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## **“I Won’t Pay Child Support, But I Insist on Visitation.” Should Visitation and Child Support Be Linked?**

John E.B. Myers\*

### I. INTRODUCTION

When parents with minor children divorce,<sup>1</sup> they have legal as well as moral duties to support their children.<sup>2</sup> Turning from support to custody, divorcing parents share equal rights to legal and physical custody.<sup>3</sup> In most cases, parents agree on the post-marital custody and support arrangement that is best for their family. When parents cannot agree, a judge decides.<sup>4</sup> If one parent gets sole or primary physical custody, the noncustodial parent enjoys visitation.<sup>5</sup>

Millions of divorced parents “make it work.” Often, there isn’t enough money, but that’s true for most Americans most of the time. Divorced parents do their best to forge new lives for themselves and their kids, cooperating despite the breakup.

Unfortunately, anyone who has spent more than fifteen minutes in family court understands that some divorced couples are anything but cooperative. The anger, frustration, and depression wafting through family court are thick enough to cut with a knife. Charles Dickens would struggle for words to describe the torrent of emotion running through family court.

Some warring parents wield their children as weapons on the post-divorce battlefield. One tactic designed to vanquish the other parent is to withhold child support. Untold numbers of noncustodial parents who *could* pay child support don’t. In 2013, Emily Alpert Reyes reported in the *Los Angeles Times*, “More than \$14 billion of child support was left unpaid to American parents in a single

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1. The principles discussed in this Article apply equally to divorced parents and never-married parents. For ease of reading, the text is limited to divorced parents.

2. *See, e.g.*, CAL. FAM. CODE § 3900 (West 2013) (“Subject to this division, the father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child’s circumstances.”).

3. *Id.* § 3010 (West 2004) (“The mother of an unemancipated minor child and the father . . . are equally entitled to the custody of the child.”).

4. *See id.* § 3020(c) (“Where . . . conflict, any court’s order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.”).

5. *See id.* § 3100(a).

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year . . . Fewer than half of eligible parents received all of the child support they were due in 2011, according to [the Census Bureau]. About a quarter got none.”<sup>6</sup> Undetermined billions of these billions went unpaid from pure spite. Interestingly, quite a few parents who steadfastly refuse to support their kids insist on visiting them. Consider Sue and Tom. In the divorce, Sue got custody; Tom got visitation and a child support order. Tom has the money to pay support, but refuses to pay because he hates Sue. Yet, Tom says, “I won’t pay child support, but I insist on visitation.”

Noncustodial parents who withhold child support *in order to* inflict pain are not the only malefactors. Some custodial parents deliberately frustrate the noncustodial parent’s visitation with the children. Examples range from last minute cancelled visits, at one extreme, to spiriting the kids out of the country, at the other. Consider Beth and Mike. In their divorce, Mike got custody. Beth has visits and must pay child support. Without telling Beth, Mike moves the children three thousand miles away. He does so *in order to* frustrate Beth’s relationship with the kids. From his new home on the other side of the country, Mike insists that Beth pay child support.

The law has remedies for intentional failure to pay child support and intentional interference with visitation.<sup>7</sup> Injured parents can seek court orders enforcing their rights. In extreme cases, the court can hold a disobedient parent in contempt.<sup>8</sup> Unfortunately, the majority of family law litigants cannot afford counsel to enforce their rights. Although courts do their best to treat unrepresented litigants fairly, lack of representation, coupled with the mind-numbing complexity of law, leaves many deserving parents disappointed.<sup>9</sup>

In family court, the efficacy of legal remedies can be undermined by intense emotion. Each parent has their own reality. Even when both parents do their best to tell the truth, it is astonishing how often two versions of the same events come out as polar opposites. And that’s when parents tell the truth! The dirty little secret is that some parents in family court lie.<sup>10</sup> Let’s not mince words: LIE. How many parents lie? No one knows. But ask yourself, what kind of parent finds

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6. Emily Alpert Reyes, *Billions of Dollars in Child Support Go Unpaid Yearly*, L.A. TIMES (November 20, 2013), <http://www.articles.latimes.com/print/2013/nov/20/nation/la-na-1121-child-support-20131121> (on file with the *McGeorge Law Review*).

