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I. INTRODUCTION

Whether and under what circumstances a parent who is ordered to pay child support is entitled to credit against a child support arrearage is one of the most vexing problems for the family court. Some courts consistently demand strict adherence to a child support order and do not permit retroactive modification.¹ Other courts have allowed retroactive modification of support decrees when equity dictates.² A recent amendment to the Social Security Act, however, prohibits retroactive modification of child support orders, leaving a number of unanswered questions concerning credit requests for nonconforming support payments.³

This Article explores the problems created by nonconforming child support payments' unfortunate entanglement with the rule against retroactive modification of support orders. It also suggests a more equita-
ble approach to this aspect of child support enforcement. Part I defines nonconforming child support payments and the problems they present to family courts. Part II outlines various approaches the states have taken concerning requested credit against support arrearages for nonconforming payments. Part III discusses the rule against retroactive modification of support orders and its relationship with nonconforming payments problems. Part IV examines the probable impact of 42 U.S.C. Section 666(a)(9) on credit requests for nonconforming payments. Part V argues for a more equitable approach to handling nonconforming payment issues and proposes an amendment to 42 U.S.C. Section 666(a) providing for judicial discretion. Part VI concludes that justice would be served best by legislatively empowering a court to give credit for nonconforming payments when dictated by fairness and equity.

II. WHAT ARE NONCONFORMING PAYMENTS AND WHAT PROBLEMS DO THEY CAUSE?

Generally speaking, a nonconforming payment is any payment which by its method deviates from the letter of the court's child support order. Two common situations invite nonconforming payment litigation. The first occurs when the obligated (usually noncustodial) parent makes cash or in kind advances to the obligee (custodial) parent or directly to the children, for the benefit of the children, which do not conform to the method of payment stated in the court's child support decree. For example, a typical order would provide that the obligor pay to the clerk's office the sum of $100.00 per week per child for the support and benefit of the parties' two minor children. Rather than make "conforming payments" to the clerk, the obligor might send cash directly to the children, buy them clothing and school supplies, and enroll them in swimming classes at the YMCA. Often the obligated parent will not give a second thought to the "nonconforming" nature of his or her expenditures for the children until the arrearage question surfaces at a contempt hearing initiated by the obligee. The second situation occurs when the obligated parent takes physical custody of the children for an extended period. The noncustodial parent feeds, clothes, and provides a home for the children, until they are returned to the custodian, all with no modification of the court's support decree. Should the obligor later be given credit against an alleged arrearage for cash payments and other expenditures which were not intended by the obligor as birthday, Christmas, or other gifts? What about awarding credit to
the obligor for the court-ordered amount of support for the time he or she had extended physical custody of the children in the absence of a modified custody order?

The nonconforming payment and request for credit issues come to the court's attention in several ways. The issues may arise when the obligated parent files a petition to modify the child support order or a petition to determine arrearage and request credit. These issues may also arise when the custodial parent files a verified information for a rule to show cause, requesting of the court that the obligor be held in contempt for violating the court's child support order. The court first must determine whether the obligor intended the expenditures as gifts or as payments for child support pursuant to the court's order. If the court determines that the expenditures were intended as gifts, the inquiry ends; the obligor is liable for the arrearages, and, of course, may be held in contempt for nonpayment. If the court determines that the expenditures were intended as child support, the court then must determine whether it has discretion to credit the nonconforming payments against the obligor's arrearage. When discussing credit, it is important to realize that by allowing credit for nonconforming payments, the court is technically retroactively modifying the support order. This was evident particularly in jurisdictions where the support obligation vested on the date due or became a judgment as a matter of law and the court's order, by recognizing past (nonconforming) payments which were not of record, altered the arrearage or the amount of the obligee's judgment. A closer look at the order granting credit for nonconforming payments, however, reveals that such courts have not modified the amount of the support order, but for equitable reasons have permitted payment in a form different from that ordered by the court, and only to this extent do credit orders constitute a retroactive modification.

III. THE RULE AGAINST RETROACTIVE MODIFICATION OF SUPPORT ORDERS AND NONCONFORMING PAYMENTS

The prevailing view in this country is that a party, as a matter of law, should not be permitted to retroactively modify a child support order. The rule against retroactive modification applies to an obligee's

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* The Uniform Marriage and Divorce Act § 316 9A U.L.A. 147 (1987) provides in part "the provisions of any decree respecting ... support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." See also Sutton v. Sutton, 359
request to retroactively increase a support order as well as an obligor's petition for a retroactive decrease of the support decree. The focus of this Article is on the obligor's request for credit for nonconforming payments and its often confusing relationship with the rule against retroactive modification of child support orders.

A retroactive modification of a support decree is any judicial order which alters, in form or amount, payments past due to the obligee for the benefit of minor children. There are both public policy and practical reasons for the rule against retroactive modification. The custodial parent must be able to rely upon the financial assistance provided by a court order for child support, at least until there is a formal legal action to modify the support order. Also, courts are concerned that permitting a noncustodial parent to unilaterally vary the terms of a decree usurps from the custodian the right to determine the manner in which the support money should be used for the children. The rule against a retroactive modification also is generally followed, for example, where the obligor seeks credit against the support arrearage where the children, who are in the obligee's custody, reside with him. The court's denial of retroactive modification in this situation acts as a safeguard against the obligor influencing the children to avoid the obligee. Another common justification for prohibiting retroactive modification and denying credit is that the arrearages have ripened into judgments as they become due and are thus final. Additionally, to permit a noncustodial parent to increase the amount of child support at one time, reduce it another time, and require an adjustment for the differences in the future might result in economic hardship for the child.

So. 2d 392 (Ala. 1979); Hadford v. Hadford, 633 P.2d 1181 (1980); Annotation, Right to Credit on Accrued Support Payments for Time Child is in Father's Custody or for other Voluntary Expenditures, 47 A.L.R.3d 1031 (1973).


See 42 U.S.C. § 666(a)(9) (support payments due are to be treated as judgments); Holley v. Holley, 264 Ark. 35, 568 S.W.2d 487 (1978) (entitlement to payment vests in person entitled to it as payments accrue as equivalent of debt due). But see Haw. Rev. Stat. § 580-47(d) (1985) (court may revise its orders as they do not vest upon becoming due but are subject to control of the court.); Slep v. Slep, 43 N.J. Super. 538, 129 A.2d 317 (1957) (past installments of alimony and child support do not vest as they become in arrears but are subject to the control of the court).

Newton v. Newton, 202 Va. 515, 118 S.E.2d 656 (1961) (decrease setting husband's pay-
It is important to note the distinction between an obligor's request for credit for nonconforming payments and a petition for retroactive modification of the amount of a child support order based upon a substantial change in circumstances. Where a party seeks retroactive modification due to changed circumstances, he or she petitions the court for reduction of the child support obligation as of a prior date. If the court grants the modification request, any arrearage is adjusted based upon credit for the reduced amount of the support order. Where, however, a party requests credit for nonconforming payments, he or she merely seeks judicial recognition of past support payments which, though made, did not strictly conform to the method of payment set out in the court's child support decree. The essential difference between the two situations is that nonconforming payments alter only the form of the payments, whereas retroactive modification of a child support order due to changed circumstances seeks to reduce the amount of child support past due. Unfortunately, many courts tend to lump nonconforming payments in the same category as retroactive modification due to changed circumstances. This Article proposes a way to remove nonconforming payments from the shadow of the rule against retroactive modification, without affecting the prohibition of retroactive modification based upon changed circumstances.

