

# Missouri Association of Prosecuting Attorneys

## Child Support Best Practices Subcommittee (Enforcing Payment from Bond and other Assets)

(Approved March 2015)

Note: A best practices recommendation of the Missouri Association of Prosecuting Attorneys is the product of careful consideration by experienced prosecuting attorneys. However, it is only a recommendation. A best practices recommendation may or may not be feasible in every case or in every county. There may be other methods in local jurisdictions to reach the same or similar objectives

**RECOMMENDATION #1:** In all criminal IV-D non-support cases, when a warrant will be issued, request a cash only/defendant only bond to secure the defendant's appearance.

*Commentary:*

- *“IV-D” is used to reference the federal Social Security Act of 1934, Title IV, Part D, which encompasses the enabling statutes for the federal child support program that created these cases and this area of the law. These cases may be currently receiving state welfare benefits, formerly receiving state welfare benefits, or never have received state welfare benefits.*
- *Although not necessarily the sole goal in prosecuting nonsupport cases, efforts to collect child support through mutually agreeable means should be a concerted effort. Many cases arise because nonpayment of child support has been ongoing for a long period of time. Utilizing a cash bond on nonsupport cases may create an immediate opportunity for victim families to recover some financial loss created by the offender. The use of cash only/defendant only bonds is an effective tool to obtain money on child support cases while insuring a defendant's appearance on a criminal case.*
- *A defendant only bond is a bond that deemed to be paid by the defendant. Each Prosecuting Attorney's office needs to review the bond forms in its jurisdiction(s) to understand the language used and the notice given to the payor of the bond regarding the ownership of the bond. Make sure that your bond form says something like: “When posting a cash bond, any money deposited will be considered by the Court as belonging to the defendant.” Also, make sure there is language akin to: Be advised fines, court costs, restitution, and various other fees will be deducted from the cash bond before any money will be refunded to the defendant. I have read and understand the front and back of this form.” In the event your jurisdiction's bond forms do not include this language, consider with your elected Prosecutor to approach the Presiding Judge and/or the Court en banc to request a local rule that would add that language found in case law to the bond form to protect the State's ability to intercept cash bonds for legitimate purposes. See discussion about the second part of the language italicized above in Recommendation #3.*

- *This recommendation was intentionally worded above “when a warrant will be issued” to reflect the differences between jurisdictions for issuing a summons or a warrant concurrent with filing the felony/misdemeanor charge(s).*
- *Request that the judge set the amount of bond equal to that of the defendant’s arrears on the underlying order. This sends a message and can be used as a quick reference tool when the assistant prosecutor is without the file and needs to know the approximate amount owed. CAVEAT: In some jurisdictions, any case where the defendant posts a significant cash bond may prevent the appointment of a public defender.*
- *Request the Court to add a term and condition of any bond granted, that the defendant is required to make a child support payment each and every month to the Family Support Payment Center (statutorily required disbursement unit) in the underlying case while the criminal action is pending.*
  - *This ensures that some payment of child support is made while the case remains pending, preventing the defendant from being in violation of the law while awaiting disposition.*
  - *This shows the Court that the defendant will make a good faith attempt to comply with the laws of our State and not incur a new nonsupport charge.*
  - *You do not have to dictate a specific amount to be paid each month, just that a payment must post in the calendar month.*
  - *TIP: this provides the opportunity for your office to get payments made earlier in the process instead of waiting the several months it takes to get to plea/trial before the defendant feels the pressure to pay.*
- *See State v. Jackson, 384 S.W.3d 208 (Mo. banc 2012) imposing cash-only bail does not violate Article I, Section 20 of the Missouri Constitution.*

**RECOMMENDATION #2:** In all criminal non-support cases where a cash bond has been posted, take every available remedy to apply that cash bond to existing child support obligations in that case.

Commentary:

- *In seeking to apply a cash bond to an existing child support obligation, the three most effective options are:*
  - *1) an administrative lien under RSMo 454.505 using the MO Family Support Division Form, CS 702;*
  - *2) a court Order; or*
  - *3) a judicial assignment agreement. See the OSCA Form (04-10) CR40 (BOND) attached.*

- *It is arguable that a properly filed child support lien, for example the Family Support Division (FSD) Form CS 702, takes precedence over most other legal process, and a **filed** lien is required to establish priority. However, FSD has not challenged orders of the Court that have paid attorney's fees on the immediate case before paying the child support. Merely moving at the bench for an Order for the bond to be paid to the Family Support Payment Center on this MACSS case number (Missouri Automated Child Support System—statutorily required automated system used for FSD cases) most likely will not supersede a lien previously filed by defense counsel for attorney's fees or by any other creditor.*
- *Most bonds are not paid over or released until disposition, but you need to understand your jurisdiction's practice. File the lien or other bond payment documents as soon as possible after it has posted.*
- *Steps to file a child support lien:*
  1. *Have the referring FSD specialist file a FSD Form CS-702 lien in the criminal case (you may have to give them the criminal case number.) Check to make sure the lien is filed in correct case. With counties already using OSCA's e-filing, an "e-notice" of the filing will be sent to the attorney of record (State and the Defense.)*
  2. *When you contact/email the referring FSD child support specialist requesting that FSD sends a CS 702 lien form to the circuit clerk's office (CCO) for filing, request a copy of the lien for you and set a reminder to follow up on its filing. If time is of the essence and the CS 702 form has not been yet filed, you may want to either 1) e-file a copy of the CS-702 lien or 2) present the paper copy of the CS-702 to the CCO for filing if you cannot wait for FSD to mail another copy of it to the CCO.*

**RECOMMENDATION #3:** Meet with local Judges and/or the Circuit Clerk's office to devise a plan to ensure a defendant's cash bond is ultimately paid to the defendant's underlying child support obligation in the criminal case.

