STATE OF MINNESOTA
IN COURT OF APPEALS
A09-619
A09-620

Karen M. Barrett, petitioner,
Respondent,
County of Anoka, intervenor,
Respondent,

vs.

Daniel T. Barrett,
Appellant.

Filed December 1, 2009
Affirmed
Stoneburner, Judge

Anoka County District Court
File No. 02F297009786

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Daniel T. Barrett, 4120 Sixth Street Northeast, Columbia Heights, MN 55421 (pro se appellant)

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

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

STONEBURNER, Judge

In these consolidated appeals, father challenges the portions of a March 2, 2009 order that deny compensatory visitation and modification of child support and custody and a March 17, 2009 order affirming denial of his request for reinstatement of his driver's license. Because we find no error or abuse of discretion by the district court in ruling on the issues challenged by father, we affirm.

FACTS

Appellant, Daniel T. Barrett (father) and respondent Karen M. Barrett (mother) were married in 1992. There are two children of the marriage: K.M.B., born February 27, 1993, and J.A.B., born April 29, 1995. Mother initiated dissolution proceedings in 1997. In September 1997, father and mother stipulated to temporary custody and temporary child support. This stipulation, which father now labels a deprivation of parental rights, appears to be the genesis of father's long-held perception that he has been unfairly treated in the dissolution and post-dissolution proceedings.

The marriage was dissolved by judgment dated January 11, 1999, as amended by an order dated February 12, 1999. Finding that the parties had no ability to deal cooperatively with parenting decisions, the district court denied father's request for joint legal and physical custody and awarded sole legal and physical custody of the children to mother subject to a detailed visitation schedule. Based on a finding that mother's net monthly income was $1,543.66 and father's net monthly income was $1,775.90, father was ordered to pay guideline child support of $532.77 per month. Father's $802.43

arrearage on temporary child support was forgiven in exchange for father's interest in mother's 401(k) retirement account.

Since the dissolution, father has engaged in unsuccessful, almost-nonstop litigation in both state and federal courts. He was fired from his job in 2001 due to poor work performance. Father blames his loss of work on the dissolution process which, he claims, forced him into poverty and stressful, time-consuming, pro se litigation, that, coupled with denial of visitation, resulted in headaches and inability to concentrate at work. Father has remained unemployed throughout most of the time since 2000, but, due to repeated findings that his unemployment and/or underemployment is voluntary, has been unable to obtain a reduction in child support or forgiveness of arrearages.

Mother has twice moved to have him held in contempt for failure to pay child support. As a result of the first motion, father spent six months in jail. In February 2004, as a result of mother's second contempt motion, father's driver's license was suspended and visitation was restricted. In 2006, mother successfully moved for further modification of visitation. Father asserts that mother's motions were granted without any findings by the district court and much of father's brief in this appeal is devoted to an attack on the orders that resulted from these motions.

In September 2008, father, through counsel, moved for: (1) modification of parenting time; (2) removal of a provision giving the children the right to refuse parenting time; (3) elimination of his child-care obligation retroactive to 2004; (4) granting father a tax exemption for J.A.B.; (5) a downward-deviation modification of child support; and (6) attorney fees. The parties, who were both represented by counsel at the hearing on

this motion, reached an agreement retroactively eliminating a portion of father's child-care obligation and setting the amount of future child-support based on father's then-current wages. Nonetheless, father filed a pro se supplemental motion requesting that the district court: (1) review past orders; (2) reopen the dissolution judgment and grant a new trial; (3) grant sole legal custody to father and joint physical custody to father and mother; (4) reverse all orders signed by the predecessor (now retired) judge; (5) eliminate all child support arrears; (6) eliminate orders awarding fees to mother; (7) reinstate appellant's driver's license; (8) order the State of Minnesota to stop cost-of-living increases from being applied to father's support obligation; (9) order the State of Minnesota and Anoka County to stop the accrual of child-support interest; (10) order the State of Minnesota and Anoka County to stop the collection of child support through tax levies; (11) reinstate father's tax exemption for one child; (12) hold a hearing on deprivation of parenting time caused by legal errors of the predecessor judge; (12) award father compensation for time spent in county jail; (13) modify father's child-support obligations; (14) order Anoka County to pay attorney fees for father and mother throughout their dissolution proceedings; and (15) award compensation to father for denial of access to the Anoka County Courthouse and law library while he was in jail.

