

CRIMINAL NONSUPPORT

August 2016

Dear Prosecuting Attorneys:

The collaborative effort between your offices and the Child Support Division of my office has made a very real difference in the lives of Texas children. District attorneys across the state, in cooperation with our field investigators and assistant attorneys general, have successfully prosecuted hundreds of criminal cases against parents for failure to pay child support since 2007. With your assistance, we can continue this trend.

Thousands of Texas children rely on child support payments for a fair start in life. Parents who do not follow the law must be held accountable for refusing to take care of their children. Failure to follow court orders that require payment of financial and medical support must be prosecuted to ensure that Texas children receive the support they need. Without enforcement, compliance will wane.

To help district attorneys with child support prosecutions under Texas Penal Code Section 25.05, we have updated and enhanced the criminal nonsupport handbook. This easy-to-use guide provides all the essential information needed to successfully collaborate with the Attorney General's Child Support Division to prosecute criminal nonsupport cases.

Because of the wide range of services my office can provide, prosecutors who have worked with us on these cases have found that they take little time and effort to prepare, present to a grand jury, and plead out.

Additional copies of this handbook are available from the child support section of my website at www.texasattorneygeneral.gov. For more information, you may also contact: Weldon Wallace, Investigations Manager, at (512) 460-6232 or weldon.wallace@texasattorneygeneral.gov.

If your office has been reluctant to prosecute these cases, please consider joining forces with my Child Support Division. Together, we can ensure that children receive the support that is essential for their future.

Sincerely,

Attorney General of Texas

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Introduction

Purpose

The purpose of this handbook is to assist prosecutors in Texas with the preparation and trial of criminal nonsupport cases. Every year, hundreds of thousands of parents regularly make their child support payments. However, there are others who have the ability to pay but refuse to fulfill their legal obligation to support their children.

To create a culture of compliance, it must be clear that there are stiff penalties for parents who refuse to take care of their children. Prosecution for criminal nonsupport is one important avenue for sending the message that parents should take seriously their obligation to pay child support.

Cooperation

Many prosecutors shy away from criminal nonsupport cases because they involve family law, which is far outside the normal purview of most prosecutors. This is where the Office of the Attorney General (OAG) can help. The OAG's Child Support Division (CSD) handles more child support cases than any other entity in the nation, filing as much as one-half of all family law cases in Texas and up to one-third of all the civil suits in Texas.

The OAG serves every county in Texas with 82 locations across the state and employs a staff of more than 2,400, including more than 200 assistant attorneys general (AAGs). The OAG has a caseload of about 1.5 million cases, and in 2015 collected more than \$3.9 billion in child support. However, the OAG cannot independently prosecute criminal nonsupport cases, which is why we need your help.

An Ongoing Effort

The OAG will work closely with your office to increase public awareness of the importance of both the collection of child support obligations and your office's role in pursuing these cases. If we refer a case to you, an assistant attorney general (AAG) and a field investigator will be assigned to assist with the case from presentation to conviction. The OAG assists with litigation support including giving expert testimony on how support is set, collected, recorded and distributed, and providing access to staff analysis regarding the specific case. The OAG is committed to referring only those cases where prosecution is clearly indicated and the facts are established beyond a reasonable doubt.

Credits

This handbook was initially prepared by AAG John Beauduy; AAG Debi Caffee; AAG A.D. Clark; Tom Hamilton, Assistant Deputy Director for Special Enforcement Operations; AAG Meg Jordan; AAG Harry Monck; AAG Debra Morgan; AAG Donna O'Shea; AAG Rolando Ramirez; Don Strup, Supervisor and Field Investigator for Special Enforcement Operations; AAG Alan Sumrall; and AAG Henry Voegtle. The handbook has been updated by Weldon Wallace, Manager Investigations and State Office Facilities; Penny Denmon, State Office Investigator; AAG Joel Rogers, Assistant Deputy Director for Field Legal Practice; and AAG Patricia Barsalou, Special Litigator for Field Legal Practice.

Comments and Questions

For comments or suggestions regarding this handbook, or to get your questions answered about criminal nonsupport, please contact Weldon Wallace, Investigations Manager, at (512) 460-6232 or weldon.wallace@texasattorneygeneral.gov.

The OAG and Child Support Collection in Texas

Background

In 1975, the federal government determined that the best way to help women and children move from public assistance to self-sufficiency was to collect child support from fathers. To ensure that states followed through with this idea, each state's receipt of welfare funding (under Title IV-A of the Social Security Act) was tied to that state's creation and operation of a child support enforcement program (under Title IV-D of the Social Security Act; hence the name "IV-D.") [S. REP. NO. 1356, 93d Cong., 2nd Sess. (1974).] Until 1985, this responsibility was shared by district and county attorneys and the Texas Department of Public Welfare. In 1985, the function was transferred to the OAG.

Nationwide, the child support program is governed almost exclusively by federal regulations. Title IV-D, 42 U.S.C. §651 *et seq.* spells out in great detail the standards state programs must meet to qualify for funding.

The Role of the OAG

Texas Is Unique

Texas is one of only a few states that makes the attorney general – an elected official – responsible for child support collections and one of only a handful of states with a statewide consolidated child support program. In most states, programs are operated at the county level. In some states, the non-legal program is state based, but in-court activities are the responsibility of the local district or county attorney's office or private contract attorneys.

The Office of the Attorney General is the state's Title IV-D agency. [Texas Family Code §231.001] These duties are handled by the OAG's Child Support Division, under the supervision of the Deputy Attorney General for Child Support, who is designated as the state's IV-D director. By statute, this person must report directly to the Attorney General. [TFC §231.0012]

As the state's IV-D agency, the OAG provides the following services:

- Parent locator services
- Paternity determination
- Child support and medical support establishment
- Review and adjustment of child support orders
- Enforcement of child support and medical support orders
- Collection and distribution of child support payments.

[TFC §231.101]

What the OAG Cannot Do

The OAG is not authorized to handle divorces, address property issues, or enforce visitation or custody provisions.

The AAGs who work in the Child Support Division represent the state of Texas; they do not represent the parties in the suit or the child or children. Additionally, an AAG cannot be appointed *ad litem* or “friend of the court.” [TFC §231.109]

Local Rule Offices

The OAG has contracted with several counties to provide IV-D services for all divorce cases in the county; these are usually handled through the local domestic relations office. District judges in those counties enact a local rule declaring that all divorce decrees entered after a certain date will be treated as IV-D cases. The parties may opt out of this referral. [TFC §231.0011(c)]

Confidential Records

The OAG’s child support records contain information from many sources, including the Internal Revenue Service (IRS), credit bureaus, and other state and federal agencies. As a result, child support records are confidential under both state and federal statutes. [TFC §231.108]

Title IV-D Cases

The OAG gets its cases in two ways:

1. A case is automatically referred to the OAG if a person with possession of a child applies for public assistance or Medicaid.
2. Individuals may apply for IV-D services, whether or not they have received public assistance. This includes people who have possession of the child but are not the parents, such as grandparents. Over 65 percent of the current caseload involves families who have never received any form of public assistance. There is no charge to apply for child support services. Custodial parents who have never received public assistance pay a \$25 annual service fee each year that they receive at least \$500 in child support collections.

By filing an application or accepting public assistance, the applicant assigns his or her rights in the child support case to the state of Texas. [TFC §231.104] This assignment provides the OAG with standing in the case.

An applicant who has never received public assistance may terminate services at any time. Those currently receiving public assistance cannot terminate services and must cooperate with the OAG or risk losing benefits. Those who have previously received public assistance cannot terminate services until these benefits have been recouped.

How are we doing?

