RACE, THE INCARCERATED FATHER, AND CHILD SUPPORT OBLIGATIONS

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This article focuses specifically on incarcerated fathers of color. This particular group was chosen over incarcerated mothers or incarcerated white men for the purpose of this research because obligor incarcerated men of color comprise a much larger percentage of incarcerated obligors than any other group. Males were chosen over females for the purpose of this research due to the extremely small percentage of women in the overall prison population (both state and federal).

Child support laws create a more distinct set of challenges than other laws. These laws have the unique function of attempting to provide for children. Child support laws may also involve noncustodial parents who find themselves ordered to pay for a child that they may have never wanted or, conversely, a noncustodial parent who has difficulty paying for a child that they did want. Every state has its own child support laws and each state's laws vary from the next. No one has yet been able to come up with the one right answer or a "one-size-fits-all" approach. If we find a method that helps obligor fathers when they experience difficulty, then we are most likely simultaneously helping the custodial mother and, in turn, doing a service to the child.

There is a great deal of stigma attached to the incarcerated father, and there is a misconception that we are trying to find a way to make it easier for these men not to pay their obligations. This is not the objective. The objective is to incorporate a system that can assist these men when they have a valid difficulty in paying, while helping mother and child in the process. Many people are under the assumption that child support cases result in mothers being welfare recipients, but the truth is that fewer than 15 percent of child support cases are currently receiving welfare benefits.[1] The overall assumption seems to be that men who don't pay child support just don't want to pay child support; however, reality proves that for most men of color with obligations, they *can't* pay the order, especially if they become incarcerated. This article focuses on the reasons for the difficulty to pay and the flaws in the current system.

Parental incarceration affects a large and increasing number of children. The most recent estimates indicate that over 1.5 million children have a parent who is currently in state or federal prison. Most of these children are young, low-income, and black or Hispanic. Estimating the number of children affected by parental incarceration is not an easy task. Most estimates begin by quantifying the number of parents currently behind bars, with recent data indicating that nearly half of all state and federal prisoners, or 700,000 inmates, have at least one minor child. These parents expect to serve an average sentence of 80 to 103 months, most often for crimes involving a violent offense or drug trafficking. For parents incarcerated in state prison systems, 75 percent hold a prior conviction and 56 percent

have served time before. On average, for each one parent currently incarcerated, two children are left behind.[2]

The research in this article narrowly focuses on the child support laws in the state of New York and examines some of the state law's evolution in the specific area of modification of child support orders for obligor men who later become incarcerated. For many obligors, the cycle of child support payments can seem endless: child support obligations are ordered, the payer is unable to pay, arrears accrue and pile up to exorbitant amounts, a feeling of hopelessness and despair follows, payers have thoughts of earning an illicit income, and the threat of being incarcerated for nonpayment looms … the cycle goes on and on. If one adds being an incarcerated man of color to the child support obligation cycle, the end result is even more dismal.

The issue remains that anytime a state decides a case or makes a law that attempts to answer the question of "what happens to a child support obligation if the obligor goes to prison?" this is essentially—maybe unconsciously, maybe consciously, maybe accidentally, maybe purposefully—making a law that has disproportionate effects on males of color. The disproportionate effect is due to the myriad of disproportionate percentages of men of color in the situations that directly drive this particular area of law-making. Men of color disproportionately represent the overall prison population in this country in both state and federal prisons. Therefore, when deciding any law that specifically deals with incarcerated individuals, we are in turn automatically deciding laws that will disproportionately effect males of color.

For men of color who owe child support, the difficulties in fulfilling their payment obligations are even greater than they are for white males. Due to the disparities compared to white males in education levels, salaries, unemployment rates, and incarceration rates, these factors disproportionately increase the burden on the ability to fulfill any child support order, let alone an order that precedes an incarceration for a crime other than a crime against the mother or child or for failure to pay child support itself.

This article examines, in detail, the disparities listed above and focuses on the current procedure for dealing with an incarcerated father who was ordered to pay child support before he was incarcerated. It explores the history of *Knights v. Knights* in New York as the 22-year-long standard in New York that made incarceration a complete bar to modification of a child support order and examines the 2010 legislation in New York that repealed the decision in *Knights* and created a new standard allowing incarcerated obligors to petition for a child support order modification. Although the change of law in 2010 seems to be a good start in forward progress, the number of cases in which it can currently be applied is minimal because of strict requirements and can help only a small percentage of obligors while leaving many behind.

Part I lays out the basic background and demographics for this article and looks to the "Princeton University—Columbia University Fragile Families Study," which studied child support, poverty levels, income, and education. Part II further examines the earlier mentioned racial disparities in the areas of salary, education levels, unemployment rates, and in-kind support using data from the U.S. Census Bureau, Pew Research Center, and various academic articles written on these statistics. Part III explains basic child support, minimum payments, modification, and arrears laws and how federal child support laws tie into a system largely controlled by the states.

Part IV specifically looks at the laws in New York and the evolution of these laws over the last 25 years. It also examines cases decided based on both the old and new law. New York statutes previously prohibited modification of a child support order if the petitioner's request related to incarceration, since incarceration was deemed to be the result of a voluntary act. In 2010, the state enacted changes to the New York Family Court Act and Domestic Relations Law.[3] This new law specifically states that "incarceration shall not be a bar to finding a substantial change in circumstances" so long as the incarceration is not for nonpayment of support or an offense against the custodial parent or child.[4] The amendment now allows the courts to modify support orders for incarcerated parents whenever appropriate, preventing accumulation of arrears.

Part V looks to the laws in other states that permit modification for incarceration and utilizes some of the various factors to formulate suggestions for change, which are discussed in Part VII, the final section of this article.

Part VI lists, as examples, the currently available re-entry and assistance programs in six particular states that have proved to be successful (California, Connecticut, Minnesota, Texas, New Jersey, and Washington) and that aim to serve a variety of functions, including assisting fathers in paying their child support obligations, helping incarcerated fathers reintegrate into the workforce, and teaming up with employers who are willing to hire these men.

Part VII, the final section of this article, takes aspects from various state laws and factors from the re-entry and assistance programs discussed in Part VI to propose a nationwide standardized change for one unified system in the United States.

Part I. Background and Demographics: Assessing the True Story

The focus of this section is on how child support works according to economics.

