STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2240

In re the Marriage of:
Colleen Marie Ziemke, petitioner,
Respondent,

vs.

Shawn Craig Ziemke,
Appellant.

Filed August 19, 2013
Affirmed
Smith, Judge

Dakota County District Court
File No. 19-F6-02-016480

Thomas H. Boyd, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for respondent)

Carrie A. Doom, The Law Firm of Carrie A. Doom, Isanti, Minnesota (for appellant)

Considered and decided by Smith, Presiding Judge; Peterson, Judge; and Chutich, Judge.

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

SMITH, Judge

We affirm the denial of appellant's motion to reduce his child support obligation because the district court did not abuse its discretion in determining that appellant had

failed to establish that his existing child support order was unreasonable an unfair based on the evidence that was admissible.

FACTS

Appellant Shawn Ziemke and respondent Colleen Ziemke divorced in 2003. Respondent received sole physical custody of the parties' two minor children, subject to appellant's right of reasonable parenting time. As part of the divorce decree, the district court established appellant's child-support obligation.

On June 25, 2012, appellant filed a motion to modify his child-support obligation.[1] Appellant alleged that he was unemployed and was unable to work due to a back injury. He noted that he was undergoing physical and occupational therapy. Appellant explained in an affidavit that "I gave [work] two weeks notice and had accepted a job driving buses for the Isanti/Cambridge School District. On June 21, 2012, while working at my last job, I hurt my back." Although appellant began training for the bus-driver position, he alleged that because of his injury "they could not have me driving buses." Respondent filed a responsive motion requesting denial of appellant's motion. On July 31, the district court reserved appellant's motion to modify "given the limited information on the permanency of [appellant's] alleged back injury and how it might impact his employment."

Appellant includes a multitude of medical documentation with his appellate materials. However, the record is unclear regarding what documents the district court

[1] Appellant unsuccessfully attempted to modify his child-support obligation one month prior. At that time, the presiding child support magistrate (CSM) determined that appellant had not stated a "basis to modify" his child-support obligation.

actually received into evidence. According to this documentation, appellant underwent an MRI to determine the extent of his back injury. The MRI revealed "moderate to moderately severe spinal canal stenosis" of the L2-3 and L3-4 discs and "[a]lmost certain compression of the left L3 nerve root." Dr. Amir Mehbod reviewed the MRI results. Dr. Mehbod noted that "[the injury] has actually gotten better since this all started[]" and ordered a "conservative care" approach consisting of physical therapy and an epidural injection. Dr. Mehbod also indicated that appellant was unable to work from June 21 through October 2.

Appellant also includes a report from Rehab Results, LLC dated August 30. This report indicates that "Dr. Mehbod has recommended the client for the surgical procedure." The report also noted that "Dr. Mehbod did provide an updated work ability form stating that the client should continue to remain off work until the surgery has been completed." The report indicated that a "Qualified Rehabilitation Consultant" completed the report and that it was "dictated not read." The surgery remained unscheduled during the pendency of appellant's motion.

On October 4, the district court heard argument on appellant's motion. Although the district court never clarifies what evidence it received or reviewed, both parties discussed appellant's medical paperwork during the hearing. Specifically, respondent raised a hearsay objection, contending, "I [have] received the doctor's reports that the Court has and I read through them . . . I would object to the Court considering those documents as hearsay without the doctor here to testify." The district court never explicitly ruled on the objection. On October 22, the district court denied appellant's

motion to modify. The district court concluded that appellant "voluntarily terminated his most recent employment . . . has not worked since [his alleged injury] nor has he collected any disability . . . [is] unable to provide any proof of his inability to work . . . [and his] testimony regarding his injury is not credible." This appeal followed.

D E C I S I O N

A district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We will not alter a district court's decision on a motion to modify a child-support obligation unless that decision is against logic and the facts in the record. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002).

