ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Bonita M. Schumacher, nka Bonita Wikenheiser, Plaintiff-Appellant, -vs- John William Schumacher, Defendant-Appellee.	)	Supreme Court No. 980258 980258

FILED
IN THE OFFICE OF THE
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STATE OF NORTH DAKOTA

APPEAL FROM THE AMENDED JUDGMENT, DATED JUNE 11, 1998
DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA
REFEREE ROBERT A. FREED, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

The Appellee John William Schumacher (herein called John) concurs with the Statement of Issues presented by the Appellant-Regional Child Support Enforcement Unit (herein called RCSEU).

STATEMENT OF THE CASE

John concurs with the Statement of the Case, as presented by the RCSEU.

LAW AND ARGUMENT

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Summary of Argument.

I. It was not clearly erroneous for the Referee to allow a $200 per month deduction for the payment of medical expenses, where both parties testified to the existence of certain medical expenses, and where the information was presented to the court without objection in response to questioning by the attorney for RCSEU.

II. It was appropriate for the Referee, in accord with the original written agreement of the parties, to allow an abatement of child support during the 3-month summer visitation, where the current financial information indicated that child support payments created a hardship.

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I. It was not clearly erroneous for the Referee to allow a $200 per month deduction for the payment of medical expenses, where both parties testified to the

existence of certain medical expenses, and where the information was presented to the court without objection in response to questioning by the attorney for RCSEU.

The essence of the RCSEU's argument opposing the medical expense deduction is that, since John did not provide documentation for the claimed medical expenses, the medical expense deduction should be disallowed.

The starting point for argument is N.D.Adm.C. § 75-02-04.1-01(7)(e), which allows "[P]ayments made on actual medical expenses of the child or children for whom support is being sought" as a deduction from total gross monthly income, for purposes of calculating net income.

RCSEU argues that, since the Administrative Code requires specific documentation in a determination of gross income, N.D.Adm.C. § 75-02-04.1-02(7), documentation must be provided for deductions. This argument, however, defeats itself. Since the Administrative Code does require specific documentation of income, it is presumed that, if the drafters of the Code had intended to demand similar documentation of deductions, clear wording of that intent could have easily been placed into the Administrative Code. As is clear from the language, such intent was not so expressed.

John is concerned that the RCSEU is confusing issues relating to weight of evidence with issues relating to admissibility of evidence. If one were to take the RCSEU argument to its logical extreme, then a judge (or referee) would be required to sustain an objection to oral testimony on deductions, where the party, offering the evidence, has not produced documents. In such a case, the standard of documentation would become a

threshold question of admissibility for evidence of deductions. John suggests that neither logic, the Administrative Code, nor the cited court decisions, demand such a result.

RCSEU cites to the case of Helbling v. Helbling, 541 N.W.2d 443 (N.D. 1995). In that case, the issue was relocation expenses which were reimbursed by an employer. The obligor-parent claimed that the amount of actual relocation expenses should be deducted from the amount of relocation expense reimbursement, since the reimbursement was included in calculating gross income. This Court concluded that the obligor-parent, in attempting to rebut the gross income arising from expense reimbursement, failed to offer any evidence of his expenses:

> "The parties agree that David received relocation reimbursement payments of $12,550.38 in 1993 and $12,536.69 in 1994. David argued that these payments should not be included in his income for child support purposes because they represented money paid to him for expenses resulting from a move to Nebraska. Yet, he offered no proof of his actual moving expenses or proof that his expenses equaled the reimbursement payments he received. He testified only that his employer had required him to make the move, and that his employer's policy was 'when they ask you to relocate they will give you expenses for holding down two homes.' Although David argued that his moving expenses were greater than the amount he was allowed to deduct from his federal taxes, he did not introduce any evidence to prove his point."

Id. at 446. It is clear that Helbling does not stand for the proposition that, in the absence of documentary evidence, deductions under the Child Support Guideline may not be proven. Instead, Helbling stands for the proposition that, if a party has a burden of persuasion, that party needs to present evidence in support of that burden. Where no evidence is presented, the party has failed in its burden.

