

ADVOCACY IN CHILD SUPPORT CASES

You Know the Law
Now What?

OBJECTIVES

- PRELIMINARY MATTERS.
 - Type of case
 - Client Interview
 - Case file review
- INTERACTING WITH CASE WORKER.
 - How to make the most of your relationship.
- THE HEARING/MOTIONS
 - Preparation- Discovery? Subpoenas? Motions?
 - Embrace your Burden.

TYPICAL CASE TYPES

Civil Contempt

- Unable to comply during the period of non payment and/or underpayment & unable to comply now. (great case)
- Was able to comply; non-payment and/or under payment not willful & unable to comply now.
- Was able to comply at relevant time; no good excuse, but is unable to comply now. (still okay case for civil, but not criminal)

CLIENT INTERVIEW

Finances during non-payment

- Financial condition then and now
 - Job history
 - Demoted/Fired/Laid off/Quit (if yes, WHY?)
 - Medical conditions which impede employment.
 - Unexpected expenses. Often seen in self-employed clients.
 - Efforts to become employed/improve employment
 - Monthly Bills
 - Evictions
 - Assets
 - “Luxury items” (cable, cell phones, cigarettes etc.)

CLIENT INTERVIEW

You also want to know:

- Direct payments.
- Purchase of “goods” for the child in lieu of cash payment.
- Hospitalization
- Incarceration**
- Changes in primary custody**
- Did they misunderstand Court Order. Often seen where more than one child on Order and one child ages out.
 - 50-13.10 (d)

**change in *primary* custody, implied, express or by Court Order and Incarceration are grounds for a credit against arrears accumulated during that time: they do not vest.

CLIENT INTERVIEW

Establishment Issues

- Was your client there when the Establishment Order entered.
 - service issues?
- Does the worksheet and complaint the Order is based on accurately reflect the situation of the parties at the time?
 - Fraud issues?
 - Omission of custodial parent's income?
 - Incorrect worksheet used?

THE COURT FILE

What to Look For

- Look at the return of service .
- Is the Order Establishing Child Support more than 3 years old? If you run the current numbers would your client's obligation be 15% less than his current obligation?
- Prior History of Contempt? Who was the Judge?
- Is a Current Show Cause Order even in the File.
- Payment history-does it line up with your client's account of the case?

Discovery?

- Interrogatories
- Admissions
- Request for production of documents
 - Who do you serve?
 - See:
<http://www.sog.unc.edu/pubs/electronicversions/pdfs/flb22.pdf>

Discovery

- Subpoena custodial parent?
 - Custodial parent rarely there.
 - Do you need documents they have?
 - Balance between potential to help vs hurt ?

CASEWORKERS

- Be polite
 - Be knowledgeable (law)
 - Know your case (facts)
 - What do you do with an offer your client can't comply with? (***)ultimately this is your client's decision)
- **are they seeking contempt & purge that your client can't make OR a continuance to allow payments?

CASEWORKER

This is The Witness Against Your Client

- Treat the caseworker as a witness.
- Try to get favorable information from them.
 - Prior communication indicating inability to pay
 - Prior communication seeking advice on modification.
 - Prior communication indicating direct payment
 - Prior communication indicating change in custody
 - Prior communication regarding efforts to gain employment.
 - Prior communication any medical problems.

When to Settle?

- Generally: If your client could not pay then but can now
- Definitely: if you client could pay then and now.

The Hearing Burdens

- Civil Contempt:
 - When initiated by a Show Cause Order
 - Obligor has the burden of presenting evidence of inability to comply.
 - Unclear who bears ultimate burden proof (this is just my opinion -if John Saxon tells you otherwise, then forget what I have said)
 - Standard of Proof? Appears to be preponderance of the evidence

The Hearing

- Embrace your Burden
 - Rare instance where you get to introduce your client to the Court prior to testimony about why he/she is awful.
 - Use this opportunity to the fullest.
 - Prepare your client for the types of questions they will be asked by you and opposing counsel.

Motions

Motion to Modify

- File as soon as possible as possible.
- If granted, the Court has the discretion to modify the obligation as of the date of filing.
- Always make this request in your motion.

MOTIONS

Motion To Modify

Substantial Change in Circumstance.

The following are sufficient:

- Substantial change rebuttable presumption where Order is more than 3 years old and new calculation results in 15% change in obligation.
- Substantial change in custodial arrangement.
- Involuntary change in income.
- Decrease in needs of the child.
- Aging out of one child where support order is for multiple children.

Motions

Motions to Modify

The following, alone, are not sufficient:

- Voluntary decrease in income.
- Birth of additional children.
- Substantial increase in custodial parents income.

Things that make you go hmMMM.

- Client comes to court for first appearance.
- You are assigned and you read the file and see the following motion and Order.
- “ Defendant has requested counsel”.
- “The case is continued to 5/13/09”, and
- “The defendant voluntarily agrees to pay a purge payment in the amount of 300.00 today and 200.00 by 5/1/09”.
- No finding of Contempt is made.

USING RULE 60 B

Paternity

- Goal
 - Set aside an acknowledgement/adjudication of paternity.
 - Order DNA test because now paternity is back in issue. (**N.C. Gen. Stat. § 8-50.1(b1)**)

USING RULE 60 B

Paternity

- Most often filed under:
 - 60 b (1)
 - Mistake, inadvertence, surprise, excusable neglect.
 - 60 b (2) New evidence.
 - Client had DNA test and discovers he isn't the father.
 - 60 b (3) Fraud
 - Mother tells client he is not the father.
- **1 year time limit runs from entry of Order establishing paternity , not from putative father signing acknowledgement.

USING RULE 60 B

Service Issues

- The defenses/objections of lack of personal jurisdiction and insufficiency of service of process are covered under Rule 12. Per Rule 12 they are to be asserted by motion prior to a responsive pleading, or in a responsive pleading to the complaint.
- Obviously, if your client was not served, or not served properly they would not necessarily know to respond. 60 b (4) is your answer—the Order is void.

USING RULE 60 B (4)

Service Issues

- 60 b (4)- Order is void. No time limit

Use when there is a personal jurisdiction issue or insufficiency of service of process and the time to assert the defense under Rule 12 has passed. (See Rule 4 for service rules.)

***If your client was not present when the order was entered investigate service issues.

USING RULE 60 B Service Issues

- If return of service indicates service correctly made there is a presumption of valid service. You will need more than your client's affidavit that he did not live there. **293 N.C. 67**
- If return of service is not valid on its face you are in good shape.

Using Rule 60 B

- Other possibilities?
 - Fraud concerning income?
 - Fraud concerning extraordinary expenses?
 - Mistake-wrong worksheet used?