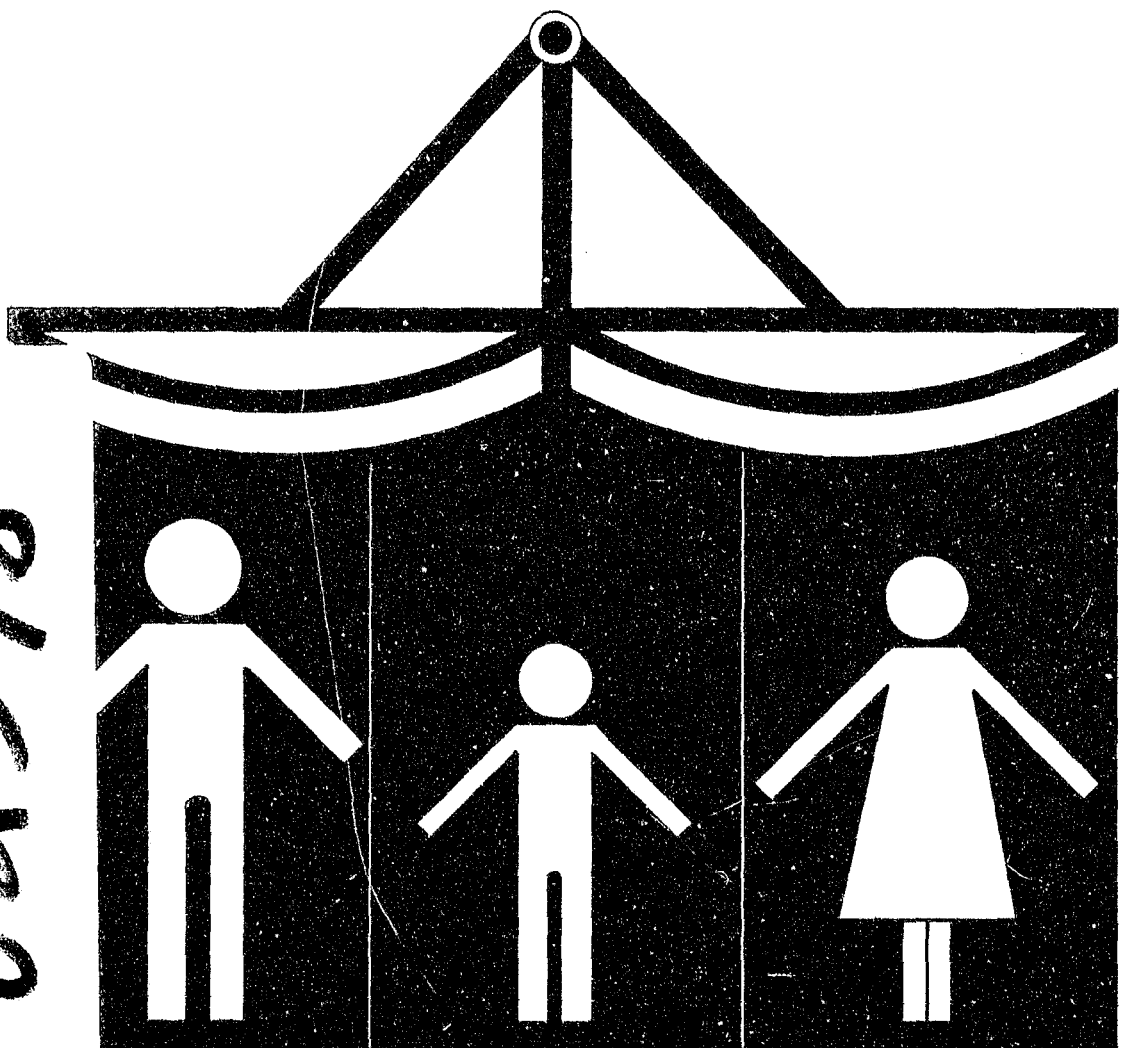
A GUIDE FOR JUDGES IN CHILD SUPPORT ENFORCEMENT

SECOND EDITION



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A Guide for Judges In Child Support Enforcement

SECOND EDITION

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LIST OF EXHIBITS

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A number of individuals have assisted in the preparation of the second edition of the Guide. Jeff Kahn, Project Officer for the Child Support Technology Transfer Project, assisted throughout all phases of the project. Judge James D. Sloan of the Seventh Judicial Circuit Court in Anniston, AL, and Judge Willard H. Douglas, Jr., of the Juvenile and Domestic Relations District Court in Richmond, VA, reviewed the draft and provided valuable substantive comments and suggestions. Virginia Cain, Child Support Enforcement Project Director of the National Council of Juvenile and Family Court Judges, assisted in the review process. Ann Jaffin served as the OSCE contact person and coordinated OCSE comments. Finally, Rebecca Hopkins provided editorial and production assistance in the preparation of the final manuscript. We gratefully acknowledge all these contributions.

CHAPTER 1
The Child Support Problem in America

INTRODUCTION

In 1984, Congress enacted Public Law (P.L.) 98-378, better known as the Child Support Enforcement Amendments. This is by far the most significant step taken by the Federal Government in child support enforcement since Congress enacted P.L. 93-647 in 1975 to establish Title IV-D of the Social Security Act, thereby creating the Child Support Enforcement Program. Both the 1975 implementing legislation and the 1984 Amendments were inspired by dramatic changes in our social structure--the growing instability of marital relationships, the feminization of poverty, and increases in out-of-wedlock births, especially among teenagers. As a result, more and more children are living in single-parent families. In single-parent households, financial contributions from absent parents often fail to constitute a significant portion of the family income. In fact, almost nine out of every ten children who are receiving welfare through Aid to Families with Dependent Children (AFDC) have a living parent absent from the home.[1]

This chapter discusses the child support problem in greater detail, identifies its effects on society at large and the legal system in particular, and assesses the effectiveness of the Child Support Enforcement Program as it completes its first decade. Subsequent chapters discuss Federal and State program roles and responsibilities and detail the role of the judiciary in the child support enforcement effort. The remainder of the Guide concentrates on the process of establishing and enforcing child support obligations.

CAUSES OF THE CHILD SUPPORT PROBLEM

The child support enforcement caseload has grown in response to a host of complex demographic, economic, and sociological factors. The following pages discuss recent developments that have affected the child support problem in America and forced families to seek AFDC benefits. These developments are increased rates of divorce and desertion, households headed by single females, and out-of-wedlock births.

Divorce

In the last several decades, divorce rates have increased dramatically. Between 1963 and 1975, the national divorce rate increased 100 percent and then increased 100 percent in each year thereafter until 1981. In 1981, the number of annual divorces climbed to a record 1.2 million. It is further estimated that 49 percent of all existing marriages will end in divorce.[2]

Desertion

The dimensions of the nonsupport problem become even more staggering when one considers the vast numbers of couples who simply separate without obtaining a divorce. In 1960, the number of separated individuals heading a household in which children reside

was approximately 1,058,000. By 1983, the number had increased to over 1,917,000, which is an 83 percent increase. Of this 1983 figure, approximately 1.8 million families were headed by women.[3]

An important aspect of marital disruption is the impact on children. Studies have revealed that today there is a greater chance than ever before that a couple will have children at the time of a divorce or separation. In 1983, 21.8 percent of children under 18 lived with only one parent (19.4 percent with the mother; 2.4 percent with the father). This is a 107 percent increase from 1970.[4] The Census Bureau estimates that nearly half of the children born during 1982 will spend a "significant portion" of their lives in a single-parent family.[5]

Out-of-Wedlock Birth Rates

By far the most significant rate of increase in single-parent households has occurred among never-married mothers. Between 1970 and 1983, the number of never-married mothers increased by 377 percent. By 1983, one-fourth of all single parents were in this category. Of the 7.6 million women heading single-parent families in 1984, 2.1 million had never been married. Of particular concern is the rate of out-of-wedlock births among teenagers. In 1981, 537,024 children were born to teenage mothers, and about one-half of these babies were born out of wedlock.[6]

EFFECTS OF THE CHILD SUPPORT PROBLEM

These changes in the social structure of the United States, coupled with the lack of an accessible and effective process for ensuring that both parents contribute to the support of their offspring, produced at least three significant effects. First, a greater proportion of women who have children are finding themselves living below the poverty line, a phenomenon that has been termed "the feminization of poverty." Second, welfare expenditures to support dependent children continue to rise during a period in which Federal, State, and local revenues are hard pressed to meet taxpayers' expectations for other necessary governmental services. Third, parents who fail to pay or receive child support lose respect for the legal system, which often has lacked the authority, will, and resources to provide effective remedies.

The Feminization of Poverty

A growing number of single mothers are heading their own households. In 1984, there were 33 million families with children under 18 in the home, and 7.7 million were one-parent households headed by women. This figure represents a 13.2 percent increase since 1980, and a 100 percent increase since 1970.[7] "As a consequence, increasing proportions of families are headed by women with sole responsibility for raising and caring for children. Since the probability that a woman will become a widow has not changed substantially, the increase in female-headed households can be attributed directly to the rising divorce and [out-of-wedlock] birth rates."[8]

This situation is economically as well as sociologically significant because the absence of a parent usually means a lower standard of living for the family. In 1983, the poverty rate for the Nation, determined on an income-per-family basis, was 15.2 percent. The rate was 40 percent for single-parent families headed by white women and 75 percent for those headed by black women.[9] The composite poverty rate for all families headed by females with no husband present was more than 3 times that for

married-couple families.[10] In short, society is faced with an increasing number of dependent children in female-headed households with marginal incomes.

These women, left alone to care for the children, frequently cannot cope adequately on their own. It is difficult to both care for children and work. Those who do work usually cannot command a sufficient salary to meet the needs of their families. Without financial support from absent fathers, mothers very often are forced to seek public assistance. As of March 1984, median incomes for female heads of households were as follows: married, absent husband, $8,851; widowed, $8,806; divorced, $13,486; never married, $13,251.[11]

According to the 1981 survey on Child Support and Alimony conducted by the U.S. Department of Health and Human Services (DHHS) and the Department of Commerce, of the 8.4 million women living with a child under 21 years of age whose father was not living in the household, 59 percent were awarded child support. However, of the four million women due child support payments in 1981, only 47 percent received the full amount; 25 percent received partial payments; and 28 percent received nothing. Consequently, the problem of increasing welfare costs in the United States is, to a considerable extent, a problem of the nonsupport of children by their absent parents.

Increasing Welfare Expenditures

Until the 1930s, Government involvement in the support of dependent children was virtually nonexistent, except for the imposition of criminal remedies for nonsupport. However, because of the Depression, by 1933 many people were in need of public assistance. Approximately 2 1/2 years later, on August 14, 1935, Congress passed the Social Security Act, which was signed by President Franklin D. Roosevelt on the same day. The Act was the first attempt at providing social insurance in our country.

The original Act contained no comprehensive system of social insurance, and it was amended throughout the years to include many categories of need. In an early amendment, Title IV-A of the Act, Aid to Dependent Children [now Aid to Families with Dependent Children (AFDC)], the Federal Government assumed some responsibility for the support of needy dependent children. The AFDC program encourages the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation to needy dependent children and the parents or relatives with whom the children reside. The AFDC program was created to help maintain and strengthen family life. By providing financial assistance to custodial relatives in addition to the children, children can continue to be protected and cared for by their parents.

Government spending on all social welfare programs increased rapidly over the years, from $77 billion in 1965 to over $286 billion in 1975, almost a fourfold increase in a single decade. Eventually, taxpayers began to demand reduced Government spending, and Congress began to examine welfare programs for possible budget cuts or changes that could make the system more effective. The rest of this section discusses the Congressional study of and response to the AFDC program because of its special relationship to the nonsupport problem.

The size of the child support problem in the United States was difficult to analyze until recently because there was little data on the subject.[12] However, it has become clear that the number of families receiving AFDC has a direct relationship to the problem

of nonsupport.[13] Figures on the AFDC program show a steady increase in both AFDC recipients and associated costs. Since the beginning of the program, there has been a gradual upward trend in AFDC caseloads. The number of children receiving AFDC first doubled from June 1948 to February 1960 and then doubled again in less than 9 years--from February 1960 to January 1969. Twelve years later, in March 1981, the number of children receiving AFDC had increased another 77 percent to 7.7 million.[14]

Even more significant is the increase in the proportion of children under age 18 receiving AFDC. In 1948, 25 children per 1,000 under age 18 in the United States were receiving AFDC. By December 1966, 18 years later, the number of these AFDC children had doubled in relation to the total number of children. It then doubled again in less than 4 years, from December 1966 to June 1971. By 1973, there were 113 AFDC children per 1,000 under age 18 in the United States. In other words, 11.3 percent of the children under age 18 in the United States were receiving AFDC in 1973. This is compared to only 2.5 percent in 1948.

The costs associated with these increases have continued to be enormous. For example, between calendar years 1960 and 1983, the cost of AFDC money payments increased from $1.0 billion to $13.8 billion.[15] Investigation of this dramatic increase in the AFDC rolls shows a drastic change in the nature of the AFDC recipients nationwide since the program began in 1935. Initially, death of the father was the main basis for eligibility. Since World War II, the reason increasingly has become the absence of the father from the home. This figure has risen from 45 percent of the AFDC cases in 1948 to 88 percent in 1983.[16]

An Overburdened Legal System

When Congress created the Child Support Enforcement Program in 1975, it delegated to each State legislature the authority to decide on the structure of the program within each State, the resources committed to the task, and the legal procedures and remedies available to the program. State legislatures responded by enacting implementing legislation that authorized the creation of new agencies at the State or local level to locate absent parents and prepare cases for stipulation or litigation. Legislators apparently assumed that existing court procedures and resources would be sufficient to handle the volume of cases to be processed. Often, this assumption proved incorrect. Backlogs have occurred, both in program attorneys' offices and in the courts. Many courts have lacked sufficient personnel to handle the scheduling, hearing, and processing of cases. Competition from juvenile court and child abuse caseloads has made court time a precious commodity. Remedies have been inadequate to enforce compliance with existing support orders or too cumbersome to allow for expeditious and efficient case processing.

In addition to exacerbating the nonsupport problem, these insufficiencies have caused a significant proportion of the populace to lose confidence in and even respect for the legal system. As divorce and out-of-wedlock birth rates have risen, many individuals who have never been exposed to the legal system have become involved in divorce proceedings and paternity suits. These parents' sole experience with the legal system has been to witness its difficulty in resolving these disputes and its inability to enforce a resolution once entered. Such experiences take a toll in public confidence and respect.

THE CHILD SUPPORT ENFORCEMENT PROGRAM

The negative effects of the child support problem discussed above helped promote the enactment of strong legislation at the Federal level. In particular, Congress created the Child Support Enforcement Program. The Program, Title IV-D of the Social Security Act (Part B of P.L. 93-647), was signed into law in 1975. As noted in Appendix A at the end of this Guide, Congress has acted in almost every legislative session since that year to improve or expand the Program. The Program is charged with locating absent parents, establishing paternity, and obtaining and enforcing support owed by absent parents to their children. The Federal legislation places responsibility for the Child Support Enforcement Program at both the Federal and State levels, giving the DHHS, Office of Child Support Enforcement (OCSE) primary administrative, regulatory, and technical assistance responsibilities and delegating to State IV-D agencies the operational aspects of the Program. With the Child Support Enforcement Amendments of 1984, Congress set forth more specific requirements as to how these State and local operations are to be carried out. Most of these requirements, which are discussed in detail in subsequent chapters, are based on successful practices in effect in one or more States.

Even though the Child Support Enforcement Program centers on the enforcement and collection of child support, the Program benefits the taxpayer, the child, and the legal system:

- The taxpayer. The millions of dollars that the Child Support Enforcement Program collects each year represent a direct benefit to taxpayers as well as to children and families. In fact, the Program is one of few government programs that helps needy families while also saving tax dollars. As of October 1, 1985, the Federal Government matches 70 percent of costs incurred by States in the administration of the Program (the rates will be reduced to 68 percent on October 1, 1987, and again to 66 percent on October 1, 1989);[17] matches 90 percent for costs related to the development of management information systems; and permits the States to retain as much as 50 percent of support monies collected to offset the State costs of AFDC.[18] As an added incentive to operate effective programs, States and localities involved in the collection and enforcement of child support are entitled to an amount ranging from 6 to 10 percent of both AFDC and non-AFDC collections. These "incentive payments" may be used for whatever purposes governing officials deem appropriate.[19]

  In addition to its direct revenue-generating aspects, the Child Support Enforcement Program produces indirect financial benefits through the provision of services to non-AFDC families who, without income from child support, might be forced to turn to public assistance. Similarly, through Program efforts, sufficient support is collected on behalf of some AFDC families to eliminate their dependence on welfare and related assistance programs.

- The child. Although its primary role is a financial one, the Child Support Enforcement Program clearly offers social, economic, and medical benefits to children and fosters in families a sense of parental responsibility, heritage, and self-esteem.

Establishing paternity for a child born out of wedlock and having that parent contribute financial assistance for the child's upbringing (that otherwise might come from public funds) benefit society and the child. In addition to providing an alternative source of income for the family, absent parents may be able to provide their children with access to such "social entitlements" as Social Security benefits, pension benefits, veterans' benefits, and other rights of inheritance.

The children also gain social and psychological advantages from having legally identified parents and a sense of family heritage. Perhaps the most important of these advantages is escaping the prejudices often held against children who cannot identify their fathers. A legally established relationship is a first step in creating a psychological and social bond between a father and his child.

Further, it is in the child's best medical interest to know who his or her parents are. A significant number of diseases, illnesses, birth defects, and other abnormalities are passed to children by their parents. This knowledge of medical history is the only way of predicting a child's susceptibility to some medical disorder before it occurs.

- The legal system. As the focal point of the Child Support Enforcement Program and the upholder of strong public policy interests in protecting the rights of children and their parents, the legal system can derive certain benefits by becoming familiar with and more involved in State and local child support enforcement programs. First, rapid enforcement of support orders conditions the absent parent to avoid the inconvenience of a court appearance by making regular child support payments. Second, improved handling of child support cases will increase respect for judicial decrees and orders and increase community support for the program. Third, Federal financial participation is available for certain judicial staff and operational costs through the State IV-D agency, when properly documented. Finally, the legal system has the fundamental responsibility to ensure that the rights of all parties (the State, the child, the parents, and the taxpayers) are protected. The system can carry out this task more easily and effectively when the judiciary is well informed about all legal aspects and the administrative ramifications of the Child Support Enforcement Program.

CURRENT STATUS OF THE CHILD SUPPORT ENFORCEMENT PROGRAM

The Child Support Enforcement Program can point to significant achievements. These include the development of a Federal organizational and operational capability through OCSE to support State IV-D programs; the building of a comprehensive policy and regulatory base; and the provision of high quality services and products to States and jurisdictions operating the IV-D Program.

Clearly, the best measure of the Child Support Enforcement Program's nationwide effectiveness during its brief history is the steady growth in collections: present AFDC collections more than quadruple the amount collected in 1975. From Federal fiscal year (FY) 76 through FY 84, more than $13.2 billion in child support payments have been

collected, $5.7 billion of that amount on behalf of families receiving AFDC. The total amounts collected each year have increased steadily from $500 million in FY 76 to $2.4 billion in FY 84. In the same period of time, the paternity of over 1.2 million children was established; legally enforceable support orders were established in about 3.3 million cases. In addition, from FY 80 to FY 84, nearly 4 million absent parents were located.

These achievements have been realized while actually saving or making money for State and local governments. For example, in FY 84, for every dollar spent on IV-D operating expenses, $1.38 was collected on behalf of AFDC families and used to reimburse State and local governments, and $1.91 was collected per dollar on behalf of non-AFDC families. This cost-effective operation, combined with incentive payments from the Federal Government, provided over $350 million in revenue to State and local treasuries during the year.[20]

Notwithstanding these favorable trends in collection growth and despite its achievements, OCSE is concerned with the rate of progress of State and local IV-D agencies in operating more cost-effective programs. Collections made on behalf of children have increased at a slower rate in recent years. At the same time, Program expenditures are increasing steadily. If this trend continues, the overall Program eventually will cease to be cost-effective.

The performance of the best State programs clearly indicates the vast potential for nationwide improvement. [See Exhibit 1.1.] During FY 84, the average of the 10 best States' performances in recovering AFDC payments in a number of categories was dramatically superior to that of the Nation as a whole. For example, the 10 best States recovered AFDC payments at a rate more than twice the national average. They also collected child support on behalf of AFDC recipients from a percentage of absent parents that was about two and one-quarter times the national average. The States with the most cost-effective programs (ratio of AFDC collections to administrative costs) were almost twice as cost-effective as the other States. Finally, the ratio of non-AFDC collections to total administrative cost for the 10 best performing States was over two and one-half times the national average.

In contrast, the 10 worst performing States recovered AFDC payments at a rate that was slightly over one-half the national average. They collected support from a percentage of AFDC absent parents that was one-third of the national average. The cost-effectiveness ratio of the programs in the 10 worst performing States was just over one-half that of the national average. Further, the ratio of non-AFDC collections to total administrative cost for the 10 worst performing States was only 8 percent of the national average. If one compares the 10 top performing States with the 10 lowest performing States, the contrast is even more astounding.

Of particular significance is the wide diversity of performance among States and localities. The ability of some States to operate highly effective programs shows that there is great potential for all States to generate additional revenue. Exhibit 1.2 provides a State-by-State review of both AFDC and non-AFDC cost-effectiveness ratios for FY 84.

EXHIBIT 1.1

PROGRAM PERFORMANCE FOR FISCAL YEAR 1984

Performance Indicator	Ten Best States	National Average	Ten Worst States
AFDC Payments Recovered	14.5%	7.0%	4.1%
AFDC Absent Parents Paying Child Support	23.5%	10.5%	3.9%
	Cost-Effectiveness		
Ratio of AFDC Collections To Total Administrative Costs (14 States Lower than $1.00)	$2.27	$1.38	$0.71
Ratio of Non-AFDC Collections To Total Administrative Costs (26 States Lower than $1.00)	$4.88	$1.91	$0.23

Data from Child Support Enforcement: 9th Annual Report to the Congress for the Period Ending September 30, 1984 (Washington, DC: U.S. Govt. Print. Off., 1985).

EXHIBIT 1.2

STATE PROGRAM COLLECTIONS FOR FISCAL YEAR 1984*

	AFDC Collections	Non-AFDC Collections	Total Collections
National Average	**$1.38**	**$1.91**	**$3.29**
I. States At or Above the National Average for Both AFDC and Non-AFDC Collections			
Pennsylvania	$1.48	$6.89	$8.37
Michigan	2.40	4.46	6.86
Delaware	1.66	2.97	4.64
II. States At or Above the National Average for AFDC Collections Only			
Iowa	3.87	1.82	5.69
Maine	3.01	0.73	3.75
Indiana	2.84	0.44	3.29
Vermont	2.26	0.18	2.44
Wisconsin	2.21	1.04	3.25
Rhode Island	2.11	1.25	3.36
South Carolina	1.97	0.52	2.49
Ohio	1.88	0.08	1.95
Massachusetts	1.81	1.74	3.55
South Dakota	1.80	0.53	2.33
Montana	1.78	0.49	2.27
Wyoming	1.76	0.82	2.58
Florida	1.74	0.69	2.43
Kansas	1.73	0.59	2.32
Connecticut	1.71	1.65	3.36
Mississippi	1.64	0.13	1.77
North Dakota	1.61	0.70	2.31
Minnesota	1.61	1.33	2.94
Utah	1.59	0.42	2.01
Washington	1.54	0.89	2.43
Idaho	1.53	0.34	1.86
Missouri	1.52	1.11	2.64
Virginia	1.50	0.24	1.74
North Carolina	1.49	1.17	2.65
West Virginia	1.48	0.04	1.52
Georgia	1.44	0.37	1.80

*Ratio of Collections to Total Administrative Costs

	AFDC Collections	Non-AFDC Collections	Total Collections
National Average	**$1.38**	**$1.91**	**$3.29**
III. States At or Above the National Average for Non-AFDC Collections Only			
Puerto Rico	0.35	24.26	24.61
Nebraska	1.08	4.68	5.76
New Hampshire	1.07	4.09	5.16
New Jersey	1.25	3.30	4.55
Virgin Islands	0.37	3.11	3.48
Maryland	1.31	2.84	4.15
Tennessee	0.92	2.25	3.17
Oregon	0.98	2.03	3.01
Kentucky	0.78	1.97	2.75
Alaska	0.40	1.99	2.39
IV. States Below the National Average for Both AFDC and Non-AFDC			
Hawaii	1.03	1.33	2.37
Illinois	1.31	0.99	2.31
California	1.23	1.08	2.31
Arizona	0.33	1.84	2.18
New York	0.77	1.27	2.03
Louisiana	0.74	1.22	1.96
Nevada	0.52	1.39	1.91
Texas	0.94	0.83	1.77
Colorado	1.02	0.70	1.72
New Mexico	1.10	0.62	1.71
Arkansas	1.08	0.55	1.63
Guam	0.93	0.59	1.52
Oklahoma	1.01	0.35	1.36
Alabama	0.82	0.30	1.11
District of Columbia	0.50	0.39	0.90

Data from Child Support Enforcement: 9th Annual Report to the Congress for the Period Ending September 30, 1984 (Washington, DC: U.S. Govt. Print. Off., 1985).

Examining these discrepancies in performance shows that the potential for recovering additional revenue is staggering. If all of the States currently performing below the national average increased their cost-effectiveness to the national average, the additional welfare savings for the taxpayer would be almost $300 million per year. If the Program as a whole could recoup 25 percent of the AFDC costs, it would be collecting more than four times what it now collects.

Current collection and administrative expenditure growth trends suggest that program performance can be improved while administrative costs are contained. The U.S. Bureau of the Census estimates that over $3 billion in unpaid child support obligations exist yearly nationwide.[21] Without affirmative judicial involvement and the effective operation of the Child Support Enforcement Program at the Federal, State, and local levels, the rights of children to receive support from both parents and to enjoy the benefits of having their paternity established are thwarted.

FUTURE DIRECTIONS

As noted at the outset of this chapter, the Child Support Enforcement Amendments of 1984 reflect a clear Congressional mandate to force States and local jurisdictions to adopt improved procedures, management practices, and legal remedies. These mandatory changes, which are discussed throughout the remainder of this Guide, will radically alter the structure of the child support enforcement programs in many States. The role played by the judiciary likewise will change drastically as many States implement expedited judicial and administrative processes for child support (as discussed below in Chapter 4). As noted in Chapter 5, support obligations established pursuant to new mandatory procedures should be entered more expeditiously and should be based on objective standards. As noted in Chapter 8, more effective enforcement remedies are to be applied more consistently to a greatly expanded number of delinquent cases. Of particular note is the legislative provision for mandatory income withholding for all cases when the delinquency equals the amount of 1 month's obligation. Interstate establishment and enforcement will improve as a result of the interstate income withholding procedure mandated by Congress, and OCSE's commitment to improvement in this crucial area. These changes are discussed in Chapter 10. By mandating expedited processes for establishment and enforcement of support obligations, Congress has issued an invitation to the American judiciary to become involved in implementing, administering, and improving the child support enforcement process.

FOOTNOTES

/1/ Social Security Administration, 1979 AFDC Recipient Characteristics Study, Pub. 13-11729 (Washington, DC: U.S. Govt. Print. Off., June 1982), Table 18.

/2/ Lenore Weitzman, The Divorce Revolution (New York, NY: Free Press, 1985).

/3/ U.S. Bureau of the Census, March 1984 U.S. Census (Washington, DC: U.S. Bureau of the Census, August 1984).

/4/ U.S. Bureau of the Census, "Population Characteristics Series P-20, No. 372," Marital Status and Living Arrangements: March 1981 (Washington, DC: U.S. Bureau of the Census, June 1982), Table D.

/5/ Quote from Arthur Norton, Assistant Chief of the U.S. Bureau of Census Population Division, Washington Post, June 18, 1982.

/6/ U.S. Bureau of the Census, "Population Characteristics," op. cit.

/7/ Paul C. Glick, "American Household Structure in Transition," Family Planning Perspectives 16(5): 2, September/October 1984.

/8/ Heather L. Ross and Isabel V. Sawhill, Time of Transition: The Growth of Families Headed by Women (Washington, DC: The Urban Institute, 1975), p. 21-24.

/9/ U.S. Congressional Research Service/Congressional Budget Office, Children in Poverty (Washington, DC: U.S. Govt. Print. Off., May 1985).

/10/ Asland Thorton and Deborah Freedman, "The Changing American Family," Population Bulletin 38(4) (Washington, DC: Population References Bureau, Inc., 1983).

/11/ U.S. Commission on Civil Rights, A Growing Crisis: Disadvantaged Women and Their Children, Clearinghouse Pub. 78 (Washington, DC: U.S. Govt. Print. Off., May 1983).

/12/ U.S. Senate Committee on Finance, "Child Support Data and Materials," 94th Congress of the U.S. Senate Committee on Finance, 1st Session (Washington, DC: U.S. Govt. Print. Off., 1975).

/13/ Id., p. 3.

/14/ Social Security Administration, Social Security Bulletin 45(8): Table M-30, August 1982.

/15/ American Children in Poverty (Washington, DC: Children's Defense Fund, 1984).

/16/ U.S. Bureau of the Census, Child Support and Alimony: Current Population Reports, Report 112 (Washington, DC: U.S. Bureau of the Census, 1978), p. 23.

/17/ 48 USC 655.

/18/ The Gramm-Rudman-Hollings legislation may impact these percentages.

/19/ Note that the amount of this incentive payment may not exceed twice the amount awarded to the State on account of collections for AFDC cases. [42 USC 658.]

/20/ U.S. Department of Health and Human Services, Office of Child Support Enforcement, Child Support Enforcement; 9th Annual Report to the Congress for the Period Ending September 30, 1984 (Washington, DC: U.S. Govt. Print. Off., 1985).

/21/ U.S. Bureau of the Census, March 1984 U.S. Census, op. cit.

CHAPTER 2
The Federal Role in the Child Support Enforcement Program

INTRODUCTION

Since the early 1950s, Congress has shown a persistent and increasingly forceful initiative to promote a viable Child Support Enforcement Program. Efforts to pass effective child support legislation began to intensify in the mid- to late 1960s, culminating in the 1975 passage of Title IV-D, the current comprehensive Child Support Enforcement Program. Prior to this time, Public Law (P.L.) 89-97, which passed in 1965, legally sanctioned the use of Social Security records to locate parents--a process that many States had employed informally for years. Upon enactment of this legislation, States could gain access to Social Security records through the Social Security Administration to obtain recent addresses and places of employment of absent parents. Next followed the 1967 passage of P.L. 90-248, providing States access to Internal Revenue Service (IRS) records to obtain addresses of absent parents. This law, which amended Title IV of the Social Security Act, included provisions that required State welfare agencies to establish a single unit whose mission was to collect child support and to establish paternity for children on public assistance. States also were required to work cooperatively with each other under child support reciprocity agreements and with courts and law enforcement officials.

Nevertheless, by 1972, it was clear from the rapid increase in numbers of AFDC recipients that the 1967 Amendments had not produced the intended results. In light of their relative ineffectiveness, the U.S. Senate Finance Committee, under the chairmanship of Russell Long, had begun working in early 1971 to compile data on AFDC costs and child support enforcement. The Committee intended to use this information in developing new Social Security amendments to strengthen child support enforcement.

A group of Senators, most notably Long, Mondale, and Nunn, continued to push for a comprehensive Child Support Enforcement Program, despite unsuccessful attempts in 1972 and 1973. The Senators apparently envisioned legislation that would define clearly the functions and operational parameters for the State agencies that had been mandated by law in 1967 to collect child support and establish paternity. Other desired outcomes were to strengthen the Federal regulatory and oversight role, to establish parent locator services at the Federal and State levels, and to establish funding standards and procedures.

Despite repeated failures to get bills through both houses, the child support provisions that had been deleted from legislation a year earlier were incorporated into House Rule 17045 in late 1974. The provisions passed both the Senate and the House on December 20, 1974. President Ford signed the bill into law on January 4, 1975, as P.L. 93-647, the Social Security Amendments of 1974. Part B of P.L. 93-647 enacted Title IV-D of the Social Security Act, which created the Program for Child Support Enforcement and Establishment of Paternity.

Since 1975, Congress has examined a number of legislative initiatives and, almost every year, passed bills that address such things as funding to States, additional child

support collection remedies, and mandated State recordkeeping and enforcement activities. Appendix A provides a chronological legislative history of Congress' activities, including a thorough discussion of the Child Support Enforcement Amendments of 1984, which embody the most comprehensive requirements on State child support enforcement practices since the Program was established.

THE FEDERAL OFFICE OF CHILD SUPPORT ENFORCEMENT

P.L. 93-647 required the Secretary of Health, Education, and Welfare [now the U.S. Department of Health and Human Service (DHHS)] to establish a separate organizational unit to oversee the operations of State child support enforcement programs. This was accomplished through the establishment, within DHHS, of the Office of Child Support Enforcement (OCSE). In a move reflecting the commitment of DHHS to the Child Support Enforcement Program, the director of OCSE began reporting directly to the Secretary of DHHS in early 1985. Previously, the Commissioner of the Social Security Administration also served as the Director of OCSE.

OCSE's mission is to provide leadership in the planning, development, management, and coordination of the Department's Child Support Enforcement Program and activities authorized and directed by Title IV-D of the Social Security Act and other pertinent legislation. The general purpose of these programs and activities is to require States to enforce support obligations owed to children by locating absent parents, establishing paternity when necessary, and collecting child support.

The specific responsibilities of OCSE are to:

- Establish regulations and standards for State programs for locating absent parents, establishing paternity, and obtaining child support
- Establish minimum organizational and staffing requirements for State units engaged in carrying out child support enforcement programs
- Review and approve State plans for child support enforcement programs
- Evaluate the implementation of State child support enforcement programs, conduct audits of State programs to assure their conformity with requirements; and, not less often than every 3 years, conduct a complete audit of these programs in each State and determine for the purposes of the penalty provision of section 403(h) of the Social Security Act [42 USC 603(h)(2)] whether the actual operation of such programs in each State conforms to Federal requirements
- Assist States in establishing adequate reporting procedures and maintaining records of the operations of child support enforcement programs
- Maintain records of all amounts collected and disbursed under child support enforcement programs and of the costs incurred in collecting such amounts
- Provide technical assistance to the States to help them establish effective systems for collecting child support and establishing paternity

- Certify applications from States for permission to use the courts of the United States to enforce court orders for support against absent parents in interstate cases where a State has been noncompliant

- Operate the Federal Parent Locator Service (FPLS)

- Certify amounts of past-due child support obligations to the Secretary of the Treasury for collection

- Submit an annual report to the Congress on all activities undertaken relative to the Child Support Enforcement Program

- Establish regulations and standards for Federal financial participation in support of State child support enforcement programs.

The Organization of OCSE

OCSE is responsible for all program and policy aspects of Federal, State, and local child support enforcement programs. To carry out this mission, OCSE has been organized into the Office of the Director and five divisions: Management and Budget, Program Operations, Policy and Planning, Audit, and Information and Management Systems. The responsibilities of these divisions are discussed briefly below.

- The Division of Management and Budget directs the overall OCSE administrative management support effort in the areas of budget, personnel management, manpower and organizational management, travel management, space management, and procurement. This division also administers the OCSE State grants program.

- The Program Operations Division assesses State program performance and effectiveness by assisting OCSE Regional Offices in the conduct of special studies and reviews; provides technical assistance to Regional Offices and States on operational aspects of their programs; develops guides, concepts, and procedures for use in program operations; provides management consulting services to State child support enforcement agencies. In addition, this division develops and issues various publications related to child support, including a monthly newsletter, and operates the National Child Support Enforcement Reference Center. The National Child Support Enforcement Reference Center provides technical information concerning program management, research findings, and other topics related to child support enforcement.

- The Policy and Planning Division develops and analyzes policies, regulations, and legislation relevant to the Child Support Enforcement Program; develops procedures for State plan review and approval by Regional Offices; reviews Regional Office recommendations of State plan disapprovals; develops long-range plans and objectives for the agency; conducts statistical analyses and research projects; develops, coordinates, and conducts evaluation studies; and designs statistical reporting requirements and methods for obtaining data.

- The Audit Division conducts program results audits of State child support enforcement programs at least once every 3 years to determine program effectiveness and compliance with the Social Security Act; makes

recommendations to the Director regarding imposition of the penalty provision of section 403(h) of the Social Security Act [42 USC 603(h)(2)]; develops and conducts administrative cost and other special audits; and develops guidance concerning audit procedures and standards.

- The Information and Management Systems Division develops and assists in the planning and installation of automated systems for use by State programs; provides consulting services and technical assistance to States on Advance Planning Documents for 90 percent Federal Financial Participation; reviews, evaluates, and approves requests for Federal matching funds for automated State/local child support enforcement systems; conducts periodic reviews of State Advance Planning Document installations; establishes and maintains automated system standards for the States; operates the Federal Parent Locator Service; provides computer services, automated system design, development, and maintenance services to OCSE; operates the Federal Tax Offset System and the Project 1099 System; coordinates and monitors the IRS Full Collection Process; and, in conjunction with other OCSE users, operates the OCSE Management Information System.

The OCSE Regional Offices provide technical assistance to States in establishing effective child support enforcement programs; provide interpretation of Child Support Enforcement Program regulations to State agencies; provide assistance to State agencies in developing State plans; review and approve or recommend disapproval of State plans and State plan amendments; evaluate the implementation of State programs; and review State activities to determine legitimacy of claims for Federal financial participation.

OCSE Projects and Activities

The provision of technical assistance to States is a mandated requirement of OCSE. To this end, OCSE operates the FPLS, produces Program-related publications, administers research and demonstration projects, provides training and disseminates information to the public, and conducts audits of State and local child support enforcement programs. Each of these activities is discussed below.

The Federal Parent Locator Service. OCSE operates the FPLS by communicating with other Federal agencies to find the current addresses and places of employment of absent parents. On receiving a request, the FPLS checks records maintained by the Social Security Administration and the records of several other agencies including the:

- Internal Revenue Service
- Department of Defense
- Veterans' Administration
- National Personnel Records Center
- Selective Service System.

Publications. OCSE disseminates news and information regarding effective program techniques and management practices through its monthly publication Child

Support Report and its periodic Abstracts of Child Support Techniques. In addition, OCSE publishes the semiannual Information Sharing Index, a listing of all child support enforcement materials, including research reports, available from the National Child Support Enforcement Reference Center. OCSE conveys its policies and procedures, including proposed and final Federal regulations, in Action Transmittals. Items of interest to State and local IV-D agencies are conveyed through Information Memoranda. These last two publications are issued as necessary. OCSE releases data in tabular form, on a periodic basis, in a publication entitled Child Support Enforcement Statistics, and informs Congress of Federal and State child support enforcement activities through the Annual Report to Congress. All these materials are available at no cost, upon request, from the National Child Support Enforcement Reference Center, 6110 Executive Boulevard, Room 820, Rockville, MD 20852.

Research and demonstration projects. OCSE expends about $450,000 annually to employ contracts and grants for research and demonstration projects to add to existing knowledge and develop new methods and techniques. In addition, the Child Support Enforcement Amendments of 1984 authorize OCSE to award grants to encourage and promote improved interstate establishment and enforcement. These grants may be awarded to States beginning in Federal fiscal year (FY) 85; amounts authorized are $7 million in FY 85, $12 million in FY 86, and $15 million in subsequent years.

In FY 83, OCSE funded research and demonstration projects with the following purposes: to quantify the national collections potential; to develop models for assessing and updating child support award levels; to develop standards for parentage testing laboratories; to study the effects of child custody arrangements on child support payments by absent parents; to develop alternative methods for obtaining financial and case characteristic data about absent parents; to research the costs and benefits of paternity establishment; to improve interstate child support collections; to investigate the practical aspects of modern paternity testing; and to study court systems to improve the collection of court-ordered support. In addition, OCSE funded various demonstrations of administrative improvements in child support enforcement case processing techniques.

Training and public information. In order to provide more efficient and effective services to States and to improve management effectiveness, OCSE has contracted with several organizations to train child support enforcement professionals in proven methods of operation and to interpret the Program to interested outside parties and the general public. Included in this effort are the National Council of Juvenile and Family Court Judges, the National Institute for Child Support Enforcement, the National Conference of State Legislatures, the American Bar Association, and the National Governors' Association. The services of these five organizations are discussed below:

- National Council of Juvenile and Family Court Judges. Founded in 1937, the National Council of Juvenile and Family Court Judges (NCJFCJ) is the oldest judicial membership organization in the nation. Council membership comprises judges, referees, commissioners, and masters. Court administrators, clerks, attorneys, and others active in juvenile and family law may join as associate members. Membership services include continuing judicial education at the University of Nevada and other sites around the country; consultation and technical assistance; provision of State and regional training programs; and a variety of publications, including the Juvenile and Family Law Digest and the Juvenile and Family Court Journal. The Council also provides research consultation services through its Research Division, the National Center for Juvenile Justice, in Pittsburgh, PA.

The training division of NCJFCJ, the National College of Juvenile and Family Law (NCJFL) conducts over 100 continuing judicial education programs annually for professionals in the juvenile and family court field in cities throughout the United States and on the Reno campus of the University of Nevada. In 1985, over 12,000 people were trained. The faculty is composed of judges as well as internationally and nationally known experts in the fields of juvenile and family law, child development, sociology, psychology, medicine, and administration.

Since 1979, NCJFCJ has been providing child support enforcement judicial education under contract to OCSE. This includes presentations targeted to judicial participants at national, State, and local conferences; the incorporation of child support enforcement issues in courses offered at NCJFL in Reno; published articles on child support enforcement in periodicals targeted to the judicial community; and a 12-member judicial advisory committee, which makes recommendations on child support enforcement issues.

- National Institute for Child Support Enforcement. The National Institute for Child Support Enforcement (NICSE) was established in March 1979 to develop and present training courses tailored to the needs of Federal, State, and local personnel participating in the Child Support Enforcement Program and to assist with technology transfer among the States. In its 6 years, NICSE has developed 11 formal training courses and conducted over 500 deliveries to more than 10,000 child support enforcement professionals. NICSE has developed 16 publications and distributed over 90,000 of them to the field. This publication record makes the Institute a major source of printed information on the Child Support Enforcement Program. The Institute's working relationship with OCSE and State and local programs also has facilitated the dissemination of information. Through its Lecture Presentation Series, Institute staff and affiliated consultants have made over 175 presentations to audiences as large as 800 persons.

  Now beginning its 7th year of operations, NICSE continues to offer training courses, materials development, and lectures for the Child Support Enforcement Program. In addition, a new technical assistance project will apply Institute expertise in training development and delivery to help improve State training capabilities. NICSE also will be offering seminars for new State IV-D administrators and developing videotapes in support of various OCSE information campaigns.

- National Conference of State Legislatures. The National Conference of State Legislatures (NCSL) assists State legislatures in developing and enacting legislation beneficial to their child support enforcement programs. Toward this end, NCSL conducts research, provides information, and coordinates expert testimony concerning the experience of other States that have enacted similar laws.

- American Bar Association. The American Bar Association (ABA) has contracted with OCSE to operate a child support project as a component of its National Legal Resource Center for Child Advocacy and Protection. Under this contract, ABA provides training to attorneys, both inside and outside of the

IV-D Program; produces related written materials; provides training to court and paralegal personnel on interstate support enforcement; and provides technical assistance to bar groups, legislative committees, State Child Support Commissions, and individual attorneys. In addition, ABA has worked with NCSL to develop model legislation such as the Model Interstate Income Withholding Act.

- National Governors' Association. The National Governors' Association (NGA) provides a mechanism for identifying and resolving problems related to the development and implementation of national policy and a forum for addressing State problems. The Association works with Congress on Federal and State policy issues, which include the Child Support Enforcement Program. This relationship enhances the sharing of Program knowledge among the States. Specifically, NGA has contracted with OCSE to provide a forum for identifying issues that need to be brought to the attention of top-level policy makers at the State level for action needed to implement Federal law in State child support enforcement agencies. In addition, NGA develops and disseminates a variety of material on child support enforcement to key-level managers and policy makers in the States.

In addition to these contracted services, training and public awareness activities are conducted by OCSE Central and Regional Office staff.

Audits of State and local programs. OCSE audits of State programs significantly improve program performance by alerting management to deficiencies and by recommending more effective and efficient methods of operation. Prior to the FY 86 audit period, OCSE auditors will complete State plan program results audits and systems reviews of all 54 States and territories. Beginning with the FY 86 audit period, the auditors will begin using criteria that are related to program performance indicators as well. In order to assess States' performance on a results-achieved, quantifiable basis, several initial performance indicators have been developed by OCSE in conjunction with State officials. These indicators are:

- AFDC IV-D Collections / Total IV-D Expenditures

- Non-AFDC Collections / Total IV-D Expenditures

- AFDC IV-D Collections / IV-A Assistance Payments (minus payments to unemployed parents)

Beginning with the audits for FY 86, these indicators will be used to evaluate performance and, with the program results audits of State Plan requirements, will constitute the bases for determining States' program effectiveness for purposes of the audit penalty. Beginning with FY 88, four additional performance indicators will be added to evaluate performance.

Three regulations implement the new audit system: 45 CFR 305.98 defines the performance indicators; 45 CFR 305.99 provides for notice to a State of a finding by the Secretary of DHHS that the State's program is not substantially in compliance with Program requirements and also provides for a corrective action period; and 45 CFR 305.100 establishes the sanctions to be applied against States found to be out of

compliance and that fail to correct the deficiencies, based on the criteria contained in the Secretary's notice. The sanctions are applied by reducing the States' Federal IV-A matching funds, as follows:

- Not less than 1 nor more than 2 percent of such payments for a period beginning in accordance with the regulation not to exceed the 1-year period following the end of the suspension period

- Not less than 2 nor more than 3 percent of such payments if the finding is the second consecutive finding made as a result of an audit for a period beginning as of the second 1-year period following the suspension period not to exceed 1 year

- Not less than 3 nor more than 5 percent of such payments if the finding is the third or subsequent consecutive finding as a result of an audit for a period beginning as of the third 1-year period following the suspension period.

When a State corrects the deficiencies within the corrective action period, the penalty will not be imposed.

CHAPTER 3
State and Local Roles in the Child Support Enforcement Program

INTRODUCTION

Child support enforcement on the State and local levels specifically includes all activities devoted to securing the payment of established financial obligations from absent parents. To achieve this end, child support enforcement programs carry out many important federally mandated functions at the State level. These functions require the investment of significant time and resources, and range from establishing a case file to enforcing a support obligation. In addition, State and local agencies are responsible for locating absent parents, establishing paternity, establishing equitable support obligations, monitoring payments for compliance with orders, distributing collections, and safeguarding confidential information. The effective culmination of these efforts can minimize the use of judicial time since absent parents are more likely to pay child support if their cases are processed properly.

However, if the cases go to court, judges must rely on the information gathered by the child support agency to represent the interests of both children and State. Moreover, the agency depends on the power of the courts to enforce child support obligations. To be effective, judges must be familiar with the Child Support Enforcement Program as mandated by Federal law and regulations and the effect that the program has on the courts, children, and States, as well as taxpayers. The following is a discussion of how Federal regulations are affecting the Child Support Enforcement Program.

TITLE IV-A STATE PLAN REQUIREMENTS

Generally, the State welfare agency administers the AFDC program, as well as other financial assistance programs. The State or local agency administering this program is commonly known as the IV-A agency, since Title IV-A of the Social Security Act set up the AFDC program to provide financial assistance to families with dependent children. The AFDC program and the Child Support Enforcement Program are administered by States or localities pursuant to Federal guidelines. A review of some of the more relevant regulations will help explain the responsibilities of the welfare agency.[1/]

To receive Federal funds, the welfare agency and the child support enforcement agency each must have an approved State plan. A State plan is an agreement between the State and Federal Governments to perform certain minimum duties in order to receive Federal funds. Also, requirements related to child support are imposed on the welfare agency by Congress through statute and by the Department of Health and Human Services (DHHS) through regulations. These regulations are intended to ensure that all procedures used and information obtained result in enforceable cases. The welfare agency must gather this information as part of the eligibility process. An applicant's unwillingness to provide information can have an immediate adverse effect on his or her financial assistance eligibility. An applicant must show "good cause" for not providing such information. "Good cause" is defined at 45 CFR 232.40 and discussed below.

An applicant/recipient for AFDC must meet two child support-related conditions: assignment of rights to child support and cooperation in obtaining child support.

Assignment of Rights to Support

As a condition of eligibility for assistance, the IV-A agency must require each AFDC applicant or recipient to assign to the State all rights to past and present support from any other person. [42 USC 602(a)(26).] This assignment applies both to the applicant and to any other member of the family for whom assistance is being sought and to whom future payments will be made. The assignment includes arrearages due on the date the assignment becomes effective, in addition to current and future support. [45 CFR 232.11 and 45 CFR 302.50.] If the relative with whom a child is living fails to comply with these requirements, that relative shall be denied eligibility without regard to other eligibility factors. If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of this section, any aid for which such child is eligible will be provided in the form of protective payments. An assignment by operation of State law may be used in lieu of the assignment described above. If there is a failure to execute an assignment, the State still may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations.[2]

Cooperation in Obtaining Support

The Title IV-A State plan must meet, inter alia, all of the following requirements:

- The plan must provide that, as a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate (unless good cause for refusing to do so is determined to exist) with the State in:
  - Identifying and locating the parent of a child for whom aid is claimed
  - Establishing the paternity of a child born out of wedlock for whom aid is claimed
  - Obtaining support payments for the applicant or recipient and for a child for whom aid is claimed
  - Obtaining any other payments or property due the applicant or recipient or the child.
- The IV-A State plan must specify that cooperation includes any of the following actions that are relevant to, or necessary for, the achievement of the objectives specified above:
  - Appearing at an office of the State or local IV-A or IV-D agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by the applicant or recipient
  - Appearing as a witness at judicial or other hearings or proceedings
  - Providing information or attesting to the lack of information under penalty of perjury

- Paying to the child support agency any child support payments received from the absent parent after an assignment has been made.

- The IV-A State plan must provide that, if the child support agency notified the State or local IV-A agency of evidence of failure to cooperate, the State or local agency will act on that information to enforce these eligibility requirements.

- The IV-A State plan must provide that if the custodial relative fails to cooperate as required by 45 CFR 232.12, the State or local agency will:

  - Deny assistance to the custodial relative without regard to other eligibility factors

  - Provide assistance to the eligible child in the form of protective payments. Such assistance will be determined without regard to the needs of the custodial relative.[3/]

- The IV-A State plan must provide an applicant for or recipient of AFDC with an opportunity to claim good cause for refusing to cooperate.[4/] The State or local agency must notify such person, in writing, of the right to claim good cause as an exception to the cooperation requirement. The notice must:

  - Advise the applicant or recipient of the potential benefits the child may derive from establishing paternity and securing support

  - Advise the applicant or recipient that, by law, cooperation in establishing paternity and securing support is a condition of eligibility for AFDC

  - Advise the applicant or recipient that if the State or local agency determines that there is good cause, the applicant or recipient will be excused from the cooperation requirement.

The applicant or recipient must provide corroborative evidence of a good cause circumstance and, when requested, must furnish sufficient information to permit the State or local agency to investigate the circumstances. The State or local agency must provide, on request, reasonable assistance in obtaining the corroborative evidence. On the basis of the evidence supplied and the agency's investigation (if necessary), the State or local agency will determine whether cooperation would be against the best interests of the child.

Generally, the State IV-D child support enforcement agency will not attempt to establish paternity and collect support in those cases where the applicant or recipient is determined to have good cause for refusing to cooperate. However, the State IV-D agency may attempt to establish paternity and collect support in those cases where the IV-A agency determines that this can be done without risk to the applicant or recipient if done without his or her participation.

The IV-A agency's final determination that good cause does or does not exist will be in writing, contain the agency's findings and basis for determination, and be entered into the AFDC case record.

If the IV-A agency determines that good cause does not exist, the applicant or recipient will be so notified and afforded an opportunity to cooperate, withdraw the application for assistance, or have the case closed. Continued refusal to cooperate will result in the applicant's ineligibility for AFDC. The children involved will still be eligible for AFDC for their own needs; however, the children's grant will go to another person in the form of protective payments.

Circumstances under which cooperation may be against the best interests of the child are:

- Physical or emotional harm to the child for whom support is to be sought
- Physical or emotional harm to the parent or custodial relative with whom the child is living of such nature or degree that it reduces such person's capacity to care for the child adequately
- The child for whom support is sought was conceived as a result of incest or forcible rape
- Legal proceedings for the adoption are pending before a court of competent jurisdiction
- The applicant or recipient currently is being assisted by a public or a licensed private social agency to resolve the issue of whether to keep the child or relinquish him or her for adoption, and discussions have not gone on for more than 3 months.

TITLE IV-D PLAN REQUIREMENTS AND OPERATIONS STANDARDS

The State plan requirements and standards for program operations for IV-D agencies are found in 45 CFR 302 and 303. This section discusses mandatory caseload characteristics and the functional steps the IV-D agency takes as a case is processed.

Since the inception of the Child Support Enforcement Program in 1975, States and local agencies have been required to provide equal services to both welfare and nonwelfare families. In 1984, Congress reemphasized this responsibility by revising section 451 of the Social Security Act [42 USC 651] to require specifically "that assistance in obtaining support will be made available under this part to all children (whether or not eligible for aid under Part A) for whom such assistance is requested."

In addition, Congress reinstated the States' responsibility to establish paternity and secure support for children in foster care who are receiving Federal assistance through Title IV-E of the Social Security Act. In 1980, Congress transferred the AFDC foster care program from Title IV-A of the Act to the newly created Title IV-E. Because the foster care program was no longer funded or administered under Title IV-A, the provision for assignment of support rights by AFDC recipients required by 42 USC 602(a)(26) no longer applied to foster care cases. This meant that Title IV-D child support enforcement services were not available for Title IV-E foster care cases except as non-AFDC cases. To receive IV-D services as a non-AFDC case, the child's parent, legal guardian, or the entity given custody of the foster child by the courts had to apply to the IV-D agency pursuant to 42 USC 654(6). To remedy this situation, Congress added 42 USC

671(a)(17) to require States to secure an assignment of support rights on behalf of children receiving foster care maintenance payments under Title IV-E and amended 42 USC 654(4)(B), 656(a), 657(d), and 664(a) to require IV-D agencies to collect and distribute child support for IV-E foster care maintenance cases.

Processing a Child Support Case

The steps a child support case goes through before it shows up in court are both numerous and complex. This section provides an overview of this preparation process; the steps, or separate functions, are depicted in Figure 3.1. They are eligibility determination, intake, locate, paternity establishment, support order establishment, monitoring, and enforcement.

Eligibility determination. New cases originate in one of three ways: (1) referral from the public assistance or foster care agency, (2) application from a non-public assistance recipient, and (3) referral from another State.

The IV-A or IV-E agency determines whether a public assistance applicant is eligible for AFDC or foster care. If the applicant is determined eligible and there is a duty to pay child support by an absent parent, the case must be referred to the child support enforcement agency. The referral must contain an assignment of support rights and an agreement to cooperate, in addition to other pertinent information discussed below under "Intake."

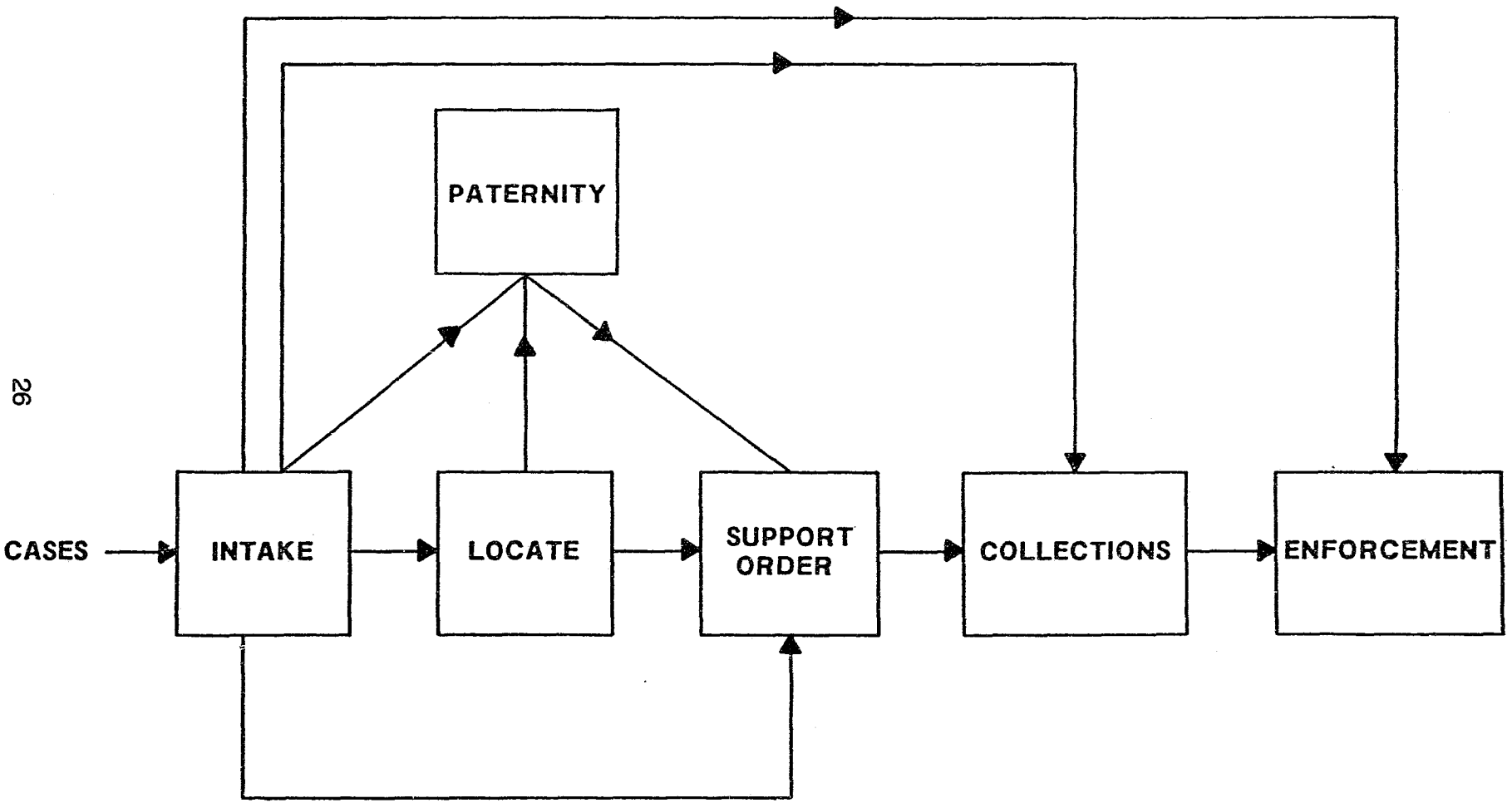
The assignment of support rights, completed by the applicant as a condition of eligibility, constitutes an obligation owed the State by the individual responsible for providing support. This obligation must be legally binding and, thus, must be established through an order of a court of competent jurisdiction or by other legal processes established by State law. Failure to execute such an assignment results in a denial of eligibility for assistance to the applicant, and any assistance to which dependent children are entitled must be made in the form of protective payments.

The State plan must provide that the same level of support enforcement services be provided to individuals not receiving public assistance that are provided to AFDC or foster care recipients. Such individuals, often referred to as non-AFDC clients, must file an application with the State IV-D agency, or with other State or local offices the State IV-D agency has authorized to accept non-AFDC applications on its behalf. Under P.L. 98-378, States must charge an application fee, not to exceed $25. 45 CFR 302.33 allows the State the option of charging the fee to the applicant, or paying the fee out of State funds. Either way, the State may seek to recover the fee from the absent parent in order to repay the applicant or itself. 45 CFR 302.30 requires that States publicize the availability of child support enforcement services, including any application fees that may be imposed for non-AFDC.

Interstate cases may be referred by other States using several procedures. The State where the family resides may request the State where the absent parent resides or works to withhold his or her income to enforce an in-State or out-of-State support order. The initiating State may request the responding State to establish and/or enforce an obligation through use of the Uniform Reciprocal Enforcement of Support Act (URESA). If an order exists in the absent parent's jurisdiction, the initiating State may simply request the absent parent's jurisdiction to enforce it using available remedies.

EXHIBIT 3.1

CHILD SUPPORT CASEFLOW DIAGRAM



Intake. Once the child support enforcement agency receives the appropriate forms from the IV-A agency, the non-AFDC applicant, or another State, a case record must be established. Three things are needed to open a child support enforcement case:

- Information on the custodial family
- Information on the absent parent
- An executed assignment of support rights or non-AFDC application.

The intake function consists of compiling the data received from the above sources along with other information available to the child support enforcement agency. Some States have designed and implemented automated computer interfaces to augment the information available to the child support enforcement worker during the intake process.

Preparation of an accurate and complete case record is important to the child support enforcement process. Later action on the case often depends on information collected at this point in the case processing sequence. A well prepared case minimizes the use of judicial time, establishes a verifiable audit trail, and generally helps the system operate effectively.

Locate. During case preparation, the child support enforcement worker will try to verify an address for the absent parent. If the worker cannot verify an address, Federal law requires that the child support enforcement agency attempt to locate the absent parent. If necessary, these locate efforts must extend across State lines, and the out-of-State agency must assist in the effort.[5]

There are three levels of location efforts--local, State, and Federal. Except for requests from other States, location efforts begin at the local child support enforcement office. The request for locate services may be made by a court with jurisdiction to issue child support orders, the caretaker parent or agent of a child not receiving public assistance, or the agency seeking to collect child support payment.[6]

Local locate efforts involve all community sources of information on the absent parent. The best local source is the custodial relative. If the custodial relative is an AFDC recipient, he or she must cooperate and reveal this information as a condition of AFDC eligibility.[7]

To contact these sources, the child support enforcement agency is required to establish a working relationship with all appropriate local resources.[8] Some of these sources may be reluctant to cooperate because of the Privacy Act. To encourage the source to reveal the information, the child support enforcement worker should explain the purpose of the IV-D Program and its confidentiality requirement for safeguarding information. Also, many State statutes require that this information be provided to the IV-D agency.

The State also must have a State Parent Locator Service (SPLS) to contact State agencies that may have information concerning the location of the absent parent.[9] The SPLS should have contacts with all appropriate State agencies, but at least contact with those agencies that maintain records concerning:

- Public assistance and social services
- Driver's licenses and vehicle registration
- Employment
- Revenue
- Law enforcement.

To check these records, the SPLS generally must have the absent parent's social security number and his or her date and place of birth. Also, the SPLS acts as a clearinghouse for interstate locate efforts by submitting and receiving requests to locate an absent parent who is residing in a State other than the one where the child and caretaker parent reside. Under a Federal requirement of cooperation, the SPLS receiving such a request must take steps to locate the absent parent and notify the State that initiated the request concerning the search results. Federal locate efforts are discussed in Chapter 2.[10]

Paternity establishment. Paternity establishment is very important to the Child Support Enforcement Program. Of the children born out of wedlock who live and are not adopted, approximately 60 percent receive welfare.[11] This results in a high expenditure of AFDC, the taxpayer's burden. In addition, national demographic trends demand that child support enforcement programs place high priority on establishing paternity.

How a paternity case is intiated depends on whether or not the mother is receiving AFDC. Although a woman who is not a recipient of AFDC is under no legal obligation to establish the paternity of her child, she can apply to the child support enforcement agency for use of its services in attempting to establish paternity. According to the Child Support Enforcement Amendments of 1984, the IV-D agency may charge an application fee of not more than $25 for these services in non-AFDC cases. On the other hand, AFDC and foster care recipients are required by law to cooperate in locating and identifying the parent of the child for whom aid is requested or to establish good cause for refusing to do so. The procedures and regulations for establishing paternity are discussed in full in Chapter 7. Scientific blood testing procedures for establishing paternity are discussed in Chapter 6.

Assessment/Establishment. If no existing court order determines the amount of the support obligation, the child support enforcement agency must make a financial assessment of the amount of the obligation under a formula developed by the agency.[12] This financial assessment is used to recommend an amount of legal obligation pursuant to a consent agreement or an administrative determination.[13] The court also may use the assessment as a guide when setting the amount of the obligation in the court order. Under 45 CFR 302.56, the State must establish specific and numeric guidelines, by law or judicial or administrative action, for setting child support award amounts within the State. By October 1, 1987, these guidelines must be made available to all persons in the State whose duty it is to set child support award amounts, but the guidelines need not be binding.

The assessment generally is conducted through contacts with the absent parent (when the individual will cooperate), the caretaker parent, the current or past employer, credit agencies, banks and other lending institutions, and insurance companies. This investigation serves several useful functions. It forms the basis of an administrative order or stipulation setting the amount of a legal obligation. Many IV-D agencies attempt to negotiate consent orders with the responsible parent prior to referring cases for legal action. If a consent agreement is not reached, the investigation can provide the court with valuable information, including a recommended amount, which the court may consider entering in the support order.

Sometimes an order of support can be established with the cooperation of the absent parent; other times a court or administrative hearing is necessary. If the parent must be summoned to court and does not appear, the order may be established by default. Under the Child Support Enforcement Amendments of 1984, all newly established or modified support orders must include a mandatory wage withholding provision as an automatic and preferred enforcement technique should the absent parent become delinquent in paying child support.

Monitoring/Enforcement. Accurate monitoring of child support payments is essential to the enforcement of the obligation, especially since it can help prevent the accumulation of arrearages. Under the State plan, the IV-D agency must maintain an effective system for identifying, within 30 days, those cases in which there is a failure to comply with the established support obligation, and contact delinquent individuals as soon as possible in order to enforce the obligation and obtain the current support amount plus any arrearages. Pursuant to 45 CFR 302.75, the IV-D agency may impose a late payment charge of not less than 3 percent or more than 6 percent of overdue support.

The mandatory wage withholding procedures required by the Child Support Enforcement Amendments of 1984 will have a major impact on agency enforcement tactics. Under the new law, all new or modified support orders must contain a provision for withholding wages as a means of collecting child support. Withholding will go into effect--without the need for any amendment to the support order involved or any further action by the court or administrative agency--once the arrearage equals 30 days support. (Mandatory wage withholding is discussed in detail in Chapter 8, and interstate wage withholding is discussed in detail in Chapter 10.)

Even without a wage withholding provision, the child support enforcement agency should attempt to secure voluntary compliance before relying on administrative or judicial enforcement. These initial nonjudicial enforcement techniques can minimize the use of court personnel and attorneys. If the nonjudicial enforcement techniques are unsuccessful, the child support enforcement agency must be ready to use its or a court's authority quickly to enforce the obligation and establish regular payments.

Numerous methods can be employed to encourage delinquent absent parents to comply with their financial obligations. These methods include but are not limited to interviews, personal contacts, telephone collection calls, billing systems, delinquency notices, and voluntary wage assignments. A child support enforcement agency bases its selection of a particular technique on a consideration of case characteristics, such as past payment history, age of the established obligation, date since the last payment was received, location, income, and resources available to the absent parent.

Attempts to collect support must include the following procedures as applicable and necessary:

- Automatic mandatory wage withholding pursuant to 45 CFR 303.100
- Withholding of unemployment compensation benefits pursuant to 45 CFR 302.65
- Contempt proceedings to enforce an existing court order where it can be shown that the support obligor had the ability to pay support but refused to do so
- Interception of State and Federal income tax refunds pursuant to 45 CFR 303.102 and 45 CFR 303.72
- Garnishment or similar proceedings if the State's statutes permit such a procedure and if the individual can be brought under the jurisdiction of the court
- Proceedings to establish liens on real and personal property pursuant to 45 CFR 303.103, where appropriate
- Proceedings to attach real or personal property if the State's law provides for such a procedure and the individual is subject to such procedure
- Procedures to secure and enforce medical support obligations pursuant to 45 CFR 306.51
- Proceedings to require an obligor to post security or a bond or give some other guarantee to secure payment pursuant to 45 CFR 303.104, where appropriate
- Reports to consumer reporting agencies regarding an obligor's overdue support, pursuant to 45 CFR 303.105
- Applications to use the Federal courts of the United States and proceedings to enforce an order in the Federal courts of the United States if such application is certified pursuant to 45 CFR 303.73
- Application for collection of the delinquent child support obligation by the Secretary of the Treasury pursuant to 45 CFR 303.71
- Any other collection or enforcement procedure described in the State plan.

Maintaining Case Records

In addition to carrying out the above activities, Federal regulations require the State or local IV-D agency (including subcontracting agencies) to keep careful records. The elements of a complete case record include, pursuant to 45 CFR 303.2, the following:

- The referral documents received from the IV-A agency or the application for IV-D services by another individual

- Records of any contacts with (1) an applicant or recipient of assistance under Title IV-A who is required to cooperate, (2) an individual who has applied for service, and (3) the absent parent and the date, reason, and result of these contacts

- Records of efforts to use local, State, and Federal locate resources and the dates and results of these efforts

- Records of any information collected on medical support as listed in 45 CFR 306.50(a)

- Records identifying the court order or, if there is no court order, the calculation of the amount of the obligation using the formula prescribed in the State plan

- Records of any actions taken as outlined in 45 CFR 303.3 through 303.6, including the dates and results thereof

- Records of communications to and from the State or local agency administering the State's Title IV-A plan, the OCSE Regional Office, and any other IV-D agencies

- A notation in the case record of the closing of the case, including the date thereof and the reason for taking the action.[14]

An agency that prepares cases accurately and takes timely enforcement measures can reduce court backlogs. Rapid enforcement of child support obligations conditions the absent parent to avoid the inconvenience of court appearances by making regular child support payments.

Distributing Collections

In AFDC cases, the recipients must assign to the State any rights they have to support from any other person in their own behalf or in behalf of any other family member for whom assistance is being paid.[15] The assignment includes all rights that have accrued at the time the assignment is made, including all arrearages due and collectible on that date. As a result of these assignments, IV-D agencies become possessed of support collections each month that are attributable to AFDC cases and that must be distributed according to Federal regulations. The distribution process is described below.

In non-AFDC cases, there is no requirement that the support obligee assign his or her support rights to the State. Nevertheless, many States have found that it greatly increases the quality of their recordkeeping and the efficiency of their case processing procedures to require absent parents to make their support payments to the IV-D agency or to the court that entered the support order. Such a requirement may be imposed by statute, by judicial rule, or by way of a voluntary assignment of support rights for the purpose of collection. In these States, the IV-D agency or the court must pass the support collection through to the family in a timely fashion. 45 CFR 302.57 sets forth requirements with which a State must comply in order to set up a payment processing system for non-AFDC cases. The State may charge the requesting parent a fee, not to exceed $25 annually and not to exceed State costs.

Distribution of collections in AFDC cases for which there is an assignment under Section 471(a)(17) of the Act is covered by 42 USC 657 and 45 CFR 302.51. Under these provisions, the first $50 collected that represents payment on current support due in a given month is forwarded to the family pursuant to 42 USC 657(a)(1). Amounts in excess of the first $50 of current support are retained by the State to reimburse itself for the AFDC paid to the family for the month in question. Any remaining amount of current support collected is paid to the family. If the amount collected exceeds the current support obligation, the State retains such amounts to reimburse itself for AFDC paid to the family for "any sequence of months for which it has not yet been reimbursed."[16] Once it is reimbursed in full, the State distributes the remainder of the collection to the family. Because the $50 pass-through only applies to current support, it does not apply when the collection remedy is Federal or State tax refund offsets.

The distribution sequence in foster care cases follows a slightly different pattern. The foster care agency "stands in" for the family. 45 CFR 302.52 requires that payments that would normally be forwarded to the family be paid to the State agency responsible for supervising the child's placement and care. That agency may set aside such amounts for the child's future or make all or a part of the money available to the child's caretaker for meeting the child's daily needs.

Safeguarding Information

Safeguarding information is an extremely sensitive area because U.S. citizens have a right to privacy. However, privacy is not an economic or even a tangible interest. It is not among the necessities of life. It does not necessarily guarantee the right to engage in or refrain from any particular activity. Rather, privacy is a conceptual interest arising from an expectation of how government will ensure that an individual may hold himself free from public scrutiny if he so chooses. The freedom from unwarranted publicity is said to exist only so far as its assertion is consistent with law or public policy.

Privacy is akin to the expectation interest of equality. Individuals expect government to treat those governed equally or to leave them alone altogether. The privacy right is not an explicit guarantee of the Constitution but is a contextual right that emanates from the First, Fourth, Fifth, and Ninth Amendments. Neither privacy nor equality can be viewed as independent "rights" or "interests," but rather each rises to the level of constitutional significance only within certain factual contexts. Privacy requires a wholly qualitative assessment of the interests affected by the governmental intrusion, with a relatively undefined balancing of interests as the vehicle for arriving at a result.

