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Fisco v. Department of Human Services: The Inequity of Equitable Defenses in Child Support Arrearage Cases

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MAINE LAW REVIEW

FISCO v. DEPARTMENT OF HUMAN SERVICES: THE INEQUITY OF EQUITABLE DEFENSES IN CHILD SUPPORT ARREARAGE CASES

I. INTRODUCTION

On August 8, 1995, using a federal law targeting the most egregious deadbeat fathers, FBI agents arrested Jeffrey Nichols for failing to pay approximately $580,000 in child support. Although the law is fairly new, the problem of child support enforcement has troubled this country for decades. In the early 1970s, child support enforcement was so inadequate that the federal government spent $7.6 billion annually on welfare to provide for single parents. The government has tried to remedy the problem, but seventy-five percent of custodial mothers in this country continue either to lack child support orders or to receive less than full payment under such orders. Although Maine has received national acclaim for its child support enforcement law, the issue continues to pose financial,


3. From 1970 to 1981, the number of divorces in America doubled. JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA 11 (1986). Also, from 1970 to 1981, the number of children living with only one parent increased by 54% to 12.6 million. Of the four million women who were owed child support in 1981, only 47% received the full amount due, and 28% received nothing. Id.


5. LIEBERMAN, supra note 3, at 6. The federal government became involved in child support matters in 1935 when Congress implemented the Aid to Families with Dependent Children (AFDC) program. The government originally conceived of the program as a way to provide the financial assistance necessary to keep orphaned or abandoned children out of community institutions. The program operated by dispersing money from Washington into the states, and then to the relatives of dependent children. Congress' original concern was with children whose fathers died. However, the government eventually utilized the program as a way to assist children whose fathers physically and financially abandoned them. Id. at 5.


8. The Maine law threatens the revocation of drivers' and professional licenses from parents who are behind in child support payments. ME. REV. STAT. ANN. tit. 19, § 305 (West Supp. 1994-1995). See also Clinton Likes Maine's Law on Deadbeats, ORLANDO SENTINEL, May 20, 1994, at A11; Deadbeat Dads Lose
moral, and legal problems for Maine’s legislators, courts, and parents.

In Fisco v. Department of Human Services, the Maine Supreme Judicial Court, sitting as the Law Court, held that in an action for child support arrearages, it was “unreasonable” for the defendant, Fisco, to rely on his former wife’s written discharge of his child support obligations. The court rejected his defense of laches, defined as negligence or omission to seasonably assert a right that results in prejudice to the defendant. Fisco’s reliance on the agreement did not demonstrate the requisite prejudice despite twelve years of apparent complacency on the part of his former wife.

This Note contends that the Law Court’s decision in Fisco created a uniquely heightened standard of prejudice in laches defenses for application in child support arrearage cases. In cases where parties have engaged in private agreements or modifications, the court has inextricably linked prejudice with whether a defendant’s reliance on that agreement was reasonable. For any party who uses a laches defense in a child support arrearage case, and who attempts to show that the requisite prejudice is premised upon an unincorporated or private agreement, the court has created an essentially insurmountable evidentiary burden. The court’s analysis demonstrates its general unwillingness to grant laches or other equitable defenses in child support arrearage cases.

Although this Author contends that Fisco was correctly decided, the court’s reasoning produced an unnecessarily esoteric definition of prejudice, and an undiscriminating concept of equity. The Law Court manipulated equitable principles in order to reject a defense to a child support claim. Instead, the Law Court should evaluate child support arrearage cases by focusing upon the duty of support owed to a child by the child’s non-custodial parent. This Author argues that focusing upon the child’s interest in, and basic legal right to parental financial support during his or her minority reveals the unconditional impropriety of entertaining laches and other equitable defenses in child support arrearage cases. Judicial decisions affecting child support should begin with the presumption that


9. 659 A.2d 274 (Me. 1995).
10. Id. at 275.
13. One of the principal constituents of laches is injury, prejudice, or disadvantage to the defendant in the event that relief is granted to the complainant. 30A C.J.S. Equity § 133 (1992).
throughout their minority, children are owed a duty of support. Like the application of the “best interest of the child” standard, required in all cases pertaining to parental rights and responsibilities (custody), the Law Court should presume that child support is one of the essential factors in providing for the welfare of the children of divorce. As such, the enforcement of such orders is critical. The Law Court should decide affirmatively that equitable defenses in this context are neither available nor appropriate and should direct any inquiries toward upholding the interests of the unnamed party in every child support arrearage case—the child.

II. LACHES AS A DEFENSE TO BAR RECOVERY OF CHILD SUPPORT ARREARAGES: MAINE JURISPRUDENCE

The Law Court first encountered a laches defense in a child support arrearage case in 1989 in Jack v. Department of Human Serv-

14. See infra note 103.
15. ME. REV. STAT. ANN. tit. 19, § 752 (5), (6) (West Supp. 1995-1996) provides:
   5. Best interest of the child. The court, in making an award of parental rights and responsibilities with respect to a minor child, shall apply the standard of the best interest of the child. . . . In applying this standard, the court shall consider the following factors:
   A. The age of the child;
   B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;
   C. The preference of the child, if old enough to express a meaningful preference;
   D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;
   E. The stability of any proposed living arrangements for the child;
   F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;
   G. The child's adjustment to the child's present home, school and community;
   H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
   I. The capacity of each parent to cooperate or to learn to cooperate in child care;
   J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
   K. The effect on the child if one parent has sole authority over the child's upbringing;
   K-1. The existence of a history of domestic abuse between the parents, . . .
   K-2. The existence of any history of child abuse by a parent; and
   L. All other factors having a reasonable bearing on the physical and psychological well-being of the child.

6. Order. The order of the court shall award allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities according to the best interest of the child.
ices. In Jack, an ex-husband proposed that the doctrine of laches should bar the Department of Human Services' (DHS) six-year-old claim against him for Aid to Families with Dependent Children (AFDC) payments made on behalf of his child. The court reiterated the definition of laches found in Leathers v. Stewart: "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly . . . ." The court held that such a defense would bar the DHS's claim only if Jack demonstrated that the six-year delay caused him that which is essential to a laches defense: prejudice. Jack's demonstration, however, was insufficient and the court rejected his claim.

In the three cases that followed Jack, the court repeatedly found that each parent failed to make the necessary showing of prejudice. In so finding, the court neither provided an affirmative definition of prejudice nor answered the threshold question of whether laches could or should defeat an action for child support arrearages. In Carter v. Carter, the court was not persuaded that a mother's eleven-year delay in seeking child support caused prejudice to the children's father. The court provided some guidance on the concept of prejudice when it suggested that the defendant did not show that he undertook any obligation he would have forsaken had the plaintiff asserted her rights earlier. Rather, the defendant's consistent employment from the time of the divorce and throughout the following eleven years indicated that he had been capable of paying

17. 108 Me. 96, 79 A. 16 (1911).
18. Id. at 102, 79 A. at 18 (quoting Chase v. Chase, 37 A. 804, 805 (R.I. 1897)).

