Child-Support Issues for Parents Who Receive Means-Tested Public Assistance

By Paula Roberts

Establishing and enforcing child-support obligations can be a complicated process. When one or both of the parents receive means-tested public assistance, the process is even more complex.[1] In this article I first give background information on several public assistance programs and their related child-support provisions. I then desaibe the typical services offered by a state child-support enforcement program. After highlighting the debate about whether the child-support agency represents the custodial parent, the child, or the state, I explore some of the critical issues in applying the child-support guidelines in calculating cash and medical support obligations when one or both parents receive means-tested public assistance. Some of these issues are whether public assistance is countable as "income," whether a court should impute income to a parent with no countable income, whether minimum-sup port awards should be established, and whether support payments in forms other than cash are allowed. I also explore policies to be considered when deviating from child-support guidelines and approaches to adjusting awards based on visitation. Finally I discuss enforcement issues unique to the situation in which the noncustodial parent receives public assistance or Social Security Disability Income.

I. Public Assistance Programs

Starting with the basics of public assistance programs and their related child-support provisions is helpful in understanding child-support issues for parents who receive means-tested public assistance:

■ Temporary Assistance for Needy Families supplies time-limited assistance—in the form of cash and services-to families that have at least one minor child, little or no income, and few assets.* Recipients must assign their child-support rights to the state and, unless they have good cause for failing to do so, must cooperate with the state in pursuing those rights.[3] Failure to cooperate results in a

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1 An assistance program is considered "means tested" if eligibility for its benefits, or the amount of such benefits, or both, are determined on the basis of income or resources of the eligibility unit seeking the benefit. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA); Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45256, 45256 (proposed Aug. 26, 1997).

2 42 U.S.C.A. §§ 601 *et seq.* (West Supp. 1999).

3 *Id.* §§ 608(a)(3) (requiring recipients of Temporary Assistance for Needy Families to assign their child support rights to the state), 654(29) (requiring recipients of Temporary Assistance for Needy Families to cooperate with the state in pursuing their child-support rights, unless they have good cause for failing to do so).

loss of at least 25 percent of the family's assistance; the state has the option to impose an even stiffer penalty.[4]

- Food stamps are used to purchase food at authorized stores.[5] Single people, childless couples, and families with children are all potentially eligible for this benefit. Thus the custodial parent and children may live in one food stamp household while the noncustodial parent lives in a separate food stamp household.[6] To receive food stamps, a family must have limited income and assets.' States are allowed, but not required, to impose a child-support cooperation requirement on both custodial and noncustodial parents who receive food stamps. Failure to cooperate leads to a loss of the noncooperating individual's food stamps.[8] The state may also opt to discontinue the coupon allotment of noncustodial parents who are in arrears on their child-support payments and have not arranged to pay those arrears? The amount of food stamps a family receives depends on its size and income. When the custodial parent's household receives food stamps, cash child-support payments are treated as unearned income.[10] The more support received, the lower is the family's food stamp allotment. When the noncustodial parent receives food stamps and pays child support, that parent's support payments are deducted from income." Because the household's income is reduced, its coupon allotment increases.

- Medicaid supplies health care services to eligible adults and children.[12] Only those with low income and few resources receive assistance. Most recipients of Temporary Assistance for Needy Families are eligible for Medicaid. Many children and some parents in families not receiving such assistance also qualify for Medicaid coverage.[13] Custodial parents receiving Medicaid must assign their medical

[4] *Id.* § 608(a)(2).Approximately one-third of the states impose a 25 percent sanction, another one-third take away the entire grant, and another one-third have a system of gradually escalating penalties for noncooperation. See VICKI TURETSKY, STATE CHILD SUPPORT COOPERATION AND GOOD CAUSE: A PRELIMINARY LOOK AT STATE POLICIES (Aug. 1998) (available at www.clasp.org/pubs/childsupport/coopsum.htm or from the Center for Law and Social Policy, 202.328.5140).

[5] 7 U.S.C.A. §§ 2031 *etseq.* (West Supp. 1999).

[6] A significant number of these families also receive assistance funded by the Temporary Assistance for Needy Families program and are subject to the child-support requirements of that program as well as the child-support requirements of the Food Stamp Program. A large group of families do not receive Temporary Assistance for Needy Families but do use food stamps. These "food stamp only" families consist of (1) custodial-parent families who have income or assets over their state's Temporary Assistance for Needy Families' limits but who do meet the income and asset tests of the Food Stamp Program and (2) low-income noncustodial parents, both single parents and those who have formed new families. A 1998 study indicates that about 28 percent of low-income noncustodial parents participate in the Food Stamp Program. See Elaine Sorensen & Robert Lerman, *Welfare Reform and Low-Income Noncustodial Fathers,* 41 CHALLENGE 101 (Aug.-Sept. 1998).

[7] 7 U.S.C.A. § 2014 (West Supp. 1999).

[8] *Id.* § 2015(l), (m). Proposed federal regulations implementing these requirements were issued on December 17, 1999, at 64 Fed. Reg. 70949–51.

[9] 7 U.S.C.A. § *2015(n)* (West Supp. 1999). Proposed regulations implementing this option, issued December 17, 1999, are found at *64* Fed. Reg. 70951.

[10] 7 C.F.R. § 273.9(b)(2)(iii) (1999). The one exception to this is where the family also receives Temporary Assistance for Needy Families and the child support must be turned over to the state as a condition of eligibility for such assistance. 45 C.F.R. § 232.12(b)(4) (1999). Then the child support is not counted as family income. 7 C.F.R. § 273.9(b)(5)(ii) (1999).

[11] 7 U.S.C.A. § 2014(e)(4) (West Supp. 1999); 7 C.F.R. § 273.9(d)(7) (1999). Informal payments do not count, however. The payments must be those that the parent is "legally obligated to make" in order to qualify for a deduction. See 7 U.S.C.A. § 2014(e)(4) (West supp. 1999).

[12] *42* U.S.C.A. §§ 1396–1396s (West Supp. 1999).

[13] *Id.* § 1396a(a)(10)(A)(i) (West Supp. 1999).

support rights to the state.[14] In the absence of good cause, they must cooperate with the state in establishing paternity and pursuing medical support.[15] Failure to do so disqualifies the custodial parent from Medicaid coverage.[16]

- State Children's Health Insurance Program is a health care program for children whose family income is above the Medicaid-eligibility level but too low to afford private insurance.[17] Families on this insurance program may be asked to pay part of the premiums and make nominal copayments.[18] Families on the program are not required to cooperate with the state in pursuing medical support or to use the services of the state's child-support enforcement program.

