AN ELECTIVE SHARE APPROACH TO POST-MORTEM ENFORCEMENT OF CHILD SUPPORT AGREEMENTS

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ABSTRACT

Millions of children in the United States today are the beneficiaries of child support agreements. Many of those agreements are silent about whether the payor's obligation would continue if the payor died with the agreement still partially unperformed. The states vary wildly in their approach to this situation: some terminate the obligation (as at common law), others preserve it; some presumptively terminate it, giving courts the option to revive it; others presumptively preserve it, but give courts broad discretion to modify or terminate it. Some states have enacted statutes addressing this; others rely on judicial decisions. The uncertainty and insecurity this creates cannot be justified. Children who are the beneficiaries of judicially-approved child support agreements in any state should be treated as top-priority creditors of the estate of a solvent obligor parent.

This Essay breaks new ground by proposing an elective share approach to preserving and satisfying prospective child support obligations at death. Under the proposed statute, the unpaid child support obligation is reduced to its present value and paid to the custodial parent before any other claim, whether the decedent is testate or intestate. The amount should be reduced (abated) only if necessary to satisfy other claims of the same type (claims of other supported children). The supported child's claim should be funded in the same way as familiar spousal elective shares: by first applying any probate or non-probate

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transfers to the supported child, and only then turning to other estate assets. This approach is the best way to balance the supported child's claim, the testamentary freedom of a testate decedent, and the shares of other intestate heirs. An elective share approach is familiar, easy to implement, and reflects an appropriate limit on testamentary freedom.

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INTRODUCTION

Millions of children in the United States today are the beneficiaries of child support agreements.[1] Although such agreements are typically created in the aftermath of divorce,[2] rather than in a business setting, they create enforceable contract-style obligations against the payor parent.[3] What happens when a solvent obligor parent dies with such an agreement still partially unperformed? Is it enforceable against the decedent's estate? Or must the supported child hope to receive their contractual entitlement in the form of a legacy or intestate share? Does it matter if the child support agreement expressly addressed this issue? Under current law, the answer is troublingly complicated.

Although generally a child support arrearage can be satisfied by timely presentation to the estate of the deceased obligor, even if not reduced to a judgment,[4] the same does not apply to prospective support. At common law, the death of the obligor parent terminated the obligation, regardless of whether other testamentary or non-testamentary arrangements made any provision at all for the supported child.[5] As the Pennsylvania

1. *Child Support Statistics in the United States*, ANNE E. CASEY FOUND., https://www.aecf.org/blog/child-support-statistics [https://perma.cc/2JSD-RMFZ] (June 29, 2024).

2. *Id.* Since 1977, the marital status of a child's parents is an unconstitutional basis of discrimination. Trimble v. Gordon, 430 U.S. 762, 766 (1977). Thus, a non-marital child may be the beneficiary of a child support agreement. RESTATEMENT OF CHILD. & L. § 2.10 cmt. a (AM. L. INST., Tentative Draft No. 4, 2022) [hereinafter Tentative Draft No. 4]. "In the modern era, it is unconstitutional for a state to distinguish between the support obligations of fathers and mothers and between the duty owed to marital and nonmarital children." *Id.* at cmt. a, reporter's note; *accord* Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding unconstitutional a law only requiring child support for marital childrenck). All states have codified this understanding. Tentative Draft No. 4, *supra*, at cmt. a, reporter's note.

3. RESTATEMENT OF CHILD. & L. § 2.10 cmt. b (AM. L. INST., Tentative Draft No. 1, 2018) [hereinafter Tentative Draft No. 1] (explaining the enforcement mechanisms for child support rights generally).

4. *See, e.g.*, Pierce v. Higgins, 531 A.2d 1221, 1223 (Del. Fam. Ct. 1987) (setting aside the issue of timeliness for the Chancery Court).

5. *See, e.g.*, *In re* Marriage of Schoby, 982 P.2d 406, 408 (Kan. 1999) ("We know of no circumstance short of death of the parent obligor or the child that calls for automatic termination of

Supreme Court put it in 2003, "hundreds of years of Pennsylvania precedent instruct[s] that a child is owed no support from a dead parent," whether there is a child support agreement or not.[6] This rule remains in force by case law in some states,[7] and by statute (sometimes impliedly) in others.[8] At least one state has enacted a law that presumptively terminates the obligation but gives the court the discretion to revive it.[9] On the other hand, some states, including California, have judicially reversed the common law rule.[10] Others have enacted statutes reversing the common law rule and expressly providing that the obligations of such agreements survive the death of the

child support before a child reaches 18 years of age."). *See also Parent and Child. Support and Education. Liability of Divorced Father's Estate for Continued Support of Children After His Death*, 62 HARV. L. REV. 1079, 1080 (1949) [hereinafter *Liability of Divorced Father's Estate for Continued Support*] ("At common law, the estate of the deceased father was not liable for the continued support of this children."); E.M.S., *Continuance of Alimony and Payments for Support of Minor Children After a Husband's Death*, 35 VA. L. REV. 482, 491 (1949) [hereinafter E.M.S., *Continuance of Alimony after a Husband's Death*].

6. Benson *ex rel.* Patterson v. Patterson, 830 A.2d 966, 969 (Pa. 2003).

7. *See id.* at 967–68; *accord* Abrego v. Abrego, 812 P.2d 806, 811–13 (Okla. 1991) ("The majority of states follow the common law approach and hold that upon the death of a parent under court order to make child support payments, the order terminates automatically with respect to payments accruing after death . . . The common law is intact in Oklahoma."); *In re Schoby*, 4 P.3d at 607 (terminating the child support obligation with the death of the paying parent, but otherwise referring to the rules of child support set by judicial administrative orders).

8. TEX. FAM. CODE ANN. § 154.016(a) (2023). Virginia arguably codifies the common law at VA. CODE ANN. § 20-124.2.C (West 2024) ("In addition, the court may confirm a stipulation or agreement of the parties which extends a support obligation beyond when it would otherwise terminate as provided by law. The court shall have no authority to decree support of children payable by the estate of a deceased party."). None of the voluminous Notes of Decision addresses the death of the obligor or reconciles these two apparently conflicting sentences, and it is therefore unclear whether the parties could create an obligation enforceable against the payor's estate. *See id.*

9. S.D. CODIFIED LAWS § 25-5-18.1 (2024) ("If it is determined by the court that the child support obligation survives the death of the parent, the amount due may be modified, revoked, or commuted to a lump sum payment by the court, taking into consideration all factors deemed relevant, including the financial resources of the child and the other parent and the needs of the decedent's family.").

10. *See* Taylor v. George, 212 P.2d 505, 507 (Cal. 1949) ("In California[,] the rule is that the obligation of a father to support his minor child which is fixed by divorce decree . . . does not cease upon the father's death, but survives as a charge against his estate."); *In re* Marriage of Bertrand, 33 Cal. App. 4th 437, 440 (Cal. Dist. Ct. App. 1995); *In re* Marriage of Gregory, 230 Cal. App. 3d 112, 115 (Cal. Dist. Ct. App. 1991).

obligor.[11] Still others have enacted laws that presumptively preserve the obligation but give the court discretion to terminate it completely.[12]

Consistency or uniformity among the states is not always the most important value. But the variability of state law is especially problematic when it affects the rights of persons who cannot choose their domicile or participate in the political process by which laws are made or judges chosen.[13] They cannot meaningfully be regarded as having constructive notice of these laws.[14] And even if they did, they are in no position to protect (or trade away) their own rights.[15] Supported children are

11. *E.g.*, L.W.K. v. E.R.C., 735 N.E. 2d 359, 364–65 (Mass. 2000) (interpreting the statute "liberally[,]" per the legislature's directive); ARIZ. REV. STAT. § 25-327(c) (LexisNexis 2024).

12. *See, e.g.*, ARIZ. REV. STAT. § 25-327(c); 750 ILL. COMP. STAT. § 5/510(d) (2022) ("An existing obligation to pay for support or educational expenses, or both, is not terminated by the death of a parent. When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, modified, revoked or commuted to a lump sum payment, as equity may require, and that determination may be provided for at the time of the dissolution of the marriage or thereafter."); COLO. REV. STAT. § 14-10-122(3) (2024) ("Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances."); IND. CODE § 31-16-6-7-(b) (2023); KY. REV. STAT. ANN. § 403.213(3) (West 2005); MINN. STAT. § 518A.39, sub. 4 (2023); MONT. CODE. ANN. § 40-4-208(7) (2023).

13. *See also* Phyllis C. Taite, *Freedom of Disposition v. Duty of Support: What's a Child Worth?*, 2019 WIS. L. REV. 325, 347 (2019) ("The current laws place all the risk on the children who almost never have the power of decision for the events that could affect their livelihoods.").

14. *See* Newton v. Progressive Marathon Ins. Co., No. 364569, 2024 WL 56008, at *5 (Mich. Ct. App. Jan. 4, 2024) (noting that "[m]inors occupy a unique and awkward space in contract [law]"). "Minors lack the capacity to contract outside of certain common-law exceptions." *Id.* (stating that "a minor can bind [themselves] by contract for . . . items that answer [their] bodily needs" that are reasonably required to live). In the bankruptcy context, also dealing with delinquent payments and debts, an unknown debtor is bound by a court's orders if they have constructive notice of the proceedings. *See generally In re* CTE 1 LLC, No. 19-30256, 2024 WL 2349620, at *10 (Bankr. D.N.J. May 21, 2024) (holding that an unknown creditor "was not entitled to actual notice"). In the child support context, the children could never have constructive notice of statutes and orders terminating their payments since they are generally incompetent. *See Newton*, 2024 WL 56008, at *5. If the children are incompetent and cannot be credited with constructive notice, then their outstanding support should not be terminatable by a court. *Newton*, 2024 WL 56008, at *5 (explaining that minors generally do not have the capacity to contract).

15. ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM 54 (2020) (stating that "because of the existence of . . . immobile people," like children unable to move without their guardian, "foot voting cannot be effective for everyone").

utterly at the mercy of these larger legal forces, and I believe the law should protect them and their contracted-for rights.[16]

Perhaps surprisingly, this inconsistency among the states is not a new phenomenon, nor is it the product of the no-fault divorce revolution. Seventy-five years ago, in 1949, two student Notes, one in the *Virginia Law Review* and one in the *Harvard Law Review*, surveyed the different approaches taken to post-mortem child support after divorce (even as the Virginia law student author tut-tutted about the recent emergence of divorce as "one of the major problems of modern society").[17] The *Virginia Law Review* piece noted first that "A number of courts, following the common law doctrine that a father's duty to support his children ceases at his death, hold that the father's estate is not liable for the support of his minor children when the divorce decree does not contain any provisions for their support."[18] As the *Harvard Law Review* Note explained further, "[i]nterpretations restricting support to the period of the father's life have usually considered statutory support of children after absolute divorce as only a substitute for the common law duty which terminated at his death."[19] The *Virginia Law Review* Note found that "[i]n jurisdictions which adhere[d] strictly to this common law view, even though a divorce decree does contain provisions

16. I am not the first to consider these issues. *See* Taite, *supra* note 13, at 326, 345 (arguing for a forced share for "minor children in testate estates" and something she calls an "elective share" for "minimum financial support to adult children, based on age, in testate estates," but which is better described as a right to seek modification of a will: "adult children should have the option to apply for financial support if they were disinherited or left inadequate support," with "presumptive approval" for those between eighteen and twenty-five years old). By its own terms, Taite's approach, which I discuss in more detail below in Section IV.B, goes considerably further than mine in conferring a right to a forced share on *all* minor and disabled children, and giving adult children a right to seek modification of an otherwise-valid will. At the same time, her proposal is also much narrower, because she applies it, without explanation, only to testate estates. This is notable because approximately half of all decedents die intestate, and all the problems Taite seeks to address with her proposal can also occur under intestacy whenever the particular division among heirs results in one or more minor or disabled children being inadequately provided for, while self-supporting independent adults (or their well-provided for issue) receive relatively large shares as well as non-probate transfers. *See infra* Section IV.B.

17. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 482; *Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1079–80.

18. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 491.

19. *Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1080.

requiring the father to contribute to the support of his minor child, the courts still refuse[d] to bind the husband's estate for these payments at his death."[20]

However, by the middle of the 20th century, the *Virginia* author reported, "The majority of jurisdictions now recognize that an obligation to support minor children created by a divorce decree may be made binding on a deceased father's estate."[21] One justification for this, offered by the *Harvard* author, is the protection from disinheritance: "[S]ince separation of the children from the father as a result of divorce materially increases the danger that he will make no provision for them by will, [some] courts have construed these statutes to allow support after his death."[22] Still, even "[i]n the jurisdictions following the majority view, the courts are often confronted with the problem of determining whether the divorce decree actually intended the obligation to survive the death of the husband,"[23] or whether a statute providing for child support orders should be so interpreted.[24] Three-quarters of a century later, the variation among state approaches persists.[25]

As the *Virginia Law Review* student author noted seventy-five years ago, the failure to secure post-mortem rights to ongoing child support deprives many children of the only inheritance they may ever receive.[26] It also frees solvent decedents

20. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 491.

21. *Id.* at 492–93.

22. *Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1080.

23. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 493; *see also Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1080 ("[W]hether the particular decree does in fact bind the estate depends upon the intent of the court rendering it.").

24. *Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1080.

25. *See supra* notes 7–8 and accompanying text.

26. E.M.S., *Continuance of Alimony After a Husband's Death, supra* note 5, at 490 ("[A]n embittered or disinterested father might well disinherit a child who had been placed in the custody of the other spouse."). What the student author gets wrong are the myriad ways the surviving guardian of a supported child might have reason to "attempt to hold the [obligor's] estate liable for the support payments decreed by the divorce court." *Id.* He imagines just one: "A wife obtains an absolute divorce in which the decree . . . orders the father to make periodic contributions . . . for the support of the children during their minority. If the father dies before the children reach the age of twenty-one and disinherits them in his will, the mother . . . is then left

(and their estates) from unperformed and ongoing contractual obligations to their minor children. The inconsistency between different states produces and exacerbates inheritance inequality of several distinct kinds. First, it creates inequality between children whose obligor-parents survive until the children reach majority (or the obligation otherwise terminates) and children who not only suffer the loss of a parent, but also lose their right to support. These laws also produce inequality between creditors of the estate: supported children who are involuntary creditors of their parent's estate may have their claims subordinated to other voluntary and involuntary creditors or wiped out completely. The lack of uniformity among these laws also produces inequality based on domicile.[27] Otherwise similarly-situated minor children, sometimes even those covered by the same decretal language, are treated differently depending on their parents' domicile when the support order was entered, something a minor child obviously cannot control.[28] Supported children in states that terminate the obligation are clearly worse off than those in states that do not; but if the state gives courts discretion to terminate the obligation, the supported child must litigate to protect their rights.[29]

These laws also produce inequality regardless of testacy. Among children of a testate decedent, everything depends on whether the testator parent has provided for the supported child or other children in their estate plan or otherwise.[30] Under

with the entire burden of the child's maintenance." *Id*. Here are just a few of the other ways the problem might arise: the legacy is considerably less than the present value of the support obligation; the legacy is on an unmet condition; the obligor dies intestate with many heirs in addition to the supported child (a subsequent spouse and numerous issue), so the inheritance is similarly reduced in comparison to the support obligation; the estate is partially insolvent, and any gift to the child is abated almost entirely to satisfy the claims of creditors. Disinheritance by will is far from the only way this problem might arise.

27. *See* Taite, *supra* note 13, at 347 (emphasizing children's inability to influence their legal position and livelihoods).

28. Notably, courts apply the law of the state where the agreement was entered into, even if the law of the enforcing state is different. *See, e.g.*, Barnett v. Barnett, 619 N.E. 2d 38, 41 (Ohio Ct. App. 1993) (applying Indiana law).

29. *See supra* notes 7–8 and accompanying text.

30. *See supra* notes 5–6 and accompanying text.

intestacy, although supported children, as issue, are top-priority heirs, if death terminates a child support obligation, the supported child may receive a smaller share by intestacy (sharing with other issue) than they would have received had the agreement been fully performed before they inherited anything.[31] The inequality may also cut the other way: the prospective obligations of a child support agreement, fully enforced, might consume the entire probate estate, leaving nothing to be distributed to other heirs by intestacy or legatees in the will.

Finally, there is an inequality with a constitutional dimension. Any post-mortem termination or diminution of a solvent parent's obligations leaves a formerly supported child, the intended third-party beneficiary of the child support agreement, much worse off. But when this happens under the authority of a state law, it may also implicate the Contracts Clause, the provision of the U.S. Constitution prohibiting state laws "impairing the Obligation of Contracts."[32] Concededly, affirmative legislative enactments retroactively terminating the obligations of child support agreements are likely to be relatively rare or perhaps unknown. More commonly, statutory enactments modify or reverse the common law rule, and affirmations of the rule happen judicially, without triggering a Contracts Clause analysis.[33] Although the scope of constitutional analysis in this area is correspondingly narrow, it is important to address it as yet another form of inequality between those who do and those who do not have a constitutional argument against the termination (including the retroactive termination) of their rights.[34]

While state-to-state variation in some aspects of family law can perhaps be justified on a "laboratories of democracy"

31. This is why it is so strange that Professor Taite confines her attention to testate estates. *See* Taite, *supra* note 13, at 331; *supra* note 13 and accompanying text.

32. U.S. CONST. art. I, § 10, cl. 1.

33. *See* Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924) (holding that only a state's legislative action triggers contract clause analysis, not judicial orders).

34. *See* Taite, *supra* note 13, at 329 (explaining how the duty to support children comes from civil law or common law without mention of the Constitution).

theory,[35] minor children who have lost a parent, and often been through their parents' divorce as well, are not the appropriate guinea pigs for that experiment. Making supported children's ongoing rights dependent on the whims of state law and probate court judges' discretion, as well as the planning and drafting expertise of their custodial parent's divorce lawyer, serves no legitimate state purpose.

This Essay proposes a uniform rule enforcing child support obligations post-mortem and uses an elective share approach to fund it. The proposal brings order from chaos, better protects the legitimate expectations of supported children, and appropriately balances the rights of testators, creditors, and supported children. It ensures that after the death of a solvent obligor parent, a supported child will receive no less than the present value of that support agreement, regardless of whether that parent made testamentary or other provision for that child, unless the size of the estate or the claims of other supported children make that impossible. Because the elective share approach is used, there is no risk of a supported child "double-dipping" and receiving the value of the support agreement in addition to any transfer made to them by will, intestacy, or nonprobate arrangement.[36] And because the share is funded first by any testamentary gifts to the supported child (or any testamentary substitute), the disruption to the testator's plan is minimized.[37]

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35. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

36. Professor Johanna Jacques of Durham University has suggested that rather than being a problem, "double-dipping" is entirely appropriate, because the child support obligation replaces *support* (and will be administered by the custodial parent), while any inheritance or legacy is a separate gift outright to the child. In conversation, she has suggested that the unfairness would consist in putting the supported child to an election, when they are entitled to both. *See infra* note 143 and accompanying text, but full consideration of this idea is beyond the scope of this Essay. Letter from Johanna Jacques, Professor, Durham Univ., to author (Oct. 1, 2024) (on file with author).

37. The position taken here strikes a different balance than the one Professor Taite advocates. *Contra* Taite, *supra* note 13. As she expresses her view, "The duty to support children

This proposal makes child support obligations a top-priority debt of a solvent obligor-decedent's estate, subject to the supported child's right of election between the value of the support order and any other testamentary or intestate share.[38] This obligation is not waivable by the other parent unless adequate alternative provision is made.[39] This protects the child from parental (or attorney) oversight in failing to make any explicit provision for the survival of the obligation should the obligor-parent die during the term of the agreement. I argue that as a matter of both policy and morality, children of a solvent obligor-parent have a better claim to a share of their solvent parent's estate than any other creditor, voluntary or involuntary, regardless of whether the child-support agreement expressly so provided. As the child-creditor is perhaps least able to protect their own rights, the same law that secures a child's support during their parent's life should continue to do so after the parent's death.

In Part I, I survey the history and current state of the law, identifying examples of states taking each of the four most common approaches, whether by case law or statute: (1) termination (as at common law); (2) presumptive termination with the possibility of "revival"; (3) presumptive preservation with the

should be paramount in any just legal system, especially after death when a source of financial support is no longer available. As such, testamentary freedoms should be subordinate to the duty to financially support children." *Id.* at 326. Stated this way, I believe the view is too absolute. I would argue that the support duty is arguably "paramount" *only* when there are resources and need that cannot otherwise be met, and perhaps not even then. The death of one parent might—but might *not*—leave a child unsupported. For one thing, the child may be a self-supporting adult. The child may have access to other resources, including from the other parent or a spouse. The child may have been provided for outside the probate system. In this situation, as in most probate situations, we are called upon to engage in a three-way balance, between testamentary freedom or autonomy, family protection, and other social values (for example, creditor protection and protection of the public fisc). *See* E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 492. I would suggest that none of these are obviously or self-evidently "paramount" in "any just legal system." *Contra* Taite, *supra* note 13.

38. After federal tax liability, which always comes first. 26 U.S.C. § 6321. For purposes of this Essay, the term "solvent" will refer to decedents whose estate is large enough to cover all tax debt and some or all of the testamentary gifts made, if any.

