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## Garnishment of Wages to Enforce Child Support - A New Remedy for an Old Problem.

Mary Fenlon

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**Garnishment of Wages To Enforce Child Support — A New  
Remedy for an Old Problem**

**Mary Fenlon**

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**I. INTRODUCTION**

As a result of the number of divorces granted each year, the single-parent family is the fastest growing family group in the United States.<sup>1</sup> Consequently, court orders regarding child support are affecting an ever-increasing number of children.<sup>2</sup> In setting the amount of support, the

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1. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-20 No. 381, POPULATION CHARACTERISTICS 1, 2 (1983). Between 1970 and 1982, single head of household families increased from 24% to 35% while married-couple families declined from 29% to 19%. See *id.* at 2-3.

2. See R. SANDERS, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23 No. 124, CHILD SUPPORT AND ALIMONY: 1981, at 1 (1983). In 1981, four million women were awarded child support for their children. See *id.* at 1. By 1982, five million women had been awarded child support for their children. See *id.* at 1.

judge considers such things as actual and potential earnings of the parents, debts, division of property between the parties, age of the children, and other pertinent facts.<sup>3</sup> In Texas, the primary difficulty with child support orders, lies in their enforcement rather than in their establishment.<sup>4</sup>

More than fifty percent of the children in the United States in single-parent families entitled to receive child support as a result of a court order do not receive the full amount to which they are entitled from the noncustodial parent.<sup>5</sup> Texas has been cited as having one of the worst collection records of all fifty states for enforcement of child support.<sup>6</sup> This record is largely due to the inadequate remedies that have been available to the

3. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2451(c) (1982) (obligation to support, primary consideration, other financial obligations secondary); DEL. CODE ANN. tit. 13, § 514 (1981) (health, earning capacity, and relative economic conditions of parties considered); IOWA CODE ANN. § 598.21(4) (West 1981) (considerations are financial resources of child and parents, tax consequences, and desirability that custodial parent remain home with child).

4. *See* TEX. FAM. CODE ANN. § 14.05 (Vernon 1975) (court has power to establish support orders); *id.* § 14.09 (remedies available for enforcement are contempt and rendering judgment for arrearages). The requirements of rule 308-A of the Texas Rules of Civil Procedure must be strictly followed in order to enforce an order for child support by a contempt action. *See* TEX. R. CIV. P. 308-A. The rule requires that notice of failure to comply with the support order be filed with the court and that a show cause order be issued and served upon the delinquent obligor at least 10 days prior to the hearing. *See id.*; *see also Ex Parte Carpenter*, 566 S.W.2d 123, 124 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ) (failure to obey vague and indefinite provision in support decree did not justify contempt order); *Ex Parte Sturdivant*, 544 S.W.2d 512, 514 (Tex. Civ. App.—Texarkana 1976, no writ) (contempt order entered after two days notice of hearing constituted denial of due process and husband could not be incarcerated); *Ex Parte Hart*, 524 S.W.2d 365, 366 (Tex. Civ. App.—Dallas 1975, no writ) (contempt order void when relator conclusively proved inability to make support payments through no fault of his own). *But see Frank v. Reese*, 594 S.W.2d 119, 121 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (although party may prove inability to pay child support, if court feels he should be punished, court may confine him to jail for fixed time, forgiving arrearage upon release). Judgments for past due support are difficult to enforce because of broad exemption statutes and the constitutional and statutory prohibition against garnishment of current wages. *See* TEX. CONST. art. XVI, § 28 (prohibits garnishment of current wages); TEX. REV. CIV. STAT. ANN. arts. 3835, 3836 (Vernon Supp. 1982-1983) (article 3835 exempts certain land from satisfaction of debts; article 3836 exempts certain personal property, including current wages, from satisfaction of debts); *id.* art. 4099 (Vernon 1966) (prohibits garnishment of current wages). *See generally*, Solender, *Family Law: Parent and Child*, 36 Sw. L.J. 155, 178 (1982) (enforcement of child support order one of most difficult and frustrating parts of divorce).

5. *See* R. SANDERS, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23 No. 124, CHILD SUPPORT AND ALIMONY: 1981, at 1 (1983). In 1981, only 47% of the four million women entitled to receive child support payments received the full amount due, whereas 25% received partial payment, and 28% received no payment, a total of 53% not receiving the full amount due. *See id.* at 2.

6. *See* Debate on Tex. H.B. 2 and Tex. H.R.J. Res. 1 on the Floor of the Senate, 68th Leg. (May 17, 1983) (statement of Senator Ray Farabee) (copy of tape on file with St. Mary's Law Journal).

Texas custodial parent who has the primary responsibility for enforcing the court-ordered obligation.<sup>7</sup>

During the past ten years, the federal government and individual states have realized that the responsibility for support of children should primarily rest with the parents and not with the government and the taxpayer.<sup>8</sup> Federal solutions to the problem of noncompliance have mushroomed<sup>9</sup> but Texas has been largely unaffected due to the Texas constitutional amendment prohibiting the garnishment of wages.<sup>10</sup> Thus, the enforcement of child support orders in Texas has been especially difficult.<sup>11</sup>

7. *See id.* The civil remedies have included civil contempt and reduction of arrears to money judgment. *See* TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975) (civil contempt); *id.* § 14.09(c) (money judgment). The criminal remedy available is charging the recalcitrant parent with criminal non-support. *See* TEX. PENAL CODE ANN. § 25.05 (Vernon 1974); *see also* San Antonio Express-News, Sept. 25, 1983, at G 13, col. 2 (custodial parents, 90% of whom are women, burden of collecting child support).

8. *See, e.g.*, *Lizotte v. Lizotte*, 551 P.2d 137, 140 (Wash. Ct. App. 1976) (primary obligation of support should be on parents, not taxpayers of state); S. REP. NO. 1356, 93rd Cong., 2d Sess. 51-55 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 8133, 8145-49 (four out of five children are on AFDC because parent leaves home and does not support children); Phillips & Dworak, *The Federal Garnishment Statute: Its Impact in the Air Force*, 18 A.F.L. REV. 70, 70-71 (Winter 1976) (Congress passed legislation encouraging states to pursue parents who do not support children when capable of doing so because of inordinate share of support taxpayers are providing these children).

9. *See, e.g.*, 42 U.S.C. § 653 (Supp. V 1981) (established Parent Locator Service to aid enforcement of child support orders); *id.* § 659 (money due federal employee subject to legal process if brought for enforcement of support orders); *id.* § 664 (federal tax refunds can be withheld for past due support and paid to state agency which provides support for child). State remedies also include wage garnishment. *See, e.g.*, N.C. GEN. STAT. § 110-136 (Supp. 1981) (40% of wages subject to garnishment for child support); 42 PA. STAT. ANN. Rule 1910.22, *interp. commentary* (Purdon Supp. 1983-1984) (50% of wages subject to garnishment); VT. STAT. ANN. tit. 33, § 2726 (1981) (provides for wage assignment with amount to be withheld depending on different factors).

10. *See* TEX. CONST. art. XVI, § 28. "No current wages for personal service shall ever be subject to garnishment." *Id.* Garnishment of wages is also statutorily prohibited. *See* TEX. REV. CIV. STAT. ANN. art. 3836(a)(7) (Vernon Supp. 1982-1983) (current wages exempt from satisfaction of liabilities); *id.* art. 4099 (Vernon 1966) (current wages not subject to garnishment).

11. *See* Corrigan, *Garnishment of Federal Income for Child Support Alimony Obligations in Texas*, 41 TEX. B.J. 245, 252 (1978). Under section 659 of title 42 of the United States Code, a federal employee's wages are subject to garnishment for the enforcement of child support and alimony orders but only to the extent that the state, where the party entitled to receive the support resides, allows the remedy. *See* 42 U.S.C. § 659 (Supp. V 1981); *see also* Corrigan, *Garnishment of Federal Income for Child Support and Alimony Obligations in Texas*, 41 TEX. B.J. 245, 252 (1978). Since garnishment of current wages is unavailable in Texas, a federal employee's wages are effectively protected. *See* Corrigan, *Garnishment of Federal Income for Child Support and Alimony Obligations in Texas*, 41 TEX. B.J. 245, 245 (1978). This rule applies also to nonresident military members stationed in Texas. *See id.* at 246. While current pay is not subject to garnishment in Texas, military retirement benefits

In the past, Texas enforcement tools have focused on remedies for non-payment of child support, rather than on a system to insure timely, regular payments on a continuing basis.<sup>12</sup> The last legislative session proposed two solutions to change this pattern.<sup>13</sup> The first solution was the adoption of an amendment to the Family Code providing for the voluntary assignment of wages by the party under a court order to pay child support.<sup>14</sup> The second solution was the passage of a resolution<sup>15</sup> which, if adopted by the electorate, would allow the Texas Constitution to be amended to permit garnishment of wages for the sole purpose of enforcement of court-ordered child support payments.<sup>16</sup> On November 8, 1983, the voters of Texas adopted this resolution and amended the Texas Constitution.<sup>17</sup>

The purpose of this comment is to address the inadequacies of the previous enforcement system in Texas and to discuss the probable results and limitations of the new section in the Family Code allowing voluntary assignment of wages. The comment will conclude with a discussion of the new amendment to the Texas Constitution, why involuntary assignment is necessary and how it will work.

