

94th Congress }  
1st Session }

COMMITTEE PRINT

Provisions of State Laws and Other Data Relating to  
**Wage Garnishment, Attachment  
and Assignment, and  
Establishment of Paternity**

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Background Information Prepared by the Staff for the  
Use of the

**COMMITTEE ON FINANCE  
UNITED STATES SENATE**

**RUSSELL B. LONG, *Chairman***



OCTOBER 1975

Printed for the use of the Committee on Finance

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U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1975

SI-307

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Washington, D.C. 20402 - Price \$2.65

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S362-24

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### **Acknowledgment**

**The staff wishes to acknowledge the assistance provided by the Congressional Research Service of the Library of Congress in the preparation of this committee print.**

**(iii)**



## **Preface**

Public Law 93-647, as amended, established new provisions for child support and establishment of paternity. This book assembles material on various State laws and other data which should be helpful in understanding the scope of the State laws which may be utilized in the implementation of the new provisions.



# CONTENTS

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	<b>Page</b>
<b>Preface</b> .....	<b>v</b>
<b>I Garnishment of wages</b> .....	<b>1</b>
<b>II Attachment provisions of State laws</b> .....	<b>71</b>
<b>III Assignment of wages</b> .....	<b>189</b>
<b>IV Establishment of paternity</b> .....	<b>211</b>
<b>V Appendix</b> .....	<b>261</b>

**Tables:**

<b>1. AFDC families, by number of illegitimate recipient children, 1973</b> .....	<b>284</b>
<b>2. AFDC children by number and percent of illegitimate children, 1961 and 1973</b> .....	<b>286</b>

**NOTE.**—A detailed table of contents for each chapter listed above can be found at the beginning of each chapter.

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**I. GARNISHMENT OF WAGES**

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## Garnishment of Wages

### CONTENTS

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	Page
A. Highlights of State Statutes Governing the Process of Garnishment Under Judicial Procedures in Aid of Attachments and Executions on Judgment.....	7
Code of Alabama.....	9
Alaska Statutes.....	10
Arizona Revised Statutes.....	11
Arkansas Statutes.....	12
California Civil Procedure Code.....	13
Colorado Revised Statutes.....	14
Connecticut General Statutes.....	15
Delaware Code.....	16
District of Columbia Code.....	17
Florida Statutes.....	17
Code of Georgia.....	18
Hawaii Revised Statutes.....	19
Idaho Code.....	20
Illinois Revised Statutes.....	21
Indiana Statutes.....	22
Code of Iowa.....	23
Kansas Statutes.....	23
Kentucky Revised Statutes.....	24
Louisiana Revised Statutes.....	25
Maine Revised Statutes.....	26
Maryland Code.....	27
Massachusetts General Laws.....	28
Michigan Compiled Laws.....	29
Minnesota Statutes.....	30
Mississippi Code.....	31
Missouri Statutes.....	32
Montana Code.....	33
Nebraska Statutes.....	34
Nevada Revised Statutes.....	35
New Hampshire Revised Statutes.....	36
New Jersey Statutes.....	37
New Mexico Statutes.....	38
New York Consolidated Laws.....	39
North Carolina General Statutes.....	40
North Dakota Century Code.....	41
Ohio Revised Code.....	42
Oklahoma Statutes.....	43

<b>A—Continued</b>	<b>Page</b>
Oregon Revised Statutes.....	44
Pennsylvania Statutes.....	45
Rhode Island General Laws.....	46
South Carolina Code.....	47
South Dakota Compiled Laws.....	48
Tennessee Code.....	48
Texas Civil Statutes.....	50
Utah Code.....	50
Vermont Statutes.....	51
Virginia Code.....	52
Washington Revised Code.....	53
West Virginia Code.....	54
Wisconsin Statutes.....	55
Wyoming Statutes.....	57
<b>B. Statutory Remedy for Recovery of Support and Maintenance under the Aid to Families with Dependent Children Pro- gram</b> .....	59
Washington .....	60
Florida .....	62
Georgia .....	63
Maine .....	64
Utah .....	66
Virginia .....	69

## **L. Garnishment of Wages**

**The common definition of garnishment is:**

**A statutory proceeding whereby a person's property, money, or credits in possession of, or under control of, or owing by another are applied to payment of the former's debt to a third person by proper statutory process against the debtor and garnishee. (Black's Law Dictionary, 4th Edition, 1951.)**

**This chapter has two parts, the first providing a separate treatment of the principal features of the garnishment process issued through the courts and the second dealing with new processes that might be initiated without recourse to the courts.**

**Two States have no provision in State law relating to garnishment. All the earnings of a debtor for his personal services is exempt from garnishment in South Carolina by statute. Current wages for personal services are not subject to garnishment in Texas by both the constitution and civil statutes.**



## **A. Highlights of State Statutes Governing the Process of Garnishment in Aid of Attachments and Executions on Judgment**

This compilation sets forth the highlights of State laws relating to wage attachments or garnishments through the courts. It is not intended to be a comprehensive treatment of the process as it is made available in the various States; a treatment of that nature would require an in-depth review of pertinent case law interpretative of the State statutes and rules of the court.

Additionally, note must be taken of two recent United States Supreme Court decisions that are of particular application to State statutory provisions respecting prejudgment attachments and garnishments. Read together, the cases set forth a constitutional principle that if due process standards are to be met, notice and hearing, aimed at establishing the probable validity of the prospective judgment creditor's claim, must be afforded to the alleged debtor before he is deprived of the use of his property. (See: *Fuentes v. Shenin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).)

Further, the highlights included in the compilation are to be compared with their corresponding provisions in the Federal Consumer Credit Protection Act. Codified at 15 U.S.C. 1601 et seq. That act acts out as exemptions in garnishment actions (or process initiated as an aid in attachment proceedings or in execution on a judgment) the greater of the following: (a) 75% of the wage earner's disposable income for that workweek, or (b) the amount by which such disposable earnings for that week exceed 30 times the Federal minimum hourly wage. In the case of earnings for any pay period other than a week the Secretary of Labor is required to prescribe, by regulation, a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (b). (15 U.S.C. § 1673(a)).

The above restrictions are inapplicable to any order of any court for the support of any person (15 U.S.C. § 1673(b)(1)), nor may any employer discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness. (15 U.S.C. § 1674(a)).

The Federal act does not annul, alter, or affect, or exempt any person from complying with the laws of any State prohibiting garnishments, providing for more limited garnishments than allowed under the Federal act, or prohibiting the discharge of an employee by reason of a garnishment of his wages. (15 U.S.C. § 1677).

On a comparative basis, then, the Federal exemption would be more beneficial to an employer and would control in the States of: Alabama, Arizona, Colorado, Delaware (excepting New Castle County), Michigan, Mississippi, Oklahoma, Rhode Island, Tennessee, Utah, West Virginia, and Wyoming; and, in certain circumstances, the Federal exemption would be more beneficial and controlling in the States of: Alaska, Arkansas, Florida, Hawaii, Illinois, Maryland, Missouri, New

**Hampshire, New Jersey, New York, North Carolina, Pennsylvania, and South Dakota.**

**On the same basis, the Federal restriction respecting discharge of an employee would apply in the States of: Alabama, Arizona, Arkansas, Florida, Louisiana, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Tennessee.**

## Code of Alabama

### *Exemptions*

Seventy-five percent of wages, salaries or other compensation of resident laborers or employees. (§ 7-630).

Personal property to the extent of \$1,000 is exempted from sale or execution or other process for the collection of a debt. (§ 7-629). Personal property, in the exemption laws, includes wages. (*Walker v. Williams and Bauler Constr. Co.*, 46 Ala. App. 337, 241 So. 2d. 896, (1970)).

*Consumer Finance Act.*—The exemption is the greater of: (a) 80 percent of disposable earnings for that week, or (b) the amount by which disposable earnings for that week exceed 50 times the Federal minimum hourly wage. (§ 5-326). Act applies to consumer loans, consumer credit sales and consumer leases.

### *Before judgment*

No garnishment of earnings before judgment under Consumer Finance Act, (§ 5-326); otherwise, an employer may be served with a writ of garnishment in suits in which judgment has been rendered or in which judgment may be rendered. (§§ 7-314, 996). Prejudgment garnishment of salaries of public officials and employees is prohibited. (§ 7-1035).

### *Public officers and employees*

Salaries due officials and employees of a city, county or State government, or any department or institution thereof, may be garnished after judgment. (§ 7-1032).

### *Service of process*

On the person authorized by law to draw a warrant on the treasury of said government, or to issue a check for salary due. (§ 7-1033).

### *Time to answer*

Within 30 days of service of the writ. (§ 7-999).

### *Examination of garnishee*

Plaintiff may demand oral examination of garnishee before the Court, (§ 7-1011). He may also be examined on written interrogatories. (§ 7-477). Answer may be controverted and issues tried by court. (§ 7-1020).

### *Penalty on failure to answer*

A conditional judgment may be entered for the amount of the plaintiff's claim, to be made absolute unless appearance made within 30 days after notice of the conditional judgment.

### *Effect of writ*

Nonexempt salary is to be retained during such period of time as is necessary to accumulate a sum equal to the sum shown due by the court on the writ. (§ 7-630).

(9)

*Discharge of employee*  
No statutory provision.

**NOTE:** In *Lasseter v. Lasseter*, 266 Ala. 459, 97 So. 2d 555, it was held that the salary of a public official is not subject to garnishment on a decree for support and maintenance.

### Alaska Statutes

#### *Exemptions*

The maximum part of the aggregate disposable income of an individual for any week which is subject to execution may not exceed: (a) 25% of his disposable income for that week, or (b) the amount by which his disposable income for that week exceeds \$114, whichever is less. The multiple of the weekly wage for semimonthly and monthly income periods is  $2\frac{1}{2}$  and  $4\frac{1}{2}$  respectively.

**Support orders.**—The above exemptions are inapplicable to an order of a court for the support of any person. (§ 09.35.080). Additionally, the amount which the judgment debtor has been ordered to pay to a court trustee as child support payments is exempt from execution. (§ 09.35.085).

#### *Before judgment*

Prejudgment attachment of nonexempt wages permitted after notice and hearing. (§ 09.040.030; Alaska Rules of Court Procedure and Administration, Civil Rule 89).

#### *Public officers and employees*

Salaries, wages, credits or other personal property in possession or control of the State, or an organized or unorganized borough, city, incorporated town, school district or other political subdivision, or a board, institution, commission or officer of the State, belonging or owed to any person, is subject to attachment and execution in the manner and with the same effect as property in the possession of private persons. (§ 09.35.330).

#### *Service of process*

Upon the Attorney-General and upon the state officer or agency when the State or an officer or agency thereof is the party designated as garnishee; and, upon the chief executive officer, chief clerk or secretary of a public corporation summoned as garnishee. (Alaska Rules of Court Procedure and Administration, Civil Rule 4).

#### *Time to answer*

Within a reasonable time and in any event within 24 hours, he must furnish a statement designating the amount and description of personal property in his possession belonging to the defendant or any debt he owes to the defendant. (§ 09.40.060).

#### *Examination of garnishee*

Upon refusal to answer, or providing an unsatisfactory answer, the garnishee may be ordered to appear before the court and be examined. (§ 09.40.060). Examination may also be by interrogatories after order for appearance has issued. (Alaska Rules of Court Procedure and Administration, Civil Rule 89). He may also be examined at trial of any issues raised. (Rule 89).

***Penalty on failure to answer***

Judgment may be rendered against the garnishee to the full value of the defendant's property liable to the attachment and in his hands at the time of the service of the writ. (Alaska Rules of Court Procedure and Administration, Civil Rule 89).

***Effect of writ***

Binds wages and salaries owed at time of service of the writ. (§ 09.40.040).

***Discharge of employees***

No employer may discharge an employee by reason of the fact that his income has been subject to execution for any one indebtedness. (§ 09.35.080).

**Arizona Revised Statutes*****Exemptions***

Fifty percent of resident debtor's wages, earnings or salary for personal services rendered at any time within 30 days next preceding the levy of garnishment when it appears from the debtor's affidavit that such earnings, wages or salary are necessary for use by the debtor's resident family supported wholly or in part by him. (§ 12-1594).

***Before judgment***

Permitted (§ 12-1571), but prejudgment garnishment of wages is invalid in the absence of some provision respecting notice to the defendant and a hearing on the validity of the plaintiff's claim. (*Templan Inc. v. Superior Court of Maricopa County*, 105 Ariz. 270, 463 P2d 68, (1969)).

***Public officers and employees***

The salaries of officers, deputies, clerks, and employees of the State or its political subdivisions is subject to garnishment. (§ 12-1601).

***Service of process***

Upon the State treasurer in the case of garnishment of salaries and wages owed by the State; upon the chief disbursing officer of the political subdivision in case of the garnishment of wages and salaries paid by a political subdivision. (§ 12-1602).

***Time to answer***

In the superior court, the garnishee must answer within 10 days if the writ is served in the county wherein the action is brought, and within 20 days if served out of the county. In justice court if served within precinct in which action is brought, within 5 days; if without the precinct but within the county, within 10 days; if within the county, within 15 days. (§ 12-1576).

***Examination of garnishee***

Plaintiff or defendant may controvert the garnishee's answer and file pleadings stating why they believe the garnishee's answer is incorrect. Thereafter, the issue is resolved at trial. (§§ 12.1589, 1590).

***Penalty on failure to answer writ***

If garnishee fails to answer within the time specified in the writ, the court may, after judgment has been rendered against defendant, render

judgment by default against garnishee for the full amount of the judgment against defendant (§ 12-1583).

### *Effect of writ*

Does not reach salary, wages or earnings earned by employee after date of service. (*Gillespie Land and Irrigation Co. v. Jones*, 63 Ariz. 535, 164 P.2d 4J6).

### *Discharge of employee*

No statutory provision.

## Arkansas Statutes

### *Exemptions*

*Unmarried resident.*—Personal property of a value of \$200 is exempt from execution for collection of any debt by contract. (Const. Art. 9, § 1).

*Married resident or head of family.*—Personal property of a value of \$500 is exempt from execution for collection of any debt by contract. (Const. Art. 9, § 2).

### *Laborers and mechanics*

Wages for 60 days exempt provided a statement is filed to the effect that said wages plus personal property holdings are less than the constitutional exemption (§ 30-207). The first \$25 per week of net wages is absolutely exempt without the necessity of filing a schedule of exemptions. (§ 30-207(b)).

**NOTE:** Courts are specifically authorized to enforce their order or decrees for alimony and support by sequestration of defendant's property, or by such other lawful means, including equitable garnishment. (§ 34-1212).

### *Before judgment*

Prejudgment garnishment authorized. (§ 31-501). Prejudgment garnishment of the State is prohibited. (§ 31-521).

### *Public officers*

Any indebtedness, goods and chattels, moneys, credits or effects belonging to a defendant in a civil action and in the hands or possession of the State, any subdivision thereof, institution, department, special district or instrumentality of the State shall be subject to garnishment. (§ 31-519).

### *Service of process*

Upon the individual representing the State, subdivision thereof, institution, department, special district or instrumentality of the State. (§ 31-520).

### *Time to answer*

Return day named in the writ. (§ 31-506).

### *Examination of garnishee*

If the plaintiff shall deem the garnishee's answer to be untrue or insufficient, he may deny such answer and have the issue tried by a court or jury. (§ 31-508). Interrogatories filed with writ. (§ 31-505).

***Penalty on failure to answer***

If garnishee neglects or refuses to answer the writ, judgment must be entered against him for the full amount of the plaintiff's judgment, plus costs. (§ 51-512).

***Effect of writ***

Binds all property in the garnishee's hands and belonging to the defendant at the time of service. (*Harris v. Harris*, 201 Ark. 684, 146 S.W. (2d) 539).

***Discharge of employees***

No statutory provision.

**California, Civil Procedure Code*****Exemptions***

Fifty percent or such greater portion as is allowed by statute of the United States of earnings received for personal services rendered within 30 days preceding date of withholding by the employer.

One hundred percent of earnings for personal services rendered 30 days preceding date of withholding by employer if needed for the support of his resident family.

*Exception.*—100 percent exemption inapplicable if the debt was incurred by the debtor, his wife or his family for the common necessities of life, or, if the debt was incurred for personal services rendered by any employee or former employee of the debtor. (C.C.P. § 690.6).

*Note:* Earnings not exempt against judgment for alimony. (*Bruton v. Teasle*, 7 Cal. 2d. 48, 59 P.2d. 953, (1936)).

No exemption from writ of execution issued against 50 percent of earnings of absent parent after judgment in action for support; earnings received for personal services are not exempt from levy of attachment in connection with such support judgment. (C.C.P. § 690.6).

***Before judgment***

Writ may be issued at time of issuance of summons or afterwards. (C.C.P. § 537-538); but prejudgment garnishment of wages violates procedural due process. (*Lynch v. Superior Court of Los Angeles County*, 83 Cal. Rptr. 670, 464 P.2d 128 (1970)).

***Public officers and employees***

After judgment, money due officers and employees of the State or its political subdivisions is subject to garnishment. (C.C.P. § 710).

*Note:* Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer and Attorney-General are exempted.

***Service of process***

The judgment creditor shall file a duly authenticated abstract or transcript of such judgment, together with an affidavit stating the exact amount then due and owing and unpaid, with the State department, board, office or commission owing such money, or with the auditor of the political subdivision owing such money, wages or salary to the judgment debtor. (C.C.P. § 710).

***Time to answer***

The party owing the debts or credits to the judgment debtor must supply a memorandum thereof within 10 days after service to the officer levying the attachment or garnishment. (C.C.P. § 546).

***Examination of garnishee***

Any person having any credits belonging to defendant may be required to attend before a court or judge, or a referee appointed by the court or judge and be examined on oath respecting the same. (C.C.P. § 545).

***Penalty on failure to answer***

Failure to supply the required memorandum within the time specified may subject the employer to liability for payment of costs of proceedings for the purpose of obtaining the required information. (C.C.P. § 546).

***Effect of writ***

Garnishee is liable to plaintiff until garnishment is released or judgment is satisfied. (C.C.P. §§ 544, 550).

***Discharge of employes***

Prohibited (Labor Code § 2029).

### Colorado Revised Statutes

***Exemptions***

***Head of family.***—70% of earnings due at time of service of the garnishment summons. ***Single person:*** 35% of such earnings. (§ 13-54-104.) The above exemptions are subject to the exemption provisions of the Uniform Consumer Credit Code, which exempts the greater of: (a) 75% of disposable earnings for a workweek, or (b) the amount each week equal to 30 times the Federal minimum hourly wage. For pay period other than a workweek, an appropriate multiple determined by the administrator shall be applied to ascertain the amount of the exemption. (§ 5-5-105; Colorado Rules of Civil Procedure, Rule 103(a)).

***Before judgment***

May issue garnishment any time after issuance of an attachment (which may be issued before judgment) providing the sum exceeds twenty dollars. (Colorado Rules of Civil Procedure, Rule 103(a)). No prejudgment garnishment for debts arising from consumer credit sale, consumer lease or consumer loan. (§ 5-5-104). Attachment issues only at or after complaint filed. (Colorado Rules of Civil Procedure, Rule 102).

***Public officers and employes***

Salaries and wages of officers and employes of the State, municipal and quasi-municipal corporations, or boards and commissions thereof, is subject to garnishment. ***Exception:*** officers whose salaries or fees are fixed by the State Constitution. (§ 13-61-101).

***Service of process***

Upon the officer whose duty it is to issue pay warrants, checks or money in payment of salaries and wages. (Colorado Rules of Civil Procedure, Rule 103(d)).

*Time to answer*

Within the time specified in the writ. (Colorado Rules of Civil Procedure, Rule 103(e)).

*Examination of garnishee*

Interrogatories submitted and answered under oath and on failure to answer interrogatories, the plaintiff may enter a default against him and proceed before the court to prove the garnishee's liability, and in such case, the garnishee may be compelled to give testimony as a witness. His answer may also be traversed and issues thereby raised are tried by the court. (Colorado Rules of Civil Procedure, Rule 103(g), (l), (n)).

*Penalty on failure to answer*

Plaintiff may have judgment entered (on the default) the same as if the garnishee had answered. If the employer is found liable, the plaintiff may recover costs, otherwise, the employer is discharged without costs. (Colorado Rules of Civil Procedure, Rule 103(e)).

*Effect of writ*

Binds wages earned at the time of service. (Colorado Rules of Civil Procedure, Rule 103(k)).

*Discharge of employee*

Prohibited with respect to garnishments on judgments arising out of consumer transactions. (§ 5-5-106).

**Connecticut General Statutes***Exemption*

The greater of: (1) 75% of disposable earnings for a workweek, or (2) disposable earnings for a workweek up to the greater of \$65 or the amount equal to forty times the Federal minimum hourly wage. (§ 52-361(b)).

*Support orders.*—Exemption limited to \$25 per workweek (§ 52-362).

*Before judgment*

Wage executions issue only after a judgment order has been entered and judgment debtor defaults in complying with the terms of the order. (§ 52-361(a)).

*Public officials and employees*

Earnings of State employees are subject to wage executions (§ 52-361(c)).

*Service of process*

May be made on the clerk or chief presiding officer of a political subdivision (§ 52-57) or upon the State by leaving a true and attested copy of the process with the Attorney-General (§ 52-64).

*Penalty on failure to answer*

No statutory provisions requiring answers. Employer required to pay over nonexempt wages as of date of service of the writ, which is a continuing levy. Upon failure to pay, the employer is liable to an action by the judgment creditor. (§ 52-361(e)).

*Effect of writ*

A continuing levy until such execution and expenses are fully satisfied. (§§ 52-361(b), 362).

*Discharge of employes*

Prohibited unless garnishments exceed seven in a calendar year. (§ 52-361(h)).

**Delaware Code***Exemptions*

Eighty-five percent of wages (§ 10-4913).

*Support orders.*—Not more than 25% of defendant's "net" or "take home" salary or wages shall be attached for 1 child whom defendant is legally obligated to support, and not more than an additional 5% of "net" or "take home" salary or wages shall be attached for each additional child whom defendant is legally bound to support. (§§ 10-4913; 13-507(d)).

*Before judgment*

Writs of attachments containing an order summoning the employer as garnishee may be issued before judgment. (§ 10-3501).

*Public officers and employes*

Subject to attachment and garnishment. (§ 10-3503(a)).

*Service of process*

Made upon any officer of the State or its political subdivisions whose duty it is to pay such employees compensation from funds of the State or the political subdivision. (§ 10-3503(a)).

*Time to answer*

Garnishees must serve answer within 20 days specifying money and credits of a defendant in his possession. (Superior Court Civil Rules, Rule 5).

*Examination of garnishees*

At option of the plaintiff, garnishee's answer may be taken by affidavit before any person authorized to administer oaths. A prejudgment garnishee who fails to appear, as required, may be compelled to appear and answer or plead. (§ 10-3509). A plaintiff may file exceptions to an answer and the issues thereby raised will be tried by the court. (Superior Court Civil Rules, Rule 5).

*Penalty on failure to answer*

Judgment may be entered for plaintiff in an amount equal to the value of the property of the defendant in the garnishee's custody or possession, or for the amount of his judgment, whichever is less. (Superior Court Civil Rules, Rule 5).

*Effect of writ*

Garnishment attaches at time when garnishee is served and continues on all moneys which accrue to the debtor's credit until the garnishment is answered. (*Cooper's Home Furnishings Inc. v. Lolley*, 270 A 2d. 676, (Del Super. Ct. 1970)).

*Discharge of employes*

An employer shall not discharge an employee because the employer was summoned as garnishee. (§ 10-3509).

## District of Columbia Code

### *Exemptions*

Greater of: (1) 75% of disposable earnings for a workweek, or (2) amount of disposable earnings for a workweek equal to 30 times the Federal minimum wage. (§ 16-572). For pay periods longer than one week, the exemption equals the number of workweeks (or fraction thereof) times 30 times the applicable Federal minimum wage. (Minimum Wage and Industrial Safety Board Order No. 74-4).

*Employer.*—Garnishee shall not withhold or pay over more than 10% of gross wages for any period ending in any calendar month until the total amount of gross wages equals \$200; nor more than 20% of gross wages in excess of \$200 until the total amount of gross wages equal \$500. (§ 16-573(d)).

*Support orders.*—Limitation shall be 50% of gross wages for the pay period or periods ending in any calendar month.

*Debtor who is principal support of his family.*—Two-hundred dollars each month of earnings (other than wages) of person residing or earning major portion of his livelihood in the District of Columbia is exempt for 2 months next preceding issuance of the writ.

*Debtor who is not the principal support of his family.*—Sixty dollars each month of earnings (other than wages) for 2 months preceding date of attachment of persons residing or earning the major portion of their income in the District of Columbia. (§ 15-503).

### *Before judgment*

Prohibited (§ 16-583).

### *Public officers and employees*

No statutory authorization.

### *Time to answer*

Within 10 days after service of the writ. (§ 16-521a).

### *Examination of garnishee*

In addition to answers to written interrogatories, the garnishee, on motion, may be required to appear in court and be examined orally under oath. (§§ 16-521(b), 552(b)). An answer may be traversed and issues raised tried by a court or jury. (§ 16-553).

### *Penalty on failure to answer*

Judgment may be entered against the garnishee for the whole of the plaintiff's judgment (§§ 16-526, 556) or for an amount equal to the percentages with respect to which the failure occurs in garnishments in aid of execution of support orders. (§ 16-575).

### *Effect of writ*

Until judgment satisfied, writ is a continuing levy upon wages (§ 16-572).

### *Discharge of employees*

Prohibited (§ 16-584).

## Florida Statutes

### *Exemptions*

One hundred percent of wages due for personal services or labor performed by a head of a family are exempt from garnishment. (§ 222.11).

**Support orders.**—Such amount as the court shall order to be withheld. (§ 61.12).

**Before judgment**

No garnishment shall issue before judgment in any action sounding in tort. The writ is available before judgment in suits to recover a debt. (§ 77.01).

**Public officers and employees**

Subject to garnishment proceedings to enforce court orders for alimony, suit money or support, or other proceedings for dissolution, alimony, or child support. (§ 61.12).

**Service of process**

Served on public officer whose duty it is to pay the salary of a State or county public officer. (§ 61.12).

**Time to answer**

Garnishee required to answer writ within 20 days after service. (§ 77.04).

**Examination of garnishee**

If plaintiff unsatisfied with garnishee's answer, he shall serve a reply within 20 days denying the allegations of the answer. (§ 77.061). The issue thereby raised may be tried by a judge or jury. (§§ 77.07, .08).

**Penalty on failure to answer**

A default shall be entered in the cause and, upon final judgment in favor of the plaintiff, judgment shall be entered against the garnishee for the amount of the plaintiff's claim with interest and costs. (§ 77.081).

**Effect of writ**

Writ attaches all credits and debts due to defendant at the time of its service on the garnishee or at any time between the service and the time of the garnishee's answer. (§ 77.06).

**Discharge of employee**

No statutory provision. The Federal restriction would apply.

## Code of Georgia

**Exemptions**

The lesser of: (a) 25% of disposable earnings for that workweek, or (b) the amount by which disposable earnings for that workweek exceed 30 times the Federal minimum hourly wage in effect at the time the earnings are payable. In the case of pay periods of other than one week, a multiple of the minimum Federal hourly wage that is equal in effect to the weekly exemption. (§ 46-208).

**NOTE:** Exemption from garnishment is ineffective as against a decree for alimony. (*Huling v. Huling*, 195 Ga. 819, 22 S.E. 2d. 832 (1952)).

**Before judgment**

Authorized by statute (§ 46-101) but held unconstitutional in present form as violative of due process in that it permits prejudgment garnishment without notice or hearing to the alleged debtor. (*Morrow Electric Co. Inc. v. Cruse*, (D.C. Ga. 1974) 370 F.Supp. 639).

*Public officers and employees*

Money due officials or employees of the State or its political subdivisions, as salary for services performed, may be garnished. (§ 46-801).

*Service of process*

Writ is to be served on the person authorized by law to draw the warrant on the treasury of the government to be garnished. (§ 46-802).

*Time to answer*

Garnishee is required to answer under oath not sooner than 30 days and not later than 45 days of the service of a summons of garnishment. (§ 46-105).

*Examination of garnishee*

Garnishee's answer may be traversed by a plaintiff or claimant, or both, and the issue raised thereby may be tried by a jury. (§ 46-303). A garnishee may also be required to make his answer under oath in the court where suit is pending or judgment has been obtained. (§ 46-105).

*Penalty on failure to answer*

Judgment by default may be entered against the garnishee for the amount of such judgment as may have been obtained against the defendant. (§ 46-106).

*Effect of writ*

Attaches to all money and credits due at time of service and that accrue to the debtor's credit up to the date of the answer. (§ 46-203).

*Discharge of employee*

Prohibited with respect to any one indebtedness. (§ 46-215).

## Hawaii Revised Statutes

*Exemptions*

Ninety-five percent of the first \$100 per month, ninety percent of the next \$100 per month, and eighty percent of all sums in excess of \$200 per month. (§ 652.1).

*Before judgment*

Permitted upon hearing and proof of statutory grounds required to be alleged in plaintiff's motion for an attachment of wages, salary or commissions before judgment. (§§ 652-1, 653-6).

*Public officers and employees*

The salary, stipend or wages of an officer or employee of the State or its political subdivisions is subject to garnishment. (§ 653-2).

*Service of process*

Writ is served on the comptroller of the State or political subdivision. After judgment, the judgment creditor's affidavit as to the amount due and unpaid, along with a certified copy of the judgment, may be filed with the comptroller in lieu of a garnishee summons. (§ 653-6).

*Time to answer*

On return day specified in the writ. (§ 652-1). No answer or court appearance is required with respect to the garnishment of the salary,

stipend or wages of public officials and employees; it is sufficient for the garnishee in such cases to withhold the required amount or amounts which shall thereafter be deemed sequestered in the treasury of the State or its political subdivision. (§ 653-11).

#### *Examination of garnishee*

Either party to an action may, on written notice served on the garnishee, require the garnishee to appear and be examined under oath as to the disclosures in his return or as to his liability as garnishee. (§ 652-1). Does not apply in garnishments directed to the State or its political subdivisions. (§ 653-11).

#### *Penalty on failure to answer*

If plaintiff recovers a judgment, execution shall issue at his request, against the estate of the contumacious garnishee for the amount of the judgment. (§ 652-8).

#### *Effect of writ*

Continues until judgment is satisfied. (§§ 652-3, 4; 653-11).

#### *Discharge of employee*

Prohibited. (§ 387-32).

### Idaho Code

#### *Exemptions*

The greater of: (a) 75 percent of disposable earnings for a workweek, or (b) the amount by which disposable earnings for that workweek exceed 30 times the Federal minimum hourly wage. For pay periods other than a week, the exemption is to be determined by application of an appropriate multiple of the Federal minimum hourly wage equivalent, in effect, to (b) above. (§ 11-207).

*Uniform consumer credit code.*—The exemption is the greater of: (a) 75 percent of disposable earnings for that workweek, or (b) the amount by which disposable earnings for that week exceed 40 times the Federal minimum hourly wage. For pay periods other than a week, an appropriate multiple of the Federal minimum hourly wage equivalent, in effect, to (b) applies. (§ 28-35-105).

*Support orders.*—Exemptions of § 11-207 inapplicable to support orders.

#### *Before judgment*

Permitted if, on a show cause hearing, it is shown that there is a reasonable probability the plaintiff will prevail. (§ 8-502 (e)). Prohibited in consumer credit transactions. (§ 28-35-104).

#### *Public officers and employees*

Permitted as to all except elected officers. (§§ 8-502, 11-202).

#### *Service of process*

Service is to be made on the mayor, president of the council or board of trustees, or any presiding officer of a political subdivision. (§ 8-507). As to State officers and employees, service is to be made on the State auditor. (§ 11-202).

#### *Time to answer*

Within 5 days of service. (§ 8-512).

***Examination of garnishee***

Garnishee may be required to attend before the court, a judge or a referee for examination under oath. (§ 8-509). Examination may also be by written interrogatories. (§ 8-511). A plaintiff may also file exceptions to an answer and issues thus presented may be tried by a court. (§ 8-514).

***Penalty on failure to answer***

Failure or refusal to answer may result in a default judgment for an amount not greater than the debt claimed by the plaintiff, plus interest and costs. (§ 8-519).

***Effect of writ***

Binds all credits until it is discharged or any judgment recovered by the plaintiff is satisfied. (§ 8-508).

***Discharge of employes***

Prohibited under Consumer Credit Code. (§ 28-35-106).

### Illinois Revised Statutes

***Exemptions***

Wages, salary, commissions, bonuses and periodic payments pursuant to a retirement or pension plan are exempt to the extent of: (a) \$65 per week in the case of a head of a family who contributes substantially to its support and \$50 per week for a nonhead of a family, or (b) 85 percent of such funds, or (c) the amounts prescribed by Title III of the Federal Consumer Protection Act, whichever amount is greater. (§ 62-73).

***Before judgment***

No statutory authorization with respect to garnishment of wages.

***Public officers and employees***

Precluded on public policy grounds. (*Lloyd v. State*, 11 Ill. Ct. Cl. 456; and *Quitsov v. Hennessey*, 38 Ill. App. 176, 86 N.E. 2nd 836).

***Time to answer***

Writ must be answered by garnishee on or before the return date therein specified. (§ 62-77).

***Examination of garnishee***

Judgment creditor may contest the employer's answer in which case the issues shall be immediately tried by the court. (§ 62-80), may also be examined on written interrogatories. (§ 62-74).

***Penalty on failure to answer***

A conditional judgment may be entered against the employer for the amount due on the underlying judgment against the judgment debtor. A summons to confirm the conditional judgment then issues and if the employer fails to answer the summons (which is returnable not less than 10 nor more than 20 days after issuance) final judgment is entered for the balance of the underlying judgment and costs (§ 62-76).

***Effect of writ***

Writ continues until the total amount due on the judgment and costs is paid. (§ 62-77).

***Discharge of employes***

Prohibited for any one indebtedness. (§ 62-88).

**Indiana Statutes*****Exemptions***

Under Uniform Consumer Credit Code, only 25 percent of disposable earnings in excess of 30 times the Federal minimum hourly wage may be garnished. (§ 24-4.5-5-105).

***Support orders.***—Exemption inapplicable to court orders for the support of any person, and to any decree awarding alimony or attorney's fees therein when such decree specifies the amount or percentage of the disposable earnings to be applied thereon. (§ 24-4.5-5-105).

***Resident householders.***—An exemption of \$15 per week plus 90 percent of excess over \$15, \$1,000 maximum. (§ 34-2-28-1).

***Householders.***—An exemption not exceeding \$25 at any one time. (§ 34-1-11-47).

**NOTE:** In *Mims & Commercial Credit Co.*, 307 N.E. 2d. 867 (S. Ct. Ind., 1974) it was held that the uniform garnishment exemption does not repeal the resident-householder exemption, but that under the two statutes, the debtor defendant who satisfies the requirements of the resident-householder exemption and whose indebtedness flows from a contractual breach is entitled to whichever results in the least amount of garnished income.

***Before judgment***

Permitted in personal actions arising upon contract (§ 34-1-11-20) but prohibited with respect to actions under the Consumer Credit Code (§ 24-4.5-5-104).

***Public officers and employes***

Permitted on order of court in satisfaction of a judgment. (§ 34-1-44-7).

***Service of process***

Court order to be served upon the governmental officer indicated to the judgment debtor. (§ 34-1-44-7).

***Time to answer***

Within 5 days of service. (§ 34-1-11-22).

***Examination of garnishee***

On failure to answer within the specified time, the garnishee may be required to appear before the court for examination proceedings under oath. (§ 34-1-11-22).

***Penalty on failure to answer***

A garnishee failing to answer may be defaulted and judgment rendered against him as against other defendants. (§ 34-1-11-23).

***Effect of writ***

From the day of the service of summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property or credit in his hands. (§ 34-1-11-21).

**Discharge of employes**

Prohibited (§ 21-4.5-5-106).

**Code of Iowa****Exemptions**

The greater of: (a) 75 percent of disposable earnings for a workweek, or (b) amount each week equal to 30 times the Federal minimum hourly wage. For pay periods other than a week, a multiple of the minimum hourly wage equal in effect to the weekly exemption applies. Excepting support orders, the annual maximum exemption is \$250 for each judgment creditor. (§ 642.21.)

**Consumer Credit Act.**—Exemption is the greater of: (a) 75 percent of disposable workweek earnings, or (b) 40 times the Federal minimum hourly wage. A consumer may apply to the court for a greater exemption on the ground that it is necessary for the maintenance of the consumer or a family wholly or partially supported by the consumer. The court may exempt part or all of the earnings in such application. (Ia. Acts 1974, c. 1250, § 5.105).

**Before judgment**

Permitted in aid of an attachment. (*Eller v. National Motor Vehicle Co.*, 181 Iowa 679, 165 N.W. 64). Prohibited in consumer credit transactions. (Ia. Acts 1974, c. 1250, § 5.105).

**Public officers and employes**

State officials cannot be garnished. (Op. Atty-Gen. 1911-12, p. 432). Municipal or political corporations shall not be garnished. (§ 642.2).

**Time to answer writ**

Plaintiff may direct the sheriff to take the garnishee's answer at time of service of the writ. (§ 642.5).

**Examination of garnishee**

If garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified to appear and answer in court, and he may be so required in any event, if the plaintiff so notifies him. (§§ 642.6, 7). The answer may be controverted and issues raised tried by court. (§ 642.11).

**Penalty on failure to answer**

Judgment may be rendered for the full amount of the plaintiff's demand. (§ 642.9).

**Effect of writ**

Writ attaches to amounts owing to defendant at time of its service. (§ 642.10, 21).

**Discharge of employes**

Prohibited (§ 642.21).

**Kansas Statutes****Exemptions**

Greater of: (1) 75 percent of aggregate disposable earnings for a workweek, or (2) the amount by which the aggregate disposable earnings for that workweek or multiple thereof exceed an amount equal

to 30 times the Federal minimum hourly wage, or equivalent multiple thereof for such longer period, whichever is less. (§ 60-2310(b)).

*Support order.*—Restrictions do not apply to any order to any court for the support of any person. (§ 60-2310(e)(1)).

*Before judgment*

Available upon showing a ground or grounds of attachment. (§ 60-715).

*Public officers and employees*

Garnishment law applies to all State, county, city, township and school district officers and employees as well as to all officers and employees of all municipal or quasi-municipal corporations. (§ 60-723).

*Service of process*

Upon a public officer for the State or any instrumentality thereof. (§ 60-718).

*Time to answer*

Within 30 days after service of a garnishment seeking to attach earnings due and owing to the defendant. (§ 60-718(b)).

*Examination of garnishee*

If a reply is filed to the garnishee's answer, the court shall try the issues joined thereby. Must also answer interrogatories on writ. (§ 60-718).

*Penalty on failure to answer*

Judgment may be taken against the garnishee for the amount of the plaintiffs judgment or claim against defendant. Judgment against the State or any instrumentality thereof shall be limited to an amount for claim and costs not exceeding the total amount of the indebtedness of the State or instrumentality thereof to the defendant. (§ 60-718(c)).

*Effect of writ*

Writ attaches to earnings for the entire normal pay period in which the order is served. (§ 60-717(c)).

*Discharge of employees*

Prohibited for any three indebtednesses. (§ 60-2311).

### Kentucky Revised Statutes

*Exemptions*

The maximum disposable earnings for any workweek subject to garnishment may not exceed: (1) 25 percent of his disposable earnings for that workweek, or (2) the amount by which his disposable earnings for that week exceed 30 times the Federal minimum hourly wage. (§§ 427.010(2)(a); (b)).

*Support orders.*—The above restrictions do not apply to any order of any court for the support of any person. (§ 427.010(3)), nor to garnishments issued for the collection or maintenance of minor children. (§ 427.045).

*Before judgment*

Prejudgment garnishment treated as an attachment. Person seeking order must make a demand in writing and deliver such demand to the debtor at least 7 and not more than 60 days before such order is sought. The demand shall advise defendant he has 7 days to petition the court for a hearing or in which to pay the claim in full, and that unless a hearing is set or the claim paid, an order of attachment or garnishment will be sought to subject his earnings to the payment of the claim. (§ 425.185(h)(4)).

*Public officers and employees*

Salaries or sums due State, county, city and school board officers and employees, and all sums due any person from the State or any agency or department thereof and all sums due from any county school board, city or county, shall be subject to garnishment. (§§ 427.130(1), (2)).

*Service of process*

Made upon the commissioner of finance, and the State treasurer. (§ 427.130(3)).

*Time to answer*

Affidavit (answer) must be filed and served in the manner and at the time required for an answer by the Rules of Civil Procedure. (§ 425.315).

*Examination of garnishee*

A garnishee may appear in court rather than file an answer to the writ and he may be compelled to appear if he should default by not appearing to answer the writ. (§ 425.315).

*Penalty on failure to answer*

On failure to make a satisfactory disclosure, he may be made a defendant in the suit, and the plaintiff may proceed against the garnishee in the same manner as the defendant might proceed in an action against the garnishee to recover property held or a debt owing to the garnishee. (§ 425.325).

*Effect of writ*

Attaches to property in garnishee's possession at time of service of the writ. (§ 425.190).

*Discharge of employee*

Employee may not be discharged by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness. (§ 427.140).

**Louisiana Revised Statutes***Exemptions*

Seventy-five percent of disposable earnings for any week, but not less than \$70 per week, or a multiple or fraction thereof according to whether the employee's pay period is greater or lesser than one week. (§ 13:3881).

*Support orders.*—Exemption inapplicable to orders for support of parents and grandparents. (§§ 13:4731, 4732). Child support orders take precedence over all garnishments of a father's wages. (§ 13:3928).

***Before judgment***

Garnishment available in aid of attachment (La. Code of Civil Procedure, Act. 3503).

***Public officers and employees***

State waives its immunity from garnishment only with respect to public employees or contractors of the State, its agencies, boards, commissions, political subdivisions, public corporations, and municipal corporations. (§ 13-3881).

***Service of process***

Upon the chief executive officer of the political entity. (C.C.P. 1265).

***Time to answer***

Within 15 days of date of service (C.C.P. 2412).

***Examination of garnishes***

Garnishee's answer to interrogatories may be traversed by the attaching creditor and issues thereby raised are tried by the court. (C.C.P. 2414). Garnishee may also be examined by interrogatories. (§ 13:3024).

***Penalty on failure to answer***

Judgment may be rendered against garnishee for full amount of the unpaid judgment, with interest and costs. (C.C.P. 2413).

***Effect of writ***

Seizure includes both accrued and future earnings. (C.C.P. 2411) *Sun Sales Co. v. Hodges*, 256 La. 687, 237 So. 2d 684, (1970).

***Discharge of employees***

No statutory provision.

### Maine Revised Statutes

***Exemptions***

Under trustee process, 100 percent of wages due a debtor for his personal labor, or that of his wife or minor children, is exempt. (§ 14-2602(6)).

***Enforcement of money judgments.***—When a judgment debtor receives money or earnings from a source other than a source which is otherwise exempt from trustee process, the maximum amount of the earnings of any natural person for any workweek that may be subjected to an installment payment order of the court may not exceed: (1) 25 percent of the judgment debtor's disposable earnings for that week, or (2) the amount by which his disposable earnings for that week exceed 30 times the Federal minimum hourly wage, whichever is less. Multiples of the Federal minimum hourly wage are exempt for non-weekly pay periods, as per regulations of the United States Secretary of Labor. (§ 14-3127).

***Consumer Credit Code.***—Garnishment to enforce judgments arising from consumer credit transactions, the exemption is equal to 75 percent of weekly disposable earnings or 40 times the Federal minimum hourly wage. Multiples of the Federal minimum hourly wage are to be prescribed for nonweekly pay periods. (§ 9A-5.105).

***Before judgment***

Prohibited under the Consumer Credit Code (§ 9A-5.104). Authorized under trustee process at commencement of any nonexcepted personal action. (§ 14-2601).

***Public officers and employees***

The statute providing that no person shall be adjudged trustee by reason of any money in his hands as a public officer has been interpreted as not applying to cases of personal indebtedness on the part of such officer. (*Tyler v. Winslow*, 46 Me. 348 (1859) interpreting § 14-2602).

***Service of process***

Upon a county, by serving a county commissioner, their clerk, or the county treasurer. Upon a town, by serving the town clerk, selectman or assessor. Upon a city, by serving the city clerk, treasurer manager. Upon any other public corporation or body, by serving any director, officer or manager thereof. (Maine Rules of Civil Procedure, Rule 4).

***Time to answer***

Within 20 days of service. (Maine Rules of Civil Procedure, Rule 4B).

***Examination of garnishee***

Garnishee must submit his disclosure under oath and submit to examination. (§§ 14-2701, 2707).

***Penalty on failure to answer***

Garnishee is liable for all costs (§ 14-2701) and is liable for the whole sum remaining due on the judgment against the defendant. (§ 14-2952).

***Discharge of employee***

Discharge for subjection of earnings to installment order. (§ 14-3137). Discharge for subjection of unpaid earnings to satisfaction of judgment arising from consumer credit transaction prohibited. (§ 9A-5.106).

**Maryland Code*****Exemption***

The amount equal to \$120 multiplied by the number of weeks in which such wages due were earned, or 75 percent of such wages, whichever is greater. (Art. 9, § 31(a)).

*Caroline, Worcester, Kent, and Queen Anne Counties.*—The exemption is the greater of: (1) 75 percent of the wages due or (2) 30 times the federal minimum hourly wage. (Art. 9, § 31(a)).

*Wife and child support.*—Willful neglect to support a wife or child is a misdemeanor. In lieu of punishment on conviction, the court may order the defendant to pay a certain sum weekly toward their support. Any such order is a lien on defendant's earnings and the employer is required to deduct such sum and pay it over to the Probation Department. (Art. 27, § 88).

***Before judgment***

No separate garnishment proceeding exists. Practice is to levy an attachment. In such proceeding, the third party is referred to as a garnishee. Pursuant to the Maryland Rules of Procedure, an attachment may issue on original process against matured or unmatured property or credits upon the application of any person that has the right to become a plaintiff in an action. (Maryland Rules of Procedure, Rule G40).

***Public officers and employees***

No statutory provision.

***Time to answer***

Within 15 days after return day. If interrogatories are served upon the garnishee, answer thereto must be made within 30 days after service. (Maryland Rules of Procedure, Rules G47, G56).

***Examination of garnishee***

By appearance in court to show cause why property or credits attached should not be condemned, and by interrogatories. (Maryland Rules of Procedure, Rules G47, G56).

***Penalty on failure to answer***

Judgment may be entered for the full amount of the plaintiff's claim. (Maryland Rules of Procedure, Rule G56).

***Effect of writ***

Writ does not affect salary or wages which are not actually due at date of attachment. (Art. 9, § 31(a)).

***Discharge of employee***

May not discharge an employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness within a calendar year. (Art. 9, § 31(b)).

**Massachusetts General Laws*****Exemptions***

\$125 of wages for labor performed or services rendered during each week is exempt from attachment under the trustee process. (§ 246-28).

***Before judgment***

Trustee process involving wages is available only in actions brought upon a judgment and is authorized in advance by a justice of the court in which the action is commenced. (§ 246-32(3)).

***Public officers and employees***

Towns, cities, and counties are liable to be summoned as trustees. (*Adams v. Tyler*, 121 Mass. 380, (1876)). The Commonwealth, in the absence of statutory authority, cannot be summoned as a trustee. (*MacQuarrie v. Bulch*, 1972 Mass. Adv. Sh. 1225, 285 N.E. 2d. 103).

***Service of process***

Statute declares only that trustee writs shall be served on each trustee. (§ 246-5).

***Time to answer***

Within 20 days of service of the trustee summons. (Mass. Rule of Civ. Proc., Rule 4.2).

**Examination of garnishee**

Plaintiff may, from time to time, examine trustee upon written interrogatories. (§ 246-12). An answer may be controverted and the issues raised tried by the court. (§ 246-17).

**Penalty on failure to answer**

A trustee who neglects to appear and answer shall be defaulted and adjudged a trustee. (§ 246-18). He is liable for the full amount of the judgment in the suit, plus interest thereon, if he willfully falsifies his answers. (§ 246-19).

**Effect of writ**

Writ attaches only to money which is unconditionally due. (*Benison v. Wright*, 21 Mass. App. Dec. 68, (1961)).

**Discharge of employee**

No statutory provision.

**Michigan Compiled Laws****Exemptions**

(a) *First garnishment of a householder having a family.*—The basic exemption is 60 percent of wages, with the following limitations: (1) if the labor extends over a period of 1 week or less; the maximum exemption is \$50 and the minimum is \$30; (2) if the labor extends over a period greater than 1 week, the maximum exemption is \$90 and the minimum is \$60.

(b) *Subsequent garnishments of a householder with a family.*—The exemption is to the amount of 60 percent of the indebtedness, but: (1) if the labor extends over a period of 1 week or less, the maximum exemption is \$30 and the minimum is \$12; (2) if the labor extends over a period greater than 1 week but not exceeding 16 days, the maximum exemption is \$60 and the minimum is \$124; (3) if the labor extends over a period in excess of 16 days, the maximum exemption is \$60 and the minimum is \$30.

(c) *First garnishment of an employee who is not a householder with a family.*—The basic exemption is 40 percent with a maximum exemption of \$50 and a minimum of \$20.

(d) *Subsequent garnishments of an employee who is not a householder with a family.*—The basic exemption is 30 percent with a maximum exemption of \$20 and a minimum of \$10. (§§ 600.4031, 7267, 7511).

*Support orders.*—In addition to above exemptions, such sums as are required to comply with court orders for alimony and child support is exempted. (§ 600.7511(4)).

**Before judgment**

A plaintiff's claim must be reduced to judgment before garnishment of wages for labor performed may issue. (§§ 600.4011(b)(3)).

**Public officers and employees**

Under Michigan case law, compensation of State officers or employees may not be garnished. (*Auditor General v. Wayne Circuit Judge*, 234 Mich. 540, 208 N.W. 696). No execution may issue against any township, village, city, the trustees or common council, or the officers thereof any corporate body or unincorporated board having

charge or control of any State institution, any school district, any county of the board of supervisors or any county officer. (§ 600.6021).

*Time to answer*

In court of record, garnishee must file answer within 15 days after service. (Rule 738.3). In justice court, summons involving wages is returnable in not less than 5 nor more than 9 days, except that in counties with a population greater than 2 million, the summons shall be returned in not less than 9 nor more than 15 days. (§ 600.7509).

*Examination of garnishee*

Plaintiff, unsatisfied with garnishee's answer, may serve written interrogatories or demand oral examination of garnishee. (Rule 738.8). In justice court, the garnishee is required to appear before the justice on the return day. (§ 600.7517).

*Pecnalty on failure to answer*

A default may be taken as in other civil actions (Rule 738.8). In justice court, garnishee is liable to arrest. (§ 600.7515).

*Effect of writ*

Attaches wages earned and due on the next date when payment is regularly made. (§ 600.7511).

*Discharge of employes*

Prohibited with respect to justice court garnishments. (§ 600.7585).

### Minnesota Statutes

*Exemptions*

Seventy-five percent of disposable earnings for any period, or an amount equal to eight times the number of business days and paid holidays, not to exceed five per calendar week, in the pay period times the Federal minimum hourly wage, whichever is greater. (§ 550.37 (13), 571.55).

*Before judgment*

In specified instances, a garnishment before judgment is permitted. (§ 571-41(2)).

*Public officers and employes*

Salary or wages of any official or employee of a county, town, city, village, or school district, or any department thereof is subject to garnishment. (§ 571.45).

Money due or owing any person or corporation by the State on account of any employment, work, or contract with the commissioner of highways is liable to garnishment. (§ 571.46).

*Service of process*

On the auditor, treasurer or clerk of the bodies specified in § 571.45. In other cases, service on such bodies shall be made upon the officer in whose office, or the head of the department in which, or the presiding officer of the body by which such person is employed. (§ 571.45).

Under § 571.46, service may be made by registered mail on the commissioner of highways.

***Time to answer***

Within 20 days (12 days in justice court) after service thereof. (§§ 571.47, 571.48).

***Examination of garnishee***

Either before or after written disclosure by answer to interrogatories submitted by a plaintiff, any party to the garnishment proceeding may obtain an ex parte order requiring oral disclosure. (§§ 571.47, 571.5).

***Penalty on failure to answer***

Judgment may be rendered against a defaulting garnishee for an amount not exceeding the judgment creditor's judgment against the judgment debtor or 110 percent of the amount claimed in the garnishee summons, whichever is smaller. (§ 571.53).

***Effect of writ***

Binds all disposable earnings earned or to be earned within that one pay period. (§§ 550.37(13), 571.42(2)).

***Discharge of employee***

Prohibited unless there have been more than three garnishments within a 90 day period involving more than one indebtedness, (§ 571.61).

**Mississippi Code*****Exemptions***

Seventy-five percent of a resident's wages, salary or other compensation, due or to become due. (§ 85-3-1).

***Before judgment***

Authorized in aid of attachment (§ 11-35-3) but is apparently authorized only after judgment to bind wages of public officers and employees. (§ 11-35-1).

***Public officers and employees***

Garnishment provisions apply to any person, either natural or artificial, including the State, any county, municipality, school district, board or other political subdivision thereof. (§ 11-35-1).

***Service of process***

(a) In case of garnishment against any employee of a State department, agency, board, commission, institution or other authority, the writ shall be served upon the department head, president of the institution or chairman or other presiding officer thereof.

(b) The writ shall be served on the State auditor in case of a garnishment against a State officer, departmental head, president of an institution, director of a board or other head of any other agency or commission of the State.

(c) The writ shall be served on the State treasurer in case of a garnishment against the State auditor. The writ shall also be served on the State treasurer in case of a garnishment against one of his employees.

(d) The writ shall be served on the clerk of the county chancery court in case of a garnishment against a salaried officer or employee of a county.

(e) The writ shall be served on the county sheriff in case of a garnishment against the clerk of the chancery court.

(f) The writ shall be served on the superintendent of the school district in case of a garnishment against a salaried officer or employee of a county or separate municipal school district.

(g) In case of garnishments against the school district superintendent, the writ shall be served on the president of the board of education or board of trustees.

(h) Garnishments against officers or employees of a municipality shall be served on the city, town or village clerk. (§ 11-35-11).

#### *Time to answer*

Answers in the circuit or chancery courts are due on the first day of the return term; in the justice of the peace court, the answer is due by noon on the return day of the writ. (§ 11-35-27).

#### *Examination of garnishee*

Garnishee required to submit written answers under oath. (§ 11-35-25). Garnishee's answer may be contested by the plaintiff. (§§ 11-35-45, 85-3-1), issues thereby raised are triable by the court. (§ 11-35-45).

#### *Penalty on failure to answer*

If the plaintiff prevails in a contest of garnishee's answer, judgment may be rendered against the garnishee for such amount as would have been subject to the order of condemnation had the said sum not been released to the defendant. (§ 85-3-1). On simple failure to answer, judgment for the amount of the plaintiff may be entered. (§ 11-35-1).

Judgment shall not be rendered against the State, county, municipality, State institution, board, commission or authority for default in failing to answer a writ of garnishment. (§ 11-35-13).

A sum of \$25 may be recovered by a plaintiff from any person failing to answer a writ of garnishment served upon him in his representative capacity under the provisions of § 11-35-11 above. (§ 11-35-19).

#### *Effect of writ*

Attaches wages on a continuing lien basis until the amount shown as due is equalled. (§ 85-3-1).

#### *Discharge of employee*

No statutory provision.

### Missouri Statutes

#### *Exemption*

The greater of: (a) 75 percent of workweek earnings, after deductions required by law to be withheld; (b) an amount each week equal to 30 times the Federal minimum hourly wage, or (c) if the employee is a resident head of a family, 90 percent of such earnings after deductions required by law.

**Support orders.**—Restrictions due not apply in the case of any order of any court for the support of any person. (§§ 452.140, 525.030(2)).

**Before judgment**

Available in aid of an attachment before judgment (§ 525.010), but sequestration of a public officers or employees salary may be made only after a judgment. (§ 525.310).

**Public officers and employees**

Permitted (§§ 525.030, 310).

**Service of process**

Upon the treasurer or the disbursing or auditing officer of the State or political subdivision charged with the duty of payment or audit of the salary, wages, fees or earnings of an officer, employee, or appointee of the State or political subdivision. (§ 525.310).

**Time to answer**

The return date of a summons to a garnishee is the return date of the execution. (Missouri Rules of Civil Procedure, Rule 90.02).

Answer to interrogatories filed by a plaintiff is due within 10 days after service thereof. (Missouri Rules of Civil Procedure, Rule 90.13).

In magistrate courts, time to answer, by appearance before the magistrate, is specified in the writ, but may not be more than 90 days from the date of service of the writ. (§ 525.320).

**Examination of garnishees**

The garnishee may be examined on written interrogatories submitted by the plaintiff. (§ 525.130).

In magistrate courts, garnishees may file written answer to statutory interrogatories, under oath, or the magistrate may, at his request, write the answer of the garnishee to each interrogatory separately and file the answer as a paper in the cause. (§ 525.350).

**Penalty of failure to answer**

The plaintiff may take judgment by default against the garnishee, or the court, on motion, may compel him to answer by attachment of his body. (§ 525.140). The same procedure applies in magistrate courts. (§ 525.360). The plaintiff may deny the garnishee's answer and issues thereby raised are to be tried by the court. (§ 525.190).

**Effect of writ**

Writ attaches to all earnings due on date of service, or which may become due between that time and the time of filing his answer. (§ 525.040).

**Discharge of employee**

Prohibited (§ 525.030(5)).

### Montana Code

**Exemptions**

One hundred percent of earnings for personal services rendered at any time within 45 days next preceding the levy of execution or attachment when it appears, by debtor's affidavit or otherwise, that such earnings are necessary for the use of his family, supported in whole or in part by his labor.

A 50 percent exemption applies if the obligation was incurred for gasoline or the common necessities of life. (§ 93-5816).

### *Before judgment*

In general, garnishments are in all respects subject to the same statutes as attachments and are available at the time of issuing the summons, or at any time afterward. (§§ 93-4301, 4314).

### *Public officers and employees*

Attachment or garnishment of money, credits or property in the possession or under the control of any public officer of a political subdivision, or State board or State government, is permitted. (§ 93-4311).

### *Service of process*

The writ is to be served upon the clerk of the county or chairman of the board of county commissioners, the city clerk or mayor of a municipal corporation, or upon the clerk of the board of school trustees or chairman of such board, as the case may be. (§ 93-4341).

### *Time to answer*

No specific time specified by statutes which state, only, that upon application of the officer serving an attachment, the garnishee must furnish such levying officer a statement of the property of the defendant held by the garnishee. (§ 93-4310).

### *Examination of garnishee*

Upon a refusal to give the required certificate, or if there is reason to believe the certificate submitted is untrue or incomplete, the court may order a garnishee to appear at a specified place and time for an examination under oath by a judge or referee. (§ 93-4311). Garnishees may also be required to appear in court or before a judge or referee to answer as to his indebtedness to the defendant. (§ 93-4315).

### *Penalty on failure to answer*

No statutory provision.

### *Effect of writ*

Attaches to credits due at time of service (§ 93-4314).

### *Discharge of employees*

Prohibited (§ 41-305.1).

## Nebraska Statutes

### *Exemptions*

Greater of: (a) 75 percent of workweek's disposable earnings, or (b) the amount each week equal to 30 times the Federal minimum hourly wage, or (c) 85 percent of disposable earnings for workweek if the wage earner is a head of a family. Multiples of the minimum wage apply for pay periods longer than one week. (§ 25-1558).

*Support orders.*—Exemptions inapplicable to support orders. (§ 25-1558).

### *Before judgment*

Wages may be garnished by an order for attachment. (§§ 25-1002, 1010).

***Public officers and employees***

Garnishment provisions apply to all State, county, municipal, municipally owned corporations, townships and school district officers and employees. (§ 25-1012).

***Service of process***

Made upon the officer whose duty it is to issue warrants for the payment of the officer or employee whose earnings are sought to be held. (§ 25-1013).

***Time to answer***

Within 10 days of issuance of summons to garnishee to answer interrogatories. (§ 25-1010).

***Examination of garnishees***

By interrogatories submitted by plaintiff. (§ 25-1010).

A garnishment summons served on a disbursing officer of the State or a political subdivision may be answered by him in writing by mail, or he may appear in person before the court, or file his written answer to the summons. In no case shall he be required to appear in person. (§ 25-1013).

***Penalty on failure to answer***

Garnishee is presumed to be indebted to the defendant to the full amount of the plaintiff's claim, and upon notice as directed by the court, judgment may be entered against him. (§ 25-1028).

***Effect of writ***

A garnishee summons binds wages under the control of the employer at the time of the service of the summons. (§ 25-1010). An order of attachment binds the wages in the employer's hands from the time of service. (§ 25-1017). Garnishment of State or political subdivision binds wages due between date of service and answer day. (§ 25-1013).

***Discharge of employee***

Discharge for garnishment for any one indebtedness prohibited. (§ 22-1558).

**Nevada Revised Statutes*****Exemptions***

The greater of: (1) 75 percent of disposable earnings for relevant pay period, or (2) the amount by which his disposable earnings for each week of that pay period exceed 30 times the Federal minimum hourly wage.

***Support orders.***—The above restrictions do not apply to any court order for the support of any person. (§§ 21.090, 31.295).

***Before judgment***

A writ of garnishment may be issued at the time of the order directing a writ of attachment to issue. (§§ 31.240; 249).

***Public officers and employees***

Fees and salaries of all officers and employees of the State, county, city, town, township or school district are subject to attachment and

execution for all debts and liabilities created or incurred by such officials or other persons. (§ 281.130).

*Service of process*

Service is upon the appropriate auditor, treasurer or disbursing officer. (§ 281.130).

*Time to answer*

Within 90 days of the date of service of the writ. (§ 31.260).

*Examination of garnishee*

Garnishee required to answer written interrogatories under oath. (§ 31.290). The plaintiff may traverse a garnishee's answer and new matters raised thereby shall be tried by the court. (§§ 31.330, 340).

*Penalty on failure to answer*

Judgment may be entered in favor of the defendant for the use of plaintiff against the garnishee for the value of the property or amount of money specified in the writ of garnishment. (§§ 31.260, 320).

*Effect of writ*

Attaches to wages earned as of the time of service, whether due or or not. (§ 31.290).

*Discharge of employee*

No statutory provision.

### New Hampshire Revised Statutes

*Exemptions*

Wages for labors performed after service of the writ on the trustee are exempt from the trustee process. Wages for services performed before service of the writ on the trustee are exempt except in actions founded upon a debt on a judgment issued by a State court; in such case, wages earned, before service of the writ, to the amount of 50 times the minimum hourly wage shall be exempt. (§§ 512.21(1), (2)).

*Before judgment*

Wages of an employee may be reached by an attachment of wages by trustee process before or after judgment. (§ 512.1).

*Public officers and employees*

Salary and wages of officials and employees of the State, county, city, town or school district are subject to the trustee process. (§§ 512.9, 9-a).

*Service of process*

Process served upon the State treasurer or treasurer of the county, city, town or school district. (§§ 512.9, 9-a).

*Time to answer*

At any time after service of the writ, a trustee's disclosure may be given or taken by any party after giving the same notice to the adverse party as is required in taking depositions. (§ 512.12). Superior Court rules respecting the taking of depositions deems 20 days notice as being reasonable. (Rules of the Superior Court, Rule 30). Depositions are submitted at the term next after the trustee's deposition is taken (§ 512.16).

*Examination of garnishee*

The writ requires the trustee to appear in court and show cause, if any, why execution should not issue against him for the judgment which may be recovered by the plaintiff. (§ 509.18). Examination may also be had under the deposition process set out above, (§ 512.13), and a trial of any issues raised by the deposition may be had on the motion of either party to the suit before a decision of the court. (§ 512.15).

*Penalty on failure to answer*

A trustee may be charged on default after a refusal to answer upon such notice as the court may order. (§ 512.10). If a trustee again defaults after such notice, he may be held chargeable for the amount of the judgment recovered by the plaintiff. (§ 512.11). If upon depositions or trial by jury, and verdict thereof, it appears that the trustee had in his possession at the time of the service of the writ upon him, or at any time thereafter, any money, goods, chattels, rights or credits of the defendant, not exempted from the trustee process, the trustee must be adjudged chargeable therefor. (§ 512.20).

*Effect of writ*

Attaches only to wages owing at the time of the writ's service. (§ 512.21).

*Discharge of employee*

No statutory provision.

**New Jersey Statutes***Exemption*

A minimum wage exemption of \$48 per week applies. If the wages, debts, earnings, salary, trust fund income or profits due and owing to a judgment debtor do not exceed \$7,500 per annum, the amount specified in any execution issued out of any court shall not exceed 10 percent thereof. If such income exceeds \$7,500 per annum, the court may order a larger percentage. (§§ 2A:17-52, 17-53, 17-57).

*Support orders.*—In case of multiple executions against such income, executions pursuant to court orders for maintenance and support of a wife and children shall be first satisfied. (§ 2A:17-52).

*Before judgment*

Wages may be reached by attachment or execution, attachments may be issued before judgment in specified instances. (§ 2a:26-2). An execution may issue only when a judgment has been recovered. (§ 2A:17-50).

*Public officers and employees*

Wages of State and public employees may be levied against by execution. (§ 2A:17-53).

*Service of process*

May be made upon any person, agent, treasurer or other fiduciary officer of a private or public municipal corporation, including the county, the State, or other governmental agency. (§ 2A:17-53).

*Time to answer*

The person to whom an execution is presented is required to pay over to the officer presenting the same, such amount of such indebted-

edness as such execution shall prescribe, until such execution shall be wholly satisfied. (§ 2A:17-53).

*Examination of garnishes*

No statutory provision.

*Penalty on failure to answer*

Failure or refusal to make payments required by § 2A:17-53 shall render such person, agent or officer so failing liable to an action therefor by the judgment creditor named in the execution.

*Effect of writ*

A continuing lien and levy upon the wages, debts, earnings, salary, trust fund income or profits due or to become due to such judgment debtor to the amount specified therein. (§ 2A:17-51).

*Discharge of employes*

No statutory provision.

### New Mexico Statutes

*Exemptions*

The greater of: (1) 75 percent of defendant's disposable earnings for any pay period, or (2) an amount each week equal to 40 times the Federal minimum hourly wage. Equivalent exemptions to be prescribed for pay periods other than one week. (§ 36-14-7).

*Before judgment*

Permitted on specified grounds. (§ 36-14-1), but prejudgment garnishment does not attach wages or salary due defendant from garnishee. (§ 36-14-3(B)).

*Public officers and employees*

Wages and salaries due public officials and employees of the State or its political subdivision are subject to garnishment *only after* a judgment has been obtained by the plaintiff. (§ 36-14-8).

*Service of process*

In garnishment actions involving State officials and employees, service shall be made upon the department of finance and administration, on the attorney general, and on the head of the branch, agency, bureau, department, commission or institution. ((§ 5-6-22)(G)).

*Time to answer*

Within 20 days of the service of the writ. (§ 36-14-2).

*Examination of garnishes*

Answer of public officer of the State or its political subdivisions shall be by statement over his official signature and filed in the action without cost. (§ 36-14-8). Statute requires other garnishees to appear before the magistrate court and file their answers, under oath, to interrogatories stated on the writ. (§§ 36-14-2, 36-14-15). Answers may be controverted and issues thereby raised may be tried by the magistrate court. (§ 36-14-5).

*Penalty on failure to answer*

Failure to answer under oath within 20 days may result in a judgment against garnishees for the full amount of a plaintiff's judgment, together with interest and costs. (§ 36-14-1(B)).

***Effect of writ***

The writ is a continuing lien and levy upon the judgment debtor's wages and salary until the judgment is paid or his employment is terminated. (§ 36-14-7.2).

***Discharge of employee***

No statutory provision.

**New York Consolidated Laws*****Exemptions***

Under income execution procedure, 90 percent of earnings for service within 60 days before, and at anytime after, an income execution is delivered to the sheriff or a motion is made to secure the application of the judgment debtor's earnings to the satisfaction of the judgment, is exempt. The exemption may be reduced by such amount as the court may determine to be unnecessary for the reasonable requirements of the judgment debtor and his dependents. Earnings of \$85 per week or less are entirely exempt. (Civil Practice Law and Rules, §§ 5205, 5231).

***Support orders.***—Court determines amount necessary for support of spouse and children and may order an employer to deduct such amount from an employee's wages, salary and commissions, and forward such amount monthly to the court as directed in the order. (Personal Property law § 49-b).

***Before judgment***

Income executions are available in satisfaction of judgments. (Civil Practice Law and Rules, § 5231). Wages may be reached before judgment by the attachment process. (*Morris Plan Industrial Bank v. Gunning*, 295 N.Y. 324, 67 N.E. 2d. 510, (1946)).

***Public officers and employees***

Wages and salaries of state and political subdivision officers and employees is subject to income executions. (Civil Practice Law and Rules, § 5231(f)).

***Service of process***

A levy upon money payable directly by a department of the State, or by an institution under its jurisdiction, shall be made by serving the income execution on the head of the department, or an officer designated by him, at the office of the department in Albany. A levy upon money payable directly upon the State comptroller's warrant, or directly by a State board, commission, body or agency which is not within any department of the State shall be made by serving the income execution upon the State department of audit and control at its office in Albany. Service on municipal or public benefit corporations or boards of education are apparently made by leaving a copy of the income execution with an executive officer or person whose duties are of sufficient importance to make it reasonably probable that process will be brought to the attention of the corporation or board. (Civil Practice Law and Rules, § 5231(f)).

***Time to answer***

Written interrogatories may be served upon an employer pursuant to a subpoena and are returnable within 7 days of their receipt or serv-

**ice. Procedure:** the income execution is served upon an employer by the sheriff who is then required to make a return of service within 60 days. Service of the income execution subjects the judgment debtor's nonexempt income to a lien and requires the employer to withhold such nonexempt income of the judgment debtor and pay the same over to the sheriff who in turn shall, from time to time, and at least once every six months, account for and pay all installments of monies collected under the execution to the person entitled thereto. (Civil Practice Law and Rules, §§ 5224, 5231 (f), (i)).

#### *Examination of garnishee*

A judgment creditor may subpoena any person to compel disclosure of matters relevant to the satisfaction of their judgment. The subpoena may be accompanied by written interrogatories or it may require the person to attend at an oral deposition. (Civil Practice Law and Rules, §§ 5223, 5224).

#### *Penalty on failure to answer*

A person renders himself liable to the judgment creditor for the accrued installments upon a failure to pay such installments to the sheriff. (Civil Practice Law and Procedures, § 5231).

#### *Effect of writ*

The income execution is a continuing levy on the judgment debtor's salary or wages. (Civil Practice Law and Procedure, § 5231).

#### *Discharge of employes*

No employer shall discharge or lay off an employe because one or more income executions have been served upon such employer against the employe's wages. (Civil Practice Law and Rules, § 5252).

### North Carolina General Statutes

#### *Exemptions*

One hundred percent of a debtor's earnings for personal services rendered at any time within 60 days next preceding the order of execution when it appears, by affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partially by his labor. (§ 1-362).

#### *Before judgment*

Garnishment is not an independent action but is a proceeding ancillary to attachment. (§ 1-440.21). A summons to a garnishee may be issued: (1) at the time of the issuance of the original order of attachment, or (2) at any time thereafter prior to judgment in the principal action. (§ 1-440.22), and is available in actions for alimony, or maintenance and support. (§ 1-440.2).

#### *Public officers and employes*

For reasons of public policy, the salaries of officers and the pay of employes of the State cannot be reached by creditors by proceedings supplementary to execution. (*Simpson v. Turner*, 76 N.C. 115 (1877)).

#### *Service of process*

Personal service on garnishee required. (§ 1-440.22).

***Time to answer***

Within 20 days of service. (§ 1-440.23).

***Examination of garnishes***

Interrogatories are incorporated in the garnishment summons. (§ 1-440.23). Additionally, a plaintiff may challenge a garnishee's answer and the issues thereby raised are triable by a court or jury. (§ 1-440.31).

***Penalty on failure to answer***

A conditional judgment for the full amount of the plaintiff's claim, plus costs, may be entered. A conditional judgment may be made final upon a continued failure to appear. (§ 1-440.27).

***Effect of writ***

Attachment reaches wages owing at and from the time of service of the summons until the employer makes his answer. (§ 1-440.28(a)(1)).

***Discharge of employee***

No statutory provisions.

### North Dakota Century Code

***Exemptions***

The greater of: (a) 75 percent of disposable earnings for workweek, or (b) an amount equal to 40 times the Federal minimum hourly wage. Equivalent multiples as prescribed by the Secretary of Labor apply in cases of pay periods other than a week. (§ 32-09-02(2)).

***Support orders.***—The above exemptions are inapplicable to any order of any court for the support of any person. (§ 32-09-02(3)(a)). Upon affidavit of need for the support of a family, 100 percent of earnings for personal services rendered within 60 days of order may be exempted by the court. (§ 28-25-11).

***Before judgment***

Prejudgment garnishment may be issued at any time before final judgment in any action to recover damages founded upon contract, express or implied, or upon a judgment or decree. (§ 32-09-06).

***Public officers and employees***

Garnishment is available against any person, any public corporation, the State, or any institution, department, or agency of the State. (§ 32-09-01).

***Service of process***

Service is made upon the director of the department of accounts and purchases. (§ 32-09-05).

***Time to answer***

An affidavit denying indebtedness or an answer to the garnishment summons must be filed within 20 days of service of the summons. (§§ 32-09-07, 14).

***Examination of garnishee***

By affidavit concerning his liability to the defendant (§ 32-09-15) and such answer is conclusive unless controverted by the plaintiff, in which case, the issues thereby raised shall be tried by the court. (§ 32-09-18).

***Penalty on failure to answer***

The court may render judgment against the garnishee for the amount of the judgment which the plaintiff shall recover against the defendant in the action for damages and costs, together with the costs of such garnishment action. (§ 32-09-16).

***Effect of writ***

Attaches earnings from the time of service of the demand for the employees disposable earnings and for five days thereafter. (§ 32-09-03).

***Discharge of employee***

No statutory provision.

**Ohio Revised Code*****Exemptions***

A debtor's earnings owed for services rendered within 30 days before attachment, process, judgment or order is exempt to the extent of the greater of: (1) if paid weekly, 30 times the current federal minimum hourly wage; if paid biweekly, 60 times the current Federal minimum hourly wage; if paid semi-monthly, 65 times the current Federal minimum hourly wage; or if paid monthly, 130 times the current Federal minimum hourly wage in effect at the time the earnings are payable; or (2) 75 percent of the disposable earnings due the debtor. (§§ 2329.62, 66).

*Support orders.*—Limitations do not apply to support orders. Employers must withhold the amount ordered by the court for the support of the wage earner's minor children. (§ 3113.21).

***Before judgment***

Attachments against the personal earnings of defendant, through an action in garnishment, may be granted only after a judgment has been obtained by the plaintiff. (§ 2715.01). A demand for payment is prerequisite to issue of garnishment summons. (§ 2715.02).

***Public officers and employees***

State subject to garnishment process with respect to its officers and employees. (§ 115.46).

***Service of process***

On State auditor (§ 115.46).

***Time to answer***

Garnishee required to appear and answer within the time allowed the defendant to answer the petition upon which the attachment was granted. (§ 2715.29).

***Examination of garnishee***

In the case of garnishments issued by the court of common pleas, the garnishee shall make his answer before the clerk of the court and a special examination of the garnishee shall be had. (§ 2715.13). In municipal or county court, garnishee appears at Court and answers questions put to him respecting credits and debts owed by him to the defendant. (§1911.35).

***Penalty on failure to answer***

On failure to appear and answer, the plaintiff may proceed against the garnishee by civil action wherein judgment may be rendered in favor of the plaintiff for the amount of the property and credits of the defendant in the possession of the garnishee, and for what appears to be owing by him to the defendant, and for the costs of the proceedings against such garnishee. (§§ 1911.44, 2715-33).

***Effect of writ***

Binds garnishee for all property of the defendant held by him, all amounts due the defendant from the garnishee from the time of the service of the order, and personal earnings owed the defendant for services rendered before service of the notice. (§§ 1911.35, 2715.19, 2715.29).

***Discharge of employee***

Discharge for any one garnishment of personal earnings in any twelve-month period is prohibited. (§ 2715.01).

**Oklahoma Statutes*****Exemptions***

Resident homeowner and head of family, 75 percent of wages or earnings for professional or personal services earned during last 90 days is exempt. (§ 31-1-1). Seventy-five percent of wages of resident nonfamily head is exempt. (§ 31-1-4).

***Support orders.***—One hundred percent of earnings for services performed within 90 days before issuance of execution is exempt if the same is necessary for the maintenance of a family wholly or partially supported by the defendant's labor (§ 31-1.1). Does not apply to orders for child support. (§ 31-1.1(1)).

***Consumer Credit Code.***—Exempts the greater of: (a) 75 percent of disposable earnings for that workweek, or (b) an amount each week equal to 30 times the Federal minimum hourly wage. For pay periods other than a week, the Administrator shall prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (b) (§ 14A-5-105(2)).

***Before judgment***

Garnishment may issue at or after issuance of the summons and before judgment. (§ 12-1172). Prejudgment garnishment of wages, however, is prohibited under the general garnishment provisions and under the Consumer Credit Code. (§ 12-1171.1; §14A-5-104). A hearing is a prerequisite to prejudgment garnishments. (§ 2-1172.1).

***Public officers and employees***

Garnishment proceedings may be initiated against State, county, city, town, school board, board of education, or any municipal subdivision officer or employee. (§ 12-1191).

***Service of process***

When the State is garnished, process shall be served upon the officer having control of the department or institution which caused the State to become indebted to the defendant. If such department is under the control of a board or commission, service may be had upon either the chairman or secretary of such board or commission.

Service on an officer having control of a State institution shall be had upon the president of the school, college or university, the superintendent of the institution or the warden of the penitentiary or reformatory involved.

Service on the State Auditor shall be made when a State officer not under the control of a State Department or Institution is the defendant.

Service shall be made on the clerk of a county, city, town, township, school board or board of education in garnishments affecting officers and employes of such bodies. (§ 12-1193).

*Time to answer*

Within 10 days from date of service (§ 12-1194).

*Examination of garnishee*

A garnishee may be examined by deposition or written interrogatories at any time after he files his answer. (§ 12-1183). A plaintiff may also elect to take issue on a garnishee's answer, in which case the issue shall stand for trial. (§ 12-1177). Garnishee may answer by affidavit. (§ 12-1178).

*Penalty on failure to answer*

Judgment may be rendered against him for the amount of the judgment which the plaintiff shall recover against the defendant, plus costs, together with the costs of such garnishment. (§ 12-1179). No judgment, however, shall be rendered against the State, or any county, city, town, board of education, school board, or any municipal subdivision of the State named as garnishee, but judgment may be rendered against any person served as provided under § 12-1193 above (i.e. the State offices, city, county, town, or township clerk, etc.). (§ 12-1194).

*Effect of writ*

Attaches to wages, salaries, bonus, and commission owing on the date of service. (§ 12-1173).

*Discharge of employee*

Discharge because of garnishment or like proceeding brought for purpose of paying a judgment arising out of a consumer credit transaction is prohibited unless such action is brought on more than two occasions within one year. (§§ 14A:5.106, 5.202).

## Oregon Revised Statutes

*Exemptions*

The greater of: (1) seventy-five percent of disposable earnings for a workweek, or (2) the amount by which his disposable earnings for that week exceed 30 times the Federal minimum hourly wage. (§ 23.185(1) (a), (b)).

*Support orders.*—Exemptions do not apply to court orders for the support of any person, including an award for attorneys fees or costs. (§ 23.185(2) (a)).

*Before judgment*

Prejudgment attachment and garnishment authorized on stated grounds (§ 29.110) and upon a hearing into the grounds alleged in the affidavit for a garnishment before judgment. (§§ 29.025, .065).

***Public officers and employees***

Salary, wages, credits, or other personal property in possession or control of the State or of any county, city, school district or other political subdivision, or any board, institution, commission, or officer of the same, is subject to garnishment. (§ 23.190).

***Service of process***

Process served on the board, department, institution, commission, agency, or officer charged with the duty of approving a voucher or claim for such salary, wages, credits, or other public property. (§ 23.190).

***Time to answer***

Within 5 days of service when service made in the county in which the action is pending; 10 days when service is made in any other county. (§ 29.280).

***Examination of garnishee***

Garnishee may be examined by written interrogatories or before the court, on oath, if he fails to respond to the writ, or provides an unsatisfactory response thereto. (§§ 29.280, 310). An answer may be controverted and the issues tried by the Court. (§ 29.340).

***Penalty on failure to answer***

Judgment may be entered against garnishee for an amount not greater than the judgment against plaintiff. (§ 29.330).

***Effect of writ***

Attaches to credits due at time of service. (§ 29.280).

***Discharge of employee***

Discharge because earnings have been garnished is prohibited. (§ 23.185(7)).

**Pennsylvania Statutes*****Exemptions***

One hundred percent of all wages (§ 42-883).

*Support orders.*—Exemptions do not apply to orders for support of wife and children. (§ 48-136).

***Before judgment***

Attachment of wages for a duty of support presupposes a court order requiring payments.

The procedure for enforcing court orders for support is set out at § 62: 2043.39 of the Code, and states as follows:

**§ 2043.39 Enforcement of orders of the court**

(a) The court, upon receiving information, either through written application or at any hearing, that there is failure to comply with the order of the court, may issue attachment proceedings, directed to the sheriff or other proper officer of the county, directing that the person named be brought before the court at such time as the court may direct which in counties of the first class shall be within forty-eight (48) hours or two court working days, whichever is the longer from the time the person is taken in custody of law pursuant to the attachment.

(b) Any willful failure to comply with any order of the court may be deemed a contempt of court and except in counties of the first class may be punishable by the court by commitment to the county jail or house of correction. In counties of the first class, any person who is found, after hearing, to have willfully failed to comply with any order of the court may be adjudged in contempt of court and may be punished by the court by commitment to the county jail or house of correction until compliance with said order, but in no case for a period exceeding six (6) months, and the court in its order shall state the condition which upon fulfillment will result in the release of such person.

(c) The wages, salary or commissions of any person owing a duty, of support may be attached in the following manner:

(1) A certified copy of the order of support shall be served on the employer, whether a corporation, political subdivision, association, company, firm or individual, and may be served by registered mail or by any adult person or by any other manner provided by law.

(2) Such certified copy of the order shall contain an order directing the employer to make a full answer, within ten (10) days after service of the order, of the amount of wages, salary or commissions of the defendant, and further directing the employer to make no payment to the defendant over 50 percent of the amount due him until further order of the court.

(3) The court shall determine the amount of the wages, salary or commissions which shall be regularly paid by the employer to the Domestic Relations Division and shall so notify said employer.

(4) Thereafter, it shall be the duty of the employer to pay such amount regularly to the Domestic Relations Division, and upon failure so to pay shall be in contempt and subject to the court's order as now provided in proceedings against defendant. The employer is authorized to deduct 2 percent of the amount paid under the order from the wages of the defendant for clerical work and expense involved in complying therewith.

(5) Such attachment shall continue until discharge by order of the court.

(d) The Domestic Relations Division shall make periodic reports to the court of defaults in and failure to comply with any order of the court.

## Rhode Island General Laws

### *Exemptions*

Salary or wages due a defendant at time of service of the writ in excess of \$50 may be attached. (§ 9-26-4).

### *Before judgment*

At the time of the commencement of any action, or at any time thereafter prior to judgment, a court may authorize issuance of an attachment (garnishment) after hearing on the plaintiff's motion for authority to attach a defendant's assets. (§§ 10-5-2, 5, 8).

**Note:** Prejudgment attachment, insofar as it is authorized without judicial notice and hearing, was held unconstitutional in *McClellan v. Commercial Credit Co.*, (D.R.I. 1972) 350 F. Supp. 1013.

***Public officers and employees***

City is subject to garnishes process, (*Wilson v. Lewis*, 10 R.L. 285(1872)).

***Service of process***

Service upon a public corporation, body, or authority is made by delivering a copy of the summons or process to any officer, director or manager thereof. (District Court Civil Ruler, Rule 4).

***Time to answer***

In district courts, within 10 days after service of the writ, in the Superior Court, within 20 days after service of the writ. (§ 10-17-4).

***Examination of garnishes***

Each garnishee is required to render an account in writing, upon oath, of what estate, if any, had in its hands or possession at the time the writ was served. (§ 10-17-2). A person signing the garnishee's answer may be summoned by either party at any time before final judgment and subjected to examination and cross-examination upon all matters relating to or connected with the facts set forth in such answer. (§ 10-17-6).

***Penalty on failure to answer***

Upon failure to render an account, a garnishee may be charged to the amount of the judgment or decree rendered against the defendant in the suit. If no judgment is rendered because of want of service on the defendant, the garnishee shall be charged to the amount of the just claim or demand which the plaintiff may show against the defendant to the satisfaction of the court. (§ 10-17-15).

***Effect of writ***

Attaches salary and wages due and payable at the time of the service of the writ. (§ 10-5-8).

***Discharge of employees***

No statutory provision.

**South Carolina Code**

***Exemptions***

All of the earnings of a debtor for his personal services is exempt from the process of garnishment. (§ 10-1731).

***Consumer Protection Code.***—Under the Consumer Protection Code, a creditor may not attach unpaid earnings of the debtor by garnishment to enforce collection of a debt arising from a consumer credit sale, a consumer lease, or a consumer loan, regardless of where made. Nor may an employer discharge an employee for the reason that a creditor of the employee has subjected or attempted to subject unpaid earnings of the employee to garnishment or like proceedings for the purpose of paying a judgment arising from a consumer credit sale, consumer lease or consumer loan. (S.C. Laws 1974, No. 1476) (§§ 5.104, 106).

## South Dakota Compiled Laws

### *Exemptions*

One hundred percent of earnings for personal services rendered within 60 days prior to the court order if such earnings are necessary for the use of a family supported wholly or partly by his labor. (§ 15-20-12).

### *Before judgment*

A garnishment of earnings may be issued only in aid of execution following a final judgment. (§ 21-18-3.1).

### *Public officers and employees*

The writ may issue against any person, including the State and any municipal or public corporation. (§ 21-18-1).

### *Service of process*

Upon the State auditor or on the head of the State department, institution or agency affected, or on his deputy, or on any member of the board in control of said department, institution or agency, or on both the State auditor and such heads, deputies or members of the boards, when the State is the garnishee. (§ 21-18-8).

### *Time to answer*

Within 30 days from the date of service. (§§ 21-18-26 to 29).

### *Examination of garnishee*

State need only inform the plaintiff, by registered or certified mail, the amount it owes to the principal defendant. (§ 21-18-28). In all other cases, a garnishee answers, by affidavit, the questions relating to the nature and extent of his indebtedness to the defendant as the same are prescribed at § 21-18-27. A garnishee's answer may be traversed, in which case, the issues thereby raised stand for trial as a civil action. (§ 21-18-30). No issues may be raised against the State by traverse of its reply. (§ 21-18-30).

### *Penalty on failure to answer*

Court may render judgment against a garnishee (except the State) for the amount of any judgment, including costs, which the plaintiff shall recover, together with costs of the garnishee action. (§ 21-18-39). No judgment shall be entered against the State nor shall any actual liability be incurred by the State in any garnishment proceeding. (§ 21-18-40).

### *Effect of writ*

Attaches to property, money, credits and effects in the garnishee's possession at the time of service and thereafter until garnishee makes his answer. (§ 21-18-12).

### *Discharge of employee*

No statutory provision.

## Tennessee Code

### *Exemptions*

The greater of 50 percent or \$20 per week of the total weekly salary, wages or income of every resident head of a family, subject to a maximum total exemption of \$50 per week; and, 40 percent or \$17.50, whichever is greater, of the total weekly salary, wages or income of every

resident nonhead of a family, subject to a maximum total exemption of \$40 per week.

An additional exemption of \$2.50 per week is provided for each dependent child under 16 years of age. (§ 26-207).

*Support orders.*—Unless a spouse (in whose favor an order, decree or judgment has been rendered) has remarried, the exemptions do not apply with respect to alimony and child support. (§ 26-210).

#### *Before judgment*

Excepting State, county and municipal employees, an employee's wages may be reached by garnishment at the commencement of an action and before or after judgment, if grounds for an attachment exist, since the attachment may be by garnishment. (§§ 23-601, 701). Garnishment is also available in aid of execution on a judgment. (§ 26-501).

#### *Public officers and employees*

Salaries, wages or other compensation of State, county and municipal officers and employees is subject to garnishment. (§ 26-516).

**NOTE:** This section does not authorize commencement of a suit against a State employee by attachment or attachment by garnishment against wages due the State employee. The wages may not be attached before the claim for which they are sought has been reduced to judgment. (*Brewington v. Brewington*, 215 Tenn. 473, 387 S.W. (2d) 777, (1963)).

#### *Service of process*

Process is served on the budget officer in the department in which the garnished employee works, and also upon the commissioner of that department in which such official or employee shall be engaged or connected. (§ 26-519).

#### *Time to answer*

In attachments by garnishment, the garnishee shall appear at the return term of the attachment, or before a justice of the peace, at a time and place fixed, to answer such questions as may be asked of him touching the property and effects of defendant. (§ 26-703). Garnishments in aid of execution are required to be answered within 10 days after issuance except that if the execution is issued from a justice of the peace or general sessions court, the officer or clerk of the latter court shall set the time when the garnishee shall appear. (§ 26-501). Income executions are to be answered by mail, or appearance before the court, within 5 days. (§ 26-207).

#### *Examination of garnishee*

Statute specifies questions garnishee may be required to answer under oath. Statute applies to attachments by garnishment and garnishment in aid of execution. (§§ 23-707, 26-207, 506). He may be required to answer such other questions as are put to him by the court or judgment creditor. (§ 26-506(4)). Additionally, an answer is not conclusive for amounts under \$1,000, and it may be controverted with a resulting trial on issues raised thereby. (§ 26-507).

#### *Penalty on failure to answer*

In case of a default in appearance or answer, a conditional judgment may be entered against the garnishee for the amount due and

a second summons is issued. Upon a second default, the conditional judgment may become final. (§§ 23-714 to 717; 26-511).

*Effect of writ*

Attaches to salaries, wages or income earned at the time of service (§ 26-207).

*Discharge of employees*

No statutory provision.

**Texas Civil Statutes**

*Exemptions*

Current wages for personal services are not subject to garnishment. (Tex. Const. Act 16, § 28, and Civil Statutes, articles 3836, 4099).