The court further stated:

[W]hen, knowing his rights, [the plaintiff] takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right.

Id.

20. Id. The court also rejected Jack's laches argument because the defense applies only to equitable actions. Id. (citing Strickland v. Cousens Realty, Inc., 484 A.2d 1006, 1008 (Me. 1984)). The administrative proceeding under review was a statutory action to establish Jack's debt and therefore the doctrine of laches was inapplicable. The court declined to determine whether, in an appropriate application, the defense of laches would be available against the State. Id.

22. 611 A.2d 86 (Me. 1992).
23. Id. at 87.
24. Id.
the monthly child support payments at the time they were due, and that he was able to pay the $17,129 arrearage debt. The defendant’s ongoing financial stability contradicted his assertions of prejudice and the court rejected his laches defense.

In both Schneider v. Department of Human Services and Trimble v. Commissioner, Department of Human Services the court again avoided the question of whether the defense of laches ever could defeat an action for child support arrearages. The children’s father in Schneider presented no evidence of prejudice and the court rejected his defense with a firm reminder: “Laches cannot be predicated on delay alone.” In Trimble, the defendant resorted to self-help measures by ceasing to make support payments after his former wife denied him visitation with his children for several years. He testified that his former wife then offered to permit him to resume contact with the children if he would relinquish to her his custodianship of the children’s $12,000 mutual fund. He did so, but his former wife continued to prohibit him from contacting the children. The defendant’s persistent efforts to maintain a relationship with his children, however, neither convinced the court that he was prejudiced by plaintiff’s delay, nor elicited the court’s approval of “the kind of self-help to which Trimble resorted.” The court took a firm position that self-help modifications in child support cases are unlikely to survive the court’s scrutiny.

The court again disapproved of a defendant’s reliance on a self-help approach as a way to modify court ordered child support payments in Ashley v. State. The defendant, Ashley, presented an equitable estoppel defense claiming that he and his ex-wife had agreed on a modification. Nonetheless, the court held that his participation

25. Id. at 86-87.
26. The defendant challenged the District Court’s failure to apply not only laches, but also equitable estoppel, waiver, and the statute of limitations. The court found that he did not make the requisite showing to satisfy any of these defenses. The court also addressed for the first time the application of the statute of limitations to an action for child support arrearages. The court asked whether past due payments of child support were the equivalent of judgments falling within the exception for actions based on judgments or decrees. The court determined that an order of child support was essentially a “judgment in monthly installments,” and that such an order is an action on a judgment. Id. at 87-88 (quoting Britton v. Britton, 671 P.2d 1135, 1139 (N.M. 1983)).
27. 617 A.2d 211 (Me. 1992).
28. 635 A.2d 937 (Me. 1993).
29. Schneider v. Department of Human Servs., 617 A.2d at 212 (citing Carter v. Carter, 611 A.2d at 87; Tewksbury v. Noyes, 23 A.2d 204, 207 (Me. 1941)).
30. Trimble v. Commissioner, Dep’t of Human Servs., 635 A.2d at 938.
31. Id.
32. Id.
33. Id. at 939 (citing Wood v. Wood, 407 A.2d 282, 288 (Me. 1979)).
34. 642 A.2d 176 (Me. 1994).
in creating a private agreement "frustrated the court's power."\textsuperscript{35} His decision to ignore the court order and to rely, instead, on a private agreement with his former wife was "neither reasonable nor justifiable."\textsuperscript{36}

Ashley asserted equitable estoppel rather than laches as his defense. Like the previous laches defense cases, however, Ashley's failure to make the showing necessary to establish his defense left unresolved whether any equitable defense, in this case equitable estoppel, could defeat an action for child support arrearages. The decision affirmed the court's growing disdain for private, self-help support agreements between divorced parents.

III. \textit{Fisco v. Department of Human Services}

Richard Fisco and Janet Fisco (now Westhoff) were granted a divorce by the supreme court in Suffolk County, New York, on October 30, 1979.\textsuperscript{37} Westhoff was awarded custody of the couple's two children, Rigel, age five, and Alia, age two. Pursuant to a stipulation agreement\textsuperscript{38} the court ordered Fisco to pay $37.50 per week in child support for each child.\textsuperscript{39} In accordance with the agreement, Fisco began paying the child support obligation in August 1979. The following May, Westhoff presented Fisco with a written modification agreement. The modification informed Fisco that Westhoff was employed, remarried, and able and willing to support the children without his financial or parental support.\textsuperscript{40} It released Fisco from his child support obligation in exchange for terminating his visitation rights with his children. Westhoff signed this agreement and had it notarized. Fisco did not sign the agreement.\textsuperscript{41}

Fisco left New York and settled in Maine with his second wife and her two children from a prior relationship. Fisco and his second wife had two children of their own. In 1988 the Social Security and Veterans' Administrations determined that Fisco was disabled as of 1983 and he began to receive disability benefits.\textsuperscript{42} On December 3,
1992, twelve years after his former wife presented him with the modification, Fisco received a notice of debt from DHS alleging a child support debt to Westhoff in the amount of $50,625.

Fisco sought administrative review of the debt and at the hearing he raised the defense of laches. The DHS hearing officer recognized that the consideration of the defense of laches as a bar to Westhoff's recovery was beyond his jurisdiction and re-established Fisco's debt at $34,347. On review, the superior court applied the doctrine of laches and barred recovery, finding that "a reason-

in 1988 both children received a monthly benefit from the Social Security Administration. The Social Security Administration sent the money directly to the children. Brief of Appellant at 2, Fisco v. Department of Human Servs. (CUM-94-662).

43. The Suffolk County Family Court forwarded the petition to DHS in Maine pursuant to Maine's Uniform Reciprocal Enforcement of Support Act (URESA). ME. REV. STAT. ANN. tit. 19, §§ 331-420 (West 1981 and Supp. 1995-1996), repealed by Uniform Interstate Family Support Act, ME. REV. STAT. ANN. tit. 19, §§ 421-429B (West Supp. 1995-1996). In 1949 New York reacted to the problem of fathers who had left their families and refused to pay support by passing a law that allowed a mother or child to begin a lawsuit to collect support in the state where they lived and enforce it in the state where the child's father had gone. Within a year, ten other states adopted similar legislation, and the national Conference of Commissioners of Uniform Laws promulgated the Uniform Reciprocal Enforcement of Support Act (URESA). UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 553 (1968). Every state adopted the law. LIEBERMAN, supra note 3, at 5.


