NO. 35678

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MELISHA A. BOYD (DECEASED), Petitioner Below,

Appellee,

v.

JOHN E. CAPLINGER, Respondent Below,

Appellee,

v.

JANET HORNBECK and DONALD HORNBECK, Intervenors Below,

Appellants.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

From the Circuit Court of Wood County, West Virginia
The Honorable J.D. Beane
Civil Action Number 97-D-133

BRIEF OF APPELLANTS

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ASSIGNMENT OF ERROR

Did the Family Court and Circuit Court err when they adopted the calculations of the West Virginia Bureau for Child Support Enforcement ("BCSE") regarding the child support arrearages owed by Appellee John E. Caplinger for the support of his minor child, where the challenged calculations were based on a policy of allocating any payment made by the obligor first to reduction of principal, and only then to payment of interest?

STATEMENT OF THE CASE

Appellee John E. Caplinger ("Appellee") is the father of the minor child, K.C., who was born May 9, 1995. In 1997, Appellee was ordered to pay child support in the amount of $149.34 per month to K.C.'s mother, Petitioner Melisha A. Boyd, who was the primary residential parent of K.C. In addition, the state of West Virginia was granted a judgment against Appellee in the amount of $6,014.90 for reimbursement of medical and birthing expenses provided for K.C. in 1994 and 1995. (App. Tab 21.) Following the order, Appellee failed to remain current on his child support obligation.

Petitioner Melisha A. Boyd was killed in a motor vehicle accident on January 26, 2002. On February 22, 2003, the West Virginia Bureau for Child Support Enforcement ("BCSE") filed a notice of redirection of child support payments to the maternal grandparents of the child, Janet and Donald Hornbeck, Intervenors Below and Appellants in this Court ("Appellants"), with whom the child was living following the death of her mother. (App. Tab 21.)

Following a motion for modification of custody filed in June 2007 by Appellee, Appellee and Appellants amicably agreed to a divided custody plan which granted more than half the custodial time with K.C. to Appellee. Appellee's obligation to pay support was modified to $0 effective September 1, 2006. (App. Tab 21.)

At a further hearing on the matter, an issue was raised with regard to the arrearages in child support owed by Appellee. At a hearing held December 3, 2008, BCSE showed arrearages of $18,325.11. Appellants, using exactly the same schedule of debts and payments, presented an accounting alleging arrearages of $22,974.91. (App. Tab 21.)

The difference in these two accountings resulted from the BCSE policy of applying any payment received first to the reduction of principal, rather than to interest owed on the arrearage, as advocated by Appellants. The BCSE policy reduced the principal amount on which interest was owed, and thus reduced the total amount due.

Following the hearing on December 3, 2008, the Family Court issued an order holding that BCSE was a proper party to the action, and giving BCSE 30 days in which to respond to the legal authorities presented by counsel for Appellants. (Although it has not yet been done, this case should be restyled to reflect the BCSE status as a proper party.) (App. Tab 16, p. 3.) Following briefing by the parties, the Family Court issued an order in which it found that there appeared to be prior cases in which this Court had accepted, without objection, the accounting system adopted by the BCSE, although the court acknowledged that it was unclear whether the issue had ever been brought to the attention of this Court. The Family

Court therefore found that "absent statutory or case law direction, that it is compelled to adopt the accounting of the BCSE." (App. Tab 21.)

Appellants filed a Petition for Appeal in the Circuit Court of Wood County, making the same arguments. (App. Tab 22.) BCSE filed a response, and on October 1, 2009, the Circuit Court of Wood County, the Honorable J.D. Beane, Judge, presiding, affirmed the Family Court order adopting the BCSE calculation of the amount due on the unpaid child support obligation. (App. Tab 24.)

Appellants filed a Petition for Appeal with this Court on November 30, 2009, attaching copies of both of the lower court decisions, and submitting a docketing statement to the court. (App. Tabs 25, 26.) Opposition was filed by BCSE. (App. Tab 27.)

By order issued September 9, 2010, this Court granted the Petition for Appeal filed by Appellants. (App. Tab 29.) Appellants now file this Brief in support of their position.

SUMMARY OF THE ARGUMENT

Appellants contend that the long-established law of West Virginia compels this Court to direct BSCE to revise its procedures, and to allocate child support payments first to interest and then to principal. Although this issue has not previously been considered by this Court, the outcome sought by Appellants is consistent with the West Virginia law applicable to other debts; it is consistent with the "United States rule" applicable to obligations throughout the country; and it comports with the approach taken by a majority of jurisdictions that have addressed this issue with regard to child support obligations.

