

Battered Immigrants and Family Law Issues: Custody, Support, Divorce

financial resources is one of the most significant factors preventing immigrant victims of domestic violence from leaving abusive relationships.⁴

For many low-income abused women, achieving adequate financial assistance usually requires a combination of help from family, friends, public assistance, employment, and child support. Women often must leave everything behind and travel great distances to escape the abuse, leaving them with few resources to start a new life in another community.⁵ In short, violence affects poor women in two critical ways: it makes them poor, and it keeps them poor.⁶

Securing and enforcing child support and spousal support awards for immigrant victims can provide an important resource to enhance an immigrant victim's economic security. Such awards provide critical income for low-income battered immigrants who may not yet be eligible to work, and who are often not eligible to receive a full range of public benefits.⁷ Even when immigrant victims can access public benefits for themselves and their children and can access VOCA crime victim's assistance funds,⁸ child and spousal support are an important additional source of economic support.

This chapter will provide an overview of the child support system and demonstrate some of the problems faced by immigrant victims in accessing this system. This chapter will also provide practical information on how to prepare for a child and spousal support case; what form of support orders are best in domestic violence cases; and tips on child support enforcement. The focus of this chapter will be on the child- and spousal support issues that arise in cases of immigrant victims.

Role of Safety in Seeking Child Support

Financial control and isolation are powerful weapons that abusers use to maintain control over their victims. Many domestic violence victims do not have access to bank accounts or charge accounts. In other instances, their abusers make it difficult for their victims to work outside the home, or completely forbid victims from working outside the home. This financial isolation and control is especially exacerbated where the abuser can control the victim's immigration status, because the abusive spouse is a U.S. citizen, lawful permanent, resident or non-immigrant visa holder and the victim is undocumented.⁹ Abusers of non-citizen victims often use immigration-related abuse to control their victims. Abusers of non-citizen victims threaten to report them to the Department of Homeland Security (DHS), and to not file for immigration status for the victim and/or the children, in order to perpetuate control and instill further fear.¹⁰

The family-based immigration process and laws relating to temporary visas can leave immigrant victims vulnerable to economic abuse. This is because an immigrant spouse generally is dependent on the U.S. citizen/lawful permanent resident/temporary- visa-holder spouse for immigration status. Immigration status determines whether someone can work in the United States legally, and whether he or she is eligible to receive certain public benefits. Immigrant victims may lack work authorization¹¹ under a variety of situations, such as:

⁴ See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 259, 295-99 (2000).

⁵ Martha F. Davis, "The Economics of Abuse: How Violence Perpetuates Women's Poverty", in *Battered Women, Children, and Welfare Reform: The Ties That Bind* 17, 18 (Ruth Brandwein ed., 1999).

⁶ *Id.* at 19.

⁷ See Chapter 4 of this Manual for a full discussion of Public Benefits that can be accessed by immigrant victims.

⁸ Generally, immigrant victims of domestic violence can qualify to receive victim's compensation from their state from Victims of Crime Compensation Act funds. These funds can provide the victim with reimbursement for costs associated with medical treatment, mental health care, day care, relocation, and loss of income due to the abuser's incarceration. For a more complete discussion of immigrant victim access to VOCA funding, see Chapter 4 of this manual.

⁹ See Dutton, Orloff and Hass, Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000).

¹⁰ *Id.*

¹¹ As an attorney or advocate working with immigrant victims, it is important to warn the client about the immigration consequences of buying or using false papers in order to secure employment, and/or representing herself as a United

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- when their abusive citizen or lawful permanent resident spouse has not filed immigration papers for them;
- when their immigration status is dependent upon the status of their abusive spouse, and they are not authorized to work under the particular immigration status category;
- when they are undocumented;
- when they qualify for the battered spouse relief under the Violence Against Women Act (VAWA) or the crime victim (U visa) but do not know they qualify, or have filed for relief but have not yet been approved.

Further, some immigrant victims of domestic violence have an immigration visa that requires them to work for a particular employer.¹² If they leave that employer, they may violate the terms of their visa and lose their immigration status. Abusers of immigrant women on employment-based visas may harass and abuse them at work.¹³ Harassment at work can cause immigrant victims to lose their jobs, and thus lose their immigration status.

Despite the fact that child support can enhance a victim's ability to achieve self-sufficiency, many abused women forego obtaining child support from their abusers altogether.¹⁴ It is important to weigh the benefits and the risks of pursuing child support orders. Some risks include: an abuser learning the whereabouts of the victim and children; an abuser retaliating in the form of actions for custody or visitation, resulting in increased contact between the abuser and victim; and the escalation of violence.¹⁵ The added threats of retaliation and reporting to immigration authorities can also heighten the risk to an immigrant victim and her children.¹⁶ It is important to always keep in mind the immigrant victim's safety concerns for herself and her children when evaluating her economic options. It is also advisable to become informed on immigration relief under VAWA, and the U visa provisions created by VAWA 2000. Many immigrant victims who qualify for relief under VAWA will be unaware that this relief is available to them.

Duty to Support Children

A statutory duty to support children is imposed on parents in all 50 states and Puerto Rico, the Virgin Islands, Guam, and the District of Columbia.¹⁷ While this chapter focuses on obtaining child support for immigrant custodial parents, it is important to note that immigrant victims may also have a case for child support initiated against them when they are not the custodial parent.

States citizen, or signing a form stating that she is a United States citizen for purposes of employment. Battered immigrants who could potentially qualify to attain legal immigration status under Violence Against Women Act [hereinafter VAWA] could jeopardize their access to VAWA immigration benefits if they do any of these things. 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1227(a)(3)(D)(2003); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 344(c). If you discover that your clients have done any of these things, then they should be referred to an immigration attorney in your area to advise them on how to proceed. For a referral to an immigration attorney familiar with VAWA immigration cases, or for technical assistance to attorneys and victim advocates, please contact the National Immigrant Women's Advocacy Project (NIWAP) at (202) 274-4457 or by email at info@niwap.org.

¹² See INA § 101(a)(15); 8 U.S.C. § 1101 (2003); 8 C.F.R. § 274a.12(b) (2003). For example, persons on H, J, O, and TN visas have specific visas related to their employer, and their spouses and children, as "derivatives" on their visas, may or may not be authorized to work.

¹³ This pattern is typical of abusers in general. See, e.g., Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655, 664-68 (2000); Jody Raphael, *Prisoners of Abuse, Domestic Violence and Welfare Receipt* 6-10 (1996), available at <http://www.ssw.umich.edu/trapped>.

¹⁴ See Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 54 (2003).

¹⁵ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 664 (2000). Danger of new violence, injury, and death go up when a victim tries to separate from her abuser. See Caroline W. Harlow, U.S. Dep't of Justice, *Female Victims of Crime* 3 (1991).

¹⁶ See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245 (2000); Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 54 (2003).

¹⁷ Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004).

Abusers who are custodial parents may bring child support proceedings against low-income victims of domestic violence in retaliation. When working with a low-income immigrant victim against whom child support is being sought, it is important to review your state's child support statute. Many states have recognized the need for a parent to reserve a portion of income to meet his or her basic subsistence needs before the child support award is calculated.¹⁸ Attorneys and advocates should explore what the immigrant victim's income and resources are, and whether advocacy for a basic subsistence reserve is appropriate.¹⁹ Even victims who have not yet attained legal work authorization can be ordered to pay child support.²⁰

If the immigrant victim and abuser have a shared custody agreement, in many jurisdictions the amount of child support awarded can be adjusted to reflect the percentage of time that each parent actually has physical custody of the children. The child support guidelines (see discussion below) are rebuttable presumptions of an appropriate amount of child support. In other jurisdictions, the child support guidelines reflect the traditional custodial arrangement in which one parent has sole legal and physical custody of the child, and the other parent exercises visitation rights. In these jurisdictions, counsel for the immigrant victim should argue that the amount of support ordered should reflect the custody agreement.²¹ When the immigrant victim incurs costs related to care for the children under a shared-custody arrangement, her child support order should be adjusted accordingly.

Noncompliance with child support payments can have serious legal and immigration consequences. Failure to pay child support can result in civil and criminal penalties. In addition, for non-citizens ordered to pay child support, failure to pay child support can also have immigration consequences. (See discussion below). It is important to adequately advise immigrant victims of their rights and responsibilities, and consequences of failure to pay their child support orders.

Jurisdiction and Establishment of Paternity

There are several ways that immigrant victims can request child support and spousal support. Applicants can usually petition a civil family court for an order of child support and spousal support, or they can obtain orders through a divorce-, separation-, or custody- proceeding. In addition, immigrant victims can request an order for child support and spousal support through a civil protection order.²²

Personal jurisdiction in a family court proceeding for child support can be established when: (1) in a child custody case, the child has substantial connections with the state;²³ (2) in cases of child support and alimony (spousal support), the child, parent, or spouse who is required by law to pay or receive support resides in the state;²⁴ or (3) with respect to domestic violence, child abuse and criminal cases as part of a protection order case when, illegal acts are committed in the state or the victim needs protection in the state.²⁵ When the child or spousal support award will be part of a divorce proceeding,²⁶ the majority of jurisdictions require the party

¹⁸ *Id.*

¹⁹ Attorneys representing immigrant victims with low-wage work need to be aware that the fact that the victim may not have work authorization will not protect her against having to pay child support, whether or not the amount is calculated taking into account a subsistence reserve.

²⁰ *Asal v. Asal*, 960 P.2d 849, 850 – 851 (Okla. 1998) (Although the former husband claimed that he could not work due to his current immigration status, he was ordered to pay support because his testimony indicated that his mother was paying his expenses, and that he could work in the United States, but had not found work)

²¹ Rutkin, Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004).

²² See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 810 (1993).

²³ Uniform Child Custody Jurisdiction and Enforcement Act m[hereinafter UCCJEA] § 201 (a)(2)(A); UCCJA § 75-d (b)(i-ii); 28 U.S.C. § 1738A(c).

²⁴ *Porter v. Porter*, 684 A. 2d 259 (R.I. Sup. Ct. 1996) (court ruled it had exclusive jurisdiction over the non-paying parent because that jurisdiction was the child's state or residence of contestant). North Carolina Gen. Stat. § 50-13.5(f) (child support orders must be made in divorce proceedings and jurisdiction is found where the child resides or is physically present, or where the parent resides). See *Bass v. Bass*, 43 N.C. App. 212 (1979).

²⁵ National Council of Juvenile & Family Court Judges [hereinafter NCJFCJ], *Family Violence: A Model State Code*, § 303 (1994), available at <http://www.ncjfcj.org>.

²⁶ For a full discussion of immigration status and jurisdiction in a range of family court cases, see Chapter 8 of this Manual.

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seeking a divorce to satisfy a threshold residency requirement before their courts will adjudicate a divorce action.²⁷ Some states require their courts to have jurisdiction over the party seeking the divorce,²⁸ while other states only require jurisdiction over either one of the parties in the divorce.²⁹

PATERNITY

If a child is born to parents who were married when the child was born or conceived, the law presumes that the husband is the father, no additional action is required to establish the child's paternity.³⁰ To establish legal paternity for a child whose parents are unmarried, formal action must be taken.³¹

The 1996 Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA) required states to adopt and implement a variety of new policies concerning paternity establishment in order to encourage and facilitate voluntary paternity establishment.³² A paternity acknowledgment or order establishes a legal relationship between the father and child. It is the first step in a formal child support process, legally identifies the father for purposes of inheritance and other benefits, and permits non-marital fathers to seek court-ordered visitation or custody.³³

Generally, states must recognize a signed acknowledgment of paternity as a legal finding of paternity, unless it is rescinded within 60 days. No further legal action may be required to make the voluntary acknowledgment legally binding.³⁴ After 60 days, paternity acknowledgments may be challenged in court only for fraud, duress, or material mistake of fact.³⁵ The law and the implementing regulations require states to make voluntary paternity establishment services broadly available at birth record agencies, as well as at public and private hospitals.³⁶ Additionally, the PRWORA eased the requirements in cases where paternity is contested. Child support agencies are able to order genetic tests without applying for a court order, and the results of properly conducted tests are more readily admitted as evidence.³⁷

²⁷ Without establishing this threshold residency requirement, the state courts do not have subject matter jurisdiction in divorce cases. See e.g. Blair v. Blair, 643 N.E.2d 933 (Ind. Ct. App. 1994). Parties cannot agree to confer subject matter jurisdiction on a court that does not have it. Gosa v. Mayden, 413 U.S. 665 (1973). See also, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); Industrial Addition Ass'n v. Commissioner, 323 U.S. 310, 313 (1945); People's Bank v. Calhoun, 102 U.S. 256 (1880); Cutler v. Rae, 7 How. L.J. 729, 731 (1849).

²⁸ See Idaho, Idaho Code § 32-701 (2000); Iowa, Iowa Code § 598.6 (2001); Maine, 19-A M.R.S. § 901 (2000); Massachusetts, Mass. Ann. Law ch. 208, § 5 (2001); New Hampshire, R.S.A 458:5 (2000); North Carolina, N.C. Gen. Stat. § 50-8 (2000); North Dakota, N.D. Cent. Code, 14-05-17 (2001); Ohio, O.R.C. Ann. §3105.03 (2001); South Carolina, S.C. Code Ann. § 20-3-30 (2000); South Dakota, S.D. Codified Laws § 25-4-30 (2001); Virgin Islands, 16 V.I.C. §106 (2001); Wyoming, Wyo. Stat. § 20-2-107 (2001).

²⁹ See Alabama, Code of Ala. §30-2-5 (2001); Arizona, A.R.S. §25-312 (2000); Arkansas, A.C.A. §9-12-307 (2001); California, Cal Fam. Code §2320 (2001); Colorado, C.R.S. §14-10-106 (2001); Connecticut, Conn. Gen. Stat. §466-44 (2001); Delaware, 13 Del. C. §1504; District of Columbia, D.C. Code Ann. §16-902 (2001); Florida, Fla. Stat. §61.021 (2000); Georgia, §19-5-2 (2001); Hawaii, HRS §580-1 (2001); Illinois, §750 ILCS 5/401 (2001); Indiana, Burns Ind. Code Ann. §31-15-6 (2001); Kansas, K.S.A. §60-1603 (2000); Kentucky, K.R.S. §403.140 (2001); Louisiana, La. R.S. §9:308 (2001); Maryland, Fletcher v. Fletcher, 95 App. 114 (1993); Michigan, MCLS §5529(2001); Mississippi, Miss. Code Ann. §93-5-5 (2001); Missouri, §R.S. Mo. (2000); Montana, Mont. Code Ann. §40-4-104 (2001); Nebraska, R.R.S. Neb. §42-349 (2001); Nevada, Nev. Rev. Stat. Ann. §125.020 (2001); New Jersey, N.J. Stat. §2A:34-10 (2001); New Mexico, N.M. Stat. Ann. §40-4-5 (2001); New York, NYCLS Dom Rel §230 (2001); Northern Mariana Islands, 8 C.M.C. §1332; Oklahoma, 43 Okla. St. §102 (2000); Oregon, ORS §107.075 (1999); Pennsylvania, 23 Pa. C.S. §3104 (2001); Puerto Rico, 31 L.P.R.A. §331 (1999); Rhode Island, R.I. Gen. Laws §15-5-12 (2001); Tennessee, Tenn. Code Ann. §36-4-104 (2001); Texas, Tex. Fam. Code §6.301 (2000); Utah Code Ann. §30-3-1 (2001); Vermont, 15 V.S.A. §592 (2001); Virginia, Va. Code Ann. §20-97 (2001); Washington, Rev. Code Wash. (ARCW) §26.09.030 (2001); West Virginia, W. Va. Code §48-5105 (2001); Wisconsin, Wis. Stat §767.05 (2000).

³⁰ Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE § 33.02 (Arnold H. Rutkin ed., Matthew Bender 2004).

³¹ *Id.*

³² Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 §331(C) (codified, as amended, in scattered sections of 42 U.S.C.)

³³ National Women's Law Center, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Father, and Children* (2000).

