

No: A06-1864

**STATE OF MINNESOTA
IN COURT OF APPEALS**

In Re the Matter of:

Lori Ann Frank-Bretwisch,

Petitioner/Respondent

vs.

William Ryan,

Respondent/Appellant

APPELLANT'S BRIEF AND APPENDIX

Kathy K. Hart (#300019)
Sieloff and Associates, P.A.
Yankee Square Office III
3460 Washington Drive, Suite 214
Eagan, MN 55122
(651) 454-2000
Attorney for Appellant

Patricia A. O'Gorman (#81097)
Patricia A. O'Gorman, P.A.
8750 - 90th Street South
Suite 207
Cottage Grove, MN 55016
(651) 458-9114
Attorney for Respondent

Dakota County Attorney
Dakota County Attorney's Office
Child Support Division
One Mendota Road West, Suite 240
West St. Paul, MN 55118
(651) 554-5909
Statutory Counsel for Support Enforcement

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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LEGAL ISSUES

- I. Did the trial court err and abuse its discretion by not using current net income and by not including bonus income to calculate Respondent's current child support obligation?
- II. Did the trial court err in its failure to make required statutory written findings to support a downward deviation from the child support guidelines and by failing to address the best interests of the minor child?
- III. Did Appellant meet his burden of proof by showing a substantial change in circumstances had occurred that rendered the terms of the prior child support order unreasonable and unfair?
- IV. Did Respondent's material misrepresentation regarding her net income in the Prior Order give Appellant the option of bringing a motion pursuant to Minn. Stat. §518.145, Subd. 2 or Minn. Stat. §518.64, Subd. 2?
- V. Did the trial court err in finding that it could not address the lack of statutory findings in the Prior Order based on Appellant's failure to bring a Rule 60 motion?
- VI. Is a prior stipulated child support obligation binding on the trial court, when a substantial change in circumstances has occurred that renders the terms of the prior stipulated order unreasonable and unfair?

STATEMENT OF THE CASE

This appeal is taken from the Findings of Fact, Conclusions of Law and Order issued by the Child Support Magistrate, filed on April 3, 2006 (hereinafter 04/03/06 Order) and the Order issued on review by a district court judge, filed August 2, 2006, (hereinafter "08/02/06 Order") affirming the Child Support Magistrate's Order.

The parties' agreement to modify custody and child support was memorialized in an Order filed in Dakota County District Court on September 27, 2005. On February 18, 2006, Appellant/Obligee served and filed a Motion to Modify Child Support in the Expedited Child Support Process. The Magistrate's Order, filed April 3, 2006, denied Appellant's Motion to Modify Child Support based on its finding there had not been a substantial change in circumstances that rendered the existing child support order unreasonable and unfair.

On April 26, 2006, Appellant sought review by Dakota County District Court by serving and filing a Motion for Review. The District Court Order filed August 2, 2006, affirmed the Magistrate's Order. This appeal follows.

STATEMENT OF FACTS

Appellant and Respondent were never married. They are the parents of a child born on February 8, 1991, now age 15. Appellant was adjudicated the child's father by a Judgment filed in February 1997. A Findings of Fact, Conclusions of Law, Order and Order for Amended Judgment awarded to Respondent sole physical custody and to the

parties joint legal custody of the minor child.

Appellant served and filed a Motion to Modify Custody in August 2004. Pursuant to the temporary recommendation of a Custody Evaluator, the minor child commenced living with Appellant on April 8, 2005.

The matter came before the court for an evidentiary hearing on August 26, 2005. Prior to the commencement of the evidentiary hearing, the parties reached an agreement regarding custody, parenting time and child support. Both parties were represented by counsel. The agreement was read into the record by Respondent's counsel, but the agreement was not ratified by the parties. The parties' verbal agreement reached on August 26, 2006, was memorialized in the Order filed September 27, 2005.

By agreement, Appellant was awarded sole physical custody of the minor child, subject to Respondent's parenting time. The parties were awarded joint legal custody, provided that, in the event the parties cannot agree as to the minor child's education, health care and religious training, Appellant shall determine her upbringing, including education, health care and religious training.

Respondent/Obligor agreed to pay to Appellant/Obligee the amount of \$350.00 per month child support, commencing September 1, 2005. Respondent/Obligor's guideline child support, based upon her current net income at the time, would have been \$1,096.50. Although the agreed upon amount was a substantial downward departure from Respondent/Obligor's guideline child support obligation, the Order filed 09/27/05, lacked

findings to support the downward departure and also did not address how the stipulated amount served the child's best interests.

