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Contractual Modification of Past Due and Future Child Support Payments

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CONTRACTUAL MODIFICATION OF PAST DUE AND FUTURE CHILD SUPPORT PAYMENTS

I. INTRODUCTION

One parent is given custody of two children, a daughter and a son. The other parent is ordered to pay monthly child support in the amount of $500. This arrangement is agreeable to both parties and continues with few problems for several years. Then circumstances change. The daughter wants to live with her father.[1] The parties orally agree that the daughter can live with her father and he can reduce the support payments to $250 per month. The parties abide by the oral agreement for the duration of the daughter's minority. As the daughter reaches majority, the mother sues for past due support payments equivalent to the $250 per month not paid for the daughter throughout the years the daughter lived with her father.[2] The court is now faced with the decision of whether to enforce the oral agreement or invalidate it because the parties did not have prior court approval. A different situation in which the court would have the same dilemma is when the parties contract for the father to pay money directly into a savings account for higher education expenses and agree not to use the monthly payments for current expenses. Increasingly, fact patterns and questions such as these are confronting the courts and challenging them to define how they will view independent contracts, written or oral, made between parents for the support of their children.

This comment will address the custodial parent's right to contract with the supporting parent to modify court-ordered child support payments.[3] Part II discusses how the courts have classi-

1. In this article the supporting parent will be identified as the father and the custodial parent will be referred to as the mother. Any fact patterns to the contrary will be expressly identified.

2. The general fact pattern of the story comes from Dubroc v. Dubroc, 388 So. 2d 377 (La. 1980).

3. This comment will not address statutory law surrounding child support. The exception will be for those statutes reported in the cases. Readers should be aware of the statutory laws of their states concerning this matter. Additionally, the following are not within the scope of this comment: The method in which courts modify child support orders. *See* C.P. Jhong, Annotation, *Change in Financial Condition or Needs of Parents or Children as Ground for Modification of Decree for Child Support Payments*, 89 A.L.R.2d 7 (1963). The acts of children

fied contracts made to settle past due child support payments. It will also explain the defenses that some courts recognize and utilize to protect the supporting parent when the courts refuse to enforce the contracts. Part III discusses the different rationales for either enforcing or invalidating contracts that modify future child support payments.[4] Part IV recommends that the courts allow parents to contractually modify payments and that the courts use traditional contract principles, combined with a best interests of the child test, to determine the validity of each contract.

II. PAST DUE SUPPORT PAYMENTS

Some courts have been reluctant to allow parties to contractually modify arrearage.[5] Other courts recognize the agreements because they consider the arrearage to be a debt owed to the custodial parent or as referred to by the courts: the judgment creditor. What follows is a discussion of how the different courts have dealt with the agreements between the parties, with an emphasis on a Texas Supreme Court case which sets forth the two conflicting views. The traditional view is that parents may not form a contract that affects child support payments. The modern and minority view does allow parents to modify payments if it is in the best interests of the children.

A. Courts Not Allowing Parties to Contractually Settle Arrearage

The courts that void contracts between parties to waive arrearage do so on the premise that the support payments are for the sole benefit of the child and neither the trial court nor the parents have the power to waive a child's right to payment.[6] Courts

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that modify or terminate child support. *See* Michael J. Greene, Annotation, *What Voluntary Acts of Child, Other Than Marriage or Entry Into Military Service, Terminate Parent's Obligation to Support*, 32 A.L.R.3d 1055 (1970). Any right by a spouse to offset debts against support payments or to unilaterally reduce amount of payments. *See* Claudia Catalano, Annotation, *Spouse's Right to Set Off Debt Owed by Other Spouse Against Accrued Spousal or Child Support Payments*, 11 A.L.R.5th 259 (1993).

4. The situations presented in the introduction of this comment are examples of agreements about future support payments.

5. Arrearage is money that is overdue and owed to the custodial parent.

6. *See* Frasemer v. Frasemer, 578 So. 2d 1346, 1349 (Ala. Civ. App. 1991) ("[A] mother may not waive support payments due a minor child from the child's father under a decree of the court, nor may support provisions of the decree be

find support for this proposition in their public policy, statutes and case law.

Vander Woude v. Vander Woude is an example of how a court will read into its state statutes a requirement that any agreement that waives child support obligations must be in writing and, more importantly, pre-approved by the courts.[7] The reasoning is as follows: Parents have a duty, imposed by public policy and statute,[8] to support their children. "Statutorily, courts and administrative

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nullified by agreement between the parties."); Goodpasture v. Goodpasture, 371 S.E.2d 845, 847 (Va. Ct. App. 1988) ("Past due support installments become vested as they accrue and are thereafter immune from change. Parties cannot contractually modify the terms of a support order without the court's approval.").

7. Vander Woude v. Vander Woude, 501 N.W.2d 361, 363 (S.D. 1993) (Donna and Robert were divorced in 1974 and Donna retained custody of their two daughters. Robert stayed current with his support payments until 1987 when he was laid off from his job. In 1988, Robert returned to his job and eventually resumed payments but he did miss a significant number of payments following his return to work. In 1990, Donna wrote Robert about the arrearage owing on their second daughter and threatened legal action. She also stated: "No more support after that! I know that has got to be a thorn out of your side." *Id.* at 363. Robert wrote Donna a check, which Donna cashed, but she wrote back "that while she had thought of letting the earlier child support arrearage of $5,227.50 pass [amount due for arrearage on first daughter], she now regretted that decision." *Id.* Subsequently, Donna brought this action to recover the arrearage.).

