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STATE OF NORTH DAKOTA

IN THE

SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA

TINA ANDREA JOHNSON n/k/a TINA ANDREA BERNDT,	)	
Plaintiff/Appellee,	)	Supreme Court No. 20170010
-Vs-	)	Civil No. 25-2013-DM-00047
MATTHEW VAUGHN JOHNSON,	)	
Defendant/Appellant.	)	

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT ENTERED ON DECEMBER 1, 2016
BY THE DISTRICT COURT
MCHENRY COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT
CIVIL NO. 25-2013-DM-00047
THE HONORABLE LEE CHRISTOFFERSON, PRESIDING

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[¶3] May a trial court change tax deduction allocations of minor children, when the obligor had admitted he has not paid his child support as ordered?

STATEMENT OF THE CASE

[¶4] The statement of the case as presented by the Appellant is in some respects inaccurate. It is correct that this is an appeal of an order issued by the trial court in which the tax deductions were changed from that as ordered in the original judgment, but other portions are incomplete.

[¶5] It is correct that Appellee did file a motion to amend the tax deduction due to the fact that the Appellant was often behind in this child support; that he rarely had any time wherein he had the children, thus relieving the Appellee of the financial burden of the child for the days in which the Appellant had the children. What is in error is that the Appellant indicated that he was only behind in the months of March and June of 2016 in which he paid about 11% of his monthly obligation when in fact, in the month of August of 2016, he also made no payment for his child support what so ever. The Appellant's own exhibit [Appellant's Appendix, Pages 27-28] indicated he was also not current in November of 2015. He only paid his child support once timely and was late almost consistently.

[¶6] The moving documents were served upon the Appellant and his counsel requested additional time in which to respond. The Appellant did not provide an order for the additional time as required under the Rules. The Court did not issue a written order granting the extension of time to file the responsive documents. Even if the Court had granted the additional time, the Appellant did not file his responsive documents within the time frame that he had requested as an extension.

STATEMENT OF THE FACTS

[¶7] This history of the parties has been set forth in the Appellants Statement of Facts. The present issue is the Appellee's Motion to Enforce Judgment which required the Appellant to pay the debt on the vehicle he was awarded in the divorce, and which was subsequently repossessed leaving a deficiency. The second part of the motion was to change the tax deductions due to the Appellant not paying his child support on time and not exercising his parenting time, thus leaving the financial obligation for such parenting time with the Appellee.

[¶8] The Motion, Notice of Motion and Brief in Support of Motion were served by a Sheriff on November 3, 2016. [Appendix, Page 1] The Appellant did not have an attorney in the divorce but stipulated to the terms of the divorce [Appellant's Appendix, Pages 3 - 8]. The Notice of Motion [Appellant's Appendix, Pages 9 - 11] included the language set out in Rule 3.2 of the North Dakota Rules of Court.

[¶9] On November 16, 2016, Appellant filed a Request to Extend Deadline to Respond to Motion. [Appendix, Page 2] The Appellant did not provide an Order form for the extension of time as required under Rule 3.2 (d) NDRCt. The trial court did not issue a written order granting the extension as required under Rule 3.2 (d) NDRCt. The Request as filed by the Appellant asked that he be permitted to file his response by November 28, 2016.

[¶10] The Appellant did not file his Brief in Response until November 29, 2016, one day after his requested extended time. [Appendix, Page 3]

[¶11] The issue of the payment for the deficiency had been resolved by the Appellant making his payment after the motion was served. Without hearing, the Court granted the motion to change the tax deductions. This appeal followed.

LAW AND ARGUMENT

Did the Appellant properly request an extension of time in which to file responsive documents to Appellee's 3.2 Motion?

[¶12] The moving documents were served upon the Appellant on November 3, 2016. Under the provisions of the rule, he is required to serve and file his responsive brief, affidavits and other supporting documents within 14 days of service. NDRCt. 3.2(a) (2). The 14 days would have elapsed on November 17, 2016. As he has a right to do, the Appellant can request additional time, however, the methodology for such extension is set forth with specificity. The Rule states: 'Extensions of time for filing briefs and other supporting papers, or for the continuance of the hearing on a motion, may be granted only by written order of the court. All requests for extension of time or continuance whether written or oral, must be accompanied by an appropriate order form.' Rule 3.2 (d) NDRCt.

[¶13] The trial court did not grant an extension of the time to file the responsive papers as required in the rule. The Appellant did not provide the trial court with such proposed order form, thus, the trial court did not grant such order. If such order was not granted, the time to file responsive documents expired on November 17, 2016.

[¶14] Even if the trial court had granted the extension of time, the time requested by the Appellant was to file his responsive documents by November 28th. He did not file his responsive documents by the due date [if one had been ordered]. Nowhere in the Rule is there a provision that a party may file responsive documents outside of the strict provisions and time limits of the rule.

