

**North Dakota Family Support Council Annual Training Conference
Minot, North Dakota
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Case Law Update

Guidelines Cases

Becker v. Becker, 2011 ND 107

Issues: 1) Determination of net income. 2) Deviation when the obligee's net income is more than three times the obligor's net income. 3) Imputation of income.

Trial court found that Obligee/Dad's net income was more than three times that of Obligor/Mom and ordered a downward deviation from the presumptively correct child support amount.

Dad argued that the trial court erred in calculating Mom's income and also erred in calculating his income for purposes of calculating Mom's support obligation.

Supreme Court held that the trial court failed to make findings about the parties' net income under the guidelines. (For example, the evidence presented regarding Mom's income were gross amounts and in determining Dad's net income, it was not clear whether the trial court used only his average net income from his surgical practice or also included income from surgical and consulting fees.) In short, Supreme Court could not determine what net incomes the trial court compared to find that Dad's net income was at least three times higher than Mom's net income.

Dad argued that income should be imputed to Mom since she was unemployed. However, Mom had been awarded the Spa D'Athena in the divorce and had testified that she wanted to go back to school for cosmetology and get more involved in operating the spa. The Supreme Court determined that this meant that Mom was self-employed and that her net income had to be calculated using the self-employment provisions in the guidelines. The Supreme Court held that if Mom's net income from self-employment proves to be less than the amount to be imputed because she is unemployed, then income should be imputed.

Dad argued that income should be imputed to Mom because she made a voluntary change in employment and that she should go back to her former profession as a speech pathologist. (Although at the time of the divorce trial in 2009, the trial court had found that Mom had not worked outside the home since 2003). The Supreme Court held that Mom did not meet the requirements for imputing income to her because she had not made a voluntary change in employment during the two-year look back period specified in the applicable provision in the guidelines.

Krueger v. Krueger, 2011 ND 134

Issue: Determination of net income.

Dickinson RCSU petitioned the trial court to modify (increase) Obligor/Dad's support obligation following Obligee/Mom's request for review. The paperwork filed with the court included an affidavit from Brad Davis, a guidelines worksheet, and a proposed order for amended judgment. Brad also testified at the modification hearing about the financial information he had obtained and used to calculate the new child support amount. The proposed order was eventually signed by the trial court; it included a net income amount for Dad and stated that it was based on application of the guidelines. However, the amended order did not specify how the new net income amount was determined.

The Supreme Court reversed the amended child support order for the reason that the trial court "did not make independent, specific findings regarding [Dad's] net income."

Justice Kapsner, joined by Justice Maring, dissented, asserting that this was not a situation where the trial court had used vague figures to determine the child support amount. Instead, it was a situation where the trial court made "a precise finding of net income based on adequate evidence in the record."

Crandall v. Crandall, 2011 ND 136

Issue: Support obligation assessed against the custodial parent.

Following Mom and Dad's divorce trial, the trial court awarded Dad primary residential responsibility of the parties' three children and also ordered him to pay child support to Mom in the amount of \$680 per month. The trial court also denied Dad's request to stay his payment of child support pending appeal.

The Supreme Court reversed, holding that "the plain language of the child support guidelines does not authorize the court to order a custodial parent to pay child support to the noncustodial parent." The case was remanded back to the trial court to calculate Mom's support obligation "with appropriate recoupment of child support erroneously paid by [Dad] . . ."

State ex rel. I.R.S. v. Landrus, 2011 ND 173

Issue: Imputation of income to incarcerated obligor.

Bismarck RCSU initiated an action for paternity and support against Dad, who was incarcerated at the state penitentiary. Eventually, a default judgment was entered against Dad which included a child support obligation based on minimum wage

imputation and the multiple-family adjustment. Dad motioned the trial court to reconsider the default judgment and when that motion was denied, he appealed to the Supreme Court.

Dad raised several issues on appeal, including that the trial court acted in bad faith and violated his 14th amendment due process rights. Regarding the child support obligation, the gist of Dad's argument was that the trial court erred by imputing income based on minimum wage. He alleged that since he was incarcerated, he was "limited to the amount of money that can be made, and that amount in [sic] no where near the amount requested."

