

COURT FILE NOS. A06 -1015

*STATE OF MINNESOTA
IN THE SUPREME COURT*

—
Wayne Alan Butt, fka
Wayne Alan Butt Schmidt, *Appellant*,

v.

Eleanor Anna Schmidt, fka
Eleanor Anna Butt Schmidt, *Respondent*

APPELLANT WAYNE ALAN BUTT SCHMIDT'S BRIEF AND APPENDIX

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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).

APPELLANT'S TABLE OF CONTENTS

	Page
<i>TABLE OF AUTHORITIES</i>	<i>-ii-</i>
<i>STATEMENT OF THE CASE</i>	<i>-1-</i>
<i>STATEMENT OF THE FACTS</i>	<i>-6-</i>
<i>ISSUES</i>	<i>-20-</i>
1. DID THE COURT OF APEALS ERR BY CONFERRING AUTHORITY ON THE TRIAL COURT TO MODIFY THE PARTIES' STIPULATED MAINTENANCE AWARD WHERE THE TRIAL COURT HAD ALREADY DIVESTED ITSELF OF JURISDICTION AND THE ISSUE WAS NOT RAISED ON APPEAL?	
2. DID THE TRIAL COURT ERR BY FAILING TO IMPUTE INCOME TO ELEANOR?	
3. DID THE TRIAL COURT ERR BY FAILING TO REVIEW WAYNE'S SUPPORT OBLIGATION <i>DE NOVO</i>?	
<i>STANDARD OF REVIEW</i>	<i>-21-</i>
<i>ARGUMENT</i>	<i>-21-</i>
<i>CONCLUSION</i>	<i>-34-</i>

TABLE OF AUTHORITIES

Judicial Decision, Minnesota:

<i>Burkstrand v. Burkstrand</i> , 632 N.W.2d 206, 209 (Minn. 2001)	21
<i>Evans v. Evans</i> , 672 N.W.2d 232 (Minn.App. 2003)	20, 23
<i>Geske v. Marcolina</i> , 624 N.W.2d 813, 818 (Minn.App. 2001)	19, 25
<i>Gorz v. Gorz</i> , 552 N.W.2d 556, 558 (Minn.App. 1996)	20, 29
<i>Herubin v. Finn</i> , 603 N.W.2d 133, 137 (Minn.App. 1999)	21, 24
<i>In Re Bender</i> , 671 N.W.2d 602, 606 (Minn.App. 2003)	20, 32, 33
<i>Johnson v. Murray</i> , 648 N.W.2d 644, 670 (Minn. 2002)	21
<i>Karon v. Karon</i> , 435 N.W.2d 501 (Minn. 1989)	11, 20, 21, 22, 23, 24
<i>Ludwigson v. Ludwigson</i> , 642 N.W.2d 441, 446 (Minn.App. 2002)	26
<i>Moylan v. Moylan</i> , 384 N.W.2d 859, 864 (Minn. 1986)	21, 32
<i>Nazar v. Nazar</i> , 505 N.W.2d 628, 633 (Minn.App. 1993)	32
<i>Porro v. Porro</i> , 675 N.W.2d 82, 85 (Minn.App. 2004)	21
<i>Putz v. Putz</i> , 645 N.W.2d 343 (Minn.App. 2002)	20, 29
<i>Strandberg v. Strandberg</i> , 664 N.W.2d 887, 889 (Minn.App. 2003)	21
<i>Thiele v. Stich</i> , 425 N.W.2d 580, 582 (Minn. 1988)	19
<i>Tweeton v. Tweeton</i> , 560 N.W.2d 746 (Minn.App. 1997)	29
<i>Vangsness v. Vangsness</i> , 607 N.W.2d 468, 474 (Minn.App. 2000)	26

Statutory Provisions:

Minnesota Rules of Civil Procedure 12.08(c) 24

Minnesota Statutes, Section 518.145, Subd. 2 22, 23

Minnesota Statutes, Section 518.551 15

Minnesota Statutes, Section 518.551, Subd. 5b(d)(e) 13, 19, 20, 24, 25, 28

Minnesota Statutes, Section 518.551, Subd. 5b(c)(j) 20, 33

Minnesota Statutes, Section 518.552, Subd. 4 22

Minnesota Statutes, Section 518.552, Subd. 20, 23, 24

STATEMENT OF THE CASE

Wayne Butt (formerly Wayne Butt Schmidt, hereinafter “Wayne”) and Eleanor Schmidt (formerly Eleanor Butt Schmidt, hereinafter “Eleanor”) had their marriage dissolved on December 27, 2005. They have three minor children, namely, Jeremy, Jeffrey and Jessica Butt-Schmidt. In December 2003 Wayne filed for dissolution of their marriage in Washington County District Court, Court File No. F0-03-7349. The case was assigned to the Honorable Stephen Muehlberg.

There were numerous orders for protection and harassment orders sought by each party during the pendency of their dissolution action. Some of those had a bearing on the issues of temporary maintenance and child support, and are more fully discussed herein in the *Statement of Facts*.

The parties appeared in Court on July 30, 2004, for their temporary hearing. The issue of Eleanor’s employment was brought up at that hearing. Her attorney made no claims that Eleanor was not capable of obtaining gainful employment. [A 214]

On August 5, 2004, the Honorable Stephen Muehlberg issued a temporary order, granting Eleanor temporary physical custody of the parties’ minor children, temporary child support of \$2,358 per month and \$1,010 a month temporary maintenance. Due to her purported unemployed status, Judge Muehlberg specifically reserved for *de novo* review at the time of trial Eleanor’s employment status, as well as the calculation of support and maintenance. The Court also ordered Wayne to pay the second mortgage on the house of \$800 a month and Eleanor to pay the first mortgage of \$2,600 a month. In its order the Court found,

“[Eleanor] is capable of finding suitable employment to become partially self-supporting.” [A 331]

On November 29, 2004, Wayne brought a motion to vacate the temporary maintenance award. The basis for the motion was that within a week of the issuance of the temporary order, Eleanor had obtained employment at a bakery. She claimed an injury on the job and advised Wayne that she was receiving work comp. She also advised Wayne that she was working part-time as a para-professional at the local junior high school. In addition, the house had sold in October 2004, and Eleanor no longer had the \$2,600 a month house payment. Furthermore, she had failed to pay the last two months' mortgage payments of \$2,600 a month, which Wayne ended up paying by borrowing \$5,200 from his father. Wayne further noted that he had gone in debt more than \$20,000 since the commencement of the action and had run up the parties' credit card over \$30,000.¹ The motion (along with a number of other motions) was scheduled to be heard on December 10, 2004.

On December 10, 2004, the Court's calendar ran long and the Court re-scheduled the motions to January 7, 2005, the date of the *Settlement Conference*.

On January 7, 2005, the parties appeared in Court and stipulated to a parenting plan. The motions that were originally scheduled for December 10, 2005, were deferred again to the trial date of January 18, 2005.

On January 18, 2005, the Court continued the trial due to a calendar conflict. In April 2005, the case was reassigned to the Honorable Gary Schurrer.

On April 11, 2005, Wayne re-noted his motion to eliminate the temporary maintenance award. The motion was re-noted for April 25, 2005.

On April 11, 2005, Wayne also served a demand for updated discovery and Requests for Admissions. [A 181]

On April 25, 2005, the parties appeared in Court. The matter was rescheduled to May

¹ These facts are set forth in Wayne's affidavit dated November 29, 2004. [A 173]

31, 2005, due to the Clerk of Court misplacing the file.

