NFLR NEVADA FAMILY LAW REPORT

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The Availability of Equitable Defenses to Actions to Enforce Child Support

by Sylvia G. Gross

Introduction

The nonpayment of court ordered child support is now a national epidemic. And, the burgeoning divorce rate only adds to the problem by producing more children for whom support will not be paid. In the face of this dilemma, legislatures across the country are enacting tougher child support laws and courts are implementing harsher enforcement procedures. However, strict adherence to a policy of enforcing legally correct claims for accrued support may create injustice where mitigating circumstances exist which justify nonpayment. Then, the paramount policy of providing for the children of divorce clashes with fundamental principles of fairness and equity. Many courts, in attempting to balance these competing interests, have begun to recognize the application of equitable principles to prevent injustice in actions to enforce payment of child support arrearages.

Until recently, the only "defense" to an action for enforcement of child support was to establish the dollar amount of the arrearages.[1] Now, a party may avail himself of various defenses such as waiver, laches, release, and estoppel. This article will discuss the extent to which such equitable defenses are applicable to actions for the enforcement of child support. As this is a recently developing area of the law, the scope of this discussion will encompass decisions from other jurisdictions, as well as the trends in Nevada.

In child support enforcement actions, as in other areas of the law, courts have resorted to equitable doctrines to prevent injustice which would otherwise result from the application of legal principles in child support enforcement actions. The application of equitable defenses to child support actions developed from cases where express or implied agreements were asserted to preclude enforcement of child support. Necessarily then, this discussion will commence with a review of the law as it relates to agreements to modify child support. As will be shown, when the legally correct claim results in injustice, the courts have gone beyond the agreements to seek refuge in equitable doctrines to render a just and fair decision.

Agreements to Modify Child Support

The obligation of parents to support their minor children is firmly established in the law.[2] Further, this obligation to support and the children's right to such support cannot be abrogated or limited by their parents.[3] So inviolate is the duty to pay child support that Nevada has recognized the right of the child, as third-party beneficiary, to enforce child support.[4] Yet, courts have acknowledged the ratified agreements by the parties to modify child support. The extent to which such agreements are approved depends initially on whether they relate to past or prospective support.

Prospective Support. Parents may enter into agreements for the support and custody of their minor children.[5] But, "such agreements are not the last word on the subject, for the law views the welfare of the children as a paramount concern."[6] Thus, agreements between parents to modify prospective child support are invalid as against public policy.[7] The custodian parent is viewed as receiving support as trustee for the child and not in his own right.[8] The child's present and future welfare takes precedence over the rights of the payor and payee of child support.[9]

Past Support. The general rule is that child support, once accrued, becomes a

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Margaret G. Green, Continuing Legal Education Director of the State Bar of Nevada, said that the attendees' comments rated the seminar "Excellent" and indicated that it was one of the best seminars to date.

The FLS mock trial presented the case of *Ligament v. Ligament* (an orthopedic surgeon). The issues included evaluation of a professional practice; evaluation of the professional license; apportionment; reimbursement and pro-tanto interests; transmutation; alimony, equitable distribution of assets and liabilities, and custody.

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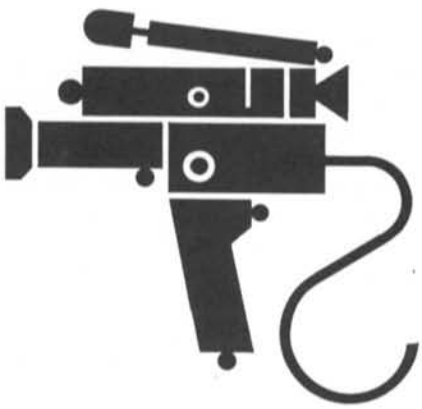

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Such defenses reflect a growing awareness by the courts that strict adherence to legal principles governing enforcement of child support may yield harsh and unfair results.

vested right which cannot thereafter be modified or avoided.[10] But, as with most general rules, there are exceptions. While agreements to modify accrued support usually arise in the context of waiver, there is authority in Nevada that accrued child support may be modified by agreement.

