COMMONWEALTH *of* VIRGINIA

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TO: KARIN CLARK
Virginia Department of Social Services

FROM: JOSH S. OURS [jso]
Sr. Assistant Attorney General

Date: November 16, 2021

Re: Fast-Track Submission to Amend 22VAC40-880 Child Support Enforcement Regulations

I have reviewed the attached amendments to subsections of 22VAC40-880. Per the Governor's Executive Order 14 (2018), the Office of the Attorney General is charged with reviewing the proposed fast-track regulation and producing "a memorandum assessing the agency's legal authority to promulgate the regulation and determining that the content of the proposed regulation does not conflict with existing law."

As Virginia Code § 63.2-217 mandates that the State Board promulgate "regulations as may be necessary or desirable to carry out the purpose of this title," the State Board has authority to amend 22 VAC40-880 subject to compliance with Article 2 of the Administrative Process Act and Executive Order 14 (2018). However, the current proposal conflicts with existing law in two respects:

1) <u>State tax offset.</u>

The proposal regarding 22VAC40-880-380 (tax intercept) states:

> A. The department shall intercept state and federal income tax refunds due to obligors that owe support arrearages<u>, except when Virginia is the responding state as defined at § 20-88.32 of the Code of Virginia</u>.
>
> B. The Virginia Department of Taxation prescribes rules for interception of state tax refunds and notification to the person whose state tax refund is being intercepted.

1. The department may retain moneys up to the amount owed on the due date of the finalization notice from the department to the Virginia Department of Taxation.
2. The department may intercept state tax refunds when the arrearage equals at least $25 <u>for arrearages-only cases or when the arrearage is equal to or greater than two months' current support for cases with current support due</u>.

Conclusion: State tax intercept is a mandatory process that DCSE must use unless the agency determines that the administrative costs of the process (as defined by the Tax Commissioner) exceed the debt to be collected. Use of the process cannot be linked to whether Virginia is responding in an interstate matter, nor can it be linked to the amount of past due current support.

Authority:

Va. Code § 58.1-520. "'*Claimant agency'* means any administrative unit of state . . . government, including department, institution, commission, authority . . . . All state agencies and institutions shall participate in the setoff program."

Va. Code § 58.1-521(B). "[A]ll claimant agencies shall submit, for collection under the procedure established by this article, all delinquent debts which they are owed."

Va. Code § 58.1-522(A). "If the claimant agency determines that the administrative cost, as defined in rules promulgated by the Tax Commissioner, of utilizing this article will exceed the amount of the delinquent debt, then such claimant agency shall not participate in the setoff program below such levels determined economically infeasible."

Advice: Delete the language that qualifies use of state tax offset based on interstate status and current support delinquency. Revise the proposal to link use of state tax offset to the administrative cost defined by the Tax Commissioner.

2) <u>Federal tax offset.</u>

The proposal regarding 22VAC40-880-380 (tax intercept) states:

A. The department shall intercept state and federal income tax refunds due to obligors that owe support arrearages<u>, except when Virginia is the responding state as defined at § 20-88.32 of the Code of Virginia</u>.

Conclusion: Use of federal tax offset cannot be tied solely to whether Virginia is the responding state in an interstate matter. Federal law requires that enforcement services be made available to residents of other states on the same terms as Virginia residents and that DCSE ensure that past-due support is paid from federal tax overpayments. While federal regulations clarify that the initiating state must certify qualifying cases for federal tax offset, the regulations do not release the responding state from the responsibility to do so when appropriate. Because federal law requires DCSE to ensure collection of past due support from federal tax overpayments, DCSE must certify cases for federal tax offset when serving as a responding state unless another IV-D agency has done so.

Authority:

42 U.S.C. § 654. "A State plan for child . . . support must –

(6) provide that – (A) services under the plan shall be made available to residents of other States on the same terms as to residents of the State submitting the plan; . . .

(18) provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury . . . , and take all necessary steps to implement and utilize such procedures . . . . "

45 CFR § 303.6. " . . . the IV-D agency must maintain and use an effective system for:

(c)(3) Submitting once a year all cases . . . which meet the certification requirements . . . for Federal income tax refund offset . . . ."

45 CFR § 303.7(c). "The initiating State IV-D agency must:

(8) Submit all past-due support owed in IV-D cases that meet the certification requirements . . . for Federal tax refund offset . . . ."

