STATE OF MINNESOTA
IN COURT OF APPEALS
A10-295

In re the Marriage of:
Denise Jo Weidner, petitioner,
Appellant,

vs.

Tony Stan Weidner,
Respondent.

Filed September 14, 2010
Affirmed
Klaphake, Judge

Renville County District Court
File No. 65-FA-08-109

Denise Jo Weidner, Champlin, Minnesota (pro se appellant)

Jennifer Kurud Fischer, Jones & Fischer, P.A., Willmar, Minnesota (for respondent Tony Stan Weidner)

David J. Torgelson, Renville County Attorney, Olivia, Minnesota 56277 (for respondent Renville County)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Schellhas, Judge.

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

KLAPHAKE, Judge

Appellant Denise Jo Weidner challenges the child support magistrate's (the CSM) support order, arguing that the CSM improperly (1) calculated her income and expenses;

(2) modified a previous support order; (3) failed to consider the income taxation dependency exemption received by her former husband, respondent Tony Stan Weidner; and (4) calculated past child support.

Because the CSM's findings are supported by record evidence and are not clearly erroneous and because based on these findings the CSM's order was not an abuse of discretion, we affirm.

D E C I S I O N

We review the district court's findings of income, for purposes of setting child support, for clear error; findings must be based in evidence in the record. *Schisel v. Schisel*, 762 N.W.2d 265, 272 (Minn. App. 2009). The district court has broad discretion to provide for support. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). Appellant challenges a support order issued by a CSM; this court reviews a CSM's decision using the same standard of review it would apply to a district court determination. *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000).

At the hearing, appellant testified that she was receiving $290 per week in unemployment compensation and that she had been laid off from a job paying $14.00 per hour; she further testified that this was seasonal employment and she expected to be called back to work. The CSM found that her income consisted of 18 weeks of unemployment compensation and found potential income of 34 weeks of employment at $14.00 per hour. This was based on appellant's employment history, including her testimony that she would be called back to work by her employer.

This is a permissible calculation under Minn. Stat. § 518A.32 (2008). The CSM found that appellant was voluntarily unemployed or underemployed. If a parent is voluntarily unemployed or underemployed, the CSM is directed to calculate support based on potential income for full-time employment. *Id.*, subd. 1. Permissible calculations include consideration of the parent's probable earnings based on employment history, potential, and opportunities in the community. *Id.*, subd. 2. The CSM may also use unemployment compensation to establish actual income, but here appellant's testimony supported a finding that she would not be unemployed for a long term, because her job was seasonal and she expected to return to work. Appellant submitted a letter from her employer stating that he would be happy to rehire her.

Although appellant argued that she was applying for employment, she had applied for only three positions. The CSM concluded that "[t]he minimal job applications are not good faith job search efforts." Under these circumstances, the CSM's finding that appellant was voluntarily unemployed or underemployed and the CSM's dual calculation of actual income and potential income is reasonable, based on fact, and not clearly erroneous. *See Schisel*, 762 N.W.2d at 272.

Appellant argues that the CSM erred in using potential income because she was temporarily unemployed in order to attend school. A parent is not considered unemployed or underemployed if the temporary lack of employment will ultimately lead to an increase in income or represents a bona fide career change. Minn. Stat. § 518A.32, subd. 3(1), (2). Appellant is finishing an associate degree in paralegal studies, but according to her testimony, she is taking online classes in her free time by computer and

she is unemployed because of a slowdown in work, not because of a career change. The exceptions of subdivision 3, therefore, do not apply to appellant's situation.

Appellant asserts that the CSM failed to take into account that she had to provide all transportation for parenting time. In her brief, appellant alleges that she drives 880 miles per month in order to participate in parenting time. In appellant's affidavit opposing modification of child support, appellant notes a cost of $150 per month for gasoline and that she has to provide transportation, but that is the only reference to this cost. The CSM can deviate from the child support guidelines based on circumstances or extraordinary financial needs. Minn. Stat. § 518A.43, subd. 1 (2008). As appellant has not provided enough information to provide a basis for a deviation from the guidelines, the CSM did not err in failing to address this issue.

