



**CENTER FOR FAMILY
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Low-income and never- married families:

**Service and support at the
intersection of family court and
child support agency systems**

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ABSTRACT

State child support enforcement agencies facilitate the legal establishment of paternity for children born outside of marriage, and enforce the payment of child support by noncustodial parents. They are directed to move cash resources from a nonresident parent to the home of his or her child. Ideally, this income transfer provides financial support for children, and security for custodial families. This paper describes how the agency is challenged in the fulfillment of this responsibility by the adversarial nature of its own process, and by the intractable poverty and unemployment (among other barriers to economic security) of a significant portion of its caseload.

Key points:

- Many noncustodial (mother and fathers) who are unemployed (even long-term unemployed) receive child support orders they cannot pay, based on a presumed earning capacity.
- Current child support policy and practice may be detrimental to economic security and well-being of low-income individuals and families.
- The structure of the US child support system may conflict with the goals of security and stability for children and families.
- Racial inequity and disparities in poverty and unemployment in the US suggest a thorough inquiry into the impact of child support policy and practice on families of color.

Low-income and never-married families:

Service and support at the intersection of family court and child support agency systems

There is growing concern on the part of family advocates and legal professionals that under current family court systems, unrepresented family court litigants are not getting the support that they need to transition through divorce and separation. Various explanations for increased pro-se litigation include parents who cannot afford lawyers and parents who do not trust that any actor in the judicial system will represent (or even recognize) their children's best interest. The general impact of the many parents and families in courtrooms without information and direction is to delay and otherwise negatively affect courtroom efficiency. The misguided or uninformed documents submitted to family courts every day is evidence of the effect.

Court personnel need systems that run predictably and smoothly. Individuals and families, of course, need opportunities and information to make the best plans for their lives after separation or divorce, and for their children's wellbeing and security. A recent report, "The Family Law Bar: Stewards of the System, Leaders of Change," from the Institute for the Advancement of the American Legal System (IAALS) calls for a focus on families. The report recommends that family courts "implement client-centric court practices...including differentiated case management, and innovative trial procedures."¹ This paper will highlight the importance of that recommendation with specific attention to low-income, never-married families in the system.

In 2012, 42% of all children born in the United States were born to unmarried women, and the

issue of unrepresented parents in the family court system also pertains in those cases.² When a child is born outside of marriage, a court order establishes parentage and creates parental rights and responsibilities. At that point, never-married parents, like divorcing parents, can work toward custody, support, and parenting time agreements for their children.

For unmarried parents, however, the progress through the system will be very different in at least one important respect. The majority (71 percent) of all never-married custodial families in the United States are in the federal child support system.³ In accordance with public assistance policy, state child support agencies initiate court proceedings and manage administrative cases.⁴ Parents in those cases, just like divorcing parents, are likely to be uninformed and misguided in the process, and unlikely to have legal representation.

Low-income, unmarried parents do not need a legal dissolution of their relationship. And, whether or not either of them wants judicial interjection or oversight into the status of their relationship, interest in welfare cost containment prompts the state to bring a petition in family court for child support payment. For the poorest, most chronically unemployed parents in the system, child support orders based on imputed income (with little basis in fact) do not result in financial support for children. Low-income parents say that the systematic imputing and ordering of payment (and the resulting debt and the risk of incarceration) is counterproductive and unfair to parents and, therefore, detrimental to

their children.⁵ The IAALS report focuses on better outcomes for children and fairness for all parties begs the question of how we can better serve very low-income, economically unstable parents at the intersection of judicial and government agency practice, where they confront barriers to justice, opportunity, and family support.⁶

If the process is to change and remove those barriers, the first step will be to recognize and distinguish vulnerable families when they appear in the courtroom. Many of the most vulnerable parents in the system (1) have never been married to each other; (2) have likely been summoned on the petition of the state, and appear (or default) without legal representation or counsel; (3) have little or no income or ability to pay child support as ordered, and, therefore, little chance of avoiding a contempt of court ruling—and thus the possibility of mounting debt and incarceration; and (4) represent a racial, ethnic or other marginalized group generally at disproportionate risk of unemployment, poverty, and punishment for nonpayment. Investigation of the issues and circumstances that create barriers to court access for these families reveals an urgent need for change in the broader family court/child system to accommodate and respond to those needs.

The family court system has the capacity to adapt both law and policy in response to social changes in family formation. Recent social and legal recognition of parentage—beyond hetero-normative, married mothers and fathers who produce biological children—attests to the opportunity for creative change and adaptation for families outside social and economic margins. This paper is a call for family court reform and innovation that will provide options and opportunities for low-income, never-married parents. The advantage of focusing on the needs and the barriers to access and justice for the least resourced, most complex family situation is that the resulting structural modifications and improvements will, inevitably, redound to the benefit of all families in the system.

Legal professionals and family advocates should recognize and analyze the position of the poorest, least resourced parents in child support agencies and courtrooms. And, they may be called upon in the future to argue and litigate those parents'

rights. That work will certainly require that advocates educate themselves on the statutory foundation, policy, and practice of the current child support enforcement system.

