PURSUING JUSTICE:

A STRATEGIC APPROACH TO CHILD SUPPORT ARREARS IN CALIFORNIA

by Paula Roberts

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Center for Law and Social Policy
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1015 15th Street, NW, Suite 400, Washington, DC 20005

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A paper submitted to the California Department of Child Support Services by Paula Roberts of the Center for Law and Social Policy

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EXECUTIVE SUMMARY

In 1999, California undertook a major restructuring of its child support program. As part of this effort, the state legislature asked that a study of accumulated support arrears be done. Elaine Sorensen and Chava Zibman of the Urban Institute undertook this study. The report is called *Estimating How Much of California's Child Support Arrears Are Collectable Using State-Wide Data Bases.* It was submitted to the Department of Child Support Services (DCSS) in October 2001.

Sorensen and Zibman found:

- As of March 2000, 60% of the non-custodial parents whose cases were being handled by the state's child support enforcement program were in arrears on their obligations. These 834,908 parents owed $14.4 billion in arrears.
- Eighty percent (80%) of these individuals had some recent income or earnings. However, many had very low incomes and some had no income at all.
- 73% of the debt was more than 2 ½ years old.
- Most of the money (70%) was owed to the state under a public assistance assignment. The other 30% was owed to custodial parents.

There are a number of reasons why non-custodial parents have accumulated so much child support debt. Sorensen and Zibman identify two of the biggest culprits: 1) the state's policy of charging substantial interest on arrears and then paying the interest before paying the principal when a collection is made; and 2) seemingly high child support orders imposed on obligors with little or no reported income. Sorensen and Zibman conclude that ? given the size of the debt, the nature of the debtors, and these two policies ? even with intense efforts, California will recover only a small portion of what is owed over the next ten years. At the same time, unless some of the state's policies are changed, substantial additional arrears will accrue.

DCSS must now take the information in this report, examine its implications, and devise a strategy for 1) collecting as much of the arrears as possible; 2) developing procedures for insuring that arrears of this magnitude do not accumulate in the future; and 3) devising policies that address the substantial amount of uncollectable arrears. In developing its strategies, California will have to take into account restrictions imposed by federal law and policy as well as current California law. Some strategies will require the department of Child Support Services to change existing policy. This may be easily done and be consistent with the advice of other groups (such as the P3 Process) which have made policy recommendations to the agency. Other possible strategies involve changes in state law. In the past, both the legislature and the governor have been willing to entertain sensible changes in child support law, and they may be called upon to do so again.[1]

[1] For example, Governor Davis recently signed AB 1449, which sets up a process for setting standards so that parents whose children are going into foster care will not be referred for child support enforcement if such enforcement would negatively affect their ability to successfully reunite with their children. This same law also establishes a process for forgiving arrears owed by reunited families so that the family's meager resources can be devoted to the present support of the children.

Fortunately, in developing its strategies, California can draw on the experience of other states as well as evaluations of a number of different approaches. For example, when faced with the accumulation of substantial arrears, many states have developed and documented *aggressive enforcement strategies*. Within the framework of existing law and policy, California might adapt some of these strategies to:

- Review all cases not currently subject to income withholding to see if this collection technique should be employed. Cases where the order pre-dates immediate income withholding, cases involving federal employees, and interstate cases are particularly good targets for this type of review.
- Resolve pending IDB issues so that federal and state income tax intercept remedies can be more aggressively used.
- Fully implement both the in-state and interstate aspects of the Financial Institution Data Match (FIDM) program.
- Make greater use of the contempt process as well as referral of appropriate interstate cases to the United States Attorney's Office for prosecution.
- Design a specific strategy to address cases involving the incarcerated and parolees.

There is also much California could do to *prevent the accumulation of huge arrears in the future*. Again, drawing from the documented experience of other states, the DCSS could:

- Develop clear and concise materials for non-custodial parents fully explaining their rights and responsibilities.
- Simplify the forms used for establishing and modifying orders so that parents are clear about what they are required to do.
- Clarify that the guidelines applicable to low-income obligors are to be used in all IVD cases and provide training to case workers in this regard.
- Design protocols to be used in cases where there is a default or little income information so that the best available information is used to establish the order.
- Provide frequent notice to both custodial and non-custodial parents of the payment status of their cases, including information about arrears and how much interest is accumulating on those arrears.
- Swiftly impose income withholding so that there is minimal gap between the issuance of an income withholding order and implementation of that order.
- Streamline the modification process so that it is simple to use.
- Work with the state's unemployment and corrections agencies to make sure that those who experience a severe drop in income know that they need to seek modification of their orders and facilitate their ability to do so.

However, the primary tasks here probably require state legislation. As Sorensen and Zibman note, one of the prime factors in California's arrearage build-up is the levy of interest on arrears. This is compounded by attributing payments to interest before principal, making it unlikely that arrears will ever be paid off. The legislature could consider a variety of approaches here. It could:

- Eliminate interest on arrears.

- ❖ Reduce interest on arrears.
- ❖ Cap the amount of interest and arrears that can be accumulated by obligors with income below poverty.
- ❖ Require that collections be attributed to principal rather than interest until all principal is paid off.

In addition, consideration should be given to changing the standard for modifying orders. Currently, in order to obtain a modification, California requires that the new order would deviate from the current order by $50 or an amount equal to 30% of the current order. In low-income cases, this may preclude a modification when one is truly warranted.

Finally, DCSS and the state must carefully *consider approaches to arrears owed by low-income and no-income obligors that have been permanently assigned to the state.* While there are good policy reasons to aggressively pursue these arrears, there are also both practical and policy reasons to develop some flexibility in approach. Of particular note is the data generated by Sorensen and Zibman that indicates that child support orders for most low- income and no-income non-custodial parents are grossly inconsistent with the state's child support guidelines. Those guidelines provide the opportunity for low-income obligors (net income of less than $1,000 per month) to obtain orders commensurate with their ability to pay. It may be that many of the orders were set pre-guidelines, when standard practice was to set the order at the public assistance level, regardless of ability to pay. More recently, orders may have been obtained in default proceedings where income was imputed. Thus, the obligor's actual ability to pay was not considered and the obligor did not have the opportunity to argue his or her case for treatment under the guidelines as a low-income obligor. In light of this, the state could:

- ❖ Review the orders of all obligors with income below $15,000 per year to determine if the amount of the order was excessive relative to the non-custodial parent's ability to pay; or
- ❖ Acknowledge that arrears accumulated under many of the orders (particularly the older ones) may be unreasonably high and develop policies for adjusting the amounts to reflect a more realistic support obligation.

If the latter approach is taken, the legislature will have to authorize DCSS to develop standards and procedures for doing this. Another alternative is for the legislature to authorize pilot projects to test out different approaches to arrears adjustment given California's caseload and public policies. For example, incorporating an arrears adjustment program into existing non-custodial parent employment programs might be considered. The legislature might also consider authorizing negotiated agreements that:

- ❖ Demand full payment of the arrears but forgive/reduce the interest on the debt.
- ❖ Accept lump sum payments in the present in lieu of full recoupment in the future.
- ❖ Gradually write down the arrears if the obligor pays his/her current support regularly and on time for a specified period.
- ❖ Target obligors who clearly would have had their orders modified downward had they filed for a modification.

DCSS could also make use of federal case closure policies to close cases in which there is little or no likelihood that there will be any collection even with highly aggressive enforcement activity. These include cases where the obligor has died, where there is no current support order and the amount owed is small, and cases where there is no Social Security Number on record and diligent, but unsuccessful efforts have been made to obtain one.

This paper examines these and several other strategies in depth. Clearly, the state will not want to take every step outlined in this paper. In the short run, those most likely to yield significant results are:

- Aggressive use of income withholding and FIDM to collect from those who have easily reachable income and bank accounts.
- Development of user-friendly outreach materials, forms, and protocols so that non-custodial parents fully understand what is happening and why.
- Training of those involved in setting support awards so that the guidelines applicable to low-income obligors are in fact followed in IVD cases.
- Reduction in the number of default orders and the number of cases in which income is imputed.
- Streamlining the modification process so that orders accurately reflect the obligor's ability to pay.
- Elimination of the policy of charging interest on delinquent cases. If interest is not eliminated, then applying collections to principal before interest so that the obligor has a chance to reduce the amount of principal over time.
- Development of standards for reducing state-owed arrears in cases involving low-income obligors.
- Closure of appropriate cases.