39. *See infra* note 134 and accompanying text.

possibility of termination; and (4) preservation of the obligation.[40] In Part II, I provide a concise version of the Constitutional Contracts Clause argument against state statutes that retroactively terminate the obligations of child support agreements, in light of *Sveen v. Melin*.[41] In Part III, I present the elective share proposal and provide some examples of its operation in practice. In Part IV, I present arguments against the preservation of the obligation and compare my elective share proposal to other proposals.

I. THE HISTORY AND CURRENT STATE OF THE LAW

The situation described as early as 1949,[42] in which different states take different approaches to post-mortem child support obligations, persists today.[43] In fact, there is even greater variation than before in how states handle termination, modification, or preservation of child support obligations after the death of the obligor parent.[44] Most enforce the support right after the death of the obligor if the support agreement explicitly so provides.[45] The divergence appears most clearly when the agreement is silent. Examples of the four major approaches when the agreement is silent, and states that adhere to them, are set out below.

40. A prior work of scholarship followed a 1966 New Mexico Supreme Court case, Hill v. Matthews, 416 P.2d 144, 145 (N.M. 1966), in identifying three approaches, somewhat different from the four identified here. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 166 n.271 (1994) (discussing three approaches: "termination upon death, no termination upon death, and intention as indicated in court decree").

41. 584 U.S. 811 (2018).

42. *See, e.g.*, E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 482–84 (arguing that the divergence among courts' approaches to post-mortem child support obligations stems from a differing conception of parental duties to support children after death); *Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1079–80.

43. Benson *ex rel.* Patterson v. Patterson, 830 A.2d 966, 968–70 (Pa. 2003) (compiling caselaw to 2003).

44. *See id.* at 969–70.

45. *Id.* at 969.

A. Common Law Rule (Termination of Obligation)

The common law rule is that the obligation of support terminates at the death of the divorced or never-married obligor parent, just as it does for the child of parents in an intact marriage.[46] At mid-century, there were jurisdictions that terminated the obligation at the father's death "even though a divorce decree . . . contain[s] provisions requiring the father to contribute" throughout the child's minority.[47] In some cases, the court's rationale reflected outdated aspects of fault divorce: "[t]he decision was based in part on the theory that the divorce was granted against the wife, the father not being at fault, and thus no reason existed for depriving the father of his inherent right to dispose of his property by will at his death."[48] In fairness, the author of the 1949 *Virginia Law Review* Note found this objectionable, despite his own gendered view: "since the interests of the child are paramount to the rights of the parent, the court should prevent the father from disinheriting his child irrespective of the father's lack of fault in the dissolution of the family."[49] In a statement that closely anticipates the position I defend here (apart from its gendered form), the Note author concludes, "The balance is clearly in favor of the minor children and the father's right to dispose of his property by will should be subject to the right of children of divorced parents to be protected

46. *See* E.M.S., *Continuance of Alimony After a Husband's Death, supra* note 5, at 489–91; *see also* Trimble v. Gordon, 430 U.S. 762, 765–66 (1977) (holding that non-marital children are protected from discrimination by the Constitution).

47. E.M.S., *Continuance of Alimony After a Husband's Death, supra* note 5, at 491 nn.41–43. *See also* Carey v. Carey, 43 S.W.2d 498, 499–500 (Tenn. 1931) (holding that a parent's estate cannot be held liable to support their minor children following the parent's death); Brown v. Smith, 33 A. 466, 467–68 (R.I. 1895) (finding that the grant of full custody of minor children to the mother was sufficient to terminate the deceased father's duty to support his children); Barry v. Sparks, 27 N.E. 2d 728, 731 (Mass. 1940) (holding that a divorce decree granting custody to the mother was terminated upon her death, therefore reviving the father's obligation to support his minor children); Blades v. Szatai, 135 A. 841, 845 (Md. 1927) (upholding notion that the obligor parent's duty to support their children ceases after death on the basis that the parent had an inherent right to willfully dispose of their property upon death).

48. E.M.S., *Continuance of Alimony After a Husband's Death, supra* note 5, at 491 (citing *Blades*, 135 A. 841).

49. *Id.* at 492.

against the loss of their father's support and protection."[50] As late as the 1990s, a scholar summarized the situation this way: "[b]ecause the parental duty of support generally ends at the child's majority or upon the death of the parent, courts traditionally have been reluctant to extend child support obligations beyond the death of the obligor parent."[51]

Into the twenty-first century, termination at common law was, and remains, the majority approach if the agreement is silent.[52] In 2003, the Pennsylvania Supreme Court declined to find a continuing obligation on the basis that "hundreds of years of Pennsylvania precedent instruct[s] that a child is owed no support from a dead parent."[53] As the *Benson* court reasoned, "[a] child's needs do not end when a parent dies, but as sympathetic a fact as this may be, there are other considerations in the law."[54] In Florida, "[a] parent's obligation to support the child terminates at death, and the court lacks authority to compel support of the child by the parent's estate."[55] Similarly, in Georgia, "the death of the former husband terminates his obligation to pay periodic alimony and child support."[56] In Kansas, the death of the payor parent is an "automatic terminating event."[57] In Maryland, "responsibility for support ceases with the death of the parent."[58] In Mississippi, "[t]he law of this state is (and always has been) that child support and alimony terminate upon the death of the father unless by written agreement he has made the

50. *Id.*

51. Brashier, *supra* note 40, at 166 n.271.

52. Benson *ex rel.* Patterson v. Patterson, 830 A.2d 966, 969 (Pa. 2003). In some cases, even if the agreement provides for survival of the obligation, the court will strike it. *See, e.g.*, Foskey v. Foskey, 363 S.E.2d 547, 547 (Ga. 1988) (striking a provision providing that the obligation will survive as "unlawful").

53. *Patterson*, 830 A.2d at 969.

54. *Id.* at 968.

55. Burnham v. Burnham, 884 So. 2d 390, 393 (Fla. Dist. Ct. App. 2004); *see* Flagler v. Flagler, 94 So. 2d 592, 594 (Fla. 1957); Riley v. Riley, 131 So. 2d 491, 492 (Fla. Dist. Ct. App. 1961).

56. Dolvin v. Dolvin, 284 S.E.2d 254, 254–55 (Ga. 1981); *Foskey*, 363 S.E.2d at 547 (striking a provision providing that the obligation will survive as "unlawful").

57. *In re* Marriage of Schoby, 4 P.3d 604, 607 (Kan. 2000) (referring to "the death of the payor parent" as an "automatic terminating event in Kansas").

58. Wooddy v. Wooddy, 265 A.2d 467, 472 (Md. Ct. App. 1970).

same binding on his estate."[59] The Missouri Supreme Court held that "[d]ecretal obligations to pay future child support expire with the obligor and cannot be enforced against the obligor's estate."[60] In Nevada, although a provision in a support agreement binding the estate of the payor is valid, it will not be 'read in' to an otherwise silent agreement, including an agreement providing for support until the child reaches a fixed age.[61] In New York, "absent an agreement to the contrary, child support obligations terminate at death."[62] In North Carolina, an order with "no provision, express or clearly implied, that the payments were to be continued after [the obligor's] death" was held not to do so.[63] In *Gilford v. Wurster*, the Ohio Court of Appeals held to the same effect: a child support order does not survive the death of the obligor unless the agreement so provides.[64] Oklahoma follows the common law.[65] In Tennessee, "the duty of a parent to support a child ends at majority or the parent's death, but the obligation to support may survive by contract between the parties."[66] Virginia may also be included on this list, as it appears to permit a court only to "confirm a stipulation or agreement of the parties which extends a support obligation

59. Smith v. Smith, 349 So. 2d 529, 531 (Miss. 1977).

60. Olofson v. Olofson, 625 S.W.3d 419, 432 (Mo. 2021); *see* Fower v. Fower's Est., 448 S.W.2d 585, 587 (Mo. 1970); *see also* Gardine v. Cottey, 230 S.W.2d 731, 748–50 (Mo. 1950) (en banc) (discussing cases holding that child support obligations terminate upon death).

61. Bailey v. Bailey, 471 P.2d 220, 222 (Nev. 1970) ("NRS 125.140 permits a court granting a divorce, in the exercise of its sound discretion, to order that child support payments bind the father's estate . . . . We decline, however, to . . . hold that an order granting child support until further order of the court or during minority is such an exercise of discretion . . . . Instead, like the Washington court, 'we are convinced that if a judicial decree is to be held to impose upon the father a greater duty of child support than that required by the common law, the decree must specifically state that such obligation is to survive the death of the obligor.'" (citing Scudder v. Scudder, 348 P.2d 225, 228 (Wash. 1960))).

62. State Farm Life & Accident Assurance Co. v. Hobin, 719 F. Supp. 3d 274, 280 (W.D.N.Y. 2024); *see* Mayer v. Mayer, 142 A.D.3d 691, 695–96 (N.Y. 2016).

63. Layton v. Layton, 139 S.E.2d 732, 735 (N.C. 1965).

64. *See* Gilford v. Wurster, 493 N.E.2d 258, 259 (Ohio Ct. App 1983).

65. *See* Abrego v. Abrego, 812 P.2d 806, 812–13 (Okla. 1991).

66. Wendell v. Sovran Bank/Cent. S., 780 S.W.2d 372, 373–74 (Tenn. Ct. App. 1989) (citing Prim v. Prim, 754 S.W.2d 609, 611 (Tenn. 1988)).

beyond when it would otherwise terminate."[67] Otherwise, "[t]he court shall have no authority to decree support of children payable by the estate of a deceased party."[68]

The State of Washington has codified the common law rule by statute. Under Section 26.09.170(3), "Unless otherwise agreed in writing or expressly provided for in the decree, provisions for the support of a child are terminated by . . . the death of the person required to pay support for the child."[69]

Alabama's approach is unusual. Alabama distinguishes between two types of child support (or alimony). "Support 'in gross'" is distinguished from "mere periodic payments for current and continuous support."[70] The latter type terminates at death.[71]

B. Presumptive Termination with "Revival" Possible

Some states deviate from the common law rule by giving a court the affirmative discretionary power to revive the obligation. In Texas, the property of the decedent vests in the heirs or legatees, but the court has the power to enter an order binding the estate to pay unpaid child support.[72] In West Virginia, "[i]n a case involving child support, if compelling equitable considerations are present . . . a court has the authority to enforce the

67. VA. CODE ANN. § 20-124.2.C (West 2025) ("In addition, the court may confirm a stipulation or agreement of the parties which extends a support obligation beyond when it would otherwise terminate as provided by law.") (held unconstitutional on other grounds by Williams v. Panter, 911 S.E.2d 212 (Va. Ct. App. 2025)).

68. *Id.* None of the voluminous Notes of Decision addresses the death of the obligor or reconciles these two apparently conflicting sentences, and it is therefore unclear whether the parties could create an obligation enforceable against the payor's estate. *See id.*

69. WASH. REV. CODE ANN. § 26.09.170(3) (West 2024); *see also* Pessein v. Pessein, 846 P.2d 1385, 1386–87 (Wash. Ct. App. 1983) ("[C]redit for social security death benefits will be allowed against an estate's child support obligations only when such credit is specifically provided for in the dissolution decree . . . .").

