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THE EFFECT OF THE CHANGE IN THE AGE OF MAJORITY ON PRIOR DIVORCE DECREES PROVIDING FOR CHILD SUPPORT

INTRODUCTION

EFFECTIVE JANUARY 1, 1974, the legal age of majority for both men and women in Ohio was changed from 21 to 18.¹ Although the statutory change was not unexpected (Ohio having ratified the 26th amendment to the United States Constitution on June 30, 1971²) the General Assembly has seemingly left to the courts the issue as to the effect that the new age of majority will have on the termination of child support obligations under prior divorce decrees.

The jurisdiction of a domestic relations court to enforce child support orders is largely dependent on the source from which the order gains its strength. Support orders that incorporate an agreement of the parents retain vitality in Ohio and in a number of other states at least until the agreement dictates the support obligation should terminate,³ absent a change of circumstances.⁴ The effect of the change of the age of majority on such orders involves the construction of the termination provisions of the incorporated agreement. The major difficulty under such child support orders is that the termination provisions are often provided in terms relating to infancy. Other incorporated agreements provide no termination provision at all or do so only tangentially by dictating that the obligation is for a "minor" child.

Where the court-ordered support is not based on an agreement of the parents, the jurisdiction of the domestic relations court to enforce the order extends no further than the parental duty of child support imposed by law.⁵ The parents have assumed no greater obligation. The

¹ OHIO REV. CODE ANN. § 3109.01 (Page Supp. 1973). The statutory duty of a parent to support his child was also amended to extend the obligation beyond minority where the child is in full-time attendance at an accredited high school. OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1973).

² U.S. CONST. amend. XXVI, § 1 provides: "The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

³ Through the incorporation of their child support agreement into the divorce decree, parents can assume an enforceable obligation that is greater than the obligation imposed by law. For a summarization of case law supporting this proposition see *In re Trust Between LaBelle,* Minn., 223 N.W.2d 400, 407-08 (1974); Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 TEMPLE L.Q. 319, 337-38 (1971) [hereinafter cited as Washburn]. *But see* *Fellows v. Fellows*, 267 So. 2d 572 (La. App. 1972).

⁴ Support orders are modifiable because of a change of circumstances whether the order is based on a separation agreement incorporated into a divorce decree or not. *See* H. CLARK, *LAW OF DOMESTIC RELATIONS* § 15.2 at 498 (1968).

⁵ The statutes defining the obligation of parents to support their children have generally been interpreted as limiting the court's jurisdiction to order, on its own, post-majority support. *See* Washburn, *supra* note 3, at 329-32.

lowering of the age of majority has limited this duty of support imposed by law to age 18 with limited exceptions.⁶ Court orders providing for child support beyond age 18, entered prior to the effective date of the statutory change and not based on an agreement of the parents, may, therefore, become unenforceable because of a lack of jurisdiction. The ousting of jurisdiction to enforce such orders raises the issue of whether such an operation of the statutes impairs vested rights towards unaccrued support payments.

The purpose of this article is to consider the effect of the statutory change in the age of majority on the construction and enforcement of support orders entered prior to the effective date of the new statutory age. The goal is to provide the domestic relations practitioner with a shorthand guide as to how these issues have been decided in Ohio and in other states and, finally, to provide an analysis of these decisions.

EARLY PRECEDENT

In Ohio, the age of majority has been changed by statute three times. The General Assembly modified the common law age of 21 years⁷ in 1834 to 18 years for women (while leaving the age for men at 21),⁸ only to change the statutory age back to 21 for both men and women in 1923.⁹ The 1923 legislation reflected similar changes in other states.¹⁰

The effect of the change of the statutory age from 18 to 21 for women on prior divorce decrees ordering child support was confronted directly in reported decisions of four states.¹¹ The decisions divided along two lines, one represented by the state of Washington in *Springstun v. Springstun*¹² and the other represented by the California decision of *Rosher v. Superior Court*.¹³

In *Springstun v. Springstun*, the state of Washington approached the issue of the effect of the statutory change of the age of majority on the child support provisions of prior divorce decrees in terms of the life of the particular decree entered prior to the legislative enactment. The

⁶ Ohio requires parental support for adult children who are attending an accredited high school full time. OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1973). Other states require post-majority support for education, or to prevent an indigent child from becoming dependent on the state for support. See ILL. ANN. STAT. ch. 40, § 19 (Smith-Hurd Supp. 1974); Washburn, *supra* note 3, at 341-42 (which contains a compilation of state family responsibility laws).

⁷ Prior to this first statutory modification of the age of majority, both men and women reached the age of majority at 21 in Ohio under the common law. *Slater v. Cave*, 3 Ohio St. 80 (1853); *McClintock v. Chamberlin*, Wright's Reports 547 (1834).

⁸ Law of February 3, 1834, 32 Laws of Ohio 10.

⁹ Law of April 5, 1923, 110 Laws of Ohio 125.

¹⁰ 5 C. VERNIER, AMERICAN FAMILY LAWS § 271 (1938).

¹¹ *Rosher v. Rosher*, 9 Cal. 2d 556, 71 P.2d 918 (1937); *Kendall v. Kendall*, 122 Cal. App. 397, 10 P.2d 131 (1932); *Irby v. Martin*, 500 P.2d 278 (Okla. 1972); *State ex rel. Weingart v. Kiessenbeck*, 167 Or. 25, 114 P.2d 147 (1941); *Springstun v. Springstun*, 131 Wash. 109, 229 P. 14 (1924).

