STATE OF MINNESOTA
IN COURT OF APPEALS
A09-337

Christa Lynn Nagel,
Respondent,

vs.

Trevor J. Penning,
Appellant.

Filed December 22, 2009
Affirmed
Peterson, Judge

Rice County District Court
File No. 66-F3-97-050656

Melanie J. Leth, 38 West Main Street, P.O. Box 130, Dodge Center, MN 55927 (for respondent)

Trevor J. Penning (pro se appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

PETERSON, Judge

This appeal is from a district court order that affirms a child support magistrate's order modifying appellant's child-support obligation. Appellant argues that because (1) respondent's medical-insurance contribution was incorrectly calculated, (2) respondent's income was incorrectly calculated, and (3) various civil and criminal

statutes were violated by various people who either (a) participated in the proceeding before the child support magistrate or (b) work for Rice County, the district court's and the child support magistrate's orders should be vacated and the case should be remanded for a new trial in a county other than Rice County. We affirm.

FACTS

Pro se appellant Trevor Penning and respondent Christa Nagel are the parents of a child who was born in March 1996. A June 1998 order adjudicated appellant to be the child's father and ordered appellant to pay $273 per month as ongoing child support; 57% of respondent's monthly premium for medical and dental insurance, which amounted to $55 per month at the time of the order; and $50 per month for work-related child care expenses.

In April 2008, respondent brought a motion to modify the existing child-support order by increasing basic child support and changing the order to reflect that appellant carries medical and dental insurance for the child and respondent carries additional dental insurance. In an October 2, 2008 order issued following a hearing on respondent's motion, a child support magistrate (CSM) ordered appellant to pay $608 monthly for ongoing child support and to continue to maintain health care and dental coverage for the child through his employer. The CSM found that there was no cost to appellant for medical and dental insurance for the child.

Appellant sought review of the CSM's order in the district court, and in a December 12, 2008 order, the district court identified a clerical error in the CSM's findings of fact but noted that because the error did not carry over into the order, the

order was correct and did not need to be modified. The district court affirmed the CSM's order in all respects.

On January 5, 2009, appellant filed a motion for a new trial and a request for a hearing to contest the validity of the child-support judgment pursuant to Minn. Stat. § 518.14. The district court did not respond to appellant's motion, and appellant brought this appeal.

D E C I S I O N

When a district court affirms a CSM's decision, the CSM's decision becomes the district court's decision, and this court reviews the district court's decision. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). Whether to modify child support is discretionary with the district court, and a district court's decision to modify child support will be altered on appeal only if the district court 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); *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986).

I.

Respondent argues that this appeal must be dismissed because Rice County initiated the paternity action in 1997 and, therefore, it is a party to the current action, and appellant failed to serve a notice of appeal on Rice County. *See* Minn. R. Civ. App. P. 103.01, subd. 1 ("An appeal shall be made by filing a notice of appeal with the clerk of the appellate courts and serving the notice on the adverse party or parties within the appeal period."). But respondent cites no authority for her claim that Rice County is a party simply because it was a party in the paternity action, and the record contains

nothing that indicates that respondent served her modification motion on Rice County or did anything else to make Rice County a party in the modification proceeding. Therefore, we will not dismiss the appeal.

II.

Respondent argues that because a transcript of the hearing before the CSM was not filed in the district court, this court may not consider a transcript of the hearing. We agree. If review of the CSM's decision is sought in the district court, a transcript of the hearing before the CSM is not required. *Blonigen v. Blonigen*, 621 N.W.2d 276, 282 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001). "Failure to submit a transcript to the district court for review of the CSM's decision precludes consideration of the transcript on appeal because the transcript is not part of the record on appeal." *Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001) (citing Minn. R. Civ. App. P. 110.01). The district court noted in its order that "[a] transcript of the proceedings was ordered by [appellant] but not paid for and, consequently it has not been provide[d] to or reviewed by the Court." Because the transcript of the hearing before the CSM did not become part of the district court record, we will not consider the transcript.

