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LAW AND THE FAMILY

## **"Statutes of Limitation"**

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**TIMING IS EVERYTHING.** With few exceptions, nowhere is timing more crucial than in the practice of matrimonial law. Knowing the time limitation for bringing an action can save the client and save the attorney's energy and money. Ensuring not being precluded from commencing an action because of a missed statute of limitations will spare many a sleepless night.

**Tauber v. Lebow** was an action brought by a former wife to collect alimony and child support arrears pursuant to a separation agreement, which was incorporated in and survived a Mexican judgment of divorce. The husband successfully raised the six-year Statute of Limitations in Civil Law and Practice Rules (CPLR) s213(2) as an affirmative defense to her cause of action based upon contract.

The Court of Appeals held that because there was no time limitation prescribed by statute for enforcement of the foreign divorce judgment, the six-year period provided in CPLR s213(1) applied to the cause of action to enforce the judgment. Prompted by Tauber, the Legislature added CPLR s211 (e), which provides for a 20-year statute of limitations for any action or proceeding to enforce any order or judgment awarding support, alimony or maintenance, entered after Aug. 7, 1987, its effective date.

In **Commissioner of Social Services v. Gomez**, [FN1] decided last year, the Family Court order of support required respondent to pay \$50 bi-weekly child support, effective Sept. 23, 1971. The order was modified in 1977 to provide for the payments to be paid directly to the Department of Social Services (DSS).

In October 1993, following the emancipation of all of respondents' children, the petition to terminate the order was granted, and the matter was referred to the Child Support Enforcement Term on the issue of arrears due DSS. After a hearing, respondent admitted to arrears totalling \$17,847.29 due from Nov. 25, 1977, to Sept. 24, 1993, and an order was issued fixing arrears at that amount. Respondent filed an objection to the order, contending that the arrears total was inaccurate, stating that he believed he had made more payments.

#### **A Recalculation**

The Family Court granted the objection and remanded the matter to a Hearing Examiner for recalculation of arrears, finding that pursuant to the ruling in Tauber, [FN2] "[i]t may be appropriate in this case, however, to apply a six- year Statute of Limitations which would bar DSS from collecting the entire amount of arrears which have accrued since 1977."

The Hearing Examiner, in reliance upon the judge's decision, applied the six- year statute of limitations and concluded that no arrears would be considered before Aug. 17, 1981. He also found that respondent, who had been unemployed for two years, qualified for the \$500 cap on arrears under Family Court Act (FCA) s413(1)(g) in 1991 and 1992 and assessed no arrears for 1993, recalculating the arrears to be \$10,322.29.

The Family Court denied DSS objections to the order, holding that the Hearing Examiner properly proceeded in accordance with the judge's order and agreeing that the six-year statute of limitations was properly applied.

The Appellate Division, First Department, reversed. It held that the Family Court's reliance upon the holding in Tauber was misplaced inasmuch, as, subsequent to Tauber, the Legislature enacted the New York State Support Enforcement Acts of 1985 and 1986 [FN3] which, among other things, amended Family Court Act 451, to provide, in part, that any "modification, set aside or vacatur [or any order issued in any support proceeding] shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section."

It noted that New York has elected to participate in the federally funded Aid to Families with Dependent Children program and that to remain eligible for federal funds, the State must have in effect laws requiring the use of procedures that require that any payment or

**installment of support under any child support order is "not subject to retroactive modification by such State or by any other State."**

**Since respondent did not move to terminate the order of support until Oct. 6, 1993, FCA s451, as amended, was controlling. It held that under the circumstances of this case, petitioner's objections should have been granted and child support arrears fixed at the original amount admitted to by respondent.**

### **Only Issue Is Computation**

**The Appellate Division pointed out that respondent never raised either the statute of limitations or FCA s413(1)(g) as a defense. Nonetheless, emerging with further observations, the court noted, in dicta, that Tauber and the statute of limitations defense would also fail dismally in assisting respondent.**

**Despite the order of support being entered before Aug. 7, 1987, this "was not an attempt to enforce a contractual obligation or collect accrued arrears under a divorce decree and the only issue presented was the computation of child support arrears." It added: "Nor would it bar enforcement of any subsequent income execution pursuant to CPLR s5241 with respect to the arrears at issue in this case."**

**Matter of Dox v. Tynon, [FN4] decided last May by the Court of Appeals is a straightforward, fact-filled, reader-friendly antidote to problems in seeking arrears. Noting that under the current scheme for enforcing court-ordered child support obligations, courts may not reduce or cancel any arrears that have accrued, the court held that the law does not permit a recipient to waive the right to unpaid child support simply by failing to demand payment or seek enforcement of support obligations for 11 years.**

**It concluded that forgiveness of nonpayment based on an implied waiver is prohibited and reversed an order of the Appellate Division, which found that petitioner had waived her right to child support arrears. It reinstated the trial court's decision allowing the arrears.**

**The Dox case is a good example of the court once again taking seriously the needs of children. Petitioner and her former husband were divorced in June 1983. They had two children, and their divorce judgment incorporated a stipulation providing that respondent would pay petitioner \$25 per week per child in support.**

**After meeting his child support obligations for a few months, respondent ceased making payments in October 1983. For the next**

