STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0224

In re the Marriage of:

Tabatha Annette Cusick n/k/a Tabatha Annette Biegler,
Respondent,

vs.

Mark Anthony Cusick,
Appellant.

Filed March 16, 2020
Affirmed
Cochran, Judge

Anoka County District Court
File No. 02-FA-14-2311

Caitlin E. O'Rourke, Hess & Jendro Law Office, P.A., Elk River, Minnesota (for respondent)

Francis Herbert White III, Brian K. Lewis, Francis White Law, P.L.L.C., Woodbury, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Segal, Judge.

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

COCHRAN, Judge

Appellant Mark Anthony Cusick filed a post-dissolution motion to modify his child support, medical support, and child-care support obligations based on a change in his

income and other circumstances. The district court denied the motion with respect to his child-support obligation. On appeal, appellant-father argues that the district court abused its discretion when it included his military disability payments and his overtime earnings in its calculation of his income for child-support modification purposes. We affirm.

FACTS

The marriage between appellant Sergeant Mark Cusick (father) and respondent Tabatha Cusick (mother) was dissolved in September 2015, by stipulated judgment and decree. At the time of the dissolution, mother was employed full-time, with an average gross monthly income of $9,564. Father was employed full-time by Life Link III as a flight paramedic, and was also employed with the Army Reserves; father's average gross monthly income was $5,625, including overtime from both Life Link III and the Army Reserves. Based on the parties' income, and the adjustment to account for father's parenting-time, father was ordered to pay child support for the parties' two minor children in the amount of $919 per month.

In 2018, father retired from the United States Army Reserves and began receiving monthly veteran's disability payments of $951.41. Father continued to work for Life Link III. After retiring from the Army Reserves, father moved to modify his child-support obligation, seeking to have his military disability payments and Life Link III overtime pay excluded from his income for child-support purposes. At the time father filed the motion, his monthly child-support obligation had increased to $932 per month to reflect cost-of-living adjustments.

The district court denied father's motion, ordering him to "continue to pay $932 per month as ongoing basic support." The district court concluded that father's military disability payments constitute income for purposes of child support under Minn. Stat. § 518A.29(a) (2018), and rejected father's argument that Minnesota's statutory definition of income for child-support purposes is preempted by federal law. The district court also found that father's "overtime did not begin after the filing of the petition for dissolution or even the motion to modify child support, nor does it reflect an increase in his work schedule or hours over the past two years." Thus, the district court determined that father's overtime "should continue to be included in his parental income for child support." This appeal follows.

D E C I S I O N

Father challenges the order denying his motion to modify his child-support obligation, arguing that the district court erred by including his military disability payments and his Life Link III overtime as income for purposes of establishing child support.

"[A] district court enjoys broad discretion in ordering modifications to child support orders" provided that it exercises that discretion "within the limits set by the legislature." *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). A district court's order regarding modification of child support will not be reversed absent an abuse of discretion. *Rogers v. Rogers*, 622 N.W.2d 813, 822 (Minn. 2001). A district court abuses its discretion if its decision is based on a misapplication of the law or is contrary to the facts in the record. *Shearer v. Shearer*, 891 N.W.2d 72, 77 (Minn. App. 2017).

A child-support order may be modified on a showing of a substantial change in circumstances that makes the order unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(a) (2018). Circumstances that may warrant modification include a "substantially increased or decreased gross income of an obligor or obligee," and a "substantially increased or decreased need of an obligor or obligee." *Id.*, subd. 2(a)(1), (2). When a dissolution judgment is based on the parties' stipulation, the judgment constitutes "baseline circumstances" from which any change in circumstances is measured. *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997). The party seeking to modify child support has the burden of proof. *Heaton v. Heaton*, 329 N.W.2d 553, 554 (Minn. 1983). While the existence of a stipulation does not bar later consideration of whether a change in circumstances warrants modification, a district court should "carefully and only reluctantly" alter its terms. *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 475 (Minn. App. 2004) (quotation omitted).

A. The district court did not abuse its discretion by including father's military disability payments in its calculation of father's income for purposes of his motion to modify child support.

