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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0501

In re the Marriage of:
Cynthia Kay Champlin, petitioner,
Respondent,

vs.

Kevin Gale Champlin,
Appellant,

and

Dakota County, intervenor,
Respondent.

Filed December 31, 2012
Affirmed
Bjorkman, Judge

Dakota County District Court
File No. 19HA-FA-08-430

J. Kevin McVay, Richfield, Minnesota; and

Sandra S. Sather, Sandra S. Sather, P.A., Minneapolis, Minnesota (for respondent Cynthia Champlin)

Michael G. Hamilton, Tanner & Hamilton, P.A., Hastings, Minnesota (for appellant)

James C. Backstrom, Dakota County Attorney, Jean M. Mitchell, Assistant County Attorney, West St. Paul, Minnesota (for respondent county)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Cleary, Judge.

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

BJORKMAN, Judge

Appellant challenges the denial of his motion to modify parenting time and child support, arguing the district court erred by (1) not adopting the parenting consultant's parenting-time modification and (2) including financial support he receives from his parents in his gross income. In a related appeal, respondent challenges the denial of her child-support-modification motion, contending the district court erred in calculating appellant's gross income. We affirm.

FACTS

On May 4, 2009, the ten-year marriage between appellant Kevin Champlin (father) and respondent Cynthia Champlin (mother) was dissolved. The stipulated judgment provided that their children, Z.C. and B.C., would primarily reside with mother; awarded the parties joint legal and physical custody of the children; and required the parties to retain a parenting consultant with binding authority to resolve parenting-time disputes.

The judgment granted father unsupervised parenting time with both children every Wednesday overnight and every other Friday to Sunday evening. Father also received parenting time with B.C. every Tuesday evening until 7:30 p.m. and with Z.C. every Thursday evening until 7:30 p.m. The parenting consultant subsequently modified the schedule to give father parenting time with both children on Tuesday evenings, Wednesday overnights, and every other Friday evening to Monday morning.

Father's initial monthly child-support obligation was $1,232. During the marriage, father worked as an executive chef. Since November 2008, when the parties experienced significant financial difficulties caused by father's gambling, father's parents have been paying his unmet living expenses. Father lost his job in 2009 and began pursuing a business administration degree in lieu of starting a new job. On December 8, 2010, the child-support magistrate (CSM) determined that father was voluntarily unemployed and had a potential monthly income of $2,739.29 based on his average earnings over the previous five years. Based on this determination, which did not include his parents' financial contributions, the CSM set father's total support obligation at $884 per month. On August 17, 2011, father began working as a line cook, earning a monthly income of $1,667.

In June 2011, the parenting consultant added Tuesday overnights to father's parenting time. This change resulted in equal parenting time based on the number of overnights. Father moved the district court to adopt the parenting consultant's parenting-time decision to award him Tuesday overnights with the children and modify the child-support arrangement so that mother would pay support to him. Mother moved to increase father's child-support obligation, arguing that his monthly gross income should include his potential income based on his employment as a chef and the financial support he receives from his parents.

The district court denied the motions, finding that father remains voluntarily underemployed and that his income includes financial support he receives from his parents. Although the district court determined that father's gross monthly income

increased to $3,700, the change did not impact his support obligation because it did not meet the statutory threshold for modification of child support.

Both parties moved for reconsideration. While the motions were pending, father commenced this appeal. The district court subsequently denied the reconsideration motions.[1]

D E C I S I O N

I. The district court did not abuse its discretion by denying father's motion to modify parenting time.

The district court has broad discretion to decide parenting-time questions based on the best interests of the children. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). But the district court shall modify a parenting-time order if it serves the children's best interests and does not change their primary residence. Minn. Stat. § 518.175, subd. 5 (2012). We will not reverse a parenting-time decision unless the district court abused its discretion by misapplying the law or relying on findings not supported by the record. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). Findings of fact will be upheld unless clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).

