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Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0735

In re the Marriage of:
Elio Fumagalli, petitioner,
Appellant,

vs.

Stacy Lynn Fumagalli,
Respondent.

Filed March 20, 2017
Affirmed
Johnson, Judge

McLeod County District Court
File No. 43-FA-08-1372

Elio Fumagalli, New York, New York (pro se appellant)

Stacy Lynn Fumagalli, Stewart, Minnesota (pro se respondent)

Michael Junge, McLeod County Attorney, Amy E. Olson, Assistant County Attorney, Glencoe, Minnesota (for respondent McLeod County)

Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

U N P U B L I S H E D   O P I N I O N

JOHNSON, Judge

The district court denied a motion to modify a child-support obligation. The obligor argues that the district court erred for five reasons. We conclude that the district court did not err and, therefore, affirm.

FACTS

Elio Fumagalli and Stacy Lynn Fumagalli (now known as Stacy Lynn Duesterhoeft) were married for seven years before their marriage was dissolved in February 2009. They have two children, who were born in 2003 and 2005. In the dissolution decree, the district court awarded sole physical custody of the children to Duesterhoeft. The district court granted Fumagalli parenting time in Minnesota on one evening per week and on alternating weekends. The district court ordered Fumagalli to pay Duesterhoeft child support of $1,382 per month.

Fumagalli relocated to New York City in early 2012. In July 2013, the district court granted Fumagalli two weeks of parenting time in New York during the summertime. But in April 2014, the district court issued an order providing that Fumagalli may not have parenting time outside Minnesota. In May 2014, the district court increased Fumagalli's child-support obligation to $2,282 per month on a motion filed by McLeod County.

On December 18, 2015, Fumagalli signed a *pro se* motion to modify his child-support obligation. The motion was filed with the district court on January 11, 2016. He declared in his motion papers that he had no income from any source. He attached a letter dated December 17, 2015, signed by a human-resources representative of a company that

employed him as a consultant. The letter states that Fumagalli's "current project is anticipated to end on December 18, 2015," that "he will not receive regular wages" after that date, and that his employment would be terminated if he were not reassigned to a new project within 90 days. Duesterhoeft, who also appeared *pro se*, served and filed an affidavit in response to Fumagalli's motion. She stated that she had been employed as a day-care provider for 12 years and that her gross income is $1,126 per month.

A child-support magistrate (CSM) conducted a hearing on Fumagalli's motion on January 20, 2016. Fumagalli participated by telephone. He argued that his child-support obligation should be reduced because he was not then working on a consulting project and, thus, was not earning any income. Duesterhoeft argued that Fumagalli's employer was continuing to look for projects for him and that his motion was premature.

The CSM issued an order the following day. The CSM noted that Fumagalli did not submit any documentation of his income other than the letter from his employer, which said he would not be working after December 18, 2015. The CSM found that Fumagalli "has not provided the court with any basis to show that this period between assignments will be of a sufficient duration to substantially change his income." The CSM noted that, at the time of the April 2014 order, Fumagalli had gross income of $12,124 per month. The CSM found that Fumagalli had gross income of $65,870 in the first half of 2015 (implying an annual income of $131,740), $45,360 in the second half of 2014 (implying an annual income of $90,720), and $31,833 in the third quarter of 2013 (implying an annual income of $127,332). The CSM further found that Fumagalli is eligible to receive unemployment benefits of $425 per week. The CSM concluded her findings with respect

to Fumagalli's income by stating, "Based upon the information before the court, [Fumagalli] has an average gross monthly income of $9,537.53."

With respect to Duesterhoeft's income, the CSM found that, at the time of the April 2014 order, she had gross income of $1,884 per month. The CSM found that Duesterhoeft is not employed full time, works for less than the minimum wage, and earns $1,126 per month. The CSM found that Duesterhoeft is voluntarily underemployed and, accordingly, found that her gross income is $2,338 based on her potential income of 150 percent of the minimum wage for 40 hours per week.