PART I
FINDINGS FROM THE SORENSEN-ZIBMAN STUDY

In 1999, California undertook a major restructuring of its child support program. As part of this effort, the state legislature asked that a study of accumulated support arrears be done. Elaine Sorensen and Chava Zibman of the Urban Institute undertook this study and submitted their report in October 2001. The report is called *Estimating How Much of California's Child Support Arrears Are Collectable Using State-Wide Data Bases.*

Sorensen and Zibman find that ? as of March 2000 ? 834,908 non-custodial parents owed $14.4 billion in arrears. They further estimate that, unless current policies change, by 2010, these parents will owe $30 billion in arrears.[2] Now the state must take the information in this report, examine its implications, and devise a strategy for: 1) collecting as much of the arrears as possible; 2) developing procedures for insuring that arrears of this magnitude do not accumulate in the future; and 3) devising policies that address the substantial amount of existing, uncollectable arrears.

THE FACTS

Sorensen and Zibman make several important factual and policy points in their paper. This information is a useful starting place for analysis.

What percentage of obligors owes arrears? Eighty-five percent (85%) of the non-custodial parents whose support orders are being enforced by California's Department of Child Support Services are in arrears on their obligations.[3]

What is the income status of those who owe arrears? Eighty percent (80%) of the individuals who are in arrears on their child support obligation have some recent income or earnings.[4] However, many have very low incomes and some have no income at all.[5]

Most of those with recent income earned this income in California. However, about 15% had earnings outside California[6] and 17% did not actually live in California.[7] In addition to their income, the available data show that 14% of these debtors had accounts in banks, credit unions, or other financial institutions.[8]

[2] Elaine Sorensen and Chava Zibman, *Estimating How Much of California's Child Support Arrears Are Collectable Using State-Wide Data Bases, October 2001*,at 1.
[3] Estimate prepared by Leora Gershenzon based on data reported by the state to the Federal Office of Child Support Enforcement.
[4] Id. at 30.
[5] Twenty-two percent (22%) of those with recent earnings had income below $5,000 a year and 21% had neither recent nor prior year income. Thus, 43% of obligors had little or no ability to pay their debts. Id. at 31.
[6] Id. at 29.
[7] Id. at 34.
[8] Id. at 34. Sorensen and Zibman note that their data is incomplete and that it is likely that non-custodial parents have significantly more money in the bank than their study shows.

Of those with no recent income, 23% do not live in California. Moreover, 5% are incarcerated and 16% are poor enough to qualify for Medical. Only 16% had incomes in the prior years and only 7% had assets.[9]

In how many cases are both current support and arrears owed? Thirty-nine percent (39%) of those who owe arrears do not have a current support obligation,[10] while 61% of debtors owe both current support and arrears. Just meeting their current support obligation takes a substantial amount of their income: in many cases, their current support obligations actually exceed their incomes. The median award for those with income of less than $5,000 per year is $280 per month.[11] The median award for those with no recent income is only slightly lower: $277 per month.[12]

How much is owed? As of March 2000, $14.4 billion in arrears had accumulated. Of this, $6.3 billion was owed by those with incomes over $5,000 per year, $3.4 billion was owed by those whose incomes were below $5,000 per year, and $4.7 billion was owed by those with no recent income.[13]

To whom is the money owed? The bulk of what is owed (70%) is owed to the state under a public assistance assignment (AFDC or TANF). The remaining 30% is owed to custodial parents.[14]

How old is the debt? Much of the debt is quite old. Seventy-three percent (73%) has been owed for longer than 2 ½ years.[15]

How successful has the state been in collecting this debt? In 1999, California collected a little less than 6% of the arrears owed. This was down from a high of 10% in 1986.[16]

POLICIES THAT HAVE CONTRIBUTED TO THE ACCUMULATION OF SUBSTANTIAL ARREARS

Sorensen and Zibman conclude that several factors have contributed to the accumulation of substantial arrears. These are described in brief below.

Interest Charges. Part ? but not all ? of the problem of enormous accumulated arrears is related to the imposition of interest.[17] Even if collections increase, the combination of charging 10% annual interest and attributing collections to interest before principal means that arrears will

[9] Id.
[10] Id. at 26.
[11] Id. at 31.
[12] Id. at 34.
[13] Id. at 36.
[14] Id. at 25.
[15] Id. at 26.
[16] Id. at 10.
[17] Id. at 9.

continue to mount even if there is a substantial increase in collections from those who are able to pay.[18]

Setting Substantial Support Orders for Obligors with Limited Income. Child support awards against low- income individuals appear to be very high. As noted above, those with incomes below $5,000 per year have median orders of $280 per month and those with no reported income have median orders of $277 per month. With orders this far in excess of their ability to pay, it is inevitable that these obligors fall behind in their obligations.[19]

CONCLUSIONS

Sorensen and Zibman estimate ? given the size of the debt, the nature of the debtors, and the policies described above ? that California should expect to recover only a portion of what is owed over the next ten years. If non-custodial parents are required to contribute 40% of their net income to the payment of current support and/or accumulated arrears:

- Those with incomes over $15,000 could pay off 66% of their debt;
- Those with incomes between $10,000 and $15,000 could pay off 36%;
- Those with incomes between $5,000 and $10,000 could pay off 18% of their debt;
- Those with incomes between $1,000 and $5,000 could pay off about 4% of their debt; and
- Those with no recent income could pay off about 3% of their debt.[20]

Given the high percentage of obligors with little or no recent income, this means that, with better enforcement, about 20% of California's arrears ($2.9 billion) are likely to be collected in 10 years.[21] However, while these arrears are being paid off, an additional $10.1 billion in interest charges and $9.3 billion in new arrears will accrue.[22] As a result, after 10 years, nearly $30 billion will be owed by these obligors.

[18] Id. at 40. In support of this finding, it is worth noting that (according to the OCSE Annual Reports to Congress) in FY 1992, California had 467,218 orders on which an arrearage was owed. One year later, that number had increased 21% to 566,155. Thus, 100,000 arrearage cases may have been created by the retroactive calculation of interest.
[19] Id. at 40.
[20] Id. at 41.
[21] Id. at 43.
[22] Id. at 40.

PART II
SETTING THE STAGE

From the Sorensen-Zibman report, it is clear that California's non-custodial parents owe a significant amount of arrears. Some of this money is collectable over the next ten years, but much of it is not. California needs to develop policies that maximize the amount that is collected. This is good for the state (since 70% of what is owed would go to California under a public assistance assignment)[23] and for the families to whom the other 30% is owed. This is the first order of business.

At the same time, California must recognize that some of its past practices have led to the accumulation of uncollectable arrears. Future policies should be developed that will address the root problems and make it unlikely that such large arrears will accumulate in the future. Thought should also be given to designing strategies for cases in which substantial arrears have accumulated, the obligated parent has little or no income, and it appears unlikely that he or she will ever be able to repay the debt.

Each of these areas must be examined in light of federal and state law. It is also helpful to look at the experience of other states that have grappled with these issues. The remainder of this part of the paper examines this background.

FEDERAL LAW

In order to obtain federal funds to operate its child support program, California must follow certain federal laws and policies. Thus, in deciding how to address its arrears problem, California must consider federal requirements. These requirements are described below.

One of the basic functions of a child support agency is establishing support orders.[24] A support order may provide for current support, a payment on arrears, and/or medical support.[25] The exact amount of the order is to be determined under the state's child support guidelines.[26] These guidelines must take into account the income and assets of the obligated parent.[27] The decision-maker can deviate from the guideline amount if the award would be unjust or inappropriate. The deviation can be upward or downward and must be explained on the record.[28]

Under this scheme, arrears accumulate in one of two ways: 1) at the time an order is established, the tribunal sets an amount to be paid for the period *before* the order was in place (pre-order arrearages); and/or 2) the order provides for current support only, but the non-custodial parent fails to pay the full amount ordered (post-order arrearages). Whether to establish pre-order

[23] However, it should be noted that this money would have to be split with the federal government. See 42 USC §657.
[24] 42 USC §§ 651 and 654(4) and 45 CFR §302.31(a)(2).
[25] 45 CFR §302.56.
[26] 42 USC §667 and 45 CFR §302.56.
[27] 45 CFR §302.56(b)(1).
[28] 42 USC §667.

arrears is entirely a matter of state law.[29] However, if a state does pursue pre-order arrears, the amount must be determined under the state's child support guidelines as applicable to the obligors income either at the time the obligation arose or at the time the order is set.[30]

