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APPELLATE COURT CASE NUMBER

A-11-746

STATE OF MINNESOTA
IN COURT OF APPEALS

COUNTY OF GRANT, RESPONDENT,

NICOLE MARIE KOSER, RESPONDENT,

VS.

DARREN LANE KOSER, APPELLANT

APPELLANT'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).

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LEGAL ISSUES

I. Did the District Court err as a matter of fact and as a matter of law in determining that there was a substantial change in circumstances rendering the existing child support order unreasonable and unfair?

The District Court held that the Child Support Magistrate did not err in modifying the Appellant's child support obligation and that there was a substantial change in circumstances rendering the existing child support order unreasonable and unfair.

II. Did the District Court err by holding the excess amount Respondent received as a retroactive lump sum RSDI payment over existing arrearages a "windfall" or gratuity to the children and not as a credit on appellant's future child support obligation?

The District Court ruled that a portion of the lump sum retroactive RSDI payment Respondent received for the benefit of the children should be applied to Appellant's existing child support arrears, but held that Appellant was not entitled to a future credit for the remainder of the lump sum retroactive RSDI payment Respondent received for the benefit of the children.

STATEMENT OF THE CASE

Appeal has been taken from the Order of the District Court dated February 23, 2011, upholding a Child Support Magistrate's Order dated September 14, 2010, as amended November 17, 2010. Appellant raises two issues.

First, Appellant contends that under the child support modification statute, *Minnesota Statute 518A.39*, there was no showing of a substantial change in circumstance making the terms of the existing support order unreasonable and unfair. In particular, Appellant contends that the Child Support Magistrate's finding that the provisions of *Minnesota Statute 518A.39 Subd. 2(b)* were met and that a newly calculated Court Order results in a support order that is at least 20% and $75.00 higher or lower than the current child support obligation is erroneous.

The second issue Appellant raises in this appeal is the treatment and application of a retroactive Retirement, Survivors and Disability Insurance (RSDI) lump-sum payment Respondent received (due to Appellant's disability) on behalf of the children in the amount of $4,752.00 which was partially applied to child support arrears and the balance treated as a "windfall" to the children. Appellant asked that the District Court apply the surplus of the lump-sum retroactive RSDI payment as a credit balance towards ongoing child support under the authority of *Minnesota Statue 518A.52*.

The District Court held that Appellant's monthly receipt of ongoing RSDI benefits constituted a sufficient change of circumstances for modification of child support. The District Court refused to treat the lump-sum surplus Respondent received as an overpayment on Appellant's child support obligation.

STATEMENT OF FACTS

In October, 2009, Grant County, through the Office of Child Support, initiated a child support modification proceeding, seeking an increase in Appellant's child support obligation from the March 12, 2009, Dissolution Decree (Appendix A1-A20). Following hearing, in which Appellant claimed he was disabled, that he had applied for Social Security Disability Benefits, provided evidence regarding his disability condition, including medical records, and sought a reduction due to decreased income and medical disability, the Child Support Magistrate issued an Order on December 30, 2009, ruling, in part, that:

> "10. The Defendant does have a medical condition known as a conversion disorder. The Defendant does have tremors related to the disorder and does take medication in an attempt to control the symptoms. The medication does make the Defendant tired and drowsy. However none of the medical evidence suggests that the Defendant is unemployable." (Appendix A-2)

The Child Support Magistrate ascribed potential income to Appellant in the sum of $1,257.00 per month (Appendix A-6) and determined a new child support obligation, finding that, under the provisions of *Minn. Stat. 518.39 Subd. 2* the existing child support order was unreasonable and unfair because it did not allocate specific amounts towards basic support, childcare or medical support (Appendix A-4). The Child Support Magistrate directed that Respondent pay ongoing basic support of $559.00 per month, childcare support of $47.00 per month and medical support of $59.00 per month, a total monthly obligation of $665.00 (Appendix A-4) and a $45.00 increase from the March 12, 2009, Order (Appendix A-2).

In May, 2010, Appellant was determined to be disabled, retroactively to July, 2009, and Respondent received a $4,752.00 retroactive RSDI payment for the children (Appendix A14). The County initiated a proceeding on June 24, 2010, to modify child support (Appendix A8-A10). Appellant requested a hearing, asserting the calculations failed to give Appellant credit for the lump sum RSDI retroactive payment Respondent received. (Appendix A25.) Appellant claimed the lump sum RSDI payment should be a credit on Appellant's child support obligation, that there should be no arrears, and that Appellant should actually have a positive credit balance for child support. (Appendix A25)

A hearing was held in August, 2010, and the Child Support Magistrate issued an Order on September 14, 2010, (Appendix A26-A32), (amended to correct a mathematical error on November 17, 2010, see Appendix A33-A35) modifying Appellant's child support obligation (effectively increasing the amount Respondent received from the former $665.00 to $710.00 per month). (Appendix A27, Appendix A31.) The Child Support Magistrate did not address the issue of the application of the lump sum RSDI payment Respondent received. Appellant then requested District Court Review. (Appendix A36-A42.)