In applying the child-support guidelines, the CSM determined that a parenting-expense adjustment is not required because Fumagalli's parenting time is less than ten percent. The CSM determined that an application of the child-support guidelines would result in a child-support obligation of $1,902 per month. That amount is only 16.6 percent less than Fumagalli's current obligation of $2,282. Accordingly, the CSM found that there is not a substantial change in circumstances. Thus, the CSM denied Fumagalli's motion to modify his child-support obligation.

In February 2016, Fumagalli sought review of the CSM's order by a district court judge. In April 2016, the district court judge issued an order affirming the CSM's order. Fumagalli appeals.

D E C I S I O N

Fumagalli argues that the district court erred by denying his motion to modify his child-support obligation.

To determine the existence and amount of a basic child-support obligation, a district court must determine the gross income of each parent. Minn. Stat. §§ 518A.29 (2016); .34(a), (b)(1) (2016). The district court must subtract certain credits from gross income to determine each parent's parental income for determining child support (PICS). Minn. Stat. § 518A.34(b)(1), (2). The district court then refers to statutory guidelines to determine each parent's proportional share of the total of the parties' PICS amounts. Minn. Stat. § 518A.35, subd. 2 (2016). Once the district court has determined the presumptively appropriate guideline support obligation, the district court must consider certain statutory factors to determine whether to depart from the presumptive child-support obligation. *Haefele v. Haefele*, 837 N.W.2d 703, 708 (Minn. 2013) (citing Minn. State. § 518A.43).

A district court may modify an existing child-support obligation if the moving party shows that either the obligor or the obligee has experienced a substantial change in circumstances. Minn. Stat. § 518A.39, subd. 2(a) (2016). An irrebuttable presumption of a substantial change in circumstances arises if a new application of the child-support guidelines would result in a child-support obligation that is at least 20 percent more or less and at least $75 more or less than the amount specified in the prior child-support order. *Id.*, subd. 2(b)(1); *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009). The moving party bears the burden of showing a substantial change in circumstances and showing the resulting unreasonableness and unfairness of the existing child-support order. *Bormann v. Bormann*, 644 N.W.2d 478, 480-81 (Minn. App. 2002).

This court generally applies an abuse-of-discretion standard of review to a district court's ruling on a motion to modify a child-support order. *Putz v. Putz*, 645 N.W.2d 343,

347-48 (Minn. 2002); *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000). We apply a *de novo* standard of review to a district court's ruling on such a motion to the extent it is based on an interpretation of the child-support statute. *See In re Dakota Cty.*, 866 N.W.2d 905, 909 (Minn. 2015); *Hubbard Cty. Health & Human Servs. v. Zacher*, 742 N.W.2d 223, 227 (Minn. App. 2007).

We construe Fumagalli's *pro se* brief to make five arguments.

A.

Fumagalli first argues that the district court erred by not finding that his gross income is limited solely to the amount of his unemployment benefits.

If child support is at issue, each party must submit a financial affidavit that discloses all sources of gross income. Minn. Stat. § 518A.28(a) (2016).

> The financial affidavit shall include relevant supporting documentation necessary to calculate the parental income for child support under section 518A.26, subdivision 15, including, but not limited to, pay stubs for the most recent three months, employer statements, or statements of receipts and expenses if self-employed. Documentation of earnings and income also include relevant copies of each parent's most recent federal tax returns, including W-2 forms, 1099 forms, unemployment benefit statements, workers' compensation statements, and all other documents evidencing earnings or income as received that provide verification for the financial affidavit.

Id. If a parent does not file the financial affidavit or does not provide the required information, a district court "shall set income for that parent *based on credible evidence before the court* or in accordance with section 518A.32." Minn. Stat. § 518A.28(c) (emphasis added).

The CSM made a finding that Fumagalli did not submit the information required by section 518A.28(a). Accordingly, the CSM sought to determine Fumagalli's income "based on credible evidence before the court," *see id.*, which included the record of prior proceedings, Fumagalli's testimony about the unemployment benefits he was receiving in New York, and wage data submitted by the child-support enforcement division of the department of human services. Fumagalli has not attacked the credibility of any of the evidence on which the CSM relied. The CSM's method of determining Fumagalli's income is consistent with the statute.