¹² *Springstun v. Springstun*, 131 Wash. 109, 113, 229 P. 14, 16 (1924).

¹³ *Rosher v. Superior Court*, 9 Cal. 2d 556, 71 P.2d 918 (1937).

question before the court was whether the particular decree, providing for support "during the minority"¹⁴ of the daughter of the parties, could be enforced beyond the age of majority existing at the time of the order.¹⁵ Although the court recognized the general continuing duty of parents to provide support for children for three more years irrespective of the prior decrees,¹⁶ the court held that the decree itself did not retain vitality beyond the child's reaching 18 years of age.¹⁷ It had expired, and the further obligation of father to support until she reached 21 years of age would require enforcement, not under the decree, but in a separate proceeding.¹⁸

The court declared that the power of the state legislature was limited in its effect on prior judgments:

We need not argue, we think, that the legislature is without power to set aside, annul, or change the liability upon a judgment affecting solely the rights of private parties by the enactment of a general law. It may possibly, after entry, change the rule of procedure for enforcing judgments, such as the manner of issuing execution, conducting sales, making redemption, and the like, but it is without power to affect the substantive rights of the parties to a judgment.¹⁹

The Supreme Court of Washington recognized the creation of substantive rights under a judgment requiring child support, even though such judgments were subject to modification²⁰ under the continuing jurisdiction of the court.²¹

California rejected the *Springstun* decision expressly in *Rosher v. Superior Court*.²² The California Supreme Court determined that the statutory increase in the age of majority for women did not constitute a prohibited retrospective application of a statute impairing vested rights. The statute was held not retrospective, in that it applied prospectively only to extend support obligations.²³ It was held not to affect vested rights, in that the court's authority to modify support orders prevents them from operating as final judgments from which such rights could be created.²⁴

¹⁴ *Springstun v. Springstun*, 131 Wash. 109, 110, 229 P. 14, 15 (1924).

¹⁵ WASH. REM. COMP. STAT. § 10548.

¹⁶ *Springstun v. Springstun*, 131 Wash. 109, 112, 229 P. 14, 16 (1924).

¹⁷ *Id.* at 113, 229 P. at 16.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Harris v. Harris*, 71 Wash. 307, 128 P. 673 (1912); *Poland v. Poland*, 63 Wash. 597, 116 P. 2 (1911).

²¹ For a discussion of the *Springstun* decision in terms of the most recent change of the age of majority see Comment, *Citizenship for Eighteen Year Olds—Age of Majority in Washington*, 47 WASH. L. REV. 367, 371 (1972).

²² *Rosher v. Superior Court*, 9 Cal. 2d 556, 559, 71 P.2d 918, 920 (1937).

²³ *Id.* at 559, 71 P.2d at 919.

²⁴ *Id.* at 560, 71 P.2d at 920. The *Rosher* decision overruled a prior California appellate court decision which had supported the *Springstun* position on vested rights. See *Rosher v. Superior Court*, 9 Cal. 2d 556, 561, 71 P.2d 918, 921 (1937), *rev'g* *Kendall v. Kendall*, 122 Cal. App. 397, 10 P.2d 131 (1932).

The final rejection of *Springstun* in the *Rosher* decision was found in the construction of the support order itself. *Springstun* concerned a decree calling for the support of a daughter during her minority.²⁵ In *Rosher* the original decree provided for child support during minority,²⁶ but the decree was modified prior to the statutory change to provide support "until further order of the Court."²⁷ *Springstun* held that the word minority should be interpreted in light of the statutory age at the time of the decree.²⁸ *Rosher* held that employment of the word minority reflected the possibility of the legislature's employing its power to change the statutory age, and, therefore, the new age should govern.²⁹

THE NEW AGE OF MAJORITY: CHILD SUPPORT CONFLICTS AMONG THE STATES

Almost every American jurisdiction has recently enacted a statutory change in the age of majority to 18.³⁰ At least 12 states anticipated the controversy over the application of such statutes by providing for savings clauses to accompany their enactment.³¹ The breadth of the protections

²⁵ See text accompanying note 14 *supra*.

²⁶ *Rosher v. Superior Court*, 9 Cal. 2d 556, 559, 71 P.2d 918, 919 (1937).

²⁷ *Id.*

²⁸ See *Springstun v. Springstun*, 131 Wash. 109, 113, 229 P. 14 16 (1924), wherein it is stated:

The language of the decree is that the appellant shall make the monthly payments "during the minority" of the daughter. The statute then in existence limited minority to the time the minor reached the age of 18 years. Seemingly, therefore, the decree is as definite and certain in that respect as it would have been had the decree expressly named the 18th year of the minor as the date of its expiration.

²⁹ *Rosher v. Superior Court*, 9 Cal. 2d 556, 560, 561, 71 P.2d 918, 920 (1937). Oregon has supported the *Rosher* position as to vested rights but added another reason for its construction of the word "minority." See *State ex rel. Weingart v. Kiessenbeck*, 167 Or. 25, 39, 114 P.2d 147, 152 (1941) wherein it is stated: "The paramount concern of the court is not with the defendant, not with the plaintiff. The decree should be liberally construed in the interest of the child, whose nurture and education during minority is of concern to the state." See also, *In re Trust Under Will of Davidson*, 223 Minn. 268, 26 N.W.2d 223 (1947) (where minority was also construed to mean whatever the legislature says it should mean).