**Utah Code**

*Exemptions*

Fifty percent of earnings for personal services rendered any time within 30 days next preceding the levy of execution or attachment by garnishment or otherwise, when it appears, by affidavit, that the debtor is a married man, or head of a family, and that such earnings are for the use of his family residing within the state and supported wholly or in part by his labor. The minimum exemption hereunder is \$70 per month. (§ 78-23-1).

Exemptions with respect to enforcement of judgments arising from debt on a consumer credit sale are the greater of: (a) 75% of disposable earnings for a workweek, or (b) the amount by which disposable earnings for a workweek exceed 40 times the Federal minimum hourly wage. The multiple prescribed by the administrator shall apply for pay periods other than a week.

An employee's earnings shall not be garnished in any amount where his disposable earnings for a pay period of one week or less is \$64 or less; \$163 for a two-week pay period; \$182 for a semi-monthly pay period. (Uniform Consumer Credit Code, Rule 5).

*Support orders.*—Exemptions inapplicable to court orders for child support. Court may order an employer trustee, financial agency, or other person, firm or corporation indebted to the parents, or either of them, to withhold and pay over to the clerk of the court, moneys due or to become due not in excess of the lesser of: (a) the amount ordered to be paid by the court, or (b) one-fourth of the amount due or to become due at each regular or usual payday or day of disbursement. (§ 55-10-110).

*Before judgment*

Wages and earnings are excepted from prejudgment garnishment (Rules of Civil Procedure, Rule 64d(b)(i)); garnishment before judgment is also prohibited for debts arising from consumer credit sale, consumer lease or consumer loan. (§ 70B-5-104).

*Public officers and employees*

No statutory provision.

*Service of process*

Service is made upon person or persons designated by plaintiff as garnishee or garnishees. (Rules of Civil Procedure, Rule 64D(e)(i)).

***Time to answer***

Within 10 days from date of service. (Rules of Civil Procedure, Rule 64D(e) (ii)).

***Examination of garnishee***

The writ may require the garnishee to answer written interrogatories; the answer may be controverted and the issues thereby raised tried by a court or jury; the garnishee may be examined, under oath, by the court, if he fails to answer the writ within the time required. (Rules of Civil Procedure, Rule 64D(e), (h), (j)).

***Penalty on failure to answer***

Plaintiff may enter the garnishee's default and proceed to prove the liability of the garnishee. In such procedure, the court may make provision for witness fees and mileage, as may be just. Judgment shall be entered on the evidence to the same effect as if the garnishee had answered, and costs may be awarded to the plaintiff. (Rules of Civil Procedure, Rule 64D(R)).

***Effect of writ***

Attaches to indebtedness due at the time of service. (Rules of Civil Procedure, Rule 64D(a)).

***Discharge of employee***

No employer may discharge an employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness. (§ 70B-5-106).

## Vermont Statutes

***Exemptions***

Vermont Rules of Civil Procedure, Rule 4.2(j) (2) incorporate the provisions of the Federal Consumer Credit Protection Act (15 U.S.C. §§ 1671-1677) which impose maximum limits upon the amount of earnings that may be garnished to satisfy a debt, but expresses the requirements of the Federal Act in terms of its practical effect, i.e., the exemption is stated as \$48 on disposable earnings of \$67 per week or less, and not more than 25 percent of earnings where the weekly disposable earnings exceed \$64. Limitations for pay periods longer than a week shall be those prescribed by regulations of the United States Secretary of Labor.

***Before judgment***

No trustee process shall issue against earnings except on a claim that has first been reduced to judgment. (Vermont Rules of Civil Procedure, Rule 4(j) (i)).

***Public officers and employees***

Earnings of officers and employees of the State is subject to the trustee process. (§ 12-3013).

***Service of process***

Upon the State Treasurer (§ 12-3013).

***Time to answer***

Within 30 days after the service of the trustee summons upon the trustee. (Vermont Rules of Civil Procedure, Rule 4.2(f)).

***Examination of garnishee***

Trustee may be examined by interrogatories answered in writing and under oath. (§ 12-3064). A trustee's answer is not conclusive and either party may allege and prove facts material to that issue. (§ 12-3066). Questions of fact arising upon such additional allegations are triable by court or jury. (§ 12-3067), or may be determined by a commissioner if a person is summoned as a trustee in a county court and he does not choose to appear before a justice or district judge competent to try causes between the parties. (§§ 12-3068, 3070).

***Penalty on failure to answer***

Judgment by default may be entered for the amount of the damages and costs recovered by the plaintiff in the action. (§ 12-3063).

***Effect of writ***

The writ attaches to the goods, effects or credits in the hands of the trustee at the time of service, or which come into his hands or possession before disclosure. (§ 12-3013).

***Discharge of employes***

Prohibited unless the employer has been previously summoned as trustee on five or more separate occasions arising from separate actions, or unless the employer establishes that there were other substantial causes contributing to the discharge (§ 12-3165).

**Virginia Code*****Exemptions***

The greater of: (a) 75 percent of disposable earnings for a work-week, or (b) the amount by which disposable earnings exceed 30 times the Federal minimum hourly wage. (§ 34-29). Appropriate multiple applicable to pay periods of longer than a week.

*Support orders*—Exemptions inapplicable to order of any court for the support of any person. (§ 34-29).

***Before judgment***

A garnishment summons must allege it is based on a judgment. (§ 8-441).

***Public officers and employes***

The wages and salaries of all employes of the State, other than State officers, is subject to garnishment or execution upon any judgment rendered against them. (§ 8-449.1).

The wages and salaries of all officials, clerks and employes of any city, town or county is also subject to garnishment or execution upon any judgment rendered against them. (§ 8-449.2).

***Service of process***

Service is made upon the comptroller or other officer through whom the judgment debtor's salary or wages is paid. (§ 8-449.1).

***Time to answer***

No specific statutory period. A person summoned as garnishee shall appear, in court, in person, on the date specified in the summons. (§ 8-441.1).

*Examination of garnishee*

A person summoned as garnishee may file a verified statement or appear in person and be examined under oath. If judgment creditor disputes the verity of the statement, he may require the garnishee to appear in person for examination on oath. (§ 8-413).

*Penalty on failure to answer*

Court may compel appearance or hear proof of any debt owing by garnishee, or of effects in his hands belonging to defendant, and make such orders in relation thereto as if what is so proved had appeared on his examination. (§§ 8-417, 552).

*Effect of writ*

Wages and salaries due up to the return day of the process are bound by the writ. (§§ 8-443, 445, 449.1; § 34-29).

*Discharge of employee*

Prohibited with respect to any one indebtedness. (§ 34-29).

NOTE: Statute empowers courts or judges to revoke exemptions upon proof that the holder of an exemption certificate is no longer entitled thereto. (§ 34-31).

**Washington Revised Code***Exemptions*

The greater of: (1) 40 times the State hourly minimum wage, or (2) 75 percent of the defendant's disposable earnings. The exemption applies whether such earnings are to be paid, or are paid, weekly, monthly, or at other intervals, and whether the earnings are due for one week, a portion thereof, or for a longer period. (§ 7.33.280).

*Support orders.*—Exemption does not apply for child support if: (a) the garnishment is based on a judgment or other court order; (b) the amount stated in the writ does not exceed the amount of two months support payments, and (c) specific statutory language showing the garnishment is based on a court order is conspicuously added to the writ. (§ 7.33.280).

*Before judgment*

Authorized with respect to earnings on stated grounds. (§ 7.33.010).

*Public officers and employees*

The State, counties, cities, towns, school districts and other municipal corporations are subject to garnishment. (§ 7.33.060).

*Service of process*

Process against the State is served upon the Attorney General. (§ 4.92.020). Service on the county is made upon the county auditor; on the mayor with respect to service on a town or incorporated city; and upon the clerk if a school district is to be served. (§ 4.28.050).

*Time to answer*

Within 20 days of service (§ 7.33.050).

*Examination of garnishee*

By interrogatories incorporated upon the writ. (§ 7.33.150). The plaintiff may controvert a garnishee's answer (§ 7.33.240) and the issues thereby raised may be tried by the court (§ 7.33.260).

***Penalty on failure to answer***

Judgment may be rendered by default against the garnishee for the full amount claimed by the defendant, or in case the plaintiff has a judgment against defendant, for the full amount of such judgment with all accruing interest and costs. Upon motion and before execution, such judgment may be reduced to the amount of the nonexempt funds or property actually in the garnishee's possession at the time of the writ's service plus nonexempt earnings subject to continuing lien, or \$100, whichever is more. (§ 7.33.190).

***Effect of writ***

A plaintiff or judgment creditor may obtain a continuing lien on wages. The lien catches nonexempt wages owed at time of service and the nonexempt portion of all wages earned through the end of the last pay period ending immediately prior to 30 days after service of the writ. At end of the 30 day period, the garnishee must answer a second set of answer forms. (§§ 7.33.350-380).

***Discharge of employee***

Prohibited unless three or more such garnishments are served upon the employer within any period of twelve consecutive months. (§ 7.33.160).

**West Virginia Code*****Exemptions***

Eighty percent of wages, but in no event shall the amount payable to a judgment debtor be reduced thereby to less than \$20 per week. (§ 38-5A-3).

***Consumer Credit and Protection Act.***—The greater of: (a) 80 percent of disposable earnings for a workweek, or (b) 30 times the Federal minimum hourly wage. For pay periods longer than a week, the commissioner of banking is to prescribe, by rule, a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in subdivision (b) above.

Upon proof that an execution on wages will cause or is causing undue hardship to him or his family, an execution arising from a consumer credit sale or consumer loan may be temporarily or permanently removed by a court. (§ 46A-2-130).

***Before judgment***

No garnishment before judgment under the Consumer Credit and Protection Act. (§ 46A-2-118). In all other cases, the process of binding the wages and salaries of private and public employees in satisfaction of a debt is termed a "suggestee execution." The process is not authorized to issue before judgment. (§ 38-5A-2).

***Public officers and employees***

Wages and salaries of officers and employees of the State, a State agency, or any political subdivision of the State are subject to garnishment and suggestee execution. (§ 38-5B-2).

***Service of process***

Upon the State auditor in the case of money owed by the State; upon the auditor of a State agency in case of money payable directly by such agency, or, lacking such, upon the officer thereof whose duty

it is to audit and/or issue warrants or orders for the payment of such claims; or, upon the person designated by the State auditor or head of such department, agency or institution to receive such service.

Service on political subdivisions shall be made upon the auditor thereof or the officer who, or the clerk of the board or any body which, is charged with the duty of auditing and/or issuing warrants or orders for the payment of such claims. (§ 38-5B-5).

#### *Time to answer*

No provision respecting answer and appearance. The employer, upon service of the execution, is, apparently, required to immediately pay over nonexempt wages or salaries to the officer serving the execution or to the judgment creditor. (§ 38-5A-5).

The proper State officer upon whom such an execution has been served is required to pay over the nonexempt wages or salaries to the person serving the execution or to the court or clerk of the court issuing the execution. (§ 38-5B-9).

#### *Penalty on failure to answer*

A suggestee who fails and refuses to pay such nonexempt wages and salaries shall be liable to an action therefor. (§ 38-5A-5).

A public officer shall be personally liable in like circumstances only if he acted in bad faith.

A political subdivision failing and refusing to pay over such nonexempt wages and salaries shall be liable to an action therefor.

No judgments shall be recovered against the State as suggestee, but a judgment creditor may bring an action for declaratory judgment to establish his right to have sums due or to become due from the State or a State agency applied in satisfaction of his suggestee execution. (§ 38-5B-9).

#### *Effect of writ*

Execution becomes a lien and continuing levy upon salary and wages due or to become due to the judgment debtor within one year after issuance of the same. (§§ 38-5A-3, 38-5B-2).

Execution does not become a lien against salary or wages due or to become due from the State or a State agency within 10 days after service thereof or payable by a political subdivision within 5 days after service thereof. Wages and salaries due or to become due after such periods are subject to a lien and continuing levy. (§ 38-5B-3).

#### *Discharge of employee*

No employer may discharge an employee by reason of a garnishment to pay a judgment arising from a consumer credit transaction. (§ 46A-2-131).

### Wisconsin Statutes

#### *Exemptions*

Greater of: (a) 75 percent of disposable earnings for each full week of the pay period, or (b) an amount equal to 30 times the Federal minimum hourly wage for each full week of the pay period. In case of pay periods other than a week, the exemption shall be determined by use of a multiple of the Federal minimum hourly wage prescribed by rule of the industry, labor and human relations commission. (§ 267.18(2)(a)).

**Support orders.**—The exemptions are inapplicable to an order of any court for the support of any person.

**Consumer Act.**—Exemption is the greater of: (a) 75 percent of customer's earnings after deductions required by law to be withheld, or (b) \$15 per dependent per week, other than the customer, and as claimed by him for Federal income tax purposes, plus 40 times the Federal minimum hourly wage. (§ 425.106(a)).

**NOTE:** The above exemptions do not displace other provisions of law which afford additional or greater protection to the customer. (§ 425.106(c)(2)).

**Employee with dependents.**—A basic exemption of \$120 plus an additional \$20 for each dependent for each 30 day period prior to service of process to collect a debt. The maximum exemption is 75 percent of income. The one claiming the exemption may elect to have the exemption computed on a 90 day basis. (§ 272.18(15)(c)).

**Employee without dependents.**—A basic exemption of 60 percent of income for each 30 day period prior to service of process to collect a debt. The minimum exemption is \$75, the maximum is \$100. (§ 272.18(15)(b)). The 90 day election also applies.

**NOTE:** "Income," for purposes of the above, is defined as gross receipts less Federal, State and social security tax withholdings. (§ 272.18(15)(a)).

#### *Before judgment*

Garnishment actions affecting the earnings of the principal defendant may not be commenced before judgment in the principal action. (§ 267.02(2)(a)).

#### *Public officers and employees*

Only a judgment creditor may maintain garnishment actions to reach the disposable earnings of officers and employees of the State or any political subdivision thereof. (§ 267.23(1)(a)).

#### *Service of process*

On the department of administration, if the State is the garnishee; otherwise to its secretary or clerk. (§ 267.23(2)(a)).

#### *Time to answer*

Within 20 days of service of process. (§§ 267.11.23(b)(4)).

#### *Examination of garnishee*

Interrogatories incorporated on summons. (§ 267.11). Plaintiff may reply to a garnishee's answer and the issues thereby raised and joined shall be tried by the court. (§ 267.14). The answer of the State is conclusive in the garnishment action. (§ 267.23(4)).

#### *Penalty on failure to answer*

Judgment may be entered to the amount of the plaintiff's judgment and costs. (§ 267.04(2)).

#### *Effect of writ*

When earnings are the subject of the garnishment action, the amount owed the principal defendant on the payday for the pay period in which the garnishment summons was served on the garnishee is subject to garnishment. (§ 267.18(1)(b)).

***Discharge of employees***

Discharge for garnishment for any one indebtedness is prohibited. (§ 267.235). Employer prohibited from discharging an employee because his earnings have been subjected to garnishment for the purpose of paying a judgment arising from a consumer credit transaction. (§ 425.110).

**Wyoming Statutes*****Exemptions***

Fifty percent of a judgment debtor's earnings for personal services rendered at any time within 60 days next preceding the levy of execution or attachment if it appears such earnings are necessary for the use of his resident family supported wholly or in part by him. (§ 1-422).

***Uniform Consumer Credit Code.***—The greater of: (a) 75 percent of disposable earnings for that week, or (b) the amount by which disposable earnings for that workweek exceed 30 times the Federal minimum hourly wage. For pay periods other than a week, the exemption is determined by application of a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in (b). (§ 40-5-105).

***Before judgment***

Available in aid of attachment at or after commencement of suit. (§§ 1-226, 571). Prohibited in actions for debts arising from consumer credit sale, consumer lease or consumer loan. (§ 40-5-104).

***Public officers and employees***

Salaries and wages of State, county, county board of commissioners, municipalities, cities, towns, and employees is subject to garnishment in the same manner and for the same causes as are private individuals.

***Service of process***

Upon the chief executive officer of a department or agency of the State, a municipal or other public corporation, or to its secretary, clerk, person in charge of its principal office or place of business, or any member of its governing body. (Wyoming Rules of Civil Procedure, Rule 4).

***Time to answer***

Within 20 days of service. (§ 1-252). Within the time specified in the writ of garnishment issued by justice of the peace courts (§ 1-579).

***Examination of garnishee***

Appearance in and examination under oath in justice of the peace courts. (§ 1-579). Employers served with garnishments in aid of execution may be required to appear before the court and respond to interrogatories or be questioned respecting the debtor's property in his hands. (§§ 1-414, 430, 579) or file answers to interrogatories with the court. (§ 1-252). Answer to interrogatories may be traversed and issues raised thereby shall be tried by the court. (§ 1-252).

***Penalty on failure to answer***

Judgment may be rendered in favor of plaintiff for the amount of the property and credits of the defendant in the garnishee's possession, and for what may appear to be owing by him to the defendant. (§§ 1-256, 582).

***Effect of writ***

Binds wages earned and those wages due within the designated period. (§ 1-422).

***Discharge of employee***

No employer shall discharge an employee for the reason that a creditor has subjected the employee's wages to garnishment for the purpose of paying a judgment arising from a consumer credit sale, consumer lease, or consumer loan. (§ 40-5-106).

## **B. Statutory Remedy for Recovery of Support and Maintenance Under the Aid to Families With Dependent Children Program**

Legislatures of at least six States Florida, Georgia, Maine, Utah, Virginia, and Washington have concluded that existing common law and statutory remedies for the enforcement of support for financially dependent minor children by responsible parents have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency.

These statutory remedies generally consist of suing out writs of attachment or garnishment to subject a delinquent parent's property and earnings to the satisfaction of a support obligation due and owing; the imposition of a statutory lien on a responsible parent's real and personal property for nonpayment of support, and its subsequent enforcement by distraint, seizure and sale; the initiation of judicial proceedings to adjudge a delinquent parent in contempt for failure to comply with a court order of support; and the definition and delineation of nonsupport as a crime subjecting a delinquent parent to arrest and imprisonment upon conviction of the crime.

Despite the enactment of Public Law 93-647, impediments on the Federal level to the effective and efficient enforcement of State child support statutes might still be found in the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 App. U.S.C. §§ 501-585. Under this Act, nothing prejudicial to the civil rights of persons in the armed forces can be enforced by legal proceedings; thus, at any stage of any proceeding in any court, a person in the military service can petition the court to stay the proceedings and the court is bound to do so if, in its opinion, the petitioner's conduct of his defense would be materially affected by reason of his military service. (50 App. U.S.C. § 521).

Under the doctrine of sovereign immunity, the Federal Government cannot be subjected to legal process or action without its consent. Prior to the enactment of Public Law 93-647, 88 Stat. 2337, the Federal Government could not be subjected to garnishment and similar proceedings for enforcement of child support and alimony obligations of its civilian employees and members of its armed services. Section 459 of Public Law 93-647 waives the government's immunity in this area; and from and after its January 1, 1975 effective date, the United States is subject, in like manner and to the same extent as if it were a private person, to legal process brought for the enforcement of the support and alimony obligations of its employees and members of its armed forces.

In light of the foregoing, the aforementioned States in the exercise of their police and sovereign powers have augmented their existing common law and statutory remedies through enactment of additional remedies directed to the real and personal property resources of the responsible parent of financially dependent children. The statutes

that are hereinafter summarized provide an alternative support method whose purpose is, in part, to reduce the burden presently borne by the general public through welfare payments to dependent children of a financially responsible parent or parents. A summary of these statutes follows.

### Washington<sup>1</sup>

#### *General background*

The payment of public assistance money for the benefit of any dependent child creates a debt due and owing to the State department of social and health services. By accepting public assistance for or on behalf of a child or children, the recipient is deemed to have made an assignment to the department of any and all right, title, and interest in any support obligation up to the amount of the public assistance money paid for or on behalf of such child or children. The amount of the debt may also be limited to the amount specified in any support agreement respecting the foster care of such child or children, or by the amount specified in a court order for support.

A court order for support prevails over any support agreement and the department is empowered to petition the courts for modification of a court order on the same grounds as a party to said cause. The department is also empowered to conduct hearings and enter findings, subject to judicial review, respecting a debtor's disclaimer of liability, or the financial responsibility of the responsible parent or parents.

Additionally, the department is subrogated to the rights of said child, children, or the person having the care, custody and control of them, to prosecute or maintain any support action or execute any administrative remedy to obtain reimbursement of moneys expended; and, when a money judgment for support is entered by a court, the department is subrogated to the debt created by the order and said money judgment is deemed to be in favor of the department.

#### *Initiation of proceedings*

Proceedings are initiated by issuance of a notice of a support debt accrued and/or accruing based either upon subrogation or assignment of the judgment created by a court order, or based upon the payment of public assistance to or for the benefit of any dependent child or children.

#### *Service of notices*

Notices relating to findings of financial responsibility of a responsible parent may be served in the same manner prescribed for service of a summons in a civil action. Notices of liens, withholding orders and debts accrued and/or accruing based upon subrogation or assignment of a support order may be served in the same manner prescribed for service of a summons in a civil action or by certified mail, return receipt requested. Notice of debts accrued and/or accruing based upon payment of public assistance may be served on the debtor in the manner prescribed for the service of a summons in a civil action, including summons by publication where appropriate and necessary.

<sup>1</sup> RCW, §§ 74.20A.010 to 74.20A.900 (approved and effective 5/20/71). See Appendix A for the Washington Revised Code.

***Time to answer notices***

Within 20 days of the date of service of the notice.

***Penalty on failure to answer***

(a) Collection actions may be undertaken against a delinquent debtor, and (b) persons, firms, corporations, political subdivisions or departments of the State failing to answer lien or withholding order notice shall be liable in an amount equal to 100% of the value of the debt which is the basis of the lien or withholding order.

(NOTE: The same penalty is assessed for a failure or refusal to comply with a lien or withholding order, or failure to honor a wage assignment.)

***Type of collection actions***

(a) *Lien*—a lien against all property of debtor, with the priority of a secured creditor, may be asserted on claims for support debts not paid when due. (b) *Order to withhold and deliver*—the secretary may issue such orders to bind a debtor's property of any kind, including earnings, due, owing or belonging to the debtor. (c) *Wage assignments*—a debtor may execute a wage assignment as part of an approved plan with the secretary to satisfy or retire a support debt or obligation.

***Effect of withholding orders and wage assignments***

Binds nonexempt earnings on a continuing basis until the entire amount of the support debt has been withheld.

***Exemptions***

50% of earnings (defined as including wages, salary, commissions, bonuses, periodic payments pursuant to pension or retirement plans or insurance policies of any type but does not include payments based on inability to work or obtain employment, or payment of money to a head of a family when the same is due for the personal labor or services of such person. Excluded from the definition, but subject to the collection actions, are: 100% of temporary and permanent total disability compensation to a workman allocated respectively by the State industrial insurance statutes, to the spouse and children of a workman, and 40% of the net proceeds of payments to a workman for permanent partial disability).

***Enforcement of liens***

By distraint, seizure and sale of property subject to the lien, or through the courts by foreclosure actions and sale, after the required public notice of sale.

***Right of redemption***

For a period of up to 240 days after a foreclosure sale, a person owning or having an interest in real or personal property sold in satisfaction of a child support debt may redeem it by paying the purchaser, at foreclosure, the purchase price plus interest at the rate of 6% per annum.

*Discharge of employe*—prohibited.

## Florida<sup>1</sup>

### *General background*

In all cases where regular child support payments are not being made, the department of health and rehabilitative services shall institute a civil action for support from the persons liable for the support of the dependent child or children. The action may be instituted within 30 days of the date an applicant is approved for public assistance on behalf of such child or children. The department may also petition the appropriate court for modification of a court order on the same grounds as either party to the cause.

The payment of public assistance money to or for the benefit of any dependent child or children creates a debt due and owing to the department by the natural or adoptive parent or parents responsible for the support of such children. The amount of that debt is limited to the amount of the public assistance payment or the amount of support specified in a court order or decree. To obtain reimbursement of money thus expended, the department is subrogated to the right of the child or children or person having the care, custody and control of the child or children to maintain any support action, to determine paternity, or execute any appropriate administrative remedy. Additionally, the department is empowered to conduct hearings respecting a debtor's disclaimer of liability, and its decision in the hearing shall establish the liability of the debtor, if any, for repayment of public assistance moneys expended to date as an assessed and determined child support debt. The findings are subject to judicial review.

### *Initiation of proceedings*

Proceedings are initiated by issuance of a notice of a support debt accrued and/or accruing based either on subrogation to or an assignment of the judgment created by a court order or final judgment of dissolution of marriage, or based upon the payment of public assistance to or for the benefit of any dependent child or children.

### *Service of notices*

Notices of a support debt or lien based on subrogation, assignment or payment of public assistance shall be served in the manner prescribed for service of summons in a civil action. Notices of distraint, seizure and sale of property subject to a lien shall be served by certified mail, return receipt requested. A withholding order shall be served in the manner prescribed for service of a summons in a civil action or by certified mail, return receipt requested.

### *Time to answer notices*

Within 20 days of service of the notice.

### *Penalty on failure to answer*

(a) Collection actions may be instituted against the delinquent debtor: (b) any person, firm, corporation, association, political subdivision or department of the State who fails to answer an order to withhold and deliver, or comply with a lien, honor a wage assignment or distraint, shall be liable to the department in an amount equal to 100% of the value of the debt which is the basis of the lien, order to withhold and deliver, distraint, or assignment of wages, together with costs, interest, and attorney fees.

<sup>1</sup> Statutes §§ 409.2452-409.2509 (approved 7/3/74, effective 10/1/75).

### *Types of collection actions*

(a) *Lien*—may be asserted against the debtor's property, earnings or bank deposits and balances. (b) *Order to withhold and deliver*—upon proper notice and hearing, a court may issue a withholding order binding property, including earnings, due, owing or belonging to the debtor and in the possession of any person, firm, corporation, association, political subdivision or department of the State. (c) *Wage assignment*—a debtor may execute a wage assignment as part of an approved plan with the department to satisfy or retire a child support debt or obligation.

### *Effect of withholding orders and wage assignments*

Bind nonexempt earnings on a continuing basis until the entire amount of the support debt has been withheld or the assignment is released in writing, by the department.

### *Exemptions*

50% of disposable earnings. (Disposable earnings means that part of an individual's earnings remaining after deductions required by law to be withheld.) Earnings include: wages, salary, commission, bonus, periodic payments pursuant to pension or retirement programs or insurance policies, that part of temporary and total disability payments and compensation as provided under the workmen's compensation statutes to the spouse and children of a workman, and not more than 40% of net proceeds of payments to a workman for permanent partial disability. It does not include State payments based upon inability to work or obtain employment, or the payment of any money or thing due to a resident head of a family for the personal services or labor of such person.

### *Enforcement of liens*

By distraint, seizure and sale of property subject to the lien, or through the courts by foreclosure actions and sale, after the required public notice of sale.

### *Right of redemption*

For a period of up to 240 days after a foreclosure, a person owing or having an interest in the real or personal property sold in satisfaction of a support debt may redeem it by paying the purchaser, at foreclosure, the purchase price plus interest at the rate of 6% per annum.

### *Discharge of employees*

Prohibited.

## Georgia<sup>1</sup>

### *Summary*

Under the child support recovery act; the payment of public assistance to or on behalf of a dependent child or children creates a debt due and owing to the State by the responsible parent or parents of the child. Such payment also operates as an assignment to the State of the right to any child support owed for the child or children up to the amount of public assistance paid, and the State is subrogated to the right of the child or children or person having their custody, to initiate

<sup>1</sup> Code, §§ 90-901b to 90-919b (approved and effective on 3/28/73).

any action for their support and to recover any payments ordered by the State courts or courts of any other State.

The department of human resources is charged with the responsibility of administering the Act. In this respect, it is empowered to conduct investigations to determine whether a responsible person is able to support the dependent child receiving public assistance. In the conduct of its investigations, the department may examine any books, papers or memoranda bearing on the determination of the ability to support and may compel the attendance of witnesses and the production of relevant documents. The department is also required to develop standards for measuring the ability of a responsible parent or parents to support his child or children.

Upon fifteen (15) days notice to a parent after the department's investigation and application of its support standard leads it to believe a parent is able to provide support, the department, or its designated hearing officer shall conduct an administrative hearing to finally determine such ability and the amount of support. The department's final affirmative order, in this respect, shall inform the parent that any failure to pay support may result in foreclosure of liens on his real or personal property or in other collection actions. The finding is subject to judicial review.

The child support lien in favor of the department attaches to all personal and real property of the responsible parent if he fails to make any support payment within 30 days after it is due, and the department is required to file its lien within three (3) months from the time it attaches.

### Maine<sup>2</sup>

*General background.*—A public assistance payment for the benefit of a dependent child creates a debt due to the Department of Health and Welfare. The amount of the debt is limited to: (a) the amount of public assistance paid; (2) the amount decreed by a court order of support; or (3) in the absence of a court order and after a hearing, the periodic support payment established by the department.

The department is required to create a scale of suggested support payments to assist courts and others in determining the amount a parent should contribute to the support of a child. Also, for a fee, and upon application, the department may locate absent parents, enforce support obligations, and determine paternity on behalf of persons who are not recipients of public assistance, by actions under any appropriate statute. However, no support obligations or debts incurred before *October 1, 1975* shall be enforced by the methods prescribed by this law.

In the absence of a court order for support, the department may, upon a hearing, establish a periodic payment to satisfy the responsible parent's support obligation. The statute prescribes the criteria to be applied in deciding on the amount of the periodic payment.

The department is subrogated to the rights of any dependent child, children, or person having their custody, to pursue any court action or administrative remedy to secure payment of the accrued or accruing debt and to enforce the court order. Further, the receipt of public assistance constitutes an assignment by the recipient to the department

<sup>2</sup> Revised Statutes, §§ 19-491 to 19-515 (approved 6/20/75, effective 10/1/75).

of all rights to support for the child, including any support unpaid at the time of assignment as long as public assistance is paid. The recipient is also deemed to have appointed the commissioner of the department as his or her attorney in fact to perform the specific act of endorsing over to the department any and all drafts, checks, money orders, or other negotiable instruments for the support of the child.

The responsible parent or the department may move for an administrative review of any action taken under this act; and, excepting its decision respecting the periodic support payment, the department may review any action taken under this act. Finally, upon exhaustion of their administrative remedies, any party aggrieved by any final action of the commissioner may seek judicial review of that action.

*Initiation of proceedings.*—Administrative proceedings are initiated by issuance of notice of a hearing. Such notice shall contain a statement of the debt accrued or accruing; the time and place of the hearing; a statement of the periodic public assistance and the name of the public assistance recipient and the dependent children; a statement that upon failure to appear, the accrued debt and future periodic support payments shall be assessed against the responsible parent and enforced by collection actions.

*Service of notice.*—Service of any notice or lien may be by certified mail, return receipt requested; by publication, or by service in hand, as specified in civil actions.

*Time to answer notices.*—Within 20 days of service.

*“Penalty” on failure to answer.*—Collection actions may be undertaken and failure to comply therewith may result in liability for the entire debt plus costs, reasonable attorney fees, and interest at the rate of 6% per annum.

*Type of collection actions.*—(a) *Lien.*—21 days after service of notice of debt or the decision establishing the periodic support payment of the responsible parent, a lien in favor of the department may be asserted against all the property of the responsible parent. (b).

*Order to withhold and deliver.*—21 days after service of notice of debt, and the filing of a lien, the commissioner may serve on any person, and the responsible parent, an order to withhold and deliver any property, including wages, to the commissioner. Such order must be answered within 20 days of its service. (c) *Wage assignment.*—A debtor may execute a wage assignment to the commissioner. (d) *Administrative seizure and disposition of property.*—If it can be done without a breach of the peace, the commissioner may seize or demand surrender of any property subject to a lien.

*Effect of withholding order and wage assignment.*—Bind earnings on a continuing basis until the entire amount of the debt has been withheld or the assignment is released in writing by the commissioner.

*Exemptions.*—(a) all property otherwise exempt from trustee process, attachment and execution is exempt from an order to withhold and deliver, administrative seizure and disposition, and lien and foreclosure.

(b) Weekly earnings up to 30 times the State minimum hourly wage are exempt. Also, a minimum amount for each dependent natural or adopted child is also exempt. Such amount is to be determined by the commissioner.

**Enforcement of Liens.**—By foreclosure actions in the county where the lien is filed and in accordance with the statutory procedures applicable to foreclosure real and personal property liens. Upon administrative seizure of property subject to a lien, the commissioner may dispose of it in any commercially reasonable manner or turn it over to the recipient of assistance for the express benefit of the dependent child involved.

**Discharge of employees.**—Prohibited.

## Utah<sup>1</sup>

**General background.**—The receipt of assistance furnished by the department of social services constitutes the department as trustee of any cause of action of the obligee or any minor child in that obligee's custody, to recover support due the obligee from any person and may bring and maintain the action either in its own name or in the name of the obligee.

The department is invested with power of attorney to act in the name of any recipient in endorsing and cashing any and all drafts, checks, money orders or other negotiable instruments received by the department and representing support payments.

Court orders embodying money judgments for support shall be deemed in favor of the department to the extent of the department's subrogation rights; and the department has the right to petition the court for modification of any court order on the same basis as a party to that action would have been able to do so. Additionally, to the extent of any conflict between them, a court order takes precedence over any order of the department.

The level of support payments established by the department may be reset at any time and may be cancelled and payment in full demanded when the department is justly apprehensive of losing property which could become subject to a collection action to satisfy the support debt.

Support liens, wage assignments or garnishments shall not be invalidated by reason of the operation of any statute of limitations; however, an 8 year period of limitations applies to actions to enforce liabilities due or to become due by reason of the failure to provide support or maintenance for dependent children.

No injunction shall issue suspending or restraining any order or award adopted by the department or any action required to be taken under this act by the county-attorney or attorney-general; and no action, proceeding or suit to set aside or vacate or amend any order issued pursuant to this act, or to enjoin the enforcement thereof shall be brought unless the plaintiff shall have so applied to the department for a hearing thereon and shall have presented every issue presented by such action, proceeding or suit.

The department, in the absence of a court order, is empowered to conduct hearings to determine the support debt of the obligee, whether accrued, accruing, or both, and, where appropriate, the amount to be paid thereon each month. A party aggrieved by such determinations may request a hearing before appointed examiners who shall provide a full and fair hearing into the responsibility and liability of the aggrieved party. A further judicial review is available.

<sup>1</sup> Code, §§ 78-45b-1 to 78-45b-23 (approved 2/11/75, effective 5/12/75).

In all investigations and prosecutions of any action against the obligor, the attorney-general is empowered to grant criminal immunity to witnesses and parties.

*Initiation of proceedings.*—By issuance of a notice of a support debt accrued or accruing, based either upon a court order or upon the furnishing of support by the department. Proceedings may also be initiated by issuing an order to show cause, to the obligor, why a previously entered order should not be prospectively modified.

Notices shall contain:—(a) A statement of the debt accrued or accruing, (b) the name of the recipient of department assistance and the name of the minor child to whom assistance is being provided; (c) a demand for payment; and (d) the consequences of failure to comply or submit an answer setting forth any claimed defenses to liability.

*Service of notice.*—By certified mail, return receipt requested. Orders to show cause shall be served in the manner of a summons in a civil action.

*Time to answer notices.*—Within 20 days of service.

*Penalty on failure to answer.*—Collection actions may be initiated.

*Type of collection actions.*—(a) *Lien.*—A lien against the real and personal property of the obligor arises at the time of the filing of the abstract of the final order of the department and continues thereafter for a period of 8 years from the date of the award. The lien has the same preference against the debtor's assets as claims for taxes have. (b) *Wage assignments.*—Upon entry of an order for support, the court, upon motion of the department, shall order any parent to assign to the county clerk or such other officer, designated by the court to receive payments, that portion of the parent's salary or wages to become due as may be sufficient to pay the court ordered support amount.

*Effect of wage assignment.*—Binds current and future wages until the entire amount of court ordered support has been satisfied, or until released in writing by the director.

*Exemptions.*—50% of disposable earnings. Exemptions from judgment lien and forced sale consist of: (a) a homestead exemption of lands, appurtenances and improvements to the sum of \$4,000 for the head of a family; (b) a further sum of \$1,500 for the spouse, and \$600 for each other member of the family; except upon the following obligations: (a) taxes accruing and levied thereon; (b) judgments obtained on debts secured by lawful mortgage on the premises and on debts created for the purchase price thereof; and (c) judgments obtained by an appropriate party on debts created by failure to provide support or maintenance for dependent children.

*Enforcement of lien.*—By execution upon and sale of the property subject to said lien.

*Right of redemption.*—Prior to sale, the property may be redeemed upon payment of the amount due, together with expenses of the proceedings and reasonable attorney fees. Within 90 days after sale, redemption may be effected upon payment of the amount paid by the purchaser plus interest thereon at the rate of 6% per annum.

*Discharge of employee.*—Prohibited. The discharge of an employee subjects the employer to liability in damages to the employer and, additionally, to the department in an amount equal to the debt, together with costs, interest and attorney fees.

Virginia<sup>1</sup>

*General background.*—The payment of public assistance to or for the benefit of any dependent child or children creates a debt due and owing to the State Department of Welfare in an amount equal to the amount of public assistance paid.

Where there is a court order or final divorce decree, the debt shall be limited to the amount specified in such order or decree. The department has the right to petition the appropriate court for modification of a court order on the same grounds as either party to such cause. Further, the department is subrogated to the right of a child or children or person having the care, custody and control of such child or children to prosecute and maintain any support action or execute any administrative remedy to obtain reimbursement of any moneys thus expended; and, the department is further subrogated to the debt for support created in any court order or final decree of divorce.

The department is obligated to undertake any action to insure that a responsible parent shall comply with the obligation to provide the support, care and maintenance of a dependent child or children in receipt of public assistance. In this respect, the department is specifically empowered to: (1) represent dependent children on whose behalf public assistance is being provided; (2) appear as a friend of the court in divorce and separate maintenance suits, or proceedings supplemental thereto; (3) upon request, assist mothers of dependent children, on whose behalf public assistance is being provided, for the purpose of securing modifications of divorce or separate maintenance decrees when it appears to the satisfaction of the court that the mother is without funds to employ private counsel; (3) initiate any civil proceeding deemed necessary to secure reimbursement from a parent or parents of all money expended by the State in providing assistance to the dependent child or children.

Upon approval of the Federal Department of Health, Education and Welfare, the State Department of Welfare may disclose and keep the Federal Internal Revenue Service advised of the names of all persons who are under a legal obligation to support any dependent child or children and who are not doing so.

All money paid as the result of any action taken under this act shall be paid to the clerk of juvenile and domestic relations district court. The clerk is required to notify and report all persons in arrears. Reports of delinquent obligors shall be made to the department's investigation and enforcement unit.

The department is required to establish a scale of suggested minimum contributions to assist localities and courts in determining the amount that a responsible person should be expected to contribute toward the support of his or her child. The department is also authorized and directed to establish a central unit to serve as a registry for the receipt of information for answering interstate inquiries concerning deserting responsible persons. The unit's primary functions are: (1) investigate individual assistance cases as to the potential for provision of support by an absent responsible person; (2) locate absent responsible persons; (3) assessment and acquisition of voluntary support, where

<sup>1</sup> Code, §§ 63.1-249 to 63.1-289.2 (approved 4/5/74, effective date, 7/11/74).

possible; (4) enforce child support through administrative action; (5) prepare cases for court action; (6) ensure a continuity of support payments; (7) investigate fraud involving public assistance applicants.

The department director is empowered, without the necessity of signing any document, to act as attorney-in-fact to endorse any and all drafts, checks, money orders or other negotiable instruments representing child support payments which are received on behalf of a dependent child or children as reimbursement for public assistance moneys previously paid to such recipient.

A debtor filing an answer to a notice of a debt under this act is entitled to an administrative hearing of his defenses, and if his property is assessed with a lien for a support debt, he may appeal de novo to the circuit court of the jurisdiction wherein the property is located on the basis that no child support debt is due and owing. It is the legislative intent in this respect that jurisdictional and constitutional issues, if any, shall be subject to review but that administrative remedies shall be exhausted prior to judicial review.

Interest at the rate of 6% per annum accrues on past due support debts, and the director is empowered to demand full payment and file and serve liens when the collection of any support debt appears to be in jeopardy.

*Initiation of proceedings.*—By issuance of a notice of a support debt accrued or accruing based upon subrogation to or assignment of the judgement created by a court order or final decree of divorce, or based upon payment of public assistance to or for the benefit of any dependent child or children. Notices shall include a statement of: (a) the amount of the debt; (b) the amount required to be paid under the court order, or the amount of public assistance previously paid and to be paid in the future; (c) a demand for payment; and (d) the actions to be taken upon a failure to comply with the notice.

*Service of notice.*—By certified mail, return receipt requested, or, by personal service by a sheriff or by delivery to any person at the obligor's residence.

*Time to answer notices.*—Within 20 days of service.

*Penalty on failure to answer.*—Collection actions may be initiated.

*Types of collection actions.*—(a) *Lien.*—May be asserted on the debtor's real and personal property, and such lien shall have the priority of a secured creditor. (b) *Order to withhold and deliver.*—After service of a notice of a debt or the filing of a lien, the director may issue a withholding order respecting the debtor's property in the possession of any person, firm, corporation, association, political subdivision or department of the state. (c) *Wage assignment.*—A debtor may execute a wage assignment as part of a plan to satisfy or retire a child support debt obligation.

*Effect of withholding orders and wage assignments.*—Bind non-exempt property and earnings on a continuing basis until the entire amount of the debt is satisfied. Noncompliance herewith may result in the employer's liability to the department in an amount equal to 100% of the value of the debt.

*Exemptions.*—50% of disposable earnings, which is defined as that part of the earnings of any individual remaining after the deduction from those earnings of any amount required by law.

***Enforcement of liens.***—By distraint, seizure and sale, after notice, of the property subject to such lien; or through the courts by foreclosure actions.

***Right of redemption.***—Upon institution of foreclosure proceedings, a debtor may redeem his property by payment of the amount due, together with the expenses of the proceedings and reasonable attorney fees. For a period of up to 240 days after the sale of the property foreclosed, the debtor may redeem his property by making payment to the purchaser in the amount paid by the purchaser plus interest thereon at the rate of 6% per annum.

***Discharge of employee.***—Permitted only if more than three child support liens are served upon the same employer and directed to the same employee within any period of 12 consecutive months.

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**II. ATTACHMENT PROVISIONS OF STATE LAWS**

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## Attachment Provisions of State Laws

### CONTENTS

	Page
Introduction .....	75
Law Digest:	
Alabama .....	77
Alaska .....	80
Arizona .....	80
Arkansas .....	85
California .....	86
Colorado .....	90
Connecticut .....	92
Delaware .....	96
District of Columbia .....	98
Florida .....	100
Georgia .....	102
Hawaii .....	104
Idaho .....	105
Illinois .....	107
Indiana .....	111
Iowa .....	113
Kansas .....	114
Kentucky .....	116
Louisiana .....	118
Maine .....	120
Maryland .....	122
Massachusetts .....	124
Michigan .....	129
Minnesota .....	132
Mississippi .....	134
Missouri .....	135
Montana .....	137
Nebraska .....	139
Nevada .....	141
New Hampshire .....	143
New Jersey .....	145
New Mexico .....	148
New York .....	150
North Carolina .....	154
North Dakota .....	156
Ohio .....	159
Oklahoma .....	161
Oregon .....	163
Pennsylvania .....	165

<b>Law Digest—Continued</b>	<b>Page</b>
Rhode Island.....	169
South Carolina.....	171
South Dakota.....	172
Tennessee.....	174
Texas.....	175
Utah.....	177
Vermont.....	179
Virginia.....	180
Washington.....	181
West Virginia.....	183
Wisconsin.....	185
Wyoming.....	187

## II. Attachment Provisions of State Laws

The general definition for attachment is:

The act or process of taking, apprehending, or seizing persons or property, by virtue of a writ, summons, or other judicial order, and bringing the same into the custody of the law; used either for the purpose of bringing a person before the court, of acquiring jurisdiction over the property seized, to compel an appearance, to furnish security for debt or costs, or to arrest a fund in the hands of a third person who may become liable to pay it over. Also the writ or other process for the accomplishment of the purposes above enumerated, this being the more common use of the word. Attachment is a remedy ancillary to an action by which plaintiff is enabled to acquire a lien upon property or effects of defendant for satisfaction of judgment which plaintiff may obtain. Though sometimes called an ancillary or auxiliary proceeding, attachment is in all essential respects, a suit. The purpose is to take defendant's property into legal custody, so that it may be applied on defendant's debt to plaintiff when established (Black's Law Dictionary, 4th Edition, 1951).

The attachment provisions set out in this part refer to the general survey of State laws.<sup>1</sup> Procedures to execute delayed listing of exempt property and other matters in text referred to under "See Topic—" can be found in Volume VI, Martindale-Hubbell Law Directory, which sets out a digest of the laws of the various States under specific topic headings.

Attachment is a procedure for collecting judgment and can be used for collecting arrearages with regard to alimony, separate maintenance and support of dependent spouse, child, or children. (For a complete and comprehensive understanding of the attachment provisions of a State law, it is necessary to examine case law and the other provisions in the law which set out additional requirements.)

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<sup>1</sup> Volume VI, Martindale-Hubbell Law Directory, 107th Annual Edition 1975, Published by Martindale-Hubbell, Inc., Summit, N.J. Reprinted with permission of the publishers. All rights reserved.



## Alabama Law Digest

### Attachment

*Actions in which allowed.*—An attachment may issue in following kinds of actions: (1) To enforce collection of a debt, whether due or not, (2) for a liquidated money demand, (3) to recover unliquidated damages for breach of contract, (4) when action sounds in damages merely. (7-845). Attachments may only issue in cases where defendant (1) resides outside State, (2) absconds, (3) secretes himself so that process cannot be served on him, (4) is about to remove from State, (5) is about to remove his property out of State, (6) is about fraudulently to dispose of his property, (7) has fraudulently disposed of his property, or (8) has money, property or effects liable to satisfaction of his debts which he fraudulently withholds. (7-846).

Similar rules prevail in respect to attachments to enforce certain specified liens (31-19, 20, 23, 29-34; 33-7, 8, 16, 18-21, 25, 26, 66-76, 81, 82) and in suits to collect municipal taxes (37-694).

In addition, an attachment may issue: In an action by State for recovery from a public officer of public money (7-76); on application of any surety in a written contract (7-310-313); on arbitration awards, whether for delivery of property or to do or omit a particular act (7-835); on a judgment in detinue for recovery of specific property (7-924-927). When summons to a defendant resident of the county is returned "Not found" plaintiff may sue out an attachment on making an affidavit that the defendant has evaded service of process. (7-880, 881).

*Time for issuance.*—Plaintiff may sue out an attachment pending suit under same conditions as in original attachment proceedings. (7-879).

*In equity.*—Writs of attachment issued in proceedings formerly cognizable in equity on legal demands operate only on effects or choses in action to which defendant is equitably entitled. (7-302). No exeat and equitable attachment may issue on equitable demands in any case in which an attachment at law may issue, except where otherwise provided. (7-301). Equitable attachment may issue before demand is reduced to judgment. (7-303).

Executor or administrator may commence a suit by attachment in representative character. (7-864). No judgment can be rendered against an executor or administrator on his answer in attachment until 6 months after the grant of letters testamentary or of administration. (7-891).

*Corporations.*—An attachment may be sued out by or against a corporation. (7-854-857, 860).

*Jurisdiction to issue.*—Attachment to enforce collection of debt or liquidated money demand may be issued by judge or clerk of circuit court, judge of probate, attachment to recover unliquidated damages for breach of contract or on claim sounding in damages merely can be issued only by judge of circuit court, or judge of probate. (7-847).

Circuit judges and registers may order equitable attachments to issue. (7-309).

*Procedure.*—Complaint must be filed in 15 days after suing out attachment if demand was then due; otherwise within 15 days after claim or demand becomes due. (7-882). A summons may issue on a complaint so filed, but has no effect on levy lien or enforcement of the attachment. (7-883). If defendant appears and pleads, the cause proceeds as in suits commenced by summons and complaint; if defendant fails to appear or to plead within time required by law, plaintiff may take judgment by default or, if necessary, may execute a writ of inquiry. (7-884; see also ARCP 55).

### *Affidavit*

In order to obtain an attachment to enforce collection of debt or liquidated money demand, plaintiff must make written oath that the debt or demand is justly due or to become due, that one of the grounds for attachment exists, and that the attachment is not sued out to harass defendant. (7-848).

*Special affidavits.*—In order to obtain attachment to recover unliquidated damages for breach of contract or to enforce a claim sounding in damages, merely, plaintiff must, in addition, make affidavit as to the special facts and circumstances. (7-850). A nonresident seeking an attachment against another nonresident, in addition to the other requirements, must make affidavit that defendant has not sufficient property within the State of his residence wherefrom to satisfy the debt. (7-851).

*Bond.*—Except where attachment is sued out on ground that defendant is nonresident or in suits brought by wife for alimony or support where husband has threatened to leave State or fraudulently dispose of assets, plaintiff must supply bond with sufficient surety. (7-301, 849).

Defendant may bring suit on attachment bond within 3 years, and he may recover vindictive damages if attachment was sued out maliciously. (7-887).

Alias writ of attachment may be issued without a renewal of the bond or affidavit required in original proceeding in cases where insufficient property has been found or, pending suit, plaintiff wishes to garnish other persons. (7-867).

Notice of the attachment must be given a nonresident defendant by publication and by mail. (7-852). Personal notice or notice left at his residence must be given a defendant who is a resident of the county; notice by posting at the courthouse door and by mail must be given a defendant who is a resident of some other county. (7-853; see also ARCP 4[c]). Similar rules obtain in all other cases, whether or not specifically provided. (31-21; 33-5).

Notice is necessary for attachment for enforcement of arbitration award (7-835) and where hereinabove expressly stated; see also ARCP 70.

### *Levy*

Attachments may be levied on real estate, personalty (whether or not in possession of defendant) or choses in action (7-861), and also on the joint and separate estate of joint obligors, promisors or partners, whether resident or nonresident (7-863). An attachment issued in equitable proceedings, whether on equitable or legal demands, operates

only on effects or choses to which the defendant is equitably entitled. (7-301-303).

*Levy on Investment Securities.*—No attachment or levy upon a security is valid until security is actually seized by officer making levy, but security which has been surrendered to issuer may be levied on at source. Creditor whose debtor owns a security is entitled to injunctive relief in reaching security. (1965-549, § 8-317).

*Levy on Goods Covered by Negotiable Document.*—Except where document was issued upon an unauthorized bailment, there can be no valid attachment of goods in possession of bailee for which negotiable document is outstanding unless document be surrendered to bailee or its negotiation enjoined. (1965-549, § 7-602).

*Where Levy Made.*—An attachment may be executed by the sheriff of the county in which the property is located. (7-865, 866).

*Indemnity to Officer.*—A sheriff may demand indemnity when doubt exists as to defendant's title to personal property on which he is required to levy. (7-875). Such demand may be made either before or after levy. (99 Ala. 292, 13 So. 305).

*Lien.*—Levy creates a lien in favor of plaintiff. (7-869). Equitable attachment creates a lien from service of attachment. (7-307). Liens of attaching creditors are given priority according to dates of levies. (99 Ala. 292, 13 So. 305).

*Repossession.*—A defendant, or, in his absence, a stranger, may on execution of an approved bond, replevy the attached goods. (7-876-878). Defendant may also replevy goods seized under equitable attachment. (7-305, 306).

*Vacation.*—Attachment issued without the required affidavit and bond may be abated on plea of defendant filed within 30 days after service of summons and complaint (7-885), but plaintiff is allowed a liberal right to cure defects in his affidavit or bond and to supply a bond after such plea is made. (7-886).

*Sale.*—Plaintiff, after judgment, may obtain a sale of property levied on. Court, on motion of either party, must before judgment order sale of perishable property levied on; sheriff retains proceeds to await final disposition of cause. (7-870). Sheriff must sell at public auction goods so perishable that they will deteriorate greatly in value before meeting of court, and goods the charge of keeping which is very great; proceeds of such sales must be paid into court. (7-871). A circuit judge or register of court in which complaint is filed may order a sale of personal property levied on under an equitable attachment, and proceeds must be paid to register. (7-309).

*Proceeds of Sale.*—Plaintiff, on notice to defendant and execution of a proper bond, in the absence of an adverse third person's claim and of a sworn denial by the defendant of plaintiff's claim, may before judgment obtain proceeds of sale. (7-5, 872, 873).

*Judgment.*—Where contest arises concerning title to or right in attached property, no judgment can be rendered against defendant in attachment until trial of such collateral issues. (7-889). When plaintiff fails to obtain judgment against defendant in attachment because claim for trial of right to property has been interposed, attached property must be restored to claimant at cost of plaintiff. (7-890). If judgment

for plaintiff is not satisfied by property attached, execution may issue thereon against any property of defendant (7-892), but this does not apply to a nonresident who fails to appear. (109 Ala. 270, 19 So. 814).

Forms of attachment and other proceedings are set out in the Code. (7-857; 13-432).

## Alaska Law Digest

### Attachment

*Actions in Which Allowed—Grounds.*—At any time after complaint is filed, writ of attachment may be secured by plaintiff: (1) In any action on contract, for payment of money which is not secured by a lien on property, or if so secured, when security is insufficient to satisfy a judgment for amount justly due plaintiff; (2) in any action on contract against a defendant not residing in State; (3) in any action for collection of any State tax or license fee. (09.40.010).

*Courts Which May Issue Writ.*—Superior, district and magistrate courts.

*For Whose Favor Writ May Issue.*—No distinctions made between residents and nonresidents as to right to secure attachment.

*Property Subject.*—All property not exempt from execution is liable to attachment. (09.40.010).

### Affidavit

To secure the writ, an affidavit must be filed showing the amount of the debt, with all proper allowances for setoff and counterclaims; and ground for attachment.

*Undertaking.*—Before the writ issues, an undertaking with one or more sureties, for not less than \$100, and at least equal to the amount for which judgment is claimed, must be filed by the plaintiff. With the undertaking must also be filed affidavits showing that the sureties are qualified and that, taken together, they are worth twice the penalty of the undertaking, above their liabilities, excluding exempt property. (09.40.020).

*Provisional Levy.*—Property may be attached and held during pendency of motion for issuance of execution reviving judgment and until final ruling.

*Release of Property.*—Upon giving redelivery bond. (09.40.110).

It is a good defense to an action on a redelivery bond that the property did not, at the time of the execution of the writ of attachment, belong to the defendant against whom it was issued.

*Discharge of Attachment.*—Provided where perishable goods have been sold. (Rule 89, Civ. R.P.).

*Levy on Mortgaged Personalty.*—See Chattel Mortgages.

*Third Party Claims.*—See Executions.

## Arizona Law Digest

*Proceedings.*—Plaintiff seeking an attachment must file an affidavit showing:

That defendant is indebted to plaintiff on a contract, express or implied, for direct payment of money, that such contract was made or is payable in this State, and that payment has not been fully secured by mortgage, lien or pledge, or, if originally so secured, that such security

has, without any act of plaintiff or person to whom security was given, become valueless, character of indebtedness, that same is due to plaintiff over and above all legal setoffs or counterclaims, and that demand has been made for payment of amount due; or

That defendant is indebted to plaintiff, stating amount and character of debt; that same is due and payable over and above all legal setoffs and counterclaims, and that defendant is a nonresident of this State or is a foreign corporation doing business in this State; or

That the action is brought on a judgment of another State or territory of United States, or of the District of Columbia; or

That action is pending between parties and that defendant is about to remove his property beyond jurisdiction of court to avoid payment of judgment; and

That attachment is not sought for wrongful or malicious purpose, and action is not prosecuted to hinder or delay any creditor. (12-1522).

*Debt Not Due.*—Attachment may issue upon a debt not yet due in the following cases, on affidavit showing:

That defendant is indebted to plaintiff on a contract, express or implied, for direct payment of money, stating amount and that debt is not due; that such contract was made or is payable in this State, and that payment has not been secured by mortgage, pledge or lien, and stating the character of the debt sued for and that there are no legal setoffs or counterclaims against the same; and

That defendant is about to remove permanently out of the State and has refused to secure the debt; or

That he has secreted his property for the purpose of defrauding his creditors; or

That he is about to remove his property out of the State without leaving sufficient remaining for the payment of his debts; or

That he has disposed of his property, in whole or in part, with intent to defraud his creditors or that he is about to do so; and

That the attachment is not sued for the purpose of injuring or harassing the defendant; and

That the plaintiff will probably lose such debt unless such attachment is issued. (12-1523).

Bond must be given in not less than the amount of the debt sued for conditioned that plaintiff will prosecute his writ to effect and will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment. (12-1524).

*Issuance of Writ.*—One or more writs may issue at the same time and to different counties. (12-1528).

Levy on personal property is made by seizure and on real property by filing a copy of the writ with description of the property with the county recorder where real property is situate.

*Return.*—Writs are returnable at any time within 30 days after levy. (12-1531).

*Indemnity.*—Officer levies at own risk but may require indemnity bond. (12-1529).

*Release of Property.*—At any time before judgment the defendant may replevy the attached property by giving bond in double the amount of plaintiff's debt or at defendant's option, for the value of the property, conditioned that the defendant will satisfy the judgment

which may be rendered in the action, or will pay the value of the property. (12-1536).

*Sale.*—Perishable personal property may be sold prior to final judgment upon order of the court issuing the writ. (12-1538).

*Third Party Claims.*—Third party claim to personal property is made by presenting written property beyond jurisdiction of court in which action is pending for purpose of defeating collection of judgment; or

In an action on contract, express or implied, against a defendant not residing in this State or a foreign corporation doing business in this State; or when executor or administrator has failed to file required verified account (14-622); or in an action upon a judgment of any State or territory in United States, or of District of Columbia (12-1521).

See also *infra*, subhead Debt Not Due:

### Attachment

*Courts Which May Issue Writ.*—Superior courts, justice courts.

*Lien.*—No statutory provision.

*In Whose Favor Writ May Issue.*—There is no restriction on right of nonresident individual or foreign corporation to obtain attachment.

*Actions in Which May Issue; Grounds.*—Attachments may issue in the following cases:

In an action on contract, express or implied, for direct payment of money, where contract is made or is payable in this State, and is not fully secured by any mortgage or lien on real or personal property, or any pledge of personal property; or, if originally so secured, such security has without any act of plaintiff, or person to whom the security was given, become valueless; or

When any suit is pending for damages, and defendant is about to dispose of or remove his claim under oath to levying officer and posting bond equal to double the value of the property (12-1331), the bond to be conditioned on claimant's return of the property in good condition or its value plus damages and costs if he fails to establish his claim (12-1332). The property must then be returned to the claimant (12-1333) and the claim and bond returned to the proper court and there docketed for hearing of the question of ownership (12-1335-41).

### Attorneys and Counselors

There is a public corporation called "The State Bar of Arizona" to which all lawyers must belong.

*Jurisdiction Over Admission.*—Board of Governors of State bar, with approval of supreme court, has power to fix and determine qualifications for admission. (32-237).

*Eligibility.*—Applicant must be 21 years of age or over, a citizen of the United States, of good moral character, mentally and physically able to practice law, and in good standing in any other State in which he may have been admitted to practice.

*Residence Requirements.*—Applicant must have resided in Arizona for 3 months immediately prior to first day of month of examination applied for and must have been physically present within State of Arizona for at least 75% of said period; or applicant must have been

a resident of Arizona for more than 1 year immediately prior to first day of month of examination applied for and have been physically absent from the State for more than 25% of the last 6 months because of some reason deemed substantial by the committee; or must have resided at the College of Law, University of Arizona, for 2 semesters immediately preceding examination.

*Educational Requirements.*—Applicant for admission on examination must be a graduate of a law school fully approved by the council of education of the American Bar Association at the time of graduation.

Registration as a law student is not required.

*Application for admission* and all documents required to be filed plus an examination fee of \$75, must be filed not later than first day of October if application is for the following February examination and not later than first day of March, if application is for the following July examination. Any applicant who has previously been admitted to practice or who has not been a resident of Arizona for 5 years, with the exception of certain students, must pay an additional registration fee of \$100.

Requests for information should be addressed to State Bar of Arizona, 910 Union Title Building, Phoenix, Ariz. 85026.

*Investigations.*—Applicant may be required to appear for personal interview.

Written examination held in February and July.

Admission without examination is no longer permitted. All applicants for admission to the bar must comply with examination requirements.

*Admission Pro Hac Vice.*—Attorney practicing in another State may be permitted on motion, to be associated with local counsel in trial of any particular action.

*Fees.*—Active member of bar must pay annual fee fixed by the board of governors with the consent of the supreme court not exceeding \$40 per year; fee for retired member fixed by board of governors with consent of supreme court (32-217). Member failing to pay fee after 2 months notice of delinquency will be suspended from practice, but may be reinstated. (32-219).

Readmission fee after disbarment or suspension for cause other than nonpayment of dues is \$50.

*Disabilities.*—No attorney of record of either party to an action or proceeding may be a surety. (7-109).

*Complaints.*—Board of governors has jurisdiction of complaints, may take evidence and dismiss complaint or certify evidence, with or without recommendation to the supreme court, which may then act.

*Disbarment or Suspension.*—Proceeding by local administrative committee pursuant to supreme court rules 30 to 44.

*Professional Corporations.*—See topic Corporations.

*Unlawful Practice.*—Only active members of the State bar in good standing may practice law. It is a misdemeanor to practice law unless an active member in good standing. (32-261).

*Real Estate Transactions.*—See topic Brokers.

*Automobiles.*—See Motor Vehicles.

*Bail.*—See Criminal Law.

## **Banks and Banking**

Uniform commercial code adopted. See topic Commercial Code.

*Regulated by.*—State banking department, under management of superintendent of banks, has charge of execution of laws in relation to banks and banking.

*Deposits.*—Bank deposits may be made in the name of two or more persons including minors payable to either or any of them or to any or the sole survivor. (6-267).

*In Trust.*—When deposit made in trust without further indication of existence of a legal trust, on death of trustee deposit may be paid to person for whom deposit was made. (6-268).

*Unclaimed Deposits.*—See Absentees, subhead Escheat.

Stock assessment may be imposed to extent of par value of stock held in addition to amount invested.

*Limitation of Loans.*—Unsecured loans over \$1,000 must be accompanied by financial statement every 6 months. Continuing loan must be accompanied by yearly statement. Real property outside of United States may not be used as security for loans. (6-251).

Savings banks may invest in first mortgages on real estate, subject to restrictions as to amount of loans and location of property (6-322) and securities of State and United States, but may not invest or loan on mining or oil stock.

*Trust Companies.*—Persons engaged in trust business certified and regulated by state superintendent of banks. Banks exempted from certification and other trust company requirements (except trust account administration requirements) if member of F.D.I.C. and otherwise authorized to engage in trust business under Federal or State laws. Trust companies subject to recordkeeping, examination, investigation, reporting and administration of accounts requirements (6-851 et seq.). Bank or trust company receiving trust funds must pledge its assets to extent necessary to comply with Federal Reserve requirements, or if not a member bank, with rules of superintendent. (6-225).

Uniform Common Trust Fund Act adopted. (6-871 et seq.).

Uniform Fiduciaries Act has been adopted, except that words "actual knowledge" are changed to "actual constructive knowledge" throughout Arizona act. (14-1101 et seq.).

*Foreign Banks.*—See topic Executors and Administrators.

*Building and Loan Association.*—Funds may be invested in improved and certain unimproved real estate, shares of association, bonds of United States, warrants of State and subdivisions, or debentures, notes or membership in Federal Home Loan Bank. Foreign association is prohibited from doing business within State. Superintendent of banks has supervisory control and can bring action and be appointed receiver to liquidate. (6-401 et seq.).

Uniform Disposition of Unclaimed Property Act in effect. (44-351 et seq.).

## **Bills and Notes**

Uniform Commercial Code in effect. (44-2501 et seq.). See topic Commercial Code.

*Attorney's Fees.*—Clause for collection is valid. (77 Ariz. 107; 267 P.2d 740).

**Judgment Notes.**—See Judgments, subhead Judgment by Confession.

**Bills of Lading.**—See topic Commercial Code.

**Bills of Sale.**—See Sales.

**Blue Sky Law.**—See Securities.

## Arkansas Law Digest

### Attachment

**Actions in Which Allowed.**—Any civil action for the recovery of money (31.101).

Attachment lies in equity as well as at law (38 Ark. 397).

**In Whose Favor Writ May Issue.**—Any plaintiff, even though a nonresident or a foreign corporation, may secure an attachment. (31.101).

**Claims on Which Writ May Issue.**—On unliquidated or unmatured claims in actions on contract (31.201; 62 Ark. 326, 35 S.W. 485) and on contingent claims in tort actions (31.103). It is not necessary that the claim sued on be payable in the State.

**Time for Issuance.**—Writ may be issued at or after commencement of an action. (31.101).

**County to Which Issued.**—A writ of attachment (31.101) or garnishment (31.142) may be directed to any county (31.110) in which property may be attached or a garnishee who is indebted to or has property belonging to defendant may be served with process (31.104).

Grounds for attachment in action on contract are that a defendant: (1) Is a foreign corporation or nonresident; (2) has been absent from the State 4 months; (3) has departed from the State with intent to defraud his creditors; (4) has left the county of his residence to avoid the service of summons; (5) conceals himself so that a summons cannot be served upon him; (6) is about to remove or has removed his property or a material part thereof out of this State, not leaving enough therein to satisfy the plaintiff's claim or the claims of said defendant's creditors; (7) has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold with fraudulent intent to cheat, hinder or delay his creditors; or (8) is about to sell, convey or otherwise dispose of his property with such intent. (31.101). An attachment on the sixth, seventh, or eighth ground may be sued out before maturity of the debt. (31.201).

In action in tort or to recover a statutory penalty, ground for attachment is that defendant is a nonresident of the State and cannot be personally served with process within the State. (31.103).

Specific attachment may be had in actions to enforce a lien upon or for the recovery, partition or sale of personal property if it appears by affidavit or other proof that the property is about to be sold, concealed or removed from the State, or that there is reasonable cause so to believe. This remedy is also available for a plaintiff who has a future estate or interest (31.301), for a vendor of property fraudulently purchased (31.302), for purchase money when property is in vendee's possession (31.2302).

**Pleadings.**—An order of attachment may be made by the clerk of court in which the action is brought where there is filed in his office a complaint, duly sworn to, showing the nature, amount and justness of

the claim and any one of the grounds of attachment above enumerated. (31.105). Amendments may be permitted so as to embrace any grounds of attachment which may exist up to final judgment. (31.107).

*Attachment Bond.*—An order of attachment may not be issued by the clerk until there has been executed, by one or more sufficient sureties of plaintiff, a bond that plaintiff shall pay defendant all damages sustained by reason of the attachment (31.108).

Sureties on an attachment bond are liable for actual damages. (31.152).

*Issuance of Writ.*—Writs are issued by the clerk or justice returnable to the court having jurisdiction. Orders of attachment may be issued to sheriffs of other counties, and several writs may, at the option of the plaintiff, be issued at the same time or in succession. (31.113).

*Execution of W. it.*—A levy on real estate is made by the officer leaving with the occupant, or if there is no occupant, in a conspicuous place, a copy of the order. (31.114). On personal property capable of manual delivery it is made by taking the same into his custody. (31.114). Plaintiff has a lien from the time of delivery of the order to the officer. (31.122). The court may make proper orders for the preservation and use of property, and may direct a sale of perishable property. (31.133). A receiver may be appointed to take charge of, collect and account for all choses in action. (31.134).

*Indemnity.*—There is no statutory authority for officer to demand indemnity before levying.

Priorities between attachments are according to dates of delivery of writs to sheriff. (56 Ark. 292. 19 S.W. 921).

*Release of Property.*—Defendant may retain possession of the property attached by furnishing a forthcoming bond. (31.124).

*Sale.*—If judgment is rendered for plaintiff, attached personal property is sold first, then realty, at public sale, as ordered by and subject to the confirmation of the court. (31.155).

*Third Party Claims.*—Any person claiming an interest in the property attached may file a verified petition before delivery of the property or proceeds thereof to plaintiff and without other pleading the court may hear proof, refer to a commissioner or impanel a jury to inquire into the facts. A nonresident claimant is required to give security for costs. (31.157).

*Vacation or Modification.*—Defendant may discharge the attachment, at any time before judgment, by furnishing a bond to the effect that he will perform the judgment of the court. (31.136).

## California Law Digest

### Attachment

Attachment is purely statutory and provisions are strictly construed. A writ may be issued at or after issuance of summons. (C. C. P. 537).

*Actions in Which Allowed.*—Actions where total sum claimed, exclusive of interest, attorneys' fees and costs, is \$500 or more and which is either: (1) Action against domestic or foreign corporation or partnership, or individuals engaged in a trade or business, for a liquidated sum of money based upon money loaned, negotiable instrument, sale or lease or licensed use of real or personal property, or services rendered if claim is not secured; or (2) action for recovery of money against

nonresident person (including nonqualified foreign corporations and foreign partnerships who have not filed a designation) or any person who cannot be found after due diligence or who conceals himself to avoid service of summons. (C. C. P. 537.1-537.2).

Fact that interest, attorneys' fees and costs are claimed does not make a claim "unliquidated." (C. C. P. 537.1).

*In Whose Favor Writ May Issue.*—Any claimant or moving party, whether plaintiff or defendant, including nonresident or foreign corporation, may attach property of opposing party in proper case. (98 Cal. App. 580, 277 Pac. 337).

*Proceedings to Obtain.*—Plaintiff may request clerk in writing at time of filing of complaint not to make public filing of complaint or issuance of attachment until after filing and return of service of notice and temporary restraining order. (C. C. P. 537.5).

Plaintiff must file with court application supported by affidavit based on personal knowledge showing writ is proper in specific action, indebtedness claimed is justly due and owing, attachment is not sought and action is not prosecuted to defraud creditors, and plaintiff has no information or belief that defendant has filed bankruptcy proceedings. If claim is against nonresident, nonqualified foreign corporation, or partnership not filing designation, or person who cannot be found after due diligence, then plaintiff also must show amount and validity of claim. (C. C. P. 538).

If court satisfied affidavits establish prima facie case and that attachment properly issuable, it will issue temporary restraining order and notice of hearing on question of whether writ of attachment should issue. (C.C.P. 538.1). Hearing held 7 business days after service of notice and temporary restraining order on defendant. (C. C. P. 538.2). Temporary restraining order prohibits transfer of any of defendant's property in State subject to levy prior to hearing otherwise than in ordinary course of business, issuance of checks in excess of aggregate of \$1,000 against any bank accounts in State to withdraw sums subject to levy which reduce account to less than plaintiff's claims, and opening of new bank accounts. Checks can be issued despite \$1,000 limitation to meet payroll, pay C.O.D. charges on delivered goods, pay taxes, and pay legal fees to defend action. (C. C. P. 538.3). Notice to and service upon bank are both ineffective to require bank to observe order. (C. C. P. 538.1). Temporary restraining order expires unless writ issued and levied within 30 days after service of order or if defendant gives undertaking pursuant to C. C. P. 555 in amount of plaintiff's claim. Temporary restraining order may be vacated ex parte if court satisfied that sufficient property will be available and subject to writ of attachment if one directed. (C. C. P. 538.3).

If defendant does not appear at hearing, court must order clerk to issue writ of attachment. At hearing, oral evidence and affidavits may be introduced. Defendant must make himself or an officer with knowledge of the transaction available for oral examination unless court excuses requirement. Court decides on basis of evidence whether writ of attachment properly issuable, probable validity of plaintiff's claim, and probability of defendant asserting successful defense. Thereafter it either orders clerk to issue writ of attachment or dissolves temporary restraining order. (C. C. P. 538.4).

Court may direct issuance of writ of attachment without notice of hearing upon application of plaintiff under one or more of following conditions: (1) Where bulk sales notice posted under Com'l Code 6101 or escrow opened under Bus. & Prof. Code 24074; (2) where there is substantial evidence that defendant will transfer, remove or conceal property sought to be attached; (3) where notice and order cannot be served on defendant within 10 days of issuance and court satisfied defendant departed from jurisdiction or concealing self; (4) defendant is a person not residing in State (including foreign corporation not qualified to do business in State and foreign partnership which has not filed designation) or cannot be found after due diligence, or is concealing self to avoid service of summons. In latter instance, defendant may request hearing upon 7 days' notice at any time after levy. (C. C. P. 538.5).

*Courts.*—Writ may issue from any trial court where action filed, except small claims court. (C. C. P. 117ha).

*Bond.*—Before notice of hearing and temporary restraining order issued, plaintiff must file with clerk or judge written undertaking with two or more sufficient sureties in amount of one-half of principal for which writ is to be served, excluding attorneys' fees. Sureties must be resident householders or freeholders or authorized surety company. (C. C. P. 539, 1057).

*Issuance of Writ.*—Writ of attachment may be issued to any county in State, or to several counties at once, and may be telegraphed. (C.C. P. 540, 1017).

*Property Subject to Attachment.*—With respect to domestic and foreign corporations and partnerships, all corporate and partnership property are subject to attachment. With respect to individuals engaged in a trade or business, following property may be attached: (1) Inventory; (2) accounts, contract rights, chattel paper, and general intangibles consisting of any right to payment of money exceeding \$150; (3) bank accounts and other deposit accounts except first \$1,000 in any single bank or branch bank; (4) securities; (5) equipment; (6) real estate. All of property of nonresident persons (including non-qualified foreign corporations and foreign partnerships which have not filed a designation) and persons who cannot be located is subject to attachment. (C. C. P. 537.3). Earnings of defendant for his personal services are exempt from attachment. (C. C. P. 543; C. C. P. 690.6). Other exempt property is designated in C. C. P. 690 et seq.

*Prevention or Dissolution of Attachment.*—Attachment may be defeated by homestead declaration before judgment becomes lien (58 Cal. 1), and is dissolved by death (29 Cal. 359), except where defendant transfers property before death (94 Cal. App. 31, 270 Pac. 458).

*Release of Property of Single Defendant.*—When property is or is about to be attached, defendant may secure its release by giving undertaking of at least two sufficient sureties, or by deposit of sum of money sufficient to satisfy demand plus costs actually incurred to time of undertaking or 25% of plaintiff's demand, not to exceed \$1,000, or by deposit of sum of money equal to value of property to be attached. Such undertaking must be approved by court issuing writ, or if writ is from another county, then by court of similar jurisdiction in county where levy made. (C. C. P. 540).

**Release of Property of One of Several Defendants.**—In event action is against more than one defendant, any defendant whose property has been or is about to be attached in such action may give undertaking which must first be approved, as above, or may deposit such sums of money, and such undertaking or such deposit shall not subject such defendant to or be answerable for any demand against any other defendant nor shall officer thereby be prevented from attaching or be obliged to release from attachment, any property of any other defendant; provided, however, that such defendant, at time of giving such undertaking, or depositing such sum of money, shall file with officer statement, duly verified under oath, averring and declaring that other defendant or defendants in action has or have not any interest or claim of any nature whatsoever in or to said property. Such statement must further contain character of such defendant's title and manner in which he acquired title to such attached property. Such undertaking, before release of property, must be approved in same manner as for release of property of single defendant. (C. C. P. 540).

**Levy.**—Personal property capable of manual delivery, if levied on, must be taken into custody of officer. When levy made on personal property, other than money, or vehicle required to be registered under Vehicle Code, belonging to going business concern, officer must, if defendant consents, place keeper in charge at plaintiff's expense for at least 2 days, after which officer shall take property into custody, unless other disposition is made by court or parties. (C. C. P. 542). In case of growing crops copy of writ, description of property and notice of attachment must be recorded as in case of real property. Real property is attached by recording with recorder of county where situated copy of writ with description of property attached, and notice of attachment, and leaving similar copy of writ, description and notice with occupant, or in his absence with employee, agent or family member, if such person be of suitable age and discretion, or, if no occupant, by posting same in conspicuous place on said property. If record title to property in name of person other than defendant, notice must state that property and interest of defendant therein is attached, and must be given to such person or left at his residence, if known and within county. Notice must also be served on occupant, or if none, posted as above. Attachment of investment securities (including shares of stock in corporation) is governed by Uniform Commercial Code. (Com'l. C. 8317). Debts, credits, judgments and other personal property not capable of manual delivery are attached by leaving with person owing such debt, or with person having such credit or other property under his control; copy of writ, along with notice that debts or property attached in pursuance of writ.

There are special provisions relating to attachment of debts owing by certain financial institutions, including banks, savings and loan associations, and title companies, and to attachment of checks, drafts, and money orders which are in possession of defendant and payable on demand. (C. C. P. 542).

**Indemnity.**—If property levied on is claimed by third person by verified claim served upon levying officer, such officer must release property, unless plaintiff, within 5 days after written demand by officer made by registered or certified mail, gives officer undertaking

by two sufficient sureties; in a sum equal to twice value of property levied upon; and officer is not liable for damages to third persons, unless such claim is made. (C. C. P. 689).

*Priorities.*—All attachments are to be satisfied according to their priority in time. (18 Cal. 335).

*Lien of attachment upon real property* attaches upon recording of copy, description and notice with recorder of required county, but expires in 15 days unless officer completes execution of writ within that time. Such lien is merged in lien of judgment recovered by plaintiff. If judgment is not recovered within 3 years, lien of attachment will expire unless renewed by motion made not less than 5 nor more than 60 days before expiration of said 3-year period. Certified copy of order so extending such lien must be recorded before expiration of existing lien with recorder of county where attached real property is situated. Such extension may be for not longer than 2 years (C. C. P. 542a).

*Life of Attachment of Personalty.*—Attachment of personal property ceases to be effective and property must be released 1 year after date of levy of writ unless notice of readiness for trial is filed or judgment is entered against defendant within that period. One year period may be extended by court upon motion for such additional periods as court may direct. (C. C. P. 542[c]).

*Sale of Property.*—If property attached is perishable, or if court is satisfied that sale thereof will be for interest of all parties, property may be sold as if under execution and proceeds held by sheriff or deposited in court to await result of action. (C. C. P. 547-48). Specific provision relating to cultivating, caring for, harvesting, packing and selling attached growing crops is contained in C. C. P. 542.

*Discharge and Release.*—After levy of attachment any defendant who has appeared in action may, by order of court, have same discharged, upon executing undertaking that in case plaintiff recovers judgment against such defendant, he will redeliver to officer property attached, or, in default thereof, pay its full value to plaintiff, not exceeding amount of such judgment. (C. C. P. 554-55). On appeal, stay of enforcement, accompanied by sufficient bond will entitle defendant to release, which may be recorded. (C. C. P. 553, 5, 560). Return of writ and recording of discharge or release are provided for in C. C. P. 559.

Third party claims to personal property attached may be made in same manner as is provided for third party claims to property after levy under execution. (C. C. P. 549). (See also Executions). Nonresident who claims property attached must make written claim verified by his oath, setting out his title thereto, his right to possession thereof, and stating grounds of such title, which claim should be forwarded here and served on officer holding goods. (C. C. P. 689).

## Colorado Law Digest

### Attachment

*Actions in Which Allowed.*—In courts of record attachments are allowed in actions on contract, express or implied, or in tort actions if the tort is committed by a nonresident against a resident. (Rule 102).

*Courts Which May Issue Writ.*—District or county court (Rule 102; 77-5-2) may issue writs of attachment.

**Against Whom Writ May Issue.**—In a court of record a writ may issue against: (1) A nonresident; (2) a foreign corporation; (3) a domestic corporation whose chief office is out of the State; (4) a defendant who conceals himself or has been absent from the State for 4 months, on condition that the indebtedness or claim for damages has been due during said period; (5) a defendant who is about to remove his property from the State with intent to delay creditors; (6) a defendant who has fraudulently conveyed a property to delay creditors; (7) a defendant who has fraudulently concealed property to delay creditors; (8) a defendant who is about fraudulently to convey property to delay creditors; (9) a defendant who has departed or is about to depart from the State with intention of moving property from the state; (10) a defendant who has refused to pay the price of an article delivered which he should have paid for upon delivery; (11) a defendant who has failed to pay for work done which should have been paid at completion of said work; and (12) a defendant who has fraudulently contracted the debt or fraudulently procured money or property. (Rule 102-b).

**Claims on Which a Writ May Issue.**—In a court of record, except in the case of a nonresident, a foreign corporation and a domestic corporation whose office is out of the State, a writ may issue upon debts or liabilities not yet due, provided that upon obtaining judgment the defendant shall receive interest due from the time of judgment until the time the debt or liability would become due. (Rule 102-c).

**Grounds.**—See supra. subhead Against Whom Writ May Issue.

**Proceedings to Obtain.**—In a court of record, in order to obtain a writ of attachment, the plaintiff must file an affidavit stating the cause of action, that it is an action in which attachment is allowed, and that the defendant is a person against whom a writ of attachment may issue. (Rule 102-b). The writ of attachment must be served as provided by the rules for service of process, except that if personal service be made in Colorado it must be made by the sheriff. (Rule 102-f). Within 20 days after service the defendant, by affidavit, may traverse the plaintiff's affidavit, and if the plaintiff shall substantiate one of the causes alleged in the affidavit, attachment shall issue (Rule 102-p); if the traverse affidavit shows that the evidence does not prove a cause alleged in the plaintiff's affidavit, but another cause, then on motion the plaintiff's affidavit may be conformed to proof (Rule 102-q).

**Attachment Bond.**—In a court of record, the plaintiff must give bond for double the amount claimed conditioned that, if the court finds the plaintiff not entitled to attachment, the plaintiff will pay costs awarded the defendant and damages sustained by the wrongful attachment. (102-c). Whenever it shall appear to the court that the bond is insufficient, the court may order another one and if the plaintiff fails to comply within 20 days, the writ of attachment must be dismissed. (Rule 102-z).

**Levy.**—In court of record the sheriff to whom the writ is directed must execute upon real estate by filing a copy of the writ together with a description of the property attached with the recorder of the county, and upon personal property by taking it into custody. (Rule 102-g).

**Lien.**—Attachment liens on real estate continue for 6 years unless the judgment be sooner satisfied (77-5-3), and a certificate that levy

has been made upon real estate must be filed in the office of the recorder in the county where the land is situated (77-3-1).

*Release of Property.*—In a court of record a writ of attachment will not issue if the defendant gives sufficient security to pay the judgment (Rule 102-a); after the writ of attachment has been levied the defendant may post a bond in sums fixed by the sheriff, not less than the value of the property attached, and upon posting this bond the property subject to the attachment must be released (Rule 102-x).

*Sale.*—Where perishable property is attached, any party to the action may apply to the court for a sale thereof, and upon sale the proceeds must be deposited with the clerk of the court. (Rule 102-s).

*Third Party Claims.*—In a court of record no final judgment may be rendered until after 30 days after the attachment has been made, and any creditor within the 30 days may file an affidavit setting forth his claim against the defendant, and must then be made a party plaintiff with the same remedies as the original plaintiff (Rule 102-j[1]), and a judgment creditor may, upon motion without filing an affidavit, be made a party plaintiff having like remedies as the original plaintiff (Rule 102-j[2]). When an additional creditor is made a party, a dismissal by the first attaching creditor of his cause of action does not operate as a dismissal as to any other creditor. (Rule 102-k). Upon final judgment each creditor takes pro rata from the money realized from the attachment proceedings, provided that when the property is attached while the defendant is removing the same or secreting the same for the purpose of defrauding creditors, the court may allow the creditors whose diligence procured the property a priority over other attachments or judgment creditors. (Rule 102-l). Any third person claiming property attached may intervene and, in case judgment is in his favor, may recover damages by reason of attachment. (Rule 102-r).

## Connecticut Law Digest

### Attachment

*Actions in Which Allowed.*—Upon the original writ in any action for recovery of money, but no attachment may be made in an action for slander, libel, or invasion of privacy except upon a court order. (52-279).

*In Whose Favor Writ May Issue.*—There is no distinction in favor of local creditors.

The court may, in its discretion and upon posting of a bond with surety, permit a defendant filing a set-off or counterclaim to procure attachment of the plaintiffs goods (52-282).

*Against Whom Writ May Issue.*—Writ may issue against either resident or nonresident defendant.

*Claims on Which Writ May Issue.*—It is not necessary that the claim sued on should be insured or payable within the State.

*Grounds.*—Attaching party at hearing must show probable cause that his claim will be sustained. (Public Act 73-431, § 4).

*Proceedings to Obtain.*—Plaintiff must apply for prejudgment remedy, submit affidavit and serve defendant with application at least 4 days prior to required hearing. Temporary restraining order may be obtained. Hearing's sole purpose is to ascertain whether probable cause exists to sustain plaintiff's claim. Attachment may issue without

hearing where defendant is: (a) Nonresident; (b) avoiding service of process; (c) about to leave State; (d) fraudulently concealing or disposing of his property; (e) insolvent by his own statement. Procedure not applicable to commercial transactions; as distinguished from consumer transactions, if waiver previously secured. (Public Act 73-431; 73-616, § 65). Defendant has a right to appear and be heard at hearing. If application is granted, documents are returned to plaintiff's attorney, who then signs writ, attaches property pursuant to court's order, serves writ upon defendant and returns it to court. If plaintiff does not serve writ, entry fee may be returned. (Public Act 73-431, § 4).

Attachments secured prior to May 30, 1973, shall retain their effectiveness by filing a motion for a hearing. (Public Act 73-431, §§ 4, 7).

*Forms.*—Following forms are to be used:

### Forms

#### *Application for Prejudgment Remedy.*—

To the \_\_\_\_\_ Court of \_\_\_\_\_

The undersigned represents:

1. That \* \* \* is about to commence an action against \_\_\_\_\_ of \_\_\_\_\_ (give name and address of defendant) pursuant to the attached proposed unsigned Writ, Summons, Complaint and Affidavit.

2. That there is probable cause that a judgment will be rendered in such matter in favor of the applicant and to secure such judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of \$ \_\_\_\_\_:

a. To attach the following described real property of the defendant located in the Town of \_\_\_\_\_: (Description)

b. To garnish \_\_\_\_\_ as he is the agent, trustee, debtor of said defendant and has concealed in his hands the goods, effects and estate of said defendant and is indebted to him.

c. (Other Type of Prejudgment Remedy Requested.)

Name of Applicant

By \_\_\_\_\_

His Attorney

#### *Order.*—

The above application having been presented to the court, it is hereby ordered, that a hearing be held thereon on \_\_\_\_\_ at \_\_\_\_\_ a.m. and that the plaintiff give notice to the defendant of the pendency of said application and of the time when it will be heard by causing a true and attested copy of the application, such proposed unsigned writ, summons, complaint, affidavit and of this order to be served upon the defendant by some proper officer or indifferent person on or before \_\_\_\_\_ and that due return of such service be made to this court.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Clerk of the Court

#### *Summons.*—

To the Sheriff of the County of \_\_\_\_\_, his deputy, or either constable of the Town of \_\_\_\_\_ in said County,

**Greeting:**

By authority of the State of Connecticut, you are hereby commanded to serve a true and attested copy of the above application, such unsigned proposed writ, summons, complaint, affidavit and order upon \_\_\_\_\_, of \_\_\_\_\_, by leaving the same in his hands or at his usual place of abode on or before \_\_\_\_\_.

Hereof fail not but due service and return make.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
Commissioner of the Superior Court

Attachment bond is not required, except in case of defendant filing set-off or counterclaim (52-282), although cost bond (see Costs) may be required in a proper case.

*Times for Issuance of Writs.*—Attachment may issue on commencement of action only upon court order or pursuant to temporary restraining order. (Public Act 73-431, § 2). See subhead Proceedings to Obtain, supra. It may also be made subsequent to the commencement of action by order of the court in which the action is brought, which order must be served and returned in the same manner as an original writ of attachment. (52-281).

When the court cites in a new party to an action pending before it, it may include in such citation an order for a supplemental attachment against the property of such new party (52-103).

Upon amendment of defective process, if court after notice and hearing finds that parties had notice of pendency of action and have not been prejudiced by the defect, attachment made by original process is preserved as though proper from date of service of original process. (52-72).

*Property Subject to Attachment.*—Attachment may be levied on any estate of the defendant not exempt. (52-279; 52-280). No garnishment in excess of \$5,000 on any checking account is effective except upon court order. (52-289a). As to exempt property, see topic Exemptions.

Equitable interests (114 Conn. 79, 157 Atl. 638), future interests (71 Conn. 149, 41 Atl. 284), and partial interests in land (68 Conn. 1, 35 Atl. 804) are subject to attachment if sufficiently definite to be capable of appraisal; but security interests such as interest of vendor or mortgagee may be reached only by garnishing debt secured and filing certificate of garnishment for record with town clerk for town where the land is situated (52-346; 81 Conn. 419, 71 Atl. 509). Income from trust fund, if available to defendant by the terms of the trust (see Trusts), may be availed of by equitable decree requiring trustee to pay income to the creditor. (52-321). Interest of partner in partnership property may be attached, but any party to action or partner may, by bill in equity, cause dissolution of attachment and division of partnership property on equitable principles. (52-299).

Motor vehicle or railroad car may not be attached on mesne process, except upon order of a judge. (52-288).

Fixtures of telephone, telegraph, light or power companies are attachable in manner and effect the same as real estate by lodging a certificate of attachment with the secretary of state. (52-287).

**Public Serrants.**—No attachments of property of municipal officials, policemen, or members, teachers, or employees of board of education or members of any other municipal board or commission, in action involving official conduct, except on court order, or, in case of policeman, on dismissal. (52-279).

Excessive attachments may be reduced. (52-302).

**Levy.**—Attachment is made under order of court after hearing or in special circumstances by authority subscribing writ directed to sheriff or constable. (52-89; 52-90, am'd P.A. 183, § 82; Public Acts 73-431). Sheriff or constable makes attachment by serving writ of attachment on defendant, and, in case of personal property by seizing and removing property where practicable (52-280; 107 Conn. 300), and, in case of real estate (52-285) or leaseholds (52-286) by lodging in office of town clerk in town where real estate is located a certificate that he has made such attachment and a true and attested copy of process authorizing same. (52-285).

Estate of nonresident defendant is attached as above described, a copy of the process being left with the agent or attorney of the defendant within the state, or in the absence of such agent or attorney, with the person in charge or possession of the estate attached; if there is no person in charge or possession of the estate attached, the court may order reasonable notice to be given to the defendant, and such notice, having been given and proved, is deemed sufficient service of process, and such attachment thereupon becomes effective. (52-284). Not applicable to garnishments. (79 Conn. 17; 52-88).