Fumagalli's argument assumes that a parent who is momentarily unemployed is entitled to an immediate modification of a child-support obligation, even if the unemployment is of uncertain duration and possibly of very short duration. Fumagalli has not cited any caselaw for that proposition, and we are unaware of any such caselaw. To the contrary, the caselaw indicates that it sometimes is appropriate to take a broader view of a party's income by considering what the party has earned in the recent past. *See Veit v. Veit*, 413 N.W.2d 601, 605-06 (Minn. App 1987).

Thus, the CSM did not err in its finding of Fumagalli's income.

B.

Fumagalli next argues that the district court erred by using an incorrect percentage of parenting time when performing the child-support calculation, thereby denying him a parenting-expense adjustment.

To determine whether a parenting-expense adjustment applies, a district court must refer to the parenting-time schedule set forth in the dissolution decree or subsequent order.

Minn. Stat. § 518A.36, subd. 1 (2016). "[T]he support obligor is entitled to a parenting-expense adjustment of his or her support obligation, based on the percentage of parenting time allocated to the obligor." *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009). If the percentage of parenting time allowed to the obligor is less than ten percent, the obligor is not entitled to a parenting-expense adjustment. Minn. Stat. § 518A.36, subd. 2 (2014).

Fumagalli contends that the district court erred on the ground that the decree provided him with more than ten percent of the total parenting time. At the time of the January 20, 2016 hearing, however, Fumagalli's parenting time was governed by the district court's April 2014 order. That order states, "There shall be no parenting time outside the State of Minnesota until further Order of this Court." The order also states that Fumagalli "may have such other parenting time with his children in Minnesota as may be conveniently arranged by the parties and approved by the Parenting Time Expeditor." Accordingly, Fumagalli did not have an unqualified right to *any* parenting time after the April 2014 order. No other orders modifying parenting time were issued between April 2014 and January 2016. Accordingly, Fumagalli's parenting time is less than ten percent.

Thus, the district court did not err by ruling that Fumagalli is not entitled to a parenting-expense adjustment.

C.

Fumagalli next argues that the district court erred by not considering the difference between the cost of living in New York City and the cost of living in Minnesota. The calculation of a child-support obligation is determined by a statutorily mandated formula. *See* Minn. Stat. § 518A.34 (2016). The formula is based solely on the parents' respective

incomes, not on their living expenses. *See id.* A district court may, in certain circumstances, deviate from the presumptive child-support obligation. Minn. Stat. § 518A.43, subd. 1 (2016); *In re Dakota Cty.*, 866 N.W.2d at 911. In determining whether to deviate from a presumptive child-support obligation, a district court must take into consideration seven specified factors. Minn. Stat. § 518A.43, subd. 1. A difference in the cost of living between the parents' respective homes is not among the factors that must be considered. *See id.* Fumagalli does not argue that the district court erred by not deviating from the guidelines. Thus, the district court did not err by not considering cost-of-living differences in its child-support calculation.

D.

Fumagalli next argues that the district court's finding concerning Duesterhoeft's income is erroneous because her evidence understates her income. Duesterhoeft testified that she works at least 40 hours per week and earns $1,100 per month, which is less than the minimum wage. But the CSM determined Duesterhoeft's income to be $2,338.20 per month by imputing potential income in an amount equal to 150 percent of the minimum wage for 40 hours per week. *See* Minn. Stat. § 518A.32, subd. 2(3) (Supp. 2015). Fumagalli does not say what he believes Duesterhoeft's actual income to be. For that reason, he has not established that he was prejudiced by the district court's finding of Duesterhoeft's income. Thus, we conclude that the district court did not err in its finding of Duesterhoeft's income.

E.

Fumagalli last argues that the district court was biased against him. He asserts that Duesterhoeft's brother, an attorney who did not appear in the case, somehow exerted influence on the district court proceedings. Because Fumagalli did not present this argument to the district court, he has not preserved it for appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). In any event, we note that nothing in the record supports Fumagalli's assertion.

In sum, the district court did not err by denying Fumagalli's motion to modify his child-support obligation.

Affirmed.