

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

20110036

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

State of North Dakota, County of Cass, ex.rel.  
Nancy Ann Schlect, formerly known as  
Nancy Ann Neva, and C.A.W., a minor child

APR 25 2011

STATE OF NORTH DAKOTA

Plaintiffs-Appellees,

Case No. 20110036

vs.

Civil No. 09-96-R-02147

Troy Allan Wolff,

Defendant-Appellant.

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**REPLY BRIEF OF APPELLANT & Addendum**

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APPEAL FROM THE ORDER ISSUED BY DOUGLAS R. HERMAN, JUDGE OF THE DISTRICT COURT, ENTERED ON DECEMBER 13, 2010, AND ALSO, FROM THE UNDERLYING "ORDER" AND "NOTICE OF FINDINGS AND ORDER AND RIGHT OF REVIEW" ISSUED BY SUSAN SOLHEIM, JUDICIAL REFEREE OF THE EAST CENTRAL JUDICIAL DISTRICT, DATED NOVEMBER 17, 2010, WHICH PURPORTS TO MAKE A FINDING OR DETERMINATION "THE STATE HAS DEMONSTRATED A MERITORIOUS BASIS FOR THE REQUEST FOR RULE 60 RELIEF FROM JUDGMENT. THE STATE'S MOTION TO VACATE IS HEREBY GRANTED."

CASS COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT  
REFEREE SUSAN J. THOMAS

GARAAS LAW FIRM

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	2
LAW AND ARGUMENT .....	3
Standard of Review .....	3
1.    The Judicial Referee did not obtain jurisdiction to issue the Order Vacating Second Amended Judgment because there was a failure to follow the procedural rules of the Supreme Court of North Dakota or of the District Court. ....	3
A.    Deleted issue. ....	3
B.    The Judicial Referee did not acquire authority to act. ....	3
2.    Legal Arguments [other than jurisdictional issues]. ....	5
A.    The State of North Dakota places undue emphasis on the caption of the action. ....	5
B.    There are no public funds involved – the State of North Dakota attempts to discriminate in another manner. ....	6
C.    The State of North Dakota’s fallacious arguments establish lack of standing and lack of compelling reason to interfere with parental decisions. ....	6
1.    The child support paragraph does not contain “unenforceable language”. ....	7
2.    The child support paragraph is not a parental agreement	

that prohibits or limits the power of a court to  
modify future child support. . . . . 7

3. There is nothing “problematic” with the inclusion  
of language about Social Security Derivative  
Benefits [dependency benefits]. . . . . 9

D. There is no “open file”. . . . . 9

CONCLUSION . . . . . 10

**TABLE OF AUTHORITIES**

Page

**North Dakota Cases**

Davis v. Davis, 2010 ND 67, 780 N.W.2d 707 ..... 9

State v. Byzewski, 2010 ND 30, 778 N.W.2d 551 ..... 3

State, County of Cass ex. rel. Schlect v. Wolff,  
2010 ND 642, 783 N.W.2d 642 ..... 4, 5

Thompson v. Thompson, 78 N.W.2d 395 (N.D. 1956) ..... 4

**Cases of Other Jurisdictions**

*U.S. ex rel. Eisenstein v. City of New York, New York*,  
\_\_\_ U.S. \_\_\_, 129 S. Ct. 2230, 173 L. Ed. 2d 1255 (2009) ..... 5

Dept. of Family Services, Division of Public Assistance  
and Social Services v. Peterson, 960 P.2d 1022 (Wyo. 1998) ..... 7

Kuser v. Kuser, 40 Va. Cir. 217, Not Reported in S.E.2d,  
196 WL 1065585 ..... 6

Maschoff v. Leiding, 696 N.W.2d 834 (Minn.App. 2005) ..... 9

**North Dakota Statutes**

N.D.C.C. § 14-09-09.26 ..... 6

N.D.C.C. § 14-09-09.33(5) ..... 7

N.D.C.C. § 28-01-25 ..... 7

N.D.C.C. § 32-23-11 ..... 5

**Other Authorities**

42 U.S.C. § 624(25) ..... 9

42 U.S.C. § 6540 ..... 1

45 C.F.R. § 303.11 ..... 9

N.D.A.C. § 75-02-04.1-01(5)(a)(3) ..... 8

North Dakota Administrative Rule 13(11) ..... 2

Tenth Amendment to the Constitution of the United States ..... 9

Title IV-D of the Social Security Act ..... 1

## STATEMENT OF THE CASE

The State of North Dakota [Unit] does not claim to represent either Nancy Ann Schlect [Nancy] or the minor child C.A.W. in this appeal. It later claims to be a statutory real party in interest because Nancy once received financial support, and it cannot close her case. Appellee's Brief, pages 5-8. Appellant Troy Allan Wolf [Troy] respectfully submits that the Unit is not a real party in interest, has no present statutory duties to Nancy or C.A.W., and Nancy's prior State IV-D<sup>1</sup> case is closed by North Dakota administrative rules.

