STATE OF MINNESOTA
IN COURT OF APPEALS
A07-763

In re the Marriage of:
Jacci Kay Lynch, petitioner,
Respondent,

vs.

David Lowell Peter Lynch,
Appellant,

County of Mower,
Intervenor.

Filed June 3, 2008
Reversed and remanded
Johnson, Judge

Mower County District Court
File No. 50-F1-00-000295

Jacci Kay Lynch, 570 Fourth Avenue Southeast, Wells, MN 56097 (pro se respondent)

David Lowell Peter Lynch, 10660 Commodore Drive, Anchorage, AK 99507 (pro se appellant)

Kristen Marie Nelsen, Mower County Attorney, 201 First Street Northeast, Austin, MN 55912 (for intervenor)

Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Collins, 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

JOHNSON, Judge

Jacci Kay Lynch and David Lowell Peter Lynch were divorced in 2000. Jacci Lynch was awarded custody of their only child, and David Lynch was ordered to pay child support. After David Lynch remarried and moved to Alaska to take a higher-paying job, Mower County moved to increase his child-support obligation. In recalculating David Lynch's income, the child support magistrate (CSM) included an unusual "territorial cost-of-living allowance" that David Lynch, an employee of the federal government, received because he lives in a remote area with a relatively high cost of living. On appeal, David Lynch argues that the territorial cost-of-living allowance should not be considered in determining his child-support obligation. We agree and, therefore, reverse and remand.

FACTS

David Lynch and Jacci Lynch were married in January 1998 and divorced in September 2000. Their son, Justice Lynch, was born one year before the divorce. (For the sake of clarity and simplicity, we will refer to the former couple by their first names in the remainder of this opinion.)

Prior to the dissolution of their marriage, David and Jacci lived in Austin. David is an employee of the United States Postal Service. At the time of the dissolution decree, he had a net monthly income of $1,688, which gave rise to a child-support obligation of $422 per month. Cost-of-living adjustments in 2002 and 2006 increased that obligation to $487 per month.

In approximately June 2006, David moved to Anchorage, Alaska. He continues to work for the Postal Service. At the time of his move, he received an increase in his base pay because he assumed a position with more responsibility. In addition, he began receiving a territorial cost-of-living allowance equal to 24% of his base pay.

In November 2006, Mower County intervened, as permitted by Minn. Stat. § 518.551, subd. 9(b) (2004), and moved for a modification of David's child-support obligation based on a change in circumstances. In a written order granting the motion for modification, the CSM determined that there was a change in circumstances that made David's existing child-support obligation unreasonable and unfair. *See* Minn. Stat. § 518.64, subd. 2(a)-(b)(1) (2004). The CSM found that David's net monthly income is $3,080 without the territorial allowance and $3,955 with the territorial allowance. Using the higher of those two figures, the CSM concluded that David's child-support obligation should be increased to $989 per month. David appeals.

D E C I S I O N

Whether to modify a child-support obligation is within the CSM's discretion, and that decision will not be disturbed on appeal unless it is against logic and the facts on record. *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986). On appeal from a CSM ruling, the standard of review is the same as it would be if the decision had been made by a district judge. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. App. 2002).

I. Federal Territorial Cost-of-Living Allowance

David's primary argument is that the CSM should not have included the 24% territorial cost-of-living allowance when calculating his net monthly income. Whether a

source of funds is income for support purposes is a legal question reviewed de novo. *Sherburne County Soc. Servs. v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992).

