



# **Making Work Pay: Promoting Employment and Better Child Support Outcomes for Low-Income and Incarcerated Parents**

**By Ann Cammett**  
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The New Jersey Institute for Social Justice, Inc., is a non-partisan urban research and advocacy organization established in 1999 by the Amy and Alan V. Lowenstein Foundation. Based in Newark, New Jersey, the Institute works at the state and local level to promote the development of economically healthy and vibrant urban communities and to challenge practices and policies that prevent urban New Jersey from achieving its full potential. The Institute, often in partnership with others, undertakes policy-related research and analysis, develops and implements model programs, and engages in advocacy, including litigation when appropriate, to further its mission.

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## Executive Summary

Child support is a crucial component of any widespread effort to strengthen low-income families. It is also a critical concern for formerly incarcerated parents struggling to obtain employment, rebuild family ties, and reintegrate into New Jersey communities.

A close examination of child support in low-income families reveals that many debtors are noncustodial fathers with marginal education and job skills, but who have support obligations that far outstrip their ability to contribute. Studies indicate that poor children are much more likely to receive regular payments when the amount of an order is reasonable and comports with real income. Moreover, fathers that pay consistent child support are more engaged with their children, resulting in more positive financial and social outcomes for families. Obviously, child support enforcement is critically important in furthering this goal. In recent years, though, enhanced federal and state collection efforts have outpaced the creation of job and education programs to help poor parents who cannot earn enough income to become regular financial contributors in their children's lives. There is also insufficient attention paid to policies and practices that create inappropriate arrears which make payment of ongoing support more difficult for low-income debtors.

Child support problems are compounded for low-income incarcerated men and women. 70,000 individuals will reenter New Jersey communities from state prisons over the next five years. Disproportionately African-American, many of them will have significant child support and other debt and will be subject to a broad array of legal barriers that severely impact their options in the labor market. Because enforcement sanctions that inhibit these parents from getting and keeping employment ultimately undermine their families and the health of our communities, incarcerated parents merit our special attention.

The New Jersey Institute for Social Justice has prepared this report in response to concerns about child support debt – in particular as it creates a barrier to employment for low-income parents and works at cross-purposes with the goals of the child support program. Drawing on examples from other states, this report identifies a range of policies that inform child support practice in New Jersey and offers administrative, legislative, and programmatic solutions to address child support arrears owed by low-income and incarcerated parents. The key recommendations include:

### **Encourage formal employment for parents with child support obligations**

- **Provide sliding scale garnishment for low-wage workers.** Current federal law permits the state to garnish up to 65 percent of a worker's salary for child support and other debt. While a higher wage worker's post-garnishment income may provide sufficient money to live on, this is not so for low-wage workers. New Jersey should impose a lower ceiling to limit garnishment. A third of the states provide for a 50 percent maximum on withholding, and many allow for even less. The state can also adopt a statute of limitations for collecting arrears after children reach adulthood.
- **Refine the statute permitting license suspension for child support arrears.** A driver's, professional, or recreational license can be suspended or denied if a parent owes child support, severely restricting the ability to work in a suburban state such as New Jersey. Currently low-wage workers can only regain licenses by paying 25% of

the outstanding balance and repaying the remainder within one year. This can be impossible for low-wage workers. Their circumstances can be addressed by reducing the lump sum payment amount and extending repayment time for arrears (as long as ongoing support is paid).

- **Provide state tax credits for very low-income noncustodial parents who pay child support.** Currently noncustodial parents are not eligible for many of the tax benefits that are available to custodial parents, such as the Earned Income Tax Credit. State tax credits should be extended to very low-income noncustodial parents that pay ongoing child support in the state of New Jersey.

#### **Identify and address policies and practices that create child support debt**

- **Toll (or suspend) child support obligations for incarcerated parents.** Federal law prohibits the forgiveness of child support arrears once they accrue. A legislative approach to addressing this problem would allow for suspension of arrears during incarceration. This would also reduce the administrative costs of modifying support orders from prison. Similar laws already exist in North Carolina and Virginia.
- **Make support modification part of intake procedure at correctional facilities.** In the absence of legislation that suspends child support, the state can assist qualified inmates with modifications upon entry to prison in New Jersey. For example, Massachusetts employs a full-time child support employee at its reception facility.
- **Consider passing legislation in New Jersey to “cap” arrears.** If a parent’s income is at or below the poverty level while child support mounts, the state can limit the amount of debt assessed by law. New York has used this strategy by capping child support arrears at the \$500.00 mark if a parent can demonstrate to the court that his sole income was derived from public assistance, SSI, or that he was otherwise living at the federal poverty level during the entire period of accrual.
- **Review child support orders more frequently.** Support orders are automatically reviewed after three years. Providing an *annual* review would reflect the volatile nature of the job market for low-income parents and result in more accurate orders. Support can be adjusted more quickly for a period of unemployment, and custodial parents can get *increased* support sooner if a worker’s economic prospects improve.

#### **Have realistic expectations of low-income parents who try to pay support**

- **Provide partial or graduated waiver of child support debt owed to the state.** New Jersey needs broad-based strategies to assist low-income parents with resolving child support arrears while they continue to provide consistent support to their children. In exchange for completing an education, job training, or parenting program – as well as consistent payment of ongoing child support – federal law permits discharging a percentage of arrears or accumulated interest owed to the states. Programs like this exist in a number of states including Vermont, Washington, and Minnesota.
- **Identify state and federal sources of support to get noncustodial parents into paying jobs.** Most importantly, the state must make a priority of designing effective jobs programs to assist poor parents with employment (and increasing their capacity to pay child support long-term). For example, transitional jobs programs have proven effective at turning low skilled, hard-to-employ individuals into wage earners.

## Introduction

Few would question the importance of encouraging parents to provide emotional and economic support to their children. To address the widespread problem of unpaid child support, the federal government and the states, including New Jersey, implemented stronger enforcement tools to ensure its collection. Studies show that eligible families are more likely to receive increased support as a result of enhanced enforcement, and this is a positive trend for America's children. On the other hand, although enforcement tools are useful when targeting parents with the ability to pay; they are not effective against those who can't pay due to unemployment, illness, or incarceration.

The vast majority of noncustodial parents are fathers. In very poor communities, many fathers with support obligations don't pay simply because they don't earn enough. They are not deadbeats – they are “deadbrokes” – and suffer from marginal employment and income earnings that are more volatile over time. Very low-income fathers are rightly expected to contribute to the upkeep of their children, but tend to have poor job prospects and low educational levels. Moreover, they receive far fewer government-based employment support services than low-income custodial mothers living with the children. Unpaid child support can grow quickly during a period of unemployment, and can result in substantial debt and alienation from their families. Furthermore, nonpayment can bring about a myriad of enforcement sanctions, such as driver's license suspension, that will paradoxically subvert their ability to pay ongoing support in the future.

The problems faced by poor child support debtors are compounded for those who are incarcerated. Most people in jail or prison are also low-income parents, and are likely to have support obligations when reentering their communities. Those with criminal records can also experience mounting arrears *while* incarcerated, and experience a broad array of other barriers to successful reentry, such as significant exclusions from employment and housing. Child support sanctions are a significant addition to a host of reentry barriers that discourage employment in the formal labor market. Recently released prisoners, who would benefit from establishing positive engagement with families, the formal labor market and the social order, may enter the underground economy as a result.

Society has dual goals of collecting needed support for children – and also successfully returning prisoners to their communities as employed citizens who are capable of providing for their families. Striking a balance between the two is necessary, and these goals need not be mutually exclusive. Nationally, policymakers are acknowledging that the cumulative effect of child support enforcement practices that leave low-income incarcerated parents with overwhelming arrears that can never be paid serves neither the interests of children that need support, nor their custodial parents.

This paper outlines the policies and practices that have informed child support enforcement nationally and statewide, and defines the impact of those policies on low-income parents – and in particular the employment obstacles experienced by incarcerated obligors. Finally, we offer an Appendix to describe the process of making support orders in New Jersey, and recommendations to address the more counterproductive aspects of child support enforcement.

## **Background: Child Support Enforcement in Low-Income Communities**

The child support system looms large in low-income communities. When families are poor, the distribution of available resources takes on elevated importance, and decisions about how to divide them are difficult.<sup>1</sup> For custodial parents, support from an absent parent – usually the father – represents a critical source of income. This is particularly true for custodial mothers that are no longer receiving public assistance.<sup>2</sup> On the other hand, low-income fathers themselves have extremely limited resources, but tend to have child support orders that exceed their financial abilities.<sup>3</sup> Of the seven million noncustodial fathers who do not pay child support, 2.5 million are very poor and have marginal education and job skills. If they cannot pay support ordered by a court they build up debt – referred to as *arrears* – and that debt grows very quickly. How does this come about?

