THE AVAILABILITY OF TRIAL BY JURY IN CONTESTED PATERNITY CASES

Executive Summary

This paper examines issues concerning the availability of trial by jury in an action to establish paternity. It specifies that approximately two-thirds of the States allow one or both parties to a contested paternity case to demand a trial by jury. With the possible exception of Wisconsin, State statutes rather than the State constitution is the foundation for such right.

While the frequency of actual jury trials occurring may be low as compared to case resolution methods involving stipulations, consent decrees, or bench hearings, the mere request can trigger considerable preparatory work on the part of the parties and their counsel. Several States' approaches to placing restrictions on circumstances under which a party may exercise the right to demand a trial by jury are featured, as well as a brief discussion of the historical underpinnings of paternity cases as quasi-criminal proceedings.

Some possible ideas for legislative change at the Federal and/or State level in this regard are set forth for consideration.

THE AVAILABILITY OF TRIAL BY JURY IN CONTESTED PATERNITY CASES

Introduction

This paper will examine issues concerning the availability of trial by jury in an action to establish paternity and possible ideas for circumscribing the situations in which a party may demand this method of case resolution.

Background

State law generally governs whether a judge or jury will try a paternity case. Since the Seventh Amendment of the United States Constitution does not apply to State courts, any right to trial by jury in a paternity case must be based on State constitutional, statutory, or case law.[1] Only three States [New Jersey, Wisconsin, and Ohio] have case law that recognized the existence of a State constitutional right to trial by jury in a paternity case. However, all three States have enacted subsequent statutory provisions clarifying the extent of the right and under what circumstances it may be exercised.

Ohio Revised Code §3111.12(D), effective July 15, 1992, provides that "any party to an action to establish paternity may demand a jury trial by filing the demand within three days after the action is set for trial. If a jury demand is not filed within the three-day period, the trial shall be by the court." The New Jersey Parentage Act, adopted May 21, 1983, specifies that the "trial shall be by the court without a jury, unless a party to the action files with the court a written request for a trial by jury within 10 days after service of the complaint. The complaint shall contain a notice to all parties that they may request a jury trial within 10 days of the service of the complaint. Wisconsin's statute is different in that it calls for an affirmative waiver. Wisconsin §767.50 provides that the trial shall be by jury, unless the defendant waives the right to trial by jury in writing or by statement in open court, on the record, with the approval of the court and the complainant.

Approximately thirty States have statutes which permit the parties to request trial by jury. Of these, a few limit the right to demand a jury to alleged fathers only.[2] In only fourteen States is there clearly no State constitutional or statutory right to trial by jury in a paternity action.[3]

Discussion

The historical nature of paternity proceedings as quasi-criminal coupled with the fact that the State, with all its resources and expertise, is maintaining the action, can persuade a judge to react favorably to an alleged father's jury trial demand. It is crucial to deflect this initial reaction, and devise a method for ensuring that, to the greatest extent possible, contested paternity cases are tried to the bench. Jury trials are not appropriate for paternity cases for several reasons, including docket delays of over a year. Lengthy trials use up valuable court and attorney time, whereas a bench trial normally can be completed in half a day. Evidence is of a highly personal nature and, as is the case with other family law litigation, should not be affected by the chilling effect of public disclosure. The delay factor acts in the favor of the alleged father by allowing him additional freedom from his support obligation, which has the further effect of providing a disincentive to prompt case resolution.

In States where a statutory right to a jury trial in a paternity case exists, the person requesting a jury trial must generally request it in a timely manner according to State statute or procedure or it is deemed waived.[4] For example, Missouri Revised Statutes §210.839(4) specifies that a request for a trial by jury must be made within ninety days of the first responsive pleading. In its 1993 legislative session, Missouri amended the timeframe within which a jury trial must take place after an order granting a request for trial by jury from 90 days to 270 days, and also specifying that failure to have a trial within such time period shall not result in a dismissal of the action.

Although in most instances the jury trial never materializes, the mere demand invoked early on by an alleged father to preserve the right can be unsettling to the mother and demand considerable preparatory work for the State bringing the action. Because of the prospect of having to convince twelve laypersons of the reliability of scientific proof and meet challenges to the mother's veracity, preparation for a jury trial can be intensive.

Many paternity cases can be resolved without the necessity of a full adversary bench or jury trial. Frequently, even those cases in which the alleged father initially denies the allegations become uncontested at a later stage, particularly upon receipt of genetic testing results which indicate non-exclusion and a high likelihood of paternity. With the advent of genetic testing, paternity actions have become less of a credibility contest between disputing parties and more of an objective search for biological truth. Other than waiver by failure to make a timely demand, to what extent can the exercise of the right to demand a jury be limited? Of particular note is a Colorado statute which links the right to trial by jury in paternity cases to genetic testing results.[5] It specifies that the petitioner or respondent may demand a trial by jury of six persons to determine the existence or nonexistence of the parent and child relationship. However, if genetic tests or other tests of inherited characteristics have been administered as provided in section 13-25-126, C.R.S., and the results show that the probability of the alleged father's paternity is ninety-nine percent or higher, the alleged father may not demand a trial by jury.

State constitutions generally contain a clause which specifies that "the right of trial by jury shall remain inviolate." This type of clause generally is construed to mean that any right to jury trial that existed at common law, on either the date the constitution was adopted or the date the constitution specifies as being applicable, cannot be abridged by legislative enactment. Several courts that have addressed the issue of an alleged father's constitutional right to trial by jury in a paternity case have found such right to be non-existent.[6] The courts which have found no constitutional right to a jury trial generally aver that there was no such thing as a common law action for declaration of paternity and support, illegitimate children being without a common law right to support from their fathers. That being the case, no right to jury trial existed and the legislature is free to grant or revoke the statutory right at any time.

For example, the Arizona Supreme Court upheld the constitutionality of Arizona's paternity statute which requires trial to the court and precludes the right to trial by jury.[7] In its opinion, the court traced the roots of Arizona common law. It noted particularly that paternity actions did not exist under England's non-statutory common law because the common law did not impose a duty of support upon the father of an illegitimate child. It explained that 18 Elizabeth, chapter 3, as amended, which created paternity actions in England, did not create a right to a jury trial in paternity actions. Instead, this law authorized two justices of the peace, "upon examination of the cause and circumstance" of parentage to order the parent or putative parent of an illegitimate child whose support was likely to become a parish expense to "make payment of money weekly or other sustenation for the relief of the child." The version of these laws in effect in 1776 (6 George 2, chapter 31) authorized the parish officials who implemented the Poor Laws to apply one or more justices for the type of support order the law had created. These applications were administrative in nature. Like other proceedings conducted "out of Sessions" they took place without a jury. Disgruntled defendants could appeal a resulting order to the Quarter or General Sessions of the Peace, but "out of Sessions" appeals were decided by the session Justices alone.

Of the six States that have adopted the Uniform Act on Paternity which does not provide for a trial by jury, four States added language allowing for the right.[8] The Uniform Parentage Act provides affirmatively in §14(d) that trial shall not be by jury. In the explanatory comments, the National Conference of Commissioners on Uniform State Laws explained that "(t)he use of a jury is not desirable in the emotional atmosphere of cases of this nature. The clause eliminating the jury is bracketed only because in some States, constitutions may prevent elimination of a jury trial in this context." Eighteen States have adopted this Act, some with, some without §14(d).[9]

Observations

In designing program revisions to expedite the process for resolving disputed paternity cases [as contemplated by the Administration's proposed changes to 42 USC §666(a)(2)], the delay inherent in jury cases cannot be overlooked. Burgeoning dockets in courts can result in scheduling of trials many months in the future. Lengthy proceedings involving filing and arguing pre-trial motions, crafting jury instructions, and mustering expert testimony to explain complex scientific evidence can complicate the resolution and precipitate frustration. That a possibility for a jury trial exists under statutes in a significant number of States should be a consideration in contemplating administrative mechanisms for resolving paternity cases. It will also be a factor in imposing case processing timeframes. Methods for limiting the availability of jury trials (e.g., by mandating an explicit timeframe for election or by linking to genetic testing) should be carefully explored.

Federal Legislative Possibilities

Since paternity establishment is a matter of State law, a Federal law which would wholly and unconditionally preclude States from allowing a party to a contested civil action from requesting a trial by jury may be subject to challenge as Federal intrusiveness and contrary to the Tenth Amendment. On the other hand, requiring States, as a condition of Federal financial participation in their child support program, to enact laws which restrict the availability of a jury trial to limited circumstances in which the demand is timely made, the results of genetic testing reflect an inclusionary percentage probability of paternity lower than the State's rebuttable presumption threshold, and the alleged father agrees to pay all costs and witness fees, as well as support retroactive to the date of the filing of the action or the child's birth may be worth exploring. Alternatively, the matter of the right to a jury trial in a paternity case could remain a State determination on a case-by-case basis, with States given the flexibility to repeal or place restrictions in the provisions of their jury trial statutes, such as the changes made by Colorado, for instance.

ENDNOTES

1. Annotation, "Paternity Proceedings: Right to Jury Trial," 51 ALR4th 565

2. For example, see Mississippi §93-9-15 and Oklahoma 10 § 76

3. Arizona, California, Delaware, District of Columbia, Hawaii, Idaho, Kansas, New Mexico, New York, North Carolina, South Carolina, Tennessee, Utah, Washington

4. For example, Illinois §40-2513(b) states that "any party who desires a trial by jury on the issue of parentage must file a demand therefore pursuant to and within the time limits set forth in the "Code of Civil Procedure"; Ohio §3111.12(D) specifies that "any party to an action brought pursuant to sections 3111.01 to 3111.19 of the Revised Code may demand a jury trial by filing the demand within three days after the action is set for trial. If a jury demand is not filed within the three-day period, the trial shall be by the court"; Rhode Island §15-8-8.1 declares that "trial shall be by the court unless trial by jury is claimed by either party within 10 days after the filing of an answer in which event the trial shall be by jury."

5. Colorado Revised Statute §19-4-128

6. County of El Dorado v. Schneider, 237 Cal.Rptr. 51 (Cal.Ct.App. 1987); Hyatt v. Hill, 714 P.2d 299 (Utah 1986)

7. Hoyle v. Superior Court of Arizona, County of Maricopa, 778 P.2d 259 (Ariz.App. 1989)

8. Kentucky, Maine, Mississippi, and Rhode Island added the jury trial right to their provisions; New Hampshire and Utah did not.

9. States that have adopted the Uniform Parentage Act (UPA) are Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. Montana omits subsection 14(d). North Dakota and Wyoming add the phrase "unless either party demands trial by jury" after the phrase "without a jury" to their versions of the UPA. Missouri §210.839(4) declares that "any party shall have a right to trial by jury. A request shall be made within ninety days of the first responsive pleading. If a trial by jury is granted, such trial shall take place within 270 days of the order granting the request for a trial by jury. Where there is a trial by jury, the jury shall only make factual determinations on the issue of parentage."

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Issues Surrounding Noncooperation and Paternity Establishment

Executive Summary

Child Support agencies have been struggling to improve paternity establishment performance in the face of rapid expansion in the numbers and rates of out-of-wedlock births. While there has been much discussion of this problem among teenagers, there has been little study of this phenomenon in the 25-44 age group which has experienced the most increase.

There are a number of incentives for cooperation in paternity establishment. Paternity establishment is the first step toward a child support award which can provide some stable support for the child. In addition, there are non-pecuniary incentives. Knowledge of family medical history is important. The emotional and psychological benefits of a child knowing who his father is are important. As a matter of fact, a higher value is placed on these intangible benefits than on financial ones.

Cooperation and it corollary, noncooperation, has a fairly standard definition: appearance for appointments, appearance for judicial or administrative proceedings, provision of complete and accurate information. While there are good cause provisions for noncooperation, their use so limited that they do not appear to be an option. Beyond this we have little information on noncooperation. This probably reflects the subjective nature of the determination. Further, the paternity establishment process by its personal nature presents even more problems.

There are also disincentives for paternity establishment. The presence of informal support is an important factor. Child support agency attitudes can be negative. The Federal incentive system works counter to rewarding paternity establishment efforts.

The literature provides a wide variety of findings and recommendations with regard to paternity establishment and noncooperation. Those studies which address agency performance show that poorly performing agencies often use noncooperation as a scapegoat. On the other hand, agencies which are better performers tend to dismiss noncooperation by mothers as a nonproblem, or if a problem, one that can be easily solved by a good educational program. The truth probably lies somewhere in between. Clearly aggressive

management, highly motivated staff and strong administrative procedures can have an impact.

But, cooperation is a voluntary action. We know little about the decision processes involved. In addition, there is little information about the older group of mothers where the increase in out-of-wedlock births has been so great. Finally, while we know some of the incentives and disincentives to establish paternity, there has been little examination of the role of fear of violence. Much has been said, but little written, on this factor. All of this presents us with a number of issues especially as we move to expand paternity establishment through stronger efforts and through expansion of the universe.

Issues Surrounding Noncooperation and Paternity Establishment

Who Needs to Cooperate in Paternity Establishment?

According to the Census Bureau Survey on Child Support and Alimony: 1989, as of Spring of 1990, approximately 10.0 million mothers age 15 and over were living with their own children who were under 21 years old and whose fathers were not living in the households. The poverty rate for all women with children from absent fathers was 32% in 1989, thus 3.2 million mothers had incomes below the poverty level. The poverty rate for never-married mothers was 53.9% compared to a rate of 23.1% for ever-married mothers. The poverty status of mothers with less than a high school education was 59.1%. The poverty rate for mothers under 30 was 49.2%.

Almost 56% of women of all income levels receiving Aid to Families With Dependent Children (AFDC) have never been married. Over one-half of the AFDC budget goes to families where the mother was a teenager when her first child was born. Both of these statistics point out the importance of establishing paternity. The identification of the father and his potential to contribute to the care and financial support of his progeny could mean a step in the direction of self-sufficiency for the family as well as savings for the States and the Federal Government.

Data from the National Center for Health Statistics indicate that 28% of total births were out-of-wedlock in 1990. This means that approximately one out of every four children in our society is born out of wedlock. Figures from the late 80's show that the out-of-wedlock birth phenomenon has become ingrained; there is an increase in both actual numbers and in the percentage of growth rate.

More specifically, the total number of births to unmarried mothers in 1990 totaled 1,168,384, a 6% increase over 1989. This is a 76% increase over the 665,700 out-of-wedlock births at the beginning of the decade in 1980. The 1980 figure represented, in turn, a 67% increase over the 398,700 out-of-wedlock births reported at beginning of the previous decade.

The increases in the birth rates were substantial for unmarried mothers in all age groups. Birth rates were highest for unmarried mothers aged 18 to 24, with 57-62 per 1000. Because the number of teenage women declined during the 1980's, the number of births to this age group was not as high as might have been expected.

However, the number of women aged 20 and older increased, particularly the 25 to 44 year olds. Increasingly this group is unmarried. This situation combined with the rising rate of non-marital childbearing caused sharp increases in the number of out-of-wedlock births to this group: between 1980 and 1989, the number of births rose from 393,946 to 746,289, an 89% increase. Because these women are older, it is possible that child support may be imposed and collected with more success with this group than with the teenaged one, assuming that paternity can be established. (METS, 1992)

Research has shown that welfare presents an intergenerational problem, with young mothers who are the daughters of welfare mothers giving birth to additional children, who if they are women may continue to depend on the AFDC system for the periodic support of themselves and their children. This group of women, although not the men who have fathered their children, has been the subject of research for some time. Unfortunately, there is very little literature available which studies the older group of women who are responsible for the sharpest increase in unwed births, much less on the men who father these children.

What Benefits Derive from this Cooperation?

But, what are the incentives to cooperate with the various entities which can provide help in establishing paternity? Establishing paternity is the first step toward a child support award and child support payments, in turn, can be a step toward family self-sufficiency. Immediate wage withholding can provide a consistent source of income for the child and mother and medical insurance can be an important part of the support package. Survivor's benefits through Social Security can be another source of income.

There are also non-pecuniary benefits which derive from paternity establishment. Knowledge of family medical history can be important. There are also emotional and psychological benefits. Knowing one's father, or just knowing who he is, can be important to a child's development. Studies have shown that bonding occurs within the first year of birth.

Interestingly, the literature indicates that mothers tend to place the strongest emphasis on the value of the non-financial benefits of paternity establishment (Wattenburg, 1991; Ellwood and Legler, 1993) and men do value their children. (Furstenberg, 1992)

For public assistance recipients, cooperation in location and paternity establishment is a requirement for the receipt of AFDC and Medicaid benefits with certain good cause exceptions. Welfare recipients also receive a $50 monthly passthrough when the absent parents pays child support. There has been movement in other Federal areas and in the States to tie cooperation in paternity establishment efforts to the receipt of other Federal and State social benefits as a means of limiting expenditures.

How Is Cooperation Defined at the Federal and State Levels?

But how is cooperation and, by extension, noncooperation defined? The requirements for the level of cooperation for various benefits are defined with varying degrees of precision in Federal and State regulations. Most of these regulations also include provision for good cause exceptions. The requests for and granting of good cause exceptions represent such a minuscule portion of the AFDC and IV-D caseload that elaboration is not necessary. Let it suffice to list the good cause exceptions which apply to AFDC, Child Support and Medicaid: anticipated physical harm; anticipated emotional harm; incest or rape; pending adoption; and, preadoption service.

Cooperation, and its corollary non-cooperation, cannot be so clearly determined. The Federal AFDC regulations define cooperation as:

> (1) Appearing at an office of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by the applicant or recipient;
> (2) Appearing as a witness at judicial or other hearings or proceedings;
> (3) Providing information, or attesting to the lack of information, under penalty of perjury; and,

> (4) Paying to the child support agency any support payments received from the absent parent after an assignment...has been made.

The Food Stamps regulations are more detailed. They provide for good cause exceptions as they relate to specific provisions of the regulations, such as failure to appear for an interview, failure to provide a social security number, or failure to fulfill work requirements. The regulations provide numerous examples of what constitutes refusal to cooperate.

At the State level, studies in California and Maryland include three of the four aspects of the Federal definition of cooperation/noncooperation; i.e., failure to appear for appointments, failure to appear for court proceedings, and failure to provide complete and/or accurate information. Michigan regulations include the same types of failure to cooperate; and, in addition, they stress the subjective nature of any determination of noncooperation and include factors to be taken into consideration before a finding of noncooperation.

While there is some literature on noncooperation with AFDC and Food Stamps, there is little information available on noncooperation in paternity establishment specifically. An Office of Inspector General report (January, 1990) based on visits to 13 sites which were considered "effective" in paternity establishment provided the following general use definition of noncooperation for paternity establishment:

> "..refusal to keep appointments for intake interviews, legal hearings and blood tests, and refusal to divulge information about the putative father."

An area which is not addressed in the OIG report is the fact that the paternity establishment process can be formal and legalistic and the interview process invasive. (Wattenburg, 1991) In this sensitive area, the definition of noncooperation becomes problematic.

Local practices can also be influenced by attitudes, caseloads and even pay scales for workers. Positive attitudes and reasonable caseloads can go a long way toward improving worker performance. Good pay scales and incentives have also been effective in generating an increase in the numbers of paternities established. (METS, 1992)

What are the Disincentives to Cooperate in the Establishment of Paternity?

What is the situation at the time of birth? Wattenburg, among others, found that with adolescent mothers the father was present at the time of the birth 60% of the time.(Wattenburg, 1991) Further, she and others have concluded that the father is often around for some time after the birth and often provides informal support. (Wattenburg, 1991; Radosh, 1990; Gabbard and Wolff, 1977; Bernstein, 1982; Price and Williams, 1990). This would appear to present a positive situation in which the issue of cooperation, or noncooperation, might not appear. Yet among the disincentives of establishing paternity after the birth is the presence of this informal support. The mother may not want to jeopardize her relationship with the father and the support he provides by involving him with the formal paternity establishment and child support system. (Wattenburg, 1991; Ellwood and Legler, 1993) Thus, she may provide incomplete or inaccurate information.

This leads to a second disincentive for the mother to cooperate in paternity establishment: child support agency attitudes. Often the nature of the paternity establishment process generates a negative response.(Wattenburg, 1991) In addition, the incentive payment system for child support agencies works against paternity establishment and could easily be influencing staff in this direction as well.

Under the current formula for incentive payments, States are discouraged from pursuing paternity work because payments are based on a ratio of collections to administrative costs. Paternity work, especially in the short term, generates administrative costs but does not tend to generate large collections. This is even more the case with nonAFDC cases where incentive payments are capped. Given this environment, supervisors and staff must incline toward working big payoff cases, not paternities.

Finally, there is an additional disincentive to establish paternity: fear of violence. It may be that the mother has ended her relationship and has no desire to see the father again. This sentiment may or may not involve actual previous experience with abuse or threats of violence. The tiny percentage of cases which fall into the good cause arena would indicate that this is not an avenue which is often - or easily - pursued.

It has been noted that in these difficult situations, the child support agency may not only not help the mother but also may not protect her. (Ellwood and Legler,1993) In relation to this issue, it should be noted that paternity establishment has important visitation and custody implications whether the couple is married or not and which deserve serious consideration. Unfortunately, there is little literature available on the often unstated fears of these mothers for themselves and their children.

What Does the Literature Tell Us about Child Support Agency Performance in Determining and Overcoming Noncooperation in Paternity Establishment?

The stories of poor performance by child support agencies in paternity establishment are well-documented and often cite "noncooperation" as a barrier to successful paternity establishment efforts. The OIG report(1990) found that the two most important reported barriers to paternity establishment were the parents and the adjudication process. The report cites numerous suggestions by the agencies involved for improving case processing and management, including better interviewing, streamlining of adjudication, additional staff and staff specialization and better interface between IV-A and IV-D and IV-D agencies and the courts. Improvements in these areas often appear in descriptions of best practices by IV-D agencies.

The report viewed parental noncooperation as an education issue to be addressed by informational programs on the benefits of paternity establishment. It noted "mothers provide incomplete or no information about the putative father due to a lack of understanding of the benefits of paternity establishment and other factors." This statement is matched by "fathers do not want to accept parental responsibility." Without dealing with the gender implications of these statements, the report continued to state that child support workers viewed favorably the use of financial penalties as incentives for cooperation.

McLanahan, Monson and Brown examined superior paternity establishment performance in three counties in Wisconsin. (McLanahan, Monson and Brown, 1992) They concluded that good administrative practices are more important than cooperation by the mother in successful effort to establish paternity. Among the administrative practices they found to be important were recordkeeping that made records complete and available, a timely and pertinent intake interview using child support enforcement staff, and a reasonable caseload ratio. This latter turned out to be 300-400 cases per staff person in Dane and Racine Counties. A higher ratio of 700 per staff person in Milwaukee resulted in lesser performance. A recent GAO study indicated that nationwide the average caseload per staff member was 1,000.

A recent Measuring Excellence Through Statistics (METS) report provided an overview of paternity establishment practices at the State level in 1992. The review included a sampling of effective programming related to hospital-based paternity establishment, simple and efficient procedures after the hospital, use of genetic test results, outreach and education, incentive program and interrelationships with other programs. The main conclusion was that the provision of multiple opportunities for consent, timely intervention and case processing and strong management were major factors in the development of a successful paternity establishment effort. The paper noted the importance of innovative outreach and education and interface with other concerned agencies all along the continuum of paternity establishment.

A study of the Ohio demonstration project, Parents for Ohio's Children, showed that a series of complex interactions among various agencies and apparent noncooperation by mothers to be major factors in poor agency paternity establishment performance. (Adams, Landsbergen and Hecht, 1990). They concluded that administrative reforms would not be adequate to improve paternity establishment performance as required by the Family Support Act amendments of 1988 and that "interventions directed at client attitudes might be required".

A Maryland demonstration on custodial parent cooperation seemed to show that parental cooperation was improved by efforts to improve interface between AFDC and Child Support offices. However, it was not clear that the improved paternity performance was not the result of increased focus provided by the demonstration. (Pacific Consulting Group, 1989).

Price and Williams reviewed a demonstration paternity project in Nebraska which attempted to implement many of the educational recommendations contained in the studies listed above. (Price and Williams, 1990). As part of the project, educational seminars were offered to mothers needing paternity established. The major purpose of the seminars was to inform the mothers of (1) the purpose of paternity establishment, (2) benefits of it to mother and child, (3) the legal process for paternity establishment including the mothers rights and responsibilities, (4) the use of genetic testing and test results, (5) what cooperation is required of the mother, (6) how to complete the paternity questionnaire. The issue to be addressed was whether this educational effort would improve cooperation with the Specialized Paternity Unit (also part of the demonstration).

The findings of the project have been cited elsewhere as indicators of poor agency performance in the face of information provided by the mothers. First, the statistics: 94% of the AFDC mothers knew the father's name, 49% knew his address, 29% knew the telephone number, 28% knew the social security number and 28% knew the employer's name. However, the results were that the paternity establishment rate was the same for those who attended the seminars and those who did not. Clearly poor agency performance and weak project administration were factors in the handling of this information. While AFDC paternity establishment rates did measurably improve, overall performance was still poor.

Ellwood cites the information provided as "considerable knowledge" of the alleged father.(Ellwood and Legler, 1993) However, the project report indicates that "these proportions seem higher that what is typically believed about this group of mothers" in terms of information provided. However, it is possible that the results of subsequent locate work had impacted the data in the files. It is later stated that the "data do not reveal that the educational seminars improved AFDC recipient cooperation of the IV-D agency."

The very low paternity establishment rate in the project could well reflect the quality of the information provided; a sort of noncooperating cooperation. In addition, the report noted that the average time for paternity establishment for AFDC mothers was seventeen and one-half months while that for non-AFDC mothers was ten months. The report posits that the difference in information provided could be a factor in the time differential, with non-AFDC mothers more motivated to provide accurate, useful information.

Ann Nichols-Casebolt found poor agency performance in Arizona (Nichols-Casebolt, 1992) derived from poor interface between IV-A and IV-D and between IV-D and the courts. In addition, she found that specialization of tasks can be a barrier to paternity establishment if they are not well-coordinated, that community doubt about child support agency effectiveness can affect willingness to cooperate, that the time lag in establishing paternity affects both cooperation and efficacy of paternity establishment efforts. Finally, she noted that the Arizona definition of noncooperation included the standard failure to appear for interviews, etc. and/or not providing complete or accurate information. She concluded that lack of cooperation was a function of lack of knowledge of the benefits of paternity establishment.

However, she also connected performance in Arizona with the Nebraska Paternity Establishment Project where she concluded that the educational program had little impact on paternities established. Additional conclusions drawn from the Arizona study were that caseworkers believe that the provision of informal support by the father mitigates child support agency efforts to pursue paternity establishment and that poor agency performance means that the mother gets few benefits from the program anyway. This latter point and the absence of resources to address weaknesses would seem to create a self-fulfilling prophecy where neither side expects much from the other and thus nothing is achieved. It has been posited that this same set of attitudes may govern police response to domestic violence calls; an idea which could explain some of the lack of data. (Notar to Cleveland interview, 1993)

In Poor Support, David Ellwood cites an unpublished study by Paul Jargowsky which addresses the noncooperation issue. The study notes that "In very unusual cases, the mother may cooperate fully yet not know the identity of the father...In our sample of 52 cases from upstate New York counties, only one case in fifty-two did not have the name of the father listed." Ellwood continues to emphasize the importance of also obtaining the social security number and to discuss the government's emphasis on pursuing paternity establishment as a source of welfare savings while the welfare system offers few incentives for the mother to cooperate. Further, while the assumption that the government has just not been doing a good job on paternity establishment is probably a fair one, there tends to be a glossing over of the problem of women who provide inaccurate information or of performance in the face of rapidly increasing rates of out-of-wedlock births.

Finally, a number of focus groups were conducted in connection with the establishment of the Parents Fair Share Project (Furstenberg, 1992). Interviewers found a great deal of gender mistrust among the participants. Further, they found hostility toward the IV-D agencies. The mothers faulted poor performance and the fathers faulted failure to recognize the unevenness of the lives they lead. The interviewers also noted a great deal of misinformation by both parties. This combined with the hostility resulted in noncooperation with the IV-D agency. Esther Wattenburg found similar misinformation and lack of knowledge of the welfare system in a study in Minnesota.

