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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1089**

Nicole A. Nyhus,
Respondent,

Hennepin County,
Respondent,

vs.

Sokkhan Ka,
Appellant.

**Filed March 4, 2019
Affirmed in part, reversed in part, and remanded
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-PA-FA-000049303

Nicole A. Nyhus, Inver Grove Heights, Minnesota (pro se respondent)

Michael O. Freeman, Hennepin County Attorney, Charles S. Weber, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Sokkhan Ka, Shoreview, Minnesota (pro se appellant)

Considered and decided by Worke, Presiding Judge; Cleary, Chief Judge; and
Slieter, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this child-support dispute, appellant Sokkhan Ka argues that the child support magistrate (CSM) erred in (1) calculating his potential gross monthly income, and (2) setting the effective date of his past-support award. We affirm in part, reverse in part, and remand.

FACTS

Ka and respondent Nicole A. Nyhus are the parents of one minor child, born in 2002. They have never been married. Both parties signed a recognition of parentage in July 2002. In 2011, respondent Hennepin County initiated an action to establish Ka's child-support obligation, and the district court ordered Ka to pay \$150 per month in child support. However, Ka failed to remain current with his child-support payments, and the district court found him to be in constructive civil contempt.

In November 2016, Ka moved to modify his child-support obligation because the parties' minor child was residing with him. In a February 2017 order, the CSM granted Ka's request and suspended his child-support obligation pursuant to Minn. Stat. § 518A.38, subd. 3 (2016), effective as of March 1, 2016. The CSM credited Ka's testimony that the minor child had been consistently residing with him since the beginning of March 2016. The CSM further ordered that Ka pay \$32.80 per month toward his child-support arrears, then over \$4,000.

In February 2017, Ka moved for sole legal and sole physical custody of the parties' minor child. After a court-ordered custody evaluation, Ka and Nyhus stipulated to a parenting-time schedule. The stipulation included that Ka would have primary care of the minor child. In November 2017, the district court adopted the stipulation, reserving the issue of custody. In an order dated January 30, 2018, the district court awarded Ka and Nyhus joint legal and joint physical custody of the minor child. Although Ka claimed that he had been the primary caretaker of the child for approximately two years, the district court did not find the claim significant, as the child had spent a substantial amount of his life primarily in Nyhus's care. The district court also ordered that the child primarily reside with Ka and incorporated the previous parenting-time schedule.

Ka requested child-support services from the county, and while the issue of custody was still pending, the county initiated an action under Minn. Stat. § 256.87 (2018) to establish Nyhus's basic support obligation. Ka also requested past support for two years prior to the commencement of the county's action.

In its order filed May 3, 2018, the CSM granted the county's motion to establish child support and Ka's request for past support effective December 1, 2017. Pursuant to the Child Support Guidelines, the CSM found that Nyhus's basic-support obligation is \$244 per month. Using December 1, 2017 as the effective date of past support, the CSM also offset Nyhus's past-support obligation against Ka's arrears, reducing the amount owed to Nyhus to \$2,479.66. Beginning May 1, 2018, the CSM suspended Ka's \$32.80 arrearage

payment and established Nyhus's ongoing basic-support obligation of \$244 to be credited against Ka's arrears.

Ka moved for review of the CSM's order. Ka argued that the CSM should have used unemployment benefits to determine his potential gross monthly income. Ka also requested that the CSM prohibit all enforcement remedies for the collection of arrears, including revenue recapture, passport denial, and student grant hold. The CSM denied Ka's motion and affirmed the entirety of its order. This appeal follows.¹

D E C I S I O N

We apply the same standard for reviewing a CSM's order that we apply to a district court's order regarding child support. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. App. 2002). A CSM is afforded broad discretion in making child-support determinations. *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999). But we will find an abuse of this discretion if the CSM makes an erroneous conclusion that goes against logic and facts on the record. *Id.*

I. The CSM did not err in calculating Ka's gross monthly income.

An appellate court will reverse a district court's order regarding child support only if the district court abused its broad discretion by reaching a conclusion "that is against logic and the facts on record." *Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008) (quotation omitted). "A [district] court's determination of income must be based in fact

¹ Neither Nyhus nor the county filed a brief or otherwise opposed this appeal. This court ordered the appeal to proceed under Minn. R. Civ. App. P. 142.03 (providing that if a respondent fails to file a brief, the case shall be determined on the merits).

and will stand unless clearly erroneous.” *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Dec. 15, 2015). A district court’s finding is clearly erroneous if this court has a “definite and firm conviction that a mistake has been made.” *Id.* (quotation omitted).

