CASE LAW AND STATUTORY UPDATE

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TABLE OF CONTENTS

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I. FEDERAL LEGISLATION AND POLICY

A. Federal Legislation Introduced in 112th Congress -

1. Child Support Protection Act of 2011 (S-195)

    a. Reinstates federal matching of state spending of child support incentive payments.

    b. Status as of January 26, 2011 - Referred to the Senate Finance Committee .

2. American Child Support Enforcement Immigration Act of 2011 (HR 89) -

    a. Amends the Immigration and Nationality Act and Title IV of the Social Security Act to provide for the denial of family classification petitions filed by an individual who owes child support arrearages.

    b. Among other things, the ACSEIA would amend Section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) by adding at the end the following new subsection:

    > (m) Denial of Family-Based Classification Petition for Petitioners Certified as Owing Child Support Arrearages- The Secretary of Homeland Security shall, upon certification by the Secretary of Health and Human Services transmitted under section 452(k)(1) of the Social Security Act with respect to an individual, not approve a petition filed by such individual under subsection (a) for classification of an alien by reason of a relationship described in paragraph (1), (2), (3), or (4) of section 203(a) or by reason of immediate relative status under section 201(b)(2)(A)(i).

    c. Status: January 5, 2011 - Referred to the House Ways and Means Committee; January 24, 2011 - Referred to the House Judiciary Subcommittee on Immigration Policy and Enforcement

B. Federal Regulations of the U.S. Dept of Health and Human Services, Administration for Children and Families -

1. Final Rule - Wednesday, December 29, 2010 - Federal Register Volume 75, Number 249, Rules and Regulations, Pages 81894-81908 - FR Doc No: 2010-32424:

    a. This final rule revises certain aspects of the State Parent Locator Service; Safeguarding Child Support Information final rule published on September 26, 2008 with an effective date of December 30, 2010.

b. This final rule will prohibit the disclosure of confidential and personally identifiable information to private collection agencies and expand disclosure to child welfare programs and the Supplemental Nutrition Assistance Program (SNAP).

2. Full text of 75 FR 81894 through 81908, *see* http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/html/2010-32424.htm.

C. Federal Policy -

1. OCSE Fiscal Year 2012 Budget Proposals - The budget request includes new investments of $305 million in FY 2012 and $2.4 billion over ten years for the Child Support and Fatherhood Initiative. The budget also proposes continued funding of $150 million to support the Healthy Marriage and Responsible Fatherhood grant program. *See* http://www.acf.hhs.gov/programs/cse/pubs/2011/fy2012_ocse_budget_proposal.html.

a. Child Support and Fatherhood Initiative -

(1) *Improved distribution policies to ensure that when non-custodial parents do the right thing and pay child support, their children benefit*. These proposals include:

(a) Encouraging states to pass through the current child support collections to TANF families, rather than retaining those payments;

(b) Granting states additional flexibility to discontinue the requirement that child support payments be assigned to the state when a family receives TANF assistance;

(c) Requiring that when children are in foster care, the child support payments made on their behalf are used in their best interest;

(d) Prohibiting the use of child support from fathers to repay Medicaid costs associated with giving birth—a policy already discontinued in many states;

(e) Including a short-term five-year pool of funds to offset a significant share of states' costs in implementing the distribution policies; and

(f) Providing one-time funds to states for necessary adjustments to their computer systems.

(2) *Fostering fathers' engagement in their children's lives*. The budget provides $570 million over ten years to support increased access and visitation services and integrates these services into the core child support program. The budget includes proposals to:

(a) Update the statutory purposes of the CSE program to recognize the program's evolving mission and activities that help parents cooperate and support their children;

(b) Require states to establish access and visitation responsibilities in all initial child support orders; and

(c) Encourage states to undertake activities that support access and visitation, implementing domestic violence safeguards as a critical component of this new state responsibility.

(3) *Short-term increase to incentive pool*. According to the OCSE, the child support enforcement program collects $4.78 for every dollar invested, which, the OCSE contends, "clearly demonstrates a high return on investment." The budget includes $600 million for a temporary increase in incentive payments to States based on performance in FY 2012 and FY 2013. These payments are to be based on state performance, which continues an emphasis on program outcomes and efficiency while also helping states overcome short term fiscal stresses. The budget includes several proposals aimed at increasing and improving collections and improving efficiency and effectiveness by:

(a) Requiring States to amend their uniform interstate child support laws to ensure efficient international child support case processing as required by The Hague Child Support Treaty;

(b) Closing a loophole to allow garnishment of longshoremen's benefits;

(c) Improving the processes for freezing and seizing assets in multistate financial institutions;

(d) Providing tribal child support programs with access to the Federal Parent Locator Service and other enforcement tools and grant programs currently available to state child support programs, as well as sustained support for model tribal computer systems;

(e) Modifying the threshold at which states become subject to performance penalty based upon their paternity establishment percentage to better reflect state performance;

(f) Requiring each state's use of procedures to review and adjust child support debt owed to the state, and to discourage accumulation of unpaid child support debt during incarceration; and

(g) Revising Ttitle IV-D to consolidate and clarify various data matching, safeguarding and disclosure authorities.

b. Healthy Marriage and Responsible Fatherhood Grants - The FY 2012 budget proposes continued funding of $150 million to support Healthy Marriages and Responsible Fatherhood to be administered by HHS' Office of Family Assistance within the Administration for Children and Families. These funds will be split equally among Healthy Marriage and Responsible Fatherhood activities. Under the law:

(1) Healthy Marriage funds may be used for a number of services including pre-marital education; marriage enhancement programs; divorce reduction programs; marriage mentoring programs; and marriage education, marriage skills, and relationship skills programs, that may include parenting skills, financial management, conflict resolution, and job and career advancement.

(2) The $75 million in Responsible Fatherhood funds may be used for fatherhood activities intended to promote or sustain marriage, responsible parenting, economic stability, and media campaigns that reach families with important messages about responsible fatherhood.

2. NCSEA Resolutions - *See* http://www.ncsea.org/content.asp?contentid=446

a. 2010 Resolutions -

(1) Resolution Opposing Federal Limits on State Options to Design Benefit Card Program Rules and Fees - adopted May 10, 2010.

(2) Resolution Supporting State Option to Charge Fees to Families for Child Support Services - adopted May 10, 2010.

b. 2009 Resolution - Resolution Supporting Permanent Restoration of Federal Incentive Match Funding for the Child Support Enforcement Program - adopted September 2, 2009

c. 2008 Resolution - Resolution Supporting Ratification of The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance and Supporting Conforming Changes to the Uniform Interstate Family Support Act - adopted August 2, 2008.

3. NCSEA Position Statements - *See* http://www.ncsea.org/content.asp?contentid=448

   a. Position Statement on Destruction of Genetic Samples (not dated) - urging states to oppose passage of laws mandating the destruction of genetic samples and results until further national studies can be conducted and balanced legislation submitted.

   b. Position Statement on Healthy Marriage Initiatives - 2005.

   c. Position Statement on Proposed Reduction in CSE Program Funding - Nov 1, 2005.

II. CASE LAW - FEBRUARY 1, 2008 THROUGH FEBRUARY 8, 2012[1]

A. Arrearages -

1. Nonconforming Payments -

   a. Direct Payment to Custodial Parent - A trial court violated clear statutory directives when, in a state action to recoup support arrears owed by the father of a child who was receiving public assistance, it credited him with arrearage payments made directly to the mother and set his court-ordered child support at zero, the Tennessee Court of Appeals ruled. The appellate court acknowledged that in general, a trial court has discretion over the manner in which support payments are to be made. However, in cases within the ambit of Title IV-D of the Social Security Act, Tenn. Code Ann. § 36-5-101 abrogates such discretion, the court said, observing that in a IV-D case the court "must" order support payments to be made through the state Department of Human Services. Furthermore, the statute provides that "[n]o credit shall be given" for payments made in a manner not consistent with such requirement, the court said. *State ex rel. Lott v. Lott*, No. W2007-02443-COA-R3-CV (Tenn.Ct.App. 10/6/08), 34 FLR 1571.

   b. Payment of Custodial Parent's Mortgage - A trial court did not abuse its discretion in refusing to classify mortgage and related payments that a father makes on the

[1] Primary citations are to the West National Reporter System where available. West's National Reporter System is a set of reporters that divides the 50 states and the District of Columbia into seven regions: Atlantic, North Eastern, North Western, Pacific, South Eastern, South Western, and Southern. The National Reporter System covers the appellate courts of all the states and the District of Columbia. The federal reporters published by West are also part of the National Reporter System.

Secondary citations are to the Family Law Reporter (FLR) where available. The FLR is a publication of the Bureau of National Affairs, Inc (BNA), a wholly-owned subsidiary of Bloomberg L.P., a leading source of legal, regulatory, and business information for professionals.

home where his nonmarital children reside with their mother as in-kind credits against his child support obligation, and in ordering him to pay such obligation to the mother in money, the Maine Supreme Judicial Court held. Pointing out that the child support statutes use the word "money," the court explained that this means that a support obligation generally cannot be satisfied by in-kind payments or substitutions. The court acknowledged that a trial court has authority to award credit for nonconforming payments upon a "compulsion of circumstances. Invocation of the "compulsion of circumstances" exception requires a finding that the expenditure is/was (1) necessary, (2) directly related to an essential purpose of the support order, and (3) compelled by circumstances. The Supreme Court, observing that the home was purchased long before the father's child support order arose, held that the father's obligation to pay support was independent of his obligation to pay the mortgage and monthly household expenses. *Perry v. Whitehead*, 10 A.3d 673 (Me. 2010), 37 FLR 1104.

c. <u>Support of Stepchildren</u> - A divorce court erred when it reduced the arrears that a man owed for the support of his children by the amount he allegedly provided for his wife's daughter from her prior marriage (the man's stepdaughter), the Wisconsin Court of Appeals, Division II, held. The court explained that there is no basis upon which a trial court may reduce support owed to a child based on non-child-support amounts paid to a nonmarital child. "While a credit against the child support owed to the parties' marital children is not authorized under statute, the benefit received by [the wife] and her daughter would appropriately be accounted for in the maintenance award or property division," it advised, remanding for modification of either the wife's maintenance or property awards. *Ladwig v. Ladwig*,785 N.W.2d 664 (Wis.Ct.App. 2010), 36 FLR 1332.

d. <u>Payments by Third Party</u> -

(1) A divorced father's agreement with his business partner under which the partner would settle a business debt owed to the father by giving his ex-wife $25,000 — which would cover his child support arrearage — is enforceable, the Alaska Supreme Court decided. All three parties signed the agreement, which stated that the payment would settle the business debt (involving the father's sale of his business interest to the partner and his execution of an agreement not to compete), remove a Child Support Enforcement Division lien from the business' real property, and satisfy the father's support obligation. When the partner failed to pay the $25,000, the trial court refused to enforce the agreement, holding that enforcement would modify the father's support obligation in violation of public policy and the civil rule governing modification. Reversing and remanding, the high court said that neither the rule nor public policy barred either parent from enforcing the agreement. It explained that the partner's performance under the

agreement would not waive or alter the father's support obligation, but simply fulfil the "reasonable expectation that his performance will reduce, and thus potentially discharge, the CSED lien." *Wolff v. Cunningham*, 187 P.3d 479 (Alaska 2008), 34 FLR 1418.

(2) A custodial father who had accepted "a great deal of financial assistance" from his children's maternal grandparents was properly held to be equitably estopped from seeking child support arrearages owed by the children's mother, the Arkansas Court of Appeals, Division III held. The court first observed that father cited no law that proscribes a person or persons from voluntarily paying the obligations of another. Moreover, the court noted that while any agreement between the father and the grandparents may not have been enforceable, the father attempted to repudiate it only after the grandparents had fully performed their end of the bargain and had provided nearly double the mother's child support arrearage. *Wilhelms v. Sexton*, 280 S.W.3d 565 (Ark.Ct.App. 2008), 34 FLR 1236.

2. <u>Offsets</u> -

a. <u>Offsetting Child Support with Alimony and Spousal Maintenance</u> -

(1) A consent judgment under which a divorced father's child support obligation was offset by the custodial mother's obligation to pay him alimony is void as against public policy, the Michigan Court of Appeals decided. The court said that the reciprocal alimony provision is unenforceable because it is contrary to the state's public policy that parents may not bargain away their children's right to support. In addition, the court also said that a prearranged reciprocal alimony provision that becomes effective automatically with the imposition of a child support obligation, without any regard to the parties' current circumstances or the need for alimony, is inconsistent with the purpose of alimony, "and violates the mandate that spousal support may be modified only on the basis of new facts or changed circumstances." The alimony obligation here is not really alimony, it added, saying that it is "a refund or reimburse of [the father's] child support obligation, that, both in form and effect, eliminates his child support obligation." *Laffin v. Laffin*, 760 N.W.2d 738 (Mich.Ct.App. 2008), 34 FLR 1489.

(2) A trial court interpreting a couple's decree-incorporated separation agreement — under which the wife's child support payments to the husband would equal his maintenance payments to her — properly concluded that the termination of maintenance after her remarriage did not erase her duty to pay child support, the Kansas Court of Appeals decided. Pointing out that under state law, parents cannot contractually reduce or terminate child support, or divest courts of the

power to maintain jurisdiction over custody and child support, the court asserted that "the court can ignore any contract provision that would illegally terminate child support." It concluded that "when it comes to child support, Kansas courts are not bound by private agreements. Child support cannot be lowered or ended by agreement of only the parties. Because child support belongs to the children, we hold the district court's interpretation of the separation agreement is correct and [the wife] must pay." *In re Vandervoort*, 185 P.3d 289 (Kan.Ct.App. 2008), 34 FLR 1358.

b. <u>Cohabitation</u> -

(1) A trial court properly refused to treat a father's child support obligation as having been suspended during the period in which he and his child's mother resumed living together after she had filed for support, the Louisiana Court of Appeal, Fifth Circuit, ruled. The court opined that under state law, a cause of action for *divorce* is extinguished by reconciliation. Because the parties were not married to each other, marital reconciliation did not apply, and father was not entitled to a credit against his support order for the time in which the parties cohabited following the entry of the support order. *Stanley v. Nicosia*, 19 So.3d 56 (La.Ct.App. 2009), 35 FLR 1562, *reh'g denied*.

(2) A divorced Tennessee father should not have been granted a set-off against his child support arrears for support owed by his children's mother for a period during which they lived with him, where she had assigned her right to collect support to the state of North Carolina in exchange for financial assistance, the Tennessee Court of Appeals decided. Stressing that the key issue was whether the state's efforts to collect the past due support assigned to it could be thwarted by the use of a set-off, the court found that the issue was addressed in *Office of Child Support Enforcement v. Watkins*, 119 S.W.3d 74, 29 FLR 1559 (Ark.Ct.App. 2003), which held that a delinquent obligor could not avail himself of a set-off following a de facto custody switch to deprive the state of its recovery of public assistance. *State ex rel. Strickland v. Copley*, No. W2007-01839-COA-R3-CV (Tenn.Ct.App. 8/21/08), 34 FLR 1477.

c. <u>Change of Custody</u> - A trial court erred in holding that a divorced mother had waived her right to collect child support arrears by failing to raise the issue at a modification hearing, the Arkansas Court of Appeals, Division I, held. The hearing resulted in their daughter being placed with the obligor and an order stating that "no child support is owed to either party at this time." Explaining that the trial court had failed to undertake the "requisite judicial inquiry to independently evaluate the compromise and its benefits to the minor" child, the court said that this mandatory inquiry was necessary to a finding that it had "led to the judicial determination that the compromise regarding support was in the minor's best interest." *Mainerich v. Wilson*, --- S.W.3d ----, 2010 Ark. App. 325 (Ark.Ct.App. 2010), 36 FLR 1272.

3. Agreements -

   a. Agreements to Waive Arrearage -

      (1) The defense of estoppel is available in a suit to enforce unpaid child support brought by the Texas Office of the Attorney General in its capacity as a IV-D assignee, the Texas Court of Appeals, Second District, held. The case involved the state's efforts to collect an arrearage where the mother and father agreed privately to terminate child support if he gave up his parental rights, although nothing ever happened. When the state sought to enforce the order under UIFSA, the father raised the estoppel argument. Reversing the trial court, the appellate court held that estoppel was an available defense when the action is brought by the child support obligee, and therefore there was no reason to treat a IV-D agency differently merely because an assignment of rights had been executed. It noted that sister appellate courts had ruled to the contrary, but it declined to follow those cases "because they do not analyze or address the fact that the OAG provides child support collection services pursuant to an assignment from the obligee or the fact that the OAG is not performing a state function in collecting child support." *In re C.E.S.*, 352 S.W.3d 48 (Tex.Ct.App. 2011), 37 FLR 1380, *reh'g overruled*, *petition for review filed*.

      (2) A custodial mother's agreement to accept $175,000 from her ex-husband in satisfaction of his obligations for both child support and their property division is not binding as to child support, Florida's Fourth District Court of Appeal ruled. The court emphasized the long-established rule that a parent may not contractually impair his or her obligation to support a child, and its corollary that only contracts found to be in a child's best interest are enforceable. It noted that in a case somewhat similar to this, the court had ordered the parties to return to the status quo, with the obligor resuming support payments from the date of their cessation. Remanding for ratification of the magistrate's report, the court observed that the parties' agreement was valid as to their equitable distribution settlement. *Lampert v. Lampert*, 57 So.3d 287 (Fla.Dist.Ct.App. 2011), 37 FLR 1260.

      (3) A trial court did not abuse its discretion in assessing a father's support arrearage based on the amount set out in a 2007 court order rather than the lesser amount stated in a subsequent agreement he entered into with his child's mother after he lost his job, which was never filed with the court, the New Hampshire Supreme Court decided. Rejecting the father's argument, the court rejected the father's

claim that the parties did not need to file the agreement or seek court approval "for it to be a legally binding agreement effectuating the intentions of the parties," and that the trial court thus should have found that the agreement modified the support order. In so holding, the high court said that "[a]side from being contrary to the child support statutes, numerous policy considerations weigh in favor of requiring judicial approval for private child support agreements." It stressed that court orders cannot be modified through private agreement, and that courts must weigh the best interests of the child in determining support. It also said that judicial approval of all support agreements is necessary to prevent collusion between the parties or undue pressure by one party. *In re Laura and Scott*, 13 A.3d 330 (N.H. 2010), 37 FLR 1129.

(4) A trial court properly denied a divorced obligor's request to reduce the arrearage that had accumulated under his 2000 support order in light of the fact that he and his children's mother had orally agreed that he could pay less than that amount after one of the two children died in 2002, the Oregon Court of Appeals held. Pointing out that the obligor never moved to modify the support order to reflect the parties' oral agreement, the court explained that the trial court had no authority to enforce the agreement to reduce the support obligation. However, the court said, the obligor was entitled to a four-month credit for the period of time in which the child resided with him. *In re Hunt*, 242 P.3d 682 (Or.Ct.App. 2010), 37 FLR 1008.

(5) The financial provisions of a divorced couple's mediated agreement that changed their children's primary residence from the father to the mother and waived her claim for child support was properly rejected by the trial court, the Maine Supreme Judicial Court ruled. Pointing out that DHHS was not a party to — and therefore not bound by — the mediated agreement, the court said that the state had the right to object to the agreement to the extent that it purported to waive the father's legal duty to pay support while the mother received TANF. Also observing that DHHS is authorized to enforce a support obligation on behalf of a parent who does not receive TANF, it noted that the father did not apply for such services. In rejecting the father's argument that his obligation to pay arrears should have started on the date the order was issued, and not on the earlier date when the mother started to receive TANF benefits, the court explained that his support obligation began to accrue on the day that she began receiving public assistance. *Hamilton v. Hamilton*, 976 A.2d 924 (Me. 2009), 35 FLR 1452.

b. <u>Agreements to Pre-Pay Child Support</u> -

(1) A divorced mother is bound by her agreement with her ex-husband under which he prepaid his 15-year prospective child support obligation out of his share of the

equity in their marital residence, the New York Supreme Court, Nassau County, held. While sympathizing with the mother, who sold the home two years after the divorce for much less than the amount that the parties valued it at when they entered into their stipulation, the court concluded that she was not now entitled to a money judgment against the husband for half of such unrealized amount as child support arrears. *Deabreu v. Deabreu*, No. 04-203424 (N.Y. Supp. 8/13/09), 35 FLR 1464.

(2) A court-approved agreement under which an adjudicated father paid his child's mother $14,000 with the understanding that if she ever sought and received a support order he would be credited for such amount is enforceable, the Nebraska Supreme Court ruled. Rejecting the mother's claim that the credit provision was a void conditional order and violated public policy, the court said the money was a prepayment of support, and that equity required enforcement of the provision. Finding that the credit provision was the product of negotiation and agreement by the parties, and was incorporated by the trial court into what was implicitly a fair and reasonable modification of the paternity decree, it said that "even assuming it was subject to collateral attack, it was not so indefinite as to be unenforceable." *Jensen v. Jensen*, 750 N.W.2d 335 (Neb. 2008), 34 FLR 1376.

c. <u>Unincorporated Settlement Agreements</u> - Absent an emergency, courts must abide by the support terms set out in valid unincorporated separation agreements, and may not award a custodial parent retroactive support in an amount greater than that set out in the agreement, the North Carolina Court of Appeals held. Basing this ruling on decisional law, the court explained that the child support guidelines do not abrogate such state case law, and that they are not codified statutory law. *Carson v. Carson*, 680 S.E.2d 885 (N.C.Ct.App. 2009), 35 FLR 1499.

(1) The case before the court involved a couple's March, 1998 separation agreement that required the father to pay $500 per month in child support. Although the agreement also provided that they would try to negotiate a support consent order for entry prior to Mar. 1, 1999, that never happened, and the father continued to pay $500 per month in support under the unincorporated agreement. Following the parties' divorce, their child lived with each parent on a biweekly schedule. However, in 2004 she began living exclusively with the mother, who in 2006 filed an action alleging that the amount of support being paid by the father was not just and reasonable. The mother claimed that she was entitled to reimbursement "for a portion of the actual expenses [she had] incurred" for the child over and above the father's $500 payments.

(2) Reversing the trial court's award of over $31,000 of retroactive support, the appellate court held that the guidelines are neither statutory nor abrogate case

law. Thus, the lower court was obliged to honor the agreement until the support order was modified.

4. Overpayments -

   a. A trial court erred in ordering a man to reimburse his grandchild's mother for support payments she had made to him after the child had moved in with her uncle, the Louisiana Court of Appeal, First Circuit, held. The mother claimed that the man was unjustly enriched by the support payments he kept and used for himself after the child had left his residence. Reversing the trial court's award to the mother, the appellate court held that because another remedy was available to the mother, *i.e.*, terminating or modifying her support obligation, she was not entitled to bring a claim for unjust enrichment. Since she failed to do so, it held, the trial court committed legal error in making its award to her. *Soulier v. Soulier*, 73 So.3d 390 (La.Ct.App. 2011), 37 FLR 1457.

   b. An obligor who failed to recoup his court-ordered abatements of support during the times he had physical custody of his children was properly denied a credit for such abatements against his future payments, the Wyoming Supreme Court ruled. In rejecting the claim that the unused abatements were not voluntary overpayments, the court noted that the obligor received over 20 abatement orders during an eight-year period but nevertheless continued to pay the full amount of support to (in his words) "help with his girls." In light of his knowledge of the orders, his failure to adjust his payments, and his statement that he intended the abatement amount to be used for his daughters' support, "we conclude that the unused abatements are the equivalent of voluntary overpayments," the court asserted. *Grenz v. State*, 249 P.3d 694 (Wyo. 2011), 37 FLR 1130.

   c. An obligor is not entitled to credit seven years of voluntary support overpayments against four months of nonpayments, after a trial court ordered an upward modification of his support obligation, the Arkansas Supreme Court decided. *Guffey v. Counts*, 2009 Ark. 410 (2009) (not reported in S.W.3d), affirming 315 S.W.3d 288 (Ark.Ct.App. 2009), 35 FLR 1525.

      (1) Agreeing with the appellate court that the obligor was properly held in contempt for the nonpayments, the court stressed that the overpayments were not court-mandated. The obligor "was free, as any noncustodial parent is, to pay more child support than is required by law. Without an explicit agreement with [the mother] that the overage constituted advance payment of court-ordered support and could serve as a credit for future payments of child support, [the obligor] was not entitled, as he did here, to forego child-support payments for four months," the court explained, rejecting the obligor's argument that the trial court's decision retroactively modified his support obligation.

(2) However, the court did agree with the obligor that the trial court erred in finding that the voluntary overpayments were gifts to the children. "The payments were clearly child support," it asserted, adding that it was not necessary to address the parties' estoppel arguments in light of the fact that the expenditures were voluntary support payments for which the obligor is not entitled to a credit.

(3) Also agreeing that the state support agency lacked standing and improperly joined with the mother in the appeal (as it had no involvement in the arrearage determination below), it stressed that the trial court did not err in determining that the obligor should not be credited for the overpayments and in finding him in contempt.

d. A divorced father who voluntarily increased his court-ordered support payments when his income increased is not entitled to a credit for the overpayment, the Arkansas Court of Appeals, Division II, decided. Since the parties' informal agreement for an increase in child support was not approved by a court, it was not enforceable, and thus father was estopped from claiming a credit for the overpayments to cover the support owed for the period in which he ceased making payments. *Guffey v. Counts*, 315 S.W.3d 288 (Ark.Ct.App. 2009), 35 FLR 1224, *affirmed*.

5. <u>Satisfaction of Arrearage</u> - A trial court exceeded its jurisdiction when, in considering a delinquent obligor's motion to hold the state support agency in contempt for intercepting his tax refunds, it *sua sponte* ruled that his arrearage debt to the agency had been satisfied, the Missouri Court of Appeals held. *Colbert v. State*, 264 S.W.3d 699 (Mo.Ct.App. 2008), 34 FLR 1560.

a. The trial court had previously ordered the obligor to pay the agency $12,658 in arrearages as reimbursement for aid it had provided to his child. To that end, the court instructed the agency to withhold $50 a month from his wages. However, a few months later the agency intercepted the tax refunds (totaling $5,292) and applied them to the obligor's debt. In his contempt motion, the obligor argued that the only way the agency could collect the debt was through the wage withholding order. Saying "let's call it quits," the trial court declared that it "is equitable to just call this paid in full," because the debt was "never going to get paid" at the rate of only $50 per month.

b. Reversing, the appellate court pointed out that in his contempt motion, the obligor never alleged or requested the court to find that his debt to the state was satisfied, nor did he present any evidence that would establish that he had satisfied the entire debt. Moreover, the state also did not expressly or impliedly consent to a trial of the satisfaction issue. The court thus held that although the trial court had jurisdiction over the matter, it lacked authority to rule on an issue not raised by the parties through the pleadings or tried by express or implied consent.

6. Placement of Arrearage in Escrow - Trial courts lack authority to order that an arrearage resulting from a retroactive increase in child support be placed in an account in the obligor's name to provide for the future needs of the children, the Arkansas Supreme Court decided. There was simply no authority for the trial court to place such amounts in escrow. To hold otherwise, the court said, would effectively create a guardianship, in direct contravention of the state supreme court's holding in *Smith v. Smith*, 19 S.W.3d 590 (Ark. 2000). *Gilbow v. Travis*, --- S.W.3d ----, 2010 Ark. 9 (Ark. 2010), 36 FLR 1127.

7. Fraudulent Transfers to Avoid Child Support - A child support obligee to whom an arrearage is owed is a "creditor" under the Uniform Fraudulent Transfer Act, and may bring an action to set aside fraudulent transfers made by the delinquent obligor to deplete his or her assets, the Ohio Court of Appeal, Eighth District, held. The court explained that under the Act, a "creditor" is a person who has a "claim," which the Act defines as a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Ohio Rev. Code 1336.01(C). Taking note of the Act's definition of a fraudulent transfer (§ 1336.04), it said that because the plaintiff in the instant case was owed child support by her ex-husband, she had a right to payment from him, and thus was a creditor under the Act. *Dinu v. Dinu*, No. 91705 (Oh.Ct.App. 6/18/09), 35 FLR 1381.

8. Assignment of Support Arrearage to Third Party - Child support arrears owed to an incarcerated criminal offender may not be assigned to her victim as restitution while the defendant's children are minors, the U.S. Court of Appeals for the Ninth Circuit ruled. The defendant in the case before the court had been convicted of a number of immigration and labor offenses that resulted from her mistreatment of a Peruvian nanny who cared for her children. Along with receiving a five-year prison term, the woman was ordered to make restitution of more than $100,000. Because the victim was destitute, the judge ordered the defendant to turn over to her any accrued back child support payments she might receive from her ex-husband while she was serving time, even though the defendant's children were young enough to qualify for continued current support. The woman appealed. Reversing, the Court of Appeals held that the restitution order was invalid to the extent that it assigned accrued support payments to the victim. The court opined that it read California law as stating that "until a child reaches the age of majority, the child is the real party of interest in child support arrearages. The accrued child support is simply not the property of the parent to be redistributed to a victim as restitution." *United States v. Dann*, 652 F.3d 1160 (9th Cir. 2011), 37 FLR 1518.

9. Waiver - Hardship to Obligor - A trial court abused its discretion in modifying the amount of arrears owed by a child support obligor under two separate judgments for his now adult children on the ground that payment of the full amount would work a substantial financial hardship on him, the Ohio Court of Appeals, Eighth District, held. In confronting this issue of first impression, the court held that the statutes governing retroactive support take precedence over any equitable claim the father might have due to the hardship he might face in paying the arrearage. *Taskey v. Bonner*, No. 94601 (Ohio Ct.App. 11/10/10), 37 FLR 1032.

10. Interest -

    a. Mandatory Interest - Delinquent child support payments in Illinois became subject to mandatory interest in 1987 when the state's Marriage Act was amended to provide that a support order "shall be deemed to be a series of judgments," and such obligations thus fell within the statutory mandate that judgments "shall draw interest," the Illinois Supreme Court ruled. *Illinois Department of Healthcare and Family Services ex rel. Wiszowaty (Mihaila) v. Wiszowaty*, 942 N.E.2d 1253 (Ill. 2011), 37 FLR 1141.

        (1) Explaining that in the amendments "the legislature stated that unpaid child support 'shall' be deemed judgments and that these judgments 'shall bear interest' at the same rate as all other judgments," the court asserted that "past-due child support payments began to bear mandatory interest on May 1, 1987."

        (2) In so ruling, the court rejected the lower courts' finding that *Finley v. Finley*, 410 N.E.2d 12, 6 FLR 2598 (Ill. 1980), established a general rule that dissolution actions are exempt from general statutes that establish interest requirements and that the imposition of interest on child support judgments is a matter within the trial court's discretion. "*Finley* stands for the proposition that, where there are no controlling statutes defining unpaid support payments as judgments or providing for interest, interest may be awarded on those payments as a discretionary matter …. But *Finley* does not stand for the proposition that interest is left to the discretion of the circuit court even when governing statutes have plainly stated otherwise," the court declared.

    b. Date of Accrual - A trial court erred when after entering a judgment for support arrears, it awarded interest on it from the date the petition to collect child support was filed rather than from the date the support should have been paid, the Arkansas Court of Appeals, Division IV, held. In so holding, the court looked to Ark. Code Ann. § 9-14-233(a), which provides that "[a]ll child support that becomes due and remains unpaid shall accrue interest at the rate of ten percent (10%) per annum" unless the owner of the judgment or the owner's attorney requests, prior to the accrual, that interest not accrue. In addition, previous appellate decisions affirmed decisions awarding interest from the date the support became due rather than when the petition to collect it was filed. *Mills v. Mills*, 315 S.W.3d 707 (Ark.Ct.App. 2009), 35 FLR 1223.

c. Allocation of Principal and Interest - A state agency's method of distributing child support arrearage payments between principal and interest is appropriate, even though it deviates from the way allocations are generally made for court-ordered money judgments not involving support, the West Virginia Supreme Court of Appeals held. Addressing a question of first impression, the court noted that the method employed by the state Bureau of Child Support Enforcement applied the arrearage payments first to outstanding principal, whereas the typical money judgment allocation of payments on a debt first applies the money toward reducing the accrued interest, with the remainder applied to the principal owed. *Hornbeck v. Caplinger*, 712 S.E.2d 779 (W. Va. 2011), 37 FLR 1404.

(1) Saying that the "straightforward issue" was whether the law requires that a support arrearage be treated as a money judgment, the court was not persuaded by cases from other jurisdictions that have either been superseded by statute or were based on common-law principles because there was no fixed agency procedure. After determining that BCSE's allocation procedure should be classified as an interpretive rule and was a proper exercise of the authority delegated to it by the legislature, it observed "child support payments are a legal duty rather than a debt," and that the remedies for collection of support differ significantly from those available for the collection of routine money judgments.

(2) Also noting the agency's explanation that the application of money in excess of current support to any principal in arrearage carries out the legislative intent that available assets go toward tending the needs of the child over and above the payment of interest (which would benefit someone other than the child), the court upheld application of the BCSE allocation rule in this case.

d. Waiver of Interest -

(1) A trial court should not have waived the interest that a divorced father would otherwise be liable for on his child support arrearage, the Tennessee Court of Appeals held. Ruling that the trial court erred in waiving interest on the arrearage, the court pointed out that Tenn. Code Ann. § 36-5-101 provides: "If the full amount of child support is not paid by the date when the ordered support is due, the unpaid amount is in arrears, shall become a judgment for the unpaid amounts, and shall accrue interest from the date of the arrearage, at the rate of twelve percent (12%) per year. All interest that accumulates shall be considered child

support." Also pointing out that his court had previously held that this language "is clearly mandatory regarding the accrual of interest on arrearages," it noted that the trial court did not make findings of fact and did not otherwise explain why it waived interest. Asserting that "we see no basis in the record to depart from the statutory requirement," it instructed the trial court to enter judgment providing that interest accrue at the rate of 12% from the date of the arrearage. *State ex rel. Campbell v. Penuel*, No. M2009-01688-COA-R3-CV (Tenn.Ct.App. 1/20/12), 38 FLR 1161.

(2) A trial court erred when it ordered a waiver of the statutory interest that otherwise would accrue prospectively on a $27,791 judgment for child support arrears entered against an obligor who earned $1,200 per month, the Alabama Supreme Court held. *Ex parte State ex rel. W.M.E. (State ex rel. W.M.E. v. G.C.)*, 73 So.3d 593 (Ala. 2011), 37 FLR 1274, *on remand to State ex rel. W.M.E. v. G.C.*, 73 So.3d 596 (Ala.Civ.App. 2011).

(a) At the hearing on the state's petition, the obligor had stated that he could pay $150 per month toward the arrearage. The state asked that the payment be set at $280 to cover the statutory interest that would accrue every month on the unpaid balance. The judge, however, ruled that it was "equitable to waive interest" where the higher payment would cause "an extreme financial hardship" to the obligor. The appellate court affirmed.

(b) Reversing, the high court pointed to the mandatory nature of statutory interest on past-due child support payments. Saying that a court does not have the power to waive post-judgment interest, it explained that the fact that the obligor "might not have the ability to make monthly installments payments that equal or exceed the postjudgment interest as it accrues does not make a waiver of postjudgment interest legally permissible. Instead, the law requires that interest continue to accrue on the unpaid principle balance." (The court noted that "[w]aiver of interest is an issue distinct from the issue whether a court properly might refuse to order a parent to make monthly installment payments that exceed his or her financial ability to pay."

11. <u>Post-Majority Reimbursement for Unpaid Support</u> - An obligor who along with being required to pay child support had been ordered to open a savings account and deposit $150 into it each month to cover his children's uninsured medical expenses — with the children splitting any leftover funds after they reached majority — was properly required to pay their mother the money he never deposited, the Tennessee Court of Appeals held. The father argued that the savings account requirement was a contractual — not support — obligation, because the children were to receive any funds remaining in the account after they reached majority: "that is, after [his] duty of support had expired." Rejecting

his argument, the court asserted that "the fact that unused amounts in the savings account were to be paid to the children after they reached majority does not transform the nature of the funds into something other than child support." *Wheeler v. Pickle* (Tenn.Ct.App. No. W2007-02731-COA-R3-CV, 12/17/08) (not reported in S.W.3d), 35 FLR 1093.

B. Bankruptcy -

1. Payment Priority in Ch. 13 - A Chapter 13 bankruptcy plan did not have to provide for child support obligation claims to be paid in full before disbursements were made to other priority claimants, or before secured creditors received payments for more than adequate protection, the U.S. District Court for the Middle District of Alabama concluded Jan. 24 in two separate decisions. *Alabama Dept. of Human Resources v. Boler (In re Boler)*, No. 2:06-CV-473 (M.D. Ala. 1/24/08); *Alabama Dept. of Human Resources v. Brown (In re Brown)*, No. 2:06-CV-472 (M.D. Ala. 1/24/08) (neither case reported in F.Supp.2d), 34 FLR 1151.

    a. The court explained that Bankruptcy Code § 507(a) sets forth 10 categories of claims afforded priority status, and that with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, domestic support obligations were moved from seventh to first priority. It went on to note that a Chapter 13 plan is required to "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim," quoting § 1322(a)(2). Priority claims are a type of unsecured claim, it said, adding that § 1322(b)(4) allows for unsecured claims to be paid concurrently.

    b. Thus, the court said, a Chapter 13 plan must provide for full payment of priority claims, but there is no provision that requires higher-ranked priority claims to be paid before lower-ranked ones. While domestic support obligations are listed before administrative expenses in Section 507, it declared, the plain language of § 1326 requires that administrative expenses be paid first.

    c. If Congress had intended priority claims to be paid in the order provided in § 507, it could have included a similar requirement for Chapter 13 plans, it said. In support, the court cited, *In re Vinnie*, 345 B.R. 386 (Bankr. M.D. Ala. 2006) ("it appears that DHR has confused the notion of priority, in the context of a case under Chapter 7, with priority in the context of a case under Chapter 13").

    d. The court also rejected DHR's argument that post-confirmation payments to secured creditors must be limited to only adequate protection payments until domestic support obligations are paid in full. DHR offered no authority supporting this argument, it said, adding that it ignored the very nature of secured claims and the plain language of Section 1322(b)(4), which permits Chapter 13 plans to "provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim."

2. Effect of Confirmed Plan -

   a. A debtor's second motion to modify his confirmed Chapter 13 plan did not serve to preclude the state child support enforcement agency from intercepting his tax refunds for pre-petition debt, where the first amended plan expressly provided for the tax refund offset, and the second modified was silent as to the state's ability to continue to do so. *New Hampshire v. McGrahan (In re McGrahan)*, 459 B.R. 869 (B.A.P. 1st Cir. N.H. 2011), 38 FLR 1092.

      (1) Reversing the bankruptcy court's order precluding the state from intercepting the debtor's tax refunds, the Bankruptcy Appellate Panel acknowledged that the binding effect of confirmation has led courts to conclude that once a plan is confirmed, a creditor's rights and interests are defined within the boundaries of the plan, and proceedings that are inconsistent with the confirmed plan are improper, even if they fall within an exception to the automatic stay. *See, e.g., Florida Dept. of Revenue. v. Rodriguez (In re Rodriguez),* 367 Fed.Appx. 25, 28 (11th Cir.), *cert. denied,* — U.S. —, 131 S.Ct. 128, 178 L.Ed.2d 34 (2010); *In re Worland,* 2009 WL 1707512, 2009 Bankr.LEXIS 1512 (Bankr.S.D.Ind. Jun. 16, 2009); *Fort v. Florida Dept. of Revenue (In re Fort),* 412 B.R. 840 (Bankr.W.D.Va.2009); *In re Dagen,* 386 B.R. 777, 783 (Bankr.D.Colo.2008); *In re Gellington,* 363 B.R. 497, 502 (Bankr.N.D.Tex.2007); *In re Sanders,* 243 B.R. 326, 330 (Bankr.N.D.Ohio 2000).

      (2) The court explained, however, that the binding effect of a Chapter 13 plan extends only to those issues "which were actually litigated by the parties and any issue necessarily determined by the confirmation order." Conversely, a confirmed Chapter 13 plan is not binding as to issues "not sufficiently evidenced in a plan to provide adequate protection to the creditor." Since the debtor's second amended failed to expressly retract the state's ability to intercept his tax refunds, which was permitted under the debtor's fist amended plan, the state was not barred from doing so, the court said.

   b. A bankruptcy court improperly enjoined the Florida Department of Revenue from presenting the issue of a debtor's possible child-support obligations in a state court proceeding, even after the bankruptcy court had entered an order confirming the debtor's Chapter 11 plan, which purportedly operated as an adjudication on the merits of the child support claim, the U.S. District Court for the Middle District of Florida held. Reversing the bankruptcy court's order, the District Court concluded that *res* *judicata* and collateral estoppel did not preclude the state from arguing the extent of the debtor's personal liability for child support post-bankruptcy because child support obligations are nondischargeable in Chapter 13 and Chapter 11 bankruptcy cases. In reaching this decision, the court relied on *In re Diaz*, 647 F.3d 1073 (11th Cir. 2011), which had not been issued when the bankruptcy court made its ruling. *Florida Department of Revenue v. Davis (In re Davis)*, — B.R. — (M.D. Fla., No. 8:10-cv-2216-T-33, 9/13/11), 37 FLR 1599.

3. Discharge -

   a. Effect of Discharge Injunction - The U.S. Court of Appeals for the Eleventh Circuit held that the Florida Department of Revenue and the Virginia Department of Social Services did not violate a debtor's discharge injunction by attempting to collect a child-support debt after the bankruptcy court entered its discharge order, because child-support obligations are always nondischargeable in a Chapter 13 proceeding. It also held that state sovereign immunity deprived the bankruptcy court of jurisdiction to hear the portion of the debtor's motion that alleged violations of the automatic stay, since the state had not waived its immunity by seeking affirmative relief in the bankruptcy court or filing a proof of claim, and the automatic stay had expired when the state sought to enforce the arrearage. *Florida Dept. of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073 (11th Cir. 2011), 37 FLR 1479.

   b. Dischargeability -

      (1) A bankruptcy court correctly allowed a Chapter 7 debtor to discharge a court-ordered obligation to repay her former partner for support he had paid to her for a child he erroneously believed he had fathered, the U.S. District Court for the District of Minnesota held. Following DNA tests that excluded a man who was previously determined to be the child's father and ordered to pay child support, a state court ordered that the debtor return a total of $10,622 that the father had paid her for child support. This amount included $7,558 for all money expended on behalf of the child or paid to the debtor or to the county, $525 for all genetic testing costs, and disbursements of $2,539 for filing fees, transcripts, subpoena, and other costs. Holding that the debt owed by mother to father under the state court order was not "child support" but rather the return of money that the father should never had paid the mother, the court held it did not qualify as a nondischargeable debt under § 523(a)(5) or (15). *Bartos v. Kloeppner (In re Kloeppner)*, 460 B.R. 759 (D. Minn. 2011), 38 FLR 1020.

      (2) Monthly maintenance payments and partial payment of attorneys' fees awarded in a divorce decree that a bankruptcy court determined were intended for support are domestic support obligations and not dischargeable in Chapter 13

proceedings, the U.S. Bankruptcy Appellate Panel for the Eighth Circuit held. The court explained that the characterization of the award is determined by the bankruptcy court, as a matter of federal bankruptcy law, based on its intended function. *In re Phegley*, 443 B.R. 154 (B.A.P. 8th Cir. 2011), 37 FLR 1186.

C. Contempt -

1. Sufficiency of the Evidence - A man who joined a religious community known as the Twelve Tribes of Israel — which apparently prohibits its members from earning money — shortly after entry of an order requiring him to pay child support was properly found in civil contempt for failing to comply with the order, the North Carolina Court of Appeals ruled. In rejecting the obligor's argument that he could not pay the court-ordered support or purge the contempt because his membership in the community prevents him from earning outside income or owning assets (members farm and provide services to each other in exchange for food and a place to live), the court focused on the fact that he voluntarily quit his job, refused to take another, and joined the community only after his estranged wife obtained the support order (which also requires him to pay her monthly post-separation support). "That defendant's religious beliefs may be sincerely-held is irrelevant," the court asserted, noting that "our courts have held that child support and alimony obligations cannot be avoided where the obligor has voluntarily assumed additional obligations, such as through remarriage or the birth of additional children." *Shippen v. Shippen*, 693 S.E.2d 240 (N.C.Ct.App. 2010), 36 FLR 1369.

2. Contempt Where Obligor Receives SSI - Because Kentucky's support guidelines permit use of a parent's need-based federal Supplement Security Income program benefits in calculating a child support obligation even if the benefits are the parent's only source of income, arrears may accumulate regardless of his or her present ability to meet the obligation, the Kentucky Supreme Court decided. The court thus held that such a parent's noncompliance with a support order may be subject to enforcement proceedings, including contempt. Under the facts of this case, however, there was no evidence of the mother's ability to work and afford the support payments. Thus the mother should not have been subject to contempt. *Commonwealth v. Ivy (Knighten)*, 353 S.W.3d 324 (Ky. 2011), 38 FLR 1028.

    a. The mother argued that because the SSI program is subject to 42 U.S.C. § 407(a)'s anti-alienation provision, the language in that provision shielding SSI benefits from garnishment-like "legal process" extends to enforcement actions, thus making the contempt proceeding against her improper. The high court disagreed, saying that "the contempt proceeding against [the mother] cannot be thought to conflict with section 407(a) to the extent that the statute is meant to prevent use of the [Social Security Administration] as a 'collection agency.' "

b. Going on to say that not all SSI recipients are incapable of working (federal regulations allow them to earn some income without affecting their SSI eligibility), the court declared that “given this recognition that beneficiaries' circumstances will differ and are changing and that not all beneficiaries will be incapable of contributing to the support of their children; given the Supreme Court's recognition that family law is preeminently a matter for the states, *Rose v. Rose*, 481 U.S. 619, 625 (1987); and given the widely, if not universally, held belief that one's children are not like one's creditors, and that the duty to support one's children is vastly more important and fundamental than the duty to pay one's debts, a trial court does not, we believe, act contrary to Congress' intent or do major damage to clear and substantial federal interests when it scrutinizes an SSI recipient's ability to provide child support. Where that ability is clearly established by evidence of non-SSI income, of earning capacity, or of SSI income in excess of the recipient's reasonable subsistence needs, the trial court may order the recipient upon pain of contempt to provide the support he or she is capable of providing.”

3. <u>Contempt Post-Emancipation</u> - A court's civil contempt power — with accompanying imprisonment — may be used to enforce payment of child support arrears after the subject child has reached majority, the District of Columbia Court of Appeals decided. Addressing the issue for the first time, the court adopted the majority rule among other jurisdictions. It also settled a conflict in D.C. case law by holding that the alleged contemnor has the burden of showing a current inability to purge the contempt by paying the arrearage. *Wagley v. Evans*, 971 A.2d 205 (D.C. 2009), 35 FLR 1316.

   a. The court explained that “[a]lthough civil contempt imposing a prison sentence is, indeed, an extreme remedy, we find the majority position more persuasive because the court's jurisdiction to enforce a support order is a continuing one, and emancipation of the child should not serve to dilute the court's authority to enforce arrearages that accrue before emancipation.” The court added that it found the Florida Supreme Court's expression of this policy in *Gibson v. Bennett*, 561 So.2d 565 (Fla. 1990), “compelling.”

   b. The court agreed with *Gibson* that if a court lacks the power to enforce child support orders through contempt, the nonpaying parent may hide assets or purposefully elude the court until the child reaches majority, preferring to defend a civil action to collect the debt rather than risk imprisonment from a contempt proceeding. Declaring that a nonpaying parent should not be able, in this way, not only to put off the obligation to pay, but also to select a less threatening method of enforcement, the court said that “in sum, we are satisfied that a judgment for child support arrearages is enforceable by a civil contempt order issued — and imposing imprisonment — after the child has reached the age of majority.”

4. Right to Counsel - The U.S. Supreme Court in a 5-4 decision declined to extend the right to counsel broadly to indigent persons facing incarceration in civil contempt hearings, and instead concluded that several procedural safeguards could provide a noncustodial parent with his due process rights in a hearing to determine whether he had the ability to pay child support. *Turner v. Rogers*, 131 S.Ct. 2507 (2011), 37 FLR 1405.[2]

   a. Facts - After a South Carolina family court ordered petitioner Turner to pay $51.73 per week to respondent Rogers to help support their child, Turner repeatedly failed to pay the amount due and was held in contempt five times. For the first four, he was sentenced to 90 days' imprisonment, but he ultimately paid what he owed (twice without being jailed, twice after spending a few days in custody). The fifth time he did not pay but completed a 6-month sentence. After his release, the family court clerk issued a new show cause order against Turner because he was $5,728.76 in arrears. Both Turner and Rogers were unrepresented by counsel at his brief civil contempt hearing. The judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments. After Turner completed his sentence, the South Carolina Supreme Court rejected his claim that the Federal Constitution entitled him to counsel at his contempt hearing, declaring that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.

   b. Mootness Doctrine - As a threshold matter, the Court acknowledged that by the time the U.S. Supreme Court was in a position to render its opinion, Turner had already served his one-year sentence, thus giving rise to the claim that the controversy was rendered moot. The Court observed, however, that this issue was "capable of repetition while evading review." *See Southern Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U. S. 498, 515 (1911). Recognizing this exception to the mootness doctrine, the Court rendered its opinion on the merits.

   c. Summary of holding - The Court held that the Fourteenth Amendment's Due Process Clause does not automatically require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to dispute, relevant information, and express court

[2] Justice Breyer issued the opinion of the Court, in which Justices Kennedy, Ginsburg, Sotomayor, and Kagan joined.

findings as to the supporting parent's ability to comply with the support order. Such alternative procedures include, but are not limited to: (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.,* those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. The Court went on to say that these alternatives are not the only ones possible, "and this Court's cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient."

d. In reaching its decision, the Court first observed that the Sixth Amendment's right to counsel applies only to criminal cases, which this was not. Analysis under the Due Process Clause, however, was more vexing, and the Court's prior cases, it said, do not squarely address the issue before it. On the one hand, the Court has held that the Fourteenth Amendment requires the State to pay for representation by counsel in a civil juvenile delinquency proceeding (which could lead to incarceration). *In re Gault*, 387 U.S. 1, 35–42 (1967). On the other hand, the Court has held that a criminal offender facing revocation of probation and imprisonment does not ordinarily have a right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *see also Middendorf v. Henry*, 425 U.S. 25 (1976) (no due process right to counsel in summary court-martial proceedings).

e. To strike a balance between the reasoning of these case, the Court employed the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include: (1) the nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements. The Court resolved this equation by holding that no automatic right to counsel attaches, subject to the procedural safeguards discussed above.

f. Interestingly, the Court opined that requiring counsel might create an asymmetry of representation that would alter significantly the nature of the proceeding. "Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis" (emphasis in original).

g. Dissent - Justice Thomas filed a dissenting opinion in which Justice Scalia joined, and Chief Justice Roberts and Justice Alito joined in part. They argued that neither the Due Process Clause of the Fourteenth Amendment nor the Sixth Amendment provides the right to counsel in civil cases. Turner's argument that the Due Process Clause, as a means of insuring fundamental fairness, requires the appointment of counsel anytime incarceration is a possibility renders the right to counsel under the Sixth Amendment superfluous.

h. The dissent also took issue with examining the case under the balancing test of *Mathews v. Eldridge*. "That test weighs an individual's interest against that of the Government. It does not account for the interests of the child and custodial parent, who is usually the child's mother. But their interests are the very reason for the child support obligation and the civil contempt proceedings that enforce it."

