# DELAWARE LAWYER

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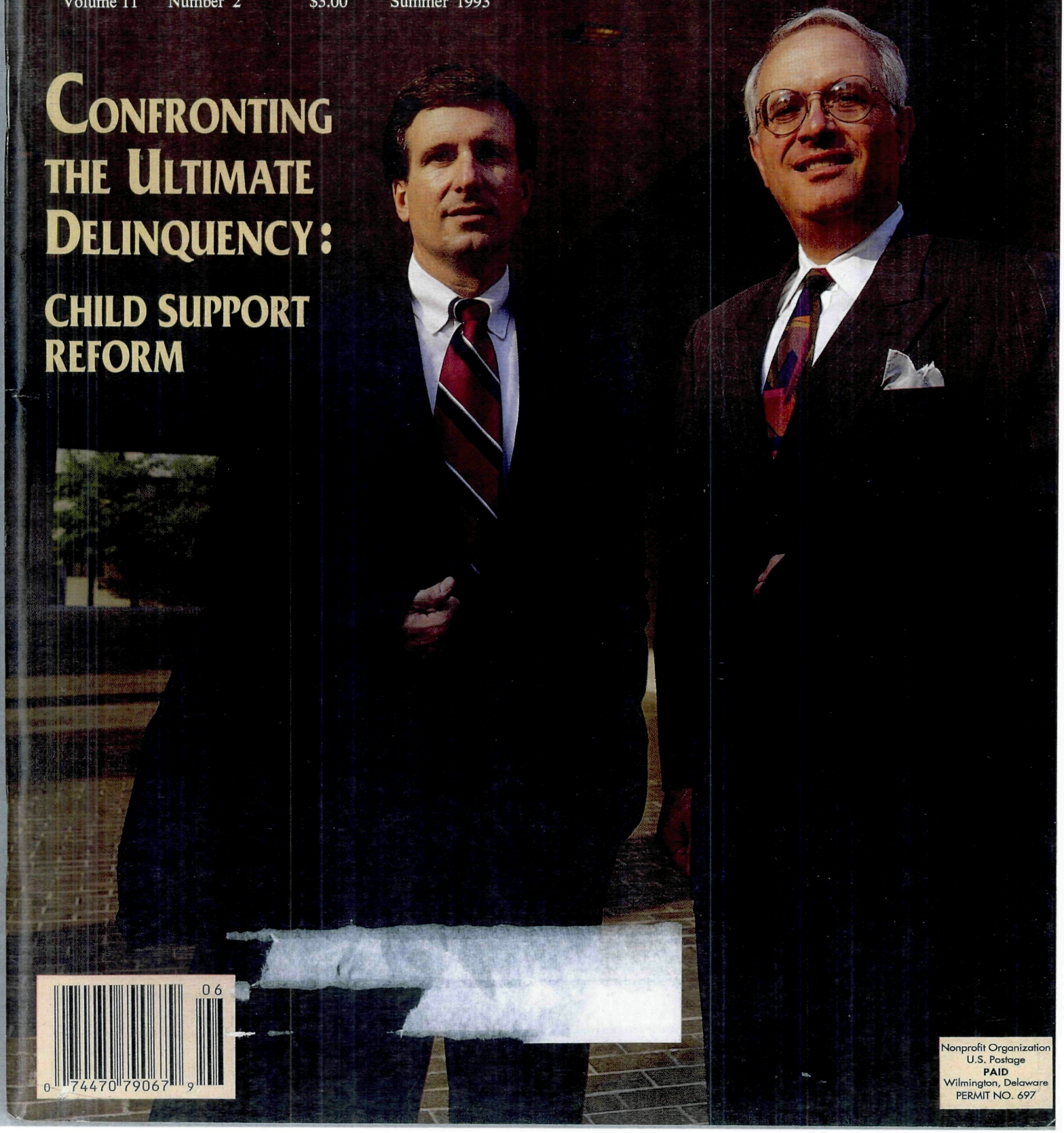
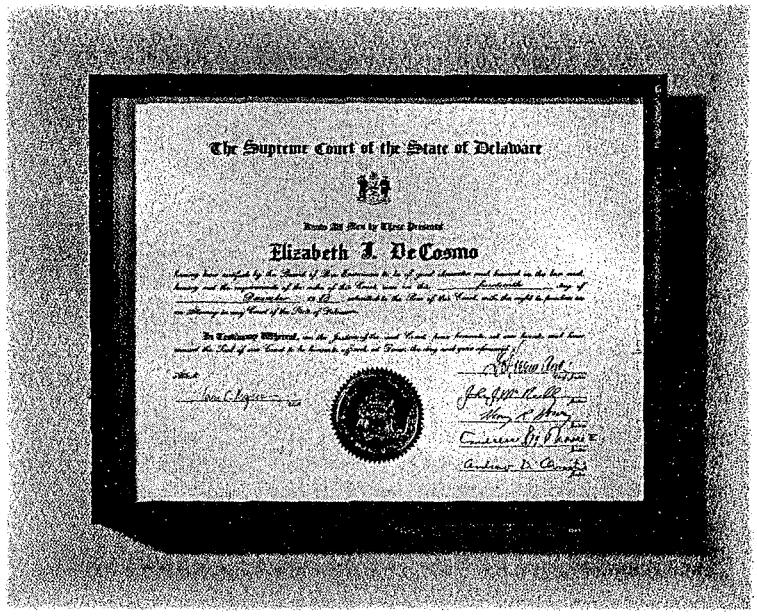
## CONFRONTING THE ULTIMATE DELINQUENCY: CHILD SUPPORT REFORM



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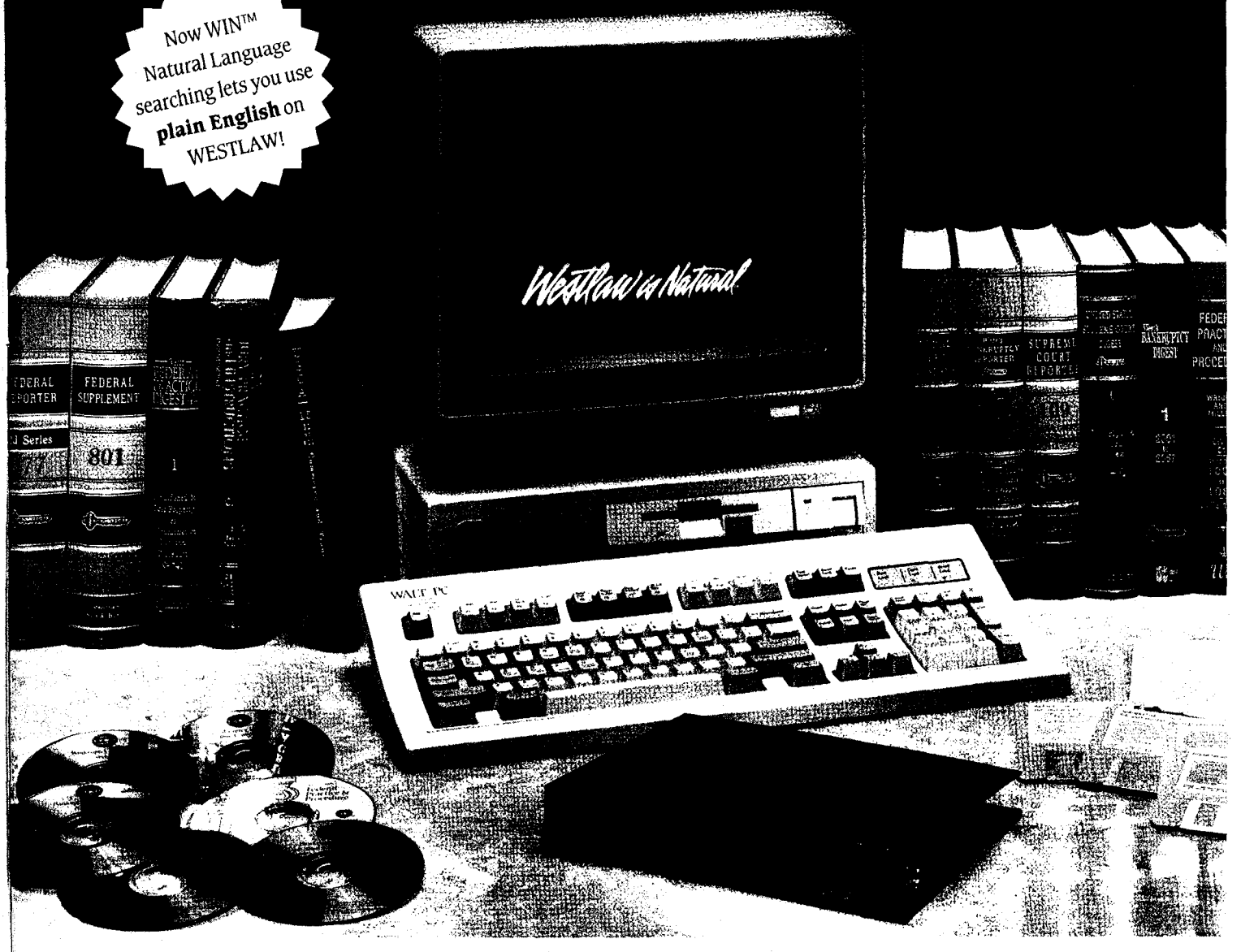


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We wish to thank The Laffee McHugh Foundation and The Junior League of Wilmington for their contributions towards the publication of this issue.


**ON THE COVER:** To the left, Justice Holland of the Delaware Supreme Court: to the right, Chief Judge Poppiti of the Delaware Family Court. Both are making significant contributions to child support reform.



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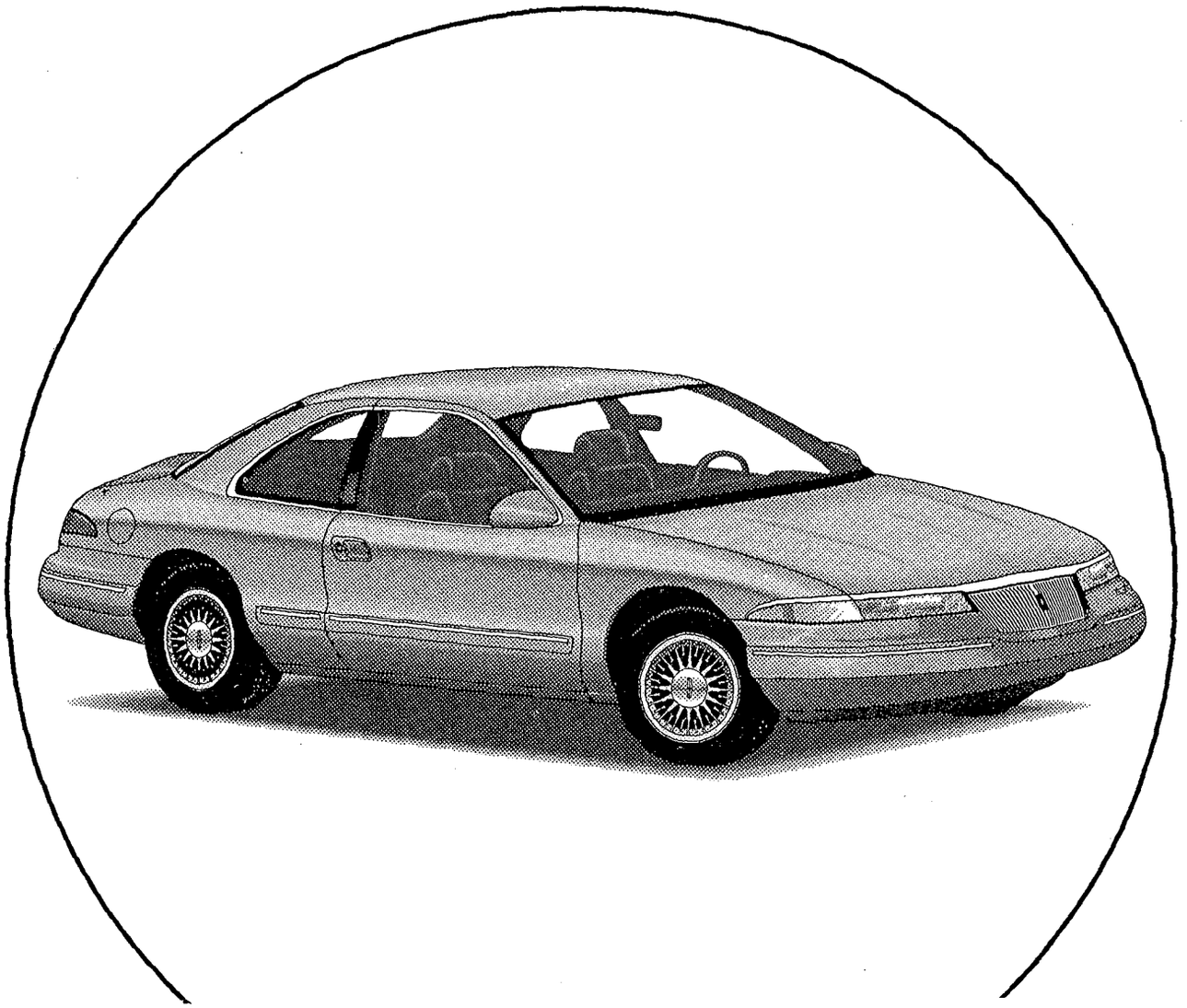

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# A Message From the Chief Justice of Delaware

Delaware has an exemplary court system. Its complement of dedicated jurists is envied by the other 49 states and foreign countries. Much has been written and said about the preeminence of the Delaware Supreme Court, Court of Chancery, and Superior Court with regard to Delaware law, as the national business law. This issue of DELAWARE LAWYER focuses appropriately on the national prominence of the Delaware Family Court in the vitally important area of child support.

The Family Court is the court that most of our citizens encounter. More than 200 years ago Alexander Hamilton stated:

> [T]he ordinary administration of criminal and civil justice ... contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence toward the government.
>
> Alexander Hamilton, *The Federalist* No. 17 (1787) quoted in *Trial Court Performance Standards,* p. 1. (Cited in Superior Court Study Committee Report of December 20, 1991).

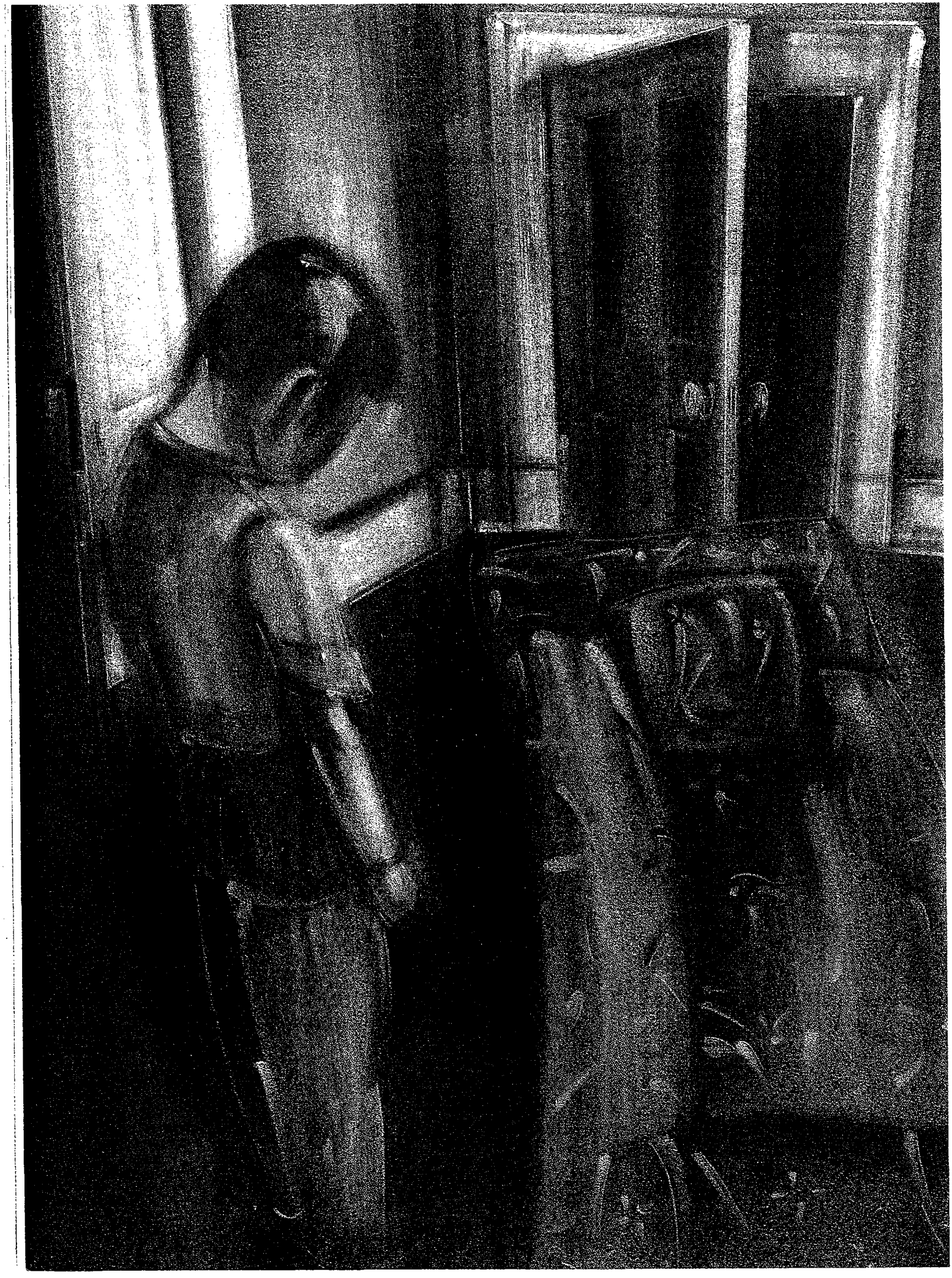
Delawareans are justly proud of the fair and impartial administration of justice in our Family Court, which, like the Phoenix, raises its litigants from the ashes of what are often tragic circumstances.

The work of Delaware's Family Court judges is a labor of love. By definition, those dedicated judges deal with human misery every day, often in an emotional swamp. Moreover, their work frequently involves complicated and sophisticated economic issues. Despite the rise in the needs and the number of litigants, the Delaware Family Court has been assiduous in striving for procedural and substantive due process for all parties generally and in particular with respect to the resolution of child support issues.

The method of establishing child support in Delaware was developed by retired Judge Elwood F. Melson, Jr., of the Family Court. The Melson Formula has been characterized as the most comprehensive method of adjudicating child support. The Melson Formula is recognized as a national model and has already been adopted in several states.

This issue of DELAWARE LAWYER demonstrates that Judge Melson's initial national leadership in child support matters is continued at the present time by many of the current judges and masters of the Delaware Family Court with superb guidance from Justice Randy J. Holland, liaison justice from the Supreme Court to the Family Court. Justice Holland recently received the National Child Support Enforcement Agency's 1992 Judge of the Year Award. As Chief Justice, I will continue to press for adequate resources for the Family Court in the handling of child support matters and all of the other important issues entrusted to its jurisdiction. I am fully committed to the importance of the work of the Family Court and the high stature of its judges.

The Honorable E. Norman Veasey



# Support in Behalf of Children

The Family Court of the State of Delaware

The Honorable Vincent J. Poppiti

It's eight-thirty a.m., and the Clerks of Court for the Family Court of the State of Delaware raise the white shades covering the opening of the windows separating them from the line of individuals brandishing manila folders and large envelopes. In the next hour, seventeen civil petitions will be checked in. Ten will ask for relief related to child support enforcement. The filings will continue until, by this date next year, the Court will have received over 18,000 child support petitions.

New support, modification increases, modification decreases, initial contempts, second, third — and sometimes more — contempts, and termination of support obligation are the collective bases of the escalating child support case load filed in Delaware's Family Court in Fiscal Year 1992. These filings represented 59% of the Court's civil filings and over 30% of the total filings for the year. This litigation is growing steadily: support filings have increased by more than 100% in the past ten years. This exploding case load may be due in part to an increased public awareness of the availability of child support remedies as well as the mandate of both federal and state legislation to become more pro-active in the enforcement of both intra and interstate child support obligations.

Be assured that the Delaware experience of an exploding child support case load is not out-of-sync with that in the rest of the country. That child support has become of such paramount national concern is evidenced by an ever increasing regularity of discussion and debate concerning child support issues on the floor of the United States Senate.

Indeed, child support enforcement has become highly regulated by the federal government in recent years. The regulatory climate is marked by frequent change in the regulations as well as frequent "fed interpretation" of those regulations. The rate at which these changes take place and the manner in which a state executive agency and a state court absorb and apply the requirements can be extremely frustrating to many engaged in the process: intake workers, clerks, masters, judges, private attorneys, deputy attorneys general, and *pro se* litigants.

Delaware is fortunate, however, in that it has *one* court with statewide jurisdiction dedicated to domestic issues. The Family Court of the State of Delaware is nationally recognized for its unprecedented strides in federally mandated timely processing of child support cases.

What follows is a brief overview of a process unique to Delaware and praised as a model in many other jurisdictions. It is also intended as a primer for the novice entering the domain of child sup-

Illustration by Traci Haymans

port enforcement. It will outline the procedure by which a petition is processed through the Family Court system, highlight past and current innovations in which the Court has taken part, as well as touch upon some pilot projects that may affect the future of the enforcement process in Family Court.

**Seeking Child Support: Where It All Begins**

Every child, regardless of the marital status of his/her parents, has the right to support. Delaware law places responsibility to provide it upon both parents equally. 13 *Del. C.* § 501. The parent's legal duty to support does not terminate until the minor child is considered legally emancipated. This occurs when the child turns 18 unless: (1) he/she is in high school and likely to graduate, and then upon the receipt of a high school diploma, or (2) age 19 - whichever occurs first. 13 *Del.C.* § 501(d).

The petition for child support must allege that the respondent has a legal duty to support the child(ren) named on the petition and has failed to do so. The petition and one copy must be filed in the Clerk's office of Family Court along with the appropriate fee. Pursuant to Family Court Civil Rule 4, a Family Court summons along with a copy of the petition will be personally served on the respondent.

If service cannot be obtained, the petition will be dismissed without prejudice to the moving party to refile once a better address for service can be ascertained. Once service is accomplished, Family Court has jurisdiction over the respondent for the life of the support order. The Family Court will then schedule the matter for a mediation conference.

**The Melson Formula: A Standard For The Nation**

The development of a child support calculation by Judge Elwood F. Melson in the late 1970's was one interested judge's effort to provide a more equitable and predictable approach to each parent's child support obligation. An obligation calculated under the so called "Melson Formula", Delaware's child support formula, has been upheld by the Delaware Supreme Court as a rebuttable presumption of the obligor's legal obligation. *Dalton v. Clanton,* Del. Supr., 559 A.2d 1197 (1989). The Melson Formula has earned the respect of the leading innovators in the field of child support. The *Family Law Quarterly* in its Fall, 1992 issue suggests that the Melson Formula is a primary model for states seeking to improve the manner in which they deal with support determination. The mechanics of the formula is discussed elsewhere in this publication.*

**Mediation: An Attempt to Reach an Amicable Solution**

In an effort to deal with the ever increasing case load and the ever present fiscal constraints limiting the number of judicial officers to hear such cases, the Family Court in 1981 developed an innovative course of alternate dispute resolution and began mediating child support matters. By January of 1985 mediation became a prerequisite to scheduling before a judicial officer. Thus every petition seeking support or support modification, alleging non-support or first time contempt must, in the first instance, be scheduled for a mediation conference to attempt to resolve the issue without the need for a full judicial hearing. Family Court Civil Rule 16(a)(1).

The mediation process in general offers the litigants a device for resolving conflicts with the assistance of a neutral third party, the mediator. It is expected that both parties will approach the process in an open and reasonable manner and attempt to cooperate with the mediator and one another. Under the present Family Court Civil Rule 16, attorneys may attend and participate in the mediation conference at their election. The main purpose, however, is to foster discussion between the parties. The mediator will request disclosure of pertinent facts and explore possible solutions agreeable to both parties.

At the outset the mediator will ask a named male respondent if he is the father of the child(ren) named in the action, unless the child(ren) was the product of the parties' marriage. The alleged father will be advised of his rights to blood tests to determine paternity. *Chase El. v. BCSE/Taylor,* Del. Super., C.A. No. 85A-AU-3, Gebelein, J. (Jan. 20, 1988) (ORDER). If the respondent exercises his right to blood tests and signs a consent order, the mediation is concluded until blood testing has been completed and the results have been distributed to the parties.

The test results will either exclude the respondent or show a probability of 99% or greater that he is the biological father. If the results show an exclusion the parties will be given the opportunity to review the Court file and present, at a scheduled Master's hearing, any evidence to the court that the results were not accurate. If no such evidence is presented, the results will be entered into evidence and the underlying petition for support will be dismissed with prejudice as to the named respondent. 13 *Del.C.* § 810(h). If the results do not exclude the alleged father, the petition will be scheduled for a subsequent mediation conference at which time the named respondent can stipulate to paternity or request a Master's hearing to dispute the scientific findings and present other evidence, in yet another attempt to shave additional time from filing to final disposition.