In its argument to the lower courts BSCE has failed to provide authority to support its position. There is no legislative authority for their procedures, and their procedures do not have the authority of law. This is an administrative decision that is subject to judicial review. Their "policy" argument that their procedures make it easier for an obligor to discharge his obligation directly contradicts the mission of the agency, which is to enforce the court-ordered obligation of a parent to support his child. The purpose of interest on a debt is to give the obligee the present value of the debt, and the BSCE procedures defeat that purpose. For the reasons that will be discussed in detail below, this Court should direct BSCE to alter its procedures, and to allocate child support payments first to interest due on the obligation and then to principal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellants respectfully request oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure. As is demonstrated by the contents of this brief, this issue is an issue of first impression in this state, and the outcome of this case will have substantial financial impact on large numbers of citizens of the state. For these same reasons, Appellants ask this Court to decide the case on the merits by issuing an opinion.

ARGUMENT

I. WEST VIRGINIA LAW REQUIRES THAT PAYMENT ON A DEBT BE ALLOCATED FIRST TO ACCRUED INTEREST, WITH ANY REMAINING FUNDS TO BE USED TO REDUCE PRINCIPAL.

The exact issue presented here does not appear to have been addressed by the courts of West Virginia. In the context of debts other than child support, however, it has long been established in this state that a payment on a debt on which interest has accrued is applied first to interest, with any additional funds being applied to principal.

Three 19th century decisions established this procedure, and it has not subsequently been challenged. In *Hurst's Adm'r v. Hite*, 20 W. Va. 183, 1882 WL 3509 (1882), the court stated: "[T]he proper rule is to bring the interest on the principal sum up to the date of each payment, and in case the interest exceeds the payment deduct it from the amount of that payment, thus making partial payments first applicable to the interest." 1882 WL 3509, at *7. That case also prohibited the award of interest on interest, stating that if the payment falls short of the interest owed, the balance of interest is not to be added to the principal, but is to be set apart and extinguished by the next payment. *Id.* at *8.

The court in *Ward v. Ward*, 21 W. Va. 262, 1883 WL 3151 (1883), reached the same conclusion, stating:

> The proper rule for computing interest, where partial payments have been made, is to deduct the payment from the aggregate sum of principal and interest, computing the latter to the date of the payment, and the balance forms a new capital on which interest is to be computed to the next payment; but the new capital must in no instance be more than the former, so that if the payment be less than the interest due, the excess of interest must not augment the

> remaining capital, because that would give interest upon interest, which would be unlawful.

Syl. pt. 3, 21 W. Va. at 274; *accord Liskey v. Snyder*, 66 W. Va. 149, 66 S.E. 702, 709 (1909).

Although it is odd to find so little recent case law on this issue, one can assume that the issue is deemed settled and not worth litigating.

II. NATIONAL LAW AND THE LAW OF OTHER JURISDICTIONS IS SIMILAR TO THE LAW OF WEST VIRGINIA ON THIS ISSUE.

A. National Law

The clearest statement of what could be called "national law" is found in American treatises such as American Jurisprudence. This issue is addressed in that treatise as follows:

> In applying partial payments to an interest-bearing debt which is due, the rule known as the "United States rule," is that in the absence of an agreement or statute to the contrary, the payment will be first applied to the interest due.
>
> If the payment exceeds the interest due, the surplus goes toward discharging the principal, and the subsequent interest is computed on the balance of the principal. If the payment falls short of the amount of the interest due, the balance of the interest is not generally added to the principal so as to produce interest.

44B Am. Jur. 2d *Interest and Usury* § 72 (database updated Nov. 2010) (case citations omitted).

On the issue of applying the payment first to the interest due, the treatise cites the decision of the U.S. Supreme Court in *Woodward v. Jewell*, 140 U.S. 247, 248 (1891), where

there was a challenge to the jurisdiction of the court to hear a matter valued at under $5,000, which was the balance on the debt if all payments were applied only to principal. Recognizing that the calculation suffered from the same weakness shown in the calculations of BCSE, the court explained the correct calculations to be as follows:

> Interest on that amount should be computed to the time of first payment, then the payment applied, (it exceeding the interest up to that time,) and a computation made of the interest on the balance to the time of the second payment, and so on.

Id. at 248. Using the correct computation, the court concluded that the debt satisfied the jurisdictional amount.

