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Stacy Brustin
The Catholic University of America, Columbus School of Law

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More Than a Witness: The Role of Custodial Parents in the IV-D Child Support Process

by Stacy Brustin*

I. Introduction

The current system for collecting and enforcing child support through state IV-D agencies' threatens the rights of parents who have custody or caretaking responsibility for children entitled to support. In many states, custodial parents who avail themselves of government child support services, or who are required to assign their right to collect child support to the state as a condition of receiving public assistance, unknowingly relinquish their authority to determine what is in their child's best interests. State agencies initiate child support cases, advocate for financial and medical support in administrative and judicial proceedings, and make decisions that affect the physical and economic well-being of children. Yet, the agency and its attorneys do not represent the custodial parent or the individual child entitled to support; rather, they represent the state and its interests. The legal status of the custodial parent in these government child support cases is often unclear and the due process protections afforded to them vary. Rather than deeming custodial parents as parties to these cases, federal and state laws are frequently silent or ambiguous on the question of party status. This ambiguity paves the way for government attorneys, courts, and administrative tribunals to treat custodial parents as little more than witnesses in cases that fundamentally affect the well-being of their children.

Government-initiated child support cases typically involve parents whose parental rights are intact and have not been terminated. The custodial parents (one or both) retain the right to make fundamental decisions regarding the rearing of their children; yet, for financial reasons, they are required to either assign their right to collect support to the government or turn to the government to assist them in collecting support because they cannot afford a private attorney. The decision to turn to the government for public benefits or to seek government assistance in bringing a child support action is one that low-income custodial parents pursue in order to enable their families to subsist.

Parents often do not understand the role of IV-D child support agencies. States uniformly take the position that the child support agency and government attorneys working on IV-D cases represent the interest of the state and not the interest of either parent or any individual child. A host of state statutes, administrative regulations, and agency policies specify that no attorney-client relationship exists between the attorneys employed or contracted by state child support agencies and the parents utilizing IV-D services. Courts have upheld these representation statutes and several state ethics boards have determined that the statutes and rules comport with ethical standards governing lawyers.

While the role of the state child support agency in IV-D cases is clear, there is far less clarity as to the role that custodial parents play in these cases. If the IV-D agency represents the interests of the state, then who represents the interests of the individual child at issue? Is the custodial parent a party to the case or merely a potential witness for the state's case? Does she have a right to receive notice of and participate in administrative or judicial proceedings concerning her child? Does she have a right to seek review of decisions in IV-D cases concerning paternity, child support, or medical support? Does a custodial parent's status or right to due process change depending upon whether she has assigned her rights to collect support to the state or voluntarily requested IV-D child support services?

Child support statutes, court rules, and child support agency websites in twenty jurisdictions were reviewed for this article in an effort to answer these questions. This review revealed differences among jurisdictions in several areas including: (i) under what circumstances custodial parents must assign their child support rights to the state and how the state defines such an assignment; (ii) whether custodial parents are considered parties to the IV-D support action; (iii) the due process rights afforded to custodial parents; (iv) the degree of involvement custodial parents are entitled to have in mediation and judicial/administrative adjudication of IV-D cases; and (v) the thoroughness and clarity of information provided to parents concerning the relationship between the state child support agency and the custodial parent.

The need for custodial parents to have a voice in administrative and judicial proceedings involving support for their children is critical because the interests of the state child support agency and the parent frequently diverge in fundamental ways. While state agencies have an interest in ensuring that children in each state are supported by their parents, the state is particularly focused on collecting child support to (i) reimburse the government for funds expended on public assistance and (ii) prevent families not currently receiving public assistance from having to seek it in the future. These agencies receive significant funding from the federal government. Agency performance is measured by federal standards that financially reward or penalize states based on criteria such as the number of

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child support orders established in a given year. These standards do not evaluate the quality of support orders issued. In contrast, parents have both liberty interests and pecuniary interests at stake in child support cases. Parents seek to collect an appropriate amount of child support for their family, obtain health care coverage that is appropriate for the needs of their particular children, maintain familial relationships, and protect themselves and their children from harm. Without according custodial parents party status and providing them with a meaningful opportunity to participate in the adjudication of IV-D cases, the needs and interests of children are not adequately represented.

This article argues that when state agencies, courts, or administrative tribunals treat custodial parents as witnesses rather than as interested and necessary parties to IV-D cases, the state impinges upon the due process rights of parents to rear their children and to act in a representational capacity on behalf of their children. Although it may not be appropriate for the state and its attorneys to enter into an attorney-client relationship with a parent seeking assistance in securing child support, it is equally inappropriate, and arguably unconstitutional, for the state to assume full authority to determine what is in the best interests of children whose parents retain the legal authority to make decisions concerning their well-being.

Part II of the article provides an overview of the federal and state child support enforcement process and analyzes the obligation of parents to assign their right to collect child support to state IV-D agencies. Part III explores the relationship between IV-D agencies and custodial parents and identifies the conflicts that can arise between them. Part IV surveys state practices regarding the accordence of party status and due process protection to custodial parents in IV-D cases. It also evaluates the information state agencies provide to parents to educate them about these issues. Part V argues that custodial parents are indispensable parties who must be joined in IV-D actions. Finally, Part VI offers a series of recommendations for preserving the rights of parents to protect the interests of their children in IV-D cases.

II. Government Child Support Services

1. Responsibilities of IV-D Agencies

During the last thirty years, the federal government and the states have invested significant resources into child support collection. Lawmakers recognized that there were many children dependent upon public assistance who failed to receive the child support to which they were entitled and Congress determined that the government should be actively involved in establishing paternity and securing support. In 1975, Congress enacted the Child Support Enforcement Program, codified as Title IV-D of the Social Security Act (IV-D program). The initial goals of the IV-D program were to ensure that children in poverty received child support and to enable the government to use child support enforcement as a means for recouping monies spent through public assistance programs. The stated goals of the program have evolved and according to the National Child Support Enforcement Strategic Plan for 2005-2009, "child support is no longer primarily a welfare reimbursement, revenue-producing device for the Federal and State governments; it is a family-first program, intended to ensure families' self-sufficiency by making child support a more reliable source of income." Under Title IV-D, and as a condition of receiving federal welfare funds, states are required to develop and implement a state plan for providing child support collection and enforcement services. Each IV-D agency is required to offer "services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations." States have enacted statutes or rules of procedure authorizing state IV-D agencies, including attorneys employed or contracted by the state, to bring legal actions to establish paternity and collect child support.

Title IV-D mandates that all individuals who currently receive welfare benefits on behalf of children or who have received welfare benefits in the past, assign their right to collect child support to the state. Each state must provide child support services to these families. The law also requires that IV-D agencies make their services available to parents who have never received public assistance. The objective of extending services to non-welfare families is to assist those families in securing child support and prevent them from needing public assistance in the future.

Every state and the District of Columbia has a IV-D child support enforcement program. IV-D programs are typically housed in the state Human Services Department, Treasury Department, or Attorney General's Office. They handle more than fifteen million paternity/child support cases every year. About seventeen percent of these cases involve low-income single parents who receive public cash assistance such as Temporary Assistance for Needy Families (TANF). Approximately forty-seven percent of the caseload comprises of former recipients of public assistance, and non-public assistance cases comprise thirty-six percent of the caseload. The overwhelming majority of IV-D cases involve custodial parents or caretakers who are entitled to receive most or all of the support collected by the government. If child support services through IV-D...
agencies were unavailable to these individuals, few
would be able to find legal representation because of the
shortage of free or low-cost legal assistance programs.38

IV-D agencies and their attorneys only handle
issues concerning paternity, child support, and health
insurance coverage.39 They do not litigate issues
concerning custody, visitation, property division, or
divorce.40 IV-D agencies seek to establish, modify, or
enforce orders that determine: paternity, amount of
prospective and retroactive support owed, amount of
arrearage owed, method of payment of support, and
health insurance coverage for children.41

States use a judicial process, an administrative
process, or a combination of both to establish paternal
and enforce child support orders. In judicial process
states, courts adjudicate paternity and support actions.
Government lawyers typically represent the IV-D agency
in court proceedings.44 In states that use an
administrative process, IV-D agency staff or
administrative hearing officers determine support order
amounts and adjudicate uncontested and, in some
jurisdictions, contested cases.45 In these administrative
systems, the involvement of attorneys is generally
minimal.46 Some states use a combination of both
judicial and administrative processes.47

2. Assignment of Rights

Federal law requires that as a condition of receiving
federal funding for child support and public assistance
programs, states must mandate that benefits recipients
assign their right to collect child support to the state.48
Federal statutes and regulations are less explicit about
whether custodians who do not receive public assistance
must assign their rights even though any money
collected would be distributed to the recipient. The
language of several regulations suggests that such an
assignment is not required or anticipated.49

Pursuant to federal law, states have enacted statutes
and regulations requiring assignments in public
assistance cases.50 For example, in Florida, all recipients
of public assistance51 must assign to the IV-D agency
"any right, title, and interest to support the recipient may
be owed."52 In addition, "[t]he recipient of public
assistance appoints the department as her or his attorney
in fact to act in her or his name, place, and stead to
perform specific acts relating to the establishment of
paternity or the establishment, modification, or
enforcement of support obligations."53 The statute
requires that the IV-D agency "be subrogated to the right
of the dependent child or person having the care, custody,
and control of the child to prosecute or maintain
any support action or action to determine paternity or
execute any legal, equitable, or administrative remedy
existing under the laws of the state to obtain
reimbursement."54 Florida courts have clarified that once
a caretaker accepts public assistance, all authority to
proceed with child support remedies once available to
the custodial parent transfers to the child support
agency.55

In many states, once an individual stops receiving
public assistance, the assignment ends. In Colorado, for
example, so long as arrearage is owed for public
assistance previously paid to the family, the right to
collect remains assigned to the state.56 However, once an
individual stops receiving public assistance and all
arrearage is paid, the state no longer acts as assignee to
collect the support.57

Some states require that custodial parents in non-
public assistance cases assign their support rights as a
condition of receiving IV-D services.58 The custodial
parent and the children receive any child support
payments collected but the state serves as the
intermediary for collecting and enforcing the support
obligation.59 In Arkansas, for example, those receiving
public assistance as well as those who do not receive
benefits assign their rights to support to the state.60 In
Texas, courts have held that when a parent applies for
IV-D services, regardless of whether the applicant is
receiving public assistance or not, the applicant assigns
the right to establish and enforce child support and
medical support to the Attorney General.61

Regardless of whether or not the custodial parent is
required to assign their rights to support, the IV-D
agency and its attorneys are obligated to represent the
interests of the state, not the interests of the parent. This
limitation is particularly significant given the fact that
the parent's interests in a IV-D case often differ from
and sometimes conflict with the interests of the state.

III. The Relationship Between
IV-D Agencies and Custodial
Parents—Divergent Interests to
Protect

1. Who Does the IV-D Agency Represent?

Prior to 1988, the relationship between agency attorneys
and parents seeking assistance on child support cases
was ambiguous. Some IV-D agencies viewed themselves
as representing custodial parents.62 They took the
position that attorneys for the state child support agency
could enter into attorney-client relationships with
custodial parents on whose behalf they collected
support.63 Other agencies did not take a clear position as
to whether they represented the custodial parent.64
However, the parameters of the relationship between the
IV-D agency and custodial parents became the subject of

The Family Support Act required state IV-D agencies to develop procedures for reviewing and modifying child support orders at the request of either a custodial or a non-custodial parent.65 Agency attorneys feared that conflicts of interest would arise if the agency were initially to represent the custodial parent and then later assist the non-custodial parent in seeking a modification.66 Early ethics opinions were inconsistent and did not provide attorneys guidance regarding whether assistance to both parents put attorneys in the ethically impermissible position of representing two parties with adverse interests.67 Ultimately, the Federal Office of Child Support Enforcement (OCSE) took the position that IV-D attorneys represent the agency in administrative and judicial support proceedings.68 States began to change their representation policies to conform to the OCSE position, often codifying these policies in state statutes and regulations.69

At least forty-three states now have laws or policies clarifying that the IV-D agency does not represent either the custodial or non-custodial parent.70 These states take the position that because the state child support agency and its attorneys do not represent the custodial parent, the state is not required to maintain the same level of confidentiality as would an attorney representing the parent. In Oregon, for example, the child support agency is authorized to share information with other government agencies if such sharing will assist in an investigation, prosecution, or civil proceeding.71 Therefore, if the state agency receives information concerning TANF or Medicaid fraud, it may disclose such information. Massachusetts permits the IV-D agency to disclose personal data to any state or federal public assistance program if the information is necessary for the administration of such program.72 In Florida, statutes authorize the IV-D agency to report information concerning individuals receiving child support services to other government agencies or officials if the information concerns "known or suspected instances of physical or mental injury, child abuse, sexual abuse or exploitation, or negligent treatment or maltreatment of a child who is the subject of a support enforcement activity under circumstances which indicate that the child's health or welfare is threatened."73

Courts in several states have interpreted representation statutes and have upheld the position that IV-D agency attorneys represent the State, not the parents. The Supreme Court of Arkansas, for example, determined that the Arkansas representation statute is unambiguous in its intent to negate any attorney/client relationship between the OCSE attorney and the custodial or non-custodial parent.74 The court found that once the custodian assigns the right to collect support, the obligation is owed to the state.75 The state, according to the court, has a pecuniary interest in obtaining financial assistance for children and obviating the need for custodians to seek public assistance in the future.76 The court concluded that the state is the client and agency attorneys represent the state's interest and not the assignor's interest.77 Therefore, the court found that no conflict of interest arises when the state enforces a father's support rights against a mother and later enforces the mother's support rights against the father.78

State ethics panels have also addressed the representation question. Many have found it ethically permissible for the IV-D attorney to represent the agency rather than one of the parents.79 Some of these opinions suggest, however, that even if a statute expressly limits the role of the agency attorney, a government attorney cannot solely rely on the statute to determine whether an attorney/client relationship exists. In Kentucky, for example, the state legislature enacted a statute clarifying that IV-D agency attorneys represent the state and do not have an attorney-client relationship with applicants for IV-D services.80 However, the Kentucky Bar ethics panel cautioned that the courts, rather than the legislature, had the authority to regulate the legal profession, and the courts had not yet interpreted the Kentucky statute.81 Therefore, the ethics panel cautioned that an attorney could not rely on the statute to define the relationship and instead, an attorney must determine whether a reasonable person would understand that an attorney-client relationship existed between the applicant and the attorney.82 In order to reduce the likelihood of forming an attorney-client relationship, the board advised attorneys to fully discuss the attorney's role with the applicant, explain the ramifications regarding confidentiality and attorney-client privilege, and provide a written explanation of the issue to every applicant for IV-D services.83

In theory, the representation policy adopted by OCSE and implemented in many states offers a reasonable way for states to assist in collecting and enforcing child support while maintaining their obligation to protect public, rather than individual, interests. It seems awkward at best, and unethical at worst, to have attorneys who work for the state represent private individuals whose interests might diverge and conflict with those of the government. Yet, in practice, the boundaries between government child support attorneys or agency personnel and custodial parents are not as clearly drawn or understood. Furthermore, even if the representation boundaries are clear, questions remain as to the ability of unre presented custodial parents to protect their interests and the interests of their children in IV-D cases, particularly when these interests diverge from those of the government.
2. Child Support Agencies and Custodial Parents Have Divergent Interests to Protect in IV-D Cases

Custodial parents have the legal right to make childrearing decisions that they believe are in the best interests of their children and to act in a representative capacity on behalf of their children to protect these interests. For biological and adoptive parents, this right to rear children is a substantive due process right protected by the Fourteenth Amendment. As early as 1944, the Supreme Court stated that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” The Supreme Court has deemed parents’ rights to raise their children as “rights far more precious . . . than property rights.”

The Court has recognized the “fundamental liberty interest of natural parents in the care, custody, and management of their child.” This liberty interest “derives from blood relationship, state-law sanction, and basic human right.” Parents have a fundamental right to control the rearing of their children and the state can only interfere with this right when there is a compelling state interest, such as the need to protect the physical safety of children. Courts, for example, have found that parents have a right to make decisions about how to educate their children, whether through public schools, private schools, or home instruction. These constitutionally protected rights are often referred to as the rights of family integrity. Courts have recognized that childrearing and family life are part of a private sphere of familial association.

