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# THE NEED FOR A BUSINESS OR PAYROLL RECORDS AFFIDAVIT FOR USE IN CHILD SUPPORT MATTERS

*J. Thomas Sullivan\**

## I. INTRODUCTION

Counsel representing indigent or near-indigent litigants in civil matters often face difficult problems obtaining discovery and developing physical and documentary evidence for trial. Although the Arkansas Rules of Civil Procedure provide that an indigent may proceed in a civil matter without payment of costs by filing an "in forma pauperis" petition,<sup>1</sup> this provision does not afford counsel the same measure of freedom in preparing for litigation that is available to counsel for litigants whose financial resources are not strained.<sup>2</sup>

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1. The Arkansas Constitution guarantees the right to a jury trial without reference to ability of the litigant to pay the costs of litigation. ARK. CONST. art. II, § 7. Additionally, the constitution suggests that poverty should not deprive citizens of access to Arkansas courts: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws." ARK. CONST. art. II, § 13. However, in *Cook v. Municipal Court*, 287 Ark. 382, 699 S.W.2d 741 (1985), the Arkansas Supreme Court held that article 2, section 13 of the Arkansas Constitution did not preclude the imposition of filing fees for the prosecution of civil actions.

Nonetheless the Arkansas Rules of Civil Procedure provide that an indigent may petition the court to proceed in forma pauperis in a civil action. Once the court is satisfied that the litigant has a colorable cause of action and finds the in forma pauperis application in order, the rule provides that: "[e]very person so permitted to proceed in forma pauperis may prosecute his suit without paying any fees to the officers of the court." ARK. R. CIV. P. 72(c).

2. Clearly, an indigent suffers some deprivation in the prosecution of a civil action, if only because of limitation of resources essential to advancing the cause of action such as inability to pay expert witnesses.

Even the language of rule 72 discriminates to some extent against indigent litigants. Rule 72 expressly prohibits an indigent from proceeding in forma pauperis in the prosecution of "any action of slander, libel or malicious prosecution." ARK. R. CIV. P. 72(d). This limitation certainly seems contrary to the constitutional guarantee in ARK. CONST. art. II, § 13 which provides that *every* person is entitled to a certain remedy for injuries or wrongs suffered in his "character." Rule 72 also calls for the trial court to screen an indigent's complaint for merit before granting a motion for leave to proceed in forma pauperis. If the indigent is represented by counsel, there should be no need for such screening because ARK. R. CIV. P. 11 and rule 3.1 of the MODEL RULES OF PROFESSIONAL CONDUCT (1983) both prohibit counsel from advancing meritless or frivolous claims in the filing of a lawsuit.

In the setting and enforcement of child support payments, the indigent litigant is confronted with the need to establish the earning capacity and resources of the parent against whom an award of child support is sought. The usual means for determining earnings, which may include the use of depositions, interrogatories, requests for admissions, and motions for production, as well as the power to subpoena business records, may be inadequate for a number of reasons.

First, in many actions in which the movant for child support is indigent, or surviving on marginal earnings, the opposing parent is unrepresented by counsel. The lack of opposing counsel renders the use of routine but sophisticated discovery devices impractical. Although counsel for the moving party may discuss the matter with the unrepresented spouse or parent, the potential for abuse of the unrepresented party is obvious in this situation. Typically, counsel is correctly inhibited from undertaking any active role in explaining the consequences of participation in the discovery process to the adversary.<sup>3</sup>

Second, even if the opposing party is represented by counsel, the use of formal discovery procedures permits significant periods of time for response and objection to discovery requests.<sup>4</sup> However, the indigent custodial parent may often need the court to conduct a temporary hearing,<sup>5</sup> final hearing<sup>6</sup> or show cause hearing on a motion for contempt<sup>7</sup> as expeditiously as possible to relieve the financial burden experienced by the custodial parent due to strained resources. Therefore, this need for quick action often renders inadequate the use of formal discovery procedures.

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3. Rule 4.3 of the MODEL RULES OF PROFESSIONAL CONDUCT deals with a lawyer's communications with unrepresented persons. The comment to rule 4.3 cautions counsel not to give any advice to an unrepresented person "other than the advice to obtain counsel." MODEL RULES OF PROFESSIONAL CONDUCT RULE 4.3 comment (1983).

4. For example, a party typically has thirty days to respond to motions for production and requests for admissions, two discovery vehicles by which evidence of earnings might be discovered prior to trial. A party may cause additional delay by filing objections to the matters set forth in the discovery requests. *See, e.g.*, ARK. R. CIV. P. 34, 36. Under ARK. R. CIV. P. 37, a court might impose sanctions for abuse of the discovery process for a failure to disclose clearly admissible and discoverable information, but the additional delay resulting from the need to resort to formal means for enforcement works to the disadvantage of the impoverished or marginally self-supporting custodial parent who is entitled to payment of support by a spouse, former spouse or non-custodial parent.

5. *See, e.g.*, ARK. CODE ANN. § 9-10-107(b) (1987) (providing for expedited hearings for purposes of setting child support in bastardy cases).

