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USING HINDSIGHT TO CHANGE CHILD SUPPORT OBLIGATIONS: A SURVEY OF RETROACTIVE MODIFICATION AND REIMBURSEMENT OF CHILD SUPPORT IN NORTH CAROLINA

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I. INTRODUCTION

A parent's potential liability for child support includes both prospective and retroactive liability. Retroactive liability for child support has received little attention from commentators on North Carolina law. It includes any remedy that allows a court to change a present support obligation, after looking back in time, to reflect history. Retroactive remedies are directed to past events, rather than to the future needs of the child.

The ratification of Chapter 50, section 13.10 of the North Carolina General Statutes,[1] effective October 1, 1987, now focuses attention on the retroactive modifiability of court-ordered child support obligations in this state. Retroactive liability for child support, however, is not limited to retroactive changes in court-ordered support. The concept also includes retroactive changes in contractual child support obligations, as well as several miscellaneous remedies that allow a court to reimburse a parent, the state, or a third-party provider of necessaries for past expenditures on the child's behalf.

II. RETROACTIVE MODIFICATION OF COURT-ORDERED CHILD SUPPORT

Nationally, proponents of stronger methods of child support

1. N.C. GEN. STAT. § 50-13.10 (1987).

enforcement have criticized retroactive modification of court-ordered child support as a loophole that allows parents to avoid financial responsibility for their children. In North Carolina, however, the remedy has been used on a limited basis to prevent injustice in some situations. The new section 50-13.10 appears to modify substantially the body of case law that allowed retroactive modification of court-ordered child support in North Carolina.[2] It provides in part:

> Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.—(a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:
> (1) before the payment is due or
> (2) if the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded.
> (b) A past due child support payment which is vested pursuant to G.S. 50-13.10(a) is entitled, as a judgment, to full faith and credit in this State and any other state, with the full force, effect, and attributes of a judgment of this State, except that no arrearage shall be entered on the judgment docket of the clerk of superior court or become a lien on real estate, nor shall execution issue thereon, except as provided in G.S. 50-13.4(f)(8) and (10).[3]

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2. This article discusses the effect of recently enacted N.C. Gen. Stat. § 50-13.10 (1987) on retroactive modification of North Carolina child support orders by North Carolina courts. A discussion of modification in North Carolina of orders rendered by courts of other states is beyond the scope of this article.

3. The remainder of N.C. GEN. STAT. § 50-13.10 provides that:

> (c) As used in this section, 'child support payment' includes all payments required by court or administrative order in civil actions and expedited process proceedings under this Chapter, by court order in proceedings under Chapter 49 of the General Statutes, and by agreements entered into and approved by the court under G.S. 110-132 or G.S. 110-133.
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> (d) For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues:
>
> (1) from and after the date of the death of the minor child for

Before the enactment of section 50-13.10, North Carolina rejected the view of some states[4] that a right to payments of court-ordered child support vested absolutely when the court entered the order.[5] A North Carolina court, therefore, was not precluded from retroactively reducing the amount due under a prior court order for child support.[6] Few North Carolina decisions, however, allowed such a reduction of arrearages,[7] and recent cases indicated that retroactive reduction should be allowed only to prevent an injustice.[8]

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whose support the payment, or relevant portion, is made;

(2) from and after the date of the death of the supporting party;

(3) during any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party;

(4) during any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment.

(e) When a child support payment which is to be made to a clerk of superior court is not received by the clerk when due, the payment is not a past due child support payment for purposes of this section, and no arrearage accrues, if the payment is actually made to and received on time by the party entitled to receive it and such receipt is evidenced by a cancelled check, money order, or contemporaneously executed and dated written receipt. Nothing in this section shall affect the duties of the clerks under this Chapter or Chapter 110 of the General Statutes with respect to payments not received by them on time, but the court, in any action to enforce such a payment, may enter an order directing the clerk to enter the payment on his records as having been made on time, if the court finds that the payment was in fact received by the party entitled to receive it as provided in this subsection.

4. Adair v. Superior Court, 44 Ariz. 139, 33 P.2d 995 (1934); Ramona v. Ramona, 244 So. 2d 547 (Fla. Dist. Ct. App. 1971); Davis v. Davis, 145 Kan. 282, 65 P.2d 562 (1937); Fainberg v. Rosen, 12 Md. App. 359, 278 A.2d 630 (1971); Jenkins v. Jenkins, 453 S.W.2d 619 (Mo. Ct. App. 1970); Mandel v. Mandel, 80 N.Y.S.2d 95 (1947); Gilbert v. Hayward, 37 R.I. 303, 92 A. 625 (1914); Wilburn v. Wilburn, 59 Wash. 2d 799, 370 P.2d 968 (1962); Foregger v. Foregger, 40 Wis. 2d 632, 162 N.W.2d 553 (1968).

5. *See infra* text accompanying notes 6-61.

6. No North Carolina case has addressed the question of whether a court has the authority to increase retroactively the amount of child support payments due under a prior court order. For a general discussion of the availability of this remedy in other states, see Annotation, *Retrospective Increase in Allowance for Alimony, Separate Maintenance or Support*, 52 A.L.R.3d 156 (1973).

7. *See infra* notes 8-61.

8. Brower v. Brower, 75 N.C. App. 425, 434, 331 S.E.2d 170, 176 (1985); Simmons v. Simmons, 74 N.C. App. 725, 727, 329 S.E.2d 723, 724 (1985); Jones v.

North Carolina courts recognized exigencies justifying a decrease in child support arrearages to prevent injustice in two situations. Courts allowed credit against arrearages due under a court order for:

(1) voluntary expenditures[9] made by the noncustodial parent on the child's behalf[10]; and

(2) an amount equal to the amount due under the order during the period of time after the parent's duty to support had terminated.[11]

The decision of whether to reduce arrearages and if so, by how much, is within the trial court's discretion.[12] The decision is reviewable on appeal only for an abuse of discretion.[13]

A. Retroactive Reduction by Allowing Credit for Voluntary Expenditures

The North Carolina Court of Appeals first articulated guidelines for granting a credit for voluntary expenditures against child support arrearages in *Goodson v. Goodson.*[14]

> We think that the better view allows credit when equitable considerations exist which would create an injustice if credit were not allowed. Such a determination necessarily must depend upon the facts and circumstances in each case . . . . However, since we are enunciating this principle for the first time in this State, we feel a duty to offer some guidelines for the trial judge. The delinquent parent is not entitled as a matter of law to credit for all expenditures which do not conform to the decree. Nor should the delinquent parent be entitled to credit for obligations incurred prior to the time of the entry of the support order. . . . The delinquent

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Jones, 52 N.C. App. 104, 109, 278 S.E.2d 260, 263 (1981); Lynn v. Lynn, 44 N.C. App. 148, 151, 260 S.E.2d 682, 685 (1979); Goodson v. Goodson, 32 N.C. App. 76, 81, 231 S.E.2d 178, 182 (1977). *See* Reavis v. Reavis, 82 N.C. App. 77, 82, 345 S.E.2d 460, 463 (1986) ("compelling equitable circumstances exist").

9. The term "voluntary expenditures" in this context means expenditures not required under a court order.

10. *See infra* discussion at notes 14-50.

11. *See infra* discussion at notes 51-61.

12. *Simmons*, 74 N.C. App. at 727, 329 S.E.2d at 724; *Jones*, 52 N.C. App. at 109, 278 S.E.2d at 264; *Lynn*, 44 N.C. App. at 151, 260 S.E.2d at 685. *But see infra* text accompanying notes 20-22.

13. *Simmons*, 74 N.C. App. at 728, 329 S.E.2d at 724; *see also Jones*, 52 N.C. App. at 109, 278 S.E.2d at 264; *Lynn*, 44 N.C. App. at 151, 260 S.E.2d at 685.

14. 32 N.C. App. 76, 231 S.E.2d 178.

> parent is not entitled as a matter of law to a deduction proportionate to the amount of time spent with the child. Credit is not likely to be appropriate for frivolous expenses or for expenses incurred in entertaining or feeding the child during visitation periods. Credit is more likely to be appropriate for expenses incurred with the consent or at the request of the parent with custody. Payments made under compulsion of circumstances are also more likely to merit credit for equitable reasons . . . . See 47 A.L.R. 3d, *supra*, at §§ 5, 6, 7, 15-19. We emphasize that these are not hard and fast rules, and that the controlling principle is that credit is appropriate *only when an injustice would exist if credit were not given.*[15]

Although the *Goodson* court expressly recognized the credit theory for voluntary expenditures in 1977, few cases after *Goodson* dealt with it. The court of appeals subsequently said the theory was "used with considerable reluctance."[16] The reluctance could be attributed, at least in part, to a desire to avoid "injustice to the custodial parent, who is entitled to rely on the continuation of monetary payments to defray necessary living expenses for the children."[17]

North Carolina cases dealing with credit for voluntary expenditures fall into two categories. The cases involve credit for support expenses incurred generally while the child was temporarily living with the parent requesting the credit[18] and credit for specific voluntary expenditures on the child's behalf incurred while the child was living with the custodial parent.[19]

