Enforce Cases

Obligors with unreported income. Cases where the obligor is working "under the table" can be the most difficult and challenging to enforce. Child support attorneys often need to be creative in locating income and assets to take appropriate enforcement action. The search for income and assets can include searches of real estate and other property records, and reviews of probate, municipal, or other court databases for potential settlements owed to the obligor. Court records may also be sources of information about trust income the obligor may be receiving. The attorney may also contact relatives and friends of the obligor or search social media for leads.[331] A child support attorney may also file a Judgment Debtor Examination action, requiring the obligor to appear and answer questions under oath about their income and assets.

Obligors in "gig" economy. Recently there has been a rise of individuals engaged in the "gig economy." The gig economy is a labor market characterized by the prevalence of short-term contracts or freelance work. Each piece of individually contracted work is a 'gig' just as a performance venue for a musician is called a gig. Usually, online platforms connect workers and customers, and payment is intermediated by the platforms.[332] The payments may supplement the obligor's regular income or substitute for it. Examples of gig workers are writers, house sharers, people who work for driving and delivery services, dog walkers, and musical or other artistic performers. As independent

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[329] *See* ABA Model Rule 8.4(c).

[330] *See* Uniform Fraudulent Transfer Act (1984), amended and approved as the Uniform Voidable Transactions Act (2014), https://www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49. *See, e.g.*, 740 Ill. Comp. Stat.160/1 – 160/12 (2019); Tex. Bus. & Com. Code Ann. §§ 24.001 *et seq*. (West 2019); Wash. Rev. Code § 19.40 (2019).

[331] For more information on the use of social media, *see* Chapter Five: Location of Case Participants and Their Assets.

[332] *See* Craig Burshem, Theodora Andreopoulos, Catherine Weaver, and Laura Cromwell, *Skipping Rocks: The GIG Worker, the Underemployed and the Determination of the Right Sized Support Obligation*, ERICSA Conference (2019), https://s3.amazonaws.com/v3-app_crowdc/assets/0/0a/0ad944c53ce0a38a/C-3_Skipping_Rocks_Final_Presentation.original.1557195498.pdf?1557195500 (last visited Feb. 7, 2021).

contractors, gig workers are not considered employees under most states' income withholding laws, so employers are not required to report them to new hire directories.[333] `When employers are known, income withholding is usually ineffective because the worker often does not stay at one job long and the income and employment varies greatly from month to month.

If the obligor is working in the gig economy, it may be necessary for a child support attorney to subpoena the obligor's bank and other financial records, such as income tax returns, to determine the obligor's income. A subpoena to the contracting agent for business records may reveal income paid, currently or in the past, to the obligor. In the case of taxi drivers or other drivers and delivery services, the attorneys can subpoena trip sheets. Certified public accountants or forensic accountants may be helpful in locating gig income. However, because of the associated costs, the attorney should check with the agency before engaging such accountants. In-depth interviews with custodial parents and exploration of social media sites may also be useful in identifying income sources. Other avenues for locating income and assets are similar to those noted in the discussion of obligors with unreported income.

Incarcerated obligors. Cases involving incarcerated obligors also present enforcement challenges. A civil contempt action will almost always be inappropriate because an incarcerated parent most likely has no current ability to pay support.[334] Some states have laws allowing the attachment of prison income for incarcerated obligors.[335] Other states suspend an obligor's support obligation when they are incarcerated.[336] In the absence of state law, child support attorneys and agencies are encouraged to develop enforcement policies for incarcerated obligors.[337] In developing such policies, agencies need to be aware that the effects of incarceration are significant and long lasting; they include:

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[333] The issue of whether such workers should be characterized as independent contractors or employees has arisen in court challenges as well as proposed legislation in various states. It is an issue that remains in flux. See Jeremy Pilaar, *Assessing the Gig Economy in Comparative Perspective: How Platform Work Challenges the French and American Legal Orders*, 27 Yale J.L. & Policy 47, 81-86 (2018).

[334] *See* 45 C.F.R. § 303.6(c)(4)(ii) (2019).

[335] *See, e.g.*, Alaska Stat. § 09.38.030(f) (2019); Colo. Rev. Stat. § 18-1.3-106(5)(a) (2019); Ohio Rev. Code Ann. § 3121.08(B) (2019).

[336] *See, e.g.,* Or. Admin. R. 137-055-3300 (2020) (an incarcerated obligor is presumed unable to pay child support and a child support obligation does not accrue for the duration of the incarceration unless the presumption is rebutted); D.C. Code § 23-112a (2020) (an individual about to be sentenced for more than 30 days will be advised by the court of his or her right to file a petition to modify or suspend the order).

[337] *See generally* Office of Child Support Enforcement, Project to Avoid Increasing Delinquencies, *"Voluntary Unemployment," Imputed Income, and Modification Laws and Policies for Incarcerated Noncustodial Parents* (July 2012); National Conference of State Legislatures, *Child Support and Incarceration* (Mar. 4, 2019), https://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx (last visited Feb. 6, 2021).

increased support debt, loss of current employment income and a decrease in future income, decreased ability to pay, and deteriorated family and child relationships.[338]

Low-Income Obligors

Low-income obligors often have barriers to paying child support that are unrelated to any willingness to pay support. For example, low-income obligors may be unemployed, homeless, have physical or mental health ailments or disabilities, or have substance abuse issues that prevent them from paying. As described earlier in this chapter, child support agencies can assist these obligors by identifying when payments stop, initiating appropriate early intervention, or referring them to other programs that can assist with employment, training, or assistance with physical, mental, or substance abuse issues. This approach can be far more effective than contempt or other enforcement procedures that do not address the causes of failure to pay.[339] A review of the case may also reveal that the support order was initially based on imputed income that does not accurately reflect the party's income. In such a case, a modification action may be more appropriate than an enforcement action.[340] Establishing or modifying an order requires using actual earnings and consideration of the subsistence needs of the obligor (and at a state's option, the needs of the obligee and children).[341]

High-Income Obligors

Federal law requires states, as a condition of receiving federal funds, to give the state child support agency administrative authority to increase the amount of monthly support payments to include amounts for arrearages, subject to due process safeguards, without the necessity of obtaining an order from any other judicial or administrative tribunal.[342] Often the payback amount is established by statute or regulation as a percentage of the current support.[343] State laws also authorize tribunals to add an arrearage payback amount when an obligor has become delinquent. The tribunal usually has discretion in setting the payback amount, so long as the amount is within the obligor's ability to pay. In *Dillingham v. Ramsey*,[344] the North Carolina Court of Appeals found that the trial court had abused its discretion. Despite the obligor's ability to pay the entire