³⁰ See Arnoff, *What Lawyers Should Know About the New Age of Majority*, 46 OHIO BAR 1551 (1973) [hereinafter cited as Arnoff]. Not all of the statutory changes have expressly related, however, to the parental duty of child support. For a consideration of the difficulties encountered in regard to the Massachusetts change of age compare *Stewart v. Stewart*, 85 N.M. 637, 515 P.2d 641 (1973), with Hamann, *Eighteen: The New Age of Majority in Massachusetts*, 59 MASS. L.Q. 17 (1974).

³¹ CAL. CIV. CODE § 25.1 (West Supp. 1974); CONN. GEN. STAT. ANN. § 1-1e (Cum. Supp. 1974); 58 Delaware Laws ch. 439 § 4; FLA. STAT. ANN. § 743.07 (Cum. Supp. 1974); GA. CODE ANN. § 74-104.1 (1973); MICH. COMP. LAWS ANN. § 722.54 (Cum. Supp. 1973); Maryland Acts 1973, ch. 651 § 51; 1974 Laws of New York, ch. 920 § 1; Oregon Laws 1973, ch. 827 § 84; R.I. GEN. LAWS ANN. § 15-12-2 (Supp. 1973); W. VA. CODE ANN. § 2-3-1 (Cum. Supp. 1974); Wyoming Laws 1973, ch. 213 § 4. For decisions construing the effect of these savings statutes see *In re Marriage of Lungstrom*, Cal. App. 3d 115 Cal. Rptr. 825 (1974); *In re Marriage of Phillips*, 39 Cal. App. 3d 723, 114 Cal. Rptr. 362 (1974); *In re Marriage of Atwell*, 39 Cal. App. 3d 383, 114 Cal. Rptr. 324 (1974); *Vicino v. Vicino*, 30 Conn. Sup. 49, 298 A.2d 241 (Super. Ct. 1972); *White v. White*, 296 So. 2d 619 (Fla. App. 1974); *Finn v. Finn*, 294 So. 2d 57 (Fla. App. 1974); *Dougherty v. Dougherty*, 293 So. 2d

provided, with respect to events occurring prior to the effective date of the new statutory age in these savings statutes, differs. California has enacted a savings statute that retains the prior definition of the word "minority" and similar words relating to infancy prior to a stated date.³² Unlike the California statute, however, the Rhode Island savings statute does not even consider the child support question. The Rhode Island statute limits itself solely to the application of the statute of limitations.³³

Unfortunately, the General Assembly of Ohio and the legislatures of most states did not take heed of the admonition of the Ohio General Assembly by Mr. Harry Lewis Deibel in 1923 for its failure to enact a savings statute to accompany the statutory change of the age of majority from 18 to 21 for women.³⁴ The natural result of this failure has been to leave the issue to the courts.³⁵ This has understandably led to uncertainty and litigation. Kentucky modified its age of majority in 1965,³⁶ and the limited issue of the effect of the statutory change on the parental duty to provide child support (whether by divorce decree, support agreement, or otherwise) has been litigated in its highest court seven times, the latest decision having been rendered in 1973, eight years after the enactment of the statutory change. As of this writing, there have been reported decisions on the effect of the change in the age of majority on child support orders entered prior to the legislative change in at least 18 states including Ohio.³⁷ The states that have considered the question without the intervention of a savings statute are a valuable source of precedent for analysis. Ohio has yet to consider the issue at either the appellate or supreme court level.

394 (Fla. App. 1974); *Choquette v. Choquette*, Ga., 208 S.E.2d 848 (Ga. 1974); *Monticello v. Monticello*, 271 Md. 168, 315 A.2d 520 (1974); *Barbier v. Barbier*, 45 Mich. App. 402, 206 N.W.2d 464 (1973).

32 CAL. CIV. CODE § 25.1 (West Supp. 1974). The California statute, however, does not expressly answer whether the word "emancipation" includes emancipation by change of law through the lowering of the age of majority. Under a recent California Court of Appeals decision, the savings statute is circumvented by having included within the order a provision for termination upon emancipation. See *In re Marriage of Phillips*, 39 Cal. App. 3d 723, 727-28, 114 Cal. Rptr. 362, 364 (1974).

33 R.I. GEN. LAWS ANN. § 15-12-2 (Supp. 1973).

34 Deibel, *Legal Age of Women—Effect of the New Law*, 21 Ohio L.R. 215, 216 (1923) wherein it is stated:

Why the Legislature failed to append a simple proviso exempting [*sic*] said class [women aged 18, 19, and 20 when the law went into effect] no man will presume to divine. It strikes one as if such old fashioned things as reason, foresight, and wisdom, take a back seat when the up-to-date legislator breezes in. Certainly, he is a marvelous conjurer of laws and human rights. His fecund necromancy is the modern wonder of the world. A New York editor has been so charitable as to ascribe this phenomenon to mental aberration.