Several issues arise in the administrative or judicial processing of IV-D cases that implicate a parent’s right to rear children and act in a representative capacity to protect the children’s interests. For example, the decision to establish paternity is an action that fundamentally affects the way in which a child will be reared. Parents often pursue paternity establishment in order to protect the child’s interests. These interests include the right to receive financial and medical support, the right to inheritance, and the interest in establishing a full medical history accessible to the child in case of medical emergency. The state, on the other hand, typically pursues paternity in order to reduce dependence on public assistance and to qualify for federal incentive payments. While both the parent and the state may be seeking paternity, there are distinct interests to protect that influence the strategies each would adopt and the effort they exert to establish paternity. The state has a strong interest in establishing paternity in as many cases as possible in order to qualify for federal incentive payments and avoid federal penalties. In cases in which it becomes difficult to locate or serve the putative father, the state may simply move on to other cases, whereas the custodial parent, in an effort to protect the child’s interests, would advocate in an administrative or judicial proceeding that efforts to locate the father continue.

Once paternity is established, the IV-D agency seeks to establish child support and health insurance coverage for the child. Once again, the interests of the parent can diverge significantly from those of the state. For example, in cases involving custodial parents whose families receive Medicaid, the state is mandated to pursue child support orders that require the non-custodial parent to provide health insurance through an employment benefit plan or through an individual plan if a reasonably priced option is available. The state seeks to move as many families as possible off Medicaid and into private health insurance plans. A custodial parent, however, may have a valid interest in keeping the child on Medicaid. In many cases, particularly those involving low-income non-custodial parents, switching a child from Medicaid to private insurance can cause great instability and discontinuity of care for the child. The non-custodial parent may have a long history of seasonal change of employment or may have a pattern of leaving jobs after short periods of time. By the time the child is taken off Medicaid and placed on private insurance, the non-custodial parent may no longer be employed and the child’s ability to secure medical care can be compromised. Similarly, children may be able to obtain certain medical services under Medicaid that are not available, or are only available at considerable expense, under private insurance plans. A parent would need to advocate for these interests because she cannot rely on the state to do so.

The IV-D agency also pursues medical support in non-public assistance cases. Federal law requires agencies to inform applicants for IV-D services that the agency will petition the court or administrative authority to require the non-custodial parent to provide employment-related or group health insurance. Once medical support is secured, the agency is to “provide the custodial parent with information pertaining to the health insurance policy which has been secured for the dependent child(ren) pursuant to an order obtained.” The state agency is required to consult with the custodial parent and “promptly select from available plan options when the plan administrator reports that there is more than one option available under the plan.” However, the regulation does not define the term “consultation” and it permits the state agency to select the plan. The custodial parent may have valid reasons for preferring one form of coverage over another, based on price, services covered, or providers offered under different plans. She should have the opportunity, from the outset of the case, to participate as a party in any informal
conferences or formal proceedings in which health care decisions are made, rather than receiving notice of the medical support decision after an order has been entered or after the state agency has selected a plan.

In addition to health care considerations, there may be issues concerning relationships among family members, which the custodial parent has a right and an obligation to raise in paternity and support cases. The state may not be aware of these concerns or the agency may be prevented from delving into issues considered outside the scope of paternity and support. For example, there may be a history of domestic violence that the custodial parent failed to raise at the outset of a IV-D case. However, if the case proceeds to a hearing, the custodial parent may fear that pursuing child support will incite violence or danger. These issues directly impact the safety and well-being of the child and a custodial parent has a strong interest in raising these issues before a court or an administrative tribunal adjudicating the IV-D case.

At the other end of the spectrum, a custodial parent may have a strong interest in facilitating the relationship between the non-custodial parent and the children. A custodial parent might believe that the strategy the IV-D agency is pursuing is adversely affecting the ability of the non-custodial parent to have visitation with the children or harming the relationship between the child[ren] and the non-custodial parent. A custodial parent may want to negotiate for an amount of support that falls outside of the state child support guideline, or she may have proposals for alternative ways in which child support can be paid (such as in-kind payments for school or childcare) that will facilitate a relationship between the children and the non-custodial parent. The state’s interest in collecting support and reimbursing payment for public assistance may conflict with the custodial parent’s interest in preserving familial relationships or ensuring protection of family members. The custodial parent should have the opportunity to participate in proceedings and raise these concerns on her own behalf and on behalf of the child.

Custodial parents also have pecuniary interests to protect in IV-D child support actions. The overwhelming majority of IV-D cases involve custodial parents who never had or no longer receive public assistance. Because they are entitled to receive support collected by the state, they have a direct financial interest in the outcome of IV-D cases. In addition, they may be entitled to collect arrearage that has accumulated as well as retroactive support for a period of time subsequent to the birth of the child and prior to the establishment of a formal support order.

In public assistance cases, custodial parents retain a financial interest in the case even though they have assigned their rights to support to the State. First of all, many states provide for a monetary pass-through, by which the custodian receives a share of any money collected in a given month. Additionally, the parent is entitled to receive any amount collected in excess of the amount the state pays in public assistance. Finally, a parent who receives public assistance has an interest in securing a strong child support order because her ability to collect public assistance is often time-limited. At any point, the custodial parent can choose to leave the TANF program. Indeed, federal and state time-limit requirements mandate that a custodial parent lose eligibility for TANF benefits after a limited period. As soon as a custodial parent leaves the TANF program (whether voluntarily or as a result of time limits), she is entitled to receive any child support payments collected in the month following her exit from the program.

Given their pecuniary interests in IV-D cases, custodial parents, particularly those who do not receive public assistance, have a strong incentive to advocate for support orders that truly reflect the ability of both parents to contribute. However, states receive federal incentive payments or penalties based upon the number of child support orders established and the number of cases in which the state is collecting support. The state is not rewarded for establishing adequate or strong child support orders based on thorough investigation and documentation of parental income. Therefore, the state has a significant incentive to establish as many child support orders as possible rather than establishing adequate child support orders. This state interest can directly conflict with the interest of a custodial parent.

In cases involving lower income non-custodial parents, the automated mechanisms IV-D agencies use to locate salary and asset information are least likely to succeed. This is particularly true for non-custodial parents who are self-employed, work sporadically in seasonal or temporary jobs, or are paid in cash. It is custodial parents who frequently have contacts or information regarding the non-custodial parent’s work situation. Although custodial parents are asked to report any new information they have concerning the employment of the non-custodial parent to the IV-D agency, custodial parents can encounter difficulty when they try to communicate such information to state child support agencies or agency attorneys. Even if the agency receives leads on where a non-custodial parent may be employed, agencies often do not have the resources or the infrastructure to undertake the labor-intensive investigation required to establish salary information for a non-custodial parent in a seasonal, self-employed, or sporadic employment situation. If the state has failed to adequately investigate or prepare a case for hearing and intends to settle for too little or go forward with the evidence it has, then a custodial parent has an interest in objecting to the settlement and requesting that
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additional discovery be done or additional witnesses be called to prove that a non-custodial parent has more income than the state is prepared to demonstrate.

Custodial parents' interest in seeking retroactive child support may conflict with the interests of the IV-D agency. State statutes and caselaw concerning retroactive support vary, with some states limiting retroactive support to a two or three-year period prior to the establishment of an order and others allowing custodial parents to seek support from the date of birth of the child. The amount of retroactive support owed to a custodial parent can be substantial. However, a state agency may decline to pursue retroactive support because it can be difficult and time-consuming to establish. The custodial parent should have an opportunity to pursue retroactive support and protect the child's pecuniary interest even if the state agency declines to seek retroactive support.

Finally, the state agency may be assisting different custodial parents in obtaining child support from the same non-custodial parent. The state is obligated to seek financial and medical support for each custodial parent and to allocate any money collected from the non-custodial parent among all custodial parents. The state is not permitted to advocate for the potentially conflicting interests of each custodial parent. However, each custodial parent has an interest in advocating for the specific needs of her family—interests that the state agency cannot be relied upon to protect.

IV. The Ability of Custodial Parents to Protect Their Interests and the Interests of Their Children in IV-D Cases Varies Among States

The ability of custodial parents to protect their interests and the interests of their children in IV-D cases depends upon whether they are considered parties, whether they are accorded due process rights, and whether they understand their role in the IV-D process. Among the twenty states reviewed for this article, there is no uniformity concerning the party status of custodial parents. In most states, the party status is ambiguous and is related to whether the custodial parent has executed an assignment of rights to collect support. In a few states, custodial parents are considered parties. The due process rights accorded to the custodial parent, including the degree to which a custodial parent/caretaker may participate in a IV-D child support case concerning his or her child, often depend upon whether or not the custodial parent is considered a party to the IV-D action. The explanations that IV-D agencies provide to custodial parents concerning the representation policies of the agency, conflicts of interest, confidentiality, and rights of custodial parents in IV-D cases are often insufficient to enable parents to protect their own interests.

1. Party Status Accorded to Custodial Parents Under Federal and State Law

While government child support agencies are considered parties to IV-D cases, federal law, state law, and agency policy across the country are far less explicit as to whether custodial parents are considered parties to a IV-D action. In a lawsuit, an individual or entity who is considered a party is generally entitled to notice, an opportunity to participate in a proceeding, and the right to seek review of a lower court or administrative decision. These due process protections enable the party to protect his or her interests in the legal action. The custodial parent's party status in IV-D cases is often ambiguous; therefore, her ability to protect her interests and the interests of her children is limited.

Section IV-D of the Social Security Act ("the Act") and its implementing regulations intermitently refer to "parties" but the term is never defined. Some provisions seem to accord party status to custodial parents while others do not. For example, the Act requires states to provide notice of all proceedings involving establishment or modification of support to "individuals who are applying for or receiving services under the State plan, or who are parties to cases in which services are being provided under the State plan." The language makes clear that an individual who applies for or receives IV-D services is not necessarily considered a party to the case. Yet, there are other sections of the Act that suggest that custodial parents are parties to certain types of IV-D actions. The provisions concerning review and adjustment of support orders specify that every three years, either the parent or the state (if there is an assignment in place) may request a review and adjustment of a child support order. If the IV-D agency applies a cost of living adjustment or uses automated methods to adjust a support order, then the statute requires procedures permitting "either party to contest the adjustment." Therefore, for purposes of requesting a review or contesting an adjustment, the custodial parent is referred to as a party.

Federal regulations concerning state IV-D programs suggest that the custodial parent could be considered a party in expedited administrative and judicial processes for determining paternity and support. The regulations state that the due process rights of "parties" must be protected and that all "parties" are to be provided copies of any paternity determinations or support orders. However, the regulations neither define the term "party" nor require that the custodial parent be a party to these proceedings. They leave open the possibility that a state could establish an expedited process in which only the non-custodial parent and the state agency are considered...
Overall, the term “party” is inconsistently applied to custodial parents, leaving their party status under federal law unclear.

Under state law and agency policy, the party status of the custodial parent is often ambiguous and in at least one jurisdiction, the custodial parent is not considered a party. In Washington, D.C., the IV-D agency takes the position that custodial parents are not parties to matters initiated or enforced by the IV-D agency. Instead, custodial parents are considered witnesses unless a court has authorized the parent to intervene in the IV-D action. The agency policy regarding party status of custodial parents is not codified in any statutes or administrative regulations.

Many states do not explicitly or clearly address the party status of the custodial parent in state statutes, regulations, or IV-D agency materials. In Massachusetts, for example, the IV-D agency is authorized to file a support action involving a public assistance recipient in the name of the recipient, in the name of the department, or in the name of both. In cases involving non-public assistance applicants for IV-D services, the agency may file an action in the name of the individual applicant. These provisions concerning the filing of an action suggest that the custodian is considered a party, at least in non-public assistance cases. However, there is no explicit discussion in these provisions of party status in support proceedings. The New York IV-D agency takes the position that in IV-D cases, the petitioner in a non-TANF case is the custodial parent, guardian, or caretaker, whereas in a TANF case, the petitioner is the Social Service Commissioner of the local department of social services. It is not clear whether the custodial parent is also considered a party in TANF cases, though provisions regarding notice suggest that custodial parents are not deemed to be parties to the action.

A few states have adopted statutes and regulations that expressly discuss the party status of custodial parents. In Oregon, for example, custodial parents owed support are considered parties in judicial as well as administrative proceedings involving IV-D cases. In California, when the child support agency initiates a child support action, the parent who requested or receives the IV-D services is not considered a necessary party to the action. The agency is authorized by statute to subpoena the parent as a witness. However, once a permanent or temporary order for child support or medical support is entered, the parent receiving services from the IV-D agency becomes a party to the action.

2. Due Process Rights Afforded to Custodial Parents in IV-D Cases

A. Notice

Federal law requires that every state, as a condition of receiving federal funding, provide individuals who receive IV-D services, as well as parties to IV-D cases, with notice of any proceeding in which support may be established or modified. In addition, the state agency must provide a copy of any order establishing or modifying a support order. Neither the statute nor regulations discuss how notice is to be effectuated nor do they explain what constitutes a “proceeding.” It is not clear, for example, whether a proceeding is a formal administrative or judicial hearing or whether a custodial parent would be entitled to notice of informal conferences, negotiations, or automated processes by which the agency establishes child support obligations. Federal regulations require that in expedited administrative or judicial processes, “[t]he due process rights of the parties involved must be protected” and “[t]he parties must be provided a copy of the voluntary acknowledgment of paternity, paternity determination, and/or support order.” However, the regulations do not specify whether the custodial parent is considered a party or delineate the due process rights that must be afforded to parties.

State rules and practices regarding providing notice to the custodial parent in IV-D cases vary. Not surprisingly, in the states where the custodial parent is automatically considered a party or becomes a party during the course of a child support action, the notice requirements are strict. In Oregon, for example, the IV-D agency must provide notice of child support proceedings as well as findings of financial responsibility to the custodial parent. Notice may be effectuated through regular mail. California law goes further and requires that once a custodial parent becomes a party to the IV-D action, the agency or the Attorney General is required to provide written notice to the custodial parent/caretaker of the date, time, and purpose of every civil paternity or support hearing. The IV-D agency is also required to serve the recipient of IV-D services with all pleadings regarding paternity and support served on the agency by any other party. In states where the party status of custodial parents is more ambiguous, the statutes or regulations concerning notice to the custodial parent typically track federal law.

Some state statutes authorize different types of notice for custodial and non-custodial parents. In Florida, for example, when the IV-D agency commences an administrative action, it must provide both parents with a notice of proceeding to establish an administrative support order. Such notice is mailed by regular mail to
the last known address of the custodial parent. However, the non-custodial parent is served with this notice by certified mail or any other means permitted in a civil action. If an administrative support order is entered by the department or by an administrative law judge, a copy of the order is to be sent, by regular mail, to both parents. However, only the non-custodial parent is notified of the right to seek judicial review of the order. Other states, such as New York, place the onus on the custodial parent who has assigned her rights to support to request notification of proceedings and other pertinent information.

Overall, federal law requires that custodial parents receive some type of notice of IV-D proceedings. However, there is no assurance under federal law or many state statutes that custodial parents will receive reliable notice of all informal meetings, formal conferences, and hearings in IV-D cases.

B. Right to Participate in and Make Decisions Concerning Administrative Proceedings and Judicial Hearings

The degree to which custodial parents can participate in and influence the direction or outcome of a child support action brought by a IV-D agency differs among states. Whether a custodial parent has a role in decision-making or a right to appeal often depends upon her status as a public assistance or non-public assistance recipient.

In some states, custodial parents are permitted to participate in the administrative or judicial adjudication of IV-D cases. In Oregon, for example, state law permits both the non-custodial parent and the custodial parent to request a negotiation conference to discuss the amount of support or health care coverage to be paid. If the parties do not reach an agreement, then the agency sends a new notice and finding of financial responsibility to both parents and informs them of their rights to submit a written objection and request an administrative hearing. The state agency allows both parents to participate in the administrative hearing.

Other states, in contrast, limit the ability of custodial parents to initiate or participate in proceedings. In Florida, for example, the state IV-D agency can issue a proposed administrative support order on behalf of a public assistance recipient or a non-public assistance recipient who has requested IV-D services. Once the IV-D agency has issued a proposed order, only the non-custodial parent has the right to request an administrative hearing. The statute does not authorize the custodial parent to request an administrative hearing nor does it indicate whether the custodial parent has a right to participate in a hearing requested by the non-custodial parent. In Washington, D.C., the custodial parent may not participate in a judicial proceeding unless the agency calls her as a witness or she has been authorized by a judge to formally intervene in the case.

