

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

Ellen Crecelius Reed.,

Plaintiff/Appellee,

vs.

Paul Trevizo Reed,

Defendant/Appellant,

and

**State of North Dakota, Statutory Real
Party in Interest.**

Supreme Court Case No.:
20220241

Case No.: 18-2016-DM-00649

~~CORRECTED~~ APPELLANT'S BRIEF

**Appeal from Judgment
Entered on June 23, 2022
In District Court, Grand Forks County, State of North Dakota
The Honorable Lolita G. Hartl Romanick**

Shawn L. Autrey/ ND License #05782
219 S 4th Street
Grand Forks, ND 58201
Telephone: 701-772-2255
Fax: 701-203-8349
Email: shawn@autreylawfirm.com
Attorney for Defendant/Appellant

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[¶1] STATEMENT OF THE ISSUES

I. Whether the District Court erred in calculating Defendant’s child support obligation.

[¶2] STANDARD OF REVIEW

[¶3] “Child support determinations involve questions of law which are fully reviewable, findings of fact subject to the clearly erroneous standard of review, and some matters of discretion subject to the abuse of discretion standard of review. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or if, after reviewing the entire record, we are left with a definite and firm conviction a mistake has been made.” See Gerving v. Gerving, 2022 ND 2, ¶7, 969 NS 2d 184. (internal citations and quotations omitted). “The district court must comply with the child support guidelines in calculating a parent's child support obligation, and the court errs as a matter of law when it does not comply with the guidelines.” *Id.*

[¶4] STATEMENT OF THE CASE

[¶5] The Plaintiff, Ellen Crecelius Reed commenced a divorce action against Paul Trevizo Reed by filing a Summons and Complaint on October 20, 2016. (R1-3). The Plaintiff filed documents in support of her Application for Default Judgment on October 20, 2016 (R5-11) and October 21, 2016. (R13). The Defendant filed an Affidavit in Response to Motion for Default on November 3, 2016. (R20). The Court held a hearing on the Plaintiff’s Application for Default on November 7, 2016. The Defendant filed an Answer and Counterclaim on November 10, 2016. (R23). An Interim Order was entered on November 10, 2016. (R25). An Amended Interim Order was entered on November 16, 2016. (R47). A Corrected Amended Interim Order was entered on December 29, 2016.

(R62). The State of North Dakota filed a Notice of State as Real Party in Interest on January 15, 2017. (R71). Trial was held on July 5 and 6, 2017. An Order for Summer Parenting Time was entered on July 14, 2017. (R157). The District Court issued its Findings of Fact, Conclusions of Law and Order for Judgment on October 13, 2017. (R163). The Corrected Findings of Fact, Conclusions of Law and Order for Judgment were issued on October 26, 2017. (R171). The Corrected Judgment was entered on October 27, 2017. (R174).

[¶6] The Defendant filed a Motion to Modify Judgment on January 20, 2022. (R202-206). The State of North Dakota filed a Response to the Defendant's Motion on January 31, 2022. (R213). The Defendant filed a Reply to Response to Motion on February 8, 2022. (R229-235). The State of North Dakota filed a Motion to Modify Judgment on February 8, 2022. (R239-247). A hearing was held on the Defendant's Motion to Modify on February 9, 2022. The Amended Judgment was entered on March 30, 2022. (R259). Plaintiff filed a Response to State's Motion to Modify Judgment on April 18, 2022. (R263-267). The Defendant filed a Reply to the Plaintiff's Brief in Response to State's Motion to Modify Judgment on May 17, 2022. (R268-275). Trial was held on May 25, 2022. Following trial the Court issued its Findings of Fact, Conclusions of Law, and Order for Amended Judgment on June 17, 2022. (R290). A Second Amended Judgment was entered on June 23, 2022. (R294). The Defendant filed a Notice of Appeal and Statement of Preliminary Issues on August 23, 2022.

