
**State of Minnesota
In Court of Appeals**

In Re the Marriage of:

SARA HELEN JONES, f/k/a
SARA JONES JARVINEN,

Petitioner/Respondent,

vs.

CRAIG SHAWN JARVINEN,

Respondent/Appellant.

RESPONDENT'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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STATEMENT OF ISSUES

1. Whether the trial court's conclusions of law are supported by the findings of fact.

The trial court properly determined child support based upon its findings.

2. Whether portions of the Appellant's Appendix should be stricken.
3. Whether the Appellant waived the issues by not raising these issues in district court.
4. Whether the trial court abused its discretion in utilizing overnight parenting time to calculate parenting time for the parenting expense adjustment.

The trial court properly calculated the parties' parenting time percentages.

5. Whether the trial court abused its discretion by ordering Appellant to pay child care support through November 2010.

The trial court properly ordered Appellant to pay child care support through November 2010.

STATEMENT OF CASE

The parties' marriage was dissolved on February 5, 2004. The Court entered the Stipulation and Order to Amend Judgment and Decree (hereinafter "Amended Decree") on March 1, 2005. An order modifying child support was entered on October 18, 2007 (hereinafter "2007 Order").

Appellant filed a Motion for Modification of Child Support on November 23, 2010 which was heard on April 1, 2011. The Honorable James R. Brinegar, Child Support Magistrate (hereinafter "CSM") of Hennepin County District Court, issued the Findings of Fact, Conclusions of Law, and Order Modifying Child Support (hereinafter "IV-D Order") on April 11, 2011.

Appellant filed a Motion for Review on April 27, 2011 which was taken under advisement without hearing on June 20, 2011. The Honorable Lloyd B. Zimmerman, of Hennepin County District Court, issued the Findings of Fact, Conclusions of Law, and Order (hereinafter "District Court Order") on July 12, 2011.

Appellant served and filed the Notice of Appeal from that Order on September 13, 2011.

STATEMENT OF FACTS

The parties have two joint children: [REDACTED], born July 20, 1997 and [REDACTED], born August 25, 1999. (Appellant's Appendix, hereinafter "AA") AA-000017.

On March 1, 2005 the Court entered the Amended Decree regarding parenting time and ordered a parenting plan which stated in part:

Residence. The children's primary residence shall be with Sara, subject to Craig's following access schedule:

Access Schedule. The school year parenting time schedule shall be the following two week rotation:

Monday – overnight with Sara

Tuesday – parents alternate one-to-one time with [REDACTED] and [REDACTED] from after school or daycare until 7:30 p.m. – overnights with Sara

Wednesday – overnight with Sara – drop off at school Thursday morning

Thursday – overnight with Craig

Friday – overnight with Craig

Saturday – overnight with Craig

Sunday – overnight with Craig – drop off at school Monday morning

Monday – overnight with Sara

Tuesday – parents alternate one-to-one time with [REDACTED] and [REDACTED] from after school or daycare until 7:30 p.m. – overnights with Sara

Wednesday – overnight with Sara – drop off at school Thursday morning

Thursday – overnight with Craig – drop off at school Friday morning

Friday – overnight with Sara

Saturday – overnight with Sara

Sunday – overnight with Sara

The summertime schedule will vary from the above schedule in that Craig shall have parenting time overnight on the Wednesday following his weekend.”

AA-000074-000075.

Appellant's parenting time has not been modified since the March 1, 2005

Amended Decree. Appellant has approximately 41% of the parenting time based on a

calculation of overnights under the March 1, 2005 Amended Decree schedule. AA-

000041-000042. Appellant conceded in his Motion for Review: “I have... a total of 149 overnights, which is 40.8% or 41% overnights....” AA-000031.

In his Affidavit dated November 22, 2010 Appellant argued that parenting time should be calculated based on a method other than overnights; including time he spent volunteering and attending the children's extracurricular activities, and one-on-one time he spends with one of the children during the evening on Tuesdays. AA-000004.

