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RECENT DEVELOPMENTS IN MISSOURI'S CHILD SUPPORT LAWS

INTRODUCTION

Nearly eighteen months had passed since Tina Dawson filed the petition necessary to end her marriage. Finally the ordeal was over—or so she thought. The court had granted a dissolution of marriage and, along with it, a child support order of \$600 per month. The court order had resolved all disagreements about custody, visitation, and child support. Six months later, however, Tina was back where she began. This mother of two small children had received only \$300 since initially bringing the dissolution of marriage action. She felt helpless and betrayed.

Yet, custodial parents are not the only ones who fall prey to “the system.” Noncustodial parents may also be victims. For example, Don Riley had made every monthly child support payment for the full amount. But, more times than not, when he arrived to pick up his young son, as part of the court-ordered visitation agreement, he found nothing but an empty house. Don, too, felt the system had let him down.

Situations like these,¹ coupled with alarming divorce statistics,² prompted

1. See T. ARENDELL, *MOTHERS AND DIVORCE: LEGAL, ECONOMICS AND SOCIAL DILEMMAS* (1986) (interviews with divorced mothers in anecdotal form).

2. With more than one million couples divorcing each year, some 500,000 children are dependent on support from a noncustodial parent. J. LIEBERMAN, *CHILD SUPPORT IN AMERICA* 8 (1986). “In the first year following divorce, . . . men’s standard of living rises an average 42% . . . [while] for women and their children it drops a sickening 73%.” *The Myth of Equality*, 73 *WOMEN LAW. J.* 14 (1987). Of the fifteen million children who live in households headed by mothers, only 35 percent of the custodial mothers receive child support with the result being that almost one-third of the families live in poverty. L. WEITZMAN, *THE DIVORCE REVOLUTION* 263 (1985). “There is a mountain of information on family disintegration, the divorce rate, separations and desertions. . . . What the statisticians don’t report is the number of unhappy and heartbroken men who are sitting alone in a furnished room somewhere with nothing from the past but their clothing.” G. SILVER AND M. SILVER, *WEEKEND FATHERS* 6 (1986). “The statistics don’t talk of the poverty level many men are subjected to after paying exorbitant alimony and child support so the kids ‘won’t have to have their lives disrupted’. . . . Statisticians are able to quantify how deprived and exploited women are, but they haven’t reduced the abuse inflicted on men to numbers yet.” *Id.* A survey of nearly 1500 children of divorced parents revealed that 52 percent of the children had not been contacted by their fathers during the previous year, and 35.5 percent had experienced no communication with their fathers in the past five years. T. ARENDELL, *supra* note 1, at 110.

both Congress³ and state legislatures⁴ to enact statutes providing for the

3. Traditionally, family law has been left to the discretion of the individual states. However, in 1935 the federal government became marginally involved when it created the Aid to Families with Dependent Children (AFDC) program as part of the Social Security Act. Although AFDC was originally intended primarily to assist relatives of dependent children whose parents had died, the needs were such that the program was actually used more often to assist children whose fathers had deserted them and refused to pay support. J. LIEBERMAN, *supra* note 2, at 5.

The next major federal intervention into what had formerly been the states' domain came in the early 1970's and was prompted in part by the fact that the cost of the AFDC program had escalated to \$7.6 billion a year and in part by a study which indicated that "state . . . agencies were casual at best in trying to collect child support from the fathers of [AFDC children]." *Id.* at 6. These factors, combined with growing public frustration with the welfare system, resulted in passage of the Child Support and Establishment of Paternity Act of 1974. *Id.* at 6-7. Aimed at cutting welfare costs by pressuring states to pursue delinquent fathers, the act also contained "an unusually farsighted provision" through which non-AFDC parents could make use of the collection services for a small fee. *Id.* at 7. The rationale behind the additional provision was that parents who did not receive support from absent parents would eventually join the ranks of AFDC parents, at a price much higher to taxpayers than that of access to collection services. *Id.*

In what has been termed "the most important change" in the area of child support law since the 1974 enactment, Congressional legislation passed in 1984 provided for automatic wage deductions for any parent who is 30 days delinquent in support payments, expedited processing of child support cases, and the establishment of state guidelines for those responsible for fixing support decrees. *Id.* at 9-10.

Recently enacted legislation expected to have great impact on domestic relations law is the Family Support Act of 1988, which requires that states make their child support guidelines rebuttable presumptions. *See* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343.

4. *See, e.g.,* ALASKA STAT. § 25.24.150(d) (1988) (court in making custody decision may consider only those factors directly affecting child's well-being); COLO. REV. STAT. § 14-10-124(1.5) (1987) (standard for custody award is what is "advantageous to the child and in his best interests"); COLO. REV. STAT. § 14-10-129.5 (1987) (parent violating visitation order or support order may be required to post bond to insure future compliance; party whose visitation rights are violated may seek tort remedy); KAN. STAT. ANN. § 60-1610(B)(vi) (1988) (in awarding custody, court shall consider "willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent"); KAN. STAT. ANN. § 60-1610(a)(1) (1988) (allows for the increasing of child support obligation to beyond age of eighteen provided child is completing high school—duty, in such cases, terminates on June 1 of school year in which child attains age eighteen); KAN. STAT. ANN. § 60-1616(e)-(f) (1988) (repeated unreasonable visitation interference or repeated child support misuse may be considered material change of circumstances justifying modification of custody); *see also* Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 417, 515 (1988) (suggesting Kansas may be the only state with this type of child support misuse provision); OHIO REV. CODE ANN. § 3113.21(F)(1) (Anderson 1989) (providing that support garnishments have priority over creditor garnishments); MONT. CODE ANN. § 40-4-224(1) (1989) (joint custody as representing the child's best interest is presumed and courts need only explain the reasoning behind an award if joint custody is denied).