The policy reasons for not permitting retroactive modifications due to changed circumstances are entrenched in the law. Dangers of economic hardships to the children, where funds which the obligee reasonably expected to be available for the children's needs are not forthcoming, are well documented in cases. This Article therefore proceeds with considerable deference to the general rule prohibiting retroactive modifications based upon changed circumstances.

IV. HOW THE STATES HANDLE CREDIT REQUESTS FOR NONCONFORMING PAYMENTS: A PATCHWORK QUILT

The laws of the various state jurisdictions on whether nonconforming payments should be credited to cancel or reduce child support ar-

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10 See 42 U.S.C. § 666(a)(9) (statute makes no distinction between modifications crediting nonconforming payments and other retroactive modifications); Bowden v. Bowden, 426 So. 2d 448 (Ala. 1983); Folds v. Lebert, 420 So. 2d 715 (La. 1982); Schafer v. Schafer, 95 Wash. 2d 78, 621 P.2d 721 (1980).

11 See supra note 9 and accompanying text.
rearages fall into seven classifications. This spectrum of approaches ranges from strict construction of the rule against retroactive modification, as applied to credit requests for nonconforming payments, to a flexible approach, emphasizing equitable considerations and judicial discretion. These approaches may be described as follows: (1) strict, either forbidding retroactive modification of child support orders or demanding strict compliance with support orders; (2) strict, but allowing for deviation in very limited circumstances; (3) semi-strict, allowing for a deviation in a series of broader circumstances (these states are still inclined to withhold credit); (4) equitable, but only representing a trend; (5) equitable, but the facts must fit into certain limited circumstances (these states are inclined to grant credit); (6) equitable, with only broad guidelines to meet; and (7) equitable, and within the discretion of the court or there is statutorily authorized retroactive modification. Not only is there great divergence on the treatment of nonconforming payments among the state jurisdictions, but even within some states appellate districts disagree on this subject. Thus, including credit requests for nonconforming support payments in the analysis of retroactive modification of support orders presents everyone concerned with a patchwork quilt of law, equity, and policy.

A. Strict Construction States

The strict construction states adhere to the majority view, which denies retroactive modification of child support decrees treating requests for credit for nonconforming payments as a retroactive modification issue. These states are: (1) Connecticut; (2) Hawaii; (3) Massachusetts; (4) New Mexico; (5) North Dakota; (6) West

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12 Jennings v. Jennings, 11 Conn. Supp. 391 (1942). In Jennings, the court held that it could not retroactively modify child support so as to release the father from his duty of paying accrued arrearages. Id. See also Gillispie v. Gillispie, 8 Conn. App. 382, 512 A.2d 238 (1986); Delevett v. Delevett, 156 Conn. 1, 238 A.2d 402 (1968) (improper for the noncustodial parent to automatically reduce a lump sum support order proportionally as each child became emancipated). For a survey of the varying approaches of other jurisdictions concerning nonconforming payments, see Goold v. Goold, 11 Conn. App. 268, 527 A.2d 696 (1987).


14 Massachusetts appears to require that child support payments must be made pursuant to the terms of the decree. Nonconforming payments, with the exception of payment by disability benefits, apparently are not acknowledged as payments per se. In Cohen v. Murphy, 368 Mass. 144, ___, 330 N.E.2d 473, 475 (1975), the Massachusetts Supreme Court permitted credit for Veteran Administration and Social Security benefits. The court declined to decide whether wel-
Virginia; and (7) Wisconsin.®

*Napoleon v. Napoleon* illustrates a typical approach the strict construction states take regarding requests for retroactive modification of child support orders. In *Napoleon*, the former wife had custody of the couple's two children and the husband was obligated to pay $200 per month in child support. The husband fell in arrears and subsequently entered into an agreement with the wife modifying the support order. The agreement, drafted by the wife's attorney, called for the husband to pay $3,000 a year for child support for three years; at the end of the three-year period the husband's child support obligations were terminated. The husband fully performed under the private contract. The Hawaii Supreme Court declared the agreement void. Citing public policy concerns, the court held that the parties could not be bound by such an agreement without consent of the court.® The court reasoned that once the issue of a child's welfare is placed before the court, the minor becomes "'a ward of the court,' subject to its inherent

fare payments would be entitled to similar treatment. *Id.*

® In *Gomez v. Gomez*, 92 N.M. 310, 587 P.2d 963 (1978), the New Mexico Supreme Court held that N.M. STAT. ANN. § 40-4-7(c) (1978), precludes a court from modifying child support payments retroactively. To the extent that *Gomez* would be interpreted to hold the applicable date for modification of child support payments should be the date for hearing, rather than the date of filing a petition, application or pleading for relief, it has been expressly overruled by *Montoya v. Montoya*, 95 N.M. 189, 619 P.2d 1233 (1980). *Gomez* was applied in *Mask v. Mask*, 95 N.M. 229, ___ 620 P.2d 883, 885 (1980), to prevent the defendant husband from receiving credit against arrearages for the amount of Social Security benefits paid to his client that exceeded his support obligations. The court also held that equitable considerations would permit the defendant to receive credit against his support obligation, to the amount of that obligation, from each month the child received the Social Security benefit. *Id.* at ___, 620 P.2d at 885-86. New Mexico is considered, nevertheless, a strict construction jurisdiction because credit has only been applied to Social Security benefits. *See also* *Romero v. Romero*, 101 N.M. 345, 682 P.2d 201 (Ct. App. 1984).

® In *Kinsella v. Kinsella*, 181 N.W.2d 764 (N.D. 1970), the Supreme Court of North Dakota announced the rule that accrued but unpaid child support payments cannot be modified. *See also* *Meadows v. Meadows*, 312 N.W.2d 464 (N.D. 1981); *Gasser v. Gasser*, 291 N.W.2d 272 (N.D. 1980).

® W. VA. CODE § 48-2-15 (1986); *Korczyk v. Korczyk*, 130 W. Va. 211, 42 S.E.2d 814 (1947). *See also* *Horton v. Horton*, 164 W. Va. 358, 264 S.E.2d 160 (1980) (credit for support while children were in father's custody was inappropriate because trial courts lack power to cancel or alter accrued installments of child support and because father had removed children from mother's custody without her consent and without authority of court order).

® *Hirschfeld v. Hirschfeld*, 118 Wis. 2d 468, 347 N.W.2d 627 ( Ct. App. 1984). *See also* *O'Brien v. Freiley*, 130 Wis. 2d 174, 387 N.W.2d 85 (Ct. App. 1986) (father not entitled to credit for voluntary expenditures made on child's behalf). The Wisconsin Supreme Court has not addressed the question.


