

ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

_____)
 Esther Buffalo,)
)
 Plaintiff,)
)
 vs.)
)
 Warren Buffalo, Sr.,)
)
 Defendant.)
 _____)

Supreme Court No.: 980166

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 13 1998

STATE OF NORTH DAKOTA

 BRIEF OF APPELLEE
 SOUTHWEST AREA CHILD SUPPORT UNIT

APPEAL FROM ORDER TO AMEND JUDGMENT
 AND AMENDMENT TO JUDGMENT
 CIVIL NO.: 88C-163
 STARK COUNTY DISTRICT COURT
 SOUTHWEST JUDICIAL DISTRICT
 HONORABLE MAURICE R. HUNKE, JUDGE

Mr. Warren Buffalo, Sr.
 Pro Se
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STATEMENT OF ISSUES

- I. DID THE TRIAL COURT ERR IN GRANTING
THE CHILD SUPPORT UNIT'S MOTION TO
TERMINATE SUPPORT AND REIMBURSE
APPELLANT IN THE SUM OF \$80.00

- II DID THE APPELLANT MAKE A RECORD FROM
WHICH TO APPEAL

STATEMENT OF THE CASE

The Southwest Area Child Support Enforcement Unit contends that the "Statement of Facts" presented by the Appellant, Warren Buffalo, Sr., is inadequate for purposes of this appeal. This appeal comes as a result of the Southwest Area Child Support Enforcement Unit's ("The Child Support Unit") Motion and Brief dated March 11, 1998. (Appendix pg. 56). Said Motion and Brief requested that the District Court terminate Mr. Buffalo's current child support obligation of \$25.00 per month to his minor children because of an adoption which took place on September 1, 1992. The Child Support Unit further moved that \$80.00 retained by the State of North Dakota be returned to Mr. Buffalo. (Appendix pg. 56). The Motion and Brief also alleged that Esther Buffalo had been overpaid in the amount of \$1,130.00 since the date of the adoption. This determination was based on the Affidavit of Dora Jenson, submitted in support of the motion and brief. (Appendix pg. 58). The Child Support Unit did not move the Court for a Judgment against Esther Buffalo. (Appendix pg. 56).

District Court Judge Maurice R. Hunke signed the Order to Amend on April 6, 1998. Paulette Reule, Clerk of the

District Court, certified the Order on April 8, 1998. Service of the Motion was made upon Mr. Buffalo and Ms. Esther Erickson, f/k/a Esther Buffalo, by first class mail. (Appendix pg. 64). As indicated by the Notice, this motion was brought pursuant to Rule 3.2, N.D.R.O.C. (Appendix pg. 55). The record shows no response to the 3.2 motion. Instead, Mr. Buffalo directly appealed "from the final Judgment of this court, entered in this case on April 06, 1998. . ." (Appendix, pg. 69).

ARGUMENT

I.

DID THE TRIAL COURT ERR IN GRANTING THE CHILD SUPPORT UNIT'S MOTION TO TERMINATE SUPPORT AND REIMBURSE APPELLANT IN THE SUM OF \$80.00.

The Child Support Unit was initially involved in this case because of the various public assistance assignments on file. (Appendix pgs. 38, 39, 40, 43, 44, 45). The Child Support Unit remained involved because the obligee, Esther Erickson, continued to be qualified for child support services subsequent to her non-eligibility for public benefits. See, 45 C.F.R. § 302.33(a)(iii). Mr. Buffalo made no response to the Child Support Unit's motion to terminate support dated March 11, 1998.

It is the contention of the Child Support Unit that Mr. Buffalo is now precluded from challenging the district court order.

This Court has held on previous occasions that, "It is a fundamental duty of a trial court to assure that basic rules of procedures are followed. Rules cannot be applied differently merely because a party not learned in the law is

acting pro se." Production Credit Ass'n of Mandan v. Obrigewitch, 443 N.W.2d 304, 307 (N.D. 1989) citing, McWethy v. McWethy, 366 N.W.2d 796 (N.D. 1985). In addition, this Court has given no special consideration to incarcerated pro se litigants in the context of Rule 3.2 motion practice, holding that both incarcerated pro se litigants and the District Court must strictly adhere to the requirements of the rule. Matter of Norman, 521 N.W.2d 395 (N.D. 1994); Adoption of J.S.P.L., 532 N.W.2d 653 (N.D. 1995).

In the instant case, Mr. Buffalo made no response to the Child Support Unit's motion. He filed no reply brief and made no request for hearing. Mr. Buffalo was given notice that the motion was being brought under Rule 3.2 and that movant Child Support Unit was declining to request oral argument. (Appendix pg. 55). Thus, Mr. Buffalo was on notice that the matter was to be considered on briefs unless either party requested a hearing. Breyfogle v. Braun, 460 N.W.2d 689 (N.D. 1990). Mr. Buffalo could have requested a telephonic hearing, but failed to do so. Walbert v. Walbert, 1997 ND 164, 567 N.W.2d 829 (1997). Thus, the trial court quite properly ruled on the Child Support Unit's motion pursuant to Rule 3.2(a) N.D.R.O.C.

II.

DID THE APPELLANT MAKE A RECORD FROM WHICH TO APPEAL

Mr. Buffalo raises several issues in his brief surrounding his central assertion that the Child Support Unit knew of the adoption of his children but failed to act upon this knowledge in a timely manner, thereby damaging him. This assertion raises serious questions about whether the Child Support Unit owed any duty to Mr. Buffalo. These questions, however, cannot be raised for the first time on appeal.

This Court has consistently held that, "We do not consider questions that were not presented to the trial court and that are raised for the first time on appeal." Messer v. Bender, 1997 ND 103, ¶10, 564 N.W.2d 291, 293 (1997), citing, Eastburn v. B.E., 545 N.W.2d 767, 773 (N.D. 1996); American State Bank and Trust Co. of Williston v. Sorenson, 539 N.W.2d 59, 63 (N.D. 1995); Bentley v. Bentley, 533 N.W.2d 682, 683 (N.D. 1995); Klose v. Klose, 524 N.W.2d 94, 96 (N.D. 1994).

The Bentley decision is particularly instructive. Michael Bentley, an incarcerated pro se litigant, directly

appealed from his default divorce judgment, apparently claiming insufficiency of service of process. Bentley v. Bentley, 533 N.W.2d 682, 683 (N.D. 1995). This Court dismissed Mr. Bentley's appeal, noting he had failed to bring a motion to vacate in the trial court. This Court held that, "Michael is required to present his issue to the trial court before it can become a basis for appeal. This allows for the expansion of the record below, enabling us to review the issue with a more complete understanding of the case should the need arise." Bentley, at 683.

The record on appeal in the case presented before the Court is insufficient. None of the issues outlined in Mr. Buffalo's brief were dealt with in the court below. Mr. Buffalo appears to be offering a reply brief, cross motion and a suit for damages in his Appellant's Brief. The issues raised simply cannot be heard by the reviewing court at this time. Thus, the Child Support Unit requests that the Order of the District Court dated April 6, 1998, be summarily affirmed under N.D.R.App.P. 35.1(a)(1), (4) and (7), or, in the alternative, that Mr. Buffalo's appeal be dismissed in its entirety. Further, the Child Support Unit waives oral argument and submits its arguments on brief pursuant to

N.D.R.App.P. 34(F).

Dated this 13th day of October, 1998.



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