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have been construed not to be "current wages" and thus are subject to garnishment. *See* United States v. Wakefield, 572 S.W.2d 569, 572 (Tex. Civ. App.—Fort Worth 1978, writ dismissed) (under Texas law military retirement pay is not current wages); United States v. Fleming, 565 S.W.2d 87, 88 (Tex. Civ. App.—El Paso 1978, no writ) (since Texas Supreme Court deemed retirement pay "property", it cannot be considered "current wages").

12. *See* TEX. FAM. CODE ANN. § 14.09 (Vernon 1975). The remedies available are contempt and reduction of arrears to money judgment. *See id.* § 14.09(a),(c). The purpose of section 14.09 was to provide courts with the means to enforce child support obligations. *See* Harrison v. Cox, 524 S.W.2d 387, 392 (Tex. Civ. App.—Fort Worth 1975, writ refused n.r.e.). With either remedy the parent entitled to receive support must wait until the payments are past due before using these remedies and may only obtain relief on the amount past due. *See* Huff v. Huff, 648 S.W.2d 286, 286 (Tex. 1983) (section 14.09(c) provides remedy to file motion to reduce unpaid child support to judgment); Stephens v. Stephens, 543 S.W.2d 686, 688 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (remedies of section 14.09 available to enforce delinquent payments).

13. *See* Act of June 17, 1983, ch. 402, §§ 1, 2, 1983 Tex. Sess. Law Serv. 2169-73 (Vernon); Tex. H.R.J. Res. 1, 68th Leg., 1983 Tex. Sess. Law Serv. A-241 (Vernon).

14. *See* Act of June 17, 1983, ch. 402, § 1, 1983 Tex. Sess. Law Serv. 2169 (Vernon). "A person ordered by a court to make child support payments may voluntarily assign a portion of his earnings for the payment of support by filing a signed assignment with the court having jurisdiction of the suit." *Id.* § 1(a), 1983 Tex. Sess. Law Serv. 2169.

15. *See* Tex. H.R.J. Res. 1, 68th Leg., 1983 Tex. Sess. Law Serv. A-241 (Vernon). "No current wages for personal services shall ever be subject to garnishment, except for the enforcement of court ordered child support payments." *Id.*

16. *See id.* "This proposed constitutional amendment shall be submitted to the voters at an election to be held on November 8, 1983." *Id.*

17. *See* San Antonio Light, Nov. 9, 1983, at 1A, col. 1.

## II. HISTORICAL BACKGROUND

### A. *Child Support*

The duty to support one's minor children is universally accepted as belonging to the parents of such children.<sup>18</sup> The common law always recognized a moral duty of both the father and the mother during marriage to support their minor children,<sup>19</sup> but the legal duty of support was not as clearly acknowledged.<sup>20</sup> Some early cases denied the existence of any legal duty, unless imposed by statute.<sup>21</sup> The majority of American courts have long since repudiated that doctrine and the prevailing view today is that, even in the absence of a statute, parents have a legal as well as a moral duty to support their minor children.<sup>22</sup> The primary duty of support, however, was recognized as one belonging to the father.<sup>23</sup> This duty

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18. *See, e.g.*, *Porter v. Powell*, 44 N.W. 295, 297 (Iowa 1890) (act of having child imposes duty upon parents to support child); *Round Bros. v. McDaniel*, 118 S.W. 956, 957 (Ky. 1909) (nature imposes obligation upon parents to support their children); *Wells v. Wells*, 44 S.E.2d 31, 33 (N.C. 1947) (principle of natural law for parents to support their children).

19. *See, e.g.*, *Dunbar v. Dunbar*, 190 U.S. 340, 351 (1903) (obligation of father to support his children exists in all states under common law); *Barrett v. Barrett*, 39 P.2d 621, 622 (Ariz. 1934) (all courts agree there is moral obligation upon parents to support their children); *Conwell v. Conwell*, 69 A.2d 712, 716 (N.J. 1949) (moral duty to support child).

20. *Compare* *Conwell v. Conwell*, 69 A.2d 712, 716 (N.J. 1949) (parents have no common law duty to support child, only moral duty to do so) *with* *Gully v. Gully*, 111 Tex. 233, 237, 231 S.W. 97, 98 (1921) (Texas courts hold parents have both legal and moral obligation to support children).

21. *See* *Cohen v. Cohen*, 69 A.2d 752, 754 (N.J. Super. Ct. App. Div. 1949) (only enforceable duties of parents to support children are those imposed by statute); *Cisna v. Beaton*, 98 P.2d 651, 652 (Wash. 1940) (under common law parent did not have legal obligation to support child).

22. *See, e.g.*, *Barrett v. Barrett*, 39 P.2d 621, 622 (Ariz. 1934) (prevailing law today is that parenting imposes legal duty despite absence of statute imposing duty); *Hooten v. Hooten*, 147 S.W. 373, 373-74 (Ga. 1929) (better view is that parents have legal as well as moral duty to support children); *Doughty v. Engler*, 211 P. 619, 620 (Kan. 1923) (because child incapable of taking care of self, parents under legal duty to provide care even in absence of statute).

23. *See, e.g.*, *Brock v. Brock*, 205 So. 2d 903, 908 (Ala. 1967) (state statute and basic morality requires primary duty of support to rest on father); *Houger v. Houger*, 449 P.2d 766, 770 (Alaska 1969) (primary and continuing obligation on father to support children); *Gully v. Gully*, 111 Tex. 233, 239, 231 S.W. 97, 98 (1921) (primary duty of support on father in interest of child). The more modern view today, however, is that a mother's obligation is equal to the father's. *See, e.g.*, *Plant v. Plant*, 312 N.E.2d 847, 849-50 (Ill. App. Ct. 1974) (modern view is that husband and wife equally liable for child support); *Pendexter v. Pendexter*, 363 A.2d 743, 750 (Me. 1976) (common law rule that father primarily liable out of date; liability should rest equally on mother); *Rose Funeral Home v. Julian*, 144 S.W.2d 755, 757 (Tenn. 1940) (primary obligation no longer on father; both parents have equal responsibility).

of support continued despite a dissolution of the marriage.<sup>24</sup>

### B. *Enforcement Remedies in Texas*

While the father may have had a continuing obligation to support his child, it was not until 1935 that the Texas courts had the power to order a parent to pay child support after the date of a final decree for divorce.<sup>25</sup> The legislature gave the courts power to make orders for custody and support of minor children pursuant to a divorce petition.<sup>26</sup> Additionally, the legislature gave the courts power to enforce orders for child support through civil contempt proceedings.<sup>27</sup>

Until 1973, civil contempt was the only civil remedy a parent had in Texas to enforce child support orders.<sup>28</sup> When the 63rd Texas Legislature

24. See *Gomez v. Perez*, 409 U.S. 535, 536 (1973) (obligation to support continues beyond end of marriage); *Almanza v. State*, 365 S.W.2d 360, 362 (Tex. Crim. App. 1963) (father's duty to support continues after divorce despite dispute over custody, subsequent remarriage, or second family obligations); *Freeman v. State*, 103 Tex. Crim. 428, 430, 280 S.W. 1069, 1070 (1926) (father's duty of support continues even if divorce decree makes no such provision).

