

CHILD SUPPORT AND MAINTENANCE -- ENTITLEMENT TO INTEREST, LIEN PROVISIONS TO ENFORCE SUPPORT AND ENFORCEMENT OF SUPPORT AFTER THE ALL THE CHILDREN ARE EMANCIPATED

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1. **Interest on Unpaid Support and Maintenance**

a. **Interest on Unpaid Child Support:**

i. **Introduction:**

Since 1999, 750 ILCS 5/505(b) has been amended to provide for mandatory interest when child support is not paid on time. Section 505(b) [immediately before subsection (c)] reads:

[505(b) Interest Provisions] A support obligation, or any portion of a support obligation, which becomes due and remains unpaid as of the end of each month, excluding the child support that was due for that month to the extent that it was not paid in that month, shall accrue simple interest as set forth in Section 12-109 of the Code of Civil Procedure. An order for support entered or modified on or after January 1, 2006 shall contain a statement that a support obligation required under the order, or any portion of a support obligation required under the order, that becomes due and remains unpaid as of the end of each month, excluding the child support that was due for that month to the extent that it was not paid in that month, shall accrue simple interest as set forth in Section 12-109 of the Code of Civil Procedure. Failure to include the statement in the order for support does not affect the validity of the order or the accrual of interest as provided in this Section.

Consider the interest provisions in connection with the series of judgments provisions:

[505(d) Series of Judgments / Lien Provisions] (d) Any new or existing support order entered by the court under this Section shall be deemed to be a series of judgments against the person obligated to pay support thereunder, each such judgment to be in the amount of each payment or installment of support and each such judgment to be deemed entered as of the date the corresponding payment or installment becomes due under the terms of the support order. Each such judgment shall have the full force, effect and attributes of any other judgment of this State, including the ability to be enforced. Notwithstanding any other State or local law to the contrary, a **lien** arises by operation of law against the real and personal property of the supporting parent for each installment of overdue support owed by the supporting parent.

There are corresponding changes to the provisions of Illinois Public Aid Code, the Non-Support of Spouse and Children Act and Illinois Parentage Act of 1984 (Section 20.7).

- ii. ***Wiszowaty* - 2011 Illinois Supreme Court Decision Rules that Statutory Interest on Missed Child Support Payments Mandatory Following 1987**
[*IDHFS ex rel. Wiszowaty v. Wiszowaty*](#), 239 Ill. 2d 483 (2011).

In 2011 the Illinois Supreme Court addressed the issue of whether delinquent child support payments in Illinois began to bear mandatory interest as of May 1, 1987 with the passage of Public Act 85-2. The appellate court had concluded, in keeping with several earlier cases, that they did not. 394 Ill. App.3d 49. The Supreme Court reversed the judgment of the appellate court. It stated:

The General Assembly changed the law in 1987 by providing that each unpaid child support installment is an actual “judgment” that arises by operation of law, and that each such judgment “shall bear interest.” Under the plain language of these statutory amendments, interest payments on child support payments became mandatory effective May 1, 1987. This court’s decision in *Finley* does not compel a different result.’

The appellate court had ruled that until January 1, 2000, awarding interest on past-due child support was discretionary – not mandatory. As a result of the Illinois Supreme Court decision, we can expect that more cases will emphasize promissory estoppel or laches type defenses to support enforcement – where there is a good faith argument in this regard.

- iii. [*IRMO Rice*](#), 2011 IL App (1st) 103753. This case ruled that following *Wiszowaty*, statutory interest on support was retroactive -- in this case to April 1991.
- iv. ***Davenport – Enforcement of Support – The Case of a 44 Year Old Child:***

Davenport is not strictly an interest case. But it addresses the same general issues as the interest cases – what occurs when there is a long delay between when support is due and ultimately may be paid.

Going back a score of years, note that in 1997 the legislature amended the IMDMA to do away with the earlier statute of limitations under which the action had to be brought within 20 years of the judgment. [*IRMO Davenport*](#), 388 Ill. App.3d 988 (2d Dist. 2009).

Davenport involves a child support arrears stemming from a 1972 divorce. The “child” at the of the ex-wife’s petition was 44 years old. The trial court found a support arrearage including interest of \$26,000. The father had only been required to pay \$13 weekly. In March of 1981 the father overpaid by more than \$1,000. The appellate court examined the statute of limitation that would apply to the case, because until July 1, 1997, the enforcement action had to be brought within 20 years of the support judgment. Relying on the 1997 amendment, the trial court concluded that the statute of limitations did not bar the mother’s claim. The appellate court noted that as a general rule statutory amendments modifying procedural laws are applied retroactively while those modifying substantive are only prospective in nature. But even procedural amendments cannot be applied retroactively when doing so would impair a right that is sufficiently well established to be protected under the due process clause of the constitution. The 20 year statute of limitations had begun to run in 1981 and therefore

the statute had not run by the time it was extended by the 1997 amendment. The appellate court accordingly reasoned that the trial court correctly applied the amended statute of limitations, i.e., the elimination of any statute of limitations.