1. Credit for Support Expenses Incurred While the Child Was Living Temporarily With the Parent Requesting Credit

Although the *Goodson*[20] court claimed that it decided the issue for the first time in North Carolina,[21] in two prior cases the supreme court and the court of appeals held that arrearages due under a court order for child support should be reduced by the amount of the payments due during the period the child lived with

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15. *Id.* at 81, 231 S.E.2d at 182 (emphasis added).
16. Gates v. Gates, 69 N.C. App. 421, 429, 317 S.E.2d 402, 407 (1984).
17. *Jones*, 52 N.C. App. at 109, 278 S.E.2d at 263. *Accord Lynn*, 44 N.C. App. at 152, 260 S.E.2d at 685.
18. *See infra* discussion at notes 20-45.
19. *See infra* discussion at notes 46-49.
20. 32 N.C. App. 76, 231 S.E.2d 178 (1977).
21. *Id.* at 81, 231 S.E.2d at 182.

the parent requesting reduction.[22] Neither court offered any explanation for its determination, implying that the parent was entitled to reduction as a matter of law.[23]

However, in two subsequent cases, *Simmons v. Simmons* and *Jones v. Jones*, the court of appeals followed *Goodson*[24] and held that a trial court had the discretion to allow or disallow credit against arrearages for voluntary expenditures incurred for supporting the child while the child lived with the parent requesting credit.[25] In both cases, the court applied the *Goodson* test, whether justice required that credit be given under the facts of that particular case.[26] In *Simmons*,[27] the court affirmed the trial court's denial of credit although the child lived with the parent requesting credit almost half of the time during which the arrearages accrued.[28] The *Simmons* court justified its decision by quoting with approval *Gibson v. Gibson*,[29] a case denying a prospective credit proportionate to the time the child was with the noncustodial parent. "The fact that a child spends a certain amount of time with

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22. Jarrell v. Jarrell, 241 N.C. 73, 84 S.E.2d 328 (1954) (per curiam); Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

23. "There is competent evidence in the Record to support His Honor's findings of fact that the respondent acted in good faith in . . . not making a payment . . . while [the child] was living with him [about six weeks], and on that basis he is only $35.00 in arrears . . . ." 241 N.C. at 74, 84 S.E.2d at 329. "Defendant is entitled to have his obligation to [pay] plaintiff [child support] reduced . . . because [the child was] living with him." *Lindsey*, 34 N.C. App. at 204, 237 S.E.2d at 563 (one child lived with the parent for 18 months, the other for four years).

24. 32 N.C. App. 76, 231 S.E.2d 178 (1977).

25. *Simmons*, 74 N.C. App. 725, 329 S.E.2d 723 (1985); *Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

In *Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981), credit was allowed for a portion of the amount of the child support payments due under the order for the period of time the children stayed with the father during visitations (six weeks in 1977 and five weeks in 1979). In *Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), the court did not state whether the expenditures for clothing, food, recreation, and medical treatment were incurred while the child lived with the parent claiming credit.

In addition, in Walker v. Walker, 59 N.C. App. 485, 297 S.E.2d 125 (1982), the court of appeals indicated that a noncustodial parent under a court-ordered obligation to pay child support may be entitled to relief from payments which accrued during a period of reconciliation between the parents. *Id.* at 489, 297 S.E.2d at 128.

26. *Goodson*, 32 N.C. App. at 81, 231 S.E.2d at 182.

27. 74 N.C. App. 725, 329 S.E.2d 723.

28. *Id.* at 726, 329 S.E.2d at 723.

29. 68 N.C. App. 566, 316 S.E.2d 99 (1984).

one parent does not necessarily mean . . . that his reasonable and necessary living expenses are incurred proportionally."[30]

On its face, section 50-13.10 appears to modify the *Goodson* rules that allow retroactive modification in the court's discretion. Section 50-13.10 precludes a trial court from granting a credit against arrearages for support expenses incurred while the child temporarily lived with a non-custodial parent requesting the credit unless (1) the child was "living with" that parent pursuant to a valid court order[31] or (2) that parent filed a motion requesting a reduction before the arrearages accrued.[32] Under section 50-13.10, if the court finds that the child was "living with" the non-custodial parent pursuant to a court order, the *Goodson* rules do not operate; in effect, the statute automatically grants a total credit equal to the support obligation for that period of time by excluding payments due during that time from the definition of arrearages.[33]

The General Assembly, however, failed to define the term "living with." The extent to which North Carolina appellate courts will include court-ordered visitation in this term remains to be seen. The courts could exclude all visitation periods from the definition of the term "living with" by limiting its application to court

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30. *Id.* at 570, 316 S.E.2d at 103. *See also* Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983), a prospective credit case, quoting with approval *Goodson*, 32 N.C. App. at 81, 231 S.E.2d at 182, "Credit is not likely to be appropriate . . . for expenses incurred in entertaining or feeding the child during visitation periods."

31. Under § 50-13.10, no arrearage accrues while the child lives with the parent pursuant to a court order.

> For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues . . . during any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party.

N.C. GEN. STAT. § 50-13.10(d)(3).

32. [A] past due child support payment . . . may not thereafter be vacated, reduced, or otherwise modified *in any way for any reason* . . . except that a child support obligation may be modified . . . if, but only if, a written motion is filed, and due notice is given to all parties either:
(1) before the payment is due or
(2) if the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before payment is due, then promptly after the moving party is no longer so precluded.

N.C. GEN. STAT. § 50-13.10(a) (emphasis added).

33. *Supra* note 31.

orders providing for joint or shared custody arrangements. An assumption that the trial court ordered visitation without adjusting support liability during that time because it recognized that the child's reasonable living expenses were not incurred proportionally to the amount of time he spent with a parent could justify such a limitation.[34] On the other hand, the appellate courts could extend the application of the term "living with" to include court-ordered visitation periods of extended duration. Because temporary absences from the custodial parent's home do not affect the fixed expenses of rearing a child, however, the court should limit the availability of this extraordinary remedy to exceptional cases involving extended visitation periods.

Section 50-13.10 also precludes a court from using its discretion under *Goodson* to allow or disallow a credit if the child was living with the parent requesting credit as a result of an agreement changing primary custody. In that situation, the statute once again mandates a total credit.[35] As a result of section 50-13.10, the *Goodson* rules, allowing a discretionary credit for expenses incurred while the child was living temporarily with the parent requesting credit and not because of a change in primary custody, apply only if the child was living with that parent by agreement, rather than by court order. In addition, the statute precludes the court from allowing a *Goodson* credit in that situation unless that parent filed a prior motion or was precluded from filing the motion by (1) physical disability; (2) mental incapacity; (3) indigency; (4) misrepresentation of another party; or (5) other compelling reason.[36]

The statute provides no guidance for defining the "other compelling reason" exception. It is doubtful that the prior case law allowing a credit for support expenses incurred while the child temporarily lived with the parent requesting credit by agreement[37] will aid the courts when they construe the term "other compelling reason." The statute limits the mandatory total credit for time spent with the non-custodial parent by agreement to situations in which the parties agreed to "transfer primary custody to the supporting party."[38] This limitation, in conjunction with the obvious legislative intent to change the prior case law, demonstrates intent to

34. *See supra* note 30.
35. N.C. GEN. STAT. § 50-13.10(d)(3).
36. *See supra* note 32.
37. *See supra* text accompanying notes 20-30.
38. *See supra* discussion at note 35.

prohibit discretionary *Goodson* retroactive changes in the absence of a prior motion. On the other hand, one could argue that section 50-13.10 was the result of a congressional mandate by federal legislation,[39] rather than any state legislative desire to change prior case law, and that the legislature intended to include situations covered by the *Goodson*[40] test of preventing an injustice in its "compelling reason" exception to the prior motion requirement.[41] Such an interpretation, however, ignores the plain meaning of the statute, which requires a compelling reason for failing to file the motion[42] rather than a compelling reason for granting the credit. It also ignores the federal mandate that prohibits retroactive modification in the absence of a prior motion.[43]

Section 50-13.10 apparently does not change the prior rule that North Carolina courts had no power to reduce retroactively court-ordered child support by ordering reimbursement of support payments already made. In 1986, in a case of first impression, the court of appeals held that a trial court lacked the authority to reduce retroactively a lump sum child support payment already paid under a consent judgment.[44] The trial court had ordered repayment of a portion of the lump sum proportional to the ratio of the length of time the child lived with the noncustodial parent before attaining majority to the total time from entry of the consent judg-

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39. The child support enforcement program established by Title IV of the Social Security Act requires states to meet certain requirements to be eligible to receive federal Aid to Families with Dependent Children funds. "A state plan for child and spousal support must . . . provide, to the extent required by section 666 of this title, that the state (a) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section . . . ." 42 U.S.C. § 654(20)(A) (1984).

In 1986, Congress added a new requirement that states must meet to comply with the child support enforcement program:

> Procedures which require that any payment or installation of support under any child support order . . . is . . . (c) not subject to retroactive modification by such state or by any other state; except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given . . . to the obligee or (where the obligee is the petitioner) to the obligor.

42 U.S.C. § 666(a)(9) (1986).

40. *See supra* text accompanying notes 14-30.

41. N.C. GEN. STAT. § 50-13.10(a). *See supra* note 32.

42. *Id.*

43. *Supra* note 39.

