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## Illinois ex rel. Sheppard v. Money: Income Withholding Provision of the Illinois Parentage Act of 1984 Expedites Child Support Enforcement at Employers' Expense, 23 J. Marshall L. Rev. 285 (1990)

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**ILLINOIS *ex rel.* SHEPPARD v. MONEY\*: INCOME  
WITHHOLDING PROVISION OF THE ILLINOIS  
PARENTAGE ACT OF 1984 EXPEDITES CHILD  
SUPPORT ENFORCEMENT AT EMPLOYERS'  
EXPENSE**

The Illinois Supreme Court was unanimous in upholding one of the most controversial and significant child support enforcement tools<sup>1</sup> that the Illinois Legislature has ever enacted in order to combat the growing crisis of unpaid child support.<sup>2</sup> The Illinois Parentage Act of 1984<sup>3</sup> (the "Act") contains an expedited income withhold-

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\* 124 Ill. 2d 265, 529 N.E.2d 542 (1988).

1. The income withholding provision drew considerable concern from several of the state senators and representatives during the floor debates. See ILLINOIS HOUSE OF REPRESENTATIVES DEBATE, 83RD GENERAL ASSEMBLY 215-16 (June 22, 1983) (statement of Rep. Johnson voicing strong concerns about implementation of income withholding to enforce child support orders). The provision also drew attention from members of the legal community after its enactment. See Lewin, *New Federal Law to Radically Change Child Support*, Chicago Daily L. Bull., Nov. 25, 1988, at 1, col. 1. (discussing the reservations of the legal community and the American Civil Liberties Union over the use of income withholding orders to enforce child support).

2. On a national level, the child support crisis is evidenced by the latest available estimates showing that overdue child support payments totaled approximately 4 billion dollars in 1985, exclusive of arrearages from prior years, and that of the 5.4 million women receiving child support awards, only one half received the full amount. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, No. 154, CHILD SUPPORT AND ALIMONY: 1985, at 1, 13 (1986). In Illinois, nearly 500 million dollars in child support has gone unpaid. ILLINOIS DEP'T OF PUBLIC AID, ENSURING A CHILD'S BIRTHRIGHT: AN ILLINOIS EMPLOYERS' GUIDE TO INCOME WITHHOLDING 1 (1988). Seventy percent of families that should be receiving child support either receive less than the full amount, or none at all. *Id.* Illinois is ranked as one of the worst states in collecting child support payments from absentee fathers. Schultz, *State May Lose Funds Over Child Support*, Chicago Sun-Times, Dec. 11, 1987, at 16, col. 4. See also COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, CHILD SUPPORT ENFORCEMENT: A REPORT CARD 18 (1988) (out of 50 states in the country Illinois ranks 35th in child support collection).

3. ILL. REV. STAT. ch. 40, ¶¶ 2501-2526 (1987). The Illinois Parentage Act of 1984 (the "Act") declares that the public policy of Illinois is to recognize the right of every child to the physical, mental, emotional, and monetary support of his or her parents. *Id.* ¶ 2501.1. The Act expands the rights of illegitimate children and putative fathers and provides expedited procedures to aid custodial parents in the collection of child support obligations. *Id.* ¶¶ 2507, 2520.

This recent statutory expansion of rights under the Act is not reflective of earlier versions of parentage laws in Illinois. Although no common law rule exists which expressly mandates that parents financially support their children, courts have implicitly recognized a parent's support obligation. See *Ehorn v. Podraza*, 51 Ill. App. 3d 816, 817, 367 N.E.2d 300, 302 (1977) (remedy of child support is purely statutory and courts may enforce it only in the manner in which the statute prescribes); *Greenspan v. Slate*, 12 N.J. 426, 435, 97 A.2d 390, 394 (1953) (no common law right to child support exists even though support obligations may be imposed on parents in a court

ing provision that the legislature designed to comply with the

of equity). See generally H. KRAUSE, FAMILY LAW 243 (1988) (discussing child support obligations under state law). In the early 18th century, Illinois statutes contained a law designed to determine the putative father of a child born out of wedlock and to provide support for that child. REVISED LAWS OF ILLINOIS 334 (1833) (repealed 1957). Although civil in nature, the law contained quasi-criminal rights and procedures, such as allowing for the arrest of accused fathers who failed to appear and defend before the court. *Id.* at 335-36. The father then had a right to take custody of the child, and a mother who did not comply by surrendering the child forfeited her right to further support payments. *Id.* at 336.

This law, later entitled the law of bastardy, continued relatively unchanged well into the 19th century. Klages, *The Illinois Parentage Act of 1984: The Continuing Shift Toward Civil Enforcement*, 73 ILL. B.J. 564, 564 (1985). Compare STATUTES OF THE STATE OF ILLINOIS ch. 16, §§ 1-10 (1856) (repealed in 1957) with ILL. REV. STAT. ch. 17, §§ 1-18 (1955) (repealed in 1957) (little change in the law concerning bastardy). The Illinois Legislature repealed the law concerning bastardy in 1957 and enacted the Paternity Act which added, most notably, requirements for the use of blood tests to determine paternity and the implementation of a two year statute of limitations. ILL. REV. STAT. ch. 17, §§ 31-53 (1957) (the Paternity Act was transferred to ILL. REV. STAT. ch. 40, ¶¶ 1351-1368 in 1979 and was later repealed in 1984). In 1983, the Paternity Act was amended to allow for the withholding of income to secure non-payment of support. ILL. REV. STAT. ch. 40, ¶ 1361(B) (1983) (repealed in 1984). However, in that same year, the Illinois appellate court held that the two year statute of limitations denied equal protection of the law to illegitimate children and was unconstitutional. *Jude v. Morrissey*, 117 Ill. App. 3d 782, 783-84, 454 N.E.2d 24, 25-26 (1983) (following the decision in *Pickett v. Brown*, 462 U.S. 1 (1983), in which United States Supreme Court held that a two year statute of limitations was unconstitutional).

The Illinois legislature enacted the Parentage Act of 1984 to comply with the court decision in *Morrissey* and to meet the requirements of the Child Support Enforcement Amendments of 1984 as mandated by Congress. *Id.* See ILLINOIS HOUSE OF REPRESENTATIVES DEBATE, 83RD GENERAL ASSEMBLY 48 (June 21, 1984) (statement by Rep. Jaffe that the proposed bill is necessary to bring Illinois law into compliance with recent court decisions and congressional mandate). But see *Dornfeld v. Julian*, 104 Ill. 2d 261, 266-67, 472 N.E.2d 431, 432-33 (1984) (Illinois Supreme Court later held that although a two year statute of limitations was unconstitutional, the balance of the Parentage Act was constitutional despite the absence of a severance clause). The legislature, in complying with the federal mandate, also incorporated an identical withholding provision into the Illinois Public Aid Code, ILL. REV. STAT. ch. 23, ¶ 10-16.2 (1987), the Illinois Marriage and Dissolution of Marriage Act, ILL. REV. STAT. ch. 40, ¶ 706.1 (1987), the Revised Uniform Reciprocal Enforcement of Support Act, ILL. REV. STAT. ch. 40, ¶ 1226.1 (1987), and the Non-Support of Spouse and Children Act, ILL. REV. STAT. ch. 40, ¶ 1107.1 (1987). *Money*, 124 Ill. 2d at 272, 529 N.E.2d at 545. See *infra* note 4 for a discussion of the history of the Child Support Enforcement Amendments of 1984. The Parentage Act of 1984 most notably expands the rights of the illegitimate child and putative father by: broadening the definition of a paternity plaintiff; extending the statute of limitations to twenty years; allowing for the establishment of paternity by consent or default of the parties; establishing a presumption that the husband is the natural father of a child under certain circumstances; establishing procedures to be followed in a paternity action; abolishing the quasi-criminal nature of the proceeding; and strengthening the enforcement of paternity judgments and support orders by requiring income withholding upon the default of the defendant. ILL. REV. STAT. ch. 40, ¶¶ 2501-2526 (1987). See also ILL. REV. STAT. ch. 40, ¶ 706.1 (Supp. to Historical and Practice Notes) (Smith-Hurd Supp. 1987) (explanation of each section of the income withholding provision). See generally ILLINOIS TASK FORCE ON CHILD SUPPORT, CHILD SUPPORT IN ILLINOIS: HOW IT WORKS AND WHAT TO DO WHEN IT DOESN'T, A HANDBOOK FOR CUSTODIAL PARENTS 1-6 (1988) (describes the procedures that custodial parents should follow to enforce child support obligations under the Illinois Parentage Act of 1984); Klages, *supra*, at 564 (discussing the im-

congressionally mandated Child Support Enforcement Amendments of 1984.<sup>4</sup> Section 2520<sup>5</sup> of the Act sets forth procedures that a parent

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provements made in the Illinois Parentage Act of 1984 as compared to the old Paternity Act of 1957).

