

**ORIGINAL**

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**Ardella Stein, f/k/a Ardella Kopp, )**

**CIVIL NO. 98-C-2642**

**Plaintiff-Appellee, )**

**SUPREME COURT NO. 20000200**

**vs. )**

**Myron Kopp, )**

**Defendant-Appellant. )**

**20000200**

**IN THE OFFICE OF THE  
CLERK OF SUPREME COURT**

**NOV - 1 2000**

**STATE OF NORTH DAKOTA**

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**APPELLEE ARDELLA STEIN'S BRIEF**

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**IRVIN B. NODLAND  
Attorney for Appellee  
109 North 4<sup>th</sup> Street Ste. 300  
PO Box 640  
Bismarck ND 58502-0640  
(701) 222-3030  
ID No. 02729**

**BENJAMIN C. PULKRABEK  
Attorney for Appellant  
402 First Street NW  
PO Box 155  
Mandan ND 58554  
(701) 663-1929  
ID No. 02908**

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STATEMENT OF THE ISSUES

I. DID THE TRIAL COURT HAVE JURISDICTION TO SET ASIDE A JUDGMENT AND ENTER A NEW ONE?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN SETTING ASIDE A JUDGMENT AND ENTERING A NEW ONE?

**STATEMENT OF THE FACTS:**

The parties were divorced by Judgment entered on the 15<sup>th</sup> day of December, 1999. (App., p. 37) In the divorce decree certain assets and debts were assigned to each of the parties. (App., pp. 37 – 40) In reliance upon said allocation plaintiff did not seek spousal support.

The respective parties were ordered to execute such documents as were necessary to effectuate the orders of the court within 30 days of entry of judgment. (App., p. 42) The entry of this Judgment is dated December 17, 1999. (App., p. 45) Plaintiff proceeded successfully to immediately have defendant's name removed from all debts that had been assigned to her. (App., pp. 47 – 49) Defendant did nothing to obey the order of the Court to cause plaintiff's name to be removed from the debts assigned to him.

**JOINT DEBTS THAT WERE ASSIGNED TO MYRON KOPP IN DIVORCE**

Visa	\$5,625.36
RM Visa	\$2,407.35
Household Bank	\$3,808.71
1 <sup>st</sup> USA Visa	\$5,547.14
Sears	\$6,606.44
Discover	<u>\$3,622.66</u>
	\$27,617.66 Plus deficiency on motor home

**ADDITIONAL DEBTS ASSIGNED TO MYRON KOPP**

His attorney fees \$3,700.00  
His pickup \$10,634.77

**LIQUID ASSETS ASSIGNED TO MYRON KOPP IN DIVORCE**

State Retirement Fund \$10,274.44 (Tax & 15% penalty will reduce to approximately \$7,000)  
IRA \$1,619.02  
Life Ins. Policy \$3,905.00  
Savings Bond \$ 250.00  
\$16,048.46 (minus tax & penalties)

Defendant was awarded a motor home upon which there was a debt of approximately \$56,000 for which both parties had signed the mortgage. The Court ordered that said debt be assumed by the defendant and in the event the motor home should be repossessed and sold and there should be a deficiency judgment sought against this plaintiff, this plaintiff would have the right to return to the District Court to ask that defendant's retirement account be made available to her application to any debt for which she might be held liable. (App., p. 40) Defendant made no payments on the motorhome and it was repossessed. Plaintiff is now being sued for the deficiency of \$24,784.87. (Capital Credit Union vs. Ardella M. Kopp, Burleigh County District Court, case not filed to-date).

On the 1<sup>st</sup> day of March, 2000, plaintiff petitioned the District Court for a contempt citation and to set aside the judgment and redistribute defendant's retirement funds to help her meet the collections that are being directed at her on accounts that were assigned to defendant in the divorce decree. A hearing was held. The District Court judge set aside the Judgment and entered a new Judgment. (App., pp. 82 – 88) The new Judgment provides as follows:

II. DIVISION OF MARITAL ASSETS:

*THE FOLLOWING PROPERTY AWARDED TO PLAINTIFF 4/11/00:*

- 45. Life Insurance Policy (1) cash value*
- 46. Life Insurance Policy (2) cash value*
- 47. Myron's State Retirement*
- 52. IRA (Myron)*

VI. ATTORNEY FEES:

*The defendant shall pay the sum of \$500 to the plaintiff's attorney, Irvin B. Nodland, P. O. Box 640, Bismarck, North Dakota, 58502. The defendant has 120 days in which to pay this amount to plaintiff's attorney.*