- General assistance programs supply cash assistance to indigent single adults and childless couples. There is no national general assistance program. Thus whether such programs exist and the rules governing them are purely a matter of state or local law.

- Supplemental Security Income is a federal program that supplies cash assistance to individuals who are over 65, blind, or disabled.[19] Such individuals must have low income and few assets.[20] Benefits are set nationally, although many states add a supplement to these benefits.[21] Benefits are not increased if the family has children.[22]

- Social Security Disability Insurance, part of the social security system, is a program under which workers who become disabled may receive cash benefits. Unlike Supplemental Security Income benefits, these payments are not restricted to those with low income and few assets.[23] Moreover, Social Security Disability Insurance benefits include funds to support the worker's children. If the children do not live with the disabled worker, they receive a separate check.[24] No child-support cooperation requirements are associated with these benefits.

Five of these programs-Temporary Assistance for Needy Families, food stamps, Medicaid, State Children's Health Insurance Program, and Supplemental Security Income-are federal means-tested public assistance programs. That is, program eligibility or amount of benefits or both are based on the income or resources of the eligibility unit seeking the benefits. General assistance is a state-based means-tested program. Social Security

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[14] *Id.* § 1396k(a)(1)(A).

[15] *Id.* § 1396k(a)(1)(B).

[16] *Id.* § 1396k(a)(1)(A), (B). An exception exists for pregnant and postpartum women.

[17] *Id.* §§ 1397aa-jj. In most states the cutoff point is 200 percent of the federal poverty line or 50 percent above the state's Medicaid eligibility level, whichever is higher. A few states offer coverage to children in families with even higher income.

[18] *Id.*

[19] *Id.* § 1382(a).

[20] For a description of the rules, see 20 C.F.R. pt. 416 (1999).

[21] In 1999 the monthly federal benefit, which is indexed yearly, was $500 for an individual and $751 for a couple. See SOCIAL SEC. ADMIN., PUB. No. 05-11000, SUPPLEMENTAL SECURITY INCOME (July 1999) (also available at www.ssa.gov/pubs/11000.html). About 37 percent of Supplemental Security Income recipients also receive social security benefits, 12.4 percent have unearned income, and 4.4 percent have earnings. See STAFF OF COMM. ON WAYS & MEANS, 105TH CONG., 2D SESS., 1998 GREEN BOOK 264, tbl. 3.1 (Comm. Print 1998) The average state supplement was about $100. *Id.*

[22] For an excellent discussion of family law issues for those receiving Supplemental Security Income, see James R. Sheldon Jr. & Diana M. Straube, *Supplemental Security Income and the Family Law Attorney: Using Creative Alimony, Child Support, and Property Settlements to Maximize Supplemental Security Income and Medicaid*, 33 CLEARINGHOUSE REV. 148 (July-Aug. 1999).

[23] 42 U.S.C.A. § 423 (West Supp. 1999).

[24] *Id.* § 402(d). For a discussion of whether these Social Security Disability Insurance payments should be credited against the noncustodial parent's child support obligation, see subsection VI.C infra.

Disability Insurance, although not a means-tested program, is important to the discussion of child-support issues for parents receiving public assistance because—as will be discussed further in subsection VI.C below-one of the most litigated issues in child-support practice is whether such disability insurance payments to children in a different household should be credited against the noncustodial parent's child-support obligation.

II. The State Child-Support Enforcement Program

Every state has a publicly funded child-support enforcement agency.[25] Recipients of Temporary Assistance for Needy Families and Medicaid automatically receive services from this agency, as do custodial parents living in states that have chosen to impose a child-support cooperation requirement on food stamp recipients.[26] Other families may obtain services by filing an application.*'

Among the services offered by the state child-support enforcement program are the following:

Locating Parents. Every state must have the capacity to locate missing parents and obtain and verify income and asset information about parents owing or potentially owing support. A state does this through its Parent Locate Service and its New Hire Directory.[28] A federal version of the service and the directory can supply information about parents living in other states.[29]

Establishing Paternity. Paternity may be established through a voluntary acknowledgment executed by the parents or through a contested proceeding.[30] If either parent wants genetic tests, the child-support agency may order them and will pay the costs up front.[31] Parents subject to a public benefits-related child-support cooperation requirement must submit to genetic tests when these tests are ordered.[32]

Establishing and Modifying Support Orders. Using a numeric guideline adopted by the state, the child-support agency establishes and periodically modifies child-support orders.33 Deviation from the guideline amount is allowed only when the guideline would yield an unjust or inappropriate result.[34] In such a case, the court must make specific findings on the record as to why the deviation was allowed and how it serves the best interest of the child.[35]

Addressing the Child's Health Care Needs. Every order that the state's child-support enforcement agency obtains must address the child's health care needs.[36] If private insurance is available to the noncustodial parent at a reasonable cost, the court must order that parent to furnish the insurance.[37]

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[25] *Id.* §§ 651 et *seq.* For more on the history of this program and the services it provides, see Naomi R. Cahn &Jane C. Murphy, *Collecting Child Support: A Histo y of Federal* and *State Initiatives,* in this issue.

[26] 42 U.S.C.A. § 654(4)(A)(i) (West Supp. 1999).

[27] *Id.* § 654(4) (West Supp. 1999).

[28] *Id.* §§ 654(8) (Parent Locate Service); 653A, 654(28) (New Hire Directory).

[29] *Id.* §§ 653 (Federal Parent Locate Service), 653(i) (New Hire Registry).

[30] *Id.* § 666(a)(5)(C) (permitting establishment of paternity through a voluntary acknowledgment executed by the parents).

[31] *Id.* §§ 666(c)(1)(A) (permitting child-support agency to order genetic tests if either parent wants them), 666(a)(5)(B)(ii)(I) (providing that child-support agency will pay costs of genetic tests up front).

[32] *Id.* § 654(29)(C).

[33] *Id.* § *667. See also id.* § 666(a)(10).

[34] *Id.* § *667(b)(2).*

[35] *Id.*; *45* C.F.R. § 302.56(g) (19993).

[36] 42 U.S.C.A. § 652(f) (West Supp. 1999); 45 C.F.R. § 303.31(b), (c) (1999).