In the case of *Hildahl v. Hildahl,*[11] the court discussed modifications of divorce decrees absent judicial approval. The court declined to modify a decree of divorce where the Defendant unilaterally decreased child support pursuant to an alleged oral agreement modifying custody. The court stated, "The instant case is not one, however, in which there is credible evidence of consent to a change by the parent granted custody. Glenda Hildahl did not impliedly acquiesce in the reduction in support by waiting several years to file a claim for arrears [citation omitted], nor was there an express agreement, written or oral, see *In re Swall,* 36 Nev. 171, 175-176; 134 P.96 (1913), that custody could be changed and the payments reduced [citations omitted]."[12] The court went on to hold the following:

> We therefore hold that, absent credible evidence of an agreement between the parties to modify the terms of a support agreement, or compelling circumstances which require a change in custody, before judicial approval is sought, in the interest of the child, a parent making expenditures for a child of whom he does not have custody is not entitled to a setoff of those amounts against his support obligations.[13]

Thus, where there is credible evidence of a support agreement, Nevada may retrospectively modify support.

In other states, the courts have avoided the evidentiary approach, and instead, have focused on the child's needs. Those courts hold that in order for out-of-court support agreements to be enforceable, they must be judicially recognized or incorporated into an order.[14]

In a recent California case, a very clever attempt was made to obviate child support.[15] In that case, the parties executed a hold harmless agreement whereby the custodial parent agreed to hold the non-custodial parent harmless from any claims regarding the child. Then, when the custodial parent sought child support, the father maintained that she had to indemnify him for the child support as it was paid based on the hold harmless agreement. The court found that the agreement was an attempt to completely obviate the clear and strong policy that a parent must support his children. In holding the agreement void, the court noted that such an agreement contemplates that the parent who assumes the entire support obligation will remain solvent throughout the child's minority. Because of overriding public policy reasons, the court held such agreements to be void.

Courts, however, have not confined their rulings to legal arguments, but instead have resorted to equitable principles to ameliorate harsh legal results. Most courts have recognized that equitable principles should be applied to mitigate the injustice caused by the enforcement of certain claims for accrued child support.[16] The exceptions have created a new general rule. As stated by one court, "The general rule in the majority of jurisdictions is that in child support enforcement proceedings various defenses are available to the obligor such as laches, estoppel, waiver, acquiescence, release or agreement."[17] The availability of equitable defenses to preclude enforcement of child support will be reviewed. This review reveals an expansive application of equity by courts to remedy unfair legal results.

Equitable Defenses

When legal defenses such as agreement and the statute of limitations prove unsatisfactory, courts have resorted to equitable principles to alleviate the unjust results caused by strict adherence to legally valid claims for past child support.[18]

Waiver. Where an agreement fails to achieve legal status, such agreement may form the basis for waiver.[19] A waiver is the intentional relinquishment of a known right. It may be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive the right.[20] Further, "If intention is to be implied from conduct, the conduct should speak the intention clearly."[21]

Waiver has been applied to retrospectively modify child support in many cases and usually arises where there is an agreement or statement regarding past due support.[22] Thus, where a custodial parent stated to the other, "I don't want anything from you at all," she was estopped under the doctrine of waiver from seeking collection of child support.[23] A waiver will not be found by a mere failure to seek enforcement of past child support. The waiver must result from affirmative conduct.[24] A delay in seeking enforcement of child support where there have been repeated demands does not result in waiver.[25] A change of physical custody made with the custodial parent's knowledge and consent, at least impliedly, will result in a waiver of claim to support the children when they were not in her custody.[26]

Waiver may also be found by acquiescence.[27] The concept of waiver by acquiescence has been applied to avoid a harsh and unjust result where a party knowingly participates in an agreed upon course of conduct.[28] The acceptance of an amount less than owed or a delay in demanding child support payments does not, in and of itself, rise to the level of waiver by acquiescence.[29] Further, waiver by acquiescence is an equitable doctrine which will not be employed to discharge a valid debt for child support where the child support obligor never changed his position in reliance on a set of facts given by custodial parent.[30] "While acquiescence can be invoked as a shield to protect

continued on page 4

injustice, it is not available as a sword to retain an undeserved windfall."[31]

