Miller, Penny

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From:	(SUP) Clerk of Court Office
Sent:	Wednesday, October 07, 2015 4:22 PM
To:	Miller, Penny
Subject:	FW: Proposed amendments to court rules

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT
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STATE OF NORTH DAKOTA

Heather Keller
Deputy Clerk | North Dakota Supreme Court

From: Fleming, James C. [mailto:jfleming@nd.gov]
Sent: Wednesday, October 07, 2015 3:57 PM
To: (SUP) Clerk of Court Office
Subject: Proposed amendments to court rules

Dear Ms. Miller:

I write on behalf of the Child Support Division of the North Dakota Department of Human Services to express a concern regarding the proposed amendment to NDRCivP 5.

As a condition of participating in the federal Temporary Assistance to Needy Families and Child Support Enforcement programs, North Dakota must comply with numerous mandates. Many of these mandates are included in 42 USC § 666, including a requirement that the state have:

> Procedures under which—
>
> (i) each party to any paternity or child support proceeding is required (subject to privacy safeguards) to file with the State case registry upon entry of an order, and to update as appropriate, information on location and identity of the party, including social security number, residential and mailing addresses, telephone number, driver's license number, and name, address, and telephone number of employer; and
>
> (ii) in any subsequent child support enforcement action between the parties, upon sufficient showing that diligent effort has been made to ascertain the location of such a party, the court or administrative agency of competent jurisdiction shall deem State due process requirements for notice and service of process to be met with respect to the party, upon delivery of written notice to the most recent residential or employer address filed with the State case registry pursuant to clause (i).

42 USC § 666(c)(2). These mandates are implemented in NDCC § 14-09-08.1(2).

We believe the provision in § 666(c)(2)(ii) is limited to enforcement proceedings such as contempt hearings, and thus is not implicated by the proposed rule change. However, we want to bring this mandate to the court's attention in the event that the federal Office of Child Support Enforcement would disagree and feel that § 666(c)(2)(ii) applies equally to modification proceedings.

Aside from the need to comply with federal mandates, we see some practical implications of the proposal that should be considered by the court.

First, the proposed amendment undermines the responsibility of a parent under the terms of state law and the terms of every child support order to keep the State apprised of his or her current address. Rule 4 service is unnecessary for motions to modify child support unless the party has failed to honor the court order and state law by maintaining a current

address with the State. The majority opinion in Rowley v. Cleaver, 1999 ND 158, remains valid: Rule 4 service of a motion to modify is not necessary for the court to obtain jurisdiction over the motion, since the court has continuing jurisdiction to modify child support.

Second, the proposed amendment creates an incentive for the parent who believes he or she will be disadvantaged by the proposed modification of child support to evade service.

Third, personal service under Rule 4 in some parts of the state, particularly on Native American reservations and in the oil patch, can be extremely difficult. If workload or jurisdiction reasons impede the ability of the county sheriff to complete personal service, there is often no private process server who can be hired (or it is cost prohibitive to do so) and certified mail is often not successful when the current address is unknown. Service by publication is not a material improvement on Rule 5 service by regular mail.

Fourth, application of the proposed rule can vary from judge to judge and even case to case. The State currently experiences this problem with a few judges and referees who, despite, NDCC § 14-09-08.1(2)(c), either 1) will not sanction an obligor who fails to appear for a contempt hearing unless Rule 4 service is provided, or 2) direct the clerk of court not to schedule an enforcement hearing unless Rule 4 service is provided (which deprives litigants of a written order from which either an appeal or supervisory writ may be pursued). This experience is not directly connected to the proposed amendment, but is brought to the court's attention to show that there is a realistic risk of subjectivity if the proposed amendment is adopted.

Fifth, the proposed rule does not require that the court make a decision regarding the need for Rule 4 service prior to granting or denying the motion to modify. Hence, a litigant who knew about the hearing yet failed to respond to service of the motion under Rule 5 could later file a motion under Rule 60(b) asking the court to determine that Rule 4 service should have been provided, and that the failure to do so meant that service was inadequate and thus the resulting modification was void under Rule 60(b)(4). Since such a motion could be brought many years after the actual modification, such a motion, if granted by the court, could implicate many months' or years' worth of child support collections.

The child support program invites the court to consider whether the proposed change in Rule 5 to add (a)(4) is needed as applied to child support modifications. Throughout the life of a child support case, the State makes continued efforts to maintain a current address for each parent. There is no incentive for the State to exploit a parent's failure to maintain a current address with the child support program; to the contrary, maintaining a current address is key to ongoing communication in the hope of discouraging noncompliance, maintaining child support obligations at appropriate levels based on the current income or earning ability of the obligor, and encouraging collections. We suggest that proposed new (a)(4) be removed in its entirety, or at least amended to exclude child support proceedings.

Jim

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