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Steven D. Capps
Director

MEMORANDUM

DATE: April 21, 2021

TO: Friends of the Court
cc: Chief Circuit Judges
Circuit Court Administrators

FROM: Steven D. Capps, Director

RE: Guidance for Child Support Cases Relating to the American Rescue Plan

MCL 552.519(3) directs the State Court Administrative Office's Friend of the Court Bureau to develop guidelines for the conduct, operation, and procedures of the office, including a formula to establish and modify child support, and to provide training for friend of the court (FOC) offices to better enable them to carry out the duties described in the act and Michigan Court Rules.

The American Rescue Plan Act of 2021 (ARP) is effective March 11, 2021. This document summarizes what the ARP does by topic (stimulus advance credit payments, child tax credit, etc.). It also discusses:

- The effect on income for purposes of setting support.
- The effect on enforcement issues.
- Miscellaneous issues.

Considerations and commentary are included to help FOCs determine how to address the effects of the ARP on child support and enforcement.

The Michigan Child Support Formula (MCSF) balances the costs of raising a child with the families' circumstances and income. It is important to keep this balance in mind and avoid general assumptions about who should or should not benefit from the ARP. Due to the unique nature of the Pandemic and Congress's response, the usual rules for how to treat some payments or credits may not fit neatly in a given case. Therefore, it may be difficult to apply hard and fast rules to all cases and each case must be looked at individually, both at the case and party level, to ensure the right result. The summary, considerations, and commentary is designed to inform and guide FOCs as they apply the facts of a case to set or enforce support.

If you have questions or need additional information, please contact Paul Gehm at gehmp@courts.mi.gov or 517-373-5975.

I. American Rescue Plan Act: What it Does

A. Stimulus Payments

1. The ARP creates a tax credit for 2021, similar to the CARES Act, in the amount of $1400 per individual and claimed dependent. The ARP makes the entire tax credit refundable for any amount that exceeds taxes owed, and is not taxable income. The payments phase out at certain income levels (starts at $75,000 for single; $150,000 for joint; $112,500 for head of household). The ARP expanded individuals eligible to receive both the credit and advance payments of the credit.

   Commentary: Individuals in prison and others who may not have had income in the past are included in those eligible for advanced payments.

2. If filing jointly, and dependents are claimed, the IRS considers each adult as entitled to half of each dependent's amount.
3. The stimulus will be paid out through advance payments and on tax return refunds. Advance payments will be made through direct deposit, paper checks, and issuing new debit cards (the law does not allow the IRS to add a balance to existing debit card accounts if the debit card was issued solely for prior advance tax credits).
4. We expect that most individuals will receive an advance credit for the tax year 2021. Those who do not receive an advanced credit payment must file for it (if claiming at all) in their 2021 tax return.
5. The ARP only exempts advance payments from direct offset by the IRS. However, the ARP does not prohibit offset of the credit through the tax refund offset process, nor does the ARP prohibit garnishment of the payment.

B. Child Tax Credit (CTC)

1. The CTC expansions only apply to tax year 2021. The ARP increases the CTC to $3,000 per dependent between ages 6-17; and $3,600 if under 6. The ARP also expands the eligibility for qualifying dependents by increasing the age *through* age 17.

   Commentary: Press reports and quotes from members of Congress and the Executive Administration indicate a desire to quickly expand the credit to future tax years.

2. The ARP makes the entire tax credit refundable for any amount that exceeds taxes owed, and is not taxable income. This is a change from the previous $1,400 maximum amount, which was refundable per qualifying dependent. The ARP also removed a requirement that the individual have "earned" at least $2,500 to be eligible to receive the credit.
3. The ARP requires that the IRS pay the CTC in advance payments (which must be 50% of the total expected credit). The law requires the IRS to make these advance payments between July and December in equal monthly installments (however, the IRS does have some discretion to alter the payment schedule – i.e. quarterly – but each installment must be the same amount). If payments are made as expected, each month from July through December, the amount is:

   a) Children ages 6 through 17: $250 per qualifying child;

   b) Children younger than 6: $300 per qualifying child.

