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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1660

In re the Custody of: A. B. T.

Peter N. Tapper, petitioner,
Respondent,

vs.

Rachael A. Lauby,
Appellant.

Filed September 3, 2013
Affirmed
Hooten, Judge

Dakota County District Court
File No. 19AV-FA-11-2238

Lindsey J. Andersen, Minneapolis, Minnesota (for respondent)

Michael W. McNabb, Burnsville, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Kalitowski, Judge; and Cleary, Judge.

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

HOOTEN, Judge

In this child-support dispute, appellant-mother argues that the district court abused its discretion by imputing income to her and by applying an alternative method to calculate parenting time for purposes of the parenting-expense adjustment. We affirm.

FACTS

Appellant Rachael Lauby and respondent Peter Tapper are the parents of A.B.T., who was born on July 6, 2009. Appellant has another child, a son, who was born in 2002 and resides primarily with appellant. Respondent also has another child, a son, who was born in 2012 and resides with respondent, his wife, and his wife's minor son from another relationship.

Appellant has worked as a hair stylist at a salon in Edina since November 2000. After the birth of her son in 2002, appellant worked at the salon 33 hours per week. Respondent has worked 40–45 hours per week as a manager at a coffee shop in Minneapolis. Before January 2011, respondent's mother provided child care for A.B.T. during the week at no charge. In January 2011, appellant decided to enroll A.B.T. in daycare during times that included respondent's then-agreed-upon parenting time. Appellant has paid all daycare costs since enrolling A.B.T.

Respondent commenced this action to establish custody, child support, and parenting time in July 2011. The district court appointed a neutral custody and parenting-time evaluator and scheduled trial for May 2, 2012. On May 2, the parties entered into a stipulation of facts, leaving the financial issues of child support, daycare expenses, and tax exemptions for resolution by the district court.

At trial, the parties admitted exhibits into evidence, discussed calculation of income for determining child support, and disputed how much income appellant received in tips and how the tips should be factored into her gross monthly income. Appellant argued that she qualified as a caretaker for A.B.T. and that therefore the district court

should use her 33-hour work schedule in calculating her gross income instead of imputing additional income to her based on a full-time, 40-hour work week. The parties discussed parenting time and agreed that they would follow the parenting-time schedule recommended by the evaluator.

The parties did not agree, however, on how parenting time should be calculated for purposes of parenting-expense adjustments. Rather than calculating the percentage of parenting time based upon overnights, the district court used an alternative method of calculating the percentage of parenting time by simply counting and comparing the number of hours that the child was with each parent. Respondent argued that this alternative calculation method available under Minn. Stat. § 518A.36 (2012) should be used because "it's fair to use the actual time [reflected in the parties' agreed-upon schedule] versus overnights." Appellant countered that the alternative method is not allowed only "when the child has significant time in the parent's physical custody and is under the direct care of the parent". Appellant argues that since the child was not under the "direct care" of respondent when respondent was working, the district court erred in utilizing the alternative method of calculating parenting time and finding that respondent had 45.1 to 50 percent of the parenting time for purposes of the parenting-expense adjustment.

In its order and judgment filed in May 2012, the district court found that appellant's income information was not complete because she was unable to provide any record of her tip income and had not claimed any tip income on her tax returns since 2002. The district court found that appellant has an average gross monthly income of

$3,728, and, noting that her income information as it related to tips was "suspect," imputed to her a gross monthly income of $4,660. The district court found that respondent's average gross monthly income is $2,833, and that the combined parental income for determining child support is $6,795. The district court found that appellant's percentage of their gross incomes is 63% and respondent's percentage is 37%. The district court ordered appellant to pay respondent $300 per month in child support, and appellant to pay all daycare expenses.[1]

Appellant subsequently moved for an amended order or for a new trial. The motion was considered by a different judge than the one who issued the May 2012 order. Appellant argued that in the May 2012 order, the district court judge erroneously imputed income to her and erroneously used the alternative method of calculating parenting time for purposes of the parenting-time expense adjustment. Appellant also argued that some of the "secondary findings" in the May 2012 order were not supported by the evidence and that the district court had adopted an "undue and unfair perception" of her as a person. In an order filed in August 2012, the district court, among other things, affirmed the imputation of income to appellant, affirmed the calculation of parenting time, and denied appellant's motion for a new trial.

This appeal follows.

[1] The May 2012 order mistakenly stated that respondent would be responsible for daycare costs. This clerical error was corrected in the August 2012 order.

D E C I S I O N

I.

