

ORIGINAL

RECEIVED BY CLERK
SUPREME COURT NOV 29 2004

IN SUPREME COURT

STATE OF NORTH DAKOTA

20040268-20040270

State of North Dakota,)
)
Plaintiff - Appellee,)
)
vs.)
)
Milton T. Stoppleworth, Jr.,)
)
Defendant - Appellant.)

SUPREME COURT NO. 20040268

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

NOV 26 2004

STATE OF NORTH DAKOTA

BRIEF OF APPELLANT

APPEAL FROM ORDER OF DENYING MOTION
FOR REDUCTION OF CHILD SUPPORT

Dated August 27, 2004

The Honorable John T. Paulson

SOUTHEAST JUDICIAL DISTRICT

Case No. 97-R-1106

Milton T. Stoppleworth, Jr., Pro Se
JRCC
2521 Circle Drive
Jamestown, North Dakota
58401

STATEMENT OF THE ISSUE

Whether the lower court erred in ordering a denial of the Defendant's Motion for Reduction of Child Support by failing to accept all supported information of evidence regarding the obligor is without financial resources.

STATEMENT OF THE CASE

The defendant, Milton T. Stoppleworth, appeals from his order denying his motion for reduction of child support.

On September 13, 2004. The court had received documents of motioning the court to modify child support. Among the paperwork submitted was: Notice of Motion, Motion and Brief in Support, Finding of Facts, Supporting Affidavit, Inmate Access Account, Form C of average income, application to proceed in Forma Pauperis and Petition/Order for the Judge to sign allowing to proceed as an indigent party.

On August 4, 2004. The State moved the defendant's motion to modify the judgment to be denied. It was further ordered, that the motion to have child support reviewed is in all things denied, dated the 27th day of August, 2004, by the Court.

LAW AND ARGUMENT

In the most fundamental terms, the defendant has provided financial resources and calculations which would warrant a child support reduction. Utilizing up the prior thirty-six (36) months of "circumstances" based on the imputation of the N.D.A.C. § 75-02-04.1-07 (3) (c):

An amount equal to ninety percent of the obligor's greatest average gross monthly earnings in any twelve (12) consecutive months beginning on or after thirty-six (36) months before commencement of the proceeding before the court, for which reliable evidence is provided.

Even imputation has limitations while the law is merely an interpretation as it is applied to specific circumstances as of "undue hardships" on obligor. which comes from years of support obligations the obligor can not meet and will be a burden upon his release.

To assist the court in determining the amount a parent should be expected to contribute toward the support of a child does not require a "must" for the court to follow. Calculation (by regulation) is presumptively correct, only at face, unless other evidence is presented to mitigate such income or lack of income. Earning capacity applied as proof in instant where earning information is available to the court for determination. Earnings do not have to be imputed when information is available.

Obligor is seeking a modification for his support obligation based upon the fact that he is currently incarcerated and suffers from a disability sufficient in severity to reasonably preclude

the obligor from gainful employment that produces average monthly gross earnings equal to one hundred sixty-seven times the hourly federal minimum wage. Which shows from prior past incarcerations and the anticipated release date of May 19, 2010. As a result he has virtually no income as shown in the Inmate Account Detail previously filed with the trial court.

Given that obligors are currently unemployed or underemployed income must be imputed "when no available resources are provided". NDAC § 75-02-04.1-07, Surerus v. Matuska, 548 NW 2d 384, 387 (ND 1996)/Ramsey County Social Service Board v. Kamara, (2002 ND) 192 ¶ 911, 653 NW 2d 693.

There is nothing in the Matuska or Kamara decisions which limit the income imputed under NDAC § 75-02-04.1-07 to a minimum wage amount. Imputation in a greater amount is available, but there must be adequate information presented by a party to support such a calculation, Nelson v. Nelson, 547 NW 2d 741 (ND 1996).

In Surerus v. Matuska, very specific and finite circumstances existed for the court to make its determination. These same kind of circumstances do not exist in this case. The only thing in common is both obligor's incarceration. Matuska's income was well above minimum wage and showed income of prior thirty-six months. In this case there is evidence to support a finding that income should be scheduled under NDAC § 75-02-04.1-10. Obligor's monthly net income \$100.00 or less for three children; \$20.00 per month.

