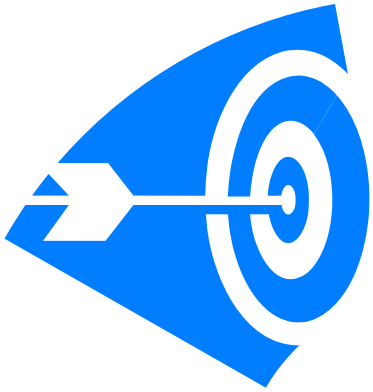
KOSER v. KOSER

MORE THAN MEETS THE EYE



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BACKGROUND AND INTRODUCTION

On January 9, 2012 the Minnesota Court of Appeals issued its *published* decision in Koser v. Koser, ___ N.W.2d ___, A11-746 (Minn. App. 2012) addressing the application of social security dependent benefits paid for and on behalf of joint children toward satisfaction of accrued child support arrears *and prospective ongoing basic child support payable for those children.*

There is, however, more to this decision than meets the eye, *as it also addresses the statutory threshold necessary to modify ongoing support*.

FACTS

Darren and Nicole Kosers' marriage to each other was dissolved in December 2003 and Darren was thereafter ordered to pay combined child support for the parties' three joint children of $665 ($559 basic child support + $47 childcare support + $59 medical support) per month.

In May 2010 the federal Social Security Administration found Darren was disabled and eligible for $960 in ongoing monthly Retirement, Survivors and Disability Insurance (RSDI) disability benefits effective June 1, 2012. He also received a lump sum payment of $4,752 for the period of July 2009 through May 2010, during which his application for benefits was pending. At that time Darren owed $1,764.15 in accrued child support arrears.

The joint children were also found eligible for ongoing social security dependent benefits of $432 per month beginning June 1, 2010 and, in addition, Nicole also received a lump sum dependent benefit payment of $4,752 for those children.

Thereafter, in June 2012, Grant County moved *the district court* to modify Darren's ongoing child support obligation. It is unknown why that motion was not filed in ExPro. See Minn.Gen.R.Prac. 353.01, subd. 1 ["Proceedings to … modify support *shall* (mandatory language) be conducted in the expedited process if the case is a IV-D case"](Emphasis added).

The district court referred the matter to a CSM who modified Darren's *total* ongoing child support obligation to $278 ($157 basic child support + $58 childcare support + $63 medical support) per month. Id. at fn. 3. The magistrate did not, however, according to the court of appeals, "explicitly" address application of the lump-sum dependent benefit received for the children.

Darren sought review by the district court and argued: (1) His monthly child support obligation had not changed by at least 20-percent and $75 and did not, consequently, meet the statutory threshold necessary to modify ongoing child support, and; (2) The lump sum benefit received by Nicole should be applied both toward satisfaction of his accrued child support arrears *and* his ongoing child support obligation.

Nicole agreed the lump sum benefit received for the joint children should be applied toward satisfaction of Darren's accrued child support arrears, *but not toward satisfaction of his ongoing child support obligation*.

The district court concluded the modification threshold was met and that the lump-sum dependent benefit received by Nicole for the joint children should be applied toward satisfaction of Darren's accrued child support arrears, *but not his ongoing child support obligation*, and Darren appealed.

On appeal, the Minnesota Court of Appeals concluded the modification threshold was met and the district court correctly modified Darren's ongoing child support obligation. Additionally, however, it concluded the district court "erred by concluding (the past) RSDI benefits paid to Nicole on behalf of the children cannot be applied as a credit toward his *prospective* child support obligation". Id. (Emphasis added).

ANALYSIS

A. MODIFICATION THRESHOLD

Koser reiterates that the "terms of an order respecting … support may be modified upon a showing of" substantially changed circumstances that "makes the terms (of that order) unreasonable and unfair". Consequently, to modify an ongoing child support obligation it must be shown *both* that circumstances have substantially changed since entry of the existing order *and* that the existing order is unreasonable and unfair. Id., citing Minn. Stat. § 518A.39, subd. 2(a).

