STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0712

In the Matter of: Tamara Lynn Kriesel, petitioner,
Respondent,

vs.

Michael James Rossman,
Appellant.

Filed December 30, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Isanti County District Court
File No. 71-FA-17-474

Jennifer Nixon, Maple Grove, Minnesota (for respondent)

Ryan P. Griffin, Vadnais Heights, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Jesson, Judge.

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

REYES, Judge

Appellant-father argues that the district court abused its discretion by (1) calculating his income under Minn. Stat. § 518A.30 (2018); (2) not counting respondent-mother's tax credits as income to her; (3) awarding health-care-coverage support to mother; and (4) awarding retroactive support to mother. We affirm in part, reverse in part, and remand.

FACTS

Appellant-father Michael Rossman and respondent-mother Tamara Kriesel are the parents of a joint child (the child) born in May 2015. Father executed a recognition of parentage for the child later that month. Mother has three other children unrelated to father. Mother obtained an order for protection (OFP) against father in October 2016 that required father to pay child support of $264 per month. We reversed the OFP, including the child-support order, in September 2017. *Kriesel v. Rossman*, No. A17-0117, 2017 WL 4228705, at *6 (Minn. App. Sept. 25, 2017). Father nonetheless has continued to pay mother $264 monthly in child support. Father has also paid mother half of the child's daycare costs since the parties were together. In July 2017, during the pendency of the OFP appeal, mother filed a petition to establish child support, upon which this appeal is based. The parties agreed on custody and parenting time and stipulated to written submissions on the issue of child support.

Father co-owns Rossman Construction LLC (Rossman Construction) with his brother. The parties disagreed on how to calculate father's income from Rossman Construction for child-support purposes. Mother presented the report of certified financial planner Mike Miller (Miller report), which calculated father's average income at $112,218 per year, or $9,352 per month, based primarily on the self-employment-income calculations in Minn. Stat. § 518A.30 and Rossman Construction's tax returns. Father presented a declaration from certified public accountant Bernard Brodkorb (Brodkorb declaration) stating that father's income should be based on his personal tax returns, leading to an income of $35,197 per year, or $2,933 per month.

The district court found father to be self-employed with an average income from 2015 to 2017 of $106,643.33 yearly, or $8,886 monthly. It found that mother has a gross monthly income of $3,049 from her 32 hours of work per week. Following Minn. Stat. § 518A.32, subd. 1 (2018), it imputed another $762 per month to get to a 40-hour-per-week income. It ordered father to pay mother $1,122 per month in basic child support, $435 per month in child-care support, and $156 per month in health-care support. The district court ordered these payments effective retroactively, starting on July 1, 2017, and found that father had accumulated $28,053 in unpaid support, which it labeled as "arrears." This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by calculating father's income pursuant to section 518A.30.

Father argues that the district court (1) improperly determined that section 518A.30 applied and (2) abused its discretion in calculating business expenses under that section. We disagree.

We review child-support orders for an abuse of discretion. *See Butt v. Schmidt*, 747 N.W.2d 566, 574 (Minn. 2008). But whether a source of funds is income for child-support purposes is a legal question we review de novo. *Hubbard Cty. Health & Human Servs. v. Zacher*, 742 N.W.2d 223, 227 (Minn. App. 2007) (citation omitted). We review district court findings of fact for clear error and will set them aside only if we have the "definite and firm conviction" that the district court made a mistake. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (quotation and citation omitted).

A. The district court properly determined that section 518A.30 applied to father.

Father argues that his income is not subject to section 518A.30 because the statute applies only to solely owned businesses and because Rossman Construction, a limited liability company, is not a partnership. Father's arguments are meritless.

Minn. Stat. § 518A.29 (2018) describes gross income for purposes of determining child support as "any form of periodic payment to an individual, including . . . self-employment income under section 518A.30." Section 518A.30 then provides that

> income from self-employment or operation of a business, *including joint ownership of a partnership or closely held corporation*, is defined as gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses are . . . any other business expenses determined by the court to be inappropriate or excessive for determining gross income for purposes of calculating child support.

Minn. Stat. § 518A.30 (emphasis added).

