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PROSECUTIVE GUIDELINES AND PROCEDURES FOR THE CHILD SUPPORT RECOVERY ACT OF 1992

Office of the Attorney General

Washington D.C. 20530

February 25, 1997

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: THE ATTORNEY GENERAL

SUBJECT: Prosecutive Guidelines and Procedures for the Child Support Recovery Act of 1992 (REVISED, 2/97)

The Child Support Recovery Act of 1992

The Child Support Recovery Act of 1992 (CSRA), Pub. L. No. 102-521, makes the willful failure to pay a past due support obligation with respect to a child residing in another state a federal offense. 18 U.S.C. § 228 (see Appendix 1). A first violation of the CSRA is punishable by six months imprisonment and/or a fine. Subsequent violations are punishable by two years imprisonment and/or a fine.

The F.B.I. has primary investigatory jurisdiction. Additionally, Special Agents of the Office of the Inspector General of the United States Department of Health and Human Services have been given authority to investigate violations of the CSRA.

The following policies and procedures are intended to ensure effective prosecution of the CSRA by providing a means for selecting egregious cases which states are unable to handle because of the interstate nature of the case.

Elements of the Offense

The United States must prove the defendant:

1. Having the ability to pay,
2. Did willfully fail to pay,
3. A known past due (child) support obligation,
4. Which has remained unpaid for longer than one year

OR is an amount greater than \$5,000,

5. For a child who resides in another state.¹

Definitions

Past Due Support Obligation

The CSRA defines "past due support obligation" as any amount:

(A) determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support and maintenance of a child and the parent with whom the child is living; and

(B) that has remained unpaid for a period longer than one year, or is greater than \$5,000.

18 U.S.C. § 228(d)(1).

Willfulness

According to the legislative history, willfulness has the same meaning as it has for purposes of federal criminal tax law.

H. Rep. No. 102-771, 102nd Cong., 2d Sess. at 6 (see Appendix 2). For criminal tax cases, willfulness is knowing and intentional violation of a known legal duty. Cheek v. United States, 111 S.Ct. 604, 610 (1991).

With respect to ability to pay, the legislative history states the government must establish beyond a reasonable doubt, that at the time payment was due the [defendant] possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the [defendant].

H.Rep. No. 102-771, 102nd Cong., 2d Sess., at 6 (see Appendix 2).

Willfulness cannot be presumed from non-payment alone. 138 Cong. Rec. S17131 (October 7, 1992) (see Appendix 3). The government is required to prove that the defendant, as of the date specified as the date of the offense, willfully failed to pay an outstanding amount.

Criminal culpability is not obviated by partial payment of support obligations because the statute defines past due support obligation as "any amount." However, partial payment may be relevant to inability to pay, which would negate willfulness. The circumstances of any case in which partial payment has been made, including

the relationship of the amount of partial payment to the total arrearage and ability to pay the arrearage, should be considered before proceeding.

Prosecutive Screening Criteria

As a general principle, it is recommended that cases should be accepted only when the referral makes clear that all reasonable available remedies have been exhausted.² Where it can be concluded based upon the obligor's past conduct that further efforts, while technically viable, would probably prove futile, the case should still be given consideration for referral. Among such cases, priority should be given to cases where the following is established:

- a. a pattern of flight from state to state to avoid payment or flight after service of process for contempt or contempt hearings; or
- b. a pattern of deception to avoid payment, such as changing employment, concealing assets or location, or using false names and/or social security numbers; or
- c. failure to make support payments after being held in contempt; or
- d. there exist particular circumstances which dictate the need for immediate federal intervention, such as where the custodial parent and/or child have special medical needs which are going unmet, where the custodial parent and/or child is handicapped, or where the custodial family is in danger of eviction and homelessness; or
- e. when the failure to make child support payments has a nexus to other potential federal charges, such as bankruptcy fraud (i.e. concealing assets), bank fraud (i.e. false statements to a bank), federal income tax charges (i.e. false statement or tax evasion) or other related criminal conduct.