dissolution of marriage and the accompanying issues relating to children. The Missouri legislature responded to the problems raised in domestic relations litigation by approving House Bill 1272 on June 20, 1988. The new legislation encompasses sweeping changes, particularly in the areas of child custody and support.⁵

Although the legislation was directed at resolving critical domestic relations issues, some authorities question whether the legislation will achieve its goal.⁶ They believe the highly emotional and personal nature of the issues addressed in the statute necessarily made it difficult for legislators to view the subject matter objectively. Namely, the biases and prejudices inherently a part of this type of legislation may actually result in the creation of—rather than solutions to—domestic relations problems.⁷

Practitioners and legal scholars are especially critical of the new legislative provisions concerning child support. This Note will focus first on the provisions that deal with termination of child support (emancipation). Second, it will evaluate that part of the legislation that requires accounting for the manner in which child support payments are spent. Then it will assess the provision that conditions payments of child support on compliance with court-ordered visitation. Finally, this Note will analyze the ramifications of the legislation and propose alternatives to some of its perceived shortcomings.

EMANCIPATION

The term “emancipation” is used to describe “[a] release which sets the child free from legal subjection and gives [him or her] the right . . . [to] collect and control [his or her] own wages.”⁸ Although a child is

5. Changes in the area of child support include providing that the obligations are to be retroactive to the time the divorce petition was filed. MO. REV. STAT. § 452.340 (Supp. 1988). The legislation appears to create a change in the approach to awarding custody with joint custody prevailing as the preferred arrangement. MO. REV. STAT. § 452.375(A) (Supp. 1988) (same language was retained in 1989 Mo. Legis. Serv. 107 (Vernon) (approved July 5, 1989) which replaces Mo. Rev. Stat. § 452.375). Although some authorities have suggested that a presumption of joint custody will lead to greater compliance with child support orders, at least one study of the relationship between custody and support does not support this contention. Polikoff, *Custody and Visitation: Their Relationship to Establishing and Enforcing Support*, in 2 IMPROVING CHILD SUPPORT PRACTICE., III-131 (1986). Of particular concern is the fact that the imposition of joint custody is often used as a means of “inappropriately reduc[ing] support awards.” *Id.* at III-132.

6. Fields, *Numerous Problems Cited in Child Support Sections of Family Law Measure*, Mo. Law. Weekly, June 27, 1988, at 4, col. 4.

7. The legislation has been described as “start[ing] out as perfectly decent . . . [until] every person . . . stuck his or her legislative finger in it, remembering what happened to cousin George or Aunt Mary and trying to make sure it [didn’t] happen again.” *Id.* at 4, cols. 5-6.

8. 59 AM. JUR. 2D *Parent and Child* § 80 (1987).

normally said to be emancipated automatically upon reaching the age of majority, the term is used more commonly to describe a status attained while still legally a minor.⁹ The status results from both the acts and omissions of a parent, as well as the acts of the child.¹⁰

Although varying degrees of emancipation exist, complete emancipation results only when a parent relinquishes all legal rights and duties pursuant to the parent-child relationship.¹¹ Courts, generally, have held that complete emancipation:

1. relinquishes the parental right to a child's services;
2. affords the child the right to hold a job and spend any earnings; and
3. terminates the parent's duty of care and support.¹²

As previously noted, a child is emancipated automatically upon attaining the age of majority. Prior to the enactment of House Bill 1272, Missouri case law held that the age of majority was twenty-one.¹³ Missouri cases also held that parents had an obligation to support their children until they reached majority or were otherwise emancipated.¹⁴ The new legislation dramatically changes the circumstances that end the parent's duty to support a child. The duty to support may end when the child dies, marries, enters the military, or becomes self-supporting.¹⁵ The new legislation also lowers the age of majority from twenty-one to eighteen years.¹⁶

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Biermann v. Biermann*, 657 S.W.2d 65, 67 (Mo. Ct. App. 1983).

14. *Id.*; *Barks v. Barks*, 686 S.W.2d 50, 52 (Mo. Ct. App. 1985).

15. The statute provides:

Unless the circumstances of the child manifestly dictate otherwise and the court specifically so provides, the obligation of a parent to make child support payments shall terminate when the child:

(1) Dies;

(2) Marries;

(3) Enters active duty in the military;

(4) Becomes self-supporting, provided that the custodial parent has relinquished the child from parental control by express or implied consent; or

(5) Reaches age eighteen or graduates from a secondary school, whichever later occurs, unless the provisions of subsection 4 or 5 of this section apply.

MO. REV. STAT. § 452.340.3 (Supp. 1988).

Historically, under Missouri case law, the emancipation of a child may come about in three ways: first, by express parental consent; second, by implied parental consent; and third, by undergoing a "change of status in the eyes of society," such as entering military service or marrying. *Orth v. Orth*, 637 S.W.2d 201, 205 (Mo. Ct. App. 1982).

For emancipation to occur by express or implied parental consent, the child

Other provisions of the statute identify situations in which the duty to support a child continues past the age of majority. Physical or mental incapacitation could require continued support.¹⁷ Additionally, subsection 5 provides that “[i]f the child is attending an institution of vocational or higher education, the parental support obligation shall continue until the child completes his education, or until the child reaches the age of twenty-two, whichever first occurs.”¹⁸

Subsection 5 is unclear. First, the legislature did not define the term “attending” with regard to education. This leaves the courts to determine what constitutes “attending” under provision 5 of section 452.340.¹⁹

Missouri courts have held that the words used in a statute should be construed according to their “plain and ordinary meaning.”²⁰ Furthermore, courts should construe statutory provisions based on common usage unless such construction “produces an absurd result or . . . defeats the purpose for which the Act was passed.”²¹ To the extent that a statute is “plain, simple and straightforward, words must be accorded their normal meanings, and it is appropriate to assume the ordinary meaning of those words accurately expresses legislative purpose.”²²

