STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1792

In re the Marriage of:
Christine Mary Callahan, f/k/a Christine Mary Jobin, petitioner,
Appellant,

vs.

Richard Robert Jobin,
Respondent.

Filed July 5, 2011
Reversed and remanded; motion denied
Halbrooks, Judge

Carver County District Court
File No. 10-F9-01-000183

Christine M. Callahan, Chanhassen, Minnesota (pro se appellant)

Richard R. Jobin, Rosemount, Minnesota (pro se respondent)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant pro se attorney Christine M. Callahan challenges the district court's modification of pro se respondent Richard R. Jobin's child-support obligation. Because the district court misapplied the law, we reverse and remand. Appellant also moved this

court to strike portions of respondent's brief as containing facts outside of the record; appellant's motion is denied.

FACTS

The parties divorced in 2002 and have three minor children, currently ages 17, 15, and 13. In March 2008, respondent took an unpaid medical leave of absence from his employer, Microsoft. In July 2008, respondent moved for a reduction in his child support based on appellant's graduation from law school and his unpaid leave of absence. Before the district court issued its order, respondent informed the district court that he had resumed working for Microsoft on September 2, 2008. In October 2008, the district court reduced respondent's child-support obligation from $2,363 to $2,008 per month, effective September 1, 2008, after imputing income to appellant in the amount of $50,000 per year. The district court ordered respondent to pay $500 in child support for the month of August 2008.

Two days before the October 2008 order was issued by the district court, respondent was placed on unpaid leave and was advised by Microsoft that he could either (1) accept a lump-sum severance package encompassing four months' salary, four months' COBRA payments, and $20,000 in a stock cash-out (total compensation of approximately $70,000) and leave his position at Microsoft or (2) continue working on a limited project-only basis with no guarantee of a severance package if he were later terminated. Respondent chose the payout and left Microsoft. Respondent then moved for amended findings in the October 2008 order or, alternatively, to modify his support obligation based on a substantial change in circumstances.

In December 2008, after a hearing on respondent's November 2008 motion, the district court issued an order temporarily imputing an annual income of $20,000 to respondent. The district court stated that respondent's "employment with Microsoft was terminated" and that "[t]hough it is anticipated it will take several months for [r]espondent to secure a comparably paying replacement position, it is reasonable based on [r]espondent's earning capacity, earning history and severance package to temporarily impute income to him in the amount of $20,000.00 per year."

By the time of the motion hearing, appellant had obtained employment, earning $57,500 per year. Based on these findings, the district court reduced respondent's child-support obligation to $437 per month, effective November 5, 2008. Appellant attempted to appeal the December 2008 order, but her appeal was dismissed as taken from an unappealable temporary order.

In April 2010, the district court held another hearing on respondent's modification motion from 2008. Appellant asked the district court to impute income to respondent in the amount that he was earning at Microsoft, based on her assertion that respondent had voluntarily left his employment. Alternatively, appellant claimed that respondent's child-support obligation should be based on his actual income in 2008 and 2009. Although respondent had been ordered to produce his 2008 and 2009 tax returns before the April 2010 hearing, he had not provided his 2009 return by the time of the hearing. The hearing also involved, among other issues, ongoing disputes over respondent's refusal to respond to appellant's discovery requests, respondent's refusal to provide documents

showing the amount of health-insurance payments, and respondent's refusal to reimburse appellant for uninsured expenses.

In May 2010, the district court found that "[t]here is no evidence in the record to support [appellant]'s allegations that [r]espondent's severance from Microsoft was voluntary such as to justify imputation of income during his period of unemployment at a level consistent with his former earnings at Microsoft." The district court also found that "[r]espondent started working with Digital River on October 27, 2009 and is currently earning $120,000.00 per year." Based on these findings, the district court determined that effective November 1, 2009, respondent's child-support obligation was $1,889 per month until the "first full month following the birth of [r]espondent's new child" at which point his obligation was reduced to $1,787 per month.

Appellant moved for amended findings of fact and a new trial, which the district court denied, deeming the motion to be one for reconsideration of its prior orders. This appeal follows.