³⁴ *Id.*; See 42 U.S.C. § 666(a)(5)(D)(iii).

³⁵ See 42 U.S.C. § 666(a)(5)(D)(iii) (1999).

³⁶ See 42 U.S.C. § 666(a)(5)(D)(iii)(II)(aa) (1999); 45 C.F.R. § 303.5(g)(1)(ii)(A)(1999).

³⁷ See 42 U.S.C. §§ 666(c)(1)(a), 666(a)(5)(B)(ii)(I), 666(a)(5)(F)(iii)(1999).

In domestic violence cases, these new paternity establishment procedures can raise safety concerns for victims. Establishing paternity when there has been a history of abuse can create increased risks for mothers and children. Parents often do not have sufficient or accurate information about the effect that a voluntary acknowledgment of paternity will have on custody and visitation rights.³⁸ Victims need to know that signing the acknowledgment of paternity could give the abuser the right to take the baby from the hospital without the victim's consent.³⁹ Once paternity is established through acknowledgment, it will be easier for the abusive father to assert custody and visitation rights.⁴⁰ Sometimes abusers will initiate paternity establishment themselves, using the paternity-establishment process and litigation over custody and visitation to continue to abuse and control the victim. When the child's father is abusive, risks to the victim can be exacerbated by issues of language access and the immigrant victim's immigration status. Threats to obtain custody of children and to cut off immigrant victims' access to their children are a common power and control tactics that effectively lock immigrant victims in abusive relationships.⁴¹

Advocates and attorneys working with immigrant victims preparing to give birth need to investigate paternity-establishment procedures at the hospital that the client will be using. They must work with clients in advance to do safety planning, and decide whether the victim will choose voluntary paternity establishment at the hospital. If she will not, advocacy with hospital staff may be needed to avoid endangering the victim by seeking paternity-establishment. Although routine screening for domestic violence is recommended practice for all hospitals and health care settings,⁴² many hospitals do not routinely screen for domestic violence.⁴³ When hospitals screen for domestic violence advocates should encourage hospital staff to review the hospital records of the woman giving birth to determine whether there is an indication that domestic violence is present in the relationship. If so, the hospital should consult with the battered woman's advocate to determine whether paternity establishment at the hospital can be done safely. If the hospital does not do domestic violence screening, advocates need to work with hospital staff to counter assumptions they may have that the father's presence in the hospital means that the relationship is good, and that domestic violence is not present. Hospital staff need to be made aware that encouraging voluntary establishment of paternity can undermine domestic violence victim safety. Further, it may be dangerous for a victim to decline establishing paternity if her abuser is present in the hospital.⁴⁴ Attorneys and advocates need to provide immigrant victims with full information about voluntary establishment of paternity, to help victims consider the pros and cons of paternity establishment, and take steps to help the immigrant victim act on her decision (whether it is to establish paternity or not).

Civil Protection Orders and Spousal and Child Support

After assessing the immigrant victim's safety in pursuing spousal and child support, advocates and attorneys are encouraged to ensure that spousal and child support orders are included in protection orders for immigrant clients and their children. At least thirty-seven jurisdictions authorize the payment of child support as part of their civil protection order remedies.⁴⁵ Including child and spousal support in protection orders can provide crucial income during the victim's first few months away from her abuser. Many state statutes specifically

³⁸ National Women's Law Center, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Father, and Children* (2000).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 302 (2000). See Leslye Orloff, Jessica Cundaria, & Erika Esterbrook, *New Dangers For Battered Immigrants: The Untold Effects of the Demise of 245(i)* (on file with author).

⁴² Ann L. Ganley, *Domestic Violence: Strategies for Screening, Assessment, Intervention and Documentation*, in TRAINERS MANUAL FOR HEALTH CARE PROVIDERS 133 (Family Violence Prevention Fund, 1998).

⁴³ Rodriguez, M., Bauer, H., McLoughlin, E., Grumbach, K., *Screening and Intervention for Intimate Partner Abuse: Practices and Attitudes of Primary Care Physicians*, 282(5) J. OF THE AM. MED. ASSN. (1999). (Only 10% of health care providers routinely screen new patients for abuse and 9% screen patients who come for check ups.)

⁴⁴ National Women's Law Center, *Family Ties: Improving Paternity Establishment Practices and Procedures for Low-Income Mothers, Father, and Children* (2000).

⁴⁵ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 998 (1993)

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allow the trial court to award child support in protection orders,⁴⁶ while other states have catch-all provisions that allow the court to grant relief for the petitioner's well-being and safety in protection orders.⁴⁷ When advocating for clients, attorneys should locate the statutory or case law that allows for the award of monetary relief in civil protection orders. If possible, child support guidelines should be used to calculate the correct amount of child support in advance of the court appearance, as this amount can be useful for the judge, or in settlement. In this way, the attorney representing the immigrant victim will be prepared to provide the court with a proposed child support calculation based upon the state's child support guidelines. Attorneys or advocates should bring a copy of the statute and child support guidelines with them to court.

In addition to spousal and child support, other economic relief may be available for victims, including: rent and mortgage payments, utilities payments, possession of residence or vehicle (for transportation to work), vehicle payments, and child care expenses.⁴⁸ Other creative forms of relief include medical bills, lost earnings, repair and replacement of damaged property, alternative housing costs, meals, out-of-pocket expenses for injuries, relocation and travel expenses, replacement costs for locks, and counseling costs.⁴⁹

Obtaining economic relief through a protection order is helpful. It is important to highlight to clients, however, that this relief is only valid for the duration of the protection order.⁵⁰ Attorneys representing

⁴⁶ The following states have specific provisions for the award of support to the petitioner and/or her minor children. These states also will generally have catch-all provisions in their protection order statutes through which an immigrant victim can obtain other forms of financial relief. ALA. CODE § 30-5-7(d)(5) (2003); ALASKA STAT. § 18.66.100(c)(12) (2003); ARK. CODE ANN. § 9-15-205(a)(4) (Michie 2003); CAL. FAM. CODE § 6341 (West 2003); DEL. CODE ANN. tit. 10, §1045(a)(6); GA. CODE ANN. § 19-13-4(a)(6) & 19-13-4(a)(7) (2002); FLA. STAT. § 741.30(6)(a)4 (2002); 750 ILL. COMP. STAT. § 60/214(b)(12) (2003); IND. CODE § 34-26-5-9(c)(3)(C); IOWA CODE § 236.5 (2003); KAN. STAT. ANN. § 60-3107(a)(6) (2002); KY. REV. STAT. ANN. § 403.750(4) (Michie/Bobbs-Merrill 2002); LA. REV. STAT. ANN. § 46:2136 (A)(2) (West 2003); ME. REV. STAT. ANN. tit. 19A, § 4007(1)(I) & § 4007(1)(J) (West 2003); MD. CODE ANN., FAM. LAW § 4-506(d)(9) (2002); MASS. GEN. L. ANN. ch. 209A, § 3(e) (2003); MINN. STAT. § 518B.01 subd. 6(5) (2003); MISS. CODE ANN. § 93-21-15(1)(e) (2003); MO. REV. STAT. § 455.050 (2003); NEV. REV. STAT. § 33.030 (2003); N.H. REV. STAT. ANN. § 173-B:5 I(b)(7) (2002); N.J. STAT. 2C:25-29b.(8) (2003); N.M. STAT. ANN. § 40-13-5 A.(2) (Michie 2003); N.Y. FAM. CT. ACT § 842 (McKinney 2003); N.C. GEN. STAT. § 50B-3(a)(6) (2003); N.D. CENT. CODE § 14.07.1-02; OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Anderson 2003); OR. REV. STAT. § 107.718(1)(h) (2001) (allowing emergency monetary assistance); 23 PA. CONS. STAT. § 6108 (a)(5) (2002); R.I. GEN. LAWS § 15-15-3(a)(4) (2002); S.C. CODE ANN. § 20-4-60(c)(2) (2002); S.D. CODIFIED LAWS § 25-10-5(4) (2003); TENN. CODE ANN. § 36-3-606(a)(7) (2003); TEX. FAM. CODE § 85.021(4) (2003); UTAH CODE ANN. § 30-6-4.2(2)(h) (2003); VT. STAT. ANN. Tit. 15, § 1110 (2003); W. VA. CODE § 48-27-503(4) & 48-27-503(5) (2003); WIS. STAT. § 813.12 (2002); WYO. STAT. § 35-21-105(b)(ii) (2003).

⁴⁷ The following states have specific provisions for the award of support to the petitioner and/or her minor children (they may also contain catch-all provisions for other forms of financial relief): ALA. CODE § 30-5-7(d)(5) (2003); ALASKA STAT. § 18.66.100(c)(12) (2003); ARK. CODE ANN. § 9-15-205(a)(4) (Michie 2003); CAL. FAM. CODE § 6341 (West 2003); DEL. CODE ANN. tit. 10, §1045(a)(6); GA. CODE ANN. § 19-13-4(a)(6) & 19-13-4(a)(7) (2002); FLA. STAT. § 741.30(6)(a)4 (2002); 750 ILL. COMP. STAT. § 60/214(b)(12) (2003); IND. CODE § 34-26-5-9(c)(3)(C); IOWA CODE § 236.5 (2003); KAN. STAT. ANN. § 60-3107(a)(6) (2002); KY. REV. STAT. ANN. § 403.750(4) (Michie/Bobbs-Merrill 2002); LA. REV. STAT. ANN. § 46:2136 (A)(2) (West 2003); ME. REV. STAT. ANN. tit. 19A, § 4007(1)(I) & § 4007(1)(J) (West 2003); MD. CODE ANN., FAM. LAW § 4-506(d)(9) (2002); MASS. GEN. L. ANN. ch. 209A, § 3(e) (2003); MINN. STAT. § 518B.01 subd. 6(5) (2003); MISS. CODE ANN. § 93-21-15(1)(e) (2003); MO. REV. STAT. § 455.050 (2003); NEV. REV. STAT. § 33.030 (2003); N.H. REV. STAT. ANN. § 173-B:5 I(b)(7) (2002); N.J. STAT. 2C:25-29b.(8) (2003); N.M. STAT. ANN. § 40-13-5 A.(2) (Michie 2003); N.Y. FAM. CT. ACT § 842 (McKinney 2003); N.C. GEN. STAT. § 50B-3(a)(6) (2003); N.D. CENT. CODE § 14.07.1-02; OHIO REV. CODE ANN. § 3113.31(E)(1)(e) (Anderson 2003); OR. REV. STAT. § 107.718(1)(h) (2001) (allowing emergency monetary assistance); 23 PA. CONS. STAT. § 6108 (a)(5) (2002); R.I. GEN. LAWS § 15-15-3(a)(4) (2002); S.C. CODE ANN. § 20-4-60(c)(2) (2002); S.D. CODIFIED LAWS § 25-10-5(4) (2003); TENN. CODE ANN. § 36-3-606(a)(7) (2003); TEX. FAM. CODE § 85.021(4) (2003); UTAH CODE ANN. § 30-6-4.2(2)(h) (2003); VT. STAT. ANN. Tit. 15, § 1110 (2003); W. VA. CODE § 48-27-503(4) & 48-27-503(5) (2003); WIS. STAT. § 813.12 (2002); WYO. STAT. § 35-21-105(b)(iii) (2003). The following states have catch-all provisions that a court could use to award financial relief: ARIZ. REV. STAT. ANN. § 13-3602(G)(6) (2003); CONN. GEN. STAT. § 46b-15 (2003); D.C. CODE § 16-1005(c)(10) (2003); HAW. REV. STAT. § 586-5.5 (2003); IDAHO CODE § 39-6306(1)(e) (2003); MONT. CODE ANN. § 40-15-201(2)(j) (2002); NEB. REV. STAT. § 42-924(1)(g) (2002); VA. CODE ANN. § 16.1-279.1 (2003); WASH. REV. CODE § 26.50.060 (2003). See also Powell v. Powell, App. D.C. 547 A.2d 973 (1988); Mabry v. Demery, 707 A.2d 49 (D.C. Cir. 1998); Katsenelenbogen v. Katsenelenbogen, 365 Md. 122 (2001); Parrish v. Parrish, 95 Ohio St. 3d 1201 (2002); Brown v. Brown, 2000 Ohio App. LEXIS 949 (March 14, 2000). See also Powell v. Powell, App. D.C. 547 A.2d 973 (1988); Mabry v. Demery, 707 A.2d 49 (D.C. Cir. 1998); Katsenelenbogen v. Katsenelenbogen, 365 Md. 122 (2001); Parrish v. Parrish, 95 Ohio St. 3d 1201 (2002); Brown v. Brown, 2000 Ohio App. LEXIS 949 (March 14, 2000).

⁴⁸ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 996 (1993). For a full discussion of the broad range of economic relief available as part of a protection order see Chapter 5 of this Manual.

⁴⁹ *Id.* at 994-995 (citing creative state statutes that allow for these forms of relief).

⁵⁰ LESLYE E. ORLOFF & CATHERINE F. KLEIN, DOMESTIC VIOLENCE: A MANUAL FOR PRO BONO LAWYERS § Remedies 75 (2d ed. Ayuda, 1992).

immigrant victims should explore and assist clients in seeking permanent spousal and child support orders as part of another family court action before the date on which the protection order ends.⁵¹ Other creative economic remedies that counsel for immigrant victims have been able to attain under protection order catch all provisions include: ordering the abuser to pay for any and all costs associated with the filing and completion of victim's immigration case; ordering the respondent to turn over a certain amount of money to be held in trust for payment of the victim's attorney's fees in a subsequent divorce, custody or other family law matter; and ordering the abuser to pay for any and all costs associated with supervised visitation, including any application fee that may be required.

Child Support Guidelines⁵²

Federal law mandates that states establish child support guidelines, either by "statute, administrative rule, or judicial rule."⁵³ Each state has responded to this federal mandate by creating child support guidelines to meet the needs of children within their state, to reduce litigation over child support award amounts, and to facilitate issuance of consistent child support awards that treat all children in the jurisdiction fairly.⁵⁴ These guidelines are used to set the appropriate amount of child support in paternity-, civil protection order-, divorce-, separation-, custody- and other types of family law cases involving children.

1. Income Shares Models, Percentage of Income Model, and Melson Formula Model

States use different models for calculating child support amounts under state child support guidelines. The Income Shares models are utilized in thirty-four states.⁵⁵ These models seek to provide children of separated households with the same amount of parental financial support they would have received if their parents lived together.⁵⁶ The income of both parents is added together, and the child support obligation is awarded using

⁵¹ Most state protection orders are of between one and three years duration. Some states have protection orders that last indefinitely. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 1085 (1993).

⁵² Many states offer child support guides that can answer specific questions. The Administration for Children and Families offers a listing of the guides available online. See

<http://ocse.acf.dhhs.gov/necsrspub/state/topic.cfm?TOPIC=Establishment%20of%20Cases>

⁵³ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001) (citing 42 U.S.C. § 667(a) providing that "[t]he guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts").