Never-Married Parents

One important reason for the dearth of information about the poorest families in the system is that they occupy a space where two systems—family court and child support—intersect. This territory is co-managed by judicial actors and a government agency, and is not widely known or understood by people who are outside it. Traditional family-law bar organizations and professionals are less likely to know or investigate issues presented by low-income, never-married parents. They may not understand the role of the state in these cases, or the vulnerability of the parents. As a result, there are fewer analyses, recommendations, or creative and effective ideas for change to accommodate these parents and their children.

Currently, never-married families are not central to the dissolution and custody work of the family court system. Poverty and lack of information keeps some families on the margins without access to legally sanctioned custody or parenting agreements. Federal welfare and public assistance laws keep them under the control of child support enforcement agencies.⁷ Like divorcing parents, most never-married parents appear in court without legal representation and for many of the same reasons. Some of them cannot afford lawyers, others do not trust the court process, and most are unlikely to understand the documents or the concepts used in the judicial process.⁸

Also, many poor and unmarried parents (both custodial and noncustodial) contend with a tenuous connection to the job market, unstable housing, and disproportionate contact with criminal courts.⁹ They may not perceive courtrooms as a place where their rights can be defended or supported, or their children's best interest will be considered—comparing family courts to criminal or landlord tenant courts in their perception perhaps. In fact, parents with a negative past experience of government institutions might not voluntarily approach the courtroom at all.¹⁰ Poor noncustodial

parents avoid the court if they are unemployed, and increasingly, custodial parents who can choose whether or not to use the agency may be declining to do so. Since 2011, total national child support caseload has declined by one million, from 15.8 million to 14.7 million.¹¹

The point at issue here, however, is that parents who do accept public benefits have fewer options. They cannot avoid the child support courtroom because, as a condition of public assistance, parents agree to cooperate fully with the state child support agency.¹² In 2015, 53% of the families in the national child support agency caseload were current or former recipients of cash welfare benefits.¹³ Custodial parents are required to cooperate by providing information about their children's other parent. Putative parents are summoned to court by the state.

Like divorcing parents, the overwhelming majority of never-married parents are not represented by counsel.¹⁴ Unlike divorcing parents, however, in never-married cases and social welfare cases, the power differential between the opposing parties (the parent and the state) is different and extremely wide. In public aid cases, the state brings the petition based—in large part—on its interest in welfare cost reimbursement and containment. Without a lawyer, the interest of any individual is less likely to be advocated for (or even articulated). In cases brought by the state, unrepresented parents whose families are current or former recipients of public assistance have little chance of constructive input into the court's decisions about their children's lives or about their own financial capacity.

For low-income parents, in addition to the lack of agency or control, there may also be an element of disinterest in a process focused on issues that are irrelevant to their lives or their reality. Like most parents, they think about daily activities such as preparing dinner for their children, transporting them to daycare, and getting the bus in time for a doctor's appointment. Very low-income parents, however, must also deal with the anxiety of a budget that does not accommodate the family's basic needs.¹⁵ The focus in family courtrooms is on financial support obligations, court orders initiated and pursued by an agency, and money

that they may never receive (or, for noncustodial parents, cannot pay). With insufficient budgets to cope with, these activities and orders may be irrelevant, and possibly frustrating, for parents who have virtually nothing to divide.

As to actual financial support, the lower the sum of the parent's combined income, the more difficult it is for them to share resources, or to support two households. For parents experiencing unemployment and poverty, a formal document that outlines a financial plan they may not even understand may be irrelevant and useless in the chaotic, unstable reality of life in poverty. And, when a parent is ordered by a court to follow the plan, it can be frightening to consider the possibility of being held in contempt of court if they cannot follow through on it over the long term.

Support and information about placement and custody could be helpful to low-income parents. Recommended schedules and terms of agreement relieve some of the stress of negotiation and decision. But this work calls for creative thinking and innovation. Poverty and instability (and sometimes homelessness) can make even a visitation or placement order difficult to follow. The current family court system may not be equipped to respond to the inevitable, and often unpredictable "change in circumstances" that make up the day-to-day lives of very poor families. Child and family-centered custody, including fair parenting time arrangements that recognize housing instability and insecurity are urgent needs for parents who do not live with their children most of the time.

It is also important to note that some unmarried parents do not need child support or custody orders because they live together as romantic partners. In recent years, parents at all socio-economic levels are deciding not to marry. For a variety of social, financial, and emotional reasons, couples decide to remain unmarried even as they live together and have children.

Parents who do not apply for public benefits have the option of coming to an agreement amongst themselves about family residency and parenting time. Some cohabiting unmarried couples can make their own decisions about whether and how to get a legal declaration of parentage. They can decide to marry at some point in the

future if that is their inclination. They can even decide—without court intervention or assistance—to make arrangements for their child’s financial support and living arrangements if they end their cohabiting partnership.

Most of these options are not available to parents who need public assistance to meet their children’s basic needs. Some low-income parents do not marry because that legal status could complicate their eligibility for public benefits. If they need child-care, housing, nutritional support, or cash benefits, for example, a second adult in the home can threaten their eligibility status for the program. In other cases (depending on agency rules), the ongoing presence of a “nonresident,” noncustodial adult could lead to the termination of already secured benefits for a custodial family. This kind of regulation and suspicion can cause parental conflict and family instability. This can, as a practical matter, keep men away from their families and children.