In this case, the issue of medical expenses arose upon questioning by the Appellant-RCSEU:

> "Q. (Sheila Keller) Okay. Um, have you been making any payments on medical bills for your children?
>
> A. (John Schumacher) Yes.
>
> Q. When were these payments made?
>
> A. They're made every month.
>
> Q. To whom?
>
> A. From St. A's Hospital to MEd Center One, to three or four other places I suppose.
>
> Q. How much do you pay each month on these bills?
>
> A. I try to pay a hundred to like St. A's and then Med Center One I believe it's still, I didn't bring it with me, but there's a bill there for like Six Hundred and some dollars yet. So I mean-outstanding medical bills that we have right now would probably be around, I'm going to guess around $2,000.00.
>
> Q. Do you make a regular payment every month to Med Center One?
>
> A. I can't say I make one every month, no. They're in contact with me, or I'm in contact with them. They're very well to work with.
>
> Q. Okay. Um, what do you think you actually pay each month on an average on the various medical bills?
>
> A. I'd say about $200.00. It's not that we don't have--we do have Blue Cross Blue Shield. This is just the deductible. Sort of had a bad couple of years I guess."

(Transcript p. 13, line 23-p. 14, line 18). Rather than asking something like, "Did you bring any documents to support a medical payment deduction?," the RCSEU directly asked John the amount of his monthly medical bill payments. John answered, and his

response, identifying $200 per month as the payment, was received into evidence, without objection.

Later, in the hearing, RCSEU asked the custodial parent Bonita Wikenheiser (herein called Bonita) about the same issue:

> "Q. (Sheila Keller) I just wanted to get some information from you. The medical bills, Mr. Schumacher indicated he thinks he pays about $200.00 per month towards the medical bills. Do you have any knowledge that would verify that, or do you believe that is incorrect?
>
> A. (Bonita Wikenheiser) Um, the two boys each had a little bit of an accident in the last year, and I would believe that there is some medical bills there. Our divorce stipulation requires the two of us to split noncovered medical expenses. I haven't ever seen any of the bills, and nor have I presented him with bills for the glasses and the dentist and the things that I pay. So I would believe that there are medical bills. To the extent of how much there is that is noncovered, I have no idea."

(Tr. p. 21, lines 5-14).

As a result, the issue became one, not of exclusion of the deduction claim, due to failure to satisfy some threshold documentary requirement, but of judging the weight of evidence, a function left to the sound discretion of the Referee. The Referee, having heard the evidence, and having observed the witnesses, concluded that John was making $200 per month in payments on various medical bills and allowed that as a deduction.

In the case of Hieb v. Hieb, 1997 ND 171, 568 N.W.2d 598, an obligor-parent sought to calculate net income by deducting meal expenses of $30 per day (per IRS guidelines) from his gross income. This Court explored the unique provisions of N.D.Adm.C. § 75-02-04.1-05, regarding the allowance of business expenses. Two conclusions that are important from that opinion. First, the court noted that tax returns

from the obligor parent "were received into evidence without objection. In fact they were offered in evidence by the State of North Dakota. We conclude, they established the business expenses which Clinton can properly deduct. . ." Id. at 601. In other words, since the RCSEU, in that case, was the proponent of the evidence, which reflected a deduction for meal expenses, thereby waiving any objection to the evidence, the issue was established for purposes of the hearing. Second, this Court did challenge the obligor-parent for failing to corroborate his testimony regarding meal expenses with documentary evidence because, as the court pointed out, the obligor-parent failed to exercise his privilege of proving a greater deduction. This Court noted that, under N.D.Adm.C. § 75-02-04.1-05(2), a trial court "may" deduct additional expenses, "actually incurred and paid, but not expensed for Internal Revenue Service purposes." Under that regulation, this Court held that, in order to justify the exercise of that privilege, the obligor-parent had an obligation to document his claim for additional expenses, beyond those expensed on his tax form.

