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SUPREME COURT #980226

DISTRICT COURT, CASS COUNTY #92-2282

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SUPREME COURT

AUG 28 1998

IN AND FOR THE STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

MARGARET DARLING,

)
)
Plaintiff, *Appellant*

Court File #92-2282

vs.

DONNY GOSSELIN,

)
)
)
)
)
)
)
)
Defendant, *Appellee*

APPEAL FROM AN
ORDER MODIFYING
REFEREE'S FINDINGS
& RECOMMENDATIONS

BRIEF FOR APPELLANT, MARGARET DARLING

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I.

STATEMENT OF JURISDICTIONAL GROUNDS

Appellant, Margaret Darling, respectfully appeals to this Court from an Order which modified a Referee's Findings and Recommendations. Such Findings and Recommendations were issued upon the parties' oral stipulation as recited into the record at time of hearing.

"Appeals shall be allowed from decisions of lower Courts to the Supreme Court as may be provided by law." North Dakota Constitution, Article VI, Section 6. Chapter 28 of the North Dakota Century Code addresses the subject of which Orders are and are not appealable. An Order modifying a Referee's Findings and Recommendations is reviewable upon appeal. NDCC, §28-27-02.

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the Trial Court err in denying a Referee's Finding and Recommendation---based upon the parties' stipulation---that the Clerk of District Court issue a docketable money judgment representing past due child support payments, including an actual sum representing post-judgment interest thereon?

What is the appropriate procedure a support obligee, the Court, the Clerk's Office and the Sheriff's department should follow in collecting the interest which has accrued upon periodic obligations which have been deemed judgments "by operation of law".

III.

STATEMENT OF THE CASE

Plaintiff and Appellant, Margaret Darling ("Margaret") and Defendant and Appellee, Donny Gosselin ("Donny") have a child, Andrew. Donny's paternal relationship with Andrew was established by way of Judgment, dated December 28, 1992.¹ Such Judgment imposed upon Donny a child support obligation of \$350 per month.² It also required Donny to bear liability upon one-half of the health-insurance premiums for and uncovered health-related expenses of his son, Andrew.³

For whatever reason, Donny developed an awful history of not paying such monthly obligation and of failing to pay his share of Andrew's health insurance premiums.⁴ By way of countermotion⁵, Margaret sought, among other things, to (1) reduce to a single amount both Donny's arrearage and the interest on each outstanding payment, (2) to incorporate such amount into a docketable money judgment and (3) to do likewise with respect to Donny's arrearage on Andrew's health insurance premiums.

¹ Appendix, pp. 5-8.

² Appendix, p. 6.

³ Appendix, p. 7.

⁴ Appendix, pp. 16-25.

⁵ Margaret's motion was denominated a "countermotion". Donny had previously noticed a hearing for a support review, but had failed to serve and file an accompanying motion. An actual modification of Donny's support amount was actually accomplished by the parties' agreement after Margaret's "countermotion" was resolved. The parties' presented such agreement to the Court via the same proposed Order at issue on this appeal.

1 In support of Margaret's counter-motion, she submitted a certified copy of the Clerk of
2 District Court's computerized ledger of Donny's child support history.⁶
3

4 Prior to the hearing on Margaret's counter-motion, the parties resolved the
5 matter by agreement.⁷ They agreed that Donny was in arrears on his child support in
6 the amount of \$4,767.49, through April of 1998, comprised of \$3,555 in past due child
7 support and \$1,212.49 in accrued interest thereon.⁸ They agreed that Donny was in
8 arrears on his obligation to pay one-half of Andrew's health insurance premiums in the
9 amount of \$1,788.45.⁹ The parties further agreed that such sums would be reduced to
10 two separate docketable money judgments.¹⁰
11

12 After jointly reviewing and editing such document, the parties submitted a
13 proposed Order to the Court, and the Honorable Janice Benson Johnson, Judicial
14 Referee, executed and gave notice of such Order on May 11, 1998.¹¹ Such order
15 contained the following two paragraphs upon which the instant appeal centers:
16

17 "3. The parties agree that, through April 1998, Judgment interest has
18 accrued upon such arrearage in the amount of \$1,212.49."¹²; and
19

20 ⁶ Appendix, pp.16-25.

21 ⁷ Transcript, p. 1., lines 12-13.

22 ⁸ Transcript, p. 1, lines 15-24.

23 ⁹ Transcript, p. 2, lines 2-5.

24 ¹⁰ Transcript, p. 2, lines 14-17.

