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Federal Criminal Enforcement of Child Support Obligations

George B. Daniels and Joel R. Brandes

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State laws have undergone major reform in the area of "children's issues," primarily because of the "federalization" of family law. These federal laws include the International Child Abduction Remedies Act, which established the basic procedure for exercising judicial remedies under the Convention on the Civil Aspects of International Child Abduction, and the Parental Kidnapping Protection Act. One of the most important laws was the Child Support Recovery Act of 1992 (CSRA) which provided criminal penalties for the willful failure to pay a "past due support obligation" with respect to a child who resides in another state.¹ The Deadbeat Parents Punishment Act of 1998 (DPPA) amended the CSRA and added greater criminal penalties for failing to pay child support. Neither the CSRA nor the DPPA created a private right of action.²

The CSRA defined a "past due support obligation" as any amount determined under a state court or administrative order to be due for the support and maintenance of a child, or of a child and the parent with whom the child is living, that remained unpaid for a period longer than one year, or was greater than \$5,000.³ A first offense is punishable by a fine up to \$5,000 and imprisonment up to six months.⁴ A second or subsequent offense is punishable by a fine up to \$250,000 and felony imprisonment up to two years. Restitution is mandatory in an amount equal to the total unpaid support obligation as it exists at the time of sentencing.⁵

"Willful" failure to pay means having the money and refusing to use it for child support, or not having the money because the defendant failed to avail himself of the available means of obtaining it.⁶ In one case, a defendant's acknowledgment that he could have paid some amount toward his past due support obligation precluded a finding that he lacked the ability to pay his obligation.⁷ The government need not prove the predicate facts for the support order, such as paternity. It merely must prove the existence of a state judicial or administrative order creating the obligation. The defendant may not raise or relitigate nonparentage as a defense.⁸

In *United States v. Mattice*,⁹ the U.S. Court of Appeals for the Second Circuit construed "willfulness" as in criminal tax cases, where the government must prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. In order to prove that a defendant violated a "known legal duty" to pay child support, the government need only prove that the defendant knew he was violating a state court or administrative support order.

In *Mattice*, appellant contended that the government failed to prove that he was financially able to pay his entire past due

support obligation and thus failed to prove "willfulness." The Second Circuit disagreed, noting that the CSRA defined a "past due support obligation" as "any amount" unpaid for more than one year or greater than \$5,000. Congress' choice of "any amount," rather than "the amount," demonstrates Congress' intent to make partial failures to pay an offense. If a defendant is unable to pay any of his past due support obligations, his failure to pay cannot be either voluntary or intentional, and, thus, cannot be willful. A defendant's inability to pay anything toward his past due obligation is a defense. The defendant may present evidence that his income was not sufficient, after meeting his basic subsistence needs, to pay any part of the support obligation.¹⁰

DPPA Amendments

The DPPA amended the CSRA to add two additional felonies punishable by a fine up to \$250,000 and imprisonment up to two years. It is a felony if a person travels in interstate or foreign commerce with the intent to evade a support obligation, if the obligation remained unpaid for a period longer than one year, or is greater than \$5,000. It is also a felony if a person willfully fails to pay a support obligation with respect to a child who resides in another state, if the obligation has remained unpaid for a period longer than two years, or is greater than \$10,000.¹¹

There was no right to a jury trial for a first offense in a CSRA prosecution because the crime, with a six-month maximum imprisonment, was a petty offense.¹² However, a second CSRA offense and the amended new felony offenses under the DPPA entitle the defendant to a jury trial.¹³

The DPPA added venue provisions. An action may be prosecuted in a federal district where either the covered child or the "obligor" resided when the "obligor" failed to meet that support obligation, or any other district with jurisdiction otherwise provided for by law.¹⁴ The term "resides" refers to residence, rather than domicile.¹⁵

The term "child" is not limited to persons under 18 years of age. It can include a parent's adult children. Emancipation does not eliminate arrears of child support, nor the criminal penalties that may be imposed.¹⁶

Under the DPPA, the prosecution must still establish beyond a reasonable doubt that the failure to pay was willful or was with an intent to evade a support obligation.¹⁷ However, the existence of a support obligation that was in effect for the time period charged creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period.¹⁸ Some courts have criticized this statutory presumption as a violation of the Due Process Clause by shifting to the defendant the government's burden of persuasion on the willfulness element.¹⁹

The criticizing courts' rationale is that this burden-shifting is impermissible because there is an insufficient link between the basic fact of an existing support obligation and the elemental fact of willfulness.²⁰ The offending portion of the statute has been held to be severable from the remainder of the statute and the presumption disregarded at trial.²¹

Defenses and Challenges

In *United States v. Kramer*, the U.S. Court of Appeals for the Seventh Circuit held that a defendant could raise the defense that the underlying state court that imposed the support obligation lacked personal jurisdiction over the defendant.²² Robert Kramer contended that he was never served with process nor notified of the Indiana paternity suit. Without such notice and opportunity to be heard, he argued that the default judgment did not constitute a valid "support obligation."

