FAMILY LAW

FIFTH EDITION

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INTRODUCTION

As we have seen, family law is primarily governed by state law. One of the rallying cries of states’ rights enthusiasts is that we don’t want federal courts telling us when someone can be divorced or adopted. By and large, state control over family law has remained intact. This was also true of the law of child support until the 1970s, when Congress began passing laws that offered funding to states that complied with federal standards for the enforcement of child-support orders. This led to major changes in every state. One of the most significant was to require employers to withhold child-support payments from the paychecks of delinquent parents, usually noncustodial parents who did not have physical custody of their children. Congress determined that letting every state design its own child-support system was not working in light of the growing number of children living in poverty and the enormity of the cost assumed by welfare agencies (primarily financed with federal funds) when noncustodial parents abandoned their child-support obligations. While the changes have dramatically increased child-support collection, the problem has not been solved. The average amount of child support received by a custodial parent is $3,543 per year.¹ This covers less than half of a child’s support needs.

We begin our examination of child support with an overview of the considerations facing a divorcing couple in their separation agreement—before child-support agencies and the courts become involved.

**SEPARATION AGREEMENT**

When the parties are negotiating the child-support terms of a separation agreement, they need to consider a wide range of factors:

- According to state guidelines, what is the minimum amount of child support that must be paid to the custodial parent? Do the parents want to exceed the minimum? If they have the resources to meet the minimum, they cannot agree to a child-support amount that is *lower* than what the guidelines mandate. (Yet there is a danger that a parent might agree to accept a very modest amount of child support out of fear that the other parent will contest custody or will commit physical violence.) When the separation agreement eventually comes before the court for approval, the child-support terms will be rejected if they fall below the minimum specified by the guidelines, which we will consider in detail later. Parents cannot bargain away the basic need of their children for support.

- What standard of living was the child accustomed to during the marriage?

- Do the providers of support have the financial resources to maintain this standard of living?

- What are the tax considerations? First, unlike alimony, child-support payments are not deductible by the provider (see chapter 11). Consequently, the provider or payor may try to convince the other parent to agree to a lower child-support payment in exchange for a higher alimony payment in order to take advantage of the deduction. Alimony payments, unlike child-support payments, are taxable to the recipient. Hence, the alimony recipient (payee) will usually want some other benefit to compensate for the increased taxes that will result from agreeing to the higher alimony and lower child-support payments (e.g., some extra benefit in the property division terms of the separation agreement). Second, which parent will claim the child as a dependency exemption? If the noncustodial parent wants to claim the child, the custodial parent must agree to cooperate by telling the Internal Revenue Service (IRS) that he or she is releasing the exemption. The separation agreement should specify how the parents propose to handle this tax benefit.

- On what day is each payment to be made?

- How many payments are to be made? One covering everyday expenses and a separate one covering large, emergency expenses (e.g., hospitalization)?

- Will there be security for the payments (e.g., a trust account, an escrow account that can be used in the event of nonpayment)?

- Is the child to be covered by medical insurance? If so, who pays the premiums?

- When the provider dies, is his or her estate obligated to continue payments? If so, must the provider’s will so state?

- Is the child to be the beneficiary of a life insurance policy on the life of the provider? If so, for how much, who pays the premiums, and can the beneficiaries be changed by the provider? Does the payment of premiums (and hence the insurance coverage) end when the child reaches the age of majority?
• Is there an escalation clause? Do the support payments fluctuate with the income of either of the parents?
• Do the support payments fluctuate with the income of the child (e.g., summer jobs, inheritance)?
• Do they fluctuate in relationship to the Consumer Price Index?
• Do the payments end or change when the child reaches a certain age, marries, moves out of the house, or becomes disabled?
• What educational expenses will be covered by the provider? Tutors, preparatory school, college, graduate/professional school, room, board, books, transportation, entertainment expenses while at school, etc.?
• Is the amount of child support reduced for every day the child spends overnight visiting the noncustodial parent (or a relative of the noncustodial parent)? If so, is the reduction a dollar amount or a percentage of each payment?
• When the child is away at school, does the provider have to continue sending child-support payments to the custodial parent? Are payments reduced during these periods? If so, by how much?
• Do school payments go to the custodial parent or directly to a child away at school?
• If disputes arise between the parents concerning child-support payments, what happens? Arbitration? Mediation?

As indicated, parents cannot agree to support a child at an amount lower than the minimum required by state guidelines. Also, many states do not allow parents to agree that child support will be paid as a one-time, lump-sum payment. Attempts to remove a parent’s continuing obligation of support are void in such states. The case of Straub v. B.M.T. presents an even more extreme example of what parents cannot attempt to accomplish through agreement.

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**CASE**

**Straub v. B.M.T.**

626 N.E.2d 848 (1993)

Court of Appeals of Indiana

**Background:** Edward Straub and Francine Todd are having an affair. Straub impregnates her after she agreed not to hold him responsible for children born from the union. But three years after the birth of a child to them (referred to as B.M.T. by the court), Todd sued Straub for child support. The trial court ordered him to pay $130 per week. Straub appealed. The case is now on appeal before the Court of Appeals of Indiana.

**Decision on Appeal:** Affirmed. The agreement to relieve a father of financial responsibility was void as a matter of public policy.

**Opinion of the Court:**

Judge MILLER delivered the opinion of the court. . . .

Straub and Todd began dating in 1985 when both were teachers at the same elementary school. In late 1986, Todd [aged 33] discussed her desire to have a child with Straub after her doctor informed her that artificial insemination would not work. Straub told Todd that he did not want the responsibility of another family due to his age [58] and the fact that he already had children from a previous marriage. However, when Todd threatened to end their relationship, he agreed to try to impregnate her providing she would sign a “hold harmless” agreement. On December 15, 1986, Straub presented Todd with a holographic agreement purporting to hold Straub harmless from financial and emotional support of a child which might result from the couple’s sexual relations. . . . That document, Petitioner’s Exhibit #8, reads in its entirety as follows:

“To Whom it may concern. I Francine Todd in sound mind & fore thought have decided not to marry, but would like to have a baby of my own. . . . I have approached several men who will not be held responsible financially or emotionally who’s [sic] names will be kept secret for life. Signed Francine Todd. . . .

Edward continued to have sexual relations with Francine after the child’s birth but did not establish a...
relationship with the child. He stopped seeing Francine after she filed this action. . . .

I. Is the Agreement against Indiana’s Public Policy?

Indiana has long recognized the obligation of both parents to support their children. In Matter of M.D.H. (1982), Ind. App., 437 N.E.2d 119, 126, the court noted that current statutory provisions relating to support orders for legitimate and illegitimate children are virtually identical. The court stated, “[A] parent’s obligation to support his minor child, legitimate or illegitimate, is a basic tenet recognized in this state by statutes that provide civil and criminal sanctions against parents who neglect such duty. . . .” Id. at 127 (emphasis added).* . . .

Straub first claims that “fundamental contract principles” allow him to contract around his statutory and common-law duty to provide support to his daughter. . . . It is well settled that a parent cannot, by his own contract, relieve himself of the legal obligation to support his minor children. In Ort v. Schage (1991), Ind. App., 580 N.E.2d 335, we held that an agreement to forego court ordered child support even in exchange for a benefit (social security payments) to the child is unenforceable because a parent has no right to contract away a child’s support benefits. Pickett v. Pickett (1984), Ind. App., 470 N.E.2d 751. . . .

Public policy considerations mandate that the state take an active interest in providing for the welfare of illegitimate children in order to avoid placing an undue financial burden on its taxpayers. “The duty of parents to provide necessary support, care, and maintenance for their children, although arising out of the fact of their relationship, may be rested upon the interest of the state as parens patriae of children and of the community at large in preventing them from becoming a public burden, and is, therefore, a duty not only to themselves, but to the public as well. This duty is at the same time a legal and natural obligation, the consistent enforcement of which is equally essential to the well-being of the state, the morals of the community, and the development of the individual.” 59 Am. Jur. 2d Parent and Child § 51 (emphasis added). . . .

Finally, Straub argues that the agreement signed by Todd should be enforced because he was acting merely as a “sperm donor.” He argues that we should follow cases from other jurisdictions which look to the pre-conception intent of the parties involved in deciding whether to enforce their agreement.

Straub’s Brief at 25–27 citing Davis v. Davis (1993), Tenn., 842 S.W.2d 588.† We are not persuaded.

We first note, of course, arguing that Straub’s and Todd’s relationship was that of a sperm donor and donee ignores the facts. It is undisputed that Straub and Todd had an ongoing affair, one which began before Todd decided to become pregnant and only ended three years after B.M.T.’s birth when she decided to have a second child by Straub—after Straub had married someone else. Secondly, both parties testified, and the trial court found, that Straub and Todd continued to have intercourse after Todd became pregnant with B.M.T. and their relationship continued for a number of years after B.M.T.’s birth. We know of no medical requirements—or of any sperm donor program—that continues to give insemination injections after the donee becomes pregnant. . . . The trial court did not err in finding Straub’s and Todd’s agreement was void because it is against Indiana’s public policy.

II. Indemnification

Straub argues that he should be indemnified against any support claims because: 1) Todd is capable of supporting the child on her own; and 2) the “economic injury” to Straub due to her “breach of contract” would exceed $100,000.00. Because this argument merely seeks to circumvent public policy, it too must fail. First, because the agreement between the parties is void, there is no enforceable contract to breach. Second, Todd’s present ability to care for the child on her own and the cost of the support to Straub do not change the law—Straub must provide his share of his daughter’s support as determined by the trial court under the Guidelines, which take into account both parent’s incomes.** . . .

If we were to accept Straub’s argument, this type of contract would arguably be binding in a variety of situations. For example, a couple desirous of having a child, but for some reason—religious or otherwise—feels the child should be born in wedlock, could enter into a valid and binding antenuptial agreement absolving one of the parents from the duty to support the child after divorce. Similarly, an agreement made after marriage (and in contemplation of divorce) would also be binding.

**We must be ever mindful of the best interests of this child. Thus, B.M.T. has a right to more than the basic necessities of life. Specifically, she has a right to the lifestyle that her parent’s combined income will furnish. This right may not be contracted away by her parents, and to do so is a violation of public policy. However, while we are not able to address every factual possibility, we recognize an exception may lie where the custodial parent is so affluent as to render the contribution of the non-custodial parent’s income irrelevant to the child’s lifestyle. In that case, the child’s lifestyle may not be an issue, and it might be argued that the parents would not be contracting away the best interests of the child. Here, however, because Todd’s only apparent income is her salary for teaching school, this appears to be a typical case wherein the child is entitled to the lifestyle that the combination of her parent’s incomes will afford.

*Ind. Code 35-46-1-5(a) provides: A person who knowingly or intentionally fails to provide support to his dependent child commits nonsupport of a child, a Class D felony.

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The judgment of the trial court is affirmed.

Judge CONOVER, dissenting. . . .