Arrears are owed to the family if it has never received cash assistance. However, if a family receives or has received cash assistance from Aid to Families with Dependent Children (AFDC) or Temporary Assistance for Needy Families (TANF), some or all of the arrears may be owed to the state.[31] This is because federal law requires families that receive federally-funded cash assistance to assign their support rights to the state.[32] The assignment lasts as long as the family receives cash assistance. When the family leaves assistance, some or all of its arrears may still be assigned to the state. When a collection is made on these arrears, the state and the federal government take a share to reimburse themselves for the assistance provided to the family.[33]

Once an order is established, a state is required to treat the resulting periodic payment as a judgment by operation of law on the date it is due.[34] This judgment cannot be retroactively modified (except for the period of time between the date of filing the motion for modification and the date of decision).[35] However, as to both pre- and post-order arrears, U.S. Department of Health and Human Services (HHS) policy allows a state to compromise the amount owed to it if it does so in the same manner that it would compromise any other judgment owed to the state. Moreover, in the case of arrears owed to the custodial parent, the parents can negotiate a compromise.[36] As to debts owed to the state pursuant to an AFDC/TANF assignment, the state can administer its arrears forgiveness policy on a case-by-case basis and/or through a large-scale amnesty program.[37]

States must also have and use a variety of civil enforcement mechanisms to insure that child support obligations are met. These include income withholding (to make sure that current support is paid in a timely manner), and federal and state tax intercepts, liens, bonds, reports to credit agencies, license revocation, and passport denial to encourage the payment of arrears.[38] There is also a federal statute that makes failure to pay support in interstate cases a federal crime, which is prosecuted by the U.S. Attorney's Office.[39]

[29] OCSE Action Transmittal 93-04 (March 22, 1993).
[30] Id.
[31] If a family receives Medicaid, it is required to assign its medical support rights to the state and cooperate with the state in pursuing those rights. However, only a small percentage of Medicaid families are owed medical support so the state rights under this part of the law will not be addressed in this paper.
[32] The current assignment provision is found at 42 USC §608(a)(3). Families that received assistance under the AFDC program also assigned their support rights to the state. Much of the arrears that are owed today are owed to the state under these old AFDC assignments. 42 USC §602(a)(26) repealed by P.L. 104-193 in August 1996.
[33] 42 USC Section § 657(a) (1) and (2) and 45 CFR §302.51. See, also OCSE Action Transmittals 97-17 and 98-24.
[34] 42 USC §666(a)(9)(A).
[35] 42 USC §666(a)(9)(C) and 45 CFR §303.106.
[36] OCSE Policy Information Questions (PIQ) 89-2 (February 14, 1989) and 99-03 (March 22, 1999).
[37] OCSE PIQ 89-2.
[38] 42 USC §666(a).
[39] 18 USC §228.

The federal government reimburses the state for 66% of the basic costs of the child support program.[40] In addition, states can receive incentive payments from the federal government to reward them for good performance. Today, incentive payments are based on five factors: one of these is success in collecting arrears.[41] The formula for determining success in this area is not based on the *amount* collected. Rather, it is based on the *number of cases in which arrears were collected and distributed* (either to the family or, if an assignment requires it, to the state) divided by the number of cases in which arrears are owed. Thus, the formula rewards collection of even small amounts of arrears on a large number of cases.

CALIFORNIA LAW

As required by federal law, California has and uses a child support guideline to establish and periodically modify support awards.[42] This guideline contains some special provisions that take into account the limited ability of some non-custodial parents to pay support. For example, public benefits (TANF, General Assistance, and Supplemental Security Income benefits) are not counted in determining income. There are also special rules for obligors with net disposable income of less than $1,000 per month.[43] Thus, orders should be sensitive to the actual ability of a lower income parent to support her/his children.

However, these special guidelines provisions apply only if the decision-maker is aware of the non-custodial parent's situation. If that parent does not appear and make his/her finances known, the decision-maker will enter a default judgment based on imputed income, using whatever income history is available. If there is no income history, income is presumed in an amount that results in an order equal to the Minimum Basic Standard of Adequate Care (welfare eligibility amount). [44]

If that amount is too high, the non-custodial parent is given the opportunity to have the default judgment set aside. He/she must do so within 6 months for mistake, inadvertence, or excusable neglect.[45] Thereafter, the default order can also be set aside if a motion is made within 90 days after child support is first collected from him/her or he/she is served with notice of collection, whichever happens first. The non-custodial parent must then demonstrate that either 1) actual income is at least 20% lower than presumed income; or 2) he/she is experiencing "extreme financial hardship."[46]

Income may also be imputed if a non-custodial parent's information indicates that he/she is unemployed or underemployed and the court finds that imputing income is in the best interests of the child.[47]

[40] 42 USC §655.
[41] 42 USC §658a(b)(6)(D).
[42] The guideline is found at Cal. Family Code §4055.
[43] Cal. Family Code §4055(b)(7).
[44] Id. §17400(d)(2).
[45] Cal. Code of Civil Procedure §473 and Cal. Family Code §§3690 and 3691.
[46] Id. §17432.
[47] Id. § 4058(3)(b).

With this in mind, a current support order will be set. The state will also seek retroactive support (pre-order arrears) for one year before the date of filing for welfare cases[48] or to the date of filing in non-welfare cases.[49] This is a recent change in policy. In the past, the state would pursue three years of retroactive support in welfare cases.

Child support orders can be modified prospectively but not retroactively. Orders can be changed prospectively at any time if there is a substantial change in circumstances. Otherwise, orders can be modified only once every 3 years and only if current income information indicates that application of the guidelines would change the order by at least $50 or an amount equal to 30% of the current order.[50]

Before July 1992, counties were supposed to charge interest on arrears but not all did so. In 1992, all counties were required to charge interest at the rate of 10% per year.[51] Interest on current support starts to accrue as soon as a payment is late.[52] Interest on pre-order arrears begins to accrue as soon as the order is entered.[53] The counties that had not previously charged interest went back and calculated interest on all past due support. Then they recalculated prior distribution so that people who had no arrears suddenly had them because payments attributed to arrears were now attributed to interest.[54]

If the order is being enforced through income withholding, California law allows the amount in current support and arrears that can be withheld to go up to the limits allowed by the federal Consumer Credit Protection Act.[55] (This can be as high as 65% of income if the obligor has no other dependents and is at least 6 months in arrears on his/her obligation.)

While current support is collected by the IVD program, the Franchise Tax Board plays a major role in the collection of arrears.[56]

As required by federal law, except in the case of arrearages collected through a federal tax intercept, payments are first applied to current support. Then they are applied to interest on arrears and then to the arrears themselves. A family receiving TANF cash assistance gets up to $50 of the amount of current support collected on its behalf each month while the rest goes to reimburse the state and federal governments for assistance provided to the family.[57] Post-TANF families get current support and post-assistance arrears. They may also get some or all of their pre-assistance arrears depending on when their assignment was executed.

[48] Cal. Family Code §17402.
[49] Id. §4009.
[50] FSD Letter No. 94-02 (January 14, 1994).
[51] Cal. Code of Civil Procedure §685.010.
[52] Id. §685.020.
[53] Id.§§ 685.010 and 685.020.
[54] Sorensen and Zibman attribute the steep rise in accumulated arrears between 1992 and 1996 to implementation of this mandate. Sorensen and Zibman, *supra*, at 9.
[55] 15 USC §1673(b). The California statute is codified at Cal. Family Code §5200 et. Seq. See, also Cal. Welfare &Institutions Code §11475.1(i).
[56] Cal. Revenue and Tax Code§§19271 and 19271.5
[57] Cal. Code of Civil Procedure §695.221.

Finally, the Department of Child Support Services is required to provide the non-custodial parent with an accounting of collections and distributions made in a case if requested to do so.[58] In this way, the parents are kept informed about what is owed and how it has been disbursed.

PAST STUDIES RELEVANT TO THE ISSUE OF ARREARS

California Studies

Prior to the Sorensen-Zibman paper, there were several other studies done of child support enforcement in California. From these studies, it is clear that there has been a long-standing public concern about the ability of the program to provide adequate services to those seeking to enforce their support orders.[59] One important critique noted that there was a lack of statewide policy in many areas and no requirement that counties replicate successful programs from elsewhere in the state. This report called for more statewide policies in order to "achieve uniform delivery of child support services at the local level." This same report also called for the implementation of "best practices" to take advantage of lessons already learned.[60] Heeding this advice, this paper will focus on the development of uniform policies that are based on best practices.

It should also be noted that a 1996 public opinion survey by EDK Associates found that the citizens of California believe that the child support system has not functioned properly and that a major reason that many parents do not pay their support is that they do not believe they will be caught.[61] An approach to dealing with arrears must consider this public perception and not fuel a feeling that the state continues to be soft on scofflaws.