25. See Act of March 19, 1935, ch. 39, § 1, 1935 Tex. Gen. Laws 111, *repealed by* Act of June 15, 1973, ch. 543, § 14.05(a), 1973 Tex. Gen. Laws 1411, 1424 (court has power to order periodic payments for support of child beyond entry of divorce decree). Before 1935, the court's power to make provisions for child support was restricted to the time prior to the entry of the divorce decree. See Law of Jan. 6, 1841, § 4, 6, 1841 Tex. Gen. Laws 19, 20, 2 H. GAMMEL, LAWS OF TEXAS 483, 484 (1898) (*repealed* 1935); see also *Cunningham v. Cunningham*, 120 Tex. 491, 496, 40 S.W.2d 46, 49-50 (1931) (statute prohibits order of child support beyond entry of divorce decree); *Ex Parte Davis*, 101 Tex. 607, 612, 111 S.W. 394, 396 (1908) (order for temporary support of child limited to time prior to entry of divorce decree); *Sneed v. Sneed*, 296 S.W. 643, 646 (Tex. Civ. App.—Austin 1927, no writ) (court cannot render judgment against either spouse for future child support). While the Act prohibited the court from awarding future child support payments, it did not prohibit the court from setting aside community property to be used for the benefit of the child in the future, and if there was no community property, separate property could be divested for the child's use. See *Fitts v. Fitts*, 14 Tex. 443, 450 (1855).

26. See Act of March 19, 1935, ch. 39, § 1, 1935 Tex. Gen. Laws 111, *repealed by* Act of June 15, 1973, ch. 543, § 14.05(a), 1973 Tex. Gen. Laws 1411, 1424. This statute allowed the court to inquire into the ability of the parent to support the child. See *id.* The statute empowered the court to make orders for periodic payments for support of the children or to enter orders for a lump sum amount for support. See *id.* The present codification of this Act gives essentially the same powers to the court. See TEX. FAM. CODE ANN. § 14.05 (Vernon 1975).

27. See Act of March 19, 1935, ch. 39, § 1, 1935 Tex. Gen. Laws 111, *repealed by* Act of June 15, 1973, ch. 543, § 14.09(a), 1973 Tex. Gen. Laws 1411, 1425. This particular portion of article 4639(a) dealing with contempt is now governed by section 14.09(a) of the Texas Family Code. See TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975). "Any order may be enforced by contempt." *Id.*

28. See Act of March 19, 1935, ch. 39, § 1, 1935 Tex. Gen. Laws 111, *repealed by* Act of June 15, 1973, ch. 543, § 14.09(a), 1973 Tex. Gen. Laws 1411, 1425; see also *Forney v. Jorrie*,

adopted the Texas Family Code in 1973, Article 4639(a)<sup>29</sup> was repealed by sections 14.05 and 14.09 of the Family Code.<sup>30</sup> Section 14.09 continued to allow the enforcement of child support orders through civil contempt proceedings<sup>31</sup> but also added an additional remedy.<sup>32</sup> Section 14.09 empowered the court to render a judgment for any amount of child support unpaid and owing, and the judgment could be "enforced by any means available for the enforcement of judgments for debts."<sup>33</sup>

While civil contempt and reduction to judgment have been the primary statutory enforcement measures in Texas for the enforcement of child support, there are other measures available.<sup>34</sup> These include the criminal non-support statute,<sup>35</sup> the Uniform Reciprocal Enforcement of Support Act,<sup>36</sup>

511 S.W.2d 379, 385 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (child support enforceable only by civil contempt); *Gani v. Gani*, 500 S.W.2d 254, 256 (Tex. Civ. App.—Texarkana 1973, no writ) (visitation rights cannot be made contingent upon payment of past due child support which is enforceable by contempt proceedings only); *Youngblood v. Youngblood*, 163 S.W.2d 731, 734 (Tex. Civ. App.—Fort Worth 1942, no writ) (civil contempt proceeding only remedy for enforcing child support orders).

29. Tex. Rev. Civ. Stat. art. 4639(a) (1935) (repealed 1973).

30. See Act of March 19, 1935, ch. 39, § 1, 1935 Tex. Gen. Laws 111, repealed by Act of June 15, 1973, ch. 543, §§ 14.05, 14.09, 1973 Tex. Gen. Laws 1411, 1424-26. Section 14.05 continued to give the court power to make orders and section 14.09 continued to give the court power to enforce orders through contempt proceedings. See TEX. FAM. CODE ANN. §§ 14.05, 14.09 (Vernon 1975).

31. See TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975).

32. See *id.* § 14.09(c). This section allows arrearages to be reduced to a money judgment and enforced by any means available for the enforcement of judgments for debts. See *id.* § 14.09(c). Just prior to the passage of the Family Code in 1973, the Texas Supreme Court held in *Menner v. Ranford*, 487 S.W.2d 698, 699 (Tex. 1972), that arrearages of child support could be reduced to a money judgment and be enforced like other judgments for a debt. See *Menner v. Ranford*, 487 S.W.2d 698, 699 (Tex. 1972).

33. See TEX. FAM. CODE ANN. § 14.09(c) (Vernon 1975). Under rule 621 of the Texas Rules of Civil Procedure, "the judgments of the district . . . courts shall be enforced by execution or other appropriate process." Tex. R. Civ. P. 621. Other appropriate remedies could include garnishment or attachment. See TEX. REV. CIV. STAT. ANN. art. 4076(3) (Vernon 1966) (garnishment); *id.* art. 275 (Vernon 1973) (attachment).

34. See 42 U.S.C. § 651 (Supp. V 1981) (title IV-D of Social Security Act); TEX. FAM. CODE ANN. § 12.01 (Vernon 1975) (Uniform Reciprocal Enforcement of Support Act); TEX. PENAL CODE ANN. § 25.05 (Vernon 1974) (criminal non-support statute).

35. See TEX. PENAL CODE ANN. § 25.05 (Vernon 1974). If an individual intentionally or knowingly does not support his children and he is legally obligated to do so, he commits an offense under this statute. See *id.* A first offense is a Class A misdemeanor. See *id.* § 25.05(h). It is punishable by a fine of not more than \$2000 or confinement in jail for not more than one year, or both. See *id.* § 12.21. An offense becomes a third degree felony if the obligor has been previously convicted of the same offense or commits the offense while residing in another state. See *id.* § 25.05(i)(1)-(2). It is punishable by confinement in the penitentiary for not more than 10 years or less than two years. See *id.* § 12.34(a). Punishment may also include a fine up to \$5000. See *id.* § 21.34(b).

36. See TEX. FAM. CODE ANN. § 21.01 (Vernon 1975). The Uniform Reciprocal En-



and title IV-D of the Social Security Act of 1975.<sup>37</sup> While it may appear that Texans have had several options to choose from to help enforce child support orders, none have proven very effective.

### III. MOVEMENT TOWARD CHANGE

#### A. Federal Approach

##### 1. Implementation of Title IV-D

In recognition of the fact that non-custodial parents were not supporting their children, despite the rendition of court orders for them to do so, the federal government began looking for remedies to solve the problem.<sup>38</sup> As early as 1935, the federal government attempted to provide adequate protection for dependent children with the establishment of the Aid to Families with Dependent Children (AFDC) Program.<sup>39</sup> But, as the number of divorces grew, so did the number of children eligible for AFDC because of the lack of enforcement of child support orders.<sup>40</sup> Finally, in 1975, in or-

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forcement of Support Act (URESAs) is designed to help when the parent and child live in different states. *See Raney v. Raney*, 536 S.W.2d 617, 619 (Tex. Civ. App.—Tyler 1976, no writ). A petition is filed in the originating state and is mailed (with supporting documents) to the receiving state. *See* TEX. FAM. CODE ANN. § 21.28 (Vernon Supp. 1982-1983) (duty of initiating state). The receiving state must then, through its prosecuting attorney, take whatever action is necessary to guarantee the court's jurisdiction over the defendant and his property and also set the case for a hearing. *See* TEX. FAM. CODE ANN. § 21.32(b) (Vernon 1975) (duty of responding state).

37. *See* 42 U.S.C. § 651 (Supp. V 1981) (purpose of title IV-D to help enforce child support obligations by locating absent parents, establishing paternity, and obtaining child and spousal support orders). The Child Support Unit of the Texas Department of Human Resources (TDHR) is the designated IV-D Agency in Texas and is mandated by federal law to establish and collect child support for those children who receive AFDC assistance. *See* TEX. HUM. RES. CODE § 46.001 (Vernon 1980) (TDHR designated to administer statewide plan in order to participate in programs established by federal law). The agency also operates a parent-locator service to help find non-paying parents. *See id.* § 46.002 (5)(c). The agency will assist non-welfare clients but may assess a fee for services provided. *See id.* § 46.004.