VIII. SPOUSAL SUPPORT:

*The defendant shall pay the sum of \$300 per month, effective May 1, 2000, for spousal support to the plaintiff. Payments shall be made on the first banking day of each month and on the first banking day of each successive month thereafter beginning May 1, 2000. Such payments shall be made in cash, certified check or by money order to the Clerk of District Court at the following address:*

*Clerk of District Court  
Burleigh County  
PO Box 1055  
Bismarck ND 58502-1055*

*A delinquency in payment of the spousal support payment due will result in an income withholding order being issued in accordance with North Dakota law.*

**ARGUMENT AND STATEMENT OF LAW**

I. DID THE TRIAL COURT HAVE JURISDICTION TO SET ASIDE A JUDGMENT AND ENTER A NEW ONE?

Plaintiff's motion to the District Court was one asking that the previous judgment be set aside pursuant to Rule 60 of NDR CivP. (App., pp. 64 – 67) Plaintiff asked that in the interests of justice and fairness a previously issued judgment be set aside under the rules. Rule 60 is a long standing procedural vehicle for addressing judgments that have been entered but which should be set aside. The motion was brought within the time period provided by the rules for such motions.

When the Court grants a Rule 60 (b) motion the effect of it is that the judgment that was previously entered is effectively set aside and consideration may then be given to entry of a different judgment.

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN SETTING ASIDE A JUDGMENT AND ENTERING A NEW ONE?



It is not automatically an abuse of a trial judge's discretion when it vacates an original divorce decree and enters a different one. Peterson v. Peterson, 555 N.W.2d 359 (N.D. 1996). The rule is a remedial one and should be construed liberally. Thronset v. L.L.S., 485 N.W.2d 775 (N.D. 1992). The rule that a Rule 60 motion is not to be used as a remedy for failure to take an appeal is not inflexible and in unusual cases, relief under the rule may be given even when an appeal has not been taken within the time allowed for appeal. Neubauer v. Neubauer, 524 N.W.2d 593 (N.D. 1994). A wife's action to obtain relief from a divorce decree under the rule is a permissible means of providing relief. It is not a "collateral attack" but rather a direct attack on the divorce judgment and it cannot be precluded "as a matter of law". Hamilton v. Hamilton, 410 N.W.2d 508 (N.D. 1979). A trial court has discretion as to whether or not it should set aside a judgment and its exercise of that discretion will not be disturbed on appeal unless that discretion has been abused. Suburban Sales & Serv., Inc. v. White, 326 N.W.2d 873 (N.D. 1982). A court should not insist that an unconscionable judgment be enforced if good cause is shown why justice requires vacation of the judgment. Crawford v. Crawford, 524 N.W.2d 833 (N.D. 1994)

When there is doubt as to the granting of an application to vacate the judgment the doubt should be resolved in favor of vacation. Hagen v. Altman, 79 N.W.2d 53 (N.D. 1956)

Plaintiff's motion was not of a type where a party comes into court and asks for an increase in alimony award based upon a showing of changed circumstance.

Becker v. Becker, 262 N.W.2d 478, (1978) is relied upon by the defendant for the proposition that a court does not have continuing jurisdiction to modify a judgment so as to add alimony where alimony was not previously awarded. In spite of our agreement with Judge Vogel's well-written and researched dissent, we accept Becker, supra, for what it says. But Becker, was not a motion to set aside a judgment. It was a motion made to the court two years after entry of judgment in which the Court was asked to modify the original judgment based upon a claim of substantial change in circumstance. Such is not the case here. Plaintiff asked, within the time period allowed by the Rules, that the Judgment be set aside. In fact there were no real changes in circumstance in this case at all unless it was Myron's failure and refusal to carry out the dictates of the judgment.

Likewise Schmalle v. Schmalle, 1998 ND 201, 586 N.W.2d 677 (1998) cited by the defendant has significant and compelling distinctions that preclude application as authority for defendant's request here. Schmalle, supra, involved a California divorce decree that was based upon a contractual and stipulated agreement between the parties. The agreement included a provision that there would be continuing jurisdiction on the issue of spousal support. Judgment based upon the stipulated agreement was entered in 1991.

Four years later, in early 1995 the California decree was filed in North Dakota and in March of 1995 the judgment first found its way into the North Dakota courtroom as a part of a motion for a change in child custody. An "amended judgment" based upon changed circumstance was entered ordering a change in custody from the mother to the father. (The child had been living with the father for two years).