® *Id.* at 624, 585 P.2d at 1273.
authority to insure his continued well-being."\textsuperscript{21} The Hawaii Supreme Court noted that in light of the mandate of Hawaii Revised Statutes section 580-47 to maintain jurisdiction over questions involving support of the parties' minor children, the agreement, lacking the court's approval, is not valid and binding, even as between the parties. \textsuperscript{22}

In \textit{Hirschfield v. Hirschfield},\textsuperscript{23} the Wisconsin Court of Appeals also demonstrated classic strict constructionist analysis of a credit request for nonconforming payments. The noncustodial father petitioned to have his child support arrearages expunged because of his direct expenditures on his children. The father had made numerous monthly advances directly to the children in the form of "school clothes and a variety of other items."\textsuperscript{24} The court held that "the general rule . . . is that a parent is not entitled to credit for voluntary expenditures for the children not made in the manner specifically ordered."\textsuperscript{25} The court defined voluntary expenditures as any payment varying from the support order.\textsuperscript{26}

\textbf{B. States with a Strict Approach but That Permit Retroactive Modification In Limited Circumstances}

The second group of states is typically strict constructionist, but these states will permit deviation from the general rule against retroactive modification in certain limited circumstances. These circumstances include a consensual agreement between the parents, which provides for nonconforming payments, or actions by the custodial parent which do not justify strict compliance with the divorce decree. The states which adhere to this approach are: (1) Arkansas;\textsuperscript{27} (2) Idaho;\textsuperscript{28} (3) In-
One may, however, question the soundness of permitting credit against child support arrearages because of misconduct by the custodial parent. Possible hardship to the child should not be judicially fostered.

28 The Idaho approach is similar to that of Arkansas. The only consistent equitable trend has been the balancing of arrearages in support payments by the noncustodial parent against the denial of visitation rights or misconduct by the custodial parent. See, e.g., Nomer v. Kossman, 100 Idaho 898, 606 P.2d 1002 (1980); Heidemann v. Heidemann, 96 Idaho 602, 533 P.2d 96 (1974).

29 Whitman v. Whitman, 405 N.E.2d 608 (Ind. Ct. App. 1980), presents a comprehensive summary of Indiana case law on nonconforming payments. In Whitman, the court acknowledged the general rule that all modifications must operate prospectively, and also noted that all payments must be made in the manner, amount, and at times prescribed in the original order. Id. at 611-13. The court recognized that there was some authority to the contrary; in Indiana, however, it found the prevailing view still favored the general rule. Id. But see Isler v. Isler, 422 N.E.2d 416, reh'g denied, 425 N.E.2d 667 (Ind. Ct. App. 1981) discussed infra at notes 39-41 and accompanying text.

30 Kansas is similar to Virginia in that credit may be allowed if reductions in payments were with the consent of the mother. In Brady v. Brady, 225 Kan. 485, 592 P.2d 865 (1979), the Supreme Court of Kansas allowed modification based on Kan. Stat. Ann. 60-260(b) (1983), which gives the court discretion to relieve a party from a final judgment, but also reaffirmed the general rule that modification of a support order may only be prospective. See also Davis v. Davis, 145 Kan. 282, 65 P.2d 562 (1937).

31 Michigan courts do not recognize the concept of credit against child support arrearages for nonconforming payments by the noncustodial parent, but they do permit retroactive modification of a support decree from the filing date if there has been a changed financial ability of the noncustodial parent to pay or changes in the children's need. See Wells v. Wells, 144 Mich. App. 722, 375 N.W.2d 800 (1985).

32 Ohio does not allow a court to retroactively modify a decree. A decree is a final judgment as to the accrued and unpaid installments and unless the power of modification was expressly retained as to the accrued installments, the court cannot modify the award as to past due and unpaid installments. This rule is upheld unless the denial of retroactive modifications would be contrary to public policy. See Ferry v. Ferry, 201 Neb. 595, 271 N.W.2d 450 (1978); Wharton v. Jackson, 107 Neb. 288, 185 N.W. 428 (1921); Fussell v. State, 102 Neb. 117, 166 N.W. 197 (1918). It appears that this type of retroactive modification will only be considered where the custodial parent has removed the children from the jurisdiction, thus violating the visitation rights of the noncustodial parent. See Goodman v. Goodman, 173 Neb. 330, 113 N.W.2d 202 (1962). However, the Nebraska Supreme Court is attempting to limit the scope of equitable decisions. See Conrad v. Conrad, 208 Neb. 588, 304 N.W.2d 674 (1981); Eiiker v. Eiiker, 206 Neb. 764, 295 N.W.2d 268 (1980).

34 In Newton v. Newton, 202 Va. 515, 118 S.E.2d 656 (1961), the Virginia Supreme Court noted that the general rule is to deny credit for nonconforming payments. See also Fearon v. Fearon, 207 Va. 927, 154 S.E.2d 165 (1967). But, in Gagliano v. Gagliano, 215 Va. 447, 211 S.E.2d 62 (1975), the Supreme Court of Virginia affirmed the lower court's ruling that the husband was entitled to payments made in reliance on what he thought was a bona fide agreement with his wife. The court recognized a possible situation in which credit was appropriate, i.e., if the parties enter into a voluntary agreement or consent to the payment. Id. at —, 211 S.E.2d at 65.

35 Gagliano v. Gagliano, illustrates the modified strict approach to
retroactive modification. The trial court in *Gagliano* issued a divorce decree requiring the husband to pay the wife $350 per month for support and maintenance of the wife and their child. A few months later, the parties entered into a property settlement agreement which provided that the husband pay $250 per month in child support and that alimony would be extinguished. For approximately two years, the husband complied with the private agreement and sent $250 per month directly to the child. At the end of the two-year period, the wife sued, claiming that the husband owed an arrearage of over $8,000.

The Virginia Supreme Court found that the money the husband had paid to the child, while not strictly in conformity with the child support decree, could be credited against the arrearage because the payments were made pursuant to a consensual agreement between the parties. The court, however, further found that the husband still owed the difference between the amount of child support paid and the amount due under the court decree. The court refused to find that the payments made under the private agreement were pure gifts merely because they were made directly to the child instead of the wife. The court reasoned that because the funds received under the agreement were “subject to her (the mother’s) exclusive discretion,” the payments conformed with the substance of the divorce decree. The court therefore determined that the husband should not be punished for his “bona fide agreement.”

In *Isler v. Isler*, the Indiana Court of Appeals permitted retroactive modification while stating that Indiana adhered to strict construction. Upon divorce, the mother retained custody of the three children born of the marriage. The trial court ordered the father to pay $240 per month in child support. The mother petitioned the court for a rule to show cause for nonpayment of support by her former husband. The parties’ two sons left their mother’s home to live with their father. Each child stayed with the father for at least four years and was supported by him. The court permitted an equitable exception to the general rule against retroactive modification “where the obligated parent, has taken the... children into his... home, ... has provided them with food, clothing, shelter, medical attention, and school supplies, and has

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36 Id. at __, 211 S.E.2d at 63.
37 Id. at __, 211 S.E.2d at 64.
38 Id. at __, 211 S.E.2d at 65.
40 422 N.E.2d at 417.
exercised parental control over their activities.”