⁵⁴ See Ala. R. Jud. Admin. R. 32 (Effective Oct. 4, 1993); Alaska Civ. R. 90.3 (2003); Ariz. Child Support Guidelines Adopted by the Ariz. Supreme Court (2001); Arkansas Admin. Order of the Supreme Court, Rule 10 (1998); In Re: Administrative Order No. 10 — Arkansas Child Support Guidelines (2002); CAL. FAM. CODE §§4050-4076 (2003); COLO. REV. STAT. ANN. §14-10-115 (2002); Conn. C.S. and Arrearage G. (1999); Del. Fam. Ct. Child Support Evaluation and Update (2002); D.C. CODE ANN. § 16-916. (2003); FLA. STAT. § 61.30 (2002); GA. CODE ANN. §19-6-15 (2002); Hawaii Family Court Child Support Guidelines (1998); Idaho R. Civ. Pro. 6(c)(6) (2003); 750 I.L.C.S. 5/505 – 5/510 (2003); Ind. Child Support Rules and Guidelines (2001); Iowa Child Support Guidelines (2000); Kan. Child Support Guidelines (Sup. Ct. Admin. Order 128) (1998); KY. REV. STAT. ANN. §403.213 (2002); LA. REV. STAT. ANN. §9:315 (2003); ME. REV. STAT. ANN. tit. 19-A § 2001 (2003); MD. CODE FAM. LAW CODE ANN. §12-202 (2002); Mass. Child Support Guidelines (2002); Mich. Child Support Formula Manual (2002); Memorandum on 2003 Child Support Manual, John D. Ferry (March 20, 2003); MINN. STAT. ANN. §§ 518.551 et. seq. (2002); MISS. CODE ANN. §§ 43-19-101 et. seq. (2003); Mo. Sup. Ct. R. 88.01, Civil Procedure Form 14 (20003); Admin. R. Mont. 37.62.101 et. seq. (2003); Neb. Child Support Guidelines (2003); NEV. REV. STAT. §125B.070-.080 (2003); N.H. REV. STAT. ANN. §§ 458-C:1 et. seq. (2003); N.J. Rules of Court, Appendix IX (2003); N.M. Stat. Ann. §§ 40-4-11 et. seq. (2003); N.Y. DOM. REL. LAW § 240(1-b) (2003); N.C. Child Support Guidelines (2002); N.D. Admin. Code §§ 75-02-04.1-01 et. seq. (2003); OHIO REV. CODE ANN. §3113.215 (2003); OKL. STAT. ANN. tit. 43, §§ 118-120 (2002); Or. Admin. Reg. §§ 137-50-320 et. seq. (2003); Pa. R. Civ. Pro. 1910.16-1 et. seq. (2000); R.I. Fam. Ct. Admin. Order 97-8 (1997); 2; S.C. Soc. Serv. Reg. 114-4710 et. seq. (1999); S.D. COD. LAWS ANN. §§ 25-7-6.1 et. seq. (2003); Tenn. Comp. R. & Regs. Dep't Human Services §§ 1240-2-4-.01 et seq. (1997); TEX. FAM. CODE ANN. §§ 154.001 et. seq. (2003); UTAH CODE ANN. § 78-45-7 et. seq. (2003); VT. STAT. ANN. tit.15 §§ 653-660 (2003); VA. CODE ANN. § 20-108.2 (2003); W. VA. CODE §§ 48A-1A-1 et. seq., 48A-1B-1 et. seq. (2003); Wis. Admin. Code DWD 40.01 - 05 (1999); WYO. STAT. ANN. §§ 20-6-301 et. seq (2003). For more information, see <http://www.supportguidelines.com/links.html>.

⁵⁵ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001); see also The Office of Child Support Enforcement Website at <http://ocse3.acf.dhhs.gov/ext/irg/sps/selectastate.cfm>; ME, VT, NH, RI, CT, NJ, NY, MD, DC, WV, VA, NC, SC, KY, AL, FL, MI, IN, OH, NM, OK, LA, NE, IA, KS, MO, SD, UT, CO, WA, OR, ID, CA, AZ.

⁵⁶ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001); (quoting from R. Williams, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report*, at II-67 (U.S. Dep't of Health and Human Services, Office of Child Support Enforcement, 1987).

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guidelines or tables.⁵⁷ Additional support may be ordered based upon the needs of the child and other expenses.⁵⁸

Other states use either the Melson Formula Model or a Percentage of Income Model.⁵⁹ The Melson Formula Model is similar to the Income Shares Model, but incorporates the Standard of Living Adjustment (SOLA), to allocate “each parent a poverty self-support reserve.”⁶⁰ Of the fourteen states⁶¹ that use the Percentage of Income Model, some states have fixed percentages formulas, while other states have variable percentages formulas.⁶² The Percentage of Income Model calculates child support by awarding a fixed or variable percentage of the non-custodial parent’s income to the child or children.⁶³ The Percentage of Income Model does not consider the income of the custodial parent.⁶⁴

It is important to note that, while states are mandated to develop child support guidelines, the guidelines are only presumptive of the appropriate amount.⁶⁵ The law permits deviation from the guidelines if the amount would produce an unjust or inappropriate result.⁶⁶ Both the custodial and non-custodial parent may seek deviation from the guidelines. A custodial parent may seek a deviation from the child support guidelines because the deviation is in the best interests of the child. Some factors courts consider include: the non-custodial parent’s net resources, costs of the child’s post secondary education, benefits to the non-custodial parent furnished by his employer (e.g. automobile, housing); cash flow from investments, or any other reason consistent with the best interests of the child.⁶⁷ Some examples of where a downward deviation from the guidelines might be appropriate would be if the non-custodial parent has a prior child support obligation from another family, shared-custody arrangements, and agreements between parents to deviate from the child support guidelines.⁶⁸

When examining the issue of income, states either use gross or net income to calculate child support obligations.⁶⁹ Gross income, used by twenty-four states for child support calculations, includes but is not limited to: salaries, wages, tips, commission, overtime, second jobs, bonuses, severance pay, pension income, and military personnel fringe benefits, etc.⁷⁰ Net income, employed by twenty-seven states for child support calculations, includes: gross income minus federal, states, and local taxes and other mandatory deductions.⁷¹

⁵⁷ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03[b]. (2001).

⁵⁸ *Id.*

⁵⁹ *Id.* at § 1.03[a]. DE, MT, HI.

⁶⁰ *Id.* at § 1.03[d].

⁶¹ See The Office of Child Support Enforcement Website at <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>; MA, PA, GA, TN, MS, MN, WI, IL, TX, AR, ND, WY, AK, NV.

⁶² See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001). See also The Office of Child Support Enforcement Website at <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>

⁶³ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.03 (2001); *Id.* at § 1.03[c].

⁶⁴ *Id.*

⁶⁵ Family Support Act of 1988, P.L. 100-485, § 102 Stat. 2343 (1988), codified at 42 U.S.C. § 667(b)(2)(1999).

⁶⁶ Rutkin, Arnold H. Rutkin, 3-33 FAMILY LAW AND PRACTICE §33.08 (Arnold H. Rutkin ed., Matthew Bender 2004).

⁶⁷ State child support guidelines often include factors to be considered by the court in determining whether to deviate from child support guidelines either by awarding more child support because doing so is in the best interests of the child or because the non-custodial parent needs a deviation from an award that might otherwise be unjust. See, TEX. FAM. CODE ANN. §§ 154.123 (2003).

⁶⁸ See June Melvin Mickens, *When Life Dictates Otherwise*, in 23 FAMILY ADVOCATE 12 (American Bar Association, Fall 2000)

⁶⁹ See also The Office of Child Support Enforcement Website at <http://ocse3.acf.hhs.gov/ext/irg/sps/selectastate.cfm>

⁷⁰ See Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[a] (2001); (stating that income can also include: “income from contractual agreements; investment and interest income (including dividends) . . . trust or estate income; annuities; capital gains, unless gain is nonrecurring; Social Security benefits; veteran’s benefits . . . national guard and reserve drill pay; benefits received in place of earned income, including workers’ compensation, unemployment insurance benefits, strike pay, and disability insurance benefits; gifts, prizes, education grants (including fellowships or subsidies that are available for personal living expenses), and lottery and gambling winnings; income of new spouse to the extent that income directly reduces expenses of the parent; alimony received from a person other than the other spouse in the present case; income from self-employment, including rent, royalties, and benefits allocated to an individual for a business or undertaking in the form of a proprietorship, partnership, joint venture, close corporation, agency, or independent contractor, such income comprising gross receipts minus ordinary and necessary expenses required to produce such income. . . Income also includes non-money items such as: employment perquisites, including use of the company car, free housing, and reimbursed expenses where such reduce personal living expenses; in-kind income, such as the forgiveness of a debts and the use of property at less than the customary charge.”); *Id.* 2.03[c].

⁷¹ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[c] (2001);

In many states for purposes of calculating either gross or net income, means-tested benefits, such as Temporary Assistance to Needy Families (TANF), Supplemental Security Income (SSI),⁷² Food Stamps (FS), Section 8 housing allowances, General Assistance (GA), Pell grants, and benefits received from the Jobs Training Partnership Act may be excluded from the determination of income.⁷³

2. Other Children and Income

In addition to child support guidelines, other issues, such as the number of children and amount of income, can affect the determination of child support. The non-custodial parent may have more than one child. This can affect the amount of the child support award. Also, the non-custodial parent may have previous support orders that he is required to pay that may treat previously born children more favorably.⁷⁴ Accordingly, the majority of child support guidelines allow previous support obligations to be deducted from the non-custodial parent's gross income before the child support calculation is made.⁷⁵ In other states support obligations to other children that are not part of the case before the court are not deducted from the non-custodial parent's income,⁷⁶ instead a deviation from the guidelines is granted lowering the percentage of net income awarded as child support.⁷⁷

3. Seasonal Employment, Self-Employment, and Unreported Income

When a non-custodial parent is employed seasonally or has fluctuating income, child support guidelines generally allow the court to look at the income over a period of time.⁷⁸ Generally, when calculating the child support order, courts will require full financial disclosure and review financial information including, but not limited to, income tax returns and year-to-date income for a lengthy enough period to account for past or anticipated changes in income.⁷⁹ For income that is steadily increasing, use of prior year's income is appropriate.⁸⁰

Determining child support can be difficult if the non-custodial parent owns his or her own business, or earns unreported income. Locating and examining the true worth of the non-custodial parent's business is paramount to obtaining an appropriate child support order. If it is safe for the clients to do so, attorneys and advocates should advise clients to copy any information that would be helpful in a child support and/or spousal support case such as spouse's credit reports, bank statements, canceled checks, deposit slips, monthly credit card statements, loan applications, etc. In addition, if there are specific benefits to the business for the non-custodial spouse, such as a company car, housing, and credit cards, these benefits should be taken into account when determining income and an appropriate child support award.⁸¹ In these cases, the custodial battered immigrant parent may also have to testify as to the non-custodial parent's salary and the lifestyle of the family before they were separated.

If the non-custodial parent is hiding or manipulating his income, courts can consider the earning capacity of the parent when awarding child support.⁸² This issue arises in cases in which the non-custodial parent is claiming less income than he actually earns, or has voluntarily reduced work hours or quit his job to evade his child support obligations. All child support guidelines offer provisions for examining the earning capacity of

⁷² Some states exclude certain forms of benefits from calculations and include others. See e.g. TEX. FAM. CODE § 154.133 (2003) (regarding Social Security Income).

⁷³ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[a], 203.[f] (2001).

⁷⁴ *Id.* at § 3.04[a].

⁷⁵ *Id.*

⁷⁶ This is because in some instances the deduction would result in no available income to pay child support to the child before the court.

⁷⁷ See e.g. TEX. FAM. CODE § 154.129 (2003)

⁷⁸ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[d] (2001).

⁷⁹ See *Ball v. Wills*, 190 W.Va. 517, 438 S.E.2d 860 (1993); *Cleveland v. Cleveland*, 249 N.J. Super. Ct. 96, 592 A.2d 20 (App. Div. 1991).

⁸⁰ See *Schaeffer v. Schaeffer*, 717 N.E.2d 915 (Ind. Ct. App. 1999); *Mahoney v. Mahoney*, 567 N.W. 2d 206 (N.D. 1997).

⁸¹ Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.03[e] (2001). See Bruce L. Richman, *Eye on the Business*, Family Advocate, Vol. 23, No. 2 American Bar Association Fall 2000.

⁸² See Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 CONN. L. REV. 647 (1997). For a discussion of the child support obligations of incarcerated parents, see Karen Cavanaugh & Daniel Pollack, *Child Support Obligations of Incarcerated Parents*, 7 CORNELL J. L. & PUB. POL'Y 531 (1998).

a non-custodial parent.⁸³ Past employment records of the non-custodial parent can be introduced to show that he is voluntarily reducing his income.⁸⁴ The custodial parent's testimony about the non-custodial parent's work schedule, earnings and extravagant spending patterns when the parties resided together can also provide evidence of the non-custodial parent's earning capacity.⁸⁵ In cases in which the abuser has voluntarily left a well-paying job to avoid child support payments, the courts can impute former income to the non-custodial parent.⁸⁶ It is important to note that immigration status of the non-custodial parent is not a valid defense in a child support case. For example, an Oklahoma appeals court ruled that a trial court did not abuse its discretion in ordering a former husband to pay child support based on attribution of minimum wage.⁸⁷ Although the former husband claimed that he could not work due to his current immigration status, he was ordered to pay support because his testimony indicated that his mother was paying his expenses, and that he could work in the United States, but had not found work.⁸⁸

4. Retroactive Child Support Awards and Prior Child Support Orders

In awarding child support, the court can award retroactive child support back to the date of birth of the minor child.⁸⁹ Some states may have a presumption for limiting retroactive child support to a lesser period of time, but attorneys for battered women have been successful in overcoming this presumption and winning retroactive support awards for longer periods of time by arguing that the non-custodial parent knew or should have known about the minor child.⁹⁰ In making determinations about retroactive child support, courts will consider not only the support that the non-custodial parent would have provided the child, but also the fact that the custodial parent who has been supporting the child in the meantime and is entitled to reimbursement.⁹¹

⁸³ See Ala. R. Jud. Admin. R. 32(B)(1); Alaska Civ. R. 90.3 (2003); Ariz. Child Support Guidelines Adopted by the Ariz. Supreme Court (2001); Arkansas Admin. Order of the Supreme Court, Rule 10 (1998); In Re: Administrative Order No. 10 — Arkansas Child Support Guidelines (2002); CAL. FAM. CODE § 4057(g)(2) (2003); COLO. REV. STAT. ANN. §14-10-115 (A)(4) (2002); Conn. C.S. and Arrearage G. (1999); Del. Fam. Ct. Child Support Evaluation and Update (2002); D.C. CODE ANN. § 16-916. (2003); FLA. STAT. § 61.30 (2002); GA. CODE ANN. §19-6-15 (2002); Hawaii Family Court Child Support Guidelines (1998); Idaho R. Civ. Pro. 6(c)(6) (2003); 750 I.L.C.S. 5/505 – 5/510 (2003); Ind. Child Support Rules and Guidelines (2001); Iowa Child Support Guidelines (2000); Kan. Child Support Guidelines (Sup. Ct. Admin. Order 128) (1998); KY. REV. STAT. ANN. §403.213 (2002); LA. REV. STAT. ANN. §9:315(6)(b) (2003); ME. REV. STAT. ANN. tit. 19-A § 2001 (2003); MD. CODE FAM. LAW CODE ANN. §12-202(b)(2) (2002); Mass. Child Support Guidelines (2002); Mich. Child Support Formula Manual (2002); Memorandum on 2003 Child Support Manual, John D. Ferry (March 20, 2003); MINN. STAT. ANN. §§ 518.551 et. seq. (2002); MISS. CODE ANN. §§ 43-19-101 et. seq. (2003); Mo. Sup. Ct. R. 88.01, Civil Procedure Form 14 (20003); Admin. R. Mont. 37.62.101 et. seq. (2003); Neb. Child Support Guidelines (2003); NEV. REV. STAT. §125B.070-.080 (2003); N.H. REV. STAT. ANN. §§ 458-C:1 et. seq. (2003); N.J. Rules of Court, Appendix IX (2003); N.M. Stat. Ann. §§ 40-4-11 et. seq. (2003); N.Y. DOM. REL. LAW § 240(1-b) (2003); N.C. Child Support Guidelines (2002); N.D. Admin. Code §§ 75-02-04.1-01 et. seq. (2003); OHIO REV. CODE ANN. §3113.215(A)(1)(b) (2003); OKL. STAT. ANN. tit. 43, §§ 118-120 (2002); Or. Admin. Reg. §§ 137-50-320 et. seq. (2003); Pa. R. Civ. Pro. 1910.16-1(c)(1) (2000); R.I. Fam. Ct. Admin. Order 97-8 (1997); 2; S.C. Soc. Serv. Reg. 114-4710 et. seq. (1999); S.D. COD. LAWS ANN. §§ 25-7-6.1 et. seq. (2003); Tenn. Comp. R. & Regs. Dep't Human Services §§ 1240-2-4-.01 et seq. (1997); TEX. FAM. CODE ANN. §§ 154.001 et. seq. (2003); UTAH CODE ANN. § 78-45-7 et. seq. (2003); VT. STAT. ANN. tit.15 §§ 653-660 (2003); VA. CODE ANN. § 20-108.1(B)(3) (2003); W. VA. CODE §§ 48A-1A-1 et. seq., 48A-1B-1 et. seq. (2003); Wis. Admin. Code DWD 40.01 - 05 (1999); WYO. STAT. ANN. §§ 20-6-301 et. seq. (2003).