D. Criminal - Federal Child Support Recovery Act -

1. Burden of Proof on Ability to Pay - To support a conviction under the Child Support Recovery Act, the government was not required to prove that the defendant had the financial ability to pay the entire past due child support obligation, but only that he had the ability to pay a portion of the past due amount, the U.S. Court of Appeals for the Eighth Circuit decided. In so holding, the court agreed with decisions from other jurisdictions. *See United States v. Mattice*, 186 F.3d 219 (2d Cir.1999) and *United States v. Mathes*, 151 F.3d 251 (5th Cir.1998). *U.S. v. Davis*, 588 F.3d 1173, 1176-77 (C.A. 8 2010), 36 FLR 1093.

2. Sufficiency of the Evidence - Evidence that a father was capable of finding gainful employment, coupled with his failure to seek to amend a child-support order, sufficed to support his conviction for willfully failing to pay support for a child living in another state in violation of the Child Support Recovery Act, 18 U.S.C. § 228(a)(3), the U.S. Court of Appeals for the Fifth Circuit held. *U.S. v. Edelkind* , 525 F.3d 388 (5th Cir. 2008), 34 FLR 1331.

   a. The court observed that while failing to pay his child support obligation, he declared bankruptcy while continuing to live a lavish lifestyle. He evaded garnishment by opening bank accounts without using his Social Security number. Further, while his mansion and expensive cars were paid for from his new wife's accounts, he was very involved in managing their joint finances.

   b. The court also stated that "Congress did not mean to let absentee parents evade their parental obligations by refusing to accept gainful employment or take other lawful steps to obtain the necessary funds." Moreover, it stressed, the father offered many excuses, but he never sought to modify the child support obligation. The jury's finding of willful failure to pay was supported, the court said, by evidence that the father was highly educated, that he had a history of employment, that he allegedly owned patents, that he had a lavish lifestyle, that he had the capacity to accept employment, and that he moved money around to avoid garnishment.

3. Double Jeopardy - An obligor who violates a single child support order covering multiple offspring may be convicted of only one count of violating the federal statute that criminalizes failure to pay child support obligations, the U.S. Court of Appeals for the Second Circuit ruled. On a separate issue, the court decided that the defendant in the case before it was not subject to the U.S. Sentencing Guidelines' "vulnerable victim" enhancement just because the twins he failed to support and their mother were poverty-stricken. *United States v. Kerley*, 544 F.3d 172, (2d Cir. 2008), 34 FLR 1559.

   a. Under 18 U.S.C. § 228(a)(3), it is a crime to willfully fail to pay "a support obligation with respect to a child …." Section 228(f)(3) defines "support obligation" as "any amount determined under a court order … to be due from a person for the support and maintenance of a child …." The statute does not indicate whether failure to pay a support obligation with respect to several children constitutes multiple offenses. Given the ambiguity, the court interpreted the statute in a way most lenient on the defendant.

   b. The district court enhanced the defendant's sentence under U.S.S.G. § 3A1.1(b)(1), which applies when "the defendant knew or should have known that a victim of the offense was a vulnerable victim." According to the commentary, a victim qualifies only if he or she is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." Additionally, the defendant generally must have singled out the victim "from a larger class of potential victims." *United States v. McCall*, 174 F.3d 47 (2d Cir. 1998).

   c. Reversing the District Court, the Second Circuit opined that the children's poverty was not a sufficient basis for applying the vulnerable victim enhancement. It pointed out that the "children were not rendered less capable of avoiding nonpayment by their condition of poverty, as state and local authorities were pursuing Kerley on their behalf."

4. Sentencing - Vulnerable Victim Enhancement - A defendant was not subject to the U.S. Sentencing Guidelines' "vulnerable victim" enhancement just because the twins he failed to support and their mother were poverty-stricken. *United States v. Kerley*, 544 F.3d 172, (2d Cir. 2008), 34 FLR 1559. [For a fuller discussion of this case, *see* Criminal Federal/ Double Jeopardy, immediately above.]

E. Criminal - State -

1. Burden of Proof on Ability to Pay - A state law that provides an affirmative defense to a criminal charge of failing to pay child support if the defendant can prove he is unable to pay unconstitutionally shifts the burden of proof on an essential element of the offense to the accused, the West Virginia Supreme Court of Appeals ruled. The court decided that it could salvage the rest of the statute by severing the affirmative-defense provision. *State v. Stamm*, 664 S.E.2d 161 (W.Va. 2008), 34 FLR 1342.

    a. The statute, W.Va. Code § 61-5-29, makes it a felony for a person to persistently fail to fulfill a legal duty to provide child support "which he or she can reasonably provide." Section 61-5-29(3) provides that "the defendant's alleged inability to reasonably provide the required support may be raised only as an affirmative defense."

    b. The court explained that the statute criminalizing the failure to pay child support includes one's reasonable ability to pay both as an element of the offense and as an affirmative defense. Saying that the state always bears the burden of proving every element of a crime beyond a reasonable doubt, the court ruled that while a defendant can be required to prove any affirmative defense he may choose to assert, the state may not place the onus on him to disprove any material element of its case.

2. Double Jeopardy - A defendant's convictions for multiple counts of felony nonsupport do not violate double jeopardy principles under the state or federal constitution, even though his children were the subject of only one child support order, the Indiana Court of Appeals has ruled. *Sickels v. State*, — N.E.2d — (Ind.Ct.App. 2012).

    a. Citing an earlier state supreme court decision in *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), the court said that "two or more offenses are the 'same offense' in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." It noted that the "statutory elements" test under the Indiana Constitution is "substantially equivalent to the 'same elements' test used in [the] federal double jeopardy analysis under *Blockburger v. United States*, 284 U.S. 299 (1932)."

    b. The appellate court opined that the criminal act is failing to support a child, not failing to pay the child support order. This was true even though the penalty for nonsupport under the statute in effect at the time was enhanced if the arrearage was at least $10,000. (The statute has since been amended to $15,000 for the enhancement).

c. The court explained that to avoid a double jeopardy violation, each conviction requires proof of at least one unique evidentiary fact. It observed that the essential unique fact of each charge was the identity of the individual child for whom the defendant failed to support. "The proof of one child's existence is a discrete and unique fact that does not prove the existence of another child. Thus, [the defendant's] three convictions did not violate to the actual evidence test."

3. <u>Probation Revocation</u> -

a. A trial court must consider, when weighing the state's motion to revoke (for failure to comply with payment conditions) probation or a conditional discharge granted to a delinquent child support obligor in a prosecution for nonsupport, whether the obligor made bona fide efforts to pay but lacked sufficient resources, the Kentucky Supreme Court held. If such efforts are found, the judge must then consider whether alternative forms of punishment might serve the interests of punishment and deterrence. *Commonwealth v. Marshall*, 345 S.W.3d 822 (Ky. 2011), 37 FLR 1514.

b. A delinquent obligor, whose conditional discharge for the offense of flagrant nonsupport was revoked when he failed to pay his current support and arrears, was entitled to a full probation revocation hearing, the Kentucky Court of Appeals held. The obligor's five-year sentence for felony nonsupport had been probated on the condition that he pay current support and arrears. When he failed to pay in compliance with the terms of the conditional discharge, a short probation revocation hearing was held on the issue of whether support had or had not been paid. When it was determined that the obligor had not paid, the court revoked his probation and imposed the five-year prison sentence. Reversing, the appellate court opined that the obligor was entitled to present evidence of his inability to pay. *Johnson v. Commonwealth*, No. 2008-CA-001093-MR, (Ky.Ct.App. 8/21/09) (unpublished), 35 FLR 1488, *review granted*, *ordered not to be published*.

4. <u>Reimbursement for Bond Paid by Third Parties</u> - Friends of a criminal non-support defendant who gave him money equal to the arrearages he owed so he could obtain an appeal bond conditioned on payment of such arrearages are not entitled to recoup the money after his death, the Ohio Court of Appeals, Seventh District, held in a *per curium* opinion. Because the funds were not bond or bail, state law does not require that the money be returned to the obligor's friends, it decided. *State v. Marcum*, No. 06-CO-46, Oh.Ct.App, 3/6/08), 34 FLR 1236.

F. Emancipation -

1. Enrollment in School -

   a. An 18-year-old's enrollment in an online high school program will satisfy the requirement in his parents' divorce agreement that he be "enrolled in and attending a secondary school" for purposes of entitlement to post-majority support, the Georgia Supreme Court held. The court explained that "in light of the legislative and executive branches endorsement and regulation of online learning opportunities for Georgia students, we conclude that once a child enrolls in approved online courses in an effort to graduate from secondary school, his online attendance constitutes 'attending school' for purposes of extending child support beyond the child's attainment of majority." *Draughn v. Draughn*, 707 S.E.2d 52 (Ga. 2011), 37 FLR 1229.

   b. A divorced father's support obligation for his 18-year-old daughter ceased when she withdrew from her senior year of high school in order to be hospitalized for a serious psychological condition, but it revived when she returned to high school a year later at age 19, the Oklahoma Court of Civil Appeals, Division III, has ruled. The court noted that although the previous state support statute terminated child support when the child turned 18, by the time the child re-enrolled, the statute had been amended to provide support until the child turned 18 and was no longer enrolled in high school. *Bradshaw v. Bradshaw*, 247 P.3d 304 (Okla.Civ.App. 2010), 37 FLR 1153, *mandate issued* 1/24/11.

   c. A trial court did not err in refusing a noncustodial father's request to emancipate his eighteen year-old-child, where although the child lived with her boyfriend and worked part-time while attending college, she continued to rely on the custodial mother for support, the Indiana Court of Appeals ruled. In addition, the court observed, the child had been technically enrolled in high school until June 2009 and entered community college at the earliest possible time. *Tew v. Tew*, 924 N.E.2d 1262 (Ind.Ct.App. 2010).

   d. A trial court did not err by requiring a father to provide post-majority support for a child who — due to absences and poor academic performance — spent five years in high school, because he was still "attending high school" within the meaning of the support statutes, the Arizona Court of Appeals held. *Young v. Lee*, 175 P.3d 85 (Ariz.Ct.App. 2008), 34 FLR 1152.

      (1) The court acknowledged that the governing statutes do not define "actually attending." Pointing out, however, that the statutes do not impose a specific attendance requirement, the court — citing a similar analysis in *Cossette v.*

Cossette, 76 P.3d 795, 29 FLR 1513 (Wyo. 2003) — asserted that "whether a child is 'actually attending' high school is more appropriately determined on a case-by-case basis after considering such factors as: (1) whether the child is regularly present in class; (2) the reasons for any absences; and (3) whether the child is taking affirmative steps in pursuit of an education." The fact that a child may be on a 'five year plan' for high school does not relieve a parent of the duty to support the child so long as he or she is actually attending high school," it explained. Determining that the evidence supported the trial court's finding that the child here was making a "sincere effort" to graduate from high school, the court affirmed the support order.

2. Child's Incarceration - The fact that a divorced couple's 20-year-old son is serving a three-year prison sentence does not necessarily mean that he is emancipated for purposes of terminating their decree-incorporated college support obligation, the Illinois Supreme Court decided. Addressing the issue for the first time, the court explained that the key question was whether the son had actually moved beyond the parents' care, custody and control. It found that in seeking to terminate the support obligation (which would end when the son turned 25), the father had failed to make such a showing, and also had not shown that the son had voluntarily abandoned the parents' support. *In re Baumgartner*, 930 N.E.2d 1024 (Ill. 2010), 36 FLR 1328.

3. Minor Child Giving Birth - An unmarried child does not become emancipated as a matter of law by giving birth, the Massachusetts Appeals Court decided. The court explained that there was nothing in the state's statutory scheme relative to the issue of support or in its decisional law on what constitutes emancipation that would warrant the conclusion that the 19-year-old unwed girl in the case before the court, who lives with her divorced mother, became emancipated upon the birth of her son. This view was consistent with that of other jurisdictions, the court added. Thus the trial court's termination of a man's college expense order on grounds of emancipation was erroneous. *LaBrecque v. Parsons*, 910 N.E.2d 947 (Mass.Ct.App. 2009), 35 FLR 1453.

4. Effect of Child Emancipating on Future and Retroactive Support -

    a. A trial court considering a father's petition to modify his support payments after the oldest of his three children reached majority erred when it ordered that the payments be retroactively reduced to a date prior to the filing of his petition, the South Carolina Court of Appeals held. The appellate court pointed out that S.C. § 63-17-310 provides that a modification order is not "effective as to any installment accruing prior to filing and service" of the modification action. Acknowledging that *Harris v. Harris*, 415 S.E.2d 391 (S.C. 1992), held that retroactive increases of support may be awarded in special circumstances, it pointed out that *Harris* was driven by a child's best interests, whereas the retroactive reduction here was based on the father's.

South Carolina Department of Social Services v. Polite, 705 S.E.2d 78 (S.C.Ct.App. 2011), 37 FLR 1141. [This case is also noted in Modification, this outline.]

b. A divorced father of two whose support payments for the child in his ex-wife's custody had been set off against her payments for the child in his custody should have been held in contempt when he did not commence paying support to her after the child in his custody turned 18, the Georgia Supreme Court held. The court found that the child support order embraced separate obligations and did not provide for any termination of [the father's] obligation to [the mother] prior to the time at which the child in her custody reached the age of 18. *Woods v. Bradford*, 703 S.E.2d 319 (Ga. 2010), 37 FLR 1033.

c. A 16-year-old girl who successfully petitioned for emancipation after moving out of her mother's home due to domestic violence should not have also been awarded child support through age 18, the New Mexico Court of Appeals held. Finding that the emancipation order had reserved the girl's right to receive support, and that she subsequently obtained an order for both pre- and post-emancipation support in a Uniform Parentage Act proceeding, the court ruled that state law does not permit an emancipated minor to collect support. However, it said she was entitled to retroactive support for a period preceding the emancipation order during which her mother had failed to provide her with financial assistance. *Diamond v. Diamond*, 245 P.3d 578 (N.M.Ct.App. 2010), 36 FLR 1554, *certiorari granted*, 263 P.3d 270 (N.M. 12/20/10).

d. A trial court did not err when it retroactively decreased a delinquent obligor's support payments to reflect the emancipation of his oldest child, the Mississippi Court of Appeals ruled. The court pointed out that state law clearly provides that support terminates upon a child's emancipation (unless otherwise provided in the support order). It noted, however, that support obligations vest in the child as they accrue and, once vested, cannot be modified or forgiven by the courts. "These rules create a paradox: a vested child support obligation cannot be forgiven, but a child support obligation terminates upon emancipation and cannot be modified by a party." In equity, the court decided that the trial court here properly reduced the obligor's arrearage to reflect the oldest child's emancipation two years before the modification motion was filed, as to hold otherwise would "unduly restrict the [court's] ability to make an equitable ruling." *Andres v. Andres*, 22 So.3d 314 (Miss.Ct.App. 2009), 35 FLR 1562. [This case is also noted in Modification, this outline.]

e. A trial court was authorized to entertain a divorced noncustodial mother's petition for a change of custody and child support where even though her child would be over age 18 when any orders issued, he was still a minor when the petition was filed, the Georgia Supreme Court ruled. The court said such determinations are relevant to the question of support owed during the child's minority and, additionally, post-majority support that may be ordered under state law. The court thus reversed the dismissal of the mother's petition for lack of jurisdiction. *Wade (Corinthian) v. Corinthian*, 661 S.E.2d 532 (Ga. 2008), 34 FLR 1332.

G. Guidelines -

1. Constitutionality - Federal law, which requires each state to establish guidelines for child support amounts and to review guidelines at least once every four years to ensure that their application results in determination of appropriate child support award amounts, does not preempt North Carolina child support guidelines despite noncustodial parent's contention that guidelines fail to comply with federal standard that requires state, when performing its four-year review of guidelines, to consider and analyze data on cost of raising children; nor do guidelines violate noncustodial parent's equal protection, procedural due process, or substantive due process rights under U.S. Constitution. "Because Congress has not positively required by direct enactment that state law be pre-empted in the area of child support enforcement, we hold that federal law does not pre-empt certain portions of the North Carolina Child Support Guidelines," the court said. *Row v. Row*, 650 S.E.2d 1 (N.C.Ct.App. 2007), *cert. denied*.

2. Guidelines to Be Used When Calculating Support - A divorce court erred by approving, and incorporating into its final order, a couple's agreement to establish a "children's fund" from which they would pay certain of their children's expenses in lieu of child support, the Alaska Supreme Court decided. The fund was set up to pay, *inter alia*, uncovered medical expenses, school activity fees, and the parties' life insurance premiums and was funded by contributions from the mother's Morgan Stanley account and their joint money market account. The parties were responsible for the children's discretionary expenses incurred during the time each had physical custody. Reversing, the court pointed out that no worksheets had been submitted, and the agreement did not contain any reason for deviating from the guideline amount. The court thus remanded for a determination consistent with the guidelines. *Laughlin v. Laughlin*, 229 P.3d 1002 (Alaska 2010), 36 FLR 1309.

3. Applicable Version to Be Used Upon Change in Guidelines - Confronting an issue that had been previously addressed only in its unpublished opinions, the Tennessee Court of Appeals held that the state's amended guidelines — which adopted the Income Shares formula — apply to modification petitions filed while the prior Flat Percentage guidelines were in effect, if the modification hearing occurred after the amendment's effective date. The court stressed that it is the date of the hearing, and not the date on which the petition was filed or the matter was considered by a special master or referee that controls. *Hall v. Hall*, No. E2009-01889-COA-R3-CV (Tenn.Ct.App. 10/5/10), 36 FLR 1577.

4. Authority to Issue Orders -

   a. Order for Life Insurance - A divorce court had subject-matter jurisdiction to order a husband to cooperate with his wife's attempts to obtain insurance on his life at her expense (and over his objection), to ensure support and education for their child in the event that he died, the Kansas Court of Appeals held. In rejecting the husband's claim that the order essentially created and divided a property interest that would not exist until after the divorce, the court said that the order was not related to the division of property, but instead was related to the court's statutory authority to make provision for the support and education of the parties' minor child. Also rejecting the husband's claim that the order was against public policy because consent of the insured is required in order to obtain insurance on such person's life, the court said that there is no case law or statute in Kansas that specifically requires the insured to consent to having a life insurance policy on his or her life. Thus, the court explained, as long as the wife is entitled to receive maintenance and child support payments from the husband, she has an insurable interest in his life in the event of his untimely demise. *In re Hall*, 225 P.3d 764 (Kan.Ct.App. 2010), 36 FLR 1225.

   b. Order for Lump-Sum Payments - Trial courts have the authority under state guidelines to order lump-sum payment of child support obligations, the Georgia Supreme Court ruled. In this case, the noncustodial father was convicted as a sex offender and sentenced to five years in prison. The court, projecting his reduced earnings capacity upon release, calculated the total amount he would owe over the course of the child's minority ($201,960) and ordered him to pay it in one lump sum. Father appealed. Affirming, the high court observed that nothing in the governing statutes precludes a lump-sum award. To the contrary, a court's discretion to order lump sums has long been the rule in the state. The father argued the trial court erred in failing to discount future child support payments to present value before calculating the lump-sum payment. Rejecting this argument, the court found the judge below did not abuse his discretion by declining to make such adjustment, and the father failed to show that such a reduction would be appropriate in light of the current economic climate — "one in which even the most secure financial investments offer extremely low rates of return," it said. *Mullin v. Roy (Mullin)*, 700 S.E.2d 370 (Ga. 2010), 36 FLR 1557.

   c. Custodial Parent Presumed to Pay Child Directly - A custodial father's child support obligation to his ex-wife as set forth in an agreed entry was properly terminated, where state law specifically prohibits making a sole residential parent's support obligation part of a child support order, Ohio Court of Appeals, First District, ruled. Since the man was the custodial parent, he could not have been ordered to pay child support, as such support is presumed to be paid directly to a child under the governing statute. *France v. France* (Ohio Ct. App., No. C-100468, 6/22/11), 37 FLR 1417.

5. Duty of Support -

   a. Adoption -

      (1) A trial court properly granted summary judgment in favor of a putative father contesting a paternity action brought by a 35-year-old child and her mother after the child had been adopted by the mother's husband two years after the child's birth. Once the child was adopted by another man, the biological father was divested of all parental rights and responsibilities, and thus could not be liable for child support. Accordingly, because there existed no reasonable possibility of establishing paternity, the trial court properly denied the petitioners' request for DNA testing. *Schmitter v. Fawley*, 929 N.E.2d 859 (Ind.Ct.App. 2010).

      (2) A Hmong man who along with his now former wife adopted a child in Thailand according to their Hmong cultural practices is not liable for the support of that child where it has not been established that the adoption was valid under Thai law, the Minnesota Court of Appeals decided. In thus affirming a trial court's denial of a petition for entry of a support order in a UIFSA proceeding, the court also upheld its refusal to extend the equitable adoption doctrine beyond inheritance cases. *Ramsey County v. Lee*, 770 N.W.2d 572 (Minn.Ct.App. 2009), 35 FLR 1474.

   b. Adult Disabled Child -

      (1) A divorced father whose support obligation for his disabled sons ceased under state law upon their reaching majority may be ordered to provide continued support for them in their mother's conservatorship action under a statute obligating the parents of a "poor person" to provide support, the Montana Supreme Court held. The court also advised that although the statute does not specify how a parent's ability to support an adult child is to be determined, "Montana's Uniform Interstate Family Support Act applies in other situations where the support of a child is at issue and provides guidance in this situation." (The Act defines "child" to include an individual who is "owed a duty of support" by his or her parents, regardless of majority.) In addition, it directed the court to consult the child support guidelines to determine the appropriate award here. *In re M.A.S. (V.L–S v. M.S.)*, 266 P.3d 1267 (Mont.2011), 38 FLR 1104.

      (2) A divorce court lacked subject-matter jurisdiction to order a father to pay child support for his severely disabled son who was over the age of 18 at the time the mother filed her divorce petition in 2005, the Tennessee Court of Appeals ruled. Under the law in existence at the time the case was decided, the court was powerless to establish an order for a child who at the time of divorce was already

emancipated. Although the governing statute has since been amended, it was of no use to the mother, as such statutory changes are presumed to operate prospectively. *Shaw v. Shaw*, No. W1020-02369-COA-R3-CV (Tenn.Ct.App. 9/21/11), 37 FLR 1565.

(3) A trial court abused its discretion in ordering a divorcing father to place over 50% of his support payments in a trust fund for his child's special needs or future education, the Kansas Court of Appeals held. Since the money placed in the trust would not have been available to use during the child's minority, such order was improper, as Kansas does not impose post-majority support obligations upon parents. *In re Wilson*, 223 P.3d 815 (Kan.Ct.App. 2010), 36 FLR 1165.

(4) A divorced father should not have been ordered to pay support for his disabled son after the son reached the age of majority and graduated from high school, the Kansas Court of Appeals ruled. Explaining that Kansas no longer imposes a common-law duty on parents to support their disabled adult children, the court said that the trial court thus lacked authority to enter the order here. *In re Doney (Goodner) and Risley*, 201 P.3d 770 (Kan.Ct.App. 2009), 35 FLR 1196.

c. <u>Affidavits of Support</u> -

(1) Abstention is not required in a Russian woman's action for specific performance of the federal affidavit of support that her now-divorcing husband executed in connection with his sponsorship of her and her minor son for permanent residency in the United States, even though enforcement of the affidavit was raised in their pending divorce action (which refused to enter a support order for a child that was not his), the U.S. District Court for the District of New Hampshire decided. Examining the husband's abstention claim under the doctrines set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the court rejected the claim on the grounds that the right to enforce his federally created contractual support obligation exists independently of the parties' marriage and would not interfere with the ongoing divorce action. *Montgomery v. Montgomery*, 764 F.Supp.2d 328 (D.N.H. 2011), 37 FLR 1173.

(2) A divorce court did not err in refusing to order a retired physician to pay child support for his wife's two teenage daughters, who had accompanied her from Russia in 2008 when the parties married following their Internet courtship, the Missouri Court of Appeals, Western District, held. In rejecting the wife's claim that her agreement to marry the husband constituted consideration for an express contract for his support of her daughters, the court recognized that although the obligation to provide support for a stepchild ends when the child no longer lives

with the stepparent, couples may contract to have support continue. However, it said, the wife had not presented evidence of such a contract, and in fact had testified she married the husband because she thought he would be a good husband and father — not because he had promised to support her children. In a footnote, the court said that immigration-related support affidavits the husband submitted to the U.S. government, and financial information he provided to the American Embassy to facilitate the wife and daughters' move to the U.S., could have been evidence of an express contract between the parties, but that the trial court's finding of no express promise of support was not against the weight of the evidence. *Thacker v. Thacker*, 311 S.W.3d 402 (Mo.Ct.App. 2010), 36 FLR 1408.

d. Assisted Reproduction -

(1) A divorce court committed plain error when it failed to award support for a child conceived by the wife during the parties' marriage via artificial insemination with donor sperm, without receiving any evidence regarding the child and the circumstances surrounding her conception, the Nebraska Court of Appeals held. The court pointed out that there are circumstances in which the husband might be estopped from disclaiming parentage, such as when he had assumed, *in loco parentis*, the obligations incident to a parental relationship. In addition, it said, there was no evidence as to whether he had consented to the artificial insemination in the first place. Remand was thus warranted to determine whether estoppel should apply. *Deterding v. Deterding*, 797 N.W.2d 33 (Neb.Ct.App. 2011), 37 FLR 1325.

(2) An artificial insemination donor agreement was enforceable as to preclude paternity action against donor for paternity and support of a child produced in contemplation of the agreement, the Indiana Court of Appeals decided. In so holding, the court said that the agreement did not violate the public policy against contracting away a child's right to support. The agreement did not, however, prevent paternity from being established nor support imposed against the donor for a second child born to the biological mother, as the agreement was not sufficiently clear that it applied to any future children produced as a result of the agreement. *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind.Ct.App. 2010).

(a) In upholding the agreement's enforceability, the court clarified that two requirements will prevent parties from engaging in spur-of-the-moment agreements to escape responsibility for supporting a child. First, a physician must be involved in the process of artificial insemination. At a minimum, this involvement includes the requirement that the semen first be provided to the physician. "This goes a long way toward preventing last-minute decisions to attempt the endeavor without the involvement of a medical professional. In fact, in our view, it obviates the possibility altogether," the Court said. Second, the instrument in question must reflect the parties' careful consideration of the implications of such an agreement and a thorough understanding of its meaning and import. The agreement in this case easily satisfied this requirement, the Court said, as it was prepared by an attorney and was sufficiently detailed; it even acknowledged that the present state of the law was not well-settled and that certain provisions of the agreement may not be enforceable, but that the parties nevertheless intended the agreement to be enforceable in all respects.

(b) The court found, however, that the agreement was not sufficiently clear so as to apply to a second child, also the product of insemination. The agreement's numerous references to "such child" contemplated only the first child, not any other produced by the mother's use of the donated sperm.

(3) A trial court erred in sustaining a man's objection to an order awarding child support to a woman to whom he had provided his sperm for artificial insemination, where after her child was born he had instituted administrative proceedings to establish himself as the child's biological father, the Ohio Court of Appeals, Ninth District, ruled. Because the man never challenged the earlier paternity determination, which he brought himself, he was now collaterally estopped from claiming that he should not have to pay support by virtue of the artificial insemination. *Curtis v. Prince*, No. 2010-Ohio-5999 (Oh.Ct.App. 3/16/10), 37 FLR 1080, *appeal not allowed*.

(4) A woman who claims that she gave birth to a child via artificial insemination in reliance on her now-former same-sex partner's promise to financially provide for the resulting child has stated a cause of action for child support under state law, the New York Supreme Court, Appellate Division, Second Department, ruled in a *per curiam* decision. Considering the issue on remand from the state high court, which overturned its ruling that New York lacked jurisdiction to address the Canadian mother's Uniform Interstate Family Support Act petition for a parentage declaration and support order, the appellate division evaluated the mother's support claim "in accordance with the Court of Appeals' holding that such a claim lies within the Family Court's 'Article 4 jurisdiction,' pursuant to which the 'Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent'." *H.M. v. E.T.*, 906 N.Y.S.2d 85 (N.Y. App.Div. 2010), 36 FLR 1469, *leave to appeal dismissed*.

(5) A man who inseminated his wife with sperm from a private donor after she purchased an artificial insemination kit from an internet vendor may not

challenge the child support award entered in their subsequent divorce on the ground that the insemination process did not conform to statutory requirements, the Oregon Court of Appeals ruled. The court pointed out that when the man stipulated to the payment of support in the parties' settlement agreement, he knew that the process was not performed in compliance with state law, under which only physicians and persons under their supervision may select sperm donors and perform artificial insemination. *In re A.C.H. and D.R.H.*, 210 P.3d 929 (Or.Ct.App. 2009), 35 FLR 1381, *review denied*.

(a) The court was not persuaded by the man's reliance on Or. Rev. Stat. 109.243, which provides that the relationship between the child and the mother's husband "shall be the same to all legal intents and purpose as if the child had been conceived by the mother and the mother's husband if the husband consented to the artificial insemination."

(b) It was also not swayed by the man's reliance on other provisions requiring that an insemination be performed by a physician with the written consent of the parents. The flaw in his reasoning, the court said, was that § 109.243 does not include a requirement for the husband's written consent and does not cross reference the provisions cited by the man. "We decline to insert those requirements when the legislature has not done so," it declared, adding that for purposes of determining the legal relationship between the mother's husband and a child conceived through artificial insemination, "the only inquiry is whether the husband 'consented to the performance of the artificial insemination'."

(6) A man who agreed to donate sperm to a lesbian couple, with the stipulation that he would not be liable for child support, cannot escape his support obligation for that child or for another child born subsequently to the mother under a similar agreement after the couple's relationship had ended, New Mexico Court of Appeals ruled. Explaining that the Uniform Parentage Act's artificial insemination provision was inapplicable here because the mother conceived the children without medical assistance, the court pointed out that the father not only holds them out as his own but has registered with the state as their parent. Thus, he is obligated as their parent to pay support, it said. *Mintz v. Zoernig*, 198 P.3d 861 (N.M.Ct.App. 2008), 34 FLR 1435, *cert. denied*, 202 P.3d 124 (N.M. 2008).

e. <u>Child's Repudiation of Parent</u> - A trial court considering a motion filed by a divorced couple's 14-year-old daughter to change her surname from that of her father (who contested the motion) to that of her custodial mother erred when, after granting the motion, it *sua sponte* abated the father's support duty until such time as the daughter chose to resume a relationship with him, the Mississippi Court of Appeals ruled.

Reversing the trial court's abatement order, the court said that the child's desire not to see her father stemmed from a no-contact order and not from any action taken by the daughter. *S.S. v. S.H.*, 44 So.3d 1054 (Miss.Ct.App. 2010), 36 FLR 1569.

f. Deceased Obligor - If a decedent's paternity of a nonmarital child is not disputed, an initial order of support may be entered against his estate after his death, the Massachusetts Supreme Judicial Court decided. The court cited *L.W.K. v. E.R.C.*, 735 N.E.2d 359, 26 FLR 1572 (Mass. 2000), which held that a support order for the benefit of a nonmarital child that is issued during the obligor's life may survive his death and be enforced against his estate. The court declared that "of paramount importance to our conclusion is the existence of the continuing obligation of parents to support their children." *L.M. v. R.L.R.*, 888 N.E.2d 934 (Mass. 2008), 34 FLR 1381.

g. Institutionalized Child -

(1) A state law excusing a parent's support obligation for a child who commits a crime "against that person" does not release a father from supporting a child who was placed in foster care after molesting his other children, the California Court of Appeal, Third District, held. Acknowledging that Cal. Welf. & Inst. Code § 903 provides that a parent is liable for the support of a child placed or detained pursuant to an order of the juvenile court, the father cited the exception provided by subdivision (e) that is applicable when the minor is placed or detained for committing a crime against the person liable for support. He argued that while his daughters were direct victims of the son's crime, he was a "derivative victim" and thus not liable for the son's support. Rejecting the father's argument, the court said that had the Legislature intended such an expansive definition of "derivative victim," it would have said so. *Yolo County Department of Child Services v. Lowery*, 98 Cal.Rptr.3d 490 (Cal.Ct.App. 2009), 35 FLR 1488.

(2) A father's child support obligation should not have been suspended during his child's temporary in-patient treatment at a mental health facility, the Pennsylvania Superior Court held. Noting that this was a case of first impression, the court said that the issue "is whether the best interests of children are served by suspension of child support orders during periods of transitory in-patient treatment outside the home." Deciding that "neither the letter nor the spirit of the law permits a parent to avoid a child support obligation under such circumstances," it acknowledged that the hospitalization of the child here (who has Asperger's Syndrome), was paid for with Social Security/disability (SSI) benefits. However, it pointed out that "when a child is receiving provisional in-patient treatment, the custodial parent's child-related expenses, as a practical matter, are not altered significantly. The custodial parent must still maintain an appropriate residence

in anticipation of the child's eventual return." The court found that the child's mother incurs travel expenses by visiting him each week, buys all of his clothing, and takes him gifts when visiting. In addition, the child returns to her home biweekly, and she takes him out whenever he gets a day pass. *R.C. v. J.S.*, 957 A.2d 759 (Pa.Super.Ct. 2008), 34 FLR 1525.

h. Parentage Actions -

(1) A trial court considering a mother's petition to modify the joint custody award entered in her divorce properly concluded that her former same-sex spouse is the child's legal parent, the Massachusetts Appeals Court declared. *Della Corte v. Ramirez*, No. 11-P-451 (Mass.App.Ct. 2/2/12), 38 FLR 1177.

(a) The mother had argued that despite the fact that the women where married when the child was born, her ex-spouse was not the child's legal parent because she was not the child's biological parent, and they were not married at the time of conception.

(b) Finding that the ex-spouse was directly involved in the mother's artificial insemination with anonymous donor sperm two months before their wedding, the appeals court pointed out that Mass. Gen. Law c. 46, § 4B provides: "Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband." The court said that it did not read "husband" to exclude same-sex couples, "but determine that same-sex married partners are similarly situated to heterosexual couples in these circumstances." Because the women were married when the child was born, it said, the child is the "legitimate child" of both parties," adding that there was no requirement that the parties be married at the time of conception, as the statute plainly states "any child born," not "any child conceived."

(2) A trial court misapplied the Uniform Parentage Act in holding that a mother's former same-sex partner had failed to present sufficient evidence to support her claim that she is the presumed parent of the mother's child, the California Court of Appeal, Third District, ruled. Providing guidance as to the proper factors to consider in determining whether the partner received the child into her home and held the girl out as her own child under the UPA's presumed parent provision, the appellate court said the judge erred in considering factors such as the women's relationship with each other and that they did not jointly plan the mother's pregnancy. *E.C. v. J.V.*, No. C064745 (Cal.Ct.App. 1/19/12), 38 FLR 1144.

(3) A juvenile court properly dismissed for lack of subject-matter jurisdiction an unwed mother's petition for past child support, filed against a man who in a 1993 probate matter acknowledged that he was the father of her now 18-year-old daughter, the Ohio Court of Appeals, Eighth District, ruled. Since the mother's request for support did not accompany a parentage action, no support could be ordered under the governing statute, the court said. Moreover, it added, since the child was now an adult, "it is the child and not the mother who has any potential claim." *In re J.V.*, 938 N.E.2d 81 (Ohio Ct.App. 2010), 36 FLR 1505.

i. <u>Repudiation of Parent - Child Relationship</u> - A trial court erred in reducing a divorced father's child support obligation to less than half the statutorily determined presumptive amount on the ground that the child had a poor relationship with him, the Wyoming Supreme Court held. In rejecting the father's arguments, the court pointed to *Sharpe v. Sharpe*, 902 P.2d 210, 216 (Wyo. 1995), which held that "visitation and child support are independent from one another; one may not be used to negate or reduce the duty relating to the other." A child's time with a parent is relevant only in regard to calculating the expenses each parent incurs when physically in custody of the child, it explained, adding that a court cannot rely on lack of a good relationship to fiscally punish a child. The court added that a parent is supposed to be a financial resource for his/her child, saying that this parental responsibility exists regardless of visitation or negative feelings between a parent and child. *Steele v. Neeman*, 206 P.3d 384 (Wyo. 2009), 35 FLR 1297.

j. <u>Termination of Parental Rights</u> -

(1) A father's obligation to support his children did not end as a matter of law when his parental rights were terminated, and thus a trial court did not abuse its discretion in requiring him to continue paying child support after entry of its termination order, the Michigan Supreme Court held. Noting that in upholding the post-termination support order, the appellate court had rejected the father's claim that the order violated his constitutional right to due process, the court said that "we affirm the judgment of the Court of Appeals, but do so on the basis of an alternative analysis." The court went on to explain that the Legislature addressed parental rights and responsibilities as two discrete concepts, adding that a parental responsibility continues until a court of competent jurisdiction modifies or terminates the obligation. Holding that "there is no indication that the duty of support is conditioned on the retention of parental rights, just as there is no indication that the exercise of parental rights is conditioned on fulfilling the parental obligation to support," the court reiterated that "nothing in the statutory structure indicates that the termination of parental rights automatically results in the severance of the parental support duty." *In re Beck (Department of Human Services v. Beck*, N.W.2d 562 (Mich. 2010), 37 FLR 1105.

(2) A court in a child abuse/neglect proceeding may terminate a parent's parental rights while continuing his or her obligation to pay support for the subject child, the West Virginia Supreme Court of Appeals said. Finding that a 2006 amendment to the state termination statute did not affect its 2003 ruling that a parent's support duty survives the voluntary or involuntary severance of his or her rights, the court instructed that a termination court must require the parent to continue paying support unless it determines that such an order would not be in the child's best interests. Had lawmakers intended to eliminate "the long standing requirement that a parent, even one who voluntarily relinquishes his/her parental rights, provide financial support to his/her child, we believe it would have done so explicitly and clearly," the court reasoned. *In re Ryan B*., 686 S.E.2d 601 (W.Va. 2009), 36 FLR 1004.

(a) It further noted that case law from its court as well as other jurisdictions has held that an obligation of support is owed to a child by both parents until such time as the child is placed in the permanent legal custody of another guardian/parent/obligor, such as in an adoption.

(b) Said the court: "In light of our strong precedent that the best interest of the child is the polar star that guides all matters affecting children, we hold that a circuit court terminating a parent's parental rights pursuant to W.Va. Code § 49-6-5(a)(6), must ordinarily require that the terminated parent continue paying child support for the child, pursuant to [the Guidelines]. If the circuit court finds, in a rare instance, that it is not in the child's best interest to order the parent to pay child support pursuant to the Guidelines in a specific case, it may disregard the Guidelines to accommodate the needs of the child if the court makes that finding on the record and explains its reasoning for deviating from the Guidelines."

(3) A parent whose rights have been terminated is still responsible for the financial support of his or her child, the Alabama Supreme Court decided. Confronting the issue for the first time, the court reasoned that the termination statute encompasses only parental "rights" and not parental "responsibilities." *Ex parte M.D.C. (M.D.C. v. K.D.)*, 39 So.3d 1117 (Ala. 2009), 35 FLR 1567.

(a) The court stated that the "termination of parental rights protects the child from any abuse or neglect arising out of the parental relationship, but terminating the duty to pay child support does not protect the child from any such abuse or neglect. Eliminating the benefit of child support after a termination of parental rights does nothing to protect the child from any harm emanating from the prior parental relationship; instead, it denies the child benefits based on the child's needs and the parent's ability to pay. If the child is adopted or emancipated, then the child-support obligation ceases. Additionally, the child-support obligation ceases upon the child's reaching majority or the paying parent's death."

(b) Further asserting that the "common law duty to support one's child remains after the termination of parental rights," the court stated that "involuntarily terminating a parent's rights to his or her child does not, by operation of law, extinguish the parent's responsibility to pay child support for the benefit of that child as established by a prior judgment."

(c) Justices Champ Lyons, Thomas Woodall, and Glenn Murdock dissented. They pointed out some possible consequences of the majority's decision, including (1) retroactive support arrearage claims against parents whose rights have been terminated; (2) a determination that other parental obligations and/or children's rights survive a termination order; (3) an increase in the use of termination proceedings by parents against one another and by the state, even in the absence of an adoptive placement; and (4) an increase in "deadbeat" parents contesting termination proceedings.

(4) A probate court order requiring a mother to pay child support, which was entered in conjunction with an order appointing her child's paternal grandparents as his co-guardians, is void where the mother's parental rights had been voluntarily terminated in a prior child protection action, the Maine Supreme Judicial Court ruled. The high court observed that state law provides that a termination order divests a parent of all duties and obligations to the child because he or she "is no longer a legal parent to the child and has no duty to provide ongoing support for the child." *In re Anthony J.*, 980 A.2d 1250 (Me. 2009), 35 FLR 1501.

6. Income -

a. Adoption and Other Subsidies -

(1) A trial court erred when, after granting a custodial mother's petition for an upward modification of child support, it calculated her ex-husband's new payment by crediting the entire amount of the state subsidy she receives for their special-needs adopted child against his support obligation, Florida's First District Court of Appeal held. The court observed that neither party had requested that the subsidy be considered, and the trial court was not at liberty to award such credit in the absence of a request. More importantly, the credit was against public policy, saying that giving the father a "dollar-for-dollar credit against his child support obligation under the guidelines is inconsistent with the supplementary purpose of the subsidy, removes the benefit intended for the special needs child,

and reduces, rather than maintains, the resources intended for meeting the child's needs." Declaring that the trial court's offset "defeats the legislative purpose of the adoption subsidy," the court remanded for recalculation of the new support amount consistent with the child support guidelines and without regard to the adoption subsidy. *Nabinger (Knight) v. Nabinger*, — So.3d — (Fla.Dist.Ct.App., No. 1D11-2616, 12/30/11), 38 FLR 1117.

(2) A divorce court should not have reduced a father's support obligation for his two adopted children based on the survivor benefits received by one child and the special-needs adoption subsidy paid by the state for both children, the Arkansas Court of Appeals, Division III, ruled. The court held that on remand, the trial court "may consider the adoption subsidy but should be mindful that these are benefits provided by the state because these are special-needs children." Stressing that parents have a legal and moral duty to provide for their child, even though the child may have sufficient property to do so him/herself, the court pointed out that neither the adoption subsidy nor the survivor benefit was earned by the father, "and neither may be considered a substitute for his obligation to support his children." While acknowledging that the payments may be considered under the guideline provision regarding other "income or assets available to support the child," it emphasized that the income is provided by the government on the children's behalf because their needs are greater than those in an ordinary child support case. *Bass v. Bass*, 2011 Ark. App. 753, — S.W.3d — (Ark.Ct.App., No. CA11-243, 12/7/11), 38 FLR 1081.

(3) A divorcing adoptive parent's child support obligation may not be offset by the adoption subsidy paid by the state for the child, the Alabama Court of Civil Appeals ruled. Addressing the issue for the first time, the court reasoned that unlike Social Security disability dependent benefits, the subsidy received by adoptive parents is a supplement to — not a substitute for — their income. In so holding, the court found support in the decisions of other jurisdictions (*see Hamblen v. Hamblen*, 54 P.3d 371 (Ariz.Ct.App. 2002), *In re Bolding-Roberts*, 113 P.3d 1265 (Colo.Ct.App. 2005), *In re Dunkle*, 194 P.3d 462 (Colo.Ct.App. 2008), *Gambill v. Gambill*, 137 P.3d 685 (Okla.Civ.App. 2006), and *In re Hennessey-Martin*, 855 A.2d 409 (N.H. 2004). *W.R. v. C.R.*, 75 So.3d 159 (Ala.Civ.App. 2011), 37 FLR 1255.

(4) In determining a parent's gross income for purposes of calculating child support, adoption subsidies or foster care payments that he or she receives for a child who is not the subject of the support proceeding are income of that child, not the parent, the Colorado Court of Appeals ruled. Noting that "income" for child support purposes is defined in Colo. Rev. Stat. § 14-10-115(3)(c) as "the actual gross income of a parent," the court looked to the opinions of other states in

holding that because such payments are intended to benefit the adopted or foster child, they are considered income to the child and not to the parent; *see*, *e.g.*, *Hamblen v. Hamblen*, 54 P.3d 371 (Az.Ct.App. 2002); *Bryant v. Bryant*, 218 S.W.3d 565 (Mo.Ct.App. 2007). *In re Dunkle and Valentine*, 194 P.3d 462 (Colo.Ct.App. 2008), 34 FLR 1472.

(5) A trial court did not err in refusing to order a Native American father to pay child support, where each of his four nonmarital children receive individual monetary distributions from their tribe that meet their needs, Florida's Fourth District Court of Appeal decided. The court observed that a court may deviate from the presumptive support obligation based on factors that include: (1) the independent income of the child (other than moneys received by a child from supplemental security income); and (2) any other adjustment which is needed to achieve an equitable result. “We find no abuse of discretion in the trial court's conclusion that the children's needs are being met by the income received by them from the tribe and that, accordingly, an assessment of a child support obligation against the father was unnecessary,” it concluded. *Cypress v. Jumper*, 990 So.2d 576 (Fla.Dist.Ct.App. 2008), 34 FLR 1442, *reh’g denied*.

b. <u>Annuities</u> - A trial court erred when, in calculating “net resources” for purposes of determining child support, it entirely excluded monies received as part of a structured settlement annuity, the Texas Tenth Court of Appeals decided. Cognizant of the state's argument that the “term ‘annuity’ as it is used in the relevant statute would include the entire amount of every payment under the annuity agreement,” the court took note of the appellee's contention that no portion of the payments under the annuity agreement should be included. Declaring that “the answer is somewhere in between,” it found that more information was required here. The “evidence the trial court needed to decide the issue is what portion of the payments being received represent a return of principal and what portion represents the interest being earned for the use or forbearance of the entire amount of the settlement proceeds,” it explained, noting that inherent in the annuity process “is the inclusion of interest for the acceptance of the payout of the settlement over time.” *In re A.A.G.*, 303 S.W.3d 739 (Tex.Ct.App. 2009), 35 FLR 1405, *reh’g overruled*.

c. <u>Bonus Income</u> - A divorce court erred in excluding a husband's annual bonus income in its calculation of his income for purposes of alimony and child support, Florida's Second District Court of Appeal held. The court determined that the judge below had excluded the bonus payments because it found that the bonuses were not “fixed or guaranteed,” since they are paid at the discretion of the husband's employer and are dependent upon the employer's yearly profit. “While this is true, it is undisputed that the husband has received bonus payments each year for the past nine years, the last eight of which exceeded $25,000,” it observed, noting that “under similar circumstances, we have concluded that a trial court abused its discretion when it excluded bonuses when determining a party's income for purposes of alimony or support." The court thus reversed and remanded the support awards. *Drew v. Drew*, 27 So.3d 802 (Fla.Dist.Ct.App. 2010), 36 FLR 1201.

d. Child Support Received for Other Children - A court calculating a father's child support obligation did not err by including in both parties' gross incomes child support payments received for other children, the North Carolina Court of Appeals ruled. In challenging the trial court's decision, the father argued that by including support payments received by a parent for one child who resides in his or her home as income when calculating the support obligations for another child, the income designated for the one child who resides in the home is effectively reduced. Admitting that this argument "is not without merit," the court nevertheless said that based on the rules of statutory construction, the state support guidelines do not exclude child support payments from income. It explained that the guidelines set out a list of monetary sources that are specifically excluded from a parent's income — benefits received from "means-tested public assistance programs" — and do not exclude any other monetary sources from income. Going on to say that had the guideline conference "intended to exclude child support payments received for other children from income, it would have done so," the court acknowledged that the majority of other states do exclude such payments, and urged the conference to "closely consider" the issue. *New Hanover Child Support Enforcement ex rel. Dillon v. Rains*, 666 S.E.2d 800 (N.C.Ct.App. 2008), 34 FLR 1560.

e. Corporate, Partnership and LLC Income -

(1) Although a trial court properly found that an obligor who had incorporated his business was self-employed, it erred in failing to consider other types of income when calculating his gross income before finding that he was underemployed, the North Dakota Supreme Court held. Agreeing with the lower court that because the obligor exercises significant control over the corporation, a portion of its taxable income must be added to his individual income to determine his net income from self-employment. However, before finding that he was underemployed, the trial court should have considered other forms of "income" he receives from the corporation, which pays many of his personal expenses and furnishes various "employee benefits" — including payment of his legal fees and insurance, along with his clothing and all of his housing expenses, the court said. It explained that some of the expenses the corporation pays for constitute in-kind income received on a regular basis that must be included in calculating the obligor's gross income. *Halberg v. Halberg*, 777 N.W.2d 872 (N.D. 2010), 36 FLR 1153.

