

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSUE TERRONES VALDEZ,
Appellant,

v.

PATRICIA SOTO AGUILAR,
Respondent.

_____ /

No. 66854

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WASHOE COUNTY DISTRICT ATTORNEY'S ANSWERING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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PATRICIA SOTO AGUILAR,

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WASHOE COUNTY DISTRICT ATTORNEY'S ANSWERING BRIEF

I. SUMMARY OF ARGUMENT

NRS 425.360(4) prevents an obligation for child support from accruing during a time when the noncustodial parent is the recipient of public assistance for the benefit of a minor child. This statute is constitutional. Additionally, application of this statute to prevent the accrual of such debt is not a prohibited retroactive modification of child support. The underlying child support order remains valid and can re-commence accruing upon the discontinuation of the receipt of public assistance by the noncustodial parent.

II. ARGUMENT

NRS 425.360(4) expressly prohibits child support debts from accruing while a non-custodial parent is the recipient of public assistance for the benefit of a dependent child.

As described by NRS 425.280, "Assistance" and "Public Assistance"

means "any payment made by the Division to or on behalf of a child pursuant to the provisions of Title 38 of NRS." Title 38 of NRS encompasses Public Welfare, NRS Chapters 422 to 432B, including but not limited to 422A, Welfare and Supportive Services and NRS 425, Support of Dependent Children. Pursuant to NRS 422.050(b), "Public Assistance" includes payments made under Temporary Assistance to Needy Families, (TANF). Respondent in this action, Patricia Soto Aguilar, was the recipient of TANF in the State of Nevada for the benefit of additional children not at issue in this case.

"When presented with a question of statutory interpretation, the intent of the legislature is the controlling factor and, if the statute under consideration is clear on its face, a court cannot go beyond the statute in determining legislative intent." *Robert E. v. Justice Court of Reno Tp., Washoe County*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983); *White v. Warden*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980). If a statute is ambiguous or lends itself to more than one reasonable interpretation, the statute can be "construed in line with what reason and public policy would indicate the legislature intended." *See Robert E. v. Justice Court of Reno Tp., Washoe County*, at 445; *Cannon v. Taylor*, 87 Nev. 285, 288, 486 P.2d 493, 495 (1971), *adhered to, withdrawn in part*, 88 Nev. 89, 493 P.2d 1313 (1972).

Interpreting NRS 425.360(4) on its face and in conjunction with the definition of public assistance set forth in NRS 425.280, the legislature expressly

prohibited the accrual of a child support debt for the duration that a non-custodial parent is on public assistance for the benefit of a dependent child. "Where the intention of the legislature is clear, it is the duty of the court to give effect to such intention and to construe the language of the statute to effectuate, rather than to nullify, its manifest purpose." *Sheriff, Clark County v. Luqman*, 101 Nev. 149, 155, 697 P.2d 107, 111 (1985). *See also, Sheriff v. Martin*, 99 Nev. 336, 662 P.2d 634 (1983); *Woofter v. O'Donnell*, 91 Nev. 756, 542 P.2d 1396 (1975).

Although NRS 425.360(4) is unambiguous and clear on its face, it is important to analyze the legislative purpose for enacting Title 38 of NRS for Public Welfare in order to address Appellant's constitutional challenge to the statute. Reading Senate Bill No. 454, Chapter 381 which enacted and amended Chapter 425 of NRS Sections 2 to 21 in 1977, the legislature states its purpose is "to conserve the expenditure of public assistance funds whenever possible in order that such funds shall not be expended if there are private funds available or which can be made available by judicial process or otherwise to partially or completely meet the financial needs of the children of this state."

NRS 425.360(4) on its face and as clearly intended by the legislature prevents a debt for child support to accrue against a noncustodial parent who is the recipient of public assistance for the benefit of a dependent child.