6. *See, e.g.*, ARK. CODE ANN. § 9-12-312 (1987) (final order for support of children).

7. *See, e.g.*, ARK. CODE ANN. § 9-14-204(a)(1) (1987) (providing that hearings are to be held within a "reasonable period of time" following service of process in enforcement of support actions).

Third, discovery devices available under the Arkansas Rules of Civil Procedure typically are not designed to circumvent the requirement of live testimony at trial.<sup>8</sup> For example, admissibility of deposition testimony in lieu of the live testimony of a witness is governed by the specific exceptions set forth in rule 32.<sup>9</sup> These exceptions generally require a showing of unavailability<sup>10</sup> or a showing that the witness is not subject to the court's power of subpoena<sup>11</sup> before the deposition testimony is admissible in the absence of the deposed witness. Also, in *Shelter Mutual Insurance Co. v. Tucker*,<sup>12</sup> the Arkansas Supreme Court concluded that while the parties, through counsel, might agree that a deposition will serve in lieu of live testimony,<sup>13</sup> rule 32 otherwise limits the use of deposition testimony for purposes other than impeachment.<sup>14</sup> The designation of a deposition as "evidentiary," while a common practice noted by the court,<sup>15</sup> has no significance in terms of affording a party an alternate theory of admissibility.<sup>16</sup>

Similarly, interrogatory answers may be used to impeach the testimony of a party at trial under rule 33.<sup>17</sup> However, the court's deci-

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8. For example, in discussing the exceptions to the requirement for live testimony which afford a party the option of using deposition testimony at trial, the court makes reference in rule 32 of "the importance of presenting the testimony of witnesses orally in open court . . ." ARK. R. CIV. P. 32(a)(3)(E).

9. ARK. R. CIV. P. 32(a)(3).

10. See, e.g., ARK. R. CIV. P. 32(a)(3)(A) (deposition may be used upon a showing that the witness is dead); ARK. R. CIV. P. 32(a)(3)(C) (deposition may be used upon a showing that the witness is unable to attend trial and give testimony by virtue of "age, illness, infirmity, or imprisonment").

11. See, e.g., ARK. R. CIV. P. 32(a)(3)(B) (inability of the party to compel attendance of the witness because the witness is either out of the state or more than 100 miles from the place of trial affords a basis for admission of the deposition); ARK. R. CIV. P. 32(a)(3)(D) (permitting admission upon a showing that the party was unable to compel the attendance of the witness by subpoena).

12. 295 Ark. 260, 748 S.W.2d 136 (1988).

13. *Id.* at 268, 748 S.W.2d at 140.

14. *Id.* at 266-67, 748 S.W.2d at 139.

15. *Id.* at 265 n.1, 748 S.W.2d at 138 n.1.

16. Subdivision (E) does afford a party an opportunity to make application to the trial court for use of the deposition in lieu of live testimony of the witness based on existence of "such exceptional circumstances . . . as to make it desirable, in the interest of justice and with due regard the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." ARK. R. CIV. P. 32(a)(3)(E). This procedure may prove cumbersome as to render its use unreasonably difficult in the context of the typical child support determination.

17. ARK. R. CIV. P. 33(b) provides that "the answers [to interrogatories] may be used to the extent permitted by the rules of evidence," and ARK. R. EVID. 613(a) permits impeachment of a witness with prior inconsistent statements.

sion in *Hunter v. McDaniel Bros. Construction Co.*,<sup>18</sup> clearly limits other uses of the sworn answers to those situations demonstrating recognized exceptions to the hearsay rule.<sup>19</sup> In other words, the use of such interrogatories to develop wage testimony at trial may be limited by the context in which it is offered, although generally the answers of the non-custodial parent may be admissible under the exception to the hearsay rule for declarations made by a party opponent<sup>20</sup> or as a statement against the party's pecuniary interest.<sup>21</sup> Since interrogatories could not, in any event, be directed to the employer or custodian of the employer's payroll records,<sup>22</sup> their use to establish accurate wage information is wholly dependent upon the truthfulness of the opposing party and primarily serve to afford a basis for impeachment,<sup>23</sup> rather than for the development of wage evidence.

The limitations on the use of these devices suggest that the primary tool for developing wage data at the support hearing will be the subpoena duces tecum issued to the custodian of the employer's payroll records.<sup>24</sup> The use of the subpoena power to produce business records reflecting hours worked and wages earned, while procedurally appropriate as a tool for developing evidence at the hearing,<sup>25</sup> is not altogether satisfactory because it may result in antagonism toward the employee by an employer who finds the records custodian subpoenaed for appearance in court on a matter personal to the employee.<sup>26</sup> An

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18. 274 Ark. 178, 623 S.W.2d 196 (1981).

19. *Id.* at 182-83, 623 S.W.2d at 199.

20. ARK. R. EVID. 801(d)(2)(i).

21. ARK. R. EVID. 804(b)(3).

22. ARK. R. CIV. P. 33(a) (only a party may be served with written interrogatories which are to be answered by the party under oath and in writing).