7. See *In re Marriage of Damico*, 7 Cal. 4th 673, 679 (1994).

8. CAL. CIV. PROC. CODE § 1209.5 (West 2007).

9. Quite a few parents seek child support help from child support enforcement agencies. These agencies are quite adept at getting blood from turnips.

10. Standing in the hallway at family court one day, I overheard another lawyer describe testifying in family court as “testilying.” Perhaps there should be a warning posted on the courthouse door: “Warning: Spending too much time in family court can turn you into a cynic.” I am constantly impressed at how *non-cynical* most family law attorneys and judges remain. I am particularly impressed by the judges in family court. How they sit up there hour after hour, day after day, month after month, listening to the stories—many true, many not true—without jumping off a bridge or, at a minimum, losing patience with litigants and their attorneys (some lawyers are worse than the litigants) is a testament to the best in human nature.

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lying expedient? The parent who deliberately takes revenge on the “ex” by refusing to support the kids? The parent whose goal it is to undermine the “ex’s” relationship with the children? Yes, the law has remedies. The effectiveness of those remedies is another story.

As an additional remedy, may a judge suspend the visitation rights of a noncustodial parent who deliberately withholds support? May a judge suspend or alter receipt of child support until a custodial parent stops interfering with visitation? In most states, the answer to both questions is “no.”<sup>11</sup> Child support and visitation are independent; they are not linked.<sup>12</sup> A parent who intentionally refuses to pay child support nevertheless is entitled to visitation.<sup>13</sup> A parent who intentionally thwarts visitation is entitled to child support.<sup>14</sup>

The rule that support and visitation are decoupled is categorical. The problem, of course, with categorical rules is that they are categorical. The hearsay rule is categorical, but the rule has exceptions. The Statute of Frauds is categorical, but there are exceptions. The attorney-client privilege is categorical, unless an exception applies. The list goes on. Legislatures and courts create exceptions to categorical rules in order to achieve fairness and justice. Exceptions should be established to the rule that support and visitation are decoupled.

## II. THE RULE IN OPERATION

Before recommending exceptions to the rule, it is useful to discuss the rule in greater depth. Several states have statutes codifying the rule.<sup>15</sup> In California, for example, the Family Code specifies that the duty to pay child support is not affected by the custodial parent’s refusal to facilitate visitation.<sup>16</sup> Kentucky is to the same effect: The duty to pay support “is not suspended” by a custodial parent’s thwarting of visitation.<sup>17</sup>

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11. *See, e.g.*, *Marriage of Popa*, 995 N.E.2d 521, 522, 374 Ill. Dec. 382 (Ct. App. 2013) (“[C]hild support payments cannot be linked to a custodial parent’s violation of visitation terms.”); *Office of the Attorney General of Texas v. Scholer*, 403 S.W.3d 859, 866 (Tex. 2013) (“Because payment of child support reflects a parent’s duty to his child, furthering the child’s welfare and best interests, estoppel is not an affirmative defense to a child support enforcement action.”); *Ledsome v. Ledsome*, 171 W. Va. 602, 301 S.E.2d 475, 477 (1983) (“[O]rdinarily, a father’s visitation rights may not be denied merely for nonpayment of child support.”); M.L. Cross, *Violation of Custody or Visitation Provision of Agreement or Decree as Affecting Child Support Payment Provision, and Vice Versa*, 95 A.L.R. 2d 118 (1964); Edward L. Raymond, Jr., *Withholding Visitation Rights for Failure to Make Alimony or Support Payments*, 65 A.L.R. 4th 1155 (1988).

12. *Id.*

13. *Id.*

14. *Id.*

15. *See, e.g.*, KY. REV. STAT. ANN. § 403.240(1) (West 1992) (“If a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but he may move the court to grant an appropriate order.”).

