STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1512

In re the Marriage of:
Michelle Marie Tweed, petitioner,
Appellant,

vs.

Bryan Gay Kuschel,
Respondent.

Filed June 9, 2009
Affirmed
Worke, Judge

Itasca County District Court
File No. 31-FA-06-1284

Michelle Marie Tweed, 1119 University Drive, #1404, Bismarck, ND 58504 (pro se appellant)

Mark T. Groettum, 402 East Howard Street, Suite 24, Hibbing, MN 55746 (for respondent)

Considered and decided by Minge, Presiding Judge; Worke, 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

WORKE, Judge

In this child-support dispute, appellant-mother argues that the district court (1) erred in calculating respondent-father's gross income; (2) failed to order respondent to reimburse her for past child-care expenses; and (3) failed to rule on the issue of respondent's future child-care obligation. Appellant also argues that the child support magistrate was biased against her. We affirm.

FACTS

In July 2006, the district court issued the judgment and decree dissolving the marriage of appellant Michelle Marie Tweed and respondent Bryan Gay Kuschel. Appellant was granted sole legal and physical custody of the parties' minor child. Respondent was ordered to pay $300 per month in child support.

In November 2007, appellant moved to modify child support, claiming that respondent's income had increased significantly since the original order. On December 19, 2007, the child support magistrate (CSM) issued an order modifying child support. The CSM found that respondent's gross monthly income was $2,860, and that appellant's gross monthly income was $1,387. The CSM applied a 12% parenting-time-expense adjustment to basic support, and ordered respondent to pay $448 per month in child support. The CSM found that appellant had no child-care costs and declined to order retroactive support.

In January 2008, appellant moved to have a district court review the CSM's order, challenging, among other things, (1) respondent's gross income; (2) the parenting-

time-expense adjustment; and (3) child-care costs. On March 10, 2008, the district court found that respondent earns $16.50 per hour, averages between 50-60 hours of work per week, and received per diem payments. The district court concluded that the CSM's finding that respondent's monthly income is $2,860 was not supported by the record and remanded this issue to the CSM. The district court found that the record was insufficient to show the degree of respondent's parenting time and remanded this issue to the CSM. The district court also found that although appellant claimed to have incurred child-care expenses in 2007, she failed to show that the people she paid are licensed child-care providers. The district court denied appellant's request for retroactive payment for child-care costs and remanded the issue of respondent's future child-care obligation to the CSM.

The matter came before the CSM on remand in May 2008. Regarding respondent's income, the CSM found that in 2007 respondent received approximately $15,000 in per diem payments when he worked away from his home. But because respondent incurred $15,600 in work-related expenses, there was no net additional income from these payments. Relying on respondent's 2007 tax return, the CSM found that respondent's gross monthly income for child-support purposes was $3,858 and ordered respondent to pay $624 per month in child support. Because respondent did not exercise parenting time, the CSM declined to apply a parenting-time-expense adjustment. Regarding child-care costs, the CSM found that appellant testified that she had minimal child-care expenses incurred in 2008, and reserved ruling on respondent's future child-care obligation.

Appellant again requested that the district court review the CSM's order, claiming that the CSM erred in (1) calculating respondent's gross income and (2) failing to rule on child-care costs. Appellant also claimed that the CSM was biased against her. In July 2008, the district court affirmed the CSM's order. The district court found that: "[respondent] introduced his 2007 tax return as evidence of his income. . . . The tax return indicates that [respondent's] gross income for 2007 was $46,298." The district court concluded that the CSM acted within his discretion in admitting the 2007 tax return into evidence. The district court also found that "[respondent] testified that his expenses while working away from home exceeded the amount of his per diem," and that respondent continues to pay rent while working away from home. The district court concluded that the record supported the CSM's decision to exclude respondent's per diem payments from gross income and that "[t]he [CSM]'s determination of [respondent's] income for the purpose of child support is supported by the evidence."