At the request of the Sussex County Division of Child Support Enforcement, the Court has instituted a pilot project for speedy determination of blood test requests by alleged fathers. Those respondents named in non-support petitions filed by the Division of Child Support Enforcement are given the opportunity, before the case is scheduled for a mediation conference, to request blood testing. An information sheet, explaining the right to blood testing and to request it before mediation, is served on the respondent together with the original summons and copy of the petition. This initial step saves the parties a day in court just to sign a consent order for blood testing and opens up a mediation slot for use by the Court and other litigants. If this pilot project is successful, it may be adopted statewide.

If paternity of the child(ren) in the instant action is not an issue, or is resolved after the receipt of blood test results, the mediation conference will proceed to establish the non-custodial parent's support obligation. Each party to the mediation conference is required to produce proof of current/annual income, or work history and earning capability, as well as proof of allowable expenses such as work-related day care and health and life insurance incurred on behalf of the child(ren) subject of the action. To this end the parties are required to complete Family Court form 16(a) — a two-sided verified form, which details the above information. The mediator uses the information on the form, the accompanying documentation, and the statements of the parties to compile the figures for calculation. Of course, use of the Melson Formula goes hand-in-hand with the expedited process of mediation, since it requires a simple mathematical calculation and an application of predetermined support needs of

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* *See Judge Tumas's lucid explanation beginning at page 30. Ed.*

the parties and their children.

In 1990, when the Melson Formula was automated, the Court took yet another significant step forward in expediting child support cases by affording the parties a better opportunity to reach an amicable settlement in mediation. Since the calculation can be performed more quickly, figures can be added, deleted, or modified and the resulting child support calculations placed in the litigants' hands in a matter of minutes. This assists the parties in gaining an overall perspective of how any modifications in the figures, which they believe are appropriate, will affect the bottom line of the support calculation. Furthermore, unless the parties are willing to agree to an amount different from the calculation performed, the mediator is bound to recommend the Melson Formula result. If the parties reach an agreement, a consent order is prepared for their signature. This agreement will become the order of the Court when signed by a Master within five days of the date of mediation. Over 60% of the Court's total filings for new support orders are successfully disposed of in this fashion.

When the parties fail to agree (e.g. when one party asserts that the calculation should fall outside the Melson Formula guidelines), the matter is scheduled for a Master's hearing forthwith in order to have an interim support order entered, or the matter is scheduled for a Master's hearing within 10 days. Family Court Civil Rule 16(a)(4).

Recently the Family Court's Executive Assistant for Support, observed that in New Castle County over one-third of the Master child support cases result from unresolved mediations. Once again, in an innovative effort, the Court instituted a pilot project in New Castle County whereby litigants may speak to a Master on an outstanding issue with the goal of resolving that issue by consent order, or may participate in a Master's hearing forthwith from mediation on single issue disputes, or both. As part of this project, a Master is dedicated to the mediation unit and is available to answer questions by both mediators and litigants. We expect that this project will be an effective training component for mediators (a resource sorely lacking in the Court) as well as a stop gap for those single issue cases, which could be resolved by conducting an immediate brief hearing whereby each litigant can present his case. If this effort reduces the Masters' case load noticeably, we shall consider instituting it statewide.

In addition to in house efforts to improve and expedite the process, Family Court has recently looked to the academic community. Commencing with the 1993 Spring semester, the Family Court in New Castle County and Widener University School of Law will conduct a joint project in which law students in the Alternative Dispute Resolution Seminar will review and evaluate the Court's mediation processes and procedures. The students will present the results of their investigation to the Chief Judge and will make recommendations for improving the system.

**Master's Hearing: Obtaining an Enforceable Order**

Petitions not resolved by mediation or petitions alleging contempt (where any previously filed contempt action resulted in an order other than dismissal) are scheduled for a Master's hearing. Family Court Civil rule 16(a)(1). Although every Master hears child support cases from time to time, currently five of thirteen Masters hear these cases statewide.

For a hearing before a Master litigants are expected to update the documentation produced for the mediation conference and present any additional evidence

A special task force formed in late Winter 1993 is exploring ways to make Delaware child support procedures more effective. The task force was previously authorized by a committee including Chief Judge Poppiti of the Family Court, the then Secretary of Health and Social Services, Thomas Eichler, Barbara Paulin, Director of Child Support Enforcement, and Attorney General Oberly.

The committee appointed as chair, William C. Gordon, who was the first Chief Judge of the State Family Court. Other members initially include Mary S. Much and Susan K. Paikin, who Master of the Family Court; Barbara Corrozi, Deputy Director of the State Division of Child Support Enforcement (DSCE) and Joseph Davison, its Senior Social Service Administrator; Peter S. Feliceangeli, Esquire, Deputy Attorney General and Supervisor of the Department of Justice's Child Support Unit; and Jo Anne Barnhart, a former Assistant Secretary of the U.S. Department of Health, Education and Welfare and Director of its Office of Child Support Enforcement.

The task force mission in brief: to make a comprehensive review of Delaware procedures bearing on child support; to identify and evaluate possible improvements; and to report its recommendations to the committee creating the task force by the end of September, 1993. In view of the extreme importance of child support in today's society, the task force will try to beat this deadline.

The task force began by mapping the movement of various child support matters through DCSE and the Family Court. The task force will explore all available options, consistent with fairness and due process, to move cases through the system as quickly as possible so that Delaware children receive the support of both parents more expeditiously.

Although Delaware is highly regarded among state child support systems, the task force, under its mandate, is examining innovative approaches that have worked well in other jurisdictions. It also will consider improvement that can now take place because of advances in computer data banks and communication networks that have sprung up in Delaware and elsewhere.

In its review, the task force will consult with those in Delaware and elsewhere who have special insight into the existing processes or the proposed improvements.

— The Honorable William C. Gordon

and argument in support of their respective positions. Although the Master will have the benefit of a memorandum from the mediator outlining the unresolved issues at mediation, it is most beneficial to all concerned if the litigants narrow the issues and present these to the Master at the start of the hearing to make the most effective use of the limited time available for the hearing.

At this level the litigants may argue that the Melson Formula should not be applied and why its application is rebutted. The court will consider testimony of the parties and witnesses and any other evidence produced by either party. If the petition alleges a contempt, the Master has statutory authority to set an amount of arrears, issue a wage attachment to the obligor's employer, order the support obligor to make a lump sum payment on arrears or to sell property in order to satisfy arrears, and post bond for prospective child support, among other remedies. 13 *Del.C.* § 513.

The Master may either issue an order from the bench at the close of the hearing or reserve decision while reviewing the evidence or researching applicable authority. A disposition outlining the Master's decision will be mailed to each party. If a party wishes to appeal, he has 15 days from the date of the written order to file with the clerk of Family Court a petition for *review de novo.* In yet another innovative step, the Family Court has adopted a Rule to provide interim support to ensure that some support is paid pending the *review de novo.* When a *review de novo* is requested, this petition, as well as the underlying Master's order is immediately reviewed by an Office Judge. If the reviewing Judge is satisfied that the Master's order was entered in accordance with the law, the Judge will issue a brief order confirming this and the Master's order will remain in effect as an interim order until such time as the entire matter is heard before a judge of the Family Court.

**Judge's Hearing: The Family Court Buck Stops Here**

A child support petition will be heard before a Judge if a *review de novo* has been filed, or on a contempt petition, in the first instance, if the file has been "flagged" by the Master as ripe for judicial review, e.g., where the respondent has a history of non-payment of a child support obligation and at least two previous findings of contempt, or if a motion has been granted to bypass the Master's hearing level because the respondent continues to fail to pay child support and the petitioner seeks incarceration.

If the matter is before the Judge on a *review de novo*, the litigants have the opportunity to present the case in its entirety as if the Master's hearing never occurred. If, however, some findings by the Master are undisputed, the parties may request the Judge to affirm those findings and merely rule on the outstanding issues. As at each level of consideration the parties are expected to present the 16(a) Financial Form and documentation of their income information for the period for which support, or support modification, is sought as well as documentation of applicable expense information. They should be prepared to offer any evidence in defense of their respective positions.

**The Family Court of the State of Delaware is nationally recognized for its unprecedented strides in federally mandated timely processing of child support cases.**

If the petition before the Court is one alleging contempt for failure to abide by the previous court order, the petitioner may seek any of the same remedies available at the Master's level as well as incarceration of the obligor until a sum certain has been paid toward the outstanding arrears. A judge is the only hearing officer who has authority to incarcerate for failure to pay support. If incarceration is ordered, the Judge will review the commitment in approximately sixty to ninety days from the date of confinement to determine if any progress has been made. The Judge may order the party to be committed to a work release program, when space is available, so that the party will be able to work and thus purge the contempt by payment of outstanding arrears.

The Judge will issue the Court's decision and order, which is appealable directly to the Delaware Supreme Court. In order to perfect the party's appeal, a Notice of Appeal must be filed in the Supreme Court within 30 days of the date of the Family Court's written order. An appeal of a Family Court order does not stay the order; the party must apply to the Supreme Court for a stay.

**Current and Future Innovations: The Court Will Not Rest**

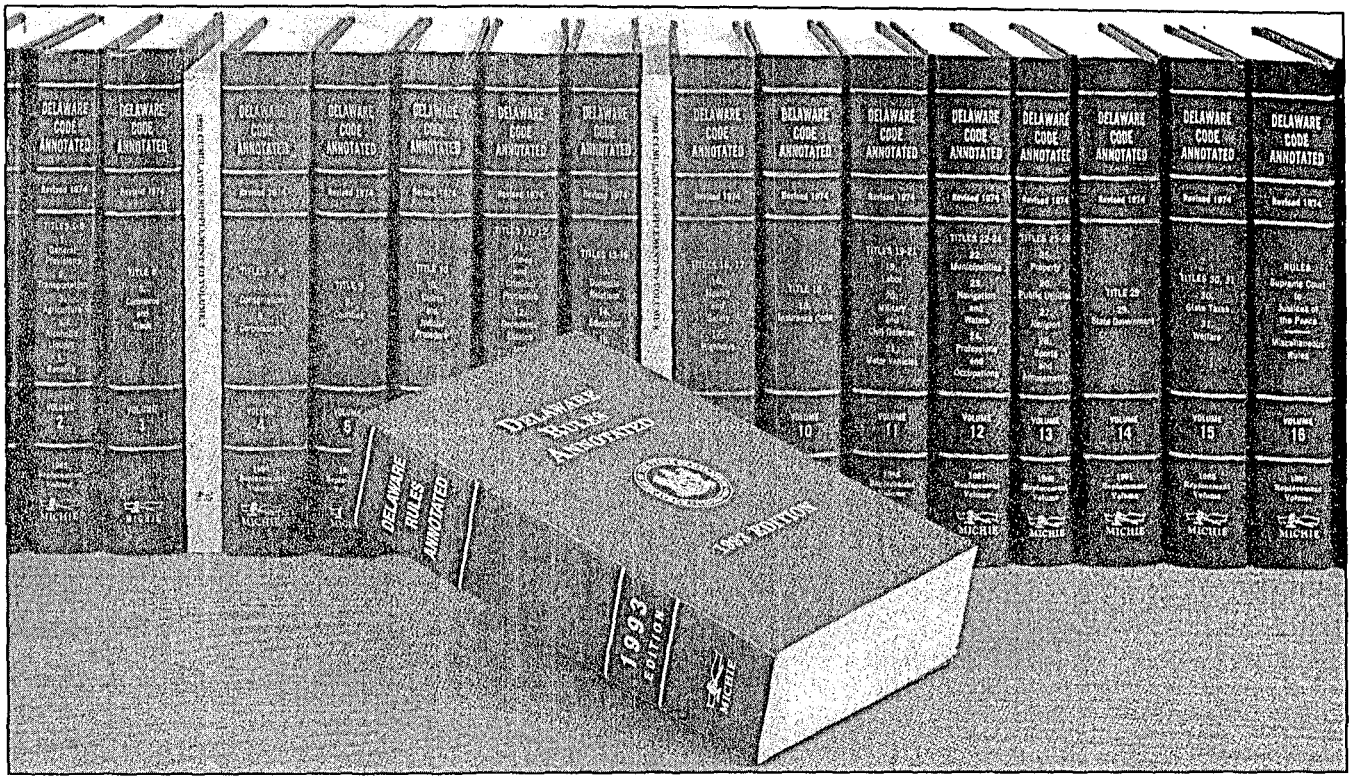
The Family Court is nearing completion of an automated case processing system, made possible by the State's commitment to ensuring Family Court's compliance with the stringent requirements of the federal government. The current manual system often thwarts efforts to process the case load expeditiously. The new system will dramatically affect the flow of the child support cases through the Court from case initiation through scheduling to file location. The Court intends to centralize the processing of pleadings so that a few Court employees will be responsible for one case from filing to final disposition and thus ensure a timely progression of that case through the Court process. Forms currently used by mediators and hearing officers will be computerized to allow them to issue written consent orders and decisions at the time they are made and to provide copies for the litigants before they leave court.

**Children Are Our Future**

Not content merely with its praised innovations in child support, the Family Court, in cooperation with other branches of state government is further committed to achieving the best for the children of Delaware. Consistent with this commitment, the Family Court, the Department of Health and Social Services, and the Department of Justice have recently formed a task force to "... explore all available options to improve efficiency and move cases through the system as quickly as possible and ensure the most effective enforcement measures possible for all child support orders." The task force is expected to complete its work and make its recommendations to its Executive Oversight Committee by the end of 1993. These will doubtless contribute to advancing the Court's unending commitment to the future of our children.

---

*The Honorable Vincent J. Poppiti began his distinguished judicial career as an Associate Judge of the Family Court. He departed that court to serve on the bench of the Superior Court of Delaware. He returned to the Family Court in 1992, when he was confirmed as Chief Judge.* ◆

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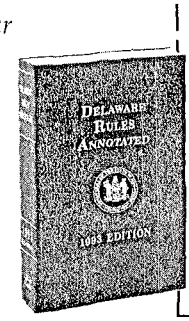


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# THE CHILD SUPPORT JUDICIAL ADVISORY COMMITTEE

THE HONORABLE
RANDY J. HOLLAND

Public Law 93-647, the Social Services Amendments of 1974, created the Child Support Enforcement (CSE) Program as Part D of Title IV of the Social Security Act. Commonly called the IV-D Program, CSE was designed as a Federal/State partnership to foster family responsibility, to ensure that children receive financial support from their parents, and to reduce the cost to taxpayers of providing Aid to Families with Dependent Children. The partnership is a legal relationship between the Federal Office of Child Support Enforcement (OCSE), an agency of the Department of Health and Human Services, and in most cases, a corresponding branch of the executive department in each state.

The Federal legislation included provisions for funding and incentives for performance in the form of economic rewards, as well as financial penalties, to encourage each state to develop its IV-D program to meet specified Federal standards. Each state's compliance with Federal CSE Program requirements encompassed judicial actions related to the establishment of paternity or the entry and enforcement of child support orders. Conspicuously absent was any direct communication between OCSE and the State jurists whose performance was being assessed in determining state compliance with the Federal mandates.

Since efforts to remedy this were only partially successful, in late 1990 OCSE established a committee of State judges to promote an ongoing dialogue between itself and the States' judiciary. The Child Support Judicial Advisory Committee ("the Committee") was charged with advising OCSE on child support enforcement matters related to state courts and judicial administration. OCSE invited jurists from a cross-section of the United States to serve on this important body.

The Committee, which I co-chaired with the then OCSE Deputy Director Allie Page Matthews, convened its first meeting in February, 1991 in Washington, DC. Members unanimously voiced three concerns. First, the Conference of Chief Justices needed to be

involved in the dialogue on child support enforcement issues. Second, state court administrators needed to be represented on the Committee. Third, the development of education programs and materials about child support enforcement issues for state court jurists and administrators should become an OCSE priority.

At this first meeting, Committee members also took note of the small number of reported appellate opinions—owing to very few appeals—involving CSE legal issues. Observing that the infrequency of appeals tended to make each reported decision an important precedent, Committee members recommended to OCSE that the Federal Government support CSE judicial education for State appellate judges.

The meeting concluded with a division of responsibilities: formal contact would be made with the Conference of Chief Justices; the chair of the Conference of State Court Administrators would be invited to join the Committee; and OCSE, in cooperation with the Committee, agreed to expedite completion of the *Child Support Enforcement Judicial Curriculum Guide*, which was then in a preliminary stage of development.

OCSE also agreed to consider funding educational programs, in particular for appellate judges. Justice Andrew Jackson Higgins of Missouri, then chair of the appellate training committee of the National Council of Juvenile and Family Court Judges (NCJFCJ), was asked to coordinate this project with NCJFCJ's then president, Judge Salvatore Mule of Louisiana.

In April, 1991 the Committee met for the second time in Atlanta during a National Leadership Conference sponsored by the U.S. Commission on Interstate Child Support. The Leadership Conference, for which many Committee members served as faculty, brought together two hundred participants from forty States to discuss legal and administrative issues relating to interstate child support.

During the Advisory Committee meeting, members resolved that Justice Holland and Chief Justice Gordon R. Hall of Utah should seek approval for a panel presentation on child support at the Conference of Chief Justices in August. Reasoning that effective decision making requires an immediate familiarity with state laws as well as Federal statutes and regulations, the Committee also suggested to OCSE the desirability of complementing the *Child Support Enforcement Curriculum Guide* by developing a judicial benchbook on child support enforcement issues. A benchbook, it was thought, would be of particular value in jurisdictions that rotate judges.

In July, 1991 OCSE sponsored an invitational round table on the subject of immediate wage withholding as a means of enforcing child support orders. The round table, indicative of OCSE's commitment to hear the states' perspective on child support issues, brought together officials from various levels and branches of the Federal Government and their state counterparts. Judge Frances Rothschild of California, who served on both the Judicial Advisory Committee and the U.S. Commission on Interstate Child Support, and was one of several members of the state judiciary in attendance, represented the Committee. In response to a congressional mandate for a feasibility study of the question, participants examined administrative and other issues related to an extension of immediate wage withholding to all child support cases.

As a result of the efforts of Chief Justice Hall and Justice Holland, the August 1991 joint meeting in Philadelphia of the Conference of Chief Justices and the Conference of State Court Administrators included an unprecedented panel presentation on child support enforcement issues. Advisory Committee panelists included Allie Page Matthews, Chief Justice Hall, Justice Higgins, and myself. Margaret Campbell Haynes, chair of the U.S.

Commission on Interstate Child Support and Director of the American Bar Association (ABA) Child Support Project, also served as a panelist.

Following the panel's presentation, the Conference of Chief Justices adopted the following resolution, proposed by Chief Justice Hall and Chief Justice Andrew D. Christie of Delaware:

> WHEREAS, the support of children is basic to a strong family structure and to the health of our people and our nation; WHEREAS, the child support enforcement program encourages the financial responsibility and the emotional support of both parents; WHEREAS, the establishment of paternity and the establishment and enforcement of support orders are important areas of the law and ones that must be viewed as a priority for judicial case management; WHEREAS, enactment of the Family Support Act of 1988 has and will substantially impact the courts and judiciary, specifically in the areas of presumptive support award guidelines, periodic review and modification of orders, immediate wage withholding, paternity establishment, and automated case management systems; WHEREAS, prevailing financial circumstances at both the State and Federal levels make it imperative for executive agencies and the courts to work more closely together to address their common problems; WHEREAS, the Office of Child Support Enforcement within the U.S. Department of Health and Human Services has established a national Judicial Advisory Committee composed of eminent jurists and court administrators from across the country; NOW, THEREFORE, BE IT RESOLVED, that the Conference of Chief Justices urges an ongoing dialogue characterized by open, two-way communication between State judicial leaders and the Federal child support enforcement authorities to find ways to bring about more productive relationships and more effective program operations, expresses support for the Judicial Advisory Committee created to facilitate achievement of that objective, and looks forward to future progress reports on this important subject.

**OCSE and the State Justice Institute are jointly funding a *pro se* demonstration project for the review and adjustment of child support orders. Simplified forms and procedures are being developed to enable litigants not represented by counsel to update their support orders without creating undue burdens on the state courts. This effort has potentially broad ameliorative ramifications for state courts, given the Federal requirements for periodic review and adjustment.**

In response to the work of Justice Higgins and Judge Mule, in October, 1991 OCSE funded an Appellate Judges Training Workshop in Reno, Nevada under the auspices of the National Council of Juvenile and Family Court Judges. As a result of the Judicial Advisory Committee's recommendation, the chief justice of each state was invited to attend or to send a justice or senior appellate judge from his or her State. OCSE funding provided scholarships for the appellate judges of the first 20 states to respond. The Workshop, chaired by Justice Higgins, and including other Committee members as faculty, devoted an entire day to CSE juvenile and family law issues from an appellate perspective.

The Fall of 1991 also saw, with the Committee's encouragement, the publication of the *Child Support Enforcement Judicial Curriculum Guide* — a joint product of OCSE and the National Center for State Courts. Written by child support enforcement experts including members of the Advisory Committee, the *Guide* is a comprehensive training curriculum for judges and judicial educators who have responsibility for designing, developing, and presenting judicial education programs.

On January 23-24, 1992 OCSE, the State Justice Institute, and the ABA's Child Support Project, in response to the Committee, hosted a National Judicial Child Support Enforcement Curriculum Training Conference to introduce the *Child Support Enforcement Judicial Curriculum Guide.* Following Committee guidance, invitations were extended to the chief justice of each state to designate one participant to attend the Conference—travel and per diem expenses to be paid by each participant's sponsoring organization. Each of those who attended, either a State judicial educator, a judge, or a court administrator, agreed to take responsibility for developing an education program, based upon a topic in the *Guide*, for the judiciary in his or her state.

The Conference, which met in Washington, D.C., attracted representatives from forty-six States, the District of Columbia, and Puerto Rico. Allie Page Matthews and I moderated. Faculty drawn from the Judicial Advisory Committee included: Judge Aubrey Ford of

Alabama, Judge Frances Rothschild of California, Judge David Ross of Maryland, Susan Paikin, a Master of the Family Court in Delaware, and Judge Charles McClure of Florida. Since the Conference, OCSE has filled over 400 requests from around the country for copies of the *Curriculum Guide.*

During this Training Conference, the Advisory Committee held its third meeting. Committee members renewed their recommendation that OCSE develop a benchbook for State jurists. They also discussed the feasibility of establishing regional or State committees which could provide forums to discuss CSE issues of shared concern to contiguous States, particularly in interstate enforcement. Max Smith, then the senior child support enforcement official in the Federal Regional Office in Kansas City, announced that Missouri, Iowa, Kansas, and Nebraska were organizing such a regional committee and that a conference was planned for May.

The Committee then considered a provision of the Family Support Act of 1988. This Act mandated OCSE to study and report to the Congress concerning the implications of requiring each state periodically to review all child support orders in effect in the state—not just orders that were part of the IV-D caseload. Members expressed an interest in contributing their opinions and ideas to the report. Responding promptly, OCSE agreed to send Advisory Committee members questionnaires, followed by telephone interviews, which solicited their comments for inclusion in the final report. State court administrators and state child support directors were also contacted by OCSE for their views on the impact of the periodic review and adjustment requirement.

On May 21-22, 1992 the Central States Judicial Council Conference, jointly sponsored by OCSE and the state courts and child support enforcement agencies of Missouri, Iowa, Kansas, and Nebraska was held in Kansas City, Missouri. The Conference members included thirty-five State supreme court justices, trial judges, court trustees, State court administrators, IV-D program administrators, legal counsel, and Federal OCSE staff for the purpose of exploring major child support enforcement issues. It is the Judicial Advisory Committee's hope that this Conference will be a model for other regions to adopt.

The 41st annual meeting of the National Child Support Enforcement

Association (NCSEA) took place August 23-28, 1992 in Orlando, Florida. NCSEA is a private organization whose membership includes national child support experts, judges, federal and state management officials and line workers. Under the leadership of Michael Henry, then director of Missouri's CSE program (now Virginia's) and Judge McClure and Master Paikin of the Advisory Committee, NCSEA presented a CSE judicial training track. The track, faculty of which included members of the Committee, featured a series of workshops developed by judges, masters, and hearing officers on topics of importance to the State judiciary, including innovative methods of support enforcement and alternative dispute resolution techniques.

OCSE's responsiveness to the Judicial Advisory Committee's suggestion to emphasize educational programs on child support enforcement issues for the legal/judicial community continued in 1992. With funding by OCSE, ABA's Child Support Project delivered a Symposium on Review and Adjustment of Child Support Orders. Held September 18-19 in Tysons Corner, Virginia, the Symposium highlighted numerous important issues, including the Federal requirements of review and adjustment, the results of related demonstration projects, the responsibilities of private and public attorneys, child support agency personnel, the judiciary and court personnel in developing and implementing review and adjustment laws and processes, and the interstate implications of review and adjustment. Once again, program faculty included members of OCSE's Judicial Advisory Committee.

**In response to a congressional mandate for a feasibility study, participants examined an extension of immediate wage withholdings to all cases.**

At the present time OCSE and the State Justice Institute are jointly funding a *pro se* demonstration project for the review and adjustment of child support orders. The project, being conducted by the ABA, has the cooperation of the Family Courts in Richland and Kershaw counties, South Carolina. Simplified forms and procedures are being developed to enable litigants not represented by counsel to update their support orders without creating undue burdens on the state courts. This effort has potentially broad ameliorative ramifications for state courts, given the Federal requirements for periodic review and adjustment. The *pro se* demonstration project is expected to be completed in late 1993.

