STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1633

In re the Marriage of: Darren Ray Schallenberger, petitioner,
Respondent,

vs.

Jessica Eren Schallenberger, n/k/a Jessica Eren Atkins,
Appellant.

Filed July 27, 2010
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-FA-000219532

Karim El-Ghazzawy, El-Ghazzawy Law Offices, LLC, Minneapolis, Minnesota (for respondent)

Deno W. Berndt, Berndt Law Offices, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Shumaker, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the denial of her motion to reduce her child-support obligation. Because appellant failed to prove a substantial change in circumstances justifying modification, we affirm.

FACTS

Appellant Jessica Eren Schallenberger, n/k/a Jessica Eren Atkins, and respondent Darren Ray Schallenberger are the parents of S.S., born on November 5, 1993. The child resides with respondent in Minnesota; appellant resides in Texas with her husband and a non-joint child. In January 2008, the district court ordered appellant to pay respondent basic child support in the amount of $432 per month.[1] The 2008 order indicates that at the time of the order, appellant was unemployed and was "seeking employment that would allow her 'to parent the children as [she] always [had].'" The order also indicates that appellant had chosen to take summers off from work and to seek part-time employment for low wages so she could be at home with her children. Despite the facts that appellant had a college degree, intended to go to graduate school, and was previously employed by Health Partners as a doula with an annual salary of $50,000, appellant claimed that she only intended to obtain part-time employment paying between $7.50 and $9 per hour. The district court found that appellant's "intention to work part-time at low wage jobs is considered by this court as voluntary under-employment." The district court therefore imputed an annual salary of $45,000 to appellant based on her education and experience. Appellant did not appeal this order.

On June 4, 2009, the parties appeared before a child support magistrate (CSM) for a hearing on appellant's motion to modify her child-support obligation. Appellant sought either a suspension of her support obligation or an imputation of income at 150% of

[1] The parties indicate that there may have since been a cost-of-living adjustment.

minimum wage. As support for her motion, appellant asserted that she was unable to find full-time employment.

Appellant and respondent were present at the hearing and were placed under oath by the court. At the beginning of the hearing, the CSM stated: "[T]his is a modification so it can be submitted based upon arguments. I will allow for brief testimony if necessary, okay, so at this point I'm just going to listen to argument. . . ." The CSM received the proffered documents, offered the parties an opportunity to testify, and heard oral argument from the parties' attorneys. Appellant did not offer any testimony. The CSM denied appellant's motion, and appellant did not seek review of the CSM's decision in district court. This appeal follows.

D E C I S I O N

A party may move to modify an existing child-support obligation under Minn. Stat. § 518A.39 (2008). Modification requires (1) a substantial change in circumstances that (2) renders the existing support obligation unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2. As the moving party, appellant bore the burden of proof on these elements. *See Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002) (stating that the moving party bears the burden of proof in a child-support modification proceeding).

A district court has broad discretion in ordering modification of child-support orders. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). An appellate court will reverse an order regarding child support if it is convinced that the district court abused its discretion by resolving the matter in a manner "that is against the logic and the facts on

the record." *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999) (quotation omitted). We have cautioned the district court to exercise its discretion "with great caution and only upon clear proof of facts showing that the circumstances of the parties are markedly different from those in which they were when the decree was rendered." *Anderson v. Anderson*, 450 N.W.2d 384, 386 (Minn. App. 1990) (quotation omitted). On appeal from a CSM's order that has not been reviewed by the district court, we use the same standard to review issues as would be applied if the order had been issued by a district court. *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000).

The CSM found that appellant was partially employed earning $25 per hour and that her income remained the same as it was at the time of the January 2008 order. The CSM also found that appellant failed to establish a substantial change in circumstances that makes the current order unjust or unreasonable and "failed to meet her burden of proof establishing a reduction in income that justifies a reduction in support." The CSM explained that appellant had averred no changed circumstances: she did not claim a disability that prevented full-time employment, and she failed to establish a good-faith effort to become fully employed within her earning capacity.

Appellant asserts that the CSM imputed income to her and erred by failing to consider the relevant statutory factors in doing so. "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." Minn. Stat. § 518A.32, subd. 1 (2008). A determination of potential income must be made according to one of three methods: (1) the parent's

"probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community"; (2) the amount of unemployment compensation or workers' compensation benefits received, if any, by the parent; or (3) "the amount of income a parent could earn working full time at 150 percent of the current federal or state minimum wage, whichever is higher." *Id.*, subd. 2 (2008). In order to base a determination of child support on a parent's potential income, the district court is required to consider factors set out in statute. *Kuchinski v. Kuchinski*, 551 N.W.2d 727, 729 (Minn. App. 1996). Appellant asks us to reverse and remand for a determination regarding the proper amount of income to be imputed to her under Minn. Stat. § 518A.32, subd. 2.