(2) The determination of whether the undistributed earnings of a Subchapter S corporation in which a parent has an ownership interest should be considered as income for child support purposes must be made on a case-by-case basis, the Massachusetts Supreme Judicial Court decided. In addressing this question of first impression, the court looked to other jurisdictions, and also noted that the current version of the state child support guidelines provide "expanded guidance" on the issue. *J.S. v. C.C.*, 912 N.E.2d 933 (Mass. 2009), 35 FLR 1507.

(a) The high court found that the new guidelines suggest that, when setting child support, the judge should determine the income of an S corporation shareholder not by including automatically the pass-through income reported on the shareholder's tax return, but rather by making a specific determination about what portion (if any) of that pass-through income realistically and fairly is or should be deemed available to the shareholder for purposes of paying child support. Such a fact-based inquiry is necessary to balance, *inter alia*, the considerations that a well-managed corporation may be required to retain a portion of its earnings to maintain corporate operations and survive fluctuations in income, but corporate structures should not be used to shield available income that could and should serve as available sources of child support funds, the court said.

(b) To determine what portion of undistributed corporate earnings may be available to a shareholder for a child support obligation, the court opined that courts consider: (1) a shareholder's level of control over corporate distributions — as measured by the shareholder's ownership interest; (2) the legitimate business interests justifying retaining corporate earnings; and (3) any affirmative evidence of an attempt to shield income by means of retained earnings.

(3) A distribution received from a Subchapter S corporation by a shareholder, in connection with stock that he purchased from another shareholder under an agreement obligating him to apply any dividends to the sale price of the stock, may be treated as income in calculating his child support payments, the Kansas Court of Appeals decided. Saying that the scenario was no different from the purchase of any other income-producing asset on credit, the court also held that the portion of the distribution that the father here applied to the income tax liability on the money distributed was likewise to be treated as income for support purposes. The court opined that a court must carefully examine, for example, factors such as whether the money is available to the parent or the parent is attempting to use the company to shield income to avoid child support. *In re Matthews*, 193 P.3d 466 (Kan.Ct.App. 2008), 34 FLR 1532, *review denied*.

(4) A trial court properly refused to treat the retained earnings of a divorcing husband's limited-liability company as income in calculating his alimony and child support obligations, the Ohio Court of Appeals, Second District, ruled. Finding that the earnings were not the husband's "personal piggy bank," the court stressed that the evidence showed the money was used for business operations. *Ulliman v. Ulliman*, No. 22560 (Ohio Ct.App. 8/1/08), 34 FLR 1447, *appeal not allowed*, 900 N.E.2d 198 (Oh. 2009).

(5) A trial court did not err in considering income from a limited partnership that a divorcing man reported on his tax returns in determining his child support obligation, even though he insists that he did not actually receive any because of his mother's usufruct right in it, the Arkansas Supreme Court ruled. Emphasizing that the state guideline's definition of income is to be "broadly construed," the court said that it also "does not distinguish between realized and recognized income." *Brown v. Brown*, 284 S.W.3d 17 (Ark. 2008), 34 FLR 1293. [Usufruct is the right to use and enjoy the profits and advantages of something belonging to another as long as the property is not damaged or altered in any way.]

f. <u>Deferred Salary</u> - A father who quit a lucrative job in order to start up his own company, and then voluntarily "deferred" his salary to shore up the company's capital (while covering his living expenses with his other substantial assets), may not claim a minimal ability to pay support due to his lack of earnings, the California Court of Appeal, Fourth District, declared. Holding that the father must be treated as currently earning the deferred salary, the court also said that this case demonstrated "special circumstances" warranting a departure from the guideline amount of support awarded below. *Berger v. Berger*, 88 Cal.Rptr.3d 766 (Cal.Ct.App. 2009), 35 FLR 1148.

g. <u>Depreciation</u> - Although the Kansas support guidelines sometime allow depreciation as a reasonable business expense that may be deducted from a parent's income in calculating child support, the method used to calculate the depreciation rests within the trial court's discretion, the Kansas Court of Appeals decided. *In re Wiese*, 203 P.3d 59 (Kan.Ct.App. 2009), 35 FLR 1248.

(1) The court confronted this issue of first impression in a case where a divorced father who is a farmer and sole proprietor uses accelerated depreciation (26 U.S.C. § 179) in computing his federal tax liability. He thus recovers the entire cost of a capital asset in one year by subtracting that cost from gross income. However, when his ex-wife petitioned for an increase in child support, the trial court used straight-line depreciation (whereby a capital asset is depreciated over its life) to determine the father's income. The father appealed, arguing that the court had to use the accelerated depreciation method.

(2) Affirming the judge below, the appellate court said that "because our child support guidelines caution that a court may include depreciation as a business expense only if is reasonably necessary to produce income, we hold the district court did not abuse its discretion by using straight-line depreciation instead of accelerated depreciation to calculate child support income."

h. Employer-Provided Benefits -

(1) A trial court erred when, in calculating a divorced father's income for child support purposes, it did not determine whether payments for a residential lease and a car lease furnished by his employer (an S corporation in which he is the majority shareholder) should be included, the Tennessee Court of Appeals decided. The appellate court pointed out that the child support guidelines provide that "fringe benefits" received by a parent in the course of employment should be counted as income if they reduce the parent's personal living expenses. It further noted that the guidelines define fringe benefits as including "company car, house, or room and board." Finding that the trial court did not consider whether the apartment and car lease payments were "fringe benefits" and thus includable in the father's gross income, it vacated the trial court's holding that the payments should be excluded, and remanded. *Gunn v. Gunn*, No. M2010-00054-COA-R3-CV (Tenn.Ct.App. 5/11/11), 37 FLR 1369.

(2) A \$20,250 tuition benefit that a woman receives for her two children by virtue of her working at the private school they attend should not be included in her gross income for child support purposes, because it does not reduce her personal living expenses, the Vermont Supreme Court held. Noting that 15 Vt. Stat. Ann. § 653 defines "gross income" as including "expense reimbursement or in-kind payments received by a parent in the course of employment … if they reduce personal living expenses," the court said that while the tuition benefit was an in-kind payment received by the woman in the course of employment, "we cannot say that the benefit reduced [her] personal living expenses." *Kelly-Whitney v. Kelly-Whitney*, 15 A.3d 138, (Vt. 2011), 37 FLR 1176.

(3) A divorce court calculating a mother's gross income for child support purposes erred in including her employer's payments toward her Social Security and Medicare (FICA) taxes, and for her medical, life, and disability insurance premiums, and its contributions to her retirement and 401(k) plans, the North Carolina Court of Appeals decided. *Caskey v. Caskey*, 698 S.E.2d 712 (N.C.Ct.App. 2010), 36 FLR 1527.

(a) Addressing the issue for the first time, the court was guided by cases from other jurisdictions in determining that employer payments made on an employee's behalf constitute income for child support purposes only if the employee can elect to receive cash in lieu of the payments, or the employment benefit reduces living expenses that the employee would have otherwise incurred.

(b) Citing *Saalfrank v. Saalfrank*, 899 N.E.2d 671, 679-80 (Ind.Ct.App. 2008), the court said that in determining whether to include employee benefits as income, courts should consider: (1) a parent's control of whether or in what amount a retirement contribution is made; (2) the parents' established course of conduct in retirement planning (prior to and after the dissolution); (3) the amount of the contribution (from nominal to a large amount that could suggest the inappropriate sheltering of income); (4) whether and to what extent there are incentives for the contribution; (5) whether the contribution qualifies for favorable tax treatment; (6) whether continuing the contribution, in whole or in part, would otherwise reduce the amount that a child in the intact home could expect to receive; and (7) any other relevant evidence.

(4) A trial court must reconsider its ruling that a divorced obligor's income consisted only of his regular wages and not his employee benefits, the Arizona Court of Appeals, Division One, decided. Addressing the issue for the first time, the court held that an obligor's vested employee stock options were a significant form of compensation and were "non-cash benefits" properly included as income under the support guidelines. *Hetherington v. Hetherington*, 202 P.3d 481 (Ariz.Ct.App. 2008), 34 FLR 1380, *review denied.*

(5) A trial court calculating a divorced father's child support obligation properly added to his gross income the amounts paid as premiums by his employer for health insurance coverage, the Louisiana Court of Appeal, First Circuit, ruled. The court observed that the state support statute does not restrict the definition of "gross income" merely to the type of compensation listed, "but instead, through the use of the words 'but not limited to …,' includes any compensation for services." It went on to find that here, the trial court apparently reasoned that because the employer's payment of the father's health insurance premiums reduced his personal living expenses, it was an economic benefit to him. Judge Robert D. Downing dissented. He pointed out that the mother benefitted from the employer's payment of the insurance premiums, because otherwise both parents would have to pay their proportionate share of health insurance for the children. *Ola v. Ola*, 985 So.2d 786 (La.Ct.App. 2008), 34 FLR 1272.

i. Gambling Winnings and Losses - A court may offset, in determining a parent's income for support purposes, his or her provable gambling losses against winnings up to their total amount for the year in question, the Tennessee Court of Appeals decided. Saying it was persuaded by *McWhorter v. McWhorter*, 58 S.W.3d 840, 846, 28 FLR 1015 (Ark. 2001), the court reasoned that support determinations are aimed at ascertaining an obligor's true disposable income. *McWhorter* held that the true expendable or disposable income can only be arrived at by crediting gambling losses only to the extent of winnings. *Vivien v. Campbell*, (Tenn.Ct.App., No. W2009-01602-COA-R3-JV, 5/10/11), 37 FLR 1331.

j. Guardianships -

(1) The income of a child's permanent guardians should not have been considered in determining the amount of child support to be paid to them by the child's parents, the Colorado Court of Appeals held. Noting that inclusion of the guardians' income in the support calculation resulted in the parents paying $1,000 less per month than if support had been determined solely on their $12,585 monthly gross income, the court pointed out that *In re Conradson*, 604 P.2d 701, 6 FLR 2162 (Colo.Ct.App. 1979), held that factors to be considered in making a support award do not include the financial resources of a nonparent with whom the child is living. In addition, it observed that Colo. Rev. Stat. § 15-14-209 provides that a "guardian need not use the guardian's personal funds for the ward's expenses." *Sidman v. Sidman*, 240 P.3d 360 (Colo.Ct.App. 2009), 36 FLR 1008, *cert. denied*.

(2) The appointment of a permanent guardian for a child, based on the consent and agreement of the child's parent, is not the equivalent of a termination of parental rights and thus does not relieve the parent of the common-law duty to support the child, the Kansas Supreme Court decided. Reaching this conclusion after examining the state's adoption and termination statutes, the court thus found it unnecessary to determine whether a 2006 statute providing that such appointment without a termination of rights does not extinguish a parent's support obligation was retroactive to the 2001 appointment in this case. *State ex rel. Sec. of Social and Rehabilitation Services v. Bohrer*, 189 P.3d 1157 (Kan. 2008), 34 FLR 1463.

k. Historical Income - A trial court erred when it calculated a father's support obligation based on income he had received while self-employed, as opposed to what he currently received as a salaried employee, the Arkansas Court of Appeals Division I, held. Ruling that the method used by the trial court in determining the father's income "was wrong as a matter of law," the court said that while it was undisputed that the father had been a self-employed independent contractor in the past, his employment status changed when the company with which he did business informed him that he would have to become its employee if he wanted to continue their relationship. Noting that the father's salary structure "changed significantly" once he became a salaried employee with a 5% sales commission, and was no longer compensated by the company solely on a 15% sales commission basis, it explained that the court thus should not have considered his past earnings in predicting his future income for support purposes. *Boudreaux v. Boudreaux*, (Ark.Ct.App. No. 08-1451, 10/21/09), *appeal after remand*, 2009 Ark. App. 877 (Ark.Ct.App. 2009), 35 FLR 1585.

l. Income of New Spouse -

(1) A trial court erred when, in calculating a remarried obligor's income for purposes of modifying his child support obligation, it considered the community income attributable to his new wife, the California Court of Appeal, Third District, held. Agreeing with the obligor that the trial court should not have used all of the community property income from his subsequent marriage, but was limited to only the half ascribed to him, the court pointed out that Cal. Fam. Code § 4057.5(a)(1) prohibits consideration of the income of a subsequent spouse when modifying child support, except in some extraordinary circumstances involving extreme hardship. Noting that the trial court made no finding of extreme or severe hardship, it acknowledged that § 4008 provides that community property "may be subject to the support of children." However, the court explained, "while pursuant to Family Code section 4008, the obligor parent's community interest in the income of the subsequent spouse may be looked to in discharge of the child support obligation, the court may not consider the subsequent spouse's community income in calculating the child support obligation. The trial court erred when it failed to make this distinction." *In re Knowles (Anastasi v. Knowles)*, 100 Cal.Rptr.3d 199 (Cal.Ct.App. 2009), 35 FLR 1562.

(2) A trial court considering a divorced custodial mother's motion to modify child support properly allowed her remarried ex-husband to redact portions of his joint federal income tax return pertaining to his new wife, the Wyoming Supreme Court ruled. The court acknowledged that Wyo. Stat. Ann. § 20-2-308 provides that full disclosure of the parties' financial status is required before an order establishing or modifying child support may be entered. Acknowledging the father's argument that his new wife was not obligated to pay support, the court opined that "despite the statutory and decree provisions requiring the exchange of tax returns, we are unable to conclude that the district court abused its discretion in allowing father to redact portions relating to his wife's income." *Keck v. Jordan*, 180 P.3d 889 (Wyo. 2008), 34 FLR 1261.

(3) The gross disparity between a father's income and that of his ex-wife's new husband does not constitute a "compelling reason" to consider her interest in her husband's income when calculating child support, the Idaho Court of Appeals decided. The court noted that both the state support statute and the guidelines

provide that a parent's community property interest in a spouse's financial resources should not be included in the parent's gross income for support purposes "unless compelling reasons exist." Finding that neither the statute, guidelines, nor any reported Idaho appellate decisions identify factors or circumstances that might constitute or contribute toward "compelling reasons" for considering a spouse's income, it determined "at least three likely reasons" for limiting such consideration: (1) the parents' legal duty to financially support their child; (2) computing support based upon a new spouse's income could have the effect of discouraging remarriages; and (3) the inclusion of such income would substantially complicate support proceedings, especially where both parents have remarried. *Harris (Carter) v. Carter*, 189 P.3d 484 (Id.Ct.App. 2008), 34 FLR 1416.

m. Inheritance and Gifts -

(1) A cash inheritance received by a child support obligor was properly included in his gross income for purposes of determining his support obligation, the Oregon Court of Appeals ruled. Recognizing that inheritances do not appear on the list contained in the state support guidelines' definition of gross income, the court pointed out, however, that "gifts" are included on the list. Saying that an inheritance is "a gift given at death," and thus part of the recipient's gross income, the court refused to adopt a test used by Colorado courts in determining whether inheritances are includable in gross income. *Leif (Lervold) v. Leif (Lervold)*, 266 P.3d 165 (Or.Ct.App. 2011), 38 FLR 1029.

(a) In *In re A.M.D.*, 78 P.3d 741(Colo. 2003), the Colorado Supreme Court held that if an obligor uses the principal of a monetary inheritance as a source of income either to meet living expenses or to increase his or her standard of living, the expended principal should be included in that year's gross income. However, if the inheritance is saved or invested, such reserved principal is not to be included in gross income.

(b) In declining to adopt the *A.M.D.* test, the court said that under Oregon's child support guidelines, whether income received by a parent should be included in the parent's gross income does not depend on how the income is used or whether it is readily available, although those facts may be relevant to whether the parent's presumptive child support obligation has been rebutted. Instead, gross income as defined by the Oregon guidelines, the court said, "includes 'income from any source,' regardless of how the income is used and how available it is. The use and availability of the income is relevant only to whether the parent's presumptive child support obligation has been rebutted," the court said.

(2) A $400,000 cash inheritance received by a father following his divorce should have been considered in calculating his "net resources" for purposes of deciding his request for a downward modification of his child support obligation after he lost his job, the Texas Court of Appeals, Fifth District, ruled. Addressing the issue for the first time, the court said the statutory definition of net resources as including "all other income actually being received," constituted a catch-all provision and encompassed inheritances. It thus did not reach the question of whether an inheritance could be classified as a "gift" under the definition. *In re P.C.S.*, 320 S.W.3d 525 (Tex.Ct.App. 2010), 36 FLR 1489.

n. Legal Fees Paid by Indian Tribe - The amount a Native American father's tribe reported on his federal income tax statement for attorneys' fees it had paid on his behalf may not be included in his gross income for purposes of calculating his child support obligation, the California Court of Appeal, Fourth District, decided. The court explained that the fees were not regular and paid directly to the father's attorneys and thus could not be considered income to him or part of his cash flow. However, it held that bonuses the tribe generally pays to its members in connection with their share of its gaming industry profits may be considered in determining his support payments. *M.S. v. O.S.*, 97 Cal.Rptr.3d 812 (Cal.Ct.App. 2009), 35 FLR 1449.

o. Loans - Family and Business -

(1) A trial court erred when, in determining a man's income for child support purposes, it failed to consider partial forgiveness of a loan he had obtained from his employer, the New Hampshire Supreme Court decided. Observing that the man's order required him to pay as support a percentage of any employment bonuses he earned, the court found that the loan forgiveness was the equivalent of money and should be treated like a normal bonus. *In re Sullivan*, 982 A.2d 959 (N.H. 2009), 35 FLR 1488.

(2) A loan that a divorced noncustodial father received from his family-owned company for payment of his federal tax liability was properly treated as income for purposes of calculating his child support obligation, the South Dakota Supreme Court ruled. The court observed that the loan was interest free, had no payment schedule, and he had personally made no payment on the loan in all his years as a member of the company. *Nace v. Nace*, 754 N.W.2d 820 (S.D. 2008), 34 FLR 1452.

p. Loans - Student Loans and Grants - Education loans received by an unemployed parent enrolled in a higher education program should not be classified as income for child support purposes, the New York Family Court, Queens County, decided.

Finding that no New York case had considered the issue, the court observed that it has been addressed by other jurisdictions, which "have almost uniformly found that a parent's higher education loans are not income for purposes of a child support determination." *Mariana D. v. Frank D.*, 858 N.Y.S.2d 864 (N.Y. Fam. Ct. 2008), 34 FLR 1357.

q. Military Income, Housing and Subsistence -

(1) A magistrate determining a man's support obligation for his nonmarital child erred by excluding any nontaxable income he may receive from employment with — and membership in — the state National Guard, the Rhode Island Supreme Court ruled. The magistrate (who was affirmed by the family court) had ruled that support would be based on the father's military and civilian earnings from the National Guard, but would not include "other income that he receives which would be generally speaking for quarters, uniforms, et cetera, which is received on a regular basis," because such income was not reportable to the Internal Revenue Service. *Tamayo v. Arroyo*, 15 A.3d 1031 (R.I. 2011), 37 FLR 1298.

(a) Reversing, the high court pointed out that "there is not an exception for nontaxable income in the child-support guidelines." It added that the magistrate also erred in failing to treat as income the "locality adjustment payment" the father receives as a cost of living benefit, as well as the one-time bonus he had received from the National Guard the year that the support action was commenced.

(b) The high court also chided the magistrate for finding that the mother was not entitled to benefit from any of the father's rental income, because his tax return for the prior year showed that he operated his rental properties at a loss. Noting that the father's financial statement showed his monthly rental income, it said the guidelines make clear that rental and business income may be different for support purposes, and that "taxable income does not always indicate one's ability to pay."

(2) A trial court should not have excluded the value of a servicemember father's on-base housing from his gross income for child support purposes without determining whether its value was significant and operated to reduce his personal living expenses, the Arizona Court of Appeals, Division One, ruled. In addressing this issue of first impression, the court looked to other jurisdictions, and determined that the state support guidelines were broad enough to encompass his "free housing." Adding that inclusion of the value of on-base military housing in gross income for support purposes was also consistent with cases from other jurisdictions, the court found that those jurisdictions "have held the family court

should consider the value of the housing (rather than an actual housing allowance) in its calculation if the value is significant and reduces personal living expenses." *Patterson v. Patterson*, 248 P.3d 204 (Ariz.Ct.App. 2011), 37 FLR 1172.

(3) The federal preemption doctrine does not prohibit the inclusion of military allowances for housing and food in a party's gross income for purposes of calculating child and spousal support, even though under federal law such allowances are not taxable or subject to wage garnishment, the California Court of Appeal, Fourth District, held. Addressing an issue of first impression in the state, the court looked to decisions from other jurisdictions before concluding that the doctrine was inapplicable, since the U.S. Supreme Court has directed that family law support matters are within the province of state law, absent an express Congressional mandate that it be preempted. The court thus upheld the denial of a servicemember's request for modification of temporary child and spousal support awards to his ex-wife that were based in part on his military allowances *In re Stanton*,118 Cal.Rptr.3d 249 (Cal.Ct.App. 2010), *reh'g denied*, *rev denied, cert. denied* by *Stanton v. Stanton*, 132 S.Ct. 125 (2011), 37 FLR 1052.

(4) A trial court properly treated a father's military housing and meal allowances as income for the purpose of calculating his support obligation, the District of Columbia Court of Appeals decided. The court noted that although the District's statutes and case law were silent on the issue, overwhelmingly, other jurisdictions do include BAH and BAS allowances when determining a parent's gross income. In this case, the court found that the servicemember father receives $2,120 per month in tax-free Basic Allowance for Housing (BAH) from the U.S. Air Force, and receives an additional $292 in Base Allowance for Subsistence (BAS) funds. (BAS payments are for the meals of the servicemember himself and explicitly do not apply to family members; BAH pays the full cost of housing for a typical BAH-receiving servicemember, but the amount paid varies according to rank, location, and whether the recipient has at least one dependent.) Nothing in the guidelines precluded including such amounts in the father's income, the court said. *Brown v. Hines-Williams*, 2 A.3d 1077 (D.C. 2010), 36 FLR 1505.

(5) The inclusion of a servicemember parent's military allowances for housing and subsistence in his or her gross income when computing his or her child support obligation does not conflict with federal law or the U.S. Constitution's Supremacy Clause, the Alabama Court of Civil Appeals decided. Finding that the Illinois Appellate Court squarely confronted that issue in *In re McGowan*, 638 N.E.2d 695 (Ill.Ct.App. 1994), the court agreed with its reasoning that the matter does not raise a supremacy of laws issue. "Including military allowances in the definition of gross income for purposes of calculating child support does not do

'major damage' to 'clear and substantial' federal interests. *See* [*U.S. v. Yazell*, 382 U.S. 341, 352 (1966)]. To the contrary, as the Illinois court pointed out, the federal government encourages members of the military to fulfill their family commitments, such as paying child support," it explained. *Norman v. Norman*, 50 So.3d 1107 (Ala.Civ.App. 2010), 36 FLR 1356.

(6) Military allowances for food and housing constitute income for purposes of calculating a parent's child support obligation, the New York Supreme Court, Appellate Division, Fourth Judicial Department, ruled. Upholding a trial court's inclusion of such allowances in a servicemember's income, the court rejected an obligor's contention that they should not be so considered because they are excluded from income for federal tax purposes. [Basic allowances for housing (BAH) is paid to servicemembers who do not reside in government-supplied housing; basic allowances for subsistence (BAS) is an additional sum paid to active duty members to subsidize the cost of meals purchased on or off base.] *In re Massey v. Evans*, 886 N.Y.S.2d 280 (N.Y. App. Div. 2009), 35 FLR 1557.

r. <u>Overtime</u> - A trial court calculating a father's child support obligation acted equitably in including his overtime pay in his gross income, the Iowa Court of Appeals held. The court acknowledged that while *In re Brown*, 487 N.W.2d 331 333 (Iowa 1992), stated that overtime wages are within the definition of gross income for support purposes, it also said that "where overtime pay appears to be an anomaly or is uncertain or speculative, a deviation from the child support guidelines may be appropriate." Turning to the father's claim that he met this burden, it took note of the assertion that his extra work hours as a mechanic as a manufacturing facility were all voluntary and likely to diminish. On the other hand, the evidence showed father had a clear history of consistently working eight extra hours per week. Should that change, the court said, the father can file a request to modify support. *State ex rel. C.J.P. v. Peisen*, 784 N.W.2d 201 (Iowa Ct.App. 2010), 36 FLR 1272.

s. <u>Proceeds from Insurance Settlement</u> - A trial court erred in treating as gross income for support purposes the total amount that a father received in settling a claim with his insurer after his house was damaged, the Arizona Court of Appeals, Division One, held. Explaining that the judge needed to weigh the purpose and nature of the settlement proceeds, the court said it would be unjust to consider the entire amount of the one-time payment as gross income if some or all of it was intended to be a recoupment of lost capital or to be used in fixing the obligor's home. *Strait v. Strait*, 224 P.3d 997 (Ariz.Ct.App. 2010), 36 FLR 1185.

t. Proceeds from Lawsuits -

(1) An unallocated, multi-million dollar settlement received by a divorced father as a result of a lawsuit he had filed against his employer during his children's minority — but which was settled after the older child had turned 18 and the younger was 171/2 years old — constitutes income subject to his child support obligation, the Wisconsin Court of Appeals, District II, held. In thus upholding an order requiring the father to pay a percentage of the settlement to his ex-wife as child support, the court rejected his claim that the support award should have been placed in trust because both children are now adults. The court acknowledged that the judge below did not address whether support may be awarded retroactively after the children have become adults. Finding, however, that the father did not show that the mother was incapable or unwilling to wisely manage the money, it also emphasized that the settlement replaced income for the time that the child support obligations were in force. *Lyman v. Lyman*, 795 N.W.2d 475 (Wis. 2011), 37 FLR 1136.

(2) A trial court did not abuse its discretion in allocating the proceeds from an obligor's lump-sum personal injury settlement award over the remaining period of his child's minority, the North Dakota Supreme Court held. Affirming the judge below, the court noted that while it had not previously addressed allocation of the proceeds of a lump-sum personal injury settlement for support purposes, other jurisdictions have approved the allocation of such proceeds over a child's minority. Asserting that the obligor's claim that the windfall had ceased because he was no longer receiving the settlement proceeds "ignores the reality of the situation," it pointed out that his use of the proceeds reduced his necessary monthly living expenses, and thus benefitted his overall financial condition. It added that adopting the obligor's argument that support should be reduced because all of the liquid proceeds from the settlement were no longer available "would encourage obligors to simply spend settlement proceeds to lower their child support obligations." *Dupay (Powell) v. Dupay*, 782 N.W.2d 42 (N.D. 2010), 36 FLR 1320.

u. Proceeds from Property Settlement Agreement - Money that a mother received from her ex-husband in 2006 for her share of real property divided in their 1995 divorce is not income for purposes of recalculating her child support obligation in his modification proceeding, the Alaska Supreme Court ruled. The court pointed out that like other jurisdictions, it had previously held that property settlements do not represent income for child support purposes. It also rejected the father's claim that because the support rule's definition of "income" coincides with the Internal Revenue Service's definition of "income" in 26 U.S.C. § 1041, the court should follow the Internal Revenue Code and treat the $15,600 principal amount he paid the mother for her share of the property as income. The court added, however, that a portion of the lump-sum interest he paid to the mother on that amount should have been considered in the mother's income. *Brotherton v. State*, 201 P.3d 1206 (Alaska 2009), 35 FLR 1212.

v. Social Security -

(1) Because Kentucky's support guidelines permit use of a parent's need-based federal Supplement Security Income program benefits in calculating a child support obligation even if the benefits are the parent's only source of income, arrears may accumulate regardless of his or her present ability to meet the obligation, the Kentucky Supreme Court decided. The court thus held that such a parent's noncompliance with a support order may be subject to enforcement proceedings, including contempt. Under the facts of this case, however, there was no evidence of the mother's ability to work and afford the support payments. Thus the mother should not have been subject to contempt. *Commonwealth v. Ivy (Knighten)*, 353 S.W.3d 324 (Ky. 2011), 38 FLR 1028. [For a fuller discussion of this case, *see* Contempt, this outline.]

(2) Social Security survivor benefits paid to a divorcing man's wife in a representative capacity for her minor child from a prior marriage are not includable in her gross income for purposes of calculating his support obligation for their daughter, the Colorado Court of Appeals ruled. The court noted that while the state child support statute addresses Social Security benefits, it "is silent with respect to the situation here in which wife receives benefits on behalf of the son she had with her deceased first husband and for whom [the current] husband owed no duty of support." Finding the case of *In re Anthony-Guillar*, 207 P.3d 934, 35 FLR 1244 (Colo. Ct. App. 2009), instructive, the court said that its holding that a child's disability dependent benefits constitute income to the child — not to the child's parent — recognized that "Social Security benefits received on behalf of a child, even if paid to the parent, are the child's financial resource" and that a parent "simply receives such benefits as a representative of the child, who, because of youth, lacks the ability to manage" the benefits. It explained that such benefits are, therefore, similar to the parent's receipt of child support or means-tested public assistance benefits, both of which are expressly excluded from the parent's income under the support statute. Finding "no reason to treat survivor benefits any differently from disability benefits," it stressed that both types of benefits operate as an income substitute for a worker's dependents. *In re Ross-Ooley*, 251 P.3d 1221 (Colo.Ct.App. 2010), 37 FLR 1045.

(3) Social Security Disability benefits paid directly to a support obligor's children as a result of his disability should be considered income attributable to the obligor

in determining the amount of his support payments, the Arkansas Supreme Court held. In addressing this issue of first impression, the court rejected the argument that SSD benefits paid to a disabled obligor should be treated the same as SSI benefits (which are not income for child support purposes). In so holding, the court observed that other jurisdictions likewise treat SSD benefits paid to a disabled obligor's child as income to the obligor. *Arkansas Office of Child Support Enforcement v. Hearst*, 2009 Ark. 599, — S.W.3d — (Ark. 2009), 36 FLR 1071.

(4) Social Security payments a child receives on account of the custodial parent's disability should be treated as income to the child for purposes of calculating child support, the Colorado Court of Appeals decided. Finding that the custodial parent, as the child's payee representative under federal law, does not "actually receive" the child's benefit per state law for purposes of including it in his or her own income, the court affirmed an order decreasing a noncustodial parent's basic support obligation by the amount of the child's benefits after finding that the benefits reduced the child's actual needs. *In re Anthony-Guillar and Guillar*, 207 P.3d 934 (Colo.Ct.App. 2009), 35 FLR 1244.

w. <u>Trust Income</u> -

(1) A trial court abused its discretion when, on remand of the reversal of its order including lump-sum trust distributions in a father's income for child support purposes, it reaffirmed the order without justifying such a deviation from the support guidelines, the District of Columbia Court of Appeals held. Finding that the lower court did not properly apply the legal principles it had set out in remanding the original order, the appellate court instructed that on this second remand, the judge examine the manner in which the obligor had used the one-time trust distributions. *Lasché v. Levin*, 26 A.3d 717 (D.C. 2011), 37 FLR 1501.

(a) When the case reached the appeals court the first time, it held that although trust distributions did not constitute income, they may be an appropriate factor in deviating from the guideline amount. It remanded the case back to the trial court for further consideration consistent with that opinion. 977 A.2d 361 (D.C. 2009) (*Lasché I*).

(b) On remand, the trial court again counted the entire amount of the trust distribution as income, finding that the distributions allowed him to meet his living expenses. Father appealed. On its second review of this case, the appellate court said that the judge below again erred by including the trust distributions as income and in reaffirming the order without justifying the deviation from the guideline amount. Thus the court remanded yet again.

(2) Undistributed income from a valid non-grantor trust should be used in calculating the trust beneficiary's child support obligation if he or she is individually taxed on it, the Wisconsin Court of Appeals, District II, held. The court thus affirmed a trial court's inclusion of such income in redetermining the support obligation of a divorced father — an heir to the Dow Jones fortune who in his pro se divorce action failed to disclose his multi-million dollar net worth from several family trusts, claiming instead that he was a self-employed carpenter earning $38,400 per year. *Stevenson (Cook) v. Stevenson*, 765 N.W.2d 811 (Wis.Ct.App. 2009), 35 FLR 1172.

x. Withdrawals from Savings Account - A trial court did not err in ruling that money withdrawn from a divorced, unemployed father's saving account to cover his living expenses constituted "net income" for purposes of determining his child support obligation, the Illinois Appellate Court, First District, has ruled. *In re McGrath*, 954 N.E.2d 842 (Ill.App.Ct. 2011), 37 FLR 1505, *appeal allowed* (Nov 30, 2011).

(1) The father lives off the assets that were awarded to him in the parties' divorce as part of their marital estate. Each month he withdraws $8,500 from his savings account to meet his expenses. He appealed when the trial court ordered him to pay $2,000 per month in support for his two children. (The state guidelines provide that support for two children should be 28% of a parent's net income, which is defined as "all income from all sources.")

(2) Affirming the support award, the court was not swayed by the father's argument that the money withdrawn from his savings account is not income "because he is merely spending money he already has and is not earning or receiving any type of monetary gain." The court, asserting that "an unemployed parent who lives off regularly liquidated assets is not absolved of his child support obligation," pointed out that nothing in the guidelines excludes monthly withdrawals from a savings account from the definition of "net income." Likewise, it rejected the father's contention that his only income is the $171 in monthly interest that he receives from the saving account, and noted that in ordering the father to pay $2,000 in support that trial court had deviated downward from the $2,380 guideline amount.

7. Potential Income -

a. A trial court properly imputed income to a voluntarily unemployed custodial mother even though she receives monthly payments from a trust, the Minnesota Court of Appeals ruled. The trial court found that in addition to her $1,642.91 trust income, the mother had potential income of $1,702, and thus calculated her gross income for support purposes as $3,345 per month. Affirming, the court pointed out that Minn.

Stat. § 518A.32 (1) provides that if a parent is "voluntarily unemployed …, or there is no direct evidence of any income, support must be calculated based on a determination of potential income." Saying that the mother's monthly income from the trust did not relieve the trial court of having to impute potential income under the statute, the court explained that because the court found her to be voluntarily unemployed "it was required to consider mother's potential income, regardless of whether she produced direct evidence of her trust income." *Welsh v. Welsh*, 775 N.W.2d 364 (Minn.Ct.App. 2009), 36 FLR 1046.

b. A trial court abused its discretion when, in modifying the support obligation of a divorced father with an annual income of $110,000, it imputed additional income to him based on the fact that he had earned $350,000 per year at a prior job, the Illinois Appellate Court, Third District, ruled. Finding that the court had imputed the $350,000 income based on the father's "earning potential," the court noted that Illinois courts have set out three primary factors to consider in determining when it is proper to impute income to a noncustodial parent: (1) whether the noncustodial parent was voluntarily unemployed because he or she willingly left the former job or remained out-of-work; (2) whether there exists an intention to evade support; and (3) whether there was any evidence of an unreasonable failure to take advantage of an employment opportunity. Under the facts of this case, all factors worked in the father's favor. Accordingly, the trial court erred in concluding that the father could have earned a salary similar to the income he previously generated. *In re Gosney and Gosney (Finnegan)*, 916 N.E.2d 614 (Ill.Ct.App. 2009), 35 FLR 1572.

c. The statutorily-allowed deviation from the support schedule in instances where a parent's voluntary actions reduce his or her income may not be applied in cases where an admittedly underemployed parent has not actually reduced his or her income, the South Dakota Supreme Court ruled. Although the mother had a Bachelor's Degree in Biology during the marriage, and had worked as a dental assistant until the birth of the parties' first child, she never did work full-time after her marriage. Thus although she earned less than her full economic potential, she had not voluntarily reduced her income, warranting a deviation from the support schedules. Said the court, "we conclude that since the legislature used the word 'reduces,' it meant to limit the deviation to those instances where a parent regularly made a higher income and purposely lowered it." Observing that the mother's income had changed very little since the divorce, the court said that the statute did not allow a deviation in this case because the mother had not actually reduced her income. The mother might have the potential to earn more based on her advanced degree, she explained, but the legislature has not provided guidance on if, or how, courts are to consider potential income or underemployment. *Hollinsworth v. Hollinsworth*, 757 N.W.2d 422 (S.D. 2008), 35 FLR 1008.

8. Voluntary Under- Unemployment - Imputed Income -

   a. Abandoning School Stipend - A custodial mother who gave up an annual $24,000 stipend when she dropped out of a Ph.D. program to go to law school full-time did not voluntarily impoverish herself by limiting her earning capacity to only summer employment (especially where her summer job at a Manhattan law firm yielded over $36,000), the Maryland Court of Special Appeals held. Rejecting the argument that the mother should be deemed to have impoverished herself during the school year, the court said her income must be averaged out over the year or "annualized." *Lorincz v. Lorincz*, 961 A.2d 611 (Md.Ct.Spec.App. 2008), 35 FLR 1064.

   b. Early Retirement -

      (1) A father's personal choice to retire at age 52 and receive his fully vested pension — equal to only half of his former salary — constitutes a voluntary reduction of income, and thus a trial court did not err in assigning him an earning capacity greater than his pension for child support purposes, the Pennsylvania Superior Court ruled. The court rejected the father's argument that his retirement should not be deemed either "early" or "voluntary" because his benefits were vested. "Despite [the father's] assertion to the contrary, his retirement at age fifty-two, even though accompanied by fully vested pension benefits, is a voluntary reduction in income" under Pa.R.C.P. 1910.16-2(d)(1), which provides that such reduction, when an obligor "leaves employment," will generally have "no effect on the support obligation," it said. Finding no evidence that the police department pressured the father to retire, and stressing that he had "the interests of his seven-year-old child to consider," the court pointed out the conference officer did not hold the father to his pre-retirement earning capacity, and thus the conference was "actually decided favorably for [him]." *Smedley v. Lowman*, 2 A.3d 1226 (Pa.Super.Ct. 2010), 36 FLR 1470.

      (2) A trial court did not err in refusing to impute income to a divorced mother who retired from her job at age 42, even though her pension was less than half of her salary, where her ex-husband failed to show her ability and opportunity to earn additional income, the California Court of Appeal, Fourth District, ruled. Noting that this was an unusual case because the existing support order was a "zero-zero" order based on the fact that the mother's preretirement income was equal to the father's, the court affirmed the new order requiring the father to pay support to the mother in light of their disparate incomes, even though he had primary custody of one child and split custody of the other. *Bardzik v. Bardzik*, 83 Cal.Rptr.3d 72 (Cal.Ct.App. 2008), 34 FLR 1424, *as modified on denial of rehearing*.

c. Failure to Participate in Remediation Program - A dissolution court properly imputed income to an unemployed father for purposes of setting his child support obligation, where the father was fired for failing to participate in the company's remediation program, the Iowa Court of Appeals held. *In re Applegate*, 801 N.W.2d 627 (Iowa Ct.App. 2011) (No. 1-222/10-1606, 5/26/11), (Table, final publication decision pending), 37 FLR 1381.

(1) In affirming the trial court, the appellate court said that in determining if it is appropriate to use a parent's earning capacity rather than a parent's actual earnings to meet the child's needs or do justice between the parties, courts will consider whether the parent's inability to earn a greater income is self-inflicted or voluntary. The trial court concluded, it said, that the father's reduced income was, and it had observed that "a reasonable person, particularly one offered a remediation program to keep his job, would know or should know that being fired would result in depriving [his daughter] of support."

(2) Appellate courts from other jurisdictions have held a parent's diminution in income to be voluntary if it results from job loss based on a wrongful act, the court added, citing decisions from Illinois, South Dakota, and Virginia. "We agree that [the father]'s reduced income status is the result of a series of voluntary choices," it concluded, explaining that "a strict application of the child support guidelines using [his] actual earnings under the circumstances of this case would not provide for the needs of his child and would result in a substantial injustice between the parties. Accordingly, the court properly used [his] earning capacity rather than his actual income to calculate his child support obligation."

d. Incarcerated Obligors -

(1) A divorce court did not err when, in calculating a father's child support obligation, it imputed to him the $18,867 monthly salary he had earned as a hospital nurse anesthetist prior to losing that job after being imprisoned and placed on the sex offender registry as a result of his sexual abuse of his daughter, the North Carolina Court of Appeals ruled. The appellate court observed that there was substantial evidence that the father had "disregarded his parental obligations." Noting the trial court's finding that the father's plight resulted from his own behavior in sexually abusing his child, and unemployment was the foreseeable result, the court pointed out that the father acted voluntarily when he abused his daughter. "Criminal prosecution, conviction, registration as a sex offender, termination of his employment in the field of nursing, and difficulty in finding employment in any other field are clearly foreseeable results of the abuse which [he] voluntarily committed, and to argue otherwise approaches absurdity," the court declared. It also noted that, following the divorce court's property

division, the father had $355,000 under his control and thus was capable of providing the $2,627 per month child support ordered by the court. *Metz v. Metz*, 711 S.E.2d 737 (N.C.Ct.App. 2011), 37 FLR 1392.

(2) A divorce court erred when, in calculating an incarcerated husband's child support obligation, it held that he was voluntarily unemployed because his imprisonment stemmed from his "voluntary" assault of his wife several months prior to her divorce filing, the Texas Court of Appeals, 13th District, ruled. Finding that the issue of whether incarceration can be characterized as "voluntary unemployment" under the child support guidelines has been discussed, but never decided, by several Texas appellate courts, the court determined that this was not a case of voluntary unemployment because the child support order was not in place at the time the father committed the assault. In fact, the court observed, he was incarcerated five months before the mother filed for divorce, and nine months before the divorce hearing where the child support award was determined. "There is no evidence that [he] had any 'intent' to be underemployed or unemployed for the purpose of decreasing a child support award," the court said. *In re Lassmann*, No. 13-09-00703-CV (Tex.Ct.App. 8/25/10), 36 FLR 1520.

(3) A trial court did not err in refusing to "exempt" a 12-year-old child's father from all current and future child support obligations, even though he is serving a 50-years-to-life prison sentence and will not be eligible for parole until 2045, the California Court of Appeal, Third District, ruled. Although the man had no current income and was not expecting to earn any during the child's minority, the court ruled that the law does not disclose the possibility of modifying the order in advance. *El Dorado County Department of Child Support Services v. Nutt*, 84 Cal.Rptr.3d 523 (Cal.Ct.App. 2008), 34 FLR 1584.

e. <u>Intent to Avoid Child Support</u> -

(1) An under- or unemployed parent's intent to avoid child support need not be proven for a trial court to apply the child support guidelines to such parent's earning potential instead of actual income, the Texas Supreme Court held. Addressing an issue that has split the state's intermediate courts, the court held, however, that a trial court may properly consider an obligor's intent to avoid support as a factor, along with other relevant factors, in an intentional under- or unemployment analysis. The court observed that Tex. Fam. Code § 154.066 states that a trial court may apply the child support guidelines to the earning potential of the obligor in an intentional unemployment or underemployment situation. Also saying that "trial courts should be cautious of setting child support based on earning potential in every case where an obligor makes less money than he or she had in the past," it said it was "wary of the proposition presented by the

Attorney General that, other things being equal, receiving more child support will always be in the best interest of the child." A court should consider the obligor's proffered rebuttal evidence of the reason for the intentional under- or unemployment, which may include "such laudable intentions" as altering employment to spend more time with, or live closer to, the children, the court said. *Iliff v. Iliff*, 339 S.W.3d 74 (Tex. 2011), 37 FLR 1298.

(2) A trial court erred in imputing to a father income based on his earnings while in the military, even though he had chosen not to reenlist so that he could complete his studies and go to law school, the Texas Court of Appeals, Fourth District, ruled. The appellate court noted that in order for a court to find that a parent is intentionally underemployed or unemployed, there must be evidence that the parent reduced his income for the purpose of decreasing his child support payments. It found that the father "does not dispute that he voluntarily left a lucrative position with the military, but explains he did so to pursue the law degree that he now holds." It went on to conclude that his "decision to leave the military in 1997 to continue his education does not give rise to an inference of voluntary underemployment to avoid paying child support," adding that "there was no court ordered child support in 1997, and there is no evidence [the mother] was asking [him] for support. [He] accomplished what he set out to do in 1997 — he obtained an undergraduate and a law degree. We conclude there was no evidence presented to the trial court to support a finding of voluntary underemployment or unemployment at the time of the trial. Therefore, the trial court abused its discretion in basing child support on the presumption of [the father]'s earning potential of $80,000.00 a year." *In re B.R.*, 327 S.W.3d 208 (Tex.Ct.App. 2010), 36 FLR 1357.

f. Lackluster Job Search / Refusal to Accept New Employment -

(1) A divorcing father with an MBA and JD who during his marriage turned down a university's offer of a full-time faculty position, and focused his employment endeavors on magic shows, speaking engagements, and developing a summer camp for performing arts, was properly found to be voluntarily underemployed for child support purposes, the Tennessee Court of Appeals ruled. Affirming the judge below, the appellate court asserted that "regardless of any merit that can be discerned from Father's work as the owner and operator of a camp, this voluntary underemployment will not shield him from his child support obligations." Also finding that the lower court imputed the proper amount of income, it noted the father's testimony that he could work as a part-time professor at the University of Tennessee earning $24,000 to $30,000 per year. Taking note that his current income was $30,000, it said that, "despite the fact the trial court cited Mother's income as a benchmark," it had reliable evidence of the father's income potential

as required by the support guidelines. It thus "articulated a reasonable amount of income for Father," the court concluded. *Armbrister v. Armbrister*, No. E2010-01561-COA-R3-CV (Tenn. Ct. App. 11/21/11), 38 FLR 1057.

(2) A trial court was "plainly wrong" when, in recalculating a divorced couple's support obligation, it imputed income to the mother for the period during which she was unemployed after being terminated from her job as a patent attorney through no fault of her own, the District of Columbia Court of Appeals held. In imputing income of $100,000 per year to the mother, the trial court found that her job search was "not commensurate with a sincere desire for employment," that she had failed to "effectively" network and market herself, that her job application letters were "lackluster," and that the number of her job interviews was "mediocre." The appellate court disagreed, noting that mother's failure to follow up with one of the twenty job contacts suggested by the father "hardly supports a finding of bad faith." The court also said that the trial court "plainly erred" in finding that the mother's job search was not "diverse and comprehensive," where she had applied for a variety of positions, including high school science teacher, IT contract manager, legal editor, senior licensing manager, and Patent Agent. *Prisco v. Stroup*, 3 A.3d 316 (D.C. 2010), 36 FLR 1533.

(3) A trial court erred in finding that a divorcing wife could become a member of the Florida Bar, and thereby increase her income beyond the level imputed to her for purposes of alimony and child support, Florida's Fourth District Court of Appeal held. Although the woman had passed the New York and New Jersey bars and practiced law for six years, she failed the Florida bar and worked as her ex-husband's office manager until he fired her after they separated. In computing support, the trial judge imputed to the woman income she could earn as a Florida lawyer. Reversing, the appellate court said there was no evidence that after many years outside the practice of law, the mother was capable of passing the Florida bar, much less obtaining gainful employment as a lawyer. Accordingly, the trial court erred in attributing to her the higher income. *Shafer v. Shafer*, 45 So.3d 494 (Fla.Dist.Ct.App. 2010), 36 FLR 1533.

(4) A trial court considering a divorced father's petition to modify child support after his ex-wife agreed that their son could live with him properly rebuffed her claim that, as a stay-at-home mother of two children from a subsequent marriage, she could not afford child support payments above the $50 monthly minimum, the Alaska Supreme Court held. The court stressed that parents have a paramount duty to support their children, and that new obligations incurred after the birth of a parent's first child do not diminish it. "Because of the significance of a parent's duty to meet his or her child support obligations, we prioritize fulfillment of that

duty over even ‘legitimate’ decisions to be voluntarily unemployed or underemployed,” it explained, adding that “[a]s we have repeatedly recognized, a parent should not be relieved of the obligation to support his or her children except in the most extreme circumstances.” Acknowledging that the support guidelines provide limited exceptions to this principle, the court found that they did not apply here because the mother failed to prove that her support obligation would cause substantial hardship for her subsequent children, and she had voluntarily elected to leave the workforce. *Kestner v. Clark*, 182 P.3d 1117 (Alaska 2008), 34 FLR 1321.

g. Loss of Job -

(1) A trial court erred in finding that an obligor who resigned from his $172,000 per year engineering job to serve as a church pastor earning $52,800 a year acted “in good faith, without disregard for his child support obligation,” the North Carolina Court of Appeals ruled. The court said that while there was no evidence that the obligor intentionally reduced his income to avoid his support obligation, the record did not support the trial court's finding that there was “no evidence” of bad faith or an intentional disregard of that obligation. On the contrary, it pointed out, “the only evidence on this point was plaintiff's testimony that he acted without considering his ability to meet his child support obligation. While we do not question the sincerity of plaintiff's religious beliefs [He had become a pastor to ‘follow Jesus Christ’], we cannot equate such justification for his actions with good faith as it pertains to his financial obligations for his children,” the court asserted, citing *Shippen v. Shippen*, 693 S.E.2d 240 (N.C.Ct.App. 2010) (obligor's voluntary reduction in income, while based on his sincerely-held religious beliefs, did not excuse his duty to comply with support order). *Andrews v. Andrews*, 719 S.E.2d 128 (N.C.Ct.App. 2011), 38 FLR 1046.