Many states expressly mandate that the IV-D agency has the sole discretion to make decisions in a IV-D case. In Florida, for example, state law authorizes the IV-D agency to “settle and compromise actions brought pursuant to law.” In Colorado, the applicant is informed that the IV-D agency has the “sole discretion” to decide what legal remedies should be used in agency child support cases. In some states, the degree of decision-making authority of the parent varies depending upon whether the parent is a recipient of public assistance. In California, “the local child support agency shall control support and parentage litigation . . . and the manner, method, and procedures used in establishing parentage and in establishing and enforcing support obligations” until the IV-D case is closed. However, in cases involving non-public assistance recipients of IV-D services, once the custodial parent/caretaker becomes a party to the support action, California law prohibits the district attorney or Attorney General from submitting a stipulation establishing or modifying a support order for court approval until the attorney has obtained the consent and signature of the recipient.

Other state courts have held that the IV-D agency can take action that conflicts with the desires of the custodial parents in non-public assistance cases. A Texas Court of Appeals case found that the state had standing to appeal a lower court decision that neither the custodial parent nor the non-custodial parent wanted to appeal. Although the custodial parent was not a public assistance recipient, the court found that the custodial parent had assigned the right to establish and enforce support to the Attorney General, and therefore, the state had standing to appeal the lower court decision. The court reasoned that the Attorney General “has a broader interest in the uniform enforcement of child support than the individual parties who are joined in [the] controversy. That interest is independent of whatever monetary interest the State may have invested, if any, in seeking to ensure the best interest of the children in question.”

The extent to which custodial parents have an independent right to appeal administrative or judicial decisions in IV-D cases varies among states. In Oregon, for example, custodial parents, as parties, may appeal orders of administrative law judges issued in IV-D cases as well as default orders and consent orders entered by the administrator of the IV-D agency. In other states, rights of appeal are limited to non-custodial parents. In Florida, for example, only the non-custodial parent has the right to seek judicial review of an administrative support order issued by the agency. Both the non-custodial parent and the IV-D agency have the right to seek judicial review of administrative decisions made by
an administrative law judge. Some states leave the authority to appeal IV-D cases in the hands of the IV-D agency and its attorneys.

3. Agency Explanations of the Rights and Obligations of Custodial Parents in IV-D Cases

In order to adequately protect their interests, custodial parents must understand their relationship with the IV-D agency, including limits on confidentiality and conflicts of interest that can arise. The custodial parent must also understand her rights and responsibilities in IV-D cases. A custodial parent who does not understand the role of the IV-D agency and its attorneys may believe that the state will protect her interests. If the custodial parent does not realize that she has rights to intervene in proceedings or appeal decisions, then she may not take steps to protect interests that diverge from the state's interests. Some states require IV-D agencies to provide these cautionary explanations. For example, Tennessee law requires that government attorneys affirmatively notify all TANF and non-TANF recipients of IV-D services that "no incidents of the lawyer-client relationship, including the confidentiality of lawyer-client communications, exist between the attorney and the applicant or recipient."169

In many states, the explanations provided to custodial parents concerning the role of the IV-D agency are not very detailed. Applications for IV-D services often include a cursory, one or two-line statement that the child support agency represents the state's interest and that no attorney-client relationship exists between the agency and the parent. The IV-D agency materials neither define these terms nor explain the implications of representation policies. For example, in Wisconsin, the Parent Application for Child Support Services has a one-sentence disclaimer at the end of the application stating that "the child support attorney does not represent either parent, but rather represents the state's interest in enforcing support."170 There is no explanation as to the meaning of the disclaimer.172

The IV-D agency applications for services do not clearly explain the limits of confidentiality to custodial parents.173 One of the most troubling explanations concerning confidentiality can be found in the Florida application. In Florida, applicants must sign and affirm that they understand that the only attorney-client relationship that exists is between the department and its contracted attorney.174 However, in the next line of the application, the applicant is told that "all information provided to the department and/or its contracted attorney pursuant to this case shall remain confidential and protected as if an attorney/client relationship existed between the contracted attorney and [the applicant]."175

This explanation of the relationship between attorney and applicant is confusing and suggests that the lawyer for the government is acting as though he or she is the attorney for the applicant. This is particularly troublesome given the fact that, by statute, the government attorneys are authorized to reveal damaging information about applicants.176

A few states provide a more comprehensive explanation concerning conflicts of interest, confidentiality, and the rights of custodial parents in IV-D proceedings. Wyoming, for example, informs parents that state child support attorneys do not represent parents, and explains that conflicts of interest may exist or develop between the state and the parent.178 The applicant is required to review and sign an Acknowledgment of Limitation of Representation, which gives examples of the types of conflicts that could arise including: payments received by the state may be split between two custodial parents; the state may retain a portion of the amount collected to reimburse the state for public assistance paid; the state may seek a reduction in child support if the non-custodial parent's income decreases; and the state may seek child support from the custodial parent if custody should transfer to the non-custodial parent at some point in the future.179 The IV-D agency also explains that the state's attorney does not owe the parent any duty of confidentiality, giving examples of situations in which a lawyer for the agency might use information that the custodial parent provides to take actions against the custodial parent.180 Oregon explains the rights of parents to participate in IV-D proceedings. In an attachment to the application for services, the agency explains that "[b]oth parents have equal status in child support cases. Either parent can ask questions, raise issues or request changes, with or without assistance from a lawyer."181

Regardless of the comprehensiveness of IV-D agency explanations, the language used to explain representation policies and their implications is uniformly complex and loaded with legal jargon. The application or agreement for services may refer to "conflicts of interest," but it rarely defines the term.182 Furthermore, in states that do not automatically consider the custodial parent a party to an administrative or judicial action, the applications or assignments rarely explain the process for intervening in a case nor do they outline the benefits of seeking private counsel. As a result, many custodians remain unclear about the role of the IV-D agency and its attorneys.183 They believe, particularly those non-public assistance custodians who have affirmatively sought IV-D services, that the state will protect their interests because the state shares their goal of collecting support from the non-custodial parent.184 If custodial parents do not understand IV-D representation policies, potential conflicts of interest,
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limitations on confidentiality, and their rights to intervene or participate in proceedings, then custodial parents cannot adequately protect their own interests and the interests of their children.

V. Custodial Parents Are Real Parties in Interest Who Are Indispensable to IV-D Actions

The custodial parent should be considered a party rather than a witness in a IV-D case. State courts have held that the paramount consideration in child support matters must be the best interest of the child. Since it is the custodian of the child rather than the state who is legally charged with making decisions on behalf of the child, a court or an administrative law judge cannot adequately consider what is in the best interest of the child without the involvement of the custodian, regardless of whether the custodial parent has assigned some of her rights to collect support. The child does not have capacity to bring suit or protect interests that diverge from the interest of the state. The custodial parent maintains this authority and legislatures or courts should deem custodial parents parties to IV-D judicial and administrative proceedings so that they may assert this authority.

1. Custodial Parents Are Real Parties in Interest Who Have Capacity and Standing to Sue

In order to determine whether an individual is a proper party in a civil suit, courts consider three factors: (1) whether the individual is a “real party in interest” because she has an interest to assert or protect; (2) whether the individual has legal “capacity” to sue or be sued; and (3) whether the individual has “standing” to sue. Custodial parents are real parties in interest in IV-D paternity/child support actions because they have constitutional liberty interests, statutory rights, and pecuniary interests to assert. Child support agencies do not necessarily share these interests, nor are they obligated to protect them. Failure to consider the custodial parent a party deprives the parent of the right to have input into childrearing decisions such as establishing paternity, determining appropriate health insurance coverage, and maintaining or protecting familial relationships. The custodial parent also has distinct and significant financial interests to protect in a IV-D case including securing: support orders that truly reflect the ability of both parents to contribute, pass through payments, support arrearage, and retroactive support.

Even in cases involving assignments, the custodial parent is a real party in interest because the assignment of rights to collect support is only a partial assignment. Under general principles of contract law, an individual can execute two different types of assignments: a full assignment or a partial assignment. In a full assignment, a person assigns to a third party all of his rights in a piece of property or his rights to collect on a debt. Generally, the assignee does not need to join the assignor in litigation involving the property or debt assigned because complete relief can be granted in the assignor’s absence. The assignor has no interest to protect and therefore is not a real party in interest. In a partial assignment, a person assigns certain interests in property or rights to collect debts but retains some interest in the property or rights transferred. An individual who has partially assigned his or her rights may retain a sufficient interest or substantive right so as to qualify as a real party in interest in any litigation concerning the property.

Statutes, regulations, and caselaw discussing assignments of child support rights in IV-D cases do not expressly address whether these assignments are full or partial assignments. However, given the weighty interests that custodial parents retain in IV-D cases, any assignment executed should properly be considered a partial assignment. In public assistance cases, the custodial parent retains liberty and custodial interests as well as pecuniary interests in the IV-D case. The state can only retain the amount of child support needed to reimburse public assistance funds paid to the family. Any money in excess of this amount must be distributed to the custodial parent. In addition, public assistance recipients are entitled to receive monetary pass through payments from monies collected by the state. These parents also have a future interest in collecting adequate child support. At any point, the custodial parent can choose to leave the TANF program or may be forced to leave pursuant to federal and state time limit requirements. As soon as a custodial parent leaves the TANF program (whether voluntarily or as a result of time limits), she is entitled to receive child support payments collected in the month following her exit from the program. As a result, public assistance recipients retain significant financial interests in IV-D cases.

In cases involving custodial parents who have assigned their rights to collect support but are not receiving public assistance, parents retain an even stronger pecuniary interest in the case because they are entitled to receive all monies collected. Several federal bankruptcy courts have gone so far as to hold that non-public assistance assignments are not true assignments. In Washington State, for example, a bankruptcy court found that non-public assistance assignments are “not true assignments but rather were merely procedures for the orderly and efficient collection of child support on behalf of the custodial parent . . . [and] the State’s non-assistance collection program here, merely facilitates the
custodial parent’s enforcement of child support rights without transferring their beneficial right to receive child support.”

The court cited several similar decisions in Ohio and Indiana. These cases lend support to the argument that the custodial parent retains a valid, legally cognizable claim or right in the action, is executing a partial assignment, and is a real party in interest.

Custodial parents have capacity to sue to establish paternity and child support on behalf of their minor children. State statutes and common law recognize the right, if not the obligation, of parents to act in a representative capacity on behalf of their children. Upon the birth of a child, both parents are considered the legal guardian or custodian of the child. The parents have the right to make major decisions concerning the upbringing of the child such as where the child will reside, what type of education and healthcare the child will receive, and to which religious faith the child will belong. As long as a child is a minor, he or she is not competent to bring suit in a court of law. Instead, the parents of the child are authorized, as the natural and legal guardians, to bring suit or initiate action on behalf of the child. It is the parent who has the decision-making power in any ensuing litigation and it is the parent’s obligation to ensure that the minor’s interests in the suit are protected.

If the parents do not reside together, both parents retain the right to make decisions for the child and bring suit on behalf of the child. If disagreements arise or the parties wish to formalize decision-making authority, either parent is eligible to petition a court and request that the court determine whether one parent should retain sole authority to make major decisions or whether both parties should share custody and retain some degree of authority for making major child rearing decisions.

The legal custodian of the children has the authority to bring an action for child support on behalf of the child, though in some states this right may be limited if the custodial parent is receiving public assistance. While the child support proceeding may nominally be brought in the name of the parent, the custodial parent acts in a representative capacity to enforce the child’s right to support.

The state and courts can only limit or supersede these custodial rights in order to protect the health and welfare of the child. The United States Supreme Court has made it clear that the state and the parent do not have equal rights to a child. Instead, in order to intervene in the relationship between the child and the parent, the state must make a showing of unfitness in order to ensure that the parents are afforded due process. In cases in which a parent is deceased or unable to care for a child, a relative or other responsible adult may step in as caretaker of the child. Once vested with legal custody or guardianship of the child, this caretaker has the authority to initiate, modify, or enforce child support actions on behalf of the minor child.

In addition to having capacity to sue, custodial parents have standing to sue and participate in the adjudication of IV-D cases. The Supreme Court has explained that “in essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” The issue of standing typically arises when a plaintiff attempts to challenge a statute or a decision issued by a government agency. The issue of standing arises in both federal and state courts. Whether an individual has standing to sue is generally determined by statute or by courts on an individual case basis.

State statutes typically confer standing on parents, legal guardians/caretakers, and government IV-D agencies to initiate child support actions. These statutes do not expressly address the standing of parents in support cases initiated by the government. Nevertheless, in these cases the custodial parent retains significant liberty and financial interests in the outcome of the action. Any decision issued in such a case directly impacts the custodial parent’s individual interests and the interests of the child whom the custodial parent is charged with representing. A custodial parent has constitutionally protected rights to rear his or her child and may be entitled to receive retroactive support, prospective support, medical support, pass through support, and arrearage on behalf of the child. The parent is closely connected to and affected by the controversy concerning whether and how a child support order should be established, enforced, or modified. This connection remains even if the parent has executed a partial assignment. Therefore, custodial parents meet the requirements for standing.

So long as she remains the legal custodian of the child[ren] at issue, the custodial parent is a real party in interest who has capacity and standing to sue. Her status as a proper party is not compromised by the fact that she may have executed an assignment of certain rights to collect support because such assignment is limited.

2. Custodial Parents Are Necessary Parties to IV-D Case

Determining that the custodial parent is a real party in interest does not resolve the issue of whether the custodial parent must be joined as a necessary or indispensable party to the IV-D action. Courts have held, for example, that the child who is owed support is a real party in interest but he or she does not need to be joined in the action. In order to be considered a necessary party, a person must not only have interests in common with existing parties in the lawsuit, but she must have interests so strong that failure to join the
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individual would threaten the person's own rights or the rights of others. Custodial parents meet the standard for necessary party status because failure to join the parent to a IV-D action threatens the parent's liberty and pecuniary interests, threatens her rights to due process, and deprives the child of the right to have a parent or caretaker act in a representational capacity on his or her behalf.

The standard for determining whether someone should be joined as a necessary or indispensable party is found in Rule 19 of the Federal Rules of Civil Procedure. Many states have adopted a compulsory joinder rule akin to the federal rule. According to Rule 19:

[A person] shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

A court, in deciding a compulsory joinder issue, must evaluate the degree to which a nonparty has an interest in the ongoing litigation and the harm that might occur if the individual is not joined. The general policy behind the concept of joinder is that courts should issue full and complete remedies to all relevant parties while avoiding duplicative litigation and the imposition of multiple liability or inconsistent obligations on defendants. In addition, courts seek to protect individuals who may be bound by a decision issued in their absence. If an individual has executed a partial assignment, the court must determine whether the assignor's interest in the matter is significant enough to require that the individual be joined in the action.

A. Disposition of the IV-D Action in the Custodial Parent's Absence Infringes on the Parent's Constitutional, Statutory, and Common Law Rights to Care for and Act in a Representational Capacity on Behalf of Minor Children

The failure to join a custodial parent as a party to a IV-D case constitutes a violation of due process. As the Supreme Court stated in Provident Tradesmen Bank & Trust Co. v. Patterson, "[n]either Rule 19, nor we, today, mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter, constitutional, rights of an outsider by proceeding with a particular case." Failure to join custodial parents infringes upon their fundamental liberty interests in the custody and rearing of their children. Custodial parents should be permitted to assert their views on critical issues that arise in IV-D cases such as paternity, health insurance coverage, and familial relationships—issues that affect the safety and well-being of their children. In addition, if the custodial parent is not joined to a IV-D action, she may be deprived of property interests such as retroactive support, child support arrearage, and pass through support without due process of law.

Parts to civil judicial proceedings enjoy many procedural protections. They typically have a right to timely notice of issues and an opportunity to review evidence, present argument, and cross-examine adverse witnesses. Administrative agency adjudications do not require the same level of procedural protection as civil judicial trials, though the federal Administrative Procedure Act (APA) and its state counterparts require certain procedural protections. Agencies often adopt procedures designed to safeguard parties in administrative adjudications including provision of notice, opportunity to present arguments and evidence in writing or orally, and issuance of a decision by a neutral fact-finder that explains the rationale of a decision.

Failure to afford these types of procedural protections to individuals whose interests are at stake in litigation can constitute a violation of due process. In Mathews v. Eldridge, the Supreme Court set forth three factors to be considered in determining whether a violation of procedural due process has occurred. A court must consider:

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

When one applies the Mathews factors to the situation of custodial parents who are relegated to non-party status in IV-D cases, it becomes evident that child support agencies, courts, or administrative authorities that fail to join custodial parents to IV-D actions deprive them of due process.

