Legislative Intent, Public Policy, Grievous Injustice, vis à vis Child Support Arrears[1]

Elliott Scheinberg

The Child Support Standards Act (CSSA) is an expression of important public policy.[2] To improve child support enforcement and to comply with the Federal Child Support Enforcement Amendments of 1984 (42 U.S.C. § 651 et seq.), and in order to receive federal funding,[3] the Legislature amended FCA §451 in 1986 to preclude forgiveness or the retroactive modification of child support.[4] Child support is sacrosanct.

In *Dembitzer v. Rindenow*,[5] a matter of first impression, Supreme Court untenably blocked the payment of child support arrears to the estate of a custodial parent as being against the best interests of the children, in contravention of statutory, legislative, and decisional pronouncements regarding this issue.

> In the preamble to *Dox v. Tynon*[6] the Court of Appeals underscored:
> Under the current scheme for enforcing court-ordered child support obligations, courts may not reduce or cancel any arrears that have accrued (see, DRL §236[B][9][b]; §244; FCA §§ 451, 460[1]). This prohibition is the culmination of a series of statutory amendments that, since 1980, have curtailed judicial power to modify accumulated child support arrears and instead shifted the burden to the paying spouse to act prospectively by seeking a reduction of support obligations before default ...[later adding] *Child support arrears must be awarded in full, regardless of whether the defaulter has good cause for having failed to seek modification prior to their accumulation*.

Dembitzer

The divorce judgment ordered the plaintiff to pay $548 per week in child support for the three children retroactive to the date of the decedent's application for child support. The order,

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[1] N.Y.L.J., Sept. 30, 2005.

[2] Tompkins County Support Collection Unit ex rel. Chamberlin v. Chamberlin, 99 N.Y.2d 328, 756 N.Y.S.2d 115 (2003); Panossian v. Panossian, 201 A.D.2d 983, 607 N.Y.S.2d 840 (4th Dept., 1994); Modica v. Thompson, 300 A.D.2d 662, 755 N.Y.S.2d 86 (2nd Dept., 2002).

[3] Tompkins/Chamberlain, supra.

[4] Blake on Behalf of Ashley v. Syck, 230 A.D.2d 596, 661 N.Y.S.2d 341 (4th Dept., 1997).

[5] Dembitzer v. Rindenow, 8 Misc.3d 683, --- N.Y.S.2d ---- (Sup.Ct. Kings Co. 2005).

[6] Dox v. Tynon, 90 N.Y.2d 166, 659 N.Y.S.2d 231 (1997).

however, failed to specify the amount of retroactive support. Following the entry of the divorce judgment, the mother moved, *inter alia*, to have retroactive child support fixed at $58,126. On March 22, 2004 the children started to reside with the plaintiff-father because the mother had become hospitalized. By order dated May 28, 2004 the plaintiff's child support obligations were suspended, effective May 31, 2004. The order further required the plaintiff to be responsible for child support up to May 31, 2004.

The mother passed away prior to the hearing on her motion for arrears. Following the hearing the estate moved to disaffirm that branch of the JHO's report recommending a credit to the plaintiff of $38,250 for child care he paid pursuant to a pendente lite order, thereby reducing his arrears to $19,876.

Governing law and public policy to the contrary notwithstanding, Supreme Court supplanted the Legislature's intent (as codified in the statutory scheme) and judicial authority (*Dox)* with its own wisdom*,* simultaneously postulating what it thought the decedent's intent would or should have been, and wiped out the arrears in their entirety. Although observing that "were the decedent alive, she would have been entitled to a judgment for child support arrears", *Dembitzer* hypothesized that a judgment against the defaulter would deplete his financial position to the children's detriment:

> ... this court has serious reservations regarding the propriety of awarding [the] estate with a judgment of child support arrears in the amount of $58,126. Child support is intended to provide for a child's day to day needs and expenses. Given that the children in this case are now in their father's custody, this court is concerned that a judgment for child support arrears to the mother's estate will only serve to reduce funds available for the children's current support with no guarantee that these funds will ever become available to them. This certainly could not have been the intention of the children's mother. Nor could it have been the intention of the New York State Legislature when it enacted the New York State Support Enforcement Act of 1986 and 1987(NYSSEA).