38. *See* H. KRAUSE, CHILD SUPPORT IN AMERICA 308 (1981) (recognition by federal government came first when AFDC program grew out of control; states then developed new programs due to pressure from federal initiative).

39. *See* Social Security Act, ch. 531, §§ 401-406, 49 Stat. 627-29 (1935); *see also* H.R. Rep. No. 615, 74th Cong., 1st Sess. 9-12 (1935).

40. *See* SENATE FIN. COMM. SOCIAL SERVICES AMENDMENTS OF 1974, S. REP. NO. 1356, 93d Cong., 2d Sess. 42, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 8133, 8145-46 (greatest increase in number of children eligible for AFDC in cases where father absent from home). Originally, the death of the father was the major basis for eligibility but that has decreased from 42% in 1940 to 4% in 1973. Absent fathers have increased the number of AFDC recipients from 66.7% in 1961 to 80.2% in 1973 for a total of 8.7 million recipients by the end of June 1974. *See id.* at 8146.

der to relieve itself of the burgeoning costs of the AFDC program, the federal government implemented the title IV-D program.<sup>41</sup> Under the program the state remained the primary vehicle for collecting child support and establishing the paternity of illegitimate children.<sup>42</sup> The program, however, offered incentives in the form of financial aid to states which established programs for the enforcement of support orders complying with criteria set forth in the statute.<sup>43</sup> States that complied received reimbursement for seventy-five percent of their costs.<sup>44</sup>

## 2. Removal of Federal Immunity for Enforcement Purposes

Another major step that Congress took in order to facilitate the collection of support orders was to repeal the special immunity federal employees enjoyed from the enforcement of judgments for past-due support through garnishment proceedings.<sup>45</sup> After January 1, 1975, the United States allowed itself to be sued to enforce alimony and child support orders through garnishment of federal employees' wages.<sup>46</sup> The effect of this provision was to bring the federal government under the control of individual state garnishment laws exactly as if it were a private employer within the state.<sup>47</sup> Since Texas constitutionally and statutorily prohibited garnishment of current wages,<sup>48</sup> this statute was ineffective in Texas as a means of collecting past-due child support from the wages of government employees.<sup>49</sup>

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41. See 42 U.S.C. §§ 651, 662 (Supp. V 1981) (Congress implemented program to strengthen enforcement and hopefully to reduce cost of AFDC program).

42. See *id.* § 654 (state plan, in order to comply with federal standards, must establish paternity in cases of children born out of wedlock and secure support orders for children).

43. See *id.* § 654 (sets forth criteria for states to meet to receive federal aid). States are required to establish paternity, to utilize reciprocal agreements adopted by other states in attempting to collect support from parents, to utilize federal courts to obtain and enforce orders when other arrangements have proved ineffective, to allow these services to be used by individuals not otherwise eligible for state aid, and to locate absent parents. There are 20 requirements in all. See *id.* § 654.

44. See *id.* § 655(a)(1) (federal government will reimburse state for 75% of its costs if it operates under a plan approved by Department of Health and Human Services).

45. See *id.* § 659 (money due federal employee subject to legal process to enforce legal obligations to provide child support and alimony).

46. See *id.* § 659.

47. See *Wilhelm v. United States Dep't of Air Force, Accounting & Fin. Center*, 418 F. Supp. 162, 164 (S.D. Tex. 1976) (purpose of statute to remove federal government's immunity in order to proceed under state law); *Bolling v. Howland*, 398 F. Supp. 1313, 1316 (M.D. Tenn. 1975) (United States government is in same position as private employer in garnishment proceedings under this statute).

48. See TEX. CONST. art. XVI, § 28 (prohibits garnishment of wages); TEX. REV. CIV. STAT. ANN. art. 4099 (Vernon 1966) (prohibits garnishment of wages).

49. See *Corrigan, Garnishment of Federal Income for Child Support and Alimony Obli-*

### 3. Collection from Federal Tax Funds

Congress also passed legislation in 1981 providing that federal tax refunds could be withheld from the taxpayer who failed to support his children if his children were receiving AFDC funds from the state.<sup>50</sup> This measure has been successful in Texas and has had a significant impact on the total collections that the state has made from recalcitrant parents whose children are on AFDC.<sup>51</sup> For fiscal year 1982, the state collected approximately seven million dollars from obligors whose children the state was supporting.<sup>52</sup> For fiscal year 1983, the state collected eleven million dollars.<sup>53</sup> The difference was attributed to the fact that Texas used the tax refund collection method for the first time in 1983.<sup>54</sup>

#### B. Other Jurisdictions

Until the federal government implemented the title IV-D program in 1975,<sup>55</sup> the majority of individual states took little interest in trying to find a solution to their growing problem with child support enforcement.<sup>56</sup> The remedies used by other states to enforce compliance with support orders included: requiring the obligor to furnish a bond as security for the payments,<sup>57</sup> imposing a lien of trust on the obligor's property once the obligor was subject to a court order for child support,<sup>58</sup> or requiring payments to be sent directly to the court clerk so that any default would come to the

*gations in Texas*, 41 TEX. B.J. 245, 245 (1978) (federal wages protected because Texas does not allow garnishment of wages).

50. See 42 U.S.C. § 664 (Supp. V 1981) (federal tax refunds can be withheld and paid to state agency providing support to child).

51. See Debate on Tex. H.B. 2 on the Floor of the House of Representatives, 68th Leg. (May 17, 1983) (statement of Representative Rene Oliveira) (copy of tape on file with the St. Mary's Law Journal).

52. See BUDGET AND FISCAL DIVISION, CHILD SUPPORT ENFORCEMENT, ATTORNEY GENERAL OF TEXAS, CHILD SUPPORT ENFORCEMENT PROGRAM FACT SHEET (Sept. 1983).

53. See *id.*

54. Telephone Interview with Mr. Joe Kouba, Chief, Budget and Fiscal Division, Office of Child Support Enforcement, Office of Attorney General of Texas (Oct. 28, 1983).

55. See 42 U.S.C. §§ 651-664 (Supp. V 1981).

56. See H. KRAUSE, CHILD SUPPORT IN AMERICA 307-08 (1981).

57. See, e.g., MINN. STAT. ANN. § 518.24 (West 1983) (court may require security given to insure payment of support order); NEB. REV. STAT. § 42-358.05 (1978) (court may require payment of bond to secure payment of support decree); N.Y. FAM. CT. ACT § 471 (McKinney 1975) (court may require surety bond for maximum of three years to insure payment of support order).

58. See ILL. ANN. STAT. ch. 40, § 503(e), (g) (Smith-Hurd Supp. 1983-1984) (to protect interest of child, court may set aside property to be held in trust for support of child); see also *In re Marriage of Rochford*, 414 N.E.2d 1096, 1106-07 (Ill. App. Ct. 1980) (where husband demonstrates unwillingness to comply with support order, court can create trust for child).

court's attention immediately.<sup>59</sup> Of all the measures used, the most satisfactory for enforcing child support payments was the garnishment of an obligor's wages.<sup>60</sup> By 1983, forty-eight states had enacted statutes which allowed in some fashion the garnishment of wages for the purposes of enforcing a child support obligation.<sup>61</sup> Texas and South Carolina were the two remaining states that did not allow garnishment of wages for the enforcement of child support payments.<sup>62</sup>

### C. *Failure of Remedies in Texas*

In the past, remedies in Texas for the enforcement of child support orders have been ineffective.<sup>63</sup> Like the majority of states, Texas provides for child support orders to be enforced through contempt proceedings.<sup>64</sup> This remedy on its face is inadequate because placing the contemnor in jail restricts his ability to earn a living and also poses a threat to any job security he may already have.<sup>65</sup> Imprisonment can cost the state more than

59. See ILL. ANN. STAT. ch. 40, § 507 (Smith-Hurd Supp. 1983-1984) (court may order payments sent directly to court clerk); MO. ANN. STAT. § 452.345 (Vernon Supp. 1983) (court may order payments sent directly to court clerk; upon nonpayment clerk shall send notice of arrearage to obligor); see also *McClintock v. McClintock*, 566 S.W.2d 247, 248 (Mo. Ct. App. 1978) (court may order payments sent directly to clerk without notice to husband because it does not affect his obligation to pay).

60. See H. KRAUSE, *CHILD SUPPORT IN AMERICA* 76 (1981) (general policy of wage assignment would help prevent many payment defaults, avoid numerous enforcement hearings, and prevent accrual of arrears).

