STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1021

In re the Marriage of:
Nathan Adam Schirmer, petitioner,
Appellant,

vs.

Gina Guidarelli,
f/k/a Gina M. Schirmer,
Respondent.

Filed May 27, 2008
Affirmed
Worke, Judge

St. Louis County District Court
File No. 69-F6-04-300146

Nathan A. Schirmer, c/o Shirley Huntsperger, 545 Fifth Street S.W., Chisholm, MN 55719 (pro se appellant)

Gina M. Guidarelli, 610 Aspen Avenue, Red Wing, MN 55066 (pro se respondent)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WORKE, Judge

On appeal in this child-support dispute, appellant argues that the district court (1) should have retroactively modified his child-support obligation to 2004 rather than just 2006; (2) failed to obtain the required information from respondent-mother; and (3) because of appellant's medical condition, should have allowed the individual who held his power-of-attorney to speak for him. Because the district court did not abuse its discretion in determining the extent of the retroactive support modification, because appellant failed to show that the district court erred in considering respondent's submitted information, and because appellant was not entitled to the assistance of a non-attorney in court, we affirm.

FACTS

In 2004, appellant Nathan Adam Schirmer and respondent Gina Guidarelli were divorced. At that time, appellant was employed as a salesman for a heating and cooling company; respondent was employed as a waitress. The parties shared legal custody, and respondent had sole physical custody of their two minor children. The district court found:

> [Appellant] claims that his net income is $1,513 per month, and [respondent] claims it is approximately $2,800 per month. . . . [T]he court sees no prejudice to either party to base the ongoing child support order on the best available evidence after review of [appellant's] income history for the entire calendar year of 2004, and will therefore modify the Decree to reflect a temporary amount of child support to be credited against the amount to be eventually awarded after determination of [appellant's] income for the entire calendar

> year, and the submission of further evidence relative to that income . . . by affidavit . . . or. . . evidentiary hearing . . . .

The district court ordered that

> [Appellant's] obligation for child support will be determined after his year end income is available, and until such order is made [appellant] shall pay as a credit against such child support the sum of $600 per month . . . .

Appellant did not submit further evidence of his 2004 income to the district court or request an evidentiary hearing. But in October 2005, appellant moved for a current and retroactive decrease in child support, arguing that he was disabled as a result of a car accident in 1995, he was unemployed, and his state medical insurance would not cover the children if they did not reside with him.

A child-support magistrate (CSM) determined that there had been a substantial change in circumstances making the previous support award unreasonable and unfair. The CSM found that appellant had terminated his former employment because it was too physically demanding for his medical restrictions, that he had been unemployed since February 2005, and he was currently receiving public assistance. The CSM found that appellant could return to work or school with restrictions, but he had not looked for work or investigated schooling. The CSM determined that appellant was voluntarily unemployed or underemployed and imputed to him income of 150 percent of the state minimum wage, with a net monthly income of $1,282, which resulted in a monthly support obligation of $385. *See* Minn. Stat. § 518.552, subds. 5b(d), (e) (2004). The CSM found that appellant had not presented the facts necessary for retroactive support

modification. Appellant did not seek review of this order by the district court or appeal it to this court.

In April 2006, appellant was seriously injured in a one-car accident, sustaining brain injuries and functional deficits. Appellant moved again for a prospective and retroactive modification of his child-support obligation. He submitted a W-2 form for 2005 showing gross earnings of $2,503 for 2005 and a statement that he had paid respondent $3,000 for child support. The CSM dismissed the motion without prejudice because the motion had not been signed by appellant or an attorney, and the CSM recommended that he consult an attorney.

In December 2006, appellant renewed his motion. After a hearing, the CSM found that appellant was currently unable to work and was receiving general assistance, there had been a substantial change in circumstances making the existing support order unreasonable and unfair, and appellant had presented the facts necessary to allow retroactive support modification. The CSM modified appellant's support obligation to $0, retroactive to May 1, 2006; however, the CSM did not reduce the arrearages or redetermine appellant's income under the 2004 judgment.

On review, the district court declined to modify the finding of appellant's 2005 income, noting that appellant had not appealed or moved to modify the 2005 order. This appeal follows.

D E C I S I O N

Appellant argues on appeal that the district court erred by failing to address the issue of redetermining his income as contemplated by the 2004 judgment. He maintains

that he is entitled to forgiveness of arrears and retroactive modification of child support based on his W-2 form for 2005 showing an income of $2,503, along with his payment of $3,000 in child support to respondent that same year.