Todd, an unmarried adult female teacher, wanted to have a child but did not want to remarry to accomplish that end. When she was medically advised artificial insemination would not work in her case, she asked her current lover Straub, a 56 year old adult male teacher, to cease using condoms during intercourse and impregnate her. Straub already had raised 5 children of his own. While willing to help, Straub neither wanted to raise another child nor assume the financial obligations concomitant with child rearing. Straub told Todd he would accommodate her if he could be free of the obligation to support the child-to-be and his name as inseminator would remain a secret. Agreeing, Todd, an employed teacher fully capable of supporting the child, signed a written agreement to that effect that Straub had prepared. In the normal course of things thereafter, Todd became pregnant. Three years after the child was born, Todd changed her mind. . . .

Today, the general public almost universally looks with understanding and approval upon a single woman's desire to bear and nurture a child without male interference. A financially responsible modern woman, at her option, has an unqualified right to do so, it perceives. In other words, our declarations on this subject are currently incorrect. They reflect policy which has been dead since the 1960's. Accordingly, they must be changed, in my view, because we are subject to the public's will in such matters.

I find no better statement of the vagaries of public policy than this: Public policy has been described as a will-o'-the-wisp of the law which varies and changes with the interests, habits, needs, sentiments, and fashions of the day; the public policy of one generation may not, under changed conditions, be the public policy of another. Thus, the very reverse of that which is public policy at one time may become public policy at another time. Hence, no fixed rules can be given by which to determine what is public policy for all time. When an alteration of public policy on any given point of general interest has actually taken place, and such alteration is indicated by long-continued change of conduct on the part of the people affected and has become practically universal, the court may recognize the fact and declare the public policy accordingly. . . .

I believe this change in public policy is readily discernible. . . . [A]n Indiana woman in this modern age has had an inalienable right to contract in any manner she chooses in the pursuit of her happiness. . . . Since the last obstructions to contractual equality due to womanhood have been removed, women are now irrevocably bound to perform the obligations they incur when contracting just as men are. Courts have neither the right nor the power in the name of public policy to intervene simply because the contracting woman with the benefit of hindsight determines she has made a bad bargain by entering into a contract of this kind. The courts now must leave the parties where they find them in such cases.

Thus, in my opinion, the contract in question is valid and enforceable because it is conversant with current public policy. Todd had an absolute right to contract with Straub as she did, and is absolutely bound by the obligations she incurred under that contract. . . . Todd is gainfully employed and fully capable of providing for all the needs of the child she so desperately wanted. Under current public policy, the contract she signed here is valid and enforceable. Neither the legislature nor the judiciary can act to impair the obligations she incurred thereunder because the record demonstrates the child will never become a ward of the state.

I would reverse.

ASSIGNMENT 10.1

a. Did this court hold that it would have reached a different result if Todd had been rich?
b. Who is correct? Judge Miller or Judge Conover? Is the majority opinion anti-woman?
c. As we will see in chapter 13 on paternity, a sperm donor who is not married to the mother is not considered the father of the child and, therefore, has no support obligation. Why didn’t this rule apply in the Straub case?
d. In the discussion of the Marvin v. Marvin case in chapter 4 on cohabitation agreements, we learned that sexual intercourse cannot be a valid consideration for an enforceable contract. In the Straub case, was sexual intercourse
consideration for the agreement between Straub and Todd? If so, is this another reason their agreement is invalid?

e. George and Helen are not married but are living together. George impregnates Helen. He asks her to have an abortion. She refuses. When the child is born, can she force George to support it? Would it make any difference if Helen became pregnant after lying to George about using contraceptives? (See General Instructions for the Legal-Analysis Agreement in Appendix A.)

JURISDICTION AND THE UNIFORM INTERSTATE FAMILY SUPPORT ACT

If the parents are married and are in the process of seeking a divorce, the custodial parent might ask a court for an award of temporary child support pendente lite—while the case is being resolved in court. At the conclusion of the case, the court will decide on permanent child support. What are the jurisdictional requirements for obtaining and enforcing a temporary or permanent child-support order?

As we learned in chapter 7, a divorce judgment can accomplish five objectives: (1) dissolve the marriage, (2) award spousal support, (3) award child support, (4) divide marital property, and (5) award child custody. The court needs more than one kind of jurisdiction to accomplish these objectives. (The kinds of divorce jurisdiction are summarized in Exhibit 7.3 in chapter 7.) Our focus here is the kind of jurisdiction needed for child support.

To award child support, the court needs personal jurisdiction (sometimes called in personam jurisdiction) over the defendant. If a court makes an order of child support against someone over whom it does not have personal jurisdiction, a court in another state does not have to enforce it (i.e., the support order is not entitled to full faith and credit).

How does a court acquire personal jurisdiction over a noncustodial parent in order to issue an enforceable child-support order? If the defendant is a resident of the state, the most common method is to hand deliver the divorce complaint and court summons to the defendant. This delivery is called personal or actual service of process. If the resident defendant cannot be found in the state, substituted service of process might be authorized such as service by mail.

A more serious problem is collecting child support from a nonresident parent. Approximately 34 percent of child-support cases are against parents who live in a state that is different from the state of the child and custodial parent. Efforts to collect child support from out-of-state parents have generally been ineffective. While 34 percent of cases involve an out-of-state parent, only 8 percent of all collections come from such parents. One reason for this poor record has been the difficulty of obtaining personal jurisdiction over the nonresident parent and the lack of uniformity in child support laws among the states. According to one court:

[The] lack of uniformity in the laws regarding child support orders encouraged noncustodial parents to relocate to other states to avoid the jurisdiction of the courts of the home state. This contributed to the relatively low levels of child support payments in interstate cases and to inequities in child support payment levels that are based solely on the noncustodial parent’s choice of residence.2

To help combat the problem, every state has recently enacted the Uniform Interstate Family Support Act (UIFSA) to govern many aspects of out-of-

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state support cases. Under the UIFSA, there are seven main ways a state can acquire personal jurisdiction over a nonresident defendant:

1. The nonresident is personally served within the state;
2. The nonresident submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
3. The nonresident resided with the child in this state;
4. The nonresident resided in this state and provided prenatal expenses or support for the child;
5. The child resides in this state as a result of the acts or directives of the nonresident;
6. The nonresident engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
7. The nonresident asserted parentage in the state such as through the putative father registry (see chapter 13).3

If nonresidents are not personally served within the state or if they do not consent to the court’s jurisdiction (the first two conditions), they must have at least minimum contact with the state. Otherwise, the state cannot assert personal jurisdiction over the nonresident. Note the examples of minimum contacts listed in the UIFSA: residing in the state with the child at one time, arranging for the child to reside in the state, and engaging in sexual intercourse in the state that may have led to the conception of the child. Because these contacts with the state are considered sufficiently purposeful, it is fair and reasonable for a court in that state to resolve (i.e., to adjudicate) disputes arising out of those contacts. An example of such a dispute is whether the nonresident is the child’s father and, therefore, should pay child support. The personal jurisdiction that a state acquires over a nonresident defendant because of his or her purposeful contact with that state is called long-arm jurisdiction. A statute authorizing it is called a long-arm statute. The state extends its “arm” of power across state lines to assert personal jurisdiction over someone who in fairness should answer to the authority of the court because of his or her sufficiently purposeful contacts with that state.4

Let’s examine two case examples:

CASE I. Ted and Wilma live in New York, where they were married. While on a two-week vacation in Maine, they conceive their only child, Mary. Upon returning to New York, they decide to separate. Wilma and Mary move to Maine. Except for the two-week vacation, Ted has never been to Maine. Before Wilma leaves, he tells her that if she moves to Maine, he will have nothing to do with her or Mary. She goes anyway, and Ted carries out his threat of having no contact with either. He never pays child support. After establishing domicile in Maine, Wilma obtains a divorce and a child-support order from a Maine court. Ted is never served in Maine and does not appear in Wilma’s divorce action. He knows about the case because Wilma has mailed him all the divorce pleadings to which he never responds.

Wilma’s domicile in Maine gave the Maine court jurisdiction to dissolve the marriage. (See Exhibit 7.3 in chapter 7.) Under the UIFSA, Maine also had personal jurisdiction over Ted to make the child-support order. Ted’s act of sexual intercourse in Maine leading to conception was a sufficiently pur-

3 Uniform Laws Annotated pt. 1, § 201 (Supp. 1996). An eighth basis of personal jurisdiction under the UIFSA is a catch-all opinion: “any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.”

4 The long-arm jurisdiction provisions of the UIFSA can also be used in the enforcement of spousal support orders against obligor spouses who live in another state. (See chapter 8.)
poseful contact with the state of Maine to give it personal jurisdiction over him.

Once personal jurisdiction is acquired over a nonresident in this way, issues such as paternity and child support can be resolved. Under the UIFSA, special rules exist in conducting the proceeding against the nonresident. For example, the Maine court can accept testimony from witnesses in New York by telephone, video, or other electronic means. Also, assuming Ted continues to refuse to come to Maine, a Maine court can ask a New York court to force Ted to submit to discovery on issues such as his financial resources.

Once Wilma has a valid Maine child-support order, she has two main enforcement choices. First, she can take the expensive and cumbersome (but traditional) step of traveling to New York in order to ask the New York court system to enforce her Maine order. Such travel, however, is impractical for most custodial parents. The same is true of hiring a New York attorney. Second, the UIFSA allows her to use a special registration procedure to enforce the Maine order in New York. Without traveling to New York, she can use a government child-support agency in Maine (called a IV-D agency) to help her send the Maine order to the appropriate tribunal in New York for the purpose of registering the order. (As we will see later, there is a IV-D agency in every state.) Once registered in New York, her order can then be enforced in the same manner as a New York order can be enforced against a New York resident with the help of a New York IV-D agency. Hence the UIFSA registration procedure has allowed a Maine resident (Wilma) to obtain and enforce a Maine support order against a New York resident (Ted) even though the process never required Wilma to travel to New York and never required Ted to travel to Maine. This efficiency was one of the main reasons the UIFSA was enacted.

In our example, Maine is the initiating state—the state in which a support case is filed in order to forward it to another state. New York is the responding state—the state to which the case was forwarded for a response. A responding state can enforce, but cannot modify, an order registered from an initiating state.

Suppose, however, that Maine cannot obtain personal jurisdiction over Ted under the long-arm provisions of the UIFSA. Let’s change some of the facts of our example:

**CASE II.** Ted and Wilma live in New York, where they were married and where their only child, Mary, was conceived and born. They decide to separate. Wilma and Mary move to Maine. Ted has never been to Maine. Before Wilma leaves, he tells her that if she moves to Maine, he will have nothing to do with her or Mary. She goes anyway, and Ted carries out his threat of having no contact with either. He never pays child support. After establishing domicile in Maine, Wilma obtains a divorce and a child-support order from a Maine court. Ted is never served in Maine and does not appear in Wilma’s divorce action. He knows about the case because Mary has mailed him all the divorce pleadings to which he never responds.

The major fact difference between case I and case II is that Mary was not conceived in Maine. Reread the seven ways for a state to obtain personal jurisdiction over a nonresident under the UIFSA. None of them applies to Ted in case II. He was not personally served in Maine, he never consented to Maine jurisdiction, he never lived in Maine with his child, he never sent any child support to Maine, he never arranged for his daughter to live in Maine, he never had sexual intercourse in Maine, and he never asserted his parentage in Maine. Therefore, a Maine court could not obtain personal jurisdiction over Ted by the long-arm method in case II, and Wilma cannot use the efficient and inexpensive registration process in New York.

