

## CREDITING ESTABLISHED ARREARS WHEN THERE IS A CHANGE IN PLACEMENT IN A DEPENDENCY CASE

### Background & Analysis

Florida Statutes provide authority for the dependency court to issue child support orders, but do not provide authority to award credit toward arrearages. In fact, awarding credit toward child support arrearages – irrespective of the forum – is generally not accepted practice in Florida. There may, however, arise special circumstances in which equitable considerations would warrant a setoff.

The issue of credit toward child support arrears has come up most frequently in domestic relations cases where there is a general rule against reducing child support obligations retroactively or forgiving arrearages. Fausnight v. Teasdale, 803 So. 2d 800 (Fla. 5th DCA 2002). This rule is due to the fact that child support obligations are the “vested rights of the payee and vested obligations of the payor which are not subject to retroactive modification.” Onley v. Onley, 540 So. 2d 880 (Fla. 3rd DCA 1989) (citing Pottinger v. Pottinger, 133 Fla. 442 (1938)).

In Puglia v. Puglia, 600 So. 2d 484, 485 (Fla. 3rd DCA 1992), the non-custodial father “sought credits for weeks the child resided with him. Although the father could have sought modification of the child support order in advance, he did not do so. Having failed to do so, it is too late to seek this remedy retroactively.” The court explained that “child support payments may be modified only prospectively through a modification of the child support agreement. ... Credits towards child support arrearages have the appearance of a retroactive modification, and if so, constitute error.” Id. However, if the dependency judge changes custody or placement of the child but does not address child support in that ruling, an argument may be made that child support should be retroactive to the date of the change in custody or placement and not be limited to the date the petition for child support was filed.

As a practical matter, the trial court could often deal with this situation by ordering the “new” payor parent to pay monthly child support in the same amount that the “new” parent with the majority of the time-sharing is ordered to repay on the arrearage. The parents will submit their respective payments for the child support and delinquent support arrearages and end up largely or entirely canceling each other out. By requiring both of these payments, the parties and the court will have a record of the payments should there be any dispute in the future.

However, a departure from the foregoing cases is found in an appellate case involving a paternity and time-sharing matter in which the trial court’s decision to create just this sort of setoff was upheld. In Artuso v. Dick, 843 So. 2d 942 (Fla. 4th DCA 2003) the court awarded the father primary physical residence of the child. The mother was already due child support arrearages totaling \$4,900, however, at the time of the final judgment the father was due \$5,525 in child support that was retroactive to the time he filed the petition for support. Id. at 945. “Rather than have each party have an arrearage due, the court ‘washed out’ each arrearage.” Id. The court went on to say, “While the mother’s right to her arrearage was vested, the court simply used that award to offset against what would have been her greater obligation of support to the father. We affirm the trial court’s ruling.” Id.

In situations where the payor paid or overpaid other obligations, such as alimony or mortgage payments, the courts have refused to use those payments as a basis to award credit towards child support arrearages, stating that the payor should petition for modification prospectively. See, e.g. Waldman v. Waldman, 612 So. 2d 703 (Fla. 3d DCA 1993) (error to offset alimony overpayment against past due child support); Jones v. Jones, 689 So. 2d 1264 (Fla. 4th DCA 1997) (error to offset Christmas gifts against child support); DOR v. Kiedaisch, 670 So. 2d 1058 (Fla. 2d DCA 1996) (error to offset payments in the nature of gifts against child support).

However, the court should also consider the equitable circumstances of the case. In State of Florida, Department of Revenue of Behalf of Pulliam v. Watt, 681 So. 2d 800 (Fla. 2nd DCA 1996) the court indicated that special circumstances existed where the child lived with the payor father for a period of twenty-one months. The trial court’s order crediting the father for those twenty-one months was upheld. Id. Giving guidance in determining appropriate equitable defenses, the court in State of Florida v. Stanjeski, 562 So. 2d 673, 678 (Fla. 1990) wrote:

The following three equitable defenses may be appropriate grounds for relief: (1) payment--a direct payment is made to the payee because of the exigencies of the family situation or a family emergency; (2) no further obligation to pay support--a minor child reaches majority, marries, enters the armed services, or dies, or a former spouse receiving alimony remarries or dies; or (3) change of custody--a full change of child custody has occurred and the former custodial parent no longer supports the child or retains fiscal obligations relating to the child. There may be other equitable defenses that can be raised based on other types of extraordinary circumstances. We emphasize that the underlying purpose of this process is to assure the payment of child support for the welfare of the child.

Simply put, while child support arrearages are ordinarily vested in the custodial parent, “payments made for the benefit of the child may, under equitable considerations, entitle that parent to a setoff.” Tash v. Osterle, 380 So. 2d 1316 (Fla. 3rd DCA 1980). Courts have approved credit based on these types of equitable considerations. See State of Florida, Dept. of Rev., v. Kiedaisch, 670 So. 2d 1058 (Fla. 2d DCA 1996) (allowed setoff for payments for rent, food, clothes, utilities, and health insurance after child attained eighteen); Garcia v. Gonzalez, 654 So. 2d 1064 (Fla. 3d DCA 1995) (allowed setoff for payment of housing expenses); Goldman v. Goldman, 529 So. 2d 1260 (Fla. 3d DCA 1988) (payment for college room and board complied with spirit of the child support order); Nolte v. Nolte, 544 So. 2d 1146 (Fla. 2d DCA 1989) (non-custodial parent assumed care after custodial parent permanently expelled the child from the home); Valladares v. Junco-Valladares, 30 So.3d 519 (Fla 3d DCA 2010) (husband’s dependent benefits paid by the social security administration directly to the wife offset husband’s child support obligation.)

Also note that §61.30(11)(a)2, Florida Statutes, permits adjustment of the minimum child support award based upon the independent income of the child.