Child Support Modifications and Retroactivity in a 'Paused' World

By Jeffrey L. Catterson

JEFFREY L. CATTERSON

With New York being the epicenter of the coronavirus's domestic surge, its financial impact has been immediate and far ranging. With Gov. Andrew Cuomo's directive for 100 percent of the non-essential work force to "Shelter in Place," many of our clients have been furloughed, laid off or, more drastically, terminated from their only sources of income. With no end in sight nor a clear understanding of what the economic landscape will be for their employment once they weather this storm, clients are rightfully concerned about how to manage their support obligations and minimize any arrears.

Making matters worse, based upon Judge Marks' March 22, 2020 Administrative Order prohibiting any filings but for strictly defined "essential" matters, these aggrieved parties are prohibited from filing petitions to modify their support obligations. This inability to file an application to modify support prevents the payor from 'stopping the clock' on support arrears for date of application retroactivity. Specifically, Family Court Act §451 (1) provides as follows:

> Except as provided in article five-B of this act, the court has continuing jurisdiction over any support proceeding brought under this article until its judgment is completely satisfied and may modify, set aside or vacate any order issued in the course of the proceeding, provided, however, that the modification, set aside or vacatur shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section. The court shall not reduce or annul any other arrears unless the defaulting party shows good cause for failure to

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make application for relief from the judgment or order directing payment prior to the accrual of the arrears, in which case the facts and circumstances constituting such good cause shall be set forth in a written memorandum of decision.

While there is a "good cause" exception allowing the reduction or annulment for "any other arrears" accrued prior to a party's application to modify, there is no "good cause" exception for child support arrears. The Second Department has consistently held that the trial court does not have the authority to modify support arears accrued prior to a party's application for same, even if the party shows good cause for failing to make an application for relief from the judgment or order of support prior to the accrual of arrears. See, *Moore v. Abban*, 72 A.D.3d 970, 899 N.Y.S.2d 362 (2nd Dept. 2010) where the support magistrate concluded, in essence, that because it was unjust and inappropriate to impose any child support obligation upon the mother (see Family Ct. Act § 413[1][g]), she was entitled to have her support obligation terminated nunc pro tunc to the date of the original support order and to have her arrears vacated accordingly. However, the Second Department held that the Family Court could not reduce or vacate the arrears which accrued prior to the date of the mother's petition, regardless of whether the mother had good cause for having failed to seek modification of the child support order prior to their accumulation. *Moore* at 365. This is even so where requiring the party to pay the arrears will result in a grievous injustice. (*see* Family Ct. Act § 451; *Matter of Dox v. Tynon*, 90 N.Y.2d 166, 173–174, 659 N.Y.S.2d 231, 681 N.E.2d 398; *Matter of*

Wrighton v. Wrighton, 23 A.D.3d 669, 670, 805 N.Y.S.2d 101; *Matter of Jenkins v. McKinney*, 21 A.D.3d 558, 799 N.Y.S.2d 904; *Matter of Barrow v. Kirksey*, 15 A.D.3d 801, 790 N.Y.S.2d 278).

While this rule may appear to be absolute, arrears that accrue prior to a party's application to modify their support obligation have been vacated in limited cases, such as where it is impossible for the party to pay support or to move to be relieved from the obligation to pay support, for medical reasons. *See, Commissioner of Social Services v. Grant*, 154 Misc. 2d. 571 (NY County 1992)(where the court found that, "if it was impossible for the respondent to pay child support and impossible for him to move for relief from the order, the hearing examiner may relieve him of responsibility for child support from the date it became impossible for respondent to act. Impossibility of performance should not be confused with "good cause" to excuse spousal support. FCA § 451. Good cause is a considerably lower standard. Indeed, this hearing examiner found good cause to vacate spousal support arrears"). The subsequent cases that have rejected this analysis have distinguished that the payor did not present any evidence of fraud or demonstrate any inability on his part to seek modification of the child support orders, which might warrant a finding that enforcement of the judgment against him would result in grievous injustice (see *Matter of Commissioner of Social Servs. [Rosa Lidia T.] v. Luis Alonso G., supra; Gaudette v. Gaudette*, 263 A.D.2d 626, 628, 692 N.Y.S.2d 839; *Matter of Reynolds v. Oster*,192 A.D.2d 794, 795, 596 N.Y.S.2 545; *Matter of Commissioner of Soia Servs. v. Grant*, 154 Misc.2d 571, 574, 585 N.Y.S.2d 961).

Significantly, Judge Marks' March 22, 2020 Administrative Order expressly references Governor Cuomo's Executive Order which "suspend[ed] statute of limitations in legal matters." Specifically, Executive Order 202.8 provides as follows:

"any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020."

How, if at all, does Executive Order 202.8 affect the retroactivity for calculating child support arrears if a party cannot file a modification petition? Will the trial courts treat the retroactive application date as a tolled "time limit" for the filing and, thereby, allow modification of child support arrears that may accrue prior to a party's actual filing for a downward modification?

With this uncertainty, what can we do to limit our client's exposure? If an attorney is representing the support recipient, serve the modification petition, or, at a minimum, a notice of an intent to file a downward modification application with the change of circumstances. If there is not an attorney on the other side, provide the modification petition or notice to the support recipient directly via regular mail, certified return receipt, and e-mail, with read receipt, if possible. The idea is to provide notice as soon as possible. Fortunately, the Suffolk County Family Court is accepting filings via e-mail at: SCFCremoteclerk@nycourts.gov.

Stay safe and healthy. We will all get through this together.

Note: Jeffrey L. Catterson is a partner at Barnes, Catterson, LoFrumento & Barnes, LLP, with offices in Garden City, Melville and Manhattan and practices primarily in matrimonial and family law. He can be reached at JLC@BCLBLawGroup.com and (516)222-6500.