23. ARK. R. CIV. P. 33(c) does provide that a party responding to interrogatories might well elect to respond through the production of business records which provide data sought by the interrogatory. This usually will be inapplicable to child support determinations, except that in responding to an interrogatory relating to wages earned, the non-custodial parent might elect to answer by providing copies of income tax returns, W-2 forms and wage statements. In other situations, specific interrogatories directed toward wage information are most likely to generate information which may ultimately be used to impeach testimony at the hearing. See *Hunter v. McDaniel Bros. Constr. Co.*, 274 Ark. at 182-83, 623 S.W.2d at 199.

24. ARK. R. CIV. P. 45(e) authorizes the trial court to issue a subpoena to require the attendance of a witness at trial. Subsection (b) permits the subpoenaing party to designate the "books, papers, documents, or tangible things designated therein" which the witness must bring to trial. *Id.* 45(b).

25. ARK. R. CIV. P. 45(b) provides that a subpoena duces tecum may issue to require the custodian of payroll or other business records to appear in court and produce the records.

26. Once the court accepts a motion to proceed in forma pauperis, the court waives the \$30.00 witness fee ordinarily paid to compensate a subpoenaed witness for a missed day of work. Consequently, the employer will either be obligated to compensate the employee for hours missed due to compliance with the subpoena, or the employee—or the employer in

indigent or impoverished custodial parent cannot afford the loss of employment by the non-custodial parent due to an attempt to have a support award set or payments collected through judicial proceedings.

## II. USE OF THE BUSINESS RECORDS AFFIDAVIT

The use of an affidavit recognized as "self-authenticating" for payroll records, or business records generally, similar to that already authorized for introduction of medical and hospital records under Arkansas law,<sup>27</sup> would facilitate development of an evidentiary record in child support proceedings. Saving the cost and time involved in use of formal discovery procedures and avoiding the harassment of the non-custodial parent which may result when a payroll records custodian must be subpoenaed, the affidavit would be particularly helpful to lawyers representing indigent or financially strained custodial parents.

While an employee may admit the true amount of his or her wages earned and hours worked, counsel for the moving party will often not have an adequate opportunity to prepare for deceptive testimony at the hearing. Therefore, counsel must often assume that the employee will testify falsely and must subpoena the records custodian for purposes of impeachment. In the event counsel does not subpoena the custodian for the hearing, counsel may presently use an unauthenticated copy of the payroll records, if available, as an aid in developing impeachment through cross-examination.<sup>28</sup> However, a persistent denial of the accurate earnings by the witness will not be subject to complete impeachment unless the court actually admits into evidence the records or testimony from the records.<sup>29</sup> Thus, without the affidavit, the presence of the records custodian is essential to ensuring that the judge will have accurate information on which to base an award of support or proceed with enforcement of a prior award.

The business records affidavit, which would permit the custodian of an employer's payroll records to testify by affidavit as to the hours

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smaller establishments—may be required to attend court without a clear expectation of compensation.

27. See The Hospital Records Act, No. 255, 1981 Ark. Acts 365 (codified at ARK. CODE ANN. §§ 16-46-301 to -308 (1987)) (providing for admission of hospital records by affidavit of the custodian).

28. The availability of the records affords counsel a good faith basis for asking specific questions designed to impeach the testimony of the witness concerning wages earned or hours worked.

29. Pursuant to ARK. R. CIV. P. 36, however, the fact of the amount of earnings might be established through a timely request for admission, if the amount were known to the propounding party with some degree of accuracy. Once admitted or deemed admitted, this fact could not be contested at trial.

worked and wages earned by an employee, offers distinct advantages over conventional discovery and subpoena procedures for development of this evidence at trial. The most significant advantage lies in the fact that the records would be admissible if produced in conformity with the affidavit.<sup>30</sup> Therefore, the complying party would incur no greater expense than the cost of preparing the affidavit and photocopying the payroll records,<sup>31</sup> whereas without the affidavit the costs of producing the records for trial might include both the costs to the employer in terms of lost work time by the custodian of the payroll records subpoenaed to appear in the court and the costs to the litigant in using a deposition of the records custodian to authenticate the payroll records.<sup>32</sup> An employer, relieved of the burden of excusing the custodian of the records for an appearance in court, may voluntarily bear the cost of reproduction of these records simply to expedite the process.

The self-authenticated records of hours worked and wages earned would permit counsel to fully develop the custodial parent's claim for support without the necessity of calling additional witnesses

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30. The affidavit used should track the language of ARK. R. EVID. 803(6). Rule 803(6) requires a showing that the affiant is the custodian of the records and has personal knowledge that the record was kept in the normal course of a regularly conducted business; that the record was made at or near the time when the activity occurred by a person having knowledge of the activity; and that the activity documented occurred in the regular course of business.