4. 42 U.S.C. § 666 (1982 & Supp. IV 1986). Congress enacted the Child Support Enforcement Amendments of 1984 to combat the nationwide problem of non-payment of judicially mandated child support obligations by making collection easier and enforcement less costly for all custodial parents, irrespective of whether they receive welfare benefits. 129 CONG. REC. H33035 (1983) (statement of Rep. Snowe that legislative purpose is to encourage improved enforcement). The 1984 Amendments reflected Congress' growing involvement in the child support area over the past several years and a recognition that a more disciplined and uniform approach was necessary to remedy the child support crisis. Woods, *Child Support: A National Disgrace*, 17 CLEARINGHOUSE REV. 538, 542-43 (1983).

Congress initially attempted to help deserted mothers and unsupported children by enacting a section in the Social Security Act of 1935, Act of Aug. 14, 1935, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 601-665 (1982)), which provided public aid to destitute mothers for the care of their dependent children. 42 U.S.C. § 601 (1982). This form of public aid was commonly referred to as Aid To Families With Dependent Children (AFDC). *Id.* The act required noncustodial parents to pay child support but did not provide for any enforcement mechanisms. *Id.* See generally Baker & Stuff, *The Costs and Benefits of Child Support Enforcement*, 34 Juv. & FAM. CT. J. 41 (1984) (discussing origins of federal financial aid for child support).

Congress amended the Social Security Act again in 1967, PUB. L. No. 90-248, 81 Stat. 877 (1967) (codified as amended at 42 U.S.C. §§ 601-615 (Supp. 1985)), to require states to develop child support enforcement programs, but allowed for only a 50 percent federal reimbursement of administrative costs. 42 U.S.C. §§ 602(a), 603(a) (Supp. 1985). The 1967 Amendments proved to be ineffective due to the lack of proper state implementation of the new program and lack of federal enforcement. H. KRAUSE, CHILD SUPPORT IN AMERICA, THE LEGAL PERSPECTIVE 281-82 (1981).

Congress increased federal involvement in the child support area with the 1974 Social Security Amendments, PUB. L. No. 93-647, 88 Stat. 2351 (1974) (codified as amended at 42 U.S.C. §§ 651-657 (1982)), by adding Title IV-D, a child support title. 42 U.S.C. §§ 651-665 (1982). Title IV-D required states to meet certain federal guidelines in implementing child support programs in order to qualify for a 75 percent reimbursement of administrative costs. 42 U.S.C. § 656 (1983 & Supp. 1985). State enforcement programs were monitored for compliance with the federal guidelines. *Id.* Also, Title IV-D required custodial parents to assign their support rights to the state in order to receive AFDC benefits. 42 U.S.C. § 656 (1982). This allowed the states to initiate legal proceedings to collect the overdue support payments. *Id.* The state could also take additional steps to ensure that payment was made by garnishing income, attaching property or imprisoning the obligor. 42 U.S.C. § 654 (1982). Additionally, for support non-payments certified by the Department of Health and Human Services, the state could direct the Internal Revenue Service (IRS) to collect the arrears from federal income tax refunds of the delinquent parent and remit them to the state. *Id.* § 652(b). See generally H. KRAUSE, *supra*, at 310 (discussing the new enforcement tools provided by the 1974 Amendments).

In 1981, Congress amended the Social Security Act, PUB. L. No. 97-35, 95 Stat. 860 (1981) (codified as amended at 42 U.S.C. §§ 664 (1982)), to expand the involvement of the IRS in the enforcement of child support. *Id.* The 1981 tax intercept program allowed the IRS to deduct unpaid child support from tax refunds of both welfare and non-welfare obligors for remittance to the appropriate state. *Id.* See generally IRS Collects Unpaid Child Support from Tax Refunds, 10 TAX'N FOR LAW. 349 (1982) (IRS regulations under the 1981 tax intercept program require that non-welfare taxpayers subject to collection receive notice prior to collection but welfare taxpayers receive notice only after collection occurs). Compare Ehrlich, *A New National Family Law - Garnish the Feds - Use the U.S. Courts*, 65 ILL. B.J. 70, 70 (1976) (numerous requirements to intercept tax refunds under the 1974 Amend-

with a child support order must follow to obtain a court order re-

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ments) with Note, *In Support of Support: The Federal Tax Refund Offset Program*, 37 TAX LAW 719, 723-24 (1984) (streamlined collection procedures under the 1981 tax intercept program).

In response to the states' varying levels of enthusiasm for establishing their own support programs, Congress enacted the Child Support Enforcement Amendments of 1984. 42 U.S.C. § 666 (Supp. III 1985) (originally enacted as PUB. L. No. 98-378, 98 Stat. 1305). The 1984 Amendments, supplemented by the Department of Health and Human Services' federal regulations, amended Title IV-D of the Social Security Act by requiring states to aid in the enforcement of child support regardless of whether the family receives AFDC. 42 U.S.C. § 666 (Supp. III 1985). The enforcement procedures required include: automatic wage withholding; federal and state income tax offsets for both AFDC and non-AFDC families; mandatory liens against real and personal property; security and bonding procedures; and information access to credit agencies. 42 U.S.C. § 666 (Supp. III 1985). See generally Freed & Walker, *Family Law in the Fifty States: An Overview*, 18 FAM. L.Q. 369, 447-51 (1985) (summary of all enforcement remedies required by the 1984 Amendments); Roberts, *Additional Remedies Under The Child Support Enforcement Amendments of 1984*, 20 CLEARINGHOUSE REV. 17 (1986) (summary of the enforcement remedies other than wage withholding under the 1984 Amendments).

One of the most important and controversial requirements of the 1984 Amendments is the mandate that all child support orders issued or modified after October 1, 1985, contain a provision for withholding from non-custodial parents' wages or other income an amount sufficient to satisfy those parents' support obligations. 42 U.S.C. § 666(a)(8) (Supp. III 1985); C.F.R. § 302.70(a)(8) (1986). For custodial parents receiving IV-D services (both AFDC and non-AFDC families) the actual withholding must be automatically initiated by a public office whenever the non-custodial parent's support payments are one month in arrears or when the non-custodial parent requests a withholding. C.F.R. § 303.100(a)(4) (1986). A state may establish an earlier time for withholding to be triggered. *Id.* (amended by the Family Support Act of 1988, PUB. L. No. 100-845, §§ 101-102 Stat. 2343 (1988)) (this recent amendment requires all support orders issued or modified in IV-D cases after November 1, 1990 to have an immediate withholding order initiated unless there is a written agreement between the parties stating otherwise). See *infra* note 14 discussing the requirements of the Family Support Act of 1988). See generally Mason & Roberts, *Promises, Promises: Child Support Enforcement in 1988*, 22 CLEARINGHOUSE REV. 909 (1989) (discussing the Family Support Act of 1988).

5. ILL. REV. STAT. ch. 40, ¶ 2520 (1987). The Act provides in relevant part:

(B)(1) Upon entry of any withholding order for support on or after July 1, 1985, the court shall enter a separate order for withholding which shall not take effect unless the obligor becomes delinquent in paying the order for support or the obligor requests an earlier effective date; except that the court may require the order for withholding to take effect immediately.

(2) An order for withholding shall be entered upon petition by the obligee or public office where an order for withholding has not been previously entered.

(3) The order for withholding shall. . . [d]irect any payor to withhold a dollar amount equal to the order for support. . . (emphasis added).

*Id.*

The primary purpose of the income withholding provision of the Parentage Act of 1984 is to comply with the congressional mandate that requires states to establish a speedy and simple method of withholding income to combat the child support crisis. See *supra* note 4 discussing the mandates of the Child Support Enforcement Amendments of 1984. The withholding provision contained in the Parentage Act was virtually identical to the withholding provision which the legislature had originally enacted in the Paternity Act of 1957. ILL. REV. STAT. ch. 40, ¶ 1361(B) (1983) (repealed by the Parentage Act of 1984, PUB. ACT 83-1372, codified as amended at ILL. REV. STAT. ch. 40, ¶¶ 2501-2526 (1987)).

quiring a payor (employer) to withhold the income of an obligor (absent parent) to satisfy delinquent child support arrearages.<sup>6</sup> In *Illinois ex rel. Sheppard v. Money*<sup>7</sup>, the court addressed the issue of whether section 2520, which allows the court to enter an income withholding order against "any payor"<sup>8</sup> without naming a specific employer, deprives the payor and obligor of due process<sup>9</sup> and violates the separation of powers doctrine.<sup>10</sup> The court resolved the issue in favor of section 2520, holding that an order issued to "any payor" is within the court's jurisdiction and that a payor is not a necessary party in the action.<sup>11</sup> Moreover, the court determined that section 2520 provides an obligor with sufficient notice and hearing to satisfy due process requirements,<sup>12</sup> and does not violate the separation of powers doctrine.<sup>13</sup> Thus, the *Money* decision establishes an

6. ILL. REV. STAT. ch. 40, § 2520 (1987). The Act provides definitions for the following key terms:

(A)(1) "Order for Support" means any order of the court which provides for periodic payment of funds for the support of a child, whether temporary or final . . . .

(2) "Arrearage" means the total amount of unpaid support obligations.