To be constitutionally protected, privacy must be considered a fundamental right. In fact, few aspects of an individual's life are considered essential and therefore protected from government intrusion, regulation, or prohibition. Interests such as speech, thought, sex, education, and family, however, have been consistently set apart as meriting special consideration. Courts have held that these interests are so fundamental that they are likely to continue being the basic concerns of human society even though times and other customs change.

The constitutional right to privacy should be distinguished from the confidentiality and safeguarding of information requirements of the Social Security Act. The social security confidentiality requirements are sometimes thought of as the "protection of rights to privacy." There is no constitutional safeguard of absolute privacy in child support cases. In fact, the opposite may be true. The taxpayers have a basic right to

know where their dollars are going. In the early stages of the public assistance program, many wanted lists of welfare recipients to be published. Unfortunately, little consideration was given to the children who could suffer when the custodial parent would not accept public assistance because of the potential public scorn.

Times changed, and so did attitudes. It was determined that the public interest in providing for children was more important than the public's right to know who applied for welfare. The reasoning was that people are poor through no fault of their own and, contrary to their own desires, must rely on public aid. Because they are honorable people for the most part, they should not be exposed to public ridicule. The children at any rate are innocent bystanders who should be protected. This is not a protection of a basic right of privacy, but is rather a specialized confidentiality requirement adopted for the good of the children in these specific cases. If the requirements are not followed, a State program maybe found to be out of compliance and sanctions applied.

P.L. 93-647 requires State plans to "provide safeguards which permit the use or disclosure of information concerning applicants or recipients only to (a) public officials who require such information in connection with their official duties, or (b) other persons for purposes directly connected with the administration of aid to families with dependent children."

As described in 45 CFR 303.21, the child support enforcement agency must establish criteria, in accordance with State statutes, that impose legal sanctions on the misuse or improper disclosure of information concerning applicants or recipients of child support enforcement services. In addition to activities related to child support, case information may be used for the following activities:

- Any investigations, prosecution, criminal, or civil proceeding conducted in connection with the administration of any such plan or program approved under Part A, B, C, or D of Title IV; or under Title II, X, XIV, XVI, XIX, or XX; or the supplemental security income program under Title XVI

- The administration of any other Federal or federally assisted program that provides assistance, in cash or in kind, or services directly to individuals on the basis of need

- These safeguards shall specifically prohibit disclosure to any committee or legislative body (Federal, State, or local) of any information that identifies by name or address any such applicant or recipient of public assistance.

THE CHILD SUPPORT ENFORCEMENT PROGRAM AND THE STATE COURT SYSTEM

The ultimate goal of the Child Support Enforcement Program is to ensure that the responsibility for supporting children rests with the responsible parents and, thereby, to diminish the demand for tax dollars. To meet this goal, State and local agencies must adhere to stringent legal requirements.

Given these requirements, child support enforcement agencies invest significant time and resources to enforce the payment of child support by the responsible absent parent.

In some cases, the child support agency's activities result in an admission by the absent parent that he or she is responsible for paying child support, saving valuable judicial time. However, some cases require litigation. In these instances, the effectiveness of the child support enforcement agency's efforts depends on fair and equitable action by the court. Child support enforcement attorneys and other program personnel have the responsibility to educate judges and other court personnel who must back the program's efforts with appropriate judicial remedies. The remainder of this Guide is devoted to describing that responsibility and identifying relevant substantive and procedural considerations.

FOOTNOTES

/1/ Portions of this chapter are based on Lavon D. Loynd, J.D., Dennis C. Cooper, M.P.A., and Athena M. Kaye, Establishing An Enforceable Case (Chevy Chase, MD: National Institute for Child Support Enforcement, 1981), pp. 3-13; Lavon D. Loynd, J.D., Effective Enforcement Techniques for Child Support Obligations (Chevy Chase, MD: National Institute for Child Support Enforcement, 1981), pp. 55-64; and Chester H. Adams, J.D., et al., A Guide for Judges in Child Support Enforcement (Chevy Chase, MD: National Institute for Child Support Enforcement, 1982) pp. 1-37.

/2/ 45 CFR 232.11(c).

/3/ 45 CFR 232.12.

/4/ 45 CFR 232.40 et seq.

/5/ 45 CFR 303.7.

/6/ 42 USC 653(c).

/7/ If the caretaker refuses to cooperate, assistance may be denied or placed in protective payments. [45 CFR 232.12(d), 234.60.]

/8/ 45 CFR 303.3(b).

/9/ 45 CFR 302.35.

/10/ 45 CFR 303.3 and 45 CFR 303.7.

/11/ U.S. Bureau of the Census, Child Support and Alimony: Current Population Reports, Report 112 (Washington, DC: U.S. Bureau of the Census, 1978), p. 23.

/12/ 45 CFR 302.53.

/13/ 45 CFR 302.50.

/14/ 45 CFR 303.2.

/15/ 45 CFR 232.11.

/16/ 45 CFR 302.51(b)(4).

CHAPTER 4
Expedited Processes and The Changing Role of the Judiciary

INTRODUCTION

The Child Support Enforcement Amendments of 1984 require each State to enact and implement expedited processes for establishing and enforcing child support obligations and, at the State's option, for establishing paternity. 45 CFR 303.101(a) defines expedited processes as "administrative or expedited judicial processes . . . which increase effectiveness and meet processing times specified in paragraph (b) (2) of this section and under which the presiding officer is not a judge of the court." Expedited processes must be in effect by October 1, 1985, or, if legislation is required, prior to the 4th month after the end of the first State legislative session that ends on or after October 1, 1985.[1/]

After implementation, actions to establish or enforce support obligations in IV-D cases must be completed from time of filing to time of disposition within the following time frames: 90 percent in 3 months, 98 percent in 6 months, and 100 percent in 12 months. These standards were approved by the House of Delegates of the American Bar Association (ABA) and adopted by the Office of Child Support Enforcement (OCSE) for use in child support enforcement. The ABA considers the standards to be an appropriate measure of the length of time in which domestic relations cases should be completed from case filing to disposition.

Implementation of expedited processes will change the role of the judiciary in the Child Support Enforcement Program. This chapter of the Guide analyzes briefly the effect that widespread implementation of such processes will have on the role judges and courts play in child support enforcement. The chapter also describes the two types of expedited processes that have been implemented in the States.

A NEW ROLE FOR JUDGES

Throughout the history of the Child Support Enforcement Program, the judiciary has been the focus of case processing activity. Judges have entered orders, established paternity, and provided the authority for all enforcement activity. The judiciary has been an important guiding force on the "front lines" of the child support enforcement effort. In mandating all States to implement expedited processes and summary wage withholding procedures, Congress has forced a change in the role judges are to play in the process.

Of course, many things will remain the same. Judges will still enter support orders in divorce proceedings, and these orders will continue to be a significant percentage of the obligations enforced by program personnel. In most States, judges will continue to preside over contested paternity proceedings; other States, no doubt, will opt to delegate the conduct of these hearings to the presiding officers in their expedited processes. Furthermore, judges will continue to sit in difficult enforcement proceedings; contempt will continue to be an important remedy against absent parents who do not have readily identifiable income or assets.

Routine establishment and enforcement should require significantly less judicial involvement. In States that enact administrative processes, trial judges generally will act in the traditional role of the appellate court. However, representatives from the judiciary should work with the IV-D agency in designing and implementing an administrative process. Judiciary involvement will help ensure the establishment of an effective system, as well as one that protects the rights of all parties. Judicial involvement in States that opt for expedited judicial processes will be more extensive. In most jurisdictions judges will become involved in individual cases only rarely, on request for review. Nevertheless, the judiciary's role as manager and overseer of the process will be crucial to the success of the new procedures. Judges often will be authorized to hire and supervise the presiding officers and other court personnel who drive the system. As such, judges must be aware of the administrative problems and needs of the program within their judicial circuit or district. The success of the process demands nothing less than a significant commitment of effort and resources, and a commitment to successful implementation.

EXPEDITED JUDICIAL PROCESSES

The concept of an expedited judicial process for child support establishment and enforcement has been in existence since at least 1919, when the Michigan legislature authorized its Friend of the Court System. [See Mich.Comp.Law Ann., secs. 552.251 to 552.255.] Other States with similar provisions include Delaware, Indiana, Minnesota, Nebraska, New York, Pennsylvania, Rhode Island, Texas, Utah, and Wisconsin.[2/] Of these States, Delaware, Michigan, Pennsylvania, Rhode Island, and Wisconsin have implemented the process as their main or exclusive establishment and enforcement mechanism.

For this discussion, we define expedited judicial process as a legal process in effect under a State judicial system that reduces the processing time of support order establishment and enforcement effort pursued through full judicial process. In order to expedite case processing, our model concept assumes judge surrogates with minimum authority to:

- Take testimony and establish a record
- Evaluate and make initial decisions
- Enter default orders if the absent parent does not respond to notice or other State process in a timely manner
- Accept voluntary acknowledgment of support liability and approve stipulated agreements to pay support, and if the State establishes paternity using quasi-judicial process, authority to accept voluntary acknowledgment of paternity.

Judge surrogates often are referred to as court masters, referees, hearing officers, commissioners, or presiding officers with the above described authority.

Pennsylvania Procedures

State statutes that authorize the appointment of judge surrogates can be so general as to provide only the authority without much direction, or may be so specific as to set

out the procedure in great detail. When the statute is general, the judiciary normally will fill in the details with court rules. The Pennsylvania statute and court rules describe a typical expedited judicial process. [See Pa. Rules of Civil Procedure, secs. 1910.10 to 1910.13.]

The rules provide two alternatives from which each judicial circuit may choose. The first option provides for a mandatory office conference in each child support establishment or enforcement case. This conference is presided over by a "conference officer," who need not be an attorney. If the case cannot be settled at the office conference, the matter is referred to the court for hearing. The second option also employs the office conference, but subsequent hearings, if necessary, are presided over by a master in lieu of the court. The court may review the master's decision.

The office conference provided for by Rule 1910.11 is somewhat unique; it gives the Pennsylvania procedure the look, and some of the advantages of, the administrative process (discussed below). There are two advantages to requiring such a conference. First, in a large percentage of cases, the parties will agree on an amount of support, and a final order will be prepared to be entered by the court without a judicial hearing. Second, the process of preparing for and conducting the office conference will allow the conference officer to conduct informal discovery into the facts of the case. Should the matter go before the judge, the court file should contain useful relevant information for attorneys to refer to during the court hearing. The court hearing no longer functions as an "intake interview," except with respect to hotly contested issues.

To strike a balance between fairness and efficiency, the Pennsylvania rules reflect several policy decisions with respect to the scope of the conference and the authority and function of the conference officer. The procedure makes maximum use of the conference, including recommendations by the conference officer as to the entry of an order and the amount. The court may act on the recommendation, subject to review de novo on written request, or the court may defer action, in which case a hearing automatically follows.

Important features of Pennsylvania's conference procedure are as follows:

- The order attached to the complaint directs the parties to bring to the conference certain documents, including their most recent Federal income tax return, their pay stubs for the preceding 6 months, and a completed income and expense statement. This information establishes a meaningful basis for the conference.

- The conference officer may make an informal recommendation to the parties as to the amount of support that should be ordered. If an agreement is reached, the officer will prepare a written order conforming to the agreement. The signatures of the parties appear on the proposed order to signify their agreement. The court, in its discretion, then may enter the order as the final order of support without further hearing.

- Even if the parties agree on an amount of support, the officer is still empowered to recommend that the court disapprove the agreement. This authority encourages the conference officer to fulfill the traditional judicial function as protector of the best interests of the child(ren), and prevents a

destitute spouse from agreeing to the entry of an unreasonably low order in exchange for some other item or right.

- Where the parties do not reach an agreement for a support order, the officer prepares a conference summary and recommendation to be furnished to the court and, upon request, to the parties. It contains the facts on which the parties agree, their contentions with respect to disputed issues, and the recommendation as to the amount and effective date of a support order. The file and summary then are transmitted to the court.

- The judge reviews the file and conference summary to determine whether a support order should be entered and, if so, whether the recommendation of the conference officer is appropriate. After careful consideration, the court may decline to enter an order, enter an order based upon the recommendation, or enter an order which varies from the recommendation. If the court declines to enter an order, then a hearing will be held before the court without further action by the parties.

- If the court enters an order based on the file and conference summary without hearing the parties, the rule requires that the order notify the parties of their right to demand a hearing de novo before the court, and the procedure that must be followed in order to demand a hearing. The order, however, remains in effect as a temporary order pending the hearing, unless the court grants a stay. If an order is entered and no party files a demand for hearing, then the order becomes a final order.

In judicial districts that have opted for the alternative hearing procedure, there is again an office conference, but the conference officer does not file a report and recommendations. If the office conference fails to produce an agreement, the matter is referred to the permanent hearing officer, who must be an attorney. The parties are notified of the date, time, and place of the hearing. Prior to the hearing, the parties may request discovery in order to gather additional information not disclosed at the office conference.

The permanent hearing officer acts as a judge surrogate to receive evidence, rule on objections, hear arguments, and file with the court a report containing a recommendation as to the terms of a support order. Rule 1910.12(b) requires a stenographic record of the trial to preserve the testimony for possible subsequent judicial review. The hearing proceeds in a manner substantially similar to a regular court hearing, sometimes even using a courtroom as a setting. Both sides typically are represented by counsel. The permanent hearing officer is an impartial participant at the hearing with the additional charge of protecting the best interests of the child. The normal rules of evidence apply.

After the hearing, the hearing officer prepares a report and recommendations. The report may be in narrative form, but must set forth the specific terms of the order, such as the amount of support, by and for whom it is to be paid, and its effective date. A copy of the report is furnished to all parties.

Within 10 days of the hearing, any party may file exceptions to the report, to the permanent hearing officer's rulings on the admissibility of evidence, to statements or findings of facts, to conclusions of law, or to any other matters occurring during the

hearing. If no exceptions are filed within the 10-day period, the court must review the report and, with the judge's approval, enter a final order.

If exceptions are filed, the court reviews the record placed before the hearing officer, as prepared and submitted by the parties. There is no de novo hearing before the court. Like the appellate court in a regular judicial process, the court hears oral argument and enters a final order. The court generally will refrain from substituting its opinion for that of the hearing officer regarding issues of fact, especially where the credibility or oral testimony may have affected the hearing officer's decision. If the court finds insufficient evidence in the record to support the hearing officer's decision, the court may remand the case for further proceedings before the hearing officer. The court normally will deviate from the recommendation of the hearing officer only where it finds that the hearing officer's report and recommendations contain a mistake of law.

Rule 1910.12 provides that the order entered by the court after hearing argument and reviewing the record is final, and that the court may not accept a Motion for Post Trial Relief. If a party disagrees with both the hearing officer's report and the final order entered by the court, he or she must seek relief in the appellate courts.

Variations in Other States

As noted above, in addition to Pennsylvania, the States of Delaware, Michigan, Rhode Island, and Wisconsin use expedited judicial systems extensively in the establishment and enforcement of child support obligations. The systems in these States resemble the Pennsylvania procedure; only Pennsylvania, however, has a formalized office conference procedure that can result in an enforceable order in default situations. While the authority of the judge surrogates varies from State to State, they generally have the authority to (1) hold hearings and compel witnesses; (2) enter orders or recommend orders to the court; and (3) make findings of fact in divorce, annulment, and separation cases, child support and maintenance cases, paternity cases, child abandonment and neglect cases, and juvenile justice cases.[3/] Some of the States also have authorized judge surrogates to conduct hearings and make findings and recommendations in interstate cases, a requirement under the Child Support Enforcement Amendments of 1984.

One advantage of an expedited judicial process that extends to areas other than child support and paternity is its ability to resolve collateral issues, such as visitation, while a child support or paternity proceeding is pending. This may not maximize the system's responsiveness to the child support caseload, but it does provide a procedural avenue to absent parents who might otherwise feel the system is one-sided.

Several States have combined their expedited judicial process with local court administration of many IV-D responsibilities. In Michigan, for example, the Friend of the Court System has been in effect since 1919 to supervise child custody, visitation, and support cases. The office of the Friend of the Court also receives, disburses, and monitors payments, and investigates and prosecutes absent parents who fail to comply with their support obligations. The Friend of the Court, hired and supervised by the court, also supervises the preparation of reports to the court regarding custody and visitation issues. The court also has the authority to appoint referees to act as judge surrogates in proceedings initiated by the Friend of the Court or referred by the court.

ADMINISTRATIVE PROCESS

All State legislatures have the authority to set up executive agencies or boards to resolve disputes and claims. These agencies or boards are governed by administrative law, the branch of public law that deals with the limits placed on the powers and actions of administrative agencies. In addition, all States have the capacity to devise and implement procedures for operating these agencies or boards. These procedures, which vary from State to State and from agency to agency, constitute administrative processes.

The use of administrative processes for establishing and enforcing child support obligations is a relatively recent occurrence. However, the general concept is as old as the Republic itself. The First Congress of the United States, meeting in 1789, enacted legislation authorizing administrative officers to regulate imports and determine import duties, and to adjudicate claims to military pensions for invalids who were wounded and disabled during the Revolutionary War. By the Nation's 1976 bicentennial, the Federal administrative process had achieved considerable status, embracing more than 60 independent regulatory agencies and several hundred administrative agencies in the executive department. The administrative process also has been applied within State governments. The workers' compensation and State tax enforcement programs illustrate State-level applications of this concept.

Significant parallels can be drawn between these two historic examples and the use of administrative processes to resolve child support disputes. Injured workers were plagued by increasing compensation claims, long court delays, and disparate awards for similar injuries; child support obligees suffer from similar problems. While child support caseloads have exploded due to increased reliance on welfare by families who are not being supported, child support cases have become bogged down in the courts. Moreover, child support obligations by the courts show little uniformity. Yet, objective criteria for child support obligations seem amenable to a systematic approach which, in turn, would result in more uniform and, thus, fairer child support determinations.

The enforcement of child support obligations also has taken on increased importance to States as welfare expenditures support children when parents should but do not. States have begun to realize that enforcing child support obligations has the same importance as enforcing tax obligations. The administrative child support process can relieve the courts of this overwhelming caseload and place it in a specialized executive agency, where, because of the agency's limited scope, obligations can be determined systematically and uniformly and enforced efficiently when they are not met. Sixteen States have enacted legislation allowing administrative establishment or enforcement of child support orders. Most of these States use the process almost exclusively in the appropriate cases.

Definition

For the purposes of this discussion, "administrative process" is defined as a statutory system granting authority to an administrative agency to determine paternity and to establish and enforce child support orders. This definition is understood best by analyzing each phrase.

A statutory system. State legislatures must enact statutes authorizing the administrative process. State constitutions prohibit agencies from assuming legislative or judicial authority without specific statutory delegations. Before an agency is authorized

to determine support obligations by establishing rules of general applicability and by applying those rules to specific cases, a statute must be in place.

Granting authority to an administrative agency. The statute must authorize the agency to make determinations in contested cases and must provide some manner of enforcing these determinations.

In addition, when a State legislature gives a State agency the authority to act in a judicial capacity, there are usually some substantive and procedural matters too detailed for the legislature to address specifically in the law. So that the agency may address these matters, the legislature also gives the agency rulemaking authority. Rules promulgated by an agency under that authority carry the weight of law. Thus, in an administrative process, a State agency acts in both judicial and legislative capacities.

The "administrative" or "executive" agency is usually a subdivision of a State's executive branch, such as the human services department, the revenue and taxation department, or any other agency reporting to the Governor. However, the agency may report to another executive official such as the Attorney General or the State treasurer or to a commission created and supervised by the legislature. Most child support enforcement agencies are within the State social or human services agency. (For the purposes of this publication, administrative agency, executive agency, and State agency all refer to the State agency that administers the Child Support Enforcement Program.)

Determination of paternity. The executive agency may be granted the authority to determine paternity in addition to setting child support obligations. Clearly, a formal judicial-type hearing is necessary to establish paternity when the alleged father contests the issue. The agency also may be authorized to establish paternity without holding a hearing in uncontested cases, in cases where the alleged father has acknowledged paternity in writing, and in cases where the alleged father and the mother have married after the birth of the child.

Establishment and enforcement of orders. Through administrative adjudication, the executive agency can enter an order similar to a court order requiring the parent to pay a specific amount of child support per month and to repay the State for public assistance paid to his or her family in the past. Once the order is entered, if the parent fails to pay, the executive agency may be entitled to withhold the parent's wages, or to seize other property and credits to collect the money due.

Constitutionality

Placing traditionally judicial functions in an executive agency raises some questions, and the question most often heard is, "Are administrative determinations of child support obligations constitutional?" Those who ask this question generally are expressing two major areas of concern:

- May the legislature delegate this traditionally judicial area to the executive branch of government?
- May child support obligations be established and enforced by an executive agency without violating a responsible parent's right to due process of law?

The first question is one of State constitutional law. The answer depends on the authority the State's constitution gives to the State legislature. Generally, State legislatures have broad authority to determine the rights and responsibilities of their citizens and to establish processes for enforcing those rights and responsibilities. Certainly, if a State has a workers' compensation statute, there is precedent for placing previously judicial functions in an executive agency. Many State supreme courts have had the opportunity to consider whether delegating the authority to resolve workers' compensation claims to an administrative agency violates the State constitution. Such delegations have not been held to violate State constitutional restrictions.

The second question raises a more fundamental Federal (and State) constitutional problem. The 14th Amendment to the U.S. Constitution provides that a person "shall not be deprived of life, liberty, or property without due process of law." The U.S. Supreme Court has established some very important criteria for due process. These fall into three general areas:

- Right to notice
- Right to a hearing
- Right to judicial review of administrative action.

A person has a right to be notified of any action being taken that concerns his or her liberty or property. All child support administrative processes require the executive agency to notify the responsible parent of the amount being claimed and the procedure for contesting the claim. These statutes further require that the executive agency serve the notice in a manner reasonably calculated to give the responsible parent actual notice.[4]

The courts also have specified the type and quality of hearing necessary before a person is deprived of property. The hearing must be fair and impartial, and the person entitled to the hearing must have reasonable opportunity to present evidence through documents or witnesses, confront the opposing party, and refute any evidence.[5] Administrative processes, as presently being used, allow the alleged responsible parent to present all evidence in his or her favor with the aid of an attorney if desired.

The administrative decision must be in writing and must be based solely on evidence submitted at the hearing.[6] A proper hearing includes the right to appeal to a judicial authority. In all administrative child support processes, the responsible parent may request that a higher authority review the facts on which an order is based or the law which was applied. In all the processes, questions of law may be appealed to the judiciary.

Establishing Obligations

The administrative process may be used to establish the initial support obligation in cases that do not already include court-ordered support, and it may be used to determine the amount of arrearages due under an existing judicial order. The procedural steps for obtaining the administrative order under these two situations are similar.

The child support enforcement agency first must locate the absent parent prior to considering the case for administrative process. Usually the agency will conduct an initial inquiry into the absent parent's financial situation through information available from other State agencies (e.g., taxation or employment security) or from formal or

statutorily mandated devices such as absent parent financial statements or employer reports. This information may be used to compute the amount of the child support obligation where no order exists, or to locate income or assets for enforcement of an existing administrative or judicial order. Once the absent parent is located, the State child support enforcement agency will prepare a notice of the child support obligation, and the typical administrative process will follow the five steps described below.

Step 1: The notice of child support obligation. The State agency obtains jurisdiction over the absent parent by serving on him or her a notice of the child support obligation by personal service or certified mail, return receipt requested. (Some States allow service by first class mail.) Under existing State statutes, the notice must contain, at a minimum:

- The names of the children for whom support is sought
- The rights of the absent parent, including the rights to a hearing and representation by an attorney
- Notice that a default order can be entered if the absent parent does not respond to the notice
- Notice that the absent parent must respond within a reasonable period of time specified by statute
- Notice that the absent parent may appeal an administrative determination to a court of competent jurisdiction
- An allegation of debt owed to the State for past assistance provided to the parent's dependents (often referred to as "State debt")
- The amount of current support to be paid, based on a formula required by 45 CFR 302.53, or arrearages that have accrued under an existing order
- Instructions on how to obtain a negotiation conference
- A listing of the various collection actions, including wage withholding, which may be instituted once the administrative order is entered.

Step 2: The absent parent's response. The absent parent may respond to the notice in one of four ways:

- He or she may fail to take any action within the time specified in the notice, in which case he or she will be in default. The agency then may enter a default administrative order in the amount alleged in the notice.
- He or she may consent to pay the amount requested in the notice, in which case the agency will enter a "consent" or "stipulated" administrative order consistent with the notice.
- He or she may request a negotiation conference with the agency at which he or she will argue for a support amount different from that requested in the notice. If negotiation is successful, the absent parent and the agency will enter into a "consent" or "stipulated" administrative order.

- If the amount of child support, State debt (or payments to be made on the State debt), or arrearages due cannot be agreed on during negotiation, or if the absent parent refuses to negotiate, he or she may request a hearing by filing a formal request within the time set by statute. If the absent parent does not request a hearing, the agency may enter a default administrative order, based on the obligation alleged in the notice.

Step 3: The administrative hearing. When the absent parent makes a timely request for a hearing, the case is scheduled before an administrative hearing officer. Usually, the agency worker or an attorney represents the agency in the administrative hearing, and the absent parent represents himself or herself or is represented by an attorney.

The administrative hearing officer is a State employee, usually appointed by the agency director. The State statute may provide that hearing officers be employed by a separate agency, such as the Attorney General's Office. The hearing officer represents no one, and conducts and controls the hearing as an impartial examiner of the facts. The administrative hearing usually must be a hearing of record. A file is maintained; all pleadings, memorandums, and physical evidence are labeled, and all testimony is recorded. Most often, the hearing is tape-recorded. The record is preserved for a period prescribed by statute or rule, and is transcribed for review if the absent parent appeals the hearing officer's decision.

The rules of evidence in an administrative hearing are less formal than in court. Most States have enacted a version of the "Revised Model State Administrative Procedure Act" (APA). Sometimes the APA is cross-referenced in the administrative child support statute so that its procedural provisions apply. The APA describes the form (oral testimony, documents, and affidavits) and the admissibility of evidence. Evidence not normally admissible in a court of law (certain types of hearsay, for example) may be admitted by an administrative hearing officer if he or she determines that the evidence is reasonably reliable. The hearing officer may take notice of the same matters of which a court may take judicial notice.

In an administrative hearing, as in civil judicial proceedings, the burden of proof or "risk of nonpersuasion" is generally on the party who initiates the action (i.e., the State agency). This means that the agency first presents evidence which establishes its case, and then the absent parent attempts to counter this evidence. As specific elements of a case, the State may want to show that the absent parent owes a duty of support, that the absent parent has not complied with an existing court order, the absent parent's ability to provide support, and the State's interest in the proceeding. The absent parent may cross examine the State's witnesses and present his or her own evidence, which the State may rebut. The hearing officer weighs the evidence and rules in favor of the State or the absent parent, depending on whose evidence is more persuasive.

Some State administrative process statutes impose a "show cause" requirement on the absent parent. This lessens the agency's burden of proof by requiring the absent parent to prove that he or she should not be required to meet the agency's demands, or that he or she does not owe the amount of support arrearages claimed. In this case, if the absent parent does not "show cause" why the administrative order should not be entered in the amount requested, the hearing officer must rule in favor of the agency.

Step 4: The administrative order. The final decision and order recites, in writing, pertinent facts of the case (e.g., names, birthdates, employer, and income) and the legal

conclusions drawn (e.g., duty of support, amount of the obligation, and arrearages). The order also contains important information, such as where, how, and when support payments are to be made; a provision for wage withholding and notice of other consequences of nonpayment; and notification to the absent parent of his or her right to, and the method and time limits in applying for, review of the agency's decision. The order may be filed with the court, or it may be maintained internally by the agency, depending on the statute.

Step 5: Review of the administrative order. Most States' administrative process statutes contain specific provisions describing the nature of review available and how review must be requested. Most States provide for direct judicial review of the administrative order, although some allow for an initial internal agency review by an agency official or review board.

Regardless of specific statutory provisions for judicial review, all executive agency decisions that affect an individual's rights or property are subject to judicial scrutiny. Review ensures that statutory procedures have been followed, that Constitutional rights have been protected, and that the agency's decision is supported by substantial evidence. If the administrative process statutes of the State do not specify a review process, nonstatutory remedies developed by the courts may apply (e.g., writs of prohibition, certiorari, or mandamus). In addition, if the administrative process statute or State APA do not specify a procedure for requesting judicial review of the agency's order, the absent parent may apply to the courts for equitable relief against the enforcement of the administrative order and, may challenge the validity of the administrative order.

State statutes commonly provide for judicial review "on the record." If the absent parent requests judicial review, the agency prepares a complete record of the administrative proceedings, including all documents filed and a transcript of all oral testimony. The parties may file briefs and make oral arguments before the court, and the court examines the record and considers legal arguments. The court may affirm the agency's decision, or remand (return) the case to the administrative agency for a new hearing or a new order to be entered in compliance with the court's findings. In this type of judicial review, the court generally does not weigh the evidence again and substitute its judgment for that of the hearing officer. The court may reverse or modify the agency decision only if substantial rights of the absent parent have been prejudiced during the administrative hearing, or if the administrative decision violates statutory or constitutional provisions, exceeds the agency's statutory authority, or is not supported by substantial evidence. Virginia and Alaska allow the court the option of either reviewing the agency record or holding a hearing de novo.

Some States allow an agency official or agency review board to review the administrative order. Under this type of review, the official or board may exercise a review on the record, much like the judicial review on the record, or the agency may allow an administrative hearing de novo. If there is a provision for internal review of the administrative order, the absent parent generally must exhaust all administrative remedies before seeking judicial review.

Administrative Enforcement Mechanisms

Administrative remedies differ from judicial remedies in that they are imposed by the agency in lieu of the courts. Existing administrative process statutes have established

a number of administrative enforcement remedies. Statutes vary concerning the procedures the agency must complete in order to affect the noncomplying parent's property. Below are summaries of existing administrative remedies.

Administrative garnishment. The most common administrative enforcement remedy, an "Order to Withhold and Deliver," is used to seize property (usually money) belonging to an absent parent that is in the possession of a third party (e.g., employer, bank, credit union). The order is issued by an agency official and usually served by certified or regular mail on the person or officer of the company in possession of the absent parent's property. Typically, the order will recite identifying information about the absent parent, the amount to be withheld, the amount and types of property exempt from withholding, the procedure for delivering the property to the agency or court clerk, and information describing the withholder's liability for failing to comply with the Order to Withhold and Deliver. [See discussion on wage withholding in Chapter 8.]

The most commonly used Order to Withhold is for wages. This type of order is continuous and may remain in effect for the entire life of the support order. Under the 1984 Amendments, mandatory wage withholding will be the preferred enforcement remedy in all child support enforcement agencies. All newly established or modified support orders must include mandatory wage withholding as an automatic condition when an absent parent becomes delinquent in paying child support.

Administrative liens. The statute may prescribe a procedure for recording a lien against a noncomplying absent parent's real and personal property. The lien usually is accomplished by filing a document with the court clerk or county recorder of deeds in the county in which the property is located, similar to the State's procedure for creating judgment liens. The lien encumbers property so that, if the absent parent attempts to mortgage or sell the property, a title search will reveal the lien. In practice, the absent parent or the purchaser of the property usually will pay off the support arrearage to release the lien, so that the property will not be subject to seizure and sale by the agency or the support obligee.

Seizure and sale of property. Some existing administrative process statutes provide that once a lien is recorded, the agency may take possession of the absent parent's personal property (e.g., automobiles, guns, jewelry) and may advertise his or her real property for sale. The procedure is similar to seizure and sale (or levy and execution) under the State's civil law mechanisms for collecting judgment debts. In administrative seizure and sale, the child support enforcement agency, rather than the court, authorizes and carries out the seizure of the property and advertises and holds the sale. The sale proceeds, less the costs of seizing the property and holding the sale, are applied to reduce or satisfy the support arrearages.

Income tax refund setoff and interception. Support arrearages which accrue under an administrative order may be submitted to the Internal Revenue Service for income tax refund setoff under 42 USC 664 and Section 6402 of the Internal Revenue Code. In addition, 42 USC 666(a)(3) requires States to implement a similar setoff procedure for State income tax refunds. This procedure will include an administrative review process for settling contested tax refund interceptions. The same hearing officers who conduct hearings for establishing and enforcing support obligations also often conduct contested tax refund reviews.

Enforcing Judicial Orders Administratively

Many administrative process statutes allow the child support enforcement agency to enforce prior judicial support orders through some or all of the enforcement means described above. The agency must notify an absent parent prior to using an administrative remedy to enforce a judicial order, but the statute does not always spell out specific hearing procedures. Some statutes require the agency to complete the statutory procedures for establishing an administrative order before using administrative remedies to enforce a judicial order. Other statutes require the agency merely to notify the absent parent of the impending enforcement action. With this latter procedure, the absent parent's sole method of contesting the administrative enforcement is to seek relief in the court which entered the order.

Judicial Enforcement of Administrative Orders

Some administrative process statutes allow the agency to file its order with a court in the county in which the children or absent parent reside. Once filed, the order becomes an enforceable order of the court as though it had been rendered by a judge. In these States, which include Utah, Missouri, and Oregon, traditional judicial enforcement mechanisms are available in addition to any administrative enforcement remedies provided for by statute.

Modifications

Some administrative process statutes allow the agency to modify administratively entered child support orders. The statute will specify the criteria and the procedures for notice and hearing in an administrative modification proceeding. Generally, once the notice provisions have been met, a modification proceeding follows the same methods for hearing and review as for administrative establishment, with the additional requirement that the party seeking the modification must prove a change of circumstances.

Appellate Decisions Involving Administrative Process

To date, seven appellate decisions have been rendered in States that use administrative processes for child support establishment and enforcement. Five of the decisions are from the State of Washington, two from Utah.

The first Washington case is Taylor v. Morris, 564 P2d 795 (Wash. en banc, 1977). The issue here was simple: Did the Washington administrative process statute (RCW 74.20A) confer upon the Department of Social Services the authority to determine administratively the question of paternity? The statute did not expressly confer such authority, but the Department argued that it was implied necessarily by the statute, which did expressly authorize the Department's hearing officer to "determine the liability and responsibility, if any, of the alleged responsible parent." The court held that the statute was aimed toward the quantification and enforcement of the support obligations of "responsible parents" and not determinations of parentage itself.

Woolery v. Department of Social and Health Services, 612 P2d 1 (Wash. App. 1980), followed the Taylor case to prevent the Washington IV-A agency from determining administratively the paternity of the Woolery children in a IV-A eligibility hearing. The issue was whether the father of the children was in the home during a period of time when Mrs. Woolery was drawing AFDC. Although the case concerned a different administrative

process, the decision strengthened the concept laid out by the Washington Supreme Court in Taylor.

Whitehead v. Department of Social & Health Services, 595 P2d 926 (Wash. en banc, 1979), involved a construction of the appeal mechanisms afforded to responsible parents by the Washington statute, and whether attorney's fees are available to reduce the cost to the responsible parent of an appeal from the decision of an administrative hearing officer. The decision is probably peculiar to the Washington administrative process statute, which authorizes such appeals by reference to another Washington statute. The incorporated statute contains the attorney's fee provision, not the administrative process statute. Nevertheless, the decision held that attorney's fees are available to aid the absent parent in seeking judicial review.

The fourth Washington case, Powers v. Department of Social and Health Services, 648 P2d 439 (Wash.App. 1982), deals with the effect of an existing custody and support decree on the IV-D agency's authority to use its administrative process statute to establish a current obligation and to enter judgment for reimbursement of AFDC paid to the family prior to entry of the administrative order. The facts were not unusual. A divorce decree gave custody to the mother and ordered the father to pay $150 per month ($50 per month per child). Subsequently, the decree was modified to transfer custody to the father. Several years later, the mother picked up the children without the father's consent and later began drawing AFDC.

The Washington IV-D agency treated the case as though no support order existed, and served the father with a "Notice and Finding of Financial Responsibility." The administrative hearing officer ordered the father to pay $315 per month current support and to repay accrued State Debt (unreimbursed prior AFDC) of $4,899.80 in installments of $70 per month.

The decision has positive and negative implications from the IV-D agency's perspective. On the positive side, the court did not allow the father's legal custody to insulate him from the IV-D agency's claim. On the other hand, the court limited the claim to $150 per month, despite the fact that the support provision of the divorce decree had been modified out of existence.

The fifth Washington case is Duranceau v. Wallace, 743 F2d 709, 10 FLR 1684, (CA9 1984). Here, the 9th Circuit held that the administrative garnishment procedure authorized by Washington's administrative process statute does not violate the absent parent's right to due process. The decision analyzes the due process factors contained in the U.S. Supreme Court's decision in Mathews v. Eldridge, 424 US 319 (1976) to determine the notice and hearing rights of an absent parent in an administrative enforcement proceeding. The Washington statute allows for administrative enforcement of existing judicial orders by way of a summary procedure. The Washington IV-D agency may initiate enforcement of a judicial order simply by notifying the obligor of the amount due under the order and that his property is subject to collection action. [R.C.W. Sec. 74.20A.040.] After the expiration of a 20-day waiting period, the agency may serve the administrative garnishment (called an "order to withhold and deliver") on the obligor's employer, who is directed to turn the obligor's wages or property over to the agency after another 20 days expires. [R.C.W. Sec. 74.20A.080.]

The absent parent argued that the agency violated due process in failing to grant him a prompt postgarnishment hearing and to inform him fully as to all available exemptions, which would insulate his property from the garnishment. The court rejected both arguments, stating:

> Because of the strong governmental interest in the support of children and the expeditious enforcement of judgments, the relatively small risk of erroneous deprivation, and the negligible value of alternative procedures we find that the present procedures do not violate due process.

The court held that informal communications between the agency and the obligor were sufficient (i.e., no formal administrative hearing, prompt or otherwise, is required) given the obligor's alternative to seek immediate judicial relief in the court that entered the support order. The court further held that the notice, which stated "in summary" the wage exemptions available to the obligor and which advised the obligor to seek judicial relief "on the basis that no support debt is due and owing," were sufficient to notify him or her of available defenses and the procedure for asserting them.

The two Utah cases are likewise instructive. Pilcher v. Dept. of Social Services, 663 P2d 450 (Utah 1983), treated several important issues. First, the Utah Supreme Court noted that the purpose of the administrative remedy is not furthered by application of the technical rules of pleading and procedure used by the courts. The opinion ratified the use of an amended Notice and Finding after service of the initial Notice on the absent parent to change the amount of support prayed for, even though the statute provided for no such amended pleading..

Next, the decision concluded that the IV-D agency was well within its authority in basing the support amounts contained in the Notice and Finding on a Texas court order. This has the effect of allowing administrative registration of an out-of-State court order, which gives the agency a bit more flexibility in using the administrative process.

The most important facet of the opinion holds that the procedure may be implemented retroactively to create administrative orders for amounts owed prior to the effective date of the statute. The court noted that the administrative process statute was remedial, simply providing a new procedure to enforce a pre-existing obligation. That being the case, retroactive application offends no constitutional principle.

The facts in Pilcher involved converting court-ordered arrearages into an administrative order. The logic of the decision as to retroactivity also should apply to the creation of a "State debt" (based on the amount of AFDC benefits provided to the family) for a prior period during which no court order was in effect, at least in States where a common law "reimbursement of necessaries" action exists.

The other Utah case is Knudson v. Utah Department of Social Services, 660 P2d 258 (Utah 1983). The decision holds that the entry of a divorce decree which makes no mention of the father's obligation during the pendency of the divorce case does not prevent the IV-D agency from employing its administrative procedure to seek reimbursement of AFDC provided to the family during that period. The Utah Supreme Court held that since the issue of Mr. Knudson's obligation during the period was not actually litigated in the divorce, the doctrine of res judicata did not apply. As to the obligation to be determined in the administrative process action, no "court order" existed.

The decision contains a troublesome conclusion as well. The court concluded that the responsible parent must be given credit, against the "State debt" claim, for contributions he made to the family by way of mobile home mortgage payments, despite the fact that he retained a one-half interest in the mobile home and was accruing equity as a result of the payments. This conclusion reduces the remedy's emphasis on the State's claim for reimbursement. The statute creates a debt in the amount of AFDC provided, which then is adjusted by taking into account the responsible parent's ability to pay during the period for which reimbursement is sought. Such an adjustment complicates matters greatly. The Knudson case goes one step further by requiring the agency to give the responsible parent credit for so called "in-kind" contributions that were made to the family, despite the fact that the responsible parent had been notified that his support obligations must be channelled through to the State.

FOOTNOTES

/1/ Exemptions are available on a statewide basis and for individual political subdivisions pursuant to 45 CFR 302.70(d) and 303.101(e).

/2/ 10 Dec.C. Sec. 913; Ind.Code.Ann. 31-1-23-5 (1971) and 31-1-23-6 (1973); Minn.Stat.Ann., secs. 484.65 (1977); 484.67 (1977); 484.70 (1979); and 518.13(4) (1979); 25 Neb.Rev.Stat. 1129 to 1137; New York Fam.Ct. Act, sec. 439 (1979); 42 P.A.Cons.Stat.Ann., secs. 961 and 6703 (1978); R.I.Gen. Laws, sec. 8-10-3.1; Texas Rev.Civil Stats.Art. 2338-9b.2 (1975); Utah Code Ann., secs. 30-3-11.1 to 30-3-17.1 (1969); Wisc.Stat.Ann., sec. 767.13 to 767.145; 767.16 to 767.17; 767.29; and 757.69 (1979).

/3/ C. Kastner and L. Young, A Guide to State Child Support and Paternity Laws (Denver, CO: National Conference of State Legislatures, 1981).

/4/ Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

/5/ H. Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267 (June 1975), p. 1279.

/6/ Id., p. 1283.

CHAPTER 5
Establishment of Support Obligations

INTRODUCTION

This chapter discusses several legal and practical issues which a court must resolve when presented with a case in which no support order has been established. For the purposes of this chapter, it is assumed that paternity is not an issue or that a nonpaternity defense may be refuted with a legal presumption of paternity or estoppel theory.

The first section discusses the developing trend toward use of formulas and other objective criteria for determining current support amounts. The Child Support Enforcement Amendments of 1984 require each State to establish guidelines for determining child support award amounts within the State. The second section discusses support in the form of medical benefits in lieu of, or in addition to, the more conventional financial monetary amounts. The third section covers jurisdiction for statutory claims for temporary and current support. The fourth section discusses claims by a State for reimbursement of support provided to an absent parent's family during a period in which no current support order was in effect. The fifth section surveys defenses that absent parents often assert to avoid the entry of a current support order. A brief discussion of modifications concludes the chapter.

GUIDELINES

In theory at least, all States determine a parent's support obligation by balancing three factors: the needs of the children, the financial situation of the custodial parent, and the absent parent's ability to pay. However, as of August 1983, some 29 States had no statutory declaration of the factors a court should consider in entering a current support order.[1] (This is despite 45 CFR 302.53, a 1975 regulation mandating States to establish a formula for determining support amounts where no order exists.) In such jurisdictions, the decision as to how much a parent should pay for child support is left entirely to the subjective evaluation of the court. At least two studies have suggested that child support obligations established in such jurisdictions are inconsistent and generally insufficient to meet the needs of the children.[2]

In an attempt to increase the credibility and use of objective criteria, a provision in the Child Support Enforcement Amendments of 1984 requires each State to establish, by October 1, 1987, guidelines for determining child support award amounts within the State. Under 42 USC 667, States must establish such guidelines "by law or by judicial or administrative action," and make the guidelines available "to all judges and other officials who have the power to determine child support awards within such State."

The Federal statute does not require that the guidelines, once established and distributed, be binding on these judges and other officials, nor does it suggest methods for developing the guidelines. OCSE has made the requirement more specific by promulgating 45 CFR 302.56(c), which reads: "The guidelines must be based on specific descriptive and numeric criteria and result in a computation of the support obligation."

Several attempts have been made to develop objective guidelines that result in predictable, consistent, and equitable support amounts. Judith Cassetty and Frank Douthitt provide a good discussion of this topic in "The Economics of Setting Adequate and Equitable Child Support Awards."[3] The discussion of guidelines here is based on this article.

According to Cassetty and Douthitt, there are three basic approaches to allocating the support responsibility between parents who do not reside in the same household, as follows:

- The cost-sharing approach
- The taxation approach
- The income-sharing approach.

Each of these approaches is discussed below.

The Cost-Sharing Approach

The cost-sharing approach centers on the cost of raising the children involved in a case and allocates responsibility for that cost between the two parents based on their relative abilities to contribute. One example of a formula that adopts the cost-sharing approach and that has received a significant amount of attention in recent years, is the formula espoused by Maurice Franks, a family law specialist in Colorado.[4] Franks suggests the following formulas:

$$OA = \frac{N \times A}{A + C}$$

and

$$OC = \frac{N \times C}{A + C}$$

where

N	=	Total financial needs of the children
C	=	Net income or earning ability of the custodial parent
A	=	Net income or earning ability of the absent parent
OC	=	Total support obligation of the custodial parent
OA	=	Total support obligation of the absent parent

Assuming a family of two children with an absent father earning $18,000 per year, a custodial mother earning $12,000 per year, and an estimated need figure for the children of $769 per month,[5] the above formula produces the following proportional obligation amounts:

$$OA = \frac{\$769 \times \$1500}{\$1500 + \$1000} = \$769 \times .60 = \$461.40$$

and

$$OC = \frac{\$769 \times \$1000}{\$1500 + \$1000} = \$769 \times .40 = \$307.60$$

Total $769.00

In jurisdictions that have adopted this approach, such as the State of Oregon, the court generally assumes that the custodial parent is meeting his or her obligation by maintaining the primary home of the children, meeting their recurring needs, and perhaps incurring day care or babysitting expenses in order to work outside the home. After making this assumption, the court orders the absent parent to contribute the amount suggested by the formula (in our example $461.40). The custodial parent's share is assumed to make up the difference between the absent parent's contribution and the actual month to month needs of the children.

This approach is effective for allocating the support responsibility in situations, such as the above, where the parents are both employed and making modest to slightly above average incomes. The cost-sharing approach is not effective where the absent parent's income is significantly below or above the middle range. For low-income absent parents, the cost-sharing approach does not resolve, nor purport to resolve, the conflict between the children's demands on the absent parent's income and his or her need to retain a minimal amount of income for self support. The other significant defect is that the focus on need can operate to place a cap on the amount which is ordered. If the needs of the children are determined to be $769 per month, based on the standard of living enjoyed by the family during the marriage, then the absent parent's support obligation cannot exceed that amount, no matter how high his or her income. Most jurisdictions make an upward adjustment by assuming that children's needs are elastic, and that they increase in a positive proportional relationship to the available income. The cost-sharing approach certainly does not prevent adjustments to account for low and high incomes, but neither does it suggest how to make such adjustments.

The Taxation Approach

The taxation approach takes its name from its resemblance to income tax tables and from proposals in Wisconsin and California to implement collection of child support through the State income tax structure. The approach relies on tables which set the amount of child support as a percentage of the absent parent's income. For example, the State of Illinois recently enacted several identical statutes that dictate the amount of support to be awarded in various support proceedings.[6/] These statutes read as follows:

The Court shall determine the minimum amount of support by using the following guidelines:

Number of children	Percentage of Net Income*
1	20%
2	25%
3	32%
4	40%
5	45%
6 or more	50%

*Net income is defined as total gross income minus the following deductions:

(1) Federal Income Tax (use standard tax)
(2) State Income Tax (use standard tax)
(3) Social Security Deductions
(4) Mandatory Pension Deductions
(5) Union Dues
(6) Dependent Health/Hospitalization Insurance Coverage
(7) Individual Health/Hospitalization Coverage or Medical Expense Deductions not to exceed $25 a month.

In cases wherein health/hospitalization insurance coverage is not being furnished to dependents to be covered by the support order, the court shall order such coverage and shall reduce net income by the reasonable cost thereof in determining the minimum amount of support to be ordered.

The above guidelines, including dependent health/hospitalization insurance coverage, are binding in each case unless the court makes express findings of fact as to the reason for the departure below the guidelines. The guidelines may be exceeded by the court without express findings or by agreement of the parties. If the total gross income cannot be determined because of default or any other reason, the court shall order maintenance or support or both in an amount considered reasonable in the particular case.

Debts owed to private creditors are not to be considered in establishing a support obligation. Previous support orders and maintenance orders may be considered if the obligor is paying them. (Emphasis added.)

The taxation approach focuses on ability to pay and assumes that all children have minimum needs that comprise a constant percentage of the absent parent's net income. Where a child has additional financial needs, the custodial parent must convince the court to deviate above the guideline amount. The statute makes it difficult for the court to enter an order in an amount lower than the guideline by requiring express findings to support such an order.

This approach has several clear advantages and a few less obvious disadvantages. By defining net income as gross income less a list of specific allowable deductions, the statute standardizes and simplifies the process of applying the guideline to each individual case. For instance, the great majority of cases no longer will require evidence regarding the actual expenses incurred by the custodial parent for the support of the children. The court, in effect, can take judicial notice that the needs of the children bear a direct relationship to the absent parent's net income.

Similarly, due to the statutes' reliance on standard tax rates, the Federal and State income taxes actually withheld from the absent parent's paycheck are not relevant. In addition, the prescribed list of deductions, in combination with the last paragraph of the statute, prevents any dispute as to the effect of other debts owed by the absent parent.

One drawback of the Illinois statutes concerns the dependent health/hospitalization insurance coverage. The statute does not specify the level of coverage the absent parent is to provide, and yet the court must have evidence of the cost of the coverage in order to apply the formula. Such a situation may present difficulties to attorneys in cases where the level of coverage and cost cannot be stipulated prior to a hearing. The attorneys will need to present evidence of the cost of health insurance coverage but will not know in advance of the hearing what level of coverage the court will require. Presumably, judges will set a precedent over time that will allow attorneys to anticipate the appropriate level of coverage. This practical problem points out that judges and practicing attorneys need to participate in the initial drafting and subsequent adjustment of support guidelines.

Taxation approaches have two additional disadvantages. One involves the underemployed absent parent. Strict application of the statutory percentage to the low-income obligor may provide neither adequate support for the children nor sufficient income for the absent parent.[7] Also, such guidelines, though intended to be minimum support contributions, may become in practice a ceiling on amounts awarded.

The Income-Sharing Approach

The income-sharing approach assumes that parents should continue to share the economic function of parenting to the fullest extent possible, despite the breakup of the family household. Income-sharing formulas, therefore, seek to go beyond the children's minimum needs. An additional component allows for the sharing of surplus available income on an equitable basis. Cassetty and Douthitt provide the following formula.[8] Again, the example assumes a two-child situation, an absent parent who has not remarried and lives alone with a net income of $1500 per month, and a full-time custodial parent with a net income of $1000 per month:

$$\mathbf{CS} = \frac{\text{Income of Absent Parent} - \text{Poverty Level for 1} - \text{Income of Custodial Parent} - \text{Poverty Level for 3}}{4}$$

$$= \frac{(1500 - 405) - (1000 - 685)}{4}$$

$$= \frac{780}{4} = \$195 \text{ (per person share of "surplus" income)}$$

$$= \$585 \text{ per month (3 shares of "surplus" income)}$$

The numerator of this formula calculates the amount of surplus income available to the two-household family after covering all four individuals' minimum needs. The poverty level figures are estimates drawn from reports by the U.S. Department of Agriculture and the U.S. Department of Labor. The denominator represents the total number of individuals to be supported in both households. The resulting figure represents a per-person share of the surplus income. The child support amount would be $585 per month (3 shares of surplus income).[9]

The income-sharing approach has several advantages. Most importantly, it accounts for some variances both in need and ability to pay--the only approach of the three that can claim to do so. It accounts for the realities of the low-income obligor by granting a minimum needs allowance before requiring a support contribution. (The court presumably could impute income to an underemployed obligor.) The reliance on poverty level figures again replaces the need to adduce evidence as to the actual costs of supporting the children, and allows the formula to be adjusted by region or for the disparate costs between urban and rural life. The income-sharing approach is perhaps best at taking into account household economies of scale and changing financial conditions over time. Once the formula is applied to a case, modification proceedings often can be avoided by simply reapplying the formula and stipulating to an order based on the new end result.[10]

Selecting a Formula

Clearly, there are a variety of potential guidelines for child support awards, and selecting a formula is a complex and crucial task. The National Institute for Socioeconomic Research, under contract to the Federal Office of Child Support Enforcement, conducted a review of 37 State formulas for establishing child support and found a decided range of approaches. Agencies differed markedly in the specification of base income, the proportions of income allocated to child support, and the levels of orders established for absent parents in similar circumstances. In many States, the formulas yielded quite low results when compared to studies of family expenditures, and many formulas were inadequate to deal with broad income ranges (particularly for absent parents at the high or low ends of the range). Another frequent problem identified by the study was the effect of remarriage on the application of a State formula.[11]

In its research of State statutory procedures in establishing support awards, the Institute identified several issues that States should consider when adopting a formula for child support obligations.[12] These are discussed below.

Assessing financial responsibilities. Virtually all States take into account the income of both parents in setting the award. The needs of the absent parent (including minimum self-support exemptions) as well as a method for counting the income of the custodial parent must be considered. The incomes of current spouses also can impact support responsibilities of absent or custodial parents. Earning potential of either parent should be evaluated, particularly when it deviates substantially from actual income. This would apply to the absent or custodial parent who avoids employment or accepts underemployment to avoid paying support.

Priority of support. A growing judicial consensus holds that the equal protection clause of the Constitution prohibits discrimination among children by giving priority to earlier offspring for parental support. This issue could affect development of a standard model if it had to take into account the presence of other biological dependents of the obligor.

Shared custody. Although many child support enforcement professionals believe that joint or shared custody should affect the amount of support payments, there is no consensus concerning how to build this into the formula. Even when custody is split evenly between parents, differences in income still could affect child support awards, or child-rearing expenses may not divide easily in proportion to the time the child spends with each parent.

Indirect costs. Economists project that indirect costs for child rearing may equal direct costs (e.g., shelter, food, clothing) usually considered in setting child support amounts. Child care is one example of an indirect cost that affects many working custodial parents.

Updating mechanisms. Many social scientists and legal scholars believe that a regular updating mechanism should be built into a formula to compensate for inflation, value of earnings, and increased costs as children grow. However, most courts have rejected automatic adjustments based on the Consumer Price Index, and in States where formulas have been developed, adjustments generally have required a reapplication of the entire formula rather than a simple inflation or wage-based adjustment.

Despite the problems and issues surrounding support formulas, research strongly supports the positive impact that formulas have had on State child support enforcement efforts. States such as Delaware, Wisconsin, and Washington, which have implemented statewide formulas, report greater equity among orders; greater consistency in support amounts for absent parents in similar financial circumstances; more streamlined operations (since assessment by formula becomes a rather routine process, rather than a case-by-case problem); a valuable framework for voluntary settlements; and higher overall support orders.[13]

Perhaps the most important aspect of selecting a formula is involving the judiciary and the State bar association in the selection process. Although the 1984 Amendments require States to develop a formula for child support awards, there is no Federal law requiring judges to abide by that formula. Thus, formulas have a much better chance of being implemented when the judiciary takes an active role in their development. In Washington, guidelines were developed entirely within the judicial systems. In Wisconsin, the Department of Health and Social Services worked in conjunction with the courts throughout the development and implementation stages.

Guidelines in the Appellate Courts

A body of appellate case law is developing regarding the legality and desirability of mandatory and advisory support guidelines at the State and local levels. The emerging rule is not unanimous, but appellate courts have been approving the concept.

For instance, in Smith v. Smith, 290 Or. 675 , 626 P2d 342 (1981), the Oregon Supreme Court studied the methods courts in that State use to award child support. The court noted that most of the State's courts employed a case-by-case approach, and that "the appearance of uniformity among support orders is lacking." [Supra, p. 345.] The decision noted that this lack of uniformity causes a greater percentage of cases to require court hearing to establish a support amount; that settlements, even when successful, are more difficult to achieve, and that more cases are appealed than would be in a system with certainty and predictability.

In discussing the adoption of a statewide formula approach, the court first rejected the use of the support regulation developed by the IV-D agency as being exclusively appropriate for low-income level custodial parents with full-time physical custody. [See OAR 137-50-010.] Apparently, the court wanted to develop a more flexible approach that would be appropriate in shared physical custody situations and multiple income situations. Next, the court rejected use of the schedule or percentage approach (similar to the taxation approach discussed above) because it does not take into account the custodial parent's income. The court further concluded that a schedule or percentage approach does not work well in cases where the absent parent's income is very high. The court noted that the costs of raising children do not increase at a constant rate with increasing parental incomes, especially above about $2000 per month.

The court felt that these deficiencies are best minimized by a formula approach, tempered by the trial court's discretion. The formula chosen by the court was the cost-sharing formula proposed by Maurice Franks. [See 86 Case & Comment 3 (1981) and the discussion above.] After applying the formula to the facts of the case, the trial courts in Oregon now are directed to adjust the support amount after considering the following factors:

- The interrelationship of child support with the division of property and spousal support
- The indirect forms of child support, including payments for medical care, life insurance in the child's name on the parent's life, a trust for the child's education, insurance for hospital, medical or dental expenses and so forth
- The income of the domestic associate or present spouse of each parent
- The amount of assets of each parent, including the amount of equity in real or personal property
- The existence of any support obligations to other dependents of each parent
- The special hardships of each parent.

In Hamilton v. Hamilton, 290 SE2d 780 (N.C.App. 1982), the North Carolina Court of Appeals stated, in dicta, as follows:

> . . . the Court wishes to lend its approval to the employment of . . . guidelines by many trial courts and to encourage their use by others. A review of the case law underscores the total lack of

> consistency in the amounts of child support awarded by the courts. Moreover, the route by which the court arrived at a particular award is too often impossible to fathom.
>
> We concede that each domestic case is unique and that there must be an element of judicial discretion in setting the amount each parent should contribute to the support of his or her children. Such discretion, however, should not be unfettered. Employment of a standard formula . . . would take into account the needs and resources of the parents, as well as the needs of the children, and would result in fair apportionment of responsibility in the majority of cases. While many others might not fit neatly into the established guidelines, the formula would provide a starting point for negotiations or formulation of judicial remedies. In cases where the trial judge determines, in his discretion, that considerations of fairness dictate a substantial departure from the standard award, we would recommend strongly that the court set forth specific findings of fact in support thereof. This would provide appellate courts with something more than the skeleton findings and conclusions on which we must often base our review of support orders.

Likewise, the Supreme Court of Pennsylvania recently held that a formula approach is preferable to a system that simply refers to numerous general principles embodied in case law and subjectively worded statutes. [Melzer v. Witsberger, 480 A2d 991 (Pa. 1984).] In Melzer, at p. 994, the court noted that there is a "total lack of organization with respect to how these principles interact and how they should be applied in order to arrive at an appropriate award of support." The decision responded by requiring Pennsylvania courts to apply an adjusted cost-sharing formula to each case, after first determining the cost figure based on evidence of the children's needs, and the needs, customs, and financial status of the parents. The adjustment allows both parents to deduct their reasonable living expenses from their net incomes, prior to applying the cost-sharing formula to determine their respective support obligations. Thus, the formula adopted by the court is as follows:

$$\text{Mother's total support obligation} = \frac{\text{Mother's income available for support}}{\text{Mother's income available for support} + \text{Father's income available for support}} \times \text{Needs}$$

$$\text{Father's total support obligation} = \frac{\text{Father's income available for support}}{\text{Mother's income available for support} + \text{Father's income available for support}} \times \text{Needs}$$

After calculating the respective total obligations, the trial court is to determine what portion may be met by support provided directly to the child, and enter an order requiring the absent parent to pay that amount on a regular basis.

In Bakke v. Bakke, 351 NW2d 387 (Minn.App. 1984), the Minnesota Court of Appeals held that neither the fact that the absent parent's monthly living expenses exceeded his income nor the fact that his relationship to the child was by way of adoption justifies a trial court's deviating from the Minnesota mandatory guidelines. [Minn.Stat.sec. 518.551, Subd. 5 (Supp. 1983).] The guidelines themselves were approved as being applicable to non-public assistance child support cases in Halper v. Halper, 348 NW2d 360 (Minn.Ct.App. 1984).

One appellate decision holds that guidelines developed locally may not be used without giving the absent parent an opportunity to review or challenge them. [Powell v. Powell, 433 So2d 1375 (Fla.App.2dDist. 1983).] The Powell court held that their use violates both a State statute that proscribes a court's resort to extrinsic documentary evidence and a State statute that requires the court to balance all equitable principles and factors in reaching its decision regarding child support.

MEDICAL SUPPORT

Section 16 of the Child Support Enforcement Amendments of 1984 requires State IV-D agencies to pursue medical support in addition to financial support. Federal statute 42 USC 652(f) directs the Secretary of DHHS to issue regulations requiring the States to petition to include medical support as a part of any child support order obtained by the agency, whenever health care coverage is available to the absent parent at reasonable cost and the custodial parent does not have satisfactory health insurance coverage for the children. Regulations at 45 CFR 306.51(a) define "reasonable cost" as the cost of employment-related or other group health insurance.

The conference report on the Child Support Enforcement Amendments of 1984 included a strong statement of public policy behind the requirement, as follows:

> The conferees believe the best long-run solution to achieving medical insurance coverage for all families is the use of private medical insurance which is or can be made available through a parent's employer.
>
> The conferees direct the Secretary of HHS to examine additional administrative, regulatory and legislative possibilities to fully and vigorously use this private coverage, and report to the Finance Committee and the Ways and Means Committee by January 1, 1986 on actions taken. [14]

The new provision of the law clearly views providing for the medical needs of the child as an integral part of a parent's duty to support. While medical support may take other forms in specific situations, medical insurance is preferred because it is relatively inexpensive for the absent parent, provides for the needs of the child, and is easy for the

State to monitor without additional and costly case-by-case relitigation. Providing private insurance coverage for children who otherwise would depend on Medicaid will reduce the public costs in supporting these children and result in significant Medicaid cost savings for State and Federal governments.

In addition to the requirement to obtain medical support orders, the Social Security Act contains provisions, at 42 USC 1302 and 1396(k), allowing the State IV-D agency to assist the State Medicaid agency in enforcing medical support obligations. The accompanying regulations at 45 CFR 306, Subpart A provide for an optional cooperative agreement between the two agencies. Under a cooperative agreement, the IV-D agency agrees to perform one or more of the following activities for cases in which Medicaid has secured an assignment of medical support rights:

- Receive referrals from the Medicaid agency
- Locate the absent parent, using the State Parent Locator Service and the Federal Parent Locator Service, as needed
- Establish paternity if necessary
- Determine whether the parent has a health insurance policy or plan that covers the child
- Obtain sufficient information about the health insurance policy or plan to permit the filing of a claim with the insurer
- File a claim with the insurer; transmit the necessary information to the Medicaid agency or fiscal agent for the filing of the claim; or require the absent parent to file a claim
- Secure health insurance coverage through court or administrative order when it will not reduce the absent parent's ability to pay child support
- Take direct action against the absent parent to recover amounts necessary to reimburse medical assistance payments when the absent parent does not have health insurance and the amounts collected will not reduce the absent parent's ability to pay child support
- Receive medical support collections
- Distribute the collections as required by 42 CFR 433.154, including calculation and payment of the incentives provided for by 42 CFR 433.153
- Perform other functions as may be specified by instructions issued by OCSE.

The Federal regulations also set forth administrative requirements that must be met through the cooperative agreement entered into by the agencies. They also require that the Medicaid agency fully reimburse the IV-D agency for the latter's medical support enforcement activities under the agreement.

JURISDICTION

Actions that seek to obtain a support order against a parent are in personam actions, and the court must obtain jurisdiction over that parent by personal service of process pursuant to State statute or rule. [In re Johnston, 33 Wash.App. 178, 653 P2d 1329 (1983).] The statute or rule that allows for service must meet the due-process notice requirements established by the U.S. Supreme Court in Mullane v. Central Hanover Bank & Trust Company, 339 US 306, 70 SCt 652 (1950). The State also must possess the "minimum contacts" defined by International Shoe v. Washington, 326 US 310, 66 SCt 154 (1945), such that the exercise of jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. However, what do these standards mean when applied to the establishment of child support obligations?

Most States have adopted a statute or court rule that extends State court jurisdiction in a divorce action to spouses who reside out of State if the parties to the marriage lived in the State immediately prior to their separation. [See, e.g., Wisc.Stat.Ann. sec. 247.57; Kan.Code Civ. Proc. sec. 60-308, subd.(b).] If the facts meet the requirements of the statute, or if the absent parent's contacts with the State are clear and the State has a general long-arm statute that could form the basis of the court's jurisdiction, then it should be possible to obtain jurisdiction over him or her by way of extraterritorial service of process.

In the absence of some clear, recent connection between the absent parent and the forum State, it is difficult for a State court to exert jurisdiction over an absent parent to justify the entry of a support order. The Supreme Court ruled that neither the fact that the parties were married during a brief visit to the forum State nor the fact that the defendant allowed the children of the marriage to reside in the forum State constitutes acceptable minimum contacts under the International Shoe test. [Kulko v. Superior Court, 436 US 84, 98 SCt 1690, 56 LEd2d 132 (1978).]

More significant than the specific holding in the case was the attitude that the Court took in restricting extraterritorial jurisdiction in the child support context. The existence of an action under URESA was noted as a less restrictive alternative that protects the State's interest (i.e., providing a remedy for the support of the State's children) without causing a hardship on the out-of-State absent parent. This language does not bode well for future attempts to expand the jurisdiction of State courts in establishment cases. However, in Miller v. Kite, 318 SE2d 102 (N.C.Ct.App. 1984), the court held that a father's allowing a child to reside in North Carolina for 9 years and benefit from public education constitutes sufficient minimum contacts to confer jurisdiction over him for purposes of establishing a child support obligation. Likewise, in In re Highsmith, --- NE2d ---, 11 FLR 1247 (Ill. 1985), the Illinois Court of Appeals held that an absent parent who "dumps" a child with its grandparents and then leaves the State possesses sufficient contact with the State to allow for jurisdiction.

Some statutes and older decisions would support the entry of a support order based on in rem jurisdiction, that is, jurisdiction over the defendant based on seizure of an item of real or personal property owned by the defendant and located within the territorial jurisdiction of the court. [See, e.g., Jenkins v. Jenkins, 246 Pa.Super. 455, 371 A2d 925

(1977).] Since the U.S. Supreme Court's decision in Shaffer v. Heitner, 97 SCt 2569, 53 LEd2d 683 (1977), in rem jurisdiction is limited to actions concerning the piece of property seized. Because it is logically impossible for this condition to apply to the child support establishment process, it is unlikely that in rem jurisdiction is an option.

JURISDICTION OVER MILITARY ABSENT PARENTS

Frequently, a child support enforcement agency must obtain a support order against an absent parent who is serving out-of-State in the military who fails to respond to service of process within or without the State. Such a situation calls into play the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 USCS Appx. sec. 520. The Act establishes certain duties and obligations on plaintiffs, courts, and defendants in legal proceedings, including actions to establish support, and creates certain rights and remedies for defendants.

As the language of the Act discloses, its duties and obligations arise whenever a plaintiff seeks to obtain a default judgment in a civil action. Generally, when a defendant fails to enter any appearance in court, the plaintiff wins by default. However, the plaintiff must file an affidavit proving that the defendant is not in military service before the court can enter a default judgment. If the plaintiff files an affidavit asserting that he or she does not know whether or not the defendant is in military service, the court may require, as a precondition to entry of judgment, that the plaintiff file a court-approved bond to indemnify the defendant. Then, if the defendant is in military service, the bond covers any loss or damage caused to him by a judgment that is later set aside.

The rights and remedies under the Act apply whenever the defendant is in the military. If the plaintiff files an affidavit showing that the defendant is in military service, the court must appoint an attorney to represent and protect the interest of the defendant before entering an order of default judgment. No attorney appointed under these circumstances can waive any right of the absent defendant or bind the defendant by the attorney's acts. An indemnity bond may also be required in these cases. The defendant can move to set aside a default judgment within 90 days of completing military service if it appears that he or she has a meritorious or legal defense in the case and was prejudiced in making that defense by reason of military service.

Clearly, the Act's provisions apply in matrimonial actions. [See Anno: "Soldiers' and Sailors' Civil Relief Act, as amended, as affecting matrimonial actions," 54 ALR2d 390.] Thus, before seeking a default judgment in a support action, the plaintiff must comply with the requirements of the Act.

Where it is clear that the absent parent is not an active member of the military, the Act simply requires that an affidavit to that effect be filed with the court. Most courts have built this requirement into their routine default judgment procedures. Presumably, the affidavit may be sworn out by either the child support enforcement attorney or the custodial parent, depending on who signs the petition for support.

If the defendant is in the military, the Act is more difficult to apply. Where the cause of action involves complicated issues and extensive trial preparation, the defendant's being in the military no doubt would adversely affect his or her ability to

present a defense. The Act would require dismissal or a stay until circumstances change. However, the case law that has developed under the Act recognizes that such prejudice should not be assumed.

It is well established that a trial court has wide discretion in determining whether a defendant's service in the military would undermine his or her ability to defend an action. [54 ALR2d 392.] The issue generally finds its way into the reported appellate case law after a defendant seeks to have a default judgment set aside and is refused relief by the court that entered the order. These decisions provide valuable guidance to courts at the trial level. As the above-cited annotation points out, the Act does not delegate the burden of proof on the issue of adverse effect. In other words, the plaintiff need not prove that the defendant's service in the military will not adversely affect his or her ability to prepare for and defend the action. The court is to consider all the information available from either party in deciding whether or not to let the action proceed. Thus, the defendant is not entitled to a stay merely by filing a motion requesting relief. [Cadieux v. Cadieux, 75 So2d 700 (Fla. 1954); Gates v. Gates, 197 Ga. 11, 28 SE2d 108 (1943); Luckes v. Luckes, 245 Minn. 141, 71 NW2d 850 54 ALR2d 384 (1955).]

Where the court determines that the defendant would not be affected adversely by commencement of the suit, the Act requires the court to appoint an attorney to represent defendant's interests and authorizes the court to require the plaintiff to post a bond to indemnify the defendant against any loss or damage that the resulting judgment might cause. The court further is authorized to make other orders or judgments as necessary to protect the defendant's rights. Clearly, in some fact situations it is appropriate for the court to enter a default judgment or allow the action to proceed to judgment after appointing counsel for the absent parent.

Several decisions have refused to set aside default judgments against military defendants. Many involve divorce decrees that were not challenged until the plaintiff sought to enforce the support provisions. [See, e.g ., Krumme v. Krumme, 6 Kan.App.2d 939, 636 P2d 814 (1981); Swartz v. Swartz, 412 So2d 461 (Fla.App. 1982).] Moreover, a significant body of case law holds that a default judgment entered against a defendant in the military is merely voidable and not void. [Radlinski v. Superior Court of Santa Barbara County, 186 Cal.App.2d 821, 9 Cal.Rptr. 73 (1960); Courtney v. Warner, 290 So2d 101 (Fla.App. 1974); 35 ALR Fed. 649.] The Courtney case is particularly interesting; it holds that a default judgment entered by a Tennessee court is entitled to full faith and credit in Florida despite the defendant's allegation that the plaintiff in the Tennessee action did not comply with the Act.

A defendant in a support action is not entitled to relief per se as a result of his military service. Nevertheless, because the Act was designed to prevent prejudice to military defendants, a plaintiff may have difficulty convincing a judge to proceed with a support action without the defendant's presence. One reasonable argument would be that the only relevant issues are the needs of the children and the absent parent's ability to pay. The needs of the children can be established at the hearing through the testimony of the custodial parent. If the absent parent has been away in the military for an extended period of time, in most cases he or she will not be able to contradict the custodial parent's testimony. The attorney appointed on behalf of the absent parent will be able to cross-examine the custodial parent to the same extent whether the absent parent attends the hearing or not.

The evidence regarding the absent parent's ability to pay generally will have been obtained through his or her affidavit, answers to interrogatories, or the military discovery process. No matter what route is taken to obtain the evidence, the absent parent will have ample opportunity to review the information presented to the court and to prepare a counterposition should he or she disagree with the plaintiff's evidence. Thus, except in cases where the children have special needs or the absent parent has an unusual defense to the obligation, going forward with the hearing on a petition for support without the attendance of the military absent parent should not be prejudicial, as long as he or she is represented by counsel.

REIMBURSEMENT CLAIMS

Nationally, about one-third of new AFDC families are the beneficiaries of a current support order. Of the remaining two-thirds, about half are cases in which paternity has not been established. Thus, about one-third of new cases involve children whose parentage is not in dispute but who, for a variety of reasons, do not have the benefit of an enforceable support order.

This situation arises for several distinct reasons. Usually, the spouses simply have separated without benefit of court involvement. They may not wish to finalize their dispute in a divorce; the State in which they made their marital home may make it difficult and expensive to dissolve a marriage; or the waiting period may be long and neither of the parties may be inclined to seek temporary relief or access to legal services. Alternatively, a divorce may have been entered, but because the plaintiff-spouse did not know the whereabouts of the absent spouse, the court was unable to enter a support order. Whatever the cause, the situation requires the establishment of a support order.

