STATE OF MINNESOTA
IN COURT OF APPEALS
A10-541

Hennepin County,
Respondent,

Wendy J. Fliehs,
Respondent,

vs.

Lee Simmons,
Appellant.

Filed March 22, 2011
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-FA-07-8537

Michael O. Freeman, Hennepin County Attorney, Rachelle R. Drakeford, Assistant Hennepin County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Wendy Fliehs, Minneapolis, Minnesota (pro se respondent)

Lee Simmons, Minneapolis, Minnesota (pro se appellant)

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

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

WRIGHT, Judge

Appellant-father challenges the district court's decision affirming the order of the child support magistrate (CSM), which denied father's motion to modify his child-support obligation. He argues that the district court's order contains material factual errors and is inconsistent with Minn. Stat. §§ 518A.26-518A.78 (2010). Because the district court's factual findings support its conclusions of law, we affirm.

FACTS

In February 2003, appellant-father Lee Simmons and respondent-mother Wendy Fliehs had a child, K.F., who has always lived with Fliehs. In 2006, Simmons paid Fliehs $250 monthly in child support pursuant to an agreement between the parties. In 2007, Simmons paid only a portion of the amount he owed under this agreement. Fliehs sought the assistance of respondent Hennepin County in setting and collecting the appropriate amount for monthly child support. In December 2007, the county moved for an order establishing child support for K.F. A CSM found that Fliehs's gross monthly income was $5,042 and that Simmons was voluntarily unemployed or underemployed with a potential gross monthly income of $4,733. The CSM ordered Simmons to pay $526 monthly as child support. The CSM also concluded that Simmons owes Fliehs $2,050 for past child support and ordered Simmons to pay an additional 20 percent of the monthly child-support amount until the past child support is fully reimbursed. In January 2008, the district court affirmed the CSM's order. Simmons appealed, and we affirmed the district

court's decision. *Hennepin Cnty. v. Simmons*, No. A08-0964, 2009 WL 1048398 (Minn. App. April 21, 2009).

In September 2009, Simmons moved to modify his child-support obligation, arguing that Fliehs's gross income had increased and her expenses had decreased materially since the 2008 child-support order. He also sought forgiveness of his arrears and a judgment against Fliehs for payments Simmons made before the 2008 child-support order. Following a hearing, a CSM denied Simmons's motion. The CSM found that Simmons remains voluntarily unemployed and receives income from student loans. The CSM also found that Fliehs's income has not changed significantly since the 2008 child-support order, there is no basis to forgive Simmons's unpaid child-support obligation, and a judgment is not warranted because Simmons has made no payments pursuant to the 2008 child-support order. Based on these findings, the CSM concluded that Simmons failed to establish a substantial change in circumstances rendering the child-support order unreasonable and unfair.

Simmons moved for the district court's review of the CSM's order. He did not submit a transcript of the hearing before the CSM to the district court. Without holding a hearing, the district court affirmed the CSM's order and made additional findings regarding Simmons's education and employment. This appeal followed.

D E C I S I O N

If the district court independently reviews and affirms a CSM's order, the CSM's order becomes the order of the district court. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). The district court may modify an existing child-support

obligation if the moving party demonstrates a substantial change in circumstances that renders the existing child-support obligation unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2 (2010)[1]; *Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002). We review the district court's decision whether to modify child support to determine whether the district court abused its discretion. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002); *see also Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001) (applying abuse-of-discretion standard of review on appeal from district court's affirmance of CSM's decision regarding child support).

Because Simmons did not submit a transcript of the CSM proceedings to the district court with his motion for review, this court's order filed July 21, 2010 ruled that the transcript is not part of the record on appeal. Without a transcript, our review is limited to whether the district court's findings of fact support its conclusions of law. *Bender v. Bender*, 671 N.W.2d 602, 605 (Minn. App. 2003).

I.

Simmons argues that his child-support obligation, which was set at the presumptively correct guideline amount, should be modified because Fliehs's financial circumstances have changed since the 2008 child-support order. He challenges the district court's findings as to Fliehs's financial circumstances and the district court's

[1] Because the 2010 version of the applicable statutes does not change or alter the rights of the parties, we refer to the 2010 version of these statutes in our analysis. *See McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986) (indicating that appellate court applies current version of statute unless doing so alters matured or unconditional rights of parties or creates other injustice), *review denied* (Minn. Nov. 17, 1986).

application of the legal standard for deviating from the presumptive child-support obligation.