The federal government created support enforcement mechanisms for the important purpose of retrieving child support from noncustodial parents, but also as a vehicle for creating “self-sufficient” families in the advent of welfare reform. As a practical matter, government policymakers envisioned that women head-of-households who were transitioning from welfare to work would begin to receive enough child support to keep them out of poverty, even though the fathers of their children were often as poor as their mothers.<sup>4</sup> To understand how a system that was intended to support self-sufficiency in poor communities would have the opposite effect and provide disincentives to paying support, one must examine the evolution of child support enforcement.

### **An Overview of the Child Support System**

Child support is predicated on the notion that dependant children are entitled to support from both parents. Children that are born to married parents are entitled to support from the noncustodial parent if those parents later separate. Support includes regular financial payments and medical coverage, and is usually set through a state divorce or separation proceeding. For *non-marital* children – or children born to unmarried parents – the paternity of the child must be established through either a voluntary written acknowledgment or in a legal proceeding before a support order can be established against a father.<sup>5</sup>

Historically, child support and other family problems have been resolved through the application of state domestic relations laws. Each state has its own requirements for providing child support and for addressing a parent’s request to “modify” an award (requests that an order be increased or decreased due to a change in financial circumstances). Before the federal government took an active involvement in overhauling the child support system, there were several potentially significant problems that emerged in the making and the enforcement of child support orders.

First, setting the original support order was often completely within the discretion of the judge. In the absence of any specific guidelines, a support award was loosely based on the judge’s personal assessment of the needs of both parents and children. Since the process was so arbitrary, it produced orders that were unpredictable and resulted in different awards for similar litigants – and many of these awards were inadequate for the support of children. One study found that most noncustodial parents paid more in

monthly car payments than they did in child support payments.<sup>6</sup> Second, in the event that noncustodial parents failed to pay, the burden to enforce the support order through the courts fell on the custodial parent, usually the mother. Owing to the dearth of enforcement tools, these families were recovering an abysmal percentage of support owed to them by noncustodial fathers. In 1985, it was estimated that less than half of the women owed child support received the full amount due, and a full 26% received no support at all.<sup>7</sup> Clearly there was a need for standardization of these processes, as well as for better enforcement tools.

## **Federal Policy and Child Support Enforcement**

The problem of inadequate and uncollected support was of serious concern to those in the federal government, which had established the safety net for low-income families in 1935 with its Aid to Families with Dependent Children (AFDC) program.<sup>8</sup> By the early 1970s, Congress recognized that the composition of the AFDC caseload had changed drastically. In earlier years the majority of children needed financial assistance because their fathers had died; by the 1970s, the majority needed aid because their parents were separated, divorced, or never married. The Child Support Enforcement and Paternity Establishment Program, enacted in 1975,<sup>9</sup> was a response by Congress to reduce public expenditures on welfare by obtaining support from noncustodial parents on an ongoing basis; to help non-AFDC families get support so they could stay off public assistance; and to establish paternity for children born outside marriage so that child support could be obtained for them.<sup>10</sup> The federal child support system was originally designed not specifically to help children, but rather to recover the cost of public assistance paid by the government.<sup>11</sup>

In this new federal framework, Congress provided funding to states in order to help operate child support programs, which would be overseen by the federal Office of Child Support Enforcement (OCSE). The states were to create enforcement agencies, known as IV-D programs, in accordance with federal law. In exchange, the government would reimburse the states for a majority of costs to administer the program.<sup>12</sup>

## **Child Support and Families on Public Assistance**

A hallmark of the IV-D requirement was that custodial parents whose families received federally funded cash assistance were required to assign their economic rights to the state.<sup>13</sup> That is, in return for benefits states would collect the money paid by noncustodial parents to reimburse the federal government and the state for the cost of a families' welfare grant, and the custodial parent would receive none of the support paid by the absent parent.<sup>14</sup> Some states, like New Jersey, allow parents to keep a very small portion of the support payment as a "pass-through."<sup>15</sup> The support assignment covers the right to all arrears that accrued before the family received cash benefits (renamed Temporary Assistance to Needy Families or TANF) and also while it received them. Generally, when the family ceases to receive benefits the assignment ends, and the family regains the right to current support and in some cases, pre-assistance arrears as well.<sup>16</sup> Absent good cause,<sup>17</sup> parents are required to cooperate in establishing paternity and locating noncustodial parents. Failure to comply results in sanctions and a reduction or denial of benefits to the family. Moreover, federal law permits a state to charge noncustodial parents for retroactive support of the child (usually tied to the date that the family first received welfare) and also for the hospital costs of the birth. As a general matter, New Jersey does not usually charge retroactive support or birthing costs.

Families participating in TANF and Medicaid are required to use the services of the IV-D agency to collect benefits. They receive services without having to pay an application fee and are generally exempt from other costs.<sup>18</sup> After cooperating with the agency to establish paternity and locate the absent parent, the custodial parent cedes authority to the agency to engage the noncustodial parent in pursuing recovery of support.

Since the establishment of the child support program, Congress has amended federal law on a number of occasions to address various weaknesses in the system, particularly as it relates to enforcement. In pertinent part, the amendments include:

- **The Child Support Enforcement Amendments of 1984**, which required the states to strengthen their enforcement powers even as to non-AFDC families. It provided for income withholding, liens against defaulting obligors, and a parent locator services for all custodial parents. It also required OCSE to establish a national advisory panel on support guidelines, and required the states to establish numeric guidelines to determine appropriate child support.<sup>19</sup>
- **The 1986 Bradley Amendment to Title IV-D**, prohibited retroactive modifications to child support orders in most instances, *regardless of the reason for the request*.<sup>20</sup> This pertains to requests to either reduce or eliminate the amount of an order dating back to the date when the order was set. Prior to the amendment, it was a common practice for obligors to amass large child support arrears, only to have them reduced or eliminated through judicial intervention by providing “good cause” – a highly discretionary concept. Congress intended this amendment to eliminate this practice. The Bradley Amendment allows downward modifications of child support orders, but only from the date of the new application to modify the order. All arrears previously accrued by the parent generally becomes non-dischargeable debt.
- **The Family Support Act of 1988** among other things, mandated that the states establish presumptive child support guidelines by 1994. It created a “rebuttable presumption” that the amount of support under the guidelines would be the correct amount to be awarded. This presumption required a written finding on the record that the applications of the guidelines would be “unjust or inappropriate” in a particular case, which would be sufficient to challenge the presumption. It also required that the states to establish criteria under which the application of the guidelines might be unjust or inappropriate, and that the guidelines be used to determine subsequent modifications as well.<sup>21</sup>
- Welfare reform ushered in sweeping changes through the **Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)**.<sup>22</sup> In addition to the broad restructuring of welfare policies, the bill further bolstered various child support enforcement processes. It increased the use of wage withholding to collect child support, allowed for liens on property and on lump sum payments,<sup>23</sup> and mandated that employers report all newly hired employees to the child support program.<sup>24</sup> It also permitted states to revoke the licenses of parents who fell behind in child support.<sup>25</sup> Finally, PRWORA required states to statutorily prescribe procedures to improve the effectiveness of child support enforcement overall.<sup>26</sup>

As a consequence of this comprehensive federal legislation, the states updated their legislative codes to incorporate federal enforcement requirements – and very often the optional recommendations for support enforcement as well.

## **New Jersey Child Support Enforcement**

In 1998 the “New Jersey Child Support Program Improvement Act”<sup>27</sup> was enacted to implement all of the federal requirements that a state needed to adopt for reimbursement of its child support programs under PRWORA, as well as other revisions. Among other things, the legislation provided for:

- Enforcement of support orders and arrears by income withholding;<sup>28</sup>
- Garnishment from present and future income and lump sum sources, including federal income tax checks. (Garnishment to recover all debts including child support is capped at 65 percent of wages – the legal limit set by federal law);<sup>29</sup>
- Providing for suspension of drivers, professional or recreational licenses;<sup>30</sup> and
- Requiring arrest warrants for failure to appear in child support hearings, and for failure to pay child support in certain instances.<sup>31</sup>

This federal and state enforcement scheme, while perhaps well intentioned, has created a patchwork of regulations including punitive sanctions for those parents that have fallen behind in the payment of their support obligations. It does so without making any distinctions between obligors who are unwilling to pay and those who cannot pay.<sup>32</sup> As a result, parents with support orders for more than they are able to pay become subject to the sanctions listed above.

[As required of all states by federal law, New Jersey has adopted formal child support guidelines. These are the specific rules for creating and modifying support orders within the contours provided by federal regulations. For a description of these guidelines, and a glimpse into how state courts implement them, *see* Appendix on page 14].

## **Child Support Debt: The Impact on Low-Income Parents**

Has child support enforcement worked? Yes and no. In terms of increasing support recovery for low-income families, positive outcomes have been achieved by the enforcement program. Recent data indicates that 36 percent of eligible children with families living below the poverty line got support in 2001, up from 31 percent in 1996.<sup>33</sup> And the state of New Jersey has increased its collections by 66 percent. There is evidence that some enforcement tools, such as more automated collection efforts and paternity establishment, work efficiently to procure support from parents that can pay, and to locate parents with resources to engage the formal child support system early.<sup>34</sup> In this way, enforcement tools fulfill their intended effect of working more efficiently to provide more support to low-income children.