In a per curiam decision, the Supreme Court summarily affirmed the trial court's order, holding that wages were properly imputed to him as an incarcerated individual.

Seay v. Seay, 2012 ND 179

Issue: Providing security for future support payments.

Trial court ordered Dad to pay child support and spousal support and to buy and maintain a life insurance policy on himself as security for his future support obligations.

On appeal, Dad argued that ordering him to buy and maintain a life insurance policy on himself constituted an improper upward deviation under the guidelines.

The Supreme Court based its ruling on N.D.C.C. § 14-08.1-03 which allows a court to make suitable provision for future care and support of a child and to require "reasonable security" for child support payments. In previous cases, the Supreme Court has held that this statute authorizes a trial court to order an obligor to buy and maintain a life insurance policy as security for the child support payments.

The Supreme Court went on to say that N.D.C.C. § 14-08.1-03 (and a similar statute in N.D.C.C. ch. 14-05 pertaining to security for spousal support ordered in a divorce judgment) does not create "an extra level of child support." Instead, the statute creates a separate responsibility, beyond the amount of support required under the guidelines, to provide reasonable security for future support obligations.

Keita v. Keita, 2012 ND 234

Issue: Deviation for visitation travel expenses.

Trial court ordered Dad to pay support to Mom and denied Dad's request for a downward deviation based on Dad's visitation travel expenses. The denial was based on the trial court's finding that there was little history of actual expenses and practices of

Dad having exercised visitation. (Trial court did allow Mom's request for an upward deviation based on child care expenses.)

The Supreme Court reversed, holding simply that even if a history of actual expenses and visitation practices of the parties was not available, under the circumstances, the trial court erred in failing to consider Dad's visitation travel expenses.

Nuveen v. Nuveen, 2012 ND 260

Issue: Deviation based on high income of the obligor.

Dad moved to modify his support obligation when one of his three children moved in with him, with Mom's permission. Mom and Dad each submitted income information to the court for a child support determination based on split custody. The trial court found that Dad's monthly income exceeded \$42,000 and that his presumptive support obligation was \$3,543 per month based on the \$12,500 maximum net monthly income on the guidelines' schedule. The trial court found that Mom's monthly income was \$6,191 and that her presumptive support amount was \$1,087. The trial court offset the parents' obligations "and determined [Dad's] presumptive support obligation to [Mom] was \$2,456 per month." **(Note that this transfer payment is erroneously referred to as the presumptive support obligation.)** Then the trial court found that an upward deviation to Dad's obligation was in the children's best interests based on Dad's increased ability to pay and the children's more expansive needs. According to the opinion, the trial court ultimately ordered Dad to pay \$3,750, "a \$1,294 deviation." **(In other words, the deviation was added to Dad's transfer payment.)**

Dad argued that the trial court erred by ordering an upward deviation and also by applying the deviation to the transfer payment.

The Supreme Court held that the trial court had made a finding of fact that an upward deviation would be in the children's best interests and that there was sufficient evidence in the record for that finding to survive based on the "clearly erroneous" standard of review. In addition, the Supreme Court declined to adopt Dad's argument that Mom, to justify the deviation, had to show the children's appropriate needs in specific amounts, such as in a line-by-line accounting fashion. The Supreme Court determined that such specificity is not required by the guidelines, which only require the trial court to find that the obligor's monthly income exceeds \$12,500 and that a deviation is in the children's best interests. Continuing on and citing previous case law, the Supreme Court held that an "appropriate needs" analysis does not require specific findings of expanded needs for children with high-income parents. Instead, it allows the court to acknowledge that the "needs" of a child with wealthy parents are more expansive because of the higher standard of living to which the family is accustomed.

Regarding applying the deviation after offsetting the parents' support obligations, the Supreme Court said that Dad failed to cite any law that specifically requires the court to

apply the deviation before the offset. (Note N.D. Admin. Code § 75-02-04.1-09(6), which provides that any adjustment for a high-income obligor “shall be made to the child support amount resulting from application of this chapter.”)

Hoverson v. Hoverson, 2013 ND 48

Issue: Deviation based on high income of the obligor.