Other Relevant Studies

California is not alone in having substantial, accumulated, child support arrears. Recently, some states with a similar problem have begun conducting studies, running demonstration projects, and devising approaches to the issue. Some important lessons learned from the experience of other states include:

- *The importance of customer service.* Maryland commissioned a study of its arrears caseload in 1996.[62] The report indicates that most important factor in payment by low-income obligors was their perception of what was going on and how they had been treated. Obligors who understood the child support process, and those who felt that they had been respectfully treated by the child support workers, had far better payment records than those who did not understand their obligations or felt disrespect from the workers.

[58] Welfare and Institutions Code §11478.1(c)(3).
[59] See, e.g. Little Hoover Commission, *Enforcing Child Support: Parental Duty, Public Priority (*May 1997); The National Youth Law Center, The Child Support Reform Initiative and Children NOW, *California's Child Support program: The Cost of Failure* (1998); California State Auditor, *Child Support Enforcement Program: Without Strong Leadership California's Child Support Program Will Continue to Struggle* (August 1999).
[60] California State Auditor, *supra*, at 3.
[61] *Deadbeat Parents vs. A Deadbeat System*, A Public Opinion Survey of California Voters Commissioned by the Public Media Center (1997), at 2.
[62] Michael Conte, *Research on Child Support Arrears in Maryland*, Research Institute of Towsen University (1998).

The author suggests that promoting better understanding of the child support process and better training of workers would lead to less accumulated arrears.

A report from Colorado contains similar findings.[63] The researchers found that if non-custodial parents had participated in the negotiation conference at which the order was established, their payment pattern was significantly better than that of parents whose order had been entered by default.

- *The difficulty of collecting old debt.* The Maryland report mentioned above finds that the single most significant determination of collectability of arrears is the age of the debt. Holding all other factors constant, collectability decreases by 24% each year. Given this, it is important to prevent arrears from accumulating in the first place and to move quickly when they do start to accrue.

- *The importance of wage withholding.* The Maryland report also found that the most effective enforcement tool for keeping payments coming was wage withholding. One reason arrears accumulate is that wage withholding orders are not timely imposed. If they were, the authors believe, fewer arrearages would accrue, and those arrears that do accrue would not be so old (and thus there would be more likelihood of collection). The Colorado researchers also found that the use of income withholding was crucial. In cases with wage withholding, 59.8% of what was owed was paid: without wage withholding, only 17.7% of what was owed was paid.

- *Some state policies may contribute to the accumulation of arrears*. A Minnesota study mentions retroactive imposition of support obligations, the imposition of birthing costs, levying interest, the use of imputed income in setting orders, default orders, and the attribution of collections to interest before principal as policies that may lead to large debts owed by lower income non-custodial parents and suggests that the state develop a statewide compromise policy for dealing with debts that accumulate due to these policies.[64]

[63] Jessica Pearson, Nancy Thoennes and Lanae Davis, *Dropping Debt: An Evaluation of Colorado's Debt and Retroactive Support Initiative*, Center for Policy Research (1999).
[64] Jim Hennessey and Jane Venohr, *Exploring Options: Child Support Arrears Forgiveness and Pass-Through Payments to Custodial Families*, Policy Studies Inc. (2000).

PART III
DEVELOPING AN AGGRESSIVE ARREARS COLLECTION STRATEGY

The Sorensen-Zibman paper suggests that about 20% of the total amount owed is collectable.[65] All of this will come from obligors with some earnings and/or assets in the above-ground economy.[66] While most of the debt is owed by obligors who live and work in California, 15% of the debtors had out-of-state income in 1999.[67]

It may be that an even larger number of debtors have out-of state income. For years other than 1999, Sorensen and Zibman used only California data sources to determine whether an obligor had recent income.[68] Thus, some of those who appear to have little or no recent income may have out-of-state income that does not show up in their analysis. This seems particularly likely since they find that 23% of those with no recent income live outside California[69] and are thus likely to have out-of-state income. This underscores the need to develop both in-state and out-of-state strategies for collecting arrears.

It is also worth noting that the Sorensen-Zibman projection is based on the notion that obligors will be asked to pay no more than 40% of their net income in child support. Current California law allows the withholding of 60% (for those with other dependants to support) or 65% (for those with no other dependants) of earnings from obligors who are in arrears on their obligations. In actual practice, decision makers generally allow up to 50% to be withheld.[70] Thus, under current law and practice, there may be even more collectable arrears than Sorensen and Zibman estimate. At any rate, a strategy needs to be developed to pursue both in-state and out-of-state obligors.

IN-STATE CASES

There are a number of obvious strategies that will improve collection. First and foremost is more **aggressive use of income withholding**. Sorensen and Zibman find that, in 1999, 408,288 non-custodial parents who owed arrears had earnings. Sixty percent (60%) of these obligors or 244,973 individuals had earnings in excess of $10,000 per year.[71] Each of these individuals can and should be subject to income withholding.[72] One group of particular note is those with recent

[65] Sorensen and Zibman, *supra*, at 43.
[66] Some of those who appear to have little or no earnings may in fact be in the underground economy. See, id. at 17-18. However, there are few workable strategies to reach these debtors so it is probably wise not to anticipate collections from them.
[67] Id. at 29.
[68] Id.
[69] Id. at 34.
[70] Id. at 38.
[71] Id. at 17.
[72] With few exceptions, every order entered or modified after January 1, 1994 should contain a provision for immediate income withholding for current support and/or arrears. Orders that pre-date this (and those in which immediate income withholding was not ordered) must be enforceable through income withholding once arrears in an amount equal to one month's support have accrued. 42 USC §666(a)(1) and Cal. Family Code §5230.

earnings but no current support obligation. There are 224,619 individuals in this category.[73] It may well be that they may owe money from before the time of almost universal income withholding, so this remedy may never have been tried in their cases.[74] It may also be that these are arrears-only cases. In either situation, action should be taken to review each case in which income withholding is not ? but could be ? in place and move to serve the appropriate papers.

Federal employees and members of the military may also be particularly good targets for a withholding review. In the past, the federal government has not been a model of cooperation in enforcement against its employees. The military has been particularly difficult to deal with. However, under Executive Order 12953,[75] federal agencies are now required to conduct an annual cross-match of the federal tax refund offset file with their payroll files to determine if any employees are delinquent in their support obligations. Federal agencies are also required to comply with all income withholding orders and act as model employers in the establishment and enforcement of support orders. While the matching part of the program has not been fully implemented, there are efforts underway to improve the ability of federal agencies to comply with this Executive Order.[76] This should mean that there will be greater cooperation by federal agencies than there has been in the past.

Another group that could be targeted are retired state employees. In 1996, the legislature determined that a substantial amount of arrears could be collected from these individuals and authorized a protocol for matching lists of delinquent parents with those drawing state retirement benefits.[77] The program, which was to become operational once the state's computer system had been certified, allows up to 50% of periodic benefits to be withheld to pay arrears.[78] Since the state's computer system has not yet come on-line, this program has not been implemented. Particularly in light of the fact that there are so many old cases in the arrears caseload, this may be an important source of potential payment; implementation of this program should be a high priority.

In addition, the state should continue to submit cases for **state and federal tax intercept**. Sorensen and Zibman report that only 37% of the total amount of arrears collected in 1999 came through tax intercept. In all likelihood, more could be obtained. Moreover, given that this is a relatively simple process for the state and yields relatively high collections, this method may be quite productive.[79] However, in order for this process to function, the problems with the

[73] According to Sorensen and Zibman, there are 623,941 debtors with recent income. Only 64% have a current support order. Sorensen and Zibman at 34. That means that 36% or 244,973 do not have a current order.
[74] It is worth noting that California law did not authorize universal income withholding until 1997. Cal. Welfare & Institutions Code §11489. Thus, it is quite likely that many old cases have never used this enforcement technique.
[75] This Executive Order was signed by President Clinton on February 27, 1995.
[76] See, Office of the Inspector General, *Withholding Child Support Obligations From Departmental Employees* (October 2001) OEI-05-00-00300.
[77] Cal. Code of Civil Procedure §704.110(c) and Cal Welfare & Institutions Code §11357.
[78] Cal. Code of Civil Procedure §706.052.
[79] The state need only have a valid social security number and documented arrears in order to submit a case for federal tax intercept. Sorensen and Zibman indicate that the IDB data contain about 92% of the debt reported by counties. This indicates that there is an SSN in a high percentage of cases. Moreover, new tools like the National New Hire Directory mean that it will be possible to obtain and verify SSNs in even more cases in the future. Once reported, the case stays in the federal system until there are no more qualifying arrears. Thus, unlike the past, where

