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Recommended Citation
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POSITIVE PARENTING AND NEGATIVE CONTRIBUTIONS: WHY PAYMENT OF CHILD SUPPORT SHOULD NOT BE REGARDED AS DISSIPATION OF MARITAL ASSETS

LAURA W. MORGAN*

I. INTRODUCTION

In 1990, it was projected that the rate of divorce for couples married in the 1980s and 1990s would be 50%.¹ In a triumph of hope over experience, most divorced persons go on to marry again.² As a result of divorce and remarriage, the 1990 census revealed a portrait of families that is anything but “traditional.” Approximately 5.5 million married-couple households contain at least one step-child under the age of 18. This constitutes 29% of all married-couple households with children. Further, stepchildren make up 20% of all children in married-couple families.³

The 1996 Current Population Survey, released April 23, 1999, also revealed that in the spring of 1996, 13.7 million custodial parents lived with 22.8 million children under the age of 21; 11.6 million, or 85%, of custodial parents were women, while 2.1 million, or 15%, were men.⁴ Detailed information was also available regarding


1. For divorce rates of the 1960s through the 1990s, see Thomas M. Hanson, Intestate Succession for Stepchildren: California Leads the Way, But Has It Gone Far Enough?, 47 HASTINGS L.J. 257, 259 (1995). One commentator has been even more pessimistic. In Paul J. Buser’s, The First Generation of Stepchildren, 25 FAM. L.Q. 1, 2 (1991), the author stated that, “[i]t is predicted that within the next three decades, approximately two-thirds of all marriages will end in divorce.”

2. An estimated 75% of divorced persons remarry and go on to have additional children. See Marianne Takas, Improving Child Support Guidelines, 26 FAM. L.Q. 171 (1992) (citing Arland Thornton & Deborah Freedman, The Changing American Family, 38 POPULATION BULL. (1983)). Remarried couples, defined as “a husband and wife maintaining a household with or without children in the home and with one or both spouses in their second or subsequent marriage,” represent 21.3%, or 11 million, of all married couples in the United States. Paul C. Glick, Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile, 38 FAM. REL. 24 (1989); see also Mark A. Fine, Perceptions of Stepparents: Variation in Stereotypes as a Function of Current Family Structure, 48 J. MARRIAGE & FAM. 537 (1986). While judicial recognition of these facts has been slow, it has not been absent. As stated recently stated in Smithson v. Eatherly, No. 01A01-9806-CV-00314 (Tenn. Ct. App. July 29, 1999) (unpublished):

Common experience teaches that many divorced persons in contemporary society will decide to marry again and to start a new family. This understanding is borne out by statistics showing that an estimated seventy-five percent of divorced persons marry again and that many of these persons expect to begin a new family either with biological children, step-children, or both. Multiple families or serial family development are now the norm rather than the exception.

(Citations omitted.)

3. See Paul J. Buser, The First Generation of Stepchildren, 25 FAM. L.Q. 1, 2 (1991). It is worth noting at this point that the Census Bureau defines “stepparent” as the relationship formed whenever an individual marries the custodial parent of a minor child and thereafter resides with the child. This definition is utilized in many state statutes that impose upon stepparents the duty to support a stepchild. See part III infra (regarding the stepparent’s obligation of support). This definition of stepparent does not include the situation where a person, typically a woman, marries a noncustodial parent, typically the father. See Marilyn Ihinger-Tallman, Research on Stepfamilies, 14 ANN. REV. SOC. 25, 28 (1988) (utilizing Census Bureau definition of stepparent, 82% of stepparents are stepfathers while 18 percent of stepparents are stepmothers).

4. See Current Population Reports, Series P60-196, Child Support For Custodial Mothers and Fathers:
the income, race, gender, and marital status of custodial parents, including what types of custodial parents are more likely to receive full or partial payment of child support as opposed to no child support.\(^5\)

Detailed information of this nature regarding noncustodial parents has been more elusive.\(^6\) Instead, the analyses have focused on the interrelationship of child support and increased involvement with children, such as extended visitation, shared custody, and other forms of parental involvement.\(^7\)

Given the rates of out-of-wedlock births and remarriage, however, there can be little doubt that a substantial number of noncustodial parents paying child support marry persons other than the other parent of the child for whom they owe support.\(^8\) The 1990 Survey of Income and Program Participation study found nonresident fathers remarried at a rate of 41%, while the National Longitudinal Survey of Youth, conducted from 1979 to 1992, found that nonresident fathers remarried at a rate of 46%.\(^9\) Consequently, the question of how equitable distribution laws consider the obligation to support a child born outside of the marital relationship at issue should be of real concern to the courts and to policy makers as the divorce and remarriage rates continue to rise.

This article will discuss how the law of child support favors the timely payment of child support to children born of a prior marriage or prior relationship when considering the child support obligation for children born of the marriage. The article will next survey the law concerning the duty of a stepparent to support a stepchild, and will conclude that public policy clearly favors the support of a prior-born natural child to that of a stepchild. Third, this article will discuss how the law of equitable distribution of marital property reverses this public policy, by favoring the parent who supports the stepchild over the parent who supports his or her own child from a previous relationship. Finally, this article will offer a solution to this obvious contradiction in divorce law, by suggesting that the law of equitable distribution should change to conform to child support law by viewing the income


8. The most detailed information concerning the effects of remarriage on child support enforcement is contained in David E. Bloom et al., Child Support and Fathers’ Remarriage and Fertility, in FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 128-156 (Irwin Garfinkel et al., eds., 1999). See also Elaine Sorensen, A National Profile of Nonresident Fathers and Their Ability to Pay Child Support, 59 J. MARRIAGE & FAM. 785 (1997).

9. See Bloom, supra, note 7, at 149. Another author notes that there are eleven million families in which at least one spouse has been married before, and several million more in which at least one spouse has had an out-of-wedlock child prior to marriage. See Joan Heifetz Hollinger, Consent to Adoption, in 1 ADOPTION LAW AND PRACTICE 2-93 (Joan Heifetz Hollinger ed. 1990).
that is used to support prior-born children as income that is simply outside the marital estate.