Father argues that the district court "impermissibly" determined that it could include father's military disability compensation as income for the purpose of calculating and modifying child support. Whether a source of funds is considered to be income for child-support purposes is a legal question reviewed de novo. *Hubbard Cty. Health & Human Servs. v. Zacher*, 742 N.W.2d 223, 227 (Minn. App. 2007).

Minnesota statutes provide that "gross income" is to be used in establishing and modifying child-support obligations and is defined to include "any form of periodic

payment to an individual, including, but not limited to . . . *pension and disability payments* . . . ." Minn. Stat. § 518A.29(a) (emphasis added). Thus, the definition of "gross income" plainly contemplates that father's military disability payments may be used to calculate his income for child-support purposes.

Father contends that federal law preempts Minnesota's definition of "gross income" and exempts his military disability payments from being used for court-ordered child support. To support his claim, father cites 38 U.S.C. § 5301(a)(1) (2018), which he refers to as an anti-attachment clause, and 42 U.S.C. § 659 (2018). Section 5301(a)(1) provides that veterans' disability payments "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 5301(a)(1). And section 659(a) provides:

> [M]oneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States . . . to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States . . . were a private person . . . [to] legal process brought . . . to enforce, [against such] individual to provide child support . . . .

42 U.S.C. § 659(a). But section 659 also exempts veterans' disability payments from its application. 42 U.S.C. § 659(h)(1)(B)(iii).

Under the Supremacy Clause of the Constitution, a federal law prevails over a conflicting state law. U.S. Const. art. VI, cl. 2 (stating that the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding"). "Congressional purpose is the ultimate touchstone of the inquiry into

whether a federal statute preempts a state law." *Angell v. Angell*, 791 N.W.2d 530, 534 (Minn. 2010) (quotations omitted). When considering issues arising under the Supremacy Clause, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). "Divorce and other family law matters are traditionally within the historic police power of the states." *Angell*, 791 N.W.2d at 534.

We conclude that the United States Supreme Court's decision in *Rose v. Rose*, decides the preemption issue raised by appellant. 481 U.S. 619, 107 S. Ct. 2029 (1987). In *Rose*, the Supreme Court directly addressed whether states are preempted from requiring a veteran to use veterans' disability payments to satisfy child-support obligations and concluded that no preemption exists. The issue arose after a state court held a disabled veteran in contempt for failing to pay child support. *Rose*, 481 U.S. at 623, 107 S. Ct. at 2032. The veteran's only means of satisfying the child-support obligation were his veterans' disability benefits and Social Security benefits. *Id.* at 622, 107 S. Ct. at 2032. The state court considered these benefits when establishing child support. *Id.*

The veteran in *Rose*, like the father in this case, argued that the state court action was preempted by 38 U.S.C. § 5301 (then 3101) and by 42 U.S.C. § 659. *Id.* at 630, 634-35, 107 S. Ct. at 2036, 2038. The Supreme Court disagreed. Addressing 38 U.S.C. § 5301, the Supreme Court concluded that a state court order requiring a veteran to use military disability benefits to pay child support did not frustrate the purpose of 38 U.S.C. § 5301 because Congress intended a veteran's disability payments "to support not only the veteran,

but the veteran's *family as well*." *Id.* at 634, 107 S. Ct. at 2038 (emphasis added). And, with regard to 42 U.S.C. § 659, the Supreme Court rejected the veteran's argument that section 659 "embodies Congress' intent that veterans' disability benefits not be subject to *any* legal process aimed at diverting funds for child support. . . ." *Id.* at 635, 107 S. Ct. at 2038. The Court held that although veterans' disability payments may be exempt from attachment while in the government's hands, once they are delivered to the veteran, a state court can require that they be used to satisfy a child-support order. *Id.* at 635, 107 S. Ct. at 2039. The Supreme Court concluded that "neither the [v]eterans' [b]enefits provisions of Title 38 nor the garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support." *Id.* at 636, 107 S. Ct. at 2039.

After *Rose* was decided, this court considered whether veterans' disability payments could be used to satisfy a child-support obligation. In *Sward v. Sward*, this court stated that "both military and Social Security disability benefits may be considered as 'income' in setting child support and maintenance awards." 410 N.W.2d 442, 444 (Minn. App. 1987) (rejecting obligor's claim that 42 U.S.C. § 659(a) exempted veterans' disability payments from being considered income for child-support purposes), *review granted* (Minn. Sept. 30, 1987) *and appeal dismissed* (Minn. Dec. 2, 1987).