(3) "Delinquency" means any payment under an order for support which becomes due and remains unpaid after an order for withholding has been entered . . . .

(4) "Income" means any form of periodic payment to an individual, regardless of source, . . . and any other payments made by any person, private entity, federal or state government. . . .

(5) "Obligor" means the individual who owes a duty to make payments under an order for support.

(6) "Obligee" means the individual to whom a duty of support is owed . . . .

(7) "Payor" means any payor of income to an obligor.

(8) "Public office" means any elected official or any state or local agency which is or may become responsible by law for enforcement of . . . an order for support. . . .

*Id.*

7. *Money*, 124 Ill. 2d 265, 529 N.E.2d 542 (1988).

8. See *supra* note 5 for the text of the withholding provision in section 2520(B)(3).

9. The due process clauses of the fifth and fourteenth amendments to the United States Constitution prevent the federal and state governments, respectively, from depriving anyone of life, liberty, or property without due process of law. U.S. CONST. AMENDS. V, XIV. The Illinois Constitution contains a similar due process provision. ILL. CONST. ART. I, § 2.

10. *Money*, 124 Ill. 2d at 268, 529 N.E.2d at 543. The Illinois Constitution declares that the legislative, executive, and judicial branches are separate and that no branch shall exercise powers that properly belong to another branch. ILL. CONST. ART. II, § 1. The United States Constitution does not make a formal declaration of commitment to separation of powers. See Nelson, *Separation of Powers: A Historical Review from Marbury to Bowsher*, ILL. B.J. 484, 484 (May 1987). However, a separation of powers is implicit in the structure and language of the first three articles which expressly apportion the legislative, executive, and judicial powers among the three distinct branches of government. *Id.*

11. *Money*, 124 Ill. 2d at 283, 529 N.E.2d at 550.

12. *Id.* at 280, 529 N.E.2d at 549.

13. *Id.* at 285-86, 529 N.E.2d at 551-52.

important precedent in determining the lengths that government may go to collect child support.<sup>14</sup>

On March 16, 1987, Barbara Sheppard, a public aid recipient, filed a complaint under the Illinois Parentage Act of 1984.<sup>15</sup> The complaint named John Money as the natural father of Sheppard's son and sought an order for child support.<sup>16</sup> Money was legally served with process<sup>17</sup> but failed to appear at the initial support hearing.<sup>18</sup> The circuit court judge of Cook County entered a default order against Money and sent him notice of the order.<sup>19</sup> The court set a date to determine the amount of child support payments and noti-

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14. Subsequent to the *Money* decision, the Illinois General Assembly has amended section 2520(B)(1) to allow for an even more expeditious withholding of an obligor's income. Act of Jan. 1, 1989, PUB. ACT 85-1156, 1988 Ill. Laws 1184 (amending ILL. REV. STAT. ch. 40, § 2520(B)(1) (1987)) (effective Jan. 1, 1989). The amendment in pertinent part provides that:

On or after January 1, 1989, the court shall require the order for withholding to take effect immediately, unless a written agreement is reached by both parties providing for an *alternative arrangement*, approved by the court, which insures payment of support. In that case, the court shall enter the order for withholding which will not take effect unless the obligor becomes delinquent in paying the order for support.

*Id.* (emphasis added). See *supra* note 4 for the federal mandate requiring this provision. However, as of the date of this writing, there have been no cases interpreting what "alternative arrangements" contemplated in the amendment will be acceptable to the court.

15. *Money*, 124 Ill. 2d at 268, 529 N.E.2d at 543. The Illinois Legislature enacted the Parentage Act of 1984 to comply with the federally mandated Child Support Enforcement Amendments of 1984. See *supra* note 3 discussing the legislative history of the Illinois Parentage Act of 1984. The congressional mandate requires all states to aid in the enforcement of child support regardless of whether the custodial parent is receiving public aid (AFDC). See *supra* note 4 discussing the congressional mandates imposed on the states. However, the mandates also require custodial parents receiving AFDC funds on behalf of a minor child to assign their support rights to the state. 42 U.S.C. § 602(a)(26) (Supp. V 1987). Thus, the state has the same rights, by assignment, as the AFDC recipient has to the support payments. *Money*, 112 Ill. 2d at 277, 529 N.E.2d at 548. Because the state is a real party at interest with respect to the support issue, the state may join in the complaint to seek reimbursement for the public assistance granted on behalf of the child. *Id.* Permitting the state to collect these payments allows for the funding of the AFDC program. *Jahn v. Regan*, 584 F. Supp. 399, 401-02 (E.D. Mich. 1984).

16. *Money*, 124 Ill. 2d at 268, 529 N.E.2d at 544.

17. *Id.* Money was served by substituted service upon a member of his household over the age of thirteen pursuant to the Illinois Code of Civil Procedure. *Id.* See ILL. REV. STAT. ch. 110, § 2-203(a)(2) (1987) (requirements for service of process upon an individual).

18. Illinois *ex rel.* Sheppard v. Money, 124 Ill. 2d 265, 269, 529 N.E.2d 542, 544 (1988). The date of the support hearing was May 1, 1987. *Id.* at 268, 529 N.E.2d at 544.

19. *Id.* at 269, 529 N.E.2d at 544. Section 2520 allows the court to enter default orders against fathers who, after proper service, fail to appear in court. ILL. REV. STAT. ch. 40, § 2514(f) (1987). The court may proceed to hear the action upon the testimony of the mother or other parties. *Id.* Additionally, the court may reserve any order as to the amount of child support until the father has received notice of a hearing on the matter. *Id.*

fied Money of that hearing date.<sup>20</sup> Money again failed to appear, and the court proceeded with an *ex parte* hearing.<sup>21</sup> The court entered a default judgment of paternity and an order of support in the amount of \$76.50 per month.<sup>22</sup> The state, on behalf of Sheppard, requested that the circuit court enter a withholding order requiring "any payor" to withhold Money's wages as provided under section 2520 of the Act.<sup>23</sup> The judge, after taking the motion under advisement, denied the motion and *sua sponte* declared section 2520 unconstitutional.<sup>24</sup> The state appealed the circuit court's decision directly to the Illinois Supreme Court.<sup>25</sup> In a unanimous decision, the Illinois Supreme Court reversed the lower court and held that section 2520 was constitutional.<sup>26</sup> The court first addressed the issue of whether section 2520 provides adequate due process protection to an obligor.<sup>27</sup> The court concluded that the pre- and post-judgment hearings and notice provided in the Act were sufficient to protect an obligor's interests.<sup>28</sup> The court next resolved the issue of whether section 2520 deprives a payor of due process rights.<sup>29</sup> The court concluded that a payor is not a necessary party to the child support

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20. *Money*, 124 Ill. 2d at 269, 529 N.E.2d at 544. The court set the hearing date for June 24, 1987. *Id.*

21. *Id.* An *ex parte* hearing is a legal proceeding in which the court or tribunal hears only one side of the controversy. BLACK'S LAW DICTIONARY 297 (5th ed. 1983).

22. *Money*, 124 Ill. 2d at 269, 529 N.E.2d at 544. The amount of support ordered by the court was equal to the monthly amount of public aid payments that the state had been paying Sheppard. Brief of Amicus Curiae for Appellant, on behalf of the Illinois Task Force on Child Support at 4, Illinois *ex rel.* Sheppard v. Money, 124 Ill. 2d 265, 529 N.E.2d 542 (1988). The circuit court had refused to enter an order for an amount other than the amount that was necessary to reimburse the state for its expenditures on behalf of the child. *Id.* at n.2.

23. *Money*, 124 Ill. 2d at 269, 529 N.E.2d at 544. Section 2520(B)(1) mandates that for support orders entered after July 1, 1985, the court *must* enter an order for withholding. See *supra* note 5 for the text of section 2520(B)(1). In the instant case, the circuit court judge did not enter the withholding order and the state proceeded under section 2520(B)(2). *Money*, 124 Ill. 2d at 273-74, 529 N.E.2d at 546. Section 2520(B)(2) provides that an order for withholding shall be entered by the court upon petition by the custodial parent or public office where an order has not been previously entered. See *supra* note 5 for the text of section 2520(B)(2). The state, apparently in anticipation of denial of its petition for a withholding order under section 2520(B)(2), filed a motion to stay any refusal to enter the withholding order. *Money*, 124 Ill. 2d at 269, 529 N.E.2d at 544.

24. Illinois *ex rel.* Sheppard v. Money, 124 Ill. 2d 265, 269, 529 N.E.2d 542, 544 (1988). The circuit court denied the motion on July 17, 1987. *Id.* The circuit court also denied the state's motion to stay any refusal to enter the withholding order. *Id.*

25. *Id.* at 268, 529 N.E.2d at 543. In cases in which a circuit court holds a federal or state statute unconstitutional, the appeal shall be taken directly to the Illinois Supreme Court. ILL. REV. STAT. ch. 110A, ¶ 302(a) (1987).

26. *Money*, 124 Ill. 2d at 287, 529 N.E.2d at 552.