At the time, the district court received no documentary evidence regarding either parties' income or expenses. Respondent was employed full-time as the Manager of Retail Operations for M.A.C. Cosmetics, her employer of the past eight years. She stated gross monthly income of \$6,484.00 and net monthly income of \$4,386.00. Respondent's guideline child support obligation (25%) would have been \$1,096.50.

Appellant was unemployed. He had recently started his own company, following an extended period of unemployment and hoped his financial circumstances would soon improve. There was no finding by the court of either party's reasonable monthly living expenses.

Appellant soon realized he was not able to make ends meet. His financial circumstances did not improve as expected. His monthly expenses increased after the minor child came to live with him full-time, including increased costs for utilities, clothing, school activities, extra-curricular, sports and social activities and increased transportation costs. In addition, he provided round-trip transportation for the minor child to and from school each day and also to all educational, extra-curricular and social activities, as well as nearly 100% of parenting time transportation, despite the court's Order that the parties share parenting time transportation responsibilities.

Six months later, in February 2006, Appellant served and filed a Motion to Modify

Child Support, in the Expedited Child Support Process. The matter came on for hearing on March 14, 2006. In her Order filed March 31, 2006, the Child Support Magistrate found that Appellant/Obligee was still self-employed and received some income from employment, although no amount was stated. Respondent/Obligee was still employed by M.A.C. Cosmetics, as a salaried employee receiving periodic bonuses. Respondent's 2005 gross earnings had increased 18 percent (\$91,768.00) since the amount reported at the time of the Prior Order (\$77,808.00).

At the hearing on March 14, 2006, Appellant claimed reasonable monthly living expenses of approximately \$3,000.00 per month. Respondent claimed her monthly expenses had not changed, despite the fact that they no longer included expenses incurred on behalf of the minor child. Respondent reported incurring reasonable monthly living expenses in excess of \$11,000.00.

The Child Support Magistrate denied Appellant's Motion to Modify Child Support based on its finding there had not been a substantial change in circumstances that rendered the existing child support order unreasonable and unfair.

On April 26, 2006, Appellant sought review by Dakota County District Court by serving and filing a Motion for Review. The District Court Order filed August 1, 2006, affirmed the Magistrate's Order.

In its respective decisions, both the Child Support Magistrate and the District Court judge stated its grave concerns over the propriety of the amount of support ordered

and the lack of justification for a downward departure. Despite its “grave concerns,” the trial court denied Appellant’s Motion to modify the Prior Order and in doing so, failed to make required statutory findings to support the downward deviation in child support. The trial court also failed to address the best interests of the child.

STANDARD OF REVIEW

The trial court has wide discretion in considering motions to modify child support, and a trial court's order on modification will be reversed only if it is against logic and the facts on record. *Putz v. Putz*, 645 N.W.2d 343,347 (Minn. 2002). A trial court’s or child support magistrate’s order regarding child support modification will be reversed only if the appellate court is convinced that the trial court abused its broad discretion and reached a conclusion that is against the logic and facts on the record. *Ludwigson v. Ludwigson*, 642 N.W.2d 34, (Minn. App. 2002).

When a child support magistrate’s decision is affirmed on a motion for review, that decision becomes the decision of the district court. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n. 2 (Minn.App.2004). In appealing an order deciding a motion for review of a child support magistrate’s decision, this court reviews the order from which the appeal is taken, and, to the extent that the original decision is affirmed, it becomes the decision of the district court. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n. 2 (Minn.App.2004); see Minn. R. Gen. Pract. 376.03 (stating “[a] motion for review may be decided either by the child support magistrate who issued the decision and order or, at the request of any

party, a district court judge”).

The trial court’s decision will not be reversed unless it is a “clearly erroneous conclusion that is against logic and the facts on the record.” A trial court’s decision on child support will be reversed only when there is no evidentiary or logical justification for the amount. Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn.1984). A determination of the amount of an obligor’s income for purposes of child support is a finding of fact and will not be altered on appeal unless clearly erroneous. Ludwigson v. Ludwigson, 642 N.W.2d 441, 446 (Minn.App.2002). In order to successfully challenge a district court’s findings of fact, the party challenging the findings “must show that despite viewing that evidence in the light most favorable to the trial court’s findings … the record still requires the definite and firm conviction that a mistake was made.” Vangness v. Vangness, 607 N.W.2d 568, 4574 (Minn. App. 2000).