The Child Support System

Family court professionals and family advocates are concerned that the current volume of unrepresented and uninformed divorcing parents in the family court caseload reduces the effectiveness and efficiency of that system. Too many pro-se litigants inevitably slow down both the process and turnover of the caseload, and increase the risk that court resources will not accommodate individual case needs for time and attention.

Some parents act on their right to be in the courtroom with or without a lawyer, others (both divorcing and never-married) are not allowed to make their own decision as to whether to access the family court. Very poor, never-married families who need state income support, childcare, medical care, and other social services for their children are moved through the courts in a relatively efficient manner by state child support enforcement agencies.

It is important to have a basic understanding of the workings of the federal child support program in the context of these issues. The program was codified in 1975 as section IV-D of the Social Security Act, and is often referred to as the IV-D

system.¹⁶ In that system, lawyers who are employed by the state agency present cases. Over time, child support lawyers can establish a type of regular pattern and process within the courtroom that makes for quick and efficient disposition of a relatively large number of cases. Also, public aid policy does not require states to provide legal counsel for either noncustodial or custodial parents in cases where the state brings the petition on the basis of its interest in welfare cost containment.

The federal system was created to collect child support payments on behalf of custodial families, and to ensure reimbursement to state and federal governments for the outlay of cash welfare benefits. Federal law requires that state child support agencies pursue specific and definite objectives to (1) locate parents, (2) establish paternity for non-marital children, (3) establish orders, and (4) collect financial support.¹⁷ The state agency incentive funding structure is based on these statutory goals, which outline and define the process for families. In individual cases, each of the goals is a step in the process and provides a foundation for the next. The power differential between the unrepresented litigants and the state in the courtroom appears to accommodate the strong government interest in efficient case processing.

In 1996, the welfare reform statutes that created the Temporary Assistance to Needy Families (TANF) program refined, reinforced, and strengthened the child support enforcement system.¹⁸ The new federal policy mandated an important change in child support agency practice that would move parents in the system toward expedited and very often administrative hearing and order processes (carried out, for the most part, outside the courtroom)¹⁹ The law allows for some state options and variation, but the computer-automated, administrative process is designed for as little deviation as possible toward incentivized outcomes. As a result of the reform policies of the late 1980s and early 1990s, the system is very complex and unremitting. Depending on jurisdiction, nonpayment can subject even chronically unemployed parents to the accumulation of arrearages, contempt of court, incarceration, and loss of license privileges (including driver’s and professional licenses).

The majority of parents in the system are summoned to court (or to an administrative or pretrial hearing or a pretrial conference) on the petition of the state. Most of them are unrepresented and uninformed. Regardless of any official information and explanation from lawyers or other state agency representatives, it is extremely difficult for parents (custodial or noncustodial) to make, or even formulate, a case for their own or their children's interests. It is virtually impossible for them to successfully argue the point that the best interest of their children may not be identical to state interest.

Since child support agencies use the family courtroom to authorize and carry out their activities, many of the most important concepts, documents and case processes the parents encounter are legal in nature. Without the familiar suits and robes and courtrooms, and without legal counsel, lay people may be unable to distinguish between conferences, hearings, and pretrial agreements. As a result, some parents may assume that the administrative agency representatives have judicial status or authority, or that judicial personnel represent the agency, and they may not understand the questions presented at any given point, or how, when, or even whether or not they can present evidence that might persuade the decision maker. Few parents can meet the information and education standards necessary to present their cases in this high-stakes proceeding. Regardless of their level of understanding, because they are without legal representation, neither parent is likely to influence the child support process or the court's decision. In fact, either one or both of them may misunderstand the court orders.

In many instances, a parent's lack of understanding, and inability to articulate his financial situation can result in presumption and judgment of unwillingness to pay. Noncustodial parents (mostly men, but more and more women) generally have been unable to protect themselves from the power of the state to enforce child support orders.²⁰ For poor parents without wage-generating resources or loan options, more than assets and income are at stake. Noncustodial parents who do not pay as ordered can be held in contempt of court, and many are incarcerated, and remain so until the entire debt or a purge payment is paid. The

unfamiliarity of legal processes, and the pressure of mounting debt, (and in many counties across the country, the threat of incarceration) combine to exacerbate the stress of trying to raise children in separated households on poverty-level incomes.

Child support enforcement tools can have long-lasting and enduring impact. The debt cannot be dispatched through bankruptcy, is rarely forgiven, and for the average debtor, represents 30% of his income.²¹ State and federal law require automatic seizure and liquidation of the assets of child support debtors,²² and the debt is routinely reported to credit reporting agencies. In some jurisdictions parents experience a cyclical process of job loss, inability to pay, the issuance of an arrest warrant, a finding of contempt and incarceration. Some parents who have experienced the stress of this cycle say they avoid the system when anxiety and lack of control over the situation becomes overwhelming.²³ Over time, the cycle can become so maddening that an individual determines to evade it at all costs.²⁴

Still, evidently, the overwhelming majority of noncustodial parents in the IV-D system can and do pay at least some portion of the child support amount ordered. For 2015, the federal Office of Child Support Enforcement (OCSE) reported the collection and distribution of \$28.5 billion in child support, of which 93.5% was distributed to "families and foster care."²⁵ For those parents who are reluctant or unwilling to share resources with a child as ordered by the court, the enforcement agency—with all its power to sanction and seize—can force payments to the benefit of a household that may be in desperate need of them.

