

THE PRACTITIONER

BY MITCHELL A. JACOBS AND GRACE ABUJAMRA OLIVEREZ

Hide and Seek

The Unconditional Nature of Support for Minor Children

In *Marriage of Comer*, 28 Cal.App.4th 895 (1996), the California Supreme Court ordered a noncustodial parent to pay child-support arrearages and reimburse the county for Aid-to-Families-With-Dependent-Children payments, notwithstanding evidence the custodial parent actively concealed the children. Previously, when a noncustodial parent successfully proved the custodial parent concealed the minor child, he established a successful defense against an action for child-support arrearages. This defense, however, is not absolute and the law continues to limit its applicability.

Comer arose after *Marriage of Damico*, 7 Cal.4th 673 (1994), held that a custodial parent's concealment of her own and the child's whereabouts until the child reached majority age may estop him from seeking child support arrearages that accumulated during the concealment.

In *Damico*, the parties dissolved their marriage in 1960, and the father was ordered to pay child support. In 1979, after the minor child was an adult, the mother sued the father for the accrued child support arrearages. The father argued that from 1960 to 1979 the mother actively concealed herself and the child from him. The trial court refused to consider the father's "concealment defense," ordering him to pay the entire amount of arrearages, plus interest. The appellate court reversed.

The California Supreme Court affirmed. It reasoned that a parent who conceals a minor child until she reaches adulthood should be estopped from seeking support arrearages, because the purpose of support, to benefit the minor child, was defeated when the child reached majority age. In so holding, *Damico* assumed that a child's unmet needs, over a period of time, could not be remedied by collecting support arrearages after the child becomes an adult.

The *Damico* court left two issues unanswered: Whether a custodial parent can be estopped from collecting child-support arrearages when concealment terminates while the child is still a minor, and whether the county, as assignee of the child's support right, can be estopped from seeking AFDC benefit reimbursement if a custodial parent's active concealment terminates during the child's minority. The Supreme Court analyzed these questions in *Comer*, and the answer to both was no.

In *Comer*, the parties lived in Florida until 1985, when the mother and children relocated

to Arizona. The father was still in Florida when he received an Arizona judgment of dissolution entered by default in March 1985. The default judgment ordered the father to pay \$350 for each child per month. There was no disclosure in the judgment or otherwise as to where the mother and minor children were residing in Arizona.

The father paid no support from March 1985 to September 1992 when he paid \$100, and October 1992 when he paid an additional \$300. During the 7½-year period, the mother received AFDC benefits for the minors. She filed an action in or about November 1992 in Gila County, Ariz., seeking current child support and arrearages. The father had moved to Orange County.

The Orange County district attorney's office filed an action under Welfare Code Sections 11350, 11350.1 and 11475.1, in the name of Gila County, Ariz., on behalf of the children to recover arrearages in support payments.

In response, the father in *Comer* presented evidence that the mother actively concealed the minor children's and her whereabouts from 1985 to 1992. He testified that, during the initial period, his only contact with the minors was by telephone when the children visited their maternal grandparents' home. In 1987, when the father moved from Florida to California, he stopped in Arizona to visit the children. But, the father claimed, the mother prevented the reunion. He remained in touch with the mother's parents, knowing that his children frequently visited them.

The father also advised the court that he believed the mother warned her parents that if they informed him of their address or the children's address, the mother would never permit them to see their grandchildren again. The situation continued in this fashion until Septem-

The concealment defense is not absolute, and the law continues to limit its applicability.

ber 1992, when the father's oldest son telephoned him and provided him with the mother's new name and the address where she and the children resided.

Upon hearing this evidence, the trial court ordered the father to pay child support for the time he was actually in contact with the mother, thereby rejecting the prosecutor's argument that the father owed approximately \$64,000 for welfare reimbursements and support arrearages dating back to 1985. The court also found no support arrearages were due from 1985 to September 1992 since the mother's active concealment of her and the children's whereabouts prevented the father from sending support payments and effecting personal service upon the mother to obtain a modification of the support order.

The district attorney's office appealed, claiming the father's child-concealment defense was not established nor available. The appellate court rejected the claim and affirmed the trial court, holding that the mother's concealment estopped Gila County from collecting support arrearages.

The Supreme Court reversed, remanding the matter for determination of the amount of support arrearages and reimbursements owed. *Comer* was distinguished from *Damico*, as the court found that in *Comer* the concealment terminated when the children were minors, and they could benefit from the father's payment of arrearages.

Comer relied on statutes and cases that mandate paramount consideration be given to a parent's obligation for child support. For example, Family Code Section 3556 states in pertinent part: "The existence or enforcement of a duty of support owed by a noncustodial parent for the support of a minor child is not affected by failure or refusal by the custodial parent to implement any rights as to custody or visitation

granted by a court to the noncustodial parent." In addition, Family Code Section 4845(b) states that enforcement of a support duty owed to one obligee is unaffected by any interference by another obligee with custody and visitation rights granted by the court.

Moffat v. Moffat, 27 Cal.3d 645 (1980) held that the child's sustenance is the "paramount consideration" and depriving a noncustodial parent of visitation rights should not diminish that parent's obligation to provide child support. The *Comer* court found that when children are receiving public assistance for any substantial period, it is presumed that certain needs are being met only at a minimal level. When lengthy dependence exists, there is the likelihood of an "accumulation of unmet needs."

The father reiterated that he could have provided for some of his children's unmet needs but for the mother's conduct, and that he should not, in equity, be made to reimburse the expenses. The Supreme Court rejected that, finding that the father "has had use of the money in the past but his children's needs are in the present and surely exceed the amount of the current order of support."

The *Comer* court also found that a county or other governmental entity as assignee of a custodial parent's right to receive court-ordered child support cannot be estopped from collecting such arrearages, based upon the custodial parent's concealment of the child. "If the county furnishes support to the child, the county has the same right as the child to secure reimbursement and obtain continuing support."

Comer takes the *Damico* holding one step further by limiting a noncustodial parent's defense of active concealment to an action for child-support arrearages.

It seems clear based upon *Damico* and *Comer* that conduct hindering a noncustodial parent's ability to see his or her children does not affect a support obligation. But how can a noncustodial parent fulfill the obligations if the custodial parent successfully conceals the children's and his or her whereabouts? What is the noncustodial parent's obligation to find the custodial parent and minor children to terminate concealment?

Perhaps the safest course in these instances is to advise the payor parent, if possible, to set aside funds for the required child-support payments until the concealment ends. To avoid further problems, the noncustodial payor-parent can seek redress by challenging the custodial parent's fitness and ability to be the children's legal custodian.



Mitchell A. Jacobs, a certified family law specialist in Los Angeles, limits his practice to dissolution and other family law matters. Grace Abujamra Oliveres is a family law attorney with the Law Offices of Mitchell A. Jacobs.