Appellant contends that NRS 425.360(4) acts as an illegal retroactive

modification of Respondent's ongoing child support obligation in violation of Federal and Nevada law, citing *Khaldy v. Khaldy*, 111 Nev. 374, 892 P.2d 584 (1995). Appellant is correct that both Federal law and Nevada law prohibit retroactive modification of a child support obligation. See 42 United States Code Annotated (U.S.C.A.) §666(a)(9)(c), commonly referred to as the "Bradley Amendment." Child support "[p]ayments **once accrued** become vested rights and cannot thereafter be modified or voided." (Emphasis added). *Day v. Day*, 82 Nev. 317, 320-321, 417 P.2d 914, 916 (1966); *Ramacciotti v. Ramacciotti*, 106 Nev. 529, 795 P.2d 988 (1990).

However, NRS 425.360(4) does not modify the underlying child support order. This statute merely prevents debts for support from accruing against a noncustodial parent who is the recipient of public assistance for the benefit of a dependent child for the period when the parent is the recipient. As such, Appellant had no property interest to the accrual of a debt that has not yet vested. Appellant's argument that NRS 425.360(4) improperly retroactively modifies the child support obligation under the prior order is mistaken. At the time Respondent discontinues receiving assistance, the underlying child support obligation is valid and enforceable.

This suspension of a child support obligation is not unique to the State of Nevada and is practiced in other states. See *Hundt v. Iowa Dept. of Human Services*, 545 N.W.2d 306, 309 (1996), "A statute, Iowa Code Section

252C.2(C) (1993), prevents a support debt from accruing against a 'responsible person' for the period which that person receives public assistance for the benefit of a dependent child."; *See also* Colorado Revised Statutes Annotated §14-14-104 (West), "No child support debt. . . shall be created in the case of, or at any time collected from, a parent who receives assistance under the Colorado works program . . . for the period such parent is receiving such assistance, unless by order of a court of competent jurisdiction."

In contrast, the State of Oregon repealed a statute permitting the suspension of a child support obligation and enacted a statute that triggers an evidentiary shift in the burden of proof when a noncustodial Obligor receives public assistance. "Notwithstanding any other provision of Oregon law, a parent who is eligible for and receiving cash payments under Oregon Revised Statute 412.100 to 412.069, Title IV-A of the Social Security Act . . . or a general assistance program of another state . . . shall be rebuttably presumed unable to pay child support." Or. Rev. Stat. Ann. §25.245 (West).

NRS 425.360(4) does not retroactively modify a court ordered child support obligation. Instead, it merely suspends the accrual of said obligation during periods of receipt of public assistance by a noncustodial parent for valid public policy reasons as set forth in more detail below.

Additionally, Appellant claims that NRS 425.360(4) is an unconstitutional taking of a property right as prohibited by the substantive

due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the Nevada Constitution. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of the 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 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 protection of private property in the Fifth Amendment assumes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation. A similar assumption is made under the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605, 28 Sup.Ct. 331 (1908). *See Pennsylvania Coal v. Mahon*, 260 U.S. 393, 394, 43 S.Ct. 158, 160 (1922). "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

It is established that a custodial parent's legal right to child support

under a court order is a property right interest as protected by the U.S. and Nevada Constitutions. The right to the receipt of child support is an intangible property interest. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 987, 104 S.Ct. 1062 (1984). "... [this] Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause". "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).

There are two categorical types of governmental takings: the physical taking or occupying of tangible property versus the regulation of property interests. The U.S. Supreme Court has repeatedly recognized that "whether a particular restriction [amounts to a taking] depends upon the particular circumstances [of each] case-that is, on essentially ad hoc, factual inquiries." *Penn Central Transportation Co v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646 (1957). In this regard, a court traditionally analyzes three factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. In this instant action, NRS 425.360(4) is a regulatory taking of a property interest, e.g., child

support.

The government is permitted to take private property for public use without just compensation if it is used for a public purpose. The Supreme Court has expansively defined "public use" so that virtually any taking will meet the requirement. *See Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321 (1984); *Ruckelshaus v. Monsanto Co.*, *See supra*, "[I]n considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." *City of Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 362 (1930).

The Supreme Court has deferred to Congress to determine the scope of "public use" in Fourteenth Amendment challenges. As such, the judiciary has stated that when Congress has spoken, "[i]ts decision is entitled to deference until it is shown to involve an impossibility." *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40 (1925). Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in the judiciary invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields. *See generally, State of New York v. United States*, 326 U.S. 572, 66 S.Ct. 310 (1946); *U.S. ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546 (U.S.N.C. 1946). When Congress has spoken on

an issue of a taking for a public purpose, consideration is also weighed in favor of the "welfare of the republic itself." *United States v. Gettysburg Electric Ry.*, 160 U.S. 668, 682, 16 S.Ct. 427, 430 (1896); ("Such use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country.")

