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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1606

In re the Marriage of: Margaret A. MacMurdo, petitioner,
Respondent,

vs.

Alexander G. MacMurdo,
Appellant,
and County of Hennepin, intervenor,
Respondent.

Filed March 22, 2011
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Hennepin County District Court
File No. 27FA000246420

Margaret A. MacMurdo, Opoho, Dunedin, New Zealand (pro se respondent)

Alexander G. MacMurdo, Minneapolis, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Thomas L. Aarestad, Assistant County Attorney, Minneapolis, Minnesota (for respondent County of Hennepin)

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

STONEBURNER, Judge

Appellant father challenges modification of the duration and amount of his child-support obligation, arguing that (1) respondent county and respondent mother lacked standing to move for modification due to procedural defects; (2) the district court erred in extending the duration of his support obligation contrary to the language in the stipulated decree of dissolution; and (3) the district court erred by ruling that father's recent inheritance provided a basis for modification of his support obligation. We affirm in part, reverse in part, and remand.

FACTS

Appellant Alexander G. MacMurdo (father) and respondent Margaret A. MacMurdo (mother) dissolved their marriage in 2001. The parties stipulated to the terms of the decree, including the provision that father's child-support obligation for the younger of their two sons would continue until that child, who was 8 years old at the time of the dissolution, "attains the age of 18 or is no longer attending secondary school or is otherwise emancipated, whichever occurs first." Because the younger child's birthday is May 23, the parties anticipated that his graduation from high school would coincide with his 18th birthday on May 23, 2010.

In December 2003, the district court, over father's objection, granted mother's motion to relocate with the minor children to New Zealand. In January 2004, the district court granted mother's related motion for an increase in child support and denied father's motion to terminate his obligation to pay insurance and child-care expenses and suspend

his support obligation indefinitely. The order required payment of guideline support in the amount of $909.52 per month and ordered income withholding, with payments forwarded to the Minnesota Child Support Payment Center for distribution to mother. In addition, father was ordered to pay certain child-care costs and dependent medical costs.[1] Father has fully and timely complied with his support obligations.

In late 2009, father contacted respondent Hennepin County (the county) to confirm that, under the language in the decree, his child-support obligation would terminate on May 23, 2010, the 18th birthday of the younger child. Because the move to New Zealand resulted in the younger child remaining in high school through December 2010, the county took the position that, notwithstanding the language in the decree of dissolution, father's child-support obligation would continue until the child graduated from high school or attained the age of 20, whichever occurs first. Father objected and notified the county that its position was contrary to the plain language of the decree.

In mid-November 2009, the county, without filing a motion to intervene, brought a motion in the dissolution case requesting an extension of father's child-support obligation until the younger child graduated from high school or attained the age of 20, whichever occurs first. Father opposed the county's motion on the merits and filed his own motion requesting that, in the event his obligation was extended, the amount be recalculated under current child-support guidelines, taking into consideration mother's potential income. In late December 2009, mother also moved to extend father's support

[1] Father's obligation for medical costs ended when the children obtained state-provided medical coverage in New Zealand.

obligation and for an increase in child support based on father's recent substantial inheritance from his father.

The motions came before a child-support magistrate (CSM) in mid-January 2010. The CSM did not question the county's presence in the lawsuit, but stated that because mother had failed to pay the filing fee, her motion and other documents were not properly before the CSM at the time of the hearing. The CSM gave mother 30 days to pay the filing fee in order to have her motion and documents considered.[2] Mother paid the fee, and her documents in the record are stamped as filed on the date they were initially received by the district court.

In a March 12, 2010 order, the CSM found that the best interests of the younger child would be served by extending father's support obligation though the child's graduation from high school. And the CSM found that father's significant inheritance warranted modification of his child-support obligation. The CSM imputed full-time wages at the minimum wage to mother, who was attending school and working part time, and found that father's gross-monthly income at the time of the hearing was $4,563. But the CSM did not calculate child support based on the parties' incomes. Instead, the CSM cited father's significant inheritance as warranting "[a] deviation upward to the maximum support obligation of $1,883," beginning March 1, 2010, and continuing "up to the [child's] age of 20, if the child is still attending secondary school."

