STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0550

In re the Marriage of:
Gregory P. Bambenek, petitioner,
Respondent,

vs.

Patricia L. Bambenek,
Appellant.

Filed December 24, 2012
Affirmed
Cleary, Judge

St. Louis County District Court
File No. 69-F3-97-600447

Cheryl M. Prince, Heather N. Kjos, Hanft Fride, A Professional Association, Duluth, Minnesota (for respondent)

Allison Maxim Carlson, Tara Smith Ruesga, Walling, Berg & Debele, PA, Minneapolis, Minnesota (for appellant)

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

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

CLEARY, Judge

Appellant challenges the district court's affirmation of the order of a child-support magistrate (CSM) denying her motion to modify child support and request for the right to

claim at least one of the parties' minor children as a dependent for tax purposes. Appellant claims that it was an abuse of discretion to exclude the cost of health-insurance premiums for respondent and his spouse, dividends received by respondent, and interest income received by the parties when calculating the parties' incomes for the purpose of determining child support. Because the district court did not abuse its discretion when calculating the incomes of the parties, we affirm.

FACTS

The marriage of the parties was dissolved in 1997. The dissolution decree awarded the parties joint legal custody of their three minor children and awarded appellant Patricia Bambenek sole physical custody, subject to respondent Gregory Bambenek's right to visitation. Respondent was ordered to pay $750 per month for child support. The parties were to each claim one child as a dependent for tax purposes, with the tax exemption for the third child being alternated between the parties annually. In 2002, a court order increased respondent's monthly child-support obligation to $1,050 and allowed him to claim all three children as tax dependents as long as he remained current on his child-support obligation.

In August 2011, appellant filed a motion requesting that a CSM increase child support and grant her the right to claim at least one of the two remaining minor children as a dependent for tax purposes. Respondent opposed the motion and requested that his child-support obligation be reduced. Both parties submitted copies of their 2010 federal income-tax returns in preparation for the motion hearing.

A hearing was held before a CSM in September 2011. Appellant testified that she receives income from her job as a teacher and from dividends and does not have income from any other source. Respondent testified that he is self-employed and is the president of two corporations: Water Stone Clinic, P.C., where he practices psychiatry and where his spouse works as the office manager, and Osmic Research Company, Inc., where he does research. Respondent testified that Osmic Research operated at a loss in 2010; that he receives wages from Water Stone; and that he does not have income from any other source. Respondent also testified regarding deductions listed on Water Stone's 2010 federal income-tax return, including a deduction for "[e]mployee benefit programs," which respondent stated was the amount paid by Water Stone for health-insurance premiums for himself and his spouse as employees of Water Stone. At the end of the hearing, the CSM requested that additional information regarding the tax deductions of Water Stone and Osmic be provided to him by the corporations' accountant. Following the hearing, an accountant did provide a letter addressing several deductions, but Water Stone's deduction for health-insurance premiums was not addressed.

The CSM subsequently issued an order explaining that he had calculated respondent's income based on respondent's 2010 wages from Water Stone, the income of Water Stone in 2010, and additional income that the CSM found had been shifted to respondent's spouse. For the purpose of determining the income of Water Stone in 2010, the CSM found that the amount paid by Water Stone for health-insurance premiums is an ordinary and necessary business expense, and thus that amount was not included in respondent's calculated income. Applying the parties' incomes to the child-support

guidelines, the CSM determined that respondent's basic monthly child-support obligation is $1,230. Because this amount is not at least 20% higher than the current support order, the CSM denied appellant's motion to modify child support and request for the right to claim at least one child as a dependent.

Appellant requested review of the CSM's order by a district court judge, and the district court issued an order that corrected some clerical errors and reapplied the parties' incomes to the child-support guidelines to reach a basic monthly child-support obligation of $1,241. Because this amount still is not at least 20% higher than the current support order, the district court affirmed the CSM. This appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion by denying appellant's motion to modify child support.

A district court "enjoys broad discretion in ordering modifications to child support orders." *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). A district court's order regarding child support should be reversed only if the appellate court is "convinced that the district court abused its broad discretion by reaching a clearly erroneous conclusion that is against logic and the facts on record." *Id.* Income determinations for the purpose of calculating child support are findings of fact. *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). An appellate court will set aside a district court's findings of fact only if they are clearly erroneous, and findings are clearly erroneous when the appellate court "is left with the definite and firm conviction that a mistake has been made." *Goldman v. Greenwood*, 748 N.W.2d 279,

284 (Minn. 2008) (quotation omitted). The appellate court views the record in the light most favorable to the district court's findings and defers to the district court's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000).

"A district court may modify an existing award for child support if the moving party shows a substantial change in circumstances that renders the award unfair and unreasonable." *Bormann v. Bormann*, 644 N.W.2d 478, 480–81 (Minn. App. 2002); *see also* Minn. Stat. § 518A.39, subd. 2 (2010).

> It is presumed that there has been a substantial change in circumstances . . . and the terms of a current support order shall be rebuttably presumed to be unreasonable and unfair if:
>
> (1) the application of the child support guidelines . . . to the current circumstances of the parties results in a calculated court order that is at least 20 percent and at least $75 per month higher or lower than the current support order . . . .

Minn. Stat. § 518A.39, subd. 2(b).