Appellant argued that if this time was included, under his calculation he had 53.7% of the parenting time with the minor children. AA-000005. Respondent requested that child support should be calculated based upon calculating parenting time utilizing overnights. The CSM rejected Appellant's assertion that he had parenting time in excess of 50%.

AA-000018. The CSM found in the IV-D Order that:

“The Respondent's [Appellant's] overnight parenting time is approximately 27%. He argues that additional time he spends caring for the children afterschool, but without overnight responsibilities, constitutes parenting time in excess of 50%. The Court does not agree. The parenting time for the Respondent [Appellant] specified in the parent's divorce decree is less than 45%.”

AA-000018.

Appellant made a Motion for Review of the CSM's decision. AA-000030-000033. In his Motion for Review dated April 27, 2011, Appellant discontinued arguing that he had parenting time 53.7% of the time and instead asserted that: “parenting time is actually 48% with Tuesdays.” AA-000031. Additionally, Appellant stated “NA” in the blank in the pro se Motion for Review form which states: “I ordered the transcript from the Court Administrator on _____.” AA-000032. Respondent, in her Response to Motion for Review and Counter Motion, requested that the CSM's findings be corrected to reflect that Appellant had overnight parenting time approximately 41% of the time.

AA-000036.

The trial court, in making an independent review of the decision of the CSM, agreed with the CSM's finding that Appellant's asserted parenting time percentage was overstated; finding in the District Court Order that:

“The Court has independently reviewed the record and concludes that Respondent’s [Appellant’s] accurate overnight parenting time is approximately 41%. Respondent [Appellant] argues that parenting time is actually 48% if Tuesdays are included in the calculation, and that Tuesdays were not included in the calculation. However, the Magistrate addressed Tuesday parenting time and concluded that without overnight responsibilities, the Respondent’s [Appellant’s] estimate is overstated. The Court has independently reviewed the record and agrees that the Magistrate’s finding and conclusion is supported by the record. Further, the Magistrate found that parenting time for the Respondent [Appellant] specified in the parents’ divorce decree is less than 45%. The Court agrees that the Magistrate’s conclusion is supported by the decree.”

AA-000041-000042.

Pursuant to the March 1, 2005 Amended Decree, Appellant’s child support obligation was discontinued and the Amended Decree ordered that: “The parents shall divide the totality of the children’s expenses...” AA-000077.

On October 18, 2007 the Court entered the 2007 Order which modified child support and discontinued expense sharing, and the Appellant was ordered to pay child support as follows:

“\$380 per month for basic support, \$152 per month for child care, and \$27 per month for medical, for a total support obligation of \$559. Petitioner [Respondent] shall pay 76% and Respondent [Appellant] 24% of any unreimbursed medical expenses.”

RA-000001. By 2011, basic support increased to \$397 per month due to cost of living adjustments. AA-000018.

Appellant stated in his Affidavit dated November 22, 2010 that no child care costs had been incurred for over one year. AA-000008. Appellant provided no additional evidence supporting this statement. The CSM found that work related child care expenses continued until December 31, 2010, discontinuing at that time due to the

children's ages. AA-000019. The trial court modified the CSM's order, terminating Appellant's child care support obligation effective November 30, 2010.

STANDARD OF REVIEW

Failure to submit a transcript to the district court for review of the CSM's decision prevents consideration of the transcript on appeal. Davis v. Davis, 631 N.W.2d 822, 826 (Minn. Ct. App. 2001). When a transcript is not part of the record on appeal, review is limited to determining whether the findings of fact support the district court's conclusions of law. Bormann v. Bormann, 644 N.W.2d 478, 481 (Minn. Ct. App. 2002). Minn. R. Civ. App. P. 110.02.