Focus groups from the Teen Parent Demonstration Project in Illinois and New Jersey found that in addition to money and involvement with the child problems, teen mothers listed disputes involving jealousy, physical abuse, drugs and alcohol and attempted kidnapping. Interviews also revealed that a number of these women believed that if the father was already providing informal support and was emotionally involved with the child, that he would continue to provide what he could as a result of his emotional bond. This attitude could help explain what some have seen as a short-sighted view of the parental support situation.

Here too interviewers found hostility to the IV-D system, including the view that its goal is to punish the father; fear of jeopardizing the relationship and support by dealing with the agency; and, the perception of hostility on the part of workers at the IV-D agency. This latter perception was felt by both men and women.

Where Does This Leave Us?

The literature provides a wide variety of findings and recommendations with regard to paternity establishment and noncooperation. Those studies which address agency performance show that poorly performing agencies often use noncooperation as a scapegoat, blaming their clients rather than their own weaknesses for failure to establish paternities. On the other hand, agencies which are better performers tend to dismiss noncooperation by mothers as a nonproblem, or if a problem, one that can be easily solved by a good educational program. The truth probably lies somewhere in between. Clearly, aggressive management, highly motivated staff and strong administrative procedures can have a large impact.

However, cooperation is a voluntary action. It can be influenced by threat of sanctions and other potential punishments but it still remains the mother's decision. Unfortunately, we know little about the decision processes involved in noncooperation. Most of the literature deals with teenage mothers and the fathers of their children. It discusses how teen mothers and fathers often feel that it is important to sign the birth certificate but that marriage is not always regarded as a good solution by the parents and social workers involved.

Studies have not addressed the older group of mothers where the rate of increase in out-of-wedlock births has been so great. We know little about this latter group and their decision-making. We do know that with the younger group there is a deep-seated gender mistrust and a mistrust of the welfare system and other public agencies, including child support. It would not be surprising to see some of this reflected in the older group as well. This older group probably has more experience in using or manipulating the system.

Federal and State definitions of cooperation, by necessity, have to allow for a great deal of subjective judgment. This combined with a welfare population that has some sophistication in dealing with the system has resulted perhaps in something which we can call noncooperating cooperation. The welfare recipient provides enough information to satisfy the caseworker that she is cooperating but not enough to lead to a successful paternity establishment. Services are provided without the necessity of jeopardizing the relationship with the male or more importantly without being forced to confront him.

This is a fuzzy area. There is lots of suspicion that fear of violence plays a role in the decision to cooperate in paternity establishment; yet, there is little documentation. The percentage of good cause exceptions is so small that one tends to dismiss it. If child support assurance and universal paternity establishment are to be implemented, this issue and others need to be examined.

<u>Major Issues Which Merit Examination</u>

I. Research

A. If the incentives to establish paternity for AFDC and financially independent women are primarily non-financial, how does a larger welfare passthrough or the promise of a child support assurance payment, overcome noncooperation in paternity establishment?

B. How are decisions to cooperate or not cooperate in establishing paternity made?

- Women's groups and line workers could be surveyed

- Interviewing concerning this issue will be a part of Year Three activities undertaken by the staff of the Program Improvement Grant in Denver Colorado

C. What do we know about coercion, abuse and violence as factors in the determination to cooperate in paternity establishment?

- Women's groups and line workers could be surveyed

- The Violence Against Women Act has been re-introduced, we could attempt to require that a study be conducted on non-cooperation in paternity establishment as part of this legislation. Any study should be limited to the paternity establishment process because this process is much more personal and potentially dangerous than the application for welfare benefits. (See below)

- Links could be established between OCSE and the OCS Family Violence Program. Joint research might be a possibility.

- At a minimum, programs throughout the Department of Health and Human Services could be surveyed for their connection to this issue and possible unintended negative impact.

II. Regulations and Initiatives

A. How do we capitalize on the presence of the father at birth and in early infancy to establish paternity and involve him in the life of the child even if the adult relationship is terminating?

- Regulations could be issued in this area based on the experiences of the Program Improvement Grants in New York City and Denver requiring the use of trained personnel to work with both parents during both the pre and post natal period in the hospital and at related facilities.

- An initiative could be launched to encourage work with local Bureaus of Vital Statistics to improve information gathering for paternity establishment including the use of additional supplementary community sensitive staff at the hospital and allowing for information regarding paternity establishment to be provided within a reasonable time period after the birth, rather than just in the hospital at time of birth. OCSE has already initiated contacts in this area at the national level.

B. If paternity establishment is to become mandatory under a child support assurance system, should good cause be redefined?

III. Legislation

A. The Violence Against Women Act currently under consideration could be amended to include a study of the role of abuse and threats of violence against women by their partners, whether the putative father or not, in the paternity establishment process.

B. Are the custody issues that derive from paternity establishment a factor in the determination to cooperate in paternity establishment? Will they become more of an issue with universal paternity establishment efforts?

- Consideration could be given to legislation that would require that paternity establishment be decoupled from other legal steps. Custody rights could rest with the mother unless specific legal action is taken to redefine them.

BCCleveland
6/93

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GENETIC TESTING

Final Draft
June 28, 1993

Andrew Williams
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GENETIC TESTING: EXECUTIVE SUMMARY

As a result of Federal requirements and advancements in genetic testing technology, genetic testing is now routinely used. However, States conduct testing and use test results in different ways, some of which may create lack of uniformity in interpreting test results, and some of which create unnecessary delays in establishing paternity. This paper examines ways to streamline the paternity establishment process through genetic testing reforms.

INCREASING STANDARDIZATION IN GENETIC TESTING

Accreditation of Paternity Testing Laboratories. The Federal Government may want to require that IV-D agencies use test results obtained from a laboratory accredited to perform such tests. While the American Association of Blood Bank (AABB) is the organization that presently provides accreditation, additional research would need to be conducted prior to recommending the AABB as the organization to provide accreditation, if such accreditation were federally-mandated.

Use of DNA Tests. Another issue to be considered when examining standardization of genetic testing for parentage is which methodology -- DNA or the traditional sequential testing -- should be the methodology of choice. The traditional sequential testing is well-established and slightly cheaper. The DNA testing has advantages as well: it is viewed as state-of-the-art, is not dependent on scarce reagents, and can be used in cases where the man is deceased.

INCREASING AND EXPEDITING THE USE OF GENETIC TESTING

Ensuring the expeditious use of genetic testing is essential since most men will voluntarily acknowledge after receiving test results that show a high probability of paternity. Some options include:

- Use of default orders, with due process safeguards, when the man refuses to cooperate with genetic testing.
- Offering the parties the opportunity to voluntarily submit to genetic testing before such tests are ordered.
- Offering free or subsidized genetic tests.
- If tests are not free, collecting appropriate fees or reimbursement only after testing is completed.
- In cases where it is necessary to order testing, require that tests be compelled based on the petition alone, without the need for additional testimony or evidence.

- Provide blood drawings at a court or agency office while the parents are present for hearings or other appointments.

INCREASING THE VALUE OF TEST RESULTS

In some States, admitting genetic testing evidence can be cumbersome and the test results may be given little weight. To address these problems, the Administration has proposed legislation which would require States to adopt procedures:

- which provide that any objection to genetic test results must be made in writing within a specified number of days prior to any hearing at which such results may be introduced in evidence, and if no objection is made, the test results are admissible as evidence without further foundation.

- that create a rebuttable, or at the option of the State, conclusive presumption of paternity if test results indicate a threshold probability of the alleged father being the father of the child.

There are also additional reforms that would improve the value of genetic test results. Possible options include:

- Use of retesting or additional tests if objections are raised to test results, rather than automatically proceeding to a trial or hearing.

- Encouraging the parties to sign agreements, as part of the adjudication of the paternity, that increase the value of test results (e.g., the parties agree to abide by the results).

GENETIC TESTING

In recent years, scientific advancements in genetic testing have revolutionized the paternity determination process. Genetic tests can usually either exclude a man from consideration or establish the probability that he is the father at 99 percent or higher, leaving little doubt as to whether an alleged father is actually the biological father. Genetic test results provide powerful evidence and may, if they show a high probability of paternity, encourage fathers to voluntarily acknowledge paternity.

Federal law requires States to have procedures for compelling all parties in a contested IV-D case to submit to genetic testing upon the request of any party.[1] Federal financial participation (FFP) is available at the 90 percent rate to cover genetic testing laboratory costs. As a result of Federal requirements and advancements in genetic testing technology, genetic testing is now routinely used. However, States conduct testing and use test results in different ways, some of which may create lack of uniformity in interpreting test results, and some of which create unnecessary delays in establishing paternity. For example, some States do not take swift action against an alleged father who refuses to cooperate with tests, do not administer tests in an efficient manner, and do not give test results adequate weight in the paternity determination process.

In order to streamline the paternity establishment process, issues in three areas need to be examined: (1) increasing standardization in genetic testing, (2) increasing and expediting the use of genetic testing, and (3) increasing the value of test results.

INCREASING STANDARDIZATION IN GENETIC TESTING

To assist in ensuring that laboratories performed both legally and medically acceptable genetic tests, in 1976 a joint committee of the American Bar Association (ABA) and the American Medical Association (AMA) established guidelines that recommended sequential testing (1) Red Cell Antigen, (2) White Cell Antigen (HLA), and (3) the Enzyme and Proteins. Using the sequential testing method, laboratories are able to exclude at least 90 percent, but preferably 95 to 99 percent, of all falsely accused men. Another advantage of this guideline is the ability to sometimes exclude a falsely accused alleged father during the first or second tier of testing, thus reducing testing costs.

As more laboratories became involved in paternity testing, concern grew that the ABA/AMA guidelines were not enough. That is, there should be standards that require competent staff and a properly designed set of laboratory procedures to ensure the accuracy of test results.

To augment the ABA/AMA guidelines the American Association of Blood Banks (AABB) started on-site laboratory accreditation in 1985. Under a grant from the Federal Office of Child Support Enforcement the AABB developed the Standards for Parentage Testing Laboratories which were published in 1990. In developing the standards, the AABB received assistance from the American Bar Association, the American Medical Association, the American Society for Histocompatibility and Immunogenetics, and the College of American Pathologists. These standards form the basis for the Parentage Testing Accreditation Program of the AABB and are subject to future revision as the state-of-the-art and experience dictate. For example, the AABB established standards for DNA testing in 1992, a technique in experimental stages at the time the original standards were formulated.

It should be pointed out that the AABB reviews laboratories based on the laboratories' ability to exclude falsely accused men rather than on inclusionary evidence, i.e., that is genetic tests that provide inclusionary evidence by showing the likelihood that an alleged father is the natural father.

Should the Federal Government mandate accreditation of laboratories? Thirty-six of the fifty-four (67 percent) Child Support Enforcement IV-D agencies use solely AABB accredited laboratories for paternity testing. While five States use the Deoxyribonucleic Acid (DNA) test exclusively, the majority of States who use AABB accredited laboratories have contracts that require for a battery of tests to be performed sequentially and only as necessary to exclude parentage or reach a specific inclusion rate. (States with statutory requirements of rebuttable presumption vary from a requirement of 95 percent to 99 percent inclusion rate.)

If the Federal Government were to authorize an organization to provide accreditation, which should it be? It is apparent that the AABB has had a major role in the standardization of genetic testing and has been successful partially because of its sensitivity in involving other organizations (as listed above) in the development of standards. While the other organizations have not been contacted to determine their interest in acquiring a leadership in accreditation, the AABB is recognized by many in the CSE community as the organization responsible for accreditation of parentage testing laboratories. No other accreditation system seems to exist in the parentage testing arena. Whether the AABB would support their accreditation program being a mandatory one rather than the voluntary service that it is now, however, remains in question and would need to be explored further.

One might ask why mandate some form of accreditation, when 36 State CSE programs already exclusively use accredited laboratories on a voluntary basis? Several States have reported some difficulties in usage of nonaccredited laboratories that do not have contracts with the CSE agency. For example, in one State, even though there is a statewide contract with an AABB accredited laboratory which is used exclusively by the CSE agencies, judges have discretion in which labs are used once the case is litigated. Specifically, a local lab vendor that is not AABB accredited is sometimes used. This local lab charges $138.00 per person while the lab contracted by the State charges $130.00 per person. (Whether the actual accuracy of the testing suffers is unknown.) In another example, while the State CSE agency uses its two AABB accredited contractual labs exclusively, there are instances where once a case is litigated a judge will order the testing to be done by another laboratory that is not accredited and does not have a contract with the State. This can increase genetic testing prices for State CSE agencies.

Laboratories that are not presently accredited may resist a mandatory accreditation program. The AABB charges a fee of $1,800 for accreditation. One representative of the Human Identification Trade Association (HITA)[2] maintains, however, that it is not the cost of the accreditation that serves as a resistance. Rather, nonaccredited laboratories do not have to follow the AABB standards which enables them to take shortcuts, thereby diminishing quality control. Moreover, because shortcuts in laboratory procedures may be taken, nonaccredited laboratories may bid lower prices. If a State agency's Request for Proposal (RFP) for genetic testing does not require AABB accreditation and puts a lot of weight on a bid with the lowest cost, the State may be tempted to sacrifice test accuracy for the lowest bid.

There appears to be no data that are statistically sound that can prove that quality control is inferior in laboratories that are not AABB accredited. Because of human involvement, even AABB accredited laboratories make mistakes. A possible solution to make certain that genetic testing is accurate is to pass a Federal statute that requires retesting upon the request of either party -- the mother or alleged father. The implementation of such a statute could potentially have a high price tag. Consequentially, certain prerequisites such as evidence that the laboratory may have made a mistake or corroborating evidence of the defendant's paternity would need to be built in. *In re Paternity of Bratcher*, 551 N.E.2d 1160 (1990) is an example of an appellate case where the first round of testing excluded the alleged father. The retesting provided inclusionary results.

A final issue that needs to be examined in the accreditation area is whether States should have one statewide contract or permit contract staff who do IV-D work (such as county attorneys) to seek their own contracts. In some States where this is permitted there is a wide range of prices even though various contracts are with the same genetic testing firm.

<u>DNA or the traditional battery of tests?</u> Another issue to be considered when examining standardization of genetic testing for parentage is which methodology -- DNA or the traditional sequential testing -- should be the methodology of choice.

The traditional sequential testing has several advantages. First, because it has been around much longer than DNA it has a legal tradition. Second, it is a good methodology and is capable of reaching a 99 inclusion rate as can the DNA test. Third, unlike DNA, data from previous testing can be used if additional testing is necessary. Fourth, the testing is slightly cheaper. The two laboratories that do the most business as CSE agency contracts charge an average of $85 per person for the sequential testing and $100 per person for the DNA testing.[3]

The DNA testing has advantages as well. First, both the popular press and staff in criminal law practice view the DNA test as a state-of-the-art test which in turn is changing public perception of DNA in a positive fashion. Second, it is not dependent on good reagents. The scarcity of reagents (used in HLA testing) is growing as a result of their increased use in other medical fields. Third, its ability to be used in cases where the man is deceased has caused that type of testing to increase. Paternity can be established after the father is dead.

The State of New York appears to be the only State that prohibits the use of DNA results in court. (It is interesting to note, however, that the New York CSE program's contracted genetic testing laboratories use DNA if necessary.) Five CSE agencies use DNA as the test of choice, while the other States use DNA if necessary. Lack of statutes and case law could potentially cause problems in the admissability of DNA testing in a court room setting. Perhaps State CSE programs using DNA without supporting case law highlights that few paternity cases are appealed. Finally, it should be noted that some adverse case law against DNA exists. For example, the *Commonwealth of Massachusetts vs. Lanigan*, 596 N.E.2d 311 (1992) establishes that DNA findings as a stand-alone test are not permitted. It does permit use of DNA findings in conjunction with HLA. The States of California, Minnesota, and the territory of Guam also have case law that could pose problems for DNA admission.

Perhaps testing trends need to be observed longer before a decision is made as to whether the Federal Government should have a role in recommending which methodology is used and if so, which one.

INCREASING AND EXPEDITING THE USE OF GENETIC TESTING

Ensuring the expeditious use of genetic testing is essential since most men will voluntarily acknowledge after receiving test results that show a high probability of paternity. Some options, which could either be mandated or encouraged by the Federal Government, are listed below.

Use Default Orders When Man Refuses to Cooperate with Testing. Default orders, which allow paternity to be established based on a refusal to submit to genetic testing, provide an incentive for men to cooperate with testing. While most States have general default order provisions as part of their civil procedures, the circumstances under which a default order can be issued, and the extent to which such orders are actually used varies. Not all States have specific provisions which provide for default orders based on the man's refusal to cooperate with genetic testing.

Legislation proposed by the Administration as part of the President's Fiscal Year 1994 budget would require States to use default orders to establish paternity when the alleged father refuses to cooperate in contested cases. This provision does not specifically mention, but may encompass, cases where a party refuses to comply with an order for genetic testing. Both the Interstate Commission[4] and Bradley/Roukema[5], however, recommend default order provisions that specifically apply to cases where the man refuses genetic testing. Judges or hearing officers may be more likely to use a default order for failure to cooperate with genetic testing if State law allows default orders specifically for that purpose. The drawback of default orders is that they may be perceived as too severe, although State law should provide for due process safeguards such as adequate notice.

Offer Genetic Testing Before it is Ordered. Prior to ordering genetic tests in a case, States could offer the tests to see if the parties will submit voluntarily. Genetic tests could be integrated as part of voluntary acknowledgment programs. If a father is unwilling or reluctant to acknowledge, the IV-D agency could offer genetic tests. If one of the parties does not submit to tests voluntarily, testing can then be ordered.

Offering and encouraging genetic testing as part of voluntary acknowledgment programs should increase the number of fathers who acknowledge since most fathers will voluntarily acknowledge after receiving test results that show a high probability of paternity. Offering, instead of automatically ordering, tests creates less conflict and may allow the paternity issue to be resolved based on the cooperation of both parents. This reduced conflict may improve relations between the parties and benefit the child. The tests would also resolve any doubts the father may have about paternity, thereby possibly strengthening the father-child relationship. In addition, delays, hearings, and paperwork needed to order testing can be avoided. On the other hand, if testing is encouraged and widely available, the number of fathers who voluntarily acknowledge prior to testing may decline. Increased testing will lead to increased laboratory costs, 90 percent of which is currently paid by the Federal Government. Many genetic testing laboratories are already operating at capacity and may have trouble, at least initially, handling an increased volume of tests. It appears that when laboratories (the large ones) experience slippage in turnaround time, however, it is remedied by expanding operations or adding shifts.

Genetic testing could be integrated as part of hospital-based voluntary acknowledgment programs. However, arranging genetic tests in a hospital could be difficult since a mother's stay in the hospital after birth is typically short. The cost for blood drawing in a hospital would likely be expensive, considering the high cost of other hospital services. In addition, the methods for genetic testing of newborns is limited. Most genetic tests are typically not used before a baby's sixth month since it is difficult to draw blood from an infant. Technology is available for drawing blood from the umbilical cord, but it is not widely used. Idaho, which recently conducted a pilot project on umbilical cord testing, suspended the project after discovering that such tests were difficult to arrange and were often not completed since medical staff in the delivery room were often distracted by more pressing matters. An alternative, which is easier to implement, is to obtain a DNA sample, using a swab, from the baby's mouth.

Because of these difficulties, no State has integrated genetic testing into its hospital-based program. Integrating genetic testing into voluntary acknowledgment programs administered by IV-D agencies outside of the hospital may be more feasible.

Offer Free or Subsidized Genetic Tests. If genetic testing is routinely offered to alleged fathers, the question arises: who will pay for the tests? Under current Federal policy, a IV-D agency may charge any individual, except for Aid to Families with Dependent Children (AFDC) or Medicaid recipients, a reasonable fee for performing genetic tests. If paternity is established and genetic tests were performed, the IV-D agency must attempt to obtain a judgment for the costs of the genetic tests from the party who denied paternity or, at State option, from each party. Therefore, in many cases, a father whose paternity was established after genetic testing will be required to pay for the tests.

Offering free or subsidized tests in all cases may encourage fathers to voluntarily cooperate with testing, without the need for an order and its attendant delays. The main drawback to this approach is its cost. It may also encourage the "overuse" of testing in cases where the father would otherwise be willing to voluntarily acknowledge paternity without testing, if free or subsidized tests were not available.

An alternative to free or subsidized testing in all cases would be to only charge the man for the tests in cases where paternity is established.[6] This approach discourages overtesting and controls the government's costs, but only charges the man if he is actually the father of the child.

Have State Finance Testing Up-Front. If tests are not free, the State can still finance testing up-front and collect fees or reimbursement later.[7] This approach decreases delays and reluctance to take the tests due to the cost. Currently, a party may be ordered to pay costs prior to testing, and some tribunals may delay testing to give the man time to save money to pay for the tests. A recent Health and Human Services Office of Inspector General report found that up-front State financing of tests was an effective technique for expediting the paternity establishment process.[8]

Compel Testing Based on Petition Alone. In cases where it is necessary to order genetic testing, some States will not order tests simply on the basis of a petition or the mother's signed statement alleging the man's paternity. These States require additional evidence or testimony, often in the form of a hearing, which can slow down the process. To address this problem, Federal law might be revised to require that test be ordered based on a petition alone, without the need for additional testimony or evidence.

Provide On-Site Blood Drawing. Many IV-D agencies, including agencies in Maryland and Tennessee, provide on-site blood drawings at a court or agency office while the parents are present for hearings or other appointments. On-site drawing expedites the process by preventing: scheduling delays, missed appointments, and the need to relocate alleged fathers who "disappear" after an initial hearing.

On-site blood drawing also has other advantages. First, procedures may be adopted that strengthen the chain of custody in that a local official (e.g., officer of the court, sheriff, etc.) becomes part of the chain of custody process. Second, logistical problems may be diminished. Especially in rural States, each county seems to have its own courthouse. On-site blood drawing at a county courthouse in a rural area where neither a blood center, hospital, or CSE agency exists, can eliminate the necessity of the parties to travel long distances.

INCREASING THE VALUE OF TEST RESULTS

While reforms are needed to ensure that testing is conducted quickly in all appropriate cases, reforms are also needed to increase the value given to test results. Some men will still not voluntarily acknowledge after receiving test results that show a high probability of paternity. In such cases, test results need to be used and given adequate weight in the paternity adjudication process. Statute or case law in nearly every State provide that genetic test results that exclude a man as a possible father or establish a probability of paternity are admissible as evidence. However, in some States, the process for admitting such evidence can be cumbersome and the test results may be given little weight. The Administration's proposed paternity legislation, mentioned earlier, addresses these problems in the following provisions:

Admissibility of Genetic Test Results. States would be required to adopt procedures which provide that any objection to genetic test results must be made in writing within a specified number of days prior to any hearing at which such results may be introduced in evidence, and if no objection is made, the test results are admissible as evidence without further foundation. This provision would prevent delays resulting from last-minute challenges, and would limit time-consuming foundation requirements in cases where no objections are raised. Adoption of such procedures might be more palatable if States were required to use laboratories that used certain testing standards as required and monitored by a laboratory accreditation program.

Presumption of Paternity Based on Genetic Test Results. States would be required to adopt procedures that create a rebuttable, or at the option of the State, conclusive presumption of paternity if test results indicate a threshold probability of the alleged father being the father of the child. A rebuttable presumption is likely to expedite paternity resolution by shifting the burden to the presumed father to disprove paternity. A conclusive presumption, would conclusively resolve the matter by establishing paternity. At least 26 States currently have rebuttable or conclusive presumptions based on genetic test results. While Texas uses an exclusion rate, the remaining States use an inclusion rate ranging from 95 - 99.8 percent. It also should be pointed out that some States require a higher inclusion rate in their genetic testing contracts than their inclusion rate for rebuttable presumption, thus placing stringent demands on laboratories for accurate tests.

While the proposed legislation provides a starting point, there are still additional reforms that would improve the value of genetic test results. Possible options include:

Retesting or Additional Tests. If a man is still unwilling to voluntarily acknowledge paternity after genetic testing, the case usually goes to a hearing or trial. In such cases, there may be scheduling delays and the adjudication itself may be lengthy and expensive. The man, if he believes the test results are inaccurate, will likely object to the results, creating the need for additional testimony and proof that will likely further delay resolution.

However, the use of retesting or additional tests may help to avoid hearings or trials. Some men may be willing to voluntarily acknowledge paternity, without a hearing or trial, if retesting or additional tests confirm the results of the initial test. Furthermore, since testing mistakes may be made in some cases, this allows such errors to be discovered without the need of going through a trial or hearing.

Some State statutes, including Nebraska's, specify that "if the result of genetic testing ... is disputed, the court, upon reasonable request of a party, shall order that additional testing be done by the same laboratory or an independent laboratory at the expense of the party requesting additional testing."[9] The Uniform Parentage Act, which has been adopted by 17 States, provides that "the court, upon reasonable request by a party, shall order that independent tests be performed by other experts...."[10] Despite such statutes, it is not clear that States use additional testing on a regular basis.

A drawback of retesting is that the alleged father may use it simply as a dilatory tactic. However, in most cases, additional testing should be completed fairly quickly, so the delay should be limited. Another concern is that, if the State pays for additional testing, all alleged fathers may request retesting at significant public expense. On the other hand, if the alleged father must pay for the tests, as under the Nebraska statute, he may be unwilling, and retesting will rarely if ever be used. Charging the alleged father only if paternity is subsequently established may prevent frivolous requests for retesting while not discouraging legitimate ones.

Stipulations or Agreements. Some States encourage the parties to sign an agreement, prior to testing. There are several possible types of agreements:

- Some jurisdictions encourage the parties to stipulate the admissibility of the test results.

- Some States encourage the alleged father to sign an agreement, stating that he will voluntarily acknowledge paternity if the test results show a probability of paternity above a certain threshold.

- Some jurisdictions encourage the parties to sign a statement agreeing to abide by the test results. Under Washington, DC law if the parties sign such an agreement and the test results show at least a 99 percent probability of paternity, paternity is automatically established without the need for further proceedings.

The first type of agreement is useful if test results must be used as evidence in a contested case. It avoids the need to meet burdensome evidentiary requirements and prevents a party from objecting to the test results unless a significant error in the testing is found. The other two types of agreements make it less likely that a contested hearing or trial will be necessary.

LEGISLATIVE INITIATIVES

Many of the reforms discussed in this paper, if they are to be implemented, will require Federal legislation. The Administration may want to consider legislation that would:

- Require IV-D agencies to use only genetic test results obtained from a laboratory accredited to perform the testing technique that was used. [This option needs further research for two reasons: (1) an accreditation requirement may discourage or prohibit States from using new, state-of-the-art techniques which might not yet be accredited, and (2) the American Association of Blood Banks, the organization that presently provides accreditation may not support a federally-mandated accreditation program.]

- Encourage or require the use of a particular testing technique as the test of choice. (Further research is need to compare DNA testing versus traditional sequential testing to determine if one is clearly preferable or cost-effective).

- Require States to have and use laws providing for default orders when the man refuses to cooperate with genetic testing.

- Require States to use procedures that would give parties the opportunity to voluntarily submit to genetic testing before tests are ordered.

- Provide free or subsidized genetic testing. (Further research on the cost implications and State versus Federal financing is needed).

- Require States to pay up-front for genetic tests, and only allow fees or reimbursement to be collected after testing.

- Require States to have and use laws providing that, in cases where it is necessary to order testing, tests be compelled based on the petition alone, without the need for additional testimony or evidence.

- Require States to have procedures for on-site blood drawings at court or agency offices.

- Require States to have and use laws providing for retesting or additional tests. (Research is needed regarding whether retesting should be used on a routine basis or only when requested by a party, and who should pay for retesting).

- Require States to have and use laws regarding agreements or stipulations between parties that would increase the value of test results, and to have procedures for encouraging parties to enter such agreements.

To avoid the risk of overwhelming States, the Administration may want to prioritize and limit the number of Federal mandates it attempts to impose, particularly since States are still struggling to implement Family Support Act requirements.

ENDNOTES

1. The only exceptions to this requirement are cases where (1) an AFDC recipient has established good cause for refusing to cooperate, or (2) the IV-D agency has determined that paternity establishment would not be in the best interest of the child in a case involving incest, forcible rape, or pending legal proceedings for adoption.

2. The Human Identification Trade Association is a national non-profit association of 35 private DNA testing laboratories and commercial manufacturers whose members process over 90 percent of the DNA tests in the United States to establish human identity, including forensic and paternity DNA tests.