In *Lewellyn v. State*, 4 Ark. App. 326, 328-29, 630 S.W.2d 555, 556-57 (1982), the court of appeals held that the testimony of a supervisor of the chemist who actually performed a test for contraband was inadmissible because the testifying witness lacked personal knowledge of the receipt and testing of the contraband sample. The court held instead that this evidence constituted a "factual finding" which is not a "record" of a regularly conducted business activity when used by the government in the prosecution of a criminal case, pursuant to ARK. R. EVID. 803(8)(iii). Because the supervisor lacked personal knowledge of the analysis run on the substance, the accused was deprived of an adequate opportunity for cross-examination.

A properly worded records affidavit would avoid the problem posed in *Lewellyn* by permitting a testifying witness to rely on a record admitted through the affidavit of the custodian of the record, and by permitting such witness to further testify as to contents of the record or offer an opinion predicated on the contents. See *SurrIDGE v. State*, 279 Ark. 183, 190, 650 S.W.2d 561, 564 (1983) (state medical examiner could testify as to opinion based on x-ray records properly authenticated by custodian of medical records); accord *Woodard v. State*, 696 S.W.2d 622, 627, (Tex. App.—Dallas 1985, no writ) (medical examiner's testimony, based on autopsy report properly admissible under business records exception to hearsay rule, admissible despite showing that report made by medical examiner's assistant).

31. Photocopies of business records are admissible in evidence in lieu of the originals pursuant to ARK. CODE ANN. § 16-46-101(b); See also *Reed v. State*, 267 Ark. 1017, 1019, 593 S.W.2d 472, 473 (1980) (microfilm copies of bank records admissible); Survey, *Acts of 1953 Arkansas General Assembly: Act 64, Photographic Copies of Business and Public Records as Evidence*, 7 ARK. L. REV. 332 (1953).

32. See ARK. R. CIV. P. 30(b)(1), (5); see also *supra* notes 8-23 and accompanying text.

at the hearing.<sup>33</sup> Where the opposing party appears and testifies falsely or deceptively, counsel for the custodial parent would have the records available to complete the impeachment of the witness on cross-examination. Moreover, the use of the affidavit would save the party not only the cost of procuring live testimony, but also the cost implicit in the use of court time for the development of routine but time-consuming testimony from the custodian regarding the predicate for admission of the payroll records through live testimony. Use of the affidavit would also help eliminate superficial or irrelevant cross-examination of the records custodian by opposing counsel whose primary interest lies in giving the client the appearance of aggressive representation at the hearing.

### III. ADOPTION OF THE AFFIDAVIT FOR SELF-AUTHENTICATION PURPOSES

The use of an affidavit made by the custodian of payroll records, or a more generalized, all-purpose business records affidavit, does not pose a serious threat to the integrity of the adversarial process. The payroll or business records are generally accepted as accurately reflecting the information they contain, justifying their admission under rules 803(6) and (7) of the Arkansas Rules of Evidence once the proponent lays a proper predicate for admission through the testimony of the custodian. The affidavit merely facilitates admission of the records through a standardized affidavit, rather than requiring the use of live testimony by the custodian to lay the predicate.

Clearly, the General Assembly could adopt legislation which would authorize use of a general, all-purpose business records affidavit for use in any type of proceeding and for any type of business records.<sup>34</sup> This article suggests a more limited affidavit which would relate only to the admission of payroll records.<sup>35</sup> This type of device already exists for the admission of hospital and medical records;<sup>36</sup> legislation prompted by the needs of the state's hospital administrators to avoid lost hours on the job by their records custodians occasioned by court appearances under subpoena.<sup>37</sup> The affidavit could also be

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33. The documentary evidence would overcome the problem posed by default or non-appearance of the opposing party or opposing party's refusal to testify accurately concerning earnings.

34. See ARK. CODE ANN. § 16-45-101 (1987) (setting forth the general rules for use of affidavits).

35. See *infra* app. (sample affidavit).

36. ARK. CODE ANN. § 16-46-305 (1987).

37. In adopting the affidavit for admission of hospital records, the emergency clause in-



recognized by inclusion in the rules of evidence promulgated by the supreme court in its rule-making and supervisory function.<sup>38</sup>

#### IV. OTHER JURISDICTIONS

Texas, California and Massachusetts have all adopted procedures to permit the introduction and admission of business records by affidavit. The Texas Supreme Court and Texas Court of Criminal Appeals have adopted business records affidavit<sup>39</sup> provisions in the Rules of Evidence and the Rules of Criminal Evidence recently adopted by those courts. These provisions supercede article 3737e of the civil statutes<sup>40</sup> which the legislature had adopted to facilitate admission of business records in Texas litigation. Rule 902(10) of both sets of evidentiary rules provides for the use of the business records affidavit and also includes a form for the affidavit which is sufficient, although not exclusive, for admission of these records in Texas proceedings.<sup>41</sup>

Subsection (a) of rule 902(10) in each version provides, in pertinent part, that a party seeking to admit business records through the custodian's affidavit must file the affidavit and accompanying records or photocopies of the records with the clerk of the trial court at least fourteen days before the date the trial commences.<sup>42</sup> The party seeking to use the affidavit must also give notice of the filing to the opposing party, so the opposing party may review the records in time to determine whether it will be necessary to subpoena the records custodian to attend trial and present live testimony concerning the records.<sup>43</sup>

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cluded reference to the following finding by the General Assembly: "presently custodians of hospital records must appear personally in court to verify such records resulting in the waste of a large amount of time of hospital personnel with a resulting increase in cost of medical care." The Hospital Records Act, No. 255, § 10, 1981 Ark. Acts 365, 370 (emergency clause).