61. See *San Antonio Light*, October 30, 1983, at H 1, col. 1-2; see also, FLA. STAT. ANN. § 61.12 (West Supp. 1983) (continuing writ of garnishment to employer allowed to enforce court-ordered support payments); N.Y. PERS. PROP. LAW § 49-b (McKinney Supp. 1982-1983) (garnishment order to enforce support payments may be entered at any time after court orders support); N.C. GEN. STAT. § 110-136 (Supp. 1981) (if parent delinquent or erratic with support payments, wages can be garnished).

62. See Debate on Tex. H.R.J. Res. 1 on the Floor of the Senate, 68th Leg. (April 20, 1983) (statement of Senator Ray Farabee) (copy of tape on file with the *St. Mary's Law Journal*); see also S.C. CODE ANN. § 15-39-410 (Law. Co-op 1977) (earnings of debtor for personal services cannot be applied to satisfy judgment); TEX. CONST. art. XVI, § 28 (current wages for personal service cannot be garnished).

63. See Debate on Tex. H.B. 2 and Tex. H.R.J. Res. 1 on the Floor of the Senate, 68th Leg. (May 17, 1983) (statement of Representative Rene Oliveira) (copy of tape on file with *St. Mary's Law Journal*).

64. See TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975) (child support order may be enforced by civil contempt proceeding); see also TENN. CODE ANN. § 36-231 (1977) (obligor may be held in contempt for refusing to pay child support); W. VA. CODE § 48-2-15 (1980) (court may enter any order necessary to enforce a support decree); WIS. STAT. ANN. § 52.01 (West 1983-1984) (contempt available to enforce payments).

65. See H. KRAUSE, *CHILD SUPPORT IN AMERICA* 81-82 (1981) (jailing should be used for only the most flagrant abuser).

supporting the child;<sup>66</sup> furthermore, jailing does nothing to insure that timely payments will be made in the future once the contemnor is released.<sup>67</sup> While the threat of jail may appear to be a viable remedy in some cases, in the majority of situations the end does not seem to justify the means especially when there are more effective remedies that could be implemented.

Additionally, contempt proceedings are regarded as a harsh solution to the child support problem and therefore courts require strict compliance with statutory provisions for contempt motions in order to afford due process.<sup>68</sup> In actual practice, contempt orders are often found defective and are easily overturned on writs of habeas corpus.<sup>69</sup> For these reasons, contempt as a remedy for enforcement of child support solves few problems.

The other most commonly used method of enforcement is reduction of arrearages to judgment.<sup>70</sup> While this remedy is effective in some situations, it too is an ineffectual remedy for the majority of cases because judgments are hard to enforce.<sup>71</sup> A judgment can be rendered only after a party entitled to receive support files a motion with the court after the payments have become past-due, after notice has been given to the recalcitrant parent, and after a hearing has been held.<sup>72</sup> Obtaining a judgment also does nothing to insure future payments.<sup>73</sup>

A major stumbling block to the effective enforcement in Texas of sup-

66. *See id.* at 81.

67. *See id.* at 63-65. There can be no contempt unless non-support violates a court order; thus, contempt only applies to past due payments, not to future payments. Often asserted as an excuse for nonpayment of support in a contempt proceeding is the denial of visitation rights by the custodial parent. The courts have held that this action is not a defense to a contempt charge because the non-custodial parent's remedy in such a situation is to have the custodial parent held in contempt. *See id.* at 67.

68. *See, e.g., Ex Parte Bush*, 619 S.W.2d 298, 299 (Tex. Civ. App.—Tyler 1981, no writ) (due process requires notice and hearing before attachment for contempt); *Ex Parte Eureste*, 614 S.W.2d 647, 648 (Tex. Civ. App.—Austin 1981, no writ) (without proper notice contempt order is void); *Ex Parte Crocker*, 609 S.W.2d 833, 834 (Tex. Civ. App.—Tyler 1980, no writ) (contempt order suspending punishment cannot be enforced later without a hearing).

69. *See Solender, Family Law: Parent and Child*, 36 Sw. L.J. 155, 178-79 (1982).

70. *See* TEX. FAM. CODE ANN. § 14.09(c) (Vernon 1975).

71. *Cf. McKnight, Modernization of Texas Debtor-Exemption Statutes Short of Constitutional Reform*, 35 TEX. B.J. 1137, 1140 (1972) (non-exempt property sometimes invested or converted into exempt property). There is little property that can be levied upon under Texas' broad exemption statutes. *See* TEX. REV. CIV. STAT. ANN. arts. 3835, 3836 (Vernon Supp. 1982).

72. *See* TEX. FAM. CODE ANN. § 14.09(c) (Vernon 1975) (judgment may be rendered for payments past due if defaulting party given notice).

73. *Cf. TEX. FAM. CODE ANN. § 14.09(c)* (Vernon 1975) (judgment may be rendered for amount unpaid and owing; by implication payments that may become due in future not included).

port orders has been the constitutional prohibition against the garnishment of current wages.<sup>74</sup> Current wages are defined as "services as are to be paid periodically or from time to time."<sup>75</sup> By implication, these wages must be currently due and in the hands of the employer.<sup>76</sup> Since the primary asset of most obligors is their ability to earn wages, these wages provide the most logical source from which to derive child support payments.<sup>77</sup> Once the income is in the hands of the wage earner, however, it is difficult to reach these funds for the purposes of child support.<sup>78</sup>

Texas has had a long history of guarding the rights of the individual against excessive governmental intrusion.<sup>79</sup> The constitutional prohibition against the garnishment of wages has reflected this tradition.<sup>80</sup> Texas has had a provision prohibiting the garnishment of wages since the state constitution was first amended in 1876.<sup>81</sup> The framers of the Texas Constitution, however, did not intend for this prohibition to be a shield for people who do not support their children.<sup>82</sup> The purpose behind the prohibition against garnishment was to protect the family.<sup>83</sup> The exception to the constitutional amendment prohibiting garnishment of wages proposed by the Legislature during its last session was well within the meaning and purpose of the 1876 constitutional amendment.<sup>84</sup>

74. See TEX. CONST. art. XVI, § 28 (prohibits garnishment of wages).

75. *J.M. Radford Grocery Co. v. McKean*, 41 S.W.2d 639, 640 (Tex. Civ. App.—Fort Worth 1931, no writ).

76. See *Brasher v. Carnation Co.*, 92 S.W.2d 573, 575 (Tex. Civ. App.—Austin 1936, writ dismissed) ("wages for personal service necessarily implies a relationship of master and servant, or employer and employee").

77. See Comment, *Federal Wage Garnishment: Inadequate Protection for Wage Earners' Dependents*, 64 IOWA L. REV. 1000, 1000 (1979) (debtor's main asset is wages and logically creditors desire to employ garnishment remedy for relief).

78. See Student Symposium, *Creditor's Post-Judgment Remedies in Texas*, 5 ST. MARY'S L.J. 716, 716-18 (1973). Unless the property is in the possession of a third party it cannot be garnished. See *id.* at 719.

79. See Debate on Tex. H.B. 2 and Tex. H.R.J. Res. 1 on the Floor of the Senate, 68th Leg. (May 17, 1983) (statement of Senator Oscar Mauzy) (copy of tape on file with the St. Mary's Law Journal).

80. See *id.*

81. See TEX. CONST. art. XVI, § 28.

82. See TEX. CONST. art. XVI, § 28, interp. commentary (Vernon 1955). "The authors of the present constitution felt strongly that it was better that some creditor go unpaid than to take away from the debtor and his family the current wages essential to preserve the family from want and make them independent." *Id.* By implication the prohibition against garnishment is a shield from creditors to keep children from becoming dependent on the state. See *id.*

83. See *id.*; see also *United States v. Fleming*, 565 S.W.2d 87, 88 (Tex. Civ. App.—El Paso 1978, no writ) (purpose of statute to insulate worker's livelihood).

84. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Ms. Cecily Simms, attorney in Travis

## IV. THE TEXAS SOLUTION

The ineffectiveness of the measures available to enforce child support orders led the Texas Legislature to amend the Family Code to allow for a more effective remedy.<sup>85</sup> The new section to the Family Code, section 14.091, has two parts.<sup>86</sup> Part one of section 14.091 concerns the voluntary assignment of wages,<sup>87</sup> and part two of section 14.091 concerns the involuntary assignment of wages.<sup>88</sup>

With the proposed constitutional amendment in mind, the drafters of section 14.091 of the Family Code were particularly thorough in addressing the usual problems associated with statutes which allow for assignment of wages.<sup>89</sup> For example, this statute addresses the maximum amount that can be assigned<sup>90</sup> and the liability of the employer for non-compliance,<sup>91</sup> and prohibits the employer from taking punitive action against an employee whose wages are subject to assignment.<sup>92</sup> In all, there are seventeen subsections to section 14.091 addressing those problems.<sup>93</sup> A discussion of these problems and the protections offered by section 14.091 follows.

