STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1778

In re the Marriage of:
Elizabeth Ann Boland, petitioner,
Respondent,

vs.

Thomas Francis Murtha, IV,
Appellant.

Filed August 5, 2008
Affirmed in part, reversed in part, and remanded
Muehlberg, Judge[*]

Stearns County District Court
File No. 73-F6-04-005138

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Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

Appellant challenges the district court's determination that modification of his child-support obligation was warranted only for a three-and-one-half-month period of transition, arguing that (1) he is not voluntarily underemployed and (2) even if he is voluntarily underemployed, the district court erroneously calculated his imputed income. We affirm the temporary reduction. But as more fully explained below, we remand for an extension of this transitional period to a more reasonable length and reverse the determination that appellant is voluntarily underemployed.

FACTS

The parties' seven-year marriage was dissolved January 11, 2005. Respondent Elizabeth Ann Boland was awarded sole physical custody of their minor child, born October 25, 2000. Appellant Thomas Francis Murtha, IV was ordered to pay respondent $1,177 per month in child support. At the time of dissolution, appellant earned approximately $87,000 per year as the Aitkin County Attorney. But in 2006, appellant's reelection campaign was unsuccessful. Appellant continued to serve as county attorney until the end of his term on January 2, 2007. That same day, appellant opened a solo law practice in the city of Aitkin. On January 17, 2007, appellant filed a motion to modify his child-support obligation.

The child-support magistrate (CSM) heard appellant's motion on March 22, 2007. Appellant testified that in the four-and-one-half-month period between losing the election in November 2006 and the child-support-modification hearing, he had submitted three

resumes seeking full-time employment as an attorney at "various firms in Brainerd." His post-hearing affidavit explained that "none of [these firms] had openings or were willing to make an offer that did not involve having a book of business." He testified he was "in the process" of "check[ing] out" firms in Duluth but he had not formally applied to them for employment. Appellant admitted that he had previously commuted from Aitkin to St. Cloud but he had not looked at any St. Cloud law firms, claiming he could not get a job in that area. Appellant also admitted he knew that the Stearns County Attorney's Office and a law firm were hiring, but he had not applied to either. Finally, appellant testified that he had "a possible offer with a firm in the Cities" but he did not have "a hard number" regarding his potential salary and could not give the court a definite timeline.

Appellant explained that he decided to start a solo practice in Aitkin based on his reputation after "talk[ing] to a number of people, judges, other attorneys in the area [who] felt that Aitkin was short of attorneys in private practice." His post-hearing affidavit stated that two solo practitioners had retired and closed their Aitkin practices in the past two years. Further, he claimed that case filings in Aitkin County were increasing. Appellant testified that he "hope[d] . . . that someday I can get to the $100,000 level that the other attorneys obtain . . . . I don't know if I can do that in a year." He stated, "In my research I also learned that it might take 2 to 5 years before I [am] able to make a profit [in solo practice] but in the long [run] I would be far better off and would more likely than not exceed the income I was making as County Attorney." He also stated, "I anticipate that this reduction in my income is only temporary and that within 2 to 5 years

I will be able to at least achieve the average income for a lawyer in the Northeast Region . . . $66,000.00."

Finally, appellant testified that he shared all expenses listed with his current wife, who also is employed as an attorney. The CSM noted that appellant failed to verify the claimed income of his current wife or her contribution to household expenses.

Appellant calculated his net income in solo practice would be $1,605 per month. But the CSM noted appellant did not verify his claimed business expenses used to calculate the net figures. Moreover, the CSM found that appellant failed to verify his purported job-search efforts: "[Appellant] has failed to establish a good faith effort to become employed." And because appellant did not provide a business plan or profit-and-loss statement, the CSM found he had not established he was entering private practice in good faith or that his underemployment was temporary.

Appellant argued that the CSM should consider and compare attorney incomes only in the immediate Aitkin area where attorneys have a median income of $66,215. But the CSM concluded that appellant's approach "belies reality" because (1) appellant conceded that his job search included the Twin Cities; (2) appellant had previously commuted from Aitkin to St. Cloud; and (3) appellant's assertion that he was "unemployable" in St. Cloud was not verified. The CSM found that appellant had the ability to earn $83,479 annually—constituting less than a 20% reduction from his prior income of $87,000—by averaging the median incomes for attorneys in (1) northeast Minnesota (Aitkin area); (2) central Minnesota (St. Cloud area); and (3) the Twin Cities area. Nevertheless, the CSM allowed appellant a three-and-one-half-month transitional

period (January 16, 2007 to April 30, 2007) to reach that income level, reducing his monthly child-support obligation to $213 and his health-insurance obligation to $21 because appellant had lost his county-attorney position involuntarily: "A transition period with a reduced obligation to allow [appellant] to become fully employed, if engaged in a good faith employment search, is warranted."