Also, appellant's appendix includes documents that were not filed in the district court and copies of documents that were filed in the district court but that now include hand-written notations that were added after the documents were submitted to the district court. Because these documents are not part of the district court record, we cannot consider them, and we will restrict our review to only documents that are part of the district court record. *See Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992)

("The court will strike documents included in a party's brief that are not part of the appellate record."), *aff'd*, 504 N.W.2d 758 (Minn. 1993).

III.

Appellant alleges that respondent, respondent's attorney, the Rice County Attorney, the Rice County Board of Commissioners, and several Rice County employees violated the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.90 (2008), and various other civil and criminal statutes. It appears that some of the allegations relate to events that occurred after the district court issued its order affirming the CSM's decision. But even if all of the alleged violations occurred before the hearing before the CSM, appellant has not cited any authority that indicates that a remedy for the alleged violations may be obtained in a review of the CSM's decision. This child-support proceeding is not the proper forum for enforcing the data practices act or criminal statutes regarding perjury, defamation, harassment, fraud, theft, or obstruction of justice.

The substance of several of appellant's allegations regarding perjury, fraud, and theft is that the CSM's decision is based on false testimony presented by respondent and her attorney during the hearing before the CSM. Appellant contends that evidence that he produced after the hearing proves that the testimony was false. But because the CSM did not leave the record open at the conclusion of the hearing and the district court did not request additional evidence, neither the CSM nor the district court could consider the evidence that appellant produced after the hearing. *See* Minn. R. Gen. Pract. 364.14 (stating that at conclusion of hearing, CSM may leave record open and request or permit submission of additional documentation and documents submitted without permission of

CSM shall not be considered by CSM when deciding case); .377.09, subd. 4 (stating that on motion for review, "parties shall not submit any new evidence unless the . . . district court judge, upon written or oral notice to all parties, requests additional evidence"). Also, because a transcript of the hearing before the CSM was not made part of the record in the district court, neither the district court nor this court could review a claim that is based on testimony presented at the hearing.

IV.

Appellant argues that he is entitled to an attorney-fee award under Minn. R. Civ. P. 11, Minn. Stat. § 518.14 (2008), and Minn. Stat. § 549.211 (2008) because respondent's false statements prolonged the proceedings before the CSM and in the district court. But the record does not indicate that appellant filed a motion seeking fees or that the district court made the findings necessary for a fee award under section 518.14. *See* Minn. Stat. § 549.211, subd. 4(a) (motion for sanctions must be made separately from other motions or requests); Minn. R. Civ. P. 11.03(a)(1) (motion for sanctions must be made separately from other motions or requests).

V.

After receiving notice of the district court order affirming the CSM's order, appellant filed in the district court a motion for a new trial[1] and a request for a hearing to contest the validity of the child-support judgment pursuant to Minn. Stat. § 518.14. The district court did not address the motion or the request, and appellant now requests that

[1] The caption described the motion as a motion for new trial, but the motion requested relief under both Minn. R. Civ. P. 59.01 and Minn. R. Civ. P. 60.02.

this court enforce Minn. R. Civ. P. 60.02 and Minn. Stat. § 548.14 (2008)[2] by reversing, remanding, or vacating the district court's order. But because appellant did not properly bring a motion under rule 60.02 or initiate an action as required to obtain relief under Minn. Stat. § 548.14, there is no basis for this court to grant appellant's request.

Minn. R. Civ. P. 60.02

The Expedited Child Support Process Rules establish the procedure for presenting to the district court a motion to correct clerical mistakes, a motion for review, and a combined motion, but they do not establish a procedure for presenting a motion under rule 60.02.[3] *See* Minn. R. Gen. Pract. 377.02-.03 (prescribing timing and content of motions). Consequently, the general rules of family court procedure apply to appellant's motion. Under the general rules, "[a]ll motions shall be accompanied by either an order to show cause or by a notice of motion which shall state, with particularity, the time and place of the hearing and the name of the judge, referee, or judicial officer, as assigned by the local assignment clerk[,]" and the party who obtains a date and time for hearing shall give notice of the date and time to all other parties. Minn. R. Gen. Pract. 303.01(a).

