

State of Minnesota
In Supreme Court

DARLENE GERBER, n/k/a DARLENE NELSON,

Respondent,

and

JOHN TRUMAN GERBER,

Respondent,

and

COUNTY OF ANOKA,

Appellant.

RESPONDENT JOHN TRUMAN GERBER'S BRIEF

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TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	ii
LEGAL ISSUE	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	3
ARGUMENT	5
STANDARD OF REVIEW	5
I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT INCOME WITHHOLDING IS A JUDICIAL, NOT AN ADMINISTRATIVE REMEDY	5
II. MINN. STAT. § 518.5513 CANNOT BE APPLIED RETROACTIVELY TO THE TIME OF THE JUDGMENT PLACED AGAINST JOHN GERBER	8
A. There is no indication of a legislative intent for § 518.5513 to apply retroactively	8
B. The legislature intended for judgments to be renewed	10
III. THE 10 YEAR STATUTE OF LIMITATIONS APPLIES TO A JUDICIAL ORDER REGARDING INCOME WITHHOLDING	11
CONCLUSION	12

TABLE OF AUTHORITIES

Pages

CASES:

<i>Bednarek v. Bednarek</i> , 430 N.W.2d 9 (Minn. Ct. App. 1988)	1, 6, 7
<i>Benigni v. County of St. Louis</i> , 585 N.W.2d 51, 54 (Minn. 1998).....	5
<i>Dent v. Casaga</i> 208 N.W.2d 734 (Minn. 1973)	11
<i>Dolly v. Nichols</i> , 386 N.W.2d 261, 263 (Minn. Ct. App. 1986)	11
<i>Gerber v. Gerber</i> , 694 N.W.2d 573 (Minn. Ct. App. 2005).....	6
<i>Goplen v. Olmstead County Support & Recovery Unite</i> , 610 N.W.2d 686, 689 (Minn. Ct. App. 2000)	9
<i>Har-Mar, Inc. v. Thorsen & Thorsen, Inc.</i> 218 N.W.2d 751 (Minn. 1974).....	1, 7
<i>Ludwigson v. Ludwigson</i> , 642 N.W.2d 441, 445-46 (Minn. Ct. App. 2002)	5

MINNESOTA LAWS:

1981 Minn. Laws, Ch. 360, art. 2, § 47, subd. 3	9
1987 Minn. Laws, Ch. 403, art. 3, § 83, subd. 2(4)	9
1987 Minn. Laws, Ch. 403, art. 3, § 89	9

MINNESOTA STATUTES:

Minn. Stat. § 270A.01-.12.....	7
Minn. Stat. § 518.5513 (2004).....	1
Minn. Stat. § 518.5513 subd. 5(a).....	8
Minn. Stat. § 518.5513	8, 9, 10, 12
Minn. Stat. § 518.611, subd. 1 (1981).....	5-6
Minn. Stat. § 518.611, subd. 2 (1981).....	9
Minn. Stat. § 518.6111 (2004).....	1
Minn. Stat. § 518.6195	6, 7, 12
Minn. Stat. § 518.6195(a) (2004)	6
Minn. Stat. § 541.01 (2004).....	11
Minn. Stat. § 541.01	12
Minn. Stat. § 541.04	2, 12
Minn. Stat. § 541.09	10
Minn. Stat. § 541.091 subd. 3b (2004).....	10
Minn. Stat. § 541.091	10
Minn. Stat. § 548.09, subd. 1 (2004).....	10
Minn. Stat. § 645.21	8

FEDERAL RULES AND CODES:

42 U.S.C. § 666 (2005)	1
45 C.F.R. §303.100 (2005).....	1

LEGAL ISSUE

Can the County of Anoka collect child support payments on an expired judgment through an administrative process that is not subject to the statute of limitations? The child support magistrate ruled in the affirmative. The Court of Appeals ruled in the negative.

Minn. Stat. § 518.6111 (2004).

Minn. Stat. § 518.5513 (2004).

42 U.S.C. § 666 (2005).

45 C.F.R. § 303.100 (2005).

Bednarek v. Bednarek, 430 N.W.2d 9 (Minn. Ct. App. 1988).

Har-Mar, Inc. v. Thorsen & Thorsen, Inc. 218 N.W.2d 751 (Minn. 1974).