II. THE ABSOLUTE DUTY TO SUPPORT PRIOR-BORN CHILDREN DURING A SUBSEQUENT MARRIAGE

When a husband and wife divorce and one of the parties has a child support obligation for a child born prior to a child born of the marriage, the child support obligation to the prior born child is given absolute preference to the child support obligation of the children born of the marriage through the mechanics of the child support guidelines.\(^{10}\) The courts have consistently held that this legislative policy choice of favoring preexisting child support orders is acceptable, and even preferable to favoring later-born children. When a parent cannot afford to support prior children and later children at the same standard of living, and someone has to bear the cost of that choice, the cost should be borne by the later children for the simple reason that the parent had the choice of whether to have additional children. The family “first in time” is entitled to have its support obligations considered first.\(^{11}\)

The states, through the child support guidelines, have implemented this policy choice of favoring preexisting children by allowing the obligor parent a credit for child support actually paid under a court order. The only variation among the states’ guidelines is in determining where that credit comes into play in the calculation. In the vast majority of states, the guidelines provide that an existing child support obligation, arising out of a court order or separation agreement and actually paid, is deducted from that parent’s gross income.\(^{12}\) Where this method is used, it is error as a matter of law not to make the appropriate deduction.\(^{13}\) Some of these same

10. One commentator has suggested that this approach is “both fair and obvious, given that the obligee of the first order is generally not a party to the action then before the court; accordingly, the original order or agreement is not then subject to modification.” Susan Paikin, *Trial of Child Support Issues, in FAMILY LAW LITIGATION GUIDE WITH FORMS: DISCOVERY, EVIDENCE, TRIAL PRACTICE* § 34.04[4][h], at 34-71 (1993).


states also provide that support for preexisting children, not made pursuant to a court order, may be deducted from income as well. This provision benefits the parent who has children from a prior relationship living with him or her. In a minority of states, the support obligations to prior children, under court order or not, are a deviation factor once the presumptive award is set. Because a child support award under the child support guidelines is income determinative, it is obvious that in the majority of states, the support of prior born children is favored over the support of later born children of a different relationship.

This absolute preference for the support of children born prior to the children of the marriage has prompted at least a few litigants to play with the timing of various support orders. In Marksberry v. Riley, on day one, a father willingly entered into a generous support order for the child of his first marriage. On day two, the father was before the court on his second wife’s request for modification of support. The second wife had filed her request for modification well before the first wife filed her request for support. Because the first wife obtained her order first, however, the father was able to claim as a deduction the court-ordered support for that child. The court noted that the timing and amount the obligor agreed to pay for the first child opened the door for the possibility of favoritism and reprisals, but the trial court correctly determined the father’s support of the second child by taking into account the court-ordered obligation for the first child.

The absolute preference for a child born prior to the children born of the marriage when a child support obligation is being determined should be contrasted with the consideration given to a child born after the children born of the marriage. Unlike the near uniformity of approach concerning prior born children, states differ on the fundamental public policy question of whether a parent should be prevented from taking on additional child support responsibilities to the possible detriment of

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15. Because so many more states grant a credit for support of prior children made pursuant to a court order than also grant a credit for support of prior children not made pursuant to a court order, the guidelines clearly discriminate against a custodial parent of prior children, as opposed to the noncustodial parent of prior children. An argument may be made, however, that if the prior order arises under the guidelines, the custodial parent has, in fact, been “ordered” to pay for support, because all guidelines assume that the custodial parent is paying a certain percentage of income toward the support of the child. The custodial parent should, therefore, also be able to deduct from income support for prior children. If a court does not accept this argument, the custodial parent may seek a deviation based on the support of prior children. See Hutslar v. Lappin, 652 So. 2d 432, 434 (Fla. Dist. Ct. App. 1995) (court may deviate to take into account custodial parent’s support of other children from prior relationship); see also In re Marriage of Gulsvig, 498 N.W.2d 725, 726 (Iowa 1993) (support of prior children not made pursuant to court order may be reason for deviation).

16. E.g., Texas, Virginia.


18. See also In re Marriage of Potts, 696 N.E.2d 1263, 1266 (Ill. App. Ct. 1998) ("prior order" means first family, even though order for second family was entered on court docket first); Spencer ex rel. Spencer v. White, 584 N.W.2d 572, 574 (Iowa Ct. App. 1998) ("Qualified Additional Dependent Deduction," rather than prior child support order deduction, was appropriate for child born later, but whose support was ordered earlier).
children already in need of support,\textsuperscript{19} or whether all children should be treated equally regardless of the parent's behavior.\textsuperscript{20} Indeed, South Carolina stated the problem succinctly in the guidelines themselves:

A frequent factor in the determination of a child support award is the existence of additional dependents. The court is often faced with the task of balancing the needs of the noncustodial parent's additional dependents with those of the children in the action before the court, while also trying to encourage parental responsibility.\textsuperscript{21}

Another reason the states are not uniform in their treatment of subsequent children is that unlike child support obligations that have been previously imposed by a court, child support obligations for subsequent children are generally not court-ordered, the exception being out-of-wedlock paternity judgments, and thus there has been no judicial scrutiny as to either their reasonableness or their necessity. As stated by one court, the mere fact that a parent may have a legal duty to support other children does not indicate the extent of the support needs of the other children, whether those needs are or can be met by other persons, or the obligor's actual contribution to those needs.\textsuperscript{22}

Because of the lack of unanimity in underlying public policy and the difficulty in assessing subsequent children's needs, the states have taken varying approaches to the consideration of subsequent children. First, some guidelines provide that the court must deduct support for subsequent children from gross income. Second, some guidelines provide that the court may deduct support for subsequent children from gross income if the circumstances so warrant. This is very much like treating subsequent children as a deviation factor, except the discretion of the court comes into play earlier in the guideline calculation. Third, some guidelines provide that the court may deviate from the presumptive award if the circumstances so warrant. Fourth, some states make no provision, even by way of deviation, for subsequent children.\textsuperscript{23}

Regardless of the method chosen, many states further provide that the consideration of subsequent children may only be used "defensively" and not "offensively." This means that an obligor may not affirmatively seek a modification of the support obligation on the grounds that he or she has new children from a subsequent marriage. The obligor may, however, defend a motion for an upward modification of the support obligation on the grounds that he or she has new children from a subsequent marriage.\textsuperscript{24} The public policy reason for this restriction

\textsuperscript{19} See, e.g., Feltman v. Feltman, 434 N.W.2d 590, 593 (S.D. 1989) (noncustodial parent who becomes responsible for supporting the children of a second marriage does so with the knowledge of a continuing responsibility to the children of the first marriage). This policy is also expressed in the imputation of income to parents who stay at home to care for children of a subsequent marriage.