## **The Unintended Effects of Aggressive Enforcement**

Whether these trends indicate complete program success is a much more complex matter. Recovery of past due support against low-income obligors does not indicate that they will successfully engage the formal child support system over the long haul. Many low-income obligors accumulate crushing debt due to a period of illness, unemployment or incarceration, and such a broad host of enforcement sanctions may actually create a disincentive to taking a low-wage job in the formal economy.

For example, a parent earning minimum wage for full-time work at the federal (and state) rate of \$5.15 per hour would make a gross salary of \$206.00 per week. Surviving in the formal economy on this income, while being garnished for arrears and ongoing support is next to impossible. This encourages noncustodial parents to find work “off-the-books,” where they can avoid the government’s tracking system but are subject to exploitation by unscrupulous employers (or resume criminal activity). Under this rubric, it is likely that children will get less or *no* ongoing support and the dynamic is likely to exacerbate tensions with custodial parents. Further, maintaining employment in the underground economy creates limitations on future wage growth when an employee is removed from the usual processes of advancement in the formal economy.

Likewise, other sanctions may be counterproductive to low-income parents as well. One prominent study examined the impact of four of the primary enforcement reforms: automating child support enforcement systems; improving the paternity establishment process; adopting comprehensive new hire directories, and enforcing license revocation.<sup>35</sup> The study determined that the new hire reporting requirements and the early intervention paternity requirements have resulted in successful support outcomes for children of poor, never married parents. At the same time it concluded that license suspension is *not* statistically increasing child support collected for these children in states where it is enacted; indicating that some enforcement tools such as license suspension may be counterproductive, and work at cross-purposes with the intent of the statute. This is especially relevant as it becomes clear that license suspension in general can create a formidable employment barrier which further limits a parent’s range of employment options, especially in a suburban state like New Jersey.<sup>36</sup>

In order to make the child support enforcement system an effective tool for collecting support from very low-income fathers, it is critical to determine who they are, and examine the economic realities that rule their lives. In this way, enforcement systems can be fashioned to work more effectively.

### **Who Are Low-income Noncustodial Fathers?**

Low-income fathers must be expected to contribute to the support of their children, and most want to. Nevertheless, any examination of child support must be viewed through the lens of the prevailing economic conditions of the parent in question. Out of the seven million noncustodial fathers who do not pay child support, 2.5 million are poor, and have very marginal education and skills.<sup>37</sup> Employment figures from the Current Population Survey (CPS)<sup>38</sup> compare earnings at the peaks of three business cycles, and demonstrate that even during the boom economic period times of the 1990s employment rates for less-educated men remained stagnant. After one of the longest economic expansions in history, 22 percent of young men with a high school diploma or less were not working, and when they did, earned lower wages for comparable work than before.<sup>39</sup> A few of the factors that contribute to this negative employment trend are: a decline in job availability for less-educated workers overall, due to an increase in demand for literacy and technical skills; the movement of manufacturing, construction and transportation jobs away from the inner cities; and employer discrimination, particularly against African Americans.<sup>40</sup>

Commensurate with the decline of younger men in the workforce is the rise of the prison population, ostensibly with the same young men that cannot find steady work in the formal economy. Between 1980 and 2002 the New Jersey state prison population

had more than quadrupled.<sup>41</sup> This upsurge can be attributed to the dramatic rise in arrests resulting from drug convictions, and changes in sentencing policies – principally the use of mandatory minimums which provide for the increased use of incarceration.<sup>42</sup> The common profile of a prisoner in New Jersey,<sup>43</sup> is a young man who is low-income, African American, who on average has a 6<sup>th</sup> grade reading level, and who is quite possibly in poor health or substance addicted. Most importantly, he will have marginal education and very poor employment prospects, which are further inhibited by a period of incarceration.<sup>44</sup>

In the advent of welfare reform, custodial mothers were afforded some very minimal assistance from the government when they were transitioned into the low-wage labor market. They were also provided with other economic incentives, like the Earned Income Tax Credit (EITC) – tax benefits that are unavailable to noncustodial parents that are required pay support for those children.<sup>45</sup> Although employment barriers faced by low-income fathers are similar to those faced by low-income mothers, this group of noncustodial fathers are significantly less likely to have access to available training, education, job search activities, and income security programs, and are not eligible for many of the government work supports provided to custodial mothers.<sup>46</sup>

### **Helping Low-Income Parents Become Financial Contributors**

Child support enforcement is not a one-size-fits-all proposition. Collecting support from a parent who wants to pay but has few resources to do so presents special challenges. This concept is reflected in the National Child Support Enforcement Strategic Plan for fiscal years 2005-2009,<sup>47</sup> generated by the Department of Health and Human Services. The strategic plan is the product of collaborative efforts among branches and levels of government, resulting in a guiding document for those involved nationally in support enforcement. In recent years the child support enforcement community has slowly evolved from presenting an exclusive posture of aggressive support collection to one which includes creating a “culture of compliance” in its stakeholders, which includes noncustodial parents. Included in its delineated strategies to carry forth its mission of collecting support for children is a call to “customize [its] approach to customer service.” Among the suggestions for bringing this about are to “customize enforcement approach[es], distinguishing between those who refuse to pay (e.g. denial/revocation of licenses) and those who cannot pay (e.g. workforce development referral).”<sup>48</sup>

Low-income parents who are struggling with large amounts of arrears may never be able to satisfy them; and enforcing orders against them will likely result in less support paid overall.<sup>49</sup> States have experimented with programs such as: arrears forgiveness programs; fatherhood programs; and most importantly job training and workforce development programs to assist poor parents with paying support.<sup>50</sup> These programs are designed to give very low-income parents a shot at becoming long-term financial contributors to their children’s well being. In addition to designing programs to spur job readiness for marginally employed parents, we can also examine the ways in which low-income parents mount arrears, and recommend solutions to adjust practices for more equitable outcomes from the start.

While the IV-D agency of state of New Jersey has taken up the call to provide some program initiatives for low-income families, the agency has statutory and regulatory constraints. What is needed is a full-fledged commitment to provide training and workforce development to New Jersey’ low-income citizens, along with a

reevaluation of mandated sanctions for those falling behind in child support payments. If we reasonably expect noncustodial low-income fathers to pay support, we must give them a chance to earn enough to do so. Any strategy to increase child support payments to children must address the underlying issues of employment readiness for a population that is not currently in the position to compete in the job market. This should include enhanced educational support for those who are incarcerated, and employment services for noncustodial fathers generally.

The government is not only concerned with collecting arrears, but also with the effect of large uncollected payments on the state that will never be collected.<sup>51</sup> The federal government evaluates state performance in collecting arrears and uses, as a performance indicator, the number of cases that are in arrears with collections.<sup>52</sup> Since the passage of the welfare reform law, collections have increased nearly 50 percent overall. Despite this success, program administrators worry that arrears (more than \$96 billion dollars nationally and \$2.1 billion in New Jersey) will appear inefficient.<sup>53</sup> And while collections improve, arrears continue to mount.

Is it fair to forgive or otherwise reduce arrears for some low-income parents and not others? It depends on what the goals of the support enforcement program are. If the goal of the program is to collect support for children, then it is certainly worth creating solutions to ensure that a greater number of low-income noncustodial parents pay over the course of the child's life. An examination and retooling of child support in New Jersey may produce better child support and social outcomes for children. And there are ancillary issues to consider as well. Policymakers recognize that paying support generally results in more engagement between noncustodial parents and their children, and many arrears forgiveness programs link the two concepts of child support and parenting. Fathers that pay on support orders are also more likely to visit with their children, and this in and of itself is a worth goal.<sup>54</sup> And for incarcerated obligors, a program that supports ex-prisoner involvement with family, community and the larger society has the demonstrated benefit of reducing recidivism<sup>55</sup> and in turn public safety.

## **Child Support as a Barrier to Prisoner Reentry**

The majority of incarcerated individuals are parents, who might already be in debt to the child support enforcement system.<sup>56</sup> The National Child Support Enforcement Strategic Plan also specifically provides for strategies to “develop targeted, specific initiatives to deal with special populations, including incarcerated or formerly incarcerated parents.” Subsumed in this directive is the recognition by national policymakers that incarcerated and formerly incarcerated parents require special attention to engage the child support system effectively. For the incarcerated, negotiating child support arrears is a threshold issue.