Trial court ordered Dad to pay \$3,002 per month for child support, which included an upward deviation of \$900. Mom argued that based on Dad’s high income, which averaged about \$164,000 per month, the court should have ordered a greater upward deviation. Dad countered that the court should not have ordered any upward deviation because there was no showing of need, nor was there a showing that the deviation was in the best interests of the child.

The Supreme Court held that the trial court’s decision was not clearly erroneous because Mom had not presented specific evidence of the child’s appropriate needs, nor had she proposed a specific amount for an upward deviation in support.

Non-Guidelines Cases

Schlecht v. Wolff, 2011 ND 164

Issue: Child Support’s standing as real party in interest.

Paternity and child support were established against Dad in 1997. In 2009, Mom and Dad entered into an agreement for equal residential responsibility. They further agreed that Dad would not have a support obligation, that Dad would not seek support from Mom, and that Mom would forgive Dad’s arrears. The trial court approved the stipulation and entered an amended judgment. Several months later, the Fargo RCSU sought to vacate the amended judgment on the grounds that the State was a real party in interest pursuant to N.D.C.C. § 14-09-09.26, did not agree with the stipulation, and had not received notice or the opportunity to be heard before the amended judgment was entered.

The referee vacated the amended judgment and Dad appealed. The Supreme Court remanded the case back to the trial court for the referee to explain the reasons behind vacating the amended judgment. Eventually the referee issued another order finding that the State is a party to the action and also that the stipulation contained some invalid and unenforceable terms. Dad sought review from the district judge who affirmed the referee’s ruling and Dad appealed again.

Dad raised several issues on appeal, including whether the State had standing to contest the amended judgment. He argued that since Mom had not received public

assistance for over ten years and that since none of Dad's arrears were assigned, the State did not have an interest in the matter or the right to interfere in the private affairs of Mom and Dad.

The Supreme Court noted that standing is a question of law subject to a de novo review. Citing federal law and regulations providing that IV-D services are to continue once public assistance closes unless the applicant/recipient requests case closure, the Supreme Court noted that there is nothing in the record indicating that Mom asked that her IV-D case be closed once public assistance stopped. Therefore, the justices held that the State continues to be a real party in interest because it has continued to provide IV-D services to Mom and, accordingly, has standing. (The Supreme Court also agreed with the trial court that the parties' stipulation didn't comply with the guidelines and improperly limited the trial court's ability to modify child support.)

Sall v. Sall, 2011 ND 202

Issue: Contempt of court.

Mom and Dad were divorced in 2003. Among other things, Dad was ordered to maintain medical and hospital insurance for the children, pay one-half of the children's uncovered medical, dental, and optical expenses, and pay for all costs related to the children's extracurricular activities.

In 2010, Mom brought contempt motions against Dad for not paying some of these items, including some items dating back to 2004. After some procedural maneuvers and after holding two hearings, the trial court issued an order in January 2011. The trial court determined that all of Mom's claims that were more than two years old were stale as a matter of law and would be denied. The trial court also declined to hold Dad in contempt but did award Mom reimbursement of approximately \$1,000 for expenses she incurred within the two-year timeframe leading up to her motions.

One of Mom's issues on appeal was the trial court's denial of her request for reimbursement for the children's extracurricular and medical expenses that were more than two years old.

The Supreme Court first addressed the standard of review when one party seeks to hold another in contempt: the moving party must clearly and satisfactorily prove the alleged contempt occurred and the court's decision will not be overturned on appeal absent an abuse of discretion.

On this issue, the Supreme Court sided with Mom. The trial court did not cite any applicable statute of limitations or any other legal theory (e.g., laches) to justify its denial, nor did it make any factual determinations regarding the credibility of the claims. Instead, it (admittedly) arbitrarily picked two years as the cut-off date. Thus, the Supreme Court held that the trial court had abused its discretion.

(In the decision, the Supreme Court cited N.D.C.C. § 14-08.1-05 and prior case law indicating that if an obligor is required to make cash payments for the benefit of a child, it is “direct support” and the statute applies. In the case before them, the children’s extracurricular expenses and uncovered medical expenses that Dad was required to pay constituted “cash payments for the benefits of a child” and, accordingly, the statute applied.)