Shares of stock in a corporation, together with the dividends due thereon, may be attached by the officer leaving attested copies of the process and complaint at the office of the corporation, and the officer in charge thereof must issue to him a certificate of the amount of stock owned, the incumbrances thereon and the dividends due; but no such attachment shall be valid until the stock certificate be seized by the officer, or be surrendered to the corporation. (52-289).

Attachments of certain cumbersome articles not moveable without manifest injury may be effectual without removal thereof if properly filed within 48 hours in town clerk's office in town where property situated and with secretary of state. In some cases, posting on building containing property required. (52-283).

**Lien.**—The attachment constitutes a lien on the property attached to secure payment of attaching creditor's claim, and priority of levy of attachment gives priority of lien. (36 Conn. 578). A real estate attachment is not a lien after 15 years unless reduced to judgment and a judgment lien filed. (52-327).

Attachment holds until the execution is levied, provided the levy is made within 60 days after final judgment when personal estate is attached, and within 4 months when real estate is attached. (52-328).

**Sale.**—Upon order of court, perishable property or property difficult or expensive to care for and preserve levied on under attachment may be sold (52-293), provided the plaintiff gives bond with surety in double the value of such property, conditioned on prosecution to effect and payment of damages sustained by sale at less than appraised value (52-294). The proceeds of such sale are paid into court and are there subject to attachment by other creditors. (52-297). Defendant may

take the proceeds at any time during suit upon giving bond with surety conditioned on refund in the event of adverse judgment. (52-208).

*Priorities.*—Where several attachments of the same property are made, the debt and costs of suit of the first attaching creditor must first be fully satisfied, and subsequent attaching creditors are paid in the order of their several attachments. (85 Conn. 573, 84 Atl. 119; 36 Conn. 578).

*Property of Nonresidents.*—The property of a nonresident defendant may be attached in the same manner as other property is attached except that the writ and complaint is served by leaving a copy with the defendant's agent or attorney in State, if known and by giving such notice to said defendant as court, on application made to it, shall require. (52-284).

*Release of Property.*—Defendant may secure release of attached property and dissolution of attachment lien upon substitution of surety bond or lien on other property which has equal or greater net equity value than amount secured by attachment (52-304); all persons interested may be heard in relation to amount and sufficiency of bond or substitute lien, and amount must equal value of estate which process directed to be attached, except in tort action for unliquidated damages in which case reasonable bond or substitute lien is sufficient (52-307). Lien on real estate of surety on bond may be obtained by filing in office of town clerk. (49-86).

*Dissolution.*—When attachment of record is for any reason of no effect, any person interested in estate may require plaintiff (52-322) or clerk of court (52-324) to file certificate of dissolution with town clerk. If plaintiff fails to execute and deliver a release within 30 days after demand, he is liable to person aggrieved at \$50 per week, up to \$1,000. (49-8; 49-13).

When the attachment is dissolved, the defendant must file a certificate of dissolution signed by the plaintiff or the plaintiff's attorney with the town clerk if real estate was attached, with the served officer of the corporation if corporate stock was attached, or with the garnishee in case of goods or effects in hands of garnishee, before the corporation or garnishee can be held liable for refusing to transfer stock, pay debts or return goods and effects. (52-310).

*Bond.*—By application to court defendant may secure dissolution of attachment lien upon substitution of a surety bond or lien on other property which has equal or greater net equity value than amount secured by attachment. (52-304). Amount and sufficiency of bond or substitute lien are subject to hearing, but amount must equal value of estate which process directed to be attached, except in action or tort for recovery of unliquidated damages where court may take bond or substitute lien for amount deemed reasonable. (52-307).

## Delaware Law Digest

### Attachment

*Actions in Which Allowed.*—In both foreign and domestic attachment actions the writ will issue on contract or in tort.

*Courts Which May Issue Writ.*—In foreign and domestic attachment, superior court has jurisdiction in any amount exceeding \$50

(10-3501) and justices of peace up to \$1,500 (10-9590). Common pleas court has jurisdiction in foreign attachment not exceeding \$1,000. (10-1371).

*In Whose Favor Writ May Issue.*—Any plaintiff may secure an attachment where proper grounds therefor are shown; there is no discrimination in this respect against nonresidents or foreign corporations. Provision is made for the attachment of shares of corporate stock or any interest therein (8-324).

*Against Whom Writ May Issue.*—Writs of attachment are known as domestic and foreign. Domestic writs are those issued against residents of the State or domestic corporations. Foreign writs are those issued against nonresidents or foreign corporations. Banks, savings institutions and loan associations doing business in the State are exempt. Insurance companies are liable only as to amounts claimed or payable under policy. (10-3502).

An unincorporated association including a partnership is liable to attachment in any action in its common name. (10-3504).

*Claims on Which Writ May Not Issue.*—Property title to which has not yet passed to judgment debtor not subject to attachment. (10-3508).

*Grounds.*—Writs of both domestic attachment against a resident or a domestic corporation and writs of foreign attachment against a nonresident may issue by order of court, on proof satisfactory to court. An affidavit is satisfactory for this purpose. (Super. Ct. Rule 4).

Domestic writs may issue against a resident or domestic corporation upon proof satisfactory to court that defendant cannot be found or that defendant is justly indebted to plaintiff in an amount over \$50, and that he has absconded, is about to leave the State, or left the State, with intent to defraud creditors or elude process, as is believed (10-3501).

Foreign writs may issue against a nonresident upon proof satisfactory to court that defendant cannot be found, that plaintiff has good cause of action against defendant in amount exceeding \$50, and that defendant resides out of State (10-3506). Foreign writs may issue against foreign corporation upon proof satisfactory to court that defendant is a corporation not created by, or existing under laws of Delaware, and that plaintiff has a good cause of action against defendant in an amount exceeding \$50 (10-3507).

*Procedure to Obtain.*—Affidavit filed in Superior Court with complaint setting forth statutory grounds and other facts required by court rules. (Sup. Ct. Rule 4).

*Attachment Bond.*—No mesne writ of attachment will be issued until plaintiff gives bond conditioned that if suit is not prosecuted with effect, or if judgment rendered therein is in favor of defendant, plaintiff will pay any and all costs which may be awarded to a defendant, together with any and all damages, not exceeding amount of the bond, which a defendant in the suit may have sustained by reason of such attachment. Amount and surety discretionary with superior court. (Super. Ct. Rule 4).

Levy is to cover both real and personal property. (10-3508).

*Indemnity.*—Statute gives superior court rule power over indemnity (10-3512). See subhead Attachment Bond above.

*Lien.*—Writ is a lien on goods and chattels actually levied on from time of levy.

**Priorities.**—Writs of attachments are to be executed by sheriff in order in which received by him.

**Release of Property.**—The writ may be discharged by furnishing security to the amount of the value of the attached property or the amount claimed in the suit, whichever is the lesser. If a nonresident enters general appearance and moves to release property, court must so order unless plaintiff shows other circumstances which threaten satisfaction of any judgment obtained and unless plaintiff gives bond in amount at least equal to current value of property. (Super. Ct. Rule 4).

**Sale.**—If attached property is perishable court may order attaching officer to sell same. No sale without court order. (Super. Ct. Rule 4).

**Third Party Claim.**—Statutory provision made for auditors in domestic attachment cases. (10-3521-22).

**Vacation or Modification.**—Nonresident may generally get property released on general appearance, property in any event will be released on furnishing security. (Super. Ct. Rule 4).

## District of Columbia Law Digest

### Attachment

Attachments may be levied on the lands and tenements and personal chattels of defendant not exempt by law, whether in defendant's or a third person's possession, whether defendant's title is legal or equitable, and upon his credits in hands of third person whether due or not, and upon his undivided interest in a partnership. (§ 16-507).

While attachment may be issued upon a judgment in aid of execution (§ 16-542), the following pertains to attachment before judgment:

**Actions in Which Allowed.**—In any action for the recovery of specific personal property, or a debt, or damages for the breach of a contract, express or implied. (§ 16-501).

**Courts Which May Issue Writ.**—District and superior courts (§§ 16-501, 533).

**In Whose Favor Writ May Issue.**—Any plaintiff.

**Against Whom Writ May Issue.**—Any defendant.

**Claims on Which Writ May Issue.**—On matured claims (§ 16-501) or claims where debt is not due and payable (§ 16-503).

Grounds for attachment are that defendant (1) Is a foreign corporation or a nonresident; (2) has been absent from District for at least 6 months; (3) evades service of process; (4) has removed, or is about to remove, some or all of his property from District so as to defeat just demands against him; (5) has assigned or secreted his property, or is about to do so, in fraud of creditors; or (6) fraudulently contracted the debt or incurred the obligation. (§ 16-501).

**Proceedings to Obtain.**—An affidavit must be filed by plaintiff showing grounds for attachment, details of his claim, his right to recover, and if action is to recover specific personal property, value of such property and probable amount of damages; and, if action is for a debt, amount thereof; and, if action is for damages on contract, showing in detail the breach of contract and actual damage. (§ 16-501).

If the debt is not yet due the affidavit of the plaintiff must be substantiated by testimony of one or more witnesses in relation to the amount and justice of the claim, time it will become due, and must also

show either that defendant has removed, is removing or that he intends to remove a material part of his property from District to defraud creditors. Judgment may not be entered before debt matures. (§ 16-503).

**Attachment Bond.**—Plaintiff must file a bond with surety approved by clerk of court with penalty of twice amount of his claim or value of specified property to be levied upon, whichever lower. (§ 16-501). Officer who serves writ, U.S. marshal, will require a bond for protection of himself against making a false levy where a seizure of personal property is to be made.

**Levy.**—An attachment is sufficiently levied on real estate by said real estate being described by the marshal in an endorsement on the writ of attachment to the following effect:

Levied on the following estate of the defendant A. B., to-wit: (here described property) this ----- day of -----.

C. D. Marshal.

and by serving a copy of the writ bearing such endorsement and a notice to the defendant to appear, upon the person, if any, in possession of the property. (§ 16-508).

An attachment is levied on personal chattels by the marshal taking the same into his possession and custody unless the defendant or person in possession gives an undertaking, in which event attachment is sufficiently levied by the taking of the undertaking. (§ 16-509).

An attachment is levied on credits of defendant in hands of garnishee or upon undivided interest in partnership by serving garnishee or partner with copy of writ and interrogatories and a notice that any property or credits in his possession are attached. (§ 16-511).

**Indemnity.**—The officer who serves the writ, the United States marshal, will require a bond for protection of himself against making a false levy where a seizure of personal property is to be made.

**Lien.**—Attachment is a lien on property from the date of delivery of the writ to the marshal. (§ 16-507).

Priorities are according to the dates when the attachments were delivered to the marshal. (§ 16-507).

Release of property or credits may be secured by defendant or person who had possession of property or credits, by furnishing an undertaking with security to be approved by the court to pay any judgment recovered against him. (§ 16-510).

**Sale.**—After judgment of condemnation, specific property may be sold under writ of fieri facias to satisfy demand of plaintiff. (§ 16-525). Prior to final decision the court may order a sale of property if perishable or if for other reasons a sale appears expedient. (§ 16-518).

**Third Party Claims.**—A third party may file a petition in the cause claiming the personalty attached, and the matter must be tried to determine the ownership (§ 16-523).

**Vacation or Modification.**—Defendant (§ 16-506), as well as a garnishee where attachment is based on fraudulent conveyance (§ 16-529), may contest right of plaintiff to writ by filing affidavits traversing facts set forth in plaintiff's affidavits. Motion to quash writ may be heard on 3 days' notice (§ 16-506). Also, defendant or any garnishee may plead to attachment, and raise issue to be tried by court (§ 16-520).

**Interrogatories.**—Garnishee may be required to answer interrogatories under oath concerning defendant's property in his possession or his indebtedness to defendant. (§ 16-521). Plaintiff may traverse such answers and have issue tried by court. (§ 16-522).

**Judgment.**—If defendant has been served with process, final judgment may not be entered against garnishee until action against defendant is determined. (§ 16-524). Where plaintiff recovers judgment against defendant, plaintiff may have judgment of condemnation of property attached or of proceeds from sale of property (§§ 16-524, 525) or judgment of condemnation against garnishee for amount of defendant's credits in his hands or where undertaking has been provided judgment of condemnation of property and against garnishee and his sureties (§§ 16-526, 527).

Payment of salary or earnings before due for the purpose of preventing or avoiding an attachment or garnishment against them is void as to an attaching creditor. After the service of a writ of attachment or garnishment on a judgment against an employer, any advance payment of salary or earnings made within a period of 6 months after the service of the writ or before an earlier satisfaction of the judgment is, as to an attaching creditor, presumed to be for the purpose of avoiding the attachment. (§ 16-513).

## Florida Law Digest

### Attachment

**Actions in Which Allowed.**—Attachment lies before or after judgment in actions ex contractu in nature. (76.04 et seq.). Attachment not available in tort actions except those arising from operation of boats, vessels, etc. (76.32). Foregoing not affected by commercial code.

**Courts That May Issue Writ.**—Attachments are required to issue from court which has jurisdiction of amount claimed by creditor, unless property to be attached is being actually removed from State and creditor is unable to obtain process from proper court in time to prevent such removal, in which case any judge may issue writ, making same returnable to circuit or county court having jurisdiction of amount claimed. (76.03).

**In Whose Favor and Against Whom Writ May Issue.**—Any creditor may have an attachment against goods, lands and tenements of his debtor in a proper case. (76.01). No restrictions on foreign corporations or nonresidents.

**Claims on Which Writ May Issue.**—See subhead, Actions in Which Allowed, supra.

**Grounds.**—Attachment may be procured upon filing a motion therefor, which shall not be verified or negative attachment debtor's exemptions. (76.08). When debt is due, motion shall state amount of debt that is actually due, and that movant has reason to believe that defendant will fraudulently part with his property before judgment, is actually removing his property out of State of Florida, is about to remove his property, resides beyond limits of State, is actually moving himself beyond limits of State, is about to move himself out of State, is absconding, concealing himself, or secreting or fraudulently disposing of his property, is actually removing himself beyond limits of judicial circuit in which he resides, or is about to so remove himself out of limits of such judicial circuit (76.09, .04).

*When Debt Not Due.*—Motion shall state amount of debt or demand; that it is actually an existing debt; and shall state specifically such special ground or grounds: that debtor is actually removing his property beyond limits of State, that he is fraudulently disposing of his property for purpose of avoiding payment of his just debts or demands or that he is fraudulently secreting his property for such purpose. In addition, plaintiff must produce before officer granting attachment proof, by affidavit (other than his own) or otherwise, satisfactory to such officer, of existence of such special ground. (76.05, .10).

*When Attachment in Aid of Chattel Mortgage Foreclosure.*—Motion shall describe property on which mortgage exists, and state that complaint has been filed to foreclose mortgage, amount of debt secured by mortgage, that it is actually due, and that movant has reason to believe that property or part of same: (1) Will be concealed or disposed of so that it will not be forthcoming to answer judgment or decree of foreclosure; (2) will be removed beyond jurisdiction of court; (3) is perishable and is being used and consumed; or (4) has been disposed of without consent of holder and owner of mortgage, stating who has property, if known, or that affiant does not know who has same. (76.11, .07). Where attachment is on ground (4) and holder of property is unknown, attachment bond must be payable to State. (76.12).

*Proceedings to Obtain.*—Practice in suits commenced by attachments are same as other suits at law. See R. C. P. 1.010.

*Attachment Bond.*—No attachment may issue until person applying for same, his agent or attorney, has entered into bond, with two sureties, payable to defendant, in at least double the debt or sum demanded, conditioned to pay all costs and damages which he may sustain in consequence of improperly suing out attachment. (76.12). See subhead *When Attachment in Aid of Chattel Mortgage Foreclosure*, supra, regarding need for bond payable to State in certain foreclosure circumstances. (76.12).

*Levy, Lien, Priorities.*—Levy of a writ of attachment does not operate to dispossess tenant of any lands or tenements, but levy upon real or personal property binds property attached, except against pre-existing liens. Levies upon same property under successive attachments have precedence as liens in order in which they are made. Levy binds real estate as against subsequent creditors or purchasers only from time of record by clerk of circuit court in lien book of a notice of levy and a description of property levied upon. (76.14).

Upon statement in motion that defendant has property in a county other than that in which suit is instituted, a writ of attachment may issue directed to sheriff or other proper officer of county where said property is, and said officer must execute writ and hold and dispose of property as in other cases. (76.16).

*Release of Property.*—Property attached may be restored to defendant upon his giving a bond to officer levying attachment, payable to plaintiff, with two sureties, in double value of property levied upon, or double amount of claim if value exceeds claim, value to be fixed by officer levying attachment, where such value exceeds claim. (76.18).

*Vacation or Modification.*—Court to which attachment is returnable is always open for purpose of entertaining motions to dissolve such attachment, and if any allegation in plaintiff's affidavit which is

denied under oath in writing by defendant is not sustained and proved to be true, such court will dissolve attachment. Issue joined upon such denial may be tried by a jury, upon demand of either party. (76.24).

*Third Party Claims.*—Attached property claimed by third persons may be replevied, or a claim interposed therefor by filing with officer levying attachment an affidavit made by claimant, his agent or attorney, that property claimed by him is his property, and by giving of a bond, payable to plaintiff, with two good and sufficient sureties to be approved by such officer in double value of goods claimed. (76.21; 56.16).

## Georgia Law Digest

### Attachment

*Actions in Which Allowed.*—Attachment may issue in all cases of money demands, whether ex contractu or ex delicto if statutory grounds exist. (8-102).

*In Whose Favor Writ May Issue.*—Attachment may issue on behalf of any plaintiff, including a nonresident or foreign corporation. A surety may have an attachment against his principal, but if surety has not paid obligation, money raised on attachment must be paid to obligee. (8-107).

*Against Whom Writ May Issue.*—Attachment may issue against a foreign corporation doing business in the State (8-108); joint contractors and partners (8-106); administrator or executor of an estate (8-105); or against any person or corporation if statutory grounds exist (8-102).

*Claims on Which Writ May Issue.*—Attachment may issue for money not yet due, but execution is stayed until maturity of the debt (8-103).

*Time for Issuance.*—An attachment may issue at any time prior to or during the pendency of suit (8-104) on any day of week including Sunday (8-115).

*Grounds.*—General grounds are that debtor: (1) Is a nonresident, (2) is removing or about to remove without county, (3) absconds, (4) conceals himself, (5) resists legal arrest, or (6) is causing his property to be removed without State (8-101). These grounds do not result in unreasonable seizure. (231 Ga. 157, 200 S.E.2d 703). Attachment may issue against debtor who has sold, conveyed or concealed property liable for his debts or threatened or prepared to do so, or made a fraudulent lien on his property (8-401, 402). Real or personal property may be attached for purchase price thereof (8-301, 302).

*Proceedings to Obtain.*—Creditor, his agent or attorney, or one of joint creditors (8-110), must make affidavit before any superior, county or city court judge, magistrate, justice of peace, or clerk of any court of record showing ground for attachment and amount of debt claimed (8-109).

*Attachment Bond.*—Creditor must file bond in not less than double amount of debt conditioned to pay damages and costs if attachment not successful. (8-111). Bond need not exceed \$20,000 (8-111) but may be increased by levying officer after hearing (8-113). Agent or attorney making affidavit may sign bond for his principal. (8-111). Attorney cannot be surety, nor can nonresident unless he owns real estate in county. (8-112).

**Levy.**—Attachment may be levied on real or personal property of defendant anywhere in State (8-114) including investment securities where actually seized (109A-8-317); goods covered by a negotiable document of title where document is not outstanding (109A-7-602) and debtor's rights in collateral (109A-9-311). See topic Commercial Code. If property found in county other than that in which writ issued, officer must make and certify copy and deliver same to officer of county where property is and latter officer levies and makes return to court issuing attachment. (8-210). Levy on real estate must be entered on general execution docket within 5 days of levy to bind third parties. (8-906).

**Indemnity.**—No statutory provision.

**Lien.**—Attaching creditor has lien created by the levy. (8-905).

**Priorities.**—Among attachments, first levied is first satisfied. As between attachment and ordinary judgment, judgment rather than levy fixes lien except where attachment has been levied prior to filing of suit resulting in ordinary judgment. (8-904, 905).

**Return.**—If debt exceeds \$200, and in any case where defendant is nonresident, attachment returnable to superior court of defendant's last residence as to residents of Georgia, and to any appropriate superior court as to nonresidents. If debt does not exceed \$200, attachment returnable to next justice's court of district where debtor resides or last resided, which sits not less than 10 days after issuance thereof. Attachments returnable to superior, city and county courts governed by same rules of procedure and practice governing all civil actions. (8-117).

**Release of Property.**—Defendant may replevy property attached by giving bond with security payable to plaintiff for not less than double amount claimed or value of property. (8-701).

Third party claims may be asserted before or after judgment in attachment suit. (8-806). Officer must return claim to court issuing attachment except that claim involving land always returnable to superior court. (8-801). Claimant may replevy property by giving forthcoming bond to levying officer. (8-803). If claimant unsuccessful and property does not bring enough to satisfy judgment, plaintiff may sue claimant on bond for use and hire of property and deterioration in value, but may not recover more than enough to satisfy the unpaid portion of the debt. (8-805).

**Vacation.**—Judgment may be set aside for fraud or want of consideration. (8-802).

**Proceedings After Attachment.**—Where attachment returnable to superior, city or county court appearance day of such declaration to be 30 days after filing thereof. (8-117). See also topic Pleadings. Plaintiff may by written notice served personally on defendant at least 10 days before final judgment on attachment, bind defendant personally and after service of notice, even though attachment be dismissed, plaintiff entitled to judgment on declaration filed on merits of the case. (8-602). Should defendant replevy attached property or appear and plead to merits, judgment will bind defendant personally though no notice given. (8-602). Any defendant against whom an attachment may issue, for recovery of demand which is not due, may plead a set-off even if it is not due or is more than plaintiff's claim and recover judg-

ment. (8-604). Unless plaintiff gives notice, defendant replevies or pleads to merits, a judgment in rem against attached property may be had.

### Hawaii Law Digest

#### Attachment

*Actions in Which Allowed.*—Attachment of either real or personal property not exempt from execution may issue in any action on an express or implied contract, including actions by nonresident or foreign corporation. (651-2).

*Courts Which May Issue Writ.*—Circuit and district courts may issue writ, except that district magistrate may not have his writ served in circuit outside one in which his district is situated nor may he issue writ for attachment of real property. (651-1).

*In Whose Favor Writ May Issue.*—Plaintiff in action, including nonresident or foreign corporation, may have property attached (651-2).

*Against Whom Writ May Issue.*—Property of defendant, or any one or more of several defendants, may be attached, but not that of State or political subdivision. (651-1).

*Claims on Which Writ May Issue.*—Before writ will issue, plaintiff, or someone in his behalf, must file affidavit with clerk that defendant is indebted to plaintiff, specifying amount of debt over and above just credits and offsets, and that action is not prosecuted to defraud, hinder, or delay any of defendant's creditors. (651-3). No statute or case in Hawaii as to whether creditor may attach on unmatured or contingent claim.

*Grounds.*—No statutory restriction.

*Proceedings to Obtain.*—At time of commencing action or afterward before judgment, plaintiff may have attachment by applying to clerk of court in which action pending (district magistrate in district courts [651-1]) (651-3), upon filing required affidavit (see subhead Claims on Which Writ May Issue supra), filing bond and additional security as required (see subhead Attachment Bond infra) (651-4, 5), and upon approval of court (651-7). Writ is directed to any police officer. (Ibid.)

*Attachment Bond.*—Plaintiff must file bond in double amount of claim, but not less than \$50 in district court or \$300 in circuit court, together with affidavit of sureties (see topic Bonds). Bond is not required of State, municipalities, their officers or agents (651-4). Court may, on plaintiff's motion reduce bond to one and one half times amount of claim more than \$50,000 or on defendant's motion require additional security. (651-4, 5).

*Lery.*—Police officer is to levy on sufficient property, giving preference to clearer title (651-7, 8), 20% greater in value than plaintiff's claim (651-8).

Real property is attached by filing in bureau of conveyances true copy of writ with officer's certificate that he has attached real estate or defendant's interest in it, and describing land with convenient certainty. (651-9[1]).

Personal property capable of manual delivery is attached by taking it into custody. (651-9[2]).

A security (see topic Commercial Code) is attached by actual seizure thereof. (651-9[3]).

Court may allow compensation to police officer. (651-8). Court may appoint receiver (compensation to be out of that of police officer). (651-14).

*Indemnity.*—Police officer may require indemnification (651-10).

*Lien.*—No statutory provision.

*Priorities.*—Several attachments are executed in order received by police officer. (651-11). Leases, mortgages, sales, devices, etc. after attachment are void in law as against plaintiff in such cases. (634-66; 51 Haw. 164, 454 P.2d 116).

*Release of Property.*—Writ is discharged if action is discontinued, dismissed, or if judgment is for defendant (651-16), by defendant filing a bond approved by officer having attachment or by clerk after return (651-17), or upon defendant's motion if writ improperly issued (651-18). Order of discharge on real property is to be recorded in same manner as writ and expenses of attachment must be paid by plaintiff (651-18).

*Return.*—Return is to be within same time as is allowed for return of summons. Return is to be accompanied with full inventory of property attached and certificate of proceedings indorsed on writ (651-15).

*Examination.*—If on plaintiff's affidavit or on return of writ it appears that attachable property cannot be found, court may require attendance of defendant to give relevant information on oath (651-12).

*Sale.*—Police officer may sell perishable property. If in interest of parties, court may, after hearing, order sale of property. Sales are in same manner as execution (651-13).

*Third Party Claims.*—No statutory provision.

*Variation or Modification.*—See subhead Release of Property.

## Idaho Law Digest

### Attachment

Attachment is ancillary to action and in accord with statute. (8-501, am'd 1974, c. 307).

*Actions in Which Allowed.*—Attachment can issue only in action on judgment or express or implied contract for direct payment of money not secured by mortgage, deed of trust, lien, or security interest. (8-501).

*Courts Which May Issue Writ.*—All district courts.

*Claims on Which Writ May Issue.*—Debt must be due, but it need not be payable in this State (8-501).

*In Whose Favor Writ May Issue.*—In proper case, any plaintiff, including nonresident or foreign corporation may obtain attachment.

Grounds for attachment are: (1) That contract or debt sued for arose on contract, express or implied, for direct payment of money, and has not been secured by mortgage, deed of trust, security interest, or lien, on real or personal property; or if so secured, that such security has become valueless, without any act of plaintiff or person to whom such security was originally given; or (2) that defendant is a nonresident. (8-501). Foreign corporation is nonresident within the latter provision. (26 Ida. 703, 146 Pac. 101).

*Proceedings to Obtain.*—Plaintiff shall file application for writ supported by affidavit. (8-502; 1974, c. 307). Court shall issue order to show cause why writ should not issue and for hearing date, no

sooner than 5 days, and direct time within which service on defendant be made, (8-502[b]; 1973, c. 266).

Prior to hearing, court may, nevertheless, issue writ if (1) jurisdiction depends on attachment of defendant's property in State; (2) property is a negotiable instrument; (3) property is bank account subject to threat of immediate withdrawal, property is perishable, in danger of destruction, concealment or removal from State, or sale to innocent third person. (8-502[c]; 1974, c. 307).

On order to show cause hearing court makes preliminary determination, and if a reasonable probability that plaintiff's claim would prevail, requires undertaking for value of property and may issue writ which may be levied upon in amount adequate to secure judgment which may be obtained. (8-502[e]; 1974, c. 307).

If writ issued prior to hearing, defendant may request shortened time, with notice to plaintiff, of not less than 48 hours. (8-502[c]; 1974, c. 307).

If no appearance by defendant after service, writ may issue.

Court may, in addition, issue temporary restraining order, in lieu of writ of attachment. (8-502[d]; 1974, c. 307).

*Affidavit for Attachment.*—Plaintiff, or his agent or attorney must make and file an affidavit stating ground of attachment, that debt is due, amount due, and that attachment is not sought, or the action prosecuted, to hinder, delay, or defraud any creditor of defendant. (8-502, 16-601).

*Attachment Bond.*—No writ shall issue except by filing a written undertaking by plaintiff in amount set by court. (8-503[a]).

*Notice of Attachment.*—Two days after issuing writ clerk of court must post at door of courthouse for 10 days, and cause to be published in a newspaper (if a weekly, in three issues; if any other, six issues) a notice setting out title of case and fact of attachment. (8-503[b]). Not applicable to justice courts.

Levy made on real property by filing notice of attachment describing property and copy of writ with county recorder; personal property incapable of manual delivery, by serving similar notice and copy of writ on party in possession; other personal property, by taking into custody. (8-506). Securities must be attached by actual seizing by officer making levy and pursuant to § 28-8-317. See topic Replevin.

*Indemnity.*—Officer may not demand indemnity bond before making levy, but may do so after, if defendant claims exemption or third party claims property. (11-203).

Lien of attachment merges in judgment for plaintiff when obtained. (8-528). See subhead Vacation or Modification, *infra*.

*Priorities.*—Attaching creditor has priority over subsequent attachments and judgments, except that other creditors who file suit within 30 days after first publication and posting of notice of attachment and diligently pursue to judgment, are entitled to prorate. (8-503[b]).

Sale after judgment is made as in case of execution, but perishable property may be sold before judgment and other property may also be sold before judgment under court order. (8-525-6, 528).

*Release of Property.*—Attachment may be discharged by judgment for defendant in action, by defendant giving bond in an amount fixed by court for redelivery or payment of value, or may be vacated for irregularity on motion. (8-531-8).

Claims of third persons to ownership of property levied on, or of debtor that such property is exempt, are governed by same rules as in case of execution. (8-527). Third party claim by way of security interest must set forth dollar amount of claim. (11-203). See topic Executions.

*Vacation or Modification.*—Where lien on real estate has in any manner been lost or destroyed, issuing court, on application, may discharge lien. (8-539). Levy is lien on real property for 2 years, unless sooner released, discharged, or discharged by dismissal of the action. Lien ceases after 2 years, unless on motion made not less than 5 or more than 60 days before expiration, court extends time, not to exceed 2 years, Lien may be so extended from time to time. (8-539).

Mortgaged personal property may be attached as follows: (1) If property could be attached by taking possession thereof except for the mortgage, and mortgagee consents in writing, by taking it into possession subject to rights of mortgagee; (2) by paying amount of the mortgage; (3) the equity of redemption of the debtor may be attached without taking possession by serving and filing a copy of the writ and notice. (45-1106).

*Debtor's Personal Property.*—Attachment by possession (1) if parties with UCC perfected security interest consent in writing, then subject to their rights; (2) payment of perfected security interest holder, and obtaining possession by payment is subrogated to interest of such perfected security holder; (3) attachment of defendant's equity of redemption without possession, by sheriff serving and filing writ and notice.

*Mortgage and Trust Deed.*—Interest of mortgagee and beneficiary to trust deed may be attached by sheriff recording and serving copy of writ and notice.

*Defendant's Security Interest.*—Attached by sheriff filing and serving copy of writ and notice. (8-506A).

## Illinois Law Digest

### Attachment

*Actions in Which Allowed.*—May be used in all actions whether contract or tort. (11-1). But re prejudgment attachment, see 407 U.S. 67.

*Courts Which May Issue Writ.*—Any court of competent jurisdiction may issue a writ. (11-1). See Court Calendar in part V.

*In Whose Favor Writ May Issue.*—Any person, including a non-resident or foreign corporation, may obtain an attachment.

*Against Whom Writ May Issue.*—Writ may issue against resident or nonresident. (11-1).

*Claims on Which Writ May Issue.*—An attachment may issue on any money claim exceeding \$20, whether liquidated or unliquidated. (11-1).

*Property Subject to Attachment.*—Attachment may issue against both real and personal property. For property exempt from attachment, see Exemptions.

*Water Craft, Etc.*—Special provision is made for attachment of water craft used in State or having home port therein to enforce certain liens or claims, and also for attachment to enforce lien for freight on goods shipped by water craft. (12-1 to 29a, 12-47).

**Time for Issuing Attachment.**—Attachment may issue either at time of instituting suit or thereafter. (11-1). Writ may issue prior to filing of complaint upon affidavit of creditor described below, provided that complaint shall be filed 10 days before return day of writ, in which event defendant is required to appear or answer on or before return day. If complaint is not so filed, defendant is not required to appear or to answer until 15 days after return day; and if complaint is not filed 5 days after return day, defendant may, at court's discretion, have suit dismissed. (11-25).

Attachment may issue in aid of a pending case. Notice of pendency of suit and of issue and levy of writ is given as in cases of original attachments, unless defendant has previously been served with process in original cause. (11-33).

**Grounds.**—Attachment may issue where: (1) debtor is a nonresident; (2) debtor conceals himself or defies officer so that process cannot be served on him; (3) debtor has departed or (4) is about to depart from State with intention of having his effects removed therefrom; (5) debtor is about to remove his property from State to injury of creditor; (6) debtor has within 2 years preceding filing of affidavit, fraudulently conveyed or assigned all or part of his effects, or (7) fraudulently concealed or disposed of his property so as to hinder or delay his creditors; (8) debtor is fraudulently about to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay creditors; and (9) debt was fraudulently contracted by debtor, provided fraudulent statement was in writing and debtor's signature attached thereto by himself, his agent or attorney. (11-1). Provisions for attachment are to be construed in most liberal manner for detection of fraud. (11-41).

Affidavit must be filed by creditor, his agent or attorney, with clerk of court, stating nature and amount of indebtedness, after allowing all just credits and set-offs, and any one or more of the above causes, also place of residence of defendant or that on diligent inquiry affiant has been unable to ascertain same. (11-2). Judgment will be set aside if affiant has not complied with requirement of diligent inquiry to ascertain address of defendant. (13 Ill. App.2d 76, 141 N.E.2d 63). In addition, written statement executed by creditor's attorney or attorneys, showing whether or not action sounds in tort, together with designation of return day for summons to be issued, must be filed. Where action sounds in tort, plaintiff, his agent or attorney must apply to a judge and be examined under oath concerning cause of action. Such judge endorses on affidavit amount of damages for which writ shall issue and no greater amount may be claimed. (11-2).

Form of affidavit may be substantially as follows (11-2a):

### Form

STATE OF ILLINOIS,  
----- County, ss,

A B, being duly sworn, says: That (here state if affiant is agent or attorney of the creditor; if suit is by an individual or corporation, the name of such individual or corporation, and if the suit is by a firm, the name of the partners) has a just demand against (name of debtor), on account of (here make short statement of the nature and amount of

the claim), and the affiant believes (the name of the creditor) is entitled to recover of said (name of debtor), after allowing all just credits and set-offs ..... dollars and ..... cents, which is now due, and that he has good reason to believe and does believe that (name of debtor) (here state some one or more of the causes which authorize an attachment) the said (name of debtor) (here state the residence of the debtor if known, or if not, that the affiant has made diligent inquiry and cannot ascertain his place of residence).

Subscribed and sworn to before me on this ..... day of ....., A.D.

My commission expires ....., A.D.

(If action sounds in tort here include the endorsement of judge as to amount of damages for which writ shall issue.)

Bond must be taken by clerk with sufficient security; payable to the People of the State of Illinois, for use of person interested in property attached, in double sum sworn to be due, conditioned for satisfying all costs awarded to defendant or any others interested in proceedings, and all damages and costs recovered against plaintiff for wrongfully suing out the attachment. All attachments issued without bond and affidavit taken (except where State is plaintiff) are void. (11-4a). Court may, on ex parte motion, without notice, supported by affidavit of plaintiff describing specific property to be attached and value thereof, fix bond at double value of property to be attached instead of double sum sworn to be due. (11-4b).

If no property found or a designated garnishee is not served, and where property seized is of insufficient value, alias and pluries writs may issue without additional bond, except where additional specific property is desired to be attached, in which case an additional bond at least double value of additional property is furnished as stated above. (11-10a).

Form of writ is substantially as follows (11-6) :

**Form**

The People of the State of Illinois to the Sheriff of ..... County: or for the purpose only of service as summons; to any person authorized to serve writs of summons:—Greeting:

Whereas A B (or agent or attorney of A B, as the case may be.) hath complained that C D is justly indebted to the said A B to the amount of ..... and that (here state the cause set out in the affidavit) and the said ..... having given bond and security, according to law: We therefore command you that you attach so much of the estate, real or personal, of the said C D, to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the affidavit, but in case any specific property of the said C D, found in your county, shall be described in this writ, then you shall

attach said described property only, and no other property, the said specified property to be so attached, being described as follows:

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and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law: and that you summon C D to appear and answer the complaint of said A B, before the ----- Court of ----- at ----- in the county of ----- on the ----- day of ----- next: and that you also summon ----- and such other persons as you shall be required by the said A B, as garnishees, to be and appear before the said court on the said ----- day of ----- next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness ----- clerk of the said court, this ----- day of ----- in the year of our Lord, etc.

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Writ of attachment is directed to sheriff and is signed by clerk, and seal of court is affixed thereto. (11-6).

If debtor is actually absconding or concealed, or stands in defiance of an officer, or has left the State with intention of having his effects removed, or intends to depart with such intention, writ may issue and be served on Sunday. (11-12).

Writs may issue to other counties in State. (11-13).

*Execution of Writ.*—In case of joint debtors writ issues against property of those brought within act; and others are summoned to answer action. (11-7). Writ may be executed on lands or tenements in which debtor has equitable interest or title. (11-8).

*Indemnity.*—In practice, officer executing writ demands indemnity bond in double the amount alleged due where personal property is seized. (11-4a).

Sale of perishable property is provided for. (11-20). Provision also made for sale of livestock. (11-39a).

*Lien.*—Attachment becomes lien on real estate after officer making levy files a certificate of said fact with recorder (11-9) unless land is registered under Torrens system, in which event attachment becomes lien on real estate only upon (a) filing of certificate with registrar of titles and (b) entry in registry of a memorial thereof (30-123).

*Priorities.*—Judgments in attachments against same defendant returnable on same day, and judgments in suits by summons, capias or attachment against such defendant recovered within 30 days from day when judgment in first attachment on which judgment is recovered is rendered, share pro rata in proceeds of attached property. Court may allow priority to creditors through whose diligence property being removed was secured. (11-37).

*Proceedings in Action.*—Where defendant is a nonresident, or has left State, or cannot be found, or is concealed so process cannot be served, and where property has been attached or garnishees summoned, clerk must give notice by publication, and by mailing copy of such notice to defendant, if his place of residence is stated. (11-22). If defendant is personally served or appears, judgment is of same force

as in suit commenced by summons (11-34). Where defendant is notified by publication but not served and does not appear, judgment is in rem against property attached and special execution issues. (11-35). Defendant may traverse facts stated in affidavit by verified answer. If, on trial, that issue is found for plaintiff, defendant may answer or move as in other cases; if found for defendant, attachment is quashed. Where personal jurisdiction of defendant has been obtained, suit proceeds to final judgment as if commenced by summons. (11-27). Any party, intervenor, or sheriff who may feel aggrieved by final order or judgment, may appeal in accordance with procedure applicable to civil cases. (11-40). Any defendant may file any counterclaim pleadable by laws of Illinois. (11-30). Original affidavit or attachment bond may be amended by filing a legally sufficient affidavit or bond; and writ itself may also be amended, in such time and manner as court may direct. (11-28). Civil Practice Act governs except as provided in Chapter 11. (110-1).

*Third Party Claims.*—Person other than defendant may intervene by verified petition, without giving bond, but property is not thereby replevied. Jury is impaneled to inquire into right of property. If jury finds for claimant, he is given judgment for his costs, and if it further finds he is then entitled to possession of property, it is ordered delivered to him. If jury finds for plaintiff, he is given judgment against claimant for his costs. Nonresident claimant must file security for costs as in case of nonresident plaintiffs. (11-29).

*Release of Property.*—Person from whose possession property is taken may obtain same by entering into bond to officer, approved by him, in double value of property, conditioned that property will be forthcoming to answer judgment. (11-14). In lieu of said bond defendant desiring return of attached property may give like bond and security in sum sufficient to cover debt and damages sworn to, with interest, damages and costs, conditioned that defendant will pay plaintiff amount of judgment and costs rendered on final trial within 90 days after judgment, or a recognizance in same substance may be taken in open court, entered of record, and approved by court; on forfeiture of which judgment may be rendered and execution issued. In either case attachment is dissolved, property restored, and cause proceeds as if commenced by summons. (11-15).

Amendment of pleadings may be permitted on motion to pleadings or summary judgment or at trial, if wrong remedy sought, court to consider effect on defendant as well. (11-44).

## Indiana Law Digest

### Attachment

New Rules of Civil Procedure extend prior remedies of attachment. (3-501; IC34-1-11-1; Rule TR 64[B]).

*Actions in Which Allowed.*—Attachment is allowed upon any claim of creditor if plaintiff's complaint is for money or to determine rights in property or obligation attached. (3-501; IC34-1-11-1; Rule TR 64[B]). See subhead Grounds, *infra*.

*Courts Which May Issue Writ.*—Any court of first instance having civil jurisdiction and any justice of the peace when the principal claim is within his jurisdiction. (3-544; IC34-1-11-4).

***In Whose Favor Writ May Issue.***—Any plaintiff, whether resident or nonresident.

***Claims on Which Writ May Issue.***—Attachment may issue on a claim which is not payable in the State. (96 Ind. App. 325, 183 N.E. 699). As to unmaturred claims, see *infra*, subhead Grounds.

***Time for Issuance.***—Attachment may issue any time, or during pendency of action after filing of complaint, even though summons has not been served (183 N.E. 699), and on Sundays in emergencies (3-511; IC34-1-11-8).

***Grounds.***—An attachment may be issued when defendant is a foreign corporation or a nonresident, or being a resident, if he secretes himself so that summons may not be served upon him, or is secretly about to leave State, or has departed therefrom, or is removing his property therefrom or has sold or is about to sell or to dispose of his property subject to execution with intent to defraud or delay his creditors, or is a person whose residence and whereabouts are unknown and cannot be determined after reasonable investigation before commencement of action. (3-501, 502; IC34-1-11-1, 2; Rule TR 64[B]).

***Unmatured Claims.***—Attachment may not issue on unmaturred claim, except on ground that defendant is removing or has removed his person, has sold or is about to sell or convey his property with intent to defraud or is removing or about to remove property subject to execution leaving an insufficient excess subject to execution. (3-501; IC34-1-11-1).

***Proceedings to Obtain.***—Plaintiff must file an affidavit showing the nature and amount of his claim and existence of one or more of the statutory grounds for attachment. (3-507; IC34-1-11-41). Writ of attachment against defendant's real estate or his interest is effectively served by recordation of action in appropriate lis pendens record, and, unless vacant, by serving writ of attachment or notice thereof upon person in possession of land. (Rule TR 64[B][6]).

***Attachment Bond.***—Any plaintiff, except the State, must file a written undertaking with security to the approval of the county clerk conditioned that plaintiff will prosecute the attachment (3-508, 543; IC34-1-11-5, 39) and pay defendant all damages he may sustain if proceedings prove to be wrongful or oppressive (3-542; IC34-1-11-38).

***Levy and Lien.***—Attachment must be levied first on personalty and may be levied on realty if sufficient personalty is not found. (3-515; IC34-1-11-11).

***Indemnity.***—There is no statutory authority for the officer to demand indemnity before making a levy.

Lien attaches from time of delivery of property to sheriff. (3-513; IC34-1-11-10).

***Release of Property.***—Defendant or any other person having had possession may secure release of property by giving bond for the appraised value of the goods attached or for payment of any judgment which plaintiff may secure. (3-516; IC34-1-11-13).

***Sale.***—Perishable goods held under attachment may be ordered sold at public auction by the court upon reasonable notice. (3-520; IC34-1-11-18).

***Third Party Claims.***—Where personal property is in the possession of an officer by virtue of a writ of attachment and a third person brings

an action to replevy the same, such officer may demand of the attachment plaintiff an indemnifying bond against loss for attorney's fees or judgment for damages and costs, and after five days in default thereof may deliver the property to replevin plaintiff. (3-517; IC34-2-4-1).

Consigned goods are attached subject to lien of consignee. (3-514; IC34-1-11-16).

Adverse claimants to attached property may be examined under oath. (3-518; IC34-1-11-15).

*Intervention of Other Creditors.*—Any other creditors of defendant may enter complaint and file their affidavits and bonds and prove their claims as parties to the original action at any time before final judgment. The money realized from sale and garnishees after paying costs and expenses is shared pro rata on the amount of all claims filed. The original attaching creditor has no preference. (3-534, 540; IC34-1-11-31, 37).

Dismissal by original creditor does not affect intervening creditors (3-535; IC34-1-11-32).

*Appeals.*—After judgment for the defendant, attached property is released unless plaintiff files notice of appeal within 72 hours. (3-537; IC34-1-11-34).

## Iowa Law Digest

### Attachment

(c. 630).

Attachment may be obtained in any civil action, by any plaintiff, including nonresident or foreign corporation, provided one or more of the necessary grounds exists. It may issue on a claim not payable in the State.

Grounds for attachment are that defendant is: (1) A foreign corporation or acting as such; or (2) a nonresident; (3) is about to remove property from the State without leaving sufficient to pay debts; (4) has disposed; or (5) is about to dispose of property with intent to defraud creditors; (6) has absconded so that ordinary process cannot be served on him; (7) is about to remove permanently out of the county and has property therein not exempt; or (8) is about to remove permanently out of the State, and refuses to pay or secure plaintiff's debt; (9) is about to remove property out of county with intent to defraud creditors; (10) is about to convert property into money in order to place it beyond reach of creditors; or (11) has property or rights in action which he conceals; or (12) that debt is due for property obtained under false pretenses. Attachment may be had before debt due on grounds 4, 5, and 12, or where defendant has removed or is about to remove from State and refuses to secure payment of debt, if plaintiff did not know of removal or contemplated removal when debt contracted.

*Proceedings.*—Plaintiff must file petition sworn to by him, or his agent or attorney (knowing the facts) setting out the claim and one or more grounds for attachment.

*Bond.*—Plaintiff must give bond with resident surety approved by clerk of court in penalty double value of property sought to be attached, in no event less than \$250 in district court or \$50 in justice court. Where only real property is attached, bond must be in penalty fixed by court or clerk.

*Levy.*—The sheriff must, as nearly as the circumstances of the case will permit, levy upon property 50% greater in value than the amount of the claim. Any property not exempt from execution may be attached.

*Indemnity.*—There is no statute authorizing the officer to demand indemnity before levying.

*Priorities.*—In case of two or more attachments, the attaching creditors do not share pro rata, but the attachments have priority in the order of their levy.

A valid attachment levied before a general assignment for the benefit of creditors is not affected thereby.

*Release.*—The defendant, or any person in possession of any attached property, or any person making affidavit that he has an interest in same, may, at any time before judgment, discharge the property attached by giving bond with security to be approved by the sheriff, or after return of the writ, by the clerk, in a penalty at least double value of property. Bond must be filed with clerk of court, (639.45).

*Sale.*—Where the property attached is perishable, the sheriff may summon three persons having the qualification of jurors to examine it. Defendant, if within country, must have 3 days notice of the hearing. If it is the opinion of those who examine the property that it should be disposed of, they must specify in writing a day beyond which the property should not be kept. If this day occurs before trial, the property must be sold as goods are sold on execution. An earlier sale may be made if the condition of the goods warrants it. Sale may be made on written consent of defendant without such finding. (639.48,50).

*Third Party Claims.*—Any third party may, before sale of attached property or before payment to plaintiff of the proceeds thereof or any attached debt, present his verified petition to the court disputing the validity of the attachment or stating a claim to the attached property and setting forth the facts upon which the claim is founded. (639.60).

Uniform Commercial Code enacted, effective July 4, 1968. See topic Commercial Code.

## Kansas Law Digest

### Attachment

*Actions in Which Allowed.*—At or after commencement of any civil action. (60-701).

*Court Which May Issue Writ.*—District court (60-701) and some lower courts in which cases procedure and grounds are substantially same but governed by Code of Civil Procedure for courts of limited jurisdiction (61-1601 et seq.) with exceptions.

*In Whose Favor Writ May Issue.*—Any plaintiff, resident or non-resident.

*Against Whom Writ May Issue.*—Any defendant or defendants, resident or nonresident.

*Claims Upon Which Writ May Issue.*—An action may be commenced and attachment issued on a demand not yet due in any of cases mentioned under subhead Grounds (infra), except those in clauses (1) and (2), but no judgment may be rendered until maturity of the demand. (60-702). No order of attachment shall be issued before judgment where defendant's property is in possession of third party and is in form of earnings due and owing. (60-703).

**Grounds.**—When the defendant whose property is to be attached (1) is a nonresident or a foreign corporation; (2) has absconded or concealed himself so that summons cannot be served upon him, or is about to move out of State with intent of changing his domicile; (3) is about to remove his property or effects out of this State; (4) is about to convert his property into money for purpose of placing it beyond the reach of his creditors; (5) has concealed, removed, assigned, conveyed or otherwise disposed of his property so as to hinder or delay his creditors or is about to do so; (6) fraudulently contracted the debt or incurred the liability; (7) is liable for damages for injuries arising out of the commission of some felony or misdemeanor, or the seduction of a female; (8) has failed to pay the price or value of any article or thing delivered which by contract he was bound to pay upon delivery. (60-701).

**Proceedings to Obtain.**—By filing an affidavit stating that the plaintiff has a just claim, the amount thereof, and that plaintiff has good reason to believe and does believe in the existence of one or more grounds for attachment. (60-603, 4).

**Attachment Bond.**—Required except in actions instituted on behalf of State of Kansas or a county thereof, or where defendant is a nonresident or foreign corporation not qualified to do business in this State and is not a common carrier or public utility, (60-703). Bond is executed by plaintiff with sufficient sureties, in a sum double amount of plaintiff's claim, or such lesser amount as may be approved by court order. (60-705).

**Levy.**—Order commands officer to attach the property of defendant, real or personal, tangible or intangible, or so much thereof as will satisfy plaintiff's claim, or such specific property as plaintiff directs, and to summon as garnishees all persons in whose possession any personal property or money of the defendant may be. (60-706).

**Indemnity.**—No statutory authority for levying officers to require.

**Priorities.**—Orders of attachment are levied on in the same order in which they were received by levying officers. If several attachments issue out of different courts, all questions arising must be determined by court out of which was issued first attachment served, with preference given to a court of general jurisdiction over one of limited jurisdiction regardless of time of service. (60-713).

**Release of Property.**—Defendant or any other person in whose hands property of defendant is found may retain or regain possession at any time before final judgment or sale of such property under court order by giving bond with sufficient sureties in an amount which is either, at option of party giving the bond, (1) double amount of plaintiff's claim, or (2) double appraisal of the property, conditioned that such property or value thereof shall be available to apply on any judgment rendered. (60-707).

**Third Party Claims.**—Any person claiming an interest in any property attached and, in discretion of the judge, any creditor of a party if creditor's claim is liquidated in amount will be permitted to intervene and court will adjudicate their respective rights. (60-713).

**Sale.**—When property seized is likely to perish or materially depreciate in value before probable termination of the suit, or keeping of which would be attended with unreasonable loss or expense, the property may be ordered sold. (60-710). See topic Executions.

*Vacation or Modification.*—Any interested person may file a motion to dissolve attachment, verified by affidavit, putting in issue sufficiency of proceedings or truth of the facts alleged in attachment affidavit. Court may permit amendments to the petition or affidavit. (60-712).

Discharge of attachment and restitution of property is possible at any time before judgment if defendant or person in his behalf executes an undertaking, with sureties, in double amount of plaintiff's claim to effect that defendant will perform judgment of court. (60-707).

*Receiver.*—Receiver may be appointed in aid of attachment. (60-711).

## Kentucky Law Digest

### Attachment

*Actions in Which Allowed.*—A general attachment may be had, where grounds therefor exist, in any action for recovery of money. (KRS 425.185). Specific provisions authorize attachment in suit to enforce mortgage or other lien or interest in personal property or in suit to void fraudulent sale of property (KRS 425.430) and in action by landlord for rent due from original tenant (KRS 383.020).

*Courts Which May Issue Writ.*—Writs may be issued from circuit court, county or quarterly courts and police or justice's courts if court has jurisdiction over subject matter of claim for money, property, rent due, etc. (KRS 425.435; 383.030), except that returns for over \$200 for rent due must be before circuit court (KRS 383.030).

*In Whose Favor Writ May Issue.*—Remedy by attachment is available to any plaintiff, including nonresident and foreign corporation.

*Against Whom Writ May Issue.*—Property of any defendant in civil action is subject to attachment, unless exempted by statute. Writ may issue against any person holding property of defendant otherwise than as security; as, for example, to attach funds in court (KRS 425.245), joint property (KRS 425.250), and funds due governmental employees (KRS 427.130).

*Claims on Which Writ May Issue.*—Claim must be for recovery of money. It is not necessary that claim sued on should have accrued or become payable in Kentucky, if otherwise the court has jurisdiction.

Before a debt or liability on contract becomes due, an equitable action may be brought for indemnity, and an attachment against defendant's property or order of arrest obtained by order of court on grounds similar to those hereinafter stated and after bond given. (KRS 425.375 (1), 425.425).

By special statute (KRS 383.030) claim for rent may be collected by attachment issued by a justice of the peace, police judge or judge of quarterly court of the county, on affidavit filed by landlord or his agent, showing that rent is owing and will probably be lost unless attachment is issued.

An attachment may also be issued in an action for recovery of money due on contract, judgment or award, if defendant therein has no property in this State subject to execution or not enough thereof to satisfy plaintiff's demand and collection of such demand will be endangered by delay in obtaining judgment and return of no property found.

Likewise an attachment may be obtained in an action to recover possession of personal property which has been ordered to be delivered to plaintiff, where such property or part thereof has been disposed of, concealed or removed so that sheriff cannot execute order for its delivery. (KRS 425.185). In this case value of property thus done away with is measure of relief by attachment.

*Limitations Upon Right to Attach.*—Attention is called to limitations imposed by the following laws, upon right to attach goods covered by negotiable documents unless such documents are impounded by the court: (a) Uniform Commercial Code (KRS 355.7-602); (b) United States Code, title 49, § 103, affecting order bills of lading issued in interstate commerce.

Grounds of attachment, other than as heretofore stated, are that the defendant, or one or more of several defendants: (1) Is a foreign corporation or a nonresident of the State; (2) has been absent from the State for 4 months; (3) has departed from the State with intent to defraud his creditors; (4) has left the county of his residence to avoid the service of summons; (5) so conceals himself that a summons cannot be served upon him; (6) is about to remove or has removed his property, or a material part thereof out of this State, not leaving enough therein to satisfy plaintiff's claim, or the claims of the said defendant's creditors; (7) has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors; or (8) is about to sell, convey, or otherwise dispose of his property with such intent. But an attachment may not be granted on the sole ground that the defendant is a foreign corporation or a nonresident of this State except in action on a debt or demand arising on contract. (KRS 425.185; 154 Ky. 162, 156 S.W. 1079).

*Exemptions.*—As to exempt property, see topic Exemptions.

*Proceedings to Obtain.*—To obtain an attachment before judgment and return of "No property found" on execution, the plaintiff must file an affidavit, showing: (1) Nature of plaintiff's claim; (2) that it is just; (3) the amount which the affiant believes the plaintiff ought to recover; and (4) the existence of some one of the grounds above enumerated. (KRS 425.195).

*Attachment Bond.*—In order to procure attachment, plaintiff must give bond, not exceeding double the amount of his claim, with probable costs, conditioned to pay defendant all damages which he may sustain by reason of the attachment if it prove wrongful (KRS 425.205), except where the attachment issues after return of "no property found" on execution (see Executions, subhead Supplementary Proceedings) or where the attachment is issued in a divorce proceeding, for maintenance or alimony, against the husband's property when it appears that the husband is about to remove himself or his property, or a material part thereof, out of the State or that there is reason to suspect that he will fraudulently sell, convey or conceal his property (KRS 403.080; 100 Ky. 696, 39 S.W. 244). One surety on the bond is sufficient, provided he has property in the State, subject to execution, in double the amount of the bond.

*Lery.*—Attachments are levied in the following manner (KRS 425.225): (1) Upon real property, by leaving a copy of the order with

the occupant thereof, or, if no occupant, by posting such copy in a conspicuous place thereon; (2) upon tangible personal property, by taking it into custody and holding it subject to order of court, unless it is already in custody of another officer; (3) upon intangible personal property, as in cases of garnishment (q.v.).

*Indemnity.*—If officer required to levy on personal property doubts whether it is subject to attachment, he may demand an indemnity bond from plaintiff. (KRS 425.265).

*Lien and Priorities.*—An attaching creditor has a lien on the property to which the order is directed. (KRS 425.270). Several orders of attachment against the same defendant rank according to the times of their delivery to the sheriff (KRS 425.220), except that all attachments executed on the same day on a fund held in court share ratably in such fund (KRS 425.245).

*Notice Required to Preserve Lien of Attachment.*—In order to preserve lien of attachments upon real estate of defendants affected thereby, a memorandum giving the style and nature of the case, the amount of the attachment, the names of the parties, and a description of the real estate attached, must be filed in the clerk's office of the county in which the land is located.

This applies also to attachments issued by United States district court. (KRS 382.440-382.470).

*Release of Property.*—Sheriff may deliver attached property to person in whose possession it was found, upon such person's execution of bond to plaintiff, with surety, binding obligors in double the value of the property, that defendant will perform the judgment of the court, or that the property or its value will be forthcoming. (KRS 425.280-1). Or, before judgment, defendant may execute bond, with surety, to plaintiff, to effect that defendant shall perform judgment of the court. Upon execution of such bond, attachment will be dissolved and restitution of the property made. (KRS 425.035). Or, of course, the property may be recovered upon judgment for defendant. (KRS 425.330).

*Sale.*—Attached property may be sold by order of court during pendency of action if, by reason of its perishable nature or cost of keeping it, a sale would be beneficial to the parties. (KRS 425.200).

*Third Party Claims.*—Sheriff may not take possession of property owned by defendant jointly or in common with another person, until plaintiff executes bond, with surety, to such other person, that plaintiff shall pay such damages as other person may sustain through wrongful suing out of order, not exceeding double amount of plaintiff's claim. (KRS 425.250).

*Vacation or Modification.*—Defendant may, before judgment, after notice to plaintiff, move court for additional security on part of plaintiff and court may thereupon vacate the order of attachment, unless sufficient security is given by plaintiff within a reasonable time fixed by the court. (KRS 425.370).

### Louisiana Law Digest

In case of an unmaturing claim, attachment may issue on any of the aforementioned grounds or on the ground that the debtor is about to remove his property out of the State before the debt becomes due. (C.C.P. 3543).

In case of a money demand against a nonresident, attachment lies regardless of nature or origin of claim, liquidated or unliquidated character or certainty or uncertainty of amount demanded. (C.C.P. 3542).

Attachment on ground of nonresidence lies against a foreign corporation which has not qualified in the State, but not against one which has qualified. (152 La. 1075, 95 So. 227).

*Property Subject to Seizure.*—A creditor may obtain a seizure against all property belonging to the debtor, whether same be in debtor's possession or in that of third person. (C.C.P. 3503, 2411).

*Proceedings.*—Attachment issues upon filing of petition showing grounds for writ, with verification or affidavit by creditor, his counsel or agent. (C.C.P. 3501). *Case:* Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), held notice and an opportunity to a hearing prior to seizure of property constitutionally essential under due process clause.

Attachment may be obtained by leave of court on affidavit and giving bond, provided the usual petition is filed on the next day. (C.C.P. 3502).

*Bond.*—Creditor must file bond equal to debt, exclusive of interest and costs; except that bond need not exceed \$250, unless court orders otherwise, where nonresidence is sole ground of attachment. (C.C.P. 3544).

*Issuance of Writ.*—Writ may issue on legal holiday (C.C.P. 268), and whether or not debt is liquidated or has matured. (C.C.P. 3542, 3543).

Levy on personal property is made by sheriff taking physical possession of same; on real property by placing keeper on property or, by service of notice of seizure upon owner, filing of notice with recorder of mortgages for parish and entry of data regarding the filing with recorder of mortgages and description of property in sheriff's seizure book. (T. 13, §§ 3851–3861, as am'd Act 32 of 1960).

*Release.*—Defendant may secure release of attachment by filing bond in amount exceeding by one-fourth the value of property attached or the amount of the claim, whichever is less. (C.C.P. 3507, 3508).

*Sale.*—Property attached, except perishables, may be sold only under execution after judgment. (C.C.P. 3510).

Preferences between attachments are in order of dates of service of writs.

*Dissolution.*—Attachment may be dissolved on rule to show cause. (C.C.P. 3506).

*Third Party Claims.*—Third person may intervene to protect interest in property attached. If such person claims ownership of property, sale may be enjoined; if he claims a prior lien, sale is not enjoined but rights of parties are referred to proceeds of sale. (C.C.P. 1092, 1094, 1098, 2592, 2643).

*Vacation or Modification.*—If value of property seized under attachment exceeds what is reasonably necessary to satisfy plaintiff's claim, defendant may secure release of excess.

## Attachment

*Actions in Which Allowed.*—Attachment is a conservatory writ and may be obtained in any action for a money judgment. (C.C.P. 3542).

*In Whose Favor Writ May Issue.*—Attachment may be obtained by any plaintiff, including a nonresident or foreign corporation.

*Against Whom Writ May Issue.*—Attachment may issue against resident or nonresident.

*Claims on Which Writ May Issue.*—Attachment may issue on an unmatured claim or a claim which is not payable in the State.

*Grounds.*—Attachment may be granted on ground that debtor: (1) Has departed from State permanently, or is about to do so before judgment can be obtained and executed against him; (2) is nonresident who has no agent for service of process within State; (3) conceals himself with intention to avoid citation; (4) with intent to defraud creditors, or to give unfair preference to some of them, has mortgaged, assigned or otherwise disposed of his property, or part thereof, or is about to do so; (5) has converted his property into money or other evidences of debt, with intent to place it out of reach of creditors, or is about to do so. (C.C.P. 3541).

## Maine Law Digest

### Attachment

*Actions in Which Allowed.*—All actions.

*Courts Which May Issue Writ.*—Personal property may be attached on writs from district court. (T. 14, § 4151). Real property may be attached on writ from district court having jurisdiction. (T. 14, § 4451). Real and/or personal property may be attached on writ issued by superior court.

*In Whose Favor Writ May Issue.*—May issue in favor of resident, nonresident or foreign corporation.

*Against Whom Writ May Issue.*—Against any resident of the State or against any nonresident having property in the State.

*Claims on Which Writ May Issue.*—No attachment may be made until debt is due.

*Proceedings to Obtain.*—No property, including real estate, may be attached unless such attachment is for specified amount approved by court. Such order may be entered only after notice to defendant, hearing and finding by court of reasonable likelihood that plaintiff will recover judgment, including interest and costs, equal to or greater than amount of attachment over any liability insurance. Attachment of property must be within 30 days of order approving attachment. (M.R.C.P. 4A[c]).

Order approving attachment may be entered *ex parte* only where plaintiff shows either (1) Defendant not subject to personal jurisdiction, or (2) clear danger that defendant will remove property from State, or (3) immediate danger that defendant will damage or destroy property. Certificate by plaintiff's attorney of amount of liability insurance of defendant required. Motion for *ex parte* order shall be supported by affidavit. (M.R.C.P. Rule 4A[f]). Affidavit shall be upon affiant's own knowledge, information or belief. (M.R.C.P. 4A[h]). Attachment must be recorded.

*Lery.*—If on real estate then within 5 days after attachment officer must file in registry of deeds in county where some part of estate lies an attested copy of his return relative to such attachment with value of property he is commanded to attach. (T 14, §§ 4451-4457, 4601-4613).

If attachment is of personal property, officer must take possession of it either by removing the property or putting in a keeper. (T. 14, § 4152).

*Bulky Goods.*—Officer may file attested copy of his return in town clerk's office where attachment made within 5 days thereafter. This has the same effect as if the property had remained in his possession. (T. 14, § 4154).

*Indemnity.*—Officer may require indemnity before levying.

*Attachment Bond.*—Any attachment made on an original writ, against an absent defendant, continues for 1 year and 60 days after judgment is rendered, when no bond is given; and when bond is given it continues for 60 days after such bond is filed with the clerk of the court. The bond must be deposited with the clerk of the court, who decides upon the sufficiency of its sureties, subject to appeal. (T. 14, § 4701).

*Priorities.*—Creditor first attaching may exhaust the amount covered by his attachment; but subsequent creditors may petition court for permission to defend prior suits. (T. 14, § 201).

*Sale.*—Personal property may be sold by consent of debtor and creditor, proceeding as if it were a sale on execution. (T. 14, § 4351).

*Perishable goods* may be sold without consent of debtor before or after entry of actions. Procedure for sale set forth in the statutes. (T. 14, §§ 4158; 4352–4355).

*Release of Property.*—Attachments are dissolved: (1) By an assignment in insolvency, of defendant, on proceedings begun within 4 months; (2) by death of the defendant, and commission of insolvency before levy; but the attachment of personal property continues in force after death of debtor as if living, unless, before a sale thereof on execution, his estate is decreed insolvent; (3) by judgment for defendant; (4) by lapse of 60 days, or, in case of absent defendant, 1 year and 60 days, without levy after judgment; (5) by reference of the suit and all demands between the parties thereto; (6) by increasing the demand for relief of the complaint, and judgment for the plaintiff thereon, unless only claims originally stated were allowed plaintiff; (7) by delivery to the office of a bond to plaintiff in a penal sum not exceeding the ad damnum of the writ, with approved sureties, conditioned that within 60 days after judgment, or after adjournment, the defendant will pay the plaintiff or his attorney the amount of the judgment, with costs, such bond to be approved as to penal sum and sureties by plaintiff or the court; (8) if made within 4 months before the filing of a complaint wherein a receiver is appointed. (T. 14, §§ 4451–4457, 4601–4613). Ex parte attachment may be dissolved or modified without submitting to personal jurisdiction upon motion by defendant on 2 days notice; plaintiff has burden of justifying any finding which defendant has challenged by affidavit. (M.R.C.P. 4A[g]). Fee for discharging attachment is \$3. (T. 33, § 751).

*Third Party Claims.*—Where personal property attached or seized on execution is claimed by virtue of a mortgage, pledge or other lien, claimant must give attaching officer at least 48 hours written notice of his claim. Thereupon the officer or attaching creditor may restore the property or pay the claim or attaching creditor may summon claimant to answer as to his claim. If claimant establishes validity of his

claim court may direct attaching creditor to pay same or suffer attachment to be vacated; if claimant fails to establish his claim he cannot hold property. If attaching creditor pays claim, security must be assigned to him. (T. 14, §§ 4251-4252). Attachment may be made by party bringing counterclaim, crossclaim, or third-party complaint in same manner as upon original claim. (M.R.C.P. 4A[d]).

## Maryland Law Digest

### Attachment

*Actions in Which Allowed.*—Attachment may issue against property or credits, matured or unmatured, of nonresident or absconding debtor in action ex contractu, whether damages are liquidated or unliquidated, or in an action ex delicto. Attachment may issue against property or credits of resident defendant returned *twice non est*, of debtor about to conceal or transfer property with intent to defraud and of an adult nonresident heir or devisee only in an action ex contractu for liquidated damages. (courts art. §§ 3-304, 3-305; R. P. G41).

*Courts Which May Issue Writ.*—Writ may be issued by court of record. (courts art. § 3-301). Judges of district court have jurisdiction to issue writ to extent of their jurisdiction, as to which, see topic Courts. (M.D.R., c. 1100).

*In Whose Favor Writ May Issue.*—Any plaintiff, including a nonresident or foreign corporation, may obtain an attachment. (courts art. § 3-302).

*Against Whom Writ May Issue.*—Attachment may issue against any defendant as to whom sufficient grounds (see *infra*) are shown to exist. The writ may issue against a married woman.

*Claims on Which Writ May Issue.*—It is not necessary that claim sued on be matured or payable within State. Attachment may issue on claim prior to maturity. (courts art. § 3-305; R. P. G41).

*Grounds.*—Attachment may issue:

(1) On a judgment or decree. (courts art. § 3-301; R. P. 623; F1-F5).

(2) On original process (a) when debtor is a nonresident; or if a corporation, when it has no resident agent or when two unsuccessful attempts to serve process have been made on different business days; (b) when two summonses against resident defendant have been returned *non est*; (c) when debtor absconds or is about to abscond from this State; (d) when debtor is about to or has assigned, disposed of or concealed his property or some part thereof with intent to defraud his creditors; (e) when debtor has fraudulently contracted debt or incurred obligation respecting which action is brought; (f) when debtor is about to or has removed his property or some part thereof out of this State with intent to defraud creditors; (g) when an adult nonresident is entitled by descent or devise to land of debtor lying within State. (R. P. G40; courts art. § 3-303; art. 23, § 96).

*Proceedings to Obtain.*—(1) On a judgment or decree, an attachment will be issued by the clerk of the court in lieu of other execution without any formality being required other than a written application on a printed form (R. P. 623); (2) on original process, the clerk of the court will issue an attachment upon the plaintiff filing (i) a declara-

tion stating plaintiff's claim, (ii) an affidavit by plaintiff that defendant is indebted in the amount claimed (or verifying the facts where unliquidated damages are claimed) and stating facts which constitute grounds for an attachment on original process, (iii) original or true copies of documentary evidence of the claim, such as note, invoice, etc., (iv) instructions to sheriff as to description and location of property to be attached and (v) in attachment on grounds of fraud, or in actions *ex contractu* for unliquidated damages or *ex delicto*, a bond must be filed in the amount alleged due. (R. P. G42). Writ of attachment may be served by posting copy on real or leasehold property or by seizing tangible personalty. In addition, clerk must issue writ of summons to defendant. Where defendant cannot be served, plaintiff must make reasonable efforts to notify defendant of the attachment. Plaintiff must also notify person having custody of the property attached. (R. P. G46, 48). Writ of attachment by way of garnishment may be served upon person having property or credits belonging to defendant. (R. P. G47). Amendment of proceedings is liberally allowed. (R. P. 320).

Successive writs of attachment may issue on original affidavit and proof. (R. P. G49).

**Attachment Bond.**—No bond is required when attachment is issued on judgment or decree. No bond is required in attachment on original process when contract claim is liquidated or when resident debtor has twice been returned non est. In actions for unliquidated damages, or fraud or in actions *ex delicto* against a nonresident or absconding debtor, bond must be given for amount claimed conditioned on paying costs and damages suffered by defendant or others interested. (R. P. G42). Additional bond may be ordered upon application of defendant, garnishee or other person interested. (R. P. G53, G58). Property may not be condemned or sold without giving bond. (R. P. G59).

**Levy and Property Subject.**—All property of defendant of all kinds and wherever situated, including credits not due and property or credits of defendant in hands of another and including debt due defendant upon a judgment or decree, may be attached (courts art. § 3-305; R. P. G45); except that proceeds of life insurance and annuity contracts and fraternal order benefits are not subject to attachment (art. 48A, §§ 328, 385), benefits under Workmen's Compensation Law are not subject to attachment prior to delivery of voucher (art. 101, § 50) wages or hire of laborer or employee not yet due and the greater of \$120 per week or 75% of a week's wages or hire earned and due cannot be attached, which exemption cannot be waived (except that in Caroline, Kent, Queen Anne's and Worcester Counties, greater of 75% of wages due or 30 times Federal minimum hourly wage then in effect is exempt) (art. 9, § 31), and salaries of National, State or municipal officers or employees and money, property or credits in hands of National, State or municipal governments or in custody of law are exempt (8 Md. 95; 142 Md. 52, 120 Atl. 235; 168 Md. 440, 178 Atl. 108).

No levy can be made against any property of an estate, although security interests may be enforced in appropriate proceedings. (est. and tr. art. § 3-114).

Wages of nonresidents are attachable on judgment, warrant or two non ests in same manner and to same extent as if residents. (art. 9, § 32).

Securities may be attached if actually seized or if surrendered to issuer. (art. 23, §§ 112, 113; art. 95B, § 8-317).

Under Uniform Commercial Code, effective Feb. 1, 1964, defendant's rights in collateral may be attached. (art. 95B, § 9-311).

Creditors of husband may attach money or restrain by injunction payment of money deposited to wife's credit if in fraud of their rights. (art. 45, §§ 1, 2).

*Indemnity.*—Sheriff may demand indemnity bond if he has reasonable doubt as to ownership of property on which he is directed to levy.

*Lien and Priorities.*—Attachments are liens and have priority in order in which levied. Attaching creditors first levying upon personalty take to exclusion of those whose levy is subsequent or those not levying, even though latter be judgment creditors.

*Release of Property.*—Attachment may be dissolved at any time on appearance of every defendant and filing of approved bond in value of goods attached or double plaintiff's claim, whichever is less, conditioned to satisfy judgment for plaintiff, and may be quashed at any time for matters apparent on or dehors the record. (R. P. F1, G51, G57).

*Sale.*—Attached property may be sold if court deems this expedient (R. P. G60), but in practice this is usually limited to perishable property. After judgment of condemnation the plaintiff is entitled to execution thereof and to have any property that has been condemned sold. (R. P. F1, F4, G59, G60). For procedure in sale see topic Executions.

*Third Party Claims.*—Claimants of property attached may intervene by petition, and on their giving bond the property may be discharged from the levy. (R. P. F1, G58).

*Vacation or Modification.*—Where a defect is apparent on the face of the proceedings, an attachment may be quashed on motion by the defendant or by a third person claiming interest in the property attached. (2 Md. 334; 182 Md. 601, 35 A.2d 641).

## Massachusetts Law Digest

### Attachment

*Caveat.*—Massachusetts prejudgment attachment of personal property statute, c. 214, § 7, declared unconstitutional. See 349 F. Supp. 741 (D. Mass. 1972). Statute governing prejudgment attachment of real property, c. 223, §§ 42, 62-66, declared unconstitutional. See 365 F. Supp. 1299 (D. Mass. 1973). This case nullifies attachments of real property made after Aug. 7, 1973. Attachments prior to Aug. 7, 1973, are still valid. See, however, supplement for anticipated decision confirming or rejecting prior attachment validity. Constables and sheriffs will not serve prejudgment attachments unless issued pursuant to new procedure. Mass. R. Civ. P., Rule 4.1, effective July 1, 1974, provides revised attachment procedure, requiring notice and hearing, except on showing of limited exigent circumstances, applicable to goods, chattels and other property, as well as real estate. Supreme Judicial Court (SJC) Rule 3-27 sets forth equivalent procedure applicable to district courts. There is a case pending in Mass. Federal district court with respect to constitutionality of repossession of automobiles without prior notice or hearing. See *Boland v. Essex County Bank and Trust Co.*, Civil Action No. 723299 G. Note: Prac-

tice in those courts governed by Mass. R. Civ. P. (see topic Actions, catchline Caveat) is digested under catchline superior court. Practices in district court and Boston municipal court is digested under catchline district court. Practices common to both superior and district court is digested without separate designation.

*Actions in Which Allowed.*—In all personal civil actions in which a debt or damages are recoverable, property may be attached upon original writ and held as security to satisfy such judgment or decree as plaintiff may recover, but no attachment of real estate may be made on a writ returnable before a district court unless damages demanded (determined by ad damnum of writ) exceed \$20 (c. 223, § 42, am'd 1973, c. 1114, § 94) and, in action or suit for an amount which is liquidated or ascertainable by calculation, no attachment by trustee process or otherwise may be made for larger sum than amount of claim and amount reasonably necessary to include interest and costs (c. 223, § 42A).

*Courts Which May Issue Writ.*—All courts may issue writ of attachment.

*In Whose Favor Writ May Issue.*—Attachments may be made in suits by or against nonresidents as well as in suits by or against residents. (c. 227, § 1).

*Against Whom Writ May Issue.*—See subhead In Whose Favor Writ May Issue.

*Claims on Which Writ May Issue.*—There is no statutory requirement that the claim sued on should be payable within the State. No direct attachment will lie to secure a claim not yet due.

In actions or claims against the estate of a deceased person there can be no attachment other than a "chip" (nominal) attachment (262 Mass. 43, 184 N.E. 677), except by permission of the probate court where the executor or administrator was appointed (c. 230, § 7).

Attachment may issue in action for divorce (c. 208, § 33) or separate support.

*Grounds.*—Plaintiff must show that there is a reasonable likelihood that he will recover judgment, including interest and costs, in an amount equal to or greater than amount of attachment over and above any liability insurance shown by defendant to be available to satisfy judgment. If plaintiff seeks a writ of attachment, ex parte, plaintiff must show in addition to above, either: (1) That person of defendant is not subject to jurisdiction of court in action; (2) that there is a clear danger that defendant if notified in advance of attachment of property will convey it, remove it from State or will conceal it; or (3) there is immediate danger that defendant will damage or destroy property to be attached. (Rule 4.1, Mass. R. Civ. P.; see also SJC Rule 327).

*Proceedings To Obtain.*—Plaintiff must file a motion for approval of attachment along with complaint (declaration in district court; see topic Actions) and affidavit in support of motion. Copies of motion, complaint, affidavit and notice of hearing must be served on defendant. Notice of hearing must inform defendant that by appearing to be heard on motion for approval of an attachment he will not thereby submit himself to jurisdiction of court nor waive service of complaint and summons upon him in manner provided by law. Minor procedural variations exist depending on whether attachment is

sought in superior court (Rule 4.1, Mass. R. Civ. P.) or in district court. (SJC Rule 3 27).

**Attachment Bond.**—No bond is required to obtain attachment, but attaching officer may require sufficient security if there is reasonable doubt as to ownership of personal property either before or after attachment (c. 223, § 45A) except in trustee process (c. 246, § 1, am'd 1973, c. 1114, § 259).

There are certain restrictions on right to attach railroad cars and engines and steamboats in use making regular passages (c. 223, § 43), ships and vessels (c. 223, § 44, am'd 1973 c. 1114, § 96), personal property used in printing and publishing a newspaper (c. 223, § 45, am'd 1973, c. 1114, § 96) and motor vehicles (see *infra* this topic).

**Levy of Attachment on Real Estate.**—Every original writ for the attachment of real estate shall contain the name and last known residence of each defendant. Original writ for attachment of personal estate does not require address of defendant. Officer's return on writ that attachment has been made constitutes valid attachment as between parties of defendant's right, title and interest in unregistered real estate not exempt by law. No special description of land attached is required. To be effective against subsequent creditors or bona fide purchasers, attachment must be recorded at registry of deeds of district where land lies. Such attachment holds all unregistered real estate, record title to which is then in defendant's name, including property conveyed by a deed not recorded before attachment is recorded. (c. 223, § 62-66, am'd 1973, c. 1114, § 104). Attachment of registered land must be filed and registered in office of assistant recorder for registry district where land lies. (c. 185, § 78).

Attachment made after Aug. 23, 1945, expires 6 years from recording date unless renewed for subsequent periods of 6 years. (c. 223, § 114A).

If an encumbrance is removed after the attachment is made, it inures to the benefit of the attaching creditor. (c. 223, § 70).

Real estate fraudulently conveyed, or which is held in trust for debtor, whereby he is entitled to a present conveyance, or which was acquired by debtor by a deed describing him as trustee, regardless of validity of trust or legal effect of designation as trustee, may be attached specially as property of debtor, but must be described with sufficient accuracy for identification. (c. 223, § 67).

**Levy of Attachment on Personal Property.**—A perfected security interest in personal property, which from its bulk or other cause cannot be immediately removed, may be obtained by filing within 3 days after attachment a certified copy of writ and return of attachment in office of clerk of city or town in which property is situated. (c. 223, § 50, am'd 1973, c. 1114, § 100). Wages may in certain actions be attached by trustee process (c. 246, § 276), but \$125 thereof is exempt. See generally topic Garnishment.

Other personal property must be kept in possession of the officer, who may put a keeper over it on authorization of court therefor. Such property must be removed upon the written request of the defendant, without unreasonable delay. (c. 223, § 48). In order to have a keeper appointed, plaintiff must file affidavit with court stating facts which require such appointment and court must endorse its assent to appointment upon writ. (§ 48). Unless such request is made by defendant, or

by owner or occupant of premises, property may be kept where found. (§ 49). If defendant requires property to be left on premises it cannot be removed, until he has had reasonable opportunity to dissolve attachment by giving bond. (*Ibid.*). Live animals and personal property liable to perish, or that cannot be kept without disproportionate expense, may be sold, and proceeds held subject to attachment. (§§ 88-101).

Motor vehicle registered in the Commonwealth may not be attached on mesne process in an action of contract except on consent in writing of a justice of the court where suit is commenced. (§§ 42, 44A, am'd 1973, c. 1114, §§ 96-97).

There can be no attachment of goods for which a negotiable document of title is outstanding, unless the document be first surrendered to the person issuing it or its negotiation enjoined. (§ 72).

Personal property subject to a mortgage, pledge, or lien or sold under a conditional sale contract of which notice is not recordable may be attached as if unincumbered, if the creditor pays or tenders to the mortgagee, pledgee, lienor, conditional vendor, or his assigns, the amount for which it is so liable within 10 days after demand. If attaching creditor denies validity of any such incumbrance, incumbrancer or his assigns may be summoned as trustee and validity of encumbrance and amount due determined. If validity is upheld, attachment becomes void unless amount due is paid as ordered by court. (§§ 74-83).

Personal property owned by several jointly may, it seems, be attached on a writ against one of them, but on appraisal and giving of a bond by the others must be surrendered to them. (§§ 102-105). This does not, however, apply to trustee process nor to personal property belonging to a partnership (interest of a partner in property of partnership can be reached only in equity).

*Indemnity.*—See subhead Attachment Bond.

*Lien.*—A lien exists so long as a valid attachment remains in effect.

*Priorities.*—Successive attachments may be made in different suits upon the same property, and take priority according to time. In case of real property, priority is in the order of recording at the Registry. Any person claiming an interest in property attached, by reason of a subsequent attachment or otherwise, may by proper proceeding be admitted to contest the validity of the prior attachment on the ground that the amount demanded in the first action was not justly due or was not payable when it was commenced. (c. 223, §§ 106-113).

Judgment creditors who have not attached have no rights in the debtor's property as against attaching creditors.

*Release of Property.*—An attachment may be dissolved by depositing with attaching officer a sum equal to ad damnum in complaint or writ, or by giving bond with sureties or an authorized surety company satisfactory to plaintiff, or approved by a magistrate upon examination, with condition to pay amount plaintiff may recover within 30 days after final judgment and/or to pay amount of any special judgment within 30 days after entry thereof. (c. 223, §§ 120-129, am'd 1973, c. 1114, §§ 119-121). Attachment may be dissolved as to particular property by giving bond as above to pay value of such property, which is fixed by appraisal. (c. 223, § 125, am'd 1973, c. 1114, § 120). Attach-

ment is dissolved by proceedings in insolvency or bankruptcy begun within 4 months, by appointment of a receiver on a complaint filed within 4 months (c. 223, § 130, am'd 1973, c. 1114, § 122), and by a final judgment in favor of defendant after time for appeal has expired. (In district court, judgment in favor of defendant dissolves attachment forthwith). If an appeal has been duly claimed in appeals court or SJC, any attachment or other security as by bond shall stand until entry of final judgment (c. 223, § 115, am'd 1973, c. 1114, § 116). Attachment is also dissolved, except as to property alienated by him before death, by death of defendant, if administration is granted on his estate upon application made within 1 year after death. (c. 223, § 116). Also if real property is attached and no service is made upon defendant, attachment is dissolved unless record shows that notice has been given to defendant within 60 days or such further time as court may allow after entry of case. (c. 223, § 115A). Attachment of real or personal property is dissolved if case brought in district court is not entered in court within 35 days after return day of writ or process. (c. 223, § 115B, am'd 1973, c. 1114, § 116A). In district court, attachment remains in force, unless dissolved, until 30 days after final judgment for plaintiff. In superior court property remains subject to attachment for 30 days after expiration of time to appeal from judgment so that it may be taken on execution, unless attachment is sooner dissolved. If an appeal is claimed, attachment remains in force during appeal and if judgment is affirmed, for 30 days from entry of order of appeals court. (For property attached or judgment rendered in Nantucket County above periods are extended to 60 days). (c. 223, § 59, am'd 1973, c. 1114, § 102).

Any bond may be executed by another person in behalf of party to suit, if it appears to magistrate approving it that there is a good cause why it is not executed by such party. (c. 223, § 133). Sureties on a bond to dissolve attachment are released by principal's discharge in insolvency in proceedings within 4 months after attachment, if original claim if proved in insolvency would have been barred by a discharge of defendant (c. 223, § 124).

*Sale.*—Animals and perishable goods which have been attached may be sold after appraisal proceedings. (c. 223, § 87-101, am'd 1973, c. 1114, §§ 110-113). Proceeds of such a sale are held pending final judgment and are then distributed by court.

### *Third Party Claims*

*Superior Court.*—Attachment may be made by a party bringing a counterclaim, cross-claim or third party complaint in same manner as upon an original claim. (Rule 4.1[d], Mass. R. Civ. P.).

*District Court.*—Usual method of asserting third party claim is through suit for conversion.

### *Vacation or Modification*

*Ex Parte Attachments.*—On 2 days notice to plaintiff, or on such notice as court prescribes, a defendant may move, without submitting his person to jurisdiction of court for dissolution or modification of an ex parte attachment. At such hearing plaintiff shall have burden of justifying any finding in ex parte order which defendant has challenged by affidavit. (Rule 4.1[g] Mass. R. Civ. P. and SJC Rule 3:27[6]).

**Other Attachments.**—On application to a justice of court to which process is returnable, an attachment found upon summary hearing of parties to be excessive or unreasonable may be ordered to be reduced or discharged, or a part of property may be ordered to be released. (c. 223, § 114, am'd 1973, c. 1114, § 113).

**Liability of Attaching Officer.**—The attaching officer becomes liable to the creditor for the goods attached. He may deliver them to a person receiving to him therefor, who thereby becomes liable to him, but this does not discharge the officer's liability to the creditor.

**Property Liable to Attachment.**—With limited exceptions (see *infra* this topic and topic Exemptions), all real and personal estate liable to be taken on execution, except such personal estate as is considered from its nature or situation exempt according to principles of common law or which is by statute exempt, is liable to attachment. (c. 223, § 42, am'd 1973, c. 1114, § 94).

### **Time of Making Attachment**

**Superior Court.**—Attachment may be made within 30 days after order allowing attachment or, upon order of court, subsequent to expiration of 30-day period. (Rule 4.1[E], Mass. Rules Civ. Procedure).

**District Court.**—No attachment of property can be made on an original writ after personal service upon defendant (c. 223, § 30, am'd 1973, c. 1114, § 90), except that on a trustee writ, after service on both defendant and trustee, a second service may be made on trustee, to be followed by second service on defendant within time allowed for original service on him (c. 246, § 8, am'd 1973, c. 1114, § 264). At any time during the pendency of action in district court, upon commencement of which an attachment is authorized by law, court for cause may, on motion *ex parte*, order such attachment of defendant's property to secure judgment or decree which plaintiff may obtain in said action. (c. 223, § 85, am'd 1973, c. 1114, § 108).

**Equitable Attachment.**—In actions brought in superior court and SJC and in certain proceedings before probate court, equitable attachment by injunction may be had on usual principles governing injunctive relief. (c. 214, § 3[6]–[9], am'd 1973, c. 1114, § 62). Shares in domestic and foreign corporations cannot be attached in a civil action in which only money damages are sought (c. 223, § 71, am'd 1973, c. 1114, § 62), but may be reached and applied to satisfaction of claims (c. 214, § 3[7], am'd 1973, c. 1114, § 62). Choses in action and any property, right, title or interest, legal or equitable, within or without State, which cannot be taken on execution, may, without other ground of equitable jurisdiction, be reached and applied for satisfaction of a debt. (c. 214, § 3[6], am'd 1973, c. 1114, § 62). A civil action to reach and apply should not be confused with judgment creditors' bills to reach property that cannot be taken on execution. (215 Mass. 415, 102 N.E. 646).

## **Michigan Law Digest**

### **Attachment**

**Actions in Which Allowed.**—Attachment is available in both contract and tort actions. (MCLA § 600.4001; MSA § 27A.4001; Rule 835). Justice court is proper forum for claims under \$100 and is permissible forum for claims up to \$300. (MCLA § 600.6001; MSA § 27A.-

6001; Rule 735). In cities where justice court has concurrent jurisdiction in contract actions up to \$500 such court has concurrent jurisdiction in attachment actions wherein value of property involved does not exceed \$500. (MCLA § 600.6661; MSA § 27A.6661). Common pleas court (at present only in Detroit) has exclusive jurisdiction up to \$500 and concurrent jurisdiction with circuit court up to \$3,000. (MCLA § 728.1; MSA § 27.3651).

*Courts Which May Issue Writ.*—Circuit court (MCLA § 600.4001; MSA § 27A.4001; Rule 735), justice court (MCLA § 600.7401; MSA § 27A.7401), and common pleas court (MCLA § 728.1; MSA § 27.3651). For rules as to attachment in justice court and common pleas court differing from those applicable to circuit court, see *infra*, sub-head *In Justice Court and Common Pleas Court*.

*In Whose Favor Writ May Issue.*—Any person, including non-resident or foreign corporation. (Rule 735).

*Against Whom Writ May Issue.*—Circuit courts have power to issue attachments with respect to any interest in things which are subject to judicial jurisdiction of State and belonging to person against whom claim is asserted whether or not person himself is subject to judicial jurisdiction of State. (MCLA § 600.4001; MSA § 27A.4001).

*Claims on Which Writ May Issue.*—All claims, matured or unmatured. (Rule 735).

*Grounds.*—(1) Defendant has absconded or is about to abscond from State or is concealed therein to injury of his creditors; (2) defendant has assigned, disposed of or concealed any of his property with intent to defraud his creditors or is about to do so; (3) defendant has removed or is about to remove any of his property from State with intent to defraud his creditors; (4) defendant fraudulently contracted the debt or obligation sued upon; (5) defendant is not resident of State and has not resided therein for 3 months immediately preceding; (6) defendant is a foreign corporation. (MCLA § 600.4001; MSA § 27A.4001).

*Proceedings to Obtain.*—After contract action has been commenced on matured obligation, plaintiff files affidavit or verified complaint made within 5 days by plaintiff or some person in his behalf that at time of oath or affirmation defendant is indebted to plaintiff in stated amount upon a contract or judgment over and above all legal setoffs, and that deponent reasonably believes in the existence of one or more of the statutory grounds. (Rule 735).

Where action has been commenced on obligation not yet due, affidavit must also state when indebtedness will become due and facts justifying immediate issuance of writ, circuit judge must authorize writ, and no judgment can be taken until indebtedness becomes due. If obligation is paid at or before maturity, plaintiff is liable for defendant's costs and reasonable attorney fees and any actual loss occasioned by the attachment. (Rule 735).