In SFY 2015, the OAG collected \$3.9 billion in child support, more than any other state in the nation. In 2014, the OAG received the National Child Support Enforcement Association's Outstanding Program award to recognize the Child Support Division's excellent performance.

The OAG and Criminal Nonsupport Cases

The role of the Office of the Attorney General in criminal nonsupport cases is to provide support and assistance to enable local prosecutors to see that justice is served. The discretion to prosecute any case remains with the district or county attorney. The support services offered will vary depending on the needs and circumstances of each jurisdiction.

What the OAG Can Do

Find Cases

The OAG can identify criminal nonsupport cases suitable for prosecution from its caseload of more than 1.5 million statewide.

Investigate Cases

The OAG can investigate cases to determine if they are suitable for criminal nonsupport prosecution. Each case under consideration for referral for prosecution is assigned to a field investigator. These investigators, many of whom are former law enforcement personnel, are specially trained to research child support cases for criminal nonsupport prosecution. Their duties include the following:

- Obtaining and reviewing the original order establishing the support obligation to ensure the obligor received proper notice and the order is not subject to collateral attack
- Obtaining and reviewing subsequent orders regarding any modifications and civil enforcement actions
- Reviewing the financial information to ensure proper credit was given for all payments
- Contacting the obligee to ensure no payments were received that were not included in the official payment records
- Reviewing the obligor's wage and income records to ensure the obligor had the ability to pay support as ordered
- Reviewing the OAG's case file and computer system to identify any potential difficulties with the case
- Reviewing the court records and discussing the case with the AAGs to determine if a civil enforcement remedy may be more appropriate than criminal prosecution
- Determining if the case meets the guidelines established by the local prosecutor for a criminal nonsupport referral

Refer Cases

If a case meets the guidelines established by the local prosecutor, the OAG can refer the case to the prosecutor for consideration of possible criminal action, along with a specific case package containing all the relevant orders, pleadings and records.

What the OAG Can Do to Help the Prosecutor

Pre-screen Cases

The OAG can assist the prosecutor by pre-screening cases that obligees bring to the prosecutor if there is an open, full-service OAG child support case. Obligees who do not have an OAG case must apply for our services; once that happens, the cases are assigned to a field investigator.

Prepare a Case for the Grand Jury

Upon request, the OAG can assist the prosecutor in preparing a case for presentation to the grand jury. Each case accepted for prosecution is assigned to an AAG in the local field office and a field investigator. The AAG reviews the field investigator's report and the documents, pleadings, case file, and computer and financial records to ensure the case is appropriate for referral. The field investigator gathers additional documents and information as needed.

Present a Case to the Grand Jury

The OAG field investigator can assist the prosecutor in presenting the criminal nonsupport case to the grand jury. Field investigators are trained and experienced in testifying before grand juries and are knowledgeable about all phases of OAG child support enforcement.

Locate the Obligor

The OAG can assist the prosecutor in locating the obligor. Through the Child Support Evader program, the OAG seeks the public's help in finding parents wanted for criminal nonsupport by displaying their pictures in newspapers, on posters, and on the OAG web-site.

Prepare a Case for Trial

The OAG can also assist the prosecutor in preparing the case for trial. The AAG can answer questions and produce briefs on any relevant legal topic. The AAG can assist in drafting indictments, responses to defensive motions, and evidentiary and trial motions. OAG staff with personal knowledge of the case can provide factual evidence regarding the specific activities of the obligor and obligee in addition to information regarding the OAG's child support payment records.

Try a Case

The OAG can assist the prosecutor in trying the case. The AAG can sit second chair and the OAG staff can testify regarding the order creating the child support obligation and any modification thereof in addition to OAG payment records. If the obligor raises the affirmative defense of inability to pay, the field investigator can testify regarding the obligor's employment and income history.

Set Up Restitution

The OAG can assist the prosecutor in setting up terms of probation to ensure the obligor's restitution payments are credited against the child support obligation and go to support the children.

Inform the Public

The OAG can assist the prosecutor in raising public awareness about the basic elements of the case and how it was resolved to benefit the children. The community expects children to be supported, and one purpose of prosecution is to meet that expectation.

What the OAG Cannot Do

Release Confidential Information

Much of the information gathered by the OAG is confidential pursuant to federal and state law. Although certain kinds of information may be available to the OAG for release to a prosecutor in connection with a criminal nonsupport referral, other kinds of information cannot be released, even to a prosecutor. However, the OAG can provide the prosecutor with all the information necessary to successfully prosecute the criminal nonsupport case.

No Independent Prosecution

The distinction and division of responsibilities between the OAG civil enforcement and the criminal prosecution of nonsupport are unambiguous. The OAG does not have the authority to independently prosecute criminal nonsupport cases. Instead, the OAG can only assist the local prosecutor to the extent requested.

Advantages to the Prosecutor

The scope and extent of OAG services available to prosecutors eliminates most of the uncertainty of prosecuting criminal nonsupport cases. This is particularly true with respect to prosecutors who do not have the available resources to develop a specialized criminal nonsupport program. The OAG is here to assist.

Indictment

Elements

The elements of the offense of criminal nonsupport are as follows:

1. The defendant intentionally or knowingly
2. Fails to provide support for his child younger than 18 years of age, or for his child who is the subject of a court order requiring the individual to support the child.

[*Belcher v. State*, 962 S.W.2d 653 (Tex. App. -- Austin 1998, no pet)]

Alternatives

Two indictment examples are provided:

- Example 1, from Harris County, is a one-count indictment.
- Example 2, from Rains County, is a multi-count indictment listing each missed payment for each child as a separate count.

Example 1: Single count indictment

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

The duly organized Grand Jury of *[county name]* County, Texas, presents in the *[court number]* District Court of *[county name]* County, Texas, that in *[county name]* County, Texas, *[defendant name]*, hereafter styled the Defendant, heretofore on or about *[offense date]*, did then and there unlawfully, intentionally and knowingly fail to provide support for *[child name]*, his child younger than 18 years of age (*or his child who was the subject of a court order requiring the Defendant to support the said child*)

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Example 2: multiple count indictment

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

The Grand Jurors of *[county name]* County, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the *[term identifier]* Term, *[term date]* of the *[court number]* District Court of said County, Texas, upon their oaths present in and to said Court, that on or about the *[offense date]* day of *[offense month]*, *[offense year]*, and before the presentation of this indictment, in said County and State, *[defendant name]*, hereafter styled the Defendant, did then and there unlawfully, intentionally or knowingly fail to provide support for his child, *[1st child name]*, said child being the subject of a court order requiring the Defendant to support said child; And the Grand Jurors aforesaid do further present in and to said Court, that on or about the *[offense date]* day of *[offense month]*, *[offense year]*, and before the presentation of this indictment, in said County and State, *[defendant name]* did then and there intentionally or knowingly fail to provide support for his child, *[2nd child name]*, said child being the subject of a court order requiring [OBLIGOR] to support said child;

And the Grand Jurors aforesaid do further present in and to said Court, that on or about the *[offense date]* day of *[offense month]*, *[offense year]*, and before the presentation of this indictment, in said

County and State, *[defendant name]* did then and there intentionally or knowingly fail to provide support for his child, *[3rd child name]*, said child being the subject of a court order requiring [OBLIGOR] to support said child;

And the Grand Jurors aforesaid do further present in and to said Court, that on or about the *[offense date]* day of *[offense month]*, *[offense year]*, and before the presentation of this indictment, in said County and State, *[defendant name]* did then and there intentionally or knowingly fail to provide support for his child, *[4th child name]*, said child being the subject of a court order requiring [OBLIGOR] to support said child; (This continues for each child for each month for a year of missed payments)

AGAINST THE PEACE AND DIGNITY OF THE STATE OF TEXAS.

