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## BACK CHILD SUPPORT

Once it has been ordered and has not been paid on time, unpaid child support becomes a judgment by operation of law. The amount of child support that has not been paid on time is called an “arrearage” or “arrearages.” More often, it’s simply called “back child support.” It can’t be changed retroactively. Neither party can go back and undo, set aside, or change the arrearage. It can’t be discharged in bankruptcy. All you can do is pay it. If you have proof of payment, you should show that to the court or agency that last ordered child support.

The following is an explanation of how child support is ordered, and what happens if it isn’t paid.

### **Who has to pay child support?**

If you do not have physical custody of your child, you owe a duty to pay child support, on behalf of the child, to the person who has physical custody of the child. You are called the “responsible party.” Unless you have a good reason for not paying child support (such as receipt of SSI disability benefits), you will be ordered to pay some amount. Being unemployed is not a sufficient reason to not pay child support.

### **How is child support set?**

Child support is established either administratively through the Division of Child Support Enforcement (DCSE), or judicially through the Juvenile and Domestic Relations (J&DR) Court. Child support may also be handled in Circuit Court, if it’s part of a divorce case.

### **How is child support set through DCSE?**

After receiving a petition, DCSE can issue an Administrative Support Order (ASO) and serve it on the responsible party. If you are the responsible party, you then have 10 days to object in

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writing and ask for an administrative hearing by sending a letter to the Appeals and Fair Hearings Unit, DCSE Section, Virginia Department of Social Services, 801 E. Main Street, Richmond, Virginia 23219-2901. A hearing officer will determine if the objection is valid and, if so, will then schedule a hearing within 45 days, unless there are delays due to scheduling conflicts. Unless you request a telephone hearing, the hearing will be held at the appropriate DCSE local office, and all parties must be present. The hearing may be rescheduled once, and only if the hearing officer finds that there is good cause to reschedule. At the hearing, you must be able to show that either:

1. You are not the noncustodial parent,
2. The amount ordered is incorrect, or
3. Your income is exempt from garnishment for child support (SSI benefits for example.)

You will need to have all your evidence and witnesses available at the hearing. All comments should be directed to the hearing officer and you should not argue with the other party. A written decision will be sent to all parties by certified mail within 45 days of the hearing. If you still object to the hearing officer's decision, then within 10 days of receiving the decision you may file an appeal to the appropriate J&DR Court to request a hearing in court.

If no objection is made, the ASO is as good as a court's Child Support Order. It may be enforced by DCSE issuing a Mandatory Withholding of Earnings (MWE) to your employer or other entity paying you, such as the Social Security Administration. The only way to change the order at this point would then be to file a Motion to Amend or Review Child Support, either through DCSE or through the J&DR court.

### **How is child support set through court?**

A petition for child support may be filed through the Court Services Unit of the J&DR Court in the city or county where the responsible party lives. The petition usually will be heard within several weeks. The judge will hear evidence as to the parties' income and issue a Child Support Order. The judge also may issue an MWE.

### **How is the amount of child support set?**

Child support is set using the Child Support Guidelines. This one page worksheet asks for the income of both parties. There are a few deductions. If a party has no income, or a very low income, income can be imputed to that party. This means it is assumed the party could obtain that much income, even if it is not really there. The income of the parties is combined.

Based on combined income, and the number of children for whom support is sought, the guidelines set a combined child support obligation of both parties. There are a few deductions. The obligation then is divided between the parties according to the ratio of the incomes of the parties. For example, if the responsible party has twice as much income as the custodial party, and the total obligation is \$300 per month, the responsible party's share is \$200 per month.

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**The other parent is not paying the ordered amount. What can I do?**

- You may go to the clerk of J&DR Court to file a Motion to Show Cause.
  - The court will contact the other parent and notify them of a day and time that they must appear in court to explain to the judge why support payments are not being made. The non-paying parent must show why they should not be held in contempt for failing to pay support. Non-payment of support can be a criminal offense, which may result in a jail sentence. The delinquent payor may also be charged with interest and attorney's fees.
- You may file a Motion for an Income Deduction Order.
  - Income withholding takes money from the noncustodial parent's paycheck to pay their child support. An employer must honor an income deduction order and may not punish the noncustodial parent because of it. However, the employer may charge \$5 per withholding to handle the administrative costs of complying with the order.
  - Even with an income deduction order, the noncustodial parent is responsible for ensuring that the correct amount of child support is being paid on time to the custodial parent.
- You may file a Motion and Notice for Judgment for Arrearages.
  - The J&DR Court can calculate the amount of child support the other party is behind, and enter a judgment against the noncustodial parent for that amount. This judgment is just like any other civil judgment, and can be the basis for garnishments, property liens, etc.
- You may fill out an application with the Division of Child Support Enforcement and request their assistance in obtaining child support. DCSE has the authority to:
  - have income withheld by the noncustodial parent's employer,
  - file property liens,
  - report child support debts to credit agencies,
  - suspend drivers' and other licenses, including professional licenses
  - intercept income tax refunds,
  - prepare your case for court action, and
  - petition another state for assistance if the other parent is living in another state.

