IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSUE TERRONES VALDEZ,

Appellant,

vs.

PATRICIA SOTO AGUILAR,

Respondent.

/

Supreme Court No. 66854

APPELLANT'S OPENING BRIEF

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15-07676

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Table of Contents

Table of Authorities

Cases:

Statutes and Rules:

Constitutions:

Jurisdictional Statement

This Court has jurisdiction pursuant to NRAP 3A(b)(1). The August 20, 2014 Order both affirms the Master's Findings and Recommendations filed May 9, 2014, overrules the Objection to Master's Recommendations filed May 19, 2014 and is a final Order; Appellant's Index (hereinafter "AA") pgs. 64 - 71. Notice of Entry was filed November 6, 2014; AA pgs. 72 - 73. Appellant JOSUE TERRONES-VALDEZ (hereinafter "JOSUE") filed his Notice of Appeal on November 6, 2014.

Statement of the Issues

1. Is NRS 425.360(4) unconstitutional on its face?
2. Is NRS 425.360(4) unconstitutional as applied to the facts and circumstances in this case?
3. Is the Order filed August 20, 2014 arbitrary, capricious and/or in violation of state and federal law?

Summary of the Case

JOSUE requested the assistance of the Washoe County District Attorney's Office Child Support Division to assist him in the collection of the child support obligation owed by Respondent PATRICIA SOTO-AGUILAR (hereinafter "PATRICIA"). Pursuant to hearing conducted January 6, 2011, a child support

Recommendations filed May 9, 2014 upholding the constitutionality of the statute; AA pgs. 55 - 60.

JOSUE timely filed his Objection on May 19, 2014; AA pgs. 61 - 63. A hearing was conducted on July 16, 2014 before the District Court. The matter was taken under submission, thereafter resulting in an Order filed August 20, 2014; AA pgs. 64 - 71. Although said Order is described as affirming in part and denying in part the May 9, 2014 Findings and Recommendations, said Order really affirms said Findings and Recommendations in its entirety.

PATRICIA was found to owe ***ZERO*** child support during all of the twenty-seven (27) months of when she was receiving public benefits not related to the child in issue, contrary to the Judgment and Order filed January 28, 2011, and the fact that JOSUE had primary and actual custody during all of those months. The District Court refused to allow the obligation to accrue, or alternatively, for the obligation to at least accrue at the statutory minimum under formula in NRS 125 B.080(4) of $100.00 per month.

PATRICIA attended all of the hearings. The hearings conducted January 2, 2014 and July 16, 2014 were limited to oral argument only, and the only persons speaking at said hearings were JOSUE's attorney, and the representative from the Washoe County District Attorney, Family Support Division.

STATEMENT OF FACTS

JOSUE and PATRICIA have one child ANDREI TERRONES SOTO (DOB 3/6/09), now age six; AA pg. 1. JOSUE has continuously had primary physical custody of ANDREI for more than four and one-half (4 1/2) years. When the child support obligation was created, PATRICIA had gross monthly income of at least $2,950.00, 18% of which would be $531.00; AA pgs. 1 - 8.

While she has claimed to be unemployed, PATRICIA has a history of working "under the table" and earning undisclosed income. By her own admission, PATRICIA is wilfully unemployed. She is in good health and has testified that she has not even sought employment since 2011.

When PATRICIA owed child support for the last four (4) months of 2010 ($2,124.00, not including penalties and interest), she paid zero. In 2011 PATRICIA owed $6,372.00 (not including penalties and interest), but paid only $610.00. In 2012 PATRICIA owed $6,372.00 (not including penalties and interest), but paid zero. In 2013 PATRICIA owed $6,372.00 (not including penalties and interest), but paid zero. In 2014 PATRICIA owed $6,372.00 (not including penalties and interest), but paid zero. In the first two months of 2015 PATRICIA owed $1,062.00 (not including penalties and interest), but paid zero.