First, the private interests of parents affected by the official action of the agency or adjudicating body are significant. As discussed above, failure to join the custodial parent to a IV-D action jeopardizes both liberty and pecuniary interests of the parent and child. If a parent is not a party to the action, she will not receive the procedural protections that enable her to safeguard these interests. While some of the parent's interests may
coincide with the interests of the state, many will not. As a bystander or as a witness, the custodial parent cannot protect these distinct interests.242

Secondly, there is a substantial risk that if the custodial parent is not joined as a party and afforded procedural protections in IV-D cases, her interests and the interests of the child whom she is charged with protecting will be negatively affected. Issues concerning health insurance, adequacy of child support, or retroactive support arise in nearly every IV-D case.243 Additional concerns such as domestic violence or the relationship between the child and the non-custodial parent are present in many cases.244 The state and the non-custodial parent have the opportunity to address these issues in both informal and formal proceedings. However, the custodial parent’s opportunity to do so is often limited either by law or practice.245 The IV-D agency and its attorneys do not represent the custodial parent.246 Given that many of the state’s interests as well as those of the non-custodial parent conflict with those of the custodial parent and the child whom she is obligated to protect, there is a significant risk that without an opportunity to participate as a party in administrative and judicial adjudications of IV-D cases, the interests of the custodial parent and the child will not be asserted. If these issues are not asserted, then courts, administrative tribunals, or child support agencies will issue orders that compromise the physical and economic well-being of children.

The value of existing procedural safeguards, such as notices sent to the custodial parent by the IV-D agency or the right to seek intervention, are insufficient to protect the interests of the parent and the child. Federal law requires IV-D agencies to send notice of proceedings in which support obligations may be established or modified.247 However, it does not require the agency to inform the custodial parent of informal conferences or meetings in which support is often calculated nor does it mandate that custodial parents have an opportunity to participate in informal and formal proceedings. In terms of intervention, many parents must use IV-D services as a condition of receiving public assistance or because they do not have the resources to hire a private attorney.248 There are few, if any, attorneys available to provide free or low-cost legal services in child support matters. Without the assistance of an attorney, most parents/caretakers will not realize that they can request to intervene in a judicial or administrative proceeding.249

Furthermore, parents are unlikely to understand that they may be prohibited from litigating claims at a later date or prevented from retroactively modifying support orders that were decided based on insufficient or inaccurate evidence.250 Parents are also unlikely to be aware that government attorneys and IV-D staff may be immune from civil liability for mistakes they make in handling a IV-D case. In Gill v. Ripley,251 for example, the Maryland Court of Appeals found that the state’s attorneys and their support staff had absolute immunity from civil liability for having dismissed a paternity action with prejudice. The custodial parent had consented to dismissal of the case but not with prejudice.252 The court found that “prosecutors enjoy absolute immunity with respect to claims arising from their role in the judicial process” and held that such immunity applied in a civil paternity proceeding.253 The immunity enjoyed by the government attorneys also extended to a non-lawyer, IV-D employee who was acting under the direction of the state’s attorney and undertook tasks that were directly involved with the prosecution or non-prosecution of the paternity case.254 The court noted that its determination was in line with decisions in other states, citing paternity cases in Iowa, Michigan, Minnesota, California, and Indiana.255 In light of the immunity afforded to IV-D agency staff, it is critical that custodial parents have the opportunity to participate in IV-D proceedings.

The burden imposed on the state by requiring that (i) the custodial parent be deemed a party and (ii) the IV-D agency fully inform the custodial parent of the representation policy and its implications is minimal when compared with the interests at stake. States are already required to notify parents of proceedings involving establishment or modification of child support.256 It should not add excessive expense to include in this notice, dates of informal conferences to be held prior to hearing. Notice of proceedings could be effectuated by first class mail rather than by more costly means such as certified mail or personal service.257 In addition, most states already notify custodial parents, generally in the application for services, of the state’s representation policy.258 Therefore, it should not add significant cost to identify potential conflicts between the state and the custodial parent and explain the custodial parent’s rights in the IV-D child support process.259

The Supreme Court of California rejected this type of due process argument in Monterey County v. Cornejo.260 The trial court had allocated a tax dependency deduction to a non-custodial parent in a support enforcement proceeding brought by the District Attorney.261 The custodial parent was not a party to the case.262 On appeal, the County argued that it was a violation of due process to litigate the custodial parent’s right to tax benefits in a proceeding to which the parent was not a party.263 The California Supreme Court found that the County, represented by the District Attorney, brought the action on behalf of the custodial parent and was authorized to enforce issues relevant to paternity and child support.264 The court noted that while the custodial parent was not a party, the mother cooperated with the
District Attorney, provided financial documentation, and was available to testify.\(^{265}\) Further, the court pointed out that the District Attorney submitted written points and authorities in opposition addressing the exemption issue, the District Attorney argued to the lower court that the mother was opposed to the exemption request, and the lower court considered the income and expenses of both parents in deciding the issue.\(^{266}\) The court gave significant weight to the fact that, pursuant to California statute, the custodial parent could litigate the issue in a subsequent action.\(^{267}\) In its rejection of the due process argument, the court noted that at any point, the District Attorney or the parent could have requested that the custodial parent be made a party to the action.\(^{268}\)

The dissent in Monterey argued that the custodial parent's due process rights were violated when she failed to receive notice and an opportunity to be heard on the exemption allocation issue.\(^{269}\) Applying the Mathews v. Eldridge factors, the dissent concluded that there was a significant private interest at stake: the tax exemption, which provides financial benefit to the parent who claims it.\(^{270}\) Second, the risk of "erroneous deprivation" was significant because the custodial parent was not represented by the state and the District Attorney did not present arguments on behalf of the parent concerning allocation of the exemption.\(^{271}\) According to the dissent, "the custodial parent in fact had no opportunity to be heard or to be represented by counsel on this significant property issue."\(^{272}\) The dissenting justice argued that it would not have been unduly burdensome to provide the custodial parent with notice and an opportunity to be heard and such opportunity would have helped promote the interest of the state in securing adequate support of children following divorce.\(^{273}\) The dissent rejected the majority view that the custodial parent was also protected because she could relitigate the issue in the future, suggesting that she may not have the means to do so.\(^ {274}\)

The Monterey decision relied heavily on a California statute that permits a custodial parent to relitigate issues that were previously litigated by the state in a IV-D action.\(^ {275}\) However, custodial parents in many states do not enjoy the right to relitigate and, as the dissent in Monterey noted, even those who do may not have the means to exercise the right.\(^ {276}\) In addition, in Monterey there was no clear conflict between the state’s position and the position of the custodial parent. The Monterey court did not address the situation that frequently arises in IV-D cases in which the interests of the state and the interests of the parent concerning health care, retroactive support, or a host of other issues conflict.\(^ {277}\) In those situations, the custodial parent cannot rely on the attorneys for the IV-D agency to represent or assert her interests. A custodial parent who does not receive notice (including a comprehensive explanation of the representation policy and its implications), an opportunity to participate, or an opportunity to seek review of an adverse decision in an administrative or judicial proceeding, stands to lose significant rights to property as well as to rights to rear and protect the best interest of her children. The economic losses are particularly significant given the low-income status of most custodial parents utilizing IV-D agency services.

Failure to join custodial parents in IV-D actions also impedes the parents' ability to exercise their statutory/common law rights to custody. As discussed earlier,\(^ {278}\) parents have the statutory and/or common law right to make major decisions concerning the upbringing, safety, and welfare of that child. As legal custodians, parents have the authority to act in a representative capacity on behalf of their children in lawsuits or administrative proceedings. Parents cannot effectively protect the interests of their children if they do not understand the role of the state agency and do not have notice of or an opportunity to participate in judicial or administrative proceedings involving IV-D cases.

B. Failure to Join Custodial Parents Impairs Their Ability to Protect Their Interests Because They May Be Bound by Judgments Issued in IV-D Cases

There is a significant risk that a custodial parent who is not joined in a IV-D action will be barred by collateral estoppel or res judicata from relitigating issues addressed in the IV-D action.\(^ {279}\) If the custodial parent is a real party in interest who could have intervened in the earlier proceeding,\(^ {280}\) who may be considered to be in privity with the parties to the original proceeding and thus, barred by collateral estoppel or res judicata from relitigating issues.\(^ {281}\) In Turner v. Butler,\(^ {282}\) for example, the Court of Appeals of Georgia held that a mother was precluded from bringing an action against the father for fraudulent misrepresentation of income in a previous child support hearing.\(^ {283}\) The state IV-D agency had brought the initial child support action and the mother argued that she was not in privity with the agency.\(^ {284}\) The court found that the purpose of the mother's current action and the agency's previous action was the same—to collect child support.\(^ {285}\) According to the court, "the gravamen of this action is that [the father] misrepresented his income to the DHR in the earlier proceeding. If [the mother] was not a privy of the DHR in that proceeding, then she was a stranger to it and lacks standing to bring this suit."\(^ {286}\) The court held that the judgment entered in the original child support action was res judicata and binding unless set aside or reversed.\(^ {287}\)

Similarly, in Lohman v. Flynn, the Idaho Supreme Court determined that a custodial parent was in privity with the state and was barred by res judicata from bringing an action seeking retroactive child support.\(^ {288}\) In
that case, the mother of the child had brought suit against
the father, seeking reimbursement of expenses incurred
prior to the establishment of a paternity and support
order.289 The father argued that the mother’s claim was
barred by res judicata because the state IV-D agency had
previously litigated a case, at the request of the mother,
in which paternity was established, a child support order
was issued, and the father was ordered to pay support
retroactive to the date the paternity case was filed.290 In
the previous action, the state did not request
reimbursement expenses incurred by the mother prior to
the filing of the paternity action.291

The court noted that the mother had requested IV-D
services and, pursuant to Idaho law, she could have
requested that the agency seek reimbursement for
expenses incurred prior to the establishment of
paternity.292 The mother claimed that the IV-D agency
did not involve her in the case or inform her as to how
the case was progressing.293 She further argued that she
did not participate in the litigation.294 Nevertheless, the
Idaho Supreme Court determined that the mother had a
full and fair opportunity to litigate the issue in the earlier
case.295 The court found that the issue of child support
was adjudicated in the prior case, though reimbursement
was not addressed, and the court rendered a final
judgment on the merits.296 The court stated that the
critical question for its consideration was whether privity
existed between the mother and the state child support
agency.297 The court explained that for privity to exist,
the plaintiff must have derived benefit or had a direct
interest in the outcome of the previous litigation.298 The
court found that Ms. Lohman had requested that the state
agency act on her behalf and the state had no independent
interest in pursuing the action because Lohman was not receiving public assistance.299 In
addition, “[a]lthough Lohman may not have been an
active participant in the prior litigation, all of the benefits
recovered were given to Lohman; the state had nothing
to recover. Lohman clearly derived a direct interest in
the outcome of the former litigation and, therefore, was
in privity with the state.”300 As a result, the court found
that the mother was barred from bringing the subsequent
action.301

Custodial parents are also at risk of being bound by
administrative decisions in IV-D cases issued in their
absence. The principles of res judicata and collateral
estoppel may apply to judgments rendered in
administrative proceedings so long as the issues or
claims raised were properly before the agency and
contested factual and legal issues were resolved after
adequate opportunity for litigation.302 “The essential
elements of adjudication,’ including ‘fair opportunity to
rebut evidence and argument by opposing parties,’ must
be present in the administrative proceeding.303 In other
words, when administrative agencies hold trial-like
hearings in which the agency or ALJ makes findings of
facts and applies the law to the facts, res judicata
ordinarily applies to the decision.304 The agency must
take action that resembles a court proceeding rather than
merely executing a ministerial duty.305 An administrative
determination issued after such a proceeding may bind
parties, and those in privity, to the underlying action.306

A legislature has the prerogative to enact a statute
that allows relitigation and prohibits the application of
res judicata to administrative or judicial decisions.307
Some states have permitted relitigation of support
issues.308 California, for example, enacted a statute that
expressly authorizes a custodial or non-custodial parent
to relitigate child support issues previously raised in an
action brought by the IV-D agency.309 The statute
provides that in a subsequent proceeding, the court has
the authority to make an independent determination on
the issue of support that may supersede the support order
made in the original action.310 However, as discussed in
the next section, even if the custodial parent is permitted
to relitigate issues at a later date, both the parent and the
child can still be harmed by judgments entered in
proceedings to which the custodial parent was not a party.

C. Even if Relitigation Is Permitted, the
Custodial Parent Can Be Harmed by a
Judgment Issued in the Original Action

Regardless of whether a custodial parent is permitted to
relitigate paternity or child support claims, the second
prong of the compulsory joinder test is still met because
custodial parents who are not joined to the original
action can be significantly harmed by prohibitions
against retroactive modification. Federal law requires,
as a condition for granting IV-D funding, that states
prohibit retroactive modification of support orders.311
These laws prevent a court or administrative tribunal
from adjusting the amount of support owed by the non-
custodial parent based on evidence that comes to light
after the initial order is entered.312 The fact-finder can
prospectively modify child support based on changed
circumstances but she cannot adjust amounts that have
been reduced to judgment.313 As a result, if a custodial
parent discovers that an inappropriate amount of child
support was established in a IV-D case, based on
inaccurate, insufficient, or fraudulent evidence, the
parent can attempt to relitigate the issue or file a motion
to modify the existing order but any modification
awarded applies only to prospective support. The child
cannot receive an adjusted amount of support to
compensate for the period of time in which the
inappropriate order was in effect.314 Therefore, it is
critical that the custodial parent be joined in the IV-D
action to ensure that issues concerning child support,
medical support, and protection of children are adjudicated fully and correctly the first time around.\textsuperscript{315}

In addition, custodial parents who have the right to relitigate paternity and child support issues may not be aware of these rights or have the ability to enforce them. As discussed above, many custodial parents do not understand the role of the IV-D agency and its attorneys. They may believe that the IV-D agency represents their interests and therefore, whatever judgment the agency secures is in their interest or is the best judgment they are likely to get. Even if the custodial parent understands that they have a right to relitigate, they may not have the resources to do so. Low or moderate-income custodial parents will have great difficulty finding free or reduced-cost legal services. In addition, this litigation is time consuming and custodial parents often cannot afford to miss work or pay for childcare to attend an additional set of court hearings or administrative proceedings. Although a child may have a right to relitigate a paternity or support issue, these actions are likely to be initiated once a child reaches adolescence or adulthood, long after the child has experienced the effects of an inappropriate child support order.

VI. Recommendations for Change

In order to ensure that custodial parents are able to exercise their liberty interests, protect their pecuniary interests, and fulfill their obligation to act in a representative capacity on behalf of their children, they must be considered parties to IV-D actions. Congress and state legislatures should follow the lead of states such as Oregon and enact legislation formalizing party status for custodial parents.\textsuperscript{316} In those states that do not adopt such statutes or regulations, judges should take the initiative to join custodial parents as necessary parties to judicial and administrative proceedings pursuant to local rules of civil procedure and administrative procedure. Child support agencies, including attorneys working for or contracted by the agency, must do more to inform custodial parents about representation policies and their implications. Local bar associations, law schools, and legal services organizations can educate the public about the parents' roles in a IV-D case and the problems that can arise if the custodial parent fails to participate in or monitor a IV-D case.

1. Legislative Change

Congress should remedy the ambiguity and inconsistency that exists throughout Section IV-D of the Social Security Act and its implementing regulations concerning the party status of custodial parents.\textsuperscript{317} As a condition of funding, the Social Security Act requires states to enact a host of laws designed to enhance the effectiveness of the IV-D child support program.\textsuperscript{318} Congress should add to this list a requirement that each state enact laws and regulations making custodial parents parties to IV-D paternity and support actions from the outset of the case.\textsuperscript{319}

In non-public assistance cases, the custodial parent should be named as a plaintiff. In these cases, the parent has sought the assistance of the IV-D agency and is entitled to receive all prospective child support collected. In public assistance cases, the custodial parent should not be named as a plaintiff but should be deemed an interested and necessary party to all IV-D cases. In these public assistance cases, the custodial parent is not affirmatively seeking IV-D services but is required to assign her rights to support to the state. The state is initiating the action in order to recoup public assistance funds or to reduce dependency on public assistance. Particularly in cases in which the custodial parent is not entitled to receive any of the monies collected, she may believe that having the government pursue child support from the non-custodial parent is not in the best interests of her child.\textsuperscript{320} However, the custodial parent is an interested and necessary party to the IV-D case regardless of whether she wants the government to initiate the case. The custodial parent's interests and the interests of her child are at stake and she must be afforded an opportunity to protect those interests. Therefore, in IV-D public assistance cases, the custodial parent should not be named as the plaintiff but should be joined as an interested party.