STATEMENT OF THE CASE

The marriage of the parties was dissolved by an Anoka County Judgment dated February 12, 1982. Pursuant to paragraph 3 of that Judgment, John Gerber was ordered to pay child support in the amount of \$900 or 45 percent of his net income, whichever is greater. Paragraph 3 of the judgment also ordered that John Gerber's employer withhold said child support from his income and that said withholding be forwarded directly to Anoka County Social Services which then shall forward the payments to Darlene Gerber.

On September 13, 1993, Darlene Gerber was awarded a judgment in the amount of \$94,850 for unpaid child support.

No action was taken by Darlene Gerber or the State of Minnesota or Anoka County to renew the judgment or to have it re-docketed. Therefore, the statute of limitations ran out and the judgment expired on September 13, 2003.

Even after the expiration of the judgment, the State of Minnesota has continued to collect the judgment through automatic withholding. On May 4, 2004, John Gerber file a Notice of Motion and Motion asking that the trial court determine the \$94,850 judgment had expired, had not been renewed, and therefore was barred from collection by the statute of limitations, Minn. Stat. § 541.04. Mr. Gerber further requested that the court determine the judgment is uncollectible through automatic income withholding. The County of Anoka, on behalf of the public authority, filed a Notice of Motion and Responsive Motion asking that John Gerber's motion be dismissed.

John Gerber was not present, but was represented by his attorney, Robert A. Howard, who appeared at the trial court on May 27, 2004, in front of Child Support Magistrate Jeffrey D. Bangma. Darlene Gerber did not appear and was not represented by counsel. Kay Gavinski, Assistant Anoka County Attorney appeared on behalf of Anoka County.

On June 10, 2004, the trial court issued its Findings of Facts, Conclusions of Law, and Order. The trial court determined that automatic wage withholding is an administrative remedy, not a judicial remedy that remains in place regardless

of the date of entry of the judgment and decree and therefore denied John Gerber's request to stop the automatic wage withholding.

John Gerber filed a Notice of Appeal on August 13, 2004. The Court of Appeals reversed the trial court's determination and held that automatic wage withholding was a judicial remedy and thus, subject to the statute of limitations. Hence, the County of Anoka was barred from automatic wage withholding.

STATEMENT OF FACTS

The parties' marriage dissolution was finalized by Judgment entered on February 12, 1982. (Appellant's Appendix A-22.) John Gerber was ordered to pay \$900 per month in child support or 45 percent of his net monthly income, whichever is greater. (Appellant's Appendix A-23.) The trial court ordered in pertinent part:

That Respondent's [Appellant's] employer shall withhold said child support from Respondent's [Appellant's] net income and direct that said withholding shall be forwarded directly to Anoka County Social Services which agency shall then forward said support sums to Petitioner [Respondent].

A judgment for the unpaid child support was entered in favor of Darlene Gerber and against John Gerber in the amount of \$94,850 on September 13, 1993. (Appellant's Appendix A-56.)

John Gerber's last minor child emancipated on June 20, 1993, and his ongoing child support obligation was terminated effective July 1, 1993. (See

paragraph 1 of the Findings of Fact, Conclusions of Law, and Order dated June 10, 2004.) (Appellant's Appendix A-5.)

The child support judgment represented arrearages of \$94,850 accumulated between April 19, 1984 to May 31, 1993. (See Finding of Fact #2.) (Appellant's Appendix A-6.)

The trial court found that judgment expired on September 15, 2003. (See Finding of Fact #3.) (Appellant's Appendix A-6.) The trial court found that despite the expiration, automatic wage withholding is still available as a remedy for the collection of the child support judgment. (See Finding of Fact #11.) (Appellant's Appendix A-7.) Therefore, the trial court denied the Appellant's request to stop the automatic wage withholding from his income. (See Order #1.) (Appellant's Appendix A-7.)

John Gerber filed a Notice of Appeal on August 13, 2004. The Court of Appeals reversed the trial court's determination and held that automatic wage withholding was a judicial remedy and thus, subject to the statute of limitations. Hence, the County of Anoka was barred from automatic wage withholding. (Appellant's Appendix A-20.)

ARGUMENT

STANDARD OF REVIEW

On appeal from a child support magistrate's ruling, the standard of review is the same as it would be if the decision had been made by a district court. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. Ct. App. 2002). The construction and applicability of a statute of limitation is a question of law, which this Court reviews *de novo*. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT INCOME WITHHOLDING IS A JUDICIAL, NOT AN ADMINISTRATIVE REMEDY

Determining whether or not income withholding is a judicial and not an administrative remedy is a case of first impression in Minnesota. Minnesota cases have addressed other child support remedies and held those to be administrative remedies. However, the cases addressed have been distinctly different from that of income withholding. The Court of Appeals agreed and determined that income withholding was in fact a judicial, and not an administrative remedy.

