

AG Defenses

Failure to Pay Child Support



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Time Limitations to Enforce



Tex. Fam. Code §157.005 Time Limitations; Enforcement of Child Support

Not a statute of limitation, defines the court's jurisdiction to enforce its order.

- A motion to enforce must be filed not later than the second anniversary of the date:
 1. The child becomes an adult; or
 2. The child support order terminates under the order or by operation of law.

- A motion to confirm child support arrears must be filed no later than the tenth anniversary of the date:
 1. The child becomes an adult; or
 2. The child support order terminates under the order or by operation of law.

Objection to the Associate Judge



Once a party receives notice that an associate judge will hear the trial, they have ten days to file a written objection to the associate judge hearing the trial on the merits. Tex. Fam. Code § 201.005(c).

Affirmative Defense

Tex. Fam. Code § 157.008



A respondent must prove the affirmative defense by a preponderance of the evidence.

Voluntary Relinquishment

Tex. Fam. Code §157.008 (b)

Inability to Provide Support as Ordered

Tex. Fam. Code §157.008 (c) & (d)

Voluntary Relinquishment

Tex. Fam. Code §157.008 (a) & (b)



Voluntary relinquishment requires the obligor to plead and prove two things:

1. The obligee has voluntarily relinquished actual possession and control of the child to the obligor in excess of any court ordered period of possession; **AND**
 - The obligee does not have to give up all rights of control and possession, nor does the child have to live separately from the obligee. *In re W.J.B*, 294 S.W.3d 873, 880 (Tex. App. – Beaumont 2009, no pet.).
 - Agreeing to allow the child to attend a boarding school that the obligor paid for is not considered voluntary relinquishment. *Chenault v. Banks*, 296 S.W.3d 186,191 (Tex. App. – Houston [14th Dist.] 2009, no pet.).

Voluntary Relinquishment

Tex. Fam. Code §157.008 (a) & (b)



2. The obligor actually provided support.
 - With no evidence that anyone else provided support for the child, it is enough to show that the obligor had actual possession of the child for the period in excess of the court order. *In re AM*, 192 S.W.3d 570, 575-76 (Tex. 2006); *see also*, *Pedregon v. Sanchez*, 234 S.W.3d 90, 96 (Tex. App. – El Paso 2007, no pet.) (Obligor must provide some evidence of the actual support paid when there is evidence that the obligor did not solely support the child).

Failure to plead and prove both elements will cause the affirmative defense to fail. *Pedregon v. Sanchez*, 234 S.W.3d 90, 94 (Tex. App. – El Paso 2007, no pet.) and *Gonzalez v. Tippit* 167 S.W.3d 536, 541 (Tex. App. – Austin 2005, no pet.).

Reimbursement or Offset



- ❖ Once the obligor has established the affirmative defense of voluntary relinquishment, the obligor may request reimbursement through a counterclaim or an offset from the obligee as a defense to the contempt action; **but not both**. Tex. Fam. Code §157.008 (d); *In re AM*, 192 S.W.3d 570, 574 (Tex. 2006).
- ❖ The amount of reimbursement or offset against the obligee is limited to the amount of periodic payments previously ordered by the court. Tex. Fam. Code §157.008(e).
- ❖ The establishment of this defense does not shift the child support obligation from the obligor to the obligee; the obligor will still need to file a motion for modification. *In Re Am*, 192 S.W.3d 570, 574 (Tex. 2006).

Inability to Provide Support as Ordered

Tex. Fam. Code §157.008(c)



The obligor must prove all four elements of this affirmative defense to be successful.

1. The obligor lacked the ability to provide the ordered support amount;
2. The obligor lacked property that could be sold, mortgaged or otherwise pledged to raise funds to pay support;
3. The obligor attempted unsuccessfully to borrow the money to pay support; and
4. The obligor knew of no other source to obtain or borrow money legally.