\textsuperscript{20} See, e.g., Pa. R. Civ. P. 1910.1605(n) (the goal of the guidelines is to treat every child equitably).

\textsuperscript{21} S.C. SOC. SERV. REG. 114-4720(D) (Supp. 1998).

\textsuperscript{22} Ainsworth v. Ainsworth, 574 A.2d 772, 777 (Vt. 1990) (citing In re C.D., 767 P.2d 809, 811-12 (Colo. Ct. App. 1988)).

\textsuperscript{23} See LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 3.04(b)(1), tbl. 3-6, at 3-46 (Supp. 1999).

\textsuperscript{24} Colorado, Connecticut, Delaware, Florida, Iowa, Kansas, Massachusetts, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, Utah, Vermont, specifically state that support of subsequent children may
is that parents should plan for additional children through increased earnings and not through a reduction in support of existing children.

Where a child support guideline provides that subsequent children are a possible deduction from income or are a deviation factor, the guideline is essentially embodying the public policy of “first family first.” Under this method, the needs of the children of the first family have primacy.\(^{25}\) A deviation may be had only where the parent demonstrates that the second family has a significant impact on his or her ability to support the children of the prior marriage.\(^{26}\)

By contrast, where a court considers the needs of a subsequent family as a mandatory deduction from income, the guideline is embodying the public policy of “second family first.” This approach has been criticized as validating “irresponsible” behavior, because it allows a parent to have additional children to the detriment of prior children.\(^{27}\) This criticism seems unwarranted, as even in mandatory deduction states such as Colorado, Iowa, Missouri, North Carolina, and

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\(^{25}\) See HARRY KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 20 (1981) Traditionally, courts have taken the position that the father’s prior support obligations take absolute precedence over the needs of the new family, and rejected the plea that a new family constitutes a change in circumstance justifying modification. See id.

\(^{26}\) See Allsup v. State ex rel. Salas, 648 So. 2d 597, 599 (Ala. Civ. App. 1994) (while support of new child can be deviation factor, court must be presented with evidence of new child’s expenses, other means of support, etc.); Howard v. Wiseman, 826 S.W.2d 314, 316 (Ark. Ct. App. 1992) (adjusting of child support guideline permitted amount may be adjusted to take into consideration obligations to a current family where strict application of the guidelines would result in hardship to the current family); Haggard v. Haggard, 45 Cal. Rptr.2d 638, 639 (Cal. Ct. App. 1995) (disallowing remarriage and support of new spouse and child as special circumstance for deviation below guidelines); State Dep’t of Revenue ex rel. Powell v. Feeney, 689 So. 2d 350 (Fla. Dist. Ct. App. 1997); State ex rel. Nielsen v. Nielsen, 521 N.W.2d 735, 738 (Iowa 1994) (guidelines permit consideration of subsequent children as deviation factor, but do not require it); Guillot v. Munn, 767 So. 2d 86 (La. 1996) (deviation from child support guidelines not warranted for subsequent child absent evidence of expenses or extent to which new spouse contributes to support); In re Marriage of Cohen, 884 S.W.2d 35, 38 (Mo. Ct. App. 1994) (new child is a factor to consider, but it does not require deviation); Lodden v. Lodden, 497 N.W.2d 59, 62-63 (Neb. 1993) (holding that the mere fact that a former husband contributed to support of subsequently adopted son does not warrant deviation, absent sufficient evidence to rebut presumption established by guideline); Scott v. Scott, 822 P.2d 654, 656 (Nev. 1991) (holding that a court may deviate for support given to subsequent children as it impacts on ability to provide support); Palmieri v. LaConti, 662 N.Y.S.2d 78, 79 (N.Y. App. Div. 1997) (discussing policy considerations when determining whether to deviate because of other children of noncustodial parent); White v. Cook, 440 S.E.2d 391, 393 (S.C. 1994) (court should consider obligation to subsequent children); Jensen v. Bowers, 892 P.2d 1053, 1057-58 (Utah Ct. App. 1995) (holding that guidelines do not mandate that a credit be given for children in father’s home, but court may consider support to such children in its discretion); Ainsworth v. Ainsworth, 574 A.2d 772, 777-78 (Vt. 1990) (upholding deviation for stepchild of second marriage); Hasty v. Hasty, 828 P.2d 94, 99 (Wyo. 1992) (obligating consideration of subsequent children as a reason for deviation); see also Miller v. Tashie, 454 S.E.2d 498, 449 (Ga. 1995) (holding that increased responsibility for new child constitutes substantial change in circumstances); Graham v. Adams, 608 N.E.2d 614, 617 (Ill. Ct. App. 1993) (holding that court can consider mother’s obligation to support children not of the obligor in setting obligor’s support).

\(^{27}\) See Paikin, supra note 10, at 34-72.
Vermont, the existence of subsequent children cannot be used offensively. New children are, thus, not used as an excuse to avoid a preexisting obligation, but may only be used as a defense to a request for upward modification of an existing support order for prior born children. Moreover, where the court considers the needs of subsequent children, the court will also consider the income provided by the subsequent children's other parent. The threat of irresponsible behavior is, therefore, mitigated by the consideration of all possible sources of support for the new child.