(2) A divorce court calculating an Egyptian father's support obligation for his child in New Jersey erred in imputing to him income he could have earned had he lived in New Jersey instead of in Egypt, the New Jersey Superior Court, Appellate Division, held. The court observed that support “must be based on the income that [the father] currently earns in Egypt, or if income is imputed to him, it must be based on what he can earn in Egypt.” It explained that “imputing income based on New Jersey wage levels would be unjust and futile in the circumstances of this case, where the supporting parent is unable to work in New Jersey due to no fault on his part and is located in a foreign country where his earnings will be drastically less than the amount he could earn here.” The court added that since the parties were in the U.S. only on visitor visas, “we must presume that had the family remained intact it would have returned to Egypt, as it did after an earlier visit.” *Ibrahim v. Aziz*, 953 A.2d 508 (N.J.Super.Ct.App. 2008), 34 FLR 1477.

h. Participation in "Welfare-to-Work" Program - A trial court did not abuse its discretion in refusing to impute income for child support purposes to a mother participating in the CalWORKs (welfare-to-work) program, where employment while in the program would cause her to lose program benefits, the California Court of Appeal, Second District, ruled. Finding that the imputation of income to the mother would be contrary to public policy, the court explained that the CalWORKs program provides benefits to families with minor children where the parents are unable to provide for their support. "Broadly stated, the goal of the program is to achieve the ability of the parent to provide support; since CalWORKs requires, whenever possible, that the parent seek or prepare for employment, an unemployed parent who is in compliance with his or her CalWORKs plan is, in effect, in the process of seeking employment," it said. Thus, the requested elimination of the father's obligation to pay support based on imputed income to the mother would leave her without the ability to complete her program, or, at the very least, would require her to work in violation of the provisions that allow her to receive the assistance necessary to support her children, the court asserted. *Mendoza v. Ramos*, 105 Cal.Rptr.3d (Cal.Ct.App. 2010), 36 FLR 1213.

9. Support Calculations -

a. Child Care Expenses -

(1) A trial court abused its discretion when, in determining a noncustodial father's child support obligation, it refused to include the mother's day-care costs because the day care provider was in the U.S. illegally and was not reporting her income to the IRS, the Rhode Island Supreme Court ruled. The trial court had also denied the credit because it found that either the father's wife or the paternal grandmother could provide day-care for free. Reversing, the high court said that "the sole criterion of whether a parent's day-care costs may be included in the child-support calculation is whether those costs are reasonable," not whether the day-care provider is "cheating the government," adding that the magistrate inappropriately required the mother to choose between placing the child with the father's family or shouldering the day-care expenses herself. *Tamayo v. Arroyo*, 15 A.3d 1031 (R.I. 2011), 37 FLR 1298.

(2) A divorce court erred in calculating a husband's support obligation for his child based on the custodial wife's alleged child-care costs of $390 per month, where she included in those costs sums she voluntarily paid her day-care provider over the latter's regular fee, the South Carolina Court of Appeals held. The court found that the day-care provider testified that the wife had initially paid her $100 per week, but later reduced the amount to $60 a week; the provider added, however, that when the wife "feels like blessing me, she will give me a little more."

Pointing out that this evidence showed that the day-care provider charged only \$240 a month, not \$390, it asserted that while the wife's decision to "bless" the provider "with additional money on a random basis is an affable gesture, the voluntary gift given at Wife's sole discretion should not be attributed to Husband in calculating his child support obligation." *Mosley v. Mosley*, 390 S.C. 524 (S.C.Ct.App. 2010), 37 FLR 1032.

(3) Day care costs incurred while a parent attends school are not cognizable "child care expense" under the Maryland guidelines, which define such expenses as those "incurred due to employment or job search" under Md. Fam. L. Art. § 12-204(g)(1), the Maryland Court of Special Appeals held. "The clear meaning of 'due to employment' means due to actual current employment, not long range preparation for potential employment. We deem the phrase 'due to job search' to be similarly limited to a direct and immediate relationship between the child care and the job search and not to embrace some more distant and attenuated philosophical association between the two," the court asserted, adding that the mother's summertime day-care costs while she worked at the law firm were "a textbook example of what is meant by the phrase 'due to employment.' " Explaining that this ruling was compelled by the statute's language, it noted that some jurisdictions do allow consideration of day-care costs associated with job training or education. *Lorincz v. Lorincz*, 961 A.2d 611 (Md.Ct.Spec.App. 2008), 35 FLR 1064.

b. Health Insurance Expenses - A trial court may include, in modifying a divorced father's child support obligation, the costs of extra health insurance obtained by his ex-wife as additional child-rearing expenses, but such coverage must be limited to the children, the Missouri Court of Appeals decided. The court held that the trial court had the discretion to order both parents to provide health insurance coverage for the children, and that the father did not deny that the additional coverage was beneficial to the children. Therefore, the court did not abuse its discretion in including the cost of the extra health coverage as additional child-rearing costs. However, acknowledging that the record was unclear whether the monthly premium was for coverage of only the parties' children, the court also ruled that the trial court erred by not limiting the father's payment responsibility to that portion of the monthly premium attributable to covering the children only. *Blevins v. Blevins*, 249 S.W.3d 871 (Mo.Ct.App. 2008), 34 FLR 1273.

c. Credit for Subsequent Children - A trial court erred by not following state support guidelines in entering a support order against a man for the second of three children he fathered with three different women, the New Mexico Court of Appeals held. The court found that the support award had been tailored based on what income was left over after the court-order support obligations for the father's other two children were satisfied, taking into account the state garnishment statute's mandate that the maximum amount that may be taken from wages for the enforcement of child support is 50% of disposable earnings. The court said, however, that in determining the father's support obligation for the subject child, the court below should have “worked forward from Father's income and applied the guidelines. The guidelines are the starting point for determining child support.” *Thompson v. Dehne*, 220 P.3d 1132 (N.M.Ct.App. 2009), 35 FLR 1501.

d. Credit for Parenting Time -

(1) A trial court abused its discretion by calculating child support separately for each of a divorced couple's two children on the ground that their father had overnight visitation with only one of them, the Colorado Court of Appeals ruled. The trial court had declared that “given the different circumstances of the children,” it would deviate from the state support guidelines by using multiple worksheets to calculate support. It then added the amounts from the two worksheets together and deviated again downward from that amount, but made no findings as to the reason for such deviation. The appellate court said that by beginning the calculation using two worksheets, the trial court inappropriately treated each child, for support purposes, as an only child. It explained that this approach was contrary to the guidelines, which provide for incremental increases in support for each additional child in a family. It instructed that on remand, the court recalculate support using only one worksheet and credit the obligor's overnight visits with one child according to the formula set out in *In re Quam*, 813 P.2d 833 (Colo. Ct. App. 1991) (under which he will be credited for one-half of an overnight for each visit with the one child), unless sufficient findings are made to justify deviating from that formula. *In re Wells*, 252 P.3d 1212 (Colo.Ct.App. 2011), 37 FLR 1240.

(2) A trial court erred when, in calculating a noncustodial father’s child support obligation for his two children with whom he exercised parenting time in different amounts, it used two worksheets, one for each of the parties’ two children, and added the amount from each worksheet to determine Father’s total obligation, the Indiana Court of Appeals decided. *In re Marriage of Blanford*, 937 N.E.2d 356 (Ind.Ct.App. 2010).

(a) The appellate court held that only one child support worksheet should be completed. It noted, however, that Guidelines presume that each child under an in gross order will have the same number of overnight stays with the noncustodial parent and do not address the present situation, *i.e.*, when the children involved exercise overnight parenting time in different amounts. The father proposed on appeal that the trial court should have averaged the total number of overnights in arriving at the figure to be used on the Parenting Time Worksheet.

(b) The court found that this method has its own difficulties and might extend Father too much or too little credit. The appellate court thus remanded the case with instructions for the trial court to explain its use of the specific number of overnight credit in its order.

(c) Compare *Hartley v. Hartley*, 862 N.E.2d 274, 286 (Ind.App. 2007). In that case the trial court averaged the number of overnights, as in the instant case. Father argued on appeal that the trial court should have calculated the overnight parenting time using the full amount for all three children, and then divided the credit by three. The appellate court affirmed, saying that the trial court's methodology was not clearly erroneous, but neither would it have been error if the court had used Father's proposed method.

(3) The percentage of parenting time used in applying a parenting-expense adjustment to calculate support for the period that an obligor is entitled to custody of his or her children is determined under the terms of the order scheduling such parenting time, regardless of whether or not the obligor actually exercises the full amount of that time, the Minnesota Court of Appeals decided. The statute governing the parenting time credit does not establish the exercise of parenting time as a rebuttable presumption, and thus whether the parent actually exercises it is irrelevant, the court said. "Any other result would encourage litigation by allowing a party to return to court to argue for a parenting-expense adjustment, and consequently a recalculation of support, based solely on that party's failure to exercise parenting time," the court explained, adding that a party wishing to challenge compliance with the parenting-time schedule should instead seek a hearing to resolve such dispute. *Hesse v. Hesse*, 778 N.W.2d 98 (Minn.Ct.App. 2009), 36 FLR 1070.

e. <u>Support Calculation for Child Who Resides at School</u> -

(1) An obligor who defeated his ex-wife's request that he contribute to their son's college costs by showing that the son had repudiated him should not have been granted a reduction in his child support obligation for the period the son would be at school, where the boy planned to live with his mother while attending college, the Indiana Court of Appeals ruled. Explaining that such a reduction is permitted only when the child support would duplicate funds provided under an education support order, the court said that the father was not entitled to a reduction for the time that the son could — but does not — live away from home in order to attend college. *Lechien v. Wren*, 950 N.E.2d 838 (Ind.Ct.App. 2011), 37 FLR 1464.

(a) The appellate court agreed with the father that because the child had repudiated a relationship with him, the father was relieved of his relationship to contribute to the child's college expenses, citing *Scales v. Scales*, 891 N.E.2d 1116 (Ind. Ct. App. 2008), *McKay v. McKay*, 644 N.E.2d 164 (Ind.Ct.App. 1994), and *Milne v. Milne*, 556 A.2d 854 (Pa.Super.Ct. 1989).

(b) However, the father was not entitled to reduce his child support order to reflect only the amount that would be owed if the son were residing away from home during the school year. Rejecting the father's argument, the court observed that the child was, in fact, staying with the custodial parent while attending school. Thus the post-secondary education worksheet, which determines a noncustodial parent's child support obligation for a child who lives way from home part of the year, was therefore unnecessary. This accords with IC § 31-16-6-2, which provides that a child support obligation shall be adjusted to avoid duplication of a support order for a child who spends a portion of the year living away at school. In the case at bar, no such duplication was involved, since the child resides with his custodial mother all year.

(2) The statutory support guidelines should not be used to determine the amount of support owed by a divorced father who agreed to support his adult son through college, where the son attends school year-round in a different city and thus does not live with either parent, the California Court of Appeal, Second District, decided. The court explained that one of the essential factors in calculating support pursuant to the guidelines is "approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent" (Cal. Fam. Code § 4055(b)(1)(D). Stressing that the son is "a competent adult," the court said that the facts that the mother receives mail for him at her address, that he keeps some of his "stuff" at her home, and that he visits from time to time, do not support a finding that she has "primary physical responsibility" for any percentage of time. In this fact situation, neither parent retains such responsibility, the court declared, ruling that "the guideline formula, by its terms, is inapplicable." *Edwards v. Edwards*, 75 Cal.Rptr.3d 458 (Cal.Ct.App. 2008), 34 FLR 1284.

f. <u>Deviation from the Guideline Amount</u> -

(1) A remarried obligor was properly granted a $300 monthly deviation from the guideline amount of child support based on his poor financial condition resulting from his wife's serious medical problems, the South Dakota Supreme Court held. In so holding, the court observed that S.D. Codified Law 25-7-6.10(2) allows a deviation from the guidelines based on "any financial condition of either parent

which would make application of the [support] schedule inequitable." In rejecting the mother's argument that because the father has been able to remain solvent, a deviation should not be available, the court noted that the husband has been able to meet his financial obligations only by consolidating debts, refinancing property, securing loans, incurring credit card debt and so on. The court also rejected the mother's argument that the trial court should have disallowed the deviation as it does in cases where obligors create new families, saying that there was no evidence that the obligor's wife's medical condition was known at the time of their marriage. *Linge v. Meyerink*, 806 N.W.2d 245 (S.D. 2011), 38 FLR 1057.

(2) One parent's alleged interference with the parenting time rights of the other parent is not a circumstance that would permit deviation from the support formula set out in the state child support guidelines, the Michigan Court of Appeals held. In vacating the support order entered below, the court opined that the Support and Parenting Time Enforcement Act, MCL 522.601 *et seq*., read as a whole, does not provide for enforcement of parenting time rights by adjusting child support obligations. "Consequently, a parent's alleged interference with the parenting time rights of the other parent is not a circumstance that would permit deviation from the child support formula" under the guidelines. The court decided the matter as a question of first impression. *Ewald v. Ewald*, — N.W.2d — (Mich.Ct.App., No. 295161, 5/26/11), 37 FLR 1392.

(3) A trial court did not abuse its discretion in denying a divorced father's motion for relief from final judgment, in which he contended that an agreed order he had entered into with his ex-wife obligating him to pay her retroactive child support was void as against public policy or else offset by her arrears, the Tennessee Court of Appeals ruled. To the extent the agreed order required him to pay more than guideline amount, the court said that there was nothing here offensive to public policy, as parties are always free to agree to more support for a child than the guidelines provide. As for offsetting the man's arrearage by the amount his ex-wife owed him before the agreed entry, there was no basis for allowing the offset, as he could have accounted for such in the agreed entry but failed to do so. Accordingly, the trial court denied the man's motion for relief. *Henderson v. Wilson*, No. M2009-01591-COA-R3-CV (Tenn. Ct. App. 2/25/11), 37 FLR 1213.

(4) A trial court abused its discretion when, in considering a county child support agency's request to increase a divorced mother's support obligation to the presumptive guideline amount, it instead deviated downward from that amount for the purpose of maintaining the children's custodial grandparents' eligibility for public daycare assistance benefits, the Colorado Court of Appeals, Division IV, held. After finding that the presumptive amount of the mother's support

obligation was $399 per month, the trial court noted that an order in excess of $245 a month would result in the grandparents losing their public assistance benefits for the children's daycare. It thus modified her monthly support payments from $173 to only $240. Reversing, the appellate court held that it would be "untenable" to place a child in a position of poverty simply so that she would remain eligible for public assistance benefits, citing *In re Thornton*, 802 P.2d 1194 (Colo.Ct.App. 1990). Noting that other jurisdictions have ruled similarly that child support awards should not be structured so as to ensure that the recipient remains eligible for needs-based public assistance, it explained that "child support is income, and thus the amount of public assistance is properly determined after child support has been fixed and not vice versa." *In re Hein (Farrer)*, 253 P.3d 636 (Colo.Ct.App. 2010), 36 FLR 1569.

(5) A divorce court judgment awarding a wife bridge-the-gap alimony, lump-sum alimony, child support and arrears, and other child-related expenses exceeded the husband's financial ability and thus was an abuse of discretion, Florida's Fourth District Court of Appeal ruled. Finding that the awards left the husband nothing for living expenses, the court pointed out that the total support and expense awards "consume nearly all of his net monthly income. Based on the record evidence and findings as to his ability to pay, the total award places an undue burden on him without any justification — assuming that he could be required to pay an amount leaving him with nothing for his personal needs," it said. In support, the court cited *Ballesteros v. Ballesteros*, 819 So.2d 902 (Fla.Dist.Ct.App. 2002), which stated that "where the husband's income is nearly exhausted on obligations imposed by the final judgment, leaving him with practically no money to support himself, reasonable persons could not differ as to the impropriety of the actions taken by the trial court." *Posner v. Posner*, 988 So.2d 128 (Fla.Dist.Ct.App. 2008), 34 FLR 1440, *appeal after remand*, 39 So.3d 411 (Fla.App. 4 Dist. 2010).

10. <u>High-Income Obligors</u> -

a. A trial court did not err in ordering actor Jon Cryer to continue paying $8,000 per month in child support to his ex-wife Sarah, even though their son has been in his care for almost the entire time since being removed from his mother's home as a result of an ongoing dependency proceeding, the California Court of Appeal, Second Appellate District, held. While recognizing that the situation may seem unfair to the high-earning "Two and a Half Men" co-star, the court explained that maintaining the child support payments would enable the mother to keep her home, to which the child could return following conclusion of the dependency case. The court also rejected Cryer's request for an accounting of where the money was being spent, or for it to be placed in trust, saying similar arrangements had been rejected by the appellate court. *Cryer v. Cryer*, 131 Cal.Rptr.3d 424 (Cal.Ct.App. 2011), 37 FLR 1524.

b. A divorce court improperly ordered a high-income father to pay 20% of his annual net cash employment bonus as additional child support, the Connecticut Supreme Court ruled. The court explained that although the guidelines permit consideration of bonuses when calculating a family's net income, an open-ended award of 20% of the variable bonus violates the guideline principles that a declining percentage of the combined net family income should be awarded as the income level rises and that the percentage of any future bonus allocated for child support should be generally consistent with the percentages established in the schedule in order to ensure consistency, uniformity, and equality in the treatment of persons in such situations. The claims in this case, the court said, were virtually indistinguishable from those in *Maturo v. Maturo*, 995 A.2d 1 (Conn. 2010) [see below], which rejected the flat percentage rule for high-income obligors. *Misthopoulos v. Misthopoulos*, 999 A.2d 721 (Conn.2010), 36 FLR 1421.

c. A divorce court considering the support obligation of a high-income father abused its discretion when it supplemented the amount due under the upper limit of the state guidelines by ordering him to also pay 20% of his annual net cash bonus, the Connecticut Supreme Court held. Explaining that in high-earner cases the percentage of income applied to support should decline rather than increase, the court said that in determining whether to supplement the basic support obligation with bonus income, a judge should consider other financial obligations imposed on the obligor — such as the children's school tuition and insurance — as well as the parties' property division and custody schedule. *Maturo v. Maturo*, 995 A.2d 1 (Conn. 2010), 36 FLR 1293.

d. A family court abuses its discretion in making a determination of child support in a paternity action when it chooses not to consider the standard of living the child would have had if he or she lived with both parents, the Arizona Court of Appeals, Division One, has ruled. The case involved Los Angeles Angels outfielder Gary Matthews, Jr., who earned approximately $10,000,000 per year but was ordered to pay only $1,561 per month in support for his nonmarital daughter born in 2004. In reversing the trial court, the appellate court held that § 8 of the support guidelines clearly required courts to examine the standard of living the child would have enjoyed if the parents and children were living together. *East v. Matthews*, 213 P.3d 248 (Ariz.Ct.App. 2009), 35 FLR 1467, *review denied and ordered depublished*.

e. A divorcing father was properly ordered to pay $7,000 per month in temporary support for his three children, as well as the costs of their private school tuition, child care and nursery school expenses, after-school and extracurricular activities, books, supplies, camp and travel expenses, and their medical, therapy, dental and pharmacological costs, the New York Supreme Court, Appellate Division, First Department, held. Noting that a pendente lite award should "rarely" be modified, the court said that in fashioning the award, the divorce court properly considered the family's standard of living. Remarking that the father "cannot dispute that his children became accustomed to a lifestyle that is extremely expensive," it pointed out that the goal of the award is to continue the status quo pending the divorce and to maintain a sense of continuity in the children's lives. *Ayoub v. Ayoub*, 883 N.Y.S.2d 179 (N.Y.App.Div. 2009), 35 FLR 1406.

f. Carolina Hurricanes center Rod Brind'Amour does not have to pay his wife $15,000 per month in child support, as he had agreed to do when they separated, the North Carolina Court of Appeals said. Mindful of the NHL lockout that occurred after the parties' separation, the court acknowledged the temporary nature of the agreement. In addition, there was no evidence to suggest that reducing Brind'Amour's obligation to $9,147 per month (plus health care, extracurricular activity, and educational expenses) in any way deprived the children of advantages and luxuries they otherwise would have received. Determining that the reduced order ensured that the children would continue to have advantages such as private schools, the court stated that "we cannot say the trial court abused its discretion by refusing to include" expenses it found were unrelated to the children's needs or were exorbitant. *Brind'Amour v. Brind'Amour*, 674 S.E.2d 448 (N.C.Ct.App. 2009), 35 FLR 1272.

g. A trial court erred when it increased Miami Dolphin safety Yeremiah Bell's support obligation for his nonmarital child based on the "share the wealth" support model, the Kentucky Court of Appeals ruled. The appellate court pointed out that *Downing v. Downing*, 45 S.W.3d 449, 456 (Ky.Ct.App. 2001), made clear that where parental income exceeds the uppermost level of the guideline table ($15,000 per month), "any decision to set child support above the guidelines must be based primarily on the child's needs, as set out in specific findings." Observing that *Downing* thus rejected a "share the wealth" approach for high-income support cases, the court noted that the record was void of any supporting documents regarding an increase in [the child's] reasonable expenses. Adding that the "trial court chose, in direct contravention of our holding in *Downing*, to apply the 'share the wealth' model," the court held that the judge below abused his discretion in arbitrarily increasing Bell's support obligation to $5,000 per month from $1,225 per month solely based on his increased income without evidence of an increase in the child's reasonable needs. *Bell v. Cartwright*, 277 S.W.3d 631 (Ky.Ct.App. 2009), 35 FLR 1139.

h. A showing of "extraordinary need" is not required before a court may award support above the advisory amount in cases where parents' combined monthly income exceeds the guideline table, the Washington Court of Appeals decided. The court also held that an obligor's voluntary lack of residential time with his children increased their custodial mother's financial burden and should be considered in the support calculation. *In re Krieger and Walker*, 199 P.3d 450 (Wash.Ct.App. 2008), 35 FLR 1101, *reconsideration denied*.

i. New York Giants defensive end Michael Strahan's $214,745 annual child support obligation for the twin daughters born shortly before his divorce must be recalculated, the New Jersey Superior Court, Appellate Division, decided. Among other things, the court said that the judge below failed to properly analyze the children's needs, and should have imputed income to their mother, who it said left the marriage with increased employment opportunities due to her status as the former wife of a celebrity. *Strahan v. Strahan*, 953 A.2d 1219 (N.J.Super.Ct.App. Div. 2008), 34 FLR 1485.

(1) The court explained that the trial judge failed to consider whether the child support order exceeded the child's reasonable needs so as to constitute a windfall to the custodial parent. The trial court also failed to make any analysis of the reasonableness of the "needs" claimed by the mother on behalf of the twins, saying that the court clearly should have deleted some of the mother's claimed expenses. "For example, the 'children' sent their nanny and her family to Jamaica for a ten-day vacation, and gave their grandmother diamond jewelry. [The mother] claimed that the twin toddlers needed nearly $27,000 a year for clothing because she dressed them in a new outfit every time they saw their father, and one of the three-year-old girls did not like to leave the house without a purse. There was no explanation as to why the children needed $30,000 worth of landscaping per year, or what was included in $3,000 for 'audio visual' expenses per year. [The mother] listed $36,000 a year for the children's 'equipment and furnishings' without explaining what that covered."

(2) In support of its decision, the court referred to the Kansas "Three Pony Rule" ("no child, no matter how wealthy the parents, needs to be provided [with] more than three ponies," *In re Patterson*, 920 P.2d 450, (Kan.Ct.App. 1996)), saying other expenses listed by the mother should have been questioned, "but the court made no distinction between what needs were reasonable, given the young age of the children, and what simply amounted to a 'fourth pony'."

11. <u>Retroactive Support</u> -

a. Under certain circumstances, an award of final child support may be made retroactive to the date of judicial demand, the Louisiana Supreme Court held in a *per curiam* opinion. In the case before the court, a divorcing father had submitted an affidavit during a hearing on his wife's demand for interim child support, stating that his yearly income was $262,000. After he was ordered to pay $7,000 per month in interim support based on that income, a court-appointed CPA determined that the father's actual income was far higher (according to the mother's expert, the father's yearly income was over $3.5 million). Based on that newly discovered evidence, the court entered a final support order of $16,546 per month, and made it retroactive to the date of the mother's judicial demand. Upholding the trial court after examining the controlling statute, the high court explained, "[i]f an order modifying a final support judgment may be made retroactive, *a fortiorari*, the judgment itself may be made retroactive." *Vaccari v. Vaccari*, 50 So.3d 139 (La. 2010), *reh'g denied*, 37 FLR 1093.

b. A trial court erred in ordering a noncustodial father to pay child support retroactive to a date preceding the date on which the petition for dissolution was filed, the Indiana Court of Appeals decided. The appellate court observed the absence of any statutory authority to order retroactive support, in contrast to the paternity statute (IC § 31-14-11-5(1)), and it expressed disfavor with a court's intervention into a marriage that is still intact in the eyes of the law. *Boone v. Boone*, 924 N.E.2d 649 (Ind.Ct.App. 2010). In holding that dissolution courts lack authority to order support preceding the filing date, the court explained:

> In dissolution actions, the machinery of the courts engages when the dissolution petition is filed. For instance, this is the point at which the marital pot closes. *See Granzow v. Granzow*, 855 N.E.2d 680 (Ind. Ct. App. 2006). If child support is requested, pursuant to the foregoing authority, this has heretofore been the point at which support commences or can commence. Prior to this event (*i.e.*, the filing of a dissolution petition), the court has no jurisdiction to issue orders pertaining to matters involving the children of the marriage except in situations involving criminal neglect or abuse. There are no such allegations in the instant case. Until a dissolution petition is filed, the parents are free to decide between themselves financial matters involving the children, such as whether they will pay an allowance, whether they will buy cars for their children, or whether they will pay for a college education, to cite just a few examples. This autonomy ends with the filing of a dissolution petition. With the filing of the petition, the parties immediately confer considerable authority upon the court to make decisions, from that time forward, previously reserved only for the parents. In our view, that rule and the bright line it represents should remain inviolate.

12. College Expenses -

a. The fact that a divorced father's sole source of income is his monthly Social Security disability check did not warrant the vacation of an order that he comply with his agreement to contribute to his daughter's college education, the Illinois Appellate Court, Second District, held. While noting the absence of any case law on the question of whether an obligation to pay such post-majority expenses constitutes "child support" for purposes the Social Security Act, the court concluded that in light of similar bankruptcy cases, it should be so classified. *In re Truhlar*, 935 N.E.2d 1199 (Ill.App.Ct. 2010), 36 FLR 1552, *reh'g denied*, *appeal denied*.

b. A statutory provision allowing a court to order post-majority support in cases where there are "exceptional circumstances" offends equal protection concerns if used to require a parent who is subject to a support order at the time his or her child turns 18 to pay the child's college expenses, the South Carolina Supreme Court held. Interpreting the provision as not applying to parents who are not subject to an existing support order, the court thus said that its holding in *Risinger v. Risinger*, 253 S.E.2d 652, 5 FLR 2513 (S.C. 1979), that a child's desire to attend college constitutes an exceptional circumstance under the statute, was wrongly decided. *Webb v. Sowell (Webb)*, 692 S.E.2d 543 (S.C. 2010), 36 FLR 1279.

(1) The court observed that § 63-2-530(A)(17) (formerly § 20-7-420(17)) provides that a support order terminates when the child reaches age 18, marries, or becomes self-supporting, but that, "in the discretion of the court," post-majority support may be provided "where there are physical or mental disabilities of the child or other exceptional circumstances that warrant the continuation of support." "However," the court continued, "the statute grants the court no such power over a parent not subject to such an order, nor is there any common law duty on parents to pay for an adult child's post-secondary education."

(2) Pointing out that to satisfy equal protection concerns, "a legislative classification must bear a reasonable relation to the legislative purpose sought to be achieved, the members of the class must be treated alike under similar circumstances, and the classification must rest on some rational basis," the court asserted that "we view the appropriate class as those parents subject to a child support order at the time of the child's emancipation and can discern no rational basis for the varied treatment of the class as compared to those parents who are not subject to such an order." Finding that the statute, as interpreted by *Risinger*, failed the rational basis test "and thus, does not meet the constitutional requirements of Equal Protection" under the state and federal constitutions, the court reversed the ruling below.

H. Income Withholding -

1. Bank Accounts - A trial court erred in dissolving a writ of garnishment levied against the personal bank account of a self-employed delinquent obligor, the Texas Court of Appeals, Fifth District, ruled. In dissolving the writ, the trial judge had reasoned that the obligor was his own employer and that attachment of disposable earnings in his personal bank account (he deposited his income from working as a carpenter into the nonsegregated account and also paid bills associated with his carpentry business out of it) for payment of his support arrears violated Tex. Fam. Code Ann. § 157.312(g), under which a child support lien "may not be directed to an employer to attach the disposable earnings of an obligor paid by the employer." Reversing, the appellate court held that the

lien was not attaching to an employer, but instead to the financial institution possessing or controlling the obligor’s assets. To hold otherwise, the court said, would allow self-employed obligors to shield their earnings, including those maintained in bank accounts, from child-support liens and would also render virtually meaningless those sections of the family code that provide a child-support lien arises by operation of law and attaches to all nonexempt personal property of the obligor, including bank accounts. *In re C.A.T.*, 316 S.W.3d 202 (Tex.Ct.App. 2010), 36 FLR 1408.

2. <u>Unemployment Benefits</u> - A trial court erred, Florida's Fourth District Court of Appeal held, in including in its orders in ten different cases establishing paternity and/or child support obligations language that provided that withholding from unemployment benefits could not exceed the amounts ordered by the court for current support and arrears. The trial court’s limiting language was not within its power to order. *Department of Revenue v. Varela*, 67 So.3d 1205 (Fla.Dist.Ct.App. 2011), 37 FLR 1542. [For a fuller discussion of this case, *see* IV-D/Administrative Authority, this outline.]

3. <u>Proceeds from Personal Injury Settlements</u> - Money received by a child support obligor as part of a settlement in a personal injury case is exempt from execution on a judgment for his or her support arrearage, the Maryland Court of Appeals ruled. Explaining that such proceeds are clearly covered by a state law exempting money payable in the event of sickness, accident or injury, the court was not swayed by a custodial father's claim that state and federal public policy favor excepting support obligations from the exemption statute. *Rosemann v. Salsbury, Clements. Bekman, Marder & Adkins*, 987 A.2d 48 (Md. 2009), 36 FLR 1124. [For a fuller discussion, *see* Lien, this outline.]

4. <u>Social Security Disability Income</u> - An incarcerated disabled obligor's monthly Social Security Disability Insurance benefits were properly subjected to a withholding order to cover his support arrearage, the Kansas Court of Appeals ruled. *State ex rel. Secretary of Kansas Department of Social and Rehabilitation Services v. White*, 216 P.3d 727 (Kan.Ct.App. 2009), 35 FLR 1538.

    a. Saying that the issue was controlled by *Mariche v. Mariche*, 758 P.2d 745 (Kan. 1988), which held that SSDI was subject to garnishment to recover past-due child support, the court rejected the obligor's reliance on *State ex rel. Secretary of SRS v. Moses*, 186 P.3d 1216 (Kan. Ct. App. 2008), which held that Supplemental Security Income benefits are not treated as income in the calculation of child support. Stressing that “*Moses* does not address SSDI benefits,” it explained that SSDI is federal disability insurance and that the amount of assistance paid is directly affected by the recipient's previous earnings/work history. On the other hand, SSI is a welfare program, not an insurance program, and the financial assistance provided is not based on the recipient's work history but rather on their income level, it pointed out.

b. Thus holding that *Moses* does not control here, the court also rejected the obligor's reliance on 42 U.S.C. § 407. Acknowledging that prior to 1975, § 407 provided that Social Security payments of all types were exempt from garnishment, it explained that 42 U.S.C. § 659 specifically supersedes § 407 in child support cases and allows garnishment to collect support.

5. Seaman's "Maintenance and Cure" Payments - "Maintenance and cure" payments received by an injured commercial fisherman from his employer are subject to withholding for child support obligations if they constitute income under the relevant state law, the U.S. Court of Appeals for the Ninth Circuit held. Pointing out that "Congress expressly recognized that a seaman's wages are subject to attachment under a valid support order [46 U.S.C. § 11109(a)]," the court asserted that "we find no reasoned basis to distinguish between a seaman's wages and a seaman's maintenance and cure payments for purposes of satisfying a valid child support obligation." In addition, the court found that the Texas income withholding issued under its order was entitled to full faith and credit in Alaska, where the obligor worked, under the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. 1738B(h)(2). *Aguilera v. Alaska Juris F/V*, 535 F.3d 1007 (9th Cir. 2008), 34 FLR 1451.

6. Health Insurance Provider as Income Payor - An obligor's sole proprietorship is an "individual" for purposes of a state income withholding statute's definition of income, and thus a health insurance provider should have withheld, from the payments transmitted to an obligor's chiropractic practice on behalf of its insured patients, sums requested by his ex-wife in a withholding notice to cover his child support payments, the Illinois Appellate Court, First Department, decided. The court also said that the provider's claim that it did not knowingly violate the statute because it did not know that when it was paying the obligor's practice, it was paying him, was not a valid defense. *Vaughn v. Blue Cross Blue Shield of Illinois*, 935 N.E.2d 123 (Ill.App.Ct. 2010), 36 FLR 1529, *appeal denied*.

7. Continuous Nature of a Single Income Withholding Order - A garnishment notice served upon a corporation that, pursuant to a business settlement agreement, is making quarterly payments based on its sales to a man who owes past-due child and spousal support, applies to the payments he will receive in the future under that agreement, the Tennessee Court of Appeals decided. In thus rejecting the corporation's claim that new notices must be issued in order to reach the prospective payments (*i.e.*, debts owed to the man) because its sales revenue is not determinable until the end of each quarter, the court recognized that there is "no Tennessee law expressly addressing the issue." The court observed that while the state garnishment statutes do not require that a debt be due and payable prior to judgment against the garnishee, the law does require that there be some existing liability or obligation and not just a contingent liability. It stressed that here, the corporation was obligated to pay the man $1 for each unit of its product sold over a

seven-year period. The fact that these payments were not due and payable until after the end of each quarter does not make the corporation's liability a mere contingency, it asserted, explaining that the "payments were unmature debts, not contingent debts." *McKee-Livingston v. Livingston*, No. M2009-00892-COA-R3-CV (Tenn.Ct.App. 1/21/10), 36 FLR 1154 (not reported in S.W.3d).

8. Remedy for Failure to Withhold - A delinquent obligor's Mississippi employer was properly ordered to pay $369,000 to his ex-wife as a penalty for knowingly failing to timely pay child support from his wages as directed by an Illinois court's income-withholding notice, the Illinois Appellate Court, Second District, held. The court observed that the employer was clearly notified and obligated to honor the income withholding order but failed to do so. The court also rejected the employer's contention that because it was a Mississippi corporation that had no contacts with Illinois, the trial court lacked jurisdiction over it. It pointed out that 42 U.S.C. § 666(a)(9)(B) requires that each state grant full faith and credit to the child support withholding procedures of any other state, and that Mississippi law provides that an employer shall treat an income-withholding order issued in another state as if it had been issued by a Mississippi court. *In re Gulla and Kanaval*, 917 N.E.2d 392 (Ill. 2009), 35 FLR 1352, *reh'g denied* (affirming as modified, 34 FLR 1309).

9. Remedy for Wrongful Termination - A chef who was fired by a private social club after it received a court order to withhold part of his income for child support may proceed with his claim for wrongful discharge in violation of public policy, the Missouri Court of Appeals ruled. Reversing a lower court's grant of the Kansas City Club's motion to dismiss, the appeals court found that although Mohamid Hamid cannot bring a private cause of action under a Missouri law that prohibits employers from taking adverse action against employees because of an order to withhold child support, the law does not preempt or displace common-law remedies. *Hamid v. Kansas City Club*, 293 S.W.3d 123 (Mo.Ct.App. 2009), 35 FLR 1548.

I. IV-D

1. Availability of IV-D Services - A trial court erred in reversing an administrative order entered against an unmarried father that required him to pay support to his child's mother, who is not a United States citizen and lives in Russia with their American-born child, the Missouri Court of Appeals, Western District, ruled. *Lajeunesse v. State*, 350 S.W.3d 842 (Mo.Ct.App. 2011), 37 FLR 1601.

    a. Reinstating the order entered by the Department of Social Services, the court rejected the father's interpretation of Mo. Rev. Stat. 454.425, which provides that DSS's support enforcement division shall make its services "available to residents of other states." It noted that, "by negative implication," the father contended that unless a recipient resides in Missouri or another state, he or she is not eligible for support services.

b. Acknowledging that whether § 454.425 "allows or forbids persons who are not residents of the United States to benefit from child support services has never been established by a Missouri court," the court determined that the plain language of this "anti-discrimination provision" did not support the father's argument. Adding that the statutory scheme permits "DSS to afford services to all children, custodial parents and other persons entitled to receive support," it said that "this broad and unrestricted directive is not, by its terms or by implication, limited to residents (or citizens) of the United States." The court also pointed out that Missouri's state plan for child support services was enacted in response to federal funding requirements, and that the federal Office of Child Support Enforcement has declared in a policy directive (PIQ15099-01, OCSE, 1/14/99) that states must provide "services to anyone who has filed a proper application … regardless of nationality." Thus holding that DSS acted within its statutory authority by entering the support order requested by the mother, it concluded that the trial court erred in finding that the agency lacked jurisdiction.

2. <u>Administrative Authority</u> -

a. <u>Income Withholding</u> -

(1) A trial court erred, Florida's Fourth District Court of Appeal held, in including in its orders in ten different cases establishing paternity and/or child support obligations language that provided that withholding from unemployment benefits could not exceed the amounts ordered by the court for current support and arrears. *Department of Revenue v. Varela*, 67 So.3d 1205 (Fla.Dist.Ct.App. 2011), 37 FLR 1542.

(a) Reversing, the appellate court observed that under the Social Security Act, a state IV-D agency must have the power of "intercepting or seizing periodic or lump-sum payments from a State or local agency, including unemployment compensation, workers' compensation, and other benefits." 42 U.S.C. § 666(c)(1)(G). It further noted that Florida law, in accordance with the federal law, expressly permits the Florida Department of Revenue, as the state's IV-D agency, to administratively withhold unemployment benefits in specified amounts.

(b) In agreeing with the state that the trial court lacked authority to enter such an order, the court cited *Department of Revenue ex rel. Jackson v. Nesbitt*, 975 So.2d 549 (Fla. Dist.Ct.App. 2008), in which a trial court was held to lack the power to order the Department to lift restrictions on an obligor's passport that had been placed pursuant to authority statutorily delegated to it as part of the child support enforcement scheme. "Thus," the court declared, "the ten final orders are reversed and these cases are remanded so that the offending language may be stricken from the orders."

(2) A trial court erred in prohibiting the State from issuing an income withholding order other than as directed by the trial court. The appellate court observed that the IV-D agency has independent administrative authority under IC § 31-16-2.5 to issue income withholding orders, and such power may not be limited by judicial fiat. *In re Paternity of A.M.P.*, 896 N.E.2d 188 (Ind.Ct.App. 2008).

(a) The court observed that 42 U.S.C. § 666(b)(1) "requires a state plan to withhold 'so much of [a noncustodial] parent's income . . . as is necessary to comply with the [child support] order . . . .', including amounts necessary to satisfy an arrearage, and paragraph (b)(2) states that 'such withholding must occur without the need for any amendment to the support order involved or for any further action (other than those actions required under this part) by the court . . . which issued such order.' *See also* 45 C.F.R. § 303.100(a)(4) (stating substantially similar requirements)."

(b) The court went on to say that "[w]e recognize our interpretation may cause some concern, as it permits the State to forego judicial authorization before increasing the withholding amount, but the statute itself limits the withholding amount, *see* Ind. Code § 31-16-15-2.5(f)(1) to (7), and the State is required to send the obligor a notice of intent to withhold income before withholding occurs, see Ind. Code § 31-16-15-3.5(a). . ."

b. <u>Tax Refund Offset</u> - State trial courts do not have authority under the federal tax refund intercept program to limit the Florida Department of Revenue's ability to intercept or retain a delinquent child support obligor's federal income tax refund to satisfy past-due support, Florida's First District Court of Appeal held. *Florida Department of Revenue ex rel. Baker v. Baker*, 24 So.3d 1254 (Fla.Dist.Ct.App. 2009), 36 FLR 1105.

(1) Observing that the Tax Refund Intercept Program (TRIP) was established pursuant to Title IV-D of the Social Security Act and the Internal Revenue Code, the court explained that under that program, tax refunds owed to such obligors may be intercepted by the Internal Revenue Service at the state's request and applied against support arrears.

(2) Reversing the trial court's injunctive order, the court noted that in *Department of Revenue ex rel. Jackson v. Nesbitt*, 975 So.2d 549 (Fla.Dist.Ct.App. 2008), the Fourth District held that a trial court lacked authority to order the Department to lift federally mandated restrictions imposed on a father's passport due to his child support arrearage because it could not interfere with the statutory authority delegated to the Department to certify to the federal government that the father was eligible for such restrictions. Observing that the First District had followed

Nesbitt in *State v. Walton*, 12 So.3d 921 (Fla.Dist.Ct. App. 2009), it said that "these cases are applicable here because the passport restriction and tax refund programs are all part of a comprehensive child support enforcement scheme. The trial court was without authority to place restrictions on the interception or retention of appellee's IRS tax refund because this interfered with the authority delegated to the Department under TRIP," it concluded.

c. <u>Passport Restrictions</u> -

(1) Federal "passport denial laws" that authorize the government to refuse to issue a passport to any applicant who owes child support arrears exceeding $2,500 are constitutional, the U.S. District Court for the District of Nebraska ruled. The court thus dismissed a delinquent obligor's challenge to 42 U.S.C. § 652(k) and § 654(31), as well as his request that the court "suspend" his $14,000 support debt so that he could attend a "summit against violent extremism" in Ireland. *Perryman v. Health & Human Services*, No. 8:11CV175 (D. Neb. 6/28/11), 37 FLR 1421.

(a) The court explained that although the right to travel abroad is a protected liberty, it can be regulated within the bounds of due process. Indeed, the freedom to travel abroad is less important than the freedom to travel interstate, which is virtually unqualified. Given the lesser importance of the freedom to travel abroad, the government need only advance a rational, or at most an important, reason for restricting international travel, it said, citing *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996).

(b) Also noting that the Second and Ninth Circuits have previously considered and rejected constitutional challenges to the passport denial laws, the court agreed with those cases, *see Eunique v. Powell*, 302 F.3d 971 (9th Cir. 2002), and *Weinstein v. Albright*, 261 F.3d 127 (2d Cir. 2001). Ensuring that parents pay child support is an important interest, the court held, adding that the passport denial laws are substantially related to this interest because they focus the mind of the parent who wishes to travel abroad, on a more important concern — the need to support one's children first.

(2) A delinquent obligor's 42 U.S.C. § 1983 suit against Washington child support enforcement officials, arising from the denial of his passport, was dismissed by the U.S. District Court for the Western District of Washington. *Montgomery v. Washington Department of Social & Health Services*, No. 3:09-cv-05453-RBL (W.D.Wash. 5/27/10), 36 FLR 1356.

(a) The court first found that the obligor's claims were not sustainable against the defendants in their official capacities, because they are not, as a matter of law, "persons" within the meaning of §1983. It also ruled that they could not be sued in federal court because they have not waived their Eleventh Amendment immunity.

(b) In addition, it said, "even if the Court were to reach the merits, the Plaintiff cannot prevail as a matter of law." While finding it unclear whether the obligor was seeking "to sue the individual state defendants in their individual, as opposed to official, capacities," the court said that assuming this to be the case, the defendants were entitled to qualified immunity, because their conduct did not violate the obligor's clearly established constitutional rights. It explained that spousal support is included within the definition of "child support" for purposes of the Title IV-D of the Social Security Act, observing that under 42 U.S.C. § 659(j)(2) and § 664(c), " 'child support' and similar terms are consistently defined to include spousal support so long as the recipient is living with a child for whom support is also owed." The defendants, the court declared, properly included the obligor's spousal support obligation in its arrearage certification, and because such "arrearage made him ineligible for a passport under federal law, his due process rights under the Constitution were not violated by the state defendants as a matter of law."

(3) A trial court did not have the authority to lift federally mandated passport restrictions placed on former SoCon Basketball Player of the Year Elton Nesbitt where support arrearages owed to the mothers of his nonmarital children exceed $37,000. *See* 42 U.S.C. § 652; 22 C.F.R. § 51.72(a) ($2,500 threshold established by federal law as a ground for revoking, restricting or limiting a delinquent obligor's passport). *Department of Revenue v. Nesbitt*, 975 So.2d 549 (Fla.Ct.App. 2008), 34 FLR 1165.

(a) Agreeing that the trial court had no authority to order the State to lift and release the restrictions on Nesbitt's passport, the court rejected Nesbitt's reliance on a webpage from the United States Department of State, Department of Consular Affairs (see http://travel.state.gov/passport/ppi/family/family_863.html), which Nesbitt claimed buttressed his argument that if an acceptable child support arrangement is in place, a denied or suspended passport may be reinstated. The court explained that the "website language indicates that the appropriate state agency, in this case DOR, must deem the payment arrangements acceptable, and then certify that determination to the Department of Health and Human Services. Because DOR has not deemed the arrangements created by the trial court to be acceptable, this language is inapposite."

(b) Judge Gary M. Farmer dissented. Agreeing that the trial court has no authority to order a federal agency to perform a certain act, he suggested that the order be recast to require the state to decertify its prior certification to HHS, and to request that Nesbitt's passport be restricted so as allow him to travel for the limited purpose of pursuing employment in order to satisfy his support obligations.

3. IV-D Agency Represents State, Not Program Participants - A trial court erred in prohibiting the Florida Department of Revenue from providing services to a child support obligor in a support modification action, Florida's First District Court of Appeal ruled in a *per curiam* opinion. The obligee claimed that because it had represented her in attempting to collect support, a conflict of interest barred the state from seeking a modification on his behalf. In reversing the trial court's order in the mother's favor, the court explained that because the department's counsel represents the department and does not represent either parent, "there is no conflict." *Florida Department of Revenue v. Collingwood*, 43 So.3d 952 (Fla.App.2010), 36 FLR 1458.

   a. The court noted that in other jurisdictions where the issue had been raised, "the courts have concluded that there is no conflict of interest, because the attorney represents the agency rather than the parent and thus can take a position that benefits one parent in one action involving child support and a position that benefits the other parent in a later action."

   b. Going on to determine that the judge might have concluded that the department's action was inequitable on the ground that it should spend its time and resources seeking to recover for the mother what the father owes her, rather than seeking to arrange that he pay her a lesser amount, the court said that, "on the contrary," state law requires the department to review a support obligation every three years to determine if the amount continues to be consistent with the support guidelines, and it may seek an adjustment of the order if appropriate under the guidelines. "The statute does not provide that the department may bring such an action only if the paying parent is current on his or her payments, or only if the paying parent is seeking an upward adjustment," it pointed out.

J. Jurisdiction

1. Personal Jurisdiction to Issue Child Support Order -

   a. In a two-prong ruling, the Missouri Court of Appeals, Western District, held that because a state divorce court lacked personal jurisdiction over a Missouri resident's wife in Texas, it erred in ordering her to pay child support and certain marital debts. Noting that the wife's only connection with Missouri was occasionally passing through it on her way to Indiana and Illinois, and to enforce a Texas custody order, the court opined that these contacts were insufficient to establish "minimum contacts" under a Due Process analysis. *Ketteman v. Ketteman*, 347 S.W.3d 647 (Mo.Ct.App. 2011), 37 FLR 1511.

b. A trial court that had jurisdiction to determine custody in a divorce proceeding also had jurisdiction to make a child support award after a foreign court dissolved the parties' marriage, the Virginia Court of Appeals ruled. Explaining that the lower court had equity jurisdiction because the case originated as a suit for divorce (and included custody and support issues), the appellate court said although it ended up not exercising jurisdiction over the divorce (and thus calling into question its statutory authority to order support) after deferring to the Hungarian court in which the mother filed for divorce prior to the father's filing in Virginia, it retained jurisdiction to award support as an "equitable concomitant" to its home state jurisdiction over custody. The court observed that the Hungarian court refrained from issuing a support order in the case. *Prizzia v. Prizzia*, 707 S.E.2d 461 (Va.Ct.App. 2011), 37 FLR 1293.

2. Jurisdiction to Order Support Prior to Separation - A trial court erred in holding that it lacked subject-matter jurisdiction to consider a woman's petition for custody and child support, which she filed in contemplation of — but prior to — separating from her husband, the North Carolina Court of Appeals ruled. Finding no requirement that parents be physically separated or have filed for divorce before seeking a custody and/or child support order, the court also held, however, that the judge properly dismissed the woman's claim for post-separation spousal support. The court held that child support claims relate to the custody and care of a child rather than the economic needs of spouses. On that basis, a child support order may be brought without the need for physical separation while a spousal support order may not. *Baumann-Chacon v. Baumann*, 710 S.E.2d 431 (N.C.Ct.App. 2011), 37 FLR 1343.

3. Tribal Jurisdiction -

a. Alaska tribal courts have subject-matter jurisdiction to enter support orders concerning tribal member children, a state trial court decided. Addressing an issue left open by the state supreme court when it held that tribes have custody jurisdiction, the First Judicial District Superior Court reasoned that because the determination of child support is an integral part of a custody ruling, tribal courts have jurisdiction to decide both issues. The case arose from a federally recognized Indian tribe's petition for injunctive and declaratory relief after the state had failed to honor child support orders issued by its tribal court. The tribe requested the superior court to find that its tribal court has subject-matter jurisdiction over child support cases concerning tribal member children and to require the state to give recognition to support orders in such cases. Both the tribe and the state (via its Department of Revenue and Child Support Services Division) moved for summary judgment. *Central Council of Tlingit and Haida Indian Tribes of Alaska v. State*, No. 1JU-10-376 CI (Alaska Super.Ct. 10/25/11), 38 FLR 1015.

K. License Suspension

1. Constitutionality - A California Family Code provision requiring the state Department of Motor Vehicles to suspend a child support obligor's driver's license for nonpayment of support does not infringe the fundamental right to travel and thus does not trigger strict scrutiny review, the U.S. District Court for the Northern District of California held. Explaining that the license suspension prevents only driving, not travel, the court pointed out that a parent with a suspended license "can still travel as a passenger in a car, bus, or plane." Hence the governing statute, Cal. Fam. Code § 17520, need only be rationally related to a legitimate government interest. The court opined that the state has a "vital" interest in collecting support and that the statute furthers this interest. In so holding, the court cited *Tolces v. Trask*, 90 Cal. Rptr. 2d 294 (Cal.Ct.App. 1999), which similarly rejected a constitutional attack on an analogous statute. *Farley v. Santa Clara County Department of Child Support Services*, No. 5:11-cv-01994-LHK (N.D. Cal. 10/11/11), 37 FLR 1601.

