



Child Law Practice

Vol. 28 No. 5

July 2009

Helping Lawyers Help Kids

ENGAGING FATHERS

Legal Strategies to Address Child Support Obligations for Nonresident Fathers in the Child Welfare System

by Daniel L. Hatcher

Imagine your client is a father involved in child welfare proceedings. He hopes to reunify with his child and has started a reunification plan with the caseworker. Although he was unemployed and homeless, he just got a job driving a taxi and is saving money for a deposit on an apartment. A child support obligation was initiated when the child entered foster care, however, so the father's license was suspended due to lack of payment. His job is at risk, and 65 percent of his last paycheck was garnished for the child support debt. The apartment

complex manager tells him his credit looks bad because of the unpaid child support debt and his application will likely be denied. The caseworker updates the reunification plan to require the father to pay \$5,000 in child support arrearages in addition to current payments of \$200 per month. The caseworker explains that if he does not make sufficient progress on the reunification plan within the next six months the plan will change to termination of parental rights based upon failure to obtain housing and provide adequate child support. As his attorney, what can you do?

custodial parents and for children as child support issues affect all parties in the child welfare system.

Child support is a crucial resource for low-income families. When the obligation amount is realistically set and payments are directed to the custodial families, child support can help struggling single mothers lift their families out of poverty and can improve family relationships with nonresident fathers. However, in the context of child welfare cases, the potential benefits of child support often turn to harm. In the child welfare system, child support is not owed to

(Continued on page 70)

About this Series

This series gives attorneys and judges tools to better engage nonresident fathers in child welfare cases. Article topics include:

- ✓ Nonresident Fathers' Constitutional Rights (Nov. 08)
- ✓ Representing Nonresident Fathers (Dec. 08)
- ✓ Understanding Male Help-Seeking Behavior (Jan. 08)
- ✓ Involving Nonresident Fathers: Tips for Judges (Mar./Apr. 09)
- ✓ Representing Incarcerated Fathers (June 09)
- ✓ **Child Support (this issue)**
- o Ethical Considerations

The legal and practical issues surrounding child support obligations have enormous impact on families in the child welfare system.¹ Unfortunately, these issues are often ignored, overlooked, or misunderstood. A much-needed effort to engage nonresident fathers in the child welfare system is underway,² but those efforts will often be derailed if child support is not properly addressed. This article sheds light on the legal and policy concerns regarding child support enforcement in child protection cases and provides legal strategies for advocates to address those concerns. While primarily aimed at advocates for nonresident fathers, this article should also benefit advocates for

Resources

- Federal guidance regarding discretion to not refer child welfare cases for child support enforcement services: www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=170
- Federal communication regarding coordination between child welfare and child support agencies: www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2007/im0706.pdf
- Daniel L. Hatcher. “Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support.” *Brooklyn Law Review* 74(4), 2009, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424485

(Continued from front page)

the children. For children eligible for Title IV-E foster care assistance, federal law requires state child welfare agencies to enforce child support obligations against the parents. The payments do not benefit the children, but are rerouted to the state and federal government to reimburse the government costs of providing foster care assistance. This cost-recovery effort can often derail case planning goals, burdening already impoverished parents with added troubles that hamper reunification and undermine agency efforts to improve family relationships. Also, imposing government-owed child support obligations limits nonresident parents from providing informal and in-kind support to their children. Several state practices are legally questionable, at best, but legal strategies exist to challenge these practices.

Cost-Recovery Framework

Title IV-E of the Social Security

Act, the largest source of federal funding for child welfare services, requires child welfare agencies to pursue child support obligations.³ When children are “IV-E eligible,”⁴ federal law requires child welfare agencies to seek child support “where appropriate” by referring cases for child support enforcement services. Resulting payments are generally kept by the government to reimburse the costs of foster care.⁵ In state-funded child welfare cases (where children are not IV-E eligible), no federal requirement to pursue child support exists. Nonetheless, states often pursue child support in such cases despite the lack of a federal requirement.

Consequences

The two primary goals of the child welfare system are protecting the interests of children and strengthening and preserving families. Although the Adoption and Safe Families Act increased the focus on adoption, providing services to parents to encourage reunification continues as a core goal. The child support cost-recovery efforts divert attention from the agency’s mission, and often conflict with case-planning goals. As a low-income parent struggles to meet reunification plan requirements, imposing a government-owed child support obligation can derail the parent’s efforts through immediate enforcement mechanisms, such as suspending licenses, garnishing wages, and credit reporting.