Thus, the equitable doctrine of waiver may be employed to modify past support where the parties have changed their position in reliance on a representation, where agreements have been made, and where custody has been changed absent court approval. Whenever any of these factors exist, the doctrine of waiver should certainly be advanced. Waiver may not be used, however, to waive not yet due payments because of the overriding public policy of promoting the child's welfare.[32]

Equitable Estoppel. The doctrine of equitable estoppel operates to prevent the assertion of legal rights that in equity and good conscience should be unavailable because of a party's conduct. Equitable estoppel, once known as estoppel in pais, is defensive in nature only and operates to prevent one party from taking unfair advantage of another.[33] Further, the doctrine of equitable estoppel will not permit a party to repudiate acts done or positions taken or assumed by him where there has been reliance thereon and prejudice would result to the other party.[34]

Given the above statements, the doctrine of equitable estoppel may have broad application to actions to enforce child support. The elements of equitable estoppel are (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true stated facts; and (4) he must have relied to his detriment on the conduct of the party to be estopped.[35]

Equitable estoppel has been extensively applied to enforcement of child support cases. The decisions which have allowed equitable estoppel to reduce payments have found the essential element of detrimental reliance to be present.[36] Thus, the supporting parent must have relied on the custodial parent's assent or conduct to his financial detriment in order to support a finding of equitable estoppel.[37] Estoppel has also been invoked to preclude enforcement of child support where immediately after the divorce the parties agreed that the wife would not enforce child support provisions so long as the husband never attempted to enforce visitation rights, and this agreement was carried out fourteen years.[38] The court noted that the legal principles were "rendered impotent" when the parties mutually agreed that they could be ignored and they fulfilled the agreement.[39] Estoppel will also arise where a party has expressly or impliedly consented to an arrangement other than one for the payment of a child support judgment, and the parties have acted in reliance on that arrangement.[40]

Estoppel also has been invoked traditionally to preclude enforcement of child support arrearages from the non-custodial parent if the custodial parent has interfered with visitation rights.[41] However, it is now generally held that interference with visitation rights will not warrant estoppel.[42] Further, even actual concealment of a child does not constitute a defense to child support.[43]

Oregon has stated flatly that equitable estoppel is not applicable to cases involving child support.[44] Having made this statement, the Oregon court in a subsequent case created an exception where the parent who is obligated to pay child support had actual custody with the knowledge and consent of the custodial parent.[45]

The doctrine of equitable estoppel has been adopted in Nevada, and its principles have wide application to child enforcement actions. So long as the elements of estoppel are met, then such a defense is viable in this context.

Laches. Even where a party technically complies with the applicable statute of limitations in filing an action to collect child support, the equitable doctrine of laches may be available.

Laches is an equitable defense based on estoppel which operates where a party has unreasonably delayed in seeking enforcement of his claim.[46] The elements of laches are (1) knowledge of the facts constituting a cause of action; (2) unreasonable delay in commencing the action; and (3) damage resulting from the delay.[47] Thus, although a court may decline to retrospectively modify child support because it has become a vested judgment, it will apply laches.[48] In such cases, the courts have found that the delay resulted in injury to the party obligated to pay support. Thus, where a former wife agreed that the husband's visitation rights and support obligation would be terminated, and the husband complied with this agreement making no support payments for five and one-half years with the wife's knowledge, and incurred financial obligations he otherwise would have forsaken had he anticipated paying support during those years, the court applied laches.[49] In another case, where there was a fifteen year delay, the court did not apply laches where the husband produced no evidence to show that his present income was inadequate to make the required payments, thus finding that he was not injured.[50]

Practitioners should consider the doctrine of laches where the applicable statute of limitations has not run and enforcement of a legally valid claim for child support would produce an unjust result.