Due to the excessive caseloads facing most State child support enforcement agencies, and the several months it can take to locate an absent parent, several thousand dollars in AFDC and Medicaid benefits may be paid out prior to a case being referred for legal action. The issue for discussion here is: Is there a legal remedy that allows the State to seek reimbursement of public assistance paid to an absent parent's family during the period prior to entry of a current support order?

Statutory Remedies

Several States authorize the IV-D agency to establish enforceable support obligations through administrative notice and hearing processes. (Administrative processes are discussed in detail in Chapter 4.) Typically, such a statute will provide that, in the absence of a current support order, the payment of public assistance to or for an absent parent's child creates a debt due from the parent or parents in the amount of the AFDC provided.[15] Other States, such as California, Kansas, and Texas, have created a similar obligation, which may be determined and enforced judicially.[16] In many States, no statutory treatment of this issue exists, and the issue rests on common law principles.

The Common Law Remedy

Blackstone frequently is quoted in support of the proposition that no civil action existed at common law for support of a minor child. [1 Bl. Comm. 449; Greenspan v. Slate, 12 N.J. 426, 97 A2d 390 (1953).] As the New Jersey Supreme Court points out in its decision in Greenspan, pp. 391-393, Blackstone's conclusion is not entirely accurate when applied to the common law as it developed in this country.

As early as 1371, an action existed in the English ecclesiastical courts against the alleged father of an illegitimate child, both for current support and for reimbursement of sums the mother expended from her own estate in supporting the child.[17] During the same period, the law courts were applying an agency theory to require a father to repay third persons who provided necessaries to the father's legitimate children. In England, the evidence of agency or apparent agency had to be specific or "express." [Greenspan, supra, p. 392, citing Mortimore v. Wright, 6 M.&W. 482 (Exch. Div. 1840) and Shelton v. Springett, 11 C.B. 452 (Com. Pl. 1851).] Both in England and the United States, common law allowed third parties to recover for necessaries provided to a man's wife. For this action, no showing of express agency was necessary.

Many U.S. courts merged these two theories to create a cause of action on behalf of the mother, as well as on the behalf of third parties, for reimbursement of necessaries provided to children. These courts either inferred agency from very slight evidence, or acted as though the action existed in English common law without the agency requirement. [See Freeman v. Robinson, 38 N.J.L. 383, 384 (Sup.Ct. 1876); Penningroth v. Penningroth, 71 Mo.App. 438, 441 (1897).] As a result, it is not always clear whether the decisions infer the existence of an agreement, or whether the agreement is merely a legal fiction the courts employ to enforce the moral duty. There is also some confusion as to whether the action is an action at law[18] or in equity.[19] Whatever the nature of the claim, it is firmly established in a majority of American jurisdictions. [91 ALR3d 530; Fanelli v. Barclay, 100 Misc.2d 471, 419 NYS2d 813 (1979); Jenkins v. Jenkins, 246 Pa.Super. 455, 371 A2d 925 (1977); Toy v. Cherico, 367 A2d 651 (Del.Super. 1976); Franklin v. Julian, 30 Ohio St.2d 228, 283 NE2d 813 (1972); Calig v. Shrank, 179 Conn. 283, 426 A2d 276 (1979) (dicta, recognizing that the action exists in New Jersey); Weinstein v. Weinstein, 148 So2d 737 (Fla.App. 1963); Dawson v. Dawson, 135 SW2d 458 (Tenn.App. 1939); Jameson v. Jameson, 306 NW2d 240 (S.D., 1981); Watkins v. Dudgeon, 270 Ark. 56, 606 SW2d 78 (Ark.App. 1980); Brown v. Brown, 269 NW2d 819 (Iowa 1978); York County v. Johnson, 206 Neb. 200, 292 NW2d 31 (1980); Mobley v. Baptist Hosp. of Gadsden, 361 So2d 16 (Ala.Civ.App. 1978); Fauntroy v. U.S., 413 A2d 1294 (D.C. App. 1980); Allison v. Fulton-Dekalb Hosp. Auth., 245 Ga. 445, 265 SE2d 575 (1980); Lane v. Aetna Cas. & Sur. Co., 48 N.C. App. 634, 269 SE2d 711, rev. den. 276 SE2d 916 (1980); Marks v. Mitchell, 90 W.Va. 702, 111 SE 763 (1922); Hartley v. Ungvari, 318 SE2d 634 (W.Va.Sup.Ct.App. 1984).]

Under the common law theory, a claim for reimbursement of necessaries accrues against a child's father to any person who has provided the child with food, shelter, clothing, medical attention, or education. [Hooten v. Hooten, 15 SW2d 141 (Tex.Civ.App. 1929).] The cause of action looks to the past, not the future. In most jurisdictions, a statutory support order substitutes for the common law obligation at least as to the children's mother. The statutory support order looks to the future and acts to limit any future recovery by the custodial parent to the amount of the order. [Lodahl v. Papenberg,

277 SW2d 548 (Mo. 1955).] The effect of an existing current support order on the claims of third parties varies from jurisdiction to jurisdiction. [91 ALR3d 561.] As pointed out above, this discussion assumes no support order.

The common law claim in the IV-D context. A claim for reimbursement of necessaries may be made by the IV-D agency in the following situations:

- An action is being pursued to establish a current support obligation, and the AFDC case has been open for a number of months prior to the filing of the support action.
- A paternity action is being pursued, and the AFDC case has been open for a number of months.
- The AFDC case that formed the basis of the IV-D referral has closed, and the case promises good collection potential.
- An enforcement action has produced a collection (for instance, a Federal tax refund interception), and the absent parent responds with a collateral attack, or other challenge, on the order which forms the basis of the collection.

Some argue that the addition of the common law claim to a IV-D agency's arsenal of collection weapons would have little effect. After all, it is difficult enough to collect current support from the majority of absent parents pursued by the IV-D Program. In addition, the burden of repaying the agency for past assistance often would limit the absent parent's ability to pay current support. Such an argument is misleading, however; common law claims can strengthen the agency's negotiating position in every case and allow cases to be worked that would otherwise be shelved. The last two situations noted above are particularly good examples. The agency already has spent time and effort on these cases, and the common law claim may turn this effort into collections instead of frustration.

In evidence of the usefulness of the common law claim in the IV-D context, at least three State child support enforcement agencies have obtained appellate decisions which establish the vitality of the claim on behalf of the State. In State Division of Family Services v. Clark, 554 P2d 1310 (Utah 1976), the Utah Supreme Court held that the State may recover amounts of public assistance provided in the past despite the lack of a support order for the period in question. The court noted that the parent's obligation is rooted in natural law as an implied promise contained in the marriage contract. The obligation runs to the children, but when a third party comes forward and assumes the parent's responsibility, that party becomes subrogated to the child's right and may obtain reimbursement. [Clark, supra, p. 1311.] The court did not address the specific issue of whether the State may qualify as a "third party" under the common law rule but simply assumed no impediment.

The Montana Supreme Court also treated the issue in the case of State by and through Department of Social and Rehabilitative Services v. Hultgren, 168 Mont. 257, 541 P2d 1211 (1975). There, the decision specifically held that the State agency that assumes the support responsibility qualifies as a third party under the common law rule and is entitled to reimbursement. [Also see State Division of Family Services v. Hollis, 639

SW2d 389 (Mo.App. 1982).] In addition to making a claim against an absent parent under the third party liability theory, it would seem to be possible to assert the claim through the custodial parent via the assignment of support rights required of all AFDC recipients by 42 USC 602(a)(26).

Elements of the cause of action. In the majority of jurisdictions, the elements of the cause of action are simple to allege and establish. At common law, the obligation ran to the father and simply stated that he was liable to reimburse any third party who came forward to supply reasonable and necessary support for his wife and/or children. The elements of the cause of action were as follows:

- Paternity in the defendant
- No court order for support entered by any court
- His failure to provide support
- Provision of support by the plaintiff
- Necessity
- Reasonableness of the support provided.

In the majority of States, the cause of action remains as set forth here, except that it presumably extends to claims against mothers as well as fathers, at least in States which have enacted an equal rights constitutional amendment. [91 ALR3d 530.] However, courts in a few States have added additional requirements that create obstacles for the IV-D programs, such as:

- A requirement that the plaintiff first demand that the absent parent meet the obligation prior to assuming it and seeking reimbursement [McSwain v. Holmes, 269 S.C. 293, 237 SE2d 363 (1977)]
- A requirement that the plaintiff expect reimbursement at the time the necessaries are provided [Re Altmann's Will, 149 Misc. 115, 266 NYS 773 (1933)]
- A requirement that the plaintiff show that the absent parent had the financial ability to pay during the period for which reimbursement is sought [Holt v. Holt, 42 Ark. 495 (1983)]
- A requirement that the fault of the separation not be the custodial parent's. [State ex rel. Division of Family Services v. Standridge, 676 SW2d 513 (Mo. 1984).]

One other potential problem concerns the issue of the custodial relative's portion of the public assistance grant in those States that consider the needs of the custodial relative in the AFDC budgeting process. If the absent parent owes no duty of support to the custodial relative, it is arguable whether the absent parent has an obligation to repay the entire amount of public assistance. The counterargument here is that the eligibility for public assistance is based on the children. Taking into account the needs of the custodial relative, and balancing those needs against the income of the custodial parent,

the State simply is adjusting the amount to be paid to the children according to the financial situation of the custodial parent. A court uses the same process to fashion a current support amount. The amount of the public assistance grant that is attributable to the needs of the custodial relative, when reviewed in this light, is no more for the custodial parent than would be the analogous portion of a judicial order for current support.

The common law reimbursement for necessaries remedy still exists in a majority of American jurisdictions. It can increase the effectiveness of the IV-D Program by allowing the State or local jurisdiction to recover child support from a parent for a period of time in the past during which no support order was in effect. Also, it can increase the bargaining position of the IV-D agency when negotiating the establishment of a current support obligation. Both of these benefits are consistent with sound public policy.

TEMPORARY ORDERS

Generally, temporary orders are appropriate for only a small portion of the IV-D agency's caseload. Temporary orders occasionally can help expedite a divorce action. In such cases, an absent parent who has been contesting the action to avoid support payments loses any advantage he or she may have gained through delay. Temporary support orders also are important for securing current support when the State is expending money for the child(ren) and the divorce action is likely to be lengthy. Once the temporary order is established, it is subject to all appropriate enforcement remedies.

A motion for temporary orders will come before a judge in one of two ways. Either the client's attorney will so move or the IV-D attorney will intervene in the divorce action by filing a petition for temporary support. When intervening in a divorce, the IV-D attorney will participate only in setting the amount of child support.

In setting support for the temporary order, the judge is required to consider all relevant factors in the same manner as for a "permanent" support order. The absent parent's attorney may raise issues of temporary custody and visitation.[20] However, these issues should not be relevant to the support action. The IV-D attorney should stress the limited purpose of the order, the child's best interest, and the interest of the State.

One problem that can arise in pursuing temporary orders involves the unrepresented AFDC recipient who is being divorced by an absent parent. The IV-D attorney should make it clear to the recipient, to the absent parent's attorney, and to the court, that the IV-D attorney does not represent the recipient's interest in the divorce action. The AFDC recipient should be counseled to seek representation in the divorce action from legal services or the private bar.

Under an equal protection argument, several States have begun to issue temporary support orders in paternity cases. Because the amount of the temporary order is often higher than the final order, this action often encourages early resolution. Temporary support in paternity cases is discussed in Chapter 7 of this Guide.

It should be noted that the common law reimbursement for necessaries action, discussed above, also is available as an option to reimburse the State for monies paid out in AFDC for children for whom there was no established support order.

DEFENSES TO ESTABLISHMENT

This section surveys a limited number of defenses that absent parents submit in establishment proceedings. Enforcement defenses are covered in Chapter 9. Defenses peculiar to interstate cases are treated in Chapter 10.

Bad Faith Nonpaternity Defenses

On occasion, fathers of children who were born during their marriage to the mother will submit a defense of nonpaternity for the purpose of gaining a negotiation advantage or making the proceeding as cumbersome as possible in the hopes that the IV-D agency will drop the action. There are several rules of law that should defeat any such attempt.

Presumption of paternity. Where the child was conceived or born during the marriage, or during a marriage which was attempted but failed for technical reasons, the child normally is presumed to be the legitimate issue of the husband. "In the interest of stabilizing family relationships, there is a universal, worldwide acceptance of a strong presumption of legitimacy in favor of children born in wedlock."[21] The extent to which the presumption is rebuttable varies from jurisdiction to jurisdiction, and it is almost impossible for the father to raise in jurisdictions that still recognize Lord Mansfield's Rule to prohibit a parent from giving testimony to bastardize a child born during the marriage.[22] In other jurisdictions, the presumption is rebuttable, but the party attacking the presumption generally has a difficult burden of proof to overcome. [See, e.g., A.G. v. S.G., 199 Colo. 403, 609 P2d 121 (1980); Gross v. Vanlerberg, 7 Kan.App.2d 99, 638 P2d 365 reviewed 646 P2d 477 (1981); Smith v. Casey 198 Colo. 433, 601 P2d 632 (1979).]

Legitimation by marriage. Even where the child was not born or conceived during the absent parent's marriage to the mother, if a marriage follows the child's birth and the father acknowledges his paternity in writing, many States treat that child, for all purposes, as though it was born of the marriage. [See Mixon v. Mize, 198 So2d 373 (Fla.App. 1967); Commonwealth v. Roznski, 206 Pa.Super. 397, 213 A2d 155 (1965); Missouri Family Law, Third Edition, The Missouri Bar (1982), sec. 18.50.] A State's probate code often treats this topic.

Equitable estoppel or adoption. Even where the father never made an acknowledgment specific enough to bring into play one of the above, the father may be estopped from denying paternity where he has held the child out to the community as his, and the child has relied on this implied acknowledgment. [See Watts v. Watts, 115 N.H. 186, 337 A2d 350 (1975); Drake v. Drake, 43 SW2d 556 (Mo. 1931); Missouri Family Law, Third Edition, The Missouri Bar (1982), sec. 18.51.]

The Runaway Child

The obligated parent may argue that when he or she is willing to provide a home for the child and the child voluntarily leaves the home, the parent should not be made to pay

support. Nevertheless, these circumstances do not absolve the responsible parent of his or her legal obligation to pay child support. However, an exception may arise when a court orders that the child shall not leave home without permission of the court. This is a common provision in many divorce decrees.[23]

In the case of Virgil v. Virgil, 494 P2d 809 (Colo. 1972), the fact that the mother had removed the children from Colorado without the father's consent did not relieve the father of his duty to support the children. Other cases hold that a parent may be found criminally responsible for his or her failure to support his or her child, even though the child is living apart from the parent without the parent's consent. [Bennefield v. State, 4 SE 869 (Ga. 1888); Moore v. State, 57 SE 1016 (Ga. 1907); Commonwealth v. Donovan, 220 SW 1081 (Ky. 1920); State v. Sutcliffe, 25 A 654 (R.I. 1892); Beilfuss v. State, 126 NW 33 (Wis. 1910); and Bowen v. State, 46 NE 708 (Ohio 1897).]

Release Agreements

Generally, an agreement between the parents of a child made outside the courtroom which absolves the noncustodial parent's support obligation is invalid.[24] [In re Marriage of Goodrich, 622 SW2d 411, 413 (Mo.App. 1981); Storey v. Ward, 258 Ark. 24, 523 SW2d 387 (1975); Elkind v. Byck, 67 Cal. Rptr. 404, 439 P2d 316 (1968); Barnett v. Barnett, 243 A2d 51 (D.C.App. 1968).]

Most courts hold that parents cannot bargain away the children's right to continuing support in accordance with their needs and the parent's ability to provide support. This is true even where the agreement is contained in a previous settlement which was incorporated in to a divorce decree. [Williams v. Williams, 542 SW2d 563, 566 (Mo.App. 1976); Hart v. Hart, 539 SW2d 679, 682 (Mo.App. 1976); Keyes v. Keyes, 9 P2d 804 (Idaho 1932).] However, in some jurisdictions, the custodial parent can release his or her title to both past and future support but cannot release support belonging to the children. [Ruehle v. Ruehle, 74 NW2d 689 (Neb. 1956).]

MODIFICATIONS

Many child support orders have been rendered insufficient by the passage of time and the effects of inflation.[25] Others no longer correspond to the real ability of the absent parent to pay support. The authority of the court to modify child support obligations has been addressed in several decisions, universally affirming the discretion of the court to modify its own orders.

The Child Support Enforcement Amendments of 1984 further require States to include wage withholding provisions in all support orders as they are issued or modified. [45 CFR 303.100; 42 USC 666(a)(1). See also the discussion of income withholding in Chapter 8.] In addition, it is now mandatory to include medical support coverage in all new or modified support orders when it is available. [45 CFR 306.51(b)(1); 42 USC 652(f).]

Jurisdiction

The authority to modify child support orders usually is based on the continuing jurisdiction of a trial court over the order: "a decree of child support is always modifiable." [Ill.Rev.Stat. 1979, ch. 40 par. 510.] Moreover, a trial court generally has "inherent jurisdiction to consider future child support in a dissolution proceeding and need not expressly retain jurisdiction." [In re Marriage of Petramale,, 58 Ill.Dec. 537, 1021

Ill.App. 1049, 430 NE2d 569 (1981).] This is true even where the absent parent no longer resides in the jurisdiction. [See Carlin v. Carlin, 620 Or.App. 350, 660 P2d 204 (1983), citing cases from Arizona, Arkansas, Colorado, Illinois, Louisiana, Maryland, Minnesota, Mississippi, New Hampshire, Ohio, and West Virginia.]

As a general rule, all orders are subject to modification, at least as the order applies to the future. Even where an agreement intended to be determinative was entered and incorporated into the final decree, the Supreme Court of Indiana held that this did not prevent modification, stating:

> . . .the fact that a child support order has been entered pursuant to the terms of a settlement agreement, even where, as here, it is intended as forever determinative by the parties, is of no consequence to the question whether the order should subsequently be modified. [Meehan v. Meehan, 425 NE2d 157 (Ind. 1981). See also Burks v. Burks, 427 NE2d 353 (Ill.App.Ct. 1981); Lacassagne v. Lacassagne, 430 So2d 818 (La.App. 5 Cir. 1983).]

Criteria

The general requirement for modifying orders is "changed circumstances so substantial and continuing as to make the terms [of the original order] unconscionable." [Uniform Marriage and Divorce Act, Sec. 316(a).] The petitioner requesting modification is responsible for proving such a change in circumstances. [In re Marriage of Roth, 55 Ill.Dec. 271, 99 Ill.App.3d, 426 NE2d 246 (1981).] In determining whether or not such a change has occurred, the relevant times are the date of the decree or the time of the last prior modification and the time of petition for modification. [Strauss v. Strauss, 619 SW2d 18 (Tex.Civ.App. 1981).]

Courts have reached various decisions about what constitutes a substantial and continuing change in circumstances. The major elements used to differentiate such circumstances have been: which parties to the order are affected; the kinds of change which qualify as substantial and continuing; and the standards which can be used to evaluate the current order.

Many jurisdictions have found sufficient justification for modification in a substantial change in the absent parent's financial position since the date of the current order.

> Our question, then, is whether a material and substantial change in both circumstances, the ability of the parent to contribute and the needs of the child, must be shown, or whether a material and substantial change in only one of the circumstances, the ability of the parent to contribute, is sufficient to justify modifying an order providing for the support of a child. We hold that a material and substantial change in only one circumstance, the ability of the parent to contribute, is sufficient to justify modifying an order providing for the support of a child. [Holt v. Holt, 620 SW2d 650 (Tex.Civ.App. 1981).]

Other courts have held that an increase in the father's ability to pay is insufficient alone to justify modification. [In re Marriage of Hughes, 635 P2d 933 (Colo.App. 1981).] These courts have held that it is necessary to show not only that the absent parent's situation has changed but also that the needs of the children have changed: "the parent,

in seeking an increase, has a twofold burden--he or she must prove (a) the children's need for additional support and (b) the other parent's ability to pay more than the amount that was originally fixed in the order presently under review." [Bates v. Bates, 440 A2d 724 (R.I. 1982). (Emphasis added.)] To meet such a burden, it is often necessary to prove the needs of the children and financial situations of the parents at both relevant times. [Flynn v. Flynn, 433 So2d 1037 (Fla.App.4th Dist. 1983).]

Generally, to justify a modification, the change in circumstances must be something that the court has not and could not have anticipated. [Bilosz v. Bilosz, 441 A2d 59 (Conn. 1981).] This sometimes is based explicitly on the interpretation of the order and the principle of res judicata, which prohibits the relitigation of issues already decided. A Maryland court of appeals explains:

> Any issue that was litigated or could have been litigated in the divorce proceeding may not be relitigated in a subsequent petition to modify the support. The basis of a petition to modify child support may only be an issue that was not and could not have been raised earlier, viz., a change in the circumstances of the parties. [Reese v. Huebschman, 50 Md.App. 709, 440 A2d 1109, 1111 (1982).]

What constitutes a change in circumstances sufficient to modify the order depends on the State. Colorado seems to lay the heaviest burden on the movant, i.e., to show that the order currently in effect is "unconscionable." [In re Marriage of Anderson, 638 P2d 82 (Colo.App. 1981); In re Marriage of Hughes, supra.] Alaska has accepted the lightest criteria, that "there was a 'change' in the sense that there may have been a mistake in the assumption made when the decree was entered" and "that lack of sufficient funds to permit the custodial parent to do an adequate and reasonable job in providing for the best interests and welfare of the children was something which was both material and substantial." [Headlough v. Headlough, 639 P2d 1010, 1013 (Alaska, 1982).]

Most other courts have adopted a middle position on the issue, although the discretion allowed the trial court may lean toward one of the positions described above. For instance, a Missouri appellate court found that there was no abuse of discretion in failure to modify in the absence of evidence that the order was unreasonable. [Henderson v. Henderson, 622 SW2d 7 (Mo.App. 1981).] Generally, there is a heavier duty involved in establishing the need for modification if the obligation results from a voluntary agreement incorporated into the decree. [Reese v. Huebschman, supra; Bish v. Bish, 404 So2d 840 (Fla.App. 1981).]

Several other criteria for modifications also have been addressed. A common concern is the extent to which the court may take the passage of time, in itself, as constituting a change in circumstances. Williamson v. Chapell, 408 So2d 134 (Ala.Civ.App. 1981), holds that the effects of inflation and increased needs of the children because of increased age justify an upward modification. [Cf. Vinson v. Vinson, 628 SW2d 376 (Mo.App. 1982).] On the other hand, a Colorado court has held that, although inflation is a factor properly to be considered in the modification of an order, the specific effects of inflation on the needs of the child must be shown. [In re Marriage of Hughes, supra; Carpenter v. White, 624 SW2d 618 (Tex.App. 1981).] The increased age of the children is not, in itself, sufficient to justify modification.

Other courts have held that something beyond the mere passage of time is required, although the discretion of the trial judge in specific cases is usually granted deference.

However, an evidentiary hearing invariably is required before deciding that a modification is in order. [In re Marriage of Smith, 641 P2d 301 (Colo.App. 1981). (Trial court erred in reversing master without evidentiary hearing).]

A modification proceeding is a two-step process. First, the court determines whether a modification is appropriate, as discussed above. Next, the amount of the new obligation is determined. [Brothers v. Vickers, 406 So2d 955 (Ala. Civ. App. 1981).]

The criteria for determining the amount of the new obligation have been held to be generally the same as those which governed the establishment of the initial order.

> Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification . . . These require the court to consider, without limitation, the needs and financial resources of each of the parties and their children, as well as such factors as health, age, and station in life. [Hardisty v. Hardisty, 439 A2d 307, 311 (Conn. 1981). (See, however, In re Marriage of Anderson, supra).]

Other issues relevant to the modification of an initial order include the obligations incurred by the absent parent toward a second family and whether earnings capacity, as distinct from actual earnings, is to be considered. Most courts explicitly consider the responsibilities toward a second family in assessing ability to pay increased child support, although these do not justify failure to provide adequately for the first family.

> Further, the subsequent remarriage of a divorced husband, as his own voluntary act, is not of itself a circumstance which justifies a [downward] revision of maintenance. . . . While children of a second marriage can be a consideration in revising maintenance payments, we cannot unreasonably curtail or ignore the necessities or wants of the first wife and child. [Vyskocil v. Vyskocil, 54 Ill.Dec. 873, 99 Ill.App. 391, 425 NE2d 1090, 1093 (1981).]

Similarly, in Openshaw v. Openshaw, 639 P2d 177 (Utah 1981), the Utah Supreme Court held that an absent parent's support of step-children is a factor to be considered during a modification proceeding.

The effect of a substantial decrease in an obligor's ability to pay depends on the extent, nature, and cause of the decrease. Unemployment, or other financial downturn, does not entitle an obligor to a automatic downward modification. [Morisch v. Morisch,--- NW2d ---, 10 FLR 1697 (Neb. 1984).] This is particularly true if the decrease in ability to pay results from the obligor's voluntary acts. He or she may not escape responsibility by voluntarily declining to work [Boyer v. Boyer, 567 SW2d 749 (Mo.App. 1978)], by deliberately limiting his or her work to reduce his or her income [Butler v. Butler, 562 SW2d 685 (Mo.App. 1977)], or by losing a job because of his or her criminal behavior [Noddin v. Noddin, 455 A2d 1051 (N.H. 1983)]. In these circumstances, most courts will consider the obligor's earnings potential to determine whether a modification is warranted. [Bilosz v. Bilosz, supra; Johnson v. Johnson, 441 A2d 578.]

Automatic Modifications

Attorneys and judges recently have begun to try to craft support orders that automatically adjust to changes in the parties' relative financial conditions, and for increases in the needs of the children that so often accompany their growing older.[26] These attempts have taken two forms: (1) orders that are based on a percentage of the obligor's income and (2) orders that self-adjust based on changes in the Consumer Price Index (CPI) or some other measure of changes in living expenses.

Percentage of income orders have not found favor in appellate courts due to their reliance on tax returns, pay stubs, or other poor reflections of the obligor's income, and because they do not account for other relevant changes, such as the needs of the children or the custodial parent's financial situation. [Lewis v. Lewis, 450 So2d 1123 (Fla.Dist.Ct.App. 1984); In re Meeker, 272 NW2d 455 (Iowa 1978); DiTolvo v. DiTolvo, 131 N.J. Super. 72, 328 A2d 625 (1974); Breiner v. Breiner, 195 Neb. 143, 236 NW2d 846 (1975); Stanaway v. Stanaway, 70 Mich.App. 294, 245 NW2d 723 (1976). Contra, see Edwards v. Edwards, 99 Wash.2d 913, 665 P2d 883 (1983); and Heinze v. Heinze, 444 A2d 559 (N.H. 1982).]

Orders that base the automatic adjustments on various factors, not merely the absent parent's income, have fared better. Courts in several States have upheld orders providing for adjustments based on changes in the CPI. [Branstad v. Branstad, 400 NE2d 167 (Ind.App. 1980); In re Marriage of Stamp, 300 NW2d 275 (Iowa 1981); Orman v. Orman, 344 NW2d 415 (Minn. 1984).] These decisions have noted that changes in the CPI provide a better measure of changes in the financial situation of all the parties to the action, that the CPI provides a readily ascertainable objective measure, and that such an approach enhances judicial economy.

One major problem with both approaches occurs in States that automatically grant an unpaid support payment the status of a judgment when its due date passes. Automatic judgment status, discussed in Chapter 8, allows execution to issue without a hearing. (The theory is that the amount of the judgment is readily ascertainable from the face of the support order, and thus a hearing would serve no useful purpose.) Clearly, automatic judgments and escalator clauses are theoretically and practically incompatible. Their use in States with automatic judgments may do more harm (by making enforcement more difficult) than good (in making modifications simpler).

FOOTNOTES

/1/ 401 FLR 001 et seq.

/2/ See White and Stone, "A Study of Alimony and Child Support Rulings With Some Recommendations," 10 Fam.L.Q. 75, 1976; "What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court," 57 Den.L.J. 21, 1979.

/3/ For an example of a regulation promulgated by a State IV-D Agency to comply with the Federal mandate, see Missouri's 13 CSR 40-20.010 (1982).

/4/ Franks, "How to Calculate Child Support," 86 Case & Comment 3, 1981; "Summing Up Child Support: A New Formula," 7 Dist. Law 28, July/August 1983. See also Polikoff, "The Inequity of the Maurice Franks Custody Formula," 8 Dist. Law 14, Nov./Dec. 1983.

/5/ Cassetty and Douthitt derive this need figure from an estimate made by economist Philip Eden and published in Estimating Child and Spousal Support: Economic Guidelines for Judges and Attorneys (Western Book Journal Press: San Mateo, CA, 1977).

/6/ Ill. Pub. Act 83-1404, 1984 Regular Session.

/7/ The passage of a percentage guideline statute may support an argument that the court may no longer impute income to the obligor based on ability to earn.

/8/ See Footnote 11, supra.

/9/ Cassetty and Douthitt recognize that allowing the custodial parent a share of the surplus income could be viewed as an implicit form of alimony, but point out that any other method would require the deletion of the custodial parent's income from the numerator. Doing so would defeat the income-sharing aspect of the approach and ignore the economic realities of the situation. Id., p. 12.

/10/ The most extensive use of an income-sharing approach has been tried in the State of Delaware, which employs the Melson Formula. It is beyond the scope of this Guide to explain the many variations of the Melson Formula. For a detailed explanation see "Delaware Child Support Formula," Family Court of the State of Delaware, July 1984. (Available from the National Reference Center of the Office of Child Support Enforcement, Rockville, MD.)

/11/ National Institute for Socioeconomic Research, Review of Selected State Practices in Establishing and Updating Child Support Awards, prepared for the Office of Child Support Enforcement, Department of Health and Human Services, under Grant 18-P-00258-8-01 (Baltimore, MD: Social Security Admin. Print. Off., 1984).

/12/ National Institute for Socioeconomic Research, Review of Literature and Statutory Provisions Relating to the Establishment and Updating of Child Support Awards, prepared for the Office of Child Support Enforcement, Department of Health and Human Services, under Grant 18-P-00258-8-01 (Baltimore, MD: Social Security Admin. Print. Off., 1984), pp. 46-47.

/13/ National Institute for Socioeconomic Research, Review of Selected State Practices in Establishing and Updating Child Support Awards, pp. 50-51.

/14/ H.R. Rep. 925, 98th Cong., 2d Sess. 29 (1984).

/15/ See, e.g., Missouri Revised Statutes, sec. 454.465 (Supp. 1984); Virginia Code, sec. 63.1-251 (1981).

/16/ California Welfare and Institutions Code, sec. 11350; K.S.A. 39-718a; Texas Family Code, Title 1, sec. 4.02.

/17/ Helmholz, "Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law," 63 Va.L.Rev. 431: 437, 1977.

/18/ See, e.g., Serbian v. Alpern, 284 Md. 680, 399 A2d 267 (1979).

/19/ Greenspan, supra, p. 392.

/20/ For information on custody and visitation, see the ABA monograph by Robert Horowitz and G. Diane Dodson, Child Support, Custody and Visitation: A Report to State Child Support Commissions (Washington, DC: National Legal Resource Center for Child Advocacy and Protection, Child Support Project, July 1985).

/21/ Krause, "Creation of Relationships of Kinship," 4 Int. Encyc. of Comp. Law 14.21, 1976.

/22/ Krause, Child Support in America: The Legal Perspective (Charlottesville, VA: Michie & Co., 1981), pp. 104-110; Uniform Parentage Act, 9A U.L.A. sec. 4.

/23/ This section is adapted from Chester H. Adams et al., A Guide for Judges in Child Support Enforcement (Chevy Chase, MD: National Institute for Child Support Enforcement and National Council of Juvenile and Family Court Judges, 1982), pp. 104-105.

/24/ Id., pp. 103-104. For a more detailed discussion of release agreements, see Chapter 6, infra.

/25/ This section is adapted from B. Keith, "Modifications of Child Support Orders," Parts I and II, Child Support Report IV(10, 11), 1982.

/26/ This section is adapted from G. Martin, "Escalator Clauses in Support Decrees: An Overview of Recent Decisions," Child Support Report VI(11), 1984.

CHAPTER 6
Scientific Testing for Paternity Establishment

INTRODUCTION

The problem of disputed parentage and the search for ways to resolve it are not new. Japanese folklore of the 12th century describes methods for dealing with genealogical controversy: "In those times any person claiming to be an heir to an estate was required to undergo a blood test. The finger of the individual making the claim was pricked and a drop of blood was permitted to drip on the skeleton of the deceased. If the blood soaked in, the claim was upheld."[1] In still another test, two persons who claimed to be related were required to allow drops of their blood to drop into a basin. Their relationship was recognized only if their respective drops of blood merged in the basin.

Tests used to establish or disprove relationship have grown increasingly sophisticated over the years. In particular, tests of the paternal relationship have profited from the scientific advancements of the last 25 years. Today, the possibility of excluding a falsely accused man is greater than 90 percent and is sometimes as high as 99 percent.

It is fortunate both for children and for the men who father them that these advances have been made in the science of genetic identification. Today, the paternity trial is more than a credibility contest. Evidence is available--and widely used throughout the court system--that minimizes the guesswork involved in determining the parentage of a child. If a man is falsely accused of fathering a child, genetic testing can prove his innocence 99 percent of the time, depending on the content of testing. Moreover, this conclusive and readily available evidence is relatively inexpensive, especially when the cost of blood tests (usually no more than $400 for a full battery of tests, which is not always necessary) is balanced against the cost of supporting a child for a period of 18 years.

In addition, tests that indicate that a man may have fathered a particular child may be interpreted further to determine the likelihood that he did father the child in question. While statistical estimates of plausibility, or "inclusionary" evidence, are not accepted as widely throughout the court system as determination of exclusion are, these estimates are extremely reliable. In particular, when considered together with other evidence of relationship, genetic evidence of this kind can turn an essentially subjective determination into a far more objective and verifiable proceeding.

This chapter discusses the genetic basis of paternity testing and reviews the tests most often used for paternity establishment, which include the red blood cell antigen test, the red cell enzyme and serum protein test (more commonly referred to as electrophoresis), and the human leukocyte antigen test. A description of the technology used in the tests and the strength of the testing results also is provided.

Other issues examined include various approaches for determining and expressing probability rates (the likelihood that a man is the father of the child); standards for blood testing laboratories as specified by the American Association of Blood Banks (AABB); and current research on technology for paternity testing.

THE GENETIC BASIS OF PATERNITY TESTING

A basic understanding of the laws of heredity is needed to comprehend how genetic principles are applied to parentage testing. All human traits are determined by genes inherited from both parents, including both red and white cell blood types. At conception, the mother's egg, which contains 23 chromosomes, combines with the 23 chromosomes contained in the father's sperm. As a result, the child inherits 46 chromosomes that are paired in 23 sets. Within each set, one chromosome is inherited from the mother and one from the father. These chromosomes contain the genetic markers that determine all inherited characteristics. Since children inherit half of their genetic markers from their mother and half from their father, deductions can be made regarding which genetic markers are paternal in nature when the mother's and child's genetic markers are known. Because the components of human blood contain many of these inherited and identifiable genetic markers, it is possible to use blood tests to determine parentage.

Of course, it is possible for a man who is not the biological father of a particular child to possess genetic markers that appear in the child. However, it is extremely unlikely that he will possess by sheer chance a large number of genetic markers that appear in the child. For this reason, paternity blood tests examine independent groups (or "systems") of genetic markers in the blood of the child, mother, and alleged father.

Knowing the variations in any one marker that are present in the blood of the mother and the child, one can specify the range of variations that may appear in the blood of the biological father. If the variations observed in the blood of the alleged father do not fall within this range, he may be excluded from paternity.

When the blood of the alleged father contains the genetic markers that are required to be present in the blood of the biological father, he cannot be excluded from paternity. Moreover, because gene frequencies have been determined for diverse populations, specialists can predict with great accuracy the likelihood that a given man actually is the biological father of a child, and not just someone who happens to share the same blood characteristics with an unrelated individual.

Other factors that make the identification of genetic markers very effective in paternity determination are as follows:

- They are expressed at birth or shortly thereafter.
- They remain stable through life and are unaffected by extrinsic factors such as age, illness, diet, etc.
- They can be identified relatively easily through scientific tests which allow both accurate and reproducible identification.[2/]

The scientific techniques that have been developed can provide statistically reliable data necessary to establish a child's parentage. Consequently, the scientific testing has transformed the paternity establishment process from a credibility contest to a conclusive, fact-oriented proceeding.

RED BLOOD CELL ANTIGEN TEST

At the beginning of this century, Dr. Karl Landsteiner's discovery of the ABO blood group system provided the basis for paternity testing as we know it today. As additional blood group systems such as MNSs, Rh, Kell, Duffy, and Kidd were discovered, the potential use of blood groups in paternity establishment increased. While these systems are commonly referred to as "blood groups," the term technically refers to antigens present on red cell membrane to which the body reacts by producing antibodies.

In testing blood group systems, red blood cells are exposed to a specific antibody under controlled conditions, and the cells then are examined for a reaction of the antigen to the known antibody. The absence or presence of the antigen is determined according to the absence (negative reaction) or the presence (positive reaction) of agglutination (clumping). A laboratory technician can determine whether a reaction has occurred by examining the antigen-antibody mixture in the test tube over a magnifying mirror.[3]

For example, when testing the ABO system, a reagent which contains the known antibodies that will react to A, B, AB, and O red blood cells are introduced to the antigen on the red blood cell. Group A red blood cells will react only to anti-A antibodies; group B red blood cells will react only to anti-B antibodies; group AB red blood cells will react to both anti-A and anti-B antibodies; and group O red blood cells will react to neither. Similar test procedures are used with the other blood group systems. Since the reactions that should occur when specific antigens are present on the red blood cells are known in the medical field, a laboratory technician can determine the typing of the antigens.

Unfortunately, red blood cell antigens are not distributed in the population with sufficient variation to allow medical experts to draw valid conclusions regarding the probability of an individual's paternity. Consequently, if the red blood cell antigen test does not provide exclusionary evidence (data that determines that the man is <u>not</u> the father of the child), the statistical probability of inclusion of parentage (likelihood that the man is the father of the child) is not admissible in evidence. As a result, the use of red blood cell antigen test results was limited to exclusionary evidence for many years.

While the red blood cell antigen test is not self-standing for purposes of inclusionary evidence, both the medical and legal communities recommend that the test should be performed <u>first</u> when testing for paternity determination. If a man can be excluded in this way, no further tests are required. The red blood cell antigen test is relatively simple to perform and inexpensive in comparison to other testing procedures. Moreover, if exclusion cannot be established at this first stage, the test results can be incorporated with those of additional tests to obtain inclusionary evidence.

RED CELL ENZYME AND SERUM PROTEIN TEST

A test that is gaining increasing respect as a reliable scientific measure for parentage determination is the red cell enzyme and serum protein test. Serum is a complex solution containing a number of proteins; these proteins are composed of amino acids, each of which has a slight electrical charge. As with blood cell structures, the information for the production of these proteins is determined genetically.

Placed in an electric field, proteins will migrate at a rate proportional to their electrical charge and size. The rate of migration can be controlled by varying the medium--the denser the medium the slower the migration of large proteins. By selecting the appropriate current and medium, a wide range of proteins can be separated. Electrophoresis is the procedure used to separate protein molecules based on their size and electrical charge. In practice a small amount of sample is placed on an electrophoresis plate along with known standards and the current applied for a prescribed length of time. The plate is then stained to reveal the location of the various proteins and the migratory distance of the unknown is compared to a standard to identify the genetic type.[4]

The reasons for interest in this testing are many. The migration patterns that are measured and compared to known standards are easy to read. In addition, the slides can be dried, which allows a permanent record and physical evidence which can be presented in court by an expert witness. An additional advantage to using this type of testing is that rare variants can be identified through their migration rate, so there is no extra labor involved in locating them. Assume, for example, that a rare variant is found 1 in 1000 times in a system (not an unreasonable assumption). If one is testing 10 systems, a rare variant in one of the systems will occur 1 in 100 times. If this variant is passed on to the child, parentage is relatively assured.[5]

As in other types of testing, new protein systems that have fairly evenly distributed gene frequencies are being discovered. Some of the more common systems in use now are phosphoglucomutase (PGM), adenosine deaminase (ADA), esterase D (EsD), 6-phosphogluconate dehydrogenase (6-PGD), and group-specific component (Gc). As new systems are being added, the red cell and serum protein test is becoming a more powerful probability indicator for both exclusion and inclusion.

Blood testing laboratories are finding that if a man is not the father of a child, the chance of his being excluded on the basis of this test runs anywhere from 80 to 85 percent. However, if the testing results are combined with those of the red blood cell antigen test, the exclusionary rate is between 89 and 96 percent. Because the cost of performing enzyme and serum protein testing can be one-half that of human leukocyte antigen (HLA) testing and because the test results are becoming more powerful as new systems are discovered, serum and protein testing is becoming more popular with the medical and legal communities.

Because the technical procedure used for this testing is quite different than that used for the red blood cell antigen test and the HLA test, which is discussed next, technicians require specialized training to perform this test. Furthermore, laboratories must have specific equipment. Consequently, many laboratories in this country still do not have the facilities or resources to perform electrophoretic testing. However, more laboratories have or are in the process of obtaining this technical expertise in order to provide it as part of their battery of tests.

HUMAN LEUKOCYTE ANTIGEN TEST

In principle, HLA testing is similar to red blood cell antigen identification since it involves a reaction of all surface antigens to a specific antibody. However, the antigens

tested are those found in the white blood cells (leukocytes) as well as all nucleated cells, rather than antigens found on the red blood cell. HLA structures are of primary importance in matching donors to recipients for organ transplantation. For this reason, they also are known as tissue antigens, transplantation antigens, or histocompatibility antigens. Like an individual's red blood cell antigen types, the white blood cell antigen types are genetically controlled.

Four subclasses of antigens are used to define an individual's tissue type. The gene coding for each white blood cell antigen type used in HLA testing are found at three closely linked locations (or loci) on the sixth pair of chromosomes. They are termed HLA-A, HLA-B, and HLA-C. At conception, an individual inherits one complete set of genes (A, B, C), known as a haplotype, from each parent. By testing the white blood cells for the presence of antigen markers determined by gene codes at the HLA-A, B, and C loci, technologies can determine the phenotype of the individual tested. From the pheonotype, the genotype (the haplotype derived from the individual parents) can be inferred.[6/]

In HLA testing, the white blood cells are exposed to known antibodies and reactions of the antigen-antibody mixture are observed to determine the identity of the antigens. While agglutination is the reaction observed in red blood cell antigen test, cytotoxicity or cell death is the reaction observed in the HLA test. More specifically, human leukocyte antigens are tested by separating the white cells from whole blood to determine the specific ability of an antibody to kill the white cell. This testing is performed by separating the white cells from the other cells and mixing them together with known antibodies and complement (which is important for the reaction). After appropriate incubation, reactions are detected microscopically using a dye as an indicator. If there is dye inside the white cells, they have been killed since cell walls become permeable on death and foreign substances (such as dye) can enter the cell. If the cells remain alive, they are intact, and the dye cannot penetrate the cell. Approximately 180 antibodies exist, including at least two antibodies for each antigen tested. Therefore, 180 separate tests per person must be completed to reach a conclusion as to the actual tissue type of an individual.

There are several drawbacks to HLA testing. As mentioned earlier, for complete typing for HLA, serological and genetic analyses of the antigens require at least 180 antibodies, which makes the procedure labor-intensive. In addition, the reagents necessary for the test are rare, so the entire process is quite expensive. Furthermore, the blood must be analyzed within 24 to 72 hours after it is drawn because the cells will die if they are not separated rapidly from the blood. Consequently, most HLA typing is confined to a relatively few large facilities.

The major advantage of HLA testing is that it is very polymorphic (i.e., genetically rich). The large number of markers in each of the three gene groups (alleles) A, B, C is so great that a large number of variations occur in the population. Moreover, any one variation has a very low frequency of occurrence. Consequently, HLA is a valuable test not only for exclusionary purposes, but for inclusionary purposes as well. "If the red blood cell antigen tests fail to exclude the alleged father and if his leukocyte variations match those of the child, it can be shown that he is a member of a class of, say 2 percent of the population that could have fathered the child--or stated another way, that there is a 98 percent chance that he fathered the child. If other factors, such as access to the mother, are taken into account, the question of paternity can be resolved under law."[7/] Using

the HLA test alone, it is possible to exclude over 90 percent of falsely accused men and to indicate those men who are highly likely to be the biological father. Combined with the red blood cell antigen test results, the percentage can be as high as 99 percent.

NEW TECHNOLOGY FOR PATERNITY TESTING

The three types of testing most often used in paternity establishment (red blood cell antigen testing, HLA, and the enzyme and protein test) all involve analysis of genetic markers that represent inherited genetic characteristics rather than looking directly at a person's genetic makeup. One system being studied for paternity testing that is linked more closely to direct genetic composition is the chromosome banding test. In this procedure, approximately 10 white blood cells are selected for study and cultured in flasks. Different staining techniques reveal the chromosome bands. Differences in banding patterns are usually present in four to six of the 46 chromosomes in each cell. These patterns are heritable. "The chances of excluding a man who is wrongly accused as the father of a child with the chromosome banding method probably approach 100 percent."[8/]

Another testing procedure currently in the research stage is deoxyribonucleic acid (DNA) probes. This new technique looks directly at a person's genetic composition, DNA. In simplified form, the process works as follows: "The DNA is extracted from white blood cells and divided into pieces by means of a specific enzyme, a chemical scissors that cuts the DNA only at specific sites. The number of these sites present in an individual's DNA dictates the number and size of DNA fragments generated by the enzyme. When this process is repeated with several enzymes, each of which cuts at different sites, enough information is gathered to construct a detailed genetic fingerprint of a person. Paternity is then determined by comparing the accused man's genetic fingerprint with that of the child."[9/]

The advantages of these new methods is that no two people have the same genetic make up (except identical twins). Thus, it is hoped that as the procedures are perfected, they will be more accurate than any currently available. Presently, however, neither the chromosome banding nor the DNA probe method have passed the test of legal acceptance. Furthermore, both methods are expensive and not readily available. However, as research continues, and as other genetic factors are being tested for their appropriateness in paternity testing, it seems possible that both exclusionary and inclusionary rates will increase dramatically in the future.

GUIDELINES FOR PATERNITY BLOOD TESTING

In 1976, a joint committee of the American Medical Association (AMA) and the American Bar Association (ABA) recommended guidelines for paternity blood testing. These guidelines are directed toward obtaining meaningful exclusionary or inclusionary evidence, and take into account the relative advantages and disadvantages--as well as the resolution power--of each technique discussed. Based on their findings, the committee concluded the following:

> "It is not the intent to recommend in all medico-legal problems of disputed parentage that the entire set of tests is mandatory. It is often possible to establish exclusion with the basic blood group systems (ABO, Rh, and MNSs). When these basic tests do not allow exclusion, extended testing may be done (using Kell, Duffy, and Kidd systems) to increase the mean probability of exclusion to the 63 to 72 percent level. If no exclusion is found, testing by human leukocyte antigens or electrophoresis should proceed until at least 90 percent, but preferably, 95 to 99 percent, of all wrongly accused men are excluded."[10]

Exhibit 6.1, which outlines the available methods of paternity testing discussed earlier, supports the AMA/ABA guidelines. To increase efficiency, paternity tests are taken sequentially, using first an approach that yields a 90 percent or better chance of exclusion. The combination of red cell antigens with enzymes and proteins has substantially the same efficiency of exclusion as the combination of red cell antigens with HLA; each provides a likelihood of exclusion of greater than 90 percent.

INTERPRETATION OF PATERNITY TEST RESULTS

As recommended by the AMA/ABA, laboratories should be able to exclude at least 90 percent of falsely accused men based on test results. In general, laboratories that specialize in paternity testing advertise the strength of their tests according to Probability of Exclusion (P.E.)--that is, the probability that a given test or combination of tests will exonerate a falsely accused man. The Probability of Exclusion should not be confused with Probability of Paternity, which is a statement expressing the likelihood of paternity in a particular case. They are independent concepts and are mathematically unrelated.

Every genetic system has an associated P.E. For the ABO system, the P.E. is roughly .17; for MNs, it is .32, etc. For HLA, it ranges from .88 to .92, depending upon the number of different test antibodies used. "The HLA test is the best single system in terms of having the largest P.E., but is not the best test. The best test would be one which would give a total P.E. of better than 99 percent. In fact, any combination of systems which can give a total P.E. of .88 to .92 would equal the HLA test in the ability to detect falsely accused men."[11] Thus, two separate laboratories may use the same techniques in testing but have different P.E.s depending on the level of testing. Consequently, when selecting laboratories and methods of testing, paternity workers should base their selection on the P.E. that the laboratory offers, rather than the method of testing implemented.

Exclusionary Methods

While absolute proof of paternity cannot be established by scientific testing, exclusion of paternity is considered absolute if results are based on direct exclusion (Class I) or on indirect exclusions (Class II). Direct exclusion refers to testing results that demonstrate that the child possesses a genetic marker lacking in both parents. For example, in using the ABO system, a direct exclusion is obtained when the child types as B, and both the biological mother and alleged father type as O. Since neither the mother nor the alleged father can contribute the B gene (and there are almost no exceptions to this rule), this information constitutes a direct exclusion and is considered adequate evidence for nonparentage.

EXHIBIT 6.1

SUMMARY OF AVAILABLE METHODS OF PATERNITY TESTING*

Group	Systems	Experimental Technique	Probability of Exclusion Using Systems In Group
Enzymes and Proteins	AcP, AD, EsD, Bf, Gc, Hp, PGM, Tf, GPT, 6-PGD, ADA	Electrophoresis	.70 - .85
			.91 - .97
Red Cell Antigens	ABO, Rh, MNSs, Kell, Duffy, Kidd A & B	Agglutination	.63 - .72
			.91 - .99
White Cell Antigens	HLA-A, HLA-B	Complement-Mediated Cytotoxicity	.85 - .91

* Reprinted from OCSE TEMPO #4: Blood Testing, U.S. Department of Health and Human Services, April 15, 1980. This summary is taken in large part from a pamphlet prepared by Paternity Testing Laboratory, Department of Pathology, Memorial Hospital Medical Center of Long Beach, California, and reprinted with the permission of Jeffrey Morris, M.D., Ph.D. No official support or endorsement of the laboratory or any one blood testing group, system, or technique by the Office of Child Support Enforcement, DHHS, is intended.

As the table indicates, use of all systems yields a probability of exclusion of 99 percent. However, it is neither practical nor efficient to utilize all three groups routinely for the following reasons:

- The different groups of tests utilize different skills and techniques. At present, very few laboratories offer all the systems.

- The cost of testing all systems and the inconvenience of submitting specimens to several laboratories is considerable.

Regardless of whether one starts with red cell antigens plus enzymes and proteins, or white cell antigens (HLA), exclusion of a falsely accused man will be made 90 percent of the time. If the tests used indicate a sufficiently high probability of paternity, no further testing may be required. If the results are inconclusive, further analyses may be desirable. Use of all tests will result in an overall exclusion of 99 percent as indicated by Exhibit 6.1.

Indirect exclusions are obtained if the child does not possess a genetic marker that he or she should have received if either parent was homozygous (the two genes in a pair being identical) for this marker. For example, in using the MNSs system, the mother may type as an MN, the alleged father as an M, and the child types as an N. The child would appear homozygous for the N gene, which the father appears to lack. In addition, the alleged father appears homozygous for the M gene, which the child lacks. However, the alleged father may possess the rare gene Mg, which the laboratory could detect only by using a specific reagent that would demonstrate the rare factor and distinguish between the homozygous state (exclusion) and the presence of the rare factor in the child and the alleged father (nonexclusion).[1,2] Often, these reagents are not available, and laboratories resort to testing other systems that may reveal direct exclusion.

Thus, the distinction between direct and indirect exclusion is that in direct exclusion, the child carries a genetic marker which is not demonstrated in either the biological mother or the alleged father, while indirect exclusion is based on an assumption that either of the parents is homozygous. While people may appear homozygous, genetic abnormalities may produce inaccurate results. Gene mutations, recombination of unexpressed genes that leave unexpressed antigens, are examples of rare factors that would require additional testing with the specific reagents that are often not readily available. Consequently, many laboratories find it necessary to find exclusion in at least two different genetic systems before excluding parentage with confidence. Multiple system exclusions are always desirable and are necessary for an unqualified statement of exclusion when indirect exclusions are involved.

Inclusionary Methods

When a man is not excluded from parentage, statistical calculations can reveal the Probability of Paternity (sometimes referred to as the likelihood or plausibility of paternity). How the calculations are made is perhaps the most controversial issue in the paternity testing field because there are several methods of calculations used. Each method is based on a different premise, though each premise is itself mathematically sound.

Prior probability. The calculations most often used in paternity testing are based on Bayes' Theorem, a mathematical statement about the effect new information has on previously held beliefs about "chances." This method relates the probability of an item (alleged father) with certain attributes (genetic markers) of a particular group (biological father) to the probability that a known member of the group would have the same attributes.

The most often used calculations use a neutral prior probability--that is, that a random man and the alleged father had an equal opportunity to father the child. The rationale for using a neutral prior probability rate is that an impartial laboratory should not assess the value of nongenetic information. Since the laboratory has no knowledge of the evidence, most laboratories assign a neutral estimate of 0.5 from a scale of 0-1 (ranging from impossible to certain), which is indicative of a particular event having occurred. The Essen-Moller calculation (the one recommended by the AMA) and the Hummel modification (which expresses the likelihood of paternity in a percentage) both imply a neutral prior probability.

This impartial calculation has implications for the paternity worker. Blood testing laboratories are not privy to all the information on a particular case and cannot weigh the laboratory results relative to other factors. The person who can evaluate the case is the worker and/or attorney who has been working directly with the mother and the alleged father. Consequently, the paternity worker must be able to recognize special situations in which this parameter of prior probability has a greater or lesser meaning.

The Neyman-Pearson Theory argues that weighed prior probability is appropriate. The following example supports weighed prior probability: "A bite is inflicted in a blackout in Times Square. Given the nature of the two animals, a tiger is more likely to bite one than a dog; but tigers are much scarcer in Times Square. While the probability that a dog would bite one is less than 1 percent, and would lead to rejecting the null hypothesis that the miscreant was a dog, it does not lead the rational mind to decide that, after all it probably was a tiger."[13]

As shown, there are pros and cons in using both weighed and neutral prior probability. Perhaps a statement by Hummel best explains why a neutral prior probability rate is recommended by AMA/ABA:

> Equality before the law requires that if a man denies a child's allegation that he is the child's father, these two claims must be treated as equal. The probability of his being the father is the same as that of not being a father. Accordingly, in cases involving one man the prior probability of paternity should be 0.5. The legal philosophy behind this prior probability cannot be challenged so long as the legal rights asserted by the child are valued as highly as those defended by the man.[14]

Calculation of probability of paternity. As mentioned previously, there are numerous methods that can be used in calculating inclusionary evidence. The following is an explanation of the method recommended by the AMA/ABA and which assigns neutral prior probability:

The paternity index is a calculation that estimates the possibility that the tested man might be the father of the child. The paternity index indicates how many men of the same background as the alleged father would have to be tested to find another man who could be the father of the child. Several factors are taken into account when determining this number. First, each of the genetic systems that can be passed on by the alleged father to the child are tested. In other words, what needs to be determined is whether the alleged father's sperm have all the necessary characteristics to pass on to the child in question. If so, the calculation needs to consider whether all his sperm or only some have the necessary characteristics. The answer to this question will depend on whether the man is homozygous or heterozygous.

The gene frequency is based on how many men of similar ethnic background as the alleged father would have to be tested to find another man who could be the father of the child in a random population. Gene frequency tables are based on laboratory tests of several thousand individuals that have been selected at random, and are calculated for racial populations. Typically, these tests are done in paternity cases (from blood donors, etc.) and are compared with other laboratories.

To illustrate how this calculation is computed, first assume that if the alleged father is homozygous, his genotype is AA. This means that all his sperm have the necessary characteristics to pass on the A gene 100 percent of the time. If he is heterozygous, his genotype being AO, his sperm have the appropriate characteristics to pass on the A gene 50 percent of the time.

X = chance of sperm having A
If a man is AA (homozygous), X = 1
If a man is AO (heterozygous), X= .5

The next step in determining the paternity index is to calculate how frequently another man at random also will be able to contribute the A gene that the child has--that is, if such a person were to have had a sexual relationship with the mother, how often would this occur. For example, assume that the frequency of the A gene occurs in a random population 25 percent of the time. Therefore, the other characteristic, O, occurs with a frequency of 75 percent. If an A gene has a 25 percent change of occurring, and A is the characteristic we are testing for, we would determine the ratio of X (the chance of the sperm having A) over Y (the frequency that A occurs in the random population). When the man is homozygous, X = 1, and if A has a frequency of 25 percent, one divided by 25 percent or X over Y equals 4. If, on the other hand, the man is heterozygous, then X = .5, and X divided by Y would be equal to 2.

X = chance of sperm having A
Y = gene frequency for A

If A = .25, O = .75

If X is 1.0 (man is homozygous)
1/.5 or X/Y = 4

If X is .50 (man is heterozygous)
.50/.25 or X/Y = 2

This calculation is done for each specific system since the true biological father of the child must contribute all the paternal genes, and, of course, the alleged father is able

to pass each such gene to his offspring. To determine the paternity index, the resulting numbers from each system tested (each X/Y) are then multiplied together.[15]

The paternity index reflects the number of random men who would have to be tested in order to find another man who could have fathered the child in combination with the mother. The paternity index number is used to determine likelihood value of paternity. The likelihood value of paternity is calculated by dividing the paternity index number and the paternity index number plus 1 and multiplying by 100 to get a percent (e.g., P1/P1+1 x 100). The calculation gives a percent basis of how many more times it is likely that the man who has been tested could be the father versus some man picked at random who has not been tested.

This method of calculating probability of paternity is employed by the majority of parentage testing laboratories in the United States and Europe, and it is the method most familiar to the American court system. However, there has been some criticism. For example, Dr. Mikel Aickin argues that "the [probability] figure is not, in fact, the probability that the alleged father is the true father." In addition, he maintains that assumptions (sometimes self-contradictory) affect the denominator of the likelihood ratio used in the calculation and that speculation about genotypes that does not constitute scientific evidence is used in postinclusionary calculation.[16] Dr. Aikin's arguments against paternity probabilities originally appeared in an article entitled, "Some Fallacies in the Computation of Paternity Probabilities," published in the American Journal of Human Genetics. Appendix B includes a summary of his argument and a rebuttal to his original article by Dr. Richard H. Walker.

SELECTING A BLOOD TESTING LABORATORY

When selecting a blood testing laboratory, the foremost consideration is whether the laboratory performs a sufficiently detailed series of tests to exclude most wrongfully accused men. The AMA/ABA Guidelines recommend a rate of 90 to 95 percent. Furthermore, in cases where an exclusion is not achieved, the persuasiveness of the inclusionary evidence is tied directly to the probability of exclusion that has been rendered by the battery of tests. In addition, one should not rely solely on a lab's advertisement that it performs both HLA and enzyme/protein tests. The probability of exclusion is tied to the number of factors and variations tested within each category of testing; different labs test different numbers and combinations of factors. There are other considerations as well, and these are discussed below.

Ability to handle required volume. The IV-D agency should determine in advance whether the lab can support the anticipated volume of work. Procedures and protocol at blood testing labs can be matters of significance during paternity trials, and the agency must make sure that the lab understands its needs in this area.

Provide service at a reasonable cost. Generally, labs that perform red blood cell enzyme and serum protein tests are less expensive than labs that perform HLA tests. The relatively flexible handling requirements for the enzyme and serum samples permit one to use labs anywhere in the country.

Provide expert testimony in selected cases. Expert testimony can be required during disputed paternity trials. In most States, extremely few paternity cases go to trial. Blood test reports can be particularly useful in encouraging a negotiated

settlement. In the estimated 5 or 6 percent of disputed cases that finally must be tried, it is highly advantageous to have medical evidence available showing the likelihood of paternity based upon genetic resemblance of the accused father and the child.

Provide effective quality control procedures. The laboratory's method of certifying and reporting test results also should be agreed on in advance. Such practices as duplicate testing for key factors by different technicians should be encouraged and discussed if they are performed. Test reports that list all tests performed and provide detailed discussions of any factor that may result in an exclusion should be required. If no exclusion is achieved, test reports should include calculations of the probability that a wrongly accused man would have been excluded, and possibly a calculation of the probability of paternity based on the test results. Expert testimony, either in person or by deposition, also should be available.

Provide adequate chain of custody. Chain of custody refers to the possession and control of the blood samples from the time they are drawn until the time the blood is analyzed. Selecting a lab requires careful inquiry concerning methods used to identify the parties and procedures used to label and seal blood specimens. Adequate precautions should be taken at every stage of the proceeding to lessen the risk of basing results on the wrong samples.

PROCEDURES FOR BLOOD TESTING LABORATORIES

The clinical laboratory plays an important role in cases of disputed parentage. Because of the legal aspects of scientific testing, precautions must be taken to ensure that the test results will be admissible as evidence in court. Consequently, such tests must be conducted with accepted techniques by qualified personnel and in such a way as to ensure the correct identification of the parties involved. Also, the chain of custody must be documented properly. The procedures followed by some laboratories are outlined below.

Step 1: Referring. Most laboratories will not perform any testing unless a case is referred by a lawyer, physician, judge, or an appropriate welfare agency.

Step 2: Scheduling. There are two alternatives to scheduling the parties to a paternity case for drawing the blood to be tested. The first alternative, if convenient, is to have everyone appear at the same time, to identify each, and to witness the drawing, labeling, and sealing of the blood specimens. The second alternative is to have the alleged father arrive before the mother and child to avoid any unpleasant scenes. If the second alternative is selected, the alleged father typically should be photographed before any blood is drawn and asked to sign his photograph before a witness. Some laboratories also take thumb prints. When the mother and child come to have their blood drawn, the mother should be asked to identify the alleged father and initial his photograph.

Step 3: Verifying the donor's identity. Regardless of which alternative is selected for scheduling blood tests, samples can be obtained, confirmed, and labeled so there is not doubt later whether the samples were drawn from the right individual. At least 2 pieces of identification (such as a driver's license, Social Security card, or birth certificate) should be required from all parties.

Prior to obtaining the blood samples, laboratory staff should counsel all parties to explain the procedure and the implication of the results. Appropriate consent forms should be completed, and a photograph and thumb print of each party should be obtained for the purposes of identification and later court use if necessary.

Step 4: Drawing the blood specimen. Blood must be drawn in sufficient quantity for the particular tests to be performed. Most blood typing procedures require only miniscule amounts of blood. Because it is difficult to obtain any significant volume of blood from a newborn infant (the child's veins are too small to locate), many laboratories require that a child be at least 6 months old and in good health before they will attempt to obtain a blood sample. In addition, a child under 6 months may possess maternal genetic markers that were transmitted across the placenta while the child was in the uterus. A similar situation occurs when a person receives a blood transfusion. A laboratory should ask a donor if he or she has had a transfusion and how long ago the transfusion occurred; a blood specimen should not be taken unless 3 months have elapsed since the transfusion.

If the laboratory performing the test was not responsible for drawing the blood, it is extremely important that the samples are labeled and sealed immediately after venipuncture and withdrawal. For the convenience of the parties, it is not at all uncommon for the blood to be drawn at a local hospital or physician's office and then shipped to the testing center. The major problem this imposes is that the blood must arrive in a condition suitable for analysis, and chain of custody must be documented carefully. For HLA testing, this usually means delivery within 24 hours. The red blood cell components are hardier and can be tested several days after the blood is drawn. If non-HLA testing is performed, the blood may be delivered to the laboratory by ordinary mail. In fact, many laboratories provide insulated mailing containers for this purpose. It is recommended, however, that blood always should be drawn and shipped early in the week to avoid any unnecessary delay caused by storage over the weekend. Also, there must be no possibility of tampering with the specimens or confusion with others stored in the same area. These precautions should be standard operating procedures in a laboratory experienced in the handling of blood for paternity testing.

Step 5: Documenting the chain of custody. The chain of custody is initiated by the person obtaining the specimen and should be maintained by each succeeding person who handles it. Specimens are marked for identification by each person who handles them. Each exchange of a specimen from one person to another should be documented by both according to a specified protocol. A single chain-of-custody form accompanying the specimen should be used to record all of the transactions described above. Many laboratories have prepared written procedures and designed forms to document the chain of custody, and each link in the chain of custody may be documented and proven by affidavit. These safeguards lessen the chance that the chain of custody will be challenged in court.

Until recently, child support enforcement programs had no guidelines or set standards to follow in the selection of a blood testing laboratory. However, in May of 1984 the AABB released their "Standards for Parentage Testing Laboratories." These standards apply to areas of personnel, policies, collection and identification of specimens, red blood cell antigen testing, HLA testing, red cell enzyme and serum protein testing and reports and calculations.

The personnel and policies section addresses the qualifications of the director and technical staff of the laboratory. It also covers various other aspects of the laboratory such as size, competency of staff, safety codes, storing and handling of reagents and blood specimens, testing methods, proficiency testing programs, use of reference laboratories, consulting with outside sources, and the development of a manual detailing all procedures and policies utilized by the laboratory.

The collection, identification, and documentation section specifies documentation vital to the legal and general laboratory aspects of the case, and requires the confidential maintenance of all case records. The standards for blood tests require the red blood cell antigen testing to be performed in duplicate, by different technicians utilizing at least two reagents from different sources for each antigen tested. Each HLA test must be plated on two separate trays or tray sets, each containing a minimum of one monospecific or two multispecific sera defining HLA-A and HLA-B antigens. These trays must be read independently. The tests for the red cell enzymes and serum proteins also must be read independently by two different technicians.

The reporting and calculations section requires that the information provided to the requesting agency be sufficient to permit an understanding of the results with a minimum of difficulty.

In May 1982, the Office of Child Support Enforcement sponsored a forum to resolve of genetic test calculation issues. More than 40 experts from 7 foreign countries and the United States convened at the International Conference on Inclusion Probabilities in Parentage Testing. The Conference was organized by the Committee for Parentage Testing of the American Association of Blood Banks. Attendees were selected for their knowledge and expertise in areas related to the calculation of parentage testing and included geneticists, statisticians, and lawyers. As a result of the Conference, uniform guidelines were established for reporting estimates of probability of paternity. These guidelines are included in Exhibit 6.2. In addition, AABB standards were developed to assure any party involved in a paternity dispute that high quality laboratory standards were established and used. Any laboratory involved in paternity testing is eligible to request accreditation by the AABB. Once accredited, laboratories are reviewed annually. As a result of these new standards, much laboratory accreditation work is now being performed by AABB.

FOOTNOTES

/1/ American Association of Blood Banks, Paternity Testing (New Orleans, LA: American Association of Blood Banks, 1978), p. vii.

/2/ Howard Bragdon, Medical Technician, et al., "Parentage Evaluations: A Biological Analysis for the Legal Profession" (Nashville, TN: Dia Clin Laboratory, Inc.), p. 5.

/3/ Baltimore Rh Typing Laboratory, Inc., Genetic Markers Inheritance Paternity Rh Laboratory-Solution (Baltimore, MD).

/4/ Bragdon, op. cit., p. 12.

/5/ B.A. Myhre, M.D., Ph.D., "The Use of Genetics in Parentage Testing" (unpublished manuscript).

/6/ Baltimore Rh Typing Laboratory, Inc., op. cit.

/7/ Joel S. Kolko, "Admissibility of HLA Test Results to Determine Paternity," The Family Law Reporter, Monogr. 2, Vol. G, No. 15 (February 15, 1983).

/8/ The Oregon Health Sciences University, Special Laboratory Services, Paternity Testing (Portland, OR).

/9/ Madeline Chinnici, "Ultraprecise Paternity Test," Science Digest (December 1984), p. 22.

/10/ American Medical Association/American Bar Association, Guidelines for Paternity Blood Testing (Washington, DC: 1976).

/11/ Henry Gershowitz, Ph.D., A Guide to Paternity Testing (Okcemos, MI: National Legal Laboratories).

/12/ Bowman Gray School of Medicine of Wake Forest University, Policies and Procedures for Medicolegal Blood Testing in Cases of Disputed Parentage (Wake Forest, NC: November 1982).

/13/ Wilma B. Bias, Ph.D., et al., "Theoretical Underpinnings of Paternity Testing," Inclusion Probabilities in Parentage Testing (Arlington, VA: American Association of Blood Banks, 1983), p. 57.

/14/ K. Hummel, "Gesellschaft for Forensische Blutgruppenkunde, e.v." Paper presented at 8th International Congress of the Society for Forensic Haemogenetics (London: September 1979), p. 237.

/15/ Basic statistical theory holds that the combined probability of a string of independent events is determined by multiplying their individual probabilities. For example, if event A occurs once every 4 days at random and event B occurs once every 4 days at random, the chance of choosing a random day and having both events occur is 1/4 x 1/4 or 1/16.

/16/ Mikel Aickin, Ph.D., "Some Fallacies in the Computation of Paternity Probabilities," American Journal of Human Genetics 36: 904-915, 1984.

EXHIBIT 6.2

GUIDELINES FOR REPORTING ESTIMATES OF PROBABILITY OF PATERNITY*

1. Testing of genetic markers in cases of disputed parentage should include multiple systems which will exclude most falsely accused men. If tests fail to exclude the alleged father, an estimate of the probability of paternity should routinely be calculated from the observed phenotypes of the mother, child, and alleged father.

2. One estimate that the nonexcluded alleged father could be the biologic father is a likelihood or odds ratio known as the Paternity Index (PI;X/Y). This compares the alleged father (X) with a random man (Y) in terms of their respective probabilities of providing an appropriate gene to the child in each of the genetic systems for which phenotypes have been determined.

3. The estimate of probability derived from the phenotypes of the mother, child, and alleged father should also be stated as a percentage expression (Probability value: W value; Likelihood; Plausibility; Relative Chance of Paternity). Since calculations to determine this estimate include a value for the prior probability, reports must state the prior probability(ies) used.

4. Other mathematical expressions may be derived from the observed phenotypes or other data. If they are included in the report, such expressions should be defined and explained.

5. Probability calculations should consider the racial origin of the mother, alleged father, and the random man. Gene frequencies should have been obtained by the examination of populations of adequate size. In some cases it may not be feasible to compare the alleged father with a random man because relevant and adequate gene frequency tables are not available.

6. Mathematical expressions of probability estimates may be accompanied by verbal predicates. If used, verbal predicates should be explained in the report.

* Richard H. Walker, M.D., ed., Inclusion Probabilities in Parentage Testing (Arlington, VA: American Association of Blood Banks, 1983), p. xiv.

CHAPTER 7
Paternity Establishment in the Courts

INTRODUCTION

> Through the ages, the status of illegitimacy has expressed society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting the condemnation on the head of an infant is illogical and unjust. Moreover, imposing difficulties on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the illegitimate child is an ineffectual--as well as an unjust--way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate State interest, compelling or otherwise. [Weber v. Aetna Casualty and Surety Co., 406 US 164, 92 SCt 1400, 1406-07, 31 LEd2 768 (1972).]

With this case, the U. S. Supreme Court initiated the constitutional transformation of the status of children born out of wedlock. The common law beheld the illegitimate child as filius nullius--the child of no one. The status was so undefined that the legal tie between the child and his or her mother was not easily established, and no legal mechanism existed to establish paternal identity.[1] Since 1968, the Supreme Court has handed down a number of decisions which dictate that neither the Federal Government nor the States may discriminate against illegitimate children without a substantial and proper State interest as justification. [See Levy v. Louisiana, 391 US 68, 88 SCt 159, 20 LEd2d 436 (1968); Glona v. American Guarantee and Life Ins. Co., 391 US 73, 88 SCt 1515, 20 LEd2d 441 (1968); Labine v. Vincent, 401 US 532, 91 SCt 1017, 28 LEd2d 288 (1971); Weber v. Aetna Casualty and Surety Co., supra; Gomez v. Perez, 409 US 535, 93 SCt 872, 35 LEd2d 56 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 US 619, 93 SCt 1700, 36 LEd2d 543 (1973); Jimenez v. Weinberger, 417 US 628, 94 SCt 2496, 41 LEd2d 363 (1974); Mathews v. Lucas, 427 US 495, 96 SCt 2755, 49 LEd2d 651 (1976); Trimble v. Gordon, 430 US 762, 97 SCt 1459, 52 LEd2d 31 (1979); Lalli v. Lalli, 439 US 259, 99 SCt 518, 58 LEd2d 503 (1978); United States v. Clark, 445 US 23, 100 SCt 895, 63 LEd2d 171 (1980).]