[¶15] Rule 3.2 (c) NDRCt. Provides that if an opposing party fails to file a brief, that fact may be deemed an admission by the opposing party or counsel that the motion is meritorious. Appellant's failure to timely file his responsive documents, whether by the limits of the original rule, or by any court ordered extension, gave the Court the option to grant the motion without further proceedings.

Did the Appellant's failure to file his responsive documents within the additional time if the same had been granted by the Court, waive his right to a hearing?

[¶16] It is acknowledged that the Appellee did request and obtain a hearing date. However, the failure of the Appellant to file his responsive brief and documents is the same as a non-appearance. A trial court is not required to conduct a hearing when the opposing party has not properly responded to the pending motion. This is similar to when a party does not respond to a Motion for Default Judgment under Rule 55 N.D.R. Civ. P. This Court has held that a party who has made no response or appearance in the action is not entitled to a notice

of intent to take a default judgment. *First National Bank v Hoggarth*, 331 NW2d 271 (ND 1983)

[¶17] Rule 3.2 (a) (3) NDRCt. provides that 'If a party who has timely served and filed a brief requests oral argument, the request must be granted.' {emphasis added} The key here is that in order for a party to request a hearing they must have first properly and timely filed a brief. As indicated in the preceding discussion, Appellant did not timely file a brief, in fact his brief was not filed either as originally required under the rule, or even if there had been extension, he still did not timely file a brief and thus, was not permitted to request a hearing.

[¶18] Appellant argues that since the Appellee has acquired a hearing date, the Court could not issue its order without first conducting a hearing. We are unable to find any statute, rule or case that so provides. We do find numerous cases that indicate that the failure to [timely] respond to a motion is deemed an admission that the motion is meritorious. *Vorachek v Citizens State Bank*, 421 NW2d 45 (ND 1988)

[¶19] Since the Appellant could not obtain a hearing date, and he has admitted that the motion is meritorious, there is no restriction on a trial court granting the motion without hearing.

May a trial court change tax deduction allocations of minor children, when the obligor had admitted he has not paid his child support as ordered?

[¶20] Before we begin our analysis of allocation of tax deductions, we wish to address the Appellant's Brief. In ¶13 of his brief, in the last sentence, he states "Therefore, the Court finding that Tina should be awarded the income tax exemptions for two of the minor children indefinitely is clearly erroneous, as there is no evidence to support the findings. Rustad v Rustad, 2013 ND 185, ¶5, 838 NW2d. 421." The *Rustad* case he has cited has nothing to do with tax exemption allocation.

[¶21] The case of *Rustad v Rustad*, 2013 ND 185, 838 NW2d 421 [*Rustad I*] had three issues, custody, property valuation and spousal support. There is nothing in this case that addresses tax exemptions or deductions. After *Rustad I* was issued by this Court, the matter was remanded to the trial court. After the trial court issued its decision, the case was again appealed to this court in *Rustad v Rustad*, 2014 ND 148, 849 NW2d 607 [*Rustad II*]. A review of *Rustad II* also does not refer to tax exemption allocation.

[¶22] We are unable to determine why Appellant referred to the *Rustad* cases since they have nothing to do with the issue in this matter.

[¶23] The Judgment provided that the Defendant was to pay his child support by the first day of each month. [Appellant's Appendix pg 5, paragraph 21]The Defendant's own documents indicate that in the 28 months indicated in his child support history, he made his support payments as required once and only once. All other months he either did not make any payment, or made a partial payment when due, or he did not have his monthly payment made until the last days of the month.[Appellant's Appendix 25-28]

[¶24] A parent who has the child living with him/her is almost always the parent who is paying the daycare expenses; the school expenses; the food, clothing and shelter expenses of the child; uninsured medical expenses; extra circular expenses and all other expenses for a child. Such parent must pay these expenses when they come due, quite often the first days of each month. Such parent cannot tell the day care provider or the local grocer that they cannot be paid until the end of the month because the obligor has not paid his child support and will not do so until the end of the month.

[¶25] Likewise, when a non-custodial parent takes the children for parenting time, the custodial parent is relieved of the financial burden of providing food, shelter, entertainment expenses and daycare for the child for those few days. Such expenses become the obligation of the non-custodial parent during his/her parenting time. It may only be a small amount, but over the years, these amounts add up to large amounts.

[¶26] One way for a Court to compensate a parent who has more of the financial burden of the child's needs, is to award that parent the tax deductions and exemptions, thus allowing such parent to receive some compensation by lessening the tax obligation.

[¶27] The issue of tax exemption allocation was first addressed in *Fleck v Fleck*, 427 NW2d 355, 358 (ND 1988) when the court reviewed the federal rules as to the allocation of income tax exemption for dependent children. This court determined that the federal rules required that the exemption go to the parent having custody for a greater portion of the year unless that parent waived that

right in writing. This court concluded that a trial court may allocate the exemption and may also order the other parent to execute necessary documents.