45. Id.


1. Notice of debt. In addition to conforming with the requirements of the Maine Administrative Procedure Act, Title 5, section 9052, subsection 4, notice of debt shall include:

G. A statement that at the administrative hearing only the following issues shall be considered:

(1) The receipt of public assistance by the responsible parent;
(2) Uncredited cash payments;
(3) The amount of the debt accrued and accruing;
(4) The accuracy of the terms of the court or administrative order as stated in the notice of debt; and
(5) The maintenance of any required medical or dental insurance coverage.

See also Ashley v. State, 642 A.2d 176 (Me. 1994) (asserting that the DHS is without jurisdiction to consider the equitable defense of estoppel) (citing Trimble v. Commissioner, Dep't of Human Servs., 635 A.2d 937 (Me. 1993)) (explaining that although the Department of Human Services is without jurisdiction to consider equitable issues in support of enforcement proceedings, the applicable DHS regulation contemplates the presentation of some equitable issues evidence at the administrative level).

47. Fisco v. Department of Human Servs., 659 A.2d at 275. Although the notice of debt established Fisco's arrearage at $50,625, the hearing officer gave Fisco credit for child support payments to May 1980. He further deducted Fisco's child support obligation for the period from April 1984 through January 1987 when he received public assistance; for the four months his son Rigel lived with him; and for the payments that were made to his children by the Social Security Administration. This
able person in Fisco’s situation would have relied, as he did, on Westhoff’s offer and her apparent compliance with her part of the agreement.” Although neither Fisco nor the court signed Westhoff’s modification or incorporated it into the Divorce Decree, the superior court found that both parents substantially abided by its terms.

On appeal, DHS urged the Law Court to find that Fisco did not sustain the prejudice element of laches. DHS cited Trimble v. Commissioner, Department of Human Services to demonstrate the proposition that Fisco’s reliance on the modification was an insufficient showing of detriment, change of position, or prejudice due to the delay. DHS argued that Fisco’s claim that forfeiture of his vis-


Several jurisdictions have taken the position that an obligor parent may be allowed credit against child support arrearages for expenses accrued as a result of his custody of the child, or for other voluntary or compelling expenditures made on behalf of the child. This credit is contingent upon whether equity would so dictate under the circumstances involved and, whether such an allowance would not do an injustice to the mother. Robert A. Brazener, Annotation, Right to Credit on Accrued Support Payments for Time Child is in Father’s Custody or for Other Voluntary Expenditures, 47 A.L.R. 3d 1031, 1035-38 (1973).

48. Me. R. Crv. P. 80(C) provides for superior court review of final agency actions or failures or refusals of an agency to act.


51. DHS asserted that the only issue on appeal was the legal significance of the facts. DHS reminded the court that the appropriate standard of review did not require deference to the superior court’s finding of facts. DHS reasoned that because the superior court decided the case on the basis of the same written record which appeared before the Law Court, the case was indistinguishable from others brought before the superior court pursuant to Rule 80 (c) of the Maine Rules of Civil Procedure. Brief of Appellant at 7, Fisco v. Department of Human Servs. (CUM-94-662) (citing Vector Mktg. Co. v. Maine Unemployment Ins. Comm’n, 610 A.2d 272, 274 (Me. 1992)). The Law Court granted deference to the superior court but found its decision clearly erroneous.


53. 635 A.2d 937 (Me. 1993).

54. “In order to prevail with such a defense, the defendant-husband must also establish that he was prejudiced by the delay.” Brief of Appellant at 10, Fisco v. Department of Human Servs. (CUM-94-662) (emphasis added).
tation rights constituted prejudice due to delay was insufficient because Fisco neither signed the modification nor abided by its terms. Furthermore, Fisco's conduct constituted a "self-help" approach previously disapproved of by the court in Trimble. DHS reasoned that the court similarly should disapprove of Fisco's reliance on the modification and therefore deem Fisco's claim of prejudice insufficient.

Fisco argued that he "changed his position" in reliance on his former wife's representations in the modification agreement. He sought no direct contact with his children; he remarried, moved to Maine, and took on the financial responsibilities of a second family; and he did not pursue a career. These lifestyle "choices" would become prejudices if the court required Fisco to pay his child support debt. Without explaining the distinction, Fisco asserted that his discontinuance of child support payments was not the kind of self-help disapproved of by the court in Trimble. Finally, Fisco argued that although he did not sign the agreement, by complying with its terms "in effect . . . he did give up his rights."

The Law Court rejected the lower court's finding that a reasonable person would have relied on Westhoff's offer, calling Fisco's reliance on "this kind of informal agreement" unreasonable and unjustifiable. Notwithstanding his reliance on the modification, the court was unconvinced by Fisco's assertions of prejudice. The court acknowledged that Westhoff's delay in bringing the enforcement ac-

55. DHS did not address Fisco's other claims of prejudice: forgoing a career and taking on the additional financial responsibilities of supporting a new family. Brief of Appellee at 7, Fisco v. Department of Human Servs. (CUM-94-662).
57. Trimble v. Commissioner, Dep't of Human Servs., 635 A.2d at 939. The court stated: "We have never sanctioned the kind of self-help to which Trimble resorted by simply ceasing payments when his former wife stopped permitting visitation." See also Wood v. Wood, 407 A.2d 282, 287 (Me. 1979) ("The policy of the law is to discourage self-help . . . when modification of decrees concerning child custody and support is justified.").
60. Id. at 7.
61. Id.
62. Id. at 7-8.
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tion did prejudice Fisco, but it criticized his responsibility in creating the circumstances. Rather than petitioning the court either to enforce his visitation rights or to modify his support obligation, Fisco ignored a court order—conduct the court said amounted to desertion and non-support. The court saw Fisco's acquiescence in asserting his own rights as a bar to the assertion of laches, and rejected his equitable defense.

The dissenting justices agreed with the superior court finding that "Westhoff's twelve-year delay in seeking arrearages greatly prejudiced Fisco." The dissent discerned prejudice in several contexts. First, Fisco lost the benefit of countless, now unrecoverable visits with his two children. Second, Fisco's fully disabled status would have entitled him to judicial modification or relief from child support payments. The crux of the dissent's distress appears to be: Why should Fisco have to pay $35,000 now, if petitioning the court would have relieved him of his child support obligation? The dissent acknowledged that the agreement benefitted Fisco somewhat, but the dissenting justices remained unmoved by the majority's concern over Fisco's participation in the wrongdoing. “Although the

64. Id. at 275-76. The court expressed disapproval of Fisco's role in creating the situation:

Westhoff's delay in bringing the enforcement action certainly prejudiced Fisco, but he as much as Westhoff is responsible for the situation in which he now finds himself. His testimony demonstrates that he was at least vaguely aware that Westhoff's proposal improperly modified the judicially imposed rights and obligations of the parties in relation to the children. Yet he never petitioned the court either to enforce his visitation rights or, even after his economic circumstances changed, to modify his support obligation. Instead, he chose to abide by an agreement that . . . benefitted him at least in part. His part in the delay amounts to . . . desertion and nonsupport.

