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

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# Child Law Practice

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Helping Lawyers Help Kids

## ENGAGING FATHERS

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

by Daniel L. Hatcher

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

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

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

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

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

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#### About this Series

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

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

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## **CASE LAW UPDATE**

### **Trial Court Required to Order Continued Father-Child Contact After Terminating Parental Rights**

*Adoption of Rico*, 905 N.E.2d 552 (Mass. 2009).

A child entered the child welfare system when he was three years old after his father was convicted for accidentally shooting his sister and distributing drugs. The father was imprisoned for five years. Upon his release the trial court determined he had failed to comply with all provisions of his case plan, except for visiting his son consistently each month.

The trial court terminated the father's parental rights but, recognizing the strong bond the father and child shared, approved post-termination and postadoption contact (continued contact) at the discretion of the child welfare agency and the adoptive family.

The father and child appealed the trial court's determination concerning parental contact. The appellate court affirmed.

The Massachusetts Supreme Court granted leave for further appellate review and concluded the trial judge had an obligation to order continued contact rather than leaving it to the discretion of the agency and adoptive parents.

The father and child argued that a continued contact order was appropriate since the evidence showed a strong father-child bond, the judge had found the child should have continued contact with his father, and there were no identified adoptive parents or a situation where adoption of the child was within sight.

The court considered *Adoption of Vito*, 728 N.E.2d (Mass. 2000), which discussed the judge's power to order continued contact between a child and his biological parents. *Vito* noted that in situations where parental rights have been terminated and no preadoptive family has been identified and the child's principal

relationship is with the biological parent, "the court has the authority *and responsibility* to intervene in [the child's] best interests" (emphasis added).

The supreme court found *Vito* relevant in this case. The father's parental rights had been terminated, the child's current placement was disrupting and no preadoptive placement had been identified, the child had been in four different foster homes in six years, and the child's primary relationship with his father. The court found these circumstances to be precisely those in which an order for continued contact is appropriate.

The agency supported continued contact between the child and father in this case. However, it argued the trial judge properly did not enter such an order. The record showed the agency supported continued contact and was sensitive to the need to maintain their relationship; thus, the agency argued a court order was not needed.

The supreme court acknowledged the agency's commitment to support the father-child relationship and the discretion of the judge to determine a child's best interests regarding continued contact with biological family members. It emphasized, however, that in this case, where the judge had expressly found the child should have continued contact with his father, an order formalizing that determination was required.

The court explained that a court order protects the child in a way that leaving visitation matters to the agency and adoptive parents' discretion does not. Although a child may petition the court in the event the agency or adoptive parents prevent continued contact, the court found

this to be a burdensome and uncertain form of relief for a child. Further, if circumstances change after a continued contact order is made, the agency and the adoptive parents have the ability to request revising that order.

Another benefit of a court order is the clarity and sense of security it

brings the child about his ability to stay in contact and maintain a relationship with the person who has played a significant lasting role in his life. Thus, when a court finds the child's best interests warrant continued contact, it follows that the child's best interests will be advanced through a court order that

assures his bond with his biological parent is protected.

Since the trial court had found it was in the son's best interests to maintain contact with his father, it was obligated to order such contact. The supreme court therefore remanded the matter to the trial court for reconsideration.

## Agency Supervisor Entitled to State-Agent Immunity in Wrongful Death Action

*Ex parte Sumerlin*, 2009 WL 1100921 (Ala.).

A one-year-old child who suffered bruising on his face, ears and neck was admitted to the hospital by his mother. A medical social worker notified the child welfare agency of the child's injuries and reported suspected abuse. The medical social worker spoke with an agency supervisor and advised her that the child should not be allowed to return home with his mother because of suspected abuse and the mother's nonresponsive attitude.

The agency supervisor did not have an available investigator to immediately investigate the alleged abuse. However, she confirmed that the child could stay at the hospital over the weekend. The following Monday, an agency investigator would assess the situation. She also asked that the hospital call her before releasing the child.

