Remedies Under the Child Support Enforcement Amendments of 1984

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of Child Support Enforcement

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PREFACE

This manual was prepared by the Child Support Project of the American Bar Association's National Legal Resource Center for Child Advocacy and Protection. Supported by a contract from the federal Office of Child Support Enforcement, this is the third in a series of child support publications. The first two, Child Support: An Annotated Bibliography and Model Interstate Income Withholding Act With Commentary, may be obtained from the National Child Support Enforcement Reference Center, 6110 Executive Blvd., Room 820, Rockville, MD 20852.

Both this manual and the Model Act address enforcement remedies states must provide to comply with the Child Support Enforcement Amendments of 1984. These Amendments are described in another monograph of this project, which may be found at 10 Family Law Reporter 3051 (October 23, 1984).

This manual was prepared while most state legislatures were introducing bills to bring their states into compliance with the federal Amendments. Consequently, some statutory references are already dated. Practitioners should discover what specific child support laws were enacted in your state during or subsequent to the 1985 legislative session. A 50 state analysis of state legislative activity is being prepared by the National Conference of State Legislatures and may also be obtained from the Child Support Reference Center identified above. Furthermore, since this manual predates many state laws on the subject, some practical problems and their resolutions may have been overlooked. Practitioners are encouraged to contact the ABA Project to discuss these problems so that future manuals and writings may be based on the best available information. The Project can also assist state and local legal training activities address these remedies and other aspects of child support.

Finally, we would like to recognize those individuals who helped in the preparation of this report. First, we would like to collectively thank the many people at the federal Office of Child Support Enforcement who reviewed manuscripts. Their input was invaluable and assured that the information provided is consistent with federal laws and regulations. Second, special thanks is given to our two main legal researchers, Ed Gilmartin and Sharon Green-DeLa Garza. Our talented pool of word processing operators, Joy McRae, Joyce Moore, Earl Proctor and Tamela Jacobs also deserve our appreciation. Finally, we would like to pay special tribute to the many IV-D attorneys and private practitioners who graciously provided us with practical insight into the difficult task of child support enforcement.

CHAPTER 1

INTRODUCTION

In 1974 Congress enacted Title IV-D of the Social Security Act, 42 U.S.C. §§651-665. This title created a federal-state scheme for the establishment and enforcement of child support, under the auspices of the federal Office of Child Support Enforcement. States were required to establish child support enforcement plans administered by state IV-D agencies and partially funded by the federal government. Congress' motive for entering the domestic relations fields was a fiscal one. The costs to the Aid to Families with Dependent Children (AFDC) program, resulting from absent parents' failure to support their children, were staggering.

Title IV-D required states 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 minior children. Services were to be made available both to families receiving AFDC benefits and to others who asked for assistance.

While the Title IV-D program has led to significant improvements in child support collection in the past decade, census bureau surveys continue to report that some 40 percent of families theoretically entitled to support orders do not have them, and that overall noncompliance with support orders is still at epidemic proportions.

Enforcement problems in part may be traced to weaknesses in historic support collection remedies, principally contempt and wage garnishment. The former, while potentially effective, was reported underutilized. Reluctance to jail recalcitrant obligors, the belief that jailed persons could not meet support demands and the procedural difficulties inherent in this remedy resulted in its sporadic use. Wage garnishment could not be used to collect against the self-employed and has been hampered in practice by inadequate recordkeeping systems. They both were limited to enforce existing arrearages. Thus obligees faced the Sisyphean task of returning repeatedly to court to seek enforcement as new arrears amassed. Many obligees were "burned out" by the process and simply stopped trying. Support collection on an interstate basis, especially through the Uniform Reciprocal Enforcement of Support Act, proved even more laborious and haphazard. A recent study on interstate support collection found that states do not act timely on URESA petitions filed by other states and that, in general, the Act's reciprocity requirement did not translate into sufficient time, staff, and

energy to enforce foreign support orders adequately. (Center for Human Services, Interstate Child Support Collections Study, U.S. Department of Health & Human Services, 1985).

As a result of both a sizable nonsupport problem and opportunities for improved program performance, nine years after original passage of Title IV-D of the Social Security Act, Congress passed the Child Support Enforcement Amendments of 1984, Public Law 98-378, 42 U.S.C. §§ 651-667 (West Supp. 1985). Unlike the 1974 law, these amendments mandate that states enact a number of specific remedies and procedures to improve their child support enforcement programs. It also seeks to equalize the treatment of AFDC and non-AFDC families, and to strengthen interstate enforcement. The specific procedures the Amendments require states to adopt are:

1. Mandatory income withholding

2. State income tax refund offset

3. Liens to enforce support orders

4. Bonds, securities, or other guarantees to enforce support

5. Expeditied procedures to establish and enforce child support

6. No limitations on paternity actions until at least the child's 18th birthday

7. Reporting of support arrearages to consumer credit reporting agencies

8. Federal income tax offset in non-AFDC cases.

These procedures must be used to enforce support obligations owed to clients of the IV-D agency, whether AFDC recipients or not, and whether their case is intrastate or interstate.

Collectively, these procedures address several shortcomings of earlier enforcement efforts. Wage withholding, once initiated, will continue over time, collecting support obligations as they become due, thereby avoiding the ongoing need to return to court. Interstate collection will be facilitated both through the withholding system and the federal income tax refund offset program. The self-employed do not go unattended: liens, bonds, state and federal income tax refund offset, credit reporting, and possibly non-wage income withholding (withholding against commissions and income from self-employment, for example) offer viable remedies to be used with this group.

This monograph addresses several of these procedures - withholding, liens, bonds, and state and federal income tax refund offsets. Additionally, it concludes with a chapter central to any enforcement action--locating absent parents and their assets.

Aspects of the 1984 Amendments make for important reading for the private family law practitioner. Specifically, these Amendments address private concerns in two ways: first, by restructuring federal funding for child support programs to encourage equal treatment of AFDC and non-AFDC clients of IV-D agencies and opening federal tax intercepts to the latter group, attorneys may now refer their clients to a IV-D agency with greater confidence that they will be served. Second, while the Amendments' remedies are required for IV-D agencies, many states also will make them available to private litigants. Some form of income withholding must be made available to all parties, whether represented by the IV-D agency or private counsel, for example. Because of these changes this monograph is written for both public and private attorneys.

CHAPTER 2

INCOME WITHHOLDING

I. INTRODUCTION

One of the most popular "new remedies" for support enforcement is income or wage withholding. It is the central enforcement remedy mandated by the federal Child Support Enforcement Amendments of 1984 [hereinafter CSEA] and had long been recommended by the National Conference of State Legislatures as a key component of an effective child support enforcement scheme.

Essentially, income withholding statutes provide for a court or agency to order a child support obligor's employer or other source of income to withhold specified sums for child support from monies due him and to forward these sums to the income withholding agency. In turn, the withheld amounts are forwarded to the family or the public assistance agency.

Income withholding differs from the more traditional wage garnishment in that it can be used to collect current support obligations as well as arrearages, and thus insures long-term stability of support payments. Traditional wage garnishment could be used only to collect arrearages which had become a final judgment, either by operation of law or by a judicial proceeding at which the arrearage was reduced to judgment. Once arrearages were paid off, garnishment ended. Procedures, then, had to be reinitiated each time an arrearage accumulated. This newer remedy, which allows current payments to be withheld even after any arrearage is paid off, is especially tailored to insuring the regularity and continuity of child support payments.

Prior to passage of the CSEA, many states had some statutory provision for income withholding which covered current support payments. However, in many states this was available on a voluntary basis only, and, in others, was discretionary with the courts. Often this remedy appears under the name of income or wage assignment or wage attachment or income deduction. With the passage of these Amendments Congress mandated that every state provide an income withholding remedy which meets certain federal requirements.

After October 1, 1985 (or later date, depending on state legislative schedules) a conditional order for income withholding must be included in every support order issued or modified in each state. 42 U.S.C. §666(d)(8). Income withholding must then be available as a support collection remedy in these cases

whether the custodial parent becomes a client of the public IV-D agency or chooses to collect through private counsel or pro se. Id. For IV-D clients income withholding must be available to collect on older orders as well.

The CSEA specifies a detailed procedure for income withholding which must be adopted by each state and used to collect support for all clients of the IV-D agency, both AFDC recipients and non-AFDC recipients. 42 U.S.C. §666(b). The federal law does not require, however, that this specific procedure be made available in non-IV-D cases through private counsel. Many states will, no doubt, make exactly the same remedy available through both private counsel and the IV-D agency.

The federal law sets out a number of details which must be followed by state legislation in establishing the income withholding remedy for IV-D clients. The practice discussion that follows describes the CSEA requirements for withholding and variations that may be found from state to state.

II. INCOME WITHHOLDING UNDER THE CSEA

A. Definition of Income Subject to Withholding

The CSEA requires withholding from wages but specifically permits states to extend their withholding systems to reach other forms of income. 42 U.S.C. §§666(b)(1),(8). Many states already extend withholding to items such as commissions, disability benefits, annuity and retirement benefits, bonuses, and worker's compensation. Some states use broad catch-all language to define income subject to withholding, such as "earnings or other entitlements to money, without regard to source." Ill. Rev. Stat. ch. 23 §10-16.2 (4)(1984). Federal law already required states to check periodically whether those receiving unemployment compensation owed child support and, if so, to collect the support from the unemployment compensation by voluntary agreement or state law process. Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, codified at 42 U.S.C. §654(19). See discussion in Section III, B, below.

The only limits on income which may not be subject to withholding are those set by other federal laws. See, for example, Thibodeaux v. Thibodeaux, 454 So. 2d 813 (La. 1984), which held that payments under the Federal Longshoremen's and Harbor Worker's Compensation Act could not be reached to collect child support. While there has been considerable debate whether pension benefits covered by ERISA (the federal Employee Retirement Income Security Act) could be reached by state domestic relations orders, Congress has now settled the matter. The Retirement Equity Act of 1984 clarified that "qualified"

state domestic relations orders could reach pension benefits covered by ERISA. Pub. L. No. 98-397, §104, to be codified as 29 U.S.C. §1056(d). See discussion in section III, C, below. The Conference Report of the CSEA indicates that wages of federal employees and employees of the District of Columbia are reachable through these wage withholding procedures. See Conf. Rep. No. 925, 30-31, 98th Cong., 2d Sess. (1984), discussing the applicability of Social Security Act §459, 42 U.S.C. §659 to wage withholding. See discussion in Section III, A, below.

The support practitioner should carefully check the local statute to determine the applicable definition of income subject to withholding and should carefully interview the client to determine possible sources of covered income. See Chapter 7. These could include, for example:

- wages
- salary
- commissions
- bonuses
- payments to an independent contractor
- disability benefits
- pension benefits
- annuities
- worker's compensation
- awards in civil suits
- interest, dividends, rents, royalties
- insurance proceeds
- trust income
- partnership profits

Where the controlling statute uses general language to define affected income, such as "earnings or other entitlements to money," the attorney should argue for the broadest definition possible. Ample federal and state laws and court decisions support a broad, liberal construction of withholding laws. Congress has clearly elevated support collection over other type of debts, not only in the CSEA but in other enactments, including the above-mentioned Retirement Equity Act and the bankruptcy code (support is a non-dischargeable debt). At the court level, perhaps the strongest evidence of the "preferred" status of support collection is a series of recent cases which subject payments under spendthrift trusts to support withholding. See discussion in Section III, D, below.

B. Conditional Order of Income Withholding in Every Support Order

The CSEA requires that commencing October 1, 1985 (or later deadline under certain exceptions) every support order issued or modified in a state include: "provision for withholding from

wages, in order to assure that withholding as a means of collecting child support is available if arrearages occur without necessity of filing application for services under this part." 42 U.S.C. §666(a)(8).

This means that practitioners, judges and those responsible for development of court forms should be sure that the appropriate conditional order of withholding appears in all cases in which payment of support is ordered (whether initially or by modification), including:

- divorce
- paternity
- separate maintenance
- support
- civil protection
- guardianship
- foster care

It may be that this "order" or "provision for withholding" simply alerts the obligor to what may happen if he fails to make the payments required by the order, rather than being a withholding order which itself may be served on the employer. For example, support orders might say:

> if the [defendant] becomes delinquent in the amount of _____ or more there shall be withheld from his wages or other income, after following the procedures specified in section(s) _____, amounts to pay current support and arrearages in accordance with section _____.

Then, when a sufficient arrearage accumulates the regular withholding procedure would be followed, and an order for withholding served on the employer specifying the exact amount of current support and arrearage then due.

Some states, prior to passage of the CSEA, issued a separate withholding order directed to the employer at the time the original support order was issued, but stayed its service until a delinquency occurred. Illinois, for example, has followed such a procedure. The difficulty is that the amount of a future delinquency sometimes cannot be known at the time of the original support order. Therefore, that original withholding order must incorporate by reference some additional document which is prepared at a later time indicating the arrearage, such as a notice of delinquency or a determination of the arrearages.

Whatever format is used, the state must make income withholding available in all IV-D cases regardless of whether or not a conditional provision for withholding was included in an original or modified support order. 45 C.F.R. §303.100(h).

States may choose to make withholding available in the same manner in non-IV-D cases without conditional orders of wage withholding or could require that a support order be modified to include such an order before withholding may be commenced. (Note: there could be an equal protection problem in treating IV-D and non-IV-D cases differently, however.) A state could choose to simply provide for withholding in all cases (or all IV-D cases) whether or not they had conditional withholding orders.

Questions have arisen whether there is a constitutional problem in making the withholding remedy available to enforce already existing orders. There appears to be no problem in adding such a remedy.

Procedural due process does not require that prior notice of possible withholding be given at the time the order was originally entered. (Due process may, however, require notice to the obligor at the time withholding is to be commenced.) Many other remedies, from contempt to garnishment, may be imposed to enforce a judgment without prior notice at the time the order was originally entered.

The federal Constitution does not contain any specific prohibition against laws which are retroactive or retrospective in their effect. In general, laws with a retroactive effect are valid unless they violate some other constitutional provision such as due process, impairment of contractural obligations or ex post facto laws (applicable in criminal cases only). A law with retroactive effect may also be held invalid if it impairs "vested rights" which are protected under the due process clause of the Fourteenth Amendment. See discussion in 16a Am. Jur. 2d, Constitutional Law §§662-664 (1979).

A considerable body of law exists which holds that laws which have retroactive effect with respect to remedies and procedural matters, as opposed to "vested rights," are valid.

> The state has complete control over the remedies which it offers to suitors in its courts, even to the point of making them applicable to rights or equities already in existence.... Statutes which do not create, enlarge, diminish, or destroy contractual or vested rights, but relate only to remedies

> or modes of procedure, are not within the general rule against retrospective operation. In other words, statutes effecting changes in civil procedure or remedy may have valid retrospective application.... A statute which merely provides a new remedy, enlarges an existing remedy, or substitutes a remedy is not unconstitutionally retrospective, or violatative of due process (which does not require any particular form of process).... [Footnotes omitted/emphasis added.]

16a Am. Jur. 2d Constitutional Law §675 (1979). This rule approving the retroactive effect of statutes creating new remedies or procedural provisions is generally valid even under state constitutions which prohibit retroactive legislation in general.

It has been held that statutes authorizing new "supplementary proceedings," such as garnishment of wages, are constitutional even when they are made applicable to existing judgments. See 30 Am. Jur. 2d Executions §780 (1967). For example, in the case of Cavendar v Hewitt, 145 Tenn. 471, 239 S.W. 767 (1922), Annot. 22A. L.R. 75 (1923), the Supreme Court of Tennessee addressed the validity of a statute which made it possible to garnish the wages of municipal and county employees. A Nashville policeman claimed that it would be unconstitutional under the state constitution, which specifically prohibited retrospective laws, to apply this statute to allow garnishment of his wages to collect on judgments which were rendered prior to passage of the statute. The court upheld the validity of this application of the statute:

> This law does not undertake to deal with any right existing in a policeman, but merely deals with a matter of remedy for the enforcement of the right of a judgment creditor by process of garnishment against the municipal officer or employee. An additional new remedy is afforded by the act for the enforcement of the judgment creditor's rights. It nowhere impairs any contractural obligation. He has no vested right in a public policy.

Id. at 769. See also Fisher v. Hervey, 6 Colo. 16 (1881) (upholding validity of statute extending the scope of garnishment to authorize issuance of garnishment with respect to judgment rendered before passage of the statute); See also Laird v. Carton, 196 N.Y. 169, 89 N.E. 822 (1909) (execution to reach

wages due a judgment debtor extended to enforce any money judgment; valid as applied to judgments obtained before enactment); Compton v. Williams, 248 A.D. 545, 290 N.Y.S. 984 (1936) (statute authorizing an order directing a judgment debtor to make payments on the judgment out of his income held valid as applied to judgments existing prior to its effective date).

It should also be noted that marriage is not considered a contract within the meaning of prohibition against legislation impairing contracts under the federal constitution. Maynard v. Hill, 125 U.S. 190, 210 (1888). Courts also have shown a general willingness to uphold some retroactive effect of other legislation in the domestic area in recent years. For example, courts have upheld statutes applying new rules for equitable distribution at divorce to property which was acquired prior to passage of the legislation, see, e.g., Matter of Marriage of Bouquet, 62 Cal. 2d 558, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976); Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897 43 Cal. Rptr. 97 (1965); Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); Fournier v. Fournier, 376 A.2d 100 (Me. 1976); Corder v. Corder, 546 S.W. 2d 798 (Mo. 1977); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496 (1974); Valladares v. Valladares, 80 A.D. 2d 244, 438 N.Y.S.2d 810 1981), and have approved the constitutionality of statutes enlarging the statute of limitations in paternity cases so as to allow a cause of action for paternity which would have been barred by the prior statute of limitations. See, e.g., State v. Preston, 119 N.H. 877, 409 A.2d 797, (1979); Vigil v. Tafoya, 600 P.2d 721 (Wyo. 1979).

Although not constitutionally required, Congress has chosen to require such notice prospectively in all orders entered after October 1, 1985. This is sound policy as obligors will know the consequences of not paying and, thus, voluntary payments may be increased.

Although there is no such federal requirement, states may, if they choose, require a one time notice to the last known address of all support obligors under "old" orders warning of the possibility that withholding could be commenced in the event of support delinquency. Or a state could require that in each non-IV-D case in which there is no provision for withholding that a motion to modify the original order to provide for withholding be used. In any event, whatever notice procedural due process requires prior to withholding is met by the advance "notice of proposed withholding" which the CSEA requires to be sent (after an arrearage occurs) whether or not there is a conditional order of withholding in existence. (Some states were allowed to "grandfather in" systems which do not provide for prior notice of withholding after an arrearage occurs. 42 U.S.C. §666(b)(4)(B).)

C. Timing

One of the main purposes of the CSEA was to insure speedy enforcement of delinquent support obligations. In keeping with that objective Congress established tight deadlines for the commencement of the withholding process. On the day the triggering delinquency occurs, the withholding process must be commenced by sending a notice of proposed withholding to the delinquent obligor, 42 U.S.C. §666(b)(3), 45 C.F.R. §303.100(b)(1), or, in states which "grandfathered in" a system with no advance notice, by sending the notice of withholding to the employer, 45 C.F.R. §303.100(b)(2)(ii). Of necessity, this requires a record-keeping system capable of indicating when a payment is not made and a procedure for generating and mailing or commencing service of a notice the same day. This, in practice, will be difficult if the notice is not sent by the agency that keeps track of payments. For example, it would be cumbersome to require that a IV-D agency which tracks payments must file court papers and have the court issue the notice on the day the delinquency occurs or vice versa.

If the same system is made available in non-IV-D cases there must be a mechanism for pro se parties and private counsel to cause notice to be sent promptly - whether on application to the court or agency or by allowing the party to send the appropriate notice and filing a certificate of service with the court.

At the other end of the proceeding, the CSEA specifies that in contested IV-D withholding cases, notice of the withholding decision must be sent to the obligor within 45 days of the date the notice of proposed withholding was sent to the obligor. 42 U.S.C. §666(b)(4)(A). States are free to set their own "intermediate" deadlines for how long the obligor has to note a contest to withholding by filing an opposition, a motion to quash, a motion to stay, or a request for a hearing; how much notice must be given to both parties of the date of hearing; and how soon a hearing must be held. Practitioners should consult state law on these time limits.

If no contest is filed by the deadline for contesting withholding, withholding may be commenced immediately by sending the required notice to the employer. 45 C.F.R. §303.100(d)(2). If a contest is filed, any resulting notice or order for withholding must be sent to the employer within 45 days of the date advance notice was sent to the obligor. 45 C.F.R. §303.100(c) (4). Counsel should determine the exact deadline which has been set by state law.

Even in contested cases, states may speed the process with shorter time limits and by providing that a case may proceed as an uncontested case if the dispute is resolved informally.

Once the notice has been sent to the employer, the employer must begin withholding no later than the first pay period that occurs after 14 days following the date the notice was mailed. 45 C.F.R. §303.100(d)(1)(x). This gives the employer sufficient time to change pay records in order to accomplish the withholding. The employer is not, however, required to vary pay cycles in order to accommodate individual orders. 42 U.S.C. §666(b)(6)(B). The employer must send the withheld amounts to the appropriate agency within 10 days of the date the obligor is paid. 45 C.F.R. §303.100(d)(ii). The federal law sets no time limits by which agency must forward the payments to the custodial parent. States may set their own time limits, however, and counsel may wish to determine whether such a time limit has been imposed.

D. Arrearage Triggering Withholding

Prior to passage of the CSEA, many states which provided income or wage withholding either placed the burden on custodial parents to prove good cause before wage withholding could be ordered, or made the issuance of withholding orders discretionary with the court. Both of these requirements led to uncertainty about whether pursuing a withholding order would be fruitful; required a hearing in every case, using significant amounts of judicial time; and caused delay in the entry of withholding orders while waiting for a court date. Some states reported a passage of as much as six months, routinely, before a hearing was held and a withholding order entered.

Other states had begun to develop withholding systems under which a custodial parent was entitled to a withholding order on a showing of an arrearage of a certain number of days in payment, or automatically and immediately on entry of any support order. See, e.g., Wis. Stat. §§767.265(1),(2m),(3),(5) (Supp. 1984-1985).

Congress made a choice in the CSEA to require states to develop withholding statutes which do not require a showing of good cause and do not require a hearing except when a contest is noted. The new requirement is closer to the practice in those states which had a statutory framework defining the amount or duration of arrears entitling the custodian to withholding. Under the CSEA, IV-D clients must be entitled to withholding on the earliest of:

(A) The date on which the payments which the absent parent has failed to make under such order are at least equal to the support payable for one month,

(B) The date as of which the absent parent requests that such withholding begin, or

(C) Such earlier date as the state may select.

42 U.S.C. §666(b)(3).

No additional requirement may be imposed by the state, nor may the court or agency be allowed to exercise discretion in issuing withholding orders if the basic federal eligibility criteria are met. States are free, however, under the federal law, to set an earlier time for entitlement to withholding, including requiring automatic withholding in every support case immediately upon the entry of a support order.

Care must be taken, however, by both legislative drafters and practitioners because the federal requirement is stated in terms of an amount of money in arrears not a length of time in arrears. If a monthly support payment is missed by a single day, or the second missed biweekly payment is a few days late, the amount in arrears could equal payment for one month even though the payment is not twenty days late, for example. Similarly, focusing on the amount payable resolves the issue of how to treat partial payments. When the accumulated arrears on partial payments total a month's payment, withholding procedures must begin, regardless of whether or not any single partial payment was late.

It is important for counsel representing obligors to make sure their clients understand exactly what will lead to withholding, such as any delay on a monthly payment. It also is desirable for courts or IV-D agencies to develop brochures which can be provided to obligors (and obligees) and their attorneys with support orders explaining how the withholding system works and what will trigger it.

E. Commencement of Withholding Process

In states which are required to send advance notice of withholding (the large majority), the withholding process outlined in the federal law commences with the sending of notice to the absent parent, as described in the following section. However, the person or agency which sends the notice must have some basis for doing so. That basis will likely be one of three things: 1) the payment records kept by the agency or court issuing the notice showing the amount of arrearages; 2) a certified copy of payment records maintained by another agency (or court) showing the amount of arrearages; or 3) an affidavit of the custodial parent stating the arrearages. These three techniques will remain constant whether the custodial parent is already a IV-D client, applies for IV-D services after an arrearage accrues, or seeks withholding through private counsel or pro se.

1. IV-D Clients

The withholding agency must commence withholding procedures for all current IV-D clients the day a triggering arrearage occurs. The agency may not require a further application from the IV-D client (whether AFDC or non-AFDC) before providing this specific service. 42 U.S.C. §666(b)(2),(3). It is difficult to see how this could possibly be done without either the withholding agency or some other agency monitoring support payments, in all likelihood by receiving and disbursing them, although this is not required by the CSEA. A system for tracking and monitoring payments made by withholding must be set up, 42 U.S.C. §666(b)(5). Thus, states may well choose to use that same system to track payments made on behalf of IV-D clients before withholding is established.

If the same agency that keeps the payment record also sends out the "notice of proposed withholding" to the absent parent, this may be done on the basis of the agency's own records. If another agency sends the notice, it may be necessary to provide a certified copy of the payment record. So, for example, it may be necessary to include a copy of the agency's payment record in the court file if the court sends out the notice of proposed withholding.

If a period of time existed during which arrearages accumulated but no agency payment records were kept -- for example, if arrearages accumulated before the client became a IV-D client -- an affidavit of the client would be necessary to establish the arrearages for that period of time. It is probably simplest and most expeditious for the agency to obtain an affidavit of arrearages from all new IV-D clients who were not covered by a tracking system at the time of initial intake. This will obviate the need to get the client to come in a second time to execute such an affidavit at the time withholding is to be commenced.

2. Clients applying for IV-D services when already eligible for withholding

Some of those who apply for IV-D services will already be eligible for withholding. Depending on the state and on their own choice of whether payments were to be made through a public agency, there may or may not already be a payment record. If there is not, an affidavit of arrearages should be obtained and the client advised to notify the agency at once if any further direct payments are received.

3. Clients of private counsel and those appearing pro se

If the same or a similar withholding system is made available through private counsel, the same techniques may be

used. Private clients, too, may have availed themselves of a support clearinghouse to keep track of payments. If so, a copy of the payment record is also likely to be appropriate in private cases. If none is available, an affidavit of arrearages will likely be the appropriate documentation.

4. Need for affidavit in addition to copy of payment record to show no direct or in-kind payments

When necessary, an affidavit stating that the client received no in-kind or direct payments or stating their amount or value may be used to supplement the copy of an official payment record. The status of direct and in-kind payments varies from state-to-state. Some states provide by statute that only payments made through the central clearinghouse or court registry will be counted. See, e.g., Ore. Rev Stat. §23.765(6)(1980). Others have case law holding the same thing. Case law in other states requires that credit be given for payments made directly. Where payments must be made through the court, no supplementary affidavit is required. Where payments will be credited if made directly, a supplementary affidavit may be required.

G. Procedure for Withholding; Procedural Protections for the Obligor

1. Mandates of the Federal Act

In IV-D cases, the arrearage is sufficient to trigger withholding, the state must send an advance notice of the proposed withholding to the obligor. However, states which already had an income withholding system in place on August 16, 1984, but did not require advance notice to the obligor, may continue their former system so long as the procedures used "meet the procedural due process requirements of state law." 42 U.S.C. §666(b)(4)(B).

Under the CSEA, if the obligor contests the proposed withholding, there must be some mechanism for resolving the dispute and determining whether withholding will occur. The federal act states, generally, that withholding must be carried out "in full compliance with all procedural due process requirements of the state" but does not specify what those elements might be. It may be assumed that these procedural protections must conform with federal constitutional requirements as well.

It is important to note that procedures for sending notice and contesting withholding must be developed even in states which use automatic, immediate withholding because there will be cases in which withholding cannot or does not begin immediately upon reaching the triggering arrearage amount. These

will include old cases which existed prior to the new law in which an arrearage already exists; new cases in which the obligor is unemployed or self-employed at the time of trial, but becomes employed later after an arrearages accumulates; and new interstate cases in which an opportunity to contest must be offered with respect to accrued arrearages. On the latter point see 45 C.F.R. §303.100(g)(5).

2. Notice

The federal regulations implementing the CSEA provide that in IV-D cases, the advance notice must inform obligor of the following:

> (i) Of the amount of overdue support that is owed and the amount of wages that will be withheld;
>
> (ii) That the provision for withholding applies to any current employer or period of employment;
>
> (iii) Of the procedures available for contesting the withholding and that the only basis for contesting the withholding is a mistake of fact;
>
> (iv) Of the period within which the absent parent must contact the State in order to contest the withholding and that failure to contact the state within the specified time limit will result in the State notifying the employer to begin withholding; and
>
> (v) Of the actions the State will take if the individual contests the withholding....

45 CFR §303.100(b)(1).

While federal regulations require only that the notice state that the withholding may be contested on the grounds of mistake of fact, states may also wish to inform obligors of their right to seek a modification of the support amount in a separate action and tell them how to do so. Some states have developed simple forms for pro se use for this purpose. In addition, states may wish, in fairness to obligors, to provide them with a simple pro se form to use to note a contest and state the reasons for disagreement. It may also be desirable for the notice to inform the obligor that he or she should expect to be able to prove the defense with receipts, cancelled checks, etc.

Finally, agencies may wish to notify the obligor that in addition to formally noting a contest, he or she may call the agency - or opposing counsel in a private case - to attempt to

resolve the dispute informally prior to a formal proceeding and give a telephone number and address for doing so.

A new copy of an informational brochure on wage withholding prepared by a local agency, court or bar association may be provided along with the notice of proposed withholding.

3. Service of Notice

There are no federal regulations prescribing the method of service of the notice of withholding. Counsel or agency staff will have to determine the methods that are available under state law. Some states provide for notice by mail to the last known address. This is generally coupled with a requirement that all support obligors keep the court or agency informed of their current address.

Some states provide for service by mail at the employment address. Some practitioners report great success with this method of service, as counsel or the agency will generally know who the employer is, if, indeed, wage withholding is contemplated. Practitioners in some states report, however, that problems fairly often arise when the obligor reports not receiving the notice while the employer reports that the notice was delivered. Question then arises whether the issue of the amount of arrearages must be reopened for resolution after withholding has begun.

State statutes should also provide a method for notice to obligors who reside out of state as often their wages can be reached without an interstate enforcement action when their employer may be reached in state. This is the case with many "national" corporations. See, e.g., Champion International Corp. v. Ayares 587 F. Supp. 1274 (D. Conn. 1984).