Concomitant with the establishment of constitutional rights for children born out of wedlock were two other social trends. The first and foremost was the growth of out-of-wedlock births. The second was a growing sensitivity in Congress and State legislatures regarding the importance of paternity establishment to the child and the cost to society of supporting a significant percentage of these children through public assistance. [See Chapter 1, supra.] Thus, the creation of an equal right to support coincided with an increased awareness of the need to quantify and enforce that right. Congress responded in 1975 by creating the Child Support Enforcement Program.

42 USC 654(4) and (6) require each State plan for child support enforcement to provide that the State and all relevant political subdivisions will endeavor to establish the paternity of all children who were born out of wedlock and who receive AFDC or who have made application for non-AFDC services. 42 USC 654(9) extends the responsibility to include cooperation with other States in establishing paternity across State lines. Thus, the establishment of paternity is not merely an ancillary responsibility to that of collecting child support. The Federal statute clearly establishes an independent obligation on the States to seek paternity establishment in its own right.

Neither the Social Security Act nor Federal regulations dictate the form that paternity establishment must take. Clearly, since the main concern of the IV-D Program is support enforcement, any method of establishment must be binding on the alleged father and should include an enforceable support obligation. Traditionally, in our legal system, facts are established and obligations are imposed through the entry of a "judgment," or its legal equivalent. This chapter assumes that, in order to fulfill the statutory responsibility, such formality is necessary.

PRELIMINARY ISSUES

Jurisdiction

Two fundamental issues must be resolved prior to filing a paternity action:

- Which local court possesses subject matter jurisdiction over paternity actions?
- Can that court obtain personal jurisdiction over the prospective parties to the action, requisite to render a valid, enforceable judgment of paternity?

Where the alleged father resides within the State, the issue of subject matter jurisdiction ordinarily is resolved by simple reference to the State's paternity statute. In addition to filing an action pursuant to the paternity statute, it is sometimes possible to file an action under a Declaratory Judgment Statute[2] or under the intrastate mechanism of the Uniform Reciprocal Enforcement of Support Act (URESA). Using such an alternative can be an effective way to avoid filing actions under an outmoded criminal bastardy statute, of creating subject matter jursidiction in a court that lacks specific statutory authority, and perhaps of avoiding the necessity of granting the alleged father a trial by jury.

Paternity actions are in personam in nature, meaning that the court must obtain jurisdiction by service of process made on the defendant in accordance with State statute or court rule.[3] For defendants located within a State's territorial boundaries, State service of process and venue statutes and court rules should be consulted.

The thornier legal issue arises when the alleged father resides out of State and cannot be served within the State. One approach to this situation is a URESA action. Section 27 of the 1968 version of the Act specifically provides for interstate paternity determinations. In addition to the language in the newer version of the Act, most appellate courts that have considered the issue have held that paternity jurisdiction is included in the original version of the Act as well. [See Clarkston v. Bridge, 539 P2d 1094 (Or. banc 1975); State of Iowa ex rel. Nauman v. Troutman, 623 SW2d 269 (Mo.App. 1981);

81 ALR3d 1175 (1977).] Due to evidentiary problems, which make contested URESA paternity cases difficult to pursue, and the reluctance of some jurisdictions to cooperate in interstate paternity establishment, it may be more effective to bring the action in the State where the children reside. A thorough, though outdated, annotation of this issue appears at 76 ALR 3d 708 (1977). [See also Levy, "Asserting Jurisdiction Over Nonresident Putative Father in Paternity Actions," 45 U.Cinn.L.Rev. 207 (1976).]

In Pennoyer v. Neff, 95 US 714, 24 LEd 565 (1878), the U.S Supreme Court established the principle that a court's jurisdiction over persons is generally coextensive with the boundaries of the State in which it sits. During the next several decades, exceptions to this general rule developed to allow courts to exert jurisdiction over persons no longer physically present within the State. The exceptions very nearly devoured the rule and tread heavily on the due process clause of the 14th Amendment to the U.S. Constitution. The high court responded with the landmark case of International Shoe v. Washington, 326 US 310, 66 SCt 154, 90 LEd 95 (1945), which set forth the familiar principle that a court may exercise jurisdiction over out-of-State defendants whose prior presence or activity within the State amounted to certain "minimum contacts" with the State, such that "traditional notions of fair play and substantial justice" are not offended by allowing the suit to be maintained in that court. Subsequently, in Hansen v. Denkla, 357 US 235, 78 SCt 1288, 2LEd2d 1283 (1958), the Court added the requirement that the defendant's contact with the forum State must have been purposeful and of a nature that availed him of some benefit conferred by the State along with the privilege of conducting the activity that constituted the contact.

The U.S. Supreme Court has had no opportunity to apply this line of case law to a paternity action maintained against an out-of-State alleged father.[4/] Nevertheless, many State courts have been presented with the issue. The emerging test for personal jurisdiction is two-pronged, requiring the existence of and compliance with a State statute or court rule that authorizes service of process outside the State and facts that meet the International Shoe/Hansen v. Denkla due process requirements.

Because few States have enacted long-arm statutes that specifically provide for extraterritorial service of process in paternity actions, much of the case law has centered on the first prong of the test. The issue is: Does the defendant's alleged participation in the conception of the child or his subsequent failure to support him or her, amount to a "tort," as the term is used in the long-arm statute? The split of authority on this issue has been roughly even. At least six courts have broadened the definition of tort to encompass the paternity and support action. [Poindexter v. Willis, 87 Ill.App.2d 213, 231 NE2d 1 (1967); State ex rel. Nelson v. Nelson, 298 Minn. 438, 216 NW2d 140 (1974); Howells v. McKibben, 281 NW2d 154 (Minn. 1979); Neill v. Ridner, 153 Ind.App. 149, 286 NE2d 427 (1972); Bakora v. Balkin, 14 Ariz.App. 569, 485 P2d 292 (1971); In re Miller, 86 Wash.2d 712, 548 P2d 542 (1976); Black v. Rasile, 318 NW2d 475 (Mich.Ct.App. 1980).]

An equally impressive number of courts have refused to stretch the tort definition. [State ex rel. Larimore v. Snyder, 291 NW2d 241 (Neb. 1980); Howard v. Craighead Co. Ct., 613 SW2d 386 (Ark. 1981); Barnhart v. Madvig, 526 SW2d 106 (Tenn. 1975); A.R.B. v. G.L.P., 180 Colo. 439, 507 P2d 468 (1973); State ex rel. Carrington v. Schutts, 217 Kan. 175, 535 P2d 982 (1975); Anonymous v. Anonymous, 49 Misc2d 75, 268 NYS2d 710 (Fam.Ct. 1966); State ex rel. McKenna v. Bennett, 28 Or.App. 155, 558 P2d 1281 (1977); In re Jane Doe 38 Wash.App.251, 684 P2d 1368 (1984); Illinois v. Flieger, 124 Ill.App.3d 604,

80 Ill.Dec. 739, 465 NE2d 1376 (1984).] These decisions have noted that, logically, the broad definition of tort (duty plus breach) applies only to the support claim, which is ancillary to the underlying action for declaration of paternity. The act of sexual intercourse itself, even given the resulting conception, does not cause tortious injury or damages, so the argument goes. The alleged father's subsequent breach of his duty of support is analogous to the legal concept of "tort." Nevertheless, since it was solely the act of sexual intercourse that occurred within the forum State in each of the cited cases, the courts were held to lack jurisdiction over the underlying claim, and the ancillary claim failed along with it.

As one would expect, the "no tort" decisions do not analyze the second prong in the test--"the minimum contacts" analysis. Two "protort" cases, Howells v. McKibbin, supra, p. 157, and Larsen v. Scholl, 296 NW2d 785, 788 (Iowa 1980), set forth the following five criteria:

- The quantity of the alleged father's contacts with the forum State
- The nature and quality of those contacts
- The source and connection of the paternity action with those contacts
- The interest of the forum State in paternity establishment and support enforcement
- The convenience or inconvenience to the parties that results from allowing the forum State to assert jurisdiction.

In both of these cases, which involved repeated social and sexual intercourse within the forum State, a mother and child very much in need of financial support from the alleged father and an alleged father who lived nearby in a neighboring State, jurisdiction was held to exist. Four appellate courts have rendered contrary decisions where the child was conceived out of the State, despite the forum State's recognized strong interest in providing a remedy. [Ulmer v. O'Malley, 307 NW2d 775 (Minn. 1981); Bartlett v. Superior Ct., 86 Cal.App.3d 72, 150 Cal.Rptr.25 (1978); Barnhart v. Madvig, supra; State v. Shaffer, --- P2d ---, 11 FLR 1100 (Ariz. App. 1984).]

Right to Appointed Counsel

Does an indigent paternity defendant have an absolute constitutional right to counsel at public expense?[5] Recent decisions have held that no such absolute right exists, at least under the due process clause of the U. S. Constitution. [State ex rel. Hamilton v. Snodgrass, 325 NW2d 740 (Iowa 1982); Wake Co. ex rel. Carrington v. Townes, 293 NE2d 95 (N.C. 1982); Nordgren v. Mitchell, 716 F2d 1335 (CA10 1983); State ex rel. Adult and Family Serv. Div. v. Stoutt, 57 Or.App. 303, 644 P2d 1132 (1982). See also Sheppard v. Mack, 68 Ohio.App.2d 95, 427 NE2d 522 (1980); State v. Walker, 87 Wis.2d 443, 553 P2d 1093 (1976) and Johnson v. James, 38 Wash.App.264, 10 FLR 1564 (1984).] Prior to these decisions, a contrary rule was emerging, as exemplified by the California Supreme Court's decision in Salas v. Cortez, 24 Cal.3d 22, 154 Cal.Rptr. 529, 593 P2d 226, cert. den. 444 US 900, 100 SCt 209, 62 LEd2d 136 (1979).[6] The recent change can be attributed to the U.S. Supreme Court's decision in Lassiter v. Dept. of Social Services, 452 US 18, 101 SCt 2153, 68 LEd2d 640 (1981).

Lassiter involved a parental rights termination proceeding instituted against an indigent mother. The Court held that an absolute right to appointed counsel exists only where an indigent defendant is likely to be incarcerated or receive comparable loss of liberty as a result of the present proceeding, should he or she not prevail. Where no immediate potential for incarceration exists, a strong presumption against appointment of counsel arises. This presumption may be rebutted. [Mathews v. Eldridge, 424 US 319, 96 SCt 893, 47 LEd2d 18 (1976).] Under the Eldridge analysis, a qualified right to appointed counsel exists where the defendant's substantial interest in the outcome outweighs the government's interest in economical and informal proceedings and where there exists a serious risk of an erroneous decision in the absence of counsel.[7] The first four cases cited in the above paragraph apply this analysis to paternity cases brought against indigent alleged fathers by IV-D agencies.

Most post-Lassiter decisions concede that a man who is found to be a child's father in a paternity action runs a risk of future incarceration for civil contempt or criminal nonsupport and that the paternity judgment may be binding in such a proceeding. Nevertheless, the developing trend holds that the delayed and indirect nature of the threat to the defendant's liberty interest creates a presumption against the right to counsel.[8] The trial court must decide whether the presumption is overcome in any given paternity case after conducting the balancing test set out above. The holdings point out that the alleged father's interest in the outcome of the action is substantial in both social and economic terms and that the State shares an interest in accurate paternity determinations.

Despite these considerations, which tend to favor a right to appointed counsel, representation of the alleged father in the ordinary paternity case is not likely to decrease significantly the risk of erroneous decisions. The courts noted that paternity actions normally do not involve complex evidentiary issues and that genetic paternity test results will weed out erroneous allegations. As a result, the decisions appear to stand for the proposition that only in complex evidentiary situations should the balancing test result in a due process right to appointed counsel.[9] Clearly, the trial court is vested with a broad discretion in making the determination on a case-by-case basis.

Two decisions have been rendered by State appellate courts, subsequent to Lassiter, that apply the Eldridge test to the paternity situation and reach the opposite result. In Kennedy v. Wood, 439 NE2d 1367 (Ind.App. 1982) and Corra v. Coll, 451 A2d 480 (Pa.Super. 1982), the appellate courts in Indiana and Pennsylvania concluded that paternity actions are inherently complex and that a significant risk of erroneous decision exists whenever an indigent alleged father is not represented by counsel. That being the case, indigent alleged fathers are guaranteed a right to counsel in all paternity actions brought on behalf of the State. The significance of these two holdings should not be underestimated, given the trial court's broad discretion in applying the test.

Occasionally, defendants will argue that because the IV-D agency provides counsel for the plaintiff in the paternity cases, the State has an obligation under the equal protection clause to afford the defendant with the same benefit. Courts have held that a State's practice of representing plaintiffs and not defendants in paternity actions is rational and therefore constitutional, due to the common interest shared by the State and the plaintiffs. [Dept. of Health and Rehab. Services v. Heffler, 382 So2d 301 (Fla. 1980); State ex rel. Hamilton v. Snodgrass, supra, p. 744.]

Two other decisions related to this topic are instructive. In Ramsey Cty. Public Defenders Office v. Fleming, 294 NW2d 275 (Minn. 1980), the Minnesota Supreme Court held that where an indigent alleged father is given a right to appointed counsel by statute, the State must inform him of that right prior to proceeding to judgment. White v. Gordon, 460 A2d 828 (Pa.Super. 1983), held that nonindigent alleged fathers must be afforded a reasonable opportunity to obtain counsel.

Right to State-Financed Paternity Testing [10]

The U.S. Supreme Court's decision in Little v. Streater, 452 US 1, 101 SCt 2202, 68 LEd2d 627 (1981), and several State court decisions have firmly established the right of the indigent alleged father to State-financed genetic paternity tests . Most of the courts have applied the Eldridge test and concluded that the risk of erroneous decision is simply too high in the absence of scientific testing. [Anderson v. Jacobs, 68 OhioSt.2d 67, 428 NE2d419 (1981). See also Michael B. v. Superior Ct., 150 Cal.Rptr. 586 (Cal.App. 1978); Walker v. Stokes, 344 NE2d 159 (Ohio App. 1975); Franklin v. Dist. Ct., 571 P2d 1072 (Colo. 1977).]

Other courts have construed the State's version of the Uniform Parentage Act (UPA) to create a right in the parties to the tests, given the mandatory language in the statute forcing the court to order the tests upon the request of either party. Once such a right is recognized, equal protection may be held to prohibit the conditioning of the right on the alleged father's ability to pay. [Keesee v. Gue, 266 SE2d 146 (W.Va. 1980).] Still other courts have extended the right to State-financed tests on the theory that such tests are necessary to the alleged father's defense and are part and parcel of his right to appointed counsel, which exists in the State by reason of statute or case law. [M. v. S., 169 N.J.Super. 209, 404 A2d 653 (1979).]

The Supreme Court made much of the criminal nature of the Connecticut bastardy statute and its peculiar provision that requires the alleged father to bear the burden of proof on the ultimate issue where the complaining witness is constant in her allegation. [452 US, at 12.] Under such a reading of Little, a statutory scheme that is truly civil and that places the burden of proof on the plaintiff at all times might not create a right to State-financed paternity testing for indigent defendants. Nevertheless, the trend in the appellate courts seems to be to apply Little to all types of paternity statutes.

In what is perhaps the most far-reaching decision on this issue, the Georgia Supreme Court has held that the State must finance the tests whenever it is the moving party, regardless of the financial condition of the alleged father. [Boone v. State, Dept. of Human Resources, 250 Ga. 379, 279 SE2d 727 (1982).] The decision points out that to allow the court to order the defendant to pay for even a portion of the test costs prior to a determination of paternity constitutes a "taking" without the necessary due process hearing. It might be possible to avoid the effect of this holding by asking the court for a preliminary hearing to determine the strength of the plaintiff's case; the statutes of many States provide for such hearings.[11] The Boone decision specifically did not invalidate the court's authority to include in its eventual judgment a provision assigning the test costs to the losing party. According to appointed counsel decisions, a cost judgment may be entered against an indigent defendant with the proviso that he enjoys an exemption from execution of the judgment as long as his indigency continues. [M. v. S., supra, citing Fuller v. Oregon, 617 US 40, 53, 94 SCt 2116, 2124, 40 LEd2d 642 (1974).]

Right to Jury Trial

State statute generally determines whether a judge or jury will try a paternity proceeding. The issue finds its way into appellate case law when a State updates its paternity statute to provide for court-tried cases only, where the statute is ambiguous or silent on the issue, or where the State opts to file its paternity cases under a statute other than the paternity statute in order to avoid jury trials. Clearly, avoiding the paternity statute is possible only where it is cumulative of other remedies and where a substitute remedy, such as a Declaratory Judgment Act or the URESA mechanism, exists. The issue also can arise where a local rule provides that unless a jury trial is requested in a specific manner by a specific date, the statutory right to trial by jury shall be deemed waived. The manner in which a constitutional right can be waived differs from the manner in which a mere statutory right can be waived, so the classification of the right can be important.

The historical nature of paternity proceedings as quasi-criminal and the fact that the State, with all its resources and expertise, is maintaining the action can cause a judge to react favorably to the alleged father's demand for trial by jury. Nevertheless, a good argument can be made for the proposition that jury trials are not appropriate for paternity cases for a number of reasons:

- Docket delays of over a year are not uncommon.
- Jury trials can last several days, using up valuable court and attorney time, whereas a bench trial normally can be completed in half a day.
- The evidence is of a highly personal nature and, as is the case with juvenile court proceedings, should not be affected by the chilling effect of public disclosure.
- The delay factor acts in the favor of the alleged father by allowing him additional freedom from his support obligation, which has the further effect of providing a disincentive to negotiation and settlement.

Courts that have addressed the issue of an alleged father's constitutional right to trial by jury in a paternity case have found that right to be nonexistent. [State ex rel. Goodner v. Speed, 96 Wash.2d 838, 640 P2d 13 (1982); State ex rel. Thomas v. Cahill, 443 A2d 497 (Del.Super. 1982); Robertson v. Apuzzo, 170 Conn. 367, 365 A2d 824 (1976).]

Since the Seventh Amendment does not apply to the States, the constitutional analysis centers on the language of the applicable State constitution. State constitutions generally contain a clause that reads something like "the right of trial by jury shall remain inviolate."[12] This type of clause generally is construed to mean that any right to jury trial that existed at common law, on either the date the constitution was adopted or the date the constitution specifies as being applicable, cannot be abridged by legislative enactment. The three decisions cited above note that there was no such thing as a common law action for declaration of paternity and support, illegitimate children being without a common law right to support from their fathers. That being the case, no right to jury trial existed and the legislature is free to grant or revoke the statutory right at any time. The Robertson case is particularly interesting; it holds, at p. 832, that the State

may deny a jury trial to those alleged fathers who are unable to tender a $100 fee. The fee was held to be rational, given the additional costs inherent in jury trials, and thus free from equal protection problems.

Statutes of Limitation

Historically, the existence and extent of statutory limitations placed upon the bringing of paternity actions have varied widely among jurisdictions. The Uniform Act on Paternity (UAP), 9A U.L.A. sec. 3, encourages States to enact a limitation only as to the father's liability to reimburse the plaintiff for support provided to the child in the past in lieu of a limitation that would bar the action for declaration of paternity. At least one court has construed a general statute of limitation to operate in such a manner. [Winston v. Robinson, 270 Ark. 996, 606 SW2d 757 (1980).] In 1979, the Minnesota Supreme Court went one step farther by holding that the continuing nature of the support obligation tolls the operation of any statute of limitation throughout the child's minority. [D. v. R., 277 NW2d 27 (Minn. 1979). See also, Sutherland v. Hurin, 605 P2d 1133 (Mont. 1980); Matter of M.D.H., 437 NE2d 119 (Ind.App. 1982); 16 ALR 4th 926 (1982).]

Numerous recent cases have analyzed statutes of limitation, as applied to paternity actions, for possible equal protection violation. The applicable equal protection standard was set forth in Gomez v. Perez, 409 US 535 (1973), which requires all States to provide illegitimate children an opportunity to obtain paternal support on a more or less equal footing with the opportunity provided legitimate children. The decisions of State courts have been decidedly inconsistent.[13] Recently, the U.S. Supreme Court has handed down two decisions on point. In Mills v. Hableutzel, 456 US 91, 102 SCt 1549, 71 LEd2d 770 (1982), the Court struck down the Texas 1-year statute of limitation. In Pickett v. Brown, 103 SCt 2199, 76 LEd2d 372 (1983), the Tennessee 2-year statute was invalidated.

Under both decisions, the first issue in the equal protection analysis is whether the limitation period is sufficiently long to provide those with an interest in illegitimate children to bring suit on their behalf. Justice O'Connor's concurring opinion in Mills, p. 105, and Justice Brennan's majority opinion in Pickett both stress that the mother's strained financial condition and the possibility that she may be trying to maintain her relationship with the child's father as well as other social and economical factors may act to inhibit her from filing an action against the father. The fact that a statute may toll the running of the limitation period where the father is providing support or has acknowledged his paternity in writing, or that an exception is made for children who are likely to become public charges, does not necessarily act to mitigate the inhibiting factors in a significant number of potential paternity actions. [Pickett, p. 2209.] Large caseloads can produce a similar inhibition on the States, which often stress cases with a better potential for recovery than contested paternity cases.

The second issue for inquiry under the two holdings is whether the time limitation placed on the bringing of the action is substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. Both 1- and 2-year periods fail this test. The fact that in Texas and Tennessee the limitation periods applicable to other legal actions are tolled during a child's minority was seen to damage seriously the States' argument that the statutes were necessary to avoid stale or fraudulent claims. Many civil actions are fraught with problems of proof, but the States could offer no justification for treating paternity actions differently. Both decisions pointed out that recent

developments in scientific paternity testing attenuate any connection between the statute and a State's interest in avoiding stale or fraudulent claims, although both decisions refused to go so far as to hold that the availability of the tests negates a State's argument altogether.[14]

It seems clear that the rationale behind Mills and Pickett eventually will be applied to periods in excess of 2 years, but the point at which a State's interests begin to outweigh the illegitimate child's fundamental need for paternity establishment is unclear. The equal protection test is too subjective to provide a predictable answer. The only clues currently available come from recent State court decisions. Three-year statutes of limitation have been struck in Montana, North Carolina, Kentucky, and West Virginia. In Florida, a 4-year statute has been invalidated. A 6-year period has been upheld in Michigan and struck in Oregon.[15] The Pennsylvania Superior Court rejected an equal protection challenge to its 6-year limitation on establishing paternity. This decision was appealed to the U.S. Supreme Court but remanded when the Pennsylvania State legislature repealed the statute [Paulusson v. Herion, 483 A2d. 892 (1984).] Louisiana's new 19-year statute was upheld in In re Grice, ---So2d---, 11 FLR 1173 (La.App. 1985).

In addition to attacking the constitutionality of a statute of limitation, it is often possible to avoid its application to a specific case by bringing the case within a tolling provision. As noted above, it has been held that a provision which tolls the running of all limitation periods during a child's minority supersedes the limitation period contained in the paternity statute.

Other facts that may amount to a tolling of the statutory period include an oral or written acknowledgment of paternity, providing support for the child, or leaving the jurisdiction.[16] Also, the defendant generally must inject the bar of a statute of limitations as an affirmative defense or it is deemed waived.[17] Thus, the existence of the statute does not completely bar the door to the courthouse.

Congress addressed the statute of limitations issue in the Child Support Enforcement Amendments of 1984. 42 USC 666(a)(5) now requires each State to enact laws that provide "procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday." Compliance with this requirement will decide many of the issues raised above, at least as to cases in which the child is conceived or born after the change in the statute of limitation or within the previous statutory period. Congress' language would seem to require application of the new statutory period to existing cases as well. Because statutes of limitation generally are viewed as procedural, being a potential bar to the remedy and not the underlying cause of action, a change may be implemented retrospectively. [See Roe v. Doe, 581 P2d 310 (Hawaii 1973); Wolf v. Goin, 552 P2d 258 (Or.App. 1975); Sutherland v. Hurin, 605 P2d 332 (1980); State v. Preston, 409 A2d 792 (N.H. 1979).] Nevertheless, some courts and legislatures may conclude to apply the change prospectively. In these States, the recent case law, discussed above, will continue to be relevant as program attorneys seek to avoid the bar of a previous statutory period.

Settlements

Two issues come up regarding the settlement of paternity cases. First, what effect does a settlement agreement between the mother and alleged father, which predates the opening of the IV-D case, have on the State's ability to establish paternity or modify the support amount? Second, what procedure must be employed to create a valid, enforceable

consent judgment? Since the overwhelming majority of IV-D paternity actions are resolved by way of agreement, the importance of the answers to these questions cannot be overstated.

Assume that the mother and the alleged father have entered into an agreement whereby she agreed not to press a paternity action against the alleged father in exchange for a lump sum payment of $500. Assume further that the agreement was a simple out-of-court settlement, with no judicial scrutiny or approval, and assume that the alleged father complied with his agreement to pay the $500. Now assume that circumstances change. Either the mother becomes financially destitute and turns to AFDC for support of the child, or she decides to renege on her agreement and applies for non-AFDC paternity establishment services. Does she, or does the child, still have a cause of action?

Until recently, the validity of such an agreement was judged solely on simple contract principles, and the mother generally was barred from further legal action if there was consideration behind the agreement. In our example, the mother benefited by receiving $500 and suffered a detriment by giving up her cause of action. Thus, the older cases would have held the consideration sufficient to classify the agreement as a contract, and the mother would have been estopped from bringing suit, despite the clear folly of her agreement and its adverse impact on her ability to support the child.[18]

Modern appellate decisions and section 6(d) of the UPA refuse to grant binding effect to such agreements, regardless of their terms, unless they have been approved by a court.[19] The language of the UPA seems to assume that the agreement should be approved at the time of its making, in conjunction with a pending lawsuit. However, some courts have construed similar language to allow the judge to determine the fairness and adequacy of the agreement at the point in time when the alleged father enters it as a defense to the paternity action. The court then may allow the defense if the agreement was fair.[20]

The rule has developed in a slightly different direction regarding the enforceability of the agreement against the alleged father. Even though an agreement may not bind the mother or child, most courts have found the support provisions of an agreement to be enforceable, assuming some form of consideration can be found in the agreement. Furthermore, courts have shown a willingness to stretch the definition of consideration a bit in order to allow the mother to collect arrearages that have accrued under an agreement providing for installment support payments. Consideration has been held to be sufficient where the mother agrees not to file a civil paternity action, agrees to allow the alleged father to exercise some visitation rights or some control over the way the child is raised, agrees to move away, or agrees to give the child the father's name.[21] Some cases hold that the moral duty of a father to support his offspring will suffice as consideration.[22] It also has been held that the child, as third party beneficiary of such an agreement, has standing to enforce his or her terms against the alleged father.[23] Thus, the agreement may not bind the mother or child as to current or future support, and yet arrearages that have accrued under the agreement may be collectible by way of an action for breach of contract.

Of course many of these agreements will be oral and therefore unenforceable where they call for acts or forbearance that cannot be performed within 1 year. The statute of frauds almost always will apply. Furthermore, the language contained in the UPA is so broad as to appear to void any such agreement entered into without court approval, even

ac to the support obligation of the alleged father.[24] The agreement would still constitute an admission against interest, however.[25]

Assume that the agreement was fair and adequate when entered, that both parties have performed according to their respective promises, but that a modification appears to be necessary or equitable. Does a court have the authority to enter such a modification? The traditional answer was no, but, again, the law is changing. Many of the modern statutes grant an approved settlement the status of a judgment, indicating that the support provisions are modifiable to the same extent as any other support order.[26] Other statutes specifically provide that such an agreement is modifiable if the alleged father acknowledged his paternity as part of the agreement.[27] Even without specific statutory authority, it may be that a court's failure to assume jurisdiction for such a purpose would violate the illegitimate child's right to equal protection vis-a-vis legitimate children. Most States refuse to allow the parents of legitimate children to enter into agreements for future support that purport to bind the courts. [See Chapter 9, supra.] As a last resort, it might be possible to couch the action in terms of a request for recision of an unconscionable contract, given the alleged father's usual advantage in bargaining position at the time such an agreement is entered into.

The most frequent contact a court will have with paternity settlements will be those that are made by the IV-D agency and passed on to the court for disposition. As pointed out above, the modern statutes generally require that such settlements be court approved, and the Social Security Act probably requires a judgment of some sort.

PLEADING THE ACTION

Form of the Action

In most jurisdictions, the modern paternity act provides for a civil action. With the exception of the rights afforded indigent paternity defendants to appointed counsel and State-financed blood tests, the action proceeds like any other civil action. The proceeding is initiated with a petition or civil complaint instead of an indictment or criminal information. The purpose of the action is to determine the legal status of the parent-child relationship and not to seek societal retribution against the alleged father. In many jurisdictions, the language of the current statute carries criminal connotations, but the courts "endeavor to ascertain the true intention of the legislature, and give it effect, rather than carry out literally the terms employed." [10 AmJur2d Bastards Sec. 75 (1963); Com. ex rel. Miller v. Dillworth, 204 Pa.Super. 420, 205 A2d 111 (1964).] Service of process generally is accomplished upon a civil summons pursuant to State civil service of process statutes and rules, although some of the older statutes still provide for use of a warrant upon which the defendant is arrested, even though the resulting action may be conducted as a civil action.[28]

Burden of Proof

The burden of proof required by the statute generally follows the form of the proceeding. Modern statutes, including the UPA, clearly assume or specifically provide that the action is civil and adopt the normal civil burden of proof, preponderance of the evidence. [Roods v. Roods, 645 P2d 640 (Utah 1982); Isaacson v. Obendorf, 581 P2d 350 (Idaho 1978); Doe v. Roe 647 P2d 305 (Hawaii App. 1982).] In Missouri, a State with no

specific statutory procedure for determining paternity, it likewise has been held that the applicable burden of proof is preponderance of the evidence. [L.D. v. J.D., 481 SW2d 17 (Mo.App. 1972).]

Several States have opted for a middle ground, either by statute[29] or court decision[30] and have adopted the "clear and convincing evidence" standard. This standard requires evidence that exceeds a mere preponderance but does not require proof beyond a reasonable doubt. At least two States, both of which have very criminal-looking statutes, apply the reasonable doubt burden of proof rule.[31] If any trend is discernable, it is toward the adoption of the civil burden, as a result of the gradual enactment of the UPA by the States.

Parties

Under the UPA, section 9, the child, the natural mother, all presumptive fathers as established by section 4 of the Act, and all alleged fathers who are within the jurisdiction are necessary parties. This section has been held to be jurisdictional. [Matter of Burley, 658 P2d 8 (Wash.App. 1983); Perez v. Department of Health, 71 Cal.App.3d 923, 138 Cal.Rptr. 32 (1977).] In addition, all alleged fathers outside the jurisdiction of the court must be given notice of the proceeding and an opportunity to appear. The UPA grants all these parties standing to bring the action as well. In addition, "any interested party" may bring an action where a presumption arises because the alleged father has held the child out to the community as his, or has filed a written acknowledgment of paternity with the proper State or local agency. Where no presumption arises under the Act, the State agency that is named in the statute also may bring the action.

The Uniform Act on Paternity (UAP), section 2, contains similar standing provisions, allowing the suit to be commenced by the child, the natural mother, or the public authority chargeable by law with supporting the child. If paternity has been acknowledged, or otherwise determined by law, the list is expanded to include any third party who has provided support to the child.

Courts in at least two States that have yet to adopt one of the uniform acts have dealt with the issue. In S. v. S., 595 SW2d 357 (Mo.App. 1980), the Missouri Court of Appeals, Western District, held that the child is a necessary party to any action in which paternity becomes a contested issue, and that a guardian ad litem must be appointed to represent the child's interests. The court stressed the need to avoid conflicts of interest between parents and child, to protect the integrity of the fact-finding process (which too easily can be subverted by collusive suits), and to promote judicial efficiency. Allowing a suit to reach a judgment that is not binding on the child because the child is not made a party promotes duplicitous lawsuits, and is therefore an inefficient use of the judiciary, as well as being potentially unfair to the alleged father, according to the opinion. Conversely, an appellate court in the State of New York has held that the child is not a necessary party to a paternity action brought by the IV-D agency. [Commissioner of Social Services v. Bailey, 79 App.Div.2d 572, 424 NYS2d 24 (1st Dept. 1980).]

Some of the older statutes, which tend to be criminal or quasi-criminal in nature, limit the bringing of the action to the local prosecuting attorney, who brings the action on behalf of the county or the State. Under such a statute, neither the child nor the mother are technically parties to the action. The mother acts more in the nature of a complaining witness, and the child is an incidental beneficiary of the action. For an example of this type of statute and its effect on the standing of the parties, see State ex

rel. Barton v. Veley, 651 P2d 683 (Okla. 1982). The Oklahoma statute was held to prohibit an action brought on behalf of the mother by a private attorney, although it was construed to allow the addition of the mother as a party to allow for her representation by counsel other than the prosecutor but only after the prosecutor files the action.

Few appellate decisions discuss the party issue in the IV-D context, but the cases that do exist are very interesting. Two cases stand for the proposition that IV-D paternity cases are brought by the State on behalf of the child, and that the proper nominal plaintiff is the child, not the custodial parent. [State ex rel. Warren v. Mahan, 329 NW2d 673 (Iowa 1983); State ex rel. Adult and Family Services Division v. Bradley, 666 P2d 249 (Ore. 1983).] The latter case further held that since the State is asserting the rights of the child, the State can raise any issue which could be raised by the child.

Perhaps the most interesting line of cases is from the State of Washington, where the courts have discussed the proper procedure for adding the child to the action as party plaintiff. Section 9 of the UPA requires that the child be a party to the action and that a guardian ad litem be appointed to represent the child's interests. The Act presumes that the interests of the parents and the child are too divergent to allow either of them to represent the child.

Requiring the action to be brought in the name of the child and the appointment of a guardian ad litem creates a procedural problem. Normally, the natural mother acts as "next friend" to the child and files the action on the child's behalf. After the action is commenced, and it is clear that the alleged father intends to contest paternity, the court appoints the guardian. Two Washington cases agree that the Act prohibits the natural mother from representing the child even for the limited purpose of filing the action, and further appear to hold that the child must be served (either personally or through the guardian ad litem) with the initial process before the court obtains jurisdiction. [State v. Douty, 92 Wash. 930, 603 P2d 373 (1979); Hayward v. Hansen, 97 Wash. 614, 647 P2d 1030 (1982).] To handle this problem, someone other than the natural mother could act as next friend for the limited purpose of filing the petition; then the court could enter an immediate ex parte order appointing the guardian, who can accept service of process on behalf of the child. Washington chose to pursue an even more fundamental solution by amending the statute to allow the IV-D agency to bring the action without naming the child as a party.

Guardians Ad Litem

As noted above, there is a discernable trend toward requiring the addition of the child as party-plaintiff and the appointment of a guardian ad litem to represent the child's interests. Unfortunately, there is some confusion about the proper function of the guardian ad litem. The UPA does little to lessen the confusion; it merely states that the child may be represented by its "general guardian or a guardian ad litem" without any guidance concerning the responsibilities which attach to the office.

A court generally appoints a guardian ad litem to represent the interests of infant defendants, whereas a "next friend" normally functions in a corresponding capacity for infant plaintiffs. However, a next friend's function generally is limited to acting as nominal plaintiff to avoid the legal incapacity suffered by the child as a result of his minority. A guardian ad litem has considerably more extensive duties, and is generally

representing the child in a legal capacity and as an officer of the court.[32] As a result, the list from which most courts select guardians ad litem often is composed exclusively of attorneys, who convert the paternity trial into a three-party lawsuit. If the guardian ad litem takes his or her responsibility seriously, he or she should be actively involved in discovery, pretrial negotiations, and the trial itself, including appeals. It is difficult to reconcile this concept of the function of the guardian ad litem with the practice in some States of appointing the IV-D agency as next friend or guardian ad litem. Clearly, the interests of the IV-D agency can diverge from those of the child to the same extent as the natural mother's.

In States that require a guardian ad litem, the appointment generally is accomplished by filing a motion with the court. The appointment is by ex parte order of the court.

PRETRIAL MOTION PRACTICE

Pretrial Hearing

The UPA[33] and many of the modern civil paternity statutes provide for a pretrial hearing. The purpose of the pretrial hearing is to inform the defendant of the nature and effect of the paternity proceeding and his due process rights, encourage negotiation and settlement, and provide some structure to the discovery process. The comment to section 10 of the Act states that the purpose is to minimize inconvenience and embarrassment to the parties in the vast majority of cases that will be resolved by consent as a result of blood test evidence.[34] The public is barred from attending the pretrial hearing.

At the pretrial hearing, the parties may present and cross-examine witnesses, make motions for blood tests, and present other evidence relevant to the paternity issue. On the basis of the information presented at the hearing, the judge or referee determines whether a judicial determination is in the best interests of the child, and makes a recommendation to the parties regarding settlement of the case. The Uniform Act specifically refers to the guardian ad litem's role in the settlement negotiations.

In Wisconsin, the availability for cross-examination of an adverse party provided by the pretrial hearing has been held to preclude the use of interrogatories in paternity actions. [State ex rel. Opelt v. Crisp, 81 Wis.2d 106, 260 NW2d 25 (1977).] The same logic would appear to apply to depositions, at least as to adverse parties and witnesses who are identified and available for cross-examination at the time of the pretrial hearing. Thus, the pretrial hearing can simplify the discovery process significantly and speed up the pretrial phase of the proceeding. Another Wisconsin case holds that the court is without authority to enter a blood test order prior to the preliminary hearing. [State ex rel. Scott v. Slocum, 109 Wis.2d 397, 326 NW2d 118 (App. 1982).] At least in Wisconsin, the preliminary hearing appears to be developing into the principle discovery mechanism. The blood test decision takes the concept one step further and recognizes that one of the purposes of the pretrial hearing is to provide the alleged father with an additional degree of protection, by requiring a "probable cause" determination by the court before the proceeding may continue.

Temporary Support

Some paternity statutes allow for the entry of a support order pendente lite.[35] The entry of such an order without some sort of probable cause hearing would appear to raise some due process problems. In States where the statute provides for it, the pretrial hearing is clearly the most appropriate forum for such a determination. In States without statutory authority for the entry of a temporary support order, the court may have to rely on its inherent authority to make such a provision. A good analogy can be drawn between this situation and the remedy of the preliminary mandatory injunction. Assuming that the court sitting in the case has some equity powers, the facts should support the requirements for an injunction, as follows:

- The plaintiff is likely to prevail on the merits. This would have to be established at the pretrial hearing or the hearing on the motion for temporary support.

- The plaintiff is likely to suffer irreparable injury should the order not issue (the theory being that there is no way for the child to exercise his or her right to paternal support after the fact).

- There exists no adequate remedy at law. The counterargument here is that the reimbursement judgment, which the court is empowered to enter on disposition of the suit, is adequate. From the child's point of view, this is clearly not the case. The child is going to have to do without the added support, and permanently suffer to some degree, or be forced to turn to public assistance.

As additional ammunition for the inherent authority argument, it can be noted that the legislature has provided for temporary support orders in dissolution proceedings. Any failure to provide a similar remedy for illegitimate children arguably constitutes a violation of the equal protection clause unless the State can establish that the discrimination is related to a substantial and proper State interest. To be sure, the question of the alleged father's paternity constitutes a logically compelling reason to discriminate in this situation. The State has a valid interest in assuring that men are not forced to support children who may be adjudged to have been fathered by other men. However, an alternative exists that is less restrictive than denying the illegitimate child the remedy. The "less restrictive alternative" is provided by the pretrial hearing procedure contained in the UPA and by the type of hearing that is afforded a defendant in the preliminary injunction situation. In Minnesota, if blood tests indicate a 92 percent likelihood of paternity, the court, upon motion, will order temporary support. [Minn.Stat., sec. 257.62, subd. 5.]

A temporary order is extremely helpful in speeding up the proceeding because the alleged father no longer benefits from delay. Furthermore, experience has shown that, even where a court enters a reimbursement judgment for the period during which a paternity case is pending, it is very difficult to collect such amounts from the father. It is also clear that saddling him with a several thousand dollar judgment may reduce significantly his ability to provide current support to the child. Adopting the "collect as you go" approach provided by temporary orders furthers two laudable policy considerations. The child and the State benefit from the alleged father's financial contributions during the pendency of the suit, which is likely to be a shorter time period than would be the case without the temporary order, and the child will benefit after the fact because the father will be able to devote a greater percentage of his income to current support.

Motions for Physical and Mental Examinations

Genetic paternity testing is the most powerful form of discovery available for contested paternity cases. The results often lead to a negotiated settlement or dismissal. In most cases, the testing can be arranged for and conducted without the need of a court hearing. When such a stipulation cannot be obtained, it is necessary to move the court for an order directing the parties to submit to testing.

Most paternity statutes contain specific authority for the entry of an order requiring the parties to submit to blood tests. Without such specific statutory authority, the usual method of authorization is the civil discovery rule allowing for physical and mental examinations. The model rule here is Federal Rule of Civil Procedure 35. In addition to blood tests, physical examinations are occasionally necessary to confirm the existence of identifying birthmarks or moles on the alleged father's body to prove intimacy between the parties. Insanity is not a defense to a paternity action, even under a criminal statute, so mental examinations should not be relevant.[36]

The Federal Rule applies only to parties to the action and persons under their custody or legal control. The latter requirement clearly was drafted to include a nonparty child in a paternity case. Note that under this rule "other men" must be joined as third party defendants before the court is authorized to order them to submit to testing. Such joinder may not be necessary under the more specific provisions contained in modern civil paternity statutes.

Orders directing a party to submit to a physical exam are available only upon "good cause shown" under the Federal Rule. Given the publicity scientific paternity testing has received in recent years, and the fact that many of the newer statutes require them to be administered in every paternity case, the good cause requirement should not pose a problem. However, it may come up in the "birthmark search" situation. If the alleged father objects to the inspection of his body, the plaintiff will have to inform the court of the precise target of the inquiry.

The court apparently has some discretion to refuse to appoint the expert or laboratory suggested by the movant and appoint in lieu thereof an expert or laboratory of its own choosing.[37] Many judges prefer to use the same expert witness time after time.

The party on whom the examination is performed has an absolute right to receive, on request, a copy of the resulting report, but by accepting a copy he waives his privilege to withhold past or future examination reports regarding the same physical condition.[38]

Occasionally, an alleged father will challenge the constitutionality of the order to submit to blood testing. These challenges may include the following: the alleged father's right to privacy is being unlawfully abridged; the blood drawing constitutes an unreasonable search and seizure; allowing the test to be performed on an alleged father whose religious beliefs prohibit the drawing of blood violates his First Amendment rights; the testing unlawfully requires the alleged father to incriminate himself in violation of the Fifth Amendment. All of these arguments have been rejected.[39]

However, these decisions do not go so far as to establish that blood may be drawn over the objection of an alleged father who refuses to volunteer a vein. A number of decisions in criminal cases uphold the drawing of blood from a nonconsenting defendant. [Schmerber v. California, 384 US 757, 86 SCt 1826, 16 LEd2d 908 (1966).] Because constitutional limitations are given more weight in criminal cases than in civil cases, it is probable that a similar holding would result for paternity testing. The authors are aware of no statutes which specifically provide for involuntary blood drawing, however. There are few remedies if an alleged father simply refuses to comply with the blood test order.

Some of the modern statutes provide for enforcement by civil contempt; a sanction which no doubt would be effective. In most other States, the situation is bleak. The court may apply normal discovery sanctions, at least in Federal Rule States, after the disobedient party has refused to comply with an order to compel discovery. Applicable sanctions include:

- An order of the court "establishing" the matters to which the discovery order applied in accordance with the claim of the party who obtained the order.

- An order refusing to allow the disobedient party to support or oppose designated claims, or prohibiting him from introducing designated matters in evidence. (Clearly, the alleged father would not attempt to introduce his own test results, and it is difficult to conceive of a way the court could tailor a sanction which logically would relate to the disobedience.)

- An order striking pleadings, staying the proceedings until the order is obeyed, dismissing the action, or rendering a default judgment against the disobedient party. (The first three are effective against plaintiffs only, and the default option is perhaps too severe, given the fundamental interests of the alleged father and the child in an accurate determination of paternity. See County of Hennepin ex rel. Bartlow v. Brinkman, ---·NW2d ---, 11 FLR 1274 [Minn.App. 1985].)

- An order treating the failure as contempt of court, except as to orders to submit to a physical or mental examination. (Here, the rule itself contains the bad news.)

Clearly, legislation offers the best solution to the problem of alleged fathers who refuse to submit to testing. In the meantime, judges and attorneys need to be thinking of an appropriate sanction should the issue ever arise. There is a Minnesota decision which holds that an alleged father's refusal to undergo paternity testing may be brought out at trial to create an inference unfavorable to his defense of nonpaternity. [State on behalf of Orloff v. Hanson, 277 NW2d 205 (Minn. 1979).]

Motions in Limine

In jury trials, defense counsel often will try to place doubt in jurors' minds by referring to matters that are highly prejudicial, but that are clearly irrelevant or otherwise inadmissible. As one common tactic, defense counsel inquires of every plaintiff's witness, "Do you know John Doe?" without ever identifying John Doe or explaining his relevance to the case. Plaintiff's counsel no doubt could get an objection sustained to halt the tactic but at the sizable cost of appearing to the jury to be hiding the existence of "another man."

To ward off such a tactic, an attorney may file a Motion in Limine, asking the court to enter a pretrial order prohibiting defense counsel from seeking to admit evidence of inadmissible and prejudicial subject matter. In addition to nonspecific references to other men, attorneys may opt to include in the motion any other type of inadmissible evidence which might be prejudicial where appropriate to the facts of the case such as:

- References to other illegitimate children born to the mother
- References to contraceptives used, or not used, by the mother before, during, or after the probable period of conception
- References to the marital status of the mother's parents
- References to the mother's reputation in the community for sexual promiscuity
- References to abortions had, or allegedly had, by the mother
- References to sexual encounters between the mother and other men outside the probable period of conception.

A Motion in Limine achieves six interrelated objectives as follows:

- Isolating prejudicial evidence from the jury [Bridges v. Richardson, 163 Tex. 292, 354 SW2d 366 (1962); Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal.App.2d 60, 29 Cal.Rptr. 847 (1968)]
- Discovering the opponent's case, or theory, as to the admissibility of the contested evidence
- Forcing election by the opponent (Often, in response to the motion, opposing counsel will argue that the evidence in question is admissible, but only for a limited purpose--one that is often neither prejudicial to the plaintiff nor useful to the defendant.)
- Preserving record on appeal [Montgomery v. Vizant, 297 SW2d 350 (Tex.Civ.App. 1957)]
- Obtaining favorable settlement offers
- Simplifying the trial.[40]

NONSCIENTIFIC EVIDENCE

Once pretrial motions and proceedings are complete and the jury is selected, the paternity case is ready for trial. In both jury and bench trials, both attorneys normally make an opening statement, to present a persuasive summary of their client's allegations and to tie them, generally or specifically, to the forthcoming evidence. Some jurisdictions limit the opening statement to a general outline or summary of the allegations. Others permit, or even require, a detailed presentation of the evidence that the attorney expects to prove by each witness. Trial attorneys disagree over which tactic is more desirable. Next, each side presents its evidence.

This section discusses the types of nonscientific evidence that State courts and legislatures have determined to be legally relevant in paternity proceedings. The following section discusses the admissibility of scientific paternity testing results and the extent of the foundation necessary for their introduction at trial.

Uniform Acts

Both the UPA and the UAP contain specific sections on the types of evidence which are admissible in a paternity action. Section 12 of the UPA provides that all evidence relevant to the paternity of the child is admissible, and further sets out four categories of evidence which are specifically admissible, as follows:

- Evidence of sexual intercourse between the mother and alleged father at any possible time of conception
- An expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy
- Blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity
- Medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts.[41]

Section 14 contains two limitations concerning the admissibility of evidence regarding the mother's sexual activity. Testimony relating to sexual access to the mother by an unidentified man at any time, or by an identified man at a time other than the probable time of conception of the child, is inadmissible unless offered by the mother. Evidence offered by the alleged father relating to sexual intercourse between the mother and another man during the probable period of conception is admissible only if the other man has undergone blood tests and has not been excluded as a possible father of the child.[42] Only about a dozen States have enacted the UPA. However, the fact that the UPA contains these evidentiary limitations makes a very good argument for their application in States that have yet to adopt the Act, unless there is existing case law to the contrary or conflicting language in the State's paternity statute.

Mother's Testimony Standing Alone

While there is some case law to the contrary, the overwhelming majority opinion is that the mother's uncorroborated testimony, if sufficiently credible, is sufficient to support a finding of paternity. [P. V. v. L. W., 93 N.M. 577, 603 P2d 316 (N.M.App. 1980); Dorsey v. English, 283 Md. 522, 390 A2d 1133 (1978); 10 Am.Jur.2d Bastards, sec. 110.] The issue of corroboration has found its way into the case law because many nineteenth and early twentieth century criminal bastardy statutes required corroboration of the mother's claim as a condition precedent to filing the complaint. Clearly, the lone testimony of the mother should defeat a defendant's motion for summary judgment.

Child's Birth Certificate

As a rule, the birth certificate is admitted by stipulation for the limited purpose of establishing the birth of the child and, perhaps, the birthweight. One Illinois decision holds that a certificate that indicates no father is probative that the child was born out of wedlock. [People ex rel. Ashford v. Ziemann, 61 Ill.Dec. 741, 110 Ill.App.3d 34, 441 NE2d 1255 (1982).] There is often a State statute which makes the certificate presumptive evidence of the birth of the child. [See, for example, Cal.Evid.Code, secs. 1281 and 1530.] Even without the statute, the certificate would seem to qualify as a business, official, or hospital record, so that no hearsay objection would be sustained as to the admissibility of the certificate to prove the medical circumstances surrounding the birth, once the proper foundation is laid.

The appearance on the certificate of the alleged father's name in the "child's father" space would seem to add another layer of hearsay which would not qualify for admission as a business or hospital record, unless his name was entered as a result of some sort of acknowledgment made by him, and entered by an employee of the hospital in the ordinary course of preparing the certificate. If the father's name or other identifying characteristics appear on the certificate as a result of the attestations of the mother, the statement is no doubt too self-serving to be of any probative value, except perhaps as a prior consistent statement.

The alleged father's name rarely will appear on the certificate, either because the mother was married to another man on the date the child was born or because the alleged father has refused to comply with an acknowledgment procedure mandated by statute. State law often requires the name of the mother's husband to be entered on the certificate, regardless of the true biological facts, and prohibits the listing of a father for illegitimate children prior to the entry of a judgment of paternity or statutory acknowledgment. Counsel for alleged fathers often will try to confuse the jury by making it appear as though the mother was unsure of the identity of the father at the time the certificate was prepared. Plaintiffs counsel may anticipate this problem and request a direction from the court through a Motion in Limine.

Admissions of the Alleged Father

This is clearly one of the most powerful forms of evidence. Any acknowledgment by the alleged father of even the possibility of his paternity severely damages any of his potential defenses. Declarations of the alleged father are admissible over a hearsay objection as admissions[43] and can consist of oral or written statements or conduct that has a communicative effect.[44]

Evidence of acknowledgment may include:

- A statement by the alleged father, made after the mother becomes pregnant, that the child is his, including participation in the filling out of the birth certificate
- The alleged father's taking the mother to prenatal doctor's appointments
- The alleged father's taking the mother to the hospital and arranging for her admission

- The alleged father's visiting the mother and child at the hospital
- The alleged father's arranging for the discharge of the mother and child from the hospital and signing the necessary release forms
- The alleged father's bringing the mother or child into his home after discharge from the hospital
- The alleged father's displaying the child to others and holding the child out to the community as his
- The alleged father's providing for or making payments for the care, maintenance, and support of the child[45]
- The alleged father's suggestion that the mother get an abortion upon learning that she is pregnant[46]
- The alleged father's silence when repeatedly confronted with the allegation that he is the father[47]
- The alleged father's filing of a tax return listing the child as a dependent[48]
- The alleged father's having cohabited with the mother during the gestation period[49]
- The alleged father's complicity in the child's use of his surname[50]
- The alleged father's presence at the child's baptism and failure to object to his name appearing on the baptismal certificate[51]
- The alleged father's visitation of the child after discharge from the hospital
- The alleged father's buying gifts for the child.

Prior Declarations of the Mother

Generally, prior statements of the mother are held to be inadmissible as self-serving and not probative. Under Federal Rule of Evidence 801(d)(1)(B), prior consistent statements are admissible only after a charge of recent fabrication or improper influence has been made to impeach a witness's testimony. Some jurisdictions include declarations made by the mother during labor.[52] Some decisions have held that, because the defendant's denial of paternity challenges the plaintiff's veracity, prior consistent declarations always are admissible. [People ex rel. Ashford v. Ziemann, supra.]

Testimony on Sexual Intercourse Between Mother and Alleged Father

Clearly, testimony of sexual intercourse between the parties during the probable period of conception is crucial to the petitioner's case. Witnesses to the act are rare, so the mother generally will provide the testimony on direct examination during petitioner's portion of the trial. Circumstantial evidence is often available from friends and

roommates who were aware that the two parties were sleeping together in the same room, or who witnessed the parties "together in equivocal circumstances such as would lead the guarded discretion of a reasonable and just man" to conclude that sexual intercourse had occurred between the parties.[53]

A related issue is the admissibility of evidence regarding sexual activity between the parties which occurred outside the probable period of conception. Such evidence can help establish the extent of the intimacy that existed between the parties and therefore the credibility to be assigned to both parties' testimony. The majority rule is that such evidence is admissible if the sexual activity is not too remote in time to support an inference that the intimacy continued into the conceptive period.[54]

Defining the Probable Period of Conception

It is necessary to define the probable period of conception for two reasons. First, the mother's testimony regarding her sexual activity with the alleged father must be given some biological relevance to the birth of the child. Second, a period of time must be established to limit the alleged father's evidence regarding the mother's sexual activity with other men.

As with most potentially disputable facts, this issue is often resolved with a stipulation prior to trial. The extent to which this is possible naturally will depend on the the nature of the alleged father's defense, especially regarding the existence of other men. One common defense tactic is to make the mother appear confused as to the date of her last menstrual period. If the alleged father's attorney can shake her testimony on this issue, then her entire testimony becomes suspect, and evidence of her alleged activity with other men becomes easier to introduce.

In most States, the court may take judicial notice of the normal gestation period of 280 days or 10 lunar months.[55] Actually, this period measures the normal passage of time from the beginning of the mother's last menstrual period to the birth of the child. The average gestation period is 267 days. (The legal literature often misquotes the medical literature.) Thus, the date of conception is computed by counting backwards from the date the child was born. The date of birth can be established by introduction of the birth certificate or with live testimony from the mother. It also has been held that the state of pregnancy is such a "common condition" that a woman may give her own opinion as to when she became pregnant. [Goody v. Pinto, 37 Conn.Super. 786, 436 A2d 1099 (1981).] A few States have enacted a statute that determines the probable date of conception, again counting back from the date of birth. [See Wis. Stat.Ann., sec. 891.395.] The Wisconsin statute creates a presumption that conception occurred within a span of time extending from 240 to 300 days before date of birth. To cause the presumption to arise, it must be proved that the child was a full-term baby, which in turn is established by showing that the birth weight exceeded 5 1/2 pounds.

Occasionally, the mother will claim to have had sexual intercourse with the alleged father and no one else but during a period that is slightly outside the presumptive period. When this occurs, an expert witness may be called to testify that gestation periods commonly vary from the norm and that the child in question was either premature or past-due. The party alleging an abnormal gestation period has the burden of proof on that issue.[56]

Physical Resemblance Between Child and Alleged Father

Authorities are split regarding the admissibility of evidence offered to establish that the child and alleged father share similar physical characteristics. There are two popular methods of presenting such evidence. The simplest way is to place the alleged father next to the child, and allow the jury to "view" their similarities, without any reference to specific features. The specific demonstrative similarities can be emphasized with questions to the parties and during opening and closing argument. [See Commonwealth v. Kennedy, 383 Mass. 308, 450 NE2d 167 (1983); State v. Green, 284 SE2d 688 (N.C.App. 1981).] In States that allow exhibition of the child to the jury, a condition to the general rule sometimes states that the child must be old enough to have developed "settled features." The judge has considerable discretion regarding the determination of both this issue and the propriety of allowing the child to be exhibited for this purpose. [10 AmJur2d Bastards, sec. 120; 95 ALR 309 (1935).]

In some States, a live witness must testify that, in his or her opinion, the child resembles the alleged father or other members of his family. [10 AmJur2d Bastards, sec. 41.] Other States will not allow lay opinion testimony on the subject, but will allow expert testimony, once a proper foundation is laid to establish the witness as an expert and to establish that the testimony is based on accepted and reliable scientific principles. [State ex rel. Schehlein v. Davis, 54 Wis.2d 446, 193 NW2d 43 (1972); Almeida v. Correa, 51 Haw. 594, 465 P2d 564 (1970).] Without the foundation, such testimony is "inherently unsatisfactory." With the exception of cases where the child and alleged father share a physical characteristic for which a population distribution has been developed, it would appear impossible to lay a proper foundation. The expert could testify that the trait is transmitted genetically, but the expert's inability to report on how frequently the trait appears in the population as a whole would dilute the probative value of any expert opinion.

The practice adopted by many of the newer statutes, which require the addition of the child as a party to the action, would seem to end all prohibitions against the child being in the courtroom during the trial, and the availability of extended factor genetic paternity testing would seem to erase the need for using resemblance as evidence, except in very unusual cases (e.g., children who are biracial, have genetic abnormalities, or exhibit recessive traits).

Evidence of Impotency or Sterility

The recent popularity of vasectomies and the fact that credible evidence of impotency or sterility no doubt would be case-dispositive make it probable that this issue someday will be raised as a defense in every court that handles a high volume of paternity cases.

Impotency is a difficult defense to prove. According to estimates, 90 percent of male impotency results from psychological factors.[57] Since the psychological impact of the problem can differ from one sexual partner to the next, testimony relating to the potency of the alleged father by persons other than the parties themselves may be irrelevant and therefore inadmissible. Medical testimony regarding impotency caused by organic defects would be admissible, assuming the expert could testify that the defect was present at all times during the probable period of conception.

The situation with a sterility defense is similar. Very few men are absolutely sterile. In most men who are referred to as sterile, the defect relates to the number or quality of sperm, making it unlikely that conception will occur with most sexual partners. However, the extent of the defect often varies over time and affects fertility to a different extent from one partner to the next. Since it is impossible to recreate the conditions in vivo on the day the child was conceived, it can be argued that the results of fertility tests conducted for use at trial are inadmissible because the test conditions were not identical or similar to those which produced the conception.[58] This argument has prevailed in several reported decisions. [See, for instance, Houston v. Houston, 199 Misc 469, 99 NYS2d 199 (1950).]

Mother's Sexual Activity

Alleged fathers in paternity cases often try to argue that the mother's promiscuity casts doubt on her allegation. Generally, such evidence is inadmissible unless the sexual activity occurred within the probable period of conception. [Crain v. Crain, 662 P2d 538 (Idaho 1983); South Carolina Dept. of Social Services v. Thomas, 274 S.C. 228, 262 SE2d 415 (1980); Ramsey County v. S.M.F., 298 NW2d 40 (Minn. 1980); State ex rel. Gleason v. Gregg, 633 P2d 1322 (Ore.App. 1981); Uniform Parentage Act, sec. 14; Sass, "The Defense of Multiple Access (Exceptio Plurium Concubentium) in Paternity Suits: A Comparative Analysis," 51 Tulane L.Rev. 468 (1977).] In at least one State, such allegations must be corroborated in order to be admissible. [Moon v. Crawson, 441 NYS2d 227 (NY Fam.Ct. 1981).]

Older cases stand for the proposition that such evidence may be admissible for the limited purpose of impeaching the testimony of the mother. [10 AmJur2d Bastards, sec. 116.] This rule may still apply where the mother makes a claim of "prior chastity" on direct examination.

Contraceptive Fraud

One issue that has received recent attention in the press and in appellate decisions is contraceptive fraud. In asserting this defense, alleged fathers will admit having had a sexual relationship with the mother, but will deny legal responsibility for the conception, pregnancy, and birth of the child by alleging that the mother fraudently claimed that she was using contraceptive devices and thus could not become pregnant as a result of the sexual union. The defense has been effective in at least one trial court. [In re Pamela P., 7 FLR 2784 (NYFam.Ct. 1981).] However, appellate courts, including the courts in New York, uniformly have held that such conduct by the mother, if proven, does not constitute a defense to a paternity action. [Stephen K. v. Roni L., 164 Cal. Rptr. 618 (1980); Hughes v. Hutt, 455 A2d 623, 9 FLR 2278 (Pa. 1983); Faske v. Bonanno, --- NW2d ---, 11 FLR 1100, (Mich.Ct.App. 1984); Pamela P. v. Frank S., 449 NE2d 713, 9 FLR 2462 (NYCt.App.1983).]

These decisions recognize that an individual has a constitutional right to decide in private whether or not to conceive a child. This right guarantees the individual freedom from intrusion by the State, at least where the State is attempting to limit the individual's freedom of choice. However, this constitutional right has not been held to prevent the State from imposing a parental obligation upon someone who participated in a conception without the intent to conceive. To do so would be tantamount to allowing the parents to determine, by agreement, the extent of the parental support obligation. Courts

and legislatures have been unwilling to allow parents such control in other fact situations, and courts in the above cited decisions have refused to create an exception to the rule for the man who has been duped fraudulently, or negligently, into believing that conception was impossible.

SCIENTIFIC PATERNITY TEST RESULTS

In the Child Support Enforcement Program, scientific paternity testing has proved a powerful inducement to settlement. Nevertheless, an occasional case with highly positive test results will go to trial. Judges may find it helpful to prepare for this by developing a functional knowledge of the testing procedures, and a theoretical understanding of the genetic and statistical principles that underlie the tests and the way in which the results are presented by the laboratory. These issues are discussed in Chapter 6.

This section treats the issue of admissibility. First, the reported case law regarding admissibility in general is identified and analyzed.[59] Next appears a discussion of the proper method of laying a foundation for introduction in evidence of the test results themselves.

Admissibility

The courts in the United States have been slow to accept blood test evidence. The first reported decision in which blood analysis played a key role in a paternity dispute was Commonwealth v. Zammarelli in 1931. A new trial was granted in that case on the basis of test results showing that the defendant could not have fathered the child in question. Fifteen years later, however, the California Supreme Court still deemed similar evidence inconclusive. In a case that attracted national attention, a popular comedian was ordered to support an out-of-wedlock child, even though blood tests showed that he could not be the child's biological father.[60] Now, finally, blood tests excluding the possibility of paternity are accorded decisive evidentiary weight by all courts.[61]

The State of Iowa recognized early the principle of exclusion of the possibility of paternity based upon incompatibility of blood groups. "The uncontradicted testimony of the expert negativing paternity should be final. If it is doubted, other experts could take new tests until the facts of the blood content could be shown with accuracy. Then, where this was established, but one result would be possible scientifically, and for a court to hold the contrary seems absurdity." [25 Iowa L.R. 823, 825 (May, 1941).] Iowa also has been cited as one of the first States (perhaps the first State) to endorse, albeit tacitly, the principle that genetic similarity of the child's and the alleged father's blood may be used as affirmative evidence of paternity.[62] In the case of Livermore v. Livermore, 233 Iowa 1155, 11 NW2d 389 (1943), both sides offered test evidence. On appeal, the defendant assigned as error the admission of expert testimony relating to the fact that he could not be excluded. The test results did not indicate a probability of paternity. The court found "no merit in the contention" that this evidence was improper, and judgment was affirmed. [Livermore, supra, at 393.]

The tests employed in Livermore, supra, only could have shown that the defendant was a member of a group of men with similar blood types, which included nearly half of the male population. The case does not specify which tests were employed, but the only systems commonly typed at the time were ABO, MNS, and Rh-Hr. If all of these tests had been performed, only about 53 percent of the random male population could have been

excluded as possible fathers.[63] In fact, until very recently, the courts staunchly limited their acceptance of blood grouping evidence to the same three systems (ABO, MNS, and Rh-Hr) that were available 40 years ago when Livermore was decided. Together these tests give a wrongly accused "father" a slightly better than 50-50 chance of proving his nonpaternity.[64]

Many States recently have considered the question of the admissibility of extended factor paternity testing as positive proof of paternity. A New Jersey appellate court has stated flatly that HLA is accepted in the scientific community and that HLA test results are admissible. [Malvasi v. Malvasi. 167 N.J.Super. 513, 401 A2d 279 (Ch.Div. 1979).] In California, nonexclusionary HLA test results are admissible as one factor to be weighed among all the other evidence. [Cramer v. Morrison, 153 Cal.Rptr. 865, 88 Cal.App.3d 873 (1979).] With respect to the exclusionary findings, "the result of exclusion of paternity by the [HLA] blood test is conclusive" on that issue. [Michael B. v. Superior Court of Stanislaus County, 86 Cal.App.3rd 1006, 150 Cal.Rptr. 586 (1978).] Alaska has instituted a law providing a "presumption of paternity" if blood tests show a 95 percent or greater likelihood of paternity.

As noted above, the UPA specifically provides that scientific paternity test results are admissible for the purpose of proving the alleged father's paternity of the child, in addition to being case determinative where an exclusion is shown. The UPA is in effect in Colorado, Hawaii, Minnesota, Montana, North Dakota, Washington, and Wyoming.[65] The Uniform Act on Blood Tests, section 4, contains similar language. This provision, or one substantially similar, is in effect in nine States: Kentucky, Louisiana, Maine, Mississippi, New Hampshire, Oregon, Pennsylvania, Rhode Island, and Utah.[66] California and Illinois recently amended their versions of one of these uniform acts to allow for the admissibilty of test results as evidence of paternity.[67] Several other States, including Arizona, Georgia, Indiana, Iowa, Kansas, Maryland, Nevada, New York, North Carolina, Ohio, Texas, Virginia, and Wisconsin, have enacted independent blood testing statutes that support inclusionary admissibility.[68]

Some jurisdictions have allowed the results of HLA tests to be admitted into evidence as positive proof, despite the existence of statutes which specifically limited "blood test" evidence to the exclusionary variety. [See, e.g., County of Fresno v. Superior Court, 154 Cal.Rptr. 660 (Cal.App. 1979); Cramer v. Morrison, supra; Camden County Board of Social Services v. Kellner, 6 FLR 2412 (N.J.Juv.Dom.Rel.Ct. 1980); Miller v. Smith, 6 FLR 2660 (Ill.Cir.Ct. 1st Dist. 1980); and Cutchember v. Payne, 466 A2d 1240 (D.C.Ct.App. 1982). See also Phillips v. Jackson, 615 P2d 1228, 1233 (Utah 1980).] These decisions simply have refused to apply prohibitive statutory language to extended factor genetic testing. The holdings narrowly define the concept of "blood test" to include only the (Landsteiner) red blood cell test, generally the only testing procedure in use when the relevant statute was enacted. By using the restrictive definition, HLA and serum and protein tests become something other than blood tests and thus are not prohibited by the statute.

In the absence of specific statutory language, the admissibility of paternity test results is determined by applying the usual test for scientific evidence. The case that established the applicable standard is Frye v. United States, 293 F. 1013 (D.C.Cir. 1923). Under Frye, scientific evidence is admissible only if the scientific principle involved is considered generally reliable and accurate by the scientific community concerned. HLA paternity test results have been deemed reliable and accurate for purposes of the Frye test, and thus admissible, by every appellate court that has taken up the issue since

1979. [See Carlyon v. Weeks, 387 So2d 465 (Fla.Dist.Ct.App. 1980); Tice v. Richardson, 7 Kan.App.2d 509, 644 P2d 490 (1982); Commonwealth v. Blazo, 10 Mass.App. 324, 406 NE2d 1323 (1980); Imms v. Clarke, 654 SW2d 281 (Mo.App. 1983).] At least one appellate court has reached a similar conclusion regarding a testing battery which combined the traditional red blood cell antigen tests with an analysis of red blood cell enzymes and serum proteins. [State ex rel. D.K.B. v. W.G.I., 654 SW2d 218 (Mo.App. 1983).]

Laying a Foundation

Unfortunately, a petitioner's showing that paternity test results are accurate and reliable is not the end of the admissibility battle. As with all extrinsic evidence, the attorney must lay a proper foundation to satisfy the court that the probative value of the evidence outweighs any prejudice to the parties which might result from allowing it to be introduced. Because alleged fathers and their attorneys typically view paternity test results as very powerful evidence, they often will argue that the potential for prejudice is very high and that the court should adhere to strict rules of evidence regarding admissibility. The essential elements of the foundation are authentication of the results, qualification of the expert, and avoidance of hearsay objections that arise when all parties who took part in the testing procedure are not available to testify.

More specifically, as applied to paternity testing, the crucial issues are:

- Was the blood tested the blood of the child, the mother, and the alleged father?
- Did the blood remain in proper condition until the time of the test so that the results of the tests can be trusted?
- Did the person administering the test use proper procedures and approved reagents?
- Did the person administering the test have the scientific knowledge to interpret the tests correctly?[69]

If the courts were to require a full and complete answer to all four questions as a condition precedent to the offering of the test results, the prospect of litigating paternity cases in the volume demanded by the IV-D Program would be frightful indeed. Nothing less than the live testimony of every individual who formed a link in the "chain of custody" of the blood samples, including every individual who performed a role in the test itself, would be necessary. If such a rule were adopted and enforced, paternity litigation would be prohibitively expensive. Luckily, legislatures and courts have recognized the utility of medical and other scientific evidence and have been lenient in enforcing the technical rules of evidence. However, there must be some assurances that the laboratory that drew and tested the blood samples in any given case followed sound and regular procedures. To make this process more reliable and easier to effect, the American Association of Blood Banks (AABB) has instituted the Laboratory Accreditation Program of the American Association of Blood Banks. To earn accreditation from the AABB, blood testing laboratories must meet certain standards of reliability.

The remainder of this section discusses a workable and sufficient foundation requirement in States that have neither instructive case law nor an ameliorative statute. The foundation can be broken down into three components, as follows:

- The tests used in the case are accurate and reliable in the opinion of the relevant scientific community.

- The person who signed the bottom line on the report is qualified to render an expert opinion as to the statistical probability of the alleged father's paternity of the child.

- The test results apply to the parties to the action.

In most States, an attorney can achieve all of these ends without the live testimony of the expert. However, live testimony from at least one employee of the laboratory will be necessary.

The accuracy and reliability of extended factor blood testing is becoming easier to prove every day. As noted above, a majority of jurisdictions now have statutes that provide for admissibility of such test results. One appellate court has held that the passage of such a statute constitutes a legislative determination that the approved test or tests are accurate and reliable. [Haines v. Shanholtz, 57 Md.App.92, 468 A2d 1365 (1984).] Once the legislature speaks and the proponent makes a showing that the proffered evidence meets the legislative criteria, a court's discretion to consider whether the approved test battery constitutes admissible scientific evidence is severely limited. In States with no statute declaring the test results to be admissible, the court may accept the proffered test as accurate and reliable based on a trial brief that cites case law from other jurisdictions, statutory enactments of other jurisdictions, and medicolegal literature. It is also possible, of course, to use the testimony of the expert, either in person or by way of deposition, to establish the accuracy and reliability of the tests employed. To avoid the cost of transporting the expert to the trial, a videotaped or written deposition may be allowed in lieu of live testimony. This last alternative was ruled admissable in a recent North Dakota Supreme Court case. [Williams County Social Services Bd. v. Falcon, 367 NW2d (N.D. 1985).]

The qualifications of the expert often are established by stipulation. In absence of a stipulation, the proponent first must show that the potential witness has an ability to draw inferences from facts that are beyond the capability of the average layman. The ability generally must be related to some science, profession, or business occupation, and the witness' testimony must aid the trier of fact in the search for truth.[70] The court has wide discretion regarding the conferring of "expert" status on any given witness. The following areas should be covered:

- Name and occupational history

- Educational background and training

- Professional licenses/certifications

- Areas of specialization

- Research experience

- Publications in general

- Publications concerning paternity testing

- Teaching experience

- Attendance at seminars and courses concerning paternity testing
- Experience providing expert testimony
- Current employment emphasizing scope of work, supervisory authority, and length of time in position.

It may be possible to produce this evidence in submissible form through the use of videotaped depositions [Williams County Social Services Bd. v. Falcon, supra.] or depositions upon written questions. As an absolute last resort, it may be possible to establish the qualifications of the expert with testimony from an employee of the laboratory. There is case law to the effect that the qualifications of persons who make entries in medical records will be presumed unless some indication to the contrary is shown.[71]

The final foundation requirement is the authentication of the report. This is the area most ripe for challenge. The two most common objections are essentially hearsay problems. It is crucial to conclude that this is the case, because it will be necessary for the proponent to rely on at least one hearsay exception in order to overcome the objections. The objections are:

- Without the live testimony of every individual who handled the blood samples from the time they were drawn until the test was complete, the "chain of custody" is incomplete and the test results cannot be authenticated (that is, proved to be based on the blood samples provided by the parties to the lawsuit).
- Any opinion contained in the test result report is hearsay without the live testimony of the expert, and double hearsay to the extent that the expert opinion is based on the results of laboratory procedures carried out by persons other than the expert.

