ANALYSIS

'T.H. v. M.B.,' Judiciary Law §753(3) and Child Support, Caveat Counsel

A Manhattan Supreme Court justice's recent ruling is dangerous because it can mislead members of the bar who rely on published decisions as gospel, as they often go unaddressed and uncorrected, a Law Journal columnist writes.

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Family Law

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Some decisions are not simply devastating to the injured party alone but are also intellectually frustrating at every level as they reach every wrong conclusion.

One such decision, *T.H. v. M.B.,* Supreme Court, New York County, decided May 17, 2023, listed in the New York Law Journal's Decision Alerts, dated June 5, 2023, is dangerous because it can mislead members of the bar who rely on published decisions as gospel. Such decisions may not remain unaddressed and uncorrected.

By way of background, The Child Support Standards Act is an expression of important public policy. *Roe v. Doe*, 29 N.Y.2d 188, 192 (1971); *Burr v. Fellner*, 73 A.D.3d 1041 (2d Dept 2010) ("It is fundamental public policy in New York that parents are responsible for their children's support until age 21 (Family Ct. Act § 413; *Roe v. Doe*."); *Thomas B. v. Lydia D.*, 69 A.D.3d 24, 27-28 (1st Dep't 2009) ("A parent's duty to support a child to the age of 21 is a matter of fundamental public policy in this state and is currently embodied in statutory law.")

T.H. v. M.B.

In *T.H.,* plaintiff-husband, T.H., moved, by order to show cause, for an order finding defendant-wife, M.B., in contempt of court for willful noncompliance with orders directing her to pay monthly pendente lite child support and maintenance. Supreme Court found the wife guilty of civil contempt, pursuant to Judiciary Law §753(3), for her willful nonpayment of support totaling $48,529. The court had given the wife until April 28, 2023, to purge her contempt by paying the husband $24,264.50, half of the full arrears due, or be subject to further sanction, including arrest.

On April 28, 2023, the state Supreme Court issued an order of commitment committing the wife to the custody of the Sheriff of New York County for delivery to the New York City Department of Corrections to be held for a maximum term of three weeks commencing April 28, 2023, unless she purged herself of her contempt by paying $20,764.50 to the

husband. By amended order of commitment dated May 16, 2023, Supreme Court modified the wife's incarceration term to 19 days, retroactive to April 28, 2023, and ending on May 17, 2023, on which day she was discharged.

The Supreme Court stunningly and numbingly concluded: "By serving the full term, the Wife has effectively satisfied the purge amount of $20,764.50," i.e, that 19 days in prison fully absolves the wife from paying one penny of her purge amount support arrears; otherwise stated, 19 days in jail erased her support obligation, 19 days = $20,764.50. Many vindictive, deadbeat parents and spouses will rejoice, as the adage goes, they can do 19 days, and some more, standing on their heads to wipe out their support obligations.

Supreme Court Said It 'Was Without Guidance as to the Proper Outcome'

Notwithstanding Article 4 of the Family Court Act and the seven-year-old Court of Appeals ruling, *Matter of Columbia County Support Collection Unit v. Risley*, 27 NY3d 758 (2016), discussed below, Supreme Court somehow managed to find itself "without guidance as to the proper outcome":

"Since the Wife failed to purge her contempt, the court is now presented with the question: does the full incarceration period satisfy the purge amount of $20,764.50? *The court has examined the controlling law but found no case directly answering this question*.

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The Court is without guidance as to the proper outcome where, as here, a party has failed to satisfy a purge amount but nevertheless satisfied the full incarceration period."

The decision missed every fundamental point:

On the one hand, the purpose of child support is to assist [the] custodial parent in providing the child with shelter, food, and clothing" (*Rubin v. Salla*, 107 AD3d 60 [1st Dept 2013]). The court also recognizes the importance of enforcing its own orders especially child support orders.

On the other hand, however, the court is troubled by the punitive nature of depriving the wife of her liberty for failing to pay the civil contempt purge amount and then entering a money judgment against her that includes the same sum. The outcome is then punitive rather than remedial, contrary to the purpose and goal of civil contempt (*New York City Transit Authority v. Transport Workers' Union of America, AFL-CIO*, 35 AD3d 73, 86 (2d Dept 2007)).

First, a further reading of *New York City Transit Authority (*at 86) shows:

"Contempt sanctions may involve imprisonment or fines. The sanction of imprisonment is not necessarily criminal. For example, imprisonment for a fixed term, during which the contemnor may 'purge' the contempt and obtain early release by committing an affirmative act, *is a coercive, civil penalty*."

Notably, in *Matter of Department of Environmental Protection of City of New York v. Department of Environmental Conservation of State of N.Y.*, 70 NY2d 233, 239 (1987), the Court of Appeals emphasized that civil contempt is intended to compensate the injured party *or to coerce compliance* with a court order:

"This court's power to punish for civil and criminal contempt is found respectively in Judiciary Law § 753(A)(3) and § 750(A)(3). Although the same act may be punishable as both a civil and a criminal contempt, the two types of contempt serve separate and distinct purposes. A civil contempt is one where the rights of an individual have been harmed by the contemnor's failure to obey a court order (*People ex rel. Munsell v. Court of Oyer & Terminer*, 101 N.Y. 245, 4 N.E. 259).

Any penalty imposed is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both (*State of New York v. Unique Ideas*, 44 N.Y.2d 345, 405 N.Y.S.2d 656, 376 N.E.2d 1301)."

Supreme Court by some unknown reasoning concluded that "[b]y serving the full term, the Wife has effectively satisfied the purge amount of $20,764.50. The Court does not reach this decision lightly, but finds it is manifestly unjust to enter a money judgment against the Wife for the purge amount following her completed incarceration period. It is either one or the other, not both." The wife is now free to spend another 19 days in jail or some other such amount and erase her entire support obligations. M.B. is the Patron Saint of Deadbeat and Vindictive Spouses and Parents.