Extradition and Rendition

Statutory Authority

Extradition for criminal nonsupport is governed by Texas Family Code §159.801. The governor may demand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee. [TFC §159.801(b)(1)] This applies even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled from that state. [TFC §159.801(c)]

Before making such a demand, the governor may require the prosecutor to demonstrate that the obligee instituted proceedings for support at least 60 days prior to the date of the demand for extradition. [TFC §159.802(a)] All cases referred by the OAG will have already had proceedings for support instituted and a final order for support entered prior to referral.

Transportation

It is the policy of the OAG to assist prosecutors in arranging transportation for prisoners arrested out of state on criminal nonsupport warrants referred by the OAG and to pay for transportation costs. We need to know as soon as possible after the obligor is arrested to make these arrangements. Please contact Weldon Wallace, Investigations Manager, at (512) 460-6232 or weldon.wallace@texasattorneygeneral.gov.

Requisition Forms

Samples of two forms are provided on the following pages:

- Application to Governor for Issuance of Requisition
- Governor's Requisition

Application to Governor for Issuance of Requisition

To the Honorable [*Governor's name*], Governor of Texas.

I request a requisition for the return to this state of the person of [*defendant name*], who is charged by indictment with the crime of criminal nonsupport, in that [*defendant name*], did on the [*offense date*] day of [*offense month*] in the County of [*county name*], State of Texas, then and there unlawfully, intentionally and knowingly fail to provide support for [*child name*], his child younger than 18 years of age (*or his child who was the subject of a court order requiring the Defendant to support the said child*), and who has fled this state and is now believed to be in the City of [*child residence city name*], County of [*child residence county name*], State of [*child residence state name*].

I certify that in my opinion the ends of justice require the arrest and return of [*defendant name*] to this state and further that this application is not made to enforce a private claim.

Governor's Requisition

STATE OF TEXAS
EXECUTIVE DEPARTMENT

From the Governor of the State of Texas.

To His Excellency, The Governor of the State of *[requisition state name]*.

WHEREAS, it appears by the annexed papers which I certify to be authentic and duly authenticated in accordance with the laws of this State, that *[defendant name]* stands charged by indictment with the crime of criminal nonsupport committed in the County of *[offense county]* in this State, which I certify to be a crime under the laws of this State, and that he has fled from this State and is a fugitive from justice, and it is believed that he has taken refuge in the State of *[requisition state name]*.

Now, Therefore, I *[Governor name]*, Governor of the State of Texas, pursuant to the provisions of the Constitution and laws of the United States and the laws of the State of Texas and the State of *[requisition state name]*, and the Uniform Interstate Family Support Act, and the Uniform Criminal Extradition Act, do hereby make requisition for the apprehension of said fugitive and for his delivery to *[law enforcement representative name]* who is hereby authorized to receive and convey him to the State of Texas, here to be dealt with according to law.

In Testimony whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State, at Austin, Texas this *[signature date]* day of *[signature month name]*, 20*[signature year number]*.

Pretrial Considerations

Finding a case that meets the elements of a criminal nonsupport charge is not difficult. Getting a grand jury to indict a defendant in such a case is also not difficult. However, there are other considerations, issues, and arguments of which a prosecutor should be aware.

This section addresses defenses raised by criminal nonsupport defendants and their counsel and describes the response appropriate in each instance.

“I didn’t receive notice of the paternity suit.”

Suits to establish paternity are subject to the same rules of service as any other civil proceeding. An obligor who claims not to have received notice of the paternity suit can attack the underlying order. How the attack is made depends on the time that has elapsed between the date the underlying order was signed and the date of attack; often, the attack takes the form of a bill of review proceeding.

The prosecutor should note that the OAG is particularly cautious about proceeding against the obligor in a criminal nonsupport case if the underlying paternity order was taken by default. As a matter of practice, the OAG will have taken at least one judicial enforcement action to court before a criminal nonsupport referral is approved. As a result, the criminal nonsupport prosecutor should not be required to address issues arising out of an order taken by default.

“It’s not a real order, it’s just from the OAG.”

Child support orders can be issued in an administrative proceeding initiated by the OAG called the “Child Support Review Process” or CSRP. [TFC § 233] These voluntary administrative hearings are usually held at an OAG office; sometimes one party appears and participates by telephone. An OAG employee, called the child support review officer, works with the parties to determine the facts and reach an agreement to be memorialized in an agreed order. Parties can request paternity testing and can present evidence regarding the appropriate amount of child support. Parties do not have to participate, but the OAG can still issue an order, which is signed by an AAG. Before an order is binding, it must be approved by a court. [TFC §§ 233.024, 233.0271]

If the parties agree, the OAG submits the order to the court for approval without further notice to either party. If the parties do not agree, the OAG files a petition to confirm the order. The non-agreeing party has the option of requesting a hearing, which is a trial *de novo* regarding the non-agreed sections of the order. [TFC §233.025(b)] Once an order has been signed by the court, it is binding on all parties; the fact that the order originated through the administrative process is not a defense to enforcement.

“It’s not my child.”

A criminal nonsupport case is neither the proper time nor the proper place to make such an argument. By the time the OAG presents a prosecutor with a criminal nonsupport case, the obligor’s paternity has already been legally established, either by execution of an Acknowledgment of Paternity or by an adjudication in a paternity action. These findings, which are *res judicata*, may not be collaterally attacked in a criminal nonsupport case.

[*In re E.L.P.*, 636 S.W.2d 579 (Tex. App.–San Antonio 1982, no writ)]

“I want (or wanted) a blood test.”

If paternity has not been legally established, the OAG encourages potential fathers to have a paternity test if there is **any** question that the child may not be theirs. If the paternity test shows that the child is not biologically related to the alleged father, there is usually no charge for the paternity test. Once again, *res judicata* applies.

The OAG no longer uses blood to conduct paternity testing. Instead, the inside of the cheek is swabbed to collect samples of buccal cells, which are then tested. This procedure is non-invasive and painless. The DNA in the buccal cells is the same as the DNA in blood or any other tissue sample and yields the same results without the safety concerns connected with needles and blood samples.

“The order was unclear; I didn’t know what to do.”

This kind of argument was addressed by the Texas Supreme Court in *Ex parte Slavin*, 412 S.W.2d 43 (Tex. 1967). The Court held that for a person to be held in contempt for disobeying a court decree, the decree must spell out the details of compliance in clear, specific, and unambiguous terms so the person will readily know exactly what duties or obligations are imposed upon him. [*Slavin*, 412 S.W.2d at 44]

The OAG is cognizant of the requirements of *Slavin* and its progeny. Because the OAG will almost always take enforcement action before referring a criminal nonsupport case, this issue will have already been addressed. Accordingly, the prosecutor should not receive a case with *Slavin* issues.

“The records are wrong; I paid the other parent in cash.”

Standard child support orders require that child support payments be made through either a local registry, or the State Disbursement Unit (SDU). [TFC §154.004] Most orders state that the child support obligation may be satisfied only by making payments as prescribed and warn that any other payment or remuneration will be treated as a gift. The OAG is required to investigate any discrepancy between the payment record of the SDU and the records of the parties. The person claiming a discrepancy must provide documentary evidence of payments. [TFC §234.0091]

“The other parent doesn’t spend the money on the child.”