The ordinary meaning of “attend” as defined in standard dictionaries is “to be present.”²³ In this context, a dictionary definition is not useful in interpreting the new legislation. Because of the difficulty in determining what constitutes “attending” and the absence of a definition in the statute, a court could declare the provision ambiguous. Missouri courts, in deter-

must be old enough to “take care of and provide for himself.” *Id.* In making a determination that the child has been emancipated by implied consent, courts have considered whether the child is regularly employed, has sufficient income to be self-supporting, and spends the money earned in the manner he chooses. *Id.*

16. MO. REV. STAT. § 452.340.3(5) (Supp. 1988).

17. Subsection 4 provides that “[i]f the child is physically or mentally incapacitated from supporting himself and insolvent and unmarried, the court may extend the parental support obligation past the child’s eighteenth birthday.” *Id.* § 452.340.4.

18. *Id.* § 452.340.5 (Supp. 1988). Missouri case law has long considered college expenses relevant in setting child support amounts. Although a college education is not a birthright, the opportunity to obtain a post-secondary degree at an institution of the caliber the child would have enjoyed had the marriage been successful is a factor to consider in determining the amount of child support payments. *See Roberts v. Roberts*, 592 S.W.2d 860, 862 (Mo. Ct. App. 1979).

19. *See Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220 (Mo. 1983) (stating paramount rule of statutory construction is determining legislative intent).

20. *State v. Patterson*, 729 S.W.2d 226, 228 (Mo. Ct. App. 1987).

21. *Sternberg Dredging Co. v. Walling*, 158 F.2d 678, 681 (8th Cir. 1947).

22. *United States v. Jones*, 811 F.2d 444, 447 (8th Cir. 1987) (citation omitted).

23. *E.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 85 (1971).

mining whether statutory language is ambiguous, consider whether the terms used are "plain and clear to a person of ordinary intelligence."²⁴ "Attending" may mean enrollment in one class or it may mean a full-time classload. Practitioners have indicated that such differing interpretations may result in judicial determinations that the language is ambiguous.²⁵

Should the courts agree with these practitioners, they will be unable to rely on the ordinary meaning rule. Instead, courts may look to "the evil [the statute] seeks to remedy and . . . the circumstances and conditions existing at the time of its enactment" in effectuating the legislature's intent.²⁶

To date, no Missouri case has interpreted what "attending" means in the context of the new provision. Cases decided prior to the legislative enactment which have dealt with similar issues may offer insight on how broadly courts may interpret this provision.

In a decision made when the age of majority was twenty-one, the Missouri Court of Appeals in *Orth v. Orth*²⁷ upheld the trial court's decision that a twenty-year-old daughter was not emancipated. Since the age of 19, the daughter, except for a brief two-month period, had lived out of state with her boyfriend.²⁸ Prior to moving out of state, the daughter had lived on campus while attending a college in St. Louis.²⁹ After moving, she attended a community college night school.³⁰

In making its determination that the daughter was not emancipated, the trial court appeared to rely on its finding that the daughter was not self-supporting.³¹ Upholding the lower court's decision, the appellate court noted that the father, who was seeking to terminate child support on the basis of emancipation, had testified that he continued to send her money after she moved out of her mother's home. He stated that she was ex-

24. *Alheim v. Mullendore*, 714 S.W.2d 173, 176 (Mo. Ct. App. 1986).

25. *Fields*, *supra* note 6, at 4. Other means exist for clarifying statutory language; i.e., promulgating regulations. For example, continued state-supported payment for higher education expenses have been conditioned upon the student's fulfilling certain requirements. Regulations promulgated pursuant to the legislation which created the Missouri Guaranteed Student Loan Program indicate a recipient must be a "full time student." Mo. CODE REGS. tit. 6, § 10-2.020 (1988). "Full-time student means a student who is enrolled in at least twelve (12) semester hours." *Id.* The regulations provide that the recipient must be making satisfactory academic progress. *Id.* "Satisfactory academic progress means that a student is successfully completing sufficient courses in his/her course of study to secure the certification or degree toward which he/she is working in no more than the number of semesters . . . normally required by the institution in which the student is enrolled" *Id.*

26. *Mashak v. Poelker*, 367 S.W.2d 625, 626 (Mo. 1963).

27. 637 S.W.2d 201 (Mo. Ct. App. 1982).

28. *Id.* at 205.

29. *Id.* at 204.

30. *Id.*

31. *Id.* at 205.

periencing a "hard time getting on her feet financially."³² The appellate court further noted that the record in no way indicated that the daughter's circumstances had changed. No evidence was presented that she "got on her feet" during the time in question.³³ Neither court discussed whether attendance of college classes affected the finding that she was not emancipated.

In another ruling made under the former legislation which extended the duty to support until age twenty-one, the court in *In re Marriage of Hughes*³⁴ addressed related issues. The court determined that conditioning the duty to support on a child's attending a "publicly supported" and "fully accredited" college on a "full time" basis would be difficult to enforce.³⁵ The court also indicated that a dissolution provision of this nature "is not sufficiently definite to be capable of enforcement" without an evidentiary hearing.³⁶ Based on this case, the rather ambiguous wording of the new legislation makes it ripe for litigation.

Another problem in determining what constitutes "attendance" is how to treat children who drop out of college briefly with the intention of completing the degree at a later date.³⁷ There is uncertainty whether child support should be terminated and, if so, whether the same court will retain jurisdiction to allow for reinstatement of the child support order if the child starts attending college again.³⁸ One basis for arguing that the court retains jurisdiction is section 452.370 of the Missouri Revised Statutes. Section 452.370 provides that "[t]he circuit court shall have continuing personal jurisdiction over both the obligee and the obligor of a court order for child support . . . for the purpose of modifying such order."³⁹

If the legislative intent supporting section 452.370 was to promote parental financial assistance to those children pursuing advanced training, an amendment is needed. The amendment should include a "good cause drop out provision" to enable a court to make allowances on a case-by-case basis. The following model suggests how a court could phrase an amendment:

In the event a child must drop out of the institution of higher learning due to the time and/or financial constraints imposed by illness, family emergencies, lack of resources, or any other reasonable justification as determined by the circuit court retaining jurisdiction, the child or other interested party may petition the court to reinstate the child support order. If the court determines that the order should be reinstated, the statute is

32. *Id.* at 204-05.