The burden upon the States as to what justifies a Constitutional taking for public purpose is substantially low and easily satisfied. "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *See Berman v. Parker*, *See supra*; *Rindge Co. v. Los Angeles*, 262 U.S. 700, 43 S.Ct. 689 (1923); *Block v. Hirsh*, 256 U.S. 135, 41 S.Ct. 458 (1921); *cf. Thompson v. Consolidated Gas Corp.*, *See supra*, (invalidating an uncompensated taking). Pursuant to the Takings Clause, when the government authorizes a taking of private property for public use, the owner is typically entitled to just compensation for the deprivation of the private property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982).

However, "where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of

the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee v. City of Escondido*, Cal. U.S. Cal. 1992, 112 S.Ct. 152.

In this action, the suspension of Appellant's unvested interest in ongoing child support payments during periods of public assistance pursuant to NRS 425.360(4) is done so in a regulatory fashion for a legitimate, valid public use, namely not taking money from families in poverty while on public welfare rolls. Appellant contends that he is entitled to just compensation for the deprivation of these child support payments. Although this demand is proper pursuant to the guarantees of the Fifth and Fourteenth Amendments of the Constitution, due process and public policy refute Appellant's request for compensation.

A statute that is not unconstitutional on its face or as applied will only violate substantive due process if it is not "rationally related to a legitimate governmental purpose." *Munoz v. Sullivan*, 930 F.2d 1400, 1404 (9th Cir. 1991); *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (1997). To challenge a statute as a violation of substantive due process, the burden is on the Appellant to prove that the statute is "arbitrary and irrational" and is not rationally related to a legitimate public purpose. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1991). In this case, NRS 425.360(4) is rationally related to the legitimate governmental purpose of reducing the

State of Nevada's and the Nation's deficit while maximizing the resources available to assist family units with dependent children living in poverty.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) was an affirmative step by the Legislature to remedy the growing national concern of individuals on welfare and the increasing poverty rate of custodial parents, largely attributed to the failure of noncustodial parents not financially contributing to the maintenance and support of their dependent children.

The Federal Legislature was unequivocally clear in stating the purpose of this Act, "[i]n general, the purpose . . . is to increase the flexibility of States in operating a program designed to: (1) provide assistance to needy families so that children may be cared for in their own homes . . . and (2) end the dependency of needy parents on government benefits by promoting job preparation, work and marriage. . .". PRWORA of 1996, PL 104-196, August 22, 1996, 110 Stat 2105 §401(a)(1-2). In addition, public assistance will only be granted to families with a minor child residing in the household. ("A State to which a grant is made under Section 403 [Section 403. Grants to States] shall not use any part of the grant to provide assistance to a family: (A) unless the family includes: (I) a minor child who resides with a custodial parent or other adult caretaker of the child. . . ". *Id.* at §408(a)(1)(A)(I). Pursuant to Federal guidelines established in PRWORA, the State of Nevada enacted Title

38 of NRS that encompasses Public Welfare, NRS Chapters 422 to 432B, including but not limited to 422A, Welfare and Supportive Services and NRS 425, Support of Dependent Children.

As recognized in *Hawaii Housing Authority v. Midkiff*, "the definition [of a public purpose] is essentially the product of legislative determination addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the Legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the Legislature, not the Judiciary, is the main guardian of the public needs to be served by social legislation". *See supra* at 239. In this action, the Federal Legislature and the State of Nevada Legislature have stated the governmental purpose.

Next, the deprivation of Appellant's child support must be related to the legitimate governmental purpose. As the purpose of the Act is to reduce the Nation's deficit while providing services to indigent families struggling to support dependent children, it would be inefficient and wasteful to enforce a child support obligation upon a noncustodial parent receiving public assistance. To permit a custodial parent to receive child support payments being supplied through public assistance would defeat the express purpose of the revised federal welfare program.