“On appeal from a judgment, this Court’s scope of review is limited to deciding whether the trial court’s findings are clearly erroneous and whether it erred in its legal conclusions. When the trial court’s findings are reasonably supported by the evidence, they are not clearly erroneous and must be affirmed.” Citizens State Bank of Hayfield v. Leth, 450 N.W.2d 923, 925 (Minn. App.1990) (citations omitted); see also Schweich v. Ziegler, 463 N.W.2d 722, 729 (Minn.1990).

Clearly erroneous means “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Northern States Power Co. v. Lyon

Food Prod., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975); see also Hubbard v. United Press Int'l Inc., 330 N.W.2d 428, 441 (Minn.1982).

This Court does not defer to a district court's interpretation of a statute. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985) (statutory construction “is clearly a question of law.”)

A reviewing court is not bound by and need not give deference to a trial court's determination of a pure legal question. See Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn.1984); A.J. Chromy Constr. Co. v. Commercial Mechanical Servs., Inc., 260 N.W.2d 579, 582 (Minn.1977).

An appellate court “conduct[s] an independent review of the record in light of the relevant law to determine if the” lower court made the proper legal conclusion. Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 483 (Minn.1985).

Abuse of Discretion

An abuse of discretion will not be found absent “a clearly erroneous conclusion that is against logic and the facts on the record.” Chamberlain at 409, citing Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984).

Errors of Law.

“On appeal, this court need not defer to the trial court’s conclusion when reviewing questions of law.” County of Lake v. Courtney, 451 N.W.2d 338, 341 (Minn.App. 1990), *pet. for rev. denied* (Minn., Apr. 13, 1990); see also Waste Recovery

v. County of Hennepin, 475 N.W.2d 892, 895 (Minn.App. 1991), *pet. for rev. denied* (Minn. Dec. 9, 1991).

ARGUMENT

On August 26, 2005, prior to the commencement of an evidentiary hearing, the parties reached an agreement regarding custody, parenting time and child support. In the order filed September 27, 2005, (hereinafter referred to as "Prior Order"), Respondent was ordered to pay to Appellant \$350.00 per month child support, commencing September 1, 2005.

Paragraph six of the Prior Order states: "The circumstances upon which this award is based is as follows: Petitioner is employed and earns gross monthly income of \$6,484.00 and net monthly income of \$4,386.00. The Respondent is self-employed. He has \$0 net monthly income." (A.23)

In February 2006, Appellant filed a motion to modify the Prior Order, pursuant to Minn. Stat. §518.64, Subd. 2, based upon a substantial change in circumstances that rendered the terms of the Prior Order unreasonable and unfair.

At the hearing on March 14, 2006, evidence showed that Respondent earned \$91,768.00 gross wages in 2005, an 18 percent increase since the time of the Prior Order. Respondent's net monthly income had increased from \$4,386.00 to \$5,575.00. Guideline child support (25%) at the time of the Prior Order, based on net monthly income of \$4,386.00. would have been \$1,096.50 per month. Guideline child support (25%) based

on Respondent's current net monthly income of \$5,575.00 is \$1,393.77, a 27% increase from Respondent's guideline child support obligation, based on her net monthly income at the time of the Prior Order.

The terms of a child support order may be modified upon a showing of 1) a substantial change in circumstances; and 2) that the change makes the existing award unreasonable and unfair. *O'Donnell v. O'Donnell*, 678 n.W.2d 471 (Minn. App. 2004) citing *Stephens v. Stephens*, 407 N.W.2d 468, 470-471 (Minn. App. 1987). See Minn. Stat. §518.64, subd. 2(a) (2002). A change in circumstances includes a substantial increase or decrease in a party's earnings or expenses or substantially increased or decreased need of a party or child that are the subject of the proceeding. Minn. Stat. §518.64, subd. 2(a)(1-2).

It is presumed that there has been a substantial change in circumstances under paragraph (a) and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if the application of the child support guidelines to the current circumstances of the parties results in a calculated court order that is at least twenty percent (20%) and at least \$50.00 per month higher or lower than the current support order. Minn. Stat. §518.64, subd. 2(b)(1).

The trial court, in orders filed April 3, 2006 (child support magistrate) and August 2, 2006 (district court judge) (hereinafter referred to respectively as "April 3, 2006 Order" and "August 2, 2006 ") denied Appellant's motion to modify child support, based upon its

finding that there had not been a substantial change in circumstances since entry of the Prior Order.