⁸⁴ Some courts impute income to the non-custodial parent regardless of the reason of voluntarily being unemployed or underemployed. Others use a "good faith test" to determine if the reason for under- or unemployment is valid. Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.04[b], [c] (2001).

⁸⁵ Testimony on earning capacity need not be limited to testimony provided by the custodial parent. In cases of self-employed abusers, attorneys representing battered immigrants have successfully presented testimony on income generated through employment from investigators and from witnesses employed in a similar line of work (e.g. street vendor, waiter, construction worker).

⁸⁶ See *Lascaibar v. Lascaibar*, 658 So.2d 170, 171 (Fla. Dist. Ct. App. 1995); *Hutto v. Kneipp*, 627 So. 2d 802, 805-806 (La. Ct. App. 1993); In re *Marriage of Gable*, 750 P. 2d 534, 535-36 (Or. Ct. App. 1988); see also Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 Conn. L. Rev. 647 (1997). Some courts will also order a non-custodial parent to undertake a job search and report to the court every two weeks on the progress of that job search until the non-custodial parent has secured employment.

⁸⁷ *Asal v. Asal*, 960 P.2d 849, 850 – 851 (Okla. 1998).

⁸⁸ *Id.* Some states may have a poverty reserve for child and/or spousal support. For example, if the liable party earns less than 125% of the poverty line, the court may award \$25.00 or \$50.00 per child per month.

⁸⁹ See sample Retroactive Child Support Order in the Appendix to this chapter.

⁹⁰ See e.g. TEX. FAM. CODE ANN. § 154.131(d) (presumption that retroactive child support awards are limited to 4 years can be overcome by proof that the obligor knew or should have known that he was the father of the child or that he sought to avoid establishment of child support.)

⁹¹ See e.g. In Re *Valdez*, 980 S.W.2d 910, 913 (Tex.App. – Corpus Christi 1998).

It is important to determine whether prior child support orders have been entered for the client's child by other courts or through State Child Support IV-D agencies. When these cases exist it is important for counsel to give proper notice to both the non-custodial parent and the IV agency of any child support case being filed. Counsel may need to file motions to intervene in the prior child support case and motions to consolidate the prior case or cases with the current case and ask that the court reduce the prior orders to judgments. Important to include also in the any new child support order received arrearage language from prior court orders and retroactive judgments. In seeking a retroactive judgment, it is important that the client provide you with a detailed timeline of when they were living with the abuser and when they were not. Many times there will have been previous separations and nonsupport periods that qualify for retroactive support. It is also important that all initial pleadings include requests for both retroactive and arrearage amounts so that the court can address these issues if they come up at trial. Some judges will not award arrearages amounts or retroactive support if requests for these forms of relief were not included in the pleadings.

Spousal Support

Spousal support orders can be an important component of an immigrant victim's ability to achieve self-sufficiency and stability for herself and her children.⁹² For immigrant victims who qualify to attain legal immigration status either through a VAWA or a U visa case, spousal support orders provide victims with an important source of income during the time they are waiting for their immigration case to be processed to the point that they can receive work authorization. Spousal support orders can also provide critical support that allows immigrant victims to obtain skills, training, and education needed in order to become self-supporting. The terminology for court ordered payments to a spouse can vary from state to state. There can also be a distinction under state laws between temporary spousal support awarded as part of a temporary order in divorce proceedings⁹³ and support awarded as part of the final divorce decree.⁹⁴ Spousal support can also be awarded as part of relief granted a victim in a civil protection order case.⁹⁵

Spousal support orders are different from child support orders in that there are no set guidelines governing what an appropriate spousal support order should be. Courts are given broad discretion to determine whether a spousal support order is appropriate in a particular case, and the amount, and duration of the spousal support order.⁹⁶ Some states have statutes that list the general factors that courts may consider in determining a spousal support order.⁹⁷ Many states approach spousal support as 'rehabilitative'; they direct that the amount of support should be enough to allow a spouse to obtain the necessary job skills, education, or training to enable him or her to become fully self-supporting.⁹⁸ Typically, spousal support (maintenance/alimony) orders awarded as part of the divorce decree do not last for a duration of longer than a few years from the date of divorce.⁹⁹ Absent any extraordinary circumstances, such as advanced age or poor health, most spousal

⁹² As in child support, an assessment on the risks in pursuing spousal support should be evaluated carefully with the immigrant victim.

⁹³ Some attorneys representing battered immigrants have been successful in securing temporary injunctions against third parties (e.g. banks, savings and 401K administrators) to keep these institutions from releasing funds to the abuser. This is a very important step to take, because abusers with assets will often withdraw funds and spend them before the initial hearing in the divorce case or before the protection order hearing. These injunctions can be obtained at the time of filing the divorce action or as part of the ex parte temporary protection order. Once the temporary injunction is obtained to be effective it must be served on the institution.

⁹⁴ See *eg.*, In re Marriage of Vaughn, Iowa App. Lexis 663 (2003) (Discussing wife's need for temporary spousal support during the pendency of dissolution of dissolution hearing because she experienced an adverse change of circumstances and was unable to meet expenses of living.); See also, DeWitt v DeWitt, WL 490928 (Ohio App. 3 Dist., Feb. 26, 2003), (Granting wife's petition for temporary spousal support on November 7, 2001, where divorce hearing was not complete until May of 2002).; See also, In Re Marriage of Askmo, 102 Cal.Rptr.2d 66 (2003) (discussing wife's right to "a pendente lite order" for spousal support during pendency of dissolution); This form of more permanent spousal support can be called spousal maintenance, alimony or spousal support depending on the jurisdiction.

⁹⁵ Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 997 (1993).

⁹⁶ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004). See, *eg.*, In re Marriage of Cheriton, 92 Cal. App. 4th 269 (2001)

⁹⁷ *Id.* See California/Florida.

⁹⁸ *Id.*

⁹⁹ *Id.*; See, *eg.*, Gaines v. Gaines, No. 2000CA00020, 2000 Ohio App. LEXIS 3696 (Aug. 14, 2000);

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support orders are not permanent or lifetime awards.¹⁰⁰ Temporary spousal support awards entered as part of temporary orders in a divorce proceeding generally last for the duration of the litigation.

Attorneys and advocates for immigrant victims should think creatively about presenting arguments to support a spousal-support claim. Some things to consider include:

- Contributions of the immigrant victim to the marriage, including, but not limited to, providing childcare, homemaking, any contributions to the support of spouse in a business, or pursuit of education and any opportunities the immigrant victim sacrificed for the marriage—e.g. any career or educational opportunities, family ties, in home country and/or the United States;¹⁰¹
- the immigrant victim's eligibility for VAWA immigration relief, or other possible routes to immigration status;¹⁰²
- any of the abuser's actions that kept the victim from attaining legal immigration status and controlled her ability to learn English;
- any evidence of physical, emotional, economic, and immigration-related abuse; and
- any plans that the survivor has to further her educational or career development to enhance the immigrant victim's ability to become self-supporting.
- amounts necessary to avoid loss of community assets pending finalization of the divorce (i.e. marital home, insurance, vehicles, etc.).¹⁰³

FACTORS IN DETERMINING SPOUSAL SUPPORT

The following are the factors most courts consider in determining spousal support awards. Generally, the courts will look at all the factors and then apply the factors to the facts of a particular case.

1. Standard of Living Established During Marriage

The court will look at the parties' standard of living during the marriage and, to the extent possible, fashion an award that would maintain this standard. Marriages of long duration are generally given a lot of weight in the duration and amount of a spousal support award.¹⁰⁴ The court may also look at whether one spouse has foregone career development in order to care for the home in considering the amount and duration of a spousal support order. Courts may also attempt to allow both parties to retain the lifestyle they enjoyed during their marriage.¹⁰⁵ However, in relationships in which only one party was working and/or in cases

¹⁰⁰ See *Moorhead v. Moorehead*, 745 So.2d 549 (Fla. Dist. Ct. App. 1999); *Hartog v. Hartog*, 605 N.Y.S.2d 749 (N.Y. App. Div. 1993); *Delozier v. Delozier*, 640 A.2d 55 (Vt. 1994); *Kaprelian v. Kaprelian*, 653 N.Y.S.2d 634 (N.Y. App. Div. 1997).

¹⁰¹ See *In Re the Marriage of: Vikram Gangahar v. Preeti Gangahar*, 2000 Minn. App. LEXIS 405 (2000)(court noted that respondent-wife gave up everything when she left India and was completely dependent on petitioner when she arrived in the United States); *In Re the Marriage of: Howard Hanson v. Evonne Chou Hanson*, 378 N.W.2d 28; 1985 Minn. App. LEXIS 4908 (1985) (court held that trial court award of temporary maintenance was proper as respondent left Taiwan to marry petitioner and is now unable to speak English or to support herself, further, respondent would be unable to return to her native country without personal disgrace).

¹⁰² There may be other routes to immigration status besides VAWA relief, e.g. family-based sponsorship, employment-based petition, and education-related visas. Attorneys and advocates should consult with an experienced immigration attorney for assistance in pursuing these other routes.

¹⁰³ Counsel for immigrant victims should explore with clients the possibility of being awarded the marital home as part of a divorce decree. Home ownership is very important to people and many immigrant victims would not be able to qualify for a home loan after the divorce on their own. There are pros and cons to homeownership that need to be explored with clients. Home ownership is not always financially feasible. The abuser can be ordered to pay or help pay the mortgage pending the finalization of the divorce in community property states. The client may also explore the possibility of identifying persons with whom she can share the residence whose rent payment can be used to help pay the costs of a mortgage that is higher than the amount the court orders the abuser to pay. If the home is awarded to the client, the abuser will be required to sign a Special Warranty Deed and client will sign the Deed of Trust to Secure Assumption.

¹⁰⁴ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., *In re Hasabnis*, 322 Ill. App. 3d 582 (2001) (Outlining the factors courts consider, including duration of marriage, in deciding support amount.)

¹⁰⁵ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.04 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., *Roden v. Roden*, 949 P.2d 67 (Ariz. Ct. App. 1997) (Reasoning that because she worked outside the home during the parties' two-year marriage, being paid \$130,000, where she had received \$ 100,000 in temporary support during parties' separation, and where, given her education and experience, she was capable of maintaining the middle-class lifestyle which

involving low- to middle-income families, it may be difficult to fashion an award to allow for both parties to enjoy the lifestyle they had when they were married. In those instances, courts will attempt to distribute the income and property as fairly as possible.¹⁰⁶

2. Income and Financial Resources of Each Party

The spouse seeking spousal support must prove that he or she needs the support. For immigrant victims, if the U.S. citizen or lawful permanent resident spouse did not file petition asking immigration authorities to grant legal immigration status to the immigrant victim, counsel can argue that this choice by the abuser is the reason the immigrant spouse does not have work authorization. In such cases, spousal support is needed until she is able to receive work authorization and becomes self-supporting.¹⁰⁷ Any evidence of immigration-related abuse can be helpful to this argument, because, in many cases, had the abuser filed for immigration status for the victim, she would have had work authorization.¹⁰⁸

3. Duration of the Marriage

Although court practice in some jurisdictions is to award spousal support as part of the temporary orders in divorce cases, with regard to final orders of maintenance, alimony or spousal support, it can be difficult to obtain spousal support awards in marriages of less than five years' duration absent extraordinary circumstances.¹⁰⁹ In seeking spousal support awards for immigrant victims with shorter marriages, since immigration status and the ability to obtain legal work authorization are linked, it can be relevant to present evidence demonstrating how the abuser used immigration-related abuse, including failure to file papers, threats to withdraw the immigration case and threats to have the victim deported, to keep the victim in the abusive relationship and to maintain economic control over her. Depending on the circumstances of the case, emphasizing the need for a rehabilitative alimony or temporary order of support to allow the immigrant victim to become self-supporting can be persuasive.¹¹⁰

4. Age and Physical and Emotional Health of Parties

The courts will examine the age and physical and emotional health of the parties. If either spouse suffers from a medical or emotional condition which will affect the present or future need for treatment, this may be a factor in the amount and duration of support.¹¹¹ The courts will be looking at the parties' relative employability. If a party's physical or mental condition is an issue in the case, attorneys and advocates should be aware that the immigrant victim may be required to submit to a physical or psychological examination by a professional of the contesting party's choosing.¹¹²

the couple enjoyed during their marriage, the court Decided not to award the wife spousal maintenance, which essentially left intact both parties' lifestyles during marriage).

¹⁰⁶ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.04 (Arnold H. Rutkin ed., Matthew Bender 2004). See, eg. In Re Marriage of Mathews, 70 Wn. App. 116 (1993) (Reversing the ordered maintenance fees awarded to the wife because it left the husband without the ability to meet needs and financial obligations and would force him to pay maintenance fees out of his disability and retirement income, whereas with the remaining spousal support, wife would still be able to maintain standards of living enjoyed during the marriage.)

¹⁰⁷ See Ben C. Stone v. Larisa P. Stone, 2004 Ohio 671; Ohio App. LEXIS 644 (2004); Watson v. Watson, 724 So.2d 350; 1998 Miss. LEXIS 595 (1998); Korn v. Korn, 867 So.2d 338, 2003 Ala. Civ. App. LEXIS 42 (2003).

¹⁰⁸ Leslye E. Orloff & Janice V. Kaguyatan, *Offering a Helping Hand: Legal Protections for battered Immigrant Women: a History of Legislative Responses*, 10 Am. U. J. Gender & Soc. Pol'y. 95 (2001).

¹⁰⁹ Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See eg., Harrelson v. Harrelson, 932 P.2d 247 (Alaska 1997); Hann v. Hann, 629 So.2d 918 (Fla. Dist. Ct. App.)

¹¹⁰ See In Re Marriage of Steven John Shirilla and Natalia N. Shirilla, 2004 MT 28; 319 Mont. 385; 89 P.3d 1 (2004)(court found that rehabilitative maintenance award was necessary to allow the immigrant spouse to work on her English proficiency). In some cases an abuser may have helped the immigration victim attain legal immigration status. If he filed an immigration case for her, he may have completed an affidavit of support. For a full discussion of how the affidavit of support might be useful as evidence of ability to pay in spousal support proceedings, see discussion below.

¹¹¹ See Cal. Fam. Code § 4325, which creates a rebuttable presumption where there is a criminal conviction for an act of domestic violence entered by the court within five years of the filing of the dissolution proceeding, or at any time thereafter for any award of temporary or permanent spousal support to the abusive spouse otherwise awardable.

¹¹² Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See., eg., Coons v. Coons, 765 So. 2d 175 (Fla. Dist. Ct. App. 2000) (Discussing the issue of a wife's medical condition in regards to potentially long-term, or possibly increasing alimony payments by the husband in the event that wife's condition worsened and treatment costs increased).

5. Time Necessary for Either Party to Acquire Sufficient Education or Training in Order to Find Appropriate Employment

Since the approach taken by most courts and state statutes is to achieve financial self-sufficiency for both parties, courts will consider the amount of time it would take a party to become trained and employable. Courts will then fashion an order of support of limited duration in order for the party to achieve this. Attorneys and advocates should work with their battered immigrant clients and examine how long it would take her to become self-supporting. Factors to consider include: how long it will take for her to attain legal immigration status and receive lawful permanent residency under any immigration applications she might have pending, and any education or training she would need or has had in the past which was delayed because of domestic violence and/or family obligations. A specific and realistic plan will enhance a party's chances of obtaining a spousal support order.