The Unit suggests the September 1, 2010, order of Judge Herman – which recognizes the existence of a new “Standing Order” dated September 1, 2010 – “‘cleared up the ambiguity ... as to whether separate individual case assignments are necessary.’ Concluding that ‘...all such cases are on referral without the need for a separate case-by-case referral order,’ (so that) the court considered the procedural issued (sic) resolved.” Appellee's Brief, page(s) 1; 4.

Neither the referee, the judge, or the Unit has given explanation to the initial jurisdictional question – how can a judicial referee have jurisdiction without the initial mandatory referral? Secondly, how can a new September 1, 2010, Standing Order have retrospective application to 2009?

The correct answer to both inquiries – (1) the judicial referee did not have initial jurisdiction to decide anything, and (2), none of the district judges, individually or acting in combination, can confer jurisdiction retroactively upon such referee without violating due process of law.

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<sup>1</sup> 42 U.S.C. § 6540.

## STATEMENT OF FACTS

The Unit accurately asserts, "(p)ursuant to Rule 3.2 of the North Dakota Rules of Court, Troy requested oral arguments in his Response to Motion to Vacate the Second Amended Judgment .." but then erroneously adds, "but Troy failed to secure a time for the argument and did not serve notice to all other parties. (App. at 45)." Troy failed at nothing, the matter had not yet been noticed for hearing before District Judge Hermann. Troy did not know Referee Solheim was lurking, and, service was accomplished. See attached Addendum #1 [Docket Entry # 133].

Troy would assert the Unit confuses "facts" and "conclusions of law" when it asserts, "(o)n December 13, 2010, the court, following North Dakota Administrative Rule 13(11), adopted and affirmed the referee's order. (App. at 99)." Appellee's Brief, page 4.

Troy is appreciative of the Unit's factual admission that "Ms. Schlect's AFDC or TANF case is closed .." Appellee's Brief, page 5. Troy notes that the Unit's assertion that Nancy Ann Schlect "continues to have an open file with the Child Support Enforcement Title IV-D program .." [Appellee's Brief, page 5] is unsupported by citation to the record. Nowhere has the Unit identified a North Dakota statute or North Dakota administrative rule that recognizes that Nancy Ann Schlect has an open case at the time of the stipulation, and/or the time of the entry of the Second Amended Judgment, or now.

The Unit otherwise appears to fully accept Troy's Statement of Facts found within the Brief of the Appellant, including, but not limited to, Troy's assertion, "(t)here is no evidence in the record, nor factual finding made by the Judicial Referee, that either Troy or Nancy was receiving public assistance or medical assistance at the time they entered into

their Stipulation, or at any time material to this appeal. The Affidavit of Mischelle Hagerty, presented by the Unit, indicates that Nancy ‘has periodically received public assistance and medical assistance’, but does not present any fact that Nancy ‘is’ receiving any form of public assistance at any time material to matters set forth in this appeal. App., p. 41. Troy asserted that Nancy’s periodic receipts of public assistance and medical assistance ended over a decade ago, which would have been confirmed upon cross-examination had it been allowed. App., p. 49.” Brief of Appellant, page 8.

## **LAW AND ARGUMENT**

### **Standard of Review**

The Unit ultimately agrees that this appeal presents only questions of law which are fully reviewable on appeal. Appellee’s Brief, page 5. State v. Byzewski, 2010 ND 30, ¶ 4, 778 N.W.2d 551.

### **Apples to Apples - hard to compare in the presence of peach pits**

While not cross-appealing, the Unit chooses to assert a different order of presentation of issues as if it had done so. As the only appellant, Troy will utilize his order of issue presentation.