The IV-D statute and its implementing regulations should also require states to afford custodial parents the same due process rights as other parties including the right to notice of all judicial and administrative conferences and proceedings, the opportunity to participate in such conferences and proceedings, and the right to seek review of judicial or administrative determinations. In addition, state IV-D agencies should be required to provide comprehensive explanations of the agency's representation policy to the custodial parent at the outset of a case as well as at intermittent points during the processing of the case. These explanations should include examples of potential conflicts of interest as well as examples of information that agency personnel may disclose to third parties.

States should also enact legislation mandating that custodial parents be considered parties in all IV-D cases. Again, custodial parents who receive public assistance and are required to assign their rights to support should not be named as plaintiffs in IV-D actions. State laws and regulations should further require that in judicial proceedings, custodians be given notice of all proceedings including negotiations and settlement conferences,\textsuperscript{321} the opportunity to object to settlements reached between the IV-D agency and the non-custodial parent, the opportunity to participate in the proceeding
regardless of whether the state chooses to call the custodian as a witness, and the right to appeal lower court decisions. State administrative codes should be revised to clarify that custodial parents are parties to administrative actions and to afford custodial parents the same procedural due process protections given to non-custodial parents. These due process protections should include notice of all administrative conferences and hearings, an opportunity to participate, and the right to seek judicial review of administrative decisions.

State legislatures should enact laws requiring IV-D agencies to provide comprehensive, clear explanations of agency representation policies at the outset of a case as well as at various points during the pendency of a IV-D action. States can look to Oregon and Wyoming for examples of model statutes. Oregon addresses the due process rights of custodial parents in judicial and administrative proceedings, while Wyoming fully informs parents of the IV-D representation policy and the conflicts of interest that can arise between the custodial parents and the state. Legislation that accords party status to custodial parents and requires that states adequately inform parents of their rights not only preserves the interests of parents, but helps ensure that children, primarily children living at or near the poverty line, receive appropriate financial and medical support.

2. Judicial Action

In those states that do not statutorily confer party status on custodial parents, judges should routinely join custodial parents to IV-D actions pursuant to compulsory or permissive joinder rules. If the state or the defendant does not move to join the interested person, a trial court or an appellate court can, sua sponte, join the person as a necessary party.

If a judge does not wish to take such action sua sponte, then she should at least inform the custodial parent of her right to seek to intervene in a IV-D action. The court should ensure that the custodial parent understands why it might be in her interest to intervene in the action. Judges should liberally grant intervention when requested by the custodial parent and courts should establish simple procedures for facilitating intervention given that most custodial parents are not represented by counsel. For example, court rules and administrative regulations could allow for oral motions to intervene rather than requiring written motions. Courts and administrative agencies could develop user-friendly, form motions that custodial parents could file prior to, or on the day of, an administrative or judicial proceeding. The automated system used by the court and IV-D agency should indicate that custodial parents have intervened so that notices and copies of orders are sent to those parents.

3. Internal Child Support Agency Policies and Procedures

In states in which there is no statute deeming a custodial parent a party to a IV-D case, IV-D agencies should take the initiative and move to join the custodial parent as a party through motions for permissive or compulsory joinder. Agencies should also develop administrative procedures requiring that the custodial parent be given notice and an opportunity to participate in all administrative proceedings. Such policies, even if not statutorily mandated, ensure that the rights of custodial parents to protect the interests of their children are not infringed. In addition, increased participation of custodial parents—particularly those who do not receive public assistance and have the strongest pecuniary interest—can assist the agency in establishing and enforcing support orders.

State IV-D programs should adopt internal policies and procedures that require agency personnel to provide clear, comprehensive explanations of the relationship between the IV-D agency and custodial parents. Information contained in customer agreement documents must be written using simple, clear language. Materials should explain the limits of confidentiality and potential conflicts of interest using examples to illustrate the points. IV-D staff should also provide oral explanations to ensure that customers with limited literacy abilities understand representation policies and their implications.

IV-D agencies should follow the lead of states such as Wyoming, which inform parents that state child support attorneys do not represent parents and explain that conflicts of interest may exist or develop between the state and the parent. In Wyoming, the applicant is required to review and sign an Acknowledgment of Limitation of Representation, which gives examples of the types of conflicts which could arise. In addition, the Wyoming IV-D agency explains to parents that the State’s Attorney does not owe the parent any duty of confidentiality. The documents give examples of situations in which a lawyer for the agency might use information that the custodial parent provides to take actions against the custodial parent.

In order to ensure that custodial parents understand the role of the state in child support proceedings, government attorneys should explain that the agency can take actions that directly contradict the desires of the custodial parent. The agency must notify parents, particularly once a conflict arises, that the parents have a right to intervene and to seek private counsel. It is not sufficient to merely notify custodial parents at the outset of a case that a conflict of interest may arise in the future. The IV-D agency should notify custodial parents, in writing, at the outset, and attorneys or paralegals for the agency should provide written and/or verbal notification prior to informal conferences/negotiations.
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and administrative and judicial proceedings. The custodial parent who does not receive public assistance must be informed that he or she can discontinue receiving IV-D services at any point.

The OCSE has given attorneys working for or contracted by IV-D agencies guidance on how to explain the role of the government attorney to recipients of IV-D services. In its manual for agency attorneys, the OCSE recommends that the IV-D attorney disclose his or her role and immediately clarify any misunderstandings that a parent might have about this role. The manual also cautions agency attorneys not to “bind the custodial parent in settlement negotiations without the custodial parent’s consent and approval.” Further, it suggests that attorneys advise custodial and non-custodial parents to seek counsel if an apparent conflict arises.

The OCSE manual notes that a failure to clarify the attorney’s role may create an attorney-client relationship in fact, even if a statute or regulation states that no such relationship exists. The Florida application for services illustrates the type of ambiguous language that could lead to problems. The applicant is told that “all information provided to the department and/or its contracted attorney pursuant to this case shall remain confidential and protected as if an attorney/client relationship existed between the contracted attorney and [the applicant].” This explanation of the relationship between attorney and applicant suggests that, in terms of client confidentiality, the lawyer for the government is acting as though he or she is the attorney for the applicant. The language could lead a custodial parent to believe that an attorney-client relationship exists and, therefore, such a relationship may in fact exist under the rules of professional responsibility governing attorneys.

4. Bar Associations, Legal Services Organizations, and Law Schools

Bar associations, legal services organizations, and law schools (through clinical programs) can serve a critical role in educating parents about their rights in IV-D child support actions. These groups can generate written materials, brochures, and Internet resources discussing the party status of custodial parents, explaining the representation policy of the local IV-D agency, and underscoring the importance of intervening in an action if the custodial parent is not deemed a party at the outset. In addition, informational resources could inform custodial parents about the potential risks of non-participation including preclusion from relitigating claims in the future, bans on retroactive modification of support orders, and immunity of IV-D personnel from liability. These organizations can also assist the court and administrative agencies in drafting pro se pleadings that custodial parents can use in IV-D cases, including form motions to intervene in an action.

State bar associations, perhaps in coordination with law school clinics or other non-profit legal services providers, should also consider creating limited advice services for custodial and non-custodial parents involved in child support matters so that parents can receive guidance about their rights and responsibilities in administrative and judicial proceedings.

VII. Conclusion

Custodial parents are necessary parties to IV-D cases. The failure of state child support agencies, courts, and administrative tribunals to treat them as parties deprives parents of the right to protect the best interests of their children. Although many recipients of IV-D services assign their rights to collect support to the state, these assignments are limited. Recipients relinquish neither their custodial authority to make decisions concerning the physical and economic welfare of their children nor their rights to receive monies collected. In the overwhelming majority of IV-D cases, the custodial parent is not receiving public assistance and is entitled to support payments collected by the state. Public assistance recipients are entitled to pass through payments as well as any payments collected in excess of the amount of assistance paid out. According party status to custodial parents gives parents the opportunity to exercise their constitutional right to rear their children, protect their pecuniary interests, and act in a representative capacity on behalf of their children. As parties, custodial parents should be afforded due process rights in judicial and administrative proceedings including the right to notice of all conferences and proceedings, the right to participate in such proceedings, and the right to appeal administrative and judicial determinations.

In order to avail themselves of opportunities to participate in IV-D cases, custodial parents must understand their rights. They must be fully aware of the boundaries of the relationship between IV-D agencies and parents so that they do not rely on agencies to represent their interests. Child support agencies must clearly and thoroughly explain that attorney-client privilege does not attach and conflicts of interest may arise in IV-D cases, giving examples and simple explanations of these concepts to ensure that parents understand the limits of the relationship. In addition, parents need to be educated about the potential consequences of their failure to become involved in IV-D cases, including prohibitions on relitigation and retroactive modification of support awards. While securing child support for low-income families is an important public policy goal, the process by which the state collects support should not obscure the
representational role of state IV-D agencies or eviscerate the rights of parents who are best suited to protect the interests of their children.

Endnotes

1 Stacy Brustin is an Associate Professor of Law and Associate Dean for Academic Affairs at The Catholic University of America, Columbus School of Law. B.A. 1985 Tufts University; J.D. 1989 Harvard Law School. I would like to thank the research assistants who have contributed significantly to this article: Aisling Curran, Carolyn Manning, Evan Taylor, Alison Jarvis, and Whitney Werner. I would also like to thank Jeff Gutman for reviewing drafts of this article and offering insightful suggestions for revision. Finally, I would like to thank The Catholic University of America, Columbus School of Law for providing research funding.

1 In 1975, Congress enacted the Child Support Enforcement Program, codified as Title IV-D of the Social Security Act (IV-D program) 42 U.S.C. § 651 (1997) et. seq. The program outlines requirements that state child support agencies must follow in order to be eligible for funding under the legislation. Id. State child support agencies receiving federal funding are commonly referred to as IV-D agencies. See infra Part II.

2 See infra Parts III & IV.


4 According to the Federal Office of Child Support Enforcement, “[a]ny parent or person with custody of a child who needs help to establish a child support or medical support order or to collect support payments can apply for child support enforcement services.” Id.

5 Id. See also 42 U.S.C. § 608(a)(3) (1997) (requiring public assistance recipients to assign their right to collect support); 42 U.S.C § 654 (1999) (discussing eligibility for Title IV-D services); 45 C.F.R. 302.33 (2006) (requiring state child support agencies to offer services to those who no longer receive or never received public assistance).

6 See infra Part IV.3.


8 See infra Part III.1.

9 Id.

10 Id.


12 See infra Part II.2.

13 See infra Part IV.1.

14 See infra Part IV.2.

15 See infra Part IV.2.B.

16 See infra Part IV.3.

17 See infra notes 22 & 23.


23 Office of Child Support Enforcement, U.S. Dept. of Health & Human Servs., National Child Support Enforcement Strategic Plan 2005–2009 1 (2005), available at <http://www.acf.hhs.gov/programs/cse/prgrpt.htm> [hereinafter Strategic Plan]. The policy goals of state child support programs are similar to those articulated by OCSE. See, e.g., ORS 416.405 (2005) (“[I]t is the public policy of this state that dependent children shall be maintained, as much as possible, from the resources of both parents, thereby relieving or avoiding, at least in part, the burden often borne by single parents or by the general citizenry through public assistance programs.”). See also OCSE FY 2002/2003 Annual Report, supra note 19, at 1 (“The Child Support Enforcement Program has been serving children and their families since 1975. Over these years, the program has changed from one that recoups welfare costs to one which serves a mostly non-welfare clientele. Congress created the Child Support Enforcement Program out of intense concern over the costs to the Federal and state governments of supporting children when their parents did not.”).


26 See, e.g., Pa. Cons. Stat. Ann. § 1910.3 (2006) (establishing who has standing to bring child support actions). According to the rule, an action can be initiated: “(3) by a public body or public or private agency having an interest in the care, maintenance or assistance of a person to whom a duty of support is owing . . . .” In 1984, Congress enacted legislation requiring states (through a judicial administrative process) to adhere to expedited timelines for establishing and enforcing child support orders. Karen N. Gardiner, John Tapogna & Michael E. Fishman, Administrative and Judicial Processes for Establishing Child Support Orders 12–13 (2002)

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30 Such welfare programs include Temporary Assistance to Needy Families (TANF) (formerly Aid to Families with Dependent Children) and Medicaid.


29 42 U.S.C. § 654(4)(A) (1999). This section refers to any child who receives assistance under a state program funded by a TANF block grant pursuant to Part A, benefits or services for foster care provided under a state program funded pursuant to Part E of the Social Security Act, and medical assistance provided under the State plan devised pursuant to subchapter XIX of the Social Security Act or cooperation required pursuant to 7 U.S.C. § 2015(L)(1) governing the Food Stamp program. Id.

27 See Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement Fact Sheet, <http://www.acf.hhs.gov/opa/fact_sheets/cseprintable.html> (last visited Nov. 10, 2006) [hereinafter Child Support Fact Sheet]. The term IV-D agency is defined in 45 C.F.R. § 301.1 as "the single and separate organizational unit in the State that has the responsibility for administering or supervising the administration of the State plan under title IV-D of the Act."

34 OSCE FY 2002/2003 ANNUAL REPORT, supra note 19, at Program Charts and Graphs, Figure 1: Total Caseloads for Five Fiscal Years (showing 15.9 million cases in FY 2003, 2.8 million current assistance cases, 7.4 million former assistance cases, and 5.8 never assistance cases).

25 Child Support Fact Sheet, supra note 33 (reporting that in 2003, welfare recipients comprised seventeen percent of the agency's caseload).

36 OSCE FY 2002/2003 ANNUAL REPORT, supra note 19, at 3.

37 Id. According to OCSE, in fiscal year 2003, ninety percent of child support collections went directly to families and the largest group of recipients of IV-D services was families who did not receive public assistance. STRATEGIC PLAN, supra note 23.

38 This article does not address the issue of whether the IV-D Child Support System is the most effective vehicle for addressing issues of family poverty. Several commentators have suggested that the IV-D system does not fulfill its original promise of ameliorating child poverty and that, in fact, the current federally mandated process for collecting and enforcing support can harm relationships between children and parents. See, e.g., Jane Murphy, Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement and Fatherless Children, 81 NOTRE DAME L. REV. 325, 351–65 (2005). However, it is unlikely that the IV-D system will be dramatically changed in the short term and many families, particularly those who no longer receive public assistance, greatly benefit from the child support monies collected through the IV-D system.
uncontested cases; they submit consent orders to judges for their approval and file the orders. Id. In contested cases, IV-D attorneys argue the cases in court. Id.

48 See 42 U.S.C. § 608(a)(3) (2004) (requiring Title IV-A recipients of Temporary Assistance for Needy Families to execute an assignment); Id. § 671(a)(17) (governing recipients of Title IV-E Foster Care assistance); 42 C.F.R. 433.146 (2006) (requiring Medicaid recipients to assign rights to medical support or to payment for medical care from any third party). The federal regulations governing the IV-D child support program define “assigned support obligation” as any assignment of rights to child support required by the statutes cited above. 45 C.F.R. § 301.1 (2006).

49 See, e.g., 45 C.F.R. § 303.72 (2006) (concerning cases that qualify for federal tax refund offsets). This regulation establishes two different criteria for eligibility for the offset and distinguishes between public assistance cases, in which an assignment for support is in effect, and those cases under 45 C.F.R. § 302.33 (2006), in which non-public assistance recipients have voluntarily requested IV-D Services. Id. § 303.72. There is no mention of assignment when referring to the non-public assistance cases. See also 42 U.S.C. § 666(a)(1)(A) (2006) (discussing procedures for reviewing and seeking modification of support orders). This provision states that in cases involving an assignment under Part A of the Social Security Act, either the state or a parent may request a review and adjustment of an existing child support order. Id. The only assignment referenced is one occurring under Part A, which is the section of the Social Security Act governing the Temporary Assistance for Needy Families Block Grant Program. Id.

50 See, e.g., WYO. DEPT OF FAMILY SERVS., CHILD SUPPORT RULES, 14 § (2)(a) (2002), available at <http://dfs.web.state.wy.us/casename/csrulesAugust142002.pdf> [hereinafter WYO. CHILD SUPPORT RULES] (stating that by signing an application for or receiving public assistance, “an obligee shall be deemed to have assigned to DFS all rights they and all other members of the household on the public assistance grant have to child and spousal support . . . .”).