When both of a child's parents are very poor and one or both are unemployed, the stability of the custodial household is precarious. The instability and ongoing poverty are the focus of a central policy objective: getting income directly into the household budgets of the poorest children and their custodial families. Still, most child support offices are not overwhelmed by applications for service. Child support agencies are required by federal law to establish parentage and child support for parents who request it. Custodial parents who receive cash welfare benefits are not charged for the service. Applicants who do not receive cash benefits

are charged \$25 per year (but only if the agency collects at least \$500 on their behalf).²⁶ Parents can use this service basically at will, with virtually no financial barrier to access. Still, over the last five years the caseload has steadily declined by over one million cases.²⁷ This suggests a lack of interest. Low-income parents are almost certainly interested in financial contributions from their co-parent, but are clearly less and less interested in the service provided by the agency. Noncustodial parents whose connection to the job market is unstable (or nonexistent) say they avoid the system because of the risk of not being able to pay, which they feel unable to control, and the potential of being subjected to harsh enforcement actions.²⁸

Who participates in the child support system?

In mainstream dissolution and custody activities most court actors and family advocates recognize two divorcing adults and their mutual children as families. The concept of family court justice presumes that parents are given the opportunity to present their case for organizing their separated family—and for co-parenting. Ideally, a fair assessment of income and assets leads to a reasonable decision based on the best interest of children and fairness to parents.

On the other hand, when government agencies are involved, they seem to view families in their caseload as “single-parent” families discarded by irresponsible fathers. Public assistance programming and activities have been designed for adults who are either potential marriage partners, or are two briefly connected adults who need education to understand personal responsibility and work. Government interest in welfare cost containment confuses poverty and unemployment with apathy and unwillingness to provide for children. By providing temporary support to one parent and using the child support system to charge, police, apprehend, or incarcerate the other parent, the state imputes income, assets, and opportunities that neither parent has.

Child support policy, family court access reforms and plans should be wholly informed by the lives and experiences of the individuals and

families they mean to serve. Research and investigation of the social and economic situation of the families in the court system is crucial to effective access and support for those families. Income and employment information is certainly vital, but so is racial demographic information. Many concerns of low-income individuals, like chronic unemployment, racial discrimination, violence, and housing and food insecurity are indistinguishable from community concerns. Qualitative and quantitative data and statistics that illuminate the incidence and prevalence of pertinent issues will result in better support for families.

It is difficult, if not impossible, for some parents to financially support their children’s residence in a separate household. Many of those parents are in the IV-D child support system. The income level of many child support system participants is below the official poverty line,²⁹ and the household income of many more families in that system is well below the national median.³⁰ Over 62% of all custodial (child support eligible) families in the United States participate in the child support IV-D system.³¹ Sixty-three percent of those families receive public benefits (mostly Medicaid and SNAP), and 54% have household incomes at or below \$25,000 per year.³²

Racial Demographics and Inequity

The national ranks of the unemployed (and probably of the child support system) disproportionately include a group of people defined by the intersection of two demographic characteristics: (1) adults who are chronically unemployed for months and years at a time, and (2) adults whose race or gender can reliably predict a higher likelihood of unemployment or underemployment. According to the Bureau of Labor Statistics, the unemployment rate for African American men and women was 8.2% and 7.3%, respectively in an overall unemployment rate of 4.9%, and 4.0% for both white men and women.³³ In spite of the consistently higher unemployment rate for African American adult males, in the twenty years since President Clinton declared the “end of welfare as we know it,” states have cut general assistance programs and restricted eligibility for housing and food stamps for able-bodied adults without children.³⁴

Many African American men speak to the frustration of being men with no money or job, of the difficulty of supporting themselves and their families, and of the insurmountable child support debt that may land them in jail, a debt that ensures that they will never catch a financial break.³⁵ African American men are disproportionately poor, disproportionately unemployed,³⁶ disproportionately incarcerated,³⁷ and might be disproportionately represented in sanctions for nonpayment of court-ordered child support.

Given what we know about difficult-to-avoid debt in relation to family prosperity, and about racial disproportionality with regard to poverty, unemployment, and incarceration, we need research and investigation to determine the specific impact of child support enforcement policies on poor and low-income families of color.

Welfare Receipt

Some of the poorest families in the child support (IV-D) system receive cash welfare benefits now, or have done so at some point in the past. In 2015, these families represented more than 55% of the OCSE caseload.³⁸ Custodial parents who apply for cash benefits are required by federal law to assign their rights to child support to the state.³⁹ Currently, the majority of states (27 plus Guam and the Virgin Islands) retain all of the child support paid by the parents of children currently receiving cash welfare benefits, and seven states and Puerto Rico pass through \$50 dollars or less.⁴⁰ Therefore, for the poorest children in the caseload, even when a parent pays, the family may not receive the full amount, or in some states any, of that payment. Nationally in 2015, families with current assistance cases received only 32.2% of the money collected by the child support agency on their behalf. In the same year, the state gave families designated as “former assistance” recipients, 89.9% of the money collected for them, with the balance in each category going to the federal and state governments as reimbursement.⁴¹

