IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Debra Jean Brown, nka Debra Jean Perkins, Plaintiff-Appellant, vs. Gene Edward Brown, Defendant-Appellee.	)	Supreme Court No. 980274

APPELLANT'S BRIEF

APPEAL FROM THE FOURTH AMENDED JUDGMENT
DATED JUNE 19, 1998

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STATEMENT OF THE ISSUE

I. WHETHER THE DISTRICT COURT ERRED WHEN IT ORDERED THAT, UPON MODIFICATION OF THE CHILD SUPPORT OBLIGATION, THE OBLIGOR PAY A REDUCED CHILD SUPPORT AMOUNT DURING THE MONTH OF JULY.

STATEMENT OF THE CASE

On behalf of the State of North Dakota, the Bismarck Regional Child Support Enforcement Unit brings this appeal from the fourth amended judgment entered on June 19, 1998. The fourth amended judgment was entered pursuant to a motion to modify Gene Brown's child support obligation. At the hearing on the motion, the district court judge ordered that a previous provision for a reduced child support amount during the month of July remain in effect. The issue on appeal is whether the district court erred when it ordered that the reduction in child support during the month of July would remain in effect.

Debra Brown and Gene Brown were divorced in 1987. Pursuant to the divorce judgment entered on October 5, 1987, Gene Brown was ordered to pay child support for the parties' minor children. (App. at 5-8). An amended judgment was entered on September 7, 1993. (App. at 9-10). The second amended judgment modified the child support obligation and provided that Mr. Brown pay a reduced child support amount of $500.00 during the month of July. (App. at 10). A third amended judgment was entered on December 13, 1993. (App. at 11-13). The third amended judgment continued the child support reduction during the month of July. (App. at 13).

In April 1997, one of the parties requested a child support review from the Bismarck Regional Child Support Enforcement Unit. The child support enforcement unit filed a motion to modify the child support obligation on March 26, 1998. (App. at 4, no. 68). Mr. Brown requested that the hearing be held before the district court judge. (App. at 4, no. 68). The hearing was held on May, 19, 1998.

At the hearing, the parties stipulated to the monthly child support amount as it was set forth in the modification motion. (Tr. at 2, lines 3 - 25). A remaining issue was whether the July child support reduction should remain in effect. The child support unit did not request that the obligation be reduced during the month of July. (Tr. at 4, lines 1 - 18). Debra Brown asked that the court eliminate the reduction. (Tr. at 2, line 25, and 3, lines 1 - 19). The district court issued its findings and order dated June 11, 1998. (App. at 14 - 21). The district court judge ordered that the child support obligation be increased to $1,250.00 per month for three children, with subsequent reductions as the children were emancipated. (App. at 19 - 20). The court further ordered that the reduction to $500.00 during the month of July remain in effect. (App. at 20). The fourth amended judgment was entered on June 19, 1998. (App. at 22 - 25). The Bismarck Regional Child Support Enforcement Unit appealed from the fourth amended judgment.

ARGUMENT

While the original divorce judgment entered on October 5, 1987, does not expressly provide that Mr. Brown has visitation during the month of July and does not include a provision that he pay $500.00 child support for that month, the second amended judgment provides that there is a reduction to $500.00 for the month of July. At the modification hearing, Ms. Brown asked the court to eliminate the July reduction, explaining that the children "don't go live with him for those six weeks." (Tr. at 3, lines 17 - 19 and at 5, lines 2 - 9). As a result, it may be presumed that the reduction was originally ordered because the children visited Mr. Brown during the month of July.

The district court found that the July reduction in child support should remain in effect. (App. at 18). On appeal, the Supreme Court will not reverse a trial court's determination on child support, which is a finding of fact, unless the trial court's finding was clearly erroneous. Peterson v. Peterson, 555 N.W.2d 359, 363 (N.D. 1996). "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, [the Court] is left with a definite and firm conviction that a mistake has been made." Surerus v. Matuska, 548 N.W.2d 384, 387 (N.D. 1996).