In case II, the Maine court’s dissolution of the marriage is valid and enforceable because Wilma’s domicile in Maine gave the court jurisdiction to
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dissolve the marriage. The Maine court also issued a child-support order against Ted. This order, however, is not enforceable and not entitled to full faith and credit, since it was issued against a defendant over whom the court did not have personal jurisdiction. This is an example of divisible divorce, which we studied in chapter 7; only part of the divorce judgment is enforceable.

If Wilma wants child support from Ted, she will need a child-support order from a New York court. Obtaining a support order from a Maine court and registering it in New York for enforcement will not work, since Maine cannot obtain personal jurisdiction over Ted. Can New York obtain personal jurisdiction over Ted? Yes. This is relatively easy, since Ted is a New York resident.

To obtain a New York support order, does Wilma have to travel to New York and hire a New York attorney? Fortunately, under the UIFSA, the answer is no. Another efficient and inexpensive process is available to her. Here are the steps involved:

- Wilma files a petition for child support in Maine.
- A Maine IV-D agency helps her forward the petition to New York.
- New York obtains personal jurisdiction over Ted, a New York resident (e.g., by service of process in person or substituted service).
- New York conducts an administrative or judicial proceeding on issues such as paternity and child support.
- A New York IV-D agency uses its collection powers to force Ted to pay his support obligation.

In case II, Maine again is the initiating state and New York is the responding state. Everything is handled on Wilma’s behalf by the IV-D agency in Maine and the IV-D agency in New York. At no time is Wilma required to appear in New York. Her testimony can be received in New York by telephone, video, or other electronic means.

Note the difference between case I and case II:

- Case I: A Maine support order is enforced against a New York resident in New York by the registration process.
- Case II: A New York support order is enforced against a New York resident in New York.

The difference is based on which state could obtain personal jurisdiction over Ted.

If Wilma does not want the IV-D agency to act on her behalf in Maine or New York, she can hire a private attorney to represent her. The role of the IV-D agency would then be to assist any attorney she decides to hire.

In our mobile society, parties move often. In such an environment, one judge commented that child-support orders can “proliferate like mushrooms.”

Defendants such as Ted might start traveling to different states in order to find a court that will modify the child-support order against them. The UIFSA tries to prevent this.

Once a court issues a valid support order under the UIFSA, that court has continuing, exclusive jurisdiction (cej) over the case. This means that no other state can modify the order. A state retains its cej so long as the custodial parent (e.g., Wilma) or the noncustodial parent (e.g., Ted) or the child (e.g., Mary) continues to reside in the state. If they all leave the state, the court loses its cej, and another state can acquire cej over the case. (Another way for a court to lose its cej is if all the parties agree that another state can have cej to modify the order.)

If, in spite of these rules, the parties have generated competing support orders from courts that have jurisdiction or if the parties seek simultaneous support orders in different states, the UIFSA gives preference to the order issued

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divisible divorce
A divorce decree that is enforceable in another state only in part.

continuing, exclusive jurisdiction (cej)
Once a court acquires proper jurisdiction to make an order, the case remains open and only that court can modify the order.

in the **home state**. This is the state in which a child has lived with a parent\(^6\) for at least six consecutive months immediately before the support case was filed. If the child is less than six months old, the home state is the state in which the child has lived since birth with the parent. Periods of temporary absence are counted as part of the six months or the time since birth.\(^7\) (As we saw in chapter 9, the home state is also the basis of determining child-custody jurisdiction in interstate cases.)

If a court has the authority to modify a child-support order, under what circumstances will it do so? We will examine this question in some depth later in the chapter.

**WHO PAYS AND HOW MUCH?**

The traditional rule was that only the father had the legal duty to support his children. Today each parent has an equal duty of support regardless of who has physical custody (the right to decide where the child resides) or who has legal custody (the right to make the major child rearing decisions on health, education, religion, discipline, and general welfare). A parent who does not have physical or legal custody has the same duty of support as the parent with both physical and legal custody. The essential question is, Who has the ability to pay? The mother, the father, or both? In practice, it is usually the father who is ordered to pay. He is the one who often controls most of the financial resources. If, however, the mother also has a salary or other available resources, she will be asked to contribute her proportionate share of the child's support.

What about a stepparent (someone who has married one of the natural parents)? If the stepparent has adopted the child formally or equitably (see chapter 15), there is a duty to support the child even after the marriage ends in divorce. Without adoption, however, most states say that the stepparent has no duty of support unless he or she has agreed otherwise.

How much child support do the parents owe? A child has many needs that must be paid for: shelter, food, clothing, education, medical care, transportation, recreation, etc. A court will consider a number of factors in determining the amount of child support. These factors are quite similar to what the parties must assess on this issue in their separation agreement:

- State guidelines—the most important (see discussion below).
- Standard of living enjoyed by child before the separation or divorce.
- Child’s age.
- Child’s own income or other financial resources (e.g., from a trust fund set up by a relative, from part-time employment).
- Income or other financial resources of custodial parent.
- Income or other financial resources of noncustodial parent.
- Earning potential of both parents.
- Child’s need and capacity for education, including higher education.
- Financial needs of noncustodial parent.
- Responsibility of noncustodial parent to support others (e.g., a second family from a second marriage).

Note that marital fault is not on the list. Which parent was at fault in “causing” the divorce is not relevant and should not be considered in assessing the need for child support.

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\(^6\)Or a person acting as a parent.

\(^7\)To further prevent proliferating child-support orders. Congress passed the Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B, which requires states to enforce (i.e., give full faith and credit to) and not modify valid child support orders of other states except in limited circumstances.
Every state has adopted **child-support guidelines** for the determination of child support by its courts. The guidelines establish a rebuttable presumption on the amount of child support that should be awarded:

There shall be a rebuttable presumption . . . that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.\(^8\)

While the guidelines are not the same in every state, many states have based their guidelines on the **income shares model**, which operates on the principle that the children should receive the same proportion of parental income that they would have received had the parents lived together. Studies have shown that individuals tend to spend money on their children in proportion to their income, and not solely on need. Child support is calculated as a share of each parent’s income that would have been spent on the children if the parents and children were living in the same household. The calculation of these shares is based on the best available economic data on the amount of money ordinarily spent on children by their families in the United States. This amount is then adjusted to the cost of living for a particular state.

If a state does not use the income shares model in its guidelines, it will use one of several alternative models. Under the **percentage-of-obligor-income model**, the amount of child support is based on the number of children and a fixed percentage of the obligor’s gross income. (An **obligor** is someone with a legal obligation. The **obligee** is the person to whom that legal obligation is owed.) For example, child support might be 17 percent of the obligor’s gross income if there is one child, 25 percent if there are two children, 29 percent if there are three children, etc. Other models include the **Melson-Delaware model** and the **equal-living standard**. There may also be variations among states using the same model. For example, some states using the percentage-of-obligor-income model take a percentage of the obligor’s after-tax (net) income rather than a percentage of his or her gross income.

Whatever model a state uses, adjustments can be made when the parties have joint physical custody of the child or when a child has special medical or child care needs. There may also be separate guidelines when the combined incomes of the parents exceed a high amount, such as $100,000.

The calculation of child support under the guidelines is relatively mechanical. A number of commercial software companies sell computer programs that can be used to determine the amount of child support that should be due under the guidelines used by a particular state. Several IV-D agencies have placed calculation worksheets on their World Wide Web pages. This allows custodial parents, noncustodial parents, and others to enter their own financial data to determine the amount of child support that a IV-D agency or a court would impose. In Exhibit 10.1, there are examples of online worksheets from the Web pages of two state IV-D agencies.

### Cost of College

A good deal of litigation has centered on the issue of educational expenses, particularly higher education. Does a divorced parent have a duty to send his or her child to college? Arguments **against** imposing this duty are as follows:

- A parent’s support duty is limited to providing the necessities to the child (e.g., food, shelter, clothing). A large percentage of Americans do not attend college. It, therefore, is a luxury, not a necessity.

\(^8\)42 U.S.C.A. § 667(b)(2).
### Colorado Child Support Guidelines

**Worksheet A—Sole Physical Custody**

| Noncustodial Parent | ☐ Mother | ☐ Father |
| Noncustodial Parent | ☐ Mother | ☐ Father |
| Number of Children | | One Child |
| Monthly Gross Income | | |
| Preexisting Child Support | | |
| Maintenance Paid | | |
| Responsibility for Other Children | | |
| Monthly Adjusted Gross Income | | |
| Percentage Share | | |
| Basic Obligation Adjustments | | |
| Child Care Costs (work related) | | |
| Health Insurance Premium Costs | | |
| Extraordinary Medical Expenses | | |
| Extraordinary Expenses | | |
| Extraordinary Adjustments | | |
| Total Adjustments | | |
| Total Obligation | | |
| Each Parent’s Share | | |

**Massachusetts Child Support Guidelines**

**Calculation Worksheet - Short Form**

**BASIC ORDER**

a) Non-custodial gross weekly income (less prior support orders actually paid, for child/family other than the family seeking this order)

b) % of gross/number of children (from Chart A - Basic Order)

c) % increase for age (from Chart B - Age Differential)

**If custodial parent makes $15,000 or less please skip (d, e, and f).**

d) Custodial parent gross (annual) income

e) Less day care cost (annual)

f) Non-custodial gross (annual) income

**OPTIONAL SUPPORT CALCULATOR**

a) Please enter your current weekly child support payment.

b) Please enter the amount from the “WEEKLY SUPPORT ORDER” above.

The % difference of your current weekly child support payment and the calculated weekly support order from above.

If you used this worksheet for the purpose of seeking modification, this is the percentage difference between your current obligation and what your obligation might be (based solely on the data you have just entered).

Colorado: <www.childsupport.state.co.us/gwsa.htm>

Massachusetts: <www.state.ma.us/cse/programs/employer/Quick.htm>
• A parent’s support duty terminates when the child reaches the age of majority in the state (e.g., eighteen). Children in college will be over the age of majority during some or most of their college years.

• Children of parents who are still married have no right to force their parents to send them to college. Why should children of divorced parents have the right to be sent to college?

Some states, however, have rejected these arguments and have required the divorced parent to pay for a college education as part of the child-support payments if the parent has the ability to pay and the child has the capacity to go to college. Several arguments support this position:

• In today’s society, college is not a luxury. A college degree, at least the first one, is a necessity.

• A parent’s duty to provide child support does not terminate in all cases when the child reaches majority. For example, a physically or mentally disabled child may have to be supported indefinitely. Some courts take the position that the support duty continues so long as the child’s need for support continues (i.e., so long as the child remains dependent). This includes the period when the child is in college.

• It is true that married parents have no obligation to send their children to college. But there is a strong likelihood they will do so if they have the means and their children have the ability. When the court requires a divorced parent to send his or her children to college, the same tests are applied: ability to pay and capacity to learn. Thus, the court, in effect, is simply trying to equalize the position of children of divorced parents with that of children of married parents.