In sum, when a husband and wife divorce and the court is required to consider the child support obligations of either parent to a child not born of the marriage when determining the appropriate child support obligation of the parents for the children born of the marriage, the child support guidelines and the case law clearly favor the fulfillment of child support obligations of prior born children under an articulated public policy of first children first. By contrast, the support of children born after children born of the marriage is usually treated as a deviation factor only, with the parent left to prove the financial impact of such support.

III. THE EVANESCENT DUTY TO SUPPORT STEPCHILDREN DURING A SUBSEQUENT MARRIAGE

Unlike the absolute duty to support a natural child born prior to a subsequent marriage, the duty to support a stepchild is, at best, ephemeral. Under the common law, a stepparent has no duty to financially support a stepchild during the marriage to the child's natural parent merely by reason of the marriage. Stated otherwise, the relationship of stepparent and stepchild does not, in and of itself, impose any obligation of support.

29. One prominent commentator also criticized the use of a credit for other children for a number of reasons. See Marianne Takas, Addressing Subsequent Families in Child Support Guidelines, in CHILD SUPPORT GUIDELINES: THE NEXT GENERATION (Margaret Campbell Haynes ed., 1994).

First, the credit for subsequent children is usually inapplicable to subsequent family development of the custodial parent. Most states consider only the subsequent children of the obligor in deciding whether to apply a credit to income or to deviate from the guidelines. Compare D.C. CODE ANN. § 16.916.1(0)(4) (1997); MISS. CODE ANN. § 43-19-101(3)(d) (1993); N.Y. DOM. REL. LAW § 240(1-b)(f) (Supp. 1999); N.D. ADMIN. CODE § 75-02-04.1-06 (1995); S.C. SOC. SERV. REG. 114-4720(7) (Supp. 1998) (considering obligor parent's obligation to support subsequent children), with MD. FAM. CODE ANN. § 12-202(a)(2)(iii)(2) (Supp. 1999); OR. ADMIN. 137-50-390 (considering either parent's subsequent children). This criticism also holds true for support of prior children: the deduction from income is given more often to a support obligor who pays pursuant to a court order. See, e.g., In re Marriage of Starke, 939 P.2d 46 (Or. Ct. App. 1997) (custodial mother entitled to credit for subsequent child of new marriage).

Second, it may allocate more support to subsequent children than to the children in the case at bar, because the credit allocates support for subsequent children from the noncustodial parent's full income base, leaving a reduced income pot for the children in the case at bar. Indeed, this precise criticism was stated in Hayes v. Hayes, 473 N.W.2d 364, 365 (Minn. Ct. App. 1991), where the court held that the subtraction method gives excessive deference to the later born child, and that deviation is the only appropriate method of factoring in a subsequent child.

Third, a credit for subsequent children assumes that subsequent children impose a hardship and gives relief on this basis. This may not be the case. Studies have shown that subsequent children work a hardship for the noncustodial parent only where the noncustodial parent's new spouse is unemployed. Where the new spouse is fully employed, diminution in standard of living is minimal. See Takas, supra.

In the absence of a contract, a stepparent is obligated to support a stepchild during the marriage in two circumstances: (1) there is a statute imposing such a duty or (2) the stepparent undertakes to act in loco parentis to the child. These statutes have withstood a variety of attacks, constitutional and otherwise. Most significantly, however, these statutes do no more than codify the in loco parentis doctrine.

The in loco parentis doctrine states that if a stepparent takes stepchildren into his or her family or under his or her care in such a way that he or she places himself or herself in loco parentis, then the stepparent assumes an obligation to support the stepchildren. Stated succinctly,

The universal rule is that a stepfather, as such, is not under obligation to support the stepchildren, but that, if he takes the children into his family or under his care in such a way that he places himself in loco parentis, he assumes an obligation to support them, and acquires a correlative right to their services.

As with all other equitable doctrines, the creation of an in loco parentis relationship depends on the facts of the case. Generally, there must be an intent by the stepparent to create the status of in loco parentis. Most often, stepparents establish de facto in loco parentis relationships with their stepchildren during the course of the marriage of the child's custodial parent by residing in the same household and treating the stepchild as a natural child. Treating a stepchild as one's own includes taking responsibility for the child's care, education, and development, including contributing to the child's support without the expectation of financial compensation. Because the establishment of an in loco parentis relationship is dependent on the voluntary assumption of responsibility by the stepparent, the relationship is terminable at the will of the stepparent. The relationship, and the duty of support that goes with it, is therefore evanescent, able to be broken by the stepparent without regard to the stepchild.

As with the case of subsequent born natural children, the duty to support a stepchild will not be cause for downward modification of the prior born child's support obligation. Most states do not consider stepchildren to be "children of a subsequent marriage" in their child support guidelines. The duty to support stepchildren is explicitly considered in the guidelines calculation in only four states. Instead, most child support guidelines, and cases interpreting those guidelines, have taken the position that a noncustodial parent who becomes the stepparent to create the status of in loco parentis begins to support a child "as he permits the child to be in his home). See, e.g., In re Teddy's Estate, 29 Cal. Rptr. 402, 405 (Cal. Ct. App. 1963); Ladd v. Welfare Comm'r, 217 A.2d 490, 492 (Conn. Ct. Civ. 1965); Kelley v. Iowa Dep't of Soc. Servs., 197 N.W.2d 192, 200 (Iowa 1972); Duffey v. Duffey, 438 S.E.2d 445, 447 (N.C. Ct. App. 1994); Palmer v. Harrold, 656 N.E.2d 708, 710 (Ohio Ct. App. 1995); Drescher v. Morgan, 251 S.W.2d 173, 174 (Tex. Civ. App. 1952).

responsible for supporting the children of a second marriage does so with the knowledge of a continuing responsibility to the children of the prior marriage. 40

Finally, it must be remembered that the duty to support a stepchild is at most a secondary liability. It does not displace the primary duty of the father and mother to support the child. 41

In sum, then, the duty to support a stepchild during the marriage is a secondary liability that must be intentionally assumed. The in loco parentis relationship on which it depends can be terminated at will by the stepparent. 42

IV. EQUITABLE DISTRIBUTION LAW: THE PENALTY FOR SUPPORTING A PRIOR CHILD AND THE REWARD FOR SUPPORTING A STEPPHIL

The law of division of property upon divorce provides, in the most general terms, that upon divorce, the court may divide the marital estate between the parties as is just and equitable. 43

When a spouse conceals, conveys, or wastes marital assets in anticipation of divorce, that spouse has "dissipated" marital assets. 44 The court may then treat the


42 In fact, one court has gone so far as to declare that a stepparent who has joint custody of a child after a divorce still has no child support obligation. See Brinkerhoff v. Brinkerhoff, 945 P.2d 113, 117 (Utah Ct. App. 1997).

