

NO. A08-123

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State of Minnesota  
**In Court of Appeals**

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Karen Sue Williams,  
(f/k/a Karen Sue Hunley),

*Appellant,*

vs.

Donald Gaylord Hunley,

*Respondent.*

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**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. May a Court properly relieve an able bodied, fully employed parent, earning over \$50,000 per year and having no dependants to support other than his minor children, from any past or ongoing child support obligation with respect to such children?

TRIAL COURT HELD: In the affirmative.

APPOSITE AUTHORITY: Minn. Stat. §518.551, Subd. 5(b)

*Letourneau v. Letourneau*, 350 N.W.2d 476 (Minn. App. 1984)

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II. Where a Court orders a party's obligation to pay child support terminated on account of that party having become the custodial parent of the children for whom such child support had been ordered, may the Court continue to impose on the party an obligation to provide life insurance as security for child support?

TRIAL COURT HELD: In the affirmative.

APPOSITE AUTHORITY: Minn. Stat. §518A.39, subd. 4

Minn. Stat. §518A.71

*Emerick on Behalf of Howley v. Sanchez*, 547 N.W.2d 109 (Minn. App. 1996)

*Thiebault v. Thiebault*, 421 N.W.2d 747 (Minn. App. 1988)

III. Where both parties have moved for attorney fee awards, may a Court, without specific findings of fact indicating the basis for its award of attorney fees or indicating the extent to which its award of attorney fees was needs-based or conduct-based, properly order, on account of the disparities in the parties' incomes, an award of attorney fees to a litigant who had been found to have been uncooperative in the proceedings before the court as well as in previous, related proceedings, to have lacked credibility in his testimony, to have pursued claims in the face of overwhelming evidence against such claims and to have lost on the claim before the court as to which most of the parties' expense and efforts were directed?

TRIAL COURT HELD: In the affirmative.

APPOSITE AUTHORITY: Minn. Stat. §518.14, Subd. 1

*Geske v. Marcolina*, 624 N.W.2d 813 (Minn. App. 2001)

*Richards v. Richards*, 472 N.W.2d 162  
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*Dabrowski v. Dabrowski*, 477 N.W.2d 761 (Minn.  
App. 1991)

### Statement of the Case and the Facts

This is an appeal from Findings of Fact and Order Regarding Financial Issues filed on November 8, 2007 by the Honorable Jeannice Reding of the Hennepin County District Court in post-decree proceedings in a marriage dissolution case.

At all relevant times, the parties have both been employed outside the home and have been the parents of two minor children, born in 1996 and 1998, respectively. In June 2004, the parties reached an agreement, which was incorporated into an Order filed in September, 2004, concerning legal custody, physical custody and access issues with respect to their children. The parties' agreement provided: (1) that they would have joint legal and physical custody of the children; (2) that they would follow an agreed parenting time schedule under which their custodial time with the children was shared on an equal basis; and (3) that they would appoint a parenting consultant to assist in resolving any disputes as to custody, parenting or access. The parties proceeded to trial in June and August, 2004 with respect to the financial issues in the divorce.

On February 24, 2005 the Trial Court filed its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (the "Judgment and Decree") which incorporated the parties' earlier agreement as to custody (*See* February 24, 2005 Judgment and Decree, Finding of Fact XIII, Conclusions of Law 4 through 7) and decided their disputed financial issues.

As to child support, the Court found in its February 24, 2005 Judgment and Decree that the Respondent (also the Respondent below) was not working full time and that his argument that he was unable to work full time because of the parties' custody

arrangement was not credible. The Court proceeded to impute to the Respondent a level of net monthly income consistent with his true earning capacity (*See* Appendix to Appellant's Brief (hereafter "AA") pp. A-2, A-3). Then, based on the Appellant's (the Petitioner below) net monthly income and the net monthly income imputed to the Respondent, the Court proceeded to apply the *Hortis/Valento* formula for joint custody cases to determine child support. Under *Hortis/Valento*, the amount of child support each party would owe under the child support guidelines if the other party had sole custody of the children is calculated, then the guideline child support amounts found for each party are halved to reflect that each obligor will actually be having custody of the children and incurring custodial expenses 50% of the time, and then the party with the higher support obligation is ordered to pay the difference between the support obligations so calculated to the party with the lesser obligation. Because the Appellant's net income was found to be more than twice the net monthly income imputed to the Respondent (\$5,690 to \$2,809), the Appellant was ordered to pay \$424 monthly child support to the Respondent. (*See* AA, pp. A-2, A-3.)

