

ORIGINAL

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

Shawn M. Walberg,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 Michael Duane Walberg.)
)
 Defendant/Appellee,)
)
 vs.)
)
 State of North Dakota,)
)
 Intervenor/Appellant.)
 _____)

NOV 19 2007

STATE OF NORTH DAKOTA

APPELLANT'S BRIEF

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

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.

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STATEMENT OF THE ISSUES

- I. Whether the district court erred as a matter of law by including in its Sixth Amended Judgment an offset of current or future child support against past-due child support and placing limitations on collecting child support.
- II. Whether the district court abused its discretion by denying the State's motion to remove an offset of current or future child support against past-due child support and to remove limitations on collecting child support arrears.

STATEMENT OF THE FACTS

A Fifth Amended Judgment was entered on October 10, 2006. (A4-13) Michael and Shawn reached an agreement, and the Fifth Amended Judgment awarded primary physical custody of all three children to Michael (A7), eliminated Michael's current support obligation (A9), and set Shawn's support obligation at \$252.00 per month commencing June 1, 2006. (A9) The Fifth Amended Judgment offset Shawn's obligation for current support against the child support arrearage owed by Michael. (A9) The Fifth Amended Judgment also limited Michael's obligation to pay the arrears, and the Child Support Enforcement Unit's ability to enforce the arrears, to that offset exclusively. (A9)

On December 14, 2006, the Child Support Enforcement Unit, on behalf of the State of North Dakota, served a Motion to Intervene and Remove Offset. (A14-16) After a stipulation and order for extension of time, Michael filed Defendant's Opposition to Intervenor's Motions, Counter-Motion Regarding Arrearage Payments and For Attorney Fees and Request for Oral Argument. (A21-22) The State served and filed an opposition brief in response to Michael's motion and a hearing was held on March 2, 2007, before the judicial referee.

On March 9, the referee issued Findings and Order of the Judicial Referee, which found that aid under chapter 50-09 and 50-24.1 had been provided to the children, and application was made and accepted under N.D.C.C. §§ 14-09-08.9 and 14-09-08.13 (A24), and concluded that the State was a real party in interest and that it was allowed to intervene (A24), that granting the State's motion would be contrary to the best interests of the children (A24), and that but for a requirement to keep the clerk and public authority informed, the offset was an alternative arrangement for assuring the payment of child support. (A25) The State's motion to remove the offset was denied, as was the Defendant's counter motion for fees. (A25)

On March 14, the State's Request for Review by District Court Judge with Specifications of Error was filed, indicating three reasons for review: the offset of current support is contrary to N.D.C.C. § 14-09-09.33; the alternative arrangement authorized by N.D.C.C. § 14-09-09.24(2) is not an exception to the general prohibition of offsetting current support - but rather an alternative to the general requirement of immediate income withholding; and the Findings and Order of the Judicial Referee did not address the prohibition of various other enforcement tools otherwise available to collect existing arrears. (A26-28)

The district court's Order on Request for Review, dated March 22, 2007, ordered the Findings and Order of the Judicial Referee adopted in part, and reversed in part. (A29-35) The court adopted the findings recognizing the best interests of the children would allow for the alternative plan. (A34) The Order set Michael's monthly amount due on arrears at \$300.00 per month (A33), reduced by the \$252.00 per month of current support owed by Shawn, with a remaining \$48.00 monthly payment. (A35)

A Sixth Amended Judgment was entered May 18, 2007, consistent with the Order on Request for Review. (A36-46) On May 25, 2007, Michael served Notice of Entry on the Order on Request for Review and the Sixth Amended Judgment. (A47)

On June 7, 2007, the State served and filed a Motion for Reconsideration pursuant to N.D.R.Civ.P. 59(j), 52(b) and 60(b), because the Order on Request for Review did not address the third specification of error, that the Findings and Order of the Judicial Referee did not address the prohibition of various other enforcement tools otherwise available to collect existing arrears. (A48) By Order dated August 6, 2007, the district court denied the State's motion. (A49-50)

STATEMENT OF THE CASE

On August 29, 2007, the State's Notice of Appeal was served and filed, appealing the district court's March 22, 2007 Order on Request for Review, the Sixth Amended Judgment entered May 18, 2007, and the district court's August 6, 2007 order.