After consulting with individual members of the Judicial Advisory Committee and reviewing sample benchbooks, OCSE decided that it would be unpractical to produce a "generic" CSE benchbook that could be used in all states. Instead, OCSE directed the ABA's Child Support Project to work with one state to develop a prototype for a benchbook — one that other states could adapt to fit their own laws and procedures. Judge

William Jones, an Advisory Committee member from North Carolina, expressed an interest in collaborating on such a project and carried out preliminary negotiations with North Carolina officials, who agreed to participate.

The ABA is developing the benchbook's "skeleton" by drafting those sections related to federal law and national case development. North Carolina staff, with technical assistance from ABA Project staff, are drafting that state's specific material, while ABA has responsibility for editing the final text. An outline, developed by ABA, was circulated to the Advisory Committee for comment. Committee members believe that the benchbook, to be completed by late summer of 1993, will be of tremendous benefit to judges.

Other examples of the involvement of individual members of the Judicial Advisory Committee on CSE related issues include the recommendations of the U.S. Commission on Interstate Child Support and proposals of the National Conference of the Commissioners on Uniform State Laws, which are related to the reciprocal enforcement of interstate child support orders. Both of these endeavors will be prominent in 1993, as state legislatures and the Congress debate their recommendations.

This brief account documents the successful efforts of the Federal Office of Child Support Enforcement to improve communication between itself and state jurists by means of the Child Support Judicial Advisory Committee. OCSE has been receptive to the views and insights of the state judiciaries and has responded to their recommendations constructively. The Committee's reports on its activities to the Conference of Chief Justices give every indication that the dialogue and cooperative effort between OCSE, the Advisory Committee, and the Conference of Chief Justices will continue. The result should be a further enhancement of the substantive and procedural rights which have already accrued to the benefit of all persons involved in matters related to child support.

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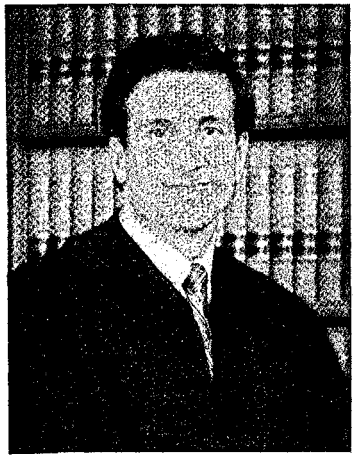
*The Honorable Randy Holland, who was appointed to the Delaware Supreme Court in 1986, is the youngest person ever to serve on that tribunal. He serves as the Supreme Court's liaison to the Delaware Board on Professional Responsibility and*



*chairs a committee studying the Delaware Code of Judicial Conduct. He is a national trustee of the American Judicature Society and the American Inns of Court Foundation. He is chair of the National Judicial Advisory Committee to the Federal Office of Child Support Enforcement. In August of last year Justice Holland received the Judge of the Year Award from the National Child Support Enforcement Association.* ◆

PETER S. FELICEANGELI

# The Attorney General's Office and Child Support Enforcement

The Delaware Department of Justice is committed to ensuring the fundamental rights of the children of Delaware to established parentage and to financial support from their parents, as federal and state law both require. To that end the Attorney General's Office has formed within the Civil Division a statewide child support unit. Operating under daily direction of a supervising Deputy Attorney General and policy guidance from the State Solicitor and Attorney General, it provides counsel to the Delaware Division of Child Support Enforcement ("DCSE") of the Department of Health and Social Services, and enforces Delaware child support laws. The thirteen Deputy Attorneys General in the child support unit handle about 8,000 child support cases in Family Court annually. In state fiscal year 1992, the unit helped DCSE collect over thirty million dollars in child support payments.


Illustration by Paulette Bogan

The assignment of Deputy Attorneys General dedicated solely to enforcement of the State's child support laws dates to the enactment by Congress in 1975 of Title IV-D of the Social Security Act, P.L. 93-647, 42 *U.S.C.* § 651 *et seq.*, which required each state to create a child support agency and to carry out a state plan to fulfill federally mandated child support directives.

The Delaware Department of Justice provides legal counsel to all state agencies and officers and represents them in legal proceedings brought on their behalf or against them. 29 *Del. C.* § 2504. DCSE is, then, a client of the Attorney General's Office and receives legal services from it. The federal government recognizes that counsel is invaluable to a child support agency: as a condition of meeting IV-D program requirements, DCSE must provide for "sufficient numbers" of "[a]ttorneys or prosecutors to represent the agency in court or administrative proceedings with respect to the establishment and enforcement of orders of paternity and support." 45 *C.F.R.* 303.20(f)(1). The Attorney General's Office prosecutes IV-D child support cases for DCSE to meet the state's compelling interest in seeing that paternity is established and that child support orders are entered and enforced. The relationship between the Attorney General's Office and DCSE, and their respective duties in the State's child support mission, is formalized through a cooperative agreement. 42 *U.S.C.* § 654(7); 45 *C.F.R.*302.34, 303.107.

The Attorney General's Office regularly provides legal advice and opinions to the DCSE director and others within the agency on issues ranging from internal operations to questions of compliance with the always changing mandates of federal and state statutory and case law. The Attorney General's Office counsels DCSE as it translates federal IV-D program requirements into the delivery of financial support for Delaware children. For example, DCSE and IV-D agencies in three other states recently completed a

federally funded demonstration project aimed at developing methods to meet the mandates of the Family Support Act of 1988, P.L. 100-485, 42 *U.S.C.* § 666(a)(10)(B). That law requires, among other things, that by October 1993 each state must begin periodic review and adjustment, consistent with the state's child support guidelines, of all IV-D child support orders at least every three years, unless certain exceptions are met. The demonstration project furnished a rewarding challenge here in Delaware to lead in developing national policy.

In addition to acting as legal counsel to the DCSE policy makers, the Attorney General's Office "represent[s] [DCSE] in court... with respect to the establishment and enforcement of orders of paternity and support." 45 *C.F.R.* 303.20(f)(1). The Attorney General's Office touches virtually every element of Delaware society in enforcing child support laws.

Since DCSE currently has over 36,000 active cases, cooperation between the IV-D agency and the Attorney General's Office in processing child support lawsuits is essential if the system is to function effectively. DCSE caseworkers maintain contact with the child support obligees. A caseworker will investigate and refer a case to the child support unit for evaluation to determine if legal action is warranted. The final decision rests with the reviewing deputy. The deputies sign all pleadings and prosecute all cases on DCSE's behalf.

The deputies assigned to the child support unit are talented practitioners dedicated to serving the best interests of children whose fundamental well-being is at stake. In Family Court daily, they must quickly master the entire spectrum of child support law from the intricacies of practice before a Family Court Master to applicable Delaware Supreme Court decisions and to federal law governing the IV-D program. The Delaware Supreme Court has recognized the considerable skill, the awesome responsibility, and the authority of Deputy Attorneys General who bring the power of the state to bear by the enforcement of Delaware child support laws. *Allen v. Division of Child Support Enforcement/ Ware,* Del. Supr., 575 A.2d 1176, 1181, 1184 (1990).

A Deputy Attorney General's role in a child support case necessarily differs from that of a private practitioner. In the case of children born in wedlock, the private practitioner will generally be involved not only in the resolution of child support obligations, but with the dissolution of the marriage, alimony, division of marital property, child custody and visitation, and any other ancillary matter deriving from the fragmentation of the family unit. But DCSE's legal mandate is narrow: it is to establish paternity and to enforce child support obligations. Since the Attorney General's Office does not engage in private litigation, the Deputy Attorney General who prosecutes a particular child support case cannot become involved in other domestic matters ancillary to the State's compelling interest in enforcing the child support laws.

While a private practitioner may represent a child support obligee who has not sought the services of DCSE, or defend a child support obligor, the Attorney General's Office does not defend persons who owe, or are alleged to owe, child support obligations.

The child support unit prosecutes cases involving a variety of child support obligees. There are cases in which obligees receiving public assistance have assigned by law all child support rights to the state for the period of such assistance. The child support collected in these cases, after a first $50.00 a month paid to the custodial parent, reimburses the State for the public assistance paid on behalf of the obligor's children. 42 *U.S.C.* § § 654(4), 602(a)(26); 31 *Del.C.* § 504(a). The child support deputies also handle cases of children in state foster care, 42 *U.S.C.* § 654(4)(B), and cases in which custodial parents had formerly received public assistance, unless they decline IV-D services. 42 *U.S.C.* § 657(c). The greatest percentage of the case load consists of cases in which custodial parents who do not receive public assistance but who meet program requirements avail themselves of the State's child support services by applying to DCSE and paying a one-time application fee. Child support that is collected for these obligees is paid directly to them through DCSE. 42 *U.S.C.* § 654(6); 45 *C.F.R.* 302.33.

Generally the child support deputies prosecute civil actions for paternity and non-support, modifications of existing child support orders, and civil contempts of court. The parties in these cases may be Delaware residents or in interstate cases obligees living outside Delaware and seeking support payments from Delaware residents. An interstate case originates in the state where the obligee resides and is tried in Delaware pursuant to the Uniform Reciprocal Enforcement of Support Act, 13 *Del. C.* Ch.6. Interstate cases proceed as if they were originally filed in Delaware, except that the obligees, whose testimony is committed to writing under oath in the initiating state, are not present. 13 *Del C.* §§ 620, 640.

In most DCSE cases child support obligors appear *pro se.* The Attorney General's representatives are fair and forthright with such parties. The prosecuting deputy will, sometimes to the consternation of an obligee, assure that the obligor's case, such as circumstances in mitigation of civil contempt, is fairly before the court.

A paternity and non-support action is one brought by DCSE for the first time on behalf of the custodial parent to establish a child's parentage and to obtain an order for child support. 13 *Del. C.* § 501 requires two elements of proof, parentage and the proper amount of child support due under the Melson Formula. 13 *Del. C.* § 501(a); *G.L. v. S.D.,* Del. Supr., 403 A.2d 1121 (1979); *Division of Child Support Enforcement/Blake v. Myrks,* Del. Supr., 606 A.2d 748 (1992).

The Deputy Attorney General will establish the putative father's paternity either by his admission on the record or by trial. The deputy advises the putative father of his right to dispute paternity, to a trial on the issue of paternity, and to blood testing to determine parentage, at the expense of DCSE. If the putative father admits paternity, his admission and waiver of his right to dispute the issue are entered on the record. A paternity finding made on the putative father's admission in a child support case is final and binding, just as if made after trial. *Division of Child Support Enforcement/Blake v. Myrks,* Del. Supr., 606 A.2d 748 (1992).

If the putative father invokes the nonpaternity defense to a child support action, the provisions of the Delaware Parentage Act, 13 *Del. C.* Ch. 8, then apply. 13 *Del. C.* § 805(b). The Court will order blood testing to determine paternity. The blood test results are admissible as substantive evidence of paternity. 13 *Del. C.* §§ 810, 811. Blood test results that exclude the putative father as the father of the subject child are conclusive of nonpaternity, and the court will dismiss the case. 13 *Del. C.* § 810(h).

But once paternity *is* established the Deputy Attorney General will elicit testimony and evidence from both parents as to their incomes and earning capacity, if unemployed or underemployed, and other evidence needed to permit the working of the presumptive child sup-

The use of blood testing to help resolve issues of disputed parentage has has increased dramatically in recent years. Today sufficient tests are available that will either exclude a man wrongfully accused of being the father of a child or when used with other information in the case provide strong evidence that he is the father. Of primary importance is that blood testing provides definitive factual information for an otherwise highly emotionally charged proceding.

The most frequently asked question about blood tests is "how do they work?". It is well recognized that some physical characteristics such as hair or eye color can vary from one person to another. In a like manner characteristics at the cellular level can also vary from person to person. For example when people speak about their blood type they are referring to biochemical variations found on red blood cells that belong to the ABO blood system. Blood type "A" means the presence of the A biochemical structure while blood type "B" means the presence of that structure. Type "O" means neither is present. Numerous systems of characteristics are found on red blood cells.

Inheritance of blood characteristics follows well-established genetic rules. A child's blood characteristics are produced by genetic information obtained from both parents. By determining what the child received from the mother it can be deduced what had to be inherited from the biological father. This set of information serves as a description of the biological father. If the man in question does not fit this description he is excluded as the father. This is analogous to the exoneration of a person accused of a crime whose physical charactistics do not match the description given by an eyewitness. In contrast, if a man is not excluded, it is possible to make statistical calculations to show how closely he fits the description of the biological father. This is analogous to matching fingerprints.

Clearly, the more information included in a description of blood characteristics, the more exacting the description. Today there are three types of blood characteristics routinely used. These are characteristics found on red blood cells (RBC), white blood cells and tissue (HLA), and all cells (DNA). All of these can be analyzed from a blood sample. Because there are advantages and disadvantages to each system, the most reliable results are obtained if all three systems are used.

Typically cases of disputed parentage are resolved by using blood samples collected from the alleged father, the mother, and the child. Collection can be done simultaneously or sequentially in different location as long as proper identification procedures are followed.

It is possible to do blood analysis without directly testing one of the three parties in the case. Thus, if the mother is not available, a direct comparison between the man and the child can be made. Because the factors inherited from the mother will be incorporated in the description of the biological father (see above), results will not be as close to definitive as in cases in which this information can be eliminated. This problem can be circumvented by analyzing more systems.

If the alleged father is unavailable for testing it is possible to reconstruct what his blood characteristics had to be by testing his first degree relatives. The reconstructed information is then used in the same manner as in a regular case. Obviously, the more relatives tested, the more complete will be the deceased's information. Analysis of a deceased's remains should provide the necessary information. In practice this is difficult, expensive, and prone to a high rate of failure.

It is even possible to do parentage analysis without directly testing the child in question. This can be done by obtaining amniotic cells prior to birth. Such a procedure is expensive and not without some risk to the developing fetus, although the risk becomes minimal with increased gestational age. usually amniocentesis will not be performed simply to answer the question of parentage. DNA analysis is the method of choice under such circumstances.

Since the enactment of Title IV D of the Social Security Act in 1975, there has been a continual increase in realization that all children regardless of birth circumstances are entitled to the same rights and protection under the law. Blood testing has contributed greatly to the equitable administration of these laws for all parties involved.

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— This is an extract from a longer scholarly study by Doctor Gary D. Niblack, Ph.D. Laboratory Director of Gene Proof Technologies of Nashville, Tennessee. Copies of the full article may be obtained without charge from Gene Proof Technologies, 4515 Harding Rd., Suite 201, Nashville, TN 37205.

port guidelines of Delaware's Melson Formula to fix the absent parent's child support obligation. *Dalton v. Clanton,* Del. Supr., 559 A.2d 1197 (1989); *Ford v. Ford,* Del. Supr., 600 A.2d 25 (1991). The Attorney General's Office will not agree to a child support obligation lower than what is presumptively shown as appropriate under law by the Melson Formula. Where appropriate, the deputy may ask the court to make the initial child support order retroactive for up to two years before the filing of the non-support petition. *Patricia M.D. v. Alexis I.D.,* Del. Supr., 442 A.2d 952 (1982).

A wage attachment is the most effective guarantor for payment of child support. In every DCSE case in which a new or modified child support order is entered, the Deputy Attorney General is required to seek an immediate attachment of the obligor's income, as broadly defined in 13 *Del. C.* § 513(b)(5), for payment of the child support obligation, whether or not there is a delinquency, unless the parties agree otherwise in writing or the court finds good cause not to order a wage attachment. 13 *Del. C.* § 513(b)(1)a; 42 *U.S.C.* § 666(b). A wage attachment for child support has priority over any other wage attachment, except one for federal tax liens, and is not subject to the normal exemptions or limitations. 13 *Del. C.* § 513(b)(7). Upon receipt of the income attachment order, the employer becomes primarily liable for payment of the child support obligation, 13 *Del. C.* § 513(b)(9). An employer who fails to comply with the terms of the order or who terminates an employee as a result thereof risks both civil contempt proceedings and criminal prosecution. 13 *Del. C.* § 513(b)(10).

As an alternative to establishing paternity in the non-support case, either parent may, at any time before paternity has been determined, seek DCSE paternity establishment services independent of any support action under the Delaware Parentage Act, 13 *Del. C.* Ch. 8. Paternity in such proceedings is established as in a support case, but the case will not proceed to the setting of a child support obligation.

Once a child's paternity has been established, whether by the father's admission or after an adversary proceeding, the Attorney General's Office will vigorously oppose any later attempt to collaterally attack that paternity finding. *See Division of Child Support Enforcement/Blake v. Myrks,* Del. Supr., 606 A.2d 748 (1992).

The Delaware Supreme Court has held that "the obligation to support children is a parent's first priority." *Division of Child Support Enforcement/Harper v. Barrows,* Del. Supr., 570 A.2d 1180, 1185 (1990). Although every effort is made to take corrective legal action at the first signs of noncompliance, too many obligors ignore court ordered child support obligations with impunity, even for years. Unpaid child support may escalate to shocking levels, often as high as $10,000 - $20,000 of support that the custodial parent and children have every right to receive but have done without. In public assistance cases, the taxpayers will have met the delinquent parent's obligations to pay support for his children.

An obligor who fails without just cause to pay a court ordered child support obligation risks civil contempt and

the imposition of sanctions to ensure compliance. *DCSE/Logue v. Logue,* Del. Fam., 598 A.2d 704 (1991); 13 *Del. C.* § 516(a). Commonly requested sanctions for a finding of civil contempt include ordering an increased payment on accumulated arrears, ordering an obligor to make a lump sum payment on the arrears by a date certain, ordering an obligor to make a monitored employment search, reducing arrears to judgment for recording as a lien in the office of the Prothonotary and for potential execution thereon, and sequestration orders against prospective recoveries in damage cases, under 13 *Del. C.* § 513(a)(6).

Where a support obligor's contempt is particularly flagrant, and the prosecuting Deputy Attorney General concludes that the record so warrants he may request as a sanction for the civil contempt that the Court commit the obligor to the custody of the Department of Correction until he purges himself of the contempt, generally by paying a lump sum on the accumulated arrears. Because a civil contempt action is remedial and intended to enforce compliance with the court's order, the prosecuting deputy will request that the obligor be placed in a work release program so that he will be employed, subject to a wage attachment, and able to provide financial support for his child.

The parents' legal obligation to support their child terminates by operation of law when the child turns 18 and is out of high school, or at age 19 if the child is still in high school. 13 *Del. C.* §§ 501, 517(a). The obligor still remains bound to pay any accumulated child support arrears. 13 *Del. C.* § 517(c). Enforcement action is taken for payment of arrears the obligor did not pay pursuant to court order during the child's minority.

As required by federal law, DCSE also conducts administrative hearings under the Delaware Administrative Procedures Act, 29 *Del. C.* Ch. 101, to determine whether federal and state income tax refunds due delinquent obligors should be intercepted [42 *U.S.C.* § 654(18), 664; 45 *C.F.R.* 302.70 (a)(3); 30 *Del. C.* § 545] or whether their delinquencies should be reported to credit bureaus. [13 *Del. C.* § 516(f); 45 *C.F.R.*302.70(a)(7)]. *See,* 29 *Del. C.* § 10161(24). A Deputy Attorney General will appear at the administrative hearing and in any appeal therefrom to the Family Court. 29 *Del. C.* § 10102(4), 10142; 10 *Del. C.* § 921(13).

While criminal non-support has long been a crime under Delaware law, 13

*Del. C.* § 521, the goal of the Attorney General's Office in Delaware's child support mission is to achieve civil, not criminal remedies, favoring remediation, not punishment. We want parents to be working and supporting their children. This emphasis on civil enforcement of child support is consistent with the policy of the support statutes, which primarily provide for civil actions and remediation rather than punishment of delinquent child support obligors. *See* 13 *Del. C.* §§ 501-517.

That is not to say the Attorney General's Office will not institute and vigorously prosecute a criminal non-support action when attempts at remediation have failed. Because the Attorney General's Office so seriously regards its obligation to enforce Delaware's child support laws, one who resorts to illegal conduct to evade lawful child support obligations risks prosecution.

Despite the concerted efforts of the federal government, DCSE, and the Department of Justice, much remains to be done. The Attorney General's Office will continue to act diligently to ensure that the best interests of Delaware children are protected and that parents honor their obligations to support their children.

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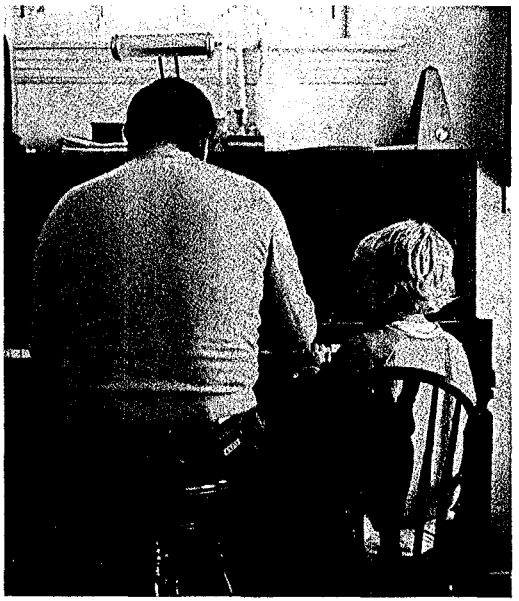
BARBARA D. CROWELL

# The Role of Private Counsel in Support Cases

If the Melson Formula so decisively determines the amount of support and if legal counsel is available through the Division of Child Support Enforcement ("DCSE") in obtaining court orders to ensure that it is paid, has the attorney in private practice any role in child support cases?



The welfare of our children is an urgent business, calling for the application of high professional skill.

Because child support is often one of a number of issues in divorce proceedings and because child support can interrelate with alimony, litigants sometimes choose to have their private attorneys, who are handling the other ancillary matters in their divorce actions, also represent them in requests for child support. In addition DCSE representation is available only to parties *seeking* child support, not to respondents. Therefore, private attorneys are also needed to represent respondents in cases brought against them by DCSE through its IV-D Program.

*Determination of Paternity*

Before child support is established, it is important that any potential support obligor be satisfied that he is indeed the father of the child for whom support is sought. Adoptive fathers aside, if any alleged father has any question whether he is the natural father, an attorney representing him should be sure that an HLA blood test is requested. Family court will perform the blood test at a relatively modest cost of about $216.00. While the test cannot establish with 100% certainty that one is the father is a particular child, it can show if he is excluded as the father or state with a fairly high statistical probability, in most cases (95-99%), the likelihood that he *is* the natural father. Before substantial sums in child support are paid and — what is more important — before emotional bonds are established with the child, any alleged father should be assured that he actually is the child's father.

*Mediation of Support Amount*

Assuming any questions about paternity have been resolved, the next step is to determine the custody and visitation arrangements for the child or children. Clients should be advised of the various possible custodial and residential arrangements and informed of the statutory requirements for a cooperative sharing by the parents of information about the child. An explanation of Delaware's Child Support Formula and its presumptive application should be given along with advice about the seriousness with which the Family Court and the State regard child support and the high priority they accord it. Indeed, one of the factors to be taken into account in determining the best interest of a child in a custody/visitation matter is whether a parent has met his or her responsibility for the child's support, care, nurture, and welfare, as set forth in 23 *Del. C.* § 701. *See* 13 *Del. C.* § 722.

Because of the application of the Delaware Child Support formula to the large majority of cases, the role of a private attorney representing a child support obligor is often one of helping the

client to accept the inevitability of paying the amount determined by the formula. Attorneys who deal frequently with the formula praise the fact that it establishes a specific monthly amount, reducing the opportunities for clients to bicker over what each believes to be appropriate. Since it is in the best interest of the litigants and, especially, their children to reduce friction between themselves, application of the formula often eliminates one issue of contention, contributing to a less acrimonious atmosphere. In most cases when there is no reason not to follow the formula, the parties, with the assistance of their attorneys, should be able to agree promptly on the amount of support. If that effort is not successful, the parties must attend a mediation hearing with a court mediator before a master or a judge can hear the matter. Whether the attorneys for the parties attend is discretionary, but some attorneys find that their attendance is helpful in sometimes resolving or at least, narrowing, issues in dispute as well as providing them with an opportunity to assess adversary parties. It is important that attorneys present for such mediations show respect for the mediators and the mediation process. Attorneys should inform their clients in advance of mediation about the purpose of the proceeding and what to expect.

*When the Melson Formula Doesn't Answer All the Questions*

While the formula is both apt and relatively easy to apply in a large majority of cases, it remains a rebuttable presumption, and there are occasional instances when the formula has been successfully rebutted. Moreover, when the formula was revised in 1990, some issues were left unresolved. Consequently, litigation still continues over child support issues.