2. Interstate Compacts - Missouri's driver's license authority should not have refused to issue a license to a man whose California driving privileges had been suspended for failure to pay child support, the Missouri Court of Appeals, Southern District, held. *Schroeder v. Missouri Director of Revenue*, 295 S.W.3d 890 (Mo.Ct.App. 2009), 36 FLR 1033.

    a. In considering the man's license application, the Missouri Director of Revenue had discovered the California suspension recorded in the National Driver Register. Because Missouri regulations provide that an application must be denied if the NDR shows an applicant's license status as suspended, the Director denied the man's application. The trial court reversed that decision and ordered that the man be issued a license.

    b. Affirming, the court rejected the Director's reliance on the Driver's License Compact, to which both Missouri and California are parties. Explaining that the "object of the Compact is to promote a driver's compliance with laws, ordinances, rules and regulations relating to the operation of motor vehicles," it pointed out that the conduct at issue here was the failure to pay child support in another state. "In our view, such conduct is completely unrelated to a person's compliance, as a driver, with laws, ordinances, rules or regulations relating to the operation of a motor vehicle. The failure to pay child support provides no evidence whatsoever that the person will engage in conduct, while operating a motor vehicle, which is likely to endanger the safety of persons or property," it asserted. Thus, because the man's California driver's license was not suspended because of a driving violation, the Compact did not authorize the denial of his application based on the out-of-state suspension, the court concluded.

3. Ex Post Facto Application of License Suspension Law - A delinquent obligor's driver's license is not an exempt "property interest" under the state Family Law License Suspensions Act, and application of such Act to child support orders entered before its effective date does not violate the constitutional prohibition against *ex post facto* laws, the Idaho Supreme Court declared. In finding no *ex post facto* violation, the court pointed out that the FLLSA, Idaho Code § 7-1401 *et seq*., does not invoke criminal jurisprudence, because lawmakers specifically provided for license suspension to be a civil remedy for the nonpayment of child support, not a criminal penalty. *Wheeler v. Idaho Department of Health and Welfare*, 207 P.3d 988 (Idaho 2009), 35 FLR 1261.

L. Lien

1. Assets Held as Tenants by the Entireties -

   a. A trial court erred when it granted a woman's motion to attach an asset jointly owned by her ex-husband and his new spouse to enforce her alimony judgment, the Michigan Court of Appeals held. In reversing the order for attachment of a home the delinquent obligor owned with his wife as tenants by the entireties, the court pointed out that Mich. Comp. Law 600.2807(1) provides that: "A judgment lien does not attach to an interest in real property owned as tenants by the entireties unless the underlying judgment is entered against both husband and wife." The court noted that in holding that a child support lien may not be imposed against real property held by an obligor and his or her spouse by the entireties, the court in *Walters v. Leech*, 761 N.W.2d 143, 34 FLR 1429 (Mich.Ct.App. 2008), explained that such property is liable only for the spouses' joint — not individual — debts. *Licavoli v. Licavoli*, — N.W.2d — (Mich.Ct.App., No. 295901, 4/26/11), 37 FLR 1313.

   b. A child support lien may not be imposed against real property held by a delinquent obligor and his or her spouse by the entireties, the Michigan Court of Appeals held. In confronting this issue of first impression, the court noted that at the heart of a tenancy by the entireties is the right of survivorship — meaning that when one party dies, the other automatically inherits the whole property. Going on to observe that as a general proposition under the common law, property held as a tenancy by the entireties is not liable for the individual debts of either party, it said that state lawmakers have codified this proposition with respect to judgment liens. Turning to the statute providing for child support liens against an obligor's real or personal property, the court acknowledged that lawmakers did not include entireties property in the list of exceptions against which liens may not arise. It decided, however, that the child support lien statute must be read in *pari materia* with the judgment lien statute. "In reading the statutes together as one law, we conclude that tenancy by the entireties property may not be liable for a child support order entered only against the husband or the wife," the court wrote. *Walters (Peoples) v. Leech*, 761 N.W.2d 143 (Mich.Ct.App. 2008), 34 FLR 1429.

2. <u>Interest in Life Insurance Policy</u> - A decedent's ex-wife has an equitable interest in a life insurance policy that he obtained after their divorce, even though it designates his girlfriend as beneficiary, because their settlement agreement required him to maintain a $100,000 policy for the duration of his child support obligations and to name her as beneficiary, the Oregon Supreme Court ruled. Addressing the availability of two equitable concepts — unjust enrichment and constructive trust — in this scenario, the court determined that the evidence did not warrant the lower courts' summary judgment rulings. Also saying that the fact the insurance policy did not exist at the time of the agreement "is of little significance," the court remanded for a determination of whether the man's girlfriend knew of his obligation under the agreement, and whether she had given valuable consideration for being named his beneficiary. *Tupper v. Roan*, 243 P.3d 50 (Or. 2010), 37 FLR 1027.

3. <u>Personal Injury Settlement</u> - Money received by a child support obligor as part of a settlement in a personal injury case is exempt from execution on a judgment for his or her support arrearage, the Maryland Court of Appeals ruled. Explaining that such proceeds are clearly covered by a state law exempting money payable in the event of sickness, accident or injury, the court was not swayed by a custodial father's claim that state and federal public policy favor excepting support obligations from the exemption statute. *Rosemann v. Salsbury, Clements. Bekman, Marder & Adkins*, 987 A.2d 48 (Md. 2009), 36 FLR 1124.

    a. The father argued that the funds should not be exempt because the underlying judgments on which he sought to execute represent child support arrears. In rejecting this argument, the court said that "although the many statutes enacted by the Legislature indeed demonstrate a strong public policy in favor of enforcing child support awards, that does not authorize this Court, when the clear application of the presently considered statute supplies a result that is adverse to that policy, to fashion from whole judicial cloth an exception to the statute. We are not a super-legislature."

    b. In addition, the court rejected the argument that such proceeds constituted income entitled to priority withholding under 42 U.S.C. § 666(b)(7), saying that "federal law does not require that support collection have a higher priority than [her] right to exempt her personal injury settlement from execution."

4. Worker's Compensation Benefits - State law does not exempt the proceeds of a workers' compensation settlement from being applied to a lien issued against the injured worker for past-due child support, the Illinois Appellate Court, Fourth District, held. In rejecting the argument that workers' compensation benefits are exempt from judicial process for support arrears, the court recognized that § 21 of the Illinois Workers' Compensation Act provides that "no payment, claim, award … under this Act shall be assignable or subject to any lien, attachment or garnishment …." Pointing out, however, that "notwithstanding section 21 … section 15(d) of the [Income Withholding for Support Act] creates an exception to that exemption for the collection of child support, including arrearages." The court further explained that because dependents are intended beneficiaries of workers' compensation awards, "the public policy furthered by the exemption in section 21 of the Act is to protect workers and their dependents from the claims of outside creditors, not to shield workers from their own internal family obligations." *Illinois Department of Healthcare and Family Services ex rel. Black v. Bartholomew*, 920 N.E.2d 542 (Ill.App.Ct. 2009), 36 FLR 1080, *reh'g denied*, *appeal denied*.

5. Energy Employees Occupational Illness Compensation Program - Money that a delinquent obligor received under the federal Energy Employees Occupational Illness Compensation Program after his father's work-related death due to radiation poisoning was properly seized for payment of support owed for one of his three children, the Oklahoma Court of Civil Appeals, Division III, has ruled. *State ex rel. Dept. of Human Services v. Palmer*, 212 P.3d 491 (Okla.Ct.App. 2009), 35 FLR 1321.

    a. After the state support agency seized the $12,960 pursuant to the Debt Collection Improvement Act of 1996, 31 C.F.R. § 285.1, to apply it to the obligor's arrearage, the lower court ordered that the funds be returned to him. (The agency had rejected his request to distribute the funds equally among his three children as "an inheritance of sorts from his father.")

    b. Considering the agency's appeal, the court examined § 285.1(i), which lists the specific federal payments that are not subject to offset under the Act. Noting that the obligor recognized that payments under the energy employee program act (42 U.S.C. § 7384 et seq.) are not included in the list of offset exceptions, it weighed his claim that they are essentially the same as those provided under the Part B Black Lung Benefits Act exception contained in § 285.1(i)(1)(iii). The court said, however, that "[d]espite the similar language [in the two acts' declarations of purpose] and the similar circumstances under which the two acts were created, we cannot find any authority for expanding the exceptions of § 285.1(i) in the manner [the obligor] proposes. We can only assume Congress articulated the exceptions it intended to provide and cannot expand on the specific exceptions contained in the statute, absent some compelling authority permitting such an expansion," the court explained.

6. Constructive Trust Over an Estate - A man's claim against his deceased intestate ex-wife's estate for the imposition of a constructive trust over its assets, in order to secure payment based on her violation of the requirement in their stipulated divorce judgment to obtain a $250,000 life insurance policy for the benefit of their child, is valid, the Oregon Court of Appeals ruled. Holding that the man had a property interest in the estate, the court rejected its equitable defense that he had failed to protect his rights by ensuring that the decedent's policy remained in effect. Citing the statutory policy of ensuring that divorced parents provide financial support for their children, the court declared that “it would be contrary to that policy to refuse to enforce the terms of the dissolution judgment on the ground that respondent failed to vigilantly protect [the child's] right to support from” the decedent. *In re Estate of McIntire (McIntire v. Lang)*, 254 P.3d 745 (Or.Ct.App. 2011), 37 FLR 1243.

M. Litigation

1. Effect of Pending Appeal on Trial Court Jurisdiction - A family court has continuing and exclusive jurisdiction in a domestic relations case to enter, modify, or reconsider a child support order, notwithstanding that another order in the same case has been appealed to a higher court, the West Virginia Supreme Court of Appeals held. Finding no statutory evidence that a court is automatically divested of jurisdiction while an appeal is pending, the high court noted that a parent's or child's circumstances may change during the appeal period, such that a new support order “is compelled by events.” *Allen v. Allen*, 701 S.E.2d 106 (W.Va. 2009), 36 FLR 1041.

   a. Noting that “in an appeal to this Court, a ‘stay’ does not automatically halt all proceedings in the court below, but is limited only to halting the operation of the final order subject to appeal,” the court said that “reading these various statutes and rules together in the context of orders pertaining to child support in domestic relations actions, we find a system that is *sui generis* and unlike a typical civil appeal. The system clearly contemplates that a final family court child support order may be challenged directly via an appeal or a motion to reconsider.” It added that a “party may seek a stay of all or part of most family court orders, but not orders pertaining to contemporaneous child support payments. And while that order is being reconsidered or reviewed on appeal, the system clearly contemplates a parent seeking an entirely new, prospective child support order based upon a significant change in the parties' circumstances.”

   b. Saying that it could conceive of circumstances where a family court has entered a child support or other domestic order and, while the order is on appeal, a parent's or child's circumstances “may have drastically changed such that a new, prospective child support order is compelled by events,” the court cited as examples a change in a parent's employment or income, or the child attaining the age of majority, developing a serious medical condition, or deciding to live with the obligor. “In such circumstances, we cannot accept the appellant's argument that the Legislature intended for the filing of an appeal to automatically deny the family court any authority to address the best interests of the child,” it declared.

2. Servicemembers Civil Relief Act -

   a. A trial court erred when, in considering a soldier's request for modification of the provision of her Texas divorce decree that granted her ex-husband primary physical custody of their child, it denied her request for a stay of the proceeding pursuant to the federal Servicemembers Civil Relief Act when she was unable to return from her duty post in Germany for the rescheduled final hearing, the Texas Court of Appeals, Third District, held. *In re H.S.J.*, No. 03-10-00007-CV (Tex.Ct.App. 11/16/10), 37 FLR 1045.

      (1) The mother’s request for a stay was accompanied by a copy of her deployment orders and a letter from her commanding officer, as required by the Act (see 50 U.S.C. § 522(b)). However, the trial court did not rule on her request, and instead ordered her to return the child to the father pending trial. (She was able to appear at the trial, following which the court denied her modification petition.)

      (2) Reversing and remanding, the appellate court pointed out that a stay is mandatory under the SCRA if the servicemember complies with § 552(b). Recognizing that the mother's request did not state a specific date on which she would be able to appear, as required by § 552(b)(2)(A), but simply requested a stay until she could return from her deployment, it refused to “strictly construe” the requirements of section 522(b)(2) in contravention of the Supreme Court's imperative to construe the Act liberally to give effect to its underlying purposes. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943). “Rather, relying on the plain language of the Act and construing it liberally, and in light of the mother's appearance on the scheduled trial date, we conclude that her request that the proceedings be stayed until she was able to return from deployment was sufficient to meet the requirements of section 522(b)(2),” the court declared.

   b. A trial court did not err in denying a custodial mother's motion under the federal Servicemembers Civil Relief Act to stay the child support modification action she had filed before receiving orders to deploy overseas with her U.S. Army Reserve unit, the Nebraska Supreme Court ruled. After the mother filed her request to modify support, the father filed his petition for custody and support while the mother was on deployment. In response, the mother filed for a stay of proceedings until she returned from deployment. The court held a hearing on the mother’s motion for a stay, which the trial court denied. Agreeing that the mother had complied with the SCRA by requesting a stay, she failed to show that her military service materially affected her ability to appear. In fact, she did appear, the court pointed out. *Carmicheal v. Rollins*, 783 N.W.2d 763 (Neb. 2010), 36 FLR 1410.

3. Jurisdiction of Small Claims Court - A money judgment issued by a small claims court awarding a child support obligor $2,500 for what he alleged was owed to him by his child's mother after she caused his wages to be garnished must be reversed for lack of jurisdiction, the Oklahoma Court of Civil Appeals has ruled. The appellate court observed that a small claims court has jurisdiction to hear matters involving the recovery of up to $6,000, but only when the claim is based on contract or tort. "While the parties may or may not have made an agreement, the child support obligation here is a matter involving marriage and divorce. Jurisdiction over such matters lies with the district court, not the small claims court," it said, noting that the father "still has a remedy, through the ongoing administrative proceedings and in district court, which retains jurisdiction over his divorce case." *Parsons v. Klingamon*, 267 P.3d 154 (Okla.Civ.App. 2011, 38 FLR 1149.

N. Modification

1. Basis for Modifying Support -

   a. Change in Circumstances from Prior Adjudication - An appeals court erred in concluding that a trial court could not consider a father's request to modify his support obligation because the circumstances he alleged as justification for the downward modification existed at the time of an earlier modification hearing, the Nebraska Supreme Court ruled. That prior hearing, the high court observed, involved only the father's request for custody and visitation rights, and did not raise the issue of child support. He was therefore not barred from seeking to modify his support now, even though his income had changed before the prior proceeding. *Incontro v. Jacobs*, 761 N.W.2d 551 (Neb. 2009), 35 FLR 1212.

   b. Birth of Additional Children / New Support Orders - A man who "has six different children from four different women in three different countries" is not entitled to a downward modification of his court-ordered support for his child in New York where he failed to show that the decreases in his income as a result of support orders for three of the other children were not brought about by his own voluntary actions or inactions, the New York Family Court, Clinton County, decided. Holding that whether an obligor should be entitled to a reduction when a material change of circumstances has been established is a different question from whether new orders for other children constitute such a change, the court decided the best way to approach the issue was through application of general standards regarding changes in income. Thus, it explained, a new order that reduces the obligor's income does not necessarily constitute a material change of circumstances. Finding that here, the obligor voluntarily engaged in acts leading to the birth of his son in 2006, the court held that to the extent his income was reduced by a subsequent support order, it was due to his own conduct and thus insufficient to establishment entitlement to a downward modification of the New York order. Likewise, since he failed to show that his reduction of income due to the Swedish divorce order was not the result of his voluntary actions, he was not entitled to a modification based on that order, it ruled. *Demetrius D. v. Lori T.*, 915 N.Y.S.2d 489 (N.Y. Fam. Ct. 2011), 37 FLR 1165.

c. Change in Custody - A trial court did not err in finding that no change in circumstances had occurred requiring modification of a couple's support agreement, even though after it was entered the mother obtained physical custody of the children, the New York Supreme Court, Appellate Division, Third Department, held. *Baker v. Baker*, 914 N.Y.S.2d 395 (N.Y.A.D. 2011), 37 FLR 1130.

(1) The parents' separation agreement stated that they would have joint legal custody of their two children, with the father having "primary placement." It also provided that notwithstanding the child support statute, neither party would be obligated to pay support, as the parties incomes were roughly the same. The agreement was incorporated but not merged into their divorce judgment. Shortly thereafter, the mother filed a modification petition seeking support from the father based an unanticipated change in circumstances in that both children were residing with her instead of with him.

(2) Affirming the denial of her petition, the court noted that a party seeking modification of a support provision derived from an agreement incorporated but not merged into a divorce decree has the burden of showing that the agreement was unfair or inequitable when entered, or that an unanticipated and unreasonable change of circumstances had occurred resulting in the children's needs not being met. Finding that the mother did not claim that the separation agreement was unfair or inequitable, it pointed out that it specifically stated that neither party would be responsible for paying support, based in part upon their equivalent incomes. "Significantly, the mother does not allege … that the children's needs were not being met," it observed, also noting that the change in the children's residence occurred prior to entry of the divorce judgment. Thus the court said "we find no reason to disturb the decision dismissing the modification petition."

d. Change in Income - A father who was forced to leave the United States and return to his native Argentina when his H-1B visa expired was properly granted a downward modification of his support obligation in light of his reduced earning power in that country, the New Jersey Superior Court, Appellate Division, held. The court observed that the father had no choice but to resettle in Argentina when his visa expired, and that "his drastically reduced earnings as an attorney appear to be commensurate with that country's economic circumstances and the prevailing exchange rate." Thus, the court held, "there is ample support for the judge's determination of an involuntary and substantial change of circumstances." The court also pointed out that there was no evidence that the father was underemployed, was concealing income, or that his lifestyle was disparate compared to his reported income. *Gonzalez-Posse v. Ricciardulli*, 982 A.2d 42 (N.J.Super.Ct.App. 2009), 36 FLR 1033.

e. Remarriage - A custodial mother's remarriage did not constitute a substantial change in circumstances warranting a decrease in her ex-husband's child support payments, the Ohio Court of Appeals, Sixth District, ruled. Recognizing that "Ohio courts have held that remarriage of the nonresidential parent *may* justify a modification of child support, as the benefits received by the obligor from the remarriage are a factor in determining whether to deviate from the child support schedule," the court found, however, that "Ohio courts have not held that the remarriage of the residential parent *must* justify a modification of child support. The trial court may consider the benefits the residential parent receives through remarriage in determining whether a change of circumstances has occurred." *Lazenby v. Bunkers*, No. WD-09-046 (Oh.Ct.App. 6/30/10), 36 FLR 1446.

f. Change in Guidelines - An obligor's motion to modify his child support payments should not have been denied on the ground that he was not entitled to rely on a recent amendment to the child support guidelines to show the requisite substantial change in circumstances, the Minnesota Court of Appeals held. Applying the revised guidelines in light of its "income-shares" amendment resulted in a change in the obligor's order by 20%. The trial court denied the obligor's motion to modify, however, saying that a change in the guidelines "cannot in and of itself create a substantial change of circumstances." Reversing, the appellate court held that the trial court's ruling completely ignores the plain meaning of the statute allowing modification upon a new computation that differs by at least 20% from the existing order. *Rose v. Rose*, 765 N.W.2d 142 (Minn.Ct.App. 2009), 35 FLR 1321.

g. Incarceration -

(1) A trial court erred in concluding that a father incarcerated for felony nonsupport may not successfully claim that the reduction in his income resulting from his imprisonment is a change in circumstances warranting a downward modification of the underlying support obligation, the Indiana Court of Appeals held. Taking note of the general rule set out by the state supreme court that an obligor's incarceration constitutes a change in circumstances, the appellate court refused

to carve out an exception to that rule in cases where the obligor's incarceration is the direct result of his or her failure to pay support as ordered. *Douglas v. State*, 954 N.E.2d 1090 (Ind.Ct.App. 2011), 37 FLR 1595.

(a) Finding that the state essentially argued that the father was not entitled to modification because incarceration for the crime of nonsupport is a form of voluntary unemployment, where the choice to commit a crime and the decision to avoid support are one and the same, the court acknowledged that if presented with the issue, many other states would arrive at this result. *See, e.g., Nab v. Nab*, 757 P.2d 1231 (Idaho Ct.App. 1988); *In re Blickenstaff*, 859 P.2d 646 (Wash. Ct. App. 1993).

(b) But even assuming the State is correct in its argument that incarceration for nonsupport amounts to a conscious decision to reduce income, the court said, *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007), held that as a general rule an obligor's incarceration may serve as a changed circumstance for modification purposes. *"Lambert* held that the concept of voluntary unemployment, so as to justify the imputation of potential income, requires both the ability to earn more income, and the conscious choice on the part of a parent to reduce income," the court explained. Pointing out that most incarcerated obligors are unable to pay support at pre-incarceration levels, the court observed that this is equally true regardless of the crime for which the obligor is imprisoned. "We therefore conclude that incarceration for nonsupport does not amount to voluntary unemployment for the purposes of the [Support] Guidelines," it said, noting that the "child support system is not meant to serve the same punitive purposes as our criminal statutes."

(2) Under certain circumstances, an obligor's incarceration is to be considered an involuntary reduction in income for purposes of modifying his or her child support obligation, the Nebraska Court of Appeals ruled. Recognizing that for the past two decades Nebraska courts have followed case law in declining to reduce support based on an incarcerated obligor's decreased income, the court rested its decision on a recent amendment to the law outlining circumstances (excluding nonsupport) under which the state may seek modification of a jailed obligor's support obligation. It also said that this change in the law constitutes a material change of circumstances for modification purposes. *Hopkins (Stauffer) v. Stauffer*, 775 N.W.2d 462 (Neb.Ct.App. 2009), 36 FLR 1028.

(3) A noncustodial parent's incarceration, and his consequential reduction in income, constitutes a substantial and continuing change of circumstances warranting a modification of support. In so holding, the court extended to modification petitions the reasoning of *Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007),

which held that pre-incarceration income should not be imputed to an imprisoned parent when setting an *initial* order of child support. The court acknowledged that criminal activity is a voluntary choice that carries with it the potential for incarceration and consequent unemployment. But the choice to commit a crime is so far removed from the decision to avoid child support obligations, the court said, that it is inappropriate to consider them as identical. Moreover, the creation of a substantial arrearage during extended periods of incarceration will make it less likely that obligated parents will ever pay their support. *Clark v. Clark*, 902 N.E.2d 813 (Ind. 2009).

2. <u>Application of Guidelines When Modifying Support</u> -

   a. State guidelines are inapplicable in a child support modification case involving parents whose combined monthly income exceeds the guidelines' upper limits, and where their particular circumstances — having nearly equal incomes, parenting time, and child-related expenses — are of an "extraordinary nature," the Kentucky Court of Appeals decided. The court explained that cases such as this are not governed by the prong of the modification statute requiring a 15% increase or decease in the amount of support owed under the guidelines, but rather by the prong that simply requires a showing of a substantial and continuing material change in circumstances. *Dudgeon v. Dudgeon*, 318 S.W.3d 106 (Ky.Ct.App. 2010), 36 FLR 1453.

   b. A trial court erred when, in ordering a downward modification of a father's child support obligation, it relied on his private agreement with his ex-wife, and failed to determine whether their agreed-upon reduction complied with the support guidelines, the Tennessee Court of Appeals ruled. The court explained that "although the trial court did not err in finding that there was an agreement between the parties to modify the ordered support, that finding is not dispositive. Parties may not enter into private agreements to avoid complying with child support obligations set forth in statute and in the Tennessee Child Support Guidelines." Saying that while a trial court may consider a private agreement to modify child support, it must in addition apply the modification standard provided in the support guidelines, the court remanded for a determination of support in accordance with those guidelines. *Luster v. Walton*, No. W2008-02167-COA-R3-CV (Tenn.Ct.App. 11/19/2009), 36 FLR 1057.

   c. A custodial mother's opposition to an order that reduced her ex-husband's support payments when the oldest of their three children turned 18, together with her request that support for the two remaining children be recalculated under the guidelines, amounted to seeking an increase in support that entitled her ex-husband to the benefit of the guidelines' Multiple-Family Application because he has children from his current marriage, the Kansas Court of Appeals decided. In rejecting the mother's claim that the MFA did not apply because she had not actually asked for more support (although she did acknowledge that use of the child support guidelines would result in a higher pro rata amount of support per child), the court found that her action in moving to set aside the order that reduced the obligor's payments by one-third amounted to her seeking an increase in support that would then allow the obligor the advantage of the MFA. *In re Winsky*, 208 P.3d 355 (Kan.Ct.App. 2009), 35 FLR 1369.

3. Agreements to Preclude or Restrict Modifications -

   a. A trial court did not err in dismissing a divorced father's motion for downward modification of his above-guideline child support obligation on the ground that the parties' stipulated judgment of dissolution prevented them from seeking a modification, the Oregon Court of Appeals ruled. In rejecting the father's argument that the provision in the judgment barring the parties from seeking modification was unenforceable as contrary to law and public policy, the court pointed to statutes expressing a strong policy in favor of enforcing voluntary dissolution agreements concerning spousal support and property division. Acknowledging that any provision that seeks to deprive a court of its authority to modify support "would indeed be unenforceable," it stressed that the agreement here does not divest the trial court of jurisdiction or authority to modify child support. "Rather," the court explained, "through their agreement, the parties have waived the right to seek modification and, absent circumstances that make enforcement of the agreement contrary to public policy, such waiver provisions are enforceable." *In re Matar*, — P.3d — (Or.Ct.App., No. A143331, 10/26/11), 38 FLR 1010.

   b. A trial court erred in reading a divorced couple's decree-incorporated settlement agreement as forbidding changes to the father's child support payments below a "floor amount," where the agreement lacked a "clear and express waiver" of his statutory right to modification, the Georgia Supreme Court ruled. Reversing the trial court's interpretation that the order could be modified so long as the payments do not fall below $2,290 per moth, the high court ruled that because the agreement did not include the "well-worn waiver language" of *Varn v. Varn*, 248 S.E.2d 776 (Ga. 1978) ["The parties hereby waive their statutory right to future modifications, up or down, of the alimony payments provided for herein, based upon a change in the income or financial status of either party."], not only could the order be modified, but the support amount could fall below $2,290 if warranted by the guidelines. *Dean v. Dean*, 715 S.E.2d 72 (Ga. 2011), 37 FLR 1552.

   c. A trial court erred in denying an obligor's motion for downward modification of the child support portion of the agreed family support order entered in his divorce, the Wisconsin Court of Appeals, District II, ruled. Because the parties had stipulated to nonmodifiable family support in their decree-incorporated marital settlement agreement, the trial court held that the obligor was estopped from seeking a modification due to changed circumstances. Reversing, the court observed that it has repeatedly held that it is against public policy to in any way limit a child support payor's ability to seek a support modification in the best interest of the children upon a substantial change in circumstances. Because the parties' nonmodifiable support provision purported to limit the obligor's ability to request a modification based upon a substantial change of circumstances, "it is against public policy and cannot provide a basis for estoppel," it said. *Huhn v. Stuckmann (Huhn)*, 772 N.W.2d 744 (Wis.Ct.App. 2009), 35 FLR 1440.

d. A trial court was entitled to reduce a father's child support obligation notwithstanding his decree-incorporated agreement that child support would be "absolutely non-modifiable downward," California's Sixth Appellate District Court of Appeal held. Citing the general rule that child support can always be modified by a court regardless of an agreement to the contrary, the court declined to find an exception applicable where the issue is reduction — rather than increasing — of a support obligation. In so holding, the court pointed out that Fam. Code § 4053 provides that in calculating child support, a court should adhere to the principle that "both parents are mutually responsible for the support of their children," and that "each parent should pay for the support of the children according to his or her ability." Foreclosing the possibility that the order can ever be downwardly modified requires ignoring those legislative principles and requires the parent to pay an amount he or she cannot afford and that does not represent that parent's fair share of support. The court also agreed with the judge below that monthly payments received by the father from his mother were gifts, which it decided were includable as income for purposes of calculating support. *In re Alter*, 89 Cal.Rptr.3d 849 (Cal.Ct. App. 2009), 35 FLR 1195.

4. <u>Automatic Modifications</u> -

a. A provision in a couple's 1982 decree-incorporated marital settlement agreement, under which the father's unallocated support obligation would be decreased by 25% as each of their four children became emancipated, does not control in determining his arrearage, where a later modification order made no mention of the reduction provision, the Illinois Appellate Court, First District, held. Because the modified order did not expressly mention the automatic reduction clause but made other important changes to the order, the reduction clause was no longer effective. The court opined that "we cannot find that the trial court's silence on the reduction provision means that the provision remained in effect. Indeed, given the law concerning reduction of support payments in the case of an unallocated lump-sum support obligation, we find that the opposite result follows and the provision was no longer applicable." *In re Rice*, — N.E.2d — (Ill.App.Ct., No. 1-10-3753, 12/9/11), 38 FLR 1093.

b. A provision in a divorced couple's decree-incorporated separation agreement that provides for automatic annual increases in the father's child support obligation based on his salary is unenforceable, the North Carolina Court of Appeals held. In so ruling, the court explained that the provision fails to consider the needs of the parties' children or other factors contained in the support statute. Noting that an increase in income alone is not enough to prove a change of circumstances to support modification of a child support obligation (*see Thomas v. Thomas*, 518 S.E.2d 513, 616, (N.C. Ct. App. 1999)), the court said that here, by computing the increases in the father's salary and applying them to his support payments without a finding of a substantial change in circumstances, the trial court impermissibly modified the support order. *Wilson v. Wilson*, 714 S.E.2d 793 (N.C.Ct.App. 2011), 37 FLR 1506.

5. <u>Requirement of Bond Before Modifying Support</u> - A statute mandating dismissal of a noncustodial parent's custody/visitation modification action when he or she owes more than $10,000 in past due child support and does not file a bond is constitutional, the Missouri Supreme Court held. The court thus rejected a delinquent obligor's claim that the statute runs afoul of his due process and equal protection rights, as well as his right of access to the courts. The father argued that the requirement to post a bond interferes with his fundamental right to the care, control and custody of his child, and thus strict scrutiny was the applicable standard of judicial review. Rejecting this argument, the court employed a balancing test to weigh the father's interests against the state's interest in securing support for a child. *Weigand (Edwards) v. Edwards*, 296 S.W.3d 453 (Mo. 2009), 35 FLR 1459.

   a. Observing that "the statutory provision protects the interests of a child … by preventing an unfair advantage in favor of the parent who has failed to pay and against the custodial parent who has depleted financial resources because of paying a disproportionate share of the child's care," the court added that the statute promotes the state's interest in the administration of justice by denying relief to parties who do not comply with court orders. On balance, the father's due process rights were not violated by the bond requirement.

   b. With regard to the father's equal protection argument, the court determined that although the father did not expressly articulate the classification created by the statute, it was nevertheless clear "that the classification at issue is between parents with child support arrearages in excess of $10,000 and parents who do not have such arrearages, and the issue is whether that classification is constitutionally repugnant." Finding that the classification did not involve suspect groups or was otherwise repugnant, the court held that the father's equal protection rights were not violated by the statutory scheme.

6. Retroactive Modification -

    a. A trial court considering a father's petition to modify his support payments after the oldest of his three children reached majority erred when it ordered that the payments be retroactively reduced to a date prior to the filing of his petition, the South Carolina Court of Appeals held. The appellate court pointed out that S.C. § 63-17-310 provides that a modification order is not "effective as to any installment accruing prior to filing and service" of the modification action. Acknowledging that *Harris v. Harris*, 415 S.E.2d 391 (S.C. 1992), held that retroactive increases of support may be awarded in special circumstances, it pointed out that *Harris* was driven by a child's best interests, whereas the retroactive reduction here was based on the father's. *South Carolina Department of Social Services v. Polite*, 705 S.E.2d 78 (S.C.Ct.App. 2011), 37 FLR 1141. [This case is also noted in Emancipation, this outline.]

    b. A divorce court did not err when, in upwardly modifying a father's child support obligation, it made the order retroactive to the date of the mother's petition even though she had not requested such an award in her pleadings. Noting that the award was based on the trial court's finding that the husband had misstated his income on his financial declaration in an earlier hearing by failing to account for his military retirement and by stating his net rather than gross income, it explained that the appellate court had previously awarded retroactive support despite a party's failure to specifically mention it in the pleadings. Holding that the trial court "was within its power" when it adjusted the support obligation and ensuing arrears, the court affirmed its retroactive increase. *Mosley v. Mosley*, 390 S.C. 524 (S.C.Ct.App. 2010), 37 FLR 1032.

    c. When divorced parents decide that their child will live with the parent previously ordered to pay child support, state law permits a trial court to terminate that parent's support obligation as of date the child relocates, but it may require the other parent to pay support only as of such date as the former obligor files a petition to modify the support order, the Colorado Court of Appeals, Division IV, ruled. Thus creating a split within the appellate court, it acknowledged that in 2003 another division interpreted the Uniform Dissolution of Marriage Act modification provision at issue here to mean that both the burden of support and the identity of the obligor shift when custody is modified from one parent to the other so as to prevent a lapse in support, but it asserted that this interpretation does not apply the statute as written. *In re White and Martin*, 240 P.3d 534 (Colo.Ct.App. 2010), 36 FLR 1376.

    d. A trial court did not err when it retroactively decreased a delinquent obligor's support payments to reflect the emancipation of his oldest child, the Mississippi Court of Appeals ruled. The court pointed out that state law clearly provides that support terminates upon a child's emancipation (unless otherwise provided in the support order). It noted, however, that support obligations vest in the child as they accrue and, once vested, cannot be modified or forgiven by the courts. "These rules create a paradox: a vested child support obligation cannot be forgiven, but a child support obligation terminates upon emancipation and cannot be modified by a party." In equity, the court decided that the trial court here properly reduced the obligor's arrearage to reflect the oldest child's emancipation two years before the modification motion was filed, as to hold otherwise would "unduly restrict the [court's] ability to make an equitable ruling." *Andres v. Andres*, 22 So.3d 314 (Miss.Ct.App. 2009), 35 FLR 1562. [This case is also noted in Emancipation, this outline.]

e. A modification of an incarcerated parent's child support obligation may not take effect earlier than the date on which the petition to modify is filed, the Indiana Supreme Court declared in a companion decision to the court's ruling the same day that incarceration may constitute a change in circumstances justifying modification of an existing child support obligation (*see Clark v. Clark*, 35 FLR 1224). *In re Becker*, 902 N.E.2d 818 (Ind. 2009), 35 FLR 1223.

(1) The obligor in the case before the court was imprisoned in 1996 for several felony offenses, and his earliest possible release date was August 25, 2009. In 2007, the Indiana Supreme Court held in *Lambert v. Lambert*, 861 N.E.2d 1176, 33 FLR 1200 (Ind. 2007), that reduced income due to incarceration was an involuntary reduction in income that may warrant a child support modification. Later that year, the obligor again sought to modify his order, retroactive to the date of his incarceration in 1996. The trial court awarded the modification, but only back to the date of the *Lambert* decision. The obligor appealed.

(2) Reversing the trial court, the high court noted that the general rule in Indiana is that the modification of a support obligation may only relate back to the date the petition to modify was filed (subject to two exceptions not applicable here). "We now hold," the court said, "that *Lambert* and *Clark* do not apply retroactively to modify child support orders already final, but only relate to petitions to modify child support granted after *Lambert* was decided. A trial court only has the discretion to make a modification of child support due to incarceration effective as of a date no earlier than the date of the petition to modify. Consequently, the date [the obligor] instituted his request for relief represents the earliest date the abatement could become effective." It accordingly vacated the trial court's reduction of the obligor's support payments to the extent that it was ordered to be retroactively effective as of the date of the *Lambert* decision.

O. Paternity

1. Standing -

   a. A motion filed by a mother and her husband to quash a man's petition to establish his paternity of twins born to her during their marriage was properly granted, the California Court of Appeal, Fourth District, ruled. The children were born during the mother's marriage to her husband. Therefore, the putative father lacked standing to establish his paternity over them, the court said. Rejecting the man's argument that the mother and her husband have thwarted his relationship with the twins, the court observed that "our society's interest is in preserving and protecting the developing parent-child relationships," citing *In re Nicholas H*., 120 Cal. Rptr. 2d 146 (Cal. 2002). It added that the man's proposed "prenatal relationship theory" views the relationship from the alleged father's perspective, not the child's, and thus does not advance the policy considerations recognizing the value to the child of an established parent-child relationship. *Neil S. v. Mary L.*, 131 Cal.Rptr.3d 51 (Cal.Ct.App. 2011), 37 FLR 1578, *review denied*.

   b. A mother's petition for a writ of prohibition barring a trial court from proceeding with a man's action to establish his paternity of the child born during her marriage was properly denied, a divided Kentucky Supreme Court held. Looking to the state's version of the Uniform Act on Paternity, the court said the lower court had subject-matter jurisdiction and that the man had standing, because the subject child was "born out of wedlock," since her biological parents were not married to each other. Three justices dissented, saying that "in essence, we hold strongly that only partners to marriage have the standing to question the legitimacy of children born during their marriage." *J.A.S. v. Bushelman*, S.W.3d 850 (Ky. 2011), 37 FLR 1363.

   c. A trial court erred in granting a paternity petition filed by a child's biological father against the man the now-deceased mother was married to at the time the child was born, Florida's First District Court of Appeal ruled. In reversing the paternity judgment, which awarded legal rights and physical custody to the biological father, the court said that "this was incorrect. Because the child was born to an intact marriage between legal father and mother, the biological father was precluded from bringing the paternity suit and the trial court should not have considered it." Pointing out that "Florida law is very specific regarding who may bring paternity suits," the court explained that the "statutes governing paternity contain language indicating biological fathers may not challenge the paternity of children born to intact marriages." *Slowinski v. Sweeney*, 64 So.3d 128 (Fla.Dist.Ct. App. 2011), 37 FLR 1350, *reh'g denied*.

d. A mother's appeal from an order, which adjudicated her divorcing husband as the legal father of the child born to her during their marriage and rejected a joint custody petition filed by the child's biological father, should not have been dismissed for lack of standing, the Minnesota Supreme Court decided. Stressing that only the mother's standing to appeal the paternity adjudication was at issue, the court recognized that such standing is only conferred on an "aggrieved party." However, the mother has a direct financial interest in the child support. Therefore, the court said, it logically follows that she has standing on the question of paternity. *In re D.T.R. (Richards v. Reiter)*, 796 N.W.2d 509 (Minn. 2011), 37 FLR 1327.

e. A child who was conceived after the married mother separated from her husband, and who was born after their divorce while they were cohabiting, was "born out of wedlock," the Maryland Court of Special Appeals decided. Accordingly, the ex-husband, who had held himself out to be the child's father, had no grounds to frustrate the putative father's paternity action. Such a petition was properly brought by a putative father under the paternity statutes to establish paternity of a child born out of wedlock. *Corbett v. Mulligan*, 16 A.3d 233 (Md.Ct.Spec.App. 2011), 37 FLR 1261, *cert granted* by *Mulligan v. Corbett*, 23 A.3d 895 (Md. 2011).

f. A trial court did not err in rejecting a man's attempt to claim a presumption of paternity as to his wife's children based on the alleged invalidity of her Sudanese marriage to their biological father, who had not delivered 15 cows to her family in completion of his dowry payment, the Washington Court of Appeals ruled. The court opined that although the Sudanese wedding may not have been legal under the laws of Sudan, it was recognized as a valid cultural marriage. Accordingly, the children were presumed to be the children of the woman's Sudanese husband, and the trial court therefore did not err in rejecting the man's claim of parentage to the woman's children. *In re Akon and Awan*, 248 P.3d 94 (Wash.Ct.App. 2011), 37 FLR 1189.

g. A New York order establishing a married mother's former paramour as the father of her child is not entitled to full faith and credit, and the paramour lacks standing to bring an action to establish paternity in Michigan, that state's Court of Appeals decided. Pointing out that under Michigan law, the mother's husband is presumed to be the child's legal father, the court explained that a third party may not rebut this presumption unless there exists a legal determination in an action between the spouses declaring that the child is not of their marriage. Because no such determination had been made here, the paramour lacked standing to seek a paternity order, it explained, adding that the New York order could not meet this requirement because the court there specifically found it lacked jurisdiction over the husband. *Pecoraro v. Rostagno-Wallat*, 805 N.W.2d 226 (Mich.Ct.App. 2011), 37 FLR 1138.

h. A trial court erred in dismissing a man's paternity action on the ground that he lacked standing because another man had already signed an acknowledgment of paternity as to the nonmarital child and the state social services agency had entered an order finding the other man to be the child's father and obligating him to pay child support, the Missouri Court of Appeals, Western District, ruled. *Wilson v. Cramer*, 317 S.W.3d 206 (Mo.Ct.App. 2010), 36 FLR 1494.

   (1) Determining that the child has no "presumed father" under state law because his mother has neither married nor attempted to marry, and a valid blood test has never been performed, the court explained that standing is thus controlled by Mo. Rev. Stat. § 210.826.2, which provides that an action to determine the existence of the father and child relationship may be brought by "a man alleging himself to be the father." Therefore, it said, because the plaintiff alleges that he is the child's father, he has standing to bring a paternity action.

   (2) Going on to hold that the other man's acknowledgment of paternity (which was co-signed by the mother when the subject child was two days old) does not bar the paternity action even though § 210.823 provides that a signed acknowledgment "shall be considered a legal finding of paternity," the court pointed out that "by its terms, section 210.823 does not touch upon a third party's standing to bring a paternity action under section 210.826, and thus it does not deprive [the plaintiff] of the standing conferred by that section." It added that the agency order likewise does not bar the plaintiff's action "because the elements of issue preclusion are not met," in that he was not a party to the administrative proceeding and the order was not a judgment on the merits as to paternity.

i. A trial court should not have ordered genetic testing in a man's paternity action where he had no standing as a presumed father other than the voluntary declaration of paternity he had executed with the married mother, who rescinded it after reconciling with her husband and decided to raise the infant as a child of their marriage, the California Court of Appeal, Fourth District, ruled. Because the mother rescinded the declaration within the allotted time frame, the child was thus conclusively presumed to be the husband's child, obviating the putative father's standing to file a paternity action under California law. *H.S. v. Riverside County (Cal.) Superior Court*, 108 Cal.Rptr.3d 723 (Cal.Ct.App. 2010), 36 FLR 1286.

j. A trial court erred by dismissing for lack of standing a biological father's petition to establish his paternity of a child conceived during the mother's brief marriage to another man, Florida's Second District Court of Appeal ruled. Reversing the trial court's dismissal of the man's paternity action on grounds that only the mother or husband could rebut the husband's presumption of parentage, the appellate court asserted that "to deny him an opportunity to succeed in this endeavor will certainly create a manifest injustice to both him and his child." Moreover, the man had standing under Florida decisional law. *L.J. v. A.S.*, 25 So.3d 1284 (Fla.Dist.Ct.App. 2010), 36 FLR 1166.

k. A trial court erred in holding that the state child support division lacked standing to challenge paternity in a case where the subject child has a presumed father, the Washington Court of Appeals, Division One, decided. Considering the Department of Child Services' request to vacate the summary judgment order on the ground that the trial court erred in concluding that it lacked standing, the appellate court observed that the governing statutes established the right of the DCS to file paternity actions. It also observed that the mother's husband was only a presumed father, not a legal father. Accordingly, the trial court erred in granting summary judgment to father in the state's action to establish paternity. *In re M.K.M.R. (State v. David R.)*, 199 P.3d 1038 (Wash.Ct.App. 2009), 35 FLR 1142.

l. A man may maintain a parenting petition even though he is neither the stepparent, biological parent, nor grandparent of the subject child, the New Hampshire Supreme Court ruled. The court held that governing statutes do not define parent. This absence did not suggest that a parent must be the biological father or mother of the child, however. The court also observed that the man had maintained a close relationship with the child and paid child support after he and the mother separated in 2006. Accordingly, the mother was not allowed to argue his lack of biological connection in his ensuing parentage action. *In re J.B.*, A.2d 1186 (N.H. 2008), 34 FLR 1467.

2. <u>Long-Arm Jurisdiction</u> -

a. A man's alleged impregnation of a woman in New Jersey in 1986, together with his other contacts with the state around that time, was sufficient to support the state's jurisdiction over him in her later suit to establish paternity and child support, the New Jersey Superior Court, Appellate Division, held. *C.L. v. W.S.*, 968 A.2d 211 (N.J.Super.Ct.App.Div. 2009), 35 FLR 1280.

(1) The appellate court observed that the state's parentage act provides: "A person who has sexual intercourse in this State thereby submits to the jurisdiction of the courts of this State as to an action brought under this act with respect to a child who may have been conceived by that act of intercourse." N.J.S.A. 9:17-46(b). In addition, the Uniform Interstate Family Support Act includes a similar long-arm provision: "In a proceeding to establish . . . a support order or to determine parentage, a tribunal of this State may exercise personal jurisdiction over a nonresident individual . . . if: . . . . the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse . . . ." N.J.S.A. 2A:4-30.68(f).

(2) Moreover, defendant was aware during the period of his engagement to plaintiff that she was a New Jersey resident, and defendant himself spent a substantial amount of time in New Jersey. These contacts with New Jersey establish that the man purposefully availed himself of the privilege of engaging in sexual activities within the state, and that he should have reasonably anticipated being haled into court there to respond to a claim for a declaration of paternity and support if such activities resulted in the conception of a child. Thus, New Jersey's exercise of jurisdiction accorded with the federal Due Process Clause of the 14th Amendment.

b. A man who agreed to travel to Arkansas to undergo a paternity test there to determine the parentage of a child born during the mother's marriage thereby established sufficient contacts with the state for it to exercise jurisdiction over him in her subsequent paternity and child support action, the Arkansas Supreme Court ruled. The court rejected the man's argument that because he had no other contacts with the state, the trial court lacked personal jurisdiction, saying that "a person submitting to a paternity test should foresee the possibility that a paternity suit and support action might be brought, depending on the results of the test." *Payne v. France*, 282 S.W.3d 760 (Ark. 2008), 34 FLR 1255.

3. <u>Competing Presumptions or Adjudications</u> -

a. <u>Consideration of Competing Interests / Best Interest Standard</u> -

(1) A trial court's dismissal of a state-initiated action against a mother's husband and her paramour to determine the paternity of (and support obligation for) the child born during her marriage should not have been dismissed on the ground that the husband is the child's legal father, Florida's Fourth District Court of Appeal ruled. The appellate court found that the state's position "is that it may file a paternity action against both the legal father and the biological father, and that issues of the best interests of the child and the presumption of legitimacy should be dealt with during the proceedings. We agree," it declared. Determining that the "trial court seemed to believe that the legal father needed to disestablish his paternity in a separate action before [the state] could proceed against the putative father," the court observed that "this does not appear to be the case." *Department of Revenue ex rel. Garcia v. Iglesias*, — So.3d — (Fla.Dist.Ct.App., No. 4D09-4790, 1/18/12), 38 FLR 1150.

(2) A juvenile dependency court erred in entering a judgment of paternity in favor of the subject child's biological father without considering her mother's husband's competing interests as her presumed father, the California Court of Appeal, Fourth District, held. Where a child has both a presumed and a biological father,

the court explained, the Uniform Parentage Act, Cal. Fam. Code § 7600 *et seq*., requires the court to "hold an evidentiary hearing at which it reconciles the competing paternity interests to determine which of those interests are founded on the weightier considerations of policy and logic." *In re P.A. (San Diego County Health and Human Services Agency v. Roger S.)*, 130 Cal.Rptr.3d 556 (Cal.Ct.App. 2011), 37 FLR 1543, *reh'g denied*.

(3) A trial court improperly denied a man's motion for genetic testing to establish his parentage of two children born to a then-married woman whose husband was adjudicated as the children's father in their subsequent divorce, the Washington Court of Appeals, Division One, ruled. Noting that the court had cited the best interests of the children in denying the motion, the court pointed out that § 26.26.405 of Washington's Uniform Parentage Act mandates such testing where, as in this case, there is a properly supported motion of a party to a parentage proceeding (subject to limited exceptions not applicable here). *In re K.P.R. (Kjolhaug v. Pawlak)*, 247 P.3d 491 (Wash.Ct.App. 2011), 37 FLR 1201.

(4) A court-approved separation agreement providing that a divorcing man was not the father of the child born to his wife during their marriage did not bar the child's post-majority parentage and support action against him, the Kansas Court of Appeals ruled. Stressing that the case was governed by the state Parentage Act and not by the divorce statutes, the court rejected the man's argument that his divorce decree rebutted the paternity presumption that arose under the Act by virtue of his marriage to the mother at the time of the child's birth (*see* Kan. Stat. Ann. 38-1114). The court explained that since the child was not a party to her parent's divorce, *res judicata* does not bar her paternity action. Moreover, such an action is expressly permitted by the state Parentage Act. *Janzen v. Janzen*, 228 P.3d 425 (Kan.Ct.App. 2010), 36 FLR 1274.

(5) A paternity court should have held a hearing before ordering the subject child's mother's husband to submit to genetic testing in connection with another man's claim to have fathered the child born during their marriage. Such hearing is necessary, the court said, to determine if testing was in the child's best interests, the Washington Court of Appeals, Division II, ruled. Noting that the husband is the child's presumptive father, the court observed that in a proceeding to adjudicate parentage, the controlling statute permits a court to deny genetic testing if it determines that (1) the conduct of the mother or the presumed father estops them from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed father. In cases such as the one before the court, where the man has openly held himself out to be the child's father, the judge below should have held an evidentiary hearing before ordering the husband to undergo DNA testing. *In re S.E.C.*, 225 P.3d 327 (Wash.Ct.App. 2010), 36 FLR 1142.