LAW AND ARGUMENT

I. The district court erred as a matter of law by including in its Sixth Amended Judgment an offset of current or future child support against past-due child support and placing limitations on collecting child support.

A. Standard of Review

Questions of law are subject to the de novo standard of review. Buchholz v. Buchholz, 1999 ND 36, ¶ 11, 590 N.W.2d 215.

B. Offset of Current or Future Child Support

This case involves child support obligations of two parents – an unpaid arrears obligation of Michael, which is a judgment by operation of law (N.D.C.C. § 14-08.1-05), and an ongoing child support obligation of Shawn. Both obligations pertain to the same children.

The State does not dispute that an offset of mutual obligations is a historic practice. See, e.g., N.D.C.C. § 28-20-33 (“[m]utual final judgments may be set off pro tanto, the one against the other, by the court, upon proper application and notice”). However, for an offset to be appropriate, the debts must be mutual.

This court has said that the right to child support belongs to the children: “Although a custodial parent may have a representational right to collect support on behalf of the child, the right to support really belongs to the child.” Sprynczynatyk v. Celley, 486 N.W.2d 230, 232 (N.D. 1992). As such, efforts by parents to waive child support obligations or set those obligations in amounts contrary to the North Dakota child support guidelines are against public policy and invalid, even if initially adopted by a district court. Reimer v. Reimer, 502 N.W.2d 231, 233 (N.D. 1993); Rueckert v. Rueckert, 499 N.W.2d 863, 868 (N.D. 1993).

Often, where there are reciprocal money judgments, the smaller is set off against the larger, so that the judgment creditor in the larger has judgment only for the amount of the difference. The offset of reciprocal judgments, however, is not mandatory. Offset is governed by the rules of equitable procedure. In order for judgments to be qualified for offset, the demands must be “mutual and subsisting between the same parties, and due in the same capacity or right.” . . . The court must assess the “individual qualities” of the judgments. . . .

A judgment for maintenance and child support is a special kind of judgment. It is intended for the limited purposes of maintenance and child support. With respect to the child support judgment, it may further be said the wife receives child support in a kind of fiduciary capacity, with the

obligation to expend it for the support of the children. This trust would be defeated if wife's judgment obligations to husband could be applied to reduce the money intended for the support of the children.

Poland v. Poland, 895 S.W.2d 670, 671-72 (Mo. Ct. App. 1995) (citations omitted).

While a custodial parent receives payments of current and future support in a fiduciary capacity for the child, the parent also has a personal interest in the collection of past due support.

If by reason of the supporting parent's default, the custodial parent is forced to dip into her own resources beyond what would otherwise be expected of her, she may recover and retain amounts so proved, subject to equitable adjustment should the child's prior needs so suggest.

Glass v. Glass, 726 So.2d 1281, 1286 (Miss. Ct. App. 1998), quoting Vice v. Dep't of Human Services, 702 So.2d 397, 401 (Miss. 1997).

As this court is aware, legal custody of children is fluid, and it is common for a former noncustodial parent to become a custodial parent, and vice versa. Likewise, it is common for a parent to owe support from prior months when the parent did not have custody of the children, yet be owed support on behalf of the same children for current or prior months when the parent did have custody of the children. In recognition of the fiduciary obligations of parents that are implicated in these circumstances, the 2003 North Dakota Legislature enacted N.D.C.C. § 14-09-09.33.

N.D.C.C. § 14-09-09.33, provides, in relevant part:

1. Notwithstanding section 14-09-09.31, a court may order that a specific amount of past-due child support owed by an obligor to an obligee be offset by an equal amount of past-due child support owed to the obligor by the obligee. An order for an offset is permitted under this subsection only if:

(d) The opportunity to offset past-due child support under this section has not been used by either party as an incentive to avoid paying child support in the month in which it is due.

5. An obligor's child support obligation for the current month or for a future month may not be offset by past-due child support or other debts owed to the obligor by an obligee unless the court orders the offset as a method of satisfying an overpayment of child support that results from the establishment or reduction of a child support obligation.