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[338] *See* Final Rule: Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,526 – 93,529, and 93,533 (Dec. 20, 2016).
[339] For more information on this topic, *see, e.g.*, OCSE-IM-12-01: Alternatives to Incarceration, (Jun 18, 2012); Office of Child Support Enforcement, Child Support Fact Sheet #1: Family-Centered Innovations Improve Child Support Outcomes (June 19, 2011).
[340] For more information on right-sized orders, *see* Chapter Ten: Establishment of Child Support and Medical Support Obligations, and Chapter Twelve: Modification of Child Support Obligations.
[341] 45 C.F.R. § 302.56(c)(1)(ii) (2019). *See also* Final Rule: Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,518 – 93,519 (Dec. 20, 2016).
[342] 42 U.S.C. § 666(c)(1)(H) (2018).
[343] *See, e.g.,* 22 Va. Admin. Code § 40-880-290.
[344] *Dillingham v. Ramsey,* 837 S.E.2d 129 (N.C. App. 2019).

arrearage immediately (he made more than $140,000 per month), the trial court had ordered him to pay $100 per month toward arrears. At that rate, it would take the obligor more than 20 years to pay the entire arrears and the youngest child would be age 35. The court held that the trial court had abused its discretion by fashioning a remedy for the obligor's failure to pay child support as ordered without considering the purpose of child support – ensuring the welfare of minor children – or the obligor's ability to pay.

LIMITATIONS ON ENFORCEMENT AND DEFENSES

While new child support enforcement techniques continue to evolve, there remain limitations on enforcement based on concepts of fairness, i.e., statutes of limitations for enforcing arrears, the obligor's current ability to pay/comply, statutory limits on income withholding, and other valid defenses under state and tribal laws.

Statutes of Limitations

Statutes of limitations prevent the assertion of claims that have become dormant or stale. The statutes of limitations for child support enforcement vary by state or tribe. The law of the jurisdiction, therefore, dictates the length of time that the child support agency must collect arrears.[345]

Note that the statute of limitations issue becomes critically important in intergovernmental cases. Both FFCCSOA[346] and UIFSA[347] clearly address choice of law regarding the issue. In an action to enforce support arrears, the applicable statute of limitations will be that of the forum state or the state that issued the controlling order, whichever has the longer period.[348] The intent of these provisions is to prevent a noncompliant obligor from moving to a state with a short statute of limitations period to avoid collection of the arrears.

Mistake of Fact

Another defense that an obligor may allege is mistake of fact – either a mistake about the identity of the parent or the amount of child support arrears.

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[345] For a complete list of state and tribal statutes of limitations for child support, *see* Office of Child Support Enforcement, Intergovernmental Reference Guide, Section E, Statute of Limitations (Dec. 31, 2019), https://ocsp.acf.hhs.gov/irg/profileQuery.html?geoType=1.
[346] Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063, (1994) (codified as amended at 28 U.S.C. § 1738B (2018)).
[347] Unif Interstate Family Support Act (2008), https://www.uniformlaws.org/viewdocument/final-act-with-comments-120?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb&tab=librarydocuments (last visited Feb. 7, 2021).
[348] 28 U.S.C. § 1738B(h)(3) (2018); Unif. Interstate Family Support Act § 604(b) (2008). For more information on the application of statutes of limitations in intergovernmental cases, *see* Chapter Thirteen: Intergovernmental Child Support Cases.

Federal law expressly recognizes mistake of fact as a valid defense to income withholding, as well as to other actions.[349] Many states also recognize this as a valid defense to other enforcement remedies.[350]

Laches

Some states allow an obligor to raise a laches defense in a child support case. Laches is an equitable defense providing that one who neglects to assert a right or a claim, when coupled with the passage of time, causes prejudice to the adverse party thereby acting as a bar to the claim by the moving party.[351] Typically, the application of laches requires clean hands by the obligor, as well as a showing of some prejudice as a result of reliance on the fact that the obligee was not going to act on the claim. In *Lasche v. Levin*, the obligor argued that the court should have been barred by laches from making a support order in 2007 that was retroactive to 1996. The Appeals Court upheld the child support order and rejected the laches claim, holding the delay was due to the inability to locate and serve process on the obligor despite several attempts over a number of years. Therefore, the delay was found to be neither undue nor unexplained.[352]

Some states have held that a laches defense is inappropriate in a child support case because the right of support belongs to the child and not the parent. An example is Oregon, which disallows such defenses in most collection contexts, although estoppel is available in some situations.[353] The court in Virginia has also held that the doctrine of laches is unavailable as a defense when the party in the enforcement action was acting in its governmental capacity.[354]

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[349] *See, e.g.*, 42 U.S.C. § 666(b)(4)(ii) (2018) (defense to income withholding); 42 U.S.C. § 666(a)(5)(D)(ii) (2018) (basis to contest a signed voluntary paternity acknowledgement); 42 U.S.C. § 666(a)(19)(C) (2018) (basis to contest enforcement of health insurance coverage); 45 C.F.R. § 303.32(c)(5) (2019) (basis to contest withholding under a National Medical Support Notice for medical support).

[350] *See, e.g.*, N.Y. C.P.L.R. § 5241(a)(8) (McKinney 2019). *See also* Mo. Rev. Stat. § 454.511 (2019) (right to a mistake of fact hearing to contest denial of a passport by the state).

[351] *See Lovejoy v. Poole,* 230 So. 3d 164 (Fla. Dist. Ct. App. 2017) (laches is an affirmative defense that must be proven by facts about both parties' conduct and is not established merely by the passage of an inordinate period of time). *See also Wolyniec v. Wolyniec,* 203 A.3d 1269 (Conn. App. 2019) (affirmed trial court's finding that the noncustodial parent had failed to prove laches where there was no evidence that the noncustodial parent was prejudiced by the custodial parent's delay in filing her contempt action six years after the noncustodial parent began reducing his support payments).

[352] *Lasche v. Levin*, 977 A.2d 361 (D.C. 2009). *See also Ryan v. Janovsky*, 999 N.E.2d 895 (Ind. App. 2013) (laches could not be established because there was no time bar to the entry of the QDRO securing the custodial parent's right to payment from the noncustodial parent's pension); *Markey v. Carney*, 705 N.W.2d 13 (Iowa 2005).

[353] *State ex rel. Dep't of Human Res. of the State of California v. Ramirez*, 2 P.3d 437 (Or. App. 2000).