[37] 45 C.F.R. § 303.31(a)(l) (1999). If insurance is available through the noncustodial parent's employer *or* some other group health insurance plan in which the noncustodial parent is eligible to participate, it is deemed to be "reasonable" in cost. *Id.*

Enforcing Support Orders. With limited exceptions, every child-support order must be enforceable by immediate wage withholding, that is, as soon as the support award is entered, the noncustodial parent's employer must be served with a notice to deduct the ordered support from that parent's wages and forward the payment to the child-support agency for distribution.3 If the noncustodial parent also has been ordered to furnish health insurance, the employer must be notified to enroll the child in the health plan and deduct any premiums related to that coverage from the noncustodial parent's paycheck.39 If the noncustodial parent is not subject to wage withholding (e.g., the parent is self-employed) or falls behind in payments, the agency has at its disposal other enforcement tools, including tax refund intercepts and withholding from Unemployment Insurance.[40]

Distributing Child Support Collected. Whether the support collected benefits the children depends on the family's public assistance status. If the family is receiving noncash assistance, it will receive the support as long as no arrearages are owed to the state.[41] If the family is receiving cash assistance funded by the Temporary Assistance for Needy Families program, support payments are first divided between the state and federal governments.[42] The federal government keeps its share as reimbursement for the family's benefits under the program.[43] The state may keep its share or give some or all of the money to the family.44 If it gives the money to the family, the state may count it as income and reduce the amount of the family's grant under the program. In the alternative, the state may disregard this amount in calculating the family's eligibility for the program or grant amount or both.[45] In the latter case, the child support collected actually benefits the children.[46]

Families receiving only food stamps receive the current support collected on their behalf.[47] This money is counted as income and will reduce somewhat the family's food stamp allotment.[48] Families receiving only Medicaid also are entitled

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[38] 42 U.S.C.A. § 666(a)(L), (a)(8)(B), (b) (West Supp. 1999). See section VI *infra* for a discussion of enforcing child-support orders when the noncustodial parent receives public assistance or Social Security Disability Insurance.

[39] *Id.* § 666(a)(19).

[40] *Id.* §§ 654(18) (tax-refund intercepts), 654(19)(a) (withholding from Unemployment Insurance).

[41] See Office of Child Support Enforcement Action Transmittal 98-24, Instructions for the Distribution of Child Support Under Section 457(a)(6) of the Social Security Act (the Act), Definition of Assistance Paid to the Family for Child Support Purposes, and Additional Questions and Answers 10 (undated) (also available at www.acf.dhhs.gov/programs/cse/1998-at.htm).

[42] 42 U.S.C.A. § 657(a)(1) (West Supp. 1999). The federal share is generally determined by multiplying the amount collected by the state's Medicaid match rate. *Id.* § 657(c)(2), (3). E.g., if a state collects $200 and its Medicaid match rate is 50 percent, then the federal government gets $100. The only limitation is that the government may not retain more child support than it has paid out in public assistance to the family. *Id.* § 657(a)(1).

[43] *Id.* § 657(a)(l)(A), (c)(2).

[44] *Id.* § 657(a)(l)(B).

[45] If the state opts to do so, it may receive maintenance-of-effort credit for doing so. *Id.* 609(a)(7)(B)(i)(I)(aa).

[46] The majority of states use the state share to reimburse themselves. Some do pass-through and disregard a portion of the payment. See my *The Potential of Child Support as an Income Source for Low-Income Families*, 31 CLEARINGHOUSE REV. 565 (Mar.-Apr. 1998).

[47] 42 U.S.C.A. § 657(a)(3) (West Supp. 1999). These families are considered to be families who "never received assistance" because the **statute** limits the definition of "assistance" to programs funded under title IV-A of the Social Security Act (Temporary Assistance for Needy Families and its predecessor, Aid to Families with Dependent Children) and foster care maintenance payments. *Id.* § 657(c)(1).

[48] *7* U.S.C.A. § 2014(d) (West Supp. 1999).

to receive the cash support collected on their behalf.[49] Benefits are not affected unless the amount is so large that the family becomes ineligible for Medicaid coverage.

III. The Issue of Representation in the State Child-Support Enforcement Program

From the inception of the child-support program, there has been debate about whether the child-support agency represents the custodial parent, the child, or the state.[50] To settle the question, many states have enacted statutes clearly stating that the agency represents the state.[51] This has serious implications when the custodial parent receives public assistance.

Example 1. A custodial mother and her two children receive cash assistance under Temporary Assistance for Needy Families. The children's noncustodial father plays a strong positive role in their lives. He works 20 hours per week at a minimum-wage job. Under the state's child-support guidelines, he would owe $100 per month in support. This would leave him with an income of 52 percent of the federal poverty level ($352 per month) to meet his own needs. This result is arguably "unjust and inappropriate" so he has a good case for a downward deviation from the guidelines. The mother would like to agree to a lesser amount. She believes that if he is ordered to pay the full $100, he will disappear, depriving the children of regular contact with their father. She also knows that, under the distribution rules discussed in section II above, she will not get any of the support paid. However, the state wants to maximize the amount of child support owed by the father so that it can use the money to recoup its expenditures under Temporary Assistance for Needy Families. The child-support agency thus opposes a guideline deviation. Because the mother is required to cooperate with the child-support agency, she must either remain silent or speak up and risk loss of benefits due to noncooperation.

Example 2. Mother and father have three children. In 1996 the father left home, and the mother and the children began receiving Temporary Assistance for Needy Families. After two years the state child-support agency finally located the father through the New Hire Directory. The state now seeks to establish a current support award and an arrearage payment. Consistent with the state's child-support guidelines, the current support payment would be $300 per month, and arrears would equal $7,200. The state wants an order for the full amount. The mother, however, has just found a job and will be leaving the Temporary Assistance for Needy Families program. She would prefer a larger current support payment of $400 per month and is willing to forgive the arrears. She believes that the father is likely to pay the $400 because-once she is no longer receiving Temporary Assistance for Needy Families—the money will go to the children, with whom he has recently reestablished his relationship. However, the state wants the full amount of arrears as reimbursement for the public assistance given to the family. Because the arrears are assigned to the state, the mother has no voice in this decision.