- 1. The Judicial Referee did not obtain jurisdiction to issue the Order Vacating Second Amended Judgment because there was a failure to follow the procedural rules of the Supreme Court of North Dakota or of the District Court.**
  - A. Deleted issue.**
  - B. The Judicial Referee did not acquire authority to act.**

The Unit finally addresses this issue as its fourth point – “Whether the Referee had



jurisdiction.” Appellee’s Brief, page 14. Unfortunately, merely reciting various administrative rules, followed by a generic comment [“Upon remand, the East Central Judicial District cleared up any ambiguity in regard to the order by specifically referring the class of cases that involve child support matters.” Appellee’s Brief, page 14], does not resolve the issue(s) posed in State, County of Cass ex. rel. Schlect v. Wolff, 2010 ND 642, ¶ 8, 783 N.W.2d 642.

The record still does not contain an order authorizing the referee’s actions of November 27, 2009, purporting to act on a pending motion before the District Court wherein oral arguments were requested.

Neither the Unit, nor any of its district judges can roll back the calendar to rectify the missing, and non-existent district judge referral. Court orders and laws are not usually retroactive. N.D.C.C. § 1-02-10; Thompson v. Thompson, 78 N.W.2d 395, 399 (N.D. 1956).

Even if the “Order” dated September 1, 2010 [App., p. 101], had been in existence in 2009 instead of the actual signed September 5, 2008, Order now nullified [Addendum #2], neither Troy [or Nancy] had been advised of their removal rights. N.D. Sup. Ct. Admin. R. 13(8). Troy did not know the Referee was lurking. The absence of a valid referral order *and/or* the absence of a valid notification of the right to remove the referee nullifies any argument advanced by the Unit.

The Unit accurately quotes N.D. Sup. Ct. Admin. R. 13(8) [Appellee’s Brief, page 14] indicating Troy had a right to file a written request to have the matter heard by a district court judge, but simultaneously overlooks the rule’s requirement that he be so informed. Troy never knew Referee Solheim was lurking.

Troy's right to appeal Referee Solheim's initial order has never been in issue – she never had jurisdiction to act. Consistent with ¶ 13 of Wolff, the referee's only possible authority relates to a single area of remand by District Judge Herman's order of September 1, 2010 – to provide an explanation. App., p. 81. Referee Solheim never acquired jurisdiction to act, *only to explain because of a double-remand* [*id.*, ¶ 13; District Judge Herman's remand {App., p. 81}].

The Unit makes no attempt to explain away the lack any prior delegation, nor does it explain away her interloper status. Without authority, such referee's order is void.

**2. Legal Arguments [other than jurisdictional issues].**

**A. The State of North Dakota places undue emphasis on the caption of the action.**

The Unit attempts to elevate its status by claiming “(t)he State of North Dakota is on the caption of the Stipulation but was not a signatory on the Stipulation to Amend Judgment.” Appellee's Brief, page 3. The United States Supreme Court, in *U.S. ex rel. Eisenstein v. City of New York, New York*, \_\_ U.S. \_\_, 129 S. Ct. 2230, 2235-36, 173 L. Ed. 2d 1255 (2009), noted, “[T]he caption is not determinative as to the identity of the parties to the action”.

The Unit attempts to allege that Troy has claimed “the IV-D program is unconstitutional”. Appellee's Brief, page 15. Troy has never brought an action, nor been involved in any action, wherein the IV-D program was a party, nor has he ever given the notice to declare any statute unconstitutional as required by N.D.C.C. § 32-23-11 – if he had ever sought such position. The Unit exhibits confusion when it inserts argument as to

constitutionality when Troy merely references the natural parents' right to raise their child having constitutional dimension. Appellant's Brief, pages 15, 17, 23.

The Unit's confusion is also exhibited when it mostly accurately quotes N.D.C.C. § 14-09-09.26 [Appellee's Brief, page 5], but ignores its words in the very next sentence on page 6: "It is not disputed that aid under chapter 50-09 *was provided* to a dependent child."<sup>2</sup> Under N.D.C.C. § 14-09-09.26(1), with emphasis provided in the quotation of the State and the statute, the "state is a real party in interest .. (w)henever aid under chapter 50-09 or 50-24.1 *is provided* to a dependent child." Aid provided more than ten (10) years ago, and fully paid back, *is not happening now* [or in 2009] as statutorily required.

Number 1 of the case outline in Kuser v. Kuser, 40 Va. Cir. 217, Not Reported in S.E.2d, 196 WL 1065585, notes the "right of the state to participate in the case ended" when the parties settled their differences.