44. Reavis v. Reavis, 82 N.C. App. 77, 345 S.E.2d 460.

ment to majority.[45]

2. Credit for Voluntary Expenditures Incurred While the Child Was Living With the Custodial Parent

Two court of appeals cases reviewed whether credit should be allowed for specific voluntary expenditures made when the child was not living with the parent requesting credit.[46] In both cases, the court used the *Goodson* guidelines[47] to determine the credit issue. In *Lynn v. Lynn*,[48] the court allowed credit for a portion of the cost of a furnace the noncustodial parent installed at the custodial parent's request in the residence occupied by the children. In *Brower v. Brower*,[49] noting a history of delinquent payments and the custodial parent's lack of consent to the expenditures, the court of appeals refused to allow credit for the cost of two automobiles for the children.

Under section 50-13.10, courts can allow a credit for voluntary expenditures incurred while the child lived with the custodial parent only if a motion was filed before the payment was due or the noncustodial parent was precluded from filing such a motion.[50]

B. Retroactive Reduction by Allowing Credit for Payments Due After Termination of the Parental Duty of Support

In addition to situations involving voluntary expenditures, pre-section 50-13.10 case law authorized courts to reduce arrearages due under a prior court order that accrued after the occurrence of an event that terminated the parental duty to support. This question arose when a support order covered two or more children and by its terms required continued payments[51] although

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45. *Id.* at 79, 345 S.E.2d at 463.

46. *Brower*, 75 N.C. App. 425, 331 S.E.2d 170; *Lynn*, 44 N.C. App. 148, 260 S.E.2d 682.

47. *See supra* note 15.

48. 44 N.C. App. 148, 260 S.E.2d 682.

49. 75 N.C. App. at 434, 331 S.E.2d at 177. The court also refused to allow credit for one child's earnings (on the ground that his parent waived his right to the unemancipated child's earnings by consenting to the child's receipt of the earnings) and for the parent's inability to claim his children as dependents for income tax purposes. *Id.*

50. *See supra* note 32.

51. In *Jarrell*, 241 N.C. 73, 84 S.E.2d 328, the consent order stated the payments should continue "so long as [the] children are not self-supporting." In *Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561, the order required the support of the

the parent's support obligation for one of the children had terminated.

In the only North Carolina Supreme Court case on this issue, *Jarrell v. Jarrell*, a per curiam opinion, one of the children married.[52] The order did not state the amount to be paid for the support of each of the children individually. It merely provided for a payment of "$100 per month for the support of [the] two children."[53] Without discussion, the court held that the trial court properly reduced the arrearages by one-half of the amount due under the order for the period of time after the child's marriage.[54] By automatically reducing the payment by one-half, the court ignored the possibility that the younger child's needs were greater than $50 per month during the period after the marriage.

In three cases, the court of appeals approved a retroactive reduction on the ground that one of two children no longer was a minor.[55] In *Lindsey v. Lindsey*, the prior order specified the amount of the parent's support obligation for each child individually.[56] When the court determined the parent's liability for arrearages, it merely noted that the noncustodial parent was entitled to have his support obligation reduced by the amount specified in the

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minor children and failed otherwise to state a terminating contingency. In *Brower*, 75 N.C. App. 425, 427, 331 S.E.2d 170, 172, the order stated that the payments should continue "until further order of the court." In *Gates*, 69 N.C. App. 421, 423, 317 S.E.2d 402, 404, the confession of judgment stated that the payments should be made until the youngest child reached 21, became self-supporting, married, or died. Subsequently the age of majority was lowered to 18. The court held that the intent of the judgment was "to provide support only until the end of the legal obligation at emancipation." *Gates*, 69 N.C. App. at 427, 317 S.E.2d at 406.

52. *Jarrell*, 241 N.C. 73, 84 S.E.2d 328.

53. *Id.* at 74, 84 S.E.2d at 328.

54. *Id.*

55. *Brower*, 75 N.C. App. 425, 331 S.E.2d 170; *Gates*, 69 N.C. App. 421, 317 S.E.2d 402; *Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561. In Tilley v. Tilley, 30 N.C. App. 581, 227 S.E.2d 640 (1976), the father requested a retroactive reduction of arrearages on the ground that the older child had reached 18. The court of appeals stated that "[w]hether the trial court has the authority to retroactively reduce payments provided for child support by a prior order of the court is not before us, since the court in the instant case made no retroactive change in the . . . order." (citation omitted) *Id.* at 584, 227 S.E.2d at 642. N.C. Gen. Stat. § 50-13.4(c) (1983) provides in part that "[p]ayments ordered for the support of a child shall terminate when the child reaches the age of 18 . . ." unless limited statutory exceptions apply.

56. *Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561.

order for that child for the period of time after she attained majority.[57] The other two cases, *Brower v. Brower* and *Gates v. Gates*, involved support orders that stated single aggregate amounts and failed to identify separate amounts of support for each of two children.[58] The support orders also failed to specify the effect of termination of the parent's duty to support one of the children on his obligation under the order.[59] In both cases, the court of appeals remanded the order reducing the arrearages because the trial court failed to make findings of fact relating to the younger child's needs during the period after the older child reached majority.[60] These appear to be the only two cases applying the statutory standard of a judicial finding of changed circumstances[61] to retroactive modification of child support due under a court order.

The new statute[62] contains no provision authorizing a credit against arrearages accruing after the parental duty to support terminates because of a child's attainment of majority or marriage. Prior case law makes it clear that, in such situations, the supporting parent cannot reduce unilaterally the aggregate support payment but instead must seek modification by the court.[63] It appears

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57. *Id.* at 204, 237 S.E.2d 561.

58. *Brower*, 75 N.C. App. 425, 331 S.E.2d 170; *Gates*, 69 N.C. App. 421, 317 S.E.2d 402.

59. The order in *Gates* implied that it should have no effect. *See infra* note 63.

60. *Brower*, 75 N.C. App. at 433-34, 331 S.E.2d at 176; *Gates*, 69 N.C. App. at 430, 317 S.E.2d at 407-08.

61. "An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. GEN. STAT. § 50-13.7(a).

62. N.C. GEN. STAT. § 50-13.10.

63. The reason underlying prohibition of unilateral modification was stated in *Gates*, 69 N.C. App. at 428-29, 317 S.E.2d at 407, quoting Halcomb v. Halcomb, 352 So. 2d 1013, 1016 (La. 1977):

> [U]nless automatic reduction, modification or termination is provided for by operation of law, the award remains enforceable notwithstanding that a cause for reduction may have occurred which would, upon proper suit, warrant such a reduction. Support for this rule is found in a proper regard for the integrity of judgments. Such a regard does not condone a practice which would allow those cast in judgment to invoke self-help and unilaterally relieve themselves of the obligation to comply. Any other rule of law would greatly impair the sanctity of judgments and the orderly processes of law. To condone such a practice would deprive the party, in whose favor the judgment has been rendered, of an opportunity to present countervailing evidence, and at the same time deny the judge

that, in the absence of a statutory exception covering this situation, the statute's general prohibition of retroactive modification "in any way for any reason"[64] precludes North Carolina courts from granting such credits in the future, in the absence of a motion filed before the arrearages accrued or one of the exceptions to the prior motion requirement.

This omission could be a legislative oversight, especially when considered in light of provisions effectively mandating a total credit in the event of the child's death.[65] More likely, the omission reflects a legislative policy decision to place the burden on a parent to assert in a timely manner his or her right to discontinue court-ordered child support payments upon termination of the parental support duty. Predictability of the attainment of majority justifies placement of such a burden on that parent. Arguably marriage, especially the marriage of a minor, is not necessarily a foreseeable occurrence. Under section 50-13.10(a)(2), however, the parent of a minor whose marriage was unanticipated or previously undisclosed can be excused from the statutory requirement of a prior motion. Ignorance of the marriage would either qualify as "misrepresentation of another party" or "other compelling reason" under the statute. Likewise, the courts may construe the "other compelling reason" exception to the prior motion requirement to include a mistaken belief that the occurrence of an event terminating the parental duty to support also terminated the obligation to continue payments pursuant to the court order.

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an opportunity to review the award in light of the alleged mitigating cause which had developed since its rendition.

Accord Brower, 75 N.C. App. 425, 331 S.E.2d 170.

64. N.C. GEN. STAT. § 50-13.10(a), *supra* note 32.

65. "For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues: (1) from and after the date of the death of the minor child for whose support the payment, or relevant portion, is made; (2) from and after the date of the death of the supporting party . . . ."

N.C. GEN. STAT. § 50-13.10(d).

III. RETROACTIVE MODIFICATION IN NORTH CAROLINA OF SUPPORT PROVISIONS IN SEPARATION AGREEMENTS NOT INCORPORATED INTO DIVORCE DECREES[66]

A. *By the Parties*

Just as with any other contract, the parties may agree to modify child support provisions in their separation agreement and, in addition, to make their modification retroactive. If the parties choose to modify their separation agreement, however, they must do so in writing and the modification must be acknowledged by both parties before a certifying officer.[67]

B. *By the Courts*

North Carolina has long recognized the general rule that an agreement or contract between the parents cannot deprive the court of its inherent authority to protect the interests and provide for the welfare of the minor children of the marriage.[68] North Carolina courts, therefore, have the power to enter an independent support order increasing or decreasing the amount agreed upon by

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66. Retroactive modification of support provisions in separation agreements incorporated into court orders after January 11, 1983, like consent judgments, will be governed by the rules applicable to court-ordered support. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1981); Tyndall v. Tyndall, 80 N.C. App. 722, 343 S.E.2d 284 (1986).