Child support arrears are past due child support that a noncustodial parent owes to a custodial parent. Current child support arrears are calculated by determining the difference between what the noncustodial parent owes and what they've paid. Even if the court later approves a new child support order with a smaller child support obligation, it won't apply retroactively, meaning it will have no effect on the arrears balance.

There are legal steps a custodial parent can take if a parent who is obligated to pay child support under the terms of a court or government agency order stops making payments. Under the Child Support Enforcement Act of 1984, district attorneys or state's attorneys must help a parent collect child support. Federal laws allow the interception of tax refunds to enforce child support orders. Other methods of enforcement include wage attachments, seizing property or—in some states—revoking the paying parent's driver's license.

Child support payments in New York are calculated using a straightforward formula. In general, noncustodial parents are responsible for paying a percentage of both parents' combined gross incomes for the year. A parent's income can include pensions, fellowships, annuity payments, workers' compensation benefits, unemployment, Social Security, and retirement benefits, along with some other earnings. Once the parents' combined income is determined, the amount is multiplied by a percentage. The percentage changes based upon how many children a parent is ordered to support. Of course, it is important to remember that family law administrators do have the discretion to order support that is greater or lesser than the standard amount. In most situations, the percentages are as follows:

17 percent for one child, 25 percent for two children, 29 percent for three children, 31 percent for four children, and 35 percent for five or more children. Once this amount is calculated, the basic child support obligation is split between the two parents. The percentage that one parent contributes to the total combined income is the same percentage of the child support payment they are responsible for. For example, if one parent contributes 40 percent of the total combined income per year, they are responsible for 40 percent of the costs of raising the child. The parent with physical custody of the child is presumed to be contributing this amount already.

Noncustodial parents whose incomes fall below the federal poverty line are generally ordered to pay $25 a month in child support (the federal poverty line is currently $12,060 for one person). Parents whose incomes fall below the New York State Self-Support Reserve generally pay $50 a month in child support (the self-support reserve is currently $16,281 for one person).[5]

The general population of the state of New York is approximately 58 percent white, 15 percent black, and 15 percent Latino—while the New York state *prison* population is 18 percent white, 46 percent black, and 34 percent Latino.[6] Nationally, 1 in 9 black children have a parent in prison, compared to only 1 in 57 white children. While 13 percent of America's population is African-American, 40 percent of all incarcerated individuals are black.[7] In 2007, the population of minor children of incarcerated parents consisted of approximately 484,100 white, non-Hispanic children (1 in 110 white children); 767,400 black, non-Hispanic children (1 in 15 black children); and 362,800 Hispanic children (1 in 41 Hispanic children). Black (54 percent) and Hispanic (57 percent) men in state prison were more likely than white men (45 percent) to be parents.[8]

Nationally, 66 percent of black children (67 percent in New York) and 42 percent of Hispanic and Latino children (53 percent in New York) live in a single-parent home,[9] while only 25 percent of white children (22 percent in New York) live in single-parent homes.[10] These statistics should signify that since a large percentage of black and Hispanic/Latino children are living in single-parent homes that their custodial parents have child support orders at disproportionate rates, but that is not the case. Studies show that this is largely because black and Hispanic/Latino custodial mothers are hesitant to file for formal child support orders and tend to receive more in-kind support than white mothers do. In-kind support is any support for the child that is not in monetary form, such as: clothing, shoes, food, school supplies, and other items. In-kind support and the relationship to race are discussed further in Part II.

According to national data collected of custodial mothers in 2013, 53 percent of white custodial mothers had child support orders, while 37 percent and 44 percent of black and Hispanic mothers had orders, respectively. Of those with child support orders, white mothers received 73 percent of the amount ordered to them, black mothers received 50 percent, and Hispanic/Latino mothers received 62 percent.[11] Even though it seems that black fathers have a child support order less frequently than white men, it also seems that black men pay less of the order when they do have one. This is likely because of the higher levels of in-kind support, lower incomes, and higher unemployment rates, which are discussed in more detail in later sections of this article.

Child support obligations tend to be ordered to men more than they are ordered to women. In addition, when specifically addressing the incarcerated population, women make up a very small minority percentage of the overall prison population in the country (both state and federal). According to a report from the U.S. Census Bureau in 2011, custodial fathers were owed $3.7 billion in child support, while custodial mothers were owed $31.7 billion. Furthermore, males comprise 93.2 percent of the nation's prison population, while women comprise only 6.8 percent of the total prison population.[12]

The vast majority of unpaid child support is owed by the very poor. A 2007 Urban Institute Study of child support debt found that 70 percent of the arrears owed on child support are owed by people who reported less than $10,000 annual income. These people were expected to pay, on average, 83 percent of their income in child support.[13] A large part of the reason for this is that in many jurisdictions, child support orders are not based on actual income, but on "imputed income"—what they would earn if they had full-time, minimum-wage employment.[14] The court may also impute income based on a finding that the father is voluntarily unemployed or underemployed. These situations include parents with marketable skills that appear to be deliberately evading obvious employment, but it also includes parents who have returned to school to improve their job prospects or those who are incarcerated.[15] When income is imputed, the amount ordered is usually very far off from what the obligor can afford, and these overcalculated amounts are a large part of the cause for support orders not getting paid.

A court order on an amount that the obligor cannot afford is not effective for the child and family. Having a parent in prison can affect a parent's ability to fulfill their child support obligations and greater numbers of children have a parent who is incarcerated, with black children more likely than children of other races to have a parent in prison. According to statistics, 1 in 28 children overall has a parent behind bars, while 1 in 9 black children have an incarcerated parent.[16] Many of these parents have child support orders that were established before their incarceration but, due to their incarceration, they are no longer able to pay them.

Statistics show that the poverty issue is prominent in the cycle. In 2006, the Institute for Research on Poverty at the University of Wisconsin-Madison noted that a majority of prisoners have minor children and conducted a review of the number of incarcerated noncustodial parents.[17] While national data on this topic remains difficult to find, the most recent figures estimate that 53 percent of all the noncustodial obligors incarcerated in both state and federal prisons in 2007 were parents of minor children.[18] Further, an estimated one-quarter of all inmates in federal or state prison have open child support cases.[19] As of 2007, an estimated 1.7 million children had an incarcerated noncustodial parent.