The accumulation of child support arrears can have a devastating impact on low-income parents. Prisoners are disproportionately low-income and minority, and are also subject to employment barriers arising from the stigma related to incarceration. A study of 650 incarcerated parents with child support orders in Massachusetts found that the parents enter prison owing an average of \$10,543 in unpaid child support.<sup>57</sup> If the orders remain at pre-incarceration levels, they will accumulate another \$20,461 in debt over time, plus 12 percent interest and six percent in penalty charges.<sup>58</sup> Similar trends have been reported in other states.<sup>59</sup> While exact figures don't exist for New Jersey, there is no

reason to believe they are notably different. Moreover, child support debt for many prisoners continues to mount even though prisoners earn little or no income during incarceration. (See appendix for an in depth analysis of potential options for modifying support orders while in prison). Given the dire economic condition of most prisoners, any accumulated debt at all can create a severe hardship for a parent whose employability is already compromised by marginal job skills and incarceration.

It is important to note that women – who generally represent a very small percentage of noncustodial parents – achieve a dubious parity with men when they are incarcerated. They too become subject to support obligations, because grandparents, fathers or others are caring for children during a jail or prison sentence. More often than not the state (and not the custodian) collects child support for children when they receive public assistance. And because women tend to be the primary caretakers of children prior to incarceration, their children are disproportionately placed in foster care.<sup>60</sup> As the primary caretakers of children before incarceration, family reunification is the paramount issue for incarcerated women. Notwithstanding their parental status before incarceration, recently released prisoners desperately need to connect to sustaining social structures of family, community, and the labor market, which will afford them stability and a chance to avoid the common problem of recidivism. In making the transition back home, they are confronted with many difficulties, including maintaining their connections with children while incarcerated through regular visitation. Returning home to insurmountable child support debt makes a positive outcome more doubtful, as it is one more substantial obstacle to a successful reentry.

### **The Collateral Consequences of Incarceration**

It is important to understand the scope of reentry barriers that an incarcerated individual might face when seeking to return to his community. A New Jersey parent who is released from prison with significant child support debt may find that:

- His credit rating is affected, diminishing any housing prospects. This is due to the state credit reporting system that permits parents owing back child support to be reported to credit agencies for relatively low amounts.<sup>61</sup> A former prisoner may also be independently discriminated against in the housing market because of his ex-offender status;
- His drivers license is likely to be suspended;<sup>62</sup>
- He will experience substantial stigma that will limit his employment options,<sup>63</sup> as well as lawful prohibitions in certain job categories due to criminal convictions;<sup>64</sup>
- If he does find work, his salary can be garnished up to the legal limit of 65 percent (for the combination of child support and other consumer debt) and any other lump sum payment received is also subject to garnishment;
- His mounting debt may subject him to re-arrest based on not paying child support or complying with the conditions of parole, or keep him from being released at all by being subject to “detainers” for owing child support arrears; and
- He may face other “collateral consequences” including paying the costs of his own probation or parole, and substance abuse treatment if there is trouble obtaining public assistance due to ineligibility arising from drug crimes.

Clearly, there is trouble ahead for most released inmates, particularly for those with the added burden of child support debt. Creating an environment where those with criminal convictions cannot obtain or keep employment – or have an opportunity to start anew – is extremely counterproductive, with implications for public safety as well as confidence in the fairness of the government.

What follows are recommendations for practical ways to mitigate the counterproductive effects of support enforcement and provide incentives for obligors to stay engaged with the formal child support system.

## Recommendations

Child support enforcement is effective to obtain support from noncustodial parents who won't pay. But for those who *can't* pay, current policies and practices diminish a parent's ability to obtain and keep employment and work at cross-purposes with the child support program. Likewise, parents that are subject to orders that exceed their ability to pay are unlikely to satisfy the resulting debt and will likely withdraw from the child support program altogether. The result may be less or no ongoing support for children and more estrangement from noncustodial parents. What can be done?

### **Encourage formal employment for parents with child support obligations**

Since the goal of the child support program is to collect support, current law in New Jersey may actually work at cross-purposes with that goal by undermining a parent's incentive to work. To address this problem consider the following:

- **Refine the New Jersey statute that requires license suspension for child support arrears.** Currently a driver, professional or recreational license can be suspended or denied if an obligor is behind six months in child support or medical support.<sup>65</sup> The hardship provision of this statute allows a driver to pay 25 percent of arrears, and the balance within the period of one year in order to get a license restored or granted. For low-income parents who owe a lot of money, it is nearly impossible to pay ongoing support while paying substantial arrears during a period limited to one year. Moreover, denying a driver or professional license that will enable a debtor to become gainfully employed works at cross-purposes with the intent of the statute – encouraging employment leading to payment of support. Amending the statute to allow for a greater period of time to pay arrearages – in addition to issuing a restoration of the license pending ongoing payment of support – will allow a parent to remain financially viable in the short- and long-term. A proposed bill is currently pending in the state legislature that, among other things, provides for extending repayment periods associated with outstanding child support debt.<sup>66</sup>
- **Provide state tax credits for very low-income noncustodial parents that pay child support.** As a result of welfare reform, many poor single heads-of-households were transitioned from public assistance to work in the low-wage economy. To effect this transition, they were afforded some minimal government assistance in the form of work supports and tax benefits such as the Earned Income Tax Credits (EITC). None of these benefits were available to noncustodial parents, even though they were expected to pay support to supplement the income of the household. Many of the noncustodial parents – usually fathers – were also very poor and underemployed.

Similar tax benefits should be extended to these parents by the state of New Jersey, as they would provide critical economic support to parents paying child support. New York currently has a budget pending before its state legislature that includes state-based income tax breaks for these parents.

- **Provide sliding scale garnishment for low-wage workers.** According to federal law, a state can garnish up to 65 percent of an obligor's salary due to unpaid child support and consumer debt.<sup>67</sup> Deducting that much of a low-wage worker's wages will not leave enough to pay ongoing support and still survive. Such a high level of garnishment creates a disincentive to formal employment. To address this problem, New Jersey has the option of imposing a lower ceiling to modestly limit garnishment for low-income obligors. A third of the states, including Arizona, Louisiana, South Dakota, New Mexico and Washington, provide for a 50 percent ceiling on income withholding, and many states allow for an even lower cap.<sup>68</sup> Moreover, in New Jersey, there is no statute of limitations for garnishment of child support arrears. At least half of the states provide some statute of limitations to limit the time period for collection of arrears – often tied to the coming of age of the youngest child. New Jersey can adopt a similar position.

#### **Identify and address policies and practices that create child support debt**

Since federal law prohibits the forgiveness of child support arrears once they accrue, even a small amount of debt with interest can grow quickly and become a burden effecting future ability to pay ongoing support. The best way to counter this problem is by preventing arrears in the first place. The following strategies should be considered:

- **Toll (or suspend) child support obligations for incarcerated parents.** Child support debt continues to mount after incarceration. Allowing arrears to accrue against a low-income prisoner with no assets when he cannot earn money in prison is a counterproductive practice. A legislative approach to suspending arrears during incarceration would prevent this and reduce the administrative costs of modifying orders from prison enormously. There are currently examples from other states of laws that toll child support for institutionalized parents. North Carolina has enacted a statute which automatically allows a child support order to be suspended with no arrears accruing “during any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make payment.”<sup>69</sup> This state law recognizes the legitimacy of suspending orders for poor prisoners who are not earning money during confinement, while allowing those with resources to fulfill their obligations. In 2000, Virginia amended its laws to exempt from the presumptive minimum support order of \$65.00, “parents unable to pay child support because they lack sufficient assets... and who in addition... are imprisoned with no chance of parole.”<sup>70</sup> Other states are also making changes to prevent the accrual of arrears for incarcerated people. Of course, prisoners with resources are expected to satisfy support obligations, and all are expected to resume payment of support upon release.
- **Make modifications part of intake procedures at correctional facilities.** In the absence of legislation that suspends child support arrears for incarcerated parents automatically, the Department of Corrections can develop an expedited administrative process to assist prisoners with no assets in modifying support orders upon entry to prison in New Jersey.<sup>71</sup> Anecdotal evidence indicates that not all prisoners realize that they must take affirmative steps to request downward

modification. Even if prisoners understand the importance of taking this action, they have other constraints. Owing to the dearth of available legal representation, inmates usually prepare motion forms themselves, often incorrectly, illegibly, or forwarded to the wrong court. A remedy that assists prisoners with applications would also greatly aid court personnel that must process motions from the same person repeatedly before obtaining a corrected motion to file. Massachusetts, for example, employs a full-time Child Support Enforcement employee at the state Department of Correction reception facility. They make presentations and meet individually with parents to prepare, among other things, modifications of child support orders.<sup>72</sup> Oregon has implemented a model project to notify those that are recently incarcerated that their obligations continue to mount. It also tells them what steps need to be taken to modify the order. In addition, the state has established a rebuttable presumption that a noncustodial parent who is incarcerated for a period exceeding 180 days and has an income of less than \$200 per month is unable to pay support. If the parent requests modification, the order is reduced to \$0 for the period of incarceration. Sixty-one days after release the order reverts to the original amount.<sup>73</sup>

