STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1681

In re the Marriage of:
Loreen Ulm, petitioner,
Appellant,

vs.

Gary Eugene Ulm,
Respondent.

Filed March 15, 2011
Affirmed in part and reversed in part
Schellhas, Judge

Ramsey County District Court
File No. 62-F4-04-002035

Elizabeth J. Citurs, Blackwell Burke P.A., Minneapolis, Minnesota (for appellant)

Larry Neilson, Rooney & Neilson Ltd., White Bear Lake, Minnesota (for respondent)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant-mother challenges a child support magistrate's order modifying both her child-support obligation and respondent-father's child-support obligation. We affirm in part and reverse in part.

FACTS

The district court dissolved the marriage of appellant-mother Loreen Ulm and respondent-father Gary Ulm in a June 17, 2005 judgment, which incorporated the parties' marital termination agreement (MTA). The court granted the parties joint legal custody of their minor son, L.U., and daughter, E.U. The court granted father physical custody of L.U. and mother physical custody of E.U. The parties agreed that father was capable of earning a gross annual income of at least $125,000. Based on an imputed income of $125,000, the court ordered father to pay mother $1,743 per month as child support for E.U. The court also ordered father to pay mother $2,000 per month as spousal maintenance for 60 months.[1] Cost-of-living adjustments in 2007 and 2009 increased father's child-support obligation to $1,933 per month and his spousal-maintenance obligation to $2,217 per month. The parties' MTA provided that mother was unable to pay father child support for L.U., and the stipulated judgment did not order mother to pay child support to father for L.U.

In February 2010, father moved the district court for an order modifying his child-support obligation. He argued that "the application [of the] child support guidelines to the current circumstances of the parties will result in at least a 20 percent [and] $75.00 a month decrease in [father's] current child support obligation." Mother opposed the motion, arguing that father's current child-support obligation was reasonable and fair,

[1] Father's spousal-maintenance obligation terminated in April 2010.

and that any modification would create an enormous hardship for her.[2] Mother submitted a list of monthly expenses totaling $5,591.29. Her stated monthly expenses exceeded her income, which consisted solely of spousal maintenance. She also received child support for L.U. After mother's maintenance terminated, she had no income; child support was her only monthly financial resource.

At a hearing before a child support magistrate (CSM) on May 10, 2010, although mother's first mortgage on her home was over $10,000 in arrears[3] at the time, she testified that she had recently gone to Paris for two weeks. She testified that her significant other paid for the entire trip.

The record reflects that from 2007 until the hearing in May 2010, mother made minimal efforts to obtain employment. As of May 2010, she had not applied for a job in over a year. Mother claims that she is limited in the types of jobs she can obtain because of transporting E.U., now age 15, to and from her extracurricular activity. She also claims that she was in an accident in 2005, resulting in severe and permanent back and neck injuries that limit her physical abilities that eliminate possible employment opportunities. Yet mother testified that she is not under any doctor-ordered work

[2] Mother has submitted to this court multiple documents regarding her alleged financial difficulties since the hearing before the child support magistrate. These documents were not submitted to the district court. Mother acknowledges in her brief that this court cannot consider matters outside the record, yet she discusses the content of the documents and other facts outside of the record. The record on appeal consists of the papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any. Minn. R. Civ. App. P. 110.01. We will not consider mother's references to facts outside the record.

[3] Mother's personal liability on the first-mortgage note has been discharged in bankruptcy. Both parties filed bankruptcy after their marriage dissolution.

restrictions. Mother is attempting to start her own photography business, but it has not yet generated any income.

After the hearing on father's motion, the CSM found father's gross monthly income to be $10,417, based on the stipulated judgment, and found mother's potential income to be $1,256 per month, based on her ability to earn a minimum wage working full time. The CSM imputed income to mother because mother "has not been self-employed [as a photographer] for sufficient time to determine her income." Applying the Minnesota child-support guidelines, the CSM calculated father's share of the combined parental support obligation to be $1,154. The CSM concluded that father "demonstrated a change of circumstances that results in a support Order at least $75.00 and 20% less than the existing Order" of $1,933, and granted father's motion to modify his child-support obligation. The CSM also ordered mother to pay father $173 per month as child support for L.U., now age 19, beginning March 1, 2010 through June 2010,[4] and to reimburse father $20 per month for medical and dental insurance for E.U.