*Unresolved Issues: Shared Residence*

The Delaware Child Support Formula Committee, appointed by then Chief Judge Thompson in March, 1989 to review and propose revisions to the Delaware child support formula, recommended that the judiciary adopt a shared physical care adjustment to the amount of child support for those situations when a child resides with each parent between 30 percent (109 overnights) and 50 percent of the year. The Committee proposed that each parent's child support obligation be calculated by applying the formula in the usual manner, except that child care expenses would be omitted from the primary support amount. Each parent's obligation would then be multiplied by 1.5 in recognition that maintainance of two full households for the children is more expensive than the situation in which the children have one primary household and use the second household for shorter visitations. A determination would next be made apportioning the support in accordance with the actual physical care schedule. When the children spend equal time with each parent, a calculation would be made first of the total support be paid by mother to father for six months and, second, of the total support to be paid by father to mother for six months. The difference would then be averaged out over twelve months. Child care expenses would be apportioned in accordance with the parties' relative net incomes. Under this arrangement, the parties would share equally all out-of-pocket expenses for the children.

**A private attorney can help the client to accept the inevitability of paying the amount determined by formula.**

Notwithstanding the Committee's recommendation, the judiciary did not adopt a specific approach for shared residential arrangements. The child support formula instruction forms state instead that the "formula contemplates normal visitation arrangements. Some adjustments may result if visitation is significantly beyond the norm" *See* Family Court Form 509, p.4.

Family Court Judge James, a member of the Delaware Child Support Formula Committee, has applied the approach recommended by the Committee when the amount of visitation exceeds what is customary. *See Wayne O. v. Colleen O.*, Del. Fam. Ct., File No. 1463-85 (January 17, 1992); *Patrick D. N. v. Kathleen A. N.*, Del. Fam., File No. CN88-7354, James, J. (October 23, 1990); *James W. v. Lajuan C. W.*, Del. Fam., File No. F-2754, James, J. (July 17, 1990).

Former Judge Gallagher also made an adjustment for those cases in which physical residence is shared, by using a different method: multiplying the base support obligation by 1.5 in the Melson calculation. *See Chandler v. Chandler*, Del. Fam. Ct., File No. CN89-10280, Gallagher, J. (October 10, 1990).

More recently in *P.T. v. R.E.T.*, Del. Fam. Ct., File No. CN89-8004, Crompton, J. (October 19, 1992), Judge Crompton announced that while she would not use a 1.5 multiplier for the child support calculation immediately before the Court, she would use the 1.5 multiplier when the parties returned for any modification.

Judge Wakefield adjusted the amount of child support in a case where the father had primary residence for two-and-a-half months during the summer by relieving the father of his SOLA (Standard of Living Adjustment) obligation for those two-and-a-half months, averaged throughout the calendar year. *See Roger C. S. v. Roseanne C. S.*, Del. Fam., File No. 004-87, Wakefield, J. (June 6, 1991).

Judge Keil had held that the 1.5 multiplier does not come into consideration until the Melson Formula is first rebutted. In a case in which the father had visitation for 40% of the time, Judge Keil held that the Melson Formula remained unrebutted. *See Phillip M. S. v. Karen D. S.*, Del. Fam., File No. CN89-9254, Keil, J. (March 8, 1991).

Judge Ableman had held that a support obligor is not entitled to seek a reduced support obligation as a result of additional visitation that has been voluntarily afforded to him, when that visitation is not specified by a court order or by a legally enforceable agreement. *See Robert C. H. v. Elena C.*, Del. Fam., File No. CN88-8932, Ableman, J. (February 5, 1991). Expressing concern that providing a support obligor with a credit in child support based on the cooperation by the mother in allowing extra visitation would have a chilling effect on future cooperation, Judge Ableman further found that in the case before her the visitation order did not grant the father visitation in excess of the customary amount.

In a previous case, *Thompson v. Thompson*, Del. Fam., File No. CN89-9614, Ableman, J. (October 16, 1990), the Court stated that offsetting child support for excessive visitation should be handled case by case to avoid situations where additional visitation would be sought solely to reduce a child support

obligation. The additional night each week the child spent with the father was found to be insufficient to rebut the standard application of the Melson Formula.

Judge Ableman's decisions raise an important consideration in the debate about whether and how to adjust child support when there is a more equal sharing of the children. Although it seems appropriate to make some adjustment for the increased time that the support obligor cares for the children, if the adjustment is too dramatic, two unfortunate consequences can follow: (1) a primary residential parent may be reluctant to share more time with the non-residential parent; and (2) a non-residential parent, not otherwise inclined to seek a shared time arrangement, may be motivated to press for it solely to reduce his or her support obligation.

With emotions in turmoil, with a reorienting of relationships among parents and children, and with a sometimes high level of distrust, it can be difficult to ascertain the true motivations of the divorcing parties. Sometimes an apparent impasse over whether the parties will share an equal residential arrangement with the children can be overcome if the father agrees to pay a little more support than a strict application of the Melson Formula might otherwise provide. Such an offer can help overcome a mother's suspicion that the father wants equal time with the children only as an excuse to reduce his support obligation.

*Split Residence*

Also left unresolved with the adoption of the revised Melson Formula in 1991 was the method to employ in situations where the children's primary residences are split between the parents. In a decision in *D.G.B. v. D.S.B.,* Del. Fam., File No. CN90-9785, Keil, J. (October 23, 1991), the Family Court held, in a case where one child resided with each parent, that while each child would be allocated a primary support need in the support formula of $220.00 (as opposed to the $385.00 support need for two children residing in the same home), for purposes of determining the appropriate amount of SOLA, the Court would use the 27% multiplier used when the children live together. The Court reasoned that the purpose of the primary support amount (to recognize the basic needs in a separate life situation) differs from the SOLA portion of the support (which reflects the extra non-essential income of the parents over the primary support).

*Deviations From the Melson Formula*

In addition to the questions discussed above about applying the Melson Formula, there are occasionally circumstances when the presumption that the formula be applied is rebutted and it is *not* applied.

*High Income*

The issue of whether the Melson Formula should be used if its application results in a high level of child support due to the extraordinarily high income of one or both of the parties has received the attention of both the Supreme Court and Family Court in recent years.

**With emotions in turmoil and a high level of distrust, it can be difficult to ascertain the true motivations of the divorcing parties.**

In *K.K. v. E.C.,* Del. Fam., File No. F-8497, James, J. (March 10, 1988) and *Kane v. Kane.* Del. Fam., File No. 341-87, Gallagher, J. (April 4, 1989), the Melson Formula was applied without adjustments to determine child support in cases in which the obligor earned an annual income of $72,000. In *Ford v. Ford,* Del. Supr., 600 A.2d 25 (1991(, the Delaware Supreme Court held that the father had successfully rebutted the presumption of the applicability of the Delaware Child Support Formula by showing that the amount of support determined by the formula was in excess of what was necessary to maintain the children's life style. The father's income exceeded $210,000 a year and the mother's income was $70,000. Strict application of the formula yielded a month support amount of $3,842 for three children if the father also continued to pay his life insurance premium. These sums were in addition to the father's obligation under a separation agreement to pay the mother's monthly mortgage payment and all educational expenses for the children through college, to provide medical and health insurance for the children if the mother could not do so, and to obtain a life insurance policy on his life with the children as beneficiaries. The Supreme Court recognized that the Family Court's task in determining child support in large income cases was difficult, since it must avoid distributing excess wealth in a parent's estate to the children while acknowledging that they are entitled to share in the more affluent life styles of their parents. The case was remanded to the Family Court, which was instructed to begin by assessing the "enhanced" needs of the children arising from the heightened standard of living of their more affluent parent. 600 A.2d 25, at p. 32. After determining the amount of child support required in light of those enhanced needs, the Family Court was to allocate the amount between the parties taking into consideration the relative abilities to participate in that level of support.

Two months later, the Delaware Supreme Court decided another high-income child support case. In *Taylor v. Taylor,* Del. Supr. No. 432, 1990, Christie, C.J., (December 26, 1991) (ORDER), the Supreme Court again found that the presumptive applicability of the Melson Formula had been rebutted in a case in which the father, with an average gross income of $232,460, paid the mother's mortgage payments, her car loan and car insurance payments, and family debt payments in addition to the support obligation determined by the Melson Formula to be $3,200 a month. Because the Delaware statute does not address the costs for children after the age of 18, the Supreme Court stated that it was inappropriate for the Family Court to consider the need for advance financial planning for the children's foreseeable needs and college training.

Future cases will decide how the courts determine the appropriate "enhanced needs" of children of high income parents and to establish at what income levels the presumption of the Melson Formula's applicability is rebutted.

*Excessive Debts*

Clients should be aware that an obligor's debts will rarely justify reducing the amount of support as calculated by the Melson Formula. In *McDowell v. Binder,* Del. Fam., File No. 1239-85, Conner, J. (November 21, 1990), father's addiction and resulting bankruptcy were found to be self-inflicted and foreseeable consequences of his heroin use. It was therefore held to be insufficient to justify a reduction in support. Likewise, in *Waybright/DCSE v. Santiago,* Del. Fam., File

No. F-2977, Ableman, J. (October 4, 1988), it was held that the obligor's incarceration was his own fault and did not justify eliminating his support obligation.

In *Swann/DCPS v. Burns,* Del. Fam., File No. CN87-1261, Ableman, J. (April 13, 1989), the Family Court rejected an argument by a support obligor that the Melson Formula should not be applied because he had numerous debts and the mother resided in West Virginia where the cost of living was lower than in Delaware. Similarly, in *Davis v. Davis,* Del. Fam., File No. 1423-84, Wakefield, J. (July 10, 1991), the Family Court refused to allow deductions for alleged payments on loans and a possible liability of $110,000 in unpaid withholding and social security taxes in calculating the amount of child support.

**The Family Court regards child support very seriously. Litigants should be well aware of this.**

But Family Court did find it inequitable to apply the Melson Formula in a case in which the mother had incurred extraordinary medical expenses resulting from her treatment for cancer. *Schneider v. Klevan,* Del. Fam., File No. 198-85, Conner, J. (March 1, 1991). The Court there adopted a four-step procedure to arrive at the amount of support: (1) a determination of the monthly needs of the children; (2) a determination of the amount the mother should contribute; (3) a determination of whether the father had financial ability to pay the balance of the children's monthly support needs; and (4) a determination of an adjustment to be made for the three summer months when the children resided with the father.

*Lump Sum Payments for Prospective Support*

While most child support orders call for regular monthly, bi-monthly, bi-

weekly or weekly payments, in certain unusual circumstances attorneys should let their clients know that the Court may order lump sum payments for future child support. Such a situation arose in *V.A.A. v. C.L.H.*, Del. Fam., File No. CS89-3723, Robinson, J. (July 1, 1992), a case in which the obligor had a long history of not paying support. He had been through bankruptcy, he was self-employed precluding the imposition of an effective wage-attachment, and was about to receive a payment as a result of the sale of an substantial asset. The Court ordered the obligor to purchase an annuity, the principle of which would revert to him if his child support obligation terminated prematurely.

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Adoption of the Delaware Child Support Formula and the services offered by the Delaware Division of Child Support Enforcement reduce, but do not eliminate, the role of the private bar in child support cases. Private attorneys engaged in domestic cases still should be informed about the child support formula and knowledgeable about how support is determined. Perhaps - and this is most important - they can exercise an effective influence on recalcitrant support obligors to meet their obligations.

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# The Melson Formula: An Equitable Evolution

In 1977, ten years before the federal government required states to adopt child support guidelines, Judge Elwood F. Melson, Jr., then a judge of the Family Court of the State of Delaware, recognized the need for a uniform approach to child support and developed a formula for this purpose. Two years later the Family Court adopted the "Melson Formula" as a rebuttable presumption in all child support actions. The formula eventually received the imprimatur of the Delaware Supreme Court, and is now a model child support guideline. From its evolution as an approach by a single judge to its recognition as a national model, the formula has withstood judicial, legislative, public, and economic scrutiny.

Judge Melson honored on the fiftieth anniversary of his admission to the Delaware Bar.

Judge Melson articulated his four-step approach to child support cases in *I.B. v. R.S.W.B.*, Del. Fam., File No. A-3000, Melson, J. (November 10, 1977). First, he determined each parent's net income. Second, he determined the minimum amount of income that each parent needed for food, clothing, shelter, medical care and job- related transportation, which would become known as the "self-support allowance." Third, he determined the amount required for the children's basic needs, which would become known as the "primary support allowance." Fourth, since the parents in *I.B.* had income remaining after they had met their own minimum needs and their children's basic needs had been apportioned between them, Judge Melson determined how the remaining income should be apportioned between each parent and the parent's dependents on the principle that "[c]hildren, in particular, are entitled to a standard of living which is, insofar as reasonably possible, commensurate with the more affluent parent". That apportionment would become known as the "standard of living adjustment (SOLA).[1]

Concerned that similarly situated parents and children were being disparately treated, several other judges began to follow Judge Melson's approach. On January 26, 1979, the Family Court unanimously adopted the Melson Formula as a rebuttable presumption in all child support actions,[2] and Delaware became the first state in the nation with a statewide presumptive child support guideline.[3]

Three years later, the Delaware Supreme Court directed the Family Court to adopt a "[r]ule prescribing mandatory guidelines and standards, which will insure that findings, conclusions, and supporting reasons therefor, in all future...child support cases, will be uniformly, clearly, and fully set forth by the Trial Judges."[4] The Family Court responded by adopting Family Court Civil Rule 52(c)[5] which provides that "in order to provide a uniform, equitable approach in applying Delaware law to all child support cases," the Court shall consider: (1) Each support obligor's monthly net income.

(2) The absolute minimum amount of income each support obligor must

retain to function at maximum productivity.

(3) The number of support obligor's dependents in an effort to apportion the amount available for support as equally as possible between or among said dependents according to their respective needs.

(4) The primary child support needs and the primary support obligation of each obligor.

(5) The available net income for a Standard of Living Adjustment (SOLA) to be paid by each support obligor after meeting their own primary needs and those of dependents.

(6) A consideration of the factors set forth in 13 *Del. C.* Section 514.

In June 1983 after the formula had been in use statewide for more than four years, the General Assembly passed a resolution asking the Chief Judge of the Family Court to "conduct a thorough review and evaluation" of the Delaware Child Support Formula, as the Melson Formula is formally, but less well known.[6] The resolution was passed in response to public complaints that the formula was "unfair" and "unrealistic".[7] Parents who paid support thought they paid too much. Parents who received support thought they received too little.

The 1983-84 study, which culminated in a forty-four page report to the General Assembly on April 15, 1984, reaffirmed the formula.[8] The study concluded that it was meeting its goals of establishing presumptively equitable and economically sound child support orders, and ensuring that parents similarly situated were being treated equally. The report emphasized that when the formula produced an inequitable result, the Court could enter an order outside the scope of the formula, based on "the unique facts of a particular case."[9] The report also noted that the formula enabled the Court to manage a growing case load.

The 1983-84 study did result in some adjustments to the formula, effective June 1, 1984. The Court recognized that the cost of providing for a child's minimum needs had risen, and increased the primary support allowance accordingly. The Court also recognized that in cases where the parties had three or more children, the standard of living adjustment often resulted in the non-custodial parent paying a disproportionate share of his or her remaining income to the custodial parent. As a result, the Court reduced the standard of living adjustment beginning with the fourth child, and imposed a cap on the percentage of a parent's remaining income which could be awarded as SOLA. The report noted that the Court might make further adjustments after it received the report of Robert G. Williams, Ph.D. Dr. Williams, an economist who had been awarded a federal grant by the Office of Child Support Enforcement of the Department of Health and Human Services, was studying child support standards, including the Delaware formula, and their relationship to the costs of child rearing. By 1984 it was clear that Judge Melson's approach was receiving national attention.

Five years later, however, the formula once again was under scrutiny. In *Dalton v. Clanton,* Del. Supr., 559 A.2d 1197 (1989), the legality of the formula was squarely challenged. Mr. Dalton argued that the application of a court-created formula was inconsistent with 13 *Del. C.* 514 which requires that in determining the amount of support due, the Court consider:

> "(1) [t]he health, relative economic condition, financial circumstance, income, including the wages, and earning capacity of

Form 509 (Rev. 11/90)

**The Family Court of the State of Delaware**

Case Name: _____ Period Covered: _____
File Number: _____

**CHILD SUPPORT CALCULATION**

| | | Father___ (filing status) | Mother___ (filing status) | Total |
|---|---|---|---|---|
| | **Net Income Derived From (__) Tax Return (__) Tax Table** | | | |
| 1 | A-Monthly Gross Earned Income | $ | $ | |
| | B-Monthly Gross Other Income (type) _____ | + | + | |
| | C-Total Monthly Gross Income (Line 1A + Line 1B) | =$ | =$ | |
| 2 | Total Tax Fed + FICA + State + City + Other = | | | |
| | -Father _____ _____ _____ _____ _____ | - | | |
| | -Mother _____ _____ _____ _____ _____ | | - | |
| 3 | Allowable Insurance: _____ | - | - | |
| 4 | Allowable Deductions | | | |
| | Support Order + Req. Pension + Union Dues + Other = | | | |
| | -Father _____ _____ _____ _____ | - | | |
| | -Mother _____ _____ _____ _____ | | - | |
| 5 | Monthly Net Income (Line 1C - Lines (2+3+4)) | =$ | =$ | |
| | **Net Income Available for Primary Support** | | | |
| 6 | Parent's Self Support Allowance | -$ 550 | -$ 550 | |
| 7 | **Net Income Available for Primary Support** (Line 5 - Line 6) | =$ | =$ | $ |
| 8 | Share of Total Available Net Income (Line 7 ÷ Line 7 Total) | % | % | |
| | ***Child(ren's) Primary Support Need*** | | | |
| 9 | Number of Children Due Support in this Support Action | | | |
| 10 | Primary Support Allowance (from table below) | $ | $ | $ |
| 11 | A-Monthly Child Care Expenses of Working Custodial Parent | | | + |
| | B-Other _____ | | | + |
| 12 | Total Primary Need (Line 10 + Line 11A + Line 11B) | | | =$ |
| 13 | **A-Primary Support Obligation** (Line 8 x Line 12 Total) | $ | $ | |
| | B-Primary Support for Other Dependents (fr. Suppl. Wksheet) | + | + | |
| | C-Total Primary Support Obligation (Line 13A + Line 13B) | =$ | =$ | |
| | **Standard of Living Adjustment (SOLA)** | | | |
| 14 | Amount Available for SOLA (Line 7 - Line 13C) | $ | $ | |
| 15 | SOLA Percentage (from table below) | % | % | |
| 16 | **A-SOLA Amount** (Line 14 x Line 15) | $ | +$ | = $ |
| | B-SOLA Amount Per Child (Line 16A ÷ Line 9) | | | $ (per child) |
| | **Total Monthly Support Amount** | | | |
| 17 | **Total Monthly Child Support Obligation** (Line 13A + Line 16) | $ | $ | |
| 18 | Amount Retained by Custodial Parent | - | - | |
| 19 | Total Monthly Ordered Child Support (Line 17 - Line 18) | =$ | =$ | |
| 20 | Pay Period Amount: Weekly__ Bi-Weekly__ Semi-Monthly__ | =$ | =$ | |

| # of Children | Primary Support Allowance | SOLA% |
|---|---|---|
| 1 | $220 | 18% |
| 2 | $385 | 27% |
| 3 | $550 | 35% |
| each additional child | +$110 | +5% |

the parties, including the children; (2) [t]he manner of living to which the parties have been accustomed when they were living under the same roof; [and] (3) [t]he general equities inherent in the situation.

The Delaware Supreme Court rejected Mr. Dalton's argument. The Supreme Court found that the Family Court in adopting the Melson Formula as a rebuttable presumption in all child support cases, acted consistently with its statutory obligation to make and publish uniform court rules throughout the state, 10 *Del. C.* 907(5), and with the factors set forth in 13 *Del. C.* 514. The Court, however, cautioned that:

> [t]he mathematical result which is the product of the Melson Formula can never be the basis of a child support order under the Delaware procedure, until that result passes the litmus test of the rebuttable presumption. When the calculation according to the Melson Formula is mixed together with the specific facts in a case, the result must be equitable. If the result is inequitable, the presumption is rebutted, and the support calculation pursuant to the Melson Formula must yield to the extent that is necessary to balance the equities in the case.[10]

The Court also admonished the Family Court that the formula must be reviewed and revised periodically to reflect common law refinements and economic realities.

Shortly before *Dalton* was decided, the Chief Judge of the Family Court appointed a committee of judicial officers and attorneys to study and recommend revisions to the formula. The Chief Judge also commissioned Dr. Williams to analyze whether the results produced by the formula reflected the cost of rearing children. Although Dr. Williams recommended that the self-support allowance, primary support allowances, and SOLA for one and two children be adjusted upward, he concluded that the "results obtained under the Melson Formula are remarkably close to the best available evidence on the actual costs of children."[11] The committee similarly recommended adjustments and revisions to the formula, while affirming the precepts underlying it.[12]

The Family Court judiciary issued an evaluation and update of the formula in January of 1990. Adopting many of the adjustments and revisions that Dr. Williams and the committee had recommended, the judiciary concluded that the formula "remains a fair and equitable approach to setting support, as measured by both the letter and the spirit of Delaware law."[13] The changes the judiciary approved in its 1990 report became effective on April 1, 1990, and were incorporated into official Court forms in November of 1990.[14] The revised formula, which is illustrated and explained in those forms, remains in effect today.

**There were public complaints that the formula was "unfair" and "unrealistic". Parents who paid support thought they paid too much. Parents who received support thought they received too little.**

The formula is based on three principles:

- Parents are entitled to keep sufficient income to meet their most basic needs in order to encourage continued employment.
- Until the basic needs of children are met, parents should not be permitted to retain any more income than that required to provide the bare necessities for their own self-support.
- Where income is sufficient to cover the basic needs of the parents and all dependents, children are entitled to share in any additional income so that they can benefit from the absent parent's higher standard of living.[15] It shares both the cost of rearing children between parents, and the discretionary income of parents between parents and their children.

The formula begins with a determination of each parent's net income. Net income is determined by calculating each parent's gross income, both earned from salaries, wages, commissions and bonuses, and unearned, including but not limited to dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, veteran's benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, prizes, and alimony. Deductions required by law, such as federal taxes, social security, state and city taxes, court- ordered support and wage attachments, and deductions required by an employer, such as union dues and mandatory pension contributions, are subtracted. Payments that provide a direct benefit to the children for whom support is sought, such as health and life insurance, are also subtracted. Deductions that are not mandatory, such as voluntary pension, thrift, and charitable contributions are added to the parent's income. If a parent is not employed full-time or is employed below his or her earning capacity, gross income in an amount equivalent to his or her earning capacity is imputed. The minimum net income attributed to a parent is $607 per month, assuming a forty-hour work week at $3.50 per hour.

From a parent's monthly net income, a self-support allowance of $550 per month is deducted. In 1990 the Court established $550 per month as the absolute minimum amount of income which a parent must retain to meet his or her own basic needs. The self-support allowance is $52.00 more than the federal poverty level for a single person in 1989, and $15.00 more than the increase in the Consumer Price Index from January of 1984 through January of 1989.[16] The allowance is not based on a parent's actual expenditures "since most people tend to spend whatever income is available to them,"[17] and, as a matter of policy, the Court will not allow a parent to provide for more than his or her "bare necessities" until the parent has provided for his or her children.[18]

The self- support allowance is deducted from a parent's monthly net income to determine net income available for primary support. That amount is compared to the other parent's net income available for primary support. For example, if the parents' net incomes for primary support are equal, their children's

primary support needs are apportioned equally. While the custodial parent bears the responsibility for the first $350 in unreimbursed medical, dental, and psychological expenses per calendar year, the parents share such expenses in excess of $350, per child or per family, in proportion to their net incomes available for primary support.

The children's primary support needs are determined by the number of children for whom support is sought. In 1990, the Court established the primary support need of one child at $220 per month, of two children at $385 per month, of three children at $550 per month, and of each additional child, at $110 per month, 40%, 30% and 20%, respectively, of the self-support allowance. The primary support allowances, like the self-support allowance, are comparable to federal poverty levels. Child care expenses incurred by as parent who works outside the home are added to the primary support allowance. Child care expenses claimed by a parent who is unemployed, but to whom income is attributed are not.

If the parents of the children for whom support is sought have other dependents, those dependents' primary support needs are calculated and are apportioned between the dependents' parents. The primary support needs of the dependents are calculated in the same manner as the primary support needs of the children for whom support is sought with one exception. The primary support needs of the children for whom support is sought are deducted from the parent's monthly net income before the primary support needs of the parent's dependents are determined. A parent's total primary support obligation for all of his or her children is deducted from his or her net income available for primary support to determine the amount available for SOLA.

The purpose of SOLA is "to ensure that the child enjoys, as nearly as possible, the standard of living to which he or she would be accustomed if the parties resided under the same roof."[19] In 1990 the Court established percentages to be applied to the amount of income that a parent has available for SOLA, based on the percentage of parental income spent on a child in a household where the parents live together. For one child, the SOLA percentage is 18%, for two, it is 27%, for three, 35%, and for each additional child, 5%, up to a maximum of 50% of the parent's remaining net income. In order to determine a parent's total monthly child support obligation, the parent's SOLA amount is added to his or her primary support obligation for the children for whom support is sought. The minimum monthly obligation is $50 per child.