3. The $85 per person may be a little overstated. According to two sources, approximately 30 percent of genetic testing completed under IV-D agency contracts results in excluding the alleged father. In a hypothetical situation where 100 alleged fathers are being tested, 30 of them would be excluded. Of those 30, 3 of them would be excluded at the first tier of testing (RCA), hence not requiring the HLA test. Using average figures, an additional saving of $630 per 100 cases may be realized. (Some contracts charge $15 per person for the RCA test and do not charge additional costs if the alleged father is excluded at the first tier of testing.

4. Congress, as part of the Family Support Act of 1988, created the U.S. Commission on Interstate Child Support, charging it to submit a report containing recommendations for improving the interstate establishment and enforcement of support awards. In 1992, the Commission issued its comprehensive final report which contained numerous recommendations.

5. In both the last and current sessions of Congress, Senator Bill Bradley and Representative Marge Roukema introduced legislation that, if enacted, would implement many of the Interstate Commission's recommendations.

6. Current Federal policy allows States to charge men a fee for genetic testing even if paternity is not established. States can also charge mothers a fee. It is unclear how many States levy such charges. Many do not charge falsely accused men.

7. It is unclear if some States actually charge fees for testing prior to conducting the tests, but States are allowed to do so under current Federal policy.

8. Department of Health and Human Services Office of Inspector General, "Effective Paternity Establishment Practices: Technical Report", January 1990, p. 16.

9. Neb.Rev.Stat. §43-1417.

10. Uniform Parentage Act, Section 11(b).

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Divider Title: 8

REVIEW AND ADJUSTMENT OF CHILD

SUPPORT AWARDS IN A CHANGING CHILD SUPPORT SYSTEM

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EXECUTIVE SUMMARY

It is vital that child support awards are updated regularly to provide for the child's needs and the parents' financial circumstances. In the past, States required a "change of circumstances" before their courts or administrative bodies would adjust a child support award amount. Because the updating of amounts was optional, many orders were never reviewed and adjusted. With the passage of the Family Support Act however, the Federal government for the first time mandated that States regularly review and adjust IV-D cases in which an assignment of support rights has been made to the State, with several exceptions.

The Family Support Act mandated demonstration projects to test and evaluate model procedures for reviewing and adjusting child support award amounts. Four States, Colorado, Delaware, Illinois, and Florida conducted such projects. They illustrate both the importance of automation to an efficient review and adjustment process, and examples of reasons why parties may not wish to have their cases reviewed. The limitations of the demonstration projects, and the Oregon updating project should be kept in mind however, because their results were undoubtedly affected by the fact that none of the States tested the 1993 review and adjustment requirements, and two States, Florida and Illinois, did not process cases in which a review indicated that a downward adjustment was warranted.

Several proposals to alter the review and adjustment process include: 1) the Downey/Hyde proposal; 2) the United States Interstate Commission recommendations to Congress; and 3) the Bradley/Roukema companion pieces of legislation. While these suggestions differ in substance, they reveal an acknowledgment of the importance of the review and adjustment of child support awards regardless of the form of the future child support system.

States are developing creative innovations in their endeavor to implement the review and adjustment requirements. For example, at least 13 States are developing pro se practices to make the process more comprehensible for those pursuing review and adjustment actions on their own.

Australia has tackled the regular updating of child support awards differently than the United States, adjusting orders once a year based on prior year's tax information. We might wish to study its system in depth both to learn from its mistakes, and benefit from its experience.

The review and adjustment system of the future does not necessarily have to resemble the present one. There are variations such a system could take, among which are a mandatory system, one with limited "opt-outs", or one similar to that of the existing one, where non-AFDC parties may in effect "opt-in" to procure a review and adjustment.

BACKGROUND

The importance of child support orders which accurately reflect the economic circumstances of the parents while still adequately providing for the needs of the children cannot be overestimated. Historically, State laws governing updating of child support orders have required that the party seeking a change in the award amount must prove that a material change in circumstances has occurred since entry of the order. Several States require that the change in circumstances be substantial and continuing. Still others impose a condition that the change be one that could not have been contemplated at the time the order was initially established. Meeting this burden of proof has often made obtaining a change in the amount of child support a difficult undertaking for many parties, and one which often required a lengthy adversarial proceeding to resolve.

Child support orders established prior to the adoption of State guidelines may be grossly inadequate. Even the use of guidelines in establishing the initial award amount does not ensure that orders continue to meet the support standards set by the guidelines. To address these problems, Congress passed the Family Support Act (FSA) of 1988 (P.L. 100-485) which amended § 466 the Social Security Act (the Act), (42 U.S.C. 666), to require States effective October 13, 1990, to develop procedures for review and adjustment of orders consistent with a State plan indicating how and when child support orders are to be reviewed and adjusted.[1]

The Federal Office of Child Support Enforcement (OCSE), has defined "review" to mean "an objective evaluation, conducted through a proceeding before a court, quasi-judicial process, or administrative body or agency, of information necessary for application of the State's guidelines for support to determine the appropriate support award amount, and the need to provide for the child's health care needs in the order through insurance or other means."[2] It has defined "adjustment" to mean "an upward or downward change in the amount of child support based upon an application of State guidelines for setting and adjusting child support awards; and/or, the provision for the child's health care needs, through insurance coverage or other means."[3]

Either parent or the IV-D agency may request a review, and any adjustment to the order must be made in accordance with the State's child support guidelines. The requirements for the review and adjustment process are important because they constitute the first Federal requirements to modify child support orders under their IV-D programs. In the past, while States were required to establish and enforce orders, modification services were optional.[4]

As of October 13, 1993, States must have implemented a process whereby orders being enforced in the title IV-D system will be reviewed no later than 36 months after establishment of the order or the most recent review of the order and adjusted in accordance with the State's guidelines for support award amounts. States must conduct reviews in IV-D cases in which support obligees have assigned their rights to support to the State, unless the State determines that it would not be in the child's best interests, and neither parent has requested a review. This includes cases in which benefits under the AFDC, title IV-E foster care, or Medicaid programs are currently being provided. It does not encompass orders in former AFDC, title IV-E foster care, or Medicaid cases even if the State retains an assignment of support rights to the extent of any unpaid support that accrued under the assignment which remains due to the State after assistance terminates.

In IV-D cases in which there is no current assignment of support rights to the State, including former recipients of AFDC, title IV-E foster care, or Medicaid benefits receiving continued IV-D services, review is required at least once every 36 months only if a parent requests it. The State must also notify each parent whose case the IV-D agency is working, of the right to request a review, provide a 30-day notice to both parents that a review will be conducted, and a notice of proposed adjustment that allows the parents 30 days to challenge the review findings. In all IV-D cases, if such a review indicates that adjustment of the support amount is appropriate, the State must proceed to adjust the award accordingly.

The Oregon Updating Project

Before Congress enacted the FSA, Oregon initiated a project in October, 1988, to develop and test a strategy for periodic review and adjustment of child support orders with the aid of a grant from the Federal Office of Child Support Enforcement.(OCSE) About a year later, after the passage of the FSA, OCSE funded four demonstration projects to test review and adjustment. Those projects will be discussed below.

The Oregon project lasted nineteen months (March, 1989 to September, 1990). The Child Support Updating Unit (CSSU) handled reviews of 5,001 IV-D cases. After eliminating inappropriate cases, the agency reviewed 4,054 cases, and obtained adjusted orders in 693, or 17% of those cases appropriate for review. It should be noted however, that in 355 cases the agency began a review which it had not finished by the end of the project period.[5]

The study limited the sample to IV-D cases, and chose an approximately equal number of existing support orders established by administrative and judicial processes selected for review each month. The study selected only those orders which were 2.5 years or older, over which the support enforcement division had jurisdiction. This excluded most non-AFDC IV-D cases that were not former AFDC cases, (over which the district attorneys have authority).[6]

Cases which the CSSU deemed inappropriate for review included: 1) cases in which the youngest child would be emancipated within three months of case selection, 2) cases in which the parent was not the caretaker, 3) cases with incarcerated obligors, 4) cases with AFDC "good cause" determinations, 5) cases in which modifications were already pending. Oregon excluded almost one-fifth of cases from the review process.

Findings in Oregon

The CSSU adjusted 81% of the orders upward, while it reduced only 19% of the cases. The average child support order increased from $133 to $212 per month, a net increase of $79 per month (59%). One noteworthy finding of the project was that adjustment increased the number of orders with medical support awards, so that medical support orders were incorporated into almost all modified orders. For 63% of AFDC cases with adjusted orders and 73% of non-AFDC cases with adjusted orders, this was the first time medical support had been included in the order. The project also discovered both that adjustment was more likely to occur in AFDC cases than non-AFDC cases (20% of eligible AFDC cases were adjusted compared to 7% in non-AFDC cases), and that it was less expensive to modify orders for AFDC cases than non-AFDC cases ($560 for AFDC cases versus $1,010 per non-AFDC case).

The project report suggests that both of these results may have occurred because in AFDC cases, unlike non-AFDC cases, CSSU workers did not have to request one of the parents to authorize a review of the existing support order. Therefore, a higher proportion of AFDC cases selected were adjusted. The agency already possessed all the financial information concerning the AFDC obligee, which reduced both the case processing time and the number of procedural steps that were required to be made.[7]

The study also discovered that it was less expensive to adjust orders through an administrative process ($496 per case), than by judicial process ($770 per case).[8] This is not surprising however, if we consider that administrative procedures tend to be more simple and expeditious. The Oregon project reported an overall decrease in compliance rates (from 70% to 64%) in the 12 months following adjustment, although only the decrease in compliance among AFDC cases (70% to 63%) was statistically significant.

The importance of automation

The report also emphasized the importance of an automated system for the review and adjustment process. It states:

> [t]he importance of automated support in the Oregon project cannot be overestimated. Case selection was entirely automated by the mainframe, that system provided case information, including information about obligor and obligee earnings through an interface with Employment Wage Commission files. Case tracking was also automated through the microcomputer Data Retrieval System.

Automation is likely to play a key role in the future of child support and particularly in the review and adjustment process, where automation could potentially allow automatic scheduling of review and adjustment cases upon either request or when such review came "due", and ease calculation of adjusted child support orders.

Demonstration Projects

In addition to its other mandates, the Family Support Act (§103(e)), also required the Secretary of the Department of Health and Human Services to enter into an agreement with four States to conduct demonstration projects to test and evaluate model procedures for reviewing child support award amounts. States competed for demonstration project grants, which OCSE awarded to Colorado, Delaware, Florida and Illinois. Delaware acted as the lead State for the evaluation effort, and it awarded a contract for the evaluation.[9]

Project limitations

While these demonstrations provide examples of different review and adjustment processes, and may enlighten us generally with their results, we should keep in mind one of their primary limitations: they did not apply the implementing regulations of the FSA. Because OCSE had not yet issued the final implementing regulations covering the 1990 and 1993 FSA review and adjustment requirements during the demonstration project period, the demonstration States applied their interpretations of the FSA review and adjustment requirements. The States operated independently and in fact often had inconsistent policies on review and adjustment. This fact is important because the regulations are likely to effect future outcomes of State review and adjustment processes.

A second important limitation of the project is that only Delaware (the smallest State, with three counties, and a population approximately that of the District of Columbia) conducted it on a Statewide basis. Colorado and Florida initiated it in six counties and four counties; while Illinois launched it in two judicial districts, Cook County and 6th Judicial Circuit.

A third limitation of the project was that two of the four demonstration States, Illinois and Florida, did not process any cases in which the review indicated a downward adjustment was warranted. Both States reasoned that: (1) processing of downward modifications was against the best interests of children; and (2) there may be a conflict of interest for IV-D attorneys, who are often perceived as representing applicants or recipients of services, not the State.

OCSE has recently addressed the latter issue in a forthcoming information memorandum (or IM). Our research has found that at least 26 States and one territory have legislated that neither the custodial parent nor the non-custodial parent is the "client" of the IV-D agency, or the attorneys who work for the IV-D program.[10] The State Supreme Court of Oklahoma has recently held that no attorney-client relationship was formed between the district attorney and the State Department of Human Services when the district attorney attempted to collect child support from the noncustodial parent. (See Haney v. Oklahoma, 850 P.2d 1087 (Okla. 1993)). In addition, the American Association of Public Welfare Attorneys has also issued a policy memorandum which takes the position that the IV-D attorney represents only the IV-D agency, and that no attorney-client relationship exists between the IV-D agency and the recipient of IV-D services.[11]

This stance is advantageous in that it may reduce the possibility of conflicting interest when those of the parent and those of the State differ. Such conflicts may arise for example, when a IV-D attorney learns that a parent has received public assistance at the same time that he or she received support directly from another parent, and therefore, the interests of the State (possible prosecution for welfare fraud), conflict with those of the parent (defense).

It should be noted that there is still debate on this issue. In her recent article, Marilyn Ray Smith of the Department of Revenue, Child Support Enforcement Division, in Cambridge, Massachusetts, indicates that in her opinion, there is a conflict of interest for a IV-D agency or attorney to initiate proceedings "on behalf of" noncustodial parents seeking downward modifications.[12]

A fourth limitation of the demonstrations was that not all of the States processed interstate cases. While Delaware and Colorado (for Colorado the exception was the existence of a URESA order in another State) reviewed interstate cases, both Florida and Illinois did not. Because interstate cases represent one of the most difficult types of child support cases to work, future review and adjustment results in "real" case scenarios will differ.

State Demonstration Project Processes

All four states conducted the review of child support orders by obtaining current financial information from the parents or independent data sources and applying the State's child support guidelines to determine whether any adjustment in the order was warranted. The specific procedures used to conduct the review, the sources of information used, and the process used to modify the order differed among the four projects.

Colorado conducted the reviews using financial information on both parents obtained from financial affidavits submitted by the parties or from independent data sources, such as the Colorado Department of Labor and Employment database. If the review indicated an adjustment was appropriate, project staff attempted to obtain a stipulation to the modified order from the parents; if this failed, they referred the case for court adjudication.

Delaware integrated the review and adjustment process through the Family Court. Parents were required to bring financial information to a Family Court mediation session, where mediators conducted reviews in concert with IV-D workers who provided documentation available from independent sources. If the review indicated that an adjustment was warranted, the mediator attempted to negotiate an agreement to the modified amount. If mediation failed, project staff referred the case to a Master's hearing. (Masters are analogous to judges in Delaware).

Florida strove to conduct the reviews using information on both parents obtained mainly from the obligee or independent sources. If a review indicated that an adjustment was warranted, staff endeavored to obtain one through both parties' consent. If the consent process failed, staff referred cases for a hearing.

Based upon information available from State labor and revenue departments' databases to identify cases likely to require adjustment, Illinois simulated a guidelines calculation. It conducted manual reviews using primarily employer income information. Staff referred all cases warranting an adjustment to court, where IV-D attorneys sought to obtain pre-trial agreements between the parties.

Project Findings

During the term of the two-year project States adjusted 3,023 orders. This number represents an average of 10 percent of the 30,968 cases selected and 47 percent of the 6,408 cases with reviews conducted. This left 5,371 cases pending at its conclusion (e.g., not worked). Of the adjustments obtained, 92 percent resulted in increased orders, 5 percent resulted in decreased orders, and in the remaining 3 percent of cases no changes were made in the order amount but new medical support and/or immediate income withholding provisions were added. Of the AFDC cases, 13,035 cases were selected of which, 8,709 (67%) were terminated, and 1,947 (15%) were modified, and 2,379 (18%) were pending. Of the non-AFDC cases, 17,907 cases were selected, of which 13,839 (77%) were terminated, 1,076 (6%) of the cases were adjusted, and 2,992 (17%) of the cases were pending.

In both the AFDC and non-AFDC cases, the average pre-modification monthly order was $127, the average post-modification order amount was $245, an increase of $118 per case per month. This represents an average percentage increase of 101%.[13]

Project findings included that many child support orders are inadequate, outdated, and unreflective of parental ability to pay. The majority (87%) were upward adjustments in the child support award. The average percentage increase in the monthly support obligation ranged from 47% in Delaware to 135 % in Illinois. Across the four projects, the average percentage increase was 92%.[14]

The States terminated 22,574 cases before review (73%). Interestingly, the average percentage of cases terminated in the four State demonstration projects (73%) was similar to that in the earlier Oregon project (79%).

A second major factor in case terminations was the lack of authorization or request for a review in non-AFDC cases. Contrary to expectations, the majority of non-

AFDC obligees (71 percent) and non-AFDC obligors (85 percent) either did not respond or declined a request for authorization for a review of the order which resulted in the termination of these cases.

Medical Support Orders

The demonstration project findings indicate that review and adjustment will have important ramifications for the provision of medical support to children. While decisionmakers made adjustments to relatively few orders for medical support purposes only, they ordered it in a large number of cases in conjunction with changes in the order amount. The States obtained new medical support orders in 1,372 cases in Colorado, Delaware and Illinois, representing 53 percent of the cases which did not have a medical support order prior to the modification. Data on medical support orders obtained were not available for Florida, although Florida's policy was to pursue medical support on all orders. While decisionmakers in Colorado could order medical support regardless of whether insurance was available to the obligor, in Delaware and Illinois, they ordered it only if medical insurance was actually available to the obligor at the time of the review and adjustment.

Why did participants refuse to have their orders reviewed?

The most frequently cited reason for not authorizing a review was that the obligee did not want to go court. Obligees were concerned both about being able to take time off from work to attend hearings, and the potential stress of an adversarial court proceeding.

Other reasons obligees cited for not wishing a review of their case include: 1) if the obligor was not currently paying or had not been located, the review was considered a waste of time; 2) concern that a review might result in a reduction of the order amount; 3) if the obligor was currently paying, a fear of jeopardizing current payments, or affecting the relationship with the obligor; and, 4) problems understanding the review process.

A higher percentage of non-AFDC cases (77%) were terminated than AFDC cases (67%), principally because of the lack of authorization or cooperation from the parents for the review. A higher percentage of interstate cases (77%) were terminated than in-state cases (72%), principally because of the difficulty in obtaining information and authorization for the review from interstate cases.

In general, a much higher percentage of AFDC cases (15%) were adjusted than non-AFDC cases (6%). The disparity between AFDC and non-AFDC cases was found in every state except Florida, where the percentages were almost equal. Proportionately fewer non-AFDC cases were modified than AFDC cases because non-AFDC cases were terminated at a higher rate due to a lack of authorization for the review or interest in pursuing a review and possible modification. For example, the response rates for authorizing a review of the order follow: for non-AFDC cases, 29 percent of obligees and 15 percent of obligors authorized a review of the order.

Time Required for Review and Adjustment

The average length of time from case selection to adjustment ranged from 157 days in Florida to 252 days in Colorado, which calculates into an overall average of 196 days (or 6.4 months) for the four demonstration States. These differences are based on variations in the amount of time devoted to case location and case "clean-up" activities (i.e., age of order, determination whether child had reached age of majority, obligor deceased or incarcerated), the extent to which case backlogs developed, and the relative efficiencies of the different review and modification processes used. Both Colorado and Delaware devoted a considerable amount of time to case location and case clean-up activities, and both States developed backlogs which contributed to lengthy case processing delays. Colorado and Florida used an out-of-court stipulation process, the average time required to obtain a stipulation (216 days in Colorado and 141 days in Florida) was considerably shorter than the time required for adjustment by court hearing (307 days in Colorado and 256 days in Florida). The expedited court-based processes that Delaware and Illinois employed, required 170 to 176 days on average to obtain modifications.

In general, non-AFDC cases demanded more time for review (15 days more on average) and adjustment (39 days more on average) than AFDC cases. This may be explained by the additional time required in non-AFDC cases to obtain authorization for the review, which was unnecessary in AFDC cases. Further, in several States, a higher percentage of non-AFDC cases were modified through court hearings than in AFDC cases; and these generally necessitate more time than consent-oriented processes.

Project staff found interstate cases more time-consuming than intrastate cases, 30 to 40 days longer on average. The interstate cases which did get reviewed and adjusted were generally the less difficult interstate cases in the sample for which authorization and/or information could be obtained in a relatively short time period.

Proposals for Change

The Downey/Hyde Proposal

In their child support enforcement and assurance proposal, (the "Downey-Hyde" proposal), Representative Henry Hyde (R. Ill.), and former Representative Tom Downey (D. N.Y.), suggested another type of review and adjustment process in the context of a substantially different child support structure. The Federal government would conduct reviews every two to three years, determining actual income based upon Federal tax returns. It would take into consideration the actual income of both parents in the base year and the income growth of both parents in the previous one-two year period. Either parent could appeal the adjusted order through a Federal administrative process. The State or either parent could contest changes made at the Federal level as a result of the Federal review. In addition, either parent could request an adjustment with a Federal administrative law judge, within the two to three-year period. Adjustments would be made only in response to changes in income or circumstances which resulted in significant (not-defined) changes in the support order amount. Temporary changes could result in the order being modified to a lesser amount for three months. The support would revert to the original amount if further evidence was not supplied. Permanent changes, such as to the custody arrangement, would be reason to reestablish the support amount.

The U.S. Interstate Commission Report

In its recent report to Congress, the United States Commission on Interstate Child Support, recommended several changes to the review and adjustment of child support awards.[15] First, it advised States to have and use laws providing that the non-AFDC custodial parent must agree to the review and adjustment of a child support order in IV-D cases. It advised IV-D agencies to notify custodial parents of the time of the review, and of the rights to "opt out" of the review process. Custodial parents who wish to pursue adjustment would be advised of a recalculated support amount and given an opportunity to "opt out" for any reason if they did not want to pursue the modification.[16] The stated purpose of this recommendation was to ensure effective use of IV-D agency's resources, and to protect parents' rights. It contradicts the premise of the review and adjustment process however, which is to adjust the child support award to reflect the parties' financial circumstances and the child's needs. Perhaps a more limited right to opt out could be implemented and made available to both parents in specific instances, or, we may decide not to follow this particular recommendation at all.

Second, the Commission recommended that States implement laws which require that a change in the support order amount, determined through application of the guidelines since the entry of the last order, is sufficient reason for adjustment of a child support obligation without the necessity of showing any other change in circumstances. This differs from some current State practices, which require a given percentage difference between the previous and the new order before an adjustment action is allowed to be brought. (See for example, Rohrback v. Rohrback, 531 N.E.2d 773 (Ohio App. 1988), in which the court explained that a party moving for an adjustment in Ohio must demonstrate a variance in excess of 10% between the State guideline formula and the prior judgment.)

Further, it advised States to establish a minimum timeframe between reviews, to prohibit reviews before a certain period of time elapses, absent other changes in circumstances.[17] In its explanation for this recommendation the Commission reasoned that it is designed to save IV-D agencies' resources by reducing the number and frequency of reviews.[18] It may be advantageous, for example, to require a minimum percentage change in the original order amount before it may be reviewed. This may prevent decisionmakers from being overwhelmed by parents rushing back to have their child support orders reviewed.

To reduce the possibility that conflicting child support orders may be entered in several States, the Commission urged the use of continuing, exclusive jurisdiction, which would allow a State that has properly asserted jurisdiction to retain continuing, exclusive jurisdiction over the parties as long as the child or either party reside in that State. A State would lose its continuing, exclusive jurisdiction to modify its order regarding child support if all the parties no longer reside in that state or if all the parties consent to another state asserting jurisdiction.[19] (This provision mirrors the Uniform Interstate Family Support Act, or UIFSA, which is discussed in depth in the welfare reform workgroup paper on interstate child support cases).

An additional recommendation, the use of administrative subpoena power to secure documents or appear at court, might expedite the review and adjustment process, by allowing information on the financial circumstances of the parties, for example, to be made readily available.

The Bradley/Roukema bills

Senator Bill Bradley (D. N.J.), and Representative Marge Roukema (R. N.J.), have recently introduced companion legislation (S.689), (H.R.773), designed to "improve the interstate enforcement of child support and parentage court orders, and for other purposes".[20] In addition to recommendations on jurisdictional issues, these bills establish practical procedures to be followed to ensure that proper notification requirements are met. At the time a support order is issued, both parents must register their locations, and provide updates as changes occur. Subsequent mailings to the locations provided by the parents would be considered sufficient notification. The legislation establishes a national subpoena duces tecum (allowing nationwide reach for a subpoena for documents) providing penalties for failure to appear or provide information. As in the Interstate Commission report, any difference between the existing support amount and the amount determined under State guidelines is sufficient for an adjustment, and the non-AFDC IV-D custodial parent must agree to the adjustment amount.

States' Implementation of Review and Adjustment

To learn how States are implementing the review and adjustment requirements, OCSE conducted an informal, anecdotal survey of about half the States, and reviewed State plans for 1990 from which to cull pertinent data. The survey consisted of the following questions: 1) is your State implementing review and adjustment? 2) have you found any procedures that are helpful? 3) have you found any procedures that are not helpful? 4) has your State developed any innovations or are you in the process of developing such innovations?

Which States are Implementing Review and Adjustment?

OCSE has received State plans from 27 of the 54 States and territories. This indicates the States have an approved plan according to the October 13, 1990 review and adjustment requirement. With the exception of two States, all of the States surveyed stated that they are implementing review and adjustment, even those without an approved State plan. This implementation is being carried out in various ways.[21]

This indicates that they have an approved plan according to the October 13, 1990 Federal requirements.

Of the States which responded to the survey, twenty-five[22] indicated that they are implementing review and adjustment. Nine (Connecticut, District of Columbia, Michigan, Minnesota, New Jersey, Pennsylvania, Rhode Island, South Carolina, Wisconsin) do not yet have an approved State plan. Two States, (Maine, Puerto Rico) reported they are not implementing review and adjustment. States are implementing the review and adjustment criteria in various ways:

- Florida, Indiana, Minnesota, New York, Ohio, South Carolina, and Tennessee are still implementing the 1990 requirements;
- Connecticut, Georgia, and Kentucky are implementing some of the 1993 requirements;
- Massachusetts, and New Jersey are reviewing only AFDC cases;
- The District of Columbia, Idaho, Rhode Island, Virgin Islands, and Wisconsin, are sending out right to review notices;
- Massachusetts and Wisconsin are testing the review and adjustment requirements in pilot projects in three and nine counties respectively;
- New Hampshire is implementing the requirements solely by pro se processes;
- Alabama, Illinois, Mississippi, and Vermont have a systematic process to complete reviewing of AFDC cases by October 13, 1993;
- Pennsylvania leaves procedures up to each county court as it has not written Statewide operating procedures.

Procedures involving notices

Our informal survey also indicated that States are devising new procedures to notify obligors/obligees of review and adjustment proceedings. Alabama generates its notices automatically, and upon receipt of a request for review, it notes the case number and court number on the request for review form. Connecticut has incorporated the right to review notice at various times during the establishment/enforcement process, and notifies the noncustodial parent on all forms that a legal action may be pursued. North Carolina has chosen to take the time and money saving tactic of assimilating three notices into one form with check-off boxes, so that it is easy to use.

Obstacles to Implementation

States which have started implementing the review and adjustment process in our survey indicated a variety of difficulties that they are having with the review and adjustment procedure. Both Georgia and South Carolina find the process too time-consuming particularly since they have an insufficient number of staff. New Jersey opined that the notice to the AFDC custodial parent was confusing and might result in additional telephone calls to the IV-D office. Georgia and Mississippi indicated that the 30 days requirement after sending out pre- and post-review notices was too lengthy. Alabama finds the issue of legal representation in requests for downward modification problematic, but, as stated supra OCSE has recently addressed this issue in an information memorandum which will be sent to all of the States. Minnesota endeavored to pass legislation to clarify the IV-D agency's relationship with the parties in IV-D cases, but it did not pass. Tennessee has experienced difficulty developing policy for review and adjustment in interstate cases.

Innovative Procedures

Although about half of the States responding to the survey indicated it was too early for innovative procedures, a number of them provided examples of efforts to streamline an otherwise potentially cumbersome process. OCSE culled these examples from their responses, the literature, and the State review and adjustment plans. About half of the responding States are developing procedures to help them carry out the review and adjustment requirements.

- Illinois employs its Bureau of Employment Security to centrally match the amount of the order and the absent parent's earnings and then compute the child support amount based on State guidelines;
- New York has enacted legislation enabling it to obtain tax return information from its Department of Taxation;
- Connecticut accesses the State Labor Department to obtain information and forwards cases where the absent parent is unknown to the FPLS. This information on employment and addresses is used for placement of new income withholding orders, liens or other enforcement tools.