After tort action has been commenced, plaintiff files affidavit or verified complaint made within 5 days by plaintiff or some person in his behalf that deponent in good faith believes defendant is liable to plaintiff in stated amount over and above all setoffs, and that deponent reasonably believes in the existence of one or more of the statutory grounds. Circuit judge must enter order authorizing writ,

fixing bond conditioned on diligent prosecution of action and payment of any damages and costs awarded defendant in the case or for wrongful attachment, and specifying amount or value of property to be attached, and bond with sureties approved by court must be filed. (Rule 735).

**Attachment Bond.**—Plaintiff is not required to furnish bond except in tort actions. (See *supra*, subhead Proceedings to Obtain).

**Levy.**—Sheriff attaches so much of defendant's lands, tenements, goods, chattels, money and effects not exempt from execution, wherever found within county, as will satisfy plaintiff's demand and costs. Where property seized within county is not sufficient, officer seizes other property anywhere within State. Realty and interests therein are seized by officer's deposit of certified copy of writ including description of realty with register of deeds for county in which realty located. Shares of stock or interest of a stockholder in a domestic corporation are seized in manner provided for seizure of such property on execution. (See topic Executions). (Rule 735).

**Indemnity.**—No provision for levying officer to require indemnity.

**Lien.**—Attachment binds goods and chattels from time they were attached. Attachment of realty constitutes lien from time when certified copy of attachment including description of realty is deposited in office of register of deeds in county where realty is situated. (MCLA § 600.4035; MSA § 27A.4035).

**Priorities.**—Where one or more attachments or executions are issued against same debtor or his property, attachment or execution first delivered to officer has preference, except that if there has been levy and sale of goods or chattels before a levy under first attachment or execution, levy on such goods or chattels under first attachment or execution is not permitted. (MCLA § 600.6007; MSA § 27A.6007).

Unrecorded land mortgage has priority over subsequent attachment levy though attaching creditor had no notice of such mortgage when attachment was commenced. (130 Mich. 127, 89 N.W. 720).

**Release of Property.**—Attached property remains in officer's hands unless defendant or other person in whose possession it was found delivers to officer bond with plaintiff as obligee signed by corporate surety or two citizens of State who satisfy officer of their financial responsibility to extent of bond. Penalty of bond is lower of double the inventory value or double the amount stated in affidavit where sureties are individuals, lower of one and one-quarter of amount stated in affidavit or one and one-quarter of inventory value where surety is corporate, unless judge or circuit court commissioner for good cause orders lesser bond. In no event is bondsman liable for amount in excess of penalty of bond, inventory value of property, or amount claimed in affidavit, whichever is lower. Bond is conditioned on payment of any judgment against defendant within 60 days after entry. Upon delivery of bond to officer, he delivers property to defendant or person in whose possession it was found, but suit is not affected by such delivery. (Rule 735).

**Sale.**—Where attached property consists of animals or is perishable, court may order sale and proceeds are brought into court to abide court's order. (Rule 735).

**Third Party Claims.**—See subhead Vacation or Modification, *infra*.

**Vacation or Modification.**—Any person whose property is attached

or who is in possession of or has an interest in property attached may apply to circuit judge or circuit court commissioner of county where writ issued for dissolution of the attachment. Plaintiff is notified and hearing is held. If attachment found invalid, it is dissolved and property is returned to defendant. Defendant may be required to submit himself to personal jurisdiction of court prior to granting of dissolution order. Any dissolution order of circuit court commissioner is not final for 3 days and if appealed has no force to release property until affirmed by circuit judge, who hears matter de novo. (Rule 735).

*In Justice Court and Common Pleas Court.*—No express provision for attachment for debts not due, and plaintiff must always give bond in a penalty double his demand (minimum penalty \$200). (MCLA § 600.7401; MSA § 27A.7401). Attachment reaches only goods, chattels, moneys and effects within county in which justice resides. (MCLA §§ 600.7405-7409; MSA §§ 27A.7405-7409). Grounds are substantially same as in circuit court, except that removal of property with intent to defraud creditors refers to removal from county where application is made or where defendant resides, removal of defendant or his property from county is additional ground without reference to intent when coupled with refusal to pay debt or damages, fact that defendant is about to abscond from State is not a ground, and nonresidence in State need only have existed for 1 month. (MCLA § 600.7401; MSA § 27A.7401). Different attachments of same property have priority in order in which served. (MCLA § 600.7423; MSA § 27A.7423). Where defendant is not personally served and does not appear on return day, justice must continue cause for 30 to 90 days. (MCLA § 600.7419; MSA § 27A.7419). Defendant or any other person may procure release of property by furnishing proper bond. (MCLA §§ 600.7411, 7413, 7431; MSA §§ 27A.7411, 7413, 7431).

When action is commenced by attachment against foreign corporation and garnishment proceedings are commenced in same action, if return of attachment writ shows that copy thereof and also copies of all garnishee summons have been personally served on officer, member, clerk or agent of foreign corporation within State, proceedings may be had against foreign corporation in same manner as upon return of summons personally served in actions against natural persons. (MCLA § 600.7437; MSA § 27A.7437).

See also topics Process; Venue.

## Minnesota Law Digest

### Attachment

All property not exempt from execution under judgment demanded in action (see topic Exemptions) is subject to attachment therein. (570.04).

*Actions in Which Allowed.*—Writ is obtainable in district court in any action for recovery of money except for libel, slander, seduction, breach of promise, false imprisonment, malicious prosecution, or assault and battery (570.01); in justice court, in any contract action or action on judgment or decree of a court (532.25).

*In Whose Favor Writ May Issue.*—Any plaintiff, including nonresident or foreign corporation, may obtain attachment.

**Claims on Which Writ May Issue.**—Not necessary that claim sued on be payable in the State.

**Commencement of Action on Claim.**—In justice court, action must be commenced at or before issuance of writ; in district court, within 60 days after its issuance. (570.01).

**Grounds.**—Attachment is allowed in district court when: (1) Debt was fraudulently contracted; (2) defendant is foreign corporation or nonresident; (3) defendant has departed from the State, as affiant verily believes, with intent to defraud or delay creditors, or to avoid service of summons, or keeps himself concealed therein with like intent; or (4) defendant has assigned, secreted, or disposed of property or is about to do so with intent to delay or defraud creditors. (570.02). In justice court an additional ground is that defendant resides in another county and more than 100 miles from residence of justice. (532.25).

**Proceedings to Obtain.**—In district court, plaintiff must file with clerk bond for at least \$250, with sufficient sureties justifying in aggregate double amount of bond, together with affidavit by plaintiff, his agent or attorney, stating that "a cause of action" exists against defendant and specifying amount of claim, and one or more grounds of attachment. (570.02, 03).

In justice court, plaintiff or someone in his behalf, must make and file with justice an affidavit stating that debt is over \$5, amount and nature of claim, and grounds for attachment. Bond is required before writ is issued, with sufficient surety in double amount of claim for damages, not exceeding \$100. (532.25, 27).

**Issuance.**—In district court, judge or court commissioner approves bond and allows writ and clerk issues same. (570.01, 04). In justice court this is done by the justice. (532.27).

Levy is made by an officer as in case of execution. In case of real estate, certified copy of writ is filed with register of deeds where land situated, and copy served on defendant. This creates lien on real estate at time of filing. (570.05). Perishable property must be sold. (570.07; 532.32).

Priorities between successive attachments are according to times of actual levies thereunder.

**Release of Property.**—Defendant may make motion to vacate attachment at any time before trial. (570.09). At any time before entry of judgment, defendant may secure release of attachment by giving bond approved by judge or commissioner, or justice if in justice court, in at least double amount of complaint, or if attached property is of less value than amount of complaint, for double its value. (570.093).

An attachment of real estate filed with register of deeds is released by filing certified copy of order vacating attachment, or of judgment for defendant or of satisfaction of judgment for plaintiff; certificate of satisfaction or discharge of attachment executed and acknowledged by plaintiff or his attorney; or deed of release of attached premises. May also be released by entry in margin of record signed by plaintiff or his attorney acknowledging release. (570.11).

**Third Party Claims.**—Any person other than defendant or his agent claiming property levied upon may make and serve on sheriff affidavit of his title or right to possession of such property and sheriff may release such levy unless plaintiff, on demand, will indemnify him

by bond in at least double value of property as alleged in affidavit. (563.10).

### Mississippi Law Digest

#### Attachment

*Actions in Which Allowed.*—Attachment at law lies in all actions founded on any indebtedness, breach of contract or penal statute. (11-33-1). Exemptions are allowed for trust funds set up by employer for pension, disability, death-benefits or profit-sharing plans. (71-1-43).

*In Whose Favor Writ May Issue.*—Nonresidents, as well as citizens, can obtain writs of attachment.

*Claims on Which Writ May Issue.*—It is not necessary, in order to warrant an attachment, that the claim sued on should be payable in this State. In some cases an attachment may issue on an unmatured claim. See *infra*, subhead Grounds for Attachment.

Grounds for attachment are that defendant: (1) Is a foreign corporation or a nonresident of the State; (2) has removed or is about to remove himself or property out of the State; (3) so absconds or conceals himself that he cannot be served with a summons; (4) contracted the debt or incurred the obligation in conducting the business of a water craft in some navigable waters of the State; (5) has property or rights in actions which he conceals and unjustly refuses to apply to the payment of his debts; (6) has assigned or disposed of, or is about to assign or dispose of his property or rights in action, or some part thereof with intent to defraud his creditors; (7) has converted or is about to convert his property into money or evidences of debt with intent to place it beyond the reach of his creditors; (8) fraudulently contracted the debt or incurred the obligations for which suit has been or is about to be brought; (9) is buying, selling or dealing in futures, directly or indirectly, or has done so within 6 months; (10) is in default as principal for public money, due the State, county or municipality; (11) is a banker, banking company, or corporation, and received deposits, knowing at the time that he or it was insolvent, or has made false or fraudulent statements as to his or its financial condition. (11-33-9).

Attachment will lie on ground that defendant is a foreign corporation, even though it be domesticated in Mississippi. (181 Miss. 223, 177 So. 653).

The creditor may obtain an attachment for a debt not due by making an affidavit to any of the last six of the aforementioned eleven grounds of attachment, or that he has just cause to suspect, and verily believes that his debtor will remove himself or his effects out of the State before the debt will become payable, with intent to hinder, delay or defraud his creditors, or has done so with such intent, leaving property in this state. (11-33-35).

*Proceedings to Obtain.*—In order to obtain an attachment, the creditor or his agent must make affidavit to the amount of his demand and to one or more of the aforementioned grounds of attachment, (11-33-9).

*Bond.*—The creditor must also give bond in double the amount sued for with good surety, to be approved by the officer issuing the attachment, payable to the defendant and conditioned to pay all damages

adjudged against him, if the attachment is proven to be wrongfully sued out. (11-33-11). See, however, *infra*, subhead Chancery Courts.

*Issuance of Writ.*—The writ issues on filing of the necessary affidavit and bond. (11-33-17).

*Levy.*—An attachment is levied on all unexempt property of the defendant. The books of account of defendant are also seized and all persons owning him are summoned as garnishees. (11-33-23).

*Indemnity.*—If the officer who is required to levy an attachment is in doubt as to the ownership of property to be levied on, he may require an indemnity bond in double the value of such property.

*Absent Defendants.*—Defendants who are absent from the State are brought in by a 3 weeks publication (11-33-37), but publication is not necessary if writ be served on nonresident defendant and proof of such service be made as provided for in case of nonresident defendants in chancery. (11-33-39).

In attachments before justices of the peace nonresident defendants are brought into court by the posting notices and mailing a copy of same to their post office address if known.

*Lien and Priorities.*—Attachments constitute liens on all property in the order in which they are levied, and those first levied must be first satisfied.

*Release of Property.*—Defendant may replevy personal property levied on by giving bond, with good sureties, payable to plaintiff, in double the value of property. (11-33-45).

*Discharge of Attachment.*—To sustain the attachment is sufficient to prove the truth of a single one of the eleven grounds of attachment, but if the plaintiff fails to do this, the attachment is discharged and the defendant is allowed all actual damages sustained, costs of the suit, and a reasonable attorney's fee, but judgment against the sureties in an attachment bond may not exceed its penalty. (11-33-85).

Defendant may discharge an attachment by giving bond in double the amount claimed by plaintiff. (11-33-59).

Chancery courts have jurisdiction in attachment suits based upon either a legal or equitable indebtedness, or for breach of contract, or arising *ex delicto* against any nonresident, absent or absconding debtor who has lands in this state, or against a person in this state who has in his hands effects of or is indebted to such nonresident, absent or absconding debtor. (11-31-1). A bond is not necessary in an attachment in chancery unless proceeding is by sequestration.

## Missouri Law Digest

### Attachment

An attachment may be had in any civil action in circuit or magistrate's court.

*In Whose Favor Writ May Issue.*—Any plaintiff, including a nonresident or foreign corporation, may obtain an attachment. (See 3 Mo. 606; 7 Mo. 281).

*Claims on Which Writ May Issue.*—It is not necessary that the claim sued on be payable within the State.

As to claims not due see *infra*, subhead Grounds.

Grounds for attachment are that defendant: (1) Is not a resident of this State; (2) is a corporation whose chief office or place of business is

out of this State; (3) conceals himself so that the ordinary process of law cannot be served upon him; (4) has absconded or absented himself from his usual place of abode in this State so that ordinary process of law cannot be served upon him; (5) is about to remove his property or effects out of State, with intent to defraud, hinder or delay creditors; (6) is about to remove out of State with intent to change his domicile; (7) has fraudulently conveyed or assigned his property or effects so as to hinder or delay his creditors; (8) has fraudulently concealed, removed or disposed of his property or effects so as to hinder or delay his creditors; (9) is about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors; (10) is about fraudulently to conceal, remove or dispose of his property or effects so as to hinder or delay his creditors; or (11) that the cause of action accrued out of this State, and defendant has absconded or secretly removed his property or effects into this State; or (12) that the damages for which the action is brought arose from the commission of some felony or misdemeanor or the seduction of a female; or (13) that defendant has failed to pay the price or value of an article or thing delivered which by contract he was bound to pay upon delivery; or (14) that the debt sued for was fraudulently contracted on the part of defendant. Attachment may also be brought for rent due within 1 year in certain cases. Attachments may issue upon a demand not due in any of the cases above mentioned, except the first, second, third and fourth; but final judgment will not be rendered against the defendant until the demand matures. (C.R. 85.01-.02).

*Affidavit and Bond.*—Plaintiff, or some one in his behalf, must make affidavit that plaintiff has a just demand against defendant, that amount which affiant believes plaintiff ought to recover, after allowing all just claims and setoffs, is . . . dollars, and that affiant has good reason to believe and does believe that one or more of the grounds for attachment exists, specifying the grounds upon which he intends to rely in the language set forth above. Bond must be given in double amount of debt, by plaintiff or some responsible person as principal and one or more securities, resident householders or county in which action is brought, except in suits instituted by the State or a county in its own behalf, and except where defendant is a nonresident, in which cases no bond is required, but in the latter case the attachment is dissolved, on motion, upon defendant entering his appearance and filing his answer to the merits unless plaintiff files bond within a time fixed by court, not exceeding 10 days. If attachment is set aside or dismissed, attaching creditor is liable on his bond for such damages as resulted from his levy and proceedings thereunder. (C.R. 85.04-.06).

*Levy.*—Officer may seize, as attachable property evidences of debt of the defendant, as well as other property real, personal and mixed and also judgment debts; but no property or wages exempt from execution may be attached, except in case of nonresident or one who is about to move out of State. (521.240). In cases before a magistrate, the attachment cannot be levied on real property. (521.660).

*Indemnity.*—There is no statutory authority for the officer to require indemnity before levying.

*Priorities.*—Where the same property is attached in different actions by different plaintiffs, the court may determine all controversies and

priorities; if the writs issue out of different courts of coordinate jurisdiction, that court out of which the first attachment issues shall determine all controversies; courts of general jurisdiction shall determine controversies and priorities between an attachment issued therefrom and one issued out of a court of limited jurisdiction. In general, priorities date from the time of the levy. (C.R. 85.48).

An attaching creditor is not a bona fide purchaser for value, but obtains only such rights as the debtor had in the property at the time and is postponed to other liens or claims on the property which became effective before the attachment. (112 Mo. 599, 20 S.W. 686).

*Release of Property.*—Defendant may retain or regain possession of property levied on by giving forthcoming bond in double the value of such property. (C.R. 85.22).

*Sale.*—Perishable property may be sold by order of court prior to termination of the suit. (C.R. 85.25).

*Claims of Third Persons.*—Any person claiming property attached, may interplead in the cause, verifying the interplea by affidavit, and issues may be made upon such interplea, and tried as like issues between plaintiff and defendant. (C.R. 85.50).

*Dissolution.*—Attachments may be dissolved on motion of the defendant at any time before final judgment in the following cases: (1) When the affidavit is adjudged by the court insufficient, unless the plaintiff files a sufficient affidavit to be approved by the court in such time as the court directs. (2) When the defendant appears and pleads to the action and gives bond to the plaintiff with sufficient security approved by the court in double the amount of the property attached, conditioned that such property shall be forthcoming and abide the judgment which shall be rendered, when and where the court shall direct. (3) When the defendant appears and pleads to the action and gives bond and security in a sum sufficient to satisfy the amount sworn to in behalf of plaintiff with interest and costs, conditioned that the defendant shall pay to plaintiff the amount which may be adjudged in favor of the plaintiff, interest and costs, within 30 days after the judgment shall be rendered. When an attachment is dissolved all proceedings touching the property attached and the garnishee summoned, are vacated and the suit proceeds, as if it had been commenced by summons only. (C.R. 85.46-47).

See also topics Executions; Exemptions.

## Montana Law Digest

### Attachment

*Actions in Which Allowed.*—Any action upon a contract express or implied for the direct payment of money, where contract is not secured by mortgage or lien on real property, or if originally secured, where security has without act of plaintiff become valueless; also in action based upon statutory stockholders' liability. (93-4301).

*Courts Which May Issue Writ.*—Both justice and district courts. (93-4301, 6908).

*In Whose Favor Writ May Issue.*—Any plaintiff (93-4301); no provision discriminating against nonresident plaintiffs.

*Claims on Which Writ May Issue.*—On unmatured claims, if it appears from plaintiff's affidavit that (1) defendant is about to leave the

State with his property to defraud his creditors, or (2) that defendant is disposing of, or about to dispose of, property subject to execution to defraud his creditors. (93-4303).

*Grounds.*—See supra, subhead Actions in Which Allowed.

*Proceedings to Obtain.*—Writ is issued by clerk of court (93-4302) or by justice of peace (93-6908) at or after issuance of summons, upon plaintiff's filing an affidavit that defendant is indebted in a specified amount, over and above counterclaims, on a contract such as that described above, and that attachment is not sought to hinder, delay or defraud any creditor of defendant (93-4302).

Attachment bond in double the amount claimed if amount is \$1,000 or less, or equal to amount claimed if in excess of \$1,000, but in no case in excess of \$20,000, must be filed before writ issues. Within 30 days after summons served defendant may except to sufficiency of sureties. Failure so to do is waiver of defects. (93-4304). In justice court, bond must be for not less than \$50, nor more than \$300. (93-6909).

Levy may be made on any property of defendant not exempt from execution (93-4306) but chose in action for personal injuries cannot be attached (100 Mont. 496, 50 P.2d 249).

Real property is attached by filing a copy of writ and notice of attachment with county clerk; personal property capable of manual delivery, by taking into custody, except where in possession of third person (93-4307); investment securities may be attached only by seizure (87A-8-317, 93-4307); corporate stocks or shares other than investment securities may be attached either by seizure or by leaving with president, secretary, cashier or managing agent of corporation, copy of writ and notice of attachment (93-4307); debts or credits and personal property in possession of third person, by leaving copy of writ and notice of attachment with person owing debt or in possession or control of property; judgments by leaving with clerk of district court copy of writ and notice of attachment; interest in personal property belonging to estate of decedent, by serving personal representative with copy of writ and notice of attachment and filing copy with clerk of court in which estate is being administered (93-4307).

*Indemnity.*—Attachment bond required. (93-4337). In event of third party claim, sheriff may require bond. (93-4320).

Lien accrues at time of attachment and in order of levies. (93-4335).

*Priorities.*—Levying officer must execute writs against same defendant in order in which he receives them. (93-4335).

Sale of property may be had prior to judgment on order of court, proceeds to be deposited in court. (93-4318).

*Release.*—After appearance defendant may obtain release of attachment upon filing undertaking in amount to be fixed by court. (93-4327, 4328). If no proceedings have been taken for 5 years in action in which attachment was issued, defendant or record owner may apply to clerk of court for release. (93-4331.1).

*Discharge.*—If it appears writ was improperly or illegally issued, it must be discharged. (93-4331).

*Vacation or Modification.*—If motion based on papers supporting writ, no notice required; otherwise notice required. Motion may be made by defendant or any person acquiring an interest in the property after attachment. (93-4333).

**Third Party Claims.**—If third party claims personal property by filing affidavit with sheriff, sheriff must deliver property to claimant unless plaintiff gives indemnity bond within 10 days after notice. (93-4320).

### Nebraska Law Digest

#### Attachment

**Actions in Which Allowed.**—Attachment may be allowed in any civil action for the recovery of money only.

**Courts Which May Issue Writ.**—All courts having jurisdiction of civil cases.

**Time for Issuance.**—Attachment may issue at or after the commencement of an action.

**In Whose Favor Writ May Issue.**—Any plaintiff, including a non-resident or foreign corporation, may obtain an attachment, except that in an action on a claim not based on contract, judgment or decree only a bona fide resident for at least 6 months prior to filing of petition may obtain attachment on ground that defendant is a nonresident or foreign corporation. (23-1001).

**Claims on Which Writ May Issue.**—Attachment may issue on either matured or unmatured claim. There is no requirement that the claim sued on should be payable within this State.

Grounds of attachment in action on matured claim are that defendant, or one of several defendants: (1) is a foreign corporation or a nonresident of State; (2) has absconded with intent to defraud creditors; (3) has left county of his residence to avoid service of summons; (4) so conceals himself that summons cannot be served upon him; (5) is about to remove his property or a part thereof out of jurisdiction of court with intent to defraud creditors; (6) is about to convert his property or a part thereof into money for purpose of placing it beyond reach of creditors; (7) has property or rights in action which he conceals; (8) has assigned, removed or disposed of or is about to dispose of property with intent to defraud creditors; (9) fraudulently contracted debt or incurred obligation for which suit is about to be or has been brought. (25-1001).

On claims not due grounds of attachment are that debtor: (1) Has sold or conveyed or otherwise disposed of property with fraudulent intent to cheat or defraud, hinder or delay creditors; (2) is about to make such sale, disposition or conveyance of his property with such fraudulent intent; (3) is about to remove property with intent or effect of cheating, defrauding, hindering or delaying creditors. (25-1049).

**Proceedings to Obtain.**—In order to obtain an attachment plaintiff must file an affidavit showing: (1) Nature of plaintiff's claim; (2) that it is just; (3) amount plaintiff believes plaintiff ought to recover; (4) existence of some one of grounds for attachment. (25-1002).

If demand is not founded on contract, original petition must be presented to some judge of Supreme, district or county court who must make allowance thereon of amount in value of property that may be attached and amount of bond, if any, to be given by plaintiff. (25-1002).

If claim sued on is not due an order is required from court in which action is brought or from judge thereof or county judge, and before attachment is allowed plaintiff, his agent or attorney, must make oath

in writing, showing nature and amount of claim, that it is just when it will become due and at least one of the grounds of attachment on such a claim. (25-1050).

**Bond.**—When ground of attachment is (1) That defendant is a foreign corporation, (2) nonresident, (3) is about to remove his property, or part thereof, out of jurisdiction of court, with intent to defraud his creditors, or (4) has assigned, removed or disposed of, or is about to dispose of his property with intent to defraud his creditors, order of attachment may issue without undertaking; under grounds (3) and (4) a bond shall be filed within 3 days after attachment is issued. In all other cases, plaintiff must give bond not exceeding amount of his claim, or in amount fixed by judge allowing attachment, conditioned to pay damages sustained by defendant if attachment wrongfully obtained. (25-1003, 1053; 27-402).

**Issuance of Writ.**—The writ is issued from the office of the clerk of the court in which the action was brought and directed to the sheriff.

**Levy, Inventory and Appraisement.**—Sheriff must make levy in presence of two residents of county and, with such residents, make and return an inventory and appraisement of property attached. Where real property is attached, sheriff must leave with occupant thereof, or if there is no occupant, in a conspicuous place thereon, a copy of the order. Accessible personal property is taken into sheriff's custody and held subject to order of court. (25-1004 to 1008).

**Indemnity.**—As a practical matter, the officer will refuse to levy unless indemnified if he fears that he may incur personal liability by levying, but there is no statutory authority for demanding indemnity.

**Lien.**—Order of attachment binds property attached from time of service. (25-1017).

**Priorities.**—If same officer has several attachments against same defendants he must serve them in order received, and each attachment is subject to all prior attachments. (25-1007).

**Release or Discharge.**—Defendant may obtain release or property attached by giving surety bond in double appraised value thereof conditioned that such value and money shall be forthcoming to answer judgment (25-1009); or may obtain discharge of attachment by giving bond in double amount of plaintiff's claim conditioned for performance of judgment rendered in the action (25-1024).

Sale of property is by order of court as on execution. (25-1033).

**Claims of Third Persons.**—If personal property be claimed by any other person than defendant officer must have validity of claim tried. (25-1036).

**Vacation or Modification.**—Defendant may at any time before judgment upon reasonable notice to plaintiff move to discharge an attachment as to whole or part of property. (25-1040). If attachment discharged by order, any party affected and excepting may appeal within time fixed by court or judge, on giving surety bond, conditioned for payment of all damage in consequence of appeal if attachment finally discharged. (25-1047).

In inferior courts rules for attachments are same as in district courts. For statutory provisions for municipal courts see 26-141-167. In attachments in municipal courts where only real estate is found, at re-

quest of plaintiff proceedings are immediately certified to district court of proper county and action proceeds as though it originated in that court. (27-426, 26-167).

## Nevada Law Digest

### Attachment

*Actions in Which Allowed and Grounds.*—With Notice and Hearing: (1) Action upon a judgment or contract, for direct payment of money which is not secured by mortgage, lien or pledge upon real or personal property situated in this State, or if so secured, when such security has been rendered valueless or insufficient without act of plaintiff or person to whom security was given. If security has depreciated without such act, attachment lies for excess of debt over value of security; (2) action in which one or more of grounds with or without notice exists; (3) action where court finds that extraordinary circumstances exist making it improbable for plaintiff to reach property of defendant by execution after judgment.

Without notice to defendant, in following actions only: (1) Against a defendant not residing in this State. Domestic and foreign corporations qualified to do business in this State are deemed residents; (2) upon a foreign judgment for direct payment of money; (3) for recovery of value of personal property which has been taken or converted by defendant without consent of owner; (4) where defendant is about to remove his money or property from this State and defendant's remaining property will be insufficient to satisfy plaintiff's claim; (5) where defendant is about to give, assign, hypothecate, pledge, dispose of or conceal his money or property, or any part, if that remaining is insufficient to satisfy plaintiff's claim; (6) for recovery of money or property obtained through embezzlement, forgery, larceny or extortion; (7) one brought under Uniform Fraudulent Conveyances Act; (8) one by State, or a political subdivision, brought under Uniform Reciprocal Enforcement of Support Act; (9) one where jurisdiction can be obtained only by attachment of defendant's property. (31.010).

*Courts Which May Issue Writ.*—District court and justice court. (31.010, 71,090).

*Time for Issuance of Writ.*—The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment. (31.010).

*In Whose Favor Writ May Issue.*—There is no provision excluding nonresidents or foreign corporations from the right to obtain attachment.

*Claims on Which Writ May Issue.*—There is no provision requiring that the contract or obligation sued on should be made or payable within this State. Neither is there any provision which authorizes issuance of the writ on an unmatured claim. A writ may issue for a foreign judgment for direct payment of money. (1973. c. 655).

*Proceedings to Obtain.*—Application for writ of attachment must be accompanied by affidavit by or on behalf of plaintiff showing nature of claim and that same is valid; stating amount which affiant believes

plaintiff is entitled to recover; describing in reasonable and clear detail all facts which show existence of grounds for attachment without notice or with notice and hearing; describing in reasonable detail money or property sought to be attached, its location, value, and any exemption from execution; naming all third persons upon whom writ of garnishment will be served; and including copy of any foreign judgment.

Court will order clerk to issue writ of attachment without notice to defendant if plaintiff's affidavit and any additional evidence meet these elements and it determines that ground for attachment without notice exists.

If application seeks a writ of attachment after notice and hearing and affidavit sets forth items required, court will issue an order to defendant to show cause why order for attachment should not be issued. Upon hearing held by court without jury, writ of attachment will be issued if court determines from all evidence that plaintiff's claim is probably valid or defendant fails to appear. (31.020).

*Attachment Bond.*—Plaintiff must give a written undertaking with two or more sureties in a sum not less than amount claimed by plaintiff or value of property to be attached, whichever is less, for payment of costs and damages, including attorney's fees, should defendant recover judgment or attachment be discharged. Defendant may except to sufficiency of sureties, and if they fail to justify, writ must be vacated (31.030).

The sureties to the undertaking must be residents and householders or freeholders within the State, and worth double the amount specified in the undertaking, over and above all debts and liabilities, exclusive of property exempt from execution. (31.030). The undertaking may also be made by a surety company authorized to do business in this State. Surety company bonds must be approved by the judge, clerk, or deputy clerk. The plaintiff may also deposit cash in lieu of a bond. (20.030).

*Examination as to Property or Debts.* The defendant, or any person owing him, may be cited to appear before the court, judge, or justice of the peace and be examined on oath as to property of defendant or debts owing to him. (31.100).

*Levy.*—Stocks, debts and any property not exempt from execution may be attached: (1) Real property by filing copy of writ with county recorder, with a description of property attached, and by leaving copy of writ with occupant, or if not occupied by posting a copy conspicuously on premises; (2) personal property by taking it into custody or by placing a keeper in charge of going business where such property is located, during which period defendant may continue to operate business if all sales are for cash and proceeds given to keeper; (3) debts, credits and other personal property in possession or under control of persons other than defendant by service of writ of garnishment. (31.050–31.060).

*Indemnity.*—Sheriff or constable may demand indemnity if third party claim is made. (31.070). Plaintiff must deposit with sheriff amount sufficient to pay expenses of taking and keeping personal property for 30 days. (31.065).

Lien of attachment on real property is conclusively presumed discharged after 10 years. (108.250).

**Release of Property.**—Where amount sought to be released is less than demand of writ, court or judge, upon application of defendant and notice to plaintiff, may discharge attachment in whole or in part, upon defendant giving bond in amount sought to be released. Where amount sought equals or exceeds demand of writ, defendant may discharge attachment by giving bond in amount of judgment which may be recovered in favor of plaintiff, or demand of writ, whichever is less. On like application writ may be discharged if improperly or improvidently issued, if property levied on is exempt from execution or necessary and required by defendant for support and maintenance of himself and family, or if levy excessive. Property may also be released upon written stipulation by plaintiff and defendant. (31.180-31.220).

**Salc.**—Perishable property may be sold by officer on reasonable posted notice and attached debts and credits collected if possible without suit. (31.120). Court or judge may order attached property sold as under execution if beneficial to parties. (31.130). If plaintiff recovers judgment attached property is sold under execution. (31.140).

**Third Party Claims.**—If verified third party claim is filed with attaching officer, he must release property unless, within 7 days after written demand, plaintiff gives undertaking in double value of property. Plaintiff or third party claimant is entitled to trial of title before court within 10 days after filing of claim, on 7 days notice to claimant. (31.070).

Mortgaged personal property may be attached, at the suit of a creditor or the mortgagor. The amount of the debt plus interest must be tendered, and if the mortgagee refuses to accept it or to disclose the amount due, proceedings may be had as in the case of unencumbered property. (106.140).

## New Hampshire Law Digest

### Attachment

Prejudgment attachments may be had in all actions at law, upon notice to defendant, and if defendant objects, a showing by plaintiff that there is a reasonable likelihood that he will recover judgment including interest and costs on an amount equal to or greater than amount of attachment and that unless attachment is allowed, there is a reasonable likelihood that defendant's assets will be insufficient to satisfy a judgment or decree. Court may order a prejudgment attachment without prior hearing if plaintiff shows probable cause of his right to recover and amount thereof, and: (1) There is substantial danger property will be damaged, destroyed, concealed, or removed from State; or (2) an attachment is necessary to vest quasi-in-rem jurisdiction; or (3) in cases for specific performance where there is imminent danger of transfer to a bona fide third party; or (4) notice period under a bulk sale is about to expire and absolute vesting of title is imminent; or (5) attachment is necessary to secure an important governmental or general public interest. (c. 511-A).

**In Whose Favor Writ May Issue.**—There is no discrimination against nonresidents or foreign corporations, except that all writs brought by nonresidents, corporate or otherwise, must be endorsed by some responsible resident, who thereby becomes liable for costs. (c. 509, § 8).

**Claims on Which Writ May Issue.**—There is no requirement that the claim sued on be payable in the State and no provision as to issuance of attachment on unmatured claims.

**Grounds.**—No special grounds are necessary; mere bringing of the action is sufficient.

**Bonds.**—Plaintiff is not required to furnish any bond in order to obtain attachment.

**Excessive Attachments.**—If an excessive or unreasonable attachment of any kind has been made on mesne process, the defendant may apply to the superior court to have the amount of the attachment reduced or to have it discharged. Upon such application the party making the attachment shall have the burden of proof to show that the attachment is not excessive or unreasonable. If, upon hearing, the court finds that the attachment is excessive or unreasonable under all the circumstances, it shall order the reduction or discharge of the attachment as justice may require. (c. 511, § 53).

**Levy.**—Real estate may be attached by the officer leaving an attested copy of the writ and of his return of the attachment thereon at the office or dwelling house of the register of deeds of the county in which the real estate is situate. (c. 511, § 3). Personal property is taken possession of by the officer making the attachment. After taking possession of livestock or articles which are incapable of being conveniently taken into actual possession, including motor vehicles, trucks, trailers and tractors, the attaching officer may, within 48 hours thereafter, leave an attested copy of the writ, and of his return of such taking possession or such attachment thereof, at the home or office of the town clerk, and such levy is effective although actual possession is not taken. (c. 511, § 23). The officer, upon completion of such bulky article attachment is under no duty to care for or preserve the attached property unless requested by the attaching creditor, who is responsible for all reasonable costs and expenses incurred by the officer, including his reasonable fees, in complying with such request. (c. 511, § 23).

**Indemnity.**—Although there is no statutory authority therefor, attaching officer who fears liability for wrongful levy requires indemnity bond for value of property to be attached plus anticipated costs.

**Encumbered Property.**—A creditor or officer attaching encumbered personal property must pay or tender to the owner of the encumbrance the amount of his lien. (c. 511, § 26). Encumbrance on real estate may be discharged by payment or tender of amount of encumbrance to owner thereof. (c. 511, §§ 10, 11).

**Priority.**—Attaching creditors acquire liens in the order in which their attachments are made, and do not share pro rata. (c. 511, § 56).

**Release of Property.**—A defendant whose real estate has been attached may obtain its release upon application to superior court by giving bond to plaintiff with sufficient sureties in a penal sum equal to *ad damnum* or writ or value of real estate attached. (c. 511, §§ 48, 59).

**Duration of Lien.**—Attachment lien continues for 6 years after judgment on real estate and 60 days after judgment on personal property. (c. 511 § 55).

**Release on Bond of Defendant.**—The debtor can, by giving suitable bond, secure the restoration of the property attached whether it be real (c. 511, § 48) or personal (c. 511, §§ 35-37).

**Sale of Attached Property.**—Personal property attached must be sold by the officer before judgment, if the parties consent thereto in writing. (c. 511, § 30). Appraisers will be appointed and attached property will be sold when it consists of living animals, or goods liable to perish or waste, or to be greatly reduced in value by keeping, or which cannot be kept without great expense. (c. 511, §§ 31-34).

## New Jersey Law Digest

### Attachment

**Courts Which May Issue Writ.**—Attachment may issue out of superior court, county courts and county district courts. (Tit. 2A, c. 26, § 2; c. 18, § 62). Attachment in county district courts is limited to personal property and plaintiff's claim may not exceed \$1,000 except in negligence actions where claim may not exceed \$3,000; proceedings are same as in other courts. (Tit. 2A, c. 18, § 62; Tit. 2A, c. 6, § 34; Rule 6:8). For property exempt from attachment, see topic Exemptions.

**In Whose Favor Writ May Issue.**—Writ may issue on application of any plaintiff, whether resident or nonresident. (Tit. 2A, c. 26, § 2; Rule 4:60-1).

**Against Whom Writ May Issue.**—Attachment may issue against real and personal property of any defendant, including females, corporations and heirs, devisees, executors, administrators or trustees of decedents, where grounds for attachment exist. (Tit. 2A, c. 26, § 2). A legacy or distributive share of an estate in hands of executor, administrator or trustee may be attached in action against legatee or next of kin. (Tit. 2A, c. 26, § 6).

**Grounds.**—(1) Same as would entitle plaintiff to order of arrest before judgment in a civil action. In such cases attachment may issue against property of female, or of corporation in same manner as though it were liable to arrest in civil action, except that in action founded on tort, attachment cannot issue against corporation on which summons can be served in New Jersey. (2) Defendant absconds or is nonresident and summons cannot be served on him in New Jersey; but attachment cannot issue on this ground against rolling stock of common carrier of another State or goods of nonresident in transit in custody of common carrier of New Jersey or another State. (3) Cause of action existed against a decedent which survives against his heirs, devisees or personal representatives who (or some of whom) are unknown or nonresident and cannot be served with summons in New Jersey, and there is property in New Jersey which by law is subject to plaintiff's claim. (4) Plaintiff has claim of equitable nature as to which money judgment is demanded, and defendant absconds or is nonresident and summons cannot be served on him in New Jersey. (5) Defendant is a corporation created by laws of another State but authorized to do business in New Jersey and such other State authorizes attachments against New Jersey corporations authorized to do business in that State. (Tit. 2A, c. 26, § 2).

**Proceedings to Obtain.**—Action in attachment commenced by filing a complaint. Venue governed by same rules applicable to issuance of summons (except if no rule applicable, venue laid in any county in which any property to be attached is situated). No writ of attachment

may issue except upon order of court based upon prima facie proof by affidavit of the cause of action alleged and grounds for issuance of writ. Writ may be sole or additional process in an action. Court order must fix the amount or value of property to be attached. Notification of defendant or his attorney of application for writ is discretionary with court. On filing with court complaint, affidavits, order and bond (if required), clerk issues writ in duplicate addressed to sheriffs in counties in which property to be attached is situated. (Rule 4:60-6). In action for attachment in county district court, writ is directed to an officer of such court, rather than to sheriff. (Tit. 2A, c. 18, § 64). Further writs may be issued prior to judgment, on further affidavit and order. (Rule 4:60-6).

*Attachment Bond.*—Court, in its discretion, may direct plaintiff to give bond, with sufficient sureties, to indemnify defendant for all damages resulting from attachment and taxed costs of action if it is dismissed or judgment given for defendant. (Tit. 2A, c. 26, § 7; Rule 4:60-5[d]). See topic Bonds.

Levy must be made within 30 days from date of writ as follows: (1) On real property by endorsing upon writ a description of property and serving a certified copy of writ upon any person in possession of same, (2) on tangible personal property in possession of a bailee for which a negotiable document of title is outstanding, by complying with the provisions of Tit. 12A, c. 7, § 602 and serving a certified copy of writ upon bailee, (3) on all other tangible personal property by taking the same into custody or by serving a certified copy of writ upon person holding same, (4) on choses in action evidenced by negotiable commercial paper, by taking said paper into custody, or by serving a certified copy of writ upon person owing same and also serving upon person in possession of said paper an order of the court enjoining its negotiation, (5) on negotiable investment securities, by complying with provisions of Tit. 12A, c. 8, § 317, (6) on all other choses in action by serving a certified copy of writ upon person owing the same. (7) on legacies or distributive shares in a decedent's estate or a beneficial interest in a trust, by serving a certified copy of the writ upon the fiduciary. (Rule 4:60-7). Sheriff, or court officer in case of county district court, makes true inventory of all property attached and appraisement of all personal property attached, endorses upon writ and duplicate thereof each levy made and the date thereof, annexes thereto a copy of the inventory and appraisement files same with court and mails notice of levy and copy of inventory and appraisement to plaintiff or his attorney within 5 days after levy. (Rule 4:60-8; Tit. 2A, c. 18, § 64).

*Consolidation of Actions.*—Whenever two or more plaintiffs in separate actions obtain attachment writs against same defendant and levy on same property, the actions may be consolidated to determine disposition of attached property. Plaintiff whose attachment writ became first lien on the property is plaintiff in consolidated action, other plaintiffs become applying claimants. (Rule 4:60-16).

*Lien.*—Attachment binds attached goods and chattels, rights and credits, moneys and effects of defendant from time of its execution, and attached property, unless released, remains during pendency of action as security for any judgment which may be entered therein. (Tit. 2A,

c. 26, § 8). Attachment from time of its issue is lien on real estate of defendant throughout State if issued out of superior court and throughout county if issued out of county court, even though officer fails to especially attach same or any part thereof. Attachment is also lien on all real estate acquired by defendant in State or county, as case may be, after its issue and before final judgment. Lien continues until plaintiff's claim is satisfied, attachment is discharged or judgment is given against plaintiff (Tit. 2A, c. 26, § 9), and any conveyance of attached real estate prior to release of attachment is void as against plaintiff (Tit. 2A, c. 26, § 10). Judgment in the action is lien on defendant's real estate acquired either before or after entry thereof. (Tit. 2A, c. 26, § 11).

Attack on writ or levy must be made by motion. Such motion does not constitute general appearance. Upon such motion, proof may be presented by affidavits, depositions or orally before the court. Burden of proof on plaintiff. Court may vacate writ, or discharge or correct levy. (Rule 4:60-11).

Release of attached property from lien of attachment, and return thereof, may be obtained by defendant, or any person who had possession or control thereof at time of levy, at any time during course of action, by filing with clerk of court bond in amount and form and with sureties approved by court, after notice to plaintiff and any applying claimants. Filing of bond does not constitute general appearance. (Rule 4:60-13).

*Third Party Claims.*—Any person claiming property attached may proceed in the action on order to show cause. (Rule 4:60-14).

*Procedure after Levy and Return.*—Plaintiff must serve on defendant notice of the attachment and copy of complaint (if not previously served), and copy of order and accompanying affidavits within 2 weeks after filing of return, or within such time as court fixes. (Rule 4:60-9). Service of the notice is to be in accordance with Rule 1:5-2 if the defendant has previously appeared in the action, or in accordance with Rule 4:4-4 or 4:4-5 if the defendant has not previously appeared, or as the court may order. See topic Process. Where notice is served by publication, plaintiff must furnish defendant with a copy within 5 days after written request therefor. (Rule 4:60-9). Where the defendant has not been served with summons, he must file his answer or move against the complaint within 20 days after service of the notice of attachment, if service made in New Jersey, or within 35 days if service made outside New Jersey, by registered or certified mail, or within 35 days after last publication if service made by publication alone, or within such time as court may fix. Where the defendant has been served with summons but has not appeared, he has 20 days to move against the attachment and levy after notice of same has been served on him or after publication, if service by publication alone. (Rule 4:60-10).

*Applying Claimants.*—At any time before defendant enters appearance, any person having a liquidated or unliquidated claim against defendant, due or not, may apply to court to be admitted as applying claimant. Application must be by verified complaint, upon notice to plaintiff and claimants previously admitted, and will be admitted upon prima facie proof of the cause of action alleged by claimant. Within 10 days after order of admission or such time as court designates,

claimant must serve notice on defendant of admission order and, if possible, a copy of verified complaint, in same manner as plaintiff must serve notice of attachment on defendant. Defendant has same time after service to move or answer as is allowed for answering plaintiff's complaint. Any applying claimant may defend against the claim of plaintiff and any other applying claimant by serving and filing notice of contest of such claim at least 10 days prior to time fixed for trial or proof thereof. Proceedings on claims of applying claimants do not suspend or affect course of plaintiff's action against defendant. (Rule 4:60-15).

*Appearance.*—Defendant may enter his appearance at any time before final judgment. Thereafter no applying claimants may intervene, lien of attachment continues in favor of plaintiff and applying claimants, proceedings with respect to attached property may be had as if no appearance had been entered, and any judgment in favor of plaintiff and applying claimants is general. If defendant has not legally been served with summons or does not appear, judgment is special against attached property only. (Rule 4:60-12).

*Auxiliary Proceedings.*—Court may order attaching officer to prosecute actions to obtain attached property in hands of third persons, including collection of choses in action, trust income or corpus and legacies and distributive shares of a decedent's estate, and may make any orders necessary to preserve attached property, including orders to attaching officer to deliver property to court appointed receiver who may be empowered to collect attached assets and apply as court directs. (Rule 4:60-17; Tit. 2A, c. 26, § 13).

*Sale of Attached Property.*—Execution sale of attached property by sheriff or other officer and conveyance pursuant thereto convey all title held by defendant at time attachment became a lien or acquired by him thereafter. (Tit. 2A, c. 26, § 15). Court may order sale of personal property before judgment. (Rule 4:60-17). Sale of attached personal property pursuant to statute or court order has same effect as if made by defendant at time when attachment became lien. (Tit. 2A, c. 26, § 14). For effect of landlord's lien for rent on sale of attached personalty taken on leased premises, see Tit. 2A, c. 42, § 2.

*Distribution of Proceeds.*—Proceeds of attached property, after payment of any costs and charges directed by court to be paid therefrom, are applied, first, to payment of plaintiff's judgment and costs and, second, among the applying claimants in proportion to, but not in excess of, their judgments and costs. (Rules 4:60-17, 4:60-15[e]).

## New Mexico Law Digest

### Attachment

*Actions in Which Allowed.*—Attachment may be issued in any action, whether on contract or in tort. (26-1-2).

*Courts Which May Issue Writ.*—A writ of attachment may be secured in district court or magistrate court. (26-1-1, 36-11-1).

*In Whose Favor Writ May Issue.*—The remedy is available to any plaintiff including a nonresident or foreign corporation.

*Against Whom Writ May Issue.*—May issue against any person in both contract and tort actions. (26-1-2, 36-11-1).

**Claims on Which Writ May Issue.**—An attachment may issue on a demand not yet due as upon demands already due. (26-1-1). It may also issue on a claim which is not payable within the State.

Grounds of attachment are that the debtor: (1) Is a nonresident; (2) has concealed himself, absconded or absented himself from his usual place of abode in State so that ordinary process of law cannot be served on him; (3) is about to remove his property or effects out of State or has fraudulently concealed or disposed of his property so as to defraud, hinder, or delay creditors; (4) is about fraudulently to convey, or assign, conceal, or dispose of his property so as to defraud, hinder, or delay creditors; (5) has absconded or secretly removed his property into State with intent to defraud, hinder, or delay creditors, when debt was contracted out of State; (6) is a corporation having its principal place of business out of State, with no designated agent in State on whom process may be served; (7) fraudulently contracted debt or incurred obligation sued on or obtained credit by false pretenses; (8) requested plaintiff or his assignor to render work, labor, or services, constituting subject-matter of debt; (9) contracted the debt for necessities of life. Foreign corporation doing business in State without complying with requirements therefore is regarded as nonresident. (26-1-1, 36-11-1).

**Proceedings to Obtain.**—Plaintiff must file an affidavit showing the existence of one or more, of the aforementioned grounds of attachment.

**Attachment Bond.**—A plaintiff in attachment must give bond for double the amount of claim involved, unless, in district court attachment, court fixes a lesser amount, (26-1-7, 36-11-1).

**Property Subject to Attachment.**—All property of debtor, of whatsoever nature, may be attached, except property specifically exempted from execution (see Exemptions) and interest of beneficiary of spendthrift trust. (26-1-4). For purpose of attachment, situs of debts and obligations is at domicile of obligor and situs of intangible interests in property is where such property is located. (26-1-3).

**Levy.**—Writ is directed to the sheriff, who is commanded to attach the lands and tenements, goods, moneys, effects and credits of defendant, and is served as an ordinary summons. When lands or tenements are attached, the officer must briefly describe the same in his return, and state that he attached all the right, title and interest of the defendant to the same, and must give notice to the actual tenants. (26-1-17, 36-11-2). Officer must also file in office of country clerk a notice of levy, describing real estate levied on and showing title and number of case and amount of debt or judgment, and when debt is satisfied, officer must file a release. (24-1-4 et seq.). When goods and chattels, moneys, effects or evidences of debt are to be attached, officer must seize same and keep them in his custody, if accessible, and if not accessible, must summons person in whose hands they may be as garnishee. When intangible interest in personal property in possession of someone other than defendant is attached, officer endorses his levy, describing property, on copy of writ and serves it on person or corporation in possession. (26-1-17, 36-11-2). Practice of officer requiring indemnity bond before levying has fallen into disuse.

**Indemnity.**—Statute does not give levying officer right to require indemnity bond.

**Lien.**—Lien may be released by giving of forthcoming bond. (26-1-20).

Priorities between successive attachments are according to dates of levies. Attachment which has been levied has priority over judgment as to personalty not levied on under execution and as to real property in county in which no transcript of the judgment has been filed in office of county clerk.

**Sale.**—Interest in realty must be sold by special master. (26-1-36). Sale of personalty same as under ordinary execution. (26-1-37).

**Release of Property.**—Property attached may be retained by the defendant on giving forthcoming bond in double the value of the property. (26-1-20).

**Third Party Claims.**—Any person claiming any property, or a lien on any property which has been attached in any proceedings to which he is not a party, may intervene therein at any time before trial, by filing a petition under oath, setting up his right. (26-1-29).

**Vacation or Modification.**—Suit not abated by release of attachment. (26-1-32).

## New York Law Digest

### Attachment

**Actions in Which Permitted.**—Attachment may be granted upon application of plaintiff in any action, except a matrimonial action, where plaintiff has demanded and would be entitled, in whole or part, or in the alternative, to a money judgment against one or more defendants, on the grounds specified below. See subhead Grounds and Procedure. (C. P. L. R. § 6201).

**Property Subject.**—Any debt or property against which a money judgment may be enforced as provided in C. P. L. R. § 5201 (See topics Executions; also Exemptions) in subject to attachment. (C. P. L. R. § 6202).

**Granting of Order.**—Order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. Order must specify amount of plaintiff's demand, be indorsed with name and address of plaintiff's attorney, and directed to sheriff of any county or of the city of New York where any property in which defendant has an interest is located or where a garnishee may be served. Order must direct sheriff to levy within his jurisdiction, before final judgment, upon such subject property and debts as will satisfy plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses. (C. P. L. R. § 6211).

**Courts Which May Issue Order.**—An order of attachment, being one which may be granted without notice in supreme court or county court in any county of State (C. P. L. R. §§ 2212, 2213, 6211), may be granted upon motion at a motion term or by a justice out of court.

**In Whose Favor.**—Except as noted hereafter (see subhead Grounds and Procedure) there are no restrictions on the right of a nonresident or foreign corporation to obtain an attachment.

Defendant setting up counterclaim or cross-claim against co-defendant has same right to attachment of plaintiff's or co-defendant's property as if he had brought action against plaintiff or co-defendant on his claim. (C. P. L. R. § 6001).

**Publication.**—Seizure of property under order of attachment is one ground for an order of service of summons by publication, where

service cannot be made by another prescribed method with due diligence. (C. P. L. R. §§ 314, 315).

**Grounds and Procedure.**—To procure order of attachment plaintiff must show that cause of action exists, that action against defendant is not a matrimonial action, that plaintiff has demanded and would be entitled, in whole or part, or in the alternative, to a money judgment against one or more defendants, and that: (1) Defendant is a foreign corporation or not a resident or domiciliary of State; or (2) defendant resides or is domiciled in State and cannot be personally served despite diligent efforts; or (3) defendant, with intent to defraud creditors or to avoid service of summons, has departed or is about to depart from State, or keeps himself concealed therein; or (4) defendant, with intent to defraud creditors, has assigned, disposed of or secreted property, or removed it from State or is about to do any of these acts; or (5) defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or (6) action is based upon wrongful receipt, conversion or retention, or aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or (7) cause of action is based on a judgment of a U.S. court, or other judgment entitled to full faith and credit or qualified for recognition; or (8) there is a cause of action to recover damages for conversion of personal property, or for fraud or deceit. (C. P. L. R. § 6201). Plaintiff also must show amount demanded from defendant above all counterclaims known to plaintiff. (C. P. L. R. Rule 6212[a]).

Within 10 days after granting of order of attachment, plaintiff must file it, with affidavit, other papers upon which granted, and summons and complaint, or, unless time for filing is extended, order is invalid. Provision exists for demand by defendant that all supporting papers be served upon him. (C. P. L. R. Rule 6212[c], [d]).

**Attachment Bond.**—Plaintiff must, before granting of order, give undertaking which must be at least \$250, a specified part thereof conditioned that if defendant recovers judgment or it is finally determined that plaintiff was not entitled to attachment, plaintiff will pay all legal costs and damages which defendant may sustain by reason of attachment, and balance conditioned that plaintiff will pay all sheriff's fees. Plaintiff's attorney not liable to sheriff for sheriff's fees. (C. P. L. R. Rule 6212[b]).

**Service of Summons.**—Order of attachment granted before action is commenced is valid only if, within 60 days after order is granted, a summons is served upon defendant, or service by publication is commenced (and subsequently completed). If defendant dies within 60 days after granting of order and before summons served upon him or publication completed, summons must be served on his executor or administrator within 60 days after issuance of letters. Upon such terms as may be just and upon good cause shown, court may extend time, not exceeding 60 days, within which summons must be served or publication commenced provided application for extension is made before expiration of time fixed. (C. P. L. R. § 6213).

**Levy.**—Sheriff must levy upon any interest of defendant in personal property, or upon any debt owed to defendant, by serving a copy of order of attachment upon garnishee, or upon defendant if property

to be levied upon is in defendant's possession or custody, in same manner as a summons, with minor exceptions. Levy by service of order of attachment upon a person other than defendant is effective only if, at time of service, he owes debt to defendant or is in possession or custody of property in which he knows or has reason to believe defendant has an interest, or if plaintiff has stated in a notice which is served with order that a specified debt is owed by person served to defendant or that defendant has an interest in specified property in possession or custody of person served. All property in which defendant is known or believed to have an interest then in and thereafter coming into possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to defendant, are subject to levy. Person served with order must immediately transfer or deliver all such property, and pay all such debts upon maturity, to sheriff and execute any document necessary to effect payment, transfer or delivery. After such payment, transfer or delivery, property coming into possession or custody of garnishee, or debt incurred by him, are not subject to the levy. Until such payment, transfer or delivery is made, or until expiration of 90 days after service of order of attachment upon him, or of such further time as is provided by subsequent order of court served upon him, garnishee is forbidden to make or allow any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt to any person other than sheriff, except upon direction of sheriff or pursuant to court order. Garnishee, however, may collect or redeem an instrument received by him for such purpose and he may sell or transfer in good faith property held as collateral or otherwise pursuant to pledge thereof or at direction of any person other than defendant authorized to direct sale or transfer, provided that proceeds in which defendant has an interest be retained subject to the levy. Plaintiff who has specified personal property or debt to be levied upon in a notice served with an order of attachment is liable to owner of property or person to whom debt is owed, if other than defendant, for any damages sustained by reason of the levy. Where property or debts have been levied upon by service of order of attachment, sheriff must take into his actual custody all such property capable of delivery and must collect and receive all such debts. Plaintiff may commence a special proceeding against garnishee served with order to compel payment, delivery or transfer to sheriff of such property or debts, or to secure a judgment against garnishee. Notice of petition must also be served upon sheriff. Garnishee may interpose any defense or counterclaim which he might have interposed against defendant. Court may permit any adverse claimant to intervene. At expiration of 90 days after levy is made by service of order of attachment, or of such further time as court, upon motion of plaintiff, has provided, levy is void except as to property or debts which sheriff has taken into his actual custody, collected or received or as to which a proceeding has been commenced by plaintiff as aforementioned. (C.P.L.R. § 6214).

If plaintiff so directs and furnishes sheriff indemnity satisfactory to him or fixed by court, sheriff must levy upon property capable of delivery by taking property into his actual custody and forthwith serve copy of order of attachment upon person from whom property taken.

(C. P. L. R. § 6215). Subject to due process requirements of U.S. Constitution, court upon presentation of affidavit and undertaking shall grant order directing sheriff of county where chattel is found to seize it, and court may direct that if chattel is not delivered to sheriff he may enter and search place where chattel may be. In alternative, court may grant restraining order that chattel not be removed, disposed of, or allowed to become subject to security interest or lien. (C. P. L. R. § 7102).

Sheriff levies upon interest of defendant in real property by filing with clerk of county in which property is located a notice of attachment indorsed with name and address of plaintiff's attorney and stating names of parties to the action, amount of plaintiff's claim and a description of property levied upon. Clerk records and indexes notice in same books, in same manner and with same effect, as a notice of pendency of action. (C. P. L. R. § 6216).

Priorities among two or more orders of attachment against same defendant are in order in which they were delivered to officer who levied upon property or debt. Same rule applies as between executions and orders of attachment delivered to same enforcement officer. Where two or more executions or orders of attachment against same defendant are delivered to different enforcement officers for levy, and personal property or debts of defendant are levied upon within jurisdiction of all such officers, proceeds are applied first to execution or attachment delivered to levying officer, and thereafter applied to executions and attachments delivered to other officers, if such officers make a demand upon levying officer prior to distribution of proceeds in order of demand. An execution or attachment returned by an officer before a levy, or delivered to him after proceeds of levy have been distributed, cannot be satisfied out of such proceeds. (C.P.L.R. §§ 6226, 6234).

*Sale or other Disposition.*—If urgency of case requires, court may direct sale or other disposition of property, specifying manner and terms thereof, with or without notice. (C. P. L. R. § 6218[a]).

*Attaching Creditor's Rights.*—Where plaintiff has delivered order of attachment to sheriff, plaintiff's rights in debt owed defendant or in interest of defendant in personal property not exempt from attachment are superior, to amount of attachment, to rights of any transferee, except: (a) transferee who acquired same before levy for fair consideration or without knowledge of order of attachment, or (b) transferee who acquired same for fair consideration after levy without knowledge thereof, while it was not in possession of sheriff. (C. P. L. R. § 6203).

*Vacation or Modification.*—Prior to application of property or debt to satisfaction of judgment, defendant, garnishee, or any person having an interest in property or debt attached, may move, on notice to each party and sheriff, for order vacating or modifying order of attachment. Court must give plaintiff reasonable opportunity to correct any defect. If, after defendant has appeared in action, court determines attachment is not necessary to security of plaintiff, it must vacate attachment. Such motion is not, of itself, appearance in action. (C.P.L.R. § 6223).

*Discharge, Annulment and Cancellation.*—Defendant whose property or debt has been levied upon may move, upon notice to plaintiff and sheriff, for order discharging attachment as to all or a part of

property or debt upon payment of sheriff's fees and expenses. On such motion, defendant must give an undertaking, in an amount equal to value of property or debt sought to be discharged, that defendant will pay to plaintiff amount of any judgment which may be recovered in the action against him, not exceeding amount of undertaking. Making a motion or giving an undertaking under this section does not of itself constitute an appearance in the action. (C.P.L.R. § 6222).

Order of attachment is annulled when action in which it was granted abates or is discontinued, or a judgment entered in favor of plaintiff is fully satisfied, or judgment is entered in favor of defendant. In latter case a stay of proceedings suspends effect of the annulment, and a reversal of vacating judgment revives order of attachment. (C.P.L.R. § 6224).

Upon motion of any interested person, on notice to sheriff and each party, court may direct clerk of any county to cancel a notice of attachment and may direct sheriff to dispose of, account for, assign, return or release any property or debt, or proceeds thereof, or any undertaking, or to file additional inventories or returns, subject to the payment of sheriff's fees and expenses. Court must direct that notice of motion be given to plaintiffs in other orders of attachment, if any, and to judgment creditors of executions, if any, affecting any property or debt, or proceeds thereof, sought to be returned or released. (C.P.L.R. § 6225).

*Claims of Third Persons.*—Prior to application of property or debt to satisfaction of a judgment, any interested person may commence a special proceeding against plaintiff to determine rights of adverse claimants to the property or debt, by serving a notice of petition upon sheriff and upon each party in same manner as a notice of motion. The proceeding may be commenced in county where property was levied upon, or in county where order of attachment is filed. Court may vacate or discharge the attachment, void the levy, direct disposition of the property or debt, direct that undertakings be provided or released, or direct that damages be awarded. Where there appear to be disputed questions of fact, court must order a separate trial, indicating person who shall have possession of the property pending a decision and undertaking, if any, which such person shall give. If court determines that adverse claim was fraudulent, it may require claimant to pay plaintiff reasonable expenses incurred in the proceeding, including reasonable attorney's fees, and any other damages suffered by reason of the claim. (C.P.L.R. § 6221).

## North Carolina Law Digest

### Attachment

Attachment and garnishment is governed by G.S. §§ 1-440.1 through 1-440.46.

*Actions in Which Allowed.*—Attachment may be had in any action, the purpose of which, in whole or in part, is to secure judgment for money, or in any action by wife for alimony or for maintenance and support, or for custody and support of children, but not in any other action. (1-440.2).

*Courts Which May Issue Writ.*—Clerk or judge of appropriate trial division in county in which action has been or is being commenced may issue order of attachment. (1-440.5).

***In Whose Favor Writ May Issue.***—No discrimination against non-residents or foreign corporations with respect to obtaining attachments.

***Against Whom Writ May Issue.***—Attachment may issue against any defendant as to whom the necessary grounds (see *infra*) are shown to exist.

***Claims on Which Writ May Issue.***—Writ may issue only on one or more grounds specified by G.S. 1-440.3 and grounds must appear by affidavit. (1-440.11; 229 N.C. 327, 49 S.E. 2d 627).

***Grounds.***—Order for attachment may be issued when defendant: (1) Is nonresident, foreign corporation or domestic corporation whose president, vice-president, secretary or treasurer cannot be found in State after due diligence; or (2) is resident of State who, with intent to defraud his creditors or to avoid service of summons, (a) has departed or is about to depart from State or (b) keeps himself concealed therein; or (3) person or domestic corporation who or which, with intent to defraud his or its creditors, (a) has removed or is about to remove property from State or (b) has assigned, disposed of or secreted or is about to assign, dispose of or secrete property. (1-440.3).

***Proceedings to Obtain.***—Plaintiff, or his agent or attorney, must file affidavit that plaintiff has commenced or is about to commence action, purpose of which in whole or in part is to secure judgment for money and amount thereof. Affidavit must also state nature of such action and ground or grounds for attachment. If action is based on breach of contract, affidavit must state that plaintiff is entitled to recover amount for which judgment is sought over and above all counterclaims known to him; and if it is alleged as ground for attachment that defendant has done or is about to do any act with intent to defraud his creditors, affidavit must state facts and circumstances supporting such allegations. Verified complaint may be used as affidavit. (1-440.11).

***Attachment Bond.***—Plaintiff must furnish bond in such amount as court deems necessary to afford reasonable protection to defendant, in no case to be less than \$200. (1-440.10).

***Order of Attachment.***—Upon giving of proper bond and filing of affidavit, court will issue order of attachment directing sheriff to attach and safely keep all property of defendant within sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy plaintiff's demands, plus costs and expenses. (1-440.12). Additional orders of attachment may be then or later issued, directed to sheriff of any other county in which defendant may have property. (1-440.13).

***Levy.***—Provision is made for levy on real property (1-440.17), levy on tangible personal property in defendant's possession by seizure thereof (1-440.18), levy on stock in corporations (1-440.19), and levy on goods in warehouses (1-440.20). Levy on other tangible personal property not in defendant's possession is made as provided by 1-440.25 relating to garnishment. Sheriff is not required to levy upon personal property before levying upon real property. (1-440.15).

***Exemption.***—Payments constituting aid to blind award not subject to levy under execution, attachment or garnishment. (111-18).

***Lien.***—Upon securing order of attachment, plaintiff may cause notice of issuance of order to be filed with clerk of court in any county in which plaintiff believes defendant has real property. Clerk must file this notice on *lis pendens* docket. Where levy is made on real prop-

erty, lien attaches and relates back to time of filing of notice of lis pendens. If no entry of issuance of order of attachment is made on lis pendens docket of county in which land lies prior to levy, lien attaches only from time of docketing of certificate of levy. A levy on tangible personal property in hands of a garnishee creates lien from time of such levy. (1-440.33).

*Priorities.*—Priority of attachment liens is same as order in which attachments were levied, subject to aforementioned provisions relating to time when lien of attachment begins with respect to real property. Simultaneous levies create simultaneous liens, and in such case proceeds are prorated among attaching creditors. (1-440.33).

*Release of Property.*—Defendant may move court to discharge attachment upon his giving bond for property attached. Such motion constitutes general appearance if no prior general appearance has been made by defendant. Amount of bond must be double amount claimed by plaintiff or double value of property attached, whichever is less. Upon filing of satisfactory bond, court will issue order discharging attachment in accordance with defendant's motion. (1-440.39).

*Sale.*—Before judgment, sheriff may apply to court for authority to sell property seized pursuant to order of attachment (1) if property is perishable or (2) if property is not perishable but (a) will materially deteriorate in value pending litigation or (b) will likely cost more than one-fifth of its value to keep pending final determination of the action. (1-440.41).

*Third Party Claims.*—Any person other than defendant who claims property which has been attached, or any person who has acquired lien upon or interest in such property, whether acquired prior to or subsequent to attachment, may (1) apply to court to have attachment order dissolved or modified, or to have bond increased, upon same conditions and by same methods as are available to defendant, or (2) intervene and secure possession of property in same manner and under same conditions as provided for intervention in claim and delivery proceedings. (1-440.43).

*Vacation or Modification.*—At any time before judgment in principal action, defendant whose property has been attached may specially or generally appear and move court to dissolve order of attachment. When defect alleged as ground for motion appears upon face of record, motion is heard and determined upon record. When defect does not appear upon face of record, motion is heard and determined upon affidavits filed by plaintiff and defendant, unless prior to hearing jury trial demanded in writing by plaintiff or defendant. If jury trial demanded, issues are determined at trial of principal action unless judge orders earlier or separate trial. (1-440.36). At any time before judgment in principal action, defendant may apply to court for order modifying order of attachment and motion is heard upon affidavits. (1-440.37).

## North Dakota Law Digest

### Attachment

*Actions in Which Allowed.*—Remedy of attachment may be used in action on contract or judgment for recovery of money only, for the wrongful conversion of personal property, or for damages, whether arising out of contract or otherwise. (32-08-01).

**Courts Which May Issue Writ.**—Warrant of attachment may be issued by district court (32-08-01), county court of increased jurisdiction (27-08-20) or justice court. (33-05-01).

**Against Whom Writ May Issue.**—Writ may issue against any individual or corporate defendant, provided grounds exist, but property of banks is exempt from attachment. (6-08-06).

**Claims on Which Writ May Issue.**—Writ may issue in any action for recovery of money only, whether or not due and payable within this State; attachment may issue on a claim before it is due if grounds for attachment number 3, 4, 6 or 7 exist. (32-08-02).

**Grounds.**—The grounds for attachment are that the defendant: (1) Is not a resident of the State, or is a foreign corporation; (2) has absconded or concealed himself; (3) has removed or is about to remove his property, or a material part thereof from this State, not leaving enough therein for the payment of his debts; (4) has sold, assigned, transferred, secreted, or otherwise disposed of, or is about to sell, assign, transfer, secrete; or otherwise dispose of his property with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; (5) is about to remove his residence from the county where he resides, with the intention of permanently changing the same, and fails or neglects, on demand, to give security for the debt on which the action is commenced; (6) incurred the debt upon which the action is commenced for property obtained under false pretenses; (7) is about to remove his property or a material part thereof, from the State, with the intention or effect of cheating or defrauding his creditors, or hindering or delaying them in the collection of their debts; and (8) that the action is to recover purchase money for personal property sold to the defendant.

In action against owner of motor vehicle for damage alleged to be caused by negligence of owner or agent, the motor vehicle alleged to have caused the accident may be attached. (32-08-01).

**Proceedings to Obtain.**—Warrant of attachment may be issued upon filing with the court a verified complaint, an affidavit setting forth one or more of the grounds of attachment in the language of the statute, and the attachment bond. (32-08-05).

**Bond.**—Plaintiff is required to give an undertaking with sufficient sureties, in amount in discretion of court and in no case less than \$500 (32-08-06), except in justice court, bond must be not less than \$50 (33-05-02).

**Issuance.**—Warrant of attachment is issued by clerk of court in which action is commenced, and is attested in name of presiding judge, and sealed with seal of court (32-08-04) or if in a justice court, by justice (33-05-01).

Levy of a warrant is made as follows: (1) Upon real property by the sheriff filing with the register of deeds of the county in which the property is situated, notice of attachment, subscribed by him, stating the names of the parties to the action, the amount of the plaintiff's claim as stated in the warrant and a description of the property levied upon, which notice must be recorded and indexed by the register of deeds in his office (2) upon personal property which by reason of its bulk or other cause cannot be immediately removed, and range cattle and horses between Nov. 1 and May 15, by the sheriff filing with the register of deeds a notice of the same kind as in case of real property;

(3) upon personal property capable of manual delivery, including bonds, promissory notes or other instruments for the payment of money, by taking the same into the sheriff's actual custody, and delivering a copy of the warrant to the person from whose custody such property is taken; (4) upon other personal property by leaving a copy of the warrant and a notice showing the property attached with the person holding the same, or, if it consists of a demand other than as above specified, with the person against whom it exists, or if it consists of a right or share in the stock of a corporation or interest or profits thereon, with the president or other head of the corporation, or the secretary, cashier or managing agent thereof. (32-08-10).

In cases (1) and (2) above the sheriff must, within 30 days after the levy, serve the warrant of attachment together with a notice of levy, describing the particular property levied on, in the manner provided for the service of a summons, as follows: (1) If the levy is made upon real property, upon the occupant thereof, if any; (2) if upon personal property, upon the person in whose custody the same may be. The failure of the sheriff to serve such warrant or notice does not invalidate the levy, but the sheriff is liable to the person whose property is attached for any damages which he may sustain by reason of such default. (32-08-12).

Lien of attachment is valid from time of levy. (32-08-10).

*Priorities.*—Attachments rank in order of times of levies. Lien of attaching creditor is superior to claims of subsequent purchasers or incumbrancers and, as to land, superior to unrecorded conveyance or lien. (47-19-41).

*Discharge.*—The defendant may at any time after he has appeared in the action and before final judgment apply to the clerk who issued the attachment or to the court to discharge the attachment as to the whole or any part of the property attached. (32-08-18). On such application defendant must give an undertaking with sufficient surety to the effect that the attached property shall be forthcoming in substantially as good condition as it is at the time of the application to answer any judgment which plaintiff may recover against him in the action. The undertaking must be in an amount equal to the value of the property according to the sheriff's inventory; or the defendant may at his election give an undertaking with sufficient surety to the effect that he will on demand pay to the plaintiff the amount of any judgment which may be recovered in the action against him not exceeding a sum specified in the undertaking, with interest. The sum so specified must be at least equal to the amount of the plaintiff's demand as specified in the warrant of attachment; or, at the option of the defendant, equal to the appraised value of the property attached according to the sheriff's inventory, or, if the application is to discharge the attachment as to a part only of the property attached, equal to the appraised value of that part. (32-08-19).

*Sale.*—Perishable property may be sold by order of court by sheriff at public auction with or without notice as urgency of case may require; if attached property is liable greatly to depreciate in value during the pendency of the action, or consists of live animals, sale may be ordered by court on notice. (32-08-17).

In case plaintiff recovers judgment, sheriff shall satisfy same out of property attached by selling attached property under execution. (32-08-27).

**Third Party Claims.**—If a third person makes affidavit of title, or right to possession of attached property, stating value and ground of title or right, sheriff may release levy unless plaintiff on demand indemnifies sheriff against such claim by an undertaking, with sufficient surety; no claim exists against sheriff as such unless third party claim is filed. (32-08-13).

**Vacation or Modification.**—Defendant at any time after appearance and before final judgment may apply to court for discharge of attachment in whole or in part. (32-08-18).

Similar application may be made by any person who has acquired a lien or interest in the property after it is attached. (32-08-24).

Grounds for attachment may be challenged and heard by court on affidavit or other proof, and if appears attachment was irregularly issued, or that affidavit on which it was issued was untrue, attachment must be discharged (32-08-24), thereupon sheriff must surrender property to defendant (32-08-25).

## Ohio Law Digest

### Attachment

**Actions in Which Allowed.**—Any civil action for the recovery of money.

**Courts Which May Issue Writ.**—Court of common pleas, county or municipal court.

**When Writ May Issue.**—At or after commencement of action.

**In Whose Favor Writ May Issue.**—Any plaintiff, including non-resident or foreign corporation.

**Claims on Which Writ May Issue.**—No requirement that claim sued on be payable in State. See also *infra*, subhead Attachment before Debt Due.

Grounds for attachment against property other than personal earnings in court of common pleas are that defendant or one of several defendants: (1) Is foreign corporation which has not qualified to do business in State; (2) is not resident of State; (3) has absconded with intent to defraud creditors; (4) has left county of residence to avoid service of summons; (5) so conceals himself that summons cannot be served; (6) is about to remove his property or part thereof, out of jurisdiction of court, with intent to defraud creditors; (7) is about to convert his property, or part thereof, into money for purpose of placing it beyond reach of creditors; (8) has property or rights in action which he conceals; (9) has assigned, removed or disposed of, or is about to dispose of, property or part thereof with intent to defraud creditors; (10) has fraudulently or criminally contracted debt, or incurred obligation for which suit is about to be or has been brought; (11) that claim is for work, labor or necessaries; or (12) has not complied with provisions of bulk transfers law. (2715.01).

Attachment will not be granted on grounds (1) or (2) unless claim is for debt or demand arising on contract, judgment, or decree, or for causing damage to property or death or personal injury by negligent or wrongful act. (2715.01).

Attachment through garnishment granted against personal earnings only after judgment obtained by plaintiff. (2715.01).

County court attachment may issue in civil action for recovery of money, before or after its commencement, on any of grounds (3) to

(11) available in court of common pleas, or if claim arises on contract, judgment or decree, on ground that defendant is corporation with no officer to serve or no place of business in county. (1911.21).

Affidavit must be filed by plaintiff, his agent or attorney showing: (1) Nature of his claim; (2) that it is just; (3) amount which affiant believes plaintiff ought to recover; and (4) existence of any of foregoing grounds. (2715.03).

If action is before county court judge, affidavit must also state that property sought to be attached is not exempt from execution, attachment or sale to satisfy judgment or order. (1911.21).

Statutory demand must be served upon debtor after judgment obtained before order for attachment of personal earnings is granted. (2715.02). See topic Garnishment.

*Orders to Different Counties.*—Orders of attachment may issue to sheriffs of different counties.

Bond in double amount of plaintiff's claim must be given unless ground of attachment is that defendant is nonresident or foreign corporation. In case before county court no bond required on claim for work. Plaintiff may, in lieu of bond, deposit currency or negotiable government bonds in amount double amount of claim. (1911.22, 2715.04). Upon defendant's motion, if plaintiff's surety moved from State or is not sufficient, order of attachment may be vacated unless additional security given. (2715.43).

*Attachment Before Debt Due.*—Before claim is due, creditor may sue and attach debtor's property when debtor, with intent to hinder, delay or defraud creditors: (1) Has sold, conveyed or otherwise disposed of property; (2) is about to make such sale, conveyance, or disposition of property; or (3) is about to remove property, or material part thereof. (1911.58, 2715.50). Before such action is brought, or such attachment granted, plaintiff, his agent or attorney, must make oath in writing showing nature and amount of plaintiff's claim, that it is just, when due, and existence of one of aforementioned grounds. (1911.59, 2715.51).

If attachment is refused action is dismissed without prejudice to future action. (1911.60, 2715.52). Bond is required as in cases of attachment after debt is due. (1911.62, 2715.54). Attachment proceedings are conducted without delay, but no judgment is entered on claim before debt becomes due. (1911.63, 2715.55).

*Exemptions.*—See topic Exemptions.

*Levy.*—Sheriff must go to place where defendant's property is and in presence of two freeholders of county declare that by virtue of order he attaches property at suit. True inventory and appraisement must be signed by officer and freeholders and returned with order. When real property is attached, officer must leave with occupant thereof, or if there is no occupant, in conspicuous place thereon, copy of order. When personal property is attached, officer must take it into custody and hold it subject to order of court. (2715.09).

In county court cases levy is made by constable in substantially same manner (1911.25), except that he cannot levy on real property (1911.56).

*Indemnity.*—No statute authorizing officer to demand indemnity before levying.

**Priorities.**—Attachments against same defendant must be executed in order received by officer (1911.23, 2715.08) and attachment liens have priority in order of levies (1911.29, 2715.19).

**Discharge.**—Attachment must be discharged if judgment in action in attachment is for defendant (1911.47, 2715.36) and may be discharged on motion (1911.27, 2715.44) on ground that affidavit is insufficient (70 O.S. 328, 71 N.E. 712), that facts stated are not true (29 O.S. 538), that attachment was obtained by illegal means or fraud (8 C.C. 674) or, in common pleas court, that plaintiff has failed to give additional security as ordered by court (2715.43).

Attachment must be discharged on giving of bond in double amount of plaintiff's claim that defendant will perform judgment of court. In lieu of bond defendant may deposit currency or negotiable government bonds in double amount of plaintiff's claim. (1911.55, 2715.26). Except in claim for causing death or personal injury by negligent or wrongful act court sets bond (2715.27). Officer making levy must return property to person in whose possession it was found, on giving such bond in double appraised value of property. (1911.26, 2715.10).

After order issues, if defendant dies or defendant corporation loses charter, proceedings continue. (2715.42).

**Disposition of Property.**—In cases in common pleas court receiver may be appointed to collect evidences of debt and may bring suit. (2715.20-21). On notice of appointment defendant's debtors become liable to plaintiff and must account to receiver. (2715.22). If no receiver is appointed attaching officer has powers and duties of receiver. (2715.24).

**Sale.**—Attached property may be sold while suit is pending when, because of perishable nature (1911.32, 2715.25) or, in common pleas court, cost of keeping it (2715.25), sale would benefit parties. If judgment is entered for plaintiff property is sold as if taken on execution. (1911.49, 2715.37).

Claims of third persons are tried as in case of property taken on execution and claimed by third person. (1911.51, 2715.40).

## Oklahoma Law Digest

### Attachment

**Actions in Which Allowed.**—An attachment may issue in any action for the recovery of money. (12-1151).

**Courts Which May Issue Attachment.**—District court has jurisdiction.

**When Attachment May Issue.**—An attachment may be issued at or after commencement of the action. (12-1151).

**In Whose Favor Attachment May Issue.**—Any plaintiff, including a nonresident or foreign corporation, may obtain an attachment.

**Claims on Which Attachment May Issue.**—Attachment may issue where the claim is not yet due, although in such case the grounds differ somewhat from those in case of matured claim. (See *infra*, subhead Grounds).

**Property Liable.**—Nonexempt real estate and personal property including shares or rights of defendant in any domestic or foreign corporation licensed in State, are subject to attachment. (12-801-6). Mortgaged chattels may be attached provided plaintiff pays or tenders amount of mortgaged debt or deposits amount with county treasurer.

Plaintiff is subrogated to rights of mortgages in event attachment is discharged.

Grounds are that defendant, or one of several defendants: (1) Is a foreign corporation or a nonresident of the State; (2) has absconded with intent to defraud creditors; (3) has left county of his residence to avoid service of summons; (4) so conceals himself that service cannot be had upon him; (5) is about to remove property out of jurisdiction of the court with intent to defraud creditors; (6) is about to convert property into money for purpose of placing it beyond reach of creditors; (7) has property or rights in action which he conceals; (8) has assigned, removed, or disposed of, or is about to dispose of property with intent to hinder, delay, or defraud creditors; (9) fraudulently contracted debt, liability, or obligation, for which suit has been or is about to be brought; or (10) where action is for injuries arising from commission of a felony or misdemeanor, or for seduction of a female; or (11) when debtor has failed to pay price or value of an article or thing delivered which he was bound to pay for on delivery. Attachment may not issue on first ground stated above for any claim other than demand arising on contract, judgment or decree, unless cause of action arose wholly within the State. (12-1151).

Where the claim is not yet due, plaintiff may have an attachment if the debtor has sold, conveyed or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or delay them in the collection of their debts, or is about to make such disposition of his property with such intent, or is about to remove his property or a material part thereof with such intent. (12-1243).

*Affidavit for Attachment.*—The plaintiff or his agent or attorney must file an affidavit showing the nature and amount of plaintiff's claim, that it is just, and the existence of one or more of the grounds of attachment hereinbefore stated. (12-1152).

Where the claim is not yet due the affidavit must show also when it will become due and must set out one of the grounds for attachment on such a claim. In such case the attachment may be conducted without delay but no judgment may be issued until the claim is due. (12-1244).

Bond is not required when all defendants are nonresidents, in cases against a foreign corporation or where State of Oklahoma is party plaintiff. Otherwise, an undertaking in not less than double amount of plaintiff's claim, with one or more sureties to be approved by the clerk, is required, which must be conditioned that plaintiff will pay to defendant all damages he may sustain by reason of attachment including a reasonable attorney's fee. (12-1153-3).

Order of attachment is issued by the clerk of the court in which the action is brought or is pending.

Several orders may, at option of plaintiff, be issued at same time or in succession and to different counties. (12-1155). A separate petition should be filed in main action as in other cases.

*Levy.*—Order of attachment is executed by sheriff, who must make inventory and appraisal of all property attached. (12-1158). When real property is attached a copy of the order must be left with occupant. Personal property is taken into his custody where sheriff can get possession. (12-1159).

*Indemnity.*—There is no statutory provision authorizing a levying officer to require indemnity.

**Lien.**—Valid attachment proceedings give rise to a lien subsisting until discharged or satisfied. (14 Okl. 115, 77 Pac. 36).

**Priorities.**—Attachments have priority in order in which they are delivered to the sheriff. (12-1157).

Where several attachments are executed on the same property, court may determine the amounts and priorities thereof.

**Release of Property.**—Sheriff must redeliver attached property to person in whose possession it was found upon execution by such person of undertaking to plaintiff, with sufficient sureties, in double the appraised value of the property, that the property or its appraised value will be forthcoming to answer the judgment of the court. (12-1160).

**Discharge of Attachment.**—Bond for release of property (see supra) does not discharge attachment. (299 Fed. 816). Attachment is discharged and restitution of property is made if defendant, before judgment, executes an undertaking to plaintiff, with sufficient sureties, in double the amount of plaintiff's claim, that he will perform the judgment of the court. (12-1230).

**Vacation or Modification of Attachment.**—Defendant may, at any time before judgment, upon reasonable notice to plaintiff, move to discharge all or any part of the property attached. (12-1241).

**Sale.**—Court may direct sale of property during pendency of suit, where, because of perishable nature or cost of keeping it, a sale would benefit the parties. (12-1229).

**Third Party Claims.**—Third party claiming attached property may intervene in action. (12-1241).

**Disposition of Property or Proceeds Thereof.**—If judgment is rendered for defendant, attached property, or its proceeds, are returned to him. (12-1234). If judgment is rendered for plaintiff, it is satisfied by applying proceeds of sale of perishable property, and so much of remaining attached property as may be necessary is sold by order of court under same regulations and restrictions as if levied on by execution. (12-1235).

## Oregon Law Digest

### Attachment

**Actions in Which Allowed.**—A writ of attachment may be had in an action upon contract, express or implied, for the direct payment of money, not secured by mortgage, lien or pledge, upon real estate or personal property, or if so secured, when such security has been rendered nugatory by act of the defendant, or in action upon contract, express or implied, against a defendant not residing in this State, or in an action against a defendant not residing in this State to recover a sum of money as damages, arising from a breach of any contract, whether made in this State or elsewhere, express or implied, other than a contract of marriage, or in an action against nonresident for damages arising from injury to real or personal property in this State (29.110), except that no writ may be had to effect attachment of a consumer good or any property for claim based on a consumer transaction unless quasi in rem jurisdiction is sought and court finds that defendant neither resides nor maintains a place of business within State or that in personam jurisdiction cannot be effected (29.030; 29.040).

**Courts Which May Issue Writ.**—Court in which action pending issues writ. (29.120).

*Against Whom Writ May Issue.*—No attachment may issue against a State bank before final judgment. (711.610).

*Claims on Which Writ May Issue.*—An attachment may be had on a claim which is not payable within the State, but cannot be had upon a claim which is not due. (153 Or. 248, 56 P.2d 336).

*Time For Issuance of Writ.*—Attachment may be had at time of issuance of summons or after such time. (29.110).

*Grounds.*—See supra, subhead Actions in Which Allowed, and subhead Proceedings to Obtain, infra.

*Proceedings to Obtain.*—Upon plaintiff's affidavit meeting detailed requirements, court shall issue order for defendant and persons in possession of property to appear, 3 to 7 days after service, to show cause why provisional process to take possession or restrain disposition or use of property shall not issue. Court shall issue provisional process if after hearing it finds probable cause for sustaining plaintiff's claim. Order may issue without hearing if court finds defendant voluntarily, intelligently and knowingly made written waiver meeting statutory requirements, and no reason to believe waiver invalid. Upon certain findings where plaintiff meets requirements for injunction, court may, in its discretion and without hearing, issue temporary order restraining injury or removal of property, and requiring defendant to show cause why order should not continue during pendency of proceedings. If court finds that before hearing defendant has or is about to harm, remove or similarly threaten property, or defendant would not comply with a temporary restraining order, it may issue provisional process. (29.025-075). *Caveat.*—Oregon attachment statute (29.110-120) was held unconstitutional and its use enjoined in Multnomah County (Portland), insofar as it provided for prejudgment attachment without notice and opportunity for prior hearing, as required by due process of law. (Conaway v. Green, Multnomah Cir. Ct. No. 375655, Dec. 7, 1972; see 407 U.S. 67). It is unclear how 29.025-075, which establishes a hearing procedure prior to issuance of attachment, replevin and garnishment, affects other procedures relating to issuance of these types of provisional process.

*Attachment Bond.*—Plaintiff must file with clerk undertaking with one or more sureties in a sum not less than \$100 and equal to amount for which he demands judgment. (29.130). Sureties on an attachment bond must be householders or freeholders in State (29.130; 29.610) or a qualified surety company (743.732).

*Property Subject to Attachment.*—The rights or shares which defendant may have in the stock of any association or corporation, together with the interest or profits thereon, and all other property, other than consumer goods (29.030), in this State of defendant not exempt from execution are subject to attachment. (29.140). See also topic Garnishment, subhead Wages.

Levy may be on real or personal property in circuit or county court; but only on personalty in district or justice court. (52.210, 250; 46.090). Sheriff levies on personal property not in possession of a third person by taking it into his possession, on real property by filing a certificate with county clerk. If personal property is in possession of third person, sheriff leaves certified copy of writ and notice specifying property attached with said person; but if debt. with debtor; if stock, or if wage or salary claim against corporate debtor, with registered agent or

designated corporate official; if bank, with bank official. (29.170). Levy on security (78.3170) or debt evidenced by negotiable instrument (242 Or. 162, 408 P.2d 925) only by possession.

Lien continues until discharged by order of court or judgment for defendant or until officer holding personal property gives up possession. (29.400).

*Priorities.*—Attaching creditors do not share pro rata, but are paid in the order of their levy. (40 Or. 412, 67 P. 299).

*Release of Property.*—Property attached may be returned to the defendant upon his giving a counter undertaking to redeliver or pay the demand. (29.220).

*Sale.*—Levying officer may sell perishable property or livestock and retain proceeds in its place. (29.200).

Third party claims may be tried by sheriff's jury or by court in a summary manner. (29.210).

See also topics Executions; Garnishment.

## Pennsylvania Law Digest

### Attachment

The various forms of attachment herein discussed are available to proper plaintiffs including nonresidents and foreign corporations.

Foreign attachment is a means of commencing an action by attaching property located in Pennsylvania belonging to a nonresident defendant. Except as otherwise provided by the Rules of Civil Procedure relating to foreign attachment, procedure is in accordance with the rules relating to the appropriate action at law or in equity. (R. C. P. 1251).

*Actions in Which Allowed.*—Writ of foreign attachment may be issued to attach property of defendant not exempt from execution, upon any cause of action at law or in equity (other than an action ex delicto arising from acts committed outside Commonwealth which is not required to be joined with an action in assumpsit under R. C. P. 1020[d][1]), in which relief sought includes a judgment or decree for payment of money when: (1) defendant is an individual nonresident of Pennsylvania, even though he is present in State; (2) defendant is a partnership or unincorporated association without a regular place of business in Pennsylvania and action is against defendant in its firm or association name, even though one or more members are present in or residents of State; (3) defendant is a foreign corporation or similar entity, which is not registered in Pennsylvania. (R. C. P. 1252).

A foreign attachment may be issued in a pending action if at time of issue a foreign attachment could have been used to commence the action.

Courts which may issue writ are the courts of common pleas of the various counties. Foreign attachment is not available in courts of justices of the peace. (R. C. P. J. P. 325[3]).

Foreign attachment against personal property of the defendant may be issued: (1) against personal property only in a county in which the property is located or a garnishee may be served; (2) against real property of the defendant only in a county where all or any part of the property is located. (R. C. P. 1254).

Any person may be made a garnishee and is deemed to have possession of property of defendant if he owes a debt to defendant, has prop-

erty of defendant in his custody, possession or control, holds as a fiduciary property in which defendant has an interest or legal title to property of defendant whether or not in fraud of creditors. (R. C. P. 1253). Investment securities which are outstanding can be attached only by manual seizure by sheriff of the securities themselves, but a security surrendered to the issuer may be attached at the source. (12A-8 [317]). Unless document was originally issued upon delivery of goods by a person with no power to dispose of them, if a negotiable document of title such as a bill of lading or warehouse receipt is outstanding with respect to goods, the goods cannot be attached unless document first be surrendered or its issuance enjoined. (12A-7 [602]).

*In Whose Favor Writ May Issue.*—There is no provision discriminating against nonresident or foreign corporation plaintiffs. For requirements pertaining to plaintiffs generally, see Actions, subhead Parties.

*Against Whom Writ May Issue.*—See supra, Actions in Which Allowed and Courts Which May Issue Writ.