Corollary to the cancelled arrears, *Dembitzer* inexplicably cited EPTL §11-3.1, mysteriously creating even more law, unsupported by any authority whatsoever: the estate would only have been entitled to the arrears if the children were under the custodial care of someone other than their father. Rather astounding because the arrears belonged to Mrs. Dembitzer who had already spent the judicially determined child support towards the daily living expenses of her three children and was, therefore, free to bequeath it to whomever she chose, logic suggesting that her children were her heirs.

Significantly, *Dembitzer* cited all the parallel statutes[7] and case law that unanimously enjoin the reduction of arrears "accrued prior to the date of application to annul or modify any

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[7] Dox, supra.

prior order or judgment as to child support"[8] and then rejected them so as to avoid a grievous injustice or an "unconscionable" result "so unreasonable or absurd as to force the conviction upon the mind that the excepted subject could not have been intended by the legislature" were the father charged with arrears.

Legislative Intent

The implementation of the legislature's intent is the *sine qua non* recurring theme throughout the schema of statutory construction: in all cases the legislative intent is to be effectuated, not frustrated[9]; such is the primary consideration[10] and is to be determined from the language of the statute or from extrinsic aid.[11] The Comment to NY Statutes §92 addresses "the duty of courts" in applying legislative intent:

> ... the legislative intent is said to be the 'fundamental rule,' 'the great principle which is to control,' 'the cardinal rule', and 'the grand central light in which all statutes must be read.'
>
> The intent of the Legislature is controlling and must be given force and effect, regardless of the circumstance that inconvenience, hardship, or injustice may result ... [and] must be ... effectuated whatever may be the opinion of the judiciary as to the wisdom, expediency, or policy of the statute, and whatever excesses or omissions may be found in the statute.

NY Statutes §§124 and 72 require courts to explore the social climate during the time of a new law's enactment as well as its historical evolution, and to "suppress the evil and advance the remedy" of the mischief sought to be cured.[12] Amendments are deemed to intend a material change in the law[13] while altering the text of existing enactments; their purpose is usually to make old statutes express and conform to more recent legislative intention, or to rectify an error for which reason it is desirable to have in mind the previous condition of the law on the subject,

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[8] (i) DRL §§236 (B)(9)(b), (ii) DRL §244, (iii) FCA §451, (iv) FCA §460, and (v) *Dox*, supra.

[9] Comment, NY Statutes §96.

[10] NY Statutes §92.

[11] NY Statutes §191.

[12] The Comment to NY Statutes §222 emphasizes that "it is a general rule of statutory construction that earlier statutes are properly considered as illuminating the intent of the Legislature in passing later acts, especially where there is doubts as to how the later act should be construed, since when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject."

[13] NY Statutes §§193(a) and (b).

and the history and purposes of the statutes which are amended.[14]

Although *Dox* did not cite the aforementioned statutes individually, it, nevertheless, methodically applied them in its historical analysis of the support enforcement, highlighting the curative aspects of each amendment:

> Significantly ... earlier statutes placed the burden of taking legal action on the party entitled to receive child support. The defaulting spouse, by contrast, could simply let arrears accumulate and wait until an enforcement proceeding was initiated to request abatement or annulment of those arrears.

Grievous injustice

The principles of statutory construction are, nevertheless, tempered by statute that construction be in a manner designed not to work hardship or injustice.[15] Courts have been mindful of this proscription in child support enforcement when strict compliance would lead to "grievous injustice." *Dembitzer*'s reference to three cases involving "grievous injustice" were, however, wholly inapplicable and irrelevant to the facts in *Dembitzer*.

