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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1924

Kathleen Sue Romuld, petitioner,
Respondent,

vs.

Scott Howard Romuld,
Appellant.

Filed August 19, 2008
Affirmed
Huspeni, Judge*

Ramsey County District Court
File No. 62-F2-00-001960

Scott Romuld, 60 Marie Avenue, St. Paul, MN 55118 (pro se appellant)

Kathleen Romuld, 1137 Mary Place South, Maplewood, MN 55119 (pro se respondent)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Huspeni, Judge.

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* 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

HUSPENI, Judge

Appellant challenges the district court's denial of his motion to modify his child-support obligation. Because the findings of the district court support its conclusions of law, there was no abuse of discretion, and we affirm.

FACTS

The marriage of appellant Scott Romuld and respondent Kathleen Romuld was dissolved in a judgment and decree dated May 6, 2002. The parties shared joint physical custody of their two minor children.

At the time of dissolution, appellant owned one business. Although it was apparently quite profitable in previous years, appellant closed it while dissolution proceedings were pending and stopped actively pursuing customers. But he continued to maintain it as a viable company. Following a trial determining appellant's income for child-support purposes,[1] the district court found that appellant had closed his business in bad faith and was deliberately limiting his income by failing to pursue business opportunities. The district court also found that appellant could revive the business if he so desired. Further, the district court noted the difficulty of determining appellant's actual income because he "is essentially self employed" and has the motive and ability to underreport his income. Based on these findings, the district court imputed to appellant a gross yearly income of $109,836, his five-year average earnings prior to the dissolution,

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[1] The record does not contain transcripts of these proceedings, as appellant apparently did not request them.

and consequently calculated appellant's child-support obligation using a net monthly income of $6,875. No appeal was taken from the dissolution decree.

Appellant first sought modification of his child-support obligation in late July 2005. Following a hearing, the child support magistrate (CSM) reaffirmed the district court's original findings and found that appellant failed to demonstrate he was unable to earn the level of income previously imputed to him. The CSM granted modification, however, to the extent necessary to recognize the parties' eldest child's emancipation. Appellant sought review of the order by the CSM who affirmed the previous order.

Appellant brought his most recent motion to modify his child-support obligation in April 2007; a hearing was apparently held before the CSM in May 2007, although appellant did not provide this court with the transcript. He submitted to the CSM his personal income-tax returns for 2005 and 2006. On the basis of these returns, the CSM found appellant's income for those years to be approximately $32,000 and $41,000, respectively. Appellant did not, however, submit his corporate tax returns. Moreover, appellant reported monthly living expenses of approximately $3,300. The CSM found that "[t]here is an ongoing disparity between [appellant]'s income and his monthly living expenses. He also pursues expensive hobbies, such as owning, flying and maintaining a vintage aircraft; and owning, driving and maintaining a vintage automobile." In light of the "ongoing disparity" between appellant's claimed income and his monthly living expenses, as well as the CSM's "inability to accurately ascertain [appellant]'s income," the CSM found that appellant's imputed income continued to be the same as in the past.

The district court affirmed the CSM's decision, adopting the CSM's findings in their entirety. This appeal followed.

DECISION

Appellant challenges the denial of his motion to modify his child-support obligation. District courts and CSMs have broad discretion in determining whether to modify child support. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. App. 2002). On appeal, we will not alter that decision absent an abuse of discretion. *Id.* A district court or CSM abuses its discretion if it resolves the matter in a manner that is against logic and the facts on the record. *Id.* Because appellant did not provide this court with a transcript of the modification hearing, however, our review is limited to determining whether the district court's factual findings support its conclusions of law. *Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002). In a modification proceeding, findings are sufficient if they "indicate that the relevant statutory factor . . . has been considered." *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (maintenance modification).

Appellant first challenges the district court's finding that appellant's income had not decreased since his child support was set.[2] When appellant sought modification

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[2] On appeal from a motion for review, we review the order from which the appeal is taken. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). Although appellant's brief is framed as challenging the CSM's decision, we note that he is actually appealing from the district court's decision on his motion for review. But "to the extent the reviewer of the CSM's original decision affirms the CSM's original decision, that original decision becomes the decision of the reviewer." *Id.* Because the district court affirmed the CSM's decision in its entirety and expressly adopted the CSM's findings,

based on changed income,[3] he was required to demonstrate a minimum change of at least 20% before an existing child-support obligation could be modified. Minn. Stat. § 518A.39, subd. 2(j) (2006); *see also Bormann*, 644 N.W.2d at 480-81 (stating that party seeking modification has burden of proving changed circumstances). Appellant argues that the federal income-tax returns he submitted in support of his motion "clearly demonstrated that his income is less than one-half of his prior income." Essentially, he claims that the district court should have found a decrease in income by comparing appellant's recent[4] income-tax returns to the income the district court had previously imputed to him. Appellant's argument lacks merit.

"Change," by definition, can only be measured against a baseline. *See Phillips v. Phillips*, 472 N.W.2d 677, 680 (Minn. App. 1991) (discussing proper baselines for different modification motions).[5] In this case, the district court set that baseline by

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the two decision are identical in substance. For the sake of clarity, therefore, we treat appellant's arguments as challenging the district court's findings.

[3] Because appellant brought the motion to modify an existing child-support obligation in April 2007, the district court decided it under Minn. Stat. § 518A.39, subd. 2(j) (2006), which limited the availability of modification during the 2007 calendar year.

[4] Appellant also argues that the district court erred because it failed to consider on review business tax returns not submitted to the CSM. But the district court's decision on review must be based on exhibits filed before the previous decision-maker, and the parties may submit new evidence only if the district court so requests. Minn. R. Gen. Pract. 377.09, subds. 3-4.