Similarly, the State of Nevada, pursuant to and in compliance with these

Federal regulations, has provided for a public welfare program that efficiently restricts wasteful spending while taking positive actions to collect monies owed for child support obligations by noncustodial parents. To effectuate this directive, the State of Nevada enacted NRS 425.360(4) to suspend the accrual of a child support debt while a noncustodial parent receives public assistance.

The Legislature intended to avoid the meaningless and inefficient exercise of giving money to those in need with one hand while requiring it to be paid back with the other hand. Interpreting NRS 425.360(4) in any other manner would fail to serve this legislative purpose. If the Legislature intended to still hold a noncustodial parent responsible for the ordered child support obligation, the Legislature would have enacted a statutory scheme similar to other states wherein a noncustodial parent's child support debt would accrue although not be collectible during the receipt of public assistance. However, the Legislature did not do this.

Title 38 was enacted with the intent and purpose of benefitting minor, dependent children while reducing the cost to the State of Nevada. With NRS Chapter 425, the legislature sought to protect minor dependent children belonging to a family unit in poverty which seeks and obtains public assistance. To create a child support debt that accrues while receiving public assistance would only serve to injure the family unit, further adding another obstacle into the struggle to get out of poverty and off public assistance.

Because the Division's plan unquestionably serves a public purpose, the takings challenge here satisfies the Fifth Amendment and compensation is not required. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 470, 125 S.Ct. 2655, 2657 (2005).

The Due Process Clause does require notice and an opportunity to be heard before the government deprives a person of his or her property. *Levingston v. Washoe Co.*, 112 Nev. 479, 484, 916 P.2d 163, 166 (1996), *modified on rehearing*, 114 Nev. 306, 956 P.2d 84 (1998). The Fourteenth Amendment has been read broadly to extend protection to "any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786 (1971), including statutory entitlements. *See also, Bell v. Burson*, 402 U.S. 523, 539, 91 S.Ct. 1586, 1589 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262, 90 S.Ct. 1011, 1017 (1970).

The U.S. Supreme Court recognized there is not a bright-line rule to determine what type of due process is needed for each situation, "due process . . . is not a technical conception with a fixed content unrelated to time, place, and circumstances, . . . [but rather] is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902 (1976).

In *Mathews v. Eldridge*, the Supreme Court carved out three factors to balance to make a determination "that [identify] . . . specific dictates of due

process. First, the private interest that will be affected by the official action; Second, the risk of 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 substitute procedural requirement would entail." *Id.* at 335.

The Court in *Goldberg v. Kelly* emphasized the importance of welfare as it provides basic subsistence to the recipients and public policy needs to protect recipients from arbitrary termination of benefits without a pre-termination hearing. Whereas the Court in *Mathews v. Eldridge* declared that only a post-termination hearing is required for social security benefits. The Court distinguished between these two findings by contrasting that welfare benefits are based upon financial need, but "[e]ligibility for disability benefits . . . is not based on financial need." *Id.* at 322.

This case is more similar to *Mathews v. Eldridge*, as child support obligations are not determined from the financial need of a custodial parent, but rather, are determined by a statutory formula based upon a noncustodial parent's income.

Balancing the fiscal and administrative burdens to the government as well as to poor families in need of state assistance presents the most persuasive argument against a pre-termination hearing and in favor of a

post-termination hearing before the suspension of ongoing child support. To entitle each custodial parent to a pre-termination hearing would result in significant and substantial costs to the courts, as well as a delay for noncustodial parents who have custody of other children from seeking and obtaining critically needed public assistance. Individuals seeking public assistance are within immediate financial need and do not have the luxury of waiting weeks or months to start receiving money to help support their children while in poverty.

III. CONCLUSION

For all the foregoing reasons, the District Court's Order filed August 20, 2014 must be affirmed. NRS 425.360(4) is not an unconstitutional taking of a property right, nor is in an improper and prohibited retroactive modification of a child support order.

DATED: April 10, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: SUSAN HALLAHAN
Chief Deputy District Attorney

CERTIFICATE OF COMPLIANCE

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 style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

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 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 appropriate references to the page 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

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 10, 2015.

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CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on April 10, 2015, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

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