4. Notice to Obligee

The federal law and regulations do not specifically require notice to the obligee in the event of any contest to the withholding. However, because it is the obligee's rights which are being resolved, the obligee, too, should be provided with notice prior to any hearing or meeting with the obligor. This will pose no difficulty for a private litigant who, presumably, will be notified of the date of any hearing or meeting by her attorney. However, when the obligee is represented by the IV-D agency, care must be taken to inform the client of the hearing date. In many cases, the client's presence will be practically important since she or he will have information crucial to the resolution of the issues--particularly when the matters in question are such things as direct or in-kind payments, emancipation of a minor child, or an agreement modifying the support amount due.

5. Opportunity to Contest Withholding

The nature of the procedure for contesting withholding is not spelled out in the federal statute. Further, it is not clear that a pre-withholding opportunity for a "hearing" is required by the due process clause of the U.S. Constitution. However, despite the fact that the opportunity to contest may not be constitutionally required to be made available before withholding commences, it is required by the CSEA except in those state whose preexisting procedures have been grandfathered in. Therefore, the question arises as to the nature of the "hearing" or "opportunity to contest" which must be provided. The final regulations do not answer this question.

In general, the nature of procedural protections which are required by due process must be based on (1) "The private interest that will be affected by the official action;" (2) "The risk of erroneous deprivation of such interest through the procedures used;" and (3) "The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews v. Eldridge, 424 U.S. 319, 335 (1976). These standards do not always require a full evidentiary hearing. In one child support tax intercept case, for example, a federal court held that there need not be a "plenary adjudicative hearing." Marcello v. Regan, 574 F. Supp. 586 (D.R.I. 1983).

Taken together, the tax intercept cases suggest that due process may require an objective decision maker (who may work for the IV-D agency), an opportunity for a personal appearance by the obligor and an opportunity for the obligor to present documentary evidence. See, e.g., Nelson v. Regan 560 F. Supp. 1101 (D. Conn. 1983); Marcello v. Regan, 574 F. Supp. 586 (D. R.I. 1983); But see, Keeney v. Sec'y of Treasury, No. 83-2427 (C.D. Cal. Oct. 13, 1983) which approved a tax intercept process with no prior hearing.

Although the constitutional requirements for a hearing on withholding contests may be quite limited, good policy may suggest that it is wise to make a full evidentiary hearing available. For one thing, experience in some jurisdictions suggests that few obligors will seek a hearing. Therefore, full evidentiary hearings should not be a burden on the court or agency. In addition, in many cases, it may be to the advantage of the obligee and agency as well as the obligor to have provision for a full evidentiary hearing. The obligee may wish to test the obligor's credibility and veracity through sworn testimony and cross-examination. The agency or obligee may wish to be able to subpoena documents. Clearly, an opportunity for an informal meeting and consent resolution of the disputes is also appropriate and may be provided.

As a general rule, of course, it is sufficient for counsel for obligors to be aware of whatever opportunity for a "hearing" or proceeding is available under state law and to take advantage of it on the client's behalf. Requesting the hearing may merely entail the return of a form or it may require the filing of a motion or a written opposition. The federal law generally requires states to develop expedited administrative or quasi - judicial processes to be used for withholding as well as other enforcement procedures. 42 U.S.C. §666(a)(2).

As described above, the proceedure for contesting wage withholding may be informal in many states and counsel may wish to use affidavits or other documentary evidence in lieu of live testimony in some instances. Counsel also may wish to request that a record be made where this is not ordinarily done in order to preserve the possibility of an appeal.

6. Defenses

The CSEA limits defenses to withholding to "mistakes of fact." 42 U.S.C. §666(b)(4)(A). The House Report describes this provision:

> Such mistakes of fact would include, for example, errors in the amount of current support, errors in the amount of arrearage that had accrued, or mistaken identity of the alleged obligor. This provision is not intended to waive the withholding requirement if the obligor paid the past due support after receiving notice that withholding was being implemented. The obligor could not contest the proposed withholding on other grounds such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation. These issues are important, but nonpayment of support should not be used to obtain relief with regard to these problems. They should be pursued independently thorough separate legal actions.

H. Rep. No. 98-527, 98th Cong., 1st Sess. 33 (1983). See also 45 C.F.R. §303.100.

Clearly "errors in the amount of arrearage that had accrued" includes arithmetic errors, failures to record payments and the like. Depending on state law, "errors in the amount of arrearage that had accrued" may include additional matters which automatically affect the amount of arrearage due by operation of law or by interpretation of the original order. These matters

could include, depending on state law or wording of the original order, direct payment, accord and satisfaction, statute of limitations barring collection of a portion of the arrearage, remarriage of a former spouse, death or emancipation of a child or a child attaining the age of majority.

7. Notice of Decision

Once the decision is made - and it must be made within 45 days from the day advance notice is sent to the obligor - the obligor must be sent a notice of the decision. It must include statements covering:

-- whether or not withholding will begin

-- when it will begin

-- those matters required to be covered in the employers notice (See Section H. 1. below).

42 U.S.C. §666(b)(4)(A) and (6)(A); 45 C.F.R. §303.100((c)(3),(d).

The simplest procedure is to prepare the notice to the employer at the same time, attach a copy to the notice of decision to be sent to the obligor, and incorporate it by reference. This can be done with pre-printed forms.

8. No Contest

When no contest is noted, the withholding agency must immediately commence withholding by sending the notice of withholding to the employer. 45 C.F.R. § 303.100(d)(2). It is to be hoped that each state will develop a highly routine, and possibly computerized system for sending out notices at once when no notice of contest is filed by the deadline for noting a contest. While the notice of decision described in the prior section is not mandated by federal law to be sent to obligors who do not contest withholding, it is likely that most states will require that the same type of notice be sent in uncontested cases because all obligors need information on limits on withholding, employer fees, protections against employer retaliation and the like. Private counsel who have access to this system in their states must determine whether they or the court or agency must send this notice to the obligor.

9. Informal Resolution

Statutory procedure or local practice may provide for an informal meeting between IV-D agency staff and the obligor or his or her attorney. It is desirable to have some mechanism for entering a consent order in such cases without the necessity of a formal hearing.

H. Employer Provisions

1. Notice or Order to Employers

Withholding itself commences by sending an order or notice to the employer or payor directing that an amount be withheld from the obligor's wages or other income and forwarded to the appropriate agency. 42 U.S.C. §666(b)(6)(A)(i). According to the federal regulations the notice must include the following:

> (i) The amount to be withheld from the absent parent's wages and a statement that the amount actually withheld for support and other purposes, including the fee specified under paragraph(d)(1) (iii) of this section, may not be in excess of the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. 1673(b));
>
> (ii) That the employer must send the amount to the State with 10 days of the date the absent parent is paid unless the State directs that payment be made to another individual or entity.
>
> (iii) That, in addition to the amount withheld under paragraph (d)(1)(i) of this section, the employer may deduct a fee established by the State for administrative costs incurred for each withholding, if the State permits a fee to be deducted.
>
> (iv) That withholding is binding upon the employer until further notice by the State;
>
> "(v) That the employer is subject to a fine to be determined under State law for discharging an absent parent from employment, refusing to employ, or taking disciplinary action against any absent parent because of the withholding;
>
> (vi) That if the employer fails to withhold wages in accordance with the provisions of the notice, the employer is liable for the accumulated amount the employer should have withheld from the absent parent's wages;

(vii) That the withholding under this section shall have priority over any other legal process under State law against the same wages;

(viii) That the employer may combine withheld amounts from absent parents wages in a single payment to each appropriate agency requesting withholding and separately identify the portion of the single payment which is attributable to each individual absent parent;

(ix) That the employer must implement withholding no later than the first pay period that occurs after 14 days following the date the notice was mailed; and

(x) That the employer must notify the State promptly when the absent parent terminates employment and provide the absent parent's last known address and the name and address of the absent parent's new employer, if known.

45 C.F.R. §303.100(d)(1).

The statute provides that the notice to the employer is to contain only the information necessary for the employer to comply with the withholding order. 42 U.S.C. § 666(b)(6)(A)(ii). This should include the information that it is child support that is being collected so that priority can be given to the withholding. Information on the numbers, names and ages of the children, or names of the mother(s), however, should not be included as they are not relevant to the employer.

2. Amount to be Withheld

The CSEA provides that the amount withheld from the obligor's wages must be equal to the current support obligation plus the employer's fee, so long as that amount is within the limits of the Consumer Credit Protection Act (hereinafter CCPA) §303(b), 42 U.S.C. §666(b)(1). If the current support payment and employer's fee do not equal the CCPA limit, some additional amount must be withheld toward the arrearage. The combined total payment for current support, employer's fee and arrearage may not exceed CCPA limits.

The general limits of the CCPA are 50 percent of disposable earnings in the case of an absent parent who has a second family and 60 percent in the case of an absent parent

without a second family. These limits increase to 55 percent and 65 percent respectively if there are arrearages which arose prior to the 12-week period which ends with the begining of the pay period involved. 15 U.S.C. §1673(b). The Consumer Credit Protection Act defines disposable earnings as that part of earnings remaining after the deduction of any amounts required by law to be withheld.

Under the CSEA a state need not withhold up to the CCPA maximum to collect arrearages. 42 U.S.C. §666(b)(1). States may set lower limits with respect to arrearages. At present, federal law is somewhat ambiguous as to whether states must withhold up to the full CCPA limit to collect the current support ordered if it reaches or exceeds that limit or whether states may set a lower limit on withholding with respect to current support.

Read literally, the CSEA suggests that states may not set a lower limit with respect to withholding to collect current support and must collect up to CCPA limits if the support award is that high. The Act states that "so much parent's wages ... must be withheld ... as is necessary to comply with the order and provide for payment of any fee to the employer ... up to the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act...." 42 U.S.C. §666(b)(1). [Emphasis added]. This suggests that the full amount must be withheld. The Act also specifically states that "the State need not withhold up to the maximum amount permitted under such section in order to satisfy arrearages." Id. No such statement is made with respect to the current order, also suggesting, by the distinction, that the maximum must be withheld if needed to pay current support.

Confusion on the point arises because Section 307 of the CCPA, 15 U.S.C. §1677, permits states to set lower limits than those specified by §303(b). The question is whether Congress intended to incorporate by reference only §303(b) of the CCPA or intended also to incorporate §307 which is not referred to in §303(b) or the CSEA. At the present time the issue is still to be resolved.

Another concern is the relationship between state withholding limits and CCPA limits. Counsel should note that CCPA limits are couched in terms of "disposable income" after all legally required withholdings, while state limits may be stated in terms of gross income. For example, in the District of Columbia 50% of gross income may be garnished to collect child support arrears. Where the CCPA limit results in a lower amount to be withheld, it must prevail.

Beyond the question of what limits apply, significant issues arise for policy makers, practitioners, and employers in developing and applying guidelines for how much must be withheld. This is particularly an issue with respect to calculation of the amount which must be withheld toward arrearages. Several factors are of concern:

-- It must be possible to issue the order on the basis of a straightforward calculation or chart specified by statute or regulation without requiring the exercise of discretion. It is not permissible under the CSEA to require that a hearing be held in every case to determine the amount to be withheld toward arrearages.

-- The order should be phrased in terms that can be applied to varying income levels both because the child support agency or court will not know the exact amount of the obligor's wages or other income at the time the order is issued and because wages may vary from week-to-week and month-to-month.

-- The calculation required by the order should be simple enough that it is reasonable to expect the employer or a court or agency clerk to perform it.

-- Consumer Credit Protection Act limits must apply. If the maximum CCPA limit applies to the collecton of arrearages, the employer must be informed when the arrearages arose in order to know whether the higher or lower CCPA limits apply.

Several legislative approaches are possible, taking these factors into account. For example, a state might:

(1) Require that a flat percentage of income or percentage of arrearage be withheld toward arrearages on top of current support (if this does not exceed CCPA limits). The calculation will be done by the employer.

(2) Provide that the person issuing the withholding order divides the total amount of arrearages by a certain number of weeks or months to determine the dollar amount that should be withheld each time and require in the order that the employer withhold that dollar amount toward arrearages in addition to current support (if this does not exceed CCPA limits). The number of months may be varied by the amount of arrearages. An obvious difficulty, however, is that one would prefer to make a high income obligor pay off a modest arrearage quickly .

(3) Issue a table which can be more refined and which can allow low income obligors to keep a larger percentage of their income toward subsistence. The chart would be based either on a percentage or a flat dollar amount. For example, a portion of a chart might read:

If the Monthly Disposable Income Is	Arrearage On Order Is $0-200	$200-400	$400-600
$ 0 - $450	$20/mo.	$20/mo.	$40/mo.
$450 - $750	$60/mo.	$70/mo.	$80/mo.

or

If the Monthly Disposable Income Is	Arrearage On Order Is $0-200	$200-400	$400-600
$ 0 - $450	5% of wages	5% of wages	7% of wages
$450 - $750	10% of wages	12% of wages	13% of wages

The chart approach makes it possible to find the correct amount easily and allows for variation in amounts based on both the amount of the arrearage and the income of the obligor.

States must also decide whether to hold the employer responsible for calculating when an arrearage is paid off or whether to require the employer to keep withholding at a steady rate until notified by the child support agency or court to modify the amount withheld. In the latter case, it is up to the withholding agency to determine when the arrearage is paid off through its tracking and monitoring system and to notify the employer to reduce the amount withheld.

A problem occurs when the remaining arrearage is less than twelve weeks old and the maximum that can be withheld under the CCPA is reduced from 65% and 55% to 60% and 50%. The withholding agency must notify the employer when to reduce the amount of withholding or the employer must be notified of the amount of "old" arrearages so the employer will know when to reduce withholding. Obviously, it is desirable to keep the burden on the employer to a minimum.

3. Liability of Employer

State law must require the employer to withhold the amounts stated in the withholding order or notice. 42 U.S.C. §666(b)(6)(A)(i). State law also must make the employer liable

for any amount which is supposed to be withheld, but is not, after receipt of the withholding order or notice. 42 U.S.C. §666(b)(6)(C); 45 C.F.R. §303.100(d)(1)(vi). State law provisions clarifying that the employer will not be liable to the employee for amounts properly withheld and forwarded to the appropriate agency are also desirable.

4. Fees

The state may establish a withholding fee to cover the employer's administrative costs. 42 U.S.C. §666(b)(6)(A)(i); 45 C.F.R. §303.100(d)(1)(iii). This fee is to be withheld by the employer along with amounts for current and past due support. 42 U.S.C. §666(b)(1). The fee may be retained by the employer while the support amounts are forwarded to the appropriate agency. 42 U.S.C. §666(b)(6)(A)(i).

Typically, in states which provide for employer's fees, the amount is $1 to $2 per pay period. Many employers in these states do not take the fee they are entitled to.

5. Payment

Employers may not be required to vary their normal pay and disbursement cycles in order to comply with the withholding order. 42 U.S.C. §666(b)(6)(C). If the order calls for withholding of a weekly amount of support and the employer pays biweekly, payments may be withheld on a biweekly basis.

The employer may combine all withheld amounts and write a single check to "each appropriate agency." 42 U.S.C. §666(b)(6)(B); 45 C.F.R. §303.100(d)(1)(viii). The single check must be accompanied by a list or computer printout showing how much of the total is attributable to each employee. Id. There may be one state agency or there may be several. In the latter case, the employer could have to send a check to several different places.

The state may direct the employer to send the payment to another "individual or entity." 45 C.F.R. §303.100(d)(ii). The "entity" presumably refers to another institution such as a bank which is authorized to collect and disburse support under 42 U.S.C. §666(b)(5) and (6)(A)(i).

The employer must commence withholding "no later than the first pay period that occurs after 14 days following the date the notice was mailed." 45 C.F.R. §303.100(d)(1)(x). The amount withheld must be sent to the state ten days from the day the absent parent is paid. 45 C.F.R. §303.100(d)(1)(ii).

Questions will arise as to the proper treatment of withholding orders when the pay cycle and support amount do not coincide. Should the full monthly support amount be taken out of the first bi-weekly payment and none out of the second or should it be divided evenly? Should a monthly support amount be taken out in full in each calendar month or should the year's total (12 x monthly payment) be divided by 26 and a proportionate amount taken out at each bi-weekly pay period, even though in some months that means more than the full monthly amount will be withheld and in others less? It would be of assistance for the state to issue guidance to employers on the resolution of these issues.

6. Priority of Conflicting Support Orders; Priority Over Other kinds of Orders

Employers may receive more than one support order with respect to a particular employee. This may happen when the employee has more than one family entitled to receive support or when arrearages are owed to a state to reimburse for AFDC payments but current support is owed to the family.

If there is more than one notice of withholding against a single obligor, the state, rather than the employer, must allocate the amounts available for withholding under the CCPA. 45 C.F.R. §303.100(a)(6). Preference must be given to payment of the current support obligation. Id. Thus, for example, states may not allocate payments towards arrearages to reimburse past AFDC costs rather than paying current support to the family which has gone off AFDC. Otherwise, the federal regulations do not spell out how the states must allocate support payments. States, by legislation, regulation, or court rule will have to resolve whether to allocate on a first come, first served basis; to prorate by number of children; to prorate by size of the several support orders or to use some other method of allocation. States also must issue guidance to employers on how to proceed when two or more orders are received.

The CSEA gives priority to support collections over other attempts to collect from an employee's wages under state law. 42 U.S.C. §666(b)(7). Thus, child support collection must take precedence over garnishment for an ordinary consumer debt or for state tax collections, for example. States are expected to pass statutes to codify this priority.

7. Protections Against Discharge or Other Disciplinary Action Against Employee with Withholding Order

The CSEA requires that states establish a fine to be imposed against any employer who discharges, refuses to employ, or takes disciplinary action against an employee because of the

wage withholding order. 42 U.S.C. §666(b)(6)(D). A number of states that already have some form of withholding provide for a private right of action by the employee against the employer in such cases, allowing for reinstatement and recovery of back pay.

In addition, many states have established the tort of wrongful discharge in recent years by case law. Under this theory, an employee who was fired for reasons that violate public policy may recover both compensatory and punitive damages. See, e.g., Petermann v. Teamster Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981). See generally Note, Protecting At will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816 (1980). Both the CSEA and state law establish a clear public policy of disallowing employer retaliation in such cases. This should justify a court's finding against an employer in a private action for wrongful discharge in those states which recognize this theory.

8. Changes of Employment

The federal regulations provide that the employer must notify the state agency when the employee ceases working for that employer and forward to the child support agency the former employee's last known address and the name and address of the new employer, if known. 45 C.F.R. §303.100(d)(x). If the obligor changes employment within the state the withholding agency must notify the new employer to commence withholding. 45 C.F.R. § 303.100(d)(3). A new order or notice must be directed to the new employer, but the entire withholding process, including notice to the obligor of the proposed withholding, need not be repeated.

Many states have enacted legislation requiring the obligor to keep the court or an agency informed of his changes of address and employment. While such a provision will not always be honored it increases the likelihood of current correct information. Attorneys representing obligors should inform them of this obligation and where they must send address and employment change information.

I. Termination of Withholding

The CSEA requires that state law make provision for terminating withholding. 42 U.S.C. §666(b)(10). The legislative history, however, suggests that withholding was intended to be terminated only in very limited circumstances, such as the disappearance of the custodial parent and child for an extended period so that it becomes impossible to forward payments, the child reaching the age specified in the support order for termination of payments, or the child being legally adopted by someone else. H. Rep. No. 98-527, 98th Cong., 1st Sess. 25

(1983). There is no indication Congress intended that withholding orders be time limited or automatically expire (except on the child reaching majority). On the contrary, Congress intended the withholding system to be a means of ensuring stable support payments over a long period of time. It is unacceptable to allow withholding to be terminated while there is an arrearage. The regulations also provide that in no case should paying off the overdue support be the sole basis for terminating withholding. 45 C.F.R. §303.100(a)(9).

Even states that choose to allow withholding to be terminated after a period of time may require one or more of the following:

-- that the withholding may be terminated after a set time period, but only on motion of the obligor. (This allows the procedure to continue so long as the obligor does not object, thus promoting stability of payments, and reduces the burden on the agency to keep track of when withholding will terminate).

-- that the withholding may be terminated after a set time only on the obligor's showing of good cause to believe payments would thereafter be made regularly.

-- that if withholding must be reinstituted it will last a longer time or until the child's majority.

In general, those representing obligors may expect that they will be required to file a motion or petition for termination of withholding on the basis of a ground set out in the withholding statute.

J. Voluntary Withholding

The CSEA requires that states make withholding available to obligors who request it. 42 U.S.C. §666(b)(3)(B). This language of the statute suggests that the obligor who voluntarily requests withholding obtains the full protections of the state's withholding laws (e.g., with respect to protection against employer retaliation) but also is subject to the termination provisions of the state's withholding law. That is, once withholding is begun, he may not simply request that it stop, but could only end it under the usual provisions for termination of withholding -- e.g., on motion and showing of good cause, if required by state law.

Some states which currently allow voluntary withholding report considerable success with it. Obligors can arrange for it in advance, as they might arrange to have car payments withdrawn from their checking account automatically. This aspect of their

finances can be insulated from other demands. Some employers are reported routinely to provide new employees with information about how to establish voluntary withholding of child support payments.

K. Withholding to Enforce Payments Required by Separation Agreement

A substantial proportion of all child support is paid pursuant to separation agreements. The obvious question arises whether withholding can be used to enforce support provisions of such agreements. In most states the answer will probably depend on whether the terms of the separation agreement were made part of the court order.

The CSEA only refers to withholding in the context of support "orders." See, 42 U.S.C. §§666(a)(8),(b)(1). To the extent the support provisions of a separation agreement are incorporated in a decree of divorce or separation they should be enforceable by withholding. This would be the result if the order provides that the agreement is "incorporated" or "incorporated but not merged" or "incorporated but retains its independent character as a contract." It may also be true if the parties are ordered to follow the terms of the agreement. However, if the separation agreement is merely "ratified" or "ratified and affirmed" or "approved" by the court order, it may not necessarily be enforceable by withholding because it is not actually part of the court order. State law generally will indicate whether agreements treated this way in court orders are entitled to enforcement by all state law remedies.

State statutes may provide that all separation agreement provisions relating to support which are in any way approved or affirmed by the court are enforceable by withholding. State laws may also provide that the parties may elect, in the separation agreement, to have its support terms enforceable by withholding. Thus far, however, such provisions have not been customary.

It should also be noted that unless there is some particular state statutory provision on the subject, the terms of a separation agreement relating to support will not be enforceable by withholding until a court order exists. Therefore, this remedy would not be available before an action to obtain support, or for divorce or separation, is filed nor would it be available to enforce the agreement pendente lite after filing, although an order for temporary support or support pendente lite would be enforceable by withholding.

All of these factors are important for counsel to consider in negotiating separation agreements on behalf of their clients. Obligees' attorneys should insure that the support provisions of

the agreement are enforceable by withholding. At a minimum, counsel should be aware of the consequences of choosing to have the agreement "ratified" or "approved" rather than incorporated and discuss these consequences with their clients.

L. Settlement; Relationship of Withholding To Use of Other Remedies

The CSEA will require changes in some states in the relationship between support remedies. At this time, in some states, once withholding is begun to collect current support and arrearages, no other means could be used to collect the arrearage. In other states, under present law, commencing use of a remedy other than withholding may make it more difficult to begin withholding.

However, the CSEA provides that in every IV-D case withholding must be used when the statutory grounds are met. 42 U.S.C. §466(b)(1)(2). Of course, as a practical matter, withholding can be used only when there are wages or other income subject to withholding. The other remedies required by the Act need not be used in every case. States must establish guidelines for determining when these remedies will be used which take into account the payment record of the obligor, the availability of other remedies, and "other relevant considerations." A particular remedy other than withholding need not be used if it would not carry out the purposes of that section of the Act or would otherwise be inappropriate. 42 U.S.C. §666(a). The provisions seem to suggest that the additional remedies, such as tax refund intercepts or liens, should be used in cases in which withholding is already underway when arrearages are substantial and could not be fully collected through withholding for a long time. Thus, there should be no state law impediment to using several kinds of remedies concurrently. The problem of not overcollecting can be resolved by use of a support clearinghouse through which all payments and collections are recorded and disbursed. States are required to refund to obligors amounts which have been improperly withheld. 45 C.F.R. §303.100(a)(10).

The mandate to use withholding in every case meeting the statutory requirements also limits what agreements the IV-D agency can make in settlement of a case. The agency cannot, for example, agree to stop withholding solely because back support amounts are paid if the triggering arrearage was reached and withholding was properly put in place. If a formula for calculating the amount of each payments is established by statute or regulation, it is doubtful that the agency could agree to a reduction in required payment on the remaining arrearages because of an initial lump sum payment.

M. Interstate Income Withholding

Each state must extend its wage withholding system to allow withholding from income "derived" within the state in order to enforce support orders from sister states. 42 U.S.C. §666(b)(9). The regulations indicate a general procedure to be followed in interstate cases. 45 C.F.R. §303.100(g). The IV-D agency in the state where the custodial parent resides must notify the IV-D agency of the state where the absent parent is employed to initiate withholding by sending a notice with all information necessary to carry out withholding. Advance notice of the proposed withholding, opportunity to contest the withholding and notice to the employer must be provided by the state where the obligor is employed. The law and procedures of the state of employment are to apply except with respect to when withholding must be implemented.

The Child Support Projects of the American Bar Association's National Legal Resource Center for Child Advocacy and Protection and the National Conference of State Legislatures have developed a Model Interstate Income Withholding Act which states may adopt to implement this requirement of the Act. See, e.g., Kansas S.B. 51 (enacted April 29, 1985) §§15-27.

III. WITHOLDING FROM PARTICULAR TYPES OF INCOME-SPECIAL CONSIDERATIONS

A. Federal Civilian and Military Employees

Enacted in 1974, 42 U.S.C. §659 makes it possible to treat the United States government like any other employer for purposes of garnishment for collection of children support and alimony. The legislative history of the CSEA specifically indicates that this provision would also allow the federal government to be treated like other employers for purposes of withholding child support payment or alimony in accordance with the new withholding procedures. H. Rep. No. 98-925, 98th Cong., 2d Sess. (1984). Regulations implementating this statutory provision may be found at 5 C.F.R. §581.

In general, the categories of federal payments which are reachable by this means include current pay and retirement benefits which are remuneration for employment. A description of the categories of federal payments which are subject to garnishment or withholding may be found at 5 C.F.R. §581.103. Certain other categories of payments to current or former federal employees are not subject to garnishment for support. These generally include disability benefits, educational benefits, and reimbursement for certain employment related expenses. A complete listing of excluded payments is found at 5 C.F.R.

§581.104. Counsel should note that to be subject to withholding a particular payment must both fall within the applicable state law definition of income subject to withholding and be subject to garnishment under 42 U.S.C. §659 and 5 C.F.R. §581.103. For example, federal civilian retirement benefits may not be withheld for child support purposes if retirement benefits are not included in the definition of income subject to withholding in the state issuing the withholding order.

To effect withholding against the federal employer, a copy of the usual withholding order or notice may be served on the agent designated to accept service of process for the federal agency or military service in question. 5 C.F.R. §581.201. A listing of these agents, by agency, may be found at 5 C.F.R. §581 Appendix A. If no agent is designated, the order may be served on the head of the governmental entity in question. 5 C.F.R. §581.202(a). Service may be by certified or registered mail, return receipt requested or by personal service on the appropriate designated agent. Id.

Sufficient additional information must be provided to allow the agency to process the withholding. The following information is requested: the obligor's full name and date of birth; the obligor's employment number, Social Security number, Veterans Administration claim number, or civil service retirement claim number; the component of the governmental entity (branch, division, administration, etc.) for which the obligor works and the official worksite or duty station. Information on whether the obligor is a current employee, retiree or annuitant is also requested. No particular form is required; a letter providing the information is sufficient.

In addition, when it is not clear from the face of the withholding order that it is for the collection of child support, the original support order must be included. 5 C.F.R. §581.201(c). In order to obtain withholding at the higher applicable rate under the Consumer Credit Protection Act, see Section II. H. 2, above, appropriate documentation establishing or certifying that arrears are more than 12 weeks old must also be sent. 5 C.F.R. §581.201(e).

Thereafter the agency must commence withholding. 5 C.F.R. §581.301,.305. The obligor is to be given notice of the withholding and a chance to supply an affidavit showing that he or she is subject to the lower CCPA limits because of having a second family. 5 C.F.R. §581.302. When served with more than one legal process for the same funds for the same employee, federal agencies presently are required to honor the orders on a first come, first served basis. 5 C.F.R. §581.305(c). The applicability of 45 C.F.R. §303.100 (a)(6) in this context is uncertain. That regulation requires states to allocate the

amount available for distribution when there are multiple orders exceeding CCPA limits.

While there were earlier problems with agencies refusing to honor support orders from administrative agencies, the Comptroller General has ruled that federal agencies must honor administrative orders if valid under state law. 55 Comp. Gen. 517 (1975). The federal agency may honor any support withholding order which appears to be valid on its face. It need not investigate whether personal jurisdiction to issue the order, in fact, existed. United States v. Morton, 104 S.Ct. 2769 (1984). See also 5 C.F.R. §581.305(2)(1).

Counsel should be aware that there are two additional avenues to having payments withheld from the salaries or retirement benefits of active duty or retired members of the military service. It is possible to obtain an involuntary allotment from the pay of service personnel who fall behind in their support or alimony payments in an amount equal to two months payments. This may be done on the basis of a notice or letter from the IV-D agency or court to the appropriate military service stating the amount of the arrearage and that it is in excess of the amount payable for two months as support or alimony without the necessity of going through the withholding procedures mandated by the CSEA. See 42 U.S.C. §665; 47 Fed. Reg. 46297 (October 18, 1982). It is also possible, in some cases, to obtain a voluntary allotment from the service member. DOD Directive 7333.1, 32 C.F.R. §59.3.

In addition, provisions of the Uniform Services Former Spouses Protection Act, 10 U.S.C. §1408, provide for withholding of military retirement benefits to meet orders to pay alimony, child support or divisions of marital property. If there is an order for such payments, they may be collected by this means from military retired pay whether or not there is any arrearage. However, this method may be used only to collect payments which will go to the spouse or former spouse. The statute has been interpreted by the Department of Defense to mean that this mechanism may not be used to collect support or alimony payments which have been assigned to a public agency.

It is significant to note that any of these mechanisms may be used to collect support due from an obligor who resides in another state or who resides in a foreign country since the appropriate federal agency may be served with a notice to withhold issued by any state with jurisdiction to enter the withholding order or notice. The obligor must still have been properly served with the notice of proposed withholding.

B. Unemployment Benefits

States must enforce support obligations owed to IV-D clients by obligors receiving unemployment benefits. 42 U.S.C. §654(19). The state employment security administration, or other state agency administering the unemployment benefits program, must furnish periodically to the IV-D agency names of those receiving unemployment benefits in order to determine which of them owe child support payments.

