Administrative and Judicial Process in Child Support Cases

by Dan Pingelton

The dual system of family courts in the judicial branch and administrative hearing agencies in the executive branch is found in almost half of the states. An additional thirteen states that do not use administrative process nonetheless employ non-judicial hearing officers to adjudicate child support matters.

Judicial-branch family court begins with a docket call. Executive-branch administrative hearings often begin with a phone call. The domestic docket is reached in the courthouse after a brisk walk, parking or a cab ride, ending at the security checkpoint. Administrative hearings often allow counsel to sit at her desk on a rainy Monday morning, sipping an espresso while cross-examining over the telephone. The rules of evidence are relaxed, along with the dress code.

"But I know my judges! These so-called hearing officers are just hired guns!" No, they're not. And like them or not, in those states featuring both judicial and administrative process in family law cases, an effective lawyer will understand the interplay and choices involved in both systems.

The need for speed

Because every state has chosen to receive federal money for child welfare programs such as TANF (Temporary Aid to Needy Families), every state is required to expedite child support cases. A state can hurry things up through its existing court system; or it can adopt an administrative process to speed along child support determinations. The nation's child support program is driven by the IV-D agencies. The term "IV-D" refers to Title IV-D of the Social Security Act, administered by the Department of Health and Human Services, Office of Child Support Enforcement (OCSE). Each state is required to have a separate organizational unit to administer the IV-D program, and these units often staff and train administrative hearing officers.

Child support orders are generally addressed in three circumstances: Establishment, enforcement, and modification. The choice (if there is one) between using a court or an administrative agency is often dependent on which circumstance confronts counsel.

Establishment

The classic child support establishment case is, of course, a divorce. A child support order was contained in a dissolution decree and the newly divorced couple went on their way to hopefully co-parent a healthy child. Of course it didn't work out like that often enough, and after enough money was spent supporting other peoples' children, the IV-D program pushed states to establish support orders independent of whether a divorce was filed, or whether the parents were married. Today, *half* of all new mothers under 30 are unmarried. So while divorce percentages may level off, establishment orders will increase in the years ahead.

Involved parent: Counsel representing an involved parent will prefer a judicial action for either a divorce or a parentage proceeding. Everyone will benefit from a detailed parenting plan — and that is something that most administrative agencies are incapable of dealing with. Therefore, if an involved parent is served with administrative process, counsel should file in court and seek to transfer all proceedings there. A well-functioning IV-D agency will resist delaying the establishment of a support order while a companion court case drags on, so counsel may want to proactively initiate a temporary custody and support proceeding in court. Many courts will stay companion IV-D agency proceedings provided a support order is in place.

Notably, some locales have benefitted from IV-D agencies partnering with various entities (colleges & universities; not-for-profit groups; bar associations) to provide counseling and mediation services that encourage parents to agree upon a parenting schedule commensurate with a new support order. Judges and hearing officers alike can stress the merits of a mediated schedule to the parties before them. A key factor to initial success is establishing both the support order and the schedule in the same proceeding. Unfortunately, these programs are far too few.

Uninvolved obligor: The client will bring into the office either a summons from the courthouse, or an administrative notice, and counsel's choice of forum will have initially been made for him. If the client is uninterested in having a relationship with the child, the administrative proceeding is preferred. It is quicker, cheaper, and hearing officers are accustomed to people not desiring to take an active role in their child's life. Some judges, on the other hand, may not look kindly upon these obligors.

Enforcement

Administrative agencies are particularly adept at adjudicating enforcement cases. This is especially true because centralized collection records are required in every state. Equitable defenses for the non-payment of child support have dried up in many states.

The vast majority of administrative enforcement actions are quick affairs, with confirmation of a certain arrearage triggering various remedies such as a lien, tax refund intercept, or wage withholding. Private counsel do not participate in most of these hearings.

Obligor: Counsel representing the obligor will want to confirm that the payment records are correct. They usually are, but with cases involving older children and a long history, some states generated errors during data conversion processes. It is a rare occurrence, but the records are not always correct (even though many state statutes create a presumption that they are).

With enforcement cases, obligors may be further categorized as follows:

Deadbeats: Keep these guys out of court. Try to negotiate a payment plan. IV-D agencies exist because of deadbeats, and they are accustomed to working large amounts of case files by negotiating repayment. Have your boy pay something quickly, lest he trigger more serious efforts, such as a criminal non-support case.

Good-faith debtors: Some have fallen on hard times. Others have legitimate defenses, such as abatement claims during periods of unplanned custody transfers. These folks may fare better in court, depending on your judge. Although many believe an abatement claim is better suited for a judge, some administrative hearing officers are well-equipped to handle this issue. Because enforcement efforts have often damaged a debtor's financial capacity, the often less-expensive administrative hearing may be advisable here.

Obligee: If a contempt action will lie, the courtroom is of course preferable. Yet private counsel will often recognize that the remedy of contempt seldom visits the obligor of means. (Although it can be a lot of fun when it does.) It is often preferable to let the IV-D agency do its enforcement work in its forum of choice, quietly participating in an administrative hearing, to see what if anything the obligor has to reveal. Administrative determinations of debt eventually become enforceable through classic judicial remedies familiar to private counsel, such as garnishments and levy and execution. Quite a bit of information can be gleaned at ease during an administrative proceeding. At the end of it all, counsel may use it as she pleases.