- **Consider passing legislation in New Jersey to “cap” arrears.** If a noncustodial parent’s income is consistently at or below the poverty level while arrears mount, the state can limit the amount of debt that can be assessed by law. New York has used this strategy by capping child support arrears at the \$500.00 mark, but only if a parent can demonstrate that his sole income was derived from public assistance, SSI, or that he was otherwise living at the federal poverty level during the entire period of accrual. This strategy does not run afoul of the prohibition against retroactively modifying arrears, because the debt has not technically mounted under the law. In this instance a litigant must still petition the court for review of the financial evidence, but would be eligible to have arrears set at \$500.00. This approach reflects a legislative and judicial determination that a policy that forces a parent living at the federal poverty level to incur insurmountable debt is “unjust and inappropriate.”<sup>74</sup>
- **Review child support orders more frequently.** Currently, court rules provide that litigants are entitled to a review and adjustment of a child support order *automatically* every three years without demonstrating a “change of circumstances.”<sup>75</sup> Providing more frequent review of child support orders – perhaps every year – would reflect the tenuous economic reality of low-income wage earners, since orders can be adjusted more quickly for a period of unemployment or other appropriate reason. An important benefit for custodial parents is that they will get *increased* support sooner if a worker’s economic prospects actually improve.
- **Limit the practice of “imputing” income to unemployed parents.** Child support should ideally be based on the *actual* income of an obligor, or a reasonable assessment of their ability to pay. When a court “imputes” income it is charging support to a parent based on income that does not actually exist; it is based on what the court believes the obligor should be making given the economic history or perceived earning ability of the person. While this is a useful enforcement tool to reach parents who are seeking to shirk their responsibilities (e.g. regularly employed *non* W-2 wage earners who report no income) imputing income for many low-income parents without careful consideration of individual circumstances is a dangerous practice, and one that leads to the accrual of inappropriate arrears.<sup>76</sup> The earnings of very low-income parents tend to fluctuate wildly, due to the lack of job skills and because full-time work is not always available long-term. The court should

make greater efforts to determine real wages or earning power of obligors through current payroll records, or state and federal income taxes. In the absence of actual income information, support should be set at the guidelines minimum of \$5.00 per week barring evidence that an obligor is “voluntarily unemployed.”<sup>77</sup>

- **Default orders should be temporary orders for a finite period of time.** Some arrears are amassed because an obligor did not attend the court hearing where the award was initially set. There may have been legitimate reasons why the parent did not appear in court. Many low-income parents change residences frequently and may not have received notice of a support proceeding. Alternatively, a parent may be incarcerated or otherwise institutionalized, and this information may not have been available to the court. If the obligor finds out about a hearing and appears at a later date arrears may have already mounted, and cannot be retroactively modified. A temporary order can be modified upon “just cause” in the event that there was not sufficient notice to the litigant and can be deemed permanent within a specific time frame. This of course, would and should require evidence submitted by the parent that he moved or did not receive notice for some other appropriate reason.

#### **Have realistic expectations of low-income parents who try to pay support**

In order to encourage ongoing payment of reasonable support orders, New Jersey must create broad-based strategies to assist parents with resolving child support debt while providing consistent financial support to their children.

- **Provide partial or graduated waivers of support debt owed to the state.** In exchange for completing an education, job-training program, or parenting program and consistent payment of ongoing child support, the state has the option of discharging a percentage of arrears owed to the state, or the accumulated interest on such arrears. Programs such as this exist in a number of states, including Vermont, Washington, and Minnesota.<sup>78</sup> Custodial parents, not involved with the cash public assistance system, can agree to waive arrears at any time.<sup>79</sup> Notwithstanding the prohibition on retroactive modification of arrears, federal law permits the waiver of arrears owed to the states in certain circumstances.<sup>80</sup> States may also offer periodic amnesty, where obligors can appear at specified periods and make new payment arrangements in exchange for waiving contempt charges and recalling warrants.
- **Identify state and federal sources of support to get noncustodial parents into paying jobs.** Last but not least, the state must fashion an effective jobs program as a remedy for assisting very low-income parents in meeting their obligations. Transitional jobs programs are short-term, publicly subsidized jobs that combine real work, skill development, and support services to help participants find and keep unsubsidized jobs.<sup>81</sup> They have proven effective at turning low skilled, hard-to-employ individuals into wage earners.<sup>82</sup> Studies have documented success in moving participants who are hard to employ into unsubsidized work, and may be funded through TANF funds.<sup>83</sup> Poor noncustodial parents need more of this type of support to increase their capacity to pay child support long-term.<sup>84</sup>

## Appendix

### **Pattern and Practice: How Child Support Law Really Works**

Once arrears have begun to mount it is extremely difficult for low-wage workers to get out from under them, especially while paying ongoing support. Although the federal government mandates child support enforcement policy, the states still make specific rules for setting support and have wide discretion to create guidelines that are either more or less onerous for low-income parents. An exploration of the court's process of creating and managing child support orders – and by extension the court system – follows here. At various points we identify where low-income obligors tend to get in trouble with arrears and where intervention might be most helpful. It is important to remember that the needs of the child are the primary consideration of the courts in the process of creating a support order, and the issue of fairness toward the noncustodial parent is balanced against the needs of the child at the time the order is set.

#### **Setting the Initial Child Support Award**

The process for commencing a child support case in New Jersey is judicial, rather than administrative. A complaint for support can be brought to the Superior Court by the custodial parent or by the Department of Probation on behalf the TANF agency, if the family receives public assistance.<sup>85</sup> New Jersey deems both parents responsible for the support of their children, and establishes support orders according to its guidelines.<sup>86</sup> The basic approach to setting an award is an “income shares” concept, which divides the average amount spent on children by intact families between the two parents in proportion to their relative incomes.<sup>87</sup> The underlying premise is that children should not be the economic victims of divorce or out-of-wedlock births. In general, the guidelines establish a rebuttable presumption for the amount of an order, which can be set-aside for good cause, as determined by the court.

According to the guidelines, if a party's income is low enough New Jersey law provides for a self-support reserve for the noncustodial parent. A noncustodial parent can qualify if his income after deducting support is less than 105% of federal poverty level.<sup>88</sup> This is true *unless* the custodial parent's income is also less than 105% of poverty level – in which case there is *no provision for self-support*. This would by definition include all custodial parents whose children receive public assistance. Nevertheless, New Jersey appears to have a minimum support order of \$5.00 per week. The guidelines provide that “a fixed dollar amount will be ordered to establish the principle of the parent's support obligation and to provide a basis for an upward modification should the obligor's income increase in the future.”<sup>89</sup>

#### **“Imputing” income to an unemployed or underemployed parent**

Despite the fact that New Jersey provides for a relatively low minimum support order, a larger sum of income will be imputed to the parent by the court if the parent is considered to be “voluntarily unemployed or underemployed.”<sup>90</sup> Imputed income will be based on “potential employment and earning capacity” using the parent's work history, occupational qualifications, educational background, and prevailing job opportunities in the region,” or if that is not available, the parent's most recent wage or benefit record on

file with the New Jersey Department of Labor. The court is supposed to consider, among other factors, “the reason and intent for the voluntary underemployment or unemployment” but this does not always seem to be adequately considered.<sup>91</sup> Not everyone is employable, especially when you factor in the marginal levels of education prevalent among low-wage workers. Generally, New Jersey imputes income to a low-income parent for full-time employment (40 hours) at the New Jersey minimum wage (\$5.15 per hour). The presumption at work here is that almost anyone is qualified for minimum wage employment. (Although this amount can quickly grow into debt for an unemployed parent, some states actually impute support for the entire amount of the welfare grant made to a child.)

### **Making a Default Order**

If the court is satisfied that there is proof that the obligor received “notice” of the hearing and that person still fails to appear, a bench warrant may be issued for their arrest. A photograph or detailed physical description of the obligor will be provided to help the Sheriff’s Department make the arrest. In addition, a default order granting the request for enforcement of a support order can be entered by the court and will usually include imputed income if the income amount of the defaulter cannot be determined.<sup>92</sup>

- The obvious problem with imputing income and setting default orders, is that they are not based on accurate financial information, and will almost certainly grow into cumbersome arrears quickly if the obligor does not find employment. Even if a parent later finds low-wage employment, it will not be enough to pay back support already owed and survive.

### **Modifying a Child Support Order**

An order may be correct when entered but quickly become outdated. Especially for low-income parents whose wages and hours constantly fluctuate, and those that lose their jobs<sup>93</sup> or are incarcerated, a once reasonable order may need to be modified downward. The modification must be swift or arrears will quickly accumulate. In New Jersey, modification of an award is administered judicially rather than administratively. The court that makes the original child support award is said to have *continuing jurisdiction* to modify the order as conditions warrant, and that modification must be presented in the same county as the county where it was first ordered. One of the problems with having a judicial rather than administrative approach is that access to the courts, especially in large urban counties, is not an expedited process. It can take as long as several months to receive a court date for a modification. As noted earlier every child support obligation becomes a judgment by operation of law on the day it is due and cannot be retroactively modified.<sup>94</sup> Thus, if an order is not timely modified, a New Jersey court cannot address the problem through the retroactive modification process.