I. **THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT USING CURRENT NET INCOME, AND BY NOT INCLUDING BONUS INCOME TO CALCULATE RESPONDENT'S CURRENT CHILD SUPPORT OBLIGATION**

Respondent is employed by M.A.C. Cosmetics as a Manager of Retail Operations. She has been employed by this company since 1997. She is an exempt, salaried employee. At the hearing on March 14, 2006, Respondent's current income was not disputed. Dakota County Child Support filed Department of Economic Security statements indicating Respondent earned \$91,768.00 (gross) in 2005, from wages including salary and bonus (\$7,647.34 gross per month).

In the April 3, 2006 Order, the trial court used this evidence provided by Dakota County Child Support to support its finding that Respondent "had income for the 1st quarter of 2005 of \$19,498.95, \$19,498.95 for the 2nd quarter and \$31,169.94 for the third quarter. The [Respondent's] salary during this period was a gross monthly income of \$6,499.65. The [Respondent] received a bonus during the 3rd quarter. The [Respondent] received an increase in her salary making her quarterly wages \$21,600.00 or a gross annual income of \$86,400.00 for 2006. This is an 11% increase." (4/3-03/06 Order; Findings of Fact 48, 49, 50; A.14). Respondent's first, second, third and fourth quarter earnings total \$91,768.00.

The trial court's reference to an 11% increase in 2006 (\$86,400.00), refers only to Respondent's salary and excludes bonus income. In the August 2, 2006 order, the trial court erroneously excluded Respondent's bonus income and found she earned gross monthly of \$6,499.65. Evidence received at the hearing showed Respondent earned \$91,768.00 (gross) in 2005, including bonus income.

"Child support is based on current net income." Kramer v. Kramer, 372 N.W.2d 364, 368 (Minn. Ct. App. 1985.) The Court cannot speculate on income in setting child support. The Court must use the most current information pertaining to income. Merrick v. Merrick, 440 N.W.2d 142 (Minn. Ct. App. 1989).

At the hearing in March 2006, Respondent testified that she receives merit raises during the third quarter of each calendar year (approximately 4%). Respondent also testified that she receives annual bonuses. Respondent testified she is notified of bonus pay at the end of each fiscal year (July). Respondent admitted she received bonus income each year for eight years, since 1998. Respondent's bonuses have been a dependable form of periodic payment and are expected to continue.

In determining whether or not to modify child support, the trial court erroneously excluded Respondent's bonus income when calculating her current net monthly income. The trial court's exclusion of Respondent's bonus income, in its April 3, 2006, and August 2, 2006 orders, was erroneous and was not supported by and was contrary to the evidence.

Bonuses received by an obligor are income for child support purposes. Lynch v. Lynch, 411 N.W.2d 771 (Minn. Ct. App. 1987); Novak v. Novak, 406 N.W.2d 64 (Minn. Ct. App. 1987.) This is especially true if bonuses have been a dependable form of periodic payment and are expected to continue.

Bonus income may be subject to a child support order, notwithstanding that the bonuses were not guaranteed and were of variable amounts. Desrosier v. Desrosier, 551 N.W.2d 507 (Minn. Ct. App. 1996). The Desrosier case included bonuses for an obligor who received annual bonuses in the preceding five-year period ranging from \$7,000.00 to \$17,000.00.

Respondent's bonus income should be included in her net monthly income for purposes of calculating her guideline child support obligation. Respondent's 2005 gross annual income of \$91,768.00, including bonus income and results in net monthly income of \$5,575.00 and based on her current net monthly income, Respondent's guideline monthly child support obligation (25%) is \$1,393.77.

Respondent's 2005 earnings are 18 percent higher (\$91,768.00) than reported at the time of the Prior Order (\$77,808.00). "It is within the trial court's discretion to find a substantial change in circumstances where one party's income increased by fifteen percent. Martin v. Martin, 401 N.W. 2d 107 (Minn. Ct. App. 1987), *citing* Mackin v. Mackin, 392 N.W.2d 661, 663 (Minn. Ct. App. 1986).

Since the Prior Order, Respondent's net monthly income increased from \$4,386.00

to \$5,575.08. Based on her current net income, Respondent's guideline child support obligation is 20 percent and \$50.00 higher than the current support order (\$350.00) and is also 20 percent and \$50.00 higher than Respondent's prior guideline child support obligation (\$1,096.50). A substantial change in circumstances is presumed.