At the District Court Review Hearing, the Respondent and Grant County agreed that it was appropriate that $1,764.15 of Appellant's child support arrears be deemed paid with Respondent's receipt of the $4,752.00 retroactive lump-sum RSDI payment, but contended that the excess was a "windfall" or "gratuity" to the children. (Appendix A45, Appendix A47.) Appellant contended he had made an overpayment of his child support

obligation in light of the retroactive RSDI lump-sum payment due to his disability which should be used to reduce his ongoing child support by 20% of the monthly payments, until exhausted, under *Minn. Stat. 518A.52(2).*

Appellant also asked the District Court to recognize that there was no grounds for modification of the then-existing child support order, notwithstanding that, under the "changed circumstance test", Appellant's "out of pocket" payment would be different, with the ongoing subtraction of $432.00 per month from his $665 monthly child support obligation due to his disability and the Respondent's receipt of said $432 monthly sum as a representative payee for the children, since Respondent would continue to receive $665 per month.

The District Court held that there was a changed circumstance justifying modification of the support order (and the concomitant second $45 per month increase) and held that the child support arrears that existed at the time of the receipt of the lump sum payment should be satisfied, but no credit for future payments should be given. (Appendix A45 to A50)

This Appeal followed.

STANDARD OF REVIEW

When a Child Support Magistrate's decision is affirmed on a motion for review, the decision is treated as that of the district court. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n. 2 (Minn.App.2004). The district court has broad discretion in deciding child support issues and the Court of Appeals will not reverse the district court's determination absent a clear abuse of that discretion. *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999). A court abuses its discretion if it improperly applies the law. *Pikula v. Pikula*, 374 N.W.2d 705,710 (Minn.1985). The Court of Appeals review questions of statutory interpretation and application *de novo*. *In re Kleven*, 736 N.W.2d 707, 709 (Minn.App.2007) (citing *Brookfield Trade Ctr. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn.1998)).

ARGUMENT

I.

DID THE DISTRICT COURT ERR AS A MATTER OF FACT AND AS A MATTER OF LAW IN DETERMINING THAT THERE WAS A SUBSTANTIAL CHANGE IN CIRCUMSTANCES RENDERING THE EXISTING CHILD SUPPORT ORDER UNREASONABLE AND UNFAIR?

The District Court held that the Child Support Magistrate did not err in modifying the Appellant's child support obligation and that there was a substantial change in circumstances rendering the existing child support order unreasonable and unfair.

The Child Support Magistrate determined Appellant's "basic support obligation" at $166.00 per month in paragraph #18 of the Findings of Fact and determined at paragraph #26 of the Findings of Fact that the Appellant's "basic child support obligation" amount is 20% and $75 lower than the current support obligation, thus authorizing the Child Support Magistrate to modify the December 30, 2009, (prior) Order because there had been "a substantial change in circumstances which renders the existing child support order unreasonable and unfair." See Conclusion of Law #3 in the September 14, 2010, Order (Appendix A29). (Amended to $157 per month by the November 17, 2010, Order Amending. See Appendix A33 to A35.)

The September 14, 2010, Order increases the Appellant's support obligations, increasing child support from $559.00 to $589.00, increasing child care support from $47.00 to $58.00 and increasing medical support from $59.00 to $63.00, a grand total change from $665.00 to $710.00, which is neither $75.00 more nor 20% more under any

mathematical calculation, separate components only or combining all or any of the elements.

A careful reading of the applicable statutes reveals that the Child Support Magistrate misapplied the modification statute – *Minn. Stat. §518A.39, Subd. 2.* The $75/20% test therein identified relates to a "calculated court order" determined under *Minn. Stat. §518A.35*. That statute, *Minn. Stat. §518A.35*, generates a "calculated court order" in the instant case of $589.00 child support. The former "calculated court order" amount was $559.00. 20% of $559.00 is $112.00. $559.00 + $75.00 is $634.00. Neither the 20% nor the $75 rule/test is met and it was error for the Child Support Magistrate to go about modifying the December 30, 2009, Order as a substantial change in circumstance making the December 30, 2009, order unreasonable and unfair. The Child Support Magistrate should have denied the County's proposed modification.