Upon mother's motion for review of the CSM's order, the district court affirmed. This appeal follows.

D E C I S I O N

Mother argues that the district court erred by (1) modifying father's child-support obligation because she rebutted the presumption that the existing order was unreasonable and unfair and the modification would create an enormous hardship for E.U. and her,

[4] The CSM found that father "stipulated and agreed that for the purpose of calculating support, [L.U.] will emancipate during June, 2010."

(2) failing to uphold the child-support-calculation formula in the MTA, (3) failing to make findings regarding the best interest of E.U., (4) concluding that she is voluntarily unemployed and imputing income to her, and (5) *sua sponte* ordering her to pay child support for L.U.

Standard of Review

"When a CSM's decision is affirmed on a motion for review, the decision is treated as that of the district court." *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009). "The district court has broad discretion in deciding child-support issues and we will not reverse the court's determination absent a clear abuse of that discretion." *Id.* "A court abuses its discretion if it improperly applies the law." *Id.*

Modification of Father's Child-Support Obligation

A child-support order may be modified upon a showing of a substantial change in circumstances that makes the current order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2010). "The party who moves to modify an existing child-support order has the burden of demonstrating both a substantial change in circumstances and the unfairness and unreasonableness of the order because of the change." *Rose*, 765 N.W.2d at 145. In certain circumstances, a substantial change will be presumed and the unreasonableness and unfairness of an order will be rebuttably presumed. Minn. Stat. § 518A.39, subd. 2(b) (2010). These circumstances exist when "the application of the child support guidelines in section 518A.35, to the current circumstances of the parties results in a calculated court order that is at least 20 percent and at least $75 per month higher or lower than the current support order." *Id.*, subd. 2(b)(1); *see also Rose*, 765

N.W.2d at 147 (concluding that after January 1, 2008, a party may rely solely on the amended child-support guidelines to demonstrate a substantial change in circumstances). When the 20 percent/$75 difference is shown, the presumption of substantial change is irrebuttable. *Rose*, 765 N.W.2d at 145.

Rebuttable Presumption

The guidelines establish a rebuttable presumption that the prescribed amount is owed. Minn. Stat. § 518A.35, subd. 1(a) (2010). Mother does not dispute that the application of the guidelines resulted in a 20 percent/$75 difference. Rather, she argues that she rebutted the presumption that the existing award is unreasonable and unfair.

The district court reduced father's child-support obligation from $1,933 to $1,154, based on his share of the child-support guideline amount less the parenting-expense adjustment. By modifying father's obligation, the district court implicitly concluded that mother failed to rebut the presumption that the existing award is unreasonable and unfair. *See Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (stating that appellate courts cannot assume district court error); *see also Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth*).

The district court's implicit conclusion is supported by the record. Mother argues that she rebutted the presumption by showing that a reduction of father's child-support obligation "eliminated any possibility [she] has of supporting her minor daughter" resulting in "homelessness and welfare." Indeed, mother's claimed monthly expenses of $5,591.29 exceed the combined total of her imputed income ($1,256) and reduced child support ($1,154). In fact, mother's claimed monthly expenses exceed the combined total

of her past spousal maintenance ($2,217) and child support prior to modification ($1,933). Considering the district court's awareness of the termination of mother's spousal maintenance, its reduction of father's child-support obligation for E.U. reflects an implicit but clear determination that mother's reported monthly expenses are unreasonably high or not credible. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (noting that district court's findings "implicitly indicate[d]" that it found certain evidence credible); *Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001) (stating that "[w]e may treat statutory factors as addressed when they are implicit in the findings").