27. *Id.* at 274, 529 N.E.2d at 546. The circuit court judge had held that the procedures in section 2520 were too limited to provide adequate protection against the possibility of a withholding order being entered against a wrong defendant or being improperly served. *Id.* at 278, 529 N.E.2d at 548.

28. *Money*, 124 Ill. 2d at 280, 529 N.E.2d at 549.

29. *Id.* at 281, 529 N.E.2d at 549.



proceeding<sup>30</sup> and that an order entered against "any payor" is within the jurisdiction of the court.<sup>31</sup> The court concluded by addressing the issue<sup>32</sup> of whether an order directing the payor to give the withholding order preference over prior claims of creditors amounts to judicial legislation.<sup>33</sup> The court held that a payor is not a party to the action and that it was error for the circuit court to determine the constitutionality of an Act which did not affect the parties in the action.<sup>34</sup>

The court prefaced its analysis by noting that the circuit court had failed to accord the legislature the proper deference in resolving the constitutionality of the Act.<sup>35</sup> The court then began its analysis by stating that due process rights consist of notice and an opportu-

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30. *Id.* at 283, 529 N.E.2d at 550.

31. *Id.* The first Appellate District subsequently followed the *Money* court's holding on this issue. See *Parks v. Romans*, 187 Ill. App. 3d 445, 543 N.E.2d 277 (1989) (withholding order directed to "any payor" was valid per the *Money* decision).

32. The Illinois Supreme Court, in addition to the constitutional issues in *Money*, also addressed the issue of whether the amount of monthly support payments entered by the circuit court against John Money were calculated correctly. *Id.* at 286, 529 N.E.2d at 552. The circuit court judge calculated the monthly support payments based on the amount of public aid the state had been paying Sheppard to support her child. See *supra* note 22 discussing how the circuit court calculated the monthly support payments. The state contended that the circuit court should have used the guidelines and standards set forth in the Illinois Marriage and Dissolution of Marriage Act as required by section 2514 of the Illinois Parentage Act. *Money*, 124 Ill. 2d at 286, 529 N.E.2d at 552. See also ILL. REV. STAT. ch. 40, § 2514 (1987) (requiring court to use guidelines in the Illinois Marriage and Dissolution of Marriage Act in determining the amount of child support). Section 505 of the Illinois Marriage and Dissolution of Marriage Act requires the court to consider certain statutory guidelines based on the need of the child when determining the amount of support due. ILL. REV. STAT. ch. 40, § 505 (1987). See generally Comment, *Recent Amendments to Illinois Child Support Statutes: Income Percentage Guidelines*, 19 J. MARSHALL L. REV. 207 (1985) (discussing the guidelines set forth in section 505 of the Illinois Marriage and Dissolution of Marriage Act). The supreme court held that the circuit court's failure to consider the guidelines in determining the amount of support payments constituted error, and remanded the case to the circuit court to recalculate the payments according to the guidelines. *Money*, 124 Ill. 2d at 286, 529 N.E.2d at 552.

33. *Money*, 124 Ill. 2d at 285, 529 N.E.2d at 551. See *infra* note 54 detailing the duties of the payor under section 2520.

34. Illinois *ex rel.* *Sheppard v. Money*, 124 Ill. 2d 265, 285, 529 N.E.2d 542, 551 (1988). Additionally, the court determined that although the Act permitted non-judicial personnel to perform certain tasks with respect to issuance of the withholding orders, the final adjudication remained with the judge, thus, there was no violation of the separation of powers doctrine. *Id.* at 285-86, 529 N.E.2d at 551-52. See *infra* note 59 discussing the delegation of duties to non-judicial personnel under section 2520.

35. *Money*, 124 Ill. 2d at 272, 529 N.E.2d at 545. The court stated that legislative statutes enjoy a heavy presumption of constitutionality. *Id.* (citing *County of Kane v. Carlson*, 116 Ill. 2d 186, 199, 507 N.E.2d 482, 494 (1987)). Thus, the courts should construe the statutes to avoid constitutional infirmity and infringement on judicial power. *Id.* (citing *Morton Grove Park District v. American Nat'l Bank & Trust Co.*, 78 Ill. 2d 353, 363, 399 N.E.2d 1295, 1299 (1980)). Moreover, courts have a duty to sustain legislation whenever possible and to resolve all doubts in favor of constitutional validity. *Id.* (citing *Agran v. Checker Taxi Co.*, 412 Ill. 145, 148, 105 N.E.2d 713, 714 (1952)).

nity to be heard.<sup>36</sup> In resolving whether section 2520 provides adequate due process to an obligor, the court applied the three part test set forth by the United States Supreme Court in *Mathews v. Eldridge*.<sup>37</sup> Under *Eldridge*, the first factor that the court considers is the interests of the private individuals that will be affected by the official action.<sup>38</sup> Second, the court examines the need for additional safeguards to prevent an erroneous deprivation of the individual's interests.<sup>39</sup> In examining this factor, the court weighs the benefits of additional safeguards against the costs involved in light of the complexity of the issue and degree of risk.<sup>40</sup> Third, the court considers the interests that the government may have in the action.<sup>41</sup> The court then applies a balancing test to determine whether adequate due process safeguards are present.<sup>42</sup>

Applying the first *Eldridge* factor, the *Money* court noted the obvious interest that an obligor has in his or her income,<sup>43</sup> and also that the custodial parent has a vested right<sup>44</sup> in past-due child support payments.<sup>45</sup> In examining the second factor, the court stated that the procedures in section 2520 had minimized the risk of an erroneous deprivation of an obligor's interest<sup>46</sup> as much as possible,

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36. *Money*, 124 Ill. 2d at 274, 529 N.E.2d at 546 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

37. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 336 (1976)). In *Eldridge*, a state agency terminated the social security disability benefits of *Eldridge* in accordance with the administrative procedures established by the Secretary of Health, Education and Welfare (HEW). *Eldridge*, 424 U.S. at 325. *Eldridge* brought an action against the Secretary of HEW challenging the constitutionality of these procedures. *Id.* at 326. The United States Supreme Court formulated a three part test to determine the sufficiency of the due process protections afforded by the Secretary's procedures. *Id.* at 336.

38. *Eldridge*, 424 U.S. at 336.

39. *Id.*

40. *Id.*

41. *Id.* The government's interest includes the function that is involved and the fiscal and administrative burdens that additional or substitute procedures would entail. *Id.*

42. *Illinois ex rel. Sheppard v. Money*, 124 Ill. 2d 265, 277, 529 N.E.2d 542, 547 (1988).

43. *Id.* at 275, 529 N.E.2d at 547 (quoting *Sniadich v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969)).

44. *Id.* at 276, 529 N.E.2d at 547 (quoting *Sostak v. Sostak*, 113 Ill. App. 3d 954, 958, 447 N.E.2d 1345, 1348 (1983)).

45. *Money*, 124 Ill. 2d at 275-76, 529 N.E.2d at 547.

46. *Id.* at 276, 529 N.E.2d at 547. The *Money* court noted that section 2520 provides notice of the pending matter at all three stages of concern: paternity, establishment of the support obligation, and enforcement by income withholding. *Id.* at 280, 529 N.E.2d at 549. The court noted further that the withholding order does not become effective unless the obligor becomes delinquent in support obligations. *Id.* at 278-79, 529 N.E.2d at 548. See also ILL. REV. STAT. ch. 40, § 2520(B) (1987) (corresponding section in the Parentage Act for these procedures). If the obligor becomes delinquent, he or she is sent a notice of the delinquency along with a copy of a petition to stay the service of the withholding order on a payor. *Money*, 124 Ill. 2d at 278, 529 N.E.2d at 548. See also ILL. REV. STAT. ch. 40, § 2520(C)(1) (1987) (corresponding

and that additional safeguards were not cost beneficial.<sup>47</sup> Finally, in applying the third factor, the court noted that Illinois has a compelling interest in promoting the welfare of children, and in recouping money spent to support children whose parents do not fulfill their support obligations.<sup>48</sup> After considering the three *Eldridge* factors, the court concluded that the procedures for income withholding afforded adequate protection to an obligor's interest in his or her property.<sup>49</sup>

The court next rejected the circuit court's ruling that section 2520 deprives a payor of due process rights.<sup>50</sup> Noting that due process requires the joinder of all necessary or indispensable parties to an action,<sup>51</sup> the court asserted, as the only relevant inquiry, whether a payor has a present interest in the controversy.<sup>52</sup> In resolving this issue the court noted that because the payor has no judgment entered against him, and is merely a stakeholder<sup>53</sup> of the obligor's funds, the payor has no present interest in the action and need not be joined as a party.<sup>54</sup> The court stated that an order issued against

section in the Parentage Act for these procedures). The notice informs the obligor of the delinquent amount and advises the obligor that a payor of income will be served a withholding order unless the delinquent amount is paid. *Money*, 124 Ill. 2d at 278, 529 N.E.2d at 548. The obligor may also avoid service of the withholding order by filing the petition to stay service to contest the amount of support due, the amount of the delinquency, or a mistake in identity, in which case the court conducts a hearing to resolve the matter. *Id.* at 279, 529 N.E.2d at 548. See also ILL. REV. STAT. ch. 40, ¶¶ 2520(D), (H) (1987) (corresponding section in the Parentage Act for these procedures).