6. Needs of Recipient Spouse and Financial Resources of Payor Spouse

The needs and resources of the recipient spouse will be balanced against the financial resources of the payor spouse.¹¹³ The award of support must not be disproportionate to the payor's ability to pay, nor should it be in excess of the payee spouse's financial needs.¹¹⁴

7. Contributions of Each Spouse During Marriage

Virtually all states recognize the nonmonetary contributions of each spouse during the marriage, which usually takes the form of homemaking or child-care services.¹¹⁵ Other examples can include contributions to the success of a family business, spouse's contributions to the other spouse's pursuit of a graduate, or professional degree and any sacrifices to career, family, education and home-country ties that she might have made for the marriage.¹¹⁶

8. Retroactive Nature of the Spousal Support Award

In most jurisdictions, the final support award of the court will be retroactive to the date of the commencement of the action, or the date upon which the request for support was filed.¹¹⁷

Proving Your Case

1. Discovery

Discovery devices are useful to gather all of the relevant facts in preparation for a child and/or spousal support proceeding. "Discovery" refers to the exchange of information between the parties. Discovery procedures that are available in civil court proceedings are generally available in divorce and custody

¹¹³ Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004). See, eg. In re Marriage of Mathews, 70 Wn. App. 116 (1993) (Reversing the order for maintenance fees awarded to the wife because it did not leave the husband with the ability to meet needs and financial obligations, as statutorily required, and would force him to pay maintenance fees out of his disability and retirement income).

¹¹⁴ *Id.*

¹¹⁵ Rutkin, ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004). See, eg., Hammer v. Hammer, 991 P.2d 195 (Alaska 1999) (Factoring in wife's homemaking for nearly 19 years out of the 23 year marriage, to conclude that more monetary support is necessary from husband when considering that wife is not likely to obtain employment that will adequately satiate basic needs.)

¹¹⁶ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., Watson v. Watson, 724 So.2d 350 (1998) (court noted the wife's contributions as a spouse and that her age and lack of work experience warranted a periodic alimony payment in the amount of \$1,000.00 per month); Ahmad v. Ahmad, 2001 Ohio App. LEXIS 5303 (2001); In Re the Marriage of: Vikram Gangahar v. Preeti Ganghar, 2000 Minn. App. LEXIS 405 (2000)

¹¹⁷ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 (Arnold H. Rutkin ed., Matthew Bender 2004); See, eg., Gotten v. Gotten, 748 S.W.2d 430 (1987) (Stating that the court's support decision was retroactive, and therefore the wife was entitled to reimbursement for mortgage payments made prior to the entering of the court's decision.)

cases.¹¹⁸ In civil protection order cases, discovery may be more limited, given the need to avoid delays and promote victim safety in the issuance of protection orders.¹¹⁹

Examples of discovery devices include:

- Interrogatories – Written requests/questions used to elicit any relevant information for a hearing.
- Requests for Production of Documents– Useful for requiring a party to turn over documents.
- Depositions – Requires a party to answer questions asked orally by the other side's attorney regarding the facts of the case. Depositions are under oath and generally take place in an attorney's office. Generally, a court reporter is present, or the deposition is taped and everything that is said is recorded.
- Physical and Mental Examinations – Appropriate if the party's or the children's physical or mental condition is at issue.

Subpoenas

Many times it is necessary to obtain documents and information from persons or entities who are not parties to the proceedings. Some examples of this include the party's employer, business associates, bank institutions, accountants, and vocational experts. The procedures governing discovery from nonparties usually are specified by statutes or rules of practice.¹²⁰ Some jurisdictions may also require that permission be obtained from the court prior to the issuance of a discovery request on a nonparty.¹²¹ In most jurisdictions a non-party's attendance and/or documents that are ordered produced at a hearing or deposition will require a subpoena (for a nonparty) or a subpoena *duces tecum* (for documents). Check your statutes and local practice rules for procedures for issuance of subpoenas and subpoena *duces tecum*.

2. Proving the abuser's income and ability to pay

If the non-custodial parent/spouse is working, W-2 forms and any other proof of salary can be used at the hearing. Also, any type of financial documents that the client possesses regarding the household's finances should be gathered before the hearing. The search for evidence that can document income and ability to pay should not be limited to financial information. For example, police reports may contain useful information. The abuser may have told the police that he is willing to pay for repairs of damages he incurred, hospital bills, or support for the child or spouse. This information may be recorded in the police report and can be used as evidence of his willingness and ability to pay or for impeachment purposes. Evidence that the battered immigrant should try to obtain in advance of a hearing to show the spouse/non-custodial parent's income and ability to pay includes:¹²²

- Financial statements
- Income tax returns
- Pay stubs
- Employer's Statements¹²³
- Employer's Affidavits
- Tax returns
- Bank statements
- Mortgage documents
- Rental lease
- Copies of credit card statements
- Affidavit of Support (see discussion below)
- Car payments or leases (showing lifestyle of opposing party)

¹¹⁸ ARNOLD H. RUTKIN, 2-12 FAMILY LAW AND PRACTICE § 12.01 (Arnold H. Rutkin ed., Matthew Bender 2004).

¹¹⁹ See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L.REV. 801, 823 (1993).

¹²⁰ 2-12 ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 12.05 (Arnold H. Rutkin ed., Matthew Bender 2004)

¹²¹ *Id.*

¹²² Lisae C. Jordan, et. al, *The Domestic Violence Civil Law Manual Protection Orders and Family Law Cases*, 2001 A.B.A. COMM. ON DOMESTIC VIOLENCE 28 (2001).

¹²³ Attached to this chapter is a copy of an employer's statement from the Superior Court of the District of Columbia.

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- Self-employment records, records of employee bonuses
- Any records of past employment
- Any proof of the non-custodial parent's assets (401K plans including the ability to borrow funds from such a plan).

If a battered immigrant seeks assistance before leaving her abuser, she should be advised to copy these documents if she can do so safely. In addition to obtaining documents from the battered immigrant, her attorney may be able to subpoena the records in advance of the hearing from the respondent's employer, banking institution, or from the respondent if he is self-employed.¹²⁴ Additionally, in many states, limited discovery may be possible in a civil protection order case if the victim will be requesting a child support and/or spousal support award as part of her protection order.¹²⁵ In such cases, the court may require that each party complete and exchange financial affidavits.

Attorneys representing immigrant victims have been successful in using Employer's Statements to prove income in a child support case in lieu of the employer's testimony. Counsel subpoenas the employer using a subpoena duces tecum which requires that the employer appear and bring with them the Employer's statement and affidavit for inspection and copying. The employer (actually it is the person in charge of payroll) is usually given the option of providing the documents prior to the hearing so that the battered immigrant's counsel can share this information with the opposing party and to secure an agreement to admit the Employers Statement at the hearing without requiring the testimony from the Employer. It is important to not quash the subpoena and keep the employer on call in case their testimony is required.

The Employer's Statement and Employer's affidavit¹²⁶ can be admitted into evidence under court rules which deem these documents prima facie evidence of income.¹²⁷ In other jurisdictions Employer's Statements and Employer's affidavits are generally admitted under the State's equivalent to the Federal Rule of Evidence Rule 902 Self-Authentication.¹²⁸ Under these circumstances these statements are obtained through a subpoena duces tecum, but the Employer is not "excused" from having to testify. If the opposing counsel objects to the admission of the Employer's Statement the person who signed the Employer's Statement and Employer's affidavit would need to be available to testify to the fact that the Employer's Statement contains information that is kept in regular course of business. In practice by keeping the employer on call and providing opposing counsel copies of the Employer's Statement and Employer's Affidavit, opposing counsel usually agrees to stipulate that the figures contained in the Employer's Statement shall be used by the court in calculating the child support amounts.

Some employers may refuse to comply with the subpoena duces tecum. When this occurs the subpoena can be enforced against the employer. Recalcitrant employers may collaborate with the non-custodial parent to help him avoid child support awards or enforcement of child support orders. This may occur but is not limited to instances in which the non-custodial parent is related to the employer. If the employer fails to comply with a subpoena, the subpoena can be enforced against him. When an employer fails to comply with a wage withholding order the employer may be sanctioned under state law for non-compliance. Employers can be fined for not withholding court ordered child support. Attorneys for immigrant victims have won damage awards from employers for failure to comply with court wage withholding orders.¹²⁹

¹²⁴ Check your statutes and local rules for the procedures governing the issuance of a subpoena.

¹²⁵ Leslye E. Orloff, Deena Jang, & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 314, 324 (1995). See also the attached financial statement from the Superior Court of the District of Columbia.

¹²⁶ See sample Employer's Statement and Employer's Affidavit included in the appendix to this chapter.

¹²⁷ See e.g. District of Columbia SCR General Family Rule J.; Alabama, ARJA Rule 32(F); Louisiana, LSA-R..S. 9:315.2 (A); Maryland, MD Code Fam. Law §12-203; Maine, 19-A.M.R.S.A. §2004 1A.

¹²⁸ See e.g. Texas Rule of Evidence, 902 Self Authentication. The Texas rule requires that the Employer's State be on file for 14 days prior to the hearing, the federal rule does not have this requirement. Attorneys should check State rules in the appropriate jurisdiction.

¹²⁹ TEX. FAM. CODE ANN. § 158.210; See, eg., *Belcher v Terry*, 420 S.E.2d 909 (1992) (Holding that W.Va. Code Sections 48A-5-3(n) and 48 A5-3(f)(b) (Supp. 1991) clearly provides a right of action against employers who failed to withhold child support payments from salary in accordance with a receipt of notice to do so from the state's Child Advocacy Office. The court also said that punitive damages could be obtained after a showing that the failure to withhold was willful on the part of the employer.); *Child Support Recovery Svcs., Inc. ex rel S.C. v. Inn at the Waterfront, Inc.*, 7 P3d 63 (Alas. 2000) (Affirming summary judgment against an employer for failure to withhold income from an employee who had child support obligations...the court's finding relied on Alaska Stat. Section 25.27.260(a) and (b).)

Generally, before making financial awards, courts require evidence of the income and expenses of the battered immigrant and her children. In many jurisdictions, completing a financial statement is the simplest means for the battered immigrant and her children to provide expense information the court.¹³⁰ This financial statement outlines the client's income and expenses, separating out expenses for the client and for her children. Whether or not the financial statement is required to be signed under oath in the jurisdiction, it is important to inform the client that she can be cross-examined on the financial statement. She needs to understand what the financial statement is and that it is being prepared to demonstrate her need for support. It is especially important to point out to clients the importance of being forthright in including all of the amounts they actually spend and to work with clients to help ensure they are not underestimating the true costs of supporting their children and themselves.¹³¹

Even when a financial statement is used, it is advisable to gather and bring to any child support hearing additional evidence of the client's expenses. Evidence of client's expenses might include:¹³²

- Mortgage payments
- Rent payments
- Food and clothing costs
- Utilities
- Telephone
- Medical and dental expenses (for client and child)
- Counseling expenses
- Child care expenses
- Car payments
- Gas or transportation costs
- Insurance payments (car, home, health)
- School tuition
- Extracurricular activities
- Payments on debts (credit cards, hospital bills, student loans)
- Attorney's Fees
- Diapers and formula
- Laundry
- Meals away from home
- School lunches
- Children's activities
- Entertainment
- Haircuts
- Cable TV and newspapers

When the victim has incurred expenses related to having suffered abuse, it is important to introduce evidence of those expenses at the civil protection order, child support-, spousal support-, and divorce hearing.

Casino Magic Corp. v. King, 43 S.W.3d 14 (Tex. App. 2001) (Awarding mother \$36,951.85 in delinquent child support plus attorney fees and court costs after mother filed motion to enforce child support wage withholding order against father's employer where employer purportedly failed to comply with previous order.); See also, State v Filipino, Conn. Super. LEXIS 266 (2000) (Suing on behalf of respondent's former wife, the Connecticut Support Enforcement Division prevailed when the court held employer to be in contempt for willfully violating a valid withholding order, and found employer liable to mother in the sum of \$29,259 for the full amount of income not withheld since receipt of the notice to withhold.)

¹³⁰ See sample financial statement in the Appendix to this chapter.

¹³¹ Often immigrant victims will underestimate their actual expenses. Sometimes this will occur because they are multiplying their weekly costs by 4 instead of 4.3 weeks to attain a monthly expense amount. In other instances they may be very proud of how their ability to be frugal, because it has helped them be able to survive and support their children on their own. One way attorneys can help clients check to see if they have included all expenses on the financial statement is to ask whether they are saving money or spending all of the money they receive. In most instances low income immigrant women will not be saving any money and the total amount of expenses reported on the financial statement should equal or be more than their income. Counsel will need to work with clients to be prepared to explain how they pay for expenses that exceed their income (e.g. help from family, credit card debt, etc.)

¹³² See Leslye E. Orloff, Deean Jang, & Catherine F. Klein, *With No Place to Turn: Improving Legal Advocacy for Battered Immigrant Women*, 29 FAM. L.Q. 314, 324 (1995).

Documentation of expenses related to the abuse and evidence of lost employment opportunities might include:¹³³

- Medical bills
- Hospital bills
- Bills related to repairing property damaged by abuse
- Costs associated with changing locks on the family residence
- Transportation costs associated with seeking medical treatment for injuries
- Counseling costs for the victim and the children
- Evidence of reduced pay from an employer related to having suffered abuse, including days missed at work when recuperating from injuries, and days missed when involved in court proceedings.

Immigration Affidavits of Support as evidence of the ability to pay child support and/or spousal support

An Affidavit of Support is a document that a U.S. citizen or lawful permanent resident is required to submit to immigration authorities when a family member whom he or she has sponsored applies for lawful permanent residence (a “green card”).¹³⁴ In the affidavit of support, the U.S. citizen or lawful permanent resident family member signs a sworn statement promising to financially support the immigrant family member. Affidavits of Support can be helpful in family court cases in obtaining child and spousal support awards. The affidavit can be used as evidence of income and the ability to pay child and/or spousal support and as evidence of the abusive spouse’s or parent’s obligation to support his family.¹³⁵ For immigrants who applied for permanent residence before December 19, 1997, affidavits were filed on Form I-134. Applicants filing on or after that date were required to submit the new enforceable Affidavit of Support on Form I-864.¹³⁶

If the immigrant victim attained lawful permanent or conditional resident status (i.e. greencard) through her spouse, he will have had to file an affidavit of support in her immigration case. The existence of an affidavit of support provides critical information that can help in obtaining child and spousal support, including evidence of the sponsoring spouse’s income. When filing the affidavit of support, the sponsor is required to submit to immigration authorities, together with the affidavit, the following documents:

- A copy of the sponsor’s income tax returns for the last three years if he or she had a legal duty to file;¹³⁷
- evidence of current employment or self-employment (normally recent pay stubs and a statement from the sponsor’s employer on business stationery);¹³⁸
- If the income is below 125% of the poverty level for the family size,¹³⁹ the sponsor may also submit other proof of his ability to support his immigrant spouse and/or child, including evidence of the sponsor’s assets.

¹³³ *Id.* at 28.

¹³⁴ An Affidavit of Support is required in all family-based immigration cases, whether the sponsored immigrant is applying for permanent residence through adjustment of status in the U.S. or an immigrant visa at a United States consulate abroad. INA 212(a)(4)(C); 8 U.S.C 1182(a)(4)(C). In employment-based immigration cases an affidavit of support is also required if the immigrant will be employed by in a business owned by a relative. INA § 212(a)(4)(D); 8 U.S.C. 1182(a)(4)(D).

¹³⁵ See *Sinojia v. Sinojia*, No. 113953, 1994 Conn. Super. LEXIS 2485 (Conn. Super. Ct. Sept. 27, 1994)(spousal support); *Stein v. Stein*, 831 S.W.2d 684 (Mo. Ct. App. 1992)(affidavit of support admitted as evidence); *K.S. v. I.G.S.*, Index No. 313910/00 (N.Y. Sup. Ct. July 16, 2001)(spousal support); *Walsh v. Walsh*, 764 N.E.2d 1103 (Ohio Ct. App. 2001)(as evidence); *Dao v. Nguyen*, No. 2071-95-4, 1995 WL 653322 (Va. Cir. Ct. Nov. 7, 1995)(spousal support).