The district court also found that "[a]t the May 7, 2008 hearing the CSM asked [appellant] whether she wished to submit any additional documentation of her 2007 child care expenses. [Appellant] indicated that she had already submitted what she had." The district court found that a letter from the child's day-care provider indicated that child-care costs as of May 7, 2008, totaled $11.55. The district court concluded that the CSM did not abuse his discretion by declining to require respondent to reimburse appellant for child-care costs and by reserving the issue of respondent's future child-care obligation. Finally, the district court determined that "[appellant's] allegations of bias on the part of the [CSM] are not supported by the record of the proceedings." This appeal follows.

D E C I S I O N

When a district court affirms a CSM's ruling, that decision becomes the ruling of the district court, and we review the district court's ruling. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004); *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000) (stating that this court's standard for reviewing a CSM's decision is the same as it would be if the district court had made the decision). This court reviews child-support issues for an abuse of discretion, reversing only when the district court resolves the matter in a manner that is against logic and the facts on record or misapplies the law. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). A determination of the amount of an obligor's income for child-support purposes is a finding of fact that will not be altered on appeal unless it is clearly erroneous. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002). A finding is clearly erroneous if a reviewing court is left "with the definite and firm conviction that a mistake has been made." *Gjovik v. Strope*, 401 N.W.2d 664, 667 (Minn. 1987).

Respondent's income

Appellant argues that respondent's per diem payments should be included in his gross income. Because the determination of the amount of an obligor's income for the purpose of child support is a finding of fact, we will only reverse the district court's determination if it is clearly erroneous. *Ludwigson*, 642 N.W.2d at 446.

Under Minn. Stat. § 518A.26, subd. 8 (2008), "'[g]ross income' means the gross income of the parent calculated under section 518A.29." Under Minn. Stat. § 518A.29(c) (2008), "[e]xpense reimbursements or in-kind payments received by a parent in the

course of employment, self-employment, or operation of a business shall be counted as income if they reduce personal living expenses." Here, the district court found that respondent "is paid per diem payments for jobs when he is away from his home . . . . In 2007, [] [r]espondent received approximately $15,000 in per diem payments and incurred $15,600 in work related expenses directly associated with being on the road. There is no net additional income . . . from his per diem payments." The district court found that "[respondent] testified that his expenses while working away from home exceeded the amount of his per diem[,]" and that "[respondent] also testified that he continued to pay rent while working away from home."

The record supports the district court's decision. Respondent's 2007 tax return shows that his total business expenses were $15,641, and respondent testified that his expenses were more than the per diem payments he received. Respondent supplied a paystub for period ending December 14, 2007, that showed per diem payments "Y-T-D" at $12,795. Based on the record, the district court did not clearly err in finding that respondent's gross income should not include his per diem payments. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations).

Child-care costs

Appellant argues that the district court abused its discretion by denying her reimbursement for child-care costs incurred in 2007, and by not ruling on respondent's future child-care obligation.

The district court found that in 2007 "[appellant] did not have any daycare expenses." This decision was based in part on the district court finding that "[t]here [wa]s no evidence in the record as to whether the person to whom the [money] was allegedly paid was a licensed child care provider." When questioned at the hearing on remand, appellant stated that she had no additional information to submit regarding her prior daycare expenses. When questioned about her present child-care expenses, appellant indicated that her job at a learning center provides child-care, and that she could "supply a letter from [her boss]" regarding what she is charged. The submission showed that appellant incurred $11.55 in child-care expenses in 2008.

The record supports the district court's decisions. At the remand hearing, appellant was asked if she had additional documentation for the claimed 2007 child-care expenses. Appellant stated: "I submitted what I had." When asked a second time if she wished to submit documentation, appellant stated, "No, I don't," and indicated that she had not been in contact with the prior day-care providers. The only documentation of 2007 child-care expenses in the record is appellant's handwritten notes. The district court stated that "[i]n light of the conflicting evidence in the record, it was entirely appropriate for the [CSM] to deny to award child care costs for 2007." The district court was within its discretion to reject appellant's evidence and did not clearly err in finding that appellant was not entitled to reimbursement for child-care costs for 2007. *See Sefkow*, 427 N.W.2d at 210 (stating that appellate courts defer to district court credibility determinations).