On May 20, 2005, Wayne filed a supplemental motion, that included a request to compel Eleanor to provide updated discovery. [A 193] In a responsive affidavit dated May 26, 2005, Eleanor requested a “*short extension to update discovery.*”² [A 203] Eleanor claimed that her unemployment was due to a recent surgery and back pain but noted that she was enrolled in school to become a *health unit coordinator*. [A 202] In a second affidavit bearing the same date, Eleanor asserted that while she was *prone* to [chemical] dependency, she was not dependent. [A 213]

On May 25, 2005, Wayne’s counsel filed an affidavit wherein he noted that the original discovery responses were received a month late and that despite repeated requests to update discovery, Eleanor had failed and refused to do so. [A 213]

On May 31, 2005, Judge Schurrer entered a partial order incorporating a parenting plan that designated Wayne as primary parent during the summer months and Eleanor as primary parent during the school year. The parties were deemed to have joint legal and physical custody. Rulings on the other motions were deferred. [A 256]

On August 3, 2005, Judge Schurrer issued an order declining Wayne’s request to terminate temporary spousal maintenance, stating that the issue would not be readdressed on a temporary basis. The Court found that with an appropriate withholding status of S-4, Wayne’s net monthly income from employment went from \$6,543.33 a month to \$5,633.35 a month.³ [A 236] The Court also found that Eleanor was enrolled in Century College. [A 236] While the Court recognized that Wayne’s income was overstated by nearly \$1,000 a

² Updated discovery responses were due on May 11, 2005. No updated discovery was every provided.

³ This was Judge Muehlberg’s concern when he initially set support and maintenance.

month at the pre-trial, and that Eleanor's housing and school expenses had gone from \$2,600 a month to \$1,195 a month, it declined to do away with the temporary maintenance award, indicating that it did not intend to, "*repeatedly readdress issues raised by the temporary hearing pending the pre-trial and trial.*" [A 236] The trial court further declined to compel discovery, asserting that it was unaware of what discovery was sought.⁴ [A 236]

On October 26, 2005, the Guardian ad Litem issued an updated report. In the report the Guardian referenced the fact that Eleanor had worked during the pendency of the action at the local elementary and junior high school as a PARA, had completed her schooling as a *health unit coordinator* and was presently working half time at that position. [A 271]

On November 1, 2005, Wayne again served a request that Eleanor update discovery. Once again, Eleanor refused. [A 279]

The December 1, 2005, trial date was postponed. Shortly thereafter a partial marital termination agreement was submitted to the Court that resolved all issues with the exception of those related to child support. The parties agreed to submit the issue of child support on written arguments.

On December 27, 2005, the trial court entered the partial judgment and decree. [A 219]

On January 17, 2006, the parties submitted separate letter arguments regarding the proper amount of child support. [A 310 - 328]

On January 27, 2005, Wayne's counsel submitted a reply letter argument regarding child support. [A 349]

On March 28, 2006, after written submissions were made to the trial court on the issue

⁴ The information was provided to the court in affidavit form and Wayne had served and filed a Demand for Updated Discovery on April 11, 2005. [A 181] The Court's ruling was not consistent with the detailed pleadings filed on the issue.

of child support, an order was entered that addressed the issue of child support on a permanent basis (as well as some miscellaneous post-trial issues that are not subject to this appeal). [A 393]

On April 6, 2006, Wayne requested an opportunity to have the decision of the trial court reconsidered. [A 391]

On April 18, 2006, the trial court declined to allow reconsideration [A 393].

Wayne timely appealed the trial court's decision, challenging its failure to re-address temporary child support and maintenance, its refusal to impute income to Eleanor for purposes of determining child support and its refusal to consider Eleanor's spousal maintenance as income for purposes of determining child support.

On July 24, 2007, the Court of Appeals affirmed the decision of the trial court not to impute income to Eleanor and affirmed the decision of the trial court not to review the temporary support and maintenance payments *de novo* as had been directed by Judge Muehlberg. The Court of Appeals reversed the decision of the trial court pertaining to the failure to consider Eleanor's spousal maintenance as income and directed remand to re-determine support, including maintenance as income; however, the Court of Appeals granted the trial court the "*discretion to make any adjustment to the maintenance award deemed necessary to achieve an equitable result * * *.*" [A i]

Wayne sought review of the Court of Appeal's decision. On September 26, 2007, the Minnesota Supreme Court granted the request for review

STATEMENT OF THE FACTS

Wayne filed for dissolution of marriage in December 2003⁵ and Eleanor moved out of the house. In the middle of January 2004, Wayne overheard Eleanor having a conversation on her cell phone.⁶ Wayne heard Eleanor state to that she needed to get a restraining order to get Wayne out of the homestead. Wayne discussed the conversation with his attorney, and was advised that he should not be alone with Eleanor, and that he needed to make sure that whenever there was a parenting time exchange he had someone with him. Wayne was warned that it was clear that Eleanor was scheming to obtain an order for protection, and if that happened it would severely affect his ability to seek custody of his children. [A 21]

Shortly thereafter, Eleanor called Wayne and told him that she and her attorney had talked and she had decided that since they were both parents they should be splitting time with the children. She told Wayne that the following Friday he could take the children for a week and that they would alternate weeks. She told him to come to her parents' house and pick them up then. [A 22]

Wayne made the decision to go to Eleanor's parents' house. When he got there, Eleanor began yelling and screaming at him. It was clear to Wayne that she was under the influence of something.⁷ Wayne told Eleanor that he just wanted to get the children and leave. Eleanor attempted to block his way out the door and was pushing and pulling on the

⁵ It is important to re-count the history behind the child support obligations, which is dependent upon various custody and support awards and agreements along the way.

⁶ The next four pages of facts are taken primarily from Wayne's affidavit and attachments dated July 17, 2004 and July 28, 2004. Reference will not be made to every single page of the affidavits.

⁷ Eleanor has a lengthy history of prescription drug abuse.

parties' children. At no time did Wayne assault her. Eleanor called the police. When the police arrived, they thought that it was a good idea that Wayne simply leave. He was not charged with assault or any other crime. Eleanor did not tell the police that he had assaulted her, or anyone for that matter. [A 22]

The following Monday, January 26, 2004, Eleanor went to the Washington County Courthouse and filed for an order for protection. The affidavit she filed bore little resemblance to the facts or the story that she had told the police. Eleanor accused Wayne of shoving her and the parties' son. Wayne was not served for a number of days and Eleanor continued to act as if nothing had happened. A hearing was scheduled for February 2, 2004. [A 22]

Despite Eleanor purportedly being afraid of Wayne, she continued to call him. Wayne would not take the calls as he knew he would be in violation of the restraining order. Eleanor called him every day of the following week and repeatedly left messages. Since Eleanor had been arrested for driving under the influence of drugs, had run over sleds in the parties' front yard with the children in the car, and almost burned down the house by letting a log roll out of the fireplace, Wayne sought his own order against Eleanor, on behalf of the children. [A 23]

On February 2, 2004, Wayne appeared in Court for the OFP hearing with his attorney. Eleanor appeared without an attorney. Wayne's attorney asked that he be given access to the children while this matter was pending. The Judge questioned that happening since Eleanor had alleged that Wayne had assaulted the parties' son. Eleanor admitted that there was no need to keep Wayne from the children (which directly contradicted the alleged concerns that she stated in her sworn affidavit). During the hearing Eleanor decided that she wanted to have an attorney present and the matter was continued to February 9, 2004. [A 24]

A conference call was held with the Court. Wayne was to pay the two mortgages on the house, all utilities, and pay Eleanor \$500 a month support, pending a reset hearing date of February 17, 2004. The Court reset the hearing to early April 2004. During the interim, Wayne's attorney made repeated attempts to schedule Eleanor's deposition prior to the continued hearing. There was no cooperation from Eleanor or her counsel. The failure to cooperate caused another continuance of the hearing to July 2, 2004.