47. *Illinois ex rel. Sheppard v. Money*, 124 Ill. 2d at 265, 276, 529 N.E.2d 542, 547 (1988).

48. *Id.* at 277, 529 N.E.2d at 547. See *supra* note 15 discussing the state's right to recoup support payments made to custodial parents receiving AFDC.

49. *Money*, 124 Ill. 2d at 280, 529 N.E.2d at 549. The court made note of the fact that the obligor in the instant case, John Money, had chosen to ignore the notices and hearings provided to him under the Act, and that it was his own failure that deprived him of his due process rights, not the failure of the Act. *Id.*

50. *Id.* at 281, 529 N.E.2d at 549.

51. *Id.* (citing *Feen v. Ray*, 109 Ill. 2d 339, 344, 487 N.E.2d 619, 620 (1985)).

52. *Id.* (citing *Lakeview Trust & Sav. Bank v. Estrada*, 134 Ill. App. 3d 792, 811, 480 N.E.2d 1312, 1326 (1985)).

53. *Illinois ex rel. Sheppard v. Money*, 124 Ill. 2d 265, 282, 529 N.E.2d 542, 550 (1988). The court stated that a payor (employer) is similar to a garnishee (employer) in that both are custodians of funds which are sought to be reached. *Id.*

54. *Id.* The court noted that the payor has no judgment entered against it and that the payor's rights, penalties and duties are set forth in the Act. *Id.* Section 2520(G) provides in relevant part:

(1) It shall be the duty of any payor who has been served with a copy of the specially certified order for withholding and a notice of delinquency to deduct and pay over income as . . . designated in the order for withholding . . .

(3) Withholding of income . . . shall be made without regard to any prior or subsequent garnishments, attachments, wage assignments, or any other claims of creditors.

(4) No payor shall discharge, discipline, refuse to hire or otherwise penalize any obligor because of the duty to withhold income.

ILL. REV. STAT. ch. 40, ¶ 2520(G) (1987).

“any payor” is within the court’s jurisdiction because it is a suitable method of accomplishing Congress’ goals.<sup>55</sup> The final issue which the court addressed was whether the requirement in section 2520(G), directing the payor to affect judgments of other courts, violates the separation of powers doctrine.<sup>56</sup> The court held that a payor is not a party to the action<sup>57</sup> and that the circuit court had erred in determining the constitutionality of an Act which did not affect the parties in the action.<sup>58</sup> The court also addressed the circuit court’s concern that the Act permitted the delegation of judicial duties<sup>59</sup> to non-judicial personnel.<sup>60</sup> The court noted that the tasks delegated under the Act were ministerial functions and that the final adjudication remained with the judge.<sup>61</sup> Consequently, the court concluded that section 2520 of the Act was constitutional, reversing the ruling

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Section 2520(J) provides in relevant part:

(1) Where a payor wilfully fails to withhold pay over income pursuant to a valid order for withholding, or wilfully discharges, disciplines, refuses to hire or otherwise penalizes an obligor as prohibited by subsection (G), or otherwise fails to comply with any duties imposed by this Section, the court, upon due notice and hearing:

(a) Shall enter judgment and order the enforcement thereof for the total amount that the payor wilfully failed to withhold or pay over; and

(b) May order employment or reinstatement of or restitution to the obligor, or both, . . . and may impose a fine upon the payor not to exceed \$200.

*Id.*

55. *Money*, 124 Ill. 2d at 282-83, 529 N.E.2d at 550. The court also noted that the payor is sent a copy of the notice of delinquency and specially certified withholding order to notify him to begin the withholding process. *Id.* See *supra* note 4 for a discussion of the congressional goals under the Child Support Enforcement Amendments of 1984.

56. *Money*, 124 Ill. 2d at 285, 529 N.E.2d at 551. Section 2520(G) directs the payor to give the withholding order priority over previously adjudicated claims on the obligor’s wages. ILL. REV. STAT. ch. 40, ¶ 2520(G) (1987). The circuit court had also ruled that withholding orders issued without naming a specific employer impermissibly extended the court’s jurisdiction and amounted to judicial legislation in violation of the separation of powers doctrine. *Money*, 124 Ill. 2d at 285, 529 N.E.2d at 551.

57. *Money*, 124 Ill. 2d at 285, 529 N.E.2d at 551. In addressing the issue of whether the payor’s due process rights had been violated, the court determined that a payor was not a necessary or indispensable party. *Id.* at 282-83, 529 N.E.2d at 549-50. See *supra* note 11 and accompanying text for discussion of whether a payor is a necessary party.

58. *Money*, 124 Ill. 2d at 285, 529 N.E.2d at 551 (quoting *Schreiber v. County Bd. of School Trustees*, 31 Ill. 2d 121, 125, 198 N.E.2d 848, 851 (1964), *cert. denied sub. nom.*, *Burton v. American Nat’l Bank & Trust Co.*, 401 U.S. 928 (1971)).

59. The circuit court judge was concerned that section 2520 allowed the court clerk to issue service of the withholding order and permitted the clerk or public office to attach a notice of delinquency to the order, without the assistance of the judge who originally issued the order. Memorandum Opinion of the Circuit Court at 1, *Illinois ex rel. Sheppard v. Money*, 124 Ill. 2d 265, 529 N.E.2d 542 (1988) (No. 87 D 56641). The circuit court judge felt that an order issued pursuant to section 2520(B), which did not become effective until a later time as determined by the clerk or agency, was an impermissible delegation of judicial power to non-judicial personnel. *Id.*

60. *Illinois ex rel. Sheppard v. Money*, 124 Ill. 2d 265, 285, 529 N.E.2d 542, 551 (1988).

61. *Id.*

of the circuit court judge.<sup>62</sup>

The Illinois Supreme Court's decision in *Money* is justifiable for three reasons. First, the court correctly relied on the three-part *Eldridge* test to determine the sufficiency of an absent parent's due process protections rather than focusing on whether an absent parent is a post-judgment versus a pre-judgment debtor. Second, the payor's lack of a present interest in a child support proceeding justified the court's determination that a payor is not a necessary or indispensable party who is required to be a party in the action. However, the court failed to provide an explanation for an important analogy which it relied on. Finally, although the *Money* court ultimately reached the proper conclusion that an order issued against "any payor" is within the court's jurisdiction, it failed to support its conclusion with an analysis of how a court obtains jurisdiction over "any payor".

The *Money* court appropriately concluded that an obligor's due process rights are adequately protected through notice and hearing prior to the withholding of income pursuant to section 2520.<sup>63</sup> In reaching this conclusion, the court justifiably relied on the *Eldridge* test rather than focusing on the status of the obligor as either a post-judgment or pre-judgment debtor.<sup>64</sup> Some states have relied on this distinction to hold that garnishment laws need not provide notice or hearing to post-judgment debtors prior to the garnishment of their wages or property.<sup>65</sup> This reliance, however, is based on the United States Supreme Court decision in *Endicott Johnson Co. v. Encyclopedia Press, Inc.*,<sup>66</sup> a decision which most courts have been

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62. *Id.* at 287, 529 N.E.2d at 552.

63. See *supra* note 49 and accompanying text discussing the *Money* court's holding.

64. See *supra* note 37 and accompanying text discussing the *Money* court's application of the *Eldridge* test.

65. See, e.g., *Betts v. Coltes*, 467 F. Supp. 544, 546 (D. Haw. 1979) (post-judgment garnishment of wages to collect past-due child support is constitutional without notice or hearing); *Wyshak v. Wyshak*, 70 Cal. App. 3d 384, 391-95, 138 Cal. Rptr. 811, 815-17 (1977) (post-judgment execution of accrued, unpaid child support without notice or hearing is constitutional). Compare *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341-42 (1969) (law allowing creditor to garnish pre-judgment debtor's wages without notice or hearing is unconstitutional); *Aaron v. Clark*, 342 F. Supp. 898, 901 (N.D. Ga. 1972) (pre-judgment garnishment of funds is unconstitutional without notice to debtor); *Santiago v. McElroy*, 319 F. Supp. 284, 293-94 (E.D. Pa. 1970) (landlord's distress sale of tenant's household property without notifying tenant is unconstitutional); *with Halpern v. Austin*, 385 F. Supp. 1009, 1011 (N.D. Ga. 1974) (garnishment of wages to satisfy past due child support without a hearing is constitutional); *Katz v. Ke Nam Kim*, 379 F. Supp. 65, 69 (D. Haw. 1974) (law allowing state to garnish employee's wages without notice to satisfy debt owed to state is constitutional); *Agnew v. Cronin*, 148 Cal. App. 2d 117, 306 P.2d 527, 531 (1957) (post-judgment debtor's property may be garnished by creditor without notice to debtor).

