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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2057**

In re the Marriage of:

Blanca Margarita Zaldivar, n/k/a Castillo, petitioner,
Respondent,

vs.

Luis Roberto Rodriguez Zaldivar, a/k/a Ramiro Lazo,
Appellant.

**Filed August 5, 2008
Affirmed
Lansing, Judge**

Watonwan County District Court
File Nos. 83-F0-03-000426, 83-F1-03-000158

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appellant)

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Considered and decided by Worke, Presiding Judge; Lansing, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

LANSING, Judge

A child-support magistrate ordered Luis Zaldivar to pay ongoing child support and to reimburse Blanca Castillo for past child support. On appeal, Zaldivar argues that the magistrate improperly ordered retroactive child support and improperly found that he is voluntarily unemployed. By notice of review, Castillo argues that the magistrate failed to order sufficient reimbursement for past child support. We affirm.

FACTS

Luis Zaldivar and Blanca Castillo were married in El Salvador in 1993. They have one daughter who was born in 1996 and is now twelve years old.

In April 2003, Castillo and her daughter moved out of the family home in St. James, and in September 2003 Castillo began dissolution proceedings. In the interim Castillo obtained an order for protection against Zaldivar based on acts of domestic violence. In November 2003, the parties agreed to dissolve the marriage and bifurcate all other issues related to the marriage. After Zaldivar and Castillo reached an agreement on the remaining issues, the district court issued an order in April 2005 granting Castillo sole legal and physical custody of their daughter and reserving the issue of child support.

Following the 2005 stipulation, Zaldivar became dissatisfied with the settlement. Since dissolution proceedings began he has filed at least sixteen motions or petitions seeking to modify the terms of the separation and dissolution. The motions and petitions have all been denied. One of Zaldivar's motions for custody modification was previously

appealed, and we affirmed the denial of the motion. *Zaldivar v. Zaldivar*, No. A06-1427 (Minn. App. Dec. 5, 2006).

This current appeal arose after Watonwan County intervened to establish child support. Following a hearing, a child-support magistrate ordered Zaldivar to pay ongoing child support and to reimburse Castillo for past child support. It is this order that Zaldivar now appeals and Castillo notices for review.

D E C I S I O N

I

The dissolution judgment reserved the issue of child support. Because of the reservation, this appeal from an order setting child support is reviewed as an initial child-support determination. *See Mulroy v. Mulroy*, 354 N.W.2d 66, 68-69 (Minn. App. 1984) (holding that it was unnecessary to show changed circumstances to establish support after reservation). The district court has broad discretion in establishing child support. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). Child support is calculated based on the gross incomes of both parents. *See* Minn. Stat. § 518A.34(b) (2006) (providing formula for calculating child support). When a parent is voluntarily unemployed or the district court has no direct evidence of income, child support must be calculated based on potential income. Minn. Stat. § 518A.32 (Supp. 2007). In establishing child support, the district court must make written findings stating each parent's gross income. Minn. Stat. § 518A.37 (2006). Gross income includes potential income and "any form of periodic payment." Minn. Stat. § 518A.29 (2006).

The child-support magistrate ordered Zaldivar to pay \$320 each month in child support, the presumptive amount under the guidelines. In establishing child support, the child support magistrate found that Zaldivar is voluntarily unemployed and that he has a potential income of \$1,616 per month. Zaldivar challenges this decision on two grounds. First, he argues that the child-support magistrate failed to make a written finding stating his gross income. Second, he argues that the district court improperly found that he is voluntarily unemployed. We reject both arguments.

Zaldivar's first argument is not persuasive. The child-support magistrate did not expressly state that "Zaldivar has a gross income of \$0." But the magistrate did find that Zaldivar is voluntarily unemployed. The findings also discuss Zaldivar's other sources of income: "The Obligor claims that he pays his current monthly living expenses with help from other people and an inheritance. The Obligor provided no details or substantiation of these claims." Finally, the magistrate found that Zaldivar had a potential monthly income of \$1,616. Because gross income includes potential income and the magistrate found no other sources of income, the magistrate found that Zaldivar's gross income was \$1,616 per month. Thus, contrary to Zaldivar's argument, the child-support magistrate's findings were adequate.

Zaldivar's second argument is also unpersuasive. The child-support magistrate concluded that Zaldivar was voluntarily unemployed based on the fact that, from December 2005 through November 2006, Zaldivar had earned a monthly income of \$1,616 working at a beef company. Zaldivar, however, argues he is not voluntarily unemployed because he cannot legally obtain work under his current visa. The

magistrate did not accept this argument. Furthermore, even if Zaldivar was not voluntarily unemployed, the magistrate could properly calculate child support based on potential income because direct evidence of Zaldivar's income was unavailable. *See* Minn. Stat. § 518A.32 (2006) (requiring potential-income approach when direct evidence of income is unavailable).

Therefore, Zaldivar has presented no basis for concluding that the child-support magistrate—and thus the district court—abused its discretion when it ordered Zaldivar to pay ongoing child support.

II

In general, a child-support order is not retroactive. *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243-44 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2008). But reimbursement for past child support is available in certain situations:

A person or entity having physical custody of a dependent child not receiving public assistance as defined in section 256.741 has a cause of action for child support against the child's noncustodial parents. Upon a motion served on the noncustodial parent, the court shall order child support payments, including medical support and child care support, from the noncustodial parent under chapter 518A. A noncustodial parent's liability may include up to the two years immediately preceding the commencement of the action. This subdivision applies only if the person or entity has physical custody with the consent of a custodial parent or approval of the court.

Minn. Stat. § 256.87, subd. 5 (2006).

The child support magistrate, in addition to ordering ongoing child support, ordered Zaldivar to reimburse Castillo for past child support. The magistrate ordered payment of \$3,840, based on Zaldivar's income from December 2005 through November

2006. This period corresponds to the time when Zaldivar was employed at the beef company. The magistrate did not order reimbursement for any other portion of the two-year period encompassed by the statute.

Zaldivar argues that the district court's order constituted an improper retroactive application of child support under *Eisenschenk*. But the ordered child support was, in fact, a *reimbursement* for past child support expressly permitted by section 256.87. Because Castillo had custody of their child, she was entitled to obtain reimbursement.

Castillo, by notice of review, challenges the amount of reimbursement ordered. She argues that she should have received reimbursement for the entire two-year period. Castillo is correct that the statute uses the word "shall," which suggests a mandatory order. *See* Minn. Stat. § 645.44, subd. 16 (2006) ("'Shall' is mandatory."). But the statute also provides that the order is made "under chapter 518A." Minn. Stat. § 256.87, subd. 5. Chapter 518A provides that child support is based on potential income when the party is voluntarily unemployed. Minn. Stat. § 518A.32 (Supp. 2007).

In calculating the amount of reimbursement, the child-support magistrate ordered reimbursement for the time during the previous two years when Zaldivar was actually employed—December 2005 through November 2006. Thus, the magistrate evidently concluded that Zaldivar was unemployed, but not *voluntarily* unemployed, during the rest of the previous two years. By applying chapter 518A, the child-support magistrate could reasonably conclude that Zaldivar had no income that could be used for child support during that time period. Under these circumstances the district court could properly decline to order reimbursement for the entire two-year period.

We therefore conclude that the child-support magistrate—and thus the district court—did not abuse its discretion by ordering Zaldivar to reimburse Castillo for past child support for a period of less than two years.

Affirmed.