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ESTATE PLANNING

Non-Payment of Child Support under Deadbeat Parents Punishment Act

Child Support and Federal Law

The Law

Although child support enforcement is primarily left up to state enforcement, a non-payment of child support may also become a federal criminal offense under certain conditions. Using the commerce clause as its base of authority, Congress enacted the Child Support Recovery Act of 1992 (CSRA), Pub. L. No. 102-521, making a 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 The intent of the statute was to prevent non-custodial parents from fleeing across state lines to avoid paying their child support obligations and to facilitate recovery of unpaid child support.

The Penalties

A person convicted of a first violation of the CSRA may be punished by up to six months in a federal prison and a fine. It is important to note that federal Sentencing Guidelines do not apply to a first violation of the CSRA because it is considered a Class "B" misdemeanor. As a Class B misdemeanor, which is a petty offense, there is no right to a jury trial. For any subsequent violation of the CSRA, federal Sentencing Guidelines are applicable which effectively increase the presumptive sentence for any subsequent offense to two years imprisonment and/or a fine. A second or subsequent violation is a Class "E" felony which carries with it a maximum sentence of 2 years incarceration. In such a case, there is a right to a jury trial. The Deadbeat Parents Punishment Act (DDPA) of 1998, amended the CSRA of 1992 and established felony violations for traveling in interstate or foreign commerce to evade a child support obligation or for failing to pay a child support obligation which is greater than \$10,000 or has remained unpaid for a period longer than two years. The balance of the CSRA and its enforcement remains intact

The 1998 amendments to 18 U.S.C. § 228 rewrote the statute to provide, in relevant part:

(a) Offense.--Any person who-

(1) willfully fails to pay a support obligation with respect to a child

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Minnesota Lawyers
Ofc. 612.240.8005
Suite 700
5775 Wayzata
Boulevard
St. Louis Park, MN
55416

maury@beaulier.com

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who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000;

(2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000; or

(3) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than \$10,000; shall be punished as provided in subsection (c).

(b) Presumption.--The existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period.

Fines and jail sentences are not the only consequence of a federal conviction for non-payment of child support. A court may also order a defendant to pay restitution to the custodial parent in an amount equal to the child support arrearage existing at the time that the defendant is sentenced. 18 U.S.C. § 228(c).

In most cases, the prosecutor will not offer pre-trial diversion, which generally means staying the jail sentence in order to allow the defendant to comply over a probationary period of time. This is not offered to underscore the seriousness of the offense and prevent second and subsequent.

Upon a conviction, the defendant will also be placed on probation for a period of years. During that probationary periods certain conditions will apply. If any condition is violated, it may result in the defendant serving additional jail time. Common conditions of probation that are imposed for a violation of the DPPA include the following:

1. That the defendant support his dependents and meet other family responsibilities, and comply 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.

2. That the defendant work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment.

3. That the if the defendant is unemployed he/she work in

community service as directed by the court."

4. That the defendant appear at all scheduled state/local court child support hearings.

Elements of the Offense

In order to convict a defendant accused of violation the Dead Beat Parents Punishment Act, the United States must prove that the defendant:

1. Had the ability to pay,
2. Willfully failed to pay,
3. A known and 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 a different state than the defendant.

Clarifications of the Law

Federal statutes and subsequent case law have helped to define some of the key terms of the statute.

- ***What is Past Due Child Support?***

The CSRA federal statute specifically defines a "past due support obligation" as any amount determined by a court order or an order under an established administrative procedure of any state which finds child support due from a person to a child or a person with whom a child is living; and the obligation has remained unpaid for a period longer than one year, or is greater than \$5,000. 18 U.S.C. § 228(d)(1).

- ***What does it mean to be Willful?***

There is no clear definition of "willful" under the DPPA. However, a good barometer of willfulness may be found under federal criminal tax law. For criminal tax cases, *willfulness* is a " knowing and intentional violation of a known legal duty." Cheek v. United States, 111 S.Ct. 604, 610 (1991).

It is important to recognize that *willfulness* cannot be presumed from non-payment by the defendant alone. The prosecution has burden to prove beyond a reasonable doubt that any failure to pay child support is willful at the time the child support was due to the custodial parent AND the defendant had sufficient money to pay the child support obligation or that any lack of funds was caused by a voluntary and intentional act of the defendant without justification in view of all the financial circumstances of the case. H.Rep. No. 102-771, 102nd Cong., 2d Sess., at 6.

- ***What if partial payments have been made?***

Even if partial payments have been made by a defendant, he/she may still be convicted under the DPPA since that statute defines a " past due support obligation" as "any amount" that is due and owing. A partial payment, however, may be relevant to a defendant's ability or inability to pay support. In fact, if full payment is made before the prosecution concludes, it does not obviate the offense since the willful intent not to pay support and the act of not paying when due has already occurred.

Where is the Case Heard?

The location where the case is heard is called the "venue."
The venue for a prosecution under the DPPA may occur in one of two federal court districts:

1. The District where the Child Resides; or
2. The District where the defendant resides.

To date Department of Justice has filed most cases in the district where the child resides.

When is the DPPA Usually Applied?

General guidelines have been set out for U.S. attorneys regarding when to prosecute a defendant for a non-payment of child support. Although these guidelines will not invalidate a qualifying prosecution under the statute that does not comply with the guidelines, it provides a barometer of when to expect a prosecution to occur.

First, U.S. attorneys are recommended to accept only cases where all reasonable available remedies have been exhausted. That does not mean that a state prosecution must occur first. It simply means that the U.S. attorney must come to a subjective conclusion based on past history of the case and past conduct of the defendant that other efforts would most likely prove futile.

Cases that are ranked as priorities may include:

- a pattern of flight from state to state to avoid payment or flight after service of process for contempt or contempt hearings; or
- 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
- failure to make support payments after being held in contempt; or
- 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
- when the failure to make child support payments has a nexus to other potential federal charges, such as bankruptcy fraud, bank fraud, federal income tax charges 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 DPPA, 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.

Possible Defenses

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

1. **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.

3. **Amount Accrued.** A defendant may assert that the arrearage amount of \$5,000 accrued prior to the enactment of the statute.

2. **Constitutional Challenges.** Challenges to the constitutionality of the statute may be made. In part, it may be argued that statute is overbroad and unsupported under the Interstate Commerce Clause or the 10th Amendment.

The United States Court of Appeals for the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th and 10th circuits have all affirmed the validity of the Act, despite claims that it interferes with interstate commerce and is an infringement upon state sovereignty because it encroaches on the field of family law. However, the United States District Court for the Western District of Michigan (Sixth Circuit) held that the Child Support Recovery Act (CSRA) - the precursor to the DPPA - is not a proper exercise of Congress' power to regulate interstate commerce. The Court stated that the CSRA criminalized conduct that was not criminal in Michigan (the father's failure to comply with a Michigan child support order). The Court also stated that by criminalizing the failure to pay based solely on the parent's residence in a different state than the child, regardless of how that diversity in residence resulted, the CSRA went beyond Congress' stated intent in passing the law preventing parents' interstate flight to avoid child support payments.

For additional information, please contact us at 612.240.8005.

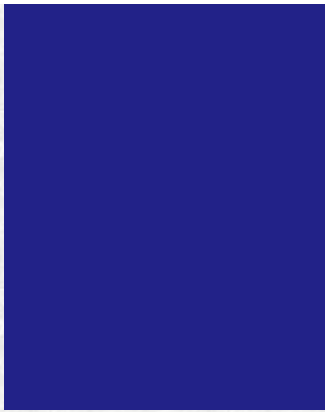
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