The core study was originally designed to primarily address four questions of great interest to researchers and policy-makers:

1. What are the conditions and capabilities of unmarried parents, especially fathers?
2. What is the nature of the relationships between unmarried parents?
3. How do children born into these families fare?
4. How do policies and environmental conditions affect families and children?

Research shows that incarcerated noncustodial parents often enter prison with child support obligations without any realistic ability to pay them. As a result, unpaid child support is a significant source of debt for incarcerated parents. The average incarcerated parent with a child support case has $10,000 in arrears when entering state

prison and leaves with $20,000 in arrears.[20] As a practical matter, such a debt will never be paid and can have the effect of discouraging fathers from even trying to pay this debt. Uncollectible arrearages can be largely prevented by setting realistic child support orders that are based strictly on the father's ability to pay.[21]

The Bradley Amendment is a controversial federal law concerning child support payments that was enacted in 1986. The basic purpose of the Bradley Amendment is to prevent those who are tasked with child support payments from having debts retroactively reduced or removed after failure to pay them has created a large debt. Under the terms of the Bradley Amendment, someone who experiences a loss of income must apply immediately to the court system to have the size of their payments adjusted immediately. Otherwise, they are liable for the payments they were unable to make and will accrue interest as well. Under the terms of the Bradley Amendment, once this debt is incurred it cannot be erased.[22]

Even though the Bradley Amendment requires the court to treat child support payments owed under a support order just as seriously as any other state court judgment, once a child support order has been entered, it does not allow a court to modify the order retroactively. It provides that states must have procedures requiring that support due under a support order is: (1) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the state, including the ability to be enforced; (2) entitled as a judgment to full faith and credit in such state and in any other state; and (3) not subject to retroactive modification by such state or any other state.[23]

The Fragile Families & Child Wellbeing Study followed a cohort of nearly 5,000 children born in large U.S. cities between 1998 and 2000 (roughly three-quarters of whom were born to unmarried parents). Unmarried parents and their children in this study are referred to as "fragile families" to underscore that they are families and that they are at greater risk of breaking up and living in poverty than more traditional families. The core study consists of interviews with both mothers and fathers at birth and again when children are ages 1, 3, 5, and 9. The parent interviews collect information on attitudes, relationships, parenting behavior, demographic characteristics, health (mental and physical), economic and employment status, neighborhood characteristics, and program participation. Additionally, in-home assessments of children and their home environments were conducted at ages 3, 5, and 9. The in-home interview collects information on children's cognitive and emotional development, health, and home environment. Several collaborative studies within the Fragile Families Study provide additional information on parents' medical, employment and incarceration histories, religion, child care, and early childhood education.[24]

Studies of new births in large cities using Fragile Families data put incarceration rates of noncustodial parents even higher than the national figures tend to show and highlight the racial disparities in incarceration rates. For these Fragile Families, 40 percent of African-American fathers had been incarcerated by their child's first birthday, compared to 18 percent of white fathers.[25] These high numbers of incarcerated noncustodial parents clearly make their child support obligations a significant policy issue.

Underlining the low economic status of the Fragile Families fathers, the never incarcerated contributed only about $8,000 to their children in the year prior the Year 5 interview. Formerly incarcerated fathers contributed significantly less than $8,000—just over $2,600. This lower contribution level reflects that fathers with incarceration histories are both less likely to financially contribute to their families at all (only 60 percent contribute, compared with 86 percent of fathers who have never been incarcerated) and that those who do contribute give less (a bit more than $4,200 by men with incarceration histories, compared with more than $9,200 by men who have never been incarcerated).[26]

Part II. How the Combined Data Results in Men of Color Facing Further Hardship

Policy-makers have aggressively pursued black fathers as "deadbeat dads" who do not pay child support. Too frequently, pursuing these men seems to ignore the fact that most of them are poor themselves and the majority are unemployed.[27]

Salary Disparity by Race

There has always been a salary gap between the races, and studies show that that gap has not decreased in decades. There has been no significant decrease in the average salary gap between white and black men in this country in almost 40 years of study. A study conducted in 2015 showed that black men still earned "73 percent of white men's hourly earnings," which are the exact same figures that were found in a study conducted in 1980.[28] While there has been no shrinking in the wage gap of black male salaries to white male salaries, the salary gap for Hispanic men has actually *increased* since 1980. Hispanic men earned 71 percent of a white male's salary in 1980; in 2015, they only earned 69 percent.[29] Attaining a higher education has not been effective in closing the wage gap between black and white workers. Black men with a bachelor's degree or more who had 11 to 20 years of experience still made 27.2 percent less than white males with same level of education and experience.[30]

There are studies that document discrimination and racial bias. A 2003 study also showed that men and women submitting essentially identical resumes to different jobs ended up receiving a call back 50 percent less often than the "white sounding" named applicant if the resume listed a "black sounding name."[31] The first part of this study also conducted a survey to make sure the names that were utilized on the resumes were found, almost unanimously among the people polled, to have a black or white connotation.[32] This study highlights the difficulty in obtaining employment even if an employer reads your resume and just assumes you're black.

Other documents show the discrimination even further. For 2015, the real median combined household income by race was as follows: Asian households $74,297, white households $60,256, Hispanic households $42,491, and black households $35,398.[33]

The trouble minority men experience when seeking and maintaining work is not surprising in light of the unemployment rate and discriminatory hiring processes in the United States, especially with the added factor of a criminal record. Research conducted across the country to measure employment discrimination through controlled experiments found that black job applicants are treated less favorably than white applicants and less frequently called back or offered jobs.[34] Black employees are offered lower starting wages than white employees. Blacks with criminal records are more heavily penalized in the job application process than whites with criminal records.[35] In fact, whites with criminal records are treated more favorably by employers than blacks without criminal records.[36] Consequently, it is unlikely that a black convicted felon has any promising prospects

in the labor market, which is particularly significant given that black men are incarcerated at much higher rates than white men.[37]