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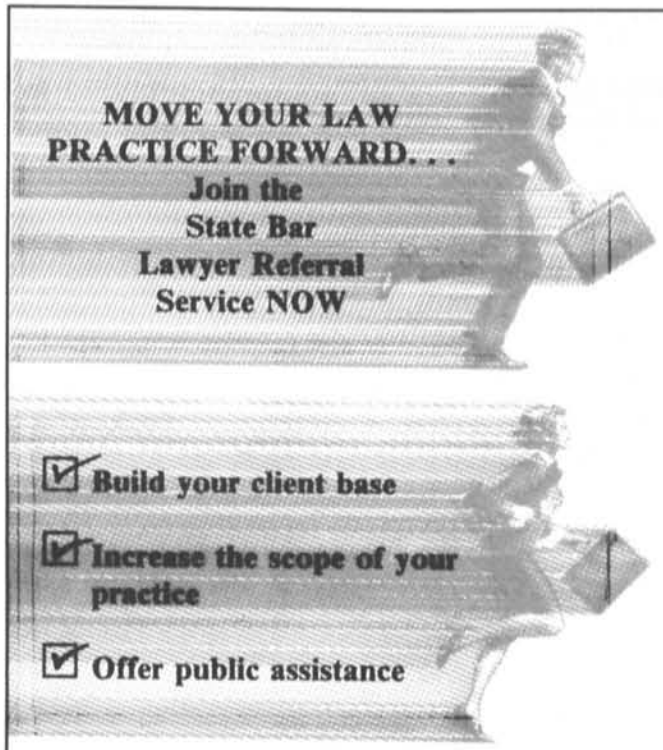

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Conclusion

When the imposition of the legal remedy would produce an unjust or harsh result, courts are invoking equitable doctrines. The domestic relations practitioner may use various equitable defenses in actions to enforce child support. Such defenses reflect a growing awareness by the courts that strict adherence to legal principles governing enforcement of child support may yield harsh and unfair results. Equitable defenses are viable arguments which should be asserted in enforcement of child support actions.

Sylvia G. Gross is a Las Vegas sole practitioner specializing in domestic relations, commercial litigation and construction law. She is a member of the State Bar of Nevada and the State Bar of California and serves on Clark County Bar's Continuing Legal Education Committee and Pro Bono Project.