As calculated by the district court, application of the child-support guidelines to the parties' current circumstances results in a basic monthly child-support obligation of $1,241. Because this amount is not at least 20% higher than the current support order, appellant's motion to modify child support was denied. Appellant argues that the district court abused its discretion by excluding the cost of health-insurance premiums for respondent and his spouse, dividends received by respondent, and interest income received by the parties when calculating the parties' incomes, and that inclusion of these amounts would have resulted in a basic monthly child-support obligation that is at least 20% higher than the current support order.

A. Health-Insurance Premiums

For the purpose of calculating child support, "gross income includes any form of periodic payment to an individual." Minn. Stat. § 518A.29(a) (2010).

> [I]ncome from self-employment or operation of a business . . . is defined as gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses are . . . any other business expenses determined by the court to be inappropriate or excessive for determining gross income for purposes of calculating child support.

Minn. Stat. § 518A.30 (2010). "The court in its discretion must decide what expenses, if any, are allowable deductions." *Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009). "The person seeking to deduct an expense . . . has the burden of proving, if challenged, that the expense is ordinary and necessary." Minn. Stat. § 518A.30.

The CSM, in his discretion, found that the health-insurance premiums paid by Water Stone for the benefit of respondent and his spouse are an ordinary and necessary business expense of Water Stone. This finding, which was adopted by the district court, is supported by Water Stone's 2010 federal income-tax return and respondent's testimony and is not clearly erroneous. Appellant claims that the definition of ordinary and necessary business expenses "should be limited to reasonable out-of-pocket expenses necessary to produce income," but provides no authority for such a definition. Appellant also argues that respondent did not meet his burden of proving that the premiums are an ordinary and necessary expense because he failed to comply with the CSM's request that he submit additional information regarding the expense following the motion hearing.

But the weight and credibility to be given to testimony and evidence is for the trier of fact to determine. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The district court ultimately determined that the evidence was sufficient to support a finding that the premiums are an ordinary and necessary business expense of Water Stone.

Appellant argues that Minn. Stat. § 518A.29(a) requires that the amount paid for respondent's health insurance be included when calculating his income. That statute states: "Salaries, wages, commissions, or other compensation paid by third parties shall be based upon gross income before participation in an employer-sponsored benefit plan that allows an employee to pay for a benefit or expense using pretax dollars, such as flexible spending plans and health savings accounts." Minn. Stat. § 518A.29(a). The district court adopted the CSM's finding that the health-insurance premiums are paid directly by Water Stone to the insurer, not by respondent or his spouse to the insurer, and this finding is supported by respondent's testimony. Because this situation does not involve a benefit plan whereby Water Stone's employees pay for a benefit or expense using pretax dollars, Minn. Stat. § 518A.29(a) is not applicable. Appellant claims that, because respondent is the president and "key person" of Water Stone and Water Stone would not exist without respondent, the health-insurance premiums can be thought of as being paid directly by respondent. However, appellant cites no authority to support her argument that the corporate structure can be ignored.

B. Dividends and Interest Income

As previously stated, for the purpose of calculating child support, "gross income includes any form of periodic payment to an individual." Minn. Stat. § 518A.29(a). It is appropriate to consider interest income and dividends when determining income for the purpose of calculating child support. *See Dinwiddie v. Dinwiddie*, 379 N.W.2d 227, 229–30 (Minn. App. 1985).

Appellant argues that the district court abused its discretion by failing to include dividends received by respondent when calculating his income, while including dividends received by appellant when calculating her income. The 2010 joint federal income-tax return of respondent and his spouse does indicate that dividends were received, but there is no evidence indicating to which spouse the dividends were paid.[1] Respondent testified that, besides his income from his psychiatric and research work, he does not receive income from any other source, and the weight and credibility to be given to this testimony was for the district court to determine. *See Sefkow*, 427 N.W.2d at 210. Meanwhile, appellant's 2010 individual federal income-tax return indicates that she received dividends, and she testified that she did receive dividends.

Appellant also argues that the district court abused its discretion by failing to include interest income received by both parties when calculating their incomes. The 2010 joint federal income-tax return of respondent and his spouse does indicate that taxable interest was received, but there is no evidence indicating to which spouse this was

[1] For the purpose of determining child support, "[g]ross income does not include the income of the obligor's spouse and the obligee's spouse." Minn. Stat. § 518A.29(f) (2010).

paid, and respondent testified that he does not receive income from any source other than his psychiatric and research work. Appellant's 2010 individual federal income-tax return indicates that she received taxable interest, but she testified that, besides the income from her job and dividends, she does not receive income from any other source. Again, the weight and credibility to be given to the parties' testimony was for the district court to determine. *Id.*

The district court's findings regarding the parties' incomes are supported by the record and are not clearly erroneous. The district court did not abuse its discretion by denying appellant's motion to modify child support.

II. The district court did not abuse its discretion by denying appellant's request for the right to claim at least one child as a dependent for tax purposes.

The allocation of federal tax exemptions for dependent children is within the discretion of the district court. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999). While under the federal tax code a parent with primary custody of a minor child is entitled to claim the child as a dependent, "[t]he code does not preclude state district courts from allocating tax dependency exemptions to a noncustodial parent incident to the determination of child support and physical custody." *Rogers v. Rogers*, 622 N.W.2d 813, 823 (Minn. 2001). "Dependency exemptions are aligned with child support and may be modified upon a showing of a substantial change of circumstances . . . ." *Biscoe v. Biscoe*, 443 N.W.2d 221, 224 (Minn. App. 1989). Because there was no substantial change in circumstances necessitating

modification of child support, the district court did not abuse its discretion by denying appellant's request for the right to claim a dependency exemption.

Affirmed.