¹³⁶ A sponsor who signs a new affidavit of support may be required to repay any “means-tested public benefits” received by the sponsored immigrant if requested by the government agency that provided the benefits. See INA Sec. 213A(b). As of April 2003, the National Immigration Law Center reported that no government agency had been known to request repayment from an I-864 sponsor. See *Sponsored Immigrants and Benefits*, http://www.nilc.org/ciwc/ciwc_ce/AOS_and_Bs_CA.htm; see generally, Charles Wheeler, *The New Affidavit of Support and Sponsorship Requirements*, 74 Interpreter Releases 1581 (Oct. 20, 1997); Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens from Becoming Public Charges*, 31 Creighton L. Rev. 741, 753-54 (1998).

¹³⁷ 8 CFR § 213a.2(c)(2)(i)

¹³⁸ 8 CFR § 213a.2(c)(2)(ii)

Obtaining information that was submitted in conjunction with the Affidavit of Support can be useful in cases where proving the abuser's income and ability to pay would otherwise be difficult. Examples include when the abusive sponsor is self-employed or works for a family member, or is hiding or manipulating income. To determine that the affidavit of support has been filed, counsel for an immigrant victim in a protection order-, child support-, divorce- or other family court proceeding should:

- Submit a Freedom of Information Act (FOIA) request to obtain copies of the battered immigrant's immigration file if she does not have a copy of the Affidavit of Support or underlying documents;
- If necessary, use discovery in the family court case to obtain copies of the affidavit of support and tax returns that the abusive spouse filed with his affidavit of support and pay stubs attesting to current income;
- If necessary, creatively use protection order remedies to order that the abuser provide a copy of the Affidavit of Support and/or copies of his tax returns. If he cannot provide copies of these documents, the abuser can be ordered to obtain an IRS transcript of tax returns filed for the past three years.¹⁴⁰

While the strategies discussed above for child support cases should also be explored in spousal support cases,¹⁴¹ obtaining spousal support awards can be significantly more difficult than child support awards. For this reason, counsel for an immigrant victim may want to consider introducing the Affidavit of Support as evidence in a divorce or protection order case in which the battered immigrant is seeking spousal support. The affidavit, in which the sponsor promised to financially support the immigrant spouse, can be introduced along with the other evidence (see discussion above on types of evidence) to support a spousal support award of sufficient duration for the battered immigrant to gain economic self-sufficiency.¹⁴²

3. Form of Relief – Wage Withholding

Wage withholding requires the non-custodial parent's employer to withhold child support from the non-custodial parent's paycheck before he or she is paid. For victims of domestic violence, this form of relief is preferable because it minimizes any contact between the abuser and victim, and provides an objective method to prove whether child support has been paid. This can be accomplished by obtaining a wage-withholding order in conjunction with the protection order, child support order, or divorce order.¹⁴³ Payment through a child support collection agency is also possible. A child support collection agency will distribute the payment to the victim and record the payments. The child support collection agency can also assist in enforcement if the abuser fails to pay the court-ordered child support.

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¹³⁹ See 8 CFR § 213a.1. In determining whether the household income is sufficient, household size is calculated to include the sponsor, all persons related to the sponsor by birth, marriage, or adoption living in the sponsor's residence, the sponsor's dependents, the sponsored immigrant(s), and any immigrants the sponsor has previously sponsored for immigration status when that support obligation has not terminated.

¹⁴⁰ To obtain a transcript of tax returns, an individual can submit IRS Form 4506-T by mail, fax, or in person at a local IRS office or order by calling 1-800-829-1040. If an attorney or individual other than the taxpayer is requesting the transcript or other document, IRS Form 2848, Power of Attorney and Declaration of Representative, must be signed by the taxpayer and submitted with the request. For more information and to obtain these forms, see the IRS official website: <http://www.irs.gov/formspubs/>.

¹⁴¹ Even when counsel plans on introducing the affidavit of support in a family court case, counsel should also use the strategies described above to obtain the financial documentation submitted with the affidavit. Any information on assets submitted could be useful both for spousal support and property division awards.

¹⁴² Under the affidavit of support the responsibility to support a family member under an affidavit of support lasts until the immigrant family member becomes a U.S. citizen or is credited with forty quarters of work (usually ten years). 8 U.S.C. § 1183a(a)(3)(A), B) (2003).

¹⁴³ Depending on your jurisdiction's rules, a wage withholding order may be issued automatically with a court order that includes spousal and/or child support. If wage withholding orders are not automatically issued, you must request that the court issue the order. See also Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, §453(g)(1) (codified, as amended, in scattered sections of 42 U.S.C.)

Another important area of which battered immigrant women should be aware involves visitation and child support. Many non-custodial parents argue that they should not be required to pay child support if they are not allowed visitation with their children. Safety concerns for the children and the battered immigrant client, particularly in very violent cases, may lead a court to not order visitation with an abusive father. Immigrant victims should be informed by counsel that the court may not demand that she allow visitation in order that child support be provided.¹⁴⁴ Rather, the non-custodial parent is required to pay child support regardless of his visitation rights with his children.¹⁴⁵ Many domestic violence victims, including battered immigrant victims, are unaware that, as a matter of law child support and visitation are independent issues in a family court proceeding. It is important for attorneys and advocates working with immigrant victims to explain that a non-custodial parent is required to pay child support regardless of his visitation rights with his children.¹⁴⁶

When a non-custodial parent who is an abuser has not been exercising visitation rights, attorneys need to be aware that seeking a child support order may spur the abuser to seek visitation with the child. An abuser's payment of child support does not guarantee him the right to visitation with the children. In domestic violence cases, if a victim seeks and receives a court order that limits or denies an abuser visitation with the parties children, those restrictions on visitation do not cut off the rights of the children to receive child support payments.¹⁴⁷

Enforcement of Support Orders

It is quite possible that, even after the successful attainment of a child support and/or spousal support order, the abuser or non-custodial parent will not pay. It is estimated that over eighty-four billion dollars of child support arrears are owed in the United States.¹⁴⁸ The state and federal government have implemented several strategies to address this problem. In addition, civil and criminal contempt actions in courts are also possible.

¹⁴⁴ See, e.g., *Hagstrom v. Smith*, 251 S.E.2d 27 (Ga. Ct. App. 1978) (finding that the withholding of visitation constitutes no defense in an action seeking payment of child support under a valid court order); *In re Marriage of Hoksbergen*, 587 N.W.2d 490 (Iowa App. 1998) (holding that the withholding of visitation did not stop the father's obligation to support the minor children); *Vanburen County Dep't of Social Servs. by Curtis v. Swearengin*, 455 S.E.2d 161, 163 (N.C. Ct. App. 1995) (voiding an order that conditioned child support on visitation for jurisdictional reasons in a URESA action). Cf. *Brancoveanu v. Brancoveanu*, 548 N.Y.S.2d 694 (N.Y. App. Div. 1989) (holding that pursuant to Domestic Relations Law § 241, interference with, or withholding of, visitation rights is not a ground for terminating child support or canceling child support arrears. However Domestic Relations Law § 241 (2003) does allow the suspension of alimony or maintenance support payments (including alimony/maintenance arrears during the time that visitation was withheld) when the custodial parent wrongfully interfered or withheld visitation).

¹⁴⁵ Generally, visitation rights cannot be terminated because of non-payment of child support. See, e.g., *Peterson v. Jason*, 513 So. 2d 1351, 1352 (Fla. Dist. Ct. App. 1987) (holding that a court can only terminate visitation rights for nonpayment of support when the nonpayment has been willful, intentional and detrimental to the welfare of the child, so that termination would be in the child's best interest); *Ledsome v. Ledsome*, 301 S.E.2d 475, 479 (W. Va. 1983) (holding that the trial court incorrectly denied visitation rights because the record did not show that he continuously, willfully, or intentionally failed to support his children).

¹⁴⁶ Generally, visitation rights cannot be terminated because of non-payment of child support. See, e.g., *Peterson v. Jason*, 513 So. 2d 1351, 1352 (Fla. Dist. Ct. App. 1987) (holding that a court can only terminate visitation rights for nonpayment of support when the nonpayment has been willful, intentional and detrimental to the welfare of the child so that termination would be in the child's best interest.); *Ledsome v. Ledsome*, 301 S.E.2d 475, 479 (W. Va. 1983) (holding that the trial court incorrectly denied visitation rights because the record did not show that he contumaciously, willfully, or intentionally failed to support his children).

¹⁴⁷ See, e.g., *Hagstrom v. Smith*, 251 S.E.2d 27 (Ga. Ct. App. 1978) (finding that the withholding of visitation constitutes no defense in an action seeking payment of child support under a valid court order); *In re Marriage of Hoksbergen*, 587 N.W.2d 490 (Iowa App. 1998) (holding that the withholding of visitation did not stop the father's obligation to support the minor children); *Vanburen County Dep't of Social Servs. by Curtis v. Swearengin*, 455 S.E.2d 161, 163 (N.C. Ct. App. 1995) (voiding an order that conditioned child support on visitation for jurisdictional reasons in a URESA action). Cf. *Brancoveanu v. Brancoveanu*, 548 N.Y.S.2d 694 (N.Y. App. Div. 1989) (holding that pursuant to Domestic Relations Law § 241, interference with or withholding of visitation rights is not a ground for terminating child support or canceling child support arrears, yet Domestic Relations Law § 241 (2003) does allow the suspension of alimony or maintenance support payments (including alimony/maintenance arrears during the time that visitation was withheld) when the custodial parent wrongfully interfered or withheld visitation).

¹⁴⁸ See Office of Child Support Enforcement, FY 2000 Preliminary Data Preview Report, Ch. 1: Child Support Enforcement (CSE) Background and Program Results, at <http://www.acf.dhhs.gov/programs/cse/pubs/2000/datareport/ch01.html>.

The following section will discuss child support enforcement and will emphasize particular issues that can arise in cases of immigrant victims.

1. Child Support Enforcement Under Personal Responsibility And Work Opportunities Reconciliation Act (PRWORA) -- TANF Requirements and Other Available Enforcement

PRWORA¹⁴⁹ made significant changes to child support enforcement. PRWORA required the creation of new databases, strengthened child support enforcement mechanisms, and pushed states to achieve a ninety percent paternity-establishment rate, or face financial penalties in the form of cuts to the State's federal TANF block-grant funds.¹⁵⁰ PRWORA tightened the cooperation requirements for child support and added a new requirement that states flag cases of individuals in the state's child support automated system when there is reasonable evidence of domestic violence, or when a protection order has been issued.¹⁵¹

Custodial parents seeking TANF are required under federal law to make a "good-faith effort" to provide the state with information about the non-custodial parent and to agree to appear at interviews, hearings, and legal proceedings. Moreover, if necessary, they are also required to establish paternity, and to subject themselves and their child to genetic tests.¹⁵² If a custodial parent does not cooperate with the state on paternity-establishment or child support proceedings, the custodial parent may be sanctioned by partial or full loss of TANF benefits for herself and her children.¹⁵³

When a parent applies for cash-assistance benefits, she will be required to disclose the identity of the children's father.¹⁵⁴ The state child support enforcement agency will then attempt to collect child support from the father. Generally, if an immigrant victim is receiving cash assistance, the amount of cash assistance she is receiving may be deducted from her child support payment, or her cash-assistance payment may be reduced.¹⁵⁵ Some battered women and battered immigrant women may not wish to collect child support out of fear of retaliation from the abuser. The child support enforcement agency may not attempt collection in certain instances where a battered immigrant shows fear of violence from the father.¹⁵⁶

Federal law provides two exceptions to the child support cooperation requirement: (1) a waiver for "good cause," and (2) the Family Violence Option (FVO), which permits the state to waive child support cooperation requirements, as well as other TANF requirements, such as work and time limits, if the state finds "good cause."¹⁵⁷ The first exception is broader, encompassing not only domestic violence, but other circumstances, including conception of the child through forcible rape or incest, pending adoption proceedings, and reasonably anticipated physical or emotional harm to the mother or child.¹⁵⁸ The FVO exception urges states to screen TANF cases for domestic violence, safeguard battered applicants' confidentiality, and refer battered individuals to counseling and supportive services.¹⁵⁹ States may also use the FVO to waive other TANF requirements such as residency requirements, child support cooperation, time

149 Pub. L. No. 104-193 §§, 110 Stat. 2105 (1996).

150 See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 660 (2000).

151 *Id.* at 695. See also 42 U.S.C. §654(26)(D) (Supp. III 1997).

152 Please refer to previous section on paternity and risks to victims of domestic violence. See Stern, Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 52 (2003). See also 42 U.S.C. §654 (Supp. III 1997).

153 See Stern, Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 56 (2003); See also 42 U.S.C. §654 (Supp. III 1997).

154 See Office of Child Support Enforcement : Handbook on Child Support Enforcement, available at <http://acf.dhhs.gov/programs/cse/fct/cshdbk.htm> (last modified September, 1997).

155 ARNOLD H. RUTKIN, 5-48 FAMILY LAW AND PRACTICE § 48.03 (Arnold H. Rutkin ed., Matthew Bender 2004).

156 For more strategies on how to argue for greater safety and security for domestic violence victims when they seek child support See Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U.J. GENDER SOC. POL'Y & L. 657 (2000).

157 See Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L. J. 47, 56 (2003).

158 *Id.*

159 In implementing FVO, it is important that immigrant battered women be provided interpreters, and that they be provided access to culturally competent and language-accessible counseling with support services. Leslye Orloff, Leandra Zarnow and Yiris Cornwall, FACILITATING ACCESS TO TANF FOR BATTERED IMMIGRANTS: A PILOT TRAINING MANUAL FOR TANF ELIGIBILITY WORKERS, Ch. 9 (2000).

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limits, work requirements, and family-cap provisions, if they make ‘good cause’ determinations to do so.¹⁶⁰ Most states have chosen to adopt the Family Violence Option.¹⁶¹

Family Violence Option waivers can be particularly useful in cases of battered immigrants who receive a prima facie determination that grants them access to public benefits usually within two months of filing a VAWA self-petition.¹⁶² However, battered immigrant self-petitioners cannot receive legal work authorization until their VAWA self-petition has been approved.¹⁶³ The delay between the prima facie determination granting them permission to access public benefits and receipt of work authorization following approval of their VAWA self-petition can take over a year. FVO’s waiver of work requirements are needed to carry the battered immigrant self-petitioner through this waiting period.

Further, battered immigrants who are eligible for benefits based on an approved family based visa petition filed by their spouse who is an abusive lawful permanent resident cannot receive work authorization until they become eligible to adjust their status to that of a lawful permanent resident.¹⁶⁴ The wait between approval of their family based visa petition and adjustment can be up to 7 years, depending on the immigrant’s country of origin.¹⁶⁵ During this waiting period, IIRAIRA explicitly granted access to benefits to battered immigrants with approved family-based visa petitions to help them address survival needs while they wait for their immigration case to work its way through the system.¹⁶⁶

PRWORA not only created child support enforcement procedures for families on TANF, it also created programs for parents not receiving TANF.¹⁶⁷ Child support enforcement programs are open to anyone seeking assistance with child support enforcement.¹⁶⁸ PRWORA created new and expanded federal and state databases that will match information on child support orders with information on newly hired employees.¹⁶⁹ In addition, the database matching also allows for automated enforcement of child support orders, such as seeking and attaching assets of delinquent obligors.¹⁷⁰ States are required to have general safeguards against unauthorized use or disclosure of information relating to paternity, child support, and custody proceedings, however.¹⁷¹ Most importantly, when a protection order has been issued the law specifically prohibits states from releasing information on the whereabouts of a spouse or child to the abuser.¹⁷²

When applying for child support collection assistance from the state, the battered immigrant should have as much information about the non-custodial parent as possible. It would thus be very useful to collect this information during discovery in the family court case, or as part of the protection order case that led to the issuance of the child support order. The information that should be collected includes the name, address and social security number of the parent, the name and address of the parent’s employer, any proof of income or

¹⁶⁰ See Stern, Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims’ Access to Child Support and TANF*, 14 HASTINGS WOMEN’S L. J. 47, 57 (2003).