(6) A trial court erred when in granting a child support obligor's belated, post-divorce petition for DNA testing to challenge his paternity of a child born during his marriage, it failed to first consider the best interests of that child, the Maryland Court of Appeals held. The judge should not have terminated the man's support obligation without making such an analysis, the court explained. In so holding, the court observed that the man could have raised the issue in his divorce proceedings but failed to do so. In addition, because the child was born to his ex-wife during their marriage, the child was presumptively his. Given these weighty considerations, the trial court should not have ordered DNA testing without first showing that the possibility of disestablishing the man’s parentage was in the child’s best interests. The case was remanded back to the trial court for a best interest determination. *Kamp v. Department of Human Services ex rel. Duckworth*, 980 A.2d 448 (Md. 2009), 35 FLR 1531.

(7) The sole factual issue in a legitimation proceeding is whether the petitioner is the biological father of the subject child, the North Carolina Court of Appeals held. The court thus rejected the claim of a man, who had believed that a child born to his wife during his marriage was his offspring, that the child's best interest should have been considered before granting the legitimation petition filed by the biological father. *In re Papathanassiou*, 671 S.E.2d 572 (N.C.Ct.App. 2009), 35 FLR 1149, *review denied*.

b. <u>Joinder of Necessary Parties</u> -

(1) A trial court in a county's action to establish a divorced mother's paramour as the father of the child born during her marriage erred in refusing to join her ex-husband as a party, the Minnesota Court of Appeals ruled. The court pointed out that the Minnesota Parentage Act provides that “each man presumed to be the father shall be made parties” to a paternity action. The husband is a presumptive father under the statute because the child was born during his marriage to the mother, it said, adding that the fact that the paramour had acknowledged parentage of the child did not mean that there was no need to join the husband as a party. *Reily (Darnell) v. Blackwell*, — N.W.2d — (Minn.Ct.App., No. A11-336, 8/22/11), 37 FLR 1519.

(2) An order conclusively finding that a married mother's paramour is the father of the child born to her during her marriage must be vacated for failure to join her now former husband as a party, in light of his status as the child's legal father, the Tennessee Court of Appeals ruled. *Danelz v. Gayden*, No. W2010-02308-COA-R3-JV (Tenn.Ct.App. 6/29/11), 37 FLR 1446.

c. Three Presumed Parents - A trial court in a dependency case correctly determined that the subject child had three presumed parents — the biological mother, the woman the mother was married to at the time of the child's birth, and the unwed biological father — but must go one step further and resolve the conflicting presumptions of parentage to identify the child's two legal parents, the California Court of Appeal, Second District, held. Pointing out that the state supreme court has clearly rejected the notion of dual paternity or maternity, when recognition of such would result in three parents, the appellate court instructed the lower court to apply the Uniform Parentage Act's provision on resolving competing presumptions. In so holding, the court admitted that "in the abstract, it is not difficult to opine a child might be well served by judicial recognition and preservation of a relationship with three legal parents." However, the court said, "this is not that case. Here we have a child who was detained as an infant and who has never found safety or stability with any person claiming parental status." *In re M.C. (Los Angeles Department of Children and Family Services v. Irene V.*, 123 Cal.Rptr.3d 856 (Cal.Ct.App. 2011), 37 FLR 1319.

d. Right of Husband to Intervene in Paternity Action -

(1) A trial court abused its discretion when it denied a divorcing husband's motion to intervene in a paternity action brought by his wife's paramour concerning the child born during their marriage, the Georgia Court of Appeals ruled. Reversing the legitimation order in the paramour's favor, the court pointed out that the requirements for intervention are three-fold: interest, impairment resulting from an unfavorable disposition, and inadequate representation. The husband clearly had an interest in the legitimation proceeding because — pursuant to the presumption of legitimacy — he was the child's legal father by virtue of the child's birth during his marriage to the mother, the court explained, adding that his interest would be impaired by a decision unfavorable to him in the paternity action, and that his interest as the legal father was not adequately represented in that action because the mother had consented to the legitimation. Thus, it concluded, the husband had a right to intervene in the legitimation proceeding. *Baker v. Lankford*, 306 Ga.App. 327 (Ga.Ct.App. 2010), 36 FLR 1582.

(2) A man who recently married the mother of the child born to her during their earlier relationship over a decade ago is precluded from establishing his paternity of the child, because her ex-husband — whom she married after the child's birth, and who was named the child's father in an order of legitimation they both obtained — is the child's presumed father, the Alabama Court of Civil Appeals held. In an opinion substituted for a previous one it had issued earlier in the year, the court found that under both the former and recently enacted state versions of the Uniform Parentage Act, the man has no right to intervene in the divorce

action between the mother and her ex-husband in order to assert his parentage of the child, so long as the ex-husband persists in his presumed status as the child's father. *Baker v. Kennedy*, 51 So.3d 339 (Ala.Civ.App. 2010), 36 FLR 1353.

(3) The biological father of a married woman's child should not have been permitted to intervene in her divorce from her husband, who had agreed to raise the child as his own, the Utah Supreme Court ruled. Applying the common-law analysis it set out in *In re J.W.F.* (*Schoolcraft*), 799 P.2d 710 (Utah 1990), the court said that the trial court erred in granting the intervention so as to allow the biological father to challenge the presumption of paternity created by the child's conception and birth during the mother's marriage. The court observed that such a holding serves several public policy objectives: (1) preserving the stability of the marriage; (2) protecting children from disruptive and unnecessary attacks upon their paternity; and (3) preserving the parent-child relationship created by the marriage. Allowing a third party to intervene by filing a paternity action undermines these objectives, the court said. *Pearson v. Pearson*, 182 P.3d 353 (Utah 2008), 34 FLR 1234.

e. Effect of Paternity Affidavits on Presumption -

(1) A voluntary acknowledgment of paternity that a man signed with a woman shortly after the birth of her nonmarital child does not preclude an order requiring that she and the child submit to court-ordered genetic testing in another man's action to establish himself as the child's biological father, the Illinois Appellate Court, First District, held. *In re Paternity of Unknown Minor (Sandoval v. Botello)*, 951 N.E.2d 1220 (Ill.App.Ct. 2011), 37 FLR 1458.

(a) In rejecting the mother's claim that the paternity acknowledgment "conclusively" established the first man's parental relationship with the child, the court acknowledged that § 5(a) of the Illinois Parentage Act provides that the presumption of a father-child relationship arising from a voluntary acknowledgment "is conclusive" and that *People ex rel. Department of Public Aid v. Smith*, 818 N.E.2d 1204, 1213, 30 FLR 1543 (Ill. 2004), stated that a conclusive presumption "cannot be overcome by additional evidence or argument."

(b) It pointed out, however, that the mother's "overbroad" reading of the term "conclusive" in § 5(a) as meaning that the presumption is unassailable by any party or in any legal proceeding "negates the legislature's plain statement in section 7(a) of the Act that 'an action to determine the existence of the father and child relationship, whether or not such a relationship is already presumed under Section 5 of this Act, may be brought by a man alleging himself to be the father of the child'." Thus, it said, the term "conclusive" as used in § 5 "must be applicable only to the signator or signators [of a voluntary acknowledgment of paternity form] in order to preclude them from subsequently disputing their parent-child relationship with the child."

(2) A trial court erred when it granted an unwed mother's request for genetic testing in a man's action to establish his paternity of her child, because it failed to give proper legal effect to a notarized acknowledgment of paternity they had executed after the child's birth, the Nebraska Supreme Court held. Pointing out that the mother had never challenged the 2006 acknowledgment, the court explained that it established the man as the child's legal father. Therefore, it said, even though the genetic tests disproved his biological paternity, the only issues the trial court should have considered were his requests for custody and child support. *Cesar C. v. Alicia L.*, 800 N.W.2d 249 (Neb. 2011), 37 FLR 1454.

(3) The rebuttable presumption of paternity that attached to a man under the Uniform Parentage Act when he took his girlfriend's newborn child into his home and held him out as his own son is defeated by the voluntary paternity declaration executed by the boy's biological father and the mother after she and the child left the man's home, the California Court of Appeal, Fourth District, held. Explaining that the declaration is accorded the force of a judgment under state law, the court pointed out that the man never availed himself of the statutory options for challenging the voluntary declaration. *Kevin Q. v. Lauren W.*, 95 Cal.Rptr.3d 477 (Cal.Ct.App. 2009), 35 FLR 1388.

(4) A Wisconsin court properly adjudicated a divorcing husband as the father of a child born to his wife before their marriage, even though five years earlier another court had found that he was not the father and had dismissed a state-initiated child support action, the Wisconsin Court of Appeals, District IV, ruled. The parties had signed a Michigan Affidavit of Parentage following the child's birth in 2000, even though they both knew the husband was not the biological father. In a subsequent child support action brought by the state, DNA testing results excluded him as the child's biological father. Although the support action was dismissed, the affidavit was not set aside, and therefore the man remained the child's legal father. *Daniel T.W. v. Joni K.W.*, 762 N.W.2d 444 (Wis.Ct.App. 2008), 35 FLR 1045.

(5) A voluntary acknowledgment of paternity that a newly married mother executed with her husband, even though they both knew he was not her child's father, defeats a parentage action she brought with the girl's biological father in connection with a post-divorce custody dispute with the husband, the Tennessee Court of Appeals ruled. Holding that the action — filed after the limitations

period for challenging a paternity acknowledgment had run — was properly dismissed for lack of standing, the court said that the unrevoked acknowledgment was conclusive as to the husband's parentage and his status as the child's legal father. *In re A.N.F.*, No. W2007-02122- COA-R3-PT (Tenn.Ct.App. 9/24/08) (not reported in S.W.3d), 34 FLR 1546.

4. Res Judicata, Estoppel and Laches -

   a. Res Judicata -

      (1) A trial court erred in denying a man's petition to disestablish his paternity — based on DNA testing — as to the now teenage child who was born to his ex-wife prior to their marriage and placed in his custody upon their divorce, in which he acknowledged paternity, Florida's Second District Court of Appeal held. Reversing the judge below, the court asserted that "although there was evidence to support the finding that the former husband should have suspected that he was not the child's biological father, there was no evidence to support a finding that he did in fact know that he was not the child's father at the time he signed the child's birth certificate" — which the court acknowledged was "arguably the original establishment of paternity." *P.G. v. E.W.*, 75 So.3d 777 (Fla.Dist.Ct.App. 2011), 38 FLR 1082.

      (2) A trial court considering a noncustodial father's petition to modify the custody provisions of his divorce decree so as to award him custody of the two children born during his marriage did not err in denying the mother's request for DNA testing to determine the paternity of the older child, the Arkansas Court of Appeals, Division III, ruled. In denying the mother's DNA request the court pointed out that the facts giving rise to the claim of her ex-husband's non-paternity were known to her at the time of her dissolution, yet she took no action to disestablish his parentage. Holding that *res judicata* applies not only to claims that were litigated in the former action but also to claims that could have been litigated, the mother was now barred from claiming that her ex-husband was not the child's father. Moreover, the public policy interest in the financial welfare of the child and the preservation of the established parent-child relationship cut against the mother's request. *Putt v. Suttles*, 2011 Ark. App. 688, — S.W.3d — (Ark.Ct.App., No. CA11-330, 11/9/11), 38 FLR 1033.

      (3) A trial court properly found that *res judicata* barred a man's challenge to the paternity of the child his ex-wife conceived before — but gave birth to during — their marriage, where he knew at the time of their 2003 divorce that the then eight-year-old child might not be his, the Arkansas Supreme Court ruled. The court explained that the claim preclusion aspect of *res judicata* applied here

because the man's 2008 action to disavow his paternity — filed after the mother had moved to hold him in contempt for not paying the child support ordered in their divorce — involved some of the same events as the parties' divorce case. The court observed that the man had failed to appeal the denial of his request for DNA testing in his divorce. *Hardy v. Hardy*, 2011 Ark. 82, — S.W.3d — (Ark., No. 10-698, 2/24/11), 37 FLR 1202.

(4) The doctrine of *res judicata* may act as a bar to the denial of parentage even where genetic testing has shown that the subject child's alleged father is not the biological father, if the issue of parentage has already been adjudicated in a previous proceeding and there is an identity of parties, the Ohio Court of Appeals, Seventh District, held. The child in the case before the court was born during the mother's marriage, and she was granted custody in her 1999 divorce action. Her husband later sought reallocation of parental rights and was awarded custody in 2003. In 2009, the child began telling people that he was not her biological father; a fact later confirmed by genetic testing. In the husband's subsequent action to determine parentage, the magistrate concluded that, despite the test results, he was the child's father, noting that "finality requires this." Affirming, the court said that *res judicata* can be invoked to give conclusive effect to a determination of parentage contained in a dissolution decree and, as such, acts as bar to a subsequent paternity action brought under R.C. Chapter 3111. *In re K.R.*, No. 2010-Ohio-6582 (10 JE 9) (Oh.Ct.App. 12/30/10), 37 FLR 1117.

(5) A divorce decree in which a husband admitted that the parties had "one minor child of the marriage" — even though the child was born three years before the marriage, when he and the mother were living together — established that the child was his daughter, and he was thus precluded from pursuing a second action to disprove his paternity, the Arizona Court of Appeals, Division One, decided. *Pettit v. Pettit*, 189 P.3d 1102 (Ariz.Ct.App. 2008), 34 FLR 1359.

b. <u>Estoppel</u> -

(1) A trial court erred in holding that equitable estoppel and public policy barred a man's tort action against his ex-wife's paramour for reimbursement of the money he had spent during his marriage supporting a child he later discovered had been fathered by the paramour, the Connecticut Supreme Court ruled. Finding that the paramour had failed to prove that the child would suffer financial detriment if the case went forward (the plaintiff had not been ordered to pay child support in his divorce action as he and his former wife stipulated that he was not the child's father), the court stressed that it was not shown that the reimbursement would hamper the paramour's financial ability to care for the child. Accordingly, neither estoppel nor public policy barred the man's claim for reimbursement. *Fischer v. Zollino*, — A.3d —, 2012 WL 264609 (Conn. No. 18654, 2/7/12).

(2) A family court erred in holding that it lacked subject-matter jurisdiction over a man's petition to determine his paternity of and custody rights as to a child born to a married mother because the child had not been born "out-of-wedlock" as required by the state's Uniform Act on Paternity, the Kentucky Court of Appeals ruled. Reversing the trial court, the appellate court observed that a child born to a married woman who was not wed to the child's father was an "out of wedlock" child for purposes of finding jurisdiction under the UPA. In this case, the court said, the mother's judicial admissions that the man was her child's biological father served to rebut the presumption of her husband's paternity, and she "is estopped from now arguing that [the child] was born during lawful wedlock and that she intended to raise the child with her husband." Also pointing out that neither the mother nor her husband challenged the genetic test results, the court held that the trial court had jurisdiction to establish paternity in the biological father and determine custody. *S.B. v. M.C.*, 352 S.W.3d 345 (Ky.Ct.App. 2011), 37 FLR 1578.

(3) A divorce court erred in holding that a husband, who after marrying his wife executed a declaration of paternity as to her then three-year-old daughter while knowing that he was not the girl's father, was equitably estopped from denying his paternity of the now six-year-old child, the Kentucky Court of Appeals decided. Acknowledging that the doctrine of paternity by estoppel was recognized in *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky.Ct.App. 2005), the court said that the facts of this case were "clearly distinguishable" from those in that case. First, unlike *S.R.D.*, the child here was not born during the parties' marriage, so there existed no statutory presumption of paternity. Second, it was undisputed that the child knew that her mother's husband was not her biological father, it said, adding that "this is a most critical distinguishing factor. Under estoppel doctrine, the true facts as to paternity must be unknown to the child. Such ignorance is necessary in order to for the child's reliance to be reasonable." *J.R.A. v. G.D.A.*, 314 S.W.3d 764 (Ky.Ct.App. 2010), 36 FLR 1382.

(4) A 12-year-old girl's biological father may assert an equitable estoppel defense in a paternity and child support action brought against him by her unmarried mother where there is another "father-figure" already present in the child's life, the New York Court of Appeals held. The court focused on the father's argument that it is not in the child's best interest to have her current child-father relationship with the other man interrupted. The father "appropriately raised an issue as to whether it is in [the child's] best interest to have someone besides [the other man] declared her father this late in her childhood. As a result, we conclude it is proper for him to assert a claim of estoppel to, among other things, protect the status of that parent-child relationship," the court said. In rejecting the argument that a person who has already been determined to be a child's biological father cannot raise

such a defense, it asserted that whether the defense "is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of child." Here, it said, it was properly invoked where the mother has acquiesced in the development of a close relationship between the child and another father figure, and it would be detrimental to the child's interest to disrupt that relationship. *Juanita A. v. Kenneth Mark N.*, 930 N.E.2d 214 (N.Y. 2010), 36 FLR 1310.

(5) A trial court overseeing a paternity action commenced under the Uniform Interstate Family Support Act by a Georgia resident to establish her teenage child's putative father's paternity and to obtain support erred in finding that she had failed to meet her *prima facie* burden of showing that he was equitably estopped from challenging paternity and in granting his request for genetic marker testing, the New York Supreme Court, Appellate Division, Second Department, held in a *per curiam* opinion. Reversing the judge below, the court held that the mother produced evidence that the putative father had held himself out as the 15-year-old child's biological father and had developed a parent-child relationship with the child for several years, and that the child had developed relationships with members of his family. This was sufficient, the appellate court held, to raise a *prima facie* case of estoppel. Noting that a child's best interests are paramount in estoppel cases, the court remanded the case to allow the father to show why allowing genetic testing would be in the child's best interests. *Smythe v. Worley*, 899 N.Y.S.2d 365 (N.Y. App. Div. 2010), 36 FLR 1298.

(6) A trial court properly refused to set aside a prior order of paternity after finding that the plaintiff was estopped from denying his parentage of the child, the Pennsylvania Superior Court held. The plaintiff admitted he might not be the child's father when it was born, and filed a stipulation of paternity in 2004. The plaintiff again questioned his paternity when the child was almost two years old and allegedly did not resemble anyone in his family. However, he did not have DNA testing performed until 2007 when he was having a conflict with the mother over visitation. Based on the results of that test, he petitioned for court-ordered blood testing and to open the paternity adjudication. The trial court denied the petition, holding that he was estopped from challenging paternity. Affirming, the appellate court held that the doctrine of paternity by estoppel controlled, noting there was no evidence of fraud, because the man had always been aware he might not be the child's father. *Ellison v. Lopez*, 959 A.2d 395 (Pa.Super.Ct. 2008), 34 FLR 1573.

(7) A divorce court erred in finding that a husband who had willingly amended his wife's daughter's birth certificate to name himself as her father — even though he was neither her adoptive nor biological parent — was estopped from denying an

obligation to support the child, the Georgia Supreme Court ruled. The court acknowledged that *Wright v. Newman*, 467 S.E.2d 533 (Ga. 1996), applied the doctrine of promissory estoppel to require payment of child support in a similar case. However, it found that this case differed significantly from *Wright* on one key point — there was no finding here that the wife and child relied to their detriment upon the husband's promise "to take care of the child" by assuming the obligations and responsibilities of fatherhood. The court explained that the nonparent's promise of support in *Wright* had caused the mother there to forgo a source of financial and emotional support for her child by refraining from identifying and seeking support from the child's biological father. The court noted that in this case, the wife had identified her child's father, acknowledged that the child was aware of the father's identity, and had stated that the reason she never sought support from him was that "he didn't want anything to do with [the child]." Because there was no evidence that the husband's promise had caused the wife to forgo a valuable legal right to her detriment, it was error to apply promissory estoppel in this case. *Garcia v. Garcia*, 663 S.E.2d 709 (Ga. 2008), 34 FLR 1417.

c. <u>Laches</u> - A man who allegedly knew that his wife's youngest child was fathered by another man, but nevertheless in his divorce petition acknowledged the child as being of their marriage, should not have later been granted court-ordered genetic testing and relieved of his duty to support the child, the Maryland Court of Special Appeals ruled. It explained that because the trial court did not extinguish the man's legal status as the child's parent, he had a continuing statutory and common-law duty to support her. Moreover, the doctrine of laches barred the man's claim, as he knew since 1992 that the child was not his but took no action to disprove paternity. *Department of Human Resources ex rel. Duckworth v. Kamp*, 949 A.2d 43 (Md.Ct.Spec.App. 2008), 34 FLR 1351.

5. <u>Statute of Limitation</u> -

a. A trial court properly dismissed a putative father from a paternity action, where the action was filed nearly three years after the child's birth. However, the statute of limitations did not bar the child, who filed in his own right by next friend putative father. In so ruling, the court observed that prior decisions have also held that a parent being time-barred from filing in his own name does not preclude him from filing a petition on behalf of the child. *In re Adoption of E.L.*, 913 N.E.2d 1276, 1281 (Ind.Ct.App. 2009), 35 FLR 1574.

b. A trial court properly held that a man's parentage petition, filed less than two months after DNA testing showed him to be the subject nonmarital child's biological father, but more than two years after the mother had acknowledged someone else as the father, was untimely under the state paternity statute, the Washington Court of Appeals ruled. The appellate court added, however, that because the order dismissing the man's petition was issued in a proceeding in which the child's constitutional right to be a party to an action determining his paternity was denied, it was necessary to remand for appointment of a guardian ad litem to represent the child's best interests and his constitutionally protected interest in an accurate determination of his parentage. *In re Q.A.L. (D.M.G. v. K.M.L.)*, 191 P.3d 934 (Wash.Ct.App. 2008), 34 FLR 1502.

6. Effect of Adoption - A trial court properly granted summary judgment in favor of a putative father contesting a paternity action brought by a 35-year-old child and her mother after the child had been adopted by the mother's husband two years after the child's birth. Once the child was adopted by another man, the biological father was divested of all parental rights and responsibilities, and thus could not be liable for child support. Accordingly, because there existed no reasonable possibility of establishing paternity, the trial court properly denied the petitioners' request for DNA testing. *Schmitter v. Fawley*, 929 N.E.2d 859 (Ind.Ct.App. 2010).

7. Assisted Reproduction -

   a. Establishing Paternity -

      (1) An unmarried man, who at his cohabitant's request donated his sperm for her use in an in vitro fertilization procedure, and who following the child's birth executed an acknowledgment of paternity with her, may proceed with an action to establish himself as the child's legal father, the Virginia Court of Appeals held. Addressing the issue for the first time, the court said that the state's assisted conception laws — which provide that a non-spouse sperm donor has no parental rights regarding the resulting child — did not bar the man's parentage action, in light of the parties' uncontested acknowledgment of his paternity. *Breit v. Mason*, 718 S.E.2d 482 (Va.Ct.App. 2011), 38 FLR 1111.

      (2) An intended parent who is neither the biological nor adoptive parent of a child born to a gestational carrier may become the child's legal parent by means of a valid gestational agreement, the Connecticut Supreme Court decided. Construing for the first time a statute requiring the state to issue a replacement birth certificate per court order "if the birth is subject to a gestational agreement," the court noted that the statute creates a fourth way by which to acquire parental status, joining the previously recognized means of conception, adoption, and compliance with statutes governing artificial insemination. The case involved a same-sex male couple, one of whose sperm along with donated eggs were implanted into a gestational carrier. The court rejected the Department of Public

Health's objection that the trial court lacked subject matter jurisdiction to declare the two men parents under the gestational agreement. *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011), 37 FLR 1135.

(3) An artificial insemination donor agreement was enforceable as to preclude an action against the donor for paternity and support of a child produced in contemplation of the agreement, the Indiana Court of Appeals decided. In so holding, the court said that the agreement did not violate the public policy against contracting away a child's right to support. The agreement did not, however, prevent paternity from being established nor support imposed against the donor for a second child born to the biological mother, as the agreement was not sufficiently clear that it applied to any future children produced as a result of the agreement. *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind.Ct.App. 2010). [For a fuller discussion of this case, *see* Guidelines/Duty of Support/Assisted Reproduction, this outline.]

(4) A trial court did not abuse its discretion in finding that the biological father of a nonmarital child conceived via artificial insemination was not the child's legal father, where the biological father had not signed a written consent to provide his sperm for the express purpose of becoming a father, as required by the Uniform Parentage Act, the Delaware Supreme Court held. *Adams-Hall v. Adams*, 3 A.3d 1096 (Del. 2010), 36 FLR 1535.

(a) The parties were involved in a relationship which began in March of 2007 and ended around January of 2008. Although Mother adopted Father's last name, they were never married and did not reside together. At the time of their relationship, Mother was 40, and Father was 25. Sometime in November of 2007, Mother told Father that she was pregnant with his baby. She also told him that she had cystic fibrosis. She stated she needed a sperm sample for genetic testing to determine if Father was a carrier for cystic fibrosis. Father agreed to provide a sample for that purpose. Mother later requested a second sperm sample after telling Father there was blood in his semen which required another test. Father provided the sample for the purpose of testing on February 8, 2008. He drove Mother to the hospital that day believing he had blood in his semen. Mother stated she would take care of having the sample tested since Father did not have sufficient health insurance. Father did not meet with anyone at the hospital or sign any consent forms.

(b) When the father later contacted the mother's doctor, he was told that a successful intrauterine insemination had been performed on the day he had provided the sperm sample. In his subsequent parentage action, the father said that he had not consented to participating in — or to the use of his genetic material for — the mother's insemination. (Initially, the mother contended that the father "should have known" that she intended to use the sperm sample to impregnate herself "because Father was a 'computer whiz' and could have Googled cystic fibrosis testing and realized this was not the method of testing.") After DNA testing confirmed the father's paternity, the court determined that the child had been conceived by assisted reproduction, but that the procedure occurred without the written consent of the father as required by the UPA. Therefore, the trial court held, although the man was the biological father he was not the child's legal father. The mother appealed.

(c) In affirming the trial court, the high court observed that the mother made a series of false statements to the father. " Mother told Father that she was pregnant in November of 2007, when she was not. She also sent Father a letter saying she was three months pregnant in March 2008, which also was untrue. She told Father she needed a sperm sample because she was pregnant, and that his sperm was needed to test for cystic fibrosis, that her son was her brother, and that she was 35 years old. All of these statements were determined to be false. On the record before us, we find no abuse of discretion by the Family Court in according weight to the credibility findings of the Commissioner."

(d) In addition, the high court found that the mother's due process rights were not violated because she did not understand the legal issues to be decided and could not adequately represent herself. The high court found these claims unsubstantiated.

(5) A Kansas law (K.S.A. 38-1114(f)) providing that "the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman" is not unconstitutional as applied to a man who claims he had an oral agreement with a woman to donate sperm to be used for her artificial insemination in exchange for parental rights as to the resulting child, the Kansas Supreme Court held. Saying it was the first court in the country to consider this issue, the court rejected the man's argument that application of the statute violated his equal protection and due process rights. *In re. K.M.H.*, 169 P.3d 1025 (Kan. 2007), *cert denied*, 555 U.S. 937 (2008).

b. Establishing Maternity -

(1) A woman may proceed with an action to establish her legal maternity of a child her husband conceived with another woman through sexual intercourse, where

the child was born during the couple's marriage, has lived with them since birth, and has been held out as their own child, the Colorado Court of Appeals held. Applying the Uniform Parentage Act, the court said that the other woman's biological motherhood is not controlling (she contends that she was not acting as a surrogate for the couple and conceived the child during her personal relationship with the married father), and it remanded for trial on the wife's petition to establish herself as the child's legal mother. Upon remand, the trial court was instructed to weigh the statutory presumption of a child born into a marriage against the biological relationship in light of the child's best interests. The court further added, "We do not suggest that, in determining best interest, a court must treat statutory presumptions and biological relationships as equals. Nor do we suggest that biological relationships are always the same. We simply note that these interests must be considered, along with all other relevant facts, in determining the outcome of an action under the UPA." *In re S.N.V.*, — P.3d — (Colo.Ct.App., No. 10CA1302, 12/22/11), 38 FLR 1113.

(2) An infertile woman may not be recognized as the legal mother of her husband's biological child, who was born to a gestational carrier following an in vitro fertilization procedure using his sperm and donated ova, unless she adopts the child, the New Jersey Superior Court, Appellate Division, ruled. Stressing that neither the wife nor the gestational carrier have a genetic connection to the child, the court rejected a gender-neutral reading of the applicable provisions of the state Uniform Parentage Act, and held that it does not offend equal protection principles by treating infertile married women differently from infertile married men, whose paternity is presumed when their wives give birth. *In re T.J.S.*, 16 A.3d 386 (N.J.Super.Ct.App. 2011), 37 FLR 1195, *cert granted* by *In re T.J.S.*, 23 A.3d 935 (N.J. 2011).

(3) A gestational surrogacy agreement signed by two women is a valid contract and rebuts the presumption of maternity that attached to the surrogate by virtue of having given birth to the subject child, where the contract makes clear their intent that the other woman is to be the child's legal mother, the Ohio Court of Appeals, 10th District, decided. Resolving the matter under the state Parentage Act, the court said that the intended mother's "voluntary acknowledgment of maternity" in the agreement was sufficient to rebut the presumption of the surrogate's maternity. *S.N. v. M.B.*, 935 N.E.2d 463 (Ohio Ct.App. 2010), 36 FLR 1363.

(4) A trial court erred in rejecting an agreed petition to establish a biological mother's maternity of a child carried and birthed by the biological mother's sister, the Indiana Court of Appeals held. Noting the state's interest in correctly identifying children with their biological parents, the case was remanded for further findings as to whether the purported biological mother was in fact the

child's biological mother. The trial court had rejected the agreed entry on grounds that because Indiana law does not provide for establishing maternity, the birth mother was necessarily the child's legal mother. Reversing, the appellate court held that the state's interests in correctly identifying the mother was no less imperative than in identifying the father. The court thus remanded for a determination of whether the gamete provider, rather than the birthing mother, was the child's biological mother. *In the Matter of the Paternity and Maternity of Infant R*, 922 N.E.2d 59 (Ind.Ct.App. 2010).

8. <u>DNA Testing</u> -

   a. <u>Compelling DNA Testing</u> - A Florida man must provide a blood or DNA sample pursuant to the Convention on Taking Evidence Abroad for use in a paternity proceeding being conducted in the Slovak Republic, the U.S. District Court for the Middle District of Florida ordered. In granting the federal government's Application for an Order Compelling Assistance to a Foreign Tribunal Pursuant to 28 U.S.C. § 1782, the court found that the four statutory prerequisites set out in § 1782 for him to order the production of evidence for use in a foreign tribunal were met here: the man can be found in the Middle District of Florida; the request is for evidence; the evidence is for use in a foreign court proceeding; and the foreign court made its application through the U.S. Attorney's Office. Noting, however, that even when the requirements of § 1782 are met he is not obligated to allow discovery, the court explained that *In re Clerici*, 481 F.3d 1324 (11th Cir. 2007), mandates that a court consider the factors set out in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), and exercise discretion as to whether to permit discovery. After determining that none of the *Intel* factors favor the man — and specifically observing that obtaining a blood or DNA sample is not unduly intrusive — the court also found that Fed. R. Civ. P. 35(a) has been satisfied, in that the man denies he is the father of the subject child, and therefore his physical condition is in controversy, and good cause exists to order him to provide the requested evidence because it is relevant to a determination of paternity. *In re Letter of Request from the District Court Stara Lubovna, Slovak Republic*, No. 3:09-mc-20-34MCR (M.D. Fla. 11/5/09), 36 FLR 1020.

   b. <u>Deceased Alleged Parent — Exhumation</u> - A probate court has jurisdiction to order the personal representative of a deceased man's estate to exhume his body for genetic testing in response to a woman's claim that she is his nonmarital child, if the personal representative — in her individual capacity as the man's marital daughter — refuses to personally submit to such testing, the Maine Supreme Judicial Court held. In so ruling, the court rejected the estate's claim that the probate court lacked the statutory authority to order the exhumation of the decedent's remains for genetic testing. Stressing that the court's authority was not without limit, "and that there must be good cause or sufficient reason advanced to justify exercise of such broad power," the court found that here, the petitioner had presented an abundance of evidence that she was the decedent's child, "and that evidence creates at the very least a reasonable probability that genetic testing of [his] exhumed body, as ordered by the Probate Court, will reveal that [she] is the daughter of [the deceased]." Accordingly, the court was authorized to order exhumation of the remains for the purpose of genetic testing in connection with the woman's petition. *Estate of Kingsbury*, 946 A.2d 389 (Me. 2008), 34 FLR 1310.

c. <u>Liability for Erroneous DNA Test Results</u> -

(1) A woman may proceed with her negligence action against a medical testing facility for its allegedly inaccurate performance of genetic DNA testing in an administrative proceeding conducted by the Department of Human Services to determine the paternity of — and collect support for — her nonmarital child, the Oklahoma Supreme Court ruled. *Berman v. Laboratory Corporation of America*, — P.3d — (Okla., No. 107999, 12/20/11), 38 FLR 11107.

(a) DHS had arranged for LabCorp to perform DNA tests on the man the mother had identified as the child's father. Two tests were performed, and the agency's proceedings were terminated after LabCorp reported negative results on both tests. Thereafter, the mother submitted the man's DNA samples to a different lab, which reported positive results. (LabCorp had apparently used someone else's DNA sample for both tests.) His paternity was adjudicated, and the mother sued LabCorp, alleging that as a result of its negligence she had suffered money damages "for the loss of the [father's] past and future child support payments." The trial court held that LabCorp's report was a communication made in the context of a quasi-judicial proceeding and thus was protected by the absolute litigation privilege. The appellate court affirmed its grant of summary judgment to LabCorp.

(b) Reversing, the high court held that the facts of this case were insufficient to invoke the privilege. It explained that the issue was whether LabCorp owed the mother a duty of care; if so, she had stated a claim for negligence unrelated to the publication or communication of the test results. Finding that her claim was based on allegations of its negligence in performing the DNA tests, not its reporting of the test results, the privilege thus did not apply. Holding that LabCorp owed the woman a duty to perform accurate DNA testing for purposes of determining the paternity of her child, it reversed the grant of summary judgment and remanded the case for trial.

(2) A woman's action against two corporate defendants whom she claims were negligent in conducting a paternity test — the erroneous results of which she says led to the dismissal of a 1997 Illinois paternity action against a man who voluntarily acknowledged his paternity of her child in 2008 — may proceed in federal court, the U.S. District Court for the Southern District of Illinois decided. *Pate v. National Legal Laboratories, Inc*., No. 09-cv-76-JPG (S.D. Ill. 8/3/09) (unpublished), 35 FLR 1454.

(a) Noting that the woman sought as damages the financial support to which she would have been entitled in the paternity action prior to the entry in 2008 of a child support order (which did not require any retroactive payment) had the paternity test not been conducted negligently, the court found that the *Rooker-Feldman* doctrine did not require remand to state court because she was not seeking to relitigate and overturn a final, adverse state court judgment.

(b) In addition, the court said, the domestic relations exception to federal diversity jurisdiction also does not require remand, explaining that the negligence action "is clearly not a core domestic relations proceeding because it does not seek a divorce, alimony or child support decree." While acknowledging that "it is true that this Court does not have the expertise in determining the appropriate amount of child support" for purposes of calculating the woman's damages, it pointed out that, if remanded, the case would be decided by a state court jury "which is no better equipped to consider child support matters." Also noting that there was no ongoing state proceeding concerning support for the discrete period at issue in this case, and that there were no difficult questions of state law, the court said that abstention from exercising jurisdiction was likewise inappropriate.

9. <u>Setting Aside Paternity</u> -

a. <u>Paternity Judgments</u> -

(1) A trial court did not err in refusing to set aside a man's paternity judgment pursuant to a Trial Rule 60(B)(2) motion filed some seven years after the judgment was entered. Saying that a T.R. 60(B) motion is not a substitute for a timely appeal, the court also pointed out that there was no evidence of newly discovered evidence or other irregularity. The man's motion was, therefore, merely a belated request to readjudicate the merits of the trial court's decision. *In re Paternity of P.S.S.*, 934 N.E.2d 737 (Ind. 2010).

(2) A trial court did not err in dismissing a divorced man's petition to reverse an adjudication that he is the biological father of a child born to his wife during their marriage, the Mississippi Court of Appeals held. A year before the man's divorce, the man learned from a home DNA test that he was not the child's biological father. He thereafter, however, agreed to pay support in the parties' divorce. Two years after that, the man sought to modify the finding in the dissolution decree that he was the child's father. Affirming the trial court's denial of the man's motion, the court was not swayed by the man's claim that the pre-divorce home DNA test was not legally binding and that he did not become certain of the child's parentage until he received the results of the post-divorce court-ordered test. (The man alleged that he did not believe the results of the home test because his wife assured him that she had not had an extramarital affair and that he relied on her sworn statements in the divorce documents that he was the biological father of both children.) *Lee v. Lee*, 12 So.3d 548 (Miss.Ct.App. 2009), 35 FLR 1334.

(3) While a trial court properly dismissed a man's action against his ex-wife for extrinsic paternity fraud as to the children their 2005 divorce judgment stated were born of their marriage, it erred in holding that the action was precluded by the doctrines of *res judicata* and collateral estoppel, the Missouri Court of Appeals, Western District, ruled. *Walker v. Walker*, 280 S.W.3d 634 (Mo.Ct.App. 2009), 35 FLR 1130, *reh'g denied*, *trans. denied*.

(a) In rejecting the man's 2007 action, the trial court found that he had not requested paternity testing during the course of the dissolution proceeding. It further said that his paternity was previously adjudicated in that proceeding, and held that the man was bound by that prior paternity determination and precluded from raising it further.

(b) Although affirming the trial court's dismissal, the court explained that both *res judicata* and collateral estoppel were inapplicable here because a prior judgment may be set aside if obtained by extrinsic fraud — which refers to fraud in the procurement of a judgment, not the propriety of the judgment. However, it continued, for the man to invoke the equitable powers of the court, he must have pleaded extrinsic fraud sufficiently in his motion. Finding that he failed to do this, it said his claim that the wife had indicated under oath that the two children were born of the parties' marriage even though she knew that one — and possibly both — were not his children alleged facts that constituted intrinsic fraud only.

(4) A trial court properly denied an unwed mother's motion for genetic testing of her child, who had been placed in the custody of the child's putative father two years

earlier, the North Carolina Supreme Court held. In adopting the dissenting opinion of the Court of Appeals decision below, the court ruled that the man's paternity was established judicially in a 2002 order, and the mother had failed to appeal that order in a timely manner. Accordingly, the mother's 2007 motion for paternity testing was thus "improper and untimely." *Helms v. Landry*, 686 S.E.2d 674 (N.C. 2009), *reh'g dismissed*.

(5) A trial court did not err in dismissing a divorced man's complaint for relief from a 1995 default judgment ordering him to reimburse the state for public assistance provided to the child born during his marriage, even though it was shown in 2003 that the child was not his, the Idaho Supreme Court ruled. The court observed that the man had failed to show for the initial paternity determination in 1995, even though he knew in 1992 that he was not the child's father. The court also asserted that his "ongoing substance abuse [did not constitute] a legal excuse for the disregard of his legal affairs." Thus holding that the trial court correctly found that *res judicata* barred the man from retrying the issue of paternity, the court likewise ruled that the judge below properly refused the man's tardy request to invalidate the judgment for reasons of fraud or by exercise of its equitable powers. *Waller v. State*, 192 P.3d 1058 (Id. 2008), 34 FLR 1488.

(6) A divorced man's independent action to set aside his 1999 child support obligation and for a determination of the paternity of the children born during his marriage should not have been dismissed, the South Carolina Court of Appeals ruled. Although the man was time-barred from filing an action for intrinsic fraud, the court held that the man could file an independent action for extrinsic fraud. The case was remanded for a determination of whether sufficient grounds in fact existed to set aside the paternity judgment. *Mr. T. v. Ms. T.*, 662 S.E.2d 413 (S.C.Ct.App. 2008), 34 FLR 1267, *reh'g denied*, *certiorari denied*.

b. Paternity Affidavits -

(1) A trial court did not err in refusing to set aside a man's affidavit of his paternity of a child, which he had executed nearly 14 years before results from a drugstore DNA kit informed him he was not the child's father, the Indiana Court of Appeals held. When the man submitted results from a drugstore DNA test that excluded him as the child's biological father, the mother objected on grounds that the results were not properly certified. In sustaining her objection, the trial court had no other evidence before it other than the mother's testimony that during the time the child was conceived, she was in an exclusive relationship with the father. Affirming, the appellate court said there was insufficient evidence of fraud to warrant setting aside the judgment. *In re T.M. (B.M. v. S.K.)*, 953 N.E.2d 96 (Ind.Ct.App. 2011), 37 FLR 1458.

(2) A trial court erred in denying a man's petition for paternity testing in his action to rescind a voluntary acknowledgment of paternity he executed in 2003, where he had presented sufficient evidence that it had been obtained through fraud, the Tennessee Court of Appeals held. Noting that the five-year statute of limitations for challenging a VAP does not bar a challenge where fraud in the procurement of the VAP by the child's mother is alleged and the requested relief will not affect the interests of the child or the state (Tenn. Code Ann. § 24-7-113(e)(4)), the court found that the evidence here "preponderates against the trial court's finding" that the man (who had obtained private genetic testing showing a 0% probability of paternity) had failed to show fraud. *State ex rel. Dancy v. King*, No. W2010-00934-COA-R3-JV (Tenn.Ct.App. 4/5/11), 37 FLR 1299.

(3) A trial court considering a state agency's petition for a support order on behalf of a nonmarital child against the man who executed a voluntary acknowledgment of the child's paternity did not err in determining, based on genetic testing, that he was not the biological father and thus not legally liable for the child's support, the Kansas Court of Appeals decided. The court recognized that state law provides that a voluntary acknowledgment of paternity establishes a presumption of paternity, but pointed out that it also provides that the presumption may be rebutted by clear and convincing evidence. *State ex rel. Taylor v. Kimbrel*, 231 P.3d 576 (Kan.Ct.App. 2010), 36 FLR 1345.

(4) A trial court erred in ordering a man to submit to genetic marker testing in his action for custody of a nonmarital child, where the Massachusetts acknowledgment of paternity he and the mother had executed after the child's birth established him as the child's legal father, the New Hampshire Supreme Court ruled. The court pointed out that "by signing the acknowledgment, the mother, by her own volition, accepted that the [man] is the child's biological father." Moreover, the paternity affidavit established paternity, not just the presumption of paternity, and the time for challenging the acknowledgment had long passed. The court added that while a child's best interests generally should be given consideration in determining whether to order genetic marker testing when that issue remains relevant, the trial court erred in finding that the child's best interests required such testing because he already had a legal father. *In re Gendron and Plaistek*, 950 A.2d 151 (N.H. 2008), 34 FLR 1333.

(5) A trial court erred in refusing a man's request for genetic testing, where the man's uncontroverted testimony was that the mother had told him he was the child's only possible biological father at the time he and the mother executed a paternity affidavit. Such testimony constituted fraud, as envisioned by IC § 16-37-2-2.1(h), thus allowing the man to request genetic testing in order to set aside his affidavit. In a footnote, the court disregarded the man's argument for setting

aside the affidavit on grounds that the hospital nurse failed to adequately explain the affidavit to him, saying that while Indiana Code Section 16-37-2-2.1(b)(2) requires that hospital personnel shall "verbally explain … the legal effects of an executed paternity affidavit," there is no corollary statutory provision allowing rescission of the paternity affidavit due to a lack of verbal explanation." *In re Paternity of M.M.,* 889 N.E.2d 846 (Ind.Ct.App. 2008), *rehg. denied*.

(6) A trial court erred in setting aside a paternity affidavit where both the child's mother and the man with whom she executed the affidavit knew when they executed it that the man was not the child's father. The appellate court held that the legislature did not intend the affidavit statute (IC § 16-37-2-2.1) to be used to set aside paternity affidavits executed by a man and a woman who both knew the man was not the child's biological father. Rather, the court said, "the legislature intended to provide assistance to a man who signed a paternity affidavit due to 'fraud, duress or material mistake of fact.' " A woman, the court explained, is often in complete control as to whether other men may be the child's father, while a man could easily sign an affidavit without awareness of the questionable nature of his paternity. It was this situation the legislature intended to address. Moreover, the court added, if a woman could defraud the State Department of Health and then manipulate the paternity statutes in this manner to dispose of a father when she tires of him, men would have no incentive to execute paternity affidavits. *In re Paternity of H.H.*, 879 N.E.2d 1175 (Ind.Ct.App. 2008).

(7) A trial court did not commit clear error in concluding that a nonmarital child's mother and biological father had failed to present sufficient evidence to warrant the revocation of an acknowledgment of parentage that the mother had executed with another man after the child's birth, the Michigan Court of Appeals decided. In so holding, the court said the child would be harmed by the termination of his relationship with the acknowledged father and the introduction of another parent. *Sinicropi v. Mazurek*, 760 N.W.2d 520 (Mich.Ct.App. 2008), 34 FLR 1406, *appeal denied*.

(8) There is no good cause for ordering DNA testing in a paternity action filed by a nonmarital child's presumptive father after the mother challenged his parentage claim, Florida's Fourth District Court of Appeal decided in a *per curiam* opinion. Finding that the petitioner and the mother had signed a paternity affidavit after the child's birth in 2003, the court said that because neither party sought to rescind the acknowledgment of paternity within 60 days, a rebuttable presumption arose under state law that the petitioner is the child's father. Further finding that the mother allowed him to be treated as the father until she relocated with the child in 2007, it noted that he then filed the underlying paternity petition,

which she contested with a counter-petition and a successful motion for scientific testing, claiming that the child had been fathered by the maternal grandmother's boyfriend (whose name is unknown and who cannot be located). *Allison v. Medlock*, 983 So.2d 789 (Fla.Dist.Ct.App. 2008), 34 FLR 1383.

10. Retroactive Support -

    a. A trial court erred in ordering a man to pay retroactive child support for the period before he learned that he had been misled by his daughter's mother into thinking she was dead, the Tennessee Court of Appeals decided. The trial court wrongly concluded that the governing statutes that require retroactive support back to the child's birth allow an exception only where the mother misrepresents that the child never existed or was not the father's. Reversing, the appellate court said that the exception also applies in cases such as the one before it, where the man was aware of the child's existence and knew it was his, but thereafter was told the child had died. *Burnine v. Dauterive*, No. 2010-02611-COA-R3-JV (Tenn.Ct.App. 7/27/11), 37 FLR 1470.

    b. A mother's petition for back child support, filed against her nonmarital child's father following the child's death at age 14, was properly denied, the Arkansas Supreme Court ruled. The father's paternity was not adjudicated until after the child's death, and no child support order had ever been entered against him prior to that time. The mother sought support after the father was awarded a portion of the proceeds in an action brought for the child's wrongful death. Saying that this case raised the issue of whether a petition for child support may be initiated after the death of a child, the court "concluded that it cannot." It explained that the plain language of the state support statute requires that the parent petitioning for support have physical custody of the child. Because the child here died two years before the mother filed her petition for child support, she was thus prohibited from doing so. *Hardy v. Wilbourne*, 259 S.W.3d 405 (Ark. 2007), 33 FLR 1382; *cert denied*, 552 U.S. 1183 (2008), 34 FLR 1179.

11. Birth and Pregnancy Expenses -

    a. An unwed mother's petition to establish paternity and for birth-related costs pursuant to the Uniform Parentage Act, which she filed after she had obtained a determination of parental responsibilities and an order for child support in an action under the Uniform Dissolution of Marriage Act, should not have been dismissed, the Colorado Court of Appeals ruled. In dismissing the UPA petition, the trial court had found that although delivery/birth expenses could not be recovered in a UMDA proceeding, the mother's UPA filing was "unwarranted" because paternity had been established in her UMDA action. Reversing, the court pointed out that under the UPA, the mother could bring an action "at any time" to obtain a judgment determining the existence of the father-child relationship, and that the judgment could include an order for birth-related expenses. Colo. Rev. Stat. § 19-4-107 and -116 (2011). "We cannot disregard the General Assembly's use of the phrase 'at any time'," it said, holding that the mother was thus not precluded from seeking birth-related costs in a paternity action under the UPA, even though the father-child relationship had been uncontested in the earlier action for allocation of parental responsibilities under the UMDA. *In re G.E.R.*, 264 P.3d 637 (Colo.Ct.App. 2011), 37 FLR 1555.

b. The father of a woman's four children was entitled to abatement of his obligation to reimburse the state for her medicaid-covered hospital confinement and pregnancy expenses, because they married after the fourth child was born, the Michigan Court of Appeals ruled in a *per curiam* opinion. Pointing out that Mich. Comp. Laws 772.215 provides for the abatement of an obligation to repay such state medical assistance benefits if the father marries the mother after a reimbursement order is entered, the court recognized that here the marriage occurred prior to the statute's effective date. Thus finding that the case presented an issue of first impression, it noted that the statute's plain language clearly authorizes the abatement of a repayment order "if the father marries the mother after the birth of the child and provides documentation of the marriage to the friend of the court." *Booker (Shannon) v. Shannon*, 776 N.W.2d (Mich.Ct.App. 2009), 35 FLR 1526.

P. QDRO

1. A trial court should have granted a divorcing mother's request for the entry of a Qualified Domestic Relations Order permitting her to attach her husband's retirement account for the sole purpose of obtaining payment of the arrears that had accumulated under its pendente lite child support order, the Virginia Court of Appeals held. *Nkopchieu v. Minlend*, 718 S.E.2d 470 (Va.Ct.App. 2011), 38 FLR 1100.

a. Finding that attachment of the account was the only means of obtaining support for the parties's two children (the father had left the country and the children were subsisting on welfare benefits), the court determined that state law did not deprive the lower court of authority to enter a QDRO pursuant to the procedures of the federal Employee Retirement Income Security Act.

b. The trial court had relied on *Hoy v. Hoy*, 510 S.E.2d 253 (Va. Ct. App. 1999), which precluded a QDRO to collect spousal support arrearage. Asserting that "this case is very different than *Hoy*," the court explained that in *Hoy*, the court rejected a woman's attempt to reopen and modify a 24-year-old divorce decree for entry of QDRO to garnish her ex-husband's pension — which did not exist when they divorced — for payment of his alimony arrears. Here, the mother "sought the entry of a QDRO for child support while the divorce proceedings were active. This difference alone brings the case completely outside the scope of this Court's holding in *Hoy*. In addition, this case concerns a parent's duty to support his minor children."

