980294

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

DANIEL P. RICHTER, Director of Ward County Social Service Board, and Crystal R. Houser, Plaintiff / Appellee, vs. SCOTT DAVID HOUSER, Defendant / Appellant.	Ward County No: 98-C-0429 Supreme Court No. 980294

ON APPEAL FROM THE WARD COUNTY DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

THE HONORABLE GARY A. HOLUM, PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

A. PROCEEDINGS BELOW:

This matter is an appeal of an order establishing the Appellant's obligation to provide child support. The Appellee does not dispute the Nature of the Case, Course of Proceedings or the Disposition in the Trial Court as set forth in the Appellant's Brief.

B. STATEMENT OF THE FACTS:

Crystal Houser (hereafter referred to as "Crystal") is married to the Appellant, Scott Houser (hereafter referred to as "Houser"). (Tr. p. 4) Crystal and Houser have two minor children in common. (Tr. p. 4) The Housers are not divorced. (Tr. p. 5) Houser last resided with his wife and children in March, 1997. (Tr. p. 6) Since March 1997, Houser directly provided Crystal with approximately $300.00 for the support of their minor children. (Tr. p. 6) Crystal first received public assistance in the form of AFDC for their children in March 1997. (Tr. p. 5) At the time of the hearing Crystal was still receiving AFDC for the minor children. (Tr. p. 5) Crystal used the AFDC funds for the benefit of the Housers' minor children. (Tr. pp. 9, 10)

At the time of the hearing Crystal had become employed. (Tr. p. 5) Crystal was only employed on an "on and off" basis while the family was intact. (Tr. p. 7) Houser is self-employed doing business as Houser Construction, Inc., a

company owned by Houser and his father. (Tr. p. 16) Houser went into self-employment in October, 1997. (Tr. p. 22)

Houser does cable construction, which is the building of cable television systems. (Tr. p. 16) Cable construction is not the same job as servicing cable television lines. (Tr. p. 30) By Houser's testimony, a cable service technician is less skilled than a cable construction technician. (Tr. p. 30) Further, by Houser's testimony, a cable service technician in Minot, ND would earn between $7.00 and $8.50 per hour as a starting wage. (Tr. p. 27)

Houser previously did cable construction with prior employers, such as Channel Communications and M&H Construction. (Tr. pp. 16, 17) Within his capacity of cable construction, Houser worked in various locations (such as Minot, Grand Forks, Bismarck, Wisconsin, Wyoming, Nebraska, etc.), wherever there was income. (Tr. pp. 10, 14, 20) Such is the nature of the cable construction business. (Tr. p. 29) Such movement is necessary, as once a cable system is constructed it will last 10 to 15 years. (Tr. p. 26) Although Houser worked in various communities and / or states, he maintained his residence in North Dakota. (Tr. pp. 14, 15) At the time of the hearing, Houser's company was commencing a project in Bismarck, ND. (Tr. p. 28)

Houser earned $39,778.00 gross in 1996. (Tr. pp. 8, 9) Houser earned $21,380.00 gross from employment and unemployment in 1997. (Tr. p. 26) Approximately $17,000 of Houser's 1997 gross income was from employment during the period of April, 1997 through August, 1997. (Tr. pp. 18, 25) Prior to owning his own company, Houser was a general lineman in the cable construction

industry. (Tr. p. 31) Houser's average earnings, about $3,400.00 gross per month, are a fair representation of what a general lineman in the cable construction industry can earn. (Tr. pp. 18, 33)

Houser currently receives no direct earnings, however he testified that he receives about $700.00 a month in in-kind income from Houser Construction, Inc. (Tr. pp. 21, 28 and 31) Houser pays his cable construction employees at the average rate of $200.00 to $300.00 per week. (Tr. p. 28) Houser can return to doing cable construction for other companies. (Tr. p. 21) There is cable construction work in the tri-state area, as well as Florida and the coasts. (Tr. pp. 20, 21 and 31)

Houser started his own company so that he could stay in the tri-state area. (Tr. pp. 21, 29) Houser wishes to stay in the tri-state area as there is work available and he can obtain higher bids due to less competition in the local industry. (Tr. p. 31) There were no additional facts presented to support Houser's decision to remain the tri-state area.