A child-support order may be modified upon a showing of a substantial change in circumstances that render the existing order "unreasonable and unfair." Minn. Stat. § 518A.39, subd. 2(a) (2012). The modification statute lists eight types of changes capable of supporting modification. *Id.* The moving party bears the burden of proof of demonstrating both a substantial change in circumstances and the unfairness and unreasonableness of the existing order. *Bormann v. Bormann*, 644 N.W.2d 478, 480-81 (Minn. App. 2002).

The modification statute also provides that an existing order is unreasonable and unfair when application of the child-support guidelines to the parties' current circumstances would result in an order that is at least 20 percent and at least $75 per month higher or lower than the current order. Minn. Stat. § 518A.39, subd. 2(b)(1) (2012). Also, if an obligor's gross monthly income has decreased by at least 20 percent

through no fault or choice of the party, the existing order is presumed unreasonable and unfair. *Id.*, subd. 2(b)(5) (2012).

Appellant contends that the district court's order is against logic and fact because he submitted uncontroverted medical evidence of an injury that prevents him from working. However, respondent objected to appellant's purported evidence. Respondent argued that appellant's medical documents amounted to hearsay because appellant's treating doctor was not present to testify or explain the documents. The district court never ruled on respondent's objection, but explained in its order that "[appellant] was unable to provide any proof of his inability to work." At oral argument before this court, appellant contended that his documents qualified under the business-records exception to the hearsay rule. Respondent argued that the district court implicitly granted her hearsay objection, rejected appellant's medical documentation, and thus concluded that appellant failed to carry his burden of proof.

Although generally inadmissible, hearsay statements may be admitted under one of several exceptions, including the business-records exception. Minn. R. Evid. 802 (general rule); Minn. R. Evid. 803(6) (business-records exception). For the business-records exception to apply, the custodian or another qualified witness must testify that the record in question satisfies four particular elements. *See* Minn. R. Evid. 803(6); *In re Child of Simon*, 662 N.W.2d 155, 160 (Minn. App. 2003) (outlining four elements). "Although Rule 803(6) does not require the custodian of the records to testify, it requires [that] the person attempting to lay foundation be familiar with how the business in question compiles its documents." *Simon*, 622 N.W.2d at 160. In this case, it is

undisputed that appellant presented no witnesses to explain his medical documentation. His suggestion that his documents qualified under the business-records exception is misplaced. Without an applicable hearsay exception, the only reasonable inference is that the district court implicitly granted respondent's hearsay objection. Any other ruling would have been error under the facts of this case. Such a conclusion renders appellant's allegedly uncontroverted medical evidence inadmissible and we therefore will not consider it.

It is undisputed that appellant voluntarily terminated his employment to secure a position as a school-bus driver. He alleges that he suffered a debilitating injury on his final day of employment and that this injury prevented him from beginning his new job. However, the district court determined that appellant's testimony was "not credible" and noted that appellant "has not worked since [his alleged injury] nor has he collected any disability." The district court is in the best place to judge the credibility of witness testimony. *See Vitalis v. Vitalis*, 363 N.W.2d 57, 59 (Minn. App. 1985) (noting that the district court made a "proper determination of credibility").

In light of the district court's credibility determination and without the inclusion of his medical documentation, appellant is unable to sustain his evidentiary burden of establishing that his existing child-support obligation is unreasonable and unfair. Because of this failure, Minnesota law presumes that appellant is capable of being "gainfully employed on a full-time basis" and is subject to the imputation of potential income. Minn. Stat. § 518A.32, subd. 1 (2012). Appellant's previous employer noted, following his alleged injury, that "[the] employer would have been able to accommodate

[appellant's] work restrictions." For the purposes of imputing income, appellant's current economic position is identical to when his motion to modify child support was denied in April 2012. *See id.*, subd. 2(1) (explaining that potential income can be based on a parent's probable earning level, which includes employment potential, recent work history, and occupational qualifications). The district court's order is not against logic or the facts in the record.

Affirmed.