The pre-section 50-13.10 case of Reavis v. Reavis, 82 N.C. App. 77, 345 S.E.2d 460 (1986), applied *Walters'* modification rules to a consent judgment. In *Reavis*, the court indicated that courts may refuse retroactive modification of a negotiated agreement later made part of a consent judgment even though prior case law allowed such modification of a judicially imposed support obligation under similar circumstances. In *Reavis*, the court of appeals refused to allow retroactive reduction of a lump-sum child support payment under a consent judgment. The court noted general judicial reluctance to allow attacks on consent judgments stemming from an assumption that parties who negotiate such agreements are aware that circumstances (such as the child's residence) following entry of the consent order might change. *Id.* at 82, 345 S.E.2d at 463.

67. Smith v. Smith, 225 N.C. 189, 34 S.E.2d 148 (1945); Greene v. Greene, 77 N.C. App. 821, 336 S.E.2d 430 (1985). *But see* Altman v. Munns, 82 N.C. App. 102, 345 S.E.2d 419 (1986) (implying that parol modifications are permissible by holding that, to be an effective parol modification of a separation agreement, all requisites of a contract must be met, including consideration).

68. *See* Thomas v. Thomas, 248 N.C. 269, 103 S.E.2d 371 (1958); McKaughn v. McKaughn, 29 N.C. App. 702, 225 S.E.2d 616 (1976); Bottomley v. Bottomley, 82 N.C. App. 231, 346 S.E.2d 317 (1986).

the parties in a valid separation agreement.[69]

A few North Carolina cases indicate that a trial court has the power to give retroactive effect to a child support order that prospectively changes the amount of the contractual obligation. These decisions apparently applied some of the rules governing prospective changes of contractual child support to retroactive changes.[70] Therefore, it is necessary to examine briefly the rules governing prospective changes. The amount of child support agreed upon by the parties in a separation agreement cannot be prospectively increased by a trial court in the absence of any evidence of the need for such increase.[71] The courts in cases involving prospective increases presume that the amount agreed upon by the parties in the contract is reasonable. The supreme court first articulated this presumption in 1963 in *Fuchs v. Fuchs*.[72] The *Fuchs* presumption of

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69. *Id.*; Richardson v. Richardson, 261 N.C. 521, 135 S.E.2d 532 (1964).

The court, however, has no power to modify child support provisions in the contract itself without the parties' consent. Church v. Hancock, 261 N.C. 764, 136 S.E.2d 81 (1964).

The effect of this distinction is unclear. Apparently only the non-moving party to the child support action can assert the availability of an independent action to recover the difference between the amount required to be paid by the child support order and the amount due under the separation agreement. In *Richardson*, 261 N.C. 521, 135 S.E.2d 532, the supreme court held that the plaintiff who earlier counterclaimed for child support in her husband's action for divorce could not later recover the difference between the amount paid under the order and the amount due under the separation agreement because she elected her remedy by bringing the action for child support. The court of appeals has stated in dicta in two cases that an independent action to recover the difference is available. In *McKaughn*, 29 N.C. App. 704, 706, 225 S.E.2d 616, 619 (1976), the court stated that "[t]he judgment . . . does not change plaintiff's *contractual* obligations under the separation agreement." In *Bottomley*, 82 N.C. App. at 235, 346 S.E.2d at 320, the court, citing *McKaughn*, 29 N.C. App. at 704, 225 S.E.2d at 618, stated that the effect of an order setting a lesser amount than provided for in a separation agreement was "to limit [the custodial parent's] contempt remedy to the sums provided for by the court order." *"[I]f the court allows the child's [custodial parent] less money for support for [the] child than does the valid separation agreement between the child's parents, the remedy of the [custodial parent] is to sue the [non-custodial parent] for breach of contract and obtain a judgment for the difference." Id., citing* 3 R. Lee, NORTH CAROLINA FAMILY LAW § 229 at 139 (4th ed. 1981) (emphasis supplied by the court). Both *McKaughn* and *Bottomley* dealt with the issue of whether a trial court could order an amount lower than the contractual amount in an independent action for child support; neither case involved the appeal of a judgment for the difference.

70. *See infra* discussion at notes 76-86.

71. Williams v. Williams, 261 N.C. 48, 134 S.E.2d 227 (1964).

72. 260 N.C. at 639, 133 S.E.2d at 491.

reasonableness can be rebutted by evidence that the amount of support reasonably needed by the child at the time of the hearing substantially exceeds the amount agreed upon in the separation agreement.[73] The court of appeals has not applied uniformly the *Fuchs* presumption in cases involving prospective decreases.[74] In one of two cases, the court merely required a determination of the child's reasonable needs and the parents' relative abilities to pay at the time of the hearing, as it would if no prior separation agreement existed.[75]

1. *Retroactive Increases*

Although North Carolina case law on this topic provides little guidance to trial courts facing the issue, both appellate courts ap-

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73. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986). For many years, there was confusion as to the proof required to rebut the *Fuchs* presumption that the amount of child support agreed upon in the separation agreement was reasonable. Some court of appeals cases held that a showing of changed circumstances between the time of the separation agreement and the date of the hearing was necessary to rebut the presumption of reasonableness. *See* Hershey v. Hershey, 57 N.C. App. 692, 292 S.E.2d 141 (1982); Rabon v. Ledbetter, 9 N.C. App. 376, 176 S.E.2d 372 (1970). Other cases decided during the same time period, however, held that the moving party was not required to show changed circumstances; he was required only to show the amount reasonably required for the support of the child at the time of the hearing. Walker v. Walker, 63 N.C. App. 644, 306 S.E.2d 485 (1983); Perry v. Perry, 33 N.C. App. 139, 234 S.E.2d 449, *disc. rev. denied*, 292 N.C. 730, 235 S.E.2d 784 (1977). The court of appeals attempted to clarify the effect of the *Fuchs* presumption of reasonableness in *Boyd*.

> [T]he moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing. Should the evidence establish . . .that such amount substantially exceeds the amount agreed upon in the separation agreement, such evidence would necessarily rebut the presumption of reasonableness created in *Fuchs* and establish the need for an increase. Absent such a showing, the agreement of the parties will be deemed to be reasonable. While evidence of a change in circumstances, involving a comparison of actual expenditures and other circumstances between the time of the separation agreement and that date of the hearing, may be relevant to the issue of reasonableness, such evidence is not an absolute requirement to justify an increase.

81 N.C. App. at 76, 343 S.E.2d at 585.

74. *Bottomley*, 79 N.C. App. 231, 346 S.E.2d 317. In *McKaughn*, 29 N.C. App. 702, 225 S.E.2d 616, the court of appeals applied the *Fuchs* presumption but required a showing of changed circumstances to rebut the presumption, *citing Rabon*, 9 N.C. App. 376, 176 S.E.2d 372.

75. *Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317.

pear to recognize the availability of the remedy of retroactive increase of contractual child support. No North Carolina case, however, has dealt with the issue of whether a court could retroactively increase child support arrearages due under a separation agreement. In addition, the appellate courts have never affirmed an order retroactively increasing contractually agreed upon amounts of already-paid child support.

The one supreme court opinion dealing with this issue seemingly limits the remedy of retroactive increase of contractual child support provisions to cases showing an emergency situation. In *Fuchs*,[76] the supreme court reversed the portion of the trial court's order retroactively increasing the amount of child support paid pursuant to the contract. The opinion, however, included only a very brief, almost summary, discussion of the issue.

> [T]he order making the increased allowance retroactive . . . without evidence of some emergency situation that required the expenditure of sums in excess of the amounts paid by the plaintiff for the support of his minor children, is neither warranted in law nor equity.[77]

In *Calhoun v. Calhoun*,[78] the court of appeals indicated that it would apply the *Fuchs* presumption of reasonableness to retroactive changes as well.[79] The *Calhoun* court held that the complaint failed to state a cause of action in the absence of allegations supporting either changed circumstances or the need for the custodial parent to spend sums in excess of the amount received pursuant to the separation agreement.[80] In *Boyd v. Boyd*,[81] the court of appeals recognized the trial court's power to increase retroactively the con-

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76. 260 N.C. 635, 133 S.E.2d 487.

77. *Id.* at 641, 133 S.E.2d at 492.

78. 7 N.C. App. 509, 172 S.E.2d 894 (1970).

79. *Id.* at 512, 172 S.E.2d at 896. The separation agreement in *Calhoun* required the father to make child support payments directly to the minor child and did not contain any provision for payments to the custodial mother. The plaintiff mother sued to set aside the portion of the agreement providing for payments to the child and to recover actual sums she had expended on the child in the past. *Id.* at 510-11, 172 S.E.2d at 895.

80. The court also noted that the rule that the courts had the power to disregard the contract to protect the interests of a minor child did not apply in this case; the mother had waited until her son was 23 to bring her action to have the contract disregarded and for reimbursement of actual expenditures on the son's behalf. 7 N.C. App. at 513, 172 S.E.2d at 896.

