



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Relating to Retroactive Child Support Orders

May 11, 2015

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **July 31, 2015**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Executive Summary

New Jersey employs a number of enforcement mechanisms to ensure that children receive appropriate support, including credit reporting, which may negatively affect the credit ratings of obligor parents and their ability to borrow.¹ But a problem arises when a judge issues a retroactive child support order which creates a “technical arrearage” against a non-custodial parent who has never violated a support order or missed any legally specified payments. The plain language of New Jersey’s child support statute, N.J.S. 2A:17-56.21, *mandates* that information regarding even technical arrearages be provided to credit reporting agencies.²

In April 2015, the Commission authorized work on a project to conduct research and propose revisions to N.J.S. 2A:17-56.21 to reflect the court’s order in the recently published *Cameron v. Cameron*.³

Background

Family court judges in New Jersey have the discretion to issue retroactive child support orders in certain circumstances, such as when the non-custodial parent concealed assets in order to intentionally avoid paying support. Also, in cases where a dissolution matter has been continued or adjourned beyond the initial return date, under N.J.S. 2A:17-56.23(a), a court may retroactively establish or increase one’s child support obligation back to at least the filing date of the petition.⁴ The greater the gap in time between the original filing date of a petition and the conclusion of the case, the greater the chance that there may be a substantial amount of technical child support arrears retroactively owed by the non-custodial parent.⁵

The court in *Cameron* identified a legal issue of first impression regarding the statutory interpretation of the child support statute and the reporting of child support arrears as a delinquency on an obligor’s credit report. This particular legal issue regarding retroactive child support orders is apparently well known to New Jersey family law practitioners, one of whom referring to it as one of the biggest “Catch-22s” in family court. Now, in accordance with *Cameron*, the reporting of child support arrears against a non-custodial parent who has never violated a support order is not required and, when a court of equity imposes a retroactive child support obligation resulting in newly assessed arrears, the court has the discretion to direct the Probation Department *not* to report such arrears to the credit reporting bureaus.⁶

¹ Elsie Gonzalez, Esq., Child Support and Your Credit Score, March 27, 2015, www.newjerseydivorcelawyer-blog.com/2015/3/27/child-support-and-your-credit-score/ (last visited 4/2/2015).

² N.J. STAT. ANN. § 2A:17-56.21 (West 2015).

³ *Cameron v. Cameron*, 2015 WL 1326333.

⁴ N.J. STAT. ANN. § 2A:17-56.23(a) (West 2015).

⁵ *Cameron v. Cameron*, 2015 WL 1326333.

⁶ As discussed below, the Probation Division of the Superior Court is responsible for child support enforcement.

It is considered a bright line rule that child support arrearages cannot be modified in most cases. New Jersey's "anti-retroactive" child support modification statute⁷ bars the retroactive modification of permanent child support arrears except with respect to the period during which there is a pending application for modification. Also, judges recognize an exception for arrearages accruing after a child has been emancipated or in the case of the death of a child.⁸

Cameron concerns a divorced couple with joint custody of a child on whose behalf the father was initially ordered to pay child support. Eventually, when the child came to live with the father and he became primary residential custodian, the father petitioned for termination of his child support obligation and an order establishing the mother's new child support obligation as the non-custodial parent, retroactive to the date of the filing of his petition. When the court issued the requested retroactive child support order immediately placing the mother in arrears, she raised a concern through counsel regarding the negative consequence such arrears might have if reported as a delinquency, as required by N.J.S. 2A:17-56.21. Section b. contains the mandatory language at issue and is highlighted within the complete statutory section, as follows:⁹

a. The State IV-D agency shall have the authority to make available the name of any delinquent obligor and the amount of overdue support owed by the obligor to credit reporting agencies, subject to the conditions set forth in this section and privacy safeguards established by the commissioner. This information shall be provided only to an entity that has demonstrated to the satisfaction of the State IV-D agency that the entity is a credit reporting agency.

b. In all Title IV-D cases where the obligor is in arrears, the information shall be made available to credit reporting agencies. [Emphasis added]

c. The State IV-D agency may establish a fee for all requests which will be uniformly applied in all Title IV-D cases. Any fee charged shall be limited to the actual cost of providing the information.

d. Information with respect to a delinquent obligor shall be reported to credit reporting agencies only after the obligor has been afforded all procedural due process required under State law including notice and a reasonable opportunity to contest the accuracy of the information.

e. The State IV-D agency shall comply with all applicable procedural due process requirements before releasing information and may request information on an obligor from a credit reporting agency only after noticing the obligor of the State IV-D agency's intent to request the information.

⁷ N.J. STAT. ANN. § 2A:17-56.23a (West 2015).

⁸ See *Centanni v. Centanni*, 408 N.J. Super. 78 (2008).