Priority should also be given to those cases where the children of the non-paying parent are still minors. While there is no policy prohibiting the filing of charges in "arrears only" cases where there is a chargeable period of non-payment post-enactment of the CSRA, the policy of identifying cases which are the most egregious encompasses the notion that the need to support minor children, while they are minors, is of greater importance.

Referral Sources

Agency Referrals

Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 et. seq. requires states to establish programs for the enforcement of child support. The agencies operating these programs are known as IV-D agencies. These agencies must pursue child support on behalf of individuals who are receiving public assistance as well as at the request of those who are not. In addition, there may be other qualified agencies involved with child support.³ These agencies may have a great deal of information concerning violations of the CSRA. U.S. Attorneys are encouraged to coordinate with IV-D officials or their designees and other appropriate officials on local and state levels to establish and/or update referral procedures, and may wish to establish local committees to develop guidelines and procedures, or draft and execute a Memorandum of Understanding to define the referral procedures and guidelines.⁴ Consideration should also be given to appointing state or local child support prosecutors as Special United States Attorneys to assist in the prosecution of cases under the CSRA.

It is recommended that U.S. Attorneys in multi-district states work together to develop a uniform state-wide approach to avoid marked differences in referral procedures and guidelines within the same state.

Other Referrals

Complaints and referrals for investigation may also come from private lawyers, advocacy groups, or from individuals. These complainants should be strongly encouraged to pursue their available remedies, and to seek any subsequent referral for prosecution, through the IV-D agency or other appropriate state or local agency.

Referral Package

U.S. Attorneys should require a referral package in every case. It is suggested that United States Attorneys coordinate the preparation of the referral package with the appropriate agency.

Venue

Venue for the prosecution will lie in either the district where the child resides or the district where the non-paying parent resides.⁵

Among the factors to be considered when making a decision regarding venue selection are, for example, the efficiency of a prosecution (i.e. the costs of transporting witnesses, victims or the defendant or the availability and need for documents custodians to testify). The deterrent impact of the prosecution in each district should also be weighed.

Factors that favor venue in the district where the child resides include the presence of significant evidence in that district, such as judicial or administrative orders reflecting the support obligation or arrearage. Another factor suggesting that venue may be appropriate in the child's district would be if the custodial parent receives public assistance in that district.

Factors that favor venue in the district where the nonpaying parent resides include the presence of evidence showing willfulness such as witnesses or documents concerning the existence or concealment of assets, change(s) of residence, or "job hopping."

Charging Decisions and Notice to Target

Care must be taken to ensure that the criminal process is not used to enforce a civil debt. As such, once a case has been filed it should not be dismissed. Nor should pre-trial diversion be considered, except in extraordinary circumstances, merely because an offender makes payment. An additional consideration militating against dismissal or pre-trial diversion once charges have been filed is that the deterrent impact of the potential felonious second offense would be avoided by dismissal or pretrial diversion of the first offense.

No notice to the target is required prior to the filing of charges in these cases. While some U.S. Attorney's Offices have had a measure of success in encouraging targets to fulfill their obligations through the transmittal of target letters prior to making a final charging decision, such a practice must be weighed carefully in light of the considerations discussed above.

The determination as to whether to issue a summons or warrant in CSRA cases should be made on a case-by-case basis by the United States Attorney's Office prosecuting the case. Since these charges will generally involve individuals who have a history of evasion of court processes and flight, a warrant may be appropriate. However, other cases involving obligors who, for instance, have become established members of another community, may only require a summons to appear.

Right to a Jury Trial

A first violation of the CSRA is considered a Class "B" misdemeanor with a maximum sentence of 6 months incarceration. As a "petty offense" there is no right to a trial by jury. A second or subsequent violation of the CSRA is considered a Class "E" felony with a maximum sentence of 2 years incarceration. In such a case, the right to a trial by jury would attach.

Possible Defenses

In screening cases, some of the possible defenses which should be considered are:

1. Lack of Venue - discussed above.

2. Ex Post Facto application of the statute, i.e. whether an arrearage in the amount of \$5,000 must accrue after the time of the enactment of the CSRA, or whether an obligation must have remained unpaid for a period of one year commencing after the enactment of the statute. A violation of the CSRA should be viewed as a continuing offense.⁶ As such, the failure to pay for a period of one year, even where only one day of that failure occurred after October of 1992, would defeat that defense. Likewise, where an arrearage has become greater than \$5,000, and has remained unpaid for any period of time after the enactment of the CSRA, no Ex Post Facto defense should be available.