[354] *Morris v. Commonwealth*, 408 S.E.2d 588 (Va. App. 1991).

Equitable Estoppel/Acquiescence

An obligor may raise this defense when the parties both agreed earlier to surrender their child support obligations and concomitant rights in exchange for something and forego actions brought before a tribunal. For the tribunal to recognize this as a valid defense, the circumstances must be extreme and compelling, and the child's welfare cannot be jeopardized by the agreement. Courts review these cases with great scrutiny.

For example, in a Kentucky case, the parents entered an agreement requiring the obligor to pay support. At a later date, the obligee's attorney sent a letter to the obligor asking him to sign an agreed order memorializing their support agreement. The obligor stopped paying altogether as a result of that letter, claiming estoppel, and alleging that the agreed order voided the parties' earlier agreement. The court held that estoppel was not a defense because the letter was not an admission by the obligee that she was not entitled to support. Rather, the letter and enclosed order were simply a recognition by the obligee that the local child support agency could more efficiently administer the order than she could monitor the agreement.[355]

In a South Carolina case,[356] there was a support order allowing direct payment to the mother. The father lost his job and claimed that his former wife had agreed to a reduction in support; he paid reduced support for seven years. The mother said she thought it was a one-time reduction but never sought enforcement because he threatened to stop paying for expenses related to the child's visitation with him. The Court of Appeals ruled that the family court had erred in finding the father had presented sufficient evidence to establish the defense of equitable estoppel. The appellate court found that there was no documentary evidence demonstrating an agreement and that the mother's apparent acquiescence over time did not constitute evidence of an agreement necessary for a finding of estoppel. It also found that the father had not presented any evidence of a prejudicial change in position or detrimental reliance on the purported agreement.[357]

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[355] *Minix v. Minix*, 2008 Ky. App. Unpub. LEXIS 166, Nos. 2006-CA-002491-MR, 2007-CA-000030-MR, 2008 WL 399442 (Ky. Ct. App. Feb. 15, 2008).

[356] *Bauckman v. McLeod*, 838 S.E.2d 208 (S.C. Ct. App. 2019).

[357] *Compare with Brannock v. Brannock,* 598 S.W.3d 91 (Ky. Ct. App. 2019) (where the obligor introduced into evidence an email and text messages that confirmed an agreement between the parties, the court found that the agreement was fair and equitable to the parties and ensured that the children's needs were met, and where the father had paid the mortgage on the family house for six years in reliance on the agreement, the mother was equitably estopped from claiming an arrearage was owed). *But see Cope v. Cope,* 231 P.3d 737 (Okla. Ct. App. 2009) (although agreement was never reduced to writing, mutual verbal agreement in which the father agreed to give up his right to visit his children and the mother gave up her right to receive child support was sufficient basis for trial court to find that equitable estoppel barred mother's claim to unpaid support where father had complied with the agreement and both children had become adults).

Other courts refuse to recognize estoppel as a defense in a child support enforcement proceeding. For example, in a Texas case, the parents had agreed that the obligor's support obligation would end if he voluntarily relinquished his parental rights. Frustrated by what he perceived as an obstruction of his visitation rights, the obligor signed the termination paperwork sent by the obligee's attorney. Unbeknownst to him, the attorney never filed the paperwork with the court. Nine years later, the Office of the Attorney General notified the obligor that he was over $80,000 in arrears. The obligor denied he owed the arrears and claimed the obligee and Office of Attorney General were estopped from pursuing support because the obligee had led him to believe that his parental rights had been terminated. The Supreme Court of Texas held that estoppel is not an affirmative defense to a child support enforcement proceeding because court-ordered child support is a parent's duty to the child, not a debt to a former spouse.[358]

Inability to Pay

Inability to pay is not a defense to income withholding. Nor is it a permissible basis for challenge to the registration and enforcement of a support order under UIFSA. However, depending on state or tribal law, inability to pay might be an affirmative defense to the particular enforcement action. For example, Wisconsin has a statute recognizing the affirmative defense of inability to pay; the defense applies to the criminal charge of "failure to support," which includes inability to provide child, grandchild, or spousal support.[359] Other states, however, have held that inability to pay is not a defense to a felony nonsupport charge.[360] If it is an affirmative defense, it is the obligor who must demonstrate their inability to pay. The burden is not on the obligee or the child support attorney to show ability to pay.[361] Additionally, courts have held that the obligor's burden of proving inability to pay must be shown with particularity and not in general terms.[362]

As noted earlier, ability to pay is a critical issue in civil contempt proceedings. In some states, after an initial prima facie showing of nonpayment, the burden of proof shifts to the obligor to show an inability to pay or present some other defense. In other states, the alleged contemnor bears the burden of proving both that they were unable to satisfy the debt and that the failure was not intentional. For example, an issue may be whether the obligor's inability to pay results from a willful failure to seek and obtain suitable employment or a voluntary reduction of income. Challenges have arisen when courts have

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[358] *Office of the Attorney Gen. of Texas v. Scholer*, 403 SW 3d 859 (Tex. 2013).
[359] Wis. Stat. § 948.22(6) (2019).
[360] *See People v. Likine*, 823 N.W.2d 50 (Mich. 2012), *aff'g People v Adams*, 683 N.W.2d 729 (Mich. App. 2004).
[361] *See, e.g., In re Warner*, 905 A.2d 233 (D.C. 2006); *Chasez v. Chasez*, 957 So. 2d 1031 (Miss. Ct. App. 2007).
[362] *Chasez v. Chasez*, 957 So. 2d 1031 (Miss. Ct. App. 2007).

imposed a contempt sanction on an obligor for the failure to seek and accept available employment commensurate with their skills or abilities or for voluntarily reducing income. Obligors have contended this constitutes involuntary servitude. Courts have rejected this argument.[363]

Obligors have also argued that imprisonment on a criminal contempt sanction violates the constitutional prohibition against imprisonment for debt. Courts have also rejected this argument.[364]

Often when an obligor asserts inability to pay as a defense to a particular enforcement action, the obligor seeks a reduction in their child support during the course of the enforcement action. The child support attorney should point out its lack of notice of such a request. Due to lack of prior notice, the tribunal should limit its action to the enforcement proceeding and continue any modification action. If the tribunal subsequently hears the modification request and determines the obligor is entitled to a reduction in support, it may only order a retroactive modification to the date of service or notice of the pleading on the other party.[365]

Incarceration. An obligor may assert an inability to meet a child support obligation because of incarceration.[366]

The majority of states permit, or encourage, an incarcerated noncustodial parent to request a modification or suspension of a child support order based on changed circumstances.[367] Federal regulations permit a state child support

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[363] *See Child Support Enforcement Agency v. Doe*, 25 P.3d 461 (Haw. 2005).

