

I.
INTRODUCTION

Effective January 1, 2003, the Legislature amended Family Code Section 4502, adding subsection (c) which eliminated the equitable defense of laches in actions brought by individuals (but not the State) to enforce judgments for child, spousal, or family support. There have been only two published cases which have directly addressed whether or not the amendment to section 4502 may be retroactively applied to conduct that occurred prior to January 1, 2003.

The trial court's determination that the defense of laches was unavailable to Appellant is a pure question of law thus this court must review this issue *de novo*. *Salve Regina College v. Russell* (1991) 499 U.S. 225. Accordingly, in reviewing *de novo* this question of law, this court must accord no deference to the trial court's determination of law. *Id.*

In *In re Marriage of Garcia* (2003), 111 Cal.App.4th 140, the Second District Court of Appeals held that, in the absence of an express retroactivity provision, this substantive change in the law could not be applied in cases where the hearing was held prior to the effective date of the statute.

Extending the analysis in *Garcia*, appellant submits that this non-retroactive amendment should not be applied, not just to cases heard prior to the effective date of the statute, but to all those cases in which the facts establishing laches occurred prior to that date as well. To conclude otherwise would violate the rules against retroactivity.

Next, appellant submits that a non-retroactive application of section 4502(c) is justified because it is consistent with both the

legislative intent behind the amendment and is supported by sound public policy reasons.

Last, although in *In re Marriage of Fellows* (2004) 121 Cal.App.4th 607, the 3rd District Court of Appeals found that Family Code Section 4, was the evidence of legislative intent needed to justify retroactive application of section 4502(c) to conduct that occurred before the statute's effective date, appellant submits that this case falls within the express exception to Family Code Section 4 and thus precludes retroactive application of section 4502(c).

Wherefore, Appellant respectfully requests that this Court reverse the trial court's legal conclusion that the defense of laches could not be applied in this case due to the amendment to Family Code section 4502, and further remand this case to the trial court with instructions to determine whether or not Appellant can affirmatively establish the defense of laches.

II.

STATEMENT OF APPEALABILITY

On June 15, 2004, the trial court issued its ruling on Respondent's motion to confirm arrearage for child support. [CT 71] Appellant then filed a motion for reconsideration of the June 15, 2004 ruling. [CT 76]. Appellant abandoned the motion for reconsideration and then timely filed notice of appeal on August 2, 2004, namely within 180 days after entry of judgment. CRC 2(a)(3). The June 15, 2004 ruling was a final ruling and thus disposed of all remaining issues between Appellant and Respondent. Cal.C.C.P. § 904.1(a)(1). This appeal timely follows.

III.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mr. and Mrs. Lazaro were married on November 19, 1955. [CT 21] The parties received a final divorce decree on November 14, 1967. [CT 86] The parties had three sons, Michael (born February 25, 1956), Richard (born October 5, 1957), and Anthony (born June 10, 1959). On August 30, 1967, in a Nunc Pro Tunc Interlocutory Judgment and Decree of Divorce, Mr. Lazaro was ordered to pay Mrs. Lazaro child support in the amount of \$65 per month per child. [CT 86] At the time of this Nunc Pro Tunc Judgment, the Lazaro children were ages 11, 9, and 8.

After the Lazaros had divorced, the children visited with Mr. Lazaro every other weekend. [RT 36] During this time, Mr. Lazaro gave his eldest son Michael, a car for his 16th birthday. [RT 36] In 1975, Mr. Lazaro attended his eldest son's wedding. [RT 37] In 1978, Mr. Lazaro suffered a back injury and has been receiving Social Security Disability ever since. [RT 37]

After seven years had passed since the parties' divorce, Mrs. Lazaro filed a Writ of Execution on February 13, 1974, claiming Mr. Lazaro had failed to pay all of the court ordered child support. [CT 86] After Mrs. Lazaro acted and took Mr. Lazaro to court for not paying the full child support amount, Mr. Lazaro satisfied the entire amount by borrowing the money from his mother. [RT 31]

After this hearing in February, 1974, there was never any further mention of child support payments, arrearages or that Mr. Lazaro had not satisfied his child support obligations. [RT 34].

