

NO. A08-794

State of Minnesota

In Court of Appeals

Todd Michael Bauerly

Appellant,

vs.

Suzanne Mary Bauerly,

Respondent.

Appellant's Brief

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Statement of Case

The Appellant served a Petition for Dissolution on the Respondent in the Fall of 2004. The matter was set for trial and heard on July 25 and July 26, 2005. The matter was heard by the Honorable Kim R. Johnson, Judge of District Court. On August 31, 2005, the Judge signed the Judgment and Decree.

The Appellant appealed the Court's ruling on the calculation of his net income (A06-557).

The Court of Appeals reversed and remanded the case for the recalculation of Appellant's net income and the recalculation of child support and stated as follows:

“We therefore reverse the finding of husband's net monthly income and child support obligation and remand for recalculation based on the most current income evidence presented at trial, or an explanation of why the use of that evidence would not be appropriate.”

At a subsequent hearing in January 2008, the Appellant requested that the Court redetermine his net income and recalculate his child support obligation pursuant to the directions Court of Appeals Order and to make the new child support amount effective as of September 1, 2005.

The Court issued amended findings and conclusions resulting in a lower child support obligation. However, the Court refused to give him credit for the overpaid support despite the fact that Appellant had been paying an amount he should not have had to pay. Appellant averred that he should receive a credit for overpaid child support. This request was based upon the undisputed fact that Appellant has paid all of the child support he was ordered to pay and had paid it at the rate mistakenly ordered by Judge Johnson. Judge Johnson declined the request.

Standard Of Review

a. Child Support

The trial court has board discretion in making support awards. Rutten v. Rutten, 347 N.W.2d 47 (Minn. 1984); Maylan vs. Maylan, 384 N.W.2d 859 (Minn. 1986). An appellate court will not reverse a determination of net income for calculating child support if it has a reasonable basis in fact. Strauch v. Strauch, 401 N.W.2d 444, 448 (Minn. Ct. App. 1987).

On appeal from a district court's support order, the reviewing court will recognize that the district court has broad discretion regarding support and its decisions will not be altered on appeal absent an abuse of discretion.

A district court abuses its discretion if it resolves the matter in a manner that is against logic and facts on the record. Putz v. Putz, 645 N.W.2d 343, 347 (Minn. 2002).

Statement of Facts

The Appellant and the Respondent were married on October 29, 1995. They have two children in common, ages 10 and 11.

In Judge Johnson's Findings and Conclusions of Law on the dissolution issues, the Court found Appellant's income to be \$5,015.00 per month and his child support to be \$1,505.00 per month. This resulted from the Court not exercising an independent evaluation of the testimony and adopting, almost verbatim, the Respondent's calculation of Appellant's income¹.

On April 10, 2007, this Court issued an opinion that directed Judge Johnson to redo the calculation of Appellant's net income because the Court used paystubs that were six months old at the time of the trial. The Court of Appeals remanded the case directing the Court to recalculate his income based upon the most current income evidence at trial.

Appellant filed a motion on December 21, 2007 praying that his child support be recalculated pursuant to the direction of the Court of Appeals. The Appellant, recognizing that his child support was overinflated by the erroneous calculations of the Court, asked that he be given credit for the overpaid support.

The Appellant did not ask for a retroactive modification of child support. The Appellant asked the Court to recalculate his net income, recognize that his support was overinflated by the Court and to give him credit for the overpaid support since it was the Court's error that led to the overpaid amount.

¹ In the first Appeal, Appellant raised the issue that the Court did not exercise an independent evaluation of the testimony and evidence. The Court's adoption of the Respondent's findings caused the Court to incorrectly use the wrong paystubs in calculating Appellant's net income. The Appellant filed a motion for modified findings before the first appeal to correct, in part, other mistakes of law resulting from the verbatim adoption of Respondent's findings.

It is undisputed that August 1, 2005 to January 2, 2008, Appellant paid the Court Ordered amount of both child support and spousal maintenance.

In its latest Findings and Conclusions dated March 19, 2007, the Court recalculated Appellant's income, based on the most recent paystubs submitted at trial dated July 15, 2005, to be \$1,923.15 biweekly. He found his income to be \$4,173.34 for the month and concluded that his child support obligation should be \$1,252.01 as of the date of trial. This resulted in the Court ordering Appellant to pay child support in the amount of \$1,252.01 per month which was \$252.99 less than what he had been paying over the last 26 months. The Court did what it should have done at the time of trial.

At the time of the latest hearing, Appellant asked the Court to recognize this error and to recognize that the error went back to August 30, 2005. The Court declined to recognize its error and called the Appellant's request "... a retroactive child support modification". (Order of Judge Johnson dated March 18, 2008, para. 7 of Findings.) The Court concluded that Appellant was not "**ENTITLED**" (emphasis added) to a retroactive modification or to any reimbursement.