It is presumed "there has been a substantial change in circumstances … and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if (among other things) … application of the child support guidelines … to the current circumstances of the parties results in a calculated order that is at least 20 percent and at least $75 per month higher or lower than the current order". Minn. Stat. § 518A.39, subd. 2(b)(1).

Darren argued the combined support obligation for the joint children was *$710* [$278 combined child support (as determined by the district court) + *$432 dependent benefit*] per month. Consequently, because that obligation was only $45 per month and 6.8-percent higher than the existing combined obligation of $665 per month, the modification threshold was not met.

According to the court of appeals, however, Darren also argued the determination of changed circumstances must be "derived solely from the child support guidelines (pertaining to basic child support only) found in section 518A.35, because the modification provision in section 518A.39, subd. 2(b)(1) does not reference any other specific section of the child support statute". Id.

If that was the case, however, Darren *should* have argued his current *basic child support obligation* was $589 ($157 basic child support + $432 dependent benefit) and, consequently, only $30 per month and 5.1-percent greater than the current basic child support amount of $559 per month. That was not, however, according to the court of appeals, the argument he made.

Of note in this regard is footnote 6 to the Koser decision, which states:

> We … observe (Darren's) interpretation of the modification provision of the child support statute would require the district court, when deciding whether to modify a child support order, to compare the amount of the original order derived from an application of the entire child support calculation to the amount of a new court order derived from an application of only part of the child support calculation. This asymmetric interpretation of the modification provision of the child support statute would create a bias in the child support system favoring modification.

Id.

Consequently, whether or not correctly, the court of appeals *clearly* believed Darren was attempting to compare "apples (combined child support under the existing order) to oranges (current basic child support only)".

In reaching its decision that the statutory threshold to modify child support must be based on a comparison between the *combined* existing and guideline obligations of support the court of appeals found the term "calculated order" in section 518A.39, subd. 2(b)(1), though not statutorily defined, was similar to the phrase "support order", which is defined by section 518A.26, subd. 21 as *including* basic child support, childcare support *and* medical support.

Additionally, under section 518A.34, "presumptive child support" is determined by adjusting the basic child support amount determined pursuant to section 518A.35, by the applicable "parenting expense adjustment, if any", adding childcare support and medical support, and then subtracting "the amount of social security benefits received by one parent on behalf of the joint children based on the other parent's eligibility". Id. (Citations omitted).

Consequently, "a calculated order is not derived solely from the child support guidelines (pertaining to basic child support) under section 518A.35; rather, the child support statute contemplates application of the *entire calculation found in section 518A.34, including all adjustments made to the guidelines "basic support" amount, when determining whether the presumption of changed circumstances and the rebuttable presumption of unreasonableness and unfairness are present in a particular case*". Id. (Emphasis added).

One could reasonably, from a purely theoretical standpoint, ask whether the result in Koser would have been different had Darren argued the modification threshold analysis should be limited to comparing the existing basic child support obligation to the proposed guideline basic child support obligation.

For now, however, we have a *published* court of appeals decision that expressly requires us to compare the *existing combined* child support obligation to the *proposed combined* child support amount when determining whether there has been a substantial change in circumstances that renders the existing order unreasonable and unfair.

Proceeding that way has, however, potentially far-reaching implications.

What if the only changed circumstance since entry of the existing order is an increase or decrease in either, or both, childcare or medical insurance costs or expenses incurred for the joint children? Are we to understand, pursuant to Koser, that we may modify those obligations *only if the total combined support amount either increases or decreases by at least $75 per month and 20-percent of the existing combined support amount*?

Section 518A.40 *requires* that "the court … order a division of work or education-related childcare costs of joint children between the" parties. Id. Section 518A.41 also *requires* that every "order addressing child support … state … the parent's responsibilities for carrying health care coverage …, the cost of premiums and how (that) cost is allocated between the parents" Id.

