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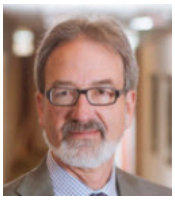
Pending Family Law Legislation

by Alan C. Eidsness and Jaime Driggs


Alan C. Eidsness


Jaime Driggs

This legislative session is shaping up to be an interesting one for the family law community as several bills have been introduced covering a wide range of family law issues. This work is the result of the child custody dialogue group which formed after Governor Dayton's 2012 pocket veto of legislation which would have created a presumption of 35 percent parenting time.[1]

Overhaul of Best Interest Factors

H.F. 465 would significantly revise the best interest factors at Minn. Stat. § 518.17. The thirteen factors in subdivision 1 and the four additional "joint custody" factors in subdivision 2 are revised and consolidated into 12 factors which would be considered in all cases, not just cases in which a party requested joint custody. Some of the original factors are preserved but simply more refined. For example, "the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference" is replaced with "the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference." Other factors introduce new concepts to evaluating a child's best interests, such as "the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent."

In addition to the revisions to the factors themselves, H.F. 465 also would provide new instruction to the court in applying the factors. For example, the presumption in favor of joint legal custody would be retained but new language would state expressly that there is no presumption for or against joint physical custody except in cases involving domestic abuse. Also, the court would be instructed that joint physical custody "does not require an absolutely equal division of time." The court would be required to "consider that it is in the best interests of the child to promote the child's healthy growth and development through safe, stable, nurturing relationships between a child and both parents." The court also would be required to "consider both parents as having the capacity to develop and sustain nurturing relationships with their children unless there are substantial reasons to believe otherwise." In making this determination, the court is directed to "recognize that there are many ways that parents can respond to a child's needs with sensitivity and provide the child love and guidance, and these may differ between parents and among cultures."

As a whole, these changes appear to modernize the factors to require a more sophisticated analysis that is even more singularly directed at determining custody and parenting time based on the needs of the child. These changes also reflect an expectation that both parents will play a substantial role in parenting a child.

Revamped Parenting Expense Adjustment

H.F. 512 would replace the three-tiered parenting expense adjustment under Minn. Stat. § 518A.36 with a system based on the number of court-ordered overnights "averaged over a two-year period." This would eliminate the significant financial incentive which can drive litigation for parents on opposite sides of the 45.1% cliff. In a change to existing law, the revamped parenting expense adjustment could be calculated based on actual parenting time rather than court-ordered parenting time in modification

[1] The pocket veto occurred when Governor Dayton decided to forgo taking action on H.F. 322 before the 14-day deadline for doing so following the adjournment of the legislative session. In a letter issued on May 24, 2012, Governor Dayton explained that he would not be signing the bill based on uncertainty regarding its impact. However, the Governor invited further discussion on the issue and expressed a "goal of producing legislation, which [he] can sign into law next year." The Governor's letter is available at http://mn.gov/governor/images/HF322-attach.pdf.

proceedings if "the parties have actually adhered to a parenting time schedule with a substantially different percentage of parenting time for a party, provided that the party has not been wrongfully deprived of their court-ordered parenting time." H.F. 512 also would provide direction to the court on how to calculate child support in split custody situations, something unaddressed by existing law. However, the language does not address the related question of how child support is to be calculated in situations involving more than one child where a parent has been granted parenting time with each child in differing amounts.

Relief from *Gossman v. Gossman*

Gossman v. Gossman, 847 N.W.2d 718, 725 (Minn. Ct. App. 2014), held that if the district court has been divested of jurisdiction to modify spousal maintenance by a valid *Karon* waiver, a subsequent stipulation and order that purports to modify spousal maintenance is void and unenforceable. H.F. 518 would undo this decision by amending Minn. Stat. § 518.552 to allow parties to "restore the court's authority or jurisdiction to award or modify maintenance through a binding stipulation."

Interest on Family Law Judgments

H.F. 464 amends the judgment interest rate statute, Minn. Stat. § 549.09, in two important ways. First, judgments over $50,000 arising from family court actions would no longer be subject to the ten percent interest rate. All judgments in family court actions would accrue interest at the ordinary judgment interest rate, which is currently four percent. Second, a new provision would empower courts in family court actions to set a lower interest rate or no interest rate if it finds doing so "is necessary to avoid causing an unfair hardship to the debtor." This provision would undo the holding in *Redleaf v. Redleaf*, 807 N.W.2d 731, 735 (Minn. Ct. App. 2011), that the court has no discretion with respect to the judgment interest rate and that it must order interest at the rate prescribed by statute. However, this discretion to set a lower rate of interest would not extend to judgments for unpaid child support or spousal maintenance subject to Minn. Stat. § 548.091.

Enhanced Income Disclosure

H.F. 518 would enhance the income disclosure requirements of Minn. Stat. § 518A.28(b) to clarify that a party must disclose their "complete" federal tax returns. Additionally, a party would no longer be able to avoid producing updated income information by delaying the filing of their tax return. If a party had not yet filed their return for the preceding year, the party would be required to produce their 1099, W-2, and K-1 forms.