81. 81 N.C. App. 71, 343 S.E.2d 581 (1986).

tractually agreed-upon amount but reversed that portion of the order because the trial court failed to make sufficient findings of fact supporting the amount of the retroactive award and the date to which the defendant's obligation was made retroactive.[82] The court, however, provided no guidance for making such determinations in the future.[83]

2. *Retroactive Decreases*

One North Carolina case dealt with a retroactive decrease in the amount of child support due under a separation agreement. In *Beverly v. Beverly*,[84] the court applied the *Goodson*[85] rule allowing a trial court to apply a credit to offset arrearages due under a court order for child support. In *Beverly*, the defendant reduced unilaterally the amount of his child support payments due under a separation agreement when one of the children, who previously lived with the plaintiff, went to live with the defendant. The plaintiff sued for arrearages due under the contract. The court of appeals held that to prevent an injustice the trial court should have set off the defendant's contractual obligation by the amount he voluntarily expended in support of the child while the child lived with him. The court was "persuaded by equitable considerations that credit [was] necessary," noting that "[i]t is uncontradicted that [the child] went to live with defendant at plaintiff's request."[86]

IV. RETROACTIVE CHANGES IN SUPPORT OBLIGATIONS THROUGH THE CAUSES OF ACTION FOR REIMBURSEMENT OF CHILD SUPPORT

North Carolina courts can reimburse the custodial parent, a third-party provider of necessaries, or the state for past expenditures for the support of a minor child. A parent who previously may have been unaware that he was a parent may suddenly face not only a prospective obligation of child support but also liability

82. In this action by the mother for court-ordered child support, the trial court increased the amount agreed upon in the separation agreement retroactively although the father had been paying more than the separation agreement required during the time in question. 81 N.C. App. at 72, 343 S.E.2d at 583.

83. The court of appeals vacated the prospective increase because the trial court's findings of fact regarding the parents' relative abilities to pay and the reasonable needs of the children were insufficient. *Id.* at 82, 343 S.E.2d at 588.

84. 43 N.C. App. 60, 257 S.E.2d 682 (1979).

85. 32 N.C. App. 76, 231 S.E.2d 178 (1977). *See supra* discussion at notes 14-17.

86. *Beverly*, 43 N.C. App. at 62-63, 257 S.E.2d at 684.

for sums the plaintiff expended on the child in the past. Moreover, a parent who has fully satisfied his child support obligation also, in some circumstances, may face liability retroactively for additional expenditures. Neither the existence of court-ordered or contractual child support duties during the time for which reimbursement is sought nor a prior demand upon the defendant to pay the support costs sought in the reimbursement action is necessary. The elements of the causes of action for reimbursement and the statutes of limitation governing those actions vary depending on the identity of the plaintiff.

A. Reimbursement of Child Support Furnished by a Parent: Retroactive Child Support

A parent who previously provided the sole support of his or her child may seek reimbursement of a portion of those expenditures from the other parent.[87] The North Carolina courts have labeled this cause of action "retroactive child support,"[88] "back child support,"[89] and "reimbursement";[90] this discussion will use the term "retroactive child support." In a retroactive child support action, the plaintiff seeks an order for reimbursement from defendant for his share of plaintiff's past reasonably necessary expenditures for support of their child.[91] The cause of action is not one for "arrearages,"[92] because it is available only in the absence of a prior

87. North Carolina has joined at least seventeen other states in recognizing a cause of action for reimbursement of child support furnished by a custodial parent. *See* Annotation, *Father's Liability for Support of Child Furnished After Divorce Decree Which Awarded Custody to Mother But Made No Provision for Support*, 91 A.L.R.3d 530 (1979); Annotation, *Father's liability for support of child furnished after entry of decree of absolute divorce not providing for support*, 69 A.L.R.2d 203 (1960); *see also infra* discussion at notes 91-145.

88. Plott v. Plott, 313 N.C. 63, 79, 326 S.E.2d 863, 873 (1985), *aff'ing in part, modifying in part, rev'ing in part*, 65 N.C. App. 657, 310 S.E.2d 51 (1983); Buff v. Carter, 76 N.C. App. 145, 146, 331 S.E.2d 705, 706 (1985); Warner v. Lattimer, 68 N.C. App. 170, 175, 314 S.E.2d 789, 792 (1984); Wood v. Wood, 60 N.C. App. 178, 180, 298 S.E.2d 422, 423 (1982).

89. *Warner*, 68 N.C. App. at 174, 314 S.E.2d at 792; *Wood*, 60 N.C. App. at 179, 298 S.E.2d at 422.

90. Tidwell v. Booker, 290 N.C. 98, 116, 225 S.E.2d 816, 827 (1976); Stanley v. Stanley, 51 N.C. App. 172, 180, 275 S.E.2d 546, 551, *rev. den.*, 303 N.C. 182, 280 S.E.2d 454, *cert. den.*, 454 U.S. 959 (1981); Hicks v. Hicks, 34 N.C. App. 128, 130, 237 S.E.2d 307, 309 (1977).

91. See *supra* notes 107-08.

92. *Buff*, 76 N.C. App. at 147-48, 331 S.E.2d at 707. *Cf. Plott*, 313 N.C. at 79,

order or contract concerning child support payments.[93] The cause of action is available even though plaintiff made no prior demand for reimbursement or child support upon defendant[94] and even if defendant made voluntary support payments during the time in question.[95]

A limited number of North Carolina cases address this cause of action.[96] The supreme court first used it in 1947 in a case extending a father's duty to support a child who was mentally and physically incapable of self-support beyond the date of the child's majority.[97] The court, however, failed to cite any authority for the use of the remedy or to discuss its availability in that case.[98]

The supreme court first expressly recognized the retroactive child support action[99] with regard to illegitimate children in *Tidwell v. Booker*.[100] In *Tidwell*, the supreme court based the cause of

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326 S.E.2d at 873 (the court referred to the cause of action as "retroactive child support" and later referred to the amount of "arrearages").

93. If prior court-ordered or contractual support obligations existed, the action would be one for retroactive modification, not for retroactive child support.

94. *Buff*, 76 N.C. App. at 147-48, 331 S.E.2d at 707.

95. *Warner*, 68 N.C. App. 170, 314 S.E.2d 789 (1984).

96. There are nine cases. *See supra* notes 88-90 and *infra* note 97.

97. Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947).

98. In *Wells*, the wife alleged in the complaint the right to recover the value of "necessities and necessary services and attentions . . . furnished by plaintiff to [the child] . . . ." *Id.* at 615, 44 S.E.2d at 32. The court held "that the allegations of the complaint do state a cause of action" and "that the expenditures made by the plaintiff since the son reached [majority] were impelled by necessity." *Id.* at 620, 44 S.E.2d at 35.

99. In Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976), the court held that the defendant was not estopped by the determination of paternity in a prior criminal action for nonsupport from denying paternity in the subsequent civil action for prospective child support and retroactive child support. *Id.* at 115, 225 S.E.2d at 826. The court then discussed the availability of an action for retroactive child support because the question of the trial court's authority to require the defendant to reimburse the child's mother for past support expenditures would "necessarily arise upon such further proceeding in the district court [and the court] deem[ed] it advisable upon the present appeal to determine those matters also." *Id.* The discussion of the retroactive child support action, therefore, is actually *obiter dictum* in *Tidwell*.

100. 290 N.C. 98, 225 S.E.2d 816. In *Tidwell*, the supreme court referred to N.C. Gen. Stat. § 49-15, which provided that the duties of the parents to support an illegitimate child are the same, "and may be determined and enforced in the same manner, as if the child were [a] legitimate child . . . ." *Id.* at 108, 225 S.E.2d at 822.

action on section 50-13.4(b),[101] which at that time provided: "(b) In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother . . . shall be liable, in that order, for the support of a minor child . . . ."[102] Recognizing that section 50-13.4(b) imposed the primary duty to support the child upon the father, and a secondary duty upon the mother, the court held that "[a] party secondarily liable for the payment of an obligation, who is compelled by the default of the party primarily liable therefore to pay it, may, by action brought within the period of the applicable statute of limitations, compel the party primarily liable to reimburse him for such expenditure."[103] The *Tidwell* court also noted that the statute of limitations for retroactive child support actions would be the three-year statute applicable to liabilities created by statute.[104] Since *Tidwell*, the court of appeals has recognized the cause of action with regard to both legitimate[105] and illegitimate children.[106]

1. Retroactive Child Support Actions Before the 1981 Amendment to Section 50-13.4(b)

From its inception in North Carolina, retroactive child support was clearly limited to recovery of the defendant's share of the amount plaintiff actually expended in support of the child during the time in question.[107] When determining the defendant's share of plaintiff's actual past expenditures, the courts considered the needs of the child and the ability of the defendant to pay during the time for which reimbursement was sought.[108] As the action

101. N.C. GEN. STAT. § 50-13.4(b) (1983).

102. 290 N.C. at 115, 225 S.E.2d at 826.

103. *Id.* at 116, 225 S.E.2d at 827.