ARGUMENT

I. THE TRIAL COURT'S IMPUTATION OF INCOME WAS A CORRECT APPLICATION OF THE NORTH DAKOTA CHILD SUPPORT GUIDELINES.

A trial court's determination of child support is a finding of fact that will not be set aside unless it is clearly erroneous. Dalin v. Dalin, 545 N.W.2d 785, 788 (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 Supreme Court is left with a definite and firm conviction that a mistake has been made. Id.

In this action the trial court did find that Houser was underemployed and imputed upon him an income at 90% of his gross 1996 earnings. The trial Court's finding of underemployment is supported by the record and the imputation of income was appropriate. The guidelines do not require imputation at the minimum wage rate in this matter, as argued by the Defendant, as Houser failed to show that no opportunity to make a comparable income was available in his community. The child support, as ordered, is correct in accordance with the record and the North Dakota Child Support Guidelines.

A. Houser is 'Underemployed'

The trial court's finding of Houser's underemployment is supported by the facts and is not erroneous. N.D.Admin.Code sec. 75-02-04.1-07(1)(b) provides:

> a. An obligor is 'underemployed' if the obligor's gross income from earnings is significantly less than the prevailing amounts earned in the community of persons with similar work history and occupational qualifications.

Further, N.D.Admin.Code sec. 75-02-04.1-07(2) provides:

> 2. An obligor is presumed to be underemployed if the obligor's gross income from earnings is less than six-tenths of the prevailing amounts

earned in the community of persons with similar work history and occupational qualifications.

Houser argues that no evidence was presented to support a finding of underemployment. At the hearing, however, sufficient evidence was presented to determine that Houser is currently underemployed. Houser constructs cable television systems, which is different than servicing such systems once they have been constructed. Houser had been so employed, as a general lineman, for several years. In 1996, Houser earned $39,778.00 (gross) as a general lineman in the cable construction industry. In 1997, Houser earned $21,380.00 (gross) as a general lineman in the cable construction industry. About $17,000.00 of Houser's income for 1997 was earned from employment inside a five-month period (April through August), as Houser went into self-employment in October, 1997. Houser's employment during the period of April, 1997 through August, 1997 generated average earnings of $3,400.00 gross per month. By Houser's own testimony, such income represents the earning ability of a person employed as a general lineman in the cable construction industry.

During the other seven months of 1997 (January through March, and September through December) Houser was either unemployed, or starting his own business. The conditions of unemployment and self-employment skew the perception of Houser's income potential as both create an illusion of an annual income that is less than his annualized earning ability.

Houser now owns his own company. Houser, however, still performs his usual task of cable construction. By virtue of such ownership, Houser has

additionally elevated himself into a supervisory role. Although Houser gets no direct income from such a venture, his company provides him with in-kind income in the area of $700.00 per month. Such earnings are, by Houser's own testimony, 20.58 percent of what an average lineman in the cable construction industry earns on a monthly basis ($700.00 divided by $3,400.00 = 20.58%).

Houser's in-kind income of $700.00 per month equates to $161.53 per week. Houser pays his subordinates an average of $200.00 to $300.00 per week. Houser's own earnings are at 53.84 percent of what he pays his own employees on a good week. One must keep in mind that Houser's subordinates are employees in a fledgling company; Houser, and his employees, could earn more if they went back to work doing cable construction for an established company. For purposes of comparison, Houser raised the issue of the cable service technicians in Minot, ND. Although Houser admits that his profession requires more skill, he is receiving only 52.10 percent of the average starting salary of a cable service technician in the Minot community. Houser is underemployed within the definition of the North Dakota Child Support Guildelines.

B. Imputation of Income was appropriate.

Houser is an underemployed person within the definition of the guidelines. Income based upon earning capacity must be imputed upon Houser for the purpose of determining his child support obligation. N.D.Admin.Code sec. 75-02-04.1-07(3) provides:

Except as provided in subsections 4 and 5, monthly gross income based

upon earning capacity equal to the greatest of subdivisions a through c, less actual gross earnings, must be imputed to an obligor who is unemployed or underemployed.

a. An amount equal to one hundred sixty-seven times the hourly federal minimum wage.

b. An amount equal to six-tenths of prevailing gross monthly earnings in the community of persons with similar work history and occupational qualifications.

c. An amount equal to ninety percent of the obligor's greatest average gross monthly earnings, in any twelve months beginning on or after thirty-six months before commencement of the proceeding before the court, for which reliable evidence is provided.