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Example 3. A mother of two young children works full-time at a minimum-wage job. Because her family is low

[49] This is because "Medicaid only" families (like "food stamp only" families) are not receiving "assistance" as defined in the distribution statute. See *supra* note 47.

[50] *Compare* my *Attorney-Client Relationship and the IV-D System: Protection Against Inadvertent Disclosure of Damaging Information*, 19 CLEARINGHOUSE REV. 158 (June 1985), *with* Cynthia Bryant, *Ethics in IV-D Practice: The Real World Problems of IV-D Lawyers*, *in* IMPROVING CHILD SUPPORT PRACTICE (1986).

[51] See, e.g., N.C. GEN. STAT. §110-130.1(c) (1998).

income, the children qualify for and receive Medicaid coverage. The family would be considerably better off if it received the $250 a month in child support that the father would owe under the state's child-support guidelines. The state pursues the father and discovers that his employer sup plies health insurance coverage to the children of its employees. The state seeks to have the children covered under this plan so that it no longer has to supply Medicaid. However, the father would have to pay a $200 per month premium, and under the guidelines this would reduce his cash child-support payment to $100 per month. The mother would rather have the $250 in child support and retain Medicaid coverage. Because the state is unaffected by the amount of cash child support paid (since it all goes to the mother), it does not care about the downward adjustment in cash support if that adjustment will allow it to avoid the costs associated with the children's Medicaid coverage. Thus its interests are clearly different from the mother's

The tribunal setting or modifying the child-support award may or may not recognize the conflicts inherent in these situations. If it does not-or if it feels compelled to be guided by state fiscal considerations-then the award may not be in the best interests of the child.

IV Applying Child-Support Guidelines in Setting Current Awards

Even when no conflict of interest exists between the state and the custodial parent, several guidelines-related issues have to be addressed. These arise primarily because partners of custodial parents receiving public assistance are generally also low income.[52]

A. Public Assistance-Countable Income?

Every state has income-based child-support guidelines.[53] Some guidelines consider the income of both parents, while others consider only the income of the noncustodial parent.[54] Whichever model is used, the first question is always, What constitutes income?

Most states exclude some or all means-tested public assistance from their definition of "income" for guideline purposes.55 However, a few states are silent on the issue, and some appear to have no consistent rationale for dealing with the question.[56] Thus cash assistance funded by Temporary Assistance for Needy Families, the value of food stamp coupons, Supplemental Security Income, and general assistance may or may not be counted-depending on the state-in

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[52] See Irwin Garfinkel et al., *A Patchwork Portrait of Nonresident Fathers, in* FATHERS UNDER FIRE 48 (Irwin Garfinkel et al. eds., Russell Sage Found. 1998).

[53] 42 U.S.C.A. § 667 (West Supp. 1999).

[54] See, e.g., WASH. REV. CODE ANN. §§ 26.19.001 *et seq.* (West 1998) (considering the income of both parents) and MINN. STAT. ANN. § 518.551 (West 1999) (considering the income of only the noncustodial parent).

[55] *See*, e.g., FLA. STAT. ch. 61.30(2)(c) (1998) (providing that Temporary Assistance for Needy Families not be counted as income); GA. CODE ANN. § 19-6-15(b)(2) (1998) (providing that needs-based public assistance not be counted as income); CAL. FAM. CODE § 4058(c) (West 1998) (excluding Temporary Assistance for Needy Families, general assistance, and Supplemental Security Income from definition of income). For more information on this issue, see DIANE DODSON & JOAN ENTMACHER, REPORT CARD ON STATE CHILD SUPPORT GUIDELINES 55 (1994). However, because each state periodically reviews and revises its guidelines, advocates must check the most recent version of the guidelines when working in this area.

[56] E.g., Pennsylvania courts have used the same rationale to reach contrary conclusions about whether to consider public assistance income available to the household in setting a support obligation. *Compare* Whitmore v. Kenney, 626 A.2d 1180 (Pa. Super. Ct. 1993) (considering Supplemental Security Income as income), *with* Sanders v. Lott, 630 A.2d 438 (Pa. Super. Ct. 1993) (declining to consider Aid to Families with Dependent Children as income).

calculating a child-support award. However, advocates should note that Social Security Disability Insurance benefits—because they are not means tested—generally are considered to be "income."[57]

Depending on the state's definition of "income," one or both of the parents may have no countable income. Or a parent may have both countable and noncountable income. For example, a custodial mother who receives cash assistance funded by Temporary Assistance for Needy Families may also have employment income. Her cash assistance is not countable "income" under the state's guidelines, but her wages are. Another example is when a noncustodial parent receives Supplemental Security Income and also has some income from a sheltered workshop program. The Supplemental Security Income payments are not countable "income," but the sheltered workshop compensation is. In both cases the order should be based on the countable income. [58]

B. Imputing Income to Either Parent

Parents with no countable income may, nonetheless, have income imputed to them.

1. Noncustodial Parents

If a noncustodial parent is unemployed or underemployed, the court may impute income to that parent and base the award on the guideline amount at that higher level of income. This is likely to happen in three different situations:

- As a policy matter, noncustodial parents receiving Supplemental Security Income based on disability or parents receiving general assistance in a state that limits general assistance benefits to those who are unemployable should not have earnings imputed to them because they are by definition unable to work. However, courts do not necessarily apply this to cases involving Social Security Disability Insurance benefits.[59] Moreover, if the noncustodial parent participates in the Temporary Assistance for Needy Families program or a food stamp program in which inability to work is not an eligibility condition, a tribunal may impute to an unemployed or underemployed noncustodial parent income based on that parent's prior work history or current ability to work.[60]

. If the noncustodial parent is not receiving any form of public assistance but the child is receiving cash benefits from the Temporary Assistance for Needy Families program, the state agency may force that parent to go to work so that the parent can pay child support to offset the cost of public assistance. The agency is likely to allege that such noncustodial parents are employable and urge the court to impute income to them.[61]

- With few exceptions, incarcerated noncustodial parents have little or no

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[57] *See*, e.g., Forbes v. Forbes, 610 N.E.2d 885, 888 (Ind. Ct. App. 1993). See *also* Kimbrell v. Kimbrell, 884 S.W.2d 268 (Ark. Ct. App. 1994) (counting Social Security Disability Income as allowable where it was the sole source of income of custodial parent, noncustodial parent, and child).