In-Kind Support and Variance by Race

Although the majority of poor black fathers do not pay child support, many of them make "in-kind" and nonfinancial contributions to their children.[38] However, child support enforcement officials do not recognize this type of support and credit the fathers only for formal child support payments.[39] As a result, these fathers, many of whom are black, are more frequently perceived as deadbeats. This failure to recognize the informal contributions to children not only makes the men look worse than they actually are, but may create more of a feeling of defeat for them. Child support guidelines specify that a parent with a child support obligation receives no credit for in-kind or informal monetary contributions to his child.[40] Under this prohibition, a father cannot receive credit for providing diapers or formula or for taking his child shopping. For low-income men, this ban degrades the value of nonmonetary contributions.[41] Mothers and fathers often work out agreements for child support that involve dad fixing the car, buying groceries, watching the children, or getting clothes for the children. These men may be unemployed, but they want to help their children. Sometimes they are concerned that monetary support doesn't benefit the children and the mother may spend it on herself. None of the nonmonetary support counts, even if the mother and father want it to count and even if they agree in writing that it should count.[42]

A Johns Hopkins-led study found that low-income fathers who might be labeled "deadbeat dads" often spend as much on their children as parents in formal child-support arrangements, but they choose to give goods like food and clothing rather than cash.[43] Nearly half of the fathers in the study (46 percent) contributed in-kind support to a child, while 23 percent gave formal support (through the court system), and 28 percent gave informal support (in the form of cash given directly to the mother). In-kind support included items like baby products (diapers, formula, strollers, and cribs), clothing, shoes, school expenses, school supplies, after-school program costs, gifts, and food.[44] Some fathers (66 in the study with 95 children) avoided cash payments altogether but gave $63 per child a month through in-kind support. These dads, who would traditionally be considered "deadbeat," give support that is currently unacknowledged in any government surveys or statistics. The total value of in-kind support did not vary by race, but the proportion of total support offered in-kind was higher among black fathers (44 percent) than non-black fathers (35 percent).[45] By this last statistic alone, more black fathers would be considered "deadbeat" dads than white fathers, even if they were providing the same amount of support to their children in a different form.

Part III. Federal Child Support Laws

Although child support enforcement laws are largely an area regulated by the states, there are federal guidelines pertaining to child support enforcement. Federal law requires states to set child support orders using numeric support guidelines adopted by each state.[46] These guidelines must be based on parental income and ability to pay. Once a child support order has been established, there are procedures, which vary by state, to seek a three-year review to modify or suspend the order. Outside the three-year review cycle, parents may seek to modify a child support order at almost any time. Federal law obliges states to review an order upon either parent's request if the requesting parent demonstrates a "substantial change in circumstances."[47]

Child support enforcement issues are handled by state and local authorities, not by the federal government, other than in specific circumstances. All child support enforcement matters must be addressed at the local or state level before concerns can be raised at the federal level. Section 228 of Title 18, United States Code, makes it illegal for an individual to willfully fail to pay child support in certain circumstances. An individual is subject to federal prosecution if he or she willfully fails to pay child support that has been ordered by a court for a child who lives in another state, if the payment is past due for longer than one year, or if the payment exceeds the amount of $5,000. A violation of this law is a criminal misdemeanor, and convicted offenders face fines and up to six months in prison.[48] If, under the same circumstances, the child support payment is overdue for longer than two years, or the amount exceeds $10,000, the violation is a criminal felony, and convicted offenders face fines and up to two years in prison.[49]

This statute also prohibits individuals obligated to pay child support from crossing state lines or fleeing the country with the intent to avoid paying child support that has either been past due for more than one year or exceeds $5,000. Any individual convicted of this crime may face up to two years in prison.[50] This is the section of the statute known as the Deadbeat Parent Punishment Act. In addition to the penalties expressly stated in the statute, a parent found to be in violation of their legal obligation to support his or her children will be placed on probation. Violation of the probation terms results in additional jail time. The specific terms of deadbeat probation include: The parent must financially support his or her children as per their legal obligation; the parent must pursue employment in order to continue making the support payments; and if the parent is unemployed, he or she will perform community service.[51]

Part IV. New York Child Support and Modification Law and Potential Penalties for Nonpayment

When child support is ordered, the payer is statutorily obligated to pay support to his or her child until the child reaches the age of 21 under New York's Family Court Act § 413(1)(a), unless the child is deemed emancipated at an earlier age as a result of attaining economic independence. A court has no discretion to cancel, reduce, or otherwise modify child support arrears that have accrued. Parents seeking relief from child support must ask the court to modify their obligations. Any such modification would only be effective as of the date of the application.

Accordingly, because child support arrears must be awarded in full—regardless of whether the defaulting payer has good cause for having failed to seek modification prior to the accumulation of the arrears—the obligor is required to pay all arrears accrued prior to the filing of his or her modification petition. Where the noncustodial parent's income is less than or equal to the poverty income guidelines amount for one person as reported by the federal Department of Health & Human Services, unpaid child support arrears in excess of $500 shall not accrue.[52]

New York Law for Modification

The most current version of the New York law for modification states, "The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of

the parties, upon a showing of a substantial change in circumstances. Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of nonpayment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment."[53]

When a noncustodial parent becomes unemployed, the following two cases are illustrative of when the court will grant a reduction of support. In *Preischel v. Preischel,* the appellate division reversed the family court judge's grant of the respondent's objections and reinstated the hearing examiner's decision to downwardly modify child support based upon the petitioner showing unanticipated and unreasonable change in circumstances.[54] The court noted that the petitioner established that he lost his job through no fault of his own because his employer closed. The factors that the court weighed heavily was that the petitioner made diligent efforts to seek employment, including: (1) sending out over 200 resumes, answering numerous want ads, and registering at approximately 15 employment agencies; and (2) after being unemployed for approximately seven and a half months, once he found a job, he filed an amended petition. The court requires a showing that there has been an active effort to secure employment.

However, in *Heverin v. Heverin,* the appellate division affirmed an order from the family court that granted the mother's objections to an order from the hearing examiner. In *Heverin,* the father lost his job through no fault of his own but nevertheless was not entitled a reduction in child support because he didn't meet the second requirement of proving that he diligently sought employment. The court stated:

> As a party seeking a downward modification of child support, the father had the burden of establishing an unanticipated and unreasonable change in circumstances.… Although a loss of employment may constitute such an unanticipated change of circumstances, a downward modification may be denied where the moving party has not made a good faith effort to obtain employment commensurate with his or her qualifications and experience.… Although it is undisputed that the father lost his job as an engineer through no loss of his own, he failed to present any evidence that he used his best efforts to obtain a new position commensurate with his education and skills.[55]

Therefore, a party seeking to lower a child support order due to a loss of income must show both the reduction of income and efforts made to find commensurate employment.