51 Under this statute, public assistance for purposes of assignment of child support includes temporary cash assistance or Title IV-E assistance. Fla. Stat. § 409.2561(2)(a) (2005).

52 Id. § 409.2561(2)(a).

53 Id. § 409.2561(2)(b).

54 Id. § 409.2561(3).


56 C.R.S.A. § 14-14-104(2) (2005).

57 In re Robbins and Robbins, 8 P.3d 625, 629 (Colo. Ct. App. 2000) (citing In re Cepedes, 895 P.2d 1172 (Colo. Ct. App. 1995)). In Robbins, the Colorado Court of appeals held that once this assignment ends, estoppel is created between the IV-D agency and the applicant whereby the agency continues to pursue child support with apparent authority from the mother of the child. Id. The court explained that once the IV-D agency begins collecting support for the mother’s benefit, rather than the state’s benefit, it acts with the consent of the mother and therefore acts as her agent even though such agency relationship is not expressly recognized. Id.


59 See, e.g., Beggin v. Beggin, 19 B.R. 759, 761 (U.S. Bankr. Ct. 1982) (“Unlike the Welfare assignment the former spouse and children remain the beneficial owners of the child support payments in the non-assistance collection assignment . . . . Thus the State is acting merely as a conduit for child support payments owed by the debtor to his former spouse and children”).

60 ARK. CODE. ANN. § 9-14-211 (2006) (discussing assigned support rights generally); Id. § 9-14-213 (2006) (addressing assigned support rights, notice, and termination of assignment).

61 In re M.C.R., 55 S.W.3d 104, 107–08 (Tex. Crim. App. 2001). However, the website for the Texas IV-D agency states that TANF recipients must assign their right to collect child support to the state and that all monies go to the state until such time as the family goes off TANF. Child Support Services, Attorney General of Texas Greg Abbott, Frequently Asked Questions, <http://www.oag.state.tx.us/cs/parents/faq.shtml> (last visited, Dec. 20, 2006). There is no mention of assignment in the case of non-TANF applicants for IV-D services. In at least one state, Vermont, non-public assistance recipients can decide whether or not to assign their rights to support. VT. STAT. tit. 33 § 4106(c) (1997). However, by statute, those who do assign their support rights are to be notified of all actions taken on their behalf by the IV-D agency and are to be informed concerning the status of such actions. Id. § 4106(d) (presumably, those who do not assign their rights do not receive such notice). In some states, it is not clear from reading state statutes or regulations whether non-public assistance recipients assign their rights to support. See, e.g., ARK. CODE. ANN. § 25.27.130 (2006).


63 Id. The ABA issued an ethics opinion holding that if the custodial parent was a public assistance recipient who assigned her right to collect support to the state, then the state was the attorney’s client. However, if the custodial parent did not receive public assistance, then the parent was the attorney’s client. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 89-1528 (1989).
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64 Info. Memorandum, supra note 62 (identifying two states, Illinois and Missouri, whose laws and policies were ambiguous).


67 See OCSE ATTORNEY HANDBOOK, supra note 7, at 36. See also Ronald K. Henry, Child Support at a Crossroads: When the Real World Intrudes Upon Academics and Advocates, 33 FAM. L.Q. 235, 249 (1999) (citing Letter from Leon R. McCowan, Regional Administrator, Department of Health and Human Services, to Hon. Richard Armey, U.S. House of Representatives (Feb. 20, 1992)). Commentators argued that state child support agencies routinely violated the rights of non-custodial parents by initiating requests for increases in child support at the behest of custodial parents whom the state claimed to represent. Id. at 248–49 (citing the Family Support Act of 1988, Pub. L. 100-485, § 103, 103 Stat. 2343 as requiring the state agency to maintain procedures for allowing either parent to request a review and adjustment of child support orders).

68 OCSE ATTORNEY HANDBOOK, supra note 7, at 34 (citing 45 C.F.R. § 303.20 (f)(1) (2000)).

69 Id. at 37.


71 See, e.g., Or. Admin. R. 137-055-1140(4)(b) (2006). In Oregon, the child support agency may share information:

[F]or purposes of any investigation, prosecution or criminal or civil proceeding conducted in connection with the administration of: (A) Title IV-D of the Social Security Act, child support programs in Oregon and other states; (B) Title IV-A of the Social Security Act, Temporary Assistance to Needy Families; or (C) Title XIX of the Social Security Act, Medicaid programs.

72 Id.


75 State v. Terry, 985 S.W.2d 711, 717 (1999).

76 Id. at 716.

77 Id. at 716–17.

78 Id. at 717.

79 Id. Similarly, the Oklahoma Supreme Court interpreted its state representation statute as effectively nullifying any attorney-client relationship between the attorney for the state IV-D agency and a custodial parent who did not receive public assistance but had assigned her rights to collect support to the state. Haney v. State, 850 P.2d 1087, 1092 (Okla. 1993). See also In Re Marriage of Lappe, 680 N.E.2d 380,391 (Ill. 1997). The Supreme Court of Illinois rejected the contention of a non-custodial parent that the
representation statute enacted in Illinois provided a private benefit to custodial parents by providing free legal services. Id. Instead, the court interpreted the statute as providing child support services for the benefit of the child and as clearly negating any attorney-client relationship between the attorney and the parent. Id.

79 See, e.g., Ohio Op. 90-10 (1990) (stating that the attorney can properly exercise his professional judgment with the state as its client); Bd. of Prof. Respn. of the Sup. Ct. of Tenn., Formal Ethics Op. 90-F-123 (1990).


82 Id.

83 Id.


87 Santosky, 455 U.S. at 753.


91 GUGGENHEIM ET AL., supra note 89, at 87.

92 Id. Grandparents and other caretakers who have responsibility for rearing children may not possess a liberty interest in the rearing of those children. CHEMERINSKY, supra note 88, at 545–46, 781–83. However, if these individuals are awarded legal custody of children, then they possess statutory rights under state law to make decisions concerning the well-being of children in their custody and to act in a representational capacity on behalf of the children. See, e.g., MO. REV. STAT. § 452.375 (2006); NY Fam. Law § 72 (2006); CAL. Fam. Code § 3041 (2003).


95 Courts have recognized that the child support agency and the custodial parent may have separate and equally significant interests in pursuing paternity and child support cases. The New York County Family Court held that the custodial parent and the Commissioner of Social Services have a right to pursue separate paternity proceedings because each party has an independent interest and is pursuing different relief. In re a Paternity Petition of the Comm’r of Soc. Servs. of the City of New York, as Ass’n ee of Terese C. v. Barry C, 466 N.Y.S.2d 174, 174 (N.Y. Fam. Ct. 1983) The family court found that the Department of Social Services seeks reimbursement for public assistance paid to support the children whereas the mother seeks to have the putative father established as the father of the child so that her child can reap benefits such as rights of inheritance that paternity establishes. Id. at 174.

96 45 C.F.R. § 303.31(b) (2006). In cases in which an assignment of rights to collect support as a condition of receiving public benefits is in effect, “unless the custodial parent and child(ren) have satisfactory health insurance other than Medicaid” [emphasis added], the IV-D agency must “petition the court or administrative authority to include health insurance that is available to the non-custodial parent at reasonable cost in new or modified court or administrative orders for support.” Id. Reasonable cost insurance is defined in 45 C.F.R. § 303.31(a)(1) (2006) as any employment-related or other group health insurance. 45 C.F.R. § 303.8(d) (2006) concerns modification of support orders and states that “[i]n no event shall the eligibility for or receipt of Medicaid be considered to meet the need to provide for the child’s health care needs in the order.”

97 45 C.F.R. § 303.31(b).

98 Children who receive Medicaid qualify for Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services. 42 U.S.C. § 1396d(a)(4)(B) (2006). EPSDT services include: lead toxicity screening, vision services, hearing services and dental services. Id. at § 1396d(r). If the screening shows a need for further diagnostic services or treatment, such health care services must be provided. CtRs. for Medicare & Medicaid Servs., U.S. Dep’t of Health & Hum Servs., EPSDT Benefits, <http://www.cms.hhs.gov/MedicaidEarlyPeriodicScrnn/02_Benefits.asp#TopOPage> (last visited Dec. 18, 2006).

99 45 C.F.R. § 303.31(c) (2006).

100 Id. § 303.31(b)(5) (2006).

101 Id. § 303.32(c)(8) (2006).

102 Fines, supra note 32, at 2181.

103 Even if a non-public assistance custodial parent has assigned her right to pursue and collect support, she retains her right to receive the payments and therefore has a strong pecuniary interest in the IV-D case. See supra notes 61–64. Courts have recognized the significant interest custodial parents who do not receive public assistance have in IV-D cases. In Maxwell v. State of Arkansas Child Support Enforcement Unit, the Arkansas Court of Appeals found that a custodial parent who had previously received public assistance but was no longer receiving assistance had the right to enter into a private agreement with the non-custodial parent that limited receipt of future child support in exchange for payment of a lump sum. Maxwell v. State of Ark. Child Support Enforcement, 16 S.W. 293, 294–95 (Ark. Ct. App. 2000). The court held that the state agency does not have “unfettered authority to exercise its right of standing in the absence of some showing that the State has some interest, current or potential.” Id. at 297.
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106 The Personal Responsibility and Work Opportunity Responsibility Act (PRWORA) established a sixty-month time limit on receipt of TANF benefits. 42 U.S.C. § 608(a)(7)(A) (2006). States can elect to use state funds to continue providing benefits beyond the sixty month time period but states can not use federal funds for this purpose. Id. § 608(a)(7)(F).


108 Id. §§ 305.2 & 305.4.

109 Over the past fifteen years, I have assisted clients who have IV-D cases in Washington D.C or whose IV-D cases have been transferred to other states. During this time, custodial parents have relayed the difficulties they have had in reporting employment information to IV-D agencies. I have experienced these same difficulties as have law students working under my supervision on child support cases. For example, when trying to reach caseworkers, clients frequently encounter cumbersome voice mail systems in which voice mail boxes are often full.


1012 A party may have to produce evidence, including testimony, to demonstrate that the non-custodial parent had an ability to pay during the period in question and to substantiate that the custodial parent incurred expenses for the child during this time period.


1014 See discussion of representation policies supra Part III.I.

1015 For purposes of this analysis, I will refer to Washington, D.C. as a state rather than a city. OCSE categorizes D.C. as a state for purposes of providing federal funding and monitoring the D.C. IV-D agency.

1016 See infra notes 138-42.


1018 Id. § 666(a)(10)(A).


1020 Similarly, under federal law, each state is to enact laws authorizing expedited procedures for establishing and enforcing support including procedures requiring “each party to any paternity or child support proceeding” to file with the state identifying information including social security number, residential and mailing addresses, and phone numbers. 42 U.S.C. §§ 666(c)(2)(A)(i) & (ii) (2006) (emphasis added.) The language appears to include custodial parents under the rubric of parties.

1021 45 C.F.R. §§ 303.101(c)(2) & (c)(3) (discussing safeguards in expedited processes). The regulations require that “[t]he due process rights of the parties involved must be protected” and “[t]he parties must be provided a copy of the voluntary acknowledgment of paternity, paternity determination, and/or support order.” Id. It is not clear how much legal significance is given to the term “parties.” In other sections of these regulations, the term “parties” is used in a more lay fashion to refer to individuals or agencies who have entered into cooperative arrangements or agreements. See, e.g., id. § 303.107(c).

1022 In addition, in these regulations, the non-custodial parent is referred to as the defendant but there is no mention of a plaintiff. Id. § 303.101(d)(4). The regulations also authorize a state to seek an exemption from these procedural requirements and safeguards “on the basis of the effectiveness and timeliness of paternity establishment, support order issuance or enforcement within the political subdivision . . . .” Id. § 303.101(e).

1023 CHILD SUPPORT ENFORCEMENT DIV., OFFICE OF THE CORP. COUNSEL OF D.C., REVISED NEW REPRESENTATION POLICY 9 (on file with author) [hereinafter D.C. REPRESENTATION POLICY]. This policy applies to individuals who have applied for IV-D services after October 16, 2000, and have had no prior relationship with the agency. Id. at 2.

1024 Id. at 11-12.

1025 See, e.g., Massachusetts and Idaho. In Idaho, the state child support enforcement agency is required to provide services to any “petitioner” in a support proceeding who seeks such services. IDAHO CODE ANN. § 7-1019(1) (2006). The obligor is referred to as the “respondent” and the statute provides that the agency must make a reasonable effort to gather information concerning the income of “the parties,” referring to the petitioner and the respondent. Id. § 7-1019(2)(c). In addition, the agency is to send the petitioner a copy of any written communication received from the respondent or his attorney within two days of receipt of the communication. Id. § 7-1019(2)(e). However, there is no discussion of custodial parents’ rights to participate in proceedings nor is there any explicit discussion of their party status.

1026 MASS. GEN. LAWS. ch. 119A, § 3(a) (2006).

1027 Id.

1028 New York State Division of Child Support Enforcement Partners for Children Website, Support Establishment: The Pre-Court Stage, <http://www. trainingspace.org/cse/module01/05_supEst/_pg05_stage_1.cfm> (last visited Dec. 20, 2006).

1029 N.Y. DOM. REL. LAW § 111-b(2-a). In assignment cases, the Department of Social Services is required to send notice to the assignor explaining her right “to be kept informed, upon request, of the time, date and place of any proceedings involving the assignor and such other information as the department believes is pertinent.” Id.
(emphasis added). Yet, New York regulations adopt the federal requirements for modification of support orders which include references to custodial parents as parties. See 18 NY A.D.C. § 347.26(a)(3).

130. OR. REV. STAT. §§ 109.015 & 416.407(1)(2) (2006). See also OR. ADMIN. R. § 137-055-1040 (2006) ("In any action taken under ORS 25.080, the State of Oregon, the obligor, and the obligee are parties.").


132. Id. § 17404(e) (2006). This provision regarding party status applies to parents who are receiving or have requested services after December 31, 1996. Id. In cases that began before this date, the parent does not become a party to the action until the court issues an order permitting joinder pursuant to an ex parte or noticed motion filed by the support agency or either parent. Id.

In the absence of a statute or regulation, materials distributed by the IV-D agency can shed light on whether or not custodial parents are considered parties. See, e.g., Div. of Child Support (DCS), State of Washington, Application for Non-Assistance Support Enforcement Services 3 (Rev. July 2000).


134. Id. § 654(12)(B).


136. Id. § 303.101(c)(3).

137. See generally, GARDINER ET AL., supra note 26 (finding that the judicial states and quasi-judicial states primarily use in-person service of process while the administrative states are more likely to use certified mail to serve non-custodial parents).


139. Id. § 416.407(b). The notice requirement applies in the proceedings outlined in 416.400–416.470. See also Id. § 416.415.


141. Id. §§ 17406(e)(3) & 17406(f)(1)(B). When issuing written notice or serving pleadings, the agency or Attorney General must include the following language:

It may be important that you attend the hearing. The local child support agency does not represent you or your children. You may have information about the other parent, such as information about his or her income or assets that will not be presented to the court unless you attend the hearing. You have the right to attend the hearing and to be heard in court and tell the court what you think the court should do with the child support order. This hearing could change your rights or your children's rights to support.

142. Id. § 17406(f)(1)(C). The statute also requires that recipients of IV-D services receive notice of any support or modification order procured by the IV-D agency or Attorney General. Id. § 17406(g).

143. In Pennsylvania, for example, the court is to provide all parties to a support action and their attorneys with notice of child support establishment or modification proceedings as well as copies of any support orders. PA. STAT. ANN. § 1910.6 (2006). See also, D.C. CODE § 46-206(d) (2001).

In some jurisdictions, the state notice requirements are more stringent than the federal requirements. In Tennessee, for example, the department of human services is required to inform the custodial parent of her right to intervene in the action to protect her future interests. TENN. CODE. ANN. § 71-3-124(a)(5) (2006).


145. Id. § 409.2563(4)(o).

146. Id. The department is to send both parents a copy of the proposed administrative support order and documents used to calculate the proposed amount. Id. § 409.2563(4)(g).

147. Id. § 409.2563(10)(a).


150. Federal regulations recognize the right of custodial parents to participate in certain proceedings. For example, in the provisions concerning automatic wage withholding, the regulations state that a non-custodial parent's wages will be subject to withholding, regardless of whether arrearage is owed, unless "(i) [either the non-custodial or custodial parent] demonstrates and the court or administrative authority finds, that there is good cause not to require immediate withholding . . . ." 45 C.F.R. § 303.100(b)(1) (2006) (emphasis added).