¹⁶¹ See the appendix of this chapter for a state-by-state analysis of which states have implemented the Family Violence Option and an overview of each state’s approach to FVO.

¹⁶² See chapter 5 on public benefits for a full discussion of public benefits access for immigrant victims.

¹⁶³ See Leslye Orloff, Leandra Zarnow and Yiris Cornwall, FACILITATING ACCESS TO TANF FOR BATTERED IMMIGRANTS: A PILOT TRAINING MANUAL FOR TANF ELIGIBILITY WORKERS, Ch. 9 (2000).

¹⁶⁴ *Id.*

¹⁶⁵ The current visa bulletin can be found at http://travel.state.gov/visa/frvi_bulletincurrent.html.

¹⁶⁶ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.) 8 U.S.C. 1641(c).

¹⁶⁷ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 671 (2000).

¹⁶⁸ See Office of Child Support Enforcement : Handbook on Child Support Enforcement, *available at* <http://acf.dhhs.gov/programs/cse/fct/cshdbk.htm> (last modified September, 1997).

¹⁶⁹ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 667 (2000).

¹⁷⁰ *Id.* at 695. The law also provides other mechanisms of enforcement including the ability of states to revoke drivers-, professional-, recreational-, and occupational licenses, the ability to attach tax refunds and turn them over to the custodial parent, and the creation of centralized collection and disbursement units. See Office of Child Support Enforcement : Handbook on Child Support Enforcement, *available at* <http://acf.dhhs.gov/programs/cse/fct/cshdbk.htm> (last modified September, 1997).

¹⁷¹ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 696 (2000).

¹⁷² *Id.*; See also 42 U.S.C §654(26)(B) (Supp. II 196).

assets (pay stubs, tax returns, bank accounts, investments or property holdings), children's birth certificates, any proof of paternity, the divorce decree or separation agreement, and past child support records.¹⁷³

2. Civil Contempt and Criminal Sanctions

If the non-custodial parent is unable to make the support payments due to financial reasons, then he may file for a modification of the previous award. Courts can examine whether the reduction in financial resources was bona fide, or voluntarily undertaken to reduce his child support obligation. When deciding such motions, courts regularly determine whether the child support payor voluntarily reduced his income or incurred debt (e.g. by buying a new car) in order to reduce or avoid child support payments.¹⁷⁴ If the payor incurred debt, the court may not reduce child support payments. In cases in which the abuser quit his job, the court could order the abuser to seek employment, and impute income to him thereby obliging him to continue paying child support.¹⁷⁵

Civil or criminal contempt proceedings are used to enforce support orders when the payor reduces or ceases payment without a modification being granted. Civil contempt proceedings are generally filed in the same court that issued the original order. The majority of states have civil contempt statutes for nonsupport,¹⁷⁶ while a minority of states have criminal contempt statutes for nonsupport.¹⁷⁷

When filing for contempt, a simple petition is usually drafted enumerating the violations of the order and attaches a copy of the original order. During the proceedings, the non-custodial parent may seek to introduce evidence of support, such as the purchase of clothes or diapers, or paying the rent or mortgage. However, if the non-custodial parent or obligor of spousal support is not paying support as ordered in the original order, he is still in contempt. Civil contempt proceedings usually have to be personally served on the non-custodial parent.

A battered immigrant may pursue civil contempt proceedings and still not receive child support payments. In such cases, the client may be advised to pursue criminal charges against the non-custodial parent for nonpayment of support.¹⁷⁸ Criminal charges for failure to pay child support are usually brought only against persons who refused to comply with child support orders after other options for civil enforcement have been exhausted. The abuser may have sought to reduce child support payments through the court. The court may have denied his request, after which he has refused to pay. On the other hand, he may simply have refused to pay without any explanation or attempt to change the order. Other abusers may continue to refuse to pay court ordered child support after having been brought before the court on civil contempt charges.

¹⁷³ U.S. Department of Health and Human Services, Handbook on Child Support Enforcement [available online at www.pueblo.gsa.gov/cgi-bin/pf.cgi].

¹⁷⁴ ARNOLD H. RUTKIN, 3-35 FAMILY LAW AND PRACTICE § 35.03 n 9.5 (Arnold H. Rutkin ed., Matthew Bender 2004).

¹⁷⁵ *Id.*

¹⁷⁶ See ALA. CODE § 12-15-11 (2001); ALASKA STAT. § 09.50.020 (2001) (referring to both civil and criminal contempt); ARIZ. REV. STAT. ANN. 12-864.01 (2002); ARK. CODE ANN. § 9-14-235 (2001); CAL. FAM. CODE § 4571 (2002); COLO. REV. STAT. § 14-14-110 (2002); CONN. GEN. STAT. § 17b-745 (2002); DEL. CODE ANN. tit. 13 § 516 (2001); D.C. CODE ANN. § 16-2325 (2002); FLA. STAT.ch. 61.14 (2001); 7 GUAM CODE ANN. § 34102 (2001); GA. CODE ANN. § 15-15-4.1 (2001); 305 ILL. COMP. STAT. ANN. 5/10-16 (West 2002); IND. CODE ANN. § 31-16-12-6 (Michie 2002); KY. REV. STAT. ANN. § 403-240 (2002); LA. CHILD. CODE tit. 1353 (2002); MD. CODE ANN., CTS & JUD. PROC. § 5-111 (2001); MICH. COMP. LAWS § 552.631 (2002); MINN. STAT. § 518.617 (2002); MISS. CODE ANN. § 43-19-39 (2002); MO. REV. STAT. § 210.843 (2002); MONT. CODE ANN. § 40-5-601 (2001); NEB. REV. STAT. § 43-512.04 (2001); NEV. REV. STAT. 425.3836 (2001); N.H. REV. STAT. ANN. § 126-A:41 (2001); N.M. STAT. ANN. § 40-4A-11 (2001); N.C. GEN. STAT. § 50-13.4 (2002); N.D. CENT. CODE § 14-17-16 (2002); OHIO REV. CODE § 3119.57 (2002); OKLA. STAT. TIT. 10 § 78 (2002); 23 PA. CONS. STAT. ANN. § 4345 (West 2002); R.I. GEN. LAWS § 15-21-1 (2001); S.C. CODE ANN. § 20-7-1350 (Law Co-op 2002) (referring to both civil and criminal contempt); S.D. CODIFIED LAWS § 26-7A-98 (2002); TENN. CODE ANN. § 36-5-101 (2001); TEX. FAM. CODE ANN. § 157.001 (2001); UTAH CODE ANN. § 78-32-17 (2001); VT. STAT. ANN. TIT. 15 § 603 (2001); TERRITORIAL COURT RULE 108 (Virgin Islands 2001); WASH. REV. CODE § 26.09.160 (2002); W. VA. CODE § 48-14-501 (2002) (referring to both civil and criminal contempt); WIS. STAT. § 767.08 (2002); WYO. STAT. ANN. § 20-2-310 (Michie 2001). This and the following statute lists may not be inclusive. Please confirm information with an attorney in your state.

¹⁷⁷ See ALASKA STAT. § 09.50.020 (2001) (referring to both civil and criminal contempt); IDAHO CODE § 7-610 (2002); IOWA CODE § 598-23A (2002); ME. REV. STAT. ANN. tit. 19-A § 2601 (West 2002); MASS. GEN. LAWS ANN. ch. 215 § 34 (2002); N.J. STAT. ANN. § 2A:34-23e (2001); N.Y. FAM. LAW § 454 (McKinney 2002); S.C. CODE ANN. § 20-7-1350 (Law Co-op 2002) (referring to both civil and criminal contempt); W. VA. CODE § 48-14-501 (2002) (referring to both civil and criminal contempt).

¹⁷⁸ See discussion in Section a. below for more information on criminal remedies.

a. Immigration Consequences of Criminal Convictions for Failure to Pay Child Support

Many states criminalize failure to support or abandonment. The statutes vary in their language, with some states mandating that there must be a willful failure to pay in order for nonsupport to be a crime, and other states holding that nonsupport is simply a strict-liability offense. When the non-paying non-custodial parent is a non-citizen, convictions under statutes with certain mens rea (intent) elements, such as willfulness requirements, could lead to a non-citizen's deportation. The fact that criminal prosecution for nonpayment of child support could potentially result in deportation of the non-paying parent means that attorneys working with immigrant victims need to carefully examine the ramifications of criminal child support enforcement. Victim safety and economic security need to be carefully considered. If the abuser is deported, the victim will likely be cut off from receiving any future child support payments. On the other hand, the fact that criminal conviction for non-payment of child support could lead to the non-paying parent's deportation could help convince batterers to make court-ordered child support payments.

Under immigration law state statutes that criminalize non-payment of support and include willfulness or other mens rea (intent) elements may be more likely than other support-enforcement laws to trigger deportation of nonpaying non-citizens, because such crimes could qualify as "crimes of moral turpitude." Most states' criminal non-support statutes require that a child support case meet civil contempt's prima facie case for nonsupport.¹⁷⁹ The failure to support must be "willful,"¹⁸⁰ and the failure to support would leave the child or spouse destitute.

Crimes of moral turpitude are not defined in the Immigration and Nationality Act, but are generally viewed by case law as crimes involving conduct that is inherently base, vile, or depraved, and contrary to accepted moral standards.¹⁸¹ Moral turpitude crimes include crimes involving an intent to steal or defraud, crimes in which bodily harm or property harm is caused or threatened by an intentional act, or crimes in which serious bodily harm or harm to property is caused or threatened by a reckless act, felonies, some misdemeanors in which malice is an element, and most sex offenses.¹⁸² Moral turpitude is determined by the fact-finder in relation to the elements of the crime, and is not determined by the state or federal criminal law's classification of a particular crime as a felony or misdemeanor.¹⁸³ Therefore, if intent to defraud is an element of the crime of which the individual was convicted, the crime is one of moral turpitude.¹⁸⁴

In particular, willful failure to pay child or spousal support can be characterized as a crime of moral turpitude, because by failing to pay court-ordered child support, the abuser demonstrates his intent to steal or defraud the person to whom court ordered support was to be paid.

Whether or not being criminally convicted of nonsupport would constitute a crime of moral turpitude in any given state depends both upon whether there is language in the statute regarding "willful," "intentional" or "knowing" nonsupport, and on whether the failure to support would make the spouse or child destitute.¹⁸⁵ Forty-two states include "willfulness" language in their criminal nonsupport¹⁸⁶ or criminal contempt¹⁸⁷

¹⁷⁹ Generally, a "prima facie showing" means that support must have been ordered, notice of the order was given or there was knowledge of it, and there was noncompliance with the order. See, e.g., Cal. Civ. Proc. Code § 1209.5 (2002), from Deborah K. Bell, *Child Support Orders: The Common Law Framework -- Part II*, 69 Miss. L.J. 1120, 1120 (2000).

¹⁸⁰ 23-FALL Fam. Advocate 49, 50 (2000).

¹⁸¹ Nat'l Ass'n of Women Judges, *Removing Obstacles to Justice for Immigrants*, Education Curriculum for Judges 20 (April 5, 2002).

¹⁸² *Id.* at 20.; See also ANN BENSON, IMMIGRATION CONSEQUENCES OF CRIMINAL CONDUCT, Appendix C (2001).

¹⁸³ *Goldsthtein v. BCIS*, 8 F.3d 645 (9th Cir. 1993).

¹⁸⁴ *Jordan v. De George*, 341 U.S. 223, 227 (1951).

¹⁸⁵ See, e.g., *In Matter of R.*, 4 I. & N. Dec. 192 (BIA 1950); Annotation, *What constitutes "crime involving moral turpitude" within meaning of secs. 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. secs. 1182(a)(9), 1251(a)(4)), and similar predecessor statutes providing for exclusion or deportation of aliens convicted of such crime*, 23 A.L.R. Fed. 480 § 12j (1975).

¹⁸⁶ See ALA. CODE § 13A-13-4 (2002); CAL. PENAL CODE § 270 (2002); COLO. REV. STAT. § 14-16-101 (2002); DEL. CODE ANN. tit. 11, § 1113 (2001); FLA. STAT. ch. 856.04 (2001); GA. CODE ANN. § 19-10-1 (2002); HAW. REV. STAT. § 709-903 (2002); IDAHO CODE § 18-401 (2002); 750 ILL. COMP. STAT. ANN. 16/15 (West 2002); IND. CODE ANN. § 35-46-1-5 (Michie 2002) (referring to children); IND. CODE ANN. § 35-46-1-6 (Michie 2002) (referring to spouses); IOWA CODE § 726.5 (2002); IOWA CODE § 598-23A (2002); KY. REV. STAT. ANN. § 530.050 (2001); LA. REV. STAT. ANN. § 14:74 (West 2002); ME. REV.

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statutes. Seven states do not include such language.¹⁸⁸ One state, Arizona, has no statute relating to nonsupport; its only enforcement mechanisms are contempt proceedings¹⁸⁹ and suspension of drivers' licenses.¹⁹⁰ When examining a particular state's statute, you must make sure that it contains "willfulness" language, and a requirement that the failure to pay support would make the spouse or child destitute. Many of the statutes with a "willfulness" requirement also contain language regarding the requirement that nonsupport leave the spouse or child destitute, but you need to check your state statute to make sure.

Other states with nonsupport statutes also impose other penalties for nonpayment of court-ordered support, such as suspension of drivers' licenses, and orders to obtain work.¹⁹¹ However, even if a state statute includes the required language, whether criminal convictions for non-payment of support will have immigration consequences also depends upon the sentence that may be imposed,¹⁹² unless the person has been convicted of crimes of moral turpitude.¹⁹³

The immigration consequences of criminal convictions for nonpayment of support vary depending upon several factors.¹⁹⁴ A non-citizen may be found deportable after conviction for one crime of moral turpitude if that crime was committed within five years of admission into the United States **and** if the sentence that could **potentially** be imposed was for one year or more.¹⁹⁵ Note that the maximum potential sentence listed in the statute, and not the sentence actually received, determines whether someone can be deported for committing the crime. If the potential sentence in the statute is one year or more, a person committing that crime can be deported even if the person actually receives a sentence of less than one year, or if s/he receives probation. A non-citizen can also be deported for any two convictions for crimes of moral turpitude committed at any time,¹⁹⁶ regardless of sentence.¹⁹⁷ This means that although non-paying parents or spouses may have their first criminal sentence structured so as not to trigger characterization as a crime of moral turpitude, a second

STAT. ANN. tit. 17-A, § 552 (West 2002); MD. CODE ANN., FAM. LAW § 10-201 (2002); MASS. GEN. LAWS ANN. CH. 273, § 1 (2002); MASS. GEN. LAWS ANN. CH. 273, § 15A (2002); Michigan, MICH. COMP. LAWS § 750.165 (2002); Minnesota, MINN. STAT. § 609.375 (2001); MISS. CODE ANN. § 97-5-3 (2001); MO. REV. STAT. § 568.040 (2002); MONT. CODE ANN. § 45-5-621 (1999); NEB. REV. STAT. § 28-706 (2001); NEV. REV. STAT. 201.020 (2001); N.H. REV. STAT. ANN. § 639:4 (2001); N.J. STAT. ANN. § 2C:24-5 (2002); N.M. STAT. ANN. § 40-4A-11 (2001); N.Y. FAM. LAW § 454 (McKinney 2002); N.C. GEN. STAT. § 49-2 (2001);, N.D. CENT. CODE § 14-07-15 (2001) (referring to children); N.D. CENT. CODE § 14-07-16 (2001) (referring to spouses); Oklahoma, OKLA. STAT. TIT. 21 § 85 (2002) (referring language to "willful" only pertains child support, not spousal support); 18 PA. CONS. STAT. ANN. § 4731 (West 2002); R.I. GEN. LAWS § 11-2-1.1 (2001); S.D. CODIFIED LAWS § 25-7-16 (2002); TENN. CODE ANN. § 39-15-101 (2001); TEX. PENAL CODE ANN. § 25.05 (Vernon 2001); UTAH CODE ANN. § 76-7-201 (2001); VT. STAT. ANN. TIT. 15, § 202 (2001); VA. CODE ANN. § 20-61 (Michie 2002); WASH. REV. CODE § 26.20.035 (2002); W. VA. CODE § 48-14-502 (2002); WIS. STAT. § 948.22 (2002); and WYO. STAT. ANN. § 20-2-310 (Michie 2001).