[364] *See, e.g.*, *In re Bielefeld*, 143 S.W.3d 924 (Tex. App 2004) (although vacating the contempt order because it related to attorney fees, the court held that imprisonment for failure to comply with a child support order is not unconstitutional).

[365] *See also* Chapter Twelve: Modification of Child Support Obligations.

[366] *See Denton v. Sims,* 884 S.W.2d 86 (Mo. Ct. App. 1994).

[367] *See, e.g., Plunkard v. McConnell*, 962 A.2d 1227 (Pa. Super. Ct. 2008) (based on Pa. Rules of Civil Procedure 1910.19(f), court terminated support order of incarcerated obligor and forgave all arrears that had accrued since he had become incarcerated. The court did not forgive arrears that had accrued prior to his incarceration). *Accord Damon v. Robles,* 226 A.3d 410 (Md. Ct. Spec. App. 2020) (After the obligor was incarcerated, Maryland enacted a law providing that child support arrears do not accrue during any period when the obligor is incarcerated and continuing from 60 days after the obligor's release from confinement. The custodial parent had argued that the statute did not apply to the obligor's child support because he was sentenced before the law went into effect. The court disagreed. It held that the statute altered the procedure for which an incarcerated obligor could stop the accrual of child support. Because it did not create a substantive right, it could be applied retroactively. The appellate court affirmed the circuit court's determination that there was a vested right in payments between the time of the support order and the enactment of the statute. However, after enactment of the statute, the noncustodial parent's payment obligations automatically ceased. Accordingly, no arrears accrued and the statute, as applied, did not interfere with vested rights of the custodial parent.). For more information about the effect of incarceration on the modification of support, *see* Chapter Twelve: Modification of Child Support Obligations.

agency to initiate a review of an order, after learning that a noncustodial parent will be incarcerated more than 180 calendar days, without the need for a specific request. Upon notice to both parents, the agency must review and, if appropriate, adjust the order.[368] In fact, in its response to comments to the Final Rule regarding Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs, OCSE said that implementation of 45 C.F.R. § 302.56(c)(3) will ensure that states consider incarceration as a substantial change of circumstances that warrants the child support order to be reviewed and, if appropriate, adjusted based on the noncustodial parent's ability to pay.[369] Incarceration cannot be treated as voluntary unemployment when modifying support orders.[370]

In states that do not permit a suspension or modification of support during incarceration, an obligor will not later be able to argue incarceration as a defense to enforcement after the incarceration is over; in such states, child support accrues during incarceration and is a vested judgment that cannot be retroactively reduced.[371] After the incarceration, courts may often give the obligor a reasonable amount of time to find a job in order to have an ability to pay toward current child support and arrears. In its response to comments to the Final Rule, OCSE observed that states should not assume an ability to earn based on pre-imprisonment wages, particularly since incarceration typically results in a dramatic drop in income and ability to get a job upon release.[372] Courts may also refer those obligors for reentry services provided by the child support or other local agencies.

Disability. An obligor might claim that their inability to pay a support obligation results from a disability. As with any claim of inability to pay, the primary issue remains the veracity of these assertions. Fortunately, there are means available to confirm the disability of the obligor. The child support attorney can use traditional discovery methods to uncover any medical documents that would confirm the medical condition alleged by the obligor. Additionally, if the disability resulted from an employment-related injury, the obligor's employer, or former employer, may have documentation relative to the injury or disability. Benefits are available for many types of disabilities. These may be attachable by means of income withholding or, as in the case of Social Security disability payments, payable directly to a child. The child support agency can verify the status of an SSDI application, if any, with Social Security.

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[368] 45 C.F.R. § 303.8(b) (2019).
[369] *See* Final Rule: Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,527 (Dec. 20, 2016).
[370] 45 C.F.R. § 302.56(c)(3) (2019).
[371] *See* 42 U.S.C. § 666(a)(9) (2018).
[372] 81 Fed. Reg. 93,492, 93,527 (Dec. 20, 2016).

A related question is whether derivative disability benefits paid to a child based on an obligor's disability should be included as income to the disabled obligor and credited against the parent's support obligation. States vary in their treatment of derivative benefits. See the earlier discussion herein. The child support attorney should check the state's child support guidelines, as well as case law, for guidance.[373]

Denial of Visitation

Another equitable defense for failure to pay support is the denial of visitation. Some state statutes specifically provide that an obligor shall not fail to pay child support due to the other parent's refusal to honor the obligor's visitation rights.[374] If this defense is raised, it is important to note that federal law prohibits retroactive modification of support; therefore, a child support attorney should vigorously argue against a tribunal's retroactively forgiving any arrears.[375] If there is a parenting plan in effect, the attorney can explain to the obligor the appropriate forum for seeking enforcement or modification of the visiting plan.[376]

Res Judicata

Res judicata is a Latin phrase that means after something is adjudicated, the issue cannot be raised again by either party; the order is final. In the context of child support enforcement, *res judicata* applies to prohibit an arrearage amount from being relitigated after it has been ordered by a tribunal.

Bankruptcy

Many obligors seek relief from their financial obligations in the U.S. Bankruptcy Courts. Typically, such actions are filed under Chapter 7 or 13 of the

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[373] *See, e.g., Lak v. Lak,* 263 Cal. Rptr. 3d 854 (Cal App. Ct. 2020) (under California law, a trial court has the option of choosing one of two approaches: (1) it may consider the derivative benefits in fixing the guideline formula support amount; or (2) it may allow a direct-benefit credit against the formula amount); *Chapman v. Ward*, 3 So. 3d 790 (Miss. Ct. App. 2008) (lower court was correct when it refused to grant a set-off to the noncustodial parent based on his Social Security disability payments that were paid to the custodial parent); *LaMothe v. LeBlanc*, 70 A.3d 977 (Vt. 2013) (SSDI payments should be considered income to the noncustodial parent and a credit toward the child support obligation, even when the payments were made directly to the custodial parent).. *See also* Ky. Rev. Stat. Ann. § 403.211(15) (West 2019) (a payment of money received by a child as a result of a parental disability shall be credited against the child support obligation of the parent.); Michigan Child Support Formula Manual § 3.07(A) (guidelines provide for a set off of derivative disability benefits paid to a child against the support obligation); N.J. Ct. R., Appendix IX-A (These child [derivative] benefits are earned benefits that are meant to replace the lost earnings of the parent in the event of disability or retirement. The derivative child benefits shall be counted in the weekly net income of the parent whose contribution is the source of the benefits and applied as a credit to that parent's child support obligation).