NOTES

[1]The applicable statute of limitations is six years. NRS 11.190(1)(a). Discussions regarding the statute of limitations are not within the scope of this article.
[2]NRS 125.510; A.B. 424 (Eff. 7/1/87)
[3]*In re Marriage of Ayo*, Cal. App.____, 235 Cal. Rptr. 458, 461 (1987).
[4]*Gibbs v. Giles*, 96 Nev. 243, 607 P.2d 118 (1980).
[5]*In re Marriage of Ayo, supra* at 461.
[6]*Id.*
[7]*In re Marriage of Watkins*, 42 Wash. App. 371, 710 P.2d 819, 821 (1985).
[8]*Id.; Brewer v. Brewer*, 506 N.E.2d 830, 831 (Ind. App. 1987).
[9]*Lindsey v. Lindsey*, 716 P.2d 496, 500 (Haw. App. 1986).
[10]*Hildahl v. Hildahl.* 95 Nev. 657, 601 P.2d 58 (1979); *In re: Marriage of Watkins*, 42 Wash. App. 371, 710 P.2nd 819, 821 (1985).
[11]95 Nev. 657, 601 P.2d 58 (1979).
[12]*Id.*
[13]*Id.*
[14]*In re Marriage of Betts* 507 N.E.2d 912, 922 (Ill. App. 1987).
[15]*In re Marriage of Ayo*, Cal. App. ____, 235 Ca. Rptr. 458, 461 (1987).
[16]*In re Marriage of Watkins, supra*, at 821.
[17]*Kissinger v. Kissinger*, 692 P.2d 71, 74 (Okl. App. 1984).
[18]*Brewer v. Brewer*, 506 N.E.2d 830, 831 (Ind. App. 1987); *Stevens v. Stevens*, 729 S.W.2d 461, 462 (Ky. App. 1987); *In re Marriage of Betts*, 507 N.E.2d 912, 922 (Ill. App, 1987); *Starzinger v. Starzinger*, 82 Or. App. 96, 727 P.2d 168, 169 (1986).
[19]See *Kaminski v. Kaminskt*, 8 Cal. App.3d 563, 565, 87 Cal. Rptr. 453 (1970).
[20]*Mill-Spex, Inc. v. Pyramid Precast Corp.*, 101 Nev. 820, 710 P.2d 1387, 1388 (1985).
[21]*Post International, Inc. vs. Summa Corporation*,94 Nev. 572, 583 P.2d 1080 (1978).
[22]*Kaminski, supra.*
[23]*Id.*
[24]*Thompson v. Lindblad*, 509 N.Y.S.2d 389 (N.Y. App. 1986).
[25]*Lannon v. Lannon*, 508 N.Y.S.2d 743 (N.Y. App. 1986).
[26]*Steger v. Steger*, 728 S.W.2d 651, 652 (Mo. App. 1987).
[27]*Sagos v. Sagos*, 729 S.W.2d 76, 79 (Mo. App. 1987).
[28]*Gromment v. Gromment*, 714 S.W.2d 747 (Mo. App. 1986).
[29]*Sagos, supra* at 79.
[30]*Id.*
[31]*Id.* at 80.
[32]*United Brotherhood of Carpenters and Joiners of America, Local No. 1780 v. Dahnke*, 102 Nev. 8 Adv. Op. 714 P.2d 177 (1986).
[33]*San Diego Mun. Credit Union v. Smith*, 176 Cal. App.3d 919, 222 Cal. Rptr. 467, (1986).
[34]*Terrible v. Terrible*, 91 Nev. 279, 534 P.2d 919 (1975) (Doctrine found applicable to decree of divorce.)
[35]*Cheger v. Painters & Decorators Joint Comm., Inc.*, 98 Nev. 609, 655 P.2d 996, 998 (1982).
[36]*In re Marriage of Betts*, 507 N.E.2d 912, 923 (Ill. App. 18987).
[37]*In re Marriage of Sabo*, 730 P.2d 1112, 1113 (Mont. 1986).
[38]*State of Washington ex rel. Blakeslee v. Horton*, 722 P.2d 1148, 1150 (Mont. 1986).
[39]*Id.*
[40]*In re Marriage of Cook*, 725 P.2d 562 (Mont. 1986) (Oral agreement modifying support found binding).
[41]*In re Marriage of Leeper*, ____ Cal. App.3d 236 Cal. Rptr. 242, 243 (1982).
[42]*Id.* at 244.
[43]*Id.* at 245.
[44]*Starzinger v. Starzinger*, 82 Or. App. 96, 727 P.2d 168, 170 (1986).
[45]*Sheldon v. Sheldon*, 82 Or. App. 621, 728 P.2d 946, 947 (1986).
[46]*In re Marriage of Yakubec*, 507 N.E.2d 117, 120 (Ill. App. 1987).
[47]*In re Marriage of Watkins*, 42 Wash. App. 371, 710 P.2d 819, 821 (1985).
[48]*Id.*
[49]*Id.*
[50]*In re Marriage of Yakubec, supra.*

The Defense of Non-Paternity to a Motion for Arrearages

In *Libro v. Walls*, 103 Nev. Adv. Op. 114 (December 19, 1987), the court addressed the defense of non-paternity in an action for child support arrearages.

One Small Detail Withheld. When Eleanor commenced her action for divorce, she alleged that a child was born of the marriage and prayed for child support. Since Joseph had no reason to doubt the child's alleged status, he filed an appearance and waiver and agreed to child support. Joseph paid all support until he suspected that the child was not his. When blood tests excluded Joseph as the father, he terminated support.

Arrearages Claimed. Undaunted, Eleanor filed for arrearages, and the trial court entered judgment thereon, finding that non-paternity is not a defense to a motion seeking enforcement of a decree of divorce.