¹⁸⁷ See IOWA CODE § 598-23A (2002); S.C. CODE ANN. § 20-7-1350 (Law Co-op 2002); W. VA. CODE § 48-14-501 (2002).

¹⁸⁸ See ALASKA STAT. § 12.55.135 (Michie 2002); ARK. CODE ANN. § 5-26-401 (Michie 2001); CONN. GEN. STAT. § 53-304 (2002); KAN. STAT. ANN. § 21-3605 (2001); OHIO REV. CODE § 2919.21 (2002); OR. REV. STAT. § 163.555 (2001); S.C. CODE ANN. § 20-7-90 (Law. Co-op 2002).

¹⁸⁹ See ARIZ. REV. STAT. § 12-864.01 (2002).

¹⁹⁰ See, e.g., ARIZ. REV. STAT. §25-518 (2002); See also, ME. REV. STAT. ANN. TIT. 19A, § 2202 (2001); MONT. CODE ANN. § 40-5-291 (2001). In practice, even without statutory requirements, many state courts regularly order non-paying parents who are not working to obtain employment. Such orders are issued as part of civil contempt proceedings and often in response to the non-paying parent's voluntarily leaving employment to avoid child support payments. See, e.g., IOWA CODE § 252B.21 (2002); MINN. STAT. § 518.616 (2001).

¹⁹¹ See, e.g., *Id.*

¹⁹² INA § 237 (a)(2)(A)(i)(II), 8 U.S.C. § 1227 (a)(2)(A)(i)(II) (2002). See further discussion in Chapter 9 of this manual on what is considered a conviction under immigration laws. The federal immigration law defining convictions is different than state criminal laws, and many determinations not considered convictions under state law are convictions for immigration law purposes.

¹⁹³ INA § 237 (a)(2)(A)(ii), 8 U.S.C. § 1227 (a)(2)(A)(ii).

¹⁹⁴ Manual Vargas, Immigration Consequences of Conviction and Sentencing, Address at National Judicial College (April 5, 2002) (power point presentation on file with the author).

¹⁹⁵ INA § 237 (a)(2)(A)(i), 8 U.S.C. § 1227 (a)(2)(A)(i) (2002).

¹⁹⁶ INA § 237 (a)(2)(A)(ii), 8 U.S.C. § 1227 (a)(2)(A)(ii) (2002) (stating "Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.") It is not likely that a pattern of domestic violence occurring over a period of time would be considered a single scheme of criminal misconduct.

¹⁹⁷ Sejal Zota, *Immigration Consequences of Convictions Checklist*, Criminal Defense Immigration Project, New York State Defenders Association (2001) in NAT'L ASS'N OF WOMEN JUDGES, REMOVING OBSTACLES TO JUSTICE FOR IMMIGRANTS, EDUCATION CURRICULUM FOR JUDGES 20 (April 5, 2002).

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conviction for non-payment of support, or for any other moral turpitude crime, may invoke deportation consequences, regardless of sentence length.

Non-citizens applying for lawful permanent residence are deemed inadmissible and denied permanent residency if they are convicted of or admit committing any crime of moral turpitude, regardless of the length of potential sentence.¹⁹⁸ However, crimes of moral turpitude are not grounds for denial of lawful permanent residency for inadmissibility in two instances.¹⁹⁹ First, the applicant may be admissible if the offense was committed more than five years before the request for admission as a lawful permanent resident, and if the offense was committed when the applicant was under eighteen (18) years of age.²⁰⁰ Second, if the applicant has no prior criminal history, the maximum possible sentence is less than one year, and the actual sentence imposed is less than six months, then the applicant may be admissible.²⁰¹

Every state has laws that criminalize failure to support a spouse or child. The penalties range in severity. In Idaho, desertion and nonsupport of children or spouse is a felony punishable by up to fourteen years in prison.²⁰² However, Alabama simply codifies nonsupport as a Class A misdemeanor.²⁰³ Many state statutes provide that a sentence of greater than one year may be imposed for nonsupport, and these statutes also have the requisite mens rea of “willful” to qualify as a crime of moral turpitude.²⁰⁴ If a batterer is convicted under such a statute, the sentence may mean that the batterer has committed a crime of moral turpitude and may face deportation in addition to being denied lawful permanent residency, **even if** he or she does not actually receive a sentence of greater than one year.²⁰⁵ The key language under federal immigration law is that a crime of moral turpitude is a crime “for which a sentence of one year or longer may be imposed.”²⁰⁶

FEDERAL LAW AND CHILD SUPPORT ENFORCEMENT

In addition to state court enforcement actions, there is also a federal remedy for non-payment of child support under the Child Support Recovery Act when implemented in combination with the Deadbeat Parents Punishment Act of 1998. These federal statutes work together to penalize criminally parents who willfully avoid child support payments for a child in another state, and who owe more than a year’s worth of child support or five thousand dollars (\$5000). This makes nonsupport a federal crime punishable by up to two years in prison for certain deadbeat parents.²⁰⁷ As with state crimes, a federal criminal conviction for non-payment of child support under these federal statutes could also constitute a crime of moral turpitude, since the length of sentence that could be imposed under the statute is up to two years in prison. Federal child support enforcement actions could lead to the non-paying non-citizen parent’s deportation.

Attorneys working with immigrant victims trying to collect court-ordered child support or spousal support from their abusers need to understand that certain child support enforcement mechanisms may have immigration consequences for non-citizen non-custodial parents. It is important for attorneys working to enforce child support orders to do safety planning with victims to ensure that actions taken to enforce child support will actually be effective. Understanding the potential immigration consequences of criminal convictions for failure to pay court-ordered support obligations can be useful information for settlement discussions with opposing counsel when non-citizens are delinquent in support payments,²⁰⁸ since batterers

¹⁹⁸ *Id.*

¹⁹⁹ INA § 212(a)(2)(i), 8 U.S.C. § 1182(a)(2)(i) (2002).

²⁰⁰ INA § 212(a)(2)(ii)(I), 8 U.S.C. § 1182(a)(2)(ii)(I) (2002). See also Memorandum of Law, Katherine Brady and Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility related to Crimes 12* (April 2001). This is unlikely to be the case in child support convictions as it is highly unlikely that someone under the age of 18 would be convicted for non-payment of child support.

²⁰¹ INA § 212(a)(2)(ii)(I), 8 U.S.C. § 1182(a)(2)(ii)(I) (2002). See also Memorandum of Law, Katherine Brady and Dan Kesselbrenner, *Grounds of Deportability and Inadmissibility related to Crimes 12* (April 2001).

²⁰² IDAHO CODE § 18-401 (2002).

²⁰³ ALA. CODE § 13A-13-4 (2002).

²⁰⁴ Check your state nonsupport statutes, found in footnotes above, and accompanying statutes (if any) for the actual length of sentence.

²⁰⁵ INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227 (a)(2)(A)(i) (2002).

²⁰⁶ *Id.*

²⁰⁷ 18 U.S.C. § 228 (2002).

²⁰⁸ This information’s usefulness is not limited to domestic violence cases. It could be equally helpful to un-abused immigrant victims who are not receiving court-ordered support. However, counsel need to ethically approach this issue

who owe spousal support or child support and fail to pay it face a range of consequences, from contempt proceedings to criminal charges for nonsupport.

a. Nonpayment of child support and good moral character in immigration cases

Immigration consequences for failure to pay child support may occur even when there is no court order to pay child support, and even when the immigrant non-custodial parent has never had a child support enforcement action filed against him. Failure to pay child support can lead to a finding of lack of “good moral character” and denial of certain immigration benefits such as naturalization²⁰⁹ and, in some cases, relief under VAWA. Establishing good moral character is a requirement for several types of immigration relief, including cancellation of removal for non-permanent residents,²¹⁰ self-petitions for battered spouses and children under VAWA, voluntary departure,²¹¹ citizenship, and registry. There is generally no waiver available for this requirement, and, if an individual is found to lack good moral character, the form of immigration relief the immigrant has requested must be denied.²¹²

Nonpayment of child support, although not listed as a statutory bar to establishing good moral character in INA § 101(f), is an important factor in determining good moral character. The INS (now U.S.CIS) has long taken the position that “the duty of . . . a parent to support his child, is not only a moral . . . obligation, but also a duty imposed by law. A finding of good moral character is precluded where there is a willful failure or refusal to provide support.”²¹³ The regulations governing the naturalization process also address the issue of child support. According to 8 C.F.R. 316.10(b)(3)(i):

[u]nless the applicant establishes extenuating circumstances, the applicant shall be found to lack good moral character if, during the statutory period, the applicant . . . [w]illfully failed or refused to support dependents (emphasis added).

This rule is implemented during the naturalization process and routinely enforced by the U.S.CIS. The naturalization application itself contains a question about child support, and all applicants must state whether they have EVER failed to support their dependents.²¹⁴ There is some variation in how the different U.S.CIS citizenship offices implement the regulation governing child support, but attorneys and advocates from different cities throughout the country report that evidence of an applicant’s payment of children support is routinely required.²¹⁵

The Board of Immigration Appeals and federal courts have long recognized the moral and legal obligation of a parent to support his or her dependents, and failure to pay child support has long been a factor in assessing good moral character in immigration cases, particularly in applications for naturalization.²¹⁶ Courts have

remembering generally that under the Rules of Professional Responsibility counsel cannot threaten criminal prosecution to gain advantage in a civil case.

²⁰⁹ INA § 316(d) – (e), 8 U.S.C. § 1427(d) – (e) (2002).

²¹⁰ Good moral character is a requirement for cancellation under INA 240A(b)(1) as well as for special rule cancellation for battered spouses and children under VAWA, and for certain nationals of Guatemala, El Salvador, and former Eastern bloc countries under NACARA § 203. Immigration courts can properly exercise their discretion to deport, rather than grant relief to, fathers who paid only limited amounts of child support. *Satoot v. I.N.S.*, 24 F.3d 249, 1994 WL 192120 (9th Cir. 1994) (unpublished opinion); *In re Halas*, 274 F. Supp. 604 (D.C. Pa. 1967). It is important to note that the parent not paying child support in the *Satoot* case was also abusive.

²¹¹ INA § 244(a), 8 U.S.C. § 1254a(a) (2002).

²¹² See *Miller v. INS*, 762 F.2d 21 (3d Cir. 1985). There is an exception under INA § 204(a)(1)(C) for self-petitioners under VAWA with criminal convictions that would otherwise preclude good moral character, if the conviction is connected to the abuse and waiveable when determining admissibility under INA § 212(h).

²¹³ INS Interpretation 316.1(f)(5).

²¹⁴ Part 10.D, Question 22g of Form N-400 asks: “Have you **EVER** failed to support your dependents or to pay alimony?” A written explanation and copies of any relevant documentation is requested if the answer is yes.

²¹⁵ Immigration practitioners from California, Florida, Minnesota, Texas, New York, Arizona, Louisiana, Oregon, Wisconsin, Missouri, Utah, Washington, and Maryland provided information on local U.S.CIS practices for this section. All reported that requests for evidence of child support are routine in citizenship cases.

²¹⁶ For decisions related to suspension of deportation and other types of immigration relief, see *Matter of S*, 3 I & N Dec. 393 (BIA 1998); *Matter of Pires da Silva*, 10 I & N Dec. 191 (BIA 1983).

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upheld decisions of the immigration authorities to deny naturalization where the non-payment was willful and not excusable due to extenuating circumstances.²¹⁷

Though an applicant's willful failure to support his dependants is presumed to be inconsistent with good moral character, an applicant for naturalization may not be barred from a positive good moral character determination if he can demonstrate extenuating circumstances for nonpayment. Because there are no *per se* statutory disqualifications to a positive good moral character determination, an applicant's nonpayment of support to his dependants is considered in the context of the applicant's total pattern of behavior and overall character.²¹⁸

Conclusion

Without adequate economic support, many victims of domestic violence find themselves in the impossible situation of choosing between a life of certain poverty or continued abuse.²¹⁹ Child support and spousal support can be important tools for a battered woman to achieve self-sufficiency and stability for herself and her children. For immigrant victims, these tools can prove to be essential, as they may not have employment authorization nor access to public benefits. Creative strategies and remedies in child support and spousal support proceedings can further assist immigrant victims and their children in building a new life free from abuse.

²¹⁷ *In re Naturalization of Halas*, 274 F. Supp. 604 (E.D. Pa. 1967). See also *Matter of Dobric*, 189 F. Supp. 638 (D. Minn. 1960); *in re Petition for Naturalization of Spak*, 164 F. Supp. 257 (E.D. Pa. 1958).

²¹⁸ *Torres-Guzman v. INS*, 804 F.2d 531, 533-34 (9th Cir. 1986) ("[i]n the absence of a congressionally imposed *per se* rule, a statutory discretion to determine the presence or absence of good moral character requires the fact finder to weigh and balance the favorable and unfavorable facts or factors, reasonably bearing on character, that are presented in evidence. To preclude consideration of favorable factors is to abuse discretion").

²¹⁹ See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657 659 (2000).

Suggested Immigrant Client Child Support Interview Questions

1. Does your client have children?
2. Does your client have or has your client ever had a child support order?
3. Is your client seeking a spousal support order?
4. What other types of financial relief are available in your jurisdiction (protective orders that allow attorney's fees, housing, utilities, medical and counseling bills)?
5. What are your jurisdiction's child support guidelines?
6. What is the abuser's income?
7. What amount of support would he legally be required to pay under your state child support guidelines?
8. What are your client's expenses per month?
9. Is the abuser able to pay?
10. Is your immigrant client eligible for any immigration relief under VAWA?
11. Will he claim that he is not able to pay, and what basis will he use for that claim (e.g. supporting other children, debt from an expensive car he purchased, quit his job, his immigration status or lack thereof)?
12. Who is the abuser's employer, and how is the abuser paid (check, cash, monthly, every other month)?
13. Does the statute in your state call nonsupport a willful failure to pay, and does it mandate a sentence of longer than one year?
14. If the abuser is self-employed, do you know approximately how much he earns a month? What aspects of his lifestyle can be used to show income? What are other businesses earning that are similar to the abuser's business?
15. If the abuser is a U.S. citizen or lawful permanent resident, did he ever file an Affidavit of Support on behalf of the immigrant victim?
16. Where are the assets of the abuser held? Are immediate injunctions necessary? Has he threatened or begun acting to take all of the parties' money out of the bank?
17. If a prior court order exists, where can copies of the order be obtained? Will there be jurisdictional issues in the current case? Are there payment problems, retroactive support issues or arrearage judgments that counsel should be aware of?
18. If the abuser has not paid his child support, how had this affected the child and the client?
19. Has the client suffered emotional distress from the abuser's failure to pay child support?
20. What kinds of difficulties has the client had because of the abuser's failure to pay child support?
 - Late fees for non-payment of rent, mortgage, credit card bills?
 - Telephone being disconnected, reconnection fees?
 - Electricity being turned off, difficulty having it turned on again?
 - Items that perished due to electricity being turned off?
 - Children not having necessary items that they needed for school?
 - Children not being able to participate in extracurricular activities?
 - Day care being cancelled for non-payment? Client not being able to continue working or loses employment due to lack of child care

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