Appellant also argues that the CSM failed to take into account that she would be obligated to pay taxes on her unemployment compensation. For purposes of calculating child support, the CSM must first determine gross income. "Gross income" includes any form of periodic payment, including unemployment benefits. Minn. Stat. § 518A.29(a) (2008). Gross income is determined before deductions for pre-tax benefits. *Id.* To compute the child support obligation, the CSM subtracts from gross income the credit for nonjoint children to determine parental income for purposes of child support (PICS). Minn. Stat. § 518A.34(b) (2008). Once each parent's obligation is determined by applying a proportionate share of the parents' combined income to the table in Minn. Stat. § 518A.35, subd. 2 (2008), the CSM may make a parenting time adjustment in accordance with Minn. Stat. § 518A.36 (2008). A parent's tax liability is not considered

in this procedure, except insofar as it provides a basis for a deviation under Minn. Stat. § 518A.43, subd. 1. Tax liabilities are not specifically identified as a basis for deviation.

The CSM's calculations, as set forth on the child support guidelines worksheet, are correct; the evidence supports her findings, which are not clearly erroneous.

Modification of Support

Appellant asserts that respondent failed to show a basis for modification of the previous support order regarding the child of the marriage, P.W. Appellant had a support obligation for P.W. from the parties' dissolution. This order was modified, with the last modification on April 3, 2009, setting support at $194 per month for P.W. The current matter began as an action to establish support for L.W., the child of the parties born in 2005, after their dissolution but during a period of renewed cohabitation. The action was initiated after an award of permanent custody of L.W. to respondent in August 2009. The current matter is therefore both an establishment and a modification action. The addition of a child is sufficient to show substantially increased need of an obligee, a basis for modification. Minn. Stat. § 518A.39, subd. 2 (2008). In order to oppose modification, appellant would have to show that the terms of the new support order were unreasonable and unfair. *Id.* In this case, it is in appellant's interest to have a combined support obligation for two children, rather than two separate obligations for those children. Appellant has failed to demonstrate that the CSM abused its discretion.

Income Taxation Dependency Exemption

Appellant asserts that the CSM erred by failing to consider the fact that respondent receives the income tax dependency exemptions for the children and the financial benefit he receives from this.

The CSM may deviate from the presumptive guidelines "in order to encourage prompt and regular payments of child support and to prevent either parent or the joint children from living in poverty." Minn. Stat. § 518A.43, subd. 1. Among other things, the CSM must consider when deviating from the guidelines "which parent receives the income taxation dependency exemption and the financial benefit the parent receives from it." *Id.* Because the CSM did not deviate from the guidelines, it was not an abuse of discretion to refuse to consider the dependency exemptions.

Past Support

The CSM ordered appellant to pay past child support for L.W. for a period from August 1, 2008, to December 31, 2009. The CSM used this period because respondent received custody of L.W. beginning with the July 15, 2008 order for temporary custody. The CSM determined that appellant owed no past child support for the period from August 1, 2008, to April 30, 2009, during which time she paid $350 per month for support for P.W. This sum exceeded the amount determined to be appellant's current support obligation for two children. In April 2009, appellant's support obligation was modified to $194 per month. The CSM calculated that based on appellant's potential income for that period of time, she should have been paying $282 per month for two

children. The CSM concluded that appellant owed the difference between these two amounts for the eight months from May 1, 2009, to December 31, 2009, or $704.

"A person . . . having physical custody of a dependent child not receiving public assistance . . . has a cause of action for child support against the child's noncustodial parents. . . . A noncustodial parent's liability may include up to the two years immediately preceding commencement of the action." Minn. Stat. § 256.87, subd. 5 (2008). Support under this statute is determined in accordance with chapter 518A. *See also* Minn. Stat. § 257.66, subd. 4 (2008) (setting forth statute of limitations of two years prior to commencement of action for support orders in paternity actions).

Appellant argues that the CSM erred because a support order may be retroactively modified "only with respect to any period during which the petitioning party has a pending motion for modification." Minn. Stat. § 518A.39, subd. 2(e). Appellant further argues that respondent made no motion to modify; therefore, the CSM could not order retroactive support.

The past support here was ordered with respect to L.W. and is proper under Minn. Stat. § 256.87, subd. 5; it was not a modification of the order for support of P.W., except insofar as the support of the two children is now combined into one support obligation. The CSM's findings regarding past support are based on evidence and are not clearly erroneous, and the order for past support was not an abuse of discretion.

Affirmed.