C. Semi-Strict Construction States

A third group of states can be described as semi-strict because of the circumstances in which they permit deviation from the rule against retroactive modification. These situations include “exceptional circumstances” or “change in circumstances.” The courts in these states are inclined to look at the circumstances surrounding the nonconforming payment before making a judgment. Although the circumstances are broadly defined, a strong showing often is required before credit is granted. These states include: (1) Iowa; (2) Minnesota; (3) Nevada; (4) Oregon; (5) South Carolina; and (6) Vermont.

41 425 N.E.2d at 670.

42 The Iowa courts have applied the general rule announced in Delbridge v. Sears, 179 Iowa 526, 160 N.W. 218 (1916) to deny an obligated parent credit for nonconforming payments. See Willcox v. Bradrick, 319 N.W.2d 216 (Iowa 1982). Retroactive modification is allowed to the date of the filing of the application. Courts have also recognized that laches or estoppel by acquiescence may be interposed in a proper case in defense of proceedings to collect unpaid support payments. See, e.g., Anthony v. Anthony, 204 N.W.2d 829 (Iowa 1973) (plaintiff would be equitably estopped from enforcing judgment because she led defendant to believe that she intended to waive her right by failing to pursue that right for seventeen years). But see Thurn v. Thurn, 310 N.W.2d 539 (Iowa 1981) (defendant's actions did not evidence an intent to waive her right to support). In Cullinan v. Cullinan, 226 N.W.2d 33 (Iowa 1975) the court refused to apply defenses of laches or estoppel because the defendant father failed to show he was “materially prejudiced by [his former wife's] delay in asserting her rights.” Id. at 36.

43 Under MINN. STAT. § 518.64, subd. 2 (1984), a retroactive modification or forgiveness of support is permitted where the movant shows: 1) that a change in circumstances exists which justifies modification; and 2) that the movant's failure to pay was not willful. See Lindberg v. Lindberg, 379 N.W.2d 575, 577 (Minn. Ct. App. 1985), aff'd, 384 N.W.2d 442 (Minn. 1986) (acknowledging that there may be circumstances under which strong equities permit credit). But see Moritz v. Moritz, 368 N.W.2d 337 (Minn. App. 1985) (general rule is that credit will not be granted for nonconforming payments).

44 In Day v. Day, 82 Nev. 317, 417 P.2d 914 (1966), the Nevada Supreme Court held that retroactive modification of child support arrearages is forbidden. But, in Hildahl v. Hildahl, 95 Nev. 657, 601 P.2d 58 (1979), the court indicates that it may be possible for the court to allow credit for nonconforming payments provided the parties agree to accept such payments or provided compelling circumstances required the nonconforming payments to be made.

45 The Oregon courts may begin to apply a somewhat less stringent approach to the general rule that accrued and unpaid installments become final judgments due under the new version of OR. REV. STAT. § 107.135(3) (1981). This amendment should let the courts know that they may look into the circumstances surrounding nonpayment or nonconforming payment. Prior to the application of the law, the Oregon Supreme Court stated in In re Marriage of Eagen, 292 Or. 492, 640 P.2d 1019 (1982) (en banc), that courts which set aside supplemental judgments for equitable reasons “do violence to principles protecting the integrity of judgments and have ramifications far beyond the law of domestic relations.” Id. at 496, 640 P.2d at 1021. Also, there has been “equitable” language in several Oregon cases. See Briggs v. Briggs, 178 Or. 193, 165 P.2d 772 (1946).

46 The South Carolina courts probably will not grant credit or a set-off against arrearages, in
Lindberg v. Lindberg\(^4\) illustrates the court’s analysis using the semi-strict approach. In this case, the father was ordered to pay $600 per month in child support and $1,000 per month for twenty-four months as maintenance, to enable the wife to acquire skills which would permit her to help support the children in the future. During the twenty-four month period, the three children lived with the father while the mother was at school. The father directly provided for the maintenance and support of the children when they lived with him. The father petitioned the court to reduce the arrearages on child support by giving him credit for the amount of direct support he provided to the children. The Minnesota Court of Appeals stated that the general rule against retroactive modification prohibited granting the husband’s motion. The court stated that even if the arrangement that the husband take care of the children while the wife attended school, rose to the level of a property settlement agreement, the court would not enforce such an agreement unless and until the informal agreement was judicially approved.\(^4\) The court, however, cited hypothetical cases where a retroactive modification may be permitted. The court stated, “For example, where an obligated parent assumes all care and cost of a child for an extended period of time, it may be unjust to require the obligor to make payments to the custodial parent.”\(^5\)

Hildahl v. Hildahl\(^6\) is another case where a semi-strict jurisdiction denied retroactive modification but did not rule it out under all circumstances. The parties were divorced, and the wife received custody of their three children. The court required the husband to pay $750 per month in support and maintenance of the wife and the children.\(^7\) A few months after the decree was entered, one of the children
moved in with the father, who thereafter withheld $250 per month in support. The wife brought suit to recover for the arrearage. The trial court granted the motion and found the husband in contempt. The Nevada Supreme Court affirmed the trial court, citing Nevada's settled law that support payments become vested upon accrual and therefore cannot be retroactively modified. The court found no basis for the husband's contention that the wife had waived her custody rights and that the husband had assumed de facto custody of the child. Significantly, the court further remarked that in certain situations equitable considerations, such as abandonment by the custodial parent, agreement between the parties, or mental or physical incapacity of the custodial parent, would compel immediate transfer of custody without resort to judicial process and a corresponding retroactive modification of child support.

D. States That Apply Equitable Considerations but That Represent Only a Trend

Under the fourth approach, the courts prefer to apply equitable considerations to the issue of nonconforming payments, but such equitable discretion is sporadic and still only represents a trend. The states in this group are: (1) Alaska; (2) Arizona; (3) Colorado; (4) New

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55 Id. at 660, 601 P.2d at 60.
56 Id. at 661, 601 P.2d at 61.
57 Id.
58 The Supreme Court of Alaska in Young v. Williams, 583 P.2d 201 (Alaska 1978), adopted the general rule that nonconforming voluntary payments made directly to the child are not to be credited arrearages. However, the court has also recognized that equitable considerations may justify granting credit for such payments, at least when that can be done without injustice to the custodial parent. Id. at 203. Therefore, it appears that the Alaska courts are willing to look at the nature of the payments to determine whether credit should be granted and will grant credit in certain situations.
59 See Adair v. Superior Court of Maricopa County, 44 Ariz. 139, 33 P.2d 995 (1934). In Badertscher v. Badertscher, 10 Ariz. App. 501, —, 460 P.2d 37, 41 (1969), the court held that the general rule is that a father should be allowed credit for expenditures made while the child is in his custody, where such payments constitute a substantial compliance with the spirit and intent of the decree. See also Cole v. Cole, 101 Ariz. 382, 420 P.2d 167 (1966).
60 Colorado has continued to follow the majority rule, established in Garvin v. Garvin, 108 Colo. 415, 118 P.2d 768 (1941). The courts, however, are beginning to recognize that there may be some circumstances under which credit may properly be granted for nonconforming payments. For example, the Colorado Supreme Court held that it may be appropriate if the payment is made directly to the court-ordered recipient or if the husband detrimentally relies on the wife's assertion that she does not want support or if the husband was denied visitation rights. See Talbot v. Talbot, 155 Colo. 350, 394 P.2d 607 (1964) (en banc); Griffith v. Griffith, 152 Colo. 292, 381 P.2d 455 (1963) (en banc). But see Baker v. Baker, 667 P.2d 767 (Colo. Ct. App. 1983).
In *Badertscher v. Badertscher,* upon divorce, the mother was given custody of the parties' two children, and the father was ordered to pay child support. Nearly one year after the divorce, the father took custody of one of the children and provided direct support for the child for three months. At the end of the three month period, an ex parte order reinstated custody with the mother. Furthermore the court ordered, inter alia, that the father pay child support in the amount of $200 per month for the period that the child had been in his custody. The Arizona Court of Appeals reversed the trial court decision and found that the father was entitled to credit for funds expended on the child during the father's custody. The court noted, "[t]he appellant (the father), actually supported the children during this period and to require that he also furnish the full support payments . . . is unwarranted." The court then stated the general rule that a father should be given credit for expenditures on a child in his custody, "where such payments constitute a substantial compliance with the spirit and intent of the decree."*64