Wayne's attorney served discovery on Eleanor in anticipation of the continued OFF date of July 2, 2004. The answers were due on May 28, 2004. The discovery requests included requests for financial information such as Eleanor's current job status, income, job history and attempts to find work. The responses were not received until one day prior to the continued hearing date in July 2004. Once again, this did not give Wayne enough time to review the documentation and prepare for the hearing.

The OFF hearing was continued to July 30, 2004, the same date as the temporary hearing in the dissolution file. [A 25] In an affidavit submitted in the dissolution of marriage file, Wayne outlined Eleanor's lengthy history of drug abuse that dated back to 1996. In the same affidavit, Wayne outlined Eleanor's work history as follows:

- ▶ She had been a Cosmetologist for 4-6 years when he met her;
- ▶ She worked at McDonald's in California for a few months;
- ▶ She worked as a Health collector;
- ▶ She worked as a bank teller;
- ▶ She worked as a playground attendant (although, she was fired for using drugs on the job while watching children);
- ▶ She worked at Subway for a year or so;
- ▶ She worked at Target (although, she was fired for not showing up for work);

- ▶ She was offered a security job (and turned it down);
- ▶ She worked at US Bank in December 2003 (although she was fired for not reporting to work. Wayne called that day to ensure she was awake and ready for work, which had been a problem. She stated she was not going because it was only being 20 hours a week and a position in Woodbury was offering 25 hours. She stated she was submitting an application). [A 28]

Due to concerns Wayne had about Eleanor's chemical dependency and ability to care for the children, Eleanor had a chemical dependency evaluation done through Washington County Human Services in December 2003. The evaluation revealed that Eleanor had no problems with drugs. That evaluation is the only one pertaining to Eleanor's physical or mental health that appears in the court file.⁸ Mention is made of the evaluation in the event that Eleanor attempts to argue in her responsive brief that drug abuse or addiction prevented her from having gainful employment.⁹

The parties appeared in court for the temporary hearing on July 30, 2004. At the time of the hearing, Eleanor claimed that she was not working and had not worked since the commencement of the action in December 2003.¹⁰ In an August 5, 2004, temporary order pertaining to the issues of income, support and maintenance, Judge Muehlberg held,

“ * * [that] insufficient information was provided to the Court regarding whether [Wayne's] disproportionately high withholding rate is related to the*

⁸ In a May 20, 2005, affidavit, Eleanor identified a second evaluation she had done and again claimed no chemical dependency problems.

⁹ Eleanor repeatedly claimed throughout the proceedings that her drug use did not have any effect on her ability to parent the parties' children.

¹⁰ Not surprisingly, mere days after the Court issued a temporary order on August 5, 2004 (that was based on her not working), that included the equivalent of more than \$1,500 a month in temporary maintenance and well over \$2,000 in child support, Eleanor obtained a job.

[Wayne's] bonus income." [¶3 of Findings]. [A 163]

Judge Muehlberg went on to hold,

*"The issue of [Wayne's] income and withholding will be reviewed de novo at trial. * * * The issue of [Eleanor's] employment status will be reviewed de novo at trial."* ¶¶7 and 8 of Order. [A 164]

Judge Muehlberg clearly intended that the initial support calculation was subject to review and modification when the issue of support was addressed on a permanent basis.¹¹ The reference to the withholding rate pertained to the fact that Wayne had been withholding at M-10 at the time of the hearing, which had reduced his withholdings, and maximized his net income.¹²

In January 2005, the parties again appeared in Court in front of the Honorable Stephen Muehlberg. A parenting time plan was read into the record. The plan indicated that Eleanor was to provide the primary residence for the children during the school year, and Wayne was to provide the primary residence during the Summer months. Pursuant to the plan, Wayne had the children overnight 100 times each year and Eleanor had the children overnight 265 times each year. [A 256]

The case was reassigned to the Honorable Gary Schurrer, who issued an order that incorporated the parenting plan on a permanent basis. The only unresolved issue for trial pertaining to the children was the amount of child support. Other unresolved issues at the

¹¹After the trial was postponed (due to priority of case settings) we brought a motion to amend the child support and maintenance awards. The Court's August 3, 2005, Order indicated as follows, *"The Court does not intend to repeatedly readdress issues raised by the temporary hearing pending the pre-trial and trial."* [¶5 of Findings].

¹² The trial court ordered Wayne to pay to Eleanor the sum of \$2,358, in temporary child support, \$1010 in temporary maintenance, and 40% of bonus monies. Wayne was also ordered to pay the \$800 a month homestead second mortgage. Wayne would later advise the Court that the draconian temporary order requirements put him more than \$70,000 into debt, which was comprised of loans from his father and credit card debt.

time included spousal maintenance, dependent health and medical, tax dependency exemptions, debt and property division.

In December 2005, the parties submitted a partial marital termination agreement, which resolved all issues other than the amount of child support. As to the issue of maintenance, the parties stipulated:

“Commencing January 1, 2006, and continuing on the first day of each month thereafter for a total period of forty-two (42) months, the Petitioner shall pay to the Respondent the sum of One Thousand and 00/100 (\$1,000.00) dollars per month as and for spousal maintenance. Except for the award of \$1,000 per month spousal maintenance for a period of forty-two months to the Respondent, both parties waive any claim to spousal maintenance past, present and future. In support of this waiver each party affirms that:

- a. Each party is fully capable of self-support and is not dependent upon the other for additional support in the form of spousal maintenance;*
- b. Each has made a full, complete and current disclosure of all income and assets available to him/her, and liabilities to which each is subject, so as to enable the other to adequately evaluate the reasonableness of this waiver;*
- c. Both parties agree that this waiver is fair and equitable, taking into account the foregoing factors, each party's respective personal circumstances and the property division agreed upon herein; and*
- d. The parties' agreement is supported by adequate consideration and was entered into after full financial disclosure to the other party.*

It is the express intention of the parties that save for the award of 42 months of spousal maintenance to the Respondent, neither party is awarded any spousal maintenance either past, present or future. The Court is divested of jurisdiction over the issue of maintenance pursuant to Karon v. Karon, 435 N.W.2d 501 (Minn. 1989).”

It was agreed that the issue of child support would be submitted on written arguments. The Court signed the dissolution judgment and decree on December 27, 2005. [A 231]

On January 17, 2006, Wayne submitted his calculation and arguments pertaining to the parties' child support. [A 310] Wayne pointed out that Eleanor's prior counsel had submitted a *FinPlan* calculation of his income in May 2005. At the time Wayne agreed with the calculation, which was thereafter adopted by the trial court as correct. Wayne's counsel asserted the following in his child support argument,

“I am enclosing a copy of that calculation [from the FinPlan], which we believe correctly identifies my client's net monthly income, without regard to his bonuses.

According to that calculation, my client has net monthly income of approximately \$5,633 per month, based upon S-4. Pursuant to the parenting time plan, my client has the children overnight 100 days each year. That calculates to 27.4% of the time. The Respondent therefore has the children 72.6% of the time. Based upon Hortis/Valento, my client's guideline support obligation (without regard to the offset) is \$1,431 per month. [$\$5,633 \times .35 = \$1,972$][$\$1,972 \times 72.6 = \$1,431$]."

Eleanor's counsel later argued (without any evidentiary support) that Wayne's "wage (*sic*) ha[d] increased every year." The fact was, Wayne's income was at the top of his pay scale. In its August 3, 2005, order, the Court found that Wayne's net monthly income was \$5,633.35 (based upon S-4 as opposed to the M -10 that was used in July 2004). That calculation remained correct in January 2006, when child support was submitted as an issue for final determination, except, it did not take into consideration Wayne's spousal maintenance payments, which Wayne argued should have been deducted from his gross income to determine child support.¹³

In Eleanor's argument, she claimed that she was not working; although, there was no information submitted regarding when she had worked, the length of employment, and the rates of pay.¹⁴ [A 324], The reasons for her lack of employment were unknown and not disclosed. Wayne had argued many times during the lengthy litigation that Eleanor had either

¹³Wayne's counsel repeatedly advised Eleanor's counsel that Wayne's income was the same as the Court had determined six months earlier and that Wayne had reached the top of his pay scale.