**B. There are no public funds involved – the State of North Dakota attempts to discriminate in another manner.**

Troy's legal authority for his assertion that it is wrong to treat paternity case parties differently than divorce case parties remains unchallenged. Appellant's Brief, pages 17-18.

**C. The State of North Dakota's fallacious arguments establish lack of standing and lack of compelling reason to interfere with parental decisions.**

**1. The child support paragraph does not contain "unenforceable**

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<sup>2</sup> The past tense, "was provided" also appears in the Appellee's Brief, page 8. No evidence exists that aid was then being provided as required by N.D.C.C. 14-09-09.26(1).

**language”.**

Neither Troy, nor Nancy, have contracted away the right to receive support, and neither party disputes the continuing jurisdiction of the court to establish future child support. N.D.C.C. § 14-09-09.33(5) – before or after the 2009 amendment – has no application; neither Troy nor Nancy seeks to offset child support for the current or future month against past-due child support or other debts.

The Unit ignores the Stipulation wherein Troy and Nancy agreed that “(2) the minor child is spending one-half of his time with the Defendant and Defendant is presently paying for one-half of the child’s living expenses, and that each would have a child support guideline calculation that would lead to an equal obligation, one to the other ..” App., p. 20. If the parents are wrong, the child will always have the right to bring an appropriate action upon reaching the age of majority. N.D.C.C. § 28-01-25.

**2. The child support paragraph is not a parental agreement that prohibits or limits the power of a court to modify future child support.**

The Unit has never sought to intervene pursuant to N.D.R.Civ.P. 24, nor can it rely upon Dept. of Family Services, Division of Public Assistance and Social Services v. Peterson, 960 P.2d 1022 (Wyo. 1998) – Wyoming statutes have no effect in North Dakota; North Dakota does not have a comparable statute.

These parents have anticipated future possibilities, and sought to eliminate legal squabbling so that: (a) Nancy acknowledged receipt of payment of, or forgiveness for, all past child support except for any monies remaining to be paid back to North Dakota for

public assistance – the Stipulation has no impact upon the amount due North Dakota by any assignment [App., p. 19], (b) Troy acknowledged a financial responsibility toward his child through age twenty-two (22) or completion of college, whichever occurred first [App., p. 20], and (c) if any social security administrative disability payments ever arise as to either Troy or Nancy, Nancy would be the recipient of the entire benefit amount for the child support [App., p. 20].

No one asserts the social security payment constitutes the maximum amount of child support to be paid – it merely identifies which parent will receive the federal monies should either parent be disabled. App., p. 20. Troy and Nancy will always face the prospect of a changing child support amount for the child “through age 19 or completion of high school, whichever first occurs.” App., p. 21.

The Unit’s concern as to who is to receive the credit, or how to maintain a record of child support [Appellee’s Brief, page 12], are red herrings. The Stipulation does not alter the child support guidelines, or any record-keeping. Nancy and Troy are continuously obligated to inform the State Disbursement Unit of “any .. condition which may affect the proper administration of Chapter 14-09 of the North Dakota Century Code.” App., p. 21; 29. If Troy is disabled, and Nancy is paid “children’s benefits”, a calculation will take place, and the parties have indicated that Nancy will be obligated to give credit to Troy for the social security payments made; to the extent those monies are “child support payments”, she does not have to include those payments into her gross income [N.D.A.C. § 75-02-04.1-01(5)(a)(3)]. If the payments are included in gross income, the resulting increase will be paid by Nancy to the State Disbursement Unit, and then returned to Nancy for the child’s benefit.

If Troy's calculation requires still more child support [from investment income?], he will also pay that additional amount.

No one is attempting to get out of a child support obligation – the Unit erroneously cries, “Wolff”.

**3. There is nothing “problematic” with the inclusion of language about Social Security Derivative Benefits [dependency benefits].**

See prior discussions, and Davis v. Davis, 2010 ND 67, 780 N.W.2d 707, describing how children's benefits are to be treated. See also, Maschoff v. Leiding, 696 N.W.2d 834, 837-838 (Minn.App. 2005), which allows each parent to zero out the support obligation(s).

**D. There is no “open file”.**

Conceding North Dakota's administrative code has closed the file, the Unit now resorts to an interpretation of one federal law [42 U.S.C. § 624(25); Appellee's Brief, page 6] which ignores the reality of another federal law requiring IV-D agencies to establish a system for case closure.