To fully understand David's argument, it is helpful to review the history of the federal territorial cost-of-living allowance. In 1948, the United States Congress enacted the Independent Offices Appropriation Act, which authorized the executive branch to implement a program to provide additional compensation to federal employees working in remote locations. *See* Ch. 219, 62 Stat. 176, 194 (1948) (codified, as amended, at 5 U.S.C. § 5941 (2006)). Pursuant to that authority, President Truman signed Executive Order 10000, which delegated to the Civil Service Commission authority to "designate places in the Territories where it determines that living costs are substantially higher than in the District of Columbia" and to "fix for each place so designated an additional rate or rates of compensation to be paid by reason of such higher living costs." 13 Fed. Reg. 5453, 5455 (Sept. 18, 1948). The additional compensation was designated "Territorial cost-of-living allowance." *Id.*

Pursuant to the act and the executive order, the Office of Personnel Management (OPM) establishes territorial allowance rates by surveying prices in the applicable territories every three years and indexing those prices against prices in the District of Columbia. 5 C.F.R. §§ 591.208, .223 (2008). Using the Consumer Price Index (CPI) and other variables, the OPM uses the price index that prevails at a particular remote territory to derive a proportional territorial cost-of-living allowance rate. *Id.* §§ 591.226, .228 (2008). At the time of the CSM's modification order, the territorial allowance rate for Anchorage, Alaska, where David lives, was 24%. 71 Fed. Reg. 63176 (Oct. 27, 2006).

Territorial allowances are excluded from gross income for purposes of calculating federal individual income taxes. 26 U.S.C. § 912(2) (2000).

Thus, the statutory and regulatory scheme is intended to allow a remote federal employee to enjoy a standard of living approximating what he or she would enjoy in the continental United States. The territorial allowance is not intended to increase an employee's standard of living beyond what would exist in the continental United States. Although the territorial allowance increases nominal compensation, real compensation remains constant.

Minnesota's child-support statute defines "income" as "any form of periodic payment to an individual including, but not limited to, wages, salaries, payments to an independent contractor, workers' compensation, unemployment benefits, annuity, military and naval retirement, pension and disability payments." Minn. Stat. § 518.54, subd. 6 (2004). This statute has been interpreted in an expansive manner; the definition of income includes room and board that accompanies employment, *Rooney v. Rooney*, 669 N.W.2d 362, 374 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003) ; social security benefits, *Sward v. Sward*, 410 N.W.2d 442, 444 (Minn. App. 1987), *review denied* (Minn. Sept. 30, 1987) *and appeal dismissed* (Minn. Dec. 2, 1987); annual payments from a structured settlement of a personal injury lawsuit, *Riedle*, 481 N.W.2d at 112; and even proceeds of student loans to the extent that they exceed expenses, *Gilbertson v. Graf*, 477 N.W.2d 771, 774 (Minn. App. 1991). The key question is whether a payment is "periodic." *Duffney v. Duffney*, 625 N.W.2d 839, 843 (Minn. App. 2001) ("Generally, if a payment is periodic, it is income."); *Herrley v. Herrley*, 452

N.W.2d 711, 714 (Minn. App. 1990) ("The key word in the definition is 'periodic.' If the payment is periodic, it is income. If the payment is not periodic, it is not income.").

David's bi-weekly territorial allowance is $521. Although this money merely offsets the higher cost of living inherent to Alaska, the territorial allowance is a periodic payment from David's employer that is paid to him because of his employment. Thus, the statute's definition of "income" and our caselaw are broad enough to encompass it.

The conclusion that the territorial allowance is "income" does not end the inquiry. David argues that the CSM improperly analyzed the statutory factors for a deviation. The guidelines provide that a

> [district] court shall take into consideration the following factors in setting or modifying child support or in determining whether to deviate from the guidelines:
>
> (1) all earnings, income, and resources of the parents, including real and personal property, but excluding income from excess employment of the obligor or obligee that meets the criteria of paragraph (b), clause (2)(ii);
>
> (2) the financial needs and resources, physical and emotional condition, and educational needs of the child or children to be supported;
>
> (3) the standard of living the child would have enjoyed had the marriage not been dissolved, but recognizing that the parents now have separate households;
>
> (4) which parent receives the income taxation dependency exemption and what financial benefit the parent receives from it;
>
> (5) the parents' debts as provided in paragraph (d); and
>
> (6) the obligor's receipt of public assistance under the AFDC program . . . .

