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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2005

In re the Marriage of:
Stuart Mark Ferrell, petitioner,
Appellant,

vs.

Amy Suzanne Ferrell,
Respondent.

Filed November 24, 2014
Affirmed
Halbrooks, Judge

Dakota County District Court
File No. 19-F7-03-012884

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Considered and decided by Chutich, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

HALBROOKS, Judge

In this appeal from an order modifying child support, appellant argues that the district court erred (1) when determining the applicable incomes of the parties, (2) by setting June 1, 2013, as the effective date of the modification order, and (3) by allocating

all of the government-assistance benefits for the parties' adult disabled child to respondent. Appellant also argues, for the first time on appeal, that respondent should be required to maximize the government-assistance benefits that she receives to care for their adult disabled child. We affirm.

FACTS

Appellant Stuart Mark Ferrell and respondent Amy Suzanne Ferrell married in 1989 and divorced in 2004. The parties have three children, and the district court awarded joint legal custody to the parties, with sole physical custody to respondent, and created a parenting plan granting appellant one-third parenting time with respect to all three children. The original judgment and decree required appellant to pay respondent $1,385.21 per month for the support of the three children. The district court modified the child-support award a few times over the years, but custody was never modified. At the time of the motion to modify the child-support award at issue on appeal, appellant paid respondent $2,040 in monthly child support. Appellant is employed as a pilot for Sun Country Airlines. Respondent is employed as a supervisor for Delta Airlines.

The parties' eldest child emancipated and currently attends college. The parties' middle child, G.F., is a disabled adult with autism. G.F. was 18 years old at the time the district court filed the modification order at issue on appeal, but she functions at a three- to four-year-old level. G.F. requires full-time care. She is unable to use the toilet by herself or dress herself, and she requires a special diet and assistance eating. G.F. receives benefits through the Dakota County Social Services' Client Driven Community Support Plan, which provides funding to cover needs such as medical items, special

dietary goods, and personal care attendant (PCA) wages. The parties' youngest child, S.F., was 16 years old at the time the district court filed the order at issue on appeal. In October 2011, S.F. moved permanently into appellant's home.

On July 27, 2012, appellant moved the district court to modify the parties' parenting plan and appellant's child-support obligation due to S.F.'s change of primary residence. The hearing on the motion was rescheduled multiple times due to settlement negotiations, formal discovery requests, and the mediation process. In October 2012, shortly before G.F. turned 18, the district probate court found G.F. to be an incapacitated person under the guardianship statutes and appointed respondent as G.F.'s guardian. In May 2013, before a hearing was held on the July 2012 motion, appellant filed a new motion to modify the parties' parenting plan, modify appellant's child-support obligation, and continue to award appellant one-third of the government-assistance benefits for G.F.

The district court heard the motion on May 16, 2013, and issued its order in August 2013. The district court's order changed S.F.'s primary residence to appellant's home and found that respondent has less than ten percent parenting time with S.F. The district court also found that G.F., age 18, remains a "child" for purposes of child support due to her autism. The district court found that respondent's gross monthly income was $3,683, based on respondent's actual wages earned in 2012, reflecting that she worked approximately 31 hours per week. The district court did not impute potential income to respondent. The district court found that appellant's gross monthly income was $14,566, based on appellant's actual wages earned in 2012.

Appellant argued his gross income should be based on the industry standard and not his actual wages. The district court found that appellant submitted no evidence that his 2012 actual income was significantly different from a typical year, and rejected appellant's argument that his gross income should be determined based on the industry standard. The district court granted the motion to modify child support and ordered appellant to pay respondent a reduced amount of $1,046 per month in child support, basing its determination on "the incomes of the parties, the fact that each parent has one child residing with them, and the requirement the [district c]ourt offset child support to reflect the parenting arrangement."

The order set June 1, 2013, as the effective date for the child-support modification. This date was two and one-half months before the district court's order granting modification, ten months after appellant's original motion, and one month after appellant's second motion in May 2013. The district court stated that it was "unwilling to make any further retroactive changes in this matter given [r]espondent's tighter budget and [appellant's] ability to meet his own needs."

The modification order awarded to respondent all of the government-assistance benefits for G.F. The prior order had divided the government-assistance benefits based on the parenting-time schedule, with appellant receiving one-third and respondent receiving two-thirds of the benefits. The district court reasoned that the differences in the parties' incomes as well as respondent's ultimate responsibility for G.F.'s care, due to her new position as G.F.'s guardian, warranted modifying the allocation of benefits. The district court specifically found that appellant "does not need the assistance provided by

the government to adequately and effectively care for [G.F.] while he exercises his parenting time, and that this [o]rder is in the best interests of [G.F.]." This appeal follows.

