FAMILY

Waiving Child Support, Overpayment, and Getting Your Money Back

By Vesselin Mitev

"If your mother tells you she loves you, you'd best double-check" goes the old journalist's maxim. It's a worthwhile reminder that someone else's rendition of a law, or a rule, or a case should not be taken as gospel. In a recent jury selection, opposing counsel attempted to claim she could use a "for cause" challenge to strike a juror that told us that he worked for an insurance company.

Counsel breezily cited CPLR 4110, which allows for cause challenges for an "employee" of an "insurance company;" at first blush, the request seemed plausible enough until, just to double check, (I suppose suffering from PTSD from all the times I was unsure whether my mother did or did not in fact love me and had to ask her) I pulled up the statute.

Sure enough, the application of this rule is limited to an "action for damages for injuries to person or property;" in other words, personal injury cases — makes sense, you don't want insurance company employees valuating personal injury or property damage claims in the jury room — but it had nothing to do with the instant matter, which only involved a potential claim of emotional distress. Faced with the text of the actual statute the matter was quickly resolved but the tip of the rusty nail was driven in yet again: if you don't double-check, you do so at your own peril.

What about the times we ask the court to take our words as gospel under the rubric of judicial notice or hornbook law? The sky is blue (mostly); the sun rises in the East and sets in the West (at least until the poles reverse); and child support is always collectible, until it isn't.


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Can child support payments be waived, for example, by dint of a party's failing to seek to enforce collection of support, for say, eight years? Public policy seems to indicate no, since a parent has a duty to support a child until the child reaches 21. There's also the public policy (that great amoeba-like antithesis of actual law) that prohibits recoupment of overpaid child support, under the theory that child support payments were used for that purpose and there is not a "fund" from which to draw down the recoupment/restitution. This policy concern is but a different side of the same coin as a waiver of child support, one may reasonably argue.

Yet the case law yields the opposite conclusion. Not only can you recover overpaid child support, you can also waive collecting it, even in the face of documents (such as a judgment of divorce or a family court order directing such payment).

If child support was incorrectly calculated by the court, leading to an overpayment, this is recoverable; see *People ex rel. Breitstein v Aaronson, 3 AD3d 588,* 589 [2004]). Myriad mistakes can be made in calculating a person's child support obligation, e.g., using the wrong tax year, utilizing gross rather than net income from a rental property, failing to include (deduct) child support being paid for a different child pursuant to a separate order, etc. Likewise, if the court erroneously directs (not makes a mistake in calculating but orders) one party to pay child support, and said order is reversed or modified on appeal, said amounts are recoverable, per se, see *Tuchrello v. Tuchrello,* 613 N.Y.S.2d 86; see also *Hamza v. Hamza*, 268 AD2d 459.

A party can also affirmatively waive its right to collect child support by its actions or words. This applies to child support obligations that have yet to accrue, i.e., prospectively.

The Court of Appeals, in *Matter of Dox v. Tynon*, 90 N.Y.2d 166, 168, 659 N.Y.S.2d 231 (1997) expressly recognized this: "A custodial parent's right to collect child support payments pursuant to court order is subject to waiver, both express and implied."

Courts since (and prior) have allowed child support to be waived where a party waives *future* support payment, *Williams v. Chapman*, 22 A.D.3d 1015, 803 N.Y.S.2d 260 (3d Dept. 2005) ("When future child support payments are waived, no arrears accrue, and the statutory amendments precluding the cancellation of arrears are inapplicable"). See also *Matter of O'Connor v. Curcio*, 281 A.D.2d 100, 104–105, 724 N.Y.S.2d 171 (2d Dept. 2001); *In re Proceeding for Support*, 704 N.Y.S.2d 599, 602, 265 A.D.2d 19, 23 (1st Dept. 2000) ("the parties did engage in affirmative conduct evidencing a waiver"); *Matter of Grant v. Grant*, 265 A.D.2d 19, 21–23, 704 N.Y.S.2d 599 (1st Dept. 2000), (existence of an alleged oral waiver was supported by the parties' affirmative conduct); *Mitchell v. Mitchell*, 170 A.D.2d 585, 585, 566 N.Y.S.2d 361 (2d Dept. 1991) (parties may waive their rights under a divorce judgment through affirmative conduct).

In short, as always, the devil is in the details. Broad-stroke shortcut postures such as arguing that overpaid child support cannot be recouped or that child support receipt cannot be waived should be scrutinized carefully to determine if they are not in direct contrast to the actual case law.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, LLP, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 % devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.

EMPLOYMENT

Top 5 Labor and Employment Laws of 2018

By Mordy Yankovich

As we begin 2019, it is important to reflect on the major legal developments in the field of labor and employment law from 2018 with an eye towards how these developments may change the legal landscape in 2019 and beyond. Attorneys should be aware of these laws and opinions in order to assist clients in ensuring compliance.