66. 266 U.S. 285 (1924).

reluctant to follow since 1980.<sup>67</sup>

The *Endicott* court held that prior notice and hearing were not required for post-judgment debtors because the debtor already had an opportunity to be heard in the proceedings leading up to the judgment of debt.<sup>68</sup> The debtor was required to take notice of the future proceedings that a judgment creditor might use to collect the judgment.<sup>69</sup> Because a child support obligor is in a position identical to that of a post-judgment debtor for purposes of due process analysis,<sup>70</sup> it would appear that under the *Endicott* rationale, a child support obligor need not receive notice or hearing prior to the withholding of income.<sup>71</sup>

The *Endicott* rationale, however, has been distinguished in most courts<sup>72</sup> in favor of the balancing test in *Eldridge*. The *Eldridge* test has moved away from the categorical analysis of *Endicott* toward an approach which balances competing interests to determine the sufficiency of due process protection.<sup>73</sup> The *Eldridge* approach affords more meaningful protection because notice and hearing have little worth unless given at a time when seizure can

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67. See *infra* note 72 and accompanying text discussing the reluctance of courts to follow *Endicott*.

68. *Endicott*, 266 U.S. at 288.

69. *Id.*

70. Baida & Motz, *The Due Process Rights of Post-judgment Debtors and Child Support Obligors*, 45 Md. L. Rev. 61, 62 n.5 (1986). At some time in the past each individual had an opportunity to contest in court whether he or she owed an obligation to another party and, in each case, a court determined that the debtor or obligor was liable. *Id.* See, e.g., *Jahn v. Regan*, 584 F. Supp. 399, 413 (E.D. Mich. 1984) (obligor is a post-judgment debtor once the court enters a valid child support order against him); cf. *Stern v. Stern*, 58 Md. App. 280, 294, 473 A.2d 56, 64 (1984) (obligor paying court ordered child support is similar to a post-judgment debtor).

71. Cf. Baida & Motz, *supra* note 70, at 62.

72. *Id.* at 64. Beginning with the Third Circuit's decision in *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) (en banc), courts have routinely questioned the *Endicott* rationale. *Id.* at 56-57. *Finberg* held that a post-judgment garnishment statute that did not provide notice to a post-judgment debtor was unconstitutional. *Id.* at 62. *Finberg* distinguished *Endicott* on the basis that various statutory provisions had been enacted by the government since *Endicott*, which provided exemptions for certain assets. *Id.* In regard to these exempted assets, the debtor had not had an opportunity to contest their seizure. *Id.* Other courts followed this distinction from *Endicott*. See, e.g., *Green v. Harbin*, 615 F. Supp. 719, 723-24 (N.D. Ala. 1985) (garnishment law which does not provide notice of exemptions is unconstitutional); *Harris v. Bailey*, 574 F. Supp. 966, 968-71 (W.D. Va. 1983) (garnishment law must provide notice of exemptions to judgment debtor). *But see* *McCahey v. L.P. Investors*, 774 F.2d 543 (2d Cir. 1985) (garnishment law is not unconstitutional for failing to provide notice to post-judgment debtor).

73. See *supra* note 37 and accompanying text discussing the three part *Eldridge* test.

74. Neagli & Troutman, *Constitutional Implications of the Child Support Enforcement Amendments of 1984*, 24 J. FAM. L. 301, 304 (1985). *Eldridge* was the culmination of a line of Supreme Court decisions which interpreted the rights of pre-judgment debtors. Baida and Motz, *supra* note 70, at 66. See, e.g., North Georgia

still be contested.<sup>74</sup> Thus, the *Money* court's reliance on *Eldridge* is justified.<sup>75</sup>

The second reason the decision in *Money* is correct follows from the court's holding that a payor is not a necessary or indispensable party to a child support action.<sup>76</sup> In examining this issue, the court appropriately noted the similarity between a payor (employer) in the present action and a garnishee (employer) in a garnishment proceeding.<sup>77</sup> However, the court failed to fully explain why the analogy is valid.<sup>78</sup>

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Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (pre-judgment garnishment law must provide notice and hearing); Mitchell v. W.T. Grant Co., 416 U.S. 600, 607 (1974) (prejudgment debtor's due process rights not violated by a procedure allowing for notice and hearing to follow the seizure of goods); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (pre-judgment debtor must receive notice and a hearing before creditor can garnish wages). However, because the test in *Eldridge* is a three part balancing test which does not focus on the status of the debtor, *Eldridge* applies to both pre- and post-judgment due process challenges. Neagli and Troutman, *supra*, at 305. Although some courts occasionally refer to the *Endicott* line of cases to point out the pre- versus post-distinction, this element is one of many which the court considers in applying *Eldridge*. Baida & Motz, *supra* note 70, at 66-67. See, e.g., Jahn v. Regan, 584 F. Supp. 399, 413-14 (E.D. Mich. 1984) (court cited *Endicott* to make pre-versus post- distinction but proceeded to apply *Eldridge* test).

75. States with notice and hearing provisions similar to those set out in section 2520 of the Act have upheld the validity of the statutes against constitutional attack. See, e.g., Varner v. Bard, 622 F. Supp. 1518, 1522 (M.D. Pa. 1985) (father's due process rights adequately met by provision for a post-attachment motion for a stay); Commissioner of Social Serv. v. Jose T., 123 Misc. 2d 893, 474 N.Y.S.2d 313, 317 (1984) (statute providing father with 15 days in which to contest Commissioner's calculation of past-due payments prior to service of withholding order is constitutional). See generally Note, *Child Support Enforcement: Balancing Increased Federal Involvement with Procedural Due Process*, 19 SUFFOLK U.L. REV. 687 (1985) (discussing history of federal and state efforts to facilitate child support with emphasis placed on due process considerations).

76. See *supra* note 51 and accompanying text discussing the *Money* court's holding.

77. Illinois *ex rel.* Sheppard v. Money, 124 Ill. 2d 265, 282, 529 N.E.2d 542, 550 (1988). The court stated that a payor, like a garnishee, is merely a custodian of funds which other parties are seeking. *Id.*

78. Despite the court's incomplete explanation of its analogy, the use of an analogy was warranted due to the lack of factually similar precedent dealing with the issue of whether a payor is a necessary party to a child support proceeding. Compare Feen v. Ray, 109 Ill. 2d 339, 349, 487 N.E.2d 619, 623 (1985) (school district indispensable party to taxpayer's action alleging that the district was fraudulently deprived of interest on funds); Lakeview Trust & Sav. Bank v. Estrada, 134 Ill. App. 3d 792, 480 N.E.2d 1312 (1985) (beneficiary of land trust agreement was a necessary party to an action to quiet title); Bovinett v. Rollberg, 73 Ill. App. 3d 490, 495, 392 N.E.2d 27-31 (1979) (legal titleholders to real estate were necessary parties in action for specific performance of an alleged sales contract); Lerner v. Zipperman, 69 Ill. App. 3d 620, 624, 387 N.E.2d 946, 950 (1979) (attorney was necessary party in action alleging attorney's failure to complete a sales transaction on behalf of a client); with *In re J.W.*, 87 Ill. 2d 56, 59-61, 429 N.E.2d 501, 503-04 (1981) (unknown father of illegitimate minor was not necessary party to an adjudication of wardship); Chariot Holdings, Ltd. v. Eastmet Corp., 153 Ill. App. 3d 50, 62, 505 N.E.2d 1076, 1084 (1987) (parent corporation which received monies on behalf of itself and five subsidiaries was not necessary party in a purchaser's action for specific performance against one of the subsidiaries); Stavros v. Karkomi, 39 Ill. App. 3d 113, 124, 349 N.E.2d 599, 607, (1976) (assignee of a contract for the purchase of real estate was not a necessary party in a vendor's

The *Money* court aptly framed the dispositive question as whether a payor has a present interest in a child support action.<sup>79</sup> In its analysis the court noted that a child support action concerns only the interests of the custodial and absent parents.<sup>80</sup> The employer of an absent parent clearly harbors no interest in an action to determine paternity and to award support.<sup>81</sup> Because this was a case of first impression,<sup>82</sup> the court drew a useful analogy between a payor and a garnishee to support its conclusion that a payor is not a necessary party.<sup>83</sup>

The court's analogy is valid because the nature of an income withholding order is similar to that of a garnishment proceeding.<sup>84</sup> A

breach of contract action); *Ellis Realty V. Chapelski*, 28 Ill. App. 3d 1008, 1012, 329 N.E.2d 370, 373 (1975) (legal and beneficial owners of real estate were not necessary parties to a broker's action to recover commissions from the seller).