33. *Id.* at 205.

34. *In re Marriage of Hughes*, 734 S.W.2d 280 (Mo. Ct. App. 1987).

35. *Id.* at 282.

36. *Id.*

37. Fields, *supra* note 6, at 4.

38. *Id.*

39. MO. REV. STAT. § 452.370 (1988).

tolled during the drop out period with the practical effect that the number of months which pass during the tolled period will be added to the reinstatement period's duration.

A third problem is raised by the provision that support continues "until the child completes his education, or until the child reaches the age of twenty-two, whichever first occurs."⁴⁰ Recognizing that many college students turn twenty-two sometime during their fourth year of undergraduate college, the legislature might have avoided some problems by terminating support at age twenty-three rather than twenty-two. Since the statute's language provides for either completion of the education or attainment of age twenty-two—whichever comes first—individuals with late spring or summer birthdays will be able to complete a traditional four-year college program before the support is terminated. According to a strict reading of the statute, individuals with early birthdays presumably will not have the same opportunity.⁴¹ Further complications could occur when one child has a late birthday and another child has an early birthday. The statute would preclude the one child from receiving the support necessary to complete his or her education. To the extent the introductory language of subsection 3(5), "[u]nless the circumstances of the child manifestly dictate otherwise and the court specifically so provides, the obligation of a parent . . . shall terminate when the child: Reaches age eighteen or graduates from a secondary school, whichever later occurs, unless . . . subsection . . . 5 of this section [applies]"⁴² may be read in conjunction with subsection 5, courts may find that the support should not be terminated until the parent has afforded each child in a particular family the same educational opportunities. If the courts determine that this proposed construction was not the legislature's intent, it is possible that one child will not get the same opportunities afforded another sibling. Arguably, approximately the same amount of money will be paid, yet there is an inherent inequity that some children in a family will graduate without the burden of a debt whereas their less fortunate siblings may be forced to incur additional debt in order to complete their degrees. Amending this statute to provide that the support obligation continues "until either completion of the education or attaining age twenty-three—whichever comes first" would eliminate many of the problems posed by the age twenty-two cut-off. Another way to alleviate these types of situations is to amend the statute by adding the following provision:

when justice and fairness so require, nothing in this act shall prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years.⁴³

40. MO. REV. STAT. § 452.340 (1988).

41. MO. REV. STAT. § 452.340 (Supp. 1988).

42. MO. REV. STAT. § 452.340.3 (Supp. 1988) (emphasis added).

43. See FLA. STAT. § 743.07(2) (1989).

The court in *Nicolay v. Nicolay*⁴⁴ addressed a similarly worded Florida statute. *Nicolay* stated in dicta that it “would be inclined to hold that in a dissolution proceeding a court could find a child under the age of twenty-one dependent by reason of attendance at college and order one or both of his parents to provide support.”⁴⁵ The court elaborated on its choice of 21 as the “cut-off” age:

One might reasonably ask why a court could not order support for college beyond the age of twenty-one since that age no longer has any statutory significance. The answer, we submit, is that while the legislature in lowering the age of majority to eighteen did not intend to eliminate any requirement for parents to pay their children’s way through college, there is nothing to indicate that the legislature wished to enlarge parental obligations.⁴⁶

Fewer than five years after the Florida Court of Appeals’ decision in *Nicolay*, the Florida Supreme Court in *Grapin v. Grapin*⁴⁷ disapproved the *Nicolay* decision. The *Grapin* court stated that parents do not have a legal duty to support the educational pursuits of a child who has reached majority.⁴⁸ The court noted that

[w]hile most parents willingly assist their adult children in obtaining a higher education that is increasingly necessary in today’s fast-changing world, any duty to do so is a moral rather than a legal one. Parents who remain married while their children attend college may continue supporting their children even beyond [the age of majority] . . . , but such support may be conditional or may be withdrawn at any time, and no one may bring an action to enforce continued payments. It would be fundamentally unfair for courts to enforce these moral obligations of support only against divorced parents while other parents may do as they choose.⁴⁹

Courts in other states, however, refute this equal protection challenge. The Washington Supreme Court in *Childers v. Childers*⁵⁰ stated that trial courts have discretion to order post-majority educational support. In *Childers*, the court noted the “irremediable disadvantages” of children whose parents have divorced and emphasized the state’s legitimate interest in minimizing such disadvantages.⁵¹ In upholding the Washington statute providing for post-majority support, the court stated that the statute bore a rational relationship to the state’s interest in producing a “well-educated citizenry capable of making the intelligent decisions required in a democratic society.”⁵²

44. 387 So. 2d 500 (Fla. 1980).

45. *Id.* at 505.

46. *Id.* at 505-06 n.5.

47. 450 So. 2d 853 (Fla. 1984).

48. *Id.* at 854.

49. *Id.*

50. 89 Wash. 2d 592, 575 P.2d 201 (1978) (en banc).

51. *Id.* at 604, 575 P.2d at 208.

52. *Id.*, 575 P.2d at 208-09.

