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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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SUPREME COURT
SEP 17 1998

Bonita M. Schumacher, nka)
Bonita Wikenheiser,)
)
Plaintiff-Appellant,)

Supreme Court No. 980258

vs.)

John William Schumacher,)
)
Defendant-Appellee.)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 17 1998

STATE OF NORTH DAKOTA

APPELLANT'S BRIEF

APPEAL FROM THE AMENDED JUDGMENT
DATED JUNE 11, 1998

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Appellee

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STATEMENT OF THE ISSUES

- I. UNDER N.D.ADM.C. §75-02-04.1-01(07)(e), IT WAS CLEARLY ERRONEOUS FOR THE DEFENDANT TO RECEIVE A DEDUCTION FOR MEDICAL BILLS ALLEGEDLY INCURRED BY THE PARTIES' CHILDREN AND PAID BY THE DEFENDANT.

- II. IT WAS CLEARLY ERRONEOUS FOR THE DEFENDANT'S CHILD SUPPORT OBLIGATION TO BE ABATED DURING THE PERIOD OF SUMMER VISITATION.

STATEMENT OF THE CASE

This case involves a divorce between the Plaintiff and Defendant and the subsequent review of the Defendant's child support obligation. This appeal is from the Amended Judgment entered on June 11, 1998, and is brought by the Bismarck Regional Child Support Enforcement Unit on behalf of the State of North Dakota, pursuant to NDCC §14-09-09.27.

The parties were married and had four children, namely John, born April 5, 1982, Nina, born July 28, 1983, Sara, born March 13, 1986, and Adam, born January 4, 1989. The parties divorced in March, 1993, and an Amended Judgment and Decree of Divorce was entered on August 31, 1993. (App. pp 4-14). The amended decree gave the parties joint legal custody of the four children but the Plaintiff was to have primary physical custody. (App. page 5). The Defendant was granted visitation, including the summer months. (App. page 6).

The Defendant was ordered to pay child support. (App. pp 6-7). Effective with February 1, 1993, the Defendant's obligation was \$800.00 per month. (App. page 6). The obligation increased to \$900.00 per month on January 1, 1994; to \$1,000.00 per month on January 1, 1995; to \$1,100.00 on January 1, 1996; and then to \$1,200.00 on January 1, 1997. (App. page 6). The obligation was to continue at the rate of \$1,200.00 per month until the end of the month during which the youngest child reached the age of 18 or graduated from high school, whichever occurred later. (App. page 6). The judgment allowed for a stay in payment of the child support in June, July and August of each year, while the Defendant had summer visitation. (App. page 6).

The Plaintiff applied for child support services from the Bismarck Regional Child Support Enforcement Unit (RCSEU). Subsequently, the Defendant requested that the RCSEU review his child support obligation pursuant to Chapter 14-09 of the North Dakota Century Code. Notices were sent to the parties informing them that a review would be performed by the RCSEU as requested.

On April 23, 1997, when requested financial information was not received by the Defendant, the RCSEU filed a motion for a change of venue from the Logan County District Court to the Burleigh County District Court. (Logan County Reg. Of Actions, Nos. 60-62) This motion was made so that a motion to compel could be brought by the RCSEU to compel the Defendant to turn over the documents necessary to complete the review. On May 28, 1997, an order changing the venue to Burleigh County was issued. (Logan County Reg. Of Actions, No. 63).

Prior to a motion to compel being filed, the Defendant provided the necessary financial documents to the RCSEU. On December 22, 1997, the RCSEU filed a motion for the decrease of the Defendant's child support obligation. (Burleigh County Reg. Of Actions, Nos. 2-4). The Defendant was served with the motion by certified mail on January 23, 1998, and the Plaintiff was served with the motion by the Burleigh County Sheriff's Department on February 10, 1998. (Burleigh County Reg. Of Actions Nos. 5-8).