79. *Money*, 124 Ill. 2d at 281, 529 N.E.2d at 549. A necessary party is one who has a present, substantial interest in the matter being litigated, and in whose absence the court cannot achieve a complete resolution of the controversy without affecting that interest. *Bovinett v. Rollberg*, 73 Ill. App. 3d 490, 494-95, 392 N.E.2d 27, 31 (1979). A person is also a necessary party if the court requires his or her presence to reach a decision which will protect the interest of those who are before the court. *Lain v. John Hancock Mut. Life Ins. Co.*, 79 Ill. App. 3d 264, 268-69, 398 N.E.2d 278, 283 (1979), *appeal denied*, 79 Ill. 2d 631 (1980), *appeal denied*, 108 Ill. 2d 567 (1985). See also ILL. REV. STAT. ch. 110, ¶¶ 2-404 - 406(A) (1987) (Illinois Code of Civil Procedure requirements for joinder of parties). See generally Comment, *Indispensable Parties: Holding Absentees Indispensable for the Sake of Present Defendants*, 21 U. CHI. L. REV. 286 (1954) (discussion of federal and state rules of civil procedure concerning joinder of parties).

80. *Money*, 124 Ill. 2d 265, 282, 529 N.E.2d 542, 550. The custodial parent is a necessary party because it has a property interest in child support payments. *Id.* The absent parent is a necessary party because it is their property which the court will award to fulfill the support obligation. *Id.* In public aid cases (AFDC), the state or public aid department is a necessary party because the parent must assign the support rights to the state or public agency. *Id.* See generally Roberts, *Expedited Processes and Child Support Enforcement: A Delicate Balance (Part I)*, 19 CLEARINGHOUSE REV. 485 (1985) (discussing the necessary parties in a child support proceeding).

81. Roberts, *supra* note 80, at 485.

82. Several states have adopted income withholding statutes similar to section 2520 of the Illinois Parentage Act of 1984. See Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L. Q. 417, 547-55 (1988). See, e.g., ALASKA STAT. § 47.23.062 (Supp. 1988); CAL. CIV. CODE § 4701 (West Supp. 1989); TEX. FAM. CODE ANN. §§ 14.30-14.50 (Vernon Supp. 1989); UTAH CODE ANN. §§ 62A-11-401 to 414 (Michie Supp. 1988). No case has held a statute with provisions similar to that of section 2520 invalid for failing to join an employer as a necessary party in an income withholding proceeding. Brief of Amicus Curiae for Appellant, on behalf of the Illinois Task Force on Child Support, at 24 n.6, Illinois *ex rel.* Sheppard v. Money, 124 Ill. 2d 265, 529 N.E.2d 542 (1988). Most states have enacted some form of income withholding or wage garnishing to enforce child support. See, e.g., ALA. CODE §§ 30-3-60 to 71 (Michie Supp. 1988); ARK. STAT. ANN. §§ 9-14-218 to 229 (Michie 1987); MICH. STAT. ANN. §§ 25.164(2)-(23) (Callaghan Supp. 1988-1989); VA. CODE ANN. § 20.78.1 (Michie Supp. 1988); WISC. STAT. ANN. § 767.265 (West Supp. 1988).

83. Illinois *ex rel.* Sheppard v. Money, 124 Ill. 2d 265, 282, 529 N.E.2d 542, 550 (1988).

84. Roberts, *Income Withholding: Part I*, 19 CLEARINGHOUSE REV. 1310, 1310 (1986). See generally Note, *Wage Garnishment as a Means for Making Past Due*



garnishment proceeding is an ancillary proceeding to an underlying action for judgment.<sup>85</sup> The principal action for judgment concerns only a debtor and a creditor.<sup>86</sup> The employer bears no interest in the adjudication of debt between an employee and a third party.<sup>87</sup> Once a creditor institutes a garnishment proceeding to collect a judgment from the debtor's employer, the employer becomes merely a custodian of the funds.<sup>88</sup> Therefore, the *Money* court justifiably stated that once the court enters an income withholding order against a payor, the payor is simply a custodian of funds.<sup>89</sup> The court hinted at, but failed to express, that the withholding of income is an ancillary proceeding to the underlying support action.<sup>90</sup> Thus, like a garnishee, a payor is not a necessary party to the underlying action and the court need only obtain jurisdiction over the payor to involve it in the ancillary proceeding.<sup>91</sup>

Finally, the *Money* court correctly held that an order issued against "any payor" is within the court's jurisdiction.<sup>92</sup> However, the court failed to explain how a court obtains jurisdiction over "any payor."<sup>93</sup> Had the court performed this analysis, a valid argument would have emerged to support its decision.

*Child Support Executory - Equal Rights for all Children: Jones v. Thibodeaux*, 33 Loy. L. Rev. 184 (1987) (wage garnishment statutes used to enforce child support orders); Annotation, *Liability of Creditor for Excessive Attachment or Garnishment*, 56 A.L.R. 3d 497 (1974) (income withholding similar to garnishment of wages).

85. *Zimek v. Illinois Nat'l Casualty Co.*, 370 Ill. 572, 574, 19 N.E.2d 620, 622 (1939). See also *Robbins, Coe, Rubenstein & Shafran, Ltd. v. Ro Tek, Inc.*, 23 Ill. App. 3d 705, 709, 320 N.E.2d 157, 160 (1974) (garnishment is an ancillary statutory proceeding to obtain satisfaction of a judgment rendered in a principal action); *Equitable Life Assurance Soc'y of United States v. Wagner*, 2 Ill. App. 2d 284, 119 N.E.2d 405 (1954) (abstract) (garnishment is an ancillary statutory proceeding).

86. *Robbins*, 23 Ill. App. 3d at 709, 320 N.E.2d at 160.

87. *Id.*

88. *Id.* See also *Equitable Life Assurance Soc'y*, 2 Ill. App. 2d at 284, 119 N.E.2d at 405 (garnishee becomes mere stakeholder of funds once the court serves garnishee with summons).

89. *Money*, 124 Ill. 2d at 282, 529 N.E.2d at 550.

90. *Id.* The court did compare income withholding to a garnishment proceeding during its discussion of whether section 2520 violates the due process rights of an obligor. *Id.* at 280, 529 N.E.2d 542, 549. However, the court did not explain why the comparison was valid.

91. *Cf. Freeport Motor Casualty Co. v. Madden*, 354 Ill. 486, 489, 188 N.E. 415, 417 (1933) (court need only serve summons to a garnishee in a garnishment proceeding); *Robbins, Coe, Rubenstein & Shafran, Ltd. v. Ro Tek, Inc.*, 23 Ill. App. 3d 705, 709, 320 N.E.2d 157, 161 (1974) (garnishee is within the court's jurisdiction once court serves summons upon garnishee); *Dale Jewelers, Inc. v. Walker*, 44 Ill. App. 2d 224, 226, 194 N.E.2d 509, 510 (1963) (judgment creditor must file an affidavit with the court from which the court can serve process upon a garnishee). See generally Comment, *Garnishment of Wages to Enforce Child Support - A New Remedy for an Old Problem*, 15 ST. MARY'S L.J. 381 (1983) (general discussion of garnishment to enforce child support); Annotation, *Law Governing Assignment of Wages or Salary*, 1 A.L.R. 3d 927 (1974) (discussion of assignment of wages).

92. *Money*, 124 Ill. 2d 265, 283, 529 N.E.2d 542, 550.

93. See *supra* note 55 discussing the court's holding.

The basis for the *Money* court's holding is that the entry of a withholding order directed to "any payor" is needed to accomplish the congressional goal of prompt commencement of income withholding.<sup>94</sup> The court, however, neglected to point out that in fulfilling this congressional objective, the states cannot overlook requirements of procedural due process while implementing the withholding procedures.<sup>95</sup> Thus, the *Money* court's analysis was incomplete for failing to address this argument.

The due process clause requires that the government provide notice to individuals before affecting their life, liberty, or property interests.<sup>96</sup> Notice enables the individual to seek a hearing to contest the government's action.<sup>97</sup> A court provides notice to an individual or corporation through service of process.<sup>98</sup> In addition to providing the individual with notice, service of process also vests the court with jurisdiction over individuals present within the state.<sup>99</sup>

Section 2520 of the Act requires that the payor receive notice of the withholding order, but does not require service of process.<sup>100</sup> A

94. *Money*, 124 Ill. 2d 265, 282-83, 529 N.E.2d 550. The court noted the congressional mandate that required states to implement withholding procedures that did not necessitate amendment of the order or any further action by the court after issuance by the court. *Id.* at 271, 529 N.E.2d 542, 545. See also 42 U.S.C. § 666(b)(2) (Supp. V 1987); 45 C.F.R. § 303.100(a)(4) (1988) (federal requirements that states must implement regarding income withholding). The court also pointed out that the withholding of income to secure child support applies to numerous sources of income in addition to wages. *Money*, 124 Ill. 2d 265, 283, 529 N.E.2d 542, 550. See also 42 U.S.C. § 666(a) (Supp. V 1987); 45 C.F.R. § 302.70 (1988) (federal requirement that child support enforcement procedures encompass tax refunds, liens on property, and other sources of income).

95. See 42 U.S.C. § 666(b)(4)(A) (Supp. V 1987); 45 C.F.R. § 303.100(a)(7) (1988) (federal requirement that states implement withholding procedures in compliance with state's due process requirements).