[2] The CSM stated on the record that mother had to pay $200, but the filing fee for motions for child-support modification is $100. *See* Minn. Stat. § 357.021, subd. 2(13) (2010).

Father appealed the CSM's order to the district court, and the county gave notice of its intervention in the district court proceeding. Noting that the county had a right to intervene, the district court found the county's notice "properly filed and served." The district court corrected some clerical errors in the CSM's order and affirmed the duration and amount of support awarded by the CSM, concluding, in part, that the amount awarded was not a deviation from the child-support guidelines that required specific findings.[3] This appeal followed.

D E C I S I O N

I. The county's intervention

Father first challenges the county's "standing" to bring a child-support-modification motion, arguing that the county failed to give timely notice of its intervention and failed to demonstrate that it was entitled to intervene in this case. Regarding the failure to give notice of intervention, father relies on the holding in *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 531 (Minn. App. 2004). In *Kilpatrick*, this court reversed a district court order affirming a CSM's child-support-modification order, holding that, because the county failed to give notice of its intervention in the child-support process, the county did not have standing to seek modification of a child-support award, and the CSM lacked jurisdiction to hear the county's modification motion. 673 N.W.2d at 531. But *Kilpatrick* is distinguishable from this case because the county in

[3] Once a district court affirms a CSM's ruling, that ruling becomes the ruling of the district court. *See Welsh v. Welsh*, 775 N.W.2d 364, 366 (Minn. App. 2009) (stating that "we review the CSM's decision, to the extent it is affirmed by the district court, as if it were made by the district court").

Kilpatrick did not give notice of its intervention in the district court proceeding and was not a party to the appeal. *Id.* Therefore, *Kilpatrick* does not address waiver, which has been raised by the county in this case. *See Skelly Oil Co. v. Comm'r of Taxation*, 269 Minn. 351, 371, 131 N.W.2d 632, 645 (1964) (stating that "'the language used in an opinion must be read in the light of the issues presented'") (quoting *Sinclair v. United States*, 279 U.S. 749, 767, 49 S. Ct. 471, 477 (1929)); *Stageberg v. Stageberg*, 695 N.W.2d 609, 613 n.2 (Minn. App. 2005) (applying *Skelly Oil* in a family law case), *review denied* (Minn. Jul. 19, 2005). We therefore reject father's argument that *Kilpatrick* is determinative.

"'[S]tanding has been called one of the most amorphous concepts in the entire domain of public law.'" *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 433 (Minn. App. 1995) (quoting *Sundberg v. Abbott*, 423 N.W.2d 686, 688 (Minn. App. 1988), *review denied* (Minn. June 29, 1988)), *review denied* (Minn. May 31, 1995). "[T]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a court and not on the issues he wishes to have adjudicated." *Id.* (quotation omitted). "[A] potential litigant must . . . have a sufficient stake in the outcome, to have a court decide the merits of a dispute." *Id.*

Father acknowledges that a county has a right to intervene under Minn. Stat. § 518A.49(b) (2010), which provides that in IV-D cases where support has not been assigned to the public authority, "the public authority may intervene as a matter of right . . . to ensure that child support orders are obtained and enforced which provide for an appropriate and accurate level of child, medical, and child care support." Minn. R.

Gen. Pract. 360.01, subd. 1, provides that the county may intervene as a party in any matter conducted in the expedited child-support process, but, as father correctly notes, subdivision 2 of the rule provides that "[i]ntervention by the county agency is effective when the last person is served with the notice of intervention." Minn. R. Gen. Pract. 360.01, subd. 2.