Although we cannot discern from the order which expenses the district court rejected as unreasonable, mother's reported expenses seem excessive given her lack of income and employment pursuits.[5] We also recognize that, although mother claimed payments on her first mortgage as a monthly expense, based on her reported first-mortgage arrearages, mother was not making those monthly payments. And other than mother's excessive lifestyle, the record contains no evidence of special circumstances requiring greater than guideline support. *See* Minn. Stat. § 518A.43, subd. 1 (2010) (requiring court to consider, among other factors, the resources of each parent and *extraordinary* financial needs of the child when determining whether to deviate from the child support guidelines).

[5] Mother's reported monthly expenses include among others: first mortgage $1,721.29; second mortgage $532.30; food $450; clothing $175; telephone/cable/internet $225; cell phone $100; exterminator $45; car license $100; car insurance $90; and hair care and cosmetics $195.

On this record, the district court's implicit finding that mother's expenses were excessive is not clearly erroneous. *See Vettleson v. Special Sch. Dist. No. 1*, 361 N.W.2d 425, 428 (Minn. App. 1985) (applying the clearly erroneous standard to an implicit finding of fact). We conclude that the district court did not abuse its discretion by rejecting mother's argument that she rebutted the presumption that father's existing child-support obligation is unreasonable and unfair.

Stipulated Child Support

Mother also argues that the district court erred by "failing to uphold the child-support calculation formula to which the parties had previously agreed" in the MTA.[6] Caselaw addresses the impact of the parties' earlier stipulation on a district court's analysis of a subsequent motion to modify. "Child support requirements, relating as they do to the non-bargainable interest of the children, are less subject to restraint by stipulation." *Moylan v. Moylan*, 384 N.W.2d 859, 865 (Minn. 1986) (quoting *Kaiser v. Kaiser*, 290 Minn. 173, 180, 186 N.W.2d 678, 683 (1971)). That a party has stipulated to an award does not relieve a district court of the obligation to consider the statutory factors regarding modification. *See Frank-Bretwisch v. Ryan*, 741 N.W.2d 910, 914 (Minn. App. 2007) (noting that although a stipulation is "relevant to issues of fairness and reasonableness . . . nothing in [the modification statute] suggests that the presumptions are inapplicable in the aftermath of a stipulated award"); *O'Donnell v. O'Donnell*, 678

[6] Mother relies on *Anderson v. Anderson*, No. A08-1502, 2009 WL 1375542 (Minn. App. May 19, 2009). While we recognize that the reasoning in unpublished opinions can be persuasive, unpublished opinions of the court of appeals are not precedential. Minn. Stat. § 480A.08, subd. 3 (2010).

N.W.2d 471, 475 (Minn. App. 2004) ("[T]he existence of a stipulation does not bar later consideration of whether a change in circumstances warrants a modification." (quotation omitted)). We note that father's guideline child-support amount is significantly less than the stipulated amount. But other than mother's seemingly excessive lifestyle, the record contains no evidence of special circumstances requiring greater than guideline support.

We conclude that the district court did not abuse its discretion by applying the guidelines despite the terms of the parties' MTA.

Best Interests of the Child

Mother argues that the district court failed to make findings regarding the best interests of E.U. When a district court does not deviate from the presumptive child-support obligation, it must make written findings that state: (1) each parent's gross income; (2) each parent's parental income for child support (PICS); and (3) any other significant evidentiary factors affecting the child-support determination. Minn. Stat. § 518A.37, subd. 1 (2010). "The framework for calculating child-support obligations reflects legislative concern for the best interests of the child." *Hesse v. Hesse*, 778 N.W.2d 98, 105 (Minn. App. 2009). Only when a district court deviates from the presumptive child-support obligation must the court make best-interests findings. Minn. Stat. § 518A.37, subd. 2 (2010).

Here, because the district court did not deviate from the presumptive child-support obligation, it was not required under section 518A.37, subdivision 1, to make written best-interests findings about E.U. The court therefore did not abuse its discretion by failing to make best-interests findings.

