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Court of Appeal, Fourth District, Division 3, California.

In re the MARRIAGE OF Louis Edmund and June Marie CORDERO.

Louis Edmund Cordero, Respondent,

v.

June Marie Cordero, Appellant.

No. G024341.

Jan. 25, 2002.

After former wife obtained wage and assignment order for unpaid spousal support, husband filed an order to show cause. The Superior Court, Orange County, No. D268329, Walter D. Posey, Temporary Judge, reduced the amount owed, and in a hearing, relieved husband of interest on the arrearages. Wife appealed. The Court of Appeal, Sills , P.J., held that: (1) trial court erred in waiving accrued interest on arrearages in spousal support, and (2) reconsideration of order limiting period for which husband was liable for arrearages in spousal support was not warranted.

Affirmed in part, reversed in part with directions.

West Headnotes

[1] Divorce 134 ⚿1224

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1222 Transfer of Cause
134k1224 k. Time of taking proceedings. Most Cited Cases
(Formerly 134k283)

Former wife failed to preserve for appellate review the issue of whether the trial court erred in limiting the period on which former wife could collect arrearages of spousal support, where wife failed to file appeal within 30 days after entry of the order that denied her motion to vacate. Cal.Rules of Court, Rules 2, 3.

[2] Divorce 134 ⚿1063

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(F) Enforcement of Judgment or Decree in General
134k1063 k. Interest. Most Cited Cases
(Formerly 134k277)

Trial court erred in relieving former husband of statutory interest on spousal support arrearages; trial court lacked authority to waive or forgive accrued interest. West's Ann.Cal.Fam.Code § 290.

[3] Divorce 134 ⚿1322(1)

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(I) Appeal
134k1320 Determination and Disposition of Cause
134k1322 Spousal Support
134k1322(1) k. In general. Most Cited Cases
(Formerly 134k287)

Reconsideration of trial court's order that limited the period that husband was liable for arrearages in spousal support was not warranted, where wife did not present "new" facts that could not have been presented at hearing on arrearages.

****788 *654** John J. Gilligan, Long Beach, for Appellant.

No appearance for Respondent.

OPINION

SILLS, P.J.

I. INTRODUCTION

This case illustrates the harsh effect of the literal operation of our spousal support collection statutes combined with a high rate of legal interest. Our ***655** colleagues in Division Two of this appellate district attempted to ameliorate that harshness in *In re Marriage of Plescia* (1997) 59 Cal.App.4th 252, 69 Cal.Rptr.2d 120, which allowed a common law laches defense to spousal support collection. As we explain below, *Plescia* was "incorrectly" decided insofar as it applied to collection efforts within the old ten-year period that a payee spouse had to renew a support judgment. Even so, the *Plescia* decision represents an effort by the judiciary to temper what can be, in certain cases at least—and the case before us is certainly one of them—some very onerous and inequitable results where a spouse forbears a substantial period of time before attempting to collect on a support order. We therefore recommend to the Legislature that it codify the rule articulated in *Plescia* to allow laches defenses to spousal support collection efforts in appropriate circumstances.

As for the case in front of us, we are spared both the need (a) to apply statutes which would have the result of leaving the respondent, a car salesman who at one point in the early 1990's was only making some $2,000 net per month and paying half of it in child support, practically in a state of indentured servitude or (b) to apply the rule in *Plescia* which, just and humane as it is, runs clearly contrary to the statutory scheme governing support collection law. This case, at least from the point of view of a court that might otherwise be forced to choose between applying a set of draconian ****789** statutes or following an erroneously decided case, has a happy ending.

II. FACTS

Louis and June Cordero were divorced in June 1987; the judgment of dissolution dated June 10 provided that Louis was to pay $1,000 a month in spousal support beginning March 1, 1987 and continuing through December 1, 1987. The amount would be stepped down to $825 a month beginning January 1, 1988, and then continue at that level until January 1, 1997, at which time jurisdiction over spousal support would terminate. Louis was working as a car salesman at the time (all indications are that he continues to do so); June was not working at the time the judgment was entered.

Louis, then living in the family residence, was awarded physical custody of the couple's two children, Vanessa, then almost 10 years old, and Jessica, who was going on eight. The judgment provided that *no* sum of child support was to be paid by June while the children were in the custody of Louis. However, less than two months later, the parties made an agreement to the effect that June would move back into the family residence, the daughters ***656** would live with her, and Louis would pay June $500 per month per child in child support. Soon June began working as a property manager.