A.

Simmons argues that Fliehs now has approximately $23,659 more "spendable cash" than she had when the 2008 child-support order was issued because her earnings have increased and her expenses for K.F.'s education have decreased.

To calculate a child-support obligation, a determination of each parent's gross income is required. Minn. Stat. § 518A.34(b)(1). A determination of income for child-support purposes is a finding of fact and will be affirmed if it has a reasonable basis in fact. *See Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002). Because a transcript is not part of the record properly before us, we cannot review whether the record supports the district court's finding of Fliehs's income. *See Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970) (stating that "[b]ecause defendant failed to provide a transcript, this court is not cognizant of the evidence upon which the trial court based its findings of fact, conclusions of law, and order for judgment").

Similarly, we cannot review whether what Simmons alleges is a decrease in Fliehs's expenses for K.F.'s education renders the child-support obligation unreasonable and unfair. Although the district court did not make findings specifically addressing Fliehs's expenses, it found that no facts have changed since the 2008 child-support order. This ruling constitutes an implicit rejection of Simmons's argument that Fliehs's decreased expenses were a basis for modifying his child-support obligation. *See*

Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1, 775 N.W.2d 168, 177-78 (Minn. App. 2009) (stating that "[a]ppellate courts cannot assume a district court erred by failing to address a motion, and silence on a motion is therefore treated as an implicit denial of the motion"), *review denied* (Minn. Jan. 27, 2010). Without a transcript in the record on appeal, we are precluded from reviewing whether this implicit finding is clearly erroneous. *Duluth Herald & News Tribune*, 286 Minn. at 498, 176 N.W.2d at 555; *see Vettleson v. Special Sch. Dist. No. 1*, 361 N.W.2d 425, 428 (Minn. App. 1985) (applying clearly erroneous standard to an implicit finding of fact). Accordingly, we affirm the district court's decision that the facts do not warrant a modification of Simmons's child-support obligation.

B.

Simmons also argues that the district court failed to apply properly the statutory standard for deviating from the presumptive child-support obligation and that his presumptive child-support obligation should be adjusted in light of Fliehs's changed financial circumstances. A parent's presumptive child-support obligation is calculated pursuant to Minn. Stat. § 518A.34(b)(1). A district court has discretion to deviate from the presumptive child-support obligation and establish a different amount. Minn. Stat. § 518A.37, subd. 2. When deciding whether a deviation from the presumptive child-support obligation is appropriate, the district court must consider several factors including "all earnings, income, circumstances, and resources of each parent." Minn. Stat. § 518A.43, subd. 1. Here, the district court made findings addressing the earnings, income, and financial circumstances of each parent. These findings address the statutory

factors and do not establish a basis for deviating from the presumptively correct statutory child-support obligation. Without a transcript, we are precluded from considering the evidentiary support for these findings. We, therefore, affirm the district court's denial of Simmons's motion to deviate from the presumptive child-support obligation on this ground.

II.

Simmons argues that the district court overstated his income when calculating his child-support obligation. He contends that the district court should have calculated his income to be 150 percent of the federal minimum wage, pursuant to Minn. Stat. § 518A.32, subd. 2(3). "Gross income includes any form of periodic payment to an individual, including . . . potential income under section 518A.32." Minn. Stat. § 518A.29(a). When a parent is voluntarily unemployed, the district court must determine the parent's potential income in order to calculate child support. Minn. Stat. § 518A.32, subd. 1. This determination must be made using one of three methods: (1) the parent's "probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community"; (2) the amount of unemployment compensation or workers' compensation benefits received, if any, by the parent; or (3) "the amount of income a parent could earn working full time at 150 percent of the current federal or state minimum wage, whichever is higher." *Id.*