38. The manner of adoption of the present Arkansas Rules of Evidence reveals some disagreement between the judicial and legislative branches regarding the appropriate role for each in the regulation of the conduct of lawsuits in Arkansas courts. Following the court's ruling in *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986), that the Arkansas Rules of Evidence recently enacted had been adopted in an unlawful legislative session, the Arkansas Supreme Court promulgated the same rules pursuant to its supervisory power over the state court system. The General Assembly then re-enacted the same set of evidentiary rules as the UNIFORM RULES OF EVIDENCE during the 1987 Regular Session. See Uniform Rule of Evidence, No. 876, § 1, 1987 Ark. Acts 2638 (codified at ARK. CODE ANN. § 16-41-101 (1987)).

39. TEX. R. EVID. 902(10); TEX. R. CRIM. EVID. 902(10).

40. TEX. REV. CIV. STAT. ANN. art. 3737e (Vernon Supp. 1989) (repealed).

41. TEX. R. EVID. 902(10); TEX. R. CRIM. EVID. 902(10); see *infra* text accompanying notes 66-67.

42. TEX. R. EVID. 902(10)(a); TEX. R. CRIM. EVID. 902(10)(a).

43. Similarly, under ARK. CODE ANN. § 16-46-307 (1987), either party may subpoena the custodian to appear in person and present live testimony concerning the records.

California includes a business record provision in its Evidence Code<sup>44</sup> which specifically includes every kind of record of every business<sup>45</sup> generated by any business recognized in the code.<sup>46</sup> The provision directs the custodian to respond to the subpoena duces tecum by delivering a legible copy of the records to the clerk of the court or judge<sup>47</sup> within five days after receipt of the subpoena in a criminal action<sup>48</sup> or within fifteen days after receipt of the subpoena in a civil action.<sup>49</sup>

In addition, section 1561 of the California Evidence Code sets forth the requirements for the custodian's affidavit which must accompany the records when filed.<sup>50</sup> The affidavit must show that the affiant is the custodian of the records or another qualified witness and has authority to certify the records;<sup>51</sup> that the copies of the records provided are true copies of those described in the subpoena duces tecum;<sup>52</sup> and that the records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition or "event."<sup>53</sup>

The California approach expands upon the Texas rules by recognizing and providing for the use of the business records affidavit in conjunction with the use of oral depositions.<sup>54</sup> This is particularly

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44. CAL. EVID. CODE § 1560 (West Supp. 1989).

45. *Id.* § 1560(a)(1), (2).

46. *Id.* Section 1560(a)(1) refers to the description of "business" provided in § 1270 which "includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not." *Id.* § 1270.

47. *Id.* § 1560(b) (delivery of the records by the custodian may be made by "mail or otherwise").

48. *Id.* The party serving the subpoena may agree with the custodian or other designated "qualified witness" to extend the time for filing the requested records.

49. *Id.* The party and custodian may agree to extend the time for compliance with the subpoena.

50. *Id.* Section 1561(a) provides that "[t]he records shall be accompanied by the affidavit of the custodian or other qualified witness . . . ."

51. *Id.* § 1561(a)(1).

52. *Id.* Section 1561(a)(2) permits the custodian to testify that the records were those delivered to counsel for the subpoena for reproduction, as is contemplated by subdivision (3) of section 1560. That provision allows the subpoenaing party to make the business records available for inspection or copying by counsel or his representative at the custodian's business address. Counsel then is charged with the responsibility for delivering the records to the appropriate court or tribunal before which a hearing is to be conducted, or to the officer before whom a deposition is to be taken, pursuant to section 1561(c). When this procedure is followed, the attorney is then required to file a separate affidavit showing that the copy delivered to the appropriate body or officer is a true copy of the records delivered to him for copying. *Id.* § 1561(c).

53. *Id.* § 1561(a)(3).

54. *Id.* § 1560(c)(2).

desirable when the party or witness deposed may have information relevant to hours worked and wages earned by the employee but is not qualified to lay a sufficient predicate for introduction of business records from which the testimony is drawn.<sup>55</sup> The utility inherent in this approach lies in the ability to complete the development of both testimonial and documentary evidence in a single deposition session for later use in settlement negotiations or at trial.