Based on the parties' disparities in monthly income and debt and the lifestyle the parties had enjoyed during their marriage, the February 24, 2005 Judgment and Decree ordered the Appellant to pay the Respondent temporary spousal maintenance of \$250 per month for 36 months, i.e., through February 2008. (*See* February 24, 2005 Judgment and Decree, Findings of Fact XVII and XVIII, Conclusion of Law 3).

The February 24, 2005 Judgment and Decree also adjudicated distribution of the parties' assets and responsibility for their debts. As to the parties' respective requests for

attorney fee awards, although the Court found: (1) that the majority of the legal expenses which the Respondent had incurred in the divorce proceeding were the result of his own questionable actions; (2) that the Respondent had caused a significant amount of money to be spent needlessly in his unsuccessful pursuit of contempt sanctions against the Appellant; (3) that the Respondent's attorney had contributed to attorney fee expense by approaching the case with a "no compromise" attitude; and (4) that the Respondent had caused a waste of money and the Court's time by requiring the Appellant to present testimony of an employment expert and by then ineffectually cross-examining the employment expert, the Court nevertheless found that both parties had contributed to the acrimony in the divorce proceedings and, on the strength of the Appellant's greater available financial resources, ordered the Appellant to pay \$7,500 towards the Respondent's attorney fees. (See AA, p. A-6.)

In January 2005, based on an incident which occurred while the children were in the Respondent's custody, the court-appointed parenting consultant suspended the Respondent's access to the children. In May 2005, the parenting consultant restored the Respondent's parenting time only to the extent of allowing him to have the children with him one night per week and every other weekend – a schedule which, other than nominal adjustments, has remained in place since May 2005. The parties have never returned to the equal joint custody arrangement which existed prior to January 2005. (See Findings of Fact and Order Regarding Custody and Parenting Time, ¶¶11-15, AA, pp. A-12 through A-15.)

On April 26, 2005, three months after the parenting consultant had suspended the Respondent's access to the parties' children, the Appellant brought a motion for amended findings with respect to the Court's February 24, 2005 Judgment and Decree, which she combined with a motion for modification of her child support obligation due to the children being in her full time care and the Respondent having no custodial time with them. (See Petitioner's April 26, 2005 Notice of Motion and Motion and particularly ¶¶16 and 17 thereof.) By its Order filed August 19, 2005, the Trial Court denied the Petitioner's amended findings motion, except to correct a computation which the Court had found and thereby raise the Appellant's monthly child support obligation from \$424 to \$432. In its same August 19, 2005 Order (Findings ¶¶17 and 18, and Order ¶3), the Court denied the Appellant's request to have her child support obligation suspended, finding that the requested relief was based on a temporary situation, did not fit in with the overall relief requested by a motion for amended findings, and should be raised in a separate motion.

On the same date that the Trial Court issued its August 19, 2005 Order substantially denying the Appellant's motions for amended findings and for modification of child support, the Court filed an Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree (hereafter the "Amended Judgment and Decree") reflecting the increase in the Appellant's child support obligation based on the computation error the Court had discovered in the original Judgment and Decree.

The Appellant promptly followed the Trial Court's directive to bring a separate motion as to child support by commencing such proceedings before a Child Support

Magistrate. On November 16, 2005, the Child Support Magistrate issued a Findings of Fact, Conclusions of Law and Order on the Appellant's motion under which: (1) the Respondent was ordered to contribute financially towards the Appellant's health insurance expenses for the children; and (2) based on changes in the Appellant's monthly income and expenses, and after reduction of the monthly health insurance contribution ordered against the Respondent, the Appellant's monthly child support obligation was reduced from \$432 to \$346.

The Child Support Magistrate also found that notwithstanding the *de facto* change in custody resulting from the parenting consultant's having sharply limited the Respondent's access to the children, she had no jurisdiction to alter the parenting time schedule stated in the Amended Judgment and Decree and thus had no jurisdiction to modify the Appellant's child support obligation to reflect the parties' actual parenting schedule. The Child Support Magistrate's decision stated that in order to obtain the relief she desired as to child support, the Appellant would need to bring a motion in the district court for modification of the parenting time schedule contained in the Amended Judgment and Decree.

The Appellant's motion for review of the Child Support Magistrate's decision was denied, other than for correction of minor clerical errors, by an Order filed January 27, 2006.

On January 10, 2006, the Respondent brought a *pro se* motion for enforcement of certain of the asset transfer provisions of the Amended Judgment and Decree. In turn, on February 16, 2006, the Appellant brought a motion seeking: (1) modification of the

custody and parenting time provisions of the Amended Judgment and Decree to award her sole legal and physical custody of the parties' children and to provide for the Respondent to have parenting time as recommended by the parenting consultant; (2) modification of the Appellant's child support obligation to reflect the fact of the parties' children having been in her full time care and custody since at least February 1, 2005; and (3) modification of the provisions of the Amended Judgment and Decree requiring both parties to maintain life insurance to secure payment of their child support obligations.