[374] *See, e.g.*, Fla. Stat. § 61.13(4)(b) (2019).

[375] 42 U.S.C. § 666(a)(9) (2018).

[376] *See* Chapter Fifteen: Access and Parenting Time.

Bankruptcy Code. In a Chapter 7 action, the relief sought is discharge from all dischargeable debts, usually within 90 days after the filing. Filings under Chapter 13 are for an adjustment of debts of an individual with regular income through a five-year payment plan.

Over the years, numerous shifts in bankruptcy law have affected child support enforcement proceedings and provided child support attorneys with challenges and opportunities. The first uniform law on bankruptcy was enacted in 1978 with the creation of Title 11 of the United States Code.[377] In 1994, the Bankruptcy Reform Act first addressed child support by increasing protection for debts owed to the children and former spouses of debtors in bankruptcy.[378] In 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, (BAPCPA) enacted several more protections for child support.[379] Because of the intricacies of bankruptcy, there are often child support attorneys who specialize in bankruptcy proceedings and serve as resources to other attorneys who encounter a bankruptcy case in their caseload. The information that follows is a general overview of the impact of bankruptcy on child support.

Automatic stay. Under 11 U.S.C. § 362(a), creditors generally are prohibited from taking any actions to establish or collect debts while the debtor's bankruptcy proceeding is pending. This "stay" arises automatically on the filing of the bankruptcy petition. That means no court enforcement action may be initiated or heard during the stay, which is typically 90 days.

BAPCPA exempted actions to establish paternity and those to establish or modify alimony, maintenance, or support from the scope of the automatic stay.[380] Whether a debt is a domestic support obligation is a question of federal law. In making this determination, courts evaluate the true nature of the debt, rather than the title in divorce decrees and support orders.[381] BAPCPA also exempted alimony, maintenance, or support as property of the bankruptcy estate. This meant that actions to establish paternity or to establish or modify alimony, maintenance, or support were not subject to the automatic stay, making it unnecessary for a child support attorney to move for relief from stay. BAPCPA[382] went a step further by allowing enforcement of support orders during the bankruptcy by income withholding, federal income tax refund offset, reporting of child support arrears to credit reporting agencies, or through the suspension or

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[377] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.
[378] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 304, 108 Stat. 4106, 4132.
[379] *See generally* Lynne F. Riley, *BAPCPA At Ten: Enhanced Domestic Creditor Protections and Enforcement*, 90 Am. Bankr. L.J. 267 (2016).
[380] 11 U.S.C. § 362(b)(2) (2018).
[381] *See In re Krueger,* 457 B.R. 465 (Bankr. D.S.C. 2011). *See also* Lynne F. Riley, *BAPCPA At Ten: Enhanced Domestic Creditor Protections and Enforcement*, 90 Am. Bankr. L.J. 267 (2016).
[382] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

restriction of driver's, professional, or recreational licenses.[383] After the passage of BAPCPA, OCSE issued policy guidance regarding its impact on child support enforcement activities.[384] The guidance assures state agencies that passport denial submissions may still be made to the Department of State as passports are the property of the United States and not the property of the debtor's estate.[385] The enforcement of medical support is also permitted during the pendency of a bankruptcy case.[386]

Child support attorneys and their support agencies may want to confer on individual bankruptcy cases to make sure agency enforcement actions do not violate the automatic stay.[387]

Dischargeability. BAPCPA defined a "domestic support obligation" broadly as "a debt that accrues before, on, or after the date of the order for relief in a case, including interest that accrues on that debt as provided under applicable non-bankruptcy law that is owed by, owed to, or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or a governmental unit."[388] The law then exempts all domestic support obligations from discharge.[389] This is the clearest statement yet of a child support order's protected status under bankruptcy law.

Debt priority. Debts owed for child support and alimony or maintenance also have a higher priority over other debts of the bankrupt obligor. After BAPCPA, child support obligations are first priority.[390] This is important because, as the bankruptcy estate is liquidated and the debtor's funds disbursed, there might not be sufficient funds to satisfy the claims of all creditors. Increasing the priority of child support claims to first gives those obligations a much better

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[383] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 214, 119 Stat. 23, 54. *See In re Dougherty-Kelsey,* 601 B.R. 426 (Bankr. E.D. Ky. 2019) (Family Court's entry of wage deduction order and enforcement by interception of the debtor's tax refunds did not violate the automatic stay.).

[384] *See* OCSE-PIQ-07-04: Enforcing Child Support When the Obligor is in Bankruptcy (July 23, 2007); OCSE-AT-06-05: Issues Regarding Child Support Provisions of the New Federal Bankruptcy Law, P.L.109-8 (Sept, 22, 2006).

[385] *See* 22 C.F.R. § 51.7(a) (2019).

[386] 11 U.S.C. § 362(b)(2)(G) (2018). There is additional discussion on medical support enforcement later in this chapter.

[387] *See In re Dougherty-Kelsey,* 601 B.R. 426 (Bankr. E.D. Ky. 2019) (court's finding in a post-petition proceeding that the debtor was in civil contempt for non-payment of a pre-petition domestic support obligation and issuance of contempt sanctions violated the automatic stay and were void).

[388] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 211, 119 Stat. 23, 50.

[389] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 215, 119 Stat. 23, 54 (codified at 11 U.S.C. § 523 (a)(5) (2018)).

[390] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 212, 119 Stat. 23, 51 (codified at 11 U.S.C. § 507(a)(1) (2018)).

chance of being paid. If the full child support debt is not paid as part of the disbursement, the remaining arrears must ultimately be paid by the obligor.

Debtor's responsibility. In addition to providing notice to all affected creditors, the debtor is required to file a schedule of their assets, liabilities, exempt property, and current income and expenditures, as well as a statement of their financial affairs.[391] This can be valuable information to the child support attorney and should be obtained from the bankruptcy court. When a bankruptcy filing is made and the filing indicates the existence of a child support debt and its status, child support creditors or their representatives are allowed to intervene in bankruptcy proceedings without charge and without meeting any special local court rule or requirement for attorney appearances that they might otherwise have had to meet.[392] Child support agencies may file the Chapter 7 proof of claim form, which lists the support, arrears, and interest. The attorney may want to review the form before it is submitted by the agency to ensure it has followed form instructions and entered details correctly.

