

Note from the Field

Child Support, Private Enforcement Companies, and the Law

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Editor's Note: Child support issues are common problems encountered in legal assistance offices both in the United States and abroad. More and more of our soldiers are paying their child support or receiving their child support through private child support enforcement companies. This article addresses some problems associated with these companies.

With over \$84 billion dollars of child support arrears owed nationwide,¹ any idea to collect those arrears is probably worth trying. For years, state agencies have been collecting both current child support and arrears, but many of these agencies have been criticized for their backlog of cases and minimal resources.² In an attempt to fill the gap between what is owed and what the states are collecting, various private child support enforcement³ companies have sprung up over the past decade—with more than twenty major companies now in existence. While the efforts of some of these companies are laudable, there is a price: many of the contracts the custodial parents sign stipulate that between 25% and 33% or more of any money recovered is kept by the company, *even if a state agency col-*

*lected the money and it would be disbursed to the custodial parent at no charge.*⁴ One company even asserts that if the non-custodial parent makes a support payment directly to the custodial parent, that money has to be turned over to the private company as well, so the company can extract its percentage, or the company will charge the custodial parent a penalty.⁵

While others have addressed whether using private child support enforcement companies is a good idea,⁶ this note focuses on two main legal issues surrounding these companies: first, what types of support these companies can collect; and second, whether the support collected by state agencies can be sent to these companies instead of the custodial parent. Surprisingly, the answers to both questions are consistent throughout the United States: at most, only child support arrears and not current support may be collected by these companies, and money collected by state agencies may not be redirected to a private company.

Current Versus Arrears

Only a few cases nationwide have dealt directly with the issue of what types of child support these companies may collect. In perhaps the most analyzed and quoted case, *Utah v. Sucec*,⁷ the Utah Supreme Court examined the right of a private child support collection company to enforce an assignment of child support arrears received from the custodial parent. The court differentiated between current, on-going child support payments and child support arrears.⁸ Unlike other debts, the

1. Office of Child Support Enforcement, *Child Support Enforcement (CSE) Background and Program Results* (Feb. 2000), at <http://www.acf.dhhs.gov/programs/cse/pubs/2000/datareport/ch01.html>.

2. This criticism has taken the form of lawsuits, see *Blessing v. Freestone*, 520 U.S. 329 (1997); *Child Support Collection Leads Divorced Fathers to Sue the State of Michigan*, Jan. 26, 2000, available at <http://law.about.com/library/weekly/aa012600a.htm>; congressional testimony, see *The Private Sector as a Partner in Solving the Child Support Crisis, Before the House Comm. on Ways and Means Subcomm. on Human Resources*, 104th Cong. (Feb. 6, 1995) (testimony of Richard Hoffman), available at http://www.supportkids.com/content/public/news/coverage/testimony950206_pt1.asp; federal investigations, see Leon M. Tucker, *U.S. to Probe Child Support Collection*, TENNESSEAN, Dec. 15, 1999; and a variety of articles by the media, see, e.g., Mark Williams, *Company Offers Child Support Collection Service*, DAILY REP., Aug. 29, 1995; not-for-profit organizations, see Press Release, Children NOW, Past Due: Child Support Collection in California (1996), available at <http://www.childrenow.org/california/Csuppastdue/ChildSupport.html>; and the states themselves, see Bureau of State Audits and Little Hoover Commission, Executive Summary (May 1997), available at <http://www.lha.ca.gov/lhcdir/142es142.html>.

3. For purposes of this article, enforcement and collection are synonymous.

4. Laura Meckler, *A Growing Field, Private Child Support Collection Agencies Under Attack*, AP, June 12, 2002.

5. See Central Child Support Enforcement Agency, Exclusive Agency Contract para. 4, available at <http://www.childsupport.ws> (last visited July 1, 2002).