The trial court's discretion is limited in this matter. Once it has been determined that an obligor is underemployed, the trial court must impute income. Additionally, the trial court must apply the formula that provides the highest result. In Houser's case, N.D.Admin.Code sec. 75-02-04.1-07(3)(c) directs the calculation, as 90 percent of Houser's 1996 income generates an imputed income greater than the application of the federal minimum wage. As well, 90 percent of Houser's 1996 income generates an income greater than 60 percent of the average income of a cable construction lineman (as evidenced by Houser's testimony of what a cable construction lineman can earn).

Houser's tax documents were analyzed by the trial court. Houser earned $39,778.00 (gross) in 1996. The 1996 tax documents provided reliable evidence

of Houser's highest earnings for a twelve month period within thirty-six months prior to the commencement of the action. For purposes of imputation, Houser's 1996 income is the starting point to determine his "imputed earning ability." Through the imputation of income the trial court found Houser's net monthly income to be $2,341.92. The trial court ordered child support in the amount of $667.00 per month (for two children). This determination of income and child support was the correct application of the North Dakota Child Support Guidelines.

C. "Community" Concept not Applicable to Houser's Facts.

Houser attempts to complicate the underemployment analysis by arguing that employment in the area of cable construction is not available in Houser's community (100 mile radius of Minot, ND). This argument is without merit. Due to the nature of the cable construction industry, employment in the occupation of cable construction would become available in the Minot community every 10 to 15 years (as such is the life span of a cable system once it is complete). Houser's job has always required him to travel to the work. As a condition of employment, Houser has always traveled to the work (Grand Forks, Bismarck, Drayton, South Dakota, Wisconsin, Wyoming, Nebraska, etc.) while always maintaining his residence in either Minot, ND or Coleharbor, ND. At the time of the hearing, Houser was about to commence a project in Bismarck, ND - a community more than 100 miles from his residence.

Houser has always maintained a community, for purposes of residence, yet traveled to locations outside of his community for purposes of employment. Houser did construct a cable system in his community in 1996, however such

work within in his residential community has been his exception, not his custom, (as he was fortunate enough to live a community that needed his services at the time). Houser has historically traveled distances greater than 100 miles to find work. Such travel is necessary for his job, as, once a cable system is built, the community will need no further cable construction for 10-15 years.

Houser expressed his motivation to remain in the tri-state area; Houser wanted to remain in the area of the employment opportunities. By such an admission Houser has expressed his willingness to travel distances greater than 100 miles to perform his services – he is at least willing to travel in the tri-state area. It is absurd to believe that Houser cannot be 'underemployed' merely because he started a business that, by its nature, requires him to travel distances greater than 100 miles. There are professions that escape the community definition: Houser operates within such a profession. After all, people cannot bring their communities to Minot for Houser's professional services, and Minot is not going to need Houser's professional services until 2006 – 2010 AD (as the cable system he built in 1996 should need replacement at such time).

A parent has the duty to support his children to the best of his abilities, not simply his inclinations. Henry v. Henry, 1998 ND 141 ¶ 14, 581 N.W.2d 921 (ND 1998). Any holding that allows an obligor to start a business and avoid imputation of income merely because his services cannot be performed in his hometown would create dangerous precedence. If such were the case, any obligor with historical earnings could totally avoid the imputation of income merely by starting a business that requires remote performance (such as resurfacing runways

of major airports, overhauling battleships, etc.). Such a holding would violate public policy as it would result in the avoidance of a proper child support obligation. The North Dakota Child Support Guidelines do not contemplate such a result.

D. Minimum Wage Imputation not Applicable to Houser.

The Defendant argues that income cannot be imputed upon Houser as his decision to become self-employed was reasonable. The Defendant further argues that if income is to be imputed, it can only be imputed at the minimum wage rate.

Implied in the guideline schedule and a parent's duty to support their children is the assumption that an obligor with a demonstrated ability to earn income and support his children at a certain level will continue to do unless he can establish legitimate reasons for a change. Henry, at ¶18. Houser argues that his decision to start his own business was a reasonable decision, and thus should avoid the harsh effect of income imputation. Within the text of the Appellant's Brief, Houser makes reference to his children as an attempt to support his concept of a "legitimate reason" for his change of employment. This argument assumes facts not in evidence as Houser made no reference to his children in support of his decision to start his own business. Houser's decision to become self-employed was motivated by money, and remaining in an area where he can obtain work.