16. CAL. FAM. CODE § 3556 (West 2004).

17. KY. REV. STAT. ANN. § 403.240(1) (West 1992) (“If a party fails to comply with a provision of a

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The rule is well established in California case law.<sup>18</sup> The Court of Appeals' decision in *Camacho v. Camacho*<sup>19</sup> is a good illustration. An unwed father brought an action to establish paternity and obtain visitation.<sup>20</sup> The trial court conditioned visitation on father's timely payment of child support.<sup>21</sup> The Court of Appeal reversed.<sup>22</sup> The appellate court noted statutory law that *requires* trial courts to grant visitation to noncustodial parents, unless visitation would be detrimental to the child.<sup>23</sup> The court acknowledged that the child's best interest is "the paramount consideration of the court in determining visitation."<sup>24</sup> The court concluded that the rule preserves the parent-child relationship, thus furthering the child's interests.<sup>25</sup>

The court is surely correct that in the run of cases, preserving visitation serves the child's interests. However, this is not *always* so. Indeed, the visitation statute expressly acknowledges that cases arise in which visitation is not in a child's interest.<sup>26</sup> Consider Sid, a noncustodial parent with plenty of money, who refuses to pay child support as part of a vendetta against Rachel, his former spouse. The lack of child support deprives Rachel of essential funds, and adds so much stress to her life that her parenting is negatively impacted. Sid invokes *Camacho* to insist on visitation. Sid derives great pleasure from making Rachel miserable, but Sid's behavior is hardly good for the child. Sid adds insult to injury by saying to Rachel, "There is nothing you can do about my visitation. My right to visitation is independent from any duty to pay support." If you think such mean-spirited behavior doesn't occur, you haven't spent much time in family court. If a judge could deny Sid visitation until he paid his child support, one of two things might happen. Sid might pay up. Or, Sid might not visit. I am not persuaded the latter would undermine the child's best interests.

The *Camacho* court apparently assumes that the only way to preserve the parent-child relationship is to decouple support from visitation.<sup>27</sup> With all due respect, where is the evidence for this conclusion? The court's intuition is probably right for many cases, but certainly not all. Some parent-child relations will strengthen if the law sends the clear message: "To visit your kids, you must

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decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but he may move the court to grant an appropriate order.").

18. See generally *Moffat v. Moffat*, 27 Cal. 3d 645 (1980); *In re Marriage of Damico*, 7 Cal. 4th 673 (1994).

19. 173 Cal. App. 3d 214 (1985).

20. *Id.* at 217.

21. *Id.*

22. *Id.* at 222.

23. *Id.* at 217 (referencing CAL. CIV. CODE § 4601, which is now CAL. FAM. CODE § 3100(a)).

24. *Id.* at 218.

25. *Id.* at 218–20.

26. FAM. § 3100(a).

27. *Camacho*, 173 Cal. App. 3d at 219–20.

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step up to the plate and deliver on your responsibility to support them. You can't have it both ways. You can't be a Disneyland dad and, at the same time, shirk your duty of support. Tolerating such behavior is bad for your kids, your former spouse, and your community. You have the money. You want to visit? Great. Pay up."