65. Id. at 276.

66. Id. ("When both parties are at fault, neither can assert laches against the other.") (quoting Mitchell v. Alfred Hofmann, Inc., 137 A.2d 569, 572 (N.J. Super. Ct. App. Div. 1958)).

67. Id. ("The law will prevail where the equities are equal.") (quoting Sargent v. Coolidge, 433 A.2d 738, 743 (Me. 1981)).

68. Fisco v. Department of Human Servs., 659 A.2d at 276 (Dana, J., dissenting).

69. Id.

70. The dissent said, "Had [Fisco] known years ago that his former wife would ultimately bring this action, he could have obtained judicial relief from the prior judgment because of his total disability." Id. This assertion is not entirely accurate. Fisco may have been able to obtain a modification once he acquired the fully disabled status. The Veterans' Administration determined that he was not disabled until 1983, four years after his divorce. Brief of Appellee at 1, Fisco v. Department of Human Servs. (CUM-94-662). The modification for which he may have been entitled, therefore, would not include the four years between his divorce and the time he was considered disabled. Furthermore, while Fisco might have been relieved of part of his obligation, he might not have been relieved of the entire obligation.
agreement may have benefitted Fisco in part, implicit in the Superior Court’s decision is the finding that the equities were far from equal.”

In addition to misconstruing the import of the facts, according to the dissent, the majority also demonstrated its confusion of equitable estoppel and laches defenses in its statement that Fisco’s “reliance on Westhoff’s abiding by an agreement we cannot credit does not constitute the prejudice necessary to establish laches.” In criticizing the majority’s emphasis on a “reasonable reliance” requirement of an equitable estoppel defense, the dissenting justices described the distinguishing qualities of laches: “In contrast [to equitable estoppel], laches is ‘an omission to assert a right for an unreasonable and unexplained length of time and under circumstances prejudicial to the adverse party.’” The dissent refused to consider “reliance,” applied a conventional laches formula, and concluded that Fisco’s defense was properly based on the prejudice flowing from Westhoff’s failure to assert her claim within a reasonable time. “Whether Fisco’s reliance on the agreement was reasonable is irrelevant to the analysis in this case.”

The dissent would have affirmed the decision of the superior court, leaving the parties to their bargain. Disregarding the informalities of Westhoff’s unincorporated modification, the dissent instead focused upon the twelve years during which Westhoff received the “benefit of her bargain.” It dismissed Westhoff’s demand for the child support payments as a mere change of mind. The dissenting justices were also disturbed because Fisco’s oldest child had reached the age of majority by the time Westhoff filed her complaint. Armed with a finding of prejudice adequate to satisfy a laches defense, they affirmatively embraced the propriety of equitable defenses in child support arrearage cases.

71. Id. at 277.
72. Id. (emphasis omitted).
73. The majority cited Ashley as support for the proposition that Fisco’s reliance on the agreement was unreasonable and unjustifiable. Id. at 275 (citing Ashley v. State, 642 A.2d 176, 176 (Me. 1994)).
74. Id. at 276 (Dana, J., dissenting) (citing A.H. Benoit & Co. v. Johnson, 160 Me. 201, 207, 202 A.2d 1, 5 (1964)).
75. Id.
76. Id. at 277.
77. Id.
78. Id. at 276.
79. Id.
80. Id.
81. Most jurisdictions have determined that disputes over child support no longer have merit once the children are 18 years old. Although Rigel had just turned 18 when Westhoff initiated this suit, Alia was still a minor. The dissent mistakenly asserted that both children had reached the age of majority by the time Westhoff filed her complaint.
82. The dissent stated, “‘[W]e now align ourselves with the majority of jurisdictions and hold that additional equitable defenses such as estoppel or waiver may be
IV. Analysis

A. The Fisco Decision

The Fisco decision heightens the prejudice standard in laches defenses by imposing a reasonable reliance requirement on any laches defense that includes a private agreement. The majority refuses to evaluate prejudice without deciding whether reliance upon the agreement was reasonable. Finding it unreasonable to rely on such an agreement, the majority is not satisfied by Fisco's showing of prejudice. The dissent also looks for a showing of prejudice but finds sufficient evidence supporting the defense. To the dissent, it is entirely irrelevant that Fisco's prejudice derives from the parents' decision to ignore the superior court's child support order.

An outcome-driven analysis of the doctrine of equity leads both the majority and the dissent to take advantage of equity's vulnerability to judicial discretion. The result is an inaccurate application of the discretionary, but precise doctrine of equity.

1. Prejudice, Reliance, and Private Agreements

Concededly, the court's rejection of Fisco's showing of prejudice is an impediment to the assertion of laches defenses in child support arrearage cases; its broader impact is to deter all equitable defenses. First, the decision takes the Law Court's already strict requirement of prejudice in laches/child support arrearage cases and heightens that standard further. While the court has not given an affirmative definition of what constitutes prejudice for the purpose of asserting laches, through its repeated rejection of the defense the court has provided a definition of what prejudice is not: Prejudice is not asserted by showing mere delay, nor is there prejudice to a defendant whose former wife fails to notify him of his children's location asserted by the obligor in a proceeding to enforce or modify an order for child support or, as here, to reduce child support arrearages to judgment. "Id. (quoting Parkinson v. Parkinson, 796 P.2d 229, 231 (Nev. 1990)).

The dissent misconstrues the majority's reliance on Mitchell v. Alfred Hofmann, Inc., 137 A.2d 569 (N.J. Super. Ct. App. Div. 1958). The dissent states: [T]he Court's reliance on a 1958 New Jersey Superior Court decision is unpersuasive support for its conclusion that the trial court erred in determining that the equitable defense of laches is applicable to this case. The trial court's decision finds substantial support from the many jurisdictions that in recent years have held that equitable defenses are available in support enforcement actions. Fisco v. Department of Human Servs., 659 A.2d at 276. The majority did not rely on Mitchell for the proposition that equitable defenses are not available. Rather, it cites Mitchell for the much more limited proposition that laches is not available when both parties are at fault. Id. The majority's reliance on this case does not speak to the issue of the general availability of the defense, but rather to the specific circumstances in which laches defenses are inappropriate.

for eleven years;\textsuperscript{84} denial of visitation rights is likewise an insufficient display of prejudice;\textsuperscript{85} and now, with \textit{Fisco}, prejudice is neither the acquisition of new financial obligations nor the decision to forgo pursuit of a career, particularly when those obligations and decisions were based upon an unincorporated, private agreement between the parties.\textsuperscript{86} By eliminating additional possibilities from the prejudice concept, the court continues to refine the definition and heighten the prejudice standard, the essential element of the defense.

