

NO. A08-2255

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**State of Minnesota**  
**In Court of Appeals**

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Patricia Louise Hesse,

*Appellant,*

vs.

Kevin James Hesse,

*Respondent,*

County of Meeker,

*Intervenor.*

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**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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## LEGAL ISSUES

I.

**Is the Parenting Expense Adjustment determined by the percentage of time a child is scheduled to spend with the parent during a calendar year according to a Court Order?**

**The District Court and the Child Support Magistrate on remand found in the affirmative.**

## STATEMENT OF FACTS

Patricia L. Hesse, Appellant, and Kevin J. Hesse, Respondent were divorced by Order of the District Court filed on September 13, 2006. The parties have two (2) sons, Jared Kevin Hesse, DOB March 12, 1995 and Trevor Kevin Hesse, DOB December 26, 1998. The District Court Order in the Conclusions of Law expressly described the parenting time for both parents in explicit detail at paragraph 2, covering three (3) pages of the Judgement and Decree. (Appendix 17, 18 and 19).

The Respondent, Mr. Hesse, has worked as a construction foreman for a sewer and water company in Minnesota and his work is seasonal. His company works seven (7) plus months a year generally, and he is laid off four (4) plus months a year. Throughout the marriage and subsequent to his marriage, Mr. Hesse was the primary caretaker of his minor children when he was laid off. During the construction season Ms. Hesse was the primary caretaker during the work week.

In the dissolution, the issue of parenting time was tried to the District Court and the Court Order and Judgment and Decree provides for a detailed parenting time schedule which took into consideration Mr. Hesse's work schedule and the prior practices of both the children's father and mother. The children spend approximately half of their time with each

parent. Each parent pays approximately half of the expenses for the two children.

In January of 2008, Respondent moved the Court for a Modification of Child Support. Respondent's child support was modified downward to \$760.00 per month. The Appellant appealed the Court's downward modification.

## ARGUMENT

### I.

**Is the Parenting Expense Adjustment determined by the percentage of time a child is scheduled to spend with the parent during a calendar year according to a Court Order?**

**The District Court and the Child Support Magistrate on remand found in the affirmative.**

The Appellant argues that the Court below incorrectly made a finding that the parenting time of the Respondent was more than 45.1%, because the Appellant argues, the Respondent did not exercise the Court ordered parenting time for the two weeks allowed during the summer months. Initially, the Child Support Magistrate adopted the argument of the Appellant, and deducted the two weeks that was allowed the Respondent but not exercised in the summer of 2007. Respondent appealed the Magistrate's decision to District Court and the District Court by Order dated October 14, 2008 (A-20) found " Petitioner (Respondent herein) was granted parenting time under the Court's September 13, 2006 Order between 45.1% - 50%. There is a presumption that parenting time is equal to both". The Court in its Memorandum (A-23) attached to the Order of October 14, 2008, specifically provided as follows:

Petitioner also contends that his parenting expense adjustment was incorrectly calculated. Parenting Expense Adjustments are governed by Minn. Stat. § 518A.36. Such statute provides that, "[f]or 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.*" *Id.* at subd. 1(a) (emphasis added). Petitioner claims that his percentage range of parenting time is 45.1% to 50% and thus there exists a presumption that parenting time is equal. His argument is based upon the CSM's order dated July 18, 2008 wherein it states that because Petitioner failed to exercise the two weeks of parenting time set aside for each parent to take the children on vacation, he has fallen into the 10% to 45% range. See Minn. Stat. § 518A.36, subd. 2(1)(ii) (2007). This Court finds that because Petitioner was granted parenting time between 45.1% and 50% in the September 13, 2006 court order, there is a presumption that parenting time is equal. *Id.* at subd. 2(1)(iii). Whether Petitioner in fact exercised the two weeks of parenting time at issue is irrelevant. As such, the parenting time expense adjustment of 50% will be applied to basic support.

Therefore, a substantial change in circumstances has occurred that renders the existing child support order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(b)(1) (2007). Petitioner's motion for review of the CSM's order dated July 18, 2008 is granted. Accordingly, the Court remands the issues which utilize the figure for Petitioner's gross income and Petitioner's parenting expense adjustment back to the CSM. The CSM shall make the necessary

**corrections in accordance with this Court's determination of these two figures."**

The Respondent, in the Court below, in his Affidavit in support of his motion (A-16), calculated the number of parenting time he was allowed by the original Judgment and Decree at 176 days per year. Respondent also in that same document, indicated "the Court Order allows Petitioner (Respondent herein) "have the first opportunity to care for the children before alternative arrangements are made for the minor children (i.e. Daycare or family members)" which would also add more actual court ordered days. This determination was unrebutted in the court below. The Magistrate originally found the Respondent had in excessive of 45.1% court ordered parenting time and then, erroneously deducted two (2) weeks for failing to exercise the summer visitation he was allowed per court order. This was corrected in the District Court by the Order of the Honorable Steven E. Drange, dated October 14, 2008 which remanded the matter back to the Child Support Magistrate who originally heard all of the evidence. On remand, the Child Support Magistrate corrected his deduction of the two (2) weeks and made the determination that the Court Ordered Parenting Time of the Respondent was more than 45.1%. The Child Support Magistrate on remand had the benefit off all of the exhibits

and heard the evidence and now had the benefit of the rulings of the District Court.

