STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0964

Hennepin County,
Respondent,

Wendy J. Fliehs,
Respondent,

vs.

Lee Simmons,
Appellant.

Filed April 21, 2009
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-FA-07-8537

Michael O. Freeman, Hennepin County Attorney, Judith A. Harrigan, Assistant County Attorney, 110 South Fourth Street, Minneapolis, MN 55401 (for respondent Hennepin County)

Wendy J. Fliehs, 4247 Pillsbury Avenue South, Minneapolis, MN 55409 (respondent)

Lee Simmons, 5404 Third Avenue South, Minneapolis, MN 55419 (pro se appellant)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Harten, Judge.

* 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

HARTEN , Judge

Appellant challenges the district court's affirmation of the order of the child support magistrate (CSM) requiring appellant to pay child support and arrearages. Because the district court's action involved no abuse of discretion, we affirm.

FACTS

In February 1993, appellant Lee Simmons and respondent Wendy Fliehs had a child, K.F., who lives and has always lived with Fliehs. Appellant also has two children from a previous relationship, born in 1997 and 2002.

In 2006, the parties agreed that appellant would pay, and appellant did pay, $250 monthly in child support for K.F. For 2007, they agreed that appellant would pay $250 monthly through July and $350 monthly for August through December. The total was $3,500,[1] of which appellant paid $1,450.

Fliehs obtained the assistance of respondent Hennepin County in collecting child support. In December 2007, Hennepin County brought this action on behalf of Fliehs. On 10 January 2008, the complaint was personally served on appellant, along with a summons notifying him that a hearing was scheduled for 31 January 2008. On 28 January 2008, appellant faxed to the court a request for a continuance, but included no affidavit of service of the request on either Fliehs or on Hennepin County. Consequently, appellant's request was not presented to the CSM.

[1] $3,500 = (7 x $250) + (5 x $350).

At the hearing, neither party was represented by counsel, Fliehs was present, and appellant was absent. Appellant had failed to complete and return a form sent to him seeking financial information for child support purposes.

The CSM found that Fliehs's monthly income was $5,042; that appellant is voluntarily unemployed but has a monthly earning capacity of $4,733; and that appellant's monthly child support obligation is $526 and his arrearage is $2,050. The CSM ordered appellant to pay $526 monthly plus 20% of that amount on the arrearage until it is satisfied.

Appellant challenged the order; the district court affirmed it in April 2008. Appellant now challenges that affirmance, arguing that it resulted from an abuse of the district court's discretion.[2]

D E C I S I O N

"We review the district court's decision confirming the CSM's order under an abuse-of-discretion standard." *Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001); *see also Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004) (explaining that, when the district court affirms the CSM's decision, that decision becomes the district court's decision).

Appellant's challenges to the order appear to be focused on the imputation of income to appellant under Minn. Stat. § 518A.32, subd. 1 (2008) (providing that, when a

[2] Neither respondent has filed a brief; we therefore decide the matter on the merits under Minn. R. Civ. App. P. 142.03.

parent is voluntarily unemployed, "child support must be calculated based on a determination of potential income"). The order in part provides:

> 10. There is no current employment or income information from [appellant], and he failed to return the Financial Statement which was sent to him . . . .
> 11. [Appellant] has an undergraduate degree in economics, a master's degree in business, and is currently believed to be pursuing a master's degree in accounting.
> 12. In the past, [appellant] has worked as a mergers and acquisitions consultant.
> 13. [Appellant] is not physically or mentally disabled and does not receive any form of public assistance. As a result, it is appropriate to impute income to him.
> 14. The median wage for a financial specialist in the seven county Minneapolis/St. Paul area is $27.31 per hour.
> 15. [Appellant] is voluntarily unemployed or underemployed and child support shall be based on potential income. [Appellant] has the ability to earn $27.31 per hour based on his employment history, education, and job skill. This considers the availability of jobs within the community for an individual with [appellant's] qualifications.
> 16. [Appellant] has potential gross monthly income of $4,733 ($27.31 x 40 hours x 4.33 weeks).
> 17. [Appellant] is ordered to pay monthly medical support for nonjoint children F.S., born May 6, 1997 and G.K., born January 25, 2002 in the amount of $75 per month. There is a finding in the court file regarding these children [for whom appellant] voluntarily pays basic child support of $500 per month directly to the mother. The court will include this amount in [appellant's] prior support obligation for purposes of calculating his income available to pay support to the joint child in this case.

Appellant challenges the finding that he was voluntarily unemployed because he is a full-time student in a master's degree program in accounting. He relies on Minn. Stat. § 518A.32, subd. 3 (2008) (providing that a parent is not considered voluntarily unemployed if his unemployment either is temporary and will ultimately lead to an increase in income, or represents a bona fide career change that will outweigh the effect of his diminished income on the child).

But appellant's reliance on these exceptions to a finding of voluntary unemployment is misplaced. First, he cannot show that his present unemployment while he obtains his accounting degree will ultimately lead to an increase in income because, as he points out, job opportunities in the financial sector are currently extremely rare and there is no indication that appellant's job opportunities will increase when he has a master's degree in accounting.

Second, appellant cannot show that the effect of his unemployment on his child while he acquires his degree will ultimately be outweighed by his improved career prospects. The child is now age 16; appellant's support obligation will presumably terminate around June 2011, when she graduates from high school. Appellant gives no anticipated date for the completion of his studies, and he claims that this lawsuit has caused him to need two additional semesters, prevented him from attending classes for one semester, and prevented his pursuit of part-time employment. Because appellant blames his studies as the cause of his unemployment, his child will likely mature beyond receiving any benefit from any degree that appellant eventually earns. Thus, neither of the exceptions in Minn. Stat. § 518A.32, subd. 3, applies to appellant.

Appellant also argues that he was denied due process of law because the hearing was held on 31 January, before appellant's time to respond to the summons and complaint had expired. The affidavit of service shows that, on 10 January, a deputy sheriff personally served a summons and complaint on appellant. The summons states:

> **PLEASE TAKE NOTICE** that a hearing has been scheduled to be held . . . on 01/31/2008 at 08:30 AM central time.
>
> **You must appear at the hearing**. If you do not appear at the hearing, the court may grant the relief requested in the complaint or take any further action the court finds is appropriate . . . .
>
> **This is the only notice you will receive informing you of this hearing.**
>
> You have 20 days after service of this summons to respond to the complaint. The day on which you receive this summons is not included in the 20 days. To respond you must serve and file a written answer or counter complaint.

On 28 January, appellant faxed a request for a continuance but did not include an affidavit of service on respondent or the county. He said the affidavit of service would arrive on 29 January; it had not arrived by 30 January. The hearing was held on 31 January.

Service on appellant was completed 21 days prior to the hearing and was timely. Appellant's response period expired on 30 January, 20 days after the day of service.[3] The CSM also found that appellant "did not appear at the hearing, make arrangements to appear via telephone, or check on the status of his request for a continuance" and that "[b]oth the County and [Fliehs] objected to the continuance request and were present and ready to proceed." Appellant was not deprived of due process.

[3] The intervening days were the 20 days from 11 January through 30 January.

The district court did not abuse its discretion by affirming the CSM's decisions to hold the hearing as scheduled and to base appellant's child support obligation on imputed income.

Affirmed.