Hardship

Mother argued to the district court that reducing father's child-support obligation would have a "devastating effect on [her] ability to provide" for E.U. Section 518A.39, subdivision 2(k), provides: "On the first modification under the income shares method of calculation, the modification of basic support may be limited if the amount of the full variance would create hardship for either the obligor or the obligee." Mother argues that because this is the first modification under the income-shares model, the district court was required to consider whether the modification would create a hardship for her as the obligee. She claims that she demonstrated to the court that "modification of the basic support would create an enormous hardship for her" and E.U., and that the court failed to address whether modifying the child-support obligation for E.U. would create a hardship for her.

Mother submitted to the district court a list of her purportedly necessary monthly expenses totaling $5,591.29. In an affidavit, she stated:

> "[S]ince I was laid off from my job in May of 2007, the sole source of money available to pay for food, clothing, and shelter for myself and our daughter has been the maintenance and child support payments. With the termination of maintenance payments, my sole source of money to provide food, clothing, and shelter as well as other necessary expenses for our daughter is child support."

Although mother raised the issue of hardship before the district court, the court did not explicitly address hardship in its order. But we do not assume that the district court erred by failing to address hardship. *See Loth*, 227 Minn. at 392, 35 N.W.2d at 546; *see*

also Luthen, 596 N.W.2d at 283. Rather, we assume that the court considered mother's argument and rejected it, and we proceed with our review on that basis.

The district court reduced father's child-support obligation from $1,933 to $1,154 based on father's share of the guideline amount less the parenting-expense adjustment. Mother presented evidence of expenses exceeding her imputed income ($1,256) and child-support amount ($1,154) combined. The court knew that the modified child-support amount plus mother's imputed income would not meet her claimed monthly expenses. The court's implicit rejection of mother's hardship argument strongly implies that the court found that mother's expenses are unreasonably high or not credible.

As discussed above, mother's expenses seem excessive, especially considering her lack of income and efforts to become employed. And the record contains no evidence of special circumstances requiring greater than guideline support. Mother received approximately $2,000 per month in spousal maintenance for five years to allow her to become self-supporting. But she has failed to replace the loss of maintenance with any income. *See Hecker v. Hecker*, 568 N.W.2d 705, 710 n.4 (Minn. 1997) (noting an implicit requirement that temporary-maintenance recipient make a reasonable effort to become self-supporting in accordance with the expectations of the parties under a negotiated stipulation). Any hardship is self-inflicted.

We conclude therefore that the district court did not abuse its discretion by implicitly denying mother's request to limit the amount of the full variance under the income-shares method due to hardship.

Imputation

Mother argues that the district court erred by finding that she is voluntarily unemployed. We disagree.

The calculation of a child-support obligation requires a determination of each parent's gross income. Minn. Stat. § 518A.34(b)(1) (2010). In the child-support context, "gross income includes any form of periodic payment to an individual, including . . . potential income under section 518A.32." Minn. Stat. § 518A.29(a) (2010). "If a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income, child support must be calculated based on a determination of potential income." Minn. Stat. § 518A.32, subd. 1 (2010). A parent is not considered voluntarily unemployed if the parent can show that the unemployment "represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." *Id.*, subd. 3(2) (2010). "[I]t is rebuttably presumed that a parent can be gainfully employed on a full-time basis." *Id.*, subd. 1. "Whether a parent is voluntarily unemployed is a finding of fact, which we review for clear error." *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009).

The district court found that mother "is self-employed as a photographer," but "has not been self-employed for sufficient time to determine her income."

We conclude that the record supports the district court's finding of mother's voluntary unemployment. From 2003 to 2007, mother worked as a receptionist. Since 2007 she had made virtually no effort to obtain employment. Nothing in mother's employment history or evidence about the availability of jobs within the community

precludes a finding of voluntary unemployment. Mother claims that permanent injuries limit her physical abilities to work but she is under no doctor-ordered work restrictions. None of mother's arguments regarding her lack of employment is persuasive. Rather than seek employment, mother has chosen to start a photography business, which had generated no income at the time of the modification hearing.