As an initial matter, father argues the district court had no authority to reject the parenting consultant's parenting-time modification because the stipulated judgment gives

[1] Because father filed this appeal while the motions for reconsideration were pending, the district court lacked jurisdiction to decide the motions. *See Rudnitski v. Seely*, 452 N.W.2d 664, 666 n.4 (Minn. 1990) (determining the district court lacked jurisdiction to decide a motion for reconsideration after a notice of appeal was filed). Accordingly, the reconsideration motions and related record are outside the scope of our review. *See Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 715-16 (Minn. App. 1997) (determining evidence presented with a motion for reconsideration is outside the record on appeal), *review denied* (Minn. Apr. 24, 1997).

the consultant binding authority to make parenting-time decisions and does not specifically provide for judicial review. We disagree. First, the parenting consultant's decision explicitly states that it will remain in effect unless "modified or vacated by district court." Second, a district court's judgment as to the best interests of the children takes precedence over a stipulation between parties as to how parenting-time issues should be resolved. *Simmons v. Simmons*, 486 N.W.2d 788, 791-92 (Minn. App. 1992); *see also Moylan v. Moylan*, 384 N.W.2d 859, 865 (Minn. 1986) (stating in the context of child support that "the welfare of the child takes precedence even if the case involves a stipulation").

Father's reliance on *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 290-91 (Minn. App. 2007), for the proposition that a district court cannot review decisions of a parenting consultant granted binding authority to resolve parenting-time disputes is misplaced. *Szarzynski* involved a parenting plan under Minn. Stat. § 518.1705 (2004) that authorized the parenting consultant to make binding decisions but, as here, did not expressly retain the district court's authority over parenting-time matters. 732 N.W.2d at 290. Notwithstanding that omission, this court observed that appellant could request unsupervised parenting time from the parenting consultant *or* move the district court to modify the parenting plan in order to grant the request. *Id.* at 290-91. In short, *Szarzynski* does not prohibit judicial review of a parenting consultant's decision.

With respect to the merits of the parenting-time modification, father argues the district court erred by not considering the children's best interests. We disagree. The court's findings of fact demonstrate careful consideration of the children's interests.

First, during weekends with father, the children often stay with his parents because father is at work. Second, Z.C.'s teacher stated there was no reason to modify parenting time. Third, there was no showing that the children preferred the modification; Z.C.'s statement that he "was used to" the new schedule does not express a preference, and B.C. is too young to express a preference. Fourth, father did not present evidence that he has addressed his long-standing gambling problem.[2] The record supports these findings and reveals that father submitted no evidence that modification of parenting time would serve the children's best interests. Moreover, the district court suggested that the modification request was motivated by father's desire to terminate his child-support obligation as evidenced by the fact that father only sought employment after the parenting consultant recommended equal parenting time. Because we discern no clear error in the district court's findings, we conclude the court did not abuse its discretion by denying father's motion to modify parenting time.[3]

II. The district court did not abuse its discretion by declining to modify child support.

The 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). The district court abuses its discretion by misapplying the law or setting support against logic and the facts on record.

[2] Although father asserts that he presented evidence that he has abstained from gambling with his motion to reconsider, such evidence is outside the record on appeal. *See Sullivan*, 560 N.W.2d at 715-16.

[3] Because the district court rejected father's motion for equal parenting time, the district court properly denied father's request that mother pay him child support. *See* Minn. Stat. § 518A.36, subd. 3(b) (2012) (stating when parents have equal parenting time but unequal incomes, the parent with the greater income must pay basic child support).

Gully v. Gully, 599 N.W.2d 814, 820 (Minn. 1999); *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). We will not alter findings of fact unless they are clearly erroneous. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002).

A. Financial support father receives from his parents is income for child-support purposes.

Child support is determined based on the gross income of each parent. Minn. Stat. § 518A.34(b)(1) (2012). Gross income is defined as "any form of periodic payment to an individual," Minn. Stat. § 518A.29(a) (2012), including payments regularly received as a gift from a dependable source, *Barnier v. Wells*, 476 N.W.2d 795, 797 (Minn. App. 1991). A valid gift requires (1) donative intent, (2) delivery, and (3) absolute disposition of the property. *Barnier*, 476 N.W.2d at 797. Whether a source of funds qualifies as gross income is a question of law, which we review de novo. *Sherburne Cnty. Soc. Servs. ex rel. Schafer v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992).