43 The hallmark of the equitable distribution system is the court's authority to distribute between the spouses, in equitable or just proportions and in accordance with the statutorily prescribed factors, property that is subject to division as defined by the statute, regardless of which spouse acquired or has title to the property. See Lewis Becker, Overview of Statutes Governing Property Distribution, in 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY §§ 3.01-3.15 (John McCahey ed., 1990).

Among the equitable distribution states, the main distinguishing feature is whether the court may divide all the property owned by the parties, or whether the court must classify the property as either separate or marital, and may then divide marital property only. Dual classification states comprise Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. All property states comprise Alabama, Connecticut, District of Columbia, Hawaii, Indiana, Kansas, Massachusetts, Montana, Nebraska, New Hampshire, North Dakota, Oregon, South Dakota, Vermont, and Wyoming.

Community property states comprise Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In Arizona, Idaho, Nevada, Texas, and Washington, community property is divided equitably, while in California, Louisiana, and New Mexico, it is divided equally.

44 While a comprehensive discussion of dissipation is beyond the scope of this article, it should be noted that a majority of cases have held that dissipation can occur only after there has been a breakdown of the marriage. See Streb v. Streb, 774 P.2d 798, 802 (Alaska 1989); In re Marriage of O'Neill, 563 N.E.2d 494, 497 (Ill. 1990); Clemens v. Clements, 397 S.E.2d 257, 261 (Va. Ct. App. 1990); see also N.C. GEN. STAT. § 50-20(c)(1)(a) (Supp. 1999) (listing as a factor to be considered in making equitable distribution "[a]cts of either party... to waste, neglect, devalue or convert the marital property . . . during the period after separation of the parties and before the time of distribution"). Other cases focus on whether property has been intentionally removed from the marital estate in order to defeat the other spouse's equitable distribution rights. See Robinette v. Robinette, 736 S.W.2d 351, 354 (Ky. Ct. App. 1987); Rosenberg v. Rosenberg, 497 A.2d 485, cert. denied, 501 A.2d 845 (Md. Spec. Ct. App.
dissipated marital assets as though they were part of the estate to be divided, and award the dissipated assets to the guilty spouse as part of his or her share of the marital estate. The obvious effect of awarding the guilty spouse assets that no longer exist is to make an unequal division of the remaining nondissipated marital estate.

The use of marital funds to pay nonmarital expenses or debts is generally considered dissipation of marital assets. The most obvious example of dissipation of marital funds for a nonmarital purpose is when one spouse uses marital funds to pay for the expenses of a paramour. Another obvious example of dissipation of marital funds to pay a nonmarital debt is when one spouse uses marital funds to pay gambling debts.

Instead of adding the marital funds back into the marital estate, some courts have held that the use of marital funds to pay nonmarital expenses or debts is a negative contribution to the marital estate. This negative contribution to the marital estate again compels the court to make an unequal division of the remaining marital estate, penalizing the "guilty" spouse by awarding that spouse less than he or she would otherwise have been entitled.

The principle that marital funds spent on nonmarital debt should work to the detriment of the spouse who spends the funds has, of late, compelled courts to hold that the payment of child support during a marriage for a child born prior to the marriage constitutes the payment of a nonmarital debts with marital funds, and thus

1985); Rundell v. Rundell, 423 N.W.2d 77 (Minn. Ct. App. 1988). Finally, a third class of cases focus on whether a spouse spends marital funds on a "nonmarital purpose." See In re Marriage of Finer, 920 P.2d 325, 331 (Colo. Ct. App. 1996); In re Marriage of Coyle, 671 N.E.2d 938, 943 (Ind. Ct. App. 1996); Dove v. Dove, 773 S.W.2d 871, 874 (Mo. Ct. App. 1989); Lenczycki v. Lenczycki, 543 N.Y.S.2d 724, 727 (N.Y. App. Div. 1989). It should also be noted that every "marital purpose" need not necessarily benefit each spouse. As stated in In re Marriage of Coyle, "[T]he fact that one spouse or the marriage itself does not benefit directly from an expenditure does not, standing alone, require a finding that a dissipation of marital assets has occurred. . . . Each party to a marriage typically spends some part of marital funds for his or her own purposes." 671 N.E.2d at 943.

What all of these theories of dissipation have in common is an attempt to compensate one spouse for an intentional or grossly negligent depletion of the marital estate at the hands of the other spouse.


The fact that a debt is incurred before the marriage or after the date of classification does not necessarily mean the payment of the debt is for a nonmarital purpose. The most obvious example of this is the payment of student loans. See In re Marriage of Speirs, 956 P.2d 622, 624-25 (Colo. Ct. App. 1997); Simmons v. Simmons, 708 A.2d 949 (Conn. 1998); Roberts v. Roberts, 570 N.E.2d 72, 76-77 (Ind. Ct. App. 1990); Tasker v. Tasker, 395 N.W.2d 100, 105 (Minn. Ct. App. 1986); Hicks v. Hicks, 969 S.W.2d 840, 846-47 (Mo. Ct. App. 1998); In re Marriage of Lopez, 841 P.2d 1122, 1125-26 (Mont. 1992); Bourdon v. Bourdon, 403 A.2d 433, 434-35 (N.H. 1979); Forristall v. Forristall, 831 P.2d 1017, 1019-20 (Okla. Ct. App. 1992). These cases recognize that student loans provide a benefit to both parties: the higher earning capacity of one party in the marital partnership.