Despite the use of the term "standing" in *Kilpatrick*, we conclude that the failure to give notice of intervention does not actually deprive a county of standing, which is plainly conferred by Minn. Stat. § 518A.49(b). Failure to give notice of intervention affects the county's capacity to sue, not its standing to sue. This distinction, which the *Kilpatrick* court was not called upon to make, is well explained in *Cochrane v. Tudor Oaks* in connection with the issue of whether a foreign limited partnership waived its right to challenge an action by failing to register in Minnesota.[4] 529 N.W.2d at 432–36. The challenge in *Cochrane* was characterized, as in this case, as a challenge to "standing," but we concluded that the issue was more properly analyzed in terms of "capacity to sue." *Id.* at 432.

> In contrast to subject matter jurisdiction, which concerns the court's ability to consider a question, and standing, which concerns a party's right to bring a particular action, capacity to sue concerns a party's right to maintain any action.

Id. at 433. And "the right to challenge capacity to sue is waived if it is not timely asserted." *Id.* Because father failed to challenge the county's capacity to pursue its

[4] The challenge in *Cochrane* was based on Minn. Stat. § 322A.75(a) (1992), providing that "[a] foreign limited partnership transacting business in this state may not maintain any action . . . in any court of this state until it has registered in this state."

motion in the expedited child-support proceeding, we conclude that, as argued by the county, father has waived the objection as to that proceeding.

The county gave formal notice of intervention before the district court's de novo review of the CSM's decision. *See Blonigen v. Blonigen*, 621 N.W.2d 276, 280 (Minn. App. 2001) (stating that the district court reviews a CSM's decision de novo), *review denied* (Minn. Mar. 13, 2001). We conclude that the district court's finding that the county's intervention was "properly filed" is not clearly erroneous as it pertains to the district court's review. *See SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979) (noting that when considering whether a motion to intervene is untimely, the district court should examine how far the suit has progressed, the reason for failure to previously intervene, and the prejudice that will result from granting intervention). Additionally, because mother's motion raised the same issue raised by the county, father was not prejudiced by the intervention. As noted above, mother cured the defect in her initial filing. Therefore, even if father had not waived his objection to the county's motion, the issues decided were properly before the district court. Father is not entitled to any relief for the county's failure to give timely notice of its intervention in this case.

Father also argues that because, in this case, there was a support order in place that provided for an appropriate level of child support, the county lacked statutory authority to intervene. This argument more properly goes to the county's standing in this case, but we conclude that it is without merit. Minn. Stat. § 518A.49(b) provides that, in IV-D cases, such as this one, where there has not been an assignment of child support, the county may intervene as a matter of right "to ensure that child support orders are obtained

and enforced which provide for an appropriate and accurate level of child, medical, and child care support." We read the language concerning the level of child support to pertain to the appropriate duration as well as amount of child support, and conclude that the county had statutory authority to seek support for the subject child consistent with the statutory definition of "child." *See* Minn. Stat. § 518A.26, subd. 5 (2010) (defining "child," in relevant part, as "an individual under age 20 who is still attending secondary school").

II. Father's inheritance as basis for modification of child support

Prior to the initial hearing, father had received two distributions from his father's estate, totaling $350,000, and he anticipated that he would be receiving assets valued at approximately $3,000,000 from the estate. The district court found that father's inheritance warranted modification and a deviation from guideline support based on the parties' incomes to the maximum support level under the guidelines. Father challenges as clearly erroneous the implicit finding that his inheritance supports modification of his child-support obligation. We agree.

Minn. Stat. § 518A.39, subd. 2 (2010), sets out the circumstances in which a child-support obligation may be modified. The only circumstance asserted by mother in her motion for an increase in child support is father's "additional income from the monies he will inherit in 2010." But mother did not provide any evidence that father received any income from his inheritance, and the district court increased father's support obligation based on the presumed value of father's inheritance without any evidence that father's income has increased. Minn. Stat. § 518A.39, subd. 2, does not include receipt of a

major asset by an obligor as a triggering circumstance for modification of a child-support obligation, and modification of child support is not authorized by the statute unless one of the listed circumstances "makes the terms [of the current order] unreasonable and unfair." Gross income is defined by statute to include

> any form of *periodic* payment to an individual, including, but not limited to, salaries, wages, commissions, self-employment income . . . , workers' compensation, unemployment benefits, annuity payments, military and naval retirement, pension and disability payments, spousal maintenance . . . , Social Security or veterans benefits provided for a joint child . . . , and potential income . . . .

