

NO. A08-0794

State of Minnesota
In Court of Appeals

Todd Michael Bauerly, petitioner,

Appellant,

vs.

Suzanne Mary Bauerly,

Respondent.

RESPONDENT'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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RESPONDENT'S STATEMENT OF LEGAL ISSUES.

- I. Is the District Court's decision to order the new child support amount to be prospective only and not retroactive consistent with this Court's first opinion filed April 10, 2007?
- II. Did the lower court abuse its discretion in denying Appellant's request for a credit for child support over-payments?
- III. Should this Court grant Respondent's motion to order Appellant to pay Respondent's attorney's fees incurred in responding to this appeal?
- IV. Should this Court remand to the lower court to correct a typographical error regarding the reduction in child support upon emancipation of the oldest child?

RESPONDENT'S STATEMENT OF THE CASE

The parties' marriage was dissolved by Judgment and Decree of the Wright County District Court, the Honorable Kim R. Johnson presiding, filed August 31, 2005, following a two-day trial. The decree ordered Appellant to pay child support of \$1,505 per month plus \$800 per month in temporary spousal maintenance for a period of 13 months which terminated in September 2006.

Appellant appealed this initial judgment and decree to the Minnesota Court of Appeals. The issues raised in Appellant's brief were that the trial court abused its discretion in awarding to Respondent 13 months of maintenance, granting to Respondent sole physical custody of the parties' two young daughters, making a hardship invasion of Respondent's nonmarital interest in his modest 401(k) plan due to inadequacy of marital assets, failing to give Appellant credit for over-payments of temporary child support during the pendency of the proceeding and by erring in the calculation of his net income for the purpose of determining his child support obligation.

In its opinion filed April 10, 2007, this Court affirmed the district court decision in all respects except with regard to the issue of determining Appellant's net income for the purpose of calculating his child support obligation. This issue was remanded to the district court with instructions.

Following remand to the district court, Appellant never scheduled a remand hearing. Finally, on December 18, 2007, the lower court, *sua sponte* scheduled a remand hearing for January 8, 2008 (RA27). The parties each submitted pleadings and the

attorneys presented oral argument to Judge Johnson at this hearing. On March 18, 2008, Judge Johnson issued his order on remand amending the judgment and decree. Appellant's second appeal is now brought from this March 18, 2008, hearing.

RESPONDENT'S STATEMENT OF FACTS

Respondent submits the following additional facts in support of her argument set forth herein. As of the date of trial in July 2005 Petitioner had no employment outside the home (Finding of Fact XIV; RA5). As of the date of the remand hearing on January 8, 2008, Respondent continued to not have any income (RA48). Respondent has not had regular gainful employment since the date of the parties' marriage. She has suffered from a back problem, numerous surgeries including removal of a non-functioning kidney following the birth of one of the children and presently suffers from Lupus, degenerative disc disease and hypothyroidism (Finding of Fact XIV; RA6). As of the date of trial, the trial court found that these conditions cause Respondent to experience symptoms of pain and fatigue and that Respondent must pace herself and plan out her chores and responsibilities to assume her day-to-day care of the children and maintaining her residence. Respondent continued to suffer from these medical conditions as of the date of the remand hearing on January 8, 2008 (RA58).

Both of the parties' two daughters, presently ages 10 and 9, also suffer from chronic diseases (RA60). The parties' oldest daughter suffers from severe asthma and juvenile arthritis causing chronic joint pain. The parties' younger daughter suffers from primary immune deficiency causing her to be frequently ill.

Following this Court's initial appellate opinion filed April 10, 2007, Appellant continued to pay the higher amount of child support under the initial Judgment and Decree in the amount of \$1,505 per month. Since Appellant continued to pay the higher

amount of child support after this Court's first appellate opinion, Respondent assumed that Petitioner was not going to pursue retroactive reduction of child support (RA49). Respondent accepted the support checks each month and spent them for the children's support (Id.)

Respondent presently has monthly living expenses for herself and the children totaling \$2,963 per month. Respondent has no income, no savings, no real estate, nor any other assets to repay child support to Appellant (Id.)

ARGUMENT

Appellant is not disputing the lower court's calculation of current child support in the amount of \$1,252.11 per month. This Court should therefore assume that the amount of child support determined by the lower court is not at issue. The only issue raised by Appellant therefore is whether the trial court should be reversed to order child support in this amount effective as of September 1, 2005, the date of entry of the Judgment and Decree and then whether Appellant should receive credit for an overpayment.

Appellant also brought motions before the lower court requesting a judgment against Respondent for a portion of a prior tax refund, for responsibility for a student loan and for alleged arrearage calculation errors by Wright County Child Support Enforcement Services. All of these motions were denied by the lower court. None of these other issues were raised in Appellant's brief and Respondent therefore assumes Appellant accepts the lower court's decision regarding these issues.

I.

THE DISTRICT COURT'S DECISION TO ORDER THE NEW CHILD SUPPORT AMOUNT TO BE PROSPECTIVE ONLY AND NOT RETROACTIVE IS CONSISTENT WITH THIS COURT'S FIRST OPINION FILED APRIL 10, 2007.

Upon remand in a marital dissolution proceeding, the trial court is allowed to proceed in any way that is not inconsistent with the opinion of the appellate court. *Gummow v. Gummow*, 375 N.W.2d 30, 34 (Minn. App. 1985).

Section IV of the Court of Appeals initial opinion concludes on the child support/net income issue as follows:

In this case, there is no explanation by the District Court for its failure to use evidence of Husband's most current income for the calculation of his net monthly income. We therefore reversed the Finding of Husband's net monthly income and child support obligation and remand for calculation based on the most current income evidence presented at trial, or an explanation of why the use of that evidence would not be appropriate.⁴

Footnote 4 then provides:

There was passing mention at the oral argument on appeal that Husband's employment has changed since the Judgment was entered. That information was not in the record, however, we recognize that the determination of income and the child support obligation at the time of the dissolution may impact later motions for modification.