Section 1564 of the California Evidence Code permits the party subpoenaing the business records to demand the appearance of the records custodian at the trial, hearing or deposition.<sup>56</sup> This provision is comparable to Arkansas law, which permits a party subpoenaing medical or hospital records to compel the records custodian to attend the hearing or other proceeding and to produce the records requested at that time.<sup>57</sup>

Interestingly, the former California code provisions resembled current Arkansas law permitting the use of the business records affidavit in lieu of personal attendance of the records custodian where the materials sought were hospital records.<sup>58</sup> The current California Evidence Code provisions are substantially the same as the former provisions, except that the amended sections now provide that all qualified

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55. For instance, the only persons who may file the affidavit under the California procedure are the records custodian or "other qualified witness." *Id.* § 1561(a)(1). An employee's supervisor may have general knowledge of the hours and pay of an employee but may not have specific knowledge of the record keeping procedure such that he would qualify as a witness to testify that the records were kept in the normal course of doing business.

56. This section expressly provides:

The personal attendance of the custodian or other qualified witness and the production of the original records is not required unless, at the discretion of the requesting party, the subpoena duces tecum contains a clause which reads: "The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure, authorized pursuant to subdivision (b) of Section 1560, and Sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena."

*Id.* § 1564.

57. ARK. CODE ANN. § 16-46-307 (1987).

58. CAL. EVID. CODE § 1560 (West Supp. 1989) was amended in 1969 to substitute "business" and "record" for the original definition of "hospital" in subsection (a) and to change references to "hospital" to "business" throughout section 1560. Thus, use of the affidavit for admission of hospital records was expanded to include all business records by this simple legislative change in wording. A similar approach could be followed to expand the use of records affidavits in Arkansas, but the records provision is contained in the "Hospital Records Act." Amendment of the entire provision would appear appropriate to avoid confusion as to the general applicability of the procedure. The "Hospital Records Act" is, however, located in the Code with provisions relating to documentary evidence adopted by the General Assembly. See ARK. CODE ANN. 16-46-301 to 308 (1987). A parallel provision in the California Code of Civil Procedure, section 1998 (repealed), essentially identical in language to section 1560 of the Evidence Code, also recognized admission of hospital records by affidavit.

business records are subject to admission by the affidavit process.<sup>59</sup>

Massachusetts has adopted a provision for the filing of the records and supporting affidavit directly with the court clerk by the business entity subpoenaed or its records custodian.<sup>60</sup> The clerk is directed to keep the records in his custody until their production is required in the proceeding by the subpoenaing party.<sup>61</sup> The record, "so certified and delivered shall be deemed to be sufficiently identified to be admissible in evidence if admissible in all other respects."<sup>62</sup>

Under the Massachusetts approach, the subpoenaing party may examine the records delivered to the court prior to their use in the proceeding for which they have been subpoenaed,<sup>63</sup> and any other party may examine the records in the discretion of the court.<sup>64</sup> Following use of the records in the proceeding, the clerk is instructed to notify the business that the records are no longer required and return them by mail unless a representative of the business picks them up in person within seven days of the notice.<sup>65</sup>

By statute or rule, California, Massachusetts, and Texas have adopted broadly worded business records affidavit provisions which facilitate the use of business records at minimal cost in official proceedings. The current provision which provides for admission of hospital or medical records in Arkansas courts advances the same goal in a more limited context. Generally, these provisions require that the affidavit supporting the admission of the records be made by the custodian of the business or medical records or a person otherwise qualified to supply the necessary predicate for their admission. The provisions also provide a procedure designed to assure the integrity of the records made available in response to the subpoena and recognize the occasional need for live testimony by the custodian. The provisions available in other jurisdictions suggest that the use of affidavits in lieu of live testimony by the custodian could appropriately be ex-

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59. CAL. EVID. CODE § 1560 (West Supp. 1989).

60. MASS. GEN. L. ch. 233, § 79J (1986).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* The circumstances under which the trial court might deny inspection of business records on file with the clerk prior to trial are difficult to imagine unless this provision is specifically designed to prevent intimidation of witnesses whose records will be used at trial. Otherwise, it would seem reasonable that a party denied access to records which will be admitted as evidence would be able to claim surprise and seek continuance for purposes of subpoenaing the records custodian or other witness in order to fully cross-examine that affiant concerning the content of the affidavit or the records themselves.

65. *Id.*

panded to include payroll records, or all business records, in Arkansas courts.

### V. THE SAMPLE AFFIDAVIT

Texas rules make the use of the business records affidavit easier by providing a sample form instrument which is sufficient for use in Texas courts.<sup>66</sup> The following affidavit, with only slight variation in the caption for criminal cases, is set forth in subsection (b) of the respective civil and criminal rules of evidence:

NO. \_\_\_\_\_

John Doe (Name of Plaintiff)      IN THE \_\_\_\_\_

v.      COURT IN AND FOR

John Roe (Name of Defendant)      \_\_\_\_\_ COUNTY, TEXAS

### AFFIDAVIT

Before me, the undersigned authority, personally appeared \_\_\_\_\_, who, being by me duly sworn, deposed as follows:

My name is \_\_\_\_\_. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of \_\_\_\_\_. Attached hereto are \_\_\_\_\_ pages of records from \_\_\_\_\_. These said \_\_\_\_\_ pages of records are kept by \_\_\_\_\_ in the regular course of business, and it was the regular course of business of \_\_\_\_\_ for an employee or representative of \_\_\_\_\_, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

\_\_\_\_\_  
Affiant

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66. See TEX. R. EVID. 902(10)(b); TEX. R. CRIM. EVID. 902(10)(b).