70. Pittman v. Pittman, 419 So. 2d 1376, 1380 (Ala. 1982).

71. *Id.* For further discussion of how Alabama handles support in gross, *see infra* notes 81–83.

72. *See* McPeak-Torres v. Brazoria Cnty., No. G-12-075, 2014 U.S. Dist. LEXIS 191951, at *7 n.11 (S.D. Tex. Nov. 5, 2014); 40 TEX. JUR. 3D *Fam. L.* § 1483 (2025).

child support obligation as a lien against the deceased obligor's estate."[73]

South Dakota's statute begins with the conditional clause, "If it is determined by the court that the child support obligation survives the death of the parent . . . ," thereby implying that in the absence of such a determination, the obligation terminates.[74] The statute continues, "the amount due may be modified, revoked, or commuted to a lump sum payment by the court, taking into consideration all factors deemed relevant, including the financial resources of the child and the other parent and the needs of the decedent's family."[75] This statutory language is striking, given that—perhaps unintentionally—it excludes the supported child from "the decedent's family."[76] In addition, while the obligor parent's obligation never extends beyond the support agreement amount ("modified" implies downward adjustment only), the entirety of "the financial resources of . . . the other parent" are treated as available for their support without limit.[77]

C. Presumptive Preservation with Termination Possible

The more common presumptive approach is the opposite: favoring preservation but conferring upon courts the discretion to modify or terminate the obligation. This approach began developing in the middle of the twentieth century, when the cases typically focused on whether decretal language not mentioning the death of the obligor but providing for continuation through minority or until further order of the court could or should be read to preserve the obligation.[78]

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73. Scott v. Wagoner, 400 S.E.2d 556, 560 (W. Va. 1990), *overruling* Robinson v. Robinson, 50 S.E.2d 455 (W. Va. 1948)), one of the cases that inspired the 1949 *Virginia Law Review* Note: E.M.S., *Continuance of Alimony After a Husband's Death, supra* note 5.

74. S.D. CODIFIED LAWS § 25-5-18.1 (2025).

75. *Id.*

76. *See id.*

77. *See id.*

78. *See* E.M.S., *Continuance of Alimony After a Husband's Death, supra* note 5, at 493.

Jurisdictions adopting this approach include Arizona, Colorado, Illinois, Indiana, Kentucky, Minnesota, and Montana.[79] In these states, the statute generally begins with a statement that the obligation is not terminated, and then confers the same powers on the court (to modify, revoke, or commute to a lump sum payment) regarding the ongoing obligation.[80]

This is also the approach taken in a number of indigenous tribal codes, including some whose territory is contained within or is adjacent to the states listed above, including the Karuk,[81] the Swinomish,[82] the Sac and Fox Tribe of the Mississippi in Iowa,[83] the Leek Lake Band of Ojibwe,[84] and the White Earth Nation.[85]

D. Preservation/Continuation of the Obligation

Some states secure the obligation of the deceased parent judicially, in cases rejecting the common law rule. One of the best arguments for preserving the obligation was actually made by an appellate judge who found himself bound by Florida law *not* to continue the obligation—but deplored the situation.

As Judge Wigginton explained,

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79. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-327 (2025); COLO. REV. STAT. § 14-10-122(3) (2025); 750 ILL. COMP. STAT. § 5/510(d) (2024); IND. CODE § 31-16-6-7(b) (2025); KY REV. STAT. ANN. § 403.213(3) (West 2024); MINN. STAT. § 518A.39, subd. 4 (2025); MONT. CODE. ANN. § 40-4-208(7) (2025).

80. *E.g.*, IND. CODE § 31-16-6-7(b) (2025).

81. KARUK TRIBAL CODE § 10.05.530(B)(5) (2024) ("Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child, but not by death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked or commuted to a lump sum payment, to the extent just and appropriate in the circumstances."). The Karuk Tribe is headquartered in northwestern California.

82. SWINOMISH CODE § 7-06.070(C). The Swinomish Reservation is in the state of Washington. *Who We Are*, SWINOMISH INDIAN TRIBAL CMTY., https://www.swinomish-nsn.gov/who-we-are [https://perma.cc/ZW65-DGC8] (last visited Mar. 31, 2025).

83. SAC & FOX TRIBE OF THE MISS. IN IOWA CODE § 6-1407(a) (2017).

84. LEECH LAKE BAND OJIBWE JUDICIAL CODE § 6-10C-27(4).

85. WHITE EARTH BAND OJIBWE TRIBAL CODE tit. 6 § 10C.28(4) (2021). The White Earth Reservation is in northwestern Minnesota. *White Earth Nation Welcomes You!*, WHITE EARTH, https://www.whiteearth.com/ [https://perma.cc/9S4K-RU7H] (last visited Mar. 31, 2025).

> [W]e are . . . confronted with the established rule of law prevailing in Florida that a father's obligation under a divorce decree to furnish support and maintenance for his minor children terminates upon the father's death. The harshness of this rule, and the inequities which flow therefrom are pointed out in the able dissenting opinion by Justice Thomas in the *Flagler* case. The highest civil and moral responsibility of a father is to provide support and maintenance for his minor children. The intervention of death does not terminate the children's need for sustenance which continues during the helpless stage of their minority. Although the law will permit a general creditor to enforce payment of a continuing obligation against the estate of a deceased father, it does not afford the same protection to a helpless child. In the event of the father's death, the rule of law presently in effect in this state places the burden of supporting and maintaining the minor children of a deceased father on someone not obligated to bear it, or on the public, in the event the father leaves no estate or disinherits his children by will. Although this rule may well comport with the law of the jungle, its proper place in a modern civilized society is subject to question. Irrespective of our personal views regarding its soundness, this principle is nevertheless the law of Florida and must be respected until changed by proper authority.[86]

Perhaps reflecting its status at the cutting-edge of the law of marriage and divorce, in 1949, California was among the first states to preserve child support obligations after the death of the supporting parent. In *Taylor v. George*, the California

86. Riley v. Riley, 131 So. 2d 491, 492 (Fla. Dist. Ct. App. 1961) (footnotes omitted).

Supreme Court ruled, "In California the rule is that the obligation of a father to support his minor child which is fixed by divorce decree . . . does not cease upon the father's death, but survives as a charge against his estate."[87] Alabama takes this approach to support payments (both alimony and child support) it characterizes as "in gross," which are not modifiable and "become vested at the time of divorce."[88] Its courts have held that "[p]ayments 'in gross' survive the death of the husband and are chargeable against his estate."[89] As recently as 2022, the Alabama court applied this approach to alimony.[90]

In 1898, in *Murphy v. Moyle*, the Utah Supreme Court read a child support agreement that provided for the children through their minority, and set aside property for that purpose, *not* to terminate with the obligor's death (the agreement being silent on that point), notwithstanding the common law rule.[91] As the court explained, the agreement contains "no other limitation than their minority, and . . . a specific lien was placed on certain property to secure the payment of such sum."[92] On that basis, terminating the obligation would be both an improper reading of the agreement, and a violation of "justice; for it is the solemn duty of every husband and father to support his wife during life, and his children during their minority, suitably to their station in life, and, if he fail to do so, every principle of justice demands that they be thus supported out of his estate."[93]

The *Murphy* court also helpfully explained their deviation from the common law rule in light of developing turn of the

87. Taylor v. George, 212 P.2d 505 (Cal. 1949); *see In re* Marriage of Bertrand, 33 Cal. App. 4th 437, 440 (Cal. Ct. App. 1995); *In re* Marriage of Gregory, 230 Cal. App. 3d 112, 115 (Cal. Ct. App. 1991).

88. Pittman v. Pittman, 419 So. 2d 1376, 1380–81 (Ala. 1982).

89. *Id.* at 1381 (citing Hager v. Hager, 299 So. 2d 743 (Ala. 1974)).

90. *See, e.g.*, Turney v. Turney, 381 So. 3d 429 (Ala. Civ. App. 2022) (citing Leo v. Leo, 189 So. 2d 558, 561 (Ala. 1966)) ("[A]limony in gross . . . becomes a vested right . . . and survives the death of the [payor spouse] . . . .").

91. Murphy v. Moyle, 53 P. 1010, 1011 (Utah 1898).

92. *Id.*

93. *Id.* at 1012.

century Utah divorce law.[94] The rule that the child support obligation terminated at death was suitable for divorce *a mensa et thoro*, what we would understand as a legal separation, because at the death of one spouse, the survivor spouse would still have their marital rights and the children of the marriage would be protected thereby.[95] For many years in England, only that type of "divorce" was available.[96] But a divorce *a vinculo matrimonii*, "absolute" divorce as we know it and as it existed in Utah by that time, does not preserve those spousal rights, and makes the continuation of the obligation appropriate.[97]

Other states have enacted statutes reversing the common law rule and expressly providing that the obligations of such agreements survive the death of the obligor.[98]

In light of all of the foregoing, it is safe to say that there is nothing resembling a uniform approach taken in the United States to the relatively straightforward question of whether a child support agreement, silent on whether the obligation survives the death of the obligor parent, shall be found or interpreted to do so.

II. CONTRACTS CLAUSE ARGUMENT AGAINST STATUTES RETROACTIVELY TERMINATING THE OBLIGATION

Suppose a state were to cut through this Gordian knot by passing a law providing that such obligations do *not* survive the death of the obligor parent and, furthermore, giving that law

94. *See id.* at 1011.

95. *Id.*

96. Matrimonial Causes Act 1857, 20 & 21 Vict. c. 85, § 7 (Eng.) (introducing absolute civil divorce in England).

97. *Murphy*, 53 P. at 1011 ("The rule which counsel would here invoke was doubtless applicable at common law to a divorce *a mensa et thoro*, which did not finally terminate the marriage relation, but merely effected a separation, without disturbing the marital rights and obligations; but it does not necessarily apply to a decree of divorce, granted under the statutes of this state, which has the same effect upon the marriage relations and marital rights and obligations as a divorce *a vinculo matrimonii* at common law"); *see also* E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 484–85.

98. *See, e.g.*, Benson *ex rel.* Patterson v. Patterson, 830 A.2d 966, 968–69 (Pa. 2003) (citing cases that explain different state statutes under which agreements survive the death of the obligor).

retroactive application to child support agreements entered into before the law was passed, but still in force when the law took effect. Would such a law be constitutional?