Appellant was also specifically asked if she was incurring child-care expenses presently. Appellant replied that her job provides child care and that she was never

charged for child-care costs until January 1. The record shows that child-care costs as of May 7, 2008, were $11.55. Because of the nominal child-care costs, the district court did not clearly err in reserving the issue of respondent's future child-care obligation.

Bias

Appellant also argues that the CSM was biased against her. The district court found that appellant's allegations of bias were not supported by the record. Appellant contends that the CSM was biased because he admitted evidence submitted by respondent that was not requested, was not credible, and did not meet the evidence standard. Specifically, appellant objects to the admission of a letter from respondent's employer, his 2007 tax return and W2, and a list of respondent's expenses. "The [CSM] may admit any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. Gen. Pract. 364.10, subd. 1.

The objected-to evidence was necessary for the CSM to determine respondent's income for child-support purposes. At the hearing following remand, the CSM stated that the hearing was to develop the record as to "[respondent's] income." When appellant objected, stating that "the only thing that [the district court] was going to allow new evidence on was the issue of childcare support," the CSM stated, "[y]ou are misinterpreting the order." The CSM was correct because the district court's order stated that "[t]he issue of [respondent's] income is remanded to the [CSM] for an accurate determination of [respondent's] income." Arguably, the best way to accurately determine respondent's income was to review his 2007 tax return and W2.

Appellant contends that because the CSM did not request the evidence, respondent should not have been able to present it. But at the hearing, the CSM stated "filed last week [is] a letter from [respondent's employer] dated April 18, and a copy of [respondent's] '07 State and Federal income tax returns." Appellant asked the CSM if he was going to allow that information as evidence, and the CSM stated: "Well, I would have asked for it anyways." Appellant also claims that the evidence "failed to meet the evidence standard." However, appellant fails to explain what that standard is and how the evidence fails to meet it. Appellant suggests that the evidence "is highly suspect and possibly fraudulent." But credibility is for the fact-finder to determine. *Sefkow*, 427 N.W.2d at 210. Thus, appellant has not shown that the evidence fails to meet the evidence standard set out in rule 364.10, subd. 1.

Appellant suggests that the evidence was untimely, but that contention fails because respondent presented the contested evidence *prior* to the hearing and appellant submitted evidence *after* the hearing. At the hearing, the CSM asked appellant to "submit [] verification of your childcare expenses since January 1, and send it to Court Administration." Appellant responded, "I'll fax you one and I will mail you one, too." The CSM stated, "[j]ust make sure it's postmarked by Friday, May 9." Thus, respondent's evidence was not untimely especially when appellant submitted evidence after respondent. The record supports the admission of the evidence, and the admission of the evidence fails to support appellant's claim that the CSM was biased against her.

Appellant also argues that the CSM was biased because he made comments intended to "harass, berate, belittle, and embarrass" her. Appellant contends that the

CSM was biased against her because he ruled that many of her questions posed to respondent were not relevant. At the May 7 hearing, the CSM asked respondent, "Are you actually seeing the child on a regular basis?" Respondent replied, "No, I haven't been," and that he did not have immediate plans to reinstate parenting time. Respondent stated that the last time he saw his child was probably June 2007. Appellant then asked respondent why he had not reported his change of address. Respondent's attorney objected as to relevance and appellant stated that it was relevant to prove her point "that if [respondent] had visiting time . . . he has rules that he's supposed to go by." The CSM ruled that the question was not relevant because respondent admitted that he was not exercising parenting time. Appellant then asked respondent how often he spoke with his child on the phone. Again, the CSM ruled that the question was not relevant. Appellant asked respondent if he called the child at her home. The CSM stated, "Again, not relevant." Appellant asked respondent if he had the child overnight in July 2007. The CSM stated, "I believe [respondent] testified he hasn't had the child overnight since June of '07 so these questions aren't relevant." As the CSM appropriately ruled, the questions were not relevant and, therefore, the CSM was not biased against appellant for such a ruling. The district court did not err in finding that the CSM was not biased against appellant.

Affirmed.