4. The IRS will look at the taxpayer's prior tax year filing for the number of children claimed and eligible to be counted for the advance payments; if no filing from the prior tax year, the IRS will look back two years.
5. The ARP allows taxpayers to opt out of advance payments in an online portal where they will also be able to update information (number of dependents, change in filing status, significant change in income, etc.).
6. The ARP says that advance payments are not subject to direct offset from the IRS; but the payments are subject to garnishment. The portion of the credit that will be claimed on the tax return (at least 50% if advance payments are received; up to 100% if the taxpayer opted out or did not get the credit they were owed) is subject to standard tax refund offset procedures.
7. The child tax credit is subject to phase out at the following income limits:
    a) For the former "base" portion of the child tax credit ($2,000 per qualifying dependent), the same income thresholds are in place: these started phasing out at $200,000 for an individual, which totally phases out by $240,000; and $400,000 for a joint filer, which totally phases out at $440,000.
    b) The expanded portion of the 2021 CTC (e.g., the additional $1,000 or $1,600, depending on the age of the qualifying dependent) phases out for individual filers making more than $75,000 AGI, head of household filers making $112,500 AGI, and for joint filers with more than $150,000 AGI.
    c) Families with incomes above the phase out threshold may still qualify for the $2,000 credit and will get a monthly payment of $167 per qualifying dependent.
8. The ARP acknowledges that overpayments of the child tax credit may happen through the advance payments. If an overpayment happens, the general rule is that the person's tax liability increases dollar for dollar. However, there is a safe harbor provision. Individuals will not have to repay any overpayment if their modified adjusted gross income is below a certain level ($40,000 for a single filer; $50,000 for head of household; and $60,000 for joint returns). If income is above that level, individuals will have to repay part of the overpayment until they reach the full repayment level ($80,000 single; $100,000 head of household; and $120,000 joint returns).

C. Child and Dependent Care Tax Credit (CDCTC)

1. The child and dependent care tax credit (CDCTC) is different than the child tax credit (CTC). The CDCTC is for child and dependent care expenses.
2. The ARP made changes to the CDCTC, which only apply to the 2021 tax year. A dependent must be under 13 the entire tax year, but can include a spouse or adult family member with a mental illness.
3. The ARP expands the amount of the credit. For a single qualifying child, up to $8,000 in expenses may be claimed for a maximum credit of $4,000. For two or more qualifying dependents, up to $16,000 of expenses may be claimed for a maximum credit of $8,000. In addition to increasing the amount of the credit, the ARP also makes the credit entirely refundable.
4. Similar to other credits, there are income thresholds for eligibility. Families making up to $125,000 would receive up to an $8,000 credit for the first $16,000 in child care expenses; and families making up to $400,000 would still

be eligible for at least 20% of their first $16,000 in child care expenses for a credit up to $3,200.

5. In order to claim the credit, the individual must report these expenses on an IRS 2441 tax form.
6. Unlike other credits expanded or created under the ARP, there are no advance payments for the CDCTC. Therefore, in order to receive the credit, the taxpayer must file for it on a tax return. Furthermore, the ARP does not prohibit the credit from being offset directly by the IRS or from other garnishment once the payment is made.
7. Finally, the ARP also increases the amount excluded from income for employer-provided dependent care assistance.

D. Unemployment

1. The ARP extends COVID-related unemployment benefits until September 6, 2021, and extends the amount at $300 in addition to state benefits. The ARP extensions include most of the programs in place through the CARES Act and the Consolidated Budget Act (e.g., PUA for self-employed). The ARP makes the effective date relate back to the CARES Act, unless the unemployment ended before March 14, 2021.
2. The ARP makes significant changes in the tax treatment of unemployment benefits received during 2020. The ARP suspends federal income tax on the first $10,200 of unemployment income for each taxpayer (if filing jointly, each taxpayer gets to exclude their first $10,200 from taxes). However, this is still subject to Michigan state tax. These changes only apply to a tax year beginning in 2020.
3. To get this treatment, the individual's AGI must be less than $150,000, regardless of filing status. The IRS has issued new guidance that says any unemployment received in 2020 is not to be used in determining the AGI. If an individual's return (regardless of filing status) shows an AGI more than $150,000, then there is no tax break.
4. The IRS has released new guidance that amended federal returns are not necessary (unless the change would make you eligible for other credits – like the EIC, dependent care, etc. – that were not already claimed), and that any tax refunds, because of including the $10,200 nontaxable income, will be paid out and processed automatically by the IRS.

