



Case No. A08-2277

STATE OF MINNESOTA  
IN COURT OF APPEALS

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In re the Marriage of:

Brian Michael Welsh,  
Petitioner-Respondent

-vs-

Laura Lyn Welsh,  
Respondent-Appellant

-and-

County of Dakota,  
Intervenor.

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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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## ISSUES PRESENTED

1. Did the Magistrate and the trial court err or abuse its discretion by imputing income to Appellant under Minn. Stat. §518A.32, subd. 1?

*The Magistrate and the trial court committed reversible error by imputing income to Appellant under Minn. Stat. §518A.32, subd. 1 since Appellant receives monthly income from a trust, did not work during the parties' marriage or following the dissolution and has always been the caretaker of the minor children.*

2. Did the Magistrate and trial court err or abuse its discretion by reducing Respondent's child support obligation due to the fact that he did not meet the standard of modification pursuant to Minn. Stat. §518A.39, subd. 2(b)(1)?

*The Magistrate and the trial court committed reversible error by reducing Respondent's child support obligation due to the fact when Minn. Stat. §518A.32 is properly applied to Appellant's income, Respondent's current obligation did not meet the threshold to be considered unreasonable and unfair, pursuant to Minn. Stat. §518A.39, subd. 2(b)(1).*

## STATEMENT OF THE CASE

The Appellant, Laura Lyn Welsh and Respondent, Brian Michael Welsh were divorced on February 19, 1999 in Dakota County, Court File No. 19-F-99-012400. Appellant was awarded sole physical custody of the parties' twin daughters. Appellant was a stay at home mom during the marriage and continued to stay at home with the minor children during the parties separation and following the dissolution. Respondent was awarded parenting time and Ordered to pay \$2,100 a month as and for child support. Child Support has increased to \$2600 a month because of the cost of living adjustments applied thereto.

On June 3, 2008, Respondent served and filed a motion upon Appellant seeking a decrease in his child support obligation. Appellant responded with a responsive motion requesting that the Respondent's motion be denied and for an award of attorneys fees.

The parties appeared before Magistrate Flynn on August 19, 2008. On September 16, 2008 the Court issued an Order which imputed income to Appellant, in addition to the income Appellant receives from a family trust and reduced the amount of Respondent' child support obligation to \$1896 per month. The Court also ordered Appellant to contribute a proportionate share towards the children's medical and dental insurance premiums.

On October 15, 2008, Appellant filed a motion to review arguing that the Magistrate should not have included potential income of \$1702 a month, when Appellant receives income from a family trust on a monthly basis and that the Magistrate should not require Appellant to pay a share of the cost of the medical and dental insurance since Respondent insures other non-joint children and his current wife. Respondent did not file a response to the Appellant's motion to review.

The Honorable Timothy L. Blakely decided the Motion to review and issued an Order on November 10, 2008. Judge Blakely determined that the Magistrate did not err by providing potential income of \$1702 a month even though Appellant's income was \$1642 a month from a family trust

and that there is no basis to reduce Appellant's income even though she had always been the full-time caregiver of the children. Judge Blakely did reverse the Magistrate's decision to require Appellant to pay a proportionate share of the medical and dental insurance premiums.

On December 26, 2008, Appellant filed an appeal challenging the Magistrate's and the district court's order. The matter is now pending before the court.

## STATEMENT OF THE FACTS

Based on the research conducted and the implementation of the Minn. Stat. §518A, this is a case of first impression.

The parties were married on August 27, 1994 and divorced by Judgment and Decree on February 19, 1999. [A-13, A-26]. Appellant was awarded sole physical custody of the parties' twin daughters. [A-17]. The parties' Judgment and Decree established Respondent's child support obligation at \$2,100 per month. [A-17-18]. Through Cost of Living Adjustments, Respondent's monthly child support obligation increased to \$2,600. [A-32]. Respondent was also Ordered to provide medical and dental insurance for the minor children and the parties were Ordered to equally share the cost of uninsured and unreimbursed medical expenses. [A-20].

The Appellant did not work during the parties' marriage or following the dissolution. [A-8, A-16, A-96]. At the time of the dissolution, Appellant was unemployed and being supported by the Respondent. [A-16]. Following the dissolution, Appellant began receiving income from a family trust so that she could remain at home with the minor children. [A-8]. The family trust income supplemented the Respondent's child support obligation and provided Appellant with the means to remain a stay at home mother. [A-8]. At the time of the hearing, Appellant was receiving monthly income from the family trust in the amount of \$1,610. [Tr. p. 14, line 11-13, p. 16, line 20-21, p. 19, line 19-20]. Appellant has taken a hand full of part-time jobs that have provided very minimal income. [A-8, A-60].