45 CFR § 303.7(d). "Upon receipt of a request for services from an initiating agency, the responding State IV-D agency must:

(6) Provide any necessary services as it would in an intrastate IV-D case including:

(iv) Processing and enforcing orders referred by an initiating agency . . . using appropriate remedies applied to its own cases . . . , and submit the case for such other Federal enforcement techniques as the State determines to be appropriate . . . . "

Advice: Revise the proposal to reinsert the language from the September 17, 2020, draft of the Period Review Recommendations, which read as follows:

> The department shall intercept state and federal income tax refunds due to obligors that owe support arrearages~~.~~, except no requirement to intercept federal income tax refunds arises when Virginia is the responding state on a case as defined at § 20-88.32 of the Code of Virginia and the initiating state has certified the case for federal tax intercept.

cc: Victoria W. Dullaghan, Section Chief

Attachment

Project 6081 – Fast Track

Department Of Social Services

Update Child Support Enforcement Program

22VAC40-880-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Appeal" means a request for a review of an administrative action taken by the division, or an action taken to contest a court order.

"Applicant" or "applicant/recipient" means a party who applies for and receives services from the division.

"Application" means a written ~~document requesting~~ <u>or electronic request for</u> child support enforcement services ~~which~~ <u>in a form that</u> the department provides to the individual or agency applying for services and ~~which~~ <u>that</u> is signed by the applicant<u>, including by electronic means.</u>

"Arrearage" means unpaid child or medical support payments, interest, and other costs for past periods owed by a parent to the state or obligee. This may include unpaid spousal support when child support is also being enforced.

"Bad check" means a check not honored by the bank on which it is drawn.

"Case summary" means a written statement outlining the actions taken by the department on a case that has been appealed.

"Child support guideline" means a method for calculating a child support obligation as set out in § 20-108.2 of the Code of Virginia.

"Delinquency" means an unpaid child or medical support obligation. The obligation may include spousal support when child support is also being enforced.

"Department" means the Virginia Department of Social Services.

"District office" means a local office of the Division of Child Support Enforcement responsible for the operation of the child support enforcement program.

"Division" means the Division of Child Support Enforcement of the Virginia Department of Social Services, also known as a IV-D agency.

"Enforcement" means ensuring the payment of child support through the use of administrative or judicial means.

"Federal foster care" means foster care that is established under Title IV-E of the Social Security Act. This is a category of financial assistance paid on behalf of children who otherwise meet the eligibility criteria for TANF and who are in the custody of local social service agencies.

"Financial statement" means the provision of financial information from the natural or adoptive parents.

"Good cause" means, as it pertains to ~~TANF~~ <u>public assistance</u> applicants and recipients, an agency determination that the individual is not required to cooperate with the division in its efforts to collect child support.

"Hearing officer" means an impartial person charged by the Commissioner of the Department of Social Services to hear appeals and decide if an agency followed its policy and procedures.

"IV-D agency" means a governmental entity administering the child support enforcement program under Title IV-D of the Social Security Act. In Virginia the IV-D agency is the Division of Child Support Enforcement.

"Locate services" means obtaining information which is sufficient and necessary to take action on a child support case including information concerning (i) the physical whereabouts of the obligor or the obligor's employer, or (ii) other sources of income or assets, as appropriate. Certain individuals and entities such as courts and other state child support enforcement agencies can receive locate-only services from the department.

"Medicaid-only" means a category of public assistance whereby a family receives Medicaid but is not eligible for or receiving TANF.

"Medical support services" means the establishment of a medical support order and the enforcement of health insurance coverage or, if court ordered, medical expenses.

"Obligation" means the amount and frequency of payments which the obligor is legally bound to pay as set out in a court or administrative support order.

"Occupational license" means any license, certificate, registration, or other authorization to engage in a business, trade, profession, or occupation issued by the Commonwealth pursuant to Title 22.1, 38.2, 46.2, or 54.1 of the Code of Virginia or any other provision of law.

"Parent" means any natural or adoptive parent; the natural or adoptive parent with whom the child resides; a stepparent or other person who has physical custody of the child and with whom the child resides; a local board that has legal custody of a child in foster care; or a responsible person who is or may be obligated under Virginia law for support of a dependent child or child's caretaker.

"Past due support" means support payments determined under a court or administrative order which have not been paid.

"Pendency of an appeal" means the period of time after an administrative appeal has been made and before the final disposition by an administrative hearing officer, or between the time a party files an appeal with the court and the court renders a decision.

"Putative father" means a person alleged to be the father of a child whose paternity has not been established.

"Recipient" means a person or agency that has applied for or receives public assistance or child support enforcement services.

"Recreational license" means any license, certificate, or registration used for the purpose of participation in games, sports, or hobbies, or for amusement or relaxation.

"Service" or "service of process" means the delivery to or leaving of a child support document, in a manner prescribed by state statute, giving the party reasonable notice of the action being taken.

"Summons" means a document notifying a parent or other person that he or she must appear at a time and place named in the document to provide information needed to pursue child support actions.

22VAC40-880-90. Case assessment.

After establishing a case record, the department shall (i) assess the case information to determine if sufficient information to establish or enforce a child support obligation is available and verified, (ii) attempt to obtain additional case information if the information is not sufficient, (iii) gather all relevant documents, and (iv) ~~verify case information which is not verified~~ initiate verification of unverified case information.