104. N.C. Gen. Stat. § 1-52(2) (1983). *Tidwell*, 290 N.C. at 116, 225 S.E.2d at 827. Therefore a plaintiff in a reimbursement action is limited to reimbursement of amounts expended on the child's behalf in the three years immediately preceding the suit for reimbursement. A new cause of action for reimbursement accrues with each expenditure in the child's behalf. *Id.*

105. *Plott*, 313 N.C. 63, 326 S.E.2d 863; *Warner*, 68 N.C. App. 170, 314 S.E.2d 789; *Wood*, 60 N.C. App. 178, 298 S.E.2d 422; *Stanley*, 51 N.C. App. 172, 275 S.E.2d 546; *Hicks*, 34 N.C. App. 128, 237 S.E.2d 307.

106. *Buff*, 76 N.C. App. 145, 331 S.E.2d 705.

107. *Warner*, 68 N.C. App. at 175, 314 S.E.2d at 792; *Wood*, 60 N.C. App. at 181, 298 S.E.2d at 424; *Stanley*, 51 N.C. App. at 180-81, 275 S.E.2d at 551; *Hicks*, 34 N.C. App. at 130, 237 S.E.2d at 309.

108. *Buff*, 76 N.C. App. at 146, 331 S.E.2d at 706; *Stanley*, 51 N.C. App. at 181-83, 275 S.E.2d at 552; *Hicks*, 34 N.C. App. at 130, 237 S.E.2d at 309.

evolved, the court of appeals applied many of the same rules when determining the extent of the defendant's retroactive liability as it applied when determining liability for prospective child support. The court used the same statutory factors[109] to arrive at the amount of the defendant's liability for retroactive child support.[110] In the action for retroactive child support, the court also applied the prospective child support rule which allows a trial court to consider the defendant's earning capacity, rather than his actual earnings, when determining his ability to pay.[111]

Because the existence of the cause of action was based on the primary/secondary rationale of *Tidwell*,[112] prior to the 1981 amendment of section 50-13.4, considerable doubt existed as to whether a father could bring an action for retroactive child support against a mother.

2. Retroactive Child Support Actions After the 1981 Amendment to Section 50-13.4

In June of 1981, the legislature amended section 50-13.4(b)[113] to make both the father and the mother primarily liable for the support of a minor child in the absence of pleading and proof that the circumstances warranted otherwise. The legislature also amended section 50-13.4(c)[114] to require the court to give due re-

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109. Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

N.C. GEN. STAT. § 50-13.4(c) (1984).

110. *Tidwell*, 290 N.C. at 115, 225 S.E.2d at 826; *Buff*, 76 N.C. App. at 147, 331 S.E.2d at 706; *Warner*, 68 N.C. App. at 172, 314 S.E.2d at 791; *Stanley*, 51 N.C. App. at 181, 275 S.E.2d at 552.

111. *Stanley*, 51 N.C. App. at 179, 275 S.E.2d at 551. The court, quoting Robinson v. Robinson, 10 N.C. App. 463, 468, 179 S.E.2d 144, 147 (1971), stated:

> To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband is failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his . . . children. Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912.

51 N.C. App. at 179, 275 S.E.2d at 550.

112. *Hicks*, 34 N.C. App. 128, 237 S.E.2d 307; *Stanley*, 51 N.C. App. 172, 275 S.E.2d 546; *Wood*, 60 N.C. App. 178, 298 S.E.2d 422. *See supra* discussion at note 102.

113. 1981 N.C. SESS. LAWS CH. 613 s. 1.

114. *Id.*

gard to "the child care and homemaker contribution of each party" in setting the amount of child support payments.

The first case dealing with the amendments' effect on the cause of action for retroactive child support also held that the cause of action was available to a father against a mother.[115] *Plott v. Plott* and subsequent cases[116] show that the cause of action for reimbursement survived the amendments to section 50-13.4 despite the action's origin in the now obsolete primary/secondary liability language of the pre-1981 version of that statute. *Plott*,[117] *Warner v. Latimer*,[118] and *Buff v. Carter*[119] indicate that the 1981 amendment did not affect the cause of action other than by (1) extending the availability of the action to a father;[120] (2) creating the difficulty of allocating the amount of child support between the parents under the statute's new dual primary liability rule;[121] and (3) introducing consideration of the factor of homemaking contributions.[122]

The post-1981 cases still use many of the same factors and rules, primarily section 50-13.4(b) and (c) and the case law interpreting it, for determining the amount of defendant's retroactive liability as trial courts use for determining the amount of defendant's liability for prospective child support. In *Plott*, both the court of appeals[123] and the supreme court[124] indicated that in retroactive child support actions the trial court should apply prospective support rules that govern the allocation of the duty of child support between the parties. The court of appeals also applied the statute governing the form of child support payments to retroactive child support actions.[125] In *Buff v. Carter*[126] the court noted

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115. *Plott*, 65 N.C. App. 657, 310 S.E.2d 51 (1983), *aff'd in part, modified in part, rev'd on other grounds in part*, 313 N.C. 63, 326 S.E.2d 863 (1985).

116. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789 (1984); Buff v. Carter, 76 N.C. App. 145, 331 S.E.2d 705 (1985).

117. 65 N.C. App. 657, 659, 310 S.E.2d 51, 53.

118. 68 N.C. 170, 173, 314 S.E.2d 789, 791.

119. 76 N.C. App. 145, 331 S.E.2d 705.

120. *Plott*, 65 N.C. App. at 660, 310 S.E.2d at 53.

121. *See Plott*, 313 N.C. 63, 68, 326 S.E.2d 863, 867.

122. *Plott*, 65 N.C. App. at 660, 310 S.E.2d at 53.

123. *Id.*

124. 313 N.C. at 69, 326 S.E.2d at 867.

125. In *Warner*, 68 N.C. App. 170, 314 S.E.2d 189, the court of appeals cited 50-13.4(e) in its discussion of form of payment of reimbursement: "Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or transfer of title or possession of personal property of any interest

that section 50-13.4(e) vests in the trial judge broad discretionary powers when determining the form of payment.[127] Only two forms of payment for retroactive child support, lump sum awards and periodic payments, appear in the North Carolina cases. In the two cases in which the trial judge ordered periodic payments after determining the total amount of defendant's liability, the appellate court vacated the order for reasons other than the form of the payment.[128]

3. Distinctions Between Retroactive and Prospective Child Support Actions

The courts use many prospective support rules to determine whether a defendant is liable for retroactive child support, and to what extent. However, retroactive and prospective child support actions differ in four important respects: the court's focus; the measure of liability; the equities of the case; and the availability of attorney's fees.

The focus in retroactive and prospective child support actions is the main distinction. In prospective support cases, the court uses present expenditures on behalf of the child to project the child's future needs.[129] Applicable law balances the child's and the parents' welfare by limiting the extent of defendant's support obligation by his ability to pay.[130] The court's primary concern is fairness to all concerned, the parents and child.[131]

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therein, or a security interest in or possession of real property, as the court may order." The court also noted that the forms of payment listed in the statute are not mutually exclusive.

126. *Buff*, 76 N.C. App. 145, 331 S.E.2d 705.

127. In *Buff*, the defendant contended that the order requiring him to pay a lump sum of $9325.50 within 60 days was in error since his financial affidavit showed that he was unable to pay that amount in so short a time. The court already had remanded the retroactive child support order for new findings and, therefore, refused to address the defendant's contention. The court noted, however, "that under G.S. 50-13.4(e) the trial judge has broad discretion in determining the manner of payment, and his order shall be upheld unless there is an abuse of discretion." *Id.* at 147, 331 S.E.2d at 707.

128. *Plott*, 65 N.C. App. 657, 310 S.E.2d 51; *Hicks*, 34 N.C. App. 128, 237 S.E.2d 307.

129. *See* Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980). *See, e.g., Plott*, 313 N.C. at 68-69, 326 S.E.2d at 867; *Warner*, 68 N.C. App. at 172, 314 S.E.2d at 791.

130. *Id. See, e.g., Stanley*, 51 N.C. App. at 179, 275 S.E.2d at 550-51.

131. *Coble*, 300 N.C. 708, 711, 268 S.E.2d 185, 189 (1980).

In contrast, because the expenditures for the child's support in retroactive child support determinations already have been made, the present or future welfare of the child is not in issue. The court's primary concern is which of the two parents should equitably bear the already-paid expenses of rearing the child.[132] As the court in *Hicks v. Hicks*[133] stated, in a retroactive child support action, the trial court is not free to determine what the defendant *should have* expended on the child in the past. The court is limited to a determination of what the defendant's share of plaintiff's *actual* expenditures should be,[134] even if the past actual expenditures failed to meet the child's reasonable needs.

Another distinction is the measure of liability. In a prospective support action there are two limits on liability. The trial court cannot order an amount of support greater than the parent's share of the child's reasonable needs or the parent's ability to pay.[135] In contrast, in a retroactive support action, there are three limits on liability: the child's reasonable needs during the time for which reimbursement is sought;[136] the parent's ability to pay during that time; and the actual past expenditures for support of the child.[137]

In retroactive support actions, the court may be prejudiced against the defendant initially because of the nature of the cause of action; the court is usually confronted by a defendant who has established a pattern of refusing to fulfill his legal obligation to support his child. If the plaintiff in fact unsuccessfully attempted to force the defendant to support his child in the past, the fact that the efforts were made and that the defendant evaded those efforts may affect the trial court. For example, in *Stanley*,[138] although the defendant father earned substantial sums of money and was capable of supporting his child, he successfully evaded plaintiff's numerous attempts to serve him with legal process for

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132. *See supra* note 107.

