STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1332

In re the Marriage of:
Babette Sue Thompson, petitioner,
Respondent,

vs.

Mark Kevin Thompson,
Appellant.

Filed May 19, 2009
Affirmed
Harten, Judge*

Dakota County District Court
File No. 19-FX-06-015731

Victor A. Coursolle, 4816 West 102nd Street, Bloomington, MN 55437; and

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondent)

Mark A. Olson, Olson Law Office, 2605 East Cliff Road, Suite 100, Burnsville, MN 55337 (for appellant)

Considered and decided by Toussaint, Chief Judge; Hudson, 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 argues that the district court abused its discretion in denying his motions for modification of child support and for an evidentiary hearing on modification of legal custody of the parties' two children. Because we see no abuse of discretion in either denial, we affirm.

FACTS

Appellant Mark Thompson and respondent Babette Thompson were married in 1990. They have two daughters, born in 1994 and 1995. Respondent commenced this marriage-dissolution proceeding in September 2006. Respondent, who had worked throughout the marriage, lost her job in May 2007 and was out of work until November 2007.

In July 2007, following trial, the district court accepted the parties' stipulation of sole physical custody with respondent but rejected their stipulation of joint legal custody and awarded respondent sole legal custody. Appellant was ordered to pay guideline child support of 30% of his net monthly income, or $1,350, and to pay monthly spousal maintenance of $852.[1]

[1] Because the parties' dissolution action was filed in 2006, the district court appropriately applied the calculation provisions of Minn. Stat. § 518.551, subd. 5(b) (2004), to set child support. *See* 2006 Minn. Laws ch. 280, § 44, at 1145 ("The provisions of this act [the new child-support law] apply to all support orders in effect prior to January 1, 2007, except that the provisions used to calculate parties' support obligations apply to actions or motions filed after January 1, 2007.").

Appellant moved for a new trial or for amended findings of fact and conclusions of law. On 1 November 2007, following a hearing, his motion was denied. On 9 January 2008, appellant filed an appeal to this court but voluntarily withdrew it about a week later.

On 25 March 2008, appellant brought a new motion in district court for, among other things, modification of child support, elimination of spousal maintenance, modification of sole legal custody to joint legal custody, and modification of parenting time. Respondent submitted a counter motion and an affidavit indicating that she had obtained a job paying her a gross monthly income of $1,907.

After a hearing before a district court judge who had not been the trial court judge, the motion was denied. Appellant challenges the denial of both a modification of child support and an evidentiary hearing on legal custody.

D E C I S I O N

1. Modification of Child Support

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

Minn. Stat. § 518A.39, subd. 2(a) (2006) provides in relevant part that a child support order may be modified upon a showing that its terms are unreasonable and unfair because of "(1) substantially increased or decreased gross income of an obligor or obligee; [or] (2) substantially increased or decreased need of an obligor or obligee or the child or children that are the subject of these proceedings." Minn. Stat. § 518A.39, subd.

2(a)(1) applies here: there has been a substantial increase in the obligee's income. When respondent obtained employment in November 2007, her gross income increased from her maintenance payment, $852, to her maintenance payment plus her $1,907 gross earnings, or $2,759. *See* Minn. Stat. § 518A.29(a) (2006) (spousal maintenance received under the current proceeding and salary or wages are included in gross income).

The remaining issue is whether the substantial increase in respondent's income "makes the terms [of the existing child support order] unreasonable and unfair." *See* Minn. Stat. § 518A.39, subd. 2(a). We conclude that it does not. It is undisputed that the needs of respondent and the children have remained the same: $4,203 monthly. Her gross income, $2,759, plus the existing child support payment, $1,350, provide $4,109. Thus, the existing order is not unreasonable and unfair as a result of the increase in respondent's income; she still receives less than she and the children need.[2]

Appellant relies on Minn. Stat. § 518A.39, subd. 2(a)(2) to argue that the terms of the existing child support order are unreasonable and unfair because his own needs have substantially increased. But appellant does not specify any change in his situation since the setting of child support in July 2007. The terms of the existing order cannot be found to be unfair and unreasonable because of an unspecified change.

Nor can the terms of the existing order be seen as unfair to appellant. The district court found his gross monthly income to be $6,144 and his net monthly income is

[2] In denying appellant's motion to modify child support, the district court did not consider the change in respondent's income, which is relevant under Minn. Stat. § 518A.39, subd. 2(a)(1). But this court "will not reverse a correct decision simply because it is based on incorrect reasons." *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987).

$4,500.[3] The terms of the existing child support order leave appellant with $3,000 monthly. In the dissolution judgment, the district court found that he claimed monthly expenses of $2,883.64; at the hearing on the motion to modify child support, he claimed expenses of $2,429.79. In either event, his income, exclusive of the existing child support payment, is sufficient to meet his needs. The terms of the existing child support order are not unreasonable or unfair.

The district court did not abuse its discretion in denying appellant's motion to modify child support.[4]

2. Evidentiary Hearing on Legal Custody Modification

"A district court is required under [Minn. Stat. §] 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) (citations omitted). A district court has discretion in deciding whether a party has

[3] Appellant claims these findings are erroneous, but the time for challenging them in this court has passed. Appellant chose to withdraw his appeal from the denial of his motion for amended findings or a new trial.

[4] We note that, if the motion had been granted, child support would be recalculated under Minn. Stat. § 518A.35 (2006), which bases the calculation on the income shares of both parents. Insofar as appellant's motion for modification is based on this fact, the motion is unjustified. "[A]n enactment, amendment, or repeal of law does not constitute a substantial change in the circumstances for purposes of modifying a child support order." Minn. Stat. § 518A.39, subd. 2(i) (2006). Moreover, recognizing that the change from a calculation based on the income of only one parent to a calculation based on the incomes of both parents could cause hardship, the legislature has provided that "[o]n the first modification under the income shares method of calculation, the modification of basic support may be limited if the amount of the full variance would create hardship for either the obligor or the obligee." *Id.*, subd. 2(k) (2006).

presented a prima facie case. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007).

A prima facie case for custody modification requires the movant to establish that: (1) a change has occurred in the circumstances of the child or the parties; (2) the proposed modification would serve the child's best interests; (3) the child's present environment endangers physical or emotional health or emotional development; and (4) the harm caused by a change in custody would be outweighed by the benefits of a change. *Goldman*, 748 N.W.2d at 282-83.

Appellant argues that his children are endangered by respondent's decision not to establish orthodontic treatment for them. The record provides no evidence that orthodontic treatment is necessary for the children or that their physical health is endangered by its absence. Appellant argues that they may be emotionally endangered if their teeth are not perfectly aligned, but provides no support for this argument. Nor does appellant offer to finance orthodontic treatment himself or explain how it is to be financed by respondent, who is already operating on a deficit.

Appellant has not made a prima facie case for custody modification.

Affirmed.