When the child's father learned of the child's hospitalization later that day, he called the agency after hours and spoke with an on-call worker, who later met him at the hospital and helped police photograph the child's injuries. The worker also spoke with the child's mother, who told her the child had fallen out of his crib while in her and her boyfriend's care. The worker determined the child should not return home with his mother upon discharge from the hospital. She informed police of this finding and documented her findings in an agency report.

The following Monday, the agency supervisor assigned an investigator to the case. Later that day,

the hospital's medical social worker contacted the supervisor to learn her plans for the child. The supervisor, who had not received the on-call worker's report, said the child could return home with his mother and the agency investigator would meet them at their home. The hospital then discharged the child that day to his mother.

The next day, the agency investigator visited the child's home and interviewed his mother and boyfriend. The mother showed the investigator the child's crib and explained how the injuries occurred. The investigator found the child's injuries were consistent with falling out of a crib and that it was safe for the child to stay in the mother's care.

Nearly two months later, the child died from brain injuries after the mother's boyfriend punched him in the head.

A personal representative of the child's estate filed a wrongful death action against the agency supervisor. She claimed the supervisor negligently violated duties she owed to the child as a victim of child abuse. The supervisor asserted the defense of state-agent immunity and requested summary judgment.

The representative countered that the supervisor was not entitled to state-agent immunity because she exceeded her authority or misinterpreted the law by failing to follow child protective service policies or ensuring the case investigator followed those policies. She claimed the supervisor failed to ensure the

investigation of the child's suspected abuse was conducted "immediately;" failed to follow agency policy when she did not evaluate the agency investigator's assessment; and violated a consent decree by assigning the investigation to an agency investigator whose caseload exceeded the limit set in the consent decree.

After a hearing, the trial court denied the supervisor's request for summary judgment, concluding that she had violated many mandatory duties required by the agency's policies and procedures manual. The supervisor petitioned for a writ of mandamus.

The Alabama Supreme Court granted the writ. The child's representative first claimed the supervisor acted beyond her authority by not immediately investigating the child's suspected abuse. The agency manual requires an "immediate" response—within 12 hours—when an allegedly abused child is at serious risk of harm. The representative claimed the supervisor exceeded her authority by not assigning an investigator until a few days after the report was made.

However, the evidence showed the supervisor had exercised her judgment in determining whether an immediate response was needed after receiving the initial intake information. Since the child was safe at the hospital and was not left unsupervised or in a life-threatening situation, the supervisor determined an

*(Continued on page 72)*

**STATE CASES****Arizona**

*Denise R. v. Ariz. Dep't of Econ. Sec.*, 2009 WL 1451452 (Ariz. Ct. App.). TERMINATION OF PARENTAL RIGHTS, SUBSTANCE ABUSE/MENTAL HEALTH Trial court properly found that mother had failed to remedy serious mental illness and substance abuse issues to properly care for children in termination hearing; despite the availability of treatment services, mother failed to make appointments, frequently tested positive for alcohol, and ceased taking her prescribed psychotropic medications.

**California**

*In re Samuel G.*, 2009 WL 1478453 (Cal. Ct. App.). DEPENDENCY, EDUCATION EXPENSES Trial court's order requiring county child welfare agency to pay expenses for child's court-appointed educational representative to visit child at his group home in another county did not violate separation of powers doctrine and was not an illegal gift of public funds; when a dependent child has severe educational and behavioral issues, court may exercise its legal authority to appoint educational representative to monitor and advocate child's interests in and rights to quality education.

**Florida**

*M.S. v. Dep't of Children & Families*, 6 So. 3d 102 (Fla. Dist. Ct. App. 2009). DEPENDENCY, TELEPHONIC TESTIMONY Trial court improperly allowed testimony by telephone in adjudicatory hearing in dependency case despite father's objection; state statute requires all parties to consent before testimony can be taken via communication equipment and does not give court discretion to overrule consent.