Father argues that the expenditures his parents make to meet his monthly living expenses are not income for child-support purposes. We disagree. First, the payments satisfy the three requirements of a gift: father's parents intend to pay his monthly expenses; payments are delivered in the form of prepaid credit cards and direct payments to father's creditors; and the payments are not loans for which his parents may assert a right to repayment. Second, the gifts are regularly received. Father's parents have paid his unmet monthly expenses since November 2008. Third, the payments are from a dependable source. There is no evidence the payments will stop in the near future;

father's parents stated they will continue to make these payments until father can take care of his finances.

Father next contends that the CSM's December 8, 2010 order established the law of the case, conclusively determining that payments from father's parents are not gross income. We are not persuaded. The law-of-the-case doctrine applies when an appellate court has ruled on an issue and then remands the case for further proceedings; it does not apply to prior decisions of the district court. *Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994). And the district court has continuing jurisdiction to modify an existing child-support order when changed circumstances make the order unreasonable or unfair. Minn. Stat. § 518A.39 subd. 2 (2012); *see also Angelos v. Angelos*, 367 N.W.2d 518, 519-20 (Minn. 1985). At the time of the December 8, 2010 order, father's parents had been covering his living expenses for two years. By the time of father's modification motion, his parents had been making regular payments for over three years, continued to pay even after father resumed working, and continued to indicate their intention to make payments as long as necessary.

Finally, father asserts that the support his parents provide is not income because the payments go directly to his creditors. *See Ramsey Cnty. ex rel. Pierce Cnty. v. Carey*, 645 N.W.2d 747, 751 (Minn. App. 2002) (concluding payments made directly to a disabled obligor's creditors were not gross income). We disagree. *Carey* involved unique facts; the obligor was totally disabled, unable to provide for himself, and living in his parents' home. *Id.* at 748-49, 751. On that record, this court declined to include the value of living expenses and care provided by the obligor's parents in his gross income.

Id. at 750-51. In contrast, father lives independently and is fully capable of and is working, albeit not at the income level for which he is qualified. We decline to extend *Carey* to the circumstances of this case. In sum, on this record, we conclude that the district court did not err by recalculating father's gross income to include financial support his parents provide on his behalf.

B. The district court did not commit reversible error when calculating father's gross income.

When, as here, an obligor is voluntarily underemployed, the district court "must" calculate child support based on potential income. Minn. Stat. § 518A.32, subd. 1 (2012). The district court may calculate potential income from (1) the parent's probable earnings based on employment potential, recent work history, and occupational qualifications; (2) the parent's unemployment compensation; or (3) the amount the parent could earn working full time at 150% of the current minimum wage. *Id.*, subd. 2 (2012).

Mother argues that the district court erred by calculating father's monthly income based on his earnings as a line cook and his parents' monthly contributions rather than considering his potential income as required by Minn. Stat. § 518A.32, subd. 2. We agree, but that does not end our analysis. We will not reverse a district court's order unless the error affects the parties' substantial rights. Minn. R. Civ. P. 61; *see also Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating the court will not "reverse a correct decision simply because it is based on incorrect reasons"). Father's parents have consistently paid his unmet monthly living expenses. The district court found, and the parties do not dispute, that father's monthly living expenses total $3,700. Accordingly,

the error is harmless. It does not matter whether the district court considered father's actual income of $1,667 or his potential income, as calculated by the CSM, of $2,739.29[4]; in both cases, father's gross income will be $3,700 because his parents will make up any deficiency.

Mother further asserts that the district court should have found that father's potential income is higher. We disagree. The CSM's finding that father's potential income is $2,739.29 was based on father's average earnings over the previous five years, which is permissible under the statute. *See* Minn. Stat. § 518A.32, subd. 2(1). We discern no abuse of discretion on this record. *See Rutten*, 347 N.W.2d at 50; *see also Murphy v. Murphy*, 574 N.W.2d 77, 82 (Minn. App. 1998) (reviewing imputation of income for an abuse of discretion).

Affirmed.

[4] The district court adopted the CSM's findings from the December 8, 2010 order, which determined father's potential monthly income was $2,739.29.