STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1006

In re the Marriage of: Jason John Braatz, petitioner,
Appellant,

vs.

Jessica Rae Braatz,
Respondent,

and

County of Meeker, intervenor,
Respondent.

Filed March 9, 2010
Affirmed
Minge, Judge

Meeker County District Court
File No. 47-FA-06-1805

David T. Johnson, Paynesfille, Minnesota (for appellant)

Kim Keithahn, Thomton, Sperry, Jensen & Keithahn, Ltd., Litchfield, Minnesota (for respondent)

Stephanie Beckman, Meeker County Attorney, Elizabeth Cummins, Assistant County Attorney, Litchfield, Minnesota (for Meeker County)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Schellhas, Judge.

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

MINGE, Judge

On appeal in this child support dispute, appellant-father argues that (1) the child support magistrate (CSM) should not have found him voluntarily unemployed when he separated from the military to enroll in college; and (2) if voluntarily unemployed, the CSM erred in imputing income. We affirm.

FACTS

Appellant Jason Braatz and respondent Jessica Braatz are the parents of a child who resides with mother. The parties are divorced. In a May 20, 2008 order, the CSM ordered father to pay $526 monthly in child support and $166 for child care. At the time of the May 20 order, father was a member of the United States Air Force, with a gross monthly income of $3,913.

On December 1, 2008, father voluntarily left the military. He testified that after his divorce he concluded that it was time to transition to a new career. Because his military work experience with munitions was not readily marketable outside of the military, father decided to enroll in a college-degree program to improve his prospects of earning a civilian income comparable to what he had been earning in the Air Force. On January 12, 2009, father began taking on-line courses for a bachelor's degree in operations management at Minnesota State University – Moorhead. Since leaving the military, father has not been employed and has no plans to seek full- or part-time employment while studying for his degree. Although father hopes to ultimately obtain employment as an "operations manager," the record indicates that he had not investigated

specific employment prospects before leaving the military and that he does not know the job prospects or income opportunities in the operations-management field. While enrolled in the Minnesota-based, on-line program, father continues to live in Georgia, his residence when he left the military.

Shortly after leaving the military, father moved to modify child support. At a January 16, 2009 hearing on this motion, father argued that child support should be reduced because he was now unemployed and could no longer obtain medical insurance for his daughter through the military. The CSM found that father was voluntarily unemployed and that "based on his employment history / education / job skills," his potential income was $3,913 per month. Using this figure and its finding regarding mother's potential income, the CSM determined that "there has not been a substantial change in circumstances that renders the existing child support and child care order unreasonable and unfair."[1] Accordingly, the CSM denied father's motion to modify the child support and child-care obligations. After father's motion for review, the CSM made incidental modifications to the prior order; however, the child support determinations were unchanged. This appeal follows.

D E C I S I O N

I.

The first issue is whether the CSM clearly erred in finding that Jason was voluntarily unemployed. We apply the same standard of review to a CSM's decision as

[1] On appeal, neither party contests the determination by the CSM that "there has been a substantial change in circumstances that renders the existing medical support order unreasonable and unfair."

to a district court's decision. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. App. 2002). Appellate courts will not reverse the factual finding that a parent is voluntarily unemployed unless it is clearly erroneous. *See Butt v. Schmidt*, 747 N.W.2d 566, 575 (Minn. 2008) (whether a parent is voluntarily unemployed is a finding of fact); *Putz v. Putz*, 645 N.W.2d 343, 352 (Minn. 2002) (same); Minn. R. Civ. P. 52.01 ("Findings of fact . . . shall not be set aside unless clearly erroneous . . . ."). When reviewing factual findings, appellate courts view the record in the light "most favorable to the findings." *Frauenshuh v. Giese*, 599 N.W.2d 153, 156 (Minn. 1999). The moving party bears the burden of proof in a proceeding to modify child support. *Johnson v. Johnson*, 304 Minn. 583, 584, 232 N.W.2d 204, 205 (1975); *Gorz v. Gorz*, 552 N.W.2d 566, 569 (Minn. App. 1996).

There is a rebuttable statutory presumption "that a parent can be gainfully employed on a full-time basis." Minn. Stat. § 518A.32, subd. 1 (2008). However, by law, a parent is not voluntarily unemployed if, among other things, "(1) the unemployment . . . is temporary and will ultimately lead to an increase in income; [or] (2) the unemployment . . . represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." *Id.*, subd. 3.

Father argues that he is not voluntarily unemployed because he meets the first statutory condition: he is making a bona fide career change and he is enrolled in college to improve his income. The record is clear that father is making a career change. However, we note that there is no evidence in the record that his income will increase. Father testified that he did not investigate job opportunities as an "operations manager,"

and that he does not know what wage he could expect to be paid if he finds an "operations manager" job. Moreover, the record indicates that father could have pursued his education while remaining in the military, without losing income.

