

IN THE NORTH DAKOTA SUPREME COURT

NOV - 1 2017

Nadia Nikolayevna Krasheninnik, )  
 )  
Plaintiff and Appellant, )  
 )  
vs. )  
 )  
Ahmed Moustafa Dokmak, )  
 )  
Defendant and Appellee. )

STATE OF NORTH DAKOTA  
Supreme Court #20170304  
Cass County #2017-DM-00467

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APPEAL FROM THE DISTRICT COURT,  
CASS COUNTY, NORTH DAKOTA  
EAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE STEVEN MARQUART, PRESIDING

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APPELLANT'S REPLY BRIEF

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## I.

### Standard of Review: "...a matter of law"

[1] "A district court's decision whether to award past child support is **discretionary** and will not be overturned unless the court abuses its discretion." See, Rebel v. Rebel, 2013 ND 116, ¶ 20, 833 N.W.2d 442; Hammeren v. Hammeren, 2012 ND 225, ¶ 30, 823 N.W.2d 482. With this sentence, Ahmed's brief both identifies the premise Nadia challenges, and mistakenly argues that a single standard of review governs all presented issues.

[2] Ahmed's brief does not include the next sentence this Court invariably shares: "*Particularly, when there has been no order for child support in place, failure to award interim child support has been deemed error as a matter of law, because parents have a mutual duty to support their children.*" See Johnson v. Johnson, 2002 ND 151, ¶ 8, 652 N.W.2d 315; Hagel v. Hagel, 2006 ND 181, ¶ 7, 721 N.W.2d 1; Ackerman v. Ackerman, 1999 ND 135, ¶¶ 20-21, 596 N.W.2d 332.

[3] Nadia's is one of those "no order for child support in place" and "no child support has been paid" cases, that have historically disturbed this Court and been dealt with "as a matter of law." Id; See also, Hagel v. Hagel, 2006 ND 181, ¶ 7, 721 N.W.2d 1.

## II.

### Discretion to Award Past Child Support: The Source?

[4] Yes, this court routinely repeats the phrase, "[a] district court's decision whether to award past child support is discretionary..."

[5] The repetition has been so frequent, so easy, that a related and relevant consideration is little discussed. What is the discretion's source?

[6] Philosophers may argue whether something can be borne of nothing: Lawyers don't. In our realm, streams of power have authorizing headwaters. Discretion has a font, a spring, a home. It comes from somewhere.

[7] When considering pre-litigation child support *in paternity cases*, this Court formerly attributed a district court's discretion to a statute that, in 2005, was repealed, and never replaced. Rydberg v. Johnson, 1998 ND 160, 583 N.W.2d 631; McDowell v. McDowell, 2003 ND 174, 670 N.W.2d 876. The legislature unplugged that particular power source.

[8] *In divorce cases* involving "past child support" issues, this Court has found an alternate source of discretionary authority in N.D.C.C., Section 14-09-08:

...section 14-09-08, N.D.C.C., continues to provide that a court "may compel" a parent to provide support...The word "may" is usually employed to imply permissive, optional, or discretionary, and not mandatory, action or conduct.

Hagel v. Hagel, 2006 ND 181, ¶ 7, 721 N.W.2d 1.

[9] However, plucking that lonely "may" out of 14-09-08, and understanding it through a single, "plain language" construction unduly magnifies and distorts it as a source of discretion.

[10] There are other rules of construction to be remembered, too:

[11] Courts construe statutes as a whole, harmonize them to give meaning to related provisions, and interpret them in context to give meaning and effect to each word, phrase, and sentence. Marhula v. Grand Forks Curling Club, Inc., 2015 ND 130, 863 N.W.2d 503.

[12] Courts construe statutes in a practical manner, and consider the context of statutes and the purpose for which they were enacted. Bragg v. Burlington Resources Oil and Gas Co. LP, 2009 ND 33, 763 N.W.2d 481, rehearing denied.