Then in October of 1995 the father filed another request to amend the judgment asking that the "continuing jurisdiction over spousal support" language of the California judgment be deleted. He also asked that Ms. Schmalle be held in contempt for not having paid off three credit card debts that the California court had assigned to her (and she had stipulated she would pay). Instead of paying these debts she had

filed bankruptcy and they were declared discharged. Her husband had not filed an adversary proceeding in the bankruptcy court asking that her obligation to hold him harmless from these debts be declared non-discharged as Title 11 Section 523 of the Bankruptcy Court permits.

Schmalle responded with her own motion saying that her credit card debts had been fully discharged by the bankruptcy court and that that included the discharge of any duty she might have had to hold her ex-husband harmless from collection efforts by the credit card companies. Ms. Schmalle requested the District Court grant her spousal support. The court ruled that Ms. Schmalle's bankruptcy discharge did "rendered inoperable" the provision that she pay off the credit card debt and in the absence of his having presented any objection to the bankruptcy court by adversarial proceeding her obligation to Mr. Schmalle was wiped out. In June of 1996, the District Court granted Ms. Schmalle \$500 a month spousal support for four years because of what it found to be her economic and health needs at the time and Mr. Schmalle's ability to pay.

In Schmalle v. Schmalle, 1998 ND 201, 586 N.W.2d 677, the North Dakota Supreme Court took away the award of spousal support. The holding of the Supreme Court was that the economic and health

circumstance recited by the evidence did not rise to the level of a “substantial change in circumstance” as would be required to justify a modification of spousal support.

The Schmale Court thus refused to approve a motion to modify spousal support brought five years after the original decree because there was a failure to establish a substantial change in circumstance. It is not authority to deny this Court jurisdiction and discretion to set aside a judgment brought within the time periods and in accordance with the provisions of Rule 60.

Myron has gone to the Bankruptcy Court seeking a discharge of the obligation assigned to him by the Court to hold Ardella harmless from \$52,515.00 of debt. Ardella did file an adversary proceeding in Myron’s bankruptcy case within the time period allowed. She has strenuously resisted such discharge because of the great hardship worked upon her in having to assume the burden of an additional \$52,515.00 in debt. The bankruptcy Court discharged Myron from his “save harmless” obligation. (Adversary No. 00-7029, Decision of Judge William Hill, dated October 17, 2000).

**DEBTS ARDELLA KOPP BECAME RESPONSIBLE FOR  
UPON MYRON KOPP'S BANKRUPTCY**

Mid Dakota Clinic	\$ 302.00
Heart & Lung	\$ ?
Citibank	\$ 5,907.00
Sears (Ardella's)	\$ 4,687.00
Penney	\$ 662.00
Wards	\$ 438.00
Visa	\$ 2,096.00
School Tuition & Meals	\$ 1,025.00
Tutor	\$ 1,440.00
Computer	\$ 1,361.00
Target	\$ 428.00
Student Loan	\$ 3,957.00
Piano Lessons	\$ 675.00
Dance Tuition & Customs	\$ 595.00
House	\$49,805.00
House Insurance	\$ 486.00
Daycare Insurance	\$ 902.00
Attorney (Ardella)	\$ 7,484.00
Dentist	\$ 116.00
Household Repairs	\$ 1,550.00
Century Siding & Windows	\$ 4,694.00
Visa (Joint)	\$ 5,625.00
RM Visa	\$ 2,407.00
Household Bank Visa	\$ 3,808.00
1 <sup>st</sup> USA Visa	\$ 5,547.00
Sears (Myron)	\$ 6,617.00
Discover	\$ 3,727.00
Motorhome	<u>\$24,784.87</u>
Total	(\$141,125.87)

After review of the extensive long list of bills/debts Ardella is now responsible for, the District Court's ruling to set aside the first Judgment and enter a new judgment makes more than good sense. There is no possible way that Ardella can pay all the debts without having some

assistance. The assets that have been awarded to Ardella in the Amended Judgment will not handle the debt load that Myron has dumped on her. The \$300 per month spousal support is a meager amount of relief to apply to the large amount of debt per month she now has. Given the decision of the Bankruptcy Court the new Judgment of the District Court in this case takes on enhanced equity, justification and good sense.

**CONCLUSION**

The Judgment of the District Court should be affirmed.

Dated this 3 day of October, 2000.

IRVIN B. NODLAND, PC  
Attorneys for Appellee, Ardella Stein  
109 North 4<sup>th</sup> Street Suite 300  
PO Box 640  
Bismarck ND 58502-0640  
(701) 222-3030 [telephone]  
(701) 222-3586 [fax]



BY: IRVIN B. NODLAND  
State Bar ID No. 02729