A hearing on the motion to modify was held on March 6, 1998, before Judicial Referee Robert A. Freed. Both the Plaintiff and Defendant appeared, pro se, and testified. Findings and Recommendations were issued on March 19, 1998. (App. pp 15-21). The Referee recommended a reduction in the Defendant's child support to \$691.00 per month for the four children, and \$622.00 per month for three children once there is no longer a duty to

support the eldest child, John. (App. page 21). The Referee calculated a net income of \$2,035.00 per month and then reduced it by the \$200.00 per month the Defendant stated he paid on medical bills for the children. This resulted in a net income of \$1,835.00 per month. (App. pp 19-20). This deduction is in dispute.

The Referee also stated that there should be a stay in the payment of the child support in the months of June, July and August. (App. pp 20-21). The Referee indicated that it is a hardship for the Defendant to make the payment during the months of summer visitation. (App. page 20). This stay in support payments is in dispute.

The State, through the attorney for the RCSEU, requested a review of the Findings and Recommendations pursuant to Rule 13 of the Administrative Code. (Burleigh Co. Reg. Of Actions, Nos. 14-16). The State's objections concerned whether the Defendant was entitled to a deduction for payment of medical bills incurred by the children, and whether the Defendant was entitled to a stay in child support during periods of summer visitation. (Burleigh Co. Reg. Of Actions, No. 16). The Plaintiff, who had represented herself, also sent the District Judge her request for review; however, there is no indication of this in the Register of Actions. The State then filed a Supplemental Brief on June 26, 1998, concerning the issue of the medical deduction. (Burleigh Co. Reg. Of Actions, Nos. 18-22). The Defendant filed no response to these briefs.

An Order was issued by the District Judge on April 28, 1998, confirming the Referee's Findings and Recommendations. (App. page 22). The Amended Judgment was entered in this matter on June 11, 1998, and Notice of Entry of the Amended Judgment was served on June 26, 1998. (App. pp 23-26). Notice of Appeal of the Amended Judgment was served on August 5, 1998. (App. page 27).

This appeal was brought because the trial court's findings as to the Defendant's net income is clearly erroneous as the Defendant is not entitled to a deduction for payments on medical bills. The trial court's decision to grant an abatement over summer visitation is also clearly erroneous. The deduction and the abatement should be overturned and the trial court should be required to issue findings accordingly.

LAW AND ARGUMENT

- I. UNDER N.D.ADM.C. §75-02-04.1-01(7)(e) IT WAS CLEARLY ERRONEOUS FOR THE DEFENDANT TO RECEIVE A DEDUCTION FOR MEDICAL BILLS ALLEGEDLY INCURRED BY THE PARTIES' CHILDREN AND PAID BY THE DEFENDANT.

The Referee found that the Defendant is entitled to a deduction from income of \$200.00 per month for medical bills allegedly paid by the Defendant, which medical bills were incurred by the parties' children. (App. page 20). The State requested a review of this finding on the basis that the evidence did not support such a deduction and was, therefore, clearly erroneous for the deduction to be given. The District Court confirmed the Referee's finding and, therefore, the deduction. The standard of review on the appropriateness of the deduction is the clearly erroneous standard.

A trial court's determination as to child support is considered a finding of fact and is to be affirmed unless it is clearly erroneous. Edwards v. Edwards, 1997 ND 94, ¶4, 563 N.W.2d 394. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, we are left with a definite and firm conviction that a mistake has been made." Id., (citing Surerus v. Matuska, 548 N.W.2d 384, 387 (ND 1996)). In this case, there is no evidence to support the finding that the Defendant is entitled to a deduction for payments on medical bills incurred by the parties' children.

In determining the presumptively correct amount of child support to be paid by a non-custodial parent, that parent's gross income is first determined. Then the court must determine the obligor's net income from all sources. Hieb v. Hieb, 1997 ND 171, ¶7, 568 N.W.2d 598. The obligor's net income is determined by deducting certain expenses or

payments from the obligor's gross income. The mandatory deductions for determining net income are found at N.D.Adm.C. §75-02-04.1-01(7). (App. pp 28-29). One such mandatory deduction is payments made by the obligor on actual medical expenses of the child or children for whom support is being sought. N.D.Adm.C. §75-02-04.1-01(7)(e). (App. page 28).