In Chapter 13 filings, the debtor prepares a five-year repayment plan for his debts, which the court must confirm. This plan contains details regarding the obligor's sources of income and other assets and resources. The debtor should include his arrears debt and current support obligation in the plan so the support and arrears are paid through the plan. This ensures prompt payment of support and arrears to the obligor's child(ren)

The child support attorney should review the debtor's repayment plan before the confirmation by the court. Once a repayment plan is confirmed, the IV-D agency must comply with the plan and may be prohibited from offsetting the obligors income/tax refund outside the plan requirements. If a copy was not provided to the agency, the agency can obtain one from the bankruptcy court. It is very helpful for the child support attorney to contact the bankruptcy trustee. The trustee is usually very cooperative in making sure the obligor's dependents are paid support and arrears regularly and timely. The trustee will want to know of the omission of support and arrears from the plan because that may be grounds to deny the obligor's plan until it is amended. The agency and attorney should ensure that an objection to the confirmation is filed if the obligor omitted support and arrears and ensure a proof of claim for the support, interest, and arrears has been filed with the bankruptcy court.

[391] 11 U.S.C. § 521 (2018).
[392] 11 U.S.C. § 502 (2018).

Finally, BAPCPA now requires the bankruptcy debtor to pay all child support that became payable on or after the date of the filing before a discharge of the bankruptcy action will be granted.[393]

Property exempt from execution. A provision of the Bankruptcy Code[394] allows a debtor to exempt a portion of their property from the claims of creditors. Types of property that can be exempt include a debtor's interest in real or personal property used as a residence, not to exceed $15,000,[395] a debtor's interest in household goods, up to an aggregate of $8,000,[396] and professional books or tools of the trade, not to exceed $1,500.[397] A debtor's right to receive alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, is also exempt.[398] These exemptions do not impact the child support agency.

MEDICAL SUPPORT ENFORCEMENT

In addition to enforcement of child support obligations, child support agencies must enforce medical support.[399]

The definition of medical support in implementing federal regulations has changed over time to reflect changes in other federal law regarding health care. The current definition of "cash medical support" for child support purposes is an amount ordered to be paid toward the cost of health insurance provided by a public entity or by another parent through employment or otherwise, or for other medical costs not covered by insurance."[400] Note that state guidelines vary widely regarding treatment of medical expenses. However, state tribunals must include medical support provisions in all IV-D child support orders.[401] Indians may receive health care services without charge from the Indian Health Service. Therefore, it is inappropriate for a state Medicaid agency seeking Medicaid reimbursement only from either parent to refer the case to the state child support agency. Tribal child support orders are not required to include provisions for medical support, although a tribal court may choose to include such provisions

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[393] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 213, 119 Stat. 23, 52 (codified at 11 U.S.C. § 1129(a)(14) (2018)).
[394] 11 U.S.C. § 522(b) (2018).
[395] 11 U.S.C. § 522(d)(1) (2018).
[396] 11 U.S.C. § 522(d)(3) (2018).
[397] 11 U.S.C. § 522(d)(6) (2018).
[398] 11 U.S.C. § 522(d)(10)(D) (2018).
[399] 42 U.S.C. § 666(a)(19) (2018).
[400] 45 C.F.R. § 303.31(a)(1) (2019).
[401] For further discussion of medical support orders, *see* Chapter Ten: Establishment of Child Support and Medical Support Obligations.

based on tribal law. If a tribe does issue an order for medical support, it is entitled to full faith and credit.[402]

Omnibus Budget Reconciliation Act of 1993

Recognizing that effective enforcement of medical support obligations required cooperation with employers and health care plans, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (OBRA '93),[403] which amended the Employee Retirement Income Security Act of 1974 (ERISA).[404] OBRA '93 created Qualified Medical Child Support Orders (QMCSOs) to obtain coverage from group plans subject to ERISA, prohibit discriminatory health care coverage practices, and allow employers to deduct the cost of health insurance premiums from an employee's income.[405] OBRA '93 also amended Title XIX of the Social Security Act by requiring states to enact laws prohibiting employers and insurers from denying the enrollment of any child under a family health plan when the child:

- Was born out of wedlock;
- Is not claimed as a dependent on the employee-parent's federal income tax return;
- Does not live with the employee-parent; or
- Does not live in the insurer's service area.[406]

A QMCSO generally cannot require a group health plan to provide a specific form of benefit or an option not otherwise provided under the plan. The exception to this rule is that specific orders may be entered to the extent necessary to comply with certain state laws described in Title XIX of the Social Security Act.[407] Attorneys should be aware that the Standard Income Withholding Form[408] does not constitute a QMCSO.

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[402] Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638, 16,660 (Mar. 30, 2004).
[403] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.
[404] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829.
[405] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 609, 107 Stat. 312, 372.
[406] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 1908, 107 Stat. 312, 633 (codified at 42 U.S.C. § 1396g-1(a) (2018)). OCSE has addressed employers' questions regarding coverage, costs, priority, and enrollment at https://www.acf.hhs.gov/css/faq/medical-support-answers-employers-questions (Nov. 7, 2017).
[407] 29 U.S.C. § 1169(a)(4) (2018); 42 U.S.C. § 1396g-1 (2018).
[408] *See* discussion of the Standard Income Withholding form earlier in this chapter, which also addresses Qualified Domestic Relations Orders (QDROs) at pages 11-18-19,

Child Support Performance and Incentives Act of 1998

To further eliminate barriers that prevented meaningful establishment and enforcement of medical child support coverage, Congress enacted the Child Support Performance and Incentives Act of 1998 (CSPIA).[409] CSPIA required the establishment of a Medical Child Support Working Group. The Working Group was charged with submitting a report to the Secretaries of HHS and Labor containing recommendations regarding appropriate measures to address impediments to the effective enforcement of medical support by IV-D agencies. The report was due not later than January 2000. The Secretaries in turn were required to submit a report of Congress.

The other major requirement in CSPIA was that HHS and DOL jointly develop a National Medical Support Notice (NMSN) for child support agencies to notify employers of persons ordered to provide health care coverage for dependent children.[410] In addition to complying with ERISA requirements regarding information and restrictions against requiring new types or forms of benefits, CSPIA required the NMSN to include a severable employer withholding notice providing the employer certain information. CSPIA also modified ERISA, providing that an appropriately completed NMSN that meets the requirements of 29 U.S.C. § 1169(a)(3) and (4) is deemed to be a Qualified Medical Child Support Order (QMSCO).[411] This amendment eliminates the need for child support agencies to develop QMSCOs that require pre-approval by the retirement plan administrator. CSPIA gave notice to health plan administrators of the requirement to enroll dependents in the employee's/retiree's health care plan upon receipt of the NMSN, if it was correctly completed.