48. See Adams v. Adams, 443 S.E.2d 780, 781 (N.C. Ct. App. 1994) (use of marital funds to pay separate debts is a distributional factor); Fenske v. Fenske, 542 N.W.2d 98, 102 (N.D. 1996) (stressing in division of marital assets that husband's premarital debts had been paid off during the marriage with marital funds).
either is considered dissipation of marital assets\textsuperscript{49} or a negative contribution to the marital estate.\textsuperscript{50}

The "dissipation of marital assets" theory was expounded in \textit{Jensen v. Jensen}.\textsuperscript{51} In that case, the husband came into the marriage with an obligation to support two children from a prior marriage. During the marriage, he had another child by a paramour, who successfully obtained a child support order against the husband. The court held that payment of both support obligations from marital funds was dissipation:

Wife did not benefit by allowing husband to liquidate marital assets for payment of these "personal" obligations. It is difficult to conceive the benefit to wife from husband's liquidation of marital assets in order to pay his ex-lover support for the child the two conceived during his marriage to wife. Likewise, wife received no benefit from money expended to pay husband's obligation for child support to husband's ex-wife. . . . The trial court did not err in setting apart assets, some of which had already been liquidated, as a portion of husband's marital property award. They were marital assets utilized by husband to fulfill his obligations.\textsuperscript{52}

The court thus classified payment of child support to children of a previous marriage, and to a child born out-of-wedlock during the marriage as dissipation of marital assets.

The latest example of the "negative contribution" theory may be found in \textit{Barker v. Barker}.\textsuperscript{53} In that case, the court stated,

In dual classification states such as Virginia, the use of marital funds for nonmarital purposes can be considered as a factor in determining an equitable distribution award. For example, where marital funds are used to pay the separate debts of one of the parties, a court may properly consider that fact as a negative monetary contribution to the marital property. In addition, we have found that support obligations arising from a prior marriage may constitute such a separate debt.

Based on Virginia's statutory scheme and the cases which have applied it, we hold that the trial court could properly consider husband's use of marital funds to pay his prior support obligations as a negative monetary contribution in fashioning its equitable distribution award.\textsuperscript{54}

\textsuperscript{49} See \textit{Jensen v. Jensen}, 877 S.W.2d 131, 135 (Mo. Ct. App. 1994).

\textsuperscript{51} 877 S.W.2d 131 (Mo. Ct. App. 1994).
\textsuperscript{52} \textit{Id.} at 135.
\textsuperscript{54} \textit{Id.} at 249; \textit{see also} Hayes v. Hayes, 465 S.E.2d 590, 592 (Va. Ct. App. 1996) (support obligation to prior family is nonmarital debt).
The New Jersey case of McGee v. McGee was no less harsh:

Moreover, while the judge may have been correct in his conclusion that Dr. McGee did not “dissipate” assets, he appears to have given no consideration at all of the payment of a small fortune by Dr. McGee toward his pre-existing obligations to his former wife and children. Mrs. McGee was not required to contribute her assets toward that support and this is an equitable consideration applicable to distribution.

The effect of Jensen, Barker, and McGee is that in a divorce action, a spouse who has paid support for a child of a prior marriage or relationship is penalized in the property division aspect of the proceeding, while at the same time that same support obligation is given priority as a matter of public policy when the support obligation is calculated for the children of the marriage.

Clearly bothered by the prospect of finding that the support of a child from a prior marriage or relationship constitutes dissipation of marital funds or a negative contribution to the marital estate, two courts have held that the nonobligor spouse “consented” to the expenditure of marital funds on the nonmarital purpose, and thus the expenditure was neither dissipation nor a negative contribution.

In contrast to the courts’ treatment of the use of marital funds for the payment of child support for prior born children is the courts’ treatment of the use of marital funds for the support of a stepchild. In this case, the stepparent is viewed as making a positive contribution to the marriage, and is rewarded for that contribution.

The leading case nationwide which espouses this principle is Fuerst v. Fuerst. Fuerst held that such support falls within the general rule that contributions to child care are relevant to property division:

Support of a spouse’s children is a factor similar in economic and equitable considerations to sec. 767.255(3). Section 767.255(3) indicates that the legislature considers homemaking and child care services to be relevant considerations in dividing property. The economic equivalent of such services would be equally relevant.

The consideration of economic and equitable factors related to homemaking and child care is consistent with the legislative statement of purpose in ch 105, sec 1, Laws of 1977, which states, in relevant part:

(2) It is the intent of the legislature that a spouse who has been handicapped socially or economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage . . . .

The factor considered in this case is an “economic” issue involved in the marital relationship. Lawrence did sustain an economic handicap by his contributions to Bernice’s children, while Bernice was benefitted economically by not having to pursue alternate sources of support.

56. Id. at 1134-35.
59. Id. at 866.
The appellate court concluded that the trial court did not abuse its discretion by considering support for stepchildren as a division factor. Alaska has also held that the prior contributions to the support of a stepchild are a division factor. In *Burgess v. Burgess*, the court held:

The trial court found that Larry supported Carole’s two children from her previous marriage and one of her grandchildren. Carole argues that the trial court abused its discretion in considering such support in dividing the property. At common law, a stepparent-stepchild relationship imposes no obligations and confers no benefits on either the stepparents or the child. Since a stepparent need not support a stepchild, and such support provided must be presented to be a gift. . . . We are unable to say that the division in this case was made unjust by the court’s consideration of Larry’s contribution to the support of Carole’s children.

It is the rare case that has held it is error to attach any weight to contributions for the support of stepchildren. In *Robinson v. Robinson*, the court summarily held:

[The voluntary support of a spouse’s child during marriage is perhaps a generous gift at the time it occurs, but it has no bearing on how the marital property should be distributed between the two spouses at divorce (except as it affects their economic circumstances at the time).]