Father acknowledges *Rose*, but he argues that the more recent Supreme Court decision of *Howell v. Howell*, 137 S. Ct. 1400 (2017), "clarifies and serves to modify the central holding of *Rose*." Father maintains that *Howell* can be read to clarify that federal law expressly limits the amount of veterans' disability payments that a state can require a

veteran to pay to satisfy a child-support obligation. In support of his argument, father cites to 38 U.S.C. § 1115(1)(C) (2018), which provides additional disability compensation to veterans with dependents. Specifically, father cites to the language of section 1115 that provides a veteran, "whose disability is rated not less than 30 percent," and who "has no spouse but one or more children," shall be entitled to additional compensation for dependents in the amount of "$101 plus $75 for each child in excess of one." 38 U.S.C. § 1115(1)(C). Father argues that, because section 1115(1)(C) is clear on its face, the amount established in the statute is the "total universe" of veterans' dependent benefits available for the state court to consider when calculating child support from veterans' disability payments.[1] He maintains that, because Minnesota's definition of "income" for child support includes all disability payments, Minnesota law is preempted by section 1115(1)(C). We are not persuaded.

The plain language of 38 U.S.C. § 1115(1)(C) does not limit a veteran's child-support obligation to the amount set forth in the statute. Rather, the statute simply establishes how much a veteran is entitled to receive in disability compensation if the veteran has "no spouse but one or more children." 38 U.S.C. § 1115(1)(C). Moreover, despite father's argument to the contrary, *Howell* does not hold or even suggest that 38 U.S.C. § 1115 was intended to preempt state laws governing the calculation of income

[1] Father also argued for the first time at oral argument that under state law, only a portion of his veterans' disability payments are eligible for payment of child support. But reviewing courts generally do not consider arguments raised for the first time at oral argument. *See Getz v. Peace*, 934 N.W.2d 347, 353 n.3 (Minn. 2019). Moreover, as this court made clear in *Sward*, "both [veterans'] and social security disability benefits may be considered as 'income' in setting child support." 410 N.W.2d at 444.

for child-support obligations. *Howell* did not address child support or 38 U.S.C. § 1115. Instead, *Howell* addressed the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, and held that the Act preempts states from requiring a veteran to reimburse an ex-spouse for veterans' retirement benefits that the veteran waived to receive veterans' disability payments. *See* 137 S. Ct. at 1405-06. Conversely, *Rose* specifically held that federal law does not preempt state-court jurisdiction over veterans' disability payments for child-support purposes because "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Rose*, 481 U.S. at 631, 107 S. Ct. at 2036. And nothing in *Howell* suggests that the Supreme Court intended to overrule *Rose*.

In fact, this court recently indicated that, despite the impact of *Howell* on veterans' disability payments in the context of marital property settlements, those benefits may still be used to calculate income for purposes of child support under *Rose*. *See Mattson v. Mattson*, 903 N.W.2d 233, 239 n.5 (Minn. App. 2017) (noting that *Rose* "held that disability benefits were never intended to be exclusively for the veteran, but were intended to support the veteran's family as well," and that courts continue to rely on "disability compensation to calculate and enforce child support and spousal maintenance obligations" (quotations omitted)), *review denied* (Minn. Dec. 27, 2017). Therefore, father has not shown that federal law preempts states from requiring veterans to use veterans' disability payments for child-support purposes, or otherwise limits the amount of veterans' disability payments that can be used in calculating income for child-support purposes.

Father further appears to argue that his military disability payments cannot be used to calculate his income for purposes of child support because he has not yet waived a portion of his retirement pay in order to receive his disability compensation.[2] But father cites no relevant caselaw supporting his claim that veterans' disability payments cannot be used to calculate income for child-support purposes where, as here, the veteran has not yet waived a portion of his retirement pay. Instead, as addressed above, Minn. Stat. § 518A.29 and Minnesota caselaw clearly establish that veterans' disability payments may be used when calculating an obligor's income for child-support purposes. Accordingly, while father is to be commended for his military service, the district court did not abuse its discretion by including father's military disability payments when calculating his income for child-support purposes.

