ORIGINAL

 20070259

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

Shawn M. Walberg,

Plaintiff/Appellee,

vs.

Michael Duane Walberg,

Defendant/Appellee,

vs.

State of North Dakota,

Intervenor/Appellant.

APPELLANT'S PETITION FOR REHEARING

Cass Co. 09-95-C-02879
Supreme Co. 20070259

Petition for Rehearing on the Appeal from the Order dated August 6, 2007, the Order on Request for Review dated March 22, 2007 and from the Sixth Amended Judgment entered May 18, 2007 in Cass County District Court, East Central Judicial District, the Honorable Georgia Dawson, Judge of the District Court.

John Waller (ND Bar ID #05623)
Special Assistant Attorney General
Department of Human Services/Appellant
P.O. Box 2987
Fargo, ND 58108-2987
(701) 298-4900

James C. Fleming (ND Bar ID #05107)
Special Assistant Attorney General
Department of Human Services/Appellant
P.O. Box 7190
Bismarck, ND 59507-7190
(701) 328-3582

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LAW AND ARGUMENT

The State is aware that petitions for rehearing under N.D.R.App.P. 40 are seldom granted. Nevertheless, we believe the Court's opinion overlooks and misapprehends the law in two areas.

I

The appellate process is not well designed for debating the merits of public policy. As a general rule, one would not expect to include in an appellate brief all the reasons that a law is a good idea, nor to bring up the proverbial "heavy artillery" to attack or defend a statute unless a statute is being challenged on constitutional grounds. Thus, the briefs and oral argument before the Court in this case did not emphasize the public policy that is served by the State's interpretation of N.D.C.C. § 14-09-09.33, and led the Court to conclude that reversing the district court would lead to "the absurd and ludicrous result of taking resources from a custodial parent and the children." Because this conclusion also implicates the prerogatives of the Legislature as the policy-making branch of state government, the State suggests that this is one of those rare cases where a rehearing is warranted.

The Walberg children cannot use the credit on Michael's arrearage to eat, nor to buy clothes or pay for shelter. The State admits – in the best case scenario, Shawn and Michael each can pay the full amount due each month and, unless the children start to receive public assistance benefits, making each parent pay separately through the State does little more than provide an impartial record of each payment. One might wonder why the State, in operating its child support enforcement program, would resist such an

efficient method of collecting support unless there was a greater public good that would be served by prohibiting the offset.

Statutes are not enacted with the best case scenario in mind. A court order authorizing an offset needs a subsequent court order to discontinue the offset. Should Michael lose employment or become injured, the time and expense of a court proceeding to discontinue the offset and restore the children's right to receive real money from Shawn will arise at exactly the time when the family can least afford that time and expense. The law was enacted to replace a case-by-case determination of the children's best interests with a categorical preservation of the children's right to receive real money each month from Shawn. Quite simply, in that circumstance, it is better for children to receive current support from the absent parent to meet their immediate needs, and let the custodial parent's arrears go uncollected until the family's situation can improve. As clearly provided in the legislative history of the statute, which is quoted extensively in the State's brief, this was exactly the policy that the Legislature intended to establish when it enacted the statute.

The State acknowledges that the opposite of the scenario above may be true: perhaps Shawn will refuse or be unable to pay her current support obligation. In addition to being speculative, that is a possibility that is now addressed by a state law that became effective after the district court's decision in this case. As amended in 2007, N.D.C.C. § 14-09-09.31 authorizes the State to divert Michael's arrears payment and apply it to Shawn's ongoing monthly obligation. Through this method, as opposed to the offset in this case, a parent in Michael's situation is assured of receiving an equal amount of money back as a payment toward Shawn's current child support obligation, yet the

children's right to receive real money is preserved in the event Michael cannot make the arrears payment and collection actions need to commence against Shawn.

There is no direct conflict between N.D.C.C. § 14-09-09.33 and § 14-09-09.24. Section 14-09-09.24 neither authorizes nor prohibits the terms of a permitted "alternative arrangement." Thus, reading the statutes together, as the Court must, there is no conflict. In addition, as noted by the Court in paragraph 12 of its opinion, statutes are interpreted to give "meaning and effect to every word, phrase, and sentence." Yet, the Court's opinion renders superfluous the reference in N.D.C.C. § 14-09-09.33(4) to "past-due support."

As further discussed in this petition, the Court misunderstands N.D.C.C. § 14-09-09.30; it is not a statute that is available to the court to determine "the level of child support required in each case," as suggested in paragraph 11 of the opinion. It pertains to how much support can be collected through income withholding or other specified collection methods. Michael's arrears are already delinquent and due in full to Shawn.

Ironically, on the same day the Court issued its opinion in this matter, the Court issued an opinion in a different case stating: "'The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination.'" Teigen v. State, 2008 ND 88, ¶ 7 (citations and quotations omitted). The Court stated the governing rule in paragraph 9 of its opinion in this case: "Our primary objective in interpreting a statute is to determine legislative intent." With all due respect to the Court, and with regret for not including more explanation of public policy in its brief, the case at bar presents the identical scenario that was presented to the Legislature when it enacted

N.D.C.C. § 14-09-09.33(4). There is no conflict with N.D.C.C. § 14-09-09.24, which pertains only to income withholding and does not authorize the offset in this case. For that reason, the State believes the Court's decision in this case comes close to substituting its judgment for that of the Legislature, and requests a rehearing of this matter before the Court's opinion becomes final.