Where support obligations are not being met, but are being enforced by the IV-D agency, the IV-D agency must either obtain a voluntary agreement for withholding of amounts from unemployment benefits or must use some appropriate state "legal process" to require this. Regulations implementing this provision were published at 49 Fed. Reg. 8924 (March 9, 1984) and will be codified at 45 C.F.R. 32.

States which did not already have some form of garnishment or withholding against unemployment benefits are required to establish some legal process to make it possible to withhold "amounts" from these benefits. There is no requirement that states include unemployment benefits under the definition of income subject to withholding under the procedures established by the CSEA. They may instead enact or extend a garnishment procedure which would provide only for collection of arrearages. However, it may be assumed that most states will simply extend their withholding system to cover unemployment benefits. Counsel will have to identify the applicable procedures available under state law.

C. Private Pensions

Private pension rights are generally regulated by the federal Employee Retirement Income Security Act (ERISA). Amendments to that Act contained in the Retirement Equity Act of 1984 set out new requirements which must be met in order to get a pension plan administrator to honor domestic relations orders requiring payments to a spouse, former spouse, or child out of a plan participant's pension benefits. Earlier case law, which had held that ERISA limits on assignment of benefits did not apply to orders requiring payments for a former spouse or children, is overruled. 29 U.S.C. §1056(d)(3)(A).

Instead, the prohibition on assignment of benefits is waived only if the order in question is a "qualified domestic relations order." Id. In other words, if counsel is to succeed in obtaining the withholding of amounts due for child support or alimony from amounts payable to an an obligor under a private pension plan, care must be taken to insure that the withholding order meets all the requirements of a "qualified domestic relations order" [QDRO]. To be a QDRO an order must specify:

1. The name and last know mailing address (if any) of the obligor/plan participant and the name and mailing address of the obligee/"alternate payee."

2. The amount or percentage of the obligor/participant's benefits to be paid by the plan to the obligee/alternate payee, or the method for determining the percentage.

3. The number of payments or period of time to which the order applies.

4. Each plan to which the order applies.

29 U.S.C. §1056(d)(3)(C). It appears that an administrative order for payment of child support which is valid under state law should qualify as a QDRO as there is no explicit requirement in the statute that the order be a court order. 29 U.S.C. §1056 (d)(3)(B)(ii).

Counsel should be sure that the order used conforms to these requirements. If the standard withholding form directed to an employer does not include all of this information, it should be amended or a special form or order prepared. For example, the typical order might not include the parties' addresses or the number of payments or period of time to which the order applies. In addition, a single employer may have several types of pension plans and it will be necessary to identify the specific one or ones from which support payments are to be withheld in the order. This will often necessitate an informal inquiry or formal discovery.

In general, an order which alters the form or amount of benefits otherwise payable to the plan participant will not be considered a qualified domestic relations order and will not be paid. Therefore, care should be taken to frame the withholding order to conform to benefits available under the plan. However, a QDRO may require payments from the plan even if the obligor is still working after the date for early retirement is reached or as if he retired the day payments are to begin. The order may require payments in any form the participant/obligor could choose (except a joint and surviors annuity with respect to the obligee/alternate payee and his or her new spouse). 29 U.S.C. §1056(d)(3)(E)(ii)(III).

A QDRO may require payments of the entire benefit payable to the participant/obligor to the obligee. CCPA limits do not apply. Therefore, counsel will have to look to other provisions of state law to determine whether other limits are imposed. The first QDRO received takes priority in payment. A later order may qualify as a QDRO only to the extent it directs payments of benefits not covered by a prior QDRO.

Payments under a QDRO must be made to an "alternate payee." The alternate payee may be a "spouse, former spouse, child or other dependent of a participant." It is not clear whether payment could be made to a public agency. From this literal definition it would appear that plan administrators may not make payments to a IV-D agency to which support rights have been assigned by the spouse or former spouse, nor may payments be made to a support clearinghouse or court registry which receives payments on behalf of the obligee. From a literal reading of the statute it appears that the check must be made out to the obligee/ "alternate payee" as payee of the check. Regulations may, however, clarify that it is permissible to make payment to a public agency on behalf of an alternate payee.

No set time is established for commencing payment. Within a reasonable time, the plan administrator must determine whether the order is a QDRO and must notify the obligor/participant and any prior alternate payee. Until that determination is made, the plan administrator must segregate or escrow the amount specified by the order. If a dispute over whether the order is a QDRO extends beyond 18 months the escrowed amounts must be paid to the plan participant/obligor and any final decision on the matter applied prospectively only. 29 U.S.C. §1056(d)(3)(H).

Under the Retirement Equity Act of 1984 payments received by this mechansim, i.e., pursuant to a QDRO against a pension plan governed by ERISA, are taxable to the obligee/alternate payee. 29 U.S.C. §1056(d)(3)(J). That is, these payments receive the same tax treatment as alimony rather than the tax treatment afforded child support payments. This is true even if the order is clearly for the purpose of collecting child support. Obviously, this is a negative consequence of using this method to collect child support.

D. Trusts

The Restatement of Trusts 2d §157 (1975) states:

> Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,
>
> (a) by the wife or child of the beneficiary for support, or by the wife for alimony....

Courts generally have allowed the interest of a beneficiary of a spendthrift trust or support trust to be subjected to claims for the support and maintenance of a wife and children. 76 Am. Jur. 2d Trusts §178 (1975); Parscal v. Parscal, 148 Cal. App. 3d

1098, 196 Cal. Rptr. 462 (1983); In re Support of Matt, 473 N.E.2d 1310 (Ill. 1985); Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969); Matthews v. Matthews, 5 Ohio App. 3d 140, 450 N.E.2d 278 (1981); Payor v. Origll, 91 Ohio L. Abs. 106, 191 N.E.2d 373 (C.P. 1963); Knettle v. Knettle, 197 Wash. 225, 84 P.2d 996 (1938); Typically, either the spendthrift clause is interpreted as not intended to exclude the beneficiary's wife and children or, if the clause is construed as excluding claims by the wife and children, it is held to be against public policy to give full effect to the clause. Restatement of Trusts 2d §157, Comment on Clause (a) (1975). This suggests that trust income may be an available source of funds for child support if it falls within the state law definition of income subject to withholding. However, some cases have held that a spendthrift clause should be overridden only if legislation is enacted requiring this. Schwager v. Schwager, 109 F.2d 754 (7th Cir. 1940); Hitchens v. Safe Deposit Trust Co. of Baltimore, Maryland, 66 A.2d 97 (Md. 1949); Bucknam v. Bucknam, 294 Mass. 214, 200 N.E. 918, (1936), Annot., 104 A.L.R. 774 (1936); Erickson v. Erickson, 197 Minn. 71, 266 N.W. 161 (1936); Bogut, Law of Trust (5th Ed. 1973)

Counsel should check for the existence of state statutory provisions permitting the enforcement of support obligations against a beneficiary's interest in any trust and also determine whether these statutory provisions in any way limit the proportion of trust income which can be reached for support purposes. See, e.g., Everhart v. Everhart, 87 Pa. Super. 184 (1926). The withholding statute itself, if trust income is arguably within the definition of income subject to withholding, may be held to override other statutory provisions to the contrary. For example, the Illinois Supreme Court held in In re Support of Matt, 473 N.E.2d 1310 (1985), that the state's new withholding statute, Ill. Rev. Stat. 1983, ch. 40, §1107.1, which provides for withholding from "income," "regardless of source" for collection of child support, overrides other state statutory provisions generally prohibiting the garnishment of trust income. Cf. Moritz v. Moritz, No. CX-84-1956 (Minn. Ct. App. May 28, 1985), 11 Fam. L. Rptr. 1438 (7/16/85) (statute permitting withholding "regardless of the source" has priority over another statute exempting disability payments from creditor's claims).

CHAPTER 3

FEDERAL INCOME TAX REFUND OFFSET

I. INTRODUCTION

As part of the Omnibus Budget Reconciliation Act of 1981, Congress recruited a new child support enforcement ally - the Internal Revenue Service (P.L. 97-35, §2331). Under the 1981 Act, state IV-D agencies may request that the IRS offset federal income tax overpayments (refunds) owed to delinquent absent parents in cases where the support rights have been assigned to the state as a condition of receipt of AFDC. 42 U.S.C. §654; 26 U.S.C. §6402(c). This has been a potent remedy: for tax year 1984, 439,000 offsets took place as of June 10, 1985, netting over $214 million. This already exceeds the total number of offsets made and amount collected for tax year 1983.

The Child Support Enforcement Amendments of 1984, which in general emphasized public agency support enforcement services for non-welfare families, amend the above provisions, permitting tax refund offsets or intercepts* for non-welfare clients of the IV-D agency. The Amendments also permit tax offsets to recoup foster care maintenance payments where there has been an assignment to the state under Title IV-E of the Social Security Act. Unlike other enforcement tools, federal income tax refund offsets must, in each instance, be processed by state IV-D offices, using the federal Office of Child Support Enforcement as the intermediary to the IRS.** A private party cannot request this assistance from the IRS, although attorneys may refer clients to the local IV-D agency for this purpose. See Section II.C.

The daily operations and administration of the federal income tax refund offset program by the IV-D agency and OCSE are beyond the scope of the attorney's duties. Suffice it to say, the program depends largely upon the passing of magnetic computer tapes with relevant data between the state IV-D agency and OCSE, and between OCSE and IRS. The details of this operation are

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* Throughout this chapter the terms offset and intercept are used interchangeably.

** Neither the 1981 nor 1984 enactments affect the states' more limited access to full collection services of the IRS, upon payment of a $122.50 fee, pursuant to 42 U.S.C. §652(b) and 26 U.S.C. §6305 (a).

spelled out in the regulations to both the federal child support law and the tax code (45 C.F.R §303.72; 26 C.F.R. §304) and in Action Transmittal No. 85-7 issued by OCSE on May 6, 1985.

The attorneys' interest in the federal income tax intercept program will be discussed in this chapter. The first section concerns offset eligibility requirements and decisions to seek an offset. The second section describes legal rights and protections of affected parties, including the absent parent taxpayer and, in the case of a joint return, that parent's current spouse. The last section concerns the handling of potentially problematic cases.

II. SEEKING THE OFFSET

A. Eligibility Requirements

The basic eligibility requirements for both AFDC and non-AFDC clients of IV-D agencies are set forth in the following chart. As with other IV-D services, there is no charge to the welfare client for the offset program. Non-AFDC applicants potentially face two fees. First, they may be required to pay the application fee in order to become a IV-D agency client. This may not exceed $25.00. Second, for the tax offset program, they may be required to pay another fee, again not to exceed $25.00. This latter fee is used to reimburse the IRS for its costs which in 1985 is $3.20 per offset and for state administrative costs. It may be collected upfront and retained, even if the offset request proves futile.

Federal Income Tax Refund Offset - Eligibility

Condition	AFDC Client	Non-AFDC Client
Minimum Amount of Delinquency	$150.00	$500.00[1]
Type of Support	child and spousal support	minor child support only [2]
Duration of Delinquency Required	at least 3 months	none
How Support Established	court order or administrative process established under state law	same
Agency Records	copy of order and modifications thereto and payment record or affidavit of custodial parent	same plus custodial parent's current address
Years Covered	unlimited	refunds payable after Dec. 31, 1985 and before January 1, 1991

1/ At the state's option, it may consider only the amount that has accrued since the state IV-D agency began enforcing the support order to determine the $500 eligibility. This limit has two possible benefits. It will minimize an otherwise potentially overwhelming initial onslaught of new cases and facilitate the state's ability to certify the exact arrearage.

2/ Under the statute non-AFDC referrals on behalf of an individual who is no longer a minor will not be eligible for offset, even if the arrearages accumulated during the person's minority. Because many support agreements, for tax purposes (Lester rule), do not clearly distinguish child support from alimony, collecting for minor children only could cause a problem.

B. Decision by IV-D Agency to Seek a Tax Offset

Assuming the above requirements are met, the IV-D agency has freedom to decide whether or not to pursue a federal income tax refund offset. Remember the only remedy the agency must pursue if eligibility criteria are met is wage withholding. See Chapter 2. Historically, for the AFDC cases, states have employed widely different standards, including certifying all eligible cases. While there is no definitive yardstick, conversations with IV-D officials have uncovered some practical considerations. These include:

1. Not certifying cases where the obligor is currently paying support and taking steps to eliminate arrearages.

2. Not certifying non-AFDC cases unless custodial parent is notified that offset will be sought and informed that they may have to reimburse state for an improper offset at later date. See Section IV.

3. If some other mandatory enforcement procedure is being used or sought, particularly wage withholding, the tax intercept may be unnecessary, especially since the exact amount of past due support may change over the year. However, even where wage withholding is being used, a tax intercept may be an appealing collateral enforcement tool, especially when there are significant arrearages. Unlike with wage withholding, consumer credit limitations do not apply to the offset program. Consequently, the entire refund may be intercepted if need be to satisfy past due support. The only debt which takes priority over child support for offset purposes in AFDC cases is an outstanding liability for any taxes owed by the obligor. 26 C.F.R. §304(d)(1). In non-AFDC cases other federal debts, such as Small Business Administration or Department of Education loans, take precedence. 26 U.S.C. §6402(d)(West Supp. 1985).

4. Not certifying non-AFDC cases unless the client, by affidavit, swears to the amount in arrears. (See 45 C.F.R. §303.72(a)(4)(ii) which requires such an affidavit in the absence of a payment record.)

For all eligible cases in which the state elects to seek a tax offset, the IV-D agency submits a notification of liability for past due support on magnetic tape to OCSE. OCSE must receive this information by October 1 in cases where the state has designated OCSE to send the pre-offset notices to the obligor

taxpayer. December 1 is the cut-off date for states which send their own notice. Before submitting an offset request to OCSE the state agency must first verify certain information contained in the submittal: accuracy of name and social security number of the absent parent and amount of arrearages. By January each year, OCSE will transmit to the IRS on magnetic tape the offset requests of the participating states.

Amounts of past due support for a given case seldom remain stable. They may go up or down depending upon the obligor's subsequent payment behavior. Indeed, this behavior may be "influenced" by other mandatory enforcement procedures, such as wage withholding. The state IV-D agency is obliged to notify OCSE of any decrease or elimination of an amount referred for tax refund offset. States may set guidelines to determine "significance of decrease" meriting such notification. OCSE, in turn, will alert the IRS of any reductions in arrearages through the entire processing year. An increase in arrearages may not be amended and submitted to OCSE, presumably since due process would be violated if more money of the taxpayer was offset than the pre-offset notice identified.

C. Decisions by Private Attorneys to Refer Clients to the IV-D Agency for the Tax Refund Offset Program

As previously stated, private attorneys may refer their clients to the local IV-D agency for enforcement services. In deciding whether to suggest this to the client for purposes of the offset program, the attorney should consider several factors. First, is the absent parent currently paying support? At the state's election, it may choose to consider only arrearages which accumulated after the client's application for IV-D services. Thus if no new arrearages are amassing, the client may not be eligible for the offset program in some states. In general you should be familiar with the local IV-D agency's criteria for submitting a case for offset; the agency, not the client, determines the appropriateness of this action. Second, was your client previously on welfare? If the answer is yes, then any tax refund intercepted will first be applied to satisfy past-due support which had been assigned to the state. The IV-D agency must inform non-AFDC applicants of this disbursement policy when they apply for services. 45 C.F.R. §303.72 (h)(3). Third, based upon your client's knowledge of his or her former spouse's income tax filing habits and current financial status, do you have reason to believe the absent parent expects a significant tax refund? The offset request to IRS is only good for taxes filed that year (including any back taxes filed). If the refund is negligible you will not recoup significant arrearages. Furthermore, the absent parent will be on notice and may take steps to minimize future refunds. In a related vein, an offset might be ineffective if you know the

absent parent owes back taxes. Additionally, in non-AFDC cases, other federal debts take priority over support collection for offset purposes. Fourth, are there other remedies which may satisfy your client? A tax refund offset is a lengthy process which cannot be completed until the absent parent files his income tax return in the following year. It is also a gamble. Unless you know the absent parent is entitled to a refund, your efforts and wait may produce nothing. In short, other enforcement remedies might be preferred, if they are more immediate and definite. The use of other remedies, however, does not foreclose a tax refund offset.

When in doubt, referring a client to the IV-D agency in the hope of an offset request is a sound gamble. The vast majority of individual taxpayers receive refunds, and the refund amounts may be substantial. For tax year 1983 the average income tax refund was $830. In tax year 1984, as of June 10, 1985, the average offset was $486, (but since only taxpayers with families on AFDC were offset, it is probable that the average refund intercepted for a non-AFDC family may be higher).

III. DUE PROCESS PROTECTIONS

A. Offset Notice Provisions

The 1984 Amendments remedy certain perceived procedural defects of the tax intercept program. While prior to these amendments taxpayers received notice of the offset, some courts found such notice inadequate for not providing "[a] clear and detailed predeprivation notification, specifying the possible defenses and the procedures for asserting those defenses." Nelson v. Regan, 560 F. Supp 1101, 1107 (D. Conn. 1983), upheld, 731 F.2d 105 (2d Cir.), cert. denied, 53 U.S.L.W. 3239 (U.S. Nov. 1, 1984). But see, Keeney v. Secretary of the Treasury, No. 83-2427 (C.D. Cal. Oct. 13, 1983) (upholding existing procedures).

The 1984 Amendments to the offset program contain two notice provisions. The first or pre-offset notice must be sent to the obligor prior to submitting his or her name to the IRS. This notice may be sent by either the state IV-D agency or OCSE at the former's request. The notice is mailed to the obligor's last address from which a return was filed. When the states mail the notice (15 in 1985) they may have other sources of address information than the IRS. If the state sends the notice it must comply with content requirements of the regulations and other instructions of OCSE. See the following outline on procedural safeguards for notice content specifications. The 1984 Amendments require that this notice contain a provision that, in cases of a joint return, the obligor's new spouse will be

notified at offset by IRS of steps to take to protect his or her share of the refund. (See Jahn v. Regan, 11 Fam. L. Rep. 1417, July 2, 1985 (E.D. Mich 5/21/85), which upheld this method of giving notice to an unobligated spouse.) It also requires that the obligor be alerted of his or her right to an administrative review and the procedures and time frame to request one. See OCSE pre-offset notice appended to this Chapter.

In a few states, by statute or case law, additional information may be required in the notice. In particular this might include possible defenses to the tax intercept. Where such additional information is required the states will have to send out the pre-offset notice.

The purpose of this pre-offset notice is two fold: first, it gives the obligor an opportunity to challenge the accuracy of the state's claim. Second, it affords the obligor an opportunity to payoff his past due support, thereby avoiding a tax offset. As stated above, should he or she make a significant payment which reduces the arrearages this information will be shared with the IRS.

At the time of the actual offset, the IRS must send the second notice. This offset notice will identify the amount of refund which has been retained and the appropriate state agency to contact if there are errors or questions. At this time the obligor's joint taxpayer will be notified as to steps to take to protect his or her share of the refund. Essentially, this joint taxpayer may file a 1040X "Amended U.S. Individual Income Tax Return." The taxpayer has three years to file this amended return.

The following outline describes the procedural safeguards of the CSEA and regulations concerning the federal tax refund offset program.

1. Pre-Offset Notice

   a. Pre-offset written notice - must be sent to obligors by the end of October before their names are submitted to IRS. Notice will be sent by the state IV-D agency or, at the state's request, OCSE.

   b. Purpose of notice - give obligor opportunity to claim error or pay past due support to avoid the tax refund offset.

   c. Content of notice - verified arrearages amount, state or local number and address for obligor/taxpayer to contact if there is a complaint, right to an administrative review by

the submitting state or at the absent parent's request the state with the order upon which the referral for offset is based, and statement of procedures and time frame in which to request an administrative review.

d. Special provision for joint returns - pre-offset notice must specify that in the case of a joint return, the IRS will notify the absent parent's spouse at the time of the offset regarding steps to take to protect the share of the refund which may be payable to the spouse.

2. Offset Notice

a. IRS will notify the absent parent that offset has been made. It will state that all or part of the refund has been retained to satisfy the child support debt and the appropriate state or local agency to contact if there are errors or questions.

b. IRS will notify the individual who filed a joint return with the absent parent of steps to take to secure his or her share of the refund.

3. Complaint Procedure - Intrastate Requests

a. Upon complaint at either the pre-offset or offset stage, the IV-D agency must conduct an administrative review of the complaint to determine its validity.

b. Notice of the time and place of this review must be sent to the absent parent and, in non-AFDC cases, to the custodial parent.

c. If complaint concerns a joint return, IV-D agency will inform absent parent that IRS will notify parent's spouse, at time of offset, of steps to take to secure his or her share of refund. If offset has already occurred, IV-D agency will refer absent parent to IRS. The state cannot satisfy directly the non-obligated taxpayer since only the IRS may apportion the joint taxpayer's refund.

d. If the administrative review results in a decrease or elimination of the amount referred for offset, the IV-D agency must notify OCSE.

e. If offset is found to exceed amount of past due support owed, state IV-D agency shall promptly refund excess amount to absent parent.

One of the major benefits of the federal income tax refund offset program is its "national jurisdiction." Any state providing IV-D services to a custodial parent may certify an offset request to the IRS regardless of the absent parent's residence. In effect the filing of a federal income tax return submits the taxpayer to the program's reach. URESA or other interstate enforcement actions are not necessary preludes. The procedures for contesting a tax refund offset in an interstate case -- where the state which issued the underlying support order is not the state submitting an offset request -- may vary. Should the absent parent seek an administrative review in the submitting state, the procedures identified for intrastate requests apply. If, however, the complaint cannot be resolved in the submitting state, and the absent parent requests an administrative review in the state which issued the underlying support order, alternative procedures enumerated below apply. It should be noted that the obligor may not request a hearing in his home state (unless it is where the offset is being submitted or where the original order arose). A federal district court recently held that the constitution does not require a hearing in the obligor's home jurisdiction. Presley v. Regan, 11 Fam. L. Reptr. 1255 (N.D.N.Y. 3/11/85).

4. Complaint Procedures - Interstate Requests

a. The submitting state notifies the state with the order of the request for an administrative review within 10 days of the absent parent's request.

b. The submitting state provides the second state with all necessary information, including a copy of the support order and any modifications thereto; a copy of the payment record or, if no record, an affidavit of the custodial parent attesting to the amount of support owed or a copy of any judgment reducing the amount of past due support to a judgment; and in non-AFDC cases, the custodial parent's current address.

c. The state with the order will notify the absent and custodial parent (in non-AFDC cases) of the time and place of an administrative review, hold the review, and make a decision within 45 days of receipt of notice and information from the submitting state.

d. If the review results in a decrease or elimination of the amount referred for offset, the state with the order must notify OCSE.

e. After resolution of the complaint the state with the order must promptly notify the submitting state of its decision.

f. In the event that the offset exceeded the amount of past due support, the submitting state must take steps to refund promptly the excess amount to the absent parent.

B. Administrative Review

Should, following either pre- or post-offset notice, the obligor contest the offset, the state IV-D agency must conduct an administrative review of the complaint to determine its validity 45 C.F.R. §303.72(f)(1). While the law and regulations do not prescribe this procedure, under the procedural due process test of Mathews v. Eldridge, 424 U.S. 319 (1976), which essentially balances "worth of the procedure to the individual against its cost to society," it is unlikely that a plenary or trial type administrative hearing, with presence of counsel, subpoena powers, right to confront and cross-examine witnesses, extensive discovery rights and comprehensive opinion with full findings of fact and conclusions of law will be required. Rather, as the Supreme Court has decided in a host of cases covering such deprivations as parole and probation revocations, school suspensions, loss of tenure and disability benefit terminations, a combination of some of these rights will satisfy due process. The Court has gone as far as to hold, in the case of short term school suspensions, that notice and an opportunity to meet with school officials to informally challenge the suspension passes constitutional muster. Goss v. Lopez, 419 U.S. 565 (1975). States may opt to provide the same administrative review process they currently use for other challenges to actions of their social services agencies. See, e.g., Mass. Gen. Laws Ann. ch. 18, §16A (West Supp. 1984) (use of fair hearing mechanism of AFDC disputes for the tax offset program).

The few federal courts which have considered due process rights in the federal income tax offset program have found the obligor's property interest in the tax refund significant, but less so than those rights, such as government subsistence payments to indigent individuals (Goldberg v. Kelley, 397 U.S. 254 (1970), requiring a more exhaustive administrative review process. Nelson v. Regan, supra; Marcello v. Regan, 574 F. Supp. 586, 596 (D.R.I. 1983); Keeney v. Secretary of Treasury, No. 83-2427 (C.D. Cal. Oct. 13, 1983).

Indeed, these courts have suggested what would be a constitutionally adequate system for contesting tax refund intercepts. This includes the pre-offset notice discussed above, which is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action." Nelson v. Regan, 560 F. Supp. 1101, 1107 (D. Conn. 1983), citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). As to the nature of the hearing itself, it "may take the form of an opportunity to submit documents which support the claimant's claim along with an opportunity to discuss the matter with an official. The hearing officer should submit a short statement of the reasons for the decision rendered." Nelson v. Regan, 560 F. Supp. 1101, 1108 (D. Conn. 1983), upheld, 731 F.2d 105 (2d Cir. 1984). The complainant should also be able to examine materials upon which the IV-D agency based its decision to certify the case to the IRS. Marcello v. Regan, 574 F. Supp. 586 (D.R.I. 1983). Presumably this will include the copy of the underlying support order and modifications thereto and a copy of the payment record. Under basic due process principles, the hearing officer or official of the IV-D agency should not be biased. Furthermore, to be meaningful, the officer or official should have the authority to: 1) delete names submitted by the IV-D agency for tax refund offset, 2) correct errors in the amount certified for offset, 3) rebate to the obligor where the offset has already occurred, amounts erroneously intercepted and disbursed to the state. Marcello, id.

The right to and the nature of judicial review of the administrative decision is less clear. The federal district court in Nelson required such state court reviews, although it could be confined to a review of the record. The Marcello court held that a review must be permitted in state court pursuant to the state's administrative procedures act.

The time frame for holding these administrative reviews is not set forth in the CSEA, regulations (except for interstate cases), or court decisions. Two time limits, however, are suggested by the statutory scheme. First, if a hearing arises from a timely response to the pre-offset notice, it should be held, and a decision rendered, before the IRS offsets any funds. To do otherwise would defeat the purpose of the predeprivation notice. The state has ample time to conduct such reviews, since the pre-offset notice must be sent no later than October, and the IRS cannot offset refunds until after the income tax return is filed the next year. Second, if the hearing results from the IRS offset notice to the obligor, practical considerations require the review to be conducted as soon as possible. Delayed reviews, especially in non-AFDC cases, may make it more difficult for the state to recoup funds from the custodial parent should the obligor-taxpayer prevail. The state will be liable to the obligor for excessively offset refunds, even if it cannot recoup

the money from the custodial parent. As a practical matter, states should encourage absent parents to request these hearings within six months of the offset. During this period the state may delay distribution of offset funds in non-AFDC cases involving joint returns.

IV. PROBLEM AREAS IN THE OFFSET PROGRAM

The 1984 Child Support Enforcement Amendments resolved two issues which had troubled the federal income tax refund offset program: treatment of the non-obligated joint taxpayer and due process rights of the obligor. See Section III. A few questions remain unanswered.

A. Earned Income Credit

The first controversy is the treatment of earned income credits. The earned income credit provides a credit of up to $550 to individuals who work during an entire tax year, and whose adjusted gross income or earned income is less than $11,000. 26 U.S.C. §43. It is generally available to married couples, surviving spouses and heads of households with a resident child. The actual credit is calculated on a sliding scale according to income. As a credit it reduces, dollar for dollar, the family's tax liability. If the earned credit exceeds the tax liability, the difference is refunded to the taxpayer. The purpose of this credit was to provide a "work bonus" for low income families, encouraging them to work rather than depend upon federal assistance. Thus at stake are two competing social interests: the support of dependent children and the encouragement of work for low income families. Not surprisingly, courts have split over the treatment of the earned income credit with respect to the intercept program. Those courts favoring its exclusion from the offset program have relied upon the work-bonus purpose. Nelson v. Regan, 731 F.2d 105 (2d Cir), cert. denied., 53 U.S.L.W. 3239 (U.S. Nov. 1, 1984); Rucker v. Secretary of the Treasury, 751 F.2d 351 (10th Cir. 1984). Courts including the earned income credit in the offset program have supported the overriding child support goal. Coughlin v. Regan, 584 F. Supp. 697 (D. Me. 1984); Sorenson v. Secretary of the Treasury, 752 F.2d 1433 (9th Cir.), cert. granted, 53 U.S.L.W. 3878 (U.S. June 17, 1985) (No. 84-1686); Mathieu v. Regan, No. 83-1292 (D. Mass. Jan. 17, 1985). In reaching their findings, both camps have relied on statutory construction as to whether the EIC is a tax "overpayment" for purposes of the offset program, obviously reaching different conclusions. As of this writing the IRS has determined that it will offset earned income credits in every state but Connecticut. Final resolution awaits the Supreme Courts action in Sorenson, which will not be argued until the 1985-86 term.

B. Community Property States - Joint Taxpayers

In the eight community property states -- Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington -- property acquired by either spouse during the marriage (with statutorily defined exceptions) is deemed property of both spouses or the community. As a corollary, debts acquired by either spouse are considered debts of the community, in effect making both spouses liable to creditors. Under this interpretation, income tax refunds from joint returns in community property states are property of the community, fully subject to an offset for child support purposes. In such instances the new spouse of an absent parent cannot file for a pro rata share of the joint tax refund. Keeney v. Secretary of the Treasury, No. 83-2427 (C.D. Cal. Oct. 13, 1983).

Attorneys, however, should be cautioned that this principle may not apply everywhere. In community property states, "the joint overpayment must be divided according to the State laws." Offset notice of IRS, reprinted in OCSE Action Transmittal No. 85-7. Community property states may differ with respect to whether support obligations, especially those arising before the new marriage, constitute separate or community debts. To date only two courts have addressed this issue. In Sorenson v. Secretary of the Treasury, 557 F. Supp. 729 (W.D. Wash. 1982), upheld, 752 F.2d 1433 (9th Cir. 1985), the federal district court, interpreting Washington state community property law, concluded that only one-half of the tax refund, regardless of innocent spouse's income or share of the deductions, is subject to an offset. A federal district court in California, however, concluded that California's community property laws allow the assets of either spouse to pay the other's debts. Thus the entire refund was held subject to an offset. Keeney v. Secretary of the Treasury, supra. It should be noted, however, that subsequent to the Keeney decision the California legislature amended its community property laws. The new law states specifically that a child or spousal support obligation of a spouse that does not arise out of the marriage is to be treated like a separate debt of the obligated spouse. This is true whether the support order or modification was established after the marriage, or installment payments on a support order accrued after the marriage. Cal. Civ. Code. §5120.150 (West Supp. 1985).

