

Using Laches to Defend Against Child Support Collection

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Introduction

Four new California appellate cases from 2000 tell us that although the laches defense is still available in child support enforcement cases, its degree of success is less promising than before. That is, only well behaved payors with support arrears may be able to escape enforcement using the equitable defense of laches.

For the past decade, Family Law attorneys and courts have relied on Family Code Section 4502 to enforce child support obligations in perpetuity. Section 4502 provides that a judgment for child support, including all interest and penalties, is enforceable until paid in full and is not retroactively modifiable either as to accrued arrearages or interest. Before 1992, child support orders expired after a set period of time unless renewed by the payee. And the trial court had discretion whether to renew the order. In 1992, the legislature amended the Civil Code to provide that judgments for child support were exempt from renewal and were enforceable until paid in full.¹

Despite the apparent endless enforcement period specified in Section 4502, California appellate courts have permitted equitable defenses to prevent the enforcement of child support arrearages. Remarkably, during the year 2000, the appellate courts issued four opinions on the defense of laches in child support enforcement.² In only one of these four cases did a payor escape child support enforcement through the use of the laches defense.

Laches In the Year 2000: The Difficult Defense

Laches is defined as an unreasonable delay that causes prejudice to the other party.³ There is no "bright line" rule to determine whether laches is a winnable defense to a child support order; the trial court must evaluate each case on its own set of facts.⁴ To succeed with a laches defense, both of the following factors must be proved: (1) unreasonable delay, *and* (2) undue prejudice.

Unreasonable Delay: Length of Delay Less Significant than Reason for the Delay.

One would imagine that a delay of 25 years in bringing a child support enforcement action would be unreasonable. Not necessarily so. In *Marriage of Dancy*⁵, although the mother waited 25 years before seeking enforcement of her 1970 child support order, and despite the fact the child was well beyond the age of majority, the Court of Appeal affirmed the trial court's

finding that the delay was not unreasonable. The mother delayed enforcement because (1) she was afraid of the father because in the past he had beaten her, her father, and the child; and (2) she was only able to begin enforcement proceedings after receiving emotional and financial assistance from the father's other wives. Because neither party requested a statement of decision, the Court of Appeal did not question the trial court's findings and limited its review to determining whether there was substantial evidence to support the trial court's findings.

In *Marriage of Cutler*⁶, the mother sought to enforce a 1966 child support order. In addition to his other arguments, because the mother did not diligently pursue enforcement, the father asserted that her request for enforcement of the 1966 child support order should be barred. The trial court, finding that father's support obligation ended when the children reached age 18 and that mother was barred from collecting support payments over 10 years old, held that enforcement was barred by the statute of limitations. The appellate court reversed and remanded. Even though the father raised laches as a defense at the trial level, he did not raise the issue on appeal. This did not stop the appellate court from finding that laches was not available as a defense because the record did not support that the mother unreasonably delayed enforcement of the child support order.

In reviewing the viability of the laches defense, the court focused more on father's "unclean hands" than on mother's lengthy delay. "[A] party seeking equitable relief must come into court with clean hands."⁷ The court found that the father was fully aware that he had fathered two children which *should have led him to believe* that a support obligation existed; that in 30 years, the father *had minimal contact with the children* and saw them only 3 or 4 times; that the mother remarried and moved, but *her address was always listed* and family and friends knew her whereabouts. "Cutler's claim of unfairness [in enforcing a 30 year child support order] amounts to nothing more than a request that he be rewarded for having successfully avoided his parental responsibilities and legal obligations in the past; this we decline to do."⁸

Of the four cases, only *Marriage of Fogarty and Rasbeary*⁹ found mother's delay in seeking past due child support unreasonable. Notably, the appellate court found substantial evidence to support the trial court's finding of laches. The court rejected mother's two reasons to explain her delay: First, mother unsuccessfully argued that it is "... notoriously difficult to enforce judgments against persons who are self-employed, and since [she] was unsuccessful in her attempts between 1977 - 1980 [to enforce the child support judgment], she was justified in not wanting to go through the 'idle acts' of further attempts at enforcement." Second, mother unsuccessfully argued that the legislature enacted Family Code section 4502 to protect people like her, including parents who were not nearly as diligent as she had been in seeking enforcement. The court quickly dismissed these arguments holding that they were unsupported by the record and the legislative history of section 4502.¹⁰

Undue Prejudice: Party's Bad Conduct May Buttress a Winning Laches Defense

The finding of undue prejudice is the second necessary component to a laches defense, but it is inextricably tied to the finding of unreasonable delay. The case of *Marriage of Fogarty & Rasbeary* was the only case of the four in 2000 to support a laches defense based on the

finding of prejudice. The appellate court, in affirming the trial court, was persuaded that laches was a winning defense, primarily because father was prejudiced by mother's delay in seeking enforcement.