3. Statute of Limitations - as noted above, the CSRA should be viewed as a continuing offense. As such, assuming a violation of this statute has occurred, at least in part, within five years of the charging date, no such defense should prevail.

4. Payment-in-kind - Often, a "non-paying" parent will provide other assistance to his or her children, such as food, clothing, tuition or other direct financial assistance not recorded or known to the child support agency monitoring the case. Such "payments" may bear upon the issue of willfulness.

5. Lopez, etc. - Challenges to the statute under the Interstate Commerce Clause, the 10th Amendment, etc., have been brought in virtually every contested case. The four circuits which have ruled on these challenges have upheld the CSRA. Other appeals are pending.⁷

Sentencing Issues

Applicability of the Sentencing Guidelines

The Sentencing Guidelines do not apply to a first violation of the CSRA because it is considered a Class "B" misdemeanor. With respect to a second or subsequent violation of the CSRA, the Sentencing Guidelines are applicable, however no guideline for this offense exists. Therefore, sentencing should be based on the most analogous offense, which is theft. See U.S. Sentencing Guideline § 2B1.1.

Restitution

In addition to imprisonment and fines, the CSRA provides that upon conviction the court shall order restitution in an amount equal to the past due support obligation as it exists at the time of sentencing. 18 U.S.C. § 228(c); for general information see Prosecutor's Guide to Criminal Fines and Restitution.⁸

Conditions of Probation

Among the conditions of probation you should consider seeking in these cases are that the defendant:

1. "Support his dependents and meet other family responsibilities," and "(c)omply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or an other possession or territory of the United States requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living."⁹

2. "Work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment."¹⁰

3. "Work in community service as directed by the court."¹¹

4. Appear at all scheduled state/local court child support hearings.
5. Prepare, execute and/or file all forms required by state and federal tax laws.

Criminal Division Contacts¹²

Any questions or suggestions concerning the CSRA may be directed to Janis Kockritz or Craig Wolf in the Criminal Division's Child Exploitation and Obscenity Section, at 202-514-5780.

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- 1 Interstate flight is not an element of the offense.
 - 2 Specific remedies are identified in Appendix 4.
 - 3 In some states, the State Attorney General or the County District Attorneys may enforce child support obligations.
 - 4 A list of the IV-D criminal non-support contacts in each state who are responsible for ensuring the referral of appropriate cases to the United States Attorney's Offices for federal prosecutive screening is attached as Appendix 5.)
 - 5 The CSRA currently has no provision specifying where venue may appropriately lie. The Department is recommending amendment of the statute to allow for venue in any place where the obligor or child resided during the period of non-payment.

Challenges relating to the selection of the appropriate venue are currently on appeal. See, United States v. Murphy, 934 F.Supp. 736 (1996), on appeal to the 4th Circuit (holding that venue is only appropriate where the obligation is due to be paid, comparing the CSRA to tax payment cases). See also, United States v. Crawford, (E.D.Mo. 1996), on appeal to the 8th Circuit (holding that venue is appropriate where the child resides).
 - 6 See, United States v. Hampshire, 892 F.Supp. 1327 (D.Kan. 1995), aff'd, 1996 W.L. 514996 (10th Cir. 1996).
 - 7 A list of case citations is attached as Appendix 6.
 - 8 The Prosecutors Guide to Criminal Fines and Restitution can be obtained by contacting Lynn Solien, Associate Director for Financial Litigation of the Executive Office for U.S. Attorneys at 202-616-6444.
 - 9 18 U.S.C. § 3563(b)(1)+(21)
 - 10 18 U.S.C. § 3563(b)(5)
 - 11 18 U.S.C. § 3563(b)(13)
 - 12 A list of the CSRA Coordinators in each USAO is attached as Appendix 7.

NOTE: Attachments not included.

Updated March 8, 2017