Haroldson v. Haroldson, 2012 ND 44

Issue: Equal physical custody as way to avoid child support.

When Mom and Dad were divorced, they stipulated to equal physical custody of their children. Less than two years later, Mom moved to amend the judgment, claiming that the equal custody arrangement had never been followed and that she always had the children a majority of the time. A few months later, Dad also motioned to amend the judgment. The trial court denied both motions but also concluded that the stipulated divorce judgment providing for equal physical custody was contrary to public policy because the parents had agreed to it to allow them to avoid child support. The trial court vacated that portion of the judgment and then ruled that it was in the children’s best interests for Mom to have primary residential responsibility and for Dad to pay child support.

One of Dad’s arguments on appeal was that the trial court erred in concluding that the equal custody language in the divorce decree was contrary to public policy.

Citing statute (N.D.C.C. § 14-09-09.32) and lots of earlier case law, the Supreme Court said that they take a dim view of agreements allowing parties to avoid or limit their child support obligations. However, the Supreme Court did not decide the case based on Dad’s public policy rationale. Instead, the Supreme Court held that because the parties had both motioned to amend the judgment, the trial court was authorized to fully resolve primary residential responsibility.

Hammeren v. Hammeren, 2012 ND 225

Issue: Award of prior period support.

Dad filed for divorce in September 2010. Custody of the child was contested (Dad argued for a shared parenting plan and Mom argued that she should be awarded primary residential responsibility.) Eventually, a trial was held in May 2011; the trial court awarded primary residential responsibility to Mom and ordered Dad to pay child support of \$1,014 per month beginning October 1, 2010. In a post-judgment motion, Dad requested that his support obligation commence in June 2011 and that he be given credit for previous support payments. The trial court allowed Dad a credit of \$4,728

toward the support obligation but reaffirmed October 1, 2010, as the commencement date.

On appeal, the Supreme Court cited prior case law holding that a trial court's decision to award prior period support is discretionary and will not be overturned on appeal absent an abuse of discretion. The Supreme Court went on to say it has held a failure to award interim support may constitute an error as a matter of law under some circumstances. Based on the facts that had been presented for the trial court's consideration (for example, that Mom had custody of the child while the divorce was pending, that Dad had provided receipts showing he had paid some support during that time, and that Mom had acknowledged receipt of the payments), the Supreme Court ruled that the trial court did not abuse its discretion by giving Dad credit for the amounts previously paid but otherwise denying his motion.

Deyle v. Deyle, 2012 ND 248

Issue: Prior period support.

Mom and Dad separated in June 2010. The parties' two children remained with Mom. When the parties' divorce action went to trial, the trial court awarded primary residential responsibility to Dad. There was no award of interim support to Mom despite the fact that she was the primary caretaker for the children throughout the parties' separation.

On appeal, Mom challenged the trial court's failure to award her interim support by claiming it was an abuse of discretion.

On this issue, the Supreme Court agreed with Mom and remanded the issue back to the trial court. Despite making findings that Dad did not pay any child support during the period of separation and that he had a duty to support the children, the trial court had failed to award interim support to Mom and did not explain its denial. The Supreme Court said it could not perform its appellate function because it could only speculate whether factors were properly considered and the law was properly applied.

Fonder v. Fonder, 2012 ND 228

Issue: "Correct" use of Rule 59(j) motion.

Mom and Dad separated in May 2008 and agreed to share residential responsibility of their children. A few months later, Dad filed for divorce and sought primary residential responsibility. By interim order, the shared residential responsibility arrangement was continued and a trial was held in January 2010. In August 2011, the trial court finally issued its findings and order, which included awarding the parties equal residential responsibility.

Dad motioned to amend the judgment under N.D.R.Civ.P 59(j), arguing that the trial court used the wrong version of N.D.C.C. § 14-09-06.2. (This statute was amended effective August 1, 2009, which was after Dad filed for divorce.) The trial court denied Dad's motion for the reason that its findings of fact and conclusions of law didn't change once the correct version of the statute was applied.

