STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0608

State of MN ex rel Kandiyohi County, petitioner,
Respondent,

Shannon Lee Barrett, petitioner,
Respondent,

vs.

Justin Benedict Murphy,
Appellant.

Filed July 29, 2013
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Kandiyohi County District Court
File No. 34-FA-11-408

Jennifer Kurud Fischer, Kandiyohi County Attorney, John L. Kallestad, Assistant County Attorney, Willmar, Minnesota (for respondent Kandiyohi County)

Shannon Lee Barrett, Willmar, Minnesota (pro se respondent)

John E. Mack, Mack & Daby P.A., New London, Minnesota (for appellant)

Considered and decided by Hudson, 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

Appellant-father challenges the district court's denial of his request to modify the child-support magistrate's order that he pay retroactive child support and ongoing child support based on income imputed to him, arguing that the court (1) abused its discretion by ordering retroactive child support; (2) clearly erred by finding that appellant-father was voluntarily unemployed as a basis for imputing income to him; and (3) abused its discretion by failing to make a parenting-time adjustment. Appellant-father also makes other arguments not argued in the district court.

We affirm the district court's retroactive child-support order, but, because we conclude that the child support magistrate erroneously imputed income to appellant-father, we reverse the child-support obligation that is based on imputation of income to appellant-father and remand for redetermination of father's child-support obligation during his period of unemployment and on an ongoing basis.

FACTS

In November 2011, respondent State of Minnesota moved a child support magistrate (CSM) to establish the retroactive and ongoing child-support obligations of appellant Justin Murphy (father) and respondent Shannon Barrett (mother) for their 13-year-old child, K.M., who resided with mother. Kandiyohi County noticed its intervention.

At a hearing before a CSM on December 2, mother and father testified and submitted evidence. The record reflects that, at the time of the hearing, mother was a

hospital nurse earning $5,324 per month, based on ".8" or ".9" time, and father was unemployed and receiving unemployment benefits of $1,909 per month. On April 6, 2011, father was terminated from his position in Chicago as a financial mutual-fund salesperson after he requested permission to relocate to Minnesota. While employed, father earned $250,000 annually; he received approximately $300,000 in severance pay upon his termination. Father relocated to Minnesota to be closer to K.M.

Father has a college degree and occupational licensing. He testified that he was doing everything that he possibly could to find employment in his competitive market; he touched base with 18 recruiters; he went "to all [his] contacts and resources"; he participated in at least seven interviews, including two "major interviews"; and, at the time of the hearing, he was in "the fifth interview process with two . . . flights out to the home office." Father submitted corroborative documentary evidence of his employment pursuits, and mother acknowledged, through her counsel, that father was "doing a diligent job search." Mother challenged father's good faith regarding his unemployment because of his relocation request, noting that his relocation request precipitated his employment termination and that the timing of his relocation request was suspicious because father's employer would have approved his relocation request two years earlier.

On December 16, the CSM found that father was voluntarily unemployed or underemployed and that he could earn $80 per hour or $13,760 in *potential* monthly income and ordered him to pay $9,834.50 in past child support for the period from January 1, 2010 to December 31, 2011. Based on father's *potential* monthly income of

$13,760, the CSM ordered father to pay ongoing monthly child support in the amount of $1,356.

Father moved the district court to review the CSM's order, requested a hearing and modifications, and argued that the CSM erred by finding that father was voluntarily unemployed or underemployed, by failing to apply a parenting-time adjustment, and by failing to consider a prior child-support agreement between father and mother. The district court denied father's request for relief without a hearing.

After father noticed this appeal in early April 2012, this court stayed the appeal and referred the case for appellate mediation because it met the mandatory-mediation requirements. After the parties failed to reach a final settlement during mediation, this court dissolved the stay and returned the appeal to the appellate process.

D E C I S I O N

Father challenges the CSM's child-support order and district court's denial of his request to modify that order. "Minnesota Statutes §§ 518A.26 to 518A.43 (2012) provide the procedure for the computation of child support." *Haefele v. Haefele*, ___ N.W.2d ___, ___, 2013 WL 2320039, at *4 (Minn. May 29, 2013).[1] "The district court reviews the decision of a CSM de novo . . . ." *Jones v. Jarvinen*, 814 N.W.2d 45, 47 (Minn. App. 2012). When—as here—"a district court affirms a CSM's decision on a motion for review, we review the order from which the appeal was taken and treat the CSM's decision as the district court's decision." *Cnty. of Grant v. Koser*, 809 N.W.2d 237, 240

[1] We apply the 2012 version of the relevant statutes based on the "general rule . . . that appellate courts apply the law as it exists at the time they rule on a case." *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000).