E. Earned Income Tax Credit

1. There is likely not as large an impact to child support because the EITC is a means-tested income, exempt from being used as income for child support (MCSF 2.04(A)).
2. The ARP lowers the EITC threshold for the age when an individual can claim the credit with no dependents, and removes an upper age threshold. The ARPA also now allows (for all future tax years, including 2021) married individual taxpayers who are separated and do not file a joint tax return to qualify for the EIC as not married.

II. Support Establishment and Review Considerations

Commentary: The payments in this legislation are unique and are in response to struggles *created and worsened by the Pandemic. Therefore, the clearly-established rules for how to treat the payments may not always cleanly fit within the rules established in the MCSF. The best way to address any support determination is to consider the individual situation of the parties and their children. It is important to look at the effect of the payment or income type; Congress took preexisting credits and refunds and applied them in new ways that may cause different outcomes. Where the circumstances dictate, the court may determine the name of a payment is not determinative of how it should be treated. The court might also determine it is appropriate to treat the payment as it is named, but because of the circumstances of the case, strict application of the formula would create an unjust or inappropriate result. All determinations concerning ARP treatment or deviation should apply equally to payers and payees. If a credit or income does not fit in a normal category, the next step would be to find a way to treat it that fits within the MCSF. As a starting point, courts and FOC offices should be mindful of the following formula provisions:*

A. MCSF Provisions

1. 2.01(B) The objective of determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a pa0rent's financial status are open for consideration when determining support.
2. 2.01(C)(8) [Income includes a]ny money or income due or owed by another individual, source of income, government, or other legal entity. Income considered should usually meet the statutory definition found at MCL 552.602(o).
3. 2.01(C)(3) states that monthly unemployment benefits are considered income.

   Commentary: Any source of income available to a parent – including special payments – are amounts available to the parents. The timing of receiving the payments, just like the timing of other payments like bonuses, will affect whether the income is available at the time support is set. It may also affect whether support is set in tiered grids (see section 4.2.6 of the Michigan Child Support Manual 4.20). For some families, some payments may more closely resemble one-time gifts. The court and FOC should carefully document any treatment different than income.
4. 1.04(A) The court can deviate from the formula, but the deviation must be based on the facts of the case and cannot be based solely on disagreement with the policies embodied in the formula. See MCL 552.605, Ghidotti v Barber, 459 Mich 189 (1998), and Burba v Burba, 461 Mich 637 (2000).

B. Other Guidance: FAQ 2020-01

However, the court may have discretion. FAQ 2020-01 says the court has several choices regarding the amount: 1) count the entire amount as income; 2) only count the net amount received; or 3) spread the amount over a year or more. The FAQ recommends only using the amount during a temporary period and using a multi-grid support order.

C. Other Consideration Tips

1. Considerations for advance credits (stimulus and child tax credit)

   Commentary: Stimulus payments: While each parent should receive the stimulus payments, the money will have an effect on the MCSF's underlying math in determining the appropriate amount of base support. Furthermore, *only one parent should receive the advanced credit for the dependents on the case. For example, a divorced family with two children will see separated parents receive $1,400 for themselves; but one parent will likely receive $2,800 for claiming the dependents that the other parent does not have access to. Unlike government benefit programs, there is no way under the MCSF to apply credits to the support amounts, as allowed in MCSF 3.07(A). Therefore, a court should pay particular attention to the portions paid for the dependents. Finally, if a party claiming dependents files jointly, the IRS has stated that half of the money attributable to the dependents claimed is considered each of the joint filer's.*

CTC Advance Payments: A complication to the CTC is the potential repayment of overpayments; however, the amount of the repayment is subject to modified adjusted gross income levels. If funds are counted as income when received, any repayment that is required should be considered when the actual tax implications become finally known (either through a future review or making a temporary order final). The advance payments are not taxable income.