The Iowa Supreme Court refuted a similar equal protection challenge in *In re Marriage of Urban*.⁵³ The court upheld the constitutionality of a statute which allowed continued financial support for full-time post-secondary students who were between the age of eighteen and twenty-two.⁵⁴ The court noted the state's interest in promoting higher education and found the statute rationally related to that interest.⁵⁵ The court also pointed out that the legislature, by enacting the statute, may have relied on the fact that parents who remain married are more likely to work together to provide post-majority educational support for their children. Hence, the legislature probably felt it unnecessary to interfere in such circumstances.⁵⁶

Should Missouri courts interpret the legislation to allow support to continue past the age of twenty-two, authority exists for both sides of an equal protection challenge. Given that the legislature clearly has indicated its intent to promote parental support of post-secondary education, Missouri courts will likely follow those states whose courts have refuted equal protection challenges on the basis of the state's interest in producing a well-educated citizenry.

Recognizing some of the problems with the legislation as originally enacted, the 85th General Assembly in its First Extraordinary Session of 1989 attempted to clarify some of the ambiguities of the original act. The statute now provides:

If the child is enrolled in an institution of vocational or higher education not later than October first following graduation from a secondary school and so long as the child continues to attend such institution of vocational or higher education, the parental support obligation shall continue until the child completes his education, or until the child reaches the age of twenty-two, whichever first occurs.⁵⁷

Thus, the legislature has attempted to formulate some time guidelines during which a child may anticipate support payments which will provide financial assistance for a post-secondary education. Interpretation of this language is a matter for the Missouri courts as they attempt to reconcile it with language indicating that child support payments will terminate on certain conditions "[u]nless the circumstances of the child manifestly dictate otherwise and the court specifically so provides."⁵⁸

Further attempting to clarify the original legislation, the General Assembly added definitions for the terms "institution of vocational education" and "higher education." "Institution of vocational education" is defined

53. 293 N.W.2d 198 (Iowa 1980).

54. IOWA CODE § 598.1(2) (1989).

55. 293 N.W.2d at 202.

56. *Id.*

57. Act of July 27, 1989, § 452.340.5, 1989 Mo. Laws 1242 (effective July 27, 1989).

58. *Id.* § 452.340.3.

as "any post-secondary training or schooling for which the student is assessed a fee and attends classes regularly."⁵⁹ "Higher education" is defined as "any junior college, college, or university at which the child attends classes regularly."⁶⁰ Although still not addressing whether a child must be a full-time student in order to benefit from this extended period of child support, the legislature may be indicating by its use of the plural "classes" that merely taking one class will not qualify a child for further payments.

ACCOUNTING

A second provision of House Bill 1272 prompting concern is the court-ordered "accounting" which may be made pursuant to the noncustodial parent's request. The statute provides:

The court which issued a judgment or order of child support payments may, upon petition of the party obligated to make the payments and upon good cause shown, order the custodial parent to furnish the party having the support obligation with a regular summary of expenses paid by the custodial parent on behalf of the child. The court may prescribe the form and substance of the summary.⁶¹

The motivation behind this accounting provision is a belief shared by many that the money noncustodial parents pay toward child support is frequently expended on items and activities unrelated to the child.⁶²

In *Weekend Fathers*, a book dedicated "[t]o all fathers who are kept from sharing in the joy and pain of raising their own children,"⁶³ the authors found that

[o]ne of the most common complaints of responsible fathers who pay child support is that there is no *accounting* of how the money is spent. Indeed, there are women who receive substantial child support which is spent on their own personal needs rather than on the children. Some women view child support as an extension of their alimony.⁶⁴

These same authors also indicated that "[c]ourts should require that the recipient of child support give a full and complete *accounting* of how the money is spent."⁶⁵

Although the statute requires a "regular summary" it fails to define either term. This ambiguity requires a similar analysis as is required with the "attending an institution" provision.⁶⁶ A further complication, however,

59. *Id.* § 452.340.5.

60. *Id.*

61. MO. REV. STAT. § 452.342 (Supp. 1988).

62. G. SILVER & M. SILVER, *WEEKEND FATHERS* 117-18 (1986).

63. *Id.* at vii.

64. *Id.* at 117-18 (emphasis added).

65. *Id.* at 118 (emphasis added).

66. *See supra* notes 18-36 and accompanying text.

is that although the legislature did not expressly use the term "accounting," the language implies such a procedure.

Following the "plain and ordinary meaning" rule,⁶⁷ a court could order a regular summary or accounting consisting of "a detailed report of the financial state or transactions of [the custodial parent]."⁶⁸ If courts determine that the legislature's intent was to provide for an accounting in the "legal sense," they could order the "rendition of an account."⁶⁹ The "account" could consist of any one of the following standards:

A detailed statement of the mutual demands in the nature of debit and credit between parties, arising out of . . . some fiduciary relation. A statement in writing, of debts and credits, or of receipts and payments; a list of items of debts and credits, with their respective dates . . . a record course of business dealing between parties.⁷⁰

To date, no Missouri court has interpreted the meaning of the term "regular summary" pursuant to the new legislation. Missouri courts will find little direction from the law of other states. As of this writing, it appears no other state legislature has provided for an "accounting" pursuant to a child support order.

In prior cases unrelated to domestic relations litigation, Missouri courts have indicated that "[a]n accounting is an equitable remedy . . . appropriate where there are many items to be settled and adjusted between parties."⁷¹ Missouri courts have also indicated that an accounting is based upon the "need of discovery, . . . the complicated nature of the accounts, . . . the existence of a fiduciary or trust relationship, and . . . the inadequacy of legal remedy."⁷² Courts will have to decide whether this is what the legislature envisioned when it provided for a "regular summary."

Another weakness with this provision is the lack of guidance concerning factors to consider in determining whether "good cause" exists.⁷³ In clear situations, "good cause" will be obvious; for example, evidence that the child's "necessaries" are not being provided yet the custodial parent vacations in exotic places.⁷⁴ The difficult situation arises in determining what lesser incidents constitute "good cause." Once again, the courts will make such a determination based on the specific facts of each case.