New York State/New York City Sexual Harassment Prevention Laws

New York State and New York City passed legislation to combat sexual harassment in the workplace. The New York State law took effect on Oct. 9, 2018 while the New York City Law becomes effective on April 1, 2019. Among other requirements, N.Y. Labor Law §201-g requires all employers to conduct annual sexual harassment prevention training for all of their employees (new employees must be trained a "reasonable" amount of time after hire) and maintain a written sexual harassment policy. Employers who fail to comply with the new laws may face stiff penalties. N.Y. Labor Law §213 imposes a fine and possible imprisonment for violating provisions of the Labor Law. In addition, it is anticipated that an employer's failure to comply with the new anti-harassment laws will make it more likely that a court will impute liability for an employee's conduct to the employer. *See Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) (holding that alleged harassment by supervisor is imputed to employer unless employer can show by a preponderance of the evidence that the employer exercised reasonable care to prevent and correct promptly any discriminatory or harassing behavior; and the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer; *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)


Mordy Yankovich

Class Action Waivers permitted in arbitration agreements

In the United States Supreme Court's 2018/2019 Term, the court settled a split between the circuit courts by deciding that class action waivers in employee arbitration agreements are enforceable. These waivers are particularly prevalent as it relates to wage and hour class actions. The court, in *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP et al. v. Morris et al.*, No. 16-300; *National Labor Relations Board v. Murphy Oil USA, Inc., et al.*, No. 16-307 (May 21, 2018) reasoned that the Federal Arbitration Act states that such arbitration agreements are enforceable which trumps the National Labor Relations Board's ruling that class action waivers violate the National Labor Relations Act's protections on "concerted activity." This decision is a victory for employers who will increasingly include a class action waiver in its arbitration agreements with employees.

Public employees are not required to pay agency fees to unions

The U.S. Supreme Court, in *Janus v. AFSCME Council 31*, No. 16-1466 (June 27, 2018), reversed the court's decision in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977) holding that public sector employees who elect not to be full members of a union can no longer be legally required to pay agency fees. Agency fees cover costs of collective bargaining and other non-political services which the union provides for all bargaining unit employees, but do not cover lobbying costs or fund other political activities. The Supreme Court, in a 5-4 decision, reasoned that requiring an employee to pay agency fees to a union, whose views they may not support, violates the employee's right to free speech under the First Amendment. The coming year will be telling as to whether this decision affects union membership and funding for union services.

Prohibition of inquiring into job applicant's salary history

Suffolk County Executive Steve Bellone signed the Restrict Information Regarding Salary and Earnings Act into law which amended the Suffolk County

(Continued on page 25)

Bench Briefs (Continued from page 4)

tion of the defendants' motion seeking dismissal of the complaint was denied as the court found that the standard of willfulness and contumaciousness required to grant such relief had not been demonstrated.

Honorable Robert F. Quinlan

Plaintiff's request to stay the motion for judgment of foreclosure and sale denied; while a bankruptcy proceeding operates to stay most civil litigations, it only stays proceedings against the debtor.

In *CitiMortgage, Inc. v. Tulio Cabal a/k/a Tulio E. Cabal; Adriana Tamayo; Cach, LLC; Capital One Bank (USA), N.A.; Chase Bank USA, N.A.; Ford Motor Credit Company LLC; KMT Group LLC; Petro, Inc.; Bank of America, NA; Village of Lindenhurst; Tulio Cabal Sr,* Index No.: 4958/2014, decided on Oct. 25, 2018, the court denied plaintiff's request to stay the motion for judgment of foreclosure and sale. In rendering its decision, the court pointed out that while a bankruptcy proceeding operates to stay most civil litigations, it only stays proceedings against the debtor. In the instant proceeding the plaintiff was proceeding against the defendant mortgagors and made no claim against defendant Cach LLC had not answered or appeared and their default was fixed and set by the court's Jan. 12, 2016 order. The court reasoned that the pendency of a bankruptcy proceeding involving someone other than the mortgagor would not prevent a foreclosure action from going forward in state court. As such, the motion was denied.

Honorable William B. Rebolini

Motion to disqualify denied; plaintiff could not demonstrate that the prior representation was substantially related to the current representation, and counsel for the defendant had shown that he possessed no confidential information.