*Claims on Which Writ May Issue.*—Writ may issue only where plaintiff has a cause of action as stated above under this subhead. Since there must be a cause of action, the writ normally may not be issued upon an unmaturing claim.

*Proceedings to Obtain.*—Attachment is commenced by filing with prothonotary a praecipe for a writ directing sheriff to attach such specific items of defendant's property as are set forth in the praecipe and all other property of defendant. The praecipe must state amount of plaintiff's claim. (R.C.P. 1255). Writ is served in same manner as writ in assumpsit (see Process) upon named garnishee and upon any person not named as garnishee who is found in possession of property of defendant. (R.C.P. 1257). Plaintiff must file complaint when he files the praecipe or within 5 days thereafter. If complaint is not so filed, defendant or any garnishee may order prothonotary to enter judgment of non pros. Complaint when filed is served on garnishee in same manner as complaint in assumpsit. Defendant may be served with writ or complaint, but failure to do so does not affect validity of the attachment. If defendant is served, appears or files a bond or security, the action proceeds as if commenced by personal service of a summons or complaint. See Actions; also Process.

Defendant may appear specially and, without subjecting himself to the jurisdiction of the court, raise the defenses of immunity or exemption of the property from attachment, or that no property of defendant was in garnishee's possession when attachment was served. These defenses are raised by preliminary objection under R. C. P. 1017(b) (1) (see Actions) or by a petition to open judgment filed any time before garnishee files his answer to interrogatories. (R. C. P. 1271). After expiration of 45 days after execution of writ, plaintiff may take default judgment against any defendant who has not been served, has not appeared and has not filed bond or security, provided that a complaint has been filed at least 20 days prior to the judgment and no preliminary objections are pending.

*Attachment Bond.*—No bond or security is required of plaintiff in connection with issuance of writ.

*Levy and Lien.*—Service of writ upon garnishee attaches all personal property of defendant in garnishee's possession at time of service

and, if garnishee had any such property in his possession at time of service, writ also attaches all personal property which thereafter comes into garnishee's possession until judgment is entered against garnishee. If no one is in possession, sheriff attaches property by manual seizure. (R.C.P. 1258). Service of writ upon garnishee enjoins him from opening or permitting opening of a safe deposit box except as directed by court.

Service of writ upon the person in actual possession attaches real property (R. C. P. 1260) and binds the same as against purchasers and mortgagees (12-2942). If no one is in possession, sheriff posts copy of the writ upon the land and sends defendant a copy by registered mail to last known address; if no address is known, notice is published pursuant to general rule or special order of court. A mortgage, judgment lien or incorporeal hereditament owned by defendant may be attached by serving as garnishee the owner of the real property subject thereto. Service of writ upon tenant attaches rent due and to become due until judgment is entered against him.

Upon giving bond, plaintiff may require sheriff to take manual possession of any tangible personal property of defendant.

*Indemnity.*—Bond or security may be required of plaintiff (1) by sheriff for the actual or estimated cost of retaining possession of tangible personal property manually seized by sheriff or (2) by court to indemnify garnishee against loss caused by forcible opening of safe deposit box.

*Priorities.*—Writ of foreign attachment, when issued and indexed by the prothonotary, attaches real property at time writ is served upon person in possession of the property, and takes priority as of time writ issued. (R. C. P. 1255, 1260; 12-2942). As to personalty, priority of attachment gives priority of lien.

*Release of Property.*—Attachment is not dissolved by service of writ on defendant, or by his appearance, or by death or dissolution of a defendant or garnishee. Attachment is dissolved when any person or party (1) files a bond, with security approved by the prothonotary, in double amount of plaintiff's claim, or in such lesser sum as court may direct, naming Commonwealth of Pennsylvania as obligee, conditioned to pay plaintiff amount to which he is entitled upon final judgment, with interest and costs or (2) deposits with prothonotary or sheriff security in legal tender in an amount equal to plaintiff's claim, with probable interest and costs. (R. C. P. 1272a-c). Specific property may similarly be released. If plaintiff fails to proceed in time against garnishee, latter may cause attachment to be dissolved as to him.

*Sale.*—Perishable property attached may be preserved, sold or disposed of as court may order. (R. C. P. 1258).

*Procedure as to Garnishee.*—Within 20 days after service of writ upon him, garnishee must file a report under oath setting forth in detail all property of defendant in his possession, or stating that property is immune or exempt. Garnishee must promptly forward to defendant a copy of writ, complaint and garnishee's report, by delivering copy to defendant by a competent adult within or without Pennsylvania in the manner prescribed for serving a writ of summons in action of assumpsit or by sending copy by registered mail to defendant's last known address. If garnishee forwards copies as required, he is under no duty to resist the attachment or defend the action. The

garnishee may, but need not, file preliminary objections raising the defense of immunity or exemption of the property from attachment and the defense that no property of defendant was in garnishee's possession at time writ was served.

After entry of judgment against defendant, plaintiff may file interrogatories directed to garnishee, in statutory form (R.C.P. 1356), endorsed with notice to answer in 20 days, respecting the property in garnishee's possession. Garnishee answers in manner provided for answering complaints in assumpsit. See Actions. Under "new matter," answer may include the defense of the immunity or exemption of property, the defense that no property of defendant was in garnishee's possession at time writ was served, or any defense or counterclaim which garnishee could assert against defendant if sued by him, but may not assert any defenses on behalf of defendant against the plaintiff or otherwise attack the validity of the attachment.

If garnishee fails to file report or answer the interrogatories, plaintiff may take default judgment against the garnishee. Judgment against the garnishee may also be entered upon the pleadings or after trial. Execution may be had upon such judgment as against property of defendant in possession of garnishee, or debt owed by defendant to garnishee. See Executions.

Fraudulent debtor's attachment may be issued as an original writ or may be issued in a pending action if at time of issue a fraudulent debtor's attachment could have been used to commence the action. Except as otherwise provided by the Rules of Civil Procedure relating to fraudulent debtor's attachment, procedure is in accordance with the Rules relating to foreign attachment, *supra*. (R. C. P. 1285).

*Actions in Which Allowed.*—A fraudulent debtor's attachment may be issued to attach personal property of the defendant not exempt from execution, upon any cause of action at law or in equity in which relief sought includes a judgment or decree for payment of money, when defendant with intent to defraud plaintiff has removed or is about to remove property from jurisdiction of the court, has concealed or is about to conceal property, has transferred or is about to transfer property, or has concealed himself within, absconded or absented himself from Pennsylvania. (R. C. P. 1286).

Courts which may issue writ are courts of common pleas. Foreign attachment is not available in courts of justices of the peace. (R. C. P. J. P. 325[3]).

As to service upon garnishees, see *supra*, subhead Foreign Attachment.

*In Whose Favor Writ May Issue.*—There is no provision discriminating against nonresident or foreign corporation plaintiffs.

*Against Whom Writ May Issue.*—See *supra*, Actions in Which Allowed and Courts Which May Issue Writ.

*Claims on Which Writ May Issue.*—Writ may issue only where plaintiff has a cause of action as stated above under Actions in Which Allowed. Since there must be a cause of action, the writ normally may not be issued upon an unmaturing claim.

*Proceedings to Obtain.*—Fraudulent debtor's attachment is commenced by filing with the prothonotary (1) a praecipe for a writ directing sheriff to attach such specific items of defendant's personal property as are set forth in the praecipe, and all other personal prop-

erty of the defendant, (2) bond or security and (3) a complaint. The complaint must set forth the cause of action, the ground for attachment, a general statement of the fraud on which the attachment is based and, if plaintiff elects to file a bond in double the estimated value of the property, a statement of its value.

The writ and complaint are served by the sheriff in the same manner as in an action in *assumpsit*, but inability to serve the defendant does not affect validity of the attachment. If defendant is served appears, or files a bond or security, action continues as if commenced by personal service of a summons or complaint.

**Attachment Bond.**—Plaintiff must give bond in either double the amount claimed or double the estimated value of the property to be attached, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that plaintiff shall pay defendant and any garnishee all legal costs, fees and damages sustained by reason of the attachment if it is adjudged that either the cause of action or the ground for attachment set forth in the complaint is not established. In lieu of bond plaintiff may deposit with the prothonotary security in the form of legal tender in an amount equal to one-half the amount which would have been required if bond were filed.

Levy under writ of fraudulent debtor's attachment can be made only upon personal property. (R. C. P. 1286).

**Indemnity.**—Bond or security may be required of plaintiff (1) by sheriff for actual or estimated cost of retaining possession of tangible personal property manually seized by sheriff and (2) by court to indemnify garnishee against loss caused by forcible opening of safe deposit box. (R. C. P. 1285, 1259-1262).

**Priorities.**—Successive fraudulent debtor's attachments have priority of lien in the order in which they come into the hands of the sheriff. (12-2715).

**Release of Property.**—Within such time as not to delay trial the defendant may raise defense of absence of grounds for the attachment by petition to dissolve attachment. Such a petition does not of itself subject defendant to the jurisdiction of the court. An attachment is dissolved when any person or party (1) files a bond with security approved by the prothonotary in same amount as the attachment bond theretofore filed with plaintiff's complaint, naming the Commonwealth of Pennsylvania as obligee, conditioned to pay plaintiff if final judgment is entered in his favor amount to which plaintiff is entitled or value of property attached, whichever is less or (2) deposits with the prothonotary or with the sheriff for the prothonotary security in the form of legal tender in an amount equal to one-half of amount of the bond theretofore filed with plaintiff's complaint.

**Sale.**—Perishable property may be preserved, sold or disposed of as the court may order. (R. C. P. 1285, 1258).

**Procedure as to garnishees** is the same as in foreign attachments, *supra*.

## Rhode Island Law Digest

### Attachment

**Actions in Which Allowed.**—Generally only allowed in action based upon a contract under which damages are susceptible of estimation and

determination. (24 R.L. 23, 51 Atl. 1044). Allowed in tort actions where defendant a nonresident. (10.5.6). See subhead Courts Which May Issue Writ.

*Courts Which May Issue Writ.*—Superior court and district court. Superior court, in civil action of an equitable character, may allow attachment by special order. (10.5.5).

*In Whose Favor Writ May Issue.*—Attachment may issue in favor of a nonresident or a foreign corporation.

*Exemptions.*—See topic Exemptions.

*Claims on Which Writ May Issue.*—Attachment may issue on a debt that is due and on unmaturing debt absolutely payable at a certain date. (19 R.L. 220).

*Proceedings to Obtain.*—At time of commencement of action, or at any time thereafter prior to judgment plaintiff must file a motion for authority to attach defendant's assets, including real and personal property. Notice of motion must be served on defendant at least 5 days prior to hearing date. Motion will be granted only upon plaintiff's showing that he will probably prevail and that there is a need for furnishing plaintiff security in amount sought for satisfaction of judgment, plus interest and costs. In actions where plaintiff's claim against defendant has been reduced to judgment, defendant's assets may be attached without further hearing or notice. (10.5.2; R.C.P. and D.C.R. 4[j]).

*Attachment Bond.*—May be required. (R.C.P. and D.C.R. 4[j]).

*Levy.*—Real estate is attachable by the sheriff by filing a copy of the writ, containing a description of the real estate to be attached, with the recorder of deeds or town clerk in the city or town where the real estate is located. (10.5.9). Personal property is attachable to value commanded in writ and is kept by officer making attachment in his custody as security until he sells property or it is withdrawn from his custody. (10.5.10, 12).

*Indemnity.*—Levying officer has no right to require.

*Priorities.*—Rights of attaching creditors are determined by time when sheriff actually serves trustee or takes possession of personal property or in case of realty, when copy of writ is filed in records of land evidence. (9.26.30).

*Release of Property.*—Personal property attached may be released within 48 hours after such attachment, exclusive of Sundays and legal holidays, by the defendant or some one in his behalf giving bond to the sheriff with satisfactory surety or sureties to pay judgment. (10.5.13). If no bond is given within that time, the attached goods are appraised and thereafter the attachment may be released at any time before final judgment by the defendant or some one in his behalf giving like bond to return the goods or pay double their appraised value or pay judgment. (10.5.16).

Real estate may be released by defendant giving surety company bond in amount of damages in writ or depositing such amount in cash with registry of court. (10.5.17).

*Dissolution of Attachments.*—Attachment dissolved if complaint in action is not filed within 30 days after such attachment. (10.5.45). Real estate attachment lien dissolved whenever the cause remains without action for a period of 6 years as shown by court docket. (10.5.44). See topic Executions.

**Sale.**—Animals, perishable goods and goods which cannot be kept without great and disproportionate expense may be sold after reasonable notice by order of court and proceeds paid into registry of court to be held as security to satisfy judgment or decree. (10.5.35-36).

**Third Party Claims.**—Interested persons may intervene and contest validity of attachment. (10.17.19).

**Modification.**—Defendant may move to reduce demand for judgment and amount of property attached or to release property from attachment. (10.5.18).

**Wages.**—Wage attachments permitted. See subhead Proceedings to Obtain, *supra*. See also Consumer Credit Protection Act. Title III (15 USCA §§ 1671 et seq.).

## South Carolina Law Digest

### Attachment

**Actions in Which Allowed.**—Attachment will lie in any action for the recovery of money, whether on contract or in tort.

**Courts Which May Issue Warrant.**—Warrant of attachment must be obtained from the judge, clerk of court, or magistrate in which or before whom the action is brought or from the circuit judge. (10-904).

**In Whose Favor Warrant May Issue.**—Attachment may be obtained by any plaintiff, including a nonresident or foreign corporation.

**Against Whom Warrant May Issue.**—Attachment may issue against any defendant as to whom the necessary grounds (see *infra*) may be shown, whether or not a resident of the State.

**Claims on Which Warrant May Issue.**—It is not necessary that the claim sued on should be due when the warrant is issued. (10-903).

**When Warrant May Issue.**—Property of defendant may be attached at time of issuing summons or at any time thereafter during pendency of the action.

Grounds for attachment are that the defendant is a foreign corporation, or not a resident of the State, or that defendant has departed from the State with intent to defraud his or its creditors, or to avoid service of a summons, or keeps himself concealed within the State with like intent, or that defendant has removed or is about to remove property from this State with intent to defraud his creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete property with like intent. (10-901).

Where debt is not due attachment will lie when it appears by affidavit that the debtor has departed from the State with intent to defraud creditors or to avoid service of summons, or keeps himself concealed in the State with like intent, or has removed or is about to remove property from the State with intent to defraud creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with like intent. Judgment cannot be had until maturity of the debt and plaintiff must pay costs if the debt is paid on or before maturity. (10-903).

**Purchase Money Claims.**—Real or personal property may be attached in an action for unpaid purchase money thereof, even though none of the general grounds for attachment exist. (10-951).

**Proceedings to Obtain.**—In order to obtain an attachment it is necessary to file an affidavit showing that a cause of action exists against the defendant, specifying the amount and grounds of plain-

tiff's claim, and showing the existence of one or more of the grounds for attachment. (See *supra*).

**Attachment Bond.**—Before a warrant of attachment issues, plaintiff must give a bond for not less than \$250, except in a magistrate's court, not less than \$25. (10-908). The bond must be signed by plaintiff or duly authorized agent before the warrant is issued. (31 S.C. 360, 9 S.E. 1028; 55 S.C. 547, 33 S.E. 581).

Warrant of attachment is addressed to any sheriff or constable of any county where property of defendant may be and requires him to attach and keep property of defendant in his county sufficient to satisfy plaintiff's demand and costs. Several warrants may be issued at the same time to sheriffs or constables of different counties. (10-911).

**Service of Summons in Action.**—Personal service of summons must be made or publication thereof commenced within 30 days after attachment. (10-901).

**Levy and Lien.**—Attaching officer must attach real and personal property, unless exempt, including money, and takes into custody books of account, vouchers and papers relating to property. Attested copy of attachment of real estate must be served on owner and lodged in office of clerk of court of county in which property situated. If service is impossible copy and officer's return must be lodged in office of clerk of court. Record of attachments is kept by clerk. Lien attaches when warrant is lodged and attachments lodged the same day rank equally. Attachment lien is subject to all prior liens. (10-923 to 924).

**Indemnity.**—There is no statutory authority for the officer demanding an indemnity bond before levy.

**Appraisal.**—All property attached must be appraised. (10-927).

**Release of Property.**—Defendant or any person establishing a right to property may have the property released from attachment by giving bond in double the amount claimed by plaintiff. (10-930 to 932.1).

**Third Party Claims.**—If property be claimed by a party other than defendant, or by defendant or the person in possession, in the right of some third person, an issue is made up by the judge and trial had. If the party in possession or third person resides in a different county from the plaintiff the issue is tried in the county where the party in possession resides. (10-929).

**Vacating.**—An attachment may be vacated for irregularities or for failure to strictly follow the statute. (31 S.C. 360, 375, 9 S.E. 1028; 38 S.C. 228, 10 S.E. 774; 43 S.C. 443, 21 S.E. 331; see also 58 S.C. 398, 36 S.E. 744; 159 S.C. 378, 157 S.E. 72).

Uniform Commercial Code governs attachment of goods covered by negotiable documents, bulk transfers of goods and investment securities.

## South Dakota Law Digest

### Attachment

**Carcat.**—*Lake Arrowhead Estates, Inc. v. Cummings*, USDC Me., June 25, 1973, 42 LW 2035, where court held prejudgment attachment without prior notice and hearing violated Due Process Clause of Fourteenth Amendment.

**Actions in Which Allowed.**—If requisite grounds exist, resort may be had to attachment in any action. (21-17-2).

**Courts Which May Issue Writ.**—Writ may be issued in any court having jurisdiction of action. (21-17-2).

***In Whose Favor Writ May Issue.***—Any plaintiff, including foreign corporation authorized to do business in the State, may obtain an attachment. (21-17-2).

***Against Whom Writ May Issue.***—There are no statutory exemptions from the writ, so far as concern private individuals and private corporations.

***Claims on Which Writ May Issue.***—The writ may issue on any claim on which action may be maintained, and a creditor may bring action on a claim before it is due, and have attachment if defendant has removed, or is about to remove, property from South Dakota with intent to defraud or delay creditors; or has secreted, incumbered, transferred, or otherwise disposed of property, or is about so to do, with like intent; or if debt was incurred for property obtained under false pretenses, no judgment, however, to be rendered until claim is due and payable. (21-17-1).

***Grounds.***—Attachment may issue in any of the following cases: (1) When defendant is a corporation and has no officer, agent or attorney upon whom summons can be served within this State; (2) when defendant is not a resident of this State; (3) when defendant has departed from this State with intent to defraud or delay his creditors or to avoid service of summons or keeps himself concealed therein with like intent; (4) when defendant, either person or corporation, has removed or is about to remove any of his or its property from this State, with intent to defraud or delay his or its creditors; (5) when defendant, either person or corporation, has secreted, incumbered, transferred or otherwise disposed of, or is about to secrete, incumber, transfer or otherwise dispose of, any of his or its property with like intent; (6) when defendant has fraudulently contracted the debt or incurred the obligation for which the suit is, or has been brought: (7) in an action to recover purchase money, for personal property sold to defendant, an attachment may be issued and levied upon such property. (21-17-2).

***Proceedings to Obtain.***—To obtain an attachment, affidavit must be made by plaintiff or his agent or attorney, setting forth grounds of cause of action against defendant, and amount of claim, and alleging existence of one or more of the grounds of attachment as above indicated; and if attachment is to be limited to specific property of defendant, definite description thereof and declaration of its fair market value. (21-17-3).

***Attachment Bond.***—Plaintiff must give bond, with sufficient surety (or cash deposit) of at least twice amount claimed, or if amount claimed exceeds \$1,000, then in such amount claimed, but in no case exceeding \$10,000, to the effect that if defendant recovers judgment, or if court finally decides plaintiff was not entitled to attachment, plaintiff will pay all costs awarded defendant and all damages defendant sustains by the attachment, not exceeding the sum specified in the undertaking; except that if affidavit for attachment describes specific property to be attached and states fair market value thereof and limits attachment thereto, undertaking shall be amount of such declared value, but not less than \$250. (21-17-4, 5).

***Levy.***—Warrant of attachment may be levied on any or all property, real or personal, of defendant, liable to execution, including property held for him in the hands of third persons, and debts due and

owing to him, sheriff taking into possession books of account, and evidences of indebtedness. (15-18-20 to 27; 21-17-8, 9).

*Indemnity.*—There is no statutory authority for sheriff to demand indemnity before making a levy.

Lien of attachment effective from time of levy. (21-17-12).

Priorities between successive attachments are according to dates of actual levies.

*Release of Property.*—Defendant upon appearing may file with sheriff undertaking executed by corporate surety or two resident freeholders of the State, approved by sheriff, conditioned to pay on demand amount of any judgment which plaintiff may recover, with interest and costs. (21-17-25 to 30). Thereupon, sheriff gives written notice thereof to plaintiff's attorney, and within 3 days thereafter plaintiff may give written notice to sheriff of exception to sufficiency of sureties, in which case sheriff notifies defendant thereof, and sureties may justify in same manner as sureties under statutes relating to civil arrest. If no such exceptions are taken, or if sureties justify following such exceptions, warrant of attachment is dismissed, and any levy released. (21-17-25 to 30).

*Dissolution.*—Defendant or any person having a lien subsequent to attachment lien may move to dissolve attachment. (21-17-22, 23, 24, 31).

*Sale.*—If property seized is perishable, it may be sold by sheriff at public auction, this under order of the court, sheriff paying net proceeds of sale into court. (21-17-20).

Third party claims must be made to sheriff, who calls six jurors and gives plaintiff notice of trial of claim. If verdict is for claimant, sheriff will relinquish levy unless plaintiff gives indemnity. (15-18-31; 21-17-21).

## Tennessee Law Digest

### Attachment

*Actions in Which Allowed.*—Attachments lie in all civil actions, whether in contract or in tort (23-601-06), without limitation as to amount in controversy in proper cases.

*Courts Which May Issue Writ.*—Writ lies in court of law or equity or before justice of the peace. (19-405, 23-606).

*In Whose Favor Writ May Issue.*—Any person is entitled to issuance of writ, whether resident or nonresident (23-601; 190 Tenn. 1, 227 S.W. 2d 35), without restriction as to foreign corporation (42 Tenn. 153). Where both creditor and debtor are residents of same foreign state, the creditor must make oath that property of debtor has been fraudulently removed to this State to evade process in State of residence. (23-609).

*Grounds.*—The writ lies against property of: (1) Nonresident (will not lie against foreign corporation domesticated in Tennessee unless it has no agent on whom process may be served); (2) one who is about to remove or has removed himself or property from the State; (3) one who has removed, or is removing himself out of the county privately; (4) one who conceals himself so that ordinary processes of the law cannot be served upon him; (5) one who absconds or is absconding or concealing himself or his property; (6) one who has fraudulently disposed of, or is about to fraudulently dispose of, his property; (7)

decedent resident outside of State liable for debt leaving property in State. (23-601).

*Claims on Which Writ May Issue.*—Writ may be sued out upon debts or demands not due upon above grounds except the first, nonresidence of defendant. (23-602). If any other ground exist, it may issue against a nonresident. An accommodation endorser may sue out writ as a security for his liability. (23-603). No final judgment will be rendered until the debt matures. (23-604).

*Proceedings to Obtain.*—To obtain attachment, the plaintiff his agent or attorney, must make oath in writing stating the nature and amount of the debt, claim or demand, and that it is a just claim, and also that one or more of the grounds for attachment exist (23-613); a substantially accurate description of the property sought to be attached and its approximate value must be set forth in the affidavit or the bill, which must be sworn to (23-617).

*Attachment Bond.*—Bond conditioned to prosecute attachment with effect, or, in case of failure, to pay defendant all costs and such damages as he may sustain by reason of the wrongful suing out of the writ, must be filed by plaintiff, his agent or attorney. (23-615). The amount of the bond must be: (1) Where the amount of the claim is less than the value of the property to be attached, equal to the asserted claim plus an additional sum estimated to cover probable costs and damages; (2) where the amount of the claim is greater than the value of the property to be attached, be equal to the estimated value of the property plus estimated costs and damages; (3) where claim is for unliquidated damages, be equal to the value of the personal property to be attached plus estimated costs and damages; (4) where real property is attached, sufficient to cover all costs and damages only. (23-616).

*Levy.*—The writ is levied by the officer upon any real or personal property, whether interest therein is legal or equitable, debts and choses in action, whether due or not due. (23-632). Personalty must be exhausted before levy on real estate. (23-633).

*Indemnity.*—No provision is made for the officer to require indemnity.

Priorities between different attachments of same property are according to times of levies.

*Release of Property.*—The attachment may be discharged if the defendant give bond and security approved by the court, in term time, or its clerk in vacation, to indemnify the plaintiff. (23-605).

*Sale.*—No property levied upon, except it be perishable property, will be sold before final judgment or decree. (23-604).

*Vacation or Modification.*—Attachments issued without prescribed affidavit and bond may be abated by plea of defendant. (23-632).

## Texas Law Digest

### Attachment

*Actions in Which Allowed.*—Attachment may issue only after suit has been filed, but may be issued either at commencement or at any time during progress of litigation. (277). Attachment may be issued on every demand founded on breach of express or implied contract where damages are capable of definite ascertainment. Generally attachment does not lie in actions founded on tort, but in cases in which

personal service cannot be obtained in State, attachment may lawfully issue whether amount claimed is in tort or contract. (281).

*Courts Which May Issue Writ.*—Attachment must issue out of court where suit is filed. Clerk issues writ.

*In Whose Favor Writ May Issue.*—No limitation is imposed on issuance of the writ on account of residence or citizenship of plaintiff.

*Against Whom Writ May Issue.*—Attachment available against all persons who are indebted to plaintiff in main action whether they are artificial or natural persons, residents or corporations.

*Claims on Which Writ May Issue.*—Attachment may only issue upon a certain or liquidated demand, unless the suit out of which it issues is against parties upon whom personal service cannot be obtained within the State, in which case it may issue upon an unliquidated demand. (281). It may issue, however, upon a debt not yet due. (278). It is not necessary that the claim be payable in Texas.

Grounds for attachment are that defendant: (1) is a nonresident or a foreign corporation, or is acting as such; (2) is about to remove permanently out of State, and has refused to pay or secure debt due to plaintiff; (3) secretes himself so that ordinary process cannot be served; (4) has secreted his property to defraud his creditors; (5) is about to secrete his property to defraud his creditors; (6) is about to remove his property from State, without leaving sufficient remaining for payment of debts; (7) is about to remove his property or part thereof, from county, to defraud creditors; (8) has disposed of all or part of his property to defraud creditors; (9) is about to dispose of his property to defraud creditors; (10) is about to convert all or part of his property into money, to place it beyond reach of creditors; (11) obtained property for which debt is due by false pretenses. (275).

*Proceedings to Obtain.*—Before a writ of attachment may issue, the plaintiff or his representative must file a bond and an affidavit showing that the defendant is justly indebted to the plaintiff in an amount which must be stated, except in the case of an unliquidated claim against a defendant who cannot be served in the State; and also showing that one or more grounds for attachment exist, that the writ is not sued out to injure or harass defendant, and that unless the writ issues, plaintiff will probably lose his claim. (276).

Attachment bond must be filed by plaintiff before a writ of attachment will issue, which is payable to defendant, in an amount to be fixed by judge or justice of the peace issuing attachment, conditioned to pay all costs and damages for wrongfully suing out writ. (279). Where defendant resides beyond State and demand is unliquidated judge or clerk of court, or justice of peace, fixes amount of bond.

*Levy.*—The officer serving a writ of attachment may levy on any property subject to execution, in the same manner as levy is made under execution.

*Indemnity.*—Levying officer may require indemnity bond to protect him. (287).

*Lien.*—Levy creates a lien on the property levied upon from the date thereof. Personal property is taken by the officer and possession retained until final judgment unless defendant, or a third party replevies, or the property is ordered sold by the court. Should plaintiff recover judgment attachment, lien is foreclosed like any other lien. (Rule 598).

Priorities among attaching creditors are governed by dates of levies.

*Release of Property.*—A defendant in attachment may recover possession of attached property, by filing a replevy bond, amount of which, at his option, may be either twice claim of plaintiff, or twice value of property attached. (Rule 599).

*Sale.*—If property attached is perishable, court may order it sold and proceeds held to secure debt, or may make such other order for its preservation or use as it may deem for best interests of parties. (Rules 600-608).

*Third Party Claims.*—Any third person claiming property levied upon, may file an affidavit showing his claim, and a bond, and secure a trial of the right of property. (291). The procedure is as in cases of executions. See Executions.

*Vacation or Modification.*—Attachment may be vacated by motion to quash if objection is based on intrinsic defect discernible on face of paper. If objection is based on extrinsic defect, plea in abatement should be used.

### Utah Law Digest

#### Attachment

(R. C. P. 64C).

The plaintiff, at any time after filing complaint, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay said judgment.

*Actions in Which Allowed.*—Attachment may be obtained in an action upon a judgment or upon a contract, express or implied, or to recover damages for any tort committed by nonresident against person or property of resident.

*Grounds.*—Writ will issue against a defendant who: (1) Is not residing in this State; or (2) is a foreign corporation not qualified to do business in this State; or (3) stands in defiance of an officer, or conceals himself so that process cannot be served upon him; or (4) has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, any of his property, with intent to defraud his creditors; or (5) has departed or is about to depart from the State to the injury of his creditors; or (6) fraudulently contracted the debt, or incurred the obligation respecting which the action is brought; or (7) where plaintiff alleges facts showing probable cause for being, and that he is justly apprehensive of loss of his claim unless attachment issues.

*In Whose Favor Writ May Issue.*—In a proper case, attachment may be had by any plaintiff, including a nonresident or a foreign corporation which has the right to sue in the State courts.

*Against Whom Writ May Issue.*—See subhead Grounds, supra.

*Claims on Which Writ May Issue.*—Attachment may issue in an action on a claim which is not payable in the State, provided the court has jurisdiction of the action.

*Unmatured Claims.*—A creditor may bring an action on his claim before it is due and have an attachment against the property of the debtor in the cases mentioned in subdivisions three, four, five and six of subhead Grounds, supra, and such property or its proceeds may be held subject to the judgment thereafter to be rendered, but no judgment may be rendered thereon until such obligation becomes due.

**Proceedings to Obtain.**—The clerk of the court must issue the writ upon receiving an affidavit by or on behalf of the plaintiff, which must be filed, setting forth: (1) That the defendant is indebted to the plaintiff, specifying the amount, as near as may be, over and above all legal setoffs and the nature of the indebtedness; (2) that the payment of the same has not been secured by mortgage, lien, or pledge of personal property situated in this State, or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become impaired; (3) that the attachment is not sought to hinder, delay, or defraud any creditor of the defendant; and also (4) alleging, but not in the alternative, one or more of the causes hereinbefore set forth as the grounds of attachment.

**Attachment Bond.**—Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, with sufficient sureties, in a sum not less than double the amount claimed by the plaintiff, but in no case exceeding \$10,000, or less than \$50. The conditions of such undertaking must be that, if the defendant recover judgment, or if the attachment is wrongfully issued, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

**Indemnity.**—See subhead Attachment Bond, supra.

**Issuance of Writ.**—Several writs may be issued at the same time to the sheriffs of different counties; and plaintiff may have other writs as often as he may require at any time before judgment.

At time of issuance of writ, or at any time thereafter, writ of garnishment may issue in aid thereof. See topic Garnishment.

**Property Subject to Attachment.**—The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this State, of such defendant, not exempt from execution, may be attached, and, if judgment be recovered, be sold to satisfy the judgment.

**Levy.**—Writ is executed: (a) in case of real property in defendant's name, or growing crops on such property, by filing with the county recorder a copy of the writ including description of the property attached and notice that it is attached, and leaving like copy of writ, description and notice with occupant of property, if there be one, otherwise posting same on the property; (b) in case of real property in the name of another or growing crops on such real property same as (a) above except that notice must name person in whose name property is recorded and notice must be given to that person and recorder must index under his name as well; (c) in case of personal property capable of manual delivery, by taking it into custody except that range stock, between November 1 and May 15 may be attached by filing with county recorder copy of writ and notice, together with statement of number with marks and brands, if any, or may be taken into custody by direction of plaintiff; (d) in case of shares of stock or an interest therein, by leaving with the president, secretary or other managing agent copy of writ and notice stating that the stock, or defendant's interest therein, is attached and taking the certificate into custody; (e) in case of debts and credits and other personal property not capable of manual delivery, by leaving with the person owing the debt or

having possession or control of credits or other personal property, a copy of the writ and a notice that the debts or credits or other personal property are attached in pursuance of the writ.

*Sale.*—If interest of parties is subserved thereby, property may be sold and proceeds deposited in court to abide judgment; or after judgment, to satisfy same—all as in case of execution.

*Priorities.*—Several attachments against the same defendant must be executed in the order in which they were received by the officer. Dates of levies control priorities.

*Release of Property.*—Defendant may obtain release of property by giving notice and bond with sufficient sureties to effect that if plaintiff recover defendant will deliver property to officer or full value to plaintiff; or defendant may obtain discharge of attachment by giving bond in double the amount claimed by plaintiff.

*Vacation.*—Upon reasonable notice to plaintiff, defendant may apply for discharge of writ if improperly or irregularly issued.

*Lien.*—No statutory provision.

## Vermont Law Digest

### Attachment

In any civil action, along with summons and complaint, except for malicious prosecution, libel, slander, or alienation of affection. (VRCP 4.1).

*In Whose Favor Writ May Issue.*—Not necessary that plaintiff be a resident of the State.

*Grounds.*—Where for attachment of personalty, only upon hearing showing probable grounds for complaint, and that amount of attachment is reasonable. Writ may be filed as if a financing statement under 9A-0-401 to secure chattel. (12-3251).

Possessory attachments require a motion, supporting affidavits, 5 days notice of hearing and finding by court of reasonable likelihood of recovery. (VRCP 4.1).

*Dissolution and Modification.*—Any time prior to final judgment, defendant may move for dissolution or modification on basis of lack of probable basis for plaintiff's complaint. (VRCP 4.1).

*Attachment Bond.*—Plaintiff must give defendant sufficient security by recognizance by some person other than plaintiff. (12-657).

*Indemnity.*—The officer to whom the writ is delivered may demand from plaintiff sufficient security to indemnify him before making a levy. (12-2741).

*Sale.*—Attached property is generally held and sold on execution at auction by the sheriff, but it may be sold before judgment on agreement of parties, and the money held to protect both parties in a declining market. (12-3401). The sheriff may sell perishable personal property or property which cannot be kept without great expense, or would be greatly reduced in value by keeping, upon the request of either party. (12-3403).

Proceeds of sale are held by the officer or by the court to be disposed of as the property would have been disposed of under final judgment. (12-3410).

*Release of Property.*—Debtor may release his property from attachment by filing a bond. A part of the property may be released by order

of the court when it appears that the value of the property attached is greatly in excess of the claim. (12-3221).

*Filing.*—Where attachment is of real estate, in office where deed recorded. (12-3291).

## Virginia Law Digest

### Attachment

*Actions in Which Allowed.*—Writ may be had on legal or equitable claim to any specific personal property or on claim on contract or for damages in tort. (8-519).

*Courts Which May Issue Writ.*—Jurisdiction is in circuit courts. (8-521). Where amount in controversy, exclusive of interest, does not exceed \$20, jurisdiction is before a district court judge (8-564) who may also try attachments not exceeding \$3,000. (16.1-77).

*In Whose Favor Writ May Issue.*—Writ may issue in favor of any person or corporation. (8-519).

*Against Whom Writ May Issue.*—Writ may issue against any person or corporation. (8-520, 525).

*Claims on Which Writ May Issue.*—Writ may issue on claim to specific property, or to any debt, or to damages for breach of contract, or to damages for a tort exceeding \$20 exclusive of interest. If claim is for a debt not due attachment will not lie where only ground for the writ is that the defendant or one of them is a foreign corporation or nonresident having estate or debts owing to him within the State, but will lie on any other ground. (8-519). As to attachment of ships, boats and other vessels of more than 20 tons, see § 8-524.1.

Grounds are that the principal defendant or one of the principal defendants: (1) Is a foreign corporation or nonresident and has estate or has debts owing to such defendant or that such defendant being a nonresident is entitled to the benefit of any liens, legal or equitable on real or personal property; (2) is about to remove from State with intent to change domicile; (3) intends to remove, is removing or has removed specific property claimed, or his own property, or proceeds thereof, or a material part thereof, from State, endangering satisfaction of judgment when recovered; (4) is converting, is about to convert or has converted his property or some part thereof into money, securities or evidences of debt with intent to hinder, delay or defraud creditors; (5) has assigned or disposed of his estate or some part thereof with intent to hinder, delay or defraud creditors, or is about to do so; (6) has absconded or is about to abscond, or has concealed himself to injury of creditors, or is a fugitive from justice. (8-520). Attachment for rent will lie if lessee intends to remove, is removing or has within 30 days removed his effects. (8-566).

*Proceedings to Obtain.*—Proceeding is commenced by filing a verified petition for writ stating particulars of claim, a sum certain which at least should be recovered, when claim will be due if not due, and one of more grounds therefor. (8-524). Defendant may answer or demur. Defendant or any party joined as co-defendant may file grounds of defense in writing, verified. No other pleadings are required. (8-523). Any amendment conducive to justice is permitted. No writ will be dismissed for formal defects. (8-532). Cases involving under \$20 are tried by general district court judge, on petition, without formal pleadings or jury. (8-564).

*Issuance.*—Writs are issued by the clerk, returnable to court having jurisdiction. (8-526). Other attachments may issue on same peti-

tion. (8-530). If defendant not served, further attachments or summons may issue until service, or an order of publication may be made against a nonresident. (8-531).

**Attachment Bond.**—No bond is required in order to sue out an attachment, but if plaintiff desires officer to take possession of any property of defendant, he must give bond, with surety, for at least double fair value of property on which attachment is levied, conditioned to pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out attachment. (8-538). In absence of such bond, if defendant or his agent or attorney files an affidavit of substantial defense, attachment will stand dismissed unless, within 10 days, plaintiff files bond, with security, for at least double amount of claim sworn to or sued for, conditioned that plaintiff will prosecute his attachment with diligence, and that obligors will pay all costs and damages which may be awarded against plaintiff, or sustained by defendant or any other person, by reason of suing out attachment. (8-539). Action continues though attachment be dismissed if defendant served or appeared generally and court would otherwise have jurisdiction. (8-537).

**Release of Property.**—Defendant may secure release and return of any property by forthcoming bond. (8-540).

**Transfer of Cause.**—If real estate is involved in attachment issued out of general district court, suit is transferred to circuit court. (16.1-105).

**Levy.**—Officer makes levy or if bond is filed, seizes property. (8-537-538). Plaintiff has lien from time of levy. (8-545). Perishable property or property expensive to keep may be sold by order of court. (8-549). Restraining orders may be made or a receiver appointed to secure property. (8-536).

Land may be levied upon. (8-538 to 535, 537, 559).

**Sale.**—Property levied on which is perishable or expensive to keep may be sold before judgment. (8-549). No real estate may be sold until other property is exhausted. (8-559).

Notice of attachment on real property should be recorded as protection against subsequent bona fide purchasers for value without notice. (8-142, 143).

Priorities between successive attachments of the same property are according to time of levies thereon or from time of service upon co-defendant having property in his possession. (8-545).

**Third-Party Claims.**—Any person claiming interest in property attached may file petition before delivery of property or proceeds thereof to plaintiff, giving security for costs, and without other pleading, court holds inquiry, with jury if requested. (8-560).

**Rehearing.**—A defendant served by publication, and not having appeared, may petition for rehearing within 1 year after being personally served with copy of judgment, otherwise within 5 years from entry thereof, on giving security for costs. (8-562).

## Washington Law Digest

### Attachment

In view of recent decisions by U.S. Supreme Court (e.g., 395 U.S. 337; 407 U.S. 67) and Washington appellate courts (e.g., 6 Wn. App. 971, 497 P. 2d 250; 7 Wn. App. 219, 499 P. 2d 92), constitutional status

of attachment, garnishment, and replevin statutes is in doubt. Trend of recent decisions is to require, at a minimum, notice and a show cause hearing before a writ of attachment, garnishment or replevin will be issued.

*Actions in Which Allowed.*—Attachment may issue in any action at any time before judgment. (7.12.010).

*Courts Which May Issue Writ.*—Attachments are issued by court in which action is pending. (7.12.020). Justices of the peace may issue writs of attachment when account is less than \$1,000 but may not issue writs upon real property or any interest therein. (3.20.020; 7.12.330).

*In Whose Favor Writ May Issue.*—There is no statutory provision against issuance of a writ of attachment on behalf of a nonresident or a foreign corporation.

*Against Whom Writ May Issue.*—See subhead. Grounds, infra.

*Claims on Which Writ May Issue.*—Statute authorizing attachment to issue on debt which is not due if only time is wanting to fix absolute indebtedness declared unconstitutional. (7.12.030; 363 F. Supp. 725). There is no statutory provision against issuance of a writ of attachment where claim sued on is not payable within State.

Grounds for attachment are: (1) Defendant is a foreign corporation; (2) defendant is nonresident; (3) defendant conceals himself or has absconded or absented himself from usual abode so that ordinary process cannot be served on him; (4) defendant has removed or is about to remove property from State or has assigned, secreted or disposed of property, or is about to do so, with intent to delay or defraud creditors; (5) defendant is about to convert property into money to place it beyond reach of creditors; (6) defendant was fraudulent in contracting debt which is basis of action; (7) damages for which action is brought are for injuries arising from commission of felony; (8) action is one for recovery of a contract. (7.12.020).

*Proceedings to Obtain.*—Plaintiff or someone in his behalf must file affidavit showing that defendant is indebted to plaintiff in a specified amount over and above all just credits and offsets, that attachment is not sought and action is not prosecuted to hinder, delay or defraud any creditor of defendant, and that statutory ground for attachment exists. (7.12.020).

*Attachment Bond.*—Plaintiff must give bond for double amount of his demand; but in no case less than \$300 in superior court or \$50 in the justice court. (7.12.060). Upon proper showing, court may reduce amount of bond. (4.44.470).

When it is desired to attach real estate only, and such fact is stated in the affidavit for attachment, and the ground of attachment is that the defendant is a foreign corporation, or is not a resident of the State, or conceals himself so that the ordinary process of law cannot be served upon him, or has absconded or absented himself from his usual place of abode, so that the ordinary process of law cannot be served upon him, the writ of attachment may issue without bond by the plaintiff. (7.12.060).

*Levy.*—The writ is directed to the sheriff of any county where property of the defendant may be, requiring him to attach and keep property of the defendant to the amount stated in the affidavit, and the sheriff, wherever possible, will levy on property 50 percent greater in valuation than the amount so stated. (7.12.060).

Real property is attached by filing a copy of the writ, together with a description of the property, with the county auditor of the county in which it is situated. Personal property, capable of manual delivery, is attached by the sheriff's taking it into custody. Stocks or shares, or interests therein of any corporation, are attached by leaving with president, secretary, cashier or managing agent thereof a copy of writ and a notice stating that stock or interest of defendant is attached in pursuance of such writ. (7.12.130).

*Indemnity.*—Sheriff, before executing a writ of attachment, may require indemnity bond in addition to attachment bond. (36.28.040).

Lien of attachment arises at moment of levy and continues until property is sold in satisfaction of judgment. (7.12.210; 23 Wash. 693, 63 P. 555).

*Priorities.*—Attachments against same defendant must be executed in order in which they were received by sheriff. (7.12.110). Priority between attachments upon same property is awarded according to order of their levy. (7.12.210; 12 Wash. 71, 40 P. 623).

*Release of Property.*—Property may be released upon bond executed by defendant to plaintiff, and approved by officer having attachment, to effect that defendant will perform judgment of court. (7.12.250).

*Sale.*—If property is perishable or subject to immediate and serious waste or decay, sheriff may sell it. Court may order sale of attached property before judgment if it appears that interests of parties will be served thereby, but only after notice to adverse party. (7.12.160).

*Third Party Claims.*—If a person other than defendant claims attached property, he has right to demand and receive it from attaching officer on making affidavit that property is his or that he has right to immediate possession, and posting bond in twice value of property conditioned on his appearance in court within 10 days to make good his title. (6.20.010).

*Vacation or Modification.*—Attachment may be discharged upon motion if shown to have been irregularly or improperly issued. (7.12.270).

See provision of U.C.C. § 7-602.

## West Virginia Law Digest

### Attachment

*Actions in Which Allowed.*—Attachment may issue in any action or proceeding at law or suit in equity for the recovery of any claim in contract or tort. (c. 38, art. 7, § 1; c. 50, art. 9, § 1).

*Courts Which May Issue Writ.*—No restrictions.

*Time for Issuance.*—Attachment may issue when action or suit is begun or at any time before judgment. (c. 38, art. 7, § 1; c. 50, art. 9, § 1).

*Property Against Which Writ May Issue.*—Attachment may issue against all kinds of property, except that in justice court it may issue only against personal property. (c. 38, art. 7, §§ 1, 7; c. 50, art. 9, § 1).

*In Whose Favor Writ May Issue.*—Any plaintiff, resident or nonresident.

*Claims on Which Writ May Issue.*—Statute does not require that the claim sued on be payable within the State. Except in certain cases and provided a certain showing be made (see infra, subhead Grounds) attachment may issue on an unmatured claim.

*Grounds.*—The grounds for attachment are that the defendant, or one of the defendants: (1) is a foreign corporation, or a nonresident of the State; (2) has left, or is about to leave, the State with intent to defraud his creditors; (3) so conceals himself that a summons cannot be served upon him; (4) is removing or is about to remove his property, or the proceeds of the sale of his property, or a material part of such property or proceeds, out of the State, so that process of execution on a judgment or decree in such action or suit, when it is obtained, will be unavailing; (5) is converting, or is about to convert, his property or a material part thereof into money or securities, with intent to defraud his creditors; (6) has assigned or disposed of his property or a material part thereof, or is about to do so, with intent to defraud his creditors; (7) has property or rights in action which he conceals; (8) fraudulently contracted the debt or incurred the liability for which the action or suit is about to be or is brought. (c. 38, art. 7, § 2; c. 50, art. 9, § 1).

The attachment may be sued out for a debt or claim, whether the same is due or not, upon any of the grounds aforesaid, but if the debt or claim is not due, the affidavit must show when it will become due; provided, that an attachment for a debt not due, may not issue in case of a foreign corporation upon ground of nonresidence alone, or in case of nonresident, unless the affidavit shows that defendant was a resident of the State when the debt was contracted, and plaintiff believed he would remain a resident of the State at the time he gave defendant credit. (c. 38, art. 7, § 5; c. 50, art. 9, § 4).

*Proceedings to Obtain.*—Proceeding is commenced by filing in clerk's office or before justice an affidavit of plaintiff or of some credible person, stating nature of claim, amount which affiant believes plaintiff is entitled to recover, and that affiant believes that one or more grounds for attachment exists. (c. 38, art. 7, § 1; c. 50, art. 9, § 1).

*Attachment Bond.*—Plaintiff is not required to give bond as a condition of the issuance and levy of a writ of attachment from a court of record; but officer cannot take possession of personal property until plaintiff gives bond for at least twice the estimated value thereof, and not less than \$500. (c. 38, art. 7, § 8). In justice court, attachment cannot issue until plaintiff gives bond in a penalty of double the amount of his claim. (c. 50, art. 9, § 2).

Bond may be attached if insufficient or improper. (c. 38, art. 7, § 11).

*Vacation or Modification.*—Right to sue out attachment may be contested and attachment quashed if court deems affidavit insufficient. Defendant may controvert existence of grounds for attachment and of facts relied upon to show existence of such grounds by plea in bar of attachment, except grounds only may be controverted before justice of peace. Upon issue so raised trial is held by jury unless waived. (c. 38, art. 7, §§ 32-33, c. 50, art. 9, § 10). Defendant, or any party to attachment or forthcoming bond or party whose rights are affected or officer who may be liable to plaintiff by reason of such bond being adjudged bad, may make defense to attachment (c. 38, art. 7, § 31).

*Issuance and Execution of Writ.*—Writs are issued by the clerk or justice, returnable to the court having jurisdiction. Justices try the attachment if they have jurisdiction of the action to which it is ancillary. (c. 38, art. 7, § 4; c. 50, art. 3, § 3, art. 9, § 1). An attachment may be

issued or executed on Sunday if oath is made that defendant is actually removing his effects on that day. (c. 38, art. 7, § 18; c. 50, art. 9, § 1). Except before justice of the peace, process commencing action must be served upon attachment debtor in any manner provided for serving process commencing other suits. (c. 38, art. 7, § 30). Before justices, if defendant is not served, a second summons is issued to be served or posted, whereupon trial proceeds whether served or not. (c. 50, art. 9, § 10).

**Levy.**—Real or personal estate may be levied on (c. 38, art. 7, § 7) and if bond be given property is seized. (c. 38, art. 7, § 12; c. 50, art. 9, § 6).

**Indemnity.**—Except as hereinbefore indicated (see supra, subhead Attachment Bond), officer executing writ has no right to demand indemnity before making a levy. (c. 38, art. 7, §§ 8-9; c. 50, art. 9, § 2).

Lien on realty exists from issuance of writ if lis pendens is filed. Lien on personalty dates from levy or service on garnishee but if no seizure is made lien does not attach to personalty sold for valuable consideration. (c. 38, art. 7, § 19).

**Sale.**—Perishable property or property expensive to keep may be sold by order of court or judge in vacation. (c. 38, art. 7, § 23; c. 50, art. 9, § 21).

Priorities between attachments are determined according to dates of levies. (c. 38, art. 7, § 19; c. 50 art. 9, § 20). Prior attachment is entitled to prior satisfaction and subsequent attachments do not prorate.

**Release of Property.**—Defendant may secure release of property levied on by giving forthcoming bond in amount of the claim and costs. (c. 38, art. 7, § 20; c. 50, art. 9, § 8). Plaintiff, within 30 days after return thereof, may file exceptions to forthcoming bond given by defendant to attaching officer. If exceptions are sustained, court directs officer to file good bond. If officer fails to do so, plaintiff has remedy against attaching officer on official bond. (c. 38, art. 7, § 21).

**Third Party Claims.**—Any person claiming an interest in property attached may file petition before sale of property or (except before justice of the peace) within 1 year from sale and before delivery of proceeds to plaintiff, and, on giving security for costs, may without other pleading have jury trial of his claim. (c. 38, art. 7, § 41; c. 50, art. 10, § 1). In justice's court, property is delivered to claimant furnishing bond in double value thereof. (c. 50, art. 10, § 1).

Attachment for rent will issue on complaint under oath that tenant intends to remove, or is removing, or has within 30 days removed, his effects from the leased premises and stating rent reserved, time when payable, and that it will be payable within 1 year, and that there will be left on the premises property liable to distress sufficient to satisfy the rent so to become payable. (c. 37, art. 6, § 17; c. 50, art. 9, § 5).

## Wisconsin Law Digest

### Attachment

**Actions in Which Allowed.**—An attachment may be had in actions based on contract, judgment or tort where the amount of indebtedness exceeds \$50 (266.03), except no writ shall issue against a municipal corporation nor in any action for the price of liquor sold at retail (266.01).

**Courts Which May Issue Writ.**—Courts of record.

**Property Subject to Attachment.**—All property in the State not exempt from execution is subject to attachment. (266.12).

**In Whose Favor Writ May Issue.**—Any creditor-plaintiff may obtain an attachment in a proper case. (266.01).

**Against Whom Writ May Issue.**—Writ may issue against any debtor except municipal corporation. (266.01).

**Claims on Which Writ May Issue.**—An attachment on certain specified grounds may issue on an unmatured debt. (266.03[3]).

**Grounds.**—In actions on contract or judgment, attachment is permitted where the defendant: (1) Is absent from, or concealed within, the State; (2) is a domestic corporation no officer of which can be found; (3) has disposed of or concealed his property or some part thereof, or is about to do so, with intent to defraud his creditors; (4) has removed some of his property out of the State, or is about to do so, with like intent; (5) fraudulently incurred the obligation sued on; (6) is a nonresident; (7) is a foreign corporation; or (8) has defaulted as a public officer or as principal on official bond. Attachment may issue on an unmatured debt on any of first four grounds aforementioned. (266.03).

In tort actions, attachment is permitted where the defendant: (1) Is a nonresident or of unknown residence; or (2) is a foreign corporation. (266.03).

**Proceedings to Obtain.**—Writ may issue at any time before final judgment and after a summons is issued and shown to clerk (266.02); it must be based on an affidavit of plaintiff or some one in his behalf, alleging positively indebtedness or liability in tort, and specifying precise amount claimed above all setoffs (which must exceed \$50), and affirming affiant's knowledge or belief of existence of one or more of grounds for attachment above specified (266.03, 304.02).

**Attachment Bond.**—Affidavit must be accompanied by an undertaking, in not less than \$250, to pay defendant's damages by attachment, and his costs, in case he recovers judgment; and a larger undertaking can be required by court afterwards, on motion. (266.06-07). Where action is on unmatured claim, bond must be for three times amount demanded. (266.03).

**Attack by Defendant.**—The defendant may within 10 days, or the time to answer the complaint, deny the allegations in plaintiff's affidavit, except the alleged liability and the amount thereof. If defendant has made assignment for benefit of creditors, his assignee may traverse and defend. A preliminary trial will then be held with plaintiff having the affirmative. If plaintiff fails to prove his allegations, the property is returned and defendant may recover, as an offset, his costs and damages, and judgment for the excess, if any. (266.19-20).

**Levy.**—Personal property is attached as upon an execution (266.12) and the attaching officer causes an appraisal to be made (266.10). To attach real estate the officer files with the register of deeds a copy of the writ with a certificate that he has attached such real estate. (266.11).

**Indemnity.**—Levying officer may demand sufficient surety to indemnify him for attaching such property. (266.13).

**Priorities.**—Priorities between attachments are according to time of placement in the executing officer's hands. (18 Wis. 406).

**Release of Property.**—At any time before judgment defendant may deliver to attaching officer a bond double amount of complaint, or double appraisal value, or for real estate a sum fixed by court; plaintiff may except to sureties, but if sureties justify to officer's satisfaction, property is returned. (266.16-17).

**Sale.**—Depreciable property, or property entailing expense in its keeping, may be sold on a court order. (266.14).

**Third Party Claims.**—Any person not a party whose property is attached may be made a party and summary relief may be granted him. (266.26).

**Vacation or Modification.**—Court may vacate or modify writ. (266.18).

**Consumer Transactions.**—No attachment of property purchased in a consumer transaction until after entry of judgment. (425.111).

## Wyoming Law Digest

### Attachment

**Actions in Which Allowed.**—Attachment may issue in civil action for recovery of money, either at or after commencement thereof. (1-571; 1-226).

**Courts Which May Issue Writ.**—District courts (1-226); justices of the peace (1-571).

**In Whose Favor Writ May Issue.**—Any plaintiff may obtain an attachment (1-226; 1-571); no provision discriminating against non-resident plaintiffs.

**Against Whom Writ May Issue.**—No statutory restriction.

**Claims on Which Writ May Issue.**—Attachment may issue upon claims not yet due. (1-269).

Grounds for attachment generally are that defendant, or one of several defendants: (1) Is a foreign corporation or is, or is about to become, a nonresident; (2) has absconded with intent to defraud creditors; (3) has left county of his residence to avoid service of summons; (4) so conceals himself that summons cannot be served on him; (5) is about to remove property from jurisdiction with intent to defraud creditors; (6) is about to convert property into money for purpose of placing it beyond reach of creditors; (7) has property or rights in action which he conceals; (8) has assigned, removed or disposed of property with intent to defraud creditors or is about to do so; (9) fraudulently or criminally contracted debt or incurred obligation on which action brought; or (10) that action is on contract, express or implied, for direct payment of not exceeding \$1,500, which is unsecured or security for which has become inadequate. (1-226).

In justice's court, grounds of attachment are substantially the same, except that the limit in ground (10) is \$200. (1-571).

Where plaintiff's claim is not due, the grounds for attachment are: That the debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts; that he is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent; that he is about to remove his property, or a material part thereof, with the intent, or to the effect, of cheating or defrauding

his creditors, or of hindering or delaying them in the collection of their debts; that he is about to become a nonresident of the State. (1-269).

*Proceedings to Obtain.*—To obtain the writ of attachment affidavit of plaintiff, his agent or attorney, must be filed, showing one or more of the above grounds and the nature of the claim, that it is just and the amount which affiant believes plaintiff ought to recover. (1-227).

*Attachment Bond.*—Plaintiff, before obtaining the writ, must also execute an undertaking to defendant with one or more sufficient sureties in an amount equal to double plaintiff's claim (not less than \$50 in justice court), to the effect that plaintiff will pay defendant all damages which he may sustain by reason of the attachment if the order be wrongfully obtained. (1-228; 1-572).

*Levy.*—Personal property in debtor's possession is attached by taking possession; real property by delivering a certificate containing title of the cause, names of parties, and description of property to the county clerk of the county. If order of attachment is issued at commencement of action an endorsement must be made on summons to effect that defendant's real estate has been or will be attached. If order of attachment is issued after commencement of action a copy of notice filed in clerk's office must be mailed to defendant by registered mail at his last known post-office address by plaintiff, his agent, or attorney, and proof thereof must be made by affidavit and filed in office of clerk of court before attached real estate may be ordered sold. (1-233).

Personal property is levied upon in similar manner before justice of the peace. (1-575).

*Indemnity.*—No statutory provision.

Lien attaches at time of service. (1-243).

*Priorities.*—In district court, orders of attachment bind the property from time of service. (1-243). Several orders are executed in the order received by Sheriff. (1-232). In justice court, all creditors attaching before judgment share pro rata in proceeds of attached property. (1-599).

Release of property attached may be obtained by defendant at any time before judgment by giving bond in double amount of claim stated in plaintiff's affidavit. (1-250).

*Sale.*—Perishable property may be sold pending suit, in the manner directed by district court (1-249), and as upon execution in justice court (1-586).

*Third Party Claims.*—Attaching officer under district court or justice court writ must have such claims tried. (1-263, 587).

*Vacation or Modification.*—Defendant may move to discharge attachment at any time before judgment and upon reasonable notice. Motion may be heard upon affidavits. (1-267-3).

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### **III. ASSIGNMENT OF WAGES**

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## Assignment of Wages

### CONTENTS

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	<b>Page</b>
General Statement.....	193
Alabama.....	194
Alaska.....	194
Arizona.....	194
Arkansas.....	195
California.....	195
Colorado.....	195
Connecticut.....	196
Delaware.....	196
District of Columbia.....	196
Florida.....	196
Georgia.....	196
Hawaii.....	196
Idaho.....	196
Illinois.....	197
Indiana.....	197
Iowa.....	198
Kansas.....	198
Kentucky.....	198
Louisiana.....	199
Maine.....	199
Maryland.....	199
Massachusetts.....	199
Michigan.....	201
Minnesota.....	201
Mississippi.....	201
Missouri.....	202
Montana.....	202
Nebraska.....	202
Nevada.....	202
New Hampshire.....	202
New Jersey.....	203
New Mexico.....	203
New York.....	203
North Carolina.....	205
North Dakota.....	205
Ohio.....	205
Oklahoma.....	205
Oregon.....	206
Pennsylvania.....	206
Puerto Rico.....	206

	<b>Page</b>
Rhode Island .....	206
South Carolina .....	207
South Dakota .....	207
Tennessee .....	207
Texas .....	208
Utah .....	208
Vermont .....	208
Virginia .....	209
Washington .....	209
West Virginia .....	209
Wisconsin .....	210
Wyoming .....	210

### **III. Assignment of Wages**

#### **General Statement**

The broad definition of assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. An assignment of wage, by definition, then, would be the transfer of a right to collect current or future wages. (Black's Law Dictionary, 4th Edition, 1951.)

The wage assignment provisions<sup>1</sup> as set out in this chapter refer to the general survey of State laws. Where permissible, the wage assignment may also be utilized as a procedure to satisfy judgment for sums in arrears or currently due under court orders and under certain State's statutes for alimony, maintenance and support of the dependent spouse, child and children. In five States, California, Connecticut (public welfare cases only), Michigan, Ohio, and Wisconsin, there is a specific reference that wage assignments for child support is covered by State law. For a complete and comprehensive understanding, it is necessary to refer to other provisions in the law which set out additional requirements.

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<sup>1</sup> Reprinted from the Consumer Credit Guide, Published by Commerce Clearing House, Inc., Washington, D.C. No reprint may be made of this material without the express permission of the publisher.

**ALABAMA**

*References are to Code of Alabama, Recompiled 1958, as amended*

<sup>1</sup> Coverage.—Assignments of future wages unenforceable. (T. 39, Sec. 201)

<sup>2</sup> Requirements.—None.

<sup>3</sup> Payment Limitations.—None.

**ALASKA**

No statutory provisions pertaining to assignment of wages.<sup>4</sup>

**ARIZONA**

*References are to Arizona Revised Statutes, as amended*

Coverage.—*Small Loan Law*; Assignments given to secure small loans. (Sec. 6-631(a), as amended by Law 1971, Ch. 154, effective August 11, 1971)

**Coverage<sup>1</sup>**

The heading "Coverage" provides a listing of the types of wage assignments passed upon by the state legislatures. Where wage assignments are prohibited, that fact is noted under this heading. Instalment credit statutes containing wage assignment provisions are identified. General contract rules govern aspects of wage assignments not covered by statute.

**Requirements<sup>2</sup>**

The requirements for validity and enforceability of wage assignments are set forth generally and under the specific instalment credit statutes. Requirements include the need for writing, signatures, copies to employers, notices of default, recording, etc.

**Payment Limitations<sup>3</sup>**

Some state statutes limit the percentage of wages which may be assigned, the period of time during which collection may be made, or the length of time during which an assignment remains valid. These restrictions, if any, appear under "Payment Limitations."

**Statutory Citations<sup>4</sup>**

At the end of each statutory provision its law location is parenthetically described. Title, Article and Section numbers refer to the state statutes or codes. Where the GUMS reproduces a statutory provision in full text, it is shown by a state abbreviation and paragraph number in parentheses, such as "(Cal. § 6001)" which is a reference to the paragraph in the state division.

**Requirements.—Small Loan Law:** Assignment to secure small loan invalid unless: (a) in writing, (b) spouse's assent endorsed or attached, (c) limited to 10% of wages and 48 months. (Sec. 6-631(c))

**Payment Limitations.—Small Loan Law:** Assignment limited to (a) 10% of each wage payment, (b) period of 48 months. (Sec. 6-631(c))

### ARKANSAS

*References are to Arkansas Statutes 1947, as amended*

**Coverage.—**Assignments given to secure loans (Sec. 81-316) and all assignments of future wages. (Sec. 81-317)

**Requirements.—**Assignment to secure loan not valid unless: (a) accepted in writing by employer, (b) filed with county recorder. (Sec. 81-316) Every assignment of future wages of married man must have written consent of wife. (Sec. 81-317)

**Payment Limitations.—**None.

### CALIFORNIA

*References are to California Codes, as amended*

**Coverage.—**Assignments of earned and future wages. Assignment of future wages unenforceable unless made for the necessities of life. (Labor Code, Sec. 300) Court ordered assignments for child support, maintenance and education. (Civil Code, Sec. 4701, amended by Laws 1972, Ch. 802) *Retail Installment Sales Law (Unruh Act):* Assignment of wages prohibited except for necessities of life. (Cal. § 6033)

**Requirements.—**No assignments of wages valid unless: (a) in writing, signed by employee, and transaction identified, (b) written consent of spouse attached, (c) written consent of parent or guardian if minor employee is assignor, (d) employee who is single or adult or both states these facts, (e) contains denial of the existence of other assignments, (f) notarized and filed with employer. (Labor Code, Sec. 300) Court order of assignment for child support operates as assignment by parents upon service of copy of order on employer; employer may deduct \$1 for each payment pursuant to order; order has priority over any attachment, execution or other assignment. (Civil Code, Sec. 4701, as amended by Laws 1972, Ch. 802)

**Payment Limitations.—**Assignment limited to 50% of wage payment, but to 25% if wages necessary for support of family members. (Labor Code, Sec. 300)

### COLORADO

*References are to Colorado Revised Statutes, 1963, as amended*

**Coverage.—**Assignments with exception of revocable deduction authorizations made for hospital, medical, stock purchase, savings, insurance, charity, credit union, bank, savings and loan, and other financial institutions, or other similar purposes. Where consumer transactions are involved, assignments are subject to restrictions of Uniform Consumer Credit Code (see "Consumer transactions" below). (Sec. 80-15-1, 80-15-7, as amended by Laws 1971, Ch. 207) *Consumer transactions:* Assignments of earnings in connection with consumer credit sales, consumer leases and consumer loans (Sec. 73-2-410, 73-3-403, as added by Laws 1971, Ch. 207, approved June 4, 1971, effective October 1, 1971) [See UCCC § 5110, 5223.]

**Requirements.—General:** Assignment not valid unless: (a) in writing, (b) for fixed and definite part of wages (Sec. 80-15-1, as amended by Laws 1971, Ch. 207), (c) copy given to employer within 5 days and to employee (Sec. 80-15-2), (d) spouse signs and signature acknowledged by notary if assignment is of future wages. (Sec. 80-15-4) *Consumer transactions:* Assignment of earnings taken by creditor from buyer, lessee or debtor as payment for or as security for payment of debt arising out of consumer credit transaction is unenforceable by assignee and revocable by buyer, lessee or debtor. In connection with loan transactions, above prohibition does not apply to earnings in the form of accounts receivable or commissions payable to the debtor for services rendered. (Secs. 73-2-410, 73-3-403, as added by Laws 1971, Ch. 207, approved June 4, 1971, effective October 1, 1971) A sale of unpaid earnings, if made in consideration of payment of money to or for account of seller of earnings is deemed a loan secured by an assignment of earnings. (Sec. 73-3-403, as added by Laws 1971, Ch. 207, approved June 4, 1971, effective October 1, 1971) [See UCCC § 5110, 5223.]

**Payment Limitations.—General:** Limited to earned wages or wages to be earned within 30 days from time of assignment. (Sec. 80-15-1, as amended by Laws 1971, Ch. 207)

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## CONNECTICUT

*References are to General Statutes of Connecticut, Revision of 1959, as amended*

**Coverage.**—Assignments of wages void except as to amounts due for support in public welfare cases. (Sec. 52-361(g)) *Small Loan Law*: Assignments of wages not allowed. (Sec. 36-236)

## DELAWARE

*References are to Delaware Code Annotated, as amended*

**Coverage.**—Assignments given as security for loans on "real estate, or otherwise". (T. 5, Sec. 2115)

**Requirements.**—Assignment cannot be taken as security for money loaned on "real estate, or otherwise," without written consent of employer. (T. 5, Sec. 2115)

**Payment Limitations.**—None.

## DISTRICT OF COLUMBIA

*References are to Code of the District of Columbia, 1967, as amended*

**Coverage.**—Contract made in District of Columbia to assign future salary or wages invalid and unenforceable. (Sec. 28-2305(a)). *Consumer Protection Law*: Taking of assignment of earnings of consumer by creditor as payment of or security for payment of consumer credit sale or direct instalment loan obligation prohibited and unenforceable. (Sec. 28-3804, as added by P. L. 92-200, approved and effective December 17, 1971)

FLORIDA<sup>1</sup>

*References are to Florida Statutes 1967, as amended*

**Coverage.**—*Consumer Finance Act*. (Ch. 516) [Note: Until the October 1, 1973, effective date of Laws 1973, Ch. 192, coverage is also provided under Ch. 519, the *Consumer Finance Law*.—CCH.]

**Requirements.**—No assignment of wages given to secure any loan is valid. (Sec. 516.17, as amended by Laws 1973, Ch. 192, approved June 17, 1973, effective October 1, 1973) [Note: Until October 1, 1973, Section 516.17, and Section 519.11, repealed by Laws 1973, Ch. 192, provide that an employer should pay an assignment of wages given to secure a small loan only if: (a) loan has been exchanged simultaneously with execution, (b) assignment is in writing and signed by employee, (c) assignment is signed by wife.—CCH.]

**Payment Limitations.**—None.

## GEORGIA

No statutory provisions pertaining to assignment of wages.

## HAWAII

*References are to Hawaii Revised Statutes, as amended*

**Coverage.**—Assignments in employment agency contracts. (Sec. 373-11(i)) *Small Loan Act*: Assignments made to secure small loans. (Sec. 409-20) *Retail Instalment Sales Act*: Assignments in retail instalment contracts unenforceable. (Hawaii § 6036)

**Requirements.**—Assignment in employment agency contract must be in form approved by director of labor. (Sec. 373-11(i)) *Small Loan Act*: Assignment not valid unless (a) in writing and signed by borrower, (b) signed by spouse. (Sec. 409-20)

**Payment Limitations.**—*Small Loan Act*: Limited to 20 months if repayable in equal monthly instalments of principal or 12 months if repayable in any other manner. (Sec. 409-18)

## IDAHO

*References are to Laws 1971, Ch. 299, (Idaho Uniform Consumer Credit Code), approved March 30, 1971, effective July 1, 1971*

**Coverage.**—Assignments of earnings in connection with consumer credit sales, consumer leases and consumer loans. (Secs. 28-32-410, 28-33-403) [Note: See UCC § 5110, 522 for Secs. 2410, 3403.—CCH.]

<sup>1</sup> Chapter 74-380 (Support of Dependent Children). Provides that a debtor may execute a wage assignment as part of an approved plan with the department to satisfy or retire a child support debt or obligation. (See Chapter III, Part 2)

**Requirements.**—Assignment of earnings taken by creditor from a buyer, lessee or debtor as payment for or as security for payment of a debt arising out of a consumer credit transaction is unenforceable by the assignee and revocable by the buyer, lessee or debtor. An employee is not prohibited from making a revocable authorization of deductions from his earnings. (Secs. 28-32-410, 28-33-403) A sale of unpaid earnings, if made in consideration of payment of money to or for the account of the seller of the earnings, is deemed a loan secured by an assignment of earnings. (Sec. 28-33-403) [Note: See UCCC § 5110, 5223 for Secs. 2.410, 3.403.—CCH.]

**Payment Limitations.**—No provisions.

## ILLINOIS

*References are to Act of July 1, 1935, and Illinois Revised Statutes, 1971, as amended*

**Coverage.**—All assignments. (Secs. 1, 2, 4, 5; Ch. 48, Secs. 39.1, 39.2, 39.4, 39.5)

**Requirements.**—Assignment not valid unless: (a) in writing, signed by the employee in person, bearing the date of execution, the social security number, the name of the employer, the amount of money loaned or the price of the article sold, the rate of interest or time-price differential and the date when such payments are due; (b) given to secure an existing debt of the employee or one contracted for simultaneously with its execution; (c) exact copy is furnished to the employer at the time of execution; (d) contains words "Wage Assignment" printed or written in bold face letters of not less than  $\frac{3}{4}$  inch in height at the head of the wage assignment and also one inch above or below the line where the employee signs that assignment; (e) written as a separate instrument complete in itself and not a part of any conditional sales contract or other instrument. (Sec. 1; Ch. 48, Sec. 39.1.) Demand on employer for wages may not be served unless: (a) there has been a default of more than 40 days in payment of the indebtedness and the default has continued to the date of the demand; (b) the demand contains a correct statement as to the amount in default and the original or a photostatic copy of the assignment is exhibited to the employer; (c) not less than 20 days before serving the demand, a notice of intention to make the demand has been served upon the employee and an advice copy sent to the employer by registered or certified mail. The demand applies only to wages due at the time of service of the demand and upon subsequent wages until the total amount due under the assignment is paid or until the expiration of the employer's payroll period ending immediately prior to 30 days after service of such demand, whichever first occurs. (Sec. 2; Ch. 48, Sec. 39.2.) If the employee has not given notice of defense within 20 days after receiving notice of intention to make demand, the creditor may proceed with his demand, and the employer must commence payment not sooner than five business days after service, unless a notice of defense is received. If a notice of defense is received by an employer within the specified period, no wages are subject to a demand served by the creditor described in the notice of defense, unless the employer receives a copy of a subsequent written agreement between the creditor and employee authorizing such payments. (Sec. 4.2; Ch. 48, Sec. 39.4b.)

**Payment Limitations.**—15% of gross of each wage payment. (Sec. 4; Ch. 48, Sec. 39.4) Void after 72 months. (Sec. 5; Ch. 48, Sec. 39.5)

## INDIANA

*References are to Indiana Code of 1971, as amended*

**Coverage.**—*General:* Assignments of future wages given to wage brokers to secure loans. (Secs. 22-2-7-1—22-2-7-5, 22-2-7-8) Assignments for payroll deductions. (Secs. 22-2-7-5, 22-2-6-1, 22-2-6-2, 22-2-7-8) *Consumer Transactions:* Assignments of earnings in connection with consumer credit sale, consumer lease, consumer loan or otherwise. (Secs. 24-4.5-2-410, 24-4.5-3-403, as added by Laws 1971, P. L. No. 366) [See UCC § 5110, 5223.]

**Requirements.**—*General:* Assignments to wage broker null and void unless: (a) interest on loan not more than 8% per year, (b) wife's signature acknowledged before notary public, (c) employer receives written notice plus copy of assignment within 10 days of execution, (d) for fixed and definite amount, (e) for wages earned or wages to be earned within 30 days following assignment, (f) dated on date of execution. (Secs. 22-2-7-3—22-2-7-5,

**22-2-7-8) Assignment for payroll deductions null and void unless:** (a) in writing signed by employee and revocable at any time and consented to by employer, (b) delivery of executed copy to employer plus written notice within 10 days of execution, (c) made for purpose permitted by statute. (Secs. 22-2-7-5, 22-2-7-8, 22-2-6-2) **Consumer Transactions:** Assignment of earnings taken by creditor from buyer, lessee or debtor as payment for or as security for payment of claim arising out of a consumer credit sale, consumer lease, consumer loan, or otherwise, is unenforceable by assignee and revocable by buyer, lessee or debtor. An employee is not prohibited from making revocable authorization of deductions from his earnings if otherwise permitted by law. (Secs. 24-4-5-241A, 24-4-5-3-403, as added by Laws 1971, P. L. No. 366) A sale of unpaid earnings, if made in consideration of payment of money to or for account of seller of earnings, is deemed a loan secured by an assignment of earnings. (Sec. 24-4-5-3-403, as added by Laws 1971, P. L. No. 366) [See UCCC § 5110, 5223.]

**Payment Limitation.—General:** Assignments to wage brokers limited to part of earned wages or wages to be earned within 30 days following date of assignment. (Sec. 22-2-7-2)

## IOWA

*References are to Code of Iowa, 1973, as amended*

**Coverage.—Assignment made by a head of a family.** (Sec. 539.4) **Consumer Credit Transactions:** Assignment securing consumer credit transaction. (Iowa § 5175)

**Requirements.—Employer should not pay an assignment made by a head of a family unless:** (a) the employer has agreed in writing to accept it, and (b) it is in writing, and signed by both employee and spouse if employee is married. (Sec. 539.4) **Consumer Credit Transactions:** Creditor may not take an assignment of earnings to secure a consumer credit debt. Consumer may authorize deductions if authorization is revocable, consumer is given copy of authorization at time of signing, and the authorization contains on its face a conspicuous notice of the consumer's right to revoke it. (Iowa § 5175)

**Payment Limitations.—No provisions.**

## KANSAS

**NOTE:** The Kansas Uniform Consumer Credit Code specifically prohibits the assignment of earnings of a consumer for the payment or as security for the payment of a debt arising out of a consumer credit transaction. Such assignment is unenforceable by the assignee and revocable by the consumer. The restriction does not prohibit an employee from authorizing deductions from his earnings if the authorization is revocable. (Kan. § 5135)

## KENTUCKY

*References are to Kentucky Revised Statutes, as amended*

**Coverage.—Assignments of future wages given for less than \$200 in money or in goods and money.** (Sec. 371.110) **Petty Loan Company Act:** Assignments given to secure loans under the Act. (Ch. 288) **Instalment Loan Law:** Wage assignments to banks and trust companies as security for instalment loan prohibited. (Sec. 287.215(5), as amended by Laws 1972, Act 267; Laws 1974, S. B. 106.) **Motor Vehicle Retail Instalment Sales Act:** Wage assignments invalid. (Ky § 6102)

**Requirements.—Assignment of future wages of less than \$200 not valid unless:** (a) in writing subscribed by employee and has true date of signature and receipt of money, (b) contains true statement of consideration, amount of money advanced, fees, maturity date and schedule of payments, (c) gives full name and address of each assignee. (Sec. 371.110) Such assignment not valid against employer until he places his acceptance in writing on instrument. (Sec. 371.110) **Petty Loan Company Act:** Assignment not valid unless loan exchanged simultaneously with execution. (Sec. 288.570(2))

**Payment Limitations.—Assignment on loans under \$200 limited to 90 days from date of execution.** (Sec. 371.140) **Petty Loan Company Act:** Assignment limited to 10% of wage payment. (Sec. 288.570(2))

## LOUISIANA

*References are to Louisiana Revised Statutes (1950), as amended*

**Coverage.**—Assignments of future wages. (Sec. 23:731)

**Requirements.**—Assignment of future wages not enforceable against employer unless he has consented to it in writing. (Sec. 23:731)

**Payment Limitations.**—None.

## MAINE

*References, unless otherwise indicated, are to Maine Revised Statutes Annotated (M. R. S. A.), as amended*

**Coverage.**—All assignments of wages. (26 M. R. S. A. Sec. 627) *Consumer Credit Code:* Assignment of wages as payment or security for debt arising from a consumer credit transaction. (Me. § 5155) *Home Repair Financing Act:* Wage assignment prohibited in home repair contracts. (Me. § 6104)

**Requirements.**—Assignment of wages not valid against employer unless he has actual notice. (26 M. R. S. A. Sec. 627) *Consumer Credit Code:* Creditor may not take an assignment of wages as payment or security for a consumer credit debt. Employee may make revocable authorization for deductions from wages. (Me. § 5155)

**Payment Limitations.**—None.

## MARYLAND

*References are to Annotated Code of Maryland (1957), as amended*

**Coverage.**—Assignments of wages. (Art. 8, Sec. 6, as amended by Laws 1972, Ch. 181, Secs. 8, 10 and 11) *Small Loan Law:* Assignments of wages given to secure small loans. (Art. 58A, Sec. 19, as amended by Laws 1968, Ch. 439) *Retail Instalment Sales Law:* Assignment of wages prohibited in instalment sales contracts. (Md. § 6003)

**Requirements.**—Assignment of wages not valid unless: (a) in writing, signed by assignor and acknowledged in person by him before a notary public and entered the same day on the docket of clerk of the District Court in the same county, (b) within 3 days of execution and acknowledgement of the assignment, a copy of it plus certificates of acknowledgement are served upon employer, (c) if the assignor is married, the assignment is also executed and acknowledged by assignor's spouse. (Art. 8, Sec. 6, as amended by Laws 1972, Ch. 181, effective July 1, 1972) Assignor must make affidavit that he has not and will not pay more than 6% interest per annum. (Art. 8, Sec. 8) Assignment for usurious loan is void. (Art. 8, Sec. 10) *Small Loan Law:* Assignment given to secure small loan forbidden licensees; other small loan lenders may not receive greater compensation for wage assignment than permitted by law for small loan. (Art. 58A, Secs. 19, 21, as amended by Laws 1968, Ch. 439, effective July 1, 1968)

**Payment Limitations.**—Assignment void unless limited to period of 6 months. (Art. 8, Sec 11)

## MASSACHUSETTS

*References are to General Laws of Massachusetts, 1912, as amended*

**Coverage.**—Assignments of future wages given to secure loans of \$3,000 or more. (Ch. 154, Secs. 3, 4, 5) *Loans under \$3,000:* Assignments of future wages given to secure loans of less than \$3,000. (Ch. 154, Secs. 2, 5) *Retail Instalment Sales and Services Law:* Assignment of wages prohibited in retail instalment sale agreement. (Mass. § 6066) *Motor Vehicle Retail Instalment Sales:* Assignment of wages unenforceable. (Mass. § 6172)

**Requirements.**—Assignment of future wages to secure loan of \$3,000 or more not valid unless: (a) made to secure a debt contracted prior to or simultaneously with the execution of the assignment, (b) executed in writing in standard form prescribed by Ch. 154, Sec. 5, and signed by assignor in person, (c) assignment states date of execution, value in money furnished by assignee, and rate of interest, (d) employer accepts assignment in writing, (e) if the assignor is a married man, the written consent of his wife

is attached, (f) copy of assignment is delivered to assignor by assignee at date of its execution. (Ch. 154, Secs. 3, 4) Employer not bound until receipt of written account containing statement of balance due, date and amount paid assignee, and whether payment is for interest, principal or charge. (Ch. 154, Sec. 4) *Loans under \$3,000*: Assignment of future wages to secure loan of less than \$3,000 not valid against employer: (a) until assignment accepted in writing by employer, nor until assignment and acceptance of same have been filed and recorded with the city or town clerk, (b) unless assignment is in form prescribed by Ch. 154, Sec. 5, (c) if made by married man unless written consent of his wife is attached. (Ch. 154, Sec. 2) Assignment of wages to secure a small loan requiring licensing of the lender must contain the amount of the loan, rate of interest, and the expense of making and securing the loan. (Ch. 140, Sec. 108)

**Payment Limitations.**—Assignment of future wages to secure loan of \$3,000 or more limited to: (a) 25% of weekly earnings, (b) 2 years. (Ch. 154, Sec. 3) *Loans under \$3,000*: Assignment of future wages to secure loan of less than \$3,000 limited to: (a) \$10 per week, (b) one year. (Ch. 154, Sec. 2)

## MICHIGAN

*References are to Compiled Laws of Michigan, 1948, as amended*

**Coverage.**—Assignment of future wages by employee, including governmental employees, filed in district or municipal court; inapplicable in city having common pleas court. (Sec. 600.5301, as amended by Laws 1969, P. A. 341, approved December 19, 1969, effective January 1, 1970.) Court ordered assignments for child support. (Sec. 712A.12b, as amended by Laws 1965, P. A. No. 172) *Regulatory Loan Act of 1963*: Assignments of wages given to secure loans made by small loan licensees. (Sec. 493.17) *Retail Installment Sales Act*: Assignment of wages prohibited. (Mich. § 16327)

**Requirements.**—Employer to pay over wages from time of receipt from court of notification of the employee-filed assignment proceedings. (Sec. 600.5301, as amended by Laws 1969, P. A. 341) Court ordered assignment of wages for child support must be honored by employer one week after service upon him of a copy of the order by personal service or registered mail. (Sec. 712A.12b) *Regulatory Loan Act of 1963*: Assignment collectible from employer from time that a verified copy of the assignment together with verified statement of the amount unpaid on the loan and a copy of Sec. 493.17 is served on the employer provided these requirements for validity are met: (a) amount borrowed is paid simultaneously with execution of the assignment, (b) assignment is in writing, signed in person by borrower, and if borrower is married, signed in person by spouse. (Sec. 493.17)

**Payment Limitations.**—Assignment in court for creditor's benefit by employee who is householder with family is subject to exemption of 60% per wage earning week, but not less than \$15 per week, plus \$2 per week for each legal dependent, other than a spouse, who is under 18 or incapable of self support because of physical or mental deficiency. Assignment by employee not householder with family is subject to exemption of 40% but not less than \$10 per wage week. (Sec. 600.5311, as amended by Laws 1972, H. B. No. 5661, approved and effective February 19, 1972) *Regulatory Loan Act of 1963*: Assignment limited to 10% of each wage payment. (Sec. 493.17)

## MINNESOTA

*References are to Minnesota Statutes, 1967, as amended*

**Coverage.**—Assignments of future wages. (Secs. 181.04, 181.05, 181.06, amended by Laws 1967, Ch. 517) *Loans under \$200*: Assignments of future wages made to secure loans of less than \$200. (Sec. 181.07) *Small Loan Law*: Assignments of wages given to secure small loans made by small loan licensees (Sec. 56.17) *Consumer credit sales*: Assignments of wages prohibited in consumer credit sale contract or obligation. (Laws 1971, Ch. 275, Sec. 2, subd. 2, approved May 14, 1971, effective July 1, 1971) [Norr: Sec. 2, subd. 2 of the 1971 law appears at "Minnesota" § 6073.—CCH.]

**Requirements.**—Assignment of future wages not enforceable unless: (a) written notice plus a copy of the assignment is given to the employer within 3 days after its making (Sec. 181.04), (b) the employer consents to the assignment in writing. (Sec. 181.05) *Loans under \$200*: Assignment of future wages made to secure loans of less than \$200 invalid: (a) against employer until he accepts it in writing and the assignment and acceptance of it have been filed with the clerk of the court, (b) if made by a married man unless written consent of his wife is attached to assignment. (Sec. 181.07) *Small Loan Law*: Assignment of wages not valid unless: (a) loan is paid to borrower simultaneously with its execution, (b) assignment is in writing, signed in person by both spouses, (c) verified copy of the assignment plus verified statement of amount unpaid on the loan plus printed copy of Sec. 56.17 is served on the employer. (Sec. 56.17)

**Payment Limitations.**—Assignment void if for wages to be earned or to become due more than 60 days from date of making, except as to the excess of the first \$1,500 per month where the assignment is for less than 3 years. (Sec. 181.06, as amended by Laws 1967, Ch. 517, approved May 17, 1967, effective May 18, 1967) *Small Loan Law*: Assignment limited to 10% of each wage payment. (Sec. 56.17)

## MISSISSIPPI

*References are to Mississippi Code of 1942, Annotated, as amended*

**Coverage.**—Assignments of wages made to secure the purchases of goods. (Sec. 275)

**Requirements.**—Assignment of wages made to secure purchase of goods not valid

of binding on an employer unless, prior to the delivery of the goods or prior to the consummation of the contract to purchase goods, the employer receives a copy of the assignment and agrees in writing to its terms. (Sec. 275)

**Payment Limitations.**—None.

### MISSOURI

*References are to Missouri Revised Statutes (1967), as amended*

**Coverage.**—Assignments of earned wages. Assignments of future wages null and void. (Sec. 432.030) *Small Loan Law:* Assignment of future wages given to secure small loan prohibited. (Sec. 408.210)

**Requirements.**—Assignment of earned wages must be in writing with date of assignment, amount assigned and names of those assigning wages. (Sec. 432.030)

**Payment Limitations.**—None.

### MONTANA

*References are to Revised Codes of Montana, 1947, as amended*

**Coverage.**—Assignments of wages given to wage brokers (Secs. 41-1504, 41-1506, 41-1507); assignments of future wages given to wage brokers are invalid and unenforceable. (Sec. 41-1504) *Consumer Loan Act:* Assignments of wages given to secure loans. (Sec. 47-220)

**Requirements.**—Assignment of wages given to a wage broker is not valid or enforceable unless: (a) it is for a fixed and definite part of earned wages, (b) the wife consents to it by her signature, executed and acknowledged before a notary public, (c) notice in writing of the assignment plus a copy of it is given to the employer within one day after execution, (d) the assignment is filed in the county clerk's office. (Secs. 41-1504, 41-1506, 41-1507) *Consumer Loan Act:* Assignment of wages is payable at the option of the employer, but is not valid unless: (a) in writing, signed in person by the borrower, or if the borrower is married, signed in person by both spouses, (b) there is verified notice of default served on the employer, including a copy of the assignment, statement of amount of loan and amount unpaid and a copy of Sec. 47-228. (Sec. 47-220)

**Payment Limitations.**—*Consumer Loan Act:* Assignment limited to 10% of each wage payment. (Sec. 47-220)

### NEBRASKA

*References are to the Revised Statutes of Nebraska (1943), as amended*

**Coverage.**—Assignments of wages. (Sec. 36-213, as amended by Laws 1969, L. B. No. 864, Laws 1972, L. B. No. 781; Sec. 45-142, as amended by Laws 1972, L. B. No. 1060) *Small Loan Law:* Assignments of wages given to secure instalment loan. (Sec. 45-144)

**Requirements.**—Assignment of wages of head of family void unless both spouses sign and acknowledge it. The assignment must specify the employer who will pay the assigned wages. (Sec. 36-213, as amended by Laws 1969, L. B. No. 864, Laws 1972, L. B. No. 781) *Small Loan Law:* Assignment of wages made by one spouse to secure an instalment loan not valid unless written consent of other spouse attached. (Sec. 45-144)

**Payment Limitations.**—Assignments limited to same extent as are garnishments and an assignment in excess of the exemption is void and unenforceable. (Sec. 36-613, as amended by Laws 1972, L. B. No. 781; Sec. 25-1558, as amended by Laws 1972, L. B. No. 1032, approved March 30, 1972, effective January 4, 1973) [NOTE: The amendment to Sec. 25-1558 revised the garnishment exemptions and added the provision making excess assignments void and unenforceable.—CCH.]