The Contracts Clause of the U.S. Constitution prohibits state laws "impairing the Obligation of Contracts."[99] A state law terminating post-mortem child support obligations, especially as applied to a support agreement executed before the law took effect, might seem straightforwardly unconstitutional on this basis. However, the broad and unqualified language of the Contracts Clause has been interpreted in a much more limited way.[100] Since about 1980, the Supreme Court has steadily narrowed the scope of the Contracts Clause, permitting both non-substantial impairments and even substantial impairments if "the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'"[101]

Most recently, in *Sveen v. Melin*, an eight-to-one majority of the U.S. Supreme Court rejected a Contracts Clause challenge to a Minnesota law retroactively applying a revocation-on-divorce provision to a life insurance policy.[102] Despite the complete extinction of the former spouse's entitlement to the policy proceeds by the operation of a law enacted *after* the policy was purchased, the impairment was deemed not "substantial" enough even to trigger the second stage of Contracts Clause analysis.[103] *Sveen v. Melin*'s endorsement of retroactive impairment thus might seem to foreclose any similar argument on behalf of a supported child. However, I believe that even under the standard of substantial impairment endorsed by the majority in *Sveen*, the differences between child support agreements

99. U.S. CONST. art. I, § 10, cl. 1.

100. *See* Sveen v. Melin, 584 U.S. 811, 819 (2018).

101. *See id.* The majority and dissent agree roughly about when this change began. The majority cites Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). *Id.* at 819. Justice Gorsuch in dissent traces it to Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411–12 (1983). *Id.* at 829 ("Our modern cases permit a state to 'substantial[ly] impai[r]' a contractual obligation in pursuit of 'a significant and legitimate public purpose' so long as the impairment is 'reasonable.'") (some internal quotation marks omitted).

102. *Id.* at 812–13.

103. *See id.* at 819.

and life insurance policy designations, and the respective consequences of their termination, are sufficient to preserve a Contracts Clause argument, even after *Sveen v. Melin*.[104] The third-party beneficiary child in a child support agreement is not analogous to an adult named beneficiary of a life insurance policy.[105] The child is not able to protect their rights in the way a divorcing spouse might, and the nature of the relationship between the obligor-parent and their own child is nothing like what an insurance company owes to the person named on a beneficiary designation.[106] The Contracts Clause argument would only apply to a handful of states, but it is still significant enough to include.

As noted above, while many states have decisional law addressing when and whether the death of an obligor parent terminates the decedent's obligations under a child support agreement, judicial decisions do not trigger a Contracts Clause analysis.[107] Nor do laws that prospectively invalidate contracts (including child support agreements) not yet made.[108]

Therefore, we confine constitutional scrutiny to laws currently in effect,[109] and enacted recently enough that there are supported children who are still minors.[110] Consider a child

104. The fuller version of this argument is found at Diane Kemker, *After* Sveen v. Melin*, Is There a Contracts Clause Argument Against Laws Retroactively Terminating Child Support Obligations After the Death of the Obligor Parent?*, 50 ACTEC L.J. 53 (2024).

105. *See id.* at 64–65.

106. *See id.*

107. *See Sveen*, 584 U.S. at 821–22; *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 450–51 (1924).

108. *See Sveen*, 584 U.S. at 827 (Gorsuch, J., dissenting).

109. Until its repeal in 1995, Section 14.05(d) of the Texas Family Code stated in pertinent part: "Unless otherwise agreed to in writing, or expressly provided in the decree, provisions for the support of a child are terminated by . . . the death of a parent obligated to support the child." TEX. FAM. CODE ANN. § 14.05(d) (West 1995), *repealed by* Acts 1995, 74th Leg., ch. 20, § 2, eff. April 20, 1995. Avoidance of this result required no more than language in the judgment "providing that the child support payments were binding upon appellant 'and his estate'" to satisfy Section 14.05(d), and "empowered the court to bind [a deceased parent's] estate for payment of child support." Eggemeyer v. Eggemeyer, 535 S.W.2d 425, 428 (Tex. Civ. App. 1976).

110. There are child support agreements that extend beyond the child's minority, for example, until a higher age (twenty-one or twenty-five), or until a condition is met (such as college graduation). There are also support agreements for the benefit of a disabled person who may not be able to support themselves even in adulthood. As to these agreements, older laws may

born in 2010, whose parents divorced in 2013 and that same year, entered into a child support agreement in force until 2028. Suppose further that their state of domicile retroactively terminated any post-mortem child support obligation by a law passed in 2014 or after. Such state laws do exist. In 2015, Nevada enacted a law extinguishing child support obligations upon the death of the obligor parent unless the parents' divorce agreement expressly provides otherwise.[111] This statute only applies to divorcing (formerly married) couples; thus, a child support obligation entered against a parent not married to the other parent would also terminate upon the death of the obligor.[112] In 2018, Ohio enacted Section 3119.88, which provides that the death of the obligor-parent presumptively terminates the child support obligation.[113] This specific provision (along with a few others) would, therefore, retroactively impair child support agreements entered before that date.[114] If an Ohio family court entered a child support agreement before 2018 (when *Sveen* was decided), that was still in effect when the obligor parent died sometime thereafter, *Sveen v. Melin* would govern any challenge to the Ohio law based on the Contracts Clause. How would it fare?

First, the substantiality of the impairment must be assessed. In finding that there was no Contracts Clause violation, the Supreme Court in *Sveen* placed great emphasis on ease of

still raise a Contracts Clause issue. For the sake of simplicity, I will focus here on agreements for the support of minors.

111. NEV. REV. STAT. § 125C.0045(9)(a) (2025).

112. *See* NEV. REV. STAT. § 123.080 (2025). Chapter 123 of the Nevada Revised Statutes, which includes section 123.080, is called "Rights of Married Couples." *Id.*

113. OHIO REV. CODE ANN. § 3119.88(A)(11) (West 2025). The eleventh item on a statutory list of "[r]easons for which a child support order should terminate through the administrative process" is "[t]he obligor's death." *Id.* It is not completely clear from a review of Section 3119.89 what the resultant legal status is of the process described there, which is primarily investigative. Section 3119.89 states that "[t]he agency's investigation shall determine . . . (1) Whether any reason exists for which the order should terminate." § 3119.89. However, Section 3119.88 has already stated unequivocally that the obligor's death *is* a reason for termination, and it thus appears, reading the two together, that if the investigation confirms that the obligor is, in fact, deceased, no further investigation need be done.

114. *See* § 3119.88(A)(11).

avoidance.[115] Concededly, some state laws presumptively terminating the obligation are relatively easy to avoid, often by their own express terms.[116] A child support agreement can expressly provide by its own terms that the obligation survives the death of the obligor, or might otherwise bind the parent to make appropriate alternative provisions in the event of their death during the supported child's minority (for example, through a trust, life insurance policy, or outright bequest in favor of the child).[117] To the extent that ease of avoidance is the lodestone of impairment analysis, therefore, the challenge would seem likely to fare poorly.

However, it should be clear upon reflection that these arrangements securing the post-mortem obligation, however effective, are not something the child *themselves* is in any position to secure. Minor children are not typically separately represented in the negotiation of child support agreements and have no ability to negotiate on their own behalf, nor can knowledge of the law reasonably be imputed to them.[118] Moreover, a child support agreement is not a gratuitous transfer like a life insurance policy.[119]

The Supreme Court in *Sveen* also emphasized the alignment of the law under consideration (retroactive revocation on divorce of provisions in favor of ex-spouses) with the likely desires and intentions of former spouses toward their exes.[120] But

115. *See* Sveen v. Melin, 584 U.S 811, 819–20 (2018).

116. *See, e.g.*, 231 PA. CODE § 1910.19(a), (h) (2025).

117. *See, e.g.*, JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA: PRACTICAL ADVICE ON NEGOTIATING AND COLLECTING A FAIR SETTLEMENT 61 (1986).

118. *See generally* Wendy Shea, *Legal Representation for Children: A Matter of Fairness*, 47 MITCHELL HAMLINE L. REV. 728, 731 (2021) ("[M]ost states . . . recognize children as parties to dependency proceedings and provide children with party rights, including notice and the right to participate.").

119. An obligation to maintain a life insurance policy is often included in a child support agreement, to ensure sufficient funds to pay the obligation if the decedent dies with the agreement in effect. LIEBERMAN, *supra* note 117, at 61. In that situation, of course, the life insurance policy would have been negotiated for, and would not be a gratuitous transfer. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L. REV. 1, 15–16 (1941).

120. *Sveen*, 584 U.S. at 815.

however well-grounded the Supreme Court's assumption that a divorced insured would not wish for their former spouse to remain the beneficiary of a life insurance policy purchased during marriage, no similar assumption is either plausible or relevant in the child support context. Whether an obligor parent *wants* to support their child or would not wish for the obligation to continue after their own death is irrelevant; the child's entitlement should not depend on the parent's largesse. In fact, it is precisely *because* the parent's commitment to supporting the child after divorce cannot be assumed that the agreement is needed. Because the common law (and all states) recognize a parental duty of support, a child has both a reasonable expectation and a reliance interest in that support, particularly from a solvent parent.[121] Moreover, to the extent that a child support agreement is part of what is bargained for by divorcing parents,[122] the unexpected and premature termination of support undermines the bargain from the point of view of the custodial/obligee parent, who may, for example, have agreed to reduced alimony in reliance on receiving child support.

A further distinction between life insurance policies and child support agreements also bears on this analysis. The only party whose intentions and expectations are analyzed by the *Sveen* Court is the policyholder.[123] It is a matter of indifference to the other contracting party, the payor insurance company, who receives the proceeds. However, in the child support situation, the obligor parent stands in a completely different relationship to the other parties, both the direct payee (typically a former spouse and the child's other parent), and the supported child, to whom the obligor also owes a non-contractual

121. *See* THOMSON REUTERS, 0080 SURVS. 4, 50 STATE STATUTORY SURVEYS: FAMILY LAW: CHILD CUSTODY AND SUPPORT, DETERMINATION OF CHILD SUPPORT REQUIRED FOR HIGH AND LOW INCOME FAMILIES (2023) ("All states have passed laws or enacted court rules that set forth child support guidelines.").

122. *See, e.g.*, Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transactions Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279, 281 (1993); Hanno Foerster, *Untying the Knot: How Child Support and Alimony Affect Couples' Decisions and Welfare*, REV. ECON. STUD., Nov. 7, 2024, at 1, 2–3.

123. *Sveen*, 584 U.S. at 819–20.

obligation entirely absent in the insurance policy situation. Justice Gorsuch's remark about the law at issue in *Sveen v. Melin* seems equally apropos here: "The statute substantially impairs contracts by displacing the term that is the 'whole point' of the contract."[124] The "whole point" of the child support agreement is support throughout the child's minority.[125] A statute that retroactively changes the agreement and deprives a child of that support impairs it.