¹⁴In a subsequent affidavit, which had been submitted in conjunction with a motion unrelated to child support, Eleanor stated, "*I am broke, I do not have a job, but I am looking.*" At the time she had been living at her parents' home since September 2005 and had no rent, no utilities, and minimal food contributions; yet, she claimed that she has no money and no job. Wayne had been paying her more than \$3,000 a month, *every month*. It was inconceivable that: (1) Eleanor was broke; and (2) that she has not been able to find *any* work in four months, even though all of the parties' children were in school. The fact was, there was no mention in the affidavit that she was unable to work and make a living to support her children.

refused to find employment, or was unable to hold a job.¹⁵

Wayne's counsel argued that in light of Eleanor's reluctance to work, her income needed to be determined by statute, (citing Minn.Stat. §518.551, Subd. 5b(d)(e)). Eleanor had failed to provide sufficient information pertaining to her income and Wayne argued that it was therefore necessary to impute income pursuant to Subd. 5b(e). The last information Eleanor had provided had been in her *Respondent's Answers to Petitioner's First Set of Interrogatories*, dated June 24, 2004. Despite repeated requests to update her responses,¹⁶ Eleanor failed to provide any additional information about her employment or income after June 24, 2004. In paragraph 10 of Eleanor's affidavit dated May 26, 2005 (in response to a motion to compel discovery), she made the following comment in reference to complaints by Wayne about the lack of current income information:

"I request a short extension to update discovery."

Despite the promise to provide updated information, nothing was ever received, and no additional income information was ever provided.

¹⁵ A persistent and chronic problem throughout the litigation was Eleanor's refusal to provide any income information. Despite repeated requests, and subsequent promises, updated information (after June 2004) was never provided. On November 1, 2005, Wayne's counsel had a discussion with Eleanor's counsel wherein he told Wayne's counsel that he was going to present expert testimony that Eleanor could not work due to back problems. When asked to identify his *expert*, he refused, and told Wayne's counsel to, "*bring a motion to compel.*" Since identification of experts had been requested in Wayne's initial discovery requests from May 2004, and none had been identified, Wayne's counsel sent Eleanor's counsel a letter enclosing a request for updated discovery. In that letter Wayne's counsel confirmed that Eleanor's counsel had refused to provide the information. In light of that refusal (and the refusal to provide any evidence of any physical limitations even though previously requested) Wayne argued that Eleanor should not be allowed to allege that she had any limitations that impeded her ability to work.

¹⁶ Written demands were made in April 2005 and again in November 2005. No information was provided; although, Eleanor had stated in a May 2005 affidavit that she would need a "short extension" to provide discovery (that never came). [A 211]

Previously, on April 11, 2005, due to Eleanor's failure to provide updated answers to discovery, *Requests for Admissions* were served on her. [A 183] Request No. 1 requested that Eleanor admit that her prior answers remained accurate. She did not respond and the request was deemed admitted. A request was also made to update discovery.

Previously, on May 27, 2005, Eleanor's deposition was taken. She admitted that she was going to *Century College* for a degree as a "health unit coordinator." She anticipated completion of the program no later than September 2005. She indicated that she believed that the hourly rate was approximately \$13 an hour. [A 227]

In light of the lack of financial information, Wayne requested that the Court impute income at 40 hours a week, based upon 150% of the minimum wage. Wayne appended a calculation of Eleanor's imputed income.¹⁷ Wayne also pointed out that Eleanor was receiving \$1,000 a month in spousal maintenance from Wayne and that amount should be added into her income to calculate child support.

Wayne calculated Eleanor's monthly income based upon three scenarios:

- (1) Imputed at Minimum Wage..... \$1,996
- (2) Imputed at \$11 an Hour..... \$2,250
- (3) Imputed at \$13 an Hour..... \$2,486

Depending upon the wage scenario selected by the Court, Wayne argued that the following were the amounts of support that Eleanor would have to pay:

- (1) $\$1,996 \times .35 = \699 [$\$699 \times 27.4\%$] = \$192
- (2) $\$2,250 \times .35 = \788 [$\$788 \times 27.4\%$] = \$216
- (3) $\$2,486 \times .35 = \870 [$\$870 \times 27.4\%$] = \$238

¹⁷ This is less than the minimal \$13 that the Respondent indicated that she could make as a *health unit coordinator*.

Under *scenario one*, Wayne would pay \$985 each month in child support for three children [\$1,177 - \$192]. Under *scenario two*, Wayne would pay \$961 each month in child support for three children [\$1,177 - \$216]. Under *scenario three*, Wayne would pay \$939 each month in child support for three children [\$1,177 - \$238].

In addition to regular support payments, Wayne received bonuses on a fairly regular basis and would be required to pay a percentage of those bonuses. In order to avoid future problems, Wayne suggested that the Court determine a percentage of the *gross* income, so that there did not have to be ongoing analysis of what constitutes *net* each year. Wayne argued that could be done by taking his net child support as a percentage of the gross. In other words, Wayne had gross monthly income of approximately \$8,839 (without regard to bonus income). If the Court chose *scenario one*, Wayne's child support (based on bonus income) would be 11% of his gross income [\$985/8,839]. He would therefore be required to pay 11% of any *gross* bonuses received in the future. If the Court chose *scenario two*, Wayne's child support would have been 11% as well of his gross income [\$961/8,839]. Finally, if the Court chose *scenario three*, Wayne's client's child support would also have been 11% of his gross income [\$939/8,838].

Eleanor submitted her child support arguments contemporaneous with Wayne's submission. Even though the parties had stipulated to joint physical custody of their children (which requires a *Hortis/Valento* offset) Eleanor simply argued that Wayne should continue paying full guideline child support¹⁸ and more.¹⁹ [A 315] Instead of submitting arguments

¹⁸ The trial court adopted the parenting time plan on June 1, 2006; however, it refused to modify the existing support obligation to apply the *Hortis/Valento* formula at that time.

¹⁹ Eleanor's counsel apparently was not aware of the limitation on child support imposed under Minn.Stat. §518.551, which at the time set an earning limitation at \$6,975 per month. By lumping Wayne's bonuses together with his regular income, he exceeded

on the proper amount of permanent child support, Eleanor argued the propriety of the parenting time arrangement, which had been stipulated to a year earlier by the parties and adopted mere months earlier in their partial marital termination agreement.

Without any documentation or expert evidence whatsoever, Eleanor attempted to paint herself as incapable of working due full-time due to many nonspecific maladies and ailments. She had more than two years to come forward with information to support *any* claim that she even may be incapable of working. She did not provide a vocational evaluation. She did not provide medical documentation (i.e., directives that she not work or that she has limitations). She did not provide any sort of detailed explanation of what it was that allegedly prevented her from working. Nor did she provide an explanation of what happened to the employment that she had acquired with her recent degree.

Eleanor had not even been honest about her work history. Wayne reported that she worked many jobs over the years. Within days after being in Court in July 2004 for the temporary hearing, Eleanor became employed at a bakery. While she did not provide any information about that job though discovery, Wayne learned independently that she had quit that job, asserting that she had been injured on the job. A work comp claim that she filed ended up being denied.

The only information provided by Eleanor about her employability status after the temporary hearing in July 2004, came in through unrelated means. In her May 20, 2005 affidavit she asserted, "*I am not a danger to my children. My use of medication is steadily decreasing and I hope I will have no need of medication very soon.*"²⁰ Thereafter, she was

the dollar limitation.