2. Consideration of credits claimed through tax refund (stimulus, CTC, and CDCTC)

   Commentary: A court could consider the likelihood and consistency of an individual claiming and receiving the credit, or alternating the credit with the other party before fully counting an amount as yearly income. The MiCSES calculator allows this to be included as a non-means tested refundable tax credit. Additionally, as it applies to determining the appropriate level of taxes, SCAO Friend of the Court Bureau Memorandum "Improving Support Calculations" includes a footnote to address the child tax credit, and indicates how to include the amount in the calculator software.

   The court will want to give special consideration to the CDCTC as it directly impacts the net cost of child care, which is included as part of the support order for reimbursement to the parent incurring the expenses. If the increase in the CDCTC is not considered for 2021, the parent incurring the dependent care expenses will receive increased amounts through the credit, and a higher amount than is proper from the reimbursement provision for child care in the support order.

   Another potential for the court to consider is the increase in the amount the IRS excludes from income when looking at employer-provided dependent care benefits. By not having those amounts taxed, an individual's net income is higher. These would likely fall under the "perks" category of income under MCSF 2.01(D) and the general objective as defined in 2.01(B).

3. Consideration of unemployment monthly benefits

   Commentary: There are many options for how to consider the additional $300 payment. The payment could be included in a party's income and the court could use tiered grids. The court could also determine that the needs of the family dictate a different treatment – for instance, deviating if the payment addressed unanticipated costs in a recipient's household or, where a child's needs increased, using the income in situations in which the court would normally not include it. Note that any treatment other than including the *income in a parent's support calculation is a deviation and must be addressed as such.*

When considering whether unemployment benefits are income, the analysis should consider, at an individual level, whether the person had the choice and then chose to have taxes withheld. Depending on whether taxes were withheld at the time the monthly benefits were paid will result in a change to the impact on the tax refund, particularly with the first $10,200 treated as non-taxable income. For example, if taxes were withheld from unemployment monthly benefits, then the amount of taxes paid would be higher than required and will likely result in an increased tax refund. Particular attention should be given to cases where the individual received Workshare benefits, as this is an indication of somewhat stable employment and often resulted in higher incomes, which are impacted at a higher level by the treatment of the first $10,200 as non-taxable.

It is important for the court to consider, on an individual level, the impact of unemployment benefits. National reports and our own research shows that a vast majority of individuals received more through unemployment than they were regularly earning. Part of the reason for this is the low income of individuals on our caseload. However, this trend (getting more through unemployment than previously earned) seemed to apply to higher income brackets as well, especially with the workshare program. For perspective on the amounts that unemployment benefits could have added:

a) *When unemployment state benefits were combined with the additional $600 benefit under the CARES Act, total UIA could have been roughly $50k a year (assuming a full state benefit award).*

b) *When state unemployment benefits were combined with the additional $300 federal benefit, total UIA could have been roughly $35k a year (assuming a full state benefit award).*

4. Considerations for the first $10,200 in unemployment received as non-taxable income

   Commentary: The court could consider the first $10,200 of unemployment benefits for 2020 as income under the MCSF. It is money available to the parent from which support can be paid. If it is used, it should be recorded in CALC as nontaxable income.

   Reminder: To be eligible for the non-taxable treatment, the individual's income, regardless of filing status, must be less than an AGI of $150,000, which does not include any 2020 unemployment received.

5. General Considerations for support calculations

   a) Particularly where a court determines to use any of the CARES Act, Consolidated Budget Act, or ARP benefits and tax treatments as income, there are several options for the court to set support fairly and efficiently. For more details, see *SCAO FAQ 2020-01 Support Reviews and Support Modifications*.

   b) A court may consider using tiered grids to efficiently adjust support levels given known changes in income based on dates or events.

   Commentary: Tiered grids are most effective when a future condition is known. SCAO FAQ 2020-01 provides more explanation. Where a *promise of a job or return to work at similar wages is known or expected, a tiered grid will automatically take effect on the given date or condition set. This will allow office resources to handle reviews in the majority of other cases that will need support determinations in the future.*

National research has shown that many individuals are not returning to similar wage jobs. However, if, at the time of the review, the individual has a strong chance of reemployment with the same employer or elsewhere at the same wage, a tiered grid is an efficient method to set support. If conditions are different than anticipated in the future, a new review will likely be appropriate.

c) The court may also consider setting a temporary order, given the period of uncertainty. *SCAO FAQ 2020-01 Support Reviews and Support Modifications* provides further details on when this approach is most useful.