[13] The primary purpose of statutory construction is to ascertain the intent of the legislature. Kim-Go v J.P. Furlong Enterprises, 460 N.W.2d at 694 (ND 1990). We must presume that the legislature did not intend absurd and ludicrous results or unjust consequences. Resolution Trust Corp. v. Dickinson Econo-Storage, 474 N.W.2d 50 (ND 1991).

[14] Thus, consider Section 14-09-08 in its fullness:

Parents *shall* give their children support and education suitable to the child's circumstances. The Court *may* compel either or both of the parents to provide for the support of their child.

[15] A correct judicial understanding of Section 14-09-08's "may"—and any grant of authority it conveys—is not acquired by surgically excising it from its related legal environs, and examining it in vacuumed isolation.

[16] Instead, that lonely "may" must be seen next to its companion "shall"; it must be understood to swim in a sea of other legislation, and administrative sections, that insist parents support their children; it must be viewed against what Nadia has denominated the "alpha and omega," namely, this state's irrefutable policy that aligns behind a "shall," not a "may," approach.

[17] The "may" tail isn't authority to wag a "shall" dog.

### III.

#### **"Best Interests of the Child": Analytical Framework or Policy Goal?**

[18] "The best interests of the child"; It trips so blithely off both tongue and pen; so easily that its use has created an interesting issue in this case. In the factual

context of this case, does the term represent an analytical framework (as the District Court suggested) or is it **not** an “analysis,” but a policy end or goal (as Nadia gladly concedes)?

[19] If it is an analytical framework, could that analysis be represented any way other than the factors set forth in N.D.C.C., Section 14-09-06.2? Clearly, the District Court did not analyze those factors in this case.

[20] Or, are references to “the best interests of the child” in child support statutes and guidelines a short-hand reference to a universally understood goal? If it is **not** an analytical framework, that universal goal can only work in Nadia’s favor here.

[21] Nadia is pleased to refer to Ahmed’s own brief as support for the proposition that “the best interests of the child” demand parents pay support. It is Ahmed, himself, who tells this Court:

...the very purpose of child support is to serve the best interest of the child. This Court has previously stated that the purpose of the child support obligation “rested on an overriding public policy that the best interests of the children require child support obligors to provide adequate support and maintenance for their minor children. (citation omitted)”

Ahmed’s Brief, ¶ 53.

#### IV.

#### **Discretion to Award Past Child Support: What Considerations Matter?**

[22] A review of the many cases involving back support does not disclose an overabundance of instruction to district courts about how they are to exercise the discretion they possess. What considerations should drive a court this way or that? They are left to their own deliberative machinations and, on review, receive a Roman-styled thumbs-up or thumbs-down.

[23] If any single fact, or collection of facts, seems to matter, though—in case after case after case—it is the extent to which an obligor has or has not provided financial support during the contested period.

[24] When obligors **have** provided financial support during the time when back support is sought, this court affirms district courts' decisions to select more current, as opposed to retroactive, start dates. Jacobs-Raak v. Raak, 2016 ND 240, 888 N.W.2d 770.

[25] Conversely, where obligors—like Ahmed—have **dodged** their obligations and paid little or nothing, this court insists, “as a matter of law,” that retroactive support be paid. Johnson v. Johnson, 2002 ND 151, ¶ 8, 652 N.W.2d 315; Hagel v. Hagel, 2006 ND 181, ¶7, 721 N.W.2d 1; Ackerman v. Ackerman, 1999 ND 135, ¶¶ 20-21, 596 N.W.2d 332.

[26] In other words, there is an odd—confusing—connection between “when” and “what” (or “how much”). The question of “when should the obligation start” is often answered by reference to what, or how much, support an obligor has paid. Why?

[27] Wouldn't district courts do better, and be more consistent, by separating, rather than blending these considerations? Wouldn't separating start dates from crediting payments adhere more closely to our statutory and administrative support scheme?

[28] Here, Ahmed has been AAD's father and has been possessed of a duty of support since AAD's birth. Under all our law, and all its policy, that is when Ahmed's duty of support began. Let it be so. This should not be where discretion is permitted.



