STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1837

In re the Marriage of:

Ryan L. Hagelstrom, petitioner,
Appellant,

vs.

Gabrielle J. Ulan,
f/k/a Gabrielle J. Hagelstrom,
Respondent.

Filed August 5, 2013
Affirmed
Kalitowski, Judge

Carver County District Court
File No. 10-FA-11-12

Andrew M. Silverstein, Andrew M. Silverstein Law Office, L.L.C., Minneapolis, Minnesota (for appellant)

Gabrielle J. Ulan, Chaska, Minnesota (pro se respondent)

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

KALITOWSKI, Judge

In this appeal from two post-decree orders, appellant Ryan Hagelstrom argues that the district court erroneously (1) ordered him to pay respondent Gabrielle Ulan temporary

spousal maintenance; (2) failed to impute income to respondent for purposes of setting child support; (3) declined to order the appointment of a parenting-time consultant; and (4) required him to pay any tuition incurred as a "daycare expense." We affirm.

D E C I S I O N

In May 2011, the ten-year marriage of appellant and respondent was dissolved by a stipulated judgment and decree. The parties agreed to share joint legal and physical custody of their two minor children. The judgment and decree resolved all issues except child support and spousal maintenance. After a trial on these issues, the district court ordered in April 2012 that appellant pay respondent temporary spousal maintenance and set appellant's child-support obligation. The district court denied appellant's motion to order the appointment of a parenting-time consultant for the resolution of future parenting-time issues because it found that neither party had submitted an agreement to the district court. Appellant moved for amended findings or, in the alternative, a new trial. In September 2012, the district court granted in part and denied in part appellant's motion, and entered an amended judgment. Appellant challenges the district court's April and September orders.

I.

A district "court has broad discretion in deciding whether to award maintenance and before an appellate court determines that there has been a clear abuse of that discretion, it must determine that there must be a clearly erroneous conclusion that is against logic and the facts on record." *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn.

1997). A factual finding is clearly erroneous when, after careful review of the record, we are "left with the definite and firm conviction that a mistake has been made." *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001) (quotation omitted).

The district court ordered that appellant pay respondent $500 per month in temporary spousal maintenance for just over two years. In his post-trial motion, appellant requested that the district court find that spousal maintenance was not warranted. The district court denied his motion, reiterating that it found "that the concept of 'potential income' alluded to by [appellant] is factually and legally unwarranted in this proceeding." On appeal, appellant argues that the district court's finding under Minn. Stat. § 518.552, subd. 1 (2012), supporting its award of temporary spousal maintenance to respondent is clearly erroneous because the district court failed to consider whether respondent is able to meet her reasonable needs through employment and ignored the marital standard of living. We disagree.

The district court may award spousal maintenance if it finds that the spouse seeking maintenance lacks the property to provide for the party's own reasonable needs or is unable to provide adequate self-support through employment. Minn. Stat. § 518.552, subd. 1. When making a finding that supports a maintenance award, the district court must consider the standard of living during the marriage. *Id.* If the district court makes a finding to support an order for maintenance, it must consider several statutory factors to arrive at the amount and duration of the maintenance. *Id.*, subd. 2 (2012).

Here, the district court made detailed findings about respondent's employment history during the marriage and her employment efforts at the time of trial. During the marriage, respondent worked as a pharmacy technician. After having two children, the parties agreed that respondent would not be employed outside of the home. When respondent began part-time employment, she worked when appellant was not at work to minimize daycare expenses. In the years 2004 and 2008-2010, respondent earned an average of $13,600 per year.

After the dissolution of the marriage, respondent continued to care for the children, even while they were in the primary care of appellant. Respondent also looked for employment opportunities and started her own business. At the time of trial, respondent was not employed outside the home; she had been seeking employment and had started her own business, which she was trying to expand. In 2011, respondent earned approximately $8,000 through her business endeavors. The district court found the following:

> That [r]espondent has made reasonable and dedicated efforts to obtain employment outside of her desired field of photography and craft work. . . . Her job search has been unsuccessful, but not due to any lack of effort on her part. While she may need to undergo a small amount of retraining or class work to continue as a certified pharmacy technician, [r]espondent has searched for work in that area of past work experience, to no avail.
>
> That [r]espondent's employment goals are realistic. Her business plan . . . is workable and the steps she is taking toward her goals are reasonable.