Extrinsic Fraud. The Supreme Court reversed, holding that Eleanor's failure to disclose the non-paternity was a defense to the motion for arrearages. As well, the Court continued, the wife's failure to disclose a material fact known only to her constituted extrinsic fraud, allowing equitable relief from the decree by independent action. Eleanor's deceit in not informing Joseph of the non-paternity prior to the entry of the decree prevented him from litigating paternity in the divorce proceeding.

Editor's Note: See the article by Sylvia G. Gross discussing various equitable defenses to actions enforcing child support. Ed.

The Uniform Premarital Agreement Act

In 1983 the National Conference of Commissioners on Uniform State Laws promulgated the *Uniform Premarital Agreement Act*.

The Uniform Act, which has been approved by the American Bar Association, has been enacted in 10 states and was introduced during 1987 in nine others and the District of Columbia *(see chart on page 9)*.

The core provision of the Act, which appears below in its entirety, is Section 6, which sets forth the conditions under which a premarital agreement is not enforceable. Those conditions prove a handy checklist of what to avoid.

Conditions

An agreement is *not enforceable* if a party against whom enforcement is sought proves that:

(a) he or she did not execute the agreement voluntarily; or that

(b) the agreement was unconscionable when it was executed.

An agreement also is not enforceable if, before execution of the agreement, that same party:

(1) was not provided a fair and reasonable disclosure of the property or financial obligation of the other party.

(2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(3) did not have, or reasonably could not have had, any adequate knowledge of the property and financial obligations of the other party.

Sec. 1. Definitions

As used in this Act:

(1) "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

(2) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

Sec. 2. Formalities

A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.

Sec. 3. Content

(a) Parties to a premarital agreement may contract with respect to:

(1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(4) the modification or elimination of spousal support;

(5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(6) the ownership rights in and disposition of the death benefit from a life insurance policy;

(7) the choice of law governing the construction of the agreement; and

(8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(b) The right of a child to support may not be adversely affected by a premarital agreement.

Sec. 4. Effect of Marriage

A premarital agreement becomes effective upon marriage.

Sec. 5. Amendment, Revocation

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration.

Sec. 6. Enforcement

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(1) that party did not execute the agreement voluntarily; or

(2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party;

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(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

(b) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

Sec. 7. Enforcement: Void Marriage

If a marriage is determined to be void an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

Sec. 8. Limitation of Actions

Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and stoppel, are available to either party.

Sec. 9. Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Sec. 10. Short Title

This [Act] may be cited as the Uniform Premarital Agreement Act.

Sec. 11. Severability

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Sec. 12. Time of Taking Effect

This [Act] takes effect _____ and applies to any premarital agreement executed on or after that date.

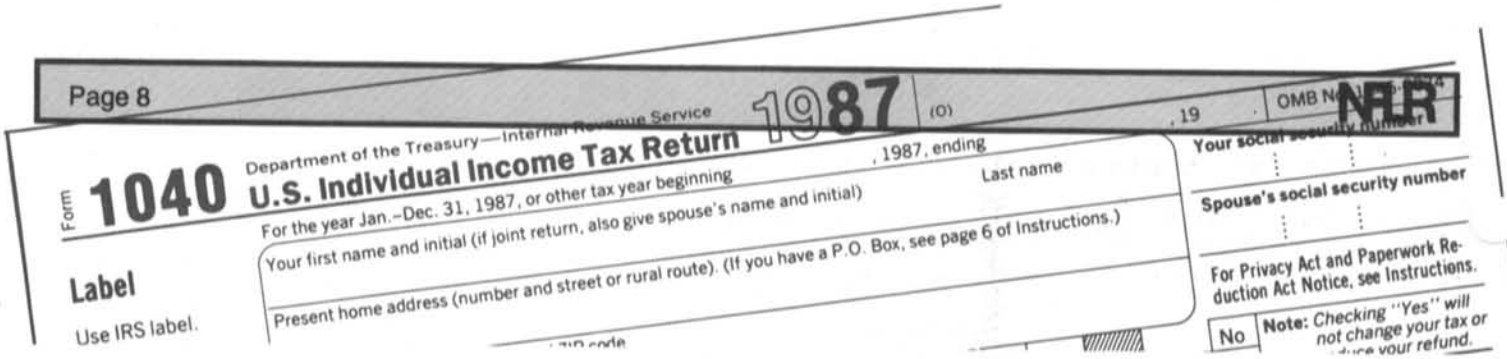
Sec. 13. Repeal

The following acts and parts of acts are repealed:

