STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1100
A10-1107

County of Sherburne,
Respondent,

Lisa M. Schoepke, petitioner,
Respondent,

vs.

James J. Schoepke,
Appellant.

Filed February 8, 2011
Affirmed in part, reversed in part, and remanded
Toussaint, Judge

Sherburne County District Court
File No. 71-F9-96-001374

Kathleen Heaney, Sherburne County Attorney, Erin E. O'Toole-Tomczik, Assistant County Attorney, Elk River, Minnesota (for respondent Sherburne County)

Lisa M. Schoepke, Zimmerman, Minnesota (pro se respondent)

Shane C. Perry, Perry, Perry & Perry, Minneapolis, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

TOUSSAINT, Judge

James J. Schoepke appeals from the district court's supplemental judgment granting attorney fees and costs to respondent Lisa M. Schoepke and from the district court judge's order denying review of an order by the child-support magistrate (CSM). Appellant argues that he was deprived of due process by decisions based on a hearing at which he did not appear and evidence to which he did not respond, that documents considered by the CSM were not timely exchanged and were barred by court rules, that the finding of his income is clearly erroneous, that respondent did not show changed circumstances justifying modification of child support