25 ¹¹ Appendix, pp. 30-35.

26 ¹² Appendix, p. 32.

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"6. The Office of the Clerk of District Court shall issue two separate docketable money Judgments, both against Donny Gosselin and in favor of Margaret Darling. One Judgment shall be in the amount of \$4,767.49, and shall represent the child support arrearage and interest set for in paragraphs 2 and 3 above. The second money Judgment shall be in the amount of \$1,788.45, and shall represent the health insurance premiums described in paragraph 4 above.¹³"

Upon in chambers review of the Referee's Findings and Recommendations, the District Court, through the Honorable Norman J. Backes, issued a curt Order, the entire body of which stated as follows:

"The Court having reviewed the Order of Janice Benson Johnson, Referee, dated May 11, 1998, and having noted the language of finding number 3 and 6, finds that interest is not properly docketable by the Clerk of District Court. The remedy would be Post Judgment Interest."¹⁴

The Clerk of District Court, accordingly, declined to enforce any aspect of the Referee's Order, including that aspect modifying Donny's child support, that aspect calling for a docketed money judgment as to insurance premium arrears, and that aspect calling for a docketed money judgment as to Donny's support arrearage (sans interest). Whereupon, the instant appeal was taken.

¹³ Appendix p. 32.

¹⁴ Appendix, p. 36.

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IV.

ARGUMENT

A.

STANDARD OF REVIEW

Again, the instant support review was first presented to a Judicial Referee. When the District Court Judge reviewed the Referee's Findings and Recommendations, he was obliged to review her findings of fact under the clearly erroneous standard. Steffes vs. Steffes, 560 N.W. 2d. 888, 891 (N.D. 1997); Thronset vs. Hawkenson, 532 N.W.2d. 394, 397 (N.D. 1995); Benson vs. Benson, 495 N.W.2d. 72, 78 (N.D. 1993). The Referee's conclusions of law, however, were fully reviewable by the District Court. Steffes, 560 N.W. 2d. at 891; Thronset, 532 N.W.2d. at 397.

Likewise, this Court reviews both the District Court's reversal of a Referee's findings of fact and its additional or substitute findings under the clearly erroneous standard. Benson, 495 N.W.2d. at 78; Thronset, 532 N.W.2d. at 397. The District Court's conclusions of law, however, are fully reviewable by this Court. Thronset, 532 N.W.2d. at 397; Gabriel vs. Gabriel, 519 N.W.2d. 293, 294 (N.D. 1994).

Margaret contends that the subject of whether post-judgment interest is or is not docketable is a matter of law. Accordingly, such issue was fully reviewable by the District Court and is, again, fully reviewable on this appeal. That the Trial Court denominated both paragraphs 3 and 6 of the Referee's Order as "findings" should not be regarded as determinative nomenclature, but as further evidence of Courts' and

1 lawyers' difficulty in discerning the difference between findings of fact and
2 conclusions of law.
3

4 B.

5 **CHILD SUPPORT ARREARAGES, A BRIEF OVERVIEW**

6 North Dakota statutory law provides, in pertinent part, as follows:

- 7 1. Any order directing any payment or installment of money for the
8 support of a child is, on and after the date it is due and unpaid:
 - 9 a. A judgment by operation of law, with the full force, effect, and
10 attributes of a judgment of the district court, and must be entered
11 in the judgment docket, upon filing by the judgment creditor...of
12 a written request accompanied by a verified statement of
13 arrearages or certified copy of the payment records of the clerk
14 of district court...and an affidavit of identification of the
15 judgment debtor, and otherwise enforced as a judgment;
 - 16 b.;
 - 17 c.
- 18 2. Failure to comply with the provisions of a judgment or order of the
19 court for the support of a child constitutes contempt of court. All
20 remedies for the enforcement of judgments apply. A party...may also
21 execute on the judgment....
- 22 3. This section applies to all child support arrearages, whether accrued
23 before or after the effective date of this section." NDCC, §14-08.1-05
24 (emphasis supplied).