133. 34 N.C. App. 128, 237 S.E.2d 307 (1977).

134. *Id.* at 130, 237 S.E.2d at 309.

135. *See supra* notes 129-30.

136. The court must determine which actual expenditures were reasonably necessary for the child's support. *Buff*, 76 N.C. App. at 146, 331 S.E.2d at 706.

137. *See supra* discussion at notes 133-34. Therefore the court must make findings of fact of what the actual reasonable past expenditures were during the time for which reimbursement is sought, as well as findings of fact regarding ability to pay when determining defendant's share of actual past expenditures. *Hicks*, 34 N.C. App. 128, 237 S.E.2d 307.

138. 51 N.C. App. 172, 275 S.E.2d 546.

about thirteen years. The defendant's history of evading service of process clearly affected the court of appeals' review of the amount of defendant's share of the child's past reasonable needs.[139] In addition, the court of appeals affirmed an order containing findings of fact which lacked the specificity usually required in support orders.[140]

The plaintiff in an action for prospective support may recover attorney's fees if statutory requirements are satisfied.[141] Although

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139. In its review of the amount of defendant's share of support, the *Stanley* court employed the seldom used "other facts of the particular case" factor from § 50-13.4(c). The court stated that:

> while the defendant's ability to pay and his earning capacity are factors to be considered, they are not controlling. The [trial] court may also consider the conduct of the parties and the equities of the case. In this case it would be inequitable to allow the defendant to prevail on his argument that the mother should have based her expectations for reimbursement solely on his ability to pay where the record clearly shows that he moved quite often and went for long periods, sometimes years, without contacting his child or his ex-wife, thereby defeating her attempts to force him to support his child and preventing her from determining what his ability to pay was. In addition, defendant readily admitted that even during the time that he was earning substantial salaries, and therefore could have supported the child, he chose not to do so. A mother, who was forced, of necessity, to be the sole provider of support and maintenance of her child for fifteen years, should not be required to measure her expenditures in the child's behalf by guessing about the extent of the defaulting and absent father's ability to pay or earning capacity.

Stanley, 51 N.C. App. at 182-83, 275 S.E.2d at 552-53.

140. The defendant in *Stanley* also continued evasive tactics after he was served by failing to comply with plaintiff's discovery requests for records of his past income and living expenses and by testifying in a vague and confusing manner on these issues. As a result of defendant's pattern of evasion, the court of appeals relaxed its requirement that the trial court make specific findings of fact regarding defendant's ability to pay. "Although the trial court's findings supporting his conclusion that the defendant had the ability to provide $400 per month in support of his child lack the degree of specificity which would be required in an action for prospective child support, they are adequate in this action for reimbursement due to the difficulty of proving what defendant's past income and living expenses were." *Stanley*, 51 N.C. App. at 182, 275 S.E.2d at 552.

141. N. C. GEN. STAT. § 50-13.6:

> COUNSEL FEES IN ACTIONS FOR CUSTODY AND SUPPORT OF MINOR CHILDREN. - In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action,

the discussion in *Tidwell*[142] was *dicta*,[143] the supreme court stated, without explanation, that attorney's fees should not be available in a proceeding for retroactive child support.[144] No other North Carolina case has considered the issue of whether attorney's fees should be available.[145]

B. Reimbursement of Necessaries Provided by a Third Party: The Doctrine of Necessaries

At early common law, the "doctrine of necessaries"[146] provided a method of enforcing a father's[147] duty to support his child.[148]

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the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

142. 290 N.C. 98, 225 S.E.2d 816.

143. *Supra* note 100.

144. G.S. § 50-13.6 provides that in any action for the support of a minor child '. . . the court may in its discretion order payment of reasonable attorney's fees . . .' if the court finds as a fact that the party ordered to furnish support has refused to do so. We think the proper construction of this statute is that it applies to a proceeding to compel the future support of the child, not to a proceeding to compel reimbursement for past payments made by a party secondarily liable for such child's support.

Tidwell, 290 N.C. at 116-17, 225 S.E.2d at 827.

145. Warner v. Latimer, 68 N.C. App. 170, 314 S.E.2d 789, did involve an attorney's fee issue. The trial court in *Warner* awarded prospective and retroactive child support and attorney's fees. The court of appeals expressly limited its examination of the attorney fee issue to the defendant's assignment of error concerning the finding and conclusion that plaintiff had insufficient means to defray the expense of the action. *See supra* note 141. The court of appeals in *Warner* did not indicate whether the award for attorney's fees included services rendered in connection with the claim for retroactive child support; nor did it comment on the availability of attorney's fees in a retroactive support action.

146. Alamance County Hospital v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986), *rev'g* 68 N.C. App. 771, 315 S.E.2d 779 (1984).

147. *See id.*; Holland v. Hartley, 171 N.C. 376, 88 S.E. 507 (1916); Howell v. Solomon, 167 N.C. 588, 83 S.E. 609 (1914); P.J. Hunycutt & Co. v. Thompson, 159 N.C. 29, 74 S.E. 628 (1912); Everitt v. Walker, 109 N.C. 129, 13 S.E. 860 (1891).

148. The common law doctrine of necessaries also provided a method for enforcing a husband's duty to support his wife. *See* North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987) (overruling Presbyterian Hosps. v. McCartha, 66 N.C. App. 177, 310 S.E.2d 409, *disc. rev. improvidently allowed*, 312 N.C. 485, 322 S.E.2d 761 [1984]); Robertson v. Robertson, 218 N.C. 447, 11

When a third party provided necessaries[149] to the child, the father, as a matter of law, was made directly responsible to the third-party provider.[150] The availability of the remedy was not dependent on a contractual relationship between the father and the third-party provider.[151] Traditionally, to recover under the doctrine, the third-party supplier of necessaries merely had to prove

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S.E.2d 318 (1940); Sibley v. Gilmer, 124 N.C. 631, 32 S.E. 964 (1899); Pool v. Everton, 50 N.C. (5 Jones) 241 (1858); McClure v. McClure, 64 N.C. App. 318, 307 S.E.2d 212 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

149. "[T]he third party provider must . . . show that the services or goods provided were legal necessaries . . ." *Alamance Co. Hosp.*, 315 N.C. at 370, 338 S.E.2d at 92. "Precisely what is meant by the term 'necessaries' can change with the times and the family's station in life . . . ." *Alamance Co. Hosp.*, 315 N.C. at 365, 338 S.E.2d at 89 (holding that medical treatment was a legal necessary). "[Necessaries include] clothing and food, and such reasonable incidental expenses, such as medical bills, schoolbooks, and things of that kind, that [are] reasonably necessary for the maintenance and comfort of [the child] in the station of life in which [he or she was] being reared." Howell v. Solomon, 167 N.C. at 592, 83 S.E. at 610.

> What constitutes necessities depends upon the facts and circumstances of the particular case. They include food, clothing, lodging, medical care and proper education. They are not limited to those things which are absolutely necessary to sustain life, but extend to articles that are reasonably necessary for the proper and suitable maintenance of the child in view of his social station in life, the customs of the social circle in which he lives or is likely to live and the fortune possessed by him and his parents.

Bethea v. Bethea, 43 N.C. App. 372, 375, 258 S.E.2d 796, 799 (1979) (dealing with prospective modification of child support).

Necessaries, under the common law doctrine, were traditionally defined as "goods." *See* H. CLARK, LAW OF DOMESTIC RELATIONS, § 6.3 at 191 (1968). But even early North Carolina cases allowed reimbursement for services rendered to the child under the doctrine. *See* Holland v. Hartley, 171 N.C. 376, 88 S.E. 507 (board); P.J. Hunycutt & Co. v. Thompson, 159 N.C. 29, 74 S.E. 628 (burial expenses).

150. "[T]he third party provider's right to recover against the parent is based upon the child's right to support . . . ." *Alamance Co. Hosp.*, 315 N.C. at 370, 338 S.E.2d at 92. "The father's duty of support is . . . an obligation imposed by law which arises from his status as father." *Id.* at 365, 338 S.E.2d at 89. "Liability under this theory was quasi-contractual in nature." *Id.* at 367, 338 S.E.2d at 90, citing H. CLARK, LAW OF DOMESTIC RELATIONS, § 6.3 (1968). *See also* Howell v. Solomon, 167 N.C. at 592, 83 S.E. at 611 ("quasi contract"); *Thompson*, 159 N.C. at 32, 74 S.E. at 630 ("implied contract").

151. *Alamance Co. Hosp.*, 315 N.C. at 368, 338 S.E.2d at 90-91. In *Holland*, 171 N.C. 376, 88 S.E. 507, the remedy was an alternative claim to the contract claim. In *Everitt*, 109 N.C. 129, 13 S.E. 860, the court indicated that a claim based on a contract and the implied liability claim were alternate remedies.

that: (1) the goods supplied were "necessaries";[152] (2) the father failed or refused to provide them;[153] and (3) the third-party provider furnished the goods or services with an expectation of compensation.[154] The father could defeat the third-party provider's claim for reimbursement by proving that he had no duty to support the child at the time the goods or services were provided[155] or that he was prevented from performing his parental duty of support by the provider's wrongful conduct.[156]

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152. *Supra* note 150.