As an alternative result, Houser attempts to seek imputation of income at the minimum wage rate. N.D.Admin.Code sec. 75-02-04.1-07(6) provides:

> If an unemployed or an underemployed obligor shows that employment opportunities, which would provide earnings at least equal to the lesser of

the amounts determined under subdivision b or c of subsection 3, are unavailable in the community, income must be imputed based upon earning capacity equal to the amount determined under subdivision a of subsection 3, less actual gross earnings.

Houser argues that employment as a general lineman in the cable construction industry is not available within a 100 mile radius of Minot, thus the court can only impute upon him the minimum wage standard. Houser's argument is without merit. The burden is upon the unemployed / underemployed obligor to show that **employment opportunities** [emphasis added] that provide comparable income are not available in the obligor's community. However, the guidelines do not limit employment opportunities only to employment within the obligor's specific profession. To satisfy this burden, the obligor must show that **no employment** (that will generate a comparable income) is available to the obligor within the obligor's community. The court's analysis must consider all occupational fields within a community, as well as the obligor's efforts to secure employment in such occupations. This is a tough burden to satisfy. Houser failed to meet this burden.

Houser testified that no employment in the cable construction industry was available in Minot. Houser testified to virtually nothing more regarding his employment opportunities. Houser failed to make any showing to the trial court that he had applied for, and was denied, employment in any other occupation that could generate an income of $2,341.92 net per month. Houser could not make such a showing, as he did not seek any other employment. Instead of seeking

employment, Houser started his own business - and now attempts to use the fledgling status of his business as a shield from the effects of imputation. This is impermissible. An obligor's ability to pay child support is not solely determinable from actual income, and income comparable with the obligor's prior earning history may be imputed in calculating the child support obligation. Edwards vs. Edwards, 1997 ND 94 at ¶ 7, 563 N.W.2d 394, at 396 (N.D. 1997). An obligor is still free to switch jobs, or become self-employed. However, if that voluntary change results in the obligor becoming "underemployed," then the obligor who made the change should make a greater sacrifice than his children. Nelson v. Nelson, 547 N.W.2d 741, at 746 (N.D. 1996).

The proposed amendments to the North Dakota Child Support Guidelines address the issue of such a voluntary change in employment. N.D.Admin.Code sec. 75-02-04.1-07(9), as proposed, provides:

> 9. Notwithstanding subsections 4, 5, and 6, if an obligor makes a voluntary change in employment resulting in reduction of income, monthly gross income equal to one hundred percent of the obligor's greatest monthly earnings, in any twelve consecutive months beginning on or after thirty-six months before commencement of the proceeding before the court, for which reliable evidence is provided, less actual monthly gross earnings, may be imputed without a showing that the obligor is unemployed or underemployed.

Upon validation of the proposed guidelines, Houser's circumstances will

be treated in a different manner. The issue of unemployment or underemployment will no longer be relevant if an obligor is making less income due to a voluntary job change (such as starting a business). Under such facts, the obligor will be held to a standard equal to the obligor's best annual income within the prior three years.

Holding Houser accountable to his prior earnings, by imputing upon him 90 percent of such earnings, is contemplated by within the guidelines and is in conformance with prior Court decisions on point. Such a holding is generous in light of the proposed changes to the North Dakota Child Support Guidelines. The trial court's imputation of income, as well as the trial court's order of child support, is not erroneous. The child support amount of $667.00 is correct, and should be upheld.

II. THE TRIAL COURT'S ORDER OF REIMBURSEMENT SUPPORT WAS NOT ERRONEOUS AND WAS IN COMPLIANCE WITH STATE LAW

There exists a misperception among attorneys, and their clients, that the entry of an order of child support establishes a parent's duty to support a child. This misperception fuels the argument that a parent has no obligation toward his or her child until the ink has dried on the order. This misperception is absurd as it is contrary to existing law and further violates public policy.

> **N.D.Cent.Code sec. 14-09-08** provides: Parents shall give their children support and education suitable to the child's circumstances.

N.D.Cent.Code sec. 14-08.1-01 provides: A person legally responsible for the support of a child under the age of eighteen years who is not subject to any subsisting court order for the support of the child and who fails to provide support, subsistence, education, or other necessary care for the child, regardless of whether the child is not or was not in destitute circumstances, is liable for the reasonable value of physical and custodial care or support which has been furnished to the child by any person, institution, agency or county social service board. Any payment of public assistance money made to or for the benefit of any dependent child creates a presumption that such payment equals the reasonable value of physical and custodial care or support.