35 See Arnoff, *supra* note 30.

36 KY REV. STAT. ANN. § 2.015 (1971).

37 The states that have litigated the issue with reported decisions are: Arizona, California, Florida, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, New Mexico, North Carolina, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and Washington.

INCORPORATED SUPPORT AGREEMENTS

The major litigated issue in the states with reported decisions considering the effect of a change in the statutory age of majority has been the impact of the change on support agreements that have been incorporated in divorce decrees. The majority of these jurisdictions will recognize and enforce an agreement incorporated into the divorce decree, showing a clear and express agreement for child support beyond the new statutory age.³⁸ The same result has occurred even in those jurisdictions with statutes which have been interpreted as limiting the jurisdiction of the court to order child support only during the minority of the child.³⁹

There is conflict, however, where the incorporation agreement provides for the termination of the child support obligation upon emancipation. In some states the provision for termination of child support upon emancipation has been construed to allow for emancipation by the state through a statutory enactment lowering the age of majority.⁴⁰ The same approach was rejected in Virginia where the state supreme court determined that emancipation by law through the change in the age of majority was not contemplated by the parties.⁴¹ The court employed contract concepts to construe the intent of the parties—the most vital being that the laws in force at the time of the execution of the contract become part of the contract as if they were incorporated within its provisions.⁴²

The contract approach to incorporated agreements, however, is not fully unanimous, at least, when the controlling issue becomes whether the court will apply the law existing at the time of the agreement to construe the provisions of the decree. There is direct conflict as to the construction and effect of incorporated agreements that provide for termination of the support obligation when the child reaches majority or where the agreement refers to the termination of the support obligation only in an indirect manner through reference to the support obligation as being for the minor child or the like.

The state of Kentucky adopted the contract approach in *Wilcox v. Wilcox*,⁴³ holding that an incorporated agreement calling for support

³⁸ See note 3 *supra*.

³⁹ See *Wilcox v. Wilcox*, 406 S.W.2d 152 (Ky. 1966); *Mason v. Mason*, 84 N.M. 720, 507 P.2d 781 (1973) (*dictum*); *Istnick v. Istnick*, 37 Ohio Misc. 91, 307 N.E.2d 922 (Stark County C.P. 1973); *Jones v. Jones*, 503 S.W.3d 924 (Tenn. Ct. App. 1973).

⁴⁰ See *In re Marriage of Phillips*, 39 Cal. App. 3d 723, 114 Cal. Rptr. 362 (1974); *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E.2d 299 (1972); *Mason v. Mason*, 84 N.M. 720, 507 P.2d 781 (1973); *Garey v. Garey*, 482 S.W.2d 133 (Tenn. 1972).

⁴¹ *Paul v. Paul*, 214 Va. 651, 653, 203 S.E.2d 123, 125-26 (1974). See also *Shoaf v. Shoaf*, 14 N.C. App. 231, 188 S.E.2d 19 (1972), *rev'd*, 282 N.C. 287, 192 S.E.2d 299 (1972), where a North Carolina Court of Appeals accepted similar reasoning only to be reversed on appeal. Cf. *Sproston v. Sproston*, 8 Wash. App. 218, 505 P.2d 479 (1973).

⁴² *Paul v. Paul*, 214 Va. 651, 653, 203 S.E.2d 123, 125 (1974).

⁴³ *Wilcox v. Wilcox*, 406 S.W.2d 152 (Ky. 1966).

until the child of the parties "reached the age of majority or became self-supporting"⁴⁴ should be construed in view of the law at the time the parties entered the agreement.⁴⁵ Once the state adopted this rule for construction of divorce decrees and independently existing support agreements, a series of Kentucky Court of Appeals' decisions followed, imposing child support obligations until 21 wherever words of infancy such as "surviving minor son,"⁴⁶ "for the infant boy,"⁴⁷ for "infant children"⁴⁸ were employed in the agreement. Such an extended obligation was found even where the agreement lacked any provision directly related to when the child support obligation would terminate.

In *Rice v. Rice*,⁴⁹ Kansas rejected the rationale of *Wilcox*. That state will enforce an incorporated agreement beyond the age of majority of the child only where the agreement clearly expresses an intent to assume a greater obligation than that imposed on the parent by law.⁵⁰ The result of such a requirement has necessarily resolved all ambiguity in favor of a termination of the support obligation upon the extinguishment of any duty imposed by law. Under such analysis an incorporated agreement calling for child support "until each child reaches his majority or until further order of the court,"⁵¹ and entered when the age of majority was 21, will not be enforced beyond the new statutory age of 18. The subsequent amendment of the age of majority thereby controls the construction of the terms.⁵² Where the incorporated agreement is entirely silent and thereby lacking a showing of any intent to assume a greater support obligation than that imposed by law, even Kentucky has held that the support obligation under the court order ends upon attainment of the new statutory age.⁵³

⁴⁴ *Id.* at 153.

⁴⁵ *Id.* For decisions in other states requiring child support until age 21 where the incorporated agreement provided for termination of support in terms of words relating to infancy see *Ruhsam v. Ruhsam*, 110 Ariz. 326, 518 P.2d 576 (1974) (agreement calling for support until emancipated by marriage, majority, or death); *Carpenter v. Carpenter*, 21 Ill. App. 3d 1022, 316 N.E.2d 207 (1974) (agreement calling for support of minor children); *Mason v. Mason*, 84 N.M. 720, 507 P.2d 781, 783 (1973) (*dictum*) (where the New Mexico Supreme Court stated it agreed with the *Wilcox* decision).