2. A trial court did not err in preventing a custodial mother from reaching her ex-husband's ERISA-certified pension plan via a QDRO to liquidate his child support obligation until such time that the husband-noncustodial father became eligible to receive the pension benefits, the Indiana Court of Appeals decided. The mother argued that although the father was not presently eligible to receive benefits himself, a public policy exception should allow her to attach such funds for the benefit of the child "sooner rather than later." The appellate court disagreed, saying that had Congress intended to provide to children a benefit not otherwise provided under the plan, it would have said so. *In re Marriage of Cook v. Bricklayers Local Union 19 of Indiana Retirement Plan*, 884 N.E.2d 877 (Ind.Ct.App. 2008).

Q. Social Security

1. <u>Duties of Representative Payee</u> - A probate court order directing a man who is the representative payee of his disabled adult son's SSI benefits to deposit at least $200 of those monthly benefits into a bank account — withdrawals from which would require the signatures of the son and the son's co-guardians — conflicts with the federal law governing the obligations of representative payees and must be vacated, the Maine Supreme Judicial Court decided. The court explained that under federal law, a Social Security beneficiary's duly certified fiduciary — the "representative payee" — is required to employ the SSI payments for the beneficiary's "use and benefit," and is subject to detailed federal regulations. *In re Guardianship of Smith*, 17 A.3d 136 (Me. 2011), 37 FLR 1315.

2. <u>Income Withholding of Obligor's Social Security Benefits</u> - An incarcerated disabled obligor's monthly Social Security Disability Insurance benefits were properly subjected to a withholding order to cover his support arrearage, the Kansas Court of Appeals ruled. *State ex rel. Secretary of Kansas Department of Social and Rehabilitation Services v. White*, 216 P.3d 727 (Kan.Ct.App. 2009), 35 FLR 1538. [For a fuller discussion, see Income Withholding, this outline.]

3. <u>Application of Social Security Dependent Benefits</u> -

   a. <u>Credit Against Current Support</u> -

      (1) A trial court did not abuse its discretion in requiring a divorced noncustodial mother to pay child support of $274 per month, even though her two children receive monthly Social Security benefits of $316 each because of their custodial

father's disability, the Ohio Court of Appeals, Sixth District, ruled. The court acknowledged that a disabled parent's support obligation should be directly offset by his or her child's derivative Social Security payments. However, that rule is limited to the credit applying only to the disabled parent’s obligation (with the credit then being included in the disabled parent’s income). Observing that the mother is not the disabled parent here, the father is, only the father is entitled to a credit for the Social Security payments, which “are presumed to inure to [the children's] benefit.” *Parker v. Parker*, No. S-10-026 (Oh.Ct.App. 11/4/11), 38 FLR 1032.

(2) A trial court properly credited an adjudicated father's child support obligation by the amount that his one-year-old child was receiving from Social Security as a derivative of the 67-year-old father's retirement benefits, the Missouri Court of Appeals, Western District, held. *Villines v. Phillips*, — S.W.3d — (Mo.Ct.App., No. WD71926, 10/25/11), 38 FLR 1009.

(a) The child's mother had relied on *Craver v. Craver*, 649 S.W.2d 440 (Mo. 1983), in contesting the credit, citing its holding that Social Security payments made to a child derivatively through a parent's retirement benefit account do not constitute “payments” made by the parent and cannot be credited against a presumed child support obligation.

(b) However, the appellate court pointed out that *Craver* was overruled in *Weaks v. Weaks*, 821 S.W.2d 503 (Mo. 1991), which held that Social Security disability benefits received by a mother through a father's account should have been credited toward his child support obligation. Asserting that “*Weaks* is controlling here,” the court explained that the father had contributed to Social Security through deductions from his wages, and that the derivative benefits paid to the child were thus “earned” by him, notwithstanding the fact that the child's benefits did not otherwise reduce the retirement benefits independently paid to the father. It rejected the mother's argument that *Craver* was overruled by *Weaks* only with respect to Social Security disability benefits, and that it was still controlling as to retirement benefits. This argument “ignores that there is no material difference between the nature of Social Security benefits earned by a parent, and that the rationale described in *Weaks* requiring focus on the fact that the benefits paid to the children are derived from funds earned by the contributor is of equal application to disability and retirement benefits,” it said, declaring that the mother's continued reliance on *Craver* was therefore misplaced.

(3) A disabled noncustodial mother's $300 per month child support obligation should not have been terminated after her child began receiving monthly $614 Social

Security dependent benefits as a result of her disability, the Iowa Court of Appeals ruled. The court recognized that Iowa Code § 598.22C provides that the payment of benefits fully satisfies and substitutes for the parent's support obligation for the same period of time for which the benefits are awarded. It pointed out, however, that termination of the mother's support obligation shifts the burden to the custodial father to seek modification to reinstate that obligation in the event her future SSD benefits eligibility ceases and payments stop. “We believe the better public policy,” the court said, “is to leave the child support obligation in place and provide that SSD benefits paid satisfy and substitute for the support obligation.” *In re Morrical*, No. 1-580/10-1963 (Iowa Ct.App. 9/8/11), 37 FLR 1541 (unpublished disposition).

(4) A trial court properly refused to grant a father credit against his support obligation for the monthly Supplemental Security Income benefits received by his disabled adult son, the New Hampshire Supreme Court held. Recognizing that a credit is allowed for Social Security dependency benefits that a child receives as a result of an obligor's retirement or disability (*In re Angley-Cook*, 855 A.2d 431 (N.H. 2004)), the court pointed out that the son's SSI benefits were not derived from the father. (*See Martin v. Martin*, 874 N.E.2d 1137 (Mass.App.Ct. 2007).) Because the son's SSI benefits have no connection with the father's previous earnings but rather are funded through general tax revenues and intended to help recipients meet their basic needs, the son's benefits in effect replace his own income rather than substitute for the father's lost income, the court said, noting that the son received the benefits based upon his own disability. *In re Lister*, 27 A.3d 673 (N.H. 2011), 37 FLR 1337.

(5) A trial judge erred in applying a credit to a noncustodial mother's support obligation for Social Security dependency benefits received by her children on account of their custodial father's disability, the Kentucky Supreme Court held. Explaining that only the disabled parent is entitled to such a credit, the court also ruled that it was an abuse of discretion for the judge to treat the monthly benefits as the children's “independent financial resource” for purposes of allowing a deviation from the guideline amount of support. *Artrip v. Noe*, 311 S.W.3d 229 (Ky. 2010), 36 FLR 1280.

(6) A divorced disabled father who has custody of one of his two children is not entitled to a credit for the Social Security dependent child benefits received by their mother on behalf of the other child (who resides with her), the Maine Supreme Judicial Court held. Considering the father's appeal, the court agreed with the judge below that the man was not entitled to a credit for the dependent child benefits because he is not an “obligor.” The court explained that under state law, an obligor is the parent with the greater theoretical support obligation.

Because the mother incurred the greater support obligation, she is the obligor, it said, stressing that entitlement to the credit is predicated on a parent's status as an obligor. Pointing out that the father did not have an established child support obligation, and instead received support from the mother, it ruled that "there is no justification for a credit" to him for the benefits. It added that even if the father qualified as an obligor, the dependent benefits would be credited toward the satisfaction of his support obligation but would not reduce the amount of that obligation. *Young v. Young*, 973 A.2d 765 (Me. 2009), 35 FLR 1345.

(7) A disabled obligor with independent sources of income is entitled to the same credit against his support obligation for the Social Security dependent benefits received by his child that is given to other disabled obligors who have no source of income beyond their own disability benefits, the Missouri Court of Appeals, Eastern District, ruled. Addressing the question for the first time, the court stressed that the benefits paid to the child in both instances are derived from funds earned by the obligor. *Wallace v. Wallace*, 269 S.W.3d 469 (Mo.Ct.App. 2008), 34 FLR 1557, *rehearing and/or transfer denied*.

b. <u>Credit Against Arrears</u> -

(1) A trial court erred in denying a disabled obligor's request to credit against his child support arrearage periodic Social Security dependent benefits received by his child before he petitioned to modify his support obligation in light of those ongoing monthly benefits, the Indiana Court of Appeals ruled. *Anderson v. Anderson*, 955 N.E.2d 236 (Ind.Ct.App. 2011), 37 FLR 1602.

(a) The obligor had been ordered to pay child support of $25 per week in the parties' 1995 divorce. He became disabled, and in 2001 began receiving Social Security disability benefits. The child's $68 monthly dependent benefits started at the same time. In 2010, the obligor successfully petitioned to modify his support obligation in light of the child's SSD benefits, but his request that the monthly benefits paid to the child since 2001 be credited against his arrearage was denied.

(b) Recognizing that in *Brown v. Brown*, 849 N.E.2d 610 (Ind. 2006), the court held that a lump-sum payment of SSD benefits could not be credited against arrears that accumulated before the obligor filed a modification petition, the appellate court noted that in 2010, Indiana's support guidelines were amended, and revised Guideline 3(G)(5) "effectively overruled" *Brown* by providing that lump-sum SSD benefits "shall be applied as a credit to an existing child support arrearage" without the need to file a petition for modification.

(c) The court acknowledged, however, that the guideline is silent as to the issue presented here, and that "we are therefore left to speculate as to how the Guidelines would treat periodic SSD payments in this regard." Deciding that "the Commentary to Guideline 3(G)(5) foreshadows that periodic SSD payments would be treated the same as lump-sum SSD payments," the court concluded that "there is no principled reason to treat periodic SSD benefit payments to a child differently than lump-sum SSD benefit payments." It thus reversed the trial court's denial of the father's request to apply all of the monthly SSD payments received by the child since 2001 against his arrearage.

(2) Social Security benefits paid to an obligor's dependent children because of his disability may not be credited against child support arrears that accrued before he became disabled, the Wyoming Supreme Court held. In so ruling, the court noted that *Groenstein v. Groenstein*, 104 P.3d 765 (Wyo. 2005), addressed how Social Security disability benefit payments fit into the support calculation, and that its conclusions are now codified at Wyo. Stat. Ann. § 20-2-304(e). Observing that the majority of jurisdictions do not allow the use of excess benefits to offset predisability arrears (*see Clark v. Clark*, 134 P.3d 625 (Haw.Ct.App. 2006)), the court explained that the rationale of the majority rule is that the benefits belong to the children — not the obligor — and thus such a credit would have the children paying for their own support. *Swaney v. State*, 256 P.3d 514 (Wyo. 2011), 37 FLR 1457.

(3) A retroactive Social Security lump-sum benefit, paid directly to the children of a disabled child support obligor, may be used to offset his support arrearage for the period covered by such payment, even though it predates his motion for an offset, the Vermont Supreme Court decided. Confronting the issue for the first time, the court adopted the majority view among other jurisdictions in holding that the offset is not an impermissible retroactive modification of the underlying support order. It also noted that unless the lump-sum dependent benefit was credited to the arrearage, the custodial parent would receive a windfall. The court noted that in adopting this position, the court was joining the majority of jurisdictions that have addressed the issue. (*See*, *e.g.*, *Pacana v. State*, 941 P.2d 1263 (Alaska 1997); *In re Henry*, 622 N.E.2d 803 (Ill. 1993); *Board v. Board*, 690 S.W.2d 380 (Ky. 1985); *Weaks v. Weaks*, 821 S.W.2d 503 (Mo. 1991), *In re Cowan*, 928 P.2d 214 (Mont. 1996), *Pontbriand v. Pontbriand*, 622 A.2d 482 (R.I. 1993), *Settle v. Settle*, 540 S.E.2d 178 (W. Va. 2000), *Brown v. Brown*, 849 N.E.2d 610 (Ind. 2006), and *Jenerou v. Jenerou*, 503 N.W.2d 744 (Mich. Ct. App. 1993).) *Louko v. McDonald*, 22 A.3d 433 (Vt. 2011), 37 FLR 1237.

(4) Lump-sum Social Security back payments received by a disabled father's children because of his disability may not be applied against his accumulated child support arrearage, the Mississippi Court of Appeals, sitting *en banc*, held. Pointing out that the father had paid no support during the four years prior to the children's mother's receipt of the payments, even though he was receiving workers' compensation benefits, the court said the order requiring his payment of the arrearage "cleansed" his unclean hands and allowed prospective modification of the support decree, so as to credit the children's ongoing monthly benefits against his future support obligation. *Chapman v. Ward*, 3 So.3d 790 (Miss.Ct.App. 2008), 35 FLR 1028, *reh'g denied*.

(5) Whether an obligor is entitled to a credit against support arrears for a lump-sum payment of Social Security benefits received by a child as a result of the obligor's disability depends on the equities of each individual case, the Arkansas Supreme Court ruled. Addressing the issue for the first time, the court reviewed the various approaches followed by other jurisdictions, and decided against adopting a bright-line rule, agreeing with those that mandate a case-by-case fact-specific inquiry. The court opined that "fact-specific inquiries, most notably the non-custodial parent's history of failure to support, are central to the decisions." Observing that this equity-based standard was not inconsistent with the court's longtime approach to child support, it also noted that the state support guidelines do not foreclose the possibility that Social Security benefits may affect a non-custodial parent's child support obligation *Grays v. State of Arkansas Office of Child Support Enforcement*, 289 S.W.3d 12 (Ark. 2008), 35 FLR 1027.

c. <u>Excess Benefits</u> -

(1) A trial court erred in refusing to apply a lump-sum payment of retroactive Social Security disability dependency benefits, which was received by a custodial mother because of her children's father's disability, as a credit toward his future child support obligation, the Minnesota Court of Appeals decided. The court said the revised support statute allows for full credit and "does not specify the manner in which the district court must subtract social security benefits from an obligor's child-support obligation, and does not limit the application of a credit to either arrearages or prospective obligations." *Grant County (Koser) v. Koser*, — N.W.2d — (Minn.Ct.App., No. A11-746, 1/9/12), 38 FLR 1129.

(2) A trial court did not err in denying a disabled father's petition to offset his obligation under his decree-incorporated agreement to pay a portion of his child's uncovered medical expenses by applying the child's Social Security dependent benefits to such obligation, the Illinois Appellate Court, Fifth District, held. The appellate court found that a fixed monthly child support payment and monthly

Social Security dependent benefits serve substantially similar purposes, as each is intended to provide for ordinary and customary items needed for the support and maintenance of a dependent child. It explained, however, that the same could not be said for dependent benefits and "unpredictable, contingent costs" such as uncovered health care expenses. In denying his petition to also apply the benefits to the child's uncovered medical expenses that had accrued since the accident, the trial court said that the amount of benefits exceeding his child support obligation was a gratuity belonging to the child. *In re Rash and King*, 941 N.E.2d 989 (Ill.App.Ct. 2010), *reh'g denied*, 37 FLR 1116.

(3) A disabled father is not entitled to a credit against his child support arrearage for Social Security dependent benefits received by his child on account of his disability that are in excess of the amount he owes in current, court-ordered support, the Texas Court of Appeals, Ninth District, held. Explaining that such a credit is not permitted under state law, the court rejected the obligor's request for an "equitable offset," pointing out that most of the arrearage accrued before the child began receiving the benefits. *In re A.J.R.*, No. 09-09-00382-CV (Tex.Ct.App. 10/28/10) (not reported in S.W.3d), 37 FLR 1016.

(a) The court found that when the judgment in this case was rendered, no statute allowed for a reduction of arrears for monthly Social Security dependent disability benefits or for a reduction of confirmed arrears for such benefits received by a child over the amount of the court-ordered support obligation. It also found that the judgment here predated a recent statute providing for a credit against support arrears for certain lump-sum Social Security disability benefits, and that the statute thus was inapplicable.

(b) The father claimed that if the mother receives Social Security disabilities on the child's behalf in excess of his support obligation and is awarded an arrearage judgment for the same period, she is receiving a double recovery. The court was not swayed by this argument, saying "significantly, we note that the Texas Legislature was undoubtedly aware of this possibility when it enacted section 157.009, which only allows a credit against arrears for lump sums," and said that a trial court thus is not authorized to consider an "equitable offset."

(c) Also pointing out that the bulk of the father's arrearage accrued before he was eligible for Social Security disability benefits, and that his support obligation was repeatedly modified to account for the child's receipt of dependent benefits, the court held that the trial court abused its discretion in reducing the confirmed arrearage by the total sum of benefits received by the child in excess of the court-ordered support payments.

(4) The amount of Social Security benefits received by a child due to a parent's disability that is over and above the parent's monthly support duty may be used to satisfy his or her court-ordered obligation to pay the child's current unreimbursed medical expenses, the Arizona Court of Appeals, Division One, decided. Explaining that the key question was whether the obligation to pay unreimbursed medical expenses constituted a "child support obligation" under the support guidelines, the court pointed out that both the guidelines and the support statute include such expenses as part of the "support" a parent is obligated to provide as directed by a court. "These provisions leave no doubt that unreimbursed medical expenses are a component of 'total child support' and are binding obligations of parents subject to child support orders," it said. *Keefer v. Keefer*, 239 P.3d 756 (Ariz.Ct.App. 2010), 36 FLR 1569.

(5) A disabled obligor's action against his ex-wife to recover child support he had paid during a period for which his children later received a retroactive lump-sum payment of Social Security dependency benefits due to his disability should not have been dismissed, where the lump-sum exceeded the support he had paid, the North Dakota Supreme Court held. *Davis v. Davis*, 780 N.W.2d 707 (N.D. 2010), 36 FLR 1261.

(a) Addressing an issue of first impression, the court acknowledged that the majority of other jurisdictions deny reimbursement of the overpaid support under one of three rationales: (1) the overpayment is a gratuity to the child; (2) the funds belong to the child, not to the obligor; or (3) 42 U.S.C. § 407(a) prohibits use of lump-sum benefits to satisfy reimbursement requests and it is inequitable to require an obligee who did not know the obligor had applied for benefits to repay support.

(b) It said, however, that such case law was not persuasive, because it did not interpret regulations similar to North Dakota's support guidelines, which provide that children's benefits "must be credited as a payment toward the obligor's child support obligation." N.D. Admin. Code § 75-02-04.1-02(11). "This language leaves no room" for application of the equitable principles relied on in the first and third line of cases, and the premise underlying the second group of cases was specifically rejected in *Guthmiller v. Guthmiller*, 448 N.W.2d 643 (N.D. 1989), the court explained, ruling that the court below thus erred in failing to comply with the guidelines.

(c) A disabled obligor, whose daughter received a lump-sum award of retroactive Social Security dependent benefits due to his disability and will receive monthly benefits in the future, is not entitled to credit the excess benefits against his future support obligation or to a reimbursement for overpayment of his past obligation, the Mississippi Court of Appeals ruled. The court explained that to the extent that Social Security benefits exceed a parent's support obligation, they are equitably deemed a gratuity to the child. *Keith v. Purvis*, 982 So.2d 1033 (Miss.Ct.App. 2008), 34 FLR 1345.

i) Observing that other jurisdictions are in accord with this, the court further remarked that several that have specifically considered the mechanics of applying a credit for a lump-sum payment of retroactive disability benefits adhere to the general rule that benefits may be credited against support obligations only for the period in which the benefits are actually received.

ii) The father's claim for reimbursement, the court said, amounted to a claim for unjust enrichment. Rejecting this argument, the court said that "because the excess money received by [the child] never belonged to [the obligor], we fail to see how he can prevail on the theory of unjust enrichment." The court added that to allow him reimbursement "would be the functional equivalent of retroactively negating his obligation to pay [support]. Reimbursement would also encourage non-custodial parents to suspend payment while awaiting the receipt of social security benefits."

4. <u>VA Benefits - Credit Against Current Support</u> - It was within a divorce court's jurisdiction to award a father a dollar-for-dollar credit against his child support obligation for the monthly Department of Veterans' Administration benefits paid to his daughter on account of his permanent and total disability, the Nebraska Court of Appeals decided. In so holding, the court looked to *Duke v. Richard*, 600 S.E.2d 182 (W. Va. 2004), which held that an obligor was entitled to credit against his support obligation for payments made by the VA to his child as a result of his disabled status as such benefits are a substitute for support payments from his own earnings. The court noted that other jurisdictions have likewise permitted a credit on the basis "that the federal benefits received on behalf of children are merely a substitute for the wages the obligor would have received but for the fact of disability or retirement, and from which support payments would have otherwise been received." *Thompson v. Thompson*, 782 N.W.2d 607 (Neb.Ct.App. 2010), 36 FLR 1344.

R. Statutes of Limitation

1. <u>Retroactive Effect of Statutory Change</u> - A trial court did not err in granting a mother's request for a judgment for the support arrears owed by her ex-husband for their now 39-year-old daughter, the Texas Court of Appeals, First District, decided. The obligor argued that the arrears were dormant under Texas law and therefore uncollectible.

Rejecting the obligor's argument, the court noted that between 1997 and 2007, Texas courts had held that dormancy did not apply to individual, overdue child support payments. In 2007, one week before this case, a court of appeals decision held for the first time that such obligations may become dormant. In the first legislative session following that case, the Legislature amended the statute providing that child support arrearages are not subject to becoming dormant. In light of this legislative intent, the trial court did not err in allowing the mother to proceed on her request for a judgment for the support arrears owed by her ex-husband. *Holmes v. Williams*, — S.W.3d —, (Tex.Ct.App., No. 01-09-00991-CV, 5/19/11), 37 FLR 1368.

2. <u>Satisfaction of Judgment</u> -

   a. A statutory 20-year limitations period on the enforcement of judgments bars an attempt to collect child support arrears under a couple's 1966 divorce decree, the Virginia Supreme Court held. The mother had argued that child support should be treated differently from other debts. Reversing the trial court and the Court of Appeals, the high court held that once the child support becomes due and unpaid, it becomes a judgment like any other. Accordingly, § 8.01-251(A), which provides: "[n]o execution shall be issued and no action brought on a judgment, including a judgment in favor of the Commonwealth and a judgment rendered in another state or country, after 20 years from the date of such judgment or domestication of such judgment …." applies, and the state was therefore barred from collecting the unpaid arrears. *Adcock v. Va. Dep't of Social Services ex rel. Houchens*, 719 S.E.2d 304 (Va., No. 101316, 11/4/11), 38 FLR 1021.

   b. A trial court did not err in allowing a mother to collect on her judgment for unpaid child support in an action involving the deceased father's estate, despite the judgment having been rendered more than 20 years before her action was filed. The court ruled that IC § 34-11-2-12, which provides: "[e]very judgment and decree of any court of record of the United States, of Indiana, or of any other state shall be considered satisfied after the expiration of twenty (20) years," established only a rebuttable presumption that the judgment had been satisfied. In this case, the presumption was rebutted in the mother's claim of nonpayment and the estate's failure in alleging otherwise. *Estate of Wilson v. Steward*, 937 N.E.2d 826 (Ind.Ct.App. 2010).

3. <u>Laches</u> - The equitable doctrine of laches does not bar enforcement of a child support order, because the support obligation is continuous, the South Carolina Supreme Court decided. The court thus extended to the child support arena the reasoning of its 2007 ruling that laches is not a defense to a claim for enforcement of an alimony award. *Ables v. Gladden*, 664 S.E.2d 442 (S.C. 2008), 34 FLR 1413.

S. Surname of Child

1. Standards to Establish / Modify Child's Surname -

   a. The presumption that a nonmarital child should be given the surname of his or her custodial parent does not apply to children born to married parents who disagree after divorce as to whose surname the children should have, the New Jersey Superior Court, Appellate Division, decided. Addressing the issue for the first time, the court explained that since mothers are granted custody in a majority of divorce cases, application of the presumption would create a bias in favor of the maternal surname. Also noting that the parties before the court had agreed to joint legal custody, it said that they thus had a shared right to determine their children's surname. *Emma v. Evans*, — A.3d — (N.J. Super.Ct.App.Div., No. A-2303-10T3, 1/20/12), 38 FLR 1158.

   b. A trial court erred in changing the surname of a child from that of his mother (Brooks) to that of his father (Sullivan), the Tennessee Court of Appeals held. The trial court stated that at the mother's young age, she could be expected to marry, thus taking on a different name. Having children with different names is harmful to the children, the trial court said, adding that the child will know who is father is in time. Reversing, the appellate court pointed out that a parent's wish that a child's surname be changed is not sufficient to justify changing a child's name. Furthermore, the father did not establish that the name change was in the child's best interests. *Sullivan v. Brooks*, No. M2009-02510-COA-R3-JV (Tenn.Ct.App. 5/23/11), 37 FLR 1370.

   c. A trial court abused its discretion in granting a father's petition to change his son's surname to his own from that of the child's mother, Florida's First District Court of Appeal held. In a *per curiam* opinion, the appeals court said that Florida law does not support a trial court's ruling to change a child's surname based on testimony which does not demonstrate that the change is in the child's best interests. When granting such a petition, a parent's conclusory assertions are insufficient to demonstrate that the change is in the best interests of the child, and none of the facts presented supported that claim. A parent's desire for a child to carry on a family name has no bearing on whether the child's best interests would be served by a name change, the court explained, adding that nor does the argument that it is customary for a child to take his or her father's name. Finally, the court opined that the father's assertion that his son may experience ridicule in school if his name is not the same as his father's was purely speculative. It thus reversed the trial court's ruling. *Chamberlin v. Miller*, 47 So.3d 381 (Fl.Ct.App. 2010), 37 FLR 1058.

d. After adjudicating a man as the father of his former girlfriend's nonmarital child, a trial court did not err in granting his request to change the child's surname from that of the mother to his, the Mississippi Supreme Court ruled. In addressing this case of first impression, the court pointed to the "plain language" of the state Uniform Law on Paternity, which provides: "[i]n the event of court-determined paternity, the surname of the child shall be that of the father, unless the judgment specifies otherwise." Miss. Code Ann. § 93-9-9(1). Construing the statute to mean that a nonmarital child's surname shall be that of the father unless the mother proves by a preponderance of the evidence that it is in the child's best interest not to have the father's surname, the court rejected the argument of the child's mother that a best interest of the child analysis must be employed in any surname change case pursuant to *Marshall v. Marshall*, 93 So.2d 822 (Miss. 1957). Noting that the issue in *Marshall* was a name-change subsequent to divorce and not paternity, it asserted that an "on-the-record, best-interest determination before changing a child's surname to that of the court-determined father in paternity cases is not required pursuant to Section 93-9-9(1) and would serve only to impede the process of 'legitimization' of children born out of wedlock." *Rice v. Merkich*, 34 So.3d 555 (Miss. 2010), 36 FLR 1310.

e. "A child's last name, all things being equal, should match the last name of one or both of his or her parents," and thus an adjudicated father's request to change his nonmarital child's surname from a hyphenated combination of his and the mother's names to his alone should have been granted, because the custodial mother now uses her new husband's last name instead of her maiden name, the Iowa Court of Appeals held. *Cowan v. Lancaster*, 777 N.W.2d 129 (Iowa Ct.App. 2009), 36 FLR 1034 [pending final disposition on publication].

(1) Distinguishing the case of *Braunschweig v. Fahrenkrog*, 766 N.W.2d 648, (Iowa 2009), the court stressed that the instant case involved not a petition to change a child's existing name, but rather an initial name determination, because it was reviewing the paternity order that established the child's hyphenated surname (the trial court used the mother's maiden name even though she had married by the time of the paternity action).

(2) Guided by the factors listed in *Montgomery v. Wells*, 708 N.W.2d 704 (Iowa Ct.App. 2005), that are to be considered in determining a child's surname as part of a custody case, the court asserted that here, "considerations of convenience and avoidance of confusion" favored use of the father's surname alone over the hyphenated name, since the mother's former surname was no longer the last name of either parent. "There will be less questioning, inconvenience, and confusion down the road if [the child] simply has her father's last name, rather than a hybrid of her father's last name and a last name that neither parent uses," it explained.

Also taking note of the child's young age and the fact that there was no evidence of delay or bad faith, it ordered that the child be given the father's surname even though the mother has physical care of her.

f. An adjudicated father's petition to change his nonmarital child's surname from that of the custodial mother to his own should not have been granted, the Oklahoma Court of Civil Appeals, Division I, has decided. Pointing out that *James v. Hopmann*, 907 P.2d 1098 (Okla.Ct.App. 1995), makes clear that "neither parent is entitled to have the child bear his or her surname simply because the parent is fulfilling parental responsibilities," the court said that the name-change statute, 10 O.S. 2001 § 90.4(B), requires a court to find that giving a child his or her father's surname is in the child's best interests and to make findings as to each of the issues raised by the parties. More is needed than merely paying child support and attempting to see the child, as were the circumstances in this case. *In re M.J.T. (Golden v. Thompson)*, 189 P.3d 745, (Okla.Ct.App. 2008), 34 FLR 1405.

2. <u>Time in Which to Raise Issue</u> - When a man brings a successful action to establish his paternity of a nonmarital child and adjudicate his parental rights, "the time and place to contest the child's surname is when the new or amended birth certificate is created," the Iowa Supreme Court decided. Adding that "anything after that time is a name change" under Iowa Code § 674.6 rather than an initial name determination under § 598.41 and thus not governed by the best interest of the child standard, the court stressed that it was "expressing no opinion whether the result may be different where the paternity action is brought against the father and the father does not choose to petition for rights of custody and visitation." *Braunschweig v. Fahrenkrog (Frank)*, 773 N.W.2d 888 (Iowa 2009).

3. <u>Sufficiency of the Evidence / Application of Factors</u> -

   a. A trial court acted properly in deciding to grant a mother's petition to change the name of her two-year-old nonmarital child from that of the child's father to her own, the Arkansas court of appeals held. In affirming the trial court, the appellate court observed that the father had been sentenced to 25 years in prison for numerous felonies. "Therefore, we hold that it was not clearly erroneous for the circuit court to determine that this created a certain degree of disrespect associated with [his] name." the court said. In addition, the court noted, the evidence showed that the father currently had no presence in his daughter's life, and that was unlikely to change in the future. Moreover, although the mother knew he had a criminal history when the child was initially given the father's surname, this was irrelevant to the fact that the child would still suffer embarrassment in bearing the name of a father who was in prison. *Hadley v. Hamilton*, 2011 Ark. App. 614 (Ark.Ct.App. 2011) (not reported in S.W.3d), 37 FLR 1614.

b. A juvenile court did not err when, after adjudicating a man's paternity of a nonmarital child, it granted his name-change petition and changed the child's surname from that of the mother to a hyphenated name formed from both parents' surnames, the Tennessee Court of Appeals ruled. Saying that “the evidence does not preponderate against the Juvenile Court's finding that changing the child's surname is in the child's best interest,” the court explained that “pertinent to our analysis is the evidence of a strong bond between Father and Child. This bond, as well as the strength of both families as evidenced in the record, is effectively reflected through a hyphenated surname combining the family names. Though neither party in this case initially advocated a hyphenated surname, there is sufficient evidence in the record to support the Juvenile Court's finding that changing the child's surname is in her best interest.” *In re A.M.K.*, No. E2011-00292-COA-R3-JV (Tenn.Ct.App. 8/11/11), 37 FLR 1493.

c. A trial court did not abuse its discretion in granting a divorcing mother's petition to change the surname of her young son from the father's to a hyphenated name that includes her maiden name, where she intends to revert to using it after the divorce, the Minnesota Court of Appeals ruled. In so holding, the court rejected father’s arguments, including the complaint that a hyphenated name would not fit on sports uniforms, to which the court responded would be solved by using a smaller font. *Foster v. Foster*, 802 N.W.2d 755 (Minn.Ct. App. 2011), 37 FLR 1445.

d. A trial court properly denied a father's petition to have the last name of his nonmarital child hyphenated with his own, the South Carolina Court of Appeals held. Examining the factors laid out in *Mazzone v. Miles*, 532 S.E.2d 890 (S.C.Ct.App. 2000), the court observed that the child’s best interests are paramount. *Wilson v. McDonald*, 713 S.E.2d 306 (S.C.Ct App. 2011), 37 FLR 1382.

    (1) While recognizing that the father had filed his request when the child was an infant, the court said that his failure to support the mother during her pregnancy, his choice not to attend his daughter's birth, and his failure to take any action on his daughter's behalf until after he was served with a lawsuit all invited the difficulty he now faces in proving she would be better off with a different last name. The court conceded that the hyphenation arguably better preserves the child's relationship with each parent and identity with each family unit, but noted that the child “recognizes both family units already, despite bearing only her mother's last name.” The court emphasized that there was little evidence that bearing the mother's last name alone would be any less embarrassing than having a hyphenated last name, but found that in either event, the child has a name that is different from at least one of her parents. “Indeed, when parents create a situation like this, it is beyond the power of the court system in a name-change case to eradicate all of the stigma that might be associated with it.”

(2) In upholding the trial court's order, the appellate court added that it was unimpressed with the mother's argument that the hyphenated name would prevent monogramming (she had given the child a monogrammed purse and clothes). "We can envision no scenario in which a child's monogram would be important enough to influence a court's decision about which last name best promotes her interests," the court said.

e. A paternity court did not abuse its discretion in granting an adjudicated father's petition to change his 15-month-old son's surname from that of the custodial mother to his own, the Texas Court of Appeals, Fifth District, ruled. In finding that the court's decision was not arbitrary or unreasonable, the court cited the noncustodial father's explanation for the name change — that after talking to people in similar circumstances, he believed the child would feel more connected to him if they had the same last name, particularly since he would not be the "main parent." Also noting that the father was actively involved in the child's life and planned to remain involved, it determined that this evidence supported the court's finding of good cause. *In re S.C.S.*, No. 05-09-00832-CV (Tex.Ct.App. 8/6/10) (not reported in S.W.3d), 36 FLR 1481, *reh'g overruled*, *review denied*.

f. A paternity court did not err when, after adjudicating a father's parentage, it provided that the nonmarital subject child's last name be changed from the mother's surname to a hyphenated name, with the father's surname added after hers, the Tennessee Court of Appeals held. Affirming the judge below, the appellate court said that the evidence did not preponderate against finding that the name-change was in the infant child's best interest. Noting that the child was too young to have a preference regarding his last name, it asserted that the name-change would affirm the child's bond with the father. Also focusing on the father's concern that the mother might marry and adopt her husband's surname, thus leaving their child with neither parent's last name, it observed that the appellate court had previously held that such a concern constituted sufficient proof that it was in a child's best interest to be given the father's surname. *Conner v. King*, No. W2009-00511-COA-R3-JV (Tenn.Ct.App. 11/18/09), 36 FLR 1046.

g. A trial court did not abuse its discretion in granting a mother's petition to change her nonmarital child's first, middle, and last names from that of his father to the names her family calls him by, the Ohio Court of Appeals, Seventh District, ruled. Upholding the name change, the court found that the "child has not had a relationship with [the father] for at least half of his short life. The child resides with his mother and maternal grandparents who all share the last name Roberts. He is the only one in his home with a different name. While the child has used the name Mahmood for his entire life, he is only two years old so the duration of time is not very long. And finally, [the father] has been delinquent in his child support on more than one occasion, has eliminated the child from his health care, and has not made any meaningful effort to visit the child. These factors all support the trial court's decision to grant the name change." *In re Roberts*, No. 08-CA-854 (Ohio Ct.App. 03/03/09), 35 FLR 1226.

h. A trial court did not err in denying a mother's petition to change her nonmarital child's surname from her maiden name to that of her husband, the Nebraska Supreme Court held. When the child was born the father agreed that the child should be given the custodial mother's surname. After she married and started using her husband's surname, the mother petitioned to change the then five-year-old child's name. The father objected, saying he was concerned that the mother was attempting to substitute her husband as the child's father (he had already rejected her request that the husband be allowed to adopt the child). The mother explained that she wanted the name-change so that the child and her marital children would share the same family name, and so he would not be embarrassed at school by having a surname that was not the same as either of his biological parents' names. She also noted that he had begun using the husband's surname at school. In denying the mother's petition, the trial court found that the evidence at trial did not support the mother's concerns that the child would suffer difficulty if he retained her former name and otherwise failed to show that the name-change was in the child's best interests. *In re Slingsby (Slingsby v. Oxford)*, 752 N.W.2d 564 (Neb. 2008), 34 FLR 1430.

T. UIFSA

1. Jurisdiction to Establish Paternity -

a. A New York family court has jurisdiction to hear a Canadian mother's Uniform Interstate Family Support Act petition seeking a parentage declaration and child support from her former same-sex partner, the New York Court of Appeals ruled. The court explained that the "Family Court indisputably has jurisdiction to determine whether an individual parent — regardless of gender — is responsible for the support of a child. Thus, because Family Court unquestionably has the subject matter jurisdiction to ascertain the support obligations of a female parent, Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent." *H.M. v. E.T.*, 930 N.E.2d 206 (N.Y. 2010), 36 FLR 1309.

b. A trial court erred in dismissing a Guatemala resident's paternity suit against the man she claims is the father of her child, Florida's Third District Court of Appeal ruled. The trial court erroneously confused custody jurisdiction under the UCCJA (the man had filed a separate action in Guatemala with regard to custody and support) with the laws governing child support under UIFSA. *Nissen v. Cortez Moreno*, 10 So.3d 1110 (Fla.Dist.Ct.App. 2009), 35 FLR 1286, *reh'g denied*.

2. <u>Jurisdiction to Establish Support</u> -

   a. A trial court considering an unmarried mother's petition to establish her daughter's nonresident father's support obligation properly concluded that it lacked personal jurisdiction over him, because although he acknowledged his paternity of the Virginia-born child, she had been conceived in France, the Virginia Court of Appeals ruled. Focusing on the long-arm statute relating to child support, which provides for jurisdiction over a nonresident who “conceived or fathered a child in this Commonwealth,” the appellate court explained that, by its plain terms, the statute “does not reach those who may have conceived a child elsewhere.” *Bergaust v. Flaherty*, 703 S.E.2d 248 (Va.Ct.App. 2011), 37 FLR 1123.

   b. A wife's claims of abuse by her husband at their marital home in Missouri, and of his failure to provide her with financial assistance, coupled with his alleged agreement and conduct regarding her move to her parents' Oklahoma home with their child due to her indigency, may be used to establish personal jurisdiction over him in her Oklahoma divorce/support action, the Oklahoma Supreme Court has ruled. Stressing that the abuse alone was insufficient to bestow such jurisdiction, the court looked to the Uniform Interstate Family Support Act in finding that the husband's overall conduct in causing the wife to flee to Oklahoma from Missouri constituted “acts or directives” establishing the necessary contact with the state for jurisdictional purposes. *Powers v. Tulsa County District Court*, 227 P.3d 1060 (Okla. 2009), 36 FLR 1172 (as corrected Dec. 29, 2009).

   c. A California trial court erred in concluding that it lacked jurisdiction to award child support for a child on the ground that the child's home state is Japan, the California Court of Appeal, Second Appellate District, held. The court observed that although UIFSA defines “state” to include a foreign jurisdiction that has enacted a law with procedures similar to UIFSA, “[w]e need not analyze whether Japan is a ‘state' as there is nothing in the record indicating a Japanese support order was made.” Since there was no foreign proceeding addressing the issue of support, “UIFSA does not limit the trial court's support jurisdiction.” *In re Richardson*, 102 Cal.Rptr.3d 391 (Cal.Ct.App. 2009), 36 FLR 1070.

   d. A trial court considering a Georgia resident's petition under the Uniform Interstate Family Support Act for the establishment of a support order against her husband, who lives in Ohio, properly dismissed his counterclaim for divorce in that action, the Ohio Court of Appeals, Eighth District, ruled. In so doing, the trial court had found that it lacked subject-matter jurisdiction, within the confines of a support action under UIFSA, over an action for divorce. The court observed that UIFSA only grants limited personal jurisdiction over a nonresident parent to determine issues of child and spousal support and custody, not divorce or marital property. Nothing barred the husband from filing a separate action for divorce in a court of competent jurisdiction, the court added. *Slaughter v. Slaughter*, No. 93227 (Oh.Ct.App. 11/19/09) 36 FLR 1046.

e. A German court from which a mother obtained a support order against her estranged American husband did not have personal jurisdiction over him, and thus the order should not have been registered by an Illinois court for enforcement pursuant to the Uniform Interstate Family Support Act, the Illinois Appellate Court, Third District, ruled. In rejecting the state support agency's reliance on *Willmer v. Willmer*, 51 Cal. Rptr. 3d 10 (Cal. Ct. App. 2006) (holding that reciprocity required registration of a default German support order), the court pointed out that here the father was not a German citizen, he had married the German mother in Denmark and lived with her in Germany for only nine months (while in the U.S. Army), their child was conceived and born in the United States, and the family had been living in the U.S. for two years when the mother took the child to Germany for a visit and unilaterally decided to remain there with him. *Department of Healthcare and Family Services ex rel. Heard v. Heard*, 916 N.E.2d 61 (Ill.Ct.App. 2009), 35 FLR 1537.

3. Jurisdiction to Enforce Support Order -

a. A divorce court that entered a child support order in 2007 abused its discretion in later refusing to enforce it on the ground that it had been registered in the child's new home state after the parties relocated, the Rhode Island Supreme Court held. Construing the Uniform Interstate Family Support Act for the first time, the supreme court drew a distinction between an issuing court's lack of modification jurisdiction in this situation and its "permissive" enforcement jurisdiction. Stressing that enforcement was not "required," it remanded for the trial court's reconsideration. *Sidell v. Sidell*, 18 A.3d 499 (R.I. 2011), 37 FLR 1291.

b. A Texas support order that has become unenforceable in that state may not be registered and then enforced in Oklahoma, the Oklahoma Supreme Court ruled. The court observed that UIFSA's choice of law clause directs Oklahoma to apply the law of the issuing state as to the "nature, extent, amount, and duration of payments under a support order." Explaining that a "judgment valid in the issuing state is required for the courts of this state to recognize and register the order of child support," the court reiterated that UIFSA "requires the courts of this state to apply the law of the state issuing the controlling order, in this case Texas." Finding that under Texas law the judgment "became dormant and incapable of being revived on April 24, 2005, twelve years after the child became eighteen years of age," it held that the "trial court was correct in disallowing the registration of the foreign support order as it was no longer a valid judgment." *Thornton v. Thornton*, 247 P.3d 1180 (Okla. 2011), 37 FLR 1165.

c. There is no "one-state, one-order" rule under the Uniform Interstate Family Support Act that bars registration of a Texas support order for enforcement in Tennessee after it was registered for enforcement elsewhere, the Tennessee Court of Appeals held. *State ex rel. Kentucky v. Farmer*, No. W2009-01503-COA-R3-CV (Tenn.Ct.App. 9/8/10), 36 FLR 1534, *reh'g denied*. Said the court:

> Nothing in the UIFSA prevents a valid order from being registered in several other states at the same time. Indeed, the comments to the UIFSA indicate that the original order may be 'registered and enforced in additional states even after the issuing State has lost its power to modify its order ….' T.C.A. § 36-5-2205 cmts. They further explain: 'The basic principle of the Act [UIFSA] is that throughout the process the controlling order remains the order of the issuing State, and that responding States only assist in the enforcement of that order.' T.C.A. § 36-5-2604 cmts. Thus, if [the father] … moves frequently from state to state, Kentucky may seek to register the valid Texas order in any and all of the states in which Father resides and whose courts may exercise personal jurisdiction over him. This does not mean that Father is subject to several different orders; rather, he is subject to the single Texas order, enforced by any sister state to which he moves. Thus, the foreign support order remains valid in the issuing state and also in 'those States in which the order has been registered.' See T.C.A. § 36-5-2205 cmts. Consequently, we must reject Father's argument that there is a 'one-state one-order' rule which prevents valid registration of the Texas child support order in Tennessee.

d. The Uniform Interstate Family Support Act applies only to child or spousal support and thus a UIFSA income withholding order cannot be used to enforce a judgment based on a divorce court's property division, the Kentucky Supreme Court held. The court explained that monies owed by one former spouse to another for an interest in marital property or for payment of marital debt may not be deemed "support" under the Act. *Lichtenstein v. Barbanel*, 322 S.W.3d 27 (Ky. 2010), 1327.

e. A Nebraska trial court that registered a woman's California alimony and child support orders pursuant to the Uniform Interstate Family Support Act had personal jurisdiction over her Washington-resident ex-husband, because he had filed a request for affirmative relief before asserting that the court lacked jurisdiction over him, the Nebraska Court of Appeals held. It also ruled that the obligor was precluded from later raising an estoppel argument to contest the previously confirmed support orders. *Trogdon v. Trogdon*, 780 N.W.2d 45 (Neb.Ct.App. 2010), 36 FLR 1214.

4. Jurisdiction to Modify Support -

   a. A Nevada trial court that issued a child support order providing that the obligor's payments would be recalculated yearly exceeded its jurisdiction when, after the parties and their children had relocated to another state, it granted the mother's motion to set the support obligation as a sum certain, the Nevada Supreme Court ruled. Addressing an issue of first impression, the supreme court explained that the matter was governed by the Uniform Interstate Family Support Act, which allows an issuing court to clarify — but not modify — its original order (if it is still controlling) once the parties and children have moved out-of-state. Since it was possible under the original order here for the father's payments to change yearly, the establishment of support at a fixed amount was an improper modification of such order, it said. *Vaile v. Porsboll (Vaile)*, — P.3d — (Nev., No. 53687, 1/26/12), 38 FLR 1156.

   b. A Montana trial court erred in refusing to exercise jurisdiction over a resident father's motion to modify his ex-wife's child support obligation regarding their son, who lived with the father, the Montana Supreme Court held. The case involved a split custody arrangement with the mother residing in Arizona (which had assumed custody jurisdiction over the daughter, although she did not reside there) and the father in Montana with the son following a Mississippi custody order. Only Montana had issued a child support order, however, and thus it retained continuing exclusive jurisdiction to modify the child support order. The trial court erred, therefore in refusing to modify the support order and in failing to reduce the mother's arrearage to judgment. The case was remanded for the trial court to correct its mistakes. *Ervin v. Ervin (Estopare)*, 265 P.3d 1272 (Mont. 2011), 38 FLR 1094.

   c. A family court properly found that it lacked jurisdiction to vacate its 2009 custody award to a divorced father so as to relieve his ex-wife of her child support obligation to him after a Louisiana court had modified the order to award her custody, the Hawaii Intermediate Court of Appeals decided. *Beam (Stefanik) v. Beam*, 266 P.3d 466 (Haw.Ct.App. 2011), 38 FLR 1069.

      (1) An October 13, 2009 Hawaii order granted the father sole physical custody and terminated his previous child support order. By the time that order was entered, the father and children had moved to Louisiana. Mother subsequently moved to Alabama. On December 12, 2010, the parents by mutual consent submitted to Louisiana's jurisdiction. The Louisiana court entered a consent judgment modifying the 2009 Hawaii order so as to award the mother physical custody. It also stated that it would retain exclusive jurisdiction over custody and child support as long as one party resided in Louisiana. The mother then returned to the Hawaii court and asked it to vacate the Oct. 13 order on the ground that the Louisiana consent judgment rendered the order "void" and "erroneous." She

contended that, as such, she should not be required to pay child support due for the period from Oct. 13, 2009 until the return of the children to her on Dec. 12, 2010. Holding that it lacked jurisdiction, the court advised the mother to look to the Louisiana court for relief.

(2) The appellate court affirmed, saying that when the parties initiated the Louisiana action to modify the Oct. 13 order as to custody, they consented to that state's assertion of jurisdiction; the family court then lost its exclusive continuing jurisdiction and thus had no authority to modify or vacate its Oct. 13 order.

d. The court in which a mother petitioned for modification of her registered Florida child support order properly determined that although it could exercise personal jurisdiction over the nonresident father, the petition must be dismissed because it did not have subject-matter jurisdiction, the Kentucky Court of Appeals decided. *Roberts v. Bedard*, — S.W.3d — (Ky.Ct.App., No. 2011-CA-00212-ME. 9/16/11), 37 FLR 1565.

(1) The mother had registered the order in 2008 after moving to Kentucky with the nonmarital child, but her subsequent motion to modify it was dismissed for lack of jurisdiction over the father. She filed a new motion in 2010, and the father was personally served while visiting the child. Nevertheless, the trial court dismissed the motion in light of the Uniform Interstate Family Support Act's requirement that for Kentucky to have subject-matter jurisdiction over a modification action, the party seeking to modify the foreign order may not be a state resident (Ky. Rev. Stat. § 407.5611). It also rejected the mother's argument that the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B, preempts the UIFSA's subject-matter jurisdiction requirements.