At the time of the dissolution, Respondent was employed at Cargill Financial Services Corporation as a business consultant and received gross annual income of \$70,000.00 [A-16]. At the time of Respondent's motion, Respondent's gross income was \$164,460 a year, from Cargill Financial Services Corporation. [A-61].

The Respondent filed and served a motion upon the Appellant seeking a reduction in his child support obligation on June 3, 2008. [A-1]. Appellant filed and served a responsive motion on August 14, 2008, requesting that Respondent's motion be denied since the reduction he was requesting did not meet the presumption that his current obligation was unfair and unreasonable. [A-3]. Respondent set forth in his affidavit the cost for providing medical and dental insurance for the parties' minor children. [A-91]. Also, in Respondent's affidavit he indicated the cost associated with the premiums was also attributable to his new wife and his non-joint children. [A-91].

The parties attended the Motion hearing on August 19, 2008. [A-68]. The Child Support Magistrate found that Appellant's income was \$1642.91 per month from the trust fund. [A-70]. The Child Support Magistrate also determined that Appellant had potential income of \$1702 a month<sup>1</sup> since she was unemployed, even though she demonstrated receiving monthly income of at least \$1610<sup>2</sup> a month. [Tr. P. 60, line 20-21]. The Child Support Magistrate found Appellant's total gross monthly income to be \$3,394 and Respondent's gross monthly income to be \$13,705. [A-71]. The Child Support Magistrate found that based on the guidelines there was a substantial change in circumstances and reduced Respondent's child support obligation to \$1896 per month and ordered Appellant to pay a proportionate share of the children's medical and dental insurance, even though it was not an additional cost to insure the parties' joint children.

On October 15, 2008, Appellant filed a Motion for Review. [A-80]. Appellant asked the District Court to find that the Child Support Magistrate made an error in determining Appellant's income and in requiring Appellant to pay a proportionate share for the cost of the parties' minor children's medical and dental insurance coverage. [A-80-86]. Appellant argued that based on the finding that her income is \$1643 a month from the family trust, the only potential income should be

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<sup>1</sup> Pursuant to Minn. Stat. §518A.32, Appellant's income was determined at 150 percent of minimum wage. Minimum wage was \$6.55 an hour at the time of the hearing.  $\$6.55 \times 150\% = \$9.83$ .  $\$9.83 \times 40 \times 4.33 = \$1,702$ .

<sup>2</sup> The Court found Appellant's income from the trust fund to be \$1,642.91 a month based on Appellant's 2007 tax return. [A-70].

\$59.00 to total \$1702 of gross income per month. [A-81]. Appellant also argued that the Court should not provide for any potential income because of her status as a caregiver for the minor children. [A-81]. Respondent did not file a response to Appellant's motion for review.

The Honorable Timothy Blakely was assigned to review the Child Support Magistrate's Order. [A-88]. On November 10, 2008, Judge Blakely issued an order finding that the Appellant's trust income and potential income were properly calculated by the Magistrate. [A-87-90]. He further found that the Magistrate did not err in allocating potential income to Appellant even though she has always been and remains the minor children's caretaker. [A-89]. Judge Blakely also found the Magistrate's Order incorrectly allocated a portion of the Respondent's medical and dental premiums to Appellant pursuant to Minn. Stat. §518A.41, subd. 5(d) and modified that portion of the Child Support Magistrate's Order. [A-89, A-90].

This appeal follows.

## STANDARD OF REVIEW

**Standard of Review—Child Support.** A district court has broad discretion to provide for the support of the parties' children. *Ratten v. Ratten*, 347 N.W.2d 47, 50 (Minn. 1984). A district court abuses its discretion when it sets support in a manner that is against logic and the facts on record or misapplies the law. *Id.* (setting support in a manner that is against logic and facts on record); *Verkuilen v. VerKuilen*, 578 N.W.2d 790, 792 (Minn.App. 1998)(improper application of the law).

## ARGUMENT

I. **THE MAGISTRATE AND THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPUTING INCOME TO APPELLANT UNDER MINN. STAT. §518A.32, SUBD. 1 SINCE APPELLANT RECEIVES MONTHLY INCOME FROM A TRUST, DID NOT WORK DURING THE PARTIES' MARRIAGE OR FOLLOWING THE DISSOLUTION AND HAS ALWAYS BEEN THE CARETAKER OF THE MINOR CHILDREN.**

Due to the fact that this issue appears to be of first impression, there is no case law that is directly on point and therefore the argument and support thereof is based on interpretation of Minn. Stat. §518A.

