

NO. A08-2255

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State of Minnesota
In Court of Appeals

Patricia Louise Hesse,

Appellant,

vs.

Kevin James Hesse,

Respondent,

County of Meeker,

Intervenor.

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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STATEMENT OF FACTS

Patricia L. Hesse, Appellant, and Kevin J. Hesse, Respondent were married for 13 years, having been divorced by order of the District Court filed on December 13, 2006 (Appendix 1-26).

The parties have 2 sons Jared Hesse, currently age 13 ½ years and Trevor Hesse, currently age 10 years.

The Decree of Dissolution was the result of a contested hearing where each side presented its points of view regarding legal and physical custody, parenting time, spousal maintenance, and property division issues.

The trial judge awarded the parties joint legal custody of their children (Appendix 11), and awarded the Appellant, Ms. Hesse, the sole physical custody of their 2 sons (A9).

The Respondent has worked as a construction foreman, for years supervising a work crew. Ms. Hesse's construction work is seasonal, and he receives unemployment compensation of approximately \$538.00 per week during the winter months (transcript page 37).

Respondent's income tax returns showed W-2 gross income of approximately \$60,000.00 in calendar year 2005 (transcript page 15), \$64,000.00 in 2006 with an \$8,200.00 refund (transcript page 18), and \$71,537.00 for calendar year 2007 (transcript page 18). Respondent indicated that he shared expenses with a significant other with whom he lived (transcript page 20). Respondent also indicated that he was supplied an automobile paid for by his employer and is reimbursed for the gasoline by his employer for the vehicle (transcript page 21). The use thereof is not included as income by his employer

Respondent admitted to some moonlighting income for he and his crew for various Saturdays in 2006 and 2007 (transcript page 32), which income was off company books.

The parties indicated that the schedule set out in the Decree of Dissolution for parenting time has been followed fastidiously (T.P 61).

Respondent's parenting time with the children was established by the original trial judge to be more intensive during his period of lay off.

The trial judge ordered that Mr. Hesse would have extended parenting time with the children "from Easter break until Christmas break" (Appendix page 9). This means that in every two week portion of that week period the Respondent would have 10 days of the 14 days, and the Appellant would have 4 days of the 14 day period.

From Easter was Christmas break this whole scenario is reversed, with Appellant having 10 days of parenting time every 2 weeks, with Respondent having 4 days every 2 weeks (Appendix page 9).

Each party was allocated approximately 5 holidays on an annual basis (Appendix page 10).

Also in the Decree of Dissolution (Appendix page 11) the trial judge dealt with vacations. Each party was allowed to have 2 weeks of uninterrupted parenting time with the children if they so desired during the summer break of school. A procedure was put in place where each party needed to notify the other party of the dates so chosen (Appendix page 11).

Respondent admitted that he chose not to use his permissible 2 weeks continuous parenting during calendar year 2007 and 2008, the first 2 calendar years after the entry of the Decree of Dissolution (transcript page 24).

The parties also testified that the start of the Respondent's primary parenting time was right after Christmas of each year (transcript page 28).

The Decree of Dissolution was entered before the effective date of modification of the Child Support Guidelines, which took effect for preexisting cases on January 1, 2008.

Attached as an exhibit at page 54 of the Appendix is listing of the date that Easter Sunday falls on during all the pertinent years of the minority of the children.

In 2007 Easter Sunday fell on April 8, and 2008 Easter Sunday was on March 23. 2009 Easter Sunday will fall on April 12 (Appendix page 54). This matter was tried in a contested hearing on the modification motion of Respondent before a child support magistrate on June 25, 2008. Said child support magistrate issued an original order denying the modification of the child support obligations which was filed July 21, 2008 (Appendix pages 27-35).

Thereafter, Respondent filed for a Review before the Honorable Steven E. Drange, Judge of District Court This review was done without taken additional testimony or having the benefit of a transcript for review by the District Court Judge. The Findings and Order of the District Court Judge were filed October 7, 2008 (Appendix pages 37-44).

Pursuant to the remand instructions of the District Judge the child support magistrate issued an Amended Order which was filed in Meeker County District Court on October 28, 2008 (Appendix pages 45-53). This granted the motion to modify child support downward, finding that parenting time was by statute deemed to be equal. This appeal was served and filed on December 24, 2008 (Appendix page 55).