If a termination-on-death statute *does* substantially impair a child-support agreement, which it seems clearly to do, it is only unconstitutional if it is also unreasonable. Because the Supreme Court found that Minnesota's revocation-on-divorce law did not substantially impair the pre-existing contract between Sveen and the insurance company, they engaged in no further analysis.[126] Because Justice Gorsuch reached the opposite conclusion, he did evaluate the law for "reasonableness," and found it lacking.[127] On his analysis, "a substantial impairment is unreasonable when 'an evident and more moderate course would serve [the state's] purposes equally well.'"[128] Part of the majority's non-substantiality analysis involved reviewing all the alternatives the *policyholder* could have undertaken to avoid the operation of the law.[129] But Justice Gorsuch instead identified several ways the state of Minnesota might have accomplished its policy goal ("ensur[ing] proceeds aren't misdirected to a former spouse because a policyholder forgets to update his beneficiary designation after divorce") without impairing the contract, such as requiring "courts to confirm that divorcing couples have reviewed their life insurance designations," or

124. *Id.* at 833 (Gorsuch, J., dissenting).

125. *See, e.g.*, 23 PA. CONS. STAT. § 4321(2) (2025) ("Parents are liable for the support of their children who are unemancipated and 18 years of age or younger.").

126. *Sveen*, 584 U.S. at 819 ("[W]e may stop after step one because Minnesota's revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements.").

127. *See id.* at 831–32 (Gorsuch, J., dissenting).

128. *Id.* at 831 (Gorsuch, J., dissenting) (alteration in original) (quoting U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 31 (1977)).

129. *See id.* at 819.

requiring "insurance companies to notify policyholders of their right to change beneficiary designations."[130] For Justice Gorsuch, Minnesota's failure even to "investigate[]" these options contributes to a finding that the law is unreasonable.[131]

The same principles can be applied here. A reasonableness analysis requires balancing the significance and legitimacy of the policy goals and the appropriateness of the means used to accomplish them.[132] What purpose or purposes are served by termination of child support obligations (including retroactively) upon the death of the obligor parent? Cases rejecting the obligation address this question and offer various justifications, which will be explored in more detail in Part IV. These policies include consistency with the common law termination of parental obligations at death, testamentary freedom, creditor protection, and equal treatment of all heirs.

The question then is whether other "evident and more moderate" approaches would suffice as well.[133] Testamentary freedom is already limited by the rights of creditors. Satisfaction of the contractual child support obligation only jeopardizes the creditors in a case of partial insolvency; otherwise, only other heirs or residuary legatees will see their shares reduced. The closer the estate comes to insolvency, the greater the risk to creditors, but what is at issue is precisely whether the supported child is to be treated on an equal footing with other creditors. Enforcement of the child support obligation as a creditor's claim does not meaningfully change others' rights or expectations; it just adds a creditor to the list.

Thus, even if preservation of an estate for the sake of creditors and intended beneficiaries or heirs are significant and legitimate public purposes—not an implausible claim—the complete destruction of a supported child's rights as a third-party

130. *Id.* at 832 (Gorsuch, J., dissenting) (citations omitted). In addition, Minnesota "could have disseminated information on its own. Or it could have required attorneys in divorce proceedings to address the question with affected parties." *Id.*

131. *Id.*

132. *See id.* at 831–32.

133. *See id.* at 831.

beneficiary of a child support contract is neither an appropriate nor reasonable way to advance those purposes. Nor is leaving the matter of whether the obligation survives entirely to the discretion of the probate court. While a non-discretionary termination is obviously a more complete destruction of the supported child's rights, the discretionary approach still leaves entirely too much to chance and to factors like the diligence of other creditors in presenting their claims and the effectiveness of the child's advocate. This degree of uncertainty itself makes laws leaving the survival of the obligation to the probate court's discretion unreasonable in a different way.

Something like Justice Gorsuch's paradox also reappears here. In *Sveen v. Melin*, Justice Gorsuch argues in dissent that the majority's analysis, validating the statute, depends on two contradictory assumptions: that the statute is "simultaneously . . . necessary because people are *inattentive* to the details of their insurance policies [and therefore neglect to change them after divorce] and constitutional [not a substantial impairment] because they are *hyperaware* of those same details [and thus could easily change them after divorce]."[134] *Mutatis mutandis*: as with life insurance beneficiary designations, "the impairment can be easily undone," by drafting (or later modifying) the child support agreement to expressly provide for the obligation's survival.[135] But also as in the life insurance situation, it is probably safe to say that many or most divorcing couples (and their counsel) neglect to consider the possibility of the obligor parent dying during the child's minority. Thus, a statute that retroactively terminates the obligation cannot "simultaneously be necessary [for creditor protection, for example,] because people are *inattentive* to the details of their [child support agreements] and constitutional because they are *hyperaware* of those same details."[136]

134. *Id.* at 833 (emphasis added).

135. *Id.*

136. *Id.* (emphasis added).

Of course, Justice Gorsuch was a minority of one in *Sveen v. Melin*, and so it is at least possible that statutes like the one I've described here might be found constitutional if challenged. That does not, of course, mean they are good policy, a topic to which I will return in Part IV.

III. ELECTIVE SHARE APPROACH TO POST-MORTEM ENFORCEMENT OF CHILD SUPPORT OBLIGATIONS

My proposal is an elective share approach that preserves child support obligations as the top-priority debt of a solvent obligor-decedent's estate, subject to the supported child's right of election between the support order and any testamentary, intestate, or non-probate transfer. The rights created would be unwaivable by the other parent, unless adequate alternative provision was made and took effect at the death of the obligor parent.

Importantly, this is *not* an argument for an elective share for all children (or all disinherited children), as such, regardless of age or the existence of a child support agreement.[137] It is not a sort of all-purpose omitted child statute or forced heirship statute.[138] The fundamental intuition driving my proposal is *not* about what all parents owe all children. It does not employ a fractional or percentage share approach, and it does not vary by reference to the total value of the estate.[139] Instead, it advocates for the enforcement of a contract right on a creditor's rights model. The elective share approach is used to *fund* a post-mortem transfer (not to justify the transfer itself), in an amount determined by the reduction of prospective child support to its

137. Professor Phyllis Taite makes this type of proposal. *See* Taite, *supra* note 13, at 342 ("Whether the surviving spouse receives the property through community property or elective share, surviving spouses are entitled to minimum financial protections. The decedent's surviving children should have similar financial protections."); *id.* at 343 (sharing her proposal for a forced share for *all* minor or disabled children, and what Taite refers to as an "elective share" for all other children).

138. Compare Taite's "fixed percentage model" designed to equalize the treatment of children in testate and intestate estates. Taite, *supra* note 13, at 342–44.

139. *See id.*

present value.[140] The elective share provisions of the Uniform Probate Code, together with the provisions for satisfying transfers to omitted spouses and children in the California Probate Code and Uniform Probate Code, are used to indicate how the payment is to be satisfied. The precondition for entitlement, however, is being a supported child (the third-party beneficiary of a child support agreement) at the time of the obligor's death.

The proposed statute is set out below, followed by comments, discussion, and examples.

A. Proposed Statute: Child Support Obligation Survives Death of Payor; How Satisfied

(a) A child covered by a child support agreement still in effect at the death of the obligor-parent shall have an unwaivable right of election, to take an elective share amount equal to the present value of the unperformed part of the child support agreement, enforceable against the estate of the decedent.[141] No language providing for the survival of the obligation is required.

(i) The obligations of (a) take priority over all later claims perfected after the date the child support agreement was executed, except for the claims of another supported child, as provided in (vi) below.

(ii) To satisfy the share of a supported child, amounts that pass or have passed to the supported child by testate or intestate succession or by non-probate arrangements will be applied first.[142]

(iii) The share will next be taken from the decedent's estate not disposed of by will or trust, if any.[143]

(iv) If that is not sufficient, so much as may be necessary to satisfy the share shall be abated in accord with the state's

140. *See id.* at 340–41.

141. This is based in part on Uniform Probate Code ("UPC") section 2-202. *See* UNIF. PROB. CODE § 2-202 (amended 2019).

142. This is based on UPC section 2-209(a). *See id.* § 2-209(a).

143. This subdivision is based on California Probate Code ("CPC") section 21623(a)(1). *See* CAL. PROB. CODE § 21623(a)(1) (West 2025).

statutory abatement scheme,[144] treating the obligation to the supported child as a specific gift in the last category to abate,[145] including, as needed, to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others. Subject to (v) below, contrary language in the will shall be disregarded to the extent necessary to effectuate this section.

(v) If the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by the application of subdivision (iv), the specific devise or gift or provision of a testamentary instrument may be exempted from abatement and a different abatement, consistent with the intent of the decedent, may be adopted.[146]

(vi) To the extent that the estate is insufficient to satisfy the claims of all supported children, their shares shall abate ratably.[147]

(b) The supported child shall not receive the share under (a)

(i) if the child (through their appropriate legal representative) instead elects to receive their share under the testator's

144. Under the California Probate Code, the general abatement statute, section 21403, does not apply to abatement to fund the shares of omitted spouses and children. *See id.* § 21403. While section 21403 abates ratably within categories, section 21612 (omitted spouse) and section 21623 (omitted child) fund these gifts by proportional reduction of *all* beneficiaries' gifts regardless of type (specific, general, or residuary) or relation of beneficiary to testator (relatives and nonrelatives). *See id.* §§ 21612, 21623. Either approach might be appropriate here. This subdivision is also based on Uniform Probate Code section 2-209(a). UNIF. PROB. CODE § 2-209 (amended 2019).

145. In California, this is "specific gifts to relatives." CAL. PROB. CODE §§ 21403(a), 21402(a) (West 2025). The obligation to the supported child is therefore *not* treated as a general (pecuniary) gift to a relative, the third-highest category in California, *id.* § 21402(a), and one that abates in favor of specific gifts. *Id.* § 21402(a). Despite its pecuniary character, the proposed elective share statute puts the obligations to the supported child in a higher priority category than other general gifts and other specific gifts, which may therefore be liquidated to fund the support obligation.

146. This subdivision is based on CPC section 21623(b).

147. This subdivision is based on CPC section 21403(a) and is intended to reflect that if one child is receiving twice as much support as another, those proportions would be maintained post-mortem. *See id.* § 21403. It is also intended to make clear that obligations to supported children are the highest-priority obligations of the estate and are abated only when necessary to satisfy other obligations of the same kind.

other testamentary instruments (including, without limitation, wills, trusts, and non-probate arrangements such as life insurance, when such transfers were made in lieu of a provision in said instruments as shown by statements of the decedent or from the amount of the transfer or by other evidence);[148] or

(ii) if adequate alternative provision is enforceably made at the time the child support agreement goes into effect or by modification thereafter and takes effect upon the decedent's death. The adequacy of such alternative provision shall be determined at the time of the decedent's death.