*Guri v. Guri* further illustrates state movement towards an equitable approach to retroactive modification of child support. In *Guri,* the

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60 New Hampshire adheres to the position that modification of child support cannot be undertaken unilaterally by the noncustodial parent. An equitable trend has emerged in recent years. The key case in this area is *McCrady v. Mahon,* 119 N.H. 247, 400 A.2d 1173 (1979). The court recognized two situations where equitable considerations warranted a grant of credit. These situations are: 1) where there are compelling circumstances which make direct payment to the child necessary; and 2) where the custodial parent consents to the direct payments. *Id.* at ___, 400 A.2d at 1174. *See also* *Guri v. Guri,* 122 N.H. 552, 448 A.2d 370 (1982). However, recent cases suggest that this equitable trend must be monitored carefully.

61 Texas law appears fairly well predisposed to deny credit despite the decision in *Gould v. Awapara,* 365 S.W.2d 671 (Tex. Civ. App. 1963), which allowed credit for nonconforming payments. Subsequent cases have been uniform in denying credit for nonconforming payments, based primarily on public policy arguments. *See In re McLemore,* 515 S.W.2d 356 (Tex. Civ. App. 1974); *Ex parte Holloway,* 490 S.W.2d 624 (Tex. Civ. App. 1973).

65 *In Utah, courts generally may not reduce or cancel accrued support installments.* See *Utah Code Ann.* § 30-3-5 (1984); *Myers v. Myers,* 62 Utah 90, 218 P. 123 (1923). However, in the case of *Ross v. Ross,* 592 P.2d 600 (Utah 1979), it appears clear that the courts will recognize specific situations where equity dictates such modification. For example, the obligated parent would be entitled to credit where 1) a child has lived with the noncustodial parent; or 2) the custodial parent consents to payments by the noncustodial parent to voluntarily expend by the obligated parent would entitle the latter to credit.


63 *Id.* at ___, 460 P.2d at 41.

64 *Id.*

husband fell in arrears in child support payments for his three children. The wife brought suit to collect the arrearage. The husband raised the defense that he had made payments directly to the child for educational and medical expenses which should be credited against his arrearage. The trial court ruled for the wife and awarded her the full amount due. The Supreme Court of New Hampshire stated that generally credit is not permitted for payments made directly to the child. The court noted that the rationale for the general rule is that the custodial parent "should have the discretion to decide how to allocate support payments for the basic needs of the children." The court pointed out, however, two exceptions to the general rule: (1) where the custodial parent fails to care for the basic needs of the children; and (2) when there is a consensual agreement between the parties providing for direct payments to the children.

E. States that Apply Equitable Considerations and That Are Inclined to Grant Credit

The fifth group of states favor equitable resolution of nonconforming payment issues but only in very limited categories. For example, credit will be granted if there is consent for the nonconforming payment, or if there is action by the custodial parent which does not justify strict compliance with the support order. The states included in this category are: (1) Illinois; (2) Kentucky; (3) Louisiana; (4) Mississippi.

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66 Id. at __, 448 A.2d at 372.
67 Id. (citing McCrady v. Mahon, 119 N.H. 247, 248, 400 A.2d 1173, 1174 (1979)).
68 Id.
69 In Illinois, it appears that the courts will grant credit to an obligated parent provided he can prove the wife consented to the alternate form of payment. See Strum v. Strum, 22 Ill. App. 3d 147, 317 N.E.2d 59 (1974). The courts will also allow credit if the obligated parent can show that the custodial parent should be equitably estopped from collecting on the arrearage. Id. at 149-50, 317 N.E.2d at 61-62. In Escott v. Escott, 26 Ill. App. 3d 417, 325 N.E.2d 395 (1975), the court also held that no credit will be allowed for periods of visitation, for payments to third parties or for overpayments. See also In re Marriage of Dawn, 108 Ill. App. 3d 808, 439 N.E.2d 1005 (1982); Harner v. Harner, 105 Ill. App. 3d 430, 434 N.E.2d 465 (1982).
70 Kentucky has allowed credit for nonconforming payments in two limited circumstances. First, it has allowed credit where it has found substantial compliance by the obligated parent. Campbell v. Campbell, 209 Ky. 571, 273 S.W. 26 (1925). Second, it has allowed credit where payment has been made under a compulsion of circumstances. Jackson v. Jackson, 306 Ky. 715, 209 S.W.2d 79 (1948). See also Dalton v. Dalton, 367 S.W.2d 840 (Ky. Ct. App. 1963).
71 Louisiana law on the issue of credits for nonconforming payments can be broken down into several approaches. Two of the approaches concern equitable standards. For example, in Dubroc v. Dubroc, 388 So. 2d 377 (La. 1980), the Louisiana Supreme Court found that where parties have expressly agreed or consented to a different manner of payment, the lower courts have either
Dubroc v. Dubroc illustrates the treatment these jurisdictions give nonconforming payments. Pursuant to the divorce decree, the wife retained custody of the parties' two children, and the husband was obligated to pay $250 per month in child support. Shortly after the divorce, the wife contacted the husband and requested that he take custody of one of the children. The husband agreed on the condition that the wife accept only $125 per month in child support. The arrangement appeared to be concluded and both sides fulfilled their modified obligations for four years. At the end of that period, the wife filed suit to recover child support due under the court order. The Supreme Court of Louisiana found that the husband was entitled to credit for the support directly given to the child in his custody. The court stated, "[a]n agreement between divorced parents to suspend the mother's right to child

been willing to enforce their agreement or the courts have found an implied agreement when the obligated parent provides direct support to the children due to the custodial parent's voluntary transfer of custody to the noncustodial parent.

The majority of cases in Mississippi appear to support the rule that child support payments become fixed and vested when due. Despite this rule, the Mississippi courts have either allowed credit for nonconforming payments or relieved the obligated parent of his liability in two sets of circumstances. The circumstances include: 1) credit granted for the time the children are in the custody of the obligated parent; or 2) when the action of the receiving parent so offends the principles of equity and justice that the court will not lend the parent its aid. See Cole v. Hood, 371 So. 2d 861 (Miss. 1979) (court applied the "clean hands doctrine" to deny wife aid of court since she willfully hid her children for period of years and kept her address secret); Schlom v. Schlom, 149 Miss. 111, 115 So. 197 (1928).