### NEVADA

*References are to Nevada Revised Statutes, as amended*

**Coverage.**—An assignment of wages is void if made at the time that an unsatisfied judgment exists against the maker. (Sec. 608.170) *Instalment Loan and Finance Act:* An assignment of wages is not valid if given to a licensee as security for a loan under the Act. (Sec. 675.340)

### NEW HAMPSHIRE

*References are to Revised New Hampshire Statutes Annotated, 1955, as amended*

**Coverage.**—Protection of creditors in assignments of future wages. (Sec. 506:3) *Retail Instalment Sales of Motor Vehicles:* Wage assignments in contracts prohibited. (N. H. §6014)

**Requirements.**—Assignment of future wages is not valid against creditors of the person making the assignment unless: (a) it has been accepted by the employer in writing, (b) the acceptance has been filed with the clerk of the town or city where the party making it resides. (Sec. 506:3)

**Payment Limitations.**—None.

### NEW JERSEY

*References, unless otherwise indicated, are to Revised Statutes of New Jersey (1937), as amended*

**Coverage.**—Assignment of wages, salary, commissions, pay or other compensation for services of employee, other than by court order, is prohibited, void and unenforceable. Person withholding, paying or receiving salary, wages, commissions or other compensation in violation of the prohibition is liable to employee for amount so paid or taken. Violation or attempted violation may lead to punishment as a disorderly person. (Law 1971, Ch. 412, as amended by Law 1973, Ch. 354, approved and effective December 28, 1973.) *Home Repair Financing Act:* Assignments of wages prohibited. (N. J. § 6067) *Retail Installment Sales Act:* Assignments of wages prohibited, void and unenforceable in connection with retail installment contract, retail charge account or in separate instrument. (N. J. § 6039) *Usurious loans:* Assignments of wages to secure usurious loans prohibited (Sec. 34:11-25), except for the full payment of goods sold to the assignor or for professional services rendered to him. (Sec. 34:11-26)

**Requirements.**—None.

**Payment Limitations.**—None.

### NEW MEXICO

*References are to New Mexico Statutes, 1953, Annotated, as amended*

**Coverage.**—Assignments of wages or salaries due or to become due. (Sec. 43-1-12, as amended by Law 1971, Ch. 172) *Small Loan Act of 1955:* Assignments of wages given to secure small loans made by small loan licensees. (Sec. 48-17-40) *Retail Installment Sales Act:* Assignments of wages prohibited. (N. M. § 6019)

**Requirements.**—Assignment of wages not valid unless: (a) acknowledged by the maker before a notary public, (b) if the maker is married and living with his wife, the assignment is recorded in the office of the county clerk and a copy of the recorded assignment is served on the employer. (Sec. 43-1-12, as amended by Law 1971, Ch. 172) *Small Loan Act of 1955:* In addition, an assignment given to secure a small loan is not valid unless: (a) loan is paid simultaneously with execution of assignment, (b) it is signed in person by the borrower; or if borrower is married, by both spouses. (Sec. 48-17-40)

**Payment Limitations.**—Any assignment providing for assignment of over 25% of assignor's disposable earnings for any pay period is void; "disposable earnings" is wages or salary remaining after deduction required by law. (Sec. 43-1-12, as amended by Law 1971, Ch. 172, approved March 30, 1971, effective June 18, 1971) *Small Loan Act of 1955:* Assignment limited to 10% of each wage payment. (Sec. 48-17-40)

### NEW YORK

*References are to Consolidated Laws of New York, as amended*

**Coverage.**—Assignments of future earnings. (Personal Property Law, Secs. 46-a, as amended by Law 1974, Ch. 753; 46-l, 47, 48, as amended by Law 1974, Ch. 753; 48-a; 48-b, as amended by Law 1974, Ch. 981; General Obligations Law, Sec. 5-531.) *Indebtedness under \$1,000:* Assignments of future earnings given to secure indebtedness of less than \$1,000. (Personal Property Law, Secs. 46-c, 48-a(2)). *Small Loan Law:* Assignments of wages given to secure small loans by small loan licensees. (Banking Law, Sec. 335, as amended by Law 1969, Ch. 1152; Law 1973, Ch. 920; and Sec. 356,

as amended by Laws 1974, Ch. 981.) *Retail Installment Sales Act*: Assignments of wages prohibited. (N. Y. §6019(c)) *Motor Vehicle Retail Installment Sales Act*: Assignments of wages prohibited. (N. Y. §6071)

**Requirements.**—Assignment of future earning not valid unless executed by assignor and a copy of the assignment and of the attached papers of any other papers executed and described in assignment are delivered to assignor. (Personal Property Law, Sec. 46-e, as amended by Laws 1974, Ch. 753.) Assignment given to secure loan carrying over 18% interest is void except for loans on which there are brokerage charges or for loans made by licensed lenders. (Personal Property Law, Sec. 46f; General Obligations Law, Sec. 5-531; Banking Law, Sec. 356, as amended by Laws 1974, Ch. 981.) Employer's obligation on assignment of future wages does not commence until authenticated copy of assignment plus statement of amount then due are filed with the employer. Statement must include dates and amounts of previous payments, and if filed with the county clerk, the statement must contain the date on which the assignment was filed with the employer. A copy of the assignment must be filed with the county clerk before a copy is filed with employer, with the exception of assignments given either as security for or as a method of repayment of money advanced by any bank, trust company or credit union. But before an assignment can be filed with the employer, the employee must be given 20 days' notice in writing by certified mail, return receipt requested, to the employee's last known address. If this is returned undelivered, it may be mailed to the employee at his place of employment or served in the same manner as a summons. The notification must be accompanied by a written notice, as specified by law, advising the employee that, if he has a defense to the assignment, he may institute court action or he may notify the assignee of the defense; if so notified, the assignee cannot file the assignment with the employer until it obtains a court order authorizing the filing. The employee must be given 8 days' written notice, by certified mail, of the application for such a court order. (Personal Property Law, Secs. 47; 48, as amended by Laws 1974, Ch. 753, approved June 7, 1974, effective September 1, 1974; 48-a; 49, as amended by Laws 1974, S. B. 8844.) [NOTE: The 1974 law added the requirement of notifying the employee of his rights and increased the notification period before an assignment can be filed with an employer from 10 days to 20 days.—CCH.] **Indebtedness under \$1,000:** Assignment of future earnings given to secure an indebtedness of less than \$1,000 not valid unless: (a) assignment is separate instrument printed in at least 8 point type and has the following title in 10 point or larger: "Assignment of wages, Salary, Commissions or other Compensation for Services," and has the following in 10 point or larger just above the place for signature: "This is an Assignment of Wages, Salary, Commissions or other Compensation for Services," (b) assignment is clear as to transaction to which it relates and is clear as to indebtedness secured by, or consideration given for the assignment, and the date and place at which payments are to be made, and contains a summary of Secs. 46-c, 46-e, 46-f, 47-e, 48, 48-a, 48-b, 48-c and 49 of the Personal Property Law, and (c) assignment, if given as security, is security only for the transaction, or series of transactions described in the assignment, but: (1) an assignment securing a guarantee of the payment of purchase price of goods (\$1,500 or less) sold for noncommercial use is valid if assignment limited to 2 years and if assignment sets forth maximum amount for which guarantor shall be liable, and (2) an assignment of future earnings for the purchase of goods (\$1,500 or less) for a noncommercial use is valid if executed by a guarantor or two or more purchasers unless purchased for common use of assignor and purchaser or co-purchaser. (Personal Property Law, Sec. 46-c, as amended by Laws 1974, Ch. 767, approved June 7, 1974, effective September 1, 1974.) [NOTE: The 1974 law added the requirement that a summary of Personal Property Law Sec. 47-e be included in the assignment instrument.—CCH.] **Small Loan Law:** Assignment of earned or future wages given to secure small loan of licensed lender not valid unless: (a) loan is paid simultaneously with execution of assignment, (b) assignment is in writing signed by borrower and spouse if married, and (c) employer receives verified copy of assignment and verified statement of unpaid amount. (Banking Law, Sec. 356, as amended by Laws 1974, Ch. 981.)

**Payment Limitations.**—Future earnings may not be withheld by reason of an assignment unless earnings exceed \$85 per week. (Personal Property Law, Sec. 48-b, as amended by Laws 1974, Ch. 981, approved June 13, 1974, effective September 1, 1974.) [NOTE: Until September 1, 1974, future earnings may not be withheld unless they amount to \$30 per week if employee is employed in a city of 250,000 or more, and to \$25 per week if the

employee is employed elsewhere.—CCH.] Assignment of wages cannot be honored while employee is, or would need to be, receiving public assistance or care supplemental to income. (Social Welfare Law, Sec. 137-a) *Indebtedness under \$1,000*: Assignment of future earnings given to secure an indebtedness of less than \$1,000 limited to 10% of each month's wages. (Personal Property Law, Sec. 48-2(a)) *Small Loan Law*: Assignment of future wages limited to 10% of each wage payment, but assignment not collectable unless wages exceed \$85 per week. (Banking Law, Sec. 356, as amended by Laws 1974, Ch. 981, approved June 13, 1974, effective September 1, 1974.) [NOTE: The 1974 law added the \$85 limitation.—CCH.]

*Discharge of Employee*.—Discharge or layoff prohibited; employer liable to civil action, within 90 days, for damages up to 6 weeks of lost wages; reinstatement may be ordered. (Civil Practice Law and Rules, Sec. 5252, as amended by Laws 1969, Ch. 1138; Laws 1974, Ch. 753, approved June 7, 1974, effective September 1, 1974; Laws 1974, Ch. 981.) [NOTE: The 1974 law made the discharge prohibition applicable to wage assignments.—CCH.]

## NORTH CAROLINA

*References are to General Statutes of North Carolina, as amended*

*Coverage*.—Assignments of future wages. (Sec. 95-31) *Small Loan Law*: Assignment of wages as payment or as security for a loan unenforceable and revocable by borrower. (Sec. 53-180, as amended by Laws 1974, Ch. 1042, ratified March 26, 1974, effective May 25, 1974.) [NOTE: The 1974 law added the prohibition.—CCH.]

*Requirements*.—Employer not bound by assignment of future wages until he has accepted it and agreed in writing to pay it. (Sec. 95-31)

*Payment Limitations*.—Action based upon assignment of future wages must be commenced within 6 months from date of execution. (Sec. 1-55)

## NORTH DAKOTA

*References are to the North Dakota Century Code, Annotated, as amended*

*Coverage*.—*Small Loan Law*: Assignments of future wages to secure small loans are void and uncollectible. (Secs. 13-03-17, 13-03-22) *Retail Installment Sales Act*: Assignments of wages prohibited. (N. D. § 6014)

## OHIO

*References are to Ohio Revised Code, as amended*

*Coverage*.—With two exceptions, assignments of wages are invalid. (Secs. 1321.31, 1321.32)

*Requirements*.—Assignments of wages generally are invalid, except that (a) wage assignments for the support of a spouse, and (b) wage assignments for the support of a minor child, are valid if made in compliance with a court order, and if in writing with the consent of both spouses. (Secs. 1321.31, 1321.32, 1321.33)

*Payment Limitations*.—Assignment for the support of a spouse limited to 25% of an employer's wages. (Sec. 1321.31)

## OKLAHOMA

*References are to Laws 1969, H. B. No. 1001 (Oklahoma Uniform Consumer Credit Code), approved May 8, 1969, effective July 1, 1969*

*Coverage*.—Assignments of earnings in connection with consumer credit sales, consumer leases and consumer loans. (Secs. 2410, 3403) [NOTE: See UCCC § 5110, 5223 for full text.—CCH]

*Requirements*.—Assignment of earnings taken by creditor from a buyer, lessee or debtor as payment for or as security for payment of a debt arising out of a consumer

credit transaction is unenforceable by the assignee and revocable by the buyer, lessee or debtor. An employee is not prohibited from making a revocable authorization of deductions from his earnings. (Secs. 2410, 1403) A sale of unpaid earnings, if made in consideration of payment of money to or for the account of the seller of the earnings, is deemed a loan secured by an assignment of earnings. (Sec. 1403) [NOTE: See UCCC § 5110, § 5223 for full text of Secs. 2410, 1403.—CCH.]

**Payment limitations.**—No provisions.

## OREGON

*References are to Oregon Revised Statutes, as amended*

**Coverage.**—*Consumer Finance Act:* Assignments of earnings given as payment of or as security for payment of small loan prohibited, unenforceable and revocable by assignor. Sale of unpaid earnings as consideration for payment of money to or for account of seller of earnings is considered loan secured by assignment of earnings. Revocable authorizations of earnings deductions are not prohibited. (Sec. 725.355) *Motor Vehicle Retail Installment Sales Act:* Assignments of wages prohibited. (Ore. § 6051) *Retail Installment Sales:* Assignments of wages invalid. (Ore. § 6015)

**Requirements.**—No provisions.

**Payment limitations.**—No provisions.

## PENNSYLVANIA

*References are to Purdon's Pennsylvania Statutes Annotated, as amended*

**Coverage.**—Assignments of future wages. (Sec. 43:271, held invalid, *Showalter v. Ehlen* 5 Pa. Super. 242, 1897; Secs. 43:273, 43:274 held invalid, *Factor's Application*, 23 Dist. 558, 1914) *Small Loan Law:* Assignments of wages made to secure small loans (\$600 or less) made by small loan licensees. (Sec. 7-750)

**Requirements.**—These provisions governing assignments have been held unconstitutional (*Factor's Application*, 23 Dist. 558, 1914): (a) assignments of future wages of married man invalid unless wife's written consent attached (Sec. 43:274), and (b) assignments of future wages to secure loan invalid unless accepted in writing by employer. (Sec. 43:273)

**Payment limitations.**—None.

## PUERTO RICO

*References are to Laws of Puerto Rico Annotated, as amended*

**Coverage.**—Except for payroll deductions permitted by statute, an employer may not deduct wages due to an employee in order to pay the same to any other person. (29 L. P. R. A. Sec. 175)

## RHODE ISLAND

*References are to General Laws of Rhode Island, 1956, as amended*

**Coverage.**—Assignments of future wages. (Sec. 28-15-2) *Small Loan Law:* Assignment of wages given to secure small loans made by small loan licensees. (Secs. 19-25-32, 19-25-33, 19-25-34)

**Requirements.**—Assignment of future wages not valid unless: (a) made to secure a debt prior to or simultaneously with execution of the assignment, (b) executed in writing in statutory standard form prescribed by Sec. 28-15-3, (c) signed by assignor in person, (d) assignment states true date of execution, the value in money furnished, and the rate of interest, (e) copy delivered to assignor at date of execution. (Secs. 28-15-2, 28-15-3, 28-15-4, 28-15-6) Assignment of future wages not binding upon employer until a copy of it which conforms to the following requirements is delivered to the employer: It must be in writing and contain a statement of balance due, and if the sum of money

received by assignee together with dates of past payments and a statement showing whether payment is a charge or not. (Sec. 28-15-6) *Small Loan Law*: Assignment of wages given to secure small loan not valid unless: (a) loan paid to borrower simultaneously with execution of assignment, (b) assignment is in writing, signed by borrower and if borrower is married, signed by both spouses. (Sec. 19-23-33) In order to collect on wage assignment, a verified copy of the assignment, together with a verified statement of the amount unpaid on loan and a printed copy of the small loan law provisions setting forth requirements for wage assignments, must be served upon the employer. (Sec. 19-23-34)

**Payment Limitations.**—Assignment of future wages limited to period of one year from date of assignment. *Small Loan Law*: Assignment limited to 10% of each wage payment. (Sec. 19-23-34)

### SOUTH CAROLINA

*References, unless otherwise indicated, are to Code of Laws of South Carolina (1962), as amended*

**Coverage.**—Assignments of wages. (Sec. 40-103) *Consumer Protection Code*: Assignments securing consumer credit transaction. (S. C. § 5110, 5183)

**Requirements.**—Employer not bound by assignment of wages unless he consents to it in writing. (Sec. 40-103) *Consumer Protection Code*: Creditor may not take an assignment of earnings to secure a consumer credit debt. Consumer may authorize deductions if authorization is revocable. (S. C. § 5110, 5183)

**Payment Limitations.**—None.

### SOUTH DAKOTA

*References are to South Dakota Compiled Laws, 1967, as amended*

**Coverage.**—*Small Loan and Consumer Finance Law*: Assignment of wages given to secure loans under Act. (Secs. 54-6-23—54-6-25)

**Requirements.**—*Small Loan and Consumer Finance Law*: Assignment to secure a small loan not binding on employer until service on the employer of a verified notice which contains: (a) correct copy of assignment, (b) statement of amount of loan and amount due and unpaid on loan, (c) a copy of Sec. 54-6-23 through 54-6-25. (Sec. 54-6-25) Notice is to be given to employer only after default and the employer has the option of accepting and honoring assignment. (Sec. 54-6-25)

**Payment Limitations.**—*Small Loan and Consumer Finance Law*: Assignment limited to: (a) 10% of each wage payment, (b) period of 24 months for loans of \$1,000 or less, (c) period of 36 months for loans of more than \$1,000. (Secs. 54-6-20, 54-6-24)

### TENNESSEE

*References are to Tennessee Code Annotated, as amended*

**Coverage.**—Assignments of future wages. (Sec. 50-315)

**Requirements.**—Employer not chargeable on assignment of future wages unless the employer assents to it in writing at the time of its execution. (Sec. 50-315)

**Payment Limitations.**—None.

**440 Validity of withholdings.**—A merchant who collected earnings on wage assignments was required to return amounts collected from earnings after the debtor's petition in bankruptcy, amounts from future earnings for which there was no written

consent to assignment by the debtor's employer, and amounts which deprived the debtor of his \$50 per week exemption from execution as the head of a family.—*In the Matter of Crawford* (DC Tenn. 1969) *Consumer Credit Guide* § 99,817.

## TEXAS

*References are to Vernon's Texas Statutes Annotated, as amended.*

**Coverage.**—Assignments of future wages (Civil Stat., Title 83, Ch. 3, Art. 5159c, Sec. 1) **Regulated Loans and Instalment Loans:** No licensee may take an assignment of wages as security for a small loan and no lender may take an assignment of wages as security for an instalment loan. (T. 79, Ch. 3, Art. 3.20(1) and Ch. 4, Art. 4.04(1), as added by Laws 1967, H. B. No. 452, approved May 23, 1967, effective October 1, 1967) **Retail Instalment Sales, Motor Vehicle Instalment Sales, Insurance Premium Financing Agreements:** Instalment contracts, charge agreements and premium financing agreements may not contain an assignment of wages. (T. 79, Ch. 6, Art. 6.05(1), and Ch. 7, Art. 7.07(2), as added by Laws 1967, H. B. No. 452; T. 79, Ch. 12, Art. 12.19(5), as added by Laws 1973, H. B. No. 543, effective August 27, 1973)

**Requirements.**—Action cannot be brought against an employer upon an assignment of future wages unless the employer has had written notice of the assignment immediately after execution. (Civil Stat., Title 83, Ch. 3, Art. 5159c, Sec. 1)

**Payment Limitations.**—None.

## UTAH

*References are to Laws 1969, Ch. 18 (Utah Uniform Consumer Credit Code), approved March 20, 1969, effective July 1, 1969*

**Coverage.**—Assignments of earnings in connection with consumer credit sales, consumer leases and consumer loans. (Secs. 2.410, 3.403) [Note: See UCCC § 5110, 5223 for full text.—CCH.]

**Requirements.**—Assignment of earnings taken by creditor from a buyer, lessee or debtor as payment for or as security for payment of a debt arising out of a consumer credit transaction is unenforceable by the assignee and revocable by the buyer, lessee or debtor. An employee is not prohibited from making a revocable authorization of deductions from his earnings. (Secs. 2.410, 3.403) A sale of unpaid earnings, if made in consideration of payment of money to or for the account of the seller of the earnings, is deemed a loan secured by an assignment of earnings. (Sec. 3.403) [Note: See UCCC § 5110, 5223 for full text of Secs. 2.410, 3.403.—CCH.]

**Payment Limitations.**—No provisions.

## VERMONT

*References are to Vermont Statutes Annotated, as amended*

**Coverage.**—Assignments of future earnings. (T. 12, Sec. 3022) **Small Loan Law:** Assignments of wages given to secure small loans made by small loan companies. (T. 8, Sec. 2227, as amended by Laws 1970, Act No. 243.)

**Requirements.**—An assignment of future earnings is not valid against trustee process (garnishment-type proceeding) unless (a) executed in writing securing debt in stated amount, (b) contracted prior to or simultaneously with execution, or (c) is a debt for necessities, and (d) is properly recorded. (T. 12, Sec. 3022) **Small Loan Law:** Assignment to secure small loan not valid unless: (a) loan made simultaneously with execution of assignment, (b) assignment in writing, signed personally by borrower, or if borrower is married, signed in person by both borrower and wife. (T. 8, Sec. 2228) Assignment to secure small loan not effective against employer until verified copy of the assignment served on him. (T. 8, Sec. 2229) **Consumer Fraud:** Assignment of wages by consumer in a contract is void. (T. 9, Sec. 2456, as amended by Laws 1969, H. B. No. 118, law without approval April 4, 1969, effective July 1, 1969.)

**Payment Limitations.**—**Small Loan Law:** Assignment limited to 10% of each wage payment. (T. 8, Sec. 2229) **Trustee Process Law:** Upon attachment of compensation, employer must accept assignment up to 10% of compensation. (T. 12, Sec. 3166, as added by Laws 1968, H. B. No. 518, approved March 22, 1968, effective July 1, 1968.)

## VIRGINIA

*References are to Code of Virginia, 1950, as amended*

**Coverage.**—Partial assignments of wages are not enforceable, but an assignment of all wages over and above those exempted is not considered a partial assignment for purposes of this limitation. (Sec. 40.1-32) *Small Loan Act*: Assignments of future wages given to secure small loans made by small loan licensees. (Sec. 6.1-290)

**Requirements.**—Assignments of wages due or to become due which do not conform to the following requirements are not valid and enforceable against an employer unless he expressly consents in writing: (a) assignment must be printed in type not smaller than pica, be a separate instrument not a part of any other instrument, and be plainly designated "Wage Assignment", (b) assignment must be executed in triplicate, and in person, dated with date of execution, with one executed copy delivered to assignor and one mailed to employer named in it within 15 days after execution, (c) name of employer must have been written in assignment before it was signed, and amount to be secured must be stated, (d) employee at time of execution must be employed by employer named in assignment, (e) notice of intent to enforce assignment must be served by person authorized to serve civil process. (Sec. 40.1-31) *Small Loan Act*: The following additional requirements must also be met before an assignment given to secure a small loan is valid: (a) loan must have been exchanged simultaneously with execution, (b) assignment must be in writing, signed in person by borrower, or if borrower is married, must be signed by both spouses, (c) verified written copy of assignment, together with a similarly verified statement of amount unpaid and a printed copy of statutory requirements for assignments must be served on employer. (Secs. 6.1-289, 6.1-290)

**Payment Limitations.**—Assignments, other than those made to secure small loans, are limited to the lesser of (1) 25% of disposable earnings for week or (2) disposable earnings in work week exceeding 30 times the federal minimum hourly wage (or an equivalent multiple for other work periods). Disposable earnings are earnings remaining after deduction required by law. Assignments in excess of the limit are void and unenforceable. (Sec. 34-29, as amended by Law 1970, Ch. 428) *Small Loan Act*: Assignment limited to 10% of each wage payment. (Sec. 6.1-290)

WASHINGTON<sup>1</sup>

*References are to Revised Code of Washington, as amended*

**Coverage.**—Assignments of future wages given to secure loans of less than \$300. (Secs. 49.48.090, 49.48.100.)

**Requirements.**—Assignment not valid against employee unless the assignment is accepted in writing by the employer, and it and its acceptance are filed and recorded with the proper county auditor; nor, if made by a married man, unless the written consent of his wife is attached to the assignment. (Secs. 49.48.090, 49.48.100)

**Payment Limitations.**—None.

**10 Employer as wage assignee.**—An employer who advances credit to an employee pursuant to a written agreement to deduct sums of money from the employee's wages, but he is not required to record a wage

assignment with the county recorder, although he must obtain the wife's written consent when the employee is a married man.—*Opinion of Attorney General of Washington* (May 16, 1968). CCH CONSUMER CREDIT GUIDE ¶ 97,682.

## WEST VIRGINIA

*References, unless otherwise indicated, are to Code of West Virginia 1931, as amended, and West Virginia Code*

**Coverage.**—Assignments of future wages. (Sec. 21-5-3)

**Requirements.**—Assignment for future wages not valid unless: (a) it is acknowledged before a notary public by the employee making it, (b) it specifies the total amount due and collectible under it and contains a statement that three-fourths of the employee's periodical earnings are exempt, (c) the employer's written acceptance is endorsed on the assignment, (d) made for one year or less. (Sec. 21-5-3) All assignments revocable by

<sup>1</sup> Chapter 74.29A (Support of Dependent Children). Alternative method provides that a debtor may execute a wage assignment as part of an approved plan with the secretary to satisfy or retire a support obligation resulting from the payment of public assistance money for the benefit of any dependent child. (See Chapter III, Part 2)

employee at will. (W. Va. § 5046) *Consumer Credit Act*: Supervised lenders prohibited from taking assignment of wages as security for loan. (W. Va. § 5129)

**Payment Limitations.**—Assignment of future wages limited to: (a) 25% of each wage payment, (b) one year from date of the assignment. (Sec. 21-5-3) *Consumer Credit Act*: Assignment of wages to pay consumer credit transaction limited to 25% of disposable earnings for week. (W. Va. § 5046)

## WISCONSIN

*References are to Wisconsin Statutes, 1971, as amended*

**Coverage.**—Assignments of wages to secure loans by state or national banks, savings and loan associations, and credit unions (Sec. 241.09, as amended by Laws 1973, Ch. 255), assignments in connection with proceedings by wage earners for amortization of debts (Sec. 128.21) and assignments for support of minor children in actions for support of dependents and actions affecting marriage. (Secs. 52.055(2m), 247.265)

**Requirements.**—No assignment of the wages of any person is valid unless the assignment is in writing signed by the person's spouse, and the spouse's signature is witnessed by two disinterested witnesses. (Sec. 241.09, as amended by Laws 1973, Ch. 255, approved May 13, 1974, effective June 12, 1974.) Court ordered assignment for child support in action for support of dependents must be honored by employer one week after service of copy of order by personal service or registered or certified mail. (Sec. 52.055(2m)) Court ordered assignment of wages of either parent for support of wife, dependents, or both, in action affecting marriage must be honored by employer one week after service of copy of order by personal service or registered or certified mail. (Sec. 247.265)

**Payment Limitations.**—Assignments not valid as to wages accruing more than six months after the making of the assignment. Assignment of wages for amortization of debts is limited to the period during which the amortization proceedings are in effect. (Sec. 241.09)

**Discharge of Employee.**—Discharge for assignment ordered in action for support of dependents or in action affecting marriage prohibited. (Secs. 52.055(2m), 247.265)

## WYOMING

*References, unless otherwise indicated, are to Wyoming Statutes, 1957, as amended*

**Coverage.**—*Consumer transactions*: Assignments of earnings in connection with consumer credit sales, consumer leases and consumer loans. (Secs. 40-2-410, 40-3-403) [NOTE: See UCC § 5110, § 223 for full text.—CCH.] *Loans under \$200*: Assignments of future wages given to secure loans of less than \$200 (except assignments given to secure loans made by banks). (Secs. 27-201, 27-202, 27-203)

**Requirements.**—*Consumer transactions*: Assignment of earnings taken by creditor from buyer, lessee or debtor as payment for or as security for payment of debt arising out of consumer credit transaction is unenforceable by assignee and revocable by buyer, lessee or debtor. Employee is not prohibited from making a revocable authorization of deductions from his earnings. Further, notwithstanding above prohibition, seller, lessor or lender may take assignment of commissions of accounts receivable payable to buyer, lessee or debtor for services rendered for payment or as security for payment of debt arising out of consumer lease or loan. (Secs. 40-2-410, 40-3-403). A sale of unpaid earnings, if made in consideration of payment of money to or for account of seller of earnings, is deemed loan secured by an assignment of earnings. (Sec. 40-3-403) [NOTE: See UCC § 5110, § 223 for full text.—CCH.] *Loans under \$200*: Assignment not valid against employer until it is accepted in writing by employer and the assignment and its acceptance have been filed and recorded; nor is assignment valid if made by married man unless written consent of his wife is attached to the assignment. (Secs. 27-201, 27-202)

**Payment Limitations.**—None.

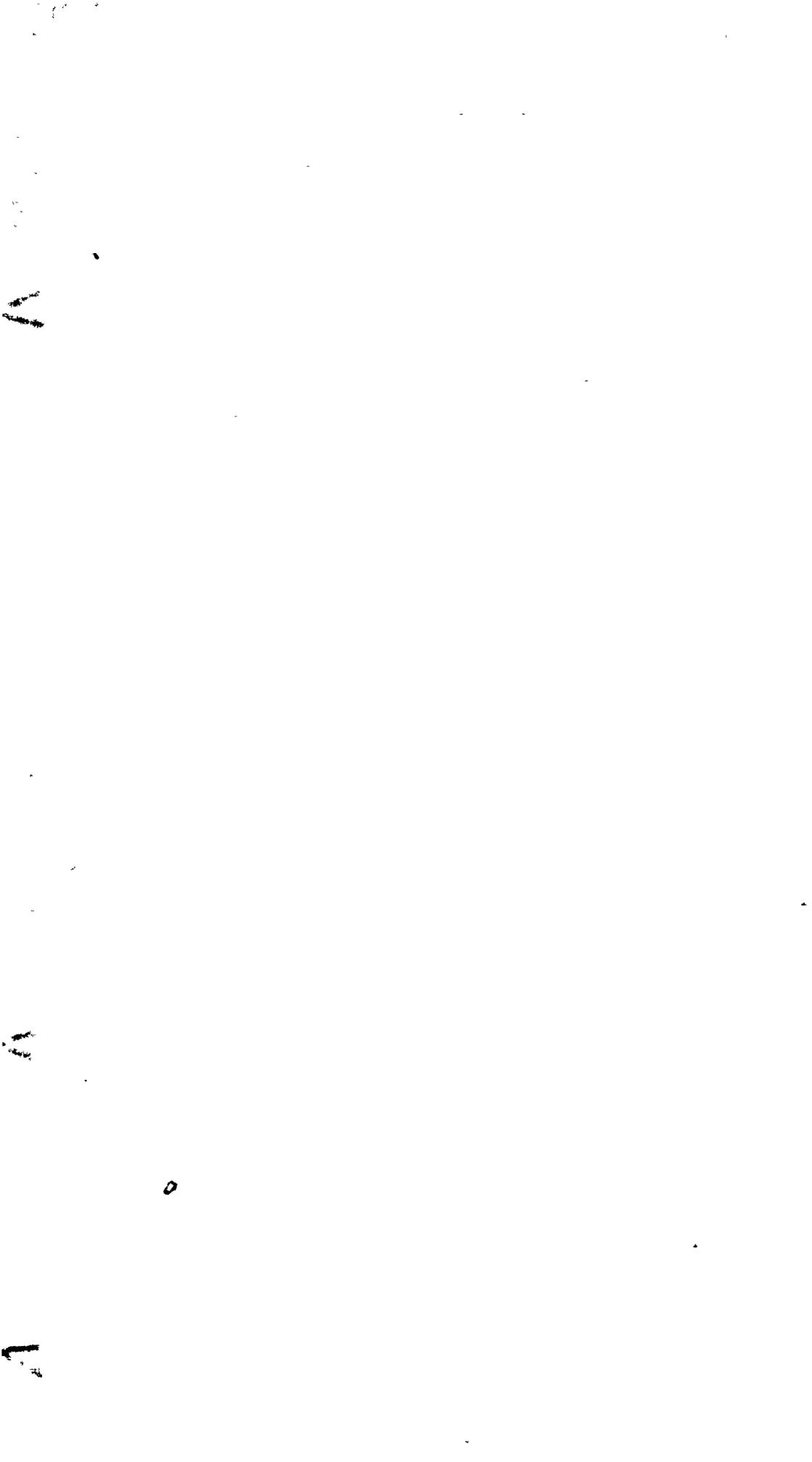
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**IV. ESTABLISHMENT OF PATERNITY**

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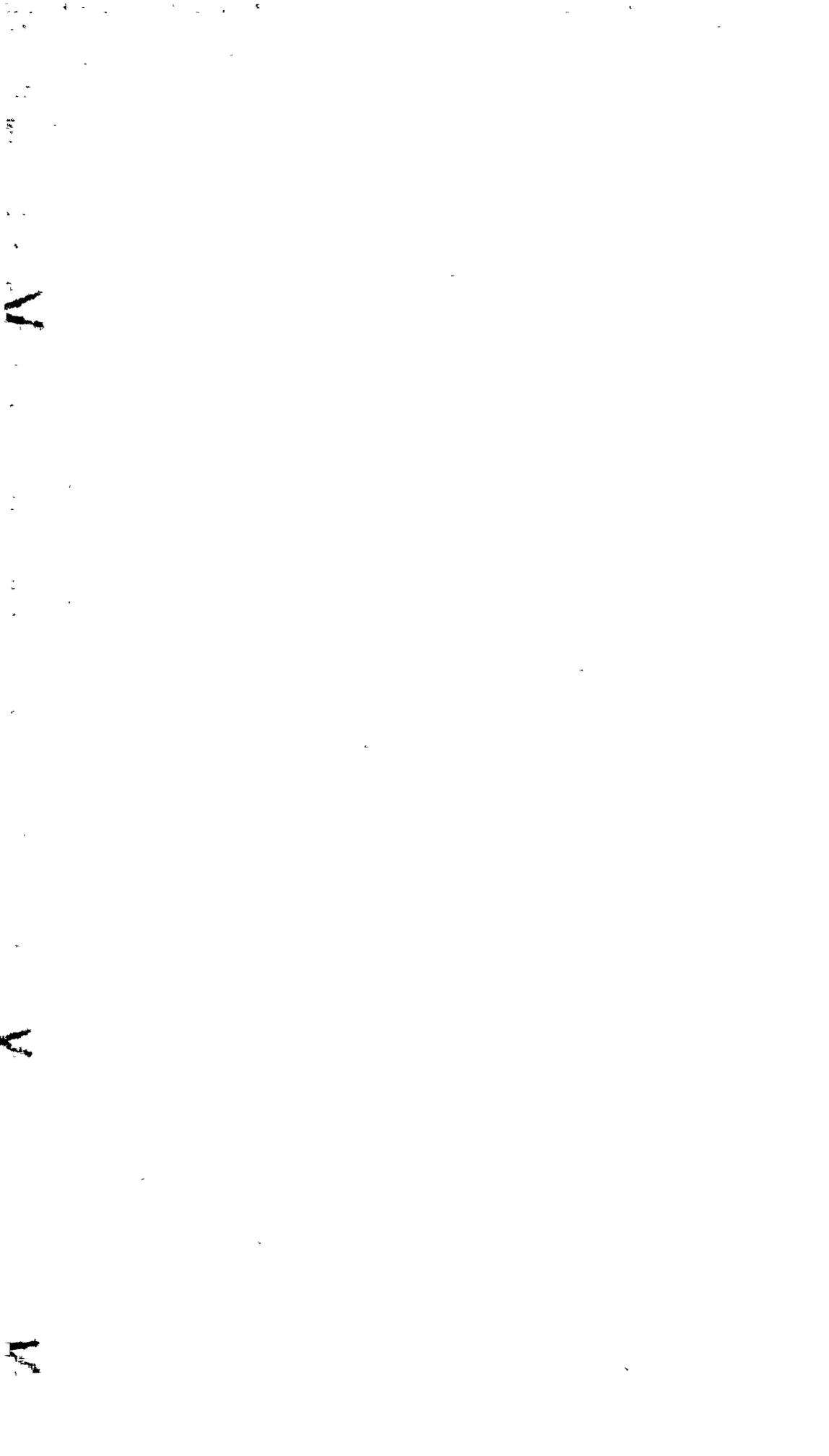
**Establishment of Paternity**

**CONTENTS**

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<b>A. The Law of Illegitimacy</b> .....	<b>Page</b> <b>217</b>
<b>B. The Uniform Parentage Act</b> .....	<b>249</b>

(213)



#### IV. Establishment of Paternity

In recent years there has been a steady growth in the number of children on the AFDC rolls who were born out of wedlock and for whom paternity support is not being provided because the identity of the father has not been determined. Children whose parents have never married present a serious problem of support and care. At common law such a child was a "son of nobody" and neither parent could be held responsible for it. The original laws imposing support of the child on a parent were enacted solely to prevent the community from having the child as a public charge.

Basically the families in which the father is absent from the home represent situations in which the marriage has broken up or in which the father and mother never married in the first place. In 1961, this category of cases represented 66.7 percent of the total AFDC caseload and has increased steadily to 83 percent in 1973.

In examining the situation more closely, one finds that the largest single factor accounting for the increase in the AFDC rolls is illegitimacy. In 21.3 percent of the families receiving AFDC in 1961, the mother was not married to the father of the child. But in New York and New Jersey, the two States with the highest AFDC payment levels, the percentages of absent fathers not married to the mother were 30.5 percent and 33.1 percent, respectively; and of all States, Illinois had the largest percentage—34 percent—of families receiving AFDC in which the absent father was not married to the mother.

This 21.3 percent grew to 27.9 percent by 1969 and to 34.7 percent in 1973. However, in New York, the 1973 percentage was 39.4 percent and in New Jersey 36.5 percent; and of all States, Alabama had the largest percentage—54.1 percent—of families receiving AFDC in which the father was not married to the mother. Thus, in the span of only 12 years, from 1961 to 1973, the percentage of families receiving AFDC in which the mother was not married to the father of the child increased by 62.9 percent. Applying the 34.7 percent to the January 1973 caseload, 3.9 million AFDC recipients today are found in families where the father is not married to the mother.

According to the 1973 survey, there were one or more illegitimate children in 1,364,255 families, or 45.6 percent of the total AFDC families. There were 757,613 families, or 25.3 percent of the 2,989,891 families in the 1973 AFDC survey, with one illegitimate child and 323,911 families, or 10.8 percent of the total AFDC families, with two illegitimate children. The number of families with six or more illegitimate children was 35,091, or 1.2 percent of the total AFDC families. There were 832 families with ten or more illegitimate children. The median number of illegitimate children in AFDC families with illegitimate children was one child (see table 1).

In 1961, there were 645,000 children, or 24.3 percent of the 2,658,525 children in the 1961 AFDC survey, who were illegitimate. But in the

District of Columbia the percentage of illegitimate children on the AFDC rolls was 40.9 percent; in New York the percentage was 35 percent; and in New Jersey 36.4 percent of the AFDC children were illegitimate (see table 2).

In 1973, there were 2,529,846 children, or 32.7 percent of the 7,724,938 children in the AFDC survey, who were illegitimate, an increase of 292 percent in the number of illegitimate children receiving AFDC in just 12 years. No valid sample on the number of illegitimate children was received from the District of Columbia in the 1973 survey. In New York there were 349,946 illegitimate children receiving AFDC, or 38.1 percent of the 917,679 children on the AFDC rolls in 1973, an increase of 298 percent in 12 years in the number of illegitimate children receiving AFDC. In New Jersey, there were 105,000 illegitimate children receiving AFDC, or 35.4 percent of the 296,521 children on the rolls in 1973, an increase of 449 percent in the number of illegitimate children receiving AFDC in 12 years. For the 12-year period, 1961 to 1973, Georgia had the largest percentage increase—1,895 percent—of all the reporting States, in the number of illegitimate children receiving AFDC (see table 2).

In 1961, 6 percent of the children born in the United States were illegitimate. The white illegitimate births were 2.5 percent of the total white births and the nonwhite illegitimate births were 23.7 percent of the total nonwhite births.

In 1973, 13.3 percent of the children born in the United States were illegitimate. Of the total white children born in 1973, 6.9 percent were illegitimate, and 42.6 percent of the total nonwhite children were illegitimate.

There was a 121.7 percent increase in the number of illegitimate children as a percent to total children born in the 12-year period, 1961 to 1973.

This chapter provides data on laws of the various States regarding establishment of paternity as they were in 1971 and brings the data up to date. It also describes various methods being used in ascertaining the paternity of the child.

State statutes for ascertainment of paternity are listed in appendix B.

## A. The Law of Illegitimacy

(Excerpts from *Illegitimacy: Law and Social Policy*, by Professor Harry D. Krause)\*

"It might perhaps be mentioned that the Decalog, which is the basis of our moral code, specifically states that the sins of the father may be visited upon the children unto the third and fourth generation, so that the argument against making the children suffer for the mother's wrong can be attacked on ethical grounds."<sup>1</sup>

Legislative attack on the common law doctrine of *filius nullius* has taken several directions. All States have legislation that reduces on a "retail" basis the instances in which a child is born out of wedlock by the expedient of expanding the definition of "wedlock" or by permitting legitimation after the child's birth. These "definitional" statutes have provided unqualified relief from illegitimacy to many children who otherwise would or might have been illegitimate.<sup>2</sup> At the logical extreme, a "definitional" statute could abolish illegitimacy "wholesale"—simply by providing that children born out of wedlock have the same legal rights against their parents as are enjoyed by legitimate children. This solution has been tried in several States.<sup>3</sup>

Many children, however, stay illegitimate. The facts of their cases do not admit legitimation. To help these children, most States have enacted statutes which seek to overcome part of the burden of illegitimacy by granting specific legal rights, in the areas of support, inheritance and concerning several other aspects of the legitimate parent-child relationship.

Problems arise with respect to both classes of children when there is a "conflict of laws." This is a frequent occurrence within the multitude of closely related but independent legal systems that make up the United States. For example, great population mobility makes the following question possible: "What are the rights of a child born out of wedlock under the laws of State No. 1, who now lives in State No. 2 which gives no legal relevance to illegitimacy, and who seeks to inherit from his father who died without a will, if the father was domiciled in State No. 3 which denies illegitimates any right to inherit from their fathers, died in State No. 4 which allows an illegitimate child to inherit if his paternity was established by court action during the father's lifetime, and left realty and personal property in all four States?" Similar questions arise concerning rights of support. Another

\*Judge Young in *In re Duke*, 189 N.E.2d 646, 649 (Juv. Ct., Huren Co., Ohio 1961).

<sup>1</sup> In very rare instances, legitimation has not been accepted as the full equivalent of legitimacy. *Pfeifer v. Wright*, 41 F.2d 464 (10th Cir. 1930) which held a child legitimated in Kansas was not permitted to inherit under Oklahoma law; *In re Crowell's Estate*, 124 Mo. 71, 126 A. 178 (1924), recognizing a distinction between legitimation and capacity to inherit; *cf. In re Garcia's Estate*, 34 Cal. 2d 419, 210 P.2d 841 (1949).

<sup>2</sup> See Appendix A, *supra* p. 241.

<sup>3</sup> Copyright (c) 1971 by Bobbs-Merrill, Inc., Indianapolis, Indiana. Pages 8-42 and appendix A reprinted with their permission. All rights reserved.

common issue is whether a legitimation purportedly accomplished in State No. 1 is effective in State No. 2.

This chapter will develop the definition of *illegitimacy* by describing the routes to legitimation by which many children born more or less out of wedlock become legally equal to legitimate children. Subsequently, discussion will turn to the "incurably" illegitimate child's legal rights against his parents, especially his father, and to problems arising when laws "conflict." How the law goes about ascertaining the father will be the subject of a later chapter.

Although this book is concerned with the legal relationship between illegitimate child and *natural* parent, brief mention should be made of adoption statutes under which a significant proportion of children born illegitimately finds legitimate status vis-a-vis *adoptive* parents. In typical cases, these children fare better with the "social parents" thus acquired than they would have fared with their natural parents. Obviously, where available, adoption can be a very desirable answer to illegitimacy.

## A. ILLEGITIMACY DEFINED

### 1. EXPANDING THE DEFINITION OF LEGITIMACY

The definition of illegitimacy is tied to the parents' marital status at the time of their child's birth. It usually involves the fact that the child was "born out of wedlock and not legitimated,"<sup>3</sup> sometimes includes a reference to the time of conception to cover the child who was conceived before marriage or born after its termination,<sup>4</sup> and excludes from legitimacy children born to a married mother in circumstances in which the husband could not have been the father.<sup>5</sup>

#### (1) CHILDREN OF INVALID MARRIAGES

"Definitional" relief has operated primarily on the definition of "born in wedlock" which, in turn, crucially depends on the definition of "wedlock." For purposes of the status of children, the definition of "wedlock" has been shifted in the would-have-been illegitimate's favor. Whereas the offspring of a defective marriage, annulled with *ab initio* effect, used to be illegitimate, a number of States today give legitimate status to the child of almost any alliance that resembles a formal marriage.<sup>6</sup> A large area of potential illegitimacy has thus been eliminated by provisions such as the following:

"Whenever persons attempt or have attempted to contract and be joined in marriage, and some form of marriage ceremony recognized by law has been performed in apparent compliance with the law in relation to marriage . . . such issue is hereby made legitimate and

<sup>3</sup> Ga. Code Ann. § 74-201 (1964); Hawaii Rev. Stat. § 577-14 (1968); La. Civ. Code Ann. art. 189 (West 1952); N.Y. Gen. Contr. Law § 59 (McKinney 1961); S.D. Comp. Laws § 25-5-3 (1967); P.H. Laws Ann. tit. 31, § 443 (1968); Wyo. Stat. Ann. § 14-69 (1965).

<sup>4</sup> "A child born out of wedlock is a child begotten and born to any woman who was unmarried from the conception to the date of birth of the child." Mich. Stat. Ann. § 722.711 (1969).

<sup>5</sup> "Child born out of wedlock . . . [means] either a child born to an unmarried woman, or a child which, although born to a married woman, is either alleged or adjudicated not to be the issue of her marriage." Wis. Stat. Ann. § 53.45 (Supp. 1969).

<sup>6</sup> H. Clark, *Domestic Relations* 139-35 (1968). See generally, statutes cited, note 7 *supra*.

may take the name of the father, though such attempted marriage is declared void or might be declared void for any reason.<sup>7</sup>

Covered by this type of provision are the children of parents whose marriage did not meet the test of legality by reason of their failure to comply with formal or substantive requirements such as health checks, consent of a parent's parents and similar details, or because of the legal disability of a parent, such as a continuing prior marriage (bigamy), consanguinity (incest), nonage, idiocy or insanity, miscegenation<sup>8</sup> and other impediments. Not all States, however, have been as generous. Apparently, no State legitimates the offspring of an invalid, informal (common law) marriage.<sup>9</sup> In some jurisdictions the impediments of prior marriage,<sup>10</sup> consanguinity<sup>11</sup> or miscegenation<sup>12</sup> have given the

<sup>7</sup> Ill. Rev. Stat. ch. 80, § 17a (1970); accord, Md. Code 1957 art. 16, § 27, and Art. 23, § 1-306 (1966). Texas provides that "[t]he issue also of marriages deemed null in law shall nevertheless be legitimate." Tex. Vernon's Prob. Code Ann. § 43 (1956). Other states have provisions of varying breadth, usually somewhat narrower, and sometimes with exclusions for incestuous, bigamous or miscegenetic illegitimacy: Ala. Code tit. 24, § 2 (1959); Alaska Stat. § 12.10.030 (1962) (as to inheritance); Ariz. Rev. Stat. Ann. § 14-306 (1966); Ark. Stat. Ann. § 61-104 (1946); Cal. Civ. Code § 85 (West 1964); Colo. Rev. Stat. Ann. § 44-3-5 (1962); Del. Code Ann. tit. 15 § 105 (1953); D.C. Code Ann. §§ 16-907, 16-908 (1967); Ga. Code Ann. § 53-104 (1951); Hawaii Rev. Stat. § 232-21 (1963); Idaho Code Ann. § 14-104 (1948) (as to inheritance); Burns' Ind. Ann. Stat. §§ 44-104, 44-107 (1965); Iowa Code Ann. § 204.23 (Supp. 1970); Kan. Gen. Stat. Ann. § 24-124 (1964); Ky. Rev. Stat. Ann. § 201.100(3) (1963); La. Civ. Code Ann. arts. 117, 118 (West 1953); Mich. Stat. Ann. § 552.1 (1967); Minn. Stat. Ann. § 517.15 (1965); Mo. Rev. Stat. § 474.060 (1960); Nev. Rev. Stat. § 123.410 (1967); N.H. Rev. Stat. Ann. § 458:23 (1966 Repl.); N.J. Rev. Stat. § 9:12-3 (1960), § 2A:24-20 (1960); N.Y. Dom. Rel. Law § 24 (McKinney Supp. 1970); N.Y. Unconsol. Laws § 21134 (McKinney 1949); N.C. Gen. Stat. § 50-11.1 (1966); N.D. Cent. Code § 50-01-05 (1960); Ohio Rev. Code Ann. §§ 2106.15 (Page 1966), 2106.23 (Page Supp. 1966); Okla. Stat. Ann. tit. 12, § 1232, tit. 84, § 218 (1949); Ore. Rev. Stat. § 104.100 (1960); Pa. Stat. Ann. tit. 48, § 100.1 (Supp. 1964); R.I. Gen. Laws Ann. § 15-4-21 (1967); S.C. Code Ann. §§ 20-4, 20-6.1 (1962); S.D. Comp. Laws §§ 24-5-1—24-5-3, 26-5-5 (1967); Utah Code Ann. § 74-4-10 (1963); Vt. Stat. Ann. tit. 18, § 430 (1966); Va. Code Ann. § 64.1-7 (1968); Wash. Rev. Code Ann. § 26.06.060 (1961); W. Va. Code Ann. §§ 49-1-2, 49-1-7 (1966); Wla. Stat. Ann. § 245.20 (1967); Wyo. Stat. Ann. § 20-63 (1960).

<sup>8</sup> See note 12 *infra*.  
<sup>9</sup> See discussion in H. Clark, Domestic Relations 123 (1968), Annot., 23 A.L.R. 2d 705, 751 (1954). But see N.Y. Dom. Rel. Law § 23 (McKinney 1964), recognizing as legitimate the child of a valid sister state common law marriage. *O'Fl.* Ill. Rev. Stat. ch. 80, § 4 (1970).  
<sup>10</sup> *E.g.*, Fla. Stat. Ann. §§ 61.041(9), 61.051 (1967). Bigamous bastards commonly are considered legitimate as to the party who entered into the bigamous marriage in good faith. D.C. Code Ann. § 16-907 (1967); Burns' Ind. Ann. Stat. § 44-106 (1965); Mass. Ann. Laws ch. 207, § 17 (1965); Neb. Rev. Stat. § 42-227 (1963); Wyo. Stat. Ann. § 20-70 (1960). See Comment, Domestic Relations—Legitimacy of Issue of Bigamous Marriage, 23 Tenn. L. Rev. 1966 (1953). An interesting variation on this theme was the case of *Simpson v. Blackburn*, 414 S.W.2d 706 (Mo. App. 1967), in which the court held that Missouri's legitimation statute applied not only to children born out of wedlock but also to a child born in wedlock by a man who did not become the mother's husband until later. Mo. Rev. Stat. § 474.070 (1960) simply provides that "[i]f a man, having by a woman a child or children, afterward intermarries with her and recognizes the child or children to be his they are thereby legitimated." Ky. Rev. Stat. § 201.080(3) (1963) similarly allows for the legitimation of an illegitimate child upon the marriage and acknowledgment of the parents. This statute was held to be inapplicable to an illegitimate child born in wedlock, since the child never was illegitimate. The fact that the natural parents married after they had obtained divorce from their respective spouses had no legitimating effect on the child. *Department of Child Welfare v. Holton*, 411 S.W.2d 622 (Ky. App. 1967).

<sup>11</sup> *E.g.*, Ky. Rev. Stat. Ann. § 201.100(1) (1963); Mo. Rev. Stat. Ann. ch. 19 § 633 (1965); Minn. Code Ann. § 2748-03 (Supp. 1966); Neb. Rev. Stat. § 42-228 (1968); N.H. Rev. Stat. Ann. § 457:2 (1968); Wyo. Stat. Ann. § 20-60 (1960).

<sup>12</sup> Such provisions remain on the books in, for example, Florida which holds that a child of an attempted marriage between white and Negro "shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance." Fla. Stat. Ann. § 74.11 (1967). *Van Hook v. Blanton*, 306 So.2d 210 (Fla. 1965), held this statute unconstitutional. Kentucky provides: "The issue of a marriage . . . between a white person and a negro or mulatto is not legitimate." Ky. Rev. Stat. Ann. § 201.100 (1963). On the other hand, Indiana expressly provides that issue of marriages void on account of differences in color shall be deemed legitimate. Burns' Ind. Ann. Stat. § 44-107 (1965); accord, Ore. Rev. Stat. § 104.210 (1960). Arkansas specifically (and generously) recognizes as legitimate the offspring of a Negro-Mulatto marriage. Ark. Stat. Ann. § 55-236 (1948). See also Ga. Code Ann. § 74-102 (1964). See *infra* note 16.

legislators pause, and only the children of unions void by reason of "lesser" impediments, such as nonage, idiocy, or insanity of one or both of the partners are legitimated.<sup>15</sup> Under some statutes, the good faith of the parties may play a decisive role.<sup>16</sup> Still others restrict the child's legitimate status to the would-be spouse who was not under an impediment.<sup>17</sup> It is of historical interest that some statutes prohibiting racial intermarriage and declaring such marriages void specifically exclude (or were judicially interpreted to exclude) the issue of such unions from a general legitimation statute.<sup>18</sup>

## (II) LEGITIMATION BY PARENTS' MARRIAGE AFTER CHILD'S BIRTH

Statutory provisions legitimating potential illegitimates have operated in a number of other situations. Most common are provisions that automatically or through acknowledgment or recognition on the part of the father, legitimate an illegitimate child upon the marriage of his parents.<sup>17</sup> A frequently imposed requirement is the specific acknowl-

<sup>15</sup> Iowa excludes legitimacy for the issue of a marriage annulled by reason of the husband's impotency. Iowa Code Ann. § 508.22 (1966).

<sup>16</sup> Miss. C. & Ann. § 2748-03 (Supp. 1966), provides: "Except for incestuous or miscegenetic marriages, the issue of the parties to a void marriage conceived subsequent to the date thereof is legitimate . . . . In addition "a void marriage" under section 3 must have been entered into innocently and in good faith by at least one of the parties." *Stuttin v. Estate of Stuttin*, 194 So. 2d 229 (Miss. 1967). Illegitimately, the one who is punished for the parent's bad faith is not the parent but the child who will have no (or limited) legal rights against the parent who acted in bad faith. La. Civ. Code Ann. Art. 118 (West, 1953) specifically provides that the children of a null marriage are legitimate if one of the parties acted in good faith. *Succession of Jeno*, 173 So. 2d 637, 636 (La. App. 1965) defines "good faith" as requiring "only that the party should have no certain knowledge of any impediment to the marriage and should have an honest and reasonable belief that the marriage was valid and that no legal impediment existed at the time of its contraction." *Cf. Pace v. Celebrezze*, 245 F. Supp. 317 (S.D. W. Va. 1965); *Bernier v. Bernier*, 237 Ct. 112 (R.I. 1967). In many other states, no element of good faith is required. See e.g., *Wolf v. Gardner*, 390 F.2d 295 (8th Cir. 1967): "We can see no sound reason . . . for withholding legitimacy from the children of a bigamous marriage simply because both parties knew that they were entering into a bigamous marriage." See generally Annot., 54 A.L.R. 490, 505 (1953); Note, *Children of Void or Voidable Marriages*, 24 Temp. L.Q. 64, 69 (1960); Comment, *Determination of Paternity of Child of Putative Marriage*, 19 La. L. Rev. 706 (1968).

<sup>17</sup> Iowa Code Ann. § 508.22 (1966); Mass. Ann. Laws ch. 207, § 16 (1955); Neb. Rev. Stat. § 43-236 (1966). See also *Unity v. Belgrade*, 76 Me. 419 (1894); 10 Am. Jur. 34 *Beardslee* § 2 (1963).

<sup>18</sup> Note 12 *supra*. *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967), held that state law could not forbid marriages solely on the basis of racial classifications. See *Washington, The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective* 52 Va. L. Rev. 1129 (1966); see also, Comment, *Miscegenation Laws Based Solely Upon Race Are a Denial of the Due Process and Equal Protection of the 14th Amendment*, 12 N.Y.L.F. 179, 171, 172, nn. 5-7 (1967). Subsequent to *Loving*, the miscegenation laws of Delaware and Oklahoma were held unconstitutional in *Davis v. Gately*, 269 F. Supp. 266 (D. Del. 1967) and *Dick v. Ravon*, 424 F.2d 295 (Okla. 1967).

<sup>19</sup> See Ala. Code tit. 27, § 10 (1955); Alaska Stat. § 25.20.050 (1962); Ark. Stat. Ann. § 61-103 (1948); Cal. Civ. Code § 215 (West 1954); Conn. Gen. Stat. Ann. § 45-274 (1960); Del. Code Ann. tit. 12, § 1201 (1953); D.C. Code Ann. § 16-2353 (1967); Fla. Stat. Ann. § 742.001 (1967); Ga. Code Ann. § 74-101 (1964); Hawaii Rev. Stat. § 235-21 (1963); Idaho Code Ann. § 33-1006 (1963); Ill. Rev. Stat., ch. 106 2/4, § 63 (1970); Burns Ind. Ann. Stat. § 3-456 (1948); Iowa Code Ann. § 505.18 (1966); Kan. Stat. Ann. § 22-125 (1964); Ky. Rev. Stat. Ann. § 201.090 (1963); La. Civ. Code Ann. arts. 194, 199 (West 1953); Me. Rev. Stat. Ann. tit. 18, § 1003 (1955); Md. Ann. Code art. 46, § 6 (1965); Mass. Ann. Laws ch. 190, § 7 (1945); Mich. Comp. Laws § 302.23 (1965); Minn. Stat. Ann. § 517.19 (1965); Neb. Rev. Stat. § 12-100 (1962); Nev. Rev. Stat. § 124.170 (1967); N.H. Rev. Stat. Ann. § 457.42 (1965); N.J. Stat. Ann. § 9:15-1 (1960); N.M. Stat. Ann. § 20-1-30 (1964); N.Y. Dom. Rel. Law § 24 (McKinney Supp. 1970); Ore. Rev. Stat. § 100.070 (1960); Pa. Stat. tit. 43, § 167 (1965); P.R. Laws Ann. tit. 31, § 453 (1963); R.I. Gen. Laws Ann. § 22-1-5 (1970); S.C. Code Ann. § 15-1204 (1963); Tenn. Code Ann. § 26-207 (1965); Utah Code Ann. § 77-60-14 (1963); Vt. Stat. Ann. tit. 14, § 554 (1955); Va. Code Ann. § 64.1-6 (1965); Wash. Rev. Code Ann. § 26.04.050 (1961); W. Va. Code Ann. § 43-1-6 (1966); Wis. Stat. Ann. § 245.25 (Supp. 1966).

edgment of the child by the father. This may have to be in writing<sup>18</sup> by conduct,<sup>19</sup> or meet other requirements such as publicity.<sup>20</sup>

The effect of a void or voidable marriage subsequent to the child's birth is not always clear, although the dual handicap has been overcome where a State had both types of legitimation statutes.<sup>21</sup> Where still recognized, even an informal, common law marriage may effect legitimation.<sup>22</sup>

### (III) MISCELLANEOUS LEGITIMATION STATUTES

The parents' divorce prior to the birth of the child normally does not affect the legitimacy of the child,<sup>23</sup> if the child is born within a certain period after the divorce, often set at 10 months,<sup>24</sup> or 300 days.<sup>25</sup> Just to make sure, at least one statute provides that a child conceived out of wedlock is legitimate if his parents marry prior to his birth.<sup>26</sup> Others proclaim that a judgment in a paternity action establishes equality with legitimate children of the same parents.<sup>27</sup>

<sup>18</sup> Alaska Stat. § 25.20.050 (1962); Colo. Rev. Stat. Ann. § 60-9-13 (Supp. 1967); Del. Code Ann. tit. 13, § 1201 (1963); D.C. Code Ann. § 16-2553 (1967); Neb. Rev. Stat. § 13-160 (1963); S.D. Comp. Laws § 24-24-16 (1960); Wash. Rev. Code Ann. § 11.04.001 (1967).

<sup>19</sup> Alaska Stat. § 25.20.050 (1962); Cal. Prob. Code § 255 (West Supp. 1963); Colo. Rev. Stat. Ann. § 152-9-5 (1964); Idaho Code Ann. § 14-104 (1948); Ky. Rev. Stat. Ann. § 261.000 (1963); Mo. Rev. Stat. Ann. tit. 18, § 1003 (1965); Md. Ann. Code art. 46, § 6 (1965); Mass. Ann. Laws ch. 190, § 7 (1965); N.J. Stat. Ann. § 9:15-1 (1960).

<sup>20</sup> D.C. Code Ann. § 16-2553 (1967).

<sup>21</sup> *Rivicic v. Bethan*, 27 Cal. 2d 621, 165 P.2d 677 (1946); *L. v. L.*, 82 N.J. Super. 112, 223 A.2d 297 (1966); *Carroll v. Carroll*, 20 Tex. 732, 746 (1856); See Comment, *Legitimation Statutes—Effect of Void Marriage on Legitimizing Child Born Prior to Such Marriage*, 19 So. Calif. L. Rev. 457 (1946); cf. Comment, *Legitimacy and Status of Children of Marriages Which Are Void or Annulled*, 17 Brooklyn L. Rev. 294, 323 (1961). See also Alaska Stat. § 12.10.050 (1962).

<sup>22</sup> *W. Va. Cod. Ann. § 42-1-7* (1960), as interpreted in *Kester v. Kester*, 106 W. Va. 615, 146 S.E. 625 (1929) and later cases. On the other hand, *Burns' Ind. Ann. Stat. §§ 44-111, 44-112* (1965), declares common-law marriages void, thus making their issue illegitimate if born after the effective date of the statute.

<sup>23</sup> *Ariz. Rev. Stat. Ann. § 26-320* (Supp. 1960); *Colo. Rev. Stat. Ann. § 42-1-1* (1964); *Del. Code Ann. tit. 13, § 1500* (1963); *D.C. Code Ann. § 16-900* (1967); *Idaho Code Ann. § 14-104* (1948); *Ill. Rev. Stat. ch. 40, § 4* (1970); *Miss. Code Ann. § 2744* (1957); *Neb. Rev. Stat. § 13-101* (1963); *N.H. Rev. Stat. Ann. § 453:23* (1968); *N.C. Gen. Stat. § 50-11* (1966); *Ohio Rev. Code Ann. § 2105.13* (Page 1960); *S.C. Code Ann. § 20-119* (1962). Legitimacy is presumed until the contrary is shown even in case of divorce for adultery. *Mich. Stat. Ann. § 552.20* (1967). Child is legitimate if it is the product of the marriage. *Ga. Code Ann. § 20-119* (1960). See, e.g., *Sturdy v. Sturdy*, 67 Ill. App. 2d 400, 214 N.E.2d 607 (1966), which held legitimate a child who had been conceived before the marriage of its parents and who was born after their divorce: "We cannot hold that the fact that this Act omits to state the particular sequence of conception, marriage, divorce and birth that is alleged here, requires this court to hold that this minor child was born out of wedlock." /s. at 472 214 N.E.2d at 600. Cf. *Home of the Holy Infancy v. Kaska*, 297 E.W.2d 206 (Tex. 1965) (child conceived before voidable marriage and born after its annulment held legitimate under Tex. Prob. Code Ann. § 42 (Vernon, 1966) which provides: "Where a man, having by a woman a child or children shall afterwards intermarry with such woman, such child or children shall thereby be legitimated and made capable of inheriting his estate".)

<sup>24</sup> *Mont. Rev. Codes Ann. § 61-102* (1970); *N.D. Cent. Code § 14-09-02* (1960); *Ohio. Stat. Ann. tit. 10, § 3* (1961); *S.D. Comp. Laws § 25-8-2* (1960). Puerto Rico recognizes as legitimate a child born within 300 days after the dissolution of the marriage. *P.R. Laws Ann. tit. 21, § 461* (1968). *La. Civ. Code Ann. art. 187* (West 1952) provides that the husband is not to be presumed the father when the child is born more than 300 days after dissolution of the marriage or judicial separation from bed and board. In *Gibson v. Gibson*, 207 Va. 821, 153 S.E.2d 189 (1967), the court held that a child born 214 days after the last date of cohabitation by husband and wife was illegitimate. Time has not always been of the essence: "In the time of Edward II, the Countess of Gloucester bore a child one year and seven months after the death of the duke, and it was pronounced legitimate. In the reign of Henry VI, Mr. Baron Keble expressed the opinion with apparent gravity, that a widow might give birth to a child seven years after her husband's death without injury to her reputation." *Dickinson's Appeal*, 45 Conn. 491, 501, 19 Am. Rep. 542, 555-56 (1875).

<sup>25</sup> *Cal. Evid. Code § 661* (West 1960); *P.R. Laws Ann. tit. 21, § 461* (1968).

<sup>26</sup> Note 4 *supra*.

<sup>27</sup> *Alaska Stat. § 25.20.050* (1962). See also Appendix A, *supra* p. 241.

#### (IV) PRESUMPTION OF LEGITIMACY IN MARRIAGE

A further aspect of the definition minimization of illegitimacy involves the children of married women. In the interest of stabilizing family relationships, there is universal acceptance of a strong presumption of legitimacy in favor of children born in wedlock. The presumption is rooted in case law but also has found statutory expression.<sup>28</sup> Even in the common law, the presumption has been traced back to Roman times.<sup>29</sup> In England, the rule colorfully referred to the husband's presence within the "four seas"—if present, a child born to his wife was legitimate unless he could prove impotency.<sup>30</sup>

Several American States continue to employ a conclusive presumption of legitimacy, prohibiting a showing to the contrary. True to its name, the conclusive presumption upholds the child's legitimacy even where nonpaternity can be established absolutely.<sup>31</sup> In 1967, a California court held that a part Negro child born to a white woman was the legitimate child of the mother's white husband.<sup>32</sup> States that have a rebuttable presumption typically make a rebuttal difficult.<sup>33</sup> Under these conditions, actual impossibility of the husband's fatherhood often turns out to be the only basis for bastardizing a child born in wedlock. To show impossibility, conclusive proof of nonpaternity by blood test exclusions may suffice,<sup>34</sup> and so may proof of nonaccess by the husband during the relevant period,<sup>35</sup> or proof of the husband's

<sup>28</sup> See generally H. Clark, *Domestic Relations*, 156, 172, 608 (1968); Annot., 57 A.L.R.2d 739 (1958). Cal. Evid. Code § 621 (West 1968).

<sup>29</sup> *Kennedy v. State*, 117 Ark. 113, 173 S.W. 843 (1915).

<sup>30</sup> J. Madden, *Persons and Domestic Relations* 235-43 (1931); Nicolas, *The Law of Adultery and Bastardy* 10-14 (1936).

<sup>31</sup> See, e.g., Ore. Rev. Stat. § 41.350 (1969); Comment, *Evidence—Presumption of Legitimacy—Blood Grouping Test Insuff. to Prove Non-Paternity where Statutory Presumption is Conclusive*, 16 Rutgers L. Rev. 767 (1963).

<sup>32</sup> *Hess v. Whitmitt*, 257 Cal. App. 2d 552, 65 Cal. Rptr. 45 (1967). Cal. Evid. Code § 621 (West 1968) provides: "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate." But cf. *Jackson v. Jackson*, 67 Cal. 2d 245, 490 P.2d 239, 66 Cal. Rptr. 649 (1967); *Hughes v. Hughes*, 125 Cal. App. 2d 721, 371 P.2d 173 (1962). See generally Comment, *Presumptions of Legitimacy and Related Problems*, 23 So. Cal. L. Rev. 533 (1960). Comment, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 Stan. L. Rev. 754 (1968).

<sup>33</sup> N.D. Cent. Code § 14-09-03 (1969), provides: "The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy in such case may be proved like any other fact." Accord, Del. Code Ann. tit. 13, § 506 (1963); Mont. Rev. Codes Ann. § 61-103 (1970); Okla. Stat. Ann. tit. 10, § 3 (1961); S.D. Comp. Laws § 25-3-4 (1969). In Maryland, testimony from other persons must be given as to the fact that husband and mother were living apart, before husband and mother may testify as to nonaccess. Md. Ann. Code art. 16, § 607 (1966). In Wisconsin the husband and wife may testify, but a "clear and satisfactory preponderance of the evidence" is required to overcome the presumption. Wis. Stat. Ann. § 291.39 (1967). What happens when the presumption of legitimacy, "one of the strongest known to the law," meets the presumption of a continuing marriage, is discussed in Comment, *Evidence—Presumption of Legitimacy*, 35 Geo. L. J. 296 (1947).

<sup>34</sup> Colo. Rev. Stat. Ann. § 53-1-37 (Supp. 1967); Conn. Gen. Stat. Ann. § 53-164 (1968); Ill. Rev. Stat. ch. 106 3/4, § 4 (1970); Miss. Code Ann. § 203-06, -09 (Supp. 1967); N.H. Rev. Stat. Ann. § 523:4 (1955); N.Y. Family Ct. Act § 418 (McKinney's Supp. 1962); Pa. Stat. Ann. tit. 25, § 397.4 (Supp. 1969); Utah Code Ann. § 78-45a-10 (Supp. 1969); Wis. Stat. Ann. § 52.35(3) (Supp. 1969). See, e.g., *Houghton v. Houghton*, 179 Neb. 278, 137 N.W.2d 361 (1965); *Crouse v. Crouse*, 51 Misc. 2d 846, 373 N.Y.S.2d 595 (Fam. Ct. 1964); *Oliver v. England*, 48 Misc. 2d 335, 264 N.Y.S.2d 900, 1004 (Fam. Ct. 1965); *Ross v. Ross*, 16 Ohio App. 2d 123, 243 N.E.2d 677 (1968). See Comment, 24 U. Pitt. L. Rev. 653 (1963).

<sup>35</sup> Puerto Rico admits no other proof. P.R. Laws Ann. tit. 31, § 461 (1963). Under West Virginia law, where a married woman lives apart from her husband for one year or does not cohabit with him during that year, she may, if she is delivered of child at any time after said year or while such separation continues, bring a paternity action against someone not her husband. W. Va. Code Ann. § 43-7-3 (1966). See also *Lanford v. Lanford*, 151 Colo. 211, 377 P.2d 115 (1963); *District of Columbia v. Prather*, 207 A.2d 119 (D.C. App. 1965); *Feltus v. Bland*, 210 So.2d 283 (La. App. 1966); *Feters v. District of Columbia*, 84 A.2d 115 (D.C. App. 1961).

sterility or impotency.<sup>33</sup> Sometimes statutes provide that only the husband may question the legitimacy of a child born to his wife, others limit the action to the husband and wife and their descendants.<sup>37</sup> The presumption of legitimacy is further supported by rules of evidence which restrict a spouse's ability to testify to nonaccess.<sup>38</sup> It is notable that the common law has applied the presumption of legitimacy with nearly equal force to a child conceived prior to marriage and born in wedlock,<sup>39</sup> as well as to a child conceived during marriage and born after a divorce.<sup>40</sup>

#### (V) COMMON LAW MARRIAGES

One important legal development is at cross purposes with the liberalizing statutes just discussed and has worked against the illegitimate. The growing trend toward abolition of the institution of informal or "common law" marriage, has had the incidental effect of significantly increasing illegitimacy. Today less than one-third of the States retain the institution<sup>41</sup> which, in one of its forms, views a union as a valid marriage if the intending spouses have presently<sup>42</sup> consented to be husband and wife, if the marriage has been consummated, and if the spouses have publicly held out each other as such.<sup>43</sup> Where valid, such a union produces legitimate offspring.<sup>44</sup> Where it is not valid, resulting children are illegitimate. Public policy arguments against the institution of common law marriage usually overlook the interests of the child who, in the absence of a legally recognized relationship between his parents, is condemned to bastardy. Professor Clark has attacked the abolitionists:

"In short, most of the objections to common law marriage mistake its purpose. As a doctrine it has little or no effect at the outset of the parties' relationship. It comes into play after that relationship has existed for some time, for the purpose of vindicating the parties' marital expectations. There are other legal devices having the same purpose, but common law marriage plays an important part. Without it there would be more injustice and suffering in the world than there is with it. This is particularly true among those social and economic classes who have not accepted middle class standards of marriage. Certainly American marriage law should tolerate this much cultural diversity."<sup>45</sup>

<sup>33</sup> See, e.g., Iowa Code Ann. § 596.23 (1966). Louisiana does not permit the husband to disavow a child born to his wife by proving his natural impotence. La. Civ. Code Ann. art. 185 (West 1952).

<sup>37</sup> Statutes cited note 23 *supra*. 10 Am. Jur. 2d *Bastards* § 10 (1963). E.g., Lewis v. Powell, 178 So.2d 769 (La. App. 1965).

<sup>38</sup> See p. 119 *infra*, concerning "Lord Mansfield's rule."

<sup>39</sup> H. Clark, *Domestic Relations* 172, nn. 97 & 98 (1963).

<sup>40</sup> A recent case is *Ross v. Ross*, 16 Ohio App.2d 123, 242 N.E.2d 677 (1968), in which the court held the presumption rebutted on the basis of a blood test exclusion, and probably about 234 day pregnancy, and evidence associating the mother with other men.

<sup>41</sup> A. Jacobs & J. Goebel, *Cases on Domestic Relations* 98-99 (1961).

<sup>42</sup> The requirement of "present consent" to marriage distinguishes the resulting relationship from an engagement to be married at a future time.

<sup>43</sup> See *Walter v. Walter*, 423 S.W.2d 183 (Tex. Civ. App. 1968); cf. *Wolf v. Gardner*, 296 F.2d 295 (6th Cir. 1967).

<sup>44</sup> See, e.g., *Spreddin v. United States*, 262 F. Supp. 503 (D. Mont. 1967).

<sup>45</sup> H. Clark, *Domestic Relations* 58 (1963).

## (VI) ARTIFICIAL INSEMINATION

A new problem has been raised by the expanding utilization and acceptance of artificial insemination. Statutory treatment of the question has been scant,<sup>40</sup> and the courts have not provided a solution.<sup>41</sup> In cases where a married woman had conceived a child with the consent of her husband by artificial insemination from a donor other than her husband, judicial treatment has ranged from a holding that the resultant child is the husband's legitimate child<sup>42</sup> to the extreme of branding the child a bastard and the mother an adulteress.<sup>43</sup> In many such cases, of course, the presumption of legitimacy applicable to children born in wedlock will help.

A 1967 Oklahoma statute may point the way toward the future. It simply provides that a child born to a married woman as a consequence of heterologous artificial insemination is legitimate as to the husband (and of course the mother), if the insemination was performed by an authorized medical practitioner with the written consent of husband and wife.<sup>44</sup>

## 2. VOLUNTARY ACCEPTANCE OF PATERNAL RESPONSIBILITY

"Definitional" relief has operated in one other area. As already indicated, most States permit full legitimation to be accomplished through the marriage of the parents of the illegitimate child, although numerous States even then require a specific acknowledgment. Beyond that, however, some States have given the father the opportunity to accept responsibility for his illegitimate child by voluntary acknowledgment.<sup>45</sup> These statutes vary widely in form and operation. They

<sup>40</sup> Cal. Fam. Code § 270 (West Supp. 1968), dealing with failure to provide support, provides: "The husband of a woman who bears a child as a result of artificial insemination shall be considered the father of that child for the purposes of this section, if he consented in writing to the artificial insemination." Cal. Civ. Code § 196b (West Supp. 1968) provides: "[t]he husband of a woman who bears a child as a result of artificial insemination shall be liable for support of the child in the same manner as if he were the natural father, if he consented in writing to the artificial insemination." A model statute on artificial insemination is proposed in Comment, *Artificial Insemination: The Law's Illegitimate Child?*, 9 VIII. L. Rev. 77, 90-93 (1963). See also note 50 *infra*.

<sup>41</sup> See generally H. Clark, *Domestic Relations at 157-58, 229*; Bickind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. Fam. L. 26 (1945); Holloway, *Artificial Insemination—An Examination of the Legal Aspects*, 48 A.B.A.J. 1009 (1957); Schwab, *Artificial Insemination and the Law*, ABA Proceedings of the Family Law Section 104 (1963); Smith, *Through A Test Tube Darkly: Artificial Insemination and the Law*, 67 Mich. L. Rev. 127 (1963); Weinberger, *A Partial Solution to Legitimacy Problems Arising From the Use of Artificial Insemination*, 35 Ind. L.J. 143 (1960); Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 Wis. L. Rev. 839 (1965). Comment, *Artificial Insemination and the Problem of Legitimation and Adultery*, 1955 U. Ill. L.F. 759 (1955); Comment, *Artificial Insemination: The Law's Illegitimate Child?*, 9 VIII. L. Rev. 77 (1963).

<sup>42</sup> *People v. Seronson*, 68 Cal. 2d 289, 66 Cal. Rptr. 7, 427 P.2d 495 (1968), involved a child who had been conceived through artificial insemination pursuant to an agreement between the husband and wife. In a nonsupport action, the mother's husband was held to be the "lawful father" of the child.

<sup>43</sup> *Deornbee v. Deornbee*, No. 54, 3, 14961 (Super. Ct. Cook Co., Dec. 13, 1954); 22 U.S.L.W. 2908 (1954). The appeal was dismissed, but the appellate court held that the declaratory judgment was not binding on the child since it had not been represented in the proceedings. *Deornbee v. Deornbee*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956). Cf. *Guraky v. Guraky*, 29 Misc. 2d 1963, 242 N.Y.S.2d 406 (1962); *Stued v. Stued*, 190 Misc. 786, 78 N.Y.S.2d 390 (1948).

<sup>44</sup> Okla. Stat. Ann. tit. 10 § 561-553 (Supp. 1967). Similarly, Ga. Code Ann. § 74-2004 (Supp. 1969). Cf. Ga. Code Ann. § 74-101.1 (Supp. 1969). See 39 Brooklyn L. Rev. 302, 322 (1963).

<sup>45</sup> See, e.g., Conn. Gen. Stat. Ann. § 53-442b (Supp. 1969). Comment, *Legitimation: The Liberal Judicial Trend in California*, 19 Hastings L.J. 232 (1967). In the French tradition, Louisiana does not consider maternity to be established by the child's birth and gives the mother an opportunity to acknowledge her out of wedlock child. But see *Gloss v. American Guaranty & Lieb. Ins. Co.*, 291 U.S. 73, 29 L. Ed. 2d 441, 88 S. Ct. 1515 (1948).

range from procedures resulting in full legitimation, thus providing equality with legitimate children,<sup>52</sup> to arrangements of "partial" legitimation, usually in support<sup>53</sup> and inheritance matters, that sometimes go no further than a judgment in a paternity action.<sup>54</sup> A variation on the legitimation theme is an adoption statute that allows the father to adopt his illegitimate child.<sup>55</sup>

As to form, the father's acknowledgment usually has to be in writing and witnessed and sometimes must be executed before a notary,<sup>56</sup> other official, or court.<sup>57</sup> Some statutes view the admission of an illegitimate child to the father's family<sup>58</sup> and other acts or events tending to show the father's voluntary acceptance of his illegitimate child<sup>59</sup> as sufficient to accomplish legitimation.<sup>60</sup>

### 3. RETROACTIVE EFFECT OF LEGITIMATION

Some statutes expressly speak in terms of a legitimation after the child's birth being effective retroactively to the birth of the child.<sup>61</sup> Such assertions should be taken with a considerable dose of salt. In some respects, such as the issuance of a new birth certificate that eliminates all reference to the child's former illegitimacy, post-birth legitimation may indeed be viewed as retroactive. However, when property

<sup>52</sup> Ala. Code tit. 27, § 11 (Supp. 1969); Ga. Code Ann. § 74-103 (1964); Idaho Code Ann. § 16-1510 (Supp. 1967); Iowa Code Ann. § 633.222 (1966); Mass. Ann. Laws ch. 190, § 7 (1955); Mich. Stat. Ann. § 702.63 (1968); Ohio Rev. Code Ann. § 2103.18 (Page 1968); S.C. Code Ann. § 13-1384 (1962); S.D. Comp. Laws § 23-6-1 (1969); Utah Code Ann. § 78-30-12 (1953).

<sup>53</sup> This would be the rough equivalent of a consensual settlement of a paternity action. See Conn. Gen. Stat. Ann. § 52-442a (1969); Hawaii Rev. Laws § 577-14 (1968); Neb. Rev. Stat. § 12-106 (1962); N.Y. Dom. Rel. Law § 33 (McKinney 1964); N.D. Cent. Code § 22-34-03 (1960); R.I. Gen. Laws Ann. § 15-8-7 (1970); Va. Code Ann. § 20-61.1 (1969); Wyo. Stat. Ann. § 14-62 (1965).

<sup>54</sup> Cal. Prob. Code § 253 (West Supp. 1968); Colo. Rev. Stat. Ann. § 153-2-11 (1964); Fla. Stat. Ann. § 731.29 (1967); Idaho Code Ann. § 14-104 (1948); Kan. Gen. Stat. Ann. § 59-501 (1964); Minn. Stat. Ann. § 525.172 (Supp. 1967); Mont. Rev. Codes Ann. § 91-404 (1964); Nev. Rev. Stat. § 131.170 (1967); N.M. Stat. Ann. § 29-1-18 (1954); S.D. Comp. Laws § 29-1-13 (1969); Wash. Rev. Code Ann. § 11.04.060 (1961); Wis. Stat. Ann. § 237.08 (Supp. 1969).

<sup>55</sup> S.C. Code Ann. § 10-2387.3(d) (Supp. 1969). South Dakota dispenses with a formal procedure where the father takes the child into his house. S.D. Comp. Laws § 23-6-1 (1969).

<sup>56</sup> La. Civ. Code Ann. art. 203 (West 1952); Me. Rev. Stat. Ann. tit. 18, § 1003 (1965). In Michigan, the acknowledgment must be executed as if it were a deed. Mich. Stat. Ann. § 702.63 (1968). In most of the statutes cited in notes 53, 54 *supra*, a simple writing, sometimes witnessed, is adequate.

<sup>57</sup> Ala. Code tit. 27, § 11 (Supp. 1969); Ga. Code Ann. § 74-103 (1964); Burns' Ind. Ann. Stat. § 3-630 (1968); Ohio Rev. Code Ann. § 2103.18 (Page 1968); S.C. Code Ann. § 13-1384 (1962); Tenn. Code Ann. §§ 36-301 to -303 (1955). *But see, State v. Wolf*, 156 Conn. 199, 239 A.2d 509 (1968), where an informal, written acknowledgment, not under oath, was held to be sufficient to establish paternity for a support action.

<sup>58</sup> Idaho Code Ann. § 16-1510 (Supp. 1969); N.D. Cent. Code § 14-11-15 (1960); Okla. Stat. Ann. tit. 10, § 55 (1962); S.D. Comp. Laws § 23-6-1 (1969); Utah Code Ann. § 78-30-12 (1953). For an interesting discussion of California law concerning paternal acknowledgment by "reception into the family," see Kay, *The Family and Kinship System of Illegitimate Children in California*, 67 Am. Anthropologist 57, 61-72 (No. 6, Part 2, 1965).

<sup>59</sup> Father's conduct, notorious and implying general recognition: Alaska Stat. § 25.20.050 (1962); Iowa Code Ann. § 633.222 (1966); Kan. Stat. Ann. § 59-501 (1964). In *Miller v. Miller*, 231 N.E.2d 828 (Ind. App. 1967), the court held that the child legitimated, for purposes of inheritance, when the putative father had married the mother after the birth of the child and both had later signed a divorce decree which acknowledged the child to be theirs. *Wong v. Beckford*, 28 App. Div. 2d 137, 283 N.Y.S.2d 491 (1967), held that support furnished the child, to serve as an acknowledgment, must without doubt or equivocation be provided for the purposes of sustenance of the child. *Green v. Blue*, 28 App. Div. 2d 628, 280 N.Y.S.2d 767 (1967), held that a hospital record of a consent to perform an operation on a child which had been signed by the alleged father was a written acknowledgment of paternity within the New York statute.

<sup>60</sup> See generally Annot., 33 A.L.R. 2d 703, 732 (1954).

<sup>61</sup> Cal. Civ. Code § 230 (West 1954); Idaho Code § 16-1510 (Supp. 1969); N.D. Cent. Code § 14-11-15 (1960); Okla. Stat. Ann. tit. 10 § 55 (1962); S.D. Comp. Laws § 23-6-1 (1969); Utah Code § 78-30-12 (1953).

interests vested prior to legitimation come in question, retroactive effect is not being given.<sup>68</sup>

## B. SUBSTANTIVE LAW—LEGISLATION THAT HAS REDUCED THE BURDEN OF ILLEGITIMACY WITHOUT AFFECTING STATUS

First a word about legislation that has neither reduced the burden of illegitimacy nor affected the child's status, that has grappled with the problem by changing its name. In modern legislative usage, terms such as "illegitimate" or "child born out of wedlock" generally have supplanted "bastard"<sup>1</sup> for obvious reasons, although some law books still speak of "bastards" and "bastardy" without apparent ill will.<sup>2</sup> Ironically, the appellation "illegitimate" (which means "unlawful") is no bargain for the bastard. The sentence "child-born-out-of-wedlock" is bulky and archaic. "Extra-marital child" has the flavor of adultery, and "natural child" has too many other meanings<sup>3</sup>—nor is it unnatural to have a child in wedlock, at least not yet. "Non-marital child" may be an inoffensively descriptive candidate to win the battle of words.<sup>4</sup> However, terminology is of secondary weight. Indeed, overconcern with nomenclature carries with it the danger that a legislature, having outlawed an unpleasant word, may come to think that it has solved an unpleasant problem. Something like this seems to have happened in Arizona and Oregon.<sup>5</sup> So as not to obscure the substantive discussion, this writing will stay with traditional terminology.

### 1. THE ILLEGITIMATE CHILD'S RIGHT OF SUPPORT

Still believing in the doctrine of *filius nullius*, Texas and Idaho (which do not have paternity statutes) continue to deny the illegitimate child its right to be supported by its father.<sup>6</sup> In Virginia the support obligation is imposed on the father only if he has voluntarily and formally recognized his child.<sup>7</sup> There it was held that it does not amount to recognition if the father has used his child to obtain an income tax exemption on his tax return.<sup>8</sup> In Missouri, the father's

<sup>68</sup> Restatement (Second) of Conflict of Laws § 287, notes at 320-21 (Official Draft, April 22, 1969); Leflar, *American Conflicts Law* 583-84 (1968). Some statutes specifically provide that interests vested prior to legitimation cannot be affected by a "retroactive" legitimation. For example, N.Y. Dom. Rel. Law § 24 (McKinney 1964).

<sup>1</sup> The Illinois legislature in 1957 renamed the "Bastardy Act" to "Paternity Act" in order "to give this chapter a more imposing and dignified title . . ." *People ex rel. Covington v. Johnson*, 79 Ill. App. 2d 266, 224 N.E.2d 664, 666 (1966); New York expressly forbids the use of the terms "bastard" and "illegitimate child" and provides that reference shall be to "child born out of wedlock." N.Y. Gen. Constr. Law § 50 (1951). Neb. Rev. Stat. § 13-118 (1962); term used shall be "child born out of wedlock." In other states, for example Alabama, Georgia, and Ohio, "bastard" and "illegitimate" are used interchangeably. See Ala. Code tit. 16, § 7 (1959) ("Bastard" used in title of section and "illegitimate" in the text); Ala. Code tit. 27, § 11 (Supp. 1969) ("bastard child"), Ala. Code tit. 27, § 12(1) (Supp. 1969) ("illegitimate child"); Ga. Code Ann. § 74-201 (1964) ("An illegitimate child, or bastard, is a child born out of wedlock"); Ohio Rev. Code Ann. § 2105.17 (Page 1968) ("bastards"); and Ohio Rev. Code Ann. § 3111.01 (Page 1960) ("bastard child"); Ohio Rev. Code Ann. § 2105.18 (Page 1968) ("illegitimate").

<sup>2</sup> See, e.g. 10 Am. Jur. 2d *Bastards* (1963); also indices to many statutes and text books. <sup>3</sup> Aside from the use of the term natural children to distinguish issue of the body from adoptive children, Louisiana law speaks in terms of natural children to distinguish the children of unmarried parents who could have been married from adulterine and incestuous illegitimates. This is based on French antecedents. *Of. ch. 6, supra*.

<sup>4</sup> See Krause, *The Non-Marital Child—New Conceptions for the Law of Unlawfulness*, 1 Fam. L.Q. 1 (June 1967).

<sup>5</sup> See Appendix A, *supra*, pp. 241-243.

<sup>6</sup> Concerning Texas, see *Hjorge v. Hjorge*, 391 S.W.2d 528 (Tex. Civ. App. 1965), *rev'd* 402 S.W.2d 143 (Tex. 1966).

<sup>7</sup> Va. Code Ann. § 20-61.1 (1960).

<sup>8</sup> *Diatefano v. Commonwealth*, 201 Va. 23, 100 S.E.2d 497 (1959).

support obligation is expressed only in the criminal nonsupport statute, and the courts had long refused to derive a civil liability from that.<sup>9</sup> Recently, however, Missouri changed her position dramatically in response to a U.S. Supreme Court decision and today, still without a specific statute, imposes a support obligation in favor of the illegitimate child, equal to that owed a legitimate child.<sup>10</sup>

Few courts have derived a duty of support from the common law.<sup>11</sup> Few have had to. Most States impose a duty of support on the legitimate father by means of their "bastardy act" or "paternity statute."<sup>12</sup> While this will be discussed in more detail in the chapter on ascertainment of paternity, it should be noted here that many of these statutes do not run in favor of the child but speak in terms of the mother's right to child support.<sup>13</sup>

Under such statutes, the level of support at which the father must maintain his illegitimate child is quite generally left to the court's discretion, rarely the jury's.<sup>14</sup> Sometimes it is fixed by the statute.<sup>15</sup> A number of statutes have gone some distance toward the ideal arrangement for the illegitimate by providing that a judgment in a paternity action establishes equality in support matters with legitimate offspring of the father.<sup>16</sup> Many statutes expressly provide that the mother must assist in providing support, thereby continuing the common law rule to that effect.<sup>17</sup> The length of time during which support must continue ranges from ages twenty-one,<sup>18</sup> twenty,<sup>19</sup>

<sup>9</sup> Mo. Ann. Stat. § 539.333 (Supp. 1968). See *James v. Hutton*, 373 S.W.2d 167 (Kan. City, Mo. Ct. App. 1963), which refused to derive a civil liability from the criminal statute. As far back as 1921, Missouri passed a law to give natural children the right to inherit from their fathers. This law, however, was never implemented and was repealed in 1931; see *Wright, Paternity, Guardianship and Nonsupport*, 12 Mo. L. Rev. 323 (1947).  
<sup>10</sup> *Levy v. Louisiana*, 391 U.S. 68, 20 L. Ed. 2d 426, 80 S. Ct. 1509 (1968); *R. v. E.*, 431 S.W.2d 152 (Mo. 1968).

<sup>11</sup> *Grayson v. Grayson*, 152 Kan. 283, 320 P.2d 803 (1958) found a nonstatutory duty to support the illegitimate child; *Annot.*, 30 A.L.R. 1069 (1924). See also *Comment, Illegitimacy—Father's Duty To Support*, 28 S.C.L. Rev. 119 (1949).

<sup>12</sup> See, e.g., *Burns' Ind. Ann. Stat. § 3-625* (1968); S.D. Comp. Laws § 25-9-5 (1969).  
<sup>13</sup> All of the following statutes leave the level of support to the court's discretion: Ark. Stat. Ann. § 34-708 (1962); Colo. Rev. Stat. Ann. § 22-8-5 (Supp. 1967); Conn. Gen. Stat. Ann. § 52-442 (1968); Del. Code Ann. tit. 13, § 1326 (Supp. 1968); D.C. Code Ann. § 16-2349 (1967); Fla. Stat. Ann. § 742.041 (1967); Hawaii Rev. Stat. § 579-4 (1968); Iowa Code Ann. § 675.25 (1968); Kan. Stat. Ann. § 62-2313 (1964); Ky. Rev. Stat. Ann. § 404.121 (Supp. 1968); Mo. Rev. Stat. Ann. tit. 19, §§ 275, 281 (Supp. 1970); Md. Ann. Code art. 16, § 66H (1968); Miss. Code Ann. § 383-12 (Supp. 1967); Nev. Rev. Stat. § 124.230 (1967); N.J. Stat. Ann. § 9-17-12 (1960); N.M. Stat. Ann. § 22-4-16 (Supp. 1969); N.Y. Fam. Ct. Act § 513 (McKinney 1963); N.C. Gen. Stat. § 49-7 (1966); N.D. Cent. Code § 32-36-21 (1960); Ohio Rev. Code Ann. § 3111.17 (Page 1960); R.I. Gen. Laws Ann. § 15-3-16 (1970); Tenn. Code Ann. § 36-223 (Supp. 1969); Utah Code Ann. § 77-60-7 (1953); Vt. Stat. Ann. tit. 15, § 339 (1958); W. Va. Code Ann. § 48-7-4 (1966). In some cases, the child may be entitled to attorney's fees as part of his right of support. See *Spivock, Attorney Fees in Paternity Cases*, 21 Cal. S.B.J. 459 (1946).