ARGUMENT

THE TRIAL COURT MISTAKENLY GRANTED RESPONDENT A REDUCTION OF CHILD SUPPORT BY PRESUMING THAT HIS PERCENTAGE OF PARENTING TIME WAS 45.1% OR MORE IN CONTRAVENTION OF UN-REBUTTED TESTIMONY AND IN CONTRAVENTION OF THE PARENTING SCHEDULE SET FORTH IN THE DECREE OF DISSOLUTION OF THE PARTIES.

The original contested divorce trial judge when deciding the issues in this case probably was unaware of the future ramifications of his order, given the statutory change in calculations child support under the new system codified in Minnesota Statutes Chapter 518A.26 et seq.

The divorce trial judge looked at the disparity of income between the parties, and the disparity of their earning capacities and, in conjunction with the prior child support order, established spousal maintenance for a period of time after the decree.

The Respondent bided his time as the new child support calculator was being introduced for new cases effective January 1, 2007, and for pre-existing cases as of January 1, 2008.

The basic law regarding modification of the preexisting child support order remains pretty much intact, with a new number, Minnesota Statutes Chapter 518A.39 Subdivision 2(a).

The Child Support Magistrate and the District Judge on Appeal had their focus solely upon the mathematics of the situation, ignoring the statutory mandate at 518A.39 Subdivision 2(a) that regardless of the mathematical calculations there must be a showing that the prior child support order is "unreasonable and unfair".

No specific analysis of the reasonable and necessary living expenses of Petitioner or Respondent was incorporated into the findings below.

The whole process in family law is finding of fact intensive. In fact, the lack of findings below as to whether the current order is unreasonable or unfair given the circumstances, could at a minimum be remanded back to the judge for additional evidence on these issues (see for example MoylanvsMoylanN.W.2d859 (Minn.1986); BlissvBliss 493N.W. 2d583 (Minn. App. 1992).

The additional income saved by the Respondent from the free use of a motor vehicle and gasoline reimbursement was nowhere factored into the equation, and the fact that the gross income of the Respondent has increased by \$10,000.00 (15%) since the Decree of Dissolution was totally ignored.

The expenses submitted in support of the modification claimed by Respondent, are partially shared by his current significant other, and were easily handled by him, including the former ordered child support.

Mr. Hesse indicated that he was current in all bills (page 21), and that also made additional personal property purchases since the dissolution.

The Appellant does not argue with the findings made by the Court below regarding the respective gross income of the parties. However, she finds the decision below to be disingenuous because it applied two different standards to determining percentage of parenting time for each party.

Also, the District Court Judge did not have the benefit of a transcript of the proceedings which is available for review in this Court.

Minnesota Statutes Chapter 518A.36 talks about a parenting time expense adjustment. It reads in part as follows: "For purposes of this section, the percentage of parenting time means the percentage of time a child is scheduled to spend with the parent during a calendar year according to a court order" (MS 518A.36 Subd. 1 (a)).

At Subdivision 2 of that same statute it makes a determination that if an obligor has the children less than 10% percent of the time there is no adjustment, 10-45% of the time has a 12% adjustment, for 45.1-50% of the time, there is a presumption of equality (MS 518A.36 Subd 2(1)).

Minnesota Statutes Chapter 518A.37, as alluded to above requires written findings on any significant Evidentiary issue regarding the child support determination (MS 518A.37 Subd 1 (3)). Where are those findings in this case?

A naked assertion is made by the District Judge based on a sheet of paper in front him and a written affidavit of the Respondent which was contradicted by his sworn testimony at the contested hearing.

The Petitioner established that Respondent, by his own testimony, chose not to exercise the continuous parenting time which was permissibly allowed to both parties in the Decree of Dissolution between the parties (transcript page 24). It was also determined, and not contradicted, that the Respondent has had no extra days, not one, of parenting time since the entry of decree of dissolution other than the basic parenting dates specified in the decree (transcript page 61).

It was also established that the Respondents period of primary parenting would start approximately a day or two after Christmas each year until the Easter holiday, when Ms. Hesse, the mother, would once again become primary.