Similarly, in *In re Marriage of Schultz*, the court reversed a trial court decision which considered support of stepchildren as a division factor in equitable distribution. The court expressly relied upon two Montana statutes. The first statute provided that where a stepparent supports stepchildren, “it is presumed that he does so as a parent.” The second statute provided that one parent is not obligated to reimburse the other for contributions to the support of their children unless there is a specific contrary agreement. The court reasoned that because support was provided, the stepparent was acting as a parent, and since no agreement was proven, the trial court’s order effectively awarded reimbursement in violation of the second statute.

In sum, at the division stage of the equitable distribution case, a support obligor’s payment of support to prior born children is considered dissipation of marital funds or a negative contribution to the marital estate, while a stepparent’s contributions of support to a stepchild is considered a positive factor.

60. 710 P.2d 417 (Alaska 1985).
61. Id. at 422; see also Cox v. Cox, 882 P.2d 909, 920 (Alaska 1994) (holding that it is an abuse of discretion not to consider stepparent’s contributions in making equitable distribution award); cf. Burcell v. Burcell, 713 P.2d 802, 805 (Alaska 1986) (agreeing that stepparent’s contribution to support can be positive factor in equitable distribution, but reversing on facts, holding there was insufficient evidence of such contribution); Schwegler v. Schwegler, 417 N.W.2d 420, 431 (Wis. Ct. App. 1987) (holding that a court may, but is not required to, consider contributions of stepparent in equitable distribution award).
62. 554 A.2d 1173 (Me. 1979).
63. Id. at 1175.
64. 597 P.2d 1174 (Mont. 1979).
65. Id. at 1176 (quoting MONT. CODE ANN. § 61-117 (1947)).
66. See id.
67. See id. at 1177.
V. A CALL TO CHANGE: INCOME TO SUPPORT A PRIOR BORN CHILD IS NOT "MARITAL FUNDS" AND THUS CANNOT BE DISSIPATED

It is black letter law in all states that the financial aspects of the divorce should fit together “like a carefully crafted mosaic”:68 spousal support must be determined in light of the equitable distribution award and the child support award, the equitable distribution award must be determined in light of the spousal support award and the child support award, and the child support award can consider the spousal support and property division provisions of the divorce.69 For this reason, when on appeal one aspect of the financial award is overturned, all aspects of the case are remanded to the trial court for redetermination.70 It seems obvious, however, that the law of child support and the law of equitable distribution are severely at odds when it comes to equitable distribution and the support of prior children. Child support law demands, as a matter of public policy, that child support obligations to prior born children be complied with in a timely manner. Yet, the law of property division effectively penalizes the parent who fulfills this obligation in a timely and responsible manner.71 Child support law also regards the stepparent’s duty to support a stepchild as only a secondary duty behind that of the natural parent, and dependent on the equitable doctrine of in loco parentis. Yet, the law of property division rewards the stepparent who uses marital funds to fulfill this ephemeral duty.

The law of equitable distribution should align itself with the law of child support by viewing the income that a support obligor earns in order to pay a child support obligation for a prior born child as neither marital funds nor separate funds, but funds earned and held in trust for the child.

69. See TURNER, supra note 45, § 8.08, at 596-7.
70. See, e.g., Byrd v. Byrd, 674 So. 2d 585 (Ala. Civ. App. 1995) (on determination on appeal that wife should have been awarded portion of husband’s retirement benefits as part of property award, trial court was instructed to revisit alimony award as well); Tortorich v. Tortorich, 902 S.W.2d 247, 251 (Ark. Ct. App. 1995) (remanding on issue of valuation of husband’s professional association, order concerning payment of expert’s fees and alimony also must be reconsidered); In re Marriage of Simon, 856 P.2d 47, 51-52 (Colo. Ct. App. 1993) (holding that reversal of order for property division required that issues of maintenance and attorney fees be reconsidered as well); Grosch v. Grosch, 665 A.2d 918, 919-20 (Conn. App. Ct. 1995) (holding that disruption of one element of financial orders necessarily places in doubt propriety of other orders in entire distribution scheme); Collinsworth v. Collinsworth, 624 So. 2d 287, 291 (Fla. Dist. Ct. App. 1993) (requiring that award of alimony be reconsidered where district court of appeal vacated entire plan of equitable distribution); In re Marriage of Brenner, 601 N.E.2d 1270, 1276 (Ill. App. Ct. 1992) (holding that if trial court is to reexamine division of marital assets, it should also examine the effect of its new division on maintenance and attorney fees); In re Marriage of Mayfield, 477 N.W.2d 859, 863 (Iowa Ct. App. 1991) (holding that where improper division of property required remand, remand was also required as to alimony); Freese v. Freese, 597 A.2d 1007, 1012 (Md. Spec. Ct. App. 1991) (requiring that alimony be reconsidered in light of remand of equitable monetary award); In re Marriage of Strassner, 895 S.W.2d 614, 617 (Mo. Ct. App. 1995) (holding that to the extent that maintenance and pension distribution award are interdependent, if pension distribution is changed on appeal, maintenance must be revisited); Madori v. Madori, 608 N.Y.S.2d 331, 332 (N.Y. App. Div. 1994) (holding that distribution of marital property is part of interrelated whole, which requires consideration of alimony and child support); Spychalski v. Spychalski, 608 N.E.2d 802, 809 (Ohio Ct. App. 1992) (holding that since division of marital property was reversed, issue of alimony may have to be redetermined as well); Kanta v. Kanta, 479 N.W.2d 505, 511 (S.D. 1991) (determining that court’s award of alimony would have to be revisited where property division was remanded).
71. Cf. Miles v. Werle, 977 S.W.2d 297 (Mo. Ct. App. 1998) (husband dissipated marital assets when wife had to bail husband out of jail for failing to pay child support).
This view of income earned by a support obligor would be wholly consistent with recent federal legislation contained in the Personal Responsibility and Work Opportunity Reconciliation Act\(^2\) (PRWORA) of 1996 concerning the enforcement of child support.

First, by way of background to the child support related provisions of PRWORA, the Bradley Amendment to the Family Support Act of 1988\(^3\) provides that one requirement for a state's receipt of federal funds for child support enforcement is that the courts cannot retroactively modify a child support obligation: once the obligation becomes due and owing, it is a judgment.