25 Thus, NDCC §14-08.1-05 seems to state that an obligee could reduce an
26 arrearage to a docketable money judgment, **without motion**, by simply filing certain
27 documents with the Clerk of District Court, namely, an affidavit of identification and
28 certified or verified evidence of the arrearage amount. However, this Court has
previously indicated, in interpreting a prior incarnation of §14-08.1-05, that reducing

1 arrears to a money judgment could (should?) appropriately be accomplished via motion
2 practice. Fuson vs. Schaible, 494 N.W.2d 593, 595-596 (N.D. 1992).
3

4 In this case, Margaret attempted to reduce Donny's support arrearage to money
5 judgment by way of such a noticed motion. To her motion papers, Margaret attached
6 as an exhibit a certified copy Donny's support ledger, as maintained by the Clerk of
7 District Court.¹⁵ After the Referee executed the parties' stipulated Order, an Affidavit
8 of Identification and Non-Military Status was filed on Margaret's behalf.¹⁶
9

10 C.

11 INTEREST ON THE PERIODIC SUPPORT OBLIGATION

12 Of course, interest does accrue on child support obligations and does so, each
13 month such obligation becomes due and is unpaid. Baranyk vs. McDowell, 442
14 N.W.2d. 423, 426 (N.D. 1989); Fuson vs. Schaible, 494 N.W.2d. 593 (N.D. 1992).
15 That point is not in dispute. The dispute at issue, instead, concerns the appropriate
16 procedure for executing upon this obligation and collecting such post-judgment
17 interest. This issue arouses great confusion amongst family law practitioners, Courts,
18 Clerks of Court, and Sheriffs' Departments. The nucleus of the problem is in the
19 difficulty of calculating interest on periodic installments, a duty the enforcement wing
20 of the judicial system (Clerks and Sheriffs) are un-equipped and unwilling to
21 discharge.
22

23
24
25 ¹⁵ Appendix, pp. 16-25.

26 ¹⁶ Appendix, p. 40.

1 Calculation and collection of interest upon an "ordinary" money judgment---
2 those which refer to a single lump sum---is fairly easy. The Clerk's Office can direct
3 the Sheriff's Department to collect the lump sum and also simply inform the Sheriff of
4 the appropriate interest rate and its date of commencement. In such cases, the
5 judgments do not refer to a specific interest amount. Instead, Sheriffs easily calculate
6 such amounts during the execution process.
7

8 However, with respect to post-judgment interest upon periodic payments
9 which constitute judgments "by operation of law", the process is confused and clumsy.
10 An Order which simply reduces the arrearage to a lump sum, and which awards
11 interest, but leaves its amount undetermined, results in over-burdened Clerks and
12 Sheriffs glassing over, and advising that "no one tries to collect interest on child
13 support" and "we don't do those calculations". The effect is uncollected interest. In
14 other words, without an understandable simple process, the "right" to post-judgment
15 interest on past due periodic support obligations is an empty one.
16

17 It is for the foregoing reason---to make the "right" to interest on the periodic
18 payments meaningful---that Margaret sought to include an actual interest amount in the
19 docketed money judgment. To do so removed from the Clerk and the Sheriff the
20 obligation of performing difficult, time-consuming calculations. To do so by motion
21 permitted Donny and his counsel to scrutinize and participate in the involved
22 mathematical process. To do so simplified matters.
23

24 Nevertheless, Margaret concedes that there are possible problems with the
25 methodology she employed---two, to be exact---namely, (1) to include the interest
26

1 amount within the docketed money judgment might, if done inappropriately, run afoul
2 of the prohibition that judgment "interest may not be compounded in any manner or
3 form", NDCC, §28-20-34 and (2) if even one additional month passes after docketing
4 such a money judgment, without collection, the interest calculations become outdated,
5 thus wrong. This entire appeal, including these two problems, can be easily resolved
6 by recalling that this matter was resolved by the parties' agreement.
7

8 Of course, "Courts have the general power of entering judgments by consent of
9 the parties for the purpose of executing a compromise and settlement of an action."

10 46 Am.Jur.2d §207 (Judgments). It is further said that:

11 "Consent excuses error and ends all contention or controversy
12 between the parties within the scope of the judgment. It leaves nothing
13 for the Court to do, but to enter what the parties have agreed upon, and
14 when so entered, the parties themselves are concluded. Generally, no
15 appeal will lie from a consent judgment, or a consent order or decree."

16 46 Am.Jur.2d §207 (Judgments).