In *Joseph Burgio v. Christopher G. Holland, Joseph M. Bananno, Benny Romano and Salvatore Romano,* Index No.: 617199/2016, decided on June 14, 2018, the court denied the motion to disqualify defendant's counsel. The court noted that a party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification was warranted. A party seeking to disqualify an attorney of law for an opposing party on the ground of conflict of interest has the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse. Here, plaintiff asserted that defendant's counsel represented plaintiff in a prior action brought against Bayville Auto Diagnostics and plaintiff as one of the principals of the business, which prior action concerned repairs performed to a customer's vehicle. In denying the motion, the court stated that disqualification was unwarranted as plaintiff could not demonstrate that the prior representation was substantially related to the current representation, and counsel for the defendant had shown that he possessed no confidential information pertaining to the plaintiff in this unrelated personal injury case.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is a partner at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation, immigration, and trusts and estate matters. She is also the President of the Nassau County Women's Bar Association.

Trusts and Estates Update (Continued from page 4)

with the Torah Law/Halakhah, and in the presence of the rabbi/ co-fiduciary. After these agreements were finalized, the executors and trustees did not retain control of any of the decedent's assets, and the residuary trust was never funded. Thirty-three years later, the subject petitions were filed by children of the decedent's post-deceased son, Samuel, seeking to compel two of the three fiduciaries to account. At the time the petitions were filed, the decedent's spouse was deceased.

The fiduciaries moved to dismiss the petitions, arguing that the Agav Suder agreements precluded the petitioners from compelling an account. In addition, they maintained that the proceedings were barred by the statute of limitations and the doctrine of laches. More specifically, the fiduciaries claimed that the Agav Suder agreements constituted a repudiation of trust sufficient to trigger the running of the statute of limitations long before the proceedings were commenced. Moreover, the fiduciaries maintained that given the passage of time, and the destruction of the estate and trust records by their attorney, the proceedings were barred by the doctrine of laches.

In opposition, the petitioners argued that the Agav Suder agreements, of which they had no knowledge, did not constitute a repudiation by the fiduciaries of their duties, and did not deprive them of their right to compel an accounting. Moreover, they maintained that since the class of beneficiaries of the residuary trust did not close until the death of the decedent's spouse, the agreement was not binding as to them. Further, the petitioners claimed that their father could not have virtually represented their interests under the circumstances.

The court observed that when dismissal is sought on the basis of the statute of limitations, the respondent bears the burden of establishing prima facie the time within which to sue has expired. To this extent, the fiduciaries contended that the agreements were entered into and observed for over 33 years, and that the decedent's will and estate tax return were a matter of public record since 1984. The petitioners, on the other hand, argued that they did not first become aware of the decedent's will or the trust for their benefit until 2016.

Given this backdrop, the court found that the fiduciaries' relinquishment of control over the decedent's property to the decedent's spouse and children constituted a repudiation of trust sufficient to trigger the statute of limitations over 30 years prior to the commencement of the proceedings. Indeed, the court concluded that the fiduciaries affirmatively negotiated eight agreements whereby they abdicated their stewardship with respect to the assets of the estate and trust to all of the persons who would be entitled to a distribution at that time. The record failed to indicate that the petitioners were even alive when the agreements were entered. Moreover, the court questioned why petitioners never inquired as to their possible interest in the decedent's estate, when they were able to do so upon the death of their father over 14 years ago, or why decades had passed without any investigation ever being undertaken on their part concerning the estate. Finally, the court rejected the notion that knowledge of the contents of the public record pertaining to the estate and its status should not be imputed to them.

Further, the court found that as a result of the inordinate delay in instituting the proceedings, the lack of any knowledge by the fiduciaries that there was dissatisfaction with the distributions made pursuant to the agreements, the absence of any records with which accountings could, if at all be prepared, and the death of important witnesses to the agreements, not the least of which was the petitioners' father, the proceedings were also barred by the doctrine of laches.

Accordingly, the proceedings for a compulsory accounting were dismissed.

***In re Estate of Eisdorfer,* NYLJ, July 6, 2018, at p. 25 (Sur. Ct. Kings County).**

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.

Top 5 Labor and Employment Laws (Continued from page 11)

Human Rights Law to prohibit employers from inquiring into a job applicant's salary history. The intent of the act, which takes effect on June 30, 2019, is to reduce pay-equity discrimination in the workplace (Department of Labor found that women in Suffolk County earn 78.1 percent of what their male counterparts earn). Failure to comply with this new law can lead to compensatory damages and civil penalties.

New York City expands Paid Sick Leave Law to include safe leave

New York City expanded its Paid Sick Leave Law (which took effect in 2014), to permit use of the maximum 40 hours of leave per calendar year to seek assistance or take other safety measures if the employee or a family member is a victim of any act or threat of domestic violence or unwanted sexual contact, stalking or human trafficking. With New York State pledging to enact more employee protections in the coming year, along with Suffolk County recently adopting New York City's salary history law, it is fair to assume that additional legislation impacting New York State (and Suffolk County) employers will be enacted in the coming year.

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