[2] The motion filed in the district court refers to Minn. Stat. § 518.14, but appellant's brief refers to Minn. Stat. § 548.14. Based on the substance of appellant's argument on appeal and the fact that Minn. Stat. § 518.14, subd. 2, was renumbered as Minn. Stat. § 518A.735, it appears that the reference to section 518.14 is a typographical error.

[3] Minn. R. Gen. Pract. 377.01 states, "Except for motions to correct clerical mistakes, motions for review, or motions alleging fraud, all other motions for post-decision relief are precluded, including those under Minn. R. Civ. P. 59 and 60 and Minn. Stat. § 518.145 (2000)." Although this rule appears to prohibit a rule 60 motion in an expedited-child-support-process proceeding, this prohibition arguably does not apply to appellant's motion because the motion alleges fraud. We need not decide whether appellant's motion is prohibited under the rule because even if the motion is permitted, appellant failed to follow the procedure for presenting a rule 60 motion.

Appellant's notice of motion did not include the time and place for a hearing or the name of the assigned judge, which may explain why the district court did not address the motion. If the motion was not properly scheduled, the district court could not address it. Because the district court did not address appellant's motion, there is no decision for this court to review. *See generally Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally do not address questions not presented to and considered by the district court).

Minn. Stat. § 548.14

A judgment obtained by "any fraudulent act . . . may be set aside *in an action* brought for that purpose by the aggrieved party." Minn. Stat. § 548.14 (2008) (emphasis added). Appellant did not bring an action to set aside a judgment; he requested a hearing to contest the validity of the child-support judgment pursuant to Minn. Stat. § 518.14. Having failed to bring an action in district court, appellant cannot obtain relief in this court under Minn. Stat. § 548.14.

VI.

Appellant argues that respondent violated Minn. Stat. § 518A.41, subds. 11(a), 13(a)(1) (2008), by leaving the parties' child without any medical insurance for nine months during 2003. But Minn. Stat. § 518A.41 was enacted in 2005 and did not become effective until January 1, 2007. 2005 Minn. Laws ch. 166, §§ 22 at 1905-16, 29 at 1924-25, and 32 at 1925. Furthermore, even if we assume that respondent violated these statutes, appellant has not identified any available remedy for the violation, which occurred six years ago.

VII.

Appellant argues that the CSM incorrectly construed Minn. Stat. § 518A.41, subd. 5 (2008), by not requiring respondent to pay part of the cost of obtaining dependent health care coverage for the parties' child. Appellant's argument is based on a portion of Minn. Stat. § 518A.41, subd. 5(a), that states that "the court must order that the cost of health care coverage and all unreimbursed and uninsured medical expenses under the health plan be divided between the obligor and obligee based on their proportionate share of the parties' combined monthly [parental income for determining child support]."

But in making this argument, appellant overlooks a later provision in Minn. Stat. § 518A.41, subd. 5, that states:

> If the party ordered to carry health care coverage for the joint child already carries dependent health care coverage for other dependents and would incur no additional premium costs to add the joint child to the existing coverage, the court must not order the other party to contribute to the premium costs for coverage of the joint child.

Minn. Stat. § 518A.41, subd. 5(d). The CSM found: "The joint child is currently enrolled in health care and dental coverage provided by [appellant]. [Appellant's] spouse is also covered under the policy. There is no additional cost for insuring the joint child over and above the coverage for [appellant's] spouse." Appellant does not challenge these findings of fact. Instead, appellant claims that because he was not married and had no dependents other than the joint child in 2004, the provisions of Minn. Stat. § 518A.41, subd. 5(d), would not have applied to him, and the parties' circumstances would have come within the provisions of Minn. Stat. § 518A.41, subd. 5(a), which would have

