

Rule 205.43 ensures a different brand of injustice

By Louis Sternberg

Family Court practitioners are accustomed to what could politely be called a rather lax approach to the procedural requirements set forth in the CPLR, Family Court Act, and the Administrative Rules. Unfortunately for all involved, a relatively unknown rule enacted in 2001 has suddenly become strictly enforced by the Suffolk County Family Court. That rule, 22 NYCRR 205.43, provides, inter alia, (1) petitions alleging a willful violation of a support order must be scheduled for a first appearance within 30 days of filing; (2) “[a]fter service is made, [the court must] commence a hearing to determine a willful violation within 30 days of the date noticed in the summons;” (3) “no adjournment shall be in excess of 14 days,” but if the hearing has commenced then “the adjourned date shall be within seven court days,” and (4) “[u]pon the conclusion of a willfulness hearing in a case heard by a support magistrate, the support magistrate shall issue written findings of fact within five court days.” Notably, there is no provision for a waiver of these timelines even upon the consent of the parties.

The recent strict adherence to these rules seems to stem from administrative an edict resulting from a class-action Article 78 proceeding in New York

County captioned as *Liz Martinez v. Janet DiFiore*. The still-pending suit alleges that after being laid off from her job, Ms. Martinez (who is the custodial parent of three children, including one with “significant special needs”), sought to enforce her support order against the children’s father, who owed nearly \$28,000. She filed a petition on Oct. 26, 2015. After numerous adjournments, the case was tried in November of 2016, and the matter was then referred to a judicial part based on a recommendation of incarceration. The matter was again adjourned after a purge amount of \$3,000 was ordered. Subsequently, the father paid an undisclosed sum less than the full \$3,000, whereupon the matter was “deemed terminated.” The essence of the suit is that Ms. Martinez was denied justice by the Family Court’s endless delays and violations of Rule 205.43.

Ms. Martinez’s Family Court experience is certainly shocking and a miscarriage of justice. Reasonable guidelines must be implemented to ensure that cases are resolved in timely fashion but Rule 205.43 ensures a different brand of injustice — one in which respondents and their counsel are given a wholly inadequate period of time to prepare a defense in cases.



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The newly-abridged period between commencement and trial will likely render respondents unable to obtain many of the documents essential for their defense. It is my belief that, in contravention of the rule’s goal of protecting the custodial parent, the courts will now be more hesitant to incarcerate a respondent who, by virtue of the severely restricted time to prepare for hearing, is unable to obtain competent documentary evidence. And, as all practitioners know, when the threat of incarceration dissipates, so does the likelihood of payment of the arrears.

Similarly, strict enforcement of 205.43’s timing requirements could actually have a deleterious effect on the custodial parents’ ultimate goal — compliance and payment of arrears. Respondents now have precious little time to find employment, to borrow funds or utilize any other mechanism that might enable payments towards the account.

Petitioners’ ability to properly prosecute their cases will also be minimized by enforcement of the rule. By way of example, a petitioner may have insufficient time to subpoena bank records of a respondent which often belie the inevitable self-serving claims of poverty offered at nearly every violation hearing.

In addition, the ancillary repercussions of adherence to Rule 205.43 can readily be seen in Suffolk County Fam-

ily Courts. With violation proceedings receiving what is essentially statutory preference, all other matters heard by Support Magistrates are now relegated to a lesser position and are more frequently delayed. In other words, Rule 205.43 has prioritized the parent seeking to enforce an order over the parent seeking to simply establish an order of support.

Enforcement of Rule 205.43 also gives rise to concerns of constitutional violations. Specifically, it is hard to fathom that providing a respondent with only 30 days to compile compelling and admissible evidence comports with the requirements of due process, especially when, after a violation is established, the respondent — not petitioner — has the burden of rebutting the presumption of a willful violation. *Powers v. Powers*, 86 N.Y.2d 63 (1995).

Rule 205.43 is undoubtedly noble in its purpose. It seeks to prevent further abuses by non-custodial parents who frequently obfuscate and delay the determination of their support violation cases. Ultimately though, enforcement of Rule 205.43 will likely harm both petitioners and respondents in Suffolk County where cases were resolved relatively expeditiously long before anyone heard of Liz Martinez.

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