The district court recognized this authority and agreed with the State “. . . insofar as that statute will not permit an offset in situations where the parties want to offset present or future child support obligations.” (A33) The district court continued:

The State’s argument concerning a judicially created offset in this instant are (sic) misplaced, for the Court is not mandating an offset of future child support obligations, as is prohibited by N.D.C.C. § 14-09-09.33, but instead is setting the Defendant’s child support arrearage obligation pursuant to N.D.C.C. § 14-09-09.30(b). (A33)

The district court has attempted to distinguish its decision from the type of offsets prohibited by the statute. However, it is a distinction without a difference – the fact remains that the district court has authorized the children to receive fewer dollars in current support from Shawn in exchange for a dollar-for-dollar reduction in Michael’s arrears.

If there was any doubt that the current order violates N.D.C.C. § 14-09-09.33(5), that doubt is resolved by reference to the testimony of the Department of Human Services regarding the legislation that enacted the statute:

Section 9. This section regulates “offsets” of child support. The word “offset” refers to a process of reducing a larger debt owed by Party A to Party B by the amount of a smaller debt owed by Party B to Party A, producing a smaller “net” debt owed by Party A to Party B.

In the child support enforcement context, an offset generally occurs when a former noncustodial parent still owes past-due support to the other parent but now has custody of the children. For example:

- Dad owes Mom several thousand dollars of past-due child support. A few months ago, custody of the minor children was changed from Mom to Dad. Mom now owes Dad child support on behalf of

the children but also has accumulated arrears. In other words, Dad owes arrears to Mom and Mom owes arrears to Dad.

In the example above, there is some appeal to subtracting the smaller arrears from the larger arrears and producing “net” arrears that are still owed. Current law does not expressly prohibit or authorize offsets involving child support, and there is no consistent state-wide practice. In some cases, particularly stipulations, an offset is approved by a court. In other cases, a court has held that an offset is a form of payment and must be made to the SDU. Section 9 is written to authorize offsets in certain circumstances and to prohibit offsets when they are inappropriate.

Subsection 1 explains when an offset of past-due child support is appropriate. An offset should not deprive children of the current support they need for food, clothes, shelter, and other essentials (subdivision a). Therefore, except as provided in subsection 4 of this section, an offset of child support arrears against child support that is due in the current month, or that will be due in a future month, is not permitted. An offset is inappropriate if some of the arrears have been assigned to the state and are no longer owed to the parent (subdivision b).

An offset is essentially a payment of past-due child support in equal amounts by both parents. If a parent who owes child support arrears to Family A also owes a duty of support to Family B, an offset would override the automatic proration of child support payments received by the SDU and allow the parent to choose a preferred family to support, which we believe is contrary to public policy (subdivision c). In addition, there is a potential that the opportunity for an offset will be used as an incentive by a former custodial parent to avoid paying support for the current month. Let’s discuss the example mentioned earlier:

- Dad owes arrears to Mom but now has custody of the children. Mom owes current child support to Dad on behalf of the children. For every month that Mom avoids paying current support and creates arrears, she may seek an offset of her arrears against the arrears Dad owes to her. In other words, by avoiding her obligation to meet the current needs of the children, Mom can reduce the debt owed to her.

While this is a way to reduce the arrears, it also leaves the children with no money coming into the home for necessary expenses. To prevent this, an offset is not appropriate if the opportunity to request an offset in a case has been used as an incentive to avoid paying current child support (subdivision d). Finally, a court needs to specifically find that the proposed offset serves the best interests of the children to whom the parents owe a duty of support (subsection 2). If the conditions in Section

9 are met, we believe the reduction in arrears that results from the offset will, in most cases, serve the interests of the supported children because a debt of the current custodial parent is eliminated or reduced and future collection actions against each parent may be avoided.

Subsection 3 clarifies that Section 9 is the exclusive basis for offsetting child support arrears.

Subsection 4 authorizes an offset of a current child support obligation against arrears in the very limited context of reducing a credit that is produced by a retroactive reduction in a child support obligation. When a motion for a change in child support is filed, there will be a delay before it is approved by a court. The North Dakota Supreme Court has held that in most cases, the change should be made “retroactive” to the date the motion is filed. If the motion is for a reduction in child support and the noncustodial parent had been paying in full until the motion was granted, the retroactive nature of the reduction will produce a credit that needs to be eliminated or “spent down.” Section 9 expressly authorizes current or future child support to be offset by this credit, but only if approved by a court. Other offsets involving child support for the current month or for future months are not permitted.