22VAC40-880-240. Administrative deviation from the child support guideline.

There shall be a rebuttable presumption that the amount of child support that results from the application of the guidelines is the correct amount of child support pursuant to §§ 20-108.1, 20-108.2, and 63.2-1918 of the Code of Virginia. Deviations from the guidelines shall be allowed as follows:

1. When either natural or adoptive parent is found to be voluntarily unemployed or fails to provide financial information upon request, income shall be imputed except as indicated

in this subdivision. A natural or adoptive parent is determined to be voluntarily unemployed when the parent quits a job without good cause or is fired for cause.

a. The current or last available monthly income shall be used to determine the obligation if that income is representative of what the natural or adoptive parent could earn or otherwise receive.

b. If evidence of actual income or other ability to pay is ~~not~~ unavailable, use ~~the federal minimum wage multiplied by 40 hours per week and converted to a monthly amount by multiplying the result by 4.333~~zero as the parent's income when computing the obligation.

2. In non-TANF cases, where there is a signed, written agreement for child support, the child support obligation may be set at the agreed amount but at no less than the statutory minimum pursuant to § 20-108.2 of the Code of Virginia.

3. No other deviations from the child support guidelines may be made in establishing or adjusting administrative support orders or reviewing court orders. Should potential deviation factors exist, as stated in § 20-108.1 of the Code of Virginia, refer the case to court for additional action.

22VAC40-880-250. Periodic reviews of the child support obligation.

A. Either parent may request a review of the child support obligation once every three years. Additional requests may be made earlier by providing documentation that a material change of circumstance has occurred that potentially affects the child support obligation. Such changes shall be limited to the following:

1. An additional child needs to be added to the order;

2. A child is no longer eligible to receive current support due to a change of custody or emancipation and needs to be removed from an existing order that includes other children;

3. A provision for health care coverage needs to be added;

4. A provision ordering the natural or adoptive parents to share the costs of ~~all~~ any reasonable and necessary unreimbursed medical/dental expenses ~~exceeding $250 per child per year~~ for the child covered by the order needs to be added; or

5. A change of at least 25% can be documented by the requesting parent in the following circumstances:

a. Income of either natural or adoptive parent;

b. Amount of medical insurance; or

c. Cost of employment-related child-care costs.

B. The department shall adjust an administrative obligation when the results of the review indicate a change of at least 10% in the monthly obligation but not less than $25.

22VAC40-880-290. Determining the amount to be applied toward past due support.

The department shall collect any court-ordered amount to be paid toward past due support. If the order does not specify an amount to be paid toward past due support, the department shall determine the amount to be paid monthly toward past due support. The monthly payment for past due support will be 25% of the current or former obligation or $65, whichever is greater.

When the noncustodial parent participates in one or more of the department's family-centered services or has entered into a payment agreement with the department, the monthly payment for past due support may be set at a lesser amount, but never an amount lower than the order of the court.

For disposable earnings, the total amount withheld shall not exceed the amount allowed under § 34-29 of the Code of Virginia.

22VAC40-880-320. Initiated withholding of income.

In all initial and modified administrative support orders, the department shall initiate an income withholding order unless the parties agree to a written alternative payment arrangement or good cause is shown. The department shall initiate an income withholding order to the noncustodial parent's employer requiring the withholding of the child support obligation from the noncustodial parent's income under the following circumstances:

1. When a payment is delinquent in an amount equal to or exceeding one month's child support obligation, or

2. ~~When either parent requests that withholding begin regardless of whether past due support is owed~~ The support order includes a provision for immediate income withholding.

22VAC40-880-350. Distraint, seizure, and sale.

A. The department may use distraint, including booting of vehicle, seizure and sale against the real or personal property of a noncustodial parent when:

1. There is an arrearage of at least $1,000 for a case with a current support obligation and at least $500 for an arrearage-only case;

2. Conventional enforcement remedies have failed or are not appropriate; and

3. A lien has been filed pursuant to § 63.2-1927 of the Code of Virginia.

B. Assets targeted for distraint, including booting of vehicle, seizure and sale are:

1. Solely owned by the noncustodial parent.

2. Co-owned by the noncustodial parent and current spouse.

3. Owned by a business in which the noncustodial parent is the sole proprietor. Assets owned by business partnerships or corporations which are co-owned with someone other

than a noncustodial parent's current spouse do not qualify for booting of vehicle, or seizure and sale.

C. The director of the division or ~~his~~ designee shall give final approval for the use of distraint, seizure and sale. This includes immobilizing a vehicle using vehicle boots.