The Second Family

Another area of controversy concerns the noncustodial parent’s responsibility of supporting others. Should the amount of child support be less because this parent has since taken on the responsibility of supporting a second family? Suppose there is a remarriage with someone who already has children and/or they have additional children of their own. The old view was that the parent’s primary responsibility was to the first family. No adjustment would be made because the parent has voluntarily taken on additional support obligations. Many courts, however, no longer take this hard line. While they will not permit the parent to leave the first family destitute, they will take into consideration the fact that a second family has substantially affected the parent’s ability to support the first. Given this reality, an appropriate adjustment will be made. It must be emphasized, however, that not all courts are this understanding. Some continue to adhere to the old view.

ASSIGNMENT 10.2

a. How does a court determine the amount of child support in your state? Describe the main features of whatever guidelines exist and explain how they are used.

b. Make up a fact situation involving two parents (John Smith and Mary Smith) and one infant child (Billy Smith). Your facts should include the income and resources available to each parent. (i) How much would each parent owe in child support in your state? (ii) On the Internet, use the online worksheets of any two states to determine how much the Smiths would owe in child support in each state. Again, make up any financial facts that you need, but be sure to use the same facts each time you make a calculation for the Smiths.

c. Under what circumstances, if any, does a noncustodial parent have an obligation to pay for his or her child’s college education in your state?

To answer questions a, b(i), and c, check your state code and opinions of courts in your state. (See General Instructions for the State-Code Assignment and General Instructions for the Court-Opinion Assignment in Appendix A.)
MODIFICATION OF CHILD-SUPPORT ORDERS

Earlier we discussed the procedural law of jurisdiction needed to impose or modify a child-support order. Now we examine the substantive law of modification itself. Assume that a court has jurisdiction to modify. When will it use that jurisdiction to make an actual modification?

The standard rule is that a child-support order can be modified on the basis of a substantial change of circumstances that has arisen since the court granted the order. The changed circumstances must be serious enough to warrant the conclusion that the original award has become inequitable (e.g., the child’s welfare will be jeopardized if the child-support award is not increased due to an unexpected illness of the child, requiring costly medical care). Alternatively, the child-support award can be decreased if it is clear that the need no longer exists at all or to the same degree (e.g., if the child has acquired independent resources or moved out on his or her own). A recent federal law allows the parties to request a review of a child-support order every three years (or such shorter cycle as a state deems appropriate) to make sure that the order complies with the guidelines and to add cost-of-living adjustments as needed.9

Frequently, the custodial parent claims that child support should be increased because the noncustodial parent’s ability to pay has increased since the time of the original order (e.g., by obtaining a much better paying job). This is a ground to increase child support only when it is clear that the original decree was inadequate to meet the needs of the child. At the time of the original decree, a lesser amount may have been awarded because of an inability to pay more at that time. Hence a later modification upward is simply a way for the court to correct an initially inadequate award. Since many initial awards are inadequate, courts are inclined to grant the modification.

Note that we have been discussing the modification of future child support payments. What about arrearages? Can a court modify a delinquent obligation? There was a time when courts were sympathetic to requests by delinquent obligors to forgive past due debts, particularly when the court was convinced that future obligations would be met. Congress changed this in 1986 when the Bradley Amendment banned retroactive modification of child-support arrearages in most cases.10

What happens when the noncustodial parent seeks a modification downward because he or she can no longer afford the amount originally awarded? If the circumstances that caused this change are beyond the control of the parent (e.g., a long illness), the courts will be sympathetic. Suppose, however, that the change is voluntary. For example:

At the time of a 2000 child-support order, Dan was a fifty-year-old sales manager earning $120,000 a year. The order required him to pay his ex-wife $3,000 a month in child support. In 2001, Dan decides to go to evening law school. He quits his job as a sales manager and takes a part-time job as an investigator earning $10,000 a year. He then petitions the court to modify his child-support payments to $250 a month.

In many courts, Dan’s petition would be denied because he has not lost the capacity to earn a high salary. Self-imposed poverty is not a ground to reduce child support in such courts. Other courts are not this dogmatic. They will grant the modification petition if:

- The child will not be left in a destitute condition and
- The petitioner is acting in good faith.


The court will want to know whether a legitimate change of career or change of lifestyle is involved. Is it the kind of change that the party would probably have made if the marriage had not ended? If so, the court will be inclined to grant a modification downward, so long as the child is not seriously harmed thereby. On the other hand, is the parent acting out of bad faith or malice (e.g., to make life more miserable for the custodial parent)? If so, the modification request will be denied.

When parents improperly reduce their income capacity, a court can treat the amount of the reduction as if it is income that was actually earned. This imputed income will be used in the calculation of the amount of child support that is owed.

### CASE

**Goldberger v. Goldberger**


Court of Special Appeals of Maryland

#### Background:

The Circuit Court awarded Esther Goldberger a divorce from Aron Goldberger and custody of their six children: Chana Frumit, Mamele, Meir, Chaim Tzvi, Eliezer, and Yaacov. The court also ordered Aron to pay $4,066 per month in child support for the six children. It found that he had impoverished himself voluntarily and that his potential income was $60,000 per year. The court based this figure on the amount of money others had contributed to his litigation expenses. The case is now on appeal before the Court of Special Appeals of Maryland. Aron is the appellant and Esther is the appellee.

#### Decision on Appeal:

Affirmed in part; reversed in part. The trial court correctly concluded that Aron voluntarily impoverished himself but failed to properly calculate the amount he should pay for child support.

#### Opinion of the Court:

Judge LEVITZ delivered the opinion of the court.

The odyssey of the young children of Aron and Esther Goldberger has led them from Lakewood, New Jersey, to Israel, to Belgium and England, and finally to Baltimore, Maryland. These children have been the subject of the attention of various courts including: The High Court of Justice, Family Division, London, England; the Ecclesiastical Court of the Chief Rabbi of London (Beth Din); and, finally, the Circuit Court for Baltimore City. [Eight judges of the Circuit Court (nearly 30% of the Bench) have been involved in the case to date.]

Prior to the trial of this matter before the Circuit Court, the parties and their children had been examined and evaluated by ten physicians or psychologists. When the trial began, Esther and Aron Goldberger were fighting only about the custody of their children and related matters of support and visitation. Allegations of sexual child abuse, kidnapping, insanity and unfitness were made by one or the other of the parents. Other extended family members were brought into the conflict and took an active part in it. Since both parties are devout Orthodox Jews, noted Rabbis in this country and in Europe and Israel were consulted by the parties for advice, guidance and support. . . .

[T]he evidence revealed that appellant was 32 years old and healthy, with many years of higher education. It was undisputed that appellant had earned no actual income, as he had never worked at any income-producing vocation. Appellant planned his life to be a permanent Torah/Talmudic student.* He was a student before he was married and before any of his children were born. Appellant testified that he studies “for the sake of studying, which is a positive commandment to study the Torah for the sake of studying it.” Further, appellant testified that it was his intention to continue his life of study forever: “. . . I should continue to study the rest of my life, to always be in studying. . . .” Throughout his life appellant has been supported by others, first, his parents, thereafter, his father-in-law, and most recently, friends in the Orthodox community. Nevertheless, appellant fathered six children whom he has refused to support, arguing that he has no means to support and never will have the means to provide support.†

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*The Torah is the “fundamental” law of the Jewish people. It consists of the five books of Moses (the Pentateuch): Genesis, Exodus, Leviticus, Numbers and Deuteronomy. It is considered to be of divine origin. The Talmud is an exposition of the fundamental oral and written law. It contains the rabbinic interpretation of the “fundamental” and “common” law.

†Rabbi Jacob ben Asher (1270–1340), known as the “Ba’al Ha Turim” and considered one of the great authorities on Jewish Law, stated in his authoritative digest, “A man can be forced to work in order to maintain his wife and infant children.” Tur, Even Ha’eZe’er 70. Horwitz, Spirit of Jewish Law. Central Book Co. 1973.
A life devoted to study is viewed by many in the Orthodox community as a true luxury that very few can enjoy.** Unfortunately for the appellant’s children, permanent Torah/Talmudic students must depend on the charity of others to provide the necessities of life. Those who support a Torah student have no legal obligation to continue such support in either duration or amount.

Nevertheless, through a network of family and Orthodox communities in Europe and the United States, approximately $180,000 had been contributed to appellant over a three year period to enable him to pursue his custody claim. Approximately $3,000 of that sum was once used to purge appellant of contempt for failing to pay child support.

Based on these facts, the court determined (1) that appellant had voluntarily impoverished himself, and (2) that his potential income was equivalent to the money that had been contributed by others to his cause. It therefore regarded his income, for purposes of paying child support as $60,000 per year and ordered that he pay $4,066 per month for the support of his six children. Appellant challenges both the finding of voluntary impoverishment and the calculation of potential income.

The obligation of parents to support their minor children has been consistently upheld by the Court of Appeals of Maryland. In Carroll County v. Edelman, 320 Md. 150, 577 A.2d 14, 23 (1990), the Court stated,

> Parenthood is both a biological and a legal status. By nature and by law, it confers rights and imposes duties. One of the most basic of these is the obligation of the parent to support the child until the law determines that he is able to care for himself. . . .


In view of the above authorities, there can be no question that appellant has a legal obligation to financially support his children until they reach the age of legal majority. The more difficult question is how to calculate the proper amount of that support. Fortunately, that question has been answered by the Legislature of Maryland. Md. Code Ann., Fam. Law § 12-202(a)(1) (1991) states, “[i]n any proceeding to establish or modify child support, whether pendente lite or permanent, the court shall use the child support guidelines set forth in this subtitle.” In order to use the guidelines as required by § 12–202(a)(1), it is necessary to calculate the income of the parents. “Income” is defined in § 12–201(b) of the Family Law Article as: (1) actual income of a parent, if the parent is employed to full capacity; or (2) potential income of a parent, if the parent is voluntarily impoverished.

The legislature’s purpose in including potential income was to implement state and federal policy of requiring adequate support by precluding parents from avoiding their obligation by deliberately not earning what they could earn.

While the Code does not define the term “voluntarily impoverished,” in John O. v. Jane O., 90 Md. App. 406, 601 A.2d 149 (1992), we had occasion to address the meaning of that term. We noted that neither the Legislature nor the Courts in existing case law had defined what “voluntarily impoverished” meant. We noted that no clear definition was found in any Maryland resource materials. Accordingly, we looked to the dictionary definitions of the words “voluntarily” and “impoverished.” We noted that “voluntarily” means “done by design or intention; proceeding from the free and unrestrained will of the person; produced in or by act of choice. . . .” “Impoverished” means “to make poor, reduce to poverty or to deprive . . . of resources, etc.” . . .

The issue of voluntary impoverishment most often arises in the context of a parent who reduces his or her level of income to avoid paying support by quitting, retiring or changing jobs. The intent of the parent in those cases is often important in determining whether there has been voluntary impoverishment. Was the job changed for the purpose of avoiding the support obligation and, therefore, voluntary, or was it for reasons beyond the control of the parent, and thus involuntary? . . . A parent who chooses a life of poverty before having children and makes a deliberate choice not to alter that status after having children is . . . “voluntarily impoverished.” Whether the voluntary impoverishment is for the purpose of avoiding child support or because the parent simply has chosen a frugal lifestyle for another reason, doesn’t affect that parent’s obligation to the child. Although the parent can choose to live in poverty, that parent cannot obligate the child to go without the necessities of life. A parent who brings a child into this world must support that child, if he has or reasonably could obtain, the means to do so. The law requires that parent to alter his or her previously chosen lifestyle if necessary to enable the parent to meet his or her support obligation.

