

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Stacey Tibor,)
)
Plaintiff-Appellant,))
)
vs.)
)
Chris Bendrick,)
)
Defendant-Appellee.)

980389

Supreme Court No. 980389

FILED
IN THE CLERK OF THE
CLERK OF SUPREME COURT

MAR 19 1999

Appellee's
APPELLANT'S BRIEF

STATE OF NORTH DAKOTA

APPEAL FROM THE AMENDED JUDGMENT
DATED JULY 24, 1998

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STATEMENT OF THE ISSUES

- I. IT WAS CLEARLY ERRONEOUS FOR THE DISTRICT COURT TO RETROACTIVELY MODIFY THE DEFENDANT'S ACCRUED CHILD SUPPORT ARREARAGES.

STATEMENT OF THE CASE

This case involves a judgment establishing paternity for the minor child, S.F.T., and the establishment of support to be paid by the Defendant, C.B. (App. pp 3-5). The current child support obligation was recently modified pursuant to the Child Support Guidelines. (App. page 7). Also modified were the accrued child support arrearages owed by the Defendant. (App. page 7). This appeal is from the Amended Judgment entered on July 23, 1998, Notice of Entry of which was served on October 23, 1998. (App. page 8). This appeal is brought by the Bismarck Regional Child Support Enforcement Unit on behalf of the State of North Dakota, pursuant to N.D.C.C. §14-09-09.27. More specifically, this appeal concerns the retroactive modification of the Defendant's child support arrearages.

The parties in this matter were never married. Pursuant to the Judgment entered on March 25, 1992, the Defendant was adjudicated the father of the minor child, S.F.T., born March 20, 1987. (App. page 3). The judgment also established a child support obligation of \$270.00 per month, to be paid by the Defendant commencing March 15, 1992. (App. pp 3-4). Subsequent to the entry of the Judgment, the Defendant failed to make all of his court ordered child support payments and an arrearage accrued. As of June 1998, the arrearage totaled \$12,505.00. (Reg. of Actions, Nos. 30-31). As the Plaintiff, S.T., from time to time was the recipient of assigned public assistance, some of the arrearages were owed to the State of North Dakota, and some were owed to the Plaintiff, S.T. Copies of the Referrals or Assignments of Rights were filed with the Morton County Clerk of Court, but do not appear on the Register of Actions.

On June 10, 1998, the Defendant served a motion to modify his child support based on the current Child Support Guidelines. (Reg. of Actions, Nos. 19-22). This motion was filed pursuant to Rule 3.2 of the North Dakota Rules of Court. The State's response was served on June 17, 1998. (Reg. of Actions, No. 26). No oral argument was requested and the District Court decided the motion on briefs.

According to the Defendant's Affidavit, filed with his motion, he began receiving social security disability benefits, and the child began receiving dependent's benefits, in December, 1997. (Reg. of Actions, No. 21). Based on the Child Support Guidelines, the dependent's benefits received by the child exceeded the amount of child support to be paid by the Defendant and are, therefore, in lieu of child support. The District Court correctly modified the Defendant's current obligation to zero.

The Defendant had also filed a supplemental request asking the District Court to retroactively modify the Defendant's accrued arrearages to zero as the child had received a lump-sum back payment from the Social Security Administration in approximately February, 1998. (Reg. of Actions, No. 30-31). The Regional Child Support Enforcement Unit opposed this request. (Reg. of Actions, No. 33). On July 15, 1998, the District Court issued an order retroactively modifying the arrearages to zero. (App. page 6). The Amended Judgment was entered on July 23, 1998, and Notice of Entry of the Amended Judgment was served on October 23, 1998. (App. pp 7-8). Notice of Appeal of the Amended Judgment was served on December 10, 1998 and was filed on December 16, 1998. (App. pp 9-10).

This appeal was brought because the District Court's order that the arrearages were to be retroactively modified to zero is clearly erroneous as it was induced by an erroneous view of the law. The retroactive modification of the arrearages should be overturned and the

matter remanded for an order requiring the repayment of the arrearages which had accrued prior to the modification of the current child support obligation.

LAW AND ARGUMENT

I. IT WAS CLEARLY ERRONEOUS FOR THE DISTRICT COURT TO RETROACTIVELY MODIFY THE DEFENDANT'S ACCRUED CHILD SUPPORT ARREARAGES.