Second, the \textit{Fisco} decision functions as a deterrent to the use of laches defenses in child support arrearage cases by establishing that it is neither inequitable nor unjust to the defendant to enforce the terms of a child support order when a private agreement is the basis for the defendant's asserted prejudice. By loosely applying the decision in \textit{Ashley}, the majority in \textit{Fisco} invites judges to disregard evidence of prejudice where the claim involves a private agreement. Although not explicit, the \textit{Fisco} opinion effectively holds that as a matter of law, a showing of prejudice will be deemed insufficient where parties engaged in private agreements. The court achieves this by grafting the holding of \textit{Ashley} onto the facts of \textit{Fisco}: \textit{Ashley} states, "[The defendant's] reliance on a private agreement with his former wife to ignore the court order to pay child support was neither reasonable nor justifiable."\textsuperscript{87} Although application of the \textit{Ashley} holding to the \textit{Fisco} facts seems appropriate, \textit{Ashley} is less relevant than the court suggests. In \textit{Ashley} the defendant asserted the defense of equitable estoppel, which specifically requires a showing of reasonable reliance on an assertion or an agreement. Laches and estoppel, however, are not equivalent concepts; they are governed by different rules. The rules governing estoppel are more clearly defined and less flexibly applied than those governing laches.\textsuperscript{88} The \textit{Fisco} court was not obligated to find the same elements required for an equitable estoppel defense.\textsuperscript{89} Nonetheless,

\textsuperscript{84} See Carter v. Carter, 611 A.2d 86, 87 (Me. 1992).
\textsuperscript{85} See Trimble v. Commissioner, Dep't of Human Servs., 635 A.2d 937, 938-39 (Me. 1993).
\textsuperscript{86} Fisco v. Department of Human Servs., 659 A.2d at 275-76.
\textsuperscript{87} Ashley v. State, 642 A.2d 176, 176 (Me. 1994).
\textsuperscript{88} Gillons v. Shell Co. of Cal., 86 F.2d 600, 607 (9th Cir. 1936), cert. denied, 302 U.S. 668 (1937) (holding that laches and estoppel are governed by different rules; rules governing laches are directed more intimately to conscience of chancellor who must exercise discretion)). See also California Packing Corp. v. Sun-Maid Raisin Growers of Cal., 81 F.2d. 674, 679 (9th Cir.), cert. denied, 298 U.S. 668 (1936) (noting that laches differs from estoppel in that laches is based upon the failure of a party to enforce its rights for such an unreasonable amount of time that equitable relief will not be granted).
\textsuperscript{89} The court has recognized the distinct requirements of the equitable defenses (laches, equitable estoppel, and waiver). See, e.g., Carter v. Carter, 611 A.2d 86 (Me. 1992). In \textit{Carter} the court stated:
Assuming estoppel, laches, or waiver could defeat an action for support arrearages[,] . . . defendant has failed to make the showing necessary to
the court incorporates the severity of the Ashley decision by affixing the concept of "reasonable reliance" onto the formula for laches.

In compelling language the court in Ashley states, "Conduct such as Ashley's frustrated the court's power to determine the amount of child support and cannot be countenanced." The court in Fisco interprets this statement as a condemnation of all self-help agreements pertaining to child support. That interpretation, however, requires the court to overlook the factual distinctions between the two cases. For example, in Ashley the divorce court rejected the parties' support proposal as insufficient and ordered a greater amount in support. The couple ignored the court's order and privately agreed that the defendant would pay less. The Ashley court seemed particularly displeased with Ashley's defense because the divorce court had explicitly rejected the agreement. The court's specific reference to Ashley's conduct suggests that the court condemns the agreement because Ashley employed self-help which the court had expressly rejected. Although the decision in Ashley is ambiguous as to whether the court intended to condemn all child support self-help agreements, the court in Fisco uses Ashley as authority to reject all self-help. The Fisco court's decision to unilaterally reject self-help agreements heightens the burden on defendants who raise equitable defenses to claims for unpaid child support. It also allows the court to avoid the larger issue: Should the Law Court ever uphold equitable defenses in child support arrearage cases?

The dissent correctly defines laches by disregarding the "reasonable reliance" requirement imposed by the majority. But the dissent's insistence on precise doctrinal definitions distracts it from careful consideration of the parties' self-help agreement, which it condones without reservation. The dissent finds prejudice in Fisco's changed employment and financial circumstances, and in the visitations with his children that he forfeited, both of which directly result from the deal struck between Fisco and Westhoff in complete disregard of the court order. The dissent ignores that the source of Fisco's prejudice is a self-help agreement, and instead, re-
iterates that the defendant in *Ashley* presented an equitable estoppel defense, and that laches does not require reasonable reliance. In so doing, the dissent legitimizes the agreement by concentrating on the elements required for a laches defense and by refusing to grapple with the assertion in *Ashley* that some, if not all self-help agreements are suspect.

2. *The Doctrine of Equity*

The court in *Fisco* concludes its decision with two quotations about the law of equity. It quotes *Mitchell v. Alfred Hofmann, Inc.* for the proposition that "‘[w]hen both parties are at fault, neither can assert laches against the other’" and *Sargent v. Coolidge* for the proposition that "‘[t]he law will prevail where the equities are equal.’" In applying these principles to the *Fisco* case, the court establishes an unrefined application of equity. Neither the majority nor the dissent recognizes that although principles of equity are governed by significant judicial interpretation and discretion, the concept of equity is subtle. *Mitchell* stands for the distinct proposition that an assertion of laches becomes illegitimate if the defendant participated in creating the plaintiff’s delay. The court asserted that the "[d]efendants’ contributions to and acquiescence in the delays preclude them from now complaining." In *Sargent* the Law Court explained that in a case where the litigation was spurred by a mutual mistake of fact, defendants’ claim would fail in accordance with the maxim that the law will prevail where the equities are equal.