On May 17, 2006, the Appellant moved for further modification of the Amended Judgment and Decree to terminate the Appellant's spousal maintenance obligation to the Respondent. In response, the Respondent, who had not had custody of the parties' children since January 2005, moved on May 25, 2006 to have the Appellant's child support obligation to him increased.

On May 30, 2006 the Trial Court issued an Order for Court Services Mediation and/or Evaluation directing Hennepin County Family Court Services to perform a custody evaluation.

On July 12, 2006 the Court, after noting that the Appellant had submitted a May 12, 2006 report of the Court-appointed parenting consultant supporting her motion for custody modification, issued an Order: (1) finding that the Appellant had made a *prima facie* showing that the joint legal and physical custody arrangement established by the Amended Judgment and Decree may be harmful to the parties' children and ordering an evidentiary hearing on the Appellant's custody modification motion; (2) reserving

decision on the Appellant's motions for termination of her child support and spousal maintenance obligations; (3) denying the Respondent's request for removal of the parties' parenting consultant; and (4) ordering the Respondent to provide the Appellant's counsel with copies of his 2005 federal tax return, including W2 statements, and with copies of his paycheck stubs for part of 2006. (*See* AA, pp. A-33 through A-36.)

In October 2006 the Appellant moved specifically for an Order decreasing the amount of life insurance which she was required to have for the Respondent's benefit to secure her child support obligation and increasing the amount of life insurance which the Respondent was required to have to secure his child support obligation to the Appellant. In response, the Respondent, notwithstanding that the Court's July 12, 2006 Order: (1) had found that a prima facie showing for custody modification in favor of the Appellant had been made; (2) had noted the Appellant's custody modification motion was supported by the parenting consultant; and (3) had denied the Respondent's request that the parenting consultant be removed from the case, moved for an order granting him sole legal and physical custody of the parties' children and dismissing the parenting consultant.

On November 27, 2006 the Hennepin County custody evaluator issued his custody evaluation, in which he recommended that the Appellant be granted sole legal and physical custody of the parties' children (*See* Petitioner's Exhibits, Exhibit 3.)

On December 21, 2006 the Court issued an Order ordering the evidentiary hearing on child custody modification to go ahead before a new judicial officer and continuing to reserve decision on the Appellant's motion for modification of her child support

obligation but, until such motion was decided, terminating the direct wage withholding for the Appellant's child support obligation and directing the Appellant to use the funds she would otherwise be required to pay the Respondent in child support to pay the unpaid charges of the parenting consultant. (*See* AA, pp. A-37 through A-41.)

On February 6, 2007, after a telephone conference call with the parties' counsel in which the Respondent asked leave to conduct a second custody evaluation for which the Appellant would be required to be interviewed and also to have an additional psychological evaluation of himself done, the Court issued an Order permitting the Respondent to obtain another psychological evaluation of himself and a second custody evaluation, or review of the Hennepin County custody evaluation which had been done, but refusing to require the Appellant to meet with the second custody evaluator or reviewer. (*See* February 6, 2007 Order.)

The evidentiary hearing on the Appellant's custody modification motion took place before a newly assigned judge on March 5 and 6 and June 7 and 8, 2007. Both parties submitted exhibit books for the hearing with documentary evidence as to both the custody dispute and as to their respective monthly earnings and expenses. In addition to the parties, and a neighbor of the Respondent whom the Respondent called as a witness, the Court heard testimony from two expert witnesses, parenting consultant Susan Phipps-Yonas and Hennepin County custody evaluator Michael London, both of whom supported an award of sole legal and physical custody to the Appellant. The Respondent did not offer any expert witness testimony opposing the Appellant's custody modification

motion or supporting his own request for custody. (See AA, pp. A-10, A-11, A-17, A-18.)

At the close of testimony as to the custody issues, the parties agreed, with the Court's approval, that the disputed financial issues as to child support and spousal maintenance would be decided based on affidavit testimony and evidence, which the parties would submit according to a post-hearing schedule set by the Trial Court. (See AA, pp. A-11, A-12.) Thereafter the Appellant submitted such affidavit testimony on the financial issues (See AA, pp. A-42 through A-63.); the Respondent submitted no such evidence as to the financial issues. Instead, the Respondent merely submitted a proposed Findings of Fact, Conclusions of Law and Order to which the Appellant objected due to the lack of any evidence to support the requested findings of fact. (See AA, p. A-64.)

