STATE OF MINNESOTA
IN COURT OF APPEALS
A11-963

Scott Eugene Morrell,
Respondent,

vs.

Stephanie Lynn Milota-Wallenberg f/k/a Stephanie Lynn Milota,
Appellant,

and

County of Dakota,
Intervenor.

Filed March 5, 2012
Affirmed
Schellhas, Judge

Dakota County District Court
File No. 19-F6-01-010216

Stephanie L. Milota-Wallenberg, Coon Rapids, Minnesota (pro se appellant)

Jeffrey K. Priest, Priest Law Firm, Ltd., Eagan, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

SCHELLHAS, Judge

In this child-support dispute, appellant mother argues (1) the child-support magistrate (CSM) should have used hours rather than overnights to calculate the

parenting-time percentage; (2) the CSM should have considered evidence mother submitted in her combined motion for review and to correct clerical mistakes; and (3) the CSM abused her discretion by awarding father $300 in attorney fees. We affirm.

FACTS

K.B.M. was born to appellant Stephanie Milota-Wallenberg (mother) and respondent Scott Morrell (father) in 1995. In 2000, the Dakota County Family Court issued a judgment of paternity, adjudicating father's paternity of K.B.M., establishing K.B.M.'s primary residence with mother, creating a visitation schedule for father with K.B.M., and ordering father to pay child support to mother.

In May 2001, the district court created a parenting-time schedule as follows: K.B.M. would stay with father from 4:30 p.m. on Thursday to 6:00 p.m. on Sunday every other weekend during the school year, and this time with father would be extended to Monday at 8:00 a.m. during K.B.M.'s summer vacation. K.B.M. would stay overnight with father every Wednesday and also on Thursday during the weeks that he did not stay with father on the following weekend. Holidays were alternated, and the court granted mother two, one-week blocks and father three, one-week blocks for vacation time with K.B.M. In 2002, 2003, and 2005, the court amended the holiday schedule. In 2004, the court amended father's Wednesday pick-up time to 3:30 p.m.

In February 2011, father moved to modify child support. After a hearing, a CSM reduced father's child-support obligation from $588 per month to $126 per month, concluding that father "has presumptively equal parenting time with [mother], as court

ordered parenting time is equal to or greater than 45.1%." Mother moved for combined review and correction of clerical mistakes, which the CSM denied. This appeal follows.

D E C I S I O N

A child-support-modification case is subject to the expedited-child-support-process rules if one of the parties receives public assistance as defined by Minn. Stat. § 256.741 or has applied for child-support services under title IV-D of the Social Security Act, 42 U.S.C. § 654(4). Minn. Stat. § 518A.26, subd. 10 (2010); Minn. Gen. R. Prac. 353.01, subd. 1. Mother receives public assistance in the form of diversionary-work-program funds and medical assistance; therefore, this child-support case is subject to the expedited rules. *See* Minn. Stat. § 256.741, subd. 1(b) (2010) (defining "public assistance" as medical assistance and programs under the Minnesota family-investment program under chapter 256J, which includes the diversionary work program codified by Minn. Stat. § 256J.95 (2010)).

Under the expedited rules, the authority of a CSM to modify child support is similar to that of a district court judge. *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000). This court applies the same standard of review to a CSM's order as it would to a district court's order. *Id.* "[W]e will reverse a district court's order regarding child support only if we are convinced that the district court abused its broad discretion by reaching a clearly erroneous conclusion that is against logic and the facts on record." *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008) (quotations omitted). "But when we are interpreting a statute, the standard of review is de novo." *Id.*

Parenting-Time Calculation

The child-support statute provides for a parenting-expense adjustment, which recognizes that during parenting time, a parent incurs costs for raising the child. Minn. Stat. § 518A.36, subd. 1(a) (2010). The statute allows for an adjustment of the amount of support owed by a parent who is paying child support to reflect the percentage of parenting time allocated to that parent during a calendar year. *Id.*, subds. 1(a), 2 (2010). The CSM applies the percentage of parenting time allocated, within specific ranges, to calculate a parenting-expense adjustment, which is then subtracted from the parent's basic support obligation to arrive at the amount for child support. *Id.*, subds. 2, 3 (2010). The child-support statute defines three ranges of parenting time that are considered in addressing a parenting-expense adjustment: less than 10%, between 10 and 45%, and between 45.1 and 50%. *Id.*, subd. 2(1). Parenting time is presumed equal when the amount of parenting time is between 45.1 and 50%. *Id.* When parenting time and parental incomes are equal, "no basic support shall be paid unless the court determines that the expenses for the child are not equally shared." *Id.*, subd. 3(a).

The statute does not require the CSM to use a particular method to calculate the parenting-time percentage; rather, the statute grants discretion to the CSM to choose a method:

> The percentage of parenting time may be determined by calculating 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., subd. 1(a). In this case, the CSM found that father had K.B.M. overnight 6 of 14 days during the school year and 7 of 14 days during the summer. The CSM also noted that father's "undisputed calculation shows that for 2010 he had [K.B.M.] overnight 171 of 365 days, which is 46.8% of the time." In calculating father's basic support obligation, the CSM determined father's parenting-time percentage to be between 45.1 and 50%.