Integrated Data Base (IDB) Internal Revenue Service Data base must be addressed. While efforts in this regard are being made, it appears that it will take some time before they are fully resolved.[80]

Another group that might be targeted are those with positive income from partnerships (1,432 individuals) and Subchapter S corporations (315 individuals). These individuals are self-employed and often are not subject to income withholding or federal income tax intercept. However, they may be sensitive to professional or business license revocation. They may also be negatively affected by reports to credit agencies as these can often dry up available credit on which partnerships and Subchapter S Corporation frequently rely. Simple notice that **license revocation or credit reporting** will occur can bring the affected individuals into the child support office with partial or full arrearage payments.[81]

The limited data suggest that many of California's obligors have interest and dividend income.[82] A new tool **Financial Institution Data Match** (FIDM) can be used to seize these assets as well as money in bank accounts for the payment of support arrears. Legislation providing the legal authority for such a program was enacted in 1997.[83] However, it does not appear that the process is now being used as extensively as it might be. There is a good deal of easily accessible information about how to successfully implement this program available from the federal government[84] and this information might be used to establish a more successful program. Alternatively, joining an existing consortium to manage this program might be an option. [85]

In some cases, it will be necessary to bring the delinquent parent back to court. Thought might be given to greater use of the **civil contempt** power to encourage payment.[86] In civil contempt, all the state has to do is show failure to pay. The burden is on the obligor to show inability to comply. Often the court will order a reasonable partial payment up front and the state will get at least some money this way. Since even small payments are counted in calculating the state's federal incentive payment, even limited success with these remedies will bring financial rewards to the state. The court can also schedule a follow-up hearing to allow an unemployed or underemployed obligor to get a job and begin payment.

Criminal contempt might also be considered. To be successful, however, parents must perceive that they will be arrested and prosecuted. This means that sheriff's offices have to be willing to

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cases had to be submitted annually, the state need only make one request. When successful, the average collection is about $873 for non-TANF families and $863 for TANF families. This is a high return for little effort.

[80] See LCSA Letter: 01-08 (May 7, 2001) re the nature of these problems and plans to begin addressing them.

[81] California has recently experienced some difficulty with credit reporting due to the expiration of its statewide credit reporting service contract. LCSA Letter 01-23 (August 7, 2001). This issue needs to be resolved swiftly.

[82] Sorensen and Zibman find that, in 1998, 60,719 debtors had interest income and 10,556 had dividend income. Sorensen and Zibman at 19. Moreover, 7% of those without recent income and 14% of those with recent income had positive bank accounts. Id. at 34. While the average amounts collected from these sources are not large, it may be that as the FIDM system becomes more sophisticated it will become apparent that there are even larger amounts to be had.

[83] Revenue and Taxation Code §19721.6.

[84] See www.acf.dhhs.gov/programs/cse/fct/fidm

[85] For example, the Electronic Parent Locator Network (EPLN) runs a consortium to which 14 states currently belong. More information on this program can be obtained at www.epln-fidm.com

[86] The use of civil contempt is authorized by Cal. Code of Civil Procedure §1218.

arrest delinquent obligors. In many jurisdictions, annual or semi-annual "sweeps" are conducted in which large numbers of arrest warrants are served simultaneously (or nearly so). Los Angeles County ran such a program ? Operation Parent T.R.A.P. ? in 1999.[87]

Finally, the Sorensen and Zibman data indicate that about 5% of NCPs without recent income and 2% of those with recent income are incarcerated.[88] The tendency is to write off this debt as uncollectable. However, some states have found that inmates do have income and assets and have developed strategies to pursue what is owed. For example, Washington State has found that many inmates ? especially those who are convicted drug dealers ? have large inmate accounts. The state now places **liens** on those accounts. It also has begun **working with probation/parole officers** to be sure that compliance with child support orders is a condition of an inmate's release. This can be combined with efforts to help the parolee find a job and reconnect with his/her children. The parolee then pays support through income withholding.[89]

INTERSTATE CASES

Many of the remedies discussed above are also available in interstate cases. With the adoption of the Uniform Interstate Family Support Act (UIFSA), **interstate income withholding** has become even simpler. If there is an income withholding order, it can simply be mailed to the obligated parent's employer and that employer must honor it. Since 17% of obligors with income live (and thus likely earn their living) outside of California, use of direct withholding may yield swift, positive results. In addition, Multistate FIDM **(MSFIDM)** is now operational and can be used to find and seize assets located outside California. The federal government, which operates this program, has identified more than 3,000 multi-state, financial institutions and has set up a process under which these institutions can use the federal system rather than having to respond to individual state requests. When a match between a delinquent obligor and a financial asset is made, that information is transmitted to the state for action. Developing the capacity to both submit requests and respond to matches would greatly increase the number of cases in which at least some arrears are collected.

Other possible approaches include aggressive screening and **referral of cases to the U.S. Attorney's Office for federal prosecution under 18 USC §228** and to the U.S. State Department for passport revocation or denial. While applicable to both in-state and interstate cases, this tool may be especially useful in interstate cases where California has been unsuccessful in reaching the obligor in any other way. One advantage of these approaches is that once the basic information has been gathered and verified, state child support personnel have to do very little work. Federal agencies take the information and pursue the appropriate action.

[87] A brief description of this effort is found in the fall 1999 issue of CSE Network Newsletter, published by the Office of Child Support at 7.
[88] Sorensen and Zibman, *supra*, at 34.
[89] See correspondence from Robbin Wohl posted on the Childsupport-L listserve, sponsored by the National Conference of State Legislatures, November 6, 2000.

PART IV
TAKING STEPS TO PREVENT FUTURE PROBLEMS

CUSTOMER SERVICE STRATEGIES

As noted earlier, studies reveal that the way non-custodial parents are treated affects their attitude toward payment.[90] Those who feel they have been dealt with respectfully and had their rights and responsibilities explained to them in a coherent way pay more willingly than those who feel that their concerns have not been heard. Thus, attention to training of workers and preparation of explanatory materials are crucial in a strategy to keep arrears from building up.

One place to start is with the **development of a handbook for non-custodial parents,**[91] explaining their rights and responsibilities. An easy-to-read explanation of how the system works, how orders are set, and what enforcement tools may be used to make sure payments are made can help these parents understand what is happening to them and why. Materials explaining the state's guidelines and how they work are especially important so that non-custodial parents understand how orders are set and what they can/should do if they think a deviation from the guidelines is warranted. These ? and similar simple-to-understand materials ? could be made available at hospitals in conjunction with the paternity establishment process, and through community-based organizations, Head Start centers, maternal and child health clinics, as well as legal services offices. Similar information could also be provided on the DCSS web site. New Jersey, Massachusetts, and New Mexico are now operating such **interactive web sites**.

Periodic notices to non-custodial parents about the payment status of their cases might also be useful. California law already requires the agency to provide non-custodial parents with an accounting of collections and disbursement in their case on request.[92] The statute could be amended to *require* the agency to send such notices *quarterly* (or semi-yearly) so that non-custodial parents would have a clear idea of what the records show and what the affect of non-payment is on the accumulation of interest. This might encourage payment and would mean that fewer non-custodial parents are startled by the amount of their obligations.[93]

Another proven approach is to **simplify the forms** used to be sure that they are clear and understandable. Alternatively, the forms can be accompanied by a more colloquial explanation of what is going on. Connecticut, for example, has a clear explanatory notice on the front of its legal forms. This enables the recipient of the form to easily determine what is required without

[90] See Maryland study described in Part II, *supra*.
[91] In all of the strategies discussed in this section, attention also needs to be given to developing materials in whatever languages are spoken in the jurisdiction. The importance of language and culture in getting the message across cannot be overemphasized.
[92] Cal. Welfare and Institutions Code §11478.1(c)(3).
[93] By mailing notices, DCSS would also be able to periodically verify current address information. If the notice was returned to the agency, a check could be made through postal forwarding records and/or the parent locate system to quickly find a new address. If payment ceased, DCSS would have a much more recent trail to locate the non-custodial parent and take appropriate enforcement action.

having to comprehend all the legal jargon. Connecticut has also increased its appearance rate to 90% in recent years simply by placing the phrase "YOU MUST APPEAR" in large letters on its initial orders.