At the most current hearing on this matter, Mrs. Lazaro testified that her business, *S & S Towing and Trucking Service*, is based out of Richmond, California. [RT 23] Furthermore, Mrs. Lazaro testified that her business is approximately three to five miles from Mr. Lazaro's current residence. [RT 23] Mrs. Lazaro knew where Mr. Lazaro lived for at least the last 20 years. [RT 23] Although Mrs. Lazaro knew where Mr. Lazaro lived, Mrs. Lazaro testified that after February, 1974, she never told Mr. Lazaro he owed her money for child support. [RT 22]. Mrs. Lazaro testified she never sent Mr. Lazaro a letter, never called him on the telephone, or made any other effort to even let Mr. Lazaro know that in her opinion, he still owed her money. [RT 22]. This was the state of affairs for this case for nearly 30 years. [RT 34].

Then sometime around 2002, Mrs. Lazaro was told by a friend that there was a collection agency on the Internet that might be able to get her some money. [RT 24] On August 1, 2002, Mrs. Lazaro filed an Order to Show Cause Contempt proceeding against Mr. Lazaro. [CT 22] This motion was dismissed by Judge Kennedy on January 23, 2003. [CT 22]

On July 22, 2003, Mrs. Lazaro then filed an OSC motion for child support arrearages. [CT 1] This hearing was held on March 25, 2004. [CT 60] During this hearing, Mr. Lazaro testified that he made all child support payments after the 1974 Writ of Execution. [RT 32] Furthermore, Mr. Lazaro testified he never kept any records of these payments, nor was he ever told to keep these records. [RT 32] Kristine Lazaro, Mr. Lazaro's current wife of 25 years, also testified that she observed Mr. Lazaro make payments by money orders as

well. [RT 54] Ostensibly, Mrs. Lazaro testified that Mr. Lazaro only made sporadic payments. [RT 22]

Judge Kennedy issued his ruling on June 15, 2004. [CT 71] Judge Kennedy specifically held that the defense of laches was not available to Mr. Lazaro. Furthermore, Judge Kennedy specifically found the oral testimony of Mr. Lazaro and his present wife Kristine, that Mr. Lazaro made the required child support payments, was insufficient to establish Mr. Lazaro's affirmative burden to prove payment. [CT 72] Judge Kennedy found the principal sum owed by Mr. Lazaro to be \$22, 230 for past due child support. [CT 114] Further, Judge Kennedy found the legal interest rate on the principal sum to be, \$61, 410.81. [CT 114] As such, Judge Kennedy ordered Mr. Lazaro to pay a total judgment in the amount of \$83, 640.81. [CT 114] Mr. Lazaro now timely appeals.

IV.

FAMILY CODE SECTION 4502(c) WAS A SUBSTANTIVE CHANGE IN THE LAW AND THERE IS NO LEGISLATIVE INTENT TO JUSTIFY RETROACTIVE APPLICATION

In California, it is the general rule that “statutes operate prospectively only.” *Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840, 123 Cal.Rptr.2d 40, 50 P.3d 751. “It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.” *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393, 182 P.2d 159.

“A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to

the adoption of the statute.” *Aetna Cas. & Surety Co.*, 30 Cal.2d at 391. Stated another way, “[a] statute has retrospective effect when it substantially changes the legal consequences of past events. *Id.*

In this case, section 4502(c) was added in 2002, and became effective January 1, 2003. *Stats.2002*, ch. 304 § 1, p. 1. It states, “In an action to enforce a judgment for child, family, or spousal support, the defendant may raise, and the court may consider, the defense of laches only with respect to any portion of the judgment owed to the state.” *Cal. Fam. Code* § 4502(c). Section 4502(c) thus eliminated laches as a defense against a person, other than the state, who has claimed to be owed child, family, or spousal support. Prior to the enactment of section 4502(c), case law recognized laches as a defense to an action to collect support. *In re Marriage of Copeman*, (2001) 90 Cal.App.4th 324, 332, 108 Cal.Rptr.2d 801; *In re Marriage of Dancy*, (2000) 82 Cal.App.4th 1142, 1156, 98 Cal.Rptr.2d 775; *In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, 1363, 93 Cal.Rptr.2d 653; see also Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1658 (2001-2002 Reg. Sess.) Apr. 30, 2002, p. 2.

