IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

UDHUS V. UDHUS



LISA A. UDHUS, NOW KNOWN AS LISA A. TAYLOR, APPELLEE,
V.
DONALD D. UDHUS, APPELLANT.

Filed December 31, 2012. No. A-12-291.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed as modified with directions.

Tracy Hightower-Henne, of Hightower Reff Law, L.L.C., for appellant.

No appearance for appellee.

INBODY, Chief Judge, and SIEVERS and RIEDMANN, Judges.

SIEVERS, Judge.

Donald D. Udhus appeals from the decision of the district court for Douglas County which modified the parties' child support and ordered such support retroactive to January 1, 2011, rather than July 1, 2008, the first of the month following the filing of the modification request.

## BACKGROUND

Donald and Lisa A. Udhus were married in December 1997 in Snohomish, Washington. They are the parents of two children: a daughter born in July 1997 and a son born in March 2000. In October 2003, Donald moved to Nebraska with the parties' children. Lisa continued to live, and still lives, in Washington. A decree dissolving the marriage between Donald and Lisa was entered in Washington in March 2005. The Washington court approved the parties' parenting plan wherein Donald was awarded custody of the parties' children, subject to Lisa's rights of visitation. Because Donald and Lisa resided more than 200 miles from each other, Lisa's visitation included the children's winter vacation in even years, spring vacation in even years, and a 2-week period of time every year. Pursuant to the parenting plan, Donald and Lisa were to

share the children's transportations costs for visits equally. In its order of child support, the Washington court found Lisa's standard obligation to be $104.83 per month, but ordered that she pay nothing each month as a deviation to adjust for the transportations costs that Lisa would incur to implement the parenting plan.

On May 8, 2008, Lisa filed a "verified complaint to register foreign decree & orders" in the district court for Douglas County, Nebraska. Lisa sought to register the parties' 2005 divorce decree, child support order, and parenting plan from Washington. Also on May 8, Lisa filed a complaint to modify visitation and custody. Lisa alleged that Donald denied her visitation as outlined in the 2005 parenting plan. Lisa asked that the district court for Douglas County modify the 2005 orders regarding visitation and custody.

On June 5, 2008, Donald filed his answer and a cross-complaint for modification of custody and child support. In his cross-complaint, Donald claimed that since the March 2005 order, the income of the parties had changed substantially, and that such change would result in a variation by 10 percent or more of the current child support obligation. Donald also alleged that Lisa had not exercised visitation with the parties' children, or attempted to do so, since March 2004 and that due to Lisa's failure to maintain a relationship with the children, the visitation as set forth in the original decree was no longer in the children's best interests. Donald asked the court to award him sole physical and legal custody of the minor children, with reasonable visitation in favor of Lisa. Donald also asked the court to award him child support for the minor children's benefit.

On July 8, 2008, Lisa filed an application and affidavit for citation of contempt alleging that since the 2005 decree, Donald has deliberately denied her visitation with the parties' children. A show cause hearing was set for August 8. On July 18, Donald filed a motion to continue the show cause hearing scheduled for August 8, alleging that he would be outside of Nebraska on a previously scheduled family vacation.

On July 22, 2008, Donald filed a motion for attorney fees and for temporary relief. He sought reasonable attorney fees expended by him in defense of Lisa's application and affidavit for citation of contempt, alleging that such application is wholly without merit, frivolous, and filed for purposes of harassment. Donald also asked the court for a temporary order setting forth specifics for Lisa's visitation with the minor children during the pendency of the modification action. In that pleading, Donald alleged that he was concerned about the proper "re-introduction" of the children to Lisa prior to out-of-town or other extended visits, given that there had been 4 years of no in-person contact between Lisa and the children.

On November 13, 2008, Donald filed a motion to compel Lisa's discovery responses and compliance with Nebraska's Parenting Act. Donald alleged that Lisa had been served interrogatories and requests for production of documents on July 3 and that she had failed to respond. Donald also alleged that Lisa had not attended the parenting seminar as required by the Parenting Act and that therefore, mediation could not be scheduled. Donald requested that the court enter an order compelling Lisa to comply with discovery within 10 days and an order compelling her to comply with the Parenting Act.

On November 21, 2008, Donald again filed a motion for temporary relief asking the court for a temporary order setting forth specifics for Lisa's visitation with the minor children during the pendency of the modification action. His supporting affidavit was filed on December 9.

On December 19, 2008, the district court filed its temporary order. The court awarded Lisa Christmas parenting time with the children in Omaha from December 20 through 27 and telephonic visitation twice each week between December 2008 and April 2009. The court also awarded Lisa Easter/spring break visitation with the children in Washington from April 4 through 12, 2009, provided that she had exercised her Christmas 2008 visitation and maintained regular telephone visits with the children. The district court ordered Donald and Lisa to each complete a high conflict parenting class.