Child Support Agreements Made on or After Oct. 14, 2010

On Oct. 14, 2010, the amendments to the Domestic Relations Law went into effect for child support modifications. Under Domestic Relations Law 236B(9)(b), the standard to modify a child support agreement changed by adding two new bases to modify support agreements. Modifications may be made if (1) more than three years have passed since the agreement was either signed, modified, or adjusted; or (2) there is more than a 15 percent change in either parent's income since the support agreement was signed, modified, or adjusted. Either side may request a modification under these new provisions. If a downward modification is sought, then the party claiming a lower income must show the reduction in income is involuntary, and they have made diligent efforts to find employment. Incarceration is not an automatic bar for a reduction of child support.

Some of the administrative procedures that may be used to collect overdue child support are:

1. Income Tax Refund Intercept (federal and state): A delinquent noncustodial parent's federal and/or state income tax refund may be intercepted to pay overdue child support.
2. Credit Bureau Submission: The names of delinquent noncustodial parents may be submitted to the major consumer credit reporting agencies. As a result, the noncustodial parent may have difficulty obtaining a loan or other forms of credit until the overdue child support is paid.
3. Lottery Intercept: New York state lottery winnings may be intercepted to pay overdue child support.
4. Property Execution: Financial assets, including bank accounts, may be seized in order to satisfy overdue child support.
5. Business and/or Professional License Suspension: Professional licenses may be suspended for nonpayment of an order.
6. Driver's License Suspension: New York state driver's licenses may be suspended for a delinquent noncustodial parent.

Suspending driver's and professional licenses is an area of contention in the discussion of child support collection. For many, especially low-income males of color, this is counterproductive. Taking a driver's license away only further challenges one's ability to find gainful employment and be able to meet their child support obligations. This point will be addressed again in Part VII as a factor to consider in suggestion.

Part V. History and Evolution of the Law in New York

New York has many policies in place that it may turn to in cases of nonpayment of ordered child support. The child support enforcement program has legislative authority to collect overdue child support (arrears). Administrative procedures can be put into action without going to court. Before any administrative procedure is begun, a notice is sent to the noncustodial parent. The notice explains the procedure, provides a deadline and instructions to comply with or challenge the action, and explains the consequences of failing to comply. Several different kinds of enforcement actions may occur at the same time, based on the dollar amount of the debt or the length of time the debt has been accruing.

Until October 2010, the case law controlling whether an incarcerated, noncustodial parent could petition for modification while incarcerated was ruled by *Matter of Knights v. Knights.*[56] *Knights* is a 1988 case that addressed a child support modification application by a father who became incarcerated for an unrelated crime. In *Knights*, following a felony conviction that resulted in a prison sentence, the petitioner applied to family court for a modification of a child support obligation fixed in a prior support order on the grounds that his income had diminished as a result of his incarceration. The family court denied the petitioner's application, concluding that it would be unfair for an individual who had freely chosen to commit a crime to be relieved from the accrual of a support obligation. The court thus decided the support order should remain in effect during the period of the petitioner's incarceration, but it held that at the time of the petitioner's release, it would determine whether to enter judgment on the entire amount due or to forgive part of the arrears that had accumulated since the filing of the application. The appellate division affirmed, concluding that family court had not abused its discretion.

The court in *Knights* addressed the fact that the Family Court Act § 451 allows modification of a child support order where there is, "a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent." Significantly, the court may consider whether a supporting parent's claimed financial difficulties are the result of that parent's intentional conduct. At the time that *Knights* was decided, the Family Court Act allowed for modification requests due to substantial change of circumstances, but not if the change of circumstances was deemed to be voluntary by the obligor. Under the rule enunciated by the court of appeals in *Knights*, where a parent was incarcerated, the resulting "financial hardship" was deemed to be "the result of his own wrongful conduct," and he was therefore "not entitled to a reduction of his child support obligation."[57]

The *Knights* decision was the ultimate authority in New York state on modification due to incarceration until the passing of a new legislative bill in 2010, the Low Income Support Obligation and Performance Act.[58] The bill was summarized on its cover as "an act to amend the tax law, the Family Court Act, the Domestic Relations Law, and the Social Services Law, in relation to the modification of child support orders, employer reporting of new hires and quarterly earnings, work programs and the noncustodial earned income tax credit." The new bill proposed new consideration that, "incarceration shall not be a bar to finding a substantial change in circumstances under certain conditions." The "Assembly Memorandum in Support" of the bill explicitly states that the provision was "intended to address the impact of the New York State Court of Appeals decision in *Knights v. Knights* and thereby clarify that a court may modify an order of child support where a party has been incarcerated."[59] "In other words, it was intended to overrule *Knights*."[60]

Justification for this bill was, in part, to conform the Family Court Act and the Domestic Relations Law in New York. The Domestic Relations Law specified that a child support order may be modified based on a substantial change of circumstances, while the statutory provisions of the Family Court Act remained largely silent. Further justification for the bill stated that family court would be able to order unemployed obligors into job training, employment counseling, and other programs that would lead to employment. If an obligor is participating in any of these programs, the Support Collection Unit would be barred from seeking a modification of the order for at least 12 months. This part of the bill gives New York the credibility to be discussed with states that have programs that aid employment and re-entry, which are discussed in detail in Parts VI and VII below. Before the change of law in New York, it was one of three states with the highest arrears balances in the country.[61] At that time, all three of those states viewed incarceration as a voluntary change of circumstance and a bar to modification.[62]

The passing of this bill successfully revised Family Court Act § 451 to now expressly state that incarceration is *not* a bar to petitioning for a modification—so long as the incarceration was for something other than failure to pay child support or a crime against the child or the other parent. The revision of Family Court Act § 451 overturned the *Knights* decision, but only for matters in which the original child support order was ordered after the date of the passing of the new bill and only in matters of modification. It does not pertain to new orders.

Even though the law was changed, it does not apply to original orders issued before 2010. Therefore, it may help alleviate debt from people with newer orders who became incarcerated, but many are left with an inability to modify their pre-2010 orders. This can leave two men, in the exact same situation, in very different positions.