⁴⁶ *Kirchner v. Kirchner*, 465 S.W.2d 299, 301 (Ky. 1971) (separation agreement).

⁴⁷ *Worrell v. Worrell*, 489 S.W.2d 817, 818 (Ky. 1973) (separation agreement).

⁴⁸ *Showalter v. Showalter*, 497 S.W.2d 420, 421 (Ky. 1973) (decree incorporating a separation agreement).

⁴⁹ *Rice v. Rice*, 518 P.2d 477 (Kan. 1974).

⁵⁰ *Id.* at 481 wherein it is stated: "[W]here a greater liability for child support than that prescribed by law is sought to be imposed pursuant to contract, such intent must be clearly expressed in the contract."

⁵¹ *Id.* at 479.

⁵² For further support of this position see *Jungjohann v. Jungjohann*, 516 P.2d 904 (Kan. 1973); *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972); *Istnick v. Istnick*, 37 Ohio Misc. 91, 307 N.E. 2d 922 (1973). Compare *Whitt v. Whitt*, 490 S.W.2d 159 (Tenn. 1973), with *Jones v. Jones*, 503 S.W.2d 924 (Tenn. Ct. App. 1973).

⁵³ *Blackard v. Blackard*, 426 S.W.2d 471 (Ky. 1968) (where the incorporated agreement provided for child support until further order of the court).

DIVORCE DECREES ABSENT AN AGREEMENT OF THE PARTIES

The jurisdiction of domestic relations courts to order child support beyond the age of majority, absent an agreement of the parents, is usually determined by local statute and the duty imposed upon a parent to support his child under local law.⁵⁴ In Ohio and in other states this duty has been stated in terms of supporting the child during his minority and under limited circumstances beyond.⁵⁵ Consequently, the lowering of the statutory age of majority at least restricts the jurisdiction of domestic relations courts to order, on their own and after the effective date of the change, child support beyond age 18. The unresolved issue is whether decrees entered prior to the statutory change are unenforceable because of a lack of jurisdiction.

The states that have confronted this issue have done so in terms of whether the parties to such decrees acquire any vested rights in their provisions. Only two Illinois appellate courts⁵⁶ and the Supreme Court of Washington⁵⁷ have held that the parties do gain a vested right under court-ordered support towards unaccrued payments. The decisions have so held even though there were existing statutes⁵⁸ granting the court continued jurisdiction to modify support orders. The decision in Washington, *Baker v. Baker*,⁵⁹ rests on a long-standing precedent in that state which began with the *Springstun* decision. The appellate court decisions in Illinois have yet to be approved by the Illinois Supreme Court.

The best articulated decisions relating to vested rights in prior divorce decrees are the Washington decisions. That state has determined that once the obligations of the parents for the support of their minor children have been determined under a court order subject to modification because of changing circumstances, the decree is final and vested as to future support payments. It is subject only to modification by the court and remains unaffected by a subsequent change in the age of majority by legislative act.⁶⁰ Rights in the judgment became fixed upon the entry of the decree

⁵⁴ See H. CLARK, LAW OF DOMESTIC RELATIONS § 15.1 at 495 (1968).

⁵⁵ See note 6 *supra*.

⁵⁶ *Strum v. Strum*, 22 Ill. App. 3d 147, 317 N.E.2d 59, 62 (1974); *Waldron v. Waldron*, 13 Ill. App. 3d 964, 301 N.E.2d 167 (1973).

⁵⁷ *Baker v. Baker*, 80 Wash. 2d 736, 498 P.2d 315 (1972); *Keen v. Goodwin*, 28 Wash. 2d 332, 182 P.2d 697 (1947); *Springstun v. Springstun*, 131 Wash. 109, 229 P. 14 (1924). See also *Waymire v. Waymire*, 10 Wash. App. 262, 517 P.2d 219 (1974); *Sproston v. Sproston*, 8 Wash. App. 218, 505 P.2d 479 (1973).

⁵⁸ ILL. ANN. STAT. ch. 40, § 19 (Smith-Hurd Supp. 1974); WASH. REV. CODE ANN. § 26.08.110 (1961) (repealed 1st Ex. Sess. 1973, ch. 157, § 30). The repeal of the Washington statute was a prelude to major divorce law reform in Washington. See WASH. REV. CODE ANN. § 26.09.010-290 (Supp. 1973); Rieke, *The Dissolution Act of 1973: From Status to Contract?* 49 WASH. L. REV. 375 (1974).

⁵⁹ *Baker v. Baker*, 80 Wash. 2d 736, 498 P.2d 315 (1972).