Contrary to Hieb, the present case involves an item of mandatory deduction, i.e., if the expense exists, that expense must be deducted. Upon hearing the evidence, the Referee concluded that, based on the weight of the evidence, there was sufficient evidence to justify the deduction under the mandatory deduction requirements of N.D.Adm.C. § 75-02-04.1-01(7)(e).

As a side note, it is remembered that, at the hearing, John testified that, through loans from his brother, he was providing a $300 per month health insurance policy for the children. Since the expense did not currently involve out-of-pocket payments by John, the

Referee declined to allow John a deduction for a proportionate share of those expenses pursuant to N.D.Adm.C. § 75-02-04.1-01(7)(d). It is assumed that, at some later point, when that loan is repaid, John will be entitled to a deduction for those medical insurance payments.

II. It was appropriate for the Referee, in accord with the original written agreement of the parties, to allow an abatement of child support during the 3-month summer visitation, where the current financial information indicated that child support payments created a hardship.

In the original divorce stipulation, John and Bonita agreed that John would have visitation during June, July, and August and that, during those months, he would not pay child support. The Referee continued this agreement by concluding at the hearing that:

> "[Referee Robert Freed] I find it to be in the best interest of the children for them to have visitation with their father. He has been exercising visitation for three months each summer. I invoke the hardship provision of the guidelines and indicate that there should be no child support accruing for those three months. That seems to be the way things have been going, and I applaud both of you for allowing visitation for an extended period of time in the summer."

(Tr. p. 28, line 24-p. 29, line 4).

John is certainly aware of the provisions of N.D.Adm.C. § 75-02-04.1-02(2), stating that "care given to the child during temporary periods when the child resides with the obligor or the obligor's relatives do not substitute for the child support obligation." In addition, John is aware of the case of Edwards v. Edwards, 1997 ND 94, 563 N.W.2d 394, in which this court overturned a trial court's provision for abatement for two months of child support obligation, during non-custodial parent summer visitation; this Court

concluded that the "guidelines expressly prohibit an abatement for temporary periods in which the child resides with the non-custodial parent." Id. at ¶ 15.

John suggests that the Referee in this case attempted to fashion a remedy, based on the evidence, that would serve the best interests of the children. The Referee had heard testimony, and had made findings that:

> "Although the state opposed this request and the Guidelines do not permit such an arrangement, the Court finds that it is in the best interests of the children that this visitation continue and that, to require the Defendant to pay child support while the four children are living with him would be a hardship to him. Therefore, the child support should continue to be stayed in the months of June, July and August."

(Paragraph XIII, Findings and Recommendations of the Referee on a Motion to Modify, Appendix 20).

Unlike Dalin v. Dalin, 545 N.W.2d 785 (N.D. 1996), this case does not involve a demand for Bonita to pay any child support during the 3-month visitation with John. Instead, the Referee attempted to protect the interest of the children by allowing John some financial leeway to afford long-term visitation. According to the findings of the Referee, John's currently available income was next to nothing. In 1996, his tax return showed income of only $593. (Paragraph X, Findings and Recommendations of the Referee on a Motion to Modify, Appendix 19). He was currently borrowing money to meet his financial needs, including child support and health insurance for the children. (Paragraph XII, Findings and Recommendations of the Referee on a Motion to Modify, Appendix 20). This was a change from his prior earning capacity, when he held an operating interest in a livestock yard and was able to rent some of his land. (Paragraph

IX, Findings and Recommendations of the Referee on a Motion to Modify, Appendix 19). Although John's current financial picture was bleak, the Referee used an income averaging process, presumably pursuant to N.D.Adm.C. § 75-02-04.1-02(7). (See Paragraph XI, Findings and Recommendations of the Referee on a Motion to Modify, Appendix 19). That process gave an upward adjustment to John's income due to factors such as increased receipts, in 1993, from a liquidation sale of his machinery. (See Paragraph VII, Findings and Recommendations of the Referee on a Motion to Modify, Appendix 18)

Given all these factors, it is easy to see why the Referee concluded that John was suffering from a hardship and that, consistent with the earlier agreement of the parties, the abatement of summer child support should be continued. In light of the Guidelines, and in light of Edwards, can the Referee's action be upheld?