Most States that have adopted the UPA or a blood test statute based on section 10 of the UAP, have a distinct advantage. The UAP provides that a verified expert's report submitted to the court, which contains documentation of the chain of custody of the specimens, is admissible unless a challenge has been made prior to trial. Iowa does not have the UAP; however, it has a model blood test statute, which has given it much the same advantage. [ICA subsect. 675.41.] Two Iowa decisions have construed this Iowa provision to allow for introduction of the report without accompanying live testimony. [State ex rel. Buechler v. Vinsand, 318 NW2d 208 (Iowa 1982); State ex rel. Hodges v. Fitzpatrick, --- NW2d --- (Iowa App. 10/25/83).] The latter case points out that, as an exception to the hearsay rule, the statute will be construed narrowly and that all statutory requirements must be adhered to. In that case, the report was held to be inadmissible because the expert submitted it to the plaintiff's counsel instead of directly to the court as required by the statute. The case also held that a challenge filed 1 day prior to trial was timely.

In most States, no such specific statutory shortcut is available. There are often other statutory alternatives that avoid the necessity of an appearance by the expert. Many States have adopted a version of the Uniform Business Records as Evidence Act[72] or the Uniform Rules of Evidence[73] or have case law establishing a similar rule. If such authority exists, it should be possible for the proponent to qualify the report as a business record and thereby escape the hearsay problem. Several decisions conclude that a

hospital or laboratory is a "business" for purposes of the exception. [See State v. Carter, 591 SW2d 219 (Mo.App. 1979); McCormick on Evidence, sec. 313, pp. 730-733.]

To take advantage of the business records exception, it will be necessary to bring in the venipuncturist to testify to the drawing and packaging of the blood samples and their delivery to an agent of the laboratory. Once it is established that the samples were delivered to the laboratory, any competent employee of the laboratory should be able to lay a foundation for the introduction of the test report. The witness will have to be familiar enough with the identity and mode of preparation of the test report to testify that the document was prepared in the ordinary course of business, that the entries on the report were made at or near the time of the transaction recorded, and that all necessary procedures and documentation protocols were followed. It is particularly important that the witness establish the chain of custody from entries made on the report document by employees of the lab, as well as identify the signature of the expert. In States that have not adopted a business records statute, case law should provide similar authority.

The second hearsay problem concerns the fact that the expert may not have supervised the lab technicians directly as they carried out the procedures to isolate and identify the genetic characteristics of the individuals tested. Again, a uniform act can come to the rescue. The Uniform Composite Reports as Evidence Act provides that an expert may testify to his conclusions even where they are based wholly or partly upon written information furnished by several persons acting for a common purpose.[74] [See Houghton v. Houghton, 179 Neb. 275, 137 NW2d 861 (1965), and 3 Wigmore, Evidence, sec. 572(a) (Chadbourn Rev. 1972).] In those States which have modeled their court rules on the Federal Rules of Evidence, a similar argument can be made under Federal Rule 803(6).

If all else fails, the proponent may argue to the court that the blood test results are admissible under the "wildcard" exception to the hearsay rule, exemplified by Federal Rule 804(b)(5). Where the declarant is unavailable to testify, the court has authority to allow hearsay evidence that has circumstantial guarantees of trustworthiness and:

- Is offered as evidence on a material fact
- Is more probative than other evidence the proponent can procure through reasonable efforts
- The purposes of the rules of evidence and the interests of justice will be served by admission of the evidence.

The blood test report is clearly relevant to a material fact. There are numerous quotations from courts across the country regarding the value of blood test evidence in paternity proceedings. Since test results are prohibitively expensive when the expert must be brought in to testify in person in every case, the interests of justice clearly are not served by strict adherence to the rules. The medical profession frequently makes life and death decisions based on expert opinions produced by similar, or less stringent, procedures.

Also the evidence involved can be reproduced. The cases that establish the importance of a continuous, unbroken chain of custody and live testimony from all persons who took part in the scientific analysis are generally criminal cases involving blood-alcohol levels, which change over time, or blood samples that were obtained at the scene of a crime. In such instances, the defendant's procedural rights are greater than in civil paternity cases. More importantly, the courts have fewer alternatives.

The samples could not be reobtained nor verified. In paternity cases, there are two alternatives that better serve the interests of justice than refusing the admission of the evidence. The alleged father has the opportunity to ask for a second set of tests when he is not satisfied with the results of the first, and he has the opportunity to call the laboratory personnel to testify should he feel the need for extensive cross-examination.

It may be possible to avoid the hearsay problem by requesting that the defendant admit that blood tests show certain resemblances based on genetic similarity. If the defendant refuses to admit this fact during discovery, then costs of proof may be taken against him as part of the final judgment.

FOOTNOTES

/ 1/ Krause, Child Support in America: The Legal Perspective 799 (1981).

/ 2/ See, for instance, Missouri's version of the Uniform Declaratory Judgment Act, Ch. 527 RSMo (Supp. 1984).

/ 3/ State ex rel. Anonymous v. Murphy, 354 SW2d 42 (Mo.App. 1962), J.E.S. v. B.J.F., 240 So2d 520 (Fla.App. 1970).

/ 4/ See, however, Kulko v. Superior Court, 436 US 84, 98 SCt 1690, 56 LEd2d 132 (1978), which discusses the limits of a court's jurisdiction to establish a support order.

/ 5/ This discussion assumes no statutory direction. Section 19(a) of the Uniform Parentage Act (UPA) provides for appointment of counsel for indigent parties. This section has been enacted by the States of Hawaii, Minnesota, Montana, North Dakota, and Wyoming. California, Colorado, and Washington have adopted versions of UPA without section 19(a). Readers are encouraged to refer to statutes in effect in their States.

/ 6/ See also Hepfel v. Bradshaw, 279 NW2d 342 (Minn. 1979); Reynolds v. Kimmons, 569 P2d 799 (Alaska 1979); Artibee v. Cheboygan, 397 Mich. 54, 243 NW2d 248 (1978); M. v. S., 169 N.J.Super. 209, 404 A2d 653 (1979); State ex rel. Graves v. Daugherty, 266 SE2d 142 (W.Va. 1980).

/ 7/ Eldridge, p. 335; Lassiter, supra, p. 27.

/ 8/ Snodgrass, supra, p. 742.

/ 9/ Stout, supra, pp. 1134-1135.

/10/ The use of the term "State" here is intended to include both State and county governments. As to which entity ultimately finances the cost of the testing, no opinion is intended. That issue is a matter for State law.

/11/ Uniform Parentage Act, 9A U.L.A. sec. 10.

/12/ State ex rel. Goodner v. Speed, 96 Wash.2d 838, 640 P2d 13, at p. 15 (1982).

/13/ Krause, supra, pp. 184-188; Anno., "Statutes Limiting Time for Commencement of Action to Establish Paternity of Illegitimate Child As Violating Child's Constitutional Rights," 16 ALR4th 926.

/14/ Mills, supra, p. 104; Pickett, supra, p. 2209.

/15/ State Dept. of Revenue v. Wilson, 634 P2d 172 (Mont. 1981); County of Lenoir ex rel. Cogdell v. Johnson, 46 N.C. App. 182, 246 SE2d 816 (1980); Locke v. Zollicoffer, 608 SW2d 54 (Ky. 1980); State ex rel. B.V.P. 284 A2d 912 (W.Va. 1981); State Department of Health and Rehabilitative Services on behalf of Gillespie v. West, 378 So2d 1220 (Fla. 1979); Shifter v. Wolf, 327 NW2d 429 (Mich.App. 1982); Astembowski v. Susmarski, 451 A2d 1012 (Pa. 1982); State ex rel. Adult and Family Services Division v. Bradley, 295 Or. 216, 666 P2d 249 (Or.Ct.App. 1982).

/16/ Cook v. Askew, 34 Ill.App.3d 1055, 341 NE2d 13 (1975); First v. Lewis, 99 Misc2d 761, 417 NYS2d 194 (1979); F. v. M., 363 NE2d 1030 (Ind.App. 1977); Anonymous v. Anonymous, 43 Misc2d 949, 266 NYS2d 505 (1965).

/17/ See, however 59 ALR3d 685, sec. 3.

/18/ 84 ALR2d 524 (1962), 10 AmJur2d, Bastards, secs. 98 et. seq.

/19/ Walker v. Walker, 266 So2d 385 (Fla.App. 1972); Tuer v. Niedoliwka, 92 Mich.App. 694, 285 NW2d 424 (1979).

/20/ 84 ALR2d 524 (1962).

/21/ 20 ALR3d 500 (1968).

/22/ Gray v. Plummer, 87 Ga.App. 331, 73 SE2d 569 (1952).

/23/ Naimo v. LaFianza, 146 N.J.Super. 362, 369 A2d 987 (1976).

/24/ Uniform Parentage Act, 9A U.L.A. sec. 6(d); Polk v. Harris, 46 Md.App. 591, 420 A2d 1004 (1981).

/25/ State v. Bashura, 37 Conn.Super. 745, 436 A2d 785 (1981).

/26/ Havighurst, "Settlement of Paternity Claims," Ariz.St.L.J. 461, 468, 1978.

/27/ Conn.Gen.Stat.Ann., secs. 466-172.

/28/ See, e.g., Nebr. Reissue Rev. Stat., secs. 13-113 (1943), repealed L.B. 845, sec. 35 (1984).

/29/ See, e.g., Wis.Stat.Ann., sec. 767.47(8).

/30/ H.H. v. I.I., 335 NYS2d 274, 286 NE2d 717 (1972); Minnich v. Rivera, --- NE2d ---, 11 FLR 1020 (Pa.Ct.Com.Pl. 1984).

/31/ N.C.Gen.Stat., sec. 49-14 (1976, Supp. 1977); Toryak v. Spagnuolo 292 A2d 654 (W.Va. 1982).

/32/ See Veazey v. Veazey, 560 P2d 382 (Alaska 1977).

/33/ Uniform Parentage Act, 9A U.L.A. sec. 10.

/34/ Id.

/35/ N.H.Rev.Stat.Anno., sec. 34-704 (1955); Colo.Rev.Stat., sec. 19-7-103 (1971); 13 Del. Cod., sec. 512 (1984); Ga.Code Anno., sec. 74-9901 (1902); Iowa Code, sec. 675.17 (1967); Md. Code, Art. 16, sec. 66F (1963); R.I.Gen.L., sec. 15-8/20 (1979); Wisc.Stat.Anno., secs. 767.23 (1979) and 767.51 (1979); all cited in C. Kastner and L. Young, A Guide to State Child Support and Paternity Laws (Denver, CO: National Conference of State Legislatures, 1981).

/36/ 10 Am.Jur.2d, Bastards, sec. 93.

/37/ Wright, supra, fn. 45, p. 391. See, however, Wasmund v. Nunnmaker, 277 Minn. 52, 151 NW2d 577 (1967).

/38/ F.R.C.P. 35(b).

/39/ Essex Co. Div. Welfare v. Harris, 460 A2d 713 (N.J.Super.App. Div. 1983); State of Washington v. Meacham, 93 Wash.2d 738, 612 P2d 795 (1980); Dept. of Soc. Serv. v. Thomas J. S., --- Misc.2d ---, --- NYS2d --- (1984); Territory of Hawaii v. Lanier, 40 Haw. 65 (1953); In re the Paternity of D.A.A.P., 344 NW2d 200 (Wis.App. 1983).

/40/ List adapted from "Motion in Limine Practice," 20 AmJurTrials 444, 451-2.

/41/ Uniform Parentage Act, 9A U.L.A. sec. 12.

/42/ Uniform Parentage Act, 9A U.L.A. sec. 14.

/43/ 10 Am.Jur.2d, Bastards, sec. 112.

/44/ Holz, J., "The Trial of a Paternity Case," 50 Marquette Law Rev. 450 (1967); see also Matter of Kuhn's Estate, 229 Kan. 536, 626 P2d 794 (1981).

/45/ Haley v. Metropolitan Life Ins. Co., 434 SW2d 7 (Mo.App. 1968).

/46/ T.A.L.S. v. R.D.B., 539 SW2d 737 (Mo.App. 1976).

/47/ Rossmiller v. Becker, 157 Neb. 756, 61 NW2d 393 (1953).

/48/ Va.Code, sec. 64.1-5.2(4).

/49/ Va.Code, sec. 64.1-5.2(1).

/50/ Va.Code, sec. 64.1-5.2(3).

/51/ Cal.Evid.Code, secs. 1220, 1221.

/52/ 10 AmJur2d, Bastards, sec. 109.

/53/ Holz, supra, fn. 70, p. 461.

/54/ 10 AmJur2d, Bastards, sec. 114, and Holz, supra, p. 462-464.

/55/ T.A.L.S. v. R.D.B., supra; S---J---B--- v. S---F---S---, 504 SW2d 233 (Mo.App. 1973).

/56/ T.A.L.S., supra.

/57/ Wershub, "Sexual Impotency in the Male" (1959), cited in Holz, supra, p. 471.

/58/ Holz, supra, p. 473.

/59/ This discussion is adapted from Robert E. Keith, "Resolution of Paternity Disputes by Analysis of the Blood," 8 FLR 4001, Nov. 24, 1981 (monograph); see also, Probability of Inclusion in Paternity Testing: A Technical Workshop (American Association of Blood Banks, 1982).

/60/ Berry v. Chaplin, 74 Cal.App.2d 652, 169 P2d 442 (1946). In deference to the court, it should be noted that possible errors in the blood analysis had been alleged, i.e., (1) lack of training of the serologist; (2) use of commercial sera; and (3) failure to make a countertest, 169 P2d at 451.

/61/ S. Schatkin, Disputed Paternity Proceedings, sec. 9.13 at 38-40 (rev.ed. 1979). However, see State v. Camp, 286 N.C. 148, 209 SE2d 754 (1975).

/62/ M. W. Shaw and M. Kass, "Illegitimacy, Child Support and Paternity Testing," Houston Law Rev. 13: 41-51, Oct. 1975.

/63/ M. Larson, "Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond," 13 J.Fam.L. 713, 716-7 (1973-1974); C. Lee, "Current Status of Paternity Testing," 7 Fam.L.Q. 615, 616-7 (Winter 1975); S. Sass, "The Defense of Multiple Access (Exceptio Plurium Concubentium) In Paternity Suits: A Comparative Analysis," 51 Tul.L.R. 468, 501 (April 1977).

/64/ Shaw and Kass, supra, fn. 11.

/65/ Colo.Rev.Stat. 19-6-112 to 19-6-114 (1977); Hawaii Rev.Stat. 584-11 to 584-13 (Supp. 1980); Minn.Stat.Ann. 257.62 to 257.64 (1980); Mont.Rev.Codes Ann. 40-6-112 to 40-6-115 (1975); N.D. Cent. Code 14-17-10 to 14-17-15 (1975); Wash.Rev.Code 26.26.100 to 26.26.110 (1976); Uniform Parentage Act, 9A U.L.A., Comments (Supp. 1984).

/66/ Ky.Rev.Stat. 406.081 to 406.111 (1964); La.Stat.Ann. 257.62 to 257.64 (1980); 19 Me.Rev.Stat. 277 to 280 (1967); Miss.Code 93-9-21 to 93-9-27 (1962); N.H.Rev.Stat.Ann. 522:1 to 522:10 (1953); 10 Okla.Stat. 109.250 to 109.262 (1969); 42 Pa.Cons.Stat.Ann. 6133 to 6138 (1978); Gen.Laws of R.I. 15-8-11 to 15-8-15.

/67/ Cal.Evid.Code, sec. 895 (1982 Supp.); 40.11 Rev.Stat. 1401 to 1407 (1980).

/68/ Ariz.Rev.Stat.Ann. 12-847 (1979); Ga.Code Ann. 74-306 and 74-307 (1980); Ind.Stat.Ann. 31-6-6.1-8 (1980); Iowa Code Ann. 675.41 (1980); Kan.Stat.Ann. 23-131 and 23-132 (1970); Nev.Rev.Stat. 126.121 to 126.151 (1979); N.Y.Fam.Ct.Act 532 (1981 Supp.); N.C.Gen.Stat. 49-7 and 8-550.1 (1979); Ohio Rev.Code Ann. 3111.09 and 3111.10 (1982); Tex.Fam. Code Ann. 13.02 to 13.06 (1975); Va. Code 20-61.2 (1982 Supp.); Wisc.Stat.Ann. 14-2-109 to 14-2-112 (1978).

/69/ Phillips v. Jackson, supra.

/70/ McCormick, Evidence 29, 30 (2nd ed., 1972).

/71/ Id., p. 732.

/72/ Uniform Business Records as Evidence Act, U.L.A. 1965 (withdrawn 1966).

/73/ Uniform Rules of Evidence, 13 U.L.A. 1974.

/74/ Uniform Composite Records as Evidence Act; Neb.Rev.Stat., secs. 25-12, 115 to 25-12, 119 (1951).

CHAPTER 8
Enforcing Child Support Obligations

INTRODUCTION

Since 1975, Federal regulations have required each State IV-D agency to employ contempt proceedings, garnishments, executions on real and personal property, and other remedies when appropriate. [45 CFR 303.6.] The Child Support Enforcement Amendments of 1984 expand the list of remedies that must be made available to and used by State IV-D agencies. This chapter surveys the enforcement remedies available to the Child Support Enforcement Program in most jurisdictions. The goal of each section is to explain the remedy, identify legal and practical issues relating to each remedy, and report relevant case law from across the county. In addition, the mandatory practices called for by the Child Support Enforcement Amendments of 1984 are discussed in depth. The remedies are not sequenced in order of importance or usefulness, except for the placement of income withholding at the outset of the chapter.

In addition to income withholding, this chapter covers judgments, liens against real and personal property, levy and execution, garnishment, civil contempt, criminal contempt, criminal nonsupport, interception of Federal and State tax refunds, bonds and other forms of security, equitable remedies, reports to consumer reporting agencies, full collection services by the Internal Revenue Service (IRS), mandatory military allotments, and statutory examination of a judgment debtor.

INCOME WITHHOLDING

Child support obligations have been enforced with various forms of income withholding for as long as the United States has been in existence. Over the years, many States have used wage garnishments effectively. However, even where garnishment procedures are summary and wage exemptions are limited, the temporary nature of the garnishment remedy is unsatisfactory. In the 1970s, many States enacted statutes authorizing an employer to withhold a portion of an obligor's paycheck each pay period and send it to the court that entered the order or directly to the family. Early versions of these statutes merely recognized the validity of voluntary wage assignments, and required employers to honor such assignments. As child support enforcement experts employed the concept more frequently, State legislatures began to enact statutes that authorized courts to order obligors to make wage assignments. Most often, judges would order an involuntary wage assignment as a condition of purgation after finding the obligor to be in contempt for failure to comply with the support order. This proved to be such an effective remedy that many State legislatures revised their statutes to expand the definition of wage to include other forms of income and to require judges to order involuntary wage assignments in certain circumstances.

Wage and income withholding is a superior enforcement mechanism because it extends into the future. It also allows for arrearages (as well as current support) to be collected in installments that do not preclude the obligor from meeting his or her minimum financial requirements.

In 1984, Congress recognized the efficacy of income withholding by enacting 42 USC 666(a)(1) and (b), which require States to enact statutes that provide for mandatory income withholding in most IV-D cases where the obligor is in arrears and his or her employer has been identified. The new Federal statute is very specific, both substantively and procedurally, in order to assure that State legislatures enact income withholding provisions which are effective and efficient, and that fully protect the rights of all affected parties. The requirements are based on the collective experience of the States that have enacted and implemented large-scale income withholding provisions.

The Federal statute requires that, effective October 1, 1985, income withholding be the preferred remedy. After that date, "all child support orders which are issued or modified in the State will include a provision for withholding from wages, in order to assure that withholding as a means of collecting child support is available if arrearages occur without necessity of filing application" with the State child support enforcement agency.[1] Clearly, this requirement applies to all support orders that are established in the State, regardless of the nature of the proceeding (i.e., divorce, separate maintenance, paternity, adult abuse, Uniform Reciprocal Enforcement of Support Act, etc.) and regardless of who brings the action. This provision was intended to permit someone other than the IV-D agency to initiate wage withholding (e.g., a private attorney or a custodial parent, pro se) and to make effecting the withholding easier for new IV-D cases in which an order already exists. A few States have gained special exemptions from immediately effecting wage withholding procedures.

Most existing statutes that contain such a requirement call for a conditional withholding provision to be included in the support order itself. Such a provision fulfills a dual function. First, it encourages the obligor to comply with the support order voluntarily. Second, it informs the obligor regarding the consequences of noncompliance in advance, thus lessening the degree of notice to which he or she may be constitutionally guaranteed at the time when the withholding is initiated.

In addition to requiring that a provision be included in every new or modified order, the Federal statute requires that income withholding be effected in every case worked by the IV-D agency in which an appropriate delinquency occurs.[2] The statute allows the State some flexibility in determining what the "triggering event" will be, but State law must provide for withholding no later than the "date on which the payments which the absent parent has failed to make under such order are at least equal to the support payable for one month."[3] The absent parent may request that the withholding begin at an earlier date.

The Act requires that the withholding occur "without the need for any amendment to the support order involved or for any further action (other than those actions required under this part) by the court or other entity which issued such order."[4] "Actions required under this part" refers only to providing notice, resolving contested cases, distributing collections, and terminating withholdings. This provision was apparently intended to remove all discretion from the court or agency administering the withholding procedure as to whether withholding should occur in a case, and to prevent State law from requiring a hearing in all cases.[5]

The Federal statute allows State due process requirements to dictate the extent of the notice to be provided to the obligor after the triggering event occurs; it requires that notice be given on the triggering date. As a general rule, the absent parent will be entitled to an advance notice regarding the alleged delinquency and the withholding procedure. The notice, where required, must inform the absent parent:

- Of the amount of overdue support owed
- Of the amount that will be withheld
- That the withholding applies to any current or subsequent period of employment
- Of the procedures available for contesting the withholding and that the only basis for contesting the withholding is a mistake of fact
- Of the period within which the absent parent must contact the State in order to contest the withholding and that failure to contact the State within the specified time limit will result in the State notifying the employer to begin withholding
- Of the actions the State will take if the absent parent contests the withholding, including the procedure to resolve such contests.[6]

The requirement of advance notice does not apply to States that had a withholding system in effect on August 16, 1984, providing for other, and presumably lesser, forms of notice. For instance, the wage withholding statutes in effect in Missouri[7] and California[8] on that date provide for notice to the employer, who is to notify the absent parent and continue to hold the portion of his or her wages until a hearing is held and a resolution is achieved.

At the hearing, the only ground on which the absent parent may contest the withholding is "mistake of fact." The Act does not define mistake of fact, but the report issued by the House Ways and Means Committee indicates that the drafters meant this to be a very restrictive concept:

> Such mistakes of fact would include, for example, errors in the amount of current support owed, errors in the amount of the arrearage that had accrued, or mistaken identity of the alleged obligor. This provision is not intended to waive the withholding requirement if the obligor paid the past-due support after receiving notice that withholding was being implemented. The obligor could not contest the proposed withholding on other grounds such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation. These issues are important, but nonpayment of support should not be used to obtain relief with regard to these problems. They should be pursued independently through separate legal actions.[9]

Within 45 days of the date the advance notice is issued, the State must provide an absent parent who contests a wage withholding an opportunity to present his or her case to the State, determine if the withholding is valid, and notify the absent parent and employer, where appropriate.[10] For States in which the administering agency is the court system, the hearing will no doubt be the type of judicial hearing normally provided to a judgment debtor who contests execution on the judgment, the scope of which will be limited to mistakes of fact. For States in which an executive agency administers the procedure, an administrative hearing will be given. The Act does not require a formal hearing. Indeed, given the limited scope of the hearing, many States may opt for a less formal hearing.

If the results of the hearing allow the withholding to occur, the administering agency must notify the obligor of the decision and serve a withholding notice, or order, on the employer within 45 days of the advance notice. The Act limits the amount of information that may appear in the employer notice to "such information as may be necessary for the employer to comply with the withholding order."[11] The employer must be required to withhold so much of the parent's wages

> . . . as is necessary to comply with the order and provide for the payment of any fee to the employer which may be required under paragraph (6)(A), up to the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act (15 U.S.C. 1673(b)). If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support and provide for the fee, may not exceed the limit permitted under such section 303(b), but the State need not withhold up to the maximum amount permitted under such section in order to satisfy arrearages. [42 USC 666(b)(1).]

The Federal Consumer Credit Protection Act (FCCPA) determines the maximum part of an individual's aggregate disposable earnings that are subject to "garnishment" to enforce an order for the support of any person. These limits are 50 percent of disposable earnings for an absent parent who is the head of a household and 60 percent for an absent parent who is not supporting a second family. These percentages increase an additional 5 percent, to 55 and 65 percent respectively, where the arrearages represent support that fell due more than 12 weeks prior to the current pay period. [15 USC 1673(b).]

The FCCPA defines garnishment as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for the payment of any debt." [15 USC 1672(c).] In addition, the FCCPA preempts less restrictive State laws. [15 USC 1677.] Thus, the Federal requirement will apply even in a State that does not incorporate the FCCPA limitations into its wage withholding statute. [Marshall v. Dist. Ct. for 41b Jud. Dist., 444 F. Supp. 1110 (E.D. Mich. 1981); G.M.A.C. v. Metropolitan Opera Assn., 98 Misc.2d 307, 413 NYS2d 818 (Sup.Ct.App.Div. 1980).] States are free to enact statutes which provide for greater protection of a debtor's disposable earnings. [15 USC 1677; Crane v. Crane, 417 F.Supp. 38 (E.D. Okla. 1976); Ferry v. Ferry, 271 NW2d 450 (Neb. 1979).]

On receiving the notice, the employer must begin withholding the appropriate amount of the obligor's wages "no later than the first pay period that occurs after 14 days following the date the notice was mailed."[12] The Act regulates closely the language in State statutes regarding other rights and liabilities of the employer. For instance, the employer must be subject to fine for discharging any absent parent from employment, or taking other forms of retaliation, because of a withholding.[13] In addition, the employer must be held liable for amounts that the employer fails to withhold as directed.[14]

The Act also requires State law to contain provisions that make it easy for employers to comply with their responsibilities under the Act. As noted above, the statute may allow the employer to retain a fee in order to offset some of the cost of the withholding if the State permits a fee to be deducted.[15] Furthermore, the employer must be allowed to combine all support payments it is required to withhold into a single payment, to be forwarded to the agency or court with a list denoting the cases to which the payment

applies.[16] The employer need not vary from its normal pay and disbursement cycles in order to comply with withholding orders,[17] but it must forward the support payment to the State, or other designated recipient, within 10 days of the date the employee/absent parent is paid.[18]

When the obligor changes jobs, the employer upon whom a wage withholding has been served must be required to notify the court or agency that entered the wage withholding order and to provide specified information,[19] and the State must notify the new employer to continue withholding from the obligor's wages.[20] Similarly, State statutes must provide for terminating wage withholding orders in appropriate circumstances, such as when all of the children have become emancipated or when it is impossible to forward amounts withheld to the custodial parent because his or her whereabouts are unknown. Payment of overdue support should never be the only basis for termination of withholding.[21]

Other provisions require that the wage withholding be given priority over other legal processes brought under State law against the same wages of the obligor,[22] and that the procedure be applied in interstate cases.[23] [Interstate wage withholding is discussed in detail in Chapter 10.] The Act also allows States to implement statutes that expand the definition of wages to include forms of income other than those normally included in the definition.[24]

Expanded use of income withholding procedures should change the principal method of enforcing child support obligations in many States. Moreover, the summary nature of the process, and the replacement of court hearings with administrative hearings in many States, will reduce the role of the courts in enforcement proceedings in cases where the obligor is employed and the employer is known. Nevertheless, the court will continue to have an important role in overseeing the process.

JUDGMENTS

In most States, child support orders are enforceable by the same means as regular court judgments. The word order is used instead of judgment because at the time a decree ordering support is issued, it looks to the future and is not at that point a judicial determination of a "sum certain." Nevertheless, in most States a judgment arises on the date a support payment is due and not made.[25] The judgment automatically increases as subsequent payments are missed. Because any remedy that might be used to enforce the order would be by definition a postjudgment remedy, the obligor may not be constitutionally entitled to notice and a predeprivation hearing. [See Sanchez v. Carruth, 568 P2d 1078 (Ariz.App. 1977).]

In other States, the order is not entitled to judgment status.[26] In these States, it is necessary to reduce the arrearages to judgment prior to depriving the obligor of property through an enforcement remedy. The procedure to reduce the arrearage to judgment can take many forms. The judgment can be established through a special proceeding filed under the original case number in the same court that entered the support order. In some States, the judgment must be sought in a court different from the one that entered the order, because the latter is a court of inferior jurisdiction and lacks authority to enter money judgments. In these States, it may be necessary to invoke a formal transfer proceeding, in addition to the enforcement proceeding, in order to get the case before the appropriate court.

The most common procedure in States where arrearages must be reduced to judgment combines the request for judgment with a contempt proceeding. In States where the arrearage obtains the status of a judgment automatically, the total arrearage can be substantiated simply by referring to the court's payment record or by presenting to the court clerk an affidavit executed by the obligee. Once the amount of the arrearage is determined, the amount of the judgment can be noted on the record, or execution may issue.

A judgment is advantageous to the child support enforcement agency for the following reasons:

- A judgment may create a nonpossessory lien against the obligor's property. (See below for a discussion of the creation and use of judgment liens.)
- The judgment may forestall the obligor's ability to seek retroactive modification of the arrearage.[27]
- Postjudgment remedies require that less cumbersome procedural protections be afforded the obligor than do prejudgment remedies. This can be particularly important in Federal tax refund setoff proceedings. [See Jahn v. Regan, 584 F.Supp. 399 (D.C. Mich. 1984).]
- Should the obligor die, a judgment may be entitled to a higher priority in probate proceedings than an unliquidated claim for support arrearages. Indeed, a judgment may be a condition precedent to filing the claim. [See Austin v. Austin, 364 So2d 301 (Ala. 1978).]
- The burden of proof regarding payment, or other form of satisfaction, may switch from the obligee to the obligor once the arrearage is reduced to judgment.
- Reducing the arrearage to judgment may change the applicable statute of limitation, thereby preserving the collectibility of payments that fell due in the distant past. Typically, the statute of limitation that applies to judgments is 5 to 20 years. (See Chapter 9 for a discussion of statutes of limitation as applied to support obligations.)
- Establishing a judgment expands the enforcement remedies that may be employed; normally a judgment creditor has a right to use all available legal remedies.
- Should the obligor move to another State, the existence of an instate judgment allows enforcement to be accomplished in State where the obligor is employed by a corporation that "does business" within the State, where he or she is employed by the Federal Government, or where he or she otherwise has property or wages that are subject to the jurisdiction of an instate court.
- A judgment is entitled to full faith and credit in other State courts.

Clearly, States that have conferred automatic judgment status on their child support orders are one step ahead of States in which arrearages must be reduced to judgment. At least two States, Oregon and Nebraska, have done so by statute.[28]

LIENS AGAINST REAL AND PERSONAL PROPERTY

The Child Support Enforcement Amendments of 1984 require States to implement "procedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the State."[29] In stark contrast to the wage withholding requirement, the Federal statute neither defines lien nor provides any guidance as to when a lien must be created. It does direct State child support enforcement agencies to establish guidelines for determining whether or not to establish a lien on a given case, however.

As used here, the term lien means a nonpossessory interest that a support obligee (or the State, by virtue of the assignment of support rights) obtains in a piece of real or personal property as a result of the entry of a support order, subsequent noncompliance by the obligor, and compliance by the obligee with all procedural steps required by State law as to the creation of liens. (Procedural variances that exist in the States will be discussed below.) This working definition excludes the "wage lien" used in some States (for example, Maryland[30]) to withhold wages from an obligor, and the possessory lien that a judgment creditor obtains after the sheriff seizes a piece of personal property pursuant to a writ of execution.

A lien, as used here, refers to a "slumbering" interest that allows the obligor to retain possession of the piece of property, but which prevents transfer of the piece of property unless the lien is satisfied. A lien statute prevents transfer of affected property either directly (by prohibiting the recording agency from issuing a new title or deed) or indirectly (by providing that all subsequent interests in the property will be subject to the lien). The latter method is the most common. It works because subsequent potential purchasers and lenders receive notice of the existence of the lien during the process of transferring the title or deed. The potential purchaser or lender reacts to this "cloud on the title" by requiring the obligor to satisfy the lien, or obtain a release from the obligee, before agreeing to go forward with the transfer or loan. In real property transfers, the potential purchaser or lender discovers the lien through the title search conducted by the title insurance company. Personal property liens require notice to subsequent purchasers and lenders as well, but the notice usually is provided by way of a note on the title of the property, or by serving notice on a third party possessor.

Typically, the lien will attach to all of the obligor's real property situated in the county in which the support judgment was entered and/or has been recorded. In some States (e.g., New Jersey), judgments are centrally recorded and create statewide liens on real property. As such, the lien document (if there is one) does not have to refer to specific property in order to prevent a sale or other transfer. In most States, the lien also will attach to property attained by the obligor after the lien has arisen.

The lien will last for a number of years, depending on the statute, and generally may be revived for an indefinite number of additional periods, as long as the underlying judgment survives. The lien may grow automatically, as the arrearage increases, and even may take priority over liens created by other creditors if the statute so provides.

Procedures to Perfect

Procedures for establishing liens vary among the States. In a few States, the lien arises automatically upon the entry of a support order and the first incidence of noncompliance by the obligor. Most States require the obligee to take some affirmative act to create the lien. This act may be as simple as recording a transcript of the support order or judgment in an appropriate office of public records (typically the recorder of deeds for real property and the title agency for personal property), or as complicated as filing an independent action to reduce the arrearage to judgment, obtaining a specific order from the court establishing the lien as to an identified piece of property, and directing the appropriate public official to note the existence of the lien on the title or deed.

The most effective procedure adopts a middle ground. The obligee files a certified copy of the support order, and perhaps attaches an affidavit detailing the amount claimed to be due and owing as of the date of recording. This latter requirement may not be necessary where the support order is payable to the court or other public registry such that the amount of the lien at any point in time can be determined by reference to public records. In addition to these two documents, it is customary to include a cover document requesting the court clerk, recorder of deeds, or title agency to file the documents and carry out any steps required by the statute to establish the lien.

Once the lien is created, the obligee takes no further steps until immediately before the lien expires. At that point, the statute should prescribe a method to "revive" the lien. Assuming the case warrants further effort, the child support enforcement agency will revive the lien prior to its expiration. Failure to revive the lien may allow the obligor to dispose of property without having to apply the sale proceeds to his or her arrearage, and may cost the child support obligee a priority over other lienholders.

Revival procedures vary among the States as well. Some States still employ the common law procedure. The obligee must obtain a writ of scire facias from the court that entered the order (or the court where the lien was created, if not the rendering court) and attempt service of the writ on the obligor. The issuance of the writ generally effects the revival, even if it cannot be served until after the initial lien expires, and the second lien dates back to the date of the initial lien's creation for priority purposes. Some States allow a judgment lien to be revived by issuance of a writ of execution at any time prior to dormancy. In other States, the lien must be revived by a separate "action in debt," seeking the entry of a new judgment based on the first judgment and an allegation of nonsatisfaction. The lien perfection procedure must be complied with anew in order to revive the lien. The second judgment lien attaches to property owned by the obligor as of the date of the creation of the second lien, and the priority of the lien is determined as of that date.

Satisfaction and Release

Most lien statutes contain provisions allowing for a voluntary lien release by the obligee, and establishing a procedure whereby the obligor can petition the rendering court for an order releasing the lien if the obligee refuses to execute a voluntary release. Such a release can be general or limited to specific property. In order to obtain a court order releasing the lien, the obligor generally must post a bond, provide other security, or satisfy the court that releasing the lien will not leave the obligee in an insecure position.

Most liens either will expire of old age or be released voluntarily by the obligee. The obligor generally requests a voluntary release when he or she attempts to sell the property or borrow money using it as collateral, and the existence of the lien becomes known to the purchaser or lender. At this point, the lien becomes a powerful collection remedy. If the obligor wants to sell the property or obtain a loan, he or she must obtain a voluntary release of lien as to the specific piece of property involved. (There generally will be insufficient time and grounds to petition the court for an involuntary release.) Clearly, the obligee has a great deal of leverage in such a situation, but the obligee should not prevent the transfer altogether. The sale or loan is likely to produce a pool of funds out of which a substantial payment on the support arrearage can be made. If the transfer is a sale, it is likely that the obligor has some equity in the property after prior lienholders (i.e., mortgagees) are paid off--otherwise the sale price would not be acceptable to the obligor. If the transfer is a loan or second mortgage, sometimes a portion of the loan proceeds can be applied to the child support obligation, or other arrangements can be made that are acceptable to the obligee.

Where the obligee is the custodial parent (non-AFDC cases), the child support enforcement agency will need to confer with the custodial parent in order to determine whether or not to release the lien based on the best terms available. Where the obligee is the State (AFDC cases), the agency will apply its own policy in responding to the absent parent's lien release request. Either way, the agency will probably not insist on recovering the entire arrearage in return for a voluntary release. The collection will occur only if the transfer occurs. Often, the agency will negotiate for the best immediate payment it can obtain, and attempt to secure payment of additional amounts by way of some other guarantee as a part of the release agreement.

Once the agreement is reached, there is usually a third party involved in the transfer (i.e., a real estate agent) who is willing to act as escrow agent to facilitate the exchange of the lien release for the payment. This allows the purchaser to pay off the lien, thereby diminishing any insecurities the purchaser might have regarding the validity of the title, instead of paying the obligor and trusting him or her to satisfy the lien.

A lien release is a contract and, like any other contract, must be drafted carefully so as to embody the entire agreement entered into between the parties. Moreover, lien releases are often the product of negotiations that can be quite unique. Furthermore, the result of the negotiation process can have profound effects on subsequent purchasers of the obligor's property (and the obligor's children) should something go awry. Thus, it is crucial that forms be tailored to each case, and that a program attorney be involved heavily in the negotiation and drafting of each agreement and release. The legal description of the property must be transcribed carefully from the deed, and the statement of exactly what is being released must be drawn narrowly. A poorly drawn lien release could be construed as a satisfaction of the entire judgment, or a limitation of the obligee's right to use other remedies to enforce any arrears that might remain.

In addition to executing lien releases, a judgment creditor occasionally is requested to enter a formal "satisfaction of judgment" with the court that entered the order. This may be particularly true in States where arrearages are entitled to automatic judgment status, a lien arises without the need of any affirmative act by the support obligee, and there is no central payment registry to act as an official record. A formal satisfaction is the only way a judgment debtor in such a situation can obtain a clear record. The obligee generally may enter the satisfaction by sworn affidavit or in person under oath.

LEVY AND EXECUTION

In this section, "levy and execution" refers to the statutory procedure that allows a judgment creditor to obtain a court order directing the sheriff (or other similar official) to seize property in the possession of the obligor, sell the property at a sheriff's sale, and apply the proceeds, less the costs of the sale, in satisfaction of the judgment debt. Because execution is statutory, the exact procedure will vary slightly from State to State.

As noted in the previous section, the Child Support Enforcement Amendments of 1984 do not define the term lien. In many States, a judgment creditor must take the steps necessary to create a lien prior to seeking levy and execution. Thus, the Act's requirement that a "lien" procedure be available could be construed to require that the lienholder obtain the right to enforce the lien by way of levy and execution, in addition to obtaining the nonpossessory interest discussed in the previous section. In most States, such a procedure is already available after judgment is rendered. In any event, as noted in the introduction to this chapter, the State IV-D agency must make use of proceedings to attach real or personal property if the State's law provides for such a procedure and the obligor or his property are subject to the jurisdiction of the appropriate court.

Obtaining the Writ

Generally, the levy and execution process is initiated by obtaining a writ of execution, or attachment, from the clerk of the court that rendered the order. In some States, the writ is issued by the court in the county where the property to be seized is located, regardless of the identity of the rendering court. In such a State, the support order or judgment first would have to be transferred (or registered) in the county where the property sits. The writ is directed to the sheriff of the appropriate county, or perhaps to any sheriff in the State, and orders the sheriff to levy on the property described in the writ and, after appraisal and a specified form of public notice, to sell the property at a sheriff's sale. Issuance of the writ is usually a ministerial act of the court clerk and as such does not allow for notice and a hearing; nor does the clerk have discretion to refuse the writ request if all procedural steps required by the statute have been completed.

In some States that require the support obligee to reduce arrearages to judgment prior to seeking execution, the judgment must provide specifically for execution before the writ can issue. In such States, the court may have some discretion regarding the language contained in the judgment. Attorneys in these States often routinely draft proposed judgments that provide for execution.

The writ typically has a limited life span of less than a year. The expiration date specified on the writ is referred to as the "return date." The sheriff must seize the property, appraise it, schedule the sale and issue public notice, hold the sale, and turn over the proceeds less costs prior to the return date. If the sheriff is unable to locate the property during the period of the writ (which should occur only for personal property), the sheriff will make a nulla bona return. Successive writs are referred to as alias and plurius, as appropriate.

Seizing the Property

The procedure the sheriff follows will depend on whether the property to be seized is real or personal property. Real property is easier to levy against. The legal description

and street address will give the sheriff sufficient information to identify and seize the property. The seizure is achieved by placing a notice on the property, notifying anyone on the property at the time of the levy, and placing a notice in the office of the recorder of deeds.

For personal property, the procedure is more difficult for at least two reasons. First, the property is often movable and thus difficult to locate. Second, the property may not be particularly unique in the community. As a result, the execution request should include very specific and complete information. The court clerk will transfer this information to the writ, enabling the sheriff to locate the piece of property. If the property is capable of being seized physically and taken away, the sheriff will do so. If not, the seizure will be accomplished by some other act that effectively removes the item from the obligor's possession and notifies third parties that the property has been seized. This may be achieved by placing a sheriff's seal on the item in a manner that makes it incapable of being removed. If the item is seized physically, it will be transported to a storage facility maintained or arranged for by the sheriff.

Notice of Exemptions

In most States, certain types of a judgment debtor's property are exempt from execution. The exemptions are established by statute, and generally protect tools of the obligor's trade, books, family heirlooms, and the like from execution. Many States also allow the judgment debtor a homestead and automobile exemption in limited amounts. By statute, court rule, case law, or practice, the sheriff often is responsible for notifying the debtor of his or her exemption rights. The notice usually is accomplished with a form "notice of exemptions" provided by the court clerk's or the sheriff's office. Often, the sheriff provides a verbal explanation of the exemption rights to ensure that the debtor understands them. The exemption process usually requires that the debtor choose the property to be protected by the exemption, substituting nonexempt property for the exempt property listed in the writ.

Many States have enacted statutes providing that the normal exemptions do not apply to protect delinquent support obligors. The theory behind this exception is that the exemptions were designed to protect the judgment debtor's ability to provide for his or her family and should not be applied to frustrate the obligee's attempt to force payment of child support.

Notice and Sale

Notice and sale procedures are set forth in detail by statute and may differ depending on whether the property to be sold is real or personal property. Once the sheriff has seized the property and appraised its value to determine whether additional property should be seized in order to satisfy the judgment, the sheriff must schedule the sale and provide the public notice required by statute. The notice may have to be accomplished by posting advertisements in a newspaper, posting notices in the courthouse, or other similar method.

The statute also may prescribe the number of days in advance of the sale that the notice must appear, and the place and timing of the sale. For instance, some statutes

provide that a real estate sheriff's sale must take place at a real estate exchange between the hours of 9:00 a.m. and 5:00 p.m. Personal property is often sold "on the steps of the courthouse."

Costs incurred in the storage and sale, along with execution and sheriff's fees, if applicable, are subtracted from the sale price, and the sheriff distributes the remainder to the judgment creditor together with a sheriff's deed to the property. The purchaser takes the property subject to prior liens and encumbrances, and subject to any right granted the debtor by statute to "redeem" the property by submitting the sale price, costs, and fees to the sheriff within a specified period of time. When the redemption period expires, the sheriff's deed matures into a regular deed.

GARNISHMENT

Garnishment is a statutory procedure allowing a judgment creditor to seize a judgment debtor's property that is in the possession of a third person, and apply the property to the judgment debt. In the child support context, garnishment has been a very effective remedy in some States, and has been used to seize wages, bank accounts, workers' compensation benefits, pension benefits, and unemployment compensation benefits. It is generally a remedy with a limited time scope, usually days or months. Garnishment cannot be used in most States to collect current or future support; the amount of the garnishment is limited to the amount of arrears due on the date the writ issues.

The future use of garnishments to reach wages will decrease markedly due to the withholding provision in the Child Support Enforcement Amendments of 1984. Nevertheless, child support enforcement agencies will continue to use this remedy to obtain other types of property.

Procedure

The first step in the garnishment process is to compute the amount of outstanding arrearages, including interest, if permitted by statute. The custodial parent normally will prepare an affidavit to document the payments he or she has received from the obligor, especially with respect to any periods during which the order was not payable through the court or other official registry. A representative of the IV-D agency often will prepare a second affidavit if payments were to have been made directly to the agency for any of the applicable period.

Next, a writ of execution or garnishment must be issued by the court that entered the order. The writ should direct the sheriff in the county in which the garnishee is located to serve the writ. If the absent parent is a Federal employee or in the military, the writ may be served by certified mail, pursuant to 5 CFR 581. The execution request form, and the writ itself, generally will contain blanks for identifying the source of the judgment, alleging the arrearage, and identifying the garnishee.

In addition to the writ, the sheriff will serve a notice on the garnishee, informing him or her of the effect of the garnishment, and instructing him or her as to the applicable exemptions for child support garnishments. This notice vests the court's jurisdiction over

the garnishee, so it is crucial that the notice comply with all statutory requirements.[31] Some States require that the obligor be notified as well.

The final document to be served on the garnishee is the interrogatory form. Normally, there are four or five interrogatories. These are designed to be easy for the garnishee to complete and file with the court within the time limit set by statute. The interrogatories require the garnishee to disclose any property acquired by the obligor during the period in which the garnishment was in effect. The garnishee also may set up any defenses to the garnishment that the garnishee, or the obligor, may have.

On the return date, the garnishee delivers the interrogatory answers to the sheriff or, more often, mails them to the court and the attorney for the obligee. The court clerk then may issue a pay-in order, directing the garnishee to pay the garnishment proceeds over to the sheriff. Often, the garnishee will pay the proceeds to the sheriff or court together with the interrogatory answers. Occasionally, the garnishee fails to answer the interrogatories or to withhold and deliver the obligor's property, or the obligee's attorney will suspect that the interrogatory answers are untrue. The garnishment statute usually will provide for a subsequent proceeding allowing the obligee to seek judgment against the garnishee for the value of the property that should have been withheld and paid over to the sheriff. In some States, the obligation to answer the interrogatories may be enforced by way of contempt proceedings as well.

Payment by the garnishee to the obligor constitutes satisfaction of the debt owed by the garnishee to the obligor. Thus, the garnishee is protected from double liability.

Constitutional Limitations on Garnishment

The U.S. Supreme Court's opinion in the case of Shaffer v. Heitner, 97 SCt 2569, 53 LEd2d 683 (1977), prevents the use of prejudgment garnishments to obtain in rem jurisdiction over a debtor. This holding applies with equal force to child support and paternity situations except where "extraordinary circumstances" exist, such as:

- The defendant has been avoiding service of process
- The defendant is about to remove his or her person or property out of the State
- The defendant has conveyed or is about to convey property fraudulently so as to hinder or delay enforcement attempt.[32]

Where such extraordinary circumstances exist, it still may be possible for the IV-D agency to initiate an action to establish a support obligation, or establish paternity, by seizing property of the debtor that is in the hands of a third party in the jurisdiction. Procedural hurdles may include an ex parte hearing to establish the existence of the extraordinary circumstances, to devise an appropriate form of service of process on the obligor, and to set the amount of the bond to be filed by the obligee.

With respect to postjudgment garnishments (and wage withholding), the chief constitutional issues are (1) the time, manner, and extent of notice to the absent parent and (2) the timing of the hearing. Due process, of course, is a variable concept depending on the individual requirements of each case. The various conflicting private and public

interests affected by the State action must be analyzed and balanced, and the risk of erroneous deprivation of a protected interest must be evaluated, given the procedure under scrutiny. [Mathews v. Eldridge, 424 US 319, 96 SCt 893, 47 LEd2d 18 (1976).]

The U.S. Supreme Court has dealt with the postjudgment seizure question on two occasions. In Endicott-Johnson v. Encyclopedia Press, Inc., 266 US 285 (1924), and Griffin v. Griffin, 327 US 220 (1946), the Court addressed the issue of whether notice and hearing must be provided before postjudgment remedies may be applied. Endicott dealt with wage garnishment. Griffin involved an out-of-State support judgment and the procedure for obtaining a writ of execution in the second State. Although the two cases involved identical constitutional issues, the results were inconsistent. Endicott held that the judgment debtor is not entitled to preseizure notice and hearing, while Griffin held that notice and hearing are required.

In Endicott, the Court rejected the due process complaint, stating:

> The established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.

Endicott has never been overruled, despite the existence of Griffin, and continues to provide authority for summary execution to satisfy judgment debts, as evidence by numerous appellate decisions. [Huggins v. Deinhard, 654 P2d 32 (Ariz.App. 1982); Casa del Rey v. Hart, 643 P2d 900 (Wash. 1982); Gedeon v. Gedeon,, 630 P2d 579 (Colo. 1979); Hartford Elec. Light Co. v. Tucker, 438 A2d 828 (Conn. 1981); Mitchell v. Mitchell, 611 P2d 373 (Utah 1980); Black v. Black, 377 A2d 1308 (R.I. 1977); Sanchez v. Carruth, 568 P2d 1078 (Ariz.App. 1977); In re Marriage of Crookshanks, 116 Cal.Rptr. 10 (Cal.App. 1974); Bittner v. Butts, 514 SW2d 566 (Mo.1974); Halpern v. Austin, 385 F.Supp. 1009 (N.D.Ga. 1974); Langford v. Tennessee, 356 F.Supp. 1163 (W.D.Tenn. 1973); Moya v. DeBaca, 286 F.Supp. 1163 (D.N.M. 1968).]

Curiously, despite the strength of the cited case law, Endicott has not established a firm rule. In Griffin, the Supreme Court rejected the Endicott rationale without expressly overruling the prior decision. Under the terms of a 1924 New York divorce decree, the husband was ordered to make monthly support payments of $250. The husband failed to comply and the wife obtained judgment after notice and hearing. In 1936, she obtained the docketing of a second judgment, this time without notice to the husband. The wife then attempted to enforce the second judgment in the District of Columbia. The Supreme Court held that it would be a violation of the husband's right to due process to allow enforcement of the judgment in the District of Columbia because of the lack of notice and hearing before the order was reduced to judgment in New York. The husband was prevented thereby from raising any defenses he might have possessed, which included filing a motion for retroactive modification or proving payment or satisfaction. The Court concluded that additional due process was required because enforcement proceedings "affect[ed] his rights in ways in which the 1926 decree did not." [327 US at 229.]

Another trend is important. Beginning in 1969, the Supreme Court struck down a number of prejudgment garnishment statutes that did not provide for preseizure notice and hearing. [See Sniadach v. Family Finance Corp., 395 US 337, 89 SCt 1820, 23 LEd2d 349 (1969); Fuentes v. Shevin, 407 US 67, 92 SCt 1983, 32 LEd2d 556 (1972); Mitchell v. W.T. Grant, 416 US 600, 94 SCt 1895, 40 LEd2d 406 (1974); North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 US 601, 95 SCt 719, 42 LEd2d 751 (1975).] These cases, combined with Griffin, recently have produced a number of decisions striking down postjudgment garnishments and executions where the procedure used did not provide for preseizure notice and hearing. [See Deary v. Guardian Loan Co., 534 F.Supp. 1178 (S.D.N.Y. 1982); Finberg v. Sullivan, 634 F2d 50 (C.A.3 1980); Betts v. Tom, 431 F.Supp. 1369 (D. Hawaii 1977); Brown v. Liberty Loan Corp., 392 F.Supp. 1023 (M.D. Fla. 1974).]

These decisions typically have referred to Griffin and Mathews v. Eldridge, supra, and have noted the proliferation of exemption rights that have been established in recent years to insulate debtor's property from execution. The decisions have held that preseizure notice and hearing are necessary to lessen the risk that a judgment debtor will be unable to assert his or her exemption rights.

It is virtually impossible to reconcile these two lines of case law, and it is doubtful that such a reconciliation will come from the Supreme Court in the near future. At least four times since 1969, the Supreme Court has refused to overrule Endicott. [See In re Marriage of Crookshanks, supra; Mova v. DeBaca, supra; Hannen v. DeMarcus, 390 US 736 (1968); Elkin v. Elkin, --- US --- (1985).]

The issue of when the judgment debtor must be provided a hearing is similarly unsettled. Even in prejudgment cases, the Supreme Court has indicated that a predeprivation hearing may not be necessary as long as safeguards are built into the process to ensure that the creditor's claim is valid, and that an immediate postseizure hearing be provided for. [Mitchell, supra, p. 615-616; Di-Chem, supra, p. 722-723.] Such safeguards generally are built into postjudgment garnishment processes as applied to child support enforcement, in that:

- A hearing was held at the time the order was established.
- The payments are paid through the court or other public registry.
- A postseizure hearing is available while the garnishee is still in possession of the obligor's property.

Garnishing Wages

In child support enforcement, the mandatory wage withholding procedure will replace wage garnishment in all but a few circumstances. Garnishment may continue to be useful when:

- The family is no longer receiving child support enforcement services and an arrearage is due and owing to the State.
- The State's garnishment procedure is quick and easy; the garnishment could be used to collect support while the notice and hearing procedure of the wage withholding statute is being complied with.

In addition, much of the statutory and case law regarding wage garnishment will continue to apply in serving and enforcing income withholding orders under the new procedure. This discussion will focus on two such topics: (1) the percentage of the obligor's disposable earnings that is subject to garnishment; and (2) the person who is authorized to accept service of a wage garnishment on behalf of an employer.

The FCCPA restricts the amount of an individual's disposable earnings that can be garnished to enforce a support obligation. Prior to 1977, when the Tax Reduction and Simplification Act was passed, there were no Federal limitations, and many States allowed 100 percent of an obligor's wages to be garnished. 15 USC 1673(b) now provides that the maximum amount of an individual's disposable earnings that may be garnished for support is as follows:

- 50 percent if the individual is supporting his or her spouse, or a dependent child
- 60 percent if the individual is not supporting any such additional persons
- These percentages increase to 55 and 65 percent, respectively, if the garnishment is issued to collect support payments that fell due more than 12 weeks earlier.

The FCCPA does not pre-empt the law of garnishment entirely. These percentages represent the maximum that State law may allow to be garnished. Where State and Federal law conflict, the law that provides the debtor with the greatest protection applies. In addition to the percentage limitations, the FCCPA prohibits an employer from discharging an employee whose wages have been garnished for only one indebtedness. [An annotation of Federal and State case law construing the FCCPA appears at 14 ALR Fed 447.]

Garnishing Out-of-State Wages

It is often possible to garnish wages earned outside the State in which the children reside, as long as an order exists in that State (or can be registered in that State), the court that entered the order had personal jurisdiction over the absent parent and subject matter jurisdiction over the cause of action that produced the order, and the court has jurisdiction over the employer. "It is well settled that a foreign corporation authorized to do business in a State and subject to process therein may be garnished on a debt owing to a nonresident of the State. . . ." [Champion Intern. Corp. v. Ayars, 587 F.Supp. 1274 (D.Conn. 1984), quoting Mechanics Finance Co. v. Austin, 8 N.J. 577, 86 A2d 417 (1952); Garrett v. Garrett, 30 Colo.App. 167, 490 P2d 313 (1971); Little v. Little, 34 N.J.Super. 111, 111 A2d 517 (1954); Birl v. Birl, 48 Del.Co. 387, 24 Pa.D.&C. 412 (Pa.Super.Ct. 1961); but see Morrill v. Tong, 45 NE2d 1221 (Mass. 1983).] In the Ayars case, the U.S. District Court for Connecticut specifically rejected the absent parent's argument that the enforcing court must have physical power (jurisdiction) over the administrative branch of the corporation that will be responsible for carrying out the terms of the garnishment order. The court held that a corporation is a single "person" and rejected the absent parent's argument on public policy grounds.

Service of Process

Typically, garnishment statutes require personal service on individuals and partnerships and, with respect to corporate garnishees, as follows:

> Notice of garnishment shall be served on a corporation, in writing, by delivering such notice, or a copy thereof, to the president, secretary, treasurer, cashier or other chief or managing officer of such corporation; provided, such notice may be served on a railroad corporation by delivering the same, or a copy thereof, to any station or freight agent of such corporation, and on insurance companies not incorporated by or organized under the laws of this State, by delivering the same, or a copy thereof, to the superintendent of the insurance department. [Section 525.030 RSMo 1978.]

In addition, many State statutes governing corporations include a provision which requires all corporations "doing business" within the State to appoint a registered agent to accept service of process on behalf of the corporation. A registry of such agents, and corporate officers, is maintained by the State agency that maintains the records required by the corporations statute, usually the Secretary of State.

Again, because garnishment is a creature of statute, strict compliance with all statutory requirements is essential. Anything short of full compliance will fail to confer upon the court the necessary jurisdiction over the garnishee. [6 Am.Jur.2d, Attachment and Garnishment, sec. 339.]

There is much case law regarding the definition of "general" or "managing" agent for purposes of accepting process on behalf of a corporation. Missouri courts have construed the above statute to define valid service as service on an officer or "a duly constituted executive officer whose authority and powers are such that he is regularly in control of the operations and business of the corporation." [Smith v. Bennett, 472 SW2d 623 (Mo.App. 1971); see Anno., 17 ALR3d 625.]

Garnishing Bank Accounts

Bank accounts can be very good collection sources. Three issues regarding the garnishment of bank accounts can cause problems, however: (1) discovering the existence and identification of the account; (2) discovering which branch of a bank may accept service of process to affect the account; and (3) if the absent parent has remarried, or has a joint account with another individual such as a business partner, determining if the account is subject to garnishment for enforcement of the absent parent's obligation.

Discovering the existence of a bank account used to be a difficult task, because the account had to be found without alerting the absent parent that the search was taking place. However, the Office of Child Support Enforcement has developed a system for locating absent parents using tax form 1099, with which banks report interest earned on bank accounts. Although the information gathered with this system is intended primarily for parent location and must be verified, pursuant to 26 USC 6103, before it can be used for any purpose, the method has proved to be very successful. In addition, State IV-D agencies have developed methods of discovering the existence of these accounts. Often, the custodial parent (or the children, if visitation is occurring) will know where the absent parent banks. Landlords, mortgagees, and credit reporting agencies can be sources of

information as well. Some jurisdictions accept personal checks for child support payments and then keep a record of the account number and location.

Unfortunately, discovering the existence of the account is not the IV-D agency's last problem. With the increase in branch banking, it is not unusual for a bank to have branches in many different locations. According to the annotation at 12 ALR3d 1088, a general rule is emerging which holds that "each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office." [Cronan v. Schilling, 100 NYS2d 474 (Sup. 1970).] Accordingly, accounts may be garnished only by serving the writ at the bank location that is holding the funds for the depositor. One very old case established a contrary rule in Illinois. [Bank of Montreal v. Clark, 108 Ill.App. 163 (1908).] Due to the advent of automatic teller machines, many depositors now may withdraw their funds on deposit at all branches of the bank. This development may produce a change in the general rule.

Once the garnishment has been issued and served, the most troublesome problem concerns interests held in the account by third parties. Generally, creditors can garnish a joint bank account to enforce judgment debts owed by one of the depositors. [See Anno., 11 ALR3d 1465, but cf. Comstock v. Morgan Park Trust and Savings Bank, 319 Ill.App. 253, 48 NE2d 980 (1943) and Andree v. Equitable Trust Co., 420 A2d 1263 (1980).] Where this is the rule, courts are split as to whether the entire account is subject to garnishment [Park Enterprises, Inc. v. Trazch, 233 Minn. 467, 47 NW2d 194 (1951).] or whether only the judgment debtor's interest in the account is reachable. [United States v. Nat. Bank of Commerce, 554 F.Supp. 110 (E.D.Ark, 1982); Purma v. Sark, 224 Kan. 642, 585 P2d 991 (1978); Nieman v. First Nat. Bank, 420 SW2d 20 (Mo.App. 1968); Beehive State Bank v. Rosquist, 21 Utah2d 17, 439 P2d 468 (Utah 1968).] In States that recognize the concept of tenancy by the entireties, many courts have concluded that when a debtor opens an account with his spouse (in child support situations, the second wife), the entire account is protected from garnishment, except for collection of joint debts.

Garnishment Against Federal Employees

Pursuant to 42 USC 659, monies due from or payable by the United States as remuneration for employment to any individual, including members of the armed services, is subject to garnishment in like manner and to the same extent as if the United States were a private person. This waiver of sovereign immunity is limited to garnishments that enforce an obligor-employee's legal obligation to provide child support or make alimony payments. Sections 661 and 662 of 42 USC deal with service of process and further definitions. Federal garnishment is available whether or not the children are receiving AFDC benefits. [See Anno., 44 ALR Fed 494.]

The waiver of sovereign immunity does not confer jurisdiction on the Federal courts to issue writs of garnishment on the Federal Government. [Kelly v. Kelly, 425 F.Supp. 181 (W.D.La. 1976); Overman v. United States, 563 F2d 1287 (C.A.8 1977).] Nor does the Federal statute create a garnishment remedy in States that do not have such a procedure. The writ of garnishment must issue pursuant to existing State procedure and must emanate from the State court that rendered the order to be enforced. [Morrison v. Morrison, 408 F.Supp. 315 (N.D.Tex. 1976); Popple v. United States, 416 F.Supp. 1227 (W.D.N.Y. 1976); U.S. v. Morton, 104 S.Ct. 2769 (1984).]

Service of the writ is accomplished pursuant to 42 USC 659, as follows:

> Service of legal process brought for the enforcement of an individual's obligation to provide child support or make alimony payments shall be accomplished by certified or registered mail, return receipt requested, or by personal service, upon the appropriate agent designated for receipt of such service of process pursuant to regulations promulgated pursuant to Section 416 (or, if no agent has been designated for the governmental entity having payment responsibility for the monies involved, then upon the head of such governmental entity). Such process shall be accompanied by sufficient data to permit prompt identification of the individual and the monies involved. [42 USC 659.]

The Office of Personnel Management has published regulations at 5 CFR 581 pertaining to garnishment, including a listing of agents designated to accept legal process. [5 CFR 581, App. A.]

Under 42 USC 659(a), only monies to be paid to the obligor as "remuneration of employment" are subject to garnishment. Several cases have held that this definition includes military retirement pay. [Watson v. Watson, 424 F.Supp 866 (E.D.N.C. 1976); Crane v. Crane, 417 F.Supp. 38 (E.D. Okla. 1976).] Conversely, veterans' disability benefits being paid to a veteran who waived all rights to military retirement pay are not garnishable. [Sanchez Dieppa v. Rodriguez Pereira, 580 F.Supp. 735 (DC Puerto Rico 1984).]

Attorneys' fees may be included in the garnishment to the extent that they are entitled to judgment status in the rendering State. [Garrett v. Hoffman, 441 F.Supp. 1151 (E.D. Pa. 1977); Murray v. Murray, 558 F2d 1340 (C.A.8 Mo. 1977); 42 USC 662.]

Garnishing Workers' Compensation Benefits

Workers' compensation statutes mandate that a form of insurance be provided to each worker involved in a covered activity, to compensate the worker for the financial cost of injuries sustained on the job. To this end, virtually all workers' compensation statutes protect personal injury awards by exempting them from seizure by workers' creditors. These exemptions have been construed liberally by the courts as applied to the claims of general creditors. [31 ALR3d 532, 535.] However, the courts have been willing to limit the exemption's application to child support, alimony, and governmental claims.

Recent cases have held that workers' compensation awards may be garnished to enforce child support orders. These decisions have noted that a child support obligation is not a "debt" as the term was used in the exemption statute, and that allowing the garnishment would be consistent with the legislature's intent in enacting the exemption--to allow the injured worker to support his dependents in addition to himself. [Dellesandro v. Dellesandro, 110 Misc2d 342, 442 NYS2d 400 (1981); American Mutual Life Insurance Company v. Hicks, 159 Ga.App. 214, 283 SE2d 18 (1981); Steller v. Steller, 97 NJ Super 493, 235 A2d 476 (1967); Petrie v. Petrie, 41 Mich.App. 80, 199 NW2d 673 (1981).] There is contrary authority as well, including Satterfield v. Satterfield, 292 Or. 780, 643 P2d 336 (1981); and Bruce v. Bruce, 100 Ohio App. 121, 130 NE2d 433 (1955).

Once the exemption problem is overcome, the IV-D agency must determine whom to serve with the garnishment and when to serve it. Generally, the workers' compensation

insurance will be underwritten by an out-of-State insurance company, the identity of which can be obtained through the worker's employer. Insurance companies generally may be served through their registered agent (as defined above) or through a State official, such as the director of the insurance regulatory agency. In some situations, it also may be possible to serve the worker's attorney with a garnishment. [35 ALR3d 1094.]

Determining when to serve the garnishment can be a difficult decision, at least in States where garnishments are effective for short time periods. If the claim has yet to be settled and State law allows for consecutive garnishments, the IV-D agency may opt to issue garnishments as often as necessary to achieve an unbroken chain of weeks or months.

In some States, such as Kansas, garnishment is effective only as to debts owed by the garnishee to the judgment debtor at the moment in time the garnishment is served. In these States, it might be more effective for the IV-D agency to use a wage withholding statute (assuming the definition of "wages" is broad enough to encompass workers' compensation benefits) or to seek an equitable lien by asking the court to invoke its equity power to assist in enforcement of the order.

CIVIL CONTEMPT

A court has inherent authority to punish individuals for violating its valid judgments or decrees, and that authority has been recognized "since the dawn of judicial antiquity." [Zeitinger v. Mitchell, 244 SW2d 91 (Mo.App. 1951).] Any act or omission that embarrasses the court, lessens its authority or dignity, or obstructs the administration of justice constitutes contempt. Contempt is classified as either "civil" or "criminal." No clear line distinguishes civil from criminal contempt. However, civil contempt differs from criminal contempt in both purpose and procedure. If the purpose and character of the penalty imposed by the court is remedial and for the benefit of a private party to the action, the contempt is classified as civil. However, if the purpose of the penalty is to vindicate the authority of the court, the contempt is classified as criminal. [See Gompers v. Buck Stove Co., 211 US 324 (1911); In re Grand Jury Investigation, 600 F2d 420 (3d Cir. 1979); Commonwealth v. Fieck, 439 A2d 774 (Pa.Super. 1982); United States v. North, 621 F2d 1255 (3d Cir. 1980); In re Timmons, 607 F2d 120 (5th Cir. 1979).] This section discusses civil contempt, including the following subtopics: procedure; notice and hearing requirements of due process; the indigent contemnor's possible right to representation by counsel at State expense; elements of contempt; burden of proof and purgation requirements; and commitment procedure. The following section treats criminal contempt.

In most jurisdictions, the contempt process is initiated by filing a Motion for Order to Show Cause as a supplementary proceeding in the cause of action that produced the underlying support order. The Motion is "heard" and ruled on by the court ex parte. In virtually all jurisdictions, the judge grants the motion and issues the Order to Show Cause without even an informal hearing. Most courts require the Motion to be supported by an affidavit from the payee or a certified copy of the clerk's payment record if the order is payable through the court for the period in question. After the judge reviews and signs the Order to Show Cause, it is processed by the court clerk's office. The clerk will check the court calendar for an available date, prepare an appropriate summons to accompany the Order, and forward the two documents to the appropriate sheriff's (or other process server's) office for service on the absent parent.

In the case of In re Oliver, 333 US 257, 275, 68 SCt 499, 92 LEd2d 682 (1948), the U.S. Supreme Court held that due process requires that an individual charged with contempt of court "be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf."

The obligor generally must have actual notice of the date and time of the hearing on the Order to Show Cause. If it can be established that the obligor is avoiding service of process, it is sometimes possible to serve the obligor's attorney of record (assuming the attorney-client relationship is intact) or to serve an adult at the obligor's residence. [See In re Morelli, 11 Cal.App.3d 819, 839 (1970).] In order to direct such service, it may be necessary for the IV-D agency to file an accompanying motion asking the court for permission prior to issuance of the summons. If the obligor appears at the hearing in response to the summons, actual notice will have been given and the issue will not have to be addressed. If he or she does not show up, it may be possible to justify the substituted service to the court as a step in obtaining a bench warrant.

In addition to the issue of getting the summons and order served on the obligor, there is an important issue surrounding the quality of the notice. The allegation contained in the Motion for Order to Show Cause and the language transferred to the order itself must be specific enough to allow the obligor to prepare a defense at the show cause hearing. The specificity that will be required will vary from State to State, and even from case to case. Generally, the IV-D agency should allege the specific provisions of the support order, and set forth the obligor's payment record during the applicable period. Serving a copy of the Motion for Order to Show Cause with the supporting affidavit or court record is one possible way to meet this requirement.

Bench Warrants

In most States, a bench warrant may be issued directing the sheriff to arrest an obligor who is served with an Order to Show Cause but who fails to appear at the hearing. [See Cal.Civ.Proc. Code Section 1212.] The procedure after the obligor is apprehended varies from court to court. If the judge is available, many courts will notify the attorneys that the obligor has been arrested, and a hearing on the Order to Show Cause will commence as soon as counsel can convene. When the judge who will hear the Show Cause Hearing is not available, another judge will hold a preliminary hearing for the purpose of setting bail to secure the obligor's appearance at the Show Cause Hearing.

Right to Counsel

As noted above, due process requires that the obligor be given the opportunity to be represented by counsel at the Show Cause Hearing. This requirement has produced quite a bit of case law with respect to indigent obligors who ask for, and who are denied, counsel at State or county expense. The decisions are split on this issue. Generally, indigent defendants possess the right to court-appointed counsel only where a proceeding might result in deprivation of liberty. [Lassiter v. Department of Social Services, 452 US 18 (1981).]

Since imprisonment is a frequent outcome of the show cause hearing, some courts have held that counsel must always be provided to indigent contemnors.[33] Other courts take a middle position, holding that the right to counsel does not accrue until the court determines that imprisonment is a possible outcome.[34] Here, the trial court must make two findings prior to appointing counsel: (1) the contemnor is indigent and (2) the elements of contempt have been duly alleged by obligee's counsel. The third position is that, in civil contempt cases, by definition, the obligor will be imprisoned only if he or she has the present ability to purge himself of the contempt. If the obligor has that present ability, he or she is not indigent and does not need court-appointed counsel.[35]

Elements of Contempt

Five elements must be established to support a finding of contempt in a civil proceeding:

- Continuing personal and subject matter jurisdiction in the court that is holding the show cause hearing
- Existence of a valid and exact support order
- Knowledge of the order by the obligor
- Ability of the obligor to comply
- Willful noncompliance by the obligor.

[See Jafarian-Kerman v. Jafarian-Kerman, 424 SW2d 333, 341 (Mo.App. 1967); Gonzales v. District Court in and for Otero County, 629 P2d 1074 (Colo. 1981).]

Burden of Proof

The moving party in a civil contempt proceeding normally is required only to establish a prima facie case by proving entry of the order, actual or constructive knowledge in the obligor, and the obligor's noncompliance. [Dyer v. Dyer, 92 Ariz. 49, 373 P2d 360 (1962); Svehaug v. Svehaug, 16 Or.App. 151, 517 P2d 1073 (1974); In re Marriage of Vanet, 544 SW2d 236, 246 (Mo.App. 1976).] Once the moving party overcomes this initial hurdle, the burden shifts to the obligor to show facts which will excuse his noncompliance. If the defense is inability to pay, he or she has the burden of proving that it was genuine and not occasioned by his or her own acts. [Brooks v. Brooks, 286 SE2d 669 (S.C. 1982); Ex Parte Almendarez, 621 SW2d 664 (Tex.Civ.App. 1981); Hess v. Hess, 87 Ill.App.3d 947, 409 NE2d 497 (1980); Blair v. Blair, 600 SW2d 143 (Mo.App. 1980); Parker v. Parker, 97 Idaho 209, 541 P2d 1177 (1975); Stafford v. Stafford, 27 Misc.2d 9, 203 NYS2d 935 (1960); State ex rel. Blackwell v. Blackwell, 179 P2d 278, 181 Or. 157 (1947); Vanet, supra, p. 245; 53 ALR2d 591; Chapter 10, infra.] Few appellate courts have analyzed the type of evidence an obligor would have to submit to the court to make a defense of inability to pay. One excellent analysis appears in the case of Ex Parte Hennig, 559 SW2d 401 (Tex.Civ.App. 1977), as follows:

> In order to establish the inability to pay, the relator must show not only that he lacks the financial resources to pay the delinquency,

but also that he knows of no other source from which the sum might be obtained. This ultimate fact can be established by proof of the following:

(1) That the relator lacks sufficient personal or real property which could be sold or mortgaged to raise the needed sum; and

(2) That the relator has unsuccessfully attempted to borrow the sum from financial institutions such as banks, credit unions, and loan companies; and

(3) That the relator knows of no other source, including relatives, from whom the sum could be borrowed or otherwise secured. (Citation omitted.)