The standard of review on appeal from a child support award by the trial court is whether the court abused the broad discretion accorded to it. Gully v. Gully, 599 N.W.2d 814, 820 (Minn. 1999). A trial court's decision will be upheld unless it committed clear error and its decision is against logic and the facts of record. Moylan v. Moylan, 384 N.W.2d 859, 864 (Minn. 1986). When a district court affirms a CSM's ruling, the CSM's ruling becomes the ruling of the district court. Welsh v. Welsh, 775 N.W.2d 364, 366 (Minn. Ct. App. 2009). A CSM's decision, to the extent it is affirmed by the district court, is reviewed as if it were made by the district court. Welsh, 775 N.W.2d at 366.

Due deference must be given to the ability of the trial court to assess witness credibility. Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988). Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. When determining if factual findings are

clearly erroneous, this Court views the record in the light most favorable to the trial court's findings. Ayers v. Ayers, 508 N.W.2d 515, 521 (Minn. 1993).

ARGUMENT

I. THE TRIAL COURT'S CONCLUSIONS OF LAW ARE SUPPORTED BY THE FINDINGS OF FACT.

Appellant did not provide a transcript of the child support hearing to the district court. AA-000032. Failure to submit a transcript to the district court for review of the CSM's decision prevents consideration of the transcript on appeal. Davis, 631 N.W.2d at 826. When a transcript is not part of the record on appeal, review is limited to determining whether the findings of fact support the district court's conclusions of law. Bormann, 644 N.W.2d at 481; Minn. R. Civ. App. P. 110.02.

Appellant contends that the district court did not review his Exhibit A. Appellant's Brief (hereinafter, "App. Br.") p. 8. Appellant also argues that the trial court should have made a different finding regarding the amount of parenting time that he has with the minor children. App. Br. p. 5. However, Appellant has the burden to provide an adequate record. Mesenbourg v. Mesenbourg, 538 N.W.2d 489, 494 (Minn. Ct. App. 1995). By opting not to provide a transcript, Appellant has limited this Court's review to whether the trial court's findings support the conclusions. Minn. R. Civ. App. P. 110.02. Because a transcript is not part of the record, it is impossible to determine if Appellant's Exhibit A was offered or received into evidence. Appellant is also precluded from disputing the trial court's findings regarding his parenting time percentage.

The trial court's finding that Appellant has 41% of the parenting time with the

minor children, entitling him to a 12% parenting expense adjustment, supports the trial court's conclusion that Appellant is obligated to pay \$335 per month for basic child support. The trial court's calculation is consistent with the Minnesota Child Support Guidelines as set forth in Minn. Stat. § 518A. Appellant does not address the issue of whether the trial court's findings regarding his parenting time support the court's conclusions regarding his basic child support obligation. App. Br. p. 1-9.

The trial court's finding that work related child care expenses continued until December 31, 2010, discontinuing at that time due to the children's ages; supports the trial court's conclusion that Appellant is obligated to pay child care support through November 30, 2010.¹ Minn. Stat. § 518A.39, Subd. 7; Minn. Stat. § 518A.40. Appellant does not address the issue of whether the trial court's findings regarding child care expenses support the court's conclusions regarding his child care support obligation. App. Br. p. 1-9.

Issues not raised by Appellant in his brief are waived. Melina v. Chaplin, 327 N.W.2d 19 (Minn. 1982); McIntire v. State, 458 N.W.2d 714 (Minn. Ct. App. 1990); Balder v. Haley, 399 N.W.2d 77 (Minn. 1987); Braend v. Braend, 721 N.W.2d 924 (Minn. Ct. App. 2006). By not raising the issue of whether the trial court's conclusions are supported by the court's findings, Appellant has waived this issue. Appellant is also precluded from addressing this issue in his Reply Brief.

¹ It should be noted that the district court, in reviewing the CSM's order, eliminated child care support for the month of December 2010 because the trial court did not find documentation to support that child care expenses were incurred for that month. However, the district court did not have access to the transcript which included Respondent's testimony on this matter.