[¶28] After the *Fleck* decision, this Court addressed the issue as to whether the Tax Reform Act of 1984 which created the presumption that the custodial parent was entitled to the income tax dependency exemptions, divested the state courts jurisdiction of the discretion to award the exemption to the noncustodial parent. *McKenzie v Jahnke*, 432 NW2d 556 (ND 1988) This Court reversed the trial court, affirming *Fleck* and held that a trial court does have the authority to require one parent to sign the necessary forms to award the tax exemption to the other parent. The Court thus directed the trial court to consider granting the tax exemption privilege to the other parent.

[¶29] The next two cases that addressed the issue of tax exemption were *State ex. Rel. Younger v Bryant*, 465 NW2d 155 (ND 1991) and *Illies v Illies*, 462 NW2d 878 (ND 1990). In *Younger* this Court indicated that it has not required that a trial court grant the tax exemption to the party who would receive the most benefit. In *Younger* the parties were alternating the child exemption, but the income of the obligor was substantially increased by approximately 300% thus the trial court did award the exemption solely to the obligor. The Court further went on to indicate that if the obligor's income decreased, the trial court could reallocate that exemption.

[¶30] The case of *Illies* however appears to be more applicable to the current matter. The facts are somewhat convoluted. Mother and father were divorced with mother having the children for nine months and father for three months.

Father paid support when mother had the children and mother paid support when father had the children. Father received two exemptions and mother one exemption. Mother elected to go to college and her support payments were suspended during her education. Father was awarded three exemptions. Three years later when mother graduated, her income was substantially higher. Father continued to pay support, mother's obligation was terminated and father continued to have three exemptions.

[¶31] On appeal this Court determined that it will not require a trial court to place the exemption in the person who could most benefit from the exemption. It further went on that even though the trial court relieved mother of child support obligation, it was not required to provide her with an exemption.

[¶32] What this Court did not do in either *Younger* or *Illies* is to require that the exemption must go to the party paying support. [Emphasis added] These cases also did not prevent the trial court from granting the exemption to the parent who would benefit the most.

[¶33] Consider the facts of this case. The parties have three young children. The obligor's income provides child support in the sum of $596 for three children, which is less than $200 per child per month. A parent cannot raise a child in today's world on $200 per month or even twice that amount. The custodial parent counts on the other parent to provide the support when ordered so that rent can be paid, food and clothing can be purchased, utilities paid and other expenses.

[¶34] As in this case, the custodial parent counts on the non-custodial parent to take the children for his days of parenting time. Appellee stated that fact in her

Affidavit to the Trial Court. [Appellant Appendix 18] According to the judgment, Appellant should have the children for 52 days on weekends, 10 days of holiday and 21 days of summer for 83 days during the year. This amounts to 23% of the time he should be financially responsible for the costs of the children thus relieving Appellee of those days of expense. Appellant refuses to have his children with him, and gives no reason for such position. One can only assume he does not want the responsibility, both parenting and financially for the children for the 83 days.

[¶35] In her Affidavit, Appellee indicated to the Court that she was making this motion based in part due to the lack of his taking the children and being financially responsible for the children for the days awarded to him. Since the Appellant did not properly file a response to the Motion, a response that the Court could have considered, there was nothing for this Court to consider in response to the position of the Appellee on the Appellant's lack of taking financial responsibility of the children during parenting time.

[¶36] A review of the Appellant's Brief in Opposition [Appellant's Appendix 21-23] merely states that just because an obligor is behind in his payments, the court cannot change the exemption, and since the obligor was at that time current in his support that the court did not have the legal authority to change the exemption. [Actually, the moving papers were served on the Appellants on November 3rd and he did not bring his arrearage current until two days after the service].

[¶37] The Appellant never argued to the Court that even though he was behind in his payments, or late in his payments, and he was not taking the children as ordered, and thus did not have any financial obligation to support the children when they were with him. We believe it is not permitted to take such a position in an appeal.

SUMMARY

[¶38] The Appellant never obtained the mandatory order for extension of time to respond to the Rule 3.2 motion as he failed to provide the trial court with the mandatory required order. Even if such extension was granted, the Appellant did not file a responsive brief timely and never filed any Affidavit in response to the Motion. Appellant cannot have a hearing if he did not properly file a responsive brief. A trial court has the legal authority to award tax exemptions for dependent children as the Court may determine. The trial court did not err in not conducting a hearing and did not err when it awarded the two exemptions to the Appellee.

CONCLUSION

[¶39] This Court should affirm the trial court.

[¶40] Respectfully submitted this 17th day of March, 2017.

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CERTIFICATE OF SERVICE

[¶41] The undersigned attorney makes this Certificate of Service pursuant to Rule 5 of the North Dakota Rules of Civil Procedure and certifies that a true and correct copy of the Brief of Appellee and Appellee's Appendix were served upon:

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by emailing the aforementioned documents via electronic mail to kcraig@ackrelaw.com on this 13th day of March, 2017.

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