In *Fisco* the court allows its disapproval of the defendant’s relinquishment of visitation rights to obscure the subtleties of equity. Yet unlike the defendant in *Mitchell*, Fisco did not participate in any way in the plaintiff’s delay in asserting her rights. He did not hide his whereabouts from his former wife or obstruct her from asserting her rights. The court, however, concludes that because the defendant did something wrong by being “vaguely aware that Westhoff’s proposal improperly modified the judicially imposed rights and obligations of the parties,” laches is not an available defense. This position obscures the concept of equity by basing its denial of the defense, in part, on the defendant’s general contributions to the creation of the circumstances and by ignoring the fact that the defendant’s wrongdoing *did not contribute to the plaintiff’s delay in asserting her rights.*

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98. 433 A.2d 738 (Me. 1981).
101. Sargent v. Coolidge, 433 A.2d at 741, 743 (citing Foster v. Kingsley, 67 Me. 152, 156 (1877); Lumbert v. Hill, 41 Me. 475, 483 (1856)).
If Fisco's evidence of prejudice were founded solely upon the denial of his visitation rights, the court's application of equity would appear more discriminating. If this were the case, the court could make the principled determination that the prejudice he sustained in not seeing his children is negated by the fact that he caused prejudice to himself. Yet Fisco's claim of prejudice also includes his accumulation of new financial obligations. The court has established a precedent for the future whereby virtually any evidence of wrongdoing on the part of a defendant will defeat an equitable defense. In cases involving children and their rights to both financial and parental support, such a crude application of equity may conveniently amount to justice. In its effort to deter divorced parents from bargaining with their rights and the rights of their children, however, the court has muddied the waters of equity.

B. Family Financial Responsibility: The Legal Obligation to Provide for the Children

The Law Court went far in Fisco towards limiting relief from child support obligations. While the court's approach has been effective in enforcing child support arrearages, its future effectiveness depends upon either similarly "insubstantial" demonstrations of prejudice, or continued mutations of laches, estoppel, and equity. Instead, the Law Court should abandon these doctrines in child support arrearage cases for two compelling reasons. First, Maine's family financial responsibility statute provides that child support is a basic legal right of the State's children and that mothers and fathers have a legal obligation to provide financial support for their children. After the court has entered a decree for child support, there is no principled reason why the court should permit abandonment of that duty merely because ex-spouses initiate litigation. Second, judicial economy will be served best by such an approach.

1. Invalidating Equitable Defenses

A child's legal right to financial support from his parents is a legislative construction that deserves unequivocal recognition by the Law Court. Neither the elements of laches, nor the elements of the

103. ME. REV. STAT. ANN. tit. 19, § 306 (West Supp. 1995-1996). The statute provides that "[t]he Legislature finds and declares that child support is a basic legal right of the State's parents and children, that mothers and fathers have a legal obligation to provide financial support for their children .... Id. See also ME. REV. STAT. ANN. tit. 19, § 421 (1), (3) (West Supp. 1995-1996):

"[c]hild" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is alleged to be the beneficiary of a support order directed to the parent. . . . "Duty of support" means an obligation imposed or imposable by law to provide support for a child, spouse or former spouse, including an unsatisfied obligation to provide support.
other equitable defenses need be nor should be considered by the court if parents' duty to provide children with economic sustenance is given genuine recognition.

If the courts are to give consistent legitimacy to the notion that financial support is a child's basic legal right, then the affirmative defense of laches is unconditionally inappropriate. Laches requires a failure to assert a right resulting in forfeiture of that right. A parent should have no standing to waive his or her child's right to receive support.104 Laches requires that the claimant's delay in asserting the right results in prejudice to the defendant. To determine whether a laches defense is available, therefore, courts naturally must focus their inquiry on the claimant's delay and, as a result of such delay, prejudice to the defendant. Such a defense does not require even the pretense of inquiry into a child's right to parental support. Instead, as in Fisco, the court must work hard to construct an unwieldy prejudice standard in an attempt not to find an excuse to pay support arrearages.

Other jurisdictions have avoided this manipulation of equitable defenses in child support cases. In Lyon v. Lyon105 the Supreme Court of Vermont held that child support payments are made for the support, maintenance, and education of the children.106 The rights of the children are to be served and protected, as their welfare is of paramount concern. Accordingly, the court stated:

[Plaintiff may not be found to have waived her child's right to receive support from defendant by her failure to enforce the child support order or to reduce the arrearages to a judgment in a more timely fashion. The child was not guilty of laches or acquiescence, and we will not attribute any such guilt on the part of the plaintiff to the child for whose benefit the original support was made.]107

The Supreme Court of Vermont affirmed the trial court's judgment for the arrearages owed by the defendant, stating definitively that the "affirmative defenses [of laches and equitable estoppel] are not available in an action brought to secure enforcement of a child support order."108 The Virginia Court of Appeals similarly held in Tay-
lor v. Taylor" that "laches may not be interposed as a defense to a [child] support arrearage." Likewise, in Kansas, laches and equitable estoppel are not permissible defenses against child support debts any time during a child's minority. The Kansas Court of Appeals explained in Wornkey v. Wornkey that laches was barred because support of children is a matter of important social concern. "Child support is an obligation a parent owes the state and the children. This obligation . . . continues through the child's minority, and an action to enforce the obligation may be brought at any time during the child's minority."

A direct, affirmative focus on the child's dependence upon the financial support of his or her parents reveals the impropriety of equitable defenses. None of the equitable theories adequately account for the relevant interests at stake when parents fail to comply with support orders. For example, equitable estoppel requires the

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110. Id. at 902. See also Richardson v. Moore, 229 S.E.2d 864 (Va. 1976). In Richardson the plaintiff argued that a trial court has the power to relieve the husband's estate of arrearages in past due payments. The court disagreed. "Laches is an equitable defense, but 'even a court of equity, in an effort to do equity, cannot disregard the provisions of a lawful decree . . . ." Id. at 866 (citing Fearon v. Fearon, 154 S.E.2d 165, 168 (Va. 1967)). The Richardson court explained its rationale:

In the absence of statute, payments exacted by the original decree of divorce become vested as they accrue and the court is without authority to make any change as to past due installments.

It is the obligation of the divorced husband to pay the specified amounts according to the terms of the decree and . . . he should not be permitted to vary these terms to suit his convenience. If conditions change . . . his remedy is to apply to the court for . . . relief.

Id. (quoting Cofer v. Cofer, 140 S.E.2d 663, 666 (Va. 1965); Newton v. Newton, 118 S.E.2d 656, 659 (Va. 1961)). The court acknowledged that there is contrary authority in other jurisdictions. Id.

111. 749 P.2d 1045 (Kan. Ct. App. 1988). See also Grimes v. Grimes, 295 P.2d 646, 648 (Kan. 1956) (asserting that support of children, like custody, is a matter of social concern; it is an obligation the father owes the state as well as his children); Effland v. Effland, 237 P.2d 380, 387 (Kan. 1951) (holding that the parental duty to provide for the support and maintenance of a child continues through the child's minority and the obligation to support may be enforced by an action at any time during the child's minority); Peters v. Weber, 267 P.2d 481 (Kan. 1954). In Peters the court noted that under the circumstances of the case,

we are unwilling to hold that defendant is entitled to invoke the defense of laches as a bar to the enforcement of his moral and legal obligation to his minor child. The rights of the latter are not to be waived by the inaction and passive acquiescence on the part of the mother.