Pro Se Practices

At least 13 States (Alabama, Arizona, Colorado, District of Columbia, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New Hampshire, Pennsylvania, Washington, and Wisconsin) are developing pro se procedures which attempt to make the review and adjustment process more comprehensible and simpler for those pursuing such actions on their own. This could in turn expedite the process, and save States' resources. For example, Massachusetts uses pro se only for obligors' requests for downward modifications. Arizona employs it in a limited manner in some of its counties. Both Arizona and Colorado are taking advantage of technological advances by using an interactive, computer driven video screen with pro se parties. In addition, Colorado makes information available in both Spanish and English. California and Iowa are developing pro se handbooks and instructions for local offices, and Massachusetts and Wisconsin are conducting pilot tests in several of their counties in each State. (Three counties and nine counties respectively). Michigan, Pennsylvania, and Wisconsin offer free assistance on pro se cases through volunteers, self-help groups, or the Legal Aid Society. If States do allow volunteers to provide information on pro se processes, it might be advisable for States to give them some sort of training to ensure that volunteers offer accurate information.

Imputation of Income

It may be difficult for States to review and adjust child support awards if they do not have adequate information about the obligor parent's earnings and income or in situations where the obligor is voluntarily underemployed or unemployed.[23] At least ten States in our informal survey (California, Colorado, Kansas, Maine, Michigan, Montana, Nebraska, North Dakota, Texas and Vermont) impute income in certain circumstances. This might occur for example, when no obligor income information is available.

Connecticut establishes a diary on the automated system at the time of the initial support order and at the time of review to track cases due for review. It then notifies IV-D workers that a review should be conducted. Vermont's guideline "Reference Sheet" includes the most up-to-date amount representing one hundred and fifty percent of the annual covered wage for all employment as calculated by the Department of Employment and Training. This amount may be used as the presumptive value of a parent's annual gross income when that parent fails to provide income information.[24]

The Australian Example

Faced with similar problems concerning child support orders becoming outdated over time through inflation or changes in circumstances, Australia enacted the Child

Support (Assessment) Act in October, 1989. The Act provided for the regular "assessment" or review and adjustment, of child support orders under "Scheme 2". Scheme 2 orders are those in which children were born on or after October 1, 1989, or whose parents separated on or after that date.[25] In cases that meet this criteria, "stage 2" liability is registered at the child support agency. In March to April of each year, the agency updates its income information on both the obligor and obligee to determine the next year's child support liability. Non-custodial parents may attempt to reduce the amount they pay if there has been at least a 15% drop in income actually experienced.

The process sounds relatively simple compared to ours, but a number of problems have arisen. Because the agency uses tax returns from the previous year to calculate support for the following year, there is in effect a two-year time lag in which the amount of income the obligor earns could increase or decrease. Further, this calculation is being done <u>every year</u> for all child support awards meeting stage 2 criteria. Depending on the number of cases, this process could be extraordinarily burdensome.

If the custodial parent becomes aware that the noncustodial parent's income has increased 15% or more, she may apply for a variation in the assessment. Some in Australia however, believe that this appeal process is an inadequate remedy.[26]

When either parent, or both parents fail(s) to file a tax return for the relevant tax year, the agency may enter a default assessment, which has been described as "in most cases, an unrealistic figure which is unlikely ever to be paid."[27]

The "Child Support Advisory Group", which is studying the Australian system, has recommended that "assessments" include all children, not simply those who fall within the scope of the 1989 Child Support Assessment Act.[28] Otherwise, children whose orders do not fall within the 1989 act are in effect being penalized, by their orders not being updated.

Future Options for Review and Adjustment

There are many forms that a review and adjustment system within the context of a child support structure of the future could take. This paper will address three: 1) all mandatory (phased-in); 2) limited opt-out; 3) existing (or non-AFDC opt-in).

Mandatory

In a mandatory review and adjustment system, every child support order would be subject to a review and adjustment at regular intervals and no one would be able to opt out. Such a system would have the benefits of uniformity in the sense that AFDC and non-AFDC recipients of child support would be subject to the same strictures regarding review and adjustment. It would benefit children by ensuring that child support awards are updated, and their parents, by ensuring that orders are adjusted either upwards or down depending on their financial circumstances. One issue that would have to be addressed however, is whether such a mandatory system would apply to non-IV-D cases as well as IV-D cases? If it applied to all cases, States are likely to need additional monetary and staffing resources.[29] We should also keep in mind the reasons parties gave in the demonstration projects for not wanting to have their orders reviewed, because such sentiments will probably influence the success of a mandatory system.

If the child support program is Federalized, it may make sense to also have a mandatory, universal system of review and adjustment of child support awards. It is possible to envision a system in which child support collections are made at the Federal level, and while States conduct reviews and adjustments of child support orders.

Another area of concern is the extent to which a mandatory system would conflict with notions of individual liberties and privacy.[30] There may be individuals who are able to support their children, and therefore are not receiving public assistance, who would like as little governmental intrusion in their lives as possible.

Limited Opt-Out

A second possible construct a child support review and adjustment structure could take, is for there to be limited criteria for "opting out" of the process. These could be made available to either one parent or both parents. It may be preferable for such opt-out criteria to be available to both parents to reduce the likelihood of equal protection lawsuits being brought to protest a system allowing custodial parents, but not noncustodial parents, from opting out of a review, and or adjustment.

The opt out criteria could follow those currently used for the "good cause" exception where the IV-D agency need not establish paternity (i.e., in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending).[31] It should be noted that this type of opt-out has the capacity to take a somewhat different form than the current system, which in effect requires that, even if a case meets the "good cause" requirement, it still must be reviewed upon parental request.[32] The opt-out criteria could certainly take other forms, which may be necessitated by an altered child support enforcement structure.

"Opt-In" or Existing Structure

A third possibility is an "opt-in" system, which would essentially mirror the current review and adjustment structure. Under the present organization, while the IV-D agency must conduct reviews and adjustments in IV-D AFDC cases, in IV-D non-AFDC cases, it must conduct reviews only upon the request of either parent.[33]

Conclusion

While mandating that States regularly review and adjust child support awards in which assignment rights have been assigned to the State is a step toward ensuring that child support awards meet children's needs and accurately reflect parent's financial circumstances, there is more that could be done to achieve this goal. We may want to mandate that all child support awards be updated regularly, and commit the resources so that this occurs. It may be desirable to examine the reasons parties specified in the demonstration projects in Illinois, Colorado, Delaware, and Florida, to try to remove the obstacles that are preventing parties from wanting to have their orders reviewed, and possibly adjusted. We may want to establish certain specified opt-out criteria that are available to one or both parties. We hope that further examination of the review and adjustment process in the context of the child support structure resulting from welfare reform, will lead to improvements in meeting children's needs.

APPENDIX

SUMMARY CONCLUSIONS OF DEMONSTRATION PROJECTS

Based on the two-year demonstration effort, the principal conclusions follow:

- The percentage of cases adjusted was remarkably similar in three of the four demonstration projects, despite the different approaches taken; approximately 10 to 11 percent of the cases randomly selected were adjusted in Colorado, Delaware, and Illinois, while Florida adjusted only 4 percent of the cases selected.

- The majority (73% overall) of the IV-D demonstration project cases selected were terminated for review and adjustment. This was because the cases were not appropriate or suitable for review, or due to a lack of authorization for a review in non-AFDC cases.

- The review and adjustment process is a lengthy one (over six months to process a case from selection to modification). This was primarily because of factors other than the Family Support Act notice requirements such as case backlogs, the time required for manual case screening, case location and case clean-up activities, and the level of difficulty in obtaining information needed to conduct the review.

- The majority of the 3,023 adjustments obtained (92%) were for increased orders, with an overall average of 101 percent increase in the order amounts from $122 to $245. Two of the four demonstration States, however, did not process downward adjustments.

- Obligees whose orders were adjusted were generally satisfied with the review process and outcomes, while obligors were generally unsatisfied.

- Resource requirements for IV-D staff, attorneys and the courts can be expected to vary in accordance with the process used for review and adjustment as well as other operational factors. Overall resource requirements and associated costs may be less than anticipated, however, because fewer cases may be suitable for review and adjustment than originally anticipated.

Suggestions to Improve the Process

Based upon the experiences of the four state demonstration projects, the following approaches be helpful to States in the development and implementation of an effective review and adjustment process:

- Assess State civil procedure rules which may effect review and adjustment to ensure the most advantageous environment for IV-D cases;
- Create a steering committee comprised of representatives from the IV-D agency, the IV-D attorneys, and the courts to oversee the development and implementation of the review and modification process and to establish close working relationships, at both the state and local levels, to ensure successful implementation of the process;
- Employ automated screening criteria to identify cases appropriate for a review of the order, rather than having to conduct a manual screening on each case;
- Recognize case clean-up activities as a time-consuming but essential element of the review and adjustment process and assign priority to this workload. Approximately 20 percent of project cases were inappropriate for review (i.e., criteria for review and adjustment not met) due to inaccurate or incomplete case data which existed in both the States' automated systems and in its casefiles. The result was that project staff devoted considerable effort to conducting manual case reviews to obtain correct information. The Family Support Act of 1988 requires States to implement an automatic tracking and monitoring system by October 1995, which should facilitate this process;
- Develop initial notice letters and forms for obligees and obligors which are clear and understandable; limit the initial collection of financial information only to that which is needed for the application of the guidelines;
- Maximize use of administrative discovery powers, particularly administrative subpoenas for obligor employers, to collect financial information needed for the review; and
- Maximize utilization of automated systems for document generation, guidelines calculations, and case tracking functions.

ENDNOTES

1. I use the term "review and adjustment" in lieu of "review and modification" as the former is the statutory language.

2. See the implementing regulation on review and adjustment at 45 CFR 303.8(a)(3).

3. 45 CFR 303.8(a)(1). It should be emphasized that the term "adjustment" is used instead of "modification" because that is the term that the statute applies.

4. Oregon Child Support Updating Project, Final Report, Policy Studies, Inc. (April, 1991).

5. Oregon Child Support Updating Project, Final Report, Policy Studies Inc., (April, 1991).

6. Id.

7. Id.

8. Id.

9. The source for the following discussion is "Evaluation of Child Support Review and Modification Demonstration Projects in Four States: Cross-Site Final Report", Caliber Associates, Sharon Bishop, Project Director (May 15, 1992).

10. The following State's statutes have language which either specifically mentions that the agency or State attorneys represent the State, or that no attorney/client relationship is formed when the State conducts IV-D services: Arizona, California, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, Maine, Mississippi, Nevada, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin, and the Virgin Islands.

11. Memorandum, re: Who Does the IV-D Attorney Represent?, American Association of Public Welfare Attorneys, January, 31, 1991.

12. Smith, Marilyn Ray, Implementing the Periodic Modification Provisions of the Family Support Act, (1993).

13. OCSE Information Memorandum, Review and Adjustment of Child Support Orders, (OCSE-IM-93-01).

14. See the preamble to the Final Rule on Review and Adjustment Requirements for Child Support Orders Effective October 13, 1993 (57 FR 61559, 61561, December 28, 1992).

15. See generally, Supporting our Children: A Blueprint for Reform, (1992).

16. Id. at 113.

17. Id. at 106.

18. Id. at 105.

19. Id at 89.

20. See the prefatory comments to S.689 (1993).

21. These are: Alabama, Alaska, Arizona, Colorado, Florida, georgia, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Texas, Vermont, and the Virgin Islands. It should be noted that because OCSE is constantly receiving updated State plans, this information is accurate as of June 30, 1993.

22. These are: Alabama, Connecticut, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, North Carolina, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, the Virgin Islands, and Wisconsin).

23. Upton, Marianne, Imputing Income in Establishing and Adjusting Child Support Award Amounts, unpublished memorandum (1993).

24. Id.

25. For this discussion on Australia's counterpart to the review and adjustment system, see Child Support in Australia, Final Report of the Evaluation of the Child Support Scheme (199).

26. Id. at 244.

27. Id at 248.

28. Id. at 6.

29. In this paper I will not attempt to discuss whether a child support system of the future will use courts, or whether it will become more or entirely administratively processed, because that is in the domain of the child support restructuring workgroup.

30. Individualism and privacy are two basic tenets of the American Philosophy. While the "right to privacy" has admittedly ambiguous roots, being found in the "penumbra" of the XIVth amendment, it nevertheless is inextricably linked to most Americans' notion of home and domestic life. While there are, of course, many exceptions to this right when the health or safety of children or other family members is endangered, when children are being cared for by able parents, an argument for governmental intrusion is more difficult to support.

31. See 45 CFR 303.5(b).

32. See the preamble to the Final Rule for review and adjustment of child support orders, 57 FR 61559, 61563 (December 28, 1992).

33. Id. at 61562.

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INCOME WITHHOLDING

Executive Summary

Income withholding accounts for half of the total IV-D collections in the country. Its share of collections has increased steadily over the past several years. Since income withholding is a relatively effective and economical method to collect support, its continued expansion is desired.

Withholding's Potential

Withholding's potential percentage of total collections may be significantly higher than its current percentage. Its upper limit reflects the labor market realities of unemployment, self-employment, short-duration employment, cash-paying employment, unreported employment, institutionalization, and incarceration, as well as the withholding-exempt status of Supplemental Security Income.

Streamlining the income withholding process should boost withholding collections somewhat, but more importantly, should free caseworkers to concentrate on cases for which withholding does not work. Automation, new-hire reporting, uniformity of laws, procedures and forms, simplification, direct withholding across state borders, improved training and accelerated universality will significantly improve withholding as a percentage of collections, and increase overall collections.

All states are required to have an automated IV-D system by 1995 that will, among other things, conduct routine obligor and employer locate matches with existing data bases, generate letters and notices, and monitor noncompliance. Automation, coupled with a new-hire reporting system that allows for rapid implementation of withholding once an obligor begins a new job, should lead to a significant increase in withholding collections.

States have variations of the same laws, procedures and forms; those differences are enough to bog down the interstate withholding system. Even within states, forms and procedures may vary, resulting in slow or inaccurate case-processing. Uniform laws and procedures remove the expense and time uncertainty adds. Simplification of laws and procedures also streamlines the process. Combining uniform, simplified laws and procedures with "direct" withholding should increase the interstate collection rate dramatically.

Appropriate, regularly-provided training has a great effect on withholding success. Caseworker turnover is fairly high, and training dollars historically have been inadequate to ensure that workers are able to master their jobs. Additionally, the proper marketing of withholding to employers is important, as they are the linchpin of the withholding system.

Universal withholding, which will be implemented a generation from now under current law (except for cases in which the parties opt out or the decisionmaker finds cause not to implement withholding), could be speeded up. More cases in withholding status will result in more withholding collections and should result in more overall collections.

Federalization

Federalization of the withholding function would be beneficial to employers, but would offer few tangible benefits to the custodial parent, the state owed AFDC reimbursement, or the obligor, if one assumes that the quality of the federal collection system is similar to that of the state-based collection system.

While the system for collecting and distributing withholdings would be arguably the easiest of all the child support functions to federalize, the more functions that are federalized, the harder it would be to operate the federal portion from a central point. If one adds collecting payments made outside of the withholding process, monitoring compliance, sending notices, adjudicating disputes, reconciling accounting discrepancies, pursuing other enforcement techniques, and adjusting award levels to the federal system, myriad problems would arise unique to a federalized system.

INCOME WITHHOLDING

I. BACKGROUND

Income withholding has long been touted as the most-effective child support enforcement tool. It is. Starting with the Child Support Enforcement Amendments of 1984 (CSEA), Congress has required states to make income withholding available under certain circumstances for both its state-agency handled cases (IV-D) cases and private (nonIV-D) cases. (See the detailed analysis of the income withholding requirements in Appendix I.) The Family Support Act of 1988 (FSA) tightened the requirements so that more cases with orders were automatically subject to income withholding. Since income withholding is the centerpiece of enforcement, it is important to ensure that it be done as efficiently and comprehensively as possible. This paper examines various options.

II. ISSUES

a. Why is the Percentage of Total Collections from Income Withholding Not Higher?

Based on state reports, one half of the almost $8 billion in distributed IV-D collections in FY 1992 was collected through income withholding. Among the states, the range of collections obtained from withholding was extremely wide, from 4.5% for Puerto Rico to 69% for Wisconsin during FY 1992. (See Table I.) Definitive reasons for the wide range are unavailable at this time. Extensive contact with state officials may help resolve this mystery; however, the disparity should caution us that the numbers reported may not be completely accurate indicators of payment methods. Also, withholding success may indicate less success at collecting through other means if one judges a state just by its percentage of total collections from withholding.)

While states report collections from withholding and other payment methods made through the IV-D system, states do not report the number of cases in withholding status, so comparing case status percentages (cases with orders and cases in withholding status) with collection percentages may skew the numbers.

Determining the potential percentage of all child support cases with orders for which withholding can be implemented is difficult. Since we do not have demographic information specific to child support obligors, we base the following projections on U.S. Department of Labor numbers and other published statistics. By doing so, we do not assert that the obligor labor force demographics are exactly the same as the general labor force demographics. Starting with the universe of obligors with orders, one must subtract a few percentages for obligors who do not seek work, who are incarcerated, institutionalized, homeless, or receive non-reachable Supplemental Security Income (SSI).

The percentage of obligors who seek work or who are working is then reduced by factoring out persons with income that is not consistently available for withholding. The labor force includes approximately 126 million Americans, 8 million of whom are unemployed. Of the 118 million employed workers, 10 million are self-employed, and 6 million have jobs but are currently not receiving pay (vacation, unpaid family leave, seasonal work, sickness, etc.), leaving 102 million Americans who currently receive salaries or wages, or 81% of Americans age 16 and over who seek work or who are working.[1]

Additionally, by factoring out persons who are paid in cash or change jobs extremely rapidly (day laborers, e.g.), the percentage of the Americans against whom income withholding could be implemented drops by several percentages.[2] So even if withholding were implemented in all cases where withholding was possible, it would only be implemented in from three-fifths to three-fourths of the cases with orders.

Obviously, agency efficiency and accuracy and employer compliance will not reach 100% of the potential cases under the best circumstances. A realistic estimate of the percentage of cases with orders for which withholding can be implemented should reflect a further reduction of a few percentage points.

b. 1. <u>How Can Income Withholding Be Expanded and Improved?</u>

Income withholding can be expanded most rapidly by implementing four initiatives: automation; improved location efforts including new-hire reporting; a speedier timetable for universal withholding; and improved staff/management training.

Income withholding can be improved through: uniform laws, procedures and forms; direct withholding across state lines; increased staff training that focuses on properly implementing withholding; and an emphasis on producing a "user-friendly" environment for employers.

III. RESPONSES TO THE TWO ISSUES

a. <u>Why is the Percentage of Total Collections from Income Withholding Not Higher?</u>

1. Self-employed, unemployed, moonlighters, teenagers, cash payees, SSI recipients, incarcerated, institutionalized and homeless persons

Income withholding, particularly immediate income withholding, has been found to be an effective remedy for collection of child support (see Garfinkel and Klawitter, <u>The Effect of Routine Income Withholding of Child Support Collections</u>). However, it doesn't work against every obligor. In a national evaluation of income withholding conducted by OCSE, <u>Feasibility of Mandatory Immediate Income Withholding for All Child Support Orders</u> (hereinafter national evaluation), the biggest withholding stumbling block was lack of information on obligors' employers or employment status. Income withholding is typically hard to obtain or not practical in situations where obligors are: self-employed; unemployed; teenagers; persons who work for cash or barter; or individuals who are incarcerated, homeless, institutionalized, or receiving Supplemental Security Income (SSI) payments.[3]

As a general rule, young unwed fathers are not required to interrupt or terminate their secondary education in order to secure a full-time job to meet child support payments. They may, instead, be ordered by the court to pay a token amount, e.g., $5 or $10 a month, while they are in school (an amount, of course, that should increase upon their graduation.) Implementing income withholding while the obligor is in school paying token amounts from odd jobs such as lawn-mowing is infeasible.

Obligors who make up a certain percentage of the 8 million unemployed are not exempt from paying child support. In fact, interception of unemployment compensation amounted to more than $143 million in FY 1991. The Bureau of Labor Statistics (BLS) of the U.S. Department of Labor has unofficially estimated that one-third to one-half of unemployed persons receive unemployment compensation sometime during their unemployment spell. Those who receive unemployment compensation may be added to the potential withholding population, even if in some states it is technically not considered withholding.

The 10 million self-employed persons are difficult to withhold against because their income is both easy to hide and hard to track. They are being asked, in effect, to withhold against themselves. There are many ways to disguise the amount of income taken from their own company. Still, they are the best candidates in this category to produce a substantial increase of collections through withholding.

Many obligors informally work for cash, receiving payments off the books. Income withholding will not be successful against under-the-table payments. As with workers who receive cash payments, persons who barter sometimes do so to avoid reporting their full income to the Internal Revenue Service. Even if income is reported by barterers, withholding is unavailable since the barterers receive in-kind payments for their work, such as sides of beef or television sets.

Supplemental Security Income (SSI) is not subject to withholding, pursuant to regulations promulgated by the Office of Personnel Management. Veteran's disability payments are also not garnishable unless they are taken in lieu of some (but not all) of the veteran's retirement pay.

Incarcerated, institutionalized or homeless obligors also limit withholding's reach.

2. Short-duration Employment

Maintaining current employer information on some obligors is difficult because job turnover and termination rates tend to be high. These obligors include those who work out of union halls, and itinerants, such as farm laborers and odd-job workers, many of whom work for a month or two and then move on to another employer or locality. Even when the employer is located, high rates of job turnover and termination lead to shorter periods of withholding.

The AFL/CIO has some 14 million members in the U.S., 2-3 million of whom work out of hiring halls at short-duration jobs with different employers, rotating from job site to job site, without knowing much in advance where they will work next. The union acts as an agent, setting up the work for the member. In these cases, by the time an income withholding order is served on the employer, the worker is often at his or her next assignment.

Many obligors are day laborers, who look for odd-job work or who specialize in a skill that is used for a few hours by a businessperson or homeowner, such as housepainting or gardening.

The Labor Department says there are more than 7 million moonlighters or "multiples" who hold second jobs. Those second jobs may be shielded from withholding. For example, a "moonlighter" may work full time at one job (from which income may be withheld for child support payments) and hold another, part-time job for which earnings are "masked" through cash payments. He or she may also be "self-employed" in the second job and, again, receive only cash for services. Maine estimated that 40-50% of its obligated caseload are self-employed or moonlighting and, having joined the underground economy, are not fully reporting income.

3. Automation implementation

Currently, there is a wide degree of variance among states in their level of automation. They vary from manual systems in some counties to sophisticated, automated statewide systems which are close to meeting the Family Support Act of 1988's (FSA's) requirements.

Among the keys to operating a successful income withholding program are: the location of noncustodial parents/obligors and their employers; generation of appropriate notices and letters; accounting for collections received from employers; and notifying caseworkers of needed actions. States are required to interface with state and national data bases to locate noncustodial parents/obligors and their employers. Once these matches are made, the data must be processed to follow-up on any "hits." Once a hit is verified, appropriate letters/notices must be sent to establish the income withholding. Incoming payments must be accounted for and monitored. When not received, contact must be made with the employer to determine the reason for noncompliance. In the absence of a comprehensive automated system, these activities are extremely labor intensive, competing for scarce program resources.

As more States conform to the FSA's system requirements, income withholding will be more efficiently implemented. By decreasing the burden of performing routine activities, particularly in those cases where income withholding is not being implemented for lack of fulfilling the process requirements, caseworkers will be in a better position to take action on problematic cases.

4. Slow Locate

Locating the obligor, and then the obligor's employer, has historically taken a long time in cases without hard leads. When an obligor relocates and fails to notify the agency, court or obligee of his/her new address, local enforcement usually stops. In some cases the obligee more actively pursues the location of the obligor than does the IV-D agency. Once the obligor is located, the income and assets of the obligor must be located.

OCSE auditors state that while in general withholding proceeds smoothly if the employer's address is known, many offices do not even attempt to locate employers when withholding is triggered. When the employer's address is not known, some offices move the case into the locate function where it may sit for months.

Offices are not routinely checking local, state and federal resources. Some states apparently rely on the annual federal tax refund offset submission process as their only locate tool for these cases. In some offices, location workers are often not trained on what location information is available from state sources and the Federal Parent Locator Service (FPLS), and are often not trained in skiptracing techniques to find absent parents who work for employers who do not report to the state employment security agencies (SESAs). (Obligors working for employers who do not have to report to SESA will not be identified in the monthly SESA crossmatches.)

New regulations require at least quarterly attempts to locate employers, but agencies should attempt location of the employer immediately upon withholding being triggered. Automation and new-hire reporting should make employer locate easier, faster and more successful.

5. Management, Resources, Training and Case-processing Deficiencies

Child support offices are understaffed. In comparison with the caseload per caseworker in the AFDC program, the average caseload for child support workers in most states is several times as large. The U.S. General Accounting Office reported that the median caseload per worker based on agency self-reporting is about 1000 cases.

Additionally, training of management, caseworkers, attorneys and decisionmakers is inadequate, and in some states, almost nonexistent beyond on-the-job training. Respondents to a GAO survey listed training as one of the top five ways to improve income withholding.[4]

Many states have repeatedly analyzed and improved their case-processing methods; however, some local offices have not intently reviewed the way they process their cases in many years. Changes in emphasis, laws, and regulations, and the impact of automation may have made old case-processing methods obsolete or fairly inefficient.

6. Multiple Orders for the Same Parties

Many orders duplicate other orders for the same parties because they are established either in different states under URESA's _de novo_ principles or in different counties where case transfer is not the rule. Additionally, some jurisdictions have historically had one case for welfare recoupment and another for nonAFDC IV-D collections for the same party. Some states may allow a nonIV-D case to remain unconsolidated with a IV-D case that covers the same parties. The impact of duplicate cases on the reporting of dollars collected through withholding compared to dollars collected through other methods is unknown.

7. Reporting data deficiencies

When one observes the large variations from state to state in the percentages of total collections coming from income withholding (Table 1 and Fig. 1), it appears that some states may be underreporting income withholding collections. Since withholding collection percentages are based on self-reporting by states, there may be several state-specific reasons for the disparity. Underreporting may also occur in states that are close to the national mean in percentage of total collections through withholding.

Washington state analyzed its "other" collection method category (i.e., collections that are not made by means of income withholding, tax intercept, or unemployment intercept) for FY 1993, first quarter. They found that about one-quarter of the other category included payments through clerks of court, which may be made either by withholding or complying payment. Also, intercepts from labor and industries benefits, like vacation pay, were included in the "other" category, even though for many states those would be considered income withholding cases. By extrapolating from the collections reported in the "other" category those that may be collected through withholding, we can add about $20 million to the annual withholding collection number for Washington state.

In FY 1992, Washington state reported collecting $115 million through withholding, 43% of their total collections. Using first quarter FY 1993 "other category" information extrapolated to $20 million, an additional 7% of FY 1992 collections probably could have been categorized as withholding collections (not including unemployment intercept).

While extrapolating Washington's data to the nation is hazardous because of the different collection systems used in each state, it seems fair to say that actual national percentage of total collections made through income withholding may be several percentage points higher than the 50% of total collections reported for FY 1992.

8. Gradually phased-in immediate income withholding.

The CSEA mandated that States provide for income withholding in all IV-D cases if the amount past-due was equal or greater than one month's worth of child support. The FSA required that, as of November 1, 1990, all new and adjusted IV-D orders have provisions for immediate income withholding, unless the parties agree otherwise or a court or agency decision-maker finds good cause for not withholding. The same provision is effective for all new nonIV-D orders after January 1, 1994. With these requirements, all orders, with the opt-out exceptions mentioned above, should contain provisions for immediate income-withholding by 2012 (or 2015 in states where the age of majority for child support purposes is 21).

Why will it take so long? Under the FSA, nonAFDC IV-D cases could remain unmodified during the life of the order if neither parent requests a review. In four demonstration projects addressing review and adjustment procedures, only about 15% of AFDC cases and 6% of the nonAFDC IV-D cases were adjusted. The

FSA requires states to review and adjust, if needed, AFDC cases every three years. NonAFDC IV-D case adjustment is dependent on the request of one of the parents.

Consequently, some curent IV-D cases with orders may never be in withholding status if: 1) the original order did not include an immediate income withholding provision; 2) neither parent requests implementation of immediate income withholding; 3) the order is not adjusted (which requires withholding implementation if not yet in place and the parties do not opt out); and 4) the obligor does not trigger initiated withholding by failing to timely pay support. The number of these cases will diminish over time: the last few cases will be phased out around 2008 when the support duty ends for an obligor under an order issued prior to the effective date of the immediate income withholding mandate.