N.D.Cent.Code sec. 14-07-05 provides (in relevant part): Every parent or other person legally responsible for the care or support of a child who is unable to support himself by lawful employment, who wholly abandons such child or willfully fails to furnish food, shelter, clothing and medical attention reasonably necessary and sufficient to keep the child's life from danger and discomfort and his health from injury is guilty of a class C felony.

N.D.Admin.Code sec. 75-02-04.1-02(9) provides: Determination of a child support obligation is appropriate in any matter where the child and both of the child's parents do not reside together.

These statutes, viewed in a collective manner, support the concept that the obligation to support a child arises at the time of the child's birth (and not by any subsequent agreement between parents or by any order of the court). It is presumed that a parent is providing support for a child if that parent resides with the child; the obligation of support is being satisfied by that parent's household contribution. This obligation is so strong that, if a parent fails to provide necessaries for his/her child, that parent can be charged with a Class C felony. When a parent moves out of his/her child's household, there becomes a need to measure and monitor the absent parent's obligation. Upon these facts the entry of a child support order is appropriate. The resulting "child support order" is nothing more than a tool to measure, monitor and enforce the already existing obligation of support. The resulting child support order does not create the obligation of support.

In a perfect world, an absent parent would voluntarily provide adequate support for his/her children when that parent no longer resides with the children. We now have strong child support laws because the world is not as perfect as described above – there exists injustice in the realm of voluntary support. As an example of such injustice. Houser paid $300.00 toward the support of his children between March 1997 and the hearing of July 20, 1998. That is $300.00 paid over a total of seventeen months, for an average of $17.65 per month. Within the first five months after he left his children, Houser earned $17,000.00 from employment. Houser's children received little or no benefit from this income. Houser's wife received little or no benefit from this income. Houser's wife went

on public assistance to provide for Houser's children in the absence of his voluntary contribution. Houser now needs to be accountable his lack of adequate support for the period of March, 1997 through July, 1998 as some other party picked up his bill. The trial court's establishment of Houser's child support arrearage is not only correct, it is just.

Houser argues that N.D.Cent.Code sec. 14-09-14 provide a defense to the reimbursement of child support expended on his behalf. N.D.Cent.Code sec. 14-09-14 is in direct conflict with N.D.Cent.Code sections 14-09-08, 14-08.1-01, and 14-07-05. N.D.Cent.Code sec. 14-09-14 also violates established caselaw and public policy. N.D.Cent.Code sec. 14-09-14 should be judicially abolished as such law serves only one purpose – **'parental irresponsibility'**. At face value, N.D.Cent.Code sec. 14-09-14 allows a parent to walk away from his/her children and not look back – and while the absent parent is building his fortune (such as earning $17,000.00 during the first five months away from his family) the custodial parent and children are forced to provide their necessaries in whatever manner is available. In Houser's instance, his family turned to the county social service board for help. The law does not work absurd results; N.D.Cent.Code sec. 14-09-14 promotes only one absurd result, and its effect should be eliminated.

The Court has supported the concept of past child support in spite of N.D.Cent.Code sec. 14-09-14. In Mougey v. Salzwedel, 401 N.W.2d 509 (N.D. 1987) the North Dakota Supreme Court upheld a trial court's decision to order reimbursement to a stepfather for past support expended for the benefit of the Defendant's natural child. In the Interest of K.E.N. by Shasky v. R.C., 513

N.W.2d 892 (N.D. 1994), the Court upheld a trial court's decision to order reimbursement of past child support to a county social service board. In Linrud v. Linrud, 552 N.W.2d 342 (N.D. 1996) the Court upheld a trial court's decision to order back support during the pendency of a divorce. In the Interest of E.H. v. T.W., 1997 ND 101, 564 N.W.2d 281 (N.D. 1997) the Court held that it is appropriate to establish child support arrears by using the obligor's actual past annual income, applied to the child support guidelines.

The above-referenced cases set one major tone: an order of past child support is permissible regardless of the type of action (reimbursement by a stepparent and / or county social service board, paternity, divorce, etc.). In a recent case, however, the Court upheld a trial court's decision to not order past support. In such decision, however, the Court found that past due child support could be awarded. Rydberg v. Johnson, 1998 ND 160 ¶ 9, 583 N.W.2d 631. Rydberg is not authority to the notion that N.D.Cent.Code sec. 14-09-14 bars any order of past child support. Rydberg exists as confirmation of the notion that the trial court is in the position to make decisions based upon facts, and the Supreme Court will uphold such decisions if they are not clearly erroneous.