Respondent cannot in good faith argue that because she failed to disclose the amount of her bonus income at the prior hearing, that there was no change of circumstances on the basis that her income was the same as it was at the prior hearing. Her failure to disclose then and her disclosure as a result of Appellant's February 2006 Motion is in itself a substantial change in circumstances.

Appellant, the moving party, met his burden of proof in that Respondent's substantially increased income constitutes a substantial change in circumstances since the Prior Order, that renders the terms of the prior child support order unreasonable and unfair.

Despite the rebuttable presumption, the trial court denied Appellant's Motion to modify child support and upheld the parties' previously stipulated child support obligation. Respondent's current child support obligation (\$350.00) is a mere **six percent** of her current net income (\$5,575.00). The trial court made no finding as to how the downward deviation from the guideline child support obligation serves the minor child's best interests and made no findings to support the continued downward deviation, despite the non-disclosure of Respondent's bonus income in the Prior Order.

II. **THE TRIAL COURT ERRED IN ITS FAILURE TO MAKE REQUIRED STATUTORY WRITTEN FINDINGS TO SUPPORT A DOWNWARD DEVIATION FROM THE CHILD SUPPORT GUIDELINES AND BY FAILING TO ADDRESS THE BEST INTERESTS OF THE MINOR CHILD**

The trial court erred by failing to make required statutory written findings to support a downward deviation from the child support guidelines and by failing to address the best interests of the minor child.

The statutory support guidelines are a “rebuttable presumption” and must be used in all cases when establishing or modifying support. Minn. Stat. §518.551, subd. 5(i) If the court deviates above or below the guidelines, the court must make written findings giving the amount of support calculated under the guidelines, the reasons for the deviation, and must specifically address the relevant statutory factors and how the deviation serves the best interests of the child. Minn. Stat. §518.551, Subd. 5(c).

Pursuant to Minn. Stat. §518.551, Subd. 5(c), the court shall take into consideration the following factors in setting or modifying (emphasis mine) child support or in determining whether to deviate from the guidelines: (1) all earnings, income and resources of the parents, including real and personal property; (2) the financial needs and resources, physical and emotional condition, and educational needs of the child or children to be supported; and (3) the standard of living the child would have enjoyed...recognizing that the parents now have separate households. [Emphasis mine]

The statutory presumption embodied in Minn. Stat. §518.64, (modification)

functions with Minn. Stat. §518.551, subd. 5(i), regarding deviation from the guidelines. A determination whether a substantial change in circumstances renders a Prior Order unreasonable and unfair requires consideration of other factors, including Respondent's needs and the needs of the child. Martin v. Martin, 401 N.W. 2d 107 (Minn. Ct. App. 1987) When the court only makes findings on net income of the parties at the time of the Prior Order and at the time of the modification motion, the findings are inadequate.

The court may deviate from the guidelines if both parties agree and the court makes written findings that it is in the best interest of the child. However, the requirement for written findings applies whether or not the parties are each represented by independent counsel and whether or not there is a written agreement concerning child support. Minn. Stat. §518.551, subd. 5(i).

In the Prior Order, the trial court did not make adequate findings because it failed to address Appellant/Oligee's needs or the needs of the minor child, pursuant to Minn. Stat. §518.551, Subd. 5(i).

"To facilitate future motions to modify child support, district courts addressing child support, even if doing so by adopting a stipulation of the parties, should make findings of fact addressing the parties' existing circumstances. Maschoff v. Leiding, 696 N.W.2d 834 (Minn. Ct. App. 2005).

Respondent's current child support obligation (\$350.00) is less than one-third the amount of her guideline child support obligation (\$1,096.50) based on her net monthly

income at the time of the Prior Order. Respondent's current child support obligation (\$350.00) is approximately one-fourth of her child support obligation based upon her current net monthly income (\$1,393.77).

Respondent's current monthly child support obligation is a substantial downward deviation from her guideline support obligation. Despite this, in all three orders: 1) the stipulated Prior Order; 2) the April 3, 2006 order; and 3) the August 2, 2006 order; the trial court failed to make written findings to support the downward deviation. In all three orders, the trial court failed to consider the best interests of the minor child. In all three orders, the trial court failed to make a written finding "giving the amount of support calculated under the guidelines." None of the three orders found that the amount of support ordered was a downward deviation from the child support guidelines.