The district court's November 5, 2008 order incorporated the parties' agreements on child-care expenses and child support, granted mother's request that a guardian ad litem (GAL) be appointed to evaluate father's parenting-time requests, and reserved decision on father's requests for an evidentiary hearing, modification of parenting time, and downward departure from the child-support guidelines, pending receipt of the GAL's

report. The district court denied father's oral motion to reinstate his driver's license because this issue was being addressed by the child support magistrate (CSM).

While these issues were pending, father filed a supplemental motion in January 2009, again requesting a new trial, review of previous court orders issued by the predecessor judge, modification of legal and physical custody, elimination of child-support arrears, reinstatement of father's driver's license, an end to cost-of-living adjustments to father's child-support obligation, an end to the accrual of child-support interest, an end to child-support collection through "levy" of taxes, "reinstatement" of father's tax exemption, post-deprivation-of-parenting-time hearing, compensation for time spent in jail, and attorney fees. A February 5, 2009 hearing date was scheduled for this motion.

When both father and mother objected to the district court's proposed adoption of the GAL's recommendations for parenting time, the district court combined the hearing on the issues reserved in October with the hearing on father's new motion. On February 5, 2009, the district court, without hearing oral argument on the issues, announced its ruling from the bench based on the written arguments of both parties that had been submitted to the district court prior to the hearing. The district court's written decision followed on March 2, 2009, granting, in part, father's motion for increased parenting time, but denying all of father's other requests, including his request for reopening of past orders and the judgment, forgiveness of arrearages, and reduction in child support.

In February 2009, a CSM denied father's motion for reinstatement of his driver's license. The district court affirmed this ruling by order dated March 17, 2009. Father's subsequent appeals from the March 2 and March 17, 2009 orders were consolidated.

D E C I S I O N

I. The district court did not err or abuse its discretion by declining to hold an evidentiary hearing on father's motion to modify custody and did not err in denying father's motion for custody modification.

Father's pro se appellate brief identifies ten issues, many of which relate to the district court's denial of father's request to reopen the 1999 judgment and vacate all orders issued by the predecessor judge. Father complains that the parties were not allowed to argue or present evidence at the February 5, 2009 hearing and asserts that the district court erred by failing to hold an evidentiary hearing on his October 2008 and January 2009 motions.

A transcript of the February 5, 2009 hearing reflects that neither party objected to the district court's statement that it would proceed directly to ruling on the pending motions based on the written submissions of the parties. Father spoke at the hearing, but the district court stopped him when it became apparent to the district court that father merely wanted to reiterate his written arguments and was not seeking to make any new arguments. "Motions, except for contempt proceedings, shall be submitted on affidavits, exhibits, documents subpoenaed to the hearing, memoranda, and arguments of counsel unless otherwise ordered by the court for good cause shown." Minn. R. Gen. Pract. 303.03(d). Because both parties in this case had a full and fair opportunity to present evidence and arguments to the district court in writing and because neither party sought

to introduce new arguments or evidence at the February 5 hearing, the district court did not commit any error or abuse its discretion by failing to allow additional argument at the February 5, 2009 hearing.[1]

The district court is required to continue a prior custody order unless a child's present environment endangers the child and the advantage of a change outweighs any harm likely to be caused by a change. Minn. Stat. § 518.18(d)(iv) (2008). "A district court is required under section 518.18(d) to conduct an evidentiary hearing *only* if the party seeking to modify a custody order makes a prima facie case for modification." *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (emphasis added); *see Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007) (stating that "[w]hether a party makes a prima facie case to modify custody is dispositive of whether an evidentiary hearing will occur on the motion").

In this case, the district court found that father failed to make a prima facie case of endangerment and therefore was not entitled to an evidentiary hearing on his motions for custody modification. Father's brief on appeal does not challenge the district court's finding that he failed to show endangerment. Father's focus, rather, is on allegations of

[1] Father complains that the district court denied his request for the district court to interview the children, but does not cite any authority supporting an argument that this denial was error or abuse of discretion. An assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971)). In this case, the GAL interviewed both children as part of her thorough report to the district court. There is no obvious error in the district court's decision not to interview the children; therefore the issue is waived on appeal.

error in prior custody orders. But those orders are not relevant to the determination of the motion that was before the district court on February 5, 2009. The district court correctly examined father's pending motion in light of the children's current circumstances. And our painstaking review of the record leads us to conclude that the district court did not abuse any discretion that it may have had to hold an evidentiary hearing despite father's failure to make a prima facie case of endangerment when it declined to exercise that discretion by holding an evidentiary hearing. While the record contains evidence of the younger child's desire to spend more time with her father, nothing in the record suggests that she is endangered in mother's custody. Furthermore, the district court granted father increased parenting time with both children and removed the option for the children to decline parenting time, thereby honoring the child's request for more time with her father. The district court did not err or abuse its discretion by deciding father's parenting-time-modification motions without an evidentiary hearing.