[¶7] STATEMENT OF THE FACTS

[¶8] The Defendant married his first wife on June 30, 1995. Pursuant to a Final Judgment the Defendant divorced his first wife in the State of New Mexico, County of Dona Ana, on July 25, 2008, in Case No.: DM-2007-1253. Pursuant to the Final Judgment

of Dissolution the Defendant's first ex-wife was awarded a portion of the Defendant's retirement account. (R286:9:10(f)). Per the Defendant's December 12, 2021, Retiree Statement the Defendant's First ex-wife receives \$812.47 per month (SBP \$189.72 plus \$622.75) directly from the Defendant's retirement account. (R284:1-2).

[¶9] The Defendant married his second wife (the Plaintiff in this matter) on August 3, 2008. Pursuant to Judgment, the Defendant divorced his second wife in the State of North Dakota, County of Grand Forks, on October 13, 2017. A corrected Finding of Fact, Conclusion of Law, and Order for Judgment was signed on October 24, 2017 (R171), and the Corrected Judgment was entered on October 27, 2017. (R174). Pursuant to paragraph 36 of the parties Amended Judgment "Ellen shall be awarded a monthly payment of \$327 (rounded) derived from application of the Bullock formula to Paul's \$2,285 monthly retirement payments. Paul shall pay to Ellen \$327 (rounded) per month as an equitable division of his military retirement." (R174:16:36).

[¶10] During the course of the parties' divorce proceedings a Corrected Second Amended Interim Order was signed by the Honorable Judge Lolita G. Hartl Romanick. (R62). This Second Amended Interim Order specifically addressed the issue of child support and the military payments the Defendant's first ex-wife received. Paragraph 5 states, "The court determines that Paul's gross income includes Veteran's Administration benefits of \$2,160 (rounded) per month and Military Retirement benefits of \$1,540 per month ($\$2,285 - \$571 - \$173 = \$1,540$) resulting in a total gross annual income of \$44,400 and a net monthly income of \$3,184, based upon the attached calculations which are incorporated by reference herein." (R62:3:5). The Court directly addressed the numbers subtracted from the Defendant's Military Retirement benefits in paragraph 4 of the Second Amended

Interim Order specifically stating, “Here, before Paul receives any of his Military Retirement, reductions are made for Spousal Benefits in the amount of \$174 (rounded) and for Former Spouse Deductions in the amount of \$571 (rounded). (Doc. 29.) Those amounts are considered in the child support calculations herein.” (R62:3:4). The gross income in the Child support calculation in paragraph 66 of the corrected Findings of Fact, Conclusions of Law, and Order for Judgment mirrored the same numbers in the corrected Second Amended Interim Order in this case. (R171:21:66).

[¶11] Paragraph 70 of the corrected Finding of Fact, Conclusion of Law, and Order for Judgment ordered an upward deviation of the Defendant’s child support to help defer the costs of childcare for the parties’ minor children. (R171:23:70).

[¶12] On January 1, 2022, the Defendant filed a motion to modify his current child support order in this case. Specifically, the Defendant requested that the upward deviation to his child support be terminated since his children with the Plaintiff no longer needed childcare.

[¶13] On or about January 25, 2022, the Plaintiff requested that North Dakota Child Support start a review of the Defendant’s child support obligation.

[¶14] On February 8, 2022, Cynthia G. Schaar, attorney for Child Support, filed a Motion and supporting documents requesting, “The Defendant pays an award of his benefits to his former wives. It is up to the court to determine if this payment constitutes a hardship under ND Admin. Code Section 75-04.1-09(2)(k). Therefore, the State has submitted calculations based upon including the benefits paid to Defendant’s former wives and calculations removing the amount from the calculations.” See Declaration in Support of Motion to Modify Judgment. (R242:1)

¶15 On June 16, 2022, the Honorable Lolita G. Hartl Romanick entered a Finding of Fact, Conclusions of Law, and Order for Second Amended Judgment. (R290). Specifically, the Court found, “that Paul has little or no control over the distributions of this military pay to his ex-wives, because these payments are property distributions ordered by the courts in New Mexico and North Dakota.” (R290:10:32). Further, the Court found that, “Paul failed to provide any evidence or any argument that such a deviation would be in the children’s best interest as required by N.D. Admin. Code §75-02-04.1-09(2).” (R290:10:32).

¶16 LAW AND ARGUMENT

¶17 The Court improperly calculated the Defendant’s net income for child support purposes when it included in the Defendant’s gross income retirement payments that were awarded to the Defendant’s ex-wives to also include spousal benefits.