The statutes support the order of past child support. The caselaw supports the order of past child support. Public policy supports the order of past child support. In Sullivan v. Quist, 506 N.W.2d 394 (N.D. 1993) the North Dakota Supreme Court expressed its opinion that a strong public policy exists against divorce settlements that bargain away child support, as the right to support belongs to the child. This holding is not limited to divorce settlements, this

holding stands for something much larger – judicially ignoring a parent's obligation to support his/her child is contrary to our public standards. An omission can also be an act and any trial court that fails to order past child support (for any month that an absent parent and child live apart) grants to the absent parent a judicial pardon from the obligation of support that already exists by virtue of the parent and child relationship.

Houser left his family in March, 1997. Houser's family obtained assistance from the Ward County Social Service Board commencing March, 1997. As of July, 1998 Hosuer's family was still receiving such assistance. Houser's obligation to support his children arose, by statute, at the time each child was born (thus the parent-child relationship for each child was created). Houser's obligation to his children needs to be measured, monitored and enforced. Such is the role of the child support obligation. It is appropriate to order support for anytime that a parent does not live with the child. Public policy requires that children be supported, while they are still children. Houser provided his children with $300.00 in support since the day that he left them. The trial court ordered Houser to be accountable for the child support that he has not paid since March, 1997. The decision of the trial court is a correct application of existing law and is not erroneous. The decision of the trial court should be upheld.

III. IT IS APPROPRIATE TO ORDER REIMBURSEMENT AT THE RATE OF THE OBLIGOR'S MONTHLY CHILD SUPPORT OBLIGATION.

The trial court ordered Houser to provide reimbursement support in the

amount of $8,789.00 for the period of March, 1997 through July, 1998. The initial portion of the arrearage ($4,120.00) was calculated upon Houser's monthly child support obligation for the last ten months of 1997 ($412.00 per month based upon an income of $1,435.00 net per month). The remaining portion of the arrearage ($4,669.00) was calculated upon Houser's monthly child support obligation for the first eight months of 1998 ($667.00 per month based upon an imputed income of $2,341.92 net per month). The calculation of arrears is correct and should be upheld.

Houser argues that, if past support must be entered, it must be entered in the amount of actual public assistance expended. Houser states that the state can only seek an order for the reimbursement of benefits paid, and enter an order for future support. Houser cites N.D.Cent.Code sections 14-08.1-01, 14-09-09.26, 14-09-09.27 as authority for such argument, however Houser's interpretation of such authority is out of context. These statutes provide a list of responsibilities placed upon the state's attorney. These responsibilities (establish paternity, secure reimbursement, establish current support, establish future support, modify and enforce child support orders) are more expansive than merely securing the reimbursement of governmental benefits paid. In limiting his argument to only a portion of the state's responsibilities, Houser ignores the others.

Reimbursement of past child support should be entered at the rate of the obligor's monthly child support obligation. Public assistance is based upon the needs of the child. Child support is based upon the obligor's finances, very few other facts are considered in determining a child support obligation. See

generally Scherling v. Scherling, 529 N.W.2d 879 (N.D. 1995). North Dakota maintains an "obligor model" guideline for calculating child support and under such model the "needs of the child" are not relevant in the determination of child support. Thus, an absent parent's duty of support has to be based upon his/her finances and not upon the degree of public assistance is being provided to the child.

Keeping in mind that a child support order only is a tool to measure and monitor the obligation of support that already exists by virtue of the parent / child relationship. The following statutes provide guidance in the evaluation of the support order.

N.D.Cent.Code sec. 14-09-09.7(1) provides in relevant part: The department of human services shall establish the amount that a parent should be expected to contribute toward the suppport of the child. . .

N.D.Cent.Code sec. 14-09-09.7(3) provides in relevant part: There is a rebuttable presumption that the amount of child support that would result from the application of the child support guidelines is the correct amount of support.