MAKING SURE THAT THE GUIDELINES PROVISIONS FOR LOW-INCOME OBLIGORS ARE KNOWN AND USED IN SETTING ORDERS

California's child support guidelines seem to be quite flexible in regard to lower income non-custodial parents. However, the Sorensen-Zibman data suggest that many of the low-income parents in arrears on their obligations have quite large current support obligations. It may be that the *use of the guidelines,* not the guidelines themselves, is the source of the problem. In that case, efforts might involve 1) **review of guidance** to IVD workers on use of the guidelines and criteria for considering a deviation (up or down) in appropriate cases; 2) **training of workers involved in guidelines calculations** to make sure that they are properly calculating the orders; and 3) **consultation with the courts** to make sure that decision-makers understand the criteria used by the agency in recommending a particular order.

REDUCING THE USE OF DEFAULT ORDERS AND IMPUTED INCOME

When establishing a support order, the child support agency serves the non-custodial parent with a complaint for support along with a proposed judgment advising what the order will be under the guidelines. If recent, accurate income information is available, the proposed judgment will likely reflect the non-custodial parent's ability to pay. If recent information is not available or income is simply imputed to the parent (based on prior earnings history or be assuming that the obligated parent works full-time at the minimum wage), the order may be too high or too low. If the parent appears, he/she may supply actual income information and the proposed order can be adjusted accordingly. If the obligated parent does not appear, then a default order will be entered; that order may not accurately reflect the non-custodial parent's actual ability to pay. As noted earlier, California law does allow the obligated parent to come in and have the default judgment set aside. He/she must do so within 6 months of entry of the default order or within 90 days after a collection action is taken.

A substantial number of proposed orders are based on imputed income. A high percentage of these are default judgments. For example, Los Angeles County estimates that 70% of its proposed judgments are based on imputed income and the county has a 70% default rate.[94] This is in stark contrast to comparable jurisdictions like New York where only 10-15% of orders are entered by default.[95]

A recent study by the HHS Office of Inspector General (OIG) suggests that there is a strong correlation between the use of imputed income and default judgments and poor state collection rates. The OIG found:

[94] This is the case in the state's largest county, Los Angeles, which contains about a third of the state's caseload. Note to the author from Howard Strauss, August 28, 2001.
[95] Note from Lee Sapienza to Howard Strauss, September 17, 2001.

> Where imputed income was used to calculate the amount of the child support obligation owed in cases established in 1996, almost half of the cases generated no payments toward the financial obligation over a 32-month period. In contrast, where cases were not based on imputed income, only 11 percent of cases received no payment during this time period. While it is possible that the parents for whom income was imputed were potentially less likely to pay anyway, imputing income does not appear to be an effective method of getting them to pay.[96]

It thus seems imperative that California **reduces the number of cases involving imputed income and default orders.** In developing an approach, particular attention should be paid to the State and National Directories of New Hires as well as information available from MSFIDM to obtain accurate, current information about the obligated parent's income and resources. Even if the obligated parent does not appear, use of the most recent information can reduce the chances that an inappropriate order will be set.

In addition, consideration might be given to:

- Making all default orders temporary orders so that they could easily be modified when actual income information is available.
- Extending the time during which a challenge to the order based on mistake, inadvertence, or excusable neglect can be filed from 6 months to one year.
- Changing the standards now used to judge the appropriateness of a post-order challenge (actual income is at least 20% lower than presumed income or the parent is experiencing "extreme financial hardship") to allow challenges based on a lower standard, (e.g., actual income is 5% lower than presumed income).
- Avoiding standard default amounts (e.g., the Minimum Basic Standard of Adequate Care) and allowing custodial parents to testify about non-custodial parents income, prior work history, etc.

FURTHER LIMITING THE ESTABLISHMENT OF RETROACTIVE ARREARS

Until recently, California policy was to seek retroactive years for the prior three years. As a result, many low-income obligors began their payment history with a substantial amount of ground to make up. Recent changes in the law require the pursuit of only one year's arrears. This should help substantially in cutting back on the amount of arrears accumulated in a given case.

The state might also consider adopting three other policies that would prevent the accumulation of substantial arrears by those who are unlikely to be able to pay them. One is to **limit the back period to one year prior to the service of process**. If the period commences with filing of the action, then it may be years before process is actually served. In that case, there will still be very large retroactive arrears. Beginning the retroactive period with actual service of process eliminates this problem and is more fair to the non-custodial parent. Another potential policy option is to **make the pursuit of arrears discretionary**. The child support worker could then evaluate whether the arrears had accumulated because the obligor had evaded service of process

[96] Department of Health and Human Services, Office of the Inspector General, *The Establishment of Child Support Orders for Low-Income Non-custodial Parents*, OEI-05-99-00390 (July 2000), at 3.

(in which case a full year's worth of arrears would be sought) or whether the obligor had responded when made aware of his/her responsibilities.

Another approach worth considering is to place a **statutory cap on the amount of arrears that can be accumulated by a parent whose income is below poverty**. New York, for example, limits the amount of arrears that can be accumulated by a person with income at or below poverty to $500.[97] This keeps arrears from accumulating in cases where the possibility of repayment is minimal and the reason for non-payment is obvious. A major virtue of this approach is that it avoids the problem of retroactive modification of support orders, which is forbidden under the Bradley Amendment discussed in Part II above.

EXAMINING THE STATE'S POLICY ON INTEREST

As discussed above, current California law requires the imposition of 10% per year in interest on child support arrears. The Sorensen-Zibman data, as well as federal data, suggest that a good deal of California's accumulated arrears is related to this policy. One aspect is the imposition of interest itself. Most states that impose interest do this so that obligors will understand that there is a cost for not paying their support on time. However, half the states do not impose interest, in part because it does contribute to the accumulation of huge arrears and in part because of the bookkeeping difficulties it creates. California could **eliminate the practice of charging interest** and be in line with the practice of other states. Alternatively, it could **lower the interest rate**, thereby preserving the penalty for late payment, but reducing its impact on the accumulation of arrears.

At the same time, **reconsideration should be given to the current policy of attributing arrears collections to interest before principal**. While this is allowable under federal law, the result of this policy is that arrears are never paid off as the bulk of all payments go to pay off the accumulated interest. This creates a never-ending cycle in which the state must keep unproductive, arrears-only cases open for years and obligors perceive that there is no end to payment. Changing this policy to attribute collections to principal first would reduce future problems for both the state and parents and could have an appreciable impact on reducing the $20 billion in additional interest and arrears Sorensen and Zibman estimate will accrue if current practice is maintained.[98]

If current policy is kept as the new computer system is set up, consideration should be given to tracking retroactive arrears, post-order arrears, and the interest thereon separately. (Connecticut is already doing this.) By doing this, the state would be able to track the effect of current policies more closely and have the kind of data needed for a future assessment. Separate tracking would also enable the state to develop sophisticated arrears management techniques, such as writing-off the interest in exchange for a lump sum payment of most/all of the principal owed. (This is discussed in greater detail in Part V.)

[97] N.Y. Family Law §240(1-b)(g).
[98] Sorensen and Zibman, *supra*, p. 40, Table 18.

SWIFT ENFORCEMENT

One of the reasons arrears accumulate is that too much time elapses between the entry of an order and the implementation of the income withholding process. **Priority should be given to developing procedures for serving income withholding orders on employers on the day an order is entered or within one or two days thereof.**

Another factor is failure to act swiftly when an order goes into default. The longer the time between lapse in payment and enforcement action, the larger the accumulated arrears (and the more difficult things are for the custodial parent and the children). In building its new system, California should:

- **Have a process for acting quickly when non-payment occurs**. For example, New Hampshire sends an automatic notice of default after 30 days. It also schedules a hearing on any case that is in default over 90 days.

- **Expand the use of one state interstate remedies**. If the non-custodial parent lives or works out of state, California should immediately use the UIFSA enforcement provisions discussed in Part II to swiftly cure default.

SIMPLIFYING THE PROCESS FOR MODIFICATION

As discussed in Part II, under the Bradley amendment, every child support installment is a judgment by operation of law on the day it is due and cannot be retroactively modified. If an obligated parent has a drop in income and is unable to meet his/her obligation under the order, he/she must seek a downward modification. If he/she does not do so, arrears under the order will accumulate. Many non-custodial parents do not remember this and thus do not take appropriate action when they suffer a severe drop in income. Some states have addressed this problem by **sending personnel to work sites where large scale lay-offs are occurring.** For example, Puerto Rico conducts outreach at private or government entities about to experience major lay-offs, providing non-custodial parents with detailed information about the modification process. Another approach is to send **notice to individuals whose unemployment checks are being garnished to pay their support.** West Virginia law requires this so that parents whose unemployment benefits are being intercepted for child support payments know about their right to seek a downward modification of the support order.[99]

However, it is not enough to provide a reminder to affected parents. Since most non-custodial parents in the IVD system are not represented by counsel, **the modification process itself needs to be simple and the forms must be easy to use**. In this regard, New Jersey and Massachusetts have developed pro se packages for the modification process and made those materials available on the Internet. New Hampshire has simplified its forms and conducted evening workshops on the pro se process. In Maryland, the IVD agency funds a worker at the court house to assist non-custodial parents in completing the pro se forms.