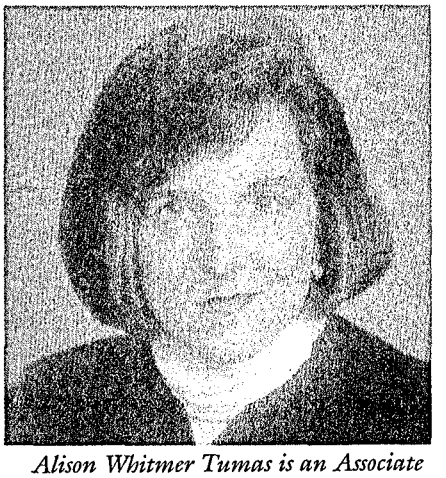
This year the formula and the official Court forms (which are an integral part of it) will once again be the subject of review. As the Court undertakes the review it will have the benefit of a study of state child support guidelines recently completed by the Child Support Project of the American Bar Association Center on Children and the Law.[20] The ABA study concluded that the Melson Formula is the most equitable of the three major models of child support guidelines currently in use, and is "particularly effective in balancing the equities in the most challenging lower and middle income cases, while also dealing well with higher income cases."[21] The ABA Project studied two of the issues which the Family Court review committee will study.

The first issue is shared custody. The formula "contemplates normal visitation arrangements," defined in 1984 as an arrangement that allows children to spend approximately 20% of their time with their non- residential parent.[22] As parents share custody of their children with increasing frequency, the formula must be refined to ensure uniformity among similarly situated families and to reflect the economic reality that the cost of child rearing is higher.

The second issue is the amount of the self-support and primary support allowances. The formula must be adjusted to reflect the economic reality that the cost of living for parents and children has increased since 1989, when the formula was last reviewed. Whatever revisions the committee recommends and the judiciary adopts effective April 1, 1994, the tenets underlying the Melson Formula will remain intact. Fourteen years of statewide use and judicial, legislative, public and economic scrutiny have proven that the formula produces equitable, uniform, and expeditious results in the overwhelming majority of the more than 17,000 support actions filed annual in the Family Court of the State of Delaware.

FOOTNOTES

1. *I.B. v. R.S.W.B.,* Del. Fam., File No. A-3000, slip op. at 2, Melson, J. (November 10, 1977).
2. Minutes of the Delaware Family Court Judges' Meeting, January 26, 1979.
3. Robert G. Williams, Ph.D., *Analysis of the Delaware Child Support Formula* (July 15, 1989) [hereinafter Williams, *Analysis*] at 1.
4. *Gregory J.M. v. Carolyn A.M.,* Del. Supr., 442 A.2d 1373, 1377 (1982).
5. Formerly Family Court Rule 271(c).
6. H.R. Con. Res. No. 116, 132nd Gen. Assembly (June 22, 1983).
7. *Id.*
8. *The Delaware Child Support Formula: Study and Evaluation, Report to the 132nd General Assembly,* Family Court of the State of Delaware (April 15, 1984) ]hereinafter Report].
9. *Id.* at 2.
10. *Dalton v. Clanton,* Del. Supr., 559 A.2d 1197, 1212 (1989).
11. Williams, *Analysis, supra* note 3, at 1.
12. Delaware Child Support Formula Committee, *Delaware Child Support Formula Report to the Family Court Judiciary* (October 11, 1989).
13. Report of the Family Court Judiciary, *The Delaware Child Support Formula: Evaluation and Update* (January 25, 1990) at 10. For a comparative analysis of the revisions recommended by the committee and the changes approved by the judiciary, see Alison Whitmer Tumas, *A Child Support Formula For the 90's: Melson Revisited,* 12 The advocate 9- 13 (May 1990).
14. Family Court of the State of Delaware, Form 509 (Appendix I), Form 509s (Appendix II, Form 509 Instructions (November 1990).
15. Report *supra* note 8, at 2.
16. Williams, *Analysis, supra* note 3, at 2.
17. Report, *supra* note 8, at 7.
18. *See I.B. v. R.S.W.B.,* Del. Fam., File No. A- 3000, slip op. at 2, Melson, J. (November 10, 1977).
19. Report, *supra* note 8, at 10.
20. *See* Marianne Takas, *Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?* 26 Fam. L.Q. 171-194 (Fall 1992).
21. *Id.* at 177.
22. Report, *supra* note 8, at 39.



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THE HONORABLE SUSAN F. PAIKIN

# Periodic Review and Adjustment: Modification and the Family Support Act of 1988

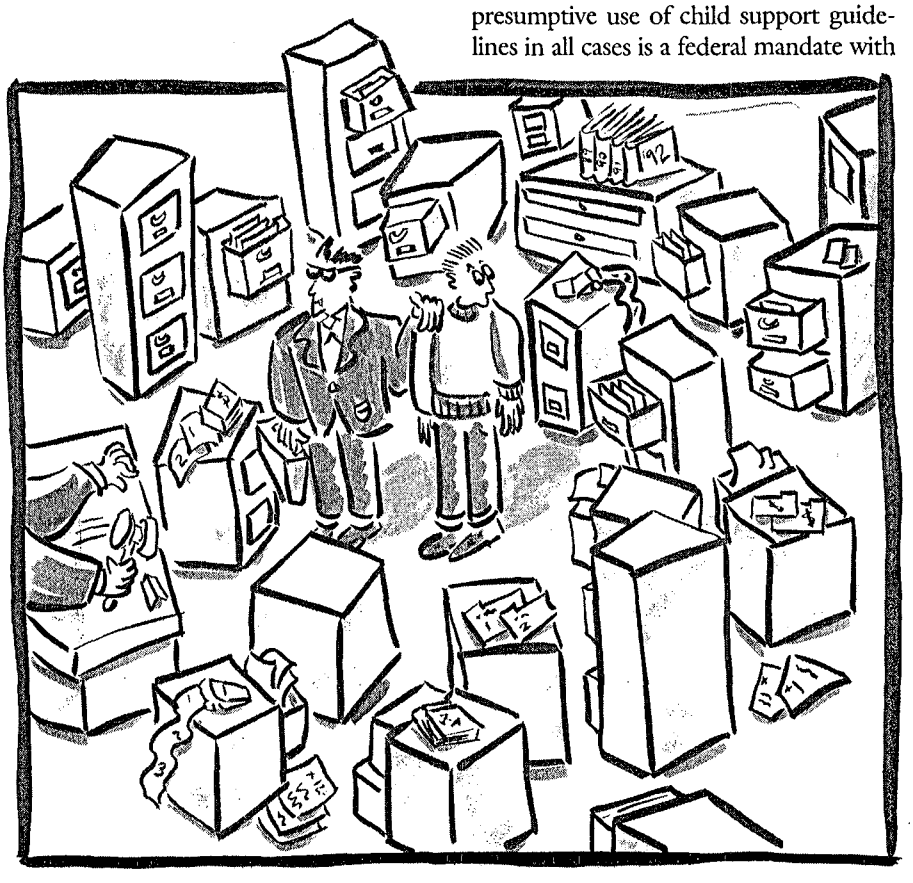

Illustration by Kevin Plottner

In which the states must learn to accommodate a large federal mandate.

Tucked away within the provisions of the Family Support Act of 1988[1] (hereinafter "FSA-88") requiring the presumptive use of child support guidelines in all cases is a federal mandate with far-ranging impact on state domestic relations law and practice. Section 103(c) [42 USC 666] requires each state, at least every three years, to "review" and "adjust" child support orders being enforced by the state's IV-D program in accord with the state's guideline.

Using the power of the purse, Congress responded powerfully to long-standing arguments that the absence of routine updating undermined the fairness and adequacy of child support obligations. The arguments were substantiated by research funded by the U.S. Office of Child Support Enforcement (OCSE). It was estimated that $26.6 billion in child support would have been due in 1984 if all orders had been set — or reset — using one of two existing child support guidelines.[2] This amount was adjusted to $27.5 billion in 1985 dollars and compared to the $10.9 billion in child support that was reported due in 1985 as shown by special census data on alimony and child support.[3] The "adequacy gap" proved 250% greater than the well publicized "compliance gap" that galvanized Congressional action in 1974 and 1984, first to establish the federal-state child support enforcement partnership under Title IV, Part D, of the Social Security Act and later to require states to make sweeping and specific changes to state laws governing child support enforcement remedies.[4] There emerged almost universal agreement that two steps were necessary to ensure that the economic needs of children were protected: (1) adoption of rebuttable presumption guidelines and (2) periodic adjustments to child support orders.

In pursuit of that goal Congress then required both statewide use of rebuttable presumption guidelines and periodic modification of IV-D child support orders. The relevant section of FSA-88 is as interesting for what it did *not* do as for the scheme it set forth. Congress chose not to require states to remove existing modification threshold standards. Instead, it enacted a review and adjustment procedure layered onto existing state law, relying on the mandate that orders be adjusted according to a state's child support guideline to accomplish by default what was not addressed directly.

Each state was required to develop by

October 13, 1990, a plan for accomplishing periodic review of existing child support orders. By October 13, 1993, each state must have in place procedures for periodic review and adjustment of all AFDC orders unless "not in the best interest of the child", and for review and adjustment of all non-AFDC orders upon the request of *either* parent. The review period is every 36 months. Recognizing the considerable diversity among the states in how IV-D programs are structured and operated, Congress deferred to state law as the primary vehicle. Five demonstration projects were funded to provide insight into potential problems and best practices. The results of those studies are now available to policymakers addressing application of this law through state legislation, administrative procedures, or both.

Among potential problems are due process requirements that may well conflict with state law. And, while it initially addressed only cases enforced under Title IV-D, Congress signaled its interest in extending the periodic review requirement to all child support cases as it had with presumptive guidelines. By 1990 the Secretary of Health and Human Services was required to conduct a study on the feasibility and impact on state courts of extending the mandate to all child support orders in effect in a state.

Federal law provides for notice at three stages of the process: (1) notice of the right to request a review; (2) notice of the review at least 30 days prior to the review; and (3) notice of the proposed adjustment, or of the determination that there should be no change in the order, and of the right to challenge that adjustment or determination not less than 30 days from the notification. Cognizant of the heated debate over the mandate for periodic modification, particularly on the issue of downward adjustment, OCSE attempts through its federal regulations to attend to the expressed concerns of the various factions within the child support enforcement community.

Four key issues are of particular interest to the bench and bar: the interplay between the requirements of this statute and traditional standards for modification, impact on child support guidelines, potential ethical issues for IV-D agency attorneys, and implications of specified times for review and adjustment for existing state law and case processing procedures. This statute portends additional problems for interstate cases.

The general rule is that a child support order is never final but may be adjusted by the court. Such modification has historically been permitted when there has been a change in circumstances occurring *after* the date on which the previous order was entered.[5] The competing public policy goals inherent in such decisions and statutes balance reduction of future uncertainty for the parties with flexibility to ensure that the needs of children are met.

Concerns about repeated or frivolous requests for modification led most states to adopt a threshold higher than mere change of circumstances. States have developed by case law or statute a variety of standards to be met at an evidentiary hearing, at which the movant has the burden of proof.[6] Standards include a "change in circumstances that could not have been anticipated by the trial court at the time the Court set the prior level of support",[7] a "showing of changed circumstances so substantial and continuing as to make the terms "unconscionable"[8] "substantial *and* continuing"[9] "substantial" or "material".[10] A few did adopt a "change of circumstance"[11] as a sufficient basis for modification.

Case law in Delaware requires a proof of "change of circumstance"[12] where child support is established originally by court order. A "substantial" or "unforeseen" change of circumstances appears required where the obligation was set by separation agreement, together with proof that enforcement of the original agreement is not in the child's best interest.[13]

Since the adoption of child support guidelines, a number of appellate courts have addressed the question of interplay between modification and those guidelines.[14] Most require a threshold finding of a change of circumstance and then apply the new standard. As a general rule enactment of a state guideline is not deemed in and of itself sufficient.

States addressing this issue by statute appear more liberal, either allowing modification of pre-existing orders merely by reapplication of the new guidelines[15] or by allowing the existing state standard to be met if reapplication of a guideline results in a specified percentage change in the order.[16] For example, the most recent changes in Delaware's Melson Formula (effective April, 1990) establish a presumption that the threshold for modification of the order is met if the calculation reflects a $25.00 per month change from the existing order.

**States addressing this issue by statute appear more liberal, either allowing modification of pre-existing orders merely by reapplication of the new guidelines or by allowing the existing state standard to be met if reapplication of a guideline results in a specified percentage change.**

Commentary on the final regulations on the 1993 modification requirements [45 C.F.R. 303.8(d) published 12/28/92] acknowledges the tension between historic state standards for changing support orders and the requirement to review *and adjust* based on application of the state guideline. It concludes that analysis of the guidelines and modification provision of FSA-88:

> ...evidence Congressional intent to make obtaining an adjustment in the amount of child support easier by requiring a process in which the standard for modification must be related to state child support guidelines. The enactment of these

requirements reflects a recognition that the traditional burden of proof for making a change in the amount of support ordered may have contributed to many awards remaining unchanged throughout the life of the order and thus, inadequate or inappropriate with the passage of time. It also signals a need for states to at least expand, if not replace the traditional change in circumstances test as the legal prerequisite for changing the amount of child support to be paid, by making state guidelines the presumptively correct amount of support to be paid.[17]

Federal regulations permit a state to establish a "reasonable quantitative standard" that must be met before an award is modified. The standard may be either a fixed dollar amount, a percentage, or both. If the previous order was established after rebutting the presumptive state guideline *and* there has been no change in the circumstances that resulted in the rebuttal, an adjustment is not required. Finally, states must permit a modification of the order simply to address a child's health care needs, whether or not the dollar amount of the existing award is changed. This latter requirement appears to implicate both the cost of a health insurance policy and unreimbursed expenses. The Melson formula deals directly with both.

While these provisions appear straightforward, numerous issues remain unresolved.

The approach delineated continues incorrectly to minimize the evidence necessary before *any* mathematical formula can be applied, particularly in modification cases. Two common fact patterns, that of an unemployed (or underemployed) parent and that of obligations to a second family, illustrate the point.

If guidelines are "mathematically" applied to the circumstance as of the date of review the result may differ significantly from a traditional modification evaluation. Where an *obligor* is not working, a court would generally make a preliminary determination, for example, whether the loss of a job was due to economic or other circumstances beyond the control of the obligor or to his or her own conduct, whether the obligor had sought work in good faith, and whether the obligor had assets available to meet the support obligation during a period of unemployment. In many states, including Delaware, a similar inquiry would be made of an unemployed custodial parent.

The "second family" scenario creates the most difficult cases — and often the most fervent opposition to child support guidelines. Even assuming child support guidelines become sophisticated enough to handle multiple family cases, a pure application of a guideline to the circumstances as they exist at the time of review will likely "reward" a support obligor who voluntarily takes on additional family responsibilities by reducing an obligation previously found due and owing to his or her first family.

This result is contrary to the majority view, which, in essence, permits use of a second family as a shield to defend against an increased support obligation but not as a sword to decrease an existing order, absent exigent circumstances.[18] With a three year review and adjustment cycle and rates of remarriage, the issue of second (or third or fourth) families will prove a common reality, not an exception. States have the choice of either addressing this issue within the context of guidelines or forcibly resolving a majority of such cases by rebutting the presumptive applicability of the state standard.[19]

Recently published regulations contain an encouraging (if implicit) recognition of the complexity of the fact-finding function by requiring "an objective evaluation, conducted through a proceeding before a Court, quasi-judicial process, or administrative body or agency." However, as highlighted by the preceding examples, effective and forceful advocacy will be required in a large percentage of cases subject to review and adjustment.

Commentary on the final regulations continues to understate the ethical issues thus confronting IV-D attorneys in presenting these cases. It deflects the issue of legal representation of parties as a matter "to be determined by state law." The Commentary goes on: "The State's role is not to advocate either an increase or a reduction in the amount of the order, but rather to facilitate whatever adjustment is appropriate in accordance with state guidelines." Any lawyer readily appreciates the impossibility of defining his or her role in such terms. This concern *must* be addressed directly by states. The pitfalls created by this law are ignored at one's peril.

To avoid relentless "churning", all of an obligor's orders should be reviewed at the same time. As they are likely not to have been entered simultaneously (or perhaps even in the same state), coordinating a review may prove problematic. Of particular concern is the circumstance when one or more of an obligor's orders involves a non-IV-D case or an NPA IV-D case where the custodial parent declines review but the obligor requests it.

Again, A "Sgt. Friday" approach ignores the heart of the American jurisprudential and constitutional system: the adversarial process as the best way of getting at the facts in contested cases. The assumption that guidelines are mechanical and ministerial with no room for advocacy or discretion grossly ignores the reality of complex support cases and

**Guidelines must also directly address simultaneous calculation of multiple support orders. The Court's traditional commitment to the best interest of children may conflict with an agency's goal to reduce welfare expenditures, to maximize state incentives.**

of the competing state and private interests involved.

Guidelines must also directly address simultaneous calculation of multiple support orders. The Court's traditional commitment to the best interest of children may conflict with an agency's goal to reduce welfare expenditures, to maximize state incentives in AFDC and Foster Care cases, or both. These policy choices should be explicit and inclusive to avoid inequity and inconsistency.

It is beyond the scope of this article to address all the ethical problems presented, particularly to IV-D attorneys, by the federal mandate or periodic modification. Issues abound and include: "who is the client?", required disclosure of nature and scope of representation, permitting or precluding independent counsel in IV-D cases, client communication and confidentiality, conflicts of interest; and maintaining independent professional judgment. The chapter "The Role of the Attorney in Child Support Enforcement" contained in *Essentials for Attorneys in Child Support Enforcement* (OCSE, 1992) contains the best overview of these issues.

For both the private and public bar, a second category of concerns arises from the relationship between mandatory periodic review and adjustment and the negotiation of divorce settlements.

Federal law clearly limits review to child support orders. At issue is the methodology for reviewing and adjusting unallocated alimony and child support orders or contractually based support orders wherein the amount of the order is intertwined with property division or retained use of a former marital residence. To assume a child support component can always be segregated for a standard review is inconsistent with many agreements and court orders. Counsel must be mindful of the review provisions even if they are not eventually extended to all cases, as either the obligee or the obligor may invoke this law and request the IV-D agency to initiate "review and adjustment".

A third set of issues revolve around the administration of justice. While regulations permit states to combine review and adjustment with regular judicial or quasi-judicial case processing, the pre-and-post-adjustment 30 day notice provision may *require* delay and separate appellate standards for this category of cases.

While the state has discretion and flexibility to determine the procedure by which the decision to adjust (or not adjust) orders may be challenged, the FSA-88 requires parties be permitted at least 30 calendar days to initiate challenge proceedings. In Delaware, contested cases will presumably be resolved by a master's hearing, and uncontested intrastate cases will have been settled at mediation. After October 13, 1993, federal law requires that there be for this special group of cases (even within general modification petitions) a 30 day review *de novo* period in lieu of the 15 days (plus 3 days if the order is mailed) applicable to all other support cases heard by masters. As with the modification standard, a state similarly situated must decide whether to incorporate a two tier system or adopt one legal and procedural standard consistent with federal law for both IV-D and non IV-D cases alike.

Given the general lack of automation in courts, a two track process will be confusing at best and more likely fertile of errors in case processing. As such, multiple standards will be found not only inequitable but unworkable.

It is unclear what will be the impact on periodic modification of 13 *Del. C.* § 513(c)(i), which requires the parties to "notify each other in writing of every change in circumstance which might materially effect the existing support order; and, in addition, each party shall exchange completed financial report forms every 12 months to determine how the needs of those receiving support are being met with the support paid, and whether any modification should be made to the existing support order based upon the factors set forth in § 514 of this title." To date, compliance has been minuscule by DCSE and private litigants; it is also unmonitored. This requirement does not appear to meet the notice requirements of FSA-88. It may nonetheless foment future litigation regarding "retroactive" modification and the effective date of modified support orders. As an aside: if the IV-D agency has concerns about staff sufficient for the current federal requirements, the mandates of this section may prove overwhelming.

The complexities described above are dwarfed by issues arising in interstate cases. While the process is essentially the same, the final regulations address the shared responsibility of the initiating and responding states.

Drafters of the Uniform Interstate Family Support Act (UIFSA) were keenly aware of the advent of periodic modification. Limitations on the jurisdiction to hear such matters is purposeful and, it is hoped, clear cut. Under the best of circumstances adoption of UIFSA is several years away. Presumably in cases with *de novo* orders in several states, the review and adjustment regulatory scheme should provide some degree of coordination even if it may not yet mandate reconciliation of all conflicting orders.

Aside from the potential complexities of interstate cases, the state must analyze the competing policy and procedural demands imposed by this act. While the decision on how best to implement review and adjustment requires and deserves debate, the underlying principle

does not. Ensuring adequate financial security to children while retaining fundamental fairness to litigants is now an accepted societal goal that will be furthered, at least in part, by ensuring child support orders are regularly reviewed and their adequacy maintained.

FOOTNOTES

1. Public Law 100-485.

2. Ron Haskins, et al., *Estimates of National Child Support Collections Potential and the Income Security of Female-Headed Families,* Report to U.S. Office of Child Support Enforcement, Bush Institute for Child and Family Policy, University of North Carolina at Chapel Hill, April 1985. Delaware's Melson Formula (first adopted statewide in 1978) was one of the formulas used to measure deficiencies in existing support levels.

3. Robert G. Williams; "Inadequate Child Support: Economic Consequences for custodial Parents and Children" prepared for Judicial Education Project of the National Center for State Courts, Policy Studies, Inc. (December 1988)

4. The Child Support Guidelines project had earlier arrived at an almost identical deficiency in support levels by comparing the average court ordered support obligation in effect in 1985, ($199.00 per month) with an obligor's estimated share of average child rearing costs for U.S. children in that year. See; Robert G. Williams, *Development of Guidelines for Child Support Orders,* Report to U.S. Office of Child Support Enforcement, National Center for State Courts, pp. II-2-II-3.

5. See, e.g. Marygold S. Melli, "Modification of Child Support Awards," Alimony, Child Support, Counsel Fees, § 22 (Matthew Bender, 1988); Harry Krause, Child Support in America: The Legal Perspective (1981).

6. See. e.g., *Manners v. Manners,* 706 F.2d 671 (Wyo.1985), *In re Marriage of Mizer,* 683 P.2d 382 (Colo. App. 1984).

7. See e.g. *Wagner v. Wagner,* 396 N.W. 2d 282 (1986); *Bilosz v. Bilosz,* 441 A.2d 59 (Conn. 1981), *Morrill v. Millard,* 570 A.2d 387 (N.H. 1990) Montana, M.C., Sect. 40-4-208(2)(b)(i).

8. See, Uniform Marriage and Divorce Act, § 316(a), 9A U.L.A. 409 (1987).

9. E.g., Arizona, Missouri, Kentucky

10. E.g., ___Idaho, I.C., Sec. 32-709; *Snow v. Snow,* 531 So 2d 921 (Ala. Civ. App. 1988).

11. See e.g., Michigan, MCL 552.17.; *Verbeke v. Verbeke,* 90 N.W. 2d 489 (1958).

12. See., *Deborah R. S. v. George F. W.,* Del. Supr., C.A. No. 87A-MR-6, Stiftel, P.J., (unreported opinion 12/31/87).

13. See, *Lawrence J.B. v. Bonnie B.H.,* Del. Supr., No. 83, 1984, Horsey, J. (ORDER), 7/12/85; and *Solis v. Tea,* Del. Supr., 468 A2d 1276 (1988).

14. See, e.g., *Albany Dept. of Social Services v. Dickerson,* 388 NYS 2d 34 (1976) requiring proof of change of circumstances beyond application of guidelines; *Moylan v. Moylan,* 384 N.W. 2d (1986, Minn); *Katz v. Katz,* 408 N.W. 2d 835 (1987, Minn); *Orlowsky v. Orlowsky,* 174 Mich. App. 637; __ N.W. 2d __ (1989) *Davis v. Davis,* 535 So. 2d 183 (Ala. Civ. App; 1988); and *Callahan v. Callahan,* 762 F.2d 205 (1988).

15. See, e.g., *South Dakota* C.L., Section 25-7-7 allowing modification based on application of the state's new guidelines to orders entered prior to their adoption without a showing of

change of circumstances.

16. See, e.g. *Colorado* R.S. § 14-10-115 (less than 10% differential in order is not considered a substantial and continuing change).

17. Vol. 87, No. 249, Federal Register 61560 (12/28/92).

18. See, e.g. *Roszko v. Roszko,* 705 P. 2d 951 (Ariz. 1985); *Beddoes v. Beddoes,* 393 P. 2d 1 (Colo. 1964); *Bentley v. Bentley,* 156 So. 2d 335 (La. App. 1971).

19. Recognizing the inherent state interest in bringing more cases within the guidelines, a number of writers and several states have moved toward adoption of formulas (based often on Melson Formula conceptions) which more directly address multiple family issues. See, e.g., Marianne Takas "Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?" (A.B.A. 1992); The Treatment of Multiple Family Cases Under State Child Support Guidelines, (CABA 1991) (Monograph available from OCSE). See also, recent changes in Montana Child Support Formula in response to these issues. It should be noted that Delaware has not yet applied a formal policy to many of these same issues, although the format and philosophy of the formula are more amenable to addressing these problems than less complex standards.

