AVAILABILITY OF CHILD SUPPORT FOR THE TIME FRAME PRECEDING AN APPLICATION THEREFOR[1]

Elliott Scheinberg

Child Support Is a Matter of Public Policy

The Child Support Standards Act (CSSA) is an expression of important public policy.[2] "[T]he Executive and Legislative branches of the New York State government joined to enunciate a strong public policy in New York State with respect to a minimum and adequate level of support for children"[3] and a court "cannot permit [an] unemancipated child to be without an appropriate level of financial support...regardless of [the] propriety [of the order] issued..."[4] Actions to enforce agreements which contract away the obligation to support a child contravene public policy."[5] The Court of Appeals[6] has also highlighted that the current child support standards and enforcement programs are circumscribed by a federal framework which serve as the predicate to the receipt of federal funding, an undoubtedly strong motivator to keep the system intact. In essence, child support is inviolably sacrosanct and it is strictly *verboten* for a parent to not provide adequate support.

Recent Decisional Authority May Have Modified the Effective Date of Child Support

DRL 236B(7), DRL §240(j), and FCA §449 provide that an application for child support is "effective as of the date of the application therefor." These statutes, nevertheless, leave two categories of custodial parents severely hamstrung in any attempts to retrieve support for unpaid periods: (1) those in Family Court seeking pre-application date support, and (2) those in post judgment/order proceedings (in Supreme or Family Court) following a *de facto* change of custody where a new custodial parent seeks support for the gap of time between the actual change of custody and the application for support. Parents in divorce actions with no extant support awards have recourse for back support via a cause of action in necessaries.

The Court of Appeals and the Appellate Division have recently interpreted public policy

---

[1] This article appeared in the N.Y.L.J., Sept. 5, 2003, as "When Does the Clock Start Ticking For Back Child Support?"

[2] Tompkins County Support Collection Unit ex rel. Chamberlin v. Chamberlin, 99 N.Y.2d 328, 337, 786 N.E.2d 14, 21, 756 N.Y.S.2d 115, 122 (2003); Panossian v. Panossian, 201 A.D.2d 983, 983, 607 N.Y.S.2d 840, 840 (4th Dept., 1994).

[3] Rakoszynski v. Rakoszynski, 174 Misc.2d 509, 513, 663 N.Y.S.2d 957, 96 (NYSup, 1997).

[4] Stanley v. Bouzaglou, 194 Misc.2d 45, 49, 753 N.Y.S.2d 305, 309 (NYFamCt., 2002).

[5] Strenge v. Bearman, 228 A.D.2d 664, 665, 645 N.Y.S.2d 315, 316 (1996).

[6] Id., at 332, 786 N.E.2d 14, 17.

which could permit the expansion of the effective dates set forth in the aforementioned statutes to reach beyond the date of the application to the date that a parent stopped paying child support. In a seeming departure from strict statutory construction a parent's failure to pay child support may now very well be the dominant theme regarding when the clock begins to tick for back child support. An expansive reading of this nature also requires a concomitant analysis of the inescapable question: has the Court of Appeals tacitly reversed itself in *Nichols v. Nichols*?[7]

Nichols

The parties in *Nichols* executed an agreement which was incorporated in their divorce decree. The mother eventually sought enforcement for child support arrears. The father denied any arrears because of a court order which transferred custody to him. The Court of Appeals pointed to "the lengthy, elaborate and carefully drawn separation contract" and enumerated the specific conditions which could either terminate or modify the father's support obligations none of which contemplated a residential change, even if occasioned by court order. The appeals court concluded that it was powerless to imply conditions conspicuously absent from the agreement, thus, "destroy[ing] the [father's] defense." The anomaly was that although Mr. Nichols was directed to pay child support to the mother pursuant to strict contract doctrine – even though he became the *de facto* and *de jure* custodial parent – she was not required to make any support payments for the benefit of her children.

Nichols placed rigid technical correctness ahead of purpose and unjustifiably rewarded the non-custodial parent with an unearned monthly tax free gift until the latest emancipation date. Although outmoded in theory *Nichols* has remained unassailable until now when the Court of Appeals spoke again in *Gravlin v. Ruppert*[8] and *Tompkins County Support Collection Unit ex rel. Chamberlin v. Chamberlin.*[9]

There Are No Longer Any Exceptions to the Obligation to Pay Child Support

The parents in *Gravlin* entered into an agreement which opted out of the CSSA "noting that [the mother] was capable of providing basic child support without assistance from [the father]." The father's "monetary obligations being limited to providing for the child's needs during visitation with him,[10] purchasing all of the child's clothing, establishing [a college trust] and paying all uninsured orthodontic expenses and 50% of the uninsured medical expenses of the child."[11] Compliance with the agreement ended when the child refused to accompany her father on a summer trip and all significant visitation and support came to an end.

---

[7] 306 N.Y. 490, 119 N.E.2d 351, 306 N.Y. 490, 119 N.E.2d 351 (1954).

[8] 98 N.Y.2d 1, 743 N.Y.S.2d 773, 770 N.E.2d 561 (2002).

[9] 99 N.Y.2d 328, 786 N.E.2d 14, 756 N.Y.S.2d 115 (2003).

[10] The child spent approximately 35% of her time with her father. Id, at 3.

[11] Gravlin v. Ruppert, 285 A.D.2d 690, 690, 726 N.Y.S.2d 792, 793 (3rd Dept., 2001).

The issue framed by the Court of Appeals[12] was whether modification of child support provisions pursuant to an "agreement is warranted where there has been an unforeseen change in circumstances, resulting in a complete failure of the support obligations contemplated in the agreement." *Gravlin*, underscored that "the complete breakdown in the visitation arrangement, which effectively extinguished the father's support obligation, constituted an unanticipated change in circumstances that created the need for modification of the child support obligations."