A district court must make written findings in every case in which it computes child-support obligations that include, in part, a parent’s gross income. Minn. Stat. § 518A.37 (2018). A parent is rebuttably presumed to be able to work full-time, which is defined, with few exceptions, as working 40 hours per week. Minn. Stat. § 518A.32, subd. 1 (2018). A district court must calculate child-support obligations based on potential income if it finds that the parent is “voluntarily unemployed, underemployed, or employed on a less than full-time basis, or [if] there is no direct evidence of any income.” Minn. Stat. § 518A.32, subd. 1.

A district court must calculate potential income according to one of three methods:

- (1) the parent’s probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community;
- (2) if a parent is receiving unemployment compensation or workers’ compensation, that parent’s income may be calculated using the actual amount of the unemployment compensation or workers’ compensation benefit received; or
- (3) the amount of income a parent could earn working 30 hours per week at 100 percent of the current federal or state minimum wage, whichever is higher.

Minn. Stat. § 518A.32, subd. 2 (2018).

Ka does not challenge the CSM's use of potential income in its child-support calculation. Instead, Ka asserts that the CSM should have used unemployment benefits to arrive at his potential gross-monthly income.

In this case, the CSM found that, as of April 1, 2018, both Ka and Nyhus were unemployed. The CSM found that Nyhus receives unemployment benefits of \$358 per week and has a gross-monthly income of \$1,551 but that Ka "left his former employment and was initially denied reemployment benefits." The CSM calculated Ka's gross-monthly income of \$1,672 based upon his ability to work full-time and earn the minimum wage of \$9.65 per hour. Pursuant to the Minnesota Child Support Guidelines, the CSM determined that Nyhus's basic support obligation is \$244 per month.

The CSM's findings are supported by the record. At the hearing, Nyhus testified that she anticipated receiving \$350 per week in unemployment benefits the following week. Ka testified that he had applied for, and been denied, unemployment benefits. Ka also testified that, prior to leaving his employment, he had been working approximately 36 hours per week at \$14 per hour. Ka was also asked if he understood that in order to arrive at the agreed-upon calculation, the CSM would "impute or presume that you could work 40 hours a week at minimum wage." Ka responded that he understood.

In his motion for review, Ka argued that the CSM should have calculated his potential income based upon unemployment benefits. But as the CSM found in its order denying Ka's motion, Ka failed to provide any evidence of his receipt of unemployment benefits. Indeed, his own testimony disclosed that he had been denied unemployment

benefits. Because Ka was denied unemployment benefits, the CSM presumed Ka's ability to work full-time at \$9.65 per hour. *See* Minn. Stat. § 518A.32, subds. 1, 2. The CSM's determination of income is supported by the record and is not clearly erroneous, and we affirm in part.

II. The CSM abused its discretion in awarding past support.

Generally, where there is no prior child-support order, it is improper to give a support order retroactive effect. *Davis v. Davis*, 631 N.W.2d 822, 827 (Minn. App. 2001). But Minn. Stat. § 256.87, subd. 5 provides that “[a] person or entity having physical custody of a dependent child not receiving public assistance . . . has a cause of action for child support against the child’s non-custodial parents.” And “[a] non-custodial parent’s liability may include up to the two years immediately preceding the commencement of the action.” Minn. Stat. § 256.87, subd. 5. This provision only applies if the person has physical custody with the consent of a custodial parent or approval of the court. Minn. Stat. § 256.87, subd. 5.

Ka argues that the CSM erred in setting the effective date of past support as December 1, 2017. Ka maintains that March 1, 2016, the date that Ka claims that he became the custodial parent, should have been the effective date of the past-support award.

Without citing to a statutory basis, the CSM awarded Ka past support effective December 1, 2017. The CSM explained that Ka is not entitled to past support prior to the November 2017 stipulation entered into by the parties, and approved by the district court, that first established the child’s primary residence with Ka. The CSM further reasoned that

prior to the stipulation, Nyhus retained sole physical custody of the child and Ka did not have court-ordered parenting time.

But Minn. Stat. § 256.87, subd. 5 only provides a cause of action against non-custodial parents. A “custodial parent” is defined as “the person who has the physical custody of the child at any particular time.” Minn. Stat. § 518.003, subd. 3(e) (2018). At the time that the county instituted the action to establish child support, Ka’s motion for sole legal and sole physical custody was pending with the district court, and Nyhus retained sole physical custody. But on January 30, 2018, the district court awarded Nyhus and Ka joint legal and joint physical custody of the child. “Joint physical custody” means that the “routine daily care and control and the residence of the child is structured between the parties.” Minn. Stat. § 518.003, subd. 3(d) (2018). According to the district court’s order, both Nyhus and Ka are custodial parents. Because Nyhus is a custodial parent, Minn. Stat. § 256.87 does not provide a basis for a past-support award. The CSM abused its discretion in awarding past support, and we reverse and remand.

Affirmed in part, reversed in part, and remanded.