Specific and mandated findings of fact would have found that in calendar year 2007, the first school year after the divorce, Respondent's parenting time would have been primary (10 days out of 14) from the first of the year through Easter Sunday which is April 8 just under 3 ½ months. The balance of the year, until shortly after Christmas, would have had the Appellant having 10 days out of 14 days with the children per the court order which the above statute mandates to be primary factor.

Basic math would establish that during those 3 ½ months, assuming the parenting order was followed, which that parties agreed it was, Respondent would have had about 76 days of parenting time. For the balance of the 8 ½ months left of the year, some 37 weeks, he would have had an average of 2 days each week or 74 days. Also, each side was allocated 4-5 days each year for a holiday, bringing his parenting days, at best in calendar 2007 to approximately 155 days, close to 45.1%, but several percentage points less.

In calendar year 2008 Easter came two weeks earlier, (March 23, 2008), and hence Respondent's parenting time of would have fallen off some ten days, so that he had approximately 145 days of the 366 days some 39.6% of the time.

By ignoring the reasonable necessary expenses of both parties, and by not doing the appropriate math regarding determining parenting time, the Court has erred in making the substantial downward modification. Nowhere in the current court order is there any analysis of the devastating effect on the two children and their primary parent of a reduction of child support. To the contrary, to the Respondent, to testified that he was easily meeting his ongoing obligations with increased income every year.

Respondent was caught in some inconsistencies between his original affidavit, which was presumably given credence by the judge since he had no transcript, and his actual testimony regarding parenting time.

The Appellant anticipates that Respondent will argue that since he is entitled to have 2 continuous weeks he should be presumed to have those weeks whether or not exercises the visitation (he stipulated that he has not ever had such continuous visitation, transcript page 24). Presumably he is too busy with his work crew each summer, which is understandable.

He could have exercised this visitation, as could the Appellant, by doing an appropriate notice to the other party if they had a desire for 2 exclusive weeks during the childrens' summer vacation.

Presumably, in the future, if Respondent, in an effort to get above 45.1% in parenting time makes the appropriate notice for visitation, such can be easily countered by the Petitioner in asking for her own exclusive 2 weeks of parenting time, thus making the net results a wash.

CONCLUSION

The original trial judge in the divorce did his best to allocate the two children between the parents as best he could after hearing the testimony presented by all sides. The trial judge recognized that a certain amount of income was needed to maintain the Appellant and the children in their household, and that the Respondent could pay the same and still meet his ongoing obligations without a problem. That remains true to this day.

Spousal maintenance was allowed to expire per the terms of the original decree and Appellant had to make do with less so that she could be there for her sons on a full time basis during her period of primary parenting.

Along comes Minnesota Statutes Chapter 518A with its new child support scheme, and this Respondent motioned the Court within weeks of his statutory ability to do so.

He supplied the Court with a misleading and in places a false affidavit, and has not provided information or expenses to show why the old order, as established by Judge Mennis, was unreasonable and unfair.

The original child support magistrate, when he denied the motion for modification in child support was correct in his findings (Appendix pages 27-31).

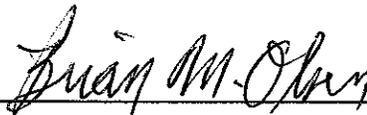
The District Court Judge, having not heard the testimony or given the benefit of a transcript, made assumptions which were contrary to the evidentiary record and made a wrongful finding that supposedly the parenting time adjustment should be based upon 45.1% or more despite the ongoing need of the children to be support during the nine months of the year they are primarily with their mother.

Appellant respectfully request that this matter be remanded back to the trial court with directions to retroactive reinstate the prior child support with a proper parenting time expense deduction, which would be 12% pursuant to Minnesota Statutes Chapter 518A.36.

Appellant and the children have suffered needlessly by reason of the decision made in the trial court and its retroactive effect, which has essentially made this family reimburse Respondent for alleged overpayment retroactive to filing of this motion. Please correct an oversight which is damaging to the children and not sustained by the evidentiary record.

Dated: February 20, 2009

Respectfully Submitted

A handwritten signature in cursive script, reading "Brian M. Olsen", is written over a solid horizontal line.

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