The district court further found that respondent needed more time to become self-sufficient:

> [A]t present [r]espondent lacks sufficient property or financial resources to adequately provide for her reasonable needs and self-support, with or without considering the marital standard of living. Given a couple of years to nurture her self-employment position(s) and/or to continue and finalize her job search, while continuing to provide daily care of the minor children until both are enrolled in school full-time, [she] should be able to meet her needs on her own.

The district court found that during the marriage the parties had "a modest standard of living," and were "frugal." The district court's detailed and thorough findings show that it clearly considered whether respondent is currently able to meet her reasonable needs through employment and the marital standard of living. Thus, we conclude that the district court did not abuse its discretion in ordering appellant to pay respondent temporary spousal maintenance.

II.

The district court has broad discretion in reaching a decision concerning child support. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We will not determine that the district court abused its discretion unless there is "a clearly erroneous conclusion that is against logic and the facts on record." *Id.*

There is a rebuttable presumption that "a parent can be gainfully employed on a full-time basis." Minn. Stat. § 518A.32, subd. 1 (2012). When a parent is voluntarily unemployed, underemployed, or employed on less than a full-time basis, child support must be calculated with the parent's potential income. *Id.* Whether a parent is voluntarily unemployed or underemployed is a finding of fact, which we review for clear error. *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009). We will not reverse the

district court's finding of income for purposes of child support unless it is clearly erroneous. *Davis v. Davis*, 631 N.W.2d 822, 827 (Minn. App. 2001). To prevail in an argument to reverse based on clear error, "the party challenging the findings must show that despite viewing that evidence in the light most favorable to the [district] court's findings . . . the record still requires the definite and firm conviction that a mistake was made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

The district court ordered that appellant pay respondent $783 per month in child support. For purposes of setting child support, the district court found that based on the average of respondent's 2010 and 2011 earnings, her gross monthly income from earnings is $935. The district court found that there was no evidentiary basis upon which it could impute more income to respondent:

> [Respondent] has been diligently seeking outside employment, while at the same time marketing her newly organized business of photography and craft marketing. While her earnings from these endeavors are not yet sufficient to meet her needs, they do represent a good faith effort on her part to expand her employment and thus her earnings and thus her ability to support herself and assist in the support of the minor children.

In his post-trial motion, appellant requested that the district court establish, for purposes of respondent's income related to child support, a potential monthly income for respondent of $2,500. The district court denied the motion and reiterated its determination that the concept of potential income is inapplicable to the proceedings. On appeal, appellant argues that the district court should have found that respondent is voluntarily unemployed or underemployed and should have made a determination of

potential income for respondent under Minn. Stat. § 518A.32, subd. 2 (2012). We disagree.

Because we do not presume error on appeal, we infer from the district court's order that it found respondent's employment circumstances 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). Based on the record, which includes evidence that shows (1) respondent's income and respondent's testimony about her diligent efforts to gain outside employment, (2) her efforts to start, market, and expand her business, and (3) her income from her new business, the district court's finding on respondent's income is not clearly erroneous. We conclude that given the circumstances of respondent's employment history during the marriage and her efforts to gain employment, the district court did not abuse its discretion.

III.