The Defendant testified that he had been making payments on medical bills for the children of the parties. (Tr. page 13, line 23-25). He did not know exactly to whom they were all owed. (Tr. page 14, line 4-5). Nor did he know exactly how much was being paid every month. (Tr. page 14, line 16-18). He provided only general information on what he was paying, to whom and when. When asked what he thought he was actually paying each month he guessed at \$200.00 per month. (Tr. page 14, line 16-18).

According to the North Dakota Child Support Guidelines, income is to be shown through the use of documentation, including tax returns and wage statements, so as to fully apprise the court of the gross income. N.D.Adm.C. §75-02-04.1-02(7). (App. page 31). No less should be expected of the various deductions to be given when calculating the obligor's net income.

Such has been the decision in other cases. In Helbling v. Helbling, 541 N.W.2d 443 (ND 1995), it was determined that the obligor had to prove actual moving expenses which he incurred before a deduction for them could be considered. It has also been held that an obligor is only entitled to federal and state taxes he would actually have to pay based on the application of the standard tax deductions and tax tables. An obligor cannot withhold "an artificially high amount of taxes from gross income in an effort to reduce net income for purposes of calculating a child support obligation." Steffes v. Steffes, 1997 ND 49, ¶32, 560 N.W.2d 888. Thus, documentation and accuracy are required.

An obligor seeking a deduction from self-employment income for certain principal payments for business loans, was denied the deduction because he failed to satisfactorily document or prove the payments. Smith vs. Smith, 538 N.W.2d 222, 228 (ND 1995). Finally, an obligor was denied certain meal expenses as a deduction because he failed to offer into evidence the necessary documents to support the amounts sought as a deduction. Hieb, 1997 ND 1997, ¶19, 568 N.W.2d 598.

These obligors were required to provide accurate and clear information and documentation in order to receive the requested deduction. No less should be expected in this case. The Defendant failed to provide the trial court with clear evidence of payments he had actually paid on the children's medical bills. Based on the fact that no evidence exists to support it, the Defendant was not entitled to the deduction and the Referee's finding that \$200.00 was to be deducted is clearly erroneous. The Defendant's net income should have been found to be \$2,035.00 per month, instead of the \$1,835.00 calculated by the Referee. Child support should then have been set based on the \$2,035.00 per month net income.

II. IT WAS CLEARLY ERRONEOUS FOR THE DEFENDANT'S CHILD SUPPORT OBLIGATION TO BE ABATED DURING THE PERIOD OF SUMMER VISITATION.

The Defendant's child support obligation was abated during the months of June, July and August under the Amended Judgment and Decree of Divorce. (App. page 6). At the modification hearing, it was requested that this abatement stop and that the Defendant's obligation be due each and every month, in accordance with the North Dakota Child Support Guidelines and case law. (Tr. page 25, line 10-15). The Referee found that the obligation should continue to be abated during June, July and August as to do otherwise would impose a hardship on the Defendant. (Tr. page 28, line 24-25, through page 29, line 1-4). The Referee also acknowledged that, although the Guidelines do not permit such an abatement, he was ordering the abatement anyway. (Tr. page 29, line 12-13). The State requested a review of the recommended abatement as it is clearly erroneous under N.D.Adm.C. §75-02-4.1-02(2) and case law on this issue. The District Court confirmed the Referee's recommendation.

Calculations under the North Dakota Child Support Guidelines "assume that the 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 ." N.D.Adm.C. §75-02-04.1-02(2). (App. page 31). Thus, the Guidelines "expressly prohibit an abatement for temporary periods in which the child lives with the non-custodial parent." Edwards, 1997 ND 94, ¶15, 563 N.W.2d 394.