Both the Magistrate and Trial Court erred by imputing potential income of \$1702 a month to Appellant. Minn. Stat. §518A.32, subd. 1 recites, "If a parent is voluntarily unemployed, underemployed, or employed on a less than full time basis *OR* there is no direct evidence of any income, child support must be calculated based on determination of potential income." Minn. Stat. §518A.32, subd. 1 (emphasis added). In the present case, Appellant does have direct evidence of income, which relieves the Court from having to impute potential income. The Magistrate found that Appellant had \$1,642.91 of income per month. [A-70, A-107]. Therefore, child support must not be based on a determination of potential income *and* the income Appellant's receives from the family trust.

Were the Court to impute income, statute allows the court to impute income based on one of three ways: past work experience, actual amount of workers' compensation or unemployment compensation, or 150% of minimum wage. See, Minn. Stat. §518A.32, subd. 2. The method the Magistrate used, and the Trial Court agreed with, considers the amount of income a parent could earn working full time at 150 percent of the current federal or state minimum wage, whichever is higher. See, Minn. Stat. §518A.32, subd. 2(3). Clearly, the other two methods set forth in Minn. Stat. §518A.32 do not apply to Appellant; Appellant has traditionally been a stay at home mom

(caregiver) for the two minor children and she is not receiving unemployment compensation or workers' compensation. See, Minn. Stat. §518A.32, subd. 2(1) and (2). At the time of the hearing minimum wage was \$6.55 an hour the maximum gross monthly income pursuant to this provision of the statute would be \$1,702 a month.<sup>3</sup> Based on the Magistrate's finding that Appellant earned \$1,642.91 (or \$1,643) in trust income, the maximum amount allowed to be imputed as potential income to Appellant must be \$59.09 (or \$59). {A-70??}. Anything other than \$59 would be disingenuous and would essentially penalize Appellant for receiving income from a family trust.

Being that Appellant is considered a "caretaker" to the children under Minn. Stat. §518A.32, subd. 5., no potential income should be imputed to Appellant. See, Minn. Stat. §518A.32, subd. 5. Minn. Stat. §518A.32, subd. 5 reads,

"If a parent stays at home to care for a child who is subject to the child support order, the court may consider the following factors when determining whether the parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis:

- (1) the parties' parenting and child care arrangements before the child support action;
- (2) the stay-at-home parent's employment history, recency of employment earnings, and the availability of jobs within the community for an individual with parent's qualifications;
- (3) the relationship between the employment-related expenses, including but not limited to, child care and transportation costs required for the parent to be employed, and the income the stay-at-home parent could receive from available jobs within the community for an individual with the parent's qualifications;
- (4) the child's age and health, including whether the child is physically or mentally disabled; and
- (5) the availability of child care providers."

Minn. Stat. §518A.32, subd. 5. When applying the statute to the current case, it is directly on point as to why Appellant should not be considered underemployed or unemployed.

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<sup>3</sup> \$6.55 X 150% X 40 hours per week X 4.33 weeks in a month = \$1702.

First, prior to the dissolution, when the support order was created, Appellant was a stay at home mother, caring for the parties' twin daughters. [A-16]. Respondent's employment status has not changed since the time of the dissolution. [A-8].

Secondly, Appellant's affidavit speaks to the fact that she has worked odds and ends jobs, here and there, as does the Child Support Officer's affidavit. [A-60]. As evidenced by the same, Appellant's gross earnings from employment in the calendar year 2008 were \$0. [Id]. The Child Support Officer's Affidavit also shows Appellant's employment history and the recency of Appellant's employment earnings. [Id]. Being that Appellant has been unemployed since the birth of the parties' twin daughter's, Appellant is not qualified for any employment other than the odds and ends jobs she has obtained, from time to time.

Third, it is unknown what the relationship between the employment-related expenses would be compared to Appellant's income. However, what is known is Appellant has made next to nothing during her times of employment. Being that the employment market is what it is today, it could be anticipated that Appellant would obtain a position of similar pay and structure, which would amount to little to no income.

Fourth, the children are both thirteen years old. [A-5, A-13].

Lastly, the availability of the child care providers is undetermined.

For the reasons set forth above, through the analysis of Minn. Stat. §518A.32, subd. 5, it is inappropriate to impute any potential income to Appellant since she has *always* been a stay at home mother and provided care giving services to her own children. See, Minn. Stat. §518A.32, subd. 5. Penalizing the party for being a stay at home mother is not the intention of the statute and should not be allowed in this case.