Minn. Stat. § 518A.29(a) (2010) (emphasis added). Whether a source of funds is income for purposes of determining an individual's support obligation is a question of law. *Sherburne Cnty. Soc. Servs. ex rel Schafer v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992).

There is no evidence in the record that father received or expected to receive "periodic" payments from the estate. There is no evidence in the record that the funds already received by father were invested and producing income, and no evidence that the assets to be received are income-producing. Therefore, mother failed to establish that father's income has substantially increased. More importantly, mother made no attempt to demonstrate that, even if father is receiving income from the inheritance, the current child-support award is unreasonable and unfair. There is evidence in the record showing that the subject child is doing very well on the support father has provided. The record further shows that this child, like his older brother, has an established trust fund to cover

expenses of post-secondary education, and, at age 21, will receive a substantial inheritance from his grandfather's estate.

The district court found that it would be in the younger child's "best interests" to share in his father's inheritance through increased child support, but best interests of the child is not the standard for determining whether a modification of child support is warranted. Because there is no evidence that father's income has substantially increased as a result of his inheritance and no evidence that, even with father's substantial inheritance, the level of child support that father has faithfully paid is unreasonable and unfair, we conclude that the district court erred by affirming modification of father's support obligation based solely on his inheritance.

The district court erroneously imported statutory considerations relevant to guideline deviations into consideration of whether mother had met statutory criteria for child-support modification. The district court cites Minn. Stat. § 518A.43 (2010) for the proposition that, in setting or modifying child support or in determining whether to deviate from the presumptive child-support obligations, "the court must take into consideration . . . (1) all earnings, income, circumstance, and resources of each parent, including real and personal property . . . ." Minn. Stat. § 518A.43, subd. 1. But Minn. Stat. § 518A.43, subd. 3, provides that "[t]he court may receive evidence on the factors in this section *to determine if the guidelines should be exceeded or modified in a particular case.*" (Emphasis added.) Because mother failed to establish a statutory basis for modification under Minn. Stat. § 518A.39, subd. 2, there was no basis for the district court to consider the factors in Minn. Stat. § 518A.43, subd. 1, concerning deviation from

the guidelines.[5] We reverse the modification of father's child-support obligation and remand to the district court to reinstate child support at the level existing before mother's motion to modify. But we reject father's assertion that the county is responsible for overpayment of child support, costs, disbursements, legal fees, or damages. Father's assertion of the county's liability is unsupported by any authority.

III. Duration of support obligation

Father argues that the district court erred by extending his child-support obligation beyond the stipulated terms set forth in the decree of dissolution. But "[c]hild support relates to the nonbargainable interests of the children and is less subject to restraint by stipulation than other dissolution matters." *Swanson v. Swanson*, 372 N.W.2d 420, 423 (Minn. App. 1985). The parties' younger child plainly met the definition of a child and was entitled to support until he completed secondary school or reached the age of 20. The record in this case establishes that when the parties entered into their stipulation that was incorporated into the decree, both contemplated that support would continue for the younger child through high-school graduation. Because the parents are not able to bargain away a child's right to support, we find no error or abuse of discretion in the district court's decision that father's support obligation continued until the younger child reached the age of 20 or completed secondary school.

[5] We conclude that the district court erred by finding that the award of support at the maximum level permitted under the guidelines was not a deviation from the guidelines. Plainly, the award represents an upward deviation from father's obligation calculated under Minn. Stat. §§ 518A.34–.35. But because we have reversed the modification, there is no need to address the lack of findings to support the deviation.

IV. Constitutional challenge to Minn. Stat. § 518A.49(b)

For the first time on appeal, father argues that Minn. Stat. § 518A.49(b) is impermissibly vague under the United States Constitution and the Minnesota Constitution. We decline to address this issue, which was not argued to or decided by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (stating that this court generally declines to address issues not raised in the district court).

Affirmed in part, reversed in part, and remanded.