For nonresident fathers, the harm child support cost-recovery efforts cause can be significant. Historically, child welfare agencies have not done well reaching out to nonresident fathers. Recently, the child welfare system has begun recognizing the need to engage nonresident fathers to encourage increased involvement in their children’s lives and possible reunification in appropriate cases. However, if the initial contact with a father is to force him into court for a

child support obligation that is owed to the government (rather than his children) and that he likely cannot afford to pay, coupled with contempt proceedings, driver’s license suspension, and garnishment of up to 65 percent of his wages, the engagement effort will be thwarted. The father will further retreat from involvement with the agency—and his family—and his efforts to comply with case planning requirements will be severely hampered.

Legal Strategies

As an attorney representing nonresident fathers, you have several legal strategies to address concerns about child support enforcement in child welfare cases.⁶

Discretion not to initiate child support

The federal law triggering the child support cost-recovery requirement in child welfare cases also includes discretion, explaining that “where appropriate,” states should “secure an assignment” of child support rights for children receiving IV-E foster care maintenance payments.⁷ Federal guidance interprets the statutory language as providing states flexibility in determining that certain child welfare cases are not appropriate for initiating child support enforcement actions.⁸ The guidance explains that states should decide a case “on an individual basis, considering the best interests of the child and the circumstances of the family,” and the guidance suggests considering whether initiating the government-owed child support obligation would be a barrier to reunification.⁹

Some states, like California and Ohio, have state statutes that require exercising discretion before referring a case for child support enforcement services.¹⁰ However, many states either have no legislation or policies implementing the discretion, or require initiating child support obligations in all cases.

Nonetheless, even in a state where no discretion is provided in state statute or regulation, you can still argue for the exercise of discretion under federal law. In any case where reunification is a possible goal, you can argue that either the agencies or the courts should exercise this discretion under federal law and find a referral for child support enforcement services inappropriate because it conflicts with case planning goals.¹¹ Supporting the argument is the simple principle that agencies and courts must ensure every action regarding children in the child welfare system is in the best interests of the child.

Conflicts with reunification requirements and illegal case plans

If you cannot convince the child welfare agency or the court to exercise discretion and decide that initiating child support is inappropriate, another legal challenge may be possible. With some specific exceptions, federal law requires child welfare agencies to make “reasonable efforts” in order “to preserve and reunify families.”¹² Case plans must incorporate these reunification services,¹³ and a “case review system” is required to regularly review progress toward meeting the case plan goals.¹⁴ Thus, if reunification is a possible goal in a child welfare case, you can argue that pursuing a government-owed child support obligation directly conflicts with federal law and regulation requiring reunification services. Imposing a debt owed to the government upon an already impoverished parent will directly hamper the parent’s efforts to become economically stable to reunify with his child.

Also, in several states, child welfare agencies include the child support obligations as part of the federally required case plans (e.g., a reunification plan might require the parent to pay regular child support to the government to comply with

Child Support and Nonresident Fathers: Legal Strategies

1. Ask agency or courts to exercise discretion not to initiate child support proceedings based upon case planning and other best interests arguments.
2. Challenge legality of child support enforcement if it conflicts with federally required reunification services and case plans.
3. Challenge constitutionality of termination of parental rights petitions relying on government-owed child support as a basis for termination.
4. Advocate for downward departure from child support guidelines amount based upon case planning and best interests of the child.
5. Challenge the assignment of child support rights to the government.

the plan). Adding government-owed debt collection efforts to case plans required by federal law to assist in reunification efforts arguably conflicts with the federal requirements and is therefore illegal.

Unconstitutional grounds for terminating parental rights

In many states, the statutory grounds for terminating parental rights consider the failure to pay the government-owed child support obligation as a factor. Some states specifically allow that factor alone to warrant termination.¹⁵ Although a parent’s failure to support a child may initially seem relevant to the decision to terminate parental rights, in child welfare cases the support obligation is not owed to the child. Including the cost-recovery debt as grounds to terminate parental rights subverts the child welfare mission and the overarching consideration in termination proceedings—the best interests of the child.