Modifications of Support and Maintenance

Leifur v. Leifur, 820 N.W.2d 40, 43 (Minn. Ct. App. 2012), held that district courts are powerless to approve parties' agreements to make a modification of spousal maintenance or child support retroactive to a date earlier than the service of the notice of motion and motion. H.F. 518 would undo this decision by amending Minn. Stat. § 518A.39, subd. 2 to permit the court to set "an alternative effective date" for a modification if "the parties enter into a binding agreement for an alternative effective date." In addition to fixing the problem created by *Leifur*, the amendments to Minn. Stat. § 518A.39, subd. 2 also would fill in a gap left under the current statute in situations where a party fails to disclose income information as required. An alternate effective date could be set by the court if "one party fails to provide income information reasonably requested" under Minn. Stat. § 518A.28 or if "one party violated a court order requiring the party to disclose income or employment information and any changes to that information and the other party acted reasonably and to that party's detriment in reliance on the court order."

Dependency Exemptions

Although the power to allocate dependency exemptions has been well established by case law, H.F. 446 adds new language to chapter 518A addressing the topic. The initial allocation would be based on four factors and could be modified by showing a substantial change in those factors. Additionally, a parent who wrongfully claims an exemption could be required to compensate the other parent for the loss of the benefit and also could be ordered to pay attorneys' fees and costs.

Whether to condition a party's right to claim the exemption on compliance with a child support obligation would be optional.

New Basis for Deviation from Child Support Guidelines

H.F. 451 establishes income disparity as a new basis for deviating from the child support guidelines. If a parent has 10-45% parenting time and "a significant disparity of income exists between the parties" such that "an order directing payment of basic support would be detrimental to the parties' joint child," the court would be allowed to eliminate the party's basic support obligation.

Revisions to Potential Income

H.F. 451 revises one of the methods for calculating potential income. Instead of using full time employment at 150 percent of minimum wage, the amended statute

uses 30 hours per week at 100 percent of minimum wage. A press release issued on January 29, 2015 explains that this was intended "to reflect current minimum hourly wages and employment trends." It is interesting to consider how this method would be applied in practice since the trigger under Minn. Stat. § 518A.32 for using potential income is a parent's employment at less than "full time" which would still be defined as 40 hours per week "except in those industries, trades, or professions in which most employers, due to custom, practice, or agreement, use a normal work week of more or less than 40 hours in a week."

New Structure for Enforcing Parenting Time

H.F. 518 would provide more precise direction to the court for enforcing parenting time under Minn. Stat. § 518.175, subd. 6. Although the remedies themselves are unchanged, the circumstances and requirements with respect to the application of those remedies are revised substantially. A single incident of interference with parenting time would no longer trigger compensatory parenting time unless the lost parenting time represented a "substantial amount." Even then, the district court would have discretion regarding whether to grant compensatory parenting time. However, if the interference of parenting time was "repeated and intentional," an award of compensatory parenting time would be mandatory. The court would have the discretion to also impose one of the statutory remedies. But if the interference of parenting time was "repeated and intentional" and there had been a prior finding that the party had "repeatedly and intentionally" interfered with parenting time, imposition of one of the statutory remedies would be mandatory in addition to the mandatory award of compensatory parenting time. This amendment narrows the circumstances in which compensatory parenting time is awarded but it would provide a more nuanced mechanism for enforcement with escalating consequences for repeat offenders.

Recognition of Parentage

H.F. 451 adds language to Minn. Stat. § 257.75 allowing courts in custody proceedings to make a temporary determination of custody and parenting time during the pendency of the case under Minn. Stat. § 518.131. Additionally, the notification provisions of the recognition of parentage form are expanded, including an emphasis that execution of a ROP does not confer any custody or parenting time rights.

Credit Reporting for Child Support Arrears

H.F. 451 requires the public authority to report delinquent child support obligors who are more than three months in arrears and not in compliance with a payment plan to a consumer reporting agency.

Deploying Military Parents

Unlike the other pieces of proposed legislation outlined above, S.F. 73, the Uniform Deployed Parents Custody and Visitation Act ("UDPCVA"), did not arise out of the child custody dialogue work group. The UDPCVA is a comprehensive piece of legislation that would provide much-needed direction on how to handle the difficult issues arising from the deployment of a military parent. It has already been enacted in six states and has been introduced in the legislatures of two states and the District of Columbia in addition to Minnesota.

The text of each of the bills referenced in this article is available at http://www.leg.state.mn.us/leg/legis.aspx. The press release accompanying these bills (except for the UDPCVA) is available at http://www.house.leg.state.mn.us/members/pressrelease.asp?pressid=8228&party=2&memid=15314.

Alan C. Eidsness, shareholder and family law attorney can be reached at aeidsness@hensonefron.com. Jaime Driggs, shareholder and family law attorney, can be reached at jdriggs@hensonefron.com.

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