[99] West Va. Stat. §48-2-17.

DCSS should also consider adjusting the standard for modification. As noted above, even at the three-year review, an obligor has to demonstrate a change of $50 or 30% in order to qualify for a modification. While at upper income levels these amounts may be appropriate, at lower income levels they may be too high. Perhaps a flat 10% change in the amount of the order should be implemented for lower income obligors.

Of course, once the obligated parent goes back to work, the order should be readjusted to reflect any increase in earnings. Thus, a similar approach should be available to custodial parents seeking an upward change in the order.

STRENGTHENING THE INTERFACE BETWEEN THE CHILD SUPPORT PROGRAM AND WORK PROGRAMS FOR LOW- INCOME NON-CUSTODIAL PARENTS

Both IVD program personnel and the courts are often faced with non-custodial parents who have limited ability to earn an income out of which to pay support. As noted in Part II, federal law requires states to have the ability to refer such obligors to a work program. Some states have used this legislative mandate in conjunction with Welfare-to-Work funding to establish positive interface between the IVD program, the courts, and the local work force agencies. The federal Office of Child Support Enforcement has made it clear that such collaborations are encouraged and that FFP is available for the referral, follow-up, and tracking of non-custodial parents to such programs.[100]

Using this authority, some states and localities have established innovative programs. For example, in Houston, Texas, the IVD agency, the courts, and the Houston Works have a cooperative agreement. A Workforce Development Specialist is assigned to the court four days per week. The Specialist determines eligibility for Welfare-to-Work programs. If the parent is not eligible, but is in need of services, a slot in another program with less restrictive criteria is made. The IVD agency also makes referrals to Houston Works in appropriate cases. Services include vocational training, adult basic education, subsidized work experience, peer counseling, on-the-job training, transportation assistance, and work-related expenses. Short-term emergency housing and parenting training are also available.[101] Similar programs might be established in California through collaboration between the courts, DCSS, and work force development programs, including community-based organizations.

DEVELOPING PROTOCOLS FOR DEALING WITH INCARCERATED PARENTS

According to Sorensen and Zibman, about 2% of obligors with recent income and 5% of those without recent income are in state prison.[102] While this is not a large percentage of cases, this population does present some unique challenges.

As noted in Part III, some prisoners do have income and assets that could be used to support their children, and efforts should be made to pursue these. However, the vast majority have only their

[100] See OCSE Action Transmittal 00-08 (September 15, 2000).
[101] A description of the program is found in Frank Powell, *Welfare to Work: A Father-Friendly Approach to Child Support*, material presented at the Eastern Regional Interstate Child Support Enforcement Program, May 22,2001.
[102] Sorensen and Zibman, *supra*, at 34.

prison wages (which are minimal) or no wages at all. If their support orders are not modified, these individuals will accumulate substantial arrears based on their pre-incarceration income. Some states deal with this problem through **legislation, which suspends the support obligation for the period of incarceration of prisoners with no income**. This keeps arrears from running when the non-custodial parent has no ability to pay. It also eliminates the need for a state to devote substantial resources to modifying the orders themselves.[103] Alternatively, some states **notify the recently incarcerated that their obligation continues to run and tells them what steps need to be taken to modify the order, if that is appropriate.** Oregon has recently implemented a model project in this regard. That state has established a rebuttable presumption that a non-custodial 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 such a parent requests modification, the order is reduced to zero dollars per month for the period of incarceration.[104] To make sure that inmates know their rights and responsibilities, the Department of Corrections and the IVD agency developed presentation materials, including a computerized slide show, frequently-asked-question handouts, and phone lists. The IVD agency also provides modification forms and pre-paid envelopes to inmates so they can use the process. Sixty-one days after release from incarceration, the order reverts to the original amount. This eliminates the need for a second modification and puts the inmate on notice that, once incarceration ends, he/she is expected to support the children.

[103] See, N.C. Gen Stat. 50-13.10(d)(4).
[104] Ore. Administrative Rule 461-200-3300.

PART V
POSSIBLE APPROACHES TO THE ARREARS ALREADY ACCUMULATED BY LOW- AND NO- INCOME OBLIGORS.

There is considerable controversy about whether child support arrears should ever be written off. Some argue that writing off the debt undermines the effectiveness of the child support program by giving obligors the sense that, if they simply hold out long enough, they will be able to avoid their obligations. Indeed, arrears forgiveness is seen by many as rewarding the most irresponsible parents while sending those who struggled to meet their obligations a message that they were foolish to be responsible. Others argue that, in many cases, the original order was too high, making it impossible for the non-custodial parent to meet his/her obligation. They argue that, if an order commensurate with actual income had been established, the obligors would have been able to meet their obligations and huge arrears would not have accrued. Therefore, it makes sense for the state to adjust the amount of arrears to be collected.

The Sorensen and Zibman analysis supports the latter view, at least in California. They document the existence of very high orders for those with little or no present ability to pay. For example, they find that the median monthly child support award for obligors with *no recent earnings* is $277.[105] For obligors with earnings whose income is below $5,000 per year the median monthly order is $280, or twice their net monthly income. The median monthly award for those with earnings and income between $5,000 and $10,000 is $276, and the median award for those with earnings and income between $10,000 and $15,000 is $285.[106] In other words, at the lower end of the income spectrum, awards are not reflective of current ability to pay and do not seem to be in line with California's existing support guidelines. Thus, it would be reasonable for the state to develop some policy of at least partial forgiveness of arrears accumulated by low-income obligors.

Sorensen and Zibman also document the likely futility of pursuing a large part of the arrears. They show that, of the $14.4 billion in arrears, $8.1 billion is owed by individuals with almost no ability to pay: those with annual incomes less than $5,000.[107] Even with maximum effort, it is going to be impossible to collect much on these arrears. Given the child support program's limited resources, it is simply not worth engaging in such futile efforts. The program resources would be better used to maximize current support collections, thereby lessening the amount of arrears that will accumulate in the future. In addition, carrying an amount on the books that all recognize to be uncollectable has a negative effect on the morale of those who work in the child support system. It also contributes to the public perception that the program is ineffective.

However, because this is a controversial and complicated issue, the state will want to proceed deliberately and with careful analysis. Below are some steps that could be considered in developing a policy.

[105] Sorensen and Zibman, *supra*, at 34.
[106] Id. at 32.
[107] Id. at 36.

EXAMINING ORDERS ESTABLISHED PRIOR TO THE USE OF CHILD SUPPORT GUIDELINES

Before mandatory child support guidelines, federal regulations required states to have a formula for setting awards in public assistance cases. California practice was to set the order at the amount of the family's public assistance grant. Thus, the order was in no way reflective of the non-custodial parent's actual ability to pay. Some of the orders on which arrears are owed were undoubtedly set under this old system.[108] The arrears owed pursuant to these orders are also likely to have been permanently assigned to the state under the AFDC assignment law discussed in Part II of this paper. Since these are amounts owed to the state, the state could partially or completely write off these debts. **For those cases without a current support obligation in which the obligor has income of less than $15,000 per year, it would be worth examining the date the order was set to determine whether it was established before the use of guidelines. If the order was set based on the public assistance grant rather than ability to pay, the debt might be wholly or partially written off.**

EXAMINING ORDERS ESTABLISHED SINCE THE ADVENT OF GUIDELINES THAT SEEM INCONSISTENT WITH THOSE GUIDELINES

As noted in Part II, California has special guideline provisions for low-income obligors. Those with net monthly income below $1,000 a month may be eligible to have their orders reduced. Given what Sorensen and Zibman documented about the size of median orders for those with no income and those with income below $15,000 per year, it appears that many low-income obligors are either unaware of the special guidelines provision or that courts are not using this provision. While it is impossible to review every order, DCSS could establish **a pilot project on modification staffed by personnel who are able to assist low-income non-custodial parents obtain an order more in keeping with the guidelines. These staff might also be given the authority to negotiate a downward adjustment in any arrears owed to the state under the prior order.** As noted in Part II, as long as the negotiations involve only money assigned to the state, the DCSS is allowed to enter such negotiations.

