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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1167**

In re the Marriage of: Suzanne Marie Ludgate, petitioner,
Respondent,

vs.

Troy Timothy Ludgate,
Appellant.

**Filed December 24, 2012
Affirmed in part, reversed in part, and remanded
Connolly, Judge**

Hennepin County District Court
File No. 27-FA-08-8107

Suzanne M. Ludgate, Farmington, Minnesota (pro se respondent)

Mark A. Olson, Olson Law Office, Burnsville, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this child-support dispute, appellant-father argues that the district court abused its discretion in determining child support, ordering the parties to file taxes separately, and granting respondent-mother the tax-dependency exemption for the parties' youngest

child. Because the district court did not err in its orders regarding the parties' tax filings and tax-dependency exemptions, we affirm in part. But because the district court erred in imputing income to appellant without finding that he was voluntarily unemployed, we reverse in part and remand.

FACTS

Appellant Troy Ludgate and respondent Suzanne Ludgate have two children, J.J.L., born in 1993, and N.R.L., born in 2000. The parties separated in November 2008, and respondent petitioned for divorce in December 2008. Before the trial, the district court issued a discovery order denying respondent's motion for a child-support order because she had not responded to discovery requests related to her income. Respondent then provided the information. In a subsequent temporary order, the district court found that respondent was employed cleaning homes and earned a gross monthly income of \$645, but imputed income to her at 100% of minimum wage pursuant to Minn. Stat. § 518A.32 (2010), for a gross monthly income of \$1,256.¹

The temporary order required appellant to pay respondent \$824 in monthly child support, retroactive to August 1, 2009, and stated that arrearages would be due within ten days of the entry of the judgment dissolving the marriage. Appellant therefore owed respondent arrearages from August 2009 to June 2010.

The dissolution judgment stated that "any arrearages existing under the temporary order for support . . . do not merge into this Order" and provided appellant with

¹ Minn. Stat. § 518A.32, subd. 2(3) (2010), actually requires the district court to impute income at 150% of minimum wage, which would have given respondent an imputed income of \$1,884 per month, the amount imputed in the permanent child-support order.

reasonable parenting time of at least one evening a week for J.J.L. and the majority of the time for N.R.L. The judgment reserved five issues for final determination by the district court: (1) respondent's income; (2) appellant's income; (3) child support; (4) allocation of the children's expenses; and (5) allocation of the children's tax-dependency exemptions. At the hearing, the parties agreed that the issue of their tax-filing status would be submitted in writing to the court.

Appellant moved for amended findings or a new trial, arguing that, because the judgment did not specifically address the issue of the parties' tax filing status, it should be modified or vacated. He also moved for emergency relief, seeking suspension or modification of his child-support obligations because his job had been terminated. Appellant's attorney filed a letter brief, arguing that \$4,300 in monthly gross income be imputed to respondent (\$25 per hour for housecleaning, at 40 hours per week) and that the temporary order be vacated because of respondent's "fraud and fraud on the court in her gross misrepresentation of her income."

In April 2011, the district court issued an order finding that respondent's claimed gross monthly income of \$956.59 was too low to be credible and that there was no evidence that respondent could not work full-time and earn minimum wage. Pursuant to Minn. Stat. § 518A.32, subd. 2(3), the district court imputed to respondent income of 150% of minimum wage, a gross monthly income of \$1,884 ($\$7.25/\text{hour} \times 40 \text{ hours/week} \times 4.33 \text{ weeks/month} \times 150\%$).

The district court found that, during trial, appellant was employed with a gross monthly income of \$6,750. While both parties agreed that his employment had been

terminated in December 2010, they disagreed on the income the court should impute to him. The district court imputed income of \$6,750 to appellant because he presented neither evidence that he could not find similar employment, nor evidence that he was actually receiving unemployment benefits. Appellant argued that his gross monthly income was \$2,473, based on his estimated monthly unemployment benefits.

To calculate the parties' child-support obligations, the district court first calculated each party's parenting time. The district court found that, because the decree did not provide a fixed parenting schedule, but provided reasonable parenting time that might include overnights and holiday time, appellant's parenting time with J.J.L. was less than 10% and respondent's parenting time with N.R.L. was 44.3%. The parties' Parental Income for Determining Child Support (PICS) was \$8,634 (appellant's \$6,750 plus respondent's \$1,884), with a combined basic support obligation of \$1,092. Appellant owed respondent \$852 monthly for J.J.L. and respondent owed appellant \$211 monthly for N.R.L., resulting in a net monthly obligation of \$641 for appellant.

The tax-dependency exemption beginning with tax year 2008 for J.J.L. was awarded to respondent, and that for N.R.L. to appellant, with the proviso that, if appellant was not current on his child-support obligations, respondent would have both exemptions.