Accordingly, we now hold that, for purposes of the child support guidelines, a parent shall be consid-

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**Even Teveya, the fictional lead character of Fiddler on the Roof, recognizes that a life of study is a luxury when he sings, “If I were a rich man. . . . Wouldn’t have to work hard. . . . I’d discuss the Holy books with the learned men seven hours every day; that would be the sweetest thing of all.” (Emphasis added).
er "voluntarily impoverished" whenever the parent has made the free and conscious choice, not compelled by factors beyond his or her control, to render himself or herself without adequate resources. To determine whether a parent has freely been made poor or deprived of resources the trial court should look to the factors enunciated in John O. v. Jane O., 90 Md. App. 406, at 422:

1. his or her current physical condition;
2. his or her respective level of education;
3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;
4. the relationship of the parties prior to the divorce proceedings;
5. his or her efforts to find and retain employment;
6. his or her efforts to secure retraining if that is needed;
7. whether he or she has ever withheld support;
8. his or her past work history;
9. the area in which the parties live and the status of the job market there; and
10. any other considerations presented by either party.

Based on a review of the evidence before the circuit court, there was no error in finding that appellant was "voluntarily impoverished."

Once a court determines that a parent is voluntarily impoverished, the court must then determine the amount of potential income to attribute to that parent in order to calculate the support dictated by the guidelines. Some of the factors the court should consider in determining the amount of potential income include:

1. age;
2. mental and physical condition;
3. assets;
4. educational background, special training or skills;
5. prior earnings;
6. efforts to find and retain employment;
7. the status of the job market in the area where the parent lives;
8. actual income from any source;
9. any other factor bearing on the parent's ability to obtain funds for child support.

After the court determines the amount of potential income to attribute to the parent, the court should calculate the amount of support by using the standardized worksheet authorized in Family Law § 12–203(a) and the schedule listed in Family Law § 12–204(e). Once the guideline support figure is determined, the court must then determine whether the presumptive correctness of the guideline support figure has been overcome by evidence that application of the guidelines would be unjust or inappropriate. Md. Code Ann., Fam. Law § 12–202(a)(2) (1991).

Unfortunately, the court below erred in determining that appellant’s potential income was $60,000 per year, based solely on his ability to raise funds to support and carry on this litigation. Although the court may consider the ability of appellant to persuade others to provide him with funds to pay child support in the future, the court cannot assume this will occur merely because appellant has been able to convince others to support this litigation up until now. The court needs to hear testimony and make findings regarding the factors relating to potential income previously enunciated. No such findings were made in this case. After calculating the guidelines using appellant’s realistic potential income, the court must decide whether the presumptive correctness of the guidelines has been overcome. Accordingly, this matter must be remanded to the trial court for such determinations.

We vacate the court’s child support order and remand the matter to the trial court to recalculate the appellant’s child support obligation in light of this opinion. Judgment affirmed in part and vacated in part. Appellant to pay the costs.

ASSIGNMENT 10.3

a. Did the court violate Aron Goldberger’s First Amendment right to freedom of religion by forcing him to pay child support?

b. Assume you work for the law firm that represents Esther Goldberger. To determine how much child support Aron should pay, what facts would you investigate as a result of the Goldberger opinion? (See General Instructions for the Investigation-Strategy Assignment in Appendix A.)
We saw in chapter 8 that separation agreements are often sloppily written in that they fail to distinguish between property division terms (which are not modifiable by a court) and support terms (which are). For example, suppose that the parties agree to give the “wife the exclusive use of the marital home until the youngest child reaches the age of twenty-one.” Is this a division of property or a child-support term? If it is the former, then the husband cannot modify it on the basis of changed circumstances (e.g., her remarriage). If it is a child-support term, then a modification is possible. Most courts would interpret the above clause as a child-support term, since it is tied to a period of time when the child would most likely need support. Yet a court could rule the other way. Needless litigation often results from poor drafting. (For a discussion of when the Internal Revenue Service will treat a payment as child support for tax purposes, see chapter 11.)

a. What standards apply to a request to modify child-support payments in your state? (See General Instructions for the State-Code Assignment in Appendix A.)
b. Sara pays her ex-husband, Harry, $800 a month in child support under a 1995 court order that granted custody to Harry but gave liberal visitation rights to Sara. Due to continuing bitterness, Harry refuses to allow Sara to see their child. Sara then petitions the court to reduce her child-support payments. How would her request for a modification be handled in your state? (See General Instructions for the Court-Opinion Assignment in Appendix A.)
c. Reread the facts involving Dan, the former sales manager who wants to go to law school (see the facts of Dan’s case in the text just before the Goldberger case). How would this request for a modification be handled in your state? (See General Instructions for the Court-Opinion Assignment in Appendix A.)

ENFORCEMENT OF CHILD-SUPPORT ORDERS

Introduction

Nonpayment of child support has reached epidemic proportions. Every year billions of dollars go uncollected. The Census Bureau found that in 1997 and 1998:

- 14 million parents had custody of 22.9 million children (under the age of twenty-one) whose other parent lived elsewhere (1998).
- Mothers were the custodial parents in 85.1 percent of families and fathers in 14.9 percent (1998).
- 7 million custodial parents had child-support agreements or court awards (1998).
- 6.6 million custodial parents had no child-support agreement or court award (many felt that one was not needed, or that the noncustodial parent could not pay, or that the noncustodial parent paid what he or she could) (1998).
- Custodial parents with child-support agreements or awards were scheduled to receive $29.1 billion; the total amount actually paid was $17.1 billion, or 58.8 percent of the amount due (1997).
- Custodial parents without child-support awards received $2.1 billion (1997).

\[\text{\textsuperscript{11}}\text{Since the vast majority of custodial parents are mothers, we will often refer to the noncustodial parent/obligor as the father, although the same rules apply when the obligor is the mother.}\]
• 34.1 percent of all custodial parents participated in at least one public assistance program—medicaid, food stamps, general assistance, TANF (Temporary Assistance for Needy Families), or AFDC (Aid to Families with Dependent Children, a program that was eventually replaced by TANF) (1997).
• 28.9 percent of custodial parents and their children lived below the poverty line or threshold (1997).
• Approximately 40 percent of custodial parents received all the child-support payments that were due (1997).
• Approximately 25 percent of custodial parents received partial child support payments (1997).
• Between a quarter and a third of all custodial parents received no child support (1997).
• The average amount of child support received by custodial mothers during the year was $3,700 (1997).
• The average amount of child support received by custodial fathers during the year was $3,300 (1997).
• The amount of child support actually received covers less than half of the child's support needs (1998).12

As indicated at the beginning of this chapter, Congress decided that the efforts of state governments to collect child support were inadequate. Federal legislation was needed to create national standards of enforcement, particularly in light of the federal tax dollars that had to be spent on welfare programs when parents failed to pay child support.

Congress added title IV-D to the Social Security Act to encourage the creation of new child-support enforcement agencies and new enforcement tools that can be used in every state.13 Each state now has such an agency. States might use different names for them such as Child Support Enforcement Division or Office of Recovery Services. Collectively, they are known as IV-D agencies, since they were proposed in title IV-D of the Social Security Act. (The address and World Wide Web site of the central IV-D agency in each state are listed in Appendix E.)

Any custodial parent with a child under eighteen is eligible for the services of a IV-D agency. The parent does not have to be receiving public assistance through a program such as TANF. Those not receiving public assistance, however, may be charged a nominal fee for the services of the IV-D agency. These services can be substantial, as we saw when discussing jurisdiction problems in cases involving nonresident parents, and, as we will see in greater detail shortly, IV-D agencies have state-of-the-art facilities. For example, when a IV-D agency collects child support from an obligor, the agency can deposit the funds directly into the bank account of the obligee through electronic funds transfer (EFT). In addition to child support, an IV-D agency can help secure health insurance for the child through the group health policy of the employer of the obligor. Exhibit 10.2 contains the application for the services of a IV-D agency in one state.

**ASSIGNMENT 10.5**

What is the name of the IV-D agency in your state? Contact the closest branch. Ask for a copy of a brochure describing its services. Summarize them.

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**Exhibit 10.2  Application for Child-Support Enforcement Services from IV-D Agency**

**Application for Child Support Enforcement Services**

### Absent Parent Background and Financial Information:

#### a. Is the absent parent currently married? Yes □ No □ Don’t Know □

(If no or don't know, skip to question #b.)

What is his or her spouse's name?  

Does his or her spouse work? Yes □ No □ Don’t Know □  

If yes, where does she or he work, if you know?  

What is her or his income $_________ per __________ Don’t Know □  

(Week, Month, or Year)

#### b. If not married, does the absent parent share his or her household with another adult?  

Yes □ No □ Don’t Know □

#### c. Does the absent parent have any children who are not also your children?  

Yes □ No □ Don’t Know □

If yes, please list their names and ages here, along with the name of the adult with whom they live.

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Living With:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### d. Is the absent parent providing support for children who are not also your children?  

Yes □ No □ Don’t Know □

If yes, how much is he/she paying? $_________ per __________ Don’t Know □  

(Week, Month or Year)

#### e. To your knowledge, does the absent parent have any of the following sources of income?  

<table>
<thead>
<tr>
<th>Type of Income</th>
<th>Amount (if known)</th>
<th>Week/Month/Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worker's compensation</td>
<td>$_________</td>
<td>per __________</td>
</tr>
<tr>
<td>Unemployment compensation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Social Security retirement (over 62, green check)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other pension</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Social Security disability (green check)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Supplemental Security Income (SSI) (gold check)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other disability</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Welfare</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Veteran's benefits</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commissions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Trust income</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rental income (from houses/apartments he or she owns)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Annuities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interest income</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dividend income</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### f. To your knowledge, does he or she have—or has he or she ever had in the last three years:  

| Royalties | Yes □ No □ When 20 | Amount $_________ |
| Severance pay | □ □ 20 | |
| Capital gains | □ □ 20 | |
| Prizes and awards | □ □ 20 | |
| Lottery winnings | □ □ 20 | |
| Gambling winnings | □ □ 20 | |
| Bonuses | □ □ 20 | |

#### g. Does the absent parent:  

Own any houses or other real estate? Yes □ No □ Don’t Know □

If yes, please describe and indicate location if you can.

Own any motor vehicle? Yes □ No □ Don’t Know □

If yes, for each vehicle, please identify the model, color, state where it is registered, and license plate number, if you can.

---

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Does the absent parent go by any other names or aliases? Yes □ No □ Don’t Know □
If yes, please indicate the name and address of the absent parent.

Where is it moored?
City or Town  State

Own any stocks or bonds? Yes □ No □ Don’t Know □
If yes, please use a separate sheet of paper to identify the name and address of the absent parent’s stock broker and list any stocks and/or bonds owned by the absent parent if that information is available to you. Indicate the name of the company, the number of shares, and the date the stock was purchased, if possible.

Have any bank accounts? Yes □ No □ Don’t Know □
List the name(s) of the bank(s), location(s), and type(s) of account(s) if that information is available to you.