Pursuant to CSPIA, unless a tribunal's order allows for alternative coverage, if a parent is required by a child support order to provide health care coverage, a child support agency must send the NMSN to an employer together with the income withholding order within two days of the date a parent's name is entered in the State Directory of New Hires.[412] There are two parts to the NMSN, both of which must be sent to the employer of the person ordered to provide medical support. Part A is the Notice to Withhold for Health Care Coverage and includes information for, and responsibilities of, the employer. It requires the employer to withhold the health care premium amounts from the income of the person ordered to provide coverage. Part A also allows the employer to report information to the child support agency on the availability of health care coverage to the employee and the employee's termination if the person is no longer

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[409] Child Support Performance and Incentive Act of 1998, Pub. L. No.105-200, 112 Stat. 645.
[410] *See* 42 U.S.C § 666(a)(19) (2018).
[411] *See* 29 U.S.C. § 1169(a)(5)(C) (2018).
[412] 42 U.S.C. § 666(a)(19)(B) (2018); 45 C.F.R. § 303.32(c)(2) (2019). For more information about income withholding and the State Directory of New Hires, *see* those sections earlier in this chapter.

employed or was never employed by that employer. It also provides a means for the employer to advise the child support agency that the required withholding amount for the plan would exceed the limits of the Consumer Credit Protection Act.[413]

Part B of the NMSN is the Medical Support Notice to Plan Administrator, which the employer sends to the administrator of the group health plan in which the person ordered to provide medical support is enrolled or is eligible for enrollment. Part B advises the administrator that the person is obligated by a court or an administrative child support order to provide medical support coverage for the named child(ren).[414]

After the employer receives the NMSN, it must transfer the document to the appropriate group health plan within 20 days of the date of the NMSN. Employers are also required to advise the child support agency if the person ordered to provide medical support is no longer employed.[415] The group health plan is required to enroll qualified children in its plan upon receipt. If the group health plan has more than one plan available, the plan administrator must report that to the child support agency, which is then required to assist the parent receiving medical support for the child(ren) with choosing a plan.[416] The NMSN also requires the employer to withhold any amount of employee contributions required to obtain the insurance and send the amount withheld directly to the insurance provider.[417]

State child support agencies are only required to send the NMSN to an employer where it is clear there is no health coverage being provided for the child and employer-offered health insurance has been ordered. They are not required to use the NMSN when the child is covered by a public health care option and there is a court or an administrative order that stipulates alternate health care coverage to employer-based coverage.[418] Child support attorneys should be aware that OCSE encourages the inclusion of a provision in child support orders that medical support for the children be provided by either or both parents, but

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[413] Office of Child Support Enforcement, National Medical Support Notice Forms & Instructions Parts A and B: OMB-0970-0222 & 1210-0113 (March 5, 2020). *See also* Consumer Credit Protection Act, Pub. L. No. 90-321, § 303, 82 Stat. 146, 163 (1968), as amended by Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 501(e), 91 Stat. 126, 161 (codified at 15 U.S.C. § 1673(b) (2018)).
[414] *Id.*
[415] 45 C.F.R. § 303.32(c)(6) (2019).
[416] 45 C.F.R. § 303.32(c)(8) (2019).
[417] Child Support Performance and Incentive Act of 1998, Pub. L. No.105-200, § 401, 112 Stat. 645, 659 (codified at 42 U.S.C. § 666(a)(19)(A) (2018)); 45 C.F.R. § 303.32(c)(4) (2019).
[418] *See* Final Rule: Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,548 (Dec. 20, 2016); 45 C.F.R. § 303.32(b) (2019).

without specifying the source of the coverage.[419] The availability of that flexibility will depend upon state law.

The NMSN can also qualify as a QMCSO as long as it contains the name of the issuing agency; the name and address of the employee/participant; the name and address of the alternative recipient, or a substituted official, if necessary; and identification of the underlying child support order.[420]

Deficit Reduction Act of 2005

In 2005, the Deficit Reduction Act added certain key provisions to medical support enforcement.[421] These provisions included a requirement that states enforce medical support obligations against either or both of the parents[422] and added a new definition of medical support. Under this definition, medical support "may include health care coverage, such as coverage under a health insurance plan (including payment of costs of premiums, co-payments, and deductibles) and payment for medical expenses incurred on behalf of a child."[423]

Patient Protection and Affordable Care Act

The most recent federal legislation pertaining to medical support and health care in the United States is the Patient Protection and Affordable Care Act (ACA).[424] This law brings changes to health care coverage, including a standard for determining the affordability of health care coverage; a definition of medical support; criteria for determining which parent is responsible for providing health care coverage; changes to how the income tax dependency credit relates to requirements for medical coverage; and the introduction of the Internal Revenue Service as the enforcement entity for medical coverage. For example, the IRS will enforce coverage requirements based on a child's tax household rather than on which parent is ordered by a tribunal to provide coverage. Obligees will be subject to penalties if they claim a tax deduction for the child when the child is not

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[419] 81 Fed. Reg. 93,492, 93,548 (Dec. 20, 2016).
[420] 29 U.S.C. § 1169(a) (2018).
[421] Deficit Reduction Act of 2005, Pub. L. No. .09-171, § 7307, 120 Stat. 4, 146.
[422] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7307(a) (b), 120 Stat. 4, 146.
[423] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7307(c), 120 Stat. 4, 146.
[424] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). Note: In *National Federation of Independent Business v, Sebelius*, 567 U.S. 519 (2012), the Supreme Court upheld the constitutionality of the ACA's individual mandate based on Congress' power to tax. In 2017 Congress reduced the individual-mandate penalty to $0 starting in 2019. Some states and private citizens sued, arguing the individual mandate is unconstitutional if it no longer imposes any tax, and because the individual mandate is integral to the ACA, if it is unconstitutional then the entire law must fall. The U.S. Court of Appeals for the 5th Circuit upheld the lower district court's ruling that the individual mandate is no longer constitutional because it is no longer a tax. However, it remanded the case and asked the district court for more analysis on severability issues. The Supreme Court has agreed to review the case. *See Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *cert*. *granted*, 140 S. Ct. 1262 (Mar. 2, 2020).

covered by health insurance, even if a tribunal had ordered the obligor to provide medical coverage. There is an IRS form the obligee can complete to release the tax exemption to the parent providing health insurance, so that the obligee who had the tax exemption but was not ordered to provide health care coverage is not penalized.