II. ANY PORTION OF APPELLANT'S APPENDIX THAT IS OUTSIDE THE RECORD ON APPEAL MUST BE STRICKEN.

Documents included in a party's brief that are outside the record on appeal must be stricken. Fabio v. Bellomo, 489 N.W.2d 241, 246 (Minn. Ct. App. 1992). Appellant includes documents within his appendix that may be outside of the record before this Court. See AA-000009-000016. Any documents outside of the record should be stricken.

III. APPELLANT HAS WAIVED ISSUES THAT WERE NOT RAISED IN DISTRICT COURT.

Appellant argues that the trial court's decisions are "not consistent with a big picture view of what is best for our boys and the reality of our situation." App. Br. p. 7. Appellant cites no legal authority supporting this argument. Additionally, Appellant did not raise this issue in his original motion or his motion for review of the CSM's order to the district court. AA-000002-000008 & AA-000030-000033. Appellate courts do not address questions not previously presented to and considered by the district court. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). Because Appellant did not raise this issue below, it is not properly before this Court and should not be considered.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN UTILIZING AN OVERNIGHT CALCULATION TO CALCULATE THAT APPELLANT HAD 41% PARENTING TIME PURSUANT TO THE AMENDED DECREE.

A party may move to modify an existing child support obligation under Minn. Stat. § 518A.39. Modification of child support requires a substantial change in circumstances that renders the existing support obligation unreasonable and unfair.

Minn. Stat. § 518A.39, Subd. 2. Appellant, as the party requesting a modification of child support, bore the burden of proof on these elements. Bormann, 644 N.W.2d at 481. Appellant argues that his child support obligation should be modified and calculated based on a finding that Appellant had parenting time in the 45.1% to 50% parenting time range.

Parenting time, for the purposes of the parenting expense adjustment to child support, is determined by the terms of a court order scheduling parenting time. Hesse v. Hesse, 778 N.W.2d 98, 103 (Minn. Ct. App. 2009). The parties' parenting time schedule is set forth in the Amended Decree. Minn. Stat. 518A.36, Subd. 1(a) provides that:

“[p]arenting time includes time with the child whether it is designated as visitation, physical custody, or parenting time. The percentage of parenting time may be determined by calculating the number of overnights that a child spends with a parent, or by using a method other than overnights if the parent has significant time periods on separate days where the child is in the parent's physical custody and under the direct care of the parent but does not stay overnight.”

Both the CSM and the district court chose to apply the overnight method of calculating the parties' percentage of parenting time. In this case, both the CSM and the district court considered the March 1, 2005 Amended Decree and the evidence presented by the parties, and reasonably concluded that it was appropriate to calculate parenting time based on overnights rather than an alternative method. AA-000018 & AA-000041-000042.

Pursuant to the Amended Decree, Appellant has 41% of the parenting time, based upon a calculation of the number of overnights that each parent has with the minor children. Appellant argues that it was an abuse of the trial court's discretion to calculate

his parenting time based upon the overnight method, rather than by utilizing the alternate method of calculating his percentage of parenting time.

Appellant argues that the trial court was bound to utilize the alternate calculation because of: (1) the time he spends with the children at extracurricular activities and (2) his evening parenting time of approximately three to four hours with one child every Tuesday. Because the time that Appellant spends with the minor children at extracurricular activities is not incorporated in the parenting time schedule, this time cannot be considered for the purposes of calculating parenting time. Hesse, 778 N.W.2d at 103. Appellant's Tuesday parenting time equals approximately six to eight hours of parenting time with the children each month. This is not a significant amount of parenting time. In the unpublished case of Vang v. Her, No. A10-2304, 2011 WL 5026230 (Minn. Ct. App. Oct. 24, 2011) the trial court did opt to utilize the alternative calculation. RA-000009. However, in Vang, unlike in the instant case, while the children slept at the father's home, the mother cared for them the majority of their waking hours. Vang, No. A10-2304 at *1. RA-000009. The six to eight hours a month spent by Appellant is not equivalent to the approximately 6 hours spent daily in the Vang case. RA-000009.