<sup>14</sup> Fla. Stat. Ann. § 742.041 (1967), fixes the following monthly amounts that the judge may increase or decrease at his discretion: 0-6 years of age, \$40; 6-12 years of age, \$60; 12-15 years of age, \$90; 15-18 years of age, \$110.

<sup>15</sup> Miss. Stat. Ann. § 257.23 (1965), imposes on the father all obligations imposed on the father of a legitimate child. *Accord*, *Ariz. Rev. Stat. Ann. § 14-206* (1956); Va. Code Ann. § 20-61.1 (1966) fixes the obligation of support, maintenance, and education of the child as if the child had been born in lawful wedlock. *Accord*, *Ill. Rev. Stat. ch. 106 3/4, § 52* (1970); *Burns' Ind. Ann. Stat. § 3-624* (1968); Ky. Rev. Stat. Ann. § 406.011 (Supp. 1968); Mo. Rev. Stat. Ann. tit. 19, § 271 (Supp. 1969); N.J. Rev. Stat. § 9-16-2 (1960). See *Stargell v. Stargell*, 263 Cal. App.2d 504, 69 Cal. Rptr. 715 (1968).

<sup>16</sup> Mo. Rev. Stat. Ann. ch. 19, § 257 (1965); Md. Ann. Code art. 16, § 66H (1966); Mich. Stat. Ann. § 722.721 (1968); Miss. Code Ann. § 383-15 (Supp. 1967). Nebraska enforces the liability of the mother in much the same manner as that of the father, although the obligation will be enforced against the mother only where support cannot be secured from the father. *Neb. Rev. Stat. § 13-108* (1962). In Louisiana liability for the support of the child extends to the mother's ascendants. *La. Civ. Code Ann. art. 245* (West 1952).

<sup>17</sup> N.Y. Family Ct. § 545 (McKinney, 1963).

<sup>18</sup> Hawaii Rev. Stat. § 579-4 (1968).

eighteen,<sup>19</sup> sixteen,<sup>20</sup> and fourteen,<sup>21</sup> to such period of time as the child is likely to be unable to support itself,<sup>22</sup> or to a period not exceeding six years.<sup>23</sup> The amount of time *prior* to judgment for which support and similar payments may be awarded ranges from four years in Kentucky<sup>24</sup> to such proportion of expenses already incurred as the court deems just.<sup>25</sup> There also are provisions that award the cost of support from the time of birth,<sup>26</sup> and others that limit it to one year next preceding the action.<sup>27</sup> Elsewhere, the support obligation extends beyond the father's death, with the proviso that the child cannot take more than if he had been an heir.<sup>28</sup> Whether the support obligation owed the illegitimate child extends to higher education is in doubt.<sup>29</sup>

Some States impose a legal duty to support a destitute parent of the illegitimate child.<sup>30</sup>

## 2. THE ILLEGITIMATE CHILD'S RIGHT OF INHERITANCE

At common law, in Blackstone's words, "[t]he incapacity of a bastard consists principally in this, that he cannot be heir to anyone, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived."<sup>31</sup> In older days, this disability was the most serious consequence of illegitimate status and was seen as a necessary byproduct of the uncertainty of illegitimate paternity. Since the child's relationship to his mother normally is beyond doubt,<sup>32</sup> statutes have long provided in nearly all States that, in matters of inheritance, the illegitimate occupies the same position with respect to his mother as a legitimate child.<sup>33</sup> Residual statutory discrimination

<sup>19</sup> Conn. Gen. Stat. Ann. § 32-442 (1968); Fla. Stat. Ann. § 742.041 (1967); Mich. Comp. Laws § 722.717 (1968); Ohio Rev. Code Ann. § 3111.17 (Page 1960); R.I. Gen. Laws Ann. § 15-8-10 (1970); Tenn. Code Ann. § 24-229 (Supp. 1969); Utah Code Ann. § 77-60-7 (1953); Wis. Stat. Ann. § 52.37 (Supp. 1969).

<sup>20</sup> Ark. Stat. Ann. § 34-706 (1962); Del. Code Ann. tit. 13, § 1306 (1953); D.C. Code Ann. § 30-320 (1967); Iowa Code Ann. § 675.25 (1966); Miss. Code Ann. § 383-12 (Supp. 1967); N.D. Cent. Code § 32-36-21 (1960).

<sup>21</sup> Ga. Code Ann. § 74-303 (1961).

<sup>22</sup> Colo. Rev. Stat. Ann. § 23-6-5 (Supp. 1967); La. Civ. Code Ann. art. 243 (West 1952); Md. Ann. Code art. 16, § 66H (1960); VI. Stat. Ann. tit. 13, § 339 (1958); W. Va. Code Ann. § 48-7-4 (1966).

<sup>23</sup> Mass. Ann. Laws ch. 273, § 5 (1968).

<sup>24</sup> Ky. Rev. Stat. Ann. § 406.031 (Supp. 1968); Mont. Rev. Codes Ann. § 93-2901-3 (1964) (4 years).

<sup>25</sup> Mich. Comp. Laws § 722.717 (1968).

<sup>26</sup> N.D. Cent. Code § 32-36-21 (1960).

<sup>27</sup> Miss. Code Ann. § 383-03 (Supp. 1967).

<sup>28</sup> Burns' Ind. Ann. Stat. § 3-629 (1968) (support, not more than heir); Md. Ann. Code art. 16, § 66J(c) (1966) (child is limited to one-half the sum a legitimate child would receive); Nev. Rev. Stat. § 128.070 (1967) (no limitation, left to discretion of the court); R.D. Comp. Laws § 23-8-33 (1969) (no limit, left to discretion of the court); Wyo. Stat. Ann. § 14-64 (1965) (no limit, left to discretion of the court).

<sup>29</sup> Cf. H. Clark, *Domestic Relations* 497-98 (1968), discussing this question in terms of the legitimate child's right to higher education.

<sup>30</sup> Alaska Stat. § 25.20.030 (1962); La. Civ. Code Ann. art. 240 (West 1952). See Comment, *Duty of an Illegitimate Child to Support Its Destitute Mother*, 48 Yale L.J. 875 (1937).

<sup>31</sup> 1 W. Blackstone, *Commentaries on the Laws of England* 483 (W. Kerr, London 1857).

<sup>32</sup> Except in Louisiana. Reflecting French suspicion in such matters, Louisiana law still requires that the mother must acknowledge her maternity so that her child, born out of wedlock, can come into a legally recognized relationship with her. See Comment, *What Effect Has Proof of Maternity*, 6 La. L. Rev. 268 (1945). But see, *Levy v. Louisiana*, 391 U.S. 68, 20 L. Ed. 2d 434, 88 S. Ct. 1500 (1968); *Giona v. American Guaranty & Liability Ins. Co.*, 391 U.S. 73, 20 L. Ed. 2d 441, 88 S. Ct. 1515 (1968).

<sup>33</sup> E.g., Ala. Code tit. 16, § 7 (1959); Ky. Rev. Stat. Ann. § 391.090 (1963); Mich. Stat. Ann. § 702.81 (1968); Mo. Rev. Stat. § 474.060 (1959). See generally Note, 26 Brooklyn L. Rev. 43, 74-84 (1959), as to the illegitimate's inheritance rights.

between legitimate and illegitimate offspring with respect to inheritance from the mother is very uncommon.<sup>34</sup>

In most States, however, the illegitimate child still cannot inherit from his father, other than by will.<sup>35</sup> Few States have enacted statutes permitting the illegitimate child to inherit from his father as if the child were legitimate.<sup>36</sup> Some ground has been occupied between these extreme positions. Thus, the inheritance laws of a substantial number of States specifically provide that the child may inherit if the father subsequently marries the mother and acknowledges the child.<sup>37</sup> Of course, even in States that do not expressly provide this in their inheritance statutes, such a child would have been legitimated by his parents' marriage and normally would be entitled to inherit for that reason. A few States would give the child his inheritance on the basis of a judgment in a paternity suit.<sup>38</sup> Mere acknowledgment or recognition of the child on the part of the father, by some laws required to be in writing and before a competent witness, may<sup>39</sup> or may not<sup>40</sup> suffice; sometimes it is effective only if the father actually had the intent to give the child the capacity to inherit.<sup>41</sup> The father's admission of paternity in open court may have the same effect.<sup>42</sup> Louisiana permits the "natural child" to inherit from his father, but only if there is no other heir.<sup>43</sup>

The next question is whether the illegitimate child may inherit from maternal and paternal grandparents and from collateral kindred.

<sup>34</sup> See La. Civ. Code Ann. art. 918 (West 1952). A view of the various forms such legislation took, now primarily of historical interest, is given in Comment, *Inheritance By, From and Through Illegitimates*, 84 U. Pa. L. Rev. 531 (1936).

<sup>35</sup> See, e.g., Hawaii Rev. Stat. § 537-14 (1968); W. Va. Code Ann. § 42-1-5 (1966).

<sup>36</sup> Ariz. Rev. Stat. Ann. § 14-206B (1956); Cal. Prob. Code § 255 (West, Supp. 1968); Burns' Ind. Ann. Stat. § 6-207 (1953); Iowa Code Ann. § 633.222 (1966); Miss. Code Ann. § 383-12(e) (Supp. 1967) (allows the court upon finding paternity to order inheritance equal to that of a natural child); Ore. Rev. Stat. § 100.060 (1969); P.R. Laws Ann. tit. 31, § 441 (1968); Tenn. Code Ann. § 36-234 (Supp. 1969); Vt. Stat. Ann. tit. 14, § 533 (Supp. 1970). Indiana and Tennessee require that paternity must be established during the father's lifetime! As late as 1968, a Tennessee court went as far as to hold unconstitutional the statute (cited herein) giving the illegitimate a right to inherit from his judicially ascertained father. *Young v. Willis*, 58 Tenn. App. 678, 436 S.W. 2d 445 (1968). See Annot., 12 A.L.R.2d 1140 (1967).

<sup>37</sup> See, e.g., Miss. Code Ann. § 474 (1967); N.J. Stat. Ann. § 3A:4-7 (1953) which provides that for the purposes of descent and distribution, a child shall be treated as legitimate if his parents "marry subsequent to his birth and recognize and treat him as their child. . . ." In one case, the statute was construed to include the legislative scheme for legitimation of children born of bigamous and void marriages. *L. v. L.*, 92 N.J. Super. 119, 222 A.2d 297 (1966); *contra, In re Weeant*, 72 N.J. Super. 323, 178 A.2d 112 (Burlington County Ct. 1962) in which the word "marry" was construed to mean "valid marriage" and was held not to include a ceremonial, bigamous marriage.

<sup>38</sup> Burns' Ind. Ann. Stat. § 6-207(b) (1953) provides that for purposes of inheritance, an illegitimate child shall be treated as a legitimate child if "paternity of such child has been established by law, during the father's lifetime. . . ." The term "established by law" has been interpreted by the Indiana courts to mean established in a court of law. Acknowledgment without marriage is alone not sufficient to legitimize the child no matter how positively or how often the acknowledgment is made. *Thacker v. Butler*, 134 Ind. App. 376, 184 N.E.2d 894 (1962). *Cruz v. Celebrezze*, 255 P. Supp. 645 (E.D. Wis. 1966). See also Miss. Code Ann. § 383-12(e) (Supp. 1967); Tenn. Code Ann. § 36-234 (1969); Wis. Stat. Ann. § 237.06 (Supp. 1969).

<sup>39</sup> Cal. Prob. Code § 255 (West Supp. 1968); Fla. Stat. Ann. § 731.29 (1967); Idaho Code Ann. § 14-104 (1948); Minn. Stat. Ann. § 525.172 (Supp. 1967); Mont. Rev. Codes Ann. § 91-404 (1964); Nev. Rev. Stat. § 154.170 (1967); N.D. Cent. Code § 56-01-05 (1960); Okla. Stat. Ann. tit. 84, § 215 (1961); Wash. Rev. Code Ann. § 11.04.080 (1961); Wis. Stat. Ann. § 237.06 (Supp. 1969).

<sup>40</sup> Del. Code Ann. tit. 13, § 1304 (Supp. 1968).

<sup>41</sup> N.M. Stat. Ann. § 29-1-18 (1954). This requirement, of course, brings the matter close to a will.

<sup>42</sup> Wis. Stat. Ann. § 237.06 (Supp. 1969).

<sup>43</sup> La. Civ. Code Ann. art. 918 (West, 1952). A "natural child" in Louisiana is one who has been acknowledged by his parents. *Id.* In *Succession of Theriot*, 185 So.2d 351 (La. App. Ct. 1966) it was held that an illegitimate child acknowledged only informally by his deceased father could not inherit from him ahead of ascending and collateral relatives. See *infra* pp. 90, 91.

The answer is that statutes permitting inheritance from the mother's family<sup>40</sup> are more frequent than those permitting inheritance from the father's side.<sup>41</sup> As to inheritance from the illegitimate himself, there is no question about his own issue. If he has no issue, the mother and her line usually will take,<sup>42</sup> and there may be a specific prohibition against the father and his line.<sup>43</sup> Uncommon are provisions permitting the father to inherit,<sup>44</sup> and statutes passing property from the illegitimate to the father's family.<sup>45</sup>

Another vehicle of discrimination is the definition of "heir," "descendant," "child," "issue," and similar terms under statutes<sup>46</sup> as well as under private instruments such as wills and trusts. Often, or even usually, these terms have been construed by courts to refer to legitimate children only.<sup>47</sup> Moreover, especially in interpreting wills and trusts, the courts do not always concern themselves with the testator's or settlor's actual intent but often apply a flat exclusion that may defeat the giver's clearly evident desire.<sup>48</sup>

### 3. CUSTODY AND GUARDIANSHIP

If she is a suitable person, the mother of the illegitimate child is entitled to its custody and guardianship.<sup>49</sup> She is considered to be

<sup>40</sup> Idaho Code Ann. § 14-104 (1948) (only if parents marry and acknowledge); Ill. Rev. Stat. ch. 2, § 12 (1970); Mass. Ann. Laws ch. 190, § 7 (1969); Mich. Stat. Ann. § 702.41 (1948); Mo. Rev. Stat. § 474.060 (1959); Mont. Rev. Codes Ann. § 91-404 (1964) (only if parents marry and acknowledge); Neb. Rev. Stat. § 30-109 (1964) (only if parents marry and acknowledge); Ohio Rev. Code Ann. § 2103.17 (Page 1968). See also Annot., 97 A.L.R.2d 1101 (1964).

<sup>41</sup> Ariz. Rev. Stat. § 14-206 (1956); Nev. Rev. Stat. § 124.170 (1967) (if the father has acknowledged the child). The following provisions require marriage of the parents and acknowledgment of the child: Idaho Code Ann. § 14-104 (1948); Mont. Rev. Codes Ann. § 91-404 (1964); Neb. Rev. Stat. § 30-109 (1964). Comment, *Legitimation—Right to Inherit from Collateral Kinship of Father*, 23 A. Cal. L. Rev. 378 (1959).

<sup>42</sup> Ala. Code tit. 16 § 8 (1959); Alaska Stat. § 13.10.040 (1962); Colo. Rev. Stat. Ann. § 153-3-11 (1964); D.C. Code Ann. § 19-316 (1967); Fla. Stat. Ann. § 731.29 (1967); Hawaii Rev. Stat. § 533-7 (1968); Idaho Code Ann. § 14-105 (1948); Iowa Code Ann. § 633.221 (1966); Ky. Rev. Stat. Ann. § 391.000 (1963); Mass. Ann. Laws ch. 190, § 6 (1969); Mich. Comp. Laws § 702.52 (1968); Mo. Rev. Stat. § 474.060 (1959); Mont. Rev. Codes Ann. § 91-405 (1964); Neb. Rev. Stat. § 30-110 (1965); Nev. Rev. Stat. § 124.180 (1967); Okla. Stat. Ann. tit. 84, § 216 (1961); S.C. Code Ann. § 16-53 (1962); S.D. Comp. Laws § 29-1-16 (1969); Tenn. Code Ann. § 31-105 (1955); Utah Code Ann. § 74-4-11 (1953); Vt. Stat. Ann. tit. 14, § 553 (Supp. 1970); Wash. Rev. Code Ann. § 11.04.061 (1967); Wis. Stat. Ann. § 237.05 (Supp. 1969); Wyo. Stat. Ann. § 2-38 (1959). Cf. Comment, *Right of Illegitimate Aunt to Inherit from Intestate Nephew*, 40 Ill. B.J. 250 (1952).

<sup>43</sup> Ky. Rev. Stat. Ann. § 391.000 (1963).

<sup>44</sup> Burns' Ind. Ann. Stat. § 6-207 (1953); N.M. Stat. Ann. § 29-1-19 (1964) (mother and her heirs are given preference, however); N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney 1967); N.D. Cent. Code 58-01-03 (Supp. 1969); Okla. Stat. Ann. tit. 84, § 216 (1961) (if father married mother and acknowledged child). Iowa also provides for mutual recognition, as a condition to the father's right to inherit. Iowa Code Ann. § 633.222 (1966).

<sup>45</sup> Burns' Ind. Ann. Stat. § 6-207 (1953); N.M. Stat. Ann. § 29-1-19 (1964); N.D. Cent. Code 58-01-03 (Supp. 1969); Ore. Rev. Stat. § 100.060 (1969).

<sup>46</sup> See *infra* pp. 34-41.

<sup>47</sup> H. Clark, *Domestic Relations* 179 (1968). For an historical summary see Comment, *The Effect of Statutes Altering the Position of Illegitimate Children on Judicial Construction of Wills*, 45 (Harv. L. Rev. 890 (1932)).

<sup>48</sup> E.g., *Wilson v. Ingram*, 297 Ga. 271, 61 S.E.2d 126 (1950).

<sup>49</sup> E.g., Ga. Code Ann. § 74-203 (1964); N.J. Rev. Stat. § 9:16-1 (1960); Wash. Rev. Code Ann. § 26.24.190 (1958). See also Annot., 98 A.L.R.2d 417 (1964). In *McMillan v. McMillan*, 224 Ga. 790, 164 S.E.2d 839 (1968), a mother with two other illegitimate children living with her was held to be entitled to the custody of her illegitimate child against her parents after the latter had taken care of the child for some ten years with little support from the mother. Cf. *Richard v. Richard*, 32 App. Div. 2d 654, 300 N.Y.R.2d 608 (1969). Lower court's holding awarding custody to father reversed in favor of mother since "the mother of an illegitimate child is prima facie entitled to custody." Other cases emphasize that in a custody case, "[i]t is basic and fundamental that the paramount consideration is the welfare of the children and that all other considerations, including the rights of parents, are subordinate to the children's physical, intellectual, moral, spiritual and emotional well-being." *Commonwealth ex rel. Staunton v. Austin*, 209 Pa. Super. 187, 190, 223 A.2d 892, 894 (Super. Ct. 1966). However, since it is presumed to be in the best interest of a child of tender age to be in the custody of its natural mother, her right to the custody of her child is superior to that of all other persons. These rules apply to the custody of legitimate as well as illegitimate children. *In re Nell*, 189 Pa. Super. 376, 378, 150 A.2d 563, 566 (1959). See also *In re T.*, 8 Mich. App. 123, 154 N.W.2d 27 (1967); *Cornell v. Hartley*, 54 Misc. 2d 732, 283 N.Y.R.2d 318 (Fam. Ct. 1967).

the child's "natural guardian" and some statutes express the common law rule that the mother is entitled to the services and earnings of her illegitimate child.<sup>54</sup> Borrowing from the rules applicable to the custody of legitimate children,<sup>55</sup> a few courts speak of the father's right to the custody of his illegitimate child. While the father's "right" always is subordinate to the mother's custodial rights, it may become operative if the mother has relinquished the child for adoption or if she is unsuitable, deceased or otherwise unable to have custody.<sup>56</sup> Some statutes<sup>57</sup> and courts,<sup>58</sup> on the other hand, flatly forbid any custodial right to be exercised by the father. Between these extreme positions, many cases have adjudicated the issue of paternal custody on the basis of the flexible standard of the child's best interests<sup>59</sup> with results that often appear contradictory—perhaps because appellate reports cannot provide the full flavor of the circumstances that went into making the decision. Thus, not long ago, the Court of Appeals of Maryland refused to grant custody to the 21-year-old father of an illegitimate child who, having the full support of his economically well-off, middle-class parents, sought to adopt the child when the 19-year-old mother had given their child to an adoption agency for adoption by strangers.<sup>60</sup> Many other cases have been decided in the father's favor.<sup>61</sup> A

<sup>54</sup> R.D. Comp. Laws § 25-3-7 (1969); Cal. Civ. Code § 200 (West, 1954).

<sup>55</sup> Concerning the rights of the natural, legitimate parents some doubts were raised a few years ago when Iowa's Supreme Court refused to grant custody of a seven year-old boy to his father who had remarried. The court concluded that the child's best interests would be served if permanent custody were granted to his maternal grandparents who had been asked by the boy's father to take care of the boy after the mother's death. The court noted that the grandparents had given the boy "a stable, dependable, conventional, middle-class, middle-west background," whereas the boy's life with his father would be "unstable, unconventional, arty, bohemian, and probably intellectually stimulating." *Painter v. Bannister*, 258 Iowa 1790, 140 N.W.2d 152, cert. denied, 385 U.S. 849, 17 L. Ed. 2d 227, 87 S. Ct. 317 (1966). In the meantime, however, the boy is back with his father. See Couch, Book Review, "Mark, I Love You," 2 Fam. L.Q. 436 (1968).

<sup>56</sup> "Upon the death of the mother of an illegitimate child, and absent intervening adoption, the putative father, if fit and the welfare of the child permits, is entitled to custody and control over the child as against all others." *In re Estate of Moore*, 63 Wash. 2d 792, 797, 413 P.2d 653, 656 (1966). Accord, *Carnes v. Superior Court*, 100 Ariz. 167, 413 P.2d 463 (1966). "An against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides her paramount right to custody." *Jolly v. Queen*, 264 N.C. 711, 714, 142 S.E.2d 582, 595, (1965). See also *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d 37 (1967).

<sup>57</sup> Ill. Rev. Stat. ch. 106 § 3/4, § 62 (1970), provides that a father of an illegitimate child "shall have no right to the custody or control of the child" except by adoption. A recent Illinois case holds that a putative father cannot be granted visitation rights with his illegitimate child because visitation rights of necessity involve "control." *DePhillips v. DePhillips*, 35 Ill.2d 154, 219 N.E.2d 465 (1966). The lone dissenter, C. J. Klingbiel, argued: "Neither the language of our statute nor any sensible interpretation of 'policy' justifies this court in depriving a putative father of the society of his child under any and all circumstances." *Id.* at 159, 219 N.E.2d at 468 (1966) (dissenting opinion). *Wallace v. Wallace*, 60 Ill. App. 2d 300, 210 N.E.2d 4 (1965). Similarly, Utah Code Ann. § 77-60-12 (1953) (at least not until the child is ten).

<sup>58</sup> *In re Adoption of A.*, 226 A.2d 523 (Del. 1967). The putative father and his wife (not the child's mother) were denied adoption of his illegitimate child. The court held that the father does not even have a right to be notified of the adoption proceedings involving his child. Similarly, *Hall v. Hall*, 222 Ga. 820, 152 S.E.2d 737 (1966).

<sup>59</sup> "... [I]n award of custody of an illegitimate child to the admitted father as against the claims of relatives and welfare agencies may be approved under circumstances where the mother rejects the child and the putative father is competent to care for and suitable to take charge of the child; but such rights of custody must always be subordinated to the best interests and welfare of the child." *In re Welfare of Zink*, 260 Minn. 535, 546, 132 N.W.2d 785, 794 (1964). See also authority cited *supra* note 56.

<sup>60</sup> *Petition of Malmstedt*, 243 Md. 92, 226 A.2d 147 (1966). The Maryland Court of Appeals refused to grant the father of an illegitimate baby permission to adopt the child even though the mother did not want to keep her. The mother turned the infant over to an adoption agency three days after birth. Accord, *In re Adoption of Irby*, 226 Cal. App. 2d 228, 37 Cal. Rptr. 870 (1964).

recent New York decision, for example, awarded two children to their illegitimate father after it rejected the presumption in favor of the mother, held the mother unfit and held further that no distinction should be made between legitimates and illegitimates in custody matters.<sup>62</sup>

#### 4. THE FATHER'S VISITATION RIGHTS

Short of custody, the question arises whether the illegitimate father may see his child from time to time, whether he has a right of visitation. Obviously, if the mother permits visitation, no case will develop. The discussion that follows therefore concerns the question whether the father should be allowed visitation when the mother objects. In this regard, specific statutory direction is scant. (On the basis of the Illinois statute which denies the father the right of "custody and control," visitation has been categorically denied a father who had regularly contributed to the support of his child. Under that statute, no investigation into the fitness of the father or the welfare of the child is considered necessary or even permitted.<sup>63</sup> On the other hand, a leading Pennsylvania case granted visitation rights to a father who had regularly contributed to his child's support on the basis of weighing the welfare and the best interests of the child.<sup>64</sup> Numerous other cases have gone both ways on this difficult question.<sup>65</sup>

#### 5. CONSENT TO ADOPTION

One crucial aspect of adoption is the question of parental consent. With regard to illegitimate children, solely the mother's consent is

<sup>62</sup> See, e.g., *Godinez v. Russo*, 49 Misc. 2d 66, 266 N.Y.S.2d 626 (Fam. Ct. 1966) and *Ballat v. Horvath*, 3 Ohio Misc. 242, 34 Ohio Op. 24 247, 213 N.E.2d 290 (1965). In *Godinez*, custody of two illegitimate children was awarded to the father where the mother was considered unfit, the court deciding that the presumption in the mother's favor should be abolished and that no distinction should be made between legitimate and illegitimate children in questions of custody; in *Ballat* it was held that under statutory adoption procedures in Ohio, the natural father must be served with notice. Cf. *Larkin v. Pridgett et al.*, 241 Ark. 193, 407 S.W.2d 374 (1966), which denied the mother custody of her illegitimate child as against the father's parents, where the mother had left the child with the latter when the child was 1½ years old, for a period of three years.

<sup>63</sup> *Anonymous v. Anonymous*, 56 Misc. 2d 711, 280 N.Y.S.2d 792 (1966); cf. *James v. Bowen*, 226 Ga. 288, 161 S.E.2d 277 (1968).

<sup>64</sup> *Supra*, note 37.

<sup>65</sup> In *Commonwealth v. Rozanski*, 206 Pa. Super. 387, 213 A.2d 153 (1965), the putative father was allowed visitation privileges when his illegitimate child was in the mother's custody. This decision overruled a case decided by the same court earlier in the year. The earlier case—*Commonwealth ex rel. Golembewski v. Stanley*, 205 Pa. Super. 101, 208 A.2d 49 (1965)—stood for the proposition that a putative father could not be granted the privilege of visiting his illegitimate child when in the mother's custody. In *Rozanski*, however, the court held that it is proper for the courts, in the appropriate circumstances, to grant visitation privileges to a putative father. The court went on to say: "... in any case involving visitation, neither the fact of illegitimacy nor the personal preferences or prejudices of the parents should control our decision. The governing criterion must always be the welfare and best interests of the child." *Rozanski*, *supra* at 400, 213 A.2d at 156.

<sup>66</sup> *Cornell v. Hartley*, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (1967) (allowed the father a right of visitation "provided the mother consents"); *Mixon v. Mixon*, 196 So.2d 373 (Fla. App. 1967) (putative father who had amply supported child granted reasonable right of visitation over mother's objection). See Annot., 15 A.L.R.3d 867 (1967), discussing right of putative father to visit illegitimate child; Note, *Domestic Relations—Illegitimate Child—Visitation Rights Granted to Putative Father*, 26 Albany L. Rev. 333 (1962); Comment, *A Father's Right to Visit His Illegitimate Child*, 27 Ohio St. L.J. 738 (1966).

normally required.<sup>64</sup> If the mother is very young, her parents or guardian must consent.<sup>65</sup> The mother's consent may be dispensed with if her parental rights have been judicially terminated, if she has previously relinquished the child to an authorized agency for adoption, or if she has abandoned it.<sup>66</sup>

The father of an illegitimate child typically is not involved in the adoption process.<sup>67</sup> Indeed, not only is his consent not required, but he is usually not even entitled to notice of the adoption proceeding or to be heard in it.<sup>68</sup> In some instances, however, the father's consent may be required or he may be entitled to notice of a pending adoption proceeding and to be heard,<sup>69</sup> especially where he has adequately contributed to the support of the child,<sup>70</sup> or where paternity has been established by a court.<sup>71</sup> Where the child has been legitimated<sup>72</sup> or acknowledged,<sup>73</sup> the father gains full paternal rights. He may not, however, attack a consent previously given by the mother.<sup>74</sup>

## 6. THE CHILD'S NAME

The illegitimate child usually bears his mother's name. It is said that, long ago, a Norman father who wished to recognize his bastard son would confer on him his name preceded by the prefix "Fitz."<sup>75</sup> Today, however, provision is rarely made permitting the illegitimate child to bear his father's name,<sup>76</sup> absent a subsequent marriage between his parents. Nevertheless, some courts have allowed the illegitimate child to change its name. For example, a recent New Jersey case allowed a minor, out-of-wedlock child to change its name from that of its mother to that of its married natural father. Despite objections from the father's wife, the court granted the name change, since it saw no "un-

<sup>64</sup> See, *Ariz. Rev. Stat. Ann.* § 8-103 (Supp. 1969); *Cal. Civ. Code* § 224 (West Supp. 1968); *D.C. Code Ann.* § 16-304(b) (1967); *Ky. Rev. Stat. Ann.* § 199.500 (1963); *N.Y. Dom. Rel. Law* § 111 (McKinney Supp. 1970); *Ore. Rev. Stat.* § 109.326 (1969); *Pa. Stat. tit. 1, § 12* (1963); *Tenn. Code Ann.* § 36-111 (1955); *Wash. Rev. Code Ann.* § 26.32.030 (1958); *Wis. Stat. Ann.* § 48.84 (Supp. 1969); *Wyo. Stat. Ann.* § 1-714 (1959). The mother's right to the child's custody "implies the right to full control over the child, including the power and right to place it with others for adoption," to the exclusion of any right the father might have by virtue of his paternity. *In re Guardianship of Truschke*, 237 Cal. App. 2d 73, 44 Cal. Rptr. 601 (1965).

<sup>65</sup> *E.g.*, *Minn. Stat. Ann.* § 259.23 (1965) (if mother is under 18). *Cf.* *Wolf v. Gardner*, 356 P.2d 245 (6th Cir. 1967); *Perez v. Gardner*, 277 F. Supp. 983 (E.D. Wis. 1967).

<sup>66</sup> *Burk v. Yarborough*, 411 N.W.2d 816 (Ky. 1966). See *Cal. Civ. Code* § 224 (West Supp. 1968); *Ga. Code Ann.* § 74-403(3) (Supp. 1969); *Hawaii Rev. Stat.* § 578-2 (1968); *N.H. Rev. Stat.* § 43-104 (1968); *Pa. Stat. tit. 1, § 2* (1963); *Wash. Rev. Code Ann.* § 26.32.030 (1961).

<sup>67</sup> Note, *Disposition of the Illegitimate Child—Father's Right to Notice*, 1968 *T. Ill. L.F.* 272 (Summer 1968). See generally Comment, *Father of An Illegitimate Child—His Right To Be Heard*, 50 *Minn. L. Rev.* 1071 (1966).

<sup>68</sup> *Rev., et al.*, *In re Adoption of A*, 226 A.2d 823 (Del. 1967). See also *Hall v. Hall*, 222 Ga. 820, 152 S.E.2d 737 (1966).

<sup>69</sup> *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965); Note, *Father of an Illegitimate Child—His Right to be Heard*, 50 *Minn. L. Rev.* 1071 (1966).

<sup>70</sup> *Burns' Ind. Ann. Stat.* § 3-129 (Supp. 1970) (the court will consider the father's objections).

<sup>71</sup> *Ark. Stat. Ann.* § 56-106(c) (1948); *cf.* *Ariz. Rev. Stat. Ann.* § 8-103 (Supp. 1969); *N.D. Cent. Code* § 14-11-10 (1960).

<sup>72</sup> *Tenn. Code Ann.* § 36-111 (1955).

<sup>73</sup> *Ariz. Rev. Stat. Ann.* § 8-103 (Supp. 1969). Where paternity has been adjudged or acknowledged, father must be notified. *N.D. Cent. Code* § 14-11-10 (1960).

<sup>74</sup> *Cf.*, *In re Adoption of a Minor*, 338 Mass. 635, 156 N.E.2d 801 (1959).

<sup>75</sup> *W. Hooper, Illegitimacy* 6-7, 122-24 (1911).

<sup>76</sup> If the father consents, his child may take his name. *Ga. Code Ann.* §§ 74-103, 88-1111 (1964). Similarly, where the child is voluntarily legitimated. *Ala. Code, tit. 27, § 12* (1964). *Tenn. Code Ann.* § 36-229 (Supp. 1969), empowers the court, upon finding paternity, to change the name of the child. To the same effect is *Wash. Rev. Code Ann.* § 26.24.190 (1956). Where paternity has been declared, at least one court has held that the mother and child have a right to take the father's name. *In re Blegaj*, 25 N.Y.S.2d 83 (1941).

worthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous or offensive to common decency and good taste."<sup>70</sup>

## 7. BIRTH RECORDS

Where paternity is clear, the original birth record may show the father's name even though paternity has not been formally established.<sup>80</sup> Upon legitimation, whether through the marriage of his parents or otherwise, many States allow the child to have his birth records changed so as to delete any open reference to his former illegitimate status.<sup>81</sup> The father's acknowledgment, in addition to the marriage, is a common condition.<sup>82</sup> In a number of States, the original birth certificate may be amended or a new certificate is issued when paternity is established.<sup>83</sup> A State may provide that a new, revised certificate may not be identified as amended.<sup>84</sup> To prevent the information that a child was born out of wedlock from becoming generally available, many statutes specifically provide that all official proceedings relating to the child's status must remain confidential.<sup>85</sup> The same rule often is applicable to adoption proceedings, where papers may not show the status of the child,<sup>86</sup> and where a new birth certificate will be issued upon completion of the adoption.<sup>87</sup>

## 8. THE FATHER'S TORT LIABILITY TO HIS ILLEGITIMATE CHILD—THE "WRONGFUL LIFE CASES"

The modern tendency to try to help the illegitimate is illustrated graphically by the "wrongful life cases." *Zepeda v. Zepeda*,<sup>88</sup> the first

<sup>80</sup> *In re M.*, 91 N.J. Super. 296, 298, 219 A.2d 906, 907 (1966). See *Gordon v. Cole*, 54 Misc. 2d 967, 263 N.Y.S.2d 787 (1967).

<sup>81</sup> Iowa Code Ann. § 675.36 (1966). But see Conn. Gen. Stat. Ann. § 7-50 (1966); N.Y. Pub. Health Law § 4135 (McKinney 1954).

<sup>82</sup> E.g., Alaska Stat. § 25.29.050 (1962); Fla. Stat. Ann. § 382.21 (1967); Md. Ann. Code art. 43, § 19 (1965); Mo. Rev. Stat. § 193.260 (1959); Mont. Rev. Codes Ann. § 69-4424 (1970); Nev. Rev. Stat. § 449.320 (1967); Ore. Rev. Stat. § 432.425 (1969); Wash. Rev. Code Ann. § 70.58.093 (Supp. 1970). In a number of states, including Utah, a supplementary birth certificate is issued upon legitimation, and no information may thereafter be given from the original certificate, except on request of the person legitimated. Utah Code Ann. § 26-15-16 (1969). In the following jurisdictions no reference to illegitimacy is permitted on birth records: Conn. Gen. Stat. Ann. § 7-50 (1966); D.C. Code Ann. § 6-301 (1967); N.Y. Pub. Health Law § 4135 (McKinney 1954); W. Va. Code Ann. § 16-3-19 (1966). The law of several states is discussed in *Klesow, An Amended Birth Certificate for Legitimated Children in Kansas*, 18 J.B.A. Kan. 215 (1950).

<sup>83</sup> D.C. Code Ann. § 16-2358 (1967); Ore. Rev. Stat. § 432.425 (1969); Wyo. Stat. Ann. § 35-69 (1959).

<sup>84</sup> Ark. Stat. Ann. § 82-519 (Supp. 1967); Colo. Rev. Stat. Ann. 67-8 13 (Supp. 1967); D.C. Code Ann. § 16-2753 (1967); Iowa Code Ann. § 675.36 (1966); Tenn. Code Ann. § 36-234 (Supp. 1964); Va. Code Ann. § 32-353.24 (1969).

<sup>85</sup> Va. Code Ann. § 32-353.24 (1969).

<sup>86</sup> Iowa limits references to illegitimacy to birth records and court proceedings where it is at issue. Iowa Code Ann. § 675.35 (1966). In Missouri, disclosure of status may be made only upon court order or upon request of individual concerned. Mo. Rev. Stat. § 193.240 (Supp. 1967); accord, Colo. Rev. Stat. Ann. § 66-8-17 (Supp. 1967); Del. Code Ann. tit. 16, § 3110 (1953); D.C. Code Ann. § 16-2354 (1967); Ga. Code Ann. § 88-1124 (1963); Hawaii Rev. Stat. § 338.18 (1968); Burns' Ind. Ann. Stat. § 3-649 (1968); Kan. Gen. Stat. Ann. § 65-2422(2) (1964); La. Rev. Stat. Ann. § 40:156 (1950); Mich. Stat. Ann. § 25.505 (1957); Nev. Rev. Stat. §§ 126.370, 440.170 (1957); N.H. Rev. Stat. Ann. § 126:7 (1964); N.M. Stat. Ann. § 22-4-26 (1954); N.D. Cent. Code § 32-36-35 (1960); R.D. Comp. Laws § 25-8-16 (1967); Tenn. Code Ann. § 36-234 (Supp. 1969); Tex. Rev. Civ. Stat. art. 4477, rule 47A (1960); Wyo. Stat. Ann. § 14-94 (1965).

<sup>87</sup> Ga. Code Ann. § 88-1110 (1963); Kan. Gen. Stat. Ann. § 65-2424 (1964); Mass. Ann. Laws ch. 210 § 2 (1955); Miss. Code Ann. § 1269-03 (1957); N.Y. Dom. Rel. Law § 114 (Supp. 1970); N.C. Gen. Stat. § 48-13 (1966); Vt. Stat. Ann. tit. 18, § 5081 (1966).

<sup>88</sup> Md. Ann. Code art. 43, § 19 (1965).

<sup>89</sup> 41 Ill. Ann.2d 240, 190 N.E.2d 849, (1963), cert. denied 379 U.S. 945, 13 L. Ed. 2d 545, 83 S. Ct. 444 (1964).

such case, was decided in Illinois in 1963. In that case, the plaintiff child argued that his father's act in giving him life as an illegitimate was really a tort and that, as a tort, the act should be compensable to the extent of the difference in monetary value between illegitimate and legitimate status. The court was receptive to the argument and actually held that the father's act was a tort. After that display of courage, however, the court backed away from allowing a recovery because it felt that to allow recovery would produce consequences of unmanageable dimensions. For example, the court worried about the case of a black child suing its father for being born black rather than white.<sup>20</sup>

Subsequently, a similar case arose in New York. In that case, plaintiff alleged that it was the negligence of State authorities in failing to prevent the insemination of its mother, a mental patient in a State hospital, that had resulted in the plaintiff's birth. Although the lower court accepted the plaintiff's case, it was overruled on appeal.<sup>21</sup>

As may be readily imagined, these cases provided food for thought and comment.<sup>22</sup> Most of their utility, however, ended there. Tort law does not lend itself to this situation. Only to the extent that *Zepeda* classified the illegitimate father's act as wrongful, does it contain a useful seed. Thus, if the father's participation in his child's illegitimate conception was wrongful because he withheld legitimate status, it would have been sensible to grant the child an order legitimating him as to his father. This would have provided *legal* equality, which the law is equipped to enforce. The conceptual problems that so hopelessly frustrated the Illinois court arose primarily because plaintiff had asked for more than legal equality, that he had asked for *de facto* equality in terms of money damages measuring the difference between his actual situation and that of a legitimate child.

Fortunately, developments in constitutional law are far more promising than the "wrongful life cases." Important changes already have been wrought in the law of some States. As will be shown below, legal equality is only four dozen cases and a comprehensive new statute away.

<sup>20</sup> *Id.* at 260, 190 N.E.2d at 858. An *amicus curiae*, Professor Max Rheinstein expertly opposed the plaintiff's argument. See Rheinstein, *Rechtswidrige Erzeugung menschlichen Lebens—Ein neuer Grund deliktischer Haftung?*, in: *Festschrift für Fritz von Harrel zum 70. Geburtstag* (J. Esser, H. Thiere, eds. 1967) at 373. Cf. *Chaffin v. Chaffin*, 239 Ore. 374, 381-82, 397 P.2d 771, 774-75 (1964).

<sup>21</sup> "Necessarily then, a parent in performing his duties of providing support, discipline and education to his children must have wide discretion. Wealth or poverty, physical strength or weakness, wisdom or mental incapacity are not in themselves criteria for fixing guidelines by which the law judges the performance of parental duties.

"Physical, mental or financial weakness may cause parents to provide what many a reasonable man would consider substandard maintenance, guidance, education and recreation for their children, and in many instances to provide a family home which is not reasonably safe as a piece of realty. But it would be clearly wrong to permit the minor child to hold the parent liable for these unintended injuries. The wide scope of the family life in day to day living should not be subjected to the scrutiny of the courts for each failure to exercise the care and attention that is required of one individual toward another as a member of the public."

<sup>22</sup> *Williams v. State*, 48 Misc. 2d 824, 260 N.Y.S.2d 953 (1965), rev'd 25 App. Div. 2d 906, 260 N.Y.S.2d 786 (1966), aff'd, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966). Cf. *Pinkney v. Pinkney*, 196 So.2d 52 (Fla. App. 1967), where the court held that, absent legislative authority, the cause of action will not lie since "no one has an inalienable right to be born under one set of circumstances rather than another . . . ."

<sup>23</sup> Foster & Freed, *Children and the Law*, 2 Fam. L.Q. 40, 58 (1968); Note, *Liability to Bastard for Negligence Resulting in His Conception*, 18 Stan. L. Rev. 530 (1966); Note, *Liability of Possible Fathers: A Superior Remedy of Illegitimate Children*, 18 Stan. L. Rev. 850 (1966); Note *Illegitimacy, Society and the Law: A Private Tort Remedy for a Public Problem*, 39 Cal. L. Rev. 438 (1966); Note, *The Infliction of Illegitimacy: A New Tort?* 43 N.D. L. Rev. 99 (1966); Note, *Compensation for the Harmful Effects of Illegitimacy*, 66 Colum. L. Rev. 127 (1966).

## 9. WRONGFUL DEATH ACTS

Some wrongful death acts provide expressly that legitimate and illegitimate children stand in the same position in relation to their mothers. Under these statutes, the mother may recover for the wrongful death of her child and the child for the death of its mother.<sup>55</sup> Other statutes, although they do not contain express provisions, have been so interpreted in the courts.<sup>56</sup> Not infrequently, a result favorable to the illegitimate child or mother is achieved by reference in the wrongful death act to an intestacy law which allows the child and the mother to inherit from each other.<sup>57</sup> What probably was the only modern American statute that still denied the illegitimate a right to recover for the wrongful death of his mother (and *vice versa*) was recently struck down.<sup>58</sup>

With respect to the father, however, the picture is less comforting. Some wrongful death acts expressly allow the illegitimate recovery<sup>59</sup> and others have been so interpreted.<sup>60</sup> Under many statutes, however, recovery is not allowed. A reference to the intestacy laws usually is fatal because the illegitimate generally may not inherit from his intestate father.<sup>61</sup>

## 10. WORKMEN'S COMPENSATION ACTS

The illegitimate child's situation under workmen's compensation acts seems somewhat better than it is under the wrongful death acts. There is no question with regard to the child's eligibility to recover on account of its mother. With regard to the father, many workmen's compensation acts expressly include illegitimate children in the definition of "child,"<sup>62</sup> or provide that an illegitimate child may recover if recognized or acknowledged<sup>63</sup> or legitimated prior to the injury,<sup>64</sup> or acknowledged *and* dependent upon the deceased.<sup>65</sup> Other statutes have been interpreted by the courts to cover illegitimates.<sup>66</sup>

## 11. STATE PENSION LAWS AND PRIVATE PENSION CONTRACTS

Similar to his situation under wrongful death and workmen's compensation acts is the illegitimate's position under some State pension

<sup>55</sup> Ga. Code Ann. § 103-1206 (1968); Ga. Code Ann. § 74-205 (1964) (mother's right); Md. Ann. Code art. 67, § 4 (Supp. 1969); Miss. Code Ann. § 1433 (Supp. 1967); S.C. Code Ann. § 10-1933 (1962) (includes brother and sister).

<sup>56</sup> See Annot., 72 A.L.R.2d 1233 (1960).

<sup>57</sup> Idaho Code Ann. § 5-311 (1948); Ill. Rev. Stat. ch. 70, § 2 (1970); N.J. Stat. Ann. § 2A:31-4 (Supp. 1969). See *Marshall v. Industrial Commission*, 342 Ill. 400, 174 N.E. 574 (1930), interpreting the Illinois statute.

<sup>58</sup> *Levy v. Louisiana*, 391 U.S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509 (1968); *Glena v. American Guaranty & Loh. Ins. Co.*, 391 U.S. 73, 20 L. Ed. 2d 441, 88 S. Ct. 1515 (1968).

<sup>59</sup> Wis. Stat. Ann. § 895.03 (1967).

<sup>60</sup> *Armitjo v. Wesselius*, 73 Wash.2d 716, 440 P.2d 471 (1968).

<sup>61</sup> *Bul. cf. Krantz v. Harris*, 40 Wls. 2d 709, 162 N.W.2d 628 (1968).

<sup>62</sup> Minn. Stat. Ann. § 174.011 (Supp. 1966); N.J. Stat. Ann. § 24:13-13(f) (Supp. 1969); Nev. Rev. Stat. § 618.510 (1957); Ore. Rev. Stat. § 656.002 (1969).

<sup>63</sup> Ark. Stat. Ann. § 81-1302 (1960); Ga. Code Ann. § 114-414 (1956); Hawaii Rev. Stat. § 386-2 (1968); Idaho Code Ann. § 72-305 (Supp. 1969); Burns' Ind. Ann. Stat. § 40-1403a (1963); Ky. Rev. Stat. Ann. § 342.085 (1969); La. Rev. Stat. Ann. § 23:1021 (West 1964); N.M. Stat. Ann. § 59-10-12.11 (Supp. 1969); N.Y. Workmen's Comp. Law § 2(11) (McKinney 1965); R.C. Code Ann. § 72-6 (1962); Vt. Stat. Ann. tit. 21, § 601(2) (1967); Va. Code Ann. § 63.1-66 (1968).

<sup>64</sup> Mont. Rev. Codes Ann. § 93-417 (Supp. 1969); Wash. Rev. Code Ann. § 51.32.005 (Supp. 1970).

<sup>65</sup> Alaska Stat. § 23.30.263(4) (1962); Colo. Rev. Stat. Ann. § 81-11-9 (Supp. 1969); Fla. Stat. Ann. § 440.02(13) (1967); N.C. Gen. Stat. § 97-2(12) (1967). An interesting case, allowing a claim to workmen's compensation of illegitimate children who were dependent on but not related to the deceased, is discussed in Comment, *Workmen's Compensation—Illegitimate Dependents*, 18 Ind. L.J. 153 (1943).

<sup>66</sup> *Yellow Cab. v. Industrial Comm'n*, 42 Ill. 226, 247 N.E.2d 601 (1969).

laws providing benefits for "children" or in similar terms that have been interpreted to refer to legitimate children only.<sup>5</sup> Discrimination also occurs in connection with private pension plans involving survivor's benefits for "children."<sup>6</sup>

## 12. "PARENT-TIED" FEDERAL WELFARE LAWS

Another large and important category of legislation which affects the illegitimate is the body of Federal "welfare" statutes that ties a child's eligibility for benefits to the existence of a father or mother who is primarily "covered" by the legislation in question.

With respect to coverage derived through the mother, few, if any problems remain in the law as currently written. With respect to the father, however, the situation is less clear. Under many Federal welfare statutes which provide benefits for children, eligibility for such benefits is derived typically through the child's father who, by membership in a given class or otherwise, has "earned" the benefit.<sup>7</sup> These statutes do not consistently provide benefits for the illegitimate children of eligible fathers. The Longshoremen's and Harbor Worker's Compensation Act,<sup>8</sup> the Foreign Service Act,<sup>9</sup> various items of veteran's legislation,<sup>10</sup> and the Social Security Act<sup>11</sup> expressly provide benefits for illegitimate children, but impose varying standards of proof of paternity. A second group of statutes, including the Federal Employee's Group Life Insurance Act<sup>12</sup> and the Copyright Act,<sup>13</sup> does not define the term "child" so as to include or exclude illegitimates expressly, and here the courts have looked to State law for a definition of "child". In

<sup>5</sup> See Comment, *Domestic Relations—Meaning of Word "Child" in Statute—Right of Illegitimate Child To Recover Pension Benefits*, 15 Fordham L. Rev. 282 (1946).

<sup>6</sup> See, for example, Comment, *Illegitimate Child's Right to Pension Payable to "Child" of Deceased Member of Beneficial Association*, 5 Wash. & Lee L. Rev. 73 (1948).

<sup>7</sup> See generally Note, *The Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 357 (1963); Note, *Illegitimates: Definition of "Children" under Federal Welfare Legislation*, 67 Colum. L. Rev. 984 (1967).

<sup>8</sup> 44 Stat. 1424 (1927), as amended, 38 U.S.C. § 902(14) (1964) defines "child" to include an "acknowledged illegitimate child dependent upon the deceased."

<sup>9</sup> 60 Stat. 1029 (1946), as amended, 23 U.S.C. § 1064(3) (1964) defines "child" to include a "recognized natural child who received more than one-half of his support from the participant."

<sup>10</sup> 38 U.S.C. § 101(4) (1964) defines "child" to include:

"[A]n illegitimate child but, as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence satisfactory to the Administrator to be the father of the child."

<sup>11</sup> See *infra* notes 18-23.

<sup>12</sup> 68 Stat. 738 (1954), as amended 5 U.S.C. § 2093 (1964) speaks of "the child or children of such employee." Concerning this language, the court in *Grove v. United States*, 170 F. Supp. 178, 181 (E.D. Va. 1959), said:

"But there are many peculiar problems arising from the familial relationship and, as there is no federal law of domestic relations, the matter is primarily of state concern. . . . This court leans to the view that the state law must control the familial relationship. . . ."

The court applied Virginia law which resulted in granting recovery to the child. But see *Haley v. Metropolitan Life Ins. Co.*, 434 R.W.2d 7 (St. Louis Ct. App. 1968) in which the court adopted a federal definition of "child" to avoid the illegitimate child being excluded under Missouri law.

<sup>13</sup> 17 U.S.C. § 24 (1964). The act provides for renewal of copyright, if the holder is deceased, by the "widow, widower, or children of the author." In *DeSylva v. Ballantine*, 351 U.S. 570, 580, 100 L. Ed. 1415, 76 S. Ct. 974 (1956), this language was interpreted in accordance with state law defining "child":

"The scope of a Federal right is, of course, a Federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." The court applied California law so as to include the bastard within the definition of "child." Cf. 351 U.S. at 583-84 (Douglas, J., concurring):

"But I would think the statutory policy of protecting dependents would be better served by uniformity, rather than by the diversity which would flow from incorporating into the Act the laws of forty-eight states. . . . I would . . . regardless of state law, hold that illegitimate children were 'children' within the meaning of § 24 of the Copyright Act."

dealing with a third group of laws, such as the Federal Death on the High Seas Act<sup>41</sup> and, it appears, the Federal Employer's Liability Act<sup>42</sup> and the Jones Act,<sup>43</sup> the courts have developed a "Federal" definition of "child" which includes illegitimates.

In summary, although there is a remnant of deference to State law and concern about the problem of proof of paternity, Federal laws have gone far toward eliminating discrimination against the illegitimate.<sup>44</sup> A very long, though not the final, step was taken in the 1964 amendment to the Social Security Act. To illustrate, important new sections,<sup>45</sup> provide, in essence, that "... an applicant will be considered the child of the worker if the worker (1) has acknowledged in writing that he is the child's father; (2) has been decreed by a court to be the child's father; (3) has been ordered by a court to contribute to the support of the child because he is the child's father; or (4) is shown by other evidence satisfactory to the Secretary to be the child's father and has been living with<sup>46</sup> or contributing to the support<sup>47</sup> of the child."<sup>48</sup>

These tests of eligibility were superimposed on those existing previously. The principal test was whether State law granted the child intestate succession rights after the father.<sup>49</sup> Usually, this had resulted

<sup>41</sup> 41 Stat. 537 (1920), 46 U.S.C. 761 (1964): "[T]he personal representative of the decedent may maintain a suit for damages . . . for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." The term "child" has been held to include illegitimates by the application of a federal, not state law definition. *Middleton v. Luckenbach R.R. Co.*, 70 F.2d 326 (2d Cir. 1934).

<sup>42</sup> 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51 (1964) provides for damage liability for the death of an employee "to his or her personal representative for the benefit of the surviving widow or husband and children of such employee. . . ." 36 Stat. 291 (1910), 45 U.S.C. § 59 (1964) provides that a right of action for injury to an employee "shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee. . . ." In *Huber v. Baltimore & O. R.R.*, 241 F. Supp. 646 (D. Md. 1965), § 51 was interpreted to apply a federal definition of "children" unless it were in conflict with a clear state policy. In *Bowen v. New York Cent. R.R.*, 179 F. Supp. 225 (D. Mass. 1959), on the other hand, § 59 of the act had been interpreted to refer to the state law definition of "children" which, in that case, resulted in denying recovery to the illegitimate child.

<sup>43</sup> 38 Stat. 1185 (1950), as amended, 46 U.S.C. § 688 (1964) provides: "[T]he personal representative of such seaman may maintain an action for damages at law . . . and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." The reference to "railway employees" involves 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1964); see cases discussed *supra* note 15. *But cf. Civil v. Waterman S.S. Corp.*, 217 F.2d 94 (2d Cir. 1954), which compares the statutory language of 41 Stat. 537 (1920), 46 U.S.C. § 761 (1964), and 36 Stat. 291 (1910), 45 U.S.C. § 59 (1964), and adopts the *Luckenbach* view, *supra* note 14.

<sup>44</sup> Not so liberal federal law covering the full range of the illegitimate's relationships applies in the District of Columbia. See D.C. Code Ann. § 16-23-49 (Supp. 1967); D.C. Code Ann. § 19-316 (Supp. 1967); *Blethyn v. Bidder*, 80 F. Supp. 962, 963 (D. D.C. 1948).

<sup>45</sup> 42 U.S.C. § 416 (1969).

<sup>46</sup>  *Cf. The interpretation of "living with" given in Wagner v. Finch*, 413 F.2d 267, 268-69 (5th Cir. 1969).

<sup>47</sup>  *Cf. The interpretation of "contributing to the support" given in Washington v. Finch*, (U.S.D.C.W.D. La. 9-26-1969) C.C.H. Pov. L. Rptr. § 15,622.

<sup>48</sup> S. Rep. No. 404, 89th Cong., 1st Sess. 267 (1965).

<sup>49</sup> 64 Stat. 492 (1950), as amended, 42 U.S.C. § 416(h)(2) (1969) provides:

"(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

"(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1) (B), would have been a valid marriage."

in discrimination because few States grant such rights to the illegitimate child. Despite Congress' obviously good intentions,<sup>22</sup> however, even the liberal new section falls short of being entirely even handed. The catch-all phrase at the end of the section remains conditioned on the illegitimate's residence with or dependency on his father, and no such requirement applies to the eligibility of a legitimate child.

Other instances of continuing discrimination against the illegitimate under the Social Security Act are the section that, when total benefits payable on behalf of one insured exceed the statutory maximum, first takes away the illegitimate's benefits before any other beneficiary's benefits are affected,<sup>23</sup> and the provision which removes the dependency requirement for legitimate children but leaves that requirement in effect for illegitimate children.<sup>24</sup> Finally, the illegitimate mother is not eligible for "mother's benefits" that may become payable to the wife of an insured.<sup>25</sup>

### 13. INHERITANCE AND GIFT TAXES

State inheritance tax rates that are applied to bequests to nonrelatives (sometimes including illegitimate children) often are higher than inheritance tax rates applied to legitimate children.<sup>27</sup>

<sup>22</sup> In the 1963 report accompanying this section the Senate Finance Committee expressed its belief that:

"... [I]n a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live."

S. Rep. No. 404, 89th Cong., 1st Sess. 109-10 (1963).

<sup>23</sup> 42 U.S.C. § 403(a)(3) (1949).

<sup>24</sup> 42 U.S.C. § 402(d)(3) (1960).

<sup>25</sup> 42 U.S.C. § 402(g)(1) (1960).

<sup>26</sup> *Kentucky*: Ky. Rev. Stat. § 140.070 (1963) grants special inheritance tax rates to Class A individuals, which include "child by blood, stepchild, child adopted during infancy." According to 1928 Op. Att'y Gen. 208, No. 136, an illegitimate child is not a "child" under the inheritance tax law.

*Louisiana*: Under earlier inheritance tax law illegitimate beneficiaries belonged to no family and, therefore, could not be classed as ascendants, descendants, or collateral relatives for purposes of inheritance tax exemptions. Succession of Baker, 129 La. 74, 55 So. 714 (1911). The present statute gives special inheritance tax treatment to a "direct descendant by blood or affinity." La. Rev. Stat. Ann. § 47:2402(1) (1952). Since the *Baker* case has not been overruled, it would appear that it still applies. Cf. Succession of Wesley, 224 La. 182, 69 So. 2d 8 (1953).

*Nebraska*: Neb. Rev. Stat. § 77-2004 (1966) grants special inheritance tax rates to a "... child, [or] ... any lineal descendant born in lawful wedlock. ..." (Emphasis added.)

*New Jersey*: N.J. Stat. Ann. § 54:34-2 (Supp. 1960) grants special inheritance tax rates to "... child or children of a decedent ... or the issue of any child. ..." The word "child" as used in this provision was construed as excluding illegitimate children. *Bank of Montclair v. McCutcheon*, 107 N.J. Eq. 561, 152 A. 379 (1939). N.J. Stat. Ann. § 54:34-2.1 (1960) provides the illegitimate child with the same exemption as that given to a legitimate child of the decedent, provided the decedent stood in the mutually acknowledged relation of a parent to the child for not less than ten years, such relationship having begun at or before the child's fifteenth birthday. See *In re Roger's Estate*, 30 N.J. Super. 479, 103 A.2d 28 (1954), *rev'd on other grounds, sub nom* *Morristown Trust Co. v. McCann*, 19 N.J. 568, 118 A.2d 16 (1955).

*North Carolina*: N.C. Rev. Stat. § 105-4(a) (1965) grants special inheritance tax rates to Class A individuals, which include "lineal issue." However, according to 1944-46 Op. Att'y Gen. 112 (April 3, 1945) illegitimate children are excluded from the special rates if they are not legally adopted by the father. 2 CCH Inv. Est. & Gift Tax Rep. (N.C.) § 1310.74 (1966).

*Pennsylvania*: Pa. Stat. Ann. tit. 72, § 2485-403 (Supp. 1970) grants special inheritance tax rates to Class A individuals, which include "lineal descendants." Pa. Stat. Ann. tit. 72, § 2485-102(13) (1964) defines "lineal descendants" as including "illegitimate descendants of the mother and their descendants, and children and their descendants of the natural parent who are adopted by his spouse. It does not include ... illegitimate children of the father and their descendants. ..." The same exclusion of illegitimate children of the father is also found in the definition of "children." Pa. Stat. Ann. tit. 72, § 2485-102(3) (1964).

*Texas*: Tex. Tax-Gen. art. 14.02 (1960) grants special inheritance tax rates to Class A individuals, which include "... any direct lineal descendant of husband or wife, or any direct lineal descendant or ascendant of the decedent. ..." According to 1958 Digest of Op. Att'y Gen. 28, No. 481, the father must "legitimate".

Rarer are instances of discrimination under State gift tax laws. Federal taxes are not in the picture, because Federal estate and gift taxes are not assessed on the basis of the relationship of the deceased to the recipient (except in the case of the marital exclusion).

#### 14. UNITED STATES CITIZENSHIP

Concerning children born abroad, present law provides that the legitimate child of at least one American parent is a U.S. citizen. The foreign-born *illegitimate* child of an American mother acquires the mother's nationality status at birth regardless of the father's nationality. However, the foreign-born *illegitimate* child of an American father and an alien mother is entitled to United States citizenship only if he is legitimated by his father before the age of twenty-one years.

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## APPENDIX A\*

### CURRENT STATE LAWS—EQUALITY ACCOMPLISHED!

Under the direct influence of the Norwegian example, North Dakota enacted legislation in 1917 which declared all children to be the legitimate children of their natural parents.<sup>1</sup> Unfortunately, this early attempt lacked provision for implementation and was short-lived. It was repealed, more or less by accident, when North Dakota adopted the Uniform Illegitimacy Act<sup>2</sup> in 1923. In 1969, in the wake of judicial developments under the equal protection clause of the United States constitution,<sup>3</sup> North Dakota reverted to its original position with the enactment of the following statute:

"Every child is hereby declared to be the legitimate child of his natural parents, and is entitled to support and education, to the same extent as if he had been born in lawful wedlock. He shall inherit from his natural parents, and from their kindred heir, lineal and collateral. The issue of all marriages null in law or dissolved by divorce are deemed to have been born in wedlock."<sup>4</sup>

In 1921, Arizona had adopted a similar provision. Its substance remains in effect today:

"Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married," and "[e]very child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock," even when ". . . the natural father of such child is married to a woman other than the mother of the child, as well as when he is single."<sup>5</sup>

Oregon followed Arizona's example in 1957. Oregon's statute provides in essential part that:

"[t]he legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married."<sup>6</sup>

Alaska has experimented with the equality of legitimate and illegitimate children of *ascertained* fathers since 1962. Today it provides that

\*Krause, *op. cit.*

<sup>1</sup>Ch. 70, § 1 [1917] Laws of N.D. 80.

<sup>2</sup>Ch. 163, §§ 1-37, [1923] Laws of N.D. 107. But *cf.*, 4 N. Veraler, *American Family Laws* 176 (note 3, table CXYII) (1936).

<sup>3</sup>See *Michaelson v. Fadhjem*, 163 N.W.2d 841 (N.D. 1968).

<sup>4</sup>N.D. Cent. Code § 56-01-05 (Supp. 1969).

<sup>5</sup>Ariz. Rev. Stat. Ann. § 14-206 (1956).

<sup>6</sup>Ore. Rev. Stat. § 109.060 (1969).

"(a) A child born out of wedlock heretofore or hereafter shall be legitimated and considered the heir of the father who (1) shall subsequently intermarry with the mother of the child; (2) shall in writing acknowledge his paternity of the child; or (3) shall be adjudged to be the father by a superior court, upon sufficient evidence. Acceptable evidence includes, but is not limited to, evidence that the alleged father so conducts and bears himself toward the child, either by word or act so as to indicate that the child is his, and such conduct may be construed by the court to constitute evidence of paternity. Extrinsic evidence may be employed by the court to show intent when indefinite, ambiguous or uncertain terms are used."<sup>7</sup>

An important difference between these provisions is that Alaska's provision does not use the sweeping language that Oregon and Arizona have used. Alaska conditions equality on ascertainment of paternity. In Arizona and Oregon, on the other hand, "the only act necessary to make a child legitimate in relation to his natural parents and their collaterals is the act of birth itself."<sup>8</sup> But this distinction is less important than it appears to be. If it is not a condition of law the ascertainment of paternity is a condition of fact. In Arizona and Oregon as much as in Alaska, the father must be identified before the rights of his child can be enforced against him.

Alaska's legitimation clause<sup>9</sup> is unequivocal, but inconsistencies have remained on the books: (1) Although the legitimation provision should make the out-of-wedlock child fully eligible to inherit from his father's kin—as a legitimate child—another section provides that "an illegitimate child is considered an heir of its mother" but "the child is not entitled to inherit . . . of the kindred . . . of the mother," unless legitimated by the subsequent marriage of his parents, even if that marriage be void.<sup>10</sup> In short, the out-of-wedlock child legitimated by paternal acknowledgment or in a paternity action inherits from his father, his mother and his father's kin, but not from his mother's kin. Inheritance from the father, mother, the father's and mother's kin will come to him only if he was legitimated by his parents' marriage. This hardly makes sense. (2) Another statute,<sup>11</sup> makes the mother the heir of her illegitimate child, but allows the father to inherit from his child only if the child was legitimated through the marriage of his parents. Since the provision does not refer to other methods of legitimation, one might conclude that the father cannot inherit from the child if the child has obtained his legitimate status through a court judgment or by law of acknowledgement. This result would be inconsistent with full legitimate status of the child. (3) The illegitimate child's status under Alaska's wrongful death act and workmen's compensation may be unclear. In the former, the statutory reference is to "children."<sup>12</sup> Neither the statute nor decisions have defined that term further. In the absence of decisions, one should assume that the reference includes a child that has become legitimate under the legitimation clause (and possibly one that has not been legitimated). However, the workmen's compensation act specifically lists an "acknowledged illegitimate de-

<sup>7</sup> Alaska Stat. § 25.20.050(a) (1962) (emphasis added).

<sup>8</sup> *Imperial v. State*, 65 (Ariz. 150, 176 P.2d 698 (1947)).

<sup>9</sup> *Supra* note 7.

<sup>10</sup> Alaska Stat. § 3.10.030 (1962) (emphasis added).

<sup>11</sup> Alaska Stat. § 13.10.040 (1962).

<sup>12</sup> Alaska Stat. § 13.20.340(a) (1962).

pendent upon the deceased.”<sup>13</sup> Disconcertingly, the act makes no reference to other methods of establishing paternity—quite aside from the point that an acknowledged illegitimate, is a *legitimate* child,<sup>14</sup> under the legitimation clause. A claimant of *unemployment compensation* was recently denied the right to list his illegitimate children as dependents for purposes of unemployment benefits.<sup>15</sup> (4) A final point worth noting is that Alaska has not legislated details for its paternity action. It appears that statutory treatment of this essential subject is limited to the evidentiary matters covered in the legitimation provision.<sup>16</sup>

#### OREGON

In thirteen years following its passage, Oregon's "equality statute" was not explained in the appellate courts. Some light is shed on the background and purpose of the legislation by the minutes of the Oregon Senate's Judiciary Committee:

"Mr. Philip A. Joss, Chairman of the Oregon State Bar Committee on Juvenile Court Procedure and Practice, was present to discuss Senate Bill 230. He presented explanatory material which he had prepared and further explained that this type of legislation has been considered by the Bar for three years and some amendment has been effected to make it acceptable to the archdiocese of Oregon. The bill is to modernize the law relating to children of unmarried parents and section 1 contains the statement that there is no distinction between parents, married or unmarried. Section 2 covers the matter of proof of paternity and involves no change in the existing law as to how paternity may be proven. Sections 1 and 2 actually involve a restatement of the two presumptions now existing. Section 3 was discussed with various title companies, meets with their approval and for the first time in this state permits the kin through the maternal line of a child of unmarried parents to inherit from that child. It makes no change as far as the father is concerned where the paternity is not established. Where the paternity is established, the situation is the same as it would be for anyone else. Section 4 is directed to preserve the present situation with relation to the adoption of children to make it clear that where the paternity has not been proved, the unmarried mother alone can sign the adoption papers. It also eliminates the necessity of a guardian for her if she is a minor. After a short discussion, Senator Lewis moved that the bill be reported out to pass. Senator Yturri seconded the motion and it passed unanimously. Members voting were: Gill, Yturri, Musband, Corbett, Dimick and Lewis. Senator Lewis was assigned the bill."<sup>17</sup>

Along with its advanced provisions, Oregon also has retained inconsistencies in its law:

(1) A mere irritant is the continuing use in statutes of terms such as "legitimate,"<sup>18</sup> "illegitimate"<sup>19</sup> and even "bastard infant";<sup>20</sup>

<sup>13</sup> Alaska Stat. § 23.30.245(4) (Supp. 1969).

<sup>14</sup> Alaska Stat. § 23.20.050 (1962).

<sup>15</sup> C.C.H. For. L. Rptr. ¶ 9952.

<sup>16</sup> See note 7 and accompanying text *supra*. Paternity proceedings generally are treated in 13 Op. Att'y Gen. (Alaska 1962). Note, however, that Alaska makes applicable its abandonment and non-support laws to the illegitimate child and its putative father. Alaska Stat. § 11.35.100 (1962).

<sup>17</sup> Minutes, Senate Judiciary Committee, Feb. 28, 1957, pp. 4-5.

<sup>18</sup> Ore. Rev. Stat. § 106.100 (1969).

<sup>19</sup> Ore. Rev. Stat. § 654.002(4) (1969).

<sup>20</sup> Ore. Rev. Stat. § 163.640(2) (1969).

(2) Until repealed in 1969, the support statute<sup>21</sup> limited the amount the father could be asked to contribute to the support of his out-of-wedlock child to an annual maximum of \$900 and continued the father's obligation only "until the child reaches the age of 18 years." Since these limitations did not control the support obligation owed a child born in wedlock, they were wholly inconsistent with the equality clause. (3) An example of poor draftsmanship rather than of irreconcilable inconsistency is the fact that the adoption provision relating to consent for adoption continues to bar the out-of-wedlock father "just as if he were dead."<sup>22</sup> The adoption provision gives sole control over the adoption of her out-of-wedlock child to the mother, if she was not married to the child's father at the time of the child's conception and birth and remained unmarried to him at the time of consenting to the adoption.<sup>23</sup> On the other hand, the custody and control provision which was enacted in 1957 along with the equality clause gives the mother the right to "give all authorizations for the care, custody, control and welfare of her child and for the adoption of her child" only "if a mother has not married the father of her child" (which substantially continues prior law) "or the paternity of the child has not been established" in accordance with law (which is new).<sup>24</sup> No case has faced this potential conflict. The newer statute probably should be viewed as overriding the older which seems consistent with the express language and spirit of the 1957 statute as well as with the legislative history quoted above.<sup>25</sup> Consequently, a father who has been ascertained in accordance with law and who objects to the adoption of his illegitimate child, should and probably will be heard. At worst, this might mean that the out-of-wedlock father may exercise a veto over the adoption of his child. At best, it means that he will play a role in the adoption process. (4) Other Oregon laws have moved in the direction in which the equality clause points. For example, the inheritance law now considers the illegitimate child's right to inherit a matter of course, after repealing, in 1969, a statute which specifically required that "full effect be given to all relationships as described in [the equality clause]" with the caveat that paternity had to be established prior to the closing of the estate or, in certain other circumstances, within three years of decedent's death.<sup>26</sup> The Workmen's Compensation Act expressly defines the term "child" to include an illegitimate child.<sup>27</sup> and the wrongful death act's reference to "dependents" probably will be interpreted to allow no distinction between dependents born in and out-of-wedlock.<sup>28</sup>

## ARIZONA

The inquiry now turns to Arizona which has lived with its equality provision for two generations. While two generations of illegiti-

<sup>21</sup> Ore. Rev. Stat. § 109.150 (1967), repealed by 1969, c. 619, § 15.

<sup>22</sup> Ore. Rev. Stat. § 109.326 (1969). On the failure of Oregon to provide equality in matters of the father's right to custody and control of the out-of-wedlock child, see Embick, *The Illegitimate Father*, 3 J. Fam. L. 521 (1963).

<sup>23</sup> Ore. Rev. Stat. § 109.326 (1969).

<sup>24</sup> Ore. Rev. Stat. § 109.080 (1969). The section also makes minority of the mother irrelevant for she is deemed to have reached her majority for the purposes of the section.

<sup>25</sup> See text at note 17 *supra*; Embick, *supra* note 22.

<sup>26</sup> Ore. Rev. Stat. § 111.231 (1967) repealed by 1969, c. 591, § 305.

<sup>27</sup> Ore. Rev. Stat. § 656.002 (4) (1969).

<sup>28</sup> Ore. Rev. Stat. § 30.020 (1969).

mates have not generated a sufficient number of cases to allow an unequivocal conclusion as to success or failure of the experiment, the cases that have dealt with the out-of-wedlock child consistently have sought to effectuate what the law promises.

Arizona cases have affirmed the out-of-wedlock child's statutory right to paternal inheritance.<sup>20</sup> Arizona courts have allowed the father to recognize his out-of-wedlock child without the mother's consent,<sup>21</sup> and they have recognized the father's paramount right to custody where the mother has relinquished the child.<sup>22</sup> The criminal nonsupport statute has been applied to cases of failure to support an out-of-wedlock child,<sup>23</sup> and the statutory command that the duty of support owed the illegitimate is the same as that owed the legitimate child has been upheld.<sup>24</sup> The courts have decided that an adjudication of paternity in a civil action, given the father's written acknowledgment of paternity, is not a prerequisite for a criminal prosecution for nonsupport,<sup>25</sup> but they have held the proceeding to establish paternity to be a civil proceeding, with all that implies.<sup>26</sup> Many other issues remain undecided. For example, the question whether and under what circumstances the out-of-wedlock child may bear his father's name seems not to have been settled.

Other Arizona statutes have been consistent with the equality clause. Thus, the adoption statute expressly requires the ascertained father's consent to the adoption of his child.<sup>27</sup> Thoughtfully, the legislator has provided a safety valve to guard against abuses on the father's part. The court may enter an adoption order without the parent's or guardian's consent when, "after hearing, the court determines that the interests of the child will be promoted thereby."<sup>28</sup> A potential conflict remains between these consent provisions and a clause which involves solely the mother of an out-of-wedlock child in the relinquishment of the child to a licensed child welfare agency for the purpose of adoption. It seems likely, however, that this problem could, should and would be resolved in the best interests of the child by reference to the provision, just discussed, that gives the court discretion to dispense with parental consent. Recent cases have interpreted this section liberally. In one case, the court dispensed with both parents' consent in a situation in which the parents had been divorced, had had a child while divorced and had later remarried, the father then acknowledging the child.<sup>29</sup> Upon the birth of the child prior to the remarriage, however, the mother had given it up for adoption. The court upheld the adoption and dispensed with the mother's consent on the ground that the adoption was in the child's best interest and dispensed

<sup>20</sup> *In re Cook's Estate*, 63 Ariz. 79, 130 P. 2d 797 (1945).

<sup>21</sup> *Plodung v. Sanford*, 51 Ariz. 211, 75 P. 2d 625 (1938).

<sup>22</sup> *Caruso v. Superior Court*, 100 Ariz. 167, 412 P. 2d 443 (1966).

<sup>23</sup> *Imperial v. State*, 65 Ariz. 150, 178 P. 2d 688 (1947). It is estimated, however, that 50% or more of the fathers are never found or prosecuted and that less than 10% of fathers contribute substantially for support voluntarily. Letter from Jack Gaston, Department of Public Welfare, State of Arizona, to H. D. Krause, Dec. 1, 1968.

<sup>24</sup> *In re Silva's Estate*, 61 Ariz. 573, 261 p. 40 (1927); *State v. Nerrist*, 61 Ariz. 503, 151 P. 2d 983 (1944).

<sup>25</sup> *Moran v. Superior Court*, 3 Ariz. App. 361, 414 P. 2d 749 (1966). Cf. *Wiley v. Wiley*, 101 Ariz. 324, 419 P. 2d 502 (1966), in which the father's admission of paternity, in a divorce action, regarding his wife's premarital children was held sufficient to impose a support obligation.

<sup>26</sup> *Shaner v. State*, 24 Ariz. 191, 207 p. 877 (1922); *McGuire v. State*, 84 Ariz. 242, 326 P. 2d 362 (1959).

<sup>27</sup> Ariz. Rev. Stat. Ann. § 8-107 A (b) (Enna, 1969).

<sup>28</sup> Ariz. Rev. Stat. Ann. § 8-104 (1934) (the court is expressly required to make written findings of all facts upon which its order is based).

<sup>29</sup> *In re Krueger*, 7 Ariz. App. 122, 436 P. 2d 916 (1969).

with the father's consent on the ground that the child was "illegitimate" because it was born while the parents were divorced and the acknowledgment (executed *after* the adoption petition had been filed) had come too late to bring him under the provision requiring the consent of the father of an out-of-wedlock child. In another recent case, it was said rather sweepingly that "the court is invested with power to decree the adoption of a child without anyone's consent where, upon a hearing, it appears that the child's welfare will thereby be promoted."<sup>30</sup>

Many other Arizona laws that affect the rights of the illegitimate, such as the wrongful death act<sup>31</sup> and the workmen's compensation act,<sup>32</sup> do not expressly refer to the out-of-wedlock child, but have been applied to his situation.<sup>33</sup>

#### MINNESOTA

Since 1918 when it charged the "board of control" with the duty to safeguard the interests of the out-of-wedlock child and to achieve for it the nearest possible approximation of the rights of a child born in lawful marriage,<sup>34</sup> Minnesota has consciously approached equality but stayed clear of it. In Minnesota, the illegitimate child of a known father has a right of support which is equal to that of a legitimate child,<sup>35</sup> and it inherits from its mother (but not her kin)<sup>36</sup> and its father (but not his kin), if the latter has formally acknowledged the child in writing.<sup>37</sup> Adjudication of paterality in a paternity proceeding does not confer inheritance rights.<sup>38</sup> Only the mother or her heirs inherit from her child, absent, of course, more immediate heirs, or another disposition by will.<sup>39</sup> While the father is not entitled to custody as against the mother, he will be heard in adoption cases when this will not unduly impede the adoption process.<sup>40</sup> The illegitimate child is allowed to receive benefits relating to his father under the workman's compensation act if entitled to inherit from him or if he was "adjudged by a court of competent jurisdiction to be the father of the child."<sup>41</sup> Under the wrongful death act, on the other hand, the reference is to "next of kin."<sup>42</sup> Most importantly, Minnesota has the following statute:

"It shall be the duty of the commissioner of public welfare when notified of a woman who is delivered of an illegitimate child, or

<sup>30</sup> *In re Anonymous*, 4 Ariz. Ann. 589, 590, 422 P. 2d 419, 421 (1967).

<sup>31</sup> Ariz. Rev. Stat. Ann. § 12-611, § 12-612 (1956).

<sup>32</sup> Ariz. Rev. Stat. Ann. § 23-901 *et seq.* (1956). As to the statutory presumption of dependency in cases of death benefits, see Ariz. Rev. Stat. Ann. § 23-1064 (Supp. 1969).

<sup>33</sup> The Public Welfare Agency encourages mothers to cooperate by explaining that if maternity is established the child's rights to social security benefits, veterans benefits and inheritance rights are established. Letter from Jack Gaston, Department of Public Welfare, State of Arizona, to H. D. Krause, Dec. 1, 1968.

<sup>34</sup> Law of Jan. 1, 1918, ch. 17, § 3225(d), (1918) Minn. Stat. Supp. 1917.

<sup>35</sup> Minn. Stat. Ann. § 257.23 (1963); *State v. Sar*, 231 Minn. 1, 42 N.W.2d 680 (1950), holding that the father's obligation is primary while the mother's is secondary.

<sup>36</sup> Minn. Stat. Ann. § 523.172 (Supp. 1967).

<sup>37</sup> *In re Karger's Estate*, 253 Minn. 542, 92 N.W.2d 137 (1958).

<sup>38</sup> Nor will a written support agreement. *In re Spethum's Estate*, 180 Minn. 202, 230 N.W. 483 (1930); or a written plea of guilty entered in an illegitimacy proceeding if it is not signed by a competent attesting witness, *Reilly v. Shapiro*, 196 Minn. 376, 263 N.W. 284 (1936).

<sup>39</sup> Minn. Stat. Ann. § 523.173 (Supp. 1967); *In re Kuenall's Estate*, 219 Minn. 176, 17 N.W. 2d 369 (1945).

<sup>40</sup> *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965), awarding the custody of the child to the father when the mother rejected it. See also *In re Shady*, 264 Minn. 222, 118 N.W.2d 449 (1962), recognizing that the father of an illegitimate does have some rights of custody, although they are not equivalent to those of a father of a legitimate child.

<sup>41</sup> Minn. Stat. Ann. § 176.011 (2) (1965). *Guptel v. E. O. Dahlquist Contracting Co.*, 197 Minn. 211, 266 N.W. 748 (1936).

<sup>42</sup> Minn. Stat. Ann. § 573.02 (Supp. 1968).

pregnant with child likely to be illegitimate when born, to take care that the interests of the child are safeguarded, that appropriate steps are taken to establish his paternity, and that there is secured for him the nearest possible approximation to the care, support, and education that he would be entitled to if born of lawful marriage. For the better accomplishment of these purposes the commissioner of public welfare may initiate such legal or other action as is deemed necessary; may make such provision for the care, maintenance, and education of the child as the best interests of the child may from time to time require, and may offer his aid and protection in such ways as are found wise and expedient to the unmarried woman approaching motherhood."<sup>52</sup>

#### CONCLUSION

Progress has been made in Arizona, Oregon and Alaska, having had a late start, seem to be coming along. Several other States for which Minnesota has served as an example, have gone some distance toward equality. Legal equality of persons of legitimate and illegitimate birth is the mandate for future legislation. Toward that end, what can be learned from the states that have experimented with equality?

In the first place, it seems fair to conclude that the promise of equality has nowhere been fulfilled. Although the statutes have improved the legal lot of illegitimates with *known* paternity, "equality" has remained a dead letter to all others. Therein lies the lesson. It is not difficult to see that, if equality is to be realized, the law must ensure the ascertainment of paternity whenever possible and in the child's best interest. To leave, as does Arizona, the decision of whether to bring a paternity action entirely in the hands of the mother<sup>53</sup> is not enough; too often her interests will conflict with those of the child. To allow, as do Arizona and Oregon, the public authorities to bring a paternity action "if the child is or is likely to become a public charge"<sup>54</sup> is based on the interest of the welfare authorities, instead of the interest of the child and will help only some illegitimates. Even Oregon's provision to the effect that "any minor child may . . . apply to the circuit court . . . for an order upon such child's father or mother, or both, to provide for the child's support"<sup>55</sup> is not enough. If meaningful "equality" is to be achieved, a statute such as Minnesota's is needed and must be enforced.<sup>56</sup>

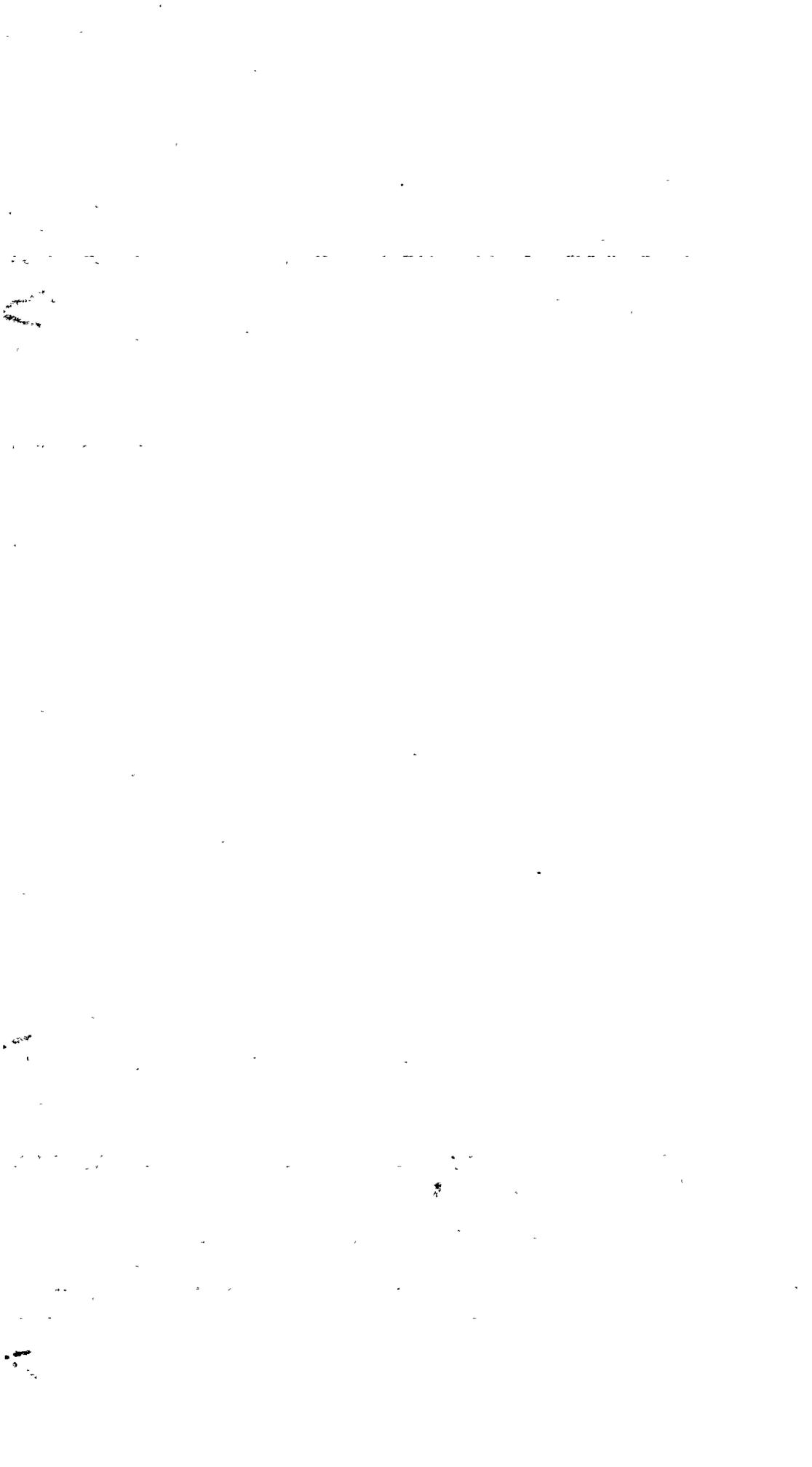
<sup>52</sup> Minn. Stat. Ann. § 257.23 (1959).

<sup>53</sup> Ariz. Rev. Stat. Ann. § 12-631 A (1956).

<sup>54</sup> Ariz. Rev. Stat. Ann. § 12-856 (1956); cf. Ore. Rev. Stat. § 109.125(b) (1969).

<sup>55</sup> Ore. Rev. Stat. § 109.160 (1969).

<sup>56</sup> *Supra*, text at note 52.



## B. The Uniform Parentage Act \*

HARRY D. KRAUSE \*\*

Few areas of the law have changed more quickly and more profoundly than has the law of illegitimacy in the half dozen years just past. From an attitude of considerable discrimination against the child born out of wedlock, the law has moved toward legal equality between legitimate and illegitimate children. Beginning in 1968, the U.S. Supreme Court decided a series of cases on the basis of the Equal Protection Clause of the Federal Constitution which establish the principle that the illegitimate child is entitled to legal equality with the legitimate child in most substantive areas of the law. Numerous State statutes discriminating against illegitimate children have been declared unconstitutional, and the bulk of the remaining legislation on this subject is under severe constitutional doubt. So far, new legislation has been slow to fill the gap thus created. In the summer of 1973, however, the National Conference of Commissioners on Uniform State Laws adopted the "Uniform Parentage Act," earlier drafts of which were known as the "Uniform Legitimacy Act." In February 1974, the Act was approved by the House of Delegates of the American Bar Association, and the new Act is expected soon to fill the statutory void left by the developments in constitutional law.

What were those developments? The first two U.S. Supreme Court cases in which the law of illegitimacy was confronted with the equal protection clause held Louisiana's wrongful death statute unconstitutional insofar as it (1) did not allow illegitimate children to recover for the wrongful death of their mother (*Lery v. Louisiana*)<sup>1</sup> and (2) denied a mother recovery for the wrongful death of her illegitimate child. (*Gloria v. American Guarantee & Liability Insurance Co.*)<sup>2</sup> Had the children been legitimate, recovery would have been allowed in both situations. Over a vigorous dissenting opinion, authored by Justice Harlan, Justice Douglas wrote for the majority in the *Lery* case:

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.<sup>3</sup>

Subsequently, State and lower Federal court decisions reached varying results in dealing with the *father* and child relationship which, of

\* The Youngest Minority: Lawyers in Defense of Children, edited by Professor Sanford N. Katz, pages 92-116 (1974), A.B.A. Press. Reprinted with permission of A.B.A. Press.

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<sup>1</sup> 391 U.S. 68, 88 S.Ct. 1509 (1968).

<sup>2</sup> 391 U.S. 73, 88 S.Ct. 1515 (1968).

<sup>3</sup> 391 U.S. at 71, 72, 88 S.Ct. at 1511.

course was the area in which discrimination was most common and serious. In regard of the child's right to support and his right to bring a paternity action, many courts applied or extended *Lery* or *Giona*,<sup>8</sup> although some courts did not.<sup>9</sup> A similar situation developed in the area of the child's right of inheritance with some courts applying or extending *Lery* or *Giona*<sup>10</sup> and others refusing to do so.<sup>11</sup> Existing State statutes that allow a child born out of wedlock to inherit under limited conditions, usually pertaining to proof of paternity, generally were upheld.<sup>12</sup> Other cases concerned life insurance proceeds<sup>13</sup> and custody, visitation, and adoption.<sup>14</sup> Federal laws came under attack<sup>15</sup>

<sup>8</sup> *R. v. R.*, 431 A.W.2d 152 (Ma. 1968); *Storm v. Nona*, 57 Misc.2d 342, 291 N.Y.R.2d 515 (1968) (extended *Lery* and *Giona* to the illegitimate child's right of support from his father); *Trent v. Lowry*, 57 Misc.2d 382, 292 N.Y.R.2d 524 (1968) (in light of *Lery* and *Giona*, Uniform Support of Dependents Law must be applied to remove as far as possible the obstacles to equal treatment of the illegitimate child); *Munn v. Munn*, 168 Col. 76, 450 P.2d 68 (1969) (father's liability to his illegitimate child may not be greater than or different from his obligation to his legitimate child); *Wales v. Gallan*, 61 Misc.2d 661, 396 N.Y.R.2d 614 (1969) (2-year period of limitation on paternity suit brought by mother held unconstitutional in light of *Lery* and *Giona*. Court referred to child's right to have his paternity ascertained, but decided case on basis of the inequality presented by a 10-year period of limitations allowed to welfare authorities); *Lery v. Torrence*, 300 N.Y.R.2d 755 (Fam. Ct. 1970) (citing *Lery* and *Giona*, the court appointed a law guardian to represent an illegitimate child in a paternity action where the natural mother had defaulted and refused to cooperate).