There is no federal review and adjustment requirement for nonIV-D cases. Since little is known about the non-IV-D caseload, the expectation is that all non-opt-out, post-1993 nonIV-D support orders would be in immediate income withholding status and many if not most pre-1994 nonIV-D orders would not be in withholding status. Given that the age of majority is generally 18, 2012 represents the latest time for child support orders issued before January 1, 1994 to expire. It is not until then that all pre-1994 cases would be phased out.

Under the FSA's withholding provisions and a projection of their effect, a large majority of non-opt-out IV-D cases with orders should be in withholding status in the next few years. By 2008, the only non-opt-out cases where withholding will not be required will be pre-1990 orders with practically perfect pay histories, no adjustments, and no requests for withholding. A higher percentage of nonIV-D orders may remain withholding-free during the next 18 years because: there is no federal mandate to do review and adjustment in nonIV-D cases; there is no requirement that adjusted non-IV-D cases be place in withholding status; and withholding implementation may require an affirmative step by the custodial parent once it is triggered.

9. Good Cause and Party Opt-out

Withholding collections could increase by eliminating the exceptions to immediate income withholding. The amount of increased collections is unknown; however, anecdotal statements by state child support workers suggest that opt-outs based on parties' agreements or decisionmakers' findings of good cause increase the higher the income of the obligor.[5]

Will limiting opt-out cases increase overall collections? Opt-out cases still face withholding initiation when one month's amount of support is past-due (or a lesser amount based on state law). In initiated cases where the obligor's employer can be immediately served with a withholding notice, few dollars will be lost. If the obligor or employer is hard to locate or no bond or escrow was posted, the dollar loss will be more significant. If the case is a direct pay case, then implementing either immediate or initiated withholding paid through a public payee will result in additional collections, only because the direct payments were not previously counted. Eliminating opt-outs will increase withholding collections, but will not increase overall collections as much.

The benefits to mandatory income withholding in all cases include destigmatization, increased withholding collections, reliance on a neutral employer to withhold instead of the obligor to pay, and accurate public accounting and monitoring. These benefits must be weighed against the actual cost of administering additional withholdings, the relatively slight effect on total collections, and the animosity of many people who are happy to remain outside the governmental system of withholding. Opt-out advocates mention the retention of privacy, the freedom to monitor one's domestic affairs, encouragement of voluntary compliance, avoidance of a presumption of noncompliance, and speedier payments receipt as reasons for continuing the opt-out option.

10. Employer noncompliance

While relatively few of the nation's six million employers fail to comply with withholding orders or notices, even a small percentage can translate into thousands of noncomplying businesses and millions of dollars in uncollected child support.

Employers' lack of cooperation accounted for 8% of nonAFDC IV-D cases where withholding was attempted but was unsuccessful, according to OCSE's 1991 national evaluation. (Since withholding is usually successful once the employer is located, this percentage is reduced significantly if one looks at total withholding attempts. Employer noncooperation was the second-leading reason for unsuccessful attempted withholding, after obligor job-changing (factoring out pending withholding cases).)

Of 42 states and territories responding to a 1989 survey conducted by the American Bar Association, all except one state, Alaska, reported satisfactory or good levels of employer compliance with income withholding requirements.

Respondents to the ABA survey indicated that small, privately-owned or family-owned businesses are those most likely not to comply with income withholding requests, particularly those small businesses that are not automated or operate on a cash basis. This finding was corroborated by the OCSE national evaluation.

Additional profile characteristics of the noncomplying employer mentioned in the ABA survey were: businesses owned by employers who are personal friends or relatives of the employee obligors; rural businesses; union locals; trucking firms; temporary employment agencies; and employers of transient workers. One state cast non-complying employers as either "marginal employers with cash flow problems, or interstate employers." New Jersey named the casino industry.

OCSE's national evaluation states that "although employer cooperation with income withholding has been very good so far, small employers frequently have difficulty understanding requirements and implementing the withholding," contending that employer education and simplification of procedures are key to employer cooperation. In the ABA survey, a respondent recommended having the state agency work through an employers' association to ensure that employers comply with withholding.

11. Business structure

Income withholding should not be stymied because of the legal organization of the business where the obligor works. Closely-held corporations (corporations owned by a small group of people or by one person) may be served as the employer of the obligor if he or she draws a salary. If the corporation pays dividends instead of a large salary to the obligor, those dividends can be withheld under most states' definitions of income.

Partnerships can be served with charging orders. Every partner must be served. The charging order usually reaches only the distributable income of the partnership and not income that is used to pay expenses. It also reaches only the draw-down share of the partner who is the obligor. Depending on state law, partnership income may be accessible through income withholding instead of through the charging order.

12. Complying payments

"Complying payments," which is defined here as payments made by the obligor under an order to pay but not under a legal process to compel pay, such as a withholding order, is considered to be a significant portion of payments, although the exact amount is unknown. "Voluntary payments" are defined by OCSE as collections from obligors who are not subject to orders. Voluntary payments accounted for only $107,000 of the reported $8 billion in collections in 1992.

Washington state's statistics for FY 1993, first quarter, show that about 2 of 3 dollars collected in its "other" category were noted as complying payments, with an additional unknown number of complying payments made through clerks of court (which accounts for most of the remaining one-third of the "other" category).

In IV-D cases, complying payments occur when: 1) withholding has not been triggered and the order is not bound by an immediate withholding requirement; 2) the obligor's employer or other income source has not been located and served by the IV-D agency; or 3) the obligor is self-employed.

In nonIV-D cases, complying payments are much more common, because: 1) many obligors make direct payments to the custodial parent; 2) a voluntary deduction from wages is sent by the employer to the custodial parent; 3) a financial institution directly transfers the payment from the obligor's account to the custodial parent's account; 4) the obligor pays on a regular basis; 5) or the custodial parent is unwilling or unable to or unsure about taking the necessary action to implement withholding.

13. Interstate

One out of ten child support dollars collected through IV-D agencies involves an interstate case, although interstate cases make up an estimated 30% of all child support cases, according the U.S. Commission on Interstate Child Support and GAO. Clearly, the system breaks down when two states become involved in enforcement. Interstate income withholding is used in only 15% of the interstate cases, while the slower URESA petitions are filed in a majority of the cases. Time lags in interstate cases may be fatal to securing a withholding order because of job-turnover and obsolete locate information. Also, it is a truism in child support that despite regulations to the contrary there is a tendency in many offices to favor instate cases over out-of-state cases. (See the paper on interstate issues for more details.)

b. <u>What can be done to improve and expand income withholding?</u>

1. New-hire reporting and other locate improvements

Once income withholding is triggered, the next step is to locate the obligor's employer. While many obligors (and obligees) provide this information at the time that the order is issued, many do not, making the agency search among existing data sources, including state employment security agency (SESA) data. Because SESAs have relatively recent data, the match with SESAs (both within one's own State and with other States) is a favored locate tool. However, because data need only be reported to SESA on a quarterly basis, these data bases contain information that is between four to six months old.

Other limitations include the fact that not all employers are required to report (exceptions vary from State-to-State, but often include government employees and farm workers). A confounding variable is the fact that the job-turnover rate for many obligors (particularly those with irregular payment histories) is extremely high.

To improve on the IV-D agency's ability to locate an obligor as soon as he or she secures employment, several States have adopted a new-hire reporting system. Several groups have proposed a similar federal new-hire scheme. (See the new-hire reporting paper.)

Under new-hire reporting, the employer would be required to report the new hire to a centralized state (or national) location soon after hiring. That information would be matched against cases with existing orders and cases in locate status. When a match was made, the information would be reported back to the appropriate IV-D agency. Based on the case's status, i.e., locate or enforcement, the IV-D agency would be responsible for contacting either the obligor or the employer. Through the use of automation, withholding could be implemented a few days after hire, perhaps by the time that the obligor's first paycheck was cut.

Washington State initiated "The Employer Reporting Program" in July 1990. Employers in five standard industrial classifications (building construction, other construction, manufacturing of transportation equipment, business services, and health services) were required to report new hires to the Office of Support Enforcement within 35 days of hire. (The employers covered by the project represented 11% of the total employers required to report to Washington's SESA.)[6]

Washington reports that it received collections from 43% of obligors who paid nothing from wages the year the program began.

The program has been particularly effective in reaching cyclical and seasonal workers.

The concept of self-disclosure in combination with new-hire reporting has been considered. Under self-disclosure, obligors report to their employers the amount of their obligation and to whom it is payable. Minnesota already has self-disclosure in place. The accuracy of self-disclosure and the rate of truthful admission of a support duty have been questioned.

Unlike self-disclosure, a new hire reporting system is able to provide the employer sufficient information on the existing order and procedures for submitting payments to ensure that they are in the proper amount, directed to the proper location and properly identified. Self-disclosure, on the other hand, ensures withholding begins with the first paycheck.

The addition of non-IV-D cases to a new-hire reporting system would have no impact on employers from the standpoint of initial reporting. The registry of existing orders would have to be expanded to accommodate non-IV-D cases, and new communication links would have to be established if administration is by other than the IV-D agency. An additional benefit to new hire reporting coupled with a central registry is the ability of the system to quickly locate, and where appropriate, expurgate, redundant cases covering the same debts for the same parties.

2. Self-employed withholding/reporting

According to BLS, there are approximately 10 million self-employed Americans. Regardless of employment, an obligor must pay according to a support order's terms.

There are two withholding-like approaches that may have an impact on self-employed obligor's compliance rates. One is to serve an income withholding order/notice on the self-employed person. A withholding notice may serve to remind the obligor of the obligation, focus the obligor on payment procedures and cycle, and provide a contact person for remittance. Coupling the withholding with a electronic funds transfer from the obligor's bank account, produces a system for the regular payment of support by the self-employed that mirrors the current withholding system. Inherent problems with noncompliance are not resolved by this method, but withholding procedures may result in a slight increase in regular payments, similar to that experienced by businesses, such as mortgage holders, that provide the debtor with return envelopes and coupon books, or the option of paying by automatic withdrawals from bank accounts.

The second method is to have the self-employed obligor tie support to his or her monthly or quarterly tax filing. (Some states require monthly reporting, while the IRS requires self-employed workers to estimate their annual tax liability quarterly and remit accordingly.) If one had to reconcile child support liability in a similar manner at the same time, this would better ensure compliance with the underlying order, particularly if the IRS is made directly responsible for monitoring child support or forwarding noncompliance information to the appropriate state.

3. Income Withholding against Nonwage Income Sources

Income is derived from sources other than employers paying wages. These sources include tenants paying rent, contractors paying consideration, trustees and financial institutions distributing interest, corporations issuing dividends, and partnerships distributing draw downs.

If all states expanded their definition of income for income withholding purposes to include lump-sum payments and nonwage recurring payments, there would be more income available for withholding. Just as tax offset has shown to be an effective enforcement tool, withholding or offsetting other payments may help in cases with chronic underpayment. Most states have a broad definition of income that includes recurring payments, but only about half the states include some lump sum payments in their definition. While all assets can be reached through other techniques, income withholding is as simple or simpler than any of the other more traditional techniques such as seizure and sale, levy, and distraint. A state may set up thresholds for lump sum payments so that the distributor of the payment must confirm that the distributee does not owe child support before the money is distributed. If child support is owed, the distributable amount is frozen pending receipt by the distributor of a withholding notice sent by the agency.

4. Uniform Laws and Procedures

Universal Ordered Withholding

One major reform that would undoubtedly increase the number of cases in withholding status would be to make withholding universal in all IV-D and nonIV-D cases sooner than under current law and without exception. Since beginning in 1994 only new nonIV-D orders have to include an immediate withholding provision (unless good cause is found or the parties agree to an alternative arrangement), it is possible that immediate income withholding won't be universal until 2012 (in some states where the age of majority for child support purposes is 21, the year will be 2015).[7]

In IV-D cases, the year of universality is 2008 (2011 in some states). However, most IV-D cases should be in withholding status within the next few years because: 1) either parent can now ask for withholding and have it implemented; 2) few cases will not have a triggered delinquency of one month's worth of support sometime during their lifetimes; and 3) if a IV-D case is adjusted, withholding will be implemented (unless opted out) if has not already been implemented.

If all nonIV-D cases, regardless of the date the order was issued, were made subject to immediate income withholding by a certain date or phase-in period (1997 or 1998, for instance), nonIV-D cases with orders in withholding status would increase at a much faster rate, adding hundreds of thousands of cases with orders to the list of cases in withholding status. Also, by eliminating opt outs, a significant portion of the nonIV-D caseload would be added to those in immediate income withholding status.

Regarding IV-D cases, income withholding could be implemented whenever a case with rights assigned to the state comes up for its triennial review and adjustment and the case is not in withholding status. This is similar to the health insurance provision in OCSE's review and adjustment regulations. 45 CFR 303.8. The required implementation may be expanded to cover nonAFDC IV-D cases as well. With the elimination of opt outs, there could be ordered withholding in all cases with awards within three years of the effective date of the legislation.

<u>Uniform Allocation in Multiple Obligee Cases</u>

A quandary exists when an employer must withhold income for an obligor who owes support to more than one family, and there is not enough disposable income available to satisfy every order. Current regulations state that current support must be satisfied before any order's arrearage claim. If there is not enough income to satisfy the aggregate claim for current support, states must determine how to allocate the income, as long as every order receives some income. (See 45 CFR 303.100(a)(5)).

This requirement has resulted in a lack of uniformity among states. Some alternatives are to prorate based on: 1) the number of children covered by each order; 2) the percentage of the aggregate current amount due for each order; and 3) the number of orders for current support. Direct withholding in interstate cases would present an even larger problem in multiple obligee cases where inconsistent allocation formulas may result. A standardized allocation formula could be included on the withholding notice, to be applied in every multiple-order case.

While the U.S. Commission recommended a per capita allocation based on the number of children under each order, many argue that it is fairer to allocate based on the ratio of current support ordered. This reflects an allocation based on guideline-established award levels, which invariably decrease the increment of added support for each additional child. In other words, since guidelines do not produce a doubling of the amount owed for having two children instead of one child under the order, distribution rules shouldn't either. It is our opinion that allocation theory in multiple order cases should be tied to guideline theory of relative costs instead of a per capita principle.

Under the law governing garnishment of federal pay and benefits, allocation is based on "first-in-time, first-in-right," which is the traditional garnishment approach. These garnishments should also follow the allocation scheme developed for nonfederal garnishment.

Uniform Policy Regarding Health Insurance Premium Deductions

Which is more important, child support or health insurance? The answer is personal to the family receiving both. A family may have pressing medical needs and continuity in health insurance coverage may be more important. A family may have alternative coverage, and may place more importance on the child support. There is no national policy on priority of health insurance premiums and child support when both are withheld from paychecks. The federal government has an interest in offsetting Medicaid expenditures and may wish to encourage higher medical support priority; however, it also has an interest in AFDC recoupment and welfare avoidance.

A default priority scheme could be set up that allows the custodial parent the opportunity to request a change in priority. This is important when the Consumer Credit Protection Act limits are met and the amount to distribute to the custodial parent (and perhaps to a third-party insurance carrier) does not meet both ordered amounts. Health insurance premiums are not deductible from gross pay when determining disposable income for CCPA purposes and must therefore compete with child support for the disposable income.

Another option is to allow health insurance premiums to be deducted from gross pay. This option gives health insurance a priority over all other nonmandatory (other-than-tax) deductions or garnishments.

Standardized Language in Initial Order Providing Notice to Satisfy Due Process

With the advent of immediate withholding, there is no need for an additional pre-withholding notice to be sent to the obligor. However, in initiated withholding, there is a requirement that notice be sent to the obligor prior to requesting that the employer begin withholding. The advance notice in triggered withholding cases is required in every state except those few that did not require advance notice prior to the date of passage of the CSEA in 1984. If the order establishing the award does not result in immediate withholding, it still could include "boilerplate" language regarding initiated withholding, which is triggered in all cases, even opt-out cases, if one month's worth of support is past due. This language may satisfy due process so that withholding may be implemented immediately upon the threshold arrearage being met.[8]

Standardized Withholding Form

The standardization of the withholding order/notice to employers should save employers significant resources currently expended on deciphering and calculating.

OCSE, in conjunction with federal, state and local officials, and employer groups, is currently drafting a standardized income withholding order/notice to be used by IV-D agencies in all income withholding cases. This form should result in a uniform approach to withholding done in an employer-friendly manner.

An important feature of the proposed standardized form is the name and phone number of a contact person. Every state or locality would be required to designate someone who can answer general income withholding questions and case-specific questions.

Uniform Federal Garnishment Statute

Combining the various statutes that govern garnishment of federal pay and benefits should lead to streamlined, standardized and more efficient withholding. Federal garnishment covers civilian and military employees of the federal government, and recipients of most federal benefits, including Social Security retirement and disability (but not SSI, black lung and most veteran's benefits). The goal is to make federal garnishment as simple as, if not simpler than, private withholding.

Amendments to IV-D and NonIV-D Withholding Statute

As stated above, the statute that governs withholding could be simplified to remove opt outs and require immediate withholding in all cases within a few years. A policy regarding federal reimbursement to implement universal withholding, particularly in nonIV-D cases, could be delineated.

Advance notice to the obligor in initiated withholding cases could be eliminated, and direct withholding across state lines could be added. Also a uniform state definition of income for withholding purposes could be added.

Consumer Credit Protection Act Amendments

The CCPA could be amended to prohibit state ceilings below the CCPA ceiling for child support and alimony. Child support's priority among competing garnishments, including federal tax levies, could be stated.

Anti-discrimination language could be strengthened by removing the "more than one garnishment" exception to the protection against disciplinary action or firing. A private right of action to enforce the anti-discrimination section could be added, allowing the aggrieved worker the right to sue to regain his or her job and pay instead of relying on the Department of Labor to bring the suit.

Centralized Collections

Centralized collections will greatly ease the burden of employers who in many states must forward withholdings to each county collection entity within the state. Because of automation and electronic funds transfer, payments at the state level can be immediately routed to the local office for distribution if the state does not distribute from the state central collection point. (See paper on centralized collection and distribution.)

5. Direct Withholding

Under UIFSA, and the U.S. Commission on Interstate Child Support's recommendations, the currently unauthorized practice of states directly sending withholding orders to employers in other states would be legitimized. Current OCSE regulations require IV-D interstate income withholding requests to go to the central registry of the state where the income is derived.

GAO found when polling local offices that it took them an average of seven weeks to respond to interstate withholding requests once received by their central registry, and an additional six weeks on average to serve the employer. This does not include the period of time the case is in the initiating state once it is discovered that withholding needs to be implemented. Instate cases took an average of four weeks from initiating withholding activity to serving the employer. One sees why GAO found that three of four offices use the one-state, direct withholding procedure even if not permitted under the regulations.

Additionally, GAO found that "pure" interstate withholding-only requests occur in only 15% of the cases. Most offices couple it with other enforcement requests, which often means filing a URESA petition to establish a new order in another state -- even if there is a perfectly valid order in the initiating state. Using URESA petitioning increases the mean interstate processing time an additional 3 to 10 weeks.

By going through a central registry and coupling withholding with other enforcement requests at this point, it takes an average of four to five months to serve a withholding order in a second state. Mathematica Policy Research found the average withholding spell to be 6 months or less in 40% of the AFDC cases, and in 28% of the nonAFDC IV-D cases. It seems fair to conclude that "indirect" withholding contributes to many missed withholding opportunities, especially when coupled with other enforcement requests.

Without uniformity in forms, orders, laws, procedures, timeframes and interpretations, an employer may receive dissimilar withholding instructions from various states (or even counties with a state). Uniformity seems to be a prerequisite to a smooth direct-withholding process.

Also, there may be a jurisdictional issue that remains unresolved without Congress' stamp of approval on direct withholding. Even if two states agree that an employer in the second state may be directed to follow the first state's order, there must be a way to bind the employer.

Procedural problems also arise in direct withholding. One issue is where the hearing should be held if the employee contests withholding. (It should be noted that contests are the exception instead of the rule, since an obligor may only claim mistakes of fact such as incorrectly calculated arrearages.) Under UIFSA, the hearing is heard in the employer's state. If so, how does the employer's state agency adequately prepare to represent the withholding state's interests and still meet the 45-day timeframe under current law for resolving withholding disputes? Second, UIFSA contemplates that the employer serves the employee with the withholding notice. What complications arise as a result of this procedure where the employer fails to timely inform the employee of the withholding?

Also, the current funding system allows incentives to be paid to both states in a two-state-agency interstate case. Direct income withholding is normally a one-state-agency interstate case, with payments going to the state that issued the withholding order, generally unbeknownst to the state in which the employer is located. This will reduce the employer's state agency's incentive to cooperate if a withholding contest arises and the employer's state agency receives no incentive for its work.

As reported by GAO, pure interstate withholding is not currently popular for several reasons, one of which is that other enforcement techniques are not available. This concern is not addressed by direct withholding. If the obligor changes jobs quickly or makes significant amounts of money through other methods, income withholding may prove inadequate, and secondary requests for enforcement will result in the two-state time delay. Medical support compliance, at a minimum, should be able to piggy-back on the withholding order/notice.

6. Multistate employer procedures

A few large businesses employ many people in several states. According to the IRS, 56,000 businesses employee over 55 million workers. These businesses typically receive withholding orders from several states, which include dissimilar and conflicting withholding instructions.

To alleviate some of the confusion, employers would benefit if the withholding order always provided employers with the name of a contact person and a toll-free number.

Also, an employer that does business in several states but has a centralized payroll may want to designate that office for receiving withholding orders. A list of employers who voluntarily provide the address of the office where they prefer the order be sent could be made available to all IV-D agencies, updated regularly. Under direct withholding, child support agencies could send their orders directly to the address listed.

7. State automation

The FSA mandates that all states have comprehensive, automated, statewide systems in place no later than September 30, 1995. Automation will free up caseworkers to pursue those activities requiring interpersonal skills. If a new-hire reporting system is integrated into the automated network, automation should solve or diminish many of the employer locate and withholding problems that currently impede withholding success.

The automation criteria for state systems require that automated interfaces be established with State and National data bases to locate noncustodial parents and their employers. Once these matches are done, the system must process the data, following-up on any "hits." Once a hit is confirmed, appropriate letters or notices must be sent to establish the income withholding. Incoming payments must be monitored and accounted for and, when not received, contact must be made with the employer to determine the reason for non-compliance.

One of the keys to improved collections is the location of non-custodial parents and employers. By increasing the number of automated matches, the number of successful locates should be increased. Once a noncustodial parent is located and/or his place of employment ascertained, the automated system will automatically generate any needed notices and letters, thus removing the need for human intervention. The more people located, the more income withholdings implemented, the greater the collections.

As the automated system ages, caseworkers will become more comfortable with its capabilities. Experience with automated matches will lead the State to determine the most reliable sources of information.

8. EFT/EDI

Electronic Funds Transfer/Electronic Data Interchange (EFT/EDI) technology is a process which will streamline the movement of income withholdings from the employer to the child support receipting agency. Using a procedures similar to those used for the direct deposit of wages, employers will send income withholdings, accompanied by identifying information (EDI), electronically through the Automated Clearing House (ACH) network. The money will be received by the IV-D agency's bank, and the identifying information forwarded to the IV-D agency for accounting, distribution, and disbursement to the custodial parent. Implementation of EFT/EDI will save employers the cost of processing and handling checks, and will save the IV-D agency data entry and check handling costs.

While all States are required to have automated systems which can accommodate the receipt of EFT payments, the regulations do not mandate that all employers use EFT/EDI to remit withheld income. OCSE believes that employers are in a unique position to determine whether or not EFT/EDI technology or the remittance procedures which they are currently using is best suited to their business needs. Many employers are anxious to use EFT/EDI, since it more closely fits with other electronic payments used for taxes, wages, etc. Many payroll processing companies will be offering a child support component, and many payroll software companies will be modifying their product.

Will EFT/EDI increase collection? Probably not. Yet, its efficiency should free workers for other tasks.

9. Management/Resources/Case-processing

Many states could increase the number of their withholding cases by identifying systemic and organizational delays and inefficient processes.

The location function, in less automated offices, can be collocated with the enforcement function, or made part of a team approach. Child support offices could experiment with having the wage withholding issued from the location unit. States could conduct automated matches with major employers.

While not solely affecting the income withholding process, expansion of the federal incentive by removal of the nonAFDC cap would provide strong inducement to the states to use cost-effective child support enforcement methods, such as income withholding, especially in nonAFDC cases. Of course removal of the incentive cap without other changes means the federal government pays more incentive dollars overall to the states.

The caseload for child support workers in most states is much too high and overwhelms the worker. With a reasonable caseload, child support staff would have time to (among other tasks): 1) respond to employer inquiries in a timely manner; 2) work with noncomplying employers; and 3) process cases that don't hit using either new-hire reporting or a SESA crossmatch.

Federally-mandated minimum staffing levels is a possibility. Perhaps the best way to encourage states to increase staff is to change the Federal law to require that all or a part of the financial incentives be reinvested in the program. While reinvestment appears to be the rule and not the exception, it should be required. Additionally, states should delegate authority to the local child support director to spend the funds where necessary, including for staff. In Philadelphia, for example, the incentive funds are reinvested in the Philadelphia CSE program, but the local office does not have the authority to hire additional staff with that money.

Emphasis on an efficient income-withholding process could reap benefits in several ways. First, the withholding process is continuous, requiring the least long-term attention in cases of stable employment. Other enforcement techniques usually require repeated efforts and are a one-time solution. Income withholding against a steady worker's paycheck is arguably the least labor-intensive long-term enforcement technique. Second, insisting that states adopt administrative procedures that require no judicial involvement such as reviewing and signing withholding orders should facilitate income withholding.

10. Training

Over the past decade, OCSE has provided a variety of management and technical assistance to states through training and technology transfer, including intensive management analysis and program analysis services, on-site courses, lectures, and participation in conferences. This assistance has been almost totally curtailed in the past two years, but training continues to be a major need at the State and local levels. There are some 40,000 child support enforcement workers nationwide, with an annual turnover rate estimated at 20 percent. In addition, the complex legal and technical nature of a continuously evolving program keeps training needs in the forefront. Legislative changes such as the CSEA and the FSA also contribute to the demand for regular training of staff.

Yet, according to the U.S. Commission on Interstate Child Support's Report to Congress, only one-third of the States have dedicated trainers within their child support organization to train on program-specific issues. The Commission recommended that: 1) federal law be changed to recognize the importance of training to the effective, efficient operation of the Child Support Enforcement Program; 2) Congress should appropriate adequate funding for the training function, comparable at least to the level of resources provided during the mid-1980s; 3) State plans should provide for annual training, at least, to all personnel furnishing services under the plan; 4) OCSE should provide a Federally funded core curriculum to all States to be used in the development of State-specific training guides; and 5) OCSE's annual report to Congress should include a description of training efforts and their results. Implementation of these recommendations would provide OCSE with a solid resource base on which to build an effective training structure.

Training specific to income withholding should target employers (especially the smaller ones) on new-hire reporting, CCPA and multiple order issues. State location staff should be trained on what location information is available from state and federal sources and skiptracing to find noncustodial parents.

Also, educating employers and simplifying withholding procedures are the keys to employer cooperation, according to OCSE's national evaluation of income withholding.

11. Federal government as a model employer

OCSE is currently working with the Department of the Treasury and other federal agencies to develop plans to ensure that the federal government is a model employer when it comes to income withholding for child support purposes. Uniformity, administrative efficiency, and full implementation of EFT/EDI are the goals. An Executive Order would ensure that agencies coordinate their streamlining efforts and emphasize the importance of a federal employee's duty to comply with orders for child support.

II. c. State-based recommendations

1. Legislative changes

A. Require states or the federal government to implement a new-hire reporting system.

B. Require states to pass UIFSA in substantially similar form as the official version, including the direct income withholding provision.

C. Pass a plenary statute allowing employers to be served directly with a withholding order by a child support agency (the one-state counterpart to UIFSA).

D. Amend Section 666 and other appropriate sections of Title IV-D to require states to use a standardized:

i. definition of income for income withholding purposes that includes all periodic and lump-sum income;
ii. method of allocating multiple order withholdings, based on order proration;
iii. withholding ceiling the same as the CCPA ceiling;
iv. procedure to withhold that does not require advance notice in initiated cases;
v. approach to health insurance premium withholding;
vi. set of criteria for opting out of immediate income withholding limiting the circumstances that support the granting of opt-outs.
vii. date of universal IV-D and nonIV-D withholding (in non-opt-out cases), preferably within 3 years of passage.

viii. penalty against obligors who do not report their employer's name and address upon entry of a support order;
ix. withholding order/notice against a self-employed obligor.