On February 12, 2009, the district court, on its own motion, filed an order for Lisa to appear and show cause as to why she should not be held in contempt for noncompliance of the "Court's order of November 20, 2008 (completion of Local Rule 4.3 seminar by December 31, 2008)." While there is no order of November 20, 2008, in our record, we assume the court was referencing its order of December 19 ordering Lisa to complete a parenting class. In an order filed on June 12, 2009, Donald's attorney was granted leave to withdraw.

Donald and Lisa mediated a revised parenting plan in 2009, calling for the children to visit Lisa each year for one-half of their winter break and for the third full week in July. Lisa was also to get two to four long weekends (defined as 4 days of parenting time) with the children, one of which could take place in Washington. Lisa was to be responsible for all transportation costs associated with those visits. On June 2, 2011, new counsel entered her appearance on behalf of Donald.

Trial was held on February 15, 2012. At trial, Lisa testified that her income has essentially doubled since the time of the 2005 decree. Lisa agreed that her gross monthly income was approximately $2,526 in 2008, $1,560 in 2009, and $2,526 in 2010. The evidence shows that Lisa has received workers' compensation payments intermittently since May 2008. However, Lisa testified that in 2010, she was not able to work due to an injury and received workers' compensation or Social Security disability payments--and the evidence shows that she received regular compensation payments in 2010. Lisa's testimony was that at the time of trial, she was earning approximately $1,700 per pay period, or $3,400 per month. Lisa testified that she and Donald mediated a new parenting plan in 2009. She stated that she agreed to pay 100 percent of the transportation expenses for the children's visitations with her, but assumed that in exchange she would not have to pay child support. She testified that the transportation costs are approximately $3,000 per year and that she would like a child support deviation for such costs--although other evidence was that she pays approximately $1,200 per trip. Lisa testified that she is aware Donald wants retroactive child support back to 2008, but she does not believe she should have to pay retroactive child support because it was not in the parenting plan.

Donald testified that Lisa has never paid child support and that he has paid for all of the children's expenses. He testified that in 2005, he agreed to give Lisa a deviation in her child support obligation so that it was $0, with the understanding that Lisa would have the children visit her twice each year at her expense. However, he testified that Lisa never saw the children, nor did she attempt to see them until 2008. Donald testified that the parties mediated a new parenting plan in August 2009. He testified that child support was not a part of the mediation and that the mediator told him it could not be part of the mediation. Donald also testified there is no mention in the parenting plan that Lisa's payment of the children's travel costs would be in lieu of child support--and this statement is supported by a review of the parties' parenting plan.

Donald testified to his concern that if Lisa was granted a deviation in the child support modification proceedings, the same situation would occur, meaning that she would again avoid paying support but decline to have the children visit. Donald testified that the children are entitled to receive support from Lisa and requested that child support be retroactive to July 1, 2008.

Donald acknowledged that this case has been ongoing for 4 years, but testified that the delay was not attributable to him. He testified that in 2009, there was a change in judges because the previous judge had retired, and that in August 2009, the parties mediated a new parenting plan. Donald testified that he "thought that the process was still in motion and I was actually waiting to hear the next steps." He testified that he had no reason to delay the proceedings because a delay meant the children would not be receiving child support from Lisa. We find no evidence in the record that Donald intentionally delayed the trial court's resolution of his motion to modify.

The district court filed its order of modification on March 12, 2012. The court approved the parties' Parenting Plan and attached it to the order. The court ordered Lisa to pay child support in the amount of $635 per month commencing on January 1, 2011. We note that the court's child support worksheet shows Lisa's share of the child support obligation under the guidelines was actually $852.12 per month, but that she was given a deviation of $217 per month for transportation costs related to visitations, making her adjusted child support obligation $635.12 per month, which the court rounded off to $635. Lisa was given 12 months from the date of the entry of the order to pay all child support arrears that have accrued since January 1, 2011, although no specific payment schedule was ordered, for example, a set amount per month. Donald appeals.

## ASSIGNMENTS OF ERROR

Donald assigns that the district court abused its discretion in denying his request for retroactive child support to the first day of the month following the filing of the complaint to modify.

## STANDARD OF REVIEW

An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Collins v. Collins*, 19 Neb. App. 529, 808 N.W.2d 905 (2012). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id*.

## ANALYSIS

Donald's sole claim on appeal is that the district court should have awarded child support retroactive to July 1, 2008, rather than January 1, 2011. He claims Lisa did not provide evidence to show the equities would be best served by denying retroactive support nor did she prove that she could not afford retroactive support. He also claims the court did not articulate how the equities supported retroactive child support to only January 2011, rather than July 2008.