¶18 There is no mention of federal income tax consequences in either of the Judgments for the payments made to the Defendant’s first and second ex-wives from the Defendant’s retirement account. Hence according to the IRS, the payments made by the Defendant to his two ex-wives pursuant to the Court orders are income of the Defendant’s two ex-wives respectfully and are NOT income of the Defendant. See Baker v. Commissioner T.C. Memo 2000-164; also see Brown v. Brown, 2011 130 Conn.App. 522, 24 A.3d 1261. The facts of the Baker v. Commissioner case mirror the facts in this case.

¶19 N.D.C.C §14-09-09.10(9) includes both taxable and nontaxable income. The Honorable Judge Lolita G. Hartl Romanick was correct when she found “whether money is taxed is not determinative of whether it is included in an Obligor’s income.” (R290:9:30).

The Court can use the Defendant's tax argument as a factor of why the retirement payments his ex-wives receive should not be considered as income for child support purposes.

[¶20] A validly created and approved QDRO allows the recipient spouse to be treated, for federal income tax purposes, as a plan participant. See IRC §72(t)(2)(c). The Baker case is not unique. See *Id.* Numerous other cases make the same point, the periodic pension share payments made from a retiree to former spouse are included in her income and excluded from his.

[¶21] By definition the Defendant's ex-wives are plan participants and should be treated as such. These payments these two ex-wives receive due to the Defendant's military service belong to the ex-wives and not to the Defendant anymore, per the court's orders.

[¶22] Pursuant to N.D.A.C. 75-02-04.1-1 the payments that are derived from the application of a QDRO and are Court ordered to be paid by the Defendant to the Defendant's first and second ex-wives are not considered gross income for the Defendant and do not fall within any of the subcategories of N.D.A.C. 75-02-04.1-1.

[¶23] In today's society there are numerous blended families and as such there are scenarios in which a parent may receive child support for some of their children and also pay child support for some of their other children. For example, the Plaintiff in this case is currently receiving child support from the Defendant for three children. Hypothetically let's assume the Plaintiff has children with another man and that man is awarded primary residential responsibility of those minor children and the Plaintiff is ordered to pay child support to this man. Using the Court's analysis of the Defendant's net income and applying it to this hypothetical example, this one payment the Plaintiff receives from Defendant's military retirement would be considered income for both the Defendant and the Plaintiff.

This is not consistent with the North Dakota Child Support Guidelines. Or to simplify this example, let's assume that the Defendant and the Plaintiff were awarded joint primary residential responsibility of the parties' minor children. The monies that the Plaintiff receives from the Defendant's military retirement would most certainly fall within 75-02-04.1-1 and be considered income for the Plaintiff. Although according to the Court's current finding this would also be considered income for the Defendant. How can this make sense.

[¶24] In a Wisconsin case the court directly addressed the issue of a military retirement account split between the parties and how it would affect child support. See Cook v. Cook, 208 Wis.2d 166 (1997), 560 N.W.2d 246. "We conclude that military retired pay must be considered as property for purposes of property division unless otherwise excluded by law and may be considered as income to the recipient for purposes of calculating child support." See *Id.* In this case Mr. Cook argued that the portion of his retirement account that he was awarded should not be considered income because it was already considered in the equitable property distribution. See *Id.* Mr. Cook argued that this was impermissible due to the "double-count" rule. See *Id.* See Also Kronforst v. Kronforst, 21 Wis.2d 54 (1963), 123 N.W.2d 528. The court in the Cook case specifically found that the portion of Mr. Cook's retirement account that he was awarded could be used as income for child support purposes. See *Id.* The Court also stated, "The circuit court appropriately presumed that the wife, like the husband, would expend on child support a portion of her income, including her share of the military retired pay." See *Id.* "The circuit court referred to the wife's "25%" deemed contribution to the support of her children. Findings and Decision, March 30, 1995, at 3. The regulations state that the percentage standard "expects that the

custodial parent shares his or her income directly with their children.” See Id. The Cook case specifically outlined how the retirement pay portion that was awarded to Mrs. Cook from Mr. Cook’s retirement account was considered her income for child support purposes. Unlike this case, the Court did not have to consider the argument that the portion of Mr. Cook’s retirement account that was awarded to Mrs. Cook should also be considered as Mr. Cook’s income because this was not on the Court’s radar it was just presumed to not be used to calculate Mr. Cook’s net income.