(2) Affirming, the appellate court agreed that because the mother resided in Kentucky, § 407.5611 was not satisfied, and that the fact the father was personally served in the state was thus “irrelevant.” Further noting that for purposes of the FFCCSOA, registration of the Florida order in 2008 would have only been effective if Kentucky had personal jurisdiction over the father at that time (which it did not), it pointed out the trial court thus lacked subject-matter jurisdiction under both the state and federal statutes. In also agreeing with the lower court that the FFCCSOA did not preempt the UIFSA, the court determined there was “no real distinction between them,” and noted that other jurisdictions have likewise held that the two acts are complementary, not contradictory. (*See Trissler v. Trissler*, 987 So.2d 209 (Fla.Dist.Ct. 2008); *Witowski v. Roosevelt*, 199 P.3d 1072 (Wyo. 2009); *Basileh v. Alghusain*, 912 N.E.2d 814 (Ind. 2009); *LeTellier v. LeTellier*, 40 S.W.3d 490 (Tenn. 2001).)

e. A trial court that issued a child support order in connection with a couple's divorce should not have later modified it, because the relocation by the parties and their children to another state resulted in the court losing continuing jurisdiction over the order, the Tennessee Court of Appeals held. In rebuffing the mother's reliance on a recent amendment to the state's version of the Uniform Interstate Family Support Act providing that parties may consent to continuing subject matter jurisdiction "if the parties consent in a record or in open court that the tribunal of this state may continue to exercise jurisdiction to modify the order," the court pointed out that no such consent was affirmatively given in this case. *Earls v. Mendoza*, No. W2010-01878-COA-R3-CV (Tenn.Ct.App. 8/10/11), 37 FLR 1489.

f. Court-ordered transportation costs associated with a child's visitation-related travel constitute a form of child support, the Alabama Court of Civil Appeals decided. Holding that a custodial mother's petition to modify her obligation to pay a portion of her child's travel expenses under a Tennessee order that (among other things) outlined the father's visitation rights, is governed by the Uniform Interstate Family Support Act, the court said that her failure to properly register the order under UIFSA meant that the Alabama court lacked subject-matter jurisdiction over the petition. *R.J.R. v. C.J.S.*, 72 So.3d 643 (Ala.Civ.App. 2011), 37 FLR 1332.

g. A Missouri trial court had jurisdiction to modify a registered Texas child support order even though the petitioning parent was a Missouri resident, the Missouri Court of Appeals decided. The court acknowledged that UIFSA provides that a responding tribunal may modify a registered foreign order "only if the petitioner is a nonresident of this state." It also recognized that Missouri courts have previously held that a trial court's subject-matter jurisdiction over a foreign support order is set forth in the UIFSA. However, the court explained, "we find that the cases analyzing the UIFSA in terms of 'subject matter jurisdiction' are no longer valid in light of our Supreme Court's recent holding in *J.C.W. (Webb) v. Wyciskalla*," 275 S.W.3d 249 (Mo. 2009), which "recognized only two types of jurisdiction — personal and subject matter, both of which are based on constitutional principles. The subject matter jurisdiction of Missouri Courts is set forth in Article V, section 14 [of the state constitution], which provides that 'the circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal'." (emphasis added) Guided by the supreme court's application of *Wyciskalla* in *Hightower v. Meyers*, 304 S.W.3d 727 (Mo. 2010) (state constitution, not UCCJA, controls subject-matter jurisdiction in custody cases), the court said that "as in *Hightower*, we find that the instant case is a civil case and therefore, under *Wyciskalla*, the trial court had subject matter jurisdiction." *Ware v. Ware*, 337 S.W.3d 723 (Mo.Ct.App. 2011), 37 FLR 1240.

h. A custodial mother's failure to register her New York child support judgment in Texas before asking a court there to enforce and modify it did not deprive the court of subject-matter jurisdiction to take such actions, the Texas Court of Appeals decided. Addressing the issue for the first time, the appellate court determined that where the parties, knowing that the mother and the children would reside in Texas, had agreed in the New York proceeding that "all future questions" would be referred to a Texas court, the registration prerequisite of the Uniform Interstate Family Support Act was a procedural — not jurisdictional — requirement. *Kendall v. Kendall*, 340 S.W.3d 483 (Tex.Ct.App. 2011), 37 FLR 1223.

i. A trial court erred in modifying its earlier support order where the parties and their child have relocated, even though the obligor does not know the mother's whereabouts, the Arizona Court of Appeals held. Citing its court's analysis of the Uniform Interstate Family Support Act's jurisdictional provision in *McHale v. McHale*, 109 P.3d 89 (Ariz.Ct.App. 2005), the court asserted that although it was the issuing tribunal, the trial court no longer shared a nexus with the parties and thus "lacked jurisdiction to modify the child support award as neither party currently resides in Arizona and Mother refuses to consent to jurisdiction in Arizona." Noting the father's argument below that he was unable to file his petition in the proper jurisdiction because, as a result of her protected address, he did not know where the mother currently resided, the court found that the state and/or the court clerk had been in contact with the mother and either knew where she resided or could easily ascertain such information and, therefore, could readily determine which tribunal currently has jurisdiction. It directed the trial court to forward the father's petition to the appropriate tribunal or support enforcement agency as provided in UIFSA. "Through this statutorily created mechanism, [he] will not be left without recourse and will be able to have the proper tribunal consider his petition," the court explained. *State ex rel. Department of Economic Security v. Tazioli*, 246 P.3d 944 (Ariz.Ct.App. 2011), 37 FLR 1116.

j. A Minnesota child support magistrate erred in dismissing a mother's motion for modification of her ex-husband's obligation under their Minnesota support order after finding that neither the parties nor their children currently resided in the state, the Minnesota Court of Appeals decided. *Wareham v. Wareham*, 791 N.W.2d 562 (Minn.Ct.App. 2010), 37 FLR 1080.

(1) The mother and children moved to Kentucky after the parties' 1998 divorce; the father is a servicemember stationed overseas, with a residence in Washington. In dismissing the mother's request for increased support, the magistrate concluded that under the Uniform Interstate Family Support Act, Minnesota no longer had continuing, exclusive jurisdiction because the parties and children had relocated.

(2) Reversing, the appellate court noted that Minnesota has adopted the 1996 version of the UIFSA, which provides that an issuing state retains continuing, exclusive

jurisdiction over a support order: (1) as long as the state remains the residence of the obligor, the obligee, or the subject child, "or (2) until all of the parties … have filed written consents" in the Minnesota court for a different state to modify the order and assume continuing, exclusive jurisdiction. (Minn. Stat. § 518C.205(a).) Explaining that the statute sets forth two "distinct" circumstances under which a Minnesota issuing court retains jurisdiction, it said that because the parties had not filed written consents, subsection (2) applied and Minnesota thus retained jurisdiction.

(3) Recognizing that other states interpreting § 205 of the 1996 uniform act have reached a contrary result, the court determined that they relied, in part, on the official comment to § 205, which provides that if the parties and their child have left the issuing state, it no longer has an appropriate nexus with them to justify the exercise of modification jurisdiction. Also acknowledging the policy considerations expressed in the comment, the court said, however, that the comment contradicts the plain language of § 518C.205(a). Further noting that the 1996 comment does not reflect the current rendering of § 205, because that section was changed in the 2001 version of the Act, it additionally found that the children here still receive IV-D services from Minnesota, and that the state thus maintains a pecuniary interest in their welfare. The court concluded therefore that it was reasonable for Minnesota to maintain jurisdiction to modify the support order.

k. An Illinois trial court erred in modifying a 2007 Texas child support order where the noncustodial father remained a Texas resident, notwithstanding that the custodial mother had served him with process on her Illinois modification petition while he was in Illinois visiting with the child, the Illinois Appellate Court, First District, ruled. *Vailas v. Vailas*, 939 N.E.2d 565 (Ill.Ct.App. 2010), 37 FLR 1053.

(1) The mother argued that because the father had been personally served while in Illinois, the rules governing jurisdiction under § 611 of UIFSA did not apply, and thus Illinois had jurisdiction to modify the Texas child support order. The mother cited *Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), in support. *Burnham* held that where a nonresident defendant is personally served in the forum state, minimum contacts with that forum need not be shown. The trial court agreed with the mother and the father appealed.

(2) The appellate court reversed. *Burnham*, the court said, in no way obviated the necessity of following UIFSA's personal and subject matter jurisdictional rules in modifying another state's child support order. Indeed, UIFSA's drafters were well aware of the reach of *Burnham* when drafting the model act. However, the

court said, "the drafters specifically elected to limit personal and subject matter jurisdiction in modification cases to something less than what is allowed under the due process clause." In support of it's well-crafted decision, the court relied on the Comments to the 2001 Model Act as persuasive authority.

l. A North Carolina court erred when, after recognizing that a divorced father owed 10 months of child support under a Michigan order, it required him to pay arrears only for the six-month period starting after the registration of the order was confirmed in North Carolina, that state's Court of Appeals held. Agreeing with the state child support enforcement agency that the lower court impermissibly modified the father's support obligation retroactively, the court explained that under the Uniform Interstate Family Support Act, if the law of the issuing state provides that past-due support amounts are vested, the registering state is required to give full faith and credit to the order and enforce the past-due obligation. *State ex rel. Benford v. Bryant*, 701 S.E.2d 387 (N.C.Ct.App. 2010), 37 FLR 1045.

m. A Florida trial court erred in transferring a divorced couple's dissolution case to Tennessee after the former spouses relocated there and the husband asked a Tennessee court to modify his alimony obligation as set out in the registered 1998 Florida divorce decree, Florida's Third District Court of Appeal ruled in a *per curiam* opinion. The court explained that "[d]espite the obvious logic of allowing the two former spouses now living in Tennessee to resolve their dispute there, we must reverse" because under the Uniform Interstate Family Support Act, the Florida trial court has "continuing exclusive jurisdiction over a spousal support order throughout the existence of the support obligation." Although Tennessee had jurisdiction to enforce the spousal support order, only Florida had authority to modify it under UIFSA. In a footnote, the court observed that "one commentator has concluded that UIFSA 'contains possibly the most cumbersome, redundancy filled, unscholarly, confusing and poorly written set of civil remedies imaginable.' Henry P. Trawick, Jr., Trawick's Florida Practice & Procedure 501 (2006 ed.)." *Sootin v. Sootin*, 41 So.3d 993 (Fla.Ct.App. 2010), 36 FLR 1469.

n. A trial court erred in denying the Texas Office of Attorney General's motion to confirm arrears owed by a Louisiana father under a 1992 Texas child support order, the Texas Court of Appeals, 14th District, ruled. *In re T.L.*, 316 S.W.3d 78 (Tex.Ct.App. 2010), 36 FLR 1380.

   (1) The father had moved to Louisiana after his Texas divorce, and in 1998 the support order was registered there for enforcement. The Louisiana court recognized the order, confirmed the outstanding arrears owed under it, and ordered the father to pay his continuing support obligation as well as a monthly amount toward the arrearage. The mother then asked the OAG to stop its

collection services and to close the support case. The OAG forwarded the request to the Louisiana court, which in 1999 issued an order suspending the father's support obligation and cancelling his $23,399 arrearage. In 2007, the OAG sought to enforce the 1992 order by filing a motion in the court below to confirm arrears. In denying that motion, the trial court concluded that Louisiana, exercising its exclusive jurisdiction, had cancelled all support owed under that order.

(2) Reversing, the appellate court explained that Louisiana was authorized to modify the support order only if Texas had lost its continuing exclusive jurisdiction over it. Applying the Uniform Interstate Family Support Act, it determined that Texas retained such jurisdiction because: (1) the mother and child still live in Texas and (2) the parties did not file a written consent to the Louisiana court's assumption of jurisdiction to modify the order. Thus, the Louisiana court could only the enforce the Texas order and lacked subject-matter jurisdiction to modify it. Therefore, the court concluded, the 1999 Louisiana order was void and could not be used as a basis for finding that the father's support obligation had been "terminated" and that he owed no arrears.

o. Although a divorced noncustodial mother may be domiciled in Arkansas, the fact that she was residing in Tennessee — where her child and ex-husband live — when the ex-husband petitioned a Tennessee court for modification of the custody and child support provisions of their Arkansas divorce decree means that Arkansas no longer had exclusive continuing jurisdiction over those issues, the Tennessee Court of Appeals decided. The court explained that under both the Uniform Interstate Family Support Act and the Uniform Child Custody Jurisdiction and Enforcement Act, Tennessee may obtain jurisdiction over a foreign order when neither the parents nor the child reside in the issuing state. In so holding, the court drew a distinction between jurisdiction to modify custody and visitation and jurisdiction over the support issues. Noting the UCCJA and UIFSA both speak in terms of "residence" as a jurisdictional concept rather than "domicile," the court opined that under the facts of this case, Tennessee had jurisdiction to modify both visitation and child support. *Highfill v. Moody*, No. W2009-01715-COA-R3-CV (Tenn.Ct.App. 5/25/10), 36 FLR 1340.

p. North Carolina lacked subject matter jurisdiction to modify, upon the father's request, a New York child support order where after the parties' New York divorce, the mother moved to Florida and the father to North Carolina, the North Carolina Court of Appeals held. In finding that the trial court lacked modification jurisdiction, the court looked to the Uniform Interstate Family Support Act and the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B. Stressing that together, these two statutes have severely limited the circumstances in which a state may modify a child support order issued by another state, it pointed out that the mother had registered the order for enforcement only, that North Carolina did not have personal jurisdiction over her, and that the parties did not consent to North Carolina's jurisdiction for modification purposes. Accordingly, the North Carolina court had no authority to reduce the father's child support arrearage when one of the parties' children came to live with them. *Lacarrubba v. Lacarrubba*, 688 S.E.2d 769 (N.C.Ct.App. 2010), 36 FLR 1188.

q. An Indiana trial court erred in finding that an Illinois modification of the parties' Indiana child support order was void and therefore a nullity, where the parties subsequently notified the Indiana court that it was transferring modification jurisdiction to Illinois. The trial court did not err, however, in finding that since Illinois had modified the Indiana order and the noncustodial father continued to reside there, Illinois had continuing exclusive jurisdiction. Absent compliance with the procedural and jurisdictional requirements of IC § 31-18-6-2 and IC § 31-18-6-11, Indiana lacked authority to modify the Illinois order. *Lombardi v. Van Deusen*, 938 N.E.2d 219 (Ind.Ct.App. 2010).

(1) The Court of Appeals acknowledged that Illinois had modified Indiana's child support order *before* the parties filed their agreed entry transferring modification jurisdiction to Illinois. Under such circumstances, the court said, such a modification is ordinarily void, since UIFSA requires that where one party remains in the issuing state, another state may only obtain modification jurisdiction upon both parties filing written consent to transfer continuing exclusive jurisdiction elsewhere.

(2) However, the court added, the parties subsequent agreed order repaired the "collective oversight" of first filing the appropriate consent before Illinois could modify the order. In support of its holding, the Court observed that the first Illinois modification order memorialized the parties' then-existing private agreement. "Although the first modification order was voidable, the February 2003 modification was proper and the sequence of events does not alter that conclusion," the court said. Given that Illinois had properly assumed modification jurisdiction, it added, Indiana was powerless to retroactively modify the Illinois order.

r. A Tennessee trial court "clearly erred" in finding that it had subject-matter jurisdiction to modify a support order entered by a Texas court pursuant to a petition initiated by a Tennessee mother under the Uniform Interstate Family Support Act, the Tennessee Court of Appeals ruled. After Texas issued the order pursuant to the mother's request under UIFSA, she sought to modify that order in Tennessee. The trial court found that Tennessee had jurisdiction over all issues in controversy.

Reversing, the appellate court observed that because the father remained in Texas, that state still retained continuing jurisdiction to modify the order, noting that neither party had filed written consents in Texas allowing Tennessee to modify the order. *Goins v. Gay*, No. E2009-00272-COA-R3-CV (Tenn.Ct.App. 1/21/10), 36 FLR 1153.

s. A Mississippi court lacked subject-matter jurisdiction to consider a state resident's petition to modify her registered New Hampshire support order under UIFSA, the Mississippi Court of Appeals ruled. Finding that the custodial mother was seeking to modify the support provisions under which her ex-husband, a California resident, was obligated to pay their child's health insurance premiums and other health costs, the court pointed out that UIFSA requires that the party petitioning for modification must be a nonresident of Mississippi. Because the mother is a Mississippi resident, the Act's requirements for modification have not been met, it said. The court added that the UIFSA provision under which Mississippi would be allowed to assume continuing exclusive jurisdiction and modify the order if both parties filed consents in the issuing state did not apply here, because the father has challenged Mississippi's jurisdiction and has never filed such a consent. *Patterson v. Patterson*, 20 So.3d 65 (Miss.Ct.App. 2009), 35 FLR 1585.

t. A Tennessee court lacked subject-matter jurisdiction to modify the support provisions of a registered Alabama order under which an Alabama resident was granted custody of his nonmarital child and the mother (who resided in Tennessee) was ordered to pay child support, the Tennessee Court of Appeals ruled. The court pointed out that UIFSA clearly provides that a court may modify another state's registered order only if the parents or the child no longer reside in the issuing state and the petitioner is a nonresident of the state in which modification is sought. Acknowledging that the Act permits the registering state to modify an order if the parties have filed a written consent in the issuing state to the registering state's assumption of jurisdiction, it noted that no such consent was filed here. *Young v. Godfrey*, No. M2007-02308-COA-R3-CV (Tenn.Ct.App. 12/19/08) (not reported in S.W.3d), 35 FLR 1104.

u. A Georgia trial court erred in registering and modifying an Alabama child support order where, although the servicemember obligor is assigned to a base in Georgia and has an apartment nearby, he is still domiciled in Alabama, the Georgia Court of Appeals decided. The trial court correctly observed that, at least as regards servicemembers, UIFSA's use of the term "residence" actually means "domicile." *See e.g.*, *In re Amezquita & Archuleta*, 124 Cal. Rptr. 2d 887 (Cal.Ct.App. 2002). The trial court erred, however, in determining that the servicemember had changed his domicile from Alabama to Georgia under the facts of the case (he had obtained an Georgia apartment for a short time to care for his father after his mother died, but all other connections were in Alabama). *Kean v. Marshall*, 669 S.E.2d 463 (Ga.Ct.App. 2008), 35 FLR 1032.

v. A trial court did not impermissibly "modify" a $340 weekly Florida child support when, in enforcing that order against a noncustodial father who had moved to Indiana, it required him to pay only $150 per week to avoid contempt, the Indiana Supreme Court ruled. The high court observed that Indiana's requirement that the father pay $150 per week in no way suspended his underlying obligation pursuant to the Florida decree. Hence, the court said, "the trial court's contempt orders [requiring less than full payment than required by the Florida order] did not modify the Florida support judgment in violation of UIFSA or FFCCSOA, and are consistent with the requirements of the Full Faith and Credit Clause [of the federal Constitution]." *Hamilton v. Hamilton*, 914 N.E.2d 747 (Ind. 2009).

w. Although a Kentucky court had authority to enforce a registered Georgia support order, it lacked subject-matter jurisdiction to modify the order, where although the mother and children had moved to Kentucky, the father remained a resident of Georgia, the Kentucky Court of Appeals decided. The court found pursuant to UIFSA, if the obligor or obligee remains a resident of the issuing state and no written consent is filed by the parties for another court to modify the order and assume jurisdiction as required by the statute, that state retains continuing, exclusive jurisdiction to modify its child support decree. The court acknowledged that this may create the difficulty of one state having jurisdiction over custody issues and another over the amount of support. Any remedy, however, must come from the legislature. *Koerner v. Koerner*, 270 S.W.3d 413 (Ky.Ct.App. 2008), 34 FLR 1585.

x. A Minnesota court did not err in finding that it lacked subject-matter jurisdiction to modify a Colorado child support order, even though the Colorado court had stated an intent to transfer jurisdiction to it, the Minnesota Court of Appeals ruled. *In re S.R.S.*, 756 N.W.2d 123 (Minn.Ct.App. 2008), 34 FLR 1548, *review denied*.

   (1) Following the subject nonmarital child's birth in Colorado, a court there had awarded sole custody to the mother and ordered the father to pay child support. After the mother and child moved to Minnesota, the father asked the Colorado court to modify his visitation rights. The court found that Colorado was an inconvenient forum, and, without objection from the father, transferred "jurisdiction of this case" to Minnesota in 2005. In 2006, the Minnesota social services agency to which the mother had assigned her support rights petitioned the Minnesota court on her behalf to modify the Colorado support order. In response to the father's claim that Colorado had only transferred custody jurisdiction to Minnesota in 2005, the Colorado court issued an order stating that its intent had been to transfer jurisdiction of the entire case. The Minnesota trial

court ruled, however, that it did not have authority under the Uniform Interstate Family Support Act to modify support, because all the parties did not live in Minnesota and the support order had not been registered in the state.

(2) Affirming, the appellate court agreed that "none of the circumstances identified in the UIFSA that would give Minnesota courts subject matter jurisdiction to modify the Colorado child-support order are present here … (1) all of the parties do not reside in Minnesota, (2) the Colorado order was not registered in Minnesota, (3) appellant-petitioner is a Minnesota resident, and (4) no written consent [of the parties] was filed with the Colorado court allowing Minnesota to modify the support order."

(3) The court rejected the appellant's claim that the U.S. Constitution's Full Faith and Credit Clause required Minnesota to accept the Colorado court's order transferring jurisdiction. It pointed out that the question of jurisdiction was only summarily addressed by the Colorado court in response to the father's request for a status conference in 2006 to clarify the issue of jurisdiction, and "was not fully and fairly litigated by the Colorado court." Finding that Colorado "simply refused to accept [its] continuing, exclusive jurisdiction without further explanation or legal authority," the court concluded that "there is no Colorado subject matter jurisdiction determination to which the Minnesota court must give full faith and credit."

(4) Concurring, Judge David Minge acknowledged that the mother was in a "virtual catch-22 situation" because the time for appealing the Colorado court's decision had presumably passed, "and now the Minnesota courts point out error by the Colorado court."

y. A Florida trial court erred in concluding that it lacked jurisdiction to enforce or modify child support orders arising from a Pennsylvania divorce where the custodial mother and children left Florida after the UIFSA registration packet was filed, Florida's Fifth District Court of Appeal held. *Trissler v. Trissler*, 987 So.2d 209 (Fla.Ct.App. 2008), 34 FLR 1429.

(1) Although the obligor had moved to Oregon and the obligee to Florida when their Pennslylvania divorce became final, they continued to litigate child support issues in Pennsylvania. In 2007, the obligor filed a Uniform Interstate Family Support Act registration packet with the Florida court and petitioned for modification of support. The court was advised that the Pennsylvania court continued to issue enforcement orders and that the obligee and children had moved to Maryland after the registration packet was filed. It concluded that since Pennsylvania was still issuing orders, Florida had no jurisdiction to proceed and it dismissed the obligor's petition.

(2) Reversing, the court noted that because neither the parties nor the children resided in Pennsylvania, that state lost its "continuing, exclusive jurisdiction" under the Act and that the support order became enforceable as a Florida order as of the filing date of the registration packet. It acknowledged, however, that this did not mean that Florida automatically obtained jurisdiction to modify the support order. While "Florida, as the non-issuing state, is authorized to modify the Pennsylvania child support order … if it is properly registered here … the procedural steps do not end there, because while a Florida court may enforce a child support order registered for modification, it may not necessarily have jurisdiction to modify it," the court explained. Looking to UIFSA, the court observed that when not all of the parties reside in Florida, a Florida court may only modify a registered order where, as pertinent here, it finds that the child and parties do not reside in the issuing state, the petitioner seeks modification and is not a Florida resident, and Florida has personal jurisdiction over the respondent.

z. A trial court did not abuse its discretion in declining to exercise jurisdiction over the state support enforcement agency's request that it modify a registered Kansas support order, the Arkansas Supreme Court decided. The trial court had found that it had jurisdiction to enforce the foreign judgment order, and thus ordered that it be registered (the obligor had moved to Arkansas after the judgment was entered in his divorce, while the mother and children had moved to Oklahoma). However, the trial court declined to exercise jurisdiction over the agency's petition for modification, "due to the joint custody provision of the foreign order." The court reasoned that it was required to consider shared or joint custody arrangements when weighing any deviation from the family support chart in considering the modification of child support. Because it was not allowed to address the issue of visitation or custody in the context of a Uniform Interstate Family Support Act proceeding, the trial court concluded that it therefore could not consider the agency's request for an increased award of child support. *Office of Child Support Enforcement v. Wood*, 285 S.W.3d 599 (Ark. 2008), 34 FLR 1369.

aa. A Kansas order entered in response to a RURESA petition for enforcement of a California judgment that did not specifically state it was modifying or nullifying the judgment could not supersede it by setting a lower amount of support, the California Court of Appeal, Fourth District, has ruled. The court thus said that although the obligor made all payments pursuant to the Kansas order, his support obligation in California continued, offset by those payments. *Gerkin v. Gerkin*, 74 Cal.Rptr.3d 188 (Cal.Ct.App. 2008), 34 FLR 1245.

(1) The court observed that the petitioner's act of checking one box rather than another on a preprinted form does not meet the requirement of specification by the responding court of its intention to modify the initiating state's support order.

In addition, the court noted, "the statutes are clear that in order to modify or nullify an existing support order, the responding state's order must state specifically that it is doing so."

(2) The custodial mother was also not bound by the Kansas' court's arrearage order, which was based on its lowered amount for current support. The mother was neither notified of nor present or represented at the 2005 Kansas hearing, and was therefore not bound by any stipulation between the Kansas agency and the father at that hearing.

bb. The federal Full Faith and Credit for Child Support Orders Act trumps a provision in Massachusetts' Uniform Interstate Family Support Act that would preclude a court from considering a state resident's motion to modify her Oregon support decree, Massachusetts' Supreme Judicial Court held. Noting that the federal act does not contain UIFSA's nonresident petitioner requirement, it found that the FFCCSOA confers subject-matter jurisdiction here because the children and parents no longer live in Oregon. [The court failed to explain how Massachusetts obtained in personam jurisdiction over the noncustodial father, who after the parties' dissolution remained in Idaho.] *Draper v. Burke*, 881 N.E.2d 122 (Mass. 2008), 34 FLR 1183.

5. <u>Challenges to Registration</u> -

a. <u>Full Faith and Credit</u> -

(1) A Texas income withholding notice issued pursuant to that state's child support order was entitled to full faith and credit in Alaska, where the obligor worked, pursuant to the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. 1738B(h)(2). The Court opined that the obligor's "maintenance and cure" payments received by an injured commercial fisherman from his employer were subject to withholding under Texas law, and therefore must be honored by the obligor's Alaska employer. *Aguilera v. Alaska Juris F/V*, 535 F.3d 1007 (9th Cir. 2008), 34 FLR 1451. [This case is also noted in Income Withholding, this outline.]

(2) A man who filed a voluntary acknowledgment of paternity in South Dakota as to a child born to his wife before they met should have been ordered to pay child support in the parties' Maryland divorce six years later, the Maryland Court of Special Appeals decided. Confronting an issue not yet addressed by the South Dakota judiciary, the court — noting that the law of that state treats the presumption of legitimacy as irrebuttable after three years — determined that it would apply such conclusive statutory presumption to a voluntary acknowledgment of paternity in a case where, as here, no constitutional issues

have been raised. The court was obliged under 42 U.S.C. § 666(a)(5)(C)(iv) to give the South Dakota paternity affidavit full faith and credit, it said. *Burden v. Burden*, 945 A.2d 656 (Md.Ct.Spec.App. 2008), 34 FLR 1244.

b. Failure to Attend Confirmation Hearing - A man who "forgot" to attend a hearing he had requested concerning the confirmation of a default support order entered against him by a German paternity court thereby waived his right under the Uniform Interstate Family Support Act to challenge the registration of the order in Kansas, that state's Court of Appeals ruled. Explaining that the man could now pursue his attack on the order's validity only in the issuing court, the court rejected his contention that Germany may not be treated as a state for UIFSA purposes in Kansas. *Dia v. Oakley*, 217 P.3d 1010 (Kan.Ct.App. 2009) 35 FLR 1579, *review denied*.

c. Non-Parentage - A Maryland trial judge who was asked to register a New York divorce court's support order erred in concluding that the obligor's parentage was not determined by that order, which referred to the children of the marriage, the Maryland Court of Special Appeals held. Saying that the obligor therefore should not have been allowed to raise non-parentage as a defense under the Uniform Interstate Family Support Act, the court also rejected his claim that once the New York order was registered and the judge had approved a modification of it, it essentially became a Maryland order and thus fell outside the scope of UIFSA, enabling him to raise a non-parentage defense pursuant to Maryland law. *Department of Human Resources ex rel. Allison v. Mitchell*, 12 A.3d 179 (Md.Ct.Spec.App. 2011), 37 FLR 1160.

6. Duration of Support -

a. A Washington trial court ran afoul of the Uniform Interstate Family Support Act when it modified a divorced couple's registered Nebraska support order to grant post-secondary education support for their child, because such post-majority support is not allowed under Nebraska law unless provided for in a decree-incorporated agreement, the Washington Supreme Court held. Addressing the issue for the first time, the court looked to other jurisdictions in finding that an award of college support amounts to a duration change to an existing child support obligation under UIFSA. *Schneider v. Almgren (In re Schneider)*, — P.3d — (Wash., No. 85112-3, 12/22/11), 38 FLR 1099.

b. New Hampshire courts may not change the time span of a father's child support obligation under his registered Massachusetts divorce decree, because duration of support is not modifiable under the Uniform Interstate Family Support Act, the New Hampshire Supreme Court ruled. However, the court also held that, despite the parties' choice-of-law provision, New Hampshire law controlled their college expense agreement, and that the judge below thus could modify it. *In re Scott and Pierce*, 999 A.2d 229 (N.H. 2010), 36 FLR 1351.

c. A Minnesota court must look to the law of the issuing state in determining whether the duration of support set out in a Mississippi child order registered under the Uniform Interstate Family Support Act is modifiable, the Minnesota Court of Appeals decided. Finding that because Minnesota has not adopted a clarifying amendment, its version of the Act is ambiguous, the appeals court — guided by the Uniform Law Commissioners' comments and case law from other jurisdictions — ruled that UIFSA does not permit modification of any aspect of a child support order that the law of the issuing state would not allow to be modified. *Hill (Grimme) v. Hill*, 777 N.W.2d 252 (Minn.Ct.App. 2010), 36 FLR 1148.

d. A New York trial court that had previously modified the amount of support a father owed under his Pennsylvania divorce decree properly held that Pennsylvania law controlled the duration of his support obligation, the New York Supreme Court, Appellate Division, Second Department, ruled in a *per curiam* opinion. *Epstein v. Shoshani*, 889 N.Y.S.2d 48 (N.Y. App. Div. 2009), 36 FLR 1009.

(1) After the parties and their child had all moved to New York, the trial court had granted the custodial mother's petition to increase the father's support payments. When their child turned 18, the father petitioned to terminate those payments pursuant to Pennsylvania law. The mother unsuccessfully countered with the claim that in light of the court's prior modification, New York law now controlled the duration of the support obligation, thus requiring that support continue until the child reached age 21.

(2) Affirming the judge below, the appellate court pointed out that the Uniform Interstate Family Support Act prohibits New York courts from modifying "any aspect of a child support order that may not be modified under the law of the issuing state." Noting that under Pennsylvania law, a parent generally has no obligation to support an adult child, it said that, in accordance with UIFSA, New York courts thus cannot modify a Pennsylvania support order by requiring a parent to pay support until the subject child turns 21. It explained that notwithstanding the New York court's prior upward modification of the Pennsylvania order, Pennsylvania law continued to control the duration of the father's support duty. The court also pointed out that the mother did not establish any of the grounds required under Pennsylvania law to obligate a parent to support an adult child.

e. A Nebraska court erred in determining that under the Uniform Interstate Family Support Act it had the authority to modify a registered New Mexico decree to extend the duration of child support pursuant to Nebraska law, that state's Court of Appeals held. *Wills v. Wills*, 745 N.W.2d 924 (Neb. Ct. App. 2008), 34 FLR 1225.

(1) After their New Mexico divorce, the parents and the children moved to Nebraska. The mother registered the New Mexico decree — which obligated the father to pay support until the children turned 18 (the age of majority in New Mexico) — and moved to modify it so as to extend the father's support obligation until the children turned 19 (the age of majority under Nebraska law). In granting her motion, the trial court found that it had exclusive continuing jurisdiction and that the decree was subject to modification using Nebraska substantive law.

(2) The appellate court reversed, observing that UIFSA makes clear that the law of the state that issued the initial controlling order governs the duration of the support obligation. As New Mexico issued the initial controlling order, its law governs the duration of the father's support obligation. The trial court thus erred in extending that obligation by an additional year. Under the Act, the court explained, "the duration of the obligation of support is an aspect that cannot be modified."

f. A New York trial court had no authority to order a Connecticut resident to pay support to his college student son after his support obligation under his Connecticut divorce decree had expired, the New York Court of Appeals held. Rejecting the argument that since the original obligation terminated under Connecticut law when the son turned 18, the trial judge could establish one de novo, the state's high court said that any such order would amount to an impermissible modification under the UIFSA and FFCCSOA, and also violate principles of interstate comity. [Where, before an action to establish an initial support order has been filed in the responding jurisdiction, a child has been emancipated by judicial or administrative decree or operation of law, the responding court may not issue an order for prospective support *See* UIFSA 2001 § 611, cmt.] *In re Spencer v. Spencer* , 882 N.E.2d 886 (N.Y. 2008), 34 FLR 1171.

7. <u>Statutes of Limitation</u> - An Arkansas trial court erred when it applied the state's general child support statute of limitations instead of the more specific Uniform Interstate Family Support Act to a California order, thereby preventing registration of the order for the purpose of enforcement and collection of arrears, the Arkansas Court of Appeals held. The court pointed out that UIFSA provides that in a proceeding for arrears, whichever is the longer limitations period under the laws of the registering state or of the issuing state applies. It noted that since 1993, under California law, a judgment for child support is enforceable until paid in full. Accordingly, at the time this action was filed, California law governed the limitation period. It was thus error for the trial court to grant the obligor's motion to dismiss based upon Arkansas's limitation period. *Office of Child Support Enforcement v. Gaddie*, 2010 Ark. App. 676 (Ark.Ct.App. 2010) (not reported in S.W.3d), 36 FLR 1593.

III. NEWS OF THE WILD, WACKY AND JUST PLAIN INTERESTING

A. Business entity may sue unfaithful groom for reimbursement of wedding expenses. 12/8/10.

1. A company that had agreed to pay the costs of a man's wedding if he promised to remain sexually faithful to his wife during their engagement and marriage may proceed with its lawsuit for his breach of such promise, the U.S. District Court for the District of Maryland decided Dec. 8. Thus denying the man's motion to dismiss the action for reimbursement of the money paid for the wedding ceremony and reception, the court noted that while this case does not present "a typical ante-nuptial arrangement," the plaintiff's allegations were not so implausible as to mandate a dismissal. It also noted that the action was not barred by Maryland's Heart Balm Act. *Hanna J. Investments, LLC v. Dlin*, NO. CIV.A. WMN-10-2255 (D.Md. 12/8/10), 37 FLR 1089.

2. http://pub.bna.com/fl/102255.pdf

B. Tom Ball, New Hampshire man who burned himself to death: "The ex-wife lawyer wants me jailed for back child support." 6/17/11.

1. "Last Statement by Tom Ball - A man walks up to the main door of the Keene N.H. County Courthouse, douses himself with gasoline and lights a match. And everyone wants to know why. Apparently the old general was right. Death is not the worst of evil. I am due in court the end of the month. The ex-wife lawyer wants me jailed for back child support."

2. http://www.inmalafide.com/blog/2011/06/17/tom-ball-new-hampshire-man-who-burned-himself-to-death-the-ex-wife-lawyer-wants-me-jailed-for-back-child-support/

C. Adolf Hitler & sister Aryan Nation remain in foster care after 33 months; parents fight for return. 10/26/11

1. Adolf Hitler's parents are still fighting to get their son back. The 5-year-old boy, named for the infamous Nazi leader, and his two sisters, including the three-year-old Aryna Nation were taken by New Jersey child welfare officials in 2009 and remained in state custody for 33 months. (The other sister is named Honszlynn Hinler.) The state took custody of the couple's children in 2009, saying there were in danger because of previous violence in the Campbell home. Their parents made headlines in 2009 when a supermarket refused to decorate a birthday cake for Adolf.

2. http://www.nydailynews.com:80/news/national/adolf-hitler-sister-aryan-nation-remain-foster-care-33-months-parents-fight-return-article-1.968340

D. Couple jailed, lose custody of daughter, over stolen sandwiches. 10/30/11.

1. A pregnant woman and her husband were arrested for allegedly stealing two sandwiches at a supermarket in Honolulu, resulting in their 3-year-old daughter being put into state care for 18 hours, officials said on Saturday, October 30, 2011. The supermarket that called the police was a Safeway in Makiki, a neighborhood in Honolulu. A statement from a company spokesman said Safeway was checking on the incident. Safeway later dropped the theft charges. "From our preliminary investigation, it appears we may not have handled this matter in the best possible way. We are taking this situation seriously, and giving it our full attention," Safeway said in a statement on Saturday.

2. http://www.reuters.com/article/2011/10/31/us-hawaii-sandwich-idUSTRE79U08C20111031

E. Woman returns child to Russian adoption agency, gets sued for child support. 11/22/11.

1. Torry Hansen is being sued for child support by the adoption agency that placed the little boy in her home. Putting a 7-year-old child on a one-way flight back to Moscow with nothing but a note in his pocket, the agency argued, does not terminate her parental responsibilities. The incident prompted Russia to shut down adoptions to the United States for the better part of a year.

2. http://www.usatoday.com/news/nation/story/2011-11-22/Tennessee-trial-Russian-adoption/51346674/1?csp=34news

F. Ex-girlfriend hid sperm and used it for in-vitro pregnancy. Man sues fertility clinic. 11/26/11.

1. A Long Island man was stunned to find out that his 4-year-old twins weren't an accidental pregnancy at all — his desperate girlfriend secretly stashed away his sperm and used it for an in-vitro procedure, he charges in a lawsuit. Elmont resident Joseph Pressil, 36, wasn't planning on having children with Anetria Burnett, with whom he was in a relationship for six months in 2007, he said. So she took matters into her own hands, he told The Post, in order to remain in his Texas house and make a legal bid for half of his possessions. "A gold digger is an understatement. She was trying to get community property and alimony. She's ruthless," he said. Pressil is suing the fertility clinic that performed the procedure. "This is more than a nightmare — it's a horror story," he told The Post yesterday.

2. http://www.nypost.com/p/news/local/ex_gal_is_rubber_robber_DCGfEDf4vcBl12VJaiIo2N

G. Alabama parents rights groups allege state profits off of broken families. 11/28/11.

1. Huntsville, Alabama (Examiner.com) - Alabama parents rights groups are crying foul over federal incentive payments to the States under a Social Security program that pays two dollars for every dollar collected by the State for State-imposed child support orders. [42 U.S.C. §658a] The groups allege these laws promote aggressive practices which result in constitutional rights violations and unnecessary government intrusion into the parent-child relationship.

2. http://www.examiner.com/divorce-support-in-huntsville/alabama-parents-rights-groups-allege-state-profits-off-of-broken-families

H. DUI bill would make drunken drivers pay child support for a dead victim's children. 11/28/11.

1. Olympia — On a sunny morning in July, Google software engineer Steve Lacey, a father of two, was on his way home from a trip to Costco in Kirkland when an accused drunken driver slammed into his BMW, killing him instantly. It's a tragedy that touched the hearts of many in the community, including state Rep. Roger Goodman, D-Kirkland. "When Steve Lacey was killed, that was in my own neighborhood. That could have been me. We've been talking with his family and supporters, and this idea has come up. Let's make the offender pay the child support for the victim's kids," Goodman said.

2. http://www.q13fox.com/news/kcpq-new-dui-bill-would-make-drunk-driver-pay-child-support-for-victims-children-20111128,0,7741038.story

I. Man with 15 children by 13 different women has more on the way. 11/28/11.

1. A British man with fifteen children by thirteen different women has two more on the way. Jamie Cumming, branded "Britain's most feckless dad" by the Daily Mail, lives off benefits and is unable to pay child support for any of his 15 children. The 34-year-old's 19-year-old ex-girlfriend gave birth to his latest child, a son, two weeks ago. His current girlfriend, also 19, is due to give birth to another boy.

2. http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10769429

J. Ex-husband wins back child support. 11/28/11.

1. A woman has been ordered to pay her former husband almost $13,000 in child support after DNA tests confirmed he was not the father of her 14-year-old son. The man - who once caught his wife in a compromising position with a neighbour - secretly took the boy for a DNA test after his own mother raised doubts about the boy's parentage from the

time he was four. "(X) is looking less and less like you. There is nothing similar, not even his ears or toes or fingers," the man's mother said.

2. http://www.heraldsun.com.au/news/more-news/ex-husband-wins-back-child-support/story-fn7x8me2-1226207436505

K. "Talaq, Talaq, Talaq": Divorce by text. 12/4/11.

1. Among Sunni Muslims, a husband can end a marriage with the "triple talaq." By saying "talaq", a form of repudiation, three times a divorce becomes final and irrevocable. Usually, there is supposed to be time between the three talaqs for the husband to carefully consider his decision and consult with others around him. There are, however, those who take the "ripping off the band-aid" approach and say the three talaqs one after another in rapid succession, a practice which is highly controversial among Muslims.

2. http://www.care2.com/causes/talaq-talaq-talaq-divorce-by-text.html

L. Child support forgiveness programs can be effective in reducing debt. 12/7/11.

1. Corvallis, Ore. – Sometimes getting something is better than nothing. That's the aim of a pilot program that allows parents with large child support debts to reduce their overall debt if they pay back at least some of what they owe in child support.

2. http://www.eurekalert.org/pub_releases/2011-12/osu-csf120711.php

M. Bosses caught keeping staff child support pay. 12/12/11.

1. Employers who deduct child support payments from workers' wages have been caught keeping the money for themselves in a government crackdown that has recovered $500,000. And the investigations unit found some employers who failed to deduct child support payments were in de facto relationships with the staff, who had children from a previous relationship.

2. http://www.theaustralian.com.au/national-affairs/bosses-caught-keeping-staff-child-support-pay/story-fn59niix-1226219433630

N. UN calls on Israel to amend custody law. 12/12/11.

1. The United Nations Committee on Economic, Social and Cultural Rights has called on the Israeli government to amend its laws in order to ease the burden on fathers seeking

full or partial custody of their children. At a special hearing in Geneva last month, the committee expressed concern that fathers embroiled in custody disputes here are not always treated fairly under the Capacity and Guardianship Law.

2. http://www.jpost.com/NationalNews/Article.aspx?id=249068

O. Man arrested in Wisconsin on 36-year-old child support warrant. 12/12/11.

1. A Georgia man pulled over for a traffic violation on his first trip back to Wisconsin in three decades was arrested on a 36-year-old warrant for child support, officials said on Monday. Stephen Schmidt, 70, of Jonesboro, Georgia, was later released on a $2,000 bond. Schmidt had been driving on Highway 41 in Fond du Lac on Friday when he was pulled over by a Wisconsin state trooper for driving without tail lights and having a loud car exhaust, Wisconsin State Patrol Sergeant Jeff Nelson said.

2. http://www.reuters.com/article/2011/12/12/us-crime-wisconsin-idUSTRE7BB21G20111212

P. Broward Sheriff's Office hoodwinks, arrests seven allegedly deadbeat parents. 12/12/11.

1. Dorshawn Tate of North Lauderdale expected to pick up a $500 gift card Monday morning. Instead, he got a trip to jail, compliments of the Broward Sheriff's Office. Tate, 26 — who has been wanted for four years — was one of five dads and two moms who were arrested after failing to pay child support, according to BSO spokeswoman Keyla Concepción. They were among hundreds of Broward residents wanted on child-support charges, she said, who were mailed letters that said they had won.

2. http://www.miamiherald.com/2011/12/12/2543755/bso-hoodwinks-arrests-seven-allegedly.html

Q. Arrest warrant issued for "millionaire dead beat dad" who owes $10M in child, spousal support. 12/15/11.

1. Hillsborough County, Fla. - John Stanton is called the millionaire dead-beat dad, and now a warrant's out for the Bay Area businessman's arrest. "The court is entering today a judgment of criminal contempt and a warrant for arrest," Hillsborough County Judge Caroline Tesche announced Thursday evening. She sentenced Stanton to five months and 29 days in jail, after living his adult life, some say, in homes worth millions of dollars. Stanton owes $10 million in child support and alimony payments. "He thinks he's above the law and can get away with and do whatever he wants," Erin Budinscak said.

2. http://www.abcactionnews.com/dpp/news/region_hillsborough/arrest-warrant-issued-for-millionaire-dead-beat-dad-who-owes-10m-in-child-spousal-support

R. Case closed on deadbeat dad boxer. 12/18/11.

1. Beatrice Johnson feels like she's been in a boxing match for 22 years. The single mother has had a decades-long family case in Tulsa County District Court seeking child support from a man known worldwide as a former heavyweight contender. Paying less than $2,600 since 1990, James "Quick" Tillis told a judge on Dec. 1 he lives on just Supplemental Security Income for a disability he blames on his boxing career. The judge closed the case, but the debt of $140,341 - $68,232 in principal and $70,789 in accrued interest - will remain.

2. http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20111218_11_A1_ULNSae714314

S. Child un-support: State agency blames parents for flawed deposit. 12/19/11.

1. Every month, Charlottesville resident Sherry Nist gets a child support payment of $1,500 when her ex-husband writes a check to the state, which then moves the funds into her bank account. In early December, however, instead of the usual $1,500, the agency credited her account with just $15. The missing funds wreaked havoc on her finances, and state officials are now refusing to compensate her for the more than $600 in ensuing overdraft fees. Nist contacted the state agency, the Division of Child Support Enforcement, which promptly blamed Joe Yung, the check writer. "Both our worker and the bank read it as $15," says Phyllis Sisk with the Division, noting that the agency processes $2.5 million in checks each day and has contacted Yung to counsel him on how to write future checks.

2. http://www.readthehook.com/102459/child-un-support-agency-blames-parents-costly-error

T. Bill seeks to ban those who owe child support from ballot. 12/21/11.

1. A bill inspired by U.S. Rep. Joe Walsh's child support issues would forbid people owing more than $10,000 in back child support from running for office in Illinois. House Bill 3932, filed Tuesday by state Rep. Jack Franks, D-Marengo, would require statements of candidacy to include a statement that the person running for office is not delinquent by $10,000 or more.

2. http://nl.newsbank.com/nl-search/we/Archives?p_multi=NWRB&p_product=SHNP8&p_theme=shnp8&p_action=search&p_maxdocs=200&p_field_label-0=title&p_text_label-0=Bill%20seeks%20to%20ban%20those%20who%20owe%20child%20support%20from%20ballot&s_dispstring=headline(Bill%20seeks%20to%20ban%20those%20who%20owe%20child%20support%20from%20ballot)&xcal_numdocs=20&p_perpage=10&p_sort=YMD_date:D&xcal_useweights=no

U. Woman pleads guilty to misusing daughter's child support payments. 12/22/11.

1. West Liberty, Iowa — A West Liberty woman pleaded guilty on Dec. 16 to theft and unauthorized use of a credit cards. Laura Bazan, 42, pleaded guilty to theft in the second degree, a class D felony, and unauthorized use of a credit card, an aggravated misdemeanor. According to court documents, Bazan had misused a credit card issued by the State of Iowa for transfer of child support payments. From March 2009-October 2010, she used a Reliacard issued to her daughter, Mayra Cabrera. She spent approximately $8,100, which had been intended to support her daughter's child.

2. http://muscatinejournal.com/news/local/crime-and-courts/woman-pleads-guilty-to-mis-using-daughter-s-child-support/article_f3381708-2d0e-11e1-be74-001871e3ce6c.html

V. Indian family protection law central to emotional custody battle. 1/8/12.

1. For the first few moments of her life, Veronica was with her birth mother. For the next two years, she was with her adoptive parents. And for the last week, the toddler has been with her biological father, over 1,000 miles away from the only home she'd ever known. It's been a long, complicated journey for young Veronica -- one made possible by a federal law meant "to protect the best interests of Indian children" that, in the process, has tugged at the heartstrings of all involved.

2. http://www.cnn.com/2012/01/08/us/south-carolina-indian-adoption/index.html?hpt=hp_t1

W. Man accused of kidnapping Mesa woman over child-support payments. 1/12/12.

1. A man was arrested Wednesday on suspicion of kidnapping his ex-girlfriend in Mesa and bringing her to a Gilbert office in an attempt to get her to cancel his child support payments. Richard Sailem Tadeo Chavez, 27, was booked on one charge of kidnapping and one charge of criminal damage after police say he abducted his ex-girlfriend in Mesa Wednesday morning. Police say Chavez was upset after the state took his tax refund to pay child support owed to his ex-girlfriend. Court documents say that Chavez drove to his ex-girlfriend's house in Mesa and broke down the door.

2. http://www.azcentral.com/community/gilbert/articles/2012/01/12/20120112man-charged-kidnapping-mesa-ex-girlfriend-over-child-support-payments-abrk.html

X. Ontario, Canada agency overbilled parents $5.3 M for child support. 1/13/12.

1. Toronto — Ontario's controversial Family Responsibility Office has been overbilling 1,700 parents, mostly fathers, for as long as 13 years, the province admitted Friday. The

1,700 parents were overbilled by an average $75 each month, after the agency wrongly applied a cost-of-living adjustment that was eliminated in 1997. Those who were overpaid will not be forced to give the money back. Instead, taxpayers will foot the $5.3-million bill for the agency's mistake. "This error's been found and it's being corrected," said Community and Social Services Minister John Milloy. "We're going to be reaching out to those individuals (who were overbilled) and talking to them about their situation, formally alerting them."

2. http://www.vancouversun.com/news/national/agency+overbilled+parents+child+support/5994192/story.html

Y. Corporate "Personhood" to be tested in MF Global bankruptcy case. 2/7/12.

1. New York -- The legal principle of "corporations are 'persons'" is set to be tested in the current MF Global bankruptcy case after a former MF Global client, Adam Furgatch of Hawaii, filed a motion on Monday in Federal Bankruptcy Court that asks the Court to treat MF Global Holdings, Ltd. as a "person" instead of a corporation. The filing asserts that because the U.S. Supreme Court has ruled that a corporation such as MF Global Holdings is a "person", then MF Global, Inc. -- the subsidiary brokerage whose customers are still missing at least $1.2 billion in segregated funds -- is a "child" of the MF Global Holdings "parent company." The filing then cites specific statutes in the Bankruptcy Code that mandates that a child's support claims shall have super-priority status over all other unsecured creditors.

2. http://www.marketwatch.com/story/corporate-personhood-to-be-tested-in-mf-global-bankruptcy-case-2012-02-07

Z. Mother sues city for $900 trillion–yes, trillion–for placing children in foster care. 2/8/12.

1. A Staten Island mom is making national headlines today after suing the city of West Brighton for $900 trillion, alleging the city improperly placed her two children in foster care.

2. http://news.yahoo.com/blogs/sideshow/mother-sues-city-900-trillion-yes-trillion-placing-213613703.html