Mother argues that "father was not taking all of his parenting time per court order and he was still given credit for time he did not take." Her argument is unpersuasive. Section 518A.36 requires parenting time to be determined by the terms of a court order, regardless of whether a parent exercises that parenting time. *Hesse v. Hesse*, 778 N.W.2d 98, 103 (Minn. App. 2009).

Mother also argues that the overnight-calculation method gives father 24 hours of parenting time on Wednesdays when, in actuality, she is responsible for the care of K.B.M. until 3:30 p.m. on Wednesdays, when father picks him up. Mother proposes that parenting time be calculated by hours and suggests that under the hourly calculation method, father's "actual time spent with [K.B.M.] is 43.6%." But mother did not argue before the CSM that parenting time should be calculated by hours rather than by overnights. Instead, in her combined motion, mother introduced her hourly calculation method to the CSM. With her combined motion, mother included a calendar that she claimed documented the hours father spent with K.B.M. in 2010, in addition to a document that listed the time father spent with child in 2010; an amended determination-of-benefits letter from the Minnesota unemployment insurance office showing a decrease in mother's income; and the amount of her monthly payments on her student loans. The

CSM declined to consider any of the information mother included because it was not presented at the hearing and "the court did not leave the record open for additional information to be provided." On appeal, mother asks that the information she submitted to the CSM with her combined motion for review and correction of clerical mistakes "be considered for the correction of these matters." Mother argues that her submissions were not new evidence because they were based on "court orders that have been on file for years." But she admits in her brief that "[t]he way of looking at [the court orders] may have been new."

We conclude that the CSM correctly declined to consider mother's new evidence submitted with her combined motion. Mother did not present any of the information in question to the CSM during the hearing, and the CSM did not solicit additional evidence from the parties after the hearing. Rule 377.09, subdivision 4, of the Minnesota Rules of General Practice for the District Courts prohibits parties from submitting new evidence when moving for review, to correct clerical mistakes, or both, unless the CSM "requests additional evidence." Moreover, mother's argument about her hourly calculation method is unpersuasive. The plain text of section 518A.36 allows the CSM, in his or her discretion, to calculate parenting time using either the overnight method or the significant-time method. Minn. Stat. § 518A.36, subd. 1(a). The two options are permissive alternatives. And, although mother argues that the use of the overnight method results in her loss of "credit for 15.5 hours" on Wednesdays, mother likewise gets "credit" for 18 hours every other Sunday during the school year when K.B.M. stays with

father until 6 p.m. and then stays overnight with mother. The CSM did not abuse her discretion in using the overnight method to calculate the parenting-time percentage.

Mother also argues that the CSM "should have under the circumstances of my depression and the newness of the law allowed review of important facts that erroneously were calculated the first go round." She characterizes her circumstances as "extreme." Whether to request additional evidence is within the CSM's discretion. *See* Minn. Gen. R. Prac. 377.09, subd. 4 (directing that parties "shall not submit any new evidence unless" the CSM requests it). Here, the record shows that the CSM heard testimony about father's and mother's incomes and expenses and their parenting time. The only testimony the CSM heard about mother's depression was in connection with her job search. Mother testified that she was being "treated for depression" but was seeking full-time work. And, even though a parenting-time adjustment had never been previously applied in this case, mother had ten days to prepare for the hearing in response to father's motion to modify child support. Mother's argument is unavailing.

Mother also argues that the CSM was incorrect in determining the parenting-time percentage because father did not use all of the parenting time the court order allowed and the CSM "gifted" time to father. We are not persuaded because mother is simply arguing a variation on her challenge of the CSM's use of the overnight method of calculating parenting time.

Mother also argues that Minn. Stat. § 518A.39, subd. 2(k) (2010), applies, which allows limited modification to child-support payments if a full variance would create hardship. Mother failed to raise this argument before the CSM, and we therefore choose

not to consider the argument. *See Thiele v. Stitch*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that, generally, an appellate court will not consider matters not argued to and considered by the district court).

Attorney Fees

Mother challenges the CSM's award of attorney fees to father. The CSM granted father a "$300.00 reduction in arrearages due as a figure calculated to make [father] whole for having to respond to parts of [mother's] motion regarding submission of new evidence that clearly was not allowed." Mother argues that this court should reverse the award of attorney fees "because of the numerous errors in which laws were not correctly applied and otherwise discarded at the magistrate's judicial discretion." We disagree.

We review an award of attorney fees for abuse of discretion. *In re Adoption of T.A.M.*, 791 N.W.2d 573, 578 (Minn. App. 2010). Rule 377.09, subdivision 6, of the Minnesota Rules of General Practice for the District Courts, allows a CSM to "award costs and fees incurred in responding to a motion to correct clerical mistakes, motion for review, or combined motion if the [CSM] . . . determines that the motion is not made in good faith or is brought for purposes of delay or harassment." Additionally, Minnesota Statutes section 518.14, subdivision 1 (2010), allows a court, in its discretion, to award attorney fees at any point during a child-support-modification proceeding "against a party who unreasonably contributes to the length or expense of the proceeding." Here, the Notice of Filing of Order and Right to Review or Appeal, attached to the March 4, 2011 order, states: "You CANNOT submit any new evidence or information unless the court grants your request to submit additional evidence or information." The record shows that

mother submitted new evidence in her combined motion and that the CSM did not request new evidence.

We conclude that the CSM did not abuse her discretion when she awarded attorney fees to father.

Affirmed.