67. See *supra* notes 20-26 and accompanying text.

68. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 13 (2d ed. 1983).

69. BLACK'S LAW DICTIONARY 18 (5th ed. 1979).

70. *Id.* at 17.

71. Willett v. Reorganized School Dist. No. 2, 602 S.W.2d 44, 48 (Mo. Ct. App. 1980).

72. Kalberloh v. Stewart, 378 S.W.2d 820, 824 (Mo. Ct. App. 1964) (citation omitted).

73. See *supra* note 61 and accompanying text.

74. See Cole v. Estate of Armstrong, 707 S.W.2d 459 (Mo. Ct. App. 1986).

As indicated previously, the statute does not specify a "regular summary" format.⁷⁵ The legislature has left the format choice to the discretion of individual courts.⁷⁶ The statute offers no guidance regarding how detailed the accounting must be, nor what evidence will satisfy a court that the custodial parent is making reasonable expenditures for the child. Since the legislation leaves decisions concerning the accounting entirely in the courts' hands, practitioners will likely see a wide variety of required formats.

The statute does not provide guidance regarding the frequency of the accounting. An accounting once a month—an arrangement which would coincide with the customary monthly support payments—is sensible.

Since the statute is silent concerning the time period relating to an accounting, the decision on how far back the accounting is to extend would be in the court's discretion. Problems could arise if the judge ordered the accounting to cover periods in the distant past and also required proof other than the custodial parent's sworn statement. Such an order could be burdensome, particularly if the custodial parent is in the habit of paying for items in cash and not keeping receipts. Amending the statute to include time limits would assure that the provision is actually used to help children and not used to harass custodial parents. Even if the parent pays by check or credit card, the accounting could become burdensome if a judge insists upon receipts to show that a particular purchase was indeed children's clothing or supplies needed for a school project. The legislature could alleviate this problem by amending the statute to provide that a court may not order a retrospective accounting; meaning, the accounting period could not begin until the custodial parent received actual notice of the format and proof required by the court. Noncustodial parents who have reason to believe that support money will be spent unwisely from the outset could incorporate some type of accounting provision into the original dissolution decree.

Yet another problem is ascertaining how long the duty to provide a "regular summary" should continue. Although this decision is also left to the court's discretion, continuing beyond a period needed to establish proper use of child support payments would serve no purpose and would unduly burden the "accounting" parent.

Conscientious custodial parents receiving regular payments, however, should have little difficulty in establishing that the child support payments are spent on the child. Equitable considerations suggest that a noncustodial parent with "unclean hands" could not obtain a court-ordered "regular summary." Given that national figures suggest noncustodial parents owe between four to five billion dollars in unpaid child support,⁷⁷ this provision

75. MO. REV. STAT. § 452.342 (1988).

76. *Id.*

77. B. CLAIR & A. DANIELE, *THE EX-FACTOR* 19 (1986).

and the concerns it raises could amount to "much ado about nothing."

Conscientious custodial parents should harbor no fears if faced with an order for an accounting. For a custodial parent with small children requiring daycare, the high costs of that care will demonstrate a reasonable use of child support.⁷⁸ For example, the cost for one infant at a private daycare center in the greater Kansas City area is about \$100 per week.⁷⁹ Individuals usually charge substantially lower rates but with the large number of women pursuing their own careers, such "neighborhood sitters" are scarce.⁸⁰ Determining the amount the custodial parent could report pursuant to the accounting would be left to the court's discretion. Thus, the question arises as to whether the full amount could be reported, half could be reported (representing an equal split of the parents' shares), or a fractional portion could be reported (based on a formula taking into account both parents' incomes). Similar issues would arise in determining the portion of rent/house payments, car payment, utility bills, and insurance to be credited in this accounting process. Some portion of these bills would be reasonable expenses for the child. Again, the amount allowed would presumably be some fractional portion based upon the ability of both parents to provide for the child and the standard of living the child would have enjoyed had the marriage not ended.⁸¹

An issue tangential to this provision is how a court would assess expenses for purposes of this accounting if the court awards joint custody.⁸² This concern could take on greater significance because recent legislation appears to favor joint custody.⁸³ Although the statutory language is ambiguous, a strong policy statement suggests that a court should consider joint custody as the preferable arrangement.

Additional problems with the accounting provision include the statute's failure to identify the person or entity entitled to evaluate the accounting and what the consequences are when the custodial parent does not provide the "regular summary" as ordered by the court.⁸⁴ One obvious remedy for failing to comply with the court order would be holding the custodial parent in contempt. The statute is also silent concerning measures if the noncustodial parent believes the accounting demonstrates frivolous expenditures or use of child support money for expenses other than those of the child.⁸⁵

78. Interview with Kamala Simmons, parent of infant (Dec. 28, 1988).

79. *Id.*

80. *Id.*; interview with Tammy Darling, parent of pre-school aged children (Dec. 28, 1988).

81. See Freed & Walker, *supra* note 4, at 540-41.

82. See generally Polikoff, *supra* note 5.

83. *Joint Custody Debate Goes On: What Did the Legislators Mean?*, Mo. Law. Weekly, May 23, 1988, at 1, col. 3.

84. Mo. REV. STAT. § 452.342 (Supp. 1988).

85. *Id.*

If the court considers the value of basic services the custodial parent provides, including doing laundry, preparing meals, shopping, housekeeping, and chauffeuring, this provision should pose no real threat to conscientious custodial parents.⁸⁶ Other possible services which could be reported in the accounting process include sewing, tutoring, interior decorating, gardening, and bookkeeping.⁸⁷ Ironically, this accounting provision, should it become widely ordered, could demonstrate through financial statistics that child support payments are insufficient to cover all the child's expenses. Such a revelation could lead to a modification increasing the child support award in a substantial number of cases, thus producing beneficial results.