Subsection 5 clarifies that an offset is essentially a payment of child support in equal amounts by both parents. A copy of the order for an offset must be provided to the SDU so its payment records can be updated.

Subsection 6 limits the regulation of offsets in Section 9 to child support only and not to combined payments of spousal support and child support.

Hearing on S.B. 2160 Before the House Human Services Comm., 58th N.D. Legis. Sess. (March 3, 2003) (testimony of Barbara Siegel, Policy Analyst of the Child Support Enforcement Division, and James Fleming, Deputy Director/General Counsel of the Child Support Enforcement Division). (A17-20)

Because the terms of the Sixth Amended Judgment provide for an offset of current or future support against past-due arrears in violation of N.D.C.C. § 14-09-09.33, the district court erred as a matter of law and the Sixth Amended Judgment should be reversed and the matter remanded to the district court to amend the judgment accordingly.

C. Limitations on Collecting Child Support Arrears

The district court and appellee have tried to avoid the clear application of N.D.C.C. § 14-09-09.33 by relying on N.D.C.C. § 14-09-09.24. This argument fails for several reasons.

First, a specific statute prevails over the general. Second, the language in N.D.C.C. § 14-09-09.24 has been largely unchanged since 1997, but N.D.C.C. § 14-09-09.33 was enacted in 2003. Third, N.D.C.C. § 14-09-09.24 addresses the very narrow question of whether a child support obligation should be subject to immediate income withholding, even if the obligor is not delinquent. If immediate income withholding has not been ordered, the obligation is nevertheless subject to income withholding if there is a delinquency. N.D.C.C. § 14-09-09.13. Fourth, nothing in N.D.C.C. § 14-09-09.24(5) authorizes an “alternative arrangement” that violates other statutes. Conversely, neither N.D.C.C. § 14-09-09.33 nor N.D.C.C. § 14-09-26, which requires payments of all support to be made through the state disbursement unit, have an exception for arrangements that have been made under N.D.C.C. § 14-09-09.24(5).

The district court also found that there is good cause not to require immediate withholding, “because it would not be in the best interests of the minor children and the parties have previously reached a written agreement that provides for this alternative arrangement for assuring the regular payment of child support.” (A34)

However, N.D.C.C. § 14-09-09.24(4) requires any finding of good cause not to require immediate income withholding be based on, among other things, proof of timely payment of previously ordered support. There has been no such finding.

Reading all these statutes together, as the court must, the State argues that the sole purpose of an alternative arrangement in N.D.C.C. § 14-09-09.24 is to prevent the immediate issuance of an income withholding order, as long as the obligor pays the support in full and on time; it does not authorize parents to enter into agreements regarding child support that violate other statutes.

Because the Sixth Amended Judgment's prohibition of income withholding was based on an "alternate arrangement" that violated N.D.C.C. § 14-09-09.33 and a finding of "good cause" that was not supported by a required finding of proof of timely payment of previously ordered support, the district court erred as a matter of law and the Sixth Amended Judgment should be reversed and the matter remanded to district court to amend the judgment accordingly.

The language of the Sixth Amended Judgment also prohibited the withholding of assets. (A42)

The State is a participant in the federal Temporary Assistance for Needy Families program implemented through Title IV-A of the Social Security Act, 42 U.S.C. §601 et seq. Eligibility to receive benefits from the Title IV-A program is tied to providing a child support program as set forth in Title IV-D of the Social Security Act, 42. U.S.C. §651 et seq.

To comply with these federal requirements, and to provide the child support program the tools necessary to effectively carry out its duties, a number of statutes exist that authorize the State to use various enforcement tools to collect child support arrears. Among them are N.D.C.C. §§ 50-09-08.5 (securing certain assets to satisfy child

support), 50-09-08.6 (administrative suspension of various licenses), and 50-09-35 (deduction orders).

Michael's arrears reflect a debt that is past-due and immediately payable. Child support arrears are a judgment by operation of law, N.D.C.C. § 14-08.1-05, and all remedies for the enforcement of judgments apply. N.D.C.C. § 14-08.1-05(3).

