

**IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA**

Dianne Kay Dunnuck,)
aka Dianne Kappleman,)

Plaintiff and Appellant,)

vs.)

Thomas Edward Dunnuck,)

Defendant and Appellee.)

BRIEF OF APPELLANT

Supreme Court File No. 20060126

**Appeal from Order on Plaintiff's Motion to Modify Child Support
from the Cass County District Court**

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STATEMENT OF THE ISSUES

The issues presented for review are:

- I. **Is That Portion of Conclusion of Law B in Which the Trial Court Stated That Diane Must Show a Material Change of Circumstances Prior to Modifying Thomas' Child Support Obligation Clearly Erroneous and Contrary to Law?**
- II. **Is the Trial Court's Conclusion That a Portion of Thomas' Income Should be Excluded When Calculating His Child Support Obligation Clearly Erroneous?**

STATEMENT OF THE CASE

The parties, Dianne Kappleman ("Dianne") and Thomas Dunnuck ("Thomas") were divorced on April 21, 2004. (App. 4-14). Following entry of the divorce Judgment and Decree, on October 4, 2004, the parties entered into a stipulation to amend Thomas' visitation schedule. (App. 15-18). An Amended Judgment and Decree was entered on November 9, 2004, incorporating the stipulation of the parties. (App. 19-29).

On January 20, 2005, Dianne brought a motion to amend the visitation provision of the parties' Amended Judgment and Decree. (App. 30-31). On February 4, 2005, Thomas brought a motion to modify the visitation provisions of the Amended Judgment and Decree. (App. 32-40). Referee's Findings of Fact, Conclusions of Law and Order were entered on May 9, 2005. (App. 41-45). Thomas requested district court review. (App. 47-54). An Order on Request for Review was entered on September 20, 2005. (App. 55-58). Referee's Amended Findings of Fact, Conclusions of Law and Order were entered on October 5, 2005. (App. 59-66). Thomas requested review of the Referee's Amended Findings of Fact, Conclusions of Law and Order on October 10, 2005. (App.

68-70). An Order on Request for Review of Referee's Amended Findings of Fact, Conclusions of Law and Order was entered on November 7, 2005. (App. 71-73). A Second Amended Judgment was entered on November 10, 2005. (App. 74-85). A Third Amended Judgment was entered on November 21, 2005. (App. 86-97). Dianne brought a motion to modify child support on November 23, 2005. (App. 116). An order denying Dianne's motion to modify child support was entered on March 7, 2006. (App.117-119). Dianne requested reconsideration on March 16, 2006. (App.120). An Order denying Dianne's motion for reconsideration was entered on March 31, 2006. (App. 121). Dianne served and filed a Notice of Appeal on April 26, 2006. (App.122)

STATEMENT OF THE FACTS

Appellant, Dianne Kappleman, f/k/a Dianne Kay Dunnuck ("Dianne") and Appellee, Thomas Edward Dunnuck ("Thomas") were divorced on April 21, 2004. (Trans. p. 8, ll. 2-4). Dianne was granted custody of the parties' three minor children. (App. 5). Thomas was ordered to pay child support. (App. 8). Following entry of the divorce Judgment, the parties entered into a stipulation to modify Thomas' visitation schedule. (App. 15-18). An Amended Judgment and Decree was entered on November 9, 2004, incorporating the stipulation of the parties. (App. 19-29). A Second Amended Judgment incorporating modifications to Thomas' visitation schedule was entered on November 10, 2005. (App. 74-85). A Third Amended Judgment was entered on November 21, 2005, to correct a clerical mistake. (App. 86-97). Neither the Second Amended Judgment nor the Third Amended Judgment modified in any manner, Thomas' child support obligation. (App. 74-97).

Dianne brought a Motion to Modify Child Support on November 23, 2005, more than one year following entry of the parties' original divorce Judgment and Decree. (App.116). A hearing was held on January 18, 2006. (Trans. p. 1). An Order denying Dianne's Motion to Modify Child Support was entered on March 7, 2006. (App.117-119).

LAW AND ARGUMENT

I. The Trial Court's Conclusion of Law that Dianne was Required to Show a Material Change of Circumstances Prior to Modifying Thomas' Child Support Obligation is Clearly Erroneous and Contrary to Law.

Modification of child support is governed by Section 14-09-08.4 of the N.D.C.C.

This statute provides in part as follows:

If a child support order sought to be amended was entered at least one year before the filing of a motion or petition for amendment, the Court shall order the amendment of the child support order to conform the amount of child support payment to that required under the child support guidelines, whether or not the motion or petition for amendment arises out of a periodic review of a child support order, and whether or not a material change of circumstances has taken place. . .if a motion or petition for amendment is filed within one (1) year of the entry of the order sought to be amended, the party seeking amendment must show a material change of circumstances.

The North Dakota Supreme Court addressed modification of child support in Oien v. Oien, 2005 ND 205, 706 N.W.2d 81. In Oien, the North Dakota Supreme Court stated as follows:

Under NDCC 14-09-08.4(3), the unit is authorized to seek modification of a prior child support order if the amount ordered is inconsistent with the guidelines. If the prior order was entered at least one (1) year before the motion to

modify, the trial court must apply the guidelines and order support in the presumptively correct amount, unless the presumption is rebutted.