At the time the judgment in this case was entered, income withholding was available only upon request and was not mandatory. Minn. Stat. § 518.611,

subd. 1 (1981). Minn. Stat. § 518.6195(a) (2004) states that remedies available for collection of child support also apply to cases in which the child is emancipated and the obligor has an arrearage at the date of the emancipation. However, the Court of Appeals held that without language authorizing collection on an expired judgment, Minn. Stat. § 518.6195 does not authorize application of remedies for child support collection to an expired judgment for child support arrearages. *Gerber v. Gerber*, 694 N.W.2d 573 (Minn. Ct. App. 2005).

Therefore, under Minn. Stat. § 518.6195, the County of Anoka was not authorized to automatically withhold income from John Gerber for the \$94,850 expired judgment against him.

In addition to Minn. Stat. § 518.6195, Appellant also argues that Minnesota case law supports the conclusion that income withholding is an administrative remedy. However, once again, the Court of Appeals disagreed.

First, Appellant argues, and the CSM agreed, that the outcome in *Bednarek v. Bednarek*, 430 N.W.2d 9 (Minn. Ct. App. 1988) should apply to the present case. However, the Court of Appeals disagreed. The court concluded that *Bednarek* involved the interception of an obligor's tax refund under the revenue recapture act and thus, did not bar the administrative remedy of intercepting the refund to satisfy child support arrearages. *Id.* at 12. The court found that the statute of limitations applies only to "actions." An "action" is any

proceeding in any court of this state. Nonjudicial relief was not necessarily barred by operation of the statute of limitations. *Id.* at 12.

The Court concluded that because *Bednarek* involved revenue recapture, it was not controlling. Specifically, since the necessity of a court order to authorize wage withholding to collect child support and child support arrearages distinguishes wage withholding from revenue recapture permitted under Minn. Stat. § 270A.01-.12. *Id.* at 12.

Another Minnesota case Appellant argues to be on point is *Har-Mar, Inc. v. Thorsen & Thorsen, Inc.* 218 N.W.2d 751 (Minn. 1974). In *Har-Mar*, the court held that arbitration was not an "action" and thus, a nonjudicial remedy that is not barred by the statute of limitations. *Id.* at 755. Once again, the present case can be differentiated from *Har-Mar* since at the time of the judgment, the only way to collect wage withholding was by judicial order. As defined by the statute, an "action" is confined to a judicial proceeding. *Id.* at 754. Therefore, under the *Har-Mar* case, the judgment against John Gerber would be within the statute of limitations, and have expired.

Clearly, both arguments made by Appellant are not convincing that income withholding is an administrative remedy. First, Minn. Stat. § 518.6195 makes no indication that income withholding must and does apply to expired child support judgments. In addition, the Minnesota case law relied upon can easily be

differentiated from the present case and is, in effect, further evidence that income withholding is a judicial remedy. Therefore, the Court of Appeals was correct in its ruling that income withholding is a judicial remedy.

II.

MINN. STAT. § 518.5513 CANNOT BE APPLIED RETROACTIVELY TO THE TIME OF THE JUDGMENT PLACED AGAINST JOHN GERBER

Minn. Stat. § 645.21 states "no law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." If on the face of the statute, there is no indication of retroactivity, then the court must look to the legislative intent. In 1983, when the income withholding judgment was issued against John Gerber, § 518.5513 was not in existence. The only way for income withholding to exist, was by court order. Here, there is no indication the legislature wanted a retroactive effect. Therefore, § 518.5513 cannot apply in this instance.

A. There is no indication of a legislative intent for § 518.5513 to apply retroactively.

Under Minn. Stat. § 518.5513 subd. 5(a):

"The public authority may take the following actions relating to...enforcement of support orders, without the necessity of obtaining an order from any judicial or administrative tribunal: subd. 5—order income withholding of child support under section 518.6111."

Nothing in § 518.5513 states any indication of a legislative intent of retroactivity, therefore; the court must look to the legislative history.