When a magistrate's decision is affirmed on a motion for review, that decision becomes the decision of the district court. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). This court recognizes the district court's broad discretion in child-support matters and will not alter a district court's decision unless the court abused that discretion by resolving the matter in a clearly erroneous fashion that is "against [] logic and the facts on [the] record." *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999) (quotation omitted).

Although a party may appeal directly to this court from a CSM's order, the time limit for appealing a CSM's final order to this court is 60 days after service of notice of filing of the order. Minn. R. Gen. Pract. 378.01. And the time for filing for district-court review of a CSM's order is 20 days from the date of service of notice of filing of the order. Minn. R. Gen. Pract. 377.02. Appellant does not contest that he neither appealed the CSM's 2005 order to this court, nor filed a motion for district court review. Therefore, the district court is correct that, to the extent appellant seeks review of the 2005 order, his challenge is untimely.

Even if appellant's challenge were timely, we note that he did not seek redetermination of his income under the 2004 judgment, but instead requested a downward modification of child support because he was unemployed and disabled from a car accident in 1995. The district court did not err in concluding that appellant failed to

properly challenge the CSM's 2005 order modifying child support and imputing income to appellant. Further, appellant submitted no evidence of his 2004 or 2005 income to the CSM in 2005. A district court "is not required to make findings where the interested party fails to meet his burden to produce evidence on the issue." *Farrar v. Farrar*, 383 N.W.2d 436, 440 (Minn. App. 1986), *review denied* (Minn. May 22, 1986). And as the district court noted, the CSM imputed income to appellant based on the record of his work history and his medical restrictions. Appellant does not claim the CSM clearly erred in imputing income to him based on findings that in 2005 appellant failed to investigate work or schooling that would allow him to be employed consistent with those restrictions.

Appellant also challenges the district court's order retroactively modifying his child-support obligation to May 1, 2006, under Minn. Stat. § 518.64, subd. 2 (2004).[1] A child-support order may be modified on a showing of a substantial change in circumstances that makes the existing order unreasonable and unfair. Minn. Stat. §518.64, subd. 2. The burden of proof rests with the party moving for modification. *Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002). Although generally a modification may be made retroactive only to the date of service of the motion, an exception may be made when, as here, the district court finds that the party seeking modification is a recipient of public assistance. Minn. Stat. § 518.64, subd. 2(d)(2).

[1] Although the Minnesota legislature revised the child-support laws in 2005 and 2006, the revised modification statute, Minn. Stat. § 518A.39 (2006), applies only to motions filed after January 1, 2007. *See* 2006 Minn. laws ch. 280, § 44, at 1145.

Appellant argues that the district court should have modified support retroactively to 2004, not 2006, and should have considered his 2005 W-2 form in that analysis. But the CSM properly informed appellant at the hearing that he was responsible for providing information to the court for adjusting his income under the judgment, and two years was an unreasonable time to wait to request that adjustment. Although appellant asserts he had difficulty obtaining his 2005 W-2 form, he submitted no other wage or earnings information, such as pay stubs or cancelled checks. Because of this unreasonable delay, there was no abuse of discretion in failing to consider his untimely submitted evidence of 2005 income and declining to order further support modification retroactive to 2004 or 2005. *See* Minn. R. Evid. 403 (stating undue delay as consideration in exclusion of relevant evidence). We agree with the district court that appellant retains the additional remedy of filing a motion to request modification of his arrearages, without relitigating the 2005 order establishing his net monthly income. We note, however, that appellant does not contest respondent's assertion that the $3,000 he paid respondent for support in 2005 has been credited against the arrearages owed.

Appellant also argues that the CSM and the district court erred by failing to verify respondent's work status and income. But appellant fails to identify in what respect any information submitted by respondent was incorrect. Appellate courts cannot presume error. *Custom Farms Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976).

Finally, appellant argues that he was improperly precluded from using the assistance of an individual acting as his "power-of-attorney" at the 2006 hearing. But

that individual was not a licensed attorney, and under Minnesota law, only licensed attorneys may appear in court to represent parties in any action, unless the parties are appearing pro se. Minn. Stat. § 481.02, subd. 1 (2006). Further, the record shows that appellant, representing himself, competently engaged in dialogue with the court and submitted evidence, including medical documentation, which was carefully reviewed in evaluating his case.

Affirmed.