A district court has broad discretion to order child support. Putz v. Putz, 645 N.W.2d 343, 347 (Minn. 2002). The trial court has the discretion to use either method: overnights or the alternate method, to calculate the parenting time percentage. Putz, 645 N.W.2d at 347); Dahl v. Dahl, No. A09-1622, 2010 WL 1753342, *2 (Minn. Ct. App. May 4, 2010). RA-000011. As the Court of Appeals notes in the unpublished case of

Dahl: “[s]ignificantly, the plain text of the statute establishes the two options as permissive alternatives.” Dahl, No. A09-1622 at *2. RA-000011. In Dahl, the Court of Appeals cited the use of the terms “may” and “or” in the text of Minn. Stat. § 518A.36, Subd. 1(a) as the reason for finding that the trial court has the option to utilize whichever method it determines appropriate. Dahl, No. A09-1622 at *2. RA-000011. Appellant has not met his burden to prove that the trial court abused this broad discretion in utilizing the overnight method of calculating the parties’ percentage of parenting time. Clearly, the trial court properly exercised its broad discretion in calculating Appellant’s parenting time percentage for the purposes of calculating child support.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING APPELLANT TO PAY CHILD CARE SUPPORT.

The party requesting modification of child support has the burden of proof. Johnson v. Fritz, 406 N.W.2d 614, 616 (Minn. Ct. App. 1987). Appellant claimed that no child care expenses were incurred for the minor children for the period of November 2009 to November 2010. It appears from the record that Appellant provided no evidence to support this claim. The CSM found that work related child care expenses ended December 31, 2010. AA-000019. It is clear from the CSM’s findings that the CSM did not find Appellant’s testimony credible. Due deference must be given to the ability of the trial court to assess witness credibility. Sefkow, 427 N.W.2d at 210. Findings of fact shall not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. When determining if factual findings are clearly erroneous, this Court views the record in the light most favorable to the trial court’s findings. Ayers, 508 N.W.2d at 521.

Additionally, a modification of support may be made retroactive only with respect to any period during which the petitioning party has a pending motion for modification. Minn. Stat. § 518A.39, Subd. 2(e). Appellant claims that no child care expenses were incurred from November 2009 to November 2010, however, Appellant brought his motion for modification on November 23, 2010. Because there was no motion for modification pending during the time period in question, the general rule that child support may not be retroactively modified would usually prevent the trial court from ordering any modification for that year. However, Minn. Stat. § 518A.39, Subd. 7 states: “The court may provide that a decrease in the amount of the child care based on a decrease in the actual child care expenses is effective as of the date the expense is decreased.” Minnesota Statute § 518A.39, Subd. 7 by its plain language, through its use of the word “may,” allows, *but does not mandate* a retroactive decrease in child care support. The trial court declined to order a decrease in child care support. Further, the trial court terminated child care support effective November 30, 2010. AA-000045. Thus, when Appellant brought his motion for modification of child support there was no amount of child care support that could be decreased.

Dated: January 18, 2012

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FORM 132. CERTIFICATION OF BRIEF LENGTH

STATE OF MINNESOTA

IN COURT OF APPEALS

In Re the Marriage of:

Sara Helen Jones, f/k/a
Sara Jones Jarvinen,

Petitioner/Respondent,

CERTIFICATION OF BRIEF LENGTH

vs.

Craig Shawn Jarvinen,

Respondent/Appellant.

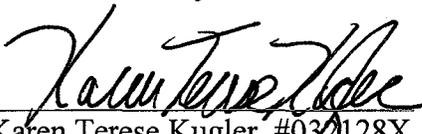
APPELLATE COURT CASE NUMBER: A11-1627

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd.1 & 3, for a brief produced with a proportional font. The length of this brief is 12 pages, 295 lines and 3,205 words. This brief was prepared using Microsoft Office Word 2010.

Dated: January 18, 2012

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