Louis kept up his child support payments until each daughter came of age, but did not pay *spousal* support after February 22, 1988. From then to mid 1992, June asked Louis to pay the spousal support order, but Louis kept putting her off by saying he didn't have the ability to pay. Meanwhile, he paid *half* of his net monthly income in child support payments which hadn't been ordered by the court (a fact that would later convince the trial judge that Louis had relied on an agreement relieving him of his spousal support obligation, even though the court found there never actually was an agreement to that effect). After mid 1992, however, June took no steps whatsoever, including any verbal importuning, to collect support.[FN1]

> FN1. At least according to the facts as found by the trial judge. June would later assert that she continued to press Louis for spousal support as late as 1996. We cover that issue in part III.D. of this opinion.

That is, until August 1997, when June obtained a wage and assignment order indicating an arrearage of about $103,000. About three months later

Louis filed an order to show cause, requesting, among other things, that the wage and earnings assignment order be quashed.

There was a hearing in April, and three months later, on July 21, 1998, the court filed a detailed written order, signed by the trial judge and mailed to the parties the next day by the clerk of the court. The gravamen of the order was that, under the rule of *In re Marriage of Plescia, supra,* 59 Cal.App.4th 252, 69 Cal.Rptr.2d 120, Louis was only liable for spousal support arrearages from February 22, 1988 through June of 1992, and he wasn't liable for any support after that. The order specifically provided that Louis owed June 53 months of support at $825 plus interest. (Without interest, the amount was $43,725.)

On August 6—the 15th day after the clerk had served the signed order—Louis (not June, even though she ostensibly had more money at stake) filed a motion entitled "To Vacate Order Per CCP § 663[;] To Set Payment Plan." Basically, there were no new facts in the motion, merely the assertion that the trial court had "misinterpreted" the evidence. Louis argued that the trial judge (a) should have found ****790** that the parties had an agreement relieving Louis of any support obligation after February 1988; (b) should not have, under *Plescia,* apportioned the support, but rather applied laches so that June could not collect any spousal support arrearages; (c) should make an order modifying the interest component of the arrearage, and (d) ***657** correspondingly reduce, under Family Code section 290,[FN2] his monthly obligation.[FN3]

FN2. Family Code section 290 now provides in its entirety: "Subject to Section 291 [which deals with judgments for sale or possession of real property], a judgment or order made or entered pursuant to this code may be enforced by the court by execution, the appointment of a receiver, or contempt, or by any other order as the court in its discretion determines from time to time may be necessary."

FN3. Louis' income and expense declaration showed net monthly disposable income as a car salesman of $4,547 a month; he claimed that his monthly debt service, apparently incurred to finance attorney fees, exceeded $3,500.

Louis' motion to vacate and set payment plan was heard on September 4, and resulted in an order, signed, filed and served September 16, 1998. The order (a) denied the motion to vacate, (b) denied the request to find that Louis owed no support arrearage at all, but (c) did relieve Louis of any interest obligation on the amount he had been found to owe. Given that Louis had already paid $12,500 toward the $43,725 principal owing, the new order meant that Louis only owed $31,225, which the court determined should be paid at the rate of $1,000 a month until paid in full.

Now it was June's turn to complain, and two days later, on September 18, 1998, she filed a motion for reconsideration. Her motion was based on (a) the declaration of her daughter that Louis and June had argued about his paying spousal support as late as December 1996; (b) a copy of a letter from June to Louis, dated July 1, 1995, asserting that he still owed support; and (c) the court's supposed error in relieving Louis of the interest on the amount it found he did owe. The motion resulted in a minute order, entered October 30, 1998, denying the motion for reconsideration.

June filed a notice of appeal November 3, 1998 from the orders of September 16 and October 30. On appeal she argues that the trial court had no basis to apply laches under *Plescia* to her conduct after June 1992, because there was no prejudice. She also argues that the trial court abused its discretion by deleting the interest.

III. DISCUSSION

A. The Problem of the High Rate of Legal Interest As It Affects Support Judgments

The legal rate of interest is 10 percent. (See Code Civ. Proc., § 685.010, subd. (a) ["Interest ac-

crues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied"].)

With regard to child and spousal support orders, that means 10 percent interest accrues when *each installment* becomes due and remains unpaid. ***658** E.g., *In re Marriage of Perez* (1995) 35 Cal.App.4th 77, 80, 41 Cal.Rptr.2d 377 [accrued spousal support arrearages " 'are treated like a money judgment' "]; *County of Los Angeles v. Salas* (1995) 38 Cal.App.4th 510, 513, 45 Cal.Rptr.2d 61 ["It is well established that the defaulting parent is required to pay interest on support arrearages as a matter of law ..."].)

