# STATE OF MICHIGAN

# COURT OF APPEALS

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WAYNE COUNTY SOCIAL SERVICES DIRECTOR, on behalf of DAVID ALLEN YATES, JR., and TRACIE LYNN YATES,

Plaintiff-Appellee,

v

DAVID ALLEN YATES,

Defendant-Appellant,

and

BRENDA J. YATES,

Defendant.

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FOR PUBLICATION
March 9, 2004
9:10 a.m.

No. 244191
Wayne Circuit Court
LC No. 77-728900-DS

Before: Neff, P.J., and Wilder and Kelly, JJ.

NEFF, P.J.

Defendant David Allen Yates appeals on delayed leave granted from a trial court order denying his motion to extinguish child support arrearage based on the running of the statute of limitations. We affirm.

I

The essential facts are not in dispute.[1] David and Brenda Yates were divorced in 1977. There were two minor children of the marriage, but the divorce judgment did not contain a provision for child support. Because Brenda Yates, the custodial parent, was a recipient of Aid to Dependent Children, Wayne County Social Services filed a complaint for support on behalf of the children, and an order was entered in 1978 requiring David Yates to pay $60 per week in child support.

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[1] Plaintiff has not filed a brief on appeal.

Mr. Yates was anything but diligent in meeting his support obligations. In 1981, the matter was referred to the Tax Intercept Program. Modest payments were received in 1979 and 1988. After David Yates relocated to Florida where he was self-employed, the Wayne County Friend of the Court filed an action under the Uniform Reciprocal of Support Act, MCL 788.183, et seq., which resulted in the entry of an order of support in the Circuit Court for Lee County, Florida. The order entered on February 16, 1990, required Yates to pay $72.10 per week on current support and arrearages. There was income withholding in 1990, 1996, 1997, and 1998; the amounts ranged from $246 to $2,447.50. By April 2002, the arrearage totaled $40,678.94.

The younger of the two children reached the age of eighteen in 1990. On April 23, 2002, David Yates filed a motion to extinguish the child support arrearage on the basis that the statute of limitations had expired. The motion was denied and David Yates appealed.

II

Where no factual dispute exists, as in this case, whether a claim is barred by the statute of limitations is a question of law which we review de novo. *Pitsch v ESE Michigan, Inc,* 233 Mich App 578, 600; 593 NW2d 565 (1999).

III

There is no question that the applicable statute of limitations is MCL 600.5809(3),[2] which provides for a ten-year statute of limitations in child support enforcement actions. See *Alpena FOC v Durecki*, 195 Mich App 635, 637; 491 NW2d 864 (1992); *Ewing v Bolden,* 194 Mich App 95, 99; 486 NW2d 96 (1992). Because the younger of the two children turned eighteen in 1990, the statute of limitations would have expired in 2000, before David Yates filed his motion to extinguish the child support arrearage, *unless* the running of the statute was *extended.* Yates' income withholding payments in 1990, 1994, 1996, 1997, and 1998, were made *after* the children turned eighteen but *before* the limitations period expired.

The sole question in this case is whether the statute of limitations was *extended* by payments made *before* the limitations period ran.[3] That is, can partial payment within the period

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[2] This statute was amended by 1996 PA 275, effective January 1, 1997. However, this Court has held that the amendment does not apply retroactively and that the pertinent section of the statute which applies is determined by the date the youngest child turned eighteen, in this case 1990, before the statute was amended. *Rzadkowolski v Pefley*, 237 Mich App 405, 411; 603 NW2d 646 (1999).

[3] Partial payment of a child support obligation made *after* the expiration of the statute of limitations is an acknowledgment of the debt and a waiver of the defense. *Durecki, supra* at 638.

of limitations – the income withholding payments made during the 1990's - operate to extend it?[4] We hold that it can.

IV

Defendant argues because he made no payment, voluntary or otherwise, *after* the statute of limitations expired, there is no authority to support an extension of the limitations period. We disagree.

In *Yeiter v Knights of St Casimir,* 461 Mich 493, 494; 607 NW2d 68 (2000), the Supreme Court held that partial payments on a debt, "some of which were within the limitation period, . . . ." constituted a renewal of the promise to pay the amount owed. In *Yeiter,* the debt was a series of loans which the defendant partially repaid. However, when the plaintiff sued for the remainder, the defendant claimed that the statute of limitations barred recovery. In rejecting the defendant's statute of limitations argument, the Court pointed out that some of the payments were made less than six years before the filing of the complaint,[5] but were unaccompanied by any declaration or circumstance that would rebut the presumption that they were "an acknowledgment of the full obligation." *Id.* at 499-500. In discussing the effect of partial payments on the statute of limitations issue, the Court cited *Miner v Lorman,* 56 Mich 212, 216; 22 NW 265 (1885), for the proposition that such payment implies a renewal as of the date of the payment of the promise to pay. More specifically, the Court held that,

> [A] partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation. *Yeiter, supra* at 497 (footnote omitted).

Although *Yeiter* did not involve a child support arrearage, the holding is clear that any payment on a debt, whether before or after the running of the statute of limitations, acts to extend the limitations period. The child support obligation in this case was a debt and payments were made pursuant to the income withholdings.

Plaintiff argues, in essence, that his payments were involuntary because they were made pursuant to an income withholding order. The logical thrust of the argument is that the payments could not represent a renewed promise to pay under these circumstances. This Court's holding in *Durecki*, *supra,* rejects that very argument. In *Durecki,* the defendant argued that his payments were involuntary because they were made to avoid being held in contempt. This Court

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[4] The lower court record contains no indication of whether any order of surcharge for late support payments was entered pursuant to MCL 552.603a. Whether any such order was entered and, if so, what the effect might be on the running of the statute of limitations is not considered here.

[5] The applicable statute of limitations was MCL 600.5807(8) relating to contract actions.

held that the claim of duress and therefore involuntariness was without record and legal support, citing both *Miner, supra*, and *Neilands v Wright,* 134 Mich 77: 95 NW 997 (1903). See also *Morehead v Hoffdal*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 1998, (Docket No. 201019), where a panel of this Court held that successful actions to collect a child support judgment via income tax refund intercepts within the limitations period waived the statute of limitations defense without regard to the consent of the paying party. *Id.,* slip op at 2.

Accordingly, we hold that the income withholding payments of the 1990's amounted to renewals of the full child support obligation and thereby served to extend the statute of limitations.[6] We further hold that the nature of the payments did not render them involuntary.

The order denying plaintiff's motion to extinguish child support arrearage is affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly

[6] The right to interpose a statute of limitations defense is not a vested right. *Bessmertnaja v Schwager*, 191 Mich App 151, 154; 477 NW2d 126 (1991).