C. Erroneous Offsets

Monies collected in the federal income tax refund offset program are first applied to any unreimbursed AFDC payments which were submitted by the state for offset. Amounts in excess of the unreimbursed assistance are distributed to the custodial parent. 45 C.F.R. §302.51(b)(4), (5) and §303.72(h). Expansion of the tax offset program to non-welfare parties poses potential

problems in the distribution of offset amounts. When the program was limited to AFDC cases, offset funds went to the state treasury to pay unreimbursed AFDC. If too much was offset, the state's treasury could refund the taxpayer at no loss to itself. In a non-AFDC case, once a custodial parent receives the offset, he or she is technically liable for reimbursement of any excessively offsetted amounts. Under the law and regulations, however, the IV-D agency has legal responsbility for refunding excess amounts to the taxpayer. See 42 C.F.R. §303.72(h)(4). Thus the IV-D agency may have to "go after" the custodial parent or bear the full repayment cost.

To help avoid this situation Congress provided partial relief. In cases of joint tax returns (an area where excessive offsets loom large since the non-obligated spouse may file for his or her pro rata share of the refund after an offset has occurred), the state may delay distribution of offset monies for up to six months. 45 C.F.R. §303.72(h)(5). Even this, however, only affords the state partial relief. Joint taxpayers have three years to file amended returns, long after the six month holding period. Nor does this provision address other potential problem areas caused, in part, by the 1984 Amendments. For example, the new law limits non-AFDC tax offsets to child support for a minor only, thereby risking offset errors if the state IV-D agency mistakenly certifies to IRS amounts which include spousal support.

There are no easy answers for state IV-D agencies seeking to minimize its potential liability for excessive offsets in non-AFDC cases. Some practical advice however may be offered. First, when dealing with non-AFDC applicants you should have her bring a copy of the order and any modifications. Second, she should supply evidence of the arrearage existing at the time IV-D assistance is sought. This might include the applicant's affidavit, an order reducing the arrearages to a judgment, or a copy of the payment record made through the clerk of the court. Third, care should be taken to explain carefully the distribution policy in IRS offset cases and that the applicant is responsible for any offset funds she receives in the event of a subsequent adjustment.

Related to the question of liability for excessively offset federal income tax refunds is that of interest. Specifically, is the taxpayer entitled to interest on any amounts that were offset improperly, resulting in a delay before the taxpayer receives his or her refund? If so who is responsible for this cost? This issue has been partially addressed by IRS Revenue Ruling No. 84-171, 12/10/84. Essentially, it states that the IRS is only responsible for interest payments if it was responsible for errors in the offset, i.e., it offset more than was requested by the state.

CHAPTER 4

STATE INCOME TAX REFUND OFFSET

I. INTRODUCTION

As discussed in Chapter 3, the Omnibus Budget Reconciliation Act of 1981 amended Title IV-D of the Social Security Act to provide for the collection of past-due support by offsetting federal income tax refunds owed to delinquent absent parents. 42 U.S.C. §664. The Act did not include any provisions for the collection of past-due support by offsetting state income tax refunds owed the parents. Many states have, however, provided for such refund offset.* (See statutes discussed in Section II). State income tax offset requirements have been added by the Child Support Enforcement Amendments of 1984. Pursuant to 42 U.S.C. §666, each state with an income tax must enact laws allowing the State IV-D agency to offset state tax refunds for the purpose of enforcing support orders under its approved state plan. Offset of state tax refunds must be available in AFDC and foster care maintenance cases (in which the client has assigned support rights to the State) and in non-AFDC cases (in which the State has agreed to collect support on behalf of a caretaker who has applied for the state's services).

The Amendments are silent concerning state income tax refund offset in support cases which are not being enforced under a state IV-D plan, i.e., those in which the custodial parent is represented by private counsel. It appears that states have discretion to include such cases in any statutory scheme for collection of overdue support from state tax refunds, although states cannot collect federal financial participation for costs associated with the non-IV-D cases. Of course, private attorneys may always refer their clients to a local IV-D agency for collection services, including the state income tax refund offset program.

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* The term "offset", when used in its ordinary sense, means the right which exists between two parties, each of whom is indebted to the other, to apply the debts against each other, thereby mutally reducing them. In this Chapter, "offset" will not only be used in its ordinary sense, but will also refer to procedures perhaps more appropriately called "interception." The term "offset" will be used throughout in order to be consistent with language contained in 45 C.F.R. §303.102.

The daily operations of a state's income tax refund offset program will depend upon accurate certification of an absent parent's overdue support payments by the State IV-D office (or by private parties if the statute so provides) to the state Department of Revenue or analogous office. The exchange of relevant data will likely be done by the passing of magnetic computer tapes. An attorney need not know specifics concerning the technical transmission of certification and refund data. The attorney should be aware, however, of statutory eligibility requirements for certification, any internal criteria used by IV-D agencies in deciding whether to offset state tax refunds, and legal protections which must be afforded to all affected persons. The following sections discuss those areas of concern.

II. SEEKING INTERCEPTION

A. Eligibility Requirements

1. State Eligibility Requirements Prior to Amendments of 1984

Although there was no federal requirement for collection of overdue support payments from state tax refunds prior to the Amendments of 1984, many states nevertheless enacted statutes providing for such an offset.

Historically, these statutes have taken two forms: (1) offset for the expressed purpose of collecting a state debt, and (2) offset for the expressed purpose of collecting overdue support payments.

a. Collecting a State Debt

Many states currently provide for offset of a taxpayer's state tax refund in order to collect a debt owed by the taxpayer to a state agency. See, e.g., Cal. Gov't Code §12419.5 (West 1980); Ill. Ann. Stat. ch. 15, §210.05 (Smith-Hurd Supp. 1983); Ky. Rev. Stat. §44.030 (1980); Minn. Stat. Ann. §270A (West Supp. 1985); Or. Rev. Stat. §293.250 (1981); Utah Code Ann. §59-14A-80 (Supp. 1984). Since a state's Child Support Enforcement Office (IV-D Office) is considered a state agency under these statutes, it is entitled to certify "debts" owed it to the state Department of Revenue or analogous office. There are two circumstances in which an absent parent's past due support payments become a debt owed to the IV-D agency: (1) when payments are owed to a caretaker who has assigned his or her support rights to the IV-D agency as a condition of receiving AFDC benefits, and (2) when payments are owed to a caretaker, not entitled to receive public assistance, who has applied to IV-D for support collection services and who has assigned his or her support rights to the

agency (NOTE: A IV-D agency may accept an assignment of support rights from a non-AFDC client but cannot make such an assignment a prerequisite for receipt of services by the non-AFDC client. 45 C.F.R.§302.33(d) (1984)). The state statutes and regulations vary as far as whether there is a minimum arrearage amount or delinquency period that is certifiable, whether the past-due support must be a liquidated sum (i.e., a judgment for a certain sum or a judicial determination of arrearage), and whether other enforcement techniques must first be attempted.

b. Collecting Overdue Support Payments

Other states have offset statutes expressly enacted to collect overdue support payments. See, e.g., Idaho Code §56-203D (Michie Supp. 1984); Iowa Code Ann. §421.17(21) (West Supp. 1983); Md. Fam. Law Code Ann. §10-113 (Michie 1984); N.Y. Tax Law §171-c (McKinney Supp. 1984); R.I. Gen. Laws §44-30.1 (Michie Supp. 1983); Wis. Stat. Ann. §46.255 (West Supp. 1984). Most of these statutes require that any certification for offset come from the State IV-D agency. The statute may allow certification of the agency's AFDC and non-AFDC cases (e.g., R.I. Gen. Laws §44-30.1 (Michie Supp. 1983)) or it may limit certification to those cases where the state has received an assignment of support rights (e.g., N.Y. Tax Law §171-c (McKinney Supp. 1984)). Again, the state statutes vary as far as whether there is a minimum arrearage amount or delinquency period that is certifiable, whether the past-due support must be a liquidated sum, and whether other enforcement techniques must be attempted first.

2. Eligibility Requirements Under Amendments of 1984

The only eligibility mandates of 42 U.S.C. §666 and federal regulations are (1) that a state's tax refund offset procedure be available to enforce any IV-D case, including AFDC cases, non-AFDC cases, and foster care maintenance cases which have an assignment under section 471(a)(17) of the Social Security Act; and (2) that use of the offset be determined appropriate under the state guidelines. Those guidelines must take into account the payment record of the absent parent, the availability of alternative remedies and other relevant considerations. More specific eligibility requirements of a state's offset program are left to each state's discretion.

States with existing statutes which allow the offset of an absent parent's income tax refund for his or her overdue child support may be able to amend their statutes to comply with the federal eligibility requirements of 42 U.S.C. §666. Those states which limit offset to the collection of a debt owed a state agency must expand the availability of their offset program to include IV-D non-AFDC cases where there has been no assignment of support rights to the State. Such cases are presently excluded

from offset because where there has been no assignment of support rights to the State, no debt to the State for overdue support ever arises. Those states which provide offset of state income tax refunds for the expressed purpose of collecting past-due support payments must insure that the IV-D agency can certify all non-AFDC cases where the client has applied for IV-D collection services, as well as AFDC and foster care maintenance cases where the state has received an assignment of rights.

Fees for use of the offset program will vary. There is no charge to the AFDC client. Non-AFDC caretakers, however, must pay their local IV-D agency an application fee, not to exceed $25.00, in order to become a IV-D client. Additionally, a state may charge the non-AFDC client a reasonable fee to cover the cost of collecting arrears through the state tax refund offset program. 45 C.F.R. §303.102(f). This second charge may be collected "up-front" or deducted from the amount collected from the refund. If the AFDC client continues to receive IV-D services after having been terminated from receipt of AFDC benefits, there is no fee for the offset provided the overdue support is certified during the period when IV-D services are automatically continued (a period not to exceed four months from the month in which the family ceased to receive assistance). If the case is referred for state tax refund offset after the former AFDC client authorizes continued IV-D service as a non-AFDC case, the state may charge the same fee to recover costs of submitting the case for offset as it charges in other non-AFDC cases. 50 Fed. Reg. 19,630 (1985).

B. Guidelines

Unlike income withholding which must be initiated in any support case where arrears equivalent to one month's support obligation have accrued, offset of state income tax refunds need not be used in cases where the State determines that such use would be inappropriate. 42 U.S.C. §666(a). Conversations with state IV-D offices reveal a variety of criteria presently used to identify cases appropriate for state income tax refund offset:

- delinquency is a certain amount
- support payments are past-due a particular time period
- criteria used for certifying a case for federal tax refund offset are used for certifying a case for state income tax refund offset
  (NOTE: Prior to the Child Support Enforcement Amendments of 1984, only past-due support in AFDC cases could be certified for federal tax offset)

- if the absent parent is making regular payments through wage withholding, the case is not certified even though an arrearage exists

- if the absent parent is making regular payments through wage withholding but the payment schedule is such that elimination of the arrearage will take more than a year, the case is certified for offset

- the support arrearage has been reduced to judgment or the absent parent has stipulated to the amount of overdue support.

In some states these criteria are established by the state IV-D office in written policy statements. In other states, each local IV-D agency is allowed to use its own discretion in referring cases for offset.

Under new federal regulations, a State must develop guidelines for determining if a case is not appropriate for state income tax refund offset, and these guidelines must be applied uniformly by all local IV-D offices. It appears likely that states with existing criteria for determining the appropriateness of state tax refund offset will include many of those factors in the guidelines they develop pursuant to the Amendments of 1984. The only factors that the statute specifies for inclusion in state guidelines are the payment record of the absent parent and the availability of alternative remedies. 42 U.S.C. §666(a)(8). States are free to include other relevant factors for consideration.

Because of the requirement under 45 C.F.R. §302.36 for states to cooperate with other states in securing and enforcing support obligations, guidelines governing the use of state income tax refund offset in a particular intrastate case must also be applied to an interstate case. See 50 Fed. Reg. 19,612; 19,622-23 (1985). There are no federal regulations specifying how an interstate request for state income tax refund offset shall be initiated. It appears that the state where the caretaker applies for IV-D services must avail itself of existing laws such as the Uniform Enforcement of Foreign Judgments Act and the Uniform Reciprocal Enforcement of Support Act (URESA) in order to register a foreign support order or to request the entry of a support order in the state(s) where the absent parent pays taxes. Once a support order is registered or entered, the State IV-D agency in the "responding" state should review the case information - as it would in any intrastate case - and determine under its laws and guidelines whether state tax refund offset is an appropriate enforcement technique in that particular case.

Although there is no requirement for states to enact legislation expressly providing for interstate application of a state income tax refund offset program, some states already have such statutes. See Mass. Gen. Laws. Ann. ch. 273A, §12 (West Supp. 1983-1984); Act of March 21, 1985, S.B. No. 2295, §8(2), 1985 Miss. Laws; Mo. Ann. Stat. §143.784(5) (Vernon Supp. 1985). The Massachusetts statute is found within the state's Uniform Reciprocal Enforcement of Support Act. It provides, in part, that when the commonwealth is acting as a responding state, the court shall "be allowed to request attachments on any tax refund due from the commonwealth to a respondent who is delinquent in any support order." Mississippi's provision is found within its recently enacted "Act to Establish a Procedure for Setting Off [sic] Against State Tax Income Refunds Debts Owed for the Care, Support or Maintenance of a Child." See Act of March 21, 1985, S.B. No. 2295, §§1-12, 1985 Miss. Laws. It states the following:

> (2) The [State Tax] commission may enter into reciprocal agreements with the departments of revenue of other states that have enacted legislation that is substantially equivalent to the setoff procedure in this act. The agreement shall authorize the commission to provide by rule for the setoff of state income tax refunds or rebates of defaulters from states with which Mississippi has a reciprocal agreement and to provide for sending lists of names of Mississippi defaulters to the states with which Mississippi has a reciprocal agreement for setoff of that state's income tax refunds.

Mo. Ann. Stat §143.784(5) (Vernon Supp. 1985) also authorizes reciprocal agreements with other states for the purpose of offsetting state tax refunds.

C. Certification for Offset

For all cases which are eligible for state income tax refund offset, the IV-D agency must establish effective procedures to ensure that amounts referred for offset have been verified and are accurate. 45 C.F.R. §303.102(b)(1). There is no specification in the statute or regulations as to how verification must be made; states may require certified payment records, sworn affidavits from the caretaker, or information from other states if they so desire.

Once an overdue amount has been certified to the appropriate state office or agency for offset, the IV-D agency must also have procedures to notify that state office of any significant reduction in, or elimination of, the amount certified. 45 C.F.R. §303.102(b)(2). Since use of a state's income tax refund offset program is only one of many procedures available for collection of support arrears, other enforcement procedures such as income withholding may result in an arrearage reduction after certification. The regulations do not prohibit a state's submission of increases in arrearage as part of the modification process. It appears, however, that such a practice may violate a state's procedural due process requirements unless the absent parent receives advance notice of the IV-D agency's intent to increase the amount certified for offset. Compare with 45 C.F.R. §303.72(d)(2); 50 Fed. Reg. 19,636 (1985) (expressly prohibiting increases in amounts certified for federal income tax refund offset). In order to insure proper certification, many states currently provide for monthly communication between the State IV-D office and local IV-D agencies regarding cases which have been referred for offset.

D. Offset Collections

Any offset collection made in an AFDC or foster care maintenance case will be applied to reimburse the State for benefits paid to the family. 45 C.F.R. §§302.51, 302.52. If the caretaker elects to continue receiving IV-D services after termination from AFDC assistance, any offset amount collected will be considered a collection on arrearages. Application of the offset collection will be the same regardless of whether the case is referred during the period when IV-D services are automatically continued pursuant to 42 U.S.C. §657, or whether the case is referred after the caretaker authorizes continued services as a non-AFDC case. The money may be paid first to the family or applied first to reimburse the State for AFDC payments to the family depending on the State's distribution scheme in non-AFDC cases. 45 C.F.R. §303.102(g); 50 Fed. Reg. 19,629-30 (1985).

The office or agency responsible for processing the state tax refund offset must notify the State IV-D agency of the absent parent's home address and social security account number(s) reported on his or her tax return. The State IV-D agency must then provide this information to any other State involved in enforcing the support order. 45 C.F.R. §303.102(h).

III. DUE PROCESS PROTECTIONS

A. Provisions Under State Laws Existing Prior to Amendments of 1984

Because of the deprivation of property resulting from the offset of an absent parent's income tax refund, procedural due process protections for the parent are required. Most state offset programs enacted prior to the Child Support Enforcement Amendments of 1984 provide the absent parent some type of offset notice and opportunity to contest the offset. Programs vary, however, regarding the timing of any notice to the absent parent about an offset of his or her income tax refund, the contents of any such notice, the availability of a hearing for the parent to contest offset, the timing of any such hearing, defenses which can be considered at any hearing, and the availability of judicial review of a hearing officer's or agency's decision.

1. Notice

Some state statutes require that a notice be sent to the absent parent prior to any offset occuring. A second notice is sent after the offset is finalized. See, e.g., Ariz. Rev. Stat. Ann. §43-614(D) (Supp. 1984); Iowa Code Ann. §421.17(21)(e) (West Supp. 1983); Kan. Stat. Ann. §75-6206 (Supp. 1983). Other states provide for notice to the absent parent at the time the state Department of Revenue or analogous office transfers to the IV-D agency the amount of money certified by the agency as arrears (up to the amount of the absent parent's refund). If the absent parent contests offset of the tax refund, the money is held in escrow pending a final determination concerning offset. A second notice is sent once offset actually occurs. See, e.g., Ala. Code §40-18-103 (Supp. 1983); Mass. Gen. Laws Ann. ch. 62d, §5 (West Supp. 1985); R.I. Gen. Laws §44-30.1-4 (Supp. 1983); Vt. Stat. Ann. tit. 32, §5934(c) (Supp. 1984). In still other state income tax refund offset programs, the statutes fail to specify whether notice to the absent parent must ever be given. See, e.g., Colo. Rev. Stat. §39-21-108(3)(a) (Supp. 1983).

States differ not only concerning the timing of any notice to the absent parent, but also concerning the contents of any such notice. Most states that provide notices - either prior to offset or at the time funds are transferred from the Department of Revenue or analogous office to the State IV-D agency - require that the notices state the following: the name of the debtor, the fact that the claimant agency claims part of the debtor's refund, the basis of the agency's assertion, the intention of the agency to claim a setoff of the amount due the agency against the debtor's refund, the fact that the debtor has an opportunity to give written notice of an intent to contest offset within a specified time period, the address to which

any notice of intent to contest must be sent, and the fact that failure by the debtor to notify the agency of an intent to contest will constitute a waiver of the right to contest. See, e.g., Ala. Code §40-18-103 (Supp. 1983); Iowa Code Ann. §421.17(21)(e) (West Supp. 1983); R.I. Gen. Laws §44-30.1-4 (Supp. 1983).

In Arizona and Missouri, a pre-offset notice further notifies the debtor that any application the debtor files for a review or hearing to contest offset must state any defenses that he or she is claiming. Ariz. Rev. Stat. Ann. §43-614(D) (Supp. 1984); Mo. Ann. Stat. §143.784(3) (Vernon Supp. 1985). In New York, the pre-offset notice informs the absent parent of steps the parent can take to avoid offset. N.Y. Tax Law §171-c (McKinney Supp. 1984) requires that the notices advise the parent that he or she can correct any error in arrearge calculation and avoid certification for offset by elimination of arrears within thirty days of the date of the written notice. The notice states the name of a Department of Social Services' employee whom the absent parent should call regarding any error in, or payment of, his or her liability, and the employee's work address and telephone number.

Many states also require notices to specify what steps the debtor's spouse can take to protect his or her portion of any refund from offset if the spouse filed a joint return with the debtor and is not obligated to the claimant agency. See, e.g., Ga. Code Ann. §48-7-164(c) (1982); Mo. Ann. Stat. §143.784(3) (Vernon Supp. 1985); Vt. Stat. Ann. tit. 32, §5935 (Supp. 1984).

Although many states require the notice to inform the absent parents of their opportunity to contest the offset, there is usually no requirement that the notice list defenses that the absent parents can raise. But see Neb. Rev. Stat. §77-27,165 (1984).

Once offset is finalized -- either because the absent parent does not contest the offset within the required time period or fails to prevail at any review or hearing -- a notice of actual offset is sent to the absent parent. Most states require that the final notice inform the debtor of the setoff and provide the debtor a final accounting of the following: the refund amount to which the debtor was originally entitled; the debt owed the claimant agency by the debtor; the amount of the following: the refund in excess of the debt which has been returned to the debtor; the amount of the refund transferred to the claimant agency; and the amount of the refund, if any, transferred to the agency in excess of the debt as finally determined which must be returned to the debtor. See, e.g., Ala. Code §40-18-105 (Supp. 1983); La. Rev. Stat. Ann. §299.17 (West Supp. 1985); Va. Code §58.1-529 (1984).

2. Review or Hearing

States that allow offset of an absent parent's state income tax refund in order to collect child support arrears usually provide some mechanism whereby the absent parent can contest the offset. States vary, however, concerning the timing and type of review or hearing provided.

Most states that provide pre-offset notice to the absent parent provide the parent some type of review or hearing at the parent's request prior to the occurrence of offset. See, e.g., Idaho Code §56-203D(d) (Michie Supp. 1984); Iowa Code Ann. §421.17(21)(e),(g) (West Supp. 1983); Me. Rev. Stat. Ann. tit. 36, §5276-A (Supp. 1984). In states that provide notice after money has already been transferred from the Department of Revenue or analogous office to the claimant agency, any hearing or review occurs after the transfer has occurred; the money is held in escrow, however, pending a final determination concerning the validity of the debt. See, e.g., Ga. Code Ann. §48-7-165 (1982); R.I. Gen. Laws §§4-30.1-3, 44-30.1-5 (Supp. 1983).

In many states, absent parents have the opportunity to contest offset in a hearing pursuant to their state's Administrative Procedures Act. See, e.g., Mass. Gen. Laws Ann. ch. 62d, §6 (West Supp. 1985); Me. Rev. Stat. Ann. tit. 36, §5276-A(2) (Supp. 1984); Minn. Stat. Ann. §2790.09 (West 1985). Other states provide that the hearing will take place according to procedures established by the claimant agency. See, e.g., Va. Code §58.1-526 (1984). Wisconsin provides a hearing before the circuit court which rendered the support or maintenance order. Wis. Stat. Ann. §46.255(3) (West Supp. 1984). In Missouri, if the absent parent raises no factual issue in his or her application for a hearing contesting setoff, or only raises issues that have been previously litigated, the state agency may enter an offset order without holding an evidentiary hearing. Mo. Ann. Stat. §143.784(3) (Vernon Supp. 1985).

Some states provide for an informal agency review of the absent parent's opposition to offset rather than a hearing. See, e.g., La. Rev. Stat. Ann. §299.15 (West Supp. 1985). In Louisiana, when an absent parent submits written notification to the bureau of support enforcement of his or her intention to contest offset, the notification must include reasons for the contest. An agency official then reviews the reasons for contest listed by the parent and redetermines whether the amount of arrears claimed is correct. The absent parent makes no appearance before the agency. Illinois' state tax refund offset program lacks any provision concerning the availability of a hearing or review to contest offset. See Ill. Ann. Stat ch. 15, §210.05 (Smith-Hurd Supp. 1983-1984). In practice, however, the absent parents do have an opportunity to contest liability,

although the opportunity arises after offset. According to representatives of the Illinois Department of Public Aid, Bureau of Child Support Enforcement, absent parents receive notice after offset has occurred, informing the parents that they have 30 days from receipt of the notice to contact the Comptroller if they question the offset. The Comptroller notifies the Department of Public Aid of contested cases, and the Department informally reviews the cases to determine if certification was accurate. If the review reveals that an arrearage was incorrectly certified, any amount offset in error is released to the debtor. The Illinois Attorney General issued an opinion in 1978 concluding that such a procedure complied with constitutional requirements as then interpreted by the courts. 1978 Op. Att'y. Gen. 109. Under new federal regulations, however, this procedure will be inadequate since the regulations require notice to absent parents of possible offset and of their opportunity to contest offset prior to offset actually occuring.

According to the provisions of most state tax refund offset programs, the purpose of any hearing or review conducted at the request of an absent parent is to determine whether the claimed sum asserted as due and owing is correct; and if not, to make the necessary adjustments. See, e.g., Kan. Stat. Ann. §75-6207 (Supp. 1983); Mass. Gen. Laws Ann. ch. 62d, §6 (West Supp. 1985); N.C. Gen. Stat. §105A-8 (Supp. 1983). Few statutes specify what defenses the absent parent can claim. Instead, most statutes specify the issues that the absent parent cannot raise. For example, several states provide that the absent parent cannot raise issues which have been previously litigated. See, e.g., Ga. Code Ann. §48-7165(c) (1982); Idaho Code §56-203D(d) (Michie Supp. 1984); Mass. Gen. Laws Ann. ch.62d, §6 (West Supp. 1985). The Code of the District of Columbia states that the Mayor shall refuse to consider any protest if it (1) solely concerns an issue other than the existence or amount of arrears or the division of a joint tax refund; (2) solely concerns an issue previously litigated and no new facts exist; or (3) is not raised timely. D.C. Code Ann. §47-1812.11(7) (Supp. 1984). According to Missouri's statute, if the debt is based on a court or administrative order, the debtor cannot assert any defenses which arose prior to entry of the order. Mo. Ann. Stat. §143.784(3) (Vernon Supp. 1985).

3. Judicial Review

Most states that provide the absent parent an opportunity to contest offset further provide a judicial review of the hearing officer's or agency's decision. See, e.g., Ala. Code §48-18-104 (Supp. 1983); Vt. Stat. Ann. tit.32, §5936(b) (Supp. 1984); Va. Code §581-527 (1984).

B. Provisions of Amendments of 1984

Although the Amendments and federal regulations governing federal income tax refund offset mandate specific notice and hearing requirements, the Amendments and regulations are less specific concerning offset of state income tax refunds. As long as states conform to certain minimal requirements governing who must receive an offset notice and the timing of the notice, states are free to establish their own state offset procedures which comply with their state due process requirements.

1. Notice

a. Caretaker

Federal regulations do not require notice of any proposed state tax refund offset to the caretaker in an AFDC case, or in a non-AFDC case if the intercepted refund will be first distributed to the custodial parent. Notice is necessary in non-AFDC cases, however, if the amount offset will not be paid to the custodial parent first. 45 C.F.R. §303.102(c). In those cases, the State must inform the non-AFDC custodial parent in advance that the State intends to first use any offset amount to satisfy any unreimbursed AFDC and foster care maintenance payments which have been provided to the family. The purpose of the notice is to ensure that the non-AFDC caretaker is able to make an informed decision in seeking services of the IV-D office. Since most states did not employ state income tax refund offset procedures in non-AFDC cases prior to the Amendments of 1984, states will need to enact provisions ensuring that non-AFDC caretakers receive such notice prior to the State's offsetting state tax refunds and applying them first toward unreimbursed AFDC and foster care maintenance payments.

b. Absent Parent

The Amendments of 1984 will also require changes in many existing state statutes governing notice to absent parents of the offset of their state income tax refund. 42 U.S.C. §666 requires that a state send notice to an absent parent prior to any state income tax refund offset. The notice must advise him or her of the proposed offset and of the procedures to be followed to contest the offset. Apart from these general requirements, the Amendments are silent concerning the contents of the notice. Federal regulations impose no requirement that the contents of the state tax refund offset notice be the same as that of the federal tax refund offset notice. Compare 45 C.F.R. §303.72(e) (advance notices of federal offset) with 45 C.F.R. §303.102(d) (advance notices of state offset). In fact, prefatory comments to the regulations emphasize that states have flexibility to determine the contents of their notices in accord with state law

and state due process requirements. 50 Fed. Reg. 19,630 (1985). Since state due process requirements, however, must at a minimum conform to constitutional due process requirements, states should look to federal regulations and case law governing federal tax refund offset notices for guidance in drafting their own notice statutes (See "Due Process Protections" under Chapter 3 on federal income tax refund offset). A state may wish to identify possible defenses to offset in its preoffset notice, as was required in Nelson v. Regan, 560 F.Supp. 1101 (D. Conn. 1983), aff'd, 731 F.2d 105 (2d Cir.), cert. denied, 53 U.S.L.W. 3239 (U.S. Nov. 1, 1984) (NOTE: Case was not appealed on due process grounds; 2d Circuit only considered 11th Amendment and Earned Income Credit issues). A state may also consider including in its notice information concerning the availability of certain protections provided the absent parent's spouse in the case of a joint return. See 45 C.F.R. §303.72(e). It is suggested that states send a second notice at the time offset actually occurs; as discussed earlier, most states with offset programs already provide for such a notice.

2. Review or Hearing

Federal regulations are also silent concerning what state procedures should be provided an absent parent to contest the referral of overdue support for state income tax refund offset. The only mandate is that state offset procedures must be in full compliance with all procedural due process requirements of the State. 42 U.S.C. §666(a)(3)(A); 45 C.F.R. §303.102(e)(1). If at some point the offset amount is found to exceed the amount of overdue support, the State IV-D agency "must take steps to refund the excess amount in accordance with procedures that include a mechanism for promptly reimbursing the absent parent." 45 C.F.R. §303.102(e)(2).

Special provisions apply when the refund owed a delinquent absent parent is due in part to earnings of the parent's spouse. Pursuant to 45 C.F.R. §303.102(e)(3), each state must also "establish procedures for ensuring that in the event of a joint return, the absent parent's spouse can apply for a share of the refund, if appropriate, in accordance with State law."

The emphasis on state due process requirements does not suggest a lower due process standard in state offset procedures as compared to federal offset procedures. As pointed out earlier, state due process requirements must at a minimum conform to constitutional due process requirements. It is therefore likely that courts will look to federal due process decisions for guidance in examining a state's offset program (See "Due Process Protections" under Chapter 3 on federal income tax refund offset). Federal decisions suggest that the absent parent must

have an opportunity to submit evidence to support any challenge to the offset; that the absent parent must have an opportunity to examine the information upon which the IV-D office is basing its claim to the refund; that the absent parent must have an opportunity to discuss the matter with an official; that the review or hearing must take place before an official who has authority to correct any error in certification made by the IV-D office; and that the review or hearing must occur, and a decision be rendered, prior to offset if the review or hearing results from the advance notice of offset. See, e.g., Nelson v. Regan, supra; Marcello v. Regan, 574 F. Supp. 586 (D.R.I. 1983). But see Keeney v. Secretary of Treasury, No. 83-2427 (C.D. Cal. Oct. 13, 1983).