However, it appears to have escaped legislative notice that, over the past two decades, a large disparity has developed between the legal rate of interest and market****791** returns on conservative investments. The legal rate of interest in section 685.010 of the Code of Civil Procedure was enacted during a period of double-digit interest rates. Since then there has been a major deflationary recession in the early 1990's and, at this writing, a number of interest rates are at lows that haven't been seen since the 1960's. For most of the past decade, for example, passbook savings accounts and money market accounts have paid less than 2 percent. Legal interest on support installments, by contrast, has been set at a point where it is permanently bumping up against the state constitutional provision against usury. (See Cal. Const., art. XV, § 1 [10 percent cap].) To put the relationship between market rates of interest and the legal rate another way: For more than a decade now, it has been more profitable to leave a judgment *uncollected* and let the interest mount up for a while than immediately collect it-assuming, of course, that the judgment debtor is good for it when the judgment creditor tries to collect it.

Now, it makes sense that there should be some disparity between the legal rate of interest on money judgments and the interest a judgment debtor can make by putting money in a savings account. After all, the law wants to encourage judgment debtors to satisfy judgments, so it shouldn't be profitable not to pay a judgment. Imagine the situation if judgment debtors could get a better return by not paying (say the legal rate of interest were 2 percent instead of 10 percent) and forcing judgment creditors to use legal process all the time. Think of all the judgment debtor exams that would soon clog the courts.

But in the area of spousal support collection, the disparity creates the potential for harsh inequity. For example, in a case like this one, a spousal support order is predicated on the fact that the payee spouse doesn't work and the payor spouse has custody of the children. But then there is a change of circumstances that prompts a change in custody. (Here, for example, the children were afforded the stability of being able to continue living in the family home, and keep their friends at school, while the parents changed residences—the law should encourage that kind of post-dissolution cooperation, not discourage it.) So the nominal payee spouse goes back to work, and ***659** the payor spouse makes child support payments without a court order (also the kind of cooperation the law should encourage—like the trial judge, we are impressed that Louis paid child support when there was no court order telling him to). But because the payor spouse never gets around to straightening out all these changes by obtaining a new set of court orders, the spousal order continues to mount up at a rate of interest well in excess of inflation.

Now, we could say to Louis, with the imperiousness of Dickens' Mr. Bounderby who, upon hearing the hard luck story of Stephen Blackpool, and in particular that Stephen was patient with his wife even though she was a drunken wastrel (and we certainly intend no parallel here with June) thought to himself, "The more fool you." [FN4] We could say: "Tsk, tsk, Louis, you could have brought a proceeding to modify the judgment, you didn't, you have made your bed and now you must toss and turn in it. Pay the last farthing, including in-

terest." [FN5]

FN4. The scene is in the No Way Out chapter (ch. xi) of Hard Times (1854).

FN5. Of course, one lesson here is that you get what you pay for when you don't hire a lawyer (in this case, a mess), but in broader terms, the picture the case paints is disturbing: The perceived high cost of legal services kept two ordinary middle-income people from being able to straighten out their respective obligations. Of course, there's nothing new in that: Back to the aptly named book Hard Times: Mr. Bounderby told poor Stephen Blackpool, trapped in a miserable marriage, that there *was* a law that could help him, but it was not for a commoner like Stephen. He could get a divorce if he went to Doctors' Commons, and a court of Common Law, and the House of Lords. "But it's not for you at all. It costs money. It costs a mint of money." (Dickens, Hard Times, ch. xi.) In at least some ways for the Louis Corderos and Stephen Blackpools of the world, things haven't changed all that much since the mid 19th Century. (Cf. George, *Fair for All,* L.A. Daily Journal (Jan. 18, 2002) p. 6, col. 3 ["The inability of individuals to obtain representation, particularly in family law matters, poses special challenges for courts dealing with the needs of pro per litigants. Some 4.3 million individuals represent themselves in our courts each year, usually because they cannot afford counsel"].)

****792** But that ignores the basic equities of the case as it developed over the course of a decade, and the more basic reality that for most middle-income people of limited means, legal fees can be prohibitively expensive. The parties had an arrangement that minimized hardship to either of them, so they left an outdated judgment alone.

But furthermore, there is an additional consideration unique to support law: As with child support obligations, spousal support arrearages are nondischargeable in bankruptcy. (11 U.S.C. § 523(a)(5).) Thus while ordinary judgment creditors typically run some risk that the judgment debtor will file a petition in bankruptcy, ex-spouses need not worry and can, in theory, let the interest run up to the heavens. For some folks—and judging by the income and expense declarations in the file this would apply to Louis—large ***660** nondischargeable support orders inflated by a 10 percent legal interest rate are the closest thing modern law has to indentured servitude. The result can be simply too Dickensian to bear.

A result too awful to bear was clearly the subtext of the *Plescia* opinion. (See, e.g., *Plescia, supra,* 59 Cal.App.4th at p. 260, 69 Cal.Rptr.2d 120 ["Equity was specifically designed to step in where the law does not work justice"].) Thus in specific terms the *Plescia* court concluded that laches (the payee spouse doing nothing about his or her rights) *should* be available as an equitable defense in spousal support collection cases, including efforts to obtain a writ of execution within 10 years of the order to be collected on. (See *id.* at p. 259, 69 Cal.Rptr.2d 120 ["Laches should always be available as a defense under the proper circum- stances"].)