8. *See* S.D. CODIFIED LAWS § 25-5-18.1 (Michie 1992). The statute reads as follows:

> The parents of any child are under a legal duty to support their child in accordance with the provisions of § 25-7-6.1, until the child attains the age of eighteen, or until the child attains the age of nineteen if he is a full-time student in a secondary school.

See also S.D. CODIFIED LAWS § 25-7-6.1 (Michie 1992). The statute reads as follows:

> The parents of a child are jointly and severally obligated for the necessary maintenance, education and support of the child in accordance with their respective means. Until established by a court order, the minimum child support obligation of a parent who fails to furnish maintenance, education and support for his child, following a continued absence from the home, is the obligor's share of the amount shown in the support guidelines, commencing on the first day of the absence. For the purposes of this section, "continued absence from the home," means that the parent or child is physically absent from the home of a period of at least thirty consecutive days, and that the nature of the absence constitutes family dissociation because of a substantial severance of marital and family ties and responsibilities, resulting in the child losing or having a substantial reduction of physical care, communication, guidance and support from the parent.

entities may not retroactively modify past due child support obligations except for the period in which there is a pending petition for modification."[9] While that statute did not address modification by parents, the court read it in connection with a second statute[10] that does not allow parents to affect the rights of a social services agency to collect from parents any support the agency has provided, unless the parent's agreement concerning support was in writing and approved by the court.[11] Therefore, when the court read the statutes together, it found that parents do not have the right to retroactively modify support payments without court approval. Since the agreement in this case was neither in writing nor approved by the court, it was not enforceable.[12] Thus, the court ruled that parents are "without authority to modify or forgive . . . child support arrearage without court approval."[13]

Other courts have also held, according to their statutes, that private agreements are unenforceable.[14] One court even held that a trial court may not "permit the parties to accomplish privately what the court could not have ordered."[15] Therefore, since a court may not modify arrearages, the parents cannot circumvent the court to reach the same result. Another court has cited public pol-

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9. *Vander Woude*, 501 N.W.2d at 363, (citing S.D. CODIFIED LAWS § 25-7-7.3 (1992)). S.D. Codified Laws § 25-7-7.3 reads as follows:

> Any past due support payments are not subject to modification by a court or administrative entity of this state, except those accruing in any period in which there is pending a petition for modification of the support obligation, but only from the date that notice of hearing of the petition has been given to the obligee, the obligor, and any other party having an interest in such matter.

10. *See* S.D. CODIFIED LAWS § 25-7A-17 (Michie 1992). The statute reads as follows:

> An agreement between parents or other responsible persons relieving a party of any duty of support or responsibility or purporting to settle past, present or future support obligations as settlement or prepayment may not act to reduce or terminate any rights of the department of social services or any support obligee to recover from parents or other responsible persons for support provided, unless the department or any support obligee has consented to the agreement in writing and the agreement has been approved by a court of competent jurisdiction.

11. *Vander Woude*, 501 N.W.2d at 363.

12. *Id.* at 364.

13. *Id.*

14. *See* Stambaugh v. Child Support Enforcement Admin. *et al.*, 591 A.2d 501 (Md. Ct. Spec. App. 1991); *Goodpasture*, 371 S.E.2d 845; Whicker v. Whicker, 711 S.W.2d 857 (Ky. Ct. App. 1986).

15. *Whicker,* 711 S.W.2d at 860.

icy as forbidding the parties from waiving liability for past or future child support payments.[16]

In all of these cases,[17] the parties to the agreement should have gone to the courts to have their agreements approved. This does not guarantee that the courts will adopt the agreement, because there still exist courts that will not approve the agreement due to the belief that neither the parents nor the courts may retroactively alter vested child support payments.[18] As will be shown in subsection B, this view does not accurately reflect the true nature of child support arrearage.

B. Courts Allowing Parties to Contractually Settle Arrearage

There exists another line of cases that allows the custodial parent and the supporting parent to enter private agreements to settle past due child support payments. The overall reasoning is that arrearage is the amount due to the custodial parent and not the child, since the child has already received support from the custodial parent. The arrearage is simply a reimbursement to the custodial parent for money already spent on the children.

Lindsey v. Lindsey asked and answered the question: "Can the payee voluntarily waive, give, release, compromise, sell, enforce, or do nothing with his or her right to collect past-due court-ordered child support payments from the payor? Yes."[19] The reasoning behind *Lindsey's* holding is that as support payments become due and payable the custodial parent becomes a decree creditor.[20]

> The designated payee of past-due court-ordered child support is a decree creditor and, like a judgment creditor, can do whatever he or she wants with the decree receivable subject, however, to the family court's superior interest in child's present and future wel-

16. *Stambaugh*, 591 A.2d at 503-04 (bargaining for waiver of past due payments in exchange for a consent to the adoption of the children).

17. *See supra* notes 6, 7 and 14.

18. *Whicker*, 711 S.W.2d at 860.