In at least one state, existing state offset procedures have been found not to comply with procedural due process requirements. McClelland v. Massinga, 600 F. Supp. 558 (D. Md. 1984). This case focused on Maryland's state income tax refund offset program which was enacted prior to the Child Support Enforcement Amendments of 1984. Under Md. Ann. Code art. 88A, §59e (1957) (repealed), the State IV-D office could certify to the state Comptroller of the Treasury, Income Tax Division, any absent parent in a IV-D case whose support obligation was more than 60 days in arrears. The Comptroller was not allowed to question the certification. The State IV-D office mailed the absent parent a notice of the certification for offset and of the parent's opportunity to request an investigation by the State IV-D office. The notice said nothing about possible defenses to the offset.

Upon receipt of a request for an investigation, the State IV-D office was required to conduct an investigation to determine the correctness of the certification. The investigation consisted of a simple comparison of the absent parent's payment record with the terms of the latest, active court order. If the absent parent was in arrears more than 8.5 times the ordered weekly amount, the certification was upheld. If the investigation revealed that the certification was in error, the IV-D office was required to correct the certification.

A second notice was sent to the absent parent by the Comptroller within 15 days of actual offset of the tax refund. This notice informed the absent parent of the amount of the offset, of his/her right to appeal to the State IV-D office, and of the method for doing so. The appeal notice further stated the following:

> [A]n appeal may only be made on the basis that: you do not believe that you have a support obligation arrearage or you believe the amount of the arrearage is less than the amount of the tax refund intercepted by the Comptroller .... Appeals based on other than the reasons,[sic] which are specified in the law, will be denied.

If it was determined on appeal that the amount offset exceeded the parent's arrearage, the State IV-D office was required to pay the absent parent the excess amount withheld within 30 days of the date of that determination. Md. Admin. Code tit. 07 §07.02.05 (1977).

Applying the three-part test of Mathews v. Eldridge, 424 U.S. 319 (1976), the United States District Court for the District of Maryland ruled that Maryland's state tax refund offset program violated taxpayer-obligors' due process rights in two respects: by misleading the obligors as to their right to appeal; and, by not providing the obligors a pre-deprivation hearing. The court found the appeal notice misleading because it appeared to limit the right to appeal to specified objections; it therefore possibly discouraged parents with valid appeals on other grounds, such as a lack of the statutorily required triggering delinquency, from pursuing their right to appeal. The court concluded, however, that due process does not require the notice to list every possible defense to offset. Such a list would be burdensome for states and would run the risk of inadvertently omitting some defense. Rather, the notice must provide enough information so that the obligors will be able to formulate defenses based on the facts of their particular case. Among the information suggested by the court was information about the fact of, and reason for, the offset; the availability of a hearing; and the procedures to be followed at the hearing. The court further concluded that due process requires the hearing to occur before offset occurs. The court reached this conclusion after finding that taxpayers have a significant interest in their refunds, that a pre-deprivation hearing would limit the possibility of a wrongful deprivation, and that the availability of such a hearing would be neither impractical nor overly costly. The court stated that the constitutionally mandated pre-deprivation hearing would be satisfied if Maryland provided its post-deprivation hearing process prior to offset.

IV. CONCLUSION

The offset of state income tax refunds for collection of overdue child support is an important enforcement procedure which must be available for IV-D cases by October 1, 1985, in all

states with income tax, unless the State is granted an exemption in accordance with 42 U.S.C. §666(d). 42 U.S.C. §666 and federal regulations leave many specifics of a state offset program to the discretion of the State. The State, however, must ensure that the program is available for all IV-D cases, including AFDC, non-AFDC, and title IV-E foster care maintenance cases. The State must establish guidelines for deciding whether a case is inappropriate for its offset program, since offsetting state income tax refunds to collect child support arrearages is not mandated as is income withholding. There must be procedures for ensuring that amounts referred for offset are accurate. Advance notice must be given to a non-AFDC client, if the State intends to first apply the amount offset to unreimbursed public assistance payments, and to the absent parent whose overdue support the State intends to refer for state income tax refund offset. The State must establish procedures, which are in full compliance with the State's procedural due process requirements, for an absent parent to use to contest the referral for offset. There must also be procedures available to the absent parent's spouse in the case of a joint return. Finally, if offset does occur, the State agency responsible for processing the state tax refund offset must notify the State IV-D agency which requested offset of the absent parent's home address and social security account number.

CHAPTER 5

LIENS

I. INTRODUCTION

Another enforcement tool which, pursuant to the Child Support Enforcement Amendments of 1984 (hereinafter CSEA), state legislators must enact is "[p]rocedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the state." 42 U.S.C. §666(a)(4). Unlike the elaborate wage withholding or federal income tax offset provisions of the CSEA, this constitutes the full lien requirement. The federal regulations, 45 C.F.R. §303.103, add little more; they require states to develop guidelines to determine whether a case is "inappropriate for application" of the lien procedure. According to the federal regulations a state may choose to apply the lien procedure to all cases.

The utility of liens for child support enforcement was best summarized by the House Committee on Ways and Means in its report on the then proposed CSEA legislation. The Committee found liens "simple to execute and cost effective," and a catalyst for an obligator "to pay past-due support in order to clear title to the property in question" without need for executing on the judgment. Of course, if the encumbered property is sold, voluntarily or involuntarily, past-due support should be satisfied. Finally, the Committee envisioned that liens would "compliment the withholding provisions" and be "particularly helpful in enforcing support payments from obligors with substantial assets or income but who are not salaried employees." H.R. Rep. No. 527, 98th Cong., 1st Sess. 37 (1983).

Lien practice is dependent totally on state law and procedure. It is impossible, therefore, in a generic manual to provide specific practice information, e.g., filing fees, time limits, exempted property and so forth. Many state and local bar associations have conducted training and prepared manuals on enforcing money judgments. Such works invariably cover local lien practice and should be consulted. This chapter addresses some general lien principles, highlights some less frequent but potentially useful provisions for use in child support cases, and ends with a brief section on execution liens.

II. GENERAL LIEN PRINCIPLES - CHILD SUPPORT

A. Source of Law

Child support liens discussed in this chapter are money judgment liens. As such, principles and rules of money judgment liens generally apply to child support liens. Less often a child support lien may be part of the original support order. In such cases the support order itself specifically imposes a lien on the obligor's property. For an example of such a provision see 8a Am. Jur. Pl. & Pr. Form (Rev. Ed.) Divorce and Separation Form 542. Such liens are less common but most states recognize the inherent power of the court to impose one in support cases. See Anno, Alimony or Support Decree-Lien, 59 A.L.R. 2d 656 (1958). This power often is limited to cases where no other support remedy is practical, the lien has a limited life, and there is reason to believe that the obligor will become delinquent. Cf. In re Marriage of Johnson, 134 Cal. App. 3d 148, 184 Cal. Rptr. 444 (1982). A few states, by statute, allow the court to include a lien provision in its support order. Typically, the court will have to specify the exact lien amount and describe specific property affected. See, e.g., Ariz. Rev. Stat. Ann. §25-318(c) (Supp. 1984-85); N. C. Gen. Stat. §50-13.4 (f)(8) (1984); Wis. Stat. Ann. §767.30(2) (Supp. 1984-85) . The remainder of this section focuses on the child support lien as a money judgment lien, since this is the procedure states must have available to enforce past-due support in order to satisfy the CSEA requirement.

Liens are state statutory creations. The first and by far most important piece of advice to attorneys seeking to obtain liens for purposes of child support enforcement is to consult the controlling state laws and procedures. This is critical since judgment liens must comply substantially with the enabling statute to take effect. Reynolds v. Kessler, 669 S.W.2d 801 (Tex. App. 1984).

With respect to child support, the state lien law may be found in either a domestic relations code or as part of a general money judgment lien statute. If part of a general money judgment lien provision, it may either refer to child support orders specifically (e.g., Idaho Code §10-1110 (1979)), or be construed by the courts to this effect. Even when a child support specific lien statute exists, it typically treats child support like any other money judgment for lien purposes. See, e.g., Iowa Code Ann. §598.22 (West Supp. 1985); Neb. Rev. Stat. §42-371(i) (1984). A child support specific lien statute may, however, cover some issues not in a general lien statute, such as the priority status of future child support installments. Cal. Civ. Proc. Code §697.380(d) (West 1983). A third source of child support lien authority may be found in the state's child support

enforcement act providing for IV-D agency services. This provision, unlike those found in general domestic relations or money judgment statutes, calls for an administrative lien procedure. See, e.g., Me. Rev. Stat. Ann. tit. 19, §503 (1981); Wash. Rev. Code Ann. §74.20A.060 (1982) and discussion in Section III.

In order to satisfy the CSEA, liens must be available to the IV-D program as part of its enforcement entourage. Indeed, many of the existing child support specific lien provisions are limited to IV-D use (especially those involving administrative processes). Often this is further limited to AFDC cases. Under the CSEA such laws must be amended to include non-AFDC clients of the agency. In states with special IV-D lien authority, private attorneys may always use a general money judgment lien provision.

B. Child Support (Money Judgment) Lien Statutes

Money judgment lien statutes typically cover the following issues:

- o how to perfect the lien
- o lien duration
- o priority status of the lien
- o property affected by a lien and
- o releases.

Additionally, most states have separate provisions on enforcing judgments after liens are filed, which are briefly described in Section IV. Please remember that all state lien laws and practices vary. The following merely identifies common statutory provisions and special child support considerations.

1. Perfecting the Lien

The support order itself does not constitute a lien. In order to take effect a lien must be perfected; that is, it must be filed, docketed or recorded in such a manner as to impose a burden or encumberance on property. How to perfect the lien requires answering the basic what, where, how, and when questions.

What is filed: depending upon the state law liens are perfected by filing (docketing, recording) a certified copy of the support order (e.g., N.M. Stat. Ann. §40-415 (1983)), be it a court or administrative order, an order reducing a specific arrearage to judgment (e.g., Ind. Code. Ann. §31-1-11.15-13(f) (West Supp. 1984-85)), or an abstract of one of these judgments. See e.g., W.Va. Code §48-2-17 (Supp. 1984). The advantage of filing an abstract is that, in a complex divorce, the support provision may be part of a long order which is often confusing to the recorder. Abstracts may be simple forms, identifying the

court, case name, date of support order, support amount, and names of the parties. An example of an abstract is found at Cal. Code Civ. Proc. Code §674 (West 1983).

As a general rule, states which allow the filing of the support order itself have child support specific lien statutes. Absent such a statute, most courts have held that a docketed support order does not create a lien on the debtor's property for support installments that become due in the future. See, e.g., Boyle v. Baggs, 10 Utah 2d 203, 350 P.2d 622 (1960). Contra Morris v. Henry, 193 Va. 631, 70 S.E. 2d 417 (1982). In such states, the arrearage must be reduced to a judgment upon which a lien may arise. See, e.g., N.C. Gen. Stat. §50-13.4(f)(8)(1984); W.Va. Code §48-2-17 (Supp. 1984). This procedure satisfies the CSEA requirements that a lien procedure exist for overdue support owed by an absent parent.

In addition to filing papers there may be one or two fees associated with this procedure. The first fee may be to the court clerk for preparing necessary documentation; the second fee may be for the public official who actually records the lien. In either event, these fees tend to be small, seldom more than $15. Regardless of the documentation required to file a lien, it is important that the filing occurs as soon as possible. The filing date establishes when the obligee becomes a secured creditor. As will be seen in the discussion on priorities below, this is a critical distinction.

When does it take effect: This in part depends upon "what is filed." In states which permit the filing of the support order (or abstract) itself, a lien may automatically arise when this order is docketed. Not all states, however, will recognize a lien with this initial filing. Some will require subsequent docketing of evidence of an arrearage. This might include a judgment of arrearage, an affidavit of the party (e.g., Mo. Rev. Stat. §454.515(3) (Supp. 1985); W.Va. Code §48-2-17 (Supp. 1984)), or a payment record maintained by the court clerk or other authorized collector of support. Evidence of a specific arrearage may be more difficult in non-AFDC cases if a central clearinghouse or registry was not used to collect and monitor support from the time the order was entered. In such instances IV-D attorneys are well advised to request an affidavit by new IV-D clients who are now seeking enforcement services.

Once a lien is properly filed, based either on the original support order or evidence of an arrearage, an interesting question concerns the status of unpaid future support installments. As indicated above the general rule is that a docketed money judgment does not place a lien on the debtor's property for such future payments. Some states by statute, however, permit the original filing of the support order to

constitute a lien upon property of the debtor for amounts of support installments as they mature, eliminating the need for periodic docketing of arrearages. See, e.g., Cal. Civ. Proc. Code §697.350(c) (West 1983); Mo. Rev. Stat. §454.515 (Supp. 1985); R.I. Gen. Laws §15-5-28 (Supp. 1984). See also Brieger v. Brieger, 197 Kan. 756, 421 P.2d 1 (1966), which held that the original support decree, when recorded, does not constitute a judgment lien on an obligor's property for future support installments, but that when such installments become due and unpaid they automatically become a judgment constituting a lien on the property. In these states, presumably, the filed order puts prospective purchasers of a debtor's property on notice that there may be a support arrearage, requiring further investigation on their part. Prospective purchasers would have to ascertain whether an arrearage exists or obtain a release from the obligee. One way of mitigating this burden in states which permit judgment liens on the obligor's property as installments mature, without requiring subsequent filings by the obligee, is to require support payments through a central clearinghouse, such as the clerk of the court. The clerk's records enable third parties to easily determine the existence of support arrearages. See, Mo. Rev. Stat. §454.515(3)(6) (Supp. 1985).

Where is it filed: Liens on real property must be filed in the county (or in some instances the town or city) where the obligor's property is situated. The filing (docketing, recording) is the physical act of submitting the requisite papers to the appropriate authority. Typically, it is filed with a recorder of deeds, county clerk, or some other public agency. It is this act, and not the support order or judgment itself, which creates the lien. Liens may be filed in more than one county. This often requires filing a certified transcript of the original docket entry in the second county. This county by county filing requirement is obviously time consuming and risks missing some of the absent parent's property. Accordingly, some have proposed state level filing, although county filing remains the norm.

Even if the debtor currently does not own real property, it is important to file a lien at least in the county of his residence. This accomplishes two things: first, should he subsequently acquire property (and the odds are greatest he will obtain property in his home county) the lien will apply. As a general rule, liens apply to "after acquired" property. Second, his ability to acquire property may be hampered. Many lenders will insist that the debtor satisfy outstanding debts so that when the obligor obtains new property he will acquire clear title.

Only a handful of states, prior to the CSEA, recognized judgment liens on personal property. In these states, as a general rule, liens for personal property are filed in the same place where financial statements are filed to perfect a security

interest. See, e.g., Cal. Civ. Proc. Code §697.550 (West 1983) (with Secretary of State); Me. Rev. Stat. tit. 14, §3132 (Supp. 1984-85) ("with the filing officer where a filing would be required to perfect a security interest in such property"). Under the Uniform Commercial Code, §9-401(b), where to file is left to the states's discretion. Indeed the Code provides three alternative filing provisions -- central filing (e.g., Secretary of State), central or local filing depending upon the type of property, and combination of central and local filing. The most common method adopted by the states is the second one -- local or central filing, dependent upon the type of collateral. For example, Kansas' new support law bringing it into compliance with the CSEA requires that a lien on a vehicle be filed with the division of vehicles. Additionally the Code allows certain exceptions to the regular filing requirements, such as allowing security interests in automobiles to be perfected by notation upon certificates of title. UCC §9-302(3).

Since the purpose of filing liens and security interests is similar -- placing prospective transferees of property on notice of a third party's interest in the property -- logic suggests that states adopting personal property liens use the same filing office for both functions.

Frequently, the debtor will own property in other states. Interstate enforcement of child support by means of a lien involves more than recording the judgment with a county clerk in another state. At common law the creditor would have to bring a new action in the second state, based upon the out of state judgment. The new judgment could be docketed and enforced. Uniform laws have greatly simplified this process. The creditor, through a URESA or Uniform Enforcement of Foreign Judgments Act action (now enacted in 28 states), may have the support order registered in the new state. That state's enforcement procedures, including liens, may then be engaged.

Who files for a lien: Liens are filed at the discretion of the obligee. It is not a mandatory procedure in every case. Thus the obligee may elect to file a lien, or where the obligee is a client of the IV-D agency, the agency may do so. In IV-D caes, the discretion is restricted by the guidelines states must develop addressing the appropriateness of enforcement remedies in individual cases. 45 U.S.C. §666(a).

2. Lien Duration, Satisfaction and Release

The life of a lien varies by statute. A common term is 10 years from the date of judgment or docketing of the lien. Its duration within a state may also vary depending upon whether it is for real or personal property. The latter liens are often shorter. In some states, with special child support lien

statutes, the lien's duration may be geared to the peculiarities of support orders. For example, in Nebraska it lasts for a specified time period following the youngest child becoming of age. Neb. Rev. Stat. §42-371 (1984). In Missouri it lasts for three years following each installment as it comes due. Mo. Rev. Stat. §454.515 (Supp. 1985). Absent specific statutory language to this effect, it may even be argued that the lien's duration runs from the time each installment becomes due, especially in jurisdictions which recognize that each support installment which becomes due and unpaid constitutes a separate and final judgment. See, e.g., Hansen v. Hansen, 538 P.2d 935 (Or. 1975) (interpreting Oregon's 10-year lien statute from date of order or decree in cases involving alimony and support, Or. Rev. Stat. §107.126, to this effect). In many states the lien may be revived and extended by refiling the necessary documents before the lien expires. Practitioners should not assume that the duration of a support lien is the same as other money judgment liens. It is critical to determine whether states have special lien durations for child support purposes. For example, in West Virginia the obligee has only 60 days following the filing of the order's abstract and affidavit of arrearage to commence a proceeding to enforce the order of support, or the lien will be discharged and extinguished. W.Va Code §48-2-17 (Supp. 1984).

Liens themselves do not compel debtors to do anything. They merely impede a debtor's ability to convey property. Consequently, liens promote "voluntary" compliance by debtors. Debtors wishing to clear title will offer to satisfy their outstanding debts. (More typically, a title or insurance company will compel this behavior.) When this occurs, the creditors must release the lien, fully or partially, on general or specific property. Should the creditor refuse to execute a release, debtors may petition the court for relief. Many states permit debtors to petition the court for a partial release on specific property. See, e.g., Mo. Rev. Stat. §454.515(2) (Supp. 1985). Courts will seldom grant this relief unless enough property remains to satisfy the support debt or the debtor posts sufficient security to insure payment for arrearages and future support.

Where the IV-D agency obtained the lien on behalf of an AFDC family, the agency must execute any releases (or consent to them). See, e.g., Kan. Stat. Ann. §60-2204. In cases where the agency secured a lien on behalf of a non-AFDC family, or a former AFDC family, the individual must sign any release.

3. Property Affected by Liens

Real Property

Judgment (and child support) liens are considered general liens. They attach to all real property of the debtor in the county where the judgment is recorded. States split as to whether it applies to present or future, vested or contingent, and legal or equitable interest in the property. It is effective against the debtor's property in the county at the time of recording, as well as all subsequently obtained property. As such, no address or description of the property is necessary.

Lien statutes cover all real property of the debtor with one notable exception: the statutory homestead. This exemption is designed to protect the debtor's family home from creditors they are unable to pay, sometimes to a statutory set maximum amount. Consequently, most homestead statutes require that the debtor have a family and that the property be occupied and used as a residence. In some states there must be a formal declaration that the property is a homestead. While these exemptions are often liberally construed to protect the debtor, child support liens may cover homestead property in many states. This is based on the policy that it would be illogical to deprive children of maintenance under exemption laws which are designed to protect them. See Anno, 54 A.L.R.2d 1422 (1957); Bickel v. Bickel, 17 Ariz. App. 29, 495 P.2d 154 (1972); Winter v. Winter, 145 N.W. 709 (Neb. 1914); Breedlove v. Breedlove, 691 P.2d 426 (Nev. 1985). But see, Puta v. Puta, 572 P.2d 973 (Okla. 1970) (homestead applies to property purchased by husband and new wife). Nonetheless, if a state does not wish to exempt homestead property from a child support lien, it should specify this in the homestead statute. Failure to do so may be interpreted to preserve the exemption. In re Block, 357 N.W.2d 134 (Minn. 1984).

Liens are said to follow the property. If the debtor succeeds in transferring ownership, the lien survives. In such cases, however, the obligee cannot collect against the proceeds of the sale; the lien on the property merely stays in effect. Some states, however, hold title companies financially liable to secured creditors for property transferred without obtaining a release. There are circumstances, however, where the transferee of property may defeat the lien, most notably when the lien was improperly recorded, thereby not putting the transferee on notice of its existence. Even this rule has its exceptions and attorneys are well advised to consult local law.

Personal Property

While most money judgment lien laws today do not cover personal property, such property is subject to execution liens. 46 Am. Jur. 2d Judgments §249 (1969). That is they may be levied

upon to satisfy the judgment, but the lien does not predate the levy. This principle frees personal property from long-term restrictions on its saleability, but enables judgment creditor's to reach it to satisfy debts. As a practical matter, upon applying judgment lien principles to personal property, states can define affected property as they do for purposes of execution. See section IV.

As with real property, state statutory exemptions for personal property exist. Exemptions typically cover commodities necessary for a person to earn a livelihood and highly personal property, such as: necessary health aids, family portraits and heirlooms, household furniture, books, jewelry, trade tools, and work vehicles. Under federal and state laws certain disability and welfare payments, including social security and veteran's benefits, are also exempted. 42 U.S.C. §407(a); 38 U.S.C. §3101. Arguments may be advanced, however, that these federal anti-assignment provisions do not apply to child support cases. Like the homestead exemptions these provisions intend to protect beneficiaries and their dependents who rely on such payments. In re Green, 27 B.R. 462 (Bankr. Va. 1983). Case law has held that exemptions for social security benefits do not apply to alimony. See, e.g., Meadows v. Meadows, 619 P.2d 598 (Okla. 1980). See also Dillard v. Dillard, 341 S.W. 2d 668 (Tex. Civ. App. 1961) (veteran benefits anti-assignment provision inapplicable to support payments). Some states by statute permit child support obligees to overcome personal property exemptions. See, e.g., Idaho Code §11-607(a)(1) (Supp. 1985); Tenn. Code Ann. §26-2-107 (1980) (no property exempt from attachment and garnishment).

4. Priority Status

A child support lien converts the obligee from an unsecured to a secured creditor. As such it gives the obligee priority status over unsecured creditors. When compared to other judgment liens on the obligor's property, priority status is determined in order of recording. Earlier recorded judgments have priority over subsequent ones. Priority status is critical. In the event of a forced sale, proceeds are not disbursed on a pro rata basis. Rather the first or more senior judgment lien must be fully satisfied before the second judgment creditor may share in the proceeds, and so on. Unsecured creditors stand last in line.

The priority ranking applies only between competing judgment liens, and between judgment liens and unsecured creditors. There may be other liens, such as mortgages, which might not be purely dependent on recording for their existence. For example, in some states the mortgage lien, sometimes referred to as a consensual lien, is created at the time the mortgage is executed (e.g., Wis. Stat. Ann. §708.01 (West 1981)), even in the

absence of recording. Thus a judgment lien may be subordinate to an earlier executed mortgage, even if the mortgage is recorded at a later date.

The Uniform Commercial Code, adopted in all states (except Louisiana), specifies the priority ranking between lien creditors and persons with unperfected security interests. UCC §9-301. As a general rule, unperfected security interests are subordinate to a judgment lien on the same property.

Child support liens raise an interesting priority status question in states which allow a docketed support order to create an automatic lien on the debtor's property as to future support payments as they mature: May an independent judgment lien, filed after the support order is recorded but prior to missed future support installments, take priority over these missed payments, or do the missed payments enjoy the priority status as of the original filing date? California, by statute, has specifically addressed this question, providing that an independent judgment lien, filed before future support payments mature, takes priority over such payments. Cal. Civ. Proc. Code §697.380(d) (West 1983). A similar question concerns the priority status of a judgment lien when the original order or judgment, which had been filed, is modified. Clearly, this is of particular concern for child support orders. Few states have legislatively addressed this issue. In California, the law provides that a money judgment that has been modified as to the amount may be recorded in the same manner as the original judgment to create a lien. If the modified order increases the support amount, the judgment lien continues under the terms of the original order until the modification is properly recorded. At that time, the priority status of the original order is preserved as to the amounts owed under that order; additional amounts of the modified order are only entitled to priority status as of the date of the second filing. Cal. Civ. Proc. Code §697.360 (West 1983).

III. ADMINISTRATIVE LIENS

Several states today provide for administrative lien procedures in child support cases. See, e.g., Me. Rev. Stat. Ann. tit. 19, §503 et seq. (1981); N.H. Rev. Stat. Ann. 161-C:10 et seq. (1983); Va. Code §63.1-254 (1980); Wash. Rev. Code Ann. §74.20A.010 et seq. (1982). Such provisions are part of more extensive enforcement remedies bestowed upon the IV-D agency. They are meant to augment existing statutory and common law remedies. Thus they are in addition to existing remedies, including the state's regular lien laws. N.H. Rev. Stat. Ann. §161-C:1.

The statutory provisions for administrative liens are remarkably similar in states with this remedy. They are part of a process which authorize the agency to enforce court orders, establish support orders where no court order exists, assert liens, and levy upon property. The rudiments of these laws are as follows:

(1) The IV-D agency, by subrogation or assignment, is authorized to enforce support orders.

(2) The agency will enforce such orders established by the court. If no court order exists it will, after service of notice on the responsible parent, conduct a hearing to establish a support award.

(3) Following service of notice of a support debt based on a court order, or notice of an administrative support order, the amount stated in the notice will be a lien on all property of the debtor. Administrative liens usually cover real and personal property. Most laws state that the lien will not take affect until a period of time following this notice, usually 21 days. During this interval the responsible parent may satisfy the debt to avoid the lien.

(4) In asserting the lien these laws provide for manner of perfecting (what is filed and where); obligation of persons holding or possessing property subject to the lien; and means of terminating the lien or releasing specific property.

(5) Exempted property is identified.

(6) Judicial review of administrative actions is specified.

Currently most administrative lien laws apply to AFDC cases only. In light of the CSEA's requirement that IV-D services be made equally available to non-AFDC persons on application, this remedy will also have to be made available to this class.

Administrative remedies also provide for means of executing on these liens, usually by orders to withhold and deliver; distraint, seizure and sale of property, or foreclosure. These actions are briefly described in the next section.

IV. ENFORCING THE LIEN

A. State Laws and Debtor's Protections

Liens are not self executory. They merely impede the debtor's ability to convey property. If a lien exists a debtor must satisfy the judgment before the property may be sold or transferred. Creditors need not, however, wait for such a conveyance; they may consummate their judgment by execution and levy against the property. The means of doing so, as with all areas of lien practice, "are often the subject of minute statutory regulation, and the general rule is that the provisions of an execution statute must be strictly construed and followed." Executions, 20 Am. Jur. 2d §1.

Unlike judgment liens, which historically have been limited to real property, the personal property of a debtor has long been subject to levy. Such property, in addition to personal belongings, typically includes rights and shares in corporate stock, money, bank accounts, credits, negotiable instruments, automobiles, recreational vehicles, and so forth. An execution on personal property itself creates a lien. When this lien takes effect for priority purposes, for example at the time a writ is issued or when the property is levied on, is a question of state law.

The CSEA has no requirements regarding the execution of a judgment. All states have authority in place to enforce money judgments which may be used in child support lien cases. Some states, with administrative lien procedures for support cases, have special execution provisions as well.

The most common means of enforcing a money judgment issued by a court after a lien has been perfected is through a writ of execution. This writ, generally issued by the clerk of the court where the judgment is recorded, at the insistence of the secured creditor, directs the sheriff or other statutorily authorized official of the county where the property, real or personal, is situated to levy on the property described in the writ and sell it at a public sale. The writ must be returned to the clerk on the specified ("return") date with an endorsement by the sheriff stating the steps he took or the impossibility of finding leviable assets (return "nulla bona"). Further writs may issue (alias and priories writs) if earlier ones failed. The life span of a writ is typically 60 or 90 days.

Most states limit issuance of this writ to a specified time period, usually between one and twenty years following judgment. As with liens many states provide for the writ's renewal or revival, although the means to do so vary by state. (At common law, revival was done through a scire facias proceeding.) For

child support orders, courts have generally held that this limitation period commences at the time each installment is due. See, e.g., Lohman v. Lohman, 29 Cal. 2d 144, 173 P.2d 657 (1946); Bradford v. Futrell, 225 Md. 512, 171 A.2d 493 (1961). In some states unpaid installments must be first reduced to a lump sum judgment. Smith v. Smith, 168 Ohio St. 447, 156 N.E.2d 113 (1959).

The scope of a debtor's protections and rights during execution varies by state. The Supreme Court has not set forth explicit instructions for post-judgment garnishment or attachment cases. To date the Court has never conditioned the issuance of a levy or post judgment garnishment on prior notice and hearing. Endicott-Johnson Corporation v. Encyclopedia Press, Inc., 266 U.S. 285 (1924). Yet Supreme Court opinions ceding due process protections in the pre-judgment remedies area (e.g., Snidach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972)), have led lower courts to conclude that reasonable and appropriate procedural protections apply to post judgment cases. For example, courts have struck down state statutes which failed to provide notice, before or after attachments of property, of availability of state and federal statutory exemptions or of means by which a debtor may challenge attachment or claim such exemptions. Dionne v. Bouley, 53 U.S.L.W. 2487 (1st Cir. March 19, 1985) (No. 84-1258).

Perhaps the most extensive set of protections in the post judgment remedy area arise when levied property is to be sold, resulting in absolute deprivation. In such instances the most common rights follow: First, the debtor is, in all states, entitled to reasonable notice prior to any forced sale. Second, he is often protected from unreasonable low sales prices. Such protection usually either takes the form of redemption rights, i.e., the debtor is allowed to repurchase the property (see, e.g., Cal. Civ. Code §§700a, 702.703 (West 1971); Mass. Gen. Laws Ann. ch. 236, §33 (West 1974)), or appraisal limitations, i.e., the property cannot be sold at a price lower than a stated percentage of its appraised value.

While writs of execution (often called fiera facias) may be the most common enforcement procedure, other methods of enforcement are available, depending upon the state and type of property. Practitioners must consult local law. Means of levying on personal property or chattel in particular may vary, often depending upon the type of property and who has possession. If the debtor possesses the property, such as his automobile, the sheriff will typically take custody of it. Should the property be in the hands of a third party, such as a lessee, or incapable of manual delivery, other techniques may be used. The most common means are:

- garnishment - based upon a writ of garnishment served on the garnishee (and usually debtor), giving the garnishee a specified period of time to respond. The garnishee must declare what property or earnings of the debtor he holds along with any defenses to the garnishment action he may have, e.g., he no longer has the funds or the property is exempted. If the answer admits or the court determines that the garnishee is indebted to the debtor, the garnishee will be required to surrender the debt to the creditor for the determined amount (if the garnishee holds the debtor's property, it may be turned over to the court for sale).