[58] *See*, e.g., Proudfit v. O'Neal, 484 N.W.2d 746 (Mich. Ct. App. 1992) (Clearinghouse *No.* 48,077); *In re* Support of B. (Wisconsin v. Rose), 492 N.W.2d 350 (Wis. Ct. App. 1992). As noted in *supra* note 21, about 17 percent of Supplemental Security Income recipients have either earned or unearned income that may be counted in setting a support award.

[59] *See*, e.g., Taliaferro v. Taliaferro, 935 P.2d 911 (Ariz. Ct. App. 1996) (holding that imputing income to college-educated recipient of Social Security Disability Income benefits was not an abuse of discretion).

[60] See, e.g., *In re* Interest of Tamika S., 529 N.W.2d 147 (Neb. Ct. App. 1995). In this case, Food stamp recipient mother whose children were in Foster care had Full-time minimum-wage income imputed to her rather than actual earnings From a pan-time job because the court saw no reason why she should not be working Full-time.

[61] See, e.g., *In re* Marriage of Chiovaro, 805 P.2d 575 (Mont. 1991). IF the child is receiving assistance Funded by the Temporary Assistance For Needy Families program, Federal law also requires the agency to request that the tribunal order the noncustodial parent to participate in appropriate work activities. 42 U.S.C.A. § 666(a)(15(B) (West Supp. 1999).

earnings and no capacity to obtain income through work. Nonetheless, tribunals have been known to impute to these parents income based on their prior work history.[62] However, not all tribunals agree with this approach.[63] The recent trend has been to examine actual earnings and income of the incarcerated parent rather than impute income.[64]

2. **Custodial Parent.5**

In states using guidelines that take into account the income of both parents, income may be imputed to the custodial parent even when that parent is receiving public assistance. Either under the guidelines or on its own initiative, a tribunal may impute minimum-wage earnings to such a parent.[65] However, if the children are under school age, a child in the home is physically or mentally handicapped, or child care is unavailable or too costly compared to expected wages, then imputing income to the public assistance recipient may be precluded.[66] At the very least, the cost of child care should be taken into account when the tribunal contemplates imputing income to a low-income parent receiving public assistance.[67]

Another situation in which imputing income to a custodial parent receiving public assistance can arise is when that parent is both a custodial and a noncustodial parent. For example, a mother of three children may receive Temporary Assistance for Needy Families for the two children living with her while the third child lives with the father. Either the state or the father may seek support for that third child. If the state's child-support guidelines exclude means-tested public assistance from the definition of income and the mother's only income is public assistance, the tribunal would have to impute income to her in order to set an award. It may try to impute earnings.[68] Alternatively the tribunal may try in this situation to impute to the mother public assistance income rather than wages.

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[62] *See*, e.g., Mooney v. Brennan, 848 P.2d 1020 (Mont. 1993); Noddin v. Noddin, 455 A.2d 1051 (N.H. 1983); Proctor v. Proctor, 773 P.2d 1389 (Utah Ct. App. 1989). For more on this point, see Frank Wozniak, *Loss of Income Due to Incarceration as Affecting the* Child *Support Obligation,* 27 A.L.R. 5th 540 (1995).

[63] See, e.g., Oregon v. Vargas, 70 Cal. App. 4th 1123 (1999); Johnson v. O'Neill, 461 N.W.2d 507 (Minn. Ct. App. 1990); Leasure v. Leasure, 549 A.2d 225 (Pa. Super. Ct. 1988).

[64] *See*, e.g., Bendixen v. Bendixen, 962 P.2d 170 (Alaska 1998); State *ex rel*. Department of Econ. Sec. v. McEvoy, 955 P.2d 988 (Ariz. Ct. App. 1998).

[65] *See*, e.g., OR. ADMIN. R. 137-050-0340(3) (1998) (requiring the tribunal to impute a full-time minimum-wage income to a parent who receives Temporary Assistance For Needy Families). See also *In re* Marriage of Weed, 836 P.2d 591 (Mont. 1992) (imputing minimum-wage income to an able-bodied custodial parent who received Aid to Families with Dependent Children).

[66] *See*, e.g., Shaddox v. Schoenberger, 869 P.2d 249 (Ran. Ct. App. 1994) (Clearinghouse No. 49,789); Singleton v. Waties, 616 A.2d 644 (Pa. Super. Ct. 1992). For more on the policy implications of this issue, see DODSON & ENTMACHER, *supra* note 55, at 57-59.

[67] See, e.g., *In re* Marriage of Noel, 875 P.2d 358 (Mont. 1994).

[68] See, e.g., Ghidotti v. Barber, 586 N.W.2d 883 (Mich. 1998) (Clearinghouse No. 52,252). In this case a mother whose sole source of income was Temporary Assistance For Needy Families would have had a zero child-support order under Michigan's child-support guidelines. However, the lower court imputed earnings to her on the basis of a full-time minimum-wage job and then required her to pay $33 per week in child support to her son who was living with his Father. The Michigan Supreme Court, reversing the lower court, held that, before imputing income, the lower court would First have had to find that the guidelines amount was 'unjust or inappropriate." *See supra* note 34 and accompanying text. Only if such a Finding was justified under the circumstances might the court impute income. Then, in imputing income, the court would have had to look at eight Factors to determine the appropriate amount to impute. The state supreme court deemed this eight-factor review essential so that "any imputation of income is based on an actual ability and likelihood of earning the imputed income. Any other rule would be pure speculation and a clear violation of the requirement that child support be based upon the actual resources of the parents."

However, at least one court has found that imputing public assistance income is improper.[69]

C. Setting a Minimum Award

That a parent has no income-real or imputed-does not necessarily mean that a court will not impose a support obligation. Some states impose mandatory minimum obligations even when a noncustodial parent has neither countable nor imputed income.[70] Some courts have held that a guideline that requires a fixed minimum amount violates federal law.[71] However, not all states hold this view.[72]

Those states without mandatory minimum amounts either have a presump tive-minimum award that can be rebutted or leave the award to the tribunal's discretion.73 In states in which tribunals have discretion, tribunals generally do not order support if the parent cannot pay.[74]

D. Payments Other than Cash

Typically child support is ordered in a specific cash amount. However, a parent can give support in forms other than direct cash payments; for example, the noncustodial parent might pay the child's day care fees directly to the provider. If a custodial parent receives food stamps, this might be a preferable way to obtain support because child and spousal support payments made directly to a household are income for food stamp purposes.[75] However, if a court order or other legally binding agreement specifies that the noncustodial parent should make indirect payment (e.g., rent payment to a landlord), those payments are not income to the custodial parent, so the food stamp allotment will not be reduced.[76] Moreover, because noncustodial parents receive a deduction for paying child support (in whatever form), their food stamp allotments would not be affected by indirect rather than direct payments. However, such an indirect payment arrangement must be specified in the court order or support agreement. Without such a provision, indirect payments are considered income to the custodial parent.[77]

In states without a mandatory cooperation requirement for food stamp program participants, such indirect payment agreements are possible. If, however, one or both parents are subject to such a requirement, indirect payment may not be possible because the state may not agree to such an arrangement. See discussion in section III above.