N.D.Admin.Code sec. 75-02-04.1-13 provides: The child support guideline schedule amount is rebuttedly presumed to be the correct amount of child support in all child support determinations, including both temporary and permanent determinations, and including determinations necessitated by actions for the support of children of married persons, actions seeking domestic violence protection orders, actions arriving out of the divorce, actions arising out of

paternity determinations, actions based upon a claim for necessaries, actions arising out of juvenile court proceedings, interstate actions for the support of children in which a court of this state has the authority to establish or modify a support order, and actions to modify orders for the support of children. The fact that two or more such actions may be consolidated for trial or otherwise joined for convenient consideration of facts does not prevent the application of this chapter to those actions.

These statutes, viewed in a collective manner, provide the basis that an obligor's obligation of support is to be measure by the application of the child support guidelines. The application of the child support guidelines is the correct method of measuring the obligation of support in any instance. Regarding the determination of back support . . . It is appropriate to establish child support arrears by using obligor's actual past annual income. In the Interest of E.H. v. T.W., 1997 ND 101 ¶ 7, 564 N.W.2d 281 (N.D. 1997). Thus, the order of back support is acceptable and, in the determination of such support, the trial court is to look at the obligor's income for each year (and determine a monthly child support obligation for each respective year).

The North Dakota Supreme Court held that the total amount of AFDC expended could be ordered as a child support arrearage. See generally In the Interest of K.E.N. by Shasky v. R.C., 513 N.W.2d 892 (N.D. 1994). In footnote #5, however, the Court indicated that the decision did not decide whether the holding could be rebutted by the application of the child support guidelines. It is the position of this author that the application of the child support guidelines

should control the order of support (as well as the order of back support) without regard to the amount of public assistance being expended for the children of the obligor.

In Jackson v. Rapps, 947 F.2d 332 (8th Cir. 1991) the issue of the determination of back support was analyzed within the framework of federal law. This action arose out of the State of Missouri, however the impact of this decision must be recognized in every state that receives federal funds to support the state's welfare program. North Dakota is such a state. The issue of public assistance is relevant to this matter as Crystal Houser is a recipient of AFDC funds, however the amount of public assistance provided to Crystal Houser is not relevant in the determination of Houser's child support obligation.

In Jackson, the State of Missouri implemented a plan to order reimbursement and support based upon the total amount of AFDC funds that were being expended for an obligor's child(ren). The 8th Circuit Court considered the state's plan to order reimbursement in an amount equal to the total amount of AFDC expended. The Court held that, in order to receive federal AFDC funds the state must develop a child support guideline that conforms with the federal requirements, and further held that child support is to be calculated in accordance with the state's guideline. Actual AFDC (or public assistance funds) is not a proper measure of an obligor's duty of support.

Houser's obligation of back support was appropriate. Houser has an obligation to satisfy his parental responsibility from March, 1997 forward. The application of the child support guidelines is the appropriate measure of his

obligation for each month. Houser's obligation of back support is correct in accordance with the facts, the statutes and established caselaw. Houser's obligation of back support should be upheld.

Houser further argues that Crystal Houser should provide one half of the cost of reimbursement. To support this position Houser argues that N.D.Cent.Code sec. 14-09-08 places a duty of support upon Crystal. Houser's argument is without merit as he has failed to make any showing that Crystal did not provide support for the children in accordance with her circumstances and abilities. It was reasonable for Crystal to seek public assistance as she had virtually no employment history during the course of the relationship. If Houser had met his obligation to his wife and children, the may have not been the need for Crystal to rely upon public assistance. Houser's argument is further without merit as he attempts to hold Crystal to a standard of support, while trying to avoid his own. What is good for the gander should be good for the goose.

CONCLUSION

The facts show that Houser is underemployed. The imputation of income was appropriate and the trial court correctly calculated Houser's obligation of support based upon 90 percent of Houser's 1996 income. It is correct to measure and enforce a parent's obligation of support for each month that the parent does not reside with the child. Houser left his family in March, 1997. The correct measure of support is to be determined by the application of the child support guidelines. Houser's child support obligation in the amount of $667.00 per month

is supported by the facts and is a correct application of the child support guidelines. The trial court's order of child support, order of reimbursement of $8,789.00 since March, 1997 is not erroneous.

The Appellee respectfully requests the North Dakota Supreme Court to uphold the decision of the trial court.

Dated this 17th day of December, 1998.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing APPELLEE'S BRIEF, and SUPPLEMENTAL APPENDIX were served by hand-delivery on the 17th day of December, 1998, to the Appellant's attorney of record, Debra K. Edwardson, at the attorney's last known address of:7A Central Avenue East, Suite 303, Minot, ND 58701.

Dated this 17th day of December, 1998.

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