### **There are two ways that a support order can be modified:**

1. Either parent may request the court to change the order throughout the duration of the child’s minority.<sup>95</sup> Modifications will not happen automatically as there is no set age for emancipation; one of the parents must request the change by a formal motion to the court. To succeed a parent must demonstrate that there has been a “substantial change of circumstances.”<sup>96</sup> If the change sought by the non-custodial parent does not meet the state’s definition of substantial change of circumstances no modification

will be granted. In order to modify an award the court must find the circumstances of the parties have changed since the date the order was entered.<sup>97</sup> The following is a list of some events that New Jersey Courts have concluded constitute a change of circumstances warranting a review of child support:<sup>98</sup> significant change in income of custodial or non-custodial parent; change of custody; change in overnight visitation schedule; or change in child care cost or court approved extraordinary expense (such as private school). The adoption of revised guidelines does not qualify as changed circumstances. Note that *incarceration is not an automatic qualifying event* for a downward modification.

2. Under the IV-D program, child support can be reviewed once every three years without a showing of “substantial change in circumstances.”<sup>99</sup> Three years is presumptive “changed circumstances” that can move the case forward to the exchange of financial information.<sup>100</sup> While the standard for change here is likely to be less stringent than the substantial change in circumstances standard some sources suggest that New Jersey still requires a change in income of at least 20% to generate a revised order.<sup>101</sup>

Obviously, to avoid the buildup of child support arrearages, it would behoove a parent to modify downward at the earliest possible time upon a change of circumstances. There are reasons why an application to modify does not happen in a timely fashion:

- **A noncustodial parent may fear incarceration.** This is especially true if arrears have already started to mount. This fear is not unjustified. A bench warrant can be issued for the arrest of an obligor if he defaults at the initial support hearing. He may have to come up with a portion of the money to avoid arrest at the court.
- **The parent didn’t know about the order.** An obligor might not have been aware of a child support order if it was issued on default and he never got notice. It is also possible that many mentally ill parents are subject to orders issued on default.
- **A parent can’t modify due to “temporary” unemployment.** A temporary work stoppage may not qualify for a modification under the current terms of the guidelines (until the 3-year review comes up).
- **A parent doesn’t know how to go about it.** There has been some effort to educate the public about child support issues including how to navigate the court system – but not nearly enough. Many people are extremely intimidated by the court system and are reluctant to engage it.

Court access is a problem for low-income litigants in other ways as well. In a system where the making of support orders is so fact-specific, it is in the best interest of a parent to come forward and make the best case to a hearing officer for the most realistic support order possible. Many low-income parents appear in court *pro se* – that is, unrepresented by an attorney. They may not understand how to explain the circumstances of their financial situations in a way that will get them the relief that they need within the confines of the law. They may be angry about the process entirely and not present themselves and their situation in the best light. Moreover, in communities devastated by high incarceration rates, many litigants avoid the courts at all costs – even when not appearing at all for a hearing works to their detriment.

## Adjusting Orders during Incarceration

Since federal law prohibits retroactive forgiveness of child support arrears, the courts' view on whether incarceration alone justifies modification of a support order will determine the amount of debt that prisoners will be burdened with upon release.<sup>102</sup> The Supreme Court of New Jersey has never directly ruled on this issue, and the appellate courts have somewhat shifting rationales for approaching the problem. Like many other jurisdictions, many courts in New Jersey and in other states consider incarceration to be "voluntary unemployment," which does not qualify for an automatic modification of an order.<sup>103</sup> However, other courts have found to the contrary.<sup>104</sup> Focusing on the prisoner's lack of assets rather than "voluntary" criminal behavior, those courts have deemed incarceration an appropriate justification for modification since it represents a significant financial change of circumstances.<sup>105</sup>

A convincing rationale for resolving this issue in New Jersey can be found in an appellate court ruling from 1999, where the court found that comparing incarcerated parents to those who reduce their earnings by *choice* fails to acknowledge that one who is incarcerated does not have the choice to *rectify* the situation in prison by increasing his earnings.<sup>106</sup> The court opined:

"One significant difference between an incarcerated obligor and one who is not incarcerated but who has engendered a reduction in income voluntarily is that the latter individual is free to rectify the situation by changing or taking on additional jobs. While so many courts of other jurisdictions, and one court in this state, have compared incarcerated obligors to those who reduce their earnings by choice, these courts fail to acknowledge that the incarcerated obligor chose to commit a crime, but the choice to rectify the situation does not exist."<sup>107</sup>

More importantly, the court emphasized significant policy considerations in making its decision. This decision proffers the "best interest of the child" standard in fashioning a remedy by focusing on the child and not the prisoner. The court suggested that the likelihood of the child prospectively receiving support is greater if the incarcerated obligor is not saddled with debt, or:

"[t]he ultimate accrued arrearage may present an impregnable wall which will deter the payment of future support... Suspending the payment of support and postponing a decision as to future support eliminates the accrual of arrears, yet does not reward the criminal who is fully apprised that upon release the support obligation will be reinstated and, based upon his ability to pay an arrearage, which will be established commensurate with his income."<sup>108</sup>

As a practical matter, a court adopting this approach still requires a motion to modify the order, which will then be deferred to an inactive calendar until release. At that point the court can also assess the other debts that the obligor may owe and modify the order from the date of the original application. A Florida Supreme Court recently used this decision for a nearly identical ruling.<sup>109</sup>

The lack of one singular approach to dealing with the effects of incarceration on support orders in New Jersey makes every case extremely fact specific. Where does this

leave incarcerated people seeking downward modifications? Judges take various ad-hoc approaches to resolving requests for downward modifications, but several things are certain. First and foremost, currently a request for modification must be affirmatively made for any action at all to occur. The sooner the motion is made the better, as the current law prohibits retroactive modification, and arrears will continue to mount until it is done. It should be noted that a court would be within the confines of the law for a hearing officer to simply decline to hear the motion and deem the incarceration voluntary (if chooses to do so). It appears that there are varying approaches between the courts throughout the state in making determinations in these cases. Second, regardless of the approach, if an incarcerated parent has resources outside of prison, he or she will be expected to continue to use them to fulfill the support obligation. As a practical matter, since most inmates are low-income, few would fall under this category.

### **Problems with Modifying Arrears While Incarcerated**

There are many problems that can occur for individuals that need to modify orders with mounting arrears while they are incarcerated:

- Some incarcerated individuals are not aware that they even have a support order pending, and will not take any action to seek a remedy for the accrual.
- Parents who have orders outstanding don't often know that they are required to file a motion for a downward modification to suspend the child support. Many assume that the court automatically suspends them during incarceration because it is not possible for parents to pay support while in prison. This is a common misperception that can be costly to prisoners.
- By the time they are provided this information, they have accumulated thousands of dollars in arrears and interest. Additionally, there are no standardized procedures within the correctional facilities to assist inmates with processing the forms correctly. One serious problem that has been identified by the court system is that the *pro se* motions submitted by inmates are inadequate for processing. This creates delay in establishing a formal case, as applications are rejected and sent back and forth to the facilities for correcting. In the meanwhile, arrears continue to mount.

Within the statutory and regulatory framework that currently exists, it is most prudent to address child support arrears before they mount. Suggestions for achieving this goal can be found in the Recommendations section of this paper.

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## **Endnotes**

<sup>1</sup> National Women's Law Center and Center on Fathers Family and Public Policy, *Dollars and Sense: Improving the Determination of Child Support Obligations for Low-Income Mothers, Fathers and Children* (2002), at 2. See generally for a balanced discussion of public policy on interrelated welfare and family law issues designed to promote effective co-parenting relationships and ensure emotional and financial support for children.

<sup>2</sup> For families leaving welfare, child support amounts to 30% of the families' income. See Paula Roberts, *Child Support—An Overlooked Issue for Low-Income Clients* (National Center on Poverty Law 2002) at 196.

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<sup>3</sup> In 1999, more than a quarter of low-income fathers who paid child support spent 50 percent or more of their personal income on child support, while only 2 percent of non-poor fathers spent that much. Elaine Sorenson and Helen Oliver, *Policy Reforms are Needed to Increase Child Support from Poor Fathers*, at 5 (Urban Institute 2002).

<sup>4</sup> See *id.* See also Elaine Sorenson and Helen Oliver, 2002. *Child Support Reforms in PRWORA: Initial Impacts*, (The Urban Institute, *Assessing the New Federalism*, Discussion Paper 02-02).

<sup>5</sup> Paula Roberts, *An Ounce of Prevention and a Pound of Cure* (Center for Law and Social Policy 2001), available at [www.clasp.org](http://www.clasp.org).

<sup>6</sup> Laura W. Morgan, *Child Support Guidelines: Interpretation and Application*, (Aspen Publishers 1996), citing U.S. Census Bureau, U.S. Dep't of Commerce, *Money Income and Poverty Status of Families and Persons in the United States: 1985* (Current Population Reports, Series P-60, No. 154, 1986); U.S. Census Bureau, U.S. Dep't of Commerce, *Child Support and Alimony: 1985 Supplemental Report* (Current Population Reports, Series P-23, No. 154, 1989).