Because it found that the parties are unable to work with each other, the district court had them file separate tax returns for 2008 and 2009, with respondent claiming J.J.L. and appellant claiming N.R.L. Because respondent had already filed her 2008 and 2009 tax returns, the district court ordered that, if respondent had claimed N.R.L., she

must file amended returns or reimburse appellant. Appellant challenges the child-support awards in both the temporary order and the judgment, the imputation of income to him, and the tax-exemption awards.²

D E C I S I O N

I. Child-Support Determinations

This court reviews the district court's decisions concerning child support for an abuse of discretion. *Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001). A ruling "that is against logic and the facts on record" constitutes an abuse of discretion, as does a misapplication of the law. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984).

A. Temporary Order

Appellant argues that the district court abused its discretion when it set a temporary child-support award in a pretrial order. Generally, temporary orders concerning dissolution actions are not appealable as of right. *See Rigwald v. Rigwald*, 423 N.W.2d 701, 705 (Minn. App. 1988) (noting that temporary relief orders in dissolution cases are not final appealable orders). But this court may review "any order affecting the order from which the appeal is taken." Minn. R. Civ. App. P. 103.04. Because the judgment specifically provided that the temporary order for arrearages remain in place, we would review the relevant part of the temporary order, if appellant's arguments against it had been raised to the district court.

² Respondent did not file a brief. Pursuant to Minn. R. Civ. App. P. 142.03, this case was decided on the merits and respondent did not participate in oral argument.

Generally, an appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). After the district court issued the temporary child-support order, and before it issued the final child-support order, appellant argued that the district court should: (1) suspend his temporary child-support obligations because his job had been terminated; (2) impute income to respondent of \$4,300 per month based on her house cleaning salary; and (3) vacate the temporary order due to respondent's fraud on the court for misrepresenting her income. On appeal, he argues that the district court abused its discretion by: (1) retroactively awarding respondent child support from August 1, 2009 because there was insufficient discovery as to her income; (2) capping respondent's support obligation at \$50 per month; (3) imputing 100% of minimum wage to respondent in calculating the retroactive award; (4) finding appellant in arrears; and (5) failing to vacate its temporary award of child support or failing to re-compute the award based on its erroneous minimum wage imputation and capping of child support. Because the issues appellant raises on appeal were not the issues raised and considered below, we decline to consider them.

Moreover, a party may not "obtain review by raising the same general issue litigated below but under a different theory." *Id.* Here, although appellant argued to the district court that the income imputed to respondent was incorrect and that the temporary order should be vacated, the theories he presents to this court differ from those presented below. Appellant now argues that the income imputed to respondent was incorrect because the district court incorrectly imputed income to respondent at 100%, rather than

150%, of minimum wage. To the district court, he argued that the income imputed to respondent was incorrect because she fraudulently misrepresented her income to the court. Because appellant is raising new theories on appeal, we decline to consider these issues.

B. Final Order

Appellant also argues that the district court abused its discretion in calculating child-support by inaccurately computing appellant's parenting time and improperly imputing income to appellant. Minn. Stat. § 518A.34 (2010) provides the procedure for determining a parent's presumptive child-support obligation. Basic child support is "determined by referencing the guideline for the appropriate number of joint children and the combined parental income for determining child support of the parents." Minn. Stat. § 518A.35, subd. 1(b) (2010).

1. Parenting Time

The district court found that J.J.L. resided with respondent and that "[Appellant's] parenting time with [J.J.L.] is less than 10%." Appellant argues that the district court erred by ruling that appellant's parenting time of J.J.L. was less than 10% for purposes of calculating child support, because under Minn. Stat. § 518.175, subd. 1(e) (2010), there is a rebuttable presumption that a parent is entitled to receive 25% parenting time. We reject this argument for two reasons.

First, the district court's finding that appellant's parenting time of J.J.L. was less than 10% is not clearly erroneous. The findings of fact on which a parenting-time decision is based will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*,

267 N.W.2d 733, 735 (Minn. 1978). The parenting-expense-adjustment statute requires that a child-support order “shall specify the percentage of parenting time granted to or presumed for each parent” and states that “[f]or purposes of this section, the percentage of parenting time means 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). Child-support determinations are to be made based on the amount of time a parent is scheduled to be with the child, not the amount of time actually spent with the child. *Hesse v. Hesse*, 778 N.W.2d 98, 103 (Minn. App. 2009). Here, the judgment calls for J.J.L. to spend “at least one evening per week” with appellant. It was “contemplated that there may be overnight visits.” If J.J.L. spent one overnight visit per week with appellant, appellant’s parenting time would be just over 14%. But the plan merely called for parenting time of one evening per week, with the possibility of some overnight visits. On this record, appellant has not shown that the finding that he has less than 10% parenting time is clearly erroneous.

Second, the statute on which appellant bases his argument, Minn. Stat. § 518.175, subd. 1(e), addresses the setting of parenting time, not the calculation of child support. The statute creates a rebuttable presumption that each parent is entitled to at least 25% of the parenting time for a child, and this presumption is the context within which a district court makes an actual award of parenting time. It is the actual award of parenting time that is relevant to the support calculation. *Hesse*, 778 N.W.2d at 103. Here, the actual award of parenting time is less than specific and is not being challenged. Moreover, appellant cites no authority allowing the rebuttable presumption created by Minn. Stat.