Since the end result of the analysis of Minn. Stat. §518A.32, subd. 5 concludes that Appellant is not unemployed or underemployed, potential income must not be imputed to Appellant under Minn. Stat. §518A.32, subd. 1. See, Minn. Stat. §518A.32, subd. 5; Minn. Stat. §518A.32, subd. 1

**II. THE MAGISTRATE AND THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REDUCING RESPONDENT'S CHILD SUPPORT OBLIGATION DUE TO THE FACT WHEN MINN. STAT. §518A.32 IS PROPERLY APPLIED TO APPELLANT'S INCOME, RESPONDENT'S CURRENT OBLIGATION DID NOT MEET THE THRESHOLD TO BE CONSIDERED UNREASONABLE AND UNFAIR, PURSUANT TO MINN. STAT. §518A.39, SUBD. 2(B)(1).**

Based on proper application of Minn. Stat. §518A.32 when determining Appellant's income for the purposes of child support, Respondent's child support obligation must not be modified since it is not considered unreasonable and unfair under Minn. Stat. §518A.39, subd. 2(b)(1). See, Minn. Stat. §518A.39, subd 2(b)(1); *see also*, Minn. Stat. §518A.32. Minn. Stat. §518A.39, subd. 2(b)(1) states, in relevant part, "It is presumed that there has been a substantial change in circumstance under paragraph (a) and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if: (1) the application of the child support guidelines in section 518A.35, to the current circumstances of the parties results in a calculated court order that is at least 20 percent and at least \$75 per month higher or lower than the current support order or, ..." Minn. Stat. §518A.39, subd 2(b)(1).

If this Court appropriately determines that Appellant is a caregiver to the parties' two minor children under Minn. Stat. §518A.32, subd. 5, Appellant's income would be \$1643 and Respondent's child support obligation would be \$2,136 a month.<sup>4</sup> See, Minn. Stat. §518A.32, subd 5; Minn. Stat. §518A.34. Based on the rebuttable presumption established in Minn. Stat. §518A.39, subd. 2(b)(1),

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<sup>4</sup> The monthly child support obligation was derived by using Appellant's gross monthly income of \$1643, Respondent's gross monthly income of \$13,705 and providing Respondent a parenting time adjustment for the parenting time he is awarded, but does not use. [Tr. P. 26, line 17- P. 28, line, 9].

Respondent's child support obligation would have to be \$2,080<sup>5</sup> a month to be considered unreasonable and unfair. See, Minn. Stat. §518A.39, subd. 2(b)(1). The amount of \$2,136 a month does not warrant a modification of Respondent's child support obligation. *Id.*

If the Court determines that Appellant is not a caregiver to the parties' two minor children under Minn. Stat. §518A.32, subd. 5, and the Court accurately applies Minn. Stat. §518.32, subd 2(3) Appellant's potential income would be \$59 for total gross monthly income of \$1,702., Respondent's current child support obligation would still not be considered unreasonable and unfair under Minn. Stat. §518A.39, subd. 2 (b)(1). See, Minn. Stat. §518A.32, subd. 5; Minn. Stat. §518A.32, subd. 2(3); Minn. Stat. §518A.39, subd. 2(b)(1). If such were the case, Appellant's income would be \$1,643 a month from the family trust and \$59 of potential income, which would establish Respondent's child support obligation at \$2,136<sup>6</sup> a month. This amount is identical to the amount Respondent would be required to pay, without potential income imputed and again does not make Respondent's current obligation unreasonable or unfair under the statute. See, Minn. Stat. §518A.39, subd. 2(b)(1).

When Appellant's income is accurately determined under the statute and application of the child support guidelines, Respondent's motion to modify child support must be denied since it is neither unreasonable or unfair. See, Minn. Stat. §518A.

### CONCLUSION

For the reasons stated above, the Appellate Court must reverse the magistrate's and the trial court's decision and remand with direction to the trial court to: make findings that the Appellant is not to receive potential income since she already receives monthly income from the family trust, has

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<sup>5</sup> Respondent's child support obligation was \$2600.  $\$2600 \times 20\% = \$520$ .  $\$2600 - \$520 = \$2,080$ .

<sup>6</sup> The monthly child support obligation was derived by using Appellant's gross monthly income of \$1643 and potential income of \$59, to derive at a total gross income of \$1,702, Respondent's gross monthly income of \$13,705 and providing Respondent a parenting time adjustment for the parenting time he is awarded, but does not use. [Tr. P. 26, line 17- P. 28, line, 9].

<sup>6</sup> Respondent's child support obligation was \$2600.  $\$2600 \times 20\% = \$520$ .  $\$2600 - \$520 = \$2,080$ .

always been a home maker and stay at home mom and deny Respondent's request for a modification of child support since the previous Order is not unreasonable and unfair.

Respectfully submitted,

**OTTEN & SEYMOUR**

Dated: 3/13/09

  
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