Nonetheless, per Koser, prior to modifying those obligations there may have to be a substantial change in the *total combined* child support amount ordered. Id. (Emphasis added).

It must also be remembered, however, that the section 518A.39, subd. 2(b) presumptions were *never* intended to be all inclusive. That is, the court may find a substantial change in circumstances has occurred that renders the existing order *in that specific case* unreasonable and unfair *even if none of the statutory presumptions apply*. The court merely must make appropriate findings supporting that conclusion.

B. APPLICATION OF LUMP SUM DEPENDENT BENEFIT

When a party is determined eligible for past and/or ongoing social security RSDI disability [as opposed to Supplemental Security Income (SSI) disability benefits] their joint children *may* also be eligible for past and/or ongoing social security dependent benefits based on that award.

Existing Minnesota law requires that *ongoing* social security dependent benefits be credited against the obligor's *ongoing* guideline child support obligation, defined by the court of appeals, in Koser, as the total *combined* child support obligation.

Minnesota law continues, however, to evolve with respect to application of lump sum payments of past social security dependent benefits awarded joint children.

1. Accrued child support arrears.

Child support arrears often accrue when applications for RSDI benefits are pending and, in many of those cases, the children are also found eligible for past dependent benefits. The question, then, is how to apply those benefits toward both past and ongoing obligations of support.

a. Kosar analysis.

Minnesota law has, since at least 1998, required that lump sum awards of social security dependent benefits be applied toward satisfaction of accrued child support arrears. See Holmberg v. Holmberg, 578 N.W.2d 817, 826-27 (Minn. App. 1998), overruling Haynes v. Haynes, 343 N.W.2d 679, 682 (Minn. App. 1984)(Previously holding the payment of social security dependent benefits from the account of a support obligor "does not constitute payments from that parent"); See also Holmberg v. Holmberg, 588 N.W.2d 720 (Minn. 1999)(Affirming the court of appeals decision *without addressing that specific issue*).

In Koser the joint children received a lump sum social security dependent benefit payment of $4,752 in June 2010 for the period of July 2009 through May 2010. The district court, based on the parties' agreement, applied $1,764 of that award toward satisfaction of Darren's child support arrears, but denied his request to apply the remainder against his *ongoing* child support obligation.

On appeal, the Minnesota Court of Appeals ruled the "plain language of the child support statute *requires the subtraction of* (the social security dependent) *benefits from (*Darren's) *net child support obligation*. Id. citing Minn. Stat. §§ 518A.31(c) and 518A.34(f)(Emphasis added).

Consequently, because neither statute distinguishes between past and ongoing dependent benefits "*all* social security benefits received by an obligee parent for a joint child based on the obligor parent's eligibility" *must* be subtracted from the Obligor's net child support obligation. Id. (Emphasis in original).

b. All cases are not, however, the same.

This problem *could* be avoided in many cases, by obligors serving and filing a notice of motion and motion to modify ongoing child support *together with medical verification they are disabled and unable to work,* while their disability claim is pending.

That, too, however, *depending on the facts and circumstances of each individual case*, may be problematic. What if, for example, the obligor-parent was a highly compensated individual ordered, for whatever reason, to pay child support far less than their income would otherwise have justified?

If, in that case, support is modified to zero during the pendency of their disability claim, and they are later found disabled and awarded RSDI disability benefits, *the lump sum benefits payable both to them and the joint children* could be *substantial while the arrears that accrued during the period the benefit application was pending would be relatively insignificant.*

In that event there would likely be a *substantial* excess lump sum benefit, after application of the lump sum dependent benefit toward satisfaction of accrued arrears that must, under Kosar, be applied in some fashion toward satisfaction of *future* obligations of support.