The Court of Appeals rejected the applicability of *Boden v. Boden*[13] and *Brescia v. Fitts*[14] because *Gravlin* hinged neither on the child's needs nor on inadequacy of support. Offensive to the appeals court was the violation of public policy that the child was being supported by only one parent despite the expectation of the father's economic participation which served as the basis behind the deviation from the CSSA:

> "It is the necessity of ensuring that respondent continues to support his child as agreed upon by the parties, despite the inability to perform under the original terms of the agreement, that justifies modification of the support provisions."

In essence, *Gravlin* engaged the issue on a *de facto* basis against the backdrop of public policy rather than textbook accuracy.

Tompkins

That the impairment of contractual rights is not an impediment with regard to a child's right to receive proper support is evidenced by the Court of Appeals' ruling in *Tompkins, supra*, which involved the review of the scope of the court's authority under FCA §413-a(3)(b)(1) to issue "a new order of support in accordance with the child support standards" upon the filing of an objection. *Tompkins* emphasized the history and intent behind the entire support statute as being to "strengthen and enhance the tools available for * * * *the establishment*, enforcement, and collection of child support orders...a clear incorporation of that statute and its goal of ensuring adequate child support." The high court referred to the purpose of the statute:

> The Program Memorandum also provides that "[e]very child is entitled to have both parents contribute to financial and medical support in accordance with uniform guidelines..."

The appeals court thereafter applied a key principle of statutory construction: read its plain language but implement the Legislative intent as the primary goal.

> To interpret a statute, we first look to its plain language, as that represents the most compelling evidence of the Legislature's intent. However, "the legislative history of an enactment may also be relevant and 'is not to be ignored, even if words be clear' "...The primary goal of the court in interpreting a statute is to determine and implement the Legislature's intent.

---

[12] See, Brockunier v. Brockunier, 2002 WL 31817940 (N.Y.Fam.Ct.), 2002.

[13] 42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791 (1977).

[14] 56 N.Y.2d 132, 436 N.E.2d 518, 451 N.Y.S.2d 68 (1982).

The Court of Appeals further stressed that the right of a child to receive support superseded any "substantial impairment" of the Contract Clause of U.S. Constitution "if the State can demonstrate that " 'it is reasonable and necessary to serve an important public purpose' "... Here, ensuring that children receive adequate support is an important public purpose... (cites omitted)." If the Court of Appeals has the authority to trespass on a constitutional right provided it "serves an important public purpose", then clearly, there should be no tether to modifying the applicability of its own state statute if it is consonant with the same important public purpose.

Clerkin

In *Clerkin v. Clerkin*,[15] the mother appealed from an order awarding the father child support due to a *de facto* change of custody to him. Pursuant to their original agreement the father's basic child support obligation was decreased because he would equally share physical and joint legal custody. Following the mother's out of state move in June 2001 the father became the exclusive *de facto* custodian – the parties had not sought a legal change in the custodial arrangement. They did, however, sign an agreement that the father's support obligation under the original agreement was terminated as of September 1, 2001, until further agreement or court order. The Supreme Court granted the father child support plus arrears retroactive to the date of the application therefor. Citing *Gravlin,* the Appellate Division affirmed the award (although remanded on other grounds) because the father's status as exclusive *de facto* custodian constituted an "unanticipated change in circumstances creating the need for modification of child support obligations."

However, under *Tompkins* and *Gravlin*, should *Clerkin* not have awarded the father child support retroactive to the date of the occurrence of the changed circumstances when he became the exclusive custodian after which time the mother became duty bound to contribute towards the child's support? Under *Nichols*, absent a written modification to the underlying agreement, Mrs. Clerkin could possibly not only have escaped making any future child support payments but could also have continued to collect support payments.[16]

Has *Nichols* Become Obsolete?

Gravlin and *Nichols*, divided by half a century and enlightened public policy, tackled the identical principle, i.e., the supremacy of contract doctrine over a parent's duty to pay child support; two eras, two different conclusions.

Tompkins, Gravlin, *Clerkin*, and current public policy simultaneously raise compelling challenges against the continued efficacy of *Nichols* while favoring the extension of the retroactivity of back support to the time that a parent stopped paying child support. *Nichols* is, clearly, out of step and not coextensive with any of these pronouncements.[17] The high court now says that there can be

---

[15] 304 A.D.2d 784, 759 N.Y.S.2d 500 (2nd Dept., 2003).

[16] Mrs. Clerkin did not argue *Nichols.*

[17] Thinking whimsically, it is rather curious that the Court of Appeals, in *O'Shea v. O'Shea*, 93 N.Y.2d 187, 711 N.E.2d 193, 689 N.Y.S.2d 8 (1999), citing "deep statutory roots" and the legislative intent behind the statute, formally declared the availability of counsel fees for

no reason to justify a parent's failure to support a child, irrespective of contract doctrine: a parent must support a child. Period. It seems that, although the Court of Appeals has, yet, to formally renounce *Nichols*, the Appellate Division perceived *Nichols'* death knell in the shadows of *Tompkins*, *Gravlin*, and prevailing public policy.

Conclusion

Custodial parents now have a formidable argument in support of pre-application child support. Coherent contemporary thinking, both legislative and judicial, generated by a child's need to receive support from both parents, is finally beginning to prevail over prior mechanical adherence to inflexible dogma which yielded blindly and absolutely to technical correctness irrespective of the consequences to the child. It is now up to the lower courts to implement available authority to facilitate child support awards in line with reality.

---

legal preparation ante-dating the commencement of the action, and, yet, has never made a similar parallel declaration with respect to the availability of child support for periods preceding the application therefor.