§ 518.175, subd. 1(e), to drive the calculations required by the child-support statute. We reject appellant's challenge to the amount of his support obligation to the extent his argument is based on Minn. Stat. § 518.175, subd. 1(e).

2. Imputed Income

Appellant argues that the district court abused its discretion by imputing income to him. Appellant lost his job in December 2010. He provided the district court with an estimate of his expected unemployment benefit of \$575 per week, but did not submit any actual evidence showing what his unemployment benefit was, that he was receiving unemployment benefits, or that he could not find employment similar to the employment he lost. Therefore, the district court imputed gross monthly income of \$6,750 to appellant. Appellant argues that the district court should have calculated child support based on his estimated unemployment benefits, rather than imputing income to appellant at his previous employment rate.

“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 a determination of potential income.” Minn. Stat. § 518A.32, subd. 1 (2010). Here, respondent did not argue and the district court did not find that appellant was voluntarily unemployed. Nor is there any evidence in the record regarding appellant's actual unemployment benefits. Due to the inadequate record, we are unable to review the district court's decision in imputing income to appellant for purposes of setting his child-support obligation. Consequently, we reverse the imputation of income and remand to the district court so that a record can be made regarding appellant's

employment status and income, a determination can be made as to whether appellant is voluntarily unemployed or underemployed, and, if appropriate, income can be imputed to appellant under Minn. Stat. § 518A.32, subd. 2.

II. Filing Status

Next, appellant argues that the district court improperly modified the parties' stipulation and violated its obligation to make an equitable division of their assets by ordering them to file their tax returns separately. He also argues that, because the stipulation stated that the parties would submit to arbitration if they could not agree on asset distribution, the district court altered the stipulation by directing them to file separately, rather than submitting the issue to arbitration.

But, as the district court noted, the parties agreed on the record that the district court would decide the issue of the tax filings:

The issue of income tax filings and allocation of 2008 and 2009 tax liabilities and/or refunds was reserved for submissions per the August 12, 2010 hearing No substantive agreement was reached on that day but it was agreed it would be submitted to the Court in writing, though the specific method of such submission was not clear.

Respondent submitted the issue in a proposed order to the district court in December 2010, proposing that the parties file separately for the tax years 2008 and later. Appellant's proposed order merely suggested that the parties submit written arguments at a future date. In mid-January 2011, respondent argued that appellant had waived his opportunity to address the tax-filing issue because he failed to brief the issue in his December submissions to the court. In late January, appellant submitted a letter argument addressing only the dependency exemptions and not the tax-filing issue.

Appellant had ample time to present an argument to the district court regarding his tax-filing status, but did not do so. Moreover, appellant never submitted any evidence as to how much, if any, tax savings would have been achieved by filing jointly. “A [district] court need not consider tax consequences in dissolution matters where the court is required to speculate on such matters.” *Hedelius v. Hedelius*, 361 N.W.2d 421, 424 (Minn. App. 1985). On this record, the district court did not abuse its discretion in ordering the parties to file separate tax returns.

III. Tax-Dependency Exemptions

Finally, appellant argues that the district court abused its discretion by granting the federal-tax-dependency exemption for the parties’ younger child, N.R.L., to respondent. The district court actually stated that, if appellant was current on his child-support obligation as of December 31, he would be awarded the tax-dependency exemption for N.R.L., but if he was not current on his child support, it would be more appropriate to grant respondent the exemption.

Allocation of federal-tax exemptions is reviewed for an abuse of discretion. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 449 (Minn. App. 2002). Generally, the rule is that the dependency exemption goes to the custodial parent. *Gerardy v. Gerardy*, 406 N.W.2d 10, 14 (Minn. App. 1987). But the district court may award the tax exemption to the noncustodial parent if it considers the relative resources of the parties and concludes that it would not be in the best interests of the children to award the exemption to the custodial parent. *See, e.g., Rogers v. Rogers*, 622 N.W.2d 813, 823 (Minn. 2001)

(reversing award of all children's exemptions to custodial parent after finding that non-custodial parent might lack funds to provide accommodation for her parenting time).

Here, the district court did not abuse its discretion. The district court awarded appellant the tax-dependency exemption for N.R.L, for whom appellant is the custodial parent. But upon considering the financial circumstances and relative resources of the parties, the district court concluded that if appellant was not current in his child-support obligation, it would not be in the best interests of the children to award the exemption to appellant. This conclusion is supported by the record and was not an abuse of discretion.

Because appellant waived the issues relating to the temporary child-support order by not raising them to the district court below, and because the district court did not abuse its discretion in its tax-filing and tax-dependency-exemption determinations, we affirm in part. But, because the district court abused its discretion by imputing income to appellant without finding that appellant was voluntarily unemployed or underemployed, we reverse the imputation of income and remand to the district court for a decision based on appellant's actual earnings or for a finding of voluntary unemployment or underemployment before imputing income to appellant. Whether to reopen the record on remand shall be discretionary with the district court.

Affirmed in part, reversed in part, and remanded.