The nature of child support is well settled. The Texas Supreme Court has established that the characterization of past child support as mere reimbursement for amounts already expended oversimplifies the true situation. [*Williams v. Patton*, 821 S.W.2d 141 (Tex. 1991)] The function of child support is to help a custodial parent maintain an adequate standard of living for the child. When child support payments are not made, the result is a loss of funds available for the child’s food, clothing, education, and home environment. Characterizing arrearages as nothing more than a “debt” owed to the custodial parent ignores the reality that the child is frequently the one who has been harmed by the nonpayment. The payment of arrearages compensates for the wrong to the child at least as much as it reimburses the custodial parent for monies spent on the child. [*Williams* at 145]

Any arrearage belongs to the obligee (usually the custodial parent) who has the right to enforce the obligation. [TFC §151.001(c); *Office of the Attorney General v. Carter*, 977 S.W.2d 159 (Tex. App.–Houston [14th Dist.] 1998, no pet.)] That right may be exercised through civil or criminal proceedings.

“The other parent and I have an agreement that I don’t have to pay child support.” An agreement to modify the terms of a court order is void unless reduced to writing, presented to the court in the form of an agreement, and approved by the court. [*Rogers v. Griffin*, 774 S.W.2d 706 (Tex. App.–Texarkana 1989, no writ.)] Obligor often produce notarized statements and are surprised to learn the agreement is not enforceable. Again, the OAG will ordinarily have dispensed with this argument in an enforcement action.

“I never get to see my child.”

This all-too-common situation is unfortunate, but it does not provide a defense for failure to pay child support. The Family Code makes it clear that support and visitation are not and may not be so connected. [TFC § 154.011] In the event a parent complains of the denial of court-ordered access and visitation, it is appropriate to refer that parent to the Access and Visitation Hotline operated by the OAG and Legal Aid of Northwest Texas at (866) 292-4636 (please note that the Hotline is answered from 1-7 p.m., Monday through Friday).

“My employer is withholding child support, but not sending it in.”

The obligation to pay child support remains with the obligor, regardless of whether a wage withholding order is in place. Moreover, an employer’s failure to remit child support at the time it is withheld creates liability on the part of the employer but does not relieve the obligor of the obligation to pay. [TFC §158.206] The OAG actively pursues employers in these circumstances. If the obligor has complained of this situation to the OAG and it has not been resolved, the OAG will not submit a criminal nonsupport referral to a prosecutor.

“If the obligor's payment record was so bad, why didn’t the OAG ever request more than 180 days in jail?”

Contempt of court for failure to pay child support is a quasi-criminal proceeding. Obligor who face jail time have the right to request an appointed attorney and cannot be made to testify against themselves. Obligor are also entitled to a jury if there is a possibility that they may be held in punitive or criminal contempt and sentenced to more than 180 days. Because of the OAG’s massive caseload, we find it more expeditious to only pursue up to 180 days.

Conclusion

The excuses and rationalizations that obligors think up to justify their failure to support the needs of their children are as varied as the needs themselves. This section covers a few of the most frequent examples. When the prosecutor accepts a case from the OAG, the AAG assigned to the case can help the prosecutor respond to any theories raised by the defendant.

Search and Discovery

Information the OAG Provides to Prosecutors

Field investigators provide the following documentation when submitting criminal nonsupport cases for prosecution:

- Completed Criminal Nonsupport Offense Report containing biographical information on the custodial parent, obligor, and children

- Copy of current arrears calculations and registry payment records
- Copies of relevant court orders
- A list of wage assignments
- Custodial parent's Customer Affidavit regarding the case
- Custodial parent's Affidavit of Residency
- Custodial parent's Affidavit of Direct Payments
- Custodial parent's Affidavit of Identification (of obligor)
- Custodial parent's Release of Information Form

The Criminal Nonsupport Offense Report summarizes the entire civil case along with a summary of service attempts and evasions by the obligor, as well as an explanation of why criminal charges against the obligor are necessary. The Customer Affidavit rounds out the information provided to the prosecutor.¹

The OAG will monitor these cases and provide updated locate and employment information on the obligor as changes occur.

Confidential Case Information

The information contained in all child support records, the physical case file and/or computer systems, is confidential and prosecutors must safeguard it. This includes information concerning any custodial parent, noncustodial parent, child, or alleged or presumed father. [42 USC § 654(26); 45 CFR §303.21; TFC § 231.108(a)]

Access to the information contained in a case file or on a computer system is restricted to designated users and authorized personnel, though they do not necessarily share the same degree of access to the information.

Case Information that may be released

If the OAG submits a case to a prosecutor for possible criminal action, the following information may be released:

- The case status of pending or possible legal action
- Copies of legal documents that have been filed with the court and are maintained in the OAG's files, unless the documents have been sealed by the court or there is an order prohibiting their release
- Copies of correspondence or documents previously provided to the OAG by either party
- Copies of correspondence or documents previously provided by the OAG to either party
- Financial information regarding child support payments and arrearage balances

¹ The Criminal Nonsupport Offense Report and the Customer Affidavit include the date and place of marriage, and divorce, if any; child support details; provisions for medical coverage; names, dates of birth, and Social Security numbers of the children; school history and anticipated graduation dates; emancipation history; explanation of disabilities or special needs of the children; the most current locate and employment history of the obligor; criminal history checks of both parties; asset information on the obligor; and explanation of possible concealment of assets, or excessive lifestyle of the obligor.

Information that cannot be released

Confidential information cannot be released unless it falls within a recognized exception under the applicable federal and state statutory and regulatory provisions. [42 U.S.C. §654(26); 45 C.F.R. §303.21; TFC §231.108(a)] For example, financial information received from the Texas Workforce Commission may not be released.

Moreover, federal law mandates that all IV-D agencies comply with safeguarding procedures established by the IRS to protect tax information (other than payment history) received from the IRS and Social Security Administration (SSA). [26 USC §6103] Federal tax information may be sent to the IV-D agency by the Department of the Treasury, IRS, SSA or the federal Office of Child Support Enforcement.

Any agency that receives information from the IV-D agency must also safeguard this information.

Search, Seizure, and Discovery by the Prosecutor

The OAG has administrative subpoena power and by law is authorized to seek discovery from any entity for child support purposes. [TFC §231.303] If there is any information a prosecutor may need, the OAG may be able to obtain or provide it. Please discuss your needs with the AAG and field investigator working with you on a case.

Pretrial Disposition

Since the OAG began working collaboratively with local prosecutors, hundreds parents have been indicted for criminal nonsupport. Of these parents, the vast majority have accepted plea bargains that involve payment of support arrears.

Deterrence

Criminal nonsupport prosecutions act as a deterrent by showing that parents must support their children or face severe consequences. When a prosecutor requests it and the custodial parent agrees, the OAG stands ready to assist prosecutors in raising public awareness through press releases about local indictments and convictions.

Impact

The greatest impact comes from convictions as opposed to deferred adjudication. By the time the OAG recommends a case to a prosecutor, the obligor has had many opportunities to support his or her child, up to and including judicial contempt proceedings. A conviction also allows the matter to be raised in subsequent civil enforcement actions.

Restitution

Restitution should be part of any plea bargain considered in a criminal nonsupport case. To ensure the obligor's restitution payments are properly credited against the child support arrears and are properly distributed to the custodial parent, the payments must eventually be directed to the SDU and specifically identified.

Sample of Criminal Nonsupport Jury Charge

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury:

The defendant, *[defendant name]*, stands charged by indictment *[or information]* with the offense of criminal nonsupport, alleged to have been committed in *[county name]* County, Texas, on or about the *[offense date name]* day of *[offense month name]*, 20*[offense month year]*. To this charge the defendant has pleaded not guilty. You are instructed that the law applicable to this case is as follows:

I.