E. Combine Sections 659, 661 and 665 of Title 42 of the United States Code to streamline federal garnishment.

F. Require self-employed obligors to report their quarterly child support obligation and payment history to IRS, and to pay any delinquency either to the IRS with the estimated income taxes or directly to the state child support agency. This report would be available to OCSE through FPLS.

G. Amend federal law to give child support withholding a priority over all federal debts, including delinquent federal taxes.

2. **Nonlegislative changes**

A. Dramatically increase worker training.

B. Increase effective outreach to employers.

C. Provide an automated list of where multistate employers would prefer to be served with a withholding order to all support offices.

D. Ensure the federal government acts as a model employer.

E. Encourage use of EFT/EDI.

F. Provide employers with a state agency contact person, named on every standardized withholding order, who may be reached daily during business hours.

III. FEDERALIZATION

Several advocates of effective child support enforcement have embraced federalization of the income withholding function as a way to improve the system and increase collections. Last year, Congressmen Tom Downey and Henry Hyde introduced legislation calling for the federalization of withholding, to be conducted by the IRS. This paper examines federalization of income withholding, addressing three issues:

1) Would the withholding process work more efficiently if federalized?

2) What other parts of the enforcement function should be federalized if remittance is federalized?

3) Would the number of cases in withholding status rise because of federalization?

Federalization of withholding has several appealing elements, including single-point remittance, greater uniformity, removal of interstate (and intercounty) barriers, nonredundant use of resources, and economies of scale. There is no question that larger employers would prefer to send one paper or electronic remittance to one point, instead of hundreds of remittances to hundreds of collection points. This will save employers money. The American Society of Payroll Management has estimated the cost of cutting each withholding check at $10, and reports that few businesses charge the employee a fee to cover the expense.

Uniformity will also help employers who must respond to various state laws and procedures (see uniformity section above), a very labor-intensive and time-consuming activity.

Federalization of withholding would dissolve the real and imagined barriers that exist in the processing of interstate cases. Perceived problems concerning priority given to instate cases over out-of-state cases in certain offices would be eliminated.

Having one large withholding system eliminates redundant tasks performed in the 54 IV-D jurisdictions and the hundreds of counties in which payments are made, particularly in the area of management. Economies of scale alone should produce a more efficient collection rate per worker as well.

On the downside, federalization of withholding further fractures a system that appears to weaken when more than one agency performs child support functions at the state and local level. Information transfer between states and the federal government will undoubtedly be an added cost, even under the best automated system. Miscommunication and lack of complete information is inevitable when dealing with millions of cases that are constantly being opened or closed, changed from welfare to nonwelfare status and back, and where the orders are regularly increased or decreased. These problems could be amplified in cases where withholding is attempted and proves unsuccessful. Should the federal, state or local government pursue compliance issues, or other enforcement techniques?

Federalization of other enforcement techniques may prove problematic, because so many of them are dependent on intimate knowledge of the obligor's assets and lifestyle, a decidedly local-based inquiry. These techniques include liens, seizure and sale, and contempt. Some techniques like IRS full collection and credit bureau reporting could be done at the national level.

What about remittances that are hard to identify? Massachusetts has reported that this is a big problem, especially in interstate cases, because the case number or custodial parent identification is not clear from the check's face. It is expensive to reconcile. The more removed one is from local collection, the more likely it is that reconciliation is necessary and the less likely it is that reconciliation can be done quickly.

Also, can the federal government distribute collections efficiently? Since it has been reported by the American Payroll Association that a plurality of employees are paid weekly, hundreds of thousands of remittances for millions of obligors will be weekly funneled through one agency. How fast can the government distribute those moneys, especially when state and local governments may have a claim to some of the withheld support for AFDC and foster care recoupment, and employer remittance may not universally be through EFT/EDI?

An additional factor to consider is that if withholding is not federalized for nonIV-D cases, then a parallel state or local collection and distribution system must remain in place.

If the federal government also monitors cases for delinquency, sends out notices to employers and obligors, documents payment histories, and adjudicates contests, there are added costs.

Certainly federalizing withholding would entail start-up costs. Once in place, however, one could foresee that a state-of-the-art automated collection system with properly managed and trained staff could be more cost-effective than today's multi-jurisdictional collection system. In FY 1991, states reported that distribution costs them $345 million, and enforcement in general $626 million. Added together, states report that over half of the $1.8 billion spent on the program were spent on these functions. The cost of just the withholding portions of the enforcement and collection functions is unknown.

Federalization of other enforcement techniques may prove problematic, because so many of them are dependent on intimate knowledge of the obligor's assets and lifestyle, a decidedly local-based inquiry. These include liens, seizure and sale, and contempt. Some enforcement techniques like IRS full collection and credit bureau reporting could be done at the national level.

Would the number of withholdings rise as a result of federalization of the income withholding function? While purely speculative, it seems that federalization would have minor impact on the number of cases in withholding status, everything else being similar. If federalization means greater success at locating employers for withholding purposes than what states currently are able to do (or will be able to do once completely automated), there may be a rise in the number (although state-based new-hire reporting may be as successful).

Federalized collection is more employer-friendly and arguably more operationally-cost-effective than the current system, but federalization by itself may not result in a significant increase in the number of cases in withholding status.

ENDNOTES

1. U.S. Department of Labor, Bureau of Labor Statistics. Persons who have jobs but who currently are not working comprise a shifting group, depending on the date of the snapshot of the workforce. Regarding income withholding, this group represents persons for whom withholding is not producing payments during that spell of leave without pay; the group should be subject to withholding upon return to pay status.

2. About 4.8 million Americans received SSI in 1990; 1.1 million Americans were in jail or prison in 1990, according to the U.S. Bureau of Justice Statistics; and, depending on whose estimates are used, several hundred thousand Americans are homeless at any one time.

3. These groups combine readily into two categories: the first includes those persons who work for barter or cash, and those who are incarcerated, institutionalized for mental or emotional problems, homeless, or receiving SSI. Not counting those who work for barter or cash (there are no reliable estimates of their numbers), there are an estimated 7.5 - 8 million Americans in this category. Income withholding, obviously, is not feasible against persons who live and work on the street or are in institutions. SSI is protected against withholding. For those who work only for cash payment (or barter), the amount and source of income is difficult to trace. Of course, for any individual in this category, withholding may become an option at some future time, since there is movement in and out of these groups.

The second category, more promising than the first but still difficult to collect from, includes the self-employed (an estimated 10 million), the unemployed (currently about 8 million), and working teens (5.4 million).

4. The same survey showed that 27% of the offices surveyed rated caseworker's familiarity with interstate income withholding as fair or poor; 31% and 59% of the offices reported equally dismal reviews for attorneys and judges, respectively.

5. Higher income obligors can more readily provide a bond or escrow money equivalent to several months' worth of support to guarantee payment. Also, generally attorneys are more likely to be involved in the higher-income cases, and attorneys may be more inclined to promote opting out to a client than if the client were representing himself or herself. States with a history of direct pay, such as California and Texas, may have a higher rate of opting out than a state such as Wisconsin, where a study found between 3 and 7% of the cases were direct pay cases (money flowed from the employer or obligor directly to the custodial parent instead of through the clerk of court).

6. An employer survey found that 93% said that reporting costs were either "none" or "minor." From the same survey, 26.5% strongly favored continuation, 46.1% favored continuation, 15.5% opposed continuation, and 11.8% strongly opposed continuation. When they were questioned on reducing the reporting time from 35 to 7 days, 46% responded that reducing the reporting time would increase their costs.

7. The percentage of cases with orders where the obligor has withholdable income that become withholding cases is speculative. Another unknown factor is the percentage of increased collections because of withholding implementation in these cases (as opposed to simply a shift in collection method without a net gain in payment).

Prof. Philip Robins predicted, based on an analysis of Wisconsin's experience with immediate income withholding, that one-fifth of nonIV-D cases not in withholding status would be in withholding status after the first year and one-third after two years. In comparison, Minnesota showed a 14% increase in the first year of nonIV-D cases in withholding status in pilot counties compared to control counties without immediate income withholding for nonIV-D cases.

8. The U.S. Supreme Court, in its only case on postjudgment, pre-garnishment notice, said that prior notice was not constitutionally required. Endicott Johnson Corp.v. Encyclopedia Press, Inc, 266 U.S. 285 (1924). Under modern precepts, notice contemporaneous with withholding and an expedient opportunity to contest a mistake in fact (i.e., not owing the triggering amount of arrearage or mistaken identity) may suffice in postjudgment garnishment cases, when balancing the competing public and private interests in child support withholding cases. See Mathews v. Eldridge, 424 U.S. 319 (1976) (balance of interest standard).

APPENDIX 1

DETAILED BACKGROUND

Title IV-D of the Social Security Act and the Social Services Amendments of 1974

With the enactment of Title IV-D in 1975, a Federal/State partnership was established for child support enforcement. As a condition for receiving Federal matching payments, States were required to establish child support enforcement programs which would use existing State laws and procedures to establish paternity and to establish and enforce support obligations on behalf of minor children. States were free to use existing enforcement techniques, which in many states included garnishment actions to collect child support. Garnishment was a discretionary remedy, and used only to collect arrears. A few States, such as Texas, did not allow garnishment for any type of collection, including child support.

However, Congress made clear through the Social Services Amendments of 1974 that in cases where the federal government owed money to obligors who owed child support or alimony (i.e., obligors who are Federal civilian employees, members of the armed services and recipients of Social Security retirement and disability payments), that garnishment would be allowed as if the United States were a private employer.

The Child Support Enforcement Amendments of 1984

While the establishment of the Title IV-D program led to significant improvements in child support collections, U.S. Census Bureau surveys continued to report that many families entitled to support orders did not have them, and that overall noncompliance with support orders continued at epidemic proportions despite the best efforts of Federal, State and local governments. In 1974, only ten States had statutory versions of child support garnishment.

When Congress determined that the child support system had to be bolstered, it looked to states for the most effective practices. Income withholding was the lead solution. In 1984, 26 States had systematic withholding of income from an obligor's paycheck based on a court order after finding of a delinquency. As a result of these efforts, the Child Support Enforcement Amendments of 1984 (CSEA) required all States to implement certain procedures. The cornerstone of the CSEA is the provision for mandatory wage withholding, requiring that States have two distinct procedures for carrying out such withholding.

The first pertained only to cases being enforced through the IV-D agency. Under this provision, States were required to implement a system under which wages of an noncustodial parent were subject to withholding in IV-D cases on the date the noncustodial parent failed to make payments in an amount equal to one-month's support obligation. States were also required to implement the withholding at any earlier date that was in accordance with State law or that the absent parent may request. Withholding was to begin without amendment to the order or further action by the court, and include amounts to satisfy both current support and an amount to be applied toward liquidation of arrearages. The CSEA also specified other elements of the withholding system for IV-D cases such as requirements for prior notice to the noncustodial parent, basis for appeal, restrictions on the maximum amounts to be withheld, notice to the employer, and interstate withholding.

The second procedure provided that all new or modified orders issued in the State include a provision for wage withholding when an arrearage occurs, in order to ensure that withholding is available without having to apply for IV-D services.

By 1988, wage withholding became a universally-available remedy, accounting for 37% of all IV-D collections. Congress, while noting that wage withholding was effective, found that a delinquency based system of withholding was cumbersome to administer, and not as efficient as originally hoped. It was noted that 12 States in 1988 had already moved from a delinquency-based system to an immediate system, where wage withholding was established at the time the underlying support order was entered.

The Family Support Act of 1988

The Family Support Act of 1988 (FSA) required that States establish a system for immediate income withholding without regard to whether there are arrearages. Immediate withholding is required, effective November 1, 1990, for all IV-D cases with new or modified orders on the effective date of the order, unless the court or administrative authority finds good cause not to require the withholding, or a written agreement is reached between the parties which provides for an alternative arrangement.

For cases being enforced by the IV-D agency which are not subject to immediate withholding, the absent parent's wages are subject to withholding on the earliest of: the date on which arrearages occur which are at least equal to the support payable for one month; the date on which the obligor requests that withholding begin; the date on which the custodial parent requests that withholding begin; or an earlier date the State may select.

The FSA also requires that all nonIV-D orders contain immediate wage withholding provisions, effective January 1, 1994.

There are several advantages to immediate withholding. Its implementation prevents arrears from accruing, so long as the obligor is working or has other attachable income. It reduces administrative costs inherent in monitoring payment timeliness and implementing initiated witholding. Furthermore, a system of immediate withholding, without regard to any arrearage, removes the stigma of an arrearage-based system, since everyone subject to a support order will have withholding, not just delinquent obligors.

Yet, almost all child support practitioners agree that the number of withholdings is still too small. After allowing for collections made by States using Federal and State tax refund offsets, and the interception of unemployment benefits, a full 39% of State collections is listed under the category of "other."

APPENDIX 2

Charts

Chart I. National Total Number of Cases with Established Orders, FY 1991 and FY 1992; National Total Number of Cases, FY 1988-1992 (Average Annual Caseload).

Chart 2. National Total Distributed Collections, FY 1988-1992; National Total Income Withholding Collections, FY 1988-1992.

Chart 3. 1988-1992 Percent Change: National Total Distributed Collections; National Total Income Withholding Collections; and National Total Child Support Enforcement Caseload.

Tables

Table 1. Income Withholding Collections as a Percentage of Total Distributed Collections, by State, FY 1988-1992 (Showing Year of Automated Systems Certification).

Table 2. Income Withholding Collections by State, FY 1988-1992.

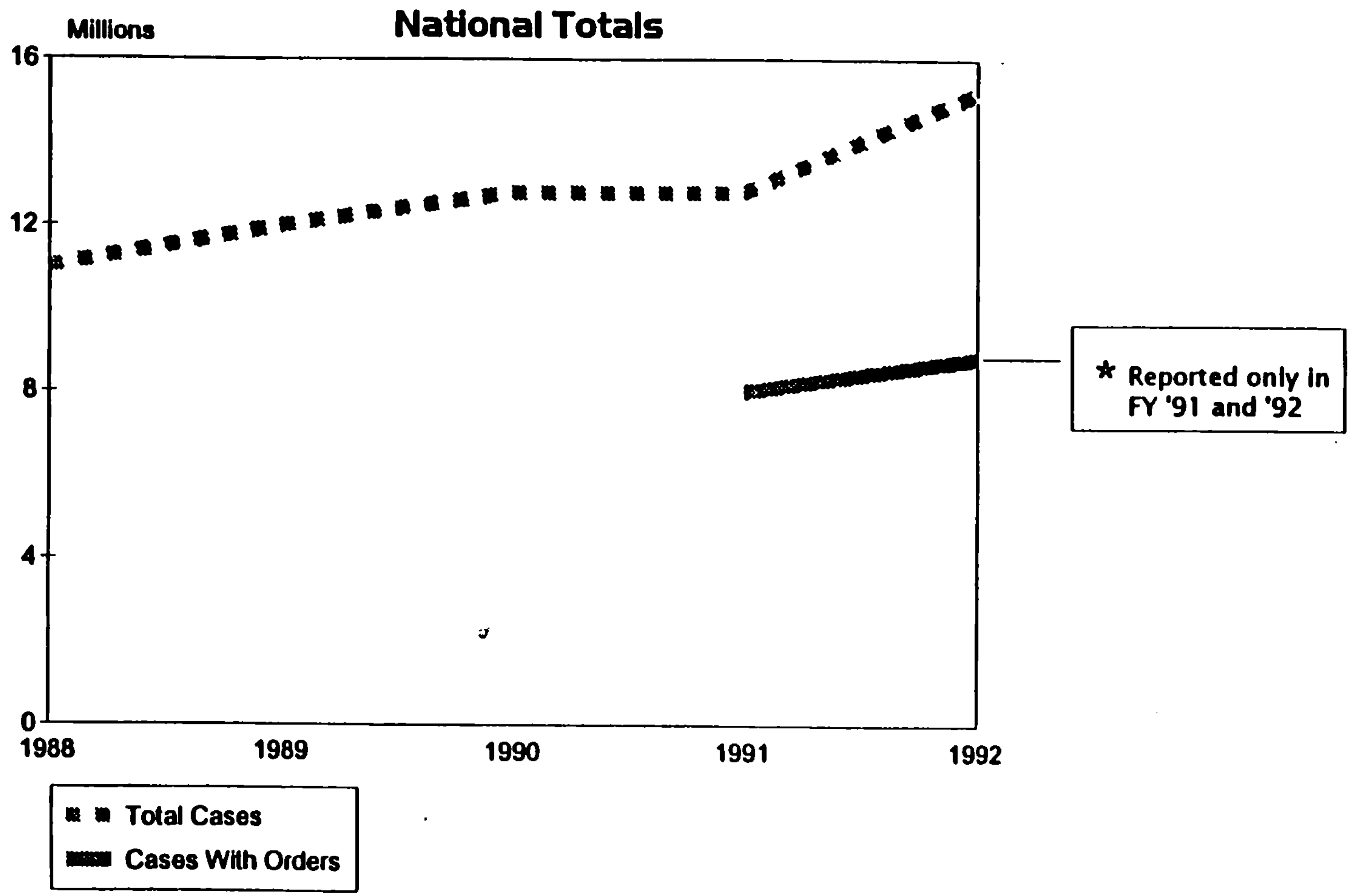
Figures

Figure 1. Most and Least Improved States in Income Withholding as a Percentage of Total Distributed Collections, FY 1988-1992 (Percentage Point Change).

Figure 2. States with Most and Least Increased Child Support Enforcement Caseloads, FY 1988-1992.

Chart 1

CASES 1988 - 1992 (Average Annual Caseload); CASES WITH ESTABLISHED ORDERS - 1991 & 1992 *



DISTRIBUTED COLLECTIONS & INCOME WITHHOLDING COLLECTIONS 1988 - 1992

Chart 2

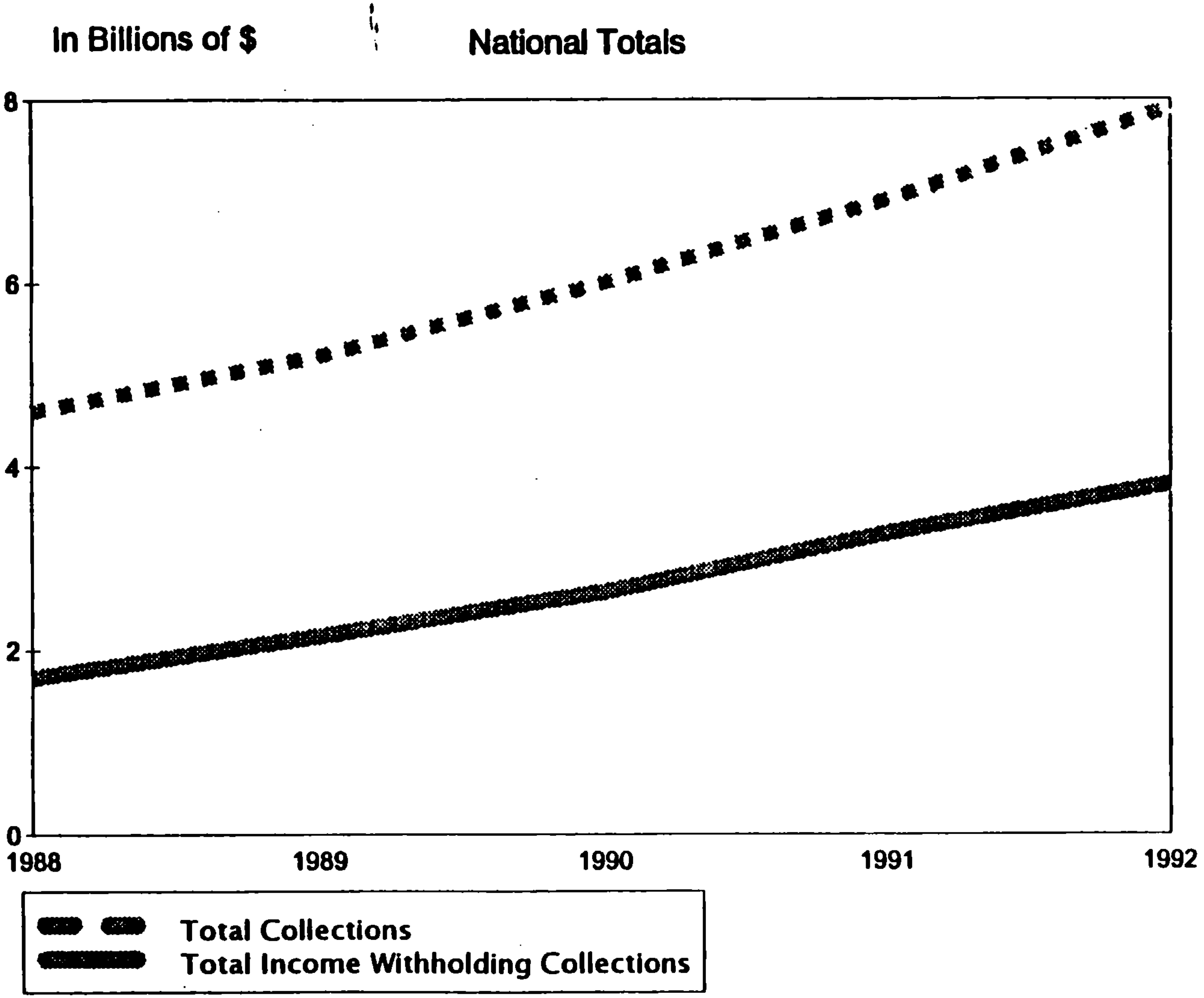
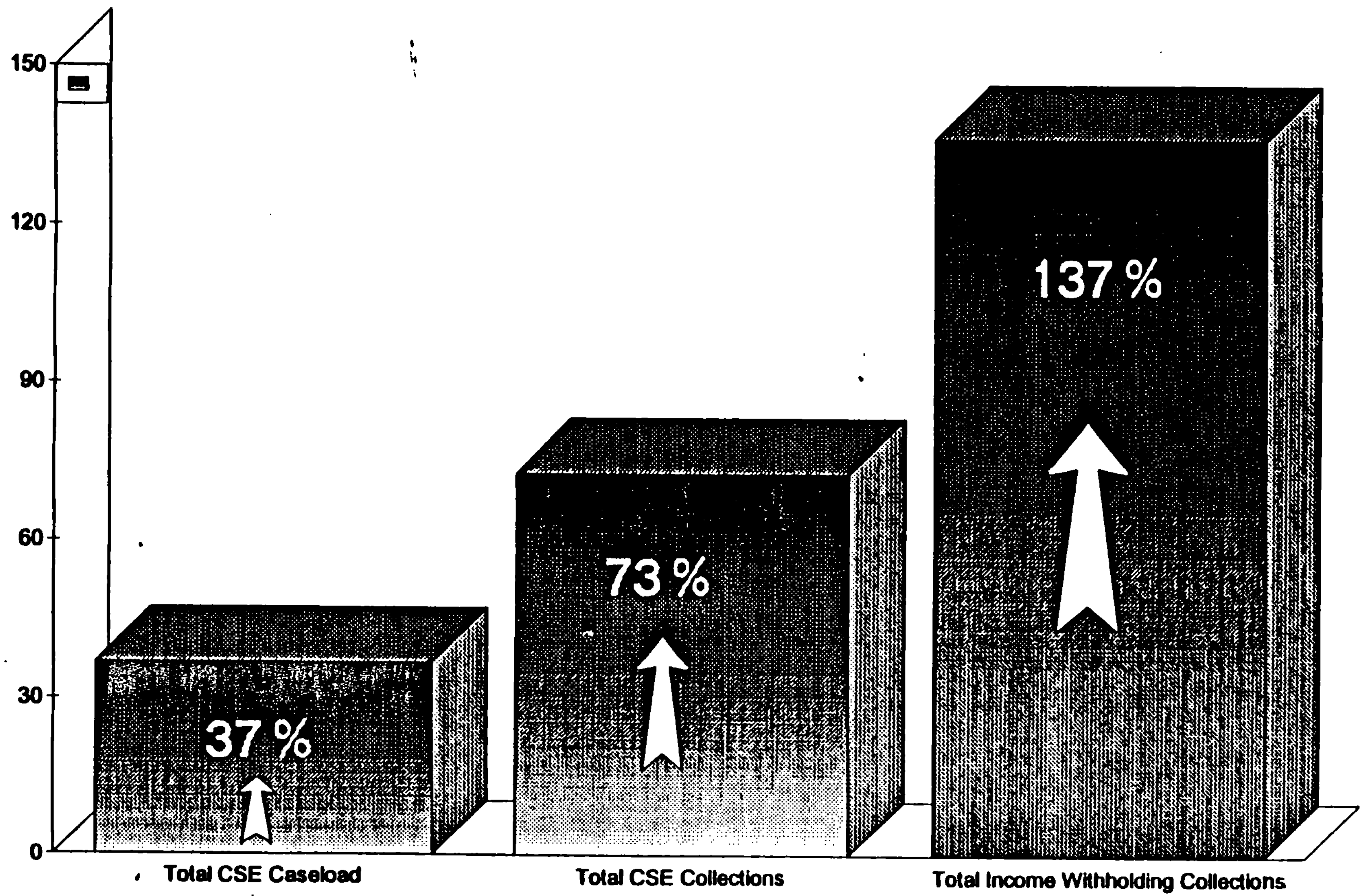


Chart 3

PERCENT INCREASE - NATIONALLY
1988 - 1992



... Collections, by State, FY 1988-1992.

DATE: 04/19/93

STATE	1988	1989	1990	1991	1992
ALABAMA	38.7	44.8	48.8	48.1	49.8
ALASKA	45.5	45.5	45.6	48.3	50.5
ARIZONA	16.0	17.9	18.3	31.5	51.3
ARKANSAS 3/	44.3	41.3	56.9	56.4	58.4
CALIFORNIA	38.8	40.6	42.2	43.5	45.8
COLORADO 3/	14.3	30.3	39.4	50.1	50.9
CONNECTICUT 3/	34.9	34.2	42.7	46.1	45.8
DELAWARE 1/	51.3	51.4	53.4	55.7	53.8
DISTRICT OF COLUMBIA	52.1	53.6	55.4	65.6	67.3
FLORIDA	19.8	41.2	45.5	47.4	41.7
GEORGIA	31.8	38.8	53.2	63.3	65.1
GUAM	29.9	41.3	45.7	42.7	56.8
HAWAII	24.8	46.2	54.4	59.5	55.8
IDAHO 2/	21.1	23.6	23.7	26.5	27.6
ILLINOIS	33.4	42.7	53.8	56.1	54.8
INDIANA	29.3	35.6	31.2	35.7	35.8
IOWA 5/	21.8	13.1	16.5	19.2	23.1
KANSAS	22.5	23.6	9.2	13.8	19.8
KENTUCKY	20.5	30.1	37.2	41.8	40.3
LOUISIANA	48.4	39.7	33.1	39.7	41.9
MAINE	42.8	43.5	48.2	42.6	47.6
MARYLAND	34.8	38.7	37.9	41.3	44.2
MASSACHUSETTS	55.6	61.4	63.6	67.8	52.8
MICHIGAN 4/	35.1	42.5	45.0	50.8	54.8
MINNESOTA 5/	40.9	47.8	51.4	54.7	56.2
MISSISSIPPI	49.3	50.8	54.5	58.2	59.3
MISSOURI	36.2	40.1	41.8	43.6	45.7
MONTANA	22.2	24.7	30.7	38.8	42.3
NEBRASKA	20.1	21.1	24.8	26.8	25.6
NEVADA	41.8	48.5	51.8	56.3	55.4
NEW HAMPSHIRE	34.5	49.3	45.1	50.3	52.7
NEW JERSEY	28.7	35.7	38.6	42.3	47.4
NEW MEXICO	25.5	27.7	27.8	29.6	30.3
NEW YORK 1/	44.9	48.2	51.3	54.9	57.7
NORTH CAROLINA	22.2	23.3	30.3	38.6	47.6
NORTH DAKOTA	10.3	16.9	25.6	38.2	42.7
OHIO	48.9	53.4	56.5	61.6	62.8
OKLAHOMA	24.3	24.4	25.2	28.4	26.8
OREGON	36.6	31.8	28.3	28.8	30.6
PENNSYLVANIA	37.3	38.4	40.2	44.4	47.7
PUERTO RICO		.7	1.2	1.7	4.5
RHODE ISLAND 4/	24.1	25.7	26.8	37.7	42.6
SOUTH CAROLINA	24.8	29.3	31.5	34.9	36.6
SOUTH DAKOTA 3/	27.6	26.7	27.2	31.1	36.6
TENNESSEE	13.7	18.2	22.7	28.2	37.4
TEXAS	47.9	52.4	59.1	57.1	58.1
UTAH	42.6	43.6	43.4	44.0	44.6
VERMONT 3/	27.0	30.5	33.8	40.6	49.9
VIRGIN ISLANDS	36.5	42.5	47.3	51.7	51.1
VIRGINIA	23.8	30.7	36.9	34.6	64.7
WASHINGTON 5/	34.5	35.6	37.0	42.4	43.0
WEST VIRGINIA	29.8	30.8	35.1	50.6	52.4
WISCONSIN	55.4	62.2	66.8	66.9	69.5
WYOMING	4.8	12.3	14.9	15.6	13.3
NATIONWIDE TOTALS	36.4	40.9	43.9	47.4	49.9

Year Automated Systems Certified:
1/ 1988: 2/ 1989: 3/ 1990: 4/ 1991: 5/ 1992

[illegible] Collections by State, FY 1988-1992.