The revision of Family Court Act § 451 is great, forward progress; however, many New York courts have had to still rely on *Knights* after the passing of the new bill for the cases not meeting the criteria to apply to the new law. For example, one of the first cases to be heard after the change of law was *Matter of Commissioner of Social Services (Donna M.W.) v. Jessica M.D.* In that case, the court found that the new language in § 451 only applies to modifications of child support orders and not to setting original child support obligations. The court had to rely on *Knights* and imputed income[63] to the incarcerated petitioner because it was not a modification being sought in this case but, rather, an initial application. If this initial order had been made earlier and this was now a modification under the new law, the petitioner may have been successful. This illustrates one of the flaws with the new law.

Another notable post-amendment case is *Matter of Baltes v. Smith.* Again, in that case, the court found that the amendment to § 451 did not apply to the father's petition regarding a May 2010 order, since the amendment applied prospectively only to child support orders entered *after* Oct. 13, 2010.[64] The father in this case was simply unfortunate on the timing of his circumstances by a mere 120 days. If his original order had been made 120 days or more later, he may have been eligible for a modification and his financial obligations could have been reduced.

The first successful downward modification after the law change was decided in *Hunter v. Traynor.*[65] "In a matter of first impression, father's incarceration entitled father to hearing to determine whether modification of child support was warranted."[66] The petitioner filed the petition seeking modification of a support order entered Aug. 19, 2013, requiring him to pay $59 per month for basic child support and managed care for the support of his 8-year-old daughter. As the basis for standing to bring the petition, the petitioner alleged that there had been "substantial change in circumstances in that I am now incarcerated." He further stated that his support obligation "should be decreased because I am incarcerated."[67] The first decision in *Hunter v. Traynor* had to be appealed, due to the fact that the magistrate's determination was contrary to the mandate of Family Court Act § 451(3)(a). The magistrate still used the law of *Knights*, presumably just out of habit.

The appellate division in *Knights* stated, "resolution of this case requires analysis of the language of the legislative intent behind Family Court Act § 451(3)(a), as well as the pre-existing case law with respect to the effect of incarceration on a parent's child support obligation."[68] There was no prior case before this one that met all the criteria to apply the new law. The appellate judge then brought up a valid point about the new law in his decision in *Hunter v. Traynor*: They are not there to decide if the law makes sense, but only to apply it appropriately. The judge further pointed out a flaw in the new law: If someone loses their job, they most likely will not be eligible for a modification; however, if that same person goes to jail for stealing from that job, then they can get a modification.[69]

In order to rectify that flaw, the law regarding the incarcerated individual should not change, although perhaps the law pertaining to anyone that doesn't have a job should be the same. If an individual suddenly has no income, they should not be expected, nor required, to pay the same amount as when they had the income.

Part VI. A Comparative Look at How Other States Handle Modification Orders for Incarcerated Noncustodial Parents

"All 50 states have processes for criminal prosecution for failure to pay child support; however, this more severe punishment is very rarely handed out. These laws generally make criminal nonsupport a felony or misdemeanor. The fines and potential prison sentences, as well as the delinquent threshold amount in order for criminal prosecution to be triggered, vary state by state."[70] Thirty-six states currently treat incarceration as involuntary unemployment for the purpose of petitioning a child support review. The other 14 states have laws in place that do not allow incarcerated noncustodial parents to obtain a reduced or suspended support order that reflects their actual income while incarcerated.[71]

On Dec. 20, 2016, the Office of Child Support Enforcement published final rules updating the rule regarding child support enforcement. The rule specifically addresses incarcerated noncustodial parents and incarceration for failure to pay child support, as well as modification procedures for incarcerated noncustodial parents. The rule ensures the right of all parents to seek a review of their order when their circumstances change. While these provisions apply to all parties involved, they specifically address incarcerated noncustodial parents and their ability to have the child support order reviewed and potentially modified while they are incarcerated. The rule prohibits state child support programs from treating incarceration as voluntary unemployment for purposes of modifying a child support order.[72]

As a matter of practice in most states, child support orders are not routinely reduced when a parent becomes incarcerated, even when that parent lacks any source of income. Therefore, it is important for child support programs to continue to facilitate incarcerated parents' efforts to adjust their orders for the period of incarceration to reflect their actual income. Doing so will aid in the overall amount of child support owed upon release being, ideally, a more realistic total. Many states have recently begun implementing practices for incarcerated obligors in hopes of keeping child support feasibly repayable.

One large problem that can arise, even in states that have reasonable options for incarcerated obligors, is the limitation that inmates may not have knowledge of their options or know how to go about pursuing them. Even in the majority of states that permit modifying a child support order during incarceration, the incarcerated obligor must typically take proactive steps in seeking a modification. For states with judicial processes, petitioning the court may present challenges since incarcerated parents often lack legal representation and do not have knowledge to petition the proper authority for the modification. The final section of this article addresses this as an issue of consideration for all future laws regarding modification options for incarcerated obligors.

California law suspends the child support order according to circumstance of the father. California law, Senate Bill 1355, which became effective July 2011, suspends child support orders if the parent will be incarcerated for longer than 90 days, so long as the obligor does not have any means to pay the order.[73] Suspending the order means that the order is set at $0 until the parent is released. Additionally, parents are entitled to ask for any arrears to be adjusted. Under the state regulations, incarceration also triggers automatic review and the local child support agency is required to seek to adjust the current order.[74] California's law seems to have many benefits that New York's law doesn't possess. If the local child support agency is required for immediate review, this can eliminate any injustice caused by an inmate not knowing their options or rights pertaining to modification. This also leaves similarly situated people in the same position because someone who knows about their options does not end up in a better position than someone who simply didn't know.

Massachusetts state law permits a deviation from the child support guidelines where the parent "is incarcerated, is likely to remain incarcerated for an additional three years and has insufficient resources to pay support."[75] The state child support agency has a package of pro se materials that the incarcerated individual must request. This method creates the difficulty of relying on the inmate's knowledge of their options in order to seek modification.