Unlike *Minn. Stat. §518A.31(a) and (c)* and *Minn. Stat. §518A.34*, the modification statute, *Minn. Stat. §518A.39, Subd. 2*, in referring to the $75/20% test <u>does not</u> use the term "net child support obligation". It uses the term "calculated court order". *Minn. Stat. §518A.39, Subd 2* refers to *Minn. Stat. §518A.35*, not *Minn. Stat §518A.34* for the "comparison point". *Minn. Stat. §518A.35, Subd. 2* declares: "basic support must be computed using the following guidelines . . ."

Neither the modification statute nor the statute directing the computation of child support (*Minn. Stat. §518A.35)* provides a deduction or declares that the "calculated" sum should be reduced by the children's receipt of RSDI benefits arising from the disability of

the obligor. The method of the payment of Appellant's child support obligation becomes a two-step process, a RSDI benefit (in this instance $432) and the amount Appellant pays from other sources. The sum the Respondent receives on behalf of the children is/should be unchanged.

The application of the RSDI payments to Appellant's child support obligation only needed administrative application by the Child Support Officer, accounting for two payments per month rather than one. In fact, the Child Support Officer, Viki Brekke, did precisely that in her Child Support Guidelines Worksheet, Appendix A19, nominating the children's Social Security disability benefit derived from Respondent as a "Benefits Adjustment" to be deducted from the $710.00 net child support obligation filed in support of the Count's June 24, 2010, Motion for Modification of Child Support.

The $559 child support sum of Appellant's total Child Support Obligation of $665 should have simply been collected in two parts, $432 from Appellant's RSDI paid to Respondent for the benefit of the children, and the rest, $233, paid by Appellant.

Thus, when assessing whether there has been, in the parlance of *Minn. Stat. §518A.39, Subd. 2,* "substantially increased or decreased gross income of an obligor or obligee" which makes the terms of the existing order "unreasonable and unfair", the Child Support Magistrate erred when he determined the 20%/$75 test of *Minn. Stat. §518A.39, Subd. 2(b)(1)* had been met. To reiterate, Appellant's former gross income was found to be $2,050 in the December 30, 2009, Order. The September 14, 2010, Order finds Appellant's gross income to be $2,176.00. Appellant's former Basic Support

Obligation was $559, total Child Support Obligation $665. The September 14, 2010 Order determines Appellant's Basic Support Obligation to be $589, total Child Support Obligation to be $710. The 20%/$75 test was not met, and it was error for the District Court to affirm the Child Support Magistrate's Order.

The District Court's observation in paragraph #5 of its Conclusions of Law highlights the issue. Under Conclusion of Law #5 the District Court notes:

> ". . . If the Social Security Administration did no pay the benefits to (Respondent herein), (Appellant) would not immediately be held legally responsible for the lack of payments. He is not ordered to pay $589 per month. . ."

This flies in the face of the clear language of *Minn. Stat. 518A.31(b)* which provides, in relevant part:

> "If Social Security . . . benefits are provided . . . then the amount . . . shall also be **subtracted from** the obligor's **net child support obligation** as calculated pursuant to section 518A.34." (Emphasis supplied.)

The District Court would have it that if Appellant were no longer qualified and receiving RSDI, Respondent would need to initiate a modification proceeding when she realized she didn't get the children's monthly RSDI check. The treatment by the Child Support Officer, essentially showing a "credit" of $432 monthly over a $710 total obligation, in her Affidavit comports with the statutory construction. *Minn. Stat. 518A.38* directs Courts to make child support orders, referencing 518A.26 and "support money". *Minn. Stat. 518A.26 Subd. 20*, the definition of "support money" says it means "an award for basic support, child care support, and medical support . . ."

Minn. Stat. 518A.26 Subd. 4 defines basic support as the "basic support obligation

computed under Section 518A. 34"

Minn. Stat. 518A.34(b) describes the procedure to determine basic support. That procedure does not require a deduction from the basic support for RSDI benefits.

The deduction for receipt of RSDI benefits comes later, as a subtraction from the obligor's net child support obligation.

Thus, the District Court should have looked, not to Appellant's net out-of-pocket, but the actual support paid, whether through his "own" income, or through RSDI benefits.

II.

DID THE DISTRICT COURT ERR BY HOLDING THE EXCESS AMOUNT RESPONDENT RECEIVED AS A RETROACTIVE LUMP SUM RSDI PAYMENT OVER EXISTING ARREARAGES A "WINDFALL" OR GRATUITY TO THE CHILDREN AND NOT AS A CREDIT ON APPELLANT'S FUTURE CHILD SUPPORT OBLIGATION?