Of course these are only conclusory elements which must be supported by specific evidence according to the facts of each particular case.[36]

When the obligor presents evidence that the noncompliance was financially justified, some States require the moving party to present evidence to the contrary. [Thomas v. Thomas, 406 So2d 939 (Ala. 1981); Henderson v. Henderson, 55 N.C.App. 506, 286 SE2d 657 (1982).]

The IV-D agency may establish the existence of the valid support order by asking the court to take judicial notice of the support order contained in the court file. [Ex Parte Ah Men, 19 P 380, 77 Cal. 198 (1888); State ex rel. Cook v. Cook, 64 NE 567, 66 Ohio St. 566, 53 ALR2d 597 (1902); but see People in the Interest of F.S.B., 640 P2d 268 (Colo.App. 1981).] The obligor's knowledge of the order usually can be established by reference to the support order itself, which often will note the presence of the obligor or his or her attorney at the hearing that produced the order. If the order does not contain such a reference, the court file should contain the court clerk's certificate of mailing, which creates a rebuttable presumption of service. [Jones v. Jones, 91 Idaho 578, 428 P2d 497 (1967).] In some States, such as California, it is customary to serve the order on the obligor in person, if necessary. Personal service creates a presumption as well. [Cal.Civ.Proc. Code Section 1209.5.] Nonpayment can be established by entering the court clerk's payment record into evidence, if available. If not, it might be necessary for the IV-D agency to call the obligee, or one of its employees, to testify as to the obligor's noncompliance. It also might be possible to substitute an affidavit in lieu of live testimony. [Bowden v. Bowden, 198 Tenn. 143, 278 SW2d 670 (1955); Catron v. Catron, 577 P2d 322 (Colo.App. 1978).]

When a dispute arises as to whether payments were or were not made as ordered, the obligor generally must plead satisfaction as an affirmative defense and prove the defense by substantial evidence. [Huchteman v. Huchteman, 557 P2d 427 (Okla. 1976); Karleskint v. Karleskint, 575 SW2d 845 (Mo.App. 1978); State ex rel. Fry v. Fry, 559 P2d 1293, 28 Or.App. 403 (1977); 53 ALR2d 591.] This rule is justified because the evidence of payment is usually in the sole possession of the obligor; placing the burden on the obligee on this issue would force him or her to prove a negative.

Punishment

Punishment for civil contempt must be remedial and coercive. As such, the purpose of the punishment is not punishment per se, nor is it to protect, preserve, and vindicate the authority of the court and the power of the law. Criminal contempt proceedings (discussed below) further these purposes.

Because punishment in civil contempt proceedings must be remedial and coercive, any imprisonment or fine is improper unless its purpose is to benefit the obligee and unless it allows the obligor to purge himself or herself by complying with clearly stated and attainable requirements. The obligor must have a present ability to comply with those requirements. [Gompers v. Buck Stove Co., supra; In re Marriage of Hartt, 603 P2d 970 (Colo.App. 1979); In re Marriage of Crowley, 663 P2d 267 (Colo.App. 1983); Kramer v. Kelly, 401 A2d 799 (Pa.Super. 1979); Long v. Long, 421 A2d 822 (Pa.Super. 1980); Eliker v. Eliker, 295 NW2d 268 (Neb. 1980); Ponder v. Ponder, 438 So2d 541 (Fla.Dist.Ct.App. 1983); Walker v. Walker, 375 NE2d 1258 (Ohio 1978); Smith v. Smith, 451 So2d 945 (Fla. 1984); Rutherford v. Rutherford, 296 Md. 347, 464 A2d 228 (Md.Ct.App. 1983).] A few courts have held that imprisonment is proper in civil contempt when the obligor intentionally or willfully placed him or herself in a financial condition that makes compliance impossible. [State ex rel. Stanhope v. Pratt, 536 SW2d 567, 575 (Mo. 1976); Ziegler v. Butler, 410 So2d 93 (Ala.Civ.App. 1982).] These cases are difficult to reconcile with the three limitations set forth above, unless the court fashions its purgation requirements to allow the obligor to purge himself or herself by something other than payment. Otherwise, the obligor would not "carry the keys to the jailhouse in his own pocket."

Punishment in civil contempt proceedings tends to fall into three categories: (1) incarceration, (2) coercive fines, and (3) compensatory fines. [Doyle v. London Guarantee & Acc. Co., 204 US 599, 27 SCt 313, 51 LEd 641 (1907); United States v. United Mine Workers of America, 330 US 258, 67 SCt 667, 91 LEd 884 (1946).] While all three are conceptually appropriate to enforce child support orders, most courts rely on incarceration alone. Generally, the fine or imprisonment continues until the obligor complies with the court's purgation requirements. Because this type of punishment conceivably could be a life sentence, many courts routinely place a maximum on the punishment by "sentencing" the obligor to a fixed term that the obligor can end at any time by complying with the purgation requirements. Such a practice has been upheld in at least one appellate decision. [Johnson v. Johnson, 319 P2d 1107, 1111 (Okla. 1957).] A fixed term without possibility of purgation is clearly not proper. [Hess v. Hess, 43 Ill.Dec. 882, 409 NE2d 497 (Ill.App. 1980).]

Purgative Requirements and Commitment

The purgative requirements must be set forth in the judgment and commitment order in clear language and detail such that the obligor knows precisely what must be done to avoid the punishment. Otherwise, the judgment and commitment are void, and the obligor must be released. [In re Quevado, 611 SW2d 711 (Tex.Civ.App. 1981); Vokolek v. Carnes, 512 SW2d 112 (Mo. 1974).]

Within these limits, the court's discretion in tailoring the purgative requirements to fit the case at hand is very broad. The U.S. Supreme Court has ruled that "the measure of the court's power in civil contempt proceedings is determined by the requirements of full

remedial relief." [McComb v. Jacksonville Paper Co., 336 US 187, 93 LEd 599, 605 (1948); see also Hopp v. Hopp, 156 NW2d 212, 216 (Minn. 1968); 85 ALR3d 897.] Civil contempt is an equitable remedy. Therefore, the court has full equitable power to order the obligor to carry out any act that he or she has the present ability to perform.

If the contemnor has the ability to borrow from friends and relatives, the court can require that the obligor do so in order to purge. [Ex parte Hennig, supra.] If the obligor has the ability to sell or mortgage property in order to make an arrearage or current support payment, the court may require him or her to do so, even though the property involved would be exempt from execution. [Casey v. Casey, 175 Or. 328, 153 P2d 700 (1944); Sheridan v. Sheridan, 33 Cal.App.3d 995, 109 Cal.Rptr. 466 (1972); Johnson v. Johnson, 413 A2d 1115 (Pa.Super. 1979).] The court even may require the obligor to make a direct transfer of personal property. [In re Marriage of Thompson, 96 Cal.App.3d 621, 158 Cal.Rptr. 160 (4th Dist. 1979).] Where the obligor is unemployed, the court may include a "seek work" order in the purgation requirement and require the obligor to report periodically to the court any efforts to find employment. [Dennis v. Wisconsin, 117 Wis.2d 249, 329 NW2d 272 (1984).] Many States allow for a commitment order, which requires the obligor to spend nights and weekends in jail, but which allows him or her to be released each day to go to work. [Hopkinson v. Hopkinson, 470 A2d 981 (Pa. 1984).]

Many courts will allow the obligor a short time period to accomplish the purgation requirement prior to invoking the commitment order. For instance, a court's judgment and order might read:

> Obligor found in contempt of this court for failure to make x payments on x dates; obligor found to have had the ability to make payments as they fell due; obligor found to have an interest in certain (real or personal) property upon which he may borrow such sums as are necessary to comply with the order of this court; obligor adjudged in contempt and committed to the county jail until such time as (s)he pays $x to the clerk of court; execution of commitment suspended until x date to allow obligor to obtain the funds necessary to comply with this order and judgment.

Many judges like to use orders such as this one because they recognize that it is the threat of jailing more than the jailing itself that provides the incentive to pay. By allowing the obligor a period of time to comply with the purgation conditions, the end can be attained without the need for the obligor to serve time. The obligor does not risk losing his or her job; the county does not have to incur the cost of housing a prisoner, and the obligor's task in raising the money is logistically easier.

This technique has caused some problems, however. If the order contains the wrong language, the commitment is tenuous. In Mayer v. Mayer, 532 SW2d 54, 60 (Tenn.App. 1975), a Tennessee appellate court overturned a contempt judgment that contained a "suspended sentence," holding that no such thing exists. In Gross v. Gross, 557 SW2d 448, 453 (Mo.App. 1977); In re Vanet, 544 SW2d 236, 247 (Mo.App. 1976), Missouri appellate courts held that probation and civil contempt are conceptually incompatible, and any contempt judgment providing for imprisonment and probation conditioned on compliance is void.

Another problem with delayed enforcement is procedural. When the date set in the contempt judgment passes prior to execution of the commitment order by the sheriff, the obligor may have a right to another hearing on the issue of whether he or she has complied with the purgation requirements. [Greene v. District Court of Polk County, 342 NW2d 818 (1983).] If this is true, then the initial hearing on the show cause order is essentially useless.

Civil contempt is an effective remedy only where the obligor can be brought before the judge immediately after a payment is missed, and only if the judge is willing to back up the support order with jailing or fine. If caseload pressures keep noncomplying obligors out of court, or if the judge is unwilling to incarcerate obligors who are able to pay but do not, then contempt proceedings can actually be counterproductive. The same is true for specific cases where the obligor is destitute and an appropriate equitable remedy does not present itself. Unless the court can impose a sanction, the obligor's experience in the contempt process merely teaches him or her that the court's bark is worse than its bite.

CRIMINAL CONTEMPT

A few States use criminal contempt to enforce child support obligations. The use of criminal over civil contempt can be imposed by statute [e.g., Cal.Civ.Proc. Sections 1209, 1209.5] or the practice can evolve naturally. Criminal contempt protects, preserves, and vindicates the authority of the courts as society's final arbiter of disputes. [Teefey v. Teefey, 533 SW2d 563, 566 (Mo. banc 1976); Kramer v. Kelly, supra; Crowley v. Crowley, 663 P2d 267 (Colo.App. 1983); Gibson v. Gibson, 15 Cal.App. 943, 948 (1971).] The distinction is crucial. While the same act might give rise to both civil and criminal contempt charges, each confers distinct procedural rights. A strictly penal sanction may be imposed only where the defendant is provided the essential procedural protections required by due process. [Kramer, supra, Murray v. Murray, 587 P2d 1220 (Hawaii, 1978); Sword v. Sword, 59 Mich.App. 730, 229 NW2d 907 (1975).] These rights may include:

- Notice of the charges as in criminal cases [In re Hinman, 239 Cal.App.2d 845 (1966).]
- Appointed counsel, after an indigency hearing [Sword, supra.]
- A jury trial [Sword, supra, but see In re Morelli, 11 Cal.App.3d 819 (1970).]
- Freedom from default judgment [Ex Parte Johnson, 669 SW2d 869 (Tex.App. 1984).]
- A verdict of innocent unless found guilty beyond a reasonable doubt [Quezada v. Superior Court, 171 Cal.App.2d 528 (1959).]
- Protection from self-incrimination [Ex Parte Gould, 990 Cal.360 (1983); Oliver v. Superior Court, 197 Cal.App.2d 197 (1961); Sword, supra.]
- Burden of proof on prosecution [Masonite Corp. v. International Woodworkers of America, 206 So2d 171 (Miss. 1968); but see Skinner v. Ruigh, 351 NW2d 182 (Iowa 1984).]

- Trial before an impartial judge, that is, one who is not familiar with the facts of the case [Sword, supra; In re Marriage of Neiswinger, 467 NE2d 43 (Ind.App. 1984).]

- Proof of contempt by independent evidence (i.e., extrajudicial statements of the obligor cannot be introduced until all elements of contempt are otherwise proven). [People v. Wong, 35 Cal.App.3d 812 (1973).]

Clearly, a criminal contempt proceeding is considerably more complicated than a civil contempt proceeding. The initiation of the proceeding may require a more formal notice than is provided the civil contemnor in the motion and order to show cause, although a formal information or indictment is not necessary. The possibility of an indigency hearing, a jury trial, and a change of judge makes the process potentially a very long one. The evidentiary hurdles are difficult to overcome without knowledgeable witnesses.

Despite these drawbacks, there are occasions when criminal contempt is useful. Where an absent parent has been charged with civil contempt on numerous occasions, but regularly frustrates the action by paying the arrearage on the day of the show cause hearing and never making payment voluntarily, a criminal contempt action may change his or her attitude about compliance. [State ex rel. Fry v. Fry, 559 P2d 1293 (Ore. 1977); Teefey, supra; United States v. United Mine Workers of America, 330 US 258, 299, 67 SCt 667; 91 LEd 899 (1946).] Furthermore, criminal contempt may be the only available remedy to punish an obligor who has made himself or herself unable to pay by quitting a job or taking one at a much lower salary. [See Murray, supra.]

CRIMINAL NONSUPPORT

Most States have passed statutes making the failure to support one's children a criminal offense. In many States, the attorneys who establish and enforce child support obligations in civil court are district or prosecuting attorneys who also have discretion to file criminal charges against an absent parent when appropriate. Criminal nonsupport charges are appropriate in instances where civil remedies are not sufficient. Indeed, one Florida appellate court has held that criminal charges should not be used if alternate civil remedies are available. [Bryne v. State, 362 So2d 812 (Fla.App. 1979).]

This decision is perhaps the culmination of a process. Child support enforcement has turned away from criminal style remedies in the recent past, as program administrators learned that an emphasis on summary civil remedies such as wage withholding and tax refund interceptions produced higher overall collections. Nevertheless, felony nonsupport proceedings can still prove useful in some instances. Where an obligor has fled the jurisdiction or is avoiding service of civil process, the filing of criminal charges will allow issuance of an arrest warrant. Once the warrant is issued, the obligor is likely to be picked up in the future, because felony warrants show up on police computers across the country. If stopped for a minor traffic violation, the obligor will be arrested on the felony nonsupport warrant, and extradition is possible. Similarly, where the obligor somehow is avoiding all civil remedies, and it would be useful to change his or her attitude about the importance of voluntary compliance, a criminal nonsupport charge can be very effective.

Pleadings

In most States, all of the normal rules of criminal procedure apply to felony nonsupport actions. The action is initiated by filing a criminal complaint, information, or indictment, depending on local practice. This document is presented to the judge who issues a summons or warrant. At least one old State court decision holds that if the charge is a felony or if "hard labor" is a possible sentence, a grand jury hearing must be held to obtain an indictment. [State v. Arris, 121 Me. 94, 115 A 648 (1922).] The initial pleading must allege all elements of the crime in a manner that allows the defendant to understand the charge and prepare a defense. [People v. Scholl, 339 Ill.App. 7, 88 NE2d 681 (1949); Gravitt v. Commonwealth, 232 Ky. 432, 23 SW2d 555 (App. 1930).]

One issue can prove troublesome at the filing stage--the location of the crime of nonsupport or abandonment. If both the defendant-parent and the children reside in the same jurisdiction, there is no issue. Where they live in different States or judicial districts, the issue is crucial. There is case law holding that the crime occurs in the place where the children reside; there is case law holding that the crime is occurring whenever the defendant-parent is at any given point in time, and there is case law holding that the action can be filed in either jurisdiction. [See Anno., 44 ALR 889.]

After accepting the complaint, the court usually issues a summons to the defendant-parent, asking him or her to come to court for the arraignment. Occasionally, the court will issue a warrant for the defendant's arrest, especially if he or she has been uncooperative. At this hearing, the court will read the charge to the defendant, advise the defendant of his or her rights, determine whether the defendant requests and qualifies for appointed counsel, set a date for the preliminary hearing, and, occasionally, set bail. At the preliminary hearing, the defendant will be asked to enter a plea. If the charge is a misdemeanor, the arraignment and preliminary hearings often are combined into one proceeding.

Elements

The elements of criminal abandonment or nonsupport vary from State to State, depending on statutory language. Typical elements of the offense are as follows:

- Abandonment, desertion, and nonsupport
- A culpable state of mind
- Ability to provide support
- The children are likely to become a public charge as a result of defendant's nonsupport.

All States include the first two elements in the list of items that the prosecutor must allege and prove. Abandonment, desertion, and nonsupport are fairly straightforward concepts and have not produced much appellate case law. In Tutt v. State, 310 SE2d 14 (Ga.App. 1983), a Georgia appellate court held that nonsupport could be proved by placing into evidence the ledger card from the probation office (chronicling the defendant's noncompliance with a civil support order).

The second element--culpable mental state--has produced quite a bit of case law. In States that have adopted the Model Penal Code, the standard definition of culpability applies to criminal nonsupport--"intentionally, knowingly, recklessly, or with criminal negligence." [State v. Gartzke, 592 P2d 1040, 39 Or.App. 463 (1979).] Other courts variously define the necessary state of mind as:

- Willful [Pirie on behalf of Law v. Law, 460 NYS2d 395 (N.Y.App.Div. 1983); Bennett v. State, 109 Tex.Crim. 237, 4 SW2d 62, 10 SW2d 1117 (1928) (evil intent or design); Commonwealth v. Wright, 433 A2d 511 (Pa.Super. 1981) (conscious object to withhold support); Burris v. State, 382 NE2d 963 (Ind.App. 1978) (deliberate or perverse design, malice, or an intentional or deliberate breach of duty of support).]

- Set purpose or design [Mercardo v. State, 86 Tex.Crim. 559, 218 SW 491 (1920).]

- Purposeful [Page v. State, 160 Miss. 300, 133 So 216 (1931); State v. Hayden, 224 N.C. 779, 32 SE2d 333 (1944); Bohannon v. State, 271 P2d 739 (Okla.Crim. 1954).]

- Absence of legal excuse or justification [State v. Russell, 73 Wash.2d 903, 442 P2d 988 (1968); State v. Richmond, 683 P2d 1093 (Wash. 1984).]

- Intentional [State v. Moran, 400 So2d 1359 (La. 1981).]

There is little agreement among the States as to how the third element is interjected into the action. In some States, ability to provide support is an element of the prosecution's case which must be proved beyond a reasonable doubt, just like the other elements. [State v. Moran, supra; Peacock v. State, 362 So2d 174 (Fla.App. 1978).] In other States, inability to pay is an affirmative defense, similar to diminished responsibility or insanity in other criminal actions. Switching the burden of coming forward with the evidence on this issue usually is justified by noting that the relevant evidence is peculiarly within the defendant's knowledge. [Commonwealth v. Wright, supra; Commonwealth v. Hussey, 14 Mass.App. 1015, 441 NE2d 783 (1982); State v. Brown, 5 Ohio App.3d 220, 451 NE2d 1232 (1982); State v. Wright, 4 Ohio App.3d 291, 448 NE2d 499 (1982).] At least one State supreme court has held that such a practice violates the defendant's right to be presumed innocent unless proven guilty. [State v. Johnson, 412 So2d 602 (La. 1982); State v. Kiper, 408 So2d 1312 (La. 1982).]

The fourth element is not required in all States. [Crawford v. State, 166 Ga.App. 632, 305 SE2d 403 (1983).] In the States where it is necessary to prove that the children were in dire straights as a result of the defendant's lack of support, various forms of proof have been approved by the courts. In Commonwealth v. Hussey, supra, the court held that proof that the children had to turn to public assistance in order to survive was sufficient to meet the element. In Turner v. State, 343 So2d 591 (Ala. 1977), the Alabama Supreme Court held that "need," as it is used in Alabama criminal nonsupport statute, does not amount to "destitute or necessitous circumstances."

Defenses

Defendants may try to deflect the nonsupport charge with a number of defenses. Because of the different burden of proof and procedure in criminal cases, each defense affects the case differently than the same defense would in a civil case.

Inability to pay. The definition of this defense should track the definition used in civil contempt cases, except that the measure is not necessarily the amount that should have been paid under an existing court order. Ability to pay will be judged according to the needs of the children during the period and the defendant's ability to earn; lack of means alone will not support the defense. [State v. Brown, supra.]

Child living apart from defendant without defendant's consent. This defense generally has been rejected. [See Bennefield v. State, 4 SE 869 (Ga. 1888); Moore v. State, 57 SE 1016 (Ga. 1907); People v. Howell, 214 Ill.App. 372 (1919); Comm. v. Donovan, 200 SW 1018 (Ky. 1920); State v. Sutcliffe, 25 A 654 (R.I. 1892); Beilfuss v. State, 126 NW 33 (Wisc. 1910); Bowen v. State, 46 NE 708 (Ohio 1897).]

Child supported by third party or of independent means. This is a frequent defense. In States that require the prosecution to allege and prove that the children were needy due to the defendant's nonsupport, the defense is virtually automatic. If the children were cared for by a third party, or if they or the custodial parent had independent means, a criminal charge may not be possible. Other State courts often have rejected this defense. [See State v. Knetzer, 3 Kan.App. 673, 600 P2d 160 (1979); People v. Yate, 298 P 961 (Cal. 1931); People v. Frazier, 261 P2d 1071 (Cal. 1972).]

Nonpaternity. Nonpaternity is only properly a defense when the issue has not been decided in previous action. [See Chapter 10 for a discussion of the res judicata effects of a paternity judgment.] If there is no existing paternity finding and no strong presumption of paternity, paternity is an element of the prosecution's case. [See Nordgren v. Mitchell, 716 F2d 1335 (C.A. Utah 1983); People v. Askew, 30 Ill.Dec. 777, 393 NE2d 1124 (1979); State v. Rawlings, 38 Md.App. 479, 381 A2d 708 (1978).] Thus, it becomes a defense only in situations where the defendant and the mother were married and separated without obtaining a divorce, or where they obtained a divorce in which the paternity issue was not decided. Where the defense is properly interjected, the evidentiary issues should track those in a normal civil paternity case. [See Chapter 7.]

Vagueness of statute. Occasionally, a defendant will challenge the language in the statute that defines the offense, arguing that it is unconstitutionally vague, and that a parent is not sufficiently notified of the behavior he or she should avoid in order to be blameless. Such an argument has been upheld on occasion. [See State v. Richmond, 683 P2d 1093 (Wash. 1984).]

Gender bias in statute. Many of the existing criminal nonsupport statutes were enacted many years ago, when the principal or exclusive duty of support rested on the father. As a result, many of the statutes provide only that the male parent may be held criminally liable for nonsupport. Several courts have set aside convictions based on this gender bias. [See State v. Fuller, 377 So2d 335, 14 ALR4th 711 (La. 1979); People v.

Lewis, 107 Mich.App. 297, 309 NW2d 234 (1981).] Other courts have opted to read the word "father" in the statute as though it says "parent," to avoid the constitutional problem. [See, for example, Comm. v. Wright, 433 A2d 511 (Pa.Super. 1981).]

Selective prosecution. One defendant recently challenged a conviction on the basis that the statute created a classification that discriminated against certain racial and ethnic groups and against poor defendants. The California appellate court held that the statute's classifications did not result or promote selective prosecutions, and rejected the defense. [See People v. Gregori, 192 Cal.Rptr. 555 (Cal.App. 4th Dist. 1983).]

Evidence

The evidence in a criminal nonsupport action should not differ markedly from that in a civil contempt case, unless the defendant asserts nonpaternity as a defense. In most cases, the most important issues will be the defendant's state of mind, his or her financial condition during the relevant period, and the needs of the children. Many courts have held that a culpable mental state can be inferred once the prosecution establishes neglect. [See Comm. v. Wright, supra; Dyer v. State, 52 P2d 1080 (Okla.Crim. 1935); State v. Faulkner, 182 N.C. 793, 108 SE 756 (1921).] In California, once the prosecution shows the omission to provide support, the burden of proof shifts to the defendant to prove that the omission was not willful or excusable. [People v. Temple, 20 Cal.App. 540, 97 Cal.Rptr. 794 (1971).]

Ability to pay may be more difficult to prove in a criminal case than in a civil case because the defendant cannot be forced to testify (except in those States where inability to pay is an affirmative defense). Presumably, the prosecutor could submit records of the defendant's employer, or of the State revenue or employment security agency. If that fails, perhaps friends or relatives of the defendant could be called to testify regarding the spending habits of the defendant during the relevant period.

The needy condition of the children can be proved with the testimony of the custodial parent or, for an AFDC case, by placing the IV-A agency's AFDC grant history into evidence. [See Comm. v. Hussey, supra.]

Punishment

Once the defendant is convicted, the court must fashion a form of punishment that is severe enough to make the defendant change his or her behavior in the future, and yet which does not make it impossible for the defendant to earn a living. The court usually can achieve these ends by sentencing the defendant to an appropriate jail term (called "shock detention") and then placing the defendant on probation. The conditions of probation normally will require the defendant to pay a certain amount of child support, and perhaps take other action to make it less likely that he or she will not repeat the offense (i.e., enter a drug or alcohol rehabilitation program). Many appellate courts have upheld a trial court's authority to enter a permanent support order as a condition of probation as well. [See Murphy v. State, 171 Ark. 620, 286 SW 871 (1926); Martin v. People, 69 Colo. 60, 168 P 1171 (1917); State v. Waller, 90 Kan. 829, 136 P 215 (1913); Poindexter v. State, 137 Tenn. 386, 193 SW 126 (1917).] However, in some States, the trial court may only enforce a current support order for the maximum period a defendant can be placed on probation, which will vary with the length of the sentence imposed.

In Los Angeles County, California, the District Attorney's Office uses the following guidelines to recommend sentences in misdemeanor cases:

- The defendant should be placed on summary probation for 2 years.
- A fine should not be imposed.
- The court should be asked to enter a current support order based on the guidelines used to set orders in civil cases.
- The court should be asked to consider the defendant's ability to repay public assistance paid to the family during the period of the crime.
- A wage assignment should be effected.
- Jail time should be recommended to the court only where necessary.[37]

In many jurisdictions where the court deems jailing to be appropriate or necessary, it is possible for the defendant to serve the sentence on weekends and evenings in order to continue working.

TAX REFUND INTERCEPTIONS

One of the most effective collection remedies in recent years has been the interception of Federal and State income tax refunds owing to delinquent absent parents. In tax year 1984 (tax processing year 1985), 1,287,717 cases were submitted to the Internal Revenue Service (IRS); the IRS certified 1,083,856 of these. By the end of the year 489,366 refunds had been intercepted, totalling almost $240 million in gross collections. Complete figures for the 1984 tax year can be found in Child Support Enforcement: 10th Annual Report to Congress for the Period Ending September 30, 1985 to be published by DHHS in 1986. By April 1986, 1,661,000 cases had been submitted for offset processing from tax year 1985; of these 227,000 were non-AFDC cases and 434,000 were AFDC cases.

States have reported similar successes intercepting State tax refunds. For instance, in 1981, Oregon collected $3 million. Congress responded in 1984 by enacting 42 USC 666(a)(3), which requires all States to enact and implement procedures under which State tax refunds can be intercepted for both AFDC and non-AFDC cases.

Federal Tax Refund Interception Program

Section 2331 of P.L. 97-35 (the Omnibus Budget Reconciliation Act of 1981) added new section 464 and new paragraph 454(18) to Title IV-D of the Social Security Act [42 USC 664 and 654(18), respectively] and amended section 6402 of the Internal Revenue Code [26 USC 6402(c)]. The combination of these statutory amendments created a new remedy by which an absent parent's Federal income tax refund could be reduced by the amount of any arrearage that has been assigned to a State and certified to the IRS for setoff. Section 464 was revised by the Child Support Enforcement Amendments of 1984 to extend use of the remedy to collection of past-due support in non-AFDC and foster care cases. This revision is effective for refunds payable after December 31, 1985, and before January 1, 1991.

Intrastate procedure. 45 CFR 303.72 governs use by the States of the Federal tax refund setoff remedy. With the expansion of the Federal tax refund offset program, there are separate qualifying criteria for AFDC and non-AFDC cases. Foster care cases, for which there is an assignment under Section 471(a)(17), are treated in the same way as AFDC cases. For AFDC cases, the amount of past-due support must be at least $150 and must represent a delinquency of at least 3 months. For non-AFDC cases, the support delinquency must be owed to or on behalf of a minor child and be entirely child support (i.e., no spousal support component), must be at least $500, and must not represent support previously assigned to the State. In addition, the State may opt to consider for setoff in non-AFDC cases only the delinquency that has accrued since the State began to enforce the support order. For both types of cases, the IV-D agency must possess a copy of the support order and all subsequent modifications and a copy of the payment record or an affidavit signed by the custodial parent attesting to the amount of support owed; in non-AFDC cases the record must include the custodial parent's current address. Also, before submitting the case to OCSE, the IV-D agency must verify the accuracy of the absent parent's name, Social Security number, and delinquency and check its records to determine that no AFDC or foster care arrearage exists.

Each State IV-D agency must submit annually to OCSE a magnetic tape identifying cases for potential refund interception. For each case submitted, the State must specify whether it is an AFDC/foster care case or non-AFDC case. OCSE reviews each submittal to determine whether the above criteria have been met. If all is in order, OCSE transmits the submittal to the IRS. The IV-D agency must inform OCSE of any cases to be deleted and, if an administrative review has been conducted, of any delinquencies to be decreased. OCSE recommends that any substantial reduction in arrearage amount, whether as a result of administrative review or not, be reported by the IV-D agency.

Two notices must be provided to the absent parent. OCSE, or the IV-D agency if it elects to do so, must send a written advance notice to the absent parent, informing him or her of the right to:

- Contest the State's determination that past due support is owed or the amount of past-due support
- An administrative review by the submitting State or, at the absent parent's request, the State with the order on which the referral for offset is based.

In addition, the notice must inform the absent parent of the procedures and time frame for contacting the IV-D agency to request administrative review and that, in the case of a joint return, the IRS will notify the absent parent's spouse at the time of offset regarding the steps to take to protect the nondebtor spouse's share of a joint refund. A second notice (from IRS) must be sent at the point the refund is intercepted.

If the absent parent responds to either notice by requesting a review, the IV-D agency must notify both the absent parent and, in non-AFDC cases, the custodial parent of the time and place of the administrative review. If the review results in a deletion of, or decrease in, the amount referred for setoff, the IV-D agency must notify OCSE within the timeframes established by OCSE. Prior to January 10, the State may notify OCSE during the State's normal update process. After that date, notification must occur within 10 working days of the review. If the setoff has already occurred, the IV-D agency must make any necessary refunds promptly.

Interstate procedure. In interstate cases, the submitting State must notify any other State involved in enforcing the order, both on submittal to OCSE and on receipt of the refund from IRS. The requirements regarding notice to the absent parent are the same as for intrastate cases. The most significant procedural change pertains to the administrative review process. The submitting State must provide the absent parent an opportunity for review. If the complaint cannot be resolved by the submitting State and the absent parent requests a review in the State that established the support order, the submitting State must notify the State with the order of the request and provide all necessary information, including a copy of the order and all subsequent modifications, a copy of the payment record or the custodial parent's affidavit, and, in non-AFDC cases, the custodial parent's current address. The rendering State must schedule the review, notify the absent parent and, in non-AFDC cases, the custodial parent, conduct the review, and make a decision within 45 days of receiving the referral from the submitting State. If the review results in a deletion of, or decrease in, the amount referred for intercept, the rendering State must notify OCSE within timeframes established by OCSE. The submitting State is bound by the rendering State's decision, and must refund promptly any amount ruled to have been intercepted in error.

Distribution of intercepted tax refunds. Collections received by a IV-D agency as a result of a Federal tax refund interception, both for AFDC and non-AFDC cases, must be distributed as past-due support pursuant to 45 CFR 302.51(b)(4) and (5). These sections require the State to retain such amounts as are necessary to reimburse itself for public assistance paid during "any sequence of months for which it has not yet been reimbursed." This amount is shared with the Federal Government to the extent of its participation in the assistance payments. Any amount left over is to be distributed to the family. If a State fails to submit its arrearages for offset, the non-AFDC offset goes entirely to the family. If both arrearages are submitted, the State gets its payment first. AFDC and foster care assigned arrearages will be offset by the IRS before the non-AFDC arrearages, which are not assigned.

Legal challenges. The Federal tax refund interception program has been challenged in State and Federal Courts, primarily on the following three grounds:

- That due process requires a predeprivation notice and opportunity for hearing [See Nelson v. Regan, 560 F.Supp. 1101 (D.Conn. 1983); Marcello v. Regan, 574 F.Supp. 586 (D.R.I. 1983); Jahn v. Regan, 584 F.Supp. 399 (E.Mich. 1984); Keeney v. Secretary of the Treasury, No. 83-2427 (C.Cal. 10/11/83); Presley v. Regan, No. 83-CV-630 (D.N.Y. 3/11/85).]

- That the interception of joint refunds, without adequate notice to the nondebtor spouse regarding the procedure he or she must follow to protect his or her share of the refund, violates due process [See Coughlin v. Regan, 584 F.Supp. 697 (D.C.Maine 1984); Jahn v. Regan, supra.]

- That the "earned income credit" portion of a Federal tax refund is not an "overpayment" and thus is not eligible for setoff. [See Sorenson v. Secretary of the Treasury, 752 F2d 1433 (C.A. 9, 1985) (No. 84-1686); Rucker v. Secretary of the Treasury, 751 F2d 351 (C.A.10 1984), aff'g 555 F.Supp. 1051 (D.Colo. 1983); Nelson v. Regan, supra.]

The procedural modifications effected by the 1985 Federal regulations should substantially alleviate the two due process concerns, i.e., notice and hearing procedures.

The earned income credit decisions have tended to be adverse to the Child Support Enforcement Program, but the issue is presently before the U.S. Supreme Court.

State Tax Refund Setoff Procedures

The 1984 Amendments require States to have laws providing for State tax refund setoff. Most States that have an income tax have enacted setoff statutes, authorizing the State revenue agency to withhold tax refunds due individuals who owe any liquidated debt to any State agency. The procedure is similar to the Federal setoff procedure, with the State revenue agency performing a role similar to that of IRS.

A broadly based statutory and constitutional challenge to the Oregon setoff procedure was mounted by the Oregon Legal Services Corporation and rejected by the Oregon Court of Appeals in Brown v. Lobdell, 36 Or.App. 397, 585 P2d 4 (1978). The Maryland statute was held to violate due process (for lack of predeprivation hearing) in McClelland v. Massinga, 600 F.Supp. 558, 11 FLR 1132 (D.Md. 1984).

BONDS AND OTHER SECURITY

The Child Support Enforcement Amendments of 1984 require States to enact and use "procedures which require that an absent parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such absent parent of the proposed action and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State)."[38] The remedy need not be applied in all cases, but the State must determine that each case is not appropriate using guidelines generally available within the State which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations.[39]

A majority of States have enacted legislation authorizing courts to require a noncomplying obligor to post a compliance bond or provide other security. Presumably, now that States will be turning to expedited judicial and administrative processes for enforcement of support obligations, the authority to require bonds or other security will be conferred on judge surrogates as well.

The remedy may be combined conveniently with a civil contempt proceeding. Where the obligor is found in contempt, the court might order that he or she post a bond or give over title to real or personal property to secure future compliance. Upon noncompliance, the security is liquidated at the direction of the court, usually ex parte, and the proceeds are applied to the support obligation. In many States, due process no doubt would require that notice and a hearing (pre- or postliquidation) be provided to determine whether the obligor did or did not comply and to allow him or her to assert any available defenses. A thorough statute will set forth a clear procedure.

In the past, the remedy has been more theoretical than actual. Bonding companies have been unwilling to provide what is in essence "child support insurance," perhaps due to the low level of compliance. The passage of Federal legislation is not likely to change this attitude. Therefore, it may be more effective to order an absent parent to provide security only where a specific piece of property has been identified that, for one reason or another, is not appropriate for seizure by way of execution. Where the obligor's personal

interest in the property is high, financial interest is low, and storage and sale costs are likely to be high, asking the court to order the obligor to put the property up as security would encourage future performance. A good example of such property would be a motorcycle or a boat. The obligor may get sufficient pleasure out of the item to make it worth more than the amount of support he or she might have to pay to comply with the order.

EQUITABLE REMEDIES

Most State courts that sit in child support cases possess equity jurisdiction. If equity power is not specifically provided for by statute, case law often can be found to support the use of equitable remedies to enforce child support obligations. Indeed, contempt is often referred to as an equitable remedy. Two other equitable remedies that can prove useful are ne exeat and receivership.

Ne Exeat

The writ of ne exeat issues from a court of equity to restrain a person from going beyond the limits of the jurisdiction until he has satisfied the movant's claim, or has given bond for his appearance or for satisfaction of the court's earlier decree.[40] The writ existed at common law, so many courts have held that it is available in domestic relations cases even in the absence of statutory authority. [Lamar v. Lamar, 123 Ga. 827, 51 SE 763 (1905); Anderson v. Anderson, 315 Ill.App. 380, 43 NE2d 176 (1942); Nixon v. Nixon, 39 Wis.2d 391, 158 NW2d 919 (1968); Bronk v. State, 43 Fla. 461, 31 So. 248 (1901); Cohen v. Cohen, 319 Mass. 31, 64 NE2d 689 (1946).]

The purpose of the writ is to restrain an individual from leaving the jurisdiction, so it generally requires an allegation and proof that the individual is about to leave. [Aiken v. Aiken, 81 So2d 757 (Fla. 1955).] The court holds a hearing ex parte, similar to the hearing held in an injunction proceeding. [McGee v. McGee, 8 Ga. 295, 8 ALR 330 (1850).] If granted, the court may order the sheriff to apprehend the obligor. After the obligor is brought into court, a hearing is held to determine the amount of the appearance bond to be filed. The bond may be set to ensure the obligor's appearance at a hearing required by another civil enforcement remedy or, perhaps, to ensure his or her compliance with the order after he or she leaves the jurisdiction. [See Gibson v. State, 220 Miss. 39, 70 So2d 30 (1954).]

Receivership

In domestic relations cases, receivers usually are used during the pendency of a divorce action where there is some danger that one of the parties will squander or waste the property or funds. There is likewise some authority for their use during the enforcement stage, at least where the court that entered the order possesses equity powers.[41] The State of Michigan has a receivership statute specifically designed for child support enforcement.[42]

Receivers are appropriate for use against self-employed absent parents who have an established, identifiable business. The court appoints a receiver to operate the business on behalf of the obligor. The proceeds of the business, less the receiver's expenses and fee, are turned over to the court for application on the child support obligation.

Receivership is an extreme remedy and one that asks the court to use its equity powers. As a result, if an available legal remedy exists, the court is well within its rights to demand that the legal remedy be tried first. [Fincham v. Fincham, 174 Kan. 199, 255 P2d 1018 (1953).] In practice, the remedy should not be as drastic as it first appears. Most self-employed absent parents will be quick to make other arrangements for paying arrearages and ensuring current support.

REPORTS TO CONSUMER REPORTING AGENCIES

Pursuant to the Child Support Enforcement Amendments of 1984 [42 USC 666(a)(7)], States must have laws in effect providing procedures "by which information regarding the amount of overdue support owed by an absent parent residing in the State will be made available to any consumer reporting agency (as defined in Section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) upon request of such agency." The procedure must be available in cases where the amount of overdue support exceeds $1000, subject to the State's authority to limit the remedy to appropriate cases using "guidelines which are generally available within the State and which take into account the payment record of the absent parent, the availability of other remedies, and other relevant considerations."[43] "Consumer reporting agency" is defined by 15 USC 1681a(f) to mean any person who "for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties and which uses means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

45 CFR 303.105 sets forth the procedural requirements a State must meet to comply with 42 USC 666(a)(7). 45 CFR 303.105(d) requires the State to provide the absent parent advance notice and an opportunity to contest the accuracy of the information to be provided to the consumer reporting agency. In carrying out the notice and conflict resolution process and prior to release of information, the State must comply with its applicable due process requirements.[44] Paragraph (c) of the regulation allows the State to charge the consumer reporting agency a fee to cover the costs of providing the information.

"FULL COLLECTION" BY THE IRS

To use this remedy, the State must submit requests for certification to the OCSE Regional Representative. [45 CFR 303.71(d)(1).] Only the State IV-D agency may request the certification. There must be a court or administrative order for support entered against the individual; reasonable efforts must have been made to collect the amount owed; the State must have an assignment of support or application for services; and the delinquency of the order cannot be less than $750. Certification will not be allowed if there has been a request for full collection services during the previous 6 months. The State must agree to reimburse the IRS for costs involved in the collection. The fee for the service is $122.50.

The OCSE Regional Representative reviews the request to determine whether the State has made reasonable efforts to collect the amount owed by other available remedies, and that all information requirements are met by the request.[45] Next, the

Regional Representative either forwards the approved request to the Secretary of the Treasury or consults with the State in an attempt to correct any deficiencies.[46]

The IRS will attempt to collect the amount certified like a tax delinquency, except that:

- No interest or penalty shall be assessed or collected.
- The property exemptions of 26 USC 6334(a)(4), (6), and (8) do not apply.
- Any salary, wages, or other income of an individual that is being withheld in garnishment for the support of minor children shall be exempt from levy, pursuant to a judgment entered by a court of competent jurisdiction.
- In the case of the first assessment against an individual, the collection shall be stayed for a period of 60 days immediately after notice and demand, as described in Section 6303 of the Internal Revenue Code.[47]

The 60-day stay described above presumably gives the obligor the opportunity to satisfy the arrearage or contest the amount of the arrearage claimed by the State. No Federal court has jurisdiction to restrain or review the assessment or collection. However, this does not preclude the individual from bringing legal, equitable, or administrative action in the appropriate State court or administrative body to determine his or her liability for any amount assessed against him or her, or to recover any such amount collected through this procedure.[48]

MANDATORY MILITARY ALLOTMENTS

Section 465 of the Social Security Act requires allotments to be taken from the pay and allowances of any active member of the uniformed services who owes the equivalent of 2 months or more in court-ordered child support or child and spousal support payments.[49] The requirement also applies to commissioned officers of the Public Health Service, an agency within DHHS, and of the National Oceanic and Atmospheric Administration, an agency within the Department of Commerce.

The mandatory allotment procedure is initiated by the IV-D agency, or the court or agency that has the authority to issue an order by sending a notice to a designated official within the uniformed service involved. [These officials are identified in Appendix A of the garnishment regulations issued at 5 CFR 581.] The notice can be given in the form of a court order, letter, or other document. The contents of the notice vary from one branch of the service to another, but generally must:

- Provide the full name, Social Security number, branch of service, and duty station (if known) of the member who owes the support obligation
- Specify the amount of support due and the period in which it has remained owing
- Be accompanied by a certified copy of an order directing the payment of support issued by a court of competent jurisdiction or in accordance with an administrative procedure that is established by State law

- Provide the full name, Social Security number, and mailing address of the person to whom the allotment is to be paid
- Identify any limitations on the duration of the allotment
- Identify the name and birthdate of all children for whom support is to be provided under the allotment.[50]

The notice and accompanying documents are served by certified or registered mail, or by personal service, on an official designated by regulation.

On receipt of the notice, the uniformed service must provide a copy to the absent parent and arrange for a consultation between the absent parent and a judge advocate (or a representative of the service's legal staff). The consultation allows the absent parent and the judge advocate to discern what factors are involved with respect to the support obligation and the failure to make payments on it.[51] The allotment may not be instituted until this consultation has been provided or 30 days after the absent parent received notice of the delinquency.

The amount of the allotment is "the amount necessary to comply with the order (which, if the order so provides, may include arrearages as well as amounts for current support), except that the amount of this allotment, together with any other amounts withheld for support from the wages of the member" may not exceed the limits established by the Federal Consumer Credit Protection Act, 15 USC 1673(b).[52]

STATUTORY EXAMINATION OF A JUDGMENT DEBTOR

One of the most frustrating situations for the IV-D agency is the self-employed absent parent or the absent parent who is paid by cash and, therefore, can continuously avoid contempt by claiming inability to pay. Without any evidence as to the obligor's income or assets, there is little the agency can do to counter the absent parent's claim of inability to pay.

This problem apparently presents itself to numerous judgment creditors, because many State legislatures have provided all judgment creditors a remedy suited to this very situation. Typically, an execution first must be returned unsatisfied by the sheriff. A motion then must be filed with the court which rendered the judgment, requesting an order requiring the defendant to appear at a time and place named in the order to undergo an examination under oath concerning his ability to satisfy the judgment. Some statutes require the plaintiff to show by affidavit or otherwise that there is reasonable ground to believe that the defendant has property subject to execution or has conveyed or attempted to convey his property with an intent to defraud his creditors.

The court then holds a hearing to examine the defendant. The process, when successful, results in a finding that the defendant owns property that ought to be applied toward satisfaction of the judgment as well as an award against the defendant for the costs of the examination. If the defendant is found to be without property, the costs are charged to the plaintiff.

Unfortunately, a Constitutional limitation may hamper the effectiveness of the remedy. In State ex rel. North vs. Kirtley, 327 SW2d 166 (Mo. 1959), the Missouri Supreme Court held that a defendant could not be required to answer questions as to the ownership of property when he based his refusal upon the privilege against self-incrimination, and when the examination was, in effect, a charge of fraudulent conveyance of property, a misdemeanor. An argument could be made that the privilege applies in States where criminal nonsupport is a possibility.

FOOTNOTES

/1/ Social Security Act sec. 466(a)(8); 42 USC 666(a)(8).

/2/ Social Security Act sec. 466(b)(1); 42 USC 666(b)(1).

/3/ Social Security Act sec. 466(b)(3); 42 USC 666(b)(3).

/4/ Social Security Act sec. 466(b)(2); 42 USC 666(b)(2).

/5/ The withholding procedure must be administered by a public agency designated by the State. Presumably, the public agency may be located either in the executive or judicial branch. [Social Security Act sec. 466(b)(5); 42 USC 666(b)(5).]

/6/ 45 CFR 303.100(b).

/7/ Sec. 452.350 RSMo (Supp. 1984).

/8/ Calif.C.P. secs. 723.010 to 723.154.

/9/ H.Rep.No. 527, at p. 33.

/10/ 45 CFR 303.100(c); Social Security Act sec. 466(b)(4)(A); 42 USC 666(b)(4)(A).

/11/ Social Security Act sec. 466(b)(6)(A)(ii); 42 USC 666(b)(6)(A)(ii).

/12/ 45 CFR 303.100(d)(1)(ix).

/13/ Social Security Act sec. 466(b)(6)(D); 42 USC 666(b)(6)(D).

/14/ Social Security Act sec. 466(b)(6)(C); 42 USC 666(b)(6)(C).

/15/ 45 CFR 303.100(d)(1)(iii); Social Security Act sec. 466(b)(6)(A)(i); 42 USC 666(b)(6)(A)(i).

/16/ Social Security Act sec. 466(b)(6)(B); 42 USC 666(b)(6)(B).

/17/ Social Security Act sec. 466(b)(6)(C); 42 USC 666(b)(6)(C).

/18/ 45 CFR 303.100(d)(1)(ii).

/19/ 45 CFR 303.100(d)(1)(x).

/20/ 45 CFR 303.100(d)(3).

/21/ 45 CFR 303.100(a)(9).

/22/ Social Security Act sec. 466(b)(7); 42 USC 666(b)(7).

/23/ Social Security Act sec. 466(b)(9); 42 USC 666(b)(9).

/24/ Social Security Act sec. 466(b)(8); 42 USC 666(b)(8).

/25/ See Sanchez v. Carruth, 568 P2d (Ariz.App. 1977); Padgett v. Padgett, 472 A2d 849 (D.C. 1984); Armour v. Allen, 377 So2d 798 (Fla.App. 1979); Kelzenberg v. Kelzenberg, 352 NE2d 845 (Minn. 1984); Minn.Stat. sec. 518.64 subd. 2 (Supp. 1983); Kruger v. Kruger, 679 P2d 961 (Wash. 1984); Schaffer v. Dist. Ct., 470 P2d 18 (Colo. 1970); Brady v. Brady, 592 P2d 865 (Kan. 1979); Poe v. Poe. 436 P2d 767 (Ore. 1967); Ore.Rev.Stat. Sec. 107.095(2) (1979); Neb.Rev.Stat. sec. 42.369 (1972); Moates v. Morgan, 440 So2d 1069 (Ala. 1983); Catlett v. Catlett, 412 P2d 942 (Okla. 1966); Britton v. Britton, 671 P2d 1135 (N.M. 1983).

/26/ Zeitlen v. Zeitlen, 544 SW2d 103 (Tenn.Ct.App. 1976); Kroeger v. Kroeger, 353 NW2d 60, 120 Wis.2d 48 (App. 1984); Griffin v. Avery, 424 A2d 175 (N.H. 1980).

/27/ Anderson v. Anderson, 199 SE2d 800 (Ga. 1973).

/28/ Ore.Rev.Stat. sec. 107.095(2) (1979); Neb.Rev.Stat. sec. 42.369 (1972).

/29/ Social Security Act sec. 466(a)(4); 42 USC 666(a)(4).

/30/ 10 Md. Code Ann. 126.

/31/ 6 Am.Jur.2d, Attachment and Garnishment, sec. 337.

/32/ Sec. 521.010 RSMo (1978).

/33/ Masten v. Fellerhoff, 326 F.Supp. 969 (S.D. Ohio 1981); Tetro v. Tetro, 544 P2d 17 (Wash. 1975); Brotzman v. Brotzman, 283 NW2d 600 (Wis. 1979). Rutherford v. Rutherford, 296 Md. 347, 464 A2d 278 (Md.Ct.App. 1983); Young v. Whitworth, 522 F.Supp. 759 (DC Ohio 1981).

/34/ Sword v. Sword, 249 NW2d 88 (Mich. 1976); Duval v. Duval, 322 A2d 1 (N.H. 1974); Department of Human Services v. Rael, 642 P2d 1099 (N.M. 1982); Jolly v. Wright, 265 SE2d 135 (N.C. 1980); McNabb v. Osmundson, 315 NW2d 9 (Iowa, 1982); Cox v. Slama, 355 NW2d 401 (Minn. 1984).

/35/ Andrews v. Walton, 428 So2d 663 (Fla. 1983); Vela v. Colorado District Ct. of Arapahoe Co., 664 P2d 243 (Colo. 1983); In re Calhoun, 350 NE2d 665 (Ohio 1976).

/36/ See also Mahaffey v. Mahaffey, 238 Ga. 64, 230 SE2d 872 (1976); Woodall v. Woodall, 397 So2d 524 (L.a.App. 1981); Bailey v. Bailey, 95 NW2d 533 (S.D. 1959).

/37/ Handbook for Proceeding On Violations of Penal Code Section 270, Office of the District Attorney, Bureau of Family Support Operations, p. 21 (1982 ed., Los Angeles, CA).

/38/ Social Security Act sec. 466(a)(6); 42 USC 666(a)(6).

/39/ Social Security Act sec. 466(a); 42 USC 666(a).

/40/ 24 Am.Jur.2d Divorce & Separation secs. 751-753.

/41/ 24 Am.Jur.2d Divorce & Separation sec. 241.

/42/ Mich. Stat. Ann. sec. 552.27.

/43/ Social Security Act sec. 466(a).

/44/ 45 CFR 303.105(e).

/45/ 45 CFR 303.71(c)(4), (e), and (f).

/46/ 45 CFR 303.71(f).

/47/ 26 USC 6303.

/48/ 26 USC 6305(b).

/49/ P.L. 97-248; 42 USC 665.

/50/ 33 CFR 54.05(b).

/51/ 42 USC 665(a)(2)(A).

/52/ 42 USC 665(a)(1).

CHAPTER 9
Defenses to Enforcement

INTRODUCTION

This chapter examines the defenses absent parents raise most frequently in their attempts to avoid enforcement of support orders. (Chapters 5, 6, and 10 discuss defenses raised to prevent the establishment of an order and defenses peculiar to interstate cases.) The following defenses are discussed: inability to pay; termination of parental rights; custody and visitation interference; release agreements; waiver by acquiescence, laches, and other equitable defenses; payment by alternative method; nonpaternity; statutes of limitation; emancipation; death of obligor; bankruptcy; property exempt from execution; challenges to the State's authority to enforce the order; and attacks on the validity of the support order due to lack of personal jurisdiction.

Most defenses to enforcement of child support orders have been held valid in at least some States. Especially as to the equitable defenses, the appellate decisions make it clear that each ruling is made in light of the circumstances of each particular case. An appellate court most likely will give great deference to the trial court's ruling, unless the law is clear. Where the law is not clear, decisions from other States in cases with similar facts can be instructive. Many of the cases cited in this chapter contain good public policy discussions, some as dicta.

State appellate courts are increasingly supportive of the Child Support Enforcement Program and are overturning outdated decisons in the child support enforcement area. Where a trial court normally would feel compelled to follow a long line of musty common law, recent moves by a majority of other States can sway appellate courts. More important, the Child Support Enforcement Amendments of 1984 will markedly diminish the effectiveness of many defenses, at least at the enforcement stage. Once States comply with the 1984 Amendments, income withholding will be the remedy of choice, both for intrastate and interstate cases. The 1984 Amendments severely limit the obligor's defenses in the context of income withholding proceedings. That is not to say that the defenses will disappear entirely. Defense counsels are sure to find strategies to continue to make the arguments discussed in this chapter, most probably in support of motions for modification. Thus, the case law cited in this chapter should continue to be relevant.

INABILITY TO PAY

Inability to pay is a frequent defense to a collection action based on the obligor's alleged lack of means to support himself or herself adequately and still comply with the support order. As treated here the defense does not suggest active or passive avoidance of the duty to support. In most States, an obligor's financial straits may limit the effectiveness of coercive or criminal remedies, particularly contempt of court. To the contrary, inability to pay is not generally an effective defense against remedies directed at specific property. Inability to pay as an enforcement defense should not be synonymous with inability to pay as a basis for retroactive modification in States that allow such modifications. The court should not, sua sponte, modify (prospectively or retroactively) a

support order based on a finding of the obligor's inability to pay made during the course of an enforcement proceeding. Ideally, the obligor should be required to file a proper motion for such relief and give the obligee notice and an opportunity to defend the motion, whether in a separate proceeding or simultaneously with the enforcement action.

Civil Contempt

An obligor may be incarcerated for civil contempt for willfully failing and refusing to comply with a court order for child support. This remedy is coercive in nature. The court must find that the obligor has the present ability to comply with the order or has a capability of performing some other task (e.g., execution of income assignment, seeking work, enrolling in a drug or alcohol rehabilitation program); however, he or she must have refused to meet the purgation requirement before jail may be imposed. If the obligor was financially unable to comply with the support order at the time the arrearage accrued but has assets available to satisfy the arrearages at the time of the contempt hearing, the court may find him or her in contempt for a present refusal to apply the assets to the arrearages.

If the obligor was able to pay the support when it fell due, but has no funds from which the obligation can be paid at the time of the hearing on contempt, the court may make a contempt finding. However, the court may not impose incarceration as a means of coercing the obligor into compliance, since he or she would not have the present ability to purge himself or herself.

Generally, in civil contempt actions, the court has ordered the obligor to show cause why he or she should not be held in contempt for noncompliance, placing the burden on the obligor to prove present inability to pay and that this inability is not due to his or her fault or negligence. [Faircloth v. Faircloth, 339 So2d 650 (Fla. 1976).] Some courts have gone so far as to impose on the obligor additional burdens when an inability to pay defense is raised. For example, in Ex Parte Hennig, 559 SW2d 401 (Tex.Civ.App. 1977), the court held that the obligor could be required to show that he had no real or personal property that could be sold; that attempts at borrowing had been made and were unsuccessful (with particulars); and that the obligor knew of no other source, including relatives, from whom he could borrow the funds to satisfy the support obligation. Similarly, in Dawson v. Dawson, 453 So2d 1054 (Ala.Civ.App. 1984), the court stated that merely being unemployed and having no cash is inadequate proof of inability to pay. In that case, the obligor recently had been awarded considerable assets by the divorce judgment that were unaccounted for at the contempt hearing. The court concluded that they still should be available for satisfying the child support delinquency.

If the obligor placed himself or herself in a position of being financially unable to comply with the support order and the court finds the acts of the obligor to be in contumacious disregard of the court's order, the obligor may be held in contempt. Generally, however, the obligor cannot be incarcerated for civil contempt, again because he or she would not have the "keys to the jailhouse." An exception could occur when the court has imposed a purgation requirement other than payment of money and the obligor has refused to perform.

Criminal Contempt

Some courts have stated that criminal contempt proceedings may become appropriate when a person commits chronic violations of a court order, single violations of which

constitute civil contempt. In those cases, the repeated violations constituted blatant contumacy. [National Popsicle Corp. v. Kroll, 104 F2d 259, 260 (CA2 1939).] A judgment of criminal contempt is punitive rather than coercive in nature; criminal contempt is defined as conduct that tends to impair the authority of the court. For this reason, the obligee need not show than the obligor has the present ability to meet the obligation, and a criminal sentence, rather than a purgation requirement, is imposed.

In Murray v. Murray, 587 P2d 1220 (Hawaii 1978), the Supreme Court of Hawaii determined that an obligor could be sentenced for criminal contempt for willfully violating the terms of a support order, even though, at the time of the hearing, he or she did not have the present ability to comply with the order or to pay the arrearages. The court pointed out, however, that when criminal sanctions are imposed, all statutory, procedural, and due-process requirements must be followed strictly.

Remedies Directed Against Specific Property

An absent parent's prior or present inability to pay child support generally is not a successful defense to actions directed at specific assets of the absent parent, such as garnishment of wages or levy and execution on real or personal property. In the majority of States, past-due support installments become vested as judgments in favor of the obligee immediately on default in payment, and the courts have no power to give retrospective application to a modification. In these States, the obligor must seek prospective modification of the support order at the time his or her change in circumstances makes it impossible to meet the support obligation.

In jurisdictions requiring the arrearages to be reduced to judgment before collection action may be directed against property, many courts allow the absent parent to argue for equitable relief justifying retroactive modification based on his prior inability to pay the ordered amount of support. [Welser v. Welser, 149 A2d 814 (N.J.App.Div. 1959).] In these instances, the defense arises in the obligee's action to obtain judgment on the arrearages, which may be combined with a request for attachment of the obligor's property. Once the judgment is obtained, however, the obligor is estopped from collaterally attacking it in the future in a subsequent action against property.

The Supreme Court of Iowa, in In re Marriage of Vetternack, 334 NW2d 761 (Iowa 1983), adopted a novel approach to a father's argument that his child support payments should be reduced because of his inability to pay while he was incarcerated. In upholding the trial court's application of the father's equity in the marital home to the child support obligation, the court noted that inability to pay has become less a consideration while a long-range capacity to earn money has become more of a consideration. Also, in this case the court implied that the father's incarceration was a voluntary diminishing of his earning capacity.

TERMINATION OF PARENTAL RIGHTS

A parent's legal relations with his or her child may be terminated by reason of abuse or abandonment of the child or after consent to the child's adoption. A final decree of adoption terminates all legal relations between the adopted child and his or her

natural parent or parents. Upon adoption, all unvested legal rights between the adopted child and his or her biological parents are absolutely terminated; and the natural parents are relieved of all future duties and obligations, including support, with respect to the child. However, if an obligor's child support arrearages have been reduced to money judgment or have attained such status by operation of law, the right to such payments becomes vested, and the debt is not affected by the adoption." [C. v. R., 404 A2d 366 (N.J. 1979).] "The accrued arrearages represent monies due pursuant to a valid judgment ordering payments for the support and benefit of the minor child. . . . Such arrearages are still due and owing and have not been eradicated by the adoption decree." [Sample v. Poteralski, 313 SE2d 145 (Ga.App. 1984).]

Adoptions involving minor children whose natural parents are living require parental consent, unless the parent-child relationship already has been terminated on other grounds, such as abuse, neglect, or abandonment, or that termination would be in the children's best interests. [In Interest of Goettsche, 311 NW2d 104 (Iowa 1981).] Frequently, in exchange for a consent to the adoption, the custodial parent agrees to waive the right to collect accrued child support arrearages. [Rodgers v. Rodgers, 505 SW2d 138 (Mo.App. 1974).] In most States, the custodial parent has the legal authority to bargain away the arrearages as consideration for the consent, which is viewed as a simple contractual agreement. However, since a custodial parent generally lacks authority to bargain away current or future support, the agreement may not purport to waive support due between the signing of the agreement and the final adoption order. [Rodgers, supra, at p. 145.]

When the adoption does not take place, the natural parent remains responsible for support of the child. In Rodgers, supra, the consent of the father was obtained but the final adoption decree was never entered. The natural father had discontinued child support payments but had not been notified of the failure to finalize the adoption. The mother, on seeking collection of arrears, was held to have acquiesced in the father's failure to make child support payments as they became due and thereby waived the right to enforce these payments. However, the appellate court reinstated the father's duty to pay support in the future.

When parental rights are terminated for neglect, nonsupport, or other reasons not directly connected with an adoption proceeding, and the child becomes a ward of the State, the parental obligation of support is not always terminated automatically. "Classification of a minor as a ward of the State is not a sufficient basis for automatically reducing child support. . . . While a child committed to the care and custody of the State may no longer in fact depend on parental support, dependence [is not] the measure of parental obligation. . . ." [Patrzykont v. Patrzykont, 644 P2d 1009 (Kan.App. 1982).] However, in Dept. of Human Resources v. Vine, 662 P2d 295 (Nev. 1983), the mother obtained sole parental rights, and the State IV-D agency was unable to reimpose a support obligation on the father after the mother applied for public assistance.

CUSTODY AND VISITATION INTERFERENCE

The general rule is that visitation and child support are separate, not interdependent issues. Thus, a refusal of visitation by the custodial parent does not relieve the absent

parent of his or her child support obligation. [Thomas v. Thomas, 335 SW2d 827 (Tenn. 1960); Williams v. Williams, 143 SE2d 443 (Ga.App. 1965).] The primary consideration is the best interest of the child in whom both visitation and support rights reside.

For an analysis of the case law on a court's authority to cancel or modify arrears, to refuse to enforce arrear, to suspend future support payments, or to set up a trust fund on the child(ren)'s behalf when the custodial parent denies visitation privileges in violation of a court order or separation agreement, see 95 ALR2d 118. Another annotation at 8 ALR4th 1231 discusses cases in which the custodial parent violates a clear judicial prohibition against removing the child(ren) from specified geographical boundaries and the resulting authority of the court to terminate, suspend, or reduce child support payments.

Substantial portions of the Uniform Marriage and Divorce Act (UMDA) have been adopted in eight States and selected portions in many more. A provision of the Act states, in part, that if a party fails to comply with a provision of a decree or temporary order, the obligation of the other party to make payments for support or to permit visitation is not suspended, but he or she may move the court to grant an appropriate order. [UMDA, 9A U.L.A. sec. 315.] There are few interpretive decisions, but two Illinois courts have held that the appropriate remedy for a father who has been denied visitation is to move the court for contempt against the mother and possibly a change of custody in the appropriate circumstances. [Huckaby v. Huckaby, 393 NE2d 1256 (Ill.App. 1979); People ex rel. Winger v. Young, 397 NE2d 253 (Ill.App. 1979).]

RELEASE AGREEMENTS

Generally, an agreement between the parents of a child made outside the courtroom that purports to absolve the absent parent of the support obligation is invalid. [100 ALR3d 1129.] Regardless of agreements or disagreements between parents, children are entitled to continuing support in accordance with their needs and the parents' ability to provide for them. The amount of support required and the ability of each parent to provide such support are questions that rest primarily with the trial court. [Flynn v. Flynn, 604 SW2d 785 (Mo.App. 1980).] Nevertheless, such agreements occasionally form the basis of a defense. They can be express attempts at accord and satisfaction or implied as a result of a reconciliation between the parents.

Accord and Satisfaction

"An accord is a contract to discharge an existing cause of action, tort, or contract. Satisfaction is the performance of such contract."[1] In the context of child support arrearages, accord and satisfaction can be defined as an agreement between the absent parent and the custodial parent relieving the absent parent of past-due child support payments, either in exchange for some other valid consideration or if supported by the requisite donative intent.

The most significant distinction in determining the validity of agreements is between past-due support and future payments. Arrearages have been held to represent a debt due the obligee for prior care given the child(ren) and, therefore, may be negotiable. In Andersen v. Andersen, 407 P2d 304 (Idaho 1965), the court examined an agreement

releasing the father from past-due support and reducing future support in exchange for a $600 lump-sum payment and a set of carpenter's tools. The agreement as to the arrearages was upheld, but the court held that the mother could not release the father permanently from his duty to provide future child support; it remained within the exclusive province of the court to modify its support orders.

Extending the concept further to include arrears, numerous cases support the proposition that any agreement between former spouses purporting to release the absent parent from the support obligation as ordered by the court is void, as against public policy. The general principle is that parents by agreement cannot nullify a court's order so as to deprive a minor child of the support granted in the decree. [100 ALR3d 1129, sec. 4(c), pp. 1149-1153.]

In some instances, courts have invalidated agreements between parents on the ground of insufficient consideration. For example, in Herb v. Herb, 103 NW2d 361 (Iowa 1960), the court held that there was no consideration for an agreement to reduce the decreed child support payments from $30 per week to $70 per month. According to the ruling, the custodial parent gained nothing she was not already entitled to receive, and the absent parent did not obligate himself to do anything he was not already required to do. Similarly, in McCabe v. McCabe, 167 NE2d 364 (Ohio App. 1959), the court held as unenforceable the obligor's agreement to make up back support payments and give consent for the wife's present husband to adopt in exchange for a release of his future obligation, because he was bound by law to pay the support arrearages and the adoption did not go through. In State ex rel. Hansen v. McKay, 571 P2d 166 (Or.App. 1977), the court found that a gratuitous satisfaction of judgment by a mother who had assigned her support rights to the Oregon IV-D agency had no effect on the agency's right to enforce the judgment.

Remarriage of Absent and Custodial Parents

According to the Illinois Court of Appeals (4th District) in Ringstrom v. Ringstrom, 428 NE2d 743 (1981), the vast weight of authority holds that the remarriage of the parties to each other annuls the prior divorce decree and restores the parties to their respective rights as if they had never been divorced. Therefore, the mother may not seek later to collect arrearages that accrued under the order for support contained in the first divorce decree. It is questionable whether this rule would be applied to support arrears that had been assigned to a State IV-D agency prior to remarriage. As noted in Greene v. Iowa District Court, 312 NW2d 915 (Iowa 1981), a valid assignment of a support judgment gives the assignee rights that cannot be affected by the assignor without the assignee's consent. In Greene, the court followed decisions from Georgia and Nebraska in holding that the remarriage of the parents does not automatically vacate a judgment for accrued support installments nor does it deprive the divorce court of subject matter jurisdiction to enforce the obligation as to those unpaid installments.

Temporary Reconciliation

Courts generally have held that the temporary reconciliation of the mother and father while the divorce is pending or subsequent to the divorce does not nullify or abate the child support order. In Scully v. Scully, 331 NW2d 801 (Neb. 1983), the court stated that there was no authority to reduce past-due installments for child support and that the father remained liable for $11,700 in unpaid child support for a period in which the mother

and children resided in his home. The court admitted that in some circumstances the principle of equitable estoppel would preclude collection, based on grounds of public policy and good faith. Circumstances would require good faith reliance on statements or conduct of the party to be estopped and a change of position to his detriment by the party claiming estoppel.

WAIVER BY ACQUIESCENCE, LACHES, AND OTHER EQUITABLE DEFENSES

Waiver by acquiescence and laches are similar defenses. Black's Law Dictionary defines laches as a failure to assert a claim within a proper time, while acquiescence implies knowing assent on which another relies.

In regard to child support enforcement, 5 ALR4th 1015 defines laches as a delay in seeking recovery of arrearages of court-awarded child support. It is ordinarily a defense to such recovery only when it is shown that the custodial parent's delay in seeking recovery prejudiced the absent parent. Papcun v. Papcun, 436 A2d 282 (Conn. 1980), held that prejudice was not established because the absent parent had not changed his circumstances in reliance on the custodial parent's 9-year delay in failing to collect payments. When prejudice is established, as in Anthony v. Anthony, 204 NW2d 829 (Iowa 1973), where the wife delayed 17 years in pursuing her right to collect child support, the deciding factor was the absent parent's reliance on her delay, which led him to believe she intended to waive or abandon recovery. Laches in this case was held to be a valid defense.

Laches may be a partial defense, as demonstrated by Eckard v. Gardner, 257 A2d 174 (Md.App. 1969). Laches was held to constitute a partial bar to an attempt by a divorced wife to obtain a judgment for arrearages in alimony and child support that were approximately 13 years past due. The divorced wife had waited too long to recover arrearage payments meant to cover current support obligations. The court awarded arrearages for only 3 years prior to the filing of the petition.

Another view is that the doctrine of laches has no application to child support obligations. [Fitzgerald v. Fitzgerald, 618 P2d 867 (Mont. 1980).] Under a divorce decree, the liability of a parent for child support payments should be unaffected by the laches of the other parent in seeking enforcement of the child's rights. Proceedings to enforce support judgments are "equitable in nature, and a mother may not be found to have waived her child's right to receive support from its father by failing to promptly enforce it." [Armour v. Allen, 377 So2d 798 (Fla.App. 1979).]

The defense of waiver by acquiescence implies the obligee's knowing waiver to nonpayment or partial payment of child support. Material prejudice is not always a requirement of estoppel by acquiescence. [Davidson v. Van Lengen, 266 NW2d 436, 5 ALR4th 1001 (Iowa 1978).] However, there must be substantial evidence that the custodial parent had intended to waive back child support. Sheffields v. Strickland, 599 SW2d 422 (Ark.App.1980), also notes that laches, estoppel, and statutes of limitation are affirmative defenses to a petition to reduce arrears to judgment and must be pleaded affirmatively. If the evidence does not support the obligor's contention that there was an agreement to reduce or waive child support payments, then the obligee will not be held to have acquiesced. [Lewis v. Lewis, 256 NE2d 660 (Ill.App. 1970).]

In In Re Marriage of Homan, 466 NE2d 1289 (1984), the First District Illinois Court of Appeals stated that the defense of equitable estoppel must be proved by clear and unequivocal evidence. Equitable estoppel arises when the voluntary conduct of the obligee results in good faith detrimental reliance by the obligor and an unwarranted benefit to the obligee. The court in Homan noted that cases which have found equitable estoppel have involved egregious circumstances.

In State ex rel. Division of Family Services v. Willig, 613 SW2d 705 (Mo. App. 1981), the mother testified she had not entered into written or verbal agreement with the father that he not pay child support; she admitted requesting public assistance because she did not expect to receive any child support from the father. The court found insufficient evidence to support the finding that the former wife had acquiesced in her former husband's nonpayment of child support for the 5-year period preceeding her assignment of support rights to the State. The court's determining factor was that taxpayers (through AFDC) were providing the support the husband owed and that his testimony that he had been contacted several times by the welfare department belied any contention of waiver by acquiescence.

On the other hand, the same Missouri court later found, in State ex rel. Division of Family Services v. Ruble, --SW2d--, Mo.App. E.D., 48498 (1-22-85), that, by virtue of two written agreements with the father to modify the support order, the mother had acquiesced to reduced payments. The agreements had been filed with the court, but the court heard no motion to modify support and was not asked to approve the agreements. Nevertheless, when the mother assigned her support rights to the State as a condition of eligibility for AFDC, the State was deemed to have received an assignment of the mother's legal right to receive support as specified by the original decree and not pursuant to the agreements. Further, the State was not estopped by a misrepresentation of its agents, who, over a period of more than 6 years, had instructed the father to pay child support in accordance with the filed agreements, rather than with the original decree. The State was allowed to recover the full amount due under the court order from the date of the mother's assignment of support rights.

PAYMENT BY ALTERNATIVE METHOD

Generally, as a matter of law, an obligor should not be allowed credit for expenditures made while the child is in his or her custody or for other voluntary payments made on behalf of the child that do not conform specifically to the terms of the decree. Credit for voluntary payments permits the absent parent to vary the terms of the decree and usurps the custodial parent's right to determine the manner in which support money will be spent. [Hirschfield v. Hirschfield, 347 NW2J 627 (Wisc.App. 1984); Horne v. Horne, 239 NE2d 348 (NY App. 1968); Glover v. Glover, 598 SW2d 736 (Ark. 1980).]