Commentary*: The court and FOC staff should be aware of potential MiCSES impacts when recording an order as "temporary." For example, it appears that the ability to use the system for certain enforcement activities or support reviews may not be possible.*

III. Enforcement Considerations

Notwithstanding how the court or FOC treats an ARP payment for one purpose it may not necessarily be appropriate to treat it the same for another purpose. Like a one-time small inheritance, a payment that does not count for purposes of setting support, may still be applied to enforce support and similarly, a payment that is used to enforce support may not automatically be considered as income to calculate support.

A. Stimulus and Advance CTC payments:

1. Advance payments are not subject to direct offset by the IRS. However, unlike the $600 stimulus payments (from the Consolidated Budget Act), which were subject to tracing requirements similar to SSI payments, the payments from the ARP are subject to garnishment (e.g., attachable in a bank account).

2. Financial Institution Data Matches have been centralized, and timing of the match and payments may not identify all payments as they are received.

Commentary: The advance payments are not subject to offset directly from the IRS. However, the ARP does not prohibit the garnishment of these funds once made by the IRS (i.e., financial lien or other enforcement order requiring the use of these funds for support payments).

B. Credits Claimed Through Tax Filing (Stimulus, CTC, and CDCTC):

1. The portion of the credits claimed on the 2021 tax return will be subject to the standard tax refund offset procedures for child support arrears.

Commentary: If the credit is not paid through an advance payment, but filed for on an individual's 2021 tax return, the individual will have reduced tax liability and is more likely to receive a refund, which will be subject to standard tax refund offset procedures (if the party is the payer of support).

To the extent a parent receives these funds, the court may consider them as proof of ability to pay in show cause. This should be considered case-by-case. Due to the quick nature of payments and spending, it may be worthwhile to ask *or find evidence of (i.e. social media) how they are spending the money. If a payer sporadically pays support, there may now be assets from which the court can order a bond for future support.*

C. Unemployment

1. Special consideration for the first $10,200 now considered as non-taxable income:

   Commentary: A court could have several options on a case-by-case basis. How the individual handled taxes on the unemployment (if given the choice) could also help the court make informed decisions.

   a) If the individual had taxes withheld, the State intercepted a lower amount from UIA. But because it is not subject to federal income tax (it is subject to state tax still), the taxable income is lower, creating a lower tax liability; additionally, an individual will have paid too much in taxes. This will result in a higher refund. The State will withhold that refund through tax offset.

   b) If the individual did not have taxes withheld, we intercepted a higher amount from UIA. But, because the first $10,200 is not subject to federal income tax, the tax liability will be lower and the State will again withhold from a refund (albeit, a lower refund than if taxes had been withheld).

IV. Miscellaneous Issues

A. Considerations in cases where parents alternate claiming dependents and the CTC

1. Courts and friend of the court staff should be aware of the ARP changes to the stimulus and CTC, particularly in cases where parties alternate which parent claims the dependent(s). There is increased potential for parents who alternate tax years to receive the wrong amount.

2. The IRS has stated that each dependent can only be claimed by one taxpayer, and the ARP grants the secretary the ability to pass further regulations.

3. Typically, the parent who has custody gets to claim an exemption. If there is a 50/50 split custody, the parent with the higher AGI gets to claim the exemption. However, in cases of divorce or separation, other rules may apply. Parents can file IRS 8332 and alternate the dependency and CTC.

   Commentary: The court should be aware that if the wrong party receives the credit, income amounts could be inaccurate if those amounts were included in the support calculation and alternated. It is also possible a party could turn to the FOC to attempt to fix the issue. Courts should establish a policy for if, when, and how the FOC will be involved in addressing these issues.

   A court could find that under the MCSF, one party now has a higher income, and the amount is income and set support accordingly. An additional consideration under this approach is that if the court determines it is income or that it could then be paid back or collected through enforcement; whether the party is the support payer or support recipient could affect that approach, as traditional enforcement does not apply to support recipients.