²⁰ Eleanor had a drug problem that was well documented, including at least two driving under the influence of drug arrests and convictions. Whenever Wayne raised it as a custody issue, Eleanor would assert that she had no problem.

able to complete her schooling in a timely manner, and was able to find employment; although; it was short-lived for whatever unknown reason.

In a subsequent January 2006, affidavit, submitted in conjunction with a motion unrelated to child support, Eleanor stated, "*I am broke, I do not have a job, but I am looking,*" again making no mention of an inability to work or why she was not working. [A 363]

On March 28, 2006, Judge Schurrer issued his decision. [A 403] While the Court adopted Wayne's argument regarding his portion of child support, it attributed no income to Eleanor even though it was undisputed that she was receiving \$1,000 a month in maintenance. Furthermore, the trial court did not impute income to Eleanor and did not modify the obligation *do novo*.

Under paragraph 8 of the order, Judge Schurrer noted that the stipulated partial judgment and decree had determined Wayne's net monthly income (without regard to bonuses) to be \$5,633 per month. He also noted that Wayne had received a \$12,000 bonus in 2004. Furthermore, he noted that Wayne was paying \$1,000 a month in spousal maintenance, and that payment should be deducted from his net monthly income of \$5,633 to arrive at net monthly income of \$4,633 for child support determination purposes.

At paragraph 9 of the order, Judge Schurrer referred to Eleanor's January 27, 2006, affidavit in which Eleanor asserted that she was unemployed but looking for work. Judge Schurrer held that there was insufficient ("scant") evidence provided to the Court for the Court to determine if Eleanor was or was not voluntarily unemployed.²¹

At paragraph 10 of the order, the trial court determined that for purposes of the *Hortis/Valento* formula, Eleanor had the children 72.6% of the time and Wayne had the

²¹ Judge Schurrer went on to assert that without evidence as to Eleanor's attempts to secure employment, her employment history, education and other appropriate factors, the Court was not in a position to impute income to her.

children 27.4% of the time. Due to the alleged lack of evidence pertaining to Eleanor's employment, the Court declined to offset any obligation that Eleanor would have and based Wayne's child support obligation on his net monthly income of \$4,633, multiplied by 35% and again multiplied by 72.6%.²² The Court found child support to be \$1,177 per month and ordered that it be reduced to that number effective April 1, 2006.

On Appeal, the Court of Appeals addressed three issues: (1) the failure of the trial court to impute income; (2) the failure of the trial court to include spousal maintenance paid to Eleanor *as* income; and, (3) the failure of the trial court to conduct a *de novo* review of the temporary support award. In addition, the Court of Appeals created a new issue by empowering the trial court to adjust the maintenance award to reach an equitable determination of child support, despite the fact that the trial court had divested itself of jurisdiction to modify maintenance.

The relevant holdings of the Court of Appeals are as follows:

IMPUTATION OF INCOME

*"[Wayne] argues that the district court abused discretion by declining to impute income to respondent * * * Here, the district court found that based upon the scant evidence provided to the Court, the Court cannot find that [respondent] is voluntarily unemployed or underemployed. Lacking evidence as to [Eleanor's] attempts to secure employment, her employment history, education, and other appropriate factors, the Court is not in a position to impute income to [Eleanor]. [Wayne] argues that the district court abused discretion by declining to impute income to respondent because (1) there was sufficient evidence of respondents work history and education in the record; and (2) the district court improperly placed the burden of proof of employability on Wayne.*

Although [Wayne] argues that the burden of proof to show employability is on respondent, the initial burden of establishing that respondent is unemployed or underemployed was on [Wayne] because [Wayne] made the allegation that

²² The 35% is the guideline percentage for three children under Minn.Stat. §518.551. The 72.6% is the percentage of the amount of time that Eleanor has the children.

respondent was voluntarily unemployed or underemployed. See *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001) (citing cases showing that the moving party in family law matters has burden of proof). Only after [Wayne] has established that [Eleanor] is underemployed does the burden shift to [Eleanor] for her to establish that the unemployment or underemployment: (1) is temporary and will ultimately lead to an increase in income; or (2) represents a bona fide career change that outweighs the adverse effect of that parents diminished income on the child. Minn. Stat. § 518.551, subd. 5b(d). Here, the district court was unable to determine whether [Eleanor's] unemployment constituted underemployment for purposes of imputing income because there was insufficient evidence in the record regarding [Eleanor's] work history and educational background. Therefore, because there was never a finding that [Eleanor] was voluntarily unemployed or underemployed, the burden never shifted to [Eleanor].

Wayne argues that there was sufficient evidence of [Eleanor's] work history and education in the record to impute income to [Eleanor]. We disagree. The parties had three children during the marriage, and it appears to be undisputed that Wayne was the primary breadwinner. This is reflected by [Wayne's] \$5,633 monthly net income. Moreover, [Eleanor's] answer and counterpetition alleged that [Eleanor] was a stay-at-home mother and homemaker during the marriage. Although there is evidence in the record that [Eleanor] occasionally worked part time as a daycare provider and as a playground attendant at the local school district, **there is nothing more in the record regarding [Eleanor's] education and employment background.** Evidence on these factors is necessary to determine whether [Eleanor] was voluntarily underemployed. Accordingly, the district court did not abuse discretion in declining to impute income to [Eleanor].” [Emp. Added]

DE NOVO REVIEW OF SUPPORT

“[Wayne] argues that the district court erred by failing to retroactively employ a Hortis/Valento offset to the joint-custody arrangement that was established in January 2005. The record reflects that [Wayne] failed to raise this issue before the district court. Because it was not raised below, [Wayne] has waived the issue and we need not address it.”²³

and

MAINTENANCE AWARD MODIFICATION

“In light of the statutory definition of “income,” we conclude that the district court erred in refusing to consider [Eleanor's] spousal-maintenance award as income. Accordingly, we remand the matter to the district court for reconsideration of appellant's child-support obligation based on our conclusion that respondent's maintenance award should be considered as income. **On remand, the district court shall have discretion to make any adjustment to the maintenance award deemed necessary to achieve an equitable result in this case. If the district court believes that**

²³ *Citing*, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)

altering the support or maintenance award requires additional information, the district court shall have discretion to reopen the record.”

Wayne challenges the Court of Appeal’s: (1) grant of jurisdiction to modify maintenance; (2) failure to impute income to Eleanor; and (3) failure to consider the issue of child support *de novo*.

ISSUES

1. DID THE COURT OF APPEALS ERR BY CONFERRING AUTHORITY ON THE TRIAL COURT THE ABILITY TO MODIFY THE PARTIES’ STIPULATED MAINTENANCE AWARD WHERE THE TRIAL COURT HAD ALREADY DIVESTED ITSELF OF JURISDICTION AND THE ISSUE WAS NOT RAISED ON APPEAL? The Court of Appeals, as part of a remand to determine child support, authorized the trial court modify the maintenance award, without regard to the fact that such power had been divested by the trial court.

Apposite Cases and Statutes:

Minn.Stat. §518.552, Subd. 5;
Evans v. Evans, 672 N.W.2d 232 (Minn.App. 2003);
Karon v. Karon, 435 N.W.2d 501 (Minn. 1989)

2. DID THE TRIAL COURT ERR BY FAILING TO IMPUTE INCOME TO ELEANOR? The trial court did not impute income. The Court of Appeals agreed, holding that the burden lay with Wayne and that there was insufficient information about Eleanor’s income and employment to do so.