Thus, under the law that existed prior to January 1, 2003, laches was a defense to Patricia’s action to collect back child support, and would have potentially, in this case, barred her claim. However, under a technical reading of the present language of section 4502(c), laches is no longer available to Frank as a defense and thus would not bar Patricia’s claim. Thus, the application of section 4502(c) to this case substantially alters the legal consequences of past acts. Thus application of this statute here would clearly be retroactive. Consequently, in order for this statute to be given retroactive effect in

accordance with the basic laws of statutory interpretation, there must be clear legislative intent to retroactively apply this statute.

In *In re Marriage of Garcia* (2003), the Second District Court of Appeals held that section 4502(c) changed the law to eliminate laches as a potential defense to back child support claims. *In re Marriage of Garcia* (2003) 111 Cal.App.4th 140, 3 Cal.Rptr.3d 370. Having concluded that the law had been changed by the January 1, 2003 amendment, the *Garcia* court analyzed the legislative history behind section 4502(c) and concluded that there was nothing in the history of the statute that demonstrated a clear legislative intent to apply the law retroactively. *Id.* at 145-147. Thus the court concluded that section 4502(c) could not be retroactively applied to hearings that occurred before the effective date of January 1, 2003. (*emphasis added*). *Id.* at 148.

V.

FAMILY CODE SECTION 4502(c) SHOULD BE CONSTRUED TO APPLY ONLY TO CONDUCT THAT OCCURRED AFTER JANUARY 1, 2003 BECAUSE IT IS CONSISTENT WITH THE LEGISLATIVE INTENT BEHIND THE AMENDMENT

The legislative intent behind Family Code Section 4502(c) favors construing the amendment as applicable only to conduct occurring on or after the statute's effective date. In other words, a construction of Section 4502(c) such that any defendant relying upon the laches defense must establish the defense by conduct occurring prior to January 1, 2003 is consistent with the legislative intent behind the creation of section 4502(c).

As reflected in the legislative history for Senate Bill 1658 (which when enacted became Family Code Section 4502(c)), “this bill thus reflects the view of the author and her sponsor, the Association for Children for Enforcement of Support (ACES), that child and spousal support obligations should never go unpaid on the ground that the support recipient unduly delayed in seeking enforcement and this delay prejudiced the support obligor. According to the author, permitting use of the laches defense flies in the face of the state policy, adopted in Family Code section 4502 almost ten years ago, stating that child, spousal and family support orders need not be renewed, and such support debts are enforceable until paid in full.” (See Assembly Committee on Judiciary, Hearing on SB 1658 on June 25, 2002, synopsis of Bill.)

Appellant does not dispute that the pursuit of deadbeat moms and dads who fail to comply with court ordered support obligations is a noble goal and legislation that is aimed at securing payment is needed. However, the statute as written reaches much farther than deadbeat moms and dads who have not paid, as the doctrine of laches is applicable in circumstances, such as the instant case, where due to the lengthy delay, **proof of payment that was made**, no longer exists. *In Re Marriage of Fogarty and Rasbeary* (2000) 78 Cal.App.4th 1353, 1365. Furthermore, laches applies where, although payment has not been made, there was a good faith and reasonable belief that no payment was owed, and the obligor spouse has changed her position in reliance upon that good faith belief. *In Re Marriage of Plescia* (1997) 59 Cal.App.4th 252, 261. Laches is also applicable in circumstances where other arrangements have been made for child

support. *In re Marriage of Garcia* (2003) 111 Cal.App.4th 140 (where parents mutually agreed to pay for child's expenses when child was living under each spouse's respective care and based on this arrangement father did not seek a formal modification of the original support order).