B. Proposed Statute: Discussion/Comments

[1] Comment to (a)

The application of this law requires, initially, the reduction to present value of the unperformed part of a child support agreement. A right to receive $1000 per month for the next 10 years, for example, has a present value considerably less than $120,000; it is, instead, the purchase price of an annuity that will pay that amount for that period. Because the lifespan of the obligor-parent cannot be known in advance, the present value of any part of the child support agreement unperformed at the parent's death cannot be calculated until their death.

At that point, the amount can be compared with any testamentary bequest, intestate share, or non-testamentary arrangement (such as a trust interest, life insurance proceeds, or any POD account). If the support amount is smaller than what the supported child would otherwise receive, it is expected that they would elect to take their testamentary gifts or intestate share. Alternatively, if the support amount is greater, the supported child would elect the support agreement, funded first by any transfers they would otherwise receive; then by intestacy property, if any; and then in accord with the abatement scheme in place in that state.

148. This subdivision is based on CPC section 21621(c).

The supported child's right to this election could be rebutted by the personal representative of the estate on a showing that adequate alternative provision was made and has taken effect. Examples of such alternative provision might include a life insurance policy with the child as the primary beneficiary; the creation of a joint tenancy with right of survivorship in property formerly owned by the obligor-parent; or a custodial or POD bank account containing an amount that exceeds the present value of the support agreement.

[2] Comment to (a)(ii)

This subdivision requires a comparison between the present value of the unperformed support obligation and all other testamentary, intestate, and non-probate transfers made by the decedent in lieu of testamentary transfers (such as life insurance policies or other POD benefits).

Example 1

The present value of the support agreement at the death of the decedent is $10,000. Decedent's valid will makes a gift of property worth $8,000 to the supported child. This property is applied towards the satisfaction of the support agreement, and the remaining $2,000 is satisfied by subdivisions (iii) and (iv).

Example 2

The present value of the support agreement at the death of the decedent is $10,000. The decedent is intestate, and the estate is valued at $15,000. The decedent is survived by three children, including the supported child. The supported child's intestate share is $5,000. The remaining $5,000 is taken from the shares of the other two children, resulting in a distribution to the supported child of $10,000 and to the other two children of $2,500 each.

[3] Comment to (a)(vi)

This subdivision is intended to address a situation in which the decedent is obligated under more than one child support agreement in effect at death, and the estate is insufficient to fulfill both obligations fully. In that case, the obligations shall abate ratably.

Example 3

Decedent dies with two outstanding child support agreements in effect. The present value of agreement number one is $10,000, and the present value of agreement number two is $5,000. Decedent's estate is valued at $9,000. The child supported by agreement number one shall receive $6,000, and the child supported by agreement number two shall receive $3,000.

Example 4

The supported child is covered by an agreement by which the obligor-parent agrees to pay $1,000 per month until the child's eighteenth birthday. The agreement is made on the child's eighth birthday, with 120 monthly payments remaining. For the sake of simplicity, assume the obligor-parent dies before making any payments. At a 5% interest rate, the present value of this agreement is just under $20,000.

A. The obligor-parent dies intestate, with an estate of $100,000, unmarried and with no other children, before making any child support payments.

In this situation, the supported child is the sole heir to $100,000. There is no election to be made because the inheritance greatly exceeds the present value of the support agreement.

B. The obligor-parent dies intestate, married, with an estate including $50,000 of separate property and a $50,000 share of community property.

In this situation, under California law, the child would be the heir to one-half of the decedent's separate property, or $25,000.[149] The surviving spouse would receive all of the community property and the other half of the separate property.[150]

Here, too, the child would take their intestate share, because it is still greater than the present value of the support agreement.

C. The obligor-parent dies with a valid will, leaving the entirety of their $100,000 estate to charity.

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149. *Id.* § 6402.

150. *See id.* § 6401(a), (c).

Here, the supported child would make the election to receive the present value of the support agreement because, otherwise, they would receive nothing. Note that this is considerably less, in this situation, than the share that would go to an "omitted child" under most state laws. It therefore is less disruptive to the testator's plan than those existing statutes.

[4] Comment to (b)(ii)

The supported child does not receive their elective share if "adequate alternative provision" has been made. Such adequate alternative provision might take the form of a testamentary gift, life insurance policy, or other non-probate arrangement, whose value exceeds that of the present value of the support agreement at the time of the obligor parent's death.

This subsection is intended to create incentives for an obligor-parent who wishes to make testamentary dispositions unburdened by possible unfulfilled child support obligations to make alternative provision for the supported child.

This may be done in the form of a conditional general pecuniary gift in the obligor-parent's will, the specific value of which would be calculated upon the death of the obligor. Such a gift could be made in language such as the following: "To [supported child's name], so much of my estate as will exceed by at least $1 the present value of any unperformed child support obligation in effect at the time of my death. This gift shall abate last and shall abate ratably, if needed, only with other like gifts."

Example 5

The supported child is covered by an agreement by which the obligor-parent agrees to pay $1,000 per month until the child's eighteenth birthday. The agreement is made on the child's eighth birthday, with 120 monthly payments remaining. The agreement also requires the obligor to obtain and maintain a policy of life insurance that will pay $100,000 for the benefit of the supported child.

For the sake of simplicity, assume the obligor-parent dies before making any payments. If the obligor-parent has

purchased the life insurance policy, its value is considerably greater than the present value of the support agreement and would qualify as an adequate alternative provision. If the obligor-parent has not purchased the life insurance policy or has not made a beneficiary designation in favor of the supported child, and is therefore in breach of the support agreement, the elective share is available to the supported child.

IV. COUNTERARGUMENTS, OTHER PROPOSALS, AND RESPONSES

The elective share proposal set out above gives the highest priority to the obligations of unperformed child support agreements in effect at the death of a (solvent) obligor parent. It deliberately does not give courts discretion to modify or terminate these obligations beyond any inherent power or statutory scheme of abatement in effect in that state. It deliberately and intentionally prioritizes the rights of the supported child(ren) above other ordinary creditors, and above other heirs and legatees.

Several policy arguments have been made, mostly by courts, against the guaranteed preservation (or continuation) of the obligation after the death of the obligor; and other scholars have made other proposals in response to the problem described here. These are surveyed with my responses below.

A. Termination of the Obligation Is Consistent with the Common Law Rule Ending Parental Obligations at Death and Maximizing Testamentary Autonomy

At common law, living parents have an obligation to support their children, but that obligation ends with the death of the parent. As the author of the *Virginia Law Review* Note put it in 1949,

> As one would naturally assume, a man's [sic] legal duty to support his family terminates at his death. He has a moral duty to provide for his family in his will, but he has no such legal duty . . . .

> [H]e has the right to disinherit his children if he so desires.[151]

Termination of child support obligations upon the death of the obligor-parent is thus consistent with this common law rule, treating decedent-parents with child support obligations the same way it treats those without.[152] It has the virtue of consistency. It should be noted, however, that the common-law rule emerged in a mostly divorceless world, and thus one without widespread post-marital negotiated child support agreements, and in anticipation that parents would die intestate or make wills in favor of their children.[153] Nevertheless, the idea that only a living parent is obligated to support their children has historical and legal support, whether we continue to find it intuitively appealing or not.

A closely related argument is that the fullest testamentary freedom for the decedent requires the termination of the obligation towards minor children. Nineteenth-century cases recognized that "order[ing] the husband to support his minor children after his death . . . did, in effect, deprive the parent of his right to disinherit his children completely."[154] As the author of the 1949 *Harvard Law Review* Note put it, reviewing cases from the first half of the twentieth century,

> [M]ost courts, whether determining decretal intent or the extent of statutory authorization [to continue the obligation], appear hesitant to take away the father's common law right to determine the testamentary disposition of his property without finding voluntary action by the father on which to base such a holding.[155]

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151. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 482.

152. *See id.* at 484.

153. *See id.* at 482–84.

154. *Id.* at 490 (first citing Murphy v. Moyle, 17 Utah 113 (1898); then citing Miller v. Miller, 64 Me. 484 (1874)).

155. *Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1080–81 (emphasis added).

Particularly in the case of partial insolvency, preservation of the obligation may indeed result in the frustration of other testamentary plans and intentions.

This argument is clearly correct, so far as it goes. The problem is that it is in the service of the odious policy permitting complete disinheritance even of minor children with no other means of support, even as ordinary (voluntary) creditors enjoy protection from this alleged "freedom" of testators to die and escape their obligations.[156] This is, to say the least, a difficult policy to defend as a matter of family law. Among its other negative consequences, this type of testamentary freedom increases the chances that the orphaned minor children of a solvent testator, with legal obligations to support them, will needlessly become a public charge. In that situation, the alleged "right" to dispose of one's estate away from one's children amounts to a right to force their support upon the public fisc. Defending such a rule thus elevates the testator's freedom (including to impoverish their own children) over all other policies.

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156. This right is modified only slightly by the provision of a temporary "family allowance" for surviving spouses and minor children, which is intended to provide "for their maintenance according to their circumstances during administration of the estate." CAL. PROB. CODE § 6540(a) (West 2025); *see also* UNIF. PROB. CODE § 2-404 (amended 2019) (enacted, for example, at title 72, chapter 2, section 414 of the Montana Code).

> Family allowance. (a) In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than 1 year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children, otherwise to the children or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or the child's guardian or other person having the child's care and custody and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance. (b) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates the right to allowances not yet paid.

UNIF. PROB. CODE § 2-404.

In the early twentieth-century cases, the court's rationale for termination often reflected outdated aspects of fault divorce: "[t]he decision was based in part on the theory that the divorce was granted against the wife, the father not being at fault, and thus no reason existed for depriving the father of his inherent right to dispose of his property by will at his death."[157] In fairness, even the author of the 1949 *Virginia Law Review* Note found this objectionable, despite his own gendered view: "since the interests of the child are paramount to the rights of the parent, the court should prevent the father from disinheriting his child irrespective of the father's lack of fault in the dissolution of the family."[158] In a statement that closely anticipates the position I defend here, the Note author concludes, "[t]he balance is clearly in favor of the minor children and the father's right to dispose of his property by will should be subject to the right of children of divorced parents to be protected against the loss of their father's support and protection."[159]

Unlike a gift in a will, a child support agreement is not an expression of gratuitous intent on the part of the payor.[160] As a judicially-approved obligation, it therefore appropriately takes priority over the payor's testamentary wishes, just as a decedent's obligations to creditors do.[161] This is a different argument than the one made by Professor Taite, who moves from correctly noting that "the intent of the parent is not a factor in determining the [child support] award amount," whether "a parent leaves the relationship [with the other parent], voluntarily or involuntarily," to a conclusion that I believe is a *non sequitur*: "These same concerns should be applied to protect children in testate estates."[162] (Later, she narrows this to apply only to

157. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 491 (discussing Blades v. Szatai, 151 Md. 644 (1927)).

158. *Id.* at 492.

159. *Id.*

160. *See id.*

161. *See, e.g.*, L.W.K. v. E.R.C., 735 N.E.2d 359, 364 (Mass. 2000) (holding that the decedent's obligation to pay child support predominates any testamentary dispositions).