In that specific case, *the non-custodial parent*, as opposed to the custodial parent, would receive a substantial "windfall", and is *that* what the legislature intended? Rather than that windfall going to the children did the legislature intend that it go to the non-custodial parent?

c. Potential solution.

One possible way of addressing this problem would be to include language in each order modifying ongoing child support due to a finding of disability that the obligor's ongoing obligations of support "shall equal the amount of the dependent benefits paid for the joint children during the period their disability claim is pending".

We cannot, however, accept this as the one, single, solution or rule that should be applied to each and every case. Every case is different; and every case requires a different solution.

2. Ongoing child support obligation.

All parties in Koser agreed that the lump sum social security dependent benefit should be applied toward satisfaction of Darren's accrued child support arrears. The real issue, consequently, was whether and, if so, how those benefits should be applied toward satisfaction of his *ongoing* child support obligations.

Although the court of appeals agreed with Darren that the remaining lump sum benefit, after satisfaction of his accrued child support arrears, should be applied toward satisfaction of his ongoing child support obligation, it clearly struggled with *how* that should be accomplished.

Darren argued the remainder of the lump sum benefit payment, after satisfaction of his accrued child support arrears, should be treated as an overpayment of support pursuant to Minnesota Statutes Section 518A.52.

Under that provision, the overpayment must be applied, first, toward satisfaction of accrued child support arrearages and, thereafter, by reducing the prospective child support payments by 20-percent of "the current monthly child support obligation until the overpayment is reduced to zero". Id.

The court of appeals correctly determined, however, there are two problems with that approach. First, Section 518A.52 applies only if the child support obligation "is not assigned (to the public authority) under Section 256.741" and Nicole had assigned her support to the state.

Second, section 518A.51 is "limited to overpayment due to 'a modification or error in the amount owed' whereas", in Koser, the "overpayment (was) due to mother's receipt of a lump sum RSDI payment". Id. at fn. 7.

There is, however, *at least* one additional problem with this approach not mentioned in Kosar.

The ongoing combined child support obligation in Koser was determined to be $278 per month. Consequently, although it would have been quite simple, *in that specific case*, to reduce that obligation by some amount, "until the overpayment is reduced to zero", *that is not true in every case.*

In a substantial number of cases, after application of the ongoing dependent benefit the total remaining child support obligation is reduced to zero *and there is no remaining obligation to reduce by 20-percent*.

If, however, as the court of appeals suggests, *all* social security dependent benefits received for a joint child *must* be subtracted from the obligor parent's net child support obligation, there is really only one way to do that; *part of the social security dependent benefit must be transferred to the obligor parent*, thereby diminishing the financial resources available to support the joint child.

The social security dependent benefit is, however, established by *federal* law. It is one thing to determine the effect that benefit will have on support obligations established by state law. *It is a completely different matter, however, to conclude part of that benefit must be paid to someone else*. That would interfere with *federally* established rights and likely, due to the supremacy clause to the federal constitution, require *federal* and not just state legislative action.

Nonetheless, the court of appeals found the "district court erred by declining to subtract the entire lump-sum RSDI payment received by a mother from father's child support obligation" and remanded the matter "for (that) … court to exercise its discretion and apply the remaining $2,987.85 of the lump sum RSDI benefit received by mother on behalf of the children as a credit toward father's prospective child support obligation, *in a manner that the district court deems appropriate*". Id. (Emphasis added).

The problem, of course, is that absolutely no direction was given the district court as to how to do that, other than finding it *cannot* do that pursuant to Minnesota Statutes Section 518A.52.

CONCLUSION

So, what are we to make of all this?

The modification threshold of $75 per month and 20-percent of the existing support obligation must be applied to the total *combined* child support amount and not just the basic child support amount payable for the joint child or children. This raises substantial concerns regarding the ability, in the future, to modify ongoing childcare and medical support orders.