The intended targets of the amendment to section 4502(c) are those persons who have not paid their support obligations; yet it starkly impacts those who have paid but maintained no record, paid in an alternative form, or who have failed, for whatever reason, to obtain anything more than an agreed informal modification to a support order.

It has been common practice in this state for many years for ex spouses to orally modify formal child support orders without the use of either of their respective attorneys. It happens all the time! A retroactive application of section 4502(c) would potentially expose every single one of these former ex spouses to vindictive spouses and unscrupulous lawyers determined to collect money they have already been paid, but which they know their former spouse will be helpless to prove that payment was made.

A retroactive application of this section was not what the legislature intended. A retroactive application would potentially open the floodgates of litigation. A retroactive application would expose countless spouses to frivolous lawsuits that will harm all litigants involved, including the new families of these former ex spouses, who have no involvement at all in the earlier proceedings but may be significantly affected by any adverse court ruling that could attach any

current community property or other assets of the alleged obligor spouse.

A construction of Section 4502(c) such that any defendant relying upon the laches defense must establish that defense by conduct occurring prior to January 1, 2003 would protect those persons who the statute was not meant to apply to.

This construction is reasonable and sensible. The new statute gives notice to the public and the attorneys who advise the public, that after its effective date, any payor of child, family, or spousal support must keep records of support payments in perpetuity, and must reduce any oral modifications of support orders to a written order executed and filed with the court. This construction would protect those who have relied upon the state of the law as it has always been. This construction would protect our citizens from these “Lazarus” type claims that, thanks to the amendment to this statute, rise from the dead and continue to haunt the living.

VI.

FAMILY CODE SECTION 4502(c) SHOULD BE CONSTRUED TO APPLY ONLY TO CONDUCT THAT OCCURRED AFTER JANUARY 1, 2003 BECAUSE OF PUBLIC POLICY CONCERNS

Sound public policy reasons favor construing Family Code Section 4502(c) as applicable only to conduct occurring on or after the statute’s effective date. In other words, a construction of Section 4502(c) such that any defendant relying upon the laches defense must establish that defense by conduct occurring prior to January 1, 2003 is supported by sound public policy reasons.

A retroactive application of § 4502(c) invites fraud. A retroactive application of § 4502(c) would have the unacceptable effect of prejudicing a defendant who has not kept records belonging to two to four decades ago, but does still have the burden to prove payment of all support obligations. No law requires a person to keep records from twenty, thirty or even forty years ago. Not even the IRS requires a citizen to keep records for more than seven years.

If section 4502(c) is retroactively applied, then anyone who has a valid judgment stating they are owed child support payments twenty, thirty, forty, even fifty years ago could claim that they never received checks. With the proliferation of law firms that specialize in collecting supposed support debts, retroactive application of this law creates a huge incentive and an even larger opportunity for vindictive, unscrupulous former spouses and greedy collections attorneys to fabricate claims and leave it to the unprotected obligor spouse to fight them, the law, and the fading of time and memories in order to mount any defense against these claims.

Retroactive application of section 4502(c) would bar Mr. Lazaro, as well as many other former spouses in the similar position of fighting claims for alleged support arrearages from many years ago, from seeking a justifiable modification of the original support order. In this case, had Mrs. Lazaro brought her claim for arrearages earlier, when Mr. Lazaro allegedly began to become delinquent in payment, Mr. Lazaro could have sought a modification to the original support order for changes in circumstances and all of the other additional expenses Mr. Lazaro spent on his children.

One very significant change in circumstance that Mr. Lazaro could have asked a court to take into account in considering the amount of modification, had Mrs. Lazaro ever once attempted to enforce the alleged nonpayment of child support, was that Mr. Lazaro suffered a back injury in 1978 and in that year went on Social Security disability, thereby significantly reducing his monthly income. [RT 37]. Furthermore, some of the additional expenses that Mr. Lazaro could have asked a court to take into account in considering the amount of modification are: Mr. Lazaro's payment of child support for six months after his son left his mother's house to live elsewhere [RT 33]; Mr. Lazaro's present to his son of a car for his son's birthday [RT 25]; Mr. Lazaro's expenses in taking care of his children when they lived with Mr. Lazaro every other weekend until, "they got to be teenagers and wanted to stay with their mother more often." [RT 36] Thus, because Mrs. Lazaro has more than thirty years to take any legal action, since the writ of execution in 1973, Mr. Lazaro has lost any opportunity for a fair modification of the original support order. Thus, retroactive application of section 4502(c) would unfairly prejudice Mr. Lazaro in denying him protection from the unreasonable delay by Mrs. Lazaro, in waiting 30 years, and now attempting to hold him liable for a debt that could, and should have been addressed thirty years ago.