**Georgia**

*In re K.C.W.*, 2009 WL 1218753 (Ga. Ct. App.). TERMINATION OF PARENTAL RIGHTS, MENTAL ILLNESS Father's mental deficiency prevented him from caring for child with special education needs and chronic medical condition, even though he had completed case plan goals, paid child support, and wanted to be part of child's life; expert testimony at termination hearing established child's deprivation was likely to continue since father's mental deficiency prevented him from caring for child on his own.

*In re T.W.*, 2009 WL 1331345 (Ga. Ct. App.). DEPENDENCY, VIOLENCE Juvenile court properly found children were without proper parental care or control based on mother's history of violence, some of which occurred in presence of her children; mother threatened one child's father with a firearm, a knife, hit him, and destroyed his belongings in the child's presence and previous incidents with other men also involved threats with firearms and harassing phone calls.

**Indiana**

*In re I.A.*, 2009 WL 748108 (Ind. Ct. App.). TERMINATION OF PARENTAL RIGHTS, FAILURE TO IMPROVE Trial court properly determined that underlying reasons for child's placement outside home would not be remedied to warrant terminating mother's parental rights; mother did not attempt to understand child's medical conditions, she did not know child's current doctors, medications, or necessary therapies, and she did not cooperate with doctors in child's medical diagnosis.

*In re Doe*, 2009 WL 1492702 (Idaho). TERMINATION OF PARENTAL RIGHTS, NEGLECT Sufficient evidence was presented at hearing to terminate parental rights on ground of continued neglect and failure to comply with the case plan; testimony revealed parents continued to have a physically unsafe environment for young children, children were left home alone with mother who had disorder that caused unconsciousness, and parents refused counseling.

**Illinois**

*People v. Konetski*, 2009 WL 1416070 (Ill.). DELINQUENCY, SEX OFFENDERS Trial court erred in exempting minor from registering as a sex offender committing criminal sexual assault; statute mandates registration and procedural due process is not violated by registration despite lack of a jury trial as registration requirements for juveniles are less harsh than those for adults.

**Indiana**

*In re Infants H.*, 904 N.E.2d 203 (Ind. 2009). ADOPTION, INTERSTATE PLACEMENT Final order of adoption reversed for lack

of compliance with the Interstate Compact on the Placement of Children; though prospective adoptive father claimed he was residing in Indiana where adoptive children were placed, he in fact only had a hotel room in state and maintained employment and a permanent residence in New Jersey.

**Michigan**

*In re Hudson*, 2009 WL 943845 (Mich.). TERMINATION OF PARENTAL RIGHTS, REPRESENTATION Trial court erred by failing to advise mother of her right to counsel in child welfare proceedings that ultimately led to terminating her parental rights, failing to timely appoint counsel, and failing to advise her that her plea could be used against her in termination proceedings; fundamental errors deprived mother of due process and violated statutory and court rule protections.

**Nebraska**

*In re Allena P.*, 2009 WL 1067510 (Neb. Ct. App.). DEPENDENCY, GUARDIANSHIP Trial court properly denied parents' petition to terminate guardianship arrangement based on clear and convincing evidence of abandonment and failure to pay child support; mother had been absent from child's life for three years and paid child support sporadically and father was completely absent from child's life for three years and stopped paying court-ordered child support altogether.

*In re Shayla H.*, 764 N.W.2d 119 (Neb. Ct. App. 2009). DEPENDENCY, INDIAN CHILD WELFARE ACT Trial court erred in proceeding on original petition which did not contain language addressing the Indian Child Welfare Act (ICWA) after being informed at the initial hearing that case fell under ICWA; prior case law requires that language addressing ICWA requirements must be included in original petitions.