STATE	1988	198	1990	1991	1992
ALABAMA	$17,225,966	$25,483,963	$31,767,640	$30,948,772	$48,126,911
ALASKA	9,035,950	10,532,565	12,220,011	14,030,636	17,987,698
ARIZONA	3,397,070	4,344,808	5,107,703	10,478,018	23,807,939
ARKANSAS	8,952,516	9,371,442	14,793,764	18,496,713	24,551,441
CALIFORNIA	167,376,262	190,526,835	220,501,154	257,139,870	299,485,990
COLORADO	3,907,246	10,155,676	15,596,037	23,535,955	29,546,265
CONNECTICUT	21,054,339	23,061,994	28,479,945	34,961,958	38,561,364
DELAWARE	7,968,120	9,282,007	10,760,472	12,643,376	13,955,457
DISTRICT OF COLUMBIA	3,623,458	5,060,626	7,539,836	10,869,176	13,283,333
FLORIDA	20,887,089	58,740,068	80,298,156	101,459,758	105,230,428
GEORGIA	20,199,226	34,474,643	60,174,441	90,588,837	113,594,696
GUAM	225,247	339,348	658,169	1,350,047	2,629,895
HAWAII	3,612,269	9,060,482	15,040,026	17,910,894	19,207,745
IDAHO	3,460,445	4,496,052	5,422,251	6,219,947	7,608,976
ILLINOIS	35,315,693	48,201,505	72,078,938	84,154,419	100,412,539
INDIANA	21,125,887	27,499,458	30,009,303	39,326,593	44,615,277
IOWA	11,670,696	8,204,638	11,691,615	15,494,412	22,141,321
KANSAS	6,246,729	7,655,722	4,117,073	7,592,746	12,542,996
KENTUCKY	7,837,422	15,397,434	22,336,650	30,296,173	37,872,661
LOUISIANA	21,480,069	20,321,598	20,055,135	26,977,728	35,345,165
MAINE	10,620,127	14,253,572	17,229,894	15,587,298	17,377,051
MARYLAND	38,890,360	49,810,330	57,422,809	67,627,291	85,720,840
MASSACHUSETTS	84,221,648	102,332,204	112,462,358	113,652,784	97,721,476
MICHIGAN	203,495,862	259,798,356	289,922,786	349,109,246	413,612,300
MINNESOTA	40,423,014	57,978,390	71,554,322	87,638,902	106,430,694
MISSISSIPPI	9,399,011	12,130,229	16,639,477	23,422,636	28,626,168
MISSOURI	31,780,050	40,781,212	54,227,237	61,680,563	76,027,073
MONTANA	1,232,043	1,739,422	2,706,907	5,026,956	7,370,805
NEBRASKA	8,632,462	10,280,554	12,570,552	14,806,637	16,935,346
NEVADA	4,418,442	6,374,154	8,396,884	13,140,731	17,770,239
NEW HAMPSHIRE	6,505,952	7,900,101	9,283,863	11,399,204	14,410,150
NEW JERSEY	77,355,734	96,066,941	108,953,521	138,167,032	176,474,408
NEW MEXICO	2,513,544	3,386,189	4,009,671	4,975,647	5,784,142
NEW YORK	133,585,793	156,909,635	191,715,186	240,241,299	281,539,015
NORTH CAROLINA	19,128,189	23,921,330	36,480,782	54,078,433	79,989,818
NORTH DAKOTA	730,077	1,419,494	2,661,274	4,698,330	6,656,155
OHIO	152,377,056	209,233,028	276,384,528	340,592,422	417,988,706
OKLAHOMA	5,211,117	6,369,119	8,110,001	11,353,091	12,463,164
OREGON	21,815,798	21,465,344	22,214,983	26,270,785	32,848,984
PENNSYLVANIA	190,684,186	214,329,563	247,199,520	310,437,442	369,940,468
PUERTO RICO	0	505,971	930,951	1,313,252	3,803,330
RHODE ISLAND	3,569,174	4,161,035	5,369,051	8,142,969	10,604,383
SOUTH CAROLINA	9,720,227	13,549,571	16,459,134	20,518,351	25,178,896
SOUTH DAKOTA	2,277,459	2,757,689	2,996,265	4,084,158	5,817,842
TENNESSEE	6,931,700	10,703,304	16,241,362	21,717,000	31,701,646
TEXAS	40,038,553	57,535,377	78,184,618	110,096,366	145,954,113
UTAH	12,725,681	14,404,572	16,513,399	19,303,756	23,484,554
VERMONT	1,846,060	2,557,267	3,164,173	4,480,161	6,746,720
VIRGIN ISLANDS	1,251,765	1,309,198	1,480,131	1,724,469	2,069,023
VIRGINIA	17,992,545	29,336,285	40,825,977	44,895,873	93,965,147
WASHINGTON	30,682,953	45,339,995	65,034,921	94,208,813	115,067,024
WEST VIRGINIA	4,351,043	5,626,737	7,612,400	11,897,766	18,626,801
WISCONSIN	105,065,098	137,339,705	161,225,272	185,040,897	203,947,213
WYOMING.	213,821	666,468	1,065,858	1,420,434	1,488,536
NATIONWIDE TOTAL	$1,674,288,971	$2,144,396,605	$2,635,897,618	$3,266,043,822	$3,964,738,327

Date: 2/23/93

Figure 1. 1988-1992 Percentage Point Difference in Income Withholding Collections as a Percent of Total Collections.

Most Improved States	Point Difference
VIRGINIA	41
COLORADO	37
ARIZONA	35
GEORGIA	34
NORTH DAKOTA	33
HAWAII	32
NORTH CAROLINA	26
GUAM	26
VERMONT	23
TENNESSEE	23
WEST VIRGINIA	22
FLORIDA	22
ILLINOIS	22
Least, or Unimproved, States	
LOUISIANA	-6
KANSAS	-4
OREGON	-4
MASSACHUSETTS	-3
UTAH	+2
IOWA	+2
DELAWARE	+3
OKLAHOMA	+3
NEW MEXICO	+4
DIST. OF COLUMBIA	+5
NATIONAL CHANGE	+14

1992 Income Withholding Collections As a Percentage of Total Collections (To Nearest Whole Percent).

Leading States	Percent
WISCONSIN	70
DIST. OF COLUMBIA	67
VIRGINIA	65
GEORGIA	65
OHIO	63
MISSISSIPPI	59
ARKANSAS	58
NEW YORK	58
MINNESOTA	56
HAWAII	56
GUAM	56
Trailing States	**Percent**
PUERTO RICO	4
WYOMING	13
KANSAS	19
IOWA	23
NEBRASKA	26
OKLAHOMA	27
IDAHO	28
NEW MEXICO	30
PENNSYLVANIA	31
INDIANA	36
NATIONAL PERCENT	50

Figure 1 Worksheet. Income Withholding Collections as a Percent of Total Distributed Collections (Percent Rounded to Nearest Whole Number).

	1988	1992	POINT DIFFERENCE
NATIONAL:	36	50	14
STATE:			
ALABAMA	39	49	10
ALASKA	46	51	5
ARIZONA	16	51	35
ARKANSAS	44	58	14
CALIFORNIA	38	46	8
COLORADO	14	51	37
CONNECTICUT	35	46	11
DELAWARE	51	54	3
DIST. OF COLUMBIA	52	67	15
FLORIDA	20	42	22
GEORGIA	31	65	34
GUAM	30	56	26
HAWAII	24	56	32
IDAHO	21	28	7
ILLINOIS	33	55	22
INDIANA	29	36	7
IOWA	21	23	2
KANSAS	23	14	-9
KENTUCKY	21	40	19
LOUISIANA	48	42	-6
MAINE	42	48	6
MARYLAND	35	44	9
MASSACHUSETTS	56	53	-3
MICHIGAN	35	54	19
MINNESOTA	41	56	15
MISSISSIPPI	49	59	10
MISSOURI	36	46	10
MONTANA	22	42	20
NEBRASKA	20	26	6
NEVADA	41	55	14
NEW HAMPSHIRE	35	53	18
NEW JERSEY	29	47	18
NEW MEXICO	26	30	4
NEW YORK	45	58	13
NORTH CAROLINA	22	48	26
NORTH DAKOTA	10	43	33
OHIO	49	63	14
OKLAHOMA	24	27	3
OREGON	37	31	-6
PENNSYLVANIA	37	48	11
PUERTO RICO	1	5	4
RHODE ISLAND	24	43	19
SOUTH CAROLINA	24	37	13
SOUTH DAKOTA	28	37	9
TENNESSEE	14	37	23
TEXAS	48	58	10
UTAH	43	45	2
VERMONT	27	50	23
VIRGIN ISLANDS	37	51	14
VIRGINIA	24	65	41
WASHINTON	35	43	8
WEST VIRGINIA	30	52	22
WISCONSIN	55	70	15
WYOMING	5	13	8

Figure 2. Percent Change in Total CSE Caseload, FY 1988-1992

States with Most Increased Caseloads	%Change
TEXAS	102
NEBRASKA	100
RHODE ISLAND	92
NEVADA	91
NEW HAMPSHIRE	90
DELAWARE	87
INDIANA	85
ARKANSAS	69
CALIFORNIA	63
NEW JERSEY	62
NORTH CAROLINA	61
NORTH DAKOTA	60

States with Decreased CSE CASELOADS	%Change
OKLAHOMA	-47
COLORADO	-21
WEST VIRGINIA	-20
NEW MEXICO	-16
MASSACHUSETTS	-3
VIRGIN ISLANDS	-2

Figure 2 Worksheet. Percent Change in Total CSE Caseload, FY 1988-1992 (Unrounded Data in Thousands).

	1988	1992	DIFFERENCE	PERCENT CHANGE
STATE:				
ALABAMA	228	247	19	8%
ALASKA	28	41	13	46%
ARIZONA	134	195	61	46%
ARKANSAS	65	110	45	69%
CALIFORNIA	930	1,513	583	63%
COLORADO	196	155	(41)	-21%
CONNECTICUT	100	148	48	48%
DELAWARE	23	43	20	87%
DIST. OF COLUMBI	63	74	11	17%
FLORIDA	513	705	192	37%
GEORGIA	330	423	93	28%
GUAM	4	5	1	25%
HAWAII	51	61	10	20%
IDAHO	36	47	11	31%
ILLINOIS	505	661	156	31%
INDIANA	301	557	256	85%
IOWA	90	126	36	40%
KANSAS	92	113	21	23%
KENTUCKY	192	242	50	26%
LOUISIAN	182	236	54	30%
MAINE	51	59	8	16%
MARYLAND	196	296	100	51%
MASSACHUSETTS	216	210	(6)	-3%
MICHIGAN	891	1,163	272	31%
MINNESOTA	142	181	39	27%
MISSISSIPPI	193	260	67	35%
MISSOURI	179	301	122	68%
MONTANA	21	21	0	0%
NEBRASKA	57	114	57	100%
NEVADA	33	63	30	91%
NEW HAMPSHIRE	20	38	18	90%
NEW JERSEY	351	568	217	62%
NEW MEXICO	68	57	(11)	-16%
NEW YORK	722	1,007	285	39%
NORTH CAROLINA	229	369	140	61%
NORTH DAKOTA	20	32	12	60%
OHIO	658	906	248	38%
OKLAHOMA	172	92	(80)	-47%
OREGON	180	195	15	8%
PENNSYLVANIA	763	828	65	9%
PUERTO RICO	148	169	21	14%
RHODE ISLAND	39	75	36	92%
SOUTH CAROLINA	135	178	43	32%
SOUTH DAKOTA	18	22	4	22%
TENNESSEE	291	429	138	47%
TEXAS	345	696	351	102%
UTAH	51	72	21	41%
VERMONT	15	17	2	13%
VIRGIN ISLANDS	9	9	0	0%
VIRGINIA	198	280	82	41%
WASHINTON	217	270	53	24%
WEST VIRGINIA	87	70	(17)	-20%
WISCONSIN	256	361	105	41%
WYOMING	17	25	8	47%
NATIONAL	11,077	15,160	4,083	37%

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NONWITHHOLDING ENFORCEMENT

FINAL DRAFT

JULY 1, 1993

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EXECUTIVE SUMMARY

Withholding income is not an appropriate or effective remedy to use in all situations to ensure compliance with a child support order. If collections are to improve dramatically, other enforcement techniques need to be strengthened and child support agencies need the resources and tools to enforce payment.

Changing the federal regulations to mandate a more aggressive use of credit reporting agencies should be considered. At the very least all states could be required to report delinquencies to credit bureaus once the obligor is one month behind in payments. Reporting ongoing support obligations should also be considered to restrict obligors from incurring debt that could prohibit their ability to pay support. A public relations effort should be launched to ensure that creditors actually understand the legal implications of a child support debt and use the information accordingly.

Most adults in the U.S. have a driver's license and at least one vehicle. Obtaining a license to drive or registering a vehicle is a privilege governed by state laws. States have the power to deny the privilege to drive or register a vehicle. One agency of the state should not assist a non-supporting obligor's ability to be mobile and potentially flee from justice while another agency seeks rightful action. Rather, the license governing agency should restrict movement by denying the initial issuance or renewal of a license or registration until the non-payment is cleared up. The same principle could apply to other licenses. When a person seeks to renew an occupational, professional, or business license, the license could be denied if the applicant is not complying with an order to pay child support.

The property or assets of obligors who are delinquent in their child support should be frozen until the debt is satisfied. The process for placing liens and releasing them should be streamlined. Routine encumbrance may be the most effective way of deterring self-employed obligors from not meeting their support obligations.

In many states, child support is the only debt that is interest free and it competes for payment with debts that are accruing interest. States should consider assessing interest or some type of late fee against past due child support as an incentive to the obligor to pay support along with other debts that carry a penalty for non-payment.

The IRS Tax Refund Offset program is a very effective tool, but there are some inconsistencies with the treatment of AFDC and non-AFDC cases. The arrearage threshold is higher for non-AFDC cases, non-AFDC cases have a lower collection priority with IRS, and tax offset is not available for collecting arrearages due non-AFDC children who have reached the age of majority. With a few changes, there appears to be great potential for an increase in child support collected via the IRS offset process.

NONWITHHOLDING ENFORCEMENT

SECTION I: BACKGROUND

The problem of non-support remains critical despite Congressional action to create tougher child support enforcement (CSE) laws in the form of the 1984 Amendments and the Family Support Act of 1988. Only 50% of obligors pay as ordered, while 25% pay less than the support order amount, and 25% ignore the order and pay nothing.

SECTION II: CURRENT SITUATION

Income withholding is the most effective enforcement remedy available. It lends itself to automation, is efficient, and uses a neutral third party to do the collecting. In FY 1992, withholding accounted for 49.9% of all CSE collections. While withholding is effective for a large part of the population, it is not appropriate for everyone. What do we do about obligors who, for example, are paid in cash, change jobs rapidly and frequently, or are self-employed?

Nonwithholding enforcement remedies, with the exception of the IRS tax refund intercept, are governed by state statute. Just as the statutes themselves vary, so does their effectiveness which generally depends on automation, sufficient resources, and training.

This paper is a discussion of nonwithholding enforcement remedies, except for IRS full collection, which is addressed in another paper. Section III focuses on credit bureaus, license holds, liens, and interest; Section IV discusses additional traditional remedies; and Section V discusses remedies that are not currently being used, but are worth exploring.

SECTION III: CREDIT BUREAUS, LICENSE HOLDS, LIENS, AND INTEREST

A. CREDIT BUREAUS

Background

The Child Support Amendments of 1984 provide that states must report to credit bureaus/credit reporting agencies child support delinquencies of $1,000 or more in IV-D cases, if requested to do so by a credit reporting agency (CRA). States have the option of reporting delinquencies that are less than $1,000 and may report on a regular basis without a request from a CRA.

Current Situation

All states have procedures which meet or exceed Federal requirements for credit bureau reporting. As of March 31, 1993, 34 states routinely report to CRAs, ensuring that up-to-date information is provided. Another 17 states are either planning, developing, or pilot-testing routine reporting systems, leaving only 3 states that provide data to CRAs only upon request.

Many states, including some that report routinely and some that report "upon request", report information on cases that have less than $1000 in arrears. According to a recent GAO study, as of September 1989, of the IV-D agencies that routinely reported:

- 17 states used dollar thresholds, with 7 states using a threshold lower than $1,000;
- 11 states used days-in-arrears thresholds, ranging from 1 to 60 days;
- 3 states reported cases on the Federal income tax refund intercept list and 1 state reported cases on their state income tax refund intercept list; and
- 1 state (Vermont) reported virtually all noncustodial parents.

In addition, since the GAO report was issued, California has developed a statewide automated system for reporting all court-ordered obligations, whether or not in arrears. This procedure conforms with the practices of other providers of credit information, which generally report information to CRAs on all persons regardless of whether payments are timely.

Many States not only report information to credit bureaus, but use them as a primary location source. According to the State-At-A-Glance Directory, 18 States use CRAs as an automated locate source. Although IV-D agencies are prohibited by the Fair Credit Reporting Act (FCRA) from obtaining a full consumer report to use as a locate resource for cases where an order has not been established, IV-D agencies can obtain and use "header" information on a credit report for such cases. There is no industry standard for "header" information, but, at a minimum, this information includes the obligor's name and address.

Benefits of Credit Reporting

IV-D agencies provide information to CRAs so that child support delinquencies will be recorded on obligors' credit records. This has several benefits.

- It encourages obligors to make prompt and consistent payments so that their credit records will not be adversely affected. A demonstration project in Marion County, Indiana found that reporting to credit bureaus increased the collection of arrearages as well as current support.

- Credit reporting may be particularly effective in cases involving self-employed obligors, which can be among the hardest cases to work, because many self-employed obligors are highly dependent on credit to operate their businesses.

- With child support debts included in credit records, delinquent obligors may have difficulty obtaining credit, incurring other debts which would interfere with their ability to pay child support.

- The cost of a credit report is relatively low compared to the collection potential of a case. The typical cost to a IV-D agency for obtaining a full consumer report ranges from $1.75 to $3.75 per report. The typical cost for a "header" report ranges from $.75 to $1.75.

Issues

Changing the CSE regulations that relate to the use of CRAs has been an area of consideration. Several legislative proposals have been introduced to mandate a more aggressive use of credit bureaus by child support agencies. This section presents a discussion of the issues involved with credit reporting and the pros and cons of making adjustments to the child support regulations that govern their use.

Should the Federal Government Mandate Submittal to CRAs?

Most states already submit to CRAs without waiting for a request, but a few states do not. Mandated submittal would ensure that all states report delinquent obligors to CRAs, but would be ineffective if periodic updating were not also required. If the information is old or inaccurate, grantors will not rely on it and the information, therefore, will have no impact. Additionally, if the credit report is routinely updated, the obligor's credit record will improve as payments are made, which may serve as an inducement for obligors to make prompt and consistent child support payments.
Routine updates, however, may be a significant burden on states, particularly for those states with limited automation.

How often should updates be required? The credit industry standard is for information in consumer records to be updated monthly. Nebraska submits new cases to CRAs once a year and updates the information monthly. Alaska, California, Delaware, and Kentucky update information monthly. With limited automation, almost any routine updating interval other than annually, would be very labor intensive and almost prohibitive.

Should the Federal Government Require Reporting for Cases with Less than $1000 Arrears?

Preliminary OCSE data for 1992 indicates that the average support award per AFDC case is $130 per month. Therefore, for a large segment of the population, an obligor could be as many as eight months behind before he/she is reported to a credit bureau. A reduced threshold for reporting would ensure that reporting occurs earlier, before large arrears accrue. One alternative would be to reduce the threshold to a defined number of months' arrearage. Using one month would be consistent with Federal regulations regarding enforcement of orders at 45 CFR 303.6. Other approaches might be to simply lower the dollar amount of the threshold or require reporting for all cases eligible for State and/or Federal tax offset.

The positive effect of lowering the threshold is that more cases would be reported and, hopefully, more child support payments made. On the other hand, a substantial increase in the number of cases reported could have major automated systems and administrative implications. In addition, CRAs are mainly interested in substantial arrears that may inhibit an obligor's ability to pay back debts. Reporting only substantial arrears to CRAs makes it clear that such an entry on the credit report is always detrimental.

Should the Federal Government Mandate the Reporting of Ongoing Support Obligations?

Reporting ongoing support obligations conforms with the practices of other providers of credit information, which generally report information to CRAs on all persons regardless of whether payments are timely. If child support obligations were included in credit reports, perhaps obligors would be less likely to incur debts that could prohibit their ability to meet their support obligations.

One could argue that including the support obligation on the credit report of an obligor who is making timely payments is intrusive. However, all other debts, regardless of payment status, are included in credit reports. Additionally, this type of system rewards obligors who pay support on time since favorable information would be included in their credit report.

As with other aspects of credit reporting, automated systems implications and costs would be a consideration.

Impact

Do credit grantors want and use child support information or does it have little impact on the outcome of a credit granting process? In a survey of credit grantors conducted by Associated Credit Bureaus, Inc., 88 percent of the grantors said such information would have an impact on the decision to approve or disapprove a credit application. However, while child support arrearage information is apparently used by credit grantors, it is unclear if it is given the same value or weight as other credit information.

The Federal government has many programs which grant credit to individuals in the form of grants, loans, or subsidies. Preliminary research with the USDA seems to indicate that child support debts have virtually no impact on granting farm subsidies or farm and home loans. There also seems to be some confusion regarding the fact that a child support arrearage has the same force and effect as any money judgment.

B. STATE LICENSING RESTRICTIONS OR REVOCATIONS

Background

A number of States are seeking to implement a powerful new remedy to strengthen child support enforcement--revoking or imposing restrictions on a wide range of licenses issued by states. Examples include drivers licenses (individual and/or commercial), vehicle registration, professional licenses (medical, legal, real estate, etc.), commercial business licenses, trade licenses (plumbers, electricians, beauticians, etc.), and sporting licenses (hunting, fishing, gun ownership, etc.). Should the Federal Government mandate that states pass legislation to revoke and restrict licenses for nonpayment of child support? Should the Federal government consider revoking or restricting federally issued licenses?

Because the states' experience with this remedy is so recent, information is quite limited. There are virtually no firm statistics at present.

Current Situation

States are in various stages of implementing some type of license holding. Following is a summary of their activity as of May 6, 1993.

- 23 states have enacted, introduced into legislation, or are planning to introduce legislation.
  - 6 have enacted legislation
  - 13 have proposed legislation
  - 4 are in active planning/discussion phase
- States are targeting a variety of licenses.
  - 14 driver's licenses
  - 14 professional licenses
  - 10 trade licenses
  - 7 vehicle registration
  - 5 business licenses
  - 4 sporting licenses
- Triggering mechanisms vary widely.
  - 6 states specify one month's arrearage

- Other triggers include failure to appear under a warrant (AR and MA), a court finding that the arrearage was deliberate (IN), the accumulation of a 14-day arrearage (NJ), and petition of an obligee alleging the existence of a delinquency (MT).

■ Procedures also vary.

- In Vermont, applicants for licenses complete a form attesting to their "good standing" with respect to child support. Failure to complete the form results in a referral to the IV-D agency.

- In California, they go after a wide variety of licenses, including licenses to teach. If an obligor is 30 days in arrears but is cooperating with the IV-D agency to reach a settlement, the licensing agency will issue a 5 month temporary license so the obligor can continue driving or working.

Benefits

An important benefit to this remedy is its applicability to interstate cases. There are over 143 million automobiles in the country which are routinely registered with a state motor vehicle agency. If states broadcast warrants on a network that is accessible to motor vehicle agencies, the agencies could routinely scan the network prior to issuing licenses. If the applicant is on the network, the agency would issue only temporary licenses until the obligor cooperates with the IV-D agency and is subsequently removed from the network.

This remedy clearly has collection potential, especially if given a lot of publicity. To date, only Idaho cites collection figures: $1.5 million through driver's licenses, $.5 million on fish and game licenses, and $75,000 through motor vehicle liens.

Issues

Licensing restrictions or revocations for child support arrearages is a powerful remedy with great potential to get the attention of obligors, especially the population that does not earn money working at conventional jobs. Because it is so potentially powerful, licensing restriction/revocation should be well thought out and planned. Loss of a license must not be allowed to contribute to nonpayment or interfere with the needs of the community. For example, a hardship could be created in a small town if the only local doctor lost his license.

An effective license revocation system depends in large part on automation. The downside to automation is start-up costs. It was DMV's start-up costs that California found to be the most costly single component--$263,000.

Due process protections must be adequately considered. Minnesota has a provision requiring that a hearing be held in 30 days. This hearing only addresses mistakes of fact. Appeal processes need adequate consideration. California's reviews are held by the various licensing boards and a person always has the right to take the case to court.

Federal Licenses

Currently, no Federal agency withholds or revokes licenses for nonpayment of child support. For example, each year the FAA issues approximately 250,000 certificates to pilots and other related personnel (mechanics,control tower personnel, flight instructors, etc.) regardless of their child support status. Should licensing agencies at the federal level be held to the same requirements as those at the state level? This is an area that may warrant further exploration.

Impact

Though some may find the restricting or revoking of licenses to be a harsh remedy, we need to remember that holding a license is a privilege, not a right. The state has an interest in seeing that the license holder is law-abiding and that its judicial orders are honored.

C. LIENS

Background

A lien is a claim on real or personal property for the satisfaction of a debt or duty. The Child Support Enforcement Amendments of 1984 required States to implement procedures under which liens are imposed against real and personal property and liquid assets for arrearages owed by an obligor who resides or owns property in the State. It directed states to establish guidelines to determine whether or not to create a lien in a given case.

All states have enacted laws allowing liens to be attached to motor vehicles, boats, trailers, houses, livestock, antique furniture, financial instruments, IRAs, bank accounts, lawsuits and worker's compensation benefits.

Banks, savings and loan associations, credit unions, and other types of financial institution accounts provide a ready source for satisfying child support arrearages. Through IRS, child support agencies have access to tax returns that show the locations of institutions that hold accounts for obligors. Project 1099 is a prime technique for locating obligated parents and obtaining information on their employment and assets. Project 1099 is named after the form on which the IRS receives information on taxpayers' savings accounts, stocks and bonds, dividends, and capital gains, as well as other important information.

Current Situation

Where used, seizing financial accounts has proven to be an effective enforcement technique. Camden County, New Jersey operates an effective seizure of assets program with which they collected over $100,500 in FY 1991.

Massachusetts has recently begun an automated system of freezing and seizing financial accounts. Defaulting parents were sent two notices prior to the seizure. The first notice informed parents that they had 30 days to resolve their child support arrears. The second notice demanded immediate payment of the arrears warning that additional measure would be taken. Seizure of their financial accounts was one of several measures mentioned.

The State crossmatched names and social security numbers from the IRS 1099 report with their own data base of obligors with an arrearage of $500 or more. When a match was found, the State submitted a notice to the appropriate financial institution directing that the account be frozen and funds, up to the amount of the arrearage, be send to the CSE agency.