*Camacho* focuses on the relationship between the child and the noncustodial parent with the duty of support.<sup>28</sup> But what about the relationship between the child and the custodial parent? Rigid application of *Camacho* will, in some cases, *undermine* the child's relationship with the day-to-day parent. Having kids is the most wonderful and rewarding experience of a lifetime. But being a parent is sometimes exhausting—physically and financially. Parenting is hard work when parents are together, each dipping an oar to keep the family boat on course. When parents divorce and one parent receives custody, the custodian pulls both oars. Workload and stress rise, particularly when the noncustodial parent is uncooperative and hostile. Life for the noncustodial parent may not be easy, but it *is easier*. Most custodial parents need child support to make ends meet. Unless you are a custodial parent whose ex-spouse refuses to pay support but who insists on visiting, you are not in a good position to understand how unfair *Camacho* seems. A custodial parent in this predicament—call her a *Camacho* parent—feels oppressed by the ex-spouse *and* the law. The noncustodial parent keeps his wallet in his pocket and thumbs his nose at his ex as he drives off with the kids for a little weekend fun. The law tells the *Camacho* parent, "You have custody. You do the day-to-day parenting. You put food on the table. You put a roof over your kids' heads. You get the kids to school, the doctor, the dentist, ballet, soccer, etc., etc., etc. You do everything. If your ex-spouse refuses to pay child support, your duties, including your financial duties, remain the same. And don't think for a moment that you can cut off visitation in an effort to force your ex-spouse to be responsible. If you do, *you* will be the one in trouble, not your ex." Forcing a *Camacho* parent to cooperate in visitation with a noncustodial deadbeat is degrading for the custodian. The *Camacho* parent resents not only the deadbeat, but "the system" that appears to support him. The result is a corrosive process of financial and psychological abuse that is aided and abetted by the state. *Camacho* parents suffer, and their suffering can harm their kids. The *Camacho* court was appropriately concerned with preserving the parent-child relationship, but the court focused only on noncustodial parents.<sup>29</sup> The court ignored custodial parents, and the close relationship between the wellbeing of custodians and the wellbeing of their kids.<sup>30</sup>

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28. *Id.*

29. *Id.* at 219–20.

30. *See id.*

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The Kentucky Court of Appeals' decision in *Stevens v. Stevens*<sup>31</sup> reiterates the rule. Nancy and Tom Stevens divorced.<sup>32</sup> They were "frequent fliers" in family court, fighting over visitation and child support.<sup>33</sup> Eventually, a trial judge relieved Tom of his child support duty until Nancy cooperated with visitation.<sup>34</sup> The Court of Appeal reversed because a Kentucky statute provides: "If a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but he may move the court to grant an appropriate order."<sup>35</sup> The appellate court wrote that the statute "codifies the common law position that a failure of one party in a divorce action to fulfill his obligation does not relieve the other party of his obligation with respect to either child support or visitation rights . . . . [T]he public policy behind the statute is to insure that the child in question is adequately supported."<sup>36</sup>

The public policy cited by *Stevens* applies in some, but not all, cases. The policy is inapposite when the custodial parent who is interfering with visitation has enough money to get by without support. In that case, cutting off support won't hurt the kids, but it might pressure the custodian to cooperate. A more difficult case arises when the uncooperative custodial parent needs the money. Cutting off or reducing support may coerce compliance with visitation, thus supporting the policy of preserving parent-child relations, but at a cost to the policy of ensuring "that the child in questions is adequately supported."<sup>37</sup> I do not suggest it is easy to carve out exceptions to the categorical rule. I argue the game is worth the candle.

### III. A RULE IS ONLY AS GOOD AS ITS EXCEPTIONS: SELECTIVE LINKING OF VISITATION AND SUPPORT

If you are still along for the ride, you may be convinced it is worthwhile to create exceptions to the rule that support and visitation are decoupled. At a minimum, you may be persuaded the rule sometimes leads to injustice. But even as you consider the possibility of exceptions, you can hear the chorus of objections. You are opening Pandora's Box. You will create more problems than you solve. Family court is busy enough without adding a new category of litigation. Remember what you said earlier: some family law litigants lie. Even litigants who are telling the truth often have stunningly different views of reality. If you create exceptions to the rule, you create new opportunities for lies and

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31. 729 S.W.2d 461 (Ky. Ct. App. 1987).

32. *Id.* at 462.

33. *Id.*

34. *Id.*

35. *Id.*; KY. REV. STAT. ANN. § 403.240(1) (1992).

36. *Stevens*, 729 S.W.2d at 462–63.

37. *Id.* at 463.

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deception. You pour gas onto a fire that is already blazing. The rule is a rule for a reason: people know where they stand. Existing remedies work most of the time. If there are problems with existing remedies, fix the problems rather than add untested ideas that may blow up in your face.

Despite the objections, I argue the categorical rule is so seriously flawed that exceptions are required to ensure justice. Deliberate malfeasance should not be tolerated. Crime shouldn't pay.