Additionally, although we must apply lump sum dependent benefit awards toward satisfaction of both past and ongoing obligations of support, should those awards be applied toward the satisfaction of arrears that accrued only during the benefit period in question (in Koser, for example, from July 2009 through May 2010), or should they be applied toward satisfaction of any and all arrearages, *regardless of when they accrued*?

Substantial questions also remain as to how to apply those benefits toward the satisfaction of ongoing, as opposed to past obligations of support. Although we have been given some, limited direction as to how that *cannot* be accomplished, we have been given no meaningful direction as to how that *should* be accomplished.

This is, as they say, still very much “a work in progress”.

ISSUES REGARDING CUSTODY AND THE PARENTING EXPENSE ADJUSTMENT IN 256 ACTIONS

Child Support Magistrate Brian Moehn, Fourth Judicial District

The Parenting Expense Adjustment Statute reads as follows:

Minn. Stat. §518A.36 subd. 1. **General**. (a) The parenting expense adjustment under this section reflects the presumption that while exercising parenting time, a parent is responsible for and incurs costs of caring for the child, including, but not limited to, food, transportation, recreation, and household expenses. Every child support order shall specify the percentage of parenting time granted to or presumed for each parent. For purposes of this section, the percentage of parenting time means the percentage of time a child is scheduled to spend with a parent during a calendar year *according to a court order.* Parenting time includes time with the child whether it is designated as visitation, physical custody, or parenting . . . (b) *If there is not a court order awarding parenting time, the court shall determine the child support award without consideration of the parenting time adjustment.* [All italics in the cited statutes have been added].

I. If there is a custody and parenting time order and a 256 action is brought, then the court is to include the parenting expense adjustment when calculating basic support and the percentage of time in the custody and parenting time order is controlling and not the actual amount of parenting time being exercised. See Hesse v. Hesse, 778 N.W.2d 98, 102-03 (Minn. App. 2009).

(a) If the parenting time is not actually being exercised, can the court then grant an upward deviation to offset the parenting expense adjustment?

II. What if there is no custody and parenting time order, paternity was established through a recognition of parentage, a 256 action is brought on behalf of the mother who may or may not be receiving public assistance, and the parties agree that the father should be given a parenting expense adjustment due to the amount of time the child is actually with him?

(a) Can the parties stipulate to the application of the parenting expense adjustment upon the acknowledgment that the obligor is not statutorily entitled to the adjustment?
(b) Can the parties stipulate to a downward deviation from the statutory child support guidelines in an amount equivalent to the statutory parenting expense adjustment?

III. What if there is no custody and parenting time order, paternity was established through a recognition of parentage, a 256 action is brought on behalf of the mother who may or may not be receiving public assistance, and the parties agree that the child is actually with the father between 10% and 45% of the time but the mother does not agree that the father should be given a parenting expense adjustment?

(a) Can the court give the father a parenting expense adjustment?
(b) Can the court grant the father a downward deviation from the statutory child support guidelines in an amount equivalent to the statutory parenting expense adjustment?

IV. What if there is no custody and parenting time order, paternity was established through a recognition of parentage, a 256 action is brought on behalf of the father who may or may not be receiving public assistance?

(a) Could the mother object to the action because she has been granted sole custody of the child by statute and has not consented to the child residing with the father?
(b) If the mother does not object to the action, could she still be entitled to a parenting expense adjustment on the basis that she has been granted custody of the child by statute instead of by court order?

Minn. Stat. §257.75 subd. 3. **Effect of recognition**. Subject to subdivision 2 . . . *Until an order is entered granting custody to another, the mother has sole custody*. . .

Minn. Stat. §256.87 subd. 1. **Actions against parents for assistance furnished**. A *parent* of a child is liable for the amount of public assistance, as defined in section §256.741, furnished to an for the benefit of the child, including any assistance furnished for the benefit of the *caretaker* of the child, which the parent has had the ability to pay . . .