In Montana, it is fairly clear that prospective modification of support orders is the general rule. See MONT. CODE ANN. § 40-4-208 (1987); Kelly v. Kelly, 117 Mont. 239, 157 P.2d 780 (1945). However, there is a growing recognition by the courts that certain circumstances, such as prior agreements or where the spirit and purpose of the decree has been substantially complied with, merit offsetting nonconforming payments against arrearages.

In South Dakota, the courts have repeatedly held that the child support statute authorizes a court to modify a divorce decree both as to past due and future installments. See State ex rel. Larsgaard v. Larsgaard, 298 N.W.2d 381 (S.D. 1980). However, before a court can exercise this power, it must find that a change in circumstances has occurred since the entry of original child support judgment. Id. at 384.

The law in Wyoming appears to be unclear at this point as to whether retroactive modification can be routinely granted upon a finding of equitable circumstances. WYO. STAT. 20-2-116 (1977), gives the trial court authority to revise and alter a divorce decree's support provision from time to time as circumstances require. However, it appears to be clear from the case of Wardle v. Wardle, 464 P.2d 854 (Wyo. 1970), that such modification is at least proper when the custodial parent violates one of the provisions concerning custody of the children during visitation periods. Under equitable principles, the trial court may leave the parties where they are, as far as past payments are concerned—if the court considers it proper to do so and if it can be done without jeopardizing the best interests of the child. Id. at 856.

388 So. 2d 377 (La. 1980).
support is enforceable if it promotes the best interests of the child." 77 Significantly, the court did not find a general rule against retroactive modification of child support payments, but rather the court focused on whether the parties' arrangement was in the best interest of the child. Thus, the court gave credit for consensual nonconforming payments which effectuated "the ultimate goal of support and upbringing of the child." 78

In *Strum v. Strum*, 79 the Illinois court took an approach similar to Louisiana. The parties divorced, and the court awarded the mother custody of their three children and ordered the father to pay $435 per month in child support. One month after the divorce, one of the children began living with the father. The other two children reached majority one year after the divorce. The father stopped paying child support, claiming that his child support obligations were extinguished because he had custody of one child and the other two had reached majority. The Illinois Court of Appeals found that past child support payments are vested and a court is without power to modify the amount due. 80 The court observed, however, that it may apply the doctrine of equitable estoppel to prevent the custodial parent from asserting the right to child support. The court found, as a matter of law, that the obligation for child support terminated when the child reached majority. 81 Additionally, the court ruled that because one child permanently resided with him, the father no longer owed the wife child support with respect to that child. 82 Thus, the court applied equitable estoppel to prevent the wife from asserting her rights to child support. 83

F. States that Apply Equitable Considerations with Broad Guidelines

States in this category are inclined to use equitable standards in resolving nonconforming payment issues and merely require a party to meet very broad guidelines. For example, credit may be granted if there are compelling circumstances, if equitable circumstances dictate, or if there is strict compliance with the spirit and intent of the decree.

77 Id. at 378.
78 Id. at 380.
80 Id. at 149, 317 N.E.2d at 61.
81 Id. at 149-50, 317 N.E.2d at 62.
82 Id.
83 Id.
Included in this group of states are: (1) Alabama; (2) Florida; (3) Maine; (4) Maryland; (5) Missouri; (6) Oklahoma; and (7) Washington.

The Alabama courts have held that child support payments become final judgments as of the date due and are immune from modification when they are past due. See Wood v. Wood, 275 Ala. 305, 154 So. 2d 661 (1963). However, the courts have also recognized that there are situations in which equity will require credit for nonconforming payments. For example, credit is likely to be granted provided the payments are in substantial compliance with the spirit and intent of the decree. As enunciated in Keller v. Keller, 370 So. 2d 306 (Ala. Civ. App. 1979), the key factor in determining credit to arrearages is whether the evidence shows that the father contributed to the actual support of the child. See also Binns v. Maddox, 327 So. 2d 726 (1976) (Social Security payments received by wife for children's benefit could be credited against father's obligation for child support under court decree).

The Florida courts will grant credit for nonconforming payments only when equitable circumstances dictate. Mooty v. Mooty, 151 Fla. 151, 179 So. 155 (1938). See also Tash v. Oesterle, 380 So. 2d 1316 (Fla. Dist. Ct. App. 1980). But see Raybuck v. Raybuck, 451 So. 2d 540 (Fla. Dist. Ct. App. 1984); Martinez v. Martinez, 383 So. 2d 1153 (Fla. Dist. Ct. App. 1980) (although the Florida courts may grant credit, they will not do so without a careful review of the facts of the cases focusing on equity).

Although the Maine courts have appeared to adopt the general common law approach to the issue of retroactive modification, in practice, the courts are willing to look at the particular circumstances of the case to determine whether credit can be granted for nonconforming payments and whether they serve the essential purposes of the decree. See Gardner v. Perry, 405 A.2d 721 (Me. 1979).

Maryland consistently has followed the majority rule that voluntary payments made directly to the children are gifts, unless the obligated parent can prove express or implied consent, a "compulsion of circumstances," and they are "in substantial compliance with the spirit and intent of the decree." See Bradford v. Futrell, 225 Md. 512, 171 A.2d 493 (1961).

Missouri permits exceptions to the general rule requiring strict compliance with the terms of a divorce decree. See Stemme v. Stemme, 351 S.W.2d 823 (Mo. Ct. App. 1961); Steckler v. Steckler, 293 S.W.2d 129 (Mo. Ct. App. 1956). For example, credit may be granted if there is a "compulsion of circumstances" or if there is consent to the nonconforming payment by the custodial parent. Stemme, 351 S.W.2d at 825-26. See also Newton v. Newton, 622 S.W.2d 23 (Mo. Ct. App. 1981) (father was entitled to credit against each monthly child support installment paid that month to ex-wife from his disability Social Security benefits); Meyer v. Meyer, 493 S.W.2d 42 (Mo. Ct. App. 1973) (father was entitled to credit for support supplied by him directly to children with implied consent of mother). But see Klinge v. Klinge, 663 S.W.2d 418 (Mo. Ct. App. 1983).

Although the Oklahoma courts have repeatedly held that modification may only be prospective, they recently have begun to lessen the harshness of this strict rule by looking into the equities in each case. In part, the courts have stressed that credit should be granted where it would be inequitable not to do so. For example, in Raczynski v. Raczynski, 558 P.2d 425 (Okla. Ct. App. 1976), the court concluded that the more just approach is one that takes into consideration the particular circumstances of each case—a "compulsion of circumstances" approach. See also McNeal v. Robinson, 628 P.2d 358 (Okla. 1981) (father received credit for payments made by him when children lived with him; circumstances supported finding of express or implied consent of mother regarding payments, since she made no complaint for at least one and a half years).