As an initial matter, mother argues that father failed to raise this argument to the district court and therefore may not raise it now. We generally consider only issues and theories presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Father did not argue prior to his appeal that section 518A.30 applies only to sole owners or that Rossman Construction is not a partnership. Therefore, father forfeited these arguments.

But even if we consider his argument, it has no merit. Section 518A.30 unambiguously treats income from the joint ownership of a partnership or closely held

corporation as self-employment income.[1] *See Haefele v. Haefele*, 837 N.W.2d 703, 710-12, 714 (Minn. 2013) (applying section 518A.30 to interest in closely held subchapter S corporation). The district court found that father owned 50% of Rossman Construction and that his income therefore qualified as self-employment income under section 518A.30. The record supports this finding. Father admitted that he co-owns Rossman Construction as an equal partner with his brother, and the business is taxed as a partnership. Therefore, even if father did not forfeit this issue, the district court properly found that section 518A.30 applies to his income.

B. The district court did not abuse its discretion in calculating father's income.

Father argues that even if his gross income is to be calculated under section 518A.30, based on Rossman Construction's gross receipts and expenses, the district court erred in this calculation and as a result abused its discretion. We are not persuaded.

Section 518A.30 "gives the district court broad discretion to determine whether to allow a parent to deduct an expense, even an otherwise ordinary and necessary expense, from income." *Id.* at 713. The district court must base these determinations in fact. *Newstrand v. Arend*, 869 N.W.2d 681, 685 (Minn. App. 2015), *review denied* (Minn. Dec. 15, 2015). The party seeking to deduct a business expense has the burden of proving, if challenged, that the expense is ordinary and necessary. Minn. Stat. § 518A.30. When that

[1] In support of his argument that section 518A.30 applies only to sole owners, father cites to an unpublished opinion regarding a maintenance award. Unpublished opinions are not precedential, see Minn. Stat. § 480A.08, subd. 3(c) (2018), and the case to which father cites did not limit section 518A.30 to sole business owners.

party provides "[n]o receipts or other documents" to show what portion of expenses is properly deductible as business expenses, the district court may refuse to deduct those expenses. *See Keil v. Keil*, 390 N.W.2d 36, 39 (Minn. App. 1986).

The district court computed father's gross income by taking Rossman Construction's gross receipts and subtracting the cost of goods and its business expenses, as listed on its tax returns. The district court divided that figure in half to reach father's "Share of Partnership Income." Next, it reviewed the portion of subtracted expenses that mother challenged to determine which were ordinary and necessary. It added back into father's share of income the expenses attributable to him that he did not prove to be ordinary and necessary.

Father first argues that the district court erred in this calculation because it had already decreased the business expenses it first subtracted from Rossman Construction's gross profits, $116,130 in 2017, by the $41,526.50 it ultimately found to be not ordinary and necessary expenses, which it then subtracted from father's share of income. Father claims this caused the district court to "double-assess[]" the disallowed deductions. However, the record shows that the $116,130 figure did not already take into account any later-disallowed expenses. As described above, $116,130 was the amount of business expenses Rossman Construction claimed on its 2017 tax return. The district court therefore did not double-assess the disallowed expenses.

Father next appears to challenge the district court's determinations that Rossman Construction's checks written for cash, mileage-reimbursement expenses, and automobile expenses were not ordinary and necessary, arguing that the district court improperly relied

on the Miller report, which questioned the expenses, rather than his Brodkorb declaration, which described them as reasonable, and that he provided sufficient evidence.

For the checks written to cash from the business's bank account, father relied only on his expert's statement that the total amount of the checks was not unusual. But we defer to the district court's credibility determinations of expert evidence. *In re Paternity of B.J.H.*, 573 N.W.2d 99, 104 (Minn. App. 1998) (citation omitted). The district court added half of the checks written for cash back into father's income. The record, which contains no indication of what father used the cash for, does not show that the district court erred.

Regarding mileage-reimbursement expenses, the district court found that father reported driving significant amounts for Rossman Construction, but that he failed to present evidence documenting his miles driven or the approximate locations he visited for business purposes. It found, for example, that the mileage reimbursements from Rossman Construction to father and to his brother were nearly identical each year,[2] even though they performed different job duties. It further found that father's statements about his significant mileage conflicted with testimony about his job duties and the company's operations. The record supports this finding. Even if it is reasonable for a business to have some mileage-reimbursement expenses, father did not show what portion, if any, of the expenses were properly deductible.

