

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA LEE HART,

Plaintiff-Appellee,

v

WALTER J. HART,

Defendant-Appellant.

UNPUBLISHED

March 5, 2002

No. 228899

Wayne Circuit Court

Family Division

LC No. 72-285613-DM

Before: Bandstra, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendant appeals by delayed application for leave granted from an order denying his motion to dissolve child support arrearages and for return of funds. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties were divorced in 1972. Plaintiff was awarded custody of their two children and defendant was ordered to pay child support until each child reached the age of majority or graduated from high school, whichever was later. That event occurred in June 1987 for the older child and June 1988 for the younger child. By then, defendant had accrued a child support arrearage. Defendant apparently avoided making payments on this arrearage until 1996, when plaintiff obtained an order of income withholding. Defendant did not object to the entry of that order or move to have it set aside.

In 1999, defendant moved to dissolve the child support arrearage, asserting that the ten-year statute of limitation had run on the support obligation. The trial court denied the motion, concluding that defendant's failure initially to challenge the order of income withholding constituted a waiver of the statute of limitation defense. On appeal, defendant contends that this ruling was in error. In the absence of a factual dispute, the question whether a statute of limitation defense exists is considered a question of law that this Court reviews de novo. See *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 600; 593 NW2d 565 (1999).

The ten-year limitation period of MCL 600.5809(3) applies to an action to collect a child support arrearage. *Ewing v Bolden*, 194 Mich App 95, 99; 486 NW2d 96 (1992). Thus, the period of limitation in this case ran in June 1997 with regard to the older child and June 1998 with regard to the younger child. The trial court's conclusion that defendant waived the limitation defense was based on *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich

App 635; 491 NW2d 864 (1992). In that case, this Court concluded that partial payments made on an arrearage after the expiration of the statutory period waived the statute of limitation defense. The *Durecki* Court reasoned that a partial payment on a lapsed debt provides an acknowledgment of the continuing vitality of the debt and revives the limitation period, allowing enforcement of the obligation. *Id.* at 637-638.

To the extent the trial court concluded that defendant waived the statute of limitation defense under *Durecki* by failing “initially” to object to the 1996 order of income withholding, we conclude that the court erred. When the order of income withholding was entered in 1996, the limitation period had not run. *Durecki* stands for the proposition that the ability to enforce an obligation after the expiration of the limitation period may be revived by the obligor’s conduct after the period has run. Acquiescing to the order of income withholding within the ten-year period could not serve to revive a limitation period that had yet to expire.

Nevertheless, the trial court reached the right result. Defendant’s wage assignment payments continued well beyond the running of the limitation periods in June 1997 and June 1998. In *Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493, 497; 607 NW2d 68 (2000), our Supreme Court held that “a partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation.” (Footnote omitted). Elsewhere in *Yeiter*, the Court characterized this formulation as a rebuttable presumption. *Id.* at 499-500. Here, defendant has failed to rebut the presumption that his acquiescence to the continued assignment of his wages for up to two years after the expiration of the limitation period amounted to an implied new promise to pay. These voluntary payouts made subsequent to the expiration of the statute of limitations also causes this case to fall within the holding of *Alpena, supra*. Accordingly, we conclude that he waived the right to assert a statute of limitation defense to avoid enforcement of his child support obligation.

Defendant contends that any wage assignments pursuant to the order of income withholding cannot constitute a voluntary waiver of the statute of limitation defense because they were not payments that he made of his own volition, but were instead made by operation of law. In *Durecki, supra* at 638-639, this Court rejected the argument that the partial payments made in that case were involuntary because they were made under duress to avoid being held in contempt of court. If child support payments made out of fear of being held in contempt are considered voluntary, it is reasonable to conclude that payments made to the friend of the court as a result of acquiescence to a wage assignment are also voluntary. We therefore reject defendant’s argument.

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Christopher M. Murray