19. Lindsey v. Lindsey, 716 P.2d 496, 498 (Haw. Ct. App. 1986).

20. *Id.* at 500.

fare.[21] The decree creditor may waive, give, release, compromise, sell, enforce, or do nothing with his or her decree receivable.[22]

It is logical to call the custodial parent a decree creditor when it is understood that the child is still being supported even when the supporting parent falls behind in payments. The needs of the child do not stop simply because one parent is not providing the financial support. The other parent must make up the difference and, hopefully, be reimbursed later by the supporting parent.

Another theory is that the custodial parent stands in a trustee-like position for the child because the support payments are created for the benefit and protection of the child.[23] When the custodial parent actually supports the child over time and discharges the liability of the trust, the judgment accrues to the parent who discharged the debt and not to the child.[24] Therefore, if the settlement or compromise is supported by adequate consideration, the courts will enforce it.[25]

Again, this analysis by the court is reasonable because the children have already received the care and support from the custodial parent; any action for arrearage would simply be repaying the custodial parent for expenses incurred up to the agreement or

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21. It should be noted that the court is not disregarding the best interests of the child. The court will examine the agreement waiving arrearage to be sure that the interests of the child have not been jeopardized. Yet, the courts are still giving the parents the opportunity to reach an agreement that is in the best interest of all parties concerned.

22. *Lindsey*, 716 P.2d at 500.

23. Miller v. Miller, 565 P.2d 382 (Or. Ct. App. 1977) (The wife signed a satisfaction and made an oral agreement eliminating an accrued child support judgment.). The concurring opinion in *Miller* gives an overview of the different holdings of the jurisdictions regarding contracts on past due child support. *Id.* at 385.

24. *Miller*, 565 P.2d at 385. ("Where a child has in the past been supported by a single parent any right of action against the noncontributing parent lies not with the child but with the parent who has provided the support."). *Accord* Rodgers v. Rodgers, 505 S.W.2d 138, 144 (Mo. Ct. App. 1974) ("Our courts have, however, for a long time recognized that past due child support owing by the divorced husband to the former wife pursuant to a court order for child support and maintenance incorporated into the divorce decree constitutes a debt of the husband to the former wife [cite omitted], and they become judgments in favor of the former wife.").

25. *Rodgers*, 505 S.W.2d at 144. *But see Miller*, 565 P.2d at 384 (absence of consideration did not make the agreement invalid because a debt may be the subject of a gift to the debtor and the court will recognize if the donee has the requisite donative intent or complies with the statutes regulating satisfaction of a debt).

the law suit. It should be left to the custodial parent's discretion to enforce the court order or settle for a different amount. The custodial parent should have the option of increasing future payments in consideration for waiving his right to go to court to seek arrearage. The custodial parent has a strong bargaining position, because if the supporting parent offers an unfair settlement, the custodial parent has the threat of court enforcement of the original support order.

C. *The Case of* Williams v. Patton

Williams v. Patton sets out the different policies that courts struggle with in deciding whether to enforce the agreements on past due and future child support payments.[26] The majority and concurring opinions represent the more traditional view that parents may not form a contract that affects child support payments. The dissenting opinion reflects the modern trend of allowing parents to contract regarding child support payments, as long as the contract is in the best interests of the child.[27]

1. *The Facts*

Houson Patton and Sherry Williams were divorced in 1974.[28] Sherry received custody of their daughter and Houson was ordered to pay $121 per month in child support.[29] Houson did not pay support for several years and in 1985 he was $9,885 in arrears.[30] At that time, Sherry filed a motion for contempt and a motion to modify child support.[31]

Sherry and Houson entered into a settlement agreement where Houson agreed to pay $2,850 in a lump sum, as well as to increase child support payments to $325 per month for 18 months and then to $350 a month until their daughter was emancipated or reached 18 years of age.[32] Following this agreement, Sherry agreed to dismiss the contempt action with prejudice and to forgive the arrearage.[33] In 1986 the trial court signed an "Agreed Order Modifying Prior Order" and an order dismissing the con-

26. Williams v. Patton, 821 S.W.2d 141 (Tex. 1991).
27. *Id.* at 153.
28. *Id.* at 141.
29. *Id.* at 141-42.
30. *Id.* at 142.
31. *Id.*
32. *Id.*
33. *Id.*

tempt motion.[34] The trial court's order increased the monthly payments, but did not release Houson's obligation to pay arrearage nor did the orders refer to or acknowledge the settlement agreement.[35]

Houson paid his $2,850 and abided by the agreement for a year and a half, then he stopped paying child support when his daughter moved into his home.[36] Sherry brought a second action for contempt in 1988 for the nonpayment since 1987 and for the period at issue in the first lawsuit.[37] Houson defended with the settlement agreement for the earliest arrearage and filed a petition against Sherry for breach of contract.[38] Sherry then cross-claimed for breach, because Houson had stopped paying support in 1987.[39]

The trial court found the agreement to be void, entered a take nothing judgment and sentenced Houson to fifteen days in jail for contempt, but suspended the sentence.[40] Houson appealed to the court of appeals and that court affirmed, stating that an agreement "may not be modified by the parties without court approval until the court either (1) reduces the unpaid child support to written judgment or (2) loses jurisdiction."[41] Houson then appealed to the Texas Supreme Court, which affirmed the court of appeals.[42]