In *United States v. Bigford*, the U.S. Court of Appeals for the Tenth Circuit also held that the defendant could challenge the validity of the underlying default order on the basis of lack of personal jurisdiction.²³ The court noted that other circuits have unanimously held that the DPPA and the CSRA did not permit an attack on the substantive lawfulness of the underlying state support obligation or permit a federal court to revise the order in any way.²⁴ The Tenth Circuit, however, adopted the holding and reasoning of the Seventh Circuit that default judgments that are void for want of jurisdiction can be attacked on that basis.

In *United States v. Kukafka*, the defendant was convicted of willful failure to pay his support obligation.²⁵ The U.S. Court of Appeals for the Third Circuit affirmed the judgment, rejecting his collateral challenge to the divorce decree. It noted that every court of appeals that had addressed merits-based collateral challenges to the underlying support orders in DPPA prosecutions had reached the same conclusion.²⁶ The Third Circuit noted that the DPPA does not require a federal court to ensure the validity of each aspect of the underlying court order containing the support obligation.

In *United States v. Kerley*, the Second Circuit rejected a challenge to the subject matter jurisdiction of the court rendering the support order.²⁷ The district court had granted the defendant's motion to dismiss, holding that the support order was

entered by a New York Family Court hearing examiner who lacked subject matter jurisdiction.²⁸

The Second Circuit reversed. It held that the DPPA did not permit collateral challenges to the subject matter jurisdiction of the state court that entered the underlying support order. The court noted that its holding was contrary to the rulings in the Seventh and Tenth circuits, which had held that defendants can collaterally challenge the personal jurisdiction of the court that issued the support order. The Second Circuit ruled that a DPPA case turns only on the defendant's violation of a court order, and not on whether that order is valid under state law.

On remand in *Kerley*, the disputed issue was whether defendant's failure to make the support payments was willful. The government argued that he was able to make the payments, but arranged his financial circumstances to avoid the obligation. The government presented evidence to show that he changed jobs and remained unemployed to avoid the wage garnishments, and that his current wife's income provided defendant with a comfortable lifestyle. Defendant stated that he did not make the payments because he believed that he was in compliance with the support order.

On appeal after conviction, the Second Circuit noted that "willfulness" means a "voluntary, intentional violation of a known legal duty."²⁹ It held that a defendant may negate a willfulness finding by showing ignorance of the law or that, because of a misunderstanding of the law, he had a good faith belief that he was not violating the legal duty. The court also ruled that violating an order to pay support for two children could only sustain a conviction for one count.

In *United States v. Fields*, the U.S. Court of Appeals for the Eleventh Circuit held that the "willfulness element" required the government to prove that the defendant knew that the duty to pay support was to a child who resided in another state.³⁰ The Eleventh Circuit held that it is the state court that imposes a legal duty to pay child support. In enacting the CSRA, Congress created a new legal duty, the duty to pay when the child resides out of state, and criminalizes the failure to do so. Congress has indicated that, like the tax laws, it intended the CSRA to punish only the violation of a known legal duty. In order to prove a willful violation of the statute, the government must prove that the defendant knew his child resided in another state and he refused to pay.³¹ Because James Fields did not know that his child resided in another state, he did not have knowledge of the facts constituting the offense and could not have had the requisite willfulness to support his conviction.

Attorney General Guidelines

The "Prospective Screening Criteria" issued by the U.S. Attorney General provides guidelines and procedures for when DPPA cases should be accepted for federal criminal prosecution. "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. 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."³²

The guidelines provide that priority should be given to cases where there exists a pattern of flight or deception to avoid payment; a failure to make payment after being held in contempt; particular circumstances that dictate the need for immediate federal intervention; a nexus to other potential federal charges; or where the children are still minors. These criteria, as well as practical experience for most attorneys and their clients, have demonstrated that it is not an enforcement remedy that is easy to come by for those who are owed outstanding support obligations.

George B. Daniels is a judge of the U.S. District Court for the Southern District of New York. **Joel R. Brandes** is the president of Joel R. Brandes Consulting Services, in Fort Lauderdale, Fla., and Jersey City, N.J. He is the author of the treatise "Law and the Family New York" (Thomson-West).

Endnotes:

1. 18 U.S.C. §228.

2. *Salahuddin v. Alaji*, 232 F.3d 305 (2d Cir. 2000).