Even if the accounting shows that the custodial parent is not exercising sound judgment concerning the expenditures of child support money, however, it is doubtful the court would order a reduction of the child support award. Relying on *Sauer v. Newman*,⁸⁸ Missouri courts would likely find it "manifestly unjust" to allow the noncustodial parent to deprive children of payments designed for their benefit because of the custodial parent's financial mismanagement.⁸⁹ More likely remedies include requiring the custodial parent to use money for stipulated expenditures or permitting the noncustodial parent to pay at least a portion of the support into a trust fund created for the child's benefit. If these remedies prove inadequate, then the court could consider transferring custody as a last resort. From a practical standpoint, the accounting provision may realistically be nothing more than an exercise in "creative accounting."⁹⁰

VISITATION

In what is considered the most controversial aspect of the legislation,⁹¹ continued payment of child support is linked to visitation rights. The statute provides:

6. A court may abate, in whole or in part, any future obligation of support or may transfer the custody of one or more children if it finds:
 - (1) That a custodial parent, has without good cause, failed to provide visitation or temporary custody to the noncustodial parent pursuant to the terms of a decree of dissolution, legal separation or modifications

86. See Minton, *Evaluating the Homemakers Services*, DISSOLUTION OF MARRIAGE 1981, at 9, 20-23 (1981).

87. See *id.*

88. 666 S.W.2d 811 (Mo. Ct. App. 1984).

89. See *id.* at 815.

90. Mo. Law. Weekly, May 23 at 4, col. 2.

91. One practitioner assessed the provision saying that "[i]t makes absolutely no sense to punish a child because of a visitation fight between the parents [Payments and visitation] are two separate and individual rights and we have no business using a child as a whipping post on the thing." Fields, *supra* note 6, at 4, col. 1.

thereof; and

(2) That the noncustodial parent is current in payment of all support obligations pursuant to the terms of a decree of dissolution, legal separation or modifications thereof. The court may also award reasonable attorney fees to the prevailing party.⁹²

The general rule is that if one parent is awarded custody of a child, the other parent receives reasonable visitation rights.⁹³ Traditionally, states steadfastly separated the obligation of support and the right to visitation.⁹⁴ A review of the case law in other jurisdictions suggests that courts usually condition continued support payments on non-interference with visitation⁹⁵ in extreme situations; for example, removing the child from the jurisdiction without prior approval from the court or when there has been "an extended pattern of total refusal to honor the visitation award."⁹⁶ In *Richardson v. Richardson*,⁹⁷ the Michigan Court of Appeals indicated that although that state's law provides for the suspension of child support payments when the noncustodial parent's visitation rights are denied wrongfully, the interference must constitute "a course of conduct designed to frustrate . . . visitation rights."⁹⁸ Other courts, however, have held that the frustration of visitation rights, whether due to the custodial parent's interference or the child's refusal to cooperate, does not warrant withholding child support payments. The North Carolina Court of Appeals in *Appert v. Appert*⁹⁹ found the trial court's ruling that support payments be paid into escrow for any month following a frustrated visitation is "inherently detrimental to the best interest of the minor child and . . . therefore contrary to" North Carolina's law.¹⁰⁰

The statutory approach to this situation is in flux. For example, in 1978, New York enacted legislation by which a court could "suspend [alimony or maintenance] payments or cancel any arrears that may have accrued during the time that visitation rights have been or are being interfered with or withheld."¹⁰¹ In 1986, the legislature added a final

92. MO. REV. STAT. § 452.340.6 (1988).

93. M. WHEELER, *DIVIDED CHILDREN* 54 (1980).

94. G. SILVER & M. SILVER, *WEEKEND FATHERS* 119 (1986).

95. Visitation interference—which may be minimal or extreme, subtle or overt—includes refusing to allow an alternative visitation when the child's needs prevent complying with the agreed upon schedule, portraying the noncustodial parent in such a manner that the child seeks to avoid the visitation, and actually hiding the child and refusing to disclose his location. Horowitz & Dodson, *Child Support, Custody and Visitation*, in 2 *IMPROVING CHILD SUPPORT PRACTICE* III-92, III-95 (1986).

96. *Id.* at III-101.

97. 122 Mich. App. 531, 332 N.W.2d 524 (1983).

98. *Id.* at 533, 332 N.W.2d at 525.

99. 80 N.C. App. 27, 341 S.E.2d 342 (1986).

100. *Id.* at 40, 341 S.E.2d at 349.

101. N.Y. DOM. REL. LAW § 241 (McKinney 1986).

sentence: "Nothing in this section shall constitute a defense in any court to an application to enforce payment of child support or grounds for the cancellation of arrears for child support."¹⁰² This revision discourages the noncustodial parent from exercising self-help where the issue is payment of child support.

Proponents of the "support conditioned upon visitation" provision believe that vigorous enforcement of visitation rights is the most effective means of assuring timely compliance with child support orders. Advocates of this philosophy perceive that a major reason child support is not paid is because of the custodial parent's interference with visitation rights.¹⁰³ This perception has been challenged.¹⁰⁴ Data suggests that custodial parents do not routinely interfere with visitation. In reality, studies show that a significant percentage of custodial parents want the noncustodial parent to have greater involvement in their children's lives.¹⁰⁵ Another study, designed to assess the noncustodial parent's view of visitation, revealed that less than one-seventh of these parents had experienced visitation problems.¹⁰⁶ Reports from a Texas county which enforces both child support orders and visitation orders reveal that support complaints outnumber visitation complaints by a ratio of about eighteen to one.¹⁰⁷ The reports further show that custodial parents respond "much more cooperatively" to visitation requests than noncustodial parents respond to requests for delinquent child support.¹⁰⁸

Critics of the "conditioning" concept reject it primarily because of the child's needs for continued economic support and also because of the likelihood of its increasing administrative burdens on an already overworked child support enforcement system.¹⁰⁹ Missouri family law experts decry the provision, saying the section creates a situation the state has attempted to avoid: "The mother says she's not turning the kids over because the father isn't paying child support, and the father says that under the law he doesn't have to pay because he's not getting his visitation rights. And the child is the one who gets hurt."¹¹⁰

Family law experts think it is likely trial judges will disregard this provision in that it is doubtful "judges would look favorably on a non-custodial parent's request to abate child support because of a visitation dispute."¹¹¹ In egregious situations, however, judges may feel compelled

102. *Id.*

103. See G. SILVER & M. SILVER, WEEKEND FATHERS 119 (1986).

104. Polikoff, *supra* note 5, at III-132.

105. *Id.* at III-133.