In this case, the parties' original divorce Judgment and Decree was entered on April 21, 2004. (App. 4-14). The original divorce judgment established Thomas' child support obligation to Dianne. (App. 8). Thomas' child support obligation has never been modified. (App. 74-97).

Dianne's Motion to Modify Child Support was brought on November 23, 2005, over one year since entry of the Thomas' current child support obligation. (App.116). Since Dianne's Motion to Modify Child Support was made more than one year after the establishment of the Thomas' current child support obligation, Dianne was not required to show a significant change of circumstance. Rather, the trial court was required to apply the guidelines and order child support in the presumptively correct amount. Accordingly, the trial court's order denying Dianne's motion to modify child support in which the trial court concluded Dianne was required to show a change of circumstances is clearly erroneous and contrary to law.

II. The Trial Court's Conclusion that a Portion of Thomas' Income Should be Excluded When Calculating His Child Support Obligation is Clearly Erroneous.

In North Dakota income is broadly defined under Section 14-09-09.10(9) of the N.D.C.C. This statute provides in part as follows:

Any form of payment, regardless of source, owed to an obligor, including any earned, unearned, taxable or non-taxable income, workforce safety and insurance benefits, disability benefits, unemployment compensation benefits,

annuity and retirement benefits but excluding public assistance benefits administered under state law.

Following the hearing in this case, the North Dakota Supreme Court addressed this issue recently in Berge v. Berge, 2006 ND 46, 710 N.W.2d 417. In Berge, North Dakota Supreme Court stated as follows:

Under the child support guidelines, all-inclusive definition of gross income of this court has consistently held that non-recurrent payments are includable in an obligor's income for determining child support. In Otterson v. Otterson, 1997 ND 232, ¶20, 571 N.W.2d 648, we held that proceeds from a personal injury settlement must be considered in calculating the obligor's income for child support purposes. In Longtine v. Yeado, 1997 ND166 ¶9, 567 N.W.2d 819, we concluded that profits from an auction sale of farm machinery and the capital gain from insurance proceeds from a fire that destroyed the parties' former homestead must be considered in determining the obligor's child support income. In Helbling v. Helbling, 541 N.W.2d 443, 447 (ND 1955), this Court concluded that excess reimbursed relocation expenses paid by the obligor's employer must also be considered under the broad definition of gross income contained in the child support guidelines. As we said in Otterson, at ¶17, the "guidelines do not authorize a deduction for non-recurrent payments, and our law and public policy dictate that children should share in the obligor's receipt of such payments."

The Supreme Court concluded in Berge as follows at ¶16,:

Neither the guidelines nor this Court's precedents allow non-recurrent payments to be simply ignored in determining an obligor's child support obligation.

In this case, Dianne requested the trial court to enter a child support obligation based upon Thomas' income from all sources, as reflected on his 2005 income tax return. (App. 98-115). The trial court concluded that it was appropriate to exclude a portion of

Thomas' income from his child support computation. (App. 117-119). Conclusion of Law B provides, in part, as follows: "The computation structure for the bonuses has not changed, and Plaintiff receives a percentage payment from each of Defendant's bonuses; therefore, it is not additional income to be included for child support calculations. Defendant's testimony in regard to his paystub and liquidation of life insurance policies reflects that Plaintiff and the children received benefit of this income either during the marriage, or shortly after the divorce. In essence, Plaintiff wants to 'double-dip,' by receiving the benefit of income and then asking the Court to include the same income for child support calculations." (App.118-119).

The trial court's determination that a portion of Thomas' taxable income should be excluded when calculating his child support obligation is clearly erroneous. (App.117-119).

CONCLUSION

Appellant, Dianne Kappleman, f/k/a Dianne Kay Dunnuck, respectfully requests that the Court reverse the trial court's order denying her motion to modify child support dated March 7, 2006.

Dated this 9th day of June, 2006.

/s/ Robert J. Schultz

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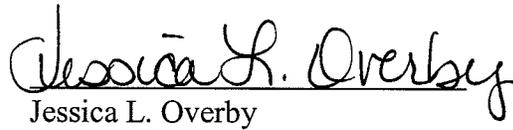
**CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS**

I, JESSICA L. OVERBY, hereby certified that on the 9th day of June, 2006, I served the following documents on appellee by electronic means by forwarding them to appellee's attorney at sellison@ohnstadlaw.com:

BRIEF OF APPELLANT

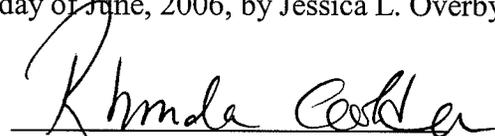
and

APPENDIX


Jessica L. Overby

Subscribed and sworn to before me this 9th day of June, 2006, by Jessica L. Overby.

(SEAL)


Notary Public
State of North Dakota