meant that respondent would have been required to pay a proportionate share of the child's health-care-coverage expenses. Appellant contends that because Rice County did not order him to provide dependent medical insurance in 2004, he was in a different category under Minn. Stat. § 518A.41, subd. 5, than he should have been when the CSM acted in 2008. But appellant has not identified any authority that indicates that Rice County, rather than the district court, could order him to provide insurance. In 1998, respondent was ordered to maintain medical insurance for the child as long as coverage was available on a group basis or through her employer or union, and appellant was ordered to pay for a portion of the insurance coverage. When the parties' circumstances changed and appellant began providing insurance coverage entirely on his own, he did not move to modify the 1998 child-support order. Appellant later got married and obtained medical coverage for his wife under the same policy that provided coverage for the child. As a result, when respondent brought her modification motion in 2008, the CSM was not faced with the circumstances that existed in 2004, and the plain language of Minn. Stat. § 518A.41, subd. 5(d), applied to the parties' circumstances. Furthermore, as we have already noted, Minn. Stat. § 518A.41, subd. 5(d), was not enacted until 2005 and could not have been applied to appellant's circumstances in 2004.

VIII.

Appellant argues that the CSM incorrectly construed Minn. Stat. § 518A.39, subd. 7 (2008), and, as a result, did not order respondent to pay back child-care support that respondent received during months when she did not incur child-care expenses. The CSM found that respondent's child-care expenses terminated when the child returned to

school in September 2006, but respondent continued to receive $50 per month in child-care support until the support was administratively terminated 13 months later. The modification statute provides, "A modification of support . . . may be made retroactive only with respect to any period during which the petitioning party has pending a motion for modification. . . ." Minn. Stat. § 518A.39, subd. 2(e) (2008). Because there was no motion for modification pending during 2005 or 2006, the general rule that child support may not be retroactively modified would prevent the CSM from ordering any modification for those years.

But the modification statute also provides: "Child care support must be based on the actual child care expenses. The court may provide that a decrease in the amount of the child care based on a decrease in the actual child care expenses is effective as of the date the expense is decreased." Minn. Stat. § 518A.39, subd. 7. The CSM determined that this statute "allows, but does not mandate, modification of child care support retroactive to the date when there is a decrease in the child care expense." Based on this interpretation, the CSM declined to retroactively modify the child care support.

The plain language of the statute allows the court to provide that a decrease in child-care support is effective as of the date child-care expenses decreased. But in this case, the CSM did not order a decrease in child-care support. Child-care support had been administratively terminated in 2007, several months before respondent brought her modification motion, and there was no amount of child-care support that the CSM could order to be decreased. Because there was no amount that could be decreased, there was no decrease that could be made retroactive.

IX.

Appellant argues that the CSM erred by calculating respondent's income based on a 36-hour work week. Citing Minn. Stat. § 518A.32, subd. 1 (2008), appellant contends that when a parent is employed on a less than full-time basis, income is to be determined based on a presumption that the parent can be employed on a full-time basis, and full time means 40 hours of work in a week.

That statute states:

> If a parent is voluntarily unemployed, underemployed, or employed on a less than full-time basis, or there is no direct evidence of any income, child support must be calculated based on a determination of potential income. For purposes of this determination, it is *rebuttably* presumed that a parent can be gainfully employed on a full-time basis. As used in this section, "full time" means 40 hours of work in a week except in those industries, trades, or professions in which most employers, due to custom, practice, or agreement, use a normal work week of more or less than 40 hours in a week.

Minn. Stat. 518.32, subd. 1 (emphasis added).

The presumption that a parent can be gainfully employed 40 hours per week is rebuttable. The CSM found that respondent works 36 hours per week and that her employment is considered by her employer to be full time. Appellant argues that there is no evidence from respondent's employer that she is not allowed to work more than 36 hours per week. But because the record does not include a transcript, we cannot determine whether the evidence supports the CSM's determination that the presumption was rebutted. We do not presume error on appeal. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997); *see also*

Thorp Loan & Thrift Co. v. Morse, 451 N.W.2d 361, 363 (Minn. App. 1990) ("When an appellant acts as attorney pro se, appellate courts are disposed to disregard defects in the brief, but that does not relieve appellant of the necessity of providing an adequate record and preserving it in a way that will permit review."), *review denied* (Minn. Apr. 13, 1990).

X.

Appellant alleges that his constitutional rights have been violated, but because his allegations are not supported by arguments or citations to authority, these issues are waived. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

Affirmed.