County, Texas, Representative of the Women's Political Caucus) (purpose of legislation to preserve family income for children, which is traditional purpose of exemption statutes in Texas) (copy of tape on file with the St. Mary's Law Journal).

85. See Act of June 17, 1983, ch. 402, § 1, 1983 Tex. Sess. Law Serv. 2169 (Vernon) (allows voluntary assignment of wages if child support has been court-ordered); see also *Hearings on Tex. H.B. 2 Before the Senate Comm. on State Affairs*, 68th Leg. (April 20, 1983) (statement of Senator Ray Farabee) (problems with enforcement recognized) (copy of tape on file with the St. Mary's Law Journal).

86. See Act of June 17, 1983, ch. 402, §§ 1-2, 1983 Tex. Sess. Law Serv. 2169, 2169-73 (Vernon).

87. See Act of June 17, 1983, ch. 402, § 1, 1983 Tex. Sess. Law Serv. 2169, 2169-72 (Vernon) (voluntary assignment of wages allowed).

88. See *id.* § 2, 1983 Tex. Sess. Law Serv. 2172-73 (involuntary assignment of earnings).

89. See *id.* § § 1, 2, 1983 Tex. Sess. Law Serv. 2169, 2169-73. There are fifteen subsections addressing the problems which will control the use of the constitutional amendment. See *id.* § § 1, 2, 1983 Tex. Sess. Law Serv. 2169, 2169-73; see also H. KRAUSE, *CHILD SUPPORT IN AMERICA*, 77-78 (1981) (problems include: failure of employer to comply, ceiling on amount garnished, costs involved in complying with order).

90. See Act of June 17, 1983, ch. 402, §§ 1(c), 2(p)(5), 1983 Tex. Sess. Law Serv. 2169 (Vernon). Section 1(c) allows one-third of assignor's disposable earnings to be assigned. See *id.* § 1(c), 1983 Tex. Sess. Law Serv. 2169. Section 2(p)(5) provides that if assignment is court-ordered, it is subject to all the provisions of the statute. See *id.* § 2(p)(5), 1983 Tex. Sess. Law Serv. 2173.

91. See *id.* § 1(h), 1983 Tex. Sess. Law Serv. 2169 (employer still liable for payments to person entitled to support).

92. See *id.* § 1(d), 1983 Tex. Sess. Law Serv. 2170. An employer may not terminate or refuse to hire a person because of an assignment; if the employer does, he is still liable to the employee for wages and benefits. See *id.* § 1(i), 1983 Tex. Sess. Law Serv. 2171.

93. See *id.* §§ 1(a)-(o), 2(p)-(q), 1983 Tex. Sess. Law Serv. 2169-73.

A. *Provisions of Section 14.091 — Voluntary Assignment of Wages*

Subsection (a) of section 14.091 allows a person obligated by court order to pay child support to assign voluntarily a portion of his earnings for that purpose.<sup>94</sup> While it is unlikely that a majority of parents under court orders will voluntarily assign their wages, section 14.091(a) will allow those who want to assign to do so.<sup>95</sup> Some obligors simply have a hard time managing their finances.<sup>96</sup> Allowing voluntary assignment will guarantee that they will not fall behind in their payments, resulting in a build-up of arrearages.<sup>97</sup> Other obligors become angry and punitive whenever they must pay money to their former spouse, despite the fact that the money is actually for their children.<sup>98</sup> Voluntary assignment would allow these people to avoid dealing with the former spouse each month and would assure that the children would be provided for as ordered.<sup>99</sup>

A person under court order to make support payments, who wants to make a voluntary assignment of his wages for the payment of support, may do so by filing a signed assignment with the court having continuing jurisdiction of the suit.<sup>100</sup> Thereafter, upon motion by a party to the suit in which the assignment has been filed, the court may order an employer to withhold monies due the employee.<sup>101</sup> All parties to the suit are entitled to notice of the motion and a hearing on the motion.<sup>102</sup> The employer is not involved in the proceeding until the court enters the order for assignment. The order must then be issued and served, as in all other civil cases, upon the employer.<sup>103</sup>

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94. *See id.* § 1(a), 1983 Tex. Sess. Law Serv. 2169. "A person ordered by a court to make child support payments may voluntarily assign a portion of his earnings for the payment of support by filing a signed assignment with the court having jurisdiction of the suit." *Id.*

95. *See Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Ms. Nancy Westerfell, Director of Harris County Child Support Enforcement Unit) ("numerous fathers come to us and say 'I want to do a wage assignment'") (copy of tape on file with the St. Mary's Law Journal).

96. *See id.* (statement of Judge Harley Clark, Jr., Travis County District Judge) (copy of tape on file with the St. Mary's Law Journal).

97. *See id.*; *see also* H. KRAUSE, CHILD SUPPORT IN AMERICA 82 (1981) (accumulation of arrearages is what makes many fathers flee once arrearages have reached an unrealistic point).

98. *See Hearing on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Judge Harley Clark, Jr., Travis County District Judge) (copy of tape on file with the St. Mary's Law Journal).

99. *See id.*

100. *See* Act of June 17, 1983, ch. 402, § 1(a), 1983 Tex. Sess. Law Serv. 2169, 2169 (Vernon).

101. *See id.* § 1(c), 1983 Tex. Sess. Law Serv. 2169, 2169.

102. *See id.* § 1(c), 1983 Tex. Sess. Law Serv. 2169, 2169.

103. *See id.* § 1(e), 1983 Tex. Sess. Law Serv. 2169, 2169.



A significant protection given the obligor is the ceiling placed on the maximum amount that can be assigned.<sup>104</sup> No more than one-third of the assignor's disposable income can be assigned.<sup>105</sup> This limit insures that the assignor will still have funds for his own use while it simultaneously guarantees that a specific amount can be counted on each month for the child.<sup>106</sup> The statute would be of questionable value if it did not place a ceiling on the amount which could be assigned since the parent paying support must also have funds for his own use.<sup>107</sup> In setting a ceiling on the amount that could be assigned, the legislature had to consider what amount, on the average, would be sufficient to cover most support orders.<sup>108</sup>

In 1981, women in the United States receiving child support were paid an average of \$2,110 annually for the support of their children, compared with \$1,800 in 1978.<sup>109</sup> Making allowances for inflation between 1978 and 1981, these payments actually decreased in real terms by 16 percent<sup>110</sup> and therefore remained at a level of 13 percent of the average income of males.<sup>111</sup> Evidently, a ceiling of one-third will be more than sufficient in the majority of cases.

In setting the level of assignment the legislature also wanted to provide the court with some leeway in order to allow consideration for the collection of arrearages.<sup>112</sup> Section 14.091(d) sets forth specifically how the employer is to be notified of the assignment, how soon thereafter it will take effect, and when the assignment will cease to be effective if the assignor

104. *See id.* § 1(c), 1983 Tex. Sess. Law Serv. 2169, 2169.

105. *See id.* § 1(c), 1983 Tex. Sess. Law Serv. 2169, 2169.

106. *See* H. Krause, CHILD SUPPORT IN AMERICA 80 (1981) (without limit on amount garnished, garnishment can cause financial ruin for the second family).

107. *See id.* at 434. The assignor must be assured a standard of living that does not impair his earning capacity, work incentive, or ability to provide for himself. *See id.* at 434.

108. *See Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statements of Representative Rene Oliveira and Ms. Cecily Sims) (one-third more than enough to cover most orders of child support since it is unusual for court to order that much) (copy of tape on file with the St. Mary's Law Journal).

109. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23 No. 124, CHILD SUPPORT AND ALIMONY: 1981, at 1 (1983).

110. *See id.* at 1.

111. *See id.* at 1. The average male income in 1978 was \$13,110 and \$16,520 in 1981. The percentage of support to income remained the same during this period because the real income of males declined during this time period as well. *See id.* at 1.