The District Court ruled that a portion of the lump sum retroactive RSDI payment Respondent received for the benefit of the children should be applied to Appellant's existing child support arrears, but held that Appellant was not entitled to a future credit for the remainder of the lump sum retroactive RSDI payment Respondent received for the benefit of the children.

The District Court held that the Child Support Magistrate did not err in modifying the Appellant's child support obligation and that there was a substantial change in circumstances rendering the existing child support order unreasonable and unfair.

A brief history of the application and treatment of Social Security disability benefit payments in the context of child support obligations is necessary for an understanding of Appellant's position regarding use of the retroactive lump-sum Retirement, Survivors and Disability Insurance (RSDI) benefit Respondent received in June, 2010, upon the determination that Appellant was disabled.

The *Holmberg* case, *Holmberg v. Holmberg*, 578 N.W.2d 817 (Minn. App. 1998), cited by the District Court in holding that arrears in existence at the time of receipt of the retroactive lump-sum RSDI payment could be satisfied with said lump-sum but that the excess could not be used for prospective application to future child support payments under *Minn. Stat. 518A.52* as an overpayment, actually addressed three questions. *Holmberg* held that the administrative child support process governed by *Minn. Stat. 518.5511 (1996)* was unconstitutional as a violation of the separation of powers doctrine of the Minnesota Constitution. It also held, relevant to the instant case, overturning *Haynes v. Haynes*, 343 NW2d 679 (Minn. App. 1984) and other contrary cases, that a disabled child support obligor is entitled to a credit for Social Security disability benefits paid on behalf of a child for whom the obligor has a duty of support. The Court of Appeals stated:

> "We overrule the relevant portions of *Haynes* and its progeny because (1) child support and Social Security benefits paid on behalf of a child due to a support obligor's disability **have almost identical purposes**; (2) *Haynes* is at odds with the majority rule that has now emerged; and (3) a case critical to our ruling in *Haynes* has been overruled." (*Holmberg*, pg 827) (Emphasis supplied.)

Holmberg, decided in 1998, relied on *Newman v. Newman* 451 NW2d 843.844 (Iowa 1990) in adopting the majority rule that *Haynes* was at odds with. *Holmberg*, directed that:

> "On remand, the district court shall give Lee Fuller an appropriate credit against his prospective support obligation and arrearages for benefits paid on behalf of the child. If the credit exceeds Fuller's support obligation, he is not entitled to recover the difference from the child or the custodial parent. See *Newman*, 451 N.W.2d at 844 ("the receipt of excess government benefits over the monthly child support obligation is equitably deemed a gratuity to the children"). *Holmberg*, at 827.

Newman, however, was a case in which the disabled obligor sought, under an "unjust enrichment" theory, repayment from the obligee those sums the obligee received that were in excess of the obligor's court-ordered child support obligation. By the time Newman made his claim, he no longer had a duty of support, as his children had attained majority. The Iowa Supreme Court held that Newman's failure to pursue child support modification meant the doctrine of unjust enrichment did not fit the circumstances.

In *Newman* the Trial Court had ruled that the obligee had been unjustly enriched, relying on the holding in *Potts v. Potts*, 240 NW2d 680 (Iowa 1976). The Iowa Supreme Court, in *Newman*, acknowledged that:

> "*Potts* also holds that the disabled parent should in fairness be allowed a credit toward the arrearage based on the assumption that the nonpayment resulted from the disability. *Potts*, 240 NW2d at 682"

The *Newman* Court, however, went on to observe that the obligor:

> ". . . did not pursue whatever rights he may have had to a modification of his obligation." *Newman*, 845.

In contrast, Appellant in the instant case did pursue modification due to disability, but the Child Support Magistrate rejected his claim (on a fact-specific basis – no grounds for appeal/appellate review), and only when Appellant was determined to be disabled and qualified to receive RSDI in May, 2010, did the error of the Child Support Magistrate's determination become apparent.

Potts, at 681, observed:

> "The courts which allow credit for Social Security disability payments against the disabled parent's child support obligation reason that dependency benefits **are not a mere gratuity** from the federal government. The benefits have been earned in part through the employee's payment of Social Security taxes. 42 U.S.C. s 301 *et seq*. Their purpose is to replace income lost because of the employee's disability. Under these circumstances, **it is equitable to treat dependency benefits as a substitute for child support** for the period during which such benefits are paid." (Emphasis supplied.)

citing *Cash v. Cash*, 234 Ark. 603, 353 S.W.2d 348 (1962), *Horton v. Horton*, 219 Ga. 177, 132 S.E.2d 200 (1963), *Andler v. Andler*, 217 Kan. 538, 538 P.2d 649 (1975), and *Cohen v. Murphy*, 330 N.E.2d 473 (Mass. 1975).