The district court affirmed the CSM's order in its entirety. The district court found "the [CSM] properly concluded that [appellant] was voluntarily underemployed" because (1) appellant's testimony that he applied for three jobs before opening his solo practice was insufficient to establish that he had made a good-faith effort to find employment to enable him to meet his current child-support obligation; (2) appellant failed to show that the decrease in his income was temporary; and (3) appellant failed to show that he opened his solo practice in good faith. The district court found the CSM's imputed-income calculation "was proper" because it was "[b]ased upon [appellant's] prior earning history, education, and job skills, and the availability of jobs within his community." Because appellant's income was not reduced by 20% with the imputed income, the district court concluded "the [CSM] correctly found that there was not a substantial change in [appellant's] circumstances under Minn. Stat. § 518A.39."

This appeal follows.

D E C I S I O N

When the order of a child-support magistrate (CSM) is confirmed by the district court, we review for abuse of the district court's discretion. *Davis v. Davis*, 631 N.W.2d 822, 825 (Minn. App. 2001). The district court's child-support determination will be

affirmed on appeal unless it is against logic and the facts on the record. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002).

I.

Appellant argues that the district court's judgment that he was voluntarily underemployed was an abuse of its discretion. We agree.

Child-support obligations may be modified upon the obligor's showing of substantially decreased gross income. Minn. Stat. § 518A.39, subd. 2(a)(1) (2006). There is a presumption that the current obligation is unreasonable if the obligor's income has decreased by 20%. *Id.*, subd. 2(b)(5) (2006). However, "potential income" is considered when calculating the child-support obligation if the obligor is voluntarily underemployed. Minn. Stat. § 518A.32, subd. 1 (2006). But an obligor is not considered to be voluntarily underemployed and income will not be imputed if the obligor shows that the underemployment (a) "is temporary and will ultimately lead to an increase in income" or (b) that it "represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." *Id.*, subd. 3 (2006).

It is undisputed that appellant's loss of the Aitkin County Attorney position was involuntary. And it is undisputed that at the time of appellant's motion requesting that his child-support obligation be modified his income had decreased substantially. But appellant, as the parent who was possibly underemployed, had the burden of proving that he fit within one of the two voluntarily underemployed exceptions to avoid imputation of potential income. *Id.* The district court explicitly found that appellant did not carry this burden. While we sympathize with the district court's frustration in being asked to

address appellant's motion without an adequately developed record, we are of the definite and firm conviction that three and one-half months is an insufficient length of time for an outgoing county attorney to develop a new, private-sector legal practice to its peak income capacity. *Cf. Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (stating that "[f]indings of fact are clearly erroneous where an appellate court is left with the definite and firm conviction that a mistake has been made") (quotation omitted). Appellant has the right to choose whether and how he will rely on his training at law and where he will practice, as long as his chosen career path is not part of a scheme to evade his child-support obligation. *See* Minn. Stat § 518A.32, subd. 3(2). And in this case, appellant was able to generate more than $13,000 in billed legal services in his first three months of private practice, and nothing in the record suggests he did so on any effort less than his best. On these facts, there is an insufficient basis to determine that appellant is currently voluntarily underemployed. We therefore affirm the district court's temporary reduction of appellant's child-support obligation, but we reverse its finding of voluntary underemployment and remand for an extension of the reduction period to a length consistent with a reasonable amount of time for the establishment of private law practice sufficient to meet the original child-support obligation. The district court may, in its discretion, reopen the record to reevaluate appellant's child-support modification request in light of this determination.[1]

[1] We note that at this point, assuming appellant has continued his practice, there may be more than 18 months of actual, verifiable information regarding appellant's income and his efforts to establish a financially viable law practice. We express no opinion regarding

Appellant also argues that the district court's imputation of income to him constituted an abuse of its discretion because the calculation included salary information from outside of Aitkin. We do not reach this issue in light of our holding.

Affirmed in part, reversed in part, and remanded.

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whether this time period represents a "reasonable" period or if more or less time is required, rather leaving this determination to the district court's discretion.