In Oregon, if the income of the incarcerated parent is less than $200 per month, it is presumed that the obligor has zero ability to pay support.[76] An affirmative request must be made in writing by one of the parties to adjust the order, and there is often a simple administrative hearing. If an order is suspended, the order goes back into effect 60 days after the parent's release from incarceration.[77]

Examples of Informational and Assistance/Re-Entry Programs

Several states offer informational and re-entry programs for incarcerated obligors, including:

- California's statewide outreach program launched in 2011 and provides informational material to incarcerated obligors, including a "video for fathers, posters, fact sheets, and a request for information or modification of support form available to all counties and to state prisons. The video includes information on the incarcerated parent's right to have their child support order reviewed during incarceration."[78]
- Connecticut's child support office is directly electronically linked to the records from jails and prisons. Since 2006, Connecticut's child support office has provided direct outreach to incarcerated parents. The child support office receives notice of incarcerated obligors with orders who are serving a minimum of three years (the state's minimum for modification) and correspond directly with these inmates. The inmates then go on to have a modification hearing through videoconference. Connecticut reports that almost 70 percent of their inmate parents request review of their child support orders during their incarceration and most of these orders are reduced to $0 or the state minimum.[79]
- "New Jersey has an extensive collaboration between the New Jersey Department of Health and Human Services and New Jersey Department of Corrections to provide child support assistance to inmates in two state prisons. This includes showing inmates a child support video and offering parenting education classes. Social workers with the corrections office provide case management on child support issues, including distributing pro se information packets on modifying orders. Child support casework continues during the re-entry process to address arrears accumulation and modification issues."[80]
- "Minnesota's Child Support Liaison program allows newly incarcerated noncustodial parents to speak with a child support enforcement representative upon intake into prison. That liaison then educates and informs the offenders about the child support system during inmate orientation, facilitates communication between the offender and the county child support enforcement agencies, and helps families support their children while the noncustodial parent is incarcerated. The liaison is also available to assist incarcerated noncustodial parents with typical child

support enforcement services, such as requesting a modification … and other child support issues the parent may be facing."[81]

- The Texas Noncustodial Parent (NCP) Choices "program is a court diversion program that assists unemployed or underemployed noncustodial parents find and maintain employment. Program participants must spend 30 hours a week looking for a job, meet with the workforce counselor every week until employment is found, attend all court hearings and program appointments, comply with the child support order, and stay in communication with their workforce counselor monthly following employment. A 2009 report on the impact of the NCP Choices program showed the following results: Participants paid $57 more child support 47 percent more often, showing a 51 percent increase in total collections. These results continued for two to four years after program participation. Participants paid their child support 50 percent more consistently over time. Participants were employed at 21 percent higher rates than nonparticipants, an effect that also persisted at least two to four years after the program. Participants were about one-third less likely to file an unemployment claim in any given month in the first year after the program. The custodial parents associated with NCP Choices participants were 21 percent less likely to receive [government] benefits in the first year after the program and 29 percent less likely two to four years after the program."[82]
- Washington state offers two similar programs with successful results: the Navigator program and the Alternative Solutions program. The Navigator program is open to individuals who are involved in the Family Support Division's Contempt of Court Unit. Both programs provide resources for job training, housing, employment, getting lost driver's licenses back, and similar matters.

It has clearly become apparent to some states that a holistic approach is required to rectify child support laws to become more successful and to attain the goal of payments being received. The results of the NCP Choices program in particular seem to illustrate the importance of helping these noncustodial parents battle every facet that they are up against regarding: difficulty in finding employment, maintaining employment, and being able to contribute to child support obligations while having enough left over to survive. The results of the Texas study verify that the majority of men in the positions discussed throughout this article "would if they could," but they just can't.

Part VII. Proposition for a Unified Nationwide System and Assistance/Re-Entry Programs

On April 4, 2015, Walter Scott was pulled over by a police officer in South Carolina for a nonfunctioning taillight.[83] This encounter ended with Scott being shot eight times from behind, with five of those bullets going through him as he fell to his death.[84] He reportedly ran because he thought he was being arrested for nonpayment of child support, once again.[85] This is the part of the story that many people don't know because this story got clumped together with a slew of other police shootings of unarmed black men. A huge part of Scott's story is the story of a child support system gone terribly wrong. Scott's brother recalls him pleading to a judge that he just didn't make enough money. When he asked the judge, "How am I supposed to live?" The judge replied, "That's your problem, you figure it out."[86]

Scott was a black man with low income and a child support order that he tried his hardest to comply with. Like so many others—as the statistics regarding racial disparities relating to child support and incarceration demonstrate—Scott had difficulty finding fruitful employment.[87] When his arrears piled up to $8,000, he repeatedly got thrown in jail for nonpayment. He kept losing the very jobs that he got in order to pay the child support because he kept going to jail for nonpayment and the employer would fire him.[88] This is the endless cycle discussed at the beginning of this article. Right before his death, his arrears added up to over $8,000. Scott ran because he didn't want to go to jail and lose yet another job.

South Carolina does not allow any modifications to the amount owed if the parent is incarcerated. That results in many parents leaving jail and facing tens of thousands of dollars of debt that has accumulated while they were incarcerated.[89] A recent MSNBC investigation highlighted that in South Carolina, noncustodial parents can be held in contempt of civil court if their child support payments are just five days late, which means a judge can send them to jail.[90]

Scott should be a nationally covered example of what needs to be avoided. First and foremost, for policy change, we need to start distinguishing those who *don't* pay child support from those who *can't* pay. It should become nationwide policy that incomes are not imputed at levels that don't come anywhere near what these individuals have a history of actually making. Income should be imputed in cases where by clear and convincing evidence, the individual is intentionally not working to avoid child support.

It should become standard policy that proof of in-kind support should be counted toward an effort to make payments, if not dollar-to-dollar subtracted from payments owed. This could be accomplished by supplying receipts for the items purchased for the child or by a signed affidavit from the custodial parent if he or she is willing. In our advanced justice system, it should be evident who is intentionally not paying child support as opposed to who is incapable of doing so, but clearly it is not. In addition, a history of a relationship with the child should stand as one possible indicator in favor of the father not intentionally avoiding payments. If the father visited the child regularly and provided in-kind support before the hardship or incarceration occurred, this should stand as an indication that this later nonpayment is not intentional, but due to circumstances.

The same should apply to incarceration for nonpayment. Incarceration should be reserved for instances where it can unequivocally be proved that nonpayment is intentional. If the individual is making minimum wage, and has always, then the courts should start recognizing a true inability to pay. Judges and magistrates should be better aware of the racial and economic realities of the people who stand before them—and be held accountable.

All states should allow for modification of orders while incarcerated. Not doing so only perpetuates the problem of requiring payments during periods of zero income and assigning uncollectible arrears. Setting a sentence minimum, such as Connecticut's, may also help create a uniform rule; however, Connecticut's three-year minimum may be slightly long. A year may prove to be a fairer minimum once it's taken into account how much can accrue in arrears in just that one-year time frame, should no modification be allowed.