## IV. INTENTIONAL FAILURE TO PAY CHILD SUPPORT

There are many reasons why parents fail to pay child support that have nothing to do with vindictiveness. Parents get laid off or injured. In today's economy, finding work is no mean feat. There is no moral obliquity in failing to pay support when you *can't*, and the visitation rights of parents in that unfortunate predicament should be unaffected. But there is a crucial difference between *can't* and *won't*. A parent who *could* pay support, but *chooses* not to—often to spite the ex—acts immorally. The parent robs the child of the support the child needs and the law demands.<sup>38</sup> The parent willingly sacrifices the child in the war against the ex. Such immorality should not be rewarded with visitation. The scofflaw holds the key to visitation. Pay up. It's that simple.

To invoke this exception, the custodial parent should prove six facts by a preponderance of the evidence. (1) The amount of support due each month from the noncustodial parent. (2) The noncustodial parent has the financial wherewithal to pay the amount due. Both parties should be required to file up-to-date financial disclosure statements. There must be meaningful sanctions (e.g., automatic attorney fees and costs) for lying on a financial statement. (3) The noncustodial parent has failed for a minimum of four months to pay child support. (4) The noncustodial parent's failure to pay support is intentional.<sup>39</sup> What is important is that the parent could pay but won't. The reasons for

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38. See *Ledsome v. Ledsome*, 301 S.E.2d 475, 479 (W. Va. 1983).

Upon a careful review of the authorities cited herein and others, we hold that a court, in defining a parent's right to visitation, is charged with giving paramount consideration to the welfare of the child involved. Furthermore, this Court is of the opinion that the right of a parent, not in custody of his or her child, to visit that child may not ordinarily be made dependent upon the payment of child support by that parent. However, when a court finds that the parent's refusal to make child support payments is contumacious, or willful or intentional, that parent's visitation rights may be reduced or denied, if the welfare of the child so requires.

*Id.*

39. See *Marriage of Popa*, 995 N.E.2d 521, 525, 374 Ill. Dec. 382 (2013) ("This court has acknowledged 'the novel possibility that [the noncustodial parent's] obligation for child support could be terminated or suspected should he prove the extreme and unusual allegations [concerning the custodial parent's contumacious behavior].' . . . Although a mere violation of visitation terms will not excuse the noncustodial parent's obligation to pay child support, active and extreme interference with his relationship with the children by the custodial parent may establish a substantial change in circumstances that warrants modification of the noncustodial parent's obligation.").



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intentional refusal should not be controlling, but can be relevant to attorney fees and costs. (5) The failure to pay support causes financial hardship for the custodial parent. (6) Suspending or altering visitation will not harm the child's interests.

V. INTENTIONAL INTERFERENCE WITH VISITATION

It is just as immoral to intentionally thwart a noncustodial parent's visitation with a child as it is to intentionally refuse to support one's child. When a custodial parent intentionally interferes with visitation, suspending or lowering child support may be necessary to coerce compliance. Rather than ending payments, however, the noncustodial parent should make payments to a child support trust.<sup>40</sup> When the custodial parent "comes around," some or all of the child support accumulated in the trust can be released.

To invoke this exception, the noncustodial parent should prove three facts by a preponderance of the evidence. (1) The noncustodial parent has established rights to visitation. (2) The custodial parent has engaged in a persistent pattern of intentional interference with or failure to cooperate with visitation. "Persistent pattern" is defined as a minimum of five instances of intentional interference with or failure to cooperate with visitation. De minimus violations don't count. The reasons for intentional interference or failure should not be controlling, but can be relevant to attorney fees and costs. (3) Suspension or reduction of child support will not inflict harm on the children.

A critic may argue that it is difficult to prove intent. True, but so what? In criminal law, it is difficult for prosecutors to prove *mens rea*, but we don't eliminate *mens rea* to make prosecution easier. Lawyers know how to prove intent. The intentionality required for the exceptions suggested here will be proven or it won't, the same way intentionality is proven every day.