An individual commits the offense of criminal nonsupport if he intentionally or knowingly fails to provide support for his child younger than 18 years, or for his child who is the subject of a court order requiring the individual to support his child.

"Child" includes a child born out of wedlock whose paternity has been admitted by the defendant or has been established in a civil suit.

II.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

III.

Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant, *[defendant name]*, on or about *[offense date number]* day of *[offense month name]*, 20 *[offense month year]*, in the County of *[county name]*, and State of Texas, as alleged in the indictment *[or information]*, did then and there intentionally or knowingly fail to provide support for *[child name]* his child younger than 18 years *[or the said [defendant name] did then and intentionally and knowingly fail to provide support for [child name], his child, who was the subject of a court order requiring the said [defendant name] to support the said [child name], you will find the defendant guilty of the offense of criminal nonsupport and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty."*

IV.

It is an affirmative defense to prosecution for criminal nonsupport that the defendant could not provide the support that he was legally obligated to provide.

The burden of proof is on the defendant to prove an affirmative defense by a preponderance of the evidence. The term "preponderance of the evidence" means the greater weight of credible evidence.

Now, therefore, if you find and believe from the evidence beyond a reasonable doubt that the defendant did commit the offense of criminal nonsupport as alleged in the indictment [*or* information], but you further find by a preponderance of the evidence that the defendant could not provide the support, if any, that he was legally obligated to provide, you will acquit the defendant and say by your verdict "Not Guilty."

Substantive Law

Criminal Provisions

Criminal Nonsupport [Texas Penal Code § 25.05]

- (a) An individual commits an offense if the individual intentionally or knowingly fails to provide support for the individual's child younger than 18 years of age, or for the individual's child who is the subject of a court order requiring the individual to support the child.
- (b) For purposes of this section, "child" includes a child born out of wedlock whose paternity has either been acknowledged by the actor or has been established in a civil suit under the Family Code or the law of another state.
- (c) Under this section, a conviction may be had on the uncorroborated testimony of a party to the offense.
- (d) It is an affirmative defense to prosecution under this section that the actor could not provide support for the actor's child.
- (e) The pendency of a prosecution under this section does not affect the power of a court to enter an order for child support under the Family Code.
- (f) An offense under this section is a state jail felony.

Definitions

"Individual" means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth. [Texas Penal Code § 1.07(26)]

Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners' court, or rule authorized by and lawfully adopted under a statute. [Texas Penal Code § 1.03(a)]

A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act. [Texas Penal Code § 6.01(c)]

"Omission" means failure to act. [Texas Penal Code § 1.07(34)]

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. [Texas Penal Code § 6.03(a)]

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. [Texas Penal Code § 6.03(b)]

"Actor" means a person whose criminal responsibility is in issue in a criminal action. [Texas Penal Code §1.07(2)]

Affirmative Defense [Texas Penal Code § 2.04]

(a) An affirmative defense in this code is so labeled by the phrase: "It is an affirmative defense to prosecution"

(b) The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense.

(c) The issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of evidence.

Jurisdiction

Criminal Nonsupport [Texas Code Crim. Proc. art. 13.16]

Criminal nonsupport may be prosecuted in the county where the offended spouse or child is residing at the time the information or indictment is presented.

Territorial Jurisdiction [Texas Penal Code § 1.04(c)]

An offense based on an omission to perform a duty imposed on an actor by a statute of this state is committed inside this state regardless of the location of the actor at the time of the offense.

Punishment [Texas Penal Code §§12.35(a), (b)]

(a) An individual adjudged guilty of a state jail felony shall be punished by confinement in a state jail for any term of not more than two years or less than 180 days.

(b) In addition to confinement, an individual adjudged guilty of a state jail felony may be punished by a fine not to exceed \$10,000.

Statute of Limitations – Felonies [Texas Code Crim. Proc. art. 12.01]

Except as provided in Article 12.03, felony indictments may be presented within these limits, and not afterward:

(7) three years from the date of the commission of the offense: all other felonies

Prior Law – Criminal Nonsupport [Texas Penal Code § 25.05 (prior to 9/1/94)]

- (a) An individual commits an offense if the individual intentionally or knowingly fails to provide support for the individual's child younger than 18 years of age, or for the individual's child who is the subject of a court order requiring the individual to support the child.
- (b) For purposes of this section, "child" includes a child born out of wedlock whose paternity has either been acknowledged by the actor or has been established in a civil suit under the Family Code or the law of another state.
- (c) Under this section, a conviction may be had on the uncorroborated testimony of a party to the offense.
- (d) It is an affirmative defense to prosecution under this section that the actor could not provide support for the actor's child.
- (e) The pendency of a prosecution under this section does not affect the power of a court to enter an order for child support under the Family Code.
- (f) Except as provided in Subsection (g) of this section, an offense under this section is a Class A misdemeanor.
- (g) An offense under this section is a felony of the third degree if the actor: (1) has been convicted one or more times under this section; or (2) commits the offense while residing in another state.

Family Code Provisions

Establishment of Parent-Child Relationship [TFC §160.201]

- (a) The mother-child relationship is established between a woman and a child by:
 - (1) the woman giving birth to the child;
 - (2) an adjudication of the woman's maternity; or
 - (3) the adoption of the child by the woman.
- (b) The father-child relationship is established between a man and a child by:
 - (1) an un rebutted presumption of the man's paternity of the child under Section 160.204;

- (2) an effective acknowledgment of paternity by the man under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged;
- (3) an adjudication of the man's paternity;
- (4) the adoption of the child by the man; or
- (5) the man's consenting to assisted reproduction by his wife under Subchapter H, which resulted in the birth of the child.

Consequences of Establishment of Parentage [TFC §160.203]

Unless parental rights are terminated, a parent-child relationship established under this chapter applies for all purposes, except as otherwise provided by another law of this state.

Presumption of Paternity [TFC §160.204]

(a) A man is presumed to be the father of a child if:

- (1) he is married to the mother of the child and the child is born during the marriage;
- (2) he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
- (3) he married the mother of the child before the birth of the child in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
- (4) he married the mother of the child after the birth of the child in apparent compliance with law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child, and:
 - (A) the assertion is in a record filed with the vital statistics unit;
 - (B) he is voluntarily named as the child's father on the child's birth certificate; or
 - (C) he promised in a record to support the child as his own; or
- (5) during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.

Subsection (b) below is effective for SAPCRs filed on or after Sept. 1, 2003.

- (b) A presumption of paternity established under this section may be rebutted only by:
- (1) an adjudication under Subchapter G; or
 - (2) the filing of a valid denial of paternity by a presumed father in conjunction with the filing by another person of a valid acknowledgment of paternity as provided by Section 160.305

Subsection (b) below is effective for SAPCRs filed before Sept. 1, 2003

- (b) A presumption of paternity established under this section may be rebutted only by an adjudication under Subchapter G.

Acknowledgment of Paternity [TFC §160.301]

For suits filed before September 1, 2003:

The mother of a child and a man claiming to be the father of the child conceived as the result of sexual intercourse with the mother may sign an acknowledgment of paternity with the intent to establish the man's paternity.

For suits filed after September 1, 2003:

The mother of a child and a man claiming to be the biological father of the child may sign an acknowledgment of paternity with the intent to establish the man's paternity.

Execution of Acknowledgment of Paternity [TFC§160.302]

(a) An acknowledgment of paternity must:

- (1) be in a record;
- (2) be signed, or otherwise authenticated, under penalty of perjury by the mother and the man seeking to establish paternity;
- (3) state that the child whose paternity is being acknowledged:
 - (A) does not have a presumed father or has a presumed father whose full name is stated; and
 - (B) does not have another acknowledged or adjudicated father;
- (4) state whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing; and
- (5) state that the signatories understand that the acknowledgment is equivalent of a judicial adjudication of the paternity of the child and that a challenge to the acknowledgment is permitted only under limited circumstances.