Id. at 486. Kansas has not determined as explicitly as Virginia that laches will never be appropriate in child support arrearage cases. The Kansas court does state, however, that provided the children have not reached the age of majority, it is very unlikely that a laches defense will be permissible. Wornkey v. Wornkey, 749 P.2d at 1051.

112. Wornkey v. Wornkey, 749 P.2d at 1051.
113. Id. (citing Strecker v. Wilkinson, 552 P.2d 979 (Kan. 1976)).
assertions of one party and reasonable reliance resulting in detri-
tment to the other. Equitable defenses are particularly inappropri-
ate when parents exchange visitation rights for child support because
they deny children the financial and emotional sustenance upon
which their health and development largely depend. The Law
Court's continued amenability to the presentation of these defenses
simply permits parents to trade their children's visitation rights for
their children's right to financial support. If the court had found
the requisite prejudice in Fisco, and if the court had not effectuated its
questionable manipulation of the concepts of prejudice and "reason-
able reliance," the outcome would have been to allow dismissal of
the children's rights on the basis of the parents' "deal." Such a swap
is inappropriate. The Oklahoma Supreme Court's decision in
Bingham v. Bingham explains the impropriety:

The[ ] [parents] agreed [that the] [h]usband, the father of
the[ ] children, would be allowed to ignore his parental pre-
rogatives and duties relating to visitation, thus depriving the
children of the companionship, training, care and nurturing to
which they are entitled. In exchange, [the] [m]other bartered
away the children's right to be parentally and financially sup-
ported. In so doing the parties made a "contract" which no
court should condone or perpetuate . . .

Parental rights . . . may only be terminated or impaired
upon a clear finding by the court after an evidentiary hearing
that it is, in fact, in the best interests of the children to enter
such an order.

Condoning the application of contractual or equitable doctrines to
parental obligations fails to respond to, and is plainly incompatible
with the interests of the child. Recognizing that child support is a
"basic legal right" provides the forum in which a child's ongoing
right to parental financial support can be relied upon and legiti-
mized in the eyes of the law.

2. Bridling Equity

Principles of equity provide that if a defendant can prove that a
plaintiff seeking relief has engaged in improper conduct related to
the plaintiff's claim, the plaintiff may be denied the opportunity to

114. See, e.g., Eliker v. Eliker, 295 N.W.2d 268, 273 (Neb. 1980) ("The right of
visitation . . . is not a quid pro quo for the payment of child support . . . ").
116. Id. at 1299-1300 (emphasis added); see also Lindsay Arthur, Child Support
117. See Carolyn Eaton Taylor, Note, Making Parents Behave: The Conditioning
118. See supra note 103.
enforce his or her right. The doctrine of equity simply fails to account for the child's interests. When deciding whether to enforce a child support order, a court's consideration of parents' improper conduct is not appropriate. "The practical effect of denying parents a remedy is to prevent the child from obtaining the rights to which he is entitled even though his hands are clean. By automatically refusing to grant a remedy in this situation the court punishes the child without considering the child's interests." It is unjust and unfair to deny a child financial support because of an application of equity to his parents' behavior. Ridding the child support enforcement field of appeals to equity will require parents to petition the court for changes in child support obligations. Otherwise, the court will inevitably face a situation where the rights of an indisputably prejudiced parent supersede the child's right to financial support.

Decisions in equity allow for considerable judicial discretion. Nonetheless, where a defendant argues laches, a plaintiff's delay is excusable in equity only where the delay was induced by the adverse party. A defendant cannot take advantage of a delay which he himself caused or to which he contributed. Fisco did not participate in creating Westhoff's delay. Concededly, the Fisco court's manipulation of equity was effective in prohibiting his defense and providing for the children's financial support. The result is laudable, but this application of equity is unbridled. Judicial discretion in the application of the equity doctrine often may be fair and appropriate between two adults. Yet its application to those same adults when the children's right to financial support should be the judicial focus is an alarmingly misplaced foundation upon which to rest our children's welfare.

3. Judicial Economy

The court had compelling reasons for discouraging the self-help approach in Fisco. Particularly in the context of child support obligations, self-help modifications are not judicially economical. The parties, as in Fisco, do not avoid litigation through independent modifications. The courts in Maine expend limited resources to determine child support payments systematically and fairly according to statutory guidelines. Further, title 19, section 319 of the Maine

119. Taylor, supra note 117, at 1070.
120. Id.
121. Id. at 1071.
123. It is perhaps difficult to envision discarding equitable principles in litigation pertaining to child support. Certainly ex-spouses should not be able to wreak havoc on each others' lives. Invalidating equitable doctrines is not an invitation to take advantage of the court's concern with the child's welfare.
Revised Statutes provides that child support obligations may be modified when the financial situation of the obligor has changed. 125

Sound public policy mandates that parties modify agreements officially, otherwise "[i]f the parent paying support would be encouraged to reduce support payments unilaterally whenever he believed a change of circumstances justified a reduction. The policy of the law is to discourage self-help . . . ." 126 Self-help modifications also tend to defy responsible social and public policy. In light of the economic and social problems facing children and parents of divorce, 127 courts use judicial discretion in examining laches defenses 128 to minimize situations in which they must deny past-due child support. Rejecting evidence of prejudice where a self-help modification provided its springboard may achieve this goal. A complete rejection of equitable defenses, however, may consistently guarantee the enforcement of past-due support. Eliminating equitable defenses also may discourage the modification of agreements that are not judicially approved. Courts need not contort concepts of prejudice or intertwine doctrinal elements. The defenses simply should not be allowed.

Elimination of equitable defenses will not inhibit proper judicial discretion in granting modifications or credit where an obligor spouse has made non-conforming child support payments or otherwise has provided for the children. Recognizing that unconventional circumstances surrounding child support may arise ensures fairness to the parent who provides nonconforming child support, without undermining the effectiveness of child support enforcement. 129

Perhaps the Law Court is ambivalent about taking the absolutist approach of rejecting equitable defenses because it has observed that other jurisdictions recognize and uphold laches and other equi-

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125. The statute provides that where there is a substantial change of financial circumstances, an obligor may modify existing support orders by filing a motion to the court. ME. REV. STAT. ANN. tit. 19, § 319 (West Supp. 1994-1995).