Andler, relied upon by *Potts*, holds, in part:

> "Social Security benefits paid to the appellee for the benefit of the parties' minor children as the result of the appellant's disability may not, however, be regarded as gratuitous." (page 542)

It noted:

> "The insurance concept here in issue was considered by the federal district court in *Schmiedigen v. Celebrezze*, 245 F.Supp. 825 (D.D.C. 1965) where the court said:
>
> '. . . (T)he payments prescribed by them (the Social Security Act) are not gratuities or matters of grace; they are not public assistance; they are not welfare payments. On the contrary, the law created a contributory insurance system, under which what in effect constitute premiums are shared by employees and employers. Consequently, in spirit at least, if not

> strictly and technically, the employee, who throughout his working life has contributed part of the premiums in the form of deductions from his wages or salary, should be deemed to have a bested right to the payments prescribed by the statutory scheme, which in effect comprises the terms of his insurance policy. He has earned the benefits; he is not receiving a gift. . . .'(p. 827.)" (page 543)

Finally, under the facts of *Andler*, it turned out the children's derivative monthly disability benefit sum in that case exceeded the court-ordered child support sum by some $61.10 per month ($221.10 Social Security disability benefit payment per month –vs- $150.00 monthly child support obligation) and the *Andler* court held:

> "Here the excess of $61.10 paid each month must be regarded under the divorce decree as a gratuity to the children. While the $61.10 is not a gratuity in the sense that it represents the children's vested right under the insurance concept of the Social Security system, it nevertheless is a gratuity under the divorce decree to the extent **it exceeds the amount ordered in the divorce decree**." (Emphasis supplied.)

So, from *Andler's* monthly excess Social Security Disability benefit, <u>*Potts*</u> loosely expanded (for Iowa, *Andler* was a Kansas case) *Andler's* general principle and held that excess payments over obligation during the benefit period may fairly be credited against any arrearage that occurred, but that "no credit may equitably given against the parent's obligation after his disability has ended" (under the facts of *Potts*, in which the obligor's period of disability had ended).

In the instant case, unlike *Andler*, the $432.00 per month Respondent received in the retroactive lump sum award of $4,752.00 did not exceed the Appellant's monthly child support obligation of $620.00 (for July – October, 2009) to $665.00 (for November, 2009 – May, 2010). Moreover, Appellant continues to be disabled and the Social Security disability benefits have not ceased.

Following the $665.00 order, Appellant made substantial child support payments, as, in the eleven months, his total child support obligation was $7,135.00, and the arrears were $1,764.15 when Respondent received the $4,752.00 lump-sum retroactive disability benefit payment.

The Trial Court ruled that the excess lump-sum RSDI payment Respondent received in June, 2010, could not be treated as an overpayment under *Minn. Stat. 518A.52*, holding that:

> "In the same way that (Appellant) would not be reimbursed if the monthly benefits payments to his children exceeded his child support obligation, Respondent is not entitled to a future credit of any "excess" benefit payment toward his future child support obligation . . .The statute applies to overpayments by the obligor. The Social Security Administration, not by the obligor, makes Social Security disability payments."

The overpayment was from the funds Respondent had already paid, not from payments that Social Security made. *Minn. Stat. 518A.31(c)* is clear:

> "If Social Security disability benefits are provided for a joint child based on the eligibility of the obligor, and are received by the obligee . . . , then the amount of the benefits shall also be subtracted from the obligor's net child support obligation . . . " Reiterated at *Minn. Stat. 518A.34(f)*.

Thus, the Appellant's overpayment of $2,987.85 should be applied to reduce Appellant's ongoing child support by 20% per month in accordance with the provisions of Minn. Stat. 518A.52.

The holdings of Holmberg and related cases were overturned by the 2005 and 2006 enactments, effective January 1, 2007, of the new child support statutes, Chapter 518A. Reliance on their analysis and approach to interpret and apply the new statutes was error.

CONCLUSION

The Court of Appeals should reverse the determination that Appellant's child support should be increased from $665 to $710 and should remand the case to the District Court with direction that the overpayment provisions of *Minn. Stat. 518A.52* apply to the $2,987.85 sum Respondent received in June, 2010, (as well as any additional overpayment Respondent has received during the pendency of this matter, constituting the difference between $665 and $710).

Dated this 24th day of June, 2011.

Respectfully submitted.

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