E. Deviating from the Guidelines

Because deviation from the guide-

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[69] *See Shaddox*, 869 P.2d at 253 (noting that imputing such income to the parent would undercut the guidelines, which precluded counting public assistance benefits as "income").

[70] Colorado, District of Columbia, Indiana, Iowa, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Rhode Island, South Carolina, Utah, Vermont, Washington, and Wyoming have mandatory minimum orders of a specific dollar amount. See LAURA MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION 4-48 to 4-49, tbl. 4-8 (1996).

[71] See, e.g., Rose *ex rel.* Clancy v. Moody, 629 N.E.2d 378 (N.Y. 1993); Velazquez v. State, 640 N.Y.S.2d 510 (App. Div. 1996); *In re* Marriage of Gilbert, 945 P.2d 238 (Wash. Ct. App. 1997).

[72] *See*, e.g., Douglas v. Alaska Dep't of Revenue, 880 P.2d 113 (Alaska 1994); Hunt v. Hunt, 648 A.2d 843 (Vt. 1994). See also *In re* Marriage of Okonkwo, 525 N.W.2d 870 (Iowa Ct. App. 1994); Glenn v. Glenn, 848 P.2d 819 (Wyo. 1993). Plaintiffs in these cases did not present supremacy clause arguments to the court; had they done so, the result might well have been different. Federal law and regulations require that the guidelines be rebuttable; mandatory-minimum orders preclude rebuttal and therefore contravene the federal statute and implementing regulations. See 56 Fed. Reg. 22337 (May 15, 1991).

[73] *See MORGAN, supra* note 70.

[74] *See*, e.g., Hannah v. Hannah, 582 So. 2d 1125 (Ala. Civ. App. 1991); Schneider v. Schneider, 473 N.W.2d 329 (Minn. Ct. App. 1991).

[75] 7 U.S.C.A. § 2014(d) (West Supp. 1999); 7 C.F.R. § 273.9 (b)(2)(iii) (1999).

[76] 7 C.F.R. § 273.9(c)(1)(vii)(C) (1999).

[77] *Id.* § 273.9(C)(1)(iv).

lines is allowed when their application would yield an unjust or inappropriate result, some tribunals deal with the issue of low-income noncustodial parents by ordering less than what the guidelines require.[78] For example, a tribunal might grant a downward adjustment in the guideline amount to a low-income noncustodial parent if the child had income from another source, including public assistance.[79]

F. Dealing with Health Care Costs

Another difficult issue is when to order private health insurance coverage. If the children have no coverage and private insurance is available to the noncustodial parent through the employer, requiring that parent to supply coverage often makes sense. However, if the cost of coverage is high, serious trade-offs must be considered.

Assessing the trade-offs requires a look at the state's approach to adjusting cash support to account for the cost of health insurance. States use one of three models: (1) order the noncustodial parent to pay the premium and deduct the premium amount from that parent's income; (2) add the premium amount to the cash award and prorate the cost between the parents; or **(3)** treat the issue as a reason to deviate from the child-support guidelines.[80] Whichever method a state uses, a court is likely to adjust the noncustodial parent's cash obligation downward; this adjustment, while helpful to that parent, can harm the children.[81] However, if a court does not make such an adjustment, the combined cash and medical support ordered may exceed the amount that may be withheld from the noncustodial parent's wages.[82] Then the children may receive neither cash support nor health insurance until the matter is sorted out.

If the children are eligible for Medicaid, the better approach is to enroll them in that program. This would maximize the cash available to meet the children's other needs while ensuring that they receive health coverage. If the children are eligible for the State Children's Health Insurance Program, another potential solution exists. This program allows states to assess premiums and copayments-commensurate with their ability to pay-on parents with moderate income. Thus, rather than ordering

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[78] See, e.g., City & County of San Francisco v. Miller, 49 Cal. App. 4th 866 (1996) (deviating from the guidelines and reducing the support obligation to zero because application of the guidelines would have left the obligor with $14 a month to meet his own needs). A detailed discussion of this policy question is beyond the scope of this article. For more information on deviations from child-support guidelines, see NANCY ERICKSON, CHILD SUPPORT ORDERS AGAINST RECIPIENTS OF MEANS-TESTED PUBLIC BENEFITS 81 (1995) (available by special request from the Center for Law and Social Policy).

[79] *See*, e.g., Landis v. Landis, 691 A.2d 939 (Pa. Super. Ct. 1997) (granting a downward modification to a father because his disabled son was receiving Supplemental Security Income benefits; the court ruled that such income could be used to determine whether a downward modification was allowable but not to determine the obligation under the guidelines). See *also* Graby v. Graby, 664 N.E. 2d 488 (N.Y. 1996) (Clearinghouse No. 50,631) (directing that the Social Security Disability dependents' benefits the children were receiving as a result of their father's disability be considered in determining whether the guideline child-support award was unjust or inappropriate).

[80] See MORGAN, *supra* note 70, at 3-4 to 3-5.

[81] See, e.g., Smith v. Smith, 597 So. 2d 1216 (La. Ct. App. 1992). In *Smith*, although the guideline amount for two children was $435 per month, the trial court ordered only $200 per month and $70 for the children's health insurance; the court of appeal upheld this order. See *also In re Marriage of Okonkwo*, 525 N.W.2d 870; Hamm v. Hamm, 422 N.W.2d 336 (Neb. 1988).