It is not clear whether father's arguments on appeal about the district court's failure to make particularized findings relate only to past orders issued by the predecessor judge or extend to the orders being appealed. To the extent that father is challenging the orders on appeal, his argument lacks merit. There is no requirement that a district court make particularized findings when denying a request to modify custody. A remand for additional findings is not required.

II. The district court did not err by denying father's request to reopen the judgment and/or vacate previously entered orders.

A substantial part of father's current brief on appeal constitutes an attack on the proceedings that occurred and orders issued from the inception of the dissolution proceedings through 2004. It is not clear under what statutory provision father seeks to reopen the 1999 judgment. The only statutory provision he cites is Minn. Stat. § 518.145, (2008) (providing, in relevant part that the district court may relieve a party from a judgment based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial" or "fraud, ...misrepresentation or other misconduct of an adverse party" under the civil rules). But father does not argue that there is any such newly discovered evidence or misconduct by an adverse party in this case. Despite father's citation to numerous cases involving reopening dissolution judgments, he has failed to demonstrate the existence in this case of any basis for reopening the judgment.

Father's primary argument is that the predecessor judge made errors of law, but the avenue for correction of such errors was appeal, the deadline for which has long passed for all orders issued by the predecessor judge. *See* Minn. R. Civ. App. P. 104.01, subd. 1 (providing that "[u]nless a different time is provided by statute, an appeal may be taken. . .from an appealable order within 60 days after service by any party of written notice of its filing"). Compliance with this rule is required for an appellate court to properly exercise jurisdiction. *Marzitelli v. City of Little Canada*, 582 N.W.2d 904, 907 (Minn. 1998). Therefore, in addition to failing to set forth any valid ground for reopening the 1999 judgment, father's request to reopen the judgment is untimely, as the district court correctly held. We are not insensitive to the financial burden involved in an appeal,

and we are not unaware that, except in rare circumstances, family-law litigants are not entitled to publicly funded lawyers to pursue appeal. Nonetheless, failure to timely challenge an order by appeal makes that order final. *See Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005) (stating that "[i]t is axiomatic that a judgment or appealable order becomes final if a timely appeal is not taken").

III. The district court did not err or abuse its discretion by failing to deviate from the child-support guidelines.

Whether to modify child support is discretionary with the district court, and its decision will be altered on appeal if it resolved the matter in a manner that is against logic and the facts on the record. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002); *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986).

Father argues that, concerning his motion for a downward departure from support guidelines, the district court failed to consider father's financial resources or needs. But, in October 2008, the district court reserved father's motion for a downward departure from support guidelines and allowed father the opportunity to submit the financial information necessary to a determination of this issue. Father failed to submit additional information, and the lack of supporting documentation is the specific reason given by the district court for denying father's motion for a departure. "[A] party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question." *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

Father also complains that the district court never considered medical evidence concerning his ability to work.[2] But there is no documentation in the record to support a finding that father currently has a physical or mental health problem that prevents him from working full-time. And the district court has never found father credible in his assertions that medical problems account for his unemployment. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (stating that appellate courts defer to trial court credibility determinations). Because father did not provide financial or medical documentation to support his motion for a departure from guidelines or any other modification of his child-support obligation, the district court did not abuse its discretion in denying appellant's request for child support modification. And, under Minn. Stat. § 518A.39, subd. 2(e) (2008), a modification of support "may be made retroactive *only* with respect to any period during which the petitioning party has pending a motion for modification . . ." (Emphasis added). Therefore the district court lacked authority to forgive arrears accruing before father filed his most recent motion for modification.

IV. Father's constitutional challenges to the child-support guidelines and garnishment procedures are procedurally barred and without merit.

Father argues that the Minnesota child-support guidelines violate his constitutional rights to equal protection and due process and that garnishment procedures also deprive him of his Constitutional rights. Additionally, father argues that Minn. Stat. § 518A.65(a) (2008)–which allows the suspension of a child-support obligor's driver's

[2] It appears that father's argument about the district court's failing to consider medical evidence primarily relates to orders issued by the predecessor judge that are not relevant to this appeal.

license when the obligor is delinquent in payments in an "amount [at least] three times the obligor's total monthly support. . .payment"–is unconstitutional because it "does not protect the obligor from injustices" and "violates a father's right to visitation."