2. *The Majority and Concurring Opinion*

The majority and concurring opinions articulated three reasons for not allowing parents to enter contracts settling past due child support payments. The first reason is that the courts want to shield the custodial parent from financial pressures.[43] Typically, the custodial parent is the mother,[44] and she encounters a greater decline in her economic position in society following a

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 143.
42. *Id.* at 146.
43. *Id.* at 144.
44. None of the cases cited in this comment contained a fact pattern in which the father was granted custody in the original proceeding.

divorce.[45] The decline in the mother's economic status does affect the children and accounts for part of the reason that children make up such a large part of the indigent of this country.[46] Additionally, it is generally only through remarriage that the woman has any chance to reach the same income level as she would have enjoyed if she had remained married.[47] The ex-husband does not encounter this problem because "most men who divorce or separate are immediately better off because they retain most of their labor incomes, typically do not pay large amounts of alimony and child support to their ex-wives, and no longer have to provide for the level of needs associated with their former families."[48]

Many studies[49] seem to support the majority's position, but the majority did not take into account findings that after the first year of divorce child support and alimony contributed to an insignificant proportion of the custodial parent's income.[50] Even in attempting to protect women from themselves, the court has not completely taken away the women's right to settle arrearage, for after adjudication the parents may settle the judgment entered by the court. The court has simply added the extra expense of having to go to court before the parties may settle the claim.

The concurring opinion by Justice Cornyn adds the second and third reasons why parents should not be allowed to contract with each other absent court approval. The second is that to allow the parties to contract without court approval will disrupt state

45. *See* Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution,* DEMOGRAPHY 22(4): 485-97 (1985). [hereinafter Duncan and Hoffman] (On the whole, women lose 30% to 46% of their income immediately following a divorce.). *See also* Robert S. Weiss, *The Impact of Marital Dissolution on Income and Consumption in Single-Parent Households,* J. OF MARRIAGE AND THE FAM. 46(1), 115 (1984). [hereinafter Weiss].

46. Duncan and Hoffman, *supra* note 45, at 485.

47. *See* Kate J. Stirling, *Women Who Remain Divorced: The Long-Term Economic Consequences*, SOC. SCI. Q. 70(3): 549, 560 (1989). ("The gains from remarriage for divorced women relative to those who remain divorced, are substantial."); Duncan and Hoffman, *supra* note 45, at 485 (economic impact of divorce is less severe when allowing for remarriage).

48. Duncan and Hoffman, *supra* note 45, at 495.

49. *See generally* Stirling, *supra* note 47; Duncan and Hoffman, *supra* note 45; Weiss, *supra* note 45.

50. Weiss, *supra* note 45, at 122. (During the first year following divorce child support and alimony contribute to 20% to 40% of total family income but in subsequent years the amount drops to an insignificant proportion of income. Also, it is primarily the middle and higher income levels that receive the higher payments.).

and federal schemes[51] of child support.[52] The example the opinion gives is that participants in the Texas AFDC program must assign their rights to receive child support to the state agency.[53] As to disrupting the state and federal schemes, a simple solution would be to rule that the parties may not contractually modify or settle the rights which they have assigned to the agencies. The agency would step into the shoes of the custodial, non-supporting parent and receive the right to contract about arrearage and future support payments.

The third reason for not allowing the parties to contract privately is that it would render child support enforcement policies toothless.[54] Congress gave overdue payments the status of judgments that are entitled to full faith and credit in other states.[55] "Congress's goal appears to have been threefold: to aid in the interstate enforcement of child support orders, to encourage timely requests for modification based on changed circumstances, and to discourage the type of self-help in which the obligor and obligee have indulged here."[56] None of these goals would be jeopardized if the court allowed the parties to contract without prior court approval. The judgments would still be given full faith and credit and they would be subject to the same rule as any other settlement, one in which the parties would be able to give release and satisfaction.[57] Additionally, allowing the parties to contract in regard to past due child support payments does not prevent the parties from asking the court for a modification. The use of a contract could advance other policies of importance to the courts, those of judicial economy and efficiency.

3. *The Dissenting Opinion*

Chief Justice Phillips, in his dissenting opinion, argued that the majority, by requiring court approval of child support contracts, imposed "a time consuming and expensive procedure, with little or no corresponding benefit to [the parents], their offspring

51. Aid to Families with Dependent Children, 42 U.S.C. § 601-617 (1994); Title IV-D of the Social Security Act, 42 U.S.C. § 666 (1994).

52. *Williams*, 821 S.W.2d at 151-52 (Cornyn, J., concurring).

53. *Id.* at 151.

54. *Id.*

55. *Id.*

56. *Id.* at 151-52.

57. *See supra* notes 19-25 and accompanying text.

or society."[58] The court in the majority opinion did not deny the parties the right to contract between themselves but the effect of the ruling will cause the parents to spend additional legal fees, delay the time until the matter is settled and waste judicial economy.[59] The problems that the majority articulates in its opinion[60] still exist because after the court reduces the arrearage to a judgment the parties still retain the power to settle the claim. No rule exists which prevents the supporting parent from overreaching after the adjudication. The only difference between the two situations is that there is now a court-ordered judgment against the supporting parent. However, the custodial parent's right to the payments existed prior to any court proceeding for "past due support payments are owed to the custodial parent as reimbursement for the amounts which have necessarily already been expended for the support of the child."[61] Thus, the best protection that can be given the parties is to allow them to contractually settle arrearage without costly prior judicial approval.