This Court's initial opinion made no comment as to which date should be used to implement the newly calculated amount of child support. The lower court's order adopted Respondent's request to make the new level of reduced child support prospective only to avoid causing her and the children financial hardship. Since the Court of Appeal's initial opinion made no comment regarding what effective date the lower court should use for the re-calculated child support amount, the lower court's decision to make the new child support amount prospective only was not inconsistent with this Court's previous opinion.

Accordingly, the only issue then is whether the lower court abused its discretion in making this decision.

II.

THE LOWER COURT DID NOT ABUSE IT'S DISCRETION IN DENYING APPELLANT'S REQUEST FOR A CREDIT FOR CHILD SUPPORT OVER-PAYMENTS.

Section II of Appellant's brief incorrectly requests this Court to use an "equitable" standard. The proper standard should be whether the lower court's decision to make the reduced child support order prospective only was an abuse of the lower court's discretion. This result was not an abuse of discretion for the following reasons.

Child support under the original Judgment and Decree \$1,505 per month was already reducing by \$253 per month to \$1,252. The standard remedy for collecting over-payments or under-payments is to withhold or reduce by an additional 20% of the monthly base amount of the order. This would have resulted in another reduction of \$250 per month, a total of a \$500 monthly reduction in Respondent's child support.

This result would have been financially catastrophic to Respondent and these two little girls. Respondent already suffers from Lupus and other medical conditions which prevent her from working. Pursuant to the budget submitted to the lower court her rent, utilities, auto insurance and gasoline total \$1,170 per month. If this Court reverses the lower court's decision and grants Appellant's request for an additional 20% reduction, child support will reduce to just \$752 per month. Not even enough to pay these fixed expenses without regard to food, clothing and all the other expenses for these children. Obviously this would be contrary to the children's best interests. The District Court then really had no choice but to make the order it did.

Unfortunately, the explanation of the District Court's prospective only ruling, set forth at Finding of Fact 7 of its March 18, 2008, Order provides no explanations of the reasons why the retroactive application of the reduced child support was denied. This is unfortunate. The undersigned provided the lower court with a proposed order with extensive proposed findings on this issue, but for whatever reason the District Court did not incorporate these proposed findings in its decision.

Petitioner's initial and supplemental affidavit provided to Judge Johnson in 2008 do, however, provide more than adequate support in the record for the lower court's decision (RA48-61). In light of the already three year pendency of this matter, the parties' limited resources and in the interest of judicial economy, Respondent requests this Court to not remand a second time for more extensive findings since Respondent's affidavits do clearly provide a basis for the decision.

III.

THIS COURT SHOULD GRANT RESPONDENT'S MOTION TO ORDER APPELLANT TO PAY RESPONDENT'S ATTORNEY'S FEES INCURRED IN RESPONDING TO THIS APPEAL.

Appellant has been relentless in pursuing litigation in this matter. This is now the second appeal arising out of the trial in July 2005. The total of Appellant's and Respondent's attorney's fees for this appeal surely exceed the amount in controversy. Respondent is utterly without financial resources to pay her fees to defend this appeal.

The undersigned has brought a motion before this Court pursuant to Rule 127 of the Rules of Civil Appellate Procedure requesting this Court to order Appellant to pay for the attorney's fees Respondent has incurred in defending this appeal. This request is

governed by Minn. Stat. § 518.14, subd. 1. This statute requires this Court to make the following findings to make such an award:

- (1) That the fees are necessary for the good faith assertion of the parties' rights and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) That the party from whom the fees, costs and disbursements are sought has the means to pay them; and
- (3) That the party to whom fees, costs and disbursements are awarded does not have the means to pay them.

The record establishes that Respondent has no ability to pay these fees. Appellant, by pursuing this appeal has demonstrated his ability to finance continued litigation in this matter. He should therefore be ordered to pay the amount as set forth in the Affidavit of Respondent's counsel, \$3,927.

IV.

THIS COURT SHOULD REMAND TO THE LOWER COURT TO CORRECT A TYPOGRAPHICAL ERROR REGARDING THE REDUCTION IN CHILD SUPPORT UPON EMANCIPATION OF THE OLDEST CHILD.

In drafting Respondent's brief, the undersigned noted for the first time a typographical error at paragraph 1 of the lower court's Order where it provides that upon emancipation of the oldest child, child support shall reduce by 36% (RA84). Under the old guidelines, child support is suppose to reduce by 16.7% which is the percentage contained at paragraph 3.a. of the original Decree (RA12).

While any request for such a correction at this point is untimely, the undersigned is requesting this Court to do what it can, perhaps in a remand to the lower court to

review this issue and correct it without the need for the parties' incurring the expense of further proceedings below.

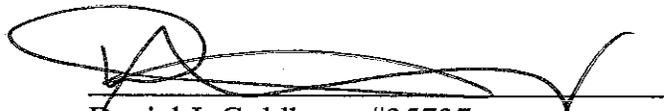
CONCLUSION

Accordingly, Respondent requests the Court of Appeals of the State of Minnesota to affirm the order of the lower court filed March 18, 2008, except to remand to the Court to correct paragraph 1 of it's order to provide for child support to reduce by 16.7% when the oldest child emancipates.

Respondent also requests this Court to order that Appellant pay her attorney's fees incurred in defending this appeal in the amount of \$3,927.

Respectfully submitted this 10th day of September, 2008.

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