First, John feels that the trial court decision was not in error. While the Referee referred to a "hardship" provision, the Referee did not provide a specific reference to the Guidelines. Therefore, one must glean the Guidelines for possible support, given the Referee's belief, after hearing all of the evidence, and after observing the witnesses, that the continued abatement should be enforced. Under N.D.Adm.C. § 75-02-04.1-09(2)(j), rebuttal of the presumptive support can arise from "a situation" which results in continued or fixed expense for the obligor-parent. The RCSEU apparently argues that, since the Guidelines specifically make reference to "temporary" periods of residence with the non-custodial parent, N.D.Adm.C. § 75-02-04.1-02(2), and since the Guidelines also preclude rebuttal of the Guidelines by factors otherwise described in the Administrative Code, N.D.Adm.C. § 75-02-04.1-09(1), the summer visitation period may not be considered as a

rebuttal of the Guideline amount. John points out that N.D.Adm.C. § 75-02-04.1-09(1) does allow rebuttal of the Guidelines for factors which are contained both in the chapter and in subsection 2 of that section (". . . no rebuttal of the guidelines may be based upon evidence of factors described or applied in this chapter, except in subsection 2 of this section. . ."). The "situation" factor of N.D.Adm.C. § 75-02-04.1-09(2)(j) therefore can be one of the factors used in rebuttal of the presumptive power of the Guidelines; the question then becomes, can a temporary period of visitation become a "situation?" The visitation period is established in the Decree of Divorce between the parties. Therefore, if one accepts the standard that visitation is a right of both parent and child, John has no unilateral option to simply walk away from summertime visitation. As a result, the summertime visitation is, in fact, "a situation, over which the obligor has little or no control." In addition, the Referee could conclude, and logic would so support, the fact that the living arrangements with four children at John's home during the summer is a "continued or fixed expense" during those months. It is recognized that, during the summer months, the ongoing expenses and attention needed by a child are paramount. The Referee took this fact into consideration and, coupling that fact with the dire financial situation of John, ordered that the abatement should continue.

Second, the Guidelines deny the abatement for a "temporary" period of residence with the non-custodial parent. N.D.Adm.C. § 75-02-04.1-02(2). In Edwards, supra, this Court reversed the partial abatement of child support during a period of summer visitation. In that decision, according to the quoted portion of the trial court's opinion, the obligor-parent was entitled to "a minimum of eight weeks" of visitation. This Court, citing to the

Guidelines, overturned the determination. The Edwards decision is distinguishable on a couple grounds. In this case, John has a predetermined, permanently established visitation right for three months out of the year. Therefore, unlike many other visitation orders, it does not vary from year to year, and it does not vary in length. Also, in John's case, the amount of abatement was not established by judicial discretion, as was the case in Edwards, but was established by an agreement of the parties.

Third, and consistent with the thought in the prior paragraph, it needs to be remembered that this agreement was established by agreement between the parties. At that time, in 1993, the judgment of divorce, which was based on a specific agreement between the parties, passed through the judicial system, even though the original 1991 Child Support Guidelines also included the "temporary" residence language. Where the parties have reached a specific agreement regarding the terms of judgment, and where the court has adopted those terms of judgment, the terms should weigh heavily in the consideration of the court.

In summary, John feels that the Referee did not err in continuing the pre-existing abatement of summer child support payments, based on the Referee's determination of the unique financial problems of John, and upon the existing agreement of the parties.

CONCLUSION

The judgment of the Referee should be affirmed.

Dated this 29th day of October, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on the 29th day of October, 1998, mailed to:

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