112. *See Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Ms. Cecily Sims) (reason for one-third ceiling is to be able to take into consideration and provide for payment of arrearages) (copy of tape on file with the St. Mary's Law Journal).

should cease working for the employer.<sup>113</sup> Because the statute also fixes liability on the employer who fails to comply, it is necessary for such details to be strictly laid out for the employer.<sup>114</sup> The employer is entitled to a hearing on the assignment should he feel it necessary to clarify the assignment or should he wish to protest his compliance with the assignment.<sup>115</sup> Since wage assignments prevent future defaults, avoid continuing court appearances and supervision, and prevent the build-up of large arrearages, courts are likely to be unsympathetic to an employer who does not wish to comply.<sup>116</sup>

While an order for wage assignment places the burden on the employer, the statute does provide a small compensation for the trouble.<sup>117</sup> An administrative fee of \$5.00 can be deducted each month,<sup>118</sup> but considering that an employer may be obligated to deduct other monthly amounts for taxes, union dues, or health and life insurance, the compensation provided seems more than adequate.<sup>119</sup> Some states either do not provide for any compensation to the employer or provide much smaller compensation.<sup>120</sup>

If an employer should fail to comply with an order of assignment, he will be liable to the person entitled to receive the support.<sup>121</sup> The employer may also be liable for attorney's fees and court costs if the person entitled to the support has to go to court to enforce the assignment.<sup>122</sup> Cooperation is not voluntary on the part of the employer.<sup>123</sup>

To protect employees who wish to make assignments, subsection (i) specifically prohibits the termination of any employee by the employer because of his use of the assignment provisions of this statute.<sup>124</sup> The sanctions which could be imposed against the employer are stiff enough to

113. *See* Act of June 17, 1983, ch. 402, § 1(d), 1983 Tex. Sess. Law Serv. 2169, 2170 (Vernon).

114. *See id.* § 1(h), 1983 Tex. Sess. Law Serv. 2170-71. It is important to note that a copy of this provision must be attached to any order served upon the employer. *See id.*

115. *See id.* § 1(f), 1983 Tex. Sess. Law Serv. 2170-71, 2170.

116. *See* H. KRAUSE, CHILD SUPPORT IN AMERICA 76-77 (1981).

117. *See* Act of June 17, 1983, ch. 402 § 1(e), 1983 Tex. Sess. Law Serv. 2169, 2170 (Vernon).

118. *See id.* § 1(e), 1983 Tex. Sess. Law Serv. 2170-71, 2170.

119. *See* H. KRAUSE, CHILD SUPPORT IN AMERICA 84 (1981).

120. *See, e.g.,* ALASKA STAT. § 47.23.070(b) (1979) (compensation of \$1.00 provided employer); CAL. CIV. CODE § 4701(c) (Deering Supp. 1983) (\$1.00 to employer); IOWA CODE ANN. § 598.23 (West 1981) (\$1.00 to employer); *but see* 42 PA. CONS. STAT. ANN. § 6709 (Purdon Supp. 1983-1984) (employer may deduct 2% of amount paid for administrative fee).

121. *See* Act of June 17, 1983, ch. 402, § 1(h), 1983 Tex. Sess. Law Serv. 2169, 2170-71 (Vernon).

122. *See id.*

123. *See id.*

124. *See id.* § 1(i), 1983 Tex. Sess. Law Serv. 2169, 2171 (employer cannot use assignment as grounds for termination or refusal to hire); *see also* ALASKA STAT. § 47.23.070(a)

assure compliance.<sup>125</sup> Not only would an employer still be liable to the terminated employee for wages and benefits, the employer also would be liable for attorney's fees and court costs incurred by the employee's enforcement of his rights.<sup>126</sup> This section is of particular importance since assignment and garnishment of wages has often been cited as a cause of loss of employment.<sup>127</sup> It is obvious that without protection for the employee from retaliation by his employer a statute allowing assignment of wages would be of little benefit.<sup>128</sup>

The primary importance of this statute is emphasized by subsection (g) which provides that an assignment under its provisions has priority over any other garnishment, attachment, execution, or other assignment or order.<sup>129</sup> A parent's obligation to support his children should take precedence over all other obligations.<sup>130</sup> The statute also recognizes that a person under orders to make support payments may have more than one obligation.<sup>131</sup> An original assignment made for the benefit of one family can be modified to allow payment to a second family but only after proper notice and a hearing.<sup>132</sup> The statute does not specify how the assignment will be divided between the two families but does require it to remain within the maximum ceiling allowed by this section.<sup>133</sup>

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(1979) (employer prohibited from terminating employee but statute does not set forth sanctions to be imposed).

125. See Act of June 17, 1983, ch. 402, § 1(i), 1983 Tex. Sess. Law Serv. 2169, 2171 (Vernon) (employer civilly liable for wages, benefits, attorney's fees and court costs); see also DEL. CODE ANN. tit. 13, § 516(f) (1981) (employer may be fined \$1000 or imprisoned up to 90 days).

126. See Act of June 17, 1983, ch. 402, § 1(i), 1983 Tex. Sess. Law Serv. 2169, 2171 (Vernon).

127. See Comment, *The Effect of the Garnishment Provisions of the Consumer Protection Act Upon State Garnishment Laws*, 9 HOUS. L. REV. 537, 539 (1972) (garnishment of wages cited as cause of workers' losing their jobs); Comment, *Federal Wage Garnishment: Inadequate Protection for Wage Earners' Dependents*, 64 IOWA L. REV. 1000, 1002 (1979) (wage garnishment sometimes results in loss of employment).

128. See Comment, *The Effect of the Garnishment Provisions of the Consumer Protection Act Upon State Garnishment Laws*, 9 HOUS. L. REV. 537, 539-40 (1972).

129. See Act of June 17, 1983, ch. 402, § 1(g), 1983 Tex. Sess. Law Serv. 2169, 2170 (Vernon) (assignment under this section has priority).

130. See *id.* Many states have restrictions on the use of garnishment proceedings except when used for enforcing child support payments. See, e.g., FLA. STAT. ANN. § 61.12(2) (West 1983) (public policy allows garnishment up to amount of child support order); MO. REV. STAT. § 25.030 (1981) (10% limit on garnishment of wages except in cases of child support in which there is no limit); OR. REV. STAT. § 23.777 (1981) (garnishment limited to one quarter of wages, but court has discretion to withhold more if for child support).

131. See Act of June 17, 1983, ch. 402, § 1(j), 1983 Tex. Sess. Law Serv. 2169, 2171 (Vernon).

132. See *id.*

133. See *id.*

B. *The Need for Amending the Constitution to Allow Involuntary Garnishment of Wages for Child Support*

Since the Family Code was amended to provide for voluntary assignment of wages, it might be questioned whether there was a need to amend the constitution to allow for involuntary assignment.<sup>134</sup> While voluntary assignment is a step toward greater enforcement of support orders, it is not enough.<sup>135</sup> Even though there are many benefits associated with the change in the Family Code, the Code still has its limitations as to effectiveness, and all deficiencies in the system are not resolved without an involuntary assignment provision.<sup>136</sup>

The first obstacle is that the assignment is voluntary on the part of the obligor.<sup>137</sup> No one but the obligor can assign his wages,<sup>138</sup> and without his cooperation, no assignment can be made.<sup>139</sup> Since cooperation is the one trait that is often missing in a recalcitrant parent, most will not assign their wages voluntarily.<sup>140</sup> While a judge may give an obligor a choice between making a voluntary assignment or being held in contempt, there may be some contemnors who would prefer to go to jail, purge themselves of the contempt, promise to make timely payments, and start the whole process over again.<sup>141</sup> Judges may be reluctant to impose such a "choice" when they know they cannot afford to send the contemnor to jail should he fail

134. See *Hearing on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Judge Harley Clark, Jr., Travis County District Judge) (copy of tape on file with the St. Mary's Law Journal).

135. See *Hearing on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Mr. Larry Brown, Assistant District Attorney of Tarrant County, Texas, Chief of Child Support Division of District Attorney's Office). There are parties in court trying to enforce an order when there is little money to be divided or paid. There are also parties who are in court simply because they can afford to be. While they have the money to pay, they refuse to do so in order to harass their former spouse and force them to go to court to enforce the order. See *id.*

136. See *id.* (cannot do as much for URESA cases as other states do because Texas does not allow garnishment while other states do).

137. See Act of June 17, 1983, ch. 402, § 1(a), 1983 Tex. Sess. Law Serv. 2169 (Vernon) (person may voluntarily assign).

138. See *id.*

139. See *id.*

140. See *Hearings on Tex. H.B.2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Judge Harley Clark, Jr., Travis County District Judge) (many offenders are repetitious in their contempt because of their attitude, not because of lack of employment) (copy of tape on file with St. Mary's Law Journal).