128. Cf. Sinclair v. Allender, 26 N.W.2d 320 (Iowa 1947). In examining a laches defense in a case involving the creation of a trust, the court explained, "'A court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed by its own circumstances.'" Id. at 329 (quoting Withrow v. Walker, 47 N.W. 893, 895 (Iowa 1891)).

129. See generally J. Eric Smithburn, Removing Nonconforming Child Support Payments from the Shadow of the Rule Against Retroactive Modification: A Proposal for Judicial Discretion, 28 J. FAM. L. 43 (1989-90) (advocating recognition of nonconforming child support payments where payments were made within the spirit of the support order).
table defenses in situations factually similar to those that the Law Court faces. This Author contends that equitable defenses, when applied to support arrearage cases involving minor children, are never appropriate. Even interference with visitation rights that rises to the level of concealment should not affect the support obligation of the non-custodial parent. A California court recently held that where a mother conceals her own and her children's whereabouts from the children's father until the children are no longer minors, fairness and equity permit the father to estop the mother's claim for the arrearages that accrue during the period of concealment. The court's holding encourages broader acceptance of equitable defenses by failing to declare the impropriety of such defenses in concealment cases involving minor children. The court's unwillingness to provide dicta condemning the equitable defenses when children are still minors invites injustice by depriving a child of his or her right to support because of a parent's refusal to abide by a court order. A child should not be deprived of the right to support because of the concealing parent's behavior. Despite the unfortunate grief that the concealing parent causes to the other parent, the law should insist that the aggrieved parent petition the courts for

130. See, e.g., Moffett v. Moffett, 570 So. 2d 691, 692 (Ala. Civ. App. 1990) (applying doctrine of laches to mother's claim for child support where father's whereabouts were known during child's minority and child was 22 years old and married at the time mother requested determination of back child support); Parkinson v. Parkinson, 796 P.2d 229, 231 (Nev. 1990) (upholding application of waiver where, despite repeated contact with father for several years subsequent to the time he ceased making payments, mother never made any demand on father and did not pursue her legal rights to the funds for five and a half years); Ferree v. Sparks, 601 N.E.2d 568, 570-71 (Ohio Ct. App. 1991) (justifying application of laches where mother's delay in asserting claim to recover unpaid child support caused father material prejudice by depriving father of his right to visitation); Taylor v. Taylor, 418 S.E.2d 900, 902-03 (Va. App. 1992) (explaining that because District of Columbia law applied, the doctrine of laches applied to bar wife's claim for support arrearages, where wife failed to make support claim for 15 years, while husband's whereabouts were ascertainable and husband had grown old, retired, remarried, and assumed additional responsibilities, relying to his detriment on lack of prosecution of wife's claim).


132. Id. at 133.

133. The dissent emphasized that the non-custodial parent has adequate remedies against a custodial parent who concealed a child and thus may not use concealment as a defense to justify violating a child support order. Id. at 137 (Baxter, J., dissenting). According to the dissent, the majority rewards a noncustodial parent by terminating the duty to pay child support without requiring that parent to follow the legal procedures to obtain this judicial relief, while punishing the custodial parent for violating the terms of the other parent's visitation order. See April Anstett, When a Custodial Parent Purposely Conceals the Location of Herself and Child and the Noncustodial Parent Makes Reasonable Efforts to Locate Them, the Custodial Parent is Estopped from Collecting Child Support Arrearages for the Time of Concealment: In Re Marriage of Damico, 22 PEPP. L. REV. 1739 (1995); see also Maria L. Retchin, Concealment of the Child as a Defense to Child Support, 6 DIVORCE LITIG. 169 (1994).
relief. Giving meaning to the "basic legal right" to child support means prioritizing the financial needs of children.

V. Conclusion

The failure of non-custodial parents to provide support for their children is an ongoing dilemma for millions of families in this country. At a time when Maine is receiving national attention for its child support enforcement laws, the Law Court in Fisco heightened the evidentiary burden regarding the concept of prejudice and effectively created a rebuttable presumption that private, self-help modifications between parents are not legitimate and will serve as barriers to assertions of prejudice in child support arrearage cases. The application to Fisco of holdings and principles from cases involving equitable defenses other than laches suggests a general unwillingness on the part of the Law Court to permit concepts of equity to estop claims for child support arrearages.

In Fisco the court did not allow the parents' conduct to affect the rights of the children or state-wide success in the collection of child support. With public policy and both national and legislative directives supporting strict enforcement, the Law Court has made assertions of laches, as well as other equitable defenses, extremely burdensome. This purely result-oriented approach has been effective. But the court should take the next step toward justice and judicial economy and deny the assertion of equitable defenses in child support arrearage cases. Although not a legal party to a dispute involving parental obligations after a divorce, the child is the integral member of the group that will be affected by the court's action. Allowing equitable defenses that require courts to grapple with whether uncooperative parents "reasonably relied" or suffered "prejudice" promotes disregard of a statutorily imposed presumption: Children have a basic legal right to receive financial support from their parents. No matter how unwelcoming, the Law Court's reception to equitable defenses reveals its discomfort with insisting,

134. In Moffat v. Moffat, 612 P.2d 967 (Cal. 1980), the Supreme Court of California expressed sympathy for a father whose ex-wife had denied him visitation with his children. Still, the court noted other remedies available to the father besides non-payment. He could have petitioned the court for a change of custody, filed a petition to hold the mother in contempt, filed a motion to terminate or reduce spousal support, or filed a motion to require and to insure compliance with the visitation orders. The court held that the mother's misconduct alone was not enough to estop her right to child support even though she "cruelly inflict[ed] incalculable damage to the children's welfare by arbitrarily denying to them the values inherent in a congenial father-child relationship." Id. at 975.


136. See supra note 8.
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unequivocally, upon the children's economic sustenance. Although the opinion in *Fisco* indicates the court's sincere concern for the children of divorced parents, it is perplexing that throughout the Law Court's recent decisions in child support arrearage cases, it never has relied expressly upon the statutory presumption of a child's right to financial support. Yet to do so would be to deploy and legitimize a legislative mandate, avoid further deconstruction of legal doctrines, and give consistent recognition to a child's right to financial support.

As between consenting adults like Janet Westhoff and Richard Fisco, allowing a laches defense may have been an equitable solution to a situation they both created. But neither the laws of child support nor those of visitation schedules were established for ex-spouses. They were established to provide financial and parental sustenance to the children of divorce. Defenses such as laches may mean justice for the parents. But to the children, there is no equity in the bargaining away of their relationships and resources.

The Law Court's decision in *Fisco* disturbs the refinement of the law in its application of prior case law, equitable defenses, and the legal principle of equity. While the court in *Fisco* did justice to the unnamed third party, the rejection of equitable defenses, the elements of which do not even feign consideration of the children, is long overdue.

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