**11 years, he paid no child support. Petitioner neither requested payment during that period nor attempted to enforce the support provisions of the divorce judgment.**

**In November 1994, petitioner sought a judgment in Family Court for alleged arrears for the past 11 years, amounting to \$28,895. At that time, she also applied for an upward modification of respondent's child support payments for their younger son.**

**At a hearing before Family Court, respondent contended that, after paying child support for several months, petitioner informed him that she wanted him out of her life. He purportedly responded that he would stay away from her and the children but that she would not receive any money from him. Thereafter, respondent made no payments and did not call or visit the children. Petitioner testified that she and her new husband supported the children during the time that respondent failed to make support payments, but she denied the alleged conversation.**

**Respondent argued before Family Court that petitioner had waived her right to child support arrears in exchange for his agreement not to interfere in her life or seek visitation and by waiting 11 years to seek enforcement. Although the applicable limitations period at the time was six years, he, like Mr. Gomez, did not raise a statute of limitations defense.**

**Concluding that respondent could not rely on petitioner's failure to request payment, Family Court rejected the waiver argument, making no finding regarding the alleged conversation between the parties. The court directed respondent to pay \$28,875 in arrears, as well as an additional \$1,490.94 for support payments due since the filing of the petition.**

**The Appellate Division reversed, holding that petitioner had waived her right to collect child support arrears. The court, dissatisfied with the evidence, was not convinced the conversation alleged by respondent actually took place. Nevertheless, it premised its waiver determination on petitioner's lengthy delay in seeking payment and because she assumed responsibility for supporting the children during the 11-year period and had the financial means to do so. It concluded that such waiver was not statutorily prohibited.**

**Fortunately, the distilled wisdom of the Court of Appeals undid the wrong and reversed. It reaffirmed that the recipient of child-support payments is subject to a limitations period and cannot delay enforcement indefinitely. Tracking history, it noted that before 1987,**

**the applicable period was six years unless the order had been reduced to judgment and that the Legislature extended the statute of limitations for all subsequent actions for support, alimony or maintenance to 20 years from the date of default, regardless of whether the arrears have been reduced to judgment. [FN5]**

**The court adhered to the position that a custodial parent's right to collect child support payments pursuant to court order had in the past been subject to waiver, both express and implied. But here there was no express waiver of support. Nor was there a finding in the court below that petitioner ever agreed to assume respondent's child support obligations in exchange for his promise to leave her and the children alone.**

**Furthermore, the Appellate Division did not base its determination on the oral agreement alleged by respondent. Consequently, the Court of Appeals reasoned that it need not resolve whether, where the parties reach an agreement altering support obligations, subsequent nonpayment would constitute a "default" in the first place, or the unpaid sums "arrears." Here, the alleged implied waiver was retrospective. It was based on petitioner's behavior after respondent declined to make the requisite payments.**

**The Court held that the petitioner's subsequent silence and inaction did not permit respondent's defaults to be forgiven retroactively and the child support arrears canceled. By the time of the parties' divorce judgment in 1983, respondent could no longer withhold support payments until an enforcement proceeding was brought by petitioner and then, at that point, obtain a reduction or cancellation of the accumulated arrears. By that time, the Legislature had already transferred the burden to respondent to seek prospective modification of court-ordered payments or explain adequately the failure to do so.**

**The Court reviewed the history of the child support enforcement legislation. It stated that as the 1980 and 1981 amendments to the Domestic Relations Law (DRL) and FCA prohibited any modification or annulment of accrued child support arrears "unless the defaulting party shows good cause for failure to make application for relief \*\*\* prior to the accrual of such arrears." "[n]ot only must the respondent's application for relief precede the petitioner's request for a money judgment - it must also precede the accrual of arrears."**

**Here respondent never sought prospective downward modification of his child support obligations and proffered no explanation for failing to make an application "prior to the accrual of such arrears."**

**As of 1986, cancellation of accumulated child support arrears was absolutely prohibited. At that point, not even good cause for having failed to seek a prospective downward modification could justify annulling respondent's unpaid child support.**

**In acknowledging a truly unjust circumstance, the Court of Appeals succinctly demolished respondent's defenses. It concluded that petitioner did not implicitly waive her right to outstanding child support payments by delaying enforcement and assuming responsibility for support during that delay. It held that to allow such an implied waiver of child support arrears would permit what the various amendments to the support enforcement scheme expressly sought to prohibit: retroactive modification of child support arrears.**

**Recognizing implied waiver under these circumstances would be a throwback to placing the burden back on child support recipients to initiate enforcement proceedings. To do this would defeat the clear legislative intent to guarantee payment in full of all court-ordered child support obligations, except where - before missing any payments - the paying spouse successfully applies to the court for modification.**

**Finally, the Court rejected respondent's argument that petitioner's 11-year delay in enforcing her right to arrears exceeded the applicable six-year statute of limitations because respondent failed to assert a statute of limitations defense before the Family Court.**

**FN1. 221 AD2d 39, (1st Dept., 1996).**

**FN2. 65 NY2d 596.**

**FN3. L 1985, ch 809.**

**FN4. 90 NY2d 166 [1997].**

**FN5. See CPLR 211[e].**

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