The trial court's error in not considering these factors at the time the parties stipulated to the Prior Order does not bar consideration of these factors on a motion for modification. The trial court cannot be permitted to perpetuate errors in the future by relying on its past errors. The parties' current financial circumstances are determinative and must be considered as the basis for the current order.

Respondent continues to claim more than \$11,000.00 in monthly living expenses, despite the trial court's finding in June 2005 that her monthly budget is not reasonable. (Findings of Fact, Conclusions of Law and Order filed June 1, 2005) Respondent also claimed that her monthly expenses did not decrease, despite the fact that the amount of

her previously stated monthly expenses included expenses incurred on behalf of the minor child while the minor child resided in her home. The minor child no longer resides with Respondent.

In pleadings and at the hearing in March 2006, Respondent admitted that she contributes 16% of her pretax gross income to retirement. This is not a reasonable retirement contribution.

Respondent claims monthly expenses between \$1,647.0 and \$1,397 for transportation costs, including \$607.00 per month for vehicle payments, despite having the use of a company vehicle for personal use. Respondent reported expenses greater than \$1,000.00 per month for jewelry, miscellaneous items and gifts. Respondent admitted spending more on motorcycle payments than on child support. (Respondent's Budget Worksheet attached as Exhibit J to Appellant's Affidavit dated 2/16/06)

Appellant's financial circumstances did not improve as anticipated at the time of the Prior Order. Appellant had recently started his own company, following an extended period of unemployment. Appellant's reasonable monthly living expenses increased since the Prior Order and the increased expenses were not anticipated at the time of the Prior Order.

Appellant testified he experiences a significant budget deficit each month and is forced to use credit cards to pay necessary monthly living expenses. The current child support amount is not sufficient to meet the needs of the child.

III. APPELLANT MET HIS BURDEN OF PROOF SHOWING A SUBSTANTIAL CHANGE IN CIRCUMSTANCES HAD OCCURRED THAT RENDERED THE TERMS OF THE PRIOR CHILD SUPPORT ORDER UNREASONABLE AND UNFAIR

In the April 3, 2006 order and August 2, 2006 order, the trial court failed to consider the inequities of the prior child support order when considering how much “change” is required to be considered a “substantial” change. Because the Prior Order was substantially unfair and did not consider the best interests of the minor child, a substantial change in circumstances is more easily established. Compart v. Compart 417 N.W.2d 658 (Minn. App. 1988) and Murray v. Murray, 425 N.W. 2d 315 (Minn. App. 1988).

In both the April 3, 2006 order and the August 2, 2006 order, the trial court abused its discretion by construing its role as and its refusal “to sit as a court of appeals regarding these issues.” (A.7)

In the 08/02/06 order, the trial court noted that both parties were represented by counsel “during the stipulation.” (A.7). However, the trial court erred by concluding, “that such representation places the District Court in a position which ‘it shall approve a child support stipulation.’” The trial court cited Minn. Stat. §518.551, subd. 5(a) (2004), the applicable portion of which reads in its entirety as follows: “The court shall approve a child support stipulation of the parties if each party is represented by independent counsel, unless the stipulation does not meet the conditions of paragraph (i). (Emphasis

mine) Minn. Stat. §518.551, subd. 5(a).

The trial court's analysis ended where it should have begun. Minn. Stat. §518.551, subd. 5(i) explains that the guidelines are a rebuttable presumption and how to properly handle a deviation from the guidelines, including a finding regarding the child's best interests. Minn. Stat. §518.551, subd. 5(i) also applies to stipulated orders.

In both the April 3, 2006 order and the August 2, 2006 order, the trial court expressed "grave concerns over the propriety of the amount of support ordered and the lack of justification for a downward departure." (A.7 and A.16). The trial court should have taken the next logical step in its analysis by finding that the "grave concerns" were a consequence of the court's failure to follow the statute in the Prior Order and not lament that it is not a court of appeals. The trial court's failure to act on or address its "grave concerns" is against logic and the facts on [the] record and therefore constitutes an abuse of discretion.

IV. RESPONDENT'S MATERIAL MISREPRESENTATION REGARDING HER NET INCOME IN THE PRIOR ORDER GAVE APPELLANT THE OPTION OF BRINGING A MOTION PURSUANT TO MINN. STAT. §518.145, Subd. 2, OR MINN. STAT. §518.64, Subd. 2

Respondent intentionally misrepresented her earnings to the court at the time of the Prior Order by stating she received gross monthly income in the amount of \$6,484.00. This amount did not include bonus income.