Massachusetts has recently experienced a 49% hit rate (number of requests submitted verses the numbers of accounts with funds) using this technique. In the case of joint financial accounts, the entire amount, up to the amount of the arrearage, may be taken. A spousal co-owner of the account has no appeal. Between January and April of 1993, Massachusetts has collected $3.2 million by using this technique.

California is conducting a pilot program using their Franchise Tax Board to seize income tax refunds in a manner similar to the IRS Tax Refund Offset program. In California, welfare and non-welfare child support arrears of $150 or more are submitted for seizure.

Issues

In spite of the fact that CSE Agencies have the authority to impose liens, very few agencies actively pursue them as an enforcement remedy. Most CSE Agencies rely instead on wage withholding, Federal tax intercept and unemployment intercept as their primary enforcement techniques.

There appear to be three reasons why liens are not fully utilized.

1. Partly as a result of individual State lien procedures,

identifying and seizing assets can be a difficult and a labor intensive operation.

2. It is generally believed that most obligors do not have much in the way of assets. However, in a recent study conducted by the Massachusetts Department of Revenue, they found that out of 72,000 obligors, over one third report interest income from bank accounts held in Massachusetts. This does not include non-interest bearing checking accounts or accounts outside the Commonwealth.

3. Seizing of non liquid personal property is not always cost effective considering the need for additional personnel and equipment to seize property, a facility for storing the property and the costs associated with selling the property.

Following are some of the many remaining questions or issues associated with the use of liens.

- Should Congress require that liens be executed on all appropriate cases? If liens were mandatory and subject to audit, would this be a catalyst to managers to place resources in this area? Where would managers get the additional staff considering the hiring freezes that many jurisdictions are under?

- Should States be required to create a lien imposition system on property that needs no court involvement unless a legal dispute arises?

- Should States be required to develop and use a process in which liens can be placed on real and personal property immediately upon the support becoming past due?

- Should Congress mandate that child support liens have priority over all subsequent lienholders (including the

Federal government), regardless of the date that arrearage subject to the lien accrue?

- Should States develop a Statewide lien registry? If a title searcher wants to check for encumbrances, the child support lien would be discoverable by on-line computer or printout access to the central lien registry's computer.

Benefits

The successful use of liens has and is being demonstrated in several jurisdictions across the country. Following is a list of the many benefits to consider in answering the question regarding imposing their use on the states.

- States already have the legislative authority to seize both real and personal property.

- The expanded use of liens is an excellent way to increase collections from obligors who are self-employed, working under the table, or working for companies that do not report wages to the State Employment Security Agency.

- Financial institutions are experienced in dealing with holds on accounts and would not be unreasonably burdened by the attachment.

- While a lien execution on personal property can be expensive, a lien on a bank account may only cost a few dollars.

- Seizing either real or personal property sends a message to obligors and the community that nonpayment of child support is a grievous offense and the CSE agency is serious about enforcing child support orders.

Barriers

As with anything, there are some barriers or impediments to the widescale use of liens. Following is a discussion of them.

- In cases where creditors can seize a joint account, courts are split as to whether the entire account or only the debtors share is subject to garnishment.

- The seizure of an account exists for a limited period of time and, therefore, would not be available in most states to use for current and future support.

- Unless the process is highly automated, processing liens requires additional staff which will be difficult if not impossible for most jurisdictions to obtain.

- Modifying existing lien systems will require the cooperation of numerous state and county agencies who may be reluctant to make any changes.

D. INTEREST

Background

A person faced with paying a bill that accrues interest if not paid on time or paying a bill that has no penalty for late payment would pay the former. There is no financial incentive for an obligor to pay child support before paying a debt that accrues interest. Child support debts are at a competitive disadvantage compared to commercial debts.

States have interest laws that apply to civil money judgments. However, while many states have the authority to apply interest to delinquent support, few routinely do so. Those states that charge interest, such as California, feel that if the obligor is assessed interest on the unpaid support he or she is motivated to make timely payments. In addition, they feel it is compensation to custodial parents and the interest reflects the current value of money owed in the past.

Issues

With only a few jurisdictions actually charging interest, there is a dearth of actual operational experience to draw upon. As more experience is gained, many more issues will most assuredly surface. However, the major issue with respect to charging interest is its effectiveness and costs. Will charging interest on arrears be an incentive for delinquent obligors to pay their child support? Will a few dollars of interest be a sufficient monetary incentive to encourage obligors who owe hundreds of dollars to make their child support payments? Will the administrative costs incurred be worth the money collected?

Benefits

The benefits to imposing and collecting interest on arrears include the following.

- Charging interest sends a message to the obligor that a child support debt is at least as important, if not more so than paying a home mortgage or car loan.

- Charging interest gives the custodial parent the future value of the money that was not paid timely.

- If charging interest provides an incentive for obligors to pay their support as ordered, it will, if implemented nationally, increase principal collections.

- Even without federal legislation, many states could implement a policy of charging interest since most states already have laws allowing interest to be charged on judgments.

Barriers

The impediments to imposing and collecting interest include the following.

- Statute of limitations problems are increased.

- Without the benefit of state-wide automated systems, calculating interest is an extremely labor intensive and error prone procedure in which the costs would outweigh the benefits gained.

- Extensive policy and audit regulations will need to be written to address all the administrative issues associated with collecting interest. This may be problematic in view of Congressional intent to reduce, not increase, regulations on the states.

- Collection of interest exacerbates an already complicated distribution system.

OPTION

Instead of charging interest on past-due child support, it may be just as effective to charge a flat monthly late fee. The late fee could be considered an administrative charge for collecting delinquent child support and would not be subject to distribution regulations.

In non-AFDC cases, the late fee could go to the custodial parent for lost value of money, or the money could be split between the state and the custodial parent.

SECTION IV: TRADITIONAL REMEDIES

A. FEDERAL INCOME TAX REFUND OFFSET

Background

Under this program, the IRS is authorized to withhold all or part of certain individuals' Federal income tax refunds for collection of delinquent child support obligations. The major provisions of the legislation and resulting regulations to be considered in this paper are as follows.

- In non-AFDC cases, the amount of past-due support that must be owed before using tax offset must be equal to or greater than $500. In AFDC and Foster Care cases, the amount of past-due support that must be owed before using tax offset must be at least $150, and the support must be delinquent for three months or longer.

- In non-AFDC cases, "past-due support" means only past-due support owed to or on behalf of a minor child or an individual who, while a minor, was determined to be disabled under title II or XVI and for whom an order of support is in force.

Current Results

The Federal income tax refund offset program has been very successful in collecting child support. Nationally, it is the second most effective collection technique (after wage withholding). The table below shows Federal tax refund offset program results for processing year 1992.

Federal Tax Refund Offset - 1992

	Cases Offset	Net Amount Collected	Net Average Per Offset
AFDC	737,254	$466 million	$632.04
non-AFDC	254,435	$179 million	$703.04
Total	991,689	$645 million	$650.26

Potential Program Expansions

To increase the collection potential of this technique, various changes have been discussed that may lead to (1) an expansion of the types of cases that may be referred for offset, or (2) an increase in the number of cases offset and/or the collections per case.

The proposals outlined below would make treatment of AFDC and non-AFDC cases the same.

Triggering Arrearage

Under current Federal regulations, in an AFDC case, an arrearage of $150 or more may be referred for Federal income tax refund offset if it is at least three months old. In a non-AFDC case, the Federal statute requires that the arrearage must equal or exceed $500.

This difference in treatment of AFDC and non-AFDC individuals could be eliminated by making the threshold amount for an arrearage that may be sent for offset the same for both types of cases.

Setting the amount at $150 for non-AFDC individuals would result in more cases being referred to the IRS for collection of arrears and send a message that non-payment of support leads to quick and serious enforcement action for everyone. Since offset is an annual process, cases that do not qualify in any given year could have an additional year of arrearages build up before a collection is made, if non-payment continues and other State mechanisms do not bring results. Since many individuals who receive IV-D services are the near poor, the additional support available through early access to offset could be very meaningful to them. Further, the longer arrearages build up, the less likely it is that any one year's offset would recoup the full amount owed.

State IV-D agencies and the IRS may not be supportive of this change if they believe increases in workload would be excessive.

In the 1985 preamble to the final regulations implementing tax offset for non-welfare cases, it is noted that "Commenters expressed concern about the different threshold amounts for referral of AFDC and non-AFDC cases for offset." In response, OCSE said that "the lower threshold for AFDC cases reflects the generally lower support obligations for AFDC families and the fact that States are able to verify these arrearages easily because they are assigned to the State." OCSE declined to raise the $150 amount at that time to match the statutory $500 threshold for non-AFDC cases.

Post-minor Child

One especially inequitable difference between AFDC and non-AFDC cases is that tax offset is not available for non-AFDC children who have reached the age of majority, even if the arrearages accrued during the child's minority. Congress carved out one exception by allowing offset for post-minor disabled non-AFDC children. In contrast, in AFDC cases, arrearages may be collected through offset regardless of the child's age. The U.S. Commission on Interstate Child Support recommends that Federal income tax refund offset be expanded to cover non-AFDC children of any age to whom support is owed, limited only by the applicable statute of limitation.

This would appear to be a low cost modification that would primarily benefit individuals who have been unable to collect support for years, but have not received public assistance.

Priority of Debt Payment

Under current IRS statute, non-AFDC refund intercepts are given the lowest priority--after any other reductions allowed by law. This priority reflects the mission of the IRS to collect public debts. However, non-AFDC offsets represent a significant amount of money that, if distributed to families, could help many families remain self-sufficient. This would reduce the amount of funds expended for AFDC payments. The U.S. Commission on Interstate Child Support recommends that non-AFDC arrearages be given first priority for offset (before Federal tax debts, child support arrearages owed to State and local governments and other debts owed to the Federal government), while a study is done to assess the impact of this policy on the Federal budget. The Downey/Hyde Child Support Enforcement and Assurance Proposal would give child support payments precedence over Federal tax liabilities.

A less extreme proposal would be to change the priority of debts repaid by Federal income tax refund offset so that AFDC and non-AFDC arrearages have equal priority after Federal tax debts and before other debts owed to the Federal government. Under this type of proposal, all child support arrearages referred for offset by the IV-D agencies would receive equal treatment at the IRS.

Non-IV-D Application for Offset Services

Under current statute and regulations, non-AFDC individuals must file an application if they wish to receive IV-D services. Once an application is filed, the IV-D agency has discretion in how it handles the case and may use any mechanisms at its disposal to enforce a support order. Program policy has always dictated that an individual may not apply for a particular IV-D service, nor may an individual specify particular services that are not desired.

A minor exception to this position has been applied to locate only services. An individual asking for locate help does not have to apply for IV-D services to receive this assistance. A fee is charged for the service.

Using locate only as a model, a proposal could be developed to permit non-AFDC individuals to access the Federal income tax refund offset service without applying for the full range of IV-D services. Under such a proposal, an individual whose case meets the criteria for non-AFDC offset (or separate criteria if desirable) would contact the State with the relevant information and request offset services. The State would likely charge a fee that would cover State and IRS costs of providing the services. The State would tag these cases as non-IV-D cases and monitor them separately from the IV-D caseload. The Federal government would have to ensure that costs of providing this service are not charged to the IV-D program, unless legislation is enacted authorizing Federal financial participation for these costs.

There is no information on the magnitude of cases that could be expected under this type of expansion of the Federal income tax refund offset program, but it could be tremendous, particularly if the service was effectively marketed to the public. According to the Census Bureau, the aggregate amount of child support received in 1989 was $11.2 billion, 68.7 percent of the $16.3

billion due. That leaves a deficit of $5.1 billion in uncollected arrearages.

Depending on the number of cases that would require the service, the IV-D agency and the IRS could experience major workload increases. For example, in the current system, the IV-D agency must send advance notices to individuals whose cases will be referred for offset, allowing them the opportunity to contest mistakes of fact in an administrative review. Simply conducting reviews could become an overwhelming task if all child support arrearages in the nation were eligible for offset. New procedures could be devised whereby a court or administrative entity would have to certify the amount of the arrearage in advance in lieu of a review by the IV-D agency. Other issues of this type would need to be identified and dealt with if this proposal were to receive serious consideration.

If a child support insurance program were to be adopted using IRS as a collection agent for all unpaid child support, this type of modification to the offset process could be viewed as a first, less drastic step toward achieving that goal.

B. CRIMINAL NONSUPPORT

Background

At the turn of the century, the first uniform law developed to deal with child support delinquents was criminal in nature. The failure by a "deserting" spouse or ex-spouse was considered more of a moral than an economic issue. Also, paternity trials were criminal and were known as "bastardy" proceedings, the vestiges of which we are just removing today.

By mid-century, as symbolized by URESA, the nation shifted to an emphasis on civil remedies. As the divorce rate skyrocketed in the 1960s and 1970s, the focus became almost exclusively civil, in part because support was considered just one part of the divorce settlement that the parties' lawyers negotiated, and because society to some degree allowed nonsupport to be destigmatized precisely because it became so commonplace. In the

1980s, with increasing governmental presence in the CSE system, there were renewed calls to use criminal nonsupport laws that had been lightly used for several decades.

Current Situation

With nonsupport not tolerated as readily by society today, persons have returned to the criminal arena for the more egregious cases of nonsupport, in which the obligor is reminded that nonsupport not only is an affront to the family but to society as well. Almost every state has a misdemeanor criminal nonsupport statute. Some states make repeated nonsupport or extensive nonsupport a felony.

Congress passed a federal criminal nonsupport statute in October 1993. The law makes it a misdemeanor to wilfully fail to pay support when the obligor lives in a different state from the child and the arrearages total $5,000 or are one-year or more past due. Anyone convicted must pay restitution equivalent to the amount of the arrears. A second conviction is a felony. The Department of Justice is currently working on guidelines for U.S. Attorneys to follow regarding the prosecution of obligors under this law. DOJ is consulting with OCSE during this process.

Issues

Criminal nonsupport should be used in high profile cases, or when it is the only "button" that once pushed will force the obligor to pay. It is considered a tool of secondary, not primary, resort. It is too costly and too hard to prove to be used routinely. It does send a message, however, that nonsupport offends the community as well as the unsupported family.

C. CONTEMPT

Background

For several years now, contempt has been held in contempt as an effective collection tool. From being practically the only tool used before the advent of the IV-D system, it has fallen in disfavor and has diminished in importance. The recent thrust of enforcement has been an emphasis on withholding and tax offset and a de-emphasis of punitive approaches. This is a natural outcome of the government taking over the enforcement effort for many if not most child support cases in the nation. Cases become less personal. They require a "mass justice" technique that is inconsistent with contempt, a process that is relatively time-consuming and costly.

Current Situation

There is a segment of the noncomplying obligor population for whom contempt remains the optimal enforcement tool. Obligors who are self-employed, asset hiders, or paid in cash are prime candidates for contempt. The threat of incarceration is enough to make many obligors pay who wouldn't otherwise. Actually serving jail time makes some others pay soon after the doors close behind them. Admittedly, incarceration is not a threat to some obligors, and a lengthy incarceration, of course, inhibits the obligor's ability to work to pay off the arrearages.

Issues

What can be done to improve contempt? First, civil contempt should be the rule. Many states still use criminal contempt, which requires the state to prove beyond a reasonable doubt that the obligor has the ability to pay and did not pay. The obligor is entitled to counsel and a jury trial, as criminal rights attach. California's attempt to have "quasi-judicial" contempt was struck down by the U.S. Supreme Court in Hicks vs. Feiock. Contempt must be civil or criminal in nature, the court said. Whether it is criminal or civil depends on whether the punishment to be meted out is set, or whether the contemnor has the keys to his/her own jail cell. The former is criminal contempt, and all rights attendant to a criminal case attach. The later is civil contempt. In civil contempt, unlike criminal contempt, the burden of proof of ability to pay may be switched to the defendant. That is, the defendant may be required to prove an inability to pay once the state makes a case that there haven't been payments made as ordered. A civil contempt case needs to be proved by a preponderance, or greater weight, of the evidence, a lower standard than the criminal standard. In most states, there is no right to an attorney in civil contempt. Also, in civil contempt there is an incentive to pay the debt because the obligor holds the keys to the jail, as he/she is released upon payment received.

Contempt has traditionally been handled exclusively by judges. While there may be a federal or state constitutional problem in having a nonjudge attempt to incarcerate someone, a state may attempt to pass constitutional muster by having a hearing officer or magistrate hear the case and make findings of fact to the judge for the judge's ratification. Upon ratification, a bench warrant is issued for the contemnor. The contemnor will have had a few hours or days to attempt to scrape together the payment that will keep him/her out of jail. A bond may be requested by the hearing officer to deter the contemnor's disappearance prior to ratification by the judge.

Contempt is a personal finding by a judge that someone has disobeyed the court's order. It is ironic that this is generally considered an unenforceable finding across state lines. While a money judgment is given full faith and credit by another state, a judge's finding of contempt is not. Full faith and credit may be extended to contempt findings, so that the judge in the second state needs to determine only that the contemnor has not purged himself/herself of the contempt a fellow judge already found. The contemnor would purge himself/herself based on the purging requirements set forth by the first judge.

SECTION V: REMEDIES TO EXPLORE

A. ACCESS TO THE NATIONAL CRIMINAL INFORMATION CENTER (NCIC)

Background

The NCIC system is a sophisticated computer-controlled message switching network linking local, state and federal agencies together for the purpose of information exchange. The system is managed by the FBI in a cooperative effort with the states and maintains 3 files for information on unidentified persons, missing persons, and persons wanted because of an outstanding Federal warrant or any other warrant involving a felony or serious misdemeanor. The NCIC system does not in itself provide locate information. Persons meeting the appropriate criteria are entered in the NCIC system and this information is then made available to Federal, State and local law enforcement agencies for "lookout" purposes. NCIC requires that a state be willing to extradite a person whose case is entered on the system.

Access to the NCIC system is generally limited to law enforcement agencies. An exception to this is the Missing Children Act of 1982 which gives parents, guardians, or next of kin, access to the NCIC Missing Persons File. To access the NCIC system, each law enforcement agency has an ORI number which is an original agency identifier.

Issue

Would access to the NCIC system help CSE agencies locate obligors?

Pros and Cons of Pursuing This Option

Pros

- Obligors for whom a Federal or State/local warrant has been issued for non-payment of child support, can be entered into the NCIC system. Although the vast majority of child support delinquent cases would not fall into this category, the publicity on those that do, could serve as a deterrent to all obligors who are not meeting their child support obligations.

- The costs for using this system are not prohibitive, according to the FBI. Although no estimates were provided, the FBI did indicate that costs vary from state to state depending on how the program is set up in each location.

- If access to this system was granted, information could be entered on behalf of IV-D and non-IV-D cases alike.

Cons

- The number of child support cases that could be found in the NCIC system is questionable. Of the three file categories in the NCIC system, it appears the "Wanted Persons File" would be most appropriate for child support enforcement, but it is restricted to those persons with a Federal warrant or other warrant involving a felony or serious misdemeanor.

- It appears that legislation would be required for the IV-D agencies to gain access to the NCIC system. This is based on the example of the Missing Children Act of 1982 which gives parents, guardians, or next of kin, access to the NCIC Missing Person File.

B. AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS NETWORK

Background

The American Association of Motor Vehicle Administrators (AAMVA) is the association which provides a forum for motor vehicle related issues for all U.S. and Canadian jurisdictions. AAMVANet is a computer network developed for AAMVA to provide management with a telecommunications system and related services used to support State government activities.

While AAMVANet offers many services to Motor Vehicle Agencies, there are two parts of the network that are of interest to CSE agencies: the Drivers License Reciprocity (DLR) and the Commercial Driver's License Information System (CDLIS). The DLR is a network which provides the capability to obtain current driver information from the driver's home jurisdiction. The information obtained from DLR is used by Motor Vehicle Agencies before they issue a license to a driver in a new jurisdiction.

The Commercial Drivers License Information System (CDLIS) contains the driver's name, date of birth, state and driver's license number, and other descriptive data on each driver who has a commercial drivers license. When a driver applies for a CDL the State checks the central file to see if the applicant has already been issued a CDL. This system prevents individuals from obtaining multiple CDLs.

In light of the difficulty CSE agencies have had in obtaining access to the National Law Enforcement Telecommunication System (NLETS), AAMVANet is a potential alternative. The DLR would provide states with the home address and vehicle information on obligors living in other states - a system which is invaluable for interstate cases.

ISSUES

While parts of the AAMVANet system are operational, several features are still in the developmental stage. As a result, listed below are issues that need to be addressed prior to determining its usefulness to CSE agencies.

- Will CSE agencies be allowed to access AAMVANet since currently only State Department of Motor Vehicles(DMV) and a select number of insurance companies are accessing the system?

- Will CSE agencies be required to sign agreements with all 50 State Departments of Motor Vehicle Departments in order to obtain access?

- What type of security and safeguarding provisions will be required of the CSE agencies?

- What will AAMVA charge for accessing the system? Will there be start up charges and/per transaction fees?

- How will CSE agencies access the system - via the State DMV's or through direct access terminals? Current federal requirements for OCSE systems specify that statewide automated systems have the capability of interfacing with state DMVs. Therefore, the potential communications link already exists.

C. ACCESS TO NATIONAL LAW ENFORCEMENT SYSTEMS

Background

The National Law Enforcement Telecommunication Network (NLETS) is a national computerized network that provides states with access to motor vehicle and driver's license data and records of traffic violations maintained by other states. When an individual is stopped for a traffic violation, the police use NLETS to determine the status of the automobile and whether there is an outstanding criminal warrant against the driver.

Current Situation

Those CSE agencies that have access to NLETS indicate that it is an invaluable locate source for interstate cases. Through NLETS, caseworkers can obtain the home address and vehicle information on obligors living in other states. Without NLETS, caseworkers must rely on mailing interstate locate requests to the various State Parent Locator Services (SPLS) to obtain motor vehicle and driver's license information. This is a time consuming and labor intensive effort which delays case processing.

Issues

The NLETS Board of Directors has taken the position that only those agencies engaged in criminal law enforcement activities qualify for access to NLETS. They acknowledge that those child support programs administered by a State Department of Justice would qualify for NLETS access. However, they have traditionally questioned the law enforcement status of those child support programs administered by a Department of Social or Human Services.

This policy has made it virtually impossible for child support administrators to obtain access to NLETS. Recently the NLETS Board has further restricted its definition of law enforcement making it even more difficult to obtain access. Specifically, even though the Utah IV-D program has statutory authority designating it as a law enforcement agency, the NLETS Board has recently revoked its access because they do not have arrest power and the staff are not peace officers.

There are two ways in which State child support program could potentially gain access to NLETS. If the Motor Vehicle Departments of all the states agreed to an interstate compact specifying that all CSE agencies should have access to their records, NLETS could amend its charter to include child support agencies as authorized users. This option requires that every State join the compact before any action is taken by the NLETS Board of Directors.

It is unlikely that every state would agree to join such a compact and the negotiation process could take a very long time. Further, even if a State's Motor Vehicle Department were to join the interstate compact, the State's NLETS control agency could still deny access to NLETS on the basis that the child support agency is not deemed a true law enforcement agency.

A second option would be to have Congress designate CSE agencies (Federal, State and local) as law enforcement agencies with all the rights and privileges accorded to such agencies. Once this designation is made, States can apply for an FBI National Crime Information Center (NCIC) access code. Once an agency has an NCIC access code, authorization to access NLETS in generally a routine matter.

Additional legislation is strongly urged to ensure that failure on the part of the governing boards that maintain NCIC, NLETS and State law enforcement agencies to provide access to child support agencies would result in a loss of Federal funding.

D. FRAUDULENT TRANSFER OF PROPERTY

Background

One of the major problems in some child support cases occurs when an obligor transfers income or assets to someone else. To avoid making support payments, obligors sometimes place the title of their real or personal property in a new spouse's name or in the name of a friend or relative. Unless the person seeking support aggressively pursues these transfers, the obligor is often successful at thwarting collection efforts.

Most states have a version of the Uniform Fraudulent Conveyance Act or the Uniform Fraudulent Transfer Act which allow a creditor to undo fraudulent transfers. "Badges" or "indicia" of fraud relieve the creditor of the initial burden of proving what the property owner's state of mind was at the time of the transfer of property. For example, instead of proving fraudulent intent, the creditor can point to a transfer to a relative for which the former owner received little in return.

Issues

Even though fraudulent transfers occur all too often in child support cases little, if any, legal action is taken against the offending obligor. In response to this situation, the U.S. Commission on Interstate Child Support recommended that the Federal government:

- encourage states to have and use laws to actively pursue civil and criminal remedies against the obligor and the person or persons who may conspire to hide income or assets to avoid payment of child support, and

- mandate states have and use laws that provide indicia or badges of fraud that create a prima facie case that an obligor transferred income or property to avoid a child support creditor.

This remedy would have to be invoked on a case by case basis as discovery of the transfer does not lend itself to an automated process because, with the exception of information on joint tax returns from tax offset, IV-D agencies do not capture data on obligors' current spouses or relatives. In most cases, the child support agency would not be aware of the transfer unless it was reported to them by a third party.

We do not gather information or statistics regarding how often fraudulent transfer to avoid payment of child support is occurring. Because most IV-D agencies are not aggressively pursuing the seizure of assets and property, one could assume that fraudulent transfer may be happening in limited numbers of cases because the threat is not real. However, as states become more aggressive at seizing property and assets, this type of enforcement action will become especially critical. Then if the state IV-D agency publicized successes in fraudulent transfer cases, perhaps fewer obligors would consider the transfer.

E. LUMP SUM PAYMENTS

Background

Delinquent obligors who receive lump sum payments from such things as lottery winnings or gambling, should use those winnings to support their children. IV-D agencies in many states with state lotteries currently intercept lump-sum lottery winnings. Few states, if any, routinely hold winnings from a casino or gambling house, insurance settlements, lawsuit proceeds or payments for agricultural goods. The U.S. Commission on Interstate Child Support recommended that the federal government mandate that states have and use laws that impose liens that freeze the payout of lump sums until a verification can be made that the receiver of the lump sum does not owe child support.

One way to implement lottery or gambling proceeds withholding would be for the lottery distributor or the gambling house to check with the state IV-D agency in significant payoff cases to determine whether the recipient of the winnings owes past due child support. A possible threshold to adopt is that used for state or federal tax withholding before payouts are made.

Insurance settlements or policy payouts could be held by the insurance carrier or the risk-holder until they receive a response from the state IV-D agency regarding whether the beneficiary of the settlement or payout owes past due child support.

Lawsuits filed in state or federal court that result in awards, judgments or settlements could be held by either the attorney for the payor or the pro se payor until the IV-D agency responds regarding the litigants child support debt.

Issues

This type of remedy should be cost-effective because the number of requests for information should not be overwhelming and the actual withholding of the funds should not be extremely labor intensive. If the threshold were high enough, the action would result in a substantial collection which would justify the work involved. Also, this type of remedy lends itself to publicity which has the residual effect of obtaining voluntary compliance from other obligors.

For this type of remedy to be effective, a national registry of court orders would be needed because often times the payor of the lump sum will not be in the same state as the court order. For example, in Nevada and New Jersey, one would expect that the majority of people receiving large payouts would probably be residents of other states so checking with the IV-D offices in those states would not result in accurate information about most obligors. The payor of the lump sum would need to be able to contact a national registry to determine if the payee of the lump sum was a delinquent obligor. Alternatively, the payor could contact the IV-D agency in their state who could contact a national registry, but states like Nevada and New Jersey would carry an unfair burden. The important issue, however, is not so much how a national registry would be accessed, but rather the importance of having a national registry for lump sum enforcement to reach its fullest capacity.

SECTION VI: SUMMARY

Since its inception, the child support enforcement program has made great strides toward becoming an effective system. However, there are still major opportunities for improvement. Until both the nonsupporting parents and the community at large accept and acknowledge that nonpayment of child support is completely inappropriate behavior, improvements will not happen as rapidly as we would like or that our children deserve. Changing the male culture to add nonsupport to the list of mores and "wimpy" behavior is a must. We must also promote positive stories of responsible parents, giving them the attention they deserve.

We also need to acknowledge that some parents simply cannot pay. They don't have the money or the training and ability to earn a living. These parents must be given those opportunities through such programs as JOBS or Parents' Fair Share.

Additionally, public officials and managers must give the child support program the resources needed to ensure that all children know who their parents are and receive support from them. Without effective automation and training on how to use the automation to manage a caseload and without good management practices, the laws and the regulations providing the necessary enforcement remedies will never reach their true potential for effectiveness.