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* AFDC required a dependent child and absent parent.

<sup>9</sup> Title IV-D, Social Security Act, Pub. L. No. 93-647, § 101, 88 Stat. 2351 (codified as amended at 42 U.S.C.A. §§ 651-665.)

<sup>10</sup> Excerpt from “Child Support Enforcement Program,” Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES (2000 Green Book, 17th edition).

<sup>11</sup> While it still serves that function, it has expanded to ensure that all children with a non-resident parent receive support, whether or not they receive cash benefits from the TANF program.

<sup>12</sup> Sorenson and Oliver, *Child Support Reforms in PRWORA*, at 8. The federal government currently reimburses the states for 66% of administration costs.

<sup>13</sup> 42 U.S.C.A. §§ 608(a) 2 and §§ 608(a) 3.

<sup>14</sup> Legislation has recently been proposed under TANF Reauthorization which would pass through all of the aid to the family, under the theory that noncustodial parents would have more incentive to pay if the children were to receive the support directly. See *Dollars and Sense*, at 9.

<sup>15</sup> New Jersey allows a pass-through of up to \$50.00 per family, regardless of the number of children or support orders. See also Paula Roberts and Michelle Vinson, *State Policy Regarding Pass-Through and Disregard of Current Month's Child Support Collected for Families Receiving TANF-Funded Cash Assistance* (Center for Law and Social Policy, August 2004).

<sup>16</sup> 42 U.S.C.A. § 657(a)(1).

<sup>17</sup> *Id.* § 654(29)(A)(i). Good cause is usually evidence of domestic violence that may put parents or their children at risk. The TANF agency makes the determination of what constitutes good cause.

<sup>18</sup> 42 U.S.C.A. § 654(6). Non-TANF families must pay a modest fee to use their services.

<sup>19</sup> Pub. L. No. 98-378, currently codified at 42 U.S.C.A. § 667(a).

<sup>20</sup> 42 U.S.C.A. § 666(a)(9). The court can, under the terms of the federal statute, end a support obligation by operation of law if a parent brings a motion to terminate support due to the emancipation of a child who is 23 years old and has never attended college. The courts can declare a child emancipated and vacate all support that has accrued since the child's 18<sup>th</sup> birthday or high school graduation.

<sup>21</sup> Pub. L. No. 100-485, currently codified at 42 U.S.C.A. § 667(b)(2).

<sup>22</sup> Pub. L. No. 104-193, codified at 42 U.S.C.A. § 1305.

<sup>23</sup> 42 U.S.C.A. § 666(a)(4).

<sup>24</sup> 42 U.S.C.A. § 653(g).

<sup>25</sup> 42 U.S.C.A. § 666 (a)(16).

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- <sup>26</sup> 42 U.S.C.A. § 666(a).
- <sup>27</sup> N.J.S.A. 2A: 56.7a.
- <sup>28</sup> 15 U.S.C.A. § 1673.
- <sup>29</sup> N.J.S.A. 2A: 17-56.52.
- <sup>30</sup> N.J.S.A. 2A: 17-56.43.
- <sup>31</sup> N.J.S.A. 2A: 17-56.8.
- <sup>32</sup> For an understanding of how low-income parents end up with support orders that exceed their ability to pay, *see supra* Appendix, Pattern and Practice: How Child Support Really Works.
- <sup>33</sup> Elaine Sorenson, *Child Support Gains Some Ground*, Snapshots III, Accessing the New Federalism (Urban Institute, October 2003) citing data from the 1997, 1999, and 2002 rounds of the National Survey of America's Families (NSAF).
- <sup>34</sup> Sorenson and Oliver, *Child Support Reforms in PRWORA*, at 36.
- <sup>35</sup> *See id.*
- <sup>36</sup> *See generally* Nancy Fishman and Ken Zimmerman, *Roadblock on the Way to Work: Driver's License Suspension in New Jersey* (New Jersey Institute for Social Justice, October 2001).
- <sup>37</sup> *See generally* Elaine Sorenson and Chava Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?* (Urban Institute 2001).
- <sup>38</sup> Elise Richer, Abby Frank, Mark Greenberg, Steve Savner, and Vicki Turetsky, *Boom Times A Bust: Declining Employment Among Less-Educated Young Men*, (Center For Law and Social Policy, July 2003) at 3.
- <sup>39</sup> *See id.*, at 6. Young African-American men have fared most poorly in this study, as evidenced by a 13 percent drop in employment over the last two decades. The group analyzed did not include young men who were institutionalized, and their lack of employment did not even factor into the study, so that the inclusion of this data would have made the numbers even more daunting.
- <sup>40</sup> *See id.*
- <sup>41</sup> Jeremy Travis, Sinead Keegan, Eric Cadora, et al, *A Portrait of Prisoner Reentry in New Jersey*, (Urban Institute, November 2003) at 65.
- <sup>42</sup> *See id.*
- <sup>43</sup> *See id.* Note that data is drawn from a 2002 release cohort (14,849).
- <sup>44</sup> *See id.* Also *see* Bruce Western, *Incarceration, Employment and Public Policy*, Session 3 of the New Jersey Reentry Roundtable (April 2003) (suggesting that incarceration reduces wage growth by limiting access to career jobs during high earning years).
- <sup>45</sup> *See id.* It can be reasonably argued that those economic supports were not sufficient to improve the quality of their lives in a significant enough way to ever transcend low-wage status. The relevant point here is that there are some government services available to mothers that are not available to fathers despite their similar economic status.
- <sup>46</sup> Sorenson and Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?*, at 3-4.
- <sup>47</sup> National Child Support Enforcement Strategic Plan, FY 2005-2009, Department of Health and Human Services, U.S.A.
- <sup>48</sup> *See id.*, at 12.
- <sup>49</sup> Paula Roberts, *Pursuing Justice: A Strategic Approach to Child Support Arrears in California*, Center for Law and Social Policy (May 2002).
- <sup>50</sup> *See generally*, Paula Roberts, *An Ounce of Prevention*.
- <sup>51</sup> Michelle Ganow Jones, *Options to Help Low-Income Noncustodial Parents Manage Their Child Support Debt*, Welfare Information Network, Issue Notes (October 2002) at 2.

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<sup>52</sup> See *id.*

<sup>53</sup> See U.S. Department of Health and Human Services, Administration for Children and Families, *Child Support Enforcement Fiscal Year 2003 Preliminary Report* at <http://www.acf.hhs.gov>.

<sup>54</sup> See Heather Koball and Desiree Principe, *Do Nonresident Fathers Who Pay Child Support Visit Their Children More?* (Urban Institute 2002).

<sup>55</sup> See generally, *Coming Home for Good: Meeting the Challenge of Prisoner Reentry in New Jersey*, (New Jersey Institute for Social Justice, December 2003).

<sup>56</sup> A majority, including 55% of state prisoners and 63% of federal prisoners, reported having children under the age of 18. See Christopher Mumola, *Incarcerated Parents and Their Children*, Bureau of Justice Statistics Special Report, U.S. Department of Justice (August 2000).

<sup>57</sup> This analysis does not include fathers who are incarcerated for non-payment of child support, although they too come from disproportionately low-income communities.

<sup>58</sup> Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, American Bar Association Judge's Journal, No. 1, Vol. 43 (Winter 2004), citing Theonnes, *Child Support Profile: Massachusetts' Incarcerated and Paroled Parents*, Center for Policy Research (2002), note 17 at 16.

<sup>59</sup> See Jessica Pearson, *Building Debt While Doing Time*, for an analysis of various approaches used by the states to address arrears accumulation for incarcerated individuals.

<sup>60</sup> Marc Mauer, *Race to Incarcerate* (1999) at 198. See also Ann Cammett, *Incarcerated Mothers*, (Center for Law and Social Justice, Winter 2003) at 2.

<sup>61</sup> 42 U.S.C.A. § 666(7). Also, see generally, Rebecca May, *The Effect of Child Support and Criminal Justice Systems on Low-Income Noncustodial Parents*, Center on Fathers Family and Public Policy (June 2004), at 20.

<sup>62</sup> For an overview of legal barriers resulting from incarceration, see Nancy Fishman, *Briefing Paper: Legal Barriers to Prisoner Reentry in New Jersey*, prepared for the New Jersey Reentry Roundtable (April 2003). According to the 2000 census, about three quarters of workers in New Jersey drive alone to work, with less than ten percent using public transportation. Recent figures from the New Jersey Department of Labor indicate that ninety percent of job openings listed by employers with the county One Stop Career Centers were not accessible by public transportation, following a statewide trend that has most job growth occurring in suburban areas.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> N.J.S.A. 2A:17-56.23a.

<sup>66</sup> N.J. State Senate Bill No. 1930, 211<sup>th</sup> Legislature, Sponsored by Senator Wayne R. Bryant, District 5, proposed October 14, 2004.