SCREENING NON-CUSTODIAL PARENTS FOR POSSIBLE DISABILITIES

Some of the very low/no-income non-custodial parents identified by Sorensen and Zibman may have physical or mental disabilities severe enough to qualify for Social Security Disability Income (SSDI). If they qualify, their children are eligible for dependent's benefits. The children might receive a lump sum retroactive payment as well as ongoing monthly support. Therefore, it may be worth considering a strategy under which **low/no-income cases are screened for disabilities and possible SSDI eligibility.**[109] If eligibility exists, the screeners could also ensure

[108] According to Sorensen and Zibman, 26-27% of obligors with recent earnings who owe arrears do not have a current support order. Most of these are probably old orders in which the children have aged out and were likely set based on public assistance levels, not ability to pay.

[109] For many years, New York State has contracted with local legal services programs to represent individuals applying for/receiving welfare benefits who might be eligible for SSDI or Supplemental Security Income (SSI) benefits to facilitate their access to these programs. The state estimates that it saves substantial state and local funds by moving people to these federal programs, while also increasing the amount of benefits those individuals obtain. California might use this as a model to develop a similar program for child support debtors.

that dependent's benefits are sought. The non-custodial parent could be credited with any lump sum retroactive benefits against his/her child support arrears. The order could also be modified to have any future dependent's benefits credited against the current support obligation. It would also be worth considering legislation so that, in the future, non-custodial parents would be given **automatic credit for dependent's benefits provided to their children without the need to modify the order.**

INCORPORATING AN ARREARS ADJUSTMENT PROCESS INTO NON-CUSTODIAL PARENT PROGRAMS

Recently, there has been substantial interest in reaching out to low-income non-custodial parents and providing services to them so that they can provide financial and emotional support to their children (see discussion in Part III above). Operators of these programs often identify the existence of substantial arrears as a barrier to a parent's participation in such programs. As a result, there has been growing interest **in incorporating some arrears adjustment into fatherhood programs.** For example, the Maryland State Owed Child Support Arrears Leveraging Program began in July 2000. This program is a partnership between CSEA and 6 community based organizations in Baltimore City. Each CBO serves a maximum of 20 fathers and provides a range of fatherhood programs and services. Participation is voluntary. If the non-custodial parent successfully completes the initial 6 months of training, arrears are reduced by 25%. Thereafter, each 6 months of success reduces the debt by 25% up to and until the entire TANF debt is forgiven. Early data suggests a positive effect on the total amount paid as well as the average payment per case.

DEVELOPING ALTERNATIVE PAYMENT METHODS

Another approach is to develop projects under which non-custodial parents can "work off" their obligation in a form other than cash. For example, in Marion County (Indianapolis), Indiana, the IVD agency contracts with the Indianapolis Department of Public Works to provide community service jobs to unemployed non-custodial parents. Those parents can either work or pay a purge bond. If they choose to pay the purge bond, the money is credited to their arrears. If they work, the value of their work is attributed to the debt. In 2000, $16,928 in purges and work valued at $50,238 was performed in this program.[110]

NEGOTIATING PAYMENT AGREEMENTS

Agreements Involving Arrearage Amounts

Several states are **developing** or have developed **policies for caseworkers to use in forgiving some or all of the arrears owed to the state by obligors who clearly lack the capacity to pay off their debts.** For example, Maryland is implementing a program under which caseworkers, with approval from the Executive Director, can forgive arrears in cases where it is clear that, had the obligor properly filed a motion to modify his/her obligation, the obligation would likely have been modified, suspended, or terminated. This includes cases where the obligor 1) was

[110] Denise McCleese, *Making Something Out of Nothing*, material presented at National Child Support Enforcement Association's Annual Conference, New York, New York, August, 2001.

incarcerated and had no income; or 2) suffered a serious physical or mental illness that affected his/her ability to work.[111]

The legislatures of Connecticut[112] and Minnesota[113] have also authorized the development of state-owed arrears forgiveness policies.

Another approach is taken in Vermont. That state forgives a certain percentage of arrears owed to the state in exchange for a lump sum payment. The lump sum is generally paid at one time, but installment payments are also allowed. The extent of the forgiveness depends on how long it would take the non-custodial to pay off the debt. For example, if it could be paid off in 1-3 years, the state would accept an 80% payment in satisfaction of the debt. If it would take the obligor more than 10 years to repay the obligation, then a lump sum payment of 50% of the amount owed wipes out the entire debt. In cases where the non-custodial parent has little/no work history or income, has health problems, or there is little potential for future payment, an even smaller lump sum may be negotiated as full repayment of the debt. Each settlement is accompanied by a full repayment plan so that, if the lump sum is not paid as agreed, full enforcement of the entire debt commences.

Still another approach is being tried in Iowa. In a pilot project, that state forgives a certain percentage of state-owed arrears if the obligor pays his/her support on time for a certain period. This approach emphasizes the importance of getting current support to families in the post-TANF period. If the obligated parent pays current support for six consecutive months, 15% of the arrears are forgiven; 12 months of regular payment reduces arrears by 35%, while 24 consecutive months of regular payment yields 80% debt forgiveness.

Agreements Involving Interest

The Sorensen-Zibman data also reveal that a good deal of what is owed in California represents interest on arrears. California might consider establishing a policy under which some or all interest payments would be reduced or forgiven in exchange for lump sum payment on actual arrears owed to the state under a TANF or AFDC assignment. Massachusetts is currently designing such a policy. A variation is being tried in West Virginia where new legislation authorizes the state agency to write-off the interest if the obligor pays all arrears due within 24 months.

CASE CLEANUP

Some cases on which arrears are owed should be closed. For example, Sorensen and Zibman found 257 cases in the system in which the obligor was dead.[114] While this is not a large number of cases, some of the **dead parents** may be holding substantial debt. Moreover, since California does not have a statute of limitations on collection of arrears, there are likely a number of quite

[111] Maryland Family Law 10-112 and 10-118. The program also allows arrears forgiveness in cases where the non-custodial parent became the custodial parent of the children and those where the parents have reunited.
[112] Conn. Gen Statutes §17b-93(e).
[113] Minnesota Statutes of 1998, section 23.
[114] Sorensen and Zibman, *supra*, at 23.

old cases in the system.[115] The obligors in these cases are reaching the age at which mortality rates begin to rise so ? in the near future ? the number of cases in the IVD system involving deceased parents is also likely to increase. Where an obligor has died and there is no estate to collect from, it is foolish to carry the case on the books, and federal regulations[116] clearly allow the closure of such cases. This should be done now, and protocols should be developed to clear these cases periodically from the system hereafter.[117]

Thought might also be given to closing **arrears-only cases when the arrears owed are either less than $500 or unenforceable under state law** (e.g., the obligor's only income is SSI benefits, which cannot be garnished). Given the substantial number of arrears-only cases Sorensen and Zibman found in the California caseload, it may be that many of these cases and can and should be closed. Again, this is consistent with federal case closure regulations.[118]

A third category of cases that might be closed is those in which there **is no Social Security number (SSN).** Sorensen and Zibman found that about 8% of the cases in administrative records had not been sent to IDB for enforcement. These cases probably did not have an SSN, which is mandatory for IDB enforcement.[119] If there is no current location information on the obligor in these cases, and the state can document (or now makes) diligent but unsuccessful efforts to locate the non-custodial parent, these cases might also be closed pursuant to federal regulation.[120]

If a case closure strategy is used under any of these circumstances, the custodial parent must be notified before case closure.[121] This gives the parent an opportunity to come forward and provide any additional information she/he has that might be a basis for keeping the case open. In that way, DCSS might obtain information that makes it worth keeping the case open and pursuing a collection.

In short, there are a number of ways to eliminate cases on which the probability of collection is extremely low. If this is done, efforts can be better focused on enforcement of cases where there is a likelihood of payment and cases where some compromise agreement may bring at least some revenue to the state.

[115] Recall that Sorensen and Zibman found that there was not a current support order in 36% of the cases in which the debtor had recent income and 47% of the cases in which the debtor had no recent income. While not a perfect match, it is likely that most of these cases involve situations where the order has expired because the children reached the age of majority, i.e., those involving older parents.
[116] 45 CFR §303.11(b)(2).
[117] New Jersey and Delaware, for example, now automatically match their case records with the state's death records.
[118] 45 CFR §303.11(b)(1).
[119] Sorensen and Zibman, *supra*, at 12.
[120] Id. §303.11(b)(4)(ii).
[121] Id. §303.11(c).