152. Id. § 416.415(2)(g).

153. Id. Some state IV-D agencies use application forms or other informational materials to inform custodial parents that they may participate in child support proceedings. However, these materials do not define the term "participate." See, e.g., Child Support Servs., State of Alaska, Custodian’s Application for Services and Information About Child Support Services 4 (Rev. May 19, 2004), available at <http://www.csed.state.ak.us/Forms/forms.asp> [hereinafter Alaska Application].

154. FLA. STAT. ANN. § 409.2563(2)(c) (2006). Either parent retains the right to file a civil action in circuit court seeking adjudication of child support issues; however, the department itself is only required to terminate the administrative proceeding and move to circuit court if the non-custodial parent requests such a transfer. Id. §§ 409.2563(2)(d) & (f).

155. Id. §§ 409.2563(5)(c) & (6).

156. D.C. REPRESENTATION POLICY, supra note 123, at 18.

157. FLA. STAT. ANN. §4009.2561(1).


159. In Vermont, the state child support agency can request a modification of a child support order at any time if the
custodial parent is a public assistance recipient. VT. OFFICE OF CHILD SUPPORT, PARENT HANDBOOK—CHAPTER 2: OBTAINING OR CHANGING CHILD SUPPORT IN VERMONT, <http://www.ocs.state vt.us/handbook/chapter2.htm> (last visited Dec. 20, 2006) [hereinafter VT. HANDBOOK CH. 2]. However, in a non-public assistance case, the agency must have the consent of the parent who applied for services before it can request a modification. Id.

California law authorizes a parent who is receiving IV-D services to file an independent action to modify a support order so long as the IV-D agency is served with notice of such action. Id. § 17404(f)(1). The parent receiving IV-D services may also independently file to enforce a support order so long as she receives the written consent of the agency to take such action. Id. § 17404(f)(2).

Id. § 17406(j). See also Carlson v. Eassa, 62 Cal. Rptr. 2d 884, 891 (Cal. Ct. App. 1997) (“[I]n a case not involving public assistance, settlement of a child support issue should not be undertaken without the consent of all parties to the action.”).

In re M.C.R., 55 S.W.3d 104, 107 (Tex. App. 2001). The state objected to the court’s determination concerning the accrual of interest on arrearage. Id. at 106–07.

Id. at 107.

Id. but see Cantin v. Young, 742 A.2d 1246, 1247 (Vt. 1999). The court in Cantin found that in child support cases in which there is no assignment, the custodial parent is a real party in interest and that the state does not have independent authority to appeal unless there is a statute authorizing the agency to intervene independently to protect state interests. Id.


Id.

See, e.g., WYO. CHILD SUPPORT RULES, supra note 50, at 4–5 (“ECSD shall determine, in consultation with the Office of the Attorney General, whether to appeal an adverse decision. Decisions to appeal shall be based on the best interest of the State of Wyoming.”).

TENN. CODE ANN. § 71-3-124(d) (2006). California requires that recipients of IV-D services be given notice of limitations on confidentiality and conflicts. CAL. FAM. CODE § 17406(c) (2005). The notice must include “the advice that the absence of an attorney-client relationship means that communications from the recipient are not privileged and that the local child support agency or Attorney General may provide support enforcement services to the other parent in the future.” Id. This notice must be presented in easily understandable English, in bold typeface, and translated into another language if necessary. Id. See also MD. CODE ANN., FAM. LAW, § 10-115(f) (2006); TEX. FAM. CODE ANN. § 231.09 (2005); ALA. CODE § 38-10-7.1 (2006); and FLA. STAT. ANN. § 409.2567 (2005).

Under federal law, the application for services is supposed to include: information describing the IV-D services available, applicant’s rights and responsibilities, fees charged, and cost recovery and distribution policies. 45 C.F.R. § 303.2(a)(2) (2006). This information must be provided to all IV-A, Medicaid, and IV-E foster care applicants or recipients within five days of referral to the IV-D agency. Id.

Bureau of Child Support, Wis. Dep’t of Workforce Dev., Parent Application for Child Support Services 5 (2004), available at <http://www.dwd.state.wi.us/bcs/> [hereinafter Wisconsin Application]. But see Child Support Enforcement Admin., Md. Dep’t of Human Res., Application for Support Enforcement Services, available at <http://www.dhr.state.md.us/csea.htm>. The Maryland application notifies the applicant that the information he or she provides to the agency may not be treated as confidential and that failure to appear in court pursuant to an order or subpoena could lead to arrest. Id.

See Child Support Enforcement Div., State of Ala., Application for Child Support Services 4–5 (1995), available at <http://www.dhr.state.al.us> (explaining that the recipient’s interests may coincide with the state’s interest but, if they do not, the recipient is told that she may wish to hire a private attorney). There is no explanation as to what types of conflicts of interest might arise. Id. at 5.

See, e.g., Child Support Enforcement Div., D.C. Office of the Corp. Counsel, Basic Services Package 2 available at <http://csed.dc.gov/csed/frames.asp?doc=/csed/lib/csed/servicepack.pdf>. There is a D.C. form entitled “Notice of Legal Representation” that warns that information provided to the agency attorneys is not protected by the attorney-client privilege but the form does not explain or define the concept of privilege. Id. but see Alaska Application, supra note 152, at 4. In the Alaska materials, the state agency informs the applicant that the agency may be required to release information about the applicant to other parties or agencies and that if the case is filed in court, the information in the court case may be accessible to the public. Id. There are no examples provided, but the language at least puts the applicant on notice that all information provided to the agency or its attorneys will not be kept confidential.


Id. (emphasis added).

Information concerning individuals receiving IV-D services can be reported to another agency or official if it relates to “known or suspected instances of physical or mental injury, child abuse, sexual abuse or exploitation, or negligent treatment or maltreatment of a child who is the subject of a support enforcement activity under circumstances which indicate that the child’s health or welfare is threatened . . . .” FLA. STAT. ANN. § 409.2579(1)(d) (2005) (safeguarding Title IV-D case file information).
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California is one of the few states that not only recognizes that limitations on confidentiality exist and that conflicts can arise, but also requires that recipients of IV-D services be given notice of such possibilities. Cal. Fam. CODE § 17406(c) (2005).

DEP'T OF FAMILY SERVS., A GUIDE TO WYOMING'S CHILD SUPPORT ENFORCEMENT PROGRAM 5 available at <http://dfsweb.state.wy.us/csehome/booklet/booklet.html> [hereinafter WYOMING GUIDE].

See id. at 3.

Id. at 3–4.


The Vermont Parent Handbook mentions that a conflict of interest might arise between the state and the parent. However, the materials do not define conflict of interest nor do they provide examples of such a conflict. VT. HANDBOOK CH. 2, supra note 159, at 2. In addition, although the handbook provides detailed information on a variety of topics, the language used is complicated. VT. OFFICE OF CHILD SUPPORT, PARENT HANDBOOK—CHAPTER 8: PARENTS’ RIGHTS IN OCS CASES 5, <http://www.ocs.state.vt.us//handbook/chapter8.htm> (last visited Dec. 20, 2006).

The failure of IV-D agency attorneys and staff to adequately inform custodial parents of the agency representation policy and its implications is not a recent development. In the late 1970’s, the Oregon Court of Appeals described the findings of a lower court concerning lax practices of the state child support agency. Gibson v. Johnson, 582 P.2d 452, 454 (Or. Ct. App. 1978). The court noted that:

During consultation with the recipient the SED [the state IV-D child support agency] rarely advises the recipient of the right, under certain circumstances, to refuse cooperation, that the recipient can consult private counsel or that the assistant attorney general assigned to SED represents the state and not the recipient. If the SED attorney obtains information which indicates fraud in the receipt of ADC [public assistance], this information is transmitted to the PWD for its use in fraud or eligibility investigations. The recipient is usually not advised how information obtained during the consultation may be used.

Id. at 454. The court went on to point out that “[e]vidence presented by plaintiff indicated members of plaintiff's class [public assistance recipients] were confused as to whether the SED attorneys were acting as their counsel.” Id.

During the fifteen years that I have represented parents in child support proceedings in Washington, D.C., I have heard former or current IV-D customers express a complete lack of understanding of the role of the IV-D attorney. They often believe that the IV-D attorney is “their attorney” or is in court to represent their interests.

See, e.g., Okla. Dep’t of Human Servs. v. T.D.G., 861 P.2d 990, 993 (Okla. 1993) (“Public policy demands that, in matters of support, the best interest of the child be paramount.”).

BLACK’S LAW DICTIONARY 516 (8th ed. 2004) (“Real party in interest. A person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action’s final outcome.”).


The requirement that a party be a “real party in interest” applies to both original plaintiffs as well as to individuals who intervene or who are joined in an action. Id. at 340. The Federal Rules of Civil Procedure articulate this requirement, as do most state rules of civil procedure. FED. R. CIV. P. 17(a) (“[E]very action shall be prosecuted in the name of the real party in interest.”). Many of these rules allow guardians to sue in their own names without joining the party who stands to benefit from the action. FRIEDENTHAL, KANE & MILLER, supra note 187, at 341.

See supra Parts III.1 & 2.

Id. The IV-D agency makes procedural decisions concerning paternity and child support cases that impact the amount of child support ordered. Parents should have an opportunity to voice views contrary to the agency positions on procedural matters. For example, decisions regarding how to pursue interstate cases—whether by transferring the case to the state where the non-custodial parent resides or handling the case by long arm jurisdiction from the state in which the child resides—implicate choice of law questions that affect the amount of support obtained as well as the number of years support can be collected. See 45 C.F.R. § 303.7(b)(1) (2006). In addition, a custodial parent’s ability to participate in an interstate case and provide information to the IV-D agency is impacted greatly by the determination of where to litigate the case. Custodial parents (particularly in non-public assistance cases) should have an opportunity to address these issues and determine whether they wish to continue IV-D services.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Some courts use language that suggests that in public assistance cases, the custodial parent is executing a full assignment. For example, in Lamier v. Lamier, the Ohio appellate court found that “[w]here the mother has assigned rights to a government agency and suffers no loss, she is not a party in interest and therefore may not sue for collection of past support due.” 664 N.E.2d 1384, 1387 (Ohio Ct. App. 1995).

See supra Part III.2.


Id.

See supra note 115.


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206 Id. (citing In re Sturgell, 19 B.R. 59, 67 (Bankr. S.D. Ohio 1980); In re Gilbert, 10 B.R. 462, 464 (Bankr. N.D. Ind. 1981); and In re Deblok, 11 B.R. 51, 54 (Bankr. N.D. Ohio 1981)). But see Arkansas Office of Child Support Enforcement v. Terry, 985 S.W.2d 711, 716–17 (Ark. 1999). The court in Terry noted that “[t]he collection of child support ultimately benefits the State by providing for the financial needs of its children, without having to resort to public funds to do so.” Id. at 716. Once the custodian assigns child support rights to the state, “the state has a pecuniary interest in enforcing those rights even though the amounts collected on behalf of those assignors who are not receiving public assistance will ultimately pass from the State to the assignors and their children.” Id. at 717.
207 FRIEDENTHAL, KANE & MILLER, supra note 187, at 340.
208 See, e.g., D.C. CODE § 16.914 (2006). In the case of an unmarried couple, both the biological father and mother have rights, pursuant to state statutes or common law, to custody of their children. However, whether unmarried fathers have a fundamental right to custody that cannot be terminated without showing of unfitness depends upon the degree of involvement with the child and the marital status of the mother. Supreme Court cases addressing this issue come to differing, sometimes irreconcilable, conclusions. See CHEMERINSKY, supra note 88, at 773–76 (discussing Stanley v. Illinois, 405 U.S. 645, 651 (1972), Lehr v. Robertson, 463 U.S. 248, 261 (1983) and Michael H. v. Gerald D., 491 U.S. 110, 126 (1989)).
211 Clark, supra note 210, at 313–14. If a parent refuses to take action on behalf of a child or if the parent’s interests conflict with those of the child, a court has the authority to appoint a special representative or a guardian ad litem to protect the child’s interests. Wright, Miller, & Kane, supra note 210, at 498–99 (citing T.W. v. Brophy, 124 F.3d 893, 895 (7th Cir. 1997) (“To maintain a suit in a federal court, a child or mental incompetent must be represented by a competent adult.”)).
212 See supra text accompanying footnotes 92–100. See also GUGGENHEIM ET AL., supra note 89, at 4.
213 GUGGENHEIM ET AL., supra note 89, at 4–5. See GREGORY ET AL., supra note 209, at 421, 463. State statutes and rules of procedure provide definitions of the term custody. See, e.g., PA. CONS. STAT. ANN. 1915.1 (2006) (defining custody as “the legal right to keep, control, guard, care for and preserve a child”). Legal custody is defined as the “legal right to make major decisions affecting the best interests of a minor child, including but not limited to, medical, religious and educational decisions.” Id. Physical custody is defined as “actual physical possession and control of a child.” Id.
214 See supra Parts II.2 & IV.1.
216 GUGGENHEIM ET AL., supra note 89, at 98 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).
217 Id. (citing Stanley v. Illinois, 405 U.S. 645, 652–53 (1972)). The United States Supreme Court has held that in order to terminate parental rights, the government must prove allegations of parental unfitness by clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 746 (1982). See also CHEMERINSKY, supra note 88, at 772–73 (discussing custody as a fundamental right).
218 See infra note 241.
220 FRIEDENTHAL, KANE & MILLER, supra note 187, at 347. At the federal level, the doctrine of standing is grounded in the constitutional requirement that courts may adjudicate only “cases or controversies.” Id. at 347–48 (discussing Article III of the U.S. Constitution and citing Seldin, 422 U.S. at 501). In determining whether a plaintiff has standing to sue in federal court, the plaintiff must (1) show that he or she has suffered an injury (or that injury is imminent); (2) allege that the defendant’s conduct caused the plaintiff’s injury; and (3) allege that a favorable decision in the matter would redress the plaintiff’s harm or injury. CHEMERINSKY, supra note 88, at 62. State courts are not bound by the case or controversy requirement of Article III though they may be bound by similar provisions in state constitutions. Norman Redlich, John Attanasio & Joel K. Goldstein, UNDERSTANDING CONSTITUTIONAL LAW 64 (2005).
221 FRIEDENTHAL, KANE & MILLER, supra note 187, at 348.
222 For example, under the Pennsylvania Rules of Civil Procedure, several categories of individuals or agencies are authorized to bring an action seeking child support including: a person to whom a duty of support is owed; a person having custody of a minor child; a person caring for a minor child regardless of whether the person has legal custody; or “a public body or private agency having an interest in the case, maintenance or assistance of a person to whom a duty of support is owing.” Pa. Stat. Ann. § 1910.3 (1981). See also CAL. FAM. CODE § 17404(a) (2004); N.Y. FAM. CT. ACT § 422 (2006) (persons who may originate proceedings). N.Y. courts have held that both a custodial parent and the Commissioner of Social Services may initiate separate paternity cases at the same time. Terese C. v. Barry C., 466 N.Y.S.2d 174, 174 (N.Y. Fam. Ct. 1983).
223 Courts have explained that the state IV-D agency “stands in place of the [custodial parent] . . . and, therefore,
has standing to seek enforcement of the [non-custodial parent's] obligation . . . .” Fla. Dep't of Revenue v. Lockmiller, 791 So. 2d 552, 553 (Cal. Ct. App. 2001). However, there is no discussion as to whether the custodial parent retains any rights or interests in the support matter.

224 See supra Part II.2 & text accompanying notes 193–205.

225 FED. R. CIV. P. 17(a) requires that “[e]very action shall be prosecuted in the name of the real party in interest.” It goes on to clarify, however, that “[a]n executor, administrator, guardian, bailee, trust of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person’s own name without joining the party for whose benefit the action is brought.” Id.

226 See, e.g., County of Tulare v. Boggs, 146 Cal. App. 3d 236, 241 (Cal. Ct. App. 1983). A California Court of Appeals found that the minor child does not need to be made a formal party to the proceeding, though the child is a real party in interest. Id. The court cited a California statute that authorizes the district attorney to bring a child support action in the name of the county on behalf of a minor child. Id. (citing CAL.WELF. & INST. CODE § 11350.1 (2000)). This statute, according to the court, does not require that a guardian ad litem be appointed for the child. Id. The court rejected the appellant’s argument that the county is incapable of acting in a “proper representative capacity” because the appellant failed to present evidence that a conflict of interest existed between the state and the child. Id. at 243. In the absence of such evidence, the court found that the District Attorney protected the child’s interests in the proceeding. Id.