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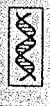

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THE HONORABLE BATTLE RANKIN ROBINSON

# The Work of the U.S. Commission on Interstate Child Support

Although most states have criminal non support laws, in recent years support has been established and enforced primarily through civil process. Nevertheless, advocacy groups have been agitating for criminal prosecutions and for making non-support in interstate cases a federal offense.

When a child's parents reside in different states, state boundaries often create a barrier to the efficient collection of support. Statistics about these so-called "interstate" cases demonstrate that such children are more likely to suffer financially than those whose parents live in the same state. Although three of every ten child support cases are interstate, only one in ten dollars collected in support is from an interstate case. Mothers in single state cases receive about 70 percent of the support they expect. In interstate cases they receive far less. Furthermore, custodial parents must confront the bureaucratic mazes and confusing laws and procedures of not one, but two, state support agencies and court systems.

Even though such cases would seem to make a federal initiative necessary, Congress largely overlooked the plight of such children in its landmark child support legislation of 1975 and 1984. In the 1988 Family Support Act (P.L. 100-485, Oct. 15, 1988, Sec. 126) Congress addressed the issue for the first time by creating a 15 member national commission, charged with recommending improvements in the interstate establishment and enforcement of child support awards.

The Commission — known as the U.S. Commission on Interstate Child Support — submitted its report to Congress in August 1992. The report contains recommendations, which, in the words of one national child support organization, "display the broad sweep of the Commission's investigation into virtually every aspect of child support enforcement, both interstate and intrastate." Many of the recommendations have already been incorporated into legislative proposals at both state and federal levels. The Bush administration specifically endorsed some of the recommendations. And, although the approach of the Clinton administration to child support enforcement is not yet known, the Commission's proposals are certain to be at the center of an increasingly prominent national debate over child support policy.

**Commission Membership**

The Commission consisted of 15 members, 8 appointed by Congressional leadership — two each by the majority and minority leaders of the Senate and House — and 7 members appointed by the Secretary of Health and Human Services. The resulting Commission was a diverse group representing a variety of participants in the child support process. It included three members of Congress — Senator Bradley of New Jersey and Congresswomen Kennelly of Connecticut and Roukema of New Jersey; three private attorneys; two state court judges; a deputy undersecretary at the federal level and a general counsel to a state executive department; and representatives of both custodial and non-custodial parents' groups. Although a number of members were law-trained and directly involved in the legal aspects of the support process, the operations side was less well represented. Only one Commissioner — Irma Neal, Director of the District of Columbia's Office of Paternity and Support — was directly involved with a child support agency, and she resigned her position midway through the Commission's work. Despite an effort to review the Commission's work with state agency heads, this imbalance may have contributed to an impression that the report is heavy on legal recommendations and that its impact on the operations side

is not as well thought out.

Another group essential to the success of any child support program — state legislators — lacked representation altogether. The Minority Leader of the Illinois House of Representatives was appointed but failed to attend a single meeting and declined to resign so as to permit a replacement to be appointed.

The Commission chose as its Chairperson Margaret Campbell Haynes, the able and soft-spoken head of the American Bar Association's Child Support Project, whose knowledge of child support issues was equaled by her diplomacy. She was supported in her job by the Vice-Chair Harry Tindall, a hard working and enthusiastic lawyer from Houston, whose willingness to take time from his practice to put in two years on behalf of the nation's children was in the best tradition of his profession. There was also a small but able staff of three, guided by Vernon Drew, former director of the South Carolina child support agency.

Ms. Haynes and Mr. Tindall, along with Beth Mason, Irma Neal, and J.B. McReynolds formed the core of the Commission and generally voted together in favor of various propositions. The two judges, along with Schuyler Baab, Deputy Undersecretary of the Department of Health and Human Services, formed the more cautious wing of the Commission, often concerned lest the Commission exceed its mandate and micro-manage state programs. Mr. Baab in particular was critical of the Commission's failure to consider the fiscal impact of its proposals. In general, however, the Commissioners got along well, despite differences in approach, and formed a close bond during their two years of service.

**The Hearings and the National Conference**

The Commission held a series of hearings across the country, at which the Commissioners listened to a broad spectrum of those engaged in child support. They heard from representatives of federal and state agencies, advocacy groups, the judiciary, custodial and non-custodial parents, and the private bar. The Commission heard repeated reference to slowness and confusion inherent in the reciprocal process, frustrations with unsympathetic child support workers, court employees, and judges, and the difficulty of obtaining support from the self employed. The Commission also heard much testimony suggestive of steady improvement in collecting support as a result of federal and state cooperation in recent years. It heard about the establishment of legal clinics by private lawyers in California and Arizona to pursue child support cases, increased cooperation with credit reporting bureaus, "privatization" of some aspects of child support, and effective regional networks for exchanging support data.

The Commission also heard from a number of scholars and experts. Law professors addressed jurisdiction, statutes of limitation, conflicts of law, choice of law, and the relationship between child custody and visitation and support. Others spoke about privacy concerns, medical support, military cases, national law enforcement computer systems, and parent locator networks. And, as the Commission's recommendations took shape, they were discussed with national organizations and advocacy groups.

One of the Commission's major efforts was to hold a National Conference in Atlanta in the spring of 1991, which brought together 200 persons from 40 states involved in the child support system. The *Child Support Report* of the federal Office of Child Support Enforcement ("OCSE") called the Conference "unprecedented" in its scope. It gave the Commission an occasion to build up interest in its work, to discuss proposals directly with a large number of those engaged in child support, and to receive helpful ideas and suggestions.

**Commission Findings and Recommendations**

Initially, the Commission made two important and potentially controversial policy decisions. First, it endorsed continuing the child support program as a state-based program. Although a federal "take over" of the existing child support program, or of various aspects of the program, was strongly endorsed by one Commissioner and enjoys the support of some advocacy groups, the Commission was simply not convinced that the federal government could do a better job. There were concerns about fragmenting domestic relations cases, the need for flexibility and responsiveness to local needs, and the states' investment of millions of dollars in existing programs.

Second, the Commission recommended separating the issues of child support and child visitation — although recognizing the importance of each in a child's life. In the Commission's view, nonpayment of support should not be a valid defense to visitation denied. Nor should denial of visitation excuse nonpayment.

The Commission divided itself into committees to address such aspects of support as operations, funding, legal issues, and staffing and training. Committee recommendations and those of individual Commissioners were then placed before the Commission for discussion and vote. Of these proposals 120 were adopted and are incorporated in the Commission's lengthy (445 pages) report, entitled *Supporting All Children: A Blueprint for Reform.* It is available through the Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9321.

The report is divided into segments that trace the development of a child support case: Staffing and Training, Location and Case Tracking, Establishment, Parentage, Healthcare, Enforcement, and Collection and Distribution. Other chapters deal with the Uniform Interstate Family Support Act, the roles of the state and federal governments, and the funding of child support programs. There are also recommendations that pertain to distinct groups, such as Indian children, federal employees, and teen parents.

The 120 specific recommendations deal with virtually every aspect of child support. Several of these should be considered the key recommendations. (They were viewed by the Commissioners as central to reform of the interstate system) It is regrettable that the sheer number of the recommendations and the length of the report may detract from these core suggestions, which hold perhaps the greatest promise for improving collection in interstate cases.

**Key Recommendations**

**1. Enable the States to Exchange Information Quickly**

The report calls the present system for getting support information from one state to another "a dinosaur fed by paper." It proposes an interlocking national network for the retrieval and exchange of information, built on the existing Federal Parent Locator Service (which has access to federal records) and supplemented by the automated data retrieval and processing systems that all states must have in place by 1995. Thus, a child support agency would have readily available information from its own state records and from federal records and access to the records of other states. The Commission envisions access to motor vehicle registrations, revenue and taxation data, and records of credit reporting agencies. The Commission also recommends including national and regional criminal informa-

tion systems. The expanded network would be particularly helpful in locating absent obligors — often a challenge in interstate cases — and in verifying child support obligations of new employees. The availability of this information should speed the entire process and insure that current accurate information is before an agency or a court.

**2. Speed Support by Requiring Prompt Reports of New Hirings**

The Commission heard testimony about the game of "catch-up" frequently played, in which an obligor switches jobs without notifying anyone whenever a wage withholding order reaches his employer, thus thwarting enforcement of a support obligation. Even where the job change is not done to avoid a support obligation, a lag frequently occurs in the flow of funds to children while the paperwork catches up with the employee. The Commission believes that the high number of cases in which job changes occur necessitates a faster method for tracking changes and getting withholding orders in place. To this end, the Commission recommends a change in the federal W-4 form to require the reporting of support obligations. The employer would be required to withhold immediately. Meanwhile, the W-4 form would be forwarded to the state employment agency, where it would be accessible to the child support agency. The latter could then use the national computer network to verify the information and to send an income withholding order to the new employer.

**3. Simplify Direct Income Withholding Across State Lines**

One of the most important support enforcement tools is the wage withholding order, which has been required since 1984 in interstate cases. However, its use has been problematic, since the court that issues the order often has no jurisdiction over the employer, and registering the order in the courts of a second state has proven slow and confusing. Accordingly, the Commission recommends that those doing business in one state be required to honor wage withholding orders from others without the necessity of registering the order in the employer's state. To expedite the process, the Commission recommends that Congress, in conjunction with the states and with employers' organizations, develop a national income withholding notice.

**4. Encourage Uniformity by the Adoption of UIFSA**

One of the Commission's specific charges was revision of the Uniform Reciprocal Enforcement of Support Act (URESA), which for some years has been the preeminent state legislation applicable to interstate support cases. Five members of the Commission and its counsel participated directly in the drafting of the Uniform Interstate Family Support Act (UIFSA), designed to replace URESA. (The new Act is the subject of another article in this issue.) The Commission endorsed UIFSA and recommended that all states adopt it verbatim. In the Commission's view UIFSA is necessary to achieve uniformity among the states and to resolve jurisdictional conflicts.

**The Commission envisions access to motor vehicle registrations, revenue and taxation data, and records of credit reporting agencies. The Commission also recommends including national and regional criminal information systems.**

**5. Expedited Establishment of Parentage**

The Commission's investigation of existing interstate parentage procedures in the states revealed a hodge-podge of practices, antiquated laws, and requirements. The Commission urges that the establishment of parentage be expedited and modernized by emphasizing voluntary acknowledgments of paternity, by using presumptions of parentage based on scientific testing, and by imposing temporary support orders pending full adjudication. The Commission also recommends that states use civil, not criminal, procedures for parentage actions and that a finding of paternity be treated as *res judicata* to the same extent as other civil judgments.

**6. Improving Health Care Support**

Providing health case support is particularly difficult in interstate cases owing to the essentially state-based coverage of many health insurers. The General Accounting Office reported to the Commission that 66 percent of interstate support cases do not include provisions for health care.

The Commission recommends that federal law require the health insurance industry to cooperate with states and parents to provide benefits to a beneficiary's children. Specifically, insurers should allow enrollment of children without permission of the policy holder, without residency restrictions, without regard to the marital status of parents, and without waiting for enrollment periods. Insurers should develop interlocking agreements to provide access to care when the insurer does not offer a plan in the child's state.

**7. Improving Staffing, Training, and Funding**

The Commission recognized that the effectiveness of its work ultimately rests on adequate funding and capable staffs. This is particularly true in the interstate context, with its complex legal issues, need for exchange of information among states, and demands for careful preparation. To this end, the Commission recommends that states and the federal government undertake an aggressive initiative for beginning instruction and annual training for everyone in the process, caseworkers, attorneys, managers, supervisors, and judges. The Commission envisions a core curriculum developed by OCSE and administered by the states.

With respect to funding, the Commission recommended an immediate change in the "formula" used to determine the financial incentives states receive from the federal government. This would require states to reinvest incentive funding in their child support programs, rather than in other state programs. In this the Commission differed with Bush administration officials, who proposed reinvestment in any program benefiting children. The Commission also recommended a comprehensive study of the funding structure of child support, including the adequacy of federal funding, alternative funding methods, and the use of funding to improve program performance.

**8. Other Notable Recommendations**

The Commission urged that support agencies be given access to national and regional criminal justice automated information systems, such as NCIC and NLETS, and broadcasting support capiases and warrants over state systems, that

custodial parents be kept advised of dates and times of hearings and court rulings, that private attorneys and *pro se* litigants receive access to enforcement tools such as credit bureau data and tax intercepts, and that a national subpoena form and standard petitions be used in interstate cases to promote uniformity. Another whole set of recommendations deal with essentially federal matters such as bankruptcy and strengthening child support compliance by military personnel and federal employees.

By no means were all of these recommendations arrived at by consensus or without reservations or dissenting votes. Since there were only 7 to 10 commissioners present at most meetings and under Commission procedures motions were adopted by majority vote of those actually voting, a number of recommendations were approved without the vote of a majority of the commissioners. One recommendation received only four affirmative votes.

Perhaps the most sharply focused differences had to do with the proper role of the Commission and the relationship between the federal government and the states. A minority felt that the Commission had been created to deal only with interstate cases. In their view the Commission's propensity for delving into every nook and cranny of child support, in-state and well as interstate, deviated from this directive and tended to "micro-manage" state programs. Nor did the Commission address to their satisfaction the costs of the proposals. Another concern was that the sheer number of recommendations detracted from the most important recommendations for reform.

Two subjects reflecting this core debate were national support guidelines and a proposal to withhold state-issued licenses from delinquent obligors. The Commission heard from witnesses who called for a national guideline as a way of promoting uniformity and fairness. Such a guideline is also tied to the call for a federal "child support assurance" program in which the federal government would guarantee minimum payments to all custodial parents. The Commissioners opposed to the national guideline believed that the determination of the amount of support historically a state matter should remain so. They also felt additional time would be necessary for the states to experiment with various guideline models before a national one was adopted. The resulting recommendation — calling for a national commission to study the need for a standard guideline — reflects a compromise between these two strongly held positions. The guidelines commission to be established no later than January 15, 1995 would examine the need for a national guideline and analyze the strengths and weaknesses of current models. A majority of commissioners also endorsed requiring state guidelines to take into account a host of matters, such as health care, child care expenses, extraordinary education expenses, job training, and multiple families. The dissenters would leave this decision to the states.

The recommendation that Congress require the states to withhold state issued licenses, such as drivers licenses and business and occupational licenses, from delinquent obligors or those who fail to appear for support hearings had its genesis in the frustration expressed by many witnesses about dealing with self-employed obligors, with whom enforcement tools — particularly wage withholding — are often ineffective. Since many of these obligors must have state licenses to engage in their trades or professions, the states' licensing authority promises an attractive remedy. However, some commissioners objected that, while this was meritorious and worthy of consideration by the states, a federal mandate would intrude on a traditional state prerogative. The Commission gave little consideration to the cost effectiveness of a state-wide system for reporting delinquencies to licensing boards or to providing personnel and resources to undertake such a task. Nevertheless, the proposal has proven popular.

Other issues before the Commission also engendered lively debate and compromise. This was particularly true of jurisdiction in interstate cases. Under the existing URESA dominated system, many cases are necessarily shifted from the state where the obligee resides to the state where the obligor resides. The inherent delay and a perception that it gives the obligor a "home town advantage" has led advocacy groups and some child support workers to endorse a system whereby a child support case would be prosecuted in the state where the child resides, whether or not the non-custodial parent has contacts with the state. At first blush this position seems to be foreclosed by the decision of the U.S. Supreme Court in *Kulko v. Superior Court*,436 U.S. 84 (1978), in which the Court expressly held that the mere presence of children in a state does not give that state jurisdiction over the children's non-custodial parent. However, the Commission heard from some legal scholars who suggested not only that *Kulko* may be ripe for reconsideration but that *Kulko's* limitations may be overcome if Congress expands the reach of a state's "long arm" statute, a delegation of congressional power to state courts in order to address national problems. Provided the constitutional obstacle to jurisdiction could be overcome, some commissioners felt such a system would be simpler to administer, would promote involvement of the custodial parent, and would serve the needs of the child. Other commissioners felt that the integrity of the court order is promoted by litigating in the obligor's state where current information about the obligor is readily obtainable, and where enforcement must usually take place. There was also a concern that under a child-state system many obligors could not or would not return for the hearing, leading to an increase of default orders, which would be difficult to modify or enforce. The result of this dispute was a close compromise, whereby the Commission supported expansion of state long arm statutes up to the limit of *Kulko* in order to reduce the number of two state cases; endorsed UIFSA as a substantial reform of the two state system; and supported child-state jurisdiction in the event *Kulko* was overruled. As a part of the compromise, a majority endorsed a recommendation that Congress make findings supporting child-state jurisdiction and provide for an expedited appeal to the Supreme Court to test of validity of *Kulko.*

There was repeated discussion of criminal non-support. Although most states have criminal non support laws, in recent years support has been established and enforced primarily through civil process. Nevertheless, advocacy groups have been agitating for criminal prosecutions and for making non-support in interstate cases a federal offense. Following testimony before the Commission in Chicago, Congressman Henry Hyde (R-IL) introduced H.R. 1241, making it a crime to leave a state to avoid paying child support. The Commission debated at length whether to support this specific bill and, indeed, whether to recommend criminal enforcement of support at all. Lawyer members expressed concern over the difficulty of establishing a willful failure to pay and the wisdom of using federal courts for prosecuting infractions. Others urged that criminal remedies be used for only the most egregious cases. Eventually the Commission, noting that

criminal prosecution "sends an important message", endorsed a general recommendation that there be both state and federal criminal non-support statutes and that states provide for "use-immunity" so that testimony in civil support cases would not be thwarted. Even as the Commission debated the issue, Congress moved ahead and approved "The Child Support Recovery Act of 1992" (P.L. 102-521, Oct. 25, 1992) which imposes a federal criminal penalty for the willful failure to pay a past due support to a child in another state, defined as an obligation which has either remained unpaid for longer than a year *or* is greater than $5,000.

**The Minority Reports**

The Commission endorsed the report as whole by a 13-1 vote. Judge Rothschild and I did not support 34 of the 120 recommendations, which we viewed as departures from the mandate of the Commission and as unduly intrusive on the states. I also disagreed with the endorsement of child support assurance demonstration projects and expressed reservations about the principle of "child-state jurisdiction." Commissioner Baab concurred in the judges' position, but he was troubled by the absence of any examination of the financial or administrative impact of the Commission's recommendations. He also called for further demonstration projects in direct withholding, reporting new hirings, and expanding locator systems before considering a federal mandate.

By far the most interesting minority views were those expressed by the members affiliated with custodial and non-custodial parents' groups, Geraldine Jensen and Don Chavez.

Ms. Jensen was the sole dissenter from the report as a whole. In her statement she strikes out against the Commission's emphasis on a "judiciary-based, lawyer-dominated, state run system" and calls instead for a wholly new federal child support system based on child support assurance; a national agency "like the Internal Revenue Service" for collecting and distributing child support monies; national guidelines; and a national system for periodic review of support orders. Disassociating herself from the report, she announced her involvement with an *ad hoc* group of advocacy groups and "several IV-D directors" whose members are pursuing these goals.

Don Chavez voted in favor of the report but filed a lengthy minority report, which, he acknowledges, reflects the "substantial contributions" of so called "fathers' rights" groups. He summarizes the report as follows: "recommendations to force the non custodial parent to defend a financial child support proceeding in a forum most convenient to the custodial parent or the child support agency ... additional (draconian) laws to increase sanctions for failure to comply with child support orders, and an increased bureaucracy to administer the recommended programs". In short, he criticizes the Commission for failing to give equal emphasis to enforcement of custody and visitation, for not considering the reasons for non-payment of child support, and for emphasizing ease of enforcement over due process. His statement urges Congress to re-evaluate the Commission's work and to modify the recommendations.

Finally, it is interesting to note that of the Commissioners who supported the report *in toto* five saw fit to attach statements that supported continuation of the existing state based system.

**Acceptance of the Report**

Despite these reservations by various Commissioners, all but one member supported most of the key recommendations. And it appears that, in general, the work of the Commission has been well accepted. The American Bar Association, the National Child Support Enforcement Association, and the Eastern Regional Child Support Association have endorsed aspects of the Commission's report. The National Conference of State Human Service Administrators called for adoption of a number of the Commission's recommendations, although it went beyond the Commission to call for a national registry of support orders, a national registry of new hirings and integration of the tax collection and child support enforcement systems. The action of these groups suggest wide support for the Commission's approach and a number of its proposals.

One of the few critiques of the Commission's work has come from the Child Support Council, which, in its congressional and federal update of January 1, 1993, points to "the broad sweep of the Commission's investigations into virtually every aspect of child support enforcement, both interstate and intrastate." The Council comments:

> Many of the provisions, if enacted, would strengthen the national child support program; others are problematical and will not be universally welcome by child support enforcement professionals. Indeed, overall the Commission's recommendations...will impose greater work burdens on the already overworked state IV-D programs. Moreover, they make heavy demands with little indication of how — and to what extent — the needed additional funding will be provided for this currently underfunded, but critically important national program.

Many of the Commission's proposals have appeared in legislative form. Senator Bradley delivered on his promise to introduce the Commission's report in Congress by sponsoring S.3291 in the 102nd Congress. This was accompanied by companion legislation sponsored by Commission members Roukema and Kennelly in the House of Representatives. Essentially, these bills encompass every aspect of the Commission's report that calls for federal legislation.

In addition to the Bradley-Roukema legislation, a number of other related proposals were before the last Congress. In August 1992, former Congressman Ton Downey held hearings on a proposal — not then in legislative form — which called for an increased federal role in child support. H.R. 5123, introduced by Congresswoman Patricia Schroeder (D-CO), contained a number of provisions that would enact Commission recommendations and a new funding structure for the IV-D program whereby federal incentive payments would be eliminated and federal financial participation increased to 90 percent. It also calls upon the states to adopt UIFSA and provides for a commission on child support guidelines. Two bills sponsored by Congresswoman Olympia Snow dealt with medical insurance coverage pursuant to some of the Commission's recommendations. The jurisdictional principles endorsed by the Commission and contained in UIFSA were included in the "Full Faith and Credit for Child Support Orders Act", H.R. 5304, introduced by Congressman Barney Frank (D-MA), and substantially amended by Congressman A. Mazolli (D-KY).

In addition to these federal legislative initiatives, UIFSA has been introduced in a number of states and has been targeted for enactment by the National Conference of Commissioners on Uniform State Laws. Child support has been a topic in a number of the major speeches of both candidate Clinton and President Clinton. During the campaign

President Bush proposed a Comprehensive Childrens Initiative, which specifically referred to a number of Commission recommendations.

These various proposals evidence the increasing national attention toward children's issues, including support. At this time, many of the proposals — including Senator Bradley's bill — are on hold, awaiting the views of the Clinton administration and the results of deliberations by a Democratic Task Force in the Senate. The issue poses the basic difficulty facing the President and his party: having to choose between an increased federal role in the support of children, capped by a national child support assurance benefit, and fiscal restraint to reduce the deficit. This may mean that the Commission's recommendations, which emphasize improving the administration of the existing state-based system, will eventually be accepted in lieu of a major federal "take over." At the very least its proposals should receive widespread attention and discussion in the coming months, even though the Commission is now disbanded.

Whatever may be the Commission's ultimate legacy , its very existence and the dedicated efforts of its members evidence one of the greatest strengths of contemporary society: thoughtful and competent citizens with genuine concern about a widespread social problem can be brought together to work productively to forge innovative and practical solutions. And that they will be listened to.

*Judge Robinson, a graduate of Duke University and Yale Law School has served as an Associate Judge of the Family Court of the State of Delaware since 1985. She is a member of the National Conference of Commissioners on Uniform State Laws. In that capacity she assisted in drafting Children of Assisted Conception Act, Adoption Act, Enforcement of Support Act, and Personal Property Leasing Act.* ◆

BARBARA A. PAULIN

# New Initiatives in Enforcing Support

The Division of Child Support Enforcement of the Delaware Department of Health and Social Services ("the Division") is the agency responsible for providing child support services in Delaware under title IV-D of the Social Security Act. State child support agencies were established in 1975 to collect support on behalf of families receiving Aid to Families with Dependent Children ("AFDC") in order to reimburse state and federal governments for AFDC expenditures made by them.


The Division, The Attorney General, The Court — ENFORCEMENT

The Child Support Amendments of 1984 expanded state child support programs to include families *not* receiving public assistance. Since then, child support services have been available to *anyone* who applies. Those services include paternity establishment, location of absent parents, support order establishment, order enforcement, adjustment of support orders, state and federal tax refund intercept, and the collection and distribution of child support payments. The Family Court of the State of Delaware and the Delaware Department of Justice work with the Division to provide child support services in Delaware.

The Division's load of 36,106 cases represents approximately 76% of eligible children in Delaware. Of the total case load, 14,627 or 41% are families receiving AFDC. These families are required to cooperate with the state child support agency. 21,479 or 59% are not on public assistance but have chosen to pursue child support through the agency. The remaining 24% are pursuing child support *pro se*, or with representation from the private bar. Some choose not to pursue child support at all.

The State of Delaware has a strong child support program, which has become known nationally for its performance in ensuring that non-custodial parents meet their support obligations. The Delaware record for establishing support orders places it second in the nation with an 83% order establishment rate compared to the national average of 58%.