6. See, e.g., Better Business Bureau of New York, *Child Support Enforcement* (NYBBB1293), available at <http://www.newyork.bbb.org/library/publications/subrep71.html> (last visited Mar. 19, 2002); Press Release, National Organization for Women, Privatizing Child Support Collection a Truly Bad Idea: Statement of the National Organization for Women (May 18, 2000), available at <http://www.now.org/press/05-00/05-18-00.html>; Association for Children for Enforcement of Support, *ACES Members Report Being Ripped Off By Private Collectors*, at <http://www.childsupport-aces.org/beware.html> (last visited Mar. 19, 2002); Mark Williams, *Company Offers Child Support Collection Service*, DAILY REP., Aug. 29, 1995, available at <http://centralohio.thesource.net/Files/9508291.html>.

7. 924 P.2d 882 (Utah 1996).

8. *Id.* at 885-86. Current support is the support due to be paid in a given time frame; if it is not paid by the time the next payment is ordered to be paid, then the amount not paid becomes child support arrears. Only one payment due during that time frame may be designated "current support."

current, on-going obligation or duty to support a child is owed to the child, and not the custodial parent. The custodial parent cannot discharge, negotiate, or assign that on-going obligation.⁹ Unlike the on-going obligation, however, child support arrears in some jurisdictions belong solely to the individual who provided the support to the child for the period current support was not being paid—the custodial parent.¹⁰ Because this debt does not belong to the child in these jurisdictions, the custodial parent is free to discharge, negotiate, or assign that debt.¹¹ Accordingly, the court held that a private child support company may, at most, collect only child support arrears, and not current support.¹²

The underlying logic of this case's holding—that current child support belongs solely to the child and cannot be contracted or assigned away—is consistent throughout the nation among states which have addressed this issue.¹³ Therefore, private companies in the United States may only legally collect child support arrears due to the custodial parent, and not current child support, despite many of the companies' assertions otherwise.

Even the ability of private companies to collect child support arrears may be limited in some jurisdictions where the child potentially has an independent right to collect the arrears owed,¹⁴ which may empower the child to bring suit against any

party whose private child support collection fees reduce the amount of support due to the child.¹⁵ Furthermore, due to the almost universal prohibition against contingency fees in domestic relations cases, attorneys working for private child support collection companies would be barred ethically from collecting child support (current or arrears) on any sort of contingency fee basis.¹⁶ At least one jurisdiction has found that the payment of collection fees from the child support award, as required by the contracts used by many private child support collection companies, is void as against public policy.¹⁷

State IV-D Agencies and Private Child Support Enforcement Companies

Regardless of what type of support, if any, private child support enforcement companies may collect, if a custodial parent has an open case with a state IV-D agency,¹⁸ the question remains, should the child support collected by the state agency be sent directly to the custodial parent or to the private company with which the parent has a contract? Under both federal and many state laws,¹⁹ state agencies must distribute the child support they collect directly to either the family or the federal/state government,²⁰ and not to a third party.

9. *Id.* at 885-86.

10. *Id.*; see *Washington v. Weimer*, 2001 Wash. App. LEXIS 2339 (Wash. Ct. App. Oct. 19, 2001).

11. *Sucec*, 924 P.2d at 885-86; see *In re Marriage of Searle*, 1999 Wash. App. LEXIS 944 (Wash. Ct. App. May 27, 1999) (holding the same as *Utah v. Sucec* that only child support arrears can be collected by a private company).

12. *Sucec*, 924 P.2d at 886.