17 The aspect of the involved stipulation at issue on this appeal was ministerial
18 and simple. It was unlike other child-related stipulations, such as those having to do
19 with visitation, custody, or prospective support amounts, all of which require
20 independent judicial oversight, scrutiny and involvement. In no manner could the
21 instant stipulation have better simplified a confusing issue. It took many months of
22 arrears and many months of interest and rolled them all into one, single figure. That
23 figure could be enforced through the three support enforcement methods, namely, (1)
24 wage withholding order, (2) contempt proceedings, and (3) traditional execution
25 methods. Neither of the agencies involved in enforcing such judgments---the Court,
26 the Clerk, the Sheriff---was required to perform any calculation or do any other act,

1 except to accept the parties' single figure. To the extent that Donny might be
2 concerned about the "compounding interest" problem---which, in any event could be
3 resolved by a properly drafted money judgment---his objection was waived, in de facto
4 fashion, by his consent to the agreement. The parties' resolution was elegantly simple
5 for all concerned.
6

7 For these reasons, the Trial Court should be directed to vacate its Order of May
8 20, 1998, and to confirm the Referee's findings and recommendations of May 11,
9 1998.

10 To resolve the instant appeal by relying upon the fact that the Referee's
11 findings and recommendations were based upon the parties' agreement, avoids the
12 larger issue: What process **should** parties, the Court, Clerks and Sheriffs follow in
13 collecting interest on periodic obligations? While this Court, in Baranyk established a
14 parties' right to post-judgment interest on child support arrearages, such right means
15 nothing without a simple, affordable, **process**, understood and employed consistently
16 by all the players in that process.
17

18 The broader policy justifications which favor this Court lending assistance on
19 the "interest collection" issue are identical to all of the mighty policy justifications
20 which favor efficient and effective collection of support arrears in general. In this
21 case, a substantial amount of interest (over \$1,200) accrued on just \$4,700 in arrears.
22 On a state-wide basis, the amount of interest which ought to be collected on the total
23 of all obligors' outstanding arrears, is surely staggering. On individual levels, the
24 figures are often enough to accomplish significant differences in recipients' (and their
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1 children's) lives, even if only that the interest could finance an attorney's pursuit of the
2 arrearage itself.
3

4 Margaret suggests that, both in this and future cases, this Court ought to
5 sanction the issuance of a docketable money judgment, obtained via motion, along the
6 following lines---using the figures from her case as a representative example:

7 "Plaintiff shall have judgment against defendant for \$4,767.49, \$3,555
8 of which represents the sum total of defendant's child support arrearage through
9 April, 1998 and of \$1,212.49 of which is post-judgment interest which has
10 accumulated thereon through April of 1998. Post-judgment interest shall
11 continue to accumulate at the legal rate only upon each of the unpaid
12 installments which comprise the \$3,555, and only for the period during which
13 such installments remain unpaid."¹⁷

14 D.

15 SUBMISSION ON BRIEFS

16 Margaret is willing to submit this matter to the Court for determination on the
17 parties' briefs, unless this Court directs that the case be argued, pursuant to Rule 34(f)
18 of the North Dakota Rules of Appellate Procedure.

19 V.

20 CONCLUSION

21 The trial Court erred in rejecting the Referee's Findings and Recommendation
22 that post-judgment interest on a periodic support arrearage could be docketed as a
23 money judgment. It was an error because the parties had essentially agreed to
24 issuance of a "consent judgment" which, in ministerial fashion, the Court ought to

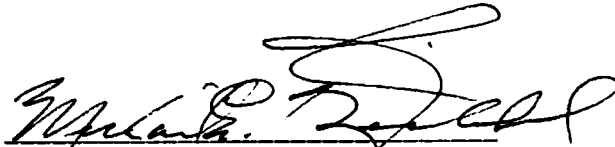
25 ¹⁷ An issue also exists as to, when partial payments are
26 received, whether they should be applied to first to
27 interest or to principal.

1 have accepted. It was an error because the parties' stipulation provided the best,
2 simplest, most easily enforceable and monitored method of collecting post-judgment
3 interest. The Trial Court gave the parties direction toward no other collection process,
4 much less a better one.
5

6 The motion process in this case, as it will in future ones, assured the
7 involvement and scrutiny of both of the parties, as well as the Court. Permitting the
8 post-judgment interest to be both reduced to a lump sum **and** included in the docketed
9 money judgment in the foregoing fashion, will relieve the Clerks and the Sheriffs from
10 work it finds too burdensome and confusing to perform. To do so breathes life into an
11 otherwise empty and unused right. Such process might encourage more support
12 recipients to avail themselves of judicial assistance in collecting arrearages. The actual
13 money eventually collected would make a difference in many lives.
14

15 Accordingly, Margaret respectfully prays that this case be remanded with
16 instructions to the District Court to vacate its Order of May 20, 1998 and to confirm
17 the Referee's Order of May 11, 1998.

18 Respectfully submitted this 28th day of August, 1998.

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