The documents submitted as to the parties' earnings showed that the both the Appellant and the Respondent could potentially receive annual bonuses through their employment, but that as of June 1, 2007, they had current gross annual incomes, exclusive of potential bonuses, of \$127,066 and \$58,500, respectively. (See AA, pp. A-68, A-69.) There was no evidence showing that either party faced any future loss of income from employment, had any dependants to support other than their children or had any noteworthy financial burdens other than consumer debt.

On November 8, 2007 the Trial Court filed two separate decisions, one as to child custody and the other as to financial issues. The Court's Findings of Fact and Order Regarding Custody and Parenting Time granted the Appellant's motion for sole legal and physical custody of the children, subject to the Respondent's parenting time one evening

per week and alternating weekends. The Court's order modifying custody was supported by 23 pages of detailed findings of fact favorable to the Appellant's claims and commenting unfavorably on the Respondent's lack of cooperation and lack of credibility in the proceedings. (*See* AA, pp. A-7 through A-32.)

In its Findings of Fact and Order Regarding Financial Issues also filed November 8, 2007 (*See* AA, pp. A-65 through A-75.), the Court relieved the Appellant of any further obligation to pay child support to the Respondent but, notwithstanding the detailed findings in its custody order confirming that the parties' children had been in the Appellant's full time care since January 2005 and unfavorably characterizing the Respondent's behavior throughout the proceedings, the Court: (1) refused to order the Respondent to pay any monthly support for the parties' children, either going forward or for the time since January 2005 that the children had been in the Appellant's full time custody; (2) refused to modify the parties' life insurance obligations in light of the adjustment in child support obligations; (3) refused to modify the Appellant's obligation to pay the Respondent spousal maintenance; and (4) ordered the Appellant to pay \$10,000 towards the Respondent's attorney fees, subject to a set off of \$3,460 reflecting the child support which the Appellant had paid to the Respondent from March 2006 through November 2006.

The Trial Court explained its refusal to impose any child support obligation on the Respondent as a downward deviation from the child support guidelines, based on the disparity in the parties' relative monthly incomes and living expenses. The Court said that such a downward deviation was in the children's best interests because the Appellant

could meet the children's financial needs from her own income and the Respondent would need all of his funds to meet the children's needs when they were with him. (*See* AA, pp. A-70, A-71.)

On January 17, 2008 the Appellant served and filed a timely Notice of Appeal from the trial court's Findings of Fact and Order Regarding Financial Issues filed November 8, 2007. (*See* AA, p. A-76.)

### Argument

#### I.

A Court may not properly relieve an able bodied, fully employed parent, earning over \$50,000 per year and having no dependants to support other than his minor children, from any past or ongoing child support obligation with respect to such children.

Orders as to child support modification are reviewed for abuse of the trial court's discretion. The Trial Court enjoys broad discretion in such matters and will only be reversed if the reviewing court is convinced that the Trial Court has abused its discretion by making a clearly erroneous decision that is contrary to logic and the facts on record. *See Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002); *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn.1986).

The Trial Court's failure in this case to impose a current or past child support obligation on the Respondent was an abuse of its discretion for two reasons. First of all, contrary to legislatively established policy in this state, the Court's decision relieved the Respondent from having to apply any part of his substantial net monthly income for the support of his minor children. In *Letourneau v. Letourneau*, 350 N.W.2d 476 (Minn. App. 1984), this Court reversed a Trial Court order which, because the custodial parent

had monthly income, had relieved the obligor from paying child support according to the guidelines of Minn. Stat. §518.551, subd. 5(b). The *LeTourneau* court explained, 350 N.W.2d at 478:

The child support payment guidelines and the factors listed in Minn. Stat. §518.17(4) (Supp.1983) clearly reflect a legislative determination that children are entitled to benefit from the income of the non-custodial parent and to enjoy the standard of living that they would have had if the marriage had not been dissolved. Conversely, the Legislature determined that the non-custodial parent has an obligation to commit a certain amount of income to his/her children as a priority over other expenses.

Other decisions of this Court have reiterated that children of divorced parents are entitled to benefit from the incomes of both parents, just as if there had been no divorce (*See Koury v. Koury*, 410 N.W.2d 31, 33 (Minn. App. 1987)) and that, regardless of minimum needs, a custodial parent who manages, by sticking to a strict budget, to meet more than the children's most basic needs ought not, on account of doing so, be penalized by the denial of appropriate child support from the noncustodial parent (*See Katz v. Katz*, 380 N.W.2d 527, 530 (Minn. App. 1986)).