13. See *Picket v. Brown*, 462 U.S. 1, 16 n.15 (1983); see generally *Commonwealth ex rel. Gray v. Johnson*, 7 Va. App. 614 (Va. Ct. App. 1989); *In re Marriage of Miller*, 790 P.2d 890 (Colo. Ct. App. 1990); *Payne v. Prince George's County Dep't of Soc. Serv.*, 67 Md. App. 327 (Md. Ct. Spec. App. 1986); *Bowen v. State*, 56 Ohio St. 235 (Ohio 1897); *In re Linville*, 2000 Tenn. App. LEXIS 787 (Tenn. Ct. App. Dec. 7, 2000); *Ellison v. Walter*, 834 P.2d 680 (Wyo. 1992); *Salter v. Salter*, 1993 Del. Fam. Ct. LEXIS 24 (Del. Fam. Ct. Apr. 2, 1993); *Hill v. Hooten*, 776 So. 2d 1004 (Fla. Dist. Ct. App. 2001); *Worthington v. Worthington*, 250 Ga. 730 (Ga. 1983); *Trunzler v. Trunzler*, 431 So. 2d 1115 (Miss. 1983); *Martinetti v. Hickman*, 261 N.J. Super. 508 (N.J. Super. Ct. 1993); *Dolhonde v. Dolhonde*, 357 So. 2d 810 (La. Ct. App. 1978); *Sorrell v. Bornder*, 593 So. 2d 986 (Miss. 1991); *Pascale v. Pascale*, 140 N.J. 583, 591 (N.J. 1995); *Shipman v. City of New York Support Collection Unit*, 183 Misc. 2d 478 (N.Y. Sup. Ct. 2000); *Toni v. Toni*, 2001 ND 193 (N.D. 2001); *Weimer*, 2001 Wash. App. LEXIS 2339, at *1.

14. See generally *Amie v. Superior Court of Riverside County*, 99 Cal. App. 3d 421 (Cal. Ct. App. 1979) (quoting *Fagan v. Fagan*, 43 Cal. App. 2d 189 (Cal. Ct. App. 1941)); *Bantz v. Bantz*, 1993 Ohio App. LEXIS 740 (Ohio Ct. App. Feb. 10, 1993); *Commonwealth v. Johnson*, 7 Va. App. 614 (Va. Ct. App. 1989). While no cases have dealt directly with the issue of whether a child may bring suit on his behalf to collect child support arrears from the non-custodial parent, these cases support the proposition that children may do so.

15. *Sorrell v. Bornder*, 593 So. 2d 986 (Miss. 1991) (citing *Trunzler*, 431 So. 2d at 1115).

16. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5 (2002); *Davis v. Taylor*, 344 S.E. 3d 19 (N.C. Ct. App. 1986); *Law Office of Tony Center v. Baker*, 185 Ga. App. 809, 810 (Ga. Ct. App. 1988) (holding that in these jurisdictions, the custodial parent must pay up front for any collection services, and that the companies' fee may not be apportioned out of the support collected).

17. *Shipman*, 183 Misc. 2d at 478.

18. Named for the authorization to create state child support enforcement agencies found in section IV-D of the Social Security Act, 42 U.S.C. §§ 651-669 (2000).

19. See W. VA. CODE § 48-1-307(d) (2001).

20. For example, to reimburse public assistance, or to repay the costs of foster care.

Title 42 U.S.C. § 657, *Distribution of Collected Support*, provides that the state may only distribute support to the family, the federal government, or the state government. No provision is made for distribution to private companies.²¹ The federal regulation enacting the statute, 45 CFR section 302.38, provides the same.²² While Congress could have included third-party private companies as potential recipients of child support from the state, it did not. Rather, it clearly enumerated who may receive support payments, and under what situations they may receive those payments. Many states have also enacted laws limiting to whom child support payments may be disbursed, none of which allow payments to be made to private child support companies.²³ Furthermore, the Uniform Interstate Family Support Act (UIFSA), followed in all fifty states, makes no provision for the state to disburse to private child support companies.²⁴ Just as Congress could but chose not to, the respective state legislatures did not include private child support companies in the definition of entities to whom child support payments may be disbursed. Even a court has held that state child support enforcement agencies must disburse payments to the custodial parent and not a third party.²⁵

In addition, at least one federal court has found the contract signed by a custodial parent and a private child support collection to *not* be a true assignment, but rather a contingency fee agreement.²⁶ Many states place restrictions, by statute, upon which causes of action are assignable, and limit the assignment

of child support only to the state.²⁷ Because the state is not in privity to the contract between the custodial parent and the child support company, there is neither a duty by the state to honor such a contract nor a cause of action against the state for failing to honor such a contract.²⁸

Conclusion

This note examined several legal issues surrounding private child support companies, not the propriety of some of their trade practices or the public policy arguments for or against these companies. While a custodial parent may enter a contract with a private company to collect child support, that company may collect, at most, only arrears not owed to a state. Some states even prohibit the collection of child support arrears through a contingency fee contract.