According to the most recent comprehensive study of arrears, a majority of much of the multi-billion dollar national child support debt is owed by parents with less than \$10,000 in income per year.⁴² Still, the system is fueled by the “dead-beat dad” stereotype and the perceived need to

force parents to support their children.⁴³ And, regardless of enforcement tactics or community-based employment programs, the debt continues to climb.⁴⁴

The Hybrid System

The result of charging poor, low-income, or unemployed men with sharing nonexistent resources with their children’s households is that they now owe a great majority of the \$115 billion in national child support debt.⁴⁵ In the computerized, standardized process by which states manage IV-D child support cases, parents with no employment, assets, or income are nonetheless considered to have the ability to pay as ordered. Currently, under state child support agency management of paternity and child support cases, court or administrative orders routinely demand an amount that the parent may not be able to pay. In most jurisdictions, (at least minimal) ability to pay is taken for granted for even the poorest parents, as evidenced by the regular and systematic imputation of income to the noncustodial parent. When a previously employed parent loses a job (and has no capacity to request or receive a modification of the order) and, as a result, cannot pay on time, the debt accumulates. A recent OCSE report illuminates this point and illustrates conflicting perspectives.

The child support program...has been less effective for the 25 percent of noncustodial parents who have a limited ability to pay child support [emphasis added]. We know that 70 percent of unpaid child support debt is owed by parents with no or low reported earnings.⁴⁶

Both state and federal governments have a clear financial interest in the child support process. In the years since the institution of the child support program in 1975 (and particularly, since the welfare reform legislation of 1995), new policy and practice have strengthened paternity establishment and child support collection enforcement tools. States petition the courts for paternity orders, paternity orders lead to child support orders, the regular practice of imputation continues, and child support orders lead to collection or enforcement. The process is persistent.⁴⁷

Child support agency actions and activities are clearly motivated by collection and other statutory requirements and state interests (including the welfare of children).⁴⁸ However, the agency is more likely to communicate and advertise its concern for the best interest of children and families. OCSE representatives present a mission of family support and service, and suggest that the state agency is the best place for vulnerable families who do not have the necessary resources, information, or legal representation to achieve a positive response and resolution in the courtroom. The clear statutory mission, the government incentive structure, and the authority of the family court, on the one hand, and the agency's social service impulse on the other hand, have created a powerful but conflicted child support system.

The conflict is inherent in the process. On behalf of the state, attorneys manage and conduct pretrial activities with the (most likely) unrepresented parents, and parents understand that the source of the authority is the court. They know that the agency uses judicial power to hold in contempt, and incarcerate parents, who cannot or will not pay.⁴⁹ It is unclear how this agency process can also support case management or assessment. For example:

Sometimes the most effective way of increasing the reliability of child support payments is to address the underlying reasons parents are not paying their obligations, whether those reasons are related to unemployment, parental conflict, or disengagement.⁵⁰

Generally, this is a reasonable explanation of parents' failure to pay child support. However, in a case where a child support agency representative comes to the conclusion that, the "underlying reason" for non-compliance is "disengagement"—for example, there is a question of process. If the agency proceeds from that premise of parental disengagement, and provides responsive services, and the non-custodial parent still cannot pay, how does the agency representative proceed? How does the agency lawyer argue the question of willingness to pay in court? Does the lawyer argue disengagement? Failure to pay because of "disengagement" or "parental conflict" is arguably unwillingness to pay. Unwilling failure to pay is

non-compliance that can subject a party to contempt of court.

Still, over the years, the federal agency has crafted, supported, and encouraged demonstration employment, debt-management and parenting time projects and services—to the approbation of most low-income family advocates and other interested parties. The focus of a recent fact sheet, *Innovations in Access to Justice*, issued from the federal agency's *Project to Avoid Delinquencies*, paper series is fundamental fairness and access to justice in child support enforcement practices.⁵¹ The document highlights four states agencies that collaborate with court facilitators, and attorneys to provide a range of services including hotlines, information and referrals, and the District of Columbia, which provides "pro bono representation and legal information and advice to individuals with child support cases." The fact sheet also includes three state child support agencies that are providing new information online, and reassessing its orders and forms, and two states that are reconsidering the administrative aspects of the order modification process.

According to the federal commissioner, the OCSE 2015-2019 strategic plan⁵² "focuses on a range of evidence-based and locally-tested strategies to collect more support payments by strengthening both the ability and willingness to pay support." One agency objective is to expand program capacity through strategic partnerships," and

- Build a network of partnerships in areas such as employment, parenting time, co-parenting education, mediation services, financial literacy, housing, food assistance, childcare, domestic violence prevention, child welfare, responsible fatherhood, financial management, health care, and substance abuse—to increase the employment and parenting opportunities of both parents.
- Bring partners with a common mission to the table, and leverage partnerships with other agencies that serve the same families.
- Proactively reach out to community organizations and establish strategic service delivery partnerships.
- Make effective referrals to partner agencies

using data sharing protocols, IT solutions, and case managers.