Civil & Criminal Contempt and the obligor's inability to comply



Civil Contempt

The obligor will have to show that he currently does not have the ability to comply with the child support order. *Ex parte Williams*, 704 S.W.2d 465, 467 (Tex. App. – Houston [1st Dist.] 1986, orig. proceeding).

Criminal Contempt

The obligor will have to show that he did not have the ability to comply each time a child support payment came due. *Ex parte Ramon*, 821 S.W.2d 711, 713 (Tex. App. – San Antonio 1991, orig. proceeding) and *Ex parte Williams*, 704 S.W.2d 465, 467 (Tex. App. – Houston [1st Dist.] 1986, orig. proceeding).

The obligor lacked the ability to provide the ordered support amount.

Tex. Fam. Code §157.008(c)(1)



1. Hospitalization
2. Incarceration
3. Disabled and unable to work

When proving the obligor lacked the ability to pay the court ordered support, the obligor does not have to show that he does not have any funds, but that he has insufficient funds after paying for necessary living expenses. *Ex parte Englutt*, 619 S.W.2d 279, 281 (Tex. App. – Texarkana 1981, orig. proceeding).

Although, the obligor may not be found in contempt because he was able to prove an inability to comply with the court order; this does not mean he will not owe the delinquent amount.

The obligor lacked property that could be sold, mortgaged or otherwise pledged to raise funds to pay support.

Tex. Fam. Code §157.008(c)(2)



- The obligor should provide evidence regarding any and all attempts to sell or mortgage property owned by obligor.
- If the obligor has a retirement fund, be sure the obligor cannot borrow against it.

The obligor attempted unsuccessfully to borrow the money to pay support.

Tex. Fam. Code §157.008 (c)(3)



- ✓ This will require the obligor to provide evidence that he attempted to borrow money from all available sources.
- ✓ The obligor must present evidence that he attempted to borrow the funds from his spouse, girlfriend, friends and relatives. Also, provide proof that he went to the bank he does business with and attempted to secure a loan. *Ex parte Loftin*, 522 S.W.2d 591, 594 (Tex. App. – Tyler 1975, orig. proceeding).
- ✓ Credit cards with available limits could also be seen as a source.

The obligor knew of no other source to obtain
or borrow money legally.

Tex. Fam. Code §157.008 (c)(4)



If the obligor has a retirement fund, life insurance, or owns part of a business; make sure the obligor cannot borrow against these items.

Payment

Tex. Fam. Code §157.162 (d)



If the obligor is able to provide proof that he is current in the payment of child support, the court may not find the obligor in contempt of court for failure to pay child support. See *In re Ezukanma*, 336 S.W.3d 389, 394-95 (Tex. App. – Fort Worth 2011).

Although the obligor may have become current on his child support obligation, the court still could order the obligor to pay the obligee's court costs and attorney fees if it finds that the obligor became current after learning of the filing of the motion for enforcement. Tex. Fam. Code §157.162 (e).

Credit for Payment of Disability Benefits

Tex. Fam. Code §157.009



If the child receives a lump-sum payment as a result of the Obligor's disability and the payment is made out to the obligee as the representative payee of the child; the obligor is entitled to a credit towards any arrearage.

Be sure the credit is applied to any child support arrearage and interest owed at the actual time the payment is made.

Consider a Motion to Modify



If the child to whom support is owed, is receiving monthly payments due to the obligor's disability or old age benefits, you need to file a motion to modify to ensure the obligor's current child support amount is correct and to ensure the obligor receives any credits due to the payments the child is receiving.

- Tex. Fam. Code §154.133 – Application of Guidelines to Children of Certain Disabled Obligor
- Tex. Fam. Code §154.134 - Application of Guidelines to Children of Obligor Receiving Social Security

Both statutes allow the obligor to receive a credit towards any current child support in the amount of the benefit payments the child is receiving due to the obligor's disability or old age benefits.

Wage & Salary Presumption

Tex. Fam. Code §154.068



In the absence of evidence of the wage and salary income of a party, the court shall presume that the party has wages or salary equal to the federal minimum wage for a 40-hour week.