III. FUTURE CHILD SUPPORT PAYMENTS

The courts are split over whether to allow parents to contractually modify future child support payments. Contracts for future payments present different issues than contracts on arrearage because the parents are contracting for care and support that has not yet been given and circumstances could change. This is one of the reasons that some courts do not enforce such agreements. However, even the courts that do not enforce the contracts allow the supporting parent to raise various defenses.[62]

A. Courts Not Allowing Modification

The general rule is that parties may not agree to relieve one parent of his obligation to pay child support.[63] This general rule

58. *Williams*, 821 S.W.2d at 152 (Phillips, C.J., dissenting).

59. *Id.* at 153.

60. *See supra* text accompanying notes 43-57.

61. *Id. See also* cases cited therein.

62. *E.g.*, equitable estoppel, promissory estoppel, waiver, and acquiescence.

63. Kimble v. Kimble, 341 S.E.2d 420 (W. Va. 1986) (may not modify, suspend, or terminate a decretal child support obligation); Peebles v. Disher, 310 S.E.2d 823 (S.C. Ct. App. 1983) (private agreement does not bar mother from enforcing child support order). *See generally* Kristine Cordier Karnezis, Annotation, *Validity and Effect, as Between Former Spouses, of Agreement Releasing Parent from Payment of Child Support Provided for in an Earlier Divorce Decree*, 100 A.L.R.3d 1129 (1980).

has in some cases been established by a statute which supercedes previous cases holding that agreements are enforceable if in the best interests of the child.[64] The courts articulate several other reasons for this rule. Most of the reasons are based on the public policy that courts must protect the best interests of the child.[65] Consequently, the courts have required that court approval must be given to all agreements to modify child support before the agreements are valid and enforceable.[66]

Public policy requires that parents may not deprive children of support to which they are entitled.[67] The courts want to serve the best interests and welfare of the child; therefore, the child, including an adopted child, will not be bound by any contract that the parents enter concerning support which is not approved by the court.[68]

A second reason that courts will not enforce a private agreement regarding future child support is that it would foreclose the court from exercising its judgment as to child support.[69] As one court stated: "to hold otherwise would destroy the power of our courts to reject inadequate, overreaching, unconscionable or other-

64. *See In re* Marriage of Harvey, 523 N.W.2d 755 (Iowa 1994) (By statute, any modification of a child support order is void unless approved by the court. This statute overruled previous court decisions that allowed private agreements if the agreements were in the best interests of the child.); Sullivan v. Edes, 801 S.W.2d 32 (Ark. 1990) (Prior to 1987, courts would recognize agreement to reduce future child support payments if supported by valid consideration and not inequitable. However, since the passage of the statute, parties may no longer modify support without court intervention.).

65. *See* Robinson v. McKinney, 432 S.E.2d 543 (W. Va. 1993) (ensure that the best interests of the child are considered).

66. *See In re* Marriage of Johnson, 625 N.E.2d 1331 (Ind. Ct. App. 1993); Lownds v. Lownds, 551 A.2d 775 (Conn. Super. Ct. 1988) (Court held that an order of support can be modified only by the court and not by a private agreement between parities to reduce child support payments.).

67. *See* Calton v. Calton, 485 So. 2d 309 (Miss. 1986) (public policy will not allow parents to contract away the vested right of a child to support); Shackleford v. Shackleford, 572 So. 2d 468, *reh'g overruled*, 1990 Ala. Civ. App. Lexis 420 (Ala. Civ. App.), *and cert. denied, without op.*, *Ex Parte* Shackleford, 1990 Ala. Lexis 1144 (Ala. 1990); Blisset v. Blisset, 495 N.E.2d 608 (Ill. App. Ct. 1986), *aff'd in part and rev'd in part*, 526 N.E.2d 125 (Ill. 1988) (public policy imposes a duty of support on parents that cannot be bargained away).

68. *In re* Marriage of Ayo, 235 Cal. Rptr. 2d 458, 461 (Cal. Ct. App. 1987) (adoptive father, now ex-husband, attempted to rescind the adoption and support duty once the natural father began to visit the child again).

69. Meredith v. Meredith, 234 S.E.2d 510 (Ga. 1977).

wise invalid alimony and child custody settlement agreements."[70] A corollary reason for holding that agreements are invalid is that they interrupt the continuing jurisdiction of the court over the minor.[71] Therefore, courts are not bound by agreements where the welfare of the children is concerned.[72]

These reasons may be valid in regard to the court's concern over the welfare of the child. However, the welfare of the child is not always put at risk when parents reach a private agreement unapproved by the courts. Realizing this some courts allow defenses in equity to protect the supporting parent[73] and other courts allow private agreements.[74]

B. Defenses that Courts Allow When They Do Not Enforce the Contracts

The jurisdictions that forbid parties from contracting between themselves regarding future child support payments have nonetheless recognized certain defenses in equity.[75] These defenses are closely related to each other, and the courts will often discuss more than one at a time. One of these defenses is waiver. The elements for waiver are: (1) abandonment of the support claim by the custodial parent; (2) waiting an unreasonable amount of time before reasserting the claim; and (3) prejudice to the supporting parent who owes the support duty.[76]

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70. Davis v. Davis, 306 S.E.2d 247, 249 (Ga. 1983) (Contemporaneously with the court decree of child support of $450, the parties entered into a written agreement, not approved by the court, for former wife to pay a percentage of profits from business, not to exceed $450, to former husband. Subsequently, they entered into an agreement not to exchange checks for $450, thus negating the child support. The mother then sued for arrearages.).