B. Law Of Other States

Although the issue does not arise frequently, several other states have addressed the matter within the past 10 years. For example, see the following: *State v. Trask*, 98 Wash. App. 690, 696, 990 P.2d 976, 979 (2000) ("When a judgment debtor makes a partial payment into the registry of the court, the payment generally is applied first to interest and then to principal, while the remainder of the principal continues to draw postjudgment interest."); *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 816 (Tex. 2006) ("[E]ach credit applies first to the accrued interest and then to the principal, with each credit establishing a new interval[.]"); *Carter v. Williams*, 2002 ME 50, ¶ 32, 792 A.2d 1093, 1101 ("Any amount tendered must be applied to interest first, with the remainder applied to the judgment. Thereafter, interest would accrue on the unpaid portion of the judgment."); *Camp v. Camp*, 14 Neb. App. 473, 483-84, 709 N.W.2d 696, 705 (2006) ("As a general rule, interest on a

judgment or debt is computed up to the time of the first payment, and that payment is first applied to interest and the balance to principal.").

To support its conclusion, the Washington court in *Trask* included, in a footnote, the following decisions which demonstrated the principle that a judgment debtor's partial satisfaction of a judgment is applied first to interest and then to principal:

> *Security Ins. Co. of Hartford v. Houser,* 191 Colo. 189, 552 P.2d 308, 311 (1976); *Claudio v. School City of Gary,* 448 N.E.2d 1212, 1215 (Ind. App.1983); *Christensen v. Snap-On Tools Corp.,* 554 N.W.2d 254, 261-62 (Iowa 1996); *Gail v. Western Convenience Stores,* 434 N.W.2d 862, 864 (Iowa 1989); *Landess v. State,* 335 P.2d 1077, 1079 (Okla.1958); *Morley v. Morley,* 102 N.C. App. 713, 403 S.E.2d 574, 575 (1991).

98 Wash. App. at 696 n.13, 990 P.2d at 979 n.13.

These cases demonstrate the broad and continuing acceptance, throughout the country, of the principles set forth in the early West Virginia decisions quoted above.

III. THE STATES THAT HAVE ADDRESSED THE ISSUE HAVE APPLIED THE SAME RULE TO CHILD SUPPORT OBLIGATIONS THAT IS APPLIED TO ANY OTHER DEBT.

Research has identified only five states that have addressed the issue of allocation of child support payments between interest and principal, and all have applied the "United States rule" that directs payment of interest before reduction of principal.

All states are required by the federal regulations to allocate payments first to the support obligation for the month in which the payment is received, and to allocate any excess

amount to "the required support obligation for previous months." 45 C.F.R. § 302.51(a)(1). That subsection states:

> The State plan shall provide as follows:
>
> (a)(1) For purposes of distribution in a IV-D case, amounts collected . . . shall be treated first as payment on the required support obligation for the month in which the support was collected and if any amounts are collected which are in excess of such amount, these excess amounts shall be treated as amounts which represent payment on the required support obligation for previous months.

Id.

The cases that have been identified, along with a brief description, are listed below.

A. California

A clear example of compliance with the federal requirement can be seen in *In re Marriage of Perez*, 35 Cal. App. 4th 77, 41 Cal. Rptr. 2d 377 (1995), where the court stated the state rule as follows:

> It is statutorily required that partial payment of an interest-bearing child support obligation must be applied first to the current month's support, and then to reduce the interest accrued; any remaining amount of the partial payment is next credited to reduce the principal. (Former Code Civ.Proc., § 695.220, subd. (e), now Code Civ.Proc., § 695.221.)

Id. at 81, 41 Cal. Rptr. 2d at 378. The clear hierarchy of payments, however, leaves no question that interest is to be paid before principal arrears are reduced.

B. Oregon

> Although not so explicitly stated, the rule appears to be the same in Oregon: The trial court correctly applied the payments in excess of the monthly obligations first to accrued interest on the oldest judgments, and then to principal.

In re Marriage of Gayer, 326 Or. 436, 446, 952 P.2d 1030, 1035 (1998).

C. North Dakota

The North Dakota scheme appears to apply a rule that identifies each payment as a separate judgment, and allocates payment on the arrearage first to *interest* on the oldest payment and then to *principal* on the oldest payment:

> Following the principles under N.D.C.C. § 9-12-07(3) payments applied to arrearage should be applied first to any interest due on the earliest maturing child support payment, and then to any principal due on that payment, with any remaining excess going to the next earliest maturing support payment, to be applied in the same manner, first to interest, then to principal.

Martin v. Rath, 1991 ND 31, ¶ 25, 589 N.W.2d 896, 902.