Matter of Columbia County Support Collection Unit v. Risley Provides the Guidance for *T.H. v. M.B*

In *Matter of Columbia County Support Collection Unit v. Risley*, 27 NY3d 758 (2016), the Court of Appeals established the extent and duration of Family Court's jurisdiction over a parent or spouse who has failed to "completely satisfy" support judgments against them even after they have completed their incarcerations for nonpayment: "Jurisdiction continues until such time as all arrears have been paid, no matter how long, and regardless of the age of the child (Merril Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., Family Ct. Act § 451)." That is the guidance for *T.H. v. M.B.*

Risely Reviews the Evolution of Child Support Enforcement

In *Risley*, Family Court had revoked two prior suspended orders of commitment for nonpayment of child support, it was authorized to order consecutive six-month sentences for each to run consecutively with a third six-month sentence imposed for a current violation and the underlying support obligations remained in full enforceable effect.

The Court of Appeals reviewed New York's priority over enforcing child support, noting that when the Family Court Act was enacted over 50 years ago, Family Court's power included "jailing for a term not to exceed six months for a willful failure to obey a support order (Family Ct Act (FCA) § 454[a], as added by L. 1962, ch. 686 [now § 454(3)(a)])."

Subsequently, New York enacted the New York State Support Enforcement Act of 1986 (SEA), aimed at addressing the harmful effects of the pervasive disregard of court-ordered support obligations. In approving this legislation, then-Gov. Mario Cuomo admonished, "[t]he absence of an effective child support system has been a major factor in the alarming rate of poverty among children in this country, who are owed nearly $3 billion in unpaid child support" (Governor's Mem. approving L. 1986, ch. 892, 1986 McKinney's Session Laws of N.Y. at 3213)." The high court noted, "Today, that number has increased to over $115 billion (see U.S. Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, Preliminary Report F.Y. 2015 at 90,)

"The SEA's primary purpose was to 'ensure that the children of this State … receive the support that is their legal right" by addressing "support enforcement issues vigorously and comprehensively' (id. at 3214) and it '[s]et forth all the remedies available for enforcing a support order upon failure of a respondent to comply, including … commitment' (L. 1986, ch. 892, Governor's Program Bill Mem. No. 84, Bill Jacket at 20)."

As a result, Family Court is empowered *'to use any or all enforcement powers in every proceeding brought for violation of a court order'* of support (FCA § 454[1]). Such powers include the authority to sentence willfully non-compliant parents to jail "for a term not to exceed six months," but also to suspend such orders of commitment when appropriate (FCA §§ 454[3][a]; 455[1]).

Risley: The Available Enforcement Tools

"The problems of enforcing a support order could fill a book" (*Matter of Powers v. Powers*, 86 N.Y.2d 63, 65 [1995]). To address such problems, Family Court has various tools to use in achieving the ultimate goal of providing children with the financial support that is their right. For instance, even absent a willfulness finding, such enforcement remedies include entry of a money judgment, income deduction, undertaking, sequestration, and the suspension of drivers' and recreational licenses (FCA § 454[2]). Incarceration is an option when the Family Court determines that a respondent willfully failed to comply with "any lawful order of support," in which case, the court may:

"…commit the respondent to jail for a term not to exceed six months. For purposes of this subdivision, failure to pay support, as ordered, shall constitute prima facie evidence of a willful violation…. Such commitment does not prevent the court from subsequently committing the respondent for failure thereafter to comply with any such order" (FCA § 454[3] [a]).

Even when the commitment provision is invoked, Family Court has the discretion to "suspend an order of commitment upon such reasonable conditions, if any, as the court deems appropriate to carry out the purposes of [article 4]" (Family Ct. Act § 455[1]). That suspension may, however, be revoked "at any time" for "good cause shown."

In *Risley,* the father's conduct resulted in a substantial amount owed in arrears and two suspended orders of commitment, one each in 2010 and 2012, for willfully violating Family Court support orders. Both suspended commitments were conditioned upon the father making timely child support payments.

In 2013, Family Court found yet a third willful violation of a prior order, revoked the two suspended orders for the past violations, and sentenced the father to a new six-month sentence, resulting in three consecutive six-month sentences. Once again, the father made no attempt to plead an inability to pay or seek modification of the support orders.

Family Court's action was taken well after the initial suspension of the earlier orders of incarceration, raising an issue of the timing of the revocation. The statute expressly provides that Family Court "has continuing jurisdiction over any support proceeding brought under [article 4] until its judgment is completely satisfied and may modify, set aside or vacate any order issued in the course of the proceeding" (FCA § 451[1]; *Matter of Damadeo v. Keller*, 132 A.D.3d 670, 672, 17 N.Y.S.3d 182 [2d Dept.2015]).

These sections make clear that Family Court may reinstate a suspended commitment at any time while respondent has failed to satisfy the judgment. This is consistent with Appellate Division Departments that have held Family Court even has the discretion to revoke a previously suspended judgment despite the fact that significant time has lapsed since the suspension [cites omitted].

Therefore, Family Court retained jurisdiction over the father on the two suspended commitments because he failed to "completely satisfy" the judgments against him and failed to comply with ongoing support obligations. "Jurisdiction continues until such time as all arrears have been paid, no matter how long, and regardless of the age of the child" (Merril Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., Family Ct. Act § 451). With this jurisdiction, Family Court had statutory authority to revoke the father's suspended sentences at any time for good cause shown, despite the lapse in time from the initial suspension.

Conclusion

Counsel: beware of *T.H. v. M.B. Risley* is the law.

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