71. Napoleon v. Napoleon, 585 P.2d 1270 (Haw. 1978). *Accord* Blisset v. Blisset, 526 N.E.2d 125 (Ill. 1988) (agreements unenforceable because "undermine and circumvent the court's role in the establishment and modification of a child support obligation").

72. *In re* Marriage of Neiss, 743 P.2d 1022 (Mont. 1987) (agreement for ex-husband to pay a total of $12,000 in quarterly installments in return for a release of future child support and maintenance obligations).

73. *See infra* notes 75-92 and accompanying text.

74. *See infra* notes 93-113 and accompanying text.

75. For a complete overview of defenses for alimony and child support see generally John C. Williams, Annotation, *Laches or Acquiescence as Defense, so as to Bar Recovery of Arrearage of Permanent Alimony or Child Support*, 5 A.L.R.4th 1015 (1981).

76. Cordova v. Lucero, 629 P.2d 1020, 1022 (Ariz. Ct. App. 1981) (Mother wrote letter to father that her new husband was going to adopt the children and

Another defense allowed by some courts, and related to waiver, is acquiescence to non-payment by the custodial parent.[77] The courts have not set out a clear test for determining acquiescence, but one court has identified it as an application of the doctrine of equitable estoppel.[78] An example of the application of the doctrine comes from *Davidson v. Van Lengen*.[79] In 1956 the court granted the parents a divorce in which it gave the mother custody of the son and ordered that the father pay $10 per week in semi-monthly installments until their son turned 18 years old.[80] During that summer, the mother approached the father and they came to an agreement that if the father stopped visitations he would not have to pay support.[81] The new husband would support the son.[82] The mother did not seek any child support payments for nearly twenty years.[83] The court stated that the doctrine of waiver by acquiescence applies "where a person knows or ought to know that she is entitled to enforce her right . . . and neglects to do so for such a time as would imply that she intended to waive or abandon her right."[84] Here the mother knew that she had an enforceable right but she did not enforce it and beyond that she, through her actions, expressed to the father an intent to waive her rights to the child support payments.[85] Upon these facts the court found that while parties may not contractually modify child support payments without court approval, the mother had acquiesced

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that they no longer wanted support money from the father or for him to visit the children. Father did not pay any support for three and a half years following receipt of the letter. The mother sued for arrearage of $6,000.).

77. For a list of courts allowing and not allowing acquiescence as a defense see Williams, *supra* note 75.

78. Sutton v. Schwartz, 808 S.W.2d 15, 18, *appeal after remand*, 820 S.W.2d 71 (Mo. Ct. App. 1991), *appeal after remand, remanded mot. granted*, 860 S.W.2d 833 (Mo. Ct. App. 1993) (Based on agreement to reduce payments when daughter moved from mother's home, the court found that mother had waived by acquiescence the right to full child support payments as decreed by the court.).

79. Davidson v. Van Lengen, 266 N.W.2d 436 (Iowa 1978).

80. *Id.* at 437.

81. *Id.*

82. *Id.*

83. *Id.* at 438 (There was evidence presented that she did speak with an attorney in regards to the matter but no action was ever taken beyond a few letters or phone calls; the attorney was not even sure if either action had actually been taken.).

84. *Id.* at 438.

85. *Id.* at 440.

to the nonpayment and was barred from now enforcing any court order for payment.[86]

A third defense allowed by the courts is equitable estoppel.[87] In this defense the father must show that he reasonably relied, to his detriment, upon acts of another which induced the father not to pay child support.[88] A corollary doctrine, also recognized by some courts, is promissory estoppel.[89] The difference is that in promissory estoppel the reliance is on a promise and not an act. Some courts add the element that equity requires the court to give the father relief.[90]

These are a few of the defenses that the courts have utilized to protect the supporting parent when he has relied on an agreement between himself and the custodial parent. The simpler method would be as one court has stated to "give effect to agreements between spouses to reduce or waive support, particularly where . . . the supporting parent changes his position for the worse in reliance on the agreement"[91] and the child is not lacking in "material needs or parental guidance."[92] This would save the trouble of establishing doctrines such as those discussed, which are similar to the legislatively created justifiable cause,[93] and instead they could use established principles of contract law to determine the validity of any oral or written agreement. The chil-

86. *Davidson*, 266 N.W.2d 436.

87. Equitable estoppel occurs when the custodial parent is estopped by her conduct from asserting her right to child support payments which she otherwise would have had. BLACK'S LAW DICTIONARY 538 (6th ed. 1990).