3. 18 U.S.C. §228 (f)(3)

4. See 18 USC §§3559, 3571.

5. 18 U.S.C. §228(d); *United States v. Lakatos* held that a federal court could not require immediate payment of the entire amount of back due support as a condition of supervised release if it conflicts with a state court order already establishing a schedule for payment of the past due obligation. 241 F.3d 690 (9th Cir. 2001); See also 18 U.S.C. §3563(b)(20).

6. *United States v. Ballek*, 170 F.3d 871 (9th Cir. 1999).

7. Id.; see also *United States v. Mathes*, 151 F.3d 251 (5th Cir. 1998).

8. United States v. Johnson, 114 F.3d 476 (4th Cir. 1997).
9. United States v. Mattice, 186 F.3d 219 (2d Cir. 1999).
10. See e.g., United States v. Calero, 02 Cr. 1422, 2004 WL 2181260, at * 2-3 (S.D.N.Y. Sept. 27, 2004) (The ability to pay is "not an element of the crime. Rather, defendant's ability to pay is evidence that defendant acted willfully in failing to pay his support obligation"). In Calero, "it was reasonable for the jury to find that... the defendant... voluntarily, intentionally and without justification arrange[d] his financial affairs so as to deliberately render assets unavailable to satisfy any portion of the support obligation." *Id.* at *3.
11. 18 U.S.C. §228 (c).
12. United States v. Sostre Narvaez, 279 F.Supp.2d 82 (D. P.R. 2003).
13. 18 U.S.C §228 (c)(2); see also United States v. Calero, No. 02 Cr. 1422 (GBD), 2004 WL 2181260 (S.D.N.Y. Sept. 27, 2004).
14. 18 U.S.C. §228(e). In United States v. Muench, venue was properly in Florida, where defendant's children resided, notwithstanding that the indictment charged defendant only with failure to pay child support in accordance with a Texas court's mandate. 153 F.3d 1298 (11th Cir. 1998). The district in which defendant's child resided was the proper venue. Venue was not limited to the state from which he failed to pay child support, and the state to which he was required to make support payments pursuant to court order. United States v. Murphy, 117 F.3d 137 (4th Cir. 1997).
15. United States v. Venturella, 391 F.3d 120 (2d Cir. 2004); United States v. Namey, 364 F.3d 843 (6th Cir. 2004).
16. United States v. Molak, 276 F.3d 45 (1st Cir 2002); United States v. Black, 125 F.3d 454 (7th Cir. 1997).
17. A state order fixing the child support arrearage amount was not a prerequisite to prosecution under the CSRA as the statute only requires that an obligation be created by court order. United States v. Black, 125 F.3d at 464.
18. 18 U.S.C §228 (b)
19. United States v. Grigsby, 85 F.Supp.2d 100 (D.R.I. 2000).
20. United States v. Thurman, 2007 WL 4522616 (D. Nev. 2005); United States v. Morrow, 368 F.Supp.2d 863 (C.D. Ill. 2005); United States v. Grisby, 85 F.Supp.2d 100 (D.R.I. 2000); see also In re Winship, 397 U.S. 358, 364 (1970).
21. United States v. Ballek, 170 F.3d 871, 873 (9th Cir. 1999).
22. 225 F.3d 847 (7th Cir. 2000).
23. 365 F.3d 859 (10th Cir. 2004).
24. See, e.g., United States v. Brand, 163 F.3d 1268, 1275-76 (11th Cir. 1998); United States v. Bailey, 115 F.3d 1222, 1232 (5th Cir.1997); see also United States v. Sage, 92 F.3d 101, 107 (2d Cir. 1996) (the CSRA "does not authorize a federal court to revise the domestic relationship adjudicated by the State courts or to modify any part of a State court decree").
25. 478 F.3d 531 (3d Cir. 2007).
26. *Id.* at 538 n.2. ("Every circuit that has addressed the issue has stated that defendants in [Deadbeat Parents Act] prosecutions cannot collaterally challenge the substantive merits of the underlying support order" (quoting United States v. Kerley, 416 F.3d 176, 178 (2d Cir. 2005))).
27. *Id.*
28. United States v. Kerley, No. 02 cr 1529 (BSJ), 2004 WL 1555119 (S.D.N.Y. 2004); United States v. Kerley, 416 F.3d at 184.
29. United States v. Kerley, 544 F.3d 172, 177 (2d Cir. 2008).
30. 500 F.3d 1327 (11th Circuit 2007).
31. *Id.* at 1332.
32. See Office of the Attorney General, Washington D.C. 20530, Feb. 25, 1997 Memorandum for All United States Attorneys

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