<table>
<thead>
<tr>
<th>Bank Name</th>
<th>Location</th>
<th>Type of Account</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If you need additional space, please continue on a separate piece of paper.

Have any credit cards? Yes □ No □ Don’t Know □
If yes, please list the names of the companies and account numbers if that information is available to you.

<table>
<thead>
<tr>
<th>Credit Company</th>
<th>Account Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Have any outstanding loans? Yes □ No □ Don’t Know □
If yes, please identify the name of the bank(s) or financial institution(s), location(s) and account number(s).

<table>
<thead>
<tr>
<th>Lending Institution</th>
<th>Location</th>
<th>Account Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

h. Have you ever filed a joint income tax return with the absent parent? Yes □ No □
If yes, for which state(s) and for what year(s)?

<table>
<thead>
<tr>
<th>State</th>
<th>Tax Years</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>19 ___ to 20 ___</td>
</tr>
</tbody>
</table>

i. Does the absent parent have any disabilities or handicaps? Yes □ No □ Don’t Know □

j. Does the absent parent have a driver’s license? Yes □ No □ Don’t Know □
If yes, from what state? ____________ What is the license number? ____________ Don’t Know □

k. Does the absent parent have any trade or commercial licenses? Yes □ No □ Don’t Know □
If yes, what sort of license is it?

<table>
<thead>
<tr>
<th>From what state was it issued?</th>
</tr>
</thead>
</table>

l. Has the absent parent ever belonged to any labor unions? Yes □ No □ Don’t Know □
If yes, enter the name of the union, local number, city and state.

m. Does the absent parent go by any other names or aliases? Yes □ No □ Don’t Know □
If yes, please identify.

n. Has the absent parent ever been a member of the armed forces? Yes □ No □ Don’t Know □
If yes, what branch of service? ____________

<table>
<thead>
<tr>
<th>Date Entered</th>
<th>Date Discharged</th>
<th>Service Number</th>
<th>Last Duty Station</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

o. What high school, trade school and/or college did the absent parent attend? Please indicate the name and address of each school, the dates attended and the degree earned.

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Dates of Attendance</th>
<th>Degree</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Please attach an additional piece of paper if you need more space.

p. Does the absent parent have a criminal record?
Yes □ No □ Don’t Know □ If yes, in which state? ________
q. Please identify the names and addresses of as many of the absent parent’s past employers as you can. (Do not include the most recent employer which you have already identified earlier.)

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
</tr>
</thead>
</table>

Please attach an additional piece of paper if you need more space.

r. What are the names of the absent parent’s parents? (Please indicate their names even if they are deceased.)

<table>
<thead>
<tr>
<th>Father’s Name</th>
<th>Mother’s Maiden Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Street or P.O. Box</td>
<td>Street or P.O. Box</td>
</tr>
<tr>
<td>City</td>
<td>State</td>
</tr>
<tr>
<td>City</td>
<td>State</td>
</tr>
<tr>
<td>Telephone</td>
<td>Telephone</td>
</tr>
</tbody>
</table>

s. Please provide the names and addresses of others who might know the whereabouts of the absent parent.

<table>
<thead>
<tr>
<th>Name</th>
<th>Relationship</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Street or P.O. Box</td>
<td>City</td>
<td>State</td>
</tr>
<tr>
<td>Name</td>
<td>Relationship</td>
<td>Phone</td>
</tr>
<tr>
<td>Street or P.O. Box</td>
<td>City</td>
<td>State</td>
</tr>
</tbody>
</table>

Source: Massachusetts Department of Revenue Child Support Enforcement Division.

If a woman is receiving public assistance, she must cooperate with the IV-D agency to establish paternity and collect child support. If, however, she can show “good cause,” she is relieved of this requirement. An example of good cause is that she faces a serious threat of physical violence if she cooperates.

A woman on public assistance must **assign** or transfer her support rights to the state IV-D agency or other county welfare agency that attempts to collect support from the father. This simply means that she gives the agency the right to keep any support money that it collects on her behalf. This money is then

**assign**
To transfer rights or property.
used to offset the TANF money she receives on an ongoing basis for herself and her children. If she fails to cooperate in assigning these rights, her share of the TANF benefits can be terminated, and the TANF benefits of her children can be sent to some other responsible adult who will agree to make them available for the children.

One of the valuable services provided by the IV-D agency is its attempt to keep careful records on when the noncustodial parent pays and fails to pay child support. (Each state has a State Case Registry [SCR], which contains a record of every support order entered or modified in the state and a State Disbursement Unit [SDU], which acts as a centralized collection center in the state.) The IV-D agencies can be quite persistent in going after the noncustodial parent through automatic billing, telephone reminders, delinquency notices, etc. Other enforcement tools are also available through the IV-D agency as outlined below.

A new federal agency was created to coordinate, evaluate, and assist state IV-D agencies—the Office of Child Support Enforcement (OCSE) within the U.S. Department of Health and Human Services. For the home page of the OCSE on the Internet, see Exhibit 1.11 on page 25 in chapter 1.

But first things first. A very large number of noncustodial parents simply disappear. Problem number one is to find the noncustodial parent in order to obtain a child-support order and/or in order to enforce it. Another service provided by the IV-D agency is its State Parent Locator Service (SPLS). At the national level, there is a comparable Federal Parent Locator Service (FPLS), which operates through the Office of Child Support Enforcement. The FPLS includes a National Directory of New Hires (NDNH), which, as we will see, collects data on newly hired employees throughout the country. The FPLS also has a Federal Case Registry (FCR), which contains data received from each state’s State Case Registry (SCR) on the child-support orders being enforced by IV-D agencies in every state. The centralization of data within these entities has been very helpful in the search for parents within a state and across state lines.

The starting point in the search is the custodial parent who is asked to provide the following leads to the IV-D agency on the whereabouts of the noncustodial parent:

- Social security number (check old state and federal tax returns, hospital records, police records, bank accounts, insurance policies, credit cards, loan applications, pay slips, union records, etc.)
- Last known residential address
- Current or recent employer’s name and address
- Prior employers’ names and addresses
- Place of birth
- Names and addresses of relatives and friends
- Local clubs and organizations to which he once belonged
- Local banks, public utilities, and other creditors he may have had or now has

The State Parent Locator Service (SPLS) of the IV-D agency will use the leads provided by the custodial parent to try to locate the noncustodial parent. It will check the records of other state agencies for a current address (e.g., Department of Motor Vehicle Registration, Unemployment Compensation Commission, Tax Department, and prisons). If the noncustodial parent has moved to another state, the IV-D agency in that state can be asked to provide comparable search services, or the Federal Parent Locator Service (FPLS) can be asked to help. The FPLS can search its records on newly hired employees throughout the country as well as the records of federal agencies such as the Internal Revenue Service, the Social Security Administration, and the Department of Defense.
The success of the SPLS and the FPLS in finding noncustodial parents has in large measure been due to the centralization and computerization of data on parents and children involved in child-support cases. The computer databases of state and federal child-support agencies are linked in order to facilitate matches between child-support orders and obligors. These agencies, however, must be careful about the locator information they release, particularly in cases where domestic violence against a spouse or child is a reasonable possibility. Without safeguards, for example, a husband might be able to use available locator services to find a wife or child who is in hiding because of his abuse. In a system containing millions of records, this is a distinct possibility. To prevent it from happening, a “flag” called a family violence indicator (FVI) is placed on the name of a person who has been abused or threatened with abuse. The victim might have an order of protection in effect against the abuser or might simply have told the IV-D agency of the danger of family violence. This leads to the placement of a flag on her name and that of her children. States are prohibited from releasing information on the whereabouts of a “flagged” parent or child to someone who has committed or threatened domestic violence. Furthermore, the address of a victim is shielded or otherwise blocked out in the maze of paperwork that will eventually be exchanged in the enforcement of a child-support order. Access to locator information such as addresses is highly restricted once a victim is flagged with an FVI.

Every state is required to have expedited paternity procedures, including standard forms in maternity wards on which unwed fathers are encouraged to acknowledge paternity voluntarily immediately after birth. (See Exhibit 13.5 in chapter 13 for an example of such a form.) In 1998, over 614,000 in-hospital paternities were voluntarily acknowledged. Where needed, the IV-D agency will help a mother obtain a court order establishing paternity. The total number of paternities established and acknowledged in 1998 was 1.5 million.

Once paternity has been established and a child-support order obtained, how is the order enforced? Some of the major enforcement mechanisms include:

- Civil contempt proceeding
- Execution
- Prosecution for criminal nonsupport
- Income withholding
- New hire reporting
- License denial or revocation
- Passport denial
- Federal tax refund offset
- Unemployment compensation intercept
- Qualified domestic relations order (QDRO)
- Qualified medical child support order (QMSCO)
- Credit bureau referral (credit clouding)
- Financial institution data match (“freeze and seize”)
- Posting security
- Protective order

**Civil Contempt Proceeding**

Contempt of court exists when the authority or dignity of the court is obstructed or assailed. The most glaring example is an intentional violation of a...
court order. There are two kinds of contempt proceedings, civil and criminal, both of which can lead to the jailing of the offender. The purpose of a civil contempt proceeding is to compel future compliance with the court order, whereas the purpose of a criminal contempt proceeding is to punish the offender. Criminal contempt in child-support cases is rare because of the cumbersome nature of any criminal proceeding.

When civil contempt occurs in child-support cases, the offender is jailed until he agrees to comply with the court order. Suppose, however, that the offender has no resources and thus cannot comply. In effect, such a person would be imprisoned because of his poverty. This is illegal. Imprisonment for debt is unconstitutional because it amounts to a sentence for an indefinite period beyond the control of the offender. To bypass this constitutional prohibition, a court must determine that the offender has the present ability to pay the child-support debt but simply refuses to do so. Such an individual is in control of how long the sentence will be. In effect, the keys to jail are in his own pocket. Release occurs when he pays the child-support debt. As one court recently said, “There is no constitutional impediment to imposition of contempt sanctions on a parent for violation of a judicial child support order when the parent’s financial inability to comply with the order is the result of the parent’s willful failure to seek and accept available employment that is commensurate with his or her skills and ability.”

In addition to jailing the obligor, most courts have the power to order the less drastic sanction of imposing a fine when the obligor is found to be in civil contempt.

**Assignment 10.7**

What steps must be taken in your state to use a civil contempt proceeding to enforce a child-support order? (See General Instruction for the Flowchart Assignment in Appendix A.)

**Execution**

Once an obligor fails to pay a judgment ordering child support, the sheriff can be ordered to seize the personal or real property of the obligor in the state. All of this occurs through a **writ of execution**. Its initial effect is to create a **lien** on the property that prevents the obligor from disposing of it. The property seized can then be sold by the sheriff. The proceeds from this **forced sale** are used to pay the judgment and the expenses of the execution. Not all property of the obligor, however, is subject to execution in every state. Certain property (e.g., clothes and cars) may be exempt from execution.