**New Jersey**

*Div. of Youth & Family Servs. v. G.M.*, 968 A.2d 698 (N.J. 2009). CUSTODY, BEST INTERESTS Where children were removed from mother and adjudicated dependent based on her assault on daughter and where custody was granted to father at emergency hearing, trial court improperly

dismissed dependency case without holding a dispositional hearing; mother's due process rights were violated where no formal procedures, sworn testimony, or introduction of relevant documents occurred and court did not determine that it would be unsafe to return the children.

*New Jersey Div. of Youth & Fam. Servs. v. A.R.*, 965 A.2d 174 (N.J. Super. Ct. App. Div. 2009). TERMINATION OF PARENTAL RIGHTS, BONDING  
Trial court's determination of whether to terminate mother's parental rights required comparative evaluation by qualified expert of child's bonding with foster parents and with mother to consider whether separating child from foster parents would result in serious and lasting emotional and psychological harm.

### New York

*In re Audrey I.*, 2008 WL 5245583 (N.Y. App. Div.). TERMINATION OF PARENTAL RIGHTS, SUSPENDED JUDGMENT  
Suspended judgment would have protected children's best interests rather than terminating mother's parental rights since evidence showed mother had progressed in counseling and had separated herself from husband's negative influence, she expressed remorse over past behavior, was trying to find a job, and recognized children's mental health needs and was committed to obtaining proper treatment to address children's needs.

*In re Anthony I.*, 877 N.Y.S.2d 520 (App. Div. 2009). TERMINATION OF PARENTAL RIGHTS, LACK OF CONTACT  
In termination proceedings, child welfare agency proved that incarcerated father failed to maintain contact with child, demonstrating an intent to forgo his rights; father failed to respond to agency supervisor's two letters providing him with her contact information, he never sent anything for child or called or wrote to supervisor, and he did not respond to caseworker's letter informing him of his right to visit child.

*Davis v. Palacio*, 2009 WL 1149443 (N.Y. App. Div.). VISITATION, MODIFICATION  
Father failed to establish a material change in circumstances sufficient to modify existing visitation order; fact that child's custodial aunt died and uncle sought custody certainly changed

circumstances, but the change did not warrant modification where original visitation order was based on fact that father was incarcerated and where he remained incarcerated at time of aunt's death and had not completed services required in original order.

### North Dakota

*State v. Geiser*, 763 N.W.2d 469 (N.D. 2009). ABUSE, UNBORN CHILD  
Criminal child endangerment statute did not apply where mother was alleged to have attempted to overdose on prescription drugs while 29 weeks pregnant; as statute did not specify whether it applied to unborn persons and other statutory sections, case law, and legislative history could lead to different results, rule of lenity requires ambiguous criminal statute to be interpreted in favor of defendant.

### Oregon

*In re A.J.T.*, 2009 WL 1459031 (Or. Ct. App.). TERMINATION OF PARENTAL RIGHTS, FITNESS  
Evidence did not support termination of parents' rights on ground of unfitness where mother and father had made significant progress addressing their drug abuse and domestic violence problems, they were maintaining consistent contact with child and evidence did not show child would be harmed by waiting a few additional months in his prospective adoptive home.

### Virginia

*Shanklin v. Commonwealth*, 674 S.E.2d 577 (Va. Ct. App. 2009). ABUSE, FELONY CHILD NEGLECT  
Grandmother who babysat child did not act with reckless disregard for child's life, as element of felony child neglect, when she failed to seek medical care for child, even though he had gauze and duct tape over burns on his feet and hands, was lethargic, and had to be carried to bathroom; grandmother was unaware of extent of child's injuries or that he needed medical care.

### Washington

*In re Silva*, 206 P.3d 1240 (Wash. 2009). STATUS OFFENSES, CONTEMPT  
Trial court improperly exercised its contempt power by imposing jail sentence on at-risk youth without first exploring all statutory contempt remedies and finding them inadequate; services for at-risk

youth under state statute aim to keep children out of detention and treat and rehabilitate them, so that judge may only consider jail as last form of punishment.