The Trial Court also abused its discretion in determining to relieve the Respondent from any past or current child support obligation because it did so without any competent or credible evidence as to the Respondent's monthly living expenses. Both parties included in their respective exhibit books statements of their claimed monthly living expenses (*See* Petitioner's Exhibits, Exhibit 15 for Appellant's claimed monthly expenses and Respondent's Exhibits, Exhibit 107 for Respondent's claimed monthly expenses.) In accordance with the parties' agreement and the Court's directive after the evidentiary custody hearing that financial issues would be determined based on documentary

evidence and the parties' affidavits, the Appellant submitted her affidavit as to financial issues in which, among other things, she explained the itemized expense entries in her Exhibit 15. (See AA, pp. A-42 through A-63). The Respondent submitted no comparable affidavit or other competent testimony on the issue of his finances (and, more specifically, his needs) and the Appellant properly objected to the unsworn material that the Respondent attempted to submit. (See AA, p. A-64.) The custody portion of the evidentiary hearing did not address financial issues, and since the Respondent failed to submit an affidavit, there is no sworn testimony in the record providing any foundation for or explanation of the claimed monthly expense items in the Respondent's Exhibit 107.

The Trial Court, in its Findings of Fact and Order Regarding Financial Issues ¶21 (See AA, p. A-70.), adopted the monthly expense figures contained in Respondent's Exhibit 107 notwithstanding the utter lack of evidentiary foundation supporting the data. It is also worth noting that the unexplained expense entries in Respondent's Exhibit 107 include both \$740 in claimed custodial expenses for the children, as well as \$40 in claimed visitation expenses with respect to the children. The Respondent submitted his Exhibit 107 for a hearing at which he was seeking to gain sole custody of the parties' children or, at least, to retain joint custody. After the Trial Court had granted the Appellant sole physical and legal custody of the parties' children and limited the Respondent's parenting time with the children to two days and five nights every two weeks (See AA, p. A-30), it certainly was contrary to logic and to the evidence in the record, and thus an abuse of the Court's discretion, for the Court to credit the Respondent with monthly expenses based on his claimed status as a custodial parent. As of August

2007, when the evidentiary record as to financial issues closed, the Respondent had not been a custodial parent since January 2005.

The Trial Court applied the child support guidelines of Minn. Stat. §518.551, subd. 5(b), without downward deviation, when it originally determined the parties' respective child support obligations for purposes of applying the *Hortis/Valento* formula in the original Judgment and Decree, and did so even though the Respondent at that time claimed monthly living expenses well in excess of the net monthly income which the Court imputed to him. (*See AA.*, pp. A-4, A-5.) Nevertheless, the Appellant does not challenge the Trial Court's discretion to deviate downward from the child support guidelines in setting the Respondent's child support obligation, if evidence in a properly presented record warranted doing so. However, the Appellant does claim that a deviation all the way down to zero in the current circumstances of this case was an abuse of the Court's discretion. Even if the Trial Court's finding of net monthly income of \$3,275 for the Respondent (*See AA.*, p. A-69) had been supported by competent evidence, the Respondent's presumptive monthly support obligation for his two children under the child support guidelines would be \$982.50. The Trial Court could have deviated substantially downward and relieved the Respondent of two-thirds of his obligation and still ordered him to pay \$327.50 per month for his children's support. The Appellant has been unable to find any Minnesota case, reported or otherwise, in which an appellate court has upheld a Trial Court's decision to entirely relieve a parent with earnings as substantial as the Respondent's from any child support obligation whatsoever.

Although the child support guidelines of Minn. Stat. §518.551, subd. 5(b) have been repealed, they continue to apply to this proceeding, which was commenced prior to their repeal. *See* Laws 2006, Chapter 280, Section 44. The issue of the Respondent's child support obligation should be remanded for appropriate findings under the child support guidelines based on competent evidence and for a decision consistent with the legislative policies reflected in the statute containing such guidelines and having retroactive effect to March 2006, the first month after the Appellant moved for adjustment of the parties' respective child support obligations.

## II.

Where a Court orders a party's obligation to pay child support terminated on account of that party having become the custodial parent of the children for whom such child support had been ordered, the Court may not continue to impose on the party an obligation to provide life insurance as security for child support.

Whether statutes authorize a Court to require a party to carry life insurance raises questions of statutory construction, which are legal questions to be reviewed *de novo* by the appellate court. *See Schumacher v. Ihrke*, 469 N.W.2d 329, 332 (Minn. App. 1991). If authorized by the statutes, the Court's exercise of such authority is discretionary, which the appellate court reviews for abuse of such discretion. *See Riley v. Riley*, 369 N.W.2d 40, 44 (Minn. App. 1985).