The Respondent argued that Appellant should not get credit for the overpaid amount. The Respondent did not dispute any of the facts surrounding the request; she merely averred that any further reduction in child support would leave her in dire financial circumstances and that any credit would be a retroactive modification.

I. THE COURT ERRED IN NOT GIVING APPELLANT CREDIT FOR THE OVERPAID CHILD SUPPORT.

As part of the relief requested by the Appellant, the Appellant asked the court to acknowledge or give him credit for the amount of child support he paid in excess of the amount that he should have been ordered to pay in August 2005.

Minn. Stat. §518A.52 directs the court on how to handle the issue of the overpayment of child support. Clearly, there is statutory authority for what the Appellant asked the court to do in this matter.

Minnesota Statute 518A.52 (2006) regulates the overpayment of child support. Any overpayment is first applied to any arrears. If overpayment exists after the reduction of arrears or debt, it reduces the obligor's future child support payment. §518A.52(2).

Here, the District Court essentially found that Appellant had overpaid child support.

In Finding number six, the court found that Appellant had a net biweekly income, as of July 15, 2005, of \$1,923.15. The Court found that his child support, as of July 15, 2005, should be \$1,252.01.

Illogically, the Court then stated, as a finding, that “the Petitioner is not entitled to a retroactive child support modification or reimbursement of previously paid child support.”² The Court made absolutely no findings as to why he has not “entitled to reimbursement of previously paid child support.” Inexplicitly, the Court did not address the tax refund which Respondent kept when both the Respondent³ and her attorney⁴ acknowledged that she kept the money that belong to Appellant. Respondent’s attorney did not deny that Appellant was entitled to at least a \$1,058.00 credit⁵.

The Court should have reached the same conclusion as in Carroll v. Boehl, 2008 WL 170554 (Minn Ct App 2000), (attached per Minn. Stat. §480A.08(3)). In that case, Appellant had been ordered to pay support as a result of a change in custody. Apparently, she paid support and then the custody arrangement was reversed or she simply overpaid the amount she should have paid. There, the Court followed §518A.23(2006) and acknowledged that child support was overpaid. The statute was followed and it was ordered that the ongoing child support obligation was to be reduced until the overpayment had been fully credited.

The Court, in Lohse v. Lohse, 2005 WL 2886721 (Minn Ct App 2005) did the same thing in giving a reduction based upon the overpayment of child support.

In both Lohse and Carroll, the overpayment resulted from payment of child support based on custody determinations. In neither case did the Judge make an error in the calculation of child support. In this case, the Judge’s error caused the overpayment and now the same Judge refuses, against logic and without findings, to give Appellant an offset against the current amount of child support.

² This is more of a conclusion of law than a finding.

³ See Respondent’s Affidavit, page 3, paragraph 6

⁴ Transcript pg 20-21, lines 1-9.

⁵ Transcript Id.

II. EQUITY SHOULD COMPEL THIS COURT TO GIVE APPELLANT CREDIT FOR THE OVERPAYMENT OF CHILD SUPPORT.

In Karypis v. Karypis, 458 N.W.2d 129 (Minn.1990) this Court indicated that lower courts have within their discretion to do what is equitable. As stated, a trial court does not lose authority to do equity in family law unless there is a pure question of law. A trial court has equitable jurisdiction in dissolution actions and relief may be awarded as the facts in each particular case and the ends of justice may require. Johnston v. Johnston, 158 N.W.2d 249, 254 (1968). In this case, the equitable action is to give Appellant credit for the overpayment of support.

Since the beginning of this case, this Appellant has done everything he has been ordered to do and then some. Prior to the temporary order, he paid over \$5,000.00 to the Respondent for rent, food and daycare and then he had actual child support and maintenance withheld from his paycheck and ultimately paid twice for the same period, once in kind and once directly. He was denied a credit even though he paid twice.⁶

At the time of trial, Appellant established a non-marital claim in a 401K in the amount of \$29,927.00. The Court invaded the non-marital portion of the 401K and awarded Respondent almost half of the total value of the 401K. To make matters worse, the Court issued a QDRO Order effectively disbursing the funds to the Respondent before the issue could be heard on appeal⁷.

In addition to the above, the Appellant has paid Respondent's student loans and the parties 2005 IRS liabilities while the Respondent kept the state refund. Illogically, the Court

⁶ This issue was raised in the first appeal.