The monthly $531.00 child support obligation began effective September 1,

2010. By the time of the hearing conducted January 2, 2014, child support arrearages (not including penalties and interest) should have exceeded $20,000.00. At said hearing on January 2, 2014 PATRICIA asserted for the very first time that she owed nothing for the ten (10) months of February 2011 through November 2011 and the eighteen (18) months from August 2012 through January 2014. The hearing conducted on January 2, 2014 was noticed only for determination of JOSUE's Motions filed August 12, 2013; AA pgs. 11 - 21. No prior Notice of Hearing was given regarding PATRICIA attempting to avoid already accrued child support arrearages. PATRICIA testified on January 2, 2014 that she is not disabled and that she receives $2,202.00 per month from her current husband.

PATRICIA continued thereafter to receive public benefits until September 2014. The decision of the District Court reduces the child support obligation retroactively from $531.00 per month to zero per month for the thirty-six (36) months of February 2011 through November 2011 and August 2012 through September 2014.

JOSUE is employed full time earning $14.00 per hour and provides health care insurance for the child without any contribution by PATRICIA during the thirty-six (36) months for which she has been determined to owe zero child support.

Argument

JOSUE urges the Court to find that the provisions of NRS 425.360(4) are unconstitutional both on its face and as applied to the facts and circumstances of this case. Said statute, greatly disfavored by the child support division of virtually every county in this State, provides as follows:

> Debts for support may not be incurred by a parent or any other person who is the recipient of public assistance for the benefit of a dependent child for the period when the parent or other person is a recipient.

In the present case, the public assistance received by PATRICIA is not for the child to which there is a support obligation payable by PATRICIA to JOSUE. This statute is unequally applied and is an accounting nightmare in determining when a parent owes or does not owe a child support obligation.

Retroactive child support modification is disallowed in Nevada. The effect of the District Court in applying the provisions of NRS 425.360(4) result in an impermissible retroactive modification lowering child support during the period in which the monthly amount was established. Under the Order of the District Court, PATRICIA is not even required to pay the statutory minimum of $100.00 per month which is set forth in NRS 125B.080(4) which states that the minimum amount that may be awarded is $100.00 per month unless the Court makes a written finding that the Obligor is unable to pay the minimum amount. NRS

125B. 080(4) further provides that unemployment is not a sufficient cause to deviate from the awarding of at least the minimum amount.

In the present case, JOSUE contends that once child support has accrued it is vested and not subject to any modification whatsoever. Perhaps a remedy could be fashioned which would suspend but not defer the accruing of the obligation. Another alternative would be for the obligation to at least accrue at the statutory minimum, once again being suspended but not deferred. The problem with what has occurred in the present case is that not only does PATRICIA not have to pay child support while she is on public assistance, but that she will not still owe the money when she gets off of public assistance. This constitutes a denial of equal protection of the law in violation of the Nevada and United States Constitutions.

Several hypothetical situations come to mind in applying the ruling of the District Court to other situations. The lesson here to be learned is that if an Obligor can get on public assistance of some sort, a child support obligation can be completely avoided. Another hypothetical situation would involve child support being entered based on the current income of the Obligor parent, and then shortly thereafter the Obligor's income becomes substantially lower through no fault of his or her own (lay off, work injury, or other). Even though the Obligor parent no longer has the financial ability to pay child support at the current amount

in the ongoing Order, the obligation accrues at said amount until a Motion is filed and the support modified. In this case, PATRICIA filed no such Motion in 2011 or 2012. Her failure to file such a Motion should preclude any ability of the Court to retroactively lower and eliminate child support.

In Nevada, certain kinds of public benefits do not suspend the obligation to pay child support. An Obligor receiving unemployment compensation pays child support pursuant to the statutory formula. An Obligor receiving worker's compensation pays child support pursuant to the statutory formula. A retired person pays child support pursuant to the statutory formula. A person receiving social security retirement benefits pays child support pursuant to the statutory obligation. All of these public benefits are subject to the statutory formula and to a wage assignment Order. There is no rational basis for not requiring a person receiving other public assistance from having to pay child support, or, at a minimum, for the child support to continue to accrue but be deferred.