Next, the father urged that the trial court erred in refusing to apply the doctrine of laches to the case. The party asserting laches as a defense to a claim must prove two elements: (1) lack of diligence by the party asserting the claim; and (2) injury or prejudice as a result of the delay to the party asserting laches. The appellate court reasoned:

Even assuming that the 26-year gap between the date respondent began to fall behind on his child support payments and the date petitioner brought suit evinces a lack of diligence on petitioner's part, we see no prejudice to respondent as a result of the delay. Respondent argues that he was prejudiced by the passage of time because it caused him to be unable to recall the amounts and dates of cash payments he made to respondent after March 1981. However, as petitioner notes, this is the precise argument this court rejected in *Smith*. See *IRMO Smith*, 347 Ill. App. 3d 395 (2004).

The key portion of the decision states:

The real crux of respondent's laches argument is that he sees infirmity in petitioner's declining to pursue support from him during a period in which they both seem to agree he was without means to provide it, before changing course and deciding to pursue support upon learning that respondent was expecting a windfall from a property sale. Petitioner appears to us to have chosen a prudent course: she forwent pursuing support during respondent's period of unemployment, when doing so would have been expensive and futile, but, once she learned that respondent might be able to meet his obligation, she pursued the support that even respondent does not contest she was rightfully owed. This is not the type of inequitable result the doctrine of laches is designed to prevent.

Comment: Consider the impact of two amendments and the case law:

- ☞ First Amendment: July 1997: The legislature removes the 20 year statute of limitations.
- ☞ Second Amendment: January 1, 2000: The legislature imposes mandatory statutory interest.

So for any support order entered after 1977, there is effectively no statute of limitations. And based on *Wiszowaty*, statutory interest is mandatory from May 1, 1987. The case law when coupled with these amendments demonstrates how difficult it is to succeed on the defense of laches – the inability to prove support payments with the passage of time generally will not be a successful defense.

b. Interest on Unpaid Maintenance:

Since January 1, 2005, Illinois law was changed to provide for mandatory interest on missed maintenance – similar to the law on missed child support. Accordingly Section 504 of the IMDMA [the maintenance section] provides:

(b-5) [Interest] Any maintenance obligation including any unallocated maintenance and

child support obligation, or any portion of any support obligation, that becomes due and remains unpaid shall accrue simple interest as set forth in Section 505 of this Act.

(b-7) Any new or existing maintenance order including any unallocated maintenance and child support order entered by the court under this Section shall be deemed to be a series of judgments against the person obligated to pay support thereunder. Each such judgment to be in the amount of each payment or installment of support and each such judgment to be deemed entered as of the date the corresponding payment or installment becomes due under the terms of the support order, except no judgment shall arise as to any installment coming due after the termination of maintenance as provided by Section 510 of the Illinois Marriage and Dissolution of Marriage Act or the provisions of any order for maintenance. Each such judgment shall have the full force, effect and attributes of any other judgment of this State, including the ability to be enforced. A lien arises by operation of law against the real and personal property of the obligor for each installment of overdue support owed by the obligor.

i. ***Barile* – Calculate Interest for Maintenance the Same as for Child Support:**

[*IRMO Barile*](#), 385 Ill. App. 3d 752 (2nd Dist., 2008) addressed the question of whether interest on maintenance arrearages is calculated the same as support arrearages. The appellate court noted that Section 504(b-5) provides simply that child support will accrue simple interest per Section 505.

Section 505 then refers to §12--109 of the Code. This section of the Code provides that “Every judgment except those arising by operation of law from child support orders shall bear interest thereon as provided in §2--1303 of [the Code].” Section 2--1303 of the Code then explains to how to calculate interest – 9% interest from the date of the judgment. The appellate court reasoned:

Because section 12--109(b) dictates that interest on child support accrues if support is not paid at the end of the month when due, §504(b--5), by incorporating §12--109, dictates that interest on maintenance accrues the same way. [See also D. Yavitz, Interest on Past-Due Maintenance and Child Support: the New Calculus, 94 Ill. B.J. 76, 93 \(2006\)](#). [Only lawyers who have logged into the ISBA website can access this.]