The district court has broad discretion in determining child support and will not be reversed absent an abuse of discretion. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). This court will not reverse a district court's factual finding regarding an obligor's income or whether that obligor is voluntarily underemployed unless the findings are clearly erroneous. *See Butt v. Schmidt*, 747 N.W.2d 566, 574–75 (Minn. 2008) (providing that whether a parent is voluntarily underemployed is a finding of fact); *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002) (reviewing the district court's findings regarding an obligor's income under a clearly erroneous standard). When determining whether factual findings are clearly erroneous, we view the record "in the light most favorable to the [district] court's findings," *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000), and defer to the district court's credibility determinations, *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

A determination of child support requires findings regarding the parents' gross incomes. Minn. Stat. § 518A.34(b)(1) (2012). "If a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis . . . child support must be calculated based on a determination of potential income. For purposes of this determination, it is rebuttably presumed that a parent can be gainfully employed on a full-time basis." Minn. Stat. § 518A.32, subd. 1 (2012). "Full-time" is considered 40 hours of work per week. *Id.*

The statutory presumption that a parent-obligor is capable of full-time work can be rebutted if that parent shows that she is working less than full time because she qualifies as a caretaker:

> If a parent stays at home to care for a child who is subject to the child support order, the court may consider the following factors when determining whether the parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis:
>
> (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 (2012).

Appellant argues that she is a caretaker within the meaning of the statute and that her status as such precludes the district court from finding her voluntarily underemployed and imputing income to her. She also argues that the failure of the district court in the May 2012 order to make factual findings regarding her caretaker status or address the caretaker statute requires reversal.

Appellant is correct that the May 2012 order did not reference the caretaker statute or specifically state that income was imputed to appellant because the district court had

found her voluntarily underemployed. But, in its August 2012 order, the district court, while recognizing that the May 2012 order did not address the caretaker statute or findings, explained that it read "the May 7 order as implicitly rejecting the assertion that [appellant] is a caretaker" since that order found that appellant was voluntarily underemployed. When the district court considered appellant's motion to amend or for a new trial, it properly deferred to the findings of fact in the May 2012 order, including the implied finding that appellant was voluntarily underemployed. Then, the district court, in a well-analyzed order, discussed the application of the caretaker statute and relevant case law to the parties' stipulated facts.

In analyzing those facts, the district court noted that appellant has worked 33 hours per week since 2002 when her first child was born. A.B.T. was not born until 2009. While at trial, appellant claimed that she was a caretaker based on A.B.T.'s young age, the fact that appellant was working less than full time for almost seven years before A.B.T. was born strongly suggests that A.B.T.'s age could not be the primary reason for appellant working less than full time.[2] *See* Minn. Stat. § 518A.32, subd. 5(4) (providing that a child's age may be considered as a factor when determining whether a parent is voluntarily underemployed if the parent stays at home with the subject child). Moreover, respondent's mother is available to provide childcare at no charge, and was doing so until appellant, at her own expense, decided to place A.B.T. in daycare. These facts strongly

[2] Because appellant did not explicitly argue to the district court or to this court that the reason she reduced her hours in 2002 was because the first child was born, the district court did not, and we need not, address whether but for the birth of A.B.T., appellant would be working full time.

suggest that availability and costs of childcare are not the reasons that appellant works less than full time. *See id.*, subd. 5(1), (3), (5) (providing that previous childcare arrangements, childcare expenses, and the availability of childcare providers may be considered as factors when determining whether a parent is voluntarily underemployed when the parent stays at home to care for the subject child).

The stipulated facts before the district court in May 2012 support a conclusion that appellant is voluntarily underemployed because she could not and did not meet her burden of showing that she qualified as a caretaker. The district court considered the stipulated facts in its May and August 2012 orders. The district court's implicit denial of appellant's caretaker argument in the May 2012 order and the district court's subsequent denial of her motion to amend the May 2012 order or grant a new trial was not an abuse of discretion.

II.

The district court has broad discretion in determining child support and will not be reversed absent an abuse of discretion. *Rutten*, 347 N.W.2d at 50. Statutory interpretation and the application of a statute to undisputed facts present questions of law that this court reviews de novo. *Brodsky v. Brodsky*, 733 N.W.2d 471, 477 (Minn. App. 2007).