Plescia arose out of a situation where the payee spouse waited until 1996 to collect support arrears accumulated between 1986 and 1988. With interest, the total amount owing had grown to a relatively tidy sum. Meanwhile, the payor had retired, so his income has been reduced. Collection was a result simply too harsh for either the trial or appellate court to countenance, and so the appellate court affirmed a trial court decision that held that the payee spouse's claim was not enforceable because of laches.

The *Plescia* result makes particular sense in light of the disparity between real world and legal interest rates that have prevailed for over a decade

now, and in light of the nondischargeability of support arrearages in bankruptcy. It bevels to smoothness a nasty jagged edge left unfinished in the Legislature's handiwork.

Unfortunately, *Plescia* was surely wrongly decided insofar as it applied to the 10–year period of time a litigant would have, under the law prior to 1993, to renew a support judgment. (Now there is no **793 need to renew support orders at all. See Fam.Code, § 4502.)

The *Plescia* court reasoned this way: Prior to the 1993 enactment of Family Code section 4502 (brought about by Assembly Bill 568 in 1992), a laches defense was available to defeat support claims that had otherwise been neglected. (See, e.g., *Plescia, supra,* 59 Cal.App.4th at p. 261, 69 Cal.Rptr.2d 120 ["the existence of a laches defense to spousal support arrearages has long been recognized"].) The 1993 change—which exempted support judgments from (in the words of Family Code section 4502) "any requirement that judgments be renewed"—did nothing to alter or "supplant" the availability of laches as a defense, so it should remain available in appropriate cases. (See, e.g., *Plescia, supra,* 59 Cal.App.4th at p. 262, 69 Cal.Rptr.2d 120 ["we conclude that the Legislature's ***661** decision to leave laches out of its legislative scheme allows that remedy to remain available in appropriate cases"].) [FN6] Therefore, since the payee spouse's delay in *Plescia* was both unreasonable and had caused prejudice, the trial court correctly held that she could not enforce her arrearage claim.

> FN6. The point was amplified by the same court later in *In re Marriage of Dancy* (2000) 82 Cal.App.4th 1142, 98 Cal.Rptr.2d 775. "The legislative history of section 4502 showed that the Legislature believed that laches would continue to be available as a defense." (*Id.* at p. 1149, 98 Cal.Rptr.2d 775, citing *In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, 1363, 93 Cal.Rptr.2d 653.)

Alas, the *Plescia* opinion erroneously assumed that family law courts *always* had the power to allow the equitable defense of laches in support collection cases *even within the period before which a support judgment had to be renewed.* In fact, this assumption was unfounded. The rule before 1993 was that *laches,* as distinct from other equitable defenses based on the affirmative conduct of the payee spouse, was *not* a defense to the collection of a support judgment for arrearages within the statutory period before a judgment had to be renewed. (E.g., *DiMarco v. DiMarco* (1963) 60 Cal.2d 387, 394, 33 Cal.Rptr. 610, 385 P.2d 2 ["Since plaintiff's rights are based upon a judgment for the payment of money, she can, by the terms of section 681 of the Code of Civil Procedure, *enforce her rights at any time within 10 years* ..." (emphasis added)]; *DiCorpo v. DiCorpo* (1948) 33 Cal.2d 195, 201, 200 P.2d 529 ["A writ of execution will issue under [CCP section 681] as a matter of right upon installments accruing within the [former] five-year period on an ex parte application by the judgment creditor merely showing that such installments remain unpaid"]; *Szamocki v. Szamocki* (1975) 47 Cal.App.3d 812, 818, 121 Cal.Rptr. 231 ["Under Code of Civil Procedure section 681, a wife is entitled to enforce her right of execution upon any installments of support that have accrued within 10 years of the date of her application for the writ"]; *Moniz v. Moniz* (1966) 241 Cal.App.2d 74, 75–76, 50 Cal.Rptr. 267: ["since the plaintiff's rights are based on a judgment for the payment of money she can, by the terms of section 681 of the Code of Civil Procedure , enforce her rights at any time within 10 years"].)

Leiden v. Hudson (1979) 95 Cal.App.3d 72, 156 Cal.Rptr. 849 summed up the law prior to AB 568: "It is clear that under Code of Civil Procedure section 681, a former wife is entitled to enforce her right of execution upon any installments of child support that have accrued within 10 years of the date of her application for a writ of execution. *This right is not subject to the defense of laches,* nor can the amount be modified, and the only discretion the court has in granting such a writ of execution as to