<sup>9</sup> *Boston v. Sears*, 15 Ohio St.2d 164, 239 N.E.2d 62 (1968) (refused to extend *Lery* and *Giona* to the father's support obligation to the child, now overruled by *Franklin v. Julian*, 30 Ohio St.2d 228, 283 N.E.2d 813, 817 (1972)); *Kennely v. Davis*, 221 So.2d 415 (Fla. 1969), cert. denied, 394 U.S. 916, 90 S.Ct. 237 (1969) (married mother not permitted to bring paternity suit against natural father because a child born in wedlock is presumed to be the legitimate child of her husband. No violation of equal protection was seen because this situation of an unmarried mother having an illegitimate child was considered to be different from the situation of the married mother); *G. v. P.*, 406 A.W.2d 41, writ refused (Tex. Civ. App. 1971) (father of a child born out of wedlock has no civil support liability, *non reversa*. *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872 (1973)).

<sup>10</sup> *In re Estate of Jensen*, 163 N.W.2d 861 (N.D. 1968) (extended *Lery* to the right of illegitimate descendants to take through their mother in an intestacy situation).

<sup>11</sup> *In re Vincent*, 229 So.2d 449, 253 La. 480, writ refused, 231 So.2d 393 (La. 1969), *aff'd Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017 (1971); *Strahan v. Strahan*, 304 F. Supp. 40 (W.D. La. 1969), *aff'd* 444 F.2d 528 (1971); *Succession of Bush*, 223 So.2d 642 (La. App. 1969) (all refusing to extend *Lery* to the illegitimate child's right to take from his intestate father); *Estate of Caldwell*, 247 So.2d 1 (Fla. 1971) (refused to extend *Lery* and *Giona* to cover intestacy rights of illegitimate offspring in dispute between legitimate and illegitimate collateral).

<sup>12</sup> *In re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970) (discrimination based solely upon illegitimacy is not permissible under *Lery* and *Giona*, but Minnesota statute admitting to intestate succession only those illegitimate children who can produce an attested written declaration of paternity has a rational purpose and therefore is constitutional); *Burnett v. Camden*, 253 Ind. 354, 254 N.E.2d 199 (1970) *reh. denied* 253 N.E.2d 650 (1970) *cert. denied* 399 U.S. 901, 90 S.Ct. 2202 (1970) (*Lery* and *Giona* distinguished as cases where the question of blood relationship was not in issue, and Indiana statute providing that a child may inherit from his putative father only if paternity has been established by law or if the putative father has married the mother of the child and acknowledged the child as his, upheld as not denying equal protection).

<sup>13</sup> *In re Estate of R.L.B.*, 259 So.2d 206 (Fla. 1972) (life insurance proceeds as sole asset in estate ordered paid to orally acknowledged illegitimate child of decedent father, under Florida statute requiring such moneys—when made payable to the estate—to devolve to the spouse and children. While not specifically mentioning *Lery* or *Giona*, court held that requiring the illegitimate child to have been acknowledged by father in writing—as required by another statute applying to inheritance from the father—would “constitute an unconstitutional deprivation of rights”).

<sup>14</sup> *Extending Lery or Giona*: *R. v. P.*, 112 N.J. Super. 396, 273 A.2d 808, 816 (1971) (denying visitation rights to putative father of illegitimate child would deny father and child due process and equal protection).

<sup>15</sup> *Refusing to extend Lery or Giona*: *State ex rel. Lewis v. Lutheran Social Services of Wisconsin and Upper Michigan*, 47 Wis.2d 420, 178 N.W.2d 54 (1970). (Failure of Wisconsin statutes to grant parental rights or notice of hearing to putative father prior to termination of parental rights does not violate equal protection clause. *Reversed on remand*, see *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051, 92 S.Ct. 1484 (1972), *State ex rel. Lewis v. Lutheran Social Services of Wisconsin and Upper Michigan*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973)). *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 410, 263 N.E.2d 717 (1971) (father denied visitation rights relating to illegitimate child). *Lery or Giona* not discussed. *Reversed*, *Vanderlaan v. Vanderlaan*, 405 U.S. 1051, 92 S.Ct. 1484 (1972).

<sup>16</sup> (i) *Louishorshemen's and Harbor Worker's Compensation Act—Inalls Shipbuilding Corp. v. Neuman*, 322 F. Supp. 1229, 1245-47 (S.D. Miss. 1970) (dictum: require illegitimates to prove dependency—whereas legitimate children need not—probably would not be “invidious discrimination”).

(ii) *Federal Employees Group Life Insurance Act—Haley v. Metropolitan Life Ins. Co.*, 434 A.W.2d 7 (Ma. App. 1968) (extended *Lery* and *Giona* to include an illegitimate child in the definition of “child” under the Act).

(iii) *Jones Act—Hebert v. Petroleum Pipe Inspectors, Inc.*, 396 F.2d 237 (5th Cir.

(Continued)

as did State compensation laws such as workmen's compensation<sup>13</sup> and wrongful death acts.<sup>14</sup> To sum up, while *Levy* and *Giona* did not meet a unanimous response, many courts considered them to require equality between legitimate and illegitimate children in their legal relationship with their fathers.

It was a great surprise when, within three years of deciding *Levy* and *Giona*, the U.S. Supreme Court reached a conclusion in a case involving inheritance which many considered to be directly at odds with the earlier decisions.<sup>15</sup> *Labine v. Vincent*<sup>16</sup> refused to extend *Levy* to permit an illegitimate child to inherit from her intestate father under Louisiana law, although her father had acknowledged her during his lifetime. The *Labine* case was quickly seized upon by conservative courts to restrict *Levy* and *Giona* narrowly to their own facts and to refuse to accord the illegitimate child broader constitu-

(Continued)

1968) (extended *Levy* to include adulterous illegitimate offspring in the Act's definition of "children").

(iv) Servicemen's Group Life Insurance Act—Prudential Insurance Company v. Willis, 227 Ga. 619, 182 S.E.2d 420 (1971) (reversed lower court's decision which had treated an acknowledged illegitimate child of a deceased serviceman as a "child" under the Act. Child held not entitled to the proceeds of a serviceman's group life policy. Strong dissent relied on *Levy*). In accord, *Dobyns v. Prudential Insurance Co.*, 227 Ga. 233, 179 S.E.2d 915 (1971) (no reference to *Levy* or *Giona*).

(v) Copyright Act—Jerry Vogel Music Co. v. Edward B. Marks Music Corp., 425 F.2d 834 (2nd Cir. 1969) (refused to extend *Levy* and *Giona* to allow the assignee of deceased copyright holder's illegitimate daughter to claim copyright renewal rights in contest with assignee of deceased copyright holder's wife).

<sup>13</sup> *Stokes v. Aetna Cas. & Surety Co.*, 257 La. 424, 242 So.2d 567 (1971), see also *Weber v. Aetna*, discussed below. (Illegitimate child is entitled to collect workmen's compensation benefits related to father.)

<sup>14</sup> *Applying or extending Levy or Giona: Armijo v. Weaselius*, 73 Wash. 2d 716, 440 P.2d 471 (1968) (with reference to the equal protection argument, construed wrongful death statute to include illegitimate children of father within the term "child or children" just before *Levy* and *Giona* were decided); *Miles v. City-Parish Government*, 219 So.2d 320 (La. App. 1969) (allowed mother to sue for wrongful death of her illegitimate children); *In re Estate of Artiz*, 60 Misc.2d 756, 303 N.Y.S.2d 806 (1969) and *In re Estate of Perea*, 230 N.Y.S.2d 881 (Surrogate's Ct. 1972) (illegitimate child whose paternity was not formally established during the father's lifetime is entitled to recover for father's wrongful death. Statutory provisions to the contrary are abrogated by *Levy* and *Giona*.) *In re Estate of Ross*, 323 N.Y.S.2d 770 (Surrogate's Ct. 1971) (under *Levy* and *Giona*, illegitimate child is entitled to recover for father's wrongful death and to be issued letters of administration). *Weaks v. Mounter*, 493 P.2d 1307 (Nev. 1972) (*Levy* and *Giona* require that posthumous illegitimate child be allowed action for father's wrongful death, although father had not acknowledged paternity. Dissent acknowledges constitutional equality requirement, but seeks to distinguish *Levy* insofar as proof of maternity usually is clear—whereas proof of paternity are not met); *Accord, without dissent: Cannon v. Transamerican Freight Lines*, 37 Mich. App. 313, 194 N.W.2d 736 (1971); *Schmoll v. Crocay*, 54 N.J. 194, 254 A.2d 525 (1969) (*Levy* and *Giona* extended to allow illegitimate child wrongful death action for death of his father);

*Refusing to apply or extend Levy or Giona: Sanders v. Tillman*, 245 So.2d 198 (Miss. 1971) (illegitimate child may not recover for the wrongful death of his father where father had not legally acknowledged him during his lifetime. *Levy* and *Giona* distinguished on basis of ease of proving maternity and difficulty of proving paternity); *Reeves v. State Farm Mutual Automobile Insurance Co.*, 261 So.2d 320 (La. App. 1972) (denial of wrongful death action to illegitimate siblings not a denial of due process and equal protection. *Levy* and *Giona* interpreted as applicable only to the parent-child relationship, involving dependency or at least mutual support obligation). *City of West Palm Beach v. Cowart*, 241 So.2d 748 (Fla. App. 1970) (father not allowed an action for the wrongful death of his illegitimate child. *Giona* and *Levy* interpreted as applying to the mother and child relationship only); *George v. Bertrand*, 217 So.2d 47, writ refused 219 So.2d 177 (1968), cert. denied 394 U.S. 974, 90 S.Ct. 430 (1969) (legal husband of mother is presumed to be the father of a child born in wedlock, and father of illegitimate child may not recover for the wrongful death of his son. *Levy* and *Giona* distinguished).

<sup>15</sup> *F.g.*, H. Krause, *Illegitimacy: Law and Social Policy*, vii-ix (Preface) (1971).

<sup>16</sup> 401 U.S. 532, 91 S.Ct. 1017 (1971)

tional protection in the areas of support,<sup>16</sup> inheritance<sup>17</sup> as well as social security benefits.<sup>18</sup>

The surprise engendered by *Labine* in 1971 was surpassed when the Supreme Court again reversed its position in 1972. In a dramatic departure from *Labine*, the Court held that workmen's compensation benefits related to the death of their father are due to dependent, unacknowledged illegitimate children.<sup>19</sup> The Court said:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate State interest, compelling or otherwise.<sup>20</sup>

One of the first cases to apply *Weber* distinguished *Labine*, and enjoined enforcement of Social Security provisions discriminating against illegitimates by denying them benefits where the family award was not sufficient to meet maximum payments to wife and legitimate children.<sup>21</sup> The Court mentioned earlier, contrary decisions that had upheld the provisions on the strength of *Labine* but, in the light of *Weber*, viewed them as no longer controlling. Other cases followed and dealt with other subjects.<sup>22</sup>

<sup>16</sup> *Mitchell v. Mitchell*, 445 F.2d 722 (D.C. Cir. 1971) (distinguished *Lery* and *Glona* and applied *Labine* to hold that children resulting from a marital relationship were entitled to support before and in preference to an illegitimate child); *Lewis R.S. v. Richard D.* and the State of Texas, 375 F. Supp. 804 (N.D. Tex. 1971) (denied declaratory judgment to mother of illegitimate child that Texas support laws unconstitutionally exclude illegitimate children. Also denied injunction against state officials to require them to apply support laws to cover support for illegitimate children. Dissent distinguishes *Labine* and would apply *Lery* and *Glona* to allow action. *See infra*, note 23 for further development.

<sup>17</sup> *In re Estate of Hendrix*, 326 N.Y.S.2d 646 (Surrogate's Ct. 1971) statute conditioning illegitimate child's right to inherit from father on order of filiation during father's lifetime upheld. *Lery* and *Glona* distinguished and *Labine* held decisive). Similarly, *In re Estate of Belton*, 70 Miss. 2d 814, 373 N.Y.S.2d 177 (1972).

<sup>18</sup> *Parker v. Secretary of HEW*, 453 F.2d 850 (5th Cir. 1972) (applied *Labine* to hold that where a reduction of social security benefits is required because of a family maximum, benefits payable to an illegitimate child may be reduced first. Court held that "any doubt in regard to the legislature's power to distribute rights on the basis of status stemming from legitimate or illegitimate birth was resolved by *Labine*"). Accord *Garner v. Richardson*, 373 F. Supp. 1191 (N.D. Cal. 1971) ("In view of *Labine*, this Court cannot conclude that any "discrimination" in favor of legitimate children and against illegitimate children is violative of the principles of equal protection" (p. 1197)). *Watts v. Veneman*, 334 F. Supp. 452 (D.D.C. 1971) (Social Security Act provisions limiting benefits to illegitimate child whose father has acknowledged the child in writing, or who has been ordered by a court to support the child, or who has been judicially decreed to be the father, or who is shown by other evidence to be the child's father and to be living with or contributing to the child's support, held reasonably designed to bar spurious claims and, in light of *Labine*, held not to deny due process). *Johnson v. Finch*, 350 F. Supp. 945 (N.D. Tex., Dallas Div. 1972) (upheld the requirement of the Social Security Act that the wage earner have been living with his illegitimate children at the time of death to entitle them to receive benefits).

<sup>19</sup> *Weber v. Aetna Casualty & Surety Co.*, 408 U.S. 164, 92 S.Ct. 1400 (1972). The explanation is that the two Justices apparently most strongly opposing the new approach to illegitimacy had left the court just before *Weber* was decided: Justice Harlan had gone on record with his dissent in *Lery* and *Glona*, and Justice Black had authored the majority opinion in *Labine*.

<sup>20</sup> 408 U.S. at 175-76, 92 S.Ct. at 1406-07.

<sup>21</sup> *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972). Accord, *Williams v. Richardson*, 347 F. Supp. 544 (N.D.N.C. 1972). *See also Morris v. Richardson*, 346 F. Supp. 494 (N.D. Ga. 1972).

<sup>22</sup> For example, in *Butcher v. Pollard*, 32 Ohio App. 2d 1, 268 N.E.2d 204, 213 (1972) the court, looking at *Weber*, held that the word "children" in the beneficiary clause of a life insurance policy "must be construed to include all offspring, regardless of legitimacy." (on the authority of *Lery* and *Weber*, *Walker v. Walker*, 266 So.2d 385 (Fla. 1972) held invalid a mother's release of the putative father insofar as it purported to affect the child's rights.

In January, 1973, finally, the U.S. Supreme Court substituted consistency for its previous vacillation. At issue was the substantive right that is of the greatest importance to the illegitimate child—the right to support. The Court held that “once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother.”<sup>22</sup> Justices Stewart and Rehnquist dissented on technical grounds. Since then, lower courts have granted relief to the illegitimate child in a number of cases ranging from workmen’s compensation<sup>23</sup> to social security,<sup>24</sup> and the U.S. Supreme Court got into the act once more by striking down a New Jersey welfare statute which discriminated against illegitimates, with only Justice Rehnquist dissenting.<sup>25</sup>

In three decisions rendered in 1972, the U.S. Supreme Court had dealt with the converse of the child’s right to his father, namely the father’s rights concerning his child. A somewhat imprecise opinion, giving the father an interest in his illegitimate child’s custody and adoption, is causing difficulty with the adoption process in many States, as many courts and some legislatures have interpreted the cases to require notice of adoption even to the *unknown* father—by publication, if need be.<sup>27</sup>

The fair conclusion to be drawn from this long line of decisions is that State and Federal law may not discriminate between legitimate and illegitimate children in any significant substantive area other than inheritance. Unfortunately, this point has not yet been fully understood by State legislatures which have made little effort to date to enact new laws that agree with the constitutional mandate of equality.

At this point, the gulf between the abstract principle and the realization of legal equality between legitimate and illegitimate children looms very wide. The old law of illegitimacy is all but a dead letter, but the new law has not yet been implemented—which leaves the situation in a state of confusion that many lawyers and some judges find difficult to understand. But even if they did, lawyers and judges would be unable to deal with the situation effectively. The courts are not suited for broad-scale implementation of the constitutional mandate. The case by case battle over specific sections of specific statutes or rules of the common law could go on for decades without bringing meaningful results for the mass of illegitimates who now make up some ten percent of newly born children.

The Uniform Parentage Act is intended to fill this vacuum. Its

<sup>22</sup> *Gomez v. Perez*, 409 U.S. 535, 93 R.Ct. 872 (1973). Almost simultaneously, the mother of an illegitimate child sought to compel a local district attorney to bring a criminal prosecution of the child’s father for failure to render support. She relied on a Texas statute which had been consistently applied only to fathers of legitimate children and argued that the same remedy should be available in respect of her illegitimate child. Somewhat surprisingly, the Supreme Court denied the mother’s claim on technical grounds related to standing. *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146 (1973).

<sup>23</sup> *Carr v. Campbell Soup Co.*, 124 N.J. Super. 382, 207 A.2d 126 (1973).

<sup>24</sup> *Beatty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973) (paternity conceded); but cf. *Jimenez v. Richardson*, 353 F. Supp. 1356, 1361 (N.D. Ill. E.D. 1973) (upholding the rationality of requirements relating to proof of paternity on the basis of the government’s interest in preventing spurious claims).

<sup>25</sup> *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 93 S.Ct. 1700 (1973).

<sup>27</sup> *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972); *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051, 92 S.Ct. 1488 (1972); *Vanderlaan v. Vanderlaan*, 403 U.S. 1051, 92 S.Ct. 1488 (1972). See *infra*, text at note 35.

guiding principle is full equality for all children, legitimate and illegitimate, in their legal relationship with both parents (§§ 1, 2). Moreover, the Act emphasizes that the right in question is the right of the child (§§ 6(a), 9)—not the right of his mother as current State laws insist. Accordingly, the mother may not stand in her child's way and, if necessary, may be compelled to testify as to the father's identity and whereabouts—just as any other witness<sup>28</sup> (§ 10(b)).

Earlier drafts of the Act had contained detailed substantive provisions, but the Supreme Court cases just discussed obviated the need for them. Accordingly, the substance of the Act now is expressed in its first two sections. The remainder of the Act is largely concerned with the *sine qua non* of equal legal rights—the identification of the person against whom these rights may be asserted. In the context of the child born out of wedlock that person is the father. (To cover the rare case in which there may be uncertainty as to the mother, the Act permits a declaratory action on the question of maternal descent § 21)

In order to identify the father, the Act first sets up a network of presumptions which cover cases in which proof of external circumstances (in the simplest case, marriage between the mother and a man) indicate a particular man to be the probable father (§ 4). While perhaps no State now includes all these presumptions in its law, the presumptions are based on existing presumptions of "legitimacy" in State laws and do not represent a serious departure. Novel is that they have been collected under one roof. All presumptions of paternity are rebuttable in appropriate circumstances (§§ 4(b), 6 (a), (b)).

The ascertainment of paternity when no external circumstances presumptively point to a particular man as the father is the next major function of the Act (§§ 6-20). Particularly noteworthy is the pre-trial procedure which will greatly reduce the current high cost and inefficiency of paternity litigation by encouraging the voluntary settlement of cases (§§ 10-13). It is expected that, as soon as reliable blood test evidence becomes available on a large scale, the great majority of cases will be settled consensually in the light of such evidence.

In this connection, proposed legislation currently pending in the U.S. Congress should be considered.<sup>29</sup> That legislation looks toward the establishment of a national system of federally assisted child support enforcement and, in that connection, provides for an efficient system of blood typing:

**REGIONAL LABORATORIES TO ESTABLISH PATERNITY THROUGH ANALYSIS  
AND CLASSIFICATION OF BLOOD\***

Sec. 461. (a) The Secretary shall, after appropriate consultation and study of the use of blood typing as evidence in judicial proceedings to establish paternity, establish, or arrange for the establishment or designation of, in each region of the United States, a laboratory which he determines to be qualified to provide services in analyzing and classifying blood for the purpose of deter-

\* Deleted by House-Senate conferees on H.R. 17045 and did not become law.

<sup>28</sup> Possible questions concerning the mother's constitutional right to privacy are answered effectively in *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1972) See also H. Krause, *Illegitimacy: Law and Social Policy* 119-21 (1971).

<sup>29</sup> H.R. 3153, 93rd Cong., 1st Sess. (1973), the child support enforcement provisions of which—after having been passed by the Senate—remains in Conference at the time of this writing. Action is expected later this year. The legislation evolved from earlier proposals made in connection with H.R. 1 in 1972. An intermediate precursor was S. 2061, 93rd Cong. 1st Sess. (June 1973). See S. Rep. 93-553, Social Security Amendments of 1973 (H.R. 3153) 39-53 (1973), for a detailed exposition of the proposal.

mining paternity, and which is prepared to provide such services to courts and public agencies in the region to be served by it.

(b) Whenever a laboratory is established or designated for any region by the Secretary under this section, he shall take such measures as may be appropriate to notify appropriate courts and public agencies (including agencies administering any public welfare program within such region) that such laboratory has been so established or designated to provide services, in analyzing and classifying blood for the purpose of determining paternity, for courts and public agencies in such region.

(c) The facilities of any such laboratory shall be made available without cost to courts and public agencies in the region to be served by it.

(d) There is hereby authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

This is important legislation and, if passed, will revolutionize the establishment of paternity. It should be noted that centralized blood typing facilities similar to those contemplated in the proposal already exist in Oslo, Copenhagen and Stockholm. Over several decades, great expertise has been developed there.<sup>20</sup> The Scandinavian laboratories are distinguished not only in terms of their use of complex and advanced blood typing systems, but also in terms of highly developed safety procedures which assure accuracy of the results they report. This latter point may be the most important element of blood typing. There can be little doubt that it would be better not to admit blood tests into evidence at all than to admit unreliable evidence under the halo of scientific truth—as has too often been done in the United States where a recheck of a sample of even relatively simple tests revealed about one-third of them to have been in error!<sup>41</sup> The Copenhagen laboratory (and the practice in Stockholm and Oslo is similar) employs two sets of systems in “layers,” the routine blood group determination resulting in exclusion of paternity for about 70 percent of non-fathers and an extended blood group determination which increases paternity exclusions to about 90 percent of non-fathers. While an exclusion figure approximating 90 percent of men falsely named as fathers is impressive, cases which do not produce an exclusion are pursued further on the basis of a “blood group paternity index” by means of which the “probability” of the named man’s paternity is estimated.<sup>22</sup> That index compares the frequency of a given father-mother-child blood constellation in a sample of actual fathers with the blood constellation in a sample of non-fathers and is related to the constellation obtained in the case in question. If the resemblance exceeds 95 percent or falls below 5 percent, the result is reported to the court. At the outer limits, this approach produces *de facto* inclusions or exclusions. In less extreme cases, it produces interesting circumstantial evidence. It is of particular value when the relative likelihood of paternity of several possible fathers is to be compared.<sup>23</sup>

A joint committee of the American Medical Association and the American Bar Association currently is studying the whole subject of the use of blood typing evidence in paternity cases. A detailed report with specific findings is expected to be completed soon.<sup>24</sup>

<sup>20</sup> See generally, Henningsen, *Some Aspects of Blood Grouping in Cases of Disputed Paternity in Denmark*, 2 *Methods of Forensic Science* 200 (1963); Henningsen, *On the Application of Blood Tests to Legal Cases of Disputed Paternity*, 12 *Revue de Transfusion* 137 (1969); P. Andresen, *the Human Blood Groups* 73 (1952).

<sup>21</sup> See Wiener, Foreward, L. Susman, *Blood Grouping Tests—Medico-legal Uses*, ix (1968). See also Wiener, *Problems and Pitfalls in Blood Grouping Tests for Non-Parentage*, 15 *J. Forensic Medicine* 104, 126 (1968).

<sup>22</sup> See Gürtler, *Principles of Blood Group Statistical Evaluation of Paternity Cases at the University Institute of Forensic Medicine, Copenhagen*, 8 *Acta Medicinæ et Socialis* 83 (1956).

<sup>23</sup> See generally, Krane, *Illegitimacy: Law and Social Policy*, 123-144 (1971).

<sup>24</sup> See 13 *Family L. Newsletter*, ABA Section of Family Law 5-6 (No. 2, August, 1972). As co-chairman of the Committee (representing the ABA), the author should be happy to provide details to interested persons on request.

To provide every infant with the means to exercise his rights rather than leave his fortunes to the possibly conflicting interests of his mother or the views of the social worker, the draft of the Act that the Committee submitted to the Conference contained the following provision in Section 6(c):

If a child has no presumed father under Section 4 and the action to determine the existence of the father and child relationship has not been brought and proceedings to adopt the child have not been instituted within [1] year after the child's birth, an action to determine the existence of the relationship shall be brought promptly on behalf of the child by the [appropriate State agency].

Regrettably, this provision was stricken from the final draft by a successful motion from the floor of the Conference. In the press of the afternoon's business, the Conference failed to see the Committee's argument that substantive equality is an empty promise, so long as the father remains unknown.

The Uniform Parentage Act contains appropriate provisions for setting the level of support, the enforcement of judgments, and deals with related issues such as custody. The custody problem has been complicated by the U.S. Supreme Court's decisions in the three cases referred to above.<sup>25</sup> In *Stanley*, the father of an illegitimate child who had long lived with the mother and children in a *de facto* family unit was held entitled to notice and a hearing in proceedings involving the custody of his child. In *Rothstein*, the Court remanded a case involving an unmarried father challenging a completed adoption to the Wisconsin Supreme Court for decision in the light of *Stanley*. In *Vanderlouw*, the Court remanded to the Appellate Court of Illinois a case involving a father's claim to visitation rights concerning his illegitimate children.

These cases are exerting a significant effect on adoptions of illegitimate children. Substantial uncertainty persists concerning the precise meaning of "due process" in this context.<sup>26</sup> For instance, the Supreme Court of Illinois has applied *Stanley* to a fact situation involving an alleged father who claimed his child born out of wedlock from an adoption agency to which the mother had surrendered the child upon birth.<sup>27</sup> The Wisconsin Supreme Court, in deciding the *Rothstein* remand, held that there can be no valid adoption without a valid termination of parental rights of the unmarried father.<sup>28</sup> Many lower State courts have interpreted the *Stanley* case very broadly, probably overly broadly, and the adoption process has become cumbersome and insecure. Even more importantly, in the scramble to reduce the feared impact of *Stanley* on adoptions, some legislatures have let themselves be stampeded into passing inadequate legislation, ranging from the ineffective to the ridiculous.

An example in the latter category is a new Michigan statute which requires the unmarried father to file what might be called a "notice of fornication" with the Probate Court prior to the birth of a child. This notice must be coupled with an advance acknowledgment of the child's right to support and education as well as the mother's pregnancy-related expenses. If such a notice is not filed, any claim to a

<sup>25</sup> *Supra*, note 27.

<sup>26</sup> *Cf. Armstrong v. Manzo*, 380 U.S. 543, 85 S.Ct. 1187 (1965).

<sup>27</sup> *Slawek v. Covenant Children's Home*, 52 Ill.2d 20, 284 N.E.2d 291 (1972).

<sup>28</sup> *State ex rel. Lewis v. Lutheran Social Services of Wisconsin and Upper Michigan*, 50 Wis. 2d 1, 207 N.W.2d 826 (1973).

child that might be born as a result of the intercourse with the mother is lost.<sup>29</sup>

It is difficult to classify this statute as anything but an absurdity on its face. Aside from other defects, this provision could not bar the father who was not aware of the mother's pregnancy. Moreover, to condition a man's constitutional rights on his acknowledgment of support obligations with respect to a child that has not seen the light of day and that may or may not be his, is of very doubtful validity. Finally, is it sound policy to allow any man to file such notices with regard to any woman who cannot disprove that he has had intercourse with her? In this connection, it should be noted that the probate court is charged with transmitting such notices to the vital records division of the department of public health, with a copy to the woman (whether she is married or not)!<sup>30</sup>

The Uniform Parentage Act provides an efficient procedure by which the rights of the *disinterested* unmarried father may be terminated. Delay and interference with the adoption process is kept to the minimum believed to be consistent with a reasonable interpretation of the *Stanley* case (§ 24). Specifically, the Act focuses on the case in which the father has not been formally ascertained and the mother seeks to surrender the child for adoption. In the light of the U.S. Supreme Court's decisions and related State court decisions, the Committee thought it essential that the unknown or unascertained father's potential rights be terminated formally in order to safeguard adoptions. Under the procedure provided by the Act, the court must try to ascertain the identity of the father, but very speedy termination of his potential rights may be had if *he shows no interest in the child* or if a reasonable effort provides no clue to his identity (§ 24(c)(d)(e)). Since that will be the typical case, the vast majority of children will be free for adoption very quickly. If, on the other hand, the natural father or a man representing himself to be the natural father claims custodial rights, the court has authority to determine custodial rights (§ 24(d)). In a case in which the man alleging himself to be the father is clearly unfit, the court would proceed to terminate his potential parental rights without deciding whether he actually is the father of the child. If, on the other hand, the man alleging himself to be the father and claiming custody is *prima facie* fit to have custody of the

<sup>29</sup> Mich. Comp. Laws Ann. vol. 37, § 710.2a (Supp. 1973-74):

"Sec. 2a. (1) Release for the purpose of adoption given only by a mother of a child born out of wedlock is sufficient and rights of any putative father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the probate court prior to the birth of the child, a notice of intent to claim paternity on such forms as shall be provided by the director of the department of public health. The notice shall contain his name and address, the name and the last known address of the mother and the month and year of the expected birth of the child. On the next business day after receipt of the notice the probate court shall transmit the notice of the department of public health, vital records division, and send a copy to the mother at her stated address. The notice is admissible in any action for paternity under Act No. 205 of the Public Acts of 1956, as amended, being sections 722.711 to 722.759 of the Compiled Laws of 1948, shall estop the claimant from denying his paternity of such child thereafter and shall contain language that he acknowledges liability for contribution to the support and education of the child after its birth and for contribution to the pregnancy-related medical expenses of the mother. The notice shall be conclusive evidence under this act or Act No. 205 of the Public Acts of 1956, as amended, unless the mother denies that the claimant is the father."

<sup>30</sup> Aside from the obvious vulnerability of the statute under *Stanley*, the following possible routes of constitutional attack might be considered (1) on behalf of the father, *Doe v. Rampton*, 386 F. Supp. 189 (D. Utah C.D. 1973), (2) on behalf of the mother, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965), *Doe v. Norton*, *supra*, note 28, notwithstanding, and (3) on behalf of the child, the whole line of U.S. Supreme Court cases just discussed.

child, an action to ascertain paternity is indicated, unless a voluntary acknowledgment can be obtained in accordance with the Act (§ 4(a) (5)). As to the determination of unfitness, the grounds generally applicable would control. An attempt to single out the unmarried father probably would be unconstitutional.<sup>41</sup>

A constitutional question is raised by a provision (§ 24(e)) attempting to cut off after a given period any claim seeking to reopen a judgment terminating parental rights. While questionable, such a provision is not without precedent. A similar provision is contained in Section 15(b) of the revised Uniform Adoption Act, approved by the Commissioners on Uniform State Laws in 1960, and other similar provisions are contained in the adoption acts of a number of States. In defense of that provision, it must be considered that the case of adoption differs from most other situations. A parent's claim to his child should not be compared to a person's claim to property. The Supreme Court itself recognized that the interest of the child is heavily involved in these cases when remanding the *Rothstein* case to the Wisconsin Supreme Court. It required that the Wisconsin court give "due consideration of the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time."<sup>42</sup>

The following footnote in *Stanley v. Illinois* caused great concern and confusion:

We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. *The Illinois law governing procedure in juvenile cases . . . provides for personal service, notice by certified mail or by notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "all whom it may concern." Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.*<sup>43</sup>

This footnote has been interpreted by some to require publication in all cases in which a child with unascertained paternity is surrendered for adoption, despite the fact that in many such cases it will be highly improbable that publication will lead to the identification of the father. In view of that and the probability that publication will lead to substantial embarrassment for the mother, the Act allows the court to determine whether, in the particular circumstances of each case, publication would be likely to lead to the identification of the father. If identification seems improbable, the court may dispense with publication (§ 24(d)). It was considered relevant that an in-

<sup>41</sup> As a good, though only partial answer to *Stanley*, consider newly enacted Ill. Rev. Stat. ch. 4 § 2.1-ID(K) which provides that "failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after its birth" is a ground for an adjudication of parental unfitness and consequent termination of parental rights. This clause should protect an adoption against at least the father who knew of the birth of his illegitimate child, had an opportunity to "show interest, concern or responsibility," and who failed to avail himself of it.

<sup>42</sup> *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1061, 92 S.Ct. 1488 (1973).

<sup>43</sup> Emphasis added, 405 U.S. at 657, 92 S.Ct. at 1215, 1216.

discriminate publication requirement probably would cause an appreciable number of mothers to withhold their children from adoption even where adoption would be in the child's best interest.

To conclude, in providing substantive legal equality for all children regardless of the marital status of their parents, the present Act no more than fulfills the mandate of the Constitution. With the exception of the child's right to inherit from his intestate father, which a growing number of States has provided without constitutional compulsion, the equal treatment provided by the Act is not the Conference's "wishful thinking." It is the law of the land. And now the Act may speak for itself.

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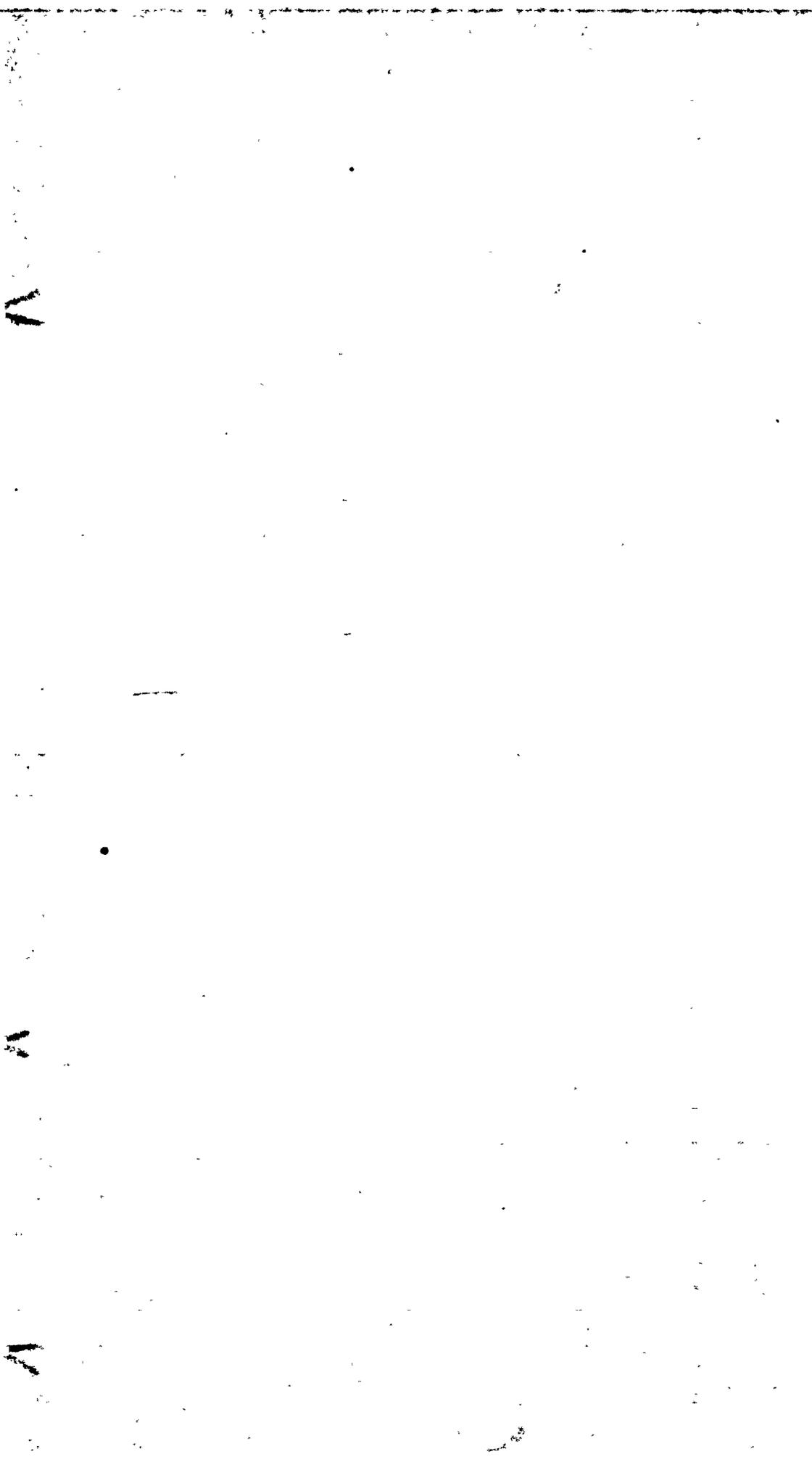
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**V. APPENDIXES**

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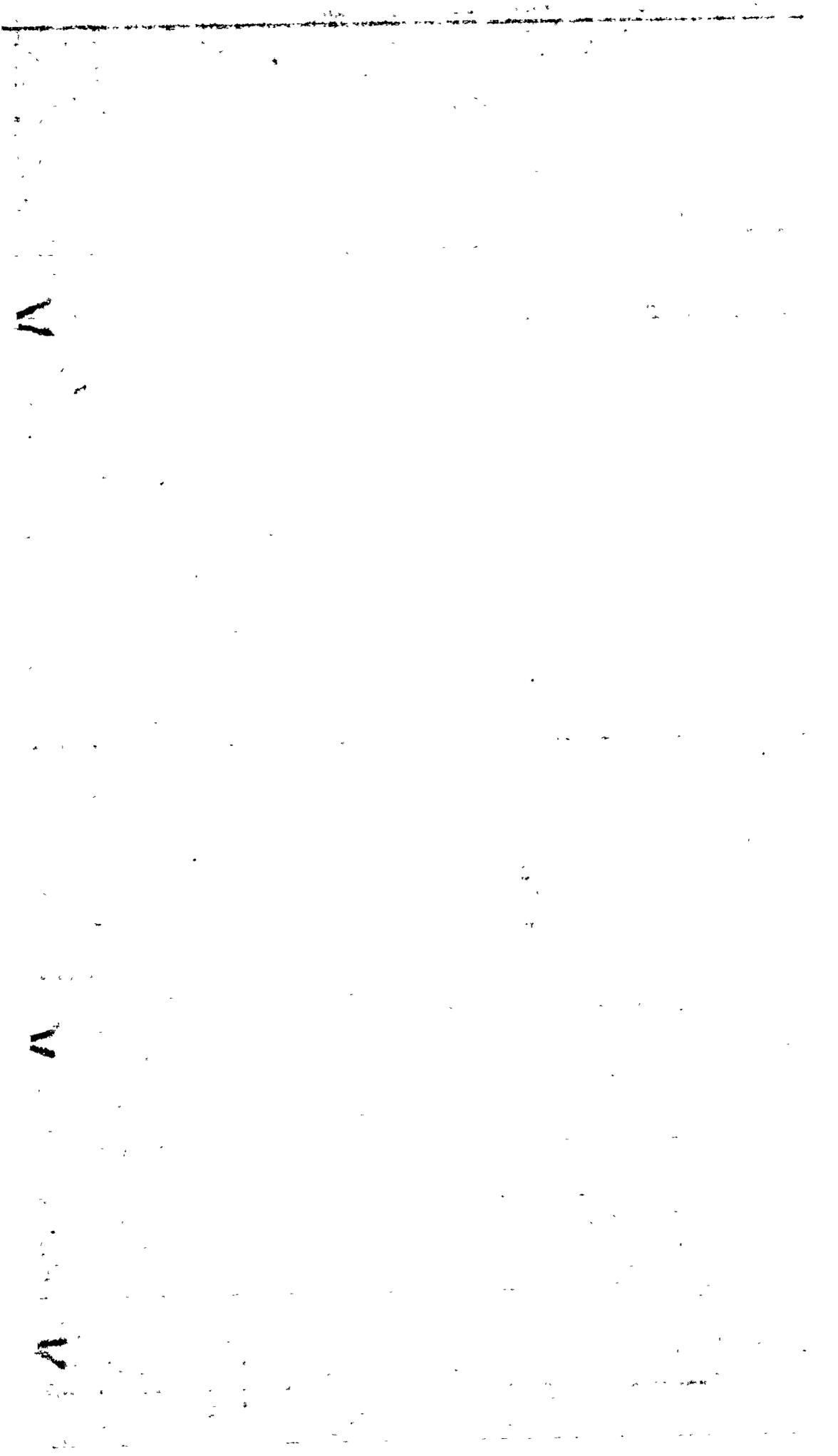
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**Appendixes**  
**CONTENTS**

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	<b>Page</b>
<b>A. Washington Revised Code—Chapter 74.90A.....</b>	<b>265</b>
<b>B. State Statutes for Ascertainment of Paternity.....</b>	<b>281</b>
<b>C. Provisions of State Divorce Laws.....</b>	<b>282</b>



## V. APPENDIXES

### Appendix A. Washington Revised Code

#### (PUBLIC ASSISTANCE)

### CHAPTER 74.20A—SUPPORT OF DEPENDENT CHILDREN—ALTERNATIVE METHOD— 1971 ACT<sup>1</sup>

#### Sections:

- 74.20A.010 Purpose—Remedies additional.
- 74.20A.020 Definitions.
- 74.20A.030 Payment of public assistance for child constitutes debt to department by natural or adoptive parents—Limitations—Department subrogated to rights.
- 74.20A.040 Notice of support debt based upon subrogation to or assignment of judgment—Service or mailing—Contents—Action on, when.
- 74.20A.050 Notice of support debt based upon payment of public assistance—Service—Contents—Collection warrant—Fair hearing—Filing and serving of liens—Bond to release liens.
- 74.20A.055 Notice and finding of financial responsibility of responsible parent—Alternative procedure.
- 74.20A.060 Assertion of lien—Effect.
- 74.20A.070 Service of lien.
- 74.20A.080 Order to withhold and deliver—Issue and service—Contents—Effect—Delivery of property—Bond to release.
- 74.20A.090 Certain amount of earnings exempt from lien or order—“Earnings” and “disposable earnings” defined.
- 74.20A.100 Civil liability upon failure to comply with order or lien.
- 74.20A.110 Release of excess to debtor.
- 74.20A.120 Banks, savings and loan associations, service effective only as to branch office served.
- 74.20A.130 Distraint, seizure and sale of property subject to liens under RCW 74.20A.060, procedure.
- 74.20A.140 Action for foreclosure of support lien—Satisfaction.
- 74.20A.150 Satisfaction of lien after foreclosure proceedings instituted—Redemption.
- 74.20A.160 Secretary may set debt payment schedule.
- 74.20A.170 Secretary may release lien or order or return seized property—Effect.
- 74.20A.180 Secretary may make demand, file and serve liens, when payments appear in jeopardy.
- 74.20A.190 Interest on debts due—Waiver.
- 74.20A.200 Judicial relief—Limitations.
- 74.20A.210 Unidentifiable moneys held in special account.

<sup>1</sup> Through first extraordinary session of 1974.

- 74.20A.220 Charging off child support debts as uncollectible.  
74.20A.230 Employee debtor rights protected—Limitation.  
74.20A.240 Assignment of earnings to be honored—Effect.  
74.20A.250 Receipt of public assistance for a child as assignment of rights in support obligation—Secretary as attorney for endorsing drafts.  
74.20A.260 Industrial insurance disability compensation payments subject to lien and order to withhold and deliver.  
74.20A.900 Severability—Alternative when method of notification held invalid.

#### **74.20A.010 Purpose—Remedies additional**

Common law and statutory procedures governing the remedies for enforcement of support for financially dependent minor children by responsible parents have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency. The increasing workload of courts, prosecuting attorneys, and the attorney general has made such remedies uncertain, slow and inadequate, thereby resulting in a growing burden on the financial resources of the state, which is constrained to provide public assistance grants for basic maintenance requirements when parents fail to meet their primary obligations. The state of Washington, therefore, exercising its police and sovereign power, declares that the common law and statutory remedies pertaining to family desertion and nonsupport of minor dependent children shall be augmented by additional remedies directed to the real and personal property resources of the responsible parents. In order to render resources more immediately available to meet the needs of minor children, it is the legislative intent that the remedies herein provided are in addition to, and not in lieu of, existing law. It is declared to be the public policy of this state that this chapter be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through welfare programs.

#### **74.20A.020 Definitions**

Unless a different meaning is plainly required by the context, the following words and phrases as hereinafter used in this chapter shall have the following meanings:

(1) "Department" means the state department of social and health services.

(2) "Secretary" means the secretary of the department of social and health services, his designee or authorized representative.

(3) "Dependent child" means any person under the age of twenty-one who is not otherwise emancipated, self-supporting, married, or a member of the armed forces of the United States.

(4) "Superior court order" means any judgment or order of the superior court of the state of Washington or an order of a court of comparable jurisdiction of another state ordering payment of a set or determinable amount of support moneys.

(5) "Responsible parent" means the natural or adoptive parent of a dependent child.

#### **74.20A.030 Payment of public assistance for child constitutes debt to department by natural or adoptive parents—Limitations—Department subrogated to rights**

Except as provided in this section, any payment of public assistance money made to or for the benefit of any dependent child or children

creates a debt due and owing to the department by the natural or adoptive parent or parents who are responsible for support of such children in an amount equal to the amount of public assistance money so paid: *Provided*, That where there has been a superior court order, the debt shall be limited to the amount provided for by said order. The department shall have the right to petition the appropriate superior court for modification of a superior court order on the same grounds as a party to said cause. Where a child has been placed in foster care, and a written agreement for payment of support has been entered into by responsible parent or parents and the department, the debt shall be limited to the amount provided for in said agreement: *Provided*, That if a court order for support is or has been entered, the provisions of said order shall prevail over the agreement. The department shall adopt rules and regulations, based on ability to pay, with respect to the level of support to be provided for in such agreements, or modifications of such agreements based on changed circumstances.

The department shall be subrogated to the right of said child or children or person having the care, custody, and control of said child or children to prosecute or maintain any support action or execute any administrative remedy existing under the laws of the state of Washington to obtain reimbursement of moneys thus expended. If a superior court order enters judgment for an amount of support to be paid by an obligor parent, the department shall be subrogated to the debt created by such order, and said money judgment shall be deemed to be in favor of the department. This subrogation shall specifically be applicable to temporary spouse support orders, family maintenance orders and alimony orders up to the amount paid by the department in public assistance moneys to or for the benefit of a dependent child or children but allocated to the benefit of said children on the basis of providing necessities for the caretaker of said children.

Debt under this section shall not be incurred by nor at any time be collected from a parent or other person who is the recipient of public assistance moneys for the benefit of minor dependent children for the period such person or persons are in such status.

**74.20A.040 Notice of support debt based upon subrogation to or assignment of judgment—Service or mailing—Contents—Action on, when**

The secretary may issue a notice of a support debt accrued and/or accruing based upon subrogation to or assignment of the judgment created by a superior court order. Said notice may be served upon the debtor in the manner prescribed for the service of a summons in a civil action or be mailed to the debtor at his last known address by certified mail, return receipt requested, demanding payment within twenty days of the date of receipt. Said notice of debt shall include a statement of the support debt accrued and/or accruing, computable on the amount required to be paid under any superior court order to which the department is subrogated or has an assigned interest; a statement that the property of the debtor is subject to collection action; a statement that the property is subject to lien and foreclosure, distraint, seizure and sale, or order to withhold and deliver; and a statement that the net proceeds will be applied to the satisfaction of the support debt. Action to collect said subrogated or assigned support

debt by lien and foreclosure, or distraint, seizure and sale, or order to withhold and deliver shall be lawful after twenty days from the date of service upon the debtor or twenty days from the receipt or refusal by the debtor of said notice of debt.

**74.20A.059 Notice of support debt based upon payment of public assistance — Service — Contents — Collection warrant—Fair hearing—Filing and serving of liens—Bond to release liens**

In the absence of a superior court order the secretary may issue a notice of a support debt accrued and/or accruing based upon payment of public assistance to or for the benefit of any dependent child or children. Said notice of debt shall be served upon the debtor in the manner prescribed for the service of summons in a civil action, including summons by publication where appropriate and necessary. The notice of debt shall include a statement of the support debt accrued and/or accruing, computable on the basis of the amount of public assistance previously paid and to be paid in the future; a statement of the amount of the monthly public assistance payment; a statement of the name of the recipient and the name of the child or children for whom assistance is being paid; a demand for immediate payment of the support debt or in the alternative, a demand that the debtor make answer within twenty days of the date of service to the secretary stating defenses to liability under RCW 74.20A.080; a statement that if no answer is made on or before twenty days from the date of the service, the support debt shall be assessed and determined subject to computation, and is subject to collection action; a statement that the property of the debtor will be subject to lien and foreclosure, distraint, seizure and sale, or order to withhold and deliver. If no answer is had by the secretary to the notice of debt on or before twenty days of the date of service, the support debt shall be assessed and determined subject to computation and the secretary shall issue a collection warrant authorizing collection action under this chapter. If the debtor, within twenty days of date of service of the notice of debt, makes answer to the secretary alleging defenses to liability under RCW 74.20A.080, said debtor shall have the right to a fair hearing pursuant to RCW 74.08.070 and 74.08.090. The decision of the department in the fair hearing shall establish the liability of the debtor, if any, for repayment of public assistance moneys expended to date as an assessed and determined support debt. Action by the secretary under the provisions of this chapter to collect said support debt shall be lawful from the date of issuance of the decision in the fair hearing. If the secretary reasonably believes that the debtor is not a resident of this state, or is about to move from this state, or has concealed himself, absconded, absented himself or has removed or is about to remove, secrete, waste, or otherwise dispose of property which could be made subject to collection action to satisfy the support debt, the secretary may file and serve liens pursuant to RCW 74.20A.060 and 74.20A.070 during pendency of the fair hearing or thereafter, whether or not appealed: *Provided*, That no further action under RCW 74.20A.080, 74.20A.180 and 74.20A.140 may be taken on such liens until final determination after fair hearing and/or appeal. The secretary shall in such cases, make and file in the record of the fair hearing an affidavit stating the reasons upon which said belief is

founded: *Provided*, That the debtor may furnish a good and sufficient bond satisfactory to the secretary during pendency of the fair hearing, or thereafter, and in such case liens filed shall be released. If the decision of the fair hearing is in favor of the debtor, all liens filed shall be released.

**74.20A.055 Notice and finding of financial responsibility of responsible parent—Alternative procedure**

As an alternative to the hearing and appeal procedures provided in RCW 74.20A.050, the secretary may, in the absence of a superior court order, serve on the responsible parent a notice and finding of financial responsibility requiring a responsible parent to appear and show cause in a hearing held by the department why the finding of responsibility and/or the amount thereof is incorrect, should not be finally ordered, but should be rescinded or modified. This notice and finding shall relate to the support debt accrued and/or accruing under this chapter and/or RCW 26.16.906, including periodic payments to be made in the future for such period of time as the child or children of said responsible parent are in need. Said hearing shall be held pursuant to this 1978 amendatory act, chapter 34.04 RCW, and the rules and regulations of the department, which shall provide for a fair hearing.

The notice and finding of financial responsibility shall be served in the same manner prescribed for the service of a summons in a civil action. Any responsible parent who objects to all or any part of the notice and finding shall have the right for not more than twenty days from the date of service to request in writing a hearing, which request shall be served upon the secretary or his designee by registered or certified mail or personally. If no such request is made, the notice and finding of responsibility shall become final. If a request is made, the execution of notice and finding of responsibility shall be stayed pending the decision on such hearing, or any direct appeal to the courts from that decision. Hearings may be held in the county of residence or other place convenient to the responsible parent. Any such hearing shall be a "contested case" as defined in RCW 34.04.010. The notice and finding of financial responsibility shall set forth the amount the department has determined the responsible parent owes, the support debt accrued and/or accruing, and, as appropriate, the amount to be paid thereon each month, all computable on the basis of the amount of the monthly public assistance payment previously paid, or need alleged, and the ability of the responsible parent to pay all, or any portion of the amount so paid and/or being paid and/or to be paid. The notice and finding shall also include a statement of the name of the recipient or custodian and the name of the child or children for whom assistance is being paid or need is alleged; and/or a statement of the amount of periodic future support payments as to which financial responsibility is found.

The notice and finding shall include a statement that the responsible parent may object to all or any part of the notice and finding, request a hearing to show cause why said responsible parent should not be determined to be liable for any or all of the debt, past and future, determined, and the amount to be paid thereon.

The notice and finding shall also include a statement that if the responsible parent fails to request a hearing that the support debt and payments stated in the notice and finding, including periodic support payments in the future, shall be assessed and determined and ordered by the department and that this debt shall be subject to collection action; a statement that the property of the debtor, without further advance notice or hearing, will be subject to lien and foreclosure, distraint, seizure and sale, or order to withhold and deliver to satisfy the debt.

If a hearing is requested, it shall be promptly scheduled, in no more than thirty days. The hearing examiner shall determine the liability and responsibility, if any, of the alleged responsible parent under RCW 74.20A.030, and shall also determine the amount of periodic payments to be made to satisfy past, present or future liability under RCW 74.20A.030 and/or 26.16.205. In making these determinations, the hearing examiner shall include in his considerations (1) the necessities and requirements of the child or children, exclusive of any income of the custodian of said child or children, (2) the amount of support debt claimed, (3) the public policy and intent of the legislature to require that children be maintained from the resources of responsible parents thereby relieving to the greatest extent possible the burden borne by the general citizenry through welfare programs, and (4) the abilities and resources of the responsible parent.

If the responsible parent fails to appear at the hearing, upon a showing of valid service, the hearing examiner shall enter a decision and order declaring the support debt and payment provisions stated in the notice and finding of financial responsibility to be assessed and determined and subject to collection action. Within fifteen days of entry of said decision and order, the responsible parent may petition the department to vacate said decision and order upon a showing of any of the grounds enumerated in RCW 4.72.010.

The hearing examiner shall, within twenty days of the hearing, enter findings, conclusions and a final decision determining liability and responsibility and/or future periodic support payments. The determination of the hearing examiner entered pursuant to this section shall be entered as a decision and order and shall limit the support debt under RCW 74.20A.030 to the amounts stated in said decision: *Provided*, That said decision establishing liability and/or future periodic support payments shall be superseded upon entry of a superior court order for support to the extent the superior court order is inconsistent with the hearing order or decision: *Provided further*, That in the absence of a superior court order either the responsible parent or the department may petition the secretary or his designee for issuance of an order to appear and show cause based on a showing of good cause and material change of circumstances, to require the other party to appear and show cause why the decision previously entered should not be prospectively modified. Said order to appear and show cause together with a copy of the affidavit upon which the order is based shall be served in the manner of a summons in a civil action on the other party by the petitioning party. A hearing shall be set not less than fifteen nor more than thirty days from the date of service, unless extended for good cause shown. Prospective modification may be

ordered, but only upon a showing of good cause and material change of circumstances.

The department, in its original determinations, and the hearing examiner in making determinations based on objections to original determinations or on petitions to modify, shall consider the standards promulgated pursuant to RCW 74.20.070 and any standards for determination of support payments used by the superior court of the county of residence of the responsible parent.

Debts determined pursuant to this section, accrued and not paid, are subject to collection action under this chapter without further necessity of action by the hearing examiner.

"Need" as used in this section shall mean the necessary costs of food, clothing, shelter and medical attendance for the support of a dependent child or children.

#### **74.20A.060 Assertion of lien—Effect**

Twenty-one days after receipt or refusal of notice of debt under provisions of RCW 74.20A.040, or twenty-one days after service of notice of debt, or as otherwise appropriate under the provisions of RCW 74.20A.050, a lien may be asserted by the secretary upon the real or personal property of the debtor. The claim of the department for a support debt, not paid when due, shall be a lien against all property of the debtor with priority of a secured creditor. This lien shall be separate and apart from, and in addition to, any other lien created by, or provided for, in this title. The lien shall attach to all real and personal property of the debtor on the date of filing of such statement with the county auditor of the county in which such property is located. A lien against earnings shall attach and be effective subject to service requirements of RCW 74.20A.070 upon filing with the county auditor of the county in which the employer does business or maintains an office or agent for the purpose of doing business.

Whenever a support lien has been filed and there is in the possession of any person, firm, corporation, association, political subdivision or department of the state having notice of said lien any property which may be subject to the support lien, such property shall not be paid over, released, sold, transferred, encumbered or conveyed, except as provided for by the exemptions contained in RCW 74.20A.090 and 74.20A.130, unless a written release or waiver signed by the secretary has been delivered to said person, firm, corporation, association, political subdivision or department of the state or unless a determination has been made in a fair hearing pursuant to RCW 74.20A.050 or by a superior court ordering release of said support lien on the basis that no debt exists or that the debt has been satisfied.

#### **74.20A.070 Service of lien**

The secretary may at any time after filing of a support lien serve a copy of said lien upon any person, firm, corporation, association, political subdivision or department of the state in possession of earnings, or deposits or balances held in any bank account of any nature which are due, owing, or belonging to said debtor. Said support lien shall be served upon the person, firm, corporation, association, political subdivision or department of the state either in the manner prescribed for the service of summons in a civil action or by certified mail, return receipt requested. No lien filed under RCW 74.20A.060 shall have

any effect against earnings or bank deposits or balances unless it states the amount of the support debt accrued and unless service upon said person, firm, corporation, association, political subdivision or department of the state in possession of earnings or bank accounts, deposits or balances is accomplished pursuant to this section.

**74.20A.060 Order to withhold and deliver—Issue and service—Contents—Effect—Delivery of property—Bond to release**

After service of a notice of debt as provided for in RCW 74.20A.040 stating a support debt accrued and/or accruing based upon subrogation to or assignment of the amount required to be paid under any superior court order or whenever a support lien has been filed pursuant to RCW 74.20A.060, the secretary is hereby authorized to issue to any person, firm, corporation, association, political subdivision or department of the state, an order to withhold and deliver property of any kind including, but not restricted to, earnings which are due, owing, or belonging to the debtor, when the secretary has reason to believe that there is in the possession of such person, firm, corporation, association, political subdivision or department of the state property which is due, owing, or belonging to said debtor. The order to withhold and deliver which shall also be served upon the debtor, shall state the amount of the support debt accrued, and shall state in summary the terms of RCW 74.20A.090 and 74.20A.100. The order to withhold and deliver shall be served in a manner prescribed for the service of a summons in a civil action or by certified mail, return receipt requested. Any person, firm, corporation, association, political subdivision or department of the state upon whom service has been made is hereby required to answer said order to withhold and deliver within twenty days, exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of therein. In the event there is in the possession of any such person, firm, corporation, association, political subdivision or department of the state any property which may be subject to the claim of the department of social and health services, such property shall be withheld immediately upon receipt of the order to withhold and deliver and shall after the twenty day period, upon demand, be delivered forthwith to the secretary. The secretary shall hold said property in trust for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or nonliability. In the alternative, there may be furnished to the secretary a good and sufficient bond, satisfactory to the secretary, conditioned upon final determination of liability. Where money is due and owing under any contract of employment, express or implied, or is held by any person, firm, corporation, or association, political subdivision or department of the state subject to withdrawal by the debtor, such money shall be delivered by remittance payable to the order of the secretary. Delivery to the secretary of the money or other property held or claimed shall satisfy the requirement of the order to withhold and deliver. Delivery to the secretary shall serve as full acquittance and the state warrants and represents that it shall defend and hold harmless for such actions persons delivering money or property to the secretary pursuant to this chapter. The state also warrants and represents that it shall defend and hold harmless for such actions persons withholding money or property pursuant to

this chapter. The foregoing is subject to the exemptions contained in RCW 74.90A.090 and 74.90A.180.

**74.90A.090 Certain amount of earnings exempt from lien or order  
—“Earnings” and “disposable earnings” defined**

Whenever a support lien or order to withhold and deliver is served upon any person, firm, corporation, association, political subdivision or department of the state asserting a support debt against earnings and there is in the possession of such person, firm, corporation, association, political subdivision, or department of the state, any such earnings, RCW 7.33.280 shall not apply, but fifty percent of the disposable earnings shall be exempt and may be disbursed to the debtor whether such earnings are paid, or to be paid weekly, monthly, or at other regular intervals and whether there be due the debtor earnings for one week or for a longer period. The lien or order to withhold and deliver shall continue to operate and require said person, firm, corporation, association, political subdivision, or department of the state to withhold the nonexempt portion of earnings at each succeeding earnings disbursement interval until the entire amount of the support debt stated in the lien or order to withhold and deliver has been withheld. As used in this chapter, the term “earnings” means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and specifically includes periodic payments pursuant to pension or retirement programs, or insurance policies of any type, but does not include payments by any department or division of the state based upon inability to work or obtain employment. Earnings shall specifically include all gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital assets. The term “disposable earnings” means that part of the earnings of any individual remaining after the deduction from those earnings of any amount be required by law to be withheld.

**74.90A.100 Civil liability upon failure to comply with order or lien**

Should any person, firm, corporation, association, political subdivision or department of the state fail to make answer to an order to withhold and deliver within the time prescribed herein; or fail or refuse to deliver property pursuant to said order; or after actual notice of filing of a support lien, pay over, release, sell, transfer, or convey real or personal property subject to a support lien to or for the benefit of the debtor or any other person; or fail or refuse to surrender upon demand property distrained under RCW 74.90A.180 or fail or refuse to honor an assignment of wages presented by the secretary, said person, firm, corporation, association, political subdivision or department of the state shall be liable to the department in an amount equal to one hundred percent of the value of the debt which is the basis of the lien, order to withhold and deliver, distraint, or assignment of wages, together with costs, interest, and reasonable attorney fees.

**74.90A.110 Release of excess to debtor**

Whenever any person, firm, corporation, association, political subdivision or department of the state has in its possession earnings, deposits, accounts, or balances in excess of the amount of the debt

claimed by the department plus one hundred dollars, such person, firm, corporation, association, political subdivision or department of the state may, without liability under this act, release said excess to the debtor.

**74.20A.129 Banks, savings and loan associations, service effective only as to branch office served**

In the case of a bank, bank association, mutual savings bank, or savings and loan association maintaining branch offices, service of a lien or order to withhold and deliver or any other notice or document authorized by this chapter shall only be effective as to the accounts, credits, or other personal property of the debtor in the particular branch upon which service is made.

**74.20A.130 Distraint, seizure and sale of property subject to liens under RCW 74.20A.060, procedure**

Whenever a support lien has been filed pursuant to RCW 74.20A.060, the secretary may collect the support debt stated in said lien by the distraint, seizure, and sale of the property subject to said lien. The secretary shall give notice to the debtor and any person known to have or claim an interest therein of the general description of the property to be sold and the time and place of sale of said property. Said notice shall be given to such persons by certified mail, return receipt requested or by service in the manner prescribed for the service of a summons in a civil action. A notice specifying the property to be sold shall be posted in at least two public places in the county wherein the distraint has been made. The time of sale shall not be less than ten nor more than twenty days from the date of posting of such notices. Said sale shall be conducted by the secretary, who shall proceed to sell such property by parcel or by lot at a public auction, and who may set a minimum reasonable price to include the expenses of making a levy and of advertising the sale, and if the amount bid for such property at the sale is not equal to the price so fixed, the secretary may declare such property to be purchased by the department for such price, or may conduct another sale of such property pursuant to the provisions of this section. In the event of sale, the debtor's account shall be credited with the amount for which the property has been sold. Property acquired by the department as herein prescribed may be sold by the secretary at public or private sale, and the amount realized shall be placed in the state general fund to the credit of the department of social and health services. In all cases of sale, as aforesaid, the secretary shall issue a bill of sale or a deed to the purchaser and said bill of sale or deed shall be prima facie evidence of the right of the secretary to make such sale and conclusive evidence of the regularity of his proceeding in making the sale, and shall transfer to the purchaser all right, title, and interest of the debtor in said property. The proceeds of any such sale, except in those cases wherein the property has been acquired by the department, shall be first applied by the secretary to reimbursement of the costs of distraint and sale, and thereafter in satisfaction of the delinquent account. Any excess which shall thereafter remain in the hands of the secretary shall be refunded to the debtor. Sums so refundable to a debtor may be subject to seizure or distraint by any taxing authority of the state or its political subdivisions or by the secretary for new sums due and owing subsequent to the subject proceeding. Except as

specifically provided in this chapter, there shall be exempt from distraint, seizure, and sale under this chapter such property as is exempt therefrom under the laws of this state.

#### **74.20A.140 Action for foreclosure of support lien—Satisfaction**

Whenever a support lien has been filed, an action in foreclosure of lien upon real or personal property may be brought in the superior court of the county where real or personal property is or was located and the lien was filed and judgment shall be rendered in favor of the department for the amount due, with costs, and the court shall allow, as part of the costs, the moneys paid for making and filing the claim of lien, and a reasonable attorney's fee, and the court shall order any property upon which any lien provided for by this chapter is established, to be sold by the sheriff of the proper county to satisfy the lien and costs. The payment of the lien debt, costs and reasonable attorney fees, at any time before sale, shall satisfy the judgment of foreclosure. Where the net proceeds of sale upon application to the debt claimed do not satisfy the debt in full, the department shall have judgment over for any deficiency remaining unsatisfied and further levy and sales upon other property of the judgment debtor may be made under the same execution. In all sales contemplated under this section, advertising of notice shall only be necessary for two weeks in a newspaper published in the county where said property is located, and if there be no newspaper therein, then in the most convenient newspaper having a circulation in such county. Remedies provided for herein are alternatives to remedies provided for in other sections of this chapter.

#### **74.20A.150 Satisfaction of lien after foreclosure proceedings instituted—Redemption**

Any person owning real property, or any interest in real property, against which a support lien has been filed and foreclosure instituted, shall have the right to pay the amount due, together with expenses of the proceedings and reasonable attorney fees to the secretary and upon such payment the secretary shall restore said property to him and all further proceedings in the said foreclosure action shall cease. Said person shall also have the right within two hundred forty days after sale of property foreclosed under RCW 74.20A.140 to redeem said property by making payment to the purchaser in the amount paid by the purchaser plus interest thereon at the rate of six percent per annum.

#### **74.20A.160 Secretary may set debt payment schedule**

The secretary may at any time consistent with the income, earning capacity and resources of the debtor, set or reset a level and schedule of payments to be paid upon the debt.

#### **74.20A.170 Secretary may release lien or order or return seized property—Effect**

The secretary may at any time release a support lien, or order to withhold and deliver, on all or part of the property of the debtor, or return seized property without liability, if assurance of payment is deemed adequate by the secretary, or if said action will facilitate the collection of the debt, but said release or return shall not operate to prevent future action to collect from the same or other property.

**74.20A.189 Secretary may make demand, file and serve liens, when payments appear in jeopardy**

If the secretary finds that the collection of any support debt based upon subrogation to or assignment of the amount of support ordered by any superior court order is in jeopardy, he may make demand under RCW 74.20A.040 for immediate payment of the support debt, and upon failure or refusal immediately to pay said support debt, he may file and serve liens pursuant to RCW 74.20A.060 and 74.20A.070, without regard to the twenty day period provided for in RCW 74.20A.040: *Provided*, That no further action under RCW 74.20A.060, 74.20A.130 and 74.20A.140 may be taken until the notice requirements of RCW 74.20A.040 are met.

**74.20A.199 Interests on debts due—Waiver**

Interest of six percent per annum on any support debt due and owing to the department under RCW 74.20A.030 may be collected by the secretary. No provision of this chapter shall be construed to require the secretary to maintain interest balance due accounts and said interest may be waived by the secretary, if said waiver would facilitate the collection of the debt.

**74.20A.200 Judicial relief—Limitations**

Any person against whose property a support lien has been filed or an order to withhold and deliver has been served pursuant to this chapter may apply for relief to the superior court of the county wherein the property is located on the basis that no support debt is due and owing: *Provided*, That judicial relief shall not be granted except as provided for in RCW 74.08.080 whenever a fair hearing has been requested pursuant to RCW 74.20A.050. Liens filed during pendency of fair hearing or court review shall be reviewed pursuant to RCW 74.08.080. It is the intent of this chapter that jurisdictional and constitutional issues, if any, shall be subject to review, but that administrative remedies be exhausted prior to judicial review.

**74.20A.210 Unidentifiable moneys held in special account**

All moneys collected in fees, costs, attorney fees, interest payments, or other funds received by the secretary which are unidentifiable as to the support account against which they should be credited, shall be held in a special fund from which the secretary may make disbursement for any costs or expenses incurred in the administration or enforcement of the provisions of this chapter.

**74.20A.220 Charging off child support debts as uncollectible**

Any support debt due the department from a responsible parent which the secretary deems uncollectible may be transferred from accounts receivable to a suspense account and cease to be accounted as an asset: *Provided*, That at any time after six years from the date a support debt was incurred, the secretary may charge off as uncollectible any support debt upon which the secretary finds there is no available, practical, or lawful means by which said debt may be collected: *Provided further*, That no proceedings or action under the provisions of this chapter may be begun after expiration of said six year period to institute collection of a support debt. Nothing herein shall be construed to render invalid or nonactionable a support lien filed prior to the expiration of said six year period or an assignment of earnings or

order to withhold and deliver executed prior to the expiration of said six year period.

**74.20A.230 Employee debtor rights protected—Limitation**

No employer shall discharge an employee for reason that an assignment of earnings has been presented in settlement of a support debt or that a support lien or order to withhold and deliver has been served against said employee's earnings: *Provided*, That this provision shall not apply if more than three support liens or orders to withhold and deliver are served upon the same employer within any period of twelve consecutive months.

**74.20A.240 Assignment of earnings to be honored—Effect**

Any person, firm, corporation, association, political subdivision or department of the state employing a person owing a support debt or obligation, shall honor, according to its terms, a duly executed assignment of earnings presented by the secretary as a plan to satisfy or retire a support debt or obligation. This requirement to honor the assignment of earnings and the assignment of earnings itself shall be applicable whether said earnings are to be paid presently or in the future and shall continue in force and effect until released in writing by the secretary. Payment of moneys pursuant to an assignment of earnings presented by the secretary shall serve as full acquittance under any contract of employment, and the state warrants and represents it shall defend and hold harmless such action taken pursuant to said assignment of earnings. The secretary shall be released from liability for improper receipt of moneys under an assignment of earnings upon return of any moneys so received.

**74.20A.250 Receipt of public assistance for a child as assignment of rights in support obligation—Secretary as attorney for endorsing drafts**

By accepting public assistance for or on behalf of a child or children, the recipient shall be deemed to have made assignment to the department of any and all right, title, and interest in any support obligation owed to or for said child or children up to the amount of public assistance money paid for or on behalf of said child or children for such term of time as such public assistance moneys are paid. The recipient shall also be deemed, without the necessity of signing any document, to have appointed the secretary as his or her true and lawful attorney in fact to act in his or her name, place, and stead to perform the specific act of endorsing any and all drafts, checks, money orders or other negotiable instruments representing support payments which are received on behalf of said child or children as reimbursement for the public assistance moneys previously paid to said recipient.

**74.20A.260 Industrial insurance disability compensation payments subject to lien and order to withhold and deliver**

One hundred percent of the temporary total disability payments and permanent total disability compensation to a workman allocated by RCW 51.32.090 and 51.32.060 respectively to the spouse and children of a workman, and forty percent of the net proceeds of payments to a workman for permanent partial disability under RCW 51.32.060 shall

not be classified as "earnings" but shall be subject to lien or order to withhold and deliver and said lien or order to withhold and deliver shall continue to operate and require any political subdivision or department of the state to withhold the above stated portions at each subsequent disbursement or receipt interval until the entire amount of the support debt stated in the lien or order to withhold and deliver has been withheld.

**74.20A.900 Severability—Alternative when method of notification held invalid**

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.

If any method of notification provided for in this 1971 act is held invalid, service as provided for by the laws of the state of Washington for service of process in a civil action shall be substituted for the method held invalid.

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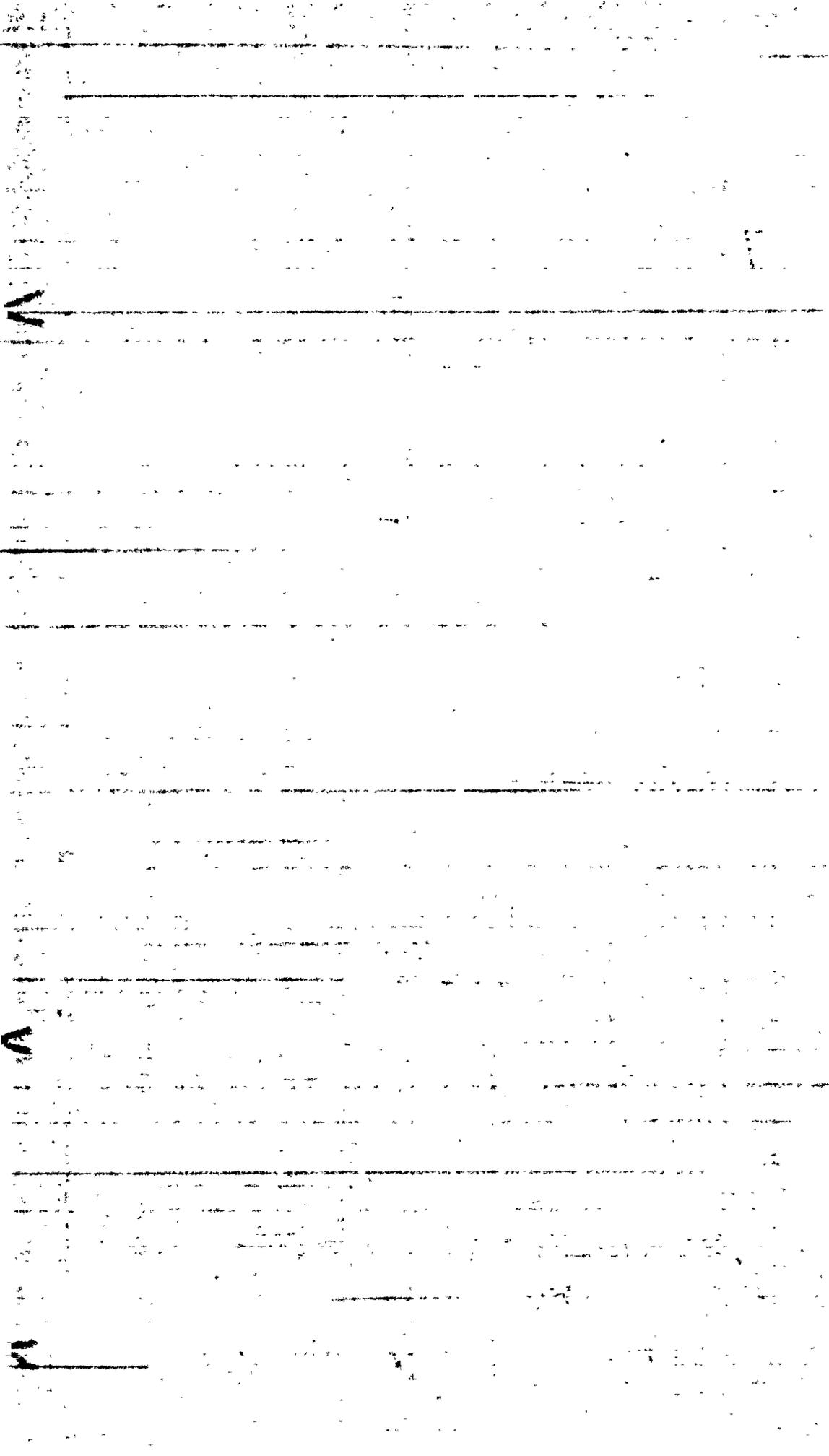
## Appendix B. State Statutes for Ascertainment of Paternity

The following State statutes authorize actions for the ascertainment of the paternity of illegitimate children:

Alabama Code	§ 27-12
Alaska Statutes	§ 11.25.100
Arizona Revised Statutes	§ 12-841
Arkansas Statutes	§ 24-2427
California Civil Code	§ 231
Colorado Revised Statutes	§ 19-6-101
Connecticut General Statutes	§ 52-435a
Delaware Code	§ 29-2510
District of Columbia Code	§ 11-1101; § 16-2941
Florida Statutes	§ 742.011
Georgia Code	§ 74-201
Hawaii Revised Statutes	§ 579-1
Idaho Code	§ 7-1101
Illinois Statutes	§ 106 2/4-51
Indiana Code	§ 31-4-1-1
Iowa Code	§ 675.1
Kansas Statutes	§ 38-1101
Kentucky Revised Statutes	§ 401.011
Louisiana Statutes (Civil Code)	§ 201
Maine Revised Statutes	§ 271
Maryland Code	§ 16-86A
Massachusetts General Laws	§ 272-11
Michigan Compiled Laws	§ 773-714
Minnesota Statutes	§ 257-251
Mississippi Code	§ 93-9-1
Missouri Statutes	§ 559-353
Montana Revised Code	§ 93-2901
Nebraska Revised Statutes	§ 18-101
Nevada Revised Statutes	§ 126-010
New Hampshire Revised Statutes	§ 168A:1
New Jersey Statutes	§ 9-17-1
New Mexico Statutes	§ 24-401
New York Family Court Act	§ 511
North Carolina General Statutes	§ 49-14
North Dakota Code	§ 32-36-1
Ohio Code	§ 3111.01
Oklahoma Statutes	§ 10-71
Oregon Revised Statutes	§ 109.125
Pennsylvania Statutes	§ 18-4323
Rhode Island General Laws	§ 15-8-1
South Carolina Code	§ 20-303
South Dakota	§ 37-2101
Tennessee Code	§ 38-223
Texas Statutes (Family Code)	§ 11.01
Utah Code	§ 78-45a-1
Vermont Statutes	§ 15-331
Virginia Code	§ 20-61.1; 19.1-298
Washington Code	§ 26.24.010
West Virginia Code	§ 48-7-1
Wisconsin Statutes	§ 52.21
Wyoming Statutes	§ 14-59







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## Tables

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TABLE 1.-AFDC families, by number of illegitimate recipient children, 1978

SPECIFIED NEW REGION AND STATE	TOTAL FAMILIES	NUMBER OF ILLEGITIMATE RECIPIENT CHILDREN					
		NONE	1 CHILD	2 CHILDREN	3 CHILDREN	4 CHILDREN	5 CHILDREN
<b>TOTAL:</b>							
NUMBER.....	299991	162519	79719	32911	13979	7324	3624
PERCENT.....	100.0	54.4	25.3	10.8	4.6	2.4	1.2
<b>NEW REGION</b>							
II.....	429049	55.3	22.3	11.4	9.6	3.2	1.1
III.....	335932	52.6	26.0	11.0	6.9	2.0	1.6
IV.....	458012	49.4	26.6	14.1	6.2	3.7	2.0
V.....	619006	56.2	23.9	10.2	4.9	2.2	1.1
VI.....	255455	46.3	26.3	12.0	6.3	3.1	1.9
VII.....	121418	56.2	25.7	9.4	3.9	2.1	1.2
VIII.....	63278	76.6	21.0	4.3	1.8	0.6	0.4
IX.....	648296	57.7	26.3	9.1	2.5	1.1	0.6
<b>STATE</b>							
ALABAMA.....	45131	35.4	30.0	16.0	7.6	3.7	2.3
ARIZONA.....	19600	57.6	22.6	8.4	6.4	2.6	0.9
ARKANSAS.....	23065	50.9	25.4	10.8	6.2	2.4	2.8
CALIFORNIA.....	411992	57.9	28.9	9.1	7.2	0.9	0.6
COLORADO.....	31874	68.5	22.5	4.4	2.6	0.0	0.7
FLORIDA.....	94622	46.6	27.2	14.7	7.1	5.2	2.8
GEORGIA.....	99718	49.2	32.3	17.7	6.5	3.0	1.3
ILLINOIS.....	149107	51.7	21.6	13.2	6.7	2.8	1.3
INDIANA.....	49526	51.0	28.7	10.7	4.6	1.2	0.7
IOWA.....	21099	68.0	23.0	9.4	1.4	0	0
KANSAS.....	20189	61.3	23.7	7.0	3.2	1.7	0.6
KENTUCKY.....	42282	59.0	24.4	8.3	3.0	2.0	1.3
LOUISIANA.....	45125	40.4	25.7	14.9	8.9	4.3	2.6
MARYLAND.....	61576	44.7	27.0	13.1	6.6	3.2	1.6
MICHIGAN.....	160219	60.3	22.3	9.6	4.1	2.4	1.0
MINNESOTA.....	37556	67.9	24.9	9.0	1.9	0.0	0
MISSISSIPPI.....	46416	38.2	27.0	14.0	6.1	3.7	2.0
MISSOURI.....	67699	49.2	27.4	11.8	6.9	3.0	1.9
NEBRASKA.....	11632	60.8	23.1	8.9	4.4	1.1	0
NEW JERSEY.....	114509	53.7	22.8	12.7	4.6	1.0	1.2
NEW YORK.....	358294	49.6	25.2	12.6	6.6	3.7	1.2
NORTH CAROLINA.....	43991	42.4	26.7	16.9	9.9	4.7	1.8
NORTH DAKOTA.....	4013	65.7	25.0	4.5	2.1	1.0	0.5
OHIO.....	137144	58.0	25.0	9.6	3.3	2.0	1.3
OKLAHOMA.....	29214	58.8	23.9	10.6	3.0	2.3	0.7
PENNSYLVANIA.....	169766	57.2	23.3	10.0	4.1	1.4	1.4
RHODE ISLAND.....	14581	71.3	18.6	6.6	2.3	0	0
SOUTH DAKOTA.....	6354	64.1	24.1	6.0	3.1	0.9	0
TENNESSEE.....	54606	44.7	30.8	12.3	9.3	3.0	2.1
TEXAS.....	120932	49.0	26.6	12.2	6.1	2.9	0.9
VIRGINIA.....	45058	43.3	30.9	13.2	4.1	3.0	2.0
WEST VIRGINIA.....	20517	69.1	17.4	8.0	3.0	0.6	1.0
WISCONSIN.....	41534	59.2	26.1	8.7	3.2	2.0	0

(CONTINUED)

NOT COMPUTED: BASE TOO SMALL.

TABLE 1.—AFDC families, by number of illegitimate recipient children, 1973—Continued

SPECIFIED MEN REGION AND STATE	TOTAL FAMILIES	NUMBER OF ILLEGITIMATE RECIPIENT CHILDREN					10 OR MORE CHILDREN
		6 CHILDREN	7 CHILDREN	8 CHILDREN	9 CHILDREN		
<b>TOTAL:</b>							
NUMBER.....	290991	20850	7770	3031	2600	832	
PERCENT.....	100.0	0.7	0.3	0.1	0.1	0.0	
<b>MEN REGION:</b>							
II.....	529049	0.7	0.3	0	0	0.0	
III.....	335952	0.0	0.3	0	0	0.0	
IV.....	450012	1.1	0.5	0.2	0.1	0	
V.....	619096	0.7	0.2	0	0.2	0	
VI.....	255455	0.6	0.3	0.5	0.1	0	
VII.....	121415	0.7	0.3	0	0	0	
VIII.....	63270	0.2	0	0.0	0	0.0	
IX.....	440296	0.6	0.1	0.0	0.0	0.0	
<b>STATES:</b>							
ALABAMA.....	45531	2.2	0	0.6	0	0	
ARIZONA.....	19600	0.0	0.0	0.0	0.0	0.0	
ARKANSAS.....	23065	0.0	0	0	0	0	
CALIFORNIA.....	411992	0.6	0	0.0	0.0	0.0	
COLORADO.....	31074	0	0	0.0	0	0.0	
FLORIDA.....	94622	0.0	0.0	0.0	0	0.0	
GEORGIA.....	99710	0.7	0	0.0	0	0.0	
ILLINOIS.....	193107	1.1	0	0	0	0	
INDIANA.....	49526	0.6	0.0	0	0.0	0.0	
IOWA.....	21095	0	0.0	0.0	0.0	0.0	
KANSAS.....	20109	0	0	0.0	0.0	0.0	
KENTUCKY.....	42202	0.7	0	0	0.0	0	
LOUISIANA.....	65125	0.0	0.7	1.2	0	0.0	
MARYLAND.....	61576	0	0	0.0	0	0.0	
MICHIGAN.....	160219	0.0	0.0	0	0.0	0.0	
MINNESOTA.....	37550	0	0.0	0	0.0	0.0	
MISSISSIPPI.....	46414	1.0	0.0	0	0	0	
MISSOURI.....	67699	1.0	0	0	0	0.0	
NEBRASKA.....	11632	0.0	0	0	0.0	0	
NEW JERSEY.....	116805	1.0	0	0	0	0.0	
NEW YORK.....	350290	0.7	0.0	0.6	0.0	0.0	
NORTH CAROLINA.....	43091	1.3	0.6	0	0	0.0	
NORTH DAKOTA.....	4013	0	0	0.0	0.0	0.0	
OHIO.....	137166	0	0	0.0	0	0.0	
OKLAHOMA.....	29216	0	0	0	0	0.0	
PENNSYLVANIA.....	169766	1.1	0	0	0.0	0.0	
RHODE ISLAND.....	14581	0	0	0.0	0	0	
SOUTH DAKOTA.....	6356	0	0	0.0	0.0	0.0	
TENNESSEE.....	56605	0.9	0	0	0.0	0.0	
TEXAS.....	120932	0.6	0	0	0.0	0.0	
VIRGINIA.....	45950	0.0	0	0.0	0.0	0.0	
WEST VIRGINIA.....	20517	0.6	0	0.0	0.0	0.0	
WISCONSIN.....	91590	0	0.0	0.0	0.0	0.0	

0 NOT COMPUTED; BASE TOO SMALL.

Source: 1973 AFDC Study, part I, table 20.

TABLE 2.—AFJG CHILDREN, BY NUMBER AND PERCENT OF ILLEGITIMATE CHILDREN, 1961 AND 1973

	1961			1973			Percentage Change 1961-73
	Total	Illegitimate		Total	Illegitimate		
		Number	Percent		Number	Percent	
Alabama.....	65,328	17,965	27.5	123,628	64,488	52.4	+238
Alaska.....	3,244	571	17.6				
Arizona.....	28,736	(*)	(*)	58,151	15,923	28.9	
Arkansas.....	18,186	3,225	18.0	61,248	23,288	37.9	+619
California.....	248,342	88,287	27.9	965,988	267,566	27.7	+286
Colorado.....	25,178	5,658	22.5	78,641	15,814	20.1	+213
Connecticut.....	28,525	5,646	19.8				
Delaware.....	7,581	2,987	39.4				
District of Columbia.....	28,686	8,348	29.1				
Florida.....	75,644	18,368	24.3	238,288	118,854	49.8	+519
Georgia.....	47,372	4,788	10.1	246,616	95,488	38.7	+1,886
Hawaii.....							
Idaho.....	8,811	2,118	24.0				
Illinois.....	6,712	817	12.2				
Indiana.....	177,586	64,867	36.5	545,528	188,688	34.6	+267
Iowa.....	32,914	7,578	23.0	128,622	37,714	29.3	+388
Kansas.....	28,148	9,458	33.6	52,488	9,356	17.8	+171
Kentucky.....	18,148	2,881	15.9	58,578	12,154	20.7	+323
Kentucky.....	58,378	12,853	22.0	105,531	31,752	30.1	+163
Louisiana.....	73,271	17,878	24.4	188,458	88,458	46.7	+386
Maine.....	14,938	2,048	13.7				
Maryland.....	37,816	13,388	35.4	162,182	62,888	38.8	+364
Massachusetts.....							
Michigan.....	62,656	15,622	24.9	431,548	118,678	27.5	+647
Minnesota.....	28,887	3,748	12.9	88,881	17,488	19.6	+367
Mississippi.....	62,434	18,826	30.2	136,248	67,638	49.6	+482
Missouri.....	79,788	21,919	27.5	177,918	67,367	37.9	+287
Montana.....	6,888	828	13.6				
Nebraska.....	8,718	1,428	16.4	28,388	8,888	31.3	+66
Nevada.....	3,638	1,088	29.6				
New Hampshire.....	3,382	317	9.4				
New Jersey.....	82,587	18,113	21.9	288,521	188,888	65.5	+448
New Mexico.....	21,914	5,588	25.5				
New York.....	258,988	87,847	33.9	917,679	348,948	38.0	
North Carolina.....	88,881	17,533	19.7	117,543	52,538	44.7	+222
North Dakota.....	5,128	688	13.4	8,633	1,987	22.9	+233
Ohio.....	188,834	27,148	14.4	334,888	98,441	29.4	+268
Oklahoma.....	51,528	13,656	26.5	75,531	21,787	28.8	+68
Oregon.....							
Pennsylvania.....	288,162	48,588	16.9	442,658	138,624	31.3	+214
Puerto Rico.....	178,653	38,182	21.4				
Rhode Island.....	14,671	2,142	14.6	37,868	8,816	23.3	+218
South Carolina.....	38,158	3,287	8.6				
South Dakota.....	8,115	1,777	21.9	16,287	3,526	21.6	+88
Tennessee.....	62,645	18,733	30.0	141,687	58,983	41.7	+188
Texas.....	62,258	12,888	20.7	328,332	112,788	34.4	+775
Utah.....	18,656	1,353	7.3				
Vermont.....	3,554	561	15.8				
Virgin Islands.....	828	538	65.0				
Virginia.....	33,828	8,464	25.0	118,431	48,217	40.7	+428
Washington.....	43,572	5,854	13.4				
West Virginia.....	93,587	11,782	12.6	53,288	11,258	21.1	-6
Wisconsin.....	28,838	5,752	19.9	188,913	27,188	14.4	+373
Wyoming.....	2,238	388	17.3				
U.S. total.....	2,658,528	648,238	24.4	17,724,838	2,528,886	32.7	+282

\* Not reported.

† Excludes Massachusetts, Oregon, and Guam.

‡ Excludes Massachusetts and Guam.