Modification

In some states, the IV-D agency will use administrative process to modify a court order. To not offend the separation of powers, this is usually done with the original court

passing upon the merits of the proposed modification once it comes out of the end of the administrative pipeline. The notion was originally offensive to some lawyers accustomed to having none but their own judge modify their own court order. Years into the process, though, things have calmed down. Judges have been relieved of the significant burden of periodically reviewing support orders (mandated by the feds). The IV-D agency now does that, and initiates modification for cases that qualify, using either the administrative process or the expedited judicial process. In the end, if a particular case demands a particular court touch a particular child support order without the permanent taint of the administrative process, every state's constitutional scheme allows that. The rest of the tainted modifications seem to fare as well, also.

Initiating Party: Counsel representing a party who desires a modification will usually want to file in court. Counsel is better able to control the process. The court will be able to address nuances with which the agency may not be as adept. This is especially true with issues involving custody, and specialized types of support — college students or disabled children.

A party of limited means who would otherwise qualify for *pro bono* judicial modification services can be referred to the IV-D agency for a modification, thus freeing up counsel for another *pro bono* case.

Defending Party: Perhaps the most naturally antagonistic posture is defending the parent who fought for a fair support order from the judge only to have it challenged a few years later in some strange administrative action by some hearing officer fresh out of law school. In truth, this is rarely the case, but the potential for problems welcomes criticism of what are called "admin mods."

Potential problems with admin mods include these:

Parenting time: Child support is increasingly tied to parenting schedules. In many states, obligors can obtain financial credit for significant time spent with a child. Dealing with existing parenting schedules should not pose a problem for administrative agencies, unless there is proof that a parent is not exercising the anticipated time. In that event, a hearing officer may tread into problematic custody matters best suited for a judge. Even more troublesome are informal arrangements between the parents that have existed for a time prior to a modification. Should the hearing officer consider the arrangement without a formal parenting schedule when setting support? What factors should the hearing officer consider, such as the history and specificity of the agreement? If an informal

agreement envisions significant parenting time but lacks other features statutorily required of a parenting plan, how should an administrative hearing officer treat it?

If significant parenting time issues are intertwined with a support obligation, counsel should try to have the matter heard in court unless the administrative hearing process in counsel's jurisdiction is particularly adept at dealing with these issues. Without an allied enterprise, such as formal mediation, this poses a tall challenge.

Imputation: Where imputation of income is appropriate, counsel will need to be especially cautious, as some hearing officers are not well-trained in the process. Cases with high-income self-employed parties generating copious financial documentary evidence can present a problem for some hearing officers.

Domestic violence: This can always derail an administrative process, because IV-D personnel may simply back away when a "DV" label appears in a case. Courts are better equipped to deal with these types of cases, including related orders of protection, either separately or within the support order itself.

Previous rebuttals: If a court's prior support order was based on a rebuttal of a presumed support amount, counsel will need to insure that the agency understands and respects that rebuttal when addressing a subsequent modification. (Many statutes and rules specifically address this concern.) The issue arises most often when the parties negotiated a combined financial package in resolving the original case — maintenance, support, debt allocation, property division. Is the modification an attempt to take advantage of a uniquely tailored financial package? Or is the modification a legitimate request to fix an inappropriate support amount based on uniquely changed circumstances since that original deal was struck? A court is usually best suited to this task.

Procedural notes for administrative process

APA form. Agencies follow state statutes similar to the Administrative Procedure Act.

Notice. Many administrative hearings are commenced with service by certified mail. Do not mistake the deadline dates as flexible. Many agencies will forgive a missed deadline. Many are not required to; and some will not. Missed deadlines can often be remedied in a subsequent court proceeding, but not without embarrassment, expense and more work. And, in a very few unfortunate incidents, a missed administrative deadline can be as damaging as a missed pleading deadline.

Exhaustion. Most states require parties to exhaust applicable administrative remedies before seeking relief in court. This cannot be met by simply requesting an administrative hearing and then not showing up. A party must actively participate and advocate. (In cases where an agency has initiated a modification of a judicial order, the review process is often different than a classical APA-style judicial review. This is grounded in consideration of the separation of powers.)

Hearing packets. Many agencies will mail documents for the hearing weeks in advance. Easy discovery, sometimes without even asking for it.

Evidence. Administrative agencies use "relaxed" rules of evidence. But they relax rules without real risk of harm, such as the unfettered use of copies. Most hearing officers will disallow egregious hearsay, but may allow less onerous hearsay. Many hearing officers will allow documentary evidence to be submitted following a hearing. If in doubt, ask. Most administrative decisions are based on "competent and substantial evidence upon the whole record."

Findings and conclusions. Almost all administrative agencies will render findings of fact and conclusions of law whether requested or not. You thus have a template should you need to appeal an erroneous decision.

Courtesy. Afford hearing officers the same courtesy as you do judges. Like most judges, most hearing officers deserve it. They are not trying to make a quota beyond finishing cases in a timely fashion. They are not hired guns for the IV-D agency or a party. They are trying to apply the law to the case before them to reach a legally correct result. Like judges, most of them truly care about the quality of their work product.

Private contractors. In some locations, counsel may learn that a hearing officer is employed by a private company under contract with the state IV-D agency. Many long-time IV-D attorneys view these contracts for quasi-judicial hearing officers as inherently suspect. The individual hearing officers may be fine folks drawn from the ranks of previous government employees. But they now answer to a for-profit company. Privatization has been highly successful in a number of endeavors throughout the IV-D program, but its place in the hearing process is suspect. Counsel may wish to register an objection on the record if she finds an employee of a multi-national corporation is adjudicating her case. Judges are certain to share this dim view as well.