The parenting-expense-adjustment statute reflects a presumption that a parent incurs expenses associated with the costs of raising a child during parenting time. Minn. Stat. § 518A.36, subd. 1(a) (2012); *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009). Accordingly, a parent may receive a parenting-expense adjustment of a support

obligation based on the percentage of parenting time allocated to that parent. Minn. Stat. § 518A.36, subd. 2(1) (2012). The percentage of parenting time for purposes of the parenting-expense adjustment

> may be determined by calculating the number of overnights that a child spends with a parent, or by using a method other than overnights if the parent has significant time periods on separate days where the child is in the parent's physical custody and under the direct care of the parent but does not stay overnight.

Id., subd. 1(a).

Appellant argues that a district court may use a calculation method based on something other than overnights only when two conditions are met: (1) the child has significant time in that parent's physical custody and (2) the child is under the direct care of that parent. Appellant maintains that the second condition is not met because the hours when A.B.T. is in daycare during respondent's parenting time do not qualify as "direct care" hours, and to the extent that they do qualify, they should not be included in any calculation of parenting time because respondent is essentially discharging his parenting duties during this time. We are not persuaded.

First, we reject appellant's assertion that use of the alternative method is conditioned on certain factors and her definition of "direct care." We have previously held that the parenting-time statute "plainly permits the district court to use *either* the overnight method of calculating parenting time or an alternative method." *Jones v. Jarvinen*, 814 N.W.2d 45, 48–49 (Minn. App. 2012) (emphasis added). Moreover, appellant agreed with the district court that her definition of "direct care"—that the "child

has to be with the parent during the entire period of time"—would lead to absurd results, which we presume that the legislature did *not* intend when it wrote this statute. *See* Minn. Stat. § 645.17(1) (2012) (providing the statutory interpretation guideline that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable"). As the district court properly noted, appellant's definition would likely result in parties returning to the court weekly, arguing:

> ["]I'm sorry. [Our child] had a sleepover. And by the way, there was a field trip. You know, [the child] wasn't under anybody's direct care at that point, so now we've got to subtract, you know, at an hourly rate." Is that what we're looking at here?

Appellant conceded that "[f]rom a practical matter, [this definition of direct care] would not work." We agree. The district court did not abuse its discretion when it declined to use the overnight method for calculating parenting time nor did it err when it rejected appellant's definition of direct care.

Second, we reject appellant's argument to the extent that she asserts that the hours during respondent's parenting time when he is at work and A.B.T. is in daycare cannot be included in parenting-expense calculations. "The plain language of [the parenting-time statute] provides that parenting time, for purposes of parenting-expense adjustment, is determined by the terms of a court order scheduling parenting time." *Hesse*, 778 N.W.2d at 103. Parenting time reflected in a court order is not rebuttable. *Id.* As a result, a district court does not err when it calculates a parenting-expense adjustment based on an ordered or agreed-upon schedule regardless of whether those parenting hours are actually exercised. *See id.* (affirming the district court's inclusion of 14 nights of unexercised

parenting time when calculating the parenting-time adjustment because those nights were included in the parenting schedule adopted by the parties).

In the August 2012 order, the district court noted that the May 2012 order included a finding that, "for purposes of calculating child support, [respondent] had parenting time 45.1% to 50% of the time" and concluded that the 45.1–50% finding was supported by the record because the agreed-upon parenting-time schedule sets respondent's parenting time at 47%. We agree. When respondent must work during his agreed-upon parenting time, those hours are properly counted as parenting time in a parenting-expense adjustment.[3] It was not an abuse of discretion when the district court declined to subtract these hours from any parenting-time calculations.

Appellant also asserts that certain "extraneous findings" in the May 2012 order indicate that the district court adopted an unfair perception of her as a person. She argues that these findings relate to allegations made by respondent and are therefore not supported by the record. We are not persuaded that these findings are clearly erroneous or otherwise require reversal. To the extent the district court adopted respondent's allegations as findings, it must have found them credible, a finding to which we give deference. *Sefkow*, 427 N.W.2d at 210. Moreover, appellant cites to no authority indicating these findings require reversal, and we generally decline to address allegations

[3] We recognize that the parenting-time schedule at issue here was not previously court ordered as was the case in *Hesse*. But because the district court adopted the schedule in its May 2012 order after the parties agreed—on the record—that it should do so, we see no reason to treat the schedule any differently than the order was treated in *Hesse*.

unsupported by legal citation or analysis. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).

Because the district court has the discretion to choose how to calculate parenting time for purposes of support calculations, because appellant's definition of "direct care" would lead to absurd results, and because the parties agreed to adopt the evaluator's parenting schedule, the district court did not abuse its discretion or otherwise err when it calculated parenting time based on the parenting time reflected in the evaluator's schedule.

Affirmed.