106. *Id.*

107. *Id.*

108. *Id.*

109. Horowitz & Dodson, *supra* note 95, at III-93.

110. Fields, *supra* note 6, at 4, col. 1.

111. *Id.*

by legislative mandate to take action. In such situations, courts will find guidance from visitation interference cases to determine whether good cause exists for interference.

Good cause may be found where the child's physical or emotional health is threatened. *In re Marriage of P.K.A. and J.E.A.*¹¹² held that a mother was justified in not following the court-ordered visitation terms when a child's statements and a psychologist's examination indicated the child was being sexually abused by the father during unsupervised visitation.¹¹³ Likewise, in *Durbin v. Durbin*,¹¹⁴ the court found that the custodial parent would not be held in contempt for failing to follow visitation orders. In *Durbin*, the court found that the request for a postponement was reasonable because the child was recuperating from surgery.¹¹⁵

The court refused, however, to find a good faith belief that would warrant denial of visitation in *A.G. v. R.M.D.*,¹¹⁶ despite the mother's claim that she sincerely believed her daughter was being sexually abused during visitation.¹¹⁷ The court distinguished *Durbin*, noting that *Durbin* involved a disease that had not been contemplated by the court when issuing its original visitation decree.¹¹⁸ When it granted visitation rights, the *A.G.* court was fully aware that the child was likely to experience stress during communications with her father.¹¹⁹ *Durbin* was further distinguished in that the child's illness had been verified, whereas the alleged sexual abuse in *A.G.* was neither substantiated by the Missouri Division of Family Services nor proven in court.¹²⁰

In assessing this provision which establishes a relationship between visitation and child support payments (even if one can make the leap of faith required to accept the detrimental effect the reduction of support payments is likely to have on children) there appears to be an inherent imbalance. The statute offers no counterpart provision that allows a custodial parent to request the elimination or reduction of visitation rights if the noncustodial parent is delinquent in child support payments and the custodial parent has consistently and faithfully honored the visitation agreement.

Other jurisdictions have advocated this counterpart concept. Termination of visitation rights was contemplated in *Peterson v. Jason*,¹²¹ for situations where the refusal has been "wilful [sic] and intentional and

112. 725 S.W.2d 78 (Mo. Ct. App. 1987).

113. *Id.*

114. 573 S.W.2d 146 (Mo. Ct. App. 1978).

115. *Id.* at 148.

116. 730 S.W.2d 543 (Mo. 1987) (en banc).

117. *Id.* at 546.

118. *Id.*

119. *Id.*

120. *Id.*

121. 513 So. 2d 1351 (Fla. Dist. Ct. App. 1987).

detrimental to the welfare of the child so that termination would be in the child's best interest."¹²² Likewise, the Supreme Court of Utah in *Rohr v. Rohr*,¹²³ stated that although "mere failure to pay child support, where the failure is due to an inability to pay" is not sufficient to warrant termination of visitation rights, "where the noncustodial parent's refusal to pay child support is contumacious, or willful and intentional, and not due to an inability to pay, visitation rights may be reduced or denied, if the welfare of the child so requires."¹²⁴ A far less restrictive view for conditioning visitation on payment of court-ordered child support is found in *Burnworth v. Hughes*.¹²⁵ In *Burnworth*, the Supreme Court of Kansas held that when the trial court addresses an issue involving custody or visitation, the court may condition the noncustodial parent's visitation rights upon payment of child support.¹²⁶ Factors to be considered in making the determination are the noncustodial parent's track record in exercising visitation rights, past and current status of the parties' relationship, and the ages of the children.¹²⁷ The court stated:

[a]lthough there is responsible authority for the view that visitation rights should not be conditioned upon the payment of child support, based upon the theory that visitation aids the child's psychological development whereas support caters to the child's physical needs, we believe that the better view is to allow a trial court, in its discretion, to condition visitation rights upon the father's payment of reasonable child support. To do otherwise would amount to overindulging an irresponsible father in preserving his right of visitation, while refusing to use one of the better means available to the court to encourage him to discharge his obligation of support.¹²⁸

Critics of this approach indicate the rationale for not having such a provision is the best interests of the child and the strong policy in maintaining a positive relationship with the noncustodial parent. Yet, if maintaining open communication and frequent contact is so essential to the stable development of children, the statute does not contain a provision providing that a court may take action if the noncustodial parent does not fulfill his or her duties and responsibilities concerning visitation.

CONCLUSION

It is no easy task for the legislature to take control of matters traditionally reserved to the family. Practitioners cannot expect the legislature

122. *Id.* at 1352.

123. 709 P.2d 382 (Utah 1985).

124. *Id.* at 383.

125. 234 Kan. 69, 670 P.2d 917 (1983).

126. *Id.* at 75, 670 P.2d at 922.

127. *Id.*

128. *Id.* at 75-76, 670 P.2d at 922.

to anticipate every conceivable problem in an area which the legislature has only recently begun to regulate. More than likely, further modifications of this statute will be forthcoming as the legislature grapples with the difficult and sensitive problems of regulating domestic relations.

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