The District Court found that the Defendant is entitled to a retroactive modification of his accrued child support arrearages based on the fact that there was a lump-sum payment made to the child from the Social Security Administration. (App. page 6). The standard of review on the appropriateness of the retroactive modification of the arrearages 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 had been made." Id. (citing Sererus v. Matuska, 548 N.W.2d 384, 387 (ND 1996)). In this case, the trial court's retroactive modification was based on an erroneous view of the law on this issue.

Pursuant to N.D.C.C. §14-08.1-05(1), child support that is due and unpaid is a judgment by operation of law, entitled to full faith and credit, and is not subject to retroactive modification. (App. page 11). There is no exception to the prohibition of the retroactive modification of arrearages. The fact that child support arrearages are not subject to retroactive modification is also supported by case law in this area.

In Guthmiller v. Guthmiller, 448 N.W.2d 643 (ND 1989), the obligor had sought credit on his child support arrearages for social security disability benefits received by the obligee as representative payee of his children. Id. at 644. The obligor began receiving social security disability payments in July, 1988, and the children began receiving dependent's benefits at that time. In 1989 the obligor motioned for a modification of his child support. Part of the requested relief was credit for the social security benefits received in the past by the children's mother as representative payee. The trial court did not give the obligor credit on his arrearages and he appealed. On appeal it was held that accrued, but unpaid child support payments cannot be modified. Id. at 649. "To apply credit to the arrearages which accrued prior to the obligor's filing of the modification application would amount to a retroactive modification of vested support rights." Id. The principle that it is improper to retroactively modify accrued and unpaid child support has been upheld in other cases. See Thorlaksen v. Thorlaksen, 453 N.W.2d 770, 775-776 (ND 1990).

Another case involving a request for a retroactive modification of child support arrearages by crediting social security dependent's benefits received by a child based on the obligor's disability is Austin v. Towne, 1997 ND 59, 560 N.W.2d 895. In that case the obligor had accumulated arrearages from 1981 to 1991. Id. at ¶ 15. His children began receiving social security dependent's benefits in 1989. Id. In 1995 and 1996, the obligor had requested a modification of his arrearages to credit the dependency payments received by his children. Id. at ¶ 5. The trial court denied his request and a subsequent request for reconsideration. The obligor appealed and it was again held that past due and unpaid child support cannot be retroactively modified. Id. at ¶ 14.

The Defendant, C.B., requested that the District Court retroactively modify his child support arrearages by crediting social security dependent's benefits received by the Plaintiff, S.T., as representative payee of his minor child. (Reg. of Actions, Nos. 30-31). The trial court granted the credit. (App. page 6). This is an improper retroactive modification of the child support arrearages, some of which were owed to the State of North Dakota.

Also to be considered is the fact that a modification of child support can be effective no earlier than the date of the filing of a motion to modify. "While a court may not retroactively modify accrued, but unpaid child support payments,... we have previously decided that a court may modify a child support order as of the date of commencing the modification proceedings." Olson v. Garbe, 483 N.W.2d 775, 776 (ND 1992) (citing, Thorlaksen v. Thorlaksen, supra, and Guthmiller v. Guthmiller, supra).

The effective date of any modification depends on the facts of the case. "Once a motion to modify a support order has been filed, an interested party is on notice circumstances relevant to child support have changed and the terms of the support obligation will change upon a judicial finding that the changed circumstances are material." Gabriel v. Gabriel, 519 N.W.2d 293, 295 (ND 1994) (citing Olsen v. Garbe).

The two principles of no retroactive modification of child support arrearages, and the effective date of any modification were visited in Mahoney v. Mahoney, 538 N.W.2d 189 (ND 1995). In the Mahoney case, the obligee objected to what she perceived to be a retroactive modification of the obligor's child support obligation. Id. at 195-197. In Mahoney, there were several hearings and proceedings which stemmed from the obligor's motion for modification of his child support. Id. at 191. These various proceedings delayed a final resolution to the motion and the obligee objected to the ordered modification being

effective more than a year back in time. The appeal reviewed the obligee's argument that it would be a retroactive modification. It was held that, although child support arrearages could not be retroactively modified under N.D.C.C. §14-08.1-05, a modification for any period during which there is a motion for modification pending is not a retroactive modification. Id. at 196.

Since the Defendant's motion to modify his child support was served on June 10, 1998, thus giving the parties' notice of his request for a modification, the District Court could decide if the appropriate effective date of the modification of the Defendant's child support to zero should be the date the motion was filed, the date the court issued its order on the modification, or some later date. Gabriel, at 295. However, the District Court could not order the modification to be effective any earlier than the date of the motion. To do so results in a retroactive modification of the child support arrearages and is prohibited by N.D.C.C. §14-08.1-05(1)(c), and the principles outlined by this Court.