Apposite Cases and Statutes:

Minn.Stat. Sec. 518.551, Subd. 5b(d)(e);
Putz v. Putz, 645 N.W.2d 343 (Minn.App. 2002);
Gorz v. Gorz, 552 N.W.2d 556 (Minn.App. 1996)

3. DID THE TRIAL COURT ERR BY FAILING TO REVIEW WAYNE’S SUPPORT OBLIGATION *DE NOVO*? Despite reservation for *de novo* review, the trial court failed to address the issue in that fashion. The Court of Appeals held that the issue was not raised below.

Apposite Cases and Statutes:

Minn.Stat. Sec. 518.551, Subd. 5b(c)(j);
In re Bender, 671 N.W.2d 602 (Minn.App. 2003)

STANDARD OF REVIEW

a. Standard of Review – Child Support. Child support awards are reviewed to determine whether or not there is a reasonable and acceptable basis in fact for the award. *Strandberg v. Strandberg*, 664 N.W.2d 887, 889 (Minn.App. 2003). A reviewing court will reverse an award where it finds a clearly erroneous conclusion that is against logic and the facts on the record. *Id. citing, Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986).

b. Standard of Review – Interpretation of Statutes. This appeal involves the statutory interpretation of the definition of “income” as well as who bears the burden of proof regarding employability. Such determinations are reviewed *de novo* by the Court of Appeals. *Porro v. Porro*, 675 N.W.2d 82, 85 (Minn.App. 2004)

c. Standard of Review - Jurisdiction. Questions of subject matter jurisdiction are reviewed *de novo* by the Minnesota Supreme Court. *Johnson v. Murray*, 648 N.W.2d 644, 670 (Minn. 2002); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 209 (Minn. 2001)

ARGUMENT

1. THE COURT OF APPEALS ERRED BY CONFERRING ON THE TRIAL COURT JURISDICTION TO MODIFY MAINTENANCE. An alleged lack of subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Herubin v. Finn*, 603 N.W.2d 133, 137 (Minn.App. 1999). The parties’ judgment contains a *Karon* waiver pertaining to spousal maintenance, permanently divesting the trial court of jurisdiction.

¶8 of the judgment reads as follows:

“Commencing January 1, 2006, and continuing on the first day of each month thereafter for a total period of forty-two (42) months, the Petitioner shall pay to the Respondent the sum of One Thousand and 00/100 (\$1,000.00) dollars per month as and for spousal maintenance. Except for the award of \$1,000 per month spousal maintenance for a period of forty-two months to the Respondent, both parties waive

any claim to spousal maintenance past, present and future. In support of this waiver each party affirms that:

- a. Each party is fully capable of self-support and is not dependent upon the other for additional support in the form of spousal maintenance;*
- b. Each has made a full, complete and current disclosure of all income and assets available to him/her, and liabilities to which each is subject, so as to enable the other to adequately evaluate the reasonableness of this waiver;*
- c. Both parties agree that this waiver is fair and equitable, taking into account the foregoing factors, each party's respective personal circumstances and the property division agreed upon herein; and*
- d. The parties' agreement is supported by adequate consideration and was entered into after full financial disclosure to the other party.*

It is the express intention of the parties that save for the award of 42 months of spousal maintenance to the Respondent, neither party is awarded any spousal maintenance either past, present or future. The Court is divested of jurisdiction over the issue of maintenance pursuant to Karon v. Karon, 435 N.W.2d 501 (Minn. 1989)."

In its decision the Court of Appeals granted the trial court the,

*"discretion to make any adjustment to the maintenance award deemed necessary to achieve an equitable result * * *."*

"Minn.Stat. §518.145, subd. 2 applies to awards of spousal maintenance." Minn.Stat. §552, Subd. 4. Once a stipulation is incorporated into a judgment and decree, the sole relief from such judgment is under Minn.Stat. §518.145, Subd. 2, which reads,

"On motion and upon terms as are just, the court may relieve a party from a judgment and decree, order, or proceeding under this chapter, except for provisions dissolving the bonds of marriage, annulling the marriage, or directing that the parties are legally separated, and may order a new trial or grant other relief as may be just for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;*
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Rules of Civil Procedure, rule 59.03;*
- (3) fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;*
- (4) the judgment and decree or order is void; or*
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective*

application.

The motion must be made within a reasonable time, and for a reason under clause (1), (2), or (3), not more than one year after the judgment and decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment and decree or order or suspend its operation. This subdivision does not limit the power of a court to entertain an independent action to relieve a party from a judgment and decree, order, or proceeding or to grant relief to a party not actually personally notified as provided in the Rules of Civil Procedure, or to set aside a judgment for fraud upon the court."

Eleanor did not argue that the maintenance provision should have been vacated nor did she seek relief from the judgment itself. The Court of Appeals *sue sponte* empowered the trial court to "make adjustments" to the maintenance award that had been agreed to by the parties and adopted as the judgment of the trial court. It is unclear what basis the Court of Appeals was operating under. It did not identify any authority for its decision and made no finding that any of the §518.145 factors were present.

Minn.Stat. §518.552, Subd. 5, provides,

"The parties may expressly preclude or limit modification of maintenance through a stipulation, if the court makes specific findings that the stipulation is fair and equitable, is supported by consideration described in the findings, and that full disclosure of each party's financial circumstances has occurred. The stipulation must be made a part of the judgment and decree."

That is precisely what the parties did here.

In *Evans v. Evans*, 672 N.W.2d 232 (Minn.App. 2003), husband and wife stipulated to a *Karon* waiver wherein a 59 year-old husband would pay permanent maintenance which after three years would remain constant at \$1,200 a month. The stipulation contained a provision that the, "Court is divested of jurisdiction to modify the maintenance [award]" as well as a contractual waiver of the right to seek modification. Additionally, there was a provision that the award was fair and equitable, and that there had been full disclosure. *Id.* at 233. A year later husband moved to modify maintenance, claiming problems with tax consequences and his health. The trial court denied the request, holding it had no jurisdiction to modify due to the divestiture of jurisdiction. The Court of Appeals affirmed the trial court

and held that,

“Statutes permitting modification of maintenance awards are inapplicable when there is an approved stipulation divesting the trial court of jurisdiction, and the trial court made proper findings under Minn.Stat. §518.552, subd. 5.” Id. at 234.

Here, the parties stipulated that (1) they were each self-supporting and not in need of additional maintenance; (2) there had been a full disclosure made; (3) that their waiver was fair and equitable, taking into consideration their circumstances and property division; and, (4) it was based on adequate consideration. The trial adopted the agreement and divested jurisdiction over the issue. Based upon *Karon v. Karon*, 435 N.W.2d 501, 503 (Minn. 1989), and its progeny, the trial court was permanently divested of jurisdiction over maintenance and the Court of Appeals was not in a position to confer jurisdiction. Jurisdiction over maintenance was properly divested by the trial court and therefore cannot be conferred by the Court of Appeals. Minn.R.Civ.P. 12.08(c) *Herubin*, at 137.

2. THE TRIAL COURT ERRED BY FAILING TO IMPUTE INCOME TO

ELEANOR. Minn.Stat. §518.551, Subd. 5b(d)(e) provide as follows:

“(d) If the court finds that a parent is voluntarily unemployed or underemployed or was voluntarily unemployed or underemployed during the period for which past support is being sought, support shall be calculated based on a determination of imputed income. A parent is not considered voluntarily unemployed or underemployed upon a showing by the parent that the unemployment or underemployment: (1) is temporary and will ultimately lead to an increase in income; or (2) represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child. Imputed income means the estimated earning ability of a parent based on the parent's prior earnings history, education, and job skills, and on availability of jobs within the community for an individual with the parent's qualifications.

(e) If there is insufficient information to determine actual income or to impute income pursuant to paragraph (d), the court may calculate support based on full-time employment of 40 hours per week at 150 percent of the federal minimum wage or the Minnesota minimum wage, whichever is higher. If a parent is a recipient of public assistance under section 256.741, or is physically or mentally incapacitated, it shall be presumed that the parent is not voluntarily unemployed or underemployed.”