227 FRIEDENTHAL, KANE & MILLER, supra note 187, at 356. The court always has discretion to join a party under the more flexible permissive joinder standard, but such joinder is not required. Id. at 350–54. Under most state procedural rules as well as under the Federal Rules, a court may grant permissive joinder when (1) a person asserts a right to relief “arising out of the transaction or occurrence or a series of transactions or occurrences that comprise the subject matter of the action” (or the person who has had such a claim asserted against him) and (2) there are common questions of law or fact among the individuals to be joined and existing parties to the action. FED. R. CIV. P. 20(a). All of the arguments in favor of compulsory joinder of custodial parents would also justify a grant of permissive joinder.

228 A necessary party is one who should be joined in the suit if feasible but failure or inability to join this party will not lead to dismissal of the action. FRIEDENTHAL, KANE & MILLER, supra note 187, at 355. An indispensable party, on the other hand, must be joined to the lawsuit and failure to join the individual is so prejudicial to his or her rights or the rights of other parties to the action that the court must dismiss the case. Id.


230 FED. R. CIV. P. 19(a). The Joinder of Persons Needed for Just Adjudication rule also requires that the person to be joined must be subject to service of process and his or her joinder may not deprive the court of jurisdiction. Id. If the person to be joined objects to the joinder, the court may make that person a defendant or an involuntary plaintiff. Id.

231 Id. In Provident Tradesmen Bank & Trust v. Patterson, the Supreme Court emphasized the importance of considering practical rather than theoretical ramifications when determining the impact on the nonparty of failure to join him or her in the action. 390 U.S. 102, 118–19 (1968). The standard is not so strict as to limit joinder to cases in which the nonparty will be bound by res judicata or collateral estoppel from relitigating the case. Even in situations where the individual may be permitted to bring suit at a later date, if the pending litigation threatens the nonparty’s ability to bring or defend against a future action, then he or she is a necessary party. FRIEDENTHAL, KANE & MILLER, supra note 187, at 360.

232 FRIEDENTHAL, KANE & MILLER, supra note 187, at 357, 359. Individuals may be bound because they are found to be in privity with a party to the action. Id. Even if an individual is not in privity and therefore cannot be bound by the decision, joinder may be appropriate where the absentee person’s rights or claims will be impaired by the judgment. Id. at 359.

233 Id.

234 See id. at 339 (citing Boris v. Moore, 152 F. Supp. 595 (E.D. Wis. 1957) aff’d on other grounds, 253 F.2d 523 (7th Cir. 1958)).

235 Provident Tradesmen Bank & Trust v. Patterson, 390 U.S. at 123. See WRIGHT, MILLER & KANE, supra note 210, Vol. 7 § 1601 (3d ed.) (citing Osborne v. Campbell, 37 F.R.D. 339, 342 (S.D.W. Va. 1965)). The Osborne court found that to adjudicate the rights of the principal beneficiary of a will in her absence (in an action to set will aside) “would not only be inconsistent with equity and good conscience, but would be a violation of due process.” Id. See also FRIEDENTHAL, KANE & MILLER, supra note 187, at 360 (citing Britton v. Green 325 F.2d 377, 382–83 (10th Cir. 1963)); Mark Dunning Indus., Inc. v. Cheney, 934 F.2d 266, 269 (11th Cir. 1991); Calcote v. Tex. Pac. Coal & Oil Co., 157 F.2d 216, 224 (5th Cir. 1946). Other constitutional issues have been suggested related to nonjoinder of necessary parties in which, as a result of the nonjoinder, the defendant can be subject to multiple liability, and if such multiple liability could require the defendant to pay the same debt more than once, it could be considered a taking without due process of law. WRIGHT, MILLER & KANE, supra note 210, Vol. 7 § 1602 (3d ed.) (citing W. Union Telegraph Co. v. Pennsylvania, 368 U.S. 71, 75–77 (1961)).

236 See supra Part III.2.
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238 Id. at 531, 560. The Federal Administrative Procedure Act mandates that when a statute calls for an administrative determination based on a “hearing,” an agency must (i) allow a party to be represented by an attorney or representative; (ii) permit a person to obtain a copy of data or evidence; and (iii) provide a brief statement explaining why the agency has denied an application or petition. Id. If an administrative agency action deprives a person of life, liberty, or property, then the Constitution requires that the agency adopt and implement procedural safeguards. Id. § 9.4, at 578–79.

239 Id. at 561 (citing Paul. R. Verkuil, A Study of Informal Adjudication Procedures, 43 U. CHI. L. REV. 739 (1976)).


241 Id.

242 See supra Part IV.1.


244 See Fines, supra note 32, at 2181; Murphy, supra note 38, at 361–65.

245 See supra Part IV.2.B.

246 See supra Part III.1.


248 See supra Part II.1.

249 Whether an interested person who is not a party to the action (i.e., someone other than the respondent, applicant, or petitioner) can participate in the action depends upon the type of proceeding at issue. PIERCE, supra note 237, at 1201. The federal APA does not specify what rights interested parties have to join or participate in administrative adjudications. Pierce suggests that APA § 555(b) addresses this issue. This section provides that “[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding . . . .” 5 U.S.C. § 555(b) (2005). See also UNIFORM LAW COMMISSIONERS' MODEL STATE ADMIN. PROCEDURE ACT § 4–209 (1981), available at <http://www.japc.state.fl.us/publications/USAPA/MSAPA1981.pdf> (authorizing the filing of petitions for intervention).

250 See infra Parts V.2.B & C.

251 Gill v. Ripley, 724 A.2d 88, 102 (Md. 1999).

252 Id. at 89. In this case, the mother was considered a party and had been actively involved in the case. Id. at 89–90. She alleged that the attorneys and personnel of the IV-D agency avoided her calls, would not meet with her, and signed a consent order despite her objection to a dismissal with prejudice. Id. at 89. Therefore, mere involvement in one’s case does not ensure that the IV-D agency will take appropriate action, but it at least preserves the custodial parent’s ability to uncover and object to any inappropriate action.

253 Id. at 96, 102.

254 Id. at 97–98.

255 Id. at 101–02 (citing Hanson v. Flores, 486 N.W.2d 294 (Iowa 1992); Origel v. Washtenaw County, 549 F. Supp. 792 (E.D. Mich. 1982); Johnson v. Granholm, 662 F.2d 449 (6th Cir. 1981), cert.denied, 457 U.S. 1120 (1982); Duerscherl v. Foley, 681 F. Supp. 1364 (D. Minn. 1987), aff'd, 845 F.2d 1027 (8th Cir. 1988); Kaplan v. LaBarvera, 67 Cal. Rptr. 2d 903 (Cal. Ct. App. 1997); Clifford v. Marion County Pros. Att'y., 654 N.E.2d 805 (Ind. Ct. App. 1995). See also Jager v. County of Alameda,10 Cal. Rptr. 2d 293, 294–95 (Cal. Ct. App. 1992) (noting that, despite the plaintiff’s allegation that county district attorney and county employees acted negligently in its handling of a support enforcement matter, the attorney and county employees enjoy absolute immunity from liability because their actions were undertaken within the scope of their employment).


257 State applications for IV-D services require applicants to provide a valid address. See, e.g., Florida Application, supra note 174; Wisconsin Application, supra note 171, at 5. In addition, once a child support order is entered, both parents are required “to file with the state case registry upon entry of an order, and to update as appropriate, information on location and identity of the party, including . . . residential and mailing addresses . . . .” 42 U.S.C. § 666(c)(2)(A). Therefore, the state should be able to provide notice by mail and, as provided in § 666(c)(2)(A), the address provided by the applicant should be deemed as a valid address for purposes of satisfying due process notice requirements.

258 See supra Part IV.3.

259 If increased custodial parent participation leads to more protracted cases or fewer cases disposed through settlement, then the costs to the courts and the government could increase. However, the liberty and pecuniary interests at stake as well as the public interest in securing adequate financial and medical support for children outweigh the possible costs of increased parental participation. Automatically according party status to custodial parents would not force parents to participate in greater numbers but would allow those who have interests they wish to protect to do so.


261 Id. at 588.

262 Id. at 587–88.

263 Id. at 588.

264 Id. at 592–93 (citing CAL. WELF. & INST. CODE §§ 11475.1 & 11350.1 (current version at CAL. FAM. CODE § 17404(a) (2001))).

265 Id. at 594.

266 Id.

267 Id.

268 Id. The court rejected the notion that allowing the district attorney to litigate the exemption issue on behalf of the custodial parent placed the district attorney in a
problematic attorney-client relationship with the custodial parent. Id. The court noted that the statute empowers the district attorney to establish, modify and enforce support matters in the name of the county and on behalf of the child or parent, stating that “n[otwithstanding the collateral benefit to the custodial parent, the ‘client’ in such actions remains the county.” Id. at 595.

260 Id. The dissent cited Article I, Section 7 subdivision (a) of the California Constitution. In its analysis, the dissenting justice cited Anderson v. Superior Court, a case in which a pro se custodial parent appeared as a witness in a IV-D case initiated by the county against the non-custodial parent. Id. at 595–96. Based on the custodial parent’s testimony, the lower court took action against the custodial parent and ordered her to participate in a workfare program or engage in a job search in order to avoid a reduction of public assistance benefits. Id. at 596. The Court of Appeals in Anderson considered the factors set forth in Mathews v. Eldridge and ordered the lower court to vacate its order, finding that because the custodial parent had not been joined as a party, the action the court took against her violated her due process rights. Id.

270 Id.
271 Id.
272 Id.
273 Id. at 596–97.
274 Id. at 597.
275 Id. at 592. See CAL. FAM. CODE § 17404(d) (2001).
276 See infra Parts V.2.B & C.
277 See supra Part III.2.
278 See supra V.1.
279 Res judicata prohibits a person from asserting the same claim or cause of action in a subsequent action. Pierce, supra note 237, at 902–03. Collateral estoppel, often referred to as issue preclusion, prohibits a person from relitigating issues that were previously adjudicated, even though the new case involves a different claim or cause of action. Id. (citing Cromwell v. County of Sac, 94 U.S. 351, 352–53 (1876)) (noting that res judicata is “an absolute bar to a subsequent action” but “where the second action . . . is upon a different claim . . . the judgment in the prior action operates as an estoppel only to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.”).
280 The notion that a custodial parent should be estopped from pursuing an action because she could have intervened in the previous litigation presumes that an individual has access to legal counsel who can inform the party of her option to intervene. In child support actions brought by the state IV-D agency, custodians are frequently low-income parties who have little or no access to private legal assistance.

281 See Wright, Miller & Kane, supra note 210, Vol. 7 § 1601 (3d ed.) (citing Thompson v. Wing, 637 N.E.2d 917, 923 (Ohio 1994)); Howell v. Richardson, 544 N.E.2d 878, 881 (Ohio, 1989); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402 (1940):

Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in Chicago, Rock Island & Pacific Railway Co. v. Schendel, 270 U.S. 611, 620 . . . ‘Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same.' A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them.

283 Id.
284 Id.
285 Id. The mother had been the sole provider for the child for approximately nine years. Id. at 704. She then applied for public assistance and received benefits for approximately one year. Id. The state agency brought a child support action during the period in which the mother was receiving benefits. Id.
286 Id. at 705.
287 Id. at 704, 706. But see Miller v. Charles, 439 S.E.2d 88, 88 (Ga. Ct. App. 1993). Plaintiff brought suit against the defendant, seeking establishment of paternity and support. Miller, 439 S.E.2d at 88. The defendant argued that the suit should be barred by res judicata because the state IV-D agency had previously brought an action seeking child support in which another man acknowledged paternity. Id. The Court of Appeals found that the state agency’s interest was “not co-extensive or fully congruent with” the mother’s or child’s interest in seeking to establish paternity. Id. at 89. Therefore, the court held that neither the mother nor the child were privy with the state agency and therefore, the mother’s subsequent action was not barred. Id.

289 Id. at 381
290 Id. at 382. Res judicata is generally an affirmative defense raised by the defendant but the court can also raise this issue on its own. See, e.g., D.F. v. Dep’t of Revenue ex rel. L.F., 736 So. 2d 782, 786 (Fla. Dist. Ct. App. 1999).
291 Lohman, 78 P.3d at 389. The court explained that res judicata bars a subsequent action between identical parties trying to litigate a claim when a final judgment previously rendered addresses the same claim. Id. at 386. The court emphasized that relitigation of claims previously adjudicated as well as subsequent litigation of claims that are related to the previous claim that were raised or could have been raised, are barred. Id. at 387.

292 Id.
293 Id.
294 Id.
295 Id.
296 Id.
297 Id.
298 Id.
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29 Id. at 387–88.
30 Id. at 388. But see State of Oregon ex rel. Moran v. Rushman, 33 P.3d 999, 1001 (Or. Ct. App. 2001). The Oregon Court of Appeals found that the state was not precluded from initiating a paternity and support action even though a previous divorce judgment existed in which the court had found that there were no children born to the marriage. Id. at 1000. The court reasoned that because the state was not a party to the previous divorce action nor was it in privity with either party, the state had the right to initiate a paternity and support action on its own behalf. Id. at 1001.
31 Lohman, 78 P.3d at 389. In some states, res judicata or collateral estoppel only prevents the custodial parent from relitigating claims or issues if the custodial parent assigned her rights to the IV-D agency or if she was joined as a party. See DOUGLAS J. BESHAROV, PRACTICE COMMENTARIES TO N.Y. FAM. LAW § 522 (citing Simone Q. v. Wayne R., 135 A.D.2d 944 (N.Y. App. Div. 1987)).
33 See id. at 890 (quoting RESTATEMENT (SECOND) OF JUDGMENTS).
34 Id.
35 Id. at 891 (citing Kleenwell Biohazard Waste v. Nelson, 48 F.3d 391, 394–95 (9th Cir. 1995)). In Kleenwell, the court applied res judicata to findings in an administrative adjudication in which an administrative law judge conducted the hearing, and the parties had an opportunity to present evidence, cross-examine adverse witnesses, and file briefs. Id.
36 See PIERCE, supra note 237, at 909. However, some courts have recognized that res judicata in an administrative setting may be more malleable than in a judicial context. Id. at 893. For example, the Third Circuit stated that when claimants typically do not have counsel to represent them, rigid application of res judicata principles “must be tempered by fairness and equity.” Id. at 893 (quoting Purter v. Heckler, 771 F.2d 682, 691 (3d Cir. 1985)).
37 See Id. at 898 (noting that the legislature may enact an exception to the common law res judicata standards).
38 California had a statute expressly authorizing a custodial or non-custodial parent to relitigate child support issues previously raised in an action brought by the IV-D agency. CAL. WELF. & INST. CODE § 11350.1 (2000). However, that statute has since been repealed and is codified in its current form at CAL. FAM. CODE § 17404(d) (2001).
39 See, e.g., CAL. FAM. CODE § 17404(d) (nothing in the statute “prevents parties from bringing an independent action under other provisions of this code and litigating the issues of support, custody, visitation, or protective orders”).
40 Id.
41 Id.
43 Id. §§ 302.70(a)(9)(iii) & 303.106(a)(3).
44 See id. § 303.106.
pursuing support could damage that relationship. If the
custodial parent is listed as a plaintiff, the non-custodial
parent might believe that the custodial parent is pushing the
government to pursue child support from him when, in fact,
it is the government that has taken this action.
321 As discussed in Part V.2.A, such notice could be
effectuated by first class mail to the address provided by the
custodial parent.
323 WYOMING GUIDE, supra note 178, at 2.
324 See WRIGHT, MILLER & KANE, supra note 210, at
139.
325 Most custodians receiving child support services from
IV-D agencies do not have private attorneys assisting them.
It is highly unlikely that pro se parties will know that they
have a right to request that they be permitted to intervene
and join in the case unless the judge or the agency explains
this right.
326 WYOMING GUIDE, supra note 179, at 5.
327 Id.
328 Id.
329 Id.
330 OCSE ATTORNEY HANDBOOK, supra note 7, at 38.
331 Id. at 37.
332 Id. at 37–38.
333 Id. at 37.
334 Florida Application, supra note 174 (emphasis added).
335 OCSE ATTORNEY HANDBOOK, supra note 7 (warning
of this potential problem).
336 Child Support Fact Sheet, supra note 33.
337 Several commentators have suggested that the current
child support system does not provide an effective vehicle
for bringing families out of poverty, particularly in cases
involving low-income non-custodial parents. See, e.g.,
Murphy, supra note 38, at 351–65.