The Constitution does not say the United States was delegated the right to close files; we presume the Tenth Amendment would reserve to the State of North Dakota the right so to do – North Dakota's laws should control.

Secondly, 45 C.F.R. § 303.11(a) requires a IV-D agency to establish a system for case closure; this case was closed by time and operation of law. That does not mean that a party cannot re-open it with respect to child support; nothing done by the parents precludes the exercise of jurisdiction by district judges in the future.

## CONCLUSION

The Judicial Referee had no authority to act; her acts are void. If not so void, the Stipulation should be upheld; the Unit has no standing to object.

Respectfully submitted this 25<sup>th</sup> day of April, 2011.

Garaas Law Firm



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# **ADDENDUM 1**





# **ADDENDUM 2**

**STATE OF NORTH DAKOTA  
IN DISTRICT COURT  
EAST CENTRAL JUDICIAL DISTRICT**

**ORDER**

Pursuant to the provisions of North Dakota Administrative Rule 13 and Section 27-05-30 of the North Dakota Century Code, Susan J. Thomas is appointed Judicial Referee in the East Central District to serve at the pleasure of the Judges of the East Central District Court. Pursuant to the provisions of North Dakota Administrative Rule 20, Section 5, Susan J. Thomas is hereby appointed Judicial Magistrate for the East Central Judicial District with authority as follows:

1. To issue search warrants pursuant to Section 29-29-01 of the North Dakota Century Code and Rule 41 of the North Dakota Rules of Criminal Procedure;
2. To issue administrative search warrants pursuant to Section 29-29.1-01 of the North Dakota Century Code;
3. To approve complaints and to issue summons or warrants pursuant Chapter 29-05 of the North Dakota Century Code and Rules 3 and 4 of the North Dakota Rules of Criminal Procedure;
4. To hold initial appearances pursuant to N.D.R.Crim.P. 5 and to set bail pursuant to Chapter 29-08 of the North Dakota Century Code and Rule 46 of the North Dakota Rules of Criminal Procedure;
5. To conduct preliminary mental health commitment proceedings pursuant to Section 25-03.1-09 of the North Dakota Century Code, notwithstanding and consistent with Section 25-03.1-02(2) and (8) of the North Dakota Century Code;
6. To perform registrar and clerk duties under the Uniform Probate Code, Title 30.1 of the North Dakota Century Code, particularly Sections 20.1-14-02 and 30.1-14-17, in informal probate proceedings and Section 30.1-15-05 in uncontested formal probate proceedings.
7. To issue domestic violence protection orders under Chapter 14-07.1 of the North Dakota Century Code.
8. To issue disorderly conduct restraining orders under Chapter 12.1-31.2 of the North Dakota Century Code.
9. To determine eligibility for public defender services.

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CASS COUNTY, NC

10. To act as the designated official for administrative traffic violations.

In addition, Susan J. Thomas, Judicial Referee of this District, shall preside in all proceedings referred to her by a District Judge of this District.


1. Title 14 of the North Dakota Century Code, except contested divorce trials;
2. Chapter 27-20 of the North Dakota Century Code, and
3. Chapter 28-25 of the North Dakota Century Code.

This Order shall be filed with the Clerk of District Court, and a copy of this Order shall be made available to any person upon request.

This Order shall be in effect August 28, 2008.

Dated this 5<sup>th</sup> day of September, 2008.

BY THE COURT:

  
\_\_\_\_\_  
Georgia Dawson  
Presiding Judge  
East Central Judicial District

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota, County of Cass, ex.rel.  
Nancy Ann Schlect, formerly known as  
Nancy Ann Neva, and C.A.W., a minor child,

Supreme Court No. 20110036

Plaintiffs-Appellees,

District Court No. 09-96-R-02147

vs.

**AFFIDAVIT OF SERVICE  
BY MAIL**

Troy Allan Wolff,

Defendant-Appellant.

State of North Dakota  
County of Cass

Pat Doty, being first duly sworn on oath, deposes and says that Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

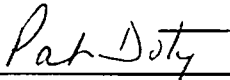
On the 25<sup>th</sup> day of April, 2011, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: REPLY BRIEF OF APPELLANT.

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

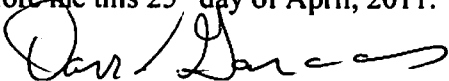
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P O Box 36  
Casselton, ND 58012

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

  
\_\_\_\_\_  
Pat Doty

Subscribed and sworn to before me this 25<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
Notary Public