- Coordinate case management and enforcement actions while a parent who owes support is satisfactorily participating in community partner programs

In this hybrid system, the agency's judicial access and power can be obscured by administrative activities and bureaucratic customs. The courtroom is certainly obscured by the agency's representation of itself to the noncustodial parents as a social service provider. Poor, unemployed parents in the IV-D system both need social services and legal representation. The impact on families and children of entrusting an agency—mandated to represent the state against those parents—with both jobs, is unclear. So that, at this point, child support agency plans to direct or administer or collaborate in social service support or employment services should be critically evaluated considered—and reconsidered.

And no legal representation— Turner v. Rogers

Recently, the U.S Supreme Court took up the question of legal counsel for child support defendants. The question presented in *Turner v. Rogers*⁵³ was whether an indigent defendant has a constitutional right to counsel at a civil contempt proceeding that could result in incarceration. In that case, the court recognized the noncustodial parent—not as a client of the child support agency—but as a defendant whose due process rights could be violated in the process involving the child support agency and the court.

In 2003, a South Carolina family court ordered Michael Turner, a noncustodial parent, to pay child support. Over time, he made sporadic, but insufficient payment. He was summoned to court many times over the years to account for the delinquency, and in January 2008, he was summoned to explain or remedy his state of arrears at the time. Turner appeared with a lawyer and said that he was unable to pay the amount owed. The family court judge held him in contempt and ordered him to jail for 12 months or until the amount was paid in full. Until that point, Turner had been sporadically

employed, apparently without money or resources, and repeatedly incarcerated for nonpayment of child support.

The Court determined that there is no automatic right to counsel in that case.⁵⁴ However, according to the majority in the case, a child support defendant's ability to pay is, in many circumstances related to poverty or indigence. The court said that it is not difficult to determine whether the noncustodial parent is indigent and possibly unable to pay child support as ordered.

...the critical question likely at issue in these cases concerns, as we have said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence.⁵⁵

And,

The state must provide procedural safeguards equivalent to the adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute relevant information, and express court findings as to the supporting parent's ability to comply with the support order.⁵⁶

The opinion included the following dicta:

We do not address civil contempt proceedings where the underlying child support payment is owed, to the state, for example, for reimbursement of welfare funds paid to the parent with custody.... Those proceedings more closely resemble debt collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938) "[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."⁵⁷

In the cases of very poor and unemployed parents the issue of ability to pay does appear to be straightforward and concrete. Collection requires two concurrent circumstances: (1) the effective work of the child support agency, and (2) the possession of money or assets by the noncustodial parent.

The response to this case from OCSE was an Action Transmittal (AT-12-01), a policy guidance document, issued in June of 2012, to help state agencies consider its policies and procedures in light of the court decision.⁵⁸ AT-12-01 clearly states and frequently reiterates the importance of procedural due process for unrepresented defendants in child support contempt proceedings. The document also strongly recommended that child support agencies carefully screen and individually review cases to determine a defendant's "actual and present ability to comply" with the child support order.

Still, and regardless of the *Turner* decision, the action transmittal from OCSE, or the DOJ letter, state agencies continue to impute income and impose overwhelming debt (including state debt for welfare reimbursement). Additionally, many continue to threaten and impose incarceration on parents with no demonstrated ability to pay. In March 2016, the U.S. Department of Justice issued a "Dear Colleague" letter from the Civil Rights Division and the Office of Access to Justice. The letter cited *Bearden v. Georgia*⁵⁹ for the due process and equal protection principles of the Fourteenth Amendment, and made clear that those principles "prohibit 'punishing a person for his poverty.'"⁶⁰ The letter referred to *Turner* as a reaffirmation of the principle against incarceration of indigent parties who simply cannot afford to pay according to a court order.

The *Turner* decision is about an enforcement proceeding. It speaks directly to the parent's liberty interest and right to counsel, not to the initial child support order. The ruling does, however, raise child support policy questions about noncustodial parents and indigence. Most important to the subject at hand, it raises the question of access to justice and due process for parents—including those

who avoid the family court out of fear for their own liberty and self-determination, and those who are brought into the family court by the state child support enforcement agency.

For poor and marginalized families, a clear path to voluntary courtroom access will require two essential changes in the current process. The first is statutory. There must be a reassessment of the state interest in welfare cost and recoupment, and a change in federal welfare policy to end the requirement that custodial parents assign their right to child support collection to the state in order to receive cash welfare benefits.

The second needed reassessment and change is in the socio-cultural perspective that has taken over the child support system. Moreover, that system cannot assume that marital status determines a parent's interest in raising, nurturing and providing for children, or that unwillingness to pay child support drives unmarried noncustodial parents to intentional poverty and unemployment. The notion that low-income, never-married fathers in general are uninterested in parenting their children and that mothers prefer to raise their children without their fathers does not support healthy co-parenting or child wellbeing and is not supported by facts. These parents and their children need a system that recognizes their needs and understands their legal and social location in relation to other families. As family courts take into account the changing structure of families with divorcing parents, it is important that the issues being worked out in the legal field do not neglect the 42 percent of families who have never married, and the large proportion of those who must contend with poverty and a child support system that fails to attend to their best interests or the wellbeing of their families.

CONCLUSIONS

Currently, few judicial or government systems or programs provide universal, efficient and effective opportunities for court-informed or sanctioned decisions. Poor and unmarried families are sometimes invisible in courtrooms and in conversations about access to family courts and justice. Just like divorcing parents, low-income parents need more options and opportunities. Poverty and instability make it difficult for them to provide for their children at all, let alone in two different residences, or to devise reliable parenting time schedules. Still, they need information, mediation, and education to help them make good decisions for their children. They need options and information that can help them meet their specific needs.

