The Practitioner Family Law

Runaway Statute

Assessing the Child Support Enforcement Act

By Kathryn Ballentine Shepherd

The Child Support Recovery Act of 1992, 18 U.S.C. Section 228, was designed to improve child-support collection and reduce welfare expenditures by correcting one state's inability to prosecute for the violation of another state's order. The CSRA is particularly controversial in making it a federal crime to willfully fail to support a child living in another state if the obligation is over $5,000 or has been unpaid for more than one year.

With increasing mobility, the rise in single-parent families and conflicting and ineffectual interstate enforcement, a limitless child-support burden has been shifted to the U.S. taxpayer.

In 1935, Aid to Families With Dependent Children was established to assist the children of deceased or disabled parents or children abandoned by a parent. By 1985, however, estimates showed that 90 percent of the AFDC recipients had a noncustodial, nonsupporting parent residing outside the home. Recent estimates predict that there are 7 million "deadbeat" parents. About one-third of these cases involve a parent who no longer resides in the same state as the child. In 1992, $27 billion went uncollected, $10 billion more than the year before. Jannelle T. Calhoun, "Interstate Child Support Enforcement System: Juggernaut of Bureaucracy," 46 Mercer L. Rev. 921, 924 (1995).

Different states issue different support orders for the same child. The Uniform Reciprocal Enforcement of Support Act (URESA) lacks a long-arm statute. Legislative fixes have been attempted with increasing frequency. Title IV-D, the 1985 Child Support Enforcement Act, 42 U.S.C. Sections 651-87, was designed to *locate absent parents and secure support*, but was paralyzed by underfunding and staggering caseloads.

The 1992 Uniform Interstate Family Support Act overhauled the URESA and providing the long-arm statute and a one-time, one-order rule eliminating the problem on inconsistent state support orders for the same child. However, that uniform law has been adopted by only 12 states and California is not among them.

The legislative findings supporting the CSRA's enactment recognized an urgent problem. The drafters noted the difficulties states have in enforcing support obligations across state lines, the increasing poverty of children and the necessary massive expenditures by government to support single parent families. The findings noted that the failure to pay child support affected interstate commerce. The CSRA passed overwhelmingly and was signed into law by President George Bush.

Three years later, the U.S. Supreme Court handed down a 5-4 decision in *U.S. v. Lopez*, 115 S.Ct. 1642 (1995). The case has direct ramifications for interstate child-support enforcement.

The federal criminalization of child-support recovery is being challenged on two primary grounds: It extends Congress' power contrary to *Lopez*, and it invades the state's province in domestic-relations law.

In *Lopez*, Chief Justice William H. Rehnquist, writing for the majority, struck down the Gun-Free School Zone Act, which prohibited possession of a gun within 1,000 feet of a school, as exceeding congressional power under the Commerce Clause. It was the first such decision in nearly 60 years.

The government had argued that Congress was within its powers because the costs of crime increased insurance rates and also decreased travel to the crime-affected area. The government further argued that national productivity was affected since possession of guns near a school inhibited the learning process. The majority was unimpressed. Following the government's argument, it said, would allow limitless regulations by Congress, clearly an unconstitutional precept.

The payment of child support across state lines is more of a commercial activity than possession of a gun is.

Chief Justice Rehnquist reiterated his concept of federalism and announced a three pronged test as to what Congress may regulate:

- The use of the channels of intestate commerce.
- The instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities.
- Those activities bearing a substantial relation to interstate commerce. (To reconcile this third prong with a history of earlier expansive decisions, the court confirmed that the test is whether the regulated activity "substantially affects" interstate commerce.)

The court also invalidated the GFSZA for failure to include a jurisdictional limitation and for its lack of a congressional finding linking the activity to interstate commerce.

Since *Lopez*, district courts have split on the constitutionality of the CSRA, but are increasingly upholding it as a valid exercise of congressional power. Five courts have held it invalid by espousing a heightened scrutiny test.

In August, the 2nd U.S. Circuit Court of Appeals overturned the Connecticut District Court in *U.S. v. Sage*, 92 F.3d 101 (1996). In September, the 9th Circuit reversed an Arizona district court's decision in *U.S. v. Mussari*, 95 F.3d 787 (1996). Both courts found the CSRA valid.

The pivotal issues for courts finding the CSRA invalid have been the following:

- The criminal statute bears no relation to commerce.
- The connection between interstate commerce and the parent and child living in different states is inadequate in that it fails to differentiate between situations where the custodial parent moves interstate.
- The effect of parental nonsupport on federal expenditures in inadequate. Courts have found that various civil remedies are available for enforcing child-support orders.
- There is no specific legislative history supporting the argument that the CSRA was aimed at interstate commerce.
- States have exclusive jurisdiction over domestic relations.

Those courts that have upheld the CSRA have found support in earlier Commerce clause cases such as *Wickard v. Filburn*, 317 U.S. 111 (1942), and *U.S. v. Heart of Atlanta Motel*, 379 U.S. 241 (1964). *Wickard* involved a small individual wheat farmer who refused to comply with federal law to reduce his harvests. In upholding congressional regulation, the *Wickard* court relied upon a Kantian analysis that although one small wheat farmer had no impact on interstate commerce, if all other wheat farmers took the same action, it would have an "aggregate impact" on intestate commerce.

In overturning *Mussari*, the 9th Circuit held that the CSRA meets the *Lopez* standard, since a child-support obligation for a child living in a different state is satisfied by payment moving throughout interstate commerce. The 9th Circuit rejected the argument that enforcement is best left to state courts and noted that the states are gravely impaired in the pursuit of these delinquent debts.

It appears that ultimately the CSRA will be held constitutional. Three elements distinguish it from *Lopez* and make its constitutionality likely:

- The CSRA has the jurisdictional limitation requiring an interstate transaction.
- The CSRA has congressional findings on the impact of the difficulties experienced by states in enforcing interstate obligations on interstate commerce.
- The payment of child support across state lines is more of a "commercial activity" than possession of a gun is.

Can federal courts then expect a deluge of domestic relations cases? That is unlikely. Those cases that reach federal court are subject to the abstention doctrine, which will return to state court those cases in which defenses as to the validity of an order modification, etc. are raised.

In any case, it is unlikely that many CSRA cases will reach federal court at all. The act is admittedly designed to complement the Child Support Enforcement Act, and is only to be used when all other civil and criminal procedures have failed.

Also, the CSRA may be characterized as a "cherry-picking" statute. Attorney General Janet Reno explained in a Department of Justice alert that the CSRA is designed "to select the most egregious cases."

In 1995, the Department of Justice was confronted with criticism for lax enforcement. At that time, Reno said, 200 CSRA cases were under active review and it was hoped that 200 cases per year would be prosecuted. The agency confirmed that Congress had not appropriated even a small amount of the funds needed to prosecute the millions of deadbeat parent who owe billions of dollars. Moreover, the agency complained it was overwhelmed by the need for manuals and training.

The Department of Justice has announced that in nine of 10 cases, it will refer the complainant back to the state for enforcement. It has placed a single staff member in each U.S. Attorney's office to assist complainants in working with state enforcement agencies. Where that fails, the department will issue timed letters to the obligor followed by FBI involvement and the issuance of a warrant.

If Justice takes on only 200 cases per year, approximately three per jurisdiction, the states will carry the burden of enforcing the balance with the promise of assistance from the department if necessary.

Kathryn Ballentine Shepherd, a certified family law specialist in Larkspur, is author of "The California Family Law Trial Preparation Handbook" (1994) and "The Family Law Manual" (1993).