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.

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