D. Mississippi

Mississippi appears to use different language to say the same thing:

> Child support payments made after a previously unpaid payment should first be applied to aggregate interest at the legal rate accrued on such payments at the date of payment. Each payment made after the overdue payment's due date has passed is to be used to extinguish the interest and then the principal on that overdue payment. Should any money remain it will then be applied to the next overdue payment and interest in order.

Fuhr v. Fuhr, 818 So. 2d 1237, 1239 (¶ 8) (Miss. Ct. App. 2002) (footnote omitted) (internal quotation marks omitted).

E. Arizona

Application of the "United States rule" is seen most clearly in *Martin v. Martin*, 198 Ariz. 135, 7 P.3d 144 (Ct. App. 2000), in which the court stated:

> The payments should apply first to unpaid interest. In Arizona, each child support installment vests as a final judgment as it becomes due and is enforceable by law. *See Jarvis v. Jarvis,* 27 Ariz.App. 266, 267-68, 553 P.2d 1251, 1252-53 (1976); *see also* A.R.S. § 25-503 (Supp.1999) (codifying the common law rule). Under the generally prevailing "United States Rule," partial payments of a debt apply first to unpaid interest due and thereafter to the principal debt.

Id. at 138, ¶ 14, 7 P.3d at 147.

IV. POLICY.

In the lower court the BCSE made several arguments that it may attempt to reargue before this Court. As mentioned above, a policy that favors making payment easier for the obligor should not, in the view of Appellants, take precedence over a policy that permits the child to recover the full value that has been ordered by the court as support. The full value of the support would include interest, which is no more than a calculation of the loss to the obligee of not having the use of the money at the time it should have been paid.

The other argument offered by BCSE is that West Virginia has chosen its method of computing the allocation of child support payments, and that method has the full force and

effect of law. BCSE goes on to state that "[t]he only way to change that method would be through the legislative process. This is not a matter subject to a determination of law by the courts." (App. Tab 23, pp. 3-4.)

It is beyond question that the courts of West Virginia have the authority to review the exercise of discretion by an administrative agency of the state. However, the issue now before this Court is whether the Circuit Court misapplied the law when it affirmed the actions of the BCSE in allocating child support payments to principal rather than interest. The standard of review of such a decision has recently been stated by this Court:

> "In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo* "; *See also* Syl. Pt. 1, *Carr v. Hancock,* 216 W.Va. 474, 607 S.E.2d 803 (2004). Because the issue before this Court is purely a legal question, we review the rulings of the circuit court *de novo.*

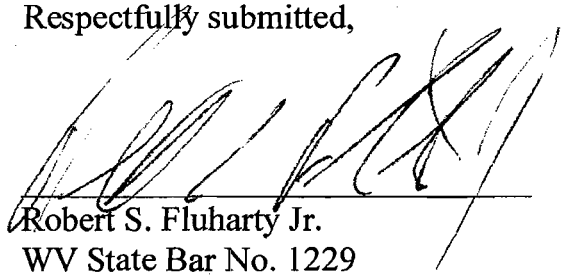
Foster v. Foster, 221 W. Va. 426, 430, 655 S.E.2d 172, 176 (2007).

CONCLUSION

Appellants ask this Court to reverse the determination of the Circuit Court that BCSE is authorized to allocate child support payments made by Appellee toward principal rather than toward interest, as would occur in West Virginia for any other obligation. BSCE has pursued this procedure despite the fact that it deprives Appellants, and consequently the minor child, of support that Appellee has been ordered to pay, and despite the fact that the procedure adopted by BCSE is contrary to long-standing West Virginia law, and is contrary

to the procedures of other states. For all the reasons stated, Appellants ask that the Circuit Court decision be reversed, and that BCSE be directed to allocate child support payments in accordance with West Virginia law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Robert S. Fluharty Jr., counsel for the Appellants, do hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANTS was served upon the persons listed below by United States mail, postage prepaid, this the 25TH day of February, 2011:

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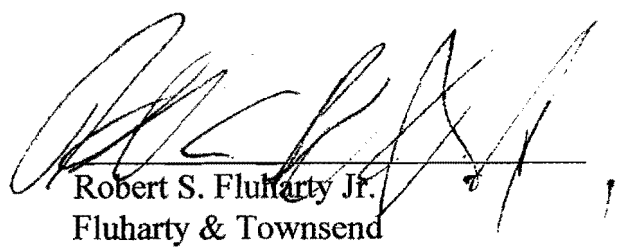

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