The power of the child support system is located in the court. When a state is a party to a child support case, its welfare cost containment interest can conflict with the best interest of individual children and their parents. The automation and efficiency of the system depends on unrepresented parents with little (and in many cases, absolutely no) input into the process, and little opportunity to participate in co-parenting and financial support decisions for their children. In this way, child support agencies interact with family law courts to reduce the options and opportunities available to the poorest, most vulnerable families moving through the system.

END NOTES

- ¹ Natalie Anne Knowlton, *The Family Law Bar: Stewards of the System, Leaders of Change*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM: IAALS HONORING FAMILIES INITIATIVE (2016) available at http://iaals.du.edu/sites/default/files/documents/publications/the_family_law_bar_stewards_of_the_system_leaders_of_change.pdf
- ² See Kye Lippold & Elaine Sorensen, *Characteristics of Families Served by the Child Support IV-D Program 2010 Census Survey Results*. URBAN INST (2013) available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412926-Characteristics-of-Families-Served-by-the-Child-Support-IV-D-Program--Census-Survey-Results.PDF>. See also, Timothy Grall, *Custodial Mothers and Fathers and their Child Support: 2013*, U.S. DEPT. OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION: U.S. CENSUS BUREAU (2016), available at <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf>
- ³ *Id.*
- ⁴ 42 U.S.C. §654 (4)(A).
- ⁵ Stacy Brustin & Lisa Martin, *Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents*, 67 HASTING L.J.S.1265 (2016).
- ⁶ Knowlton, *supra* note 1.
- ⁷ 42 U.S.C §608 (a)(3).
- ⁸ Jacquelyn Boggess et. al., *What We Want to Give Our Kids: How Child Support Debt Can Diminish Wealth-Building Opportunities for Struggling Black Fathers and Their Families*, THE CENTER FOR FAMILY POLICY AND PRACTICE AND THE INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT (2014), available at <http://cffpp.org/publications/whatwewanttogiveourkids.pdf>
- ⁹ Daniel L. Hatcher, "Forgotten Fathers," 93 B. U. L. Rev. 897 (2013).
- ¹⁰ Boggess, *supra* note 8.
- ¹¹ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT PRELIMINARY DATA REPORT, FY2015, TABLE P-2 STATISTICAL OVERVIEW FOR FIVE CONSECUTIVE FISCAL YEARS, APRIL 18, 2016.
- ¹² 42 U.S.C.608 (a)(3).
- ¹³ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *supra* NOTE 8.
- ¹⁴ U.S. Department of Health and Human Services, Department of Children and Families, Office of Child Support Enforcement, "Access to Justice Innovations," Project to Avoid Increasing Delinquencies, available at http://www.acf.hhs.gov/sites/default/files/ocse/access_to_justice_innovations.pdf (Statistics are not available, however, according to the IV-D program "serves over 17 million children, and most of the parents involved in the child support system navigate without a lawyer.")
- ¹⁵ KATHRYN EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA. (Houghton Mifflin Harcourt Publishing Company, 2015).
- ¹⁶ Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975).
- ¹⁷ 42 U.S.C.S 2652.
- ¹⁸ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub L. No. 104-193, 110 Stat. 2105.
- ¹⁹ 42 U.S.C.S. 2666 (a)(2).
- ²⁰ See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor Child*, 18 CORNELL J. L. & PUB. POL. L. 95 (2008); See also Daniel L. Hatcher, *Forgotten Fathers*. 93 B. U. L. REV. 897 (2013).
- ²¹ Elaine Sorensen, Liliana Sousa & Simon Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation*, URBAN INST. (2007) Retrieved from www.urban.org/UploadedPDF/1001242_child_support_arrears.pdf
- ²² U.S.C. §666(a)(4) (though property lien and seizure of asset may not be an immediate concern for parents without assets or income).
- ²³ Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty By Rethinking Forced and Outdated Child Support Policies*, 20 J. of Gender Soc. Pol'y and the L. 775, 778-781 (2012).
- ²⁴ Eli Hager, *Why Was Walter Scott Running: 50 Thousand Parents, Mostly Black Fathers, Can Guess*. The Marshal Project. (April 10, 2015 8:23 AM) available at <https://www.themarshallproject.org/2015/04/10/why-was-walter-scott-running#HOVkwx139>.
- ²⁵ U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, Child Support Enforcement Preliminary Data Report, FY2015, Table P-1 Financial Overview for Five Consecutive Fiscal Years, April 18, 2016.
- ²⁶ 42 U.S.C.A. §654(6)(B)(i).
- ²⁷ *Id.*; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT PRELIMINARY DATA REPORT, FY2015, P-2 STATISTICAL OVERVIEW FOR FIVE CONSECUTIVE FISCAL YEARS, APRIL 18, 2016.
- ²⁸ See Boggess, *supra* note 8. See also Nino Rodriguez, *If I Had Money: Black Fathers and Children, Child Support Debt, and Economic Security in Mississippi*, THE CTR. FOR FAM. POL'Y & PRACTICE (JAN. 2016), available at http://cffpp.org/wp-content/uploads/2016/02/If-I-Had-Money_Black-Fathers_Child-Support-Debt_Mississippi.pdf
- ²⁹ Lippold & Sorensen, *supra* note 1.
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² *Id.*
- ³³ U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., ECONOMIC NEWS RELEASE, TABLE A-2. EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY RACE, SEX, AND AGE. WWW.BLS.GOV/NEWS.RELEASE/EMPSIT.T02.HTM (JUNE, 2016).
- ³⁴ It is interesting to note here that the Supplemental Nutritional Assistance Program (SNAP) would include many parents in its definition of "able-bodied adults without dependents" (ABAWD). In fact, two different categories cover a child and her parents who do not live together, one is "families with children," and the other is "childless adults." Generally, a child and her mother would fall under the first category, and the child's father would fall under the second—based on everyone's residency. Generally, the SNAP programs limits ABAWDs to limits such individuals to three months of SNAP benefits in any 36-month period when they aren't employed or in a work or training program for at least 20 hours a week.