(b) An acknowledgment of paternity void if it:

- (1) states that another man is a presumed father of the child, unless a denial of paternity signed or otherwise authenticated by the presumed father is filed with the vital statistics unit;
- (2) states that another man is an acknowledged or adjudicated father of the child; or
- (3) falsely denies the existence of a presumed, acknowledged, or adjudicated father of the child.

(c) A presumed father may sign or otherwise authenticate an acknowledgment of paternity.

Denial of Paternity [TFC §160.303]

A presumed father of a child may sign a denial of his paternity. The denial is valid only if:

- (1) an acknowledgment of paternity signed or otherwise authenticated by another man is filed under Section 160.305;
- (2) the denial is in a record and is signed or otherwise authenticated under penalty of perjury; and
- (3) the presumed father has not previously:
 - (A) acknowledged paternity of the child, unless the previous acknowledgment has been rescinded under Section 160.307 or successfully challenged under Section 160.308; or
 - (B) been adjudicated to be the father of the child.

Rules for Acknowledgment & Denial of Paternity [TFC §160.304]

- (a) An acknowledgment of paternity and a denial of paternity may be contained in a single document or in different documents and may be filed separately or simultaneously. If the acknowledgment and denial are both necessary, neither document is valid until both documents are filed.
- (b) An acknowledgment of paternity or a denial of paternity may be signed before the birth of the child.
- (c) Subject to subsection (a), an acknowledgment of paternity or denial of paternity takes effect on the date of the birth of the child or the filing of the document with the vital statistics unit, whichever occurs later.
- (d) An acknowledgment of paternity or denial of paternity signed by a minor is valid if it otherwise complies with this chapter.

Effect of Acknowledgment or Denial of Paternity [TFC §160.305]

- (a) Except as provided by Sections 160.307 and 160.308, a valid acknowledgment of paternity filed with the bureau of vital statistics is the equivalent of an adjudication of the paternity of a child and confers on the acknowledged father all rights and duties of a parent.
- (b) Except as provided by Sections 160.307 and 160.308, a valid denial of paternity filed with the bureau of vital statistics in conjunction with a valid acknowledgment of paternity is the equivalent of an adjudication of the non-paternity of the presumed father and discharges the presumed father from all rights and duties of a parent.

Proceeding for Rescission [TFC §160.307]

- (a) A signatory may rescind an acknowledgment of paternity or denial of paternity as provided by this section before the earlier of:

(1) the 60th day after the effective date of the acknowledgment or denial, as provided by Section 160.304; or

(2) the date a proceeding to which the signatory is a party is initiated before a court to adjudicate an issue relating to the child, including a proceeding that establishes child support.

(b) A signatory seeking to rescind an acknowledgment of paternity or denial of paternity must file with the vital statistics unit a completed rescission, on the form prescribed under Section 160.312, in which the signatory declares under penalty of perjury that: this section before the earlier of:

(1) as of the date the rescission is filed, a proceeding has not been held affecting the child identified in the acknowledgment of paternity or denial of paternity, including a proceeding to establish child support;

(2) a copy of the completed rescission was sent by certified or registered mail, return receipt requested, to:

(A) if the rescission is of an acknowledgment of paternity, the other signatory of the acknowledgment of paternity and the signatory of any related denial of paternity; or

(B) if the rescission is of a denial of paternity, the signatories of the related acknowledgment of paternity; and

(3) if a signatory to the acknowledgment of paternity or denial of paternity is receiving services from the Title IV-D agency, a copy of the completed rescission was sent by certified or registered mail to the Title IV-D agency.

(c) On receipt of a completed rescission, the vital statistics unit shall void the acknowledgment of paternity or denial of paternity affected by the rescission and amend the birth record of the child, if appropriate.

(d) Any party affected by the rescission, including the Title IV-D agency, may contest the rescission by bringing a proceeding under Subchapter G to adjudicate the parentage of the child.

Challenge after Expiration of Period for Rescission [TFC §160.308]

(a) After the period for rescission under Section 160.307 has expired, a signatory of an acknowledgment of paternity or denial of paternity may commence a proceeding to challenge the acknowledgment or denial only on the basis of fraud, duress, or material mistake of fact. The proceeding may be commenced at any time before the issuance of an order affecting the child identified in the acknowledgement or denial, including an order relating to the support for the child.

(b) A party challenging an acknowledgment of paternity or denial of paternity has the burden of proof.

- (c) Notwithstanding any other provision of this chapter, a collateral attack on an acknowledgment of paternity signed under this chapter may not be maintained after the fourth anniversary of the date the acknowledgment of paternity is filed with the bureau of vital statistics.
- (d) For purposes of Subsection (a), evidence that, based on genetic testing, the man who is the signatory of an acknowledgment of paternity is not rebuttably identified as the father of a child in accordance with Section 160.505 constitutes a material mistake of fact.

Procedure for Rescission or Challenge [TFC §160.309]

- (a) Each signatory to an acknowledgment of paternity and any related denial of paternity must be made a party to a proceeding to rescind or challenge the acknowledgment or denial of paternity.
- (b) For purposes of a challenge to an acknowledgment of paternity or denial of paternity, a signatory submits to the personal jurisdiction of this state by signing the acknowledgment or denial. The jurisdiction is effective on the filing of the document with the vital statistics unit.
- (c) Except for good cause shown, while a proceeding is pending to challenge an acknowledgment of paternity or a denial of paternity, the court may not suspend the legal responsibilities of a signatory arising from the acknowledgment, including the duty to pay child support.
- (d) A proceeding to challenge an acknowledgment of paternity or a denial of paternity shall be conducted in the same manner as a proceeding to adjudicate parentage under Subchapter G.
- (e) At the conclusion of a proceeding to challenge an acknowledgment of paternity or a denial of paternity, the court shall order the vital statistics unit to amend the birth record of the child, if appropriate.

Ratification Barred [TFC §160.310]

A court or administrative agency conducting a judicial or administrative proceeding may not ratify an unchallenged acknowledgment of paternity.

Full Faith & Credit [TFC §160.311]

A court of this state shall give full faith and credit to an acknowledgment of paternity or a denial of paternity that is effective in another state if the acknowledgment or denial has been signed and is otherwise in compliance with the law of the other state.

No Time Limitation: Child Having No Presumed, Acknowledged, or Adjudicated Father [TFC §160.606]

A proceeding to adjudicate the parentage of a child having no presumed, acknowledged, or adjudicated father may be commenced at any time, including after the date:

- (1) the child becomes an adult; or

- (2) an earlier proceeding to adjudicate paternity has been dismissed based on the application of a statute of limitation then in effect.

Time Limitation: Child Having Presumed Father [TFC §160.607]

(a) Except as otherwise provided by Subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father shall be commenced not later than the fourth anniversary of the date of the birth of the child.

(b) A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time if the court determines that:

(1) the presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception; or

(2) the presumed father was precluded from commencing a proceeding to adjudicate the parentage of the child before the expiration of the time prescribed by Subsection (a) because of the mistaken belief that he was the child's biological father based on misrepresentations that led him to that conclusion..

Time Limitation: Child Having Acknowledged or Adjudicated Father [TFC §160.609]

(a) If a child has an acknowledged father, a signatory to the acknowledgment or denial of paternity may commence a proceeding seeking to rescind the acknowledgment or denial or to challenge the paternity of the child only within the time allowed under 160.308.