B. The district court did not abuse its discretion by including father's Life Link III overtime earnings in its calculation of father's income for purposes of his child-support obligation.

When establishing a parent's original child-support obligation as part of a dissolution, Minn. Stat. § 518A.29(b) (2018) provides that gross income includes overtime pay except where a parent demonstrates the overtime began after the filing of the petition

[2] The federal government provides retirement pay to veterans who have retired from the Armed Forces after serving 20 years or more, and provides disabled members of the Armed Forces with disability benefits. *Howell*, 137 S. Ct. at 1402-03. But in order to prevent double counting, federal law requires that, to receive veterans' disability payments, a retired veteran must waive an equivalent amount of retirement pay. *Id.* at 1403. Although father began receiving veterans' disability payments when he retired, he was ineligible to collect retirement pay because he had not yet reached the age of 60. *See* 10 U.S.C. § 12731(f)(1) (2018) (requiring a veteran to reach the age of 60 before he or she is eligible to receive retirement pay). As a result, father has not yet waived his retirement pay in lieu of his receiving veterans' disability payments.

for dissolution, and shows other factors are met. But in calculating income for purposes of *modifying* child support, the district court applies a different statute, Minn. Stat. § 518A.39, subd. 2 (2018). Under section 518A.39, subdivision 2, overtime is included as income unless the parent demonstrates that overtime began after the entry of the existing child-support order and other factors under the statute are met. *Id.*

Father argues that the district court erroneously analyzed his motion to modify his child-support obligation under section 518A.29(b), rather than section 518A.39, subdivision 2. Mother acknowledged at oral argument that the district court erroneously cited section 518A.29(b) in its conclusions of law. But she contends that the error was harmless because the district court properly analyzed the overtime issue under section 518A.39, subdivision 2.

We agree with mother that any error by the district court was harmless and does not require reversal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *see also Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) ("Although error may exist, unless the error is prejudicial, no grounds exist for reversal."). In its order, the district court did not state that section 518A.29(b) was dispositive of the overtime issue, nor did it appear to analyze the issue under that statute. Instead, the district court made findings addressing the factors set forth in Minn. Stat. § 518A.39, subd. 2(e)(2), including whether the overtime began after entry of the existing support order. The district court found that father's overtime with Life Link III began before, not after, the entry of the child-support order. The district court specifically found that the parties' dissolution judgment and decree stated, as a factual finding, that father "has historically worked overtime at Life Link III

and for the Army Reserves . . . ." The district court also found that father continues to be employed by Life Link III, and that his annual income still includes overtime. The district court then found that father's

> overtime did not begin after the filing of the petition for dissolution or even the motion to modify child support, nor does it reflect an increase in his work schedule or hours over the past two years. He has consistently worked some overtime and it should continue to be included in his parental income for child support.

The district court's finding that father's "overtime did not begin after the filing of the petition for dissolution or even the motion to modify child support," indicates that the district court applied the proper standard under Minn. Stat. § 518A.39, subd. 2(e)(2), when it determined that father's overtime pay is to be included in his income for purposes of the motion to modify child support.

Father further contends that he "prevails regardless" of whether the standard in Minn. Stat. § 518A.39 or Minn. Stat. § 518A.29, is used by the district court to address his motion to modify his child-support obligation. We disagree. As addressed above, Minn. Stat. § 518A.39, subd. 2(e)(2) provides that, on a motion for modification of support, the district court "shall not consider compensation received by a party for employment in excess of a 40-hour work week, provided that the party demonstrates, and the court finds," among other factors, "the excess employment began after entry of the existing support order." Minn. Stat. § 518A.39, subd. 2(e)(2)(i). Here, the district court found that father's overtime did not begin after the entry of the judgment and decree, and that finding is supported by the record. Because father failed to demonstrate this necessary factor

enumerated in Minn. Stat. § 518A.39, subd. 2(e)(2)(i), he is unable to demonstrate a change in employment circumstances with respect to his overtime compensation. *See* Minn. Stat. § 518A.39, subd. 1(e)(2) (requiring the moving party to establish all factors in order for overtime compensation to be excluded). Accordingly, the district court did not abuse its discretion by denying father's motion to modify his child-support obligation.

Affirmed.