⁶⁰ See text accompanying note 19 *supra*. See also *Keen v. Goodwin*, 28 Wash. 2d 332, 334, 182 P.2d 697, 699 (1947) wherein it was stated:

The most compelling reason for holding that the Federal statute [Act of June 23, 1942, c. 443, 56 Stat. 381] did not supersede the court's decree, is that no

and enforceable beyond the new age of majority even though Washington recognized that the court was without power to order child support beyond the statutory age existent at the time the order was rendered.⁶¹

In *Baker* the Supreme Court of Washington determined the issue in terms of the most recent change in the age of majority in 1971.⁶² The court held that the state recognizes a presumption that all acts are only prospective in operation and that the rights under the decree are final as to any subsequent act of the legislature.⁶³ Therefore the court declared that a support order calling for support until age 21⁶⁴ would be enforced until that age even though the decree was not based on an agreement of the parties and the age of majority was 18 at the time of the requested enforcement. The appellate courts of that state have required enforcement until age 21 of similarly based decrees which call for support under their terms "until the children reach their majority or are sooner self-supporting,"⁶⁵ or "until the child concerned shall have reached 21 years of age, marries, becomes emancipated, or until further Order of the Court."⁶⁶

In *Phelps v. Phelps*⁶⁷ the Supreme Court of New Mexico rejected the contention that a court decree of support created any vested rights as to payments accruing after the effective date of a change in the age of majority.⁶⁸ The court, quoting the *Rosher* decision and employing its reasoning,⁶⁹ held that a prior judgment calling for support "until each child becomes 21 years of age, or marries or otherwise becomes emancipated"⁷⁰ operates only in terms of the statutory age of majority. As the jurisdiction of the court to order support in New Mexico is limited by statute,⁷¹ the subsequent change of the age of majority can oust the court of jurisdiction to enforce previous orders of support beyond the new

law passed by state or Federal lawmaking bodies, can set aside, nullify, or modify a court's judgment. Appellant had a vested right in the decree allowing her . . . support money, and no power could take it from her, except the reserved right of the court to modify, as provided by state law in force at the time the decree was entered.

⁶¹ *Baker v. Baker*, 80 Wash. 2d 736, 742, 498 P.2d 315, 319 (1972); *Sutherland v. Sutherland*, 77 Wash. 2d 6, 8, 459 P.2d 397, 398 (1969). The jurisdiction of the court to order support has since been extended. WASH. REV. CODE ANN. § 26.09.170 (Supp. 1973); *In re Marriage of Melville*, 11 Wash. App. 879, 526 P.2d 1228 (1974).

⁶² WASH. REV. CODE ANN. § 26.28.010 (Supp. 1973).

⁶³ *Baker v. Baker*, 80 Wash. 2d 736, 741, 498 P.2d 315, 318 (1972).

⁶⁴ *Id.* at 739, 498 P.2d at 318.

⁶⁵ *Waymire v. Waymire*, 10 Wash. App. 262, 263, 517 P.2d 219, 220 (1973).

⁶⁶ *Sproston v. Sproston*, 8 Wash. App. 218, 505 P.2d 479, 480 (1973).

⁶⁷ *Phelps v. Phelps*, 85 N.M. 62, 509 P.2d 254 (1973).

⁶⁸ *Id.* at 66, 509 P.2d at 258.

⁶⁹ *Id.*

⁷⁰ *Phelps v. Phelps*, 85 N.M. 62, 64, 509 P.2d 254, 256 (1973).

⁷¹ The statute creating the power for the court to order child support was limited to orders for maintenance and custody for minor children. N.M. STAT. ANN. § 22-7-6 (1953).

statutory age.⁷² It also emancipates persons having attained the new statutory age.⁷³ The New Mexico decision represents the prevalent view of the few reported opinions, that there are no vested rights created towards unaccrued payments in a decree ordering child support.⁷⁴

CHILD SUPPORT DECREES IN OHIO

The State of Ohio has yet to consider the question of the continued vitality of prior support decrees beyond the new statutory age of majority in a reported decision in either its appellate courts or supreme court. A decision in the Stark County Court of Common Pleas⁷⁵ has outlined a general rule to be followed as to the effect of the statutory change on such prior decrees. The decision, however, is primarily dictum.⁷⁶

Under Ohio precedent⁷⁷ if the statutory change is given full effect, domestic relations courts will be ousted of jurisdiction to enforce decrees entered without an agreement of the parents beyond the new age of majority unless the child is in full-time attendance at an accredited high school.⁷⁸ The duration of the child support obligation of parents as established by law,⁷⁹ has been interpreted as limiting the powers of the domestic relations courts to order support,⁸⁰ regardless of the child's needs.⁸¹ Any rights created under such decrees are also limited by the fact that Ohio,⁸² as elsewhere,⁸³ recognizes that support orders are subject to modification because of a change in circumstances.

The court's ability to modify such orders forced the *Rosher* court to determine that such judgments could not operate to create vested rights towards unaccrued payments.⁸⁴ The State of Washington, however, while recognizing that such orders are subject to modification, has held that they

⁷² Phelps v. Phelps, 85 N.M. 62, 65, 509 P.2d 254, 257 (1973).

⁷³ *Id.*

⁷⁴ See Lookout v. Lookout, 526 P.2d 1405 (Okla. App. 1974); Beaudry v. Beaudry, 132 Vt. 53, 312 A.2d 922 (1973).

⁷⁵ Istnick v. Istnick, 37 Ohio Misc. 91, 307 N.E.2d 922 (Stark County C.P. 1973).

⁷⁶ The only issue before the court was whether an agreement between the parties incorporated into a divorce decree and calling for child support until age 21 would retain its vitality in view of a subsequent lowering of the age of majority. Istnick v. Istnick, 37 Ohio Misc. 91, 92, 307 N.E.2d 922, 923 (Stark County C.P. 1973).