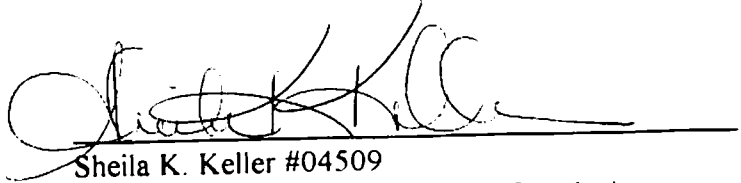
CONCLUSION

The Defendant, C.B., was entitled to a modification of his current child support obligation based on his receipt of disability payments from the Social Security Administration, and his child's receipt of dependent's benefits. Such a modification was appropriate under the North Dakota Child Support Guidelines. The effective date of this modification could be no earlier than the filing of the Defendant's motion in June, 1998.

The District Court's modification of child support which accrued and was unpaid prior to June, 1998, by giving the Defendant credit for social security dependent's benefits received by the obligee as representative payee for the child, is contrary to the principle that a modification can be effective no earlier than the motion seeking the modification. It is also contrary to the principle that there can be no retroactive modification of vested child support arrearages. And, finally, it is directly contrary to N.D.C.C. §14-08.1-05, which expressly prohibits such a modification.

Therefore, the District Court's retroactive modification of the accrued arrearages of at least \$12,505.00 was induced by an erroneous view of the law. Since the District Court's order eliminating the Defendant's arrearages was clearly erroneous, this matter should be remanded to the District Court for an order reinstating the arrearages which accrued at least prior to the filing of the Defendant's motion for modification, and requiring the Defendant to make payment on these arrearages.

Respectfully submitted this 22nd day of January, 1999.

A handwritten signature in black ink, appearing to read "Sheila K. Keller", written over a horizontal line.

Sheila K. Keller #04509
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kenneth Gerhardt, Director, Morton)
County Social Service Board as assignee for)
S.T., S.T. and Julie Lynn Sirek as guardian)
ad litem for S.F.T., a minor child,)

Plaintiff-Appellant,)

Supreme Court No. 980389

vs.)

C.B.)

Defendant-Appellee.)

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 22nd day of January, 1999, 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:

C.B.
4013 3rd Ave S
Billings, MT 59101-3520

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 22nd day of January, 1999.

Michael J. Santos
Notary Public

(SEAL)

ARGUMENT

I. This case involves collection of arrearages which were retroactively modified by the District Court and being disputed by the Regional Child Support Enforcement Unit in Bismarck, North Dakota.

The Defendant has requested on many occasions beginning in October 1996, to have his child support modified due to his disability (App. 12-20). According to the North Dakota Child Support office they could not accomodate a modification due to their large caseload (App. 21). The amount of the child support should have been based on the North Dakota Child Support Guidelines (App.22-33). However, the Defendant accrued child support arrears while not having the funds to pay the amount required by the North Dakota Child Support office (App. 34-35). They granted the Defendant a modification only after receiving social security disability benefits. The child received a lump sum payment of \$12,840.00 which they should have credited toward arrears (App. 36-37). According to the amount of social security benefits the child is receiving, it is over and above the amount of child support that is required according to the North Dakota Child Support Guidelines (App. 38).

The Defendant had zero income from June 1996 through December 1997. He lived off public assistance which included food stamps and Section 8 Housing. However, there was no income to substantiate paying child support.

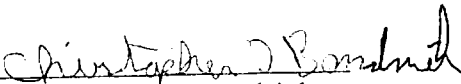
The Defendant has contacted Legal Services in Montana and North Dakota Child support to have legal representation in this matter. Due to his financial situation the Defendant could not retain his current attorney, Mr. Marnell W. Ringsak, to dispute this issue. The Defendant is the responsible party corresponding with the Supreme Court.

CONCLUSION

The Defendant, C.B., should be granted a retroactive modification of the accrued arrearages. The Defendant's child is receiving a substantial amount from social security which places the Defendant in over payment on child support due and arrears.

The Plaintiff, S.T., should be the responsible party in paying the State of North Dakota Welfare Department for the public assistance she received for the care of our son, S.F.T. The Plaintiff, S.T., received and is still collecting social security benefits on my behalf.

Respectfully submitted this 19 day of March, 1999.


Christopher D. Bendrick
Defendant
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