SWORN TO AND SUBSCRIBED before me on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.

My commission expires:

\_\_\_\_\_  
Notary Public, State of Texas

Notary's printed name:

The commentary to rule 902(10) indicates that the provision for authentication of business records is intended to apply to "any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-rays, hospital records, or any other kind of regularly kept medical record."<sup>67</sup>

Certainly, this sample form of affidavit is not necessarily exclusive or preferable to other forms which might be drafted. However, it does provide a starting point for examining the possible use of a general, all-purpose business records affidavit in Arkansas courts. As an alternative to the general affidavit, a more narrowly-drawn instrument pertaining only to the admission of payroll records could easily satisfy the needs of litigants in child support actions.<sup>68</sup>

Adoption of a sample affidavit for use in Arkansas courts for admission of payroll records, or business records generally, would have important advantages over a provision merely describing the affidavit and its use. By setting forth a sample the General Assembly or Arkansas Supreme Court would readily identify the form and substance of the instrument which courts will deem acceptable in Arkansas litigation. Adopting a sample affidavit should induce attorneys to

67. TEX. R. EVID. 902(10) comment; TEX. R. CRIM. EVID. 902(10) comment. Note that under the Arkansas Hospital Records Act, the definition of "records" expressly excludes "X-rays, electrocardiograms, and similar graphic matter . . ." ARK. CODE ANN. § 16-46-301(1) (1987). However, section 16-46-302 expressly permits the subpoena duces tecum issued for the medical records to "include X rays, electrocardiograms, and similar graphic matter" if specifically requested in the subpoena.

68. The adoption of the limited affidavit to serve the specific purpose of facilitating admission of payroll records would readily follow the adoption of provisions governing admissibility of medical or hospital records. While the affidavit would be particularly useful in enforcement actions for nonpayment of child support or the setting of support amounts, this affidavit would also afford parties a simple means for the introduction of wage records in any action where the earnings of a party or witness are relevant, such as in personal injury actions where loss of earnings or earning capacity are in issue.

quickly adapt the procedure to their practices and should satisfy trial judges that the affidavits used by lawyers practicing in their courts will not result in reversal or successful challenge, if the requirements of the procedure have otherwise been met.

## VI. CONCLUSION

Strong public policy interests call for expeditious determination and payment of child support obligations.<sup>69</sup> Under Arkansas law, both chancery<sup>70</sup> and county courts<sup>71</sup> have the authority to set support obligations in matters of divorce, separate maintenance and bastardy.<sup>72</sup> The courts are also empowered to enforce payment of support through remedies ranging from garnishment of earnings<sup>73</sup> to incarceration for contempt for willful non-compliance with a previously entered support order.<sup>74</sup>

No justification exists, in light of this strong policy for payment of child support, for making disclosure of actual earnings to the court involved more difficult. On the contrary, a relatively easy means of disclosure would expedite both determinations and enforcement in child support matters. By permitting counsel to subpoena the custodian of the payroll records maintained by the non-custodial parent's employer, Arkansas procedure already makes this disclosure of earnings possible even when an opposing party will not voluntarily and accurately disclose earnings to the court.<sup>75</sup>

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69. The adoption by the General Assembly of the Uniform Reciprocal Enforcement of Support Act, ARK. CODE ANN. §§ 9-14-301 to 344 (1987), demonstrates the General Assembly's commitment to the establishment of efficient procedures for the collection and payment of child support obligations. See *Kline v. Kline*, 260 Ark. 550, 551-52, 542 S.W.2d 499, 500 (1976).

70. ARK. CODE ANN. § 9-12-312(c)(1) (1987).

71. *Id.* §§ 9-10-101 to 107 (1987) (vesting jurisdiction in legitimacy proceedings in county courts).

72. *Id.* §§ 9-12-309 to 313 (1987) (providing for separate maintenance agreements and their enforcement).

73. The Arkansas Code authorizes the assignment of wages for payment of child support obligations. ARK. CODE ANN. §§ 9-14-102 to 206 (1987).

74. Typically, an order for payment of child support may be considered an exercise of the court's power to issue equitable relief. Punishment for non-compliance with an order compelling support payments may include citation for contempt, following the general grant of authority to trial courts in ARK. R. CIV. P. 65(f). However, a party's inability to pay due to lack of resources or employment may serve as a defense to the charge. See, e.g., *Feazell v. Feazell*, 225 Ark. 611, 614, 284 S.W.2d 117, 119 (1955) ("inability to pay [support] on the part of the defendant is always a complete defense against enforcing payment from him by imprisonment in a civil contempt proceeding").