⁷⁷ Miller v. Miller, 154 Ohio St. 530, 97 N.E.2d 213 (1951); Beilstein v. Beilstein, 31 Ohio Op. 116, 61 N.E.2d 620 (Ct. App. 1945).

⁷⁸ OHIO REV. CODE ANN. § 3103.03 (Page Supp. 1973).

⁷⁹ *Id.*

⁸⁰ Miller v. Miller, 154 Ohio St. 530, 97 N.E.2d 213 (1951).

⁸¹ See Beilstein v. Beilstein, 31 Ohio Op. 116, 61 N.E.2d 620 (Ct. App. 1945). For a criticism of this limitation see H. CLARK, LAW OF DOMESTIC RELATIONS § 15.1 at 495 (1968).

⁸² Peters v. Peters, 14 Ohio St. 2d 268, 237 N.E.2d 902 (1968); Byrd v. Byrd, 20 Ohio App. 2d 183, 252 N.E.2d 644 (1969); Rutter v. Rutter, 24 Ohio Misc. 7, 261 N.E.2d 202 (Tuscarawas County C.P. 1970).

⁸³ See note 4 *supra* and accompanying text.

⁸⁴ See notes 22-24 *supra* and accompanying text.

create a vested right in the ordered payments subject only to modification because of a change of circumstances and not by a subsequent legislative enactment.⁸⁵ Any decision concerning vested rights under such decrees will necessarily require a choice between the analysis of the issue as offered in *Rosher* and in *Springstun*. Ohio has yet to make that choice.

In Ohio, as in other states, the initial defense as to any modification of the support obligation through the enactment of a subsequent statute will be made in terms of local savings statutes. Although the Ohio General Assembly did not enact a savings statute to accompany the recent amendments to Ohio Revised Code Sections 3109.01 and 3103.03 (which provide the statutory definitions of majority and the parental duty of child support respectively), there are two Ohio savings statutes which may resolve the effect of the statutory change on prior support orders. Ohio Revised Code Section 1.48 provides that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective."⁸⁶ Section 1.58 limits the effect of the reenactment, amendment, or repeal of statutes.⁸⁷ The impact of these two statutes on the issue in question has yet to be determined.⁸⁸

If the state recognizes a vested right as to unaccrued support payments, Section 1.48 may prove determinative.⁸⁹ If there is a vested right as to such support payments, under Section 1.58 an argument can be made that "under the prior operation of the statute,"⁹⁰ a "right," "privilege," or "obligation" was "previously acquired . . . or incurred thereunder,"⁹¹ such that a remedy or proceeding to enforce that privilege or obligation may still be instituted.⁹² Such an analysis will provide

⁸⁵ See notes 19-21 *supra* and accompanying text.

⁸⁶ OHIO REV. CODE ANN. § 1.48 (Page Supp. 1973).

⁸⁷ The applicable provisions of OHIO REVISED CODE ANN. § 1.58 (Page Supp. 1973) are:

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

⁸⁸ For a background understanding of the history of the enactment of these two statutes and a working example of how they might be applied see Readey, *Application of the New Contractors Statute of Limitations Law*, 45 OHIO BAR 1515 (1972).

⁸⁹ See *Baker v. Baker*, 80 Wash. 2d 736, 741, 498 P.2d 315, 318 (1972), where a similar presumption was employed. *But see Rosher v. Superior Court*, 9 Cal. 2d 556, 559, 71 P.2d 918, 919 (1937), where the statutory change was held prospective in applying only to future payments.

⁹⁰ OHIO REV. CODE ANN. § 1.58(A)(1) (Page Supp. 1973).

⁹¹ *Id.* § 1.58(A)(2).

⁹² *Id.* § 1.58(A)(4).

domestic relations courts with continued jurisdiction to enforce support orders entered without an agreement of the parents, and thereby reduce the issue as to the effect of the recent statutory change to one of construction of the decree itself.

The jurisdiction of the domestic relations courts to enforce decrees based on an agreement of the parents is not based on or limited by the age of majority. Ohio recognizes a significant effect on the court's jurisdiction in the case of incorporation of a support agreement. In *Robrock v. Robrock*,⁹³ the Ohio Supreme Court recognized that the incorporation of an agreement between the parties to a divorce would create an enforceable obligation beyond what the court could order or enforce by itself.⁹⁴ As such, the parties to a divorce can vest the court with jurisdiction beyond the limits of the age of majority through their agreements. Although it was once held that the contractual nature of the agreement prevented a reduction in support payments,⁹⁵ this position has been rejected.⁹⁶

In *Istnick v. Istnick*,⁹⁷ the Common Pleas Court of Stark County demonstrated that, in view of *Robrock*, the statutory change in the age of majority will not affect the ability of domestic relations courts to enforce decrees based on an incorporated agreement.⁹⁸ The court enforced a divorce decree based on an agreement which called for child support until age 21, despite the subsequent reduction in the age of majority.