Under the recent amendments to 42 U.S.C. § 666 enacted by PRWORA, any support obligation will automatically become subject to an income withholding order if it is past due.\(^4\) Further, at the time the initial order is entered, the obligor may request an income withholding order, and income is not subject to withholding only if the tribunal finds good cause not to require immediate income withholding.\(^5\) In the context of interstate enforcement, the Uniform Interstate Family Support Act (UIFSA) provides that any person may send an income withholding order to an obligor's employer.\(^6\) Since 85% of Americans who file income tax returns report receiving some or all of their income by way of salary or wage, an income withholding order is applicable to most child support obligors.\(^7\)

PRWORA also provides that as a condition of receiving federal funds, the states must adopt laws providing that liens arise by operation of law for past due support.\(^8\) Consequently, a child support enforcement agency can issue a lien based on any child support obligation, and the lien can then be used as the basis for tax refund offsets, license revocation, levy and seizure of bank accounts, and seizure of government benefits, lottery winnings and other assets not otherwise exempt by law.

The effect of these federal statutes relating to child support enforcement is that as each child support obligation becomes due and owing from month to month, and in some states from week to week, it is subject to wage withholding, levy, seizure, and other enforcement procedures as a matter of law, without further order of the court. The child support obligor, therefore, earns his or her income in order to pay the outstanding order. Under this view, it is sensible to call the funds earned for the payment of support and subject to withholding and liens not "marital funds" but funds held specifically for payment of the child support obligation. In essence, the support obligor holds his or her income in trust for the benefit of the child.\(^9\)


\(^4\) See id. § 666(a)(1)(B).


\(^7\) See U.S. COMMISSION ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 148 (1994).


\(^9\) The "trust" aspect of the child support obligation is made crystal clear in pending federal legislation. HR 2855 was introduced to further amend the Social Security Act to require that anticipated child support be held
This view of income earned by a support obligor would also be wholly consistent with the view of many states that child support received by the child support obligee is held by the custodial parent in a fiduciary capacity for the child.\(^{80}\) For this reason, in most states the parents cannot privately agree to waive the payment of child support in the future,\(^{81}\) and in many states, the courts have held that the custodial parent cannot enter into an agreement with the noncustodial parent to forgive arrears; such would be a breach of the fiduciary duty.\(^{82}\) The fiduciary duty of the custodial parent with regards to the receipt of child support also imposes on the custodial parent the duty to account to the noncustodial parent for the expenditure of child support in some states.\(^{83}\) Moreover, all child support guidelines exclude from the definition of income child support received for the benefit of a child of another marriage.\(^{84}\) Clearly, then, if the child support received by the obligee is held by the obligee as fiduciary, then it is paid by the obligor as a fiduciary as well, and should not be considered as part of the marital assets.

This view that income earned and held to pay a child support obligation is not marital property is superior to the fiction that a spouse “consents” to the payment of child support for a child of a previous relationship at the commencement of the marriage.\(^{85}\) For example, what if during the marriage a husband is sued for paternity in trust upon the sale or financing of certain real property of an obligated parent.

80. See, e.g., Jenkins v. Jenkins, 567 N.E.2d 136, 140 (Ind. Ct. App. 1991); Varner v. Varner, 588 So. 2d 428, 432 (Miss. 1991); Office of Tony Ctr. v. Baker, 366 S.E.2d 167, 168 (Ga. Ct. App. 1988) (holding that attorney’s charging lien does not attach to child support payments because those payments are received and held by the custodial parent as a “trustee” for the child, and as a trustee the parent lacks sufficient ownership in the child support payments to grant a lien against the payments); Sue Davidson, P.C. v. Naranjo, 904 P.2d 354, 356 (Wyo. 1995) (same).


85. See Wright v. Wright, 904 P.2d 403, 409 (Alaska 1995) ($143,000 gift to children was not dissipation,
for a child that was born prior to the marriage, and of whom the husband had no knowledge? Clearly, the wife did not “consent” at the time of the marriage to the entry of an order finding the husband liable for child support for a then unknown child whose existence was discovered after the marriage. Nonetheless, in this situation, in the realm of child support law, the husband’s payment of child support from current income, i.e., marital funds, is payment for child support of a child born prior to the marriage, and thus is entitled to absolute judicial deference if and when the husband becomes liable for children of the new marriage. At the same time, the courts would regard this payment of child support as dissipation of marital assets. The only solution is to regard the funds earned for the benefit of the prior born child as funds held in trust for the child by the support obligor.

A public policy exception may be made for a child born as the result of an extra-marital affair. In this regard, the analogy can aptly be drawn to the principle that funds spent on a paramour constitutes dissipation. The dissipating spouse, however, should not suffer so great a penalty in the equitable distribution phase of the divorce that he or she is left without adequate means to support the out of wedlock child.

VI. CONCLUSION

The law of equitable distribution and the law of child support, especially the public policy of support enforcement espoused by the federal government, should not work in opposition. In order for the courts to apply the law consistently, the expenditure of funds on child support should not be considered dissipation of marital assets or a negative contribution to the marital estate. Rather, the income earned for the payment of child support should be considered outside the marital estate.

where nondonor spouse consented to gift); Askinazi v. Askinazi, 641 A.2d 413, 416 (Conn. App. Ct. 1994) (husband’s gambling losses were not dissipation when wife consented to and shared in husband’s winnings); St. Laurent v. St. Laurent, 583 A.2d 211, 212 (Me. 1990) (parties’ support of son and his girlfriend was not for nonmarital purpose, where both parties consented to such support); In re Aud, 491 N.E.2d 894, 901 (Ill. App. Ct. 1986) (spouse’s support of widowed mother was not dissipation, where such support had been supplied regularly through marriage). But see In re Lee, 615 N.E.2d 1314, 1320 (Ill. App. Ct. 1993) (prior history of giving each child $10,000 per year did not justify post-separation gift of $267,000).

86. See Jensen v. Jensen, 877 S.W.2d 131, 135 (Mo. Ct. App. 1994).
87. See supra footnote 46 and accompanying text.