Since 1985 child support collections have increased significantly each year, recently at an annual rate of about 13%. The record high of $30.1 million reached in fiscal year 1992 represents a 145% increase over fiscal year 1985. Of the 1992 total, nearly $25 million was distributed directly to custodial parents. The remainder was collected on behalf of clients receiving AFDC. The amount collected for AFDC clients reflects Delaware's ranking as first in the nation in the percent of AFDC orders for current year support due and received (88% compared with the 48% national average).

Consistent increases in collections have resulted from the effective use of enforcement remedies. In fiscal year 1992 approximately $3.7 million in back support was collected on behalf of AFDC and non-public assistance clients through the interception of state and federal tax refunds owing to non-custodial parents. Before fiscal 1991, the tax

Illustration by Dan Yaccarino

interception programs were mandatory for AFDC cases, but non-public assistance cases were submitted only if the client requested the service. Beginning in 1991 the program was expanded to include all non-custodial parents. A case is submitted to the IRS and State Division of Revenue when past due support reaches the minimum threshold of $500 for federal tax and $150 for state tax.

In 1989 the Division established consumer credit reporting of support arrears as a means of encouraging regular child support payments. The Division's relationship with credit bureaus also gives the Division access to their files for the purpose of locating absent parents.

Wage withholding is by far the most effective tool for collecting support. State legislation passed in 1990 mandates that wage attachments be issued on all new or modified child support orders for cases handled by the Division of Child Support Enforcement. Wage attachments issued in fiscal year 1992 totaled 7,157 and accounted for $13.8 million or 46.4% of the child support collected that year.

The Delaware Automated Child Support Enforcement System ("DACSES"), a computerized system, has been central to the Division's success. Without it Delaware could not achieve the level of collections or the quality of service that have come to be expected of the Division. DACSES was developed in 1986 and put into operation in 1987. It was the first child support system in the nation to be established statewide under enhanced federal funding, and the second to be certified as meeting comprehensive federal requirements. DACSES increased productivity by 25% TO 30% and helped the Division increase collections and manage a growing case load with minimal staff. DACSES has enabled Delaware to provide 24- hour turnaround on approximately 96% of child support payments, avoiding the lengthy delays clients experience in many other states. The system performs functions critical to the effective operation of the Division, e.g., case tracking, document generation, complex distribution, accounting, and reporting.

The Delaware child support program has been innovative in developing programs as well as in the use of automated systems. One major example is the Delaware Child Support Order Review and Modification Project. In 1989 Delaware was selected through a competitive process to be one of four states to conduct demonstration projects based on the tenets of the Family Support Act of 1988.

The primary goals of the Delaware Project were to develop streamlined methods for processing modifications and to obtain systematic evidence on the costs and cost effectiveness of modifications. It was also hoped that the Delaware initiative could process all cases eligible for review and adjustment during the one and a half year term of the project. Processing of cases for review and adjustment proved complex and required a significant amount of time per case. By the time the project ended, the modification unit had selected approximately 5,700 or 55% of all cases statewide then eligible for review.

The project primarily employed the mediation process for reviewing and modifying child support orders, although a considerable amount of time and effort was put into developing and testing a mail-based administrative process. Cases were selected at random from the pool of those cases in which the guideline had not been recalculated for at least two and a half years. In order to get as many non-custodial parents' cases on the same adjustment cycle as possible, the Delaware Project also pulled in cases involving the same non-custodial parent, which were at least one and a half years old. These were then scheduled for mediation on the same day.

During mediation parties met with Family Court Mediators, who solicited income information, ran Melson calculations (an automated version of the Delaware child support guideline was developed under the auspices of the project) and attempted to get parties to agree to the levels of support determined by the calculations. The theory behind mediation is that the parties are more likely to adhere to whatever they agree to than abide by a decision imposed on them. (In Delaware the mediation process has been used successfully for about ten years as the primary mechanism for establishing child support orders.) If parties did not reach agreement at mediation, the matters were

Figure 1

| | For Cases Selected During the Project (03/01/90-07/16/91) | For Cases Selected Since the Project (11/1/91 - 12/20/92) | Totals for All Cases Selected |
|---|---|---|---|
| Cases Selected | 5,709 | 3,321 | 9,030 |
| Cases Pending | 90 | 869 | 959 |
| Cases Disposed | 5,619 | 2,452 | 8,071 |
| | | | |
| Cases Disposed via Family Court | | | |
| Upward Modification | 769 | 234 | 1,003 |
| Downward Modification | 140 | 77 | 217 |
| Modification - Medical Support Only | 29 | 9 | 38 |
| No Modification | 248 | 74 | 322 |
| Other[1] | 515 | 226 | 741 |
| Total | 1,701 | 620 | 2,321 |
| | | | |
| Pre-Court Dispositions | | | |
| Review not Authorized | 1,063 | 53 | 1,116 |
| Not a Delaware Order | 288 | 25 | 313 |
| Child Emancipated | 544 | 52 | 596 |
| Absent Parent Incarcerated or Capias Issued | 451 | 385 | 836 |
| Modification in Progress | 220 | 99 | 319 |
| Not Appropriate - Age of Order | 515 | 667 | 1,182 |
| Other[2] | 837 | 551 | 1,388 |
| Total | 3,918 | 1,832 | 5,570 |

REVIEW AND MODIFICATION RESULTS

REPORT3\CSART93.119

[1] Contains cases disposed due to dismissal, withdraw, issuance of a capias, or deemed inappropriate for review by Family Court.

[2] Contains cases disposed if DCSE was unable to locate one of the two parties, if good cause was requested, if services were terminated, or if for some other reason the review was not deemed appropriate.

referred to Family Court Masters for hearing, at which the Masters could impose decisions on the parties. Those decisions, however, were subject to appeal to a Family Court Judge.

The Family Support Act of 1988 requires states to review and adjust child support orders "not later than 36 months after the establishment of the order or the most recent review". The key factor then is the passage of time, not a documented change in financial circumstances. It should be noted therefore that petitions filed in Family Court were based on the *age of the order alone.* A petition filed by the project alleged that at least 2.5 years had elapsed since the most recent review of the order, and the prayer for relief was that the order needed to be reviewed and modified.

As previously mentioned, the child support case load in Delaware is divided between AFDC cases (in which custodial parents receive Aid to Families with Dependent Children) and Non-AFDC cases. Custodial parents who receive AFDC are required as a condition of eligibility to assign their rights to child support collections to the State in return for a public assistance check. This permits the State to negotiate with the payor (absent parent) on behalf of the children in mediation. In a non-AFDC case the state functions in an advisory capacity, while the custodial parent negotiates with the other party. In recognition of this difference the Modification Unit requests permission from the non-AFDC custodial parents before proceeding with the review and adjustment effort.

The Delaware Project provided for extensive evaluation. The evaluation contractor, Caliber Associates, gathered a great many data in order to conduct an analysis of our processes and to determine the cost effectiveness of project methods. In addition Caliber Associates surveyed those parties whose orders were modified to obtain their views on the process. Finally, Caliber surveyed those clients who declined to participate in the project to find out their reasons for refusal.

Additional positions were acquired to staff the project. Thirteen were assigned to the Division, eleven to Family Court, and one and a half positions to the Department of Justice.

Within the Division, staff were organized into a separate unit so that the project would not be inundated with the ongoing regular work load. The availability of this separate unit facilitated the tracking of cases and costs. The long term goal, however, is to merge the adjustment process into the mainstream of the Division's activities.

The project functioned under the general supervision of a Project Steering Committee, which included members from the Family Court, the Division, the Department of Justice, and Health and Social Services' Division of Planning, Research, and Evaluation. The Chairperson of the Steering Committee was also a member of the Governor's Social Services Advisory Council and was the link to that body. An *ad hoc* subcommittee, the Technical Advisory Committee, formed to analyze specific issues, was made up of members appointed according to the topic under discussion.

Though the demonstration project concluded on September 30, 1991, the requirements of the Family Support Act are still very much in effect. Since that date the Division has continued to select cases for review and adjustment. In keeping with directives from the federal Office of Child Support Enforcement ("OCSE"), Delaware has concentrated on reviewing AFDC cases so that the first round of reviews for these cases will be substantially completed by October 1993.

The Delaware Project produced a number of significant findings:

A significant number of cases dropped out of the process before an actual application of the guidelines. **Nearly 70% of cases selected during the project were disposed of before being referred to Family Court.**

**Approximately two-thirds of non-AFDC custodial parents who were asked to participate chose not to.** This was the largest single factor contributing to the high rate of dispositions before filing a petition. Many custodial parents did not want to "rock the boat" if they were receiving child support, while those not receiving support were inclined to feel that the effort would be useless. As a result, nearly 53% of the cases modified were AFDC cases even though 59% of the Division's case load were Non-AFDC.

Before the project less than 10% of the children subject of the orders reviewed were covered by non-medicaid medical insurance. **As a result of project efforts for cases reviewed, the number of children covered by orders for medical support increased to nearly 40%.**

From data gathered during the project it was determined that the average adjustment yielded an increase of approximately 60%. **Since compliance after adjustment increased slightly, collections on these cases increased at a rate just over 60%.**

**The project demonstrated that compliance was affected by the process used to modify the court order.** If the order was modified in mediation (a consent oriented process) compliance increased. If the order was modified through a court hearing compliance decreased slightly, and if the order was modified by a default judgment compliance decreased significantly.

The review and adjustment process is a lengthy one. Cases needed to be researched, petitions filed, and calendars prepared. If cases were resolved at mediation the process stopped, but in many instances (at least 40%) cases needed to be rescheduled for mediation or scheduled for Master's Hearings. **From the time a case was selected and referred to the project until the adjustment was achieved averaged 176 days.** While lengthy, this compares favorably with the average amount of time required across all four demonstration projects (196 days).

The Review and Modification project enabled Delaware to get a head start on a major new federal requirement. The experiences gained through the project and the results achieved have convinced us that review and adjustment are essential elements in the child support process (see Figure 1).

There is a national movement to share information and effective child support enforcement remedies. The development of CSENet, a nationwide computer network for the exchange of information among child support programs, will help in locating absent parents and in processing interstate cases. Delaware was one of the states chosen by the U.S. Office of Child Support Enforcement for early use of CSENet. It has recently been installed in Delaware.

The passage of the Uniform Interstate Family Support Act ("UIFSA") will simplify interstate case processing. Interstate cases account for 34% of the Division's case load. They are among the

most difficult to process successfully because of the difficulty in locating absent parents, differences in state laws, and inefficient processes for exchanging information among states. Both CSENet and UIFSA should enable states to process cases more effectively and to increase collections.

The Division, the Family Court, and the Department of Justice have developed the Child Support Administrative Process and Enforcement Task Force. It will explore more efficient ways to establish and enforce child support orders, including the use of administrative process.

The Division is committed to the goal of ensuring that all children are supported by both parents. It will continue to pursue new approaches to that goal. Although the Division has made great strides and enjoys national recognition for leadership, much more needs to be done. As we move toward the turn of the century, more automation, innovative projects, and more uniform state laws should enable Delaware and other states to establish more paternity and support orders and to increase collections for the better support of more children by both parents.

*Barbara Paulin has been Director of the Division of Child Support Enforcement since 1985. She is responsible for the management, administration, and operation of the Delaware child support enforcement program. The Division currently provides a range of services to over 36,000 custodial parents. Ms. Paulin, a recognized expert in child support, has served on faculties dealing with these issues both for the American Bar Association and the University of Wisconsin. It is projected that the innovative programs established under her leadership will eventually return to the State of Delaware $4.60 in benefits for every state dollar spent. Taxpayers, rejoice!* ◆

THE HONORABLE MAURICE A. HARTNETT, III

# The Uniform Interstate Family Support Act

Senator Herman Holloway, co-sponsor in Delaware of the subject legislation, receiving the Delaware Bar's Liberty Bell Award.

In August of 1992 the National Conference of Commissioners on Uniform State Laws recommended to the states for enactment The Uniform Interstate Family Support Act. It is intended to replace The Uniform Reciprocal Enforcement of Support Act, which was drafted by the Uniform Law Commissioners in 1950. The 1950 Act has been enacted by all the states including Delaware.

The 1950 Act was drafted in response to the then- existing legal procedural problems that arose if a person who was legally obligated to furnish support to a child or spouse (or ex- spouse) left the state where the claimant resided either before or after a support order had been entered.

The procedural problems existed because under our federal constitutional system a state court is limited in its ability to hear a case if the defendant is outside its borders. For many years federal constitutional law made it almost impossible for a state court to enter a support order against a non-resident because the state court would not have legal jurisdiction over him (or her). Prior to 1950, for example, the mother of a minor child whose father had left Delaware and moved to California was sometimes required to go to California to commence a proceeding for support from the father and often had to return to California one or more times for hearings.

The then existing procedural burdens to obtaining a support order in a faraway state often made it economically unfeasible to pursue the absent party, thus causing a spouse or child to seek aid from the state — aid that was usually inadequate and which, in any case, imposed a burden on the taxpayers that the absent party should have borne.

In those cases where jurisdiction over the non-resident obligor could be obtained, an economic burden was imposed on the non-resident if he had to return to the state where the hearing was to be held and it was recognized that a way should be found to permit the non-resident's testimony to be taken in the state in which he resided and then be forwarded to the state where the hearing on the petition for support was to be held.

After World War II, in recognition of the increasing mobility of the population, the federal courts began to relax the barriers to a state court's obtaining jurisdiction over a non-resident in certain instances. In the landmark case of *International Shoe Co. v. State of Washington,* 326 U.S. 310 (1945) the United

States Supreme Court permitted a state court to hear a case involving a non-resident party if there was sufficient minimum contact between the state and the non-resident, if the non-resident received adequate notice of the proceeding, and if traditional notions of fair play and justice permitted it.

In response to this ruling, and other opinions based on it, efforts were undertaken to draft legislation to permit a court in the state where a child or spouse resided to hear a petition for support against a non-resident. It was recognized that to meet the constitutional mandates imposed by the United States Supreme Court, the legislation would have to provide that the non-resident would receive fair notice and be given a reasonable opportunity to be heard and would have to meet the tests for sufficient minimum contacts.

As a result of these concerns, the National Conference of Commissioners on Uniform State Laws in 1947 undertook a study of the problem of obtaining support against a non-resident. This lead to the drafting and, in 1950, the promulgation of the Uniform Reciprocal Enforcement of Support Act. The underlying philosophy of that act was that the state of residence of the person who was obligated to furnish support should recognize and give reciprocity to proceedings commenced in the state where those entitled to support resided.

The 1950 Uniform Enforcement of Reciprocal Support Act was adopted in Delaware in 1955 (50 *Del. Laws,* c. 219). It is now Chapter 6, title 13 of the *Delaware Code.* It has resulted in millions of dollars being collected from out-of-state persons for the benefit of children and spouses residing in Delaware. It has, therefore, resulted in significant economic benefits to children and savings to the state by providing support payments that would otherwise have to be supplied by the Aid to Families With Dependent Children and other welfare benefit programs.

Because the 1950 Uniform Reciprocal Enforcement of Support Act provided such an effective remedy, it was eventually adopted by all the states. In 1958 and 1968 it was amended to correct various problems that arose from its use.

When the 1950 Uniform Reciprocal Support Act was drafted, the problem of the absent party was significantly less than today because an absent parent or spouse was the exception rather than the rule and the amount of child support was typically only $10 per week. Today's highly mobile society and the millions of children from broken homes have now placed a tremendous burden on the process that seeks to obtain support from a non-resident parent or spouse.

Many of those who are obligated to pay support apparently still believe that the best way for them to avoid paying child or spouse support is to move to another state. Statistics from the United States General Accounting Office show that children whose parents live in different states receive, on average, significantly less support than children whose parents live in the same state. There are many reasons for this. Some obligors move to try to avoid their legal obligations to a child or spouse. Sometimes the whereabouts of one parent is simply unknown, or if the parent lives in a distant state, he or she may have little or no contact with the child, thus reducing a voluntary incentive to pay support. And the limitations of state judicial systems still sometimes prevent or delay the effective enforcement of child support orders in the residence of the obligor.

**Children whose parents live in different states receive, on average, significantly less support than those whose parents live in the same state.**

The conflict between competing jurisdictions often leaves a custodial parent feeling trapped. While the child may have an immediate need for school clothing, dental braces, or even more basic items such as food and medicine, that need must often wait while the jurisdictional and procedural arguments as to which state should be handling the matter are resolved. All of these factors result in delays in getting support funds to children. This also burdens taxpayers who must provide welfare and other benefits to needy children in the interim.

In response to complaints about the present system, Congress in 1990 created the United States Commission on Interstate Child Support. The Honorable Battle R. Robinson, a Delaware Family Court Judge, was appointed to the Commission by Senate Minority Leader Robert Dole (R-Kansas)*. Judge Robinson has served as a member from Delaware on the National Conference of Commissioners on Uniform State Laws since 1980. She was the only Uniform Law Commissioner on the Federal Commission and was instrumental in convincing that body to embrace the Uniform Act instead of attempting to address the problem with a new federal law. Many believe that efforts of the federal government to draft laws to be administered by state courts without the participation of the states in the drafting process often result in unworkable legislation. The federal legislative process also often delays corrections if a federal law proves to be ineffective or unworkable. The incomprehensibility of the Federal Internal Revenue Code is often cited as an example of poor federal statutory draftsmanship.

The Federal Commission on Interstate Child Support has now presented its final report to the United States Congress. The report embraces the new Uniform Interstate Family Support Act as promulgated by the Uniform Law Commissioners and recommends that Congress require its adoption by each state, without change or modification, as a prerequisite to a state's continuing to receive part of the billions of dollars of aid that Congress annually furnishes the states in support of the Aid To Families With Dependent Children program. The American Bar Association has also recommended prompt enactment of the new Uniform Act by all states.

The new Uniform Interstate Family Support Act is a general revision of the 1950 Uniform Act and retains the basic concept and many of the provisions of the original act.

Some of the problems arising under the 1950 Uniform Act remedied by the new Act have to some extent already been addressed in Delaware. The new Act, for example, contains a broad provision for obtaining personal jurisdiction over an absent parent or spouse by the

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* *Judge Robinson discusses the work of the Commission elsewhere in this issue*

use of a so-called "long arm" provision. A "long-arm" provision somewhat similar to that contained in the new Uniform Act was adopted some time ago in Delaware. It enables the Delaware Family Court to obtain jurisdiction over an absent party if the absent party had certain minimum contacts with Delaware, such as having resided in Delaware. The new Uniform Act does, however, broaden the scope of this power and also provides rules for a quick determination of whether the court in the state where the children or spouse are present or the court in the state where the obligated parent is present will have jurisdiction, thereby reducing litigation over this issue. If there is a valid dispute as to which state shall be the controlling state, the home state of the child has precedence.

Perhaps the most significant provision in the new Uniform Act is the requirement that the state that first imposes a support order retain jurisdiction over the matter until the support obligation terminates, or all the parties move out of state, or all the parties agree that another state will be the controlling state. This is often referred to as a "one-order-one-time" rule.

This provision addresses the difficult legal problem that now often arises when more than one order for support for the same child is entered by courts in different states, thus resulting in one or more inconsistent orders. Under the new Uniform Act the modification of a support order must ordinarily first be sought in the state in which the original order was entered.

The new Uniform Act still permits the litigation of paternity in conjunction with an initial support proceeding, but prohibits such litigation after the entry of the initial support order.

Like the old Uniform Act the new Act provides that a party does not have to be physically present in the state that is considering the entry or modification of a support order. Thus petitions relating to support executed out of state may be introduced into evidence without the need for live or corroborative testimony. The new Uniform Act also includes some special evidentiary rules designed to make the introduction of evidence in support cases easier.

The Federal Commission, during its deliberations, recommended certain provisions in any new Uniform Act, and many of these (but not all) were included. The new Uniform Act therefore provides: (1) for the quick exchange of child support information through an interstate computer network; (2) for simpler court procedures through the use of standard federal forms in every state; (3) for the taking of testimony by telephone; and (4) for the electronic transmission of documents that are acceptable as evidence.

The new Uniform Act prohibits the raising of child visitation issues in a support proceeding, leaving this for a separate hearing. This is in recognition that complaints about visitation are often used as a defensive tactic merely to delay the entry or enforcement of support orders. The Uniform Law Commissioners are now drafting a Uniform Interstate Child Visitation Act to deal with the issues of visitation across state lines.

**Complaints about visitation are often used as a defensive tactic merely to delay the entry or enforcement of support orders. These issues are left for separate hearings.**

The new Act uses the term "tribunal" instead of "court" in recognition that some states, although not Delaware, use administrative agencies in support matters. The Act contains a number of provisions that will streamline interstate proceedings, such as requiring tribunals in different states to cooperate in the prehearing discovery process that permits the parties to learn prior to trial such essential information as the income and expenses of the persons involved.

The new Act also increases the ability of the courts to enforce support orders. It authorizes the court that enters a support order to direct the withholding of the support from the pay of the obligor even if the obligor resides in another state. The new Act also provides for the administrative enforcement of an order entered by an initiating state in a responding state by the registration of the order in the responding state. There is also a mechanism whereby a support order can be enforced without formal court proceedings. Thus a court support order may be mailed directly to an obligor's employer even if the employer is located in another state. This triggers an immediate wage withholding unless the employee promptly objects. The new Uniform Act also provides for administrative enforcement of an out-of-state order by the support enforcement agency of the obligor's state.

The new Uniform Act continues criminal penalties, in addition to civil penalties, for the failure to abide by court orders. The substantive laws of an initiating state and the procedural laws of a registering state apply but the longer of the two states' statute of limitations will prevail.

Significantly, the new Uniform Act will not mandate a particular support formula. If the new Act is adopted in Delaware, the courts of Delaware will still be able to use the "Melson Formula" or any other legally acceptable guideline in arriving at a fair amount of support. Nor does the new Uniform Act require, as do some state acts, that driver's licenses or business and professional licenses be suspended for non-payment of support orders.

Delaware has an outstanding national reputation for collecting support for children who are recipients of Aid to Families With Dependent Children and it ranks first in the nation in the percentage of enforcement of current support orders. The most difficult problem with enforcement of support in Delaware, as elsewhere, is in collecting support from a parent (or spouse or ex-spouse) who has left Delaware and left the family behind. If Delaware and the other states enact the new Uniform Interstate Family Support Act most of these impediments will vanish.

The new Uniform Interstate Family Support Act, as drafted and without any non-uniform amendment, has been introduced in the Delaware General Assembly as House Bill No.11. Its sponsors are Representative Jane Maroney and Senator Herman Holloway.

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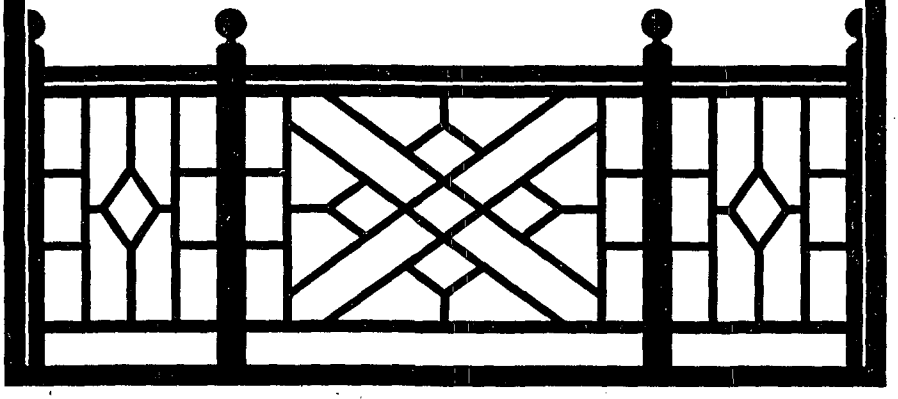
The drafter of the new Uniform Interstate Family Support Act, the National Conference of Commissioners on Uniform State Laws, recently celebrated its 100th Anniversary. It is an organization of the states and consists of Commissioners from each state, the District of Columbia, and the insular possessions of the United States. The





Commissioners, who are lawyers, law professors, or judges, meet annually, but drafting committees of the Conference meet throughout the year.

The Conference will draft a Uniform Act if, after investigation, it is believed that the suggested subject matter is appropriate for state legislation and it promotes "uniformity in the law among the several states on subjects where uniformity is desirable and practicable".

A Uniform Act that is promulgated by the Uniform Law Commissioners is

**Delaware ranks first in the nation in the percentage of enforcement of current support orders.**

the product of a long drafting and careful review process that is seldom equaled. Uniform Acts, such as the well known Uniform Commercial Code, are considered to be models of good draftsmanship and have had a great impact on the development of the law in the United States.

A Uniform Act is initially drafted by a drafting committee — usually consisting of 5 to 11 Commissioners. The drafting committee also has the help of Advisors who are experts in the particular area of the law. Generally a law professor serves as the reporter for the committee. Typically, a proposed Act takes anywhere from 2 to 5 years to be prepared by a drafting committee. It is then presented to all of the Commissioners at the Annual Conference of the Uniform Law Commissioners and read line by line. The Commissioners then debate the proposal and suggest changes. The proposed act then goes back to the drafting committee for another year of redrafting. It is again presented to the entire Conference and again read line by line, debated, amended, and then either adopt-

ed or sent back to the drafting committee for further revision.