[82] Federal law limits the amount that may be withheld for support to the maximum allowed by the Consumer Credit Protection Act. 42 U.S.C.A. § 666(b)(l) (West Supp. 1999). Some states set lower limits. E.g., Alaska, Arizona, Idaho, Iowa, Missouri, North Dakota, Texas, and Washington set a maximum limit of 50 percent of disposable income. Each state's practice in this regard is described in NATIONAL CHILD SUPPORT ENFORCEMENT ASS'N, INTERSTATE ROSTER AND REFERRAL GUIDE (1999) (available from the association, 202.624.8180).

private coverage, a court may order the children to enter the program and the noncustodial parent to defray partially the cost of that coverage by paying program-related premiums.

G. Adjusting Visitation

Some states adjust support awards downward when the noncustodial parent spends a significant amount of time with the children.[83] Because a downward adjustment for a family receiving Temporary Assistance for Needy Families results in a loss of money to the state and federal governments, the child-support agency may feel compelled to oppose a downward adjustment even if the parents favor it.

Another issue arises when the parents agree to a lengthy stay with the noncustodial parent. Federal law forbids the use of Temporary Assistance for Needy Families by a household if the child in the household is (or is anticipated to be) absent for 45 or more consecutive days.[84] Thus parents who want to give their child a chance to spend a significant period of uninterrupted time with the noncustodial parent may be thwarted from doing so unless the state has adopted-and the parents can meet-criteria for a good-cause exception to this rule.[85]

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V. Applying Child-Support Guidelines in Setting Arrears

Frequently a significant time lapse occurs from the date on which a support obligation arises to the date on which a support award is established. Tribunals can-and frequently do-order arrears payments for this period.

If the public assistance system is not involved, the parents may reach an agreement about the arrearage amount or the tribunal may simply set arrears by looking at the parent's income during the gap period and applying the state's child-support guidelines. If the public assistance system is involved, the process is not quite so simple. This is because, in most states, the noncustodial parent is responsible for the public assistance paid to the family; this obligation is referred to as the state debt. While state debt and child support are not the same, they are frequently confused with each other.

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[83] See, e.g., In *re* Guidelines for Child Support, 863 S.W.2d 291 (Ark. 1993).

[84] 42 U.S.C.A. § 608(a)(10)(A) (West Supp. 1999). The state has the option to lower this number to 30 days or allow absences of up to 180 consecutive days. If it elects to exercise this option it must so indicate in the Temporary Assistance for Needy Families state plan required by *42* U.S.C. § 602. Advocates should always check visitation agreements against the state's policy in this regard as articulated in its state plan.

[85] *Id.* § 608(a)(10)(B). Such exceptions are also to be described in the Temporary Assistance for Needy Families state plan.

In the context of current child support, state debt is not a major issue. Under federal law, as well as most states' laws, once a guideline obligation is established, state debt is limited to the amount of the child-support order.[86] Once a tribunal establishes an order, the noncustodial parent's obligation as to both child support and state debt is the amount ordered. So long as this amount is paid, no state debt accumulates.

However, the relationship between child-support arrears and state debt has not always been clear. Historically states tried to obtain an arrearage judgment equal to the full value of the assistance paid to the family even if the noncustodial parent would have owed considerably less had the obligation been computed on the basis of that parent's income.[87] While the legal basis for the state's claim was highly questionable, the attempt to maximize state reimbursement often had to be challenged.[88]

With the advent of guidelines as a rebuttable presumption of the correct support amount, arrearages should be calculated by using the guidelines. The amount should be based on either the noncustodial parent's current income or income during the period in question.[89] However, at least one court has concluded that in such cases the burden is on the noncustodial parent to present evidence of inability to pay the full public assistance amount; failure to present such evidence means that a court may assess as arrears the full amount of public assistance given to the family.[90]

Even if the accumulated arrears can be limited to the guideline amount, the sum still may be more than the noncustodial parent is able to pay. This is especially true when a lengthy period has elapsed between the date on which the obligation arose and the date on which it was quantified by the tribunal. To deal with this situation, some state laws limit liability to a specific time or a specific dollar amount.[91] In particularly troublesome situations, some courts have applied equitable principles to prevent the accumula-

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[86] 45 C.F.R. § 302.50 (a) (1999). See, e.g., N.C. GEN. STAT. 110-135 (1998); *but* see Lallier v. Lallier, 591 A.2d 31 (R.I. 1991). This policy helps low-income obligors because the amount they owe under the guidelines is generally much less than the amount of public assistance they are receiving. For an interesting discussion of this point, see *Douglas,* 880 P. 2d 113.

[87] *See*, e.g., State v. Erben, 463 A.2d 194 (R.I. 1983); Department of Human Servs. v. Roy, 585 A.2d 813 (Me. 1991).

[88] *See*, e.g., Mushero v. Ives, 949 F.2d 513, 517 n.8 (1st Cir. 1991) (Clearinghouse No. 46,041); Jackson v. Rapps, 947 F.2d 332 (8th Cir. 1991); Department of Health & Rehabilitative Servs. v. Hatfield, 522 So. 2d 61 (Fla. Dist. Ct. App. 1988); Nicollet County v. Larson, 421 N.W.2d 717 (Minn. 1988); Weihe v. Hendly, 389 N.W.2d 754 (Minn. Ct. App. 1984); Missouri ex *rel.* Anderson v. Sutton, 807 S.W.2d 152 (MO. Ct. App. 1991); Department of Human Servs. v. Huffman, 332 S.E.2d 866 (W. Va. 1985).

[89] See Office of Child Support Enforcement Action Transmittal 93-04, Use of Presumptive Child Support Guidelines for Establishment of Support Awards/Collection of Unreimbursed Assistance 2 (Mar. 22, 1993) (also available at www.acf.dhhs.gov/programs/cse/1993-at.htm). This is the law effective October 13, 1989. Moreover, only this amount may be collected through the IV-D system. Through this action transmittal, the federal government notifies the states that they may not use the child-support system to collect any other debt that state law may impose on a parent. *Id.* at 3. See also 45 C.F.R. § 302.50(a)(2), (b)(2) (1999).

[90] See State, Secretary of S.R.S. v. Briggs, 925 S.W.2d 892, 900 (MO. Ct. App. 1996).