The trial court, in deciding not to impute income to Eleanor, found that there was *scant*

evidence as to her income and that *neither* party presented sufficient evidence to show that, as alleged by Wayne, Eleanor was voluntarily unemployed. The trial court asserted that without evidence as to Eleanor's attempts to secure employment, her employment history, education and other appropriate factors, that it was not in a position to impute income to her. Wayne argued this was error for two reasons: (1) there was ample evidence in the file of Eleanor's work history and education; and (2) the trial court improperly put the burden of proof of employability on Wayne, when Eleanor should have borne the burden of demonstrating that she was not wilfully unemployed.

The Court of Appeals agreed with the trial court, giving two primary reasons, holding in relevant part,

*“Although there is evidence in the record that [Eleanor] occasionally worked part time as a daycare provider and as a playground attendant at the local school district, **there is nothing more in the record regarding [Eleanor]s education and employment background.** Evidence on these factors is necessary to determine whether [Eleanor] was voluntarily underemployed. Accordingly, the district court did not abuse discretion in declining to impute income to [Eleanor].”*

and

*“Although [Wayne] argues that the burden of proof to show employability is on respondent, the initial burden of establishing that respondent is unemployed or underemployed was on [Wayne] because [Wayne] made the allegation that respondent was voluntarily unemployed or underemployed. See *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001) (citing cases showing that the moving party in family law matters has burden of proof). Only after [Wayne] has established that [Eleanor] is underemployed does the burden shift to [Eleanor] for her to establish that the unemployment or underemployment: (1) is temporary and will ultimately lead to an increase in income; or (2) represents a bona fide career change that outweighs the adverse effect of that parents diminished income on the child. Minn. Stat. § 518.551, subd. 5b(d). Here, the district court was unable to determine whether [Eleanor]s unemployment constituted underemployment for purposes of imputing income because there was insufficient evidence in the record regarding [Eleanor]s work history and educational background. Therefore, because there was never a finding that [Eleanor] was voluntarily unemployed or underemployed, the burden never shifted to [Eleanor].”*

a. There was sufficient information in the record pertaining to Eleanor's education

and employment background. A finding of fact regarding an obligor's income for purposes of child support will be upheld on appeal unless that finding is clearly erroneous. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn.App.2002). A finding of fact is clearly erroneous when, viewing the record in the light most favorable to the trial court's findings and considering our deference to the district court's credibility determinations, the reviewing court is left with, "the definite and firm conviction that a mistake was made." *Vangness v. Vangness*, 607 N.W.2d 468, 474 (Minn.App.2000). The trial court found evidence lacking regarding Eleanor's income and employment, and the Court of Appeals found, "nothing in the record regarding [Eleanor's] education and employment background" other than evidence that she worked occasionally part-time as a daycare provider and playground attendant. This is one of those cases where the findings are clearly erroneous, and where the Supreme Court should be left with the definite and firm conviction that a mistake was made.

Putting aside the fact that Eleanor refused to provide discovery responses pertaining to her income and employment, and that the trial court refused to compel her to provide answers, there was nonetheless more than enough evidence in the record pertaining to her income and employment history, as well as her educational background.

In a July 2004 affidavit (submitted by Wayne) he outlined Eleanor's work history as:

- ▶ She had been a Cosmetologist for 4-6 years when he met her;
- ▶ She worked at McDonald's in California for a few months;
- ▶ She worked as a Health collector;
- ▶ She worked as a bank teller;
- ▶ She worked as a playground attendant;
- ▶ She worked at Subway for a year or so;
- ▶ She worked at Target;
- ▶ She was offered a security job; and
- ▶ She worked at US Bank in December 2003 [A 28]

Immediately after the temporary hearing in July 2004, Eleanor obtained a job working at a bakery. She later worked (during the proceedings) as a PARA at two schools, and was

employed after graduation as a *health unit coordinator*.

Eleanor repeatedly claimed throughout the proceedings that her drug use did not have any effect on her ability to parent the parties' children. In her May 20, 2005 affidavit she asserted, "*I am not a danger to my children. My use of medication is steadily decreasing and I hope I will have no need of medication very soon.*"²⁴ On May 27, 2005, Eleanor's deposition was taken.²⁵ She admitted that she was going to *Century College* for a degree as a "*health unit coordinator*." She anticipated completion of the program no later than September 2005. She indicated that she believed that the hourly rate was approximately \$13 an hour. [A 227] Thereafter, the Guardian ad Litem confirmed that Eleanor had completed her schooling in an expeditious manner, and was able to find employment shortly thereafter (although it was short-lived for whatever unknown reason).

In sum, there was more than ample information in the court file to at least determine that Eleanor was capable of earning minimum wage and by her own admission, she was going to make approximately \$13 an hour as a starting point as a *Health Unit Coordinator* commencing in September 2005.

b. Wayne met his initial burden of going forward with sufficient information to demonstrate that Eleanor was wilfully unemployed. The Court of Appeals held that since Wayne was alleging that Eleanor was wilfully unemployed,

"the initial burden of establishing that respondent is unemployed or underemployed was on [Wayne] because [Wayne] made the allegation that [Eleanor] was voluntarily unemployed or underemployed."

Wayne does not dispute that fact; however, he does dispute the extent to which that burden

²⁴ Eleanor had a drug addiction problem that was well documented, including at least two driving under the influence of drug arrests and convictions. Whenever Wayne raised it as a custody issue, Eleanor would assert that she had no problem.

²⁵ The deposition transcript is part of the record.

must be met and would submit to this Court that he has met his initial burden of proof by *alleging* wilful employment, thereby shifting the burden to Eleanor.²⁶ The Court of Appeals and trial court cited no precedent for the proposition that the initial burden of proof required Wayne to prove a negative, i.e., Eleanor was not wilfully unemployed. Such a precedent would be without merit. The language of the statute is clear: the burden of demonstrating that a party is not voluntarily unemployed is on the unemployed party, not the party seeking support. There are two ways that Eleanor could have avoided the conclusion that she was voluntarily unemployed: (1) she could have presented evidence that the unemployment was temporary *and* that it would ultimately lead to an increase in income; or (2) her unemployment was the result of a career change and the benefit of the change outweighed the temporary unemployment. Eleanor did neither. *Id.*, Subd. 5b(d) In her arguments she didn't provide *any* information about her employment history, education, physical ability to work or otherwise. She simply argued that Wayne should pay full guideline support, despite the fact that a *Hortis/Valento* application was required.

Since Eleanor failed to provide sufficient information pertaining to her income, the trial court was required to impute income pursuant to Subd. 5b(e). The last information pertaining to Eleanor's income was provided by her was in [*Eleanor*]'s *Answers to Petitioner's First Set of Interrogatories* dated June 24, 2004. Despite repeated requests to update her responses, Eleanor failed to provide any additional information. In fact, the most recent *scant* information provided by Wayne to the trial court was pulled out of Eleanor during a May 27, 2005, deposition when she admitted that she was going to *Century College* for a degree as a *health unit coordinator*. She testified that she anticipated completion of the program no later

²⁶ He obviously went far beyond a simple allegation since he provided the Court with ample evidence of Eleanor's employment history and her work-related educational history.

than September 2005. She testified that she believed that the hourly rate would be approximately \$13 an hour. [A 227] While it was known that she graduated from school, and that she was working in her field in the Fall of 2005, she offered no more information on the subject.²⁷

Due to the lack of information, the trial court should have imputed income at 40 hours a week, based upon 150% of the minimum wage, the \$13 an hour that she could be making (by her own admission) or \$11 an hour, which gives her the benefit of the doubt of what she could be making. *See, Putz v. Putz*, 645 N.W.2d 343 (Minn. 2002)(there is a strong state policy that children have adequate and timely support of their parents and imputing income to a voluntarily unemployed parent furthers the state's interest because it prevents parents who chose to limit their incomes from escaping a duty to support their children); *Gorz v. Gorz*, 552 N.W.2d 566, 568 (Minn.App. 1996)(it is appropriate to impute income where it is impractical to determine it); and, *Tweeton v. Tweeton*, 560 N.W.2d 746 (Minn.App. 1997)(both parents have an equal obligation to support their children).