The Sixth Amended Judgment's prohibition of withholding assets is in direct conflict with the authority and duties given by the legislature to the Child Support program.

II. The district court abused its discretion by denying the State's motion to remove an offset of current or future child support against past-due child support and to remove limitations on collecting child support arrears.

A. Standard of Review

A motion under subdivision (vi) of Rule 60(b) . . . is left to the sound discretion of the trial court and will not be disturbed on appeal unless the court abused that discretion. State Bank of Burleigh County Trust v. Patten, 357 N.W.2d 239, 242 (1984). An order on motion for amended findings is not appealable. Lang v. Lang, 1997 ND 17, ¶ 6, 558 N.W.2d 859. A decision on a motion under N.D.R.Civ.P. 59 is within the sound discretion of the trial court, and denial of a motion under N.D.R.Civ.P. 59 will not be reversed, absent a manifest abuse of discretion. Austin v. Towne, 1997 ND 59, ¶ 8, 560 N.W.2d 895.

A mistake in the law when entering a judgment does not necessarily justify setting the judgment aside under a Rule 60(b) proceeding. First Nat'l Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 796 (N.D.1986); Thronset v. LLS, 485 N.W.2d 775, 778

(N.D. 1992), citing Dakota Bank & Trust Co. of Bismarck v. Reed, 402 N.W.2d 887, 888-89 (N.D. 1987); and Production Credit Ass'n v. Dobrovolny, 415 N.W.2d 489, 491-92 (N.D. 1987). However, a trial court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or misinterprets or misapplies the law. Jarvis v. Jarvis, 1998 ND 163, ¶ 8, 584 N.W.2d 84; Austin v. Towne, 1997 ND 59, ¶ 8, 560 N.W.2d 895; Filler v. Bragg, 1997 ND 24 ¶ 9, 559 N.W. 2d 225.

In those cases where the Court refused to consider a mistake in the law as justifying relief from the judgment, the Court was reluctant to allow the use of Rule 60 as a substitute for appeal or to relieve a party from a “. . . free, calculated, and deliberate choice,” Production Credit Ass'n, 415 N.W.2d at 492, or to allow Rule 60 to retroactively modify past-due child support, Thronset, 485 N.W.2d at 780, or to disturb the finality of judgments. Bjorgen, 389 N.W.2d at 796.

In this case the initial Rule 60 motion was not used as a substitute to an appeal, since the State was not a party to the agreement, nor present at the hearing, that produced the Fifth Amended Judgment. The Motion for Reconsideration was not a substitute for an appeal, but rather a request for the district court to rule on all issues so that either an appeal could be made or avoided. Also, child support obligations are modifiable, and so there is not the same level of concern about preserving a child support judgment's finality as with other types of judgments. The fact that the judgment in the immediate case has been amended six different times clearly demonstrates this.

B. Misinterpretation or Misapplication of the Law

The laws to be interpreted or applied by the district court included N.D.C.C. § 14-09-09.33 regarding judicial offsets, N.D.C.C. § 14-09-09.24 regarding income

withholding, and §§ 50-09-08.5, 50-09-08.6. and 50-09-35 regarding various enforcement tools available to the State.

As addressed earlier in this brief, the State argues that the district court misapplied N.D.C.C. § 14-09-09.33 when it entered its order and Sixth Amended Judgment and inappropriately reduced the amount of actual payment due the children each month in exchange for a reduction in the personal obligation of Michael.

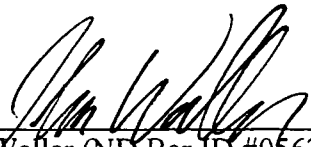
Also, the State argues that the district court misinterpreted and misapplied N.D.C.C. § 14-09-09.24 when it determined that the offset was an “alternate arrangement” to income withholding and when it found “good cause” to avoid income withholding without any supporting finding of proof of timely payment of previously ordered support, as required by the statute.

Finally, the State argues that the district court misapplied the law by prohibiting the State from using the enforcement tools provided to it by federal and state law.

CONCLUSION

For the reasons set forth above, the district court’s Sixth Amended Judgment should be reversed and remanded to amend the judgment to remove the offset of current support and remove the prohibition on the withholding of income and assets.

Respectfully submitted this 19th day of November, 2007.



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