[¶25] CONCLUSION

[¶26] As such, Defendant respectfully requests the Supreme Court reverse the District Court’s calculation of Defendant’s gross income for child support purposes. Further to order the District Court to not include in his gross income any of the monies that his ex-wives are Court ordered to receive from the Defendant’s military retirement account.

[¶27] CERTIFICATE OF COMPLIANCE

[¶28] I, Shawn L. Autrey, hereby certify that the number of pages contained in this Appellant’s Brief complies with Rule 32, N.D.R.App.P., and consists of twelve (12) pages.

Dated this 20th day of October, 2022.

/s/ Shawn L. Autrey
Shawn L. Autrey/ ND License #05782
219 S 4th Street
Grand Forks, ND 58201
Telephone: 701-772-2255
Fax: 701-203-8349
Email: shawn@autreylawfirm.com
Attorney for Defendant/Appellant

[¶29] CERTIFICATE OF COMPLIANCE

[¶30] I, Shawn L. Autrey, hereby certify that the number of pages contained in this Appellant’s Brief complies with Rule 32, N.D.R.App.P., and consists of twelve (12) pages.

Dated this 18th day of October, 2022.

/s/ Shawn L. Autrey
Shawn L. Autrey/ ND License #05782
219 S 4th Street
Grand Forks, ND 58201
Telephone: 701-772-2255
Fax: 701-203-8349
Email: shawn@autreylawfirm.com
Attorney for Defendant/Appellant

[¶31] CERTIFICATE OF SERVICE

[¶32] I, Shawn L. Autrey, hereby certify that on the 18th day of October, 2022, the foregoing Appellant’s Brief was electronically filed with the Supreme Court through the North Dakota Supreme Court Efile Portal and the following individuals were served with a copy of said Appellant’s Brief:

Nicholas A. Horst: nick@kalashpettitlaw.com

Cynthia Gay Schaar: jamestowncse@nd.gov

/s/ Shawn L. Autrey
Shawn L. Autrey/ ND License #05782
219 S 4th Street
Grand Forks, ND 58201
Telephone: 701-772-2255
Fax: 701-203-8349
Email: shawn@autreylawfirm.com
Attorney for Defendant/Appellant

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**State of North Dakota; Department of Human
Services, Statutory Real Party in Interest.**

CERTIFICATE OF SERVICE

**Supreme Court Case No.:
20220241**

Case No: 18-2016-DM-00649

I, Shawn L. Autrey, attorney for the Defendant/Appellant, and officer of the court, hereby certify that a true and correct copy of the following documents:

1. Appellant's Brief

Was served via United States Mail on the 19th day of October, 2022, to the following addresses:

- a. Ellen Reed
92 Sirocco Dr. Unit 1
Minot Air Force Base, ND 58704

Respectfully submitted by:

/s/ Shawn L. Autrey

Shawn L. Autrey/ ND License #05782

219 S 4th Street

Grand Forks, ND 58201

Telephone: 701-772-2255

Fax: 701-203-8349

Email: shawn@autreylawfirm.com

ATTORNEY FOR DEFENDANT/APPELLANT

October 19th, 2022

[¶29] CERTIFICATE OF SERVICE

[¶30] I, Shawn L. Autrey, hereby certify that on the 20th day of October, 2022, the foregoing Corrected Appellant's Brief was electronically filed with the Supreme Court through the North Dakota Supreme Court E-file Portal and the following individuals were served with a copy of said Corrected Appellant's Brief:

Ellen Reed: emcrecel@gmail.com

Cynthia Gay Schaar: jamestowncse@nd.gov

/s/ Shawn L. Autrey
Shawn L. Autrey/ ND License #05782
219 S 4th Street
Grand Forks, ND 58201
Telephone: 701-772-2255
Fax: 701-203-8349
Email: shawn@autreylawfirm.com
Attorney for Defendant/Appellant