Father's constitutional challenges are procedurally barred because the record does not reflect that the Minnesota Attorney General was properly notified of a constitutional challenge to the statutes at the district court level required by Minn. R. Civ. P. 5A(2). Additionally, father's constitutional challenges to Minn. Stat. § 518A.65 (2008)[3] (providing for driver's license suspension as a child-support enforcement remedy) and Minn. Stat. § 571.922(4) (2008) (permitting garnishment of 65 percent of a judgment debtor's disposable income for child support under specified circumstances) are insufficiently articulated and briefed to permit appellate review. *See Modern Recycling*, 558 N.W.2d at 772 (stating that an assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection (quotation omitted)).[4]

And the child-support guidelines have previously been held to be constitutional. In *Doll v. Barnell*, this court, recognizing the state's substantial interest in ensuring child support for the state's children, rejected constitutional challenges to the guidelines statute and held that Minnesota's statutory child-support guidelines do not violate equal protection or due process. 693 N.W.2d 455, 466 (Minn. App. 2005), *review denied*

[3] This provision was formerly codified as Minn. Stat. § 518.551, subd. 15 (2004).
[4] *See* George L. Blum, Annotation, *Validity, Construction, and Application of State Statutes Providing for Revocation of Driver's License for Failure to Pay Child Support*, 30 A.L.R. 6th 483, §§ 4–6 (2008), citing cases that have rejected due-process and equal-protection objections to license revocation as a mechanism to enforce child support.

(Minn. June 14, 2005). The district court did not err by failing to declare the child-support guidelines unconstitutional.

V. Denial of father's request for reinstatement of his driver's license was not an abuse of discretion.

When a district court affirms a CSM's ruling, the CSM's ruling becomes the ruling of the district court, and this court reviews the district court's decision. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004), as amended (Jan. 30, 2004). We review the district court's decision in a child-support matter for an abuse of discretion. *Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001). A district court abuses its discretion when its ruling is against logic and the facts on record, *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984), or when it misapplies the law, *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998).

Minn. Stat. § 518A.65(b) provides:

> If a public authority responsible for child support enforcement determines that the obligor has been or may be issued a driver's license by the commissioner of public safety and the obligor is in arrears in court-ordered child support or maintenance payments or both in an amount equal to or greater than three times the obligor's total monthly support and maintenance payments and not in compliance with a written payment agreement pursuant to section 518A.69 that is approved by the court, a child support magistrate, or the public authority, the public authority *shall* direct the commissioner of public safety to suspend the obligor's driver's license. The remedy under this section is in addition to any other enforcement remedy available to the public authority.

(Emphasis added.) An obligor can avoid suspension by entering into a payment agreement approved by the public authority (Minn. Stat. § 518A.65(c)). And an

obligor whose driver's license has been suspended may move for reinstatement (Minn. Stat. § 518A.65(e)(2)). Father sought reinstatement under Minn. Stat. § 518A.65(e)(2), which provides, in part, that if an obligor's motion for reinstatement is granted, the district court or CSM must establish a written payment agreement.

Based on the evidentiary hearing on father's reinstatement motion, the CSM found that father, who was $75,000 in arrears at the time of the hearing, had paid "some" support between September 22, 2008, and November 14, 2008, but, at the time of the hearing, was unemployed, was not pursuing all available jobs in his neighborhood, and had failed to enter into a payment agreement with the public authority. Father does not challenge any of these findings as clearly erroneous. Based on the record before us, we cannot conclude that the district court abused its discretion by denying father's request for reinstatement of his driver's license.

VI. The district court did not abuse its discretion by denying father's request for attorney fees.

Father acknowledges the district court's broad discretion with regard to attorney fee awards. *See Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (stating that the standard of review for attorney fee awards is abuse of discretion); *Burns v. Burns*, 466 N.W.2d 421, 424 (Minn. App. 1991) (stating that "only rarely will a [district] court's decision regarding attorney fees be overturned on appeal").

Father does not appear to be appealing the failure to award attorney fees with regard to the 2009 orders he is appealing. Rather his argument appears to be related to the predecessor judge's denial of his request for appointment of appellate counsel to challenge orders that have long since become final. Father also argues that in the past he was denied access to the Anoka County Law Library by the Anoka County Court Administrator. His request is for an order requiring Anoka County and the State of Minnesota (not mother) pay his attorney fees. Because father's arguments concerning attorney fees are unrelated to the orders on appeal and because he cites no authority for his argument that his fees should be paid by the county or the state, we decline to address these issues. We note, however, that the district court did not abuse its discretion by failing to award attorney fees to either party in connection with the orders on appeal.

Affirmed.