**Prosecution for Criminal Nonsupport**

In most states, the willful failure to support a child is a **state crime** for which the obligor can be prosecuted. There must be an ability to provide support before the obligor can be tried and convicted of **criminal nonsupport** or **desertion**. The range of punishment includes probation, fine, and imprisonment. Except for relatively wealthy offenders, imprisonment is seldom an effective method of enforcing child support. Most obligors are wage earners, and once they are jailed, their primary source of income obviously dries up. One way out of this dilemma is for the judge to agree to suspend the imposition of the jail sentence on condition that the obligor fulfill the support obligation, including the payment of arrearages. The obligor would be placed on **probation** under this condition.

The failure to pay child support can also be a federal crime under the Deadbeat Parents Punishment Act. A sentence of between six months and two years can be imposed when the obligor:

1. willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;
2. travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or
3. willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000. . . .

---

To be prosecuted under this act, the obligor must be financially able to pay the child support that is due. Federal prosecutors in the United States Attorney's Office, however, are reluctant to bring a case until civil and criminal remedies at the state level have been tried. Furthermore, federal prosecutors will give priority to cases (1) where there is a pattern of moving from state to state to avoid payment, (2) where there is a pattern of deception such as the use of a false name or a false social security number, (3) where there is failure to make support payments after being held in contempt of court, and (4) where failure to make support payments is connected to another federal offense such as bankruptcy fraud.

The creation of federal crimes in this area by Congress has been criticized as inappropriately “federalizing” family law. For example, the chief justice of the United States Supreme Court, William H. Rehnquist, has complained that Congress is enacting too many federal crimes to cover conduct that should be the exclusive domain of the state criminal justice system. One of the examples he cites is the federal crime of failing to pay child support for a child living in another state.

**Income Withholding**

One of the most successful enforcement programs is *income withholding*, which is a mandatory, automatic deduction from the paycheck of an obligor who falls behind in child-support payments. Nearly 60 percent of all child support is collected by employers through this method. An income withholding order can be sent to employers in any state where the obligor works. In addition to wages, employers can withhold commissions and retirement payments. Each pay period, the employer deducts a specified amount and sends it to the IV-D agency, to the court, or, in some cases, to the custodial parent. The process begins when the IV-D agency sends the employer an order/notice to withhold income for child support.

The order/notice can also include a requirement that the employer enroll the employee’s children in health insurance coverage made available to its employees. There is a box on the order/notice that says, “If checked, you are required to enroll the child(ren) identified above in any health insurance coverage available through the employee’s/obligor’s employment.” The employer cannot deny coverage for children simply because they may no longer live with the employee. (See also the discussion below on the qualified medical child support order or QMCSO, a formal method of accomplishing the same objective of health coverage for children.)

Employers must comply with all the requirements listed in the order/notice. They can be fined or otherwise sanctioned for failure to withhold income or to include the children in the company health insurance plan. Most states allow employers to charge an employee an administrative fee for processing the withholding, but they cannot fire or discipline the employee because of withholding.

If the employee quits or is terminated by the employer for a legitimate reason, the employer must send the IV-D agency or court a notice giving the date of termination, the employee’s last known home address, and the new employer’s address. A form to provide this notice of termination is found on the reverse side of the original order/notice to withhold income for child support received by the employer.

Here are the guidelines sent to employers on their responsibilities.
What is the maximum amount of money that may be withheld from an employee's paycheck?

The upper limit on what may be withheld is based on the Federal Consumer Credit Protection Act (CCPA). The federal withholding limits for child support are based on the disposable earnings of the obligor (i.e., the employee). The federal CCPA limit is 50 percent of the disposable earnings if the employee lives with and supports a second family and 60 percent if the employee does not support a second family. These limits increase to 55 percent and 65 percent, respectively, if the employee owes arrearages that are 12 weeks or more past due. (States may choose a lower limit.) Check with your state to determine exact limits.

About two-thirds of the states use the federal limits, and about one-third cap the withholding at 50 percent regardless of second families or age of arrearages.

Income withholding requires extra paperwork on our part. May I charge a processing fee to the employees?

Most states allow you to charge an administrative fee for processing the income withholding. Contact your local or state child support enforcement agency (also called the IV-D agency) to learn what the administrative fee is in your state.

Some of our employees already have income attachments against their paychecks. How do we handle these attachments and child support withholdings?

Child support withholdings take priority over all other claims against the same income except federal tax liens that were served before the child support order was served. Only after satisfying the child support obligation (to the CCPA-maximum-allowed limit) may you honor the other income attachments.

How soon do we need to send the child support payment that we have withheld from an employee's paycheck?

You need to send payment of the withheld income within seven business days of paying wages to the employee. Your state may set a shorter time limit for making payment.

Where are payments sent?

Each state has a State Disbursement Unit (SDU) for the collection and disbursement of child support payments for all IV-D cases (cases enforced by a child support agency) and for all private child support orders issued.

We received an income withholding Order/Notice from a child support agency in another state. Must we send payments directly to the other state?

Yes. An employer is required to honor income withholding Orders/Notice from another state as long as the order appears to be “regular on its face.”

What if my employee tells me the amount being claimed is the wrong amount and/or that I do not need to withhold?

If your employee disputes the income withholding notice, the employee should contact the child support enforcement agency or court, not his or her employer. Until you are otherwise notified by an amended Order/Notice, you should proceed with the withholding Order/Notice as issued.

Our company has an employee who has remarried and now has a child by his second wife. He told us that we should reduce the amount of the child support he is paying to his first wife because of this second family. Who makes the decision in this kind of situation?

The court or child support enforcement agency makes the decision to change an income withholding order. You must continue withholding according to a valid withholding Order/Notice until you receive notification in writing from the child support agency or court issuing the Order/Notice that a change is necessary. It is up to the employee to notify the child support agency or court of the change in his/her family situation so that the agency or court can then issue a revised Order/Notice (with a lower maximum withholding amount) to your company.

What if I fire or lay off my employee or the employee quits after I begin withholding child support?

Report the termination of employment. Complete the back of the Order/Notice and send it to the child support enforcement agency or court. Notify them of the employee's last known address and, if you know it, the name and address of the new employer.
Income withholding is similar to the more traditional garnishment process, under which a third party (e.g., a bank or employer) who owes the obligor money or other property is ordered by a court to turn it over to a debtor of the obligor, such as the custodial parent. Garnishment, however, is usually less effective than income withholding because of the more cumbersome procedures for instituting garnishment and the restrictions that may exist on how long it can be in effect.

**ASSIGNMENT 10.9**

a. Who can use income withholding in your state through the state IV-D agency? How does this enforcement mechanism operate?

b. Compare income withholding to the garnishment process in your state. How do they differ?

(See General Instructions for the State-Code Assignment in Appendix A.)

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**New Hire Reporting**

Employers are required to report information about all newly hired employees to a State Directory of New Hires (SDNH) shortly after the hire date. (In many states, it is twenty days.) The “New Hire” report from the employer must provide the employee’s name, address, and social security number as listed on his or her W-4 form. The SDNH will then match this data against its child-support records to locate delinquent parents so that income withholding orders can be issued. To help locate parents in other states, the SDNH submits its data to the National Directory of New Hires (NDNH), which is a national database that is part of the Federal Parent Locator Service (FPLS). To help locate parents who have moved across state lines, the NDNH compiles new hire and quarterly wage data from every state and federal agency and also unemployment insurance data from every state. The NDNH is an important locator tool, since a large percentage of child-support cases involve noncustodial parents who do not live in the same state as their children.

The new hire program has been quite successful. In the first two years of its operation, over 2.8 million delinquent parents were uncovered. There have been side benefits as well. Citizens collecting unemployment compensation should not be working full-time. Yet the new hire program has found thousands who have been fraudulently collecting unemployment benefits while employed. In 1998, for example, Pennsylvania alone identified 4,289 overpayments in unemployment with a dollar value of $2.3 million. Among the new hires, the government has also found numerous individuals who are in default on their student loans. Their names have been shared with the United States Department of Education, which has initiated successful loan collection efforts. Clearly, the benefits of the new hire program have extended beyond improved child-support collection.

**License Denial or Revocation**

To engage in certain occupations, a person must obtain a license from the state. Examples include plumber, hairdresser, real estate broker, accountant, electrician, teacher, doctor, and attorney. Many states will deny an initial application for a license, deny an application for a renewal of a license, or revoke the license of a parent who is delinquent in making child-support payments. In Illinois, for example, the license statute that applies to attorneys provides as follows:

No person shall be granted a license or renewal authorized by this Act who is more than 30 days delinquent in complying with a child support order. . . . 16

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16705 Illinois Compiled Statutes Annotated § 205/1.
Many states will also revoke or suspend a delinquent obligor’s driver’s license or vehicle registration. One state sends him or her an “intent to revoke” letter. If the child-support debt is not satisfied, an investigator locates the car or other vehicle, removes the license plate, and leaves a bright orange decal on the driver’s side window explaining the seizure and the steps to take through the IV-D agency to have the license plate restored.

Under the state code of your state, can licenses be revoked for the failure to pay child support? If so, what licenses? What are the conditions that will trigger a revocation? (See General Instructions for the State-Code Assignment in Appendix A.)

Passport Denial

Individuals who owe over $5,000 in child support can have their passport application denied. In addition, the United States secretary of state, the federal official in charge of the Passport Office, can take action to revoke or restrict a passport previously issued to those who have this amount of child-support debt.

Federal Tax Refund Offset Program

The Federal Tax Refund Offset Program collects past due child-support payments out of the tax refunds of parents who have been ordered to pay child support. Each year state IV-D agencies submit to the IRS the names, social security numbers, and amounts of past due child support owed by parents. The IRS then determines whether these individuals are scheduled to receive tax refunds on their returns. If so, the IRS sends them an offset notification that informs them of the proposed offset and gives them an opportunity to pay the past due amount or to contest the amount with the IV-D agency. (See Exhibit 10.4.) Since 1982, almost 10 million tax refunds have been intercepted, and over $6 billion has been collected. In 2000, $1.4 billion was collected. The average tax refund amount is $721. In addition, a program exists to intercept and offset tax refunds due on state returns.

Unemployment Compensation Intercept

The unemployment compensation benefits of the obligor can be intercepted to meet ongoing (not just past due) child-support payments. This method of withholding enables the IV-D agency to collect at least some support from an unemployed obligor. Nothing is left to chance. Computers at the unemployment compensation agency and at the IV-D agency communicate with each other to identify delinquent parents who have applied for or who are eligible for unemployment compensation. An investigator from the IV-D agency will then contact the surprised obligor. It may even be possible to intercept benefits across state lines pursuant to reciprocal agreements among cooperating states. (In most states, a similar intercept program can reach an obligor’s workers’ compensation benefits.)

Qualified Domestic Relations Order

Very often an obligor will have pension and other retirement benefit plans through an employer. A special court order, called a qualified domestic relations order (QDRO), allows someone other than the obligor to reach some or all of these benefits in order to meet a support obligation of the obligor, such as child support. The child becomes an alternate payer under these plans. This qualified domestic relations order (QDRO)

A court order that allows a nonemployee to reach pension benefits of an employee or former employee in order to satisfy a marital obligation to the nonemployee.
person cannot receive benefits under the plan that the obligor would not have been able to receive. For example, if the obligor is not entitled to a lump-sum payment, the child as alternate payee is also subject to this limitation. (For an example of a QDRO in which a spouse is the alternate payee, see Exhibit 8.6 on page 268 in chapter 8.)