The argument of the Appellant is essentially a case of mixing apples and oranges. The statute specifically provides that the Parenting Time Adjustment is based on a Court Order. The legislature was wise to make the measuring stick the Court Order allowance for parenting time, otherwise, you would have a factual dispute in every case as to how many days, hours, or minutes each child spent with each parent in any given calendar year.

In fact, the Appellant at the initial Hearing before the Child Support Magistrate, attempted to do a day-by-day factual basis to establish parenting time for the parties. The Respondent objected on the basis of relevance. (Transcript page 29, lines 15 through 25 and page 30, lines 1 through 9).

Essentially the Respondent objected to going through a day-by-day, blow-by-blow, evidentiary hearing which would have required him to rebut day-by-day for the entire year. **The Court sustained the objection.**

Thereafter, it was unnecessary for the Respondent to establish the additional times or dates he had the children beyond the Court Ordered Visitation. Nor was it necessary for the Petitioner to make her allegations about the days the parties switched or changed their visitations that they

made. Specifically, the Appellant's concern that the Respondent did not exercise the two weeks allowed Respondent in the summer of 2007 became irrelevant. Had the Court ruled, that it was relevant, we could have taken additional testimony on a day-by-day basis from both parties to show the additional times and places that the children were with the Respondent. The Child Support Statute, Minn. Stat. § 518A.36 specifically provides: "The percentage of parenting time means the percentage of parenting time a child is scheduled to spend with the parent during a calendar year according to a court order."

The Appellant also argues that because Easter is a variable date, that it is unfair to calculate the Court Order days of 176 days for the year 2007 and use that as a measuring stick for the Motion made for Modification of Child Support on January 30, 2008. Easter Sunday fell on April 8, 2007. Appellant's argument is that the time frame which is measured from Christmas, December 25, which is a fixed date, until Easter is not the same from year to year. His point is well taken. For example, in 2009 Easter is April 12; in 2010 Easter is April 4; and in 2011 Easter is April 24; and in 2012 Easter is April 8, etc. However, if you were to look at the average date Easter arrives, from the first Easter after the divorce in 2007 through the youngest child's 18th birthday in 2017, we would find that the average date is April 8. The Appellant has supplied a table of the date for Easter

for the years 1901-2100 which the Court can take judicial notice of.  
(Appellant's A-54).

The Appellant also argues that there is no showing that the prior Child Support Order is "unreasonable and unfair". However, once the proper determination of parenting time is determined and the correct income figures are inserted in the Child Support Calculator, the Child Support Magistrate on remand in his Order dated October 23, 2008, made the following conclusion of law;

**"3. Pursuant to Minn. Stat. § 518A.39 subd 2., there has been a substantial change in circumstances that renders the existing Child Support Order unreasonable and unfair."**

**"4. Pursuant to Minn. Stat. § 518A.39 subd 2.b There has been a substantial change of circumstances that renders the existing Child Support Order unreasonable and unfair. The terms of the existing Order shall be rebuttably presumed to be unreasonable and unfair if application of the Child Support Guideline results in a calculated order that is at least 20% and \$75.00 higher or lower than the current Child Support Obligation."**

In the prior Order dated September 13, 2006, the Petitioner was ordered to pay child support of \$1,107.00 per month. In the Order of October 26, 2008, the Respondent was ordered to pay ongoing basic child

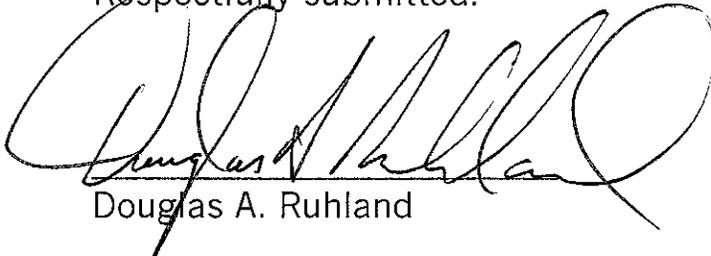
support of \$760.00 per month. This amount is \$347.00 per month less and therefore, the rebuttable presumption that the prior order is unreasonable and unfair, applies.

## CONCLUSION

The Parenting Expense Adjustment is determined by the percentage of time a child is scheduled to spend with the parent during a calendar year according to a Court Order. The Respondent is entitled to parenting time in excess of 45.1% and the parties Parenting Time is presumed equal. The final ruling of Child Support Magistrate should be affirmed.

Dated: March 26, 2009

Respectfully submitted:



Douglas A. Ruhland