II

The phrase "total amount of child support due in each month" in N.D.C.C. § 14-09-09.30 has misled the court into believing that the exclusive method of collecting Michael's arrears is through income withholding in the amount determined under that section. However, N.D.C.C. § 14-09-09.30 applies only in the context of N.D.C.C § 14-09-09.13(3), N.D.C.C. § 14-09-09.16(4), and N.D.C.C. § 14-09-09.17 regarding income withholding. See 1997 N.D. Sess. Laws ch. 404, §§ 24, 26, 27. The full amount of Michael's arrears are still a judgment by operation of law, N.D.C.C. § 14-08.1-05, and enforceable as such.

The State has never disputed the power of the district court to determine the proper amount due for income withholding under N.D.C.C. § 14-09-09.30 when there is no current monthly support obligation. Indeed, since the income-based child support guidelines no longer apply now that Michael has custody of the children and his ongoing support obligation has ceased, the court's discretion under the statute is the best way to determine the amount that a custodial parent like Michael should pay each month out of his earnings until his arrears are satisfied. The child support enforcement program itself has proposed, and the Legislature has enacted, provisions incorporating the court's

decision under that statute for other selected enforcement tools.[1] However, just as no one would suggest that the existence of a garnishment order under N.D.C.C. chapter 32-09.1 precludes a creditor from executing on property (other than earnings) of the debtor under chapter 28-21, it is erroneous to conclude that the formula in N.D.C.C. § 14-09-09.30 limits the collection of Michael's arrears except through income withholding.

While certain collection tools of the child support enforcement program are linked to N.D.C.C. § 14-09-09.30, some are not. Notable among those that are not linked are federally-mandated collection methods such as intercepting federal and state tax refunds, reporting arrears to credit bureaus, and denying renewal of passports. See generally 42 U.S.C. § 666. Aside from the state laws that specifically reference N.D.C.C. § 14-09-09.30, there is no legal basis to require the State to "sit on its hands" and refrain from collecting Michael's arrears except through the offset ordered by the court. To the contrary, such an order jeopardizes North Dakota's compliance with federal mandates that govern its public assistance programs.

In paragraph 14 of its opinion, the Court finds relevant that there is no public assistance assignment in this case. It is not correct to limit the State's role in child support to "stepping in the shoes of the assignee," or serving the wishes of one of the parents when there is no assigned support. Rather, as first addressed by the court in Sprynczynatyk v. Celley, 486 N.W.2d 230 (N.D. 1992), the State has its own interests to protect in enforcing child support cases. N.D.C.C. § 14-09-09.24 should not be interpreted in a way to allow two parents to enter into an agreement, even with district court approval, that would take the entire State out of compliance with federal mandates.

[1] The formula in N.D.C.C. § 14-09-09.30 has subsequently been incorporated by reference in other statutes regarding collection of arrears. N.D.C.C. §§§ 14-09-09.35, 50-09-08.6(8), and 50-09-32(2).

The services of the child support enforcement program under Title IV-D of the Social Security Act must be available to any parent who applies for those services, and not just those who are receiving, or have received, public assistance benefits. 42 C.F.R. § 302(a)(1)(i). If the State first becomes involved in a child support case as a result of an assignment, it is required to continue to enforce the case even after the family is no longer eligible for public assistance. 42 C.F.R. § 302(a)(1)(iii). Notwithstanding public perception, these regulations do not allow the State to distinguish between assigned support and unassigned support when it administers the child support enforcement program.

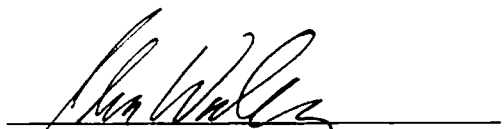
We are mindful that we cannot advocate for either parent. C.f. Knoll v. Kuleck, 2004 ND 199 ¶ 14, 688 N.W.2d 370 (Sandstrom, J., concurring specially) (the State's lawyers are to be "seekers of truth and justice."). Likewise, the State's interests as a third party cannot be compromised by the parents.

Once a case starts to receive services under Title IV-D, the State cannot discontinue providing those services unless its case can be closed for one of the reasons listed in 42 C.F.R. § 303.11(b). None of those reasons apply in this case. Thus, the State is required to collect Michael's arrears as an independent third party in compliance with federal law and regulations, and cannot be limited in that effort by any agreement to the contrary by Michael and Shawn. If Shawn does not want enforcement services, she can ask the State to close its case under 42 C.F.R. § 303.11(b)(8). Until that happens, the Court's affirmance of the district court's decision leaves the State in the untenable position of deciding whether it is better to violate the court's order or federal regulations.

Regardless of the outcome of the State's petition for rehearing on the interpretation of N.D.C.C. § 14-09-09.33, we request that the Court change its opinion and vacate the portion of the district court's decision that limits collection of Michael's arrears to the monthly amount determined under N.D.C.C. § 14-09-09.30.

CONCLUSION

N.D.R.App.P. 40(a)(4) identifies the permitted actions of the court on a petition for rehearing. The State requests a rehearing on the question of the proper interpretation of N.D.C.C. § 14-09-09.33 and whether the State's suggested interpretation reflects an appropriate policy decision of the Legislative branch. The State further requests that the Court reverse the portion of the district court's decision which prohibits the State from taking any further collection action on Michael's existing arrearage.



John Waller (ND Bar ID #05623)
Special Assistant Attorney General
Department of Human Services
P.O. Box 2806
Fargo, ND 58108-2806
(701) 298-4900
Attorney for Appellant

James C. Fleming (ND Bar ID #05107)
Special Assistant Attorney General
Department of Human Services
P.O. Box 7190
Bismarck, ND 59507-7190
(701) 328-3582
Attorney for Appellant