Minn. Stat. § 518.551, subd. 5(c) (2004).

The CSM considered at least two of these factors. First, the CSM considered the "earnings, income, and resources" of both parents, *id.*, subd. 5(c)(1), but concluded that an increase in David's support obligation was justified even though he lives in Alaska. Second, the CSM considered "the standard of living the child would have enjoyed had the marriage not been dissolved," *id.*, subd. 5(c)(3), but concluded that, "If the parties and the child were an intact family, the child would enjoy the [territorial allowance] the Obligor receives as a result of residing in Alaska." This reasoning is illogical. If the "marriage [had] not been dissolved," *id.*, either David would not have moved to Alaska, in which case there would be no territorial allowance for the child to enjoy, or David would be living in Alaska with the child, in which case the territorial allowance would be applied to the child's expenses in a manner that would preserve, but not increase, the child's "standard of living," *id.* As described above, the territorial allowance essentially reimburses David for the additional expenses he is forced to incur as a result of accepting federal employment in Alaska. Consequently, David's increased child-support obligation exceeds the increase in his ability to pay. According to the CSM's calculations, David's child-support obligation of $989, in conjunction with his other monthly expenses of $3,228, is greater than his net monthly income of $3,955.

In light of the unique facts of this case, we conclude that it would be "against logic" for David's child-support obligation to be increased based on his receipt of the federal territorial allowance. *See Moylan*, 384 N.W.2d at 864. Although the territorial allowance is within the statutory definition of income, the nature of the territorial

allowance requires a downward deviation from the guidelines. The territorial allowance arises from a government program that systematically identifies and quantifies a portion of an employee's compensation that is specifically attributable to the abnormal costs of living in a particular locale. The territorial allowance does not increase David's real income but merely places him in the same financial position he would occupy if he were living in Minnesota, where the cost of living is lower than in Alaska. Thus, the CSM erred by not deviating from the statutory guidelines accordingly.

II. Retroactive Effective Date

David also challenges the CSM's decision to make the modified child-support obligation effective December 1, 2006, which was two and one-half months before the CSM's modification order was filed. A district court has discretion to set the effective date of a support modification. *Finch v. Marusich*, 457 N.W.2d 767, 770 (Minn. App. 1990). Moreover, "modification of support is generally retroactive to the date the moving party served notice of the motion on the responding party." *Bormann v. Bormann*, 644 N.W.2d 478, 482 (Minn. App. 2002).

David argues that retroactive modifications are prohibited by federal law. He cites 54 Fed. Reg. 15757, 15764 (Apr. 19, 1989) (codified at 45 C.F.R. § 303.106 (2007). This regulation, however, by its own terms, "permit[s] modification with respect to any period during which there is pending a petition for modification." 45 C.F.R. § 303.106(b). Minnesota law also permits modifications that are retroactive "from the date of service of notice of the motion on the responding party." Minn. Stat. § 518.64, subd. 2(d) (2004). Thus, the federal regulation does not conflict with Minnesota law, and the district court

did not err when making the order retroactive to a date after the motion for modification was filed.

In sum, we reverse and remand for a downward deviation in an amount necessary to offset David's receipt of the federal territorial allowance. *See Putz v. Putz*, 645 N.W.2d 343, 352-54 (Minn. 2002) (reversing and remanding where district court decision found to be "against logic"); *Hubbard County Health & Human Servs. v. Zacher*, 742 N.W.2d 223, 228-29 (Minn. App. 2007) (reversing and remanding for district court to reconsider "obligor's ability to pay" and other factors relevant to deviation from guidelines); *Strandberg v. Strandberg*, 664 N.W.2d 887, 890-91 (Minn. App. 2003) (reversing and remanding for district court to consider "obligor's ability to pay" in light of resources available to obligor). Consistent with the earlier order, the downward deviation shall be effective December 1, 2006.

Reversed and remanded.