- creditor's bill - created at common law to reach debtor's intangible property (e.g., choses in action) or equitable interests in property (e.g., beneficial interest in property held in trust), many states still retain. Under it a judgment creditor files a bill in equity court asking the court to compel the debtor to turn over such assets to be sold.

In addition to the above execution remedies, others are more common to the administrative lien process. These include:

- order to withhold and deliver - typically applies to property of any kind, including the earnings, commissions and bonuses, bank accounts, trust funds, unemployment compensation, retirement funds and social security owed to the debtor. This is similar to garnishment: property of debtor is in possession or control of third party who is served the order. This party is required to list property and wages of debtor in their control; third party has right to challenge order. Upon demand of a IV-D agency the person must surrender the property to the agency. Third party is held harmless from any possible liability for having withheld and surrendered property.

- distraint, seizure, and sale of property subject to lien - following assertion of a lien the IV-D agency may sieze and sell debtor's property to satisfy support debt. Several due process safeguards must be met, including: notice to debtor and others with an interest in the property, including description of property and time and place of sale; public posting of the notice of sale; and public sale shortly after posting (usually 10-20 days). Other protections often afforded the debtor are requirements that property be sold in a commercially reasonable manner (e.g., Me. Rev. Stat. Ann. tit. 19, §506(3)(a) (1981)), minimum sales prices

(e.g., N.H. Rev. Stat. Ann. §16-C:13 (II) (1983)), and rights of redemption (e.g., Wash. Rev. Code. Ann. §74.20 A.150 (1982)).

- o Foreclosure - forced judicial sale of real or personal property.

B. Practical Considerations in Seeking to Enforce Liens

While obtaining a lien is an easy, inexpensive procedure, its execution may be costly and problematic. Before attempting to execute on a judgment, attorneys should consider the following factors:

Costs - Before executing on specific property it is critical to weigh the potential costs against the amount you might recover. Several costs may arise from execution; depending upon the facts it may be financially unwise to take this step. These costs include sheriff fees, storage of personal property, towing charges, appraiser's fee, auctioneer's fee and charges, and cost of any order of publication or advertising public sale. Some states also require the creditor to post a bond before levying on property. States vary as to which, if any, of these costs may be recovered through proceeds of the sale. In states with administrative liens some costs may be avoided. For example, the IV-D agencies' agents may seize property, avoiding the sheriff's fee.

Value of Property Seized - Before expending the time and money, determine whether the property, if sold, will yield sufficient funds. This not only means looking at appraisal values and blue books, but determining what, if any, other creditors have a superior interest. This typically requires checking the judgment or docket books in the county where the property is located. If the property you are seeking to attach was acquired by the debtor after you filed the lien it is important to know the law in your state regarding priority status to such property. In the majority of states, all existing liens, regardless of when filed, have the same priority rights to after acquired property. Thus your return on such property may be significantly reduced. Related to the question of value is that of ownership to the property. Does the debtor have co-owners entitled to a share of the property? Indeed, the ability to levy against jointly held property varies by type of co-ownership and state. In many states, property held by tenants by the entirety may not be levied upon, unless both owners are judgment debtors. See, Masonry Products, Inc. v. Tees, 280 F. Supp. 654 (D. Virgin Islands, 1968). As for joint tenancies and tenancies in common, many states permit the lien creditor to compel partition and sell the interest of the judgment debtor. See, e.g., Va. Code §8.01-81 (1984).

Availability of other Remedies - Other remedies less cumbersome and costly than forced sales may satisfy the support debt. Under the CSEA this would of course include wage withholding as well as levies on non-exempt wages, bank accounts, credit union savings, and other personal property of the debtor.

CHAPTER 6

BONDS AND OTHER SECURITIES

I. INTRODUCTION

Under the 1984 Child Support Enforcement Amendments (CSEA) states must adopt procedures by which "absent parent[s] give security, post a bond, or give some other guarantee to secure payment of overdue support." 42 U.S.C. §466(a)(6). The law and implementing regulations further state that the absent parent receive notice of both the proposed action and procedures available to contest it. These procedures must comport with the state's procedural due process requirements. 45 C.F.R. §303.104. As with the other enforcement procedures required by the CSEA, excluding wage withholding, the state must also develop public guidelines to determine whether an individual case is inappropriate for this procedure. 45 C.F.R. §303.104(c). Such guidelines will look typically to the payment record of the absent parent and the availability of other remedies. 45 C.F.R. 302.70(b). In the context of bonds and securities, the Act's legislative history suggests another important criteria: this procedure may be counterproductive where the "cost[s] of meeting the security might preclude payment of the support obligation." H.R. Rep. No. 527, 98th Cong., 1st Sess. 38 (1983). Thus, for example, it would be a counter-productive to hold business assets as security if it would cripple the absent parent's ability to meet his or her support obligation.

This chapter addresses this enforcement procedure by looking at state law which mostly predate the 1984 Amendments, procedures to impose and enforce bonds or securities, and different forms of security.

II. EXISTING STATE LAW

Most states already allow for the posting of a bond or giving security in support cases. Statutory authority, however, does not necessarily cover all support cases. Some provisions are found in domestic relations codes, concerning divorce decrees (e.g., Colo. Rev. Stat. §14-10-118 (1973 and Supp. 1984)); others in paternity acts. E.g., Ohio Rev. Code Ann. §3111.13 (Baldwin Supp. 1984); the Uniform Act on Paternity §12; the Uniform Parentage Act §15(c). Many interstate support enforcement statutes also include bond/security authority, consistent with §26(1) of the revised Uniform Reciprocal Enforcement of Support Act. See, e.g., Ariz. Rev. Stat. Ann. §12-1675 (1982). The more comprehensive laws cover any support order, regardless of the underlying procedure. See, e.g., Cal. Civ. Code §4700 (West 1984).

In some cases, authority to require a security is found implicitly in divorce statutes. This typically arises by interpreting statutes which require courts to provide for the care and maintenance of children to empower courts through their equitable powers to "secure" such maintenance. See, e.g., In re Marriage of Gentile, 69 Ill. App. 3d 297, 387 N.E. 2d 979 (1979). The 1984 Amendments require that the bond/security/guarantee procedure be available to IV-D agencies to enforce support orders, and thus states with bond/security authority limited to certain procedures may have to amend or expand their laws accordingly.

The states also vary as to timing of the bond or security: in most states it is permitted when the original order or modification to it is entered and is geared toward securing future support payments. In other states it is permitted upon a default in payment. Under the 1984 Amendments only the latter procedure is required. The CSEA states clearly that bonds/security are only necessary to assure payment of "overdue support." The Amendments do not, however, prevent the state's use of this provision to serve a dual purpose: secure overdue payments and guarantee timely payment of future installments. A 1984 Delaware statute, for example, permits the court to "require the person to enter into bond ... in the amount of the past-due support plus a sum fixed by the Court to insure the payment of support as it becomes due for a period of not less than three months." Del. Code Ann. tit. 13, §516 (Supp. 1984). Indeed, not withstanding the CSEA provision, it is more common practice to require a security to assure future support payments.

A common feature of all bond/security laws is that they are used at the court's discretion. An appellate court will seldom overturn or substitute its judgment for that of a trial court. See, e.g., Davis v. Davis, 395 N.E.2d 1254 (Ind. App. 1979). The guideline a state must develop for its enforcement procedures according to the CSEA are only binding on the IV-D agency; judicial discretion to apply any of these remedies remains intact. See preamble to federal regulations, 90 Fed. Reg. 19632 (May 9, 1985).

While all statutes recognize the court's discretionary authority to require a security to enforce a support order, they do not provide criteria for the court to use. Case law affirms, however, that security should not be demanded in the absence of any evidence suggesting its need. Obligors who regularly pay their support and have evidenced no inclination to the contrary should not be unduly burdened. Case law also reveals several factors a court may apply in the exercise of its discretion. The most common are debtor's threat to leave the jurisdiction of the court; debtor's intent to sell or dispose of assets, thereby jeopardizing his ability to satisfy the support obligation; and

debtor's history of noncompliance. See, e.g., Landy v. Landy, 62 So.2d 707 (Fla. 1953) (threatens to flee); Rochford v. Laser, 91 Ill. App.3d 769, 414 N.E.2d 1096 (1980) (proper to set up trust fund for future support where obligor demonstrated unwillingness to make direct support payments); Johnson v. Johnson, 86 A.D.2d 905, 448 N.Y.S.2d 264 (1982) (proper to require security where obligor threatened to sell family business and leave state); Parker v. Parker, 13 N.C. App. 616, 186 S.E.2d 607 (1972) (proper to request a bond where obligor no longer lives in state and had no attorney of record in case); Bunde v. Bunde, 270 Wis. 226, 70 N.W.2d 624 (1955) (proper to put lien on obligor's property as security where he moved to Mexico and withdrew all bank deposits and other funds from state); Foregger v. Forreger, 48 Wis.2d 512, 180 N.W.2d 578 (1970) (proper to impose trust to secure support where obligor's past performance showed he could not be relied upon to keep his payments current).

Under the CSEA the only criterion specified is noncompliance with the support order: "the statute and regulations requires States to enact laws requiring absent parents who have a pattern of overdue support to post a bond, or give security or some other guarantee of payment." 50 Fed. Reg. 19631 (May 9, 1981) (preamble to federal regulations) (emphasis added). The pattern of nonsupport or amount of arrearages necessary to require a bond/security is at the state's discretion, and should be incorporated into its guidelines, along with other criteria.

III. BOND/SECURITY PROCEDURES

Most state laws do not specify what procedures are available to contest the proposed imposition of a bond or security. Rather under general due process concepts, the obligor is given notice of the intention to require a security with some opportunity to object. For example, if the security is imposed as part of the original divorce decree, some indication should be given to the obligor during the divorce hearing so he or she may raise any arguments. See, e.g., Blakenship v. Blakenship, 212 Cal. App. 2d 736, 28 Cal. Rptr. 176 (1963). Or, if the security is proposed to enforce an existing support order, notice to the obligor giving him an opportunity to "show cause" why it should not be demanded is typically required. See, e.g., Cal. Civ. Code §4700 (West 1984); Del. Code Ann. tit. 13, §516 (Supp. 1984). In jurisdictions which require a hearing to reduce a support arrearage to a judgment, a security requirement may arise from this hearing. See, e.g., W. Va. Code §48-8-1(d) (Supp. 1984). An obligee may, in rare instances, seek an ex parte order if to can be shown that the obligor is about to flee the jurisdiction or dispose of his or her assets. A show cause hearing may also be required before the obligor forfeits any security.

Because courts are vested with broad discretionary authority in these cases, obligors' protests are somewhat limited with respect to the original imposition of the security. They tend to fall in one of four areas: first, that he is not in arrears (if this is a precondition). Second, that the type of security being required is impermissible because it violates other laws. Third, that the amount of security requested vastly exceeds the total potential child support debt. Fourth, that there has been no showing that a security is necessary to assure compliance with the order. See, e.g., Fender v. Fender, 182 S.E.2d 755 (S.C. 1971) (reversed trial court's order to require the obligor to deposit in bank account $100/month for child's future needs-record did not show it was necessary to assure support compliance). This last point is more applicable where the security is being demanded at the time of the original support decree. An accumulation of an arrearage should, in most cases, be sufficient evidence of need. Defenses to the forfeiture of a security are even more limited: the bond or security condition, i.e., default or failure to pay off existing support arrearages, did not occur.

Once the court orders the obligor to give a bond or security, his failure to do so may subject him to certain sanctions. Most often this will include contempt. See, e.g., Neb. Rev. Stat. §13-106 (1978) (paternity); Nev. Rev. Stat. §125.240 (1983) (divorce); Wisc. Stat. Ann. §767.30 (West Supp. 1984-85) (any support order). Depending upon state law and practice, other remedies may be at the court's disposal. For example, in some states failure of the obligor to post security may cause the court to sequester the obligor's property and appoint a receiver to insure payment. See, e.g., Minn. Stat. §518.24 (Supp. 1985); Neb. Rev. Stat. §42-371(5) (1984); N.J. Stat. Ann. 2A:34:23 (West Supp. 1984-85).

IV. FORMS OF SECURITY

The 1984 Amendments require states to have procedures for a posting of a bond or the giving of a security or other form of guarantee. This provision leaves open to the IV-D agency or obligee what type of security to seek, subject to the court's approval.

A. Bonds

The 1984 Amendments specifically require states to enact laws requiring that the obligor post a bond to assure support payment. Such a bond is a written promise to pay the support debt should the obligor default. It is usually underwritten by a surety or bonding company which, for a premium, will assure satisfaction of the debt if the obligor becomes delinquent. As a

practical matter, such bonds are almost never executed for child support obligations. The bonding industry dislikes involvement with child support. The long-term commitment of the support obligation, the volatile nature of family problems, and high rate of non-compliance with support obligations makes bonding in these cases too risky. Compounding this risk is the fact that the federal law only requires a bond (or other security) after there has already been a default, which is clear evidence of a credit risk. This reluctance by bonding companies was noted in the preamble to the regulations implementing the CSEA. 50 Fed. Reg. 19631 (May 19, 1985). The Department of Health and Human Services, in turn, "urge[d] States and local IV-D agencies to educate local bonding companies to the efficacy of underwriting child support obligations in cases where the absent parent has been a minimal credit risk in other credit ventures."

B. Negotiable Instruments

In light of the problems in obtaining a bond in support cases, a more probable form of security will be a negotiable instrument which the IV-D agency, obligee's attorney or court may hold in escrow. Such instruments include, for example, stocks and bonds.

Using negotiable instruments as security has several advantages. First, as a written document it is easy for the IV-D agency, obligee's attorney or court to hold in escrow. Second, such instruments are often payable to bearer, making it easier to liquidate it should there be a forfeiture. If it is payable to the order of the obligor, he may need to endorse it. Third, the agency may hold the instrument and, in the event of forfeiture, not have prior claims competing for it. Akin to holder in due course principles this is true if the agency is without notice of other claims to the instrument. Fourth, in the event of default, negotiable instruments are often immediately cashable, without need to wait for a specific period of time or condition to occur or the added time and expense of public sales. As an obvious corollary to the above, obligees should avoid taking as security negotiable instruments with earlier claims to it or which can only be liquidated subject to conditional events.

C. Trusts, Life Insurance and Liens

Another means of "securing" support payments is to require real or personal property of the obligor to be held in trust for his dependents. Courts have often done so in divorce proceedings under express statutory authority . In particular, many states which have adopted the Uniform Marriage and Divorce Act have included its trust provision found in section 307, Alternative A. See, e.g., Ill. Rev. Stat. ch. 40, §503(g) (Supp. 1984-85). In the absence of express statutory authority some courts have

imposed trusts to secure support payments under their general equitable powers to assure for the care and maintenance of children.

Some courts are reluctant to impose a trust if it is to last beyond the child's minority. In such instances courts have rationalized that this would force parents to support emancipated children, which goes beyond the law's requirement. See, e.g., Davis v. Davis, 268 N.W.2d 769 (N.D. 1978). However, when these trust arrangements are clearly designated as security for child support payments and the obligation ceases upon the child's emancipation, they should withstand any challenge. For a complete discussion of using trusts to secure support under a divorce decree see 3 A.L.R. 3d 1170 (1965).

Courts have often required the obligors to maintain life insurance with their dependants named as beneficiaries to secure the support order. Many of the same issues which arise in trust cases, such as authority of the court to require this insurance as a security and whether it must terminate with the child's emancipation, apply in these cases. For the most part, courts apply the same analyses to life insurance and trust cases. Thus, for example, Illinois appellate courts have interpreted the same statute to hold that neither life insurance (In re Marriage of Dulyn, 89 Ill. App. 304, 411 N.E. 2d 988 (1980)) or trust requirements (Olsher v. Olsher, 78 Ill. Appl 3d 627, 397 N.E.2d 488 (1979)) may extend beyond the child's emancipation. Similarly courts have ruled that the divorce courts authority to divide property of the parties enables them to secure support through a trust (e.g., Stemple v. Stemple, 12 Ohio Misc. 147, 230 N.E.2d 677 (1967)) or life insurance provision (e.g., Kirk v. Kirk, 434 N.E.2d 571 (Ind. 1982)).

An interesting issue concerning life insurance as security for child support is whether it violates the traditional principle that the support obligation (not including arrearages) ceases with the obligor's death. This traditional concept, however, has itself come under attack and states which have adopted the Uniform Marriage and Divorce Act (§316(c)) no longer abide by it. See In re Marriage of Icke, 530 P.2d 1001 (Colo. 1975) and In re Marriage of Duylun, 89 Ill. App.3d 304, 411 N.E. 2d 988 (1980) upholding life insurance security provisions on this ground.

For a complete analysis of using life insurance to secure support orders see 59 A.L.R. 3rd 9 (1974).

As discussed in Chapter 5, a post-judgment enforcement remedy is to impose a lien on the obligor's property. In most jurisdictions such liens arise only after there has been a support default. It is possible, however, to impress a lien on

the obligor's property at the time of the support order to secure future support payments. The court's authority to do so is either found in statute (see, e.g., N.C. Gen. Stat. §50-13.4 (f)(8) (1984); Wisc. Stat. §767.30(2) (Supp. 1984-85)), or by a court's use of its equitable powers to secure support. See generally 59 A.L.R. 2d 656 (1958).

When liens are used to secure future support they tend to take on the characteristics of other security devices. For example, unlike other judgment liens they usually apply only against specific property of the obligor (see, e.g., N.C. Gen. Stat. §50-13.4 (f)(8) (1984); Whitman v. Whitman, 87 Wis.2d 22, 273 N.W.2d 366 (1978)) and are imposed after evidence that the obligor may not meet his future support obligations. See, e.g., In re Valley, 633 P.2d 1104 (Colo. App. 81) (court may impose a lien where the obligor threatens to dispose of property).

D. Personal Property, Mortgage Deeds, Cash Deposits

In the end it is fair to say anything of value to the obligor may be held as security. This might include personal property such as automobiles, boats and recreational vehicles; mortgage or deed of trust (see N.C. Gen. Stat. §50-13.4 (f)(1) (1984)); or even a cash deposit. In fashioning a specific security request the obligee should bear in mind several questions. First, if personal property or a deed of trust is being used, do other's have rights to it, as owners or creditors? Second, also with respect to personal property, how easily may it be sold if the obligor forfeits it? Third, is it of sufficient value to the obligor that it will compel him to meet his support obligations?

CHAPTER 7

LOCATING ABSENT PARENTS AND THEIR ASSETS

I. INTRODUCTION

One large problem in support enforcement is the interstate movement of absent parents. When an obligor relocates and fails to notify the court or obligee of his or her new address, there is little a court can do to enforce the order should payments become delinquent. The obligee is then burdened with the task of trying to locate the absent parent. Once the absent parent is located, there often remains a problem of identifying and locating assets of the parent from which a support arrearage can be collected. Again, the burden is on the obligee to produce evidence of the absent parent's assets. This chapter will concentrate on tracking resources which are available to private and IV-D attorneys. The first section will discuss sources of information for location of the absent parent. The second section will focus on sources of information for location of the parent's assets. The latter section will also list precautions an attorney should take before attempting to collect a support arrearage from certain assets, such as motor vehicles.

II. LOCATION OF THE ABSENT PARENT

Before an attorney seeks enforcement of an administrative or judicial order for child support, he or she obviously needs to know the absent parent's whereabouts. Such information is necessary in order to serve process on the absent parent for an enforcement proceeding, to serve the absent parent with discovery concerning his or her assets, and to target the geographical area within which one should investigate for assets from which a support arrearage can be collected. There are many resources available to private and IV-D attorneys searching for an absent parent; the primary resource, however, is the attorney's client.

A. The Client Interview

It is impossible to put too much stress on the importance of a thorough client interview for successful location of an absent parent. Although the client may not know the absent parent's current address or employment, the client can provide background information which will often enable the attorney to concentrate his or her search on a particular area.

The client interview should cover the following subjects:

-- absent parent's full name and nickname

-- any other name used by absent parent

-- absent parent's social security account number

-- absent parent's date and place of birth

-- names and addresses of absent parent's parents, including maiden name of absent parent's mother

-- absent parent's current address and phone number

-- if current address and phone number are unknown, the last known address and phone number of absent parent, and date as to when such information was current

-- absent parent's address and phone number prior to last known address and phone number

-- absent parent's current employment, identifying name and address of company, length of employment at company, name of supervisor and type of work done

-- absent parent's previous employment, identifying names and addresses of companies, lengths of employment, names of supervisors, and type of work done

-- any remarriage of absent parent, identifying date and location of marriage, current spouse's maiden name, current spouse's place of employment

-- location of any real property owned by absent parent

-- any private, military or government pension or benefits received by absent parent, identifying amount and source of benefits

-- names, addresses and phone numbers of absent parent's relatives and friends

-- hobbies of absent parent

-- clubs or organizations to which the absent parent belongs

-- any criminal record of absent parent, identifying date and location of arrest and conviction, offense involved, and date and location of any incarceration

-- if absent parent is on probation, jurisdiction supervising the probation and name of probation officer

-- any military service of absent parent, identifying branch of service, date and location of assignment, absent parent's rank and service number.

An attorney may wish to prepare a written questionnaire for the client to complete at home and return, since many of the above questions require a search of personal records.

Information provided by the client may lead directly to the absent parent. More likely, however, the information will provide a base from which the attorney must conduct his or her own investigation. Location resources will vary depending upon the area within which the attorney is able to narrow the search.

B. Location Resources in a City or County

If the attorney is able to narrow the search to a particular city or county, there are many location resources readily available.

1. Directories

The first place one should check, although surprisingly it is often one of the last places searched, is the telephone directory. If the absent parent has a telephone with a published listing, the directory will provide his or her residential address and phone number. If the absent parent has relocated since the directory's printing, the attorney should ask the present resident whether the absent parent left a forwarding address or phone number. Directory assistance may also be able to provide such information.

City directories are particularly useful because of their cross-indexing. Published by a company which has received prior permission from the local government, a city directory has listings of the city's residents, businesses, streets and phone exchanges. To locate a city directory, the attorney should check with the local Chamber of Commerce or a local library.

The attorney should review the directory's resident listing, which is arranged alphabetically, for the absent parent's address and phone number. Often the resident listing will also state a person's occupation and place of employment. The business listing, which is also arranged alphabetically, states the address and phone numbers of local businesses. It also states who is the owner or president of the business. Through the street listing, an attorney can locate the absent

parent's last known address and learn the names of his or her former neighbors. Neighbors may have information about the parent's current residence or employment. The city directory's phone listing is a good resource if the only information one has is the absent parent's phone number. Phone companies will not usually divulge the name or address of a particular number's "owner," but a city directory's phone listing does exactly that - provided the exchange is not an unlisted one.

2. Local Government Resources

Local government offices are another source of location information. When looking for a current residential address of the absent parent, an attorney should check the county Registry of Deeds, the county office of motor vehicle and boat listings, the Voter's Registration office, and local tax offices. The Clerk of the Court may also have a current residential or employment address if the absent parent is making support payments to someone else or is paying restitution or a fine through the court. Civil and criminal court calendars will alert an attorney to court appearances of an absent parent; the attorney can then serve the absent parent upon his arrival to court.

Another location source is the Post Office. The Postmaster will provide the new mailing address of any specific postal customer who has filed a Change-of-Address Order or other similar address notification, to any person or government agency who submits a written request explaining why the information is needed. 39 C.F.R. §265.6(d)(1)(1984). There is a $1.00 fee per change of address, unless the requesting party qualifies for a waiver under 39 C.F.R. §265.8(e)(8)(1984). The fee has been postponed indefinitely, however, for federal, state or local government agency requesters. 49 Fed. Reg. 46,895 (1984). The postal response to a change-of-address request may take up to a month. An attorney may also obtain the address of an absent parent by mailing the parent a certified restricted delivery letter, requesting the Post Office to send back a receipt noting the address at which the letter was accepted. 48 Fed. Reg. 28,482 (1983). Certified mailings are not effective, however, if the absent parent is likely to refuse delivery or if the attorney does not wish to alert the absent parent to support enforcement efforts. A third location method provided by the Post Office is the address correction service. 48 Fed. Reg. 28,482 (1983). Said service will disclose an absent parent's new address (if known by the Postal Service) or the reason for nondelivery, to any mailer when mail is undeliverable as addressed and the mailer endorses the mail "Address Correction Requested." The fee for the service is 25 cents. IV-D attorneys may also request verification of an absent parent's current address. 39 C.F.R. §265.6(d)(7)(1984). Verification means the Postmaster will state

whether or not a given address is the one at which mail for the parent is currently being delivered; verification does not imply knowledge by the Postal Service as to the actual residence of the parent. There is currently no fee to IV-D agencies for verification services. 49 Fed. Reg. 46,895 (1984).

3. Utility Companies

Local utility companies will occasionally volunteer information concerning the address, phone number and employment of a customer if they know the purpose of such information is limited to child support enforcement.

4. Credit Bureau Information

A credit bureau is an entity which for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating consumer credit information for the purpose of furnishing consumer reports to third parties. A primary source of information in a consumer report is the consumer's financial application which contains allegedly verifiable residential, employment, financial and asset data. Other sources of information include business establishments, financial institutions, and public records.

A complete credit bureau report will usually contain identifying information such as the person's full name, date of birth, and social security account number. It will note the consumer's current residential address, former residential address, current place of employment and former places of employment. The report will detail credit and asset information about the consumer: salary from employment; other income sources; the names of credit grantors (i.e., banks, department stores, gasoline companies); account numbers with reporting grantors; the highest amount ever purchased, the original amount of the loan, or the credit limit on each account; and the account balance with each reporting grantor as of a specified date. The report will also detail public record information such as any judgments or liens against the consumer, including the court where the judgment or lien is recorded, the amount of the judgment or lien, and the case number. If the consumer has petitioned for bankruptcy, the report will identify the federal court in which the petition was filed, the petition number, listed liabilities and assets of the consumer, and whether the petition is an individual or business bankruptcy. A credit report will also identify other parties requesting credit information about the consumer.

Since absent parents are consumers, they may have information on file at a credit bureau. Obviously, such information would greatly assist an attorney's location efforts.

Federal law, however, restricts the disclosure of information in a consumer report to very specific circumstances. 15 U.S.C. §1681b. Because of these restrictions, it is impermissible for a private attorney to use credit bureau information for the sole purpose of locating an absent parent. If, however, there is an existing administrative or judicial order for child support under which an absent parent is in arrears, a private attorney can have access to credit bureau reports for purposes of enforcing the support order. It is the opinion of the Federal Trade Commission staff that in such a circumstance, the attorney will be functioning as the designated collection agent of the creditor - the person caring for the child - and will qualify for information under 15 U.S.C. §1681b(3)(A).

In order to join a credit bureau, the attorney should contact local credit bureaus about the fee involved. Members of credit bureaus must agree to abide by the restrictions in the Fair Credit Reporting Act. If an attorney violates that agreement, he or she is subject to a fine or jail confinement.

5. Individuals with Location Information

Other sources of information, especially if informed that the purpose is for child support enforcement, are local recruiters for military service, managers of apartments where the absent parent has recently lived, friends and relatives of the absent parent (if the attorney is not concerned about the absent parent learning of the inquiries), and the local Chamber of Commerce. Previous employers of the absent parent are also a good source of information. In fact, 45 C.F.R. § 303.100(d)(x) requires employers who are withholding an absent parent's wages pursuant to Public Law 98-378 to promptly notify the State when the absent parent terminates employment and to provide the absent parent's last known address and the name and address of the absent parent's new employer, if known. If the town is fairly small, people at the Town Hall may know the absent parent's whereabouts or other people who can provide such information. If an attorney knows the type work that the absent parent performs, the attorney can contact other people in that field. For example, if the absent parent is a painter, the attorney should check local paint supply companies; the companies often have postings of names and phone numbers of local painters and contractors. If the absent parent has an unusual hobby to which few stores cater, informal conversation with the store personnel will occasionally provide useful location information. An attorney should also check with places that issue hunting and fishing permits if the absent parent pursues those recreational activities.

6. Additional Local Resources Available to IV-D Attorneys

The previously mentioned resources are available to both private attorneys and attorneys for state child support offices (referred to as IV-D attorneys). IV-D attorneys, however, have access to additional location information due to statutory exemptions from state and federal privacy laws which prohibit certain government and private sector agencies and institutions from disclosing data contained in their records. See, e.g., Privacy Act of 1974, 5 U.S.C. §552a. Unless a private attorney also qualifies for an exemption, the only access he or she will have to the location information is through a court order requiring disclosure. Private attorneys may always refer their clients to the local IV-D agency for services, in which case these additional location devices may be tapped.

a. Local Government Records Available to IV-D Attorneys

Because of exemptions in most state privacy laws, a IV-D attorney can usually contact the following local governmental agencies for information relating to an absent parent's social security account number, address and place of employment: the Health Department, the Housing Authority, the Food Stamps office, local law enforcement agencies which may have locating information due to a recent arrest of the absent parent, the local probation office, and the local pre-release and after-care office.

b. Credit Bureau Information

As discussed earlier, private attorneys cannot use credit bureau reports for location purposes only. IV-D attorneys, however, have access to location information in a consumer report pursuant to 15 U.S.C. §1681f. This section allows a credit bureau to furnish a government agency with the address, former addresses, places of employment or former places of employment of any consumer on whom it has information. The location information can be provided to the IV-D attorney regardless of whether a support order exists.

In order to have access to the complete credit report of an absent parent, there must be an existing administrative or judicial order for support which the IV-D attorney is seeking to enforce. In those cases, the IV-D office will qualify under 15 U.S.C. §1681b (3)(A) as a judgment creditor if the right to receive the payments has been assigned to it, or as the designated collection agent of the creditor (the parent caring for the child) in cases where IV-D services have been requested but no assignment has been made. See TEMPO No. 17, Credit

Bureaus, April 1, 1981, National Child Support Enforcement Reference Center, Department of Health and Human Services, Office of Child Support Enforcement.

Because of the comprehensive information provided by the credit bureaus, IV-D offices should consider contracting with a local bureau in order to supplement their own location and collection efforts.

Effective October 1, 1985, credit bureaus may also obtain certain information from IV-D offices. 42 U.S.C. §666(a)(7). When an absent parent's support arrearage exceeds $1000, the IV-D agency is required to provide information on the arrearage to a consumer reporting agency (CRA) if the CRA requests the information, and the procedure is deemed appropriate under State guidelines. When an absent parent's arrearage is less than $1000, the IV-D agency may use its discretion in disclosing the arrearage to a CRA. 45 C.F.R. §303.105. IV-D agencies may also voluntarily forward arrearage information to a CRA without a request having been made.