In Washington, the courts appear to be willing to grant credit for nonconforming payments when equitable circumstances so require, provided no injustice is done to the custodial
Keller v. Keller represents the treatment these states give non-conforming payments. In Keller, the divorce decree awarded custody of the parties' child to the wife and obligated the husband to pay $100 per month in child support. The husband never made any support payments, but he did assume the cost of sending the child to a military boarding school. The wife sued to recover the support arrearage. The Alabama appellate court ruled in favor of the husband, finding that the custodial parent is not entitled to support payments if he or she did not actually provide support for the child. The court held that a noncustodial parent is entitled to credit for direct support given the child. It stated, "[t]he key factor to be considered in giving credit on child support arrearages is whether the evidence shows that the father contributed actual support of the child." Thus, the court was not concerned about whether the form of the support payments conformed to the support decree; instead, it investigated which party actually supported the child.

Similarly, in Bradford v. Futrell, the court looked to who, in substance, rendered support for the children. The parties were divorced, and the wife retained custody of their four children. The husband was ordered to pay $80 per month in child support. Over a fifteen year period, the husband failed to make the prescribed payments and the wife obtained a judgment for the support arrearage. The husband asserted that the transfers of money and several items of personal property which he made directly to the children should be credited against the support arrearage. The Maryland appellate court found that several of the items were gifts, and thus the husband was not entitled to any credit for these transfers. Other items and money in the form of checks made payable to one of the children were found to comply with the "spirit and intent of the decree." The court gave the husband credit for these payments.

[92] Id. at 307.
[93] Id.
[95] Id. at 517, 171 A.2d at 494-95.
[96] Id. at 518, 171 A.2d at 496.
The states in this group are strongly inclined to grant credit for nonconforming payments based upon equitable considerations. In these states, the judge uses his discretion to decide whether to grant credit for nonconforming payments. This group includes the following states:

1. California
2. Delaware
3. Georgia
4. New Jersey
5. New York
6. North Carolina
7. Pennsylvania
8. Rhode Island

The case law in California dictates that the courts will grant credit for nonconforming payments. However, the trial courts have a fair amount of discretion in considering these cases. It appears that the California courts will grant credit for nonconforming payments where justice so demands and where the parent has adequately provided for the children. See In re Marriage of Utigard, 126 Cal. App. 3d 133, 178 Cal. Rptr. 546 (1981); In re Marriage of Matthews, 101 Cal. App. 3d 811, 161 Cal. Rptr. 879 (1980); In re Marriage of Peet, 84 Cal. App. 3d 974, 149 Cal. Rptr. 108 (1978);Jackson v. Jackson, 51 Cal. App. 3d 363, 124 Cal. Rptr. 101 (1975); Sanford v. Sanford, 274 Cal. App. 2d 535, 78 Cal. Rptr. 144 (1969).


The case-by-case approach taken by the New York courts exemplifies the discretion with which they are vested in the area of nonconforming payments. The case law is fairly consistent depending on the type of nonconforming payment involved. See Souran v. Souran, 80 Misc. 2d 476, 363 N.Y.S.2d 511 (1975); Heinecke v. Heinecke, 41 A.D.2d 935, 343 N.Y.S.2d 609 (1973); Wallace v. Harrice, 61 Misc. 2d 28, 304 N.Y.S.2d 470 (Sup. Ct. 1969) (citing Brill, infra); Mintz v. Mintz, 5 Misc. 2d 542, 158 N.Y.S.2d 820 (1956); Kocourek v. Kocourek, 1 A.D. 2d 868, 149 N.Y.S. 2d 48 (1956); Moore v. MacKay, 132 N.Y.S. 2d 813 (Sup. Ct. 1954); Brill v. Brill, 148 A.D. 63, 131 N.Y.S. 1030 (1911). The New York statutes encourage credit. For example, N.Y. Dom. Rel. Law § 240 (McKinney 1977) directs the courts to exercise their discretion as justice so requires, while, at the same time, having due regard to the circumstances of the case. N.Y. Dom. Rel. Law § 244 (McKinney 1977) explicitly extends this power to the actual enforcement of a support order when a default has occurred.

The Pennsylvania courts have an extreme amount of discretion in child support issues. The Pennsylvania trial courts may retroactively reduce or cancel arrearages, and may grant credit...
Island;\textsuperscript{104} and (9) Tennessee.\textsuperscript{108}

The New Jersey approach in \textit{Slep v. Slep}\textsuperscript{106} illustrates the propensity of this group to use a case-by-case analysis of relevant equitable principles when considering retroactive modification. Upon divorce, the husband failed to comply with the child support order directing him to pay $100 per month to his former wife. The wife sought recovery of the arrearage accumulated over a sixteen year period. During this period, the children had spent a substantial amount of time either living with their father or at a place provided by him.

The \textit{Slep} court first noted that an action for "past due installments of support for children is an equitable remedy within the sound discretion of the court."\textsuperscript{107} Moreover, the court stated that "there is no vested right to recover unpaid [child support] arrearages . . . for it is always within the power of the court to modify its original order with retroactive effect."\textsuperscript{108} The court denied the wife’s petition for relief because the husband had provided direct support to the children in excess of the arrearage.

Tennessee followed the equitable discretion approach to petitions for retroactive modification in \textit{Dillow v. Dillow}.\textsuperscript{109} The husband fell in arrears on payments to support his two children in his ex-wife’s cus-
tody. After the divorce decree took effect, the parties entered into a private agreement modifying the decree. Approximately four months later, the husband petitioned the court to retroactively modify the divorce decree due to changed circumstances. The Dillow court found that the forgiveness of arrearages is a "matter that addresses itself to the sound discretion of the Chancellor." The court refused to apply any fixed rules, and its analysis focused only on whether the Chancellor abused his discretion. The court found that the Chancellor had abused his discretion because the husband's remarriage was purely voluntary and thus could not compel retroactive modification of the support order.

V. The Bradley Amendment and Its Impact on Judicial Discretion to Credit Nonconforming Payments

In October of 1986, Congress passed the Bradley Amendment, codified at 42 U.S.C. Section 666(a)(9) of the Social Security Act. The statute requires all states to recognize child support payments as judgments when they become due and to permit no retroactive modifications of the payments. Thus, the numerous states which have recognized judicial discretion, in varying degrees, for retroactive modification of child support orders are now prohibited from exercising discretion.

The text of Section 666(a)(9) plainly states that a child support payment is to be accorded the status of a judgment once the payment

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110 Id. at 291.
111 Id.

Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)—

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced,

(B) entitled as a judgment to full faith and credit in such State or in any other State, and

(C) not subject to retroactive modification by such State or by any other State.

See also supra note 3.
113 Id.
114 See supra notes 26-110 and accompanying text. At the present time, 42 U.S.C. § 666(a)(9) alters the law in forty-two states. Some authorities have stated that fewer than forty-two states now permit retroactive modification of support orders. These calculations appear to only count the states which liberally permit retroactive modifications as permitting any form of retroactive modifications. See, e.g., H.H.S. Rules Proposed on Proscription Against Retroactive Modification of Support Arrears, 13 Fam. L. Rptr. (BNA) 1600, 1601 (Oct. 1987).
becomes due. Having the legal force of a judgment, the obligee's right to such child support payments must be given full faith and credit in all states. Section 666(a)(9) further provides that once a payment vests, it cannot be modified by any state. The statute limits the court's discretion to "modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor." To the extent that a court construes a credit request for nonconforming payments to be a petition for retroactive modification, the Bradley Amendment would seem to prevent the exercise of judicial discretion, however inequitable the result.