Minn. Stat. §256.87 subd. 1a. **Continuing support contributions**. In addition to granting the county or state agency a money judgment, the court may, upon a motion or order to show cause, order continuing support contributions by a *parent* found able to reimburse the court or stature agency. The order shall be effective for the period of time during which the *recipient* received public assistance . . .

Minn. Stat. §256.87 subd. 3. **Continuing contributions to former recipient.** The order for continuing support contribution shall remain in effect following the period after public assistance, as defined in section 256.741, granted is terminated unless the former *recipient* ...

Minn. Stat. §256.87 subd. 5. **Child not receiving assistance.** A *person or entity having physical custody* of a dependent child not receiving public assistance as defined in section 256.741 has a cause of action for child support against the child's *noncustodial parents*. Upon a motion served on the *noncustodial* parent, the court shall order child support payments, including medical support and child care support, from the *noncustodial parent under chapter 518*. A *noncustodial parent's* liability may include up to two years immediately preceding the commencement of the action. *This subdivision applies only if the person* or entity has *physical custody with the consent of a custodial parent or approval of the court*.

Minn. Stat. §518A.17. **Primary physical custody**. The parent having "primary physical custody" means the parent who provides the primary residence for a child and is responsible for the majority of the day-to-day decision concerning a child.

Minn. Stat. §518A.13. **Obligee**. "Obligee" means a person to whom payments for maintenance or support are owed.

Minn. Stat. §518A.14. **Obligor**. "Obligor" means a person obligation to pay maintenance or support. A person who has primary physical custody of a child is presumed not to be an obligor for purposes of a child support order under section 518A.34, unless section 518A.36 subdivision 3, applies [equal joint physical custody] or the court makes specific written findings to overcome this presumption . . .

Numerous labels – caretaker, recipient, custodial parent, noncustodial parent, sole custody, primary physical custody, obligee, and obligor. What exactly is a caretaker or a custodial parent? Does a custodial parent need to have physical custody of the child? See Vega v. Silva, court file no. A09-1941 (flied August 31, 2010)(unpublished opinion). Is being a recipient of public assistance in itself sufficient? See Ramsey County v. Yee Lee, 770 N.W.2d 572, 576 (Minn. App. 2009); County of Anoka ex rel. Hassan v. Roba, 690 N.W.2d 322, 326 (Minn. App. 2004); and County of Hennepin on behalf of Clark v. Hernandez, 554 N.W.2d 618, 620-21 (Minn. App. 1996)(county still has burden of proof that it is entitled to the reimbursement regardless of having expended the public assistance).

Further, does a child support magistrate has jurisdiction to establish child support in such cases because the child support magistrate would not be following a custody and parenting time order but rather would be making factual and legal determinations as to who is the custodial parent or who has primary physical custody of the child. See Expedited Child Support Process Rule 353.01 subd. 3(b).

V. What if there is no custody and parenting time order, the parties are married but separated, and the 256 action is brought on behalf of a parent who may or may not be receiving public assistance?

(a) Unlike a recognition of parentage, married parties have equal rights to physical custody of the child by case law authority and if the parents are disputing with whom the child primarily resides, may a child support magistrate proceed to establish child support?
(b) Assuming the parents are able to reach an agreement as to who has primary physical custody of the child or that they each have the child an equal amount of time, could the responding party still be entitled to a parenting expense adjustment on the basis that he or she has been granted custody of the child by case law authority instead by court order?

VI. What if the 256 action is brought on behalf of a caretaker who may or may not be receiving public assistance against either parent, the caretaker has no court order granting the caretaker custody of the child, and paternity was established by a recognition of parentage or the parents are or were married?

(a) Could the parents object to the action because they have sole custody of the child by statute or case law authority and have not consented to the child residing with the caretaker?
(b) If the parents do not object to the action, could they still be entitled to a parenting expense adjustment on the basis that he or she has been granted custody of the child by statute or case law authority?
(c) What if the parents have been granted parenting time with the child by court order as to the other parent but not as to the caretaker?