The North Dakota Child Support Guidelines "expressly prohibit an abatement for temporary periods in which the child resides with the non-custodial parent." Edwards v. Edwards, 1997 ND 94, 15, 563 N.W.2d 394, 398 (N.D. 1997) (citing N.D.Adm.C. §75-02-04.1-02(2)). Child support amounts determined under the child support guidelines are presumed correct. N.D.Admin.C. §75-02-04.1-09(1). The presumably correct child

support amount may be rebutted "if a preponderance of the evidence establishes that a deviation from the guidelines is in the best interest of the supported children" and at least one of eleven enumerated facts set forth in the guidelines is proved. N.D.Adm.C. §75-02-04.1-09 (2)(a-k). Travel costs a child support obligor incurs to visit the children and which result in the obligor's reduced ability to pay child support may support a deviation from the presumably correct child support amount. Id. at (2)(i). The party who requests a deviation bears the burden of proving that the deviation should be allowed. Dalin v. Dalin, 545 N.W.2d 785, 788 (N.D. 1996). If the party who requests the deviation meets his or her burden of proof, a prima facie case has been made. Helbling v. Helbling, 541 N.W.2d 443, 445 (N.D. 1995). The burden of proof then shifts to the other party to rebut the prima facie case. Id. at 446.

At the modification hearing, the child support enforcement unit's attorney told the district court judge that the reduction for July should be eliminated unless the court found that a hardship existed. (Tr. at 4, lines 8 - 11). When Ms. Brown asked the court to eliminate the reduction, the court asked Ms. Brown why it should amend a provision that went into effect eleven years ago. (Tr. at 4, line 25 and 5, line 1). Ms. Brown stated that generally only one of the children continues to visit Mr. Brown, and that her costs remain constant during the child's visitation. (Tr. at 3, lines 6 - 8). The court then asked Ms. Brown on what she spent the child support money. (Tr. at 5, line 18). Ms. Brown listed her monthly expenses. (Tr. at 5, line 21 and at 6, lines 2 - 25). Mr. Brown told the court that it "is [the children's] choice that they do not come visit during the summer months."

(Tr. at 8, lines 21 - 22). He stated that his costs were increased when the child visited and asked that the reduction continue. (Tr. at 9, lines 3 - 7).

Mr. Brown was the party requesting a deviation from the presumably correct child support amount. As such, he bore the burden of proving that a deviation was justified. The district court judge instead placed the burden on Ms. Brown to show that the deviation should not remain in effect. Mr. Brown was not asked to prove that the deviation was justified until after Ms. Brown presented her case. When the court finally questioned Mr. Brown as to the deviation, Mr. Brown did not meet his burden of proving that the deviation was justified. He stated only that he had increased costs during visitation, but he did not detail those costs, and the district court judge did not question Mr. Brown as to the alleged increased costs.

In this case, because Mr. Brown did not produce evidence to support a deviation under any of the enumerated guideline factors that permit deviation, he did not make a prima facie case for a deviation. The district court erred when it did not require Mr. Brown to make a prima facie case and, instead, placed the burden of proof regarding Mr. Brown's deviation request on Ms. Brown. Because the court did not require Mr. Brown to present a prima facie case in support of a deviation from the presumptively correct child support amount, there was no evidence before the district court that would permit the court to find that a deviation was proper. As a result, the district court's finding that the child support reduction during the month of July would remain in effect was clearly erroneous and should be reversed.

CONCLUSION

Because the district court erred in placing the burden of proof regarding a deviation request on the non-requesting party and because there was no evidence to support the district court's finding that the presumably correct child support obligation had been rebutted, the district court's finding that the child support amount reduction for the month of July would remain in effect was clearly erroneous. The district court's decision as to the reduction should be reversed.

Respectfully submitted this 27th day of October, 1998.

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