The Trial Court in the present case exceeded its authority and erred as a matter of law in continuing to order the Appellant to provide life insurance as security for child support after it had relieved the Appellant of the obligation to pay child support. (*See* AA, pp. A-73, A-74.)

Minn. Stat. §518A.71 (formerly §518.24) and Minn. Stat. §518A.39, subd. 4 (formerly §518.64, subd. 4) have been cited as the sources of the Court's authority to require a child support or spousal maintenance obligor to maintain life insurance to secure payment of past or future child support or maintenance obligations. *See, e.g., Maeder v. Maeder*, 480 N.W.2d 677, 680 (Minn. App. 1992); *Emerick on Behalf of Howley v. Sanchez*, 547 N.W.2d 109, 112 (Minn. App. 1996); *Thiebault v. Thiebault*, 421 N.W.2d 747, 746 (Minn. App. 1988).

There are no reported cases addressing a Court's authority to require a party who is not a current maintenance or child support obligor to carry life insurance, but neither Minn. Stat. §518A.71 nor Minn. Stat. §518A.39, subd. 4 appear to authorize the Court to impose such an obligation.

Minn. Stat. §518A.71 says, in relevant part,

In all cases when maintenance or support payments are ordered, the court may require sufficient security to be given for the payment of them according to the terms of the order....

§518A.71 appears by its terms to authorize the court to require security only for payments that have been ordered, and not for future payments which might someday be ordered. It therefore provides no authority for the Court to order the Appellant to continue to carry life insurance in the present case.

Minn. Stat. §518A.39, subd. 4, states,

Child support on death of obligor. Unless otherwise agreed in writing or expressly provided in the order, provisions for the support of a child are not terminated by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be

modified, revoked, or commuted to a lump sum payment, to the extent just and appropriate in the circumstances.

§518A.39, subd. 4, appears also to apply only support obligations that have been ordered by the Court, i.e., "provisions for the support of a child" and to the parents who are subject to such provisions, i.e., "a parent obligated to pay support." The statute by its terms does not appear to apply to a party such as the Appellant who, although subject to the general parental duty to provide financial support for her children, is not currently under any order to "pay" such support.

There being no authority for the Trial Court's order requiring the Appellant to maintain life insurance, this Court should reverse such order. The Trial Court would remain free to impose on the Appellant an obligation to maintain life insurance if the Appellant should at some time in the future become subject to a child support order.

### III.

Where both parties have moved for attorney fee awards, a Court may not, without specific findings of fact indicating the basis for its award of attorney fees or indicating the extent to which its award of attorney fees was needs-based or conduct-based, properly order, on account of the disparities in the parties' incomes, an award of attorney fees to a litigant who had been found to have been uncooperative in the proceedings before the court as well as in previous, related proceedings, to have lacked credibility in his testimony, to have pursued claims in the face of overwhelming evidence against such claims and to have lost on the claim before the court as to which most of the parties' expense and efforts were directed.

An award of attorney fees "rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Jensen v. Jensen*, 409 N.W.2d 60, 63 (Minn. App.1987).

Minn. Stat. §518.14, subd. 1 states, as to attorney fee awards in family court proceedings,

Except as provided in section 518A.735, in a proceeding under this chapter or chapter 518A, the court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:

(1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;

(2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and

(3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Nothing in this section or section 518A.735 precludes the court from awarding, in its discretion, additional fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding. ....

Attorney fees awarded according to the three enumerated factors in §518.14, subd. 1 are characterized as "needs-based", while attorney fees awarded against "a party who unreasonably contributes to the length or expense of the proceeding" are described as "conduct-based." *See Geske v. Marcolina*, 624 N.W.2d 813, 816-818 (Minn. App. 2001). When the Trial Court awards attorney fees pursuant to §518.14, subd. 1, it must make specific findings stating what portion of the attorney fee award is needs-based and what part is conduct-based, and the Court must make specific findings as to the applicable statutory factors for any attorney fees it awards. *Id.* Conclusory findings on the statutory factors are not adequate to support a fee award. *See Richards v. Richards*, 472 N.W.2d 162, 166 (Minn. App. 1991)

Conduct-based attorney fees may be awarded pursuant to Minn. Stat. §518.14, subd. 1, regardless of the parties' respective financial resources, against any party who unreasonably contributed to the length and expense of the proceeding. *See Dabrowski v. Dabrowski*, 477 N.W.2d 761, 766 (Minn. App. 1991). Furthermore, a party need not be found to have acted in "bad faith" in order to be assessed conduct-based fees. *See Geske v. Marcolina*, supra, at 818-819.