The Bradley Amendment demonstrates Congressional concern for the losses the federal government was incurring under Title IV-D. Frequently, obligors, whose child support payments are used to reimburse the state Title IV-D agency for A.F.D.C. payments to obligees, petition courts to reduce child support arrearages based upon changed circumstances. The debtor spouse often succeeds in obtaining relief in a different state from where the support order was entered or where the child and custodial parent reside.

The Bradley Amendment undoubtedly will contribute to the Congressional goal of providing for more effective enforcement of child support in all cases, including Title IV-D proceedings, as well as establishing uniformity among the states. A literal reading of the statute, however, leads to questions about the equity of a strict application of Section 666(a)(9). Because the statute mandates that support payments become judgments when due and does not provide for any judicial discretion, child support payments made by an obligor which do

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117 Id.
not conform to the letter of the support decree, will not be credited to the obligor and may be considered by some courts as gifts. For example, where the obligor and obligee informally agree to alter the terms of a child support decree, so that the amount of money the obligor pays to the clerk of the court is reduced in return for the obligor making an in kind payment directly to the child, the obligor still would be responsible for the difference between the agreed payments made to the court and the court-ordered payments. More dramatically, in the absence of a modification order, if the custodial parent abandons a child and the obligor assumes direct financial responsibility for child care, the obligor would still be liable for the court-ordered payments which became judgments when due under Section 666(a)(9).

Due to what appears to be the nondiscretionary nature of the statute, a judge could not reduce the child support arrearage in the above cases even though, in substance, the obligor spouse has made the child support payments in compliance with the spirit and intent of the support order. One may, however, read Section 666(a)(9)(C)—"not subject to retroactive modification by such State or by any other State" as leaving the court free to retroactively modify support orders as to form rather than amount, and thereby grant a credit request for nonconforming payments. To the extent that Section 666(a)(9) was never intended to apply to the nonconforming payments situation, the statute is unclear and should be amended to recognize judicial discretion to grant credit in appropriate circumstances.

VI. A STATUTORY PROPOSAL FOR JUDICIAL DISCRETION TO RETROACTIVELY MODIFY CHILD SUPPORT ORDERS AS TO FORM OF PAYMENT

Although, as discussed in this Article, the rule against retroactive modification serves many useful purposes, an absolute bar to retroactive modifications of child support payments can produce unjust results when the rule is misapplied. In situations where the obligor makes nonconforming payments to the child or obligee, within the spirit and intent of the support decree, or where the obligor requests credit for support provided during a period of agreed upon custody (something more than visitation), an absolute prohibition on judicial discretion to award credit is unfair. By grouping the nonconforming payment cases with

cases where the obligor seeks to reduce the amount of child support payments due to changed circumstances, many courts treat two situations in the same manner where the legal and equitable considerations are quite different. A literal reading of Section 666(a)(9) to include credit for nonconforming payments under the ban against retroactive modification contributes to the confusion.

To remedy this problem, Congress and the state legislatures could enact statutes which provide for judicial discretion in all cases involving petitions for retroactive modification of child support orders. For the reasons discussed in this Article, the need for discretion in all cases is outweighed by the policies supporting the rule against retroactive modification. The better approach, however, is to limit application of the rule to cases where an obligor seeks retroactive modification of the amount of support due to changed circumstances. This approach would have the salutary effect of removing nonconforming payments from the shadow of federal and state rules against retroactive modification of child support orders. Credit for nonconforming payments should be given when, in the discretion of the trial court or hearing officer, equitable circumstances dictate. To accomplish this the legislature should authorize judges to grant credit requests and retroactively modify child support orders.

The following amendment (italicized) to 42 U.S.C. Section 666(a) is proposed to accomplish this purpose:

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)—

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced,

(B) entitled as a judgment to full faith and credit in such State or in any other State, and

(C) not subject to retroactive modification by such State or by any other State;

See supra notes 4-77 and accompanying text.

To the extent that child support payments vest or become judgments on the date due, granting credit for nonconforming payments may resemble a retroactive modification as to amount. The obligor's request, however, is merely to award credit for support previously paid, and in no way seeks relief from a civil judgment. If equity dictates, the obligor should be entitled to a set-off against an arrearage even if the unpaid support of record has been reduced to judgment prior to the obligor's credit request.
except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

(10) Provided that nothing in paragraph (9) of subsection (a) shall prevent an order which retroactively modifies the form and not the amount of any child support order — including an order of credit against a child support arrearage for a nonconforming payment, whether ordered through the State judicial system or through the expedited processes required by paragraph (2); and said order may be based upon factors which include but are not necessarily limited to the following:

(A) the extent to which the obligor's expenditure conforms to the spirit and intent of the support order;

(B) whether the obligor's expenditure was made with the consent or at the request of the obligee;

(C) periods of time, excluding reasonable visitation, unless otherwise provided by order or decree, during which the obligor has physical custody of the child with the knowledge and consent of the party authorized by law to have custody of the child; and

(D) whether a nonconforming payment is made under a compulsion of circumstances.

Because a single case cannot cover every situation which may arise, the Washington Supreme Court in *Schafer v. Schafer*, proposed the following factors which the judiciary should take into account when exercising discretion in nonconforming support payments cases: First, the court should look at whether the noncustodial parent (a) intended the nonconforming payments to be in satisfaction of the decree; or (b) attempted to obtain or retain custody for improper purposes. Second, the court should consider whether the custodial parent: (a) was willing and able to provide necessary care for the child; (b) consented, expressly or impliedly, to the noncustodial parent's continued custody; or (c) was relieved of the reasonable expenses of child support while the child was in the custody of the noncustodial parent. A third factor is the duration of child's stay with the noncustodial parent. Finally, the court should decide whether cogent reasons exist to require the noncustodial parent to provide direct support of the child, as well as to comply with the support order to make payments to the custodial parent.

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122 95 Wash. 2d 78, 621 P.2d 721 (1980). See also supra note 88.
123 *Id.* See also Goodson v. Goodson, 32 N.C. App. 76, 81, 231 S.E.2d 178, 182 (1977).
VII. CONCLUSION

The petition to retroactively modify child support orders based upon changed circumstances seeks to alter the amount of child support owed, whereas the credit request for nonconforming payments merely seeks judicial approval for payments made in a different form from that ordered by the court. Many courts nevertheless treat these two very different situations as being subject to the rule against retroactive modification. The amount of judicial discretion in nonconforming payments cases varies among the state jurisdictions. Certainly considerable economic hardship and unfairness to obligors may result from a court's strict application of Section 666(a)(9) which prohibits retroactive modification to an obligor's credit request for nonconforming payments made within the spirit and intent of the support decree. This Article proposes a solution to this problem which will ensure equitable discretion without undermining effectiveness of child support enforcement—an amendment to 42 U.S.C. Section 666(a). The proposed amendment provides the court with express authority to award credit for nonconforming support payments. By excepting credit requests for nonconforming payments from Section 666(a)(9)'s rule against retroactive modification, the proposed amendment, Section 666(a)(10), will remove nonconforming payments from the shadow of the rule and place the matter within the equitable discretion of the first decider, where it belongs.