88. *See* Harms v. Harms, 498 N.W.2d 229, 231 (Wis. 1993) (Court enforced an extra-judicial agreement relieving the non-custodial parent of future child support through the doctrine of equitable estoppel.); Hartman v. Smith, 674 P.2d 176, 178 (Wash. 1984) (apply principles of equitable estoppel when the child's interests are not at risk); *In re* Marriage of Dennin, 811 P.2d 449, 450 (Colo. Ct. App. 1991) (father may assert the doctrine of equitable estoppel when he relied on agreement to stop child support in exchange for giving consent to adoption).

89. Promissory estoppel "arises when there is a promise which [the custodial parent as] promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of [the supporting parent,] the promisee, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of a promise." BLACK'S LAW DICTIONARY 1214 (6th ed. 1990).

90. *In re* Marriage of Harvey, 523 N.W.2d 755, 756-57 (Iowa 1994) (oral agreement that while son lived with father, the father would not be required to pay child support to the mother).

91. Bartlett v. Bartlett, 389 N.E.2d 15, 16 (Ill. App. Ct. 1979).

92. *Id.* at 16.

93. Ehrman v. Moser, 253 S.E.2d 216 (Ga. Ct. App. 1979).

dren's best interests would be protected, because the court is free to determine that the contract does not jeopardize the child's right to material needs or guidance, regardless of which parent actually meets those needs.

C. *Courts Allowing Modification*

A small minority of jurisdictions allow the parties to modify court orders for payment of child support. Currently two state courts[94] enforce contracts between parents to modify future child support payments.[95] The principal case of each jurisdiction will be discussed within this section, along with the reasons for enforcing such a contract.

Dubroc v. Dubroc, a Louisiana case, involved an agreement for the father to reduce child support during the time that the son lived with the father. The Dubroc's were divorced in January 1975.[96] Ms. Moga (formerly Dubroc) received custody of the two children, Aubry and Deborah, and Mr. Dubroc was ordered to pay child support of $250 per month.[97] Then Ms. Moga no longer wanted custody of Aubry, so the parties agreed that Aubry would live with his father and Mr. Dubroc would only pay $125 per month in child support.[98] This agreement continued until Ms. Moga filed an action for arrearages.[99]

The trial court ordered Mr. Dubroc to pay $4,500 in arrearages, but the court of appeals reversed.[100] Ms. Moga appealed to the Louisiana Supreme Court, which affirmed the court of appeals.[101] The Louisiana Supreme Court allowed the agreement because it did not threaten the child's best interests.[102] The court recognized the policy reasons for not allowing the agreements, such as sanctity of child custody and support judgments, orderly process of law and to prevent "self-help" on the part of the father.[103] The court did not deny that parents have a duty to sup-

94. These are two cases where statutes have not yet superseded the courts' ruling. *See, e.g., supra* note 63.

95. *See* Dubroc v. Dubroc, 388 So.2d 377 (La. 1980); Cooper v. Allstate, Ins. Co., 735 S.W.2d 204 (Mo. Ct. App. 1987).

96. *Dubroc*, 388 So. 2d at 378.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 378.

101. *Id.*

102. *Id.*

103. *Id.* at 379.

port their children.[104] However, it went on to say that "[t]here is no prohibition, however, expressed by the law against a spouse's agreement to suspend his right[105] to compel the other parent without custody to turn over to him in advance money necessary for the child's maintenance."[106] Thus, the court held that "if the parties clearly agree to a suspension of the payments,[107] and such agreement does not interrupt the child's maintenance or upbringing or otherwise work to his detriment, the agreement should be enforced."[108]

In *Cooper v. Allstate Ins. Co.*, the court did not support the proposition that parents could reduce future support payments; however, it did hold that the parties could agree to change the method of payment.[109] In this case, the father was ordered to pay $120 per week in child support.[110] Since his job only paid him twice a month, he and the mother agreed that he would pay twice a month the amount of $240 and additionally, the father would provide health insurance for the children and school tuition payments for one child.[111] The father upheld the agreement, paying $240 twice a month, having $612 deducted from his paycheck for insurance premiums and paying $811 in private school tuition.[112] There was nothing in the agreement that jeopardized the child's right to support. Accordingly the court allowed the agreement.[113]

In both of these cases the court allowed the parents to modify the court-ordered child support payments. The parents were given a conditional right to form their own contract. That right was conditioned on the basis that the parents could not completely destroy their duty of support to the child. The Louisiana courts go

104. *Id.* at 380 ("Since the parent's duty of support and upbringing is a legal duty owed to the child it cannot be renounced or suspended.").

105. *Id.* The right the court is referring to is the right of action the custodial spouse is given to compel the non-custodial spouse "to turn over in advance the money necessary to contribute toward the child's maintenance." *Id.* This right is given so to encourage enforcement of the duty of support. *Id.*

106. *Id.* at 380.

107. *Dubroc* expressly stated that the court was not referring to unilateral action on the part of the parents, specifically the supporting parent. *Dubroc*, 388 So. 2d at 379.

108. *Id.* at 380.

109. *Cooper*, 735 S.W.2d at 206.

110. *Id.* at 205.

111. *Id.*

112. *Id.* at 206.