On appeal, the Supreme Court said that a Rule 59(j) motion, which allows a party to move to alter or amend a judgment, "should not be used as a means for the trial court to reconsider evidence already presented, but rather as a means to correct errors of law." Furthermore, a trial court's decision on a Rule 59(j) motion is subject to the "abuse of discretion" standard of review on appeal. (Under the facts in this case, the Supreme Court held that the trial court's error in applying the wrong version of N.D.C.C. § 14-09-06.2 was cured when it reconsidered its findings using the appropriate version. Thus, no abuse of discretion.)

Jordet v. Jordet, 2012 ND 231

Issue: Offset of spousal support and child support arrears.

Mom owed child support arrears to Dad and Dad owed spousal support arrears to Mom. The parties got mutual judgments against each other. Dad moved for a setoff of his debt against Mom's debt, an action that Mom opposed. The trial court denied Dad's setoff request, holding in part that the setoff would violate N.D.C.C. § 14-09-09.33. Dad then wrote out a check to Mom for the spousal support arrears and delivered it to the office of Mom's attorney. Dad was accompanied on this visit by his attorney and a deputy sheriff who then levied on the check pursuant to a writ of execution. (Dad also levied on two of Mom's bank accounts.)

Mom filed an objection to the levies and sought an emergency hearing. She asked that Dad's attorney be held in contempt for trying to circumvent the trial court's earlier ruling denying the setoff request. The trial court did hold Dad's attorney in contempt and fined him \$1,000.

On appeal, Dad argued that the trial court erred in denying his setoff request and Dad's attorney asserted that the trial court erred in holding him in contempt and assessing a fine.

On the setoff issue, the Supreme Court determined that N.D.C.C. § 14-09-09.33 does not apply because, by its very terms, it applies when setting child support arrears against child support arrears. That did not end the inquiry for the Supreme Court, which went on to note that the trial court's denial of the offset request was subject to the "abuse of discretion" standard of review. Since the Supreme Court could not find a case that was "on all fours" and since courts in other states had reached different conclusions (i.e., there was a lack of clear precedent on the issue), a majority of the justices concluded that the trial court did not abuse its discretion.

The contempt finding against Dad's attorney was also subject to the "abuse of discretion" standard of review. On this issue, the majority noted that a child support obligee has several nonexclusive remedies available to enforce a child support order. In this case, the trial court had denied Dad's request for setoff but had not prohibited him from using other available enforcement remedies. While describing the actions surrounding the levy as "somewhat theatrical," the majority concluded that the levy amounted to an "alternate available remedy" and simply did not rise to the level of intentional disobedience of a court order. Thus, on this issue, the trial court was determined to have abused its discretion.

D.E. v. K.F. and M.F., 2012 ND 253

Issue: Effect of presumption of paternity when presumed father is deceased.

Child's mother and legally presumed father are deceased. Child is living with Caretakers. Alleged Father sued to establish his paternity of Child and he named Caretakers as defendants. He wanted genetic testing and, if the test results indicated that he was the biological father, he wanted physical and legal custody of Child. Caretakers objected to the action, claiming that they were Child's "private foster parents" and were "in the process" of seeking legal guardianship. Trial court dismissed Alleged Father's action for the reason that state law (N.D.C.C. § 14-20-42) barred paternity actions commenced more than two years after the child's birth when there is a presumed father.

On appeal, Alleged Father argued that the statute didn't apply to the unusual facts of the case. The Supreme Court saw it differently. According to the justices, the real issue was whether Caretakers could raise the statute of limitations in N.D.C.C. § 14-20-42 as a defense. The Supreme Court cited the "general view" that only a person for whose benefit the statute is intended or someone standing in that person's place can take advantage of it. The record reflected that Caretakers had no legal right to make decisions for Child or to represent her interests in the action, nor were they legally recognized as her foster parents. Under the circumstances, the Supreme Court held that Caretakers were not among the intended beneficiaries of the statute of limitations and were not proper parties to raise it as a defense. The Supreme Court reversed the trial court's dismissal and remanded for additional proceedings to protect Child's interests. (The Supreme Court also concluded that Child's interests had not been adequately represented in the trial court so the remand also included a directive to appoint a guardian ad litem for Child.)