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- **NOTE:** If the parent required to pay support lives in another state, you must apply for assistance from DCSE to enforce your support order.

### **I do not know where the other parent is living. Can DCSE find him or her?**

- DCSE has many automated locator sources available for its use. But you, as the custodial parent, are one of the best resources for information about a noncustodial parent, since you may learn of addresses, assets, or employment from friends or family before that information is available to DCSE through its sources.
- DCSE staff use locator sources available in DCSE offices. DCSE cannot, however, physically search for individuals. Even with its sources and with your help, DCSE may still not be able to find a noncustodial parent. Some people are determined not to be found and may use extreme measures not to be located.

### **I've been ordered to pay child support. What should I do if I can't pay it?**

Once child support has been ordered and you are unable to pay it, you need to file a Motion to Amend or Review as soon as possible. You do this with the agency or court that last ordered child support. You can ask that future child support be lowered and set according to the Child Support Guidelines.

However, the agency or court may not do this unless you show you made good faith efforts to pay the child support, or had a good reason for not paying the child support, such as receiving or seeking disability benefits, workers' compensation, or unemployment compensation.

Your Motion to Amend or Review only affects child support that becomes due after you file. Your Motion to Amend or Review doesn't affect any arrearages that exist at the time you file. You still need to pay them.

You will need to present proof of all income, and any other dependents for which you provide support. You should also file a Subpoena Duces Tecum at the clerk's office, requesting that the custodial parent bring proof of their income, as well as any expenses that they are claiming for the child.

### **What happens if I do not file a Motion to Amend or Review?**

If you do not file this Motion to Amend or Review, child support continues to be due according to the terms of the most recent order, and continues to become a judgment by operation of law. This is true even if nobody is trying to enforce a child support order against you. It's also true if somebody has agreed orally that child support does not have to be paid. Unless you get child support changed with a new written order, the old order stays in effect.

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This can mean that after several years, you may owe a lot of child support. For example, if child support of \$500 per month is not paid, you will owe \$30,000 (plus interest) in five years. If you pay this at \$65 per month (the minimum allowed by Virginia law), it will take you 38½ years.

### **What can happen to me if I do not pay support as ordered?**

One or more of the following things can happen if you do not pay support as ordered:

- You can be held in contempt of court.
- Your payments can be automatically deducted from your pay through a payroll deduction order.
- Your wages or social security benefits can be garnished.
- Your driver's license can be suspended.
- A license, certificate, registration, or other authorization you have to engage in a profession, trade, business, or occupation in Virginia can also be suspended.
- Funds in any bank accounts you have can be seized.
- Your state and federal tax refunds can be seized.
- A lien can be placed against your personal and real property to satisfy the child support debt.

### **How much of my wages or Social Security benefits can be garnished for child support?**

- Sixty percent (60%) of your wages after taxes or Social Security benefits can be garnished for child support. If you are supporting any other child or a spouse, that amount is lowered to fifty percent (50%) of your wages after taxes of Social Security benefits.
- If your payments are more than twelve weeks behind, sixty-five percent (65%) of your wages after taxes or Social Security benefits can be garnished. That amount is lowered to fifty-five percent (55%) if you are supporting any other child or spouse.
- SSI benefits can never be garnished for child support, or any other debts.

### **Can I be put in jail if I do not pay?**

- Yes. A court can order you to jail if you have not made your payments as ordered.
- A parent who is found to be in criminal contempt for willful failure to pay child support can be sentenced to up to 12 months in jail.
- If you go to Court and there is any likelihood that you will be sentenced to jail, you should ask the judge to appoint an attorney to represent you.

### **Do I have to pay child support if I can't visit the child?**

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Child support and child visitation are completely independent issues. You still have a duty to pay child support, even if the other parent is denying child visitation. Likewise, a party still has a duty to allow child visitation, even if you are not paying child support. In either case, the remedy is to go to court and enforce the order which is being disobeyed, rather than taking matters into your own hands.

**Can I terminate (end) my parental rights if I don't want to pay child support?**

Because a child has a legal right to support from both parents, a judge is not likely to terminate parental rights for this reason.

**Can an adult child collect past due child support from their parent?**

The right to collect support arrearages belongs to the person to whom support was awarded (the custodial parent), not to the adult children. The Virginia Supreme Court held in *Fearon v. Fearon*, 207 Va. 927 (1967) that payments made to adult children did not reduce the arrearage. Also, the Virginia Court of Appeals held in *Johnson v. Johnson*, 1 Va. App. 330 (1986) that payments directly to adult children were a gift and not a payment on the arrearages.

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