Simmons first challenges the factual basis for the district court's calculation of his income, arguing that Fliehs and the county fraudulently misrepresented his work

experience and education. But the district court did not calculate Simmons's potential income in the modification proceeding that we now review. The district court determined Simmons's income in the January 2008 order, which is the subject of an earlier appeal. There, the district court found that Simmons was voluntarily unemployed and calculated Simmons's potential income based on Simmons's ability to work full-time and an estimated hourly wage. When considering Simmons's motion to modify the child-support order, the district court was not required to recalculate Simmons's income unless he established a substantial change of circumstances rendering the current child-support obligation unreasonable and unfair. *See Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (stating in maintenance-modification context that failure to show substantially changed circumstances precludes modification, therefore district court need not make findings regarding any other statutory factors). Here, the district court found that Simmons continues to be voluntarily unemployed and no facts and circumstances have substantially changed since the 2008 order. Absent a transcript, we cannot review the factual components to these determinations. *See Erickson v. Erickson*, 449 N.W.2d 173, 178 n.7 (Minn. 1989) (stating that generally whether party's increased earnings "constituted a substantial change in circumstances would be reversed only if clearly erroneous" (quotation omitted)); *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009) (stating that "[w]hether a parent is voluntarily unemployed is a finding of fact, which we review for clear error"). We, therefore, affirm this aspect of the district court's decision.

Simmons maintains that his income is overstated because the district court erroneously included funds from his student loans in his income. The district court affirmed the CSM's finding that Simmons receives approximately $1,200 to $1,500 in monthly income from his student loans. Simmons argues that, because student loans are not considered income for purposes of taxes and bankruptcy, student loans are not income for child-support purposes. This argument is contrary to Minnesota law. Student-loan proceeds that exceed tuition are a source of income for child-support purposes. *Gilbertson v. Graff*, 477 N.W.2d 771, 774 (Minn. 1991); *see also* Minn. Stat. § 518A.32 (defining "gross income" to include "any form of periodic payment to an individual"). Thus, Simmons's challenge to the calculation of his income on this ground fails.

III.

Simmons contends that Fliehs made several fraudulent representations that induced the district court to set an excessive child-support obligation and that have influenced the judicial decisions in subsequent proceedings. To the extent that Simmons challenges rulings made in the 2008 order, which we previously affirmed, he is precluded from doing so. To the extent that he argues that Fliehs's assertions in this proceeding were fraudulent, the factual nature of Simmons's allegation and the lack of a transcript prevent us from reviewing the district court's decision to rely on these representations. *See Stubblefield v. Gruenberg*, 426 N.W.2d 912, 914 (Minn. App. 1988) (stating that "[o]rdinarily, the affirmative defense of fraud in the inducement is a fact question").

IV.

For the first time on appeal, Simmons asserts that Fliehs has limited his visitation in retaliation for his challenges to his child-support obligation. We decline to address on appeal claims that have not been previously presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Simmons did not move to modify or enforce his parenting time, and the order from which he appeals does not address parenting time. Accordingly, this argument is beyond our scope of review in this appeal.

V.

Simmons challenges the district court's rejection of his request for a judgment for approximately $3,000 that he voluntarily paid Fliehs before the 2008 child-support order was issued. The district court declined to consider this request because it concerns matters outside the scope of Simmons's motion to modify the award. Payments Simmons made that predate the 2008 child-support order are the basis, in part, for that order and are reflected in Simmons's monthly child-support obligation. Absent a showing that circumstances have changed such that the 2008 child-support order is unreasonable and unfair, the award cannot be modified on this basis. Similarly, to the extent that Simmons requests a judgment on a basis other than the child-support order, that request falls outside the scope of his motion to modify his child-support obligation.[2]

[2] Simmons challenges several additional aspects of the 2008 child-support order. He argues that the district court failed to apply the statutory standards correctly, miscalculated Simmons's potential income, and made erroneous factual findings based on fraudulent misrepresentations by Fliehs and the county. The 2008 order, issued by a

In sum, on the limited record before us and in light of our limited scope of review, we affirm the district court's denial of Simmons's motion to modify his child-support obligation.

Affirmed.

CSM, was affirmed by both the district court and this court in *Hennepin Cnty. v. Simmons*, A08-0964, 2009 WL 1048398 (Minn. App. April 21, 2009). Simmons's challenges that were not a basis for his modification motion presently on review are not properly before us. Therefore, relief is unavailable on these grounds.