At the time of the Prior Order, Respondent had already received notice from her

employer of the amount (\$9,500.00) of her 2005 bonus, but she failed to disclose this information to Appellant or to the court. Respondent understated her 2005 earnings at the time of the Prior Order, by claiming to earn only \$77,808.00. Appellant was not aware of Respondent's actual earnings at the time he entered into the stipulated Prior Order, and did not learn of these actual earnings until after he served and filed his motion to modify child support in February 2006.

Appellant did not seek post-trial relief or appellate review of the Prior Order. He could not have done so because he was precluded from doing so by Respondent's failure to disclose the amount of her bonus income. Moreover, Appellant's failure to appeal or move to vacate the Prior Order does not change the fact that in the April 3, 2006 and August 2, 2006 orders, the minor child's best interests were not served and that the court did not base child support on Respondent's current net income.

V. **THE TRIAL COURT ERRED IN FINDING THAT IT COULD NOT ADDRESS THE LACK OF STATUTORY FINDINGS IN THE PRIOR ORDER BASED ON APPELLANT'S FAILURE TO BRING A RULE 60 MOTION**

Minnesota Rules of Civil Procedure, Rule 60 does not apply to the relief of a judgment or order in a family law proceeding under chapter 518. To obtain relief from a judgment or order in a proceeding under chapter 518, Minn. Stat. §518.145, subd. 2 is the exclusive remedy. *Maranda v. Maranda*, 449 N.W.2d 158 (Minn. 1989), *Harding v. Harding*, 620 N.W. 2d 920 (Minn. Ct. App. 2001), review denied. In *Maranda*, the

Minnesota Supreme Court stated, "...*In the future*, however, motions to modify divorce decrees brought under Rule 60.02 should not be entertained by the district courts. The district courts lack jurisdiction under Rule 60.02 to consider such motions." Maranda at 164.

Except, however, Minn. Stat. §518.64, Subd. 2(d) provides an alternative statutory remedy to Minn. Stat. §518.145, subd. 2, by permitting a motion to modify a child support order based on a substantial change of circumstances and permitting a party to seek a modification of child support retroactive to the date of a previous order or "earlier period" if the change of circumstances motion is based on the grounds set forth in Minn. Stat. §518.64, Subd. 2(d)(1), which includes "a material misrepresentation of another party or fraud upon the court." The effect of such a motion and the authority of the court to make it retroactive has the same effect as a motion pursuant to Minn. Stat. 518.145, Subd. 2.

The court erred in finding that Appellant "failed to bring a Rule 60 Motion before the district court. Appellant could not have done so. The Appellant had the option of either bringing a motion under §518.145, subd. 2, or Minn. Stat. §518.64, Subd. 2. He chose the latter and he was within his right to do so. In the prior proceeding, Respondent made a material misrepresentation to Appellant and to the court by (at minimum) omission, because at the time of the Prior Order, Respondent knew the amount of her bonus income and failed to disclose it.

In family law, fraud, which is sometimes referred to as "ordinary fraud" consists of

a simple failure to disclose and does not require a fraudulent intent. “Ordinary fraud, in a dissolution context, does not require an affirmative misrepresentation or an intentional course of concealment because parties to a marriage dissolution have a duty to disclose all assets and liabilities completely and accurately.” *Bollenbach v. Bollenbach*, 175 N.W.2d 148, 155 (1970). *Doering v. Doering*, 629 N.W.2d 124, 130 (Minn.App.2001).

Minn. Stat. §518.64, Subd. 2(d)(1) does not require fraud as a predicate for the motion, but only requires a material misrepresentation or omission by the other party. Under either theory, the knowing failure to disclose the amount and receipt of Respondent’s bonus income is sufficient grounds to amend the prior order and to make the increased child support retroactive to an “earlier period” than the date of service and filing of the motion requesting the relief.

The trial court erroneously turned Minn. Stat. 518.64, Subd. 2(d)(1) and *Bollenbach* on its head. The duty to disclose the bonus income was on Respondent. The mere fact that Appellant may have known that Respondent had received bonuses in the past is not a defense to the Respondent for her nondisclosure.

Every party to a family law proceeding owes a fiduciary duty to the other party to fully and fairly disclose all material facts. There is no authority of which the undersigned is aware that a party who would benefit from knowledge of undisclosed facts is deemed to have waived his or her right to knowledge of those facts because at some remote time that party may have had knowledge or notice of some related facts.