Finally, the district court found that Rossman Construction's automobile expenses lacked documentation showing they were ordinary and necessary business expenses. We

[2] Father's reimbursements were $42,000 in 2015, $20,000 in 2016, and $13,000 in 2017. His brother's were $38,000, $20,000, and $13,000, respectively.

agree generally with this determination but conclude that the district court added the incorrect figure back into father's income. Under section 518A.30, self-employment income is calculated by deducting the ordinary and usual expenses of the *business*. Rossman Construction attributed the following amounts to "auto expenses" on its tax returns: $20,519 in 2015, $19,311 in 2016, and $12,710 in 2017.[3] These expenses were part of the total business expenses that the district court initially subtracted from Rossman Construction's gross receipts. But, instead of adding back into father's income his portion of these expenses, the district court added the mileage deductions father claimed on his *personal* taxes, which were $10,628 in 2015, $7,923 in 2016, and $16,414 in 2017.

Although the district court used the incorrect figures, the effect on father's child support obligation is de minimis. *See Duffney v. Duffney*, 625 N.W.2d 839, 843 (Minn. App. 2001) (declining to remand for de minimis error). Here, father's average annual income, based on 50% of the auto expenses claimed by Rossman Construction, would appear to be $103,745, rather than $106,643.33. If so, father's presumptively appropriate guideline monthly support obligation would be approximately $1,095, rather than the current $1,122.[4] On this record, a $27 difference is de minimis and does not warrant remand. *See id.*; *see also* Minn. R. Civ. P. 61 (requiring harmless error to be disregarded unless doing so is "inconsistent with substantial justice").

[3] This was a separate category of expenses from the mileage-reimbursement expenses on the business's expense sheet.

[4] Based on the income and support calculations in Minn. Stat. §§ 518A.34 and 518A.35 (2018).

The district court did not abuse its discretion by categorizing father's income as self-employment income under section 518A.30 or in calculating his income.

II. The district court properly exercised its discretion by not counting mother's tax credits as income.

Father argues that the district court should have counted as income the $4,026 Earned Income Tax Credit and $3,000 additional child-tax credit that mother claimed in 2017, because the tax credits were a "form of periodic payment" under section 518A.29(a). We disagree.

Whether section 518A.29 applies to tax credits is a question of law we review de novo. *Sherburne Cty. Soc. Servs. ex rel. Schafer v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992). Gross income includes "any form of periodic payment to an individual." Minn. Stat. § 518A.29 (2018). Regular annual payments, such as bonuses, can qualify as income for child-support purposes. *See Desrosier v. Desrosier*, 551 N.W.2d 507, 508-09 (Minn. App. 1996) (concluding annual bonuses ranging from $7,000 to $17,000 constituted income). *But see Haasken v. Haasken*, 396 N.W.2d 253, 261 (Minn. App. 1986) (concluding district court did not err in finding annual bonuses ranging from $0 to $9,000 did not constitute income).[5]

[5] The child-support statutes do not explicitly state whether refundable tax credits are "income," but they do require district courts to consider the tax effects of claiming a dependent child after they calculate gross income and presumptive support obligations. Minn. Stat. § 518A.43, subd. 1(5) (2018). The number of dependent children a parent claims affects both the Earned Income Tax Credit and the additional-child tax credit. *See* I.R.C. §§ 24(d), 32 (2012); I.R.S. Pub. No. 972 (Jan. 23, 2018).

For 2017 income-tax returns, the Earned Income Tax Credit is refundable by any amount exceeding a taxpayer's tax liability, see I.R.C. § 32(a)(1), and a portion of the additional-child tax credit is refundable, based on income. *See* I.R.C. § 24 (d); I.R.S. Pub. No. 972. The refund that mother requested on her 2017 tax return appears to include amounts from both of these credits, beyond the taxes she had paid. However, the record does not contain information on whether the IRS processed this refund and mother received it. It also does not show that she received a refund from these credits in years other than 2017, such that they would be a "regular annual payment." The record therefore does not support father's contention that these credits are periodic payments under section 518A.29,[6] and the district court properly did not include them in mother's income.

