



PROFESSOR LEX

BY HARVEY I. HAUER

Dear Professor Lex:

I have a divorce case where my client wants to prepay any child support obligation he may have in the future. If we were to put something to that effect in the Judgment of Divorce, along with language ensuring that the payee would be responsible to reimburse my client should she ever petition the court for child support, do you think that it would be enforceable?

Practitioner

Dear Practitioner:

In *Laffin v Laffin*, 280 Mich App 513 (2008); 2008 WL 3983880, the Michigan Court of Appeals addressed whether parties may make an arrangement similar to what you are proposing. In *Laffin, supra*, defendant appealed the enforceability of certain provisions in the parties' Judgment of Divorce. The applicable provisions of the parties' Judgment of Divorce, were as follows:

SUPPORT OF MINOR CHILDREN

IT IS FURTHER ORDERED AND ADJUDGED that support is determined to be \$337.00 each week for the three minor children, \$269.00 for two minor children, and \$175.00 per week when there is one minor child.

IT IS FURTHER ORDERED AND FOUND that Plaintiff has paid in advance to Defendant \$62,500.00 for child support, and that accordingly child support is fully prepaid for as long as same would be payable under Michigan law.

IT IS FURTHER ORDERED AND ADJUDGED that in the event Defendant should ever seek and obtain child support from Plaintiff that a sum in the exact amount of the child support awarded shall be paid by Defendant to Plaintiff as alimony.

* * *

ALIMONY

IT IS FURTHER ORDERED AND ADJUDGED that neither party hereto is entitled to any alimony and same is forever barred. [*Id* at *1-2 (emphasis in original).]

The Court of Appeals noted that, "[i]n other words, the consent judgment provided that any future child support obligation imposed on plaintiff would result in a reciprocal alimony obligation imposed on defendant in the same amount." *Id* at *2.

"In 2004, the Friend of the Court determined that plaintiff's \$62,500 credit had been exhausted. It issued an income withholding order against plaintiff's income, requiring him to pay child support in accordance with the [Michigan Child Support Formula]. "*Id* at *2. " Plaintiff moved to terminate the income withholding order, and require defendant to pay him alimony in an amount equal to his child support payments." *Id* at *2. The trial court granted plaintiff's motion.

The Court of Appeals "beg[a]n by addressing the underlying question whether the reciprocal alimony provision [wa]s void because it violat[e]d public policy. [Which] is a question of law, which [it] review[s] de novo. *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002)." The Court of Appeals noted that:

A consent judgment is in the nature of a contract, and is to be construed and applied as such. *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce contractual language as written, unless the contract is contrary to law or public policy. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). In general, consent judgments are final and binding upon the court and the parties, and cannot be modified absent fraud, mistake, or unconscionable advantage. *Staple v Staple*, 241 Mich App 562, 564; 616 NW2d 219 (2000); *Walker v Walker*, 155 Mich App 405, 406-407; 399 NW2d 541 (1986). [*Id* at *2.]



The Court of Appeals went on to note that:

It is a well-established principle in Michigan that parties cannot bargain away their children's right to support. *Macomb Co Dep't of Social Services v Westerman*, 250 Mich App 372, 377; 645 NW2d 710 (2002); *Evink v Evink*, 214 Mich App 172, 175-176; 542 NW2d 328 (1995). Consequently, "[a]n agreement by the parties regarding support will not suspend the authority of the court to enter a support order." *Johns v Johns*, 178 Mich App 101, 106; 443 NW2d 446 (1989). [*Id* at *3.]

The Court of Appeals held that "the provision in the consent judgment stating that plaintiff's \$62,500 credit 'fully prepaid' his child support obligation, could not prevent the [trial] court from entering a support order." *Id* at *3. The Court of Appeals noted that while "the reciprocal alimony provision is distinct in form from a provision totally precluding child support, it is a distinction without a difference." *Id*. The Court of Appeals further held that "that enforcement of this arrangement would deprive the parties' children of the child support they are entitled to by law, and therefore, is void as against public policy, because parties cannot bargain away their children's right to support." *Id* (citing *Macomb Co Dep't of Social Services*, *supra* at 377).

In addition to holding that the reciprocal alimony provision was void against public policy, the Court of Appeals held that the trial court's order enforcing the provision violated MCL 552.605. *Id* at 3.

MCL 552.605(2) provides that the court "shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau...." A court may deviate from this formula if it "determines from the facts of the case that application of the child support formula would be unjust or inappropriate," and articulates on the record its reasons for the departure. MCL 552.605(2). Although MCL 552.605(3) permits the court to "enter a child

support order that is agreed to by the parties and that deviates from the child support formula," that subsection further provides that such an order is permissible only "if the requirements of subsection (2) are met." Thus, the trial court must still comply with MCL 552.605(2), and ensure that a child support order is just, even if the parties agree to a support order that deviates from the guidelines. A trial court has discretion to modify a child support order "as the circumstances of the parents and the benefit of the children require," MCL 552.17(1), but a court has a statutory duty to follow the criteria set forth in the Michigan Child Support Formula Manual ("MCSFM"), when modifying a child support award. *Burba v Burba (After Remand)*, 461 Mich 637, 643-645, 647; 610 NW2d 873 (2000). [*Id* at *3-4.]

Consequently, the Court of Appeals held that the trial court's decision to enforce the provision "violate[d] the child support statutes, because [the trial court's decision] permit[ed] plaintiff to effectively avoid his child support obligation, as prescribed by the child support formula, without the requisite findings that application of the child support formula would be unjust or inappropriate." *Id* at *5.

You should advise your client that there is a possibility that if he were to prepay child support it will not be credited against future child support obligations. See *Pellar v Pellar*, 178 Mich App 29 (1989); *Dorfman v Godlove*, 200 Mich App 487 (1993).

**Answer respectfully submitted by
Harvey I. Hauer, Hauer & Snover.**

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