Nevada law clearly prohibits retroactive modification of a child support Order; see Khaldy vs. Khaldy, 111 Nev. 374, 892 P.2d 584 (1985). Nevada law provides that payments once accrued for support of a child becomes vested rights and cannot thereafter be modified or avoided; see Day vs. Day, 82 Nev. 317, 417 P.2d 914 (1966) and Ramacciotti vs. Ramacciotti, 106 Nev. 529, 795 P.2d 988

(1990).

NRS 425.360(4) is contrary to Nevada law expressly prohibiting retroactive modification of child support. It also violates fundamental principles of due process of law and equal protection of law guaranteed by the Nevada and United States Constitutions. JOSUE was never afforded notice of any intention by PATRICIA to seek modification lowering her child support obligation to zero, at least not before January 2014.

The public assistance received by PATRICIA is for the benefit of children other than the one in this case.

Everyone is subject to a child support obligation. Even an inmate in jail or prison has to pay child support even though income is minimal and the statutory formula has a minimum amount to be paid of $100.00 per month. There is no excuse and/or justification for child support being reduced to even below the statutory minimum of $100.00 per month.

The denial of already accrued child support payable by PATRICIA to JOSUE constitutes a taking of private property without just compensation, also in violation of the State and Federal Constitutions. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for

public use without just compensation. The Fourteenth Amendment to the United States Constitution, Section 1 provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Similarly, the Nevada Constitution provides in Article 1, Section 8(5) that no person shall be deprived of life, liberty or property without due process of law and that private property shall not be taken for public use without just compensation.

The United States Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest; see Mathews vs. Eldridge, 429 U.S. 319 (1976), 96 S. Ct. 893, 47 L. Ed. 2d 18. That case involved a determination that certain administrative procedures were unconstitutional in regards to certain social security disability benefits which had been terminated. There, the Court stated that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society. The case of Mathews vs. Eldridge cites with approval voluminous other cases going back fifty-five (55) years to 1960. Mathews vs. Eldridge summarizes these

decisions as underscoring the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It also said that due process is flexible and calls for such procedural protection as the particular situation demands. The Court stated that more precisely, its prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In the present case, the government has taken away, without due process, JOSUE's entitlement to child support payable to him by PATRICIA. While there may be no right in the abstract to child support, however, once the government bestows those benefits, they cannot be taken away from an individual without due process of law. In this case, both PATRICIA and the government are attempting to modify retroactively and take away the child support entitlement of JOSUE.

To state law decisions outside Nevada have been located which may have

some application to the issues presented in this Appeal. The first is In re Marriage of Guthrie, 191 Cal. App. 3d 654, 236 Cal Rptr. 583 (1987) and Curtis vs. Commissioner of Human Services, 501 A. 2d 566 (1986). Those cases from California and Maine involve attempts to retroactively apply a statute which deprives a claimant of due process of law. In the California case, the Court there held the statute to be unconstitutional.

Conclusion

Reversal is warranted for two reasons. First the statute is unconstitutional on its face, or alternatively, as applied to the facts and circumstances of this case. Second, the Court erred and/or abused its discretion in retroactively modifying and eliminating child support already vested and accrued owing by PATRICIA to JOSUE. For those reasons, the District Court's Order of August 20, 2014 should be reversed.

Certification

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect format in typeface of 14, New Times Roman.

2. I further certify that this brief complies with the page -or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 12 points or more and contains 3,291 words.

[X] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the apge and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

AFFIRMATION Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 10th day of March, 2015.

JONATHAN H. KING, ESQ.
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CERTIFICATE OF SERVICE

I certify that on the 11th day of March, 2015, I deposited for mailing in the U.S. Mail in Reno, Nevada, with postage thereon fully prepaid, a true and correct copy of the within document, addressed as follows:

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