(b) If a child has an acknowledged father or an adjudicated father, an individual, other than the child, who is not a signatory to the acknowledgment or a party to the adjudication and who seeks an adjudication of paternity of the child must commence a proceeding not later than the fourth anniversary of the effective date of the acknowledgment or adjudication.

Rules for Adjudication of Paternity [TFC §160.631]

(a) The court shall apply the rules stated in this section to adjudicate the paternity of a child.

(b) The paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child.

(c) Unless the results of genetic testing are admitted to rebut other results of genetic testing, the man identified as the father of a child under Section 160.505 shall be adjudicated as being the father of the child.

(d) Unless the results of genetic testing are admitted to rebut other results of genetic testing, a man excluded as the father of a child by genetic testing shall be adjudicated as not being the father of the child.

- (e) If the court finds that genetic testing under Section 160.505 does not identify or exclude a man as the father of a child, the court may not dismiss the proceeding. In that event, the results of genetic testing and other evidence are admissible to adjudicate the issue of paternity.

Binding Effect of Determination of Paternity [TFC §160.637]

- (a) Except as otherwise provided by Subsection (b) or Section 160.316, a determination of parentage is binding on:
 - (1) all signatories to an acknowledgment or denial of paternity as provided by Subchapter D; and
 - (2) all parties to an adjudication by a court acting under circumstances that satisfy the jurisdictional requirements of Section 159.201.
- (b) A child is not bound by a determination of parentage under this chapter unless:
 - (1) the determination was based on an un-rescinded acknowledgment of paternity and the acknowledgment is consistent with the results of genetic testing;
 - (2) the adjudication of parentage was based on a finding consistent with the results of genetic testing and the consistency is declared in the determination or is otherwise shown; or
 - (3) the child was a party or was represented in the proceeding determining parentage by an attorney *ad litem*.
- (c) In a proceeding to dissolve a marriage, the court is considered to have made an adjudication of the parentage of a child if the court acts under circumstances that satisfy the jurisdictional requirements of Section 159.201, and the final order:
 - (1) expressly identifies the child as "a child of the marriage" or "issue of the marriage" or uses similar words indicating that the husband is the father of the child; or
 - (2) provides for the payment of child support for the child by the husband unless paternity is specifically disclaimed in the order.
- (d) Except as otherwise provided by Subsection (b), a determination of parentage may be a defense in a subsequent proceeding seeking to adjudicate parentage by an individual who was not a party to the earlier proceeding.
- (e) A party to an adjudication of paternity may challenge the adjudication only under the laws of this state relating to appeal, the vacating of judgments, or other judicial review.

Rights and Duties of Parents [TFC §151.001]

- (a) A parent of a child has the following rights and duties:

- (1) the right to have physical possession, to direct the moral and religious training, and to designate the residence of the child;
- (2) the duty of care, control, protection, and reasonable discipline of the child;
- (3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;
- (4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
- (5) except as provided by Section 264.0111, the right to the services and earnings of the child;
- (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;
- (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
- (9) the right to inherit from and through the child;
- (10) the right to make decisions concerning the child's education; and
- (11) any other right or duty existing between a parent and child by virtue of law.

(b) The duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in a secondary school in a program leading toward a high school diploma and complies with attendance requirements described by Section 154.002(a)(2).

(c) A parent who fails to discharge the duty of support is liable to a person who provides necessities to those to whom support is owed.

(d) The rights and duties of a parent are subject to:

- (1) a court order affecting the rights and duties;
- (2) an affidavit of relinquishment of parental rights; and
- (3) an affidavit by the parent designating another person or agency to act as managing conservator.

(e) Only the following persons may use corporal punishment for the reasonable discipline of a child:

- (1) a parent or grandparent of the child;
- (2) a stepparent of the child who has the duty of control and reasonable discipline of the child; and
- (3) an individual who is a guardian of the child and who has the duty of control and reasonable discipline of the child.

Support of Child [TFC § 154.001]

(a) The court may order either or both parents to support a child in the manner specified by the order:

- (1) until the child is 18 years of age or until graduation from high school, whichever occurs later;
- (2) until the child is emancipated through marriage, through removal of the disabilities of minority by court order, or by other operation of law;
- (3) until the death of the child; or
- (4) if the child is disabled as defined in this chapter, for an indefinite period.

(a-1) The court may order each person who is financially able and whose parental rights have been terminated with respect to either a child in substitute care for whom the department has been appointed managing conservator or a child who was conceived as a direct result of conduct that constitutes an offense under Section 21.02, 22.011, 22.021, or 25.02, Penal Code, to support the child in the manner specified by the order:

- (1) until the earliest of:
 - (A) the child's adoption;
 - (B) the child's 18th birthday or graduation from high school, whichever occurs later;
 - (C) removal of the child's disabilities of minority by court order, marriage, or other operation of law; or
 - (D) the child's death; or
- (2) if the child is disabled as defined in this chapter, for an indefinite period.

(b) The court may order either or both parents to make periodic payments for the support of a child in a proceeding in which the Department of Protective and Regulatory Services is named temporary managing conservator. In a proceeding in which the Department of Protective and Regulatory Services is named permanent managing conservator of a child whose parents' rights have not been terminated, the court shall order each parent that is financially able to make periodic payments for the support of the child.

(c) In a Title IV-D case, if neither parent has physical possession or conservatorship of the child, the court may render an order providing that a nonparent or agency having physical possession may receive, hold, or disburse child support payments for the benefit of the child.

Interest Enforced as Child Support [TFC §157.267]

Accrued interest is part of the child support obligation and may be enforced by any means provided for the collection of child support.

Termination of Duty of Support [TFC §154.006]

(a) Unless otherwise agreed in writing or expressly provided in the order or as provided by Subsection(b), the child support order terminates on:

- (1) the marriage of the child;

- (2) the removal of the child's disabilities for general purposes;
- (3) the death of:
 - (A) the child; or
 - (B) a parent ordered to pay child support; or
- (4) a finding by a court that the child:
 - (A) is 18 years of age or older; and
 - (B) has failed to comply with the enrollment or attendance requirements described by Section 154.002(a).
- (5) the issuance under Section 161.005(h) of an order terminating the parent-child relationship between the obligor and the child based on the results of genetic testing that exclude the obligor as the child's genetic father; or
- (6) if the child enlists in the armed forces of the United States, the date on which the child begins active service as defined by 10 U.S.C. Section 101.

(b) Unless a nonparent or agency has been appointed conservator of the child under Chapter 153, the order for current child support, and any provision relating to conservatorship, possession, or access terminates on the marriage or remarriage of the obligor and obligee to each other.

Grounds for Extradition [TFC § 159.801]

- (a) For purposes of this subchapter, "governor" includes an individual performing the functions of governor or the executive authority of a state covered by this chapter.
- (b) The governor of this state may:
 - (1) demand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee; or
 - (2) on the demand of the governor of another state, surrender an individual found in this state who is charged criminally in the other state with having failed to provide for the support of an obligee.
- (c) A provision for extradition of individuals not inconsistent with this chapter applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled from that state.

Conditions of Extradition [TEXAS FAMILY CODE § 159.802]

- (a) Before making a demand that the governor of another state surrender an individual charged criminally in this state with having failed to provide for the support of an obligee, the governor of this state may require a prosecutor of this state to demonstrate that, not less than 60 days previously, the obligee had initiated proceedings for support under this chapter, or that the proceeding would be of no avail.
- (b) If, under this chapter or a law substantially similar to this chapter, the governor of another state makes a demand that the governor of this state surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a

duty of support is owed, the governor may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the governor may decline to honor the demand if the individual is complying with the support order.