Under *Robrock* and *Istnick*, therefore, the effect of the statutory reduction in the age of majority and the parental duty to support becomes a question of how agreements incorporated into court decrees are to be construed. The termination provisions of such decrees are invariably placed in terms of such words as "until majority" or "until emancipated."⁹⁹ The experience of other states has shown that many decrees do not even specify the termination date but merely state that the support is for a "minor" child or the like.¹⁰⁰

The *Istnick* decision declared that the words in an incorporated agreement relating to infancy would be given meaning, not under the law at the time the agreement was made, but under whatever age the

⁹³ *Robrock v. Robrock*, 167 Ohio St. 479, 150 N.E.2d 421 (1958).

⁹⁴ For a discussion of the *Robrock* decision see 11 STAN. L. REV. 366 (1959).

⁹⁵ *Tullis v. Tullis*, 138 Ohio St. 187, 34 N.E.2d 212 (1941).

⁹⁶ See note 82 *supra* and accompanying text.

⁹⁷ *Istnick v. Istnick*, 37 Ohio Misc. 91, 307 N.E.2d 922 (Stark County C.P. 1973).

⁹⁸ *Id.* at 93, 94, 307 N.E.2d at 924, 925.

⁹⁹ The experience of the Domestic Relations Division of the Court of Common Pleas, Summit County, Ohio, has been that only one out of a hundred child support agreements does not provide for termination upon emancipation. Interview with Charles E. Lowrey, Chief Referee, Domestic Relations Division of the Court of Common Pleas, Summit County, Ohio, January 17, 1975.

¹⁰⁰ See notes 44-47 *supra* and accompanying text.

legislature should establish.¹⁰¹ Although such an approach is supported by *Rosher*¹⁰² and other states following that decision,¹⁰³ in refusing to look to the intent of the parties under the agreement at the time the agreement was entered, the court rejects the equitable considerations on which the *Robrock* decision was based:

It is entirely possible, perhaps probable, that a wife may be willing to give up by way of agreement with her husband, much to which she would be entitled in consideration of the husband doing more than he might be required to do for their children.¹⁰⁴

Alimony agreements incorporated into decrees are usually not subject to court modification.¹⁰⁵ The result of a removal of one parent's liability for child support prior to what was contemplated by the parties, and without a change in circumstances, makes the agreement no longer meaningful and the property settlement unbalanced.¹⁰⁶

CONCLUSION

What one gains from an analysis of the decisions in other states determining the rules for construction of support agreements incorporated into divorce decrees is that the *Istnick* rationale is not necessarily compelling. There is strong support for the position that such decrees should be construed according to the contract concept that the intent of the parties should govern. Basic to such an approach is that the law at the time the agreement is entered becomes part of the agreement. Under such an approach "majority" means age 21, and the word "emancipation" does not necessarily include emancipation by change of law.

Should the rights towards unaccrued payments be recognized as vested against any subsequent legislative act, the construction of a decree, whether based on an agreement of the parties or not, will become fixed as of the date of the decree. The terms will gain their meaning as of that date, disregarding subsequent legislative acts.

Under a development unique in our legal system, the parties to a divorce can, through their agreement, create jurisdiction for a court to enforce a decree calling for child support beyond the court's power to do

¹⁰¹ *Istnick v. Istnick*, 37 Ohio Misc. 91, 94, 307 N.E.2d 922, 925 (Stark County C.P. 1973).

¹⁰² See note 29 *supra* and accompanying text.

¹⁰³ See note 51 *supra* and accompanying text.

¹⁰⁴ *Robrock v. Robrock*, 167 Ohio St. 479, 487, 150 N.E.2d 421, 427 (1958).

¹⁰⁵ The general rule is that an alimony decree based upon the agreement of the parties is not subject to court modification unless the decree reserves such authority or unless there has been fraud, mistake, or misrepresentation. *Newman v. Newman*, 161 Ohio St. 247, 118 N.E.2d 649 (1954); *Law v. Law*, 64 Ohio St. 369, 60 N.E. 560 (1901); *McClain v. McClain*, 26 Ohio App. 2d 10, 268 N.E.2d 294 (1971); *Pleasants v. Pleasants*, 27 Ohio App. 2d 191, 273 N.E.2d 339 (1971). *But see* *Hunt v. Hunt*, 169 Ohio St. 276, 159 N.E.2d 430 (1959).

¹⁰⁶ See *Whitt v. Whitt*, 490 S.W.2d 159, 161 (Tenn. 1973) (Humphreys, J., dissenting).

so on its own. The jurisdiction to enforce divorce decrees is therefore significantly affected by the nature and source of its provisions. If this development was made to encourage parents to settle their differences by mutual agreement, it would seem that the intent of the parties and other contract principles should be the basis of the construction of the decree.

As to decrees imposed by the court without an agreement of the parties, the enforceability of such decrees is directly dependent on the parental duty of child support imposed by law. Yet even here the amount and duration of child support reflects upon the property settlement as a whole. There is something to be said in favor of finality of decrees subject only to a change in circumstances. College educations can be planned. Incomes can be budgeted and anticipated with reasonable certainty. Property settlements can be more balanced.

The writer finds the analysis and decisions of the state of Washington convincing, although they represent a minority view on the subject. The parties to a divorce are entitled to a certain degree of finality at the time a decree is entered. The legislature retains the power to extend or limit the parental duty of support by statute; yet not as to the particular decree after it has been rendered. At that time rights and duties become fixed subject only to a change of circumstances.

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