Information disclosed is limited to information about the amount of overdue support, e.g., whether or not the arrearage has been reduced to judgment, where the judgment is docketed. The IV-D agency may not release confidential information such as the name of the person to whom the support is owed. 50 Fed. Reg. 19,632 (1985). The IV-D agency is also required to notify the absent parent prior to any disclosure and to provide the parent an opportunity to contest the action which complies with state due process requirements. 45 C.F.R. §303.105.

C. State-wide Location Resources

If an attorney knows the state in which an absent parent is located, but does not know the particular city or county, there are state-wide location resources which may help narrow the attorney's search.

1. Occupational and Professional Licensing Bureaus

Both private and IV-D attorneys have access to information provided by a state occupational and professional licensing bureau. If the absent parent is engaged in an occupation which requires licensing (e.g., dentistry, podiatry, real estate, liquor sales), the bureau will disclose addresses it has on file for that person.

2. Secretary of State

If the absent parent has filed an application for incorporation or limited partnership and the client knows the entity's legal name, the attorney should contact the Secretary of

State or analogous office in the state where the business is believed to be located. For no charge, the Secretary will disclose to the attorney the entity's business address and its officers.

3. Trade Unions

If the absent parent works in a unionized profession (e.g., a plumber, an electrician), the attorney should contact the state trade union. Occasionally a union will disclose the address of one of its members if it knows the information is solely for child support enforcement. If the absent parent has moved out-of-state, the national union office may have the parent's current address or place of employment, depending on whether he or she has reregistered in the new location.

4. Department of Motor Vehicles

Information on file with the Department of Motor Vehicles is also a matter of public record. To ensure proper identification, the attorney should submit the absent parent's social security account number or date of birth, as well as the parent's full name.

There are two address sources within most state Department of Motor Vehicles: the driver record division and the registration division. The driver record division will have on file the address a person submitted in order to obtain a driver's license. It will also detail a person's traffic record. A check of the absent parent's most recent tickets may provide general location information insofar as the parent appears to frequent a particular area. The registration division will have a residential address on file if the absent parent owns a motor vehicle. Because the two divisions may have different addresses on file, the attorney should check with both divisions of the Department.

5. Additional State Resources Available to IV-D Attorneys

Again, because of statutory exemptions from state privacy laws, IV-D attorneys can usually readily obtain information from state agencies which is only available to a private attorney through court order.

a. State Office of Internal Revenue

If the absent parent has filed a state tax return or received income in the state, the state's office of Internal Revenue will have information concerning the parent's residential and/or employment address. Most states have statutes providing for disclosure of such information to a IV-D attorney. See,

e.g., Md. Fam. Law Code Ann. §12-104 (1984). The recently enacted Child Support Amendments of 1984 will require all state income tax offices to disclose an absent parent's social security account number and residential address to a IV-D attorney if the attorney has requested a state income tax refund offset or is enforcing a child support order by such means. 42 U.S.C. §666(a)(3)(C).

b. State Law Enforcement Division

State law enforcement divisions will often provide information to IV-D attorneys for the purpose of enforcing child support obligations. To ensure proper identification of the absent parent, the attorney needs to know the parent's full name, social security account number, and birthdate. A state law enforcement division will have information on whether or not the absent parent is located in a prison or correctional institution within that state. If the parent is incarcerated within the state, the division will also know the parent's earliest possible release date and latest possible release date. Many IV-D attorneys may also have access to the Police Information Network (PIN). A PIN check will reveal a person's criminal record, detailing the offense, date of the offense, and penalty; and the location of any current incarceration. Again, to insure proper identification, the attorney needs to know the full name, social security account number, and birthdate of the absent parent.

c. Bureau of Vital Statistics

The Bureau of Vital Statistics has on file birth certificates, marriage certificates and death certificates of persons within its state. From the Bureau's records, the IV-D attorney may learn the absent parent's date of birth, place of birth, and his parents' names. If the absent parent is dead, the Bureau's records will disclose the parent's place and date of death.

d. State Employment Security Commission

Another important source of information for IV-D attorneys is the state Employment Security Commission. 29 U.S.C. §49b(b). In order to search its records, the Commission requires the social security account number and full name of the absent parent. The search will result in a computer printout of the employment history of the absent parent, including whether or not the absent parent is currently receiving unemployment benefits and where those benefits are being sent. In fact, many IV-D offices have an arrangement with their state Employment Security Commissions whereby the IV-D office periodically submits to the Commission a tape of social security account numbers of all absent parents in active IV-D cases where the parents'

employers are not known; the Commission will run the IV-D tape against its file tape and will return a hard copy to the IV-D agency of all matches. (See also Chapter 2 on withholding against unemployment compensation).

e. Disclosure of Social Security Account Numbers

As indicated, the Employment Security Commission must have the social security account number of an absent parent before it can provide information from its file. Other than the parent's name, a social security account number is the most important element to locating the parent. There are several places the client can check to discover the absent parent's social security account number: old insurance policies, medical records, copies of loan applications, bank account statements, and copies of state and federal income tax returns. If the client cannot find the absent parent's social security number, the IV-D attorney can attempt to learn the number from state law enforcement and FBI records. If the absent parent has a criminal history, such records will not only provide a last known address and employer of the absent parent; they will also disclose the parent's social security account number and date of birth. Some states use a person's social security account number as his or her driver's license number. If the absent parent ever had a license in such a state, a check with the Department of Motor Vehicles should reveal the needed number.

IV-D attorneys may also learn the social security account number of an absent parent through submission of a written request to the federal Internal Revenue Service pursuant to 26 U.S.C. §6103(l)(6)(A)(i) (as amended by Section 19 of the Child Support Enforcement Amendments of 1984) (if the social security number is available, disclosure by Secretary is discretionary,) or to the Commissioner of Social Security pursuant to 26 U.S.C. §6103(l)(8)(A) (as amended by Section 19 of the Child Support Enforcement Amendments of 1984) (if the social security number is available, disclosure by Commissioner is mandatory). If the Federal Parent Locator Service, which is discussed later, learns an absent parent's social security account number through its search, it will forward that information to the IV-D office requesting its services.

f. Interstate IV-D Cooperation

If the IV-D attorney learns that the absent parent is residing in a state other than the state in which the attorney works, the attorney should contact the IV-D office of that second state. State IV-D offices are required by 42 U.S.C. §654 (9) to cooperate with each other to locate an absent parent.

D. Nationwide Location Resources

If an attorney cannot narrow the absent parent's address or employment to a city or state, the attorney should check sources that have national information.

1. Schools

The attorney should contact the high school, trade school or college which the absent parent attended. The school may have a current address for the parent; at the least, its records should note the parent's date of birth and social security account number. As discussed earlier, date of birth and social security account number are identifying data required by many location sources.

2. Additional Nationwide Resources Available to IV-D Attorneys

Because of exemptions from federal privacy laws, the IV-D attorney has access to additional sources that provide interstate location information.

a. Internal Revenue Service

IV-D attorneys may be able to obtain return information from the federal Internal Revenue Service which will assist in locating an absent parent. In addition to disclosing an absent parent's social security account number, the Secretary of Revenue may disclose information relating to the address of any absent parent against whom child support obligations are enforced as well as information concerning the names and addresses of the payors of income to the absent parent, if such information is not reasonably available from any other source. 26 U.S.C. §6103(l)(6)(A)(i),(ii).

Additionally, a new project between the federal Office of Child Support Enforcement and the Internal Revenue Service provides access to information contained in a 1099 tax form. 1099 tax forms are filed by financial institutions and report a person's unearned income to the Internal Revenue Service. These forms will identify, for example, earnings on stocks and bonds, interest from bank accounts, unemployment compensation, capital gains, royalties and prizes. There are two requirements for using this service: (1) the IV-D attorney must know the social security account number of the absent parent; (2) the IV-D attorney must have previously submitted a location request to the federal Parent Locator Service (discussed later) or the Internal Revenue Service which did not result in a successful location of the absent parent. There is no fee for the service.

The Office of Child Support Enforcement (OCSE) forwards 1099 search requests quarterly to the Internal Revenue Service (IRS). If any United States financial institution has filed a 1099 form on behalf of the absent parent, the IRS will be able to match the parent's social security account number with that form. The IRS will usually notify the Office of Child Support Enforcement of all matches within two to four weeks of OCSE submitting its requests. The OCSE will forward matches back to the requesting state IV-D office. A match will provide the address which the absent parent reported to the institution submitting the 1099 information to the IRS, the name and address of the submitting institution, the absent parent's account number at the institution, the source of the unearned income and the amount of the unearned income. For more detailed information about the use of 1099 tax forms, the IV-D attorney should consult Action Transmittal 85-8 issued by OCSE on May 30, 1985.

b. Information Network for Federal and State Prisons

If the IV-D attorney knows the social security number of the absent parent, the attorney may be able to discover whether or not the parent is in prison anywhere in the country by contacting his or her state law enforcement division. State law enforcement divisions have access to state and nationwide information on inmates in federal and state prisons.

E. Location Resources for Active Military Personnel

If the absent parent is on active military duty, there is a strong likelihood that the attorney will locate the parent. Each military branch operates a Worldwide Locator Service. The Service is available to both IV-D and private attorneys. Requests for the Service should be in writing and should state that location of the military person is necessary for child support enforcement. Requests should provide the absent military parent's full name, social security account number or service number (if known), date of birth, rank, and the location and time period of the parent's last known duty assignment. Most of the branches charge a small fee (less than $5.00) for use of the Worldwide Locator Service. Prior to mailing in a location request, an attorney should call the appropriate military branch to learn whether any specific procedures or fees are required.

Addresses and phone numbers of the locator services are as follows:

1. United States Army

Commander
U.S. Army EREC
Fort Benjamin Harrison, Indiana 46249-5301
(317) 542-4211

2. United States Air Force

Air Force Military Personnel Center
Attn: Worldwide Locator
MPCD 003
9504 I H 35 North
San Antonio, TX 78150
(512) 652-5774

3. United States Navy

Naval Military Personnel Command
Navy Annex
Washington, D.C. 20370
(202) 694-3155

4. United States Marine Corps

Commandant of the Marine Corps
Code MMRB-10
Attn: Locator Service
Washington, D.C. 20380-0001
(202) 694-1624 or (202) 694-2436

5. United States Coast Guard

Commandant
United States Coast Guard
Coast Guard Locator Service
GPE 3-45 (if enlisted personnel)
GPO 2-42 (if officers)
2100 2nd Street, S.W.
Washington, D.C. 20593
(202) 426-8898

F. Parent Locator Services

1. State Parent Locator Service

Each state child support program is required by 42 U.S.C §654(8) to operate a parent locator service (PLS). A state must have at least one statewide PLS office; local IV-D agency offices may double as branch PLS centers. 45 C.F.R. §302.35 (1984). A state PLS must use all state sources of information and available records to locate absent parents for purposes of child support enforcement. See, e.g., N.C. Gen. Stat. §110-139 (Michie Supp. 1983). It will typically utilize the same resources identified above. The service accepts location requests from local IV-D agencies in both AFDC and non-AFDC cases. Because of the time

involved in processing a PLS request, however, and the possibility of stale information, most local IV-D offices exhaust their own location resources before referring the case to their state PLS. When a state PLS discovers locating information, it will forward that information back to the requesting IV-D office which remains responsible for actual location of the absent parent.

2. Federal Parent Locator Service

42 U.S.C. §653 mandates the establishment of a federal Parent Locator Service. Requests for location must be made by "authorized persons." According to 42 U.S.C. §653(c), an "authorized person" means:

> (1) any agent or attorney of any State having in effect a plan approved under this part, who has the duty or authority under such plans to seek to recover any amounts owed as child support ...;
>
> (2) the court which has authority to issue an order against an absent parent for the support and maintenance of a child, or any agent of such court; and
>
> (3) the resident parent, legal guardian, attorney or agent of a child (other than a child receiving aid under Part A of this subchapter)... without regard to the existence of a court order against an absent parent who has a duty to support and maintain any such child.

All location requests by authorized persons, however, must be submitted to the federal Parent Locator Service by a state PLS. 45 C.F.R. §303.70 (1984). Exceptions are the larger cities of Philadelphia, Pittsburgh, and New York City. The IV-D offices of those cities may access directly to the federal PLS without going through their states' PLS.

Non-AFDC custodial parents or their private attorneys seeking federal location assistance may request the state PLS to request federal PLS locate-only information. The State must charge a fee for this service, which is determined by OCSE. The current federal fee is $10.00 for processing location requests and an additional $4.00 if the absent parent's social security account number is not known. The State may also charge an amount

for costs incurred on the state and local level. Once the absent parent is located, the custodial parent and attorney may resume control of the case for enforcement purposes.

Location requests forwarded to the federal PLS should state the absent parent's full name, any alias (last name only), and social security account number (if known), whether the parent is or has been a member of the armed services (identifying the branch of service, when known, for parent in active duty), whether the absent parent is receiving or has received any federal compensation or benefits, whether the parent is a federal employee, whether the parent is receiving veterans benefits, and whether the parent is required to be registered with the Selective Service System. 45 C.F.R. §303.70 (1984). If the parent's social security account number is not known, the state PLS must send additional identifying data: the absent parent's date and place of birth, mother's maiden name, and father's full name. Upon receiving a request, the federal PLS will conduct a computer search of records of federal departments and agencies in order to learn the absent parent's social security account number, last known address and place of employment.

Two federal agencies are accessed weekly: the Internal Revenue Service and the Social Security Administration. The Internal Revenue Service provides the home address the absent parent used on his most recent 1040 tax return. The IRS maintains addresses for more than 100 million individuals. The Social Security Administration provides three kinds of information. As discussed earlier, the Administration provides a social security account number on cases for which the attorney does not know the absent parent's number. The Administration provides an employer address from an absent parent's annual W2 form. The Social Security earnings files contain employer name and address for over 200 million individuals. The Administration also checks its beneficiary files. If the absent parent is receiving social security benefits, the Administration will disclose the address to which the previous month's benefits were mailed. The beneficiary files contain home addresses of 36 million persons.

Four other federal agencies or departments are accessed monthly: the Selective Service, the Veterans Administration, the Department of Defense, and the National Personnel Records Center. The Selective Service is an excellent source of information for males born in 1960 or later since all males 18 years of age are required to register with the Selective Service; when they become 26, their names are removed from the active files.

The Veterans Administration maintains records of 15 million persons receiving veterans compensation, pensions, or educational benefits. The Administration provides the address an individual has given as to where V.A. benefits should be mailed. If the veteran designated a bank, however, the Administration will not disclose the bank's name or location.

The Department of Defense provides the present military duty station of all DOD employees. The National Personnel Records Center provides the duty station of all federal civilian employees.

The time required by the federal PLS to process a request varies. If the state PLS has provided a social security account number, the request can be accessed through records of the Internal Revenue Service and the Social Security Administration within three weeks. If location requires a search of agency and department records which are only accessed monthly, a response may take up to 2 1/2 months.

If the state PLS did not provide a social security account number for the absent parent, the location procedure is more complicated. The federal PLS refers the name and identifying data to the Social Security Administration which first conducts a computer search. The computer successfully picks up an absent parent's social security account number in approximately 20 per cent of the cases submitted without a number. Notice to the state PLS of the parent's social security number will usually be within 2 to 3 weeks of the PLS request. The remaining 80 per cent of cases submitted without numbers are processed manually. The Administration is able to locate social security account numbers in approximately 50 per cent of these remaining cases. If the search must be conducted manually, the response time to a state PLS increases to approximately 8 weeks. Once a social security account number is located, the federal PLS resubmits the case for address information.

The recent Child Support Amendments of 1984 expand the availability of the federal PLS to state parent locator services. Under prior law, states could use the federal PLS only after there had been a determination that the absent parent could not be located though procedures available to the state child support agency. Under amended 42 U.S.C. §653(f), exhaustion of state resources will no longer be required. It is therefore suggested that state parent locator services contact the federal PLS for assistance simultaneously with initiation of their own search for an absent parent. The federal PLS combination of home and employer address information on individuals throughout the country should allow a IV-D attorney to focus the search on a particular state at an early state.

III. LOCATION OF AN ABSENT PARENT'S ASSETS

In addition to locating the absent parent, an attorney must locate assets of the parent from which the child support order can be satisfied. Location sources of these assets are as varied as the assets themselves.

A. The Client Interview

The best source of information for locating an absent parent's assets is the client. Much of the information the client provides concerning location of the absent parent will prove helpful in locating the parent's assets. Additionally, the attorney and client should discuss the following areas:

-- absent parent's current employment, identifying salary and pay periods

-- commissions or bonuses absent parent receives in addition to regular salary

-- deductions from absent parent's wages other than taxes and social security, including any savings plan

-- any real property owned by absent parent or jointly with another individual, identifying property's location, description, and approximate value

-- any rents received by absent parent

-- any bank account owned by absent parent or jointly with another individual, identifying bank, bank's address, type of account, and account number if known

-- any stock owned by absent parent, identifying company and number of shares

-- any lawsuit absent parent is currently participating in which may result in parent's entitlement to money, specifying location and type of court proceeding

-- any lawsuit absent parent was previously involved in which resulted in parent's entitlement to money, specifying date, location and type of court proceeding, and amount of money absent parent received or will receive

-- the death of a relative or friend of absent parent which may have resulted in absent parent's inheriting personal or real property, specifying name of the deceased person, date of the person's death and residence of the person prior to death

-- any motor vehicle, boat or plane owned by absent parent, specifying license number, location, description and approximate value of property

-- any private, government or military benefit received by absent parent, specifying type and amount of benefit

-- any personal property of absent parent which is of high value, such as artwork or jewelry

-- any professional or occupational license owned by absent parent.

B. Asset Information Provided by Absent Parent

Another source of information concerning assets of the absent parent is the absent parent.

1. Discovery

Assuming the parent has been located and is properly before the court, the attorney can serve the absent parent or parent's attorney with discovery. The attorney should check with state and local rules of procedure to ensure compliance.

Before filing discovery, however, the attorney should consider at least two factors. First, the attorney must recognize that the discovery process will alert the absent parent to enforcement efforts. If an attorney fears that an absent parent will dispose of assets once the parent realizes that the client is contemplating enforcement procedures, the attorney should consider locating the parent's assets through other means.

A second consideration in filing discovery is the expense involved. As in any case, the attorney must weigh the cost of interrogatories and requests for production of documents against what information is likely to be learned through them. Instead of filing discovery, the attorney may wish to rely on evidence contained in any financial declaration the absent parent files with the court. Many courts now require parties to a support proceeding to file sworn financial declarations (See, e.g., Rule 19 of S.C. Family Court Practice and Procedure and Appendix A), and to produce in court W2 forms and tax returns. See, e.g., Cal. Civ. Code §§4700.1, 4700.7 (West Supp. 1985).

If an attorney decides to serve discovery, he or she should inquire into general assets of the absent parent as well as specific assets targeted by the client. A sample set of interrogatories and request for production of documents focusing on general asset information is located in Appendix B. Courts

vary as to the use of sanctions or the availability of continuances should an absent parent fail to respond to proper discovery requests.

2. Examination

Most child support enforcement proceedings are civil actions in which the absent parent can be compelled to testify. Armed with information from the client and any discovery responses, the attorney should thoroughly examine the absent parent about his or her assets.

If the support arrearage has been reduced to judgment, the attorney should consider using supplementary proceedings. Supplementary proceedings are provided by statute in most states, and allow a collector or creditor to examine the debtor and third parties, under oath, concerning the financial affairs of the debtor. See, e.g., Cal. Civ. Proc. Code §§708.110, 708.120 (West Supp. 1985). In order for a collector or creditor to be entitled to the proceeding, the statute may require the collector or creditor to have made prior unsuccessful attempts to satisfy the judgment. The attorney examining an absent parent in a supplementary proceeding should probe every source of income of the parent and all of the parent's financial transactions. The attorney should also question representatives of banks, loan companies and other institutions who may be able to provide information about hidden assets from which the judgment can be satisfied.

C. Other Resources for Locating Assets

Usually the support attorney must supplement asset information provided by the client with his or her own investigation. The attorney should be creative, examining every source of income and asset available to the absent parent. Once an asset or source of income is identified, the attorney must determine whether the asset is worth pursuing for purposes of collecting past-due support payments.

The following list of assets and location sources is not an exhaustive list but rather an overview which may aid the support attorney in collection efforts. Since discovery and in-court examination of the absent parent have already been discussed as tools to discover assets, they will not be mentioned again as location resources. Besides identifying assets and means to discover them, the list will also point out factors an attorney should consider before relying on a particular asset for support collection.

1. Employment Income

The most readily available source of information concerning an absent parent's wages or pension benefits is the parent's employer. Normally an employer will disclose such information if the employer knows it is sought for child support enforcement. If the employer will not supply the information voluntarily, the attorney may compel disclosure through a subpoena and subpoena duces tecum.

Another source of wage information, if applicable, is the absent parent's trade union. In addition to the parent's salary, the trade union may disclose other employee benefits that the parent receives, such as commissions, bonuses and vacation funds.

If the attorney subscribes to a credit bureau and is seeking information for purposes of collecting support payments under a legally enforceable judicial or administrative order, the attorney can obtain salary information from any credit report which may exist on the absent parent.

Because of exemptions from federal and state privacy laws, a IV-D attorney can also learn information concerning employment income from records on file with government agencies. Pursuant to 26 U.S.C. §6103(l)(6), a IV-D attorney may submit a written request to the Secretary of the Internal Revenue Service for disclosure of available return information from the master files of the IRS relating to the amounts and nature of income reported by an absent parent. Most states provide for disclosure to the IV-D attorney of income information reported in state tax returns also. See, e.g., Alaska Stat. §43.05.230 (1983). Pursuant to 26 U.S.C. §6103(l)(8), a IV-D attorney may submit a written request to the Commissioner of Social Security for disclosure of return information with respect to wages (as defined in section 3121(a) or 3401(a)) and payments of retirement income. Additionally, in most states the IV-D office has access to wage information on file with the Employment Security Commission. See, e.g., N.C. Gen. Stat. §110-139 (Michie Supp. 1983).

Wages and pension benefits are excellent assets from which child support can be collected. Not only can they be easily garnished, but the Child Support Enforcement Amendments of 1984 also provide for mandatory ongoing withholding from wages in certain circumstances (See Chapter 2 on income withholding). Similarly, most states subject pensions to the withholding process. Any amounts withheld or garnished, however, must be within the limits of the Consumer Credit Protection Act. See 15 U.S.C. §1673. The attorney should also be aware that wage

withholding often proves ineffective in the case of the self-employed absent parent or the parent who fails to hold a steady job.

2. The Self-Employed Absent Parent

Probably the most difficult assets to identify are those of the self-employed person. One obvious hindrance is that there is no employer - other than the absent parent himself - for the attorney to contact concerning wages.

The attorney may be able to discover the parent's salary and credit rating from available credit reports, if the attorney subscribes to a credit bureau and seeks the information in order to collect support payments under a legally enforceable administrative or judicial order.

As discussed earlier, IV-D attorneys have access to additional income information. Pursuant to 26 U.S.C. §6103(l)(6), the IV-D attorney can obtain information in the self-employed's tax return on file with the IRS without having to secure a subpoena duces tecum. Additionally, the IV-D attorney may request the Commissioner of Social Security to disclose information from returns with respect to net earnings from self-employment. 26 U.S.C. §6103(l)(8). Unfortunately, the tax returns of a self-employed person often fail to indicate the true extent of his or her income. If a self-employed person's lifestyle appears more luxurious than the reported income would allow, the attorney should suspect unreported income. An indirect route for the IV-D attorney to discover evidence of the absent parent's salary is to learn what salaries the parent pays his or her employees. IV-D attorneys usually have access to such information through the state Employment Security Commission. It is reasonable to assume that, in most cases, the self-employed parent will pay himself at least as much as, and probably more than, he pays his employees.

Because the self-employed person pays his or her own salary, wage withholding is not an effective enforcement technique. Instead, the attorney should focus enforcement efforts on other assets of the parent.

Discovery of the self-employed parent's assets requires a creative examination of the sources of the parent's income. For example, most physicians receive payment not only directly from their patients but also from insurance carriers. If an attorney learns that an insurance carrier is holding funds for payment to the physician, the attorney can request attachment of the funds prior to their being disbursed.

If the self-employed person is engaged in a profession requiring a license (e.g., liquor sales), the license itself becomes an asset against which support can be enforced. Although usually the license is nontransferable and therefore cannot be sold in order to collect the arrearage, many states allow the license to be attached. Attachment virtually halts the self-employed's business. The self-employed person desiring to keep his business open will quickly find sufficient money to eliminate the support arrearage and to dissolve the attachment.

Inventory, office furniture, and equipment are subject to seizure so long as they are not within a state's statutory exemptions from execution and are not subject to prior liens. (See Chapter 5 on liens). If an attorney knows that a particular company is a supplier for the self-employed absent parent, the attorney should learn whether the company is currently holding a shipment for delivery to the parent. Assuming that the absent parent has previously paid for the shipment, the attorney can request attachment of the goods until the child support arrearage is eliminated.

The attorney should also learn whether the absent parent's business uses a cash register, e.g., a restaurant, a gas station. If the attorney has reduced the child support arrearage to judgment, he or she can request that a writ of execution be issued directing the statutory agent for service to "tap the till" of the absent parent. Such a writ means that the agent for service will appear at the absent parent's place of business; demand that the absent parent open his or her cash register or other money receptacle; seize all funds located therein, except those that are exempted from execution; and transmit the funds to the attorney for application toward the support arrearage. This procedure is an inexpensive method of executing a judgment against a self-employed absent parent.

If the absent parent has filed incorporation or partnership papers and the client knows the entity's legal name, the attorney can learn evidence of the entity's value by contacting the Secretary of State or analogous state office. Although the actual property return of the corporation or partnership is private, the final assessment of the entity is considered public information. The value of the absent parent's business is important evidence for a court to consider at any enforcement hearing. Additionally, in most states, the interest an absent parent has in a partnership is subject to a charging order (a preparatory step to a receivership), in order to satisfy a money judgment. Once a child support arrearage has been reduced to judgment, the attorney should consider moving for a charging order. By serving notice of the motion upon all partners, the attorney creates a lien on the absent parent's interest in the partnership. A receiver may then be appointed

and a sale conducted. Usually, before foreclosure, the partnership will redeem the absent parent's interest and thereby satisfy the judgment for arrears.

Location of bank accounts, personal property, and real property (discussed later) is also especially important for enforcing a child support obligation against the self-employed parent.

3. Workers' Compensation

An attorney should contact the absent parent's employer or the employer's insurance carrier if the attorney suspects the absent parent of receiving workers' compensation. The employer and insurance carrier, either voluntarily or involuntarily, can provide information concerning the amount of benefits received, where the benefits are being sent, the beginning date of the benefits, and the expected termination date. The attorney should also check his or her state's laws concerning whether or not workers' compensation can be garnished or amounts withheld from it on an ongoing basis for purposes of satisfying the worker's child support obligation. Compare Ill. Ann. Stat., ch. 23, §10-16.2(4) (Smith-Hurd Supp. 1984) (including worker's compensation within definition of income subject to withholding) with Cal. Civ. Proc. Code §704.160 (West Supp. 1985) and Cal. Lab. Code §4903 (West Supp. 1985) (allowing lien against worker's compensation, at discretion of appeals board, for reasonable living expenses of children abandoned or neglected by employee).

4. Unemployment Compensation

Pursuant to 29 U.S.C. §49b(b), unemployment insurance and employment service offices in each state, upon request from a IV-D office, are required to inform the IV-D office whether an absent parent is receiving, has received, or has made application for, unemployment compensation, and the amount of any such compensation being received by the parent. A private attorney can obtain the same information with a subpoena duces tecum or court order.

Once a IV-D attorney determines that an absent parent is receiving unemployment compensation, the attorney must take steps to enforce the parent's child support obligation against such compensation. 42 U.S.C. §654. 42 U.S.C. §654(19) provides for two collection procedures: (1) the IV-D attorney can reach an agreement with the absent parent to have specified amounts withheld from the unemployment compensation and applied to his or her support obligation; or (2) the IV-D attorney can initiate legal process to require the withholding of amounts from such compensation. Regulations implementing this provision are codified at 45 C.F.R. §302.65 (1984). States vary as to whether

or not private attorneys can request garnishment or income withholding from unemployment benefits in order to collect child support. Compare Wis. Stat. §767.265 (West Supp. 1984)(creating automatic assignment of unemployment benefits to satisfy ordered child support payments which takes effect when a required support payment is 10 days overdue or immediately at the discretion of the court) with Mo. Ann. Stat §513.430 (Vernon Supp. 1985) (exempting any person's interest in unemployment compensation from attachment and execution).

5. Social Security Benefits

Pursuant to 26 U.S.C. §6103(l)(8) and 5 U.S.C. §552a(b)(7), a IV-D attorney can request information from the Social Security Administration concerning social security benefits being received by an absent parent. 26 U.S.C. §6103(l)(8) requires the Commissioner of Social Security to disclose directly to the IV-D office, upon written request, return information concerning certain payments of retirement income. 5 U.S.C. §552a(b)(7) allows the Social Security Administration to disclose to a IV-D agency any records the Administration has on file, provided the records are sought for a civil or criminal law enforcement activity. Since enforcement of a child support order occurs as either a civil or criminal law enforcement activity, the IV-D attorney can request information from the Administration regarding social security benefits received by the absent parent and any application made by the absent parent for benefits for his or her dependents. If the absent parent has not requested insurance benefits for the dependents, the attorney should advise his or her client to go to the local Social Security Administration office and apply for such benefits pursuant to 42 U.S.C. 402(d). Said statute defines which children are entitled to receive insurance benefits under Title II of the Social Security Act and the amount of benefits to which the child is entitled each month. The attorney can also request the court to order the absent parent receiving social security benefits to apply for insurance benefits for his or her child(ren).

6. Military Benefits

a. Active Duty Pay

If the absent parent is in active military service, the support attorney can discover the parent's salary pay scale by checking with local recruiters of the appropriate military branch. Military pay varies according to a person's rank and years of service.

42 U.S.C. §665 provides for an involuntary allotment if a uniformed service member is delinquent under a support order by an amount equal to support payable for two months or longer. The amount of the allotment will be the amount necessary for the service member to comply with the order, and may include arrearages as well as current support if the order so provides. The amount of the allotment cannot exceed the limitations of the Consumer Credit Protection Act. Also, the serviceman has thirty days within which to consult a legal officer before the allotment can be imposed. Notice of delinquency and the request for an involuntary allotment must be from an "authorized person," defined by 42 U.S.C. §665 as a IV-D employee or the court which has authority to issue a child support order against the uniformed service member. See 47 Fed. Reg. 46,297 (1982) (to be codified at 32 C.F.R. §54) (proposed Oct. 18, 1982) and 33 C.F.R. §54 (1984).