⁷ See footnote 1 of this Court's decision in the first appeal.

would not even give him the credit for this even though the Respondent and her attorney admitted that he was entitled to it.⁸

Appellant does not mean to be disrespectful to Judge Johnson, but the simple fact is that he made an error; an error that was caused by his near verbatim adoption of Respondent's findings of fact. Given the calculations of the Court, that error lead to Appellant paying \$7,589.70 in child support that, by law, he should not have had to pay.

\$1,505.00	Amount of original child support order
<u>1,252.01</u>	Amount of child support ordered in March of 2008
\$ 252.99	
<u>30 months</u>	(Sept. 05 to March 08)
\$7,589.70	

Equity and fairness dictate that Appellant get credit for this and that it be offset against his current amount pursuant to Minn. Stat. §518A.52.

III. APPELLANT IS NOT SEEKING A RETROACTIVE MODIFICATION OF SUPPORT NOR CAN WHAT THE APPELLANT ASKED THE COURT TO DO BE CONSIDERED A RETROACTIVE MODIFICATION OF SUPPORT.⁹

At the hearing, Respondent averred that the request of the Appellant should be denied because it constituted a retroactive modification of child support. (Transcript pg 13, lines 13-25). The Court found that Appellant was not entitled to a retroactive modification or to reimbursement. Given the facts of this case, there should be no doubt that Appellant was not seeking a retroactive modification of support, but merely reimbursement for the overpaid support resulting from the use of the old paystubs and the Court's verbatim adoption of Respondent's findings.

⁸ See footnotes 3 and 4.

⁹ In his motion, Appellant probably made the relief requested sound like a request for retroactive modification. Obviously, what Appellant wanted the Court to do is make the new child support calculation effective September 1, 2005 not January 1, 2008.

Simply stated, this Court remanded the calculation of Appellant's net income directing the Court to use the most current paystubs. The Court had previously calculated his child support obligation to be \$1,505.00 per month. The new calculation resulted in an obligation of \$1,252.01. Put differently, had the Court followed the law, Appellant would not have paid \$7,600.00 he did pay. There is no other area of law where an obvious overpayment of monies and a resulting credit would be considered a retroactive modification.

This is not a case postured as a motion by Appellant seeking a modification of support under §518A.52 (2006) or for a reduction in arrears. The case was remanded back to the Court for recalculation of net income and the resulting child support obligation. Frankly, when the case was remanded, it was implicitly known that the new child support order would be lower than what Appellant had been paying for the previous months. Equity and fairness should compel this Court to give him credit for the amount he should not have had to pay.

The prohibition against retroactive modification is typically and normally used as a hurdle against the forgiveness of child support arrears. Tinsley v. Tinsley, 427 N.W.2d 739, 741 (Minn Ct App 1988). However, this prohibition is not violated by a finding that an obligor has satisfied an obligation imposed by the original order. Trainolti v. Trainolti, 261 Cal. Rptr. 36, 38, 212 Cal. App.3d (1072). This case was followed by the Court in Karypis, supra.

The case at hand involves no child support arrears. Obviously, the Appellant has paid and satisfied his obligation imposed by the original order. By giving him credit for the overpayment of support, this Court would not be retroactively modifying support; it would be acknowledging that Appellant had, in addition to satisfying his obligation had actually paid more than he should have had to pay.

Conclusion

Since the beginning of this litigation, Appellant had paid more than what he should have had to pay. Before the temporary hearing, he supported his children financially with payments for rent, food, etc. Then, as a result of the temporary order, he ended up having to pay child support and maintenance for the same period of time.

Appellant had documented a non-marital claim in his 401K for an amount in excess of \$29,000.00. Of that amount, the Court allowed him to keep \$9,000.00. Ultimately, the parties should have been dividing up \$60,000 not \$89,000.

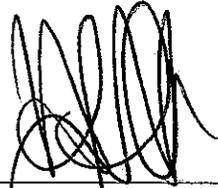
The Appellant has paid Respondent's student loans and illogically cannot get credit for having paid the parties 2005 tax liabilities even though it was acknowledged by the Respondent.

From Appellant's perspective, the source of the error in question is very obvious; the Court's adoption of Respondent's findings. Respondent attempted to inflate Appellant's net income and consequently, his child support obligation. The Court had the most current income information in front of it and completely ignored it, instead choosing an almost verbatim adoption of the Respondent's proposed findings.

The result of this is that Appellant has paid \$7,600.00 in child support he should not have had to pay and he should be given credit for the \$1,058.00 tax refund that Respondent spent. It was suppose to be used to pay the parties state tax liability. Respondent has admitted it and yet, illogically, the lower court refused to even give him credit for that.

Equity and fairness dictate that the Appellant be given credit for the overpaid child support and for having paid the parties state tax liability.

Respectfully submitted,



Dated: _____

8/9/08

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