D. When initiating booting, or seizure and sale of vehicle, the department shall check with the Department of Motor Vehicles for vehicles registered in the noncustodial parent's name, the address on the vehicle registration, and the name of any lien holder on the vehicle.

E. Once a lien has been filed pursuant to § 63.2-1927 of the Code of Virginia, the department shall send a notice of intent to the noncustodial parent before initiating distraint, including booting of vehicle, seizure and sale action.

F. If the noncustodial parent contacts the department in response to the intent notice, the department shall request payment of the arrearage in full. The department shall negotiate a settlement if the noncustodial parent cannot pay the arrearage in full. The least acceptable settlement is 5.0% of the arrearage owed or $500, whichever is greater, with additional monthly payments towards the arrearage that will satisfy the arrearage within 10 years. The department may initiate distraint, including booting of vehicle, seizure and sale, without further notice to the noncustodial parent if the noncustodial parent defaults on the payments as agreed.

G. The department shall send a fieri facias request to each county or city where a lien is filed and a levy is being executed if the noncustodial parent does not contact the department in response to the intent notice.

H. The department shall set a target date for seizure or booting and have the sheriff levy the property or boot the vehicle.

I. Once property has been seized or booted by the sheriff, the department must (i) reach a payment agreement with the noncustodial parent of 5.0% of the arrearage owed or $500, whichever is greater, with additional monthly payments towards the arrearage that will satisfy the arrearage within 10 years and release the vehicle to the owner; (ii) proceed with the sale of the vehicle pursuant to § 63.2-1933 of the Code of Virginia; or (iii) at the end of 90 days from the issuance of the writ of fieri facias, release the vehicle to the owner.

J. The department shall send a cancellation notice to the sheriff if a decision is made to terminate the seizure action before the asset is actually seized.

K. If the department sells an asset and it is a motor vehicle, the department shall notify the Department of Motor Vehicles to issue clear title to the new owner of the vehicle.

22VAC40-880-380. Tax intercept.

A. The department shall intercept state and federal income tax refunds due to obligors that owe support arrearages, except when Virginia is the responding state as defined at § 20-88.32 of the Code of Virginia.

B. The Virginia Department of Taxation prescribes rules for interception of state tax refunds and notification to the person whose state tax refund is being intercepted.

1. The department may retain moneys up to the amount owed on the due date of the finalization notice from the department to the Virginia Department of Taxation.

2. The department may intercept state tax refunds when the arrearage equals at least $25 for arrearages-only cases or when the arrearage is equal to or greater than two months' current support for cases with current support due.

3. State tax refund intercepts shall be disbursed in the same manner as support payments. Federal tax intercepts shall be disbursed as required pursuant to 42 USC § 664.

4. The department may not disburse the intercepted state taxes if the noncustodial parent has appealed the intercept action and the appeal is pending.

5. The department shall issue a refund to the noncustodial parent when one of the following occurs:

a. The intercept was made in error;

b. The noncustodial parent pays the arrearage in full after the Department of Taxation has been notified of the arrearage and before the tax refund is intercepted; or

c. The total amount intercepted is more than the amount of the arrearage owed at the time that notification of the tax intercept is received from the Department of Taxation, and the noncustodial parent does not agree to allow the department to apply the excess funds to any arrearage that accrued after certification for tax intercept.

22VAC40-880-390. Additional remedies.

In addition to state administrative enforcement remedies, the department ~~shall~~ may utilize ~~available~~ appropriate federal enforcement remedies to enforce child support obligations and collect accumulated support arrearages.

22VAC40-880-430. Validity of the appeal.

A. The department shall determine the validity of an administrative appeal.

1. The appeal ~~must~~shall be in writing.

2. If the appeal is personally delivered, the appeal ~~must~~shall be received within 10 business days of service of the notice of the proposed action on the appellant.

3. If mailed, the postmark ~~must~~shall be within 10 business days from the date of service of the notice of the proposed action on the appellant.

B. For appeals of federal and state tax intercepts, the appellant shall have 30 days to note an appeal to the department.

C. For appeals of federal passport denials, the appellant shall have 30 days from the date of the *Pre-Offset Notice* to note an appeal to the department.

22VAC40-880-480. Cooperation with other state IV-D agencies.

A. When the parents reside in different states, cooperation between these state agencies may be necessary.

B. The department shall provide the same services to other state IV-D cases that it provides to its own cases with the following conditions:

1. The request for services ~~must~~shall be in writing; and

2. The request for services ~~must~~shall list the specific services needed.

C. ~~The department shall request in writing the services of other state IV-D agencies when one parent resides in Virginia, but the other parent resides in another state.~~

~~D.~~ Other department responsibilities in providing services to other state IV-D cases and obtaining services from other state IV-D agencies are defined in 45 CFR 303.7 and §§ 63.2-1902 and 20-88.32 ~~through 20-88.82~~ et seq. of the Code of Virginia.