D E C I S I O N

I.

We first address whether the district court failed to properly calculate the parties' gross incomes and therefore improperly determined the modified child-support amount. Appellant argues that the district court erred by including appellant's "overtime" income in its determination of his gross income. In addition, appellant argues that the district court erred by not imputing potential income to respondent because respondent only works approximately 31 of her regularly scheduled 40 hours per week.

A. Appellant's gross income

The district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We will affirm the district court's findings on income for child-support purposes so long as "those findings have a reasonable basis in fact and are not clearly erroneous." *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002) (quotation omitted); *see also Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009) ("The district court's determination of net income must be based in fact and it will not be overturned unless it is clearly erroneous."). When a district court's "determination of income is challenged on appeal, we look to both the court's findings and the evidence of record to ascertain whether there has been clear error." *Schisel*, 762 N.W.2d at 272. But when an issue requires us to interpret the

statutory definition of "gross income," it is reviewed de novo. *Haefele v. Haefele*, 837 N.W.2d 703, 708 (Minn. 2013). Appellant asks us to determine whether his gross income should consist of the minimum standard set by the airline industry or by his actual wages earned. Therefore, we review de novo the statutory interpretation of "gross income."

"When the statutory language is plain and unambiguous, we will look only to that language in ascertaining legislative intent." *Id.*; *see also* Minn. Stat. § 645.16 (2012). To determine the presumptive child-support award, the district court must calculate the gross income of each parent. Minn. Stat. § 518A.34(b)(1) (2012). Minnesota law defines "gross income" as including "any form of periodic payment to an individual, including, but not limited to, salaries, wages, [and] commissions." Minn. Stat. § 518A.29(a) (2012). In addition, the statute also provides that "[g]ross income does not include compensation received by a party for employment in excess of a 40-hour work week," provided certain conditions are met. Minn. Stat. § 518A.29(b) (2012). "While the legislature did not have in mind to disregard increased earnings from a promotion or new job, it did intend the limitation to apply to wage earning obligors who earn hourly pay for work in excess of 40 hours per week." *Johnson v. Johnson*, 533 N.W.2d 859, 864 (Minn. App. 1995). But "[w]here overtime income has been a regular, steady source of income for the past several years, the [district] court may properly include the overtime income in the income used to calculate child support, although the opportunity to work overtime in the future may decrease." *Strauch v. Strauch*, 401 N.W.2d 444, 448 (Minn. App. 1987) (citation omitted).

Appellant's employer guarantees its pilots a minimum of 70 hours of pay per month. Appellant argues that his gross income should consist of only this 70-hour-per-month industry standard and not any additional hours that he worked in 2012. Appellant bases his argument on Minn. Stat. § 518A.32 (2012), which states, "As used in this section, 'full time' means 40 hours of work in a week except in those industries . . . in which most employers . . . use a normal work week of more or less than 40 hours in a week." Minn. Stat. § 518A.32, subd. 1. But section 518A.32 governs "potential income," and its definition of "full time" applies to determinations of when to impute additional potential income to a party's gross income. Appellant attempts to apply this definition to his argument regarding the calculation of his gross income.

Section 518A.29 governs calculation of gross income and is the relevant statute for appellant's argument. This section states that "gross income includes any form of periodic payment" but does not include "compensation received by a party for employment in excess of a 40-hour work week." Minn. Stat. § 518A.29(a)-(b). Section 518A.29 does not incorporate or reference the section 518A.32 definition of "full time." Instead, it uses the phrase "in excess of a 40-hour work week." Minn. Stat. § 518A.29(b). Based on the plain and unambiguous language of the statute, the definition of "full time" in section 518A.32 does not apply to the calculation of gross income in section 518A.29.

Under the plain meaning of section 518A.29, appellant's actual wages earned in 2012, including what he earned above the 70-hour-per-month industry minimum, should be used to calculate his gross income for purposes of determining child support because they are a "form of periodic payment to an individual, including, but not limited to,

salaries, wages, [and] commissions" and are not "compensation . . . for employment in excess of a 40-hour work week." Minn. Stat. § 518A.29(a)-(b). We conclude that the plain and unambiguous meaning of "gross income" in Minn. Stat. § 518A.29 includes appellant's actual wages.