⁹ Title IV, Part D of the Social Security Act, 42 U.S.C. § 651 et seq., requires "states to report periodically to consumer reporting agencies . . . the name of any noncustodial parent who is delinquent in the payment of child support and the amount of overdue support owed by such parent."

As the court observed, under a strict interpretation of the above statutory language, an obligor who owes child support arrears is potentially subject to various legal consequences, including Probation's reporting of the arrears to credit reporting agencies. But the court held that the terms and spirit of the statute do not require the reporting of technical arrears against a noncustodial parent who has never violated a support order or missed any legally specified payments, in the same manner as against an obligor who has failed to make payments or otherwise violated an existing order.

Of note, as pointed out to the Commission by a commenter, the judge in *Cameron* could have applied Rule 5:7-10 of the New Jersey Rules of Court to temporarily suspend the enforcement of the provisions of the existing child support order to allow the mother to clear up the arrearages. Such application would nevertheless have required a review of the suspension provisions of the order after 60 days, and every 60 days thereafter.

In New Jersey, if a judgment for arrears has been entered, the payee becomes a judgment-creditor and may enforce his or her judgment pursuant to the normal course of execution of any judgment.¹⁰ Court rules require support to be paid through the Probation Department of the payor's residence unless the court, upon good cause shown, orders direct payment.¹¹ The judge in *Cameron* noted that New Jersey child support law has its origin in federal law, which requires states in all Title IV-D cases in which the amount of overdue support exceeds \$1,000 to provide the information to consumer reporting agencies.¹² The court noted also, upon examination of the legislative statement and history accompanying N.J.S. 2A:17-56.21, that the New Jersey Legislature did not intend for the consequences to apply to a non-delinquent obligor, who technically owes money only as a result of a retroactively imposed order, but who has never missed a payment or otherwise violated the order itself. Furthermore, "owing support" and being "delinquent on support" are not always synonymous, since, as the facts in *Cameron* illustrate, a debtor may owe money without being delinquent.

In other states, depending upon the jurisdiction, a child support order alone may be reported without regard to arrearages. Tennessee, for instance, requires that consumer reporting agencies be notified when a child support obligor is "either current in payments of support or who is delinquent in the payment of support."¹³ Obligor must first be notified of delinquent reports, however. Arizona and California, likewise, require the reporting of child support obligations of even non-delinquent obligors.¹⁴ Noncustodial parents in Arizona have 15 days to contest the accuracy of the reported information, while California child support obligors are allowed 30 days. Maryland law requires notification of consumer reporting agencies, but only when the obligor parent is 60 days in arrears, has been notified in writing, and is provided a reasonable time to contest the information to be reported.¹⁵

¹⁰ NJ Family Law Practice § 5.7D.

¹¹ Practical Skills Series, PSS: Family Law § 5.C.

¹² "Title IV-D case" means any case in which the child support enforcement agency is enforcing the child support order pursuant to Title IV-D of the "Social Security Act," 88 Stat. 2351 (1975), 42 U.S.C. 651, as amended.

¹³ T.C.A. § 36-5-106.

¹⁴ Arizona Revised Statutes § 25-512 and California Family Code § 4701.

¹⁵ Maryland Code, Family Law §10-108.1.

Other states' family courts have similarly addressed retroactive child support orders which result in "technical" or "administrative" arrears in cases where the obligor parent is non-delinquent and has not violated any order to pay child support.¹⁶

In *Albright v. Bemis*, a father was ordered to pay child support retroactively when paternity was established many years after the child's birth.¹⁷ Montana's District Court distinguished between "delinquent" or "past due" child support for the purposes of determining a monthly payment schedule. Similarly, in *Kenck v. State of Montana Child Support Enforcement Division*, an obligor parent brought an action after being denied employment based on a report to a consumer reporting agency regarding his child support arrearage.¹⁸ The court held that an administrative arrearage of child support caused by the retroactive increase of father's child support obligation was not a delinquency or overdue child support, as could be reported as such to consumer credit reporting agencies. The *Kenck* court observed that there is "surprisingly little statutory guidance on whether an arrearage created by imposition of a retroactive increase in support should properly be construed or reported as overdue child support or a child support delinquency."

Obligor parents retroactively ordered to pay child support face additional potential consequences beyond credit reporting, such as the confiscation of tax refunds. But the court in *Laub v. Zaslavsky* held that arrearages created solely as a result of retroactive Pennsylvania child support orders did not constitute "past-due support" subjecting the obligor to the provisions of federal tax refund intercept statutes.¹⁹ Retroactive child support orders in Florida received similar treatment in *Department of Revenue, Child Support Enforcement v. Cessford*.²⁰

Child Support Enforcement in New Jersey

There is no statute of limitations to collect child support arrears in New Jersey. This basic rule was well illustrated in the unpublished Appellate Division case, *Faro v. Vonder Heyden*.²¹ Although the custodial parent in *Faro* waited seven years to attempt to collect child support arrears, neither the doctrine of equitable estoppel nor laches were found to be a defense for the obligor husband to avoid paying retroactive child support payments. Nor could he prove that he was prejudiced by the seven year delay.²²

¹⁶ "Technical arrears" is not a term commonly found in New Jersey cases and, at time of publication, is mentioned only in *Cameron*. Black's Legal Dictionary does not define "technical arrears." Family courts in other states have also used the term "administrative arrears," as discussed below.