Appellant argues that the legislative history evidences a clear intent to move from viewing income withholding as strictly a judicial determination, to viewing it as an administrative one as well. In the 1987 session laws, the legislature brought additional revisions and amendments to the withholding statute now allowing withholding to occur without a court order in certain situations. 1987 Minn. Laws, Ch. 403, art. 3, § 89. In addition, it revised the language of Minn. Stat. § 518.611, subd. 2 from its 1981 version which stated, "[T]he obligee shall also serve ... a copy of the court's withholding order..." to read as follows: "[T]he obligee serves a copy of the notice of income withholding, a copy of the court's order..." 1981 Minn. Laws, Ch. 360, art. 2, § 47, subd. 3 and 1987 Minn. Laws, Ch. 403, art. 3, § 83, subd. 2(4). However, nothing in the legislative history indicates any intent by the legislature to apply such a shift in the laws retroactively. The court cannot supply that which the legislature purposely omits or inadvertently overlooks. *Goplen v. Olmstead County Support & Recovery Unite*, 610 N.W.2d 686, 689 (Minn. Ct. App. 2000). Therefore, the legislative history does not evidence any intent for Minn. Stat. § 518.5513 to be applied retroactively.

B. The legislature intended for judgments to be renewed.

Minn. Stat. § 548.09, subd. 1 (2004), requires entry of every judgment compelling the payment of money, specifically provides that a judgment survives for ten years after its entry and makes clear that child support judgments may be renewed under Minn. Stat. § 541.091 subd. 3b (2004).

The legislature's clear intent on having judgments for child support to be renewed and the simple procedures available to do so is further evidence that neither of the statutes were meant to be applied retroactively. In addition, the simple measures one must take in order to renew a judgment for child support is further evidence of the legislature's intent.

Clearly, the legislature did not intend for Minn. Stat. § 518.5513 to apply retroactively. There is no evidence on the face of the statute or in the history of the legislature of a desire to do so. In addition, Minn. Stat. §§ 541.09 and 541.091 clearly indicate the legislature's intent for child support judgments to be renewed. Therefore, the evidence indicates that § 518.5513 was not intended to be applied retroactively, and does not apply to John Gerber's judgment.

III.

THE 10 YEAR STATUTE OF LIMITATIONS APPLIES TO A JUDICIAL ORDER REGARDING INCOME WITHHOLDING

Minn. Stat. § 541.01 (2004), provides that "[n]o action shall be maintained upon a judgment or decree of a court of the United States, or of any state or territory thereof, unless begun within ten years after the entry of such judgment."

A court order to withhold income is clearly a judicial remedy subject to the Ten year statute of limitations. Two Minnesota cases have recognized that the statute of limitations apply to child support cases. Therefore, the judgment of \$94,850 against John Gerber has expired.

Appellant argues that to hold the statute of limitations applies in child support cases would be against public policy. However, two Minnesota cases disagree with such an argument. In *Dent v. Casaga* 208 N.W.2d 734 (Minn. 1973), the court held that the statute of limitations bars any recovery after 10 years have past. The case dealt with support payments in the original divorce decree. The court held that the party who received such awards could not recover judgment for those amounts after 10 years from the date of the decree. *Id.* at 734, 737. Similarly, in *Dolly v. Nichols*, 386 N.W.2d 261, 263 (Minn. Ct. App. 1986), the court held divorce judgments were governed by the statute of limitations. Clearly, Minnesota law has indicated that child support and divorce

judgments are governed by § 541.04. Therefore, the judgment against John Gerber for child support arrears has expired.

CONCLUSION

The Court of Appeals was correct in holding that income withholding is a judicial and not an administrative remedy. First, absent language authorizing income withholding on an expired judgment, Minn. Stat. § 518.6195 does not authorize application of remedies for child support collection on an expired judgment for child support arrears. Second, no Minnesota case has held that income withholding is an administrative remedy. In addition, at the time of the judgment against John Gerber, Minn. Stat. § 518.5513 was not in effect. As previously stated, nothing in the language of the statute or in the legislative history evidences an intention by the legislature to apply this statute retroactively. Therefore, Minn. Stat. § 541.01 applies to the judgment against John Gerber and

since ten years have passed without Darlene Gerber re-filing the judgment, the judgment has expired and no further action against John Gerber is warranted.

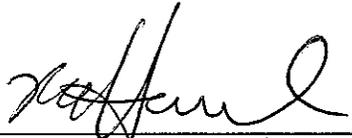
Respectfully submitted,

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Dated: _____

10/27/05

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