162. *See* Taite, *supra* note 13, at 330–31.

warrant "provisions for financial support for children who were disinherited or left inadequate support in testate estates."[163]) But why? The fact that a parent's wishes about supporting their children *sometimes* do not matter (in determining how much child support is owed, for example), does not mean they should *never* matter (for example, to a post-death transfer by a parent not subject to any such agreement). However, if there actually *is* a child support award in place, it should survive the obligor's death, testate or intestate, on creditor's rights principles. A further limitation on testamentary freedom, in favor of a forced share for decedent's children, even adult children, even those in an intact family with no child support agreement in place, may be desirable as a policy but has not (yet) been justified.

B. Unfairness Vis-à-Vis Other Heirs and Legatees (Including Siblings)

Early courts "which . . . refused to hold a divorced husband's estate liable for the support of his minor child have pointed out that a contrary decision might change the intestate laws of descent and distribution."[164] That is not quite accurate, of course; it is not the *laws* but the *distribution* that would change if a supported child were treated as a creditor rather than (or in addition to) an heir.[165] One Oregon court suggested, albeit in 1961, that termination of support obligations is necessary to avoid privileging the supported child over "children of families where the marital ties have not been dissolved."[166] There are two situations in which this might occur. In the case of an intestate obligor, it is possible that satisfaction of the child support obligations would meaningfully reduce the shares of other

163. *Id.* at 343.

164. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 492 & n.47.

165. *See id.* at 492.

166. Streight v. Est. of Streight, 360 P.2d 304, 306 (Or. 1961).

children (the other heirs).[167] The elective share approach recommended here is intended to ameliorate that to a considerable degree, because the obligation is satisfied first with any intestate share of the supported child.[168] This approach would substantially negatively affect those other heirs only in the situation in which the present value of the child support obligation greatly exceeded the supported child's intestate share; and in that event, the intestacy laws are (again) not changed, but rather, are applied to abate certain shares to fund a higher-priority claim. The result is no different for those heirs than it would be if the intestate decedent's estate were subject to the large claims of creditors, which might consume it entirely or very nearly. Alternatively, if the child support obligation were enforced against the estate of a testator who had written a will cutting out their other children, treating the supported child more favorably would also reflect an appropriate balance between enforcement of obligations and testamentary freedom.[169]

The Supreme Court of Montana in *Hornung v. Estate of Lagerquist* addressed this unfairness argument more than fifty years ago:

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167. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 492 ("[I]f a divorced parent died intestate and his estate was obligated, by virtue of a divorce decree, to support a minor child at the expense of an adult child, this would, in effect, change the intestacy laws, for it would favor one child over another."). Taite avoids this problem by making no special provision for intestate obligors (with the consequence that there is no special protection for supported children of intestate decedents). *See* Taite, *supra* note 13, at 326.

168. Professor Johanna Jacques of Durham University has suggested that rather than being a problem, "double-dipping" is entirely appropriate, because the child support obligation replaces *support* (and will be administered by the custodial parent), while any inheritance or legacy is a separate gift outright to the child. Taite, *supra* note 13, at 326. In conversation, she has suggested that the unfairness would consist in putting the supported child to an election, when they are entitled to both. Letter from Johanna Jacques, Professor, Durham Univ., to author (Oct. 1, 2024) (on file with author).

169. *See* Taite, *supra* note 13, at 343. Taite's approach avoids this particular unfairness by making the forced share available to *all* minor or disabled children "who were disinherited or left inadequate support in testate estates," with an elective share for all adult children. *Id.* The unfairness retained by her approach is that minors and disabled children are favored over adult children. *See id.* Depending on the size of the estate, children treated more generously by the will of a testate decedent may still receive more than their siblings claiming a forced share. *See id.* However, Taite's "fixed percentage model" is designed to equalize the treatment of children in testate and intestate estates. *Id.* at 344.

> Defendant argues that to [preserve the obligation] places the child of divorced parents in an unwarranted preferential position as compared to the child whose parents are not divorced. This contention is based on the argument that while the divorced father of a child cannot terminate his support obligation upon death by the provisions of his will, the undivorced father of a child can effectively terminate any future support obligation by disposing of his property to others in his will. Be that as it may, there are sound reasons grounded in human experience for affording additional legal protection to the child of divorced parents. While it is comparatively rare for the undivorced father of a minor child to leave his property to others than his surviving widow or children, it is not so uncommon for a divorced father to eliminate his ex-wife and their children from the provisions of his will. Thus any preferential position of the child of divorced parents is predicated on sound public policy.[170]

In *Pierce v. Higgins*, the Delaware Family Court was frankly dismissive of alleged "fairness" arguments:

> The "problem" of prejudicing the other children's rights is absurd. The diligence of this child's mother in obtaining an order and then making a claim against the estate should not operate against her and in favor of the other children merely because they are all members of the same class…and the others will not receive as great a share (if anything) from their father's estate. The fact remains that a Court Order existed prior to

170. Hornung v. Lagerquist, 473 P.2d 541, 545 (Mont. 1970).

> decedent's death requiring him to support this child.[171]

The issue of "unfairness" between children highlights an important distinction between the proposal I advocate here, and proposals like Professor Taite's forced share for disinherited or under-provided-for minor and disabled children, regardless of the existence of a child support agreement.[172] Unlike the latter proposals, treating obligations towards supported children as a highest-priority creditor-type claim is *not* about equalizing treatment among children. Nor is it about ensuring that supported children receive *more* than anyone else. That possibility exists in a partially insolvent estate, but it is not a necessary or even desirable outcome of the approach recommended here. Even with partial insolvency, funds sufficient to satisfy the obligation to a supported child (otherwise disinherited) may be substantially *less* than is given freely to another more favored child (of any age), or any other person. Abatement from intestate property or the residue may suffice and leave the favored child's gift intact. This proposal is intended to minimize the infringement on testamentary freedom compatibly with recognizing the obligation to the supported child(ren), only.

The wrong at which my proposal is aimed is a solvent obligor parent dying and being permitted to escape their judicially-approved obligation to a supported child. The strength of this approach is that it does not require robust commitments to a particular view of the moral obligations of parents to all of their children (during life or at death), to any particular child in any particular situation, or to treating all children equally or fairly. Unlike a forced share statute, this proposal does not require agreeing that children are entitled to any particular percentage

171. Pierce v. Higgins, 531 A.2d 1221, 1226 (Del. Fam. Ct. 1987).

172. *See* Taite, *supra* note 13, at 342–44.

of the estate of their parents.[173] These are matters about which people of good conscience may disagree, and assertions of their self-evident rightness are unpersuasive.[174] The proposal here requires only a recognition that debts ought to be paid if they can be, and that debts to children have some claim to priority.

C. Why Not a Modifiable/Presumptive Right Only?

As early as 1949, some commentators suggested an approach that "splits the difference" and treats the child support agreement as modifiable after the death of the obligor parent.[175] The *Harvard Law Review* Note concludes, "It would seem proper . . . to continue the support after death—whether or not the original decree embodied an agreement of the parties—modified on the basis of the size of the estate, the claims of creditors, and the needs of the other beneficiaries."[176] The *Virginia Law Review* Note considers the situation of a parent who dies with an unperformed child support agreement and who also has minor children from a subsequent marriage:

> [The decedent-parent's] estate might be exhausted by the payments for the support of the children of the first marriage . . . . In this situation the latter are equally entitled to the protection of the court, and to avoid discrimination against the children of the second marriage, the court should modify the support payments after the death of the father in order to provide equitably for the

173. Professor Taite suggests that "[t]he amount of the forced share should be thirty percent for the first two children and fifty percent with three or more surviving children if there is no surviving spouse." *Id.* at 343–44. This seems to me hopelessly arbitrary, even if it tracks many intestacy statutes in a general way.

174. *See id.* at 344 (Taite refers to her proposal as "the type of financial protection . . . all American children should enjoy").

175. *Liability of Divorced Father's Estate for Continued Support*, *supra* note 5, at 1081.

176. *Id.*

> maintenance of the minor children of both marriages.[177]

The modifiability approach has certain strengths, to be sure. It allows the court to weigh the needs of the supported child against other values, including creditors' rights and the claims of other heirs/legatees. It is also consistent with the basic principle that child support judgments are inherently modifiable, reflecting the possibility of changing circumstances.[178] It creates flexibility, to accommodate the myriad situations that might arise between the execution of the child support agreement and the death of the obligor.

At the same time, this approach has important weaknesses compared to the proposal made here. Any modifiability (often coupled in practice with giving the court the power to terminate the obligation entirely)[179] necessarily weakens the supported child's claims, and potentially subordinates them not only to other creditors, but to other voluntary beneficiaries of the testator. It puts an impractical and unfair burden on supported children to re-litigate their entitlement. To the extent it makes their claim vulnerable to that of intestate heirs, it elevates the claims of those the decedent took no affirmative steps to benefit (his heirs by default) over a claim based on a judicial decree. Why? Given that the claims of both voluntary and involuntary creditors are satisfied first, before those of intended beneficiaries or heirs (whose shares may be abated if necessary), it is hard to see why supported children, also involuntary creditors of a type, should be subordinated even further. While certainly preferable to any blanket termination of such obligations, the preservation

177. E.M.S., *Continuance of Alimony After a Husband's Death*, *supra* note 5, at 493. Note that it is not quite correct to say the children of the second marriage are "equally entitled," because only the children of the first marriage are supported children with a judicial decree setting the amount of their entitlement.

178. *See, e.g.*, Heron v. Camino, No. 252-2024, 2024 WL 4381303, at *3 (Pa. Super. Ct. Oct. 3, 2024) ("[A] parent's child support obligation is always modifiable if there has been a change in circumstances."); Calvert v. Calvert, 336 S.E.2d 884, 888 (S.C. Ct. App. 1985) ("[C]hild support is always modifiable upon a proper showing of a change in either the child's needs or the supporting parent's financial ability."); Nia v. Nia, 396 P.3d 1099, 1102 (Ariz. Ct. App. 2017).

179. *See* discussion *supra* Section I.C.

of child support obligations subject to modification still unfairly imposes both cost and risk on the supported minor child.

CONCLUSION

Whatever one's family-law politics, however one understands the moral obligations of parents to children during life and after death, the entry of a valid child support order makes the supported child a third-party beneficiary of that agreement, a person whose interests are entitled to the greatest protection in the event the solvent obligor-parent dies with the agreement still partially unperformed. Termination, whatever its common law roots, no longer reflects an accurate understanding of the rights of a supported child, who is not merely a gratuitous donee of their parent. Proper creditor-like protection, funded as we fund a spousal elective share or an omitted child's share, strikes a much better balance between the rights of supported children, the testamentary freedom of their parents, and other values our probate system aims to further.