In the present case, the Trial Court made findings as to the parties' requests for attorney fees (*See AA*, p. A-72), but its findings were nonspecific and conclusory. The Court found that both parties contributed to the length and cost of the proceeding, but failed to describe how either party had done so. The Trial Court's findings as to conduct based fees were simply as follows:

Both parties have contributed to the length and cost of this proceeding. Petitioner has brought numerous, sometimes duplicative motions. Respondent unwaveringly maintained his position on custody and sought sole custody for himself in the face of unified expert opinion to the contrary.

The Trial Court's finding is inadequate to penalize the Appellant for her conduct in the litigation. It does not state that any of the Appellant's conduct was unreasonable and it specifically does not indicate in what respects the "numerous, sometimes duplicative motions" which the Appellant was found to have brought were uncalled for or otherwise unreasonable.

As to the Respondent's conduct, the Trial Court's finding as to conduct-based fees is inadequate because the record shows many instances of the Respondent's conduct

contributing to the expense and length of the litigation which the trial court did not mention. Specifically:

- The custody proceedings, which the Respondent was found to have unsuccessfully pursued "in the face of unified expert opinion to the contrary", consumed the great bulk of the parties' energy and attorney fees. Numerous pre-hearing motions and three and one-half court days of testimony were devoted to the custody issue. The parties' dispute over child support and maintenance, on the other hand, involved no witness testimony. Although the parties agreed that the financial issues would be decided on exhibits and affidavits, the Respondent did not even bother submitting an affidavit in support of his financial claims.
- The Trial Court's Findings of Fact and Order Regarding Custody and Parenting Time filed November 8, 2007 contains the following findings as to the Respondent's conduct:
  - A reference to the Respondent's "continuing efforts to sabotage the parenting consultant's involvement in this matter, his repeated efforts to sabotage communication systems, and his refusal to respond to requests made by the Petitioner, the parenting consultant and the children's therapists" and a further statement that, "The court has no such concerns with respect to the Petitioner." (See Finding ¶21, xiii, AA, p.A-23.)
  - A finding that, "... Petitioner frequently was forced to seek out the services of the parenting consultant due to Respondent's delay or failure to respond to Petitioner's requests to make decisions or resolve disputes. Overall Petitioner's use of the parenting consultant has been largely appropriate or required as a result of Respondent's failure to cooperate. Although Respondent has nothing but complaints about the parenting consultant, the use of the parenting consultant has addressed many disputed issues and succeeded in keeping the parties out of court on routine issues." (See Finding ¶22, (b), AA, p. A-25.)
  - A finding that, "The record is replete with examples of the Respondent's unwillingness and even refusal to utilize reasonable mechanisms to communicate with the Petitioner and his repeated efforts to sabotage existing communication methods. At times he has refused to communicate by phone and has refused to return calls placed to his cell phone by the Petitioner prompting the Petitioner to

incur the cost of obtaining a separate cell phone for the children's use while they are with the Respondent. The Respondent has repeatedly attempted to place unreasonable restrictions on the use of email ...." (See Finding ¶22, (b), AA, p. A-26.)

- One and one half pages of findings of fact detailing instances where the court found the Respondent's testimony to have lacked credibility. (See Finding ¶23, AA, p. A-27 through A-29.)
- The Court's original February 24, 2005 Judgment and Decree contained findings of fact that "the majority of the expense Respondent incurred for these proceedings were a result of his own questionable actions" and "Respondent's attorney contributed to the expense by approaching this case with a no compromise attitude." The same paragraph of findings of fact in the Judgment and Decree also criticized the Respondent for wasting time and money by forcing the Appellant to call an employment expert as a witness and then ineffectually cross-examining the expert (See AA, p. A-6.)
- In May 2006, the Respondent moved for an increase in the Appellant's child support payments to him, notwithstanding that the parties' children had not been in the Respondent's custody since January 2005. (See May 25, 2006 Notice of Respondent's Responsive Motion and Responsive Motion.)
- In July, 2006, the Respondent had to be ordered to provide copies of his 2005 tax returns and of some of his 2006 paycheck stubs after the Appellant's requests for his voluntary production of those documents had been ignored. (See AA, pp. A-36.)
- In October, 2006, three months after the Court had denied his earlier request to have the parties' parenting consultant dismissed, the Respondent again moved to have the parenting consultant dismissed. (See October 27, 2006 Respondent's Responsive Notice of Motion and Responsive Motion.)
- After the Trial Court determined in July 2006 that the Appellant had made a *prima facie* showing in favor of modification of the joint legal and physical custodial provisions of the Judgment and Decree (a determination grounded, at least in part, upon the May 2006 report of the parenting consultant who had opined that the endangerment standard of Minn. Stat. § 518.18 had been met), the Respondent moved the Court for an award of sole legal and physical custody of the parties' minor children.
- In December 2006, because the Respondent had failed to pay his share of the parenting consultant's fees, the Court had to fashion a remedy whereby

the Appellant would pay such unpaid fees in lieu of paying further child support to the Respondent (See AA, pp.A-39, A-40.)