When the right to receive child support has been assigned to a support enforcement agency, the conduct of a custodial parent should not bind or estop the agency that is paying to support the children. The exceptions recommended in this Article should not apply to arrearages accumulated prior to the contumacious conduct justifying invocation of an exception.<sup>41</sup>

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40. The trust approach was employed by the trial judge in *In re Marriage of Popa*, 995 N.E.2d 521, 522 (Ill. 2013). The Appellate Court affirmed. *Id.* The custodial parent took the children to Uruguay. *Id.*

41. *See generally* *In re Marriage of Dennis*, 59 Cal. App. 4th 998 (1997); *Carter v. Carter*, 479 S.E.2d 681 (W. Va. 1996).

## VI. PROPOSED STATUTE

The following statute codifies the rule and two exceptions.

**§ \_\_\_\_\_. Child Support and Visitation Independent; Exceptions**

(a) Except as otherwise provided by law, and by subsections (b), (c), and (d), the duty to pay child support, as defined in § \_\_\_\_\_, and the right to visitation, as defined in § \_\_\_\_\_, are independent rights. Failure by a parent to pay court-ordered child support does not affect that parent's right to visitation. Interference by a parent with the visitation rights of the other parent does not affect the interfering parent's right to receive child support.

(b) Subsections (c) and (d) apply when:

(1) Parents have one or more minor children in common.

(2) One parent has sole or primary physical custody, as defined in § \_\_\_\_\_.

(3) The other parent has rights to visitation, as defined in § \_\_\_\_\_.

(4) The parent with rights to visitation is under a court order to pay periodic child support to the parent with sole or primary physical custody.

(c) On motion by a parent with sole or primary physical custody, the court may suspend or modify the noncustodial parent's rights to visitation if the court finds all of the following to be true by a preponderance of the evidence. The custodial parent has the burden of proof.

(1) The amount of child support owed for each period (e.g., monthly). The court may take judicial notice of its own records and the records of any other court of competent jurisdiction.

(2) The parent with the duty to pay child support has the financial ability to pay the periodic child support amount.

(3) The parent with the duty to pay child support has failed for a minimum of four months to pay child support.

(4) The failure to pay child support is intentional.

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(5) The failure to pay child support is causing financial hardship for the custodial parent.

(6) Suspending or altering visitation will not harm the child or children's interests.

(d) On motion of a noncustodial parent with rights of visitation and a duty to pay child support, the court may suspend the noncustodial parent's duty to pay some or all child support to the custodial parent if the court finds all of the following to be true by a preponderance of the evidence. The noncustodial parent has the burden of proof, except insofar as the burden of proof is placed on the custodial parent in subsection (d)(4).

(1) The noncustodial parent has rights to visitation. The court may take judicial notice of its own records and the records of any other court of competent jurisdiction.

(2) The custodial parent has engaged in a persistent pattern of intentional interference with visitation or intentional failure to cooperate in visitation. For purposes of this section, "persistent pattern" is defined as a minimum of five instances of intentional interference with visitation or intentional failure to cooperate in visitation. The court may, for good cause shown, disregard de minimis instances of interference or failure to cooperate.

(3) Suspension or modification of child support will not inflict harm on the child or children.

(4) If the court suspends any part of child support payments pursuant to subsection (d), the court shall order the parent with the duty to pay support to create a trust account in the name of the child or children, and to make all suspended child support payments into the trust. Any support not suspended shall be paid to the custodial spouse. All monies in the trust account shall remain in trust until the court orders their withdrawal. The custodial parent may move the court to lift the suspension and resume full child support payments by proving by a preponderance of the evidence that the custodial parent has ceased all intentional interference with visitation or intentional failure to cooperate in visitation.

(e) A parent prevailing under sections (c) or (d) of this section is entitled to an award of reasonable attorney fees and costs.

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(f) The court has discretion to enter such orders as the court determines are warranted by the facts and by the best interest of the child or children.

## VII. CONCLUSION

Exceptions are necessary to the rule that child support and visitation are independent. The exceptions outlined above will give trial courts discretion to tailor fair results in individual cases. The exceptions are in the best interest of children.