VII.

FAMILY CODE SECTION 4 IS INAPPLICABLE BECAUSE THIS CASE FITS WITHIN THE EXCEPTIONS TO SECTION 4

Even if this Court finds that Family Code section 4 is the evidence of legislative intent needed to justify retroactive application of section 4502(c), Family Code section 4 is inapplicable to this case because the facts of this case fall within one of the express exceptions of section 4. Family Code section 4, subdivision (f) states, “No person is liable for an action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and the person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences.” Cal. Fam. Code § 4(f).

Family Code section 4502(c), which was added in 2002, but became effective on January 1, 2003, states, “In an action to enforce a judgment for child, family, or spousal support, the defendant may raise, and the court may consider, the defense of laches only with respect to any portion of the judgment owed to the state.” Family Code section 4502(c). The text of section 4502(c) is placed here for the Court’s convenience.

Before January 1, 2003 (the effective date of section 4502(c)), it was proper for Mr. Lazaro to satisfy his court ordered child support by money order, or a loan from his mother, or by any other method of payment without keeping any receipt of the transaction. [RT 32]. According to the express language of subdivision (f), no person is liable for an action taken before the operative date that was proper at

the time the action was taken. In this case, the operative date is January 1, 2003, which is the effective date of 4502(c), which eliminates the laches defense and which now constructively imposes a duty on all ex spouses to keep each and every receipt of each and every payment made in connection with any formally ordered child, spousal, or family support, in perpetuity. This duty to keep receipts did not exist before the enactment of 4502(c) and thus it was proper for Mr. Lazaro to satisfy his court ordered child support by money order, or a loan from his mother, without keeping any receipt of the transaction. [RT 32] Thus, according to the express language in subdivision (f), Mr. Lazaro is not, and should not be held liable, for taking action in a way that was proper before January 1, 2003 (payment of child support without receipt), but which now would be considered improper and could expose Mr. Lazaro to liability, simply because he followed the law that was in place at the time he made his child support payments.

After January 1, 2003, it is improper for any ex spouse who is formally ordered to pay child, spousal or other family support to make any payment in connection with this obligation without keeping receipts and other documentary evidence to prove such payment. As a direct result to the enactment of section 4502(c), every family law attorney across the State of California will now advise any client who is paying child, spousal, or any other type of family support, that it is improper for their client to make any payment, modification, or undertake any other such action without keeping documentary evidence and receipts to prove such action. Accordingly, Mr. Lazaro's actions of making child support payments without formal

receipt or other documentary evidence would be considered improper after the enactment of section 4502(c) because they could expose him to liability in perpetuity without the defense of an unreasonable delay and the prejudice such delay caused to the obligor spouse.

Thus, because Mr. Lazaro had no duty prior to January 1, 2003 to keep receipts or other documentary evidence for each and every payment made in connection with his child support obligations, according to the express provisions of section 4, subdivision (f), Mr. Lazaro now has, “no duty, as a result of the enactment of the new law [section 4502(c)], to take any step to alter the course of action or its consequences.” Cal. Fam. Code § 4(f).