<sup>67</sup> 15 U.S.C.A. § 1637(b). Under the Consumer Credit Protection Act (CCCPA), if the obligor supports only one family, the maximum amount that may be withheld for child support purposes is 60 percent of his disposable income (gross pay minus deductions). If he has more than one family the maximum amount that can be withheld is 50 percent. Both of these amounts can be increased to 65 or 55 percent respectively if the support payments are in arrears more than 12 weeks. Child support is the first payment garnished, but federal law applies to all other creditors, which are included in the 65 garnishment percent cap.

<sup>68</sup> See Paula Roberts, *An Ounce of Prevention, Appendix 6, State Collection Policies* (for a list of other state garnishment percentages) at 40.

<sup>69</sup> See N.C. Gen. Stat. 50-13.10(d)(4)).

<sup>70</sup> See CODE of VA. S20-108.2

<sup>71</sup> See *Appendix* for a complete discussion of this issue.

<sup>72</sup> See Jessica Pearson, *Building Debt While Doing Time*, at 5.

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- <sup>73</sup> Ore. Administrative Rule 461-200-3300. *See* Paula Roberts, *Pursuing Justice*, at 24.
- <sup>74</sup> N.Y. Family Law §240(1-b)(g) and F.C.A. §413(g). *See also* *Nicholson v. Gavin*, 207 A.D.2d 402, 615 N.Y.S.2d 458 (2 Dept. 1994).
- <sup>75</sup> *See* Appendix and Rule 5:6B.
- <sup>76</sup> The practice of imputation is not mandated, but at work here is the prevailing belief that most people are able to work full-time at minimum wage and orders are set accordingly at that rate.
- <sup>77</sup> *See id.*
- <sup>78</sup> *See* Paula Roberts, *An Ounce of Prevention*, at 13-16, for an analysis of various state programs.
- <sup>79</sup> It is unlikely that the state would take any part in advising custodial parents to waive any child support arrears due to them.
- <sup>80</sup> *See* Daniel L. Hatcher and Hannah Lieberman, Breaking the Cycle of Defeat for “Deadbroke” Noncustodial Parents Through Advocacy on Child Support Issues (Journal of Poverty Law and Policy (May-June 2003), FN 32 at 10.
- <sup>81</sup> *See* Elise Richer, et al, *Boom Times a Bust*, at 12.
- <sup>82</sup> Abbey Frank, *Where the Funds Are: Potential Use of Child Support Funds for Transitional Jobs Programs* (Center for Law and Social Policy, September 2004) at 1.
- <sup>83</sup> *See id.*
- <sup>84</sup> The Center for Law and Social Policy recommends the use of incentive funds that are given to states as a result of their performance on five program performance measures. While no state has yet applied to use federal child support funds specifically to fund a transitional jobs program, several states are using these funds to provide employment services for noncustodial parents. This would be a productive way to increase the employability of low-skilled, noncustodial parents, and in turn increase support payments. *See* Abby Frank, *Where the Funds Are*, at 3.
- <sup>85</sup> 42 U.S.C. A. § 608 (a)(3). *See also* HHS Action Transmittals 97/17 and 98-24. Child support recipients on TANF must assign to the state all rights to unpaid child support owed before and during the assistance period.
- <sup>86</sup> N.J.S.A. 2A: 4-30.65(1). Support is determined according to the guidelines contained in N.J. Court Rule 5:6A. *See also* *See* Appendix IX-A of Rule 5:6A. (<http://www.judiciary.state.nj.us/csguide/ix-a.pdf>) at 2-3. Some state models for determining support look at the financial capacity of the non-custodial parent, or sets aside a certain amount of the non-custodial parent’s income for self-support.
- <sup>87</sup> The factors that are considered in fixing the amount of child support generally include the child’s share of expenses for housing, food, clothing, transportation, entertainment, unreimbursed health care up to \$250 per child per year, and miscellaneous items. *See* Appendix IX-A, 7, 22-23 for more specific information. For a basic child support award schedule, *see* Appendix IX-F of NJSA R. 5:6A. Worksheets for calculating a support award are attached as Appendices B-E. For a detailed discussion of the support guidelines and supporting data *see* New Jersey Administrative Office of the Courts, Final Report of the Supreme Court Family Division Practice Committee on Proposed Revisions to the New Jersey Child Support Guidelines, Rule 5:6A and Appendix IX of the New Jersey Court Rules, Report to the Supreme Court, March 1996.
- <sup>88</sup> *See* Appendix IX-A, 20. “If an obligor’s net income, after deducting that person’s share of the total support award, is less than 105% of the U.S. poverty guideline for one ... the court shall carefully review the obligor’s income and living expenses to determine the maximum amount of child support that can reasonably be ordered without denying the obligor the means of self support at a minimum subsistence level.”
- <sup>89</sup> *See* Appendix IX-F (20)(a).
- <sup>90</sup> *See* Appendix IX-A, 10.

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<sup>91</sup> For further information on imputing income, see *Gertcher v. Gertcher*, 262 N.J. Super. 176 (Ch.Div. 1992), *Bencivenga v. Bencivenga*, 254 N.J. Super. 328 (App. Div. 1992), *Thomas v. Thomas*, 248 N.J. Super. 33 (Ch.Div. 1991), *Arribi v. Arribi*, 186 N.J. Super. 116 (Ch.Div. 1982), *Lynn v. Lynn*, 165 N.J. Super. 328 (App. Div. 1979), *Mowery v. Mowery*, 38 N.J. Super. 92 (App. Div. 1955).

<sup>92</sup> See <http://www.judiciary.state.nj.us/probchild/prob02.htm>.

<sup>93</sup> See <http://www.judiciary.state.nj.us/probchild/prob02.htm#obligor>. Unemployment is considered a temporary change and the obligor is still required to make payments. New Jersey considers unemployment itself to be available for support, and an order to withhold child support will be sent to the Department of Labor and Industry for parents receiving benefits.

<sup>94</sup> 42 U.S.C.S. § 666(a)(9).

<sup>95</sup> In New Jersey, there is no automatic age of majority. Emancipation of a minor can come about at different times, such as: upon full-time employment or entry into military service. Likewise, emancipation may be delayed by enrollment in college, disability or other factors.

<sup>96</sup> See 42 U.S.C.S. § 666(a)(10) and N.J.S.A. 2A: 34-23.

<sup>97</sup> See generally, *Lepis v. Lepis*, 83 NJ 139 (1980). Some situations that can constitute a change of circumstances are: an increase in the cost of living; increase or decrease in the supporting spouse's income; and illness, disability or infirmity arising after the original judgment.

<sup>98</sup> See <http://www.childsupport.atfreeweb.com/FAQ.htm>.

<sup>99</sup> See 42 U.S.C.S. § 666(a)(10) and N.J.S.A. 2A: 17-56.9a (which provides for notification every three years of the right to request a review without a showing of substantial change in circumstances). See also *Doring v. Doring*, 285 N.J. Super 369 (Ch.Div 1995) (court held that under the statutory framework established by § 666(a)(10) and § 2A: 17-56.9a, although courts were still required to consider factors that impacted obligors' ability to pay, movants no longer had to demonstrate "changed circumstances" in order to get obligor's current financial information).

<sup>100</sup> See Rule 5:6B for more specifics.

<sup>101</sup> See Paula Roberts, *An Ounce of Prevention*, at 38.

<sup>102</sup> 42 U.S.C.A. § 666(a)(9). The court needs to deem incarceration a "change in circumstances" that warrants a downward modification. See also Jessica Pearson, *Building Debt While Doing Time*, for a comprehensive assessment of common judicial approaches to mitigating the effects of incarceration and child support.

<sup>103</sup> *Topham-Rapanotti v. Gulli*, 289 N.J. Super. 626, 674 A.2d 650 (1995) (incarceration is not substantial change in circumstances as it is the result of a voluntary act - commission of a crime).

<sup>104</sup> This assumes the obligor is incarcerated for a crime other than non-payment of child support.

<sup>105</sup> See, e.g. *Bergen County v. Steinhauer*, 294 N.J. Super. 507, 683 A.2d 856 (App. Div. 1996) (Father's long term incarceration and lack of personal assets established change of circumstances justifying suspension of his child support obligation. Court must focus on length of incarceration and extent of obligor's assets).

<sup>106</sup> *Halliwell v. Halliwell*, 326 N.J. Super. 442, 741 A.2d 638 (App. Div. 1999)

<sup>107</sup> *Halliwell* at 458-59. The appellate court also specifically noted that, "[w]e find fault with the motion judge's conclusion that criminal activity resulting in incarceration is a voluntary act which should not be rewarded by suspending the obligation to pay support during incarceration."

<sup>108</sup> *Halliwell* at 460.

<sup>109</sup> *Department of Revenue v. Jackson*, 780 So. 2d 342 (Fla. 5<sup>th</sup> DCA 2001).