In determining whether credit against arrearages should be granted for nonconforming payments, the rule may hinge on whether or not the arrearages become automatic judgments as they accrue. Where support arrearages vest automatically as judgments, it is generally held that no credit may be given for nonconforming payments; to do so would be to grant a retroactive modification. [Fearon v. Fearon, 154 SE2d 165 (Va. 1967).] If, as in Cope and Cope, 619 P2d 883 (Ore. 1980), it was decided that statute bars retroactive modification of accrued installments because they have ripened into judgments, they become unmodifiable and no credit will be given. In this case, a father's

Social Security benefits paid directly to the mother for the benefit of the child could not be credited retroactively against the father's child support obligation. [See also Fowler v. Fowler, 244 A2d 375 (Conn. 1968), and Chase v. Chase, 444 P2d 145 (Wash. 1968), for decisions on the court's refusal to grant credit toward child support arrears for Social Security disability payments made to the child(ren).] However, New Hampshire and Mississippi courts have followed Alabama, Arkansas, Georgia, Kansas, Massachusetts, Nebraska, New Mexico, and Tennessee in allowing a husband credit toward his overdue support obligation for Social Security payments made to the ex-wife for the benefit of the children. [Griffin v. Avery, 424 A2d 175 (N.H. 1980); Mooneyham v. Mooneyham, 420 So2d 1072 (Miss. 1982); 77 ALR3d 1315.]

Perhaps due to the harshness of the general rule, some courts have been willing to consider equitable principles where compulsory circumstances led to the substituted form of payment. Where the custodial parent expressly or by implication consents to accept an alternate form of payment as partial or complete satisfaction under the decree, some courts will give credit if the payment is in substantial compliance with the spirit and intent of the support decree. [Williams v. Williams, 405 So2d 1277 (La.App. 1981); Whitman v. Whitman, 405 NE2d 608 (Ind.App. 1980).] Credit aiso has been allowed where the father took custody of the children because of illness or incompetency of the mother. [Silas v. Silas, 300 So2d 522, (La.App. 1974); Lieffring v. Lieffring, 622 SW2d 519 (Mo.App. 1981); Headley v. Headley, 172 So2d 29 (Ala. 1964); White v. White, 368 A2d 1061 (Md.App. 1977).]

The credit for cash payments of gifts given directly to the child, educational expenses, or food, clothing, medical expenses, or other necessities depends to a large degree on the circumstances of each individual case. [Hamrick v. Seward, 189 SE2d 882 (Ga.App. 1972); Re Marriage of Bjorklund, 410 NE2d 890 (Ill.App. 1980); Gould v. Awapara, 365 SW2d 671 (Tex. Civ.App. 1963).]

Credit for support given by the noncustodial parent during periods of extended visitation or temporary custody usually is not permitted unless it is so provided in the decree. [Escott v. Escott, 325 NE2d 395, (Ill.App. 1975); Atkins v. Zachary, 254 SE2d 837 (Ga. 1979).] In Tuch v. Tuch, 316 NW2d 304, (Neb. 1982), the stipulation that support would abate during the 6-week visitation period was incorporated into the decree, and the absent parent was not held responsible during that period.

There is some precedent for allowing credit for support given during these periods. [47 ALR3d 1031.] James v. James, 271 SE2d 151 (Ga. 1980), noted that the noncustodial parent is not the only one obligated to support the child and ordered the custodial father to pay $15 per day for each day the couple's children visited with the mother. The courts also have upheld agreements to reduce support payments during the summer when children spend substantial amounts of time with the noncustodial parent. [Kahn v. Kahn, 532 P2d 541 (Ariz.App. 1975).]

NONPATERNITY

An absent father often will claim that after his marriage to the mother was dissolved he discovered he was not the natural father of a child conceived or born during or before the marriage. Courts differ on the effect of a paternity finding or an implication of nonparentage in a divorce decree. The doctrine of res judicata would prohibit later

litigation of a matter on which final judgment was reached, as long as one of the parties is not guilty of fraud or collusion. The father normally would be collaterally estopped from relitigating material facts and questions that were directly in issue in an original divorce or support proceeding. In some cases, the doctrine of res judicata extends to incidental questions arising in the previous action, so that a final judgment on matters essentially connected with the subject matter in earlier litigation may be conclusive. Under this broad concept of res judicata, most courts have found that a father and mother are bound by a finding or implication of paternity in a divorce or support proceeding. However, a child or a stranger who was not a party to the earlier proceeding is not bound by the court's determination.

Courts that have considered the binding effect on a father of an order entered in divorce or support proceeding are divided as to whether the paternity issue must have been raised and litigated in the original action. Decisions from almost every State are reported in the annotation at 78 ALR3d 846.

In a similar vein is the decision in In re Johnson, 152 Cal.Rptr. 121, 88 Cal.App.3d 848 (1979). Relying on Clevenger v. Clevenger, 189 Cal.App.2d 258 (1961), the court held that the husband was estopped from asserting illegitimacy in a support proceeding, even though the parties had stipulated that he was not the father of a child born 10 days prior to the parties' marriage. The court based its reasoning on facts indicating that the husband represented himself to the child as his father, that the husband intended for the child to accept and act on this representation, and that the child relied on the representation in ignorance of the true facts.

STATUTES OF LIMITATION

Statutes of limitation prevent the assertion of claims that have become stale. State statutes vary from 5 to 20 years in which judgment creditors must act to enforce judgments before they become dormant. Normally, a judgment may be revived by a writ of scire facias. [See discussion in Chapter 8, supra.]

A normal money judgment is based on a fixed amount and does not accrue any new or additional rights from the date of rendition. However, a child's right to support is ongoing until the child reaches majority. At the time a child support order is issued, it is not a judgment of a sum then due, like most awards, but rather a variable sum that increases as each installment is unpaid. [State ex rel. Stanhope v. Pratt, 533 SW2d 563 (Mo. 1976).] Given the installment nature of a support order, a majority of jurisdictions have ruled that the statute of limitation does not begin to run until each installment becomes due, rather than at the time the order is issued. [70 ALR2d 1250, 1258; Treaster v. Laird, 519 P2d 1231 (Colo. 1974); Bruce v. Froeb, 488 P2d 662 (Ariz. 1971); Koon v. Koon, 313 P2d 369 (Wash. 1957); Britton v. Britton, 671 P2d 1135 (N.M. 1983).]

Several courts have disallowed statues of limitation entirely, because a judgment for child support is a continuing judgment and always subject to modification by the court. [Miller v. Miller, 46 NW2d 618 (Neb. 1950).] In Knipfer v. Buhler, 35 NW2d 425 (Minn. 1948), the Minnesota court held that the statutory period does not begin to run until the children reach majority and all payments are due.

In States where each unpaid child support installment is not automatically a part of a judgment, an independent action for judgment may be brought within the appropriate statutory period after the child attains majority. In Kroeger v. Kroeger, 353 NW2d 60 (Wisc.App. 1984), the court held that the obligee had 20 years after the daughter reached the age of majority to bring an independent action for judgment. However, in Griffin v. Avery, 424 A2d 175 (N.H. 1980), the court applied the 6-year limitation applicable to "personal actions," rather than the 20-year limit on actions on judgments, since the unpaid installments were not "judgments."

Most statutes of limitation contain tolling provisions, such as the defendant's absence from the State, the minority of the plaintiff, a written acknowledgment or promise by the defendant to pay the debt, and sometimes a payment on the debt or acknowledgment on the court record of partial satisfaction of the debt.

EMANCIPATION

The obligation of parents to support their children ordinarily ceases on the children's reaching the age of majority or on the children's emancipation. [Cordorniz v. Cordorniz, 215 P2d 32 (Cal. 1950); Niesen v. Niesen, 157 NW2d 660 (Wisc. 1968); 32 ALR3d 1057.] The emancipation of a minor child frees that child from parental control; at the same time, the child surrenders his or her right to maintenance and support from his or her parents. [Biermann v. Biermann, 584 SW2d 106 (Mo.App. 1979).] Thus, the courts are not required to establish or enforce support orders for any minor child who has become self-supporting, emancipated, or married or who has ceased to attend school after the applicable age of majority. [In re Miller, 660 P2d 205 (Ore.App. 1983).] A parent's liability to support terminates when the child is in no way dependent on him or her for support. [Wood v. Wood, 61 So2d 436 (Ala. 1952); In re Marriage of Fetters, 585 P2d 104 (Col.App. 1978); Isquith v. Isquith, 250 NYS2d 481, affd. 203 NE2d 925 (NY Ct.App. 1964).] The problem most often arises in determining whether an absent parent is entitled to relief from further payments under an existing support order.

The defense that the child has become emancipated does not automatically relieve the parent of a support obligation. [Torma v. Torma, 645 P2d 395 (Mont. 1982).] In making such a determination, the courts have considered the circumstances of the particular case. Generally, they have ruled that the emancipation of a minor does not relieve the parent from the support order when the minor is not capable of supporting himself or herself. [Allison v. Binkley, 259 SW2d 511 (Ark. 1953).] In Kamp v. Kamp, 640 P2d 48 (Wyo. 1982), the absent parent was held liable for support of his disabled child despite the child's reaching the age of majority. The court construed the support statute to mean all "children," not just "minor children."

The fact that children are working to aid in their support when the absent parent fails to make payments as required by decree does not necessarily relieve the parent of the obligation to comply with the order for support. [Waldron v. Waldron, 301 NE2d 167 (Ill.App. 1973); Taylor v. Taylor, 412 So2d 1231 (Ala.App. 1982).] The annotation at 32 ALR3d 1055 discusses acts initiated by a minor that may have the effect of terminating a support obligation (e.g., employment, name change, refusal to visit parent).

With regard to the parent's obligation to support the child(ren) between the ages of 18 and 21, the opinion is mixed, with many jurisdictions ruling that emancipation has no relevancy to the parent's obligation to finance the child's schooling between those ages. [Miller v. Miller, supra.] Support orders that predate the law declaring the age of majority to be 18 continue to be obligatory to age 21. [Carrick v. Carrick, 605 P2d 1215 (Ore.App. 1980).]

A child may become unemancipated during his or her minority. In Fetters, supra, the Colorado Court of Appeals found that when the daughter's marriage was annulled, the father's support obligation under the divorce decree was reinstated. The daughter was 16 and living with and dependent on her mother for support.

The question frequently arises whether an obligor may make a pro rata reduction of a court-ordered obligation on the emancipation of one child, when the order does not specify a certain amount to be paid "per child." In a case of first impression, the Supreme Court of Montana held in Torma v. Torma, 645 P2d 395 (1982), that a decree ordering the father to pay support of $125 per month for two children required continuation of the entire monthly support payment until the younger child attained majority. The court approved the rationale of courts in Colorado, Maryland, Oregon, and Connecticut, and noted this position to be the rule in the vast majority of States. The court quoted from Becker v. Becker, 387 A2d 317, 320 (Md.App. 1978):

> The reason for considering a single amount to be paid periodically for the support of more than one child as not subject to an automatic pro rata reduction is two-fold. First, a child support order is not based solely on the needs of the minor children but takes into account what the parent can afford to pay (citations omitted). Consequently, a child support order may not accurately reflect what the children actually require but only what the parent can reasonably be expected to pay. To allow an automatic reduction of an undivided order would be to ignore the realities of such a situation. Second, to regard an undivided child support order as equally divisible among the children is to ignore the fact that the requirements of the individual children may vary widely, depending on the circumstances. Cooper v. Matheny, 349 P2d 812, 813 (Ore. 1960). Delevett v. Delevett, 156 Conn. 1, 238 A2d 402, 404 (Conn. 1968).

On the other hand, in Patrzykont v. Patrzykont, 644 P2d 1009 (Kan.App. 1982), the court held that lump-sum orders may be reduced proportionately without modification upon death, majority, or change of custody to another parent. Interestingly, the Kansas court also pointed out that emancipation, including marriage, does not necessarily terminate the obligation of support, as dependency is not a measure of parental responsibility in Kansas.

DEATH OF OBLIGOR

At common law, the father's obligation to support his child terminated simultaneously with his death. [18 ALR2d 1126.] When there is an order to make

Payments for support of a child, the order terminates automatically with respect to payments that would become due after such death, unless the court has ordered that those payments shall not be affected by the parent's death. [Gordon v. Valley National Bank, 492 P2d 444 (Ariz.App. 1972).] In appropriate circumstances, a court may enter a child support order which survives the death of the father. If a judicial decree for child support is to be held to impose upon a parent a greater duty of support than that required by common law, the decree must state specifically that such obligation is to survive the death of the obligor. [Scudder v. Scudder, 348 P2d 225 (Wash. 1960).] The court, in Spencer v. Spencer, 87 NW2d 212 (Neb. 1957), based its ruling that the support obligation survived the obligor's death on the fact that the decree specifically provides that child support payments "will remain in force until the children shall become of age or self-supporting or until the further order of the court" and, thus, survive against his estate.

Although liability for support generally terminates upon the death of the obligor, parents may agree to extend that liability beyond death. If the terms of the agreement are incorporated into an interlocutory decree for divorce, there is a proper basis for a claim against the estate of the parent. [Pelser v. Pelser, 2 Cal.Rptr. 259, 177 P2d 228 (Cal.App. 1960).]

States that, by statute or agreement between parents, allow support orders to continue to be enforceable against the absent parent's estate after death are likewise enforceable for arrearages that accrued before death. [In re Cirillo's Estate, 114 NYS2d 799 (N.Y. 1952); In re Weaver's Estate, 122 NE2d 599 (Ill.App. 1954).]

In those States having adopted UMDA in its entirety, the statute provides that death of a spouse terminates a maintenance obligation, but not a support obligation. [UMDA, 9A U.L.A. sec. 316(b), (c); 201 FLR 0005-0006.] In some States, the statute does not contain the provision excluding termination of support; therefore, unless "otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or death of either party." [Bushell v. Schepp, 613 SW2d 689 (Mo.App. 1981).]

BANKRUPTCY

Many absent parents seek relief from their financial obligations in the U.S. Bankruptcy Courts. Typically, such actions are filed under Chapter 7 of the Bankruptcy Code (straight bankruptcy) or Chapter 13 (wage earner plans). In the former, the relief sought is discharge from all dischargeable debts. In the latter, the debtor is seeking the protection and guidance of a bankruptcy trustee in devising and carrying out a plan to pay back all debts gradually. Either type of proceeding can have a significant effect, both positive and negative, on the collection of child support.

Debtor's Responsibilities

In addition to providing notice to all affected creditors, the debtor is required to file a schedule of his or her assets, liabilities, and exempt property. A provision of the Bankruptcy Code allows the debtor to select a portion of his or her property as exempt

from the claims of creditors. [11 USC 522(d).] The Code further provides that State law may determine these exemptions and supersede the Code provision. Many States have taken advantage of this authority, and State exemption laws often provide the obligor less protection from child support claims than from the claims of other creditors. [See, for example, sec. 452.120 RSMo (Supp.).] Thus, there may exist a pool of identified assets which may be seized to collect support arrearages during or after the bankruptcy proceeding.

Automatic Stay

By virtue of 11 USC 362(a), creditors generally are prohibited from taking any actions to establish or collect debts while the debtor's bankruptcy proceeding is pending. This "stay" arises automatically upon the filing of the bankruptcy petition. To the extent that it prevents the collection of child support obligations, the stay can create time-consuming litigation. In Chapter 7 proceedings, the length of time between the debtor's filing the petition in bankruptcy and the granting of the discharge is short (3-4 months), after which collection action for the nondischargeable child support debt may proceed.

Unfortunately, because of difficulties faced by State IV-D agencies in receiving and reacting properly to notices of filing, the agency occasionally will take action against an absent parent in ignorance of a pending bankruptcy proceeding. This also can be a problem with actions that take a number of months to complete, such as outstanding arrest warrants and tax refund interceptions. An exemption to the automatic stay does not make a support collection action immune from injunction. As the House Judiciary Report under 11 USCA 362 declares, the bankruptcy courts have ample powers to stay actions not covered by the automatic stay. When an action is excepted from the automatic stay, the trustee must move the court into action, rather than requiring the creditor to move for relief from the stay. In this way, the court determines on a case-by-case basis whether or not to stay a particular action. As a result, the IV-D agency occasionally finds itself in an adversary proceeding in Bankruptcy Court.

11 USC 362(b) provides that the filing of a petition under Chapter 7 does not operate as a stay for collection of alimony, maintenance, or support from property that is not property of the estate. Property of the estate includes all of the debtor's assets, but excludes exempt U.S. property and the wages the debtor earns while the bankruptcy proceeding is pending. (This is not true in Chapter 13 cases.) As a result, it could be argued that a wage garnishment or income withholding order for child support issued while a Chapter 7 bankruptcy is pending should not be stayed.

Another effective argument hinges on public policy. Section 456(b) of the Social Security Act [42 USC 656(b)] states that child support obligations that have been assigned to States pursuant to Title IV-D are not dischargeable in bankruptcy. (See below for a discussion of the dischargeability issue.) This language suggests a Congressional declaration that enforcing a parent's child support obligation is more important to society than providing that parent with a totally fresh financial start. Bankruptcy courts rightfully guard their authority to enforce the stay. The stay is necessary to allow the bankruptcy court to sort out the financial condition of the debtor, to distribute the available assets equitably among the creditors according to law, and to protect the debtor from claims against his exempt property. These are laudable provisions, designed to protect both the debtor and his family. The public policy statement, which also appears in the Code at 11 USC 523(a)(5)(A), indicates that the aims of the IV-D Program may be paramount.

Dischargeability

At 42 USC 656(b), the Social Services Amendments of 1974 (P.L. 93-647) prohibited the discharge in bankruptcy of child support arrearages that an obligee assigned to a State as a condition of AFDC eligibility. That provision was repealed by the 1978 Bankruptcy Code (P.L. 95-598, effective October 1, 1979), which contained a broader provision providing that child support obligations were not dischargeable where owed to a "spouse, former spouse, or child. . .in connection with a separation agreement, divorce decree, or property agreement, but not the extent that--(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise . . . ." [11 USC 523(a)(5)(A).]

The 1978 Amendment caused numerous problems for the Child Support Enforcement Program. The first was the exception that allowed assigned child support obligations to be discharged. The second was the language contained in the rule of nondischargeability itself, which limits application of the rule to support obligations in connection with a separation agreement, divorce decree, or property settlement. Since many orders established by IV-D agencies do not meet these criteria (e.g., orders entered in paternity proceedings brought by the agency), it has been argued that they are dischargeable. This argument would seem to apply with equal force to orders entered in URESA proceedings and orders entered in State court proceedings that are not merged into the divorce proceedings.

Congress corrected the situation in the Omnibus Budget Reconciliation Act of 1981 by reenacting 42 USC 656(b) and amending 11 USC 523(a)(5)(A). The new version of the latter section creates an "exception to the exception to the exception" by providing that assigned support obligations that have been assigned as a condition for eligibility for public assistance are again nondischargeable. The 1981 Amendments did not change that language in 11 USC 523(a)(5)(A), which limits nondischargeability to obligations created in connection with a separation agreement, divorce decree, or property agreement. However, this language was changed by the Bankruptcy Amendments and Federal Judgeship Act of 1984. 11 USC 523(a)(5)(A) now provides that debts in connection with "an order of a court of record" that are "assigned to the Federal Government or to a State or any political subdivision of such State" are nondischargeable. The effective date of the change was October 8, 1984.

One important issue remains: Does the change in law affect those absent parents who filed petitions in bankruptcy during the period in which all assigned child support arrearages were dischargeable? In Matter of Reynolds, 726 F2d 1420 (CA9 1984), the 9th Circuit U.S. Court of Appeals held that the change in law applied to actions that were pending in bankruptcy court when the change in law occurred. The court found a Congressional intent for such a holding in the 1981 Act's language, which made the amendments dealing with dischargeability effective immediately on enactment (August 13, 1981).

PROPERTY EXEMPT FROM EXECUTION

Many States have laws that make homestead items, which are exempt from execution by general creditors, subject to execution for collection of child support. [See, for example, sec. 452.140 RSMO (1978).] Some courts are willing to create such an

exception without statutory support. Although Nevada law does not contain a provision like this, the Nevada Supreme Court had an opportunity to examine the applicability of that State's homestead exemptions in a mother's action to collect approximately $90,000 in child support arrearages that had accrued under an Indiana order. After the mother recorded her Indiana judgment in Nevada, the father filed a homestead exemption on his home, pursuant to Nevada law. The mother moved to have the exemption ruled inapplicable. On appeal, the Nevada high court ruled that to protect the father's second family at the expense of depriving his first family of the support to which it is entitled was clearly not the Nevada legislature's intent in enacting the homestead exemption. The dissenting justice suggested that the legislature should be charged with enacting specific exceptions to the homestead exemption. [Breedlove v. Breedlove, 691 P2d 426 (Nev. 1984).]

Other courts have refused to create exceptions. The Louisiana Supreme Court, in Thibodeaux v. Thibodeaux, 454 So2d 813 (La. 1984), applied the anti-attachment provision of the Federal Longshoremen's and Harbor Workers' Compensation Act to prohibit the custodial parent from garnishing the absent parent's disability benefits for overdue child support. [See also Putz v. Putz, 572 P2d 970 (Okla. 1977).]

CHALLENGES TO STATES' AUTHORITY

Many State constitutions prohibit legislative grants of public money, property, or credit to private persons. However, these provisions often make specific exceptions for grants of public assistance to the needy. Two State supreme courts have addressed defenses raised by obligors that statutes authorizing State officials to bring child support collection actions on behalf of non-AFDC obligees violate such constitutional provisions. In both Johnson v. Johnson, 634 P2d 877 (Wash. 1981); and Leet v. Leet, 624 SW2d 21 (Mo. 1981), the high courts held that the State statutes authorizing support enforcement services on behalf of families who are not receiving public assistance further the compelling public interests of safeguarding children's constitutional rights, protecting the taxpayers from additional public assistance expenditures, and assuring that the primary child support obligation falls on the parents. Both courts held the constitutional provisions inapplicable due to these overriding public purposes.

Stating similar reasons, the Florida Supreme Court, in Florida Department of Health and Rehabilitative Services v. Heffler, 382 So2d 301 (Fla. 1980), held that a statute allowing the State to provide child support collection and paternity determination services to unwed mothers who are not receiving public assistance does not violate the equal protection guarantee of the State constitution.

In another light, the Oregon Court of Appeals addressed the authority of the State IV-D agency to collect child support arrearages that accrued prior to the effective date of the State statute requiring AFDC applicants to assign their support rights. In Butchko v. Butchko, 602 P2d 672 (Ore. 1979), the court held that the assignment statute was remedial and did not affect the obligor's substantive rights and that the assignment included both prospective and accrued unpaid support. The State was entitled to enforce collection of assigned support regardless of whether the support accrued or the AFDC was given prior to the effective date of the statute.

In State ex rel. Williams v. Williams, 647 SW2d 590 (Mo.App. 1983), the Missouri Court of Appeals found that the obligor did not have standing to challenge the validity or authenticity of the obligee's assignment of support rights.

VALIDITY OF THE SUPPORT ORDER

If the rendering court did not have personal jurisdiction over the absent parent at the time the child support order was entered, the obligor will attack the validity of the support order. Personal jurisdiction may have been obtained by consent (voluntary entry of appearance), personal service within the State, or long-arm jurisdiction based on the absent parent's minimum contacts sufficient to meet the due process test as enunciated in International Shoe Company v. State of Washington, 326 US 310 (1945). As the court found in Morton v. U.S., 708 F2d 680 (CAFC 1983), personal jurisdiction over a serviceman residing in Alaska was not obtained by the Alabama divorce court based on his prior residence there and his having filed two State income tax returns in Alabama. The U.S. Court of Appeals declared that the obligor was not domiciled in Alabama, nor did he reside in or have sufficient contacts with the State at the time the divorce court attempted to obtain personal jurisdiction. Therefore, the money judgment rendered by the Alabama court was void and could not be enforced.

FOOTNOTE

/1/ L. Simpson, Contracts 419 (2nd ed., 1965).

CHAPTER 10
Interstate Cases

INTRODUCTION

The problems of establishing and enforcing a support order are compounded when the absent parent and dependent child live in different States. Jurisdictional hurdles may prevent the child's caretaker from bringing the support action in his or her home State. Yet, the child's caretaker may not be able to bear the expense of bringing an action in another State.[1]

In the past, these problems enabled absent parents to avoid child support obligations by fleeing the abandoned family's home State and remaining beyond the process of its courts. Attempts to enforce the obligation in the absent parent's home State often were frustrated. Long-arm statutes were often inapplicable, and criminal enforcement proved defective because extradition was time consuming, expensive, and overly drastic in the eyes of those involved. As Americans have become more mobile, the interstate enforcement problem has become more acute, forcing more and more abandoned families onto the welfare roles.

Early child support legislation was ineffective. The Uniform Desertion and Nonsupport Act, drafted in 1910 by the Commissioners on Uniform State Laws and ultimately adopted in 24 States, made it a criminal offense to desert or fail to support a wife or child in need. The Act, however, did not provide any civil remedies for nonsupport, nor did it provide for interstate enforcement when the father fled the State.[2]

In response to the need for a simple, inexpensive, and consistent interstate process, the Commissioners began studying the issue in 1944 and adopted the Uniform Reciprocal Enforcement of Support Act (URESA)[3] at the 1950 American Bar Association (ABA) Annual Meeting. URESA provides a uniform process for using the courts of another State without traveling to that State or becoming subject to the jurisdiction of that State's courts for other purposes. To achieve this, the Act establishes a two-State legal proceeding. The URESA proceeding begins with the filing of a petition in a court in the abandoned family's home State (the initiating State). The judge of that court reviews the pleadings to determine whether the allegations establish an existing duty of support and whether the responding State appears to have jurisdiction over the absent parent. If the judge finds these elements, the proceeding is certified to the proper court in the responding State, where the support obligation is established and enforced. Some States use the same procedure between two different counties within the State.

The 1950 version of URESA also provided for criminal enforcement through extradition (or "rendition" in the language of the Act).[4] The Act was amended significantly in 1952 and 1958 and revised in 1968. The 1958 amendments incorporated a registration procedure that provides for summary registration and enforcement of existing support orders in the absent parent's home State.[5] The 1968 revisions specifically provide for paternity establishment, among other things.[6]

All 50 States plus the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and American Samoa have adopted some form of URESA or similar legislation. The basic mechanics of the Act are the same in all States, but some States have modified or omitted certain sections to comply with existing procedures and enforcement techniques. The amendments to and revisions of the Act have been adopted by some States and not by others. Consequently, the effectiveness of the Act may depend upon the initiating State's knowledge of the responding State's capabilities and procedural necessities.[7] In addition, many State IV-D agencies have shown little commitment to interstate establishment and enforcement in the past, and State courts, when acting as the responding jurisdiction in a URESA proceeding, have been a frequent haven for noncomplying absent parents. As a result, the original aims of the commissioners have remained unfulfilled.[8]

Congress reacted to this problem with the Child Support Enforcement Amendments of 1984 (P.L. 98-378), which contain several provisions pertaining to interstate support enforcement, as follows:

- States must enact and implement procedures for interstate wage withholding.
- States must enact and implement other proven enforcement techniques and apply them to interstate cases. [See Chapter 8.]
- States must enact and implement expedited judicial or administrative processes and use them for interstate establishment and enforcement.
- Federal incentive payments will accrue to both States involved in an interstate case.
- Significant Federal funding will be available in the fiscal years commencing October 1, 1984, to support special demonstration projects testing innovative methods of interstate enforcement and collection.
- Federal tax refund interceptions, a powerful interstate remedy, will be available for non-AFDC IV-D cases with tax refunds payable after December 31, 1985, and before January 1, 1991.

These mandatory improvements should make interstate enforcement a more uniform and effective procedure. No longer will orders need to be established in cases where an order already exists, and no longer will obligors have an opportunity to convince a responding court that their obligations should be excused or severely diminished.

Despite this optimistic forecast, State and local IV-D agencies, the courts, and IV-D attorneys must increase their commitment to effective interstate case processing. Until each link in the chain accepts full responsibility to carry out faithfully the functions delegated to it by statute or cooperative agreement, the interstate problem will plague the IV-D Program.

The remainder of this chapter discusses the major interstate procedures and remedies, including interstate wage withholding; proceedings to establish and enforce support obligations under Part III of URESA; registration under Part IV of URESA and

other statutory provisions; comity; full faith and credit; actions in Federal court pursuant to 42 USC 660; requests for enforcement pursuant to 42 USC 654; and seizure of in-State wages and bank accounts of obligors who reside out of the State or out of the country.

INTERSTATE INCOME WITHHOLDING

One of the most significant provisions of the Child Support Enforcement Amendments of 1984 was the interstate income withholding requirement. This section discusses both the statutory requirements and efforts by Child Support Enforcement Program leaders to ensure that the procedure is implemented consistently and efficiently.

Federal Requirements

As discussed in Chapter 8, the Child Support Enforcement Amendments of 1984 require each State to establish a system under which support payments will be withheld from the wages or other income of noncomplying obligors. [42 USC 666(b)(1).] The Federal statute further requires each State to extend its wage withholding system to "income derived within such State in cases where the applicable support orders were issued in other States, in order to assure that child support owed by absent parents in such State or any other State will be collected without regard to the residence of the child for whom the support is payable or of such child's custodial parent." [42 USC 666(b)(9).]

While the statute is very specific regarding the procedures that must be followed in wholly intrastate situations, it provides little guidance as to interstate procedures. The regulations set forth a general procedure for initiating wage withholding.

First, the IV-D agency in the State where the custodial parent applied must inform the IV-D agency in the State where the absent parent is employed of all information necessary to carry out the withholding. The employing State must provide advance notice of the proposed withholding, opportunity to contest the withholding, and notice to the employer. The law and procedures of the State of employment are to apply except with respect to <u>when</u> withholding must be implemented.[9]

The Child Support Project of the American Bar Association's National Legal Resources Center for Child Advocacy and Protection, in conjunction with OCSE and the National Conference of State Legislatures, has drafted a Model Interstate Income Withholding Act,[10] which many States may wish to adapt in implementing the interstate wage withholding requirement.

The Social Security Act requires each State to appoint an agency to administer the wage withholding procedure. The Comments to the Model Interstate Income Withholding Act refer to these agencies as income withholding agencies of the <u>requesting</u> and the <u>forum</u> States. The former is the State in which the children reside; the latter the State in which the obligor resides or works.[11] This discussion is adapted from those Comments and uses the same terminology. The term <u>agency</u> refers most often to the IV-D agency or the courts, depending on which entity administers the procedure.

Responsibilities of the Requesting State Agency

The Model Act requires the income withholding agency to request interstate withholding on behalf of its current IV-D clients, as well as for in-State and out-of-State residents who apply for this service through the IV-D agency. This corresponds to the Federal requirement for intrastate cases, which requires that income withholding services be made available to IV-D agency clients, both AFDC and non-AFDC. [Social Security Act sec. 466(b)(2), 42 USC 666(b)(2).] Non-AFDC families specifically may apply to the IV-D agency to take advantage of the withholding remedy, although many States allow non-AFDC families to institute this remedy through a private right of action as well. [See, for example, Cal.Civ.Code Ann. sec. 4701(b)(1); Tex.Fam.Code Ann. sec. 14.091.] In addition, the agency can be asked to initiate income withholding for a nonresident custodial parent if the underlying support order was issued in that agency's State. Such a request is likely to occur when the obligee has moved out of State and all the relevant documents, including payment records, are still in possession of the enacting State or when the obligee moved out of State and was receiving payments directly from the obligor without ever using the agency services of a new State. In any event, the obligee also could elect to go to the agency where she or he now resides for purposes of initiating an interstate request for income withholding.

The procedure requires the requesting agency to compile and transmit all documentation required by the forum State, along with any subsequent modifications of the support order. If the requesting agency learns that a hearing has been scheduled in the forum jurisdiction, it must notify the obligee of the date, time, and place of the hearing and of his or her right to attend the hearing.

Entry of Order in Forum State

Upon receiving the request for income withholding and the accompanying documentation, the forum State's income withholding agency will enter the support order. Entering may be accomplished by filing the document with the appropriate court or agency. Entry of a sister State support order under the Act is the cornerstone of the interstate withholding procedure. Once the order is entered, it is enforceable by the forum State's own income withholding law with some specific minor modifications to accommodate interstate needs.

A support order entered in the agency or court essentially becomes an order of the forum State for the sole and limited purpose of obtaining income withholding. The Model Act makes it clear that the entered order does not confer jurisdiction on the court or agency for any other purpose, such as resolution of disputes over custody or visitation or modification of the original support order, whether prospectively or retroactively. (See discussion of modification below.)

Notice to the Obligor

On the day the out-of-State support order is entered under this procedure, notice of the proposed withholding must be sent to the obligor. The forum State will use its regular notice procedures to notify the obligor of the intent to withhold his or her income. Specifying when advance notice should be sent to the obligor is significant. Under the new Federal law, if the obligor contests the withholding, the State must determine within 45 days of such notice whether the withholding is appropriate. [42 USC 666(b)(4)(A).]

The notice should be served according to usual State practice and contain the same information required in an intrastate income withholding notice. According to section 466(b)(4)(A) of the Social Security Act, as added by the Child Support Enforcement Amendments of 1984, the notice must alert the absent parent to the proposed withholding and to the procedures to follow to contest the withholding. The notice will state a method and a time period within which the parent must contact the court or agency in order to contest withholding, and explain that failure to do so will result in the implementation of withholding. The only added requirement of the Model Act is that the notice indicate that the proposed withholding is based upon an out-of-State support order.

The Child Support Enforcement Amendments of 1984 provide an exception for those States that were operating an income withholding system prior to the date of enactment of the 1984 Amendments. These States need not meet the advance notice requirements of the Amendments so long as their existing procedures meet due process requirements. [Social Security Act sec. 466(b)(4)(B), 42 USC 666(b)(4)(B).]

Documentation

The following documentation is required for the entry of a support order of another jurisdiction:

- A copy of the support order with all modifications (the ABA Model Law calls for a certified copy)
- A copy of an income withholding order or notice, if any, still in effect (the ABA Model Law calls for a certified copy)
- A copy of the portion of the rendering State's income withholding statute that sets forth the requirements for obtaining income withholding under the law of that State
- A sworn statement of the obligee or certified statement of the agency of the arrearages and the assignment of support rights, if any
- A statement of:
  - The name, address, and Social Security number of the obligor, if known
  - The name and address of the obligor's employer or of any other source of income of the obligor derived in the forum State against which income withholding is sought
  - The name and address of the agency or person to whom support payments collected by income withholding shall be transmitted.

The Model Act requires the forum State agency to take steps to correct faulty or incomplete documentation without returning it to the requesting agency, when possible. This should limit unnecessary delays and advance Congress' intent that income withholding be effected expeditiously. In addition to providing for correction of errors, the Act requires the agency and court to accept or process documents that are correct in substance but not form.

The Hearing

If the absent parent requests a hearing, the forum State agency must notify the requesting agency. The Model Act provides a limited form of hearing. The entered support order, the existing income withholding order, if any, and the sworn or certified statement may be admitted into evidence, without any further proof or foundation required, and constitute prima facie proof that, without a valid defense, the obligee is entitled to income withholding under the law of the jurisdiction which issued the support order. This means that the amounts of current support and arrearages are as stated and that the triggering event (i.e., amount of arrears required to commence withholding) of the jurisdiction that rendered the support order has occurred.

Once a prima facie case is established, the Model Act shifts the burden of proof to the obligor. The obligor's defenses are limited to those permitted by the Child Support Enforcement Amendments of 1984. According to the 1984 Amendments' legislative history, these defenses are restricted to "mistakes of fact," which include "errors in the amount of current support owed, errors in the amount of arrearage that had accrued, or mistaken identity of the alleged obligor." The obligor cannot "contest the proposed withholding on other grounds, such as the inappropriateness of the amount of support ordered to be paid, changed financial circumstances of the obligor, or lack of visitation." [H.R. Rep. No. 98-527, 98th Cong., 1st Sess. 33 (1983).] Such claims, though important, must be pursued through a separate legal action in the State that has jurisdiction over the original action.

In addition to mistakes of fact, three other defenses are permitted. These include two collateral attacks on the original judgment, which could be raised in the State that issued the original order if that State sought to enforce it. These attacks include charges that the court which issued the original support order lacked jurisdiction (if this had not been litigated previously), or that there was fraud in the procurement of the order judgment. [See Griffin v. Griffin, 327 US 220 (1945); Scoles and Hay, Conflicts of Law 24.14 (1982); Leflar, American Conflicts of Law. 157 (1977); Restatement (Second), Conflicts of Law 105 (1971).] Fraud in the procurement of the support order refers to fraud in the actual obtaining of the order (e.g., the defendant was lured into the jurisdiction in order to obtain personal jurisdiction). The third defense concerns the statute of limitations. [See Chapter 6 for a discussion of statutes of limitations as applied to child support orders.]

Choice of Law

In keeping with a major principle of the Model Act--that the forum State's regular income withholding laws and procedures be applied to the greatest extent possible--most choice of law questions are resolved in favor of the local law of the forum State, making it simpler for decisionmakers and employers to administer the procedure.

Only three issues are determined by the law of the State that issued the order. The first issue concerns questions about the interpretation of the original support order, including questions about the amount and form of payments and the duration of the order. For example, the law of the State issuing the order would determine the meaning of the term "minor child" as used in an order, whether support may continue beyond the age of majority for a college student, and whether in-kind payments would be credited against the support obligations. The law of the State that issued the original order also

determines the amount of support arrearages necessary to require the commencement of withholding. This should pose no problem as no request should be made until this condition is met and the request should include a copy of the section of the State's withholding law containing this condition. Third, the law of the State issuing the support order determines what items are included as arrearages that may be enforced by income withholding. These could include interest on late payments, attorneys' fees, or court costs.

Another potential conflict of law concerns statute of limitations provisions. Usually, in interstate cases, there will be no real conflict. If a judgment is rendered in the forum State, the statute of limitations for that State obviously will not have tolled and enforcement can continue in that State. If the statute of limitations has tolled in the initiating State, no judgment can be rendered there for forwarding to another State and there is nothing for the forum State to enforce. A judgment rendered in the initiating State that would have been barred by the statute of limitations in the forum State nonetheless must be enforced in the forum State. [Restatement (Second) Conflicts of Law, sec. 118(1) (1971).]

This should not prove to be difficult for local judges and hearing officers. Under general conflicts of law principles, a judge may assume that the law of the State whose support order is being considered is the same as the law of the forum State until one of the parties demonstrates otherwise. Obviously, when a question is raised, it would be in the interest of the requesting State to submit an appropriate reference to the case and statutory law of the State that issued the order.

Discovery

If the obligor successfully meets the burden of establishing a defense, the Model Act provides that the court shall continue the case to allow the obligee to collect evidence. It provides further that if the obligor acknowledges some liability (current support, for example), the court shall require income withholding for that amount while the dispute as to other issues is resolved. The Act specifically allows use of depositions, written discovery, photographic discovery such as videotape depositions, as well as live testimony in person and on the telephone. The Act includes a procedure for taking depositions in the requesting State, similar to the procedure in URESA.

The Withholding Order and Notice

If the obligor does not request a hearing, or if a hearing is held and the court or agency determines that withholding is proper, it issues an income withholding order or notice to the absent parent's employer or other payor. The same procedure applies for both intrastate and interstate cases. [See Chapter 8.]

Entry of a support order or notice for withholding purposes does not nullify any other support order that may exist--whether issued by the forum State or another State. When two or more orders exist for the support of one child by an absent parent, any amount collected will be credited against both orders. Such a situation may exist, for example, if there is both an original support order and a subsequent URESA order. Amounts withheld are to be credited against both orders.

Payment Transmission

Income withheld in interstate cases is to be paid to the income withholding agency of the forum State, which in turn will forward it to the requesting agency or person. If the forum State uses a different entity such as a private agency or bank to collect and disburse support payments, as allowed under 42 USC 666(b)(5), this entity also should collect and disburse funds withheld in interstate cases under the Model Act.

Modifications

If the rendering State modifies a support order entered in the forum State, the forum State must take the necessary steps to modify the amounts withheld accordingly. Conversely, the agency in the forum State must notify the requesting agency when the obligor's source of income has shifted to yet another State. When there has been merely a shift of a source of income within the forum State (e.g., if the obligor gets a new job), the forum State agency will take necessary steps to obtain withholding against the new source of income, as it would with any other in-State income withholding case. [45 CFR 303.100(d)(3).] Some States have facilitated the task of identifying new income by requiring employers to notify the agency of any change in the obligor/employee's status, including the name and address of a new employer, if known. [N.D. Cent. Code secs. 14-09-09.1(6).] 45 CFR 303.100(d)(x) requires that States impose an obligation on the employer to provide this information to the State.

PART III URESA PROCEEDINGS

Unfortunately, income withholding will not be possible in all interstate cases. In many cases, an enforceable support order will not exist. In others, the absent parent will not have identifiable income to withhold. These instances necessitate proceedings under URESA unless the would-be responding State has an administrative process. Where administrative remedies exist, they must be exhausted before judicial remedies can be sought. This section discusses URESA proceedings in which the court in the responding State is asked to make an independent determination of the absent parent's support obligation. This type of proceeding will be referred to as a Part III URESA action to differentiate it from proceedings under the URESA registration provisions. Registration, which is provided for by Part IV of URESA, is discussed separately.

Parties

Any person to whom a duty of support is owed may initiate an action in the court having jurisdiction to handle URESA actions, asking the court to enforce that duty. A petition on behalf of a minor may be brought by any person having legal custody.[12] In some States, mere physical custody will suffice. [See Cobbe v. Cobbe, 163 A2d 333 (D.C.Mun.App. 1960); Clearwater County, Minn. v. Petrash, 198 Colo. 231, 598 P2d 138 (1979).]

If the State is furnishing financial assistance to the plaintiff, the State "has the same right to inititate a proceeding under this Act as the individual obligee for the purpose of securing reimbursement for support furnished and of containing continuing support."[13] This section has been held to support an action for reimbursement of AFDC paid to an obligor's dependents during periods in which no court order for current support existed. [State v. Erbin, 463 A2d 194 (R.I. 1983); Kinney v. Kinney, 453 A2d 1321, 122 N.H. 1165

(1982).] This is true even where the parents are divorced but where the divorce court did not enter an order for support. [State ex rel. State of California ex rel. Santa Barbara County v. Lagoy, 54 Or.App. 164, 634 P2d 289 (1979).] Conversely, if the divorce court entered an order specifically stating that the absent parent shall not be required to pay child support, the URESA court may be unable to order the absent parent to reimburse the State because no duty of support existed during the period AFDC was paid to the family. [Chance v. LaPausky, 43 Md.App. 84, 402 A2d 1329 (1979).] The obligee need not be joined as a party to such an action. [Rolette v. Rolette, 221 NW2d 645 (N.D. 1974).]

If the obligee is financially able, he or she may employ private counsel to initiate a URESA action. If not, he or she may apply for IV-D services. The IV-D agency will refer the matter to the relevant local official, usually the prosecuting attorney, who is required by the Act to file the action on behalf of the dependents.[14]

The Petition

The URESA statute sets forth minimum information requirements to be included in the petition, as follows:

- Names of the parties
- Address and, so far as known to the obligee, the circumstances of the obligor
- Names, addresses, and circumstances of the children for whom support is sought
- All other pertinent information.[15]

The statute further invites the petition drafter to include a description and photograph of the respondent to assist the responding State in identifying and locating him. Most States' URESA statutes require the petition to be verified, or authenticated.[16]

The petitioner may not be charged a filing fee or any other costs. The initiating or responding State may seek to recover its costs from the absent parent by making a prayer in the responding court.[17]

Initiating Court's Role

The role of the initiating court is limited. The court makes a finding based on the petition and, in some jurisdictions, after an ex parte hearing at which the obligee testifies. The finding consists of two components: (1) that it appears the obligor owes a duty of support to the plaintiff(s) and (2) that it appears the court in the responding State has jurisdiction over the obligor or his property.[18] This review is not a complicated process. It resembles a determination of whether a complaint in an ordinary civil case states a claim on which relief may be granted or a determination of probable cause in a criminal case. [Watson v. Dreading, 309 A2d 493 (D.C.App. 1973); Kirby v. Kirby, 338 Mass. 263, 155 NE2d 165 (1959); Saunders v. Saunders, 650 SW2d 534 (Tex.Civ.App. 1983).] The review as to jurisdiction is similarly brief. The court normally determines only that the obligor is likely to be physically present in the responding State. If the obligor contests the sufficiency of the petition, the law of the responding jurisdiction determines the issue. [Thibadeau v. Thibadeau, 133 Ga.App. 154, 210 SE2d 340 (1974).]

These two findings are entered of record in the judge's certification. The certificate may contain a request that the responding State arrest the obligor, if arrest is permissible under State law and the court is persuaded that he or she might flee in response to being served with the URESA process.[19] The certificate often contains an order directing the court clerk to forward the pleadings and certificate to the responding jurisdiction.

Initiating courts customarily enter a recommendation as to the amount of support the responding court should order the absent parent to pay. The recommendation does not constitute a support order, and URESA provides for no such recommendation. [Mossburg v. Coffman, 6 Kan.App.2d 428, 629 P2d 745 (1981).] Nor does the recommendation bind the responding court's adjudication of the merits of the case, although it may constitute prima facie evidence of the children's present needs and circumstances. [Gambino v. Gambino, 396 So2d 434 (La.App. 1981); State of Minn., Clay County, on behalf of Licha v. Doty, 326 NW2d 74 (N.D. 1982).]

Forwarding Documents to the Responding Jurisdiction

The court clerk forwards three copies of the petition, with attachments, and one copy of the initiating State's URESA statute to the responding State.[20] One copy is for the responding court, one for the prosecuting attorney in the responding jurisdiction, and one for service on the absent parent.

If the clerk of the initiating court does not know the identity and address of the responding court, he or she may send the documents to the State information agency in the responding State, which will forward them to the proper court. Other duties of the State information agency include the following:

- Compile a list of the courts and their addresses in the State having jurisdiction under the Act and transmit it to the State information agency of every other State, and upon the adjournment of each session of the [legislature] distribute copies of any amendments to the Act and a statement of their effective date to all other State information agencies.

- Maintain a register of lists of courts received from other States and transmit copies promptly to every court in the State having jurisdiction under the Act.

- Use all means at its disposal to discover the location of the obligor or his or her property, or forward the case to the State parent location service.[21]

The National Child Support Enforcement Association has prepared a list of State information agencies.[22]

Filing the Action in the Responding Court

Upon receipt of the petition and attached documents, the clerk in the responding court is to "docket the case and notify the prosecuting attorney of his action." The prosecutor must "prosecute the case diligently."[23]

The prosecutor must first attempt to locate the absent parent "on his own initiative [using] all means at his disposal."[24] If the prosecutor has insufficient information and is unable to locate the defendant, the statute directs the prosecutor to inform the court

"of what he has done and request the court to continue the case pending receipt of more accurate information or an amended [petition] from the initiating court."[25] Many prosecutors routinely return the documents to the initiating State instead of making use of available State and local locate resources. If all prosecutors would comply with the location requirement in the statute, and make full use of all locate resources provided by the State IV-D agency, the interstate process would be improved markedly.

If the respondent is located in another judicial district or in a different State, the responding court has the duty to forward the documents to the district or State, and then to notify the initiating State.[26] The court to which the documents are forwarded must treat the documents as though they were forwarded from the initiating State.

Once the case is filed, the clerk of the court will pass the documents on to the sheriff for service. Some States treat the URESA proceeding as a "show cause" situation. [See, e.g., State ex rel. Fulton v. Fulton, 31 Or.App. 669, 571 P2d 179 (1977).] In these States, a show cause order must accompany the pleadings. Some courts include in the show cause order a provision requiring the obligor to bring to court evidence of his income (i.e., pay stubs, tax returns, cancelled checks).

In other States, the action begins with a normal civil summons, advising the absent parent that he or she has so many days to answer in order to avoid the entry of a default order based on the allegations contained in the pleadings.

If the court believes that the obligor may flee the jurisdiction, it may "obtain the body of the obligor by appropriate process. Thereupon it may release him on his own recognizance or on his giving a bond in an amount set by the court to assure his or her appearance at the hearing."[27]

Jurisdiction

The test for personal jurisdiction is the same as for any in personam action brought in the responding State. (See discussions in Chapters 5 and 7.) The Uniform Act refers in several sections to the court of the responding State obtaining jurisdiction "of the obligor or his property."[28] As noted in Chapter 8, the U.S. Supreme Court's decision in Shaffer v. Heitner, 97 SCt 2569, 53 LEd2d 683 (1977), probably would prohibit an action based solely on the obligor possessing property within the jurisdiction, unless the action were limited to enforcement of a pre-existing judgment for arrearages based on an out-of-State order.

With respect to subject matter jurisdiction, the statute and reported case law provide good direction. Section 32 of URESA provides that "participation in any proceeding under this Act does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding."[29] This provision generally has been construed to prohibit the responding court from considering:

- Counterclaims for divorce or property settlement [State ex rel. Schwartz v. Buder, 315 SW2d 867 (Mo.App. 1958); Mehrstein v. Mehrstein, 54 Cal.Rptr. 65, 245 Cal. App.2d 646 (1966); Blois v. Blois, 138 So2d 373 (Fla.App. 1962).]

- Counterclaims for custody and visitation. [England v. England, 337 NW2d 681 (Minn. 1983); State ex rel. Hubbard v. Hubbard, 110 Wis.2d 683, 329 NW2d 202

(1983); Pifer v. Pifer, 31 N.C.App. 486, 229 SE2d 700 (1976); Craft v. Hertz, 182 NW2d 293 (N.D. 1970); Grosse v. Grosse, 347 So2d 1099 (Fla.App. 1977); Hoover v. Hoover, 246 SE2d 179, 181 (S.C. 1978); Brown v. Turnbloom, 280 NW2d 473, 474 (Mich.App. 1979); Register v. Kandlbinder, 216 SE2d 647 (Ga.App. 1975).]

Responsive Pleadings

The Uniform Act does not provide specifically for a responsive pleading. Section 20 ("Hearing and Continuance") appears to assume that the obligor will enter a denial in person at the hearing, and substantiate his or her defense with evidence. At this point, the court is to determine, upon the request of either party, whether the matter should go to hearing immediately or whether a continuance should be granted.[30] This reading of Section 20 would turn the initial hearing into a kind of arraignment, at which the court would decide whether there exists probable cause to hold a hearing on any of the obligor's affirmative defenses.

Despite the lack of statutory guidance, many jurisdictions apply the normal rules of civil procedure, and responsive pleadings are filed at least where the obligor is represented by counsel. In a large percentage of cases, the obligor either fails to appear or appears and admits that a duty of support exists without filing an answer.

The Hearing

Once the disputed issues are determined, the case may proceed to hearing. The hearing should proceed like any other support proceeding, with the notable exception that the custodial parent is usually not available to testify. If the obligor asserts a defense, the prosecutor can have a difficult time proving the plaintiff's case, unless the hearing is treated as a show cause proceeding with the burden to produce evidence on the obligor.

In most jurisdictions, once the obligor asserts a defense, the two parties are on an equal footing. Because plaintiffs are asking the court to grant relief, they must proceed first and must substantiate the allegations contained in the petition with admissible and credible evidence. The allegations, standing alone or in combination with the written testimony attached to the petition, are not sufficient to authorize the court to enter an order over a proper objection. [Freano v. Rosenbaum, 399 So2d 758 (La.App. 1981); Lambrou v. Berna, 154 Me. 352, 148 A2d 697 (1959); Pfueller v. Pfueller, 37 N.J.Super. 106, 117 A2d 30 (1955); O'Hara v. Floyd, 47 Ala.App. 619, 259 So2d 673 (1972); Ivey v. Ayers, 301 SW2d 790 (Mo. 1957); Kirby v. Kirby, supra; but see Saunders v. Saunders, 650 SW2d 534 (Tex.Civ.App. 1983).]

Evidence

Clearly, as in other civil actions, the plaintiff bears the burden of proof. [City and County of San Francisco v. Juergens, 425 So2d 992 (La.App. 1983).] Section 20 allows the plaintiff's attorney to ask the court for a continuance during which to gather submissible evidence to prove the existence of a duty of support, to substantiate the needs of the children, and to counter any defenses interjected by the obligor at the hearing.[31] The case law provides some guidance regarding how this burden may be met. In Ivey v. Ayers, 301 SW2d 790, (Mo. 1957), the Missouri Supreme Court wrote:

> . . .[the] plaintiff may use other means of establishing her case. She may call the defendant as a witness, and it may be that she can establish her case by his testimony. She can also appear in person and testify, but one of the purposes of the reciprocal features of the laws pertaining to the support of dependants is to avoid this necessity. She also has available to her the use of depositions the same as has the defendant, which would include the taking of her own testimony by deposition . . . and apparently the deposition could be taken by the judge of the court in the initiating State. (Citations omitted.)

Section 23 of the 1968 Act states that the same rules of evidence apply as in other civil actions in the court.[32] Virtually all the evidence in URESA cases comes from the obligor and the obligee. Indeed, the plaintiff may prove his or her case entirely with the testimony of the obligor. [Phillips v. Phillips, 146 NE2d 919 (Mass. 1958).] Section 22 of the Act makes any law granting a privilege concerning communications between husband and wife inapplicable to URESA proceedings.[33] Both husband and wife are fully competent to testify as to any relevant matter between them. In order to ensure open communication in the family, the common law granted spouses a reciprocal privilege regarding communications that occur during the marriage. Neither could be forced to give testimony against the other, and the party against whom such testimony would be used had a right to object and bar its use. The common law rule has found its way into many State statutes that could be used to bar the plaintiff from proving important elements of his or her case (for example, the obligor's ability to earn based on statements he or she made to the obligee during prior periods). Section 22 prevents application of the privilege to URESA cases.

The secondary methods of producing evidence under the Act are interrogatories and depositions. Interrogatories have been approved for use in URESA cases. [O'Hara v. Floyd, 259 So2d 673 (Ala.App. 1972); Tanya V. v. Rosa V. 458 NYS2d 869, 117 Misc.2d 619 (1983).] As to depositions, most States have adopted a rule similar to Federal Rule of Civil Procedure 32(a)(3)(B), providing that the deposition of a witness or party may be introduced into evidence if the deponent is at least 100 miles away from the hearing, or is out of the State. In most URESA cases, the petitioner falls into one of these categories. If not, the court may allow the deposition under a rule similar to Federal Rule 32(a)(3)(E) which allows the use of a deposition if it serves the interests of justice and outweighs the importance of presenting the testimony of a witness orally in open court. This broad language should cover most URESA cases, given the simplicity of issues involved and the clearly favorable policy of affording custodial parents an interstate remedy.

It has been recognized that a plaintiff in a URESA case can prove the case solely with a deposition. [O'Hara v. Floyd, supra; Altemus v. Altemus, 18 Md.App. 273, 306 A2d 581 (1973); Carpenter v. Carpenter, 231 La.638, 92 So2d 393, (1956).] Similarly, it has been held that obligor's sole right to confront plaintiff's witnesses is through depositions and written interrogatories. [Maza v. Iaia, 430 NYS2d 244, 105 Misc.2d 992 (1980).]

The court still has the discretion to refuse to admit the deposition if the distance the petitioner would have to travel is slight and it appears the petitioner is using URESA solely for the purpose of presenting the case by deposition in lieu of live testimony. The

1968 version of URESA specifically refers to using depositions.[34] The procedure for taking and using the deposition of the obligee generally follows Federal Rule 28. The deposition may be taken orally before an individual authorized to give oaths and act as a reporter in the obligee's State, or may be taken upon written questions. The obligor must be given notice in writing of the time and place of an oral deposition to allow for cross-examination. Thus, the "Testimony Form," though duly executed under oath perhaps in the presence of the initiating court, does not constitute a deposition. [Kirby v. Kirby, 338 Mass. 263, 155 NE2d 165 (1959).] If the correct procedure is followed and the obligor fails to take advantage of his or her opportunity to cross-examine, he or she has waived the right to confront the witness and cannot object at trial. [Daly v. Daly, 120 A2d 510, 39 N.J.Super. 117, aff'd. 123 A2d 3, 21 N.J. 599 (1956).]

The cross-examination may be conducted by the respondent's attorney, or through the submission of interrogatories. The 1968 Act recommends that the responding court appoint the judge of the initiating court as the official before whom the deposition is to be taken. The prosecutor in the initiating State would be available to conduct the examination and supervise transcription and transmittal of the deposition back to the responding court. Upon receipt of the transcript, the hearing can be rescheduled and resumed in the responding court. The costs of the deposition may be taxed as costs to the obligor. [O'Hara v. Floyd, supra.]

One crucial issue in any contested hearing may be the existence or nonexistence of a duty of support. Where an order exists in another State, a certified copy of the order is competent to establish that the obligor owes a duty to support the children named in the order. [State on behalf of McDonnell v. McCutcheon, 337 NW2d 645 (Minn. 1983); Mossburg v. Coffman, 6 Kan.App.2d 428, 629 P2d 745 (1981).] In States that have not enacted Section 23 of the 1968 Act, a similar procedure is available under the Federal Authentication Act, 28 USC 1738. Once the order is placed into evidence, the obligor may contest the existence of the duty of support only by attacking the validity of the order, and his or her defenses are limited to those available to a defendant in an action or proceeding to enforce a foreign money judgment.[35] One court has construed this provision to mean that once the order is received in evidence, the hearing becomes a show cause hearing to determine if there is any valid reason why the order should not be enforced as entered. [Bachmann v. Bachmann, 196 NW2d 80 (N.D. 1972).]

The other major issue at the hearing will be the obligor's ability to pay, as measured by his or her current income, or the income he or she could earn based on prior periods. This information can be obtained from the obligor through live testimony at the hearing, or in advance through discovery devices such as interrogatories and motions to produce documents. Subpoenas can be served on employers, banks, and acquaintances of the obligor. Clearly, the latter is the preferable method where time allows.

Paternity

The 1950 version of URESA, including the 1952 and 1958 amendments, did not specifically refer to paternity. As a result, a defense of nonpaternity caused the courts considerable difficulty. Although there is a small minority position [e.g., Aguilar v. Holcomb, 155 Colo. 530, 395 P2d 998 (1964); and Smith v. Smith, 11 Ohio Misc. 25, 224 NE2d 925 (1965)], a majority of appellate courts have held that a court sitting in a URESA case has jurisdiction to determine paternity.

Perhaps the best discussion of this issue is to be found in the Supreme Court of Oregon's opinion in Clarkston v. Bridge, 539 P2d 1094 (Or.banc 1975). In Clarkston, a resident of Washington filed a petition under URESA alleging that a daughter had been born out of wedlock and that an Oregon resident was the father. The petition was forwarded to Oregon, and the alleged father denied paternity and challenged the court's jurisdiction to determine the issue. On appeal, the Oregon Supreme Court relied on Sections 2(b) and 2(f) of the Act, which provide as follows:

> If the court of the responding State finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order. (Emphasis added.)
>
> "Duty of support" includes any duty of support imposed or imposable by law, or by any court order, decree, or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, legal separation, separate maintenance, or otherwise. (Emphasis added.)

The court held that the above sections "authorize both the finding and the enforcement of duties of support which have not been previously established in another proceeding." [Clarkston, supra, p. 1096.] The court noted that a trial court sitting in a URESA proceeding necessarily first must decide whether the respondent is the child's father in determining whether such person owes a duty of support to a child born out of wedlock. Since the Oregon URESA authorizes the courts to find, as well as enforce, a duty of support, the court held the authority to establish paternity as clearly implied. [See also 81 ALR3d 1175, 1181 (1975); Moody v. Christiansen, 306 NW2d 775 (Iowa 1981); Sardonis v. Sardonis, 106 R.I. 469, 261 A2d 22 (1970); State of Iowa ex rel. Nauman v. Troutman, 623 SW2d 269 (Mo.App. 1981); Brown v. Thomas, 221 Tenn. 319, 426 SW2d 496 (1968); Yetter v. Commeau, 84 Wash.2d 155, 524 P2d 901 (1974); M. v. W., 352 Mass. 704, 227 NE2d 469 (1967); In re Miller, 114 NYS2d 304 (1952).]

In States that have adopted the 1968 revisions to the Act, it is clear that the court has jurisdiction to determine paternity, but it is also clear that the court has great discretion to refuse to exercise that jurisdiction:

> If the obligor asserts as a defense that he is not the father of the child for whom support is sought, and it appears to the court that the defense is not frivolous, and if both parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate the paternity issue. Otherwise, the court may adjourn the hearing until the paternity issue has been adjudicated.[36]

Once it is determined that the court possesses jurisdiction to determine paternity in the URESA proceeding, the next issue is to decide whether URESA or the procedure contained in the State's civil paternity statute applies. There is not ample case law from which to draw any solid conclusions, but it appears as though courts will graft the procedures and protections of the State's paternity statute onto the URESA statute. For instance, in Lee v. Lee, 442 NYS2d 904, 110 Misc.2d 623 (1981), a New York court held that blood tests could be ordered despite the lack of specific authority in the Act.

Several courts have held that the alleged father is entitled to a jury trial on the issue of paternity, despite the lack of any such provision in the State's URESA statute. [Metts v. State Dept. of Public Welfare, 430 So2d 401 (Miss. 1983); Wahlers v. Frye, 205 Neb. 399, 288 NW2d 29 (1980); Clarkston v. Bridge, supra.]

Visitation and Custody

Section 23 of the 1968 Act states: "The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court."[37] This provision has been held to prevent the support obligor from defending the URESA action by complaining that the obligee is denying him or her court-ordered visitation. [Moffatt v. Moffatt, 165 Cal.Rptr. 877, 612 P2d 967 (1980).] The court in Moffatt reached its decision despite concluding that the obligee's denial of visitation was a flagrant violation of the divorce decree--one that would prevent her from seeking enforcement of the existing support order in the divorce action.

Many States have not enacted the 1968 Amendments or have chosen not to incorporate Section 23. In these States, a public policy analysis must decide the issue. The purpose of URESA is to secure support for dependants from those who owe them this legal responsibility. Nowhere in the Act is the prosecutor charged with the duty of enforcing or defending visitation or custody claims. URESA is a special procedural statute designed to provide a convenient forum for the efficient resolution of support disputes. The only issue in most cases is the amount of support that should be paid. Nevertheless, visitation and custody issues occasionally have surfaced during the course of URESA cases.[38]

Many courts have denied the visitation/custody defense by holding that the obligee does not submit to the jurisdiction of the responding court for these issues, or that the court does not possess subject matter jurisdiction under the statute. [See Pifer v. Pifer; Graft v. Hertz; Grosse v. Grosse; Hoover v. Hoover; Brown v. Turnbloom; all supra.]

Other courts have refused to allow the defense by applying their own State law separating support from visitation/custody. [Com. v. Mexal, 201 Pa.Super. 457, 193 A2d 680 (1963); Carr v. Marshman, 195 Cal.Rptr. 603, 147 Cal.App.3d 1117 (1983); State ex rel. Hubbard v. Hubbard, 110 Wis.2d 683, 329 NW2d 202 (1983).]

On the other hand, State of New Jersey v. Morales, 35 Ohio App.2d 56, 299 NE2d 920 (1973) is frequently cited as authority for joining the issues of visitation or custody with the issue of support. The Ohio court held that the obligor legally could withhold support for the child because he had legal custody of the child. The obligor was prepared and willing to assume actual custody, and "it [was] not the father's desire that [the] children be public charges." [State of New Jersey at 923.] The court noted that: "Where there is a judicial order relating to the custody of minor children, that order has the effect of law and is that which should determine the obligation of the respective parents to their minor children." [299 NE2d at 924; in accord are Hethcox v. Hethcox, 246 SE2d 444 (Ga. 1978); Campbell v. Campbell, 126 Ariz. 558, 617 P2d 66 (1980); State ex rel. Arnayo v. Guerrero, 517 P2d 526 (Ariz. 1973).] Two courts have held that legal custody in the absent parent does not prevent the responding court from finding the existence of a duty of support and entering an order. [State of Louisiana ex rel. Eaton v. Leis, 354 NW2d 209 (Wis. App. 1984); County of Clearwater Minn. v. Petrash, 198 Colo. 231, 598 P2d 138 (1979).]

Other courts have refused to consider custody and visitation defenses where the children are being supported by another State's welfare agency, holding that the custodial parent's conduct should not be transferred to the welfare agency or that the custodial parent's destitution is a change of circumstances justifying a reappraisal of the support issue. [McCoy v. McCoy, 374 NE2d 164 (Ohio 1977); Bourdon v. Bourdon, 201 A2d 889 (N.H. 1964).]

A few States allow visitation and custody defenses in intrastate cases. As a result, an interstate case occasionally will involve a rendering State that recognizes the dependency between support and visitation or custody and a responding State that holds the issues to be separate. URESA provides that the law of the State where the obligor resided during the period for which support is sought controls regarding the existence of a duty of support.[39] Thus, normally the law of the responding State will control. However, if the obligor was present in the initiating State for a portion of the time, or if he or she returns to the initiating State and obtains a modification suspending his or her support obligation, the result changes. [See Shannon v. Sterling, 248 Minn. 266, 80 NW 13 (1956).]

Emancipation

Emancipation becomes a troublesome issue in interstate cases when a conflict exists similar to the one discussed in the previous paragraph. If the duty of support in the initiating or rendering State is different from that of the responding State, the responding State's law should apply during periods in which the obligor has resided in the responding State. [Federbush v. Mark Twain State Bank, 575 SW2d 829, (Mo.App. 1978); Burney v. Vance, 17 Ohio Misc. 307, 246 NE2d 371 (1969).]

Countermotions to Modify

On occasion, an obligor will file a countermotion to modify an existing support order of another State asking the responding court to grant retroactive or prospective relief. Such a tactic calls into play several complicated issues, ones with which appellate courts have not dealt in a clear manner.

The 1950 version of the Act, as amended, provided: "No order of support issued by a court of this State when acting as a responding State shall supersede any other order of support."[40] The 1968 version of the Act amended the provision to provide: "A support order made by a court of this State pursuant to this Act does not nullify and is not nullified by a support order made by a court of this State pursuant to a substantially similar act or otherwise or any other law, regardless of priority of issuance, unless otherwise specifically provided by the court."[41] (Emphasis added.)

The underlined phrase of the revised Act appears to confer some jurisdiction on the responding court to "nullify" an existing order of another State. No reference to "modification" is made. The original language better states the philosophy behind the Act. The hearing in the responding jurisdiction is a de novo hearing. Most of the existing decisions have recognized this concept, and have allowed the responding court to enter an order in a different amount, without affecting an existing order. [See Chisholm v. Chisholm, 197 Neb. 828, 251 NW2d 171 (1977); State on behalf of McDonnell v.

McCutcheon, 337 NW2d 645 (Minn. 1983); Stubblefield v. Stubblefield, 272 SW2d 633 (Tex.Civ.App. 1954); DeFeo v. DeFeo, 428 A2d 26 (Del.Fam.Ct. 1981); Moore v. Moore, 252 Iowa 404, 107 NW2d 97 (1961); Sullivan v. Sullivan, 98 Ill.App.3d 928, 424 NE2d 957 (1981); Davidson v. Davidson, 66 Wash.2d 780, 405 P2d 261 (1965); Olson v. Olson, 534 SW2d 526 (Mo.App. 1976); State ex rel. Swan v. Shelton, 469 SW2d 943 (Mo.App. 1971).]

Many courts have confused the authority "to enter an order in a different amount" (having no effect on an existing order) with authority to enter a "modification" of that order. [See for example In re Marriage of Popenhager, 160 Cal.Rptr. 379, 99 Cal.App.3d 514 (1979); Byrd v. Bryd, 36 Conn.Sup. 601, 421 A2d 878, (1980); Campbell v. Jenne, 563 P2d 574 (Mont. 1977).] This construction destroys the efficacy of the Part III URESA procedure, which was designed to provide the support obligee an additional enforcement mechanism that does not require the children's rights in an existing decree to be risked in an ex parte proceeding without an opportunity to submit live testimony. Such a proceeding always has been available through statutory registration procedures and common law actions for debt based on an out-of-State judgment or order.

More importantly, the level of representation a prosecutor can provide an out-of-State custodial parent regarding issues not addressed in the petition and testimony form is generally inadequate. Due to heavy caseloads and lack of access to witnesses, the prosecutor should not be put in the position of defending these existing rights.

Jurisdiction in Another Court in the Responding State

Often the State in which the obligor now resides is the State where the duty of support arose. Another court in the State, or perhaps in the same judicial circuit, already may have exerted jurisdiction over the parties with respect to the same issues. In such a situation, the obligor may respond to the incoming URESA by filing a motion to dismiss, arguing that the original court retains exclusive continuing jurisdiction over the support issue.

This argument generally has failed by virtue of URESA's status as an "additional" or "cumulative" remedy. [RURESA, 9A U.L.A. sec. 3; Olson v. Olson, 534 SW2d 526 (Mo.App. 1976); People ex rel. Argo v. Henderson, 97 Ill.App.3d 425, 422 NE2d 1005 (1981).] This is true even if the responding court is the same court that entered the prior order. In that situation, the obligee has a choice. He or she can attempt to enforce or modify the existing order, or he or she can seek the entry of a new, independent order through URESA. [Ray v. Pentlicki, 375 So2d 875 (Fla.App. 1979); Paul v. Paul, 439 SW2d 746 (Mo. 1969).]

Constitutional Defenses

Several arguments have produced appellate decisions regarding the constitutionality of the URESA procedure. The following arguments have been made and rejected:

- That URESA constitutes an unlawful agreement or compact between States without the consent of Congress. [Ivey v. Ayers, 301 SW2d 790 (Mo. 1957); Fraser v. Fraser, 415 A2d 1304 (R.I. 1980).]

- That the proceeding in the responding jurisdiction deprives the obligor the right of confronting his or her adverse witnesses as guaranteed by the 6th Amendment to the U.S. Constitution. [Gambino v. Gambino, 396 So2d 434 (La.App. 1981); Saunders v. Saunders, 650 SW2d 534 (Tex.Civ.App. 1983); Robinson v. Robinson, 8 Ohio App.2d 235, 221 NE2d 598 (1966); Com. ex rel. Shaffer v. Shaffer, 175 Pa.Super. 100, 103 A2d 430, 42 ALR2d 761.]

- That the independent determination of the support obligation in the responding jurisdiction in a Part III URESA proceeding violates the full faith and credit requirement. [Taylor v. Taylor, 175 Cal.Rptr. 716, 122 Cal.App.3d 209 (1981).]

- That the lack of notice given to the obligor regarding the time and place of the hearing in the initiating State violates his or her right to due process. [Ivey v. Ayers, supra.]

- That by allowing a nonresident to maintain an action without subjecting himself or herself to the jurisdiction of the responding court for other purposes, URESA violates the obligor's right under the 14th Amendment to equal protection of the laws and abridges his or her right to enjoy the same privileges or immunities as other citizens. [Harmon v. Harmon, 160 Cal.App.2d 47, 324 P2d 901 (1958).]

- That the provisions of the act defining duty of support are void due to vagueness. [Harmon v. Harmon, supra.]

- That by allowing an obligee to bring suit for child support despite the existence of a divorce decree that does not provide for support, URESA is an ex post facto law and impairs the obligation of contracts in violation of Article I, Section 10 of the U.S. Constitution. [Smith v. Smith, 131 Cal.App.2d 764, 231 P2d 274 (1955).]

The Support Order

If the prosecutor submits competent evidence pertaining to each allegation contained in the petition and counters all defenses posited by the obligor, the court enters a support order at the end of the hearing. In most States, the order may include a determination of arrearages due and owing on an existing order (assuming the determination was prayed for) in addition to the new, independent order for current support. [In Interest of Solomon, 546 SW2d 129 (Tex.Civ.App. 1977); Mancini v. Mancini, 136 Vt. 231, 338 A2d 414 (1978); People ex rel. Oetjen v. Oetjen, 92 Ill.App.3d 699, 416 NE2d 278 (1981); Smith v. Smith, 3 Haw.App. 170, 647 P2d 722 (1982).] This is true even if the arrears do not possess the status of a judgment in the rendering State. [Bailey v. Haas, 655 P2d 764 (Alaska 1982).]

The court must require in the order that the obligor make the payments to the clerk of the responding court or other agency authorized by the statute.[42] The court may require the obligor to put up a cash bond to secure payment of the order or subject the obligor to any other terms or conditions that are proper to secure compliance.[43] Either through this authority, or by specific authority contained in the State's wage withholding statute, the obligor should be subject to wage withholding to the same extent as is an obligor in an intrastate case.

Once the order is entered, the responding court must transmit a copy to the court in the initiating State.[44] When the obligor makes payments to the court clerk as per the order, the clerk must forward them to the designated official in the initiating State, who will distribute them to the obligee. The obligor receives credit for the payment on all existing support orders.[45]

Enforcement

If the obligor fails to comply with the order, the responding court may punish the obligor for contempt or enforce the order as it would enforce any other order of the court.[46] If the case is a IV-D case, it should be treated similarly to other IV-D cases. The responding IV-D agency should monitor the obligor's compliance and take enforcement action on its own volition. It should not be the sole responsibility of the initiating jurisdiction to monitor compliance; nor should the initiating jurisdiction be required to take formal action in order to seek enforcement.