141. See Yee, *What Really Happens In Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 DEN. L.J. 21, 47 n.84 (1979) (choice given to obligor between jail or assignment of wages resulted in choice of jail by obligor).

to "agree" to execute an assignment.<sup>142</sup> In some counties, jails are so crowded the judge cannot even consider placing a contemnor in jail.<sup>143</sup>

If a contempt notice is filed and the recalcitrant parent fails to appear, the judge cannot give him a choice.<sup>144</sup> Instead, the judge would have to order the delinquent parent's attachment and have him brought before the court.<sup>145</sup> More time and money must be spent by the courts, attorneys, and the parent entitled to receive the support, while the other parent is still not paying.<sup>146</sup>

### C. *Implementation of Involuntary Assignment*

Unlike the voluntary wage assignment, the involuntary assignment or garnishment of wages will not require the cooperation of the obligor.<sup>147</sup> The enabling legislation for the constitutional amendment allowing involuntary assignment provides some protection to the obligor from the whims of an overzealous judge.<sup>148</sup> The legislature intended the amendment to be used as a last resort to enforce support.<sup>149</sup> Recognizing the harshness of this remedy, the legislature gave a court the discretion of using it or not.<sup>150</sup>

142. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Representative Rene Oliveira) (copy of tape on file with St. Mary's Law Journal). Judges cannot afford to put offenders in jail because of overcrowding, the child suffers when the parent is placed in jail, and most parents cannot afford the stigma that incarceration would afford. See *id.*

143. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Mr. Tom Morgan, Senior Assistant County Attorney in Bell County, Texas) (county jails are so overcrowded that most counties cannot allow contemnors to be jailed because of lack of space) (copy of tape on file with St. Mary's Law Journal).

144. See Act of June 17, 1983, ch. 402, § 1(a), 1983 Tex. Sess. Law Serv. 2169 (Vernon). Since the statute allows only voluntary assignment, a court may not order assignment under this statute. See *id.*

145. See TEX. FAM. CODE ANN. § 14.09(a) (Vernon 1975).

146. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Mr. Tom Morgan) (each motion for contempt filed requires a filing fee, a service of process fee, and a fee for the writ of attachment) (copy of tape on file with St. Mary's Law Journal).

147. See Act of June 17, 1983, ch. 402, § 2(p)(1), 1983 Tex. Sess. Law Serv. 2169, 2172 (Vernon) (court may order involuntary assignment).

148. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Representative Rene Oliveira) (copy of tape on file with the St. Mary's Law Journal).

149. See *id.*

150. See Act of June 17, 1983, ch. 402, § 2(p)(1), 1983 Tex. Sess. Law Serv. 2169, 2172 (Vernon) (court may order involuntary assignment of earnings); see also N.Y. PERS. PROP. LAW § 49-a (McKinney Supp. 1982-1983) (decision of judge to use involuntary wage assignment is discretionary). But see CAL. CIV. CODE § 4701(b) (Deering Supp. 1979) (court required to make wage assignment if support in default one month).

The court may not order an assignment unless the obligor is in arrears at least for an amount equal to or in excess of the amount due for a two month period.<sup>151</sup> The obligor cannot have more than one-third of his wages assigned, but the court, in setting the amount of the assignment, may consider the amount of arrearages and the amount to become due in the future.<sup>152</sup>

Before an involuntary assignment can be made, the obligor is entitled to notice of the hearing, but if he fails to appear, the judge still has the power to order the assignment.<sup>153</sup> This provision in itself should save an inordinate amount of the court's time.<sup>154</sup> The party seeking the involuntary assignment will still face the dual problems of locating the obligor to serve him with notice of the hearing and also of knowing where the obligor is employed.<sup>155</sup> Involuntary assignment will not work for all recalcitrant parents, such as those who are self-employed, unemployed, or who change jobs frequently; but, for those who are employed and could be making payments as required of them by court order, this provision should provide much needed relief in an efficient, low-cost manner.<sup>156</sup>

One of the greatest benefits the amendment to the constitution will provide is to allow for increased recovery from obligors whose children are on AFDC.<sup>157</sup> Since the enabling legislation provides that the Attorney General may file a motion for involuntary assignment if the state provides financial assistance to the child, the state will be able to recover more of

151. See Act of June 17, 1983, ch. 402, § 2(p)(2), 1983 Tex. Sess. Law Serv. 2169, 2172 (Vernon) (must be at least two months in arrears). *But see* ARIZ. REV. STAT. ANN. § 12-2455 (1977) (wage assignment can be ordered anytime even if not in default).

152. See Act of June 17, 1983, ch. 402, §§ 2(p)(3), (5), 1983 Tex. Sess. Law Serv. 2169, 2173 (Vernon) (while court may consider amount of arrearages and amount due in future, not more than one-third of disposable earnings may be assigned).

153. See *id.* § 2(p)(1), 1983 Tex. Sess. Law Serv. 2169, 2172 (notice to all parties required).

154. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Mr. Larry Brown, Assistant District Attorney of Tarrant County, Texas, Chief of Child Support Division) (copy of tape on file with the St. Mary's Law Journal).

155. See Act of June 17, 1983, ch. 402, §§ 1(b), 2(p)(1), 1983 Tex. Sess. Law Serv. 2169, 2172 (Vernon). An assignment shall state the name and address of the employer. See *id.* § 1(b), 1983 Tex. Sess. Law Serv. 2169. Before an involuntary assignment can be ordered, notice must be given to all parties. See *id.* § 2(p)(1), 1983 Tex. Sess. Law Serv. 2172.

156. See Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in The Denver District Court*, 57 DEN. L.J. 21, 49 (1979) (assignment of wages effective tool of enforcement).

157. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Mr. Tom Morgan) (copy of tape on file with the St. Mary's Law Journal).

the sums it pays out each year in AFDC.<sup>158</sup> Under the remedies that have been available the State of Texas spends more money to enforce and collect past-due child support than it takes in.<sup>159</sup> Since the AFDC recipient is required to assign his or her rights to child support over to the state, the state will be able to keep every dollar it collects for every dollar paid out in AFDC and will not require the cooperation of the AFDC recipient to enforce the child support order.<sup>160</sup>

## V. CONCLUSION

In the past, remedies available for the enforcement of child support orders were largely ineffective. Armed with the knowledge that the obligee's ability to enforce such orders was strictly limited, the obligor's non-compliance with such orders had become the rule rather than the exception.<sup>161</sup> Allowing such complacency to continue would place an enormous burden on the public and be injurious to the children affected by such orders.<sup>162</sup>

The passage of section 14.091 of the Family Code will provide a respite for some of these children. In addition, the existence of an involuntary assignment process made possible by the new constitutional amendment should encourage greater voluntary compliance.<sup>163</sup> The children affected by support orders deserve the remedies these two solutions provide.

158. See Act of June 17, 1983, ch. 402, § 2(p)(4)(B), 1983 Tex. Sess. Law Serv. 2169, 2173 (attorney general may motion court for assignment if providing assistance to child).

159. See H. KRAUSE, CHILD SUPPORT IN AMERICA 414-15 n.5 (1981) (in 1977 Texas spent more money to collect child support payments than collected in payments); see also *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Mr. Tom Morgan) (copy of tape on file with St. Mary's Law Journal). Texas ranks fifty-second out of fifty-four jurisdictions in collections of child support. Texas ranks the lowest of all states but above Washington D.C. and the combined jurisdictions of Guam, Puerto Rico, and the Virgin Islands. For every \$1.00 Texas spends, Texas collects 78 cents compared to Michigan which collects \$8.08 for every \$1.00 spent. Idaho is typical of the average state which collects \$2.10 for every \$1.00 spent. See H. KRAUSE, CHILD SUPPORT IN AMERICA 414-15 n.5 (1981).

160. See 42 U.S.C. § 602(a)(26)(A)(B) (1976) (to receive AFDC, applicant must assign rights to child support to state and cooperate in establishing paternity).

161. See *Hearings on Tex. H.B. 2 and Tex. H.R.J. Res. 1 Before the House Judiciary Comm.*, 68th Leg. (March 2, 1983) (statement of Ms. Cecily Sims) (unfortunately non-compliance with child support orders is rule today) (copy of tape on file with the St. Mary's Law Journal).

162. See *id.*

163. See *id.*