- In February 2007 the Respondent indicated his intention to call as witnesses at the evidentiary custody hearing the parties' children's therapists and a custody evaluator who was not familiar with the parties' current circumstances, forcing the Appellant to incur the expense of a successful motion in limine to exclude such inappropriate or unhelpful testimony. (See Petitioner's Notice of Motion and Motion in Liming dated February 27, 2006.)
- The Respondent incurred total attorney fees from March 2006 to August 2007 of approximately \$64,000 compared with Appellant's attorney fees of approximately \$28,000 for the same period. (See Respondent's Affidavits of Attorney Fees dated August 10, 2007 and Affidavit of Becky Toevs Rooney dated June 20, 2007.) In light of the extraordinary disparity in the fees incurred by the parties, the fact that the Appellant, whose fees were significantly lower than that of the Respondent, was the prevailing party whose position was supported throughout the course of litigation by the experts involved in the matter, as well as the disparity in hourly rates charged by the two attorneys, a fundamental issue has been raised, not addressed by the Trial Court, with respect to the reasonableness or the necessity of the fees incurred by the Respondent.

Because of the inadequate findings of fact as to attorney fees, and particularly as to conduct-based attorney fees, the Trial Court's attorney fee award to the Respondent cannot stand. The issue of attorney fees should be remanded for more specific findings of fact with particular attention paid to the instances of the Respondent's unnecessarily expensive and delaying conduct noted above.

### Conclusion

The Trial Court's refusal to impose any past or current child support obligation on the Respondent was contrary to law and unsupported by the evidence. The issue should be remanded for reconsideration of the Respondent's child support obligation, retroactive to March 2006.

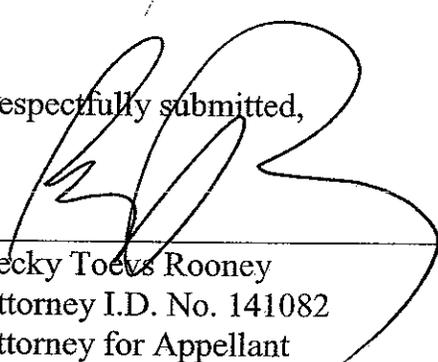
The Trial Court had no authority to continue to impose on the Appellant an obligation to maintain life insurance to secure child support after the Court had terminated the Appellant's child support obligation. The Trial Court's imposition of such an insurance obligation on the Appellant should be reversed.

The Trial Court abused its discretion and failed to make necessary findings of fact with respect to its award of attorney fees to the Respondent. The attorney fees issue should be remanded for further findings, particularly with respect to the Appellant's claim for conduct based fees against the Respondent.

Dated: \_\_\_\_\_

2/19/08

Respectfully submitted,



\_\_\_\_\_  
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STATE OF MINNESOTA  
IN COURT OF APPEALS  
COURT FILE NO. A08-123

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In Re the Marriage of:

Karen Sue Williams  
(f/k/a Karen Sue Hunley),

Appellant,

vs.

**APPELLANT'S CERTIFICATION  
AS TO BRIEF LENGTH**

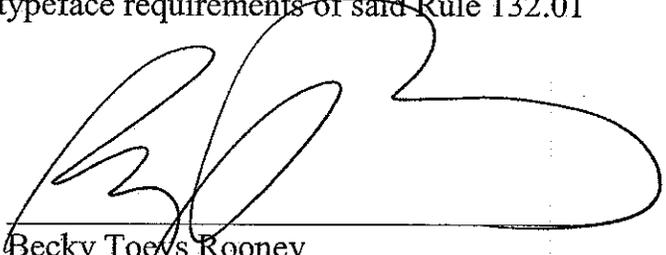
Donald Gaylord Hunley,

Respondent.

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The undersigned hereby certifies pursuant to Rule 132.01, subd. 3, of the Minnesota Rules of Civil Appellate Procedure that this brief complies with the word count limitation set forth in said rule. This brief was prepared with Microsoft Word 2003 word processing software; it complies with the typeface requirements of said Rule 132.01 and contains 6,774 words.

Dated: 2/19/08



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