75. ARK. R. CIV. P. 45(b), (e). For example, the Act authorizing the creation of the Child Support Enforcement Unit, ARK. CODE ANN. § 9-14-206 to 210 (1987) authorizes release of information concerning "wages, salaries, earnings or commissions earned by or paid prior to

The adoption of the custodian's affidavit for admission of payroll records would reduce the respective burdens on the party offering the evidence, the employer who must comply with the subpoena duces tecum and the court which must expend judicial time in hearing the live testimony of the custodian offered to lay the predicate for introduction of the payroll records. Notice of intent to rely on the affidavit and copies of the payroll records could routinely be included in a separate paragraph in the complaint or motion for enforcement of an award previously set when it is served on the opposing party.<sup>76</sup> This would permit the opposing party to subpoena the records custodian for live testimony, when necessary, even though the hearing on the support matter might be held on otherwise short notice. Following issuance of the subpoena, the custodian could routinely file the records and affidavit with the court within a few days and sufficiently in advance of the hearing to afford both parties an opportunity to examine the records prior to their introduction at trial.<sup>77</sup>

The chief advantages to the use of a regularized procedure for admission of payroll records by affidavit would lie in the reduced cost and added convenience for use of these regularly kept records<sup>78</sup> which

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the noncustodial parent, *Id.* § 9-14-208(a)(5)(E), upon request by the unit. *Id.* § 9-14-208(d). However, the Act does not make the records obtained independently admissible.

76. For example, counsel might simply include the following suggested paragraph in the complaint or motion:

Plaintiff/movant intends to offer evidence of your past and current earnings at the hearing in this matter. Unless you make an objection to the introduction of your earnings records by affidavit of the records custodian at the place(s) of your employment, these records will be admitted by affidavit at the hearing. If you object to the admission of these records by affidavit, you must subpoena the records custodian to appear in person and give testimony.

This form of notice would comport generally with the right of a party to subpoena the records custodian to appear in person recognized by ARK. CODE ANN. § 16-46-307 (1987), dealing with admission of hospital or medical records. The adoption of a payroll records affidavit by either the General Assembly or the Arkansas Supreme Court should address this need for notice of one party's intent to use such records to avoid untimely objections or frivolous objections to admission of the records at trial.

77. By analogy, the Hospital Records Act authorizes the custodian of medical records to respond to the subpoena duces tecum by providing the records to the trial court. The specific provision states that "it shall be sufficient compliance therewith if the custodian delivers, by hand or by registered mail to the court clerk or the officer, court reporter, body, or tribunal issuing the subpoena or conducting the hearing a true and correct copy of all records described in the subpoena together with the affidavit described in § 16-46-305." ARK. CODE ANN. § 16-46-302 (1987).

78. The elimination of the need for live testimony by the custodian of the employer's payroll records would serve to reduce costs in terms of lost time on the job by employees charged with the duty of keeping business records, just as the General Assembly found that the use of the medical records affidavit should reduce costs in terms of lost hours on the job by hospital employees. *See* ARK. CODE ANN. § 16-46-305 (1987).



are so obviously material to issues relating to the setting and enforcement of child support obligations. In the representation of indigent or fiscally disadvantaged custodial parents this reduction in expense and simplification of procedure offers the potential for improvement in the administration of the child support payment system.

### APPENDIX

IN THE \_\_\_\_\_ COURT OF  
 \_\_\_\_\_ COUNTY, ARKANSAS  
 DIVISION \_\_\_\_\_

JOHN DOE

PLAINTIFF

v.

NO. \_\_\_\_\_

JANE ROE

DEFENDANT

### AFFIDAVIT

Before me, the undersigned authority, personally appeared \_\_\_\_\_, who, being by me duly sworn, deposed as follows:

My name is \_\_\_\_\_. I am of sound mind, capable of making this affidavit, and personally familiar with the facts herein stated:

I am the custodian of the payroll and employment records of \_\_\_\_\_ (name of employer). My employer's place of business is \_\_\_\_\_ (address), \_\_\_\_\_ (city), Arkansas. Attached hereto are \_\_\_\_\_ pages of payroll records from the payroll and employment records of \_\_\_\_\_ (name of employer), which reflect that \_\_\_\_\_ (name of employee) is employed by \_\_\_\_\_ (name of employer) at this time or was employed by \_\_\_\_\_ (name of employer) from \_\_\_\_\_ (date employment began) to \_\_\_\_\_ (date employment terminated), and which set forth the employee's hours of work and wages earned. These said pages of records are kept by \_\_\_\_\_ (name of employer) in the usual course of business and it was the regular course of business for an employee with personal knowledge of the hours worked and wages earned by company's employees to record or transmit this information to be included in the payroll records of \_\_\_\_\_ (name of employer), and the records were made at the time the employee worked or reasonably soon thereafter. The records attached hereto are the original

or exact duplicates of the original payroll records or W-2 forms filed with the Internal Revenue Service.

\_\_\_\_\_  
Affiant

SWORN TO AND SUBSCRIBED before me on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