¹⁷ *Albright v. Bemis*, 1996 Mont. Dist. Lexis 732.

¹⁸ *Kenck v. State of Montana Child Support Enforcement Division*, 373 Mont. 168 (2013).

¹⁹ *Laub v. Zaslavsky*, 369 Pa.Super. 84 (1987).

²⁰ *Department of Revenue, Child Support Enforcement v. Cessford*, 100 So.3d 1199 (2012).

²¹ *Faro v. Vonder Heyden*, 2008 WL 5083494.

²² *Child Support Arrears*, <http://www.divorcelawyerofnj.com/2009/01/29/child-support-arrears/> (last visited 4/4/2015).

The New Jersey Family Support Payment Center (NJFSPC) is responsible for processing child support payments. These payments must be made through the Probation Division of the county in which the obligor resides.²³ Obligor must be given written notice when child support orders are issued and income withholding to pay child support is required unless there is an agreement or order to the contrary.²⁴ And fees and interest may be collected from obligors for late child support payments.²⁵

Reaction to *Cameron v. Cameron*

As discussed above, the Commission has received feedback from members of New Jersey's family law bar in support of decision in *Cameron v. Cameron*. But some of those charged with child support enforcement have expressed concern. One commenter explained that the order would negatively impact child support collections in at least the short term because of the need for a substantial amount of new training and tracking procedures. Any revision should be specific to the facts of *Cameron*, would include a defined and limited reporting blackout period, and would contain no requirement for enforcement personnel to return to court for subsequent hearings.

Commission's Recommendation

Although new training and tracking procedures for child support enforcement personnel may be unavoidable after *Cameron*, the Commission has identified potential revisions (see the Appendix, below) intended to bring existing New Jersey statute into conformance with the decision in that case, pending additional outreach and opportunity for public commentary.

Proposed new language in the first sentence of N.J.S. 2A:17-56.21 subsection b., requiring that obligors in arrears *must have actually violated a child support order*, is calculated to address the concerns articulated by child support enforcement personnel, regarding recurring hearings and time limits. No time limit is specified because there would seem to be no need for enforcement (i.e., disclosure to credit reporting agencies) against a non-delinquent obligor.

The new sentence added to N.J.S. 2A:17-56.21 b. incorporates language from the holding in *Cameron* to prohibit disclosure to credit reporting agencies in cases where an otherwise non-delinquent obligor is suddenly ordered into arrears. And enforcement is expressly and automatically permitted if the obligor should subsequently fall into a delinquent status.

²³ N.J. STAT. ANN. § 2A:17-56.13 (West 2015).

²⁴ N.J. STAT. ANN. § 2A:17-56.8 (West 2015).

²⁵ N.J. STAT. ANN. § 2A:17-56.20 (West 2015).

Appendix—Proposed Changes to Existing New Jersey Statute

The text of 2A:17-56.21, with proposed revisions shown with underlining, is as follows:

2A:17-56.21. Overdue support; release of information to consumer or credit reporting agency by state IV-D agency

a. The State IV-D agency shall have the authority to make available the name of any delinquent obligor and the amount of overdue support owed by the obligor to credit reporting agencies, subject to the conditions set forth in this section and privacy safeguards established by the commissioner. This information shall be provided only to an entity that has demonstrated to the satisfaction of the State IV-D agency that the entity is a credit reporting agency.

b. In all Title IV-D cases where the obligor is in arrears and has violated the terms of a child support order, the information shall be made available to credit reporting agencies. In cases of newly assessed arrears against a non-delinquent obligor, the State IV-D agency shall not disclose information to credit reporting agencies until such time that the obligor becomes delinquent.

c. The State IV-D agency may establish a fee for all requests which will be uniformly applied in all Title IV-D cases. Any fee charged shall be limited to the actual cost of providing the information.

d. Information with respect to a delinquent obligor shall be reported to credit reporting agencies only after the obligor has been afforded all procedural due process required under State law including notice and a reasonable opportunity to contest the accuracy of the information.

e. The State IV-D agency shall comply with all applicable procedural due process requirements before releasing information and may request information on an obligor from a credit reporting agency only after noticing the obligor of the State IV-D agency's intent to request the information.