³⁵ Bogges, Price & Rodriguez, *supra* note 6, at 3.

³⁶ U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., ECONOMIC NEWS RELEASE, *supra* note 33.

³⁷ E. Ann Carson, *Prisoners in 2014*, U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATISTICS, table 10 at 15 (2015). (illustrating how black men had the highest imprisonment rate in every age group and were in state or federal facilities 3.8 to 10.5 times more than white men and 1.4 to 3.1 times more than Hispanic men).

³⁸ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAM., OFFICE OF CHILDREN SUPPORT ENFORCEMENT, CHILDREN SUPPORT ENFORCEMENT PRELIMINARY DATA, FY 2015, TABLE P-2 at 7, (2016).

³⁹ 42 U.S.C. § 608(a)(3).

⁴⁰ *Pass Through and Disregard policies for Public Welfare Recipients*, NATIONAL COUNCIL OF STATE LEGISLATURES, (Sep. 21, 2016), available at <http://www.ncsl.org/research/human-services/state-policy-pass-through-disregard-child-support.aspx> (showing how the remaining states passed through between \$75 and \$200 based on state law. In 2015, Colorado became the only state to pass through the full amount paid by non-custodial parents to families currently receiving cash benefits Former assistance cases may not have reached the time limit for cash assistance in their state. Assistance time tolls on a month-to-month basis, so many vulnerable families move off and on until the tolling of the total number of months allowed by their state law).

⁴¹ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAM., OFFICE OF CHILDREN SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT PRELIMINARY DATA, FY2015, (2016).

⁴² Elaine Sorensen, et. al., *Assessing Child Support Arrears in Nine Large States and the Nation*, URBAN INST. (2007), www.urban.org/UploadedPDF/1001242_child_support_arrears.pdf.

⁴³ Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 J. GEN. SOC. POL'Y 774 (2012).

⁴⁴ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAM., OFFICE OF CHILDREN SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT PRELIMINARY DATA, FY2015, (2016)..

⁴⁵ Sorensen, *supra* note 39.

⁴⁶ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAM., OFFICE OF CHILDREN SUPPORT ENFORCEMENT, *Promoting Child Well-Being and Family Self-Sufficiency*, Child Support Fact Sheet Series, Number 1, (2011).

⁴⁷ One reason for this is that the 1995 and the 1997 Incentive Funding Act strengthened enforcement tools and incentivized states for each one of the steps in that process. There are three performance measures for which states have to achieve certain levels of performance in order to avoid being penalized for poor performance. These measures are (1) paternity establishment [specifically mentioned in the federal law— 42 U.S.C. 609 § 409(a)(8)(A) (1997) of the Social Security Act], (2) child support order establishment, and (3) current child support collections [these last two performance measures were designated by the HHS Secretary—45 CFR Section 305.40 (2016)].

⁴⁸ Brustin & Martin, *supra* note 4.

⁴⁹ This process calls into question the propriety of many regular child support activities like pretrial conference negotiations and agreed orders.

⁵⁰ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAM., OFFICE OF CHILDREN SUPPORT ENFORCEMENT, ANNUAL REPORT TO CONGRESS 12, FY2010 (2013).

⁵¹ U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ACCESS TO JUSTICE INNOVATIONS, PROJECT TO AVOID INCREASING DELINQUENCIES, (2012) available at http://www.acf.hhs.gov/sites/default/files/ocse/access_to_justice_innovations.pdf

⁵² U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL CHILD SUPPORT STRATEGIC PLAN, http://www.acf.hhs.gov/sites/default/files/programs/css/national_child_support_strategic_plan_2015_2019.pdf

⁵³ *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

⁵⁴ *Id.*

⁵⁵ *Id.* at 2519.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2520.

⁵⁸ Office of Child Support Enforcement, *Turner v. Rogers* Guidance AT-12-01 (2012), www.acf.hhs.gov/programs/cse/pol/AT/2012/at-12-01.htm

⁵⁹ *Bearden v. Georgia*, 103 S.Ct. 2064 (1983).

⁶⁰ U.S. DEPARTMENT OF JUSTICE OFFICE FOR ACCESS TO JUSTICE, DEAR COLLEAGUE LETTER (2016) available at <https://www.justice.gov/crt/file/832461/download>



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