Criminal Rendition

URESA also provides for the interstate criminal enforcement of support orders by facilitating the extradition of absent parents who have been charged with the crime of nonsupport in the requesting State. URESA calls for the Governor in the State where the absent parent is located to surrender the absent parent to the Governor of the State where the absent parent has been charged.[47] The rendition is accomplished by the State's usual extradition process, except that demand need not show:

- That the absent parent has fled from justice
- That the absent parent was in the demanding State at the time of the offense. [Aikens v. Turner, 241 Ga. 401, 245 SE2d 660 (1978); In re Pace, 250 Ga. 276, 297 SE2d 255 (1982).]

The intent of these provisions is to allow a State to pursue a criminal action where civil proceedings have failed. Therefore, the Governor may refuse to surrender the absent parent where:

- The absent parent has prevailed in a previous support action
- The absent parent currently is complying with an existing support order.[48]

Also, the Governor may delay the criminal rendition of the absent parent if he or she believes that a civil support action would be effective. In order to make these determinations, the Governor may order the prosecutor to investigate the case and report whether a support action has been brought previously or if such an action would be effective.[49]

Despite these limitations, it has been held that an extradition need not be refused if the obligee has alternative civil remedies. The criminal rendition procedure is an alternative choice the initiating jurisdiction is free to make. [Welch v. Strout, 180 NW2d 895 (Iowa, 1971); Conrad v. McClearn, 166 Colo. 568, 445 P2d 222 (1968).] Likewise, it is

no defense that the initiating jurisdiction previously sent a Part III URESA petition to the responding State and that a court in the responding State obtained jurisdiction over the obligor in a civil proceeding. [Ex Parte Brito, 172 Tex.Cr.R. 409, 358 SW2d 122 (1962).]

REGISTRATION

Full Faith and Credit

Under the common law, foreign judgments could be enforced only by new action in the second jurisdiction, where the original judgment was recognized as mere evidence of the debt.[50] The U.S. Constitution has attempted to change the common law rule by providing that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State."[51]

The U.S. Supreme Court has held that only final orders are entitled to full faith and credit, and if the judgment is subject to modification in the State of rendition, it is not a final judgment.[52] Furthermore, the forum State may modify an order still subject to modification in the State that rendered it. As the Supreme Court stated in Halvey v. Halvey, "It is clear that the State of the forum has as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."[53] Therefore, a court may modify the child support order of a sister State being enforced in the forum State to the same extent it could be modified in the sister State.

To determine whether the order of a sister State is entitled to full faith and credit, the court must examine:

- The order to see if it reserves the right of modification
- The statutes and judicial decisions of the sister State to see under what circumstances the order may be modified.

Many States distinguish between arrearages and payments of future installments. Orders are generally subject to modification as to current support on proof of change of circumstances.[54] Orders are generally not retroactively modifiable in States where each accrued and past due payment automatically becomes a judgment. There is a presumption that an accrued payment is final, and unless the presumption is rebutted, the order is entitled to full faith and credit.[55] The obligor may rebut the presumption by showing that the State where the order was rendered requires arrearages to be reduced to a judgment for a sum certain and that a court in the rendering State may forgive all or part of the arrearage. In this case, the order would not be entitled to full faith and credit. However, the fact that the arrearages are not entitled to full faith and credit does not prevent the court from reducing the arrearages to judgment using the principle of "comity." (See discussion below.) The court can apply its own policy regarding the extent to which arrearages should be forgiven.

Uniform Enforcement of Foreign Judgments Act

The Uniform Enforcement of Foreign Judgments Act, which has been adopted in 19 States, gives detailed procedures for seeking enforcement of a foreign judgment, as follows:

- The judgment creditor files an authenticated copy of the foreign judgment with the clerk of the court in the forum State.
- The clerk of the court sends notice of the filing to the judgment debtor.
- The judgment may be enforced as any other judgment of the forum State after a certain period of time has elapsed.
- The judgment debtor may receive a stay of execution of the foreign judgment if he or she can show that an appeal has been taken in the rendering State.[56]

With this procedure or some other procedure adopted by a particular State, valid judgments, including those for child support,[57] are entitled to full faith and credit unless:

- The judgment was rendered without jurisdiction.
- The judgment was rendered by a court lacking competence to render it.
- The judgment was not final under the law of the rendering State.
- The amount of the judgment has not been finally determined under the law of the rendering State.
- The judgment has been vacated in the State of rendition.
- The judgment is subject to modification in the State of rendition. (Again, the Constitution does not forbid the enforcement of such a judgment and a court is free to recognize or enforce a judgment that remains subject to modification).[58]

Registration of Foreign Child Support Orders Under URESA

Even though a support order is not entitled to full faith and credit, it still may be registered and enforced under Part IV of URESA.[59] Sections 35-41 of URESA, which were added to the Act with the 1958 Amendments, provide the following procedure for the registration of foreign support orders:

- The person wishing to register the order must send to the clerk of the court:
  - Three copies of the order to be registered
  - A copy of the URESA law of the State that rendered the order
  - A statement (or petition, in some States) verified and signed by the person indicating the last known address of the absent parent, the amount unpaid, the description and location of the absent parent's property subject to execution, and a list of States in which the order is registered.

- The clerk must then docket the case and notify the absent parent.
- The absent parent has 20 days to petition the court to vacate the order or stay the enforcement.
- If no such petition is filed, or if the court refuses to grant relief, the court "confirms" the registration and the amount of arrears.
- Upon registration, the order has the same effect as any other support order issued by the registering State.[60]

The registration procedure offers the child support enforcement agency at least five advantages over other alternatives. First, the statute allows for registration of orders that are not entitled to full faith and credit. Thus, the registered order can be enforced for current and future support, and for arrearages based on an order from a State that allows retroactive modifications. Second, registration is very fast. The order is registered, and enforcement proceedings may begin upon filing in the obligor's State.[61] Third, the obligor's defenses are limited to those available to a judgment debtor in an action to enforce a foreign money judgment.[62] These generally relate only to the validity of the foreign judgment, such as lack of jurisdiction, unconstitutionality, or other procedural defect.[63] Fourth, registration is available to obtain jurisdiction over the obligor's property that is located in a State other than the State in which he or she resides for the limited purpose of enforcing a foreign support judgment. Personal jurisdiction over the obligor is not required for registration, which is a ministerial act of the court in no way affecting the obligor's liberty or property interests. [Fleming v. Fleming, 49 N.C.App. 345, 271 SE2d 584 (1980); Pinner v. Pinner, 33 N.C.App. 204, 234 SE2d 633 (1977).] When the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the obligor or his property, and the amount of the arrearage. If the order was rendered in an automatic judgment State, and if authenticated court records from that State are available to substantiate the amount of the arrears, there should be no due process problems in seizing the obligor's property without jurisdiction over his person. [See Higgins v. Deinhard, 645 P2d 32 (Ariz.App. 1982); Lagerway v. Lagerway, 681 P2d 309, 312 (Alaska 1984).] Fifth, the obligor does not automatically obtain a redetermination of his support obligation, as is the case with Part III URESA proceedings.

Balanced against these significant advantages are two significant disadvantages. First, the procedure is rarely used, and court personnel are often unaware of the procedure to register an out-of-State order properly. Judges and court administrators should take steps to ensure that appropriate court personnel are adequately trained.

The second problem is more significant, and has led many attorneys in the Child Support Enforcement Program to forsake the use of the URESA registration procedure. By registering an out-of-State order, the obligee may become subject to the jurisdiction of the registering court for purposes of modification. Furthermore, a modification of the registered order also may effect a modification in the rendering State. [See Alig v. Alig, 255 SE2d 494 (Va. 1979); Monson v. Monson, 85 Wis.2d 794, 271 NW2d 137 (1978).] One Texas case has held the contrary, noting the URESA registration procedure would fail in its purpose if such a construction of the statute were allowed. [O'Halloran v. O'Halloran, 580 SW2d 870 (Tex.Civ.App. 1979).]

REQUESTS FOR ENFORCEMENT OF AN EXISTING ORDER

Sometimes an order already exists in the jurisdiction where the absent parent resides. The Social Security Act, 42 USC 654(9)(c), requires that each State cooperate with any other State:

> . . .in securing compliance by an absent parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children. . .with respect to whom aid is being provided under the plan of such other State. . . .

Clearly, the State where the absent parent resides already has an obligation under the Federal statute to enforce an existing order. Some IV-D attorneys prefer to enforce the existing order instead of wasting both courts' time establishing a superfluous order through a URESA proceeding.

Other IV-D attorneys argue that a URESA proceeding is necessary in this situation for one of two reasons: (1) they do not possess standing or statutory authority to represent an out-of-State custodial parent in a non-URESA proceeding or (2) they fear the non-URESA proceeding because they believe they are more in need of a live witness in such a proceeding than in a URESA case.

The first argument should not be true. The Federal statute clearly requires the State to enforce existing orders; this should confer standing in State court. It would be a bizarre state of affairs if a IV-D attorney were authorized to enforce an out-of-State order but was powerless to enforce one issued by the local court. URESA is merely a procedural statute. The IV-D attorney should derive his or her authority through the statute or cooperative agreement that defines his or her relationship to the IV-D agency, not through URESA. The IV-D attorney, as legal representative of the IV-D agency, should have authority to bring any action the IV-D agency has standing to bring.

The second argument should not be true either, but for practical reasons often is. Except in States where the URESA proceeding is treated as a show cause hearing, there is nothing different about a URESA case as far as problems of proof are concerned. As noted above, the petition and testimony forms are not admissible as evidence. If the obligor contests his or her liability, the IV-D attorney has the same evidentiary problems he or she would face in enforcing an existing order.

In practice, this distinction between URESA and non-URESA cases is not always maintained, so there may be some actual strategic advantage to using the URESA procedure. The greater concern among IV-D attorneys is that a countermotion to modify is more likely in a non-URESA enforcement proceeding because the jurisdiction of the court is limited by the URESA statute. Although this should not be true, it often is. The court's jurisdiction over the cause of action that produced the original order most likely continues into the future, so the obligor's attorney would have little difficulty avoiding the limited jurisdiction of the URESA proceeding by simply filing the motion of modification in the other cause.

Nevertheless, many jurisdictions firmly hold that URESA is the only way to go in this situation. Other jurisdictions prefer a well-documented request for enforcement of the existing order over a superfluous URESA proceeding. The latter procedure should predominate after implementation of the interstate wage withholding procedure mandated by the Child Support Enforcement Amendments of 1984. The number of superfluous URESA proceedings should diminish with the advent of this more efficient interstate enforcement procedure.

PETITION IN FEDERAL COURT

Pursuant to 42 USC 660, the U.S. District Courts have jurisdiction without regard to the amount in controversy to hear and determine any civil action certified by the DHHS Secretary under Title IV-D of the Social Security Act. Certifications must be requested by a State IV-D agency and must include evidence of the following:

- The State in which the absent parent resides has not undertaken to enforce an existing order against the absent parent within 60 days of receipt of the request by the originating State under uniform reciprocal enforcement of support procedures or other legal processes required by 45 CFR 303.7(a)(3).

- Use of the U.S. District Court is the only reasonable method of enforcing the order.

As a condition to obtaining the certification from the DHHS, the IV-D agency of the initiating State must give the IV-D agency of the responding State, no sooner than 60 days after first seeking assistance enforcing the order, a "30-day warning" of its intent to seek enforcement in Federal court. If the initiating State receives no response within the 30-day time limit or if the response is unsatisfactory, the initiating State may apply to its OCSE Regional Office for certification. The application must attest that the above requirements have been satisfied. On certification of the case, a civil action may be filed in the U.S. District Court. The certification should be accepted by the court as sufficient evidence that permission has been granted for use of the Federal courts. The action may be filed in the judicial district where the claim arose, where the plaintiff resides, or where the defendant resides.

OTHER ALTERNATIVES

In most cases it will be possible for the IV-D agency to enforce an obligation by relying on interstate wage withholding, Part III URESA actions, or some form of registration. Unfortunately, there will be a few cases that fall through the cracks due to lack of cooperation in the absent parent's jurisdiction, lack of good location information to allow for service of process, or similar problems. If an order exists, especially if the order exists in the State that wants enforcement, there are a few additional options. It may be possible for the IV-D agency to avoid the interstate process entirely by locating an asset of the obligor, such as wages, that can be reached within the State, and garnishing them. [See Chapter 8 for a discussion of garnishment of wages earned out-of-State but paid by a corporation that does business in-State.] It generally will be

possible to refer the case for "full collection" by the IRS. If the crime exists in the State, the authority exists in the IV-D attorney, and the elements can be proved, it is possible to file felony nonsupport charges against the absent parent and get a warrant issued and placed in the interstate computer network maintained by law enforcement agencies. Alternatively, the case will be certified to the IRS for interception of the absent parent's Federal tax refund.

INTERNATIONAL CASES

The problems faced by States when attempting to enforce an order when the parties reside in two different States are magnified where the parties reside in two different countries. Some States have been successful in obtaining mutual covenants with other countries, and can process cases through the URESA process.[64] Where no such arrangement exists, the process is difficult and must be negotiated on a case-by-case basis.

Outgoing Cases

When the absent parent leaves the United States, both location and enforcement can be difficult, but not impossible. If the absent parent is a United States citizen, the State Department can be a valuable ally in the location effort.[65] American embassies throughout the world, on request, will search their records and ask the host country to check its records for information on absent parents believed to be residing there. In addition, the U.S. Passport Services Office in Washington, D.C., will cooperate by furnishing the addresses and possible destination listed on a passport application. Each such request must cite the U.S. statute under which the State or local IV-D agency operates (P.L. 93-647), the absent parent's name, date, and place of birth, his or her parent's names, and his or her last known address with the date for which the address was valid. All requests should be in writing and should include all information the State parent locate service has on the absent parent.

If the absent parent is not a U.S. citizen, the embassy or consulate maintained by his or her country's government in the United States is a valuable ally. Often it can assist in locating the absent parent and can identify agencies in the relevant country that can assist in enforcement.

Incoming Cases

Where an order has been issued by the other country and has been, or can be, translated so the State court is able to understand its terms, the doctrine of comity allows the State court to enforce it. To allow the court to invoke the doctrine in the case, a petition must be filed alleging the following five facts:

- The foreign order was based on grounds or elements that could reasonably lead a court in the forum State to find that a duty of support exists in the amount ordered.

- The foreign court had personal and subject matter jurisdiction requisite to enter the order.

- The obligor was provided with notice sufficient to comply with the foreign court's due process requirements.

- The foreign court acted in compliance with its own rules.

- The public policy of the forum State supports enforcement of the order.

Once the order is proved, it is entitled to a presumption of validity. [See Biewend v. Biewend, 17 Cal.2d 117, 109 P2d 701 (1941); anno., 132 ALR 1272; Venator v. Venator, 512 SW2d 451 (1974); Urbanek v. Urbanek, 503 SE2d 434 (1973).] The usual enforcement remedies available in the forum State can be used to enforce the order.[66]

FOOTNOTES

/1/ Portions of this chapter are adapted from A Guide for Judges in Child Support Enforcement, by Chester A. Adams, et al. (Chevy Chase, MD: National Institute for Child Suppport Enforcement, 1982), pp. 77-93.

/2/ Early attempts at enforcement of the duty of support were through the criminal law only, which made no reference to obligors who fled from the State.

/3/ Commentary, Uniform Reciprocal Enforcement of Support Act (URESA), 9A U.L.A., Matrimonial, Health, and Family Laws 751.

/4/ URESA, 9A U.L.A. sec. 5.

/5/ URESA, 9A U.L.A. secs. 33-38.

/6/ Revised Uniform Reciprocal Enforcement of Support Act (RURESA), 9A U.L.A. sec. 27.

/7/ Information concerning the variations in URESA laws of each State and territory can be found in the URESA Laws Digest, published by OCSE in 1984 and revised by the National Institute for Child Support Enforcement in 1986, and in 9A U.L.A., Matrimonial, Family, and Health Laws 943-827. In addition to information regarding statutory variations, U.L.A. tracks URESA case law from across the country in a section-by-section format.

/8/ For details, see Interstate Child Support Collections Study Final Report: A Study to Determine Methods, Cost Factors, Policy Options, and Incentives Essential to Improving Interstate Child Support Collections (Chevy Chase, MD: Center For Human Services, 1985), pp. 43-96.

/9/ 45 CFR 303.100(g).

/10/ Child Support Projects of the American Bar Association and National Conference of State Legislatures, Model Interstate Income Withholding Act With Comments (Washington, DC: U.S. Department of Health and Human Services, Office of Child Support Enforcement, 1984), pp. 3-1 through 3-25.

/11/ Id.

/12/ RURESA, 9A U.L.A. sec. 13.

/13/ RURESA, 9A U.L.A. sec. 8.

/14/ RURESA, 9A U.L.A. sec. 12.

/15/ RURESA, 9A U.L.A. sec. 11(a).

/16/ Id.

/17/ RURESA, 9A U.L.A. sec. 15.

/18/ RURESA, 9A U.L.A. sec. 14.

/19/ RURESA, 9A U.L.A. sec. 16.

/20/ RURESA, 9A U.L.A. sec. 14.

/21/ RURESA, 9A U.L.A. sec. 17.

/22/ National Roster and URESA/IV-D Referral (Des Moines, IA: National Child Support Enforcement Association (NCSEA), formerly the National Reciprocal and Family Support Enforcement Association, 1984). This publication is available through the NCSEA office, 503 East Fifteenth Street, Des Moines, IA 50316.

/23/ RURESA, 9A U.L.A. sec. 18(a),(b).

/24/ RURESA, 9A U.L.A. sec. 19(a).

/25/ RURESA, 9A U.L.A. sec. 19(b).

/26/ Id.

/27/ RURESA, 9A U.L.A. sec. 16.

/28/ RURESA, 9A U.L.A. secs. 14, 17(b).

/29/ RURESA, 9A U.L.A. sec. 32.

/30/ RURESA, 9A U.L.A. sec. 20.

/31/ Id.

/32/ RURESA, 9A U.L.A. sec. 23.

/33/ RURESA, 9A U.L.A. sec. 22.

/34/ RURESA, 9A U.L.A. sec. 20.

/35/ RURESA, 9A U.L.A. sec. 23.

/36/ RURESA, 9A U.L.A. sec. 27.

/37/ RURESA, 9A U.L.A. sec. 23.

/38/ This discussion of the visitation and custody interference defense is based on Robert Keith, J.D., "Support and Visitation: A Review of Recent Decisions," Child Support Report 3(2): 4-6, 1981.

/39/ RURESA, 9A U.L.A. sec. 7.

/40/ RURESA, 9A U.L.A. sec. 30.

/41/ RURESA, 9A U.L.A. sec. 31.

/42/ RURESA, 9A U.L.A. sec. 28.

/43/ RURESA, 9A U.L.A. sec. 26.

/44/ RURESA, 9A U.L.A. sec. 25.

/45/ RURESA, 9A U.L.A. sec. 31.

/46/ RURESA, 9A U.L.A. sec. 26.

/47/ RURESA, 9A U.L.A. sec. 5.

/48/ RURESA, 9A U.L.A. sec. 6(c).

/49/ RURESA, 9A U.L.A. sec. 6(b).

/50/ 11 Cal. West. L.Rev. 280, 285.

/51/ U.S. Const., Art. IV.

/52/ Lynde v. Lynde, 181 US 183 (1901).

/53/ 330 US 610 (1946).

/54/ Sistare v. Sistare, 218 US 1 (1910).

/55/ 11 Cal. West L.Rev. 280, 286.

/56/ Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. secs. 173-188.

/57/ 36 Alabama Lawyer 556, 561 (1975).

/58/ Rest. of the Law 2d, Conflicts of Law 103-116 (1971).

/59/ RURESA, 9A U.L.A. secs. 35-40.

/60/ W. Brockelbank and F. Infausto, Interstate Enforcement of Family Support (2nd ed., 1971), pp. 77-87.

/61/ RURESA, 9A U.L.A. sec. 40(a).

/62/ RURESA, 9A U.L.A. sec. 40(c).

/63/ Sabrina D. v. Thomas W., 443 NYS2d 111, 110 Misc. 2d 796 (1981); Ackerman v. Yanoscik, 601 SW2d 72 (Tex.Civ.App. 1980).

/64/ For a description of this process, see G. DeHart, "Child Support Enforcement," 2 Fam. Advoc. 26, Fall 1979.

/65/ This discussion is based on F. Graves, ed., "State Department Helps Locate Absent Parent," Child Support Report 7(4): 3, 1985.

/66/ For more information about the legal aspects of international enforcement proceedings, see J. Cavers, "International Enforcement of Family Support," 81 Colum. L. Rev. 994, 1981.

APPENDIX A
Legislative History Of Child Support Enforcement

1950

Congress passed the first Federal child support enforcement legislation by adding Section 402(a)(11) to the Social Security Act [42 USC 602(a)(11)], requiring State welfare agencies to notify appropriate law enforcement officials upon providing Aid to Families with Dependent Children (AFDC) with respect to a child who was abandoned or deserted by a parent.

Also that year, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Reciprocal Enforcement of Support Act (subsequent amendments to this Act were approved in 1952, 1958, and 1968).

1965

Public Law (P.L.) 89-97 allowed a State or local welfare agency to obtain from the Secretary of Health, Education, and Welfare, the address and place of employment of an absent parent who owed child support under a court order for support.

1967

P. L. 90-248 allowed States to obtain from IRS the addresses of absent parents who owed child support under a court order for support. In addition, each State was required to establish a single organizational unit to establish paternity and collect child support for deserted children receiving AFDC. States were also required to work cooperatively with each other under child support reciprocity agreements and with courts and law enforcement officials.

1975

After 3 years of Congressional attention to child support enforcement issues, P.L. 93-647 was signed into law on January 4, 1975, creating, inter alia, Part D of Title IV of the Social Security Act [Sections 451 et seq.; 42 USC 651 et seq.]. The child support enforcement provisions of P.L. 93-647 are, in brief, as follows:

- The Secretary of the Department of Health, Education, and Welfare [now the Department of Health and Human Services (DHHS)] has primary responsibility for the Child Support Enforcement Program and is required to establish a separate organizational unit to operate the program. Operational responsibilities include (1) establishing a parent locator service; (2) establishing standards for State program organization, staffing, and operation to assure an effective program; (3) reviewing and approving State plans for the program; (4) evaluating State program operations by conducting audits of each State's program; (5) certifying cases for referral to the Federal courts to enforce support obligations; (6) certifying cases for referral to the IRS for support collections; (7) providing technical assistance to States and assisting them with reporting procedures; (8) maintaining records of program operations, expenditures, and collections; and (9) submitting an annual report to the Congress.

- Primary responsibility for operating the Child Support Enforcement Program is placed on the States pursuant to the State plan. The major requirements of a State plan are that (1) the State designate a single and separate organizational unit to administer the program; (2) the State undertake to establish paternity and secure support for individuals receiving AFDC and others who apply directly for child support enforcement services; (3) child support payments be made to the State for distribution; (4) the State enter into cooperative agreements with appropriate courts and law enforcement officials; (5) the State establish a State parent locator service that utilizes both State and local parent location resources and Federal Parent Locator Service; (6) the State cooperate with any other State in locating an absent parent, establishing paternity, and securing support; and (7) the State maintain a full record of collections and disbursements made under the plan.

- Procedures for the distribution of child support collections received on behalf of families receiving AFDC were set out.

- Incentive payments to States for collections made on AFDC cases were created.

- Monies due and payable to Federal employees became subjected to garnishment for the collection of child support.

- New eligibility requirements were added to the AFDC program, which required each applicant for, or recipient of, AFDC to make an assignment of support rights to the State; to cooperate with the State in establishing paternity and securing support; and to furnish his or her social security number to the State.

The effective date of P.L. 93-647 was to be July 1, 1975, except for the provision regarding garnishment of Federal employees, which became effective on January 4, 1975. Several problems were identified prior to the effective date though and Congress passed P.L. 94-46 to extend the effective date to August 1, 1975. In addition, P.L. 94-88 was passed in August, 1975, to allow States to obtain waivers from certain program requirements under certain conditions until June 30, 1976, and to receive Federal reimbursement at a reduced rate. This law also eased the requirement for AFDC recipients to cooperate with State child support enforcement agencies when such cooperation would not be in the best interests of the child. It also provided for supplemental payments to AFDC recipients whose grants would be reduced due to the implementation of the child support enforcement program.

1976

Effective October 20, 1976, State employment agencies were required to provide absent parents' addresses to State child support enforcement agencies (P.L. 94-566).

1977

P.L. 95-30, effective May 23, 1977, made several amendments to Title IV-D:

- Provisions relating to the garnishment of a Federal employee's wages for child support were amended to (1) include employees of the District of Columbia; (2) specify the conditions and procedures to be followed to serve garnishments on Federal agencies; (3) authorize the issuance of garnishment regulations by the three branches of the Federal Government and by the District of Columbia; and (4) define further certain terms used.

- Section 454 of the Social Security Act (42 USC 654) was amended to require the State plan to provide for bonding of employees who receive, handle, or disburse cash and to insure that the accounting and collection functions be performed by different individuals. The incentive payment provision, under section 458(a) of the Social Security Act [42 USC 658(a)], was amended to change the rate to 15 percent of AFDC collections (from 25 percent for the first 12 months and 10 percent thereafter).

The Medicare-Medicaid Antifraud and Abuse Amendments of 1977 (P.L. 95-142), effective on October 25, 1977, established a medical support enforcement program, under which States could require Medicaid applicants to assign to the State their rights to medical support. State Medicaid agencies were allowed to enter into cooperative agreements with any appropriate agency of any State, including the IV-D agency, for assistance with the enforcement and collection of medical support obligations. Incentives were also available to localities making child support collections for States and for States securing collections on behalf of other States.

1978

The Bankruptcy Reform Act of 1978 (P.L. 95-598), which was signed into law on November 6, 1978, repealed section 456(b) of the Social Security Act [42 USC 656(b)], which had barred the discharge in bankruptcy of assigned child support debts. The Federal Bankruptcy Act was subsequently repealed as of October, 1, 1979, and replaced by a new uniform law on bankruptcy. Section 456(h) of the Social Security Act was reenacted by section 2334 of P.L. 97-35.

1980

Section II of P.L. 96-178 extended until March 31, 1980, Federal financial participation (FFP) for non-AFDC services, retroactive to October 1, 1978.

The Social Security Disability Amendments of 1980 (P. L. 96-265) were signed into law on June 9, 1980, increasing Federal matching funds to 90 percent, effective July 1, 1981, for the costs of developing, implementing, and enhancing approved automated child support management information systems. Federal matching funds were also made available for child support enforcement duties performed by certain court personnel. In another provision, the law authorized the use of the IRS to collect child support arrearages on behalf of non-AFDC families. Finally, the law provided State and local IV-D agencies access to wage information held by the Social Security Administration and State employment security agencies for use in establishing and enforcing child support obligations.

The Adoption Assistance and Child Welfare Act of 1980 (P. L. 96-272) contained four amendments to Title IV-D of the Social Security Act. The law made FFP for non-AFDC services available on a permanent basis. It allowed States to receive incentive payments on all AFDC collections as well as interstate collections. Third, as of October 1, 1979, States were required to claim reimbursement for expenditures within 2 years, with some exceptions. The fourth change postponed until October, 1980, the imposition of the 5 percent penalty on AFDC reimbursement for States not having effective child support enforcement programs.

1981

The Omnibus Reconciliation Act of 1981 (P.L. 97-35) added five amendments to the IV-D provisions. First, IRS was authorized to withhold all or a part of certain individuals' Federal income tax refunds for collection of delinquent child support obligations. Second, IV-D agencies were required to collect spousal support for AFDC families. Third, for non-AFDC cases, IV-D agencies were required to collect fees from absent parents who were delinquent in their child support payments. Fourth, child support obligations assigned to the State no longer were dischargeable in bankruptcy proceedings. Finally, the law imposed on States a requirement to withhold a portion of unemployment benefits from absent parents delinquent in their support payments.

1982

The Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248) was signed into law on September 3, 1982, and included the following provisions, which affected the IV-D program:

- FFP was reduced from 75 to 70 percent, effective October 1, 1982. Incentives were reduced from 15 to 12 percent, effective October 1, 1983. The provision for reimbursement of costs of certain court personnel that exceed the amount of funds spent by a State on similar court expenses during calendar year 1978 was repealed.

- The mandatory non-AFDC collection fee imposed by P.L. 97-35 was repealed, retroactive to August 13, 1981. P. L. 97-248 allowed States to elect not to recover costs, or to recover costs from collections or from fees imposed on absent parents. Another provision clarified States' authority to collect spousal support in certain non-AFDC cases.

- As of October 1, 1982, members of the uniformed services on active duty were required to make allotments from their pay when support arrearages reach the equivalent of a 2-month delinquency.

- Also beginning October 1, 1982, States were allowed to reimburse themselves for AFDC grants paid to families for the first month in which the collection of child support is sufficient to make a family ineligible for AFDC.

The Omnibus Budget Reconciliation Act of 1982 (P.L. 97-253), effective September 8, 1982, provided for the disclosure of information obtained under authority of the Food Stamp Act of 1977 to various programs, including State child support enforcement agencies.

Title X of the Uniformed Services Former Spouses' Protection Act (P.L. 97-252), signed into law on September 8, 1982, treats military retirement or retainer pay as property to be divided by State courts in connection with divorce, dissolution, annulment, or legal separation proceedings.

1984

The key provisions of P.L. 98-378, the Child Support Enforcement Amendments of 1984, require critical improvements to State and local child support enforcement programs in four major areas:

- Mandatory Practices

  All States must enact statutes providing for the use of improved enforcement mechanisms, including (1) mandatory income withholding procedures; (2) expedited processes for establishing and enforcing support orders; (3) State income tax refund interceptions; (4) liens against real and personal property, (5) security or bonds to assure compliance with support obligations; (6) reports of support delinquency information to consumer reporting agencies. In addition, State law must allow for the bringing of paternity actions any time prior to a child's eighteenth birthday and all support orders issued or modified after Octover 1, 1985, must include a provision for wage withholding.

- Federal Financial Participation and Audit Provisions

  The law encourages greater reliance on performance-based incentives by reducing Federal matching funds by 2 percent in Federal fiscal year 1988 (to 68 percent) and another 2 percent in fiscal year 1990 (to 66 percent). Federal matching funds at 90 percent are available for the development and installation of automated systems to improve required procedures, and, for the first time, computer hardware purchases can be matched at this higher rate. These percentages may be impacted by the Gramm, Rudman, Hollings legislation.

  Starting October 1, 1985, States will receive an incentive minimum of 6 percent for both AFDC and non-AFDC collections. These percentages can increase to as much as 10 percent for both categories for very cost-effective States, but a State's non-AFDC incentive payments are limited by the amount of incentives received for AFDC collections. The law further requires States to pass incentives through to local child support enforcement agencies where these agencies have participated in the costs of the program.

  The Act modifies the requirement of auditing each State annually to one of auditing each State at least once every 3 years. The Act also alters the focus of the audits to the extent that, beginning with the fiscal year 1986 audit period, States' effectiveness will be evaluated on the basis of program performance as well as operational compliance. Graduated penalties of from 1 to 5 percent of total payments to the State under the AFDC program may be imposed if a State is found not to have complied substantially with Federal requirements over successive periods. However, the penalty may be suspended if the State opts to take corrective action, over a maximum period of 1 year, to come into substantial compliance.

- Improved Interstate Enforcement

  The proven enforcement techniques discussed above must be applied to interstate cases as well as intrastate cases. Both States involved in an interstate case will be allowed to take credit for the collection when reporting total collections for the purpose of calculating incentives. In addition, the law authorizes special demonstration grants beginning in fiscal year 1985, to be made available to States to fund innovative methods of interstate enforcement and collection. Federal audits will also focus on States' effectiveness in establishing and enforcing obligations across State lines.

- Equal Services for Welfare and Nonwelfare Families

  The Act amends section 451 of the Social Security Act to provide that Congress, by creating the Child Support Enforcement Program, intended to aid both nonwelfare and welfare families. In addition, the Act contains several specific requirements directed at improving State services to nonwelfare families. All of the mandatory practices discussed above must be made available for both classes of cases; the interception of Federal income tax refunds is extended to nonwelfare cases; incentive payments for nonwelfare cases will be available for the first time; when families are terminated from the welfare rolls, they automatically must receive nonwelfare support enforcement services without being charged an application fee; and States must publicize the availability of nonwelfare support enforcement services.

- Other Provisions

  In addition to those provisions identified above, the Act requires that States (1) collect support in certain foster care cases; (2) collect spousal support in addition to child support where both are due in a case; (3) notify AFDC recipients, at least yearly, of the collections made in their individual cases; (4) establish State commissions to examine, investigate, and study the operation of the State's child support system and report findings to the State's governor; (5) formulate guidelines for determining appropriate child support obligation amounts and distribute the guidelines to judges and other individuals who possess authority to establish obligation amounts; (6) offset the costs of the program by charging various fees to nonwelfare families and to delinquent absent parents; (7) allow families whose AFDC eligibility is terminated as a result of the payment of child support to remain eligible to receive Medicaid for 4 months; and (8) seek to establish medical support orders in addition to monetary awards. In addition, the Act also makes the Federal Parent Locator Service more accessible and effective in locating absent parents. Sunset provisions are included in the extension of Medicaid eligibility and Federal tax offsets for non-AFDC families.

APPENDIX B
Paternity Probabilities: Attack and Rebuttal

RESERVATIONS ABOUT THE PATERNITY PROBABILITY

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The victim of a hit-and-run incident testifies that he is certain that he remembers one letter and one number on the license plate of the car that hit him. He reports that the last of the three letters was A, and the last of the three numbers was 3. He cannot recall the other letters and numbers. The woman charged in the case drives a car with plate JKA 123. The prosecuting attorney presents an expert witness who testifies that on the basis of this evidence alone, the probability that the accused woman committed the hit-and-run is .9962, or 99.62%.

The computation is simple. If the woman is guilty, then the probability that her plate would match the recall of the victim is 1, or 100%, because the victim is so sure of his testimony. On the other hand, if the woman is innocent and was in effect selected for accusation at random, then the probability that her plate would match the victim's description is 1/260. This latter figure is calculated by observing that the chance of a matched letter is 1/26, the chance of a matched number is 1/10, and since the two outcomes are independent, their probabilities may be multiplied to form the chance of their joint occurrence. Finally, we compute the guilt index by dividing the former probability by the latter (GI = 260) and then the probability of guilt by the formula PG = GI/(1+GI) = .9962.

The expert witness testifies that the calculation is mathematically correct (it follows from Bayes' Theorem) and based on empirical facts (the Department of Licenses reports that except for a very small fraction of vanity plates, all letters and all numbers are equally likely on a randomly chosen license plate). He may also report that it is methodologically identical to the paternity probability calculation that was popularized in the 1970s and has come to be accepted in many courts.

Although this little example may appear to have no relationship to paternity, it is true that virtually all experts in the area of paternity testing are agreed that the fundamental logic of the preceding probability calculation is sound. To a few of us, however, it seems as though the paternity probability, like the above probability of guilt, risks overstating the evidence on which it is based, and we have expended some modest effort in trying to explain why this is so.

Direct v. Circumstantial Evidence

Direct evidence is evidence that, if believed, requires no further argument in order to establish the fact at issue. If the victim had seen the face of the woman as she drove the car that hit him and had recognized her in court, this would be direct evidence.

Circumstantial evidence is evidence that, if believed, does require a further argument in order to establish the fact at issue. The victim's partial recall of a license plate matching that of the accused woman is circumstantial evidence. That a particular man is genetically capable of having produced a given child is also circumstantial evidence.

The probability of guilt claims to be direct evidence. After all, if a scientifically determined probability of the woman's guilt is .9962, then it would be irrational to argue that she is innocent. The probability of paternity also claims to be direct evidence.

The conclusion must be that the reasoning behind the probability calculation provides the additional argument necessary to transform circumstantial into direct evidence. It is necessary to examine this reasoning before accepting the argument.

What Do Scientists Do?

The problem of determining whether a given man is the father of a given child bears similarity to the medical problem of deciding whether or not a given individual suffers from a particular disease. In each case there are two alternatives (he is the father or he isn't; the subject has the disease or doesn't), and a test is available that behaves differently depending on that of the alternatives is true.

This being so, it is informative to discover how the medical profession handles the diagnostic problem. The methodology is well-developed and consists of carrying out a study in which a number of individuals known to have the disease are tested, and then a second group of individuals known not to have the disease are similarly tested. The figures reported from such a study are the "true positive rate," which is the fraction of all nondiseased individuals who test negative. To the extent that these two rates are high, the test is regarded as being a valid indicator of the presence or absence of disease, and its results are relied on.

The logic is quite simple. No matter whether the person has the disease or not, the test has a large probability of correctly signifying the presence or absence of disease, and therefore we should accept its conclusion. No probability of disease or nondisease need be computed, because to do this computation (using Bayes' Theorem) requires an assumption (the prior probability of disease) that is less closely connected to the particular person than are the test results.

In paternity testing, the true negative rate is called the probability of exclusion (PE), which is the probability that a nonfather would be excluded by the blood tests. Because of advances in identifying multiple systems, it has become possible to design a battery of tests with true negative rates above .99.

The true positive rate is so seldom discussed in the paternity testing literature that it does not have a special name. It has probably never appeared on any laboratory report, and there is some question whether a typical serological laboratory even knows what the true positive rates of its tests are.

The reason for this may be that the true positive rate (probability of not excluding a true father) is implicitly regarded as 100%. Among the possible arguments that a lower figure is more appropriate are (1) the possibility of mutations or other genetic anomalies and (2) the lack of perfect reliability of blood tests.

As to the first, the probability of a mutation is regarded as being very small and is typically neglected. However, since one often encounters small probabilities in paternity calculations, this does not seem to be a sufficient reason to ignore it.

The second is more important, because it may involve larger probabilities and may be less accurately known. Some laboratories do not publicly admit any error rate in their tests, while some others report rates of 1% to 1.5%. It is usually unclear what the rates refer to or how they are ascertained. This point is of some significance, because it seems unreasonable for a laboratory whose test reliability (on a per case basis) is 98.5% to report paternity probabilities in excess of this figure.

It is to be emphasized that the true positive and negative rates are not only properties of the serological tests but also of the laboratories that carry them out.

One final advantage of true positive and negative rates is that it is possible to obtain accurate empirical estimates of them apart from any reference to paternity disputes and with a minimum of assumptions about population genetics. In order to empirically validate paternity probabilities it would be necessary to mount a costly and very difficult direct study of paternity cases themselves. It is unlikely that this will ever be done.

In addition to the assessment of its own internal error rates, a laboratory should be required to adhere to the same guidelines that are customarily imposed in blinded clinical studies. Many laboratories, perhaps most of them, do not do this.

Comparison of Probabilities

Granted that the production of a paternity probability based on genetic evidence is a worthy goal, there are some choices among methods by which it could be calculated. The customary paternity probability calculation is one method, but it is worthwhile to consider at least one alternative.

A key ingredient of the paternity probability is the probability that a man of the alleged father's phenotype would, in conjunction with a woman of the mother's phenotype, produce offspring with the child's phenotype. We shall call this the joint offspring probability of the mother and alleged father.

This probability is easy to compute but difficult to interpret by itself. What is required is some other probability (or probabilities) with which it can be compared. It would seem to be apparent that the most relevant probabilities for comparison would be the joint offspring probabilities of other men who might plausibly be considered as possible fathers. If blood from these other plausible fathers could be drawn, then their joint offspring probabilities could be compared to those of the alleged father, and a probability of paternity be established for each man. This would use the Bayesian methodology that has been accepted by paternity testers. It would provide a complete set of genetic evidence for the computation of paternity probabilities.

Nearly all paternity probabilities are obtained without this complete set of evidence. The comparison probability that is actually calculated is the probability that a woman of the mother's phenotype would produce offspring of the child's phenotype. We shall call this the mother's offspring probability. In order to get around the difficulty that the true father's phenotype would be unknown in this case, it is assumed that the father's genes were obtained by a random draw from some large population. This is generally called the "random man" hypothesis.

Consider these figures from an actual case. The joint offspring probability of the mother and alleged father was .006, and the mother's offspring probability was .00007. The paternity index (PI) was then .006/.00007 = 85.7, and the paternity probability was 85.7/86.7 = .989.

It was extremely unlikely in this case that the alleged father produced the child (.006), but the paternity probability was high (.989). The reason it was high is that, even though the chance of the alleged father producing the child was small, the probability of a "random man" having produced it (.00007) was much smaller. Comparing these probabilities by forming their ratio (85.7) led to the result.

The crux of the issue is whether this comparison is reasonable. Paternity testers argue that if the alleged father were not the true father, then the only reasonable way to compute the mother's offspring probability is by a genetic random draw. Although this argument is true as far as it goes, it does not address the question whether the most reasonable calculation one can carry out is sufficiently reasonable to form the basis of a judgment. It does not weigh the cost of obtaining the blood types of the other plausible fathers against the risk of producing a misleading probability without them. Actual Bayesian decision-making would take these costs and risks into account and could lead to the conclusion that further evidence is required before a decision should be reached. Paternity testers use a simplified version of Bayesian methodology that ignores this issue.

Responsible paternity testers have repeatedly emphasized that additional factors need to be considered in conjunction with the paternity probability, but it is not clear that their warnings find much expression in its day-to-day application. Some proponents of the paternity probability would evidently go so far as to say that once it reached some very high value, the introduction of additional evidence becomes unnecessary. This amounts to asserting that genetic evidence alone is sufficiently complete for a judgment, which is a determination that properly belongs in the sphere of law, not genetics.

If the paternity tester's rationale for computing the PI ratio were generally acceptable, then it would not be particularly difficult to convert circumstantial evidence into direct evidence in a wide variety of situations. The reason is that if one computes the probability of an outcome using much evidence (a proximal probability) and then recomputes it using little evidence (a distal probability), then the former will virtually always be larger than the latter.

In trying to forecast human events, if one takes enough aspects of a situation into account, then all possible outcomes are unlikely. Even the outcome that eventually happens would have been given a small distal probability. However, as one draws closer to the event and becomes aware of more and more of its aspects, the proximal probability of the actual outcome becomes larger.

Thus, once we know that the alleged father is not excluded from paternity, we can calculate a joint offspring probability (proximal) that will nearly always be much larger than the mother's offspring probability (distal). The difficulty that arises when Bayesian methods are applied to proximal and distal probabilities has been raised as an objection to routine, unconsidered employment of these methods.

On the other side, the comparison of proximal and distal probabilities only becomes an issue after the alleged father has not been excluded from paternity. It is a powerful theoretical property of genetic testing that it should have large true positive and true negative rates. Once the accused man has not been excluded, there is clearly genetic evidence that he is the true father. Nevertheless, there does not seem to be any overpowering reason to follow a legitimate test (finding that the accused man is not excluded) by a further test that inappropriately compares proximal and distal probabilities.

Probabilities Without Evidence

The most persistent objection that non-Bayesian statisticians have brought against Bayesian methods is that the Bayesian must at some point introduce (prior) probabilities based on no evidence. The Bayesian counterargument is that, as empirical evidence accumulates, the choice of the prior probabilities has a negligible influence on the final decision.

The paternity testers assign prior probability of .5 to each of the two alternatives, that the alleged father is the true father or that he is not. They justify this by saying (1) that any other assignment of prior probabilities favors one side or the other and (2) that the actual fraction of mothers who correctly identify fathers is higher (3 of 4), so that the alleged father cannot complain that the prior disfavors him.

With regard to the first justification, we have seen that a complete genetic analysis of paternity would consider all plausible fathers, and it seems reasonable that an assignment of prior probability that is fair to all of them would give each the same prior probability of being the true father. The paternity tester's adoption of a .5 prior for the alleged man is equivalent to the assumption that there is only one other plausible father. No doubt this is reasonable in some cases, but again one needs to ask whether it is better to assume only one other plausible father or to actually find out how many there are. What this point illustrates is that it is very difficult to produce a paternity probability that is based strictly on genetics, with no further nongenetic assumptions.

With regard to the second justification, it is fairly clear to the legal profession that historical conviction rates are not admissable as evidence in a particular case. Even if 99% of all murder trials had resulted in conviction in a jurisdiction, this would not lead to the decision to declare all future trials irrelevant and proceed immediately to the highly probable guilty verdict. Whether the asserted 75% identification rate of true fathers in paternity cases should be allowed to influence the allocation of prior probabilities is a question that should be decided by jurists, not geneticists.

Conclusion

There is no question that genetic tests are immediately relevant in paternity cases, nor is there any serious dispute that the laboratory tests are scientific in character. There is, however, some controversy over how the laboratory results should be presented.

Since the science of genetic testing has progressed to the point that the information it can bring to bear on paternity cases is strong and convincing, it seems unnecessary to risk calling that information into question by reporting it in a manner that is subject to

challenge. There does not seem to be any compelling reason to depart from the model that is usual in reporting the results of a medical test. One need only quote the true positive and true negative rates of the test and the result in the particular instance. If this presentation of evidence is not persuasive, then no useful purpose would be served by carrying out dubious comparisons of proximal and distal probabilities.

Consumers of the products of serological testing should be less concerned that the laboratory can calculate an impressive paternity probability and more concerned that it can provide convincing, accurate estimates of the true positive and true negative rates of the tests it actually performs, including an assessment of its unreliability or error rates.

GUIDELINES FOR REPORTING ESTIMATES OF PROBABILITY OF PATERNITY*

Richard H. Walker

"Some Fallacies in the Computation of Paternity Probabilities" by Mikel Aickin [1] purports to discredit the Guidelines for Reporting Estimates of Probability of Paternity established by the American Association of Blood Banks [2]. Dr. Aickin's assumptions, reasoning, and statements require a response since they challenge the fundamental logic employed in the laboratories of the United States, Europe, and Scandinavia in calculations and the reporting of results in nonexclusion cases.

The recent alarming increase in illegitimate births in the United States has intensified interest in establishing paternity of these infants. Blood tests offer the best means of providing valuable objective evidence for or against paternity of men alleged to be fathers.

An international conference was convened by the American Association of Blood Banks (AABB) at Airlie, Virginia, in May 1982 under a grant from the Office of Child Support Enforcement of the U.S. Department of Health and Human Services in order to develop consensus in the method of calculating and reporting the probability of paternity when there is a failure to exclude the alleged father in paternity disputes. The AABB perceived a need for a uniform method to enhance credibility and communication to the courts. The Guidelines were developed after hearing various proposals and arguments from experts in the field. Eight experts in paternity testing from Europe, Scandinavia, and England were invited to participate together with several workers from the United States in this conference. In addition, two consultants in population genetics and biostatistics were invited to critique the presentations. These four consultants were selected because they were not involved in parentage testing and therefore could take an impartial look at what was presented and the logic of the calculations. A number of other diverse, invited experts in mathematics, jurisprudence, and genetics participated. Dr. Aickin was one of the contributors to this conference.

The invited experts were given one test case to evaluate in which there was no exclusion of the alleged father. Gene/haplotype frequency tables were supplied for the calculations. The test case involved a total of six genetic systems and included systems in which the maternal and paternal gene contributions to the child were obvious as well as systems where alternative possibilities existed. The HLA system analysis was complex since blanks existed at both the A and B loci in the child.

All 14 participants who responded to the test case obtained the same result although different styles and logic were employed. This achievement is of great significance since it reflects international unanimity in terms of the mathematical result.

*The rebuttal to Dr. Mikel Aickin's article, "Some Fallacies in the Computation of Paternity Probabilities," was submitted in the form of a letter to the editor of the American Journal of Human Genetics in October 1984 and subsequently appeared in the Journal in August 1985. Written permission has been received by the author, Dr. Richard H. Walker, William Beaumont Hospital, Royal Oak, Michigan.

Various proposals and methods were discussed and debated during the conference. A strong case for reporting the probability of paternity based upon the failure to exclude after using multiple systems was proposed by Dr. C. C. Li; [3]. This suggestion was given very deliberate consideration by the Committee and was recognized as having great merit. After a review of this and other proposals and suggestions, the Committee on Parentage Testing of the AABB developed the Guidelines for use by laboratories in the United States.

The Guidelines have been subsequently approved by the Board of Directors, American Association of Blood Banks; Section of Family Law, American Bar Association; and Council on Scientific Affairs, American Medical Association.

These Guidelines do not require the reporting of any specific numerical expression but they do indicate that some mathematical estimate of the probability of paternity should be calculated from the observed phenotypes of the mother, child, and alleged father when there is a failure to exclude.

The Paternity Index (PI), referred to by Aickin as the likelihood ratio (LR), has become established as the basic mathematical expression employed by most laboratories in the United States and Europe. This value can also be transformed into a percentage expression using .5 as a prior probability value. This percentage expression, the probability of paternity, is the estimate most familiar to the legal community and the courts. The calculation is based entirely upon the genetic markers identified in the trio and does not consider any nongenetic evidence in the case such as access, impotency, sterility, and other men who could be the biological father.

Aickin's paper considered "three basic fallacies" in the probability of paternity statement used by laboratories engaged in paternity testing. Dr. Aickin's first argument is that the statement of probability of paternity is a fallacy since the "figure is not, in fact, the probability that the alleged father is the true father." The PI is a statement of probabilities in the form of a ratio that expresses the probability that a man with the same phenotype as the alleged father is the biological father of a child with the phenotypes observed when he is compared to an untested man from the same population. The assumption is made in one-man cases that the biological father was either the alleged father or an untested man often referred to as a random man. As Dr. Aickin points out, the PI is not exclusive for the alleged father but applies equally to all men of the same phenotype as the alleged father. Such a consideration is implicit in the definition of the PI ([2], pp. 475 and 656). However, Dr. Aickin avoids pursuing this matter to its logical conclusion. The relevant sequel to this statement is the question: How many men are there who have the same phenotype as the alleged father? The answer depends upon the extent of genetic testing performed in each case under consideration, but the value is frequently less than 1 in 100,000 ([2], p. 31).

The second criticism of Dr. Aickin involves factors that are unknown to the testing laboratory and therefore cannot be used in the calculation. Dr. Aickin has indicated that even in one-man cases there may be other "plausible fathers" beyond the man named by the mother, that is, the alleged father being tested. This may certainly be true, but such information is unknown to the laboratory and therefore cannot be used in a calculation. Thus, a neutral prior probability is used in the calculation. The reported probability of paternity can be adjusted up or down based upon the weight of other evidence in the case. However, such an adjustment is not in the province of the laboratory scientist. This is the

responsibility of the judge or jury charged with evaluating all of the evidence in the case. The calculation does, however, consider all possible (compatible) fathers in the denominator of the PI by selecting the untested man using gene frequencies established from a large population. The gene frequencies utilized are based on the racial origin rather than geography and are used in both the numerator and denominator of the PI.

In those rare cases where more than one man is tested, experience has demonstrated that it is usual for all but one man to be excluded. When more than one man is not excluded in a single case, a calculation of the relative probability of paternity can be given for each nonexcluded man. Formulas for such calculations have been published by Prof. K. Hummel [4]. However, the question of access to the mother, frequency of intercourse, and potency and fertility of each plausible father consitute additional variables that would also be unknown and therefore could not be accurately quantitated.

Although the race of the biological father is unknown, it is important for the laboratory to use gene frequencies in the calculation from a carefully selected and large sample of the population of the same race claimed by the mother and alleged father. Gene frequency tables have been published by the AABB ([5], p. 29 ff.) for use by parentage testing laboratories in making these calculations.

Dr. Aickin's third challenge involves the estimation of genotype frequencies within a given phenotype when silent alleles may be present. He asserts that genotype frequency assignments within such phenotypes represent "speculation about random draw." In practice, such assignments are based upon published tables of gene frequencies that are then utilized in the Hardy-Weinberg formula to estimate genotype frequencies within phenotypes. Fundamental genetic principles are applied to the calculations of both genotype frequencies and gamete frequencies.

Dr. Aickin cites the example of a group B mother with an O child and points out that the biologic father must contribute an O gene. He then states that "whether a man additionally carries A or B or another O gene is irrelevant to paternity." While it is true that the only requirement for a man to be the biologic father is to carry an O gene, it is not true that the chances of men whose phenotypes are A, B, and O all have equal chances of transmitting an O gene. The PI values for these phenotypes are as Dr. Aickin indicates: 0.63 for A, 0.72 for B, and 1.51 for O. This observation clearly demonstrates that the group O alleged father is over two times more likely to contribute an O gene than is a group A alleged father. In fact, the O alleged father cannot contribute a wrong gene while the group A alleged father has a 58% chance of transmitting an A gene that is incompatible with paternity. An obvious implication by Dr. Aickin would be that genetic counseling is of no value in instances where the phenotype does not reflect the genotype. A random woman is not equally likely to produce a hemophiliac son as is a woman known to be the sister of a hemophiliac. However, both carry normal genes. Neither are A, B, and O fathers equally likely to produce O children. Their relative chances of producing an O child can be calculated using the basic principles of population genetics. Of course, any of them could produce such a child but the probabilities are not the same. The fact that the "LR may be enormous" does not necessarily mean that it is incorrect but rather may indicate a true statement of the probabilities.

We agree that family studies would be of value in yielding an improved estimte of the probability of paternity. Such studies should not be limited to the alleged father or plausible fathers, but may also be informative and helpful when the mother's family is studied. Major problems, however, are state statutory laws, cooperation, and illegitimacy.

The principles used in the calculations for the probability of paternity require not only a knowledge of basic algebra and probability, but also the fundamentals of blood group genetics including the Hardy-Weinberg principle. Any expression from the laboratory relating to the probability of paternity should only be used with other evidence in the case in the resolution of the paternity dispute. The blood test results, however, do provide valuable objective evidence in these matters. Such objective evidence should not be ignored.

REFERENCES

1. Aickin M: Some fallacies in the computation of paternity probabilities. Am J Hum Genet 36:904-915, 1984.

2. Walker RH. ed: Inclusion Probabilities in Parentage Testing, Arlington, Va., American Association of Blook Banks, 1983, p. xiv.

3. Li CC, Chakravarti A: On the exclusion and paternity probabilities, in ibid., pp. 609-622.

4. Hummel K: Biostatistical Opinion of Parentage Table--Part 1. Stuttgart, West Germany, Gustav Fischer Verlag, 1971, p. 95.

5. Silver H: Probability of Inclusion in Paternity Testing, Arlington, Va., American Association of Blook Banks, 1982.

GLOSSARY

Absent Parent	Any individual who is absent from the home and who is legally responsible for providing financial support for a dependent child.
Abstract of Judgment	An official, certified copy of a court judgment that states the names of the parties in the case, the amount of the judgment, and the judge who rendered the judgment or the court in which it was rendered.
Acknowledged Father	The natural father of a child born out of wedlock for whom paternity has been established by admission or stipulation.
Action	An ordinary proceeding in a court by which one party sues another.
Adjudication	The entry of a judgment or decree by a judge after all claims of the parties have been heard and a verdict returned.
Admission	A voluntary or implied acknowledgement, confession, or concession of the existence of a fact or the truth of an allegation, made by a party to the case.
Administrative Determination Of Support	A support obligation arrived at through an administrative process.
Administrative Enforcement	Powers granted to a State agency by statute that allow it to seize an absent parent's real or personal property without initial reliance on the judicial system.
Administrative Process	An adjudicatory system established in a State administrative agency by statute for establishing and enforcing child support obligations, and at the State's option, for determining paternity.
Affidavit	A sworn statement in writing made under oath or on affirmation before an authorized officer.
Agglutination	Clumping of the red blood cells caused by the formation of "antibody bridges" between antigens on the membrane of the different cells.
Aid	Aid to Families with Dependent Children, emergency assistance, AFDC/foster care, or Medicaid.
Aid to Families with Dependent Children (AFDC)	A category of public assistance paid on behalf of children who are deprived of one or both of their parents by reason of death, disability, or continued absence (including desertion) from the home.

Allegation	The assertion, declaration, or statement of a party to a case, made in a pleading, setting out what is expected to be proved.
Alleged Father	A person who has been named as the father of a child born out of wedlock, but for whom paternity has not been established.
Allele	One of two or more genes that determine alternative characters in inheritance and are located at the same locus on all homologous chromosomes.
Answer	A pleading by the defendant in a civil case that contests or admits the plantiff's allegations of facts set forth in the complaint.
Antibody	A specific gamma globulin that appears in the plasma, serum, or other body fluids as a result of antigenic stimulation and that reacts specifically with such antigen in some observable (i.e., agglutination, hemolysis, etc. There are two classes of antibodies: Immune--an antibody produced in response to blood either through blood transfusions or as a result of pregnancy. Natural--an antibody without history of any "outside antigenic stimuli" such as exposure to blood (i.e., Anti-A and/or Anti-B).
Antigen	An enzymatic or toxiod substance present on the red and white blood cell membranes to which the body reacts by producing antibodies.
Appeal	The request of a party to a higher court to review the rulings made in a lower court, or administrative tribunal, for possible errors that would justify overruling the judgment and perhaps granted a new hearing.
Applicant	The caretaker relative, the children, and any other individual whose needs are considered in determining the amount of assistance.
Arrearage	The total unpaid support obligation owed by a responsible person.
Assignment	An AFDC eligibility requirement whereby all applicant/recipients must assign to the State all rights they may have in their own behalf or in behalf of a dependent child for whom assistance is sought or paid.
Assistance	Support money or goods granted to a person or family, based on income.
Blood Group	Classification of blood according to antigens present or absent on the red blood cells.

Burden of Proof	The necessity or duty of affirmatively proving a fact in dispute on an issue raised between the parties.
Caretaker	The person responsible for a dependent child's health or welfare who has temporary or legal custody of the child.
Certificate of Service	A signed writing by which a person who served process on a defendant vouches that the service was performed.
Certify	To vouch formally for the accuracy of facts by a signed writing.
Chromosomes	Ribbonlike structures within the cell nucleus, which are the basis of heredity. The sections of the chromosome that function to produce physical characteristics are called genes. In humans, there are 23 pairs of chromosomes in each nucleated cell of the body that determine everything from hair and eye color to blood type.
Circumstantial Evidence	Evidence directed to the surrounding circumstances, whereby existence of the principal fact in issue may be inferred by the exercise of logical reasoning.
Claim	To demand as one's own; to assert, state, or insist; an allegation made in an action at law.
Comity	The practice by which courts of one State follow the decisions or recognize judgments of another although they are not bound to do so; a willingness to grant a privilege to another State out of courtesy, deference, and good will.
Complainant	Person who seeks to initiate court proceedings against another person. In a civil case the complainant is the plaintiff; in a criminal case the complainant is the State.
Cooperation	A requirement of all AFDC applicants and recipients to assist the State or local IV-D agency in identifying and locating the parent of a child for whom aid is claimed, in establishing paternity, in obtaining support payments for the applicant or recipient and for such a child, and in obtaining any other payments or property due the recipient or the child. Cooperation includes (1) appearing at an office of the State or local IV-A or IV-D agency as necessary to provide verbal or written information, or documentary evidence known to, possessed by, or reasonably obtainable by the applicant or recipient; (2) appearing as a witness at judicial or other hearings or proceedings; (3) providing information, or attesting to the lack of information, under penalty of perjury; and (4) paying to the IV-D agency any support payments received from the absent parent after an assignment of support rights has been made.

Corroborating Evidence	Evidence supplementary to that already given and tending to support or strengthen it.
Court of Record	A court whose proceedings are permanently recorded by a court reporter or by electronic device. Courts not of record are those of lesser authority whose proceedings are not permanently recorded.
Credibility	That quality in a witness that renders his or her testimony worthy of belief.
Cross Examination	The examination of a witness by the opposing party to test the truth of his or her testimony, to further develop it, or for other purposes.
Default	The failure of a defendant to file an answer or appear in a civil case within the prescribed period after having been properly served with a summons and complaint.
Defendant	In civil proceedings, the party responding to the complaint; one who is sued and called on to make satisfaction for a wrong complained of by another (the plaintiff). In criminal proceedings, the accused.
Department of Health and Human Resources (DHHS)	Formerly the Department of Health, Education, and Welfare; an executive agency of the Federal Government that administers, among other programs, the IV-A, IV-D, and Medicaid Programs.
Dependent	A person to whom a duty of support is owed.
Deposition	The testimony of a witness taken on interrogatories not in open court but in pursuance of a commission to take testimony issued by a court, or under general law on the subject, and reduced to writing and duly authenticated, and intended to be used upon the trial of the action in court.
Deserted or Abandoned Child	Any child whose eligibility for AFDC is based on continued absence of a parent from the home (e.g., a child from a broken home or a child born out of wedlock).
Discovery	Pretrial procedure by which one party gains vital information concerning the case from others who have knowledge or possession of this information. It is used in preparation of the party's case. Examples are depositions and interrogatories.
Docket	A formal, brief record of proceedings in court; minute entries in case files; the court calendar. Some courts refer to filing a paper with the court as docketing.

Due Process	The conduct of legal proceedings according to those rules and principles established in our system of law for the enforcement and protection of civil rights. Its most essential elements are a court with proper jurisdiction over the subject matter and the defendant, notice to each party, the opportunity for each party to present evidence and to challenge the opposing party's evidence, orderly procedures, and a neutral and unbiased trier of fact who determines the facts and decides the issues only on the basis of the persuasiveness of relevant evidence properly admitted. Due process is a safeguard against unreasonable, arbitrary, and capricious decisions.
Electrophoresis	The movement of colloidal substances suspended in a fluid, caused by the application of an electrical current under controlled conditions.
Enzymes	Various proteinlike substances that act as organic catalysts in initiating or speeding up specific chemical reactions.
Execution	A judicial writ empowering an officer to carry out a judgment by seizing the judgment debtor's real or personal property.
Exhibit	A writing or other article marked for identification and shown to the trier of fact during a court proceeding.
Federal Parent Locator Service	The system devised and operated by OCSE used to search Federal Government records to locate absent parents.
Fraud	False statements made to State officials with the intent of wrongfully receiving public assistance.
FY	Fiscal year.
Gene	The portion of a chromosome that determines a particular trait. The unit of inheritance.
Genetic markers	A varity of structures in the blood that carry inherited characteristics of each person's parents. They are paired: one inherited from the mother and the other from the father.
Genotype	The fundamental group constitution of an individual in terms of one's hereditary factors (i.e., A/O, CDe/cde).
Grant Amount	The amount of public assistance granted to a family.
Haplotype	A collection of antigens whose determining genes are closely grouped on a single chromosome so that they are inherited en bloc. Since an individual inherits two such groups of antigens, one from each parent, each haplotype represents half of his or her full complement. (i.e., HLA-A1/B8; HLA-A2/B14).

Heterozygous	Having two different alleles at the corresponding loci of a pair of chromosomes. (Having inherited unlike genetic material from each parent.)
Histocompatibility	A condition of compatibility between the tissue of a graft or transplant and the tissue of the body receiving it.
Homozygous	Having identical alleles at the corresponding loci of a pair of chromosomes. (Having inherited like genetic material from each parent.)
Human Leukocyte Antigen (HLA)	A highly complex genetic system of multiple alleles located on the surface membrane of the white blood antigen cell (or leukocyte) and other body tissue. It is also referred to as the Histocompatibility System.
Initial Enforcement Techniques	Methods that may be used to convince an absent parent to pay child support without involving a court of law (usually centers around personal contact and persuasive arguments).
Initiating State	The State in which a URESA proceeding is commenced and where the obligee is located.
Interrogatories	A discovery technique where parties clarify the issues of a pending trial by submitting written questions that must be answered under oath.
IV-A	Title IV-A of the Social Security Act is that portion of the Federal law establishing and prescribing the Aid to Families with Dependent Children.
IV-D	Title IV-D of the Social Security Act is that portion of the Federal law establishing and prescribing the Child Support Enforcement Program.
Judgment	The official decision or finding of a court on the respective rights and claims of the parties to an action; also known as a decree or order and may include the "findings of fact and conclusions of law."
Jurisdiction	"Concurrent jurisdiction"--The authority of several different courts to deal with the same subject matter. "Jurisdiction of the person"--The court's power to subject parties in a particular case to decisions and rulings made in the case. "Subject-matter jurisdiction"--The court's authority to deal with the class of cases to which a particular case belongs. "General jurisdiction"--Judicial authority extending to all cases without any limitation on subject matter.

	"Limited jurisdiction"--Judicial authority extending to only those classes of cases and proceedings specifically granted by statute. Common examples are courts with jurisdiction over all civil cases where the amount in controversy is less than a specified amount or with jurisdiction to try all misdemeanors but to conduct only preliminary hearings of felonies. "Territorial jurisdiction"--The geographic limitation of a court's authority to cases arising or persons residing within a defined territory, such as a State, county, or judicial district.
Legal Father	A man who is recognized by law as the male parent of another person.
Locus	The position occupied by a gene on a chromosome.
Motion	An application to a magistrate or judge for an order or ruling.
Non-AFDC	Child support cases in which the custodial parent is not receiving public assistance.
Notarize	The administration of an oath to a person by a public officer who then attests and certifies, by his or her signature and official seal on the document, that the person who signed the document was, in fact, the person whose name appeared thereon.
Objection	The act of a party who takes exception to some matter of proceeding in the course of a trial or hearing.
Obligation	The legal amount of support owed for the benefit of children as ordered by a court or administrative tribunal.
Obligee	The person to whom a duty of support is owed.
Obligor	The person owing a duty of support.
OCSE	The Federal Office of Child Support Enforcement, an agency within the U.S. Department of Health and Human Services.
Opening Statement	A statement by a party or his attorney at the beginning of a trial that advises the judge or jury of facts that will be relied on and of issues in the case to give the trier of fact a general picture of the facts.
Opinion	The statement by a judge or appellate court of the decision reached in regard to a case tried before them, expounding the law as applied to the case, and detailing the reasons on which the judgment is based.

Order	Every direction of a magistrate or judge to a person, made or entered in writing and not included in a judgment.
Overrule	To refuse to sustain or recognize as sufficient an objection made in the course of a trial.
Out-of-State Case	Any support case where the parties reside outside the States.
Paternity Case	An action to determine the parentage of a child born out of wedlock.
Paternity Index (PI)	A ratio (x/y) of the frequency at which the putative father (x) would be expected to produce a given set of obligatory genes, to the frequency at which a random man (y), of the same race, would be expected to produce the same set of obligatory genes. A Paternity Index (PI) of greater than 20:1 is considered strong evidence of paternity.
Payee	Caretaker other than mother or father of child.
Petition	A formal written request submitted to the court asking that a certain thing be done. It states facts and circumstances relied on as a cause for judicial action and contains a formal request (prayer) for relief.
Phenotype	The inherited characteristic of an individual that is evident from the results of tests or from direction observations. Individuals who have the same phenotype may have completely different genotypes.
Plaintiff	A person who brings an action; the party who complains or sues in a civil case.
Plasma	The liquid portion of unclotted blood. It contains, among other constituents, the clotting factor and the antibodies that dictate one's blood type.
Plausibility of Paternity	A ratio (x/x+y) of the frequency at which the putative father (x) would be expected to produce a given set obligatory genes to the total frequency that the same set of obligatory genes is produced in the population. The total frequency (x+y) is the sum of the frequencies for the alleged father (x) plus that of the random man (y). The final result is expressed as a percentage, and a P.P. (Plausibility of Paternity) greater than 95 percent is considered strong evidence of paternity.
Pleading	A written allegation filed with the court of what is affirmed on one side and denied on the other, disclosing to the court or jury the issue between the parties.

Prayer	A request contained in a pleading that the court will grant relief requested.
Precedent	An adjudged case or decision that serves as an example or authority for an identical or similar case or similar question of law.
Preliminary Hearing or Examination	The hearing or examination given by a judge to a person who is accused of a crime, to ascertain whether there is probable cause to require the commitment and holding to bail of the person accused. It is not a trial for the determination of the accused's guilt or innocence. The accused usually does not testify but may use the hearing to test the strength of the State's case.
Prioritization	The classification of cases in descending order of their potential for collections. It is accomplished by isolating case characteristics and determining their potential influence on collection success or failure.
Probable Cause	An apparent state of facts found to exist that would induce a reasonably intelligent and prudent man to believe, objectively, that the accused person committed the crime charged or, when issuing a search warrant, that evidence relating to a crime is located in a particular place.
Prosecutor	A public official who prosecutes a criminal case or litigates civil and criminal child support enforcement proceedings in the name of the government.
Public Assistance	Support money or goods granted to a person or family based on income.
Putative Father	Alleged father; a person who has been named as the father of a child born out of wedlock but for whom paternity has not been established.
Recipient	A person who receives public assistance.
Record	A precise written history of a court action from commencement to disposition designed to remain as permanent evidence of the matters to which it relates.
Red Blood Cell	A mature erythrocyte found in blood. Its primary function is to transport oxygen to all parts of the body. The antigens that determine blood type (ABO-Rh, etc.) are located extracellularly while isoenzymes (red cell enzymes) are contained intracellularly. Both are useful determinants in assigning parentage.
Redirect Examination	Examination of a witness by the party who called the witness. It is conducted after cross-examination to rehabilitate the witness or amplify matters discussed in cross-examination.

Regulation	A rule or order promulgated by a administrative governmental agency.
Relevancy	Quality of evidence that bears directly on a fact in issue and tends to prove the existence or nonexistence of a fact.
Reporter	(1) A person who records court proceedings for an official record prepared therefrom; (2) a commercial publication that contains judicial opinions, such as the Southeastern Reporter published by West Publishing Company.
Responding State	A State receiving and acting on an interstate child support case.
Responsible Parent	Any individual who is legally responsible to provide financial support for a dependent child.
Rule	A standard, guide, or regulation either promulgated by an entity possessing supervisory authority or accepted by tradition as principle of law.
RURESA	Revised Uniform Reciprocal Enforcement of Support Act (see URESA).
Secretary	Secretary of Health and Human Services (formerly Health, Education, and Welfare).
Serum	Plasma. The clear, liquid portion of blood, devoid of cellular material. It contains the antibodies that react with a specific antigen to characterize blood type (ABO-rh).
Service of Process	The delivery of a writ, summons, or other notice to the party to whom it is directed for the purpose of obtaining personal jurisdiction over and notice to that party.
State	The individual States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.
State Parent Locator Service	The organization in a State charged with the duty of locating absent parents for establishing or enforcing child support obligations.
State Plan	The written plan for child support enforcement required by Section 454 of the Social Security Act. Each State must submit such a plan containing mandated characteristics.
Statute of Limitations	A legislative enactment that prescribes the period of time within which a civil suit must be brought on a certain claim.

Statutes	Laws enacted by legislatures; they are arranged into codes.
Stipulation	An agreement between parties through their attorneys, if any, respecting business before the court. Most stipulations are required to be in writing.
Summons	A notice to a defendant that an action against him or her has been commenced in the court issuing the summons and that a judgment will be taken against him if he fails to answer the complaint within a specified time.
Title IV-A	Title IV-A of the Social Security Act is that portion of the Federal law covering the public assistance program.
Title IV-D	Title IV-D of the Social Security Act is that portion of the Federal law covering the Child Support Enforcement Program.
Title IV-D Agency	A single and separate organizational unit in a State that has the responsibility of administering the State Plan under Title IV-D of the Act.
Uniform Reciprocal Enforcement Support Act (URESA)	A uniform law that sets forth reciprocal legislation concerning the enforcement of support between the States. All States have passed a form of URESA.
White Blood Cell	Any of the small colorless cells found in the blood that are important in the body's defense mechanism against infection. They are found throughout the body, not only in blood, but also in the lymph nodes and tissue. The antigens that comprise the HLA type are found on the surface membrane of the white blood cell. (Also referred to as a leukocyte.)

PUBLICATION EVALUATION

A Guide for Judges In Child Support Enforcement

SECOND EDITION

YOUR RESPONSES TO THE FOLLOWING QUESTIONS WILL ASSIST US IN PRODUCING PUBLICATIONS WHICH ARE RESPONSIVE TO THE NEEDS OF THE CHILD SUPPORT ENFORCEMENT FIELD.

1. Indicate your assessment of the material contained by rating the following items. (Circle the number which represents your opinion; 5 being high and 1 below low.)

   a) Clarity of the information presented (i.e., was the language clear and easy to understand; were the major concepts easy to identify?)

Very Clear	6	5	4	3	2	1	Not Very Clear

   b) Sequence in which topics were discussed

Very Logical	6	5	4	3	2	1	Not Very Logical

   c) Usefulness of Information

Very Useful	6	5	4	3	2	1	Not Very Useful

   d) Relevancy of information provided to your work needs

Very Relevant	6	5	4	3	2	1	Irrelevant

2. Please rate the overall quality of this document.

Excellent	6	5	4	3	2	1	Poor

3. How do you plan to use the material? (Check all that apply.)

_____ Reference
_____ Develop new procedures
_____ Adapt current procedures
_____ Share information with staff
_____ Training
_____ Education
_____ Personal Interest
_____ Other: (please specify)

4. What concepts presented in the publication were of most value to you, and why?

——OVER——

5. Do you have any suggestions on how this document could be improved? (i.e., the content, the sequence, the format used to present the material, the level of detail provided, and the clarity of the information.)

6. Comments:

7. Job Title _____

8. Name _____
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THANK YOU FOR YOUR COOPERATION

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