If you face these circumstances, you can argue that terminating parental rights for a government-owed debt is unconstitutional on substantive due process grounds.¹⁶ The interests of parents and children in the parent-child relationship are constitutionally protected. The substantive due process heightened scrutiny forbids the government from infringing on such fundamental liberty interests, “unless the infringement is

narrowly tailored to serve a compelling state interest.”¹⁷ The compelling state interest in termination of parental rights proceedings is protecting the welfare of children. A statute that allows ending the parent-child relationship because of a government-owed debt is not narrowly tailored or even related to that compelling interest.

Additional strategies

In addition to the legal issues briefly described above, other legal strategies exist. For example, if a court disregards arguments against initiating child support, you can still direct your advocacy toward the amount of the order. In most if not all state child support guidelines, grounds for deviating from the statutorily suggested guidelines amount are available. You can argue that a court should deviate downward from the guidelines in child welfare cases based upon best interests grounds and conflict with case planning goals.

Additionally, you may be able to challenge the actual assignment of child support rights to the government. An assignment is a form of contract, and the forced assignment (often by state statute) of child support rights without voluntary agreement is legally questionable. Some states have no provision to start the assignment, rather they simply consider the child support as owed to

the government with no legal process for the transfer of rights.

Finally, in state-funded child welfare cases (for children who are not IV-E eligible), there is no federal provision for collecting child support to reimburse government costs. Nonetheless, many states still pursue child support in these cases and keep the resulting collections. The asserted basis for the cost-recovery collections in state-funded cases is a patchwork of informal federal agency communications, therefore raising Administrative Procedures Act (APA) concerns.¹⁸

Conclusion

Child support issues facing nonresident fathers (and all parties) in child welfare cases are often overlooked and warrant serious attention by advocates. Because your state agencies, courts, and legislatures have likely not grappled with these issues, education is a key part of advocacy strategies. Although the legal issues can become complex, the core themes are simple. Child support should not harm children or conflict with case planning goals, and all actions by child welfare agencies and the courts should be guided by the best interests of the child standard—not the government’s fiscal interests in cost recovery.

Daniel L. Hatcher is an assistant professor of law at the University of Baltimore and teaches in the law school’s civil advocacy clinic.

Endnotes

¹ For a more detailed analysis of the issues addressed in this article, see Daniel L. Hatcher, “Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support,” *Brooklyn Law Review* 74(4), 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424485

² For simplicity, this article refers to custodial parents as mothers and noncustodial parents as fathers or nonresident fathers.

³ 42 U.S.C. § 671(a)(17).

⁴ The specific IV-E eligibility requirements are complicated, but primarily focus on limiting the federal assistance for children removed from low-income families that would have been eligible for welfare assistance. See 42 U.S.C.A. § 670; 42 U.S.C.A. § 672.

⁵ 42 U.S.C. § 671(a)(17).

⁶ For additional analysis regarding these strategies, see Hatcher, “Collateral Children,” 2009.

⁷ 42 U.S.C. § 671(a)(17).

⁸ U.S. Dept. of Health and Human Services, Administration for Children & Families, Child Welfare Policy Manual, 8.4C Title IV-E, General Title IV-E Requirements, Child support, available at www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=170

⁹ *Ibid.* Many other circumstances might warrant discretion to not initiate child support obligations. For example, even where reunification is not a goal, a parent may be very involved in the child’s life—with visitations, informal support, providing child care, etc. so that imposing government-owed support may harm the relationship.

¹⁰ Ohio Rev. Code Ann. § 2151.361; Cal. Fam. Code § 17552.

¹¹ Even if reunification is not the goal, discretionary arguments are still possible—such as arguing the referral would conflict with family relations and the best interests of the child, or might pose an undue hardship based upon disability.

¹² 42 U.S.C. § 671(a)(15).

¹³ 42 U.S.C.A. § 675(1)(b); 45 C.F.R. § 1356.21(b) & (g)(4).

¹⁴ 42 U.S.C.A. § 675(5); 42 U.S.C.A. § 671(a)(16).

¹⁵ E.g., N.C.G.S.A. § 7B-1111(a)(3).

¹⁶ Additional arguments may exist, such as a possible violation of the Cruel and Unusual Punishment Clause. For further analysis of the arguments, see Hatcher, “Collateral Children,” 2009.

¹⁷ *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

¹⁸ For additional analysis regarding these possible arguments, see Hatcher, “Collateral Children,” 2009.