The district court imputed mother's income to be $1,256 per month based on full-time employment earning federal minimum wage. A district court may consider "the parent's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earning levels in the community." Minn. Stat. § 518A.32, subd. 2(1) (2010). We apply a clear-error standard of review to a district court's findings of gross income for purposes of determining a child-support obligation. *Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009). On the record before us, we conclude that the court's imputation of income to mother is not a clearly erroneous determination of mother's probable earnings level.

Statutory Caretaker Factors

Mother challenges the district court's imputation of income to her, arguing that as E.U.'s caretaker under Minn. Stat. § 518A.32, subd. 5 (2010), no income should be imputed to her because "it is unreasonable and economically unjustified for her to work full time, both due to her lack of education and work history, and because of the extraordinary time commitments she has with respect to transporting [E.U.] to her activities." Section 518A.32, subdivision 5 (2010), lists factors that a district court may consider when addressing whether a parent who stays at home to care for a child who is

the subject of a child-support order is voluntarily unemployed, underemployed, or employed on a less than full-time basis. Those factors are:

> (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.

Mother argues that *Welsh*, 775 N.W.2d 364, requires remand to the trial court to address the caretaker factors. We disagree. We do not assume that the district court erred because it did not explicitly address the caretaker factors in its order. *See Loth*, 227 Minn. at 392, 35 N.W.2d at 546; *see also Luthen*, 596 N.W.2d at 283. We assume that the district court considered mother's caretaker argument and implicitly denied it by concluding that mother is voluntarily unemployed. Moreover, *Welsh* is distinguishable. In *Welsh*, the parties relied on the caretaker factors in arguments before the district court, and the district court, citing to the wrong statute in its order, declined to reduce imputed income due to caretaker responsibilities. 775 N.W.2d at 370. Because the district court did not cite to section 518A.32, subdivision 5, in its order and also only addressed the child's age, this court remanded "to apply the [caretaker factors], and to determine

whether mother's status as the caretaker of the parties' children preclude[d] her from being found to be voluntarily unemployed." *Id.* at 370–71.

Here, unlike *Welsh*, the district court did not cite to the wrong statutory section and make only a partial finding regarding the caretaker factors. The court implicitly rejected mother's argument and, based on the record, that rejection was not an abuse of discretion. At the time of the modification hearing, E.U. was almost 15 years old with no purported special needs. Mother's argument is unpersuasive, and we conclude that the district court did not err by implicitly denying it.

Modification of Mother's Child-Support Obligation

Mother argues that the district court abused its discretion by ordering her to pay child support for L.U., because she did not have notice that her child-support obligation for L.U. was at issue. Father's written motion reflects that he moved the court for a modification of his child-support obligation, not a modification of mother's child-support obligation. Father argues that the issue was raised at the hearing, and mother failed to object.

The district court does not have authority to modify child support on its own initiative. *See* Minn. Stat. § 518A.39, subd. 1 (2010) (allowing modification of child support on motion of either party). A district court may modify an award under certain unique circumstances such as a clerical error under Minn. R. Civ. P. 60.01. *See Rogers v. Rogers*, 622 N.W.2d 813, 822 (Minn. 2001) (allowing a *sua sponte* modification when increase was incident to the correction of a clerical error under Minn. R. Civ. P. 60.01). No such circumstances exist here.

While we acknowledge that, at the end of the modification hearing, the district court briefly addressed whether L.U. was going to graduate from high school in the spring of 2010 thereby becoming emancipated, mother did not have sufficient notice that the court would be addressing her child-support obligation for L.U. at the hearing. We conclude that the district court abused its discretion by modifying mother's child-support obligation *sua sponte*. We therefore reverse the order setting mother's child-support obligation for L.U. at $173 per month from March 2010 to June 2010.

Affirmed in part and reversed in part.