In *In re Marriage of Fellows* (2004) 121 Cal.App.4th 607, the Third District Court of Appeals reviewed essentially the same question that Mr. Lazaro asserts here. In responding to the argument that Family Code Section 4 subdivision (f) did not apply to the facts of that case because section 4502(c) imposed a new duty to keep records when the law did not require an obligor spouse to previously keep records, the *Fellows* court stated, “The amendment to section 4502(c) does not impose any duty on Fellows to do anything. It does not deprive him of the defense that he paid his child support obligation or the ability to prove that he has paid that obligation. In this regard, Fellows could still attempt to prove payment through his own testimony, through that of others who observed him make payments, or through the use of his bank records or those of Moyse. All section 4502(c) does is remove a defense of laches... from the list of defenses available to Fellows. This defense presumes nonpayment but Fellows had the duty to pay both prior to and subsequent to the

amendment to section 4502(c). *In re Marriage of Fellows* (2004) 121 Cal.App.4th 607, 617-618. Appellant respectfully disagrees with the Fellows Court's reasoning.

First, the duty imposed by the elimination of laches is a duty to keep records in perpetuity or risk exposure to vexatious lawsuits from time immemorial. This is a constructive duty, and this is a duty that was not imposed upon ex spouses until the enactment of section 4502(c). Furthermore, this new duty that will continue to rear its ugly head and more and more as ex spouses come to find out about, and abuse this terrible loophole in California Family law.

Next, the *Fellows* court's assumption that oral testimony of payment will be sufficient protection for ex spouses who have already paid but have not kept records, is at best flawed wishful thinking and is far divorced from the family law courtroom reality that victims of this terrible law are just beginning to feel. In fact, in Mr. Lazaro's case both he and his current wife testified as to the regular and complete payment of all child support payments to Mrs. Lazaro. [RT 32, 54] However, contrary to the *Fellows* court's wishful thinking, this testimony was not sufficient to establish the affirmative burden of proof of payment that is on each and every ex spouse in a similar position of having the burden to prove payment, where no records have been kept or can be found.

The *Fellows* Court's suggestion that ex spouse's in Mr. Lazaro's or Mr. Fellows' position can simply subpoena bank records and readily produce other documentary evidence to prove payment does not take into account the time period we are dealing with in cases where the defense of laches is potentially applicable. We are dealing

with some cases that are forty to fifty years old! Back in the 1960's, nobody had electronic records. Furthermore, most of the people who could testify as to the production of payment records or other evidence the *Fellows* Court alludes to, are probably either deceased, very elderly, and/ or likely not to have any recollection of obscure payments or the like. This is not the protection this court should provide to ex spouses.

Last, the defense of laches does not presume nonpayment. As already alluded to earlier in this brief, Appellant has listed numerous situations in which payment has been made and laches can protect the innocent payor from an obligation to pay twice. The *Fellows* Court's suggestion that the defense of laches is only applicable to cases of nonpayment is intellectually dishonest and does not take into account the full spectrum of circumstances in which the equities of a given case beg for the defense of laches to be considered.

VIII.

CONCLUSION

Appellant respectfully requests that this court extend the analysis in *Garcia* and conclude that this non-retroactive amendment should not be applied, not just to cases heard prior to the effective date of the statute, but to all those cases in which the facts establishing laches occurred prior to that date as well. To conclude otherwise would violate the rules against retroactivity.

Next, appellant submits that a non-retroactive application of section 4502(c) is justified because it is consistent with both the legislative intent behind the amendment and is supported by sound public policy reasons.

Last, although in *In re Marriage of Fellows* (2004) 121 Cal.App.4th 607, the 3rd District Court of Appeals found that Family Code Section 4, was the evidence of legislative intent needed to justify retroactive application of section 4502(c) to conduct that occurred before the statute's effective date, appellant submits that this case falls within the express exception to Family Code Section 4 and thus precludes retroactive application of section 4502(c).

Wherefore, Appellant respectfully requests that this Court reverse the trial court's legal conclusion that the defense of laches could not be applied in this case due to the amendment to Family Code section 4502, and further remand this case to the trial court with instructions to determine whether or not Appellant can affirmatively establish the defense of laches.

Dated: October 14, 2004

Maurice S. Moyal

Attorney for Defendant/ Appellant

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 14(c)(1))

The text of this brief consists of 4,801 words as counted by Microsoft XP word processing program used to generate this brief.

Dated: October 14, 2004

Maurice S. Moyal
Attorney for Defendant/ Appellant