113. *Id.* ("The agreement did not compromise future payments because mother and father did not agree to reduce payments.").

further in that they allow an actual reduction of payments when the reduction is premised on some kind of consideration.[114]

IV. WHAT THE LAW SHOULD BE: ADDING A BEST INTERESTS OF THE CHILD TEST TO RECOGNIZED PRINCIPLES OF CONTRACT LAW

The courts should allow parties to contractually modify support orders as to arrearages and future support payments as well as to the method of payment and any other provisions, so long as the agreement does not jeopardize the best interests of the child. The first prong of the proposed analysis to establish the validity of the child support agreement is to examine the agreement using traditional rules of contract law. This includes examining whether the contract was unconscionable, lacking consideration, or the product of any misrepresentation or overreaching. If this first prong is satisfied, meaning the agreement itself is valid as a contract, then the second prong which tests the validity of the child support agreement must be satisfied. The contract must be in the best interests of the child, so not to thwart the child's right to support and upbringing. If the agreement meets both of these requirements then it will be enforced by the court.

The courts should allow parents to contractually settle arrearages because these past due payments accrue to the custodial parent and not to the child.[115] The child has already received support and any collection process taken is done to reimburse the custodial parent for care already given to the child. The reasoning that a parent is actually a type of decree creditor[116] takes into account the reality of the situation when the supporting parent falls behind in payments. Thus the courts should allow the custodial

114. *See* Hernandez v. Hernandez, 640 So. 2d 818 (La. Ct. App. 1994) (agreement to increase child support if two sons went to live with their mother); Trisler v. Trisler, 622 So. 2d 730 (La. Ct. App. 1993) (agreement to reduce child support due to financial difficulties of supporting parent); Timm v. Timm, 511 So. 2d 838 (La. Ct. App. 1987) (agreement to help refinance primary residence of custodial parent and for reduction in child support due from non-custodial parent); Patrick v. Patrick, 496 So. 2d 521 (La. Ct. App. 1986) (agreement to reduce future child support when daughter married); Le Glue v. Le Glue, 404 So. 2d 1268 (La. Ct. App. 1981) (agreement for father to take two of four children and not pay for their support).

115. Cochran v. Poole, 272 S.E.2d 301 (Ga. 1980) (example of court adopting an oral agreement of the parties).

116. Lindsey v. Lindsey, 716 P.2d 496, 499 (Haw. Ct. App. 1986).

parent to "waive, give, release, compromise, sell, enforce, or do nothing with his or her decree receivable."[117]

Courts should also allow parents to contractually modify future support payments. The custodial parent is contracting to give up her right to compel the other spouse to pay support in advance and not contracting away the child's right to support.[118] The court would retain the ability to examine whether the contract is in the best interests of the child.[119] The child is not a party to the contract. If the agreement threatens the child's right to support or is any way detrimental to the child's well-being, the court may and should invalidate the agreement.

Any provision that completely takes away the right of a party to go to court to modify future child support payments will be invalid as against public policy. Any such provision would be against the best interests of the child, because it would be limiting the remedies available to the custodial parent and jeopardizing the future of the child. A good contract will be held to be valid by the court and will only be unenforceable when it is not in the best interests of the child. A contract not in the best interests of the child would be against the public policy of the state.[120] The parents will be encouraged to reach an agreement that considers the child's needs, because the parents will want a valid and enforceable agreement. Additionally, with the power to contractually modify support payments parties can more easily deal with a change in circumstances, or other contingencies, which occur over time, while saving the time and expense of going to court.

V. CONCLUSION

State courts are currently split over what legal effect they give to private agreements between parents to modify past due and future child support payments. The traditional trend, as to contracting over arrearages, is not to enforce the agreements. The modern trend is to treat arrearages as a judgment accruing to the

117. *Id.* at 500.

118. *Dubroc*, 388 So. 2d at 379-80.

119. Therefore, the courts are not foreclosed from exercising their jurisdiction over child support. The courts retain the power of declaring the contracts as "inadequate, overreaching, unconscionable or otherwise invalid . . . ." Davis v. Davis, 306 S.E.2d 247, 249 (Ga. 1983). However, at the same time the parent's right to raise their child as they see fit is protected by their ability to enter into private agreements. Wisconsin v. Yoder, 406 U.S. 205 (1972).

120. *See supra* note 66.

custodial parent and as such enforce any contract that the parents form settling those arrearages. As for contracting over future child support payments, the vast majority of jurisdictions invalidate the contracts as being against the public policy of the state to protect the child's best interests. There currently exists a small minority of jurisdictions that hold that it is not always against the child's best interests to enforce contracts which modify future support payments. The only situation in which these jurisdictions enforce a private agreement is when it is in the best interests of the child. The parents have two challenges to overcome for such a contract to be valid: the agreement itself must be valid as a contract and it must not threaten the child's right to support.

As discussed in the above sections, the courts should utilize the two-prong test, combining contract law and the best interests of the child, for analyzing agreements concerning past and future child support payments. Ultimately, it is the child's best interests that are at stake and nothing should be done to jeopardize those interests. That is why a test that analyzes an agreement under contract principles and examines the agreement in light of the best interests of the child is the test for the courts to adopt. It is the best way for the courts to insure that a child receives the necessary support and still give parents the freedom to reach an agreement that is in everyone's best interests.

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