The second statutory condition requires the CSM to compare the right of a parent to make a bona fide career change against the adverse effects of decreased income on the child. *Id.* In reviewing the record for clear error, we note that there is no evidence that the adverse effects of the decreased income on the child are offset by the importance to father of leaving the military. In fact, father does not explain the considerations that induced him to separate from the Air Force or provide helpful evidence of the opportunities as an operations manager. Similarly, father offered no evidence that leaving the military benefits the child.

On appeal, father asserts for the first time that leaving the military "enhances his ability to remain close with his daughter" by eliminating military travel. But because this argument was not raised below, we will not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that appellate courts will generally not consider matters not argued to and considered by the district court). And even if we did consider this argument, there is no evidence in the record that remaining in the military would have diminished father's ability to remain close with his daughter. We note that father, who is not employed, continues to live in Georgia and take Minnesota college courses in an on-line program. Even out of the military, he has chosen to live half a continent away from his daughter.

Father also argues that the CSM clearly erred by finding him voluntarily unemployed when nothing in the record indicates that he made the decision in bad faith. This court recently discussed the importance of evidence of bad faith:

> In 1991, the legislature adopted the provisions of 1991 Minn. Laws ch. 292, art. 5, § 76, at 1901-02, some of which are now included in Minn. Stat. § 518A.32 (2008). Section 518A.32 allows the district court to impute income for the purposes of computing child support when the obligor is "voluntarily unemployed or underemployed." These provisions do not require the district court to find bad faith in order to impute income. *See Walker v. Walker*, 553 N.W.2d 90, 95 n.1 (Minn. App. 1996) (stating that in determining child support after 1991 Minn. Laws ch. 292, art. 5, § 76, "courts are no longer required to find bad faith before considering an obligor's earning capacity").

Melius v. Melius, 765 N.W.2d 411, 415 (Minn. App. 2009). Thus, no finding of bad faith is required.[2]

In sum, we conclude the CSM's finding that father was voluntarily unemployed is not clearly erroneous.

[2] The CSM made no finding on whether father's decision to leave the military was made in good or bad faith. Contrary to father's assertions, however, the record does contain evidence that his decision may have been made in bad faith. Mother testified that she suspected that father made the decision to quit the military "not in [the child's] best interest and not in his either, but to kind of get back at me." She elaborated:

> I question his motive for leaving the military, because he . . . can pursue his degree while he was in the military. And as we were going through the divorce, since we were married for 10 years, I was entitled to a portion of his retirement and he was the whole time he was oh you're not going to get a dime of my retirement. I'm not paying for you for the rest of my life . . . .

II.

The second issue is whether the CSM clearly erred in determining father's potential income for child support. The determination of a parent's potential income for purposes of child support is a finding of fact that will not be set aside unless it is clearly erroneous. *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003).

The statute provides that when a parent with a child support obligation becomes voluntarily unemployed, the finder of fact has alternate bases for determining imputed income including "employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community." Minn. Stat. § 518A.32, subds. 1, 2(1) (2008). Here, based on father's "employment history / education / job skills," the CSM determined that his potential income was $3,913, his prior Air Force level of compensation, and calculated child support accordingly.

Father argues that the CSM erred by focusing on his military income and ignoring the job market in Georgia where he lives. Father relies on *Kuchinski v. Kuchinski*, 551 N.W.2d 727 (Minn. App. 1996). In *Kuchinski*, the obligor parent had been paying child support based on her income as a secretary in Minnesota. *Id.* at 728. She quit, moved to Kentucky, and asked the district court to suspend her child support obligation until she obtained new employment. *Id.* Although she did not know her employment prospects in Kentucky, she "had been 'told secretaries in Kentucky only make . . . less than half' of what she made in Minnesota." *Id.* The district court found that she was voluntarily

unemployed and ordered that her child support obligation continue unchanged. *Id*. at 728-29. Although this court agreed that she was voluntarily unemployed, we reversed and remanded because the district court should have determined her income based on employment in Kentucky, not Minnesota. *Id*. at 729.

The case before us differs from *Kuchinski* in important respects. Unlike the obligor parent in *Kuchinski*, who moved from Minnesota to Kentucky, father has not moved from one community to another. He was living in Georgia while in the military and he has continued to live in Georgia since leaving the military. Also, unlike the obligor parent in *Kuchinski*, where it was undisputed that mother could not continue in the same job receiving the same pay because she had moved to a new state that apparently had a lower wage scale, here father claims, but mother does not agree, that wages are lower in Georgia. Father provides no support for the claim that Georgia is a low-wage area. There was no basis for taking judicial notice of Georgia as being a low-income state or lacking in employment opportunities. Furthermore, there is no evidence that father could not work in Georgia for the same pay. In fact, mother testified that father could have continued to serve in the military with his former income and complete his degree at the same time. Finally, the record does not indicate why father is attached to Georgia. He is not employed there, and he is enrolled (on-line) in a degree program at a Minnesota college.

We conclude that the CSM's determination that father's potential income was $3,913 was not clearly erroneous and affirm.

Affirmed.