96. See *supra* note 9 discussing the requirements of the due process clause.

97. *Id.*

98. *Lord v. Hubert*, 12 Ill. 2d 83, 87, 145 N.E.2d 77, 80 (1957). See also ILL. REV. STAT. ch. 110, ¶¶ 2-201 - 212 (1987) (Illinois Code of Civil Procedure requirements for service of process).

99. *Bell Federal Sav. & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 926, 376 N.E.2d 1029, 1032 (1978).

100. Section 2520 (F) provides in relevant part that:

(2) The Clerk of the Circuit Court shall, upon request, provide the obligee or public office with specially certified copies of the order for withholding or the notice of delinquency. . . . The obligee or public office may then serve the order for withholding on the payor, . . . by certified mail or personal delivery.

Ill. Ann. Stat. ch. 40, ¶¶ 2520(F)(2) (1987).

Before a court can obligate a person to comply with its orders, the court must have jurisdiction over that person (*in personam* or personal jurisdiction). *R. CASAD, JURISDICTION IN CIVIL ACTIONS* ¶ 1.01(2)(a) (1983). Personal jurisdiction is composed of two separate elements consisting of basis and process. *Id.* Basis refers to the relationship between the person and the territory of the state from which the court derives its authority. *Id.* There are many bases from which a state may gain personal jurisdiction over a person. *Id.* Some examples are physical presence, residence, consent, doing business in the state, ownership of a thing in the state, and an act committed in the state. *Id.* See also ILL. REV. STAT. ch. 110, ¶ 2-209 (1987) (list of various

payor, therefore, is technically not within the court's jurisdiction.<sup>101</sup> The *Money* court, however, should have argued that the court does not affect the rights of the payor *until* the court takes measures to enforce the payor's compliance with the order.<sup>102</sup> Section 2520 re-

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acts which will submit an individual to the jurisdiction of the court in Illinois). The existence of an appropriate basis alone is not sufficient to subject a person to the jurisdiction of the court. R. CASAD, *supra*, ¶ 1.01(2)(a). The court must also serve the person with process to notify the person of the pending action and to allow that person to take steps to protect its interests. *Id.* ¶ 1.01(3). Notice, as opposed to service of process, may be issued by anyone without a court order. *Betts v. Betts*, 155 Ill. App. 3d 85, 91, 507 N.E.2d 912, 918 (1987). However, a court acquires jurisdiction over a person only when the court serves the person with process. *Id.* In most cases, a person receives notice through the service of process. R. CASAD, *supra*, ¶ 2.03.

When property is the subject of the action (*in rem*), the court must have jurisdiction over the property. *Id.* ¶ 1.01(3). As with personal jurisdiction, *in rem* jurisdiction is composed of basis and service. *Id.* The only valid basis for jurisdiction over tangible property, such as money, is physical presence within the forum state. *Id.* Service of process is satisfied by some form of notice directed at the property, such as publication or posting of notice. *Id.* See also ILL. REV. STAT. ch. 110, ¶ 2-206 (1987) (requirements for service when property is the subject of the action pursuant to the Illinois Code of Civil Procedure).

A garnishment proceeding is in the nature of a proceeding *in rem* although it moves against the garnishee *in personam*. *Robbins*, 23 Ill. App. 3d at 709, 320 N.E.2d at 161. Both the garnishee and the property must be within the court's jurisdiction. *Id.* Although the garnishment moves against the garnishee *in personam*, the object of the proceeding is to obtain the wages of the judgment debtor which are held by the garnishee. *Id.* By analogy, because a payor in an income withholding proceeding is similar to a garnishee in a garnishment proceeding, the same jurisdictional requirements apply. See *supra* note 84 and accompanying text discussing this analogy. Thus, in order for a court to obtain personal jurisdiction over a payor, the court must serve the payor with process. See generally Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958) (general discussion of *in personam* jurisdiction in state courts); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988) (discussion of the different types of jurisdiction in the court system).

101. Cf. *Bell Federal Sav. & Loan Ass'n v. Horton*, 59 Ill. App. 3d 923, 930, 376 N.E.2d 1029, 1035 (1978) (a judgment obtained by a court in which there was no service of process upon the defendant is invalid). See also *Lake County v. X-Po Sec. Police Serv., Inc.*, 27 Ill. App. 3d 750, 754, 327 N.E.2d 96, 99 (1975) (service of process by an individual not appointed to do so under Illinois Rules of Civil Procedure is invalid); ILL. REV. STAT. ch. 110, ¶ 2-202 (1987) (persons authorized to serve process include sheriffs, persons registered under the Private Detective Act, or upon motion to the court, private individuals over 18 years of age who are not a party in the action).

The Illinois Legislature recognized that the court would be unable to take any action against an employer who refused to comply with an income withholding order and that the employer's compliance would be voluntary. ILLINOIS HOUSE OF REPRESENTATIVES DEBATE, 83RD GENERAL ASSEMBLY, 214 (June 22, 1983). Consequently, during the floor debates, the legislature amended out of the bill a provision to penalize employers for non-compliance. *Id.* Although these debates occurred in discussions concerning the income withholding provision which was enacted into the Paternity Act of 1957, the provision was adopted virtually unchanged into the Parentage Act of 1984. See *supra* note 5 discussing the history of the income withholding provision in Illinois. One of the changes that the legislature made to the withholding provision adopted into the Parentage Act of 1984 was the addition of the penalty provision which had been deleted from the original version. See *supra* note 54 detailing the penalty provision in section 2520 of the Act.

102. See *supra* note 79 discussing the court's holding that a payor has no inter-

quires that before the court may enter judgment against an employer for non-compliance of the order, the *court* must serve the employer with notice and provide a hearing before the court.<sup>103</sup> Thus, the court acquires jurisdiction over the employer *before* affecting the employer's rights.<sup>104</sup>

In sum, the *Money* court's holding that section 2520 of the Parentage Act of 1984 does not deprive a payor or obligor of due process establishes important precedent in determining the lengths that government may go to collect child support in Illinois. Inherent in the court's conclusion is its recognition of the need for efficient and quick enforcement. Although some due process rights cannot be balanced away in favor of important governmental interests, the severity of the child support crisis necessitates these expedited procedures. The question remains whether an employer receiving notice of a withholding order can successfully refuse to comply based on the Act's provision allowing the court to serve process on the em-

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est in a child support proceeding and is not a necessary party.

103. See *supra* note 54 for the text of section 2520(J)(1) which details this requirement. The State's Attorneys Office processes cases in which employers refuse to comply with the terms of the withholding order after receiving notice pursuant to section 2520(E)(3). Telephone interview with Jim Ryan, Head Attorney of the Child Support Enforcement Division of the State's Attorneys Office (March 6, 1989). Before the court takes steps to enforce compliance, the court issues service of process upon the employer pursuant to section 2520(J)(1). *Id.* There have not been any cases reported in Cook County in which an employer has refused to comply with an income withholding order. *Id.* (Jan. 3, 1990). The cooperation of employers has been positive and the most likely employers to refuse to comply are the smaller "mom and pop" type establishments. *Id.* A major reason for this is that the Bureau of Child Support Enforcement contacted various large employers and employer associations to elicit their participation in educating employers in Illinois about the withholding law. Telephone interview with Dan Pittman, Director of Communications in the Illinois Bureau of Child Support Enforcement (March 10, 1989). See, e.g., ILLINOIS DEP'T OF PUBLIC AID, AN ILLINOIS EMPLOYERS' GUIDE TO INCOME WITHHOLDING 1 (1988) (manual compiled with the cooperation of many Illinois employers to assist employers in complying with income withholding).

Smaller employers, however, are more likely to refuse to comply because in some instances, the employer and employee may be close friends or relatives. Telephone interview with Nancy Johnston, Executive in the Illinois Department of Public Aid (Jan. 2, 1990). Thus, the employer may be hesitant to honor a withholding order against such an employee. *Id.* Currently, one such case is proceeding at the trial level in Williamson County, involving a small employer who has refused to comply with a withholding order. *Id.* The employer and employee are close friends and the employer has allegedly refused to comply with numerous withholding orders. *Id.* Because the case was filed outside of Cook County, the State's Attorney's Office was not involved, and the plaintiff had to hire a private attorney to sue the employer for non-compliance with the withholding order. *Id.* Although the court has ordered the employer to pay the attorney's fees of the plaintiff, the employer has refused to appear in court and the case has yet to be resolved. *Id.* This case exemplifies the problems that may arise should employers refuse to comply with the withholding orders, especially in counties other than Cook, where the State's Attorney's Office does not get directly involved. *Id.* In these instances, quick and swift enforcement of child support is replaced by costly and time consuming court battles.

104. See *supra* note 82 for a list of states with similar withholding provisions.

ployer only at the point at which the court takes steps to enforce the order. This question may arise in the future due to the multitude of withholding orders that will be issued under section 2520 and its recent amendment.<sup>105</sup> In the meantime, section 2520 provides the government with a powerful enforcement tool to remedy a desperate situation.

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105. See *supra* note 14 for the text of the recent amendment.