Parties may voluntarily agree "to submit their parenting time dispute to a neutral third party" or to otherwise resolve "parenting time disputes on a voluntary basis." Minn. Stat. § 518.1751, subd. 4 (2012). "Parenting consultant" is not used in the Minnesota statutes. But "the term refers to a creature of contract or of an agreement of the parties which is generally incorporated into (or at least referred to in) a district court's custody ruling." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 293 (Minn. App. 2007). In a stipulation, "parties are free to bind themselves to obligations that a court could not impose." *Gatfield v. Gatfield*, 682 N.W.2d 632, 637 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

Prior to trial, the parties stated on the record that they had agreed to appoint a parenting-time consultant to resolve future parenting-time issues. The parties agreed that they would first attempt to mediate the issues, but if unsuccessful, the parenting-time consultant would have the authority to make a binding decision. The parties agreed that they would provide the district court with their agreement, and appellant's counsel said that he would draft an order to appoint the parenting-time consultant and set forth the parenting-time consultant's authority. But in its April order, the district court found that the parties neither submitted the agreement nor the order appointing a parenting-time consultant. The district court noted that the parties could at any time add language to the parenting plan to reflect the agreement.

In appellant's post-trial motion, appellant requested that the district court incorporate his proposed order—which addressed the appointment of a parenting-time consultant—into the district court's order, asserting that the parties' statements on the record at the August 2011 hearing were sufficient evidence of their agreement. The district court denied appellant's motion, concluding that the parties had attempted to reach an agreement, but never finalized their agreement.

On appeal, appellant claims that the parties' statements at the August 2011 hearing, when they informed the district court that they had agreed to the appointment of a parenting-time consultant, are sufficient to show that the parties entered a binding agreement. But at that hearing, neither the parties nor their counsel provided specifics about the agreement; in fact, they recognized that specifics, such as the identity of the consultant, still needed to be agreed to. Significantly, the record shows that the parties

never submitted an agreement. Thus, the district court's finding that neither party had submitted the agreement is not clearly erroneous. And therefore, on this record, we cannot conclude that the district court erred in denying appellant's motion to order the appointment of a parenting-time consultant.

IV.

The district court has broad discretion in reaching a decision concerning child support. *Rutten*, 347 N.W.2d at 50. "It is well to bear in mind that on appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon the one who relies upon it." *Loth*, 227 Minn. at 392, 35 N.W.2d at 546 (quotation omitted).

Appellant challenges the following conclusion of law in the district court's order: "That as and for a 'daycare' expense, [appellant] shall be obligated to make payment of any tuition made necessary by a child's attendance at a private or public preschool or kindergarten program." Appellant characterizes the district court's mandate as a requirement that he pay "all daycare expenses" and argues that this was clear error because it violates Minn. Stat. § 518A.40 (2012). We disagree.

Appellant's characterization of the district court's order is inaccurate; the district court's conclusion of law does not fall under section 518A.40. That section requires "that work-related or education-related child care costs of joint children" are divided based on the obligee's and obligor's proportionate share of the parties' combined monthly parental income for determining child support. Minn. Stat. §§ 518A.26, subd. 15, .40 (2012).

Here, the record indicates that during the marriage, the parties did not use a daycare provider, but arranged their work schedules to accommodate the care of the children by either one of them. And at the time of trial, neither child attended daycare; the parties had no child-care expenses. Respondent cared for the children when they were in her primary care and had no daycare expenses. She also cared for the children while they were in the primary care of appellant when he was at work because in mediation before trial, the parties agreed to a right of first refusal concerning child care. Thus, the record contains no evidence of work-related or education-related child-care costs that the district court needed to divide between the parties.

The district court incorporated the parties' mediation agreement, including a right of first refusal, into its final order. The district court also found "[t]hat while respondent works and continues to pursue her employment goals, she continues to provide day-care services needed by the children. . . . Even while the children are in the primary physical care of [appellant], [r]espondent continues to provide for their child care at no cost to [appellant]." With full knowledge of the parties' circumstances during the marriage and at the time of the trial, the district court concluded that it is reasonable that appellant pay any tuition expense incurred as a "daycare expense."

Because we are not left with the definite and firm conviction that a mistake has been made, appellant has failed to show that the district court's order that he pay any tuition incurred as a "daycare expense" is clearly erroneous.

Affirmed.