[5] Generally, that baseline is the obligor's circumstances when the obligation was originally set or most recently modified. *Phillips*, 472 N.W.2d at 680. Here, the original decree imputes to appellant net monthly income of $6,875 after providing detailed findings regarding appellant's circumstances. The October 29, 2005 order modified appellant's support obligation based on the emancipation of the parties' eldest child. In

imputing income to appellant based on his earning capacity. Ordinarily, earning capacity may not be used to determine a child-support obligor's income. *Gilbertson v. Graff*, 477 N.W.2d 771, 774 (Minn. App. 1991). A court may consider the obligor's earning capacity to measure income, however, "if it is either impracticable to determine an obligor's actual income or the obligor's income is unjustifiably self-limited." *Fulmer v. Fulmer*, 594 N.W.2d 210, 213 (Minn. App. 1999); *see also* Minn. Stat. § 518.551, subd. 5b(d) (2000) (permitting calculation of support obligation based on imputed income).[6] Indeed, earning capacity is commonly used to measure income where, as here, the obligor is self-employed, in light of a self-employed obligor's opportunity to underreport income. *Fulmer*, 594 N.W.2d at 213.

In the original decree, the district court found that

> faced with determining the [appellant]'s income, where the [appellant] is essentially self employed and has the opportunity and the motive to underreport his income and income abilities, concludes from his own statements against interest and other evidence that the [appellant] has deliberately and consciously failed to make a diligent effort to make his historical average income.

On modification, therefore, the baseline against which appellant's claims of decreased income must be measured is appellant's earning capacity. And in denying appellant's most recent motion for modification, the district court continued to impute income to

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doing so, however, the CSM specifically rejected appellant's argument that his income had decreased. Noting that appellant's argument for income-based modification was identical to his argument against the original imputation, the CSM apparently found that the circumstances underlying the original imputation continued.

[6] Minn. Stat. § 518.551, subd. 5b, was subsequently amended and renumbered as Minn. Stat. § 518A.32, subd. 1 (2006).

appellant as before, noting the existence of "an ongoing disparity between [appellant]'s income and his monthly living expenses." Reiterating the difficulty of accurately ascertaining appellant's self-employment income, the district court observed appellant's ability to maintain his previous lifestyle, including the continued pursuit of expensive hobbies.[7]

We are not insensitive to the apparent high threshold involved in demonstrating changed circumstances in a case, such as this, where support has been established based on imputed income. The district court, however, has never found that appellant "earns over $109,000 per year" as he suggests; it found that appellant *could* earn that amount, but deliberately chose not to. As the moving party, therefore, it was appellant's burden to demonstrate a decrease in his potential income: that his company failed to bear fruit despite his diligent efforts at tending it. Appellant's federal income-tax returns may be evidence of what, in reality, he has earned. The question of what he is capable of earning remains, unfortunately, unanswered, but is yet the standard against which changed circumstances must be measured. Without more, appellant's income-tax returns are insufficient to demonstrate that forces beyond appellant's control have prevented him

[7] Appellant takes issue with the district court's findings with respect to these hobbies, arguing that the district court erred by considering the fact that he still owns the vintage aircraft and vintage automobile awarded in the dissolution decree. But the original decree considered the cost of these hobbies as evidence of the difficulty in ascertaining appellant's income. For example, appellant had taken personal loans from one of his companies to buy and sell "unusual airplanes" such as a MiG-21, which is a Soviet-made fighter jet capable of supersonic flight. Wikipedia, *Mikoyan-Gurevich MiG-21*, http://en.wikipedia.org/wiki/Mig-21 (last visited July 31, 2008). And in denying appellant's most recent motion, it appears the district court was less concerned with appellant's continued ownership than it was concerned with the time, effort, and money appellant presumably devotes to such extraordinary recreational vehicles.

from earning an income commensurate with that imputed to him in the original decree of dissolution; a decree that was not subject to appeal.

Appellant also challenges the district court's refusal to recalculate his child-support obligation under the *Hortis/Valento* formula. That formula is presumptively applicable when the parents have joint physical custody; under it, separate support obligations are set for each parent. *Maschoff v. Leiding*, 696 N.W.2d 834, 837 (Minn. App. 2005). Essentially, each parent's support obligation covers the portion of time that the children are in the other parent's physical custody, and the two obligations are offset against one another, resulting in one net payment. *Id.*

Appellant asserts that both the initial May 6, 2002 child-support order and its subsequent modification on October 29, 2005, miscalculated the amount of his obligation under the *Hortis/Valento* formula. Appellant's brief, however, fails to identify the miscalculation that he claims occurred. Although it may at times be appropriate to disregard a pro se appellant's failure to comply strictly with the rules governing the contents of a brief, it remains appellant's responsibility to provide this court with sufficient information "to enable us to review questions he desires to raise on appeal." *See Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968) (requiring pro se appellants to provide the "material necessary for an understanding of the issues"). The conclusory assertions of error in appellant's brief do not discharge that responsibility. We treat such assertions of error as waived and will not consider them on appeal "unless prejudicial error is obvious on mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971).

Inspection here reveals no obvious error. Finally, and importantly, we note again that appellant did not appeal from the original decree. Nor did he appeal from the order addressing his first modification motion. If he believed that the calculation of his support obligation was erroneous, the proper avenue for relief would have been to appeal those decisions. *See* Minn. R. Civ. App. P. 103.03(a), (h) (providing right to appeal final judgments and modification orders).

Affirmed.