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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-95**

In re the Marriage of: Brian Donald Hermann, petitioner,
Appellant,

vs.

Lisa Ann Hermann,
Respondent.

**Filed December 19, 2011
Reversed and remanded
Stoneburner, Judge**

Ramsey County District Court
File No. 62F006001761

Patricia M. Buss, Buss Law & Mediation, L.L.C., Burnsville, Minnesota (for appellant)

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Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant father challenges the district court's determination of his child-support obligation as \$718 per month, arguing that the record does not support the finding that he has parenting time of "between 10% and 45%" and supports only a finding that the parents have equal parenting time, as that term is defined in Minn. Stat. § 518A.36, subd.

1 (2010).¹ We agree that the record does not support a finding that appellant has less than 45.1% of the parenting time; therefore we reverse and remand for a redetermination of child support that reflects the parents' equal parenting time, as defined by Minn. Stat. § 518A.36, subd. 1.

D E C I S I O N

The district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 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 the record or it misapplies the law. *See id.* (addressing the setting of support in a manner that is against logic and the facts on the record); *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998) (addressing an improper application of law).

Minn. Stat. § 518A.36, subd. 2 (2010), requiring the district court to adjust presumptive guideline child-support obligations based on percentage of parenting time, provides for a 12% adjustment for a parent who has 10% to 45% of parenting time and presumes that parenting time is equal when a parent has 45.1% to 50% of parenting time. Minn. Stat. § 518A.36, subd. 2(i)(ii), 7(iii). The statute provides that “[i]f the parenting time is equal and the parental incomes for determining child support of the parents also are equal, no basic support shall be paid unless the court determines that the expenses for the child are not equally shared.” Minn. Stat. § 518A.26, subd. 3(a) (2010).

¹ This matter was tried to a referee whose recommendations were affirmed by the district court.

The percentage of parenting time is determined by calculating “the percentage of time a child is scheduled to spend with the parent during a calendar year according to a court order.” Minn. Stat. § 518A.36, subd. 1(a) (2010). The percentage can be calculated by counting the number of overnights that a child spends with a parent or by “using a method other than overnights if the parent has significant time periods on separate days where the child is in the parent’s physical custody and under the direct care of the parent but does not stay overnight.” *Id.*

The 2009 dissolution judgment in this case awarded the parents joint legal and physical custody of their three children under a detailed and comprehensive schedule set out in conclusion of law #4 in the judgment.² Under the parenting-time schedule, appellant Brian Donald Hermann (father) has the children 180 overnights out of 365 nights in a year, resulting in a parenting-time percentage of 49%.

In August 2010, father moved to modify child support and for a clarification of parenting-time details not relevant to this appeal. Father asserted that the parties have equal parenting time. Respondent Lisa Ann Hermann (mother) submitted an exhibit in response to father’s motion, calculating child support based on a presumption that father has less than 10% of the parenting time. At the hearing on the motion, mother’s attorney acknowledged that the exhibit was in error and took responsibility for the error. Mother’s counsel argued that despite the almost equal number of overnights, father has less than

² Although the overnight schedule set out in the judgment did not initially apply to the youngest child, it applied to that child as of September 2010 and was in effect for that child at the time child support was established in the challenged order.

50% of the actual parenting time. Counsel said that the fact-finder could look at the judgment and “figure that out.”

The findings of fact in the challenged child-support order do not describe how the percentage of parenting time was calculated to arrive at the finding that “[father’s] parenting time with the children as established under Paragraph 4 of the Judgment and Decree falls within the 10-45 percent range.”³

On appeal, mother argues that the dissolution judgment “specifically provides that [father] has less than 45.1 percent of parenting time with the children.” Mother does not dispute father’s assertion that he has 14 out of every 28 overnights. Mother bases her argument on her assertion that she has the children for additional hours on Mondays and Tuesdays, but she does not provide a specific calculation of the hours that she claims the children are in her care and merely argues that “the schedule was never a 50/50 schedule.” Mother’s argument is based, in part, on her assertion that, during the summer months, she has the children from the time they are dropped off on Monday and Tuesday mornings until approximately 4 p.m. But the judgment does not specify that mother has the children during the day on Mondays and Tuesdays during the summer, and Minn. Stat. § 518A.36, subd. 1(a), provides that “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.*” (Emphasis added). The percentage of parenting time granted to a parent is calculated according to the court order, regardless of

³ This case highlights the importance of the district court identifying the actual percentage of parenting time awarded at the time of the award and how that figure was determined.

whether the parent exercises the full amount of court-ordered parenting time. *See Hesse v. Hesse*, 778 N.W.2d 98, 100 (Minn. App. 2009).

In his reply brief, father presents a calculation of time based on the total number of hours that the children spend with each parent during a year converted into days, including the extra hours they spend at mother's on some Monday and Tuesday mornings and allowing for 9.3 hours on Tuesdays during the summer, even though those hours are not awarded in the judgment. According to this calculation, father has 46.8% of the parenting time.

Nothing in the record or the parties' briefs reflects that father has less than 45.1% of the parenting time. The record supports only a finding that father has equal parenting time as defined in Minn. Stat. § 518A.36, subd. 2. The finding that father's parenting time falls between 10% and 45% is clearly erroneous. We reverse and remand for a recalculation of child support that reflects the parents' equal parenting time.

Reversed and remanded.