(Minn. App. 2012). An appellate court "will reverse a district court's order regarding child support only if [the appellate court is] 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) (quotation omitted).

We must uphold a district court's factual findings "unless they are clearly erroneous," which occurs when "the reviewing court is 'left with the definite and firm conviction that a mistake has been made'" when "view[ing] the record in the light most favorable to the trial court's findings." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quoting *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted)).

Retroactive Child Support

The CSM commenced father's two-year retroactive child-support obligation on January 1, 2010, less than two years before November 10, 2011, when father and mother received service of process regarding the state's motion to establish child support. Father argues that the CSM erred by ordering him to pay retroactive child support because father and mother had a prior child-support agreement and, beginning approximately three years before the hearing, father began paying mother agreed-upon monthly child-support payments.

"Generally, where no prior order to pay child support exists, it is improper to give a support order retroactive effect." *Davis v. Davis*, 631 N.W.2d 822, 827 (Minn. App. 2001). Father argues that the CSM had no authority to order him to pay two years of retroactive child support because no prior child-support order existed. We disagree. "A

noncustodial parent's [child-support] liability may include up to the two years immediately preceding the commencement of the action" when the custodial parent is not receiving public assistance and has physical custody of the child with the noncustodial parent's consent. Minn. Stat. § 256.87, subd. 5 (2012). The record here does not indicate that mother was receiving public assistance—the state's affidavit regarding its support-establishment motion states that mother receives "Non-Public Assistance Child Support services." The record also reflects that mother had physical custody of K.M.

Father also argues that, because of the prior agreement between father and mother, the CSM was modifying, not setting, child support and therefore could not order retroactive child support. Father cites Minn. Stat. § 518A.39, subd. 2(e), which permits a "modification of support . . . [to] be made retroactive *only with respect to any period during which the petitioning party has pending a motion for modification*." (Emphasis added.) Father argues that Minn. Stat. § 518A.39, subd. 2(e), applies to any "modification of support" and that the "support" need not be a support *order* and could be a support *agreement*. But father waived this argument by failing to raise it in the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)). Moreover, at the hearing, father conceded the point:

> FATHER'S COUNSEL: Our feeling is this court ought not go retroactive beyond the date of [mother's] request for this modification.
> CSM: It's not a modification. It's an establishment.
> FATHER'S COUNSEL: An establishment, okay. I apologize.

Regardless, father's argument is unpersuasive because section 518A.39, read as a whole, indicates that the legislature's use of "modification of support" in subdivision 2(e) means modification of a support *order*, not merely an *agreement*. *See* Minn. Stat. § 518A.39, subd. 1 (describing court's "Authority" for "Modification of orders or decrees" "[a]fter an order under this chapter or chapter 518 for maintenance or support money"); *Washek v. New Dimensions Home Health*, 828 N.W.2d 732, 737 n.2 (Minn. 2013) ("We must interpret a statute as a whole to harmonize all its parts . . . ." (quotation omitted)).

The CSM did not err by ordering father to pay retroactive child support.

Potential-Income Imputation to Establish Child Support

The CSM found that father "was involuntarily terminated from Davis Selected Advisors 'due to a reduction in force.'" Father argues that the district court erred by finding that he was voluntarily unemployed or underemployed and imputing potential income to him to establish his child-support obligation.

Father argues that the district court should not have imputed potential income to him without finding that he acted in bad faith. We reject this argument because the provisions of section 518A.32, regarding voluntary unemployment or underemployment, do not require that the district court find bad faith to impute income. *Melius v. Melius*, 765 N.W.2d 411, 415 (Minn. App. 2009). We also reject father's argument that the CSM evidenced bias against him when she determined that he was not aggressively seeking employment. Father waived his bias argument by failing to raise it in the district court. *See Braith v. Fischer*, 632 N.W.2d 716, 725 (Minn. App. 2001) ("[T]he issue of bias was

not presented to the district court and we decline to address the issue." (citing *Thiele*, 425 N.W.2d at 582 ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)), *review denied* (Minn. Oct. 24, 2001). And, even if father had raised the argument, the record does not reflect any bias on the part of the CSM.