In order for a Uniform Act to be promulgated and recommended for adoption in every state it must receive the affirmative vote of the Commissioners from a majority of the states, each state having one vote. Thus Delaware, despite its small size, has an equal vote with all the other states. The expenses of the National Conference are offset by state assessments (based on population), grants, and donations. All the Commissioners donate their time without compensation.

The Delaware Commissioners and their date of appointment are: Maurice A. Hartnett, III (1962); Thomas A. Shiels (1978); Battle R. Robinson (1980); Ann E. Conaway Anker (1989); and W. Laird Stabler, III (1989). All of the Delaware Commissioners have served on various drafting committees. Commissioners Hartnett and Robinson have served as officers and as members of the Executive Committee of the Conference.

*Vice Chancellor Hartnett has been a member of the Court of Chancery since November 1976. Through his career he has rendered extensive services to law reform, evidenced most conspicuously by his membership on the National Conference of Commissioners on Uniform State Laws, on which he has served since 1962. He has chaired review committees of that Conference and has participated on drafting committees, working on such diverse topics as eminent domain, drug dependence treatment and rehabilitation, securities, and non probate transfer. From 1964 to 1966 he served as the Secretary of the Delaware Uniform Commercial Code Committee.* ◆

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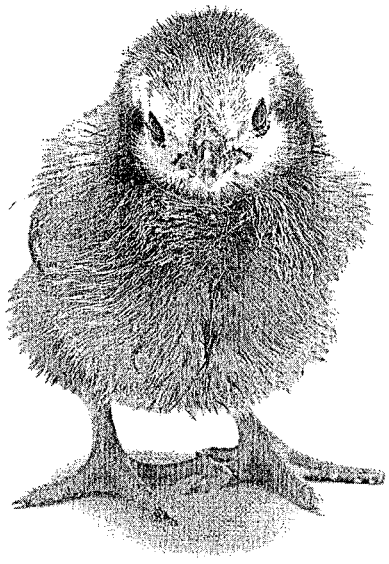

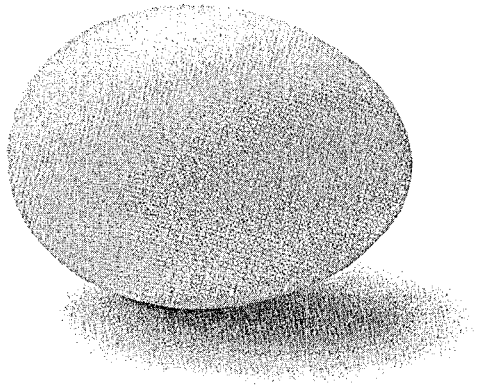

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JO ANNE B. BARNHART

# The Federal Office of Child Support Enforcement:

## Strengthening and Supporting State Programs

For the past 17 years we have committed significant federal, state, and local funding and substantially strengthened efforts to address the ever-increasing problem of nonsupport. Child support continues to be an urgent issue.

During the last decade, federal social policy has placed increasing emphasis on family self sufficiency. The passage of the Family Support Act ("FSA") in 1988 brought new mandates and opportunities for reinforcing the importance of helping families become self sufficient. Among the many provisions included in the FSA were major enhancements of the Child Support Enforcement Program. The new requirements built on the Child Support Enforcement legislation passed in 1984 and 1988, which mandated that all states adopt proven techniques to improve, simplify, and otherwise strengthen methods of securing child support and establishing paternity.

An ever increasing legislative resolve at both federal and state levels to improve the collection of child support payments has led the Federal Office of Child Support Enforcement ("OCSE") to innovative guidelines for setting the amount of support awards, simplified administrative methods of acknowledging paternity, the swifter securing and enforcement of orders, and the use of effective enforcement techniques such as wage withholding and reporting support debts to credit bureaus.

To draft, pass, and enforce better child support statutes and to apply more effective practices takes time, but after eight years of collegial cooperation the national government and the states are beginning to reap the benefits of these stronger laws.

In aiding the states, OCSE delivers a variety of services to strengthen and support state programs. OCSE provides locator services, coordinates tax offset services with the IRS, conducts and contracts out research and demonstration projects, and provides training and technical assistance.

During my tenure at OCSE I served as Assistant Secretary for Children and Families on a number of new and continuing initiatives. The new administration may decide to continue these or it may change the policy and operational direction of the program. Given President Clinton's endorsement of a strong enforcement policy begun by President Reagan and continued in the Bush administration, it is likely that changes, if any, will continue to strengthen and increase the collection of child support. What follows here describes the "state of the art" as of January 1993.

During the Bush administration approaches to improving the system included assistance to states in developing automated systems and linking them nationwide, the development of an extensive outreach program, the improvement of data reporting, and the improvement of relations with the judiciary through our Judicial Advisory Committee, chaired by The Honorable Randy J. Holland of the Supreme Court of Delaware.

There are many other federal services to help states improve their child support programs, including the Federal Parent Locator Service, a computerized national location network operated by OCSE. The locator service has access to addresses and Social Security numbers from the Internal Revenue Service and such other federal agencies as Social Security Administration, National Personnel Records Center, the Department of Defense, the Department of Veterans Affairs, the Selective Service System, and state employment security agencies.

These agencies make the most cur-

rent information available to the locator service, which then furnishes addresses and information to state and local agencies to locate absent parents and to establish or enforce child support orders.

The locator service has recently developed cross-matches on interstate cases with individual state employment security agency databases. Because accurate Social Security numbers are essential in locating absent parents, OCSE is also instituting a new Social Security Number verification system.

The Federal Office also acts as an intermediary between the Internal Revenue Office and the states in offsetting Federal income tax refunds of absent parents who have accumulated arrearages. States submit cases for offset to the Federal Office, which certifies and formats them and sends them on to the IRS. The money successfully intercepted by the IRS is then distributed to the states. As of July 1992 933,818 cases had been offset for over $619 million, up from $503 million, or a 23 percent increase for the same period for 1991. The average amounts offset are $645 for AFDC cases and $718 for Non-AFDC cases.

The Federal Office also assists the states in developing statewide automated systems. Currently nine states have fully certified operational systems; twelve are in the final stages preliminary to full operation; eleven are in the transfer/development phase, and the remaining eighteen are in the planning phase.

The Federal Office is developing a national Child Support Enforcement Network ("CSENet") that will improve communications and expedite interstate case processing. CSENet will enable all types of interstate case information, including location data, to flow between the states' automated child support systems.

The Federal Office is conducting a pilot project in the use of Electronic Funds Transfer/Electronic Data Interchange for immediate wage withholding. The four participating states are Delaware, Iowa, Nebraska, and New York. The interchange should make wage withholding convenient and quick for employers. The money would follow an electronic transfer from the bank of the employer to the bank of the state or local child support agency, and from there to the custodial parent's bank.

The Federal Office and the Health Care Financing Administration have reviewed the medical support program in 31 states. The reviews emphasized the discrete functional responsibilities of agencies engaged in the medical support process (Medicaid, Child Support Enforcement, AFDC, and Foster Case), such as cooperation and timely information exchange. Generally, the reviews found gaps and inconsistencies, and showed that a need for improved cooperation and swifter exchange of information.

As a result of these reviews, federal regional offices are providing state child support programs with technical assistance designed to improve program performance. In addition, the Federal Office is in the initial stages of developing written products, which will address such issues as line worker training, best practices, and demonstrating to state executives and legislators the benefits of medical support.

**Through the audit process the Federal Office has been able to identify problems and deficiencies in state programs. Identification of state failures to achieve substantial compliance with program requirements has been the impetus for them to improve their program performance.**

The Federal Office is also helping states improve the application process for non-AFDC parents by questioning whether applications forms as now structured in many states create unnecessary barriers to seeking child support. The Office has developed a best practice guide to help states redesign these forms.

The Federal Office has assisted states in improving allocation of personnel by providing technical assistance derived from an Office manual and videotape entitled "Designing a Model Child Support Enforcement Program: A Resource Allocation Workbook." The Office also assists states in improving enforcement through the use of revised and automated standardized interstate forms.

The Federal Office, recognizing the importance of training, has recently reorganized to place greater emphasis on instruction by creating the National Training Center. The Center develops and conducts workshops for state trainers and serves as a resource for states in obtaining state developed materials and courses.

In September 1991, the Federal Office held the first National Child Support Enforcement Training Workshop for state trainers. Representatives from 29 states attended the three- day session, which was devoted to training trainers, locating non-custodial parents, applying effective enforcement techniques, and engaging medical support. A second workshop for state agency training personnel held in September 1992 concentrated on the collaboration among the Child Support Enforcement, AFDC, and JOBS programs and improving interstate enforcement. State agencies evidenced their commitment by their overwhelming participation and their willingness to attend at their own expense. In April and May of 1992, the Federal Office conducted two sessions of a course entitled "Training of Trainers in Child Support Enforcement."

The Federal Office is now working to identify and promote best practices found in state programs. For example, it is publicizing the efforts of several states to establish paternity in the hospital at the time of birth.

The *Child Support Report* is a monthly newsletter sent to 15,000 members of the child support enforcement community, promoting efficient operations and management.

The Federal Office has been, above all, committed to changing society's perceptions of child support. The Office has worked to elevate the issues of child support and parental responsibility in the public eye so that non-support of children will be deemed a serious offense — as well as a burden on taxpayers. To foster this public attitude, the Office recently invited a representative from Mothers Against Drunk Driving ("MADD") to attend a national child support conference. The MADD representative shared strategies that had proven effective in making drinking and driving socially

unacceptable.

Recognizing the importance of accurate data in measuring program success, the Federal Office has developed an initiative, Measuring Excellency Through Statistics, which is designed to improve the accuracy of state-submitted data about IV-D programs. This is a continuing initiative, which covers both interstate and intrastate data collection. It includes:

- developing a new design for the annual report to Congress and developing a new periodic report stressing achievements that will help states to promote their programs.
- simplifying and clarifying reporting form instructions to ensure consistency among state reports and dropping unnecessary reporting requirements.
- establishing new reporting requirements to coincide with state systems development.

Another tool for measuring progress and an individual state's compliance with federal law is the Child Support Audit. Through the audit process the Federal Office has been able to identify problems and deficiencies in state programs. Identification of state failures to achieve substantial compliance with program requirements has been the impetus for them to improve their program performance. Many states have come into compliance with Federal requirements during a corrective action period following an audit. In addition audits help state and local child support agencies focus attention and obtain additional needed resources from state executive and legislative decision-makers.

OCSE audit findings have been upheld at Departmental Appeals Board and Federal District Court levels in all but one challenge, in which the determination was based on a statistical sampling technicality.

While much has been accomplished in child support enforcement and while many families are better off today as a result of these accomplishments, an important question is: What is on the horizon for child support enforcement?

One indication of where the country is headed can be found in the Commission on Interstate Child Support's, "Blueprint for Reform," which was released on August 4, 1992. The Commission's recommendations call for far-reaching improvements affecting both interstate and intrastate child support issues. The Commission recommendations include:

- keeping the state-based programs, but strengthening them by mandating proven techniques for establishing paternity, for enforcement, and for providing adequate resources and training.
- improving state ability to locate noncustodial parents and their assets, to establish paternity through simple acknowledgement procedures at hospitals or in administrative hearings, and to minimize interstate cases by reaching across state lines to establish paternity and secure support.
- a national system for the reporting of new hirings, using a revised W-4 form. New employees would report support obligations on W-4's, which would be matched against a state-based central registry of orders. I believe that targeting employer reporting in some manner (for example by selected industries), rather than requiring all employers to report, would allow for a more efficient use of time and money. This process would eliminate delays in finding those who owe support and would hasten wage withholding. States would also be allowed to initiate withholding with employers in other states directly, thus avoiding delays associated with communications between state agencies.
- enhancing and linking state and federal location sources to allow easy, expeditious access to information across state lines. Such a link would be easily accomplished by expanding (CSENet), described above. CSENet is expected to improve communication and expedite interstate case processing.
- paternity establishment, using state experience in hospital-based paternity acknowledgement and expedited and administrative procedures. At least half the states have these advancements in place or have them under consideration.
- requiring all states to adopt the Uniform Interstate Family Support Act ("UIFSA"). UIFSA is a model act developed by the National Conference of Commissioners of Uniform State Laws that outlines how states should handle child support cases when the parties live in different states. Adoption of UIFSA by all states would standardize interstate case processing and limit the need for interstate activity whenever possible. UIFSA's predecessor, the Uniform Reciprocal Enforcement of Support Act or URESA, was revised numerous times, and different states have adopted different versions, which significantly complicate interstate cases today. UIFSA would be a straightforward and effective remedy for solving interstate problems.

Other interesting approaches to child support enforcement are emerging in a number of states. Since its inception child support has operated through cooperative agreements. The states have agreements with district attorneys, collection agencies, sheriffs' offices, courts, lawyers, etc. to run different parts of the program. Recently, however, faced with budget cuts in many states, more and more legislatures are searching for ways to cut state costs. Many of them are looking to private companies to provide child support services. For example, Tennessee has now privatized two of its judicial districts. In March 1992 they were faced with a District Attorney who refused to renew a contract to continue providing child support services because he did not think he could meet new federal program standards. As a result, the state

**Faced with budget cuts, more and more legislatures are searching for ways to cut costs. Many are looking to private companies to provide child support services. Tennessee has now privatized two of its judicial districts.**

contracted with a private contractor. Progress to date has been beyond expectations. In the first seven months total collections were up 37 percent (AFDC 41 percent and non-AFDC 36 percent) over the same period in the previous year.

Privatization is clearly on the forefront of emerging enforcement techniques. At the two largest child support conferences in 1992 programs about privatization drew capacity audiences. Increasingly state legislatures allocate funding without staff, thus promoting the move toward privatization of collections.

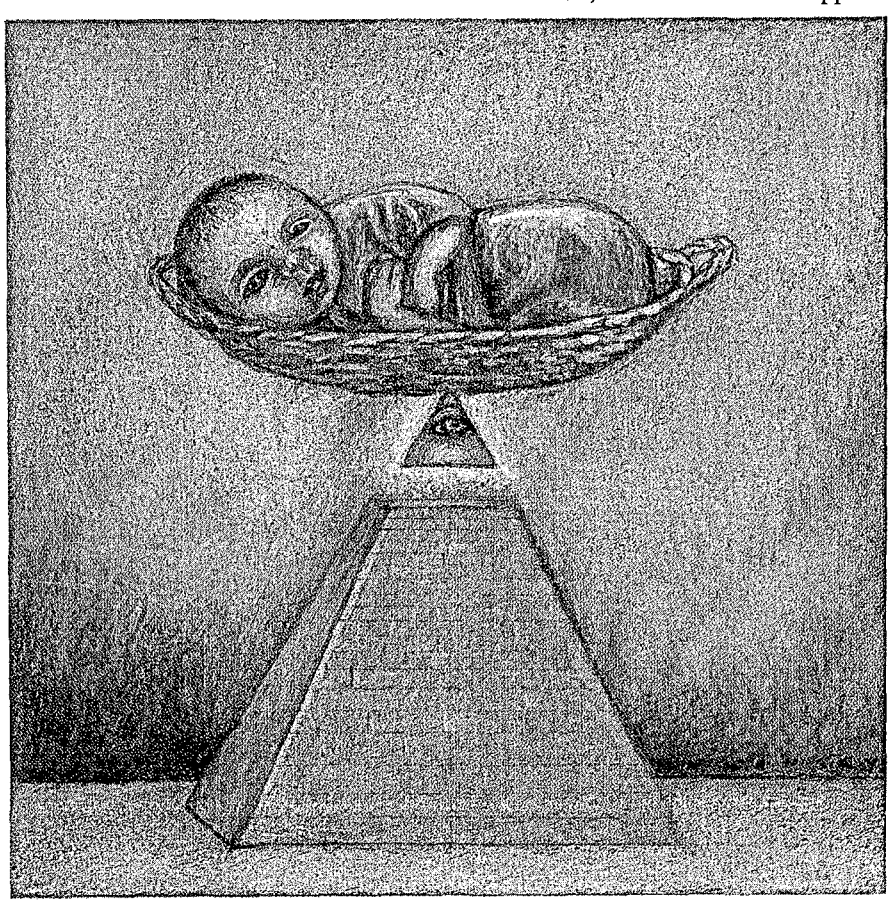
For the past 17 years we have committed significant federal, state, and local funding and substantially strengthened efforts to address the ever-increasing problem of nonsupport. Fortunately child support continues to be an urgent issue. Creative child support professionals at state and local levels persist in seeking new ways to increase paternity establishment and support collections. The Federal Office of Child Support Enforcement complements state efforts by developing more accurate methods for measuring and documenting program accomplishments, by new techniques for providing technical assistance, and by insuring a strong national commitment to making family self sufficiency a reality.

*Jo Anne Barnhart, a member of the professional staff of Senator William V. Roth, Jr. of Delaware, also serves as Director of Children Justice Center Development for the Dr. Karl Jurak Foundation. Until January of this year she was the Assistant Secretary for Children and Families, U.S. Department of Health and Human Services.* ◆

THE HONORABLE JOSEPH R. BIDEN, JR.

# Improving The System: The Child Support Necessity

Because of a lack of resources and a large case load, Delaware child support officials must sometimes ignore a non-custodial parent who owes as much as $7,000 in back child support.



A call for a *national* approach to a growing interstate social problem.

Total arrearages in Delaware have reached almost $40 million and Delaware is one of the *better* states in collecting child support. (Collections have more than doubled in the last six years.) Nationwide, however, the picture is more bleak. Of the approximately 10 million single mothers in the United States, only 58% have legally-obtained child support orders. Only 30 percent of poor mothers do. Among those 58 percent with orders, only 51 percent receive the full amount of the child support; 24 percent receive partial payment; and 25 percent receive no payment whatsoever.

All of this adds up to 16 million children in the United States who are owed $18 billion in back child support payments. That's more than the federal government spends each year on Head Start, the Women, Infants and Children program, school nutrition, and the Chapter One education program, combined.

A large part of the problem is our failure to meet our responsibilities. First of all, there is a lack of governmental coordination and a lack of resources. But there is another reason why the problem has grown exponentially worse. When I last practiced law in New Castle County, I spent a good portion of my time in Family Court and saw the problem first hand. Since that time - between 1970 and 1990 - the ratio of divorced families to married families tripled. One-half of all marriages now end in divorce. Perhaps even more striking is the explosion in out-of-wedlock births. About 27 percent of all live births in the United States are now to single mothers.

The bottom line here is that more than 40 percent of all children will spend at least part of their childhood in a single-parent family, and as a consequence will suffer financially. Over 30 percent of female-headed households in this country have incomes below the poverty line. Most are not receiving child support. Is it any wonder then that more than one in every five children in America today is born into poverty?

Quite simply, the widespread non-payment of child support is tantamount to a

Illustration by Jane Marinsky

widespread abandonment of our children. Legally, we do not consider this child neglect, but that is exactly what it is. The lack of child support forces children — already the most vulnerable of America's citizens — into poverty. It forces children to go without proper clothing, medical care, and housing. All because one parent has failed to meet his or her obligations. The fundamental problem then is a breakdown in parental responsibility. And there is only so much that the government can do about that.

There are, however, a number of simple things the government *can* do. For example, it can provide more resources to the courts, the cops, and to child support bureaus — in Delaware and across the country. The government can make sure that Delaware's computers can talk to other states' computers. And the government can make child support a top priority - in an effort to ensure that parents who can pay child support do so. This, above all, is the most important commitment government can make.

Last July I was appointed to a Senate Democratic Task Force on Child Support Enforcement, established to come up with ways to make it harder for non-custodial parents to evade their obligations. Since then the Task Force has been sifting through a hundred-plus proposals to reform the system. That work is nearly complete, and while the details of the final package are not set, I do wish to address briefly some of the larger themes.

**Asset Forfeiture:** Some non-custodial parents deliberately evade their obligations to pay support. They are paid under the table, or are paid by friends or relatives in assets, or, if self-employed, do not have attachable wages. These are the most egregious "deadbeats" — not people who can't pay and not people who find it difficult to pay, but people who simply *refuse* to pay. In these cases, we ought to go after their assets — their boats, their houses, and their bank accounts. We ought to seize their property and forfeit the proceeds to their children who are owed support. This is not a novel approach: federal asset forfeiture laws are already on the books for money laundering, bank fraud, and the illegal drug trade. Asset forfeiture should also be on the books for the most flagrant "deadbeat" parents.

**The Use of Federal Monies:** The federal government pays 66 percent of a state's costs of operating its child support system, 90 percent of the costs of a state's computer system, and an incentive payment of up to 10 percent for each child support award collected. Because of these large federal payments and the reduction in welfare expenditures that accrue from child support collections, all but five states in America make a profit from the child support system — a profit that many states then use to build roads or maintain parks. States should be required to reinvest the money they make from federal child support payments in the support system. In Delaware this money could be used, for example, to hire constables to enforce capias petitions, thus relieving the overworked state police.

**A large part of the problem is our failure to meet our responsibilities.**

**Paternity Establishment:** Most child support efforts concern the non-custodial parent who is not paying what is legally owed. But non-payment is only part of the larger problem. Remember, less than 60 percent of all single mothers have even obtained support orders. Therefore, a well-functioning child support system must begin *before* the non-custodial parent fails to pay. It must also address the issue of establishing who the father is. Hospital-based paternity establishment programs appear to be the most promising program in this regard.

**Jobs:** Although we often talk about the "deadbeats" who refuse to pay — and we must make a concerted effort to go after them — there are a significant number of parents who are *unable* to pay. Therefore, no matter how tough we are — no matter how strict the enforcement — it will not be enough if the goal is to see that all children receive financial support. We ought to consider creating a job training program for unemployed non-custodial fathers, similar to the program that now exists for welfare mothers. And we should even consider applying the same principle that is now being discussed in reforming the welfare system — that beneficiaries should be required to work — to non-custodial parents who do not work and do not pay.

**Health Insurance:** Currently, the federal government gives states an incentive payment of up to 10 percent for each child support collection that is made. However, no such incentive payment is given for the collection of health insurance. Thus, it should be no surprise that studies by the Federal Office of Child Support Enforcement and the General Accounting Office have found that states do not spend much time pursuing health insurance from non- custodial parents. In this age of 36 million uninsured Americans — nearly 10 million of whom are children — health insurance coverage is vital. When non-custodial parents are ordered to provide health insurance for their children and fail to do so, that failure should be treated as seriously as non-payment of cash support. To help in that effort, states should receive an incentive payment for the collection of medical support.

**ERISA Reform:** Even providing an incentive payment, however, will not resolve the health insurance issue. Under the Employee Retirement Income Security Act (ERISA), states are prohibited from regulating the health benefit plans of self-insured businesses — those companies that pay health costs directly rather than providing their employees with health insurance policies. As a result, if a self-insured company does not want to provide insurance for the children of a non-custodial parent, it cannot be compelled — even by a state court order — to do so. Some self-insured companies even differentiate between children who live with the worker and children who do not, and states are essentially powerless to do anything about it. Congress needs to amend ERISA to eliminate these barriers to the collection of medical support.

These components of child support reform do not even begin to represent the entire issue. There are numerous other subjects in the child support debate. For example, President Clinton has spoken of a nationwide data bank to help track down non-custodial parents and of

**In this age of 36 million uninsured Americans - nearly 10 million of whom are children - health insurance coverage is vital.**

mandatory reporting of child support obligations on W-4 tax forms. With the President's interest and with the creation of the Senate Democratic Task Force, it should be clear that a major overhaul of the child support system is forthcoming. I am encouraged that there is broad bipartisan agreement that major changes are needed in the support system — changes to help the states better enforce support obligations and ensure that every child has both parents' financial support.

*Senator Biden's experience as a lawyer familiar with domestic litigation and support issues and his presence on the Senate Democratic Task Force on child support enforcement give his message an especial authority and pertinence.* ◆

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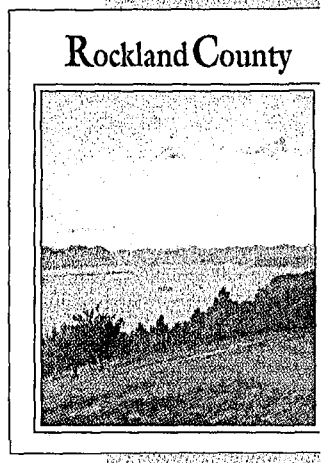


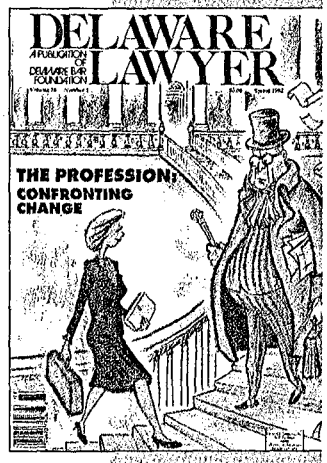


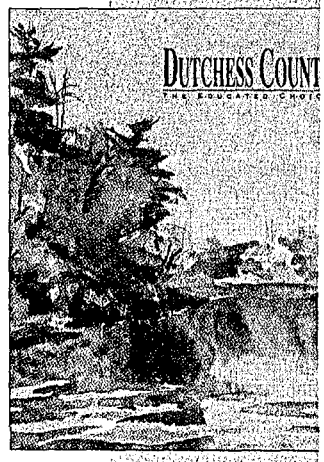

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