Not surprisingly, the mother was unsympathetic and the father sympathetic. During the period of support installments for which the mother was seeking support and even at the time the mother filed her action, the child lived with her grandparents. Father continued to participate in the child's life but, primarily because the grandparents told father he could fulfill his financial obligations in other ways, he failed to pay child support pursuant to the 1976 court order. Father did pay for medical expenses, summer camps, clothing, trips, and other extras for the child. He even built a tack cabin for the child (apparently every child's dream). In contrast to the above cases where 25 to 30 years had passed, the mother's delay in waiting 17 years to enforce the order coupled with the prejudice the delay had caused the father was sufficient to show unreasonable delay.

The other three cases found that the delay in child support enforcement did not unduly prejudice the paying parent. For instance, in *Marriage of Hamer*, in reversing the trial court, the appellate court found mother's four year delay in seeking enforcement did not unduly prejudice the father. The most significant holding of the case was that mother's acceptance of a lower support payment than what the court ordered neither constituted a waiver on the unpaid support, nor, in this case, did it prejudice the father. Accordingly, enforcement was not barred by the defense of laches.

The following chart summarizes the four cases in 2000 on laches.

Case Name	Date of Original Order	Defenses asserted	Appellate Holding	Distinguishing Characteristics of Case
<i>Marriage of Cutler</i> (2000) (5 th Dist.) 79 Cal.App.4th 460	1966	Lack of Diligence Estoppel, based on concealment Laches -- asserted at trial court level only, but addressed on appeal by Appellate court anyway	Appellate court reversed and remanded the trial court's decision. All defenses fail.	Father had the ability to locate children but made few efforts to do so. Father had "unclean hands." Lack of diligence alone is not a defense to the enforcement of an old child support order.

<p><i>Marriage of Fogarty & Rasbeary</i> (2000) (2nd Dist.) 78 Cal.App. 4th 1353</p>	<p>1976</p>	<p>Laches</p>	<p>Trial court is affirmed. Laches was a successful defense to the enforcement of this child support order.</p>	<p>The child did not live with the payee parent, but lived with her grandparents throughout her minority. The grandparents told the payor father that he did not need to make any further child support payments. Father was contributing financially to the support of the child in other ways, such as paying for medical expenses, clothing, trips, and the like.</p> <p>Father lived in the same place for 22 years and thus, it would have been easy for the mother to locate him. Father had "clean hands."</p> <p>The standard of review on appeal varies, but this court applied the abuse of discretion standard.</p>
<p><i>Marriage of Hamer</i> (2000) (1st District) 81 Cal.App. 4th 712</p>	<p>1992 (order) 1993 (judgment)</p>	<p>Laches</p>	<p>Appellate court reversed the trial court. Laches defense fails.</p>	<p>Lack of diligence is not a defense by itself to the enforcement of an old child support order.</p> <p>A payee's acceptance of a lesser support amount does not waive her right to collection of full court-ordered amount due. The appellate court denounced two prior cases (<i>Graham</i> and <i>Paboojian</i>) which allowed the forgiveness of arrearages based upon an "express" waiver for lesser support; the court found that those cases could not be reconciled with recent legislative developments that make a child support judgment enforceable until paid in full and not retroactively modifiable either as to accrued arrearages or interest due thereon.</p>

<p><i>Marriage of Dancy</i>, (2000) 82 (4th District) 82 Cal.App.4th 1142</p>	<p>1970</p>	<p>Estoppel Laches</p>	<p>Appellate court affirmed the trial court. Laches is an available defense, but no laches found here.</p>	<p>Even though there was a 30 year delay in seeking enforcement, the delay was justified. The appellate court seems to caution in dicta that success in enforcement of a child support order may depend on whether the custodial parent continuously sought to enforce the child support payment during the child's minority instead of waiting to collect after the child had reached the age of majority. (Page 1156.) The court's public policy argument is that child support is owed to the child rather than the dilatory parent.</p>
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Practical Tips and Implications of the Recent Case Law