Commentary:

- *Judges have varying philosophies in carrying out the law as written. Prosecutors should meet with their local judiciary to determine a cooperative effort to collect child support on behalf of IV-D families that meets everyone's expectations and needs. The assignment of bonds at disposition is typically secured only for the victim pending in front of the court for that particular case.*
- **NOTE:** *There is a risk that administrative liens issued by the Family Support Division (FSD) to secure payment for IV-D child support can create an automatic payment distribution to multiple IV-D child support cases with an arrearage.*
  - *If the defendant has multiple cases with current child support due, it is possible that the circuit clerk's office (CCO) will send the bond money for this single case to the Family Support Payment Center (FSPC), without sufficient documentation or explanation, where it will then be split and disbursed on multiple cases.*

- *Also, because now there is an enforcement remedy available, FSD could also send multiple liens representing multiple cases for the single bond amount in your case.*
- *Verify that the lien documents state and instruct how you want the bond paid.*
- *Do not guarantee the entire bond payment amount to the custodial parent (CP). Explain the process and help manage the CP's expectations.*
- *TIP: make sure the CCO puts only the MACSS (Missouri Automated Child Support System) case number(s) to which you want the bond payment made. Also make sure that the CCO indicates that this is a payment made by the defendant. (The CCO is not an employer.) Advise the CP that the distribution rules may apply to the payment and to wait until s/he has confirmation of the child support bank card account activity before planning to spend the money.*
- *Educate/work with the circuit clerk's office to ensure the cash bond is sent to the FSPC when the bond is discharged. The CCO needs to have a mechanism in place to know that there is a lien in the file and that the appropriate IV-D MACSS number must be put on the payment to the FSPC.*
  - *One way of handling this is to have the Judge make a docket entry with language to this effect: "bond is discharged and made payable to the FSPC in MACSS # XXXXXXXX pursuant to the child support lien filed in the case."*
  - *The concern here is that the entire bond is paid to the correct case and not split pursuant to the distribution rules for all of the defendant's IV-D cases in MACSS.*
- *See Perry v. Aversman, 168 S.W.3d 541 (Mo.App. W.D. 2005) local rule that allowed the Circuit Clerk to retain any or all of the bond posted to pay court costs, fines and fees was not void, but was unenforceable since no notice was given to the defendant or payor of the bond on the bond form that those monies could be deducted from the bond; to be enforceable," the clerk of the circuit court must outline in the receipt given to the depositor that delineated unpaid costs, fines, and expenses may be deducted before a refund will be made."*
- *See Holleran v. Holleran, 998 S.W.2d 99 (Mo.App. E.D. 1999) "There is a limitation on the principle that the money deposited in cash bail is deemed to be the property of the defendant and that it is deemed to be defendant's property only for the purpose of the deposit. Once the defendant has appeared at all times required by law and the criminal action has been terminated, then the depositor of cash bail has a superior right to the return of the cash. ...Thus, even though the rule states that the money posted as a cash bond is presumed to be the property of the defendant, our Supreme Court recognized that once the terms of the bond are fully accomplished the depositor of cash bond has a superior right to the return of the money."*

**RECOMMENDATION #4:** In all criminal IV-D non-support cases and any other criminal case of a non-custodial parent, use a lien under R.S.Mo. 454.505 /FSD form CS 702 to secure any other cash assets owed to the non-custodial parent defendant that is held by a third party.

Commentary:

- *There are several types of cases in which cash bonds are utilized to secure appearance and where money may not be an element of the crime, like drug cases. In those cases, a substantial cash amount may be seized from a defendant who owes child support. Those monies can be seized through the FSD form CS 702 and assigned to a past due support obligation. This remedy allows for all assets of a defendant to be considered for IV-D collection.*
- *Other assets found in criminal cases to secure by the FSD CS 702 form include:*
  - *inmate jail accounts,*
  - *drug forfeiture charges where money is not forfeited,*
  - *money seized by law enforcement from the payor that law enforcement holds but cannot or is not pursuing forfeiture,*
  - *restitution money owed to the defendant where s/he is a victim in another criminal case that prosecutor is collecting.*
- *A lien can seize the entire amount of money owed to payor. FSD's policy will only place a lien one time per creditor (creditor=person/business).*
- *In order to facilitate knowledge about the IV-D defendant's other criminal cases, develop a process for your office to communicate with other prosecutor staff in your county/region about cases where you have a IV-D defendant in common.*
  - *Have IV-D staff to be advised of when money is seized.*
  - *Check all jail census documents for non-custodial parents, whatever the charge.*
  - *Check your county's Karpel system for your non-custodial parents as defendants or victims.*