The rule is that absent equities to the contrary, modification of child support obligations should be applied retroactively to the first day of the month following the filing date of the application for modification. *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005). See, also, cases collected in *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). The Nebraska Supreme Court has made it clear that a noncustodial parent's inability to pay retroactive support is a consideration with respect to assessing the equities of the case. *Riggs v. Riggs, supra*. Donald filed his cross-complaint to modify child support on June 5, 2008. Therefore, the ordinary retroactivity date, if applicable, would be July 1, 2008.

In its oral ruling at the end of the modification hearing, the district court recounted the procedural posture of this case, including the lengthy period of time from August 2009 until 2011 when there was no action in this case. The district court stated:

> Generally, the Court would order retroactive child support back to 2008, but I believe the equities in the case and the chronology that the Court has just cited indicates that it was 2000 -- early 2011 where it became clear that the child support again was going to be an issue, so the Court will order retroactive child support back to January of 2011.

To the extent that the foregoing oral pronouncement constitutes the trial court's rationale for denying "full retroactivity," it does not comport with the jurisprudence on this issue and constitutes an abuse of discretion. Child support was clearly an issue as of June 5, 2008, when Donald filed his cross-complaint for modification, and such was always at issue until the trial court's decision. The testimony from Donald was that the parenting plan mediator told him that child support could not be part of the mediation process. And in fact, the parties' 2009 Parenting Plan makes no mention of child support nor does it even mention that Lisa should receive a deviation in exchange for her paying 100 percent of the travel costs related to visitation. Thus, the district court's statement that it was "early 2011 when it became clear that the child support again was going to be an issue" is not accurate, and thus would not be a basis for departing from the general rule of retroactivity which would be back to July 2008.

As for the lengthy delay in the proceedings, the record really does not explain why such occurred other than a change in the judge handling the case. There is no evidence that Donald was the cause of any such delay, and courts have an obligation to move cases forward. It has been noted that in a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Wilkins v. Wilkins, supra*. Thus, the delay in the proceedings was not a basis for denying retroactivity back to July 2008.

The only "equity" in this case that might affect retroactivity is whether or not Lisa has the ability to pay retroactive support. See *Lucero v. Lucero*, 16 Neb. App. 706, 750 N.W.2d 377 (2008). Lisa provided no evidence suggesting an inability to pay retroactive support. She provided no evidence of her personal financial situation, beyond her earnings, such as monthly living expenses or support for other children. What we do know is that her income has essentially doubled since the original 2005 decree, Lisa is remarried, she has never paid any child support since the divorce, and she had little or nothing to do with these children until late 2008--although that fact does not obviate her obligation to support her children. Furthermore, she

did not have to pay any travel expenses for the children until 2008. The only "equitable" consideration we are aware of is that she was unable to work during 2010, but that she received workers' compensation or Social Security disability payments during that time. We are inclined to give her a 1-year "break" in her retroactive support obligation because she was unable to work in 2010, although she did have income via disability of some sort. Accordingly, we order Lisa to pay child support retroactive to July 1, 2009, rather than July 1, 2008.

In its order of modification filed on March 12, 2012, the district court ordered Lisa to pay child support in the amount of $635 per month commencing on January 1, 2011, and that amount is after a $217 a month deviation from the guidelines calculated amount for travel expense. Thus, she was ordered to pay 15 months of retroactive support at $635 per month, for a total of $9,525 in retroactive support. She was given 12 months from the entry of the modification order to pay the amounts that had accrued since January 1, 2011, although no schedule for payment was set except a final date by which she had to pay the retroactive amounts. But, if she paid on a monthly basis, she would be paying $793.75 per month in retroactive support ($9,525 ÷ 12 months), in addition to making her current monthly child support payments, and she would have her retroactive support obligation paid off by March 12, 2013.

We have ordered Lisa's child support obligation retroactive to July 1, 2009. Thus, there are 18 additional months beyond what the district court ordered, in which she is required to pay retroactive support. This amounts to an additional $11,430 in retroactive support ($635 per month × 18 months) for a total of $20,995 that she owes in retroactive support. This is obviously a substantial sum, but we recall that she has not paid a dime in child support since the decree in March 2005 or for approximately the last 165 months. Thus, when viewed in that light, her retroactive obligation represents only $127.24 a month ($20,995 ÷ 165), a rather inconsequential amount. Nonetheless, given the amount she owes, she should have a reasonable timeframe to pay the retroactive support. Therefore, we give Lisa 24 months from April 1, 2012, the first of the month following the entry of the modification order, to pay this additional amount. However, we further order that she shall pay such amount month by month in the amount of $873.12 per month, in addition to the $635 per month of current support for a total of $1,508.12 per month. In this way, she is obligated to begin paying the arrearage immediately and to continue paying such amount month by month over a 24-month period until paid.

## CONCLUSION

For the reasons stated above, we affirm the district court's modification of the parties' child support, but we order such support retroactive to July 1, 2009, and we direct the district court to amend its modification order to conform to our opinion.

AFFIRMED AS MODIFIED WITH DIRECTIONS.