Federal Regulations

The final medical support rule governing Title IV-D child support programs was issued in 2008,[425] prior to enactment of the ACA. In 2016, OCSE issued Final Rule: Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs.[426] Among its provisions are several addressing medical support. For example, OCSE clarifies that health care coverage includes public and private insurance.[427] OCSE amends the reasonable cost provision in 45 C.F.R. § 303.31(a)(3) by deleting the requirement that the cost of health insurance be measured based on the marginal cost of adding the child to the policy. However, OCSE did not amend the 5% reasonable cost standard to the 8% affordable standard in the ACA. OCSE disagreed with commenters that the regulation needed to be changed:

> The existing language in the regulation at § 303.31(a)(3) allows States to adopt the five percent standard or ''a reasonable alternative income-based numeric standard'' defined by the State. We encourage States to examine the difference between the reasonable cost standard used in the child support regulations and the affordability measure used in the ACA. Both the percentage and the base are different. States are encouraged to consider ways to align these two standards to avoid confusion among families. For example, a State could choose to define reasonable cost as 8 percent of a parent's modified adjusted gross income (MAGI) under paragraph(a)(3) to align the two standards. The existing language in the regulation allows States to make these conforming changes to their medical support policies.[428]

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[425] 73 Fed. Reg. 42,416 (July 21, 2008).
[426] See Final Rule: Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs, 81 Fed. Reg. 93,492 (Dec. 20, 2016).
[427] *See* 45 C.F.R. § 303.31(a)(2) (2019). Because of the revised definition of health care coverage, if a child is covered through Medicaid, CHIP, or other state coverage plan, such public form of coverage is an allowable form of health care coverage. Additionally, since implementation of the ACA, health coverage includes health insurance policies offered through the federal or state marketplaces. *See* Final Rule: Flexibility, Efficiency, and Modernization of Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,548 (Dec. 20, 2016).
[428] 81 Fed. Reg. 93,492, 93,547-8 (Dec. 20, 2016).

The Final Rule also amends 45 C.F.R.§ 303.31(b) to require the child support agency to petition the court or administrative authority to allocate the cost of coverage between the parents.

In its response to comments to the Final Rule, OCSE recognized "the tensions between the Social Security Act and provisions in the ACA when it comes to medical support."[429] It noted that it had aligned regulatory requirements as closely as possible with the ACA. In 2018, OCSE rescinded policy guidance that had held states harmless of penalties for failure to comply with the 2008 Medical Support Final Rule requirements. The new guidance stresses that state child support agencies must comply with the Medical Support Final Rule and the Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs Final Rule.[430] As state child support agencies review their laws, rules, and policies to ensure compliance with the medical support requirements and, to the extent possible, reduce conflict with ACA requirements, input from child support attorneys is critical.

INTERGOVERNMENTAL ENFORCEMENT

Enforcing a support order can be more difficult when the obligor and the child live in different jurisdictions. The primary legislation governing interstate and international support enforcement is UIFSA (2008). Detailed information on enforcement of orders in intergovernmental cases can be found in a later chapter of this handbook.[431]

Query Interstate Cases for Kids

Query Interstate Cases for Kids (QUICK) is an electronic communications tool accessible through the State Services Portal (SSP) that allows child support workers to see case activity and financial information for cases in other states in real time. Case management is improved because workers can see and use data to take appropriate action in a timely manner. Phone calls, faxes, email, and mail are unnecessary in many cases, saving both time and money.[432]

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[429] 81 Fed. Reg. 93,492, 93,549 (Dec. 20, 2016).
[430] *See* OCSE-AT-18-06: Compliance with Medical Support Final Rule Requirements (Aug. 1, 2018).
[431] For more information on intergovernmental enforcement, *see* Chapter Thirteen: Intergovernmental Child Support Cases.
[432] *See* Office of Child Support Enforcement, QUICK User's Guide (Mar. 20, 2015), https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents//quick_ug.pdf.

Full Faith and Credit for Child Support Orders Act

The Full Faith and Credit for Child Support Orders Act (FFCCSOA) is a federal statute that does not require enabling legislation.[433] FFCCSOA requires the courts[434] of each state[435] to accord full faith and credit to a child support order issued by another state that exercised proper personal and subject matter jurisdiction.[436] FFCCSOA mirrors UIFSA's requirements regarding recognition of child support orders. Like UIFSA, FFCCSOA prohibits a state tribunal from entering a new order when one already exists and limits jurisdiction to modify support orders. FFCCSOA is also consistent with UIFSA's choice of law provisions.[437]

CONCLUSION

Child support enforcement tools have dramatically evolved since 1974. At the outset of the child support program, child support attorneys were restricted to those remedies available to collect money judgments. These actions were labor intensive, heavily reliant on the judiciary, and limited in scope, so the program focused primarily on collection activities. Now, automated enforcement actions, such as income withholding and federal and state income tax refund offsets, are available. In addition, many administrative tools, such as license revocation and passport denial, are highly effective and require less work by the child support attorney.

In addition to changes in enforcement tools, the child support program is changing, including the role of the child support attorney. Today, the program increasingly focuses on the consistent payment of support by promoting realistic support orders, child well-being, and family self-sufficiency. This approach includes education programs designed to prevent the need for child support services by strengthening family connections. It also includes looking at caseloads to identify and address the specific reasons for non-payment; establishing early intervention and arrears reduction programs; setting and maintaining realistic support orders with appropriate order modification; and partnering with local resource providers to offer employment, job training, and other programs. In certain cases, this means that child support agencies and

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[433] 28 U.S.C. § 1738B (2018). FFCCSOA was most recently amended by the Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 301, 128 Stat. 1919, 1944–45 (2014).

[434] FFCCSOA defines "court" to include a court or an administrative agency of a state "that is authorized by state law to establish the amount of child support payable by a contestant or to modify a child support order."

[435] FFCCSOA defines "state" as "a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in Section 1151 of Title 18)." *See also* 45 C.F.R. § 309.120(b) (2019).

[436] 28 U.S.C. § 1738B(c) (2018).

[437] For more information about FFCCSOA, *see* Chapter Thirteen: Intergovernmental Child Support Cases.

attorneys must move away from automated enforcement remedies and determine the most appropriate enforcement remedy for a case. Child support attorneys will need negotiation skills. In cases involving safety issues, attorneys also need to ensure that any enforcement activity does not increase any risk of harm to a parent or child.

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