Regardless of what type of support these companies may collect, federal and state law prohibits state agencies from redirecting child support payments to private child support companies. Beyond the absence of statutory authorization, the contract between the custodial parent and the private child support company is a contingency fee arrangement to which the state is not a party. The state has no obligation to honor the contract.

21. See 42 U.S.C. § 657.

22. See 45 C.F.R. § 302.38.

23. See, e.g., VA. CODE ANN. § 63.1-251.2 (2001) (requiring disbursing payment to the obligee within two business days of receipt); IOWA CODE § 252B.15 (2001); GA. CODE ANN. § 19-11-18(f) (2001); FLA. STAT. ch. 61.1824(1)(d)2 (2001); DEL. CODE ANN. § 2204(c) (2001); NEV. REV. STAT. 31A.300 (2001); MICH. COMP. LAWS § 552.509 (2002).

24. For instance, Virginia enacted the UIFSA at Code of Virginia sections 20-88.32 to .82. The Code of Virginia defines the term “obligee” at section 20-88.32 as

(i) an individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered, (ii) a state or political subdivision to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee, or (iii) an individual seeking a judgment determining parentage of the individual’s child.

VA. CODE ANN. § 20-88.32. Nowhere in the statutory definition does it provide that an “obligee” could be a private company. See *Commonwealth v. Chamberlain*, 31 Va. App. 533, 539-40 (Va. Ct. App. 2000) (discussing the history of the UIFSA and legislative history of the definition of “obligee”); see also UIFSA (1996) § 101, 9 U.L.A. 259 (1999).

25. See *Shipman v. City of New York Support Collection Unit*, 183 Misc. 2d 478 (N.Y. Sup. Ct. 2000).

26. See *Smith v. Child Support Enforcement*, 180 B.R. 648 (Bankr. D. Utah 1995) (due to no assignment of the arrearages to the child support company in satisfaction of a debt owed to it by the custodial parent, but rather an effort to collect overdue child support requiring the custodial parent to pay both a retainer and a percentage of child support arrearages recovered).

27. For example, Code of Virginia section 8.01-26 provides that only those causes of action for damage to real or personal property, whether such damage be direct or indirect, and causes of action *ex contractu* are assignable, unless otherwise provided by statute. See VA. CODE ANN. § 8.01-26. The underlying cause of action regarding the payment of child support is neither damage to real or personal property nor arising *ex contractu*. See *MNC Credit Corp. v. Sickels*, 255 Va. 314 (Va. 1998) (discussing common law assignments and Code of Virginia section 8.01-26). Code of Virginia section 63.1-273 provides that the receipt of public assistance creates an assignment on the behalf of the obligee to the Commonwealth. See VA. CODE ANN. § 63.1-273. Furthermore, Code of Virginia section 63.1’s definition of “assignment of rights” has no provision for making the assignment to a third party. See *id.* § 63.1.

28. See *Copenhaver v. Rogers*, 238 Va. 361 (Va. 1989); *Commonwealth v. Johnson*, 7 Va. App. 614 (Va. Ct. App. 1989).

While the collection of child support by state agencies is far from perfect, it at least assures the custodial parent and child that any money collected will be paid in full. Undoubtedly, some private child support companies may help combat the

national child support epidemic,²⁹ but as with any other business, the law limits what type of child support and from what sources private companies can collect.

29. See Drew A. Swank, *The Constitutionality of Limitations on a Felon's Right to Procreate and the Need to Support Children*, 2002 INT'L FAM. L. 16 (Mar. 2002) (discussing the extent of the failure to pay child support in the United States).