The Referee recognized that the abatement he was recommending was not permitted by the Guidelines but he was doing so anyway by "invoking the hardship provision." (Tr. page 29, line 12-13). The only provision in the Guidelines which may be considered a

hardship provision is found in the rebuttal section. Pursuant to N.D.Adm.C §75-02-04.1-09(2)(j), if a preponderance of the evidence and the best interests of the children show that an obligor has a reduced ability to pay child support due to a situation, over which the obligor has little or no control, and which situation requires that obligor to incur a continued or fixed expense for other than subsistence needs, work expenses, or daily living expenses, and such expenses are not otherwise described in that subsection of the Guidelines, the presumed amount of child support would be rebutted. (App. page 34). Upon such a rebuttal, the court could deviate from the guideline amount. However, this subsection cannot apply to the abatement of child support.

Since the Guidelines specifically prohibit an abatement, this section cannot be used to contradict the prohibition. If abatement wasn't to be prohibited in every case, there would have been specific criteria established for exceptions to the prohibition.

Too, even if the deviation argument could be relied on, there has been no specific showing or finding that the obligor would have continued or fixed expenses for other than subsistence needs, work expenses, or daily living expenses. There is nothing in the record to show that N.D.Adm.C. §75-02-04.1-09(2)(j) has been met. See, Interest of LDC, 1997 ND 104, ¶8, 564 N.W.2d 298.

The amount of child support to be paid by an obligor is to be based on the Guidelines. The Child Support Guidelines as they exist do not consider whether visitation occurs, how much occurs, or when it occurs. Costs incurred for travel for visitation can be considered, but only as a basis for rebutting the Guideline amount. All other aspects of visitation are irrelevant. This being so, there is no basis in the North Dakota Child Support Guidelines for an abatement of child support during period of visitation. Therefore, the Referee's

recommendation, and the District Court's confirmation of the abatement of child support over the months of summer visitation is clearly erroneous as it is based on an erroneous view of the law.

CONCLUSION

The Referee and the District Court were clearly erroneous in the calculation of the Defendant's net income in that a deduction of \$200.00 should not have been given for payment on medical bills incurred by the children. Since there was no evidence to support this finding, the Defendant's net income should have been found to be \$2,035.00 per month, instead of \$1,835.00 per month. Thus, the Defendant's child support obligation should have been \$766.00 per month for four children and \$690.00 per month for three children. Because the lower court's finding of the Defendant's net income is clearly erroneous, it should be overturned and remanded to the lower court for a correct finding and child support obligation.

The Referee and the District Judge were also clearly erroneous in ordering the abatement of the Defendant's child support obligation in the months of June, July and August of each year, which is when the Defendant is to have summer visitation. Therefore, this should be overturned and the obligation should be due each and every month of the year.

Respectfully submitted this 17th day of September, 1998.



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John William Schumacher,)
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Defendant-Appellee.)

Supreme Court No. 980258

AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Gail Daniel, being first duly sworn upon oath, deposes and says: That she is a citizen of the United States over the age of eighteen years and not a party to nor interested in the above-entitled action, and that on the 17th day of September, 1998, she placed in the United States mail at Bismarck, North Dakota, a true and correct copy of the following documents filed in the above-entitled action:

**Appellant's Brief
Appendix**

That copies of the above papers were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Bonita Wikenheiser
2726 N 4th St
Bismarck, ND 58501

That to the best of your affiant's knowledge, information and belief, such address as given above was the actual post office address of the party to be served.

Gail Daniel
Gail Daniel

Subscribed and sworn to before me this 17th day of September, 1998.

Jean D. Bashus
Notary Public

(SEAL)

JAN D. BASHUS
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires SEPT. 8, 2000

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Bonita M. Schumacher, nka)
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Supreme Court No. 980258

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**Appellant's Brief
Appendix**

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John Schumacher
PO Box 8
Linton, ND 58552-0008

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Gail Daniel
Gail Daniel

Subscribed and sworn to before me this 17th day of September, 1998.

Jan D. Bashus
Notary Public

(SEAL)

JAN D. BASHUS
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires OCT. 5, 2000