VI. **A PRIOR STIPULATED CHILD SUPPORT ORDER CANNOT BE BINDING ON THE TRIAL COURT WHEN A SUBSTANTIAL CHANGE IN CIRCUMSTANCES HAS OCCURRED THAT RENDERS THE TERMS OF THE PRIOR STIPULATED ORDER UNREASONABLE AND UNFAIR.**

Courts will not be bound by an agreement between parents affecting the rights of minor children with respect to support, but will be controlled by the welfare of the child as the paramount consideration. *Id. citing Kiesow v. Kiesow*, 133 N.W.2d 652; *Mund v. Mund*, 90 N.W.2d 309; *Mark v. Mark*, 80 N.W.2d 621.

A child support obligation predicated upon a stipulation does not deprive the court of the authority to award suitable amounts for the support of minor children. *See Tammen v. Tammen*, 182 N.W.2d 840 (Minn.1970).

The propriety of the downward deviation in the Prior Order is a proper subject for the trial court's review. A stipulated child support amount in an amount below the guidelines does not require that subsequent modifications also be set below guidelines. While it is appropriate to consider the fact of a prior stipulation when modifying support, it is unreasonable to defer to that stipulation without exception. *Lemtouni v. Lemtouni*, 2003 WL 21321830 (Minn. App. 2003) [Attached.]

At the time of the Prior Order, the trial court may have abused its discretion in approving the parties' stipulation regarding child support. This provides no basis for continued deference to the below-guideline amount of child support, particularly without adequate findings regarding the best interests of the minor child. *Citing Lemtouni at*3.*

“Case law too voluminous to cite stresses the importance of protecting the best interests of minor children and of minimizing for them the adverse consequences of their parents’ marriage dissolution. Further, unfortunately at times parents self interest may be at odds with their children’s best interests.” *citing Compart v. Compart*, 417 N.W. 2d 658, 662 (Minn. Ct. App. 1988) The parties’ stipulation set forth in the Prior Order indicates that Respondent’s self-interest is at odds with the best interests of the minor child.

Courts must not blindly accept and approve a stipulation between the parties in regard to support of children. *See Compart at 662*. Moreover, even if the court was blind in the past, in a subsequent motion the court cannot put a bag over its head to avoid seeing the present.

Child support relates to nonbargainable interests of children and is less subject to restraint by stipulation than are other dissolution matters. *Id.* This principal applies, whether the proceeding is an establishment or modification of support.

The parties’ agreement, as memorialized in the Prior Order, set Respondent’s child support at less than one-third of the amount called for by child support guidelines. This agreement was not consistent with the court’s obligation to protect the interests of the minor child. *Compart at 662*.

Courts will not be bound by an agreement between parents affecting the rights of minor children with respect to support, but will be controlled by the welfare of the child as the paramount consideration. *Id. citing Kiesow v. Kiesow*, 133 N.W.2d 652; *Mund v.*

Mund, 90 N.W.2d 309; Mark v. Mark, 80 N.W.2d 621.

In a 1988 post-dissolution child support modification proceeding, the Court of Appeals found that the trial court erred, in part, because the evidence showed that the minor children's needs had increased while appellant/obligee's income had decreased. Compart v. Compart, 417 N.W.2d 658 (Minn. Ct. App. 1988).

In *Compart*, the obligee brought her first motion to modify one year after the parties entered into a stipulated decree. The trial court denied Appellant's first motion and she brought a new motion, approximately seven months later. In her second Motion, Appellant/obligee alleged that the terms of the original decree were improper and she sought a modification of the decree based on a substantial change in circumstances.

Not only did the Court of Appeals agree that there had been a substantial change in circumstances which made the terms of the original support order unreasonable and unfair, the court expressed "an additional concern as to whether child support in the original decree might itself have been unreasonable and unfair."

In the Compart case, obligee was pro se at the time of the original stipulation. The fact that the parties in this case were represented by counsel at the time of the stipulation does not change the importance of protecting the best interests of the minor child subject to this proceeding.

CONCLUSION

The Court of Appeals should order Respondent to pay guideline child support to

Appellant, in the amount of \$1,393.77 per month, based on her current, net monthly income, commencing retroactively to September 1, 2005.

Respectfully submitted.

Dated: December 4, 2006

SIELOFF AND ASSOCIATES, P.A.



Kathy K. Hart (#300019)

Yankee Square Office III

3460 Washington Drive, Suite 214

Eagan, Minnesota 55122

(651) 454-2000

Attorneys for Appellant