Provision for Medical Support [TFC §154.008]

Text of section effective until September 1, 2018:

The court shall order medical support for the child as provided by Subchapters B and D.

Provision for Medical Support and Dental Support [TFC §154.008]

Text of section effective September 1, 2018:

The court shall order medical support and dental support for the child as provided by Subchapters B and D.

Medical Support Additional Support Duty of Obligor [TFC §154.183]

Text of section effective until September 1, 2018:

(a) An amount that an obligor is ordered to pay as medical support for the child under this chapter, including the costs of health insurance coverage or cash medical support under Section 154.182:

- (1) is in addition to the amount that the obligor is required to pay for child support under the guidelines for child support;
- (2) is a child support obligation; and
- (3) may be enforced by any means available for the enforcement of child support, including withholding from earnings under Chapter 158.

(b) If the court finds and states in the child support order that the obligee will maintain health insurance coverage for the child at the obligee's expense, the court shall increase the amount of child support to be paid by the obligor in an amount not exceeding the actual cost to the obligee for maintaining health insurance coverage, as provided under Section 154.182(b-1).

(c) As additional child support, the court shall allocate between the parties, according to their circumstances:

- (1) the reasonable and necessary health care expenses, including vision and dental expenses, of the child that are not reimbursed by health insurance or are not otherwise covered by the amount of cash medical support ordered under Section 154.182(b)(3); and
- (2) amounts paid by either party as deductibles or copayments in obtaining health care services for the child covered under a health insurance policy.

Medical and Dental Support Additional Support Duty of Obligor [TFC §154.183]

Text of section effective September 1, 2018:

(a) An amount that an obligor is ordered to pay as medical support or dental support for the child under this chapter, including the costs of health insurance coverage or cash medical support under Section 154.182 and the costs of dental insurance under Section 154.1825:

- (1) is in addition to the amount that the obligor is required to pay for child support under the guidelines for child support;
- (2) is a child support obligation; and
- (3) may be enforced by any means available for the enforcement of child support, including withholding from earnings under Chapter 158.

(b) If the court finds and states in the child support order that the obligee will maintain health insurance coverage, dental insurance coverage, or both for the child at the obligee's expense, the court shall increase the amount of child support to be paid by the obligor in an amount not exceeding the actual cost to the obligee for maintaining the coverage, as provided under Sections 154.182(b-1) and 154.1825(d).

(c) As additional child support, the court shall allocate between the parties, according to their circumstances:

- (1) the reasonable and necessary health care expenses, including vision and dental expenses, of the child that are not reimbursed by health or dental insurance or are not otherwise covered by the amount of cash medical support ordered under Section 154.182; and
- (2) amounts paid by either party as deductibles or copayments in obtaining health care services for the child covered under a health insurance or dental insurance policy.

Court-Ordered Support for Disabled Child [TFC §154.302]

(a) The court may order either or both parents to provide for the support of a child for an indefinite period and may determine the rights and duties of the parents if the court finds that:

- (1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support; and
- (2) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child.

(b) A court that orders support under this section shall designate a parent of the child or another person having physical custody or guardianship of the child under a court order to receive the support for the child. The court may designate a child who is 18 years of age or older to receive the support directly.

Relevant Case Law

Elements of the Offense

The elements of the offense of criminal nonsupport are that the defendant

- (1) intentionally or knowingly

(2) fails to provide support for his child younger than 18 years of age, or for his child who is the subject of a court order requiring the individual to support the child.

[*Belcher v. State*, 962 S.W.2d 653 (Tex. App. -- Austin 1998, no pet.)]

The ability to pay is no longer an element of the offense; instead it is an affirmative defense.

[*Lyons v. State*, 835 S.W.2d 715 (Tex. App. -Texarkana 1992, no writ)]

Duty of Support

In Texas, the natural father has a continuing and primary duty arising from statutory and common law to support his children. Natural father's duty to support his legitimate children under Texas common law and statute was enforceable on child's behalf in civil proceedings and was also subject of criminal sanctions.

[*Gomez v. Perez*, 409 U.S. 535 (1973)]

Refusal of defendant's wife who was separated from defendant to take children and go to defendant upon his request did not relieve defendant of his duty to provide for his children when he knew that wife could not provide adequate support.

[*Martinez v. State*, 165 Tex. Crim. 596, 307 S.W.2d 259 (1957)]

Defendant's showing that his second family drained his financial ability did not negate the element of willfulness in neglect and refusal to support a minor child.

[*Almanza v. State*, 365 S.W.2d 360, (Tex. Crim. App. 1963)]

Intentionally or Knowingly

Evidence that defendant had been notified of his arrearage in child support, and testimony of defendant's ex-wife that defendant had threatened to withhold support payments in retaliation for bringing charges against him, permitted a rational jury to find beyond a reasonable doubt that appellant's failure to support his children was intentional or knowing. [*Belcher v. State*, 962 S.W.2d 653, (Tex. App.--Austin, 1998, no pet.)]

Jurisdiction

Where defendant father was not a Texas resident and not under any Texas court order to support his children, prosecution in Texas for criminal non-support was appropriate since the crime of nonsupport is committed where the children reside. [*State v. Paiz*, 777 S.W.2d 575 (Tex. App.--Amarillo 1989), *aff'd as reformed*, 817 S.W.2d 84 (Tex. Crim. App. 1991)]

Assuming that for there to be criminal jurisdiction over defendant in any particular state, due process requires some behavior by that defendant by which he should have reasonably anticipated being subject to that state's criminal jurisdiction, Texas trial court had jurisdiction over Michigan

defendant in prosecution for criminal nonsupport; failure to support one's minor children was a criminal offense in Michigan, just as in Texas, and Michigan's criminal nonsupport statute on its face did not limit its reach to resident offenders so that if defendant intentionally or knowingly failed to support his minor children, whom he knew lived in Texas, he should have reasonably anticipated Texas law regarding nonsupport might be similar to Michigan law and might reach his conduct. [*Ex parte Boetscher*, 812 S.W.2d 600 (Tex. Crim. App. 1991)]

Challenges to Constitutionality

Criminal nonsupport statute is not subject to challenge for unconstitutionality as being an impermissible imprisonment for debt. [*Lyons v. State*, 835 S.W.2d 715, (Tex. App. -- Texarkana 1992, no writ)]

Evidentiary Issues

A summary of child support accrued and payments received prepared by child support officer from the Attorney General's office was hearsay since was offered for the truth of the matter asserted but was admissible as business record exception to hearsay rule. [*Perry v. State*, 957 S.W.2d 894 (Tex. App. -Texarkana, 1997, no pet.)]

What constitutes "support" is evidentiary, and it is therefore not essential for notice to the accused that the definition be included in the charging instrument. [*Lyons v. State*, 835 S.W.2d 715 (Tex. App. -Texarkana 1992, no pet.)]

Child support orders are not the sole standard of the appropriate level of support in a criminal nonsupport prosecution. This does not mean, however, that such support orders are not relevant evidence, but only that such an order is not conclusive evidence. [*Belcher v. State*, 962 S.W.2d 653 (Tex. App. - Austin, 1998, no pet.)]

Continuing Offense

Criminal nonsupport is a "continuing offense" committed not by any overt act but by omission or neglect and continuing so long as the neglect continues without excuse. [*Belcher v. State*, 962 S.W.2d 653, (Tex. App.--Austin, 1998, no pet.)]

The offense of failure to support a minor child was a "continuing offense" that is committed not by any overt act but by omission or neglect, and the offense continued so long as the neglect continued without excuse. [*Ex parte Beeth*, 142 Tex. Crim. 511, 154 S.W.2d 484 (1941)]