Next, we consider whether the district court clearly erred in calculating appellant's gross income. *See Ludwigson*, 642 N.W.2d at 446 (applying clear-error standard of review to a district court's factual finding of a party's gross income). In doing so, we review the record in the light most favorable to the district court's findings and defer to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). The ultimate question is whether we are left with a "definite and firm conviction that a mistake has been made." *Id.* at 474. The party challenging a district court's factual finding on appeal has the burden to show that the finding is clearly erroneous. *Id.*

Appellant argues that the calculation of his gross income should be based on the industry's minimum guarantee of hours worked and not based on his actual wages. The district court found that it was appropriate to base appellant's gross income on his actual wages because appellant "submitted no evidence that [his] actual W-2 income was some sort of an anomaly, and that he actually makes an appreciable amount less than that in a typical year." The record supports this finding. Appellant demonstrated that he worked more than the minimum 70-hour-per-month guarantee in 2012, but he did not demonstrate that he worked more than 40 hours per week. Nor did appellant demonstrate that his 2012 wages were anomalous. On the contrary, respondent submitted evidence of

appellant's previous annual incomes showing that appellant consistently earned more than the 70-hour-per-month minimum. In addition, the record reflects that working more than the 70-hour minimum does not automatically put appellant in "overtime." The district court found that it was appropriate to use the gross-income amount reported on appellant's W-2 tax forms in its calculation of appellant's gross income for child-support purposes. We agree. We therefore conclude that the district court's factual finding of appellant's gross income was not clearly erroneous.

B. Respondent's gross income

Next, appellant argues that the district court erred in calculating his child-support obligation because it did not impute respondent's potential income to determine her gross income. Appellant argues that respondent is voluntarily underemployed because she works approximately 31 hours per week even though she is scheduled to work 40 hours per week. Whether a parent is voluntarily underemployed is a factual determination, which we review for clear error. *See Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009) (stating that whether a party is unemployed is a fact question).

Minnesota law presumes that a parent is capable of working full time. Minn. Stat. § 518A.32, subd. 1. This statutory presumption may be rebutted if the parent shows that she is working less than full time because she qualifies as a caretaker:

> If a parent stays at home to care for a child who is subject to the child support order, the court may consider the following factors when determining whether the parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis:
>
> (1) the parties' parenting and child care arrangements before the child support action;

> (2) the stay-at-home parent's employment history, recency of employment, earnings, and the availability of jobs within the community for an individual with the parent's qualifications;
>
> (3) the relationship between the employment-related expenses, including, but not limited to, child care and transportation costs required for the parent to be employed, and the income the stay-at-home parent could receive from available jobs within the community for an individual with the parent's qualifications;
>
> (4) the child's age and health, including whether the child is physically or mentally disabled; and
>
> (5) the availability of child care providers.

Minn. Stat. § 518A.32, subd. 5. The district court must "apply the factors set forth in [the statute] and . . . determine whether [the parent's] status as the caretaker of the parties' children precludes her from being found to be voluntarily unemployed." *Welsh*, 775 N.W.2d at 371 (remanding for factual findings regarding the factors listed in the statute).

Here, the district court concluded that it would not impute any potential income to respondent, even though she works less than the statutory definition of "full time." The district court reasoned that "any additional time is spent caring for [G.F.], making a standard 40 hr. work week impractical given the situation and limitations of this family." The district court did not explicitly apply the statutory factors in Minn. Stat. § 518A.32, subd. 5. But the district court did implicitly address the fourth factor, "the child's age and health, including whether the child is physically or mentally disabled," by concluding that respondent spends additional time caring for G.F. because of G.F.'s disability. The record supports the district court's finding. The record also supports the district court's findings that G.F. remains a "child" under Minn. Stat. § 518A.26, subd. 5 (2012), due to her autism and that G.F. is incapable of self-support. The record amply details the extent

of G.F.'s disability. The record also supports the fifth factor in the statute, "the availability of child care providers." The record shows that it is in G.F.'s best interests to have consistent child-care providers who are familiar with her needs, behaviors, and type of disability.

We conclude that the district court did not commit clear error in finding that respondent was not voluntarily underemployed, and we affirm the district court's calculations of the parties' gross incomes.

II.

We next address whether the district court abused its discretion in setting June 1, 2013, as the effective date of the support-modification order. "A modification of support or maintenance . . . may be made retroactive . . . but only from the date of service of notice of the motion on the responding party." Minn. Stat. § 518A.39, subd. 2(e) (2012). "'May' is permissive." *Lee v. Lee*, 775 N.W.2d 631, 643 (Minn. 2009) (interpreting Minn. Stat. § 518A.39, subd. 2(e)). Thus, the statute governing modification of support orders gives district courts discretion to set the effective date of a child-support modification. *Finch v. Marusich*, 457 N.W.2d 767, 770 (Minn. App. 1990). The discretion to set an effective date other than the date the motion was served "must be exercised based on the facts as found by the district court." *Lee*, 775 N.W.2d at 643 (remanding for factual findings to support the district court's choice of an effective date).