But the CSM did not impute income to appellant. The current imputation results from the January 2008 order. The CSM was not obligated to recalculate appellant's income based on current circumstances unless appellant established a substantial change in circumstances rendering the current support order unreasonable and unfair. *See Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) (holding, in spousal-maintenance context, that a failure to show a substantial change in circumstances precludes a modification of maintenance obligations under the statute, and a remand for findings on other factors addressed in the statute is therefore unnecessary). Absent proof of a substantial change in circumstances, there was no basis for modification and no need to recalculate appellant's income imputation.

Appellant's evidence of a substantial change of circumstances was limited to one pay stub dated April 18, 2009, which indicated that her year-to-date earnings were $816.43, and a three-paragraph affidavit. The first paragraph of the affidavit identifies appellant as the affiant. The third paragraph identifies and incorporates Exhibit A, which is a listing of appellant's current total monthly expenses of $7,811.96—including $79 for cable television; $80 for pet food; $100 for veterinary bills and expenses; and $1,120 for children's sports, school, and hobbies. The second paragraph of the affidavit provides the purported evidence of a substantial change in circumstances. It reads as follows:

> I do not have the income to make my current child support obligation. After applying for nearly 100 jobs I have not been able to find work after being laid off and moving to Texas. The economy has caused very high rates of unemployment and human services jobs are scarce here to begin with. I have also under-reported [respondent's] income by leaving out his dividends and other sources of regular cash jobs. My costs of living have gone up. This level of child support is very unfair and does not equitably represent what I can pay and what the needs are of [respondent]. Recently a cost of living adjustment has increased this amount almost $100.00. [Respondent] was ordered to pay $1,500.00 per year (now $3,000.00) for airfare, but has not and I have been unable to purchase [S.S.] tickets on two occasions without his financial help.

Appellant offered no details regarding the "nearly 100" positions she claims to have applied for unsuccessfully, such as the type of positions, pay rates, job locations, and whether or not she interviewed for the positions. And appellant offered no evidence regarding the job opportunities, or lack thereof, for someone with her qualifications in the area where she resides. Nor did she present evidence that she is no longer capable of earning income commensurate with the January 2008 imputation. In fact, the wage

statement that she submitted at the hearing reflected an hourly wage that is commensurate with the January 2008 income imputation.

Appellant's general, unsupported attempt to blame her lack of employment on a down economy and the scarcity of jobs in Texas was found by the CSM to be inadequate to establish a substantial change in circumstances. This finding is supported by the record, which does not show that the reasons for appellant's current unemployment are any different than they were when the district court found appellant to be voluntarily underemployed in January 2008. And, having failed to produce any evidence documenting her job-search efforts, appellant cannot now complain that the CSM did not rule in her favor. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) ("On appeal, a party cannot complain about a district court's failure to rule in her favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question."), *review denied* (Minn. Nov. 25, 2003).

Appellant argues that she met her burden by providing her affidavit and twice "deferring" to the CSM to question appellant regarding her circumstances. This argument is unavailing. A CSM is not expected to extract information from a party who seeks to modify his or her child-support obligation. The burden of proof was on appellant, not on the CSM. Appellant also argues that the CSM erred by dismissing appellant's affidavit without making a specific credibility finding. We disagree. The CSM's finding that appellant "failed to establish a good faith effort to become fully employed within her earning capacity" reflects an implicit determination that appellant's

affidavit was not credible. *See, e.g.*, *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (recognizing an implicit credibility determination).

Finally, contrary to appellant's assertion, the law provides her with the opportunity to establish that her status has changed from voluntarily underemployed to involuntarily underemployed. *See* Minn. Stat. §§ 518A.32, subd. 3 (2008) (defining classes of persons not considered voluntarily underemployed); .39, subd. 2 (providing for modification of a child-support obligation upon a showing of substantial change in circumstances that renders the existing obligation unreasonable and unfair). Appellant simply failed to offer adequate proof of such a change.

The record supports the CSM's finding that appellant "failed to establish a good faith effort to become fully employed within her earning capacity." *See Anderson*, 450 N.W.2d at 387 (holding that a district court does not abuse its discretion by finding that an obligor who does not document his or her job search has not made a good-faith effort to find employment). And this finding supports the CSM's conclusion that appellant failed to meet her burden to establish a substantial change in circumstances justifying a reduced support obligation. Thus, the CSM did not abuse her discretion by denying appellant's modification motion, and we affirm.

Affirmed.

Dated:

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Judge Michelle A. Larkin