"A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence." NDREv 301 (a). This case is submitted

to the trial court on information about his ability to pay child support and to rebut the presumptively-correct amount calculated by the child support unit. Also, that the amount he pays currently in the application of the guidelines would be unjust and inappropriate ... as determined under criteria established by the State.

Under NDCC § 50-09-01 (16), 50-09-02 (16) and 50-09-03 (5), the North Dakota Department of Human Services and County Social Services Board must administer their child support enforcement programs in conformity with title IV-D of the Social Security Act, 42 USC § 651 et seq. Section 667 (b) (2), which provide:

There shall be a rebuttable presumption, in any judicial or any administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

The Federal Statutes relating to child support and the Supremacy Clause of the US Constitution do not authorize a judgment based upon a non-rebuttable mandatory minimum child support order of \$168 (due to imputation of income), and they forbid it.

42 USC 667 (b) (2); In re marriage of Gilbert, 88 Wash. App. 362,945 P. 2d 238, 242 (1997) (The Federal Mandate gives the prisoner and parent the right to rebut any presumed support amount all the way down to zero, by showing a lack of income with which to pay).

The court in Gilbert said Washington's mandatory minimum child support obligation of \$25.00 per month conflicts on its face with 42 USC § 667 (b) (2)'s requirement of a rebuttable presumption. The court remanded for further proceedings and ordered that "courts in Washington are required by the Supremacy Clause to treat the mandatory presumption contained in RCW 26.19.065 (2) and related statutes as a rebuttable rather than a mandatory presumption ." Gilbert at 244. See also Rose ex rel. Clancy v. Moody, 83 NY 2d 65, 607 N.Y.S. 2d 906, 629 NE 2d 378, 380 (1993) (By establishing an irrebuttable minimum of \$25.00 ... the State treads on the Federal mandate which gives a noncustodial parent the right to rebut any presumed support amount, all the way down to zero, by showing inability to pay".)

Imputing income is by definition "creating something where nothing exists" and is fundamentally "unjust" when applied to the creating income that can not exist for any other purpose. voluntary or self-induced do not preclude that a change of circumstance exist Even though voluntary or self-induced do not warrant a reduction, change of circumstances does. Also, to advise the court this is not a temporary change of circumstances, due to the anticipated release date of May 19, 2010. Obligor cites the State v. Foster, File No. 09-02-C-0596 (ND 2004) has reduced child support obligation down to \$15.00 per month, due to anticipated release date. Having provided financial resources and assets. The Obligor's motion to have his child support reviewed should be granted.

Dated this 22nd day of November, 2004.


Milton Stoppeworth, PRO SE
2521 Circle Drive
Jamestown, ND 58401

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the above documents was on the 24th day of November, 2004. I mailed eight (8) copies to:

Clerk of Supreme Court
600 E. Boulevard Ave.
Dept 180
Bismarck, ND 58505-0530

and mailed one copy to:

Mr. Mark S. Douglas
Attorney for the South Central
Child Support Enforcement Unit
P.O. Box 427
Jamestown, ND 58402-0427

and depositing said envelope in the mail, at JRCC, 2521 Circle Drive, Jamestown, ND 58401

By the Appellant:

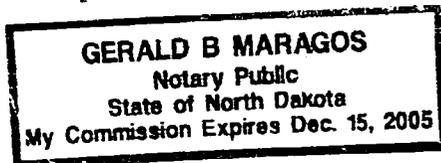

Milton T. Stopplesworth, Jr.
2521 Circle Drive
Jamestown, ND 58401

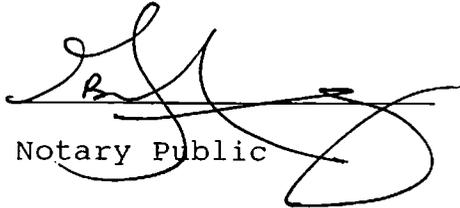
11-24-04

Subscribed & Sworn to me this 24th Day of November of 2004.

Dec. 15, 2005

My Commission Expires:




Notary Public