Here, the district court decided that the effective date of the modification order would be June 1, 2013, two and one-half months prior to the modification order, ten months after the July 2012 motion, and one month after the May 2013 motion was filed.

The district court cited "[r]espondent's tighter budget and [appellant's] ability to meet his own needs" as the factual basis for not making the order's effective date retroactive to an earlier date.

We conclude that the district court provided a sufficient factual basis for choosing its effective date and properly exercised its discretion in setting the June 1, 2013 effective date.

III.

We next consider whether the district court abused its discretion by allocating all of the government-assistance benefits for G.F. to respondent. Appellant cites no authority to support his argument that this decision constitutes an abuse of discretion by the district court. When parties fail to adequately support their arguments with legal analysis or citation, we deem those issues waived. *State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to "reach [an] issue in the absence of adequate briefing"); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations of procedural and substantive due process violations when the appellant "does not support those allegations with constitutional analysis or citation").

To the extent that appellant has not waived the issue, we affirm the district court's allocation of the benefits to respondent. We review "orders modifying child support for abuse of discretion." *Haefele*, 837 N.W.2d at 708. In addition, "[m]edical needs of minor children . . . are in the nature of child support." *Korf v. Korf*, 553 N.W.2d 706, 708 (Minn. App. 1996). Thus, we will review the district court's modification of the

government-assistance-benefits allocation for an abuse of discretion and reverse only if the district court resolved the matter in a manner "that is against logic and the facts on record." *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002).[1]

Dakota County's social-services division administers benefits to G.F. to cover services and goods that are above and beyond the normal costs of parenting, such as PCA wages, special dietary needs, and medical items. In its prior child-support order, the district court had divided the allocation of these benefits based on the parenting-time schedule, which gives appellant one-third parenting time with G.F. In the modification order, the district court based its reallocation of the government-assistance benefits on (1) the parties' incomes and their corresponding budgets, (2) respondent's new designation as G.F.'s guardian, and (3) respondent's ultimate responsibility for G.F.'s care. The district court specifically found that appellant "does not need the assistance provided by the government to adequately and effectively care for [G.F] while he exercises his parenting time, and that this [o]rder is in the best interests of [G.F.]."

The record supports the district court's findings. Appellant makes an appreciably higher income than respondent. In addition, respondent's two-third share of the benefits was not enough to cover all of the costs associated with caring for G.F., and the benefits were depleted every year by September or October. Shortly before G.F. turned 18, the district court appointed respondent as her guardian through a probate proceeding. The

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[1] Appellant does not assert that the district court misapplied or misinterpreted the law, so we are not reviewing a question of law de novo. And appellant does not challenge the factual findings of the district court, so we are not reviewing questions of fact for clear error.

guardianship order states that respondent has the power and duty to: "[p]rovide for [G.F.'s] care, comfort, and maintenance needs, . . . [g]ive any necessary consent to enable, or to withhold consent for, [G.F.] to receive necessary medical or other professional care, counsel, treatment, or service, . . . [e]xercise supervisory authority over [G.F.]." In addition, G.F. remains a "child" under Minn. Stat. § 518A.26, subd. 5. As long as G.F. remains a "child" under chapters 518 and 518A,[2] respondent has sole physical custody, and appellant and respondent have joint legal custody of G.F. For other legal matters, or if G.F. ceases to be a "child" under sections 518 and 518A, respondent is G.F.'s legal guardian.

We conclude that the district court did not abuse its discretion because its findings are not against logic and are supported by the record. We affirm the district court's allocation of the government-assistance benefits to respondent.

IV.

Lastly, appellant asks us to review his request that respondent be ordered to establish a special-needs or supplemental-needs trust for purposes of child support. Appellant contends that if child-support payments went into such a trust, G.F. would qualify for Social Security Income (SSI), which would maximize the government benefits available for her. But appellant did not present this request to the district court, and the district court did not consider it. "A reviewing court must generally consider only those

[2] The statutory designation of "child" is applicable to custody, parenting time, and child-support determinations. Minn. Stat. § 518A.26, subd. 1 ("For the purposes of this chapter [governing child support] and chapter 518 [governing marriage dissolution], the terms defined in this section shall have the meanings respectively ascribed to them.").

issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Because this issue was not raised at the district court, we decline to consider appellant's argument.

Affirmed.