To summarize, we go from §504(b-5) to §505 of the IMDMA to §2-1303 of the Code. The appellate court stated:

While section 505 of the Marriage Act directs us to section 12--109 of the Code without specifying subsection (a) or (b), it appears clear we are directed to subsection (b), because subsection (b) provides for the method of calculating interest on child support, hence on maintenance. However, to the extent the legislature may have left this ambiguous, we engage in the following analysis.

After an extended – and interesting – discussion the appellate court concluded:

Accordingly, we hold that interest on maintenance, like interest on child support, is calculated per section 12--109(b).

So, we now know that the same law regarding interest on child support arrearages now applies to maintenance arrearages.

2. **Lien Provisions as to Overdue Support**

With child support withholding in the late 1990's a provision was added to 505(d), the final sentence quoted above reads, "A lien arises by operation of law against the real and personal property of the noncustodial parent for each installment of overdue support owed by the noncustodial parent." 750 ILCS 505(d). This language was necessary to permit the ability to garnish wages automatically pursuant to a notice for income withholding, as discussed below.

There are also provisions unique to the IDHFS's ability to impose liens against "responsible relatives." In *Martinez v. IDPA*, 348 Ill. App.3d 788 (1st Dist., 2004), the Illinois appellate court ruled that the provisions of the Illinois Public Aid Code and the Illinois Administrative Code that authorize the IDHFS [then the IDPA] to adjudicate its own lien against jointly owned assets to recover child support obligations did not violate the provisions of the Illinois Constitution. It also ruled financial institutions were not liable for surrendering a person's accounts in response to a lien or order issued by what is now the IDHFS.

So, in an appropriate case read 160.70(g)(2) of the Administrative Code regarding liens against personal property of responsible relatives in **IV-D cases**. It applies when:

- i) the amount of past-due support is at least \$1,000;
- ii) the responsible relative has an interest in personal property against which a lien may be claimed; and
- iii) if the personal property to be levied is an account as defined in Section 10-24 of the Illinois Public Aid Code [305 ILCS 5/10-24], the account is valued in the amount of at least \$300.

3. **Enforcement of Support Post-Majority Generally:**

- a. Subsection g-5 (to Section 505 of the IMDMA):

"(g-5) If there is an unpaid *arrearage or delinquency* (as those terms are defined in the Income Withholding for Support Act) equal to at least one month's support obligation on the *termination date* stated in the order for support or, if there is no termination date stated in the order, on the date the child attains the age of *majority or is otherwise emancipated*, the periodic amount required to be paid for current support of that child immediately prior to that date shall *automatically continue* to be an obligation, not as current support *but as periodic payment toward satisfaction of the unpaid arrearage or delinquency*. That periodic payment shall be *in addition to any periodic payment previously required for satisfaction of the arrearage or delinquency*. The total periodic amount to be paid toward satisfaction of the arrearage or delinquency may be enforced and collected by any method provided by law for enforcement and collection of child support, including but not limited to income withholding under the Income Withholding for Support Act. Each order for support entered or modified on or after the effective date of this amendatory Act of the 93rd General Assembly must contain a statement notifying the parties of the requirements of this subsection. Failure to include

the statement in the order for support does not affect the validity of the order or the operation of the provisions of this subsection with regard to the order. This subsection shall not be construed to prevent or affect the establishment or modification of an order for support of a minor child or the establishment or modification of an order for support of a non-minor child or educational expenses under Section 513 of this Act.”

This dovetails with 750 ILCS 28/32 addressing withholding notices stating:

Sec. 32. Unpaid arrearage or delinquency after current support obligation terminates.

(a) When current support terminates on the date stated in the order for support, or because the child attains the age of majority or is otherwise emancipated, and the amount previously required to be paid for current support of that child automatically continues as an obligation for periodic payment toward satisfaction of unpaid arrearage or delinquency as provided for by law, the obligee or public office may prepare and serve upon the obligor's payor an income withholding notice that:

(1) contains the information required under subsection (c) of Section 20; and

(2) contains the total amount of the unpaid arrearage or delinquency as of the date of the notice; and

(3) directs the payor to withhold, as a periodic payment toward satisfaction of the unpaid arrearage or delinquency, the total of:

(A) the periodic amount required to be paid as current support immediately prior to the date the current support obligation terminated under the order, or by the child becoming emancipated by age or otherwise, and

(B) any periodic amount previously required for satisfaction of the arrearage or delinquency.

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