Family law practitioners can use these recent cases to provide practical advice to their clients regarding on-going and past due child support obligations:

1. Advise your client to be active in enforcing support orders to eclipse or at least limit the other parent's ability to defend using laches. In dicta in *Marriage of Dancy*, the court indicated that the laches defense gains more strength if the enforcing parent (1) has not continuously sought to enforce the child support order during the children's minority and (2) waits until the child is past its minority to seek enforcement of the order.
2. Advise your client to keep in touch with the local child support enforcement agency and advise your client to send regular reminders or summaries of arrearages to the paying parent.
3. Include a provision in the Marital Settlement Agreement that a failure to bring a child support enforcement motion or the acceptance of an amount less than the support order, does not constitute either a waiver of support or enforcement of the support order.
4. Advise your client who is required to pay support that if he or she pays less than the amount ordered, the other party's acceptance does not constitute a waiver on the unpaid amount nor does it bar enforcement. The payor should be advised to obtain a written agreement concerning lower than ordered support amounts.
5. Advise the paying parent that if he or she is unable to pay the full amount and cannot obtain a written agreement from the other party, he or she must immediately file for a modification.

6. Provide in the Marital Settlement Agreement that additional payments for child care, educational expenses, etc. should be characterized as child support so enforcement of these add ons will have the same strength as the underlying child support order. Also, if the amount of support provided for is unknown at the time of the agreement, be clear concerning the method and time for payment. For example, if the agreement requires that father will pay one-half of the educational expenses agreed to between the parties within 10 days after receipt of the invoice or receipt, the mother should keep a detailed record of educational expenses the parties agreed upon and hopefully obtain the father's initials in the detailed record, and also specify the date when she provided the invoices or receipts to father. Also, she should try to obtain the father's initials in the detailed record. It would also be prudent to provide that a notice of invoice or its receipt will, unless otherwise responded to in writing, be assumed as consent to the expense by the paying parent after the passage of ten days.

Conclusion

The four cases from the year 2000 tell us that although laches remains a viable defense to the enforcement of a child support order, it is a tough sell. And, although there are two separate elements to proving laches, unreasonable delay and undue prejudice, the success of one element is quite dependent on the success of the other.

Ostensibly, the delay in seeking to enforce the child support order is less important than the parents' behavior during the time of the delay. The court is more willing to extend the laches defense to a sympathetic payor – a parent who comes into the court with “clean hands” – who continued to participate in the child's life and provide financial assistance in some way other than strict payment of the child support order. Similar to this “clean hands” doctrine, the court looks to the behavior of the person seeking to enforce the court order. If that person is perceived to be using the child support order for his or her own gain, such as the mother in *Fogarty and Rasbeary* who did not even live with the daughter during her minority, the court will be more willing to entertain the laches defense. In contrast, the court may disallow the laches defense where the payor seems to have shirked his moral and legal responsibilities to the child.

Only the almost perfect parent in default of child support has a chance, albeit a slim one, to avoid his or her child support arrearage. If the paying parent resembles Ward Cleaver – willing to provide financial extras by building a tack cabin like the father in *Fogarty and Rasbeary*, and the recipient parent resembles Cruella de Vil – such as failing to participate in the child's minority and using the child support arrears only for her own financial gain – then laches becomes a tenable defense.

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Endnotes

1. This provision is now reflected in Family Code section 4502.
2. *Marriage of Cutler* (2000) 79 Cal.App.4th 460, *Marriage of Hamer* (2000) 81 Cal.App.4th 712, *Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, and *Marriage of Dancy* (2000) 82 Cal.App.4th 1142.
3. *Marriage of Dancy*, Id. at page 1148; citing *Marriage of Plescia* (1997) 59 Cal.App.4th 252.
4. *Marriage of Fogarty and Rasbeary*, Supra at page 1363.
5. 82 Cal.App.4th 1142.
6. 79 Cal.App.4th 460
7. Id. At 169.
8. Id. At 167.
9. 78 Cal.App.4th 1353.
10. Id. At 1365.

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