[91] See, e.g., KY. REV. STAT. ANN. § 406.031(1) (Michie 1996) (providing that, unless a paternity action is filed within four years of the child's birth, retroactive support may not be ordered); ME. REV. STAT. ANN. tit. 19-A, § 1554 (West 1998) (providing that a retroactive support award may go back only six years); N.Y. DOM. REL. LAW § 240(1-b)(g) (McKinney 1998) (providing that, where the noncustodial parent's income is less than the poverty level, only $500 in arrears may accumulate).

tion of arrears.[92] However, equitable arguments do not always win.[93] In any case, advocates should remember that there is no federal requirement that tribunals set any arrears. This is up to the state.[94]

VI. Enforcing Child-Support Orders

Once the child-support order is entered, the state child-support agency will try to enforce it. As discussed in section II above, noncustodial parents who are employed generally will be subject to immediate wage withholding. If, however, the noncustodial parent receives public assistance, Social Security Disability Insurance, or some other source of income, the state may enforce child-support orders through the following methods.

A. For Public Assistance Only

As noted in subsections IV.A and IV.B.l above, a tribunal may order support even when the noncustodial parent's sole source of income is public assistance. One way in which the state child-support agency will try to enforce such an order is by withholding the sum owed from the noncustodial parent's benefits. The predominant view is that the state may not garnish Supplemental Security Income payments.[95] Nor can it garnish general assistance.[96] However, it may garnish Social Security Disability Insurance payments.[97] If the state may not withhold the money from the noncustodial parent's public assistance, then it may seek to hold that parent in contempt. The predominant view is that this is not allowable.[98]

B. For Public Assistance and Other Income or Assets

Public assistance recipients generally have few assets. However, if a public assistance recipient does own property, the state may subject the property to a lien. Some public assistance recipients have earned income. As a result, they may have paid taxes and be entitled to a tax refund at the end of the year. The state may seek an order withholding income from the parent's wages and intercept any income tax refund owed to such individuals.99

C. For Disability Insurance

As described in section I above, Social Security Disability Insurance recipients receive an allotment for their children as well as a payment to meet their own needs. If the children live in a different household from the recipient, their payments will be sent to that household. One of the most litigated issues in child-support practice is whether those payments

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[92] *See*, e.g., State v. Garcia, 931 P.2d 427 (Ariz. Ct. App. 1996) (holding that laches applies to state that waited several years to establish paternity and collect public assistance arrears from a man who was at all times available to be sued); Wigginton v. Kentucky *ex rel.* Caldwell, 760 S.W.2d 885 (Ky. Ct. App. 1988) (allowing laches defense when paternity action brought 15 years after child's birth); Oregon v. Kitchens, 763 P.2d 1196 (Or. Ct. App. 1988) (allowing estoppel against state that had waited 10 years after public assistance assignment to bring paternity action). While these cases involve situations in which paternity was not established until long after the child's birth, the same equitable principles should apply when the delay is between paternity establishment and obtaining a child-support order.

[93] *See*, e.g., Department of Human Servs. v. Brennick, 597 A.2d 933 (Me. 1991).

[94] See Office of Child Support Enforcement Action Transmittal 93-04, *supra* note 89, at 2.

[95] See, e.g., Becker County Human Servs. v. Peppel, 493 N.W.2d 573 (Minn. Ct. App. 1992); Tennessee Dep't of Human Resources v. Young, 802 S.W.2d 594 (Tenn. 1990). *But see ex parte* Griggs, 435 So. 2d 103 (Ala. Civ. App. 1983).

[96] *See*, e.g., Lapeer County Dep't of Soc. Servs. v. Harris, 453 N.W.2d 272 (Mich. Ct. App. 1990).

[97] 42 U.S.C.A. § 659(a) (West Supp. 1999). See, e.g., Hobson v. Hobson, 901 P.2d 916 (Or. Ct. App. 1995); Mariche v. Mariche, 758 P.2d 745 (Kan. 1988).

[98] *See ex parte Griggs*, 435 So. 2d 103; Esteb v. Enright, 563 N.E.2d 139 (Ind. Ct. App. 1990) (Clearinghouse No. 45,991). See also *Peppel*, *493* N.W.2d 573.

[99] *See*, e.g., Curtis v. Commissioner of Human Servs., 507 A.2d 566 (Me. 1986) (Clearinghouse No. 37,469).

should be credited against the noncustodial parent's child-support obligation. The potential positions are (1) no credit; (2) a rebuttable presumption in favor of a credit; (3) discretionary grant of a credit; and (4) automatic credit.[100] The majority of courts dealing with the issue have held that an automatic credit should be given, but this is not always the case.[101]

Moreover, a distinction exists between credit for current support and credit toward arrears. Courts generally have held that if the children's Social Security Disability Insurance allotment exceeds the amount of the monthly child-support order, the excess amount may not be attributed to arrears. It is essentially a gift to the child.[102] Other tribunals have determined the child-support award based on the noncustodial parent's income and then allowed a downward adjustment based on the child's "income" in the form of the dependent's Social Security Disability Insurance allowance.[103]

VII. Conclusion

Advocates assisting low-income parents with child-support issues need to have a thorough understanding of the various public benefit programs in which their clients participate. They also need to be familiar with their client's obligations to cooperate with the state's child-support enforcement program.

Advocates need to be aware of the special child-support issues for parents receiving means-tested public assistance. They need to give particular care to handling cases in which the parents participate in the Food Stamp Program because some specific program rules need to be considered. Advocates for low-income noncustodial parents also need to know which enforcement remedies may be used against their clients and which are precluded. Only then will some measure of fairness be achieved for custodial parents, noncustodial parents, and their children.

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[100] *See* Michael Di Sabitino, *Right to Credit on Child Support Payments for Social Security and Other Government Dependents Payments Made for the Benefit* of *a Child,* 34 A.L.R. 5th 447 (1995).

[101] For cases holding that automatic credit should be given, see, e.g., *Forbes,* 610 N.E.2d at 889; Frens v. Frens, 478 N.W.2d 750 (Mich. Ct. App. 1991); Holmberg v. Holmberg, 578 N.W.2d 817 (Minn. Ct. App. 1998) (Clearinghouse No. 52,225); Brewer v. Brewer, 509 N.W.2d 10 (Neb. 1993); Hawkins v. Peterson, 474 N.W.2d 90 (S.D. 1991). But see Drummond v. State, 714 A.2d 163 (Md. 1998), for a discussion of the rationale behind making a credit discretionary rather than automatic.

[102] *See,* e.g., *In re* Marriage of Robinson, 65 Cal. App. 4th 93 (1998) (Clearinghouse No. 51,861).

[103] *See, e.g., Graby, 664* N.E. 2d at 488.