All states should implement assistance programs such as Texas and Washington, guiding released inmates into the workforce and providing skills to many individuals who may not have any skills or work experience, yet are expected to get a job. Creating a solid net-

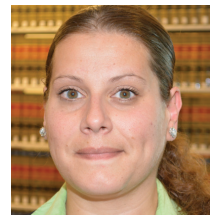
work of employers who are willing to hire individuals with criminal records should also be part of required assistance programs. New York seems to be heading in the right direction by ordering some of these programs and giving individuals a cushion period to get on their feet; however, this type of program should be implemented across the country. The follow-up studies from Texas' NCP Choices program show an improvement in all areas of concern. This is empirical proof that when receiving proper guidance, these individuals paid more support and got off government assistance more frequently.

The driver's license suspension as a penalty for nonpayment must be eliminated nationwide. All 50 states have statutory or administrative provisions that restrict, suspend, or revoke licenses for failure to pay child support.[91] The focus needs to be redirected to helping these individuals fulfill their obligations, which would benefit them, their children, and the other parent. Other than imprisonment for failure to pay, driver's license restrictions place the most burden on being able to find gainful employment. A handful of states (California, Colorado, Indiana, Louisiana, Maryland, South Carolina, South Dakota, West Virginia, and Wyoming) allow for restricted licenses to get to and from work if it would cause "undue hardship on the obligor."[92] This should not be held as the standard; instead, this should be looked at as an automatic hardship to anyone who drives. We expect people to get jobs, but then in addition to racial discrimination, criminal records, possible lack of experience or skills, we limit them to the areas serviced by the bus line (assuming there is a bus line) for employment.

All states should adopt a form of New York's Family Court Act § 413(g) and not allow arrears to accrue beyond $500 for any obligor living at or below the poverty line. States should be free to set their own amount, but the amount should never exceed $1,000. If the amount exceeded $1,000, the rule would likely be counterproductive, and even those set arrears would remain uncollectible.

Lastly, there needs to be an informational standard for inmates, such as some method to provide the inmates with their options and resources for modifications of existing child support orders while they are incarcerated. Furthermore, inmates should not have to bear the entire burden of obtaining and preparing difficult paperwork correctly in order to have the modification they deserve due to zero income. A merger of Connecticut's and Minnesota's practices in this area should be adopted as the national standard. Connecticut's linking of inmate records to child support records to stay abreast of inmates with child support orders should be implemented in all states. Moreover, the use of child support liaisons, as in Minnesota, should become the national standard for assisting the inmate to initiate the modification. The informational videos utilized in several of these states should also become the standard as part of the intake process for all inmates. This would greatly overcome any difficulties posed due to inmates not knowing the options and resources available to them for modification of their child support orders.

Creating a uniform system that includes the factors listed above will push the child support system in a positive direction for all involved. There needs to be a way to hold the father accountable, while not accruing tens-of-thousands in debt that will never be paid to anyone anyway. An end must be put to the "deadbeat" stigma and an approach that involves a "village" is necessary. The changes to these laws in this country over the last decade prove an acknowledgment that change is needed. Forward progress has begun, but cannot stop. We need there to never be another Walter Scott. ⊙



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[62]Turetsky, *supra* note 15.

[63]When a court determines that one party is earning less than they are capable of, such as when a party intentionally reduces his or her income, the court is empowered to impute additional income to that party and base child support on actual earning capacity. When the actual earning capacity is unknown, the court may impute income to a party if the proven expenses are greater than the stated income.

[64]*Matter of Comm'r of Soc. Servs. (Donna M.W.) v. Jessica M.D.*, 921 N.Y.S2d 460, 31 Misc. 3d 490 (2011); *Matter of Baltes v. Smith* 111 A.D.3d 1072, 975 N.Y.S.2d 782, 2013 N.Y. App. Div. LEXIS 7733, NY Slip Op. 7776.

[65]*Hunter v. Traynor,* 16 N.Y.S. 3d 169, 171, Y9 Misc. 3d, 973, 97Y, 2015 N.Y. Slip Op. 25296 (2015).

[66]*Id*.

[67]*Id.*

[68]*Id.* at 171.

[69]*Id.* at 172.

[70]*Child Support and Incarceration*, Nat'l Conf. of State Legislatures (Feb. 10, 2016), http://www.ncsl.org/research/human-services/child-support-and-incarceration.aspx.

[71]The 14 states are: Montana, North Dakota, South Dakota, Nebraska,

Kansas, Oklahoma, Arkansas, Louisiana, Tennessee, Kentucky, Georgia, South Carolina, Virginia, and Delaware.

[72]*Child Support and Incarceration*, *supra* note 70.

[73]Cal. Fam. Code § 4007.5 (2011).

[74]Cal. Code Regs. tit. 22, § 115530(a)(1) (2011).

[75]Massachusetts Child Support Guidelines.

[76]Or. Admin. R. 137-055-3300 (2011).

[77]Or. Rev. Stat. § 416.425(12) (2011).

[78]Off. of Child Support Enforcement, Child Report Fact Sheet Series No. 4, Realistic Child Support Orders for Incarcerated Parents 3 (June 2012), https://www.acf.hhs.gov/sites/default/files/ocse/realistic_child_support_orders_for_incarcerated_parents.pdf.

[79]*Id.* at 4.

[80]*Id.*

[81]*Child Support and Incarceration*, *supra* note 70.

[82]*Id.*

[83]Robles & Dewan, *supra* note 14.

[84]*Id.*

[85]*Id.*

[86]*Id.*

[87]*Id.*

[88]*Id.*

[89]Shawn Garrison, *Walter Scott and the Problem With Child Support*, DadsDivorce, https://dadsdivorce.com/articles/walter-scott-and-the-problem-with-child-support (last visited Apr. 23, 2018).

[90]Irin Carmon, *How Falling Behind on Child Support Can End in Jail*, MSNBC (Apr. 9, 2015, 6:54 AM), http://www.msnbc.com/msnbc/how-falling-behind-child-support-can-end-jail#56748.

[91]*License Restrictions for Failure to Pay Child Support*, Nat'l Conf. of State Legislatures (Jan. 30, 2014), http://www.ncsl.org/research/human-services/license-restrictions-for-failure-to-pay-child-support.aspx.

[92]*Id.*