Since the current minimum wage was \$6.25 an hour, imputing 1.5 multiplied by that amount results in gross hourly income of \$9.38. In Wayne's arguments, he provided the trial court with calculations of Eleanor's income at \$9.38, \$11 an hour and \$13 an hour. Any one of those scenarios could have been utilized by the trial court, but were not. Furthermore, the trial court did not even direct periodic reviews of Eleanor's employment status, as is the standard for support related unemployment situations.

In conclusion, the trial court improperly placed the burden of the lack of information on Wayne. Wayne's inability to provide concise information was due to no fault of his own,

²⁷Eleanor told the guardian ad litem in August/September 2005 that she was working as a health unit coordinator. [A 270]

or lack of trying. The record reflects that he repeatedly attempted to obtain updated income information from Eleanor. The last attempt in November 2005 was met with a response by her attorney of, "bring a motion to compel!" The burden was on Eleanor, not Wayne. She failed to meet her burden of preventing the Court from imputing income to her. The issue should be remanded to the trial court to impute income, either at minimum wage, or the \$13 an hour that Eleanor testified she could make.

3. THE TRIAL COURT ERRED BY FAILING TO REVIEW WAYNE'S SUPPORT OBLIGATIONS DE NOVO. The issues of the calculation of temporary support and Eleanor's employment were specifically reserved for *de novo* review in the final determination of the dissolution action. Judge Muehlberg found in the August 2004 temporary order:

*"[Wayne's] current net income is \$6,265 based on a withholding of 10. * * * Insufficient information was provided to the Court regarding whether [Wayne's] disproportionately high withholding rate is related to [Wayne's] bonus pay. * * * [Eleanor] is unemployed * * * however, she is capable of finding suitable employment to become partially self-supporting. [A 163-64]"²⁸*

He went on to order,

*"The issue of [Wayne's] income and withholding will be reviewed de novo at trial. * * * The issue of [Eleanor's] employment status will be reviewed de novo at trial. * * * The issue of [Wayne's] spousal maintenance obligation will be reviewed de novo at trial." [A 166]*

The Court of Appeals held that since the issue was not raised at the trial court level, it cannot be raised on appeal. That holding ignores the law of the case, to-wit: Judge Muehlberg's holding that the temporary determinations of child support and maintenance were to have been determined *de novo* by the trial court at the time of trial. It also ignores the fact that Wayne had raised the issue in his final arguments on child support and that Judge Schurrer had held

²⁸ Wayne was withholding at M – 10, which inflated his net income.

that he would not re-address the temporary order until his final decision. Since the Court of Appeals remanded to the trial court the determination of child support, it should have also directed that the determination be *de novo* to the initial setting of support. It is unclear what the Court of Appeals meant by holding that Wayne did not raise the issue below since the August 2, 2004, specifically required it, and Wayne argued that for simplicity sake, the determination of support should commence as of January 2005, when the parties stipulated to joint custody.

While Wayne could have argued that the issues should have been reviewed dating back to August 2004, (when Eleanor miraculously found work days after the temporary order came out) Wayne felt that there was a brighter line that could be drawn. In January 2005, the parties stipulated to a parenting plan with joint legal and physical custody. The agreement was reduced to an order in May 2005. In light of the joint custody, and the *de novo* review, the trial court was required to recompute child support, based upon *Hortis/Valento*, dating back to the joint arrangement, with appropriate withholding status for Wayne. In fact, in the trial court's order dated August 3, 2005, it made findings with the appropriate withholding status, but declined to review Wayne's financial obligations *at that time*. [A 269]

In a reply memorandum letter to the trial court dated January 27, 2006, [A 349], Wayne's counsel wrote:

" * * the [temporary support] award was made based upon a **temporary** award of physical custody to the Respondent. Judge Muehlberg indicated in his August 5, 2004, order the following:*

***"* * * insufficient information was provided to the Court regarding whether Petitioner's disproportionately high withholding rate is related to the Petitioner's bonus income."** [¶3 of Findings].*

Judge Muehlberg went on to note,

"The issue of Petitioner's income and withholding will be reviewed de novo

at trial.” [¶7 of Order].

Therefore, Judge Muehlberg intended that the initial support calculation was also subject to review and modification.”

Additionally, Wayne attempted to have the maintenance issue re-addressed in his May 2005 motion,²⁹ only to be rebuked by the trial court. Judge Scherrur indicated in response to Wayne’s motion in his resultant August 3, 2005, Order as follows:

“The Court does not intend to repeatedly readdress issues raised by the temporary hearing pending the pre-trial and trial.” [¶5 of Findings]

Therefore, the issue clearly was raised not only when arguments were submitted in January 2006, but also prior thereto in November 2004,³⁰ April and May 2005.

When awarding child support, the trial court must consider statutory guidelines and the factors set forth in Minn.Stat. §518.551 and must make specific findings regarding the factors that it considered in awarding support. *Nazar v. Nazar*, 505 N.W.2d 628, 633 (Minn.App. 1993); *Moylan v. Moylan*, 384 N.W.2d 859, 863 (Minn. 1986). The *Hortis/Valento* formula is required by law to be used in joint physical custody arrangements. Minn.Stat. §518.551, subd. 5(i)(noncustodial parent pays support to the custodial parent). Under the formula, separate support obligations are set for each parent for the period of time each parent has the physical care of the children. A single net payment is derived by subtracting one obligation from the other. *In re Bender*, 671 N.W.2d 602, 606 (Minn.App. 2003). Since the use of the formula is presumptively correct when there is joint physical custody, if the court deviates from the formula, it is deviating from the guidelines, and *required* to make specific statutory findings, supporting the deviation. *Id.* at 608; Minn.Stat.

²⁹ The case was originally scheduled to be heard in January 2005, two weeks after the parties stipulated to a parenting plan. The case was bumped from the schedule due to priority reasons and ultimately delayed for almost a year.

³⁰ This is when the issue was first raised.

§518.551, Subd. 5(c) and (i).

Since support was to be reviewed *de novo*, the trial court could not simply ignore the award of joint custody to Wayne during the pendency of the proceedings, and the corrected withholding status, that would have reduced his support retroactively. By ignoring the required offset, the trial court deviated from the support guidelines, without making the requisite findings. It is reversible error to fail to identify the actual support obligations and to fail to make the calculation so that a reviewing court can even make a determination whether there was a deviation. *In re Bender* at 608. After making those determinations, if the court decides that deviation is appropriate, it *must* make specific statutory findings pursuant to Minn.Stat. §518.551, subd. 5(c) and (i). The trial court failed to make any findings on the issue.

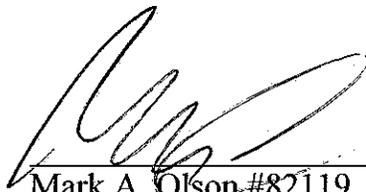
CONCLUSION

The trial court erred by failing to impute income to Eleanor and by failing to consider her spousal maintenance award as "income." The trial court also failed to retroactively employ a *Hortis/Valento* offset to the joint custody arrangement that was put into place during the pendency of the proceeding, and failed to re-compute child support at the appropriate withholding status, dating back to the temporary order. The matter should be remanded for further computations by the trial court.

Respectfully submitted,

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