III. The district court properly awarded health-care coverage support to mother.

Father argues that the district court (1) erred by allocating 73% of medical-care costs to him because it erred in determining each parent's income and (2) abused its discretion by basing his obligation on mother's total cost of health-care coverage for dependents, "even though 3/4 of the dependents are not his responsibility." We disagree.

Because we conclude that the district court did not err in calculating each parent's income, we address only father's second issue. Mother argues that father raised this issue

[6] We note that section 518A.29(h) exempts from income "forms of public assistance based on need." Minnesota courts have not yet addressed the question of whether the Earned Income Tax Credit or other child tax credits fall under this exemption, but Minnesota bankruptcy courts have found earned-income tax credits to be "relief based on financial need." *See, e.g., In re Tomczyk*, 295 B.R. 894, 896 (Bankr. D. Minn. 2003). However, because the parties did not provide briefing on this issue, and because we find that mother's tax credits did not meet the definition of "periodic," we need not address whether they fall under this exemption.

for the first time on appeal. The record shows that father did not argue to the district court that he should not be required to contribute to mother's health-care coverage of the child. In fact, his written submissions to the district court set his requested health-care coverage contribution at $183, which is $27 *more* per month than what the district court ordered. Because father did not raise this issue in the district court and it did not consider it, we conclude that father forfeited this argument. *See Thiele*, 425 N.W.2d at 582.

IV. The district court abused its discretion in determining father's retroactive support obligation and by finding that he was in arrears.

Father argues that the district court abused its discretion by awarding retroactive support to mother, not crediting his earlier child-care payments, and finding that he owes back support. We agree in part.

We will uphold a district court's determination of child support unless it is "against logic and the facts on record." *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Here, the district court ordered father's child-support obligations to be effective July 1, 2017, which is the beginning of the month in which mother filed this action. The district court determined that father owed $28,053 in back support by multiplying his $1,713 total monthly support obligation by the 21 months from July 2017 to April 2019. It gave him credit for "Voluntary Child Support Payments," in which it included only the $264 monthly basic support payments he had made to mother since October 2016.

Father first claims that, although "the [district] court had the discretion to award retroactive child support," it did not have a "principled basis for the exercise of that discretion" because it based its award on the voluntary nature of his prior payments. The

district court order referenced father's prior voluntary payments in order to give him credit for those payments, but it did not indicate in any way that it based its decision to award retroactive support on those payments. The district court did not abuse its discretion on this basis.

Father also argues that the district court abused its discretion by not giving him credit for the prior child-care payments he had made to mother, as it did with his payments of $264. In an affidavit, mother had stated that father "has always voluntarily paid for one-half of the cost of [the joint child's] daycare," including both before and since the parties separated. The district court's order did not address these prior child-care support payments, and its exclusion of them from the category of "Voluntary Child Support Payments" appears to be against the facts on the record. The record does not provide any basis for the district court giving father credit for some of his prior voluntary payments, but not others. We conclude that father should receive credit for his prior child-care payments.

Finally, father contends that the district court abused its discretion by awarding back support, which it described as arrearages. We review a district court's determination that a parent's child support obligation is in arrears for clear error. *See Cavegn v. Cavegn*, 378 N.W.2d 636, 638 (Minn. App. 1985). "Arrears are amounts that accrue pursuant to an obligor's failure to comply with a support order." Minn. Stat. § 518A.26, subd. 3 (2018). Here, the district court awarded retroactive support and deemed that support in arrears at the same time. This is contrary to our decision in *County of Nicollet v. Haakenson*. 497 N.W.2d 611, 616 (Minn. App. 1993) (holding "retroactive child support award was not an

'arrearage.' . . . Retroactive child support constitutes an arrearage only if it is not paid when due."). While it was within the discretion of the district court to award retroactive support, it erred by entering the past amount as an arrearage. We therefore reverse the district court's determination that father was in arrears and remand for recalculation of the retroactive award amount in light of his prior child-care payments.

Affirmed in part, reversed in part, and remanded.