D E C I S I O N

The district court has broad discretion in modifying child-support orders. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). A reviewing court will reverse a district court's order regarding child support only if the district court "abused its broad discretion by reaching a clearly erroneous conclusion that is against logic and the facts on the record." *Id.*

Modification of a child-support order requires a showing that a substantial change in circumstances renders the terms of the existing child-support order unreasonable and

unfair. Minn. Stat. § 518A.39, subd. 2(a) (2010). The party requesting modification has the burden of proving that his or her circumstances have substantially changed since the time of the dissolution or since the award was last modified. *Johnson v. Fritz*, 406 N.W.2d 614, 616 (Minn. App. 1987). Once modification is deemed appropriate, the district court must calculate each parent's gross income. Minn. Stat. § 518A.34(b)(1) (2010).

Appellant does not challenge the fact that respondent's circumstances changed substantially when his employment with Microsoft ended, but instead challenges the district court's calculation of respondent's gross income. In the child-support context, "gross income includes any form of periodic payment to an individual, including . . . unemployment benefits, . . . and potential income under section 518A.32." Minn. Stat. § 518A.29(a) (2010).

Respondent's initial motion for modification was made on July 29, 2008. At that time, he was on unpaid medical leave from Microsoft, and the district court ordered respondent to make a one-time child-support payment of $500 for the month of August 2008. Appellant claims that respondent's medical leave of absence was voluntary and that income should have been imputed to him. According to the child-support statutes, "child support must be calculated based on a determination of potential income" "[i]f a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income." Minn. Stat. § 518A.32, subd. 1 (2010). "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).

Because this court does not presume error on appeal, we infer from the district court's October 2008 order[1] that it found respondent's medical leave to be necessary rather than voluntary. *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*). Based on the record, which includes affidavits from respondent stating that this leave was medically necessary, this finding is not clearly erroneous. At the time of the October 2008 order, respondent was once again working for Microsoft, earning approximately $128,000 per year. We conclude that ordering the one-time payment of $500 for August 2008, given these circumstances, was not an abuse of discretion.

Appellant also argues that it was error for the district court to impute an annual income of $20,000 to respondent beginning in November 2008 and continuing until November 2009, when respondent's actual income in 2008 exceeded $135,000 and respondent's 2009 income in unemployment benefits alone exceeded $20,000. We agree. Because the district court found that respondent's employment had been terminated in October 2008 when he left Microsoft and did not otherwise find that respondent was underemployed or employed on a less-than-full-time basis, there was no statutory basis for imputing income to respondent. *See* Minn. Stat. § 518A.32, subd. 1 (allowing for the use of potential income rather than gross income in calculating child support when the

[1] Even though the district court's 2008 orders are not independently appealable at this point, "appellate courts may review any order affecting the order from which the appeal is taken." Minn. R. Civ. App. P. 103.04. Because these orders affect the order permanently setting respondent's child-support obligation, they are within the scope of this court's review. *See id.*

parent is "voluntarily unemployed"). Further, by the time that appellant moved for amended findings or a new trial, respondent had complied with the district court's order to supply his 2009 tax return. At that point, the district court had the information necessary to set respondent's child-support obligation from November 2008 to November 2009, using his actual income. But it did not do so. We therefore conclude that the district court erred when it based respondent's child-support obligation in the December 2008 order on potential income.

Appellant argues that the district court's finding that respondent was not voluntarily unemployed is clearly erroneous and that respondent's income during his period of unemployment should be based on his past earnings at Microsoft. The only evidence in the record regarding the terms of respondent's separation from Microsoft are his descriptions of it in various affidavits. There does not seem to be a factual dispute over the terms of his separation as much as there is a dispute over the interpretation of the terms. Respondent claims that his separation was involuntary, because leaving at the point that he did was the better of the two options presented to him, and his choice made the most financial sense because it guaranteed a severance package. Appellant argues that because respondent had an option of staying, albeit in what respondent characterized as a reduced capacity, and because respondent's termination was not mandatory or definite, the separation was voluntary. Because we review the district court's finding for clear error and because respondent stated in his affidavit that he was on unpaid leave before accepting the severance package, we conclude that the district court's finding that respondent did not voluntarily leave his employment is not clearly erroneous.

On this record, we conclude that imputation of income to respondent was improper. We therefore reverse and remand for computation of respondent's child-support obligation from November 2008 to November 2009 based on his actual income for that period.

Appellant's motion to strike portions of respondent's brief

Appellant argues in her reply brief that certain facts referred to by respondent are outside of the record and should be stricken from his brief. Most of the facts appellant seeks to strike are not relevant to the issues on appeal. Other facts that appellant seeks to strike are in the record and were appropriately referred to by respondent. We did not consider any facts outside of the record in reaching our decision. Appellant's motion to strike portions of respondent's brief is denied.

Reversed and remanded; motion denied.