Effective October 1, 1985, the IV-D agency may also initiate income withholding from an absent parent's military pay if the absent parent is in arrears in an amount equal to at least one month's support obligation. 42 U.S.C. §666(b). The legislative history of the Child Support Enforcement Amendments of 1984 stresses that the United States government shall be treated like any other employer for purposes of the mandated income withholding procedures. See Conf. Rep. No. 925, 98th Cong., 2d Sess. 30-31, reprinted in 1984 U.S. Code Cong. & Ad. News 2397, 2448-49. (See also Chapter 2 on income withholding). An attorney should consult 5 C.F.R. §581.103 (1984) and his or her state income withholding law for identification of military pay subject to legal process. 5 C.F.R. §581, Appendix A (1984) lists the agents for each military branch which have been designated to accept service of process.

A private attorney seeking garnishment of an absent parent's military pay must proceed under 42 U.S.C. §659. State law will control both the procedures and the extent to which wages can be garnished. See Williamson v. Williamson, 24 Ga. 260, 275 S.E.2d 42 (1981), cert. denied, 454 U.S. 1097 (1981). 5 C.F.R. §581 (1984) identifies the person or office of each military branch which is the designated agent for receipt of service of process.

b. Pension Benefits

If the absent parent is retired from the service, there are offices in each military branch which will inform the attorney as to any pension benefits received by the parent. Some offices will disclose the information over the phone; other offices require a written request for information. The attorney should provide the office with the full name of the military retiree, the retiree's social security account number and date of

birth, the retiree's rank and service number (if known), and the retiree's approximate dates of service. If the office requires a written request, it is suggested that the attorney also enclose a copy of the child support order.

The addresses and phone numbers of the military offices are as follows:

1. United States Army

Commander
United States Army
Finance and Accounting Center
Attn: FINCL
Indianapolis, IN 46249
(317) 542-2155
(317) 542-2154

The Finance and Accounting Center will not disclose over the phone whether or not a retiree is receiving pension benefits but will respond to a written request. The Finance and Accounting Center will not disclose the amount of any pension benefit unless it is served with a subpoena demanding the information or with a request for garnishment or allotment. The above address is the one to which an attorney should direct any subpoena. To request a garnishment or allotment, the attorney should write the same address, Attn: FINCL-G.

2. United States Air Force

Air Force Academy Finance Center
Attn: RPT
Denver, CO 80279-5000
(303) 370-7051

The Air Force Academy Finance Center will disclose over the phone whether or not a retiree is receiving pension benefits and the amount of the gross monthly retirement pay.

3. United States Navy

Navy Finance Center
Retired Pay Department Code 301
1240 East 9th Street
Cleveland, OH 44199-2058
1-800-321-1080

The Navy Finance Center will disclose over the phone whether or not a retiree is receiving pension benefits and the amount of the gross monthly retirement pay.

4. United States Marine Corps

Marine Corps Finance Center
Code CPR
Kansas City, MO 64197-0001
1-800-645-2024

The Marine Corps Finance Center will respond to written requests for information concerning whether or not a retiree is receiving pension benefits and the amount of the gross monthly retirement pay.

5. United States Coast Guard

Commanding Officer
U.S. Coast Guard Pay and Personnel Center
444 Southeast Quincy Street
Topeka, KS 66683
(913) 295-2657

The U.S. Coast Guard Pay and Personnel Center will respond to written requests for information concerning whether or not a retiree is receiving pension benefits and the amount of the gross monthly retirement pay.

Military pension benefits are subject to garnishment for child support, pursuant to 42 U.S.C. §659. See, e.g., Watson v. Watson, 424 F. Supp. 866 (E.D. N.C. 1976). 5 C.F.R. §581 (1984) identifies the designated agent of each military branch for receipt of service of process. Any garnishment must be within the limits of the Consumer Credit Protection Act, 15 U.S.C. §1673. 10 U.S.C. §1408 also provides for payment of child support from retirement pay of a former uniformed services member. See 50 Fed. Reg. 2665 (1985) (to be codified at 32 C.F.R §63) for final rule implementing 10 U.S.C. §1408.

c. Veterans' Benefits

An attorney can learn whether or not an absent parent is receiving veterans' benefits by contacting the nearest regional office of the Veterans Administration. The attorney must provide the veteran's full name, date of birth, and social security account number. The attorney should also include any other known identifying data, such as the veteran's serial number, and should state that the information is sought for purposes of child support enforcement.

According to 42 U.S.C. §662(f), any payment by the Veterans' Administration as pension or as compensation for service-connected disability or death ordinarily cannot be garnished. The statute provides one exception: If the former

armed service member is receiving retired pay as well as veterans compensation, and waived part of his or her retired pay (which is taxable) in order to receive the compensation (which is nontaxable), then that part of the Veterans Administration payment which is in lieu of the waived retired pay is subject to garnishment. If, however, the former armed service member's entitlement to disability compensation is greater than his or her entitlement to retired pay, and the service member waived all of his or her retired pay in favor of disability compensation, then none of the disability compensation is subject to garnishment or attachment. 5 C.F.R. §581.103 (1984).

The veteran himself can voluntarily request that an apportionment of his disability compensation be set aside as child support. A client can learn whether or not the veteran has requested such an apportionment by contacting the nearest regional office of the Veterans Administration. If the veteran has requested an apportionment for child support but is not forwarding the monies to the client, the client can contact the Veterans Administration and request that the apportionment be sent directly to the client on behalf of the child(ren).

7. Bank Accounts

Credit bureau reports are often a good source of information concerning an absent parent's bank accounts. As discussed earlier, however, an attorney seeking information from a credit bureau report must be a member of the credit bureau and must seek the information for a legally permissible purpose under 15 U.S.C. §1681b. The credit report will detail credit and asset information about the consumer, including the names of any banks which have loaned money to the consumer, the account numbers of the loans, the original amount of the loans, and the account balances as of a specified date. If the credit bureau report indicates that the absent parent owns a bank credit card, such as Mastercard or VISA, the attorney may reasonably assume, in most cases, that the absent parent has an account with the bank which issued the credit card. Once the attorney knows the bank(s) used by the absent parent and the parent's account number(s), the attorney can subpoena the institution(s) for account information, including monthly statements and interest income reported by the institution(s) to the Internal Revenue Service on IRS Form 1099 (discussed earlier).

The IV-D attorney has additional sources of information which do not require securing a subpoena. Pursuant to 26 U.S.C. §6103(l)(6)(A), the IV-D attorney can request the Secretary of the Internal Revenue Service to disclose available return information relating to any interest income reported by the absent parent or by a financial institution on behalf of the parent. 26 U.S.C. §6103(p)(4) details safeguards which the IV-D

agency must follow as a condition for receiving return information. The IV-D attorney also has access to information contained in a 1099 tax form filed on behalf of an absent parent due to a new project between the federal Office of Child Support Enforcement and the Internal Revenue Service. As discussed earlier, there are two requirements for using this service: (1) the IV-D attorney must know the social security account number of the absent parent; and (2) the IV-D agency must have previously requested address information from the IRS which did not result in a successful location of the absent parent. The Office of Child Support Enforcement forwards 1099 search requests quarterly to the IRS. If any United States financial institution has filed a 1099 form on behalf of the absent parent, the IRS will be able to match the parent's social security account number with that form. A match will provide the name of the financial institution at which the parent has an account, the institution's address, the absent parent's account number, the source of the unearned income, and the amount of the unearned income. There is no fee charged to the IV-D office for use of this service.

Disclosure of information from tax returns obtained pursuant to 26 U.S.C. §6103 is restricted. 26 U.S.C. §6103(a) states the following:

> Returns and return information shall be confidential, and except as authorized by this title --
>
> (1) . . .
>
> (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section...
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee...or under the provisions of this section....

A IV-D attorney, therefore, cannot introduce into evidence return information which he or she has obtained from the Internal Revenue Service. The attorney must serve the absent parent with a subpoena duces tecum, compelling the absent parent to produce his or her tax returns, or must obtain the information from some other sources.

Monies in an account are subject to attachment. If the attorney desires to satisfy an absent parent's support obligation from monies in the parent's bank account, however, the attorney should be aware of whether or not the account is a joint account and what other individuals have access to the account. States vary as to whether all monies in a joint account are subject to attachment for enforcement of a judgment against only one of the joint depositors. See Annot., 11 A.L.R. 3d 1465 (1964 & Supp. 1984).

8. Certificates of Deposit

An attorney seeking information about any certificate of deposit held by the absent parent must first learn the institution which issued the certificate. A IV-D attorney can discover the name of the institution by submitting a 1099 search request to the federal Office of Child Support Enforcement (discussed earlier). If the absent parent has earned interest on a certificate of deposit, the IRS will be able to tell the IV-D attorney the name of the institution which issued the certificate and the amount of earned interest.

Once an attorney knows the name of the institution which issued the certificate of deposit, the attorney can subpoena the institution for information relating to the interest rate, amount, and maturity date of the certificate. Interest income is subject to income withholding or garnishment.

9. Shares of Stock

If the absent parent is believed to own shares of stock in the company by which he or she is employed, the attorney should contact the employer of the company. Often the employer will voluntarily supply information concerning the number of shares owned by the parent, the purchase of the shares, and the transferability of the shares. The attorney can learn the approximate value of the shares on a particular date by checking with reports of the New York Stock Exchange for that date.

Other than discovery or examination of the absent parent, the best source of information about stock dividends received by the parent is the parent's income tax return. As discussed earlier, a IV-D attorney has access to return information pursuant to 26 U.S.C. §6103(l)(6). A IV-D attorney may also discover the payment of dividends through the 1099 project with the IRS. Use of return information, however, is restricted by 26 U.S.C. §6103(p)(4).

10. Trust Income

The best source of information about trust income received by the absent parent is the parent's income tax return. An attorney can request a copy of the parent's return through discovery. A IV-D attorney has additional access to return information pursuant to 26 U.S.C. §6103(l)(6).

If an attorney knows that the absent parent is receiving trust income but doubts the veracity of the absent parent's statements concerning the amount of income the parent receives, the attorney should issue a subpoena and subpoena duces tecum to the trust's trustee. The attorney should demand that the trustee provide copies of the tax returns filed on behalf of the trust over a specified time period, copies of any quarterly or annual reports prepared by the trustee for the settlor and/or beneficiaries, and copies of the instrument which created the trust.

The income that an absent parent receives from a trust may usually be reached to enforce a judgment for child support arrears. States vary, as to whether income from a spendthrift trust may be reached, and whether a spendthrift trust may be invaded, for purposes of child support. See Safe Deposit & Trust Co. v. Robertson, 192 Md. 653, 65 A.2d 292 (1948). However, the growing trend favors reaching spendthrift interest and assets for support purposes. See, e.g., Bacardi v. White, No. 65,181, slip. op. (Fla. Jan. 31, 1985); In re Matt, 473 N.E.2d 1310 (Ill. 1985). (See also Chapter 2 on income withholding).

11. Personal Property

a. Motor Vehicles

In states which tax personal property, private and IV-D attorneys can often determine the existence and value of any motor vehicle owned by an absent parent by checking with the tax listing office of the county in which the parent resided on January 1st of the given year. States vary as to whether the tax information is considered public; some states will only disclose the information pursuant to a court order. Attorneys should also check the records of the Registration Division of the state Department of Motor Vehicles. In order to ensure proper identification of an absent parent, the Registration Division usually requires the parent's full name, date of birth and social security account number. The Registration Division can provide information concerning any registration of a motor vehicle by the absent parent, the type of vehicle registered, the license plate of the vehicle, and the title number. Once an attorney learns the make and year of a vehicle owned by the absent parent, the attorney can learn the estimated value of the vehicle by

referring to The National Automobile Dealers' Association's Used Car Guide, commonly known as the "blue book." The blue book value is the assessment usually used by local tax offices to determine one's motor vehicle tax. An attorney will need to adjust the blue book value to reflect any problems with the parent's car, such as damage.

A motor vehicle is usually an easily identifiable asset against which child support can be enforced. There are many factors an attorney should consider, however, before executing a money judgment against a motor vehicle -- joint ownership of the vehicle, the existence of prior liens, any bond requirement, costs associated with the vehicle's seizure and sale, the possibility of a depressed sale price. (See Chapter 5 on liens). Often the attorney may determine that the possible recovery from sale is not sufficient to cover the time and expenses involved with the sale. The attorney should also check state statutes specifying property exempt from execution; in some states, a motor vehicle up to a certain value is exempt from execution if the vehicle is used principally by the debtor in trade or business.

b. Craft

Both private and IV-D attorneys can learn the existence and value of craft such as boats or planes owned by the absent parent by checking with the county tax listing. States usually also require registration of craft. If an attorney cannot find a tax or registration listing but suspects the absent parent of owning a boat or plane, the attorney should check with local companies that sell the craft. In the case of a boat, the attorney should also check with other area boat owners and facilities that provide docking. In the case of an airplane, the attorney should check with area pilots and local airfields. The same factors an attorney should consider before executing a judgment against a motor vehicle should be considered before executing a judgment against craft.

c. Other personal property

To determine the existence of other personal property owned by the absent parent, the attorney should check the parent's listing with the local tax office. If the absent parent does not accept the tax office's predetermined value of his or her property (usually a certain percentage of the parent's rent or mortgage payments), the parent must itemize the property and assign a value to it.

Unless the client knows the absent parent owns valuable property such as antiques, jewelry or artwork, execution against personal property (other than vehicles and craft) is usually not a satisfactory enforcement technique.

12. Real Property

The primary source of information concerning an absent parent's ownerhip of real property is the county Registry of Deeds or equivalent office. By searching the grantee index under the name of the absent parent, an attorney can locate any recorded deed conveying property in that county to the absent parent. The deed will state the date of the conveyance, the names of the grantors, the name of the grantees, and a description of the property. By searching the grantor index under the name of the absent parent, an attorney can locate any recorded conveyance of real property by the absent parent to someone else. Such information is important because it indicates that the absent parent probably received a sum of money at the time of settlement. A conveyance of real property immediately prior to a support enforcement hearing may also be indicative of an attempt by the absent parent to deplete his or her assets.

Because the Registry of Deeds is a local office, indexes will only contain recorded conveyances in that particular county. If an attorney suspects the absent parent of owning or conveying property in another county, the attorney should check that county's Registry.

Another excellent source of information is the tax listing office of the county where property owned by the absent parent is located. The tax listing will indicate the location, size, use, and value of the property.

An attorney seeking information about real property of the absent parent should also review any separation agreement or divorce judgment to which the parent was a party. Normally the agreement or judgment will contain property settlement provisions.

An additional source of information is any credit report on the absent parent. If an attorney has legally acquired a copy of a credit report on the absent parent, the attorney should look for information concerning any real estate holdings, as well as notations of a large loan or a named creditor (such as a mortgage company) which may indicate the purchase of real property. The attorney can then explore the information through contact with the creditor, discovery, or examination of the creditor and the absent parent. Once the property is identified, a lien may be placed upon it. (See Chapter 5 on liens).

13. Contingent Interests

a. Civil action

Occasionally a client will relate that the absent parent expects to receive money as the result of a civil judgment or

settlement of a law suit. If the client can provide information as to the general date and location of the legal action, the attorney can check the appropriate calendar or index of civil filings for the case number and names of the attorneys of record. A telephone call to one of the attorneys in the action should disclose any anticipated recovery by the absent parent.

Some states allow a lien to be placed on a lawsuit. See, e.g., Atiya v. DiBartolo, 63 Cal. 3d 121, 133 Cal. Rptr. 611 (1976); Cal. Civ. Proc. Code §§708.410-708.480 (West Supp. 1985). In California, once notice of the lien and a certified copy of the money judgment has been served on all parties, the lien holder's written consent is necessary before the action may be settled, compromised, or dismissed (unless the court authorizes settlement to proceed). Where the legal action results in a transfer of money or property, the court may order the money or property to be applied to the judgment. Other states allow the support attorney to file a Motion to Injoin. Such a motion requests the court to injoin the absent parent from disposing of any settlement until the court has reviewed the matter and ruled on application of settlement proceeds to the judgment. The attorney may also want to contact the absent parent about his or her voluntarily assigning any proceeds recovered in the legal action to the client for application toward support arrearage. If the parent signs a voluntary assignment, the attorney will need to send the signed document to the parent's attorney in the civil action since that attorney will most likely be the person holding any recovery.

b. Inheritance

Another source of income or asset against which a support order can be enforced is a testamentary share which will be disbursed to the absent parent once a deceased's estate is settled. To discover whether or not the absent parent is a beneficiary under a particular person's will, the attorney should write the county Office of Wills and Probate for a copy of the will. The attorney should also be knowledgeable about state intestate laws; occasionally, the attorney will discover that the absent parent has inherited property under a state's intestate laws, and the parent is not even aware of the inheritance.

In order to enforce the support judgment against the beneficiary share of the absent parent, the attorney must serve the executor of the deceased's estate with a writ of attachment or garnishment. Once the estate is settled, any property or monies due the absent parent will be applied to the judgment before disbursement to the parent.

IV. CONCLUSION

A support order without enforcement is of little benefit to the child(ren) on whose behalf it was entered. When an arrearage accrues, the attorney should take immediate steps to collect the money. Often the first step is location of the absent parent. Using information provided by the client, the attorney should attempt to narrow the search to a particular area. Various location resources are available to private and IV-D attorneys depending upon the area to be searched. Once the absent parent is located, the attorney should explore assets of the parent from which the child support can be collected. Again, the best source of information is the client. The attorney can also request information from the absent parent. If, however, the attorney fears that the absent parent will hide assets once he or she knows that enforcement proceedings are being considered, the attorney should pursue location through sources other than the parent. The type of assets discovered will determine the enforcement technique(s) eventually selected by the attorney.

APPENDIX A

Rule 19 of S.C. Family Court Practice and Procedures

Rule 19

Financial Statement

A current financial declaration in the form prescribed by Appendix A shall be served and filed by any petitioner or respondent appearing at any hearing at which the Court is to determine an issue as to which such declaration would be relevant and so much thereof shall be completed as is applicable to the issue to be determined, unless otherwise ordered by the Court in which the proceeding is pending.

Research and Practice References --

Annual Survey of South Carolina Law: Domestic Relations: The Fairness Test for Property Settlement Agreements.
33 S.C. L. Rev. 89, August 1981.

APPENDIX A

STATE OF SOUTH CAROLINA)
COUNTY OF)

IN THE FAMILY COURT

SOUTH CAROLINA DEPARTMENT)
OF SOCIAL SERVICES,)
PETITIONER,)

FINANCIAL DECLARATION
OF _____

VS.)

RESPONDENT.)

Dated: _____

Husband: _____ Wife: _____
Age: ____ Soc Sec No_____ Age:___ Soc Sec No_____
Occupation: _____ Occupation: _____

PART A: INCOME AND EXPENSE STATEMENT	HUSBAND	WIFE
(a) Gross monthly income from:		
Salary and wages (including commissions, bonuses, and overtime)	$_____	$_____
Pensions and retirement	_____	_____
Social Security	_____	_____
Disability/Unemployment	_____	_____
Public Assistance (AFDC, etc.)..	_____	_____
Child/Spousal Support	_____	_____
Dividends and interest	_____	_____
Rents	_____	_____
All other sources(Specify) . . .	_____	_____
. . . . .	_____	_____
. . . . .	_____	_____
TOTAL MONTHLY INCOME	$_____	$_____
(b) Itemize deductions from gross income:		
Income taxes(state/federal) . .	$_____	$_____
Social Security	_____	_____
Disability Insurance	_____	_____
Medical or other insurance . . .	_____	_____
Union or other dues	_____	_____
Retirement or pension fund . . .	_____	_____
Savings plan	_____	_____
Other(Specify)	_____	_____
. . . . .	_____	_____
. . . . .	_____	_____
TOTAL DEDUCTIONS	$_____	$_____
(c) Net monthly income	$_____	$_____

Estimated monthly expenses:(Specify which party is the custodial parent and list name and relationship of all members of the household whose expenses are included)_____

_____

_____

	HUSBAND	WIFE
Rent or mortgage payment	$_____	$_____
Real Property Taxes(residence) . . .	_____	_____
Real Property Insurance(residence) .	_____	_____
Maintenance(residence)	_____	_____
Food and household supplies	_____	_____
Utilities	_____	_____
Telephone	_____	_____
Laundry and cleaning	_____	_____
Clothing	_____	_____
Medical/Dental	_____	_____
Insurance(life, health, accident) .	_____	_____
Child care	_____	_____
Payment of child/spousal support .	_____	_____
School	_____	_____
Entertainment	_____	_____
Incidentals	_____	_____
Auto expenses(insurance,gas,repair).	_____	_____
Auto payments	_____	_____
Installment payments(insert total and itemize below)	_____	_____

Other Debts and Obligations:

Creditor's Name	Balance		
_____	$_____	_____	_____
_____		_____	_____
_____		_____	_____
_____		_____	_____
_____		_____	_____
_____		_____	_____
_____		_____	_____
_____		_____	_____
_____		_____	_____
_____		_____	_____
TOTAL MONTHLY EXPENSES		$_____	$_____

PART B: ASSET STATEMENT	HUSBAND	WIFE
Cash on hand	$_____	$_____
Money in checking accounts	_____	_____
Money in savings accounts.	_____	_____
Money in credit union.	_____	_____
Money in any other accounts.	_____	_____
Retirement or pension fund	_____	_____
Life insurance cash value.	_____	_____
Value of any stocks and bonds. . . .	_____	_____
Value of real estate	_____	_____
Value of all other property(specify)	_____	_____
. . . . .	_____	_____
. . . . .	_____	_____
TOTAL ASSETS	$_____	

_____
Signature

Sworn to and subscribed before me
this _____ day of _____, 198_

_____
Notary Public for South Carolina

My Commission Expires: _____

APPENDIX B

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
Case No. _____

STATE OF _____

COUNTY OF _____

PETITIONER)
)
)
vs. PETITIONER'S
) INTERROGATORIES
)
RESPONDENT)

Pursuant to Rule ____ of the _____ Rules of Civil Procedure, Petitioner requests that the following interrogatories be answered under oath by Respondent and that the answers be served on Petitioner, through Petitioner's attorney, within thirty (30) days from the time these interrogatories are served on Respondent:

I. INSTRUCTIONS

A. In answering the following Interrogatories, "you" refers to _____.

B. These Interrogatories shall be continuing in nature until the date of trial, and you are required to serve supplemental answers as additional knowledge or information may become available to you.

C. If these Interrogatories cannot be answered or responded to in full, answer or respond to the extent possible, specify why you cannot respond to the remainder, and state whatever information or knowledge you have regarding the unanswered portion. With respect to each Interrogatory, in addition to supplying the information for which you are asked, identify and describe all documents to which you refer in preparing your answers.

II. INTERROGATORIES

1. What is your current address and phone number?

2. How long have you resided there?

3. Do you live in an apartment or a private house?

4. If you live in a private house, who is it owned by?

5. If the house is owned by yourself, your spouse, or any member of your family, state the date the house was bought, the purchase price, and the person whose money was used to purchase the house.

6. If you are renting, give the name and address of your landlord.

7. Who pays the rent?

8. Is the rent paid by cash or check?

9. Please give the name, age, and relationship of each person who resides in the same place as you.

10. Please state the employment and salary of any person named in Interrogatory No. 9.

11. Are you responsible for the support of any individuals other than the dependent children named in the petition? If so, give the individuals' names, ages, addresses, and relationship to you.

12. If any person other than yourself contributes to the support of your present family, identify the person and state the amount of the contribution of that person.

13. Are you married? It so, give your spouse's full name prior to marriage.

14. Please state each place of residence you have had for the last five years by giving its full address and the year(s) during which you resided there.

15. What is your usual occupation?

16. Please state the name and address of each employer you have had during the last five years.

17. For each employment listed above, please state the dates of your employment, your title and duties, and your gross monthly income received from such employment.

18. Please state the reason for your leaving any of the jobs above.

19. Please state the name, address, and telephone number of your current employer.

20. What is your current monthly gross income from wages, commissions, overtime, and bonuses?

21. Are there monthly deductions from your paycheck?

22. If the answer to Interrogatory No. 21 is "yes", identify the reason for and the amount of each deduction.

23. Are you an officer, director or stockholder of any corporation? If so, give the details.

24. Are you a partner in any partnership? If so, give the details.

25. If you are currently unemployed, have you applied for unemployment compensation?

26. If the answer to Interrogatory No. 25 is "yes", state:

a. when you became unemployed;
b. the reason(s) for your unemployment;
c. whether or not you informed the Employment Security Commission of your child support obligation;
d. whether or not a hearing was held pursuant to your application for unemployment compensation;
e. the results of any such hearing;
f. the amount of any unemployment compensation you are receiving and its duration.

27. Do you receive any income other than wages (i.e. interest, dividends, trust fund, pension, rents, disability, government benefits, etc.)?

28. If the answer to Interrogatory No. 27 is "yes", identify the basis and amount of the other income.

29. Do you maintain a banking account, individually or jointly with any other person, firm, or corporation?

30. If the answer the Interrogatory No. 29 is "yes", identify:

a. the name in which the account(s) is (are) maintained;
b. the name and address of the banking institution(s) in which such account(s) exists;
c. the account number(s);
d. the type of each account (checking, savings, etc.);
e. the purpose of each account (household expenses, business expenses, etc.);
f. the amount of money in each account;
g. the name and relationship of each person other than yourself with authority to write checks on the account.

31. Do you own an individual retirement account?

32. If the answer to Interrogatory No. 31 is "yes", state the amount in such account, the location of the account, and the amount of money deposited in said account for each of the last three years.

33. Do you maintain in your individual name or in the name of any other person or entity or jointly with any other person a safe deposit box?

34. If the answer to Interrogatory No. 33 is "yes", identify:

a. the name and address of each person or entity in whose name the safe deposit box is rented;
b. The name and address of each person entitled to enter the safe deposit box;
c. The name of the institution where the safe deposit box is located;
d. The contents of the safe deposit box.

35. Do you own a motor vehicle(s) or motorcycle(s)?

36. If so, state its year, make, purchase price, and estimated present value.

37. If you are making monthly payments on a motor vehicle or motorcycle, state its year and make, the purchase price, the date the vehicle was purchased, and the amount of your monthly payments.

38. Do you own any type of boat or aircraft?

39. If so, state its year, design, purchase price, estimated present value, and location.

40. If you are making monthly payments on any craft, state its year and design, the purchase price, the date the craft was purchased, your monthly payments, and the present location of the craft.

41. Do you own real estate?

42. If so, identify:

a. the date the real estate was purchased;
b. the person(s) from whom you purchased the real estate;
c. the purchase price;
d. the real estate's location;
e. the name and address of any joint owners.

43. From _____ to the present, have you owned individually or jointly any stocks, bonds, or mutual funds?

44. If the answer to Interrogatory No. 43 is "yes", identify:

a. the name and address of the issuer of the stock, bond or mutual funds;
b. the total amount of money per stock, bond, or mutual fund that you have received and the date of any receipt since _____, on account of your ownership.

45. Do you own any health or life insurance? If so, identify:

a. the name of the company which issued the policy;
b. each policy number;
c. the amount, type and date of issuance of each policy;
d. the name and address of the beneficiary of any life insurance policy;
e. the name and relationship of all persons covered by any health insurance policy;
f. the dates and amounts of any loans against any life insurance policy, and the reason for such loans.

46. Do you have any interest in any of the following:

a. promissory notes?
b. judgments (i.e., money from a lawsuit)?
c. antiques?
d. furs?

If so, give the full particulars thereof.

47. Are you entitled to receive money or property due to the death of a relative or friend? If so, identify:

a. name of deceased person;
b. date person died;
c. money or property you inherited;
d. location of any such money or property;
e. name and address of executor of deceased's estate.

48. Is any of your property mortgaged, pledged, encumbered, or subject to any conditional bill of sale? If so, give the full particulars thereof.

49. Do you belong to any union, organization, or club?

50. If the answer to Interrogatory No. 49 is "yes," please identify:

a. the name of the union, organization, or club;
b. the address of the union office, organization, or club.

51. Has any kind of license or permit been issued to you by any state, city, or federal government or agency or department thereof? If so, give the details.

52. How far did you go in school?

53. Please give the name and address of any high school, trade school and college/university attended by you.

54. What is your birthdate?

55. What is your social security account number?

56. What is your mother's maiden name?

57. Please list your currently monthly living expenses for the following categories. If the list includes expenses attributable to persons other than yourself, separate your expenses from such other persons:

a. Rent (or house payment)
b. Household maintenance or repair
c. Electricity
d. Water
e. Gas
f. Telephone
g. Fuel oil
h. Insurance (life, medical)
i. Auto payment
j. Auto maintenance, gas and insurance
k. Food at home
l. Food away from home
m. Personal care (laundry, etc.)
n. Recreation
o. Alcohol and tobacco
p. Medical expenses
q. Educational expenses
r. Support for minor child(ren) who are under 18 and who are not involved in present case
s. Loans (itemize)
t. Credit cards (itemize)
u. Other (finance companies, department stores, etc.)(itemize).

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served Respondent with a copy of the foregoing Interrogatories, by depositing the same in the United States mail, postage paid, addressed to _____
_____
_____.

This the ____ day of _____, 1985.

_____

APPENDIX B

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
Case No. _____

STATE OF _____

COUNTY OF _____

PETITIONER	)	
	)	
vs.	)	PETITIONER'S REQUEST FOR
	)	PRODUCTION OF DOCUMENTS
RESPONDENT	)	

Pursuant to Rule ____ of the _____ Rules of Civil Procedure, Petitioner requests Respondent to produce for inspection and copying the following documents and things in his possession, custody or control:

1. Copies of Respondent's federal and state income tax returns for the past three years.

2. Copies of all federal partnership and corporate income tax returns filed for the past three years by any partnership or corporation in which Respondent has had an interest.

3. Copies of Respondent's W2 and 1099 report forms for the past three years.

4. Copies of Respondent's pay check receipts for the past six (6) months.

5. For the previous twelve (12) months, all records for all credit union, checking, savings and/or other bank accounts -- including passbooks, monthly statements, cancelled checks and certificates of deposits -- maintained by Respondent individually or jointly with any other firm, person or corporation.

6. All records relating to all real property owned jointly or individually by Respondent; including, but not limited to, deeds, real estate contracts, appraisals and tax statements.

7. All written appraisals made within the past three years of any jewelry, antiques, or other personal property which Respondent owns or in which Respondent claims an interest.

The Petitioner's request may be satisfied by Respondent's producing the requested documents in the offices of Petitioner's attorney for inspection and copying within thirty (30) days after service of this request. Respondent may also comply with the requested production by mailing photocopies of the requested documents to _____

_____,

but Petitioner reserves the right to examine the original documents.

This the _____ day of _____, 1985.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served Respondent with a copy of the foregoing Request for Production of Documents by depositing the same in the United States mail, postage paid, addressed to: _____

_____

_____

This the _____ day of _____, 1985.

_____