In *Reynolds v. Oster*[16] the father was misled into believing that his daughter had not been emancipated; the mother's wrongdoing by withholding the truth prevented the father from filing timely – a theory similar to extrinsic fraud. *Commissioner of Social Services v. Grant*[17] found grievous injustice where the payor's illness made it impossible for him to both pay support and file for relief. In the third case the Appellate Division rejected a finding of grievous injustice although acknowledging that such relief is available in *rare* circumstances.[18] *Dembitzer*'s only case on point emanated from an Ohio decision.

Critically, governing authority states that bad faith in failing to abide by child support

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[14] NY Statutes §§191 and 95.

[15] NY Statutes §146: Where a particular application of a statute in accordance with its literal sense will produce injustice, another and more reasonable interpretation should be sought.; Comment to NY Statutes §230: Especially is a literal construction to be avoided when it results in objectionable consequences, hardship, or injustice. The court is not bound to accord a literal interpretation to language of a statute if to do so would lead to an egregiously unjust or unreasonable result.

[16] 192 A.D.2d 794, 596 N.Y.S.2d 545 (3rd Dept., 1993); See, Brown v. Larry, 232 A.D.2d 758, 648 N.Y.S.2d 185 (3rd Dept., 1996); Commissioner of Social Services of Tompkins County on behalf of Barbara A v. Gregory B, 229 A.D.2d 801, 646 N.Y.S.2d 212 (3rd Dept., 1996).

[17] 154 Misc.2d 571, 585 N.Y.S.2d 961 (Fam.Ct. NY Co. 1992).

[18] Commissioner of Social Services ex rel. Rosa Lidia T. v. Luis Alonso G., Jr., 7 A.D.3d 388, 777 N.Y.S.2d 102 (1st Dept., 2004).

obligations or other wrongdoing,[19] torpedoes eligibility for relief under "grievous injustice."[20] Significantly, the decision does not address why the plaintiff, an attorney represented by counsel, could not have petitioned for statutory relief.[21]

Importantly, the divorce court fixed the retroactive support, to wit, the amount the plaintiff should have been paying for the prior years, in accordance with the CSSA whose provisions the Legislature declared presumptively correct[22] and an expression of important public policy.[23] Accordingly, Mr. Dembitzer's failure to timely seek affirmative relief made "grievous injustice" unavailable to him; notwithstanding the settled tenet that equity denies relief to those with unclean hands[24], *Dembitzer*'s erroneous application of the principle of "grievous injustice" richly rewarded the wrongdoer.

Children cannot be fed, clothed, or sheltered retroactively; as even *Dembitzer* noted, child support contemplates "a child's day to day needs and expenses." By operation of law, absent affirmative relief, the amount of each support payment ceases to belong to the payor as it comes due and may never inure to the defaulter's benefit.

Dembitzer sends a devastating precedent setting message that encourages a war of attrition against terminally ill custodial parents by withholding child support while awaiting their deaths, followed by a vilification of the estates for attempting to bankrupt the best interests of the children in their pursuit of arrears, albeit for monies already spent by the decedent-parents; oddly enough, the bigger the deadbeat the greater the eligibility to benefit from this ruling. Notwithstanding *Dembitzer*'s recognition of the statutory amendments that prevent defaulters from financial reward for failing either to pay the order or seek its modification, deadbeats have just been handed a ready trophy, a new judicially crafted affirmative defense: repayment to the estate will negatively impact the children's needs. There is no justification of any kind in handing equitable relief to a parent who himself is guilty of unclean hands in his exploitation of his former wife's terminal illness. The only possible grievous injustice was to the memory and estate of the mother.

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[19] See, endnote 15.

[20] Clark v. Liska, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3rd Dept., 1999).

[21] Gaudette v. Gaudette, 263 A.D.2d 626, 692 N.Y.S.2d 839 (3rd Dept., 1999); Dox, supra.; Decedent's counsel indicates that plaintiff neither appealed nor received a stay from the judgment of retroactive child support.

[22] DRL §240(1-b)(h).

[23] Tompkins/Chamberlain, supra.

[24] See, Tompkins/Barbara A, supra.