### FEDERAL CASES

#### S.D. N.Y.

*Orlik v. Dutchess County*, 603 F. Supp. 2d 632 (S.D.N.Y. 2009). LIABILITY, WRONGFUL REMOVAL  
In case alleging wrongful removal, mother's due process rights were not violated by an unduly delayed or disruptive removal; a removal hearing was held within six and a half hours of removal and was not disruptive by any means as child remained in hospital during that time.

#### W.D. Pa.

*Crawford v. Washington County CYS*, 2009 WL 720881 (W.D. Pa.). LIABILITY, CHILD WELFARE AGENCIES  
In couple's action against child welfare agency after their parental rights were terminated claiming their son's recantation of abuse allegations and stated desire to continue living with them was improperly investigated, couple failed to present sufficient evidence to support claim; child had been evaluated by specialists who found the allegations credible and state court found substantial evidence to support abuse report.

#### D. R.I.

*Elliott v. Carcieri*, 2009 WL 1143141 (D.R.I.).  
In class action lawsuit against child welfare agency alleging deficiencies in child welfare system resulting in violation of children's constitutional rights, next friends could not represent children in federal proceedings since they lacked significant relationships with children and children were already dually represented by attorneys from Rhode Island's CASA program under federal procedural rules.

#### Ninth Circuit

*United States v. Juvenile Female*, 2009 WL 1459487 (9<sup>th</sup> Cir.). DELINQUENCY, ASSAULT  
Juvenile's assault of border patrol agent, who was assisting in stop and search of vehicle in which juvenile was a passenger, fell within scope of federal assault statute, even though statutes or federal regulations did not specifically grant border control agency authority to enforce customs laws.

## Resources

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

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

## Cost-Recovery Framework Title IV-E of the Social Security

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

## Consequences

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

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

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

## Legal Strategies

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

### Discretion not to initiate child support

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

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

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

### **Conflicts with reunification requirements and illegal case plans**

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

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

### **Child Support and Nonresident Fathers: Legal Strategies**

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

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

### **Unconstitutional grounds for terminating parental rights**

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

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

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

### **Additional strategies**

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

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

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

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

## Conclusion

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

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## Endnotes

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

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

<sup>3</sup> 42 U.S.C. § 671(a)(17).

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

<sup>5</sup> 42 U.S.C. § 671(a)(17).

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

<sup>7</sup> 42 U.S.C. § 671(a)(17).

<sup>8</sup> U.S. Dept. of Health and Human Services, Administration for Children & Families, Child Welfare Policy Manual, 8.4C Title IV-E, General Title IV-E Requirements, Child support, available at [www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=170](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=170)

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

government-owed support may harm the relationship.

<sup>10</sup> Ohio Rev. Code Ann. § 2151.361; Cal. Fam. Code § 17552.

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

<sup>12</sup> 42 U.S.C. § 671(a)(15).

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

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

<sup>15</sup> E.g., N.C.G.S.A. § 7B-1111(a)(3).

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

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

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

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immediate response was not needed. The determination was within her authority to make and was supported by materials she presented to the court. The court therefore found she did not act beyond her authority.

The representative next claimed the supervisor exceeded her authority by failing to review documentation supporting the investigator’s initial assessment in the case. Although the supervisor and investigator met daily to discuss the investigator’s findings, the investigator did not document her findings in the computer system. Therefore, the supervisor did not officially approve the investigator’s initial recommendation. The agency manual permits 90 days to complete an initial assessment. Since 90 days had not passed from the initial intake date, the representative did not establish that the supervisor exceeded her authority by not completing her supervisory review.

Finally, the representative claimed the supervisor violated the terms of a consent decree by assigning an investigator whose caseload exceeded the mandated limit. The investigator had an average of 19 open cases in one month, more than the 13.5 permitted by the consent decree. However, because the investigator’s caseload average over an allowable period was within the consent decree’s caseload limit, the supervisor did not violate the consent decree.

The court concluded that summary judgment was appropriate based on state-agency immunity and therefore granted the writ and directed the trial court to set aside its order.