153. *Alamance Co. Hosp.*, 315 N.C. 362, 338 S.E.2d 87.

154. Apparently, charity is its own reward. In Everitt v. Walker, 109 N.C. 129, 13 S.E. 860, the child's aunt promised her dying sister, the child's mother, that she would care for and support the child after the mother's death. The child's father was an inmate of an insane asylum. When the aunt sued his guardian for reimbursement several years later, the supreme court stated "[s]he could not support the child from motives of charity and love for her departed sister without any intention of charging the father for the same, and afterwards . . . compel him to pay her for her good work of love and charity. She had, in such case, no valid claim at law or in equity." *Id.* at 132, 13 S.E. at 861.

155. Holland v. Hartley, 171 N.C. 376, 88 S.E. 507; *Thompson*, 159 N.C. 29, 74 S.E. 628. The common law duty of a father to support his child terminated at the child's emancipation and for other reasons such as the father's death. *See generally* 3 R. Lee NORTH CAROLINA FAMILY LAW §§ 229, 233 (1981). In *Holland*, the third-party provider's claim based on the doctrine of necessaries for boarding the child failed because the father proved he and his 18-year-old son mutually agreed to the child's total emancipation. In *Thompson*, the father attempted to defend by proving his child was emancipated. The supreme court recognized a distinction between "total" emancipation, which terminates the parental duty to support, and "partial" emancipation, which does not.

> The mere fact that a child is living away from home, with the consent of the parent, does not relieve the parent from liability for necessaries furnished to the child, and the parent is liable, where his misconduct or abuse has driven the child to leave him; but ordinarily, where there is no fault upon the part of the parent, a child who voluntarily abandons the parent's home, for the purpose of seeking its fortune in the world, or to avoid parental discipline and restraint, forfeits the claim to support, and the parent is under no obligation to pay therefor. A boy may be emancipated for some purposes, and may not be emancipated for others.

Thompson at 31, 74 S.E. at 629.

156. Howell v. Solomon, 168 N.C. 92, 83 S.E. 609. In *Howell*, the father defeated the children's maternal grandmother's claim for compensation for support and maintenance of the children by proving that his mother-in-law had driven "him from his home, which she had made unhappy by her intolerance, quarrelsome disposition, and complete domination, and that she, in various ways, not only obstructed him, but rendered it impossible for him to get possession of his children, or communicate with them, so that he could perform his legal duty to them, when he was, at all times, ready and willing to do so." *Id.* at 593, 83 S.E. at

Despite the existence today of statutory remedies for child support,[157] North Carolina still recognizes the common law remedy available to a third-party provider of necessaries against a parent[158] who failed or refused to provide such necessaries to his or her child.[159] The use of statutory remedies, however, can affect the availability of the common law remedy to third-party providers. In *Alamance Co. Hospital v. Neighbors*,[160] the court held that the parent's payment of court-ordered child support during the time the necessaries were provided to the child did not bar recovery under the common law doctrine as a matter of law.[161] However, when determining whether the doctrine of necessaries provides a remedy to the third-party provider, the trier of fact[162] must consider payments made by the parent pursuant to a court order as a factor influencing the determination of whether the parent failed to provide necessaries to his or her child.[163]

612.

157. *See generally* N.C. GEN. STAT. §§ 14-322 (1986) (criminal sanctions for nonsupport), 50-13.4 (civil remedy for child support).

158. *Alamance Co. Hosp. v. Neighbors* involved a claim against a father, but the court, citing the gender neutralization of the North Carolina child support statutes, discussed the availability of the cause of action against a "parent." 315 N.C. at 367, 338 S.E.2d at 89-90. The next year, the supreme court also made the spousal doctrine of necessaries gender neutral in North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471, by holding that the doctrine could be used to impose liability on a wife for necessaries (medical treatment) provided to her husband by a third party.

159. *Alamance Co. Hosp.*, 315 N.C. 362, 338 S.E.2d 87.

160. *Id.*

161. The father in *Alamance Co. Hosp.* apparently did not know that his child had received the medical treatment. *Id.* at 364, 338 S.E.2d at 88.

162. The issue in *Alamance Co. Hosp.* was whether the grant of summary judgment in the father's favor was proper, 315 N.C. at 365, 338 S.E.2d at 89; therefore the supreme court referred to the trial court's determination of whether the parent had failed to provide necessaries. *Alamance Co. Hosp.*, 315 N.C. at 370, 338 S.E.2d at 92. Parties to a claim based on the common law doctrine of necessaries have the right to a jury trial. Several of the earlier cases concerning the doctrine involved jury trials. Holland v. Hartley, 171 N.C. 376, 88 S.E. 507; Howell v. Solomon, 167 N.C. 588, 83 S.E. 609; P.J. Hunycutt & Co. v. Thompson, 159 N.C. 29, 74 S.E. 628.

163. The court rejected the father's contention that because the court order named a single sum for "support and maintenance" and did not additionally require him to pay the child's medical expenses, his entire obligation to provide medical expenses to his child was included in his weekly child support payment. *Alamance Co. Hosp.*, 315 N.C. at 368, 338 S.E.2d at 92. The court noted that there was a sharp division of opinion among the other jurisdictions that consid-

C. *Reimbursement For Public Assistance Provided by the State*

Under Chapter 110, section 135 of the North Carolina General Statutes,[164] a parent's receipt of public assistance on behalf of his or her child creates a debt due the state by the responsible parents of the child. The county has the authority and the duty to pursue an action against a parent responsible for the maintenance of the child and to recover amounts paid by the county for support of the child.[165] The county may bring the action in the name of the parent receiving aid or in its own name. In either case, the parent receiving aid is required to cooperate with the county in the trial of the action.[166] No prior demand upon the defendant to support the child is necessary in this cause of action.[167]

If there is no prior court order for child support, "[t]he only limitations in section 110-135 on the extent of reimbursement for which judgment may be obtained relate to the defendant's financial ability to furnish support during the relevant period of time."[168] However, if a prior child support order existed during the time of receipt of public assistance, "the debt shall be limited to the amount specified in such court order."[169] In *Wilkes County v. Gentry*,[170] the supreme court held that a lump sum settlement in an action for criminal nonsupport of an illegitimate child did not bar the county from bringing an action for reimbursement of public assistance because the settlement did not relieve the defendant of his responsibility for further support.

Section 110-136 provides a five-year statute of limitations for this cause of action for reimbursement of public assistance.[171] The

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ered this defense to the cause of action for reimbursement by a third-party provider of necessaries.

164. N.C. GEN. STAT. § 110-135 (1985).

165. N.C. GEN. STAT. §§ 110-130, -138 (1985).

166. For a description of the federal statutes and regulations requiring the state to establish and implement the Child Support Enforcement Program and this cause of action for reimbursement, see State *ex rel.* Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270, *rev. granted*, 318 N.C. 420, 349 S.E.2d 605 (1986).

167. State *ex rel.* Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984) (defendant had no notice that he was the alleged father of the child until almost twelve years after the birth of the child and no prior demand for support had been made).

168. *Marrow*, 71 N.C. App. at 175, 321 S.E.2d at 578.

169. N.C. GEN. STAT. § 110-135 (Cum. Supp. 1985).

170. 311 N.C. 580, 319 S.E.2d 224 (1984).

171. "[N]o action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance."

county may claim reimbursement for all public assistance granted after June 30, 1975, provided there is no five-year gap in payments of public assistance.[172]

V. CONCLUSION

The legislature substantially altered the prior case law governing retroactive modification of court-ordered child support obligations by enacting section 50-13.10. By requiring the parent seeking retroactive modification to file the motion before the payment to be modified is due, the new statute severely limits a North Carolina court's discretion to grant a credit against arrearages due under a prior court order.[173] The statute's definition of arrearages also eliminates a court's discretion to order a partial rather than a total credit in some situations.[174] Additionally, the new statute does not allow a credit for payments due under the terms of a prior court order for an aggregate amount after a parent's duty to support one of his children has terminated due to the child's marriage or attainment of majority, unless the parent requesting credit filed a motion before the arrearages accrued or can show a statutorily recognized excuse for failing to file the motion.[175]

The new statute, however, does not affect other retroactive changes in child support obligations. North Carolina case law has recognized the authority of a court to order such retroactive changes of contractual support obligations,[176] as well as to order retroactive changes in the form of the reimbursement remedies: reimbursement to a parent of past expenditures on a child's behalf in the absence of a contract or a court order;[177] reimbursement to a third-party provider of necessaries under the common law doctrine of necessaries;[178] and reimbursement to the state of public assistance it provides for a child's support.[179] Through its use of this miscellany of remedies, a court has the power to use hindsight to correct history, albeit to a narrow extent. Careful exercise of this

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N.C. GEN. STAT. § 110-136.

172. *Marrow*, 71 N.C. App. 170, 321 S.E.2d 575.

173. *See supra* discussion at notes 31-50.

174. *See supra* discussion at notes 51-65.

175. *See supra* discussion at note 65.

176. *See supra* discussion at notes 68-86.

177. *See supra* discussion at notes 87-145.

178. *See supra* discussion at notes 146-163.

179. *See supra* discussion at notes 164-172.

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power can force a recalcitrant parent to pay for past omissions or can relieve an overburdened parent from a potentially unjust liability.