(a)

(b)

(c)


Form 1040 Department of the Treasury—Internal Revenue Service 1987 (0) , 19 OMB No.
U.S. Individual Income Tax Return
For the year Jan.–Dec. 31, 1987, or other tax year beginning , 1987, ending
Label
Use IRS label.
Your first name and initial (if joint return, also give spouse's name and initial) Last name
Present home address (number and street or rural route). (If you have a P.O. Box, see page 6 of Instructions.)
Your social security number
Spouse's social security number
For Privacy Act and Paperwork Reduction Act Notice, see Instructions.
No Note: Checking "Yes" will not change your tax or refund.

Allocation of the Child Dependency Exemption

Can the trial court allocate the child dependency exemption without regard to the custodial parent's wishes and contrary to the requirements of the Domestic Relations Tax Reform Act of 1984?

The Domestic Relations Tax Reform Act of 1984 (DRTRA) rewrote 26 U.S.C. Section 152(e), as amended, of the Internal Revenue Code to give the dependency exemption to the custodial parent in all cases unless the custodial parent releases the exemption by filing IRS Form 8332.

Without reviewing just how the dependency exemption applies under DRTRA, an issue does exist as to whether the court can allocate the dependency exemption to the non-custodial parent and require the other to execute the IRS Form 8332 waiver.

In *In re Marriage of Lincoln*, 746 P.2d 13 (Ariz.App. 1987), the Arizona Court of Appeals held that in Arizona a custodial parent may be ordered to execute the necessary waiver of exemption in favor of a non-custodial parent who is paying child support in appropriate cases. As well, it was held to be an abuse of discretion for the trial court to refuse to resolve the issue of allocation of the dependency exemption.

In *Lincoln*, the court relied upon other state court decisions rendered before DRTRA which authorized the trial court to determine the allocation of the dependency exemption. Those courts reasoned that the ability of a parent to claim the exemption for income tax purposes is a factor in the financial resources of the parent. Claiming the exemption not only defrays the expenses of supporting the child, but also allows the parent to receive the deduction for the child's medical expenses.

The legislative history of DRTRA indicates that Congress was attempting to avoid having the IRS act as mediator between divorced spouses. The Arizona court cited with approval *Fudenberg v. Molstad*, 390 N.W.2d 19, 21 (Minn.App. 1986), which held that "State court allocation of the exemption does not involve the IRS in fact-finding determinations. State court involvement has no impact on the IRS. Thus, allocation of the exemption is permissible."

In *Lincoln*, the non-custodial father was ordered to pay more than one-half of the child's support. He was ordered to maintain health insurance for the children and to pay all uninsured medical and dental expenses. He was also ordered to maintain life insurance on his life for the children's benefit of at least $500,000. The trial court declined to rule on the husband's request for the child dependency exemptions. The appellate court remanded the case to the trial court for consideration of the exemption.

In California, some members of the bar and bench suggest that the trial courts have no jurisdiction to order a custodial parent to execute IRS Form 8332 releasing the dependency exemption to the non-custodial parent. This confusion does not seem well founded. *In re Marriage of Neal*, 92 CA3 834, 155 CR 157 (1979), upheld the trial court's award to non-custodial father of the dependency exemption.

All in all, there appears to be ample authority for the trial court to award the child dependency exemption to the non-custodial parent in an appropriate case. Inasmuch as the right to claim the exemption may be material to the total child support scheme, its application must be considered in all cases. Ed.

NFLR
State Bar of Nevada
Family Law Section
243 South Sierra Street
Reno, NV 89501

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