But, we are persuaded by father's argument that the CSM erred by imputing potential income to him based on the CSM's clearly erroneous finding that he was voluntarily unemployed or underemployed. A court must determine a parent's basic child-support obligation based on a determination of the gross income of each parent under section 518A.29. Minn. Stat. § 518A.34(b)(1). Gross income includes "potential income under section 518A.32." Minn. Stat. § 518A.29(a). "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. "For purposes of this determination, it is rebuttably presumed that a parent can be gainfully employed on a full-time basis." *Id.* "Whether a parent is voluntarily unemployed is a finding of fact, which we review for clear error." *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009) (citing *Putz v. Putz*, 645 N.W.2d 343, 352 (Minn. 2002) (noting that "[t]he primary issue" on appeal was "whether the magistrate erred in finding that [father] was not voluntarily unemployed")). Here, the only evidence submitted to the CSM was father's evidence of his re-employment efforts and interviews. And mother conceded that father's job search was diligent.

We conclude that father rebutted the statutory presumption that he could be gainfully employed on a full-time basis from the date of his employment termination, April 6, 2011, until the date of the CSM's order, December 16, 2011. We therefore reverse the district court's imputation of potential income to determine father's ongoing child-support obligation and remand for re-calculation of his gross income to determine his child-support obligation from April 6, 2011, to the present.

Other Arguments

We address the following arguments because of their relevance on remand.

Father argues that the CSM erred by considering as part of his gross income his receipt of approximately $300,000 as a severance payment from his former employer. The CSM did not err. Minnesota Statutes section 518A.43, subdivision 1(1), required the CSM to consider "all earnings, income, circumstances, and resources of each parent." We reject father's argument that the inclusion of "periodic payment" in Minn. Stat. § 518A.29(a) suggests that his one-time receipt of severance pay could not be considered in the CSM's gross-income calculation.

Father argues that the district court abused its discretion by not addressing the impact of father and mother's prior child-support agreement on his child-support obligation. Father relies on jurisprudence regarding the impact of a stipulation on the determination of child support. *See, e.g.*, *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 475 (Minn. App. 2004) ("Where child support is concerned, . . . a stipulation is one factor to be considered in *modification* motions." (emphasis added) (quotation omitted)). Father's reliance on that jurisprudence is misplaced. "Agreements between parents, whether oral

or written, do not limit the discretionary power of the court in *setting* child support obligations." *Swanson v. Swanson*, 372 N.W.2d 420, 423 (Minn. App. 1985) (emphasis added) ("The trial court did not abuse its discretion in refusing to bind the parties to the terms of the unexecuted stipulation."); *see State, St. Louis Cnty., on Behalf of Anderson v. Philips*, 380 N.W.2d 891, 894 (Minn. App. 1986) (citing *Swanson*, stating that, "[e]ven if the agreement was made as appellant states, agreements between the parties do not control the court on issues of child support").

Father argues that the district court erred by not adjusting his child-support obligation based on his parenting time. But Minnesota Statutes section 518A.36, subdivision 1(b), prohibited the court from doing so under the circumstances in this case. "If there is not a court order awarding parenting time, the court shall determine the child support award without consideration of the parenting expense adjustment." Minn. Stat. § 518A.36, subd. 1(b). No parenting-time order existed when the CSM issued the child-support order in December 2011 and the district court issued its order in February 2012.

Father argues that the CSM lacked jurisdiction to order him to pay child support because the CSM was required under Minn. Gen. R. Prac. 353.02, subd. 3, to refer the entire matter or, at least, some of the issues, to the district court. We disagree. Rule 353.02, subdivision 3, applies only to expedited-process proceedings in which "the complaint, motion, answer, responsive motion, or counter motion raises one or more issues identified in Rule 353.01, subd. 3." Father argues that the CSM should have referred the parenting-time issue to the district court for an evidentiary hearing. *See* Minn. Gen. R. Prac. 353.01, subd. 3(g) (listing "evidentiary hearings to establish

custody . . . [or] parenting time"). But nothing in the record shows that the parenting-time issue was before the CSM prior to the CSM's December 16, 2011 order or the district court's February 2012 order. When mother stated at the hearing that a parenting-time dispute existed, the CSM told her to "go to district court" to resolve the issue, stating that resolving it was beyond the CSM's authority.

Father asks this court to enforce a child-support agreement that he purports he and mother entered during mediation ordered by this court. The enforcement of a disputed agreement in mediation is beyond the scope of our function, which "is limited to identifying errors and then correcting them," *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988), and would require us to consider evidence outside the record on appeal. "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele*, 425 N.W.2d at 582–83.

In conclusion, we reverse the district court's imputation of potential income to father for the purpose of determining his child-support obligation but otherwise affirm the district court's order. To clarify, we do not otherwise disturb the district court's order that father pay retroactive child support, and we remand for re-calculation of father's gross income and re-determination of father's child-support obligation from April 6, 2011, to the present.

Affirmed in part, reversed in part, and remanded.