Qualified Medical Child Support Order

Many children of noncustodial parents have no health insurance. Assume that such a parent is working for a company that has a group health plan. But the parent either refuses to add the child to the plan, or the insurance company tells the parent that the child is ineligible because he or she does not live with the parent, does not live in the insurer’s service area, is not claimed as a dependent on the parent’s tax return, or was born to unmarried parents. In 1993, Congress passed a law that made it illegal for insurance companies to use such reasons to deny coverage to children. A court order can now be obtained to require coverage. It is called the qualified medical child support order (QMCSO). The child becomes an alternate recipient under the health plan. The employer can deduct the cost of adding the child to the plan from the parent’s pay. In 1998, Congress made QMCSOs easier to implement. As we saw earlier, employers can now be required to include a noncustodial parent’s children in company health plans. This requirement is included in the order/notice to withhold income for child support sent to an employer.

Credit Bureau Referral (Credit Clouding)

An obligor may be warned that a credit bureau (e.g., TRW, Trans Union, CBI-Equifax) will be notified of a delinquency in making child-support pay-
ments unless the delinquency is eliminated by payment or unless satisfactory arrangements are made to pay the debt. Once the computers of a credit bureau have information on such payment problems, a “cloud” on the obligor’s credit rating is created (credit clouding), which notifies potential creditors that the obligor may be a bad credit risk. This method of pressuring compliance with child-support obligations is particularly effective with self-employed obligors, who often do not have regular wages that can be subjected to income withholding or garnishment. Many states now routinely report child-support debts to credit bureaus.

**Financial Institution Data Match ("Freeze and Seize")**

State IV-D agencies can attach and seize (“freeze and seize”) the accounts of delinquent parents in financial institutions that operate in more than one state. The accounts can include savings, checking, time deposit, and money-market mutual fund accounts at large banks, credit unions, and money-market mutual funds. The IV-D agency issues a lien or levy on the account. A lien, as we saw earlier, is an encumbrance or claim on property that is imposed as security for the payment of a debt. The lien impedes the debtor’s ability to transfer the property. The debtor must satisfy the lien before the property may be sold or transferred. A **levy** is an actual collection or seizure of the property. Liens and levies are governed by state law. Some states, for example, require a minimum dollar amount of child-support debt before a lien can be imposed.

**Posting Security**

In some cases, a noncustodial parent may be asked to post security in the form of a bond or other guarantee that will cover future support obligations.

**Protective Order**

Some men do not react kindly to requests from the mothers of their children that they meet their child-support obligations. Occasionally, they may even physically assault the mother or threaten to do so. The police may be called in, although some have complained that the police do not take so-called domestic disputes seriously. Usually the woman can obtain through the local prosecutor or district attorney a **protective order**, which threatens the man with arrest and jail unless he stays away from the children and their mother. (For an example of a protective order, see Exhibit 12.2 in chapter 12.)

**IMPROPER ENFORCEMENT**

There are limits to what a state can do to enforce a child-support order. As we have seen, a state cannot imprison parents for failure to pay child support when they do not have the financial resources or capability to make such payments. Some states have tried to enforce support obligations through their marriage license statutes. One state refused to issue marriage licenses to individuals who had failed to support their children in the custody of someone else. As we saw in chapter 5 on marriage formation, however, the United States Supreme Court has held that this method of child-support enforcement is invalid because it is an unconstitutional interference with the fundamental right to marry.\(^{17}\)

Although the failure to pay child support cannot be used to interfere with the right to marry, can such failure be used to interfere with the right to pro-

create? Can the state say to a “deadbeat dad”: Stop having more children until you pay for the ones you already have? The United States Supreme Court has not yet answered this question. In 2001, however, the Supreme Court of Wisconsin answered it in the affirmative. The Wisconsin court held that a father who intentionally refused to pay child support can be required to avoid having another child until he makes sufficient efforts to support his current children.\(^\text{18}\) David Oakley was convicted of intentionally failing to support the nine children he fathered with four different women, even though nothing prevented him from obtaining gainful employment. He could have been sent to prison for eight years. Instead, the court released him on probation under the condition that he avoid fathering another child until he complied with his support obligation to the nine he had already fathered. He faced eight years in prison if he violated this condition. Oakley argued that the condition violated his fundamental right to procreate. The court acknowledged “the fundamental liberty interest of a citizen to choose whether or not to procreate.”\(^\text{19}\) Yet the court said the interest had not been violated in this case. Oakley was a convicted felon and, therefore, he was subject to more restrictions than ordinary citizens. Furthermore, the condition was reasonably related to his rehabilitation. To avoid eight years of prison (where he would face a total ban on his right to procreate), he merely had to make the efforts required by law to support his current children. The condition simply required him to avoid creating another victim of willful nonsupport.

The vote of the Wisconsin justices upholding the probation condition was 4–3. The dissenters were concerned that the right to have children was based on a parent’s financial resources. One dissenter said that the condition “is basically a compulsory, state-sponsored, court-enforced financial test for future parenthood.”\(^\text{20}\) Another dissenter commented that the condition creates a strong incentive for Oakley to demand an abortion from any woman he impregnates in the future. An attorney for the American Civil Liberties Union called the decision “a dangerous precedent” in the area of reproductive rights.\(^\text{21}\) The case received widespread publicity. Some of the news accounts thought it relevant to point out that the four justices in the majority were male and that the three dissenters were female.

**NECESSARIES**

A seldom used method for a wife and child to obtain support is to go to merchants, make purchases of **necessaries**, and charge them to the credit of the nonsupporting husband/father. The latter must pay the bills, whether or not he knows about them or authorizes them so long as:

- They are in fact for necessaries and
- The husband/father has not already provided them for the family

Since the definition of necessaries is not precise and since a merchant has difficulty knowing whether a husband/father has already made provision for the necessaries of his family, few merchants are willing to extend credit in these circumstances without express authorization from the husband/father. Some states, however, have eliminated the requirement that there be evidence of a failure of the husband/father to provide necessaries before his credit can be charged.

\(^{18}\) *State v. Oakley*, 629 N.W.2d 200 (WI 2001).
\(^{19}\) 629 N.W.2d at 207.
\(^{20}\) 629 N.W.2d at 221.
What are necessaries? Generally, they encompass what is needed and appropriate to maintain the family at the standard of living to which it has been accustomed (e.g., home, food, clothing, furniture, medical care). The educational expenses of minor children are necessaries. A college education, on the other hand, is not in many states.

Originally, the doctrine of necessaries applied against the husband only. At common law, a wife was not responsible for necessaries furnished to her child or husband. Today states have either extended the doctrine so that it now applies equally to both spouses or they have abolished the doctrine altogether.

SUMMARY

Child support is heavily influenced by federal law. When parents are negotiating the child-support terms of their separation agreement, they must consider a number of factors such as child-support guidelines, tax considerations, and methods of payment. Parents cannot agree to an amount of child support that will fall below the minimum required in the state.

A child-support order requires personal jurisdiction over the defendant/obligor. The Uniform Interstate Family Support Act (UIFSA) allows a state to obtain personal jurisdiction over a nonresident by the long-arm method. The resident parent can then enforce the order by registering it in the state of the defendant/obligor. If the resident state cannot obtain personal jurisdiction over the obligor, the custodial parent can use the services of IV-D agencies to obtain and enforce an order in the state of the obligor. A state with a valid order under the UIFSA has continuing, exclusive jurisdiction over the case so that another state cannot modify the order. If there is a conflict in orders, the order of the home state has priority.

Both parents have an equal obligation to pay child support. The amount of child support is determined primarily by the child-support guidelines of each state. States differ on whether a parent has an obligation to pay for a child’s college education and on the impact of the obligor’s start of a second family.

Child-support orders cannot be modified unless there is a substantial change of circumstances since the original order. No modification will be ordered if a parent voluntarily reduces his or her income-earning capacity in order to avoid paying support, nor will there be a modification if it results in the child becoming destitute.

Each state has a IV-D agency to assist custodial parents in obtaining and enforcing child-support orders. Locator services will help find missing noncustodial parents. An order can be enforced by civil contempt and by prosecution for criminal nonsupport if the obligor has the financial means or capacity to pay the support obligation. A writ of execution can be used to place a lien on the obligor’s property. Income withholding is the most effective enforcement device. Employers are required to deduct support payments from the obligor’s paycheck and to enroll the obligor’s children in available company health insurance plans. Employers must notify the state every time they hire a new employee; the names of these new employees are then matched with a list of delinquent obligors. Delinquent parents can be denied licenses, have licenses revoked, and have passports denied. Payments can be taken out of an obligor’s tax refund and unemployment compensation funds. Pensions can be reached through a qualified domestic relations order, and health benefits can be obtained through a qualified medical child support order. Credit bureaus can be notified of nonpayment by an obligor. Accounts in interstate financial institutions can be seized. Obligors can be required to post security for future payments. Protective orders are available if violence has been committed or is threatened against the child or custodial parent. Some states allow one spouse to charge the credit of the other for necessaries such as food for the spouse and
child. Efforts to collect child support, however, cannot interfere with an obligor’s fundamental right to marry.

**KEY CHAPTER TERMINOLOGY**

pendente lite  
personal jurisdiction  
Uniform Interstate Family Support Act (UIFSA)  
long-arm jurisdiction  
IV-D agency  
initiating state  
responding state  
divisible divorce  
continuing, exclusive jurisdiction (cej)  
home state  
child-support guidelines  
obligor  
obligees  
arrearage  
arrears  
imputed income  
assign  
State Parent Locator Service (SPLS)  
Federal Parent Locator Service (FPLS)  
family violence indicator (FVI)  
contempt  
write of execution  
lien  
garnishment  
qualified domestic relations order (QDRO)  
qualified medical child support order (QMCSO)  
levy  
protective order  
necessaries

**ETHICS IN PRACTICE**

You are a paralegal working at the law office of Helen Farrell, Esq. Claire Richardson asks Farrell to represent her in a child-support case. The court ordered the father of their child to pay $1,000 a month in child support. He is currently $25,000 in arrears. Farrell agrees to take the case. Her fee will be 40 percent of whatever amount of the arrears she collects. In addition, she will receive 10 percent of every future monthly child-support payment. Any ethical problems?

**ON THE NET: MORE ON CHILD SUPPORT**

Support Guidelines  
http://www.supportguidelines.com  
State Child Support Agencies  
http://www.acf.dhhs.gov/programs/cse/extinf.htm#exta  
Alliance for Non-Custodial Parents Rights (Child Support)  
http://www.ancpr.org  
Missing Dads (search for delinquent parents)  
http://www.missingdads.com  
online Support Calculators/Worksheets in Selected States  
**California:**  
http://www.pegasussoft.com/homepage.htm  
**Massachusetts:**  
http://www.divorcenet.com//worksheet.html  
http://www.state.ma.us/cse/programs/employer/Quick.htm  
**Ohio:**  
http://www.alllaw.com/calculators/Childsupport/ohio  
**Utah:**  
http://www.lawutah.com/gb/docs/Calc.htm  
**Vermont:**  
http://www.state.vt.us./courts/csguide.htm