[29] Likewise, North Dakota law instructs us to look to the child support guidelines to identify an obligor’s “presumptively correct” child support amount, and acceptable deviations from that amount. There is no dispute here about Ahmed’s presumptively correct guideline support calculations back to AAD’s birth.

[30] To the extent a district court is possessed of discretion, its focus should not be on trading an easily identified start date against payments made or support given. Rather, the start date and support due should be identified, and the district court’s discretion should be confined to determining how much credit an obligor is due for payments and support given. In this case, Ahmed has given none.

#### V.

#### **N.D.C.C., Section 14-08.1-01 and Ahmed: A Simple Analysis**

[31] Section 14-08.1-01 is not a hard one to read and apply. Let’s parse it—straight up—against the facts of this case.

[32] Is Ahmed “[a] person legally responsible for the support of a child under the age of eighteen years”?

[33] **Yes.** He signed an Acknowledgement of Paternity and accepted that responsibility [App. 74]. He testified that he had a legal and moral obligation to pay child support from the time of AAD’s birth [T. 49, 55, 56, 130]. Section 14-20-15.1 provides that Ahmed’s Acknowledgement of Paternity conferred upon him “all...duties of a parent.” Section 14-09-08 provides, “[p]arents shall give their children support.”

[34] Is Ahmed a person who, before this action commenced, was one “who [was] not subject to any subsisting court order for the support of the child”?

[35] **Yes.** All agree. There was no support order in place before this action commenced.

[36] Is Ahmed a person who failed “to provide support, subsistence, education or other necessary care for the [child]”?

[37] **Yes.** Again, all agree. Other than to pay a \$51 dental bill, Ahmed never paid a nickel of child support to Nadia.

[38] If Section 14-08.1-01 is to have meaning, Ahmed “is liable for the reasonable value of the physical and custodial support” Nadia has furnished AAD.

[39] Did the District Court’s decision impose such liability?

[40] **No.** It did not.

## VI.

### **Conclusion: Reverse with Instructions**

[41] Nadia is very plainly inviting, if not challenging, this Court to re-examine its understanding of the discretion it grants district courts when they address back support issues: Is there any? Is it there in every stripe of case? How broad or narrow is it? What considerations should be deemed relevant when it is exercised?

[42] She also identifies her case as being like Hagel, Johnson, and Ackerman, where an obligor’s failure to support his child brought corrective responses, “as a matter of law.”

[43] Nadia respectfully prays that this Court reverse the District Court’s support and money judgments, with instructions to commence Ahmed’s child support obligation at AAD’s birth, and to impose a \$77,865 arrearage.

Dated: November 1, 2017.

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	)	
Plaintiff and Appellant,	)	Supreme Court #20170304
	)	
	)	Cass County #2017-DM-00467
vs.	)	
	)	
	)	<b>Affidavit of Service</b>
Ahmed Moustafa Dokmak,	)	
	)	
Defendant and Appellee.	)	

I, Tiffany Plutowski, swear that I am at least 18 years of age, not a party to or interested in the above action, and that on the 1<sup>st</sup> day of November 2017, I served a copy of the following document(s):

**1. Appellant's Reply Brief**

By placing a true and correct copy of the above document(s) in an envelope addressed as follows:

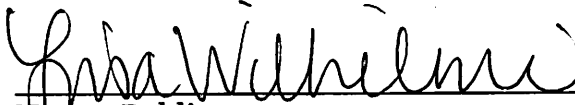
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I further state that a true and correct copy of the **Appellant's Reply Brief** was emailed to Ms. Sharon Lo. To the best of my knowledge, the email address given above is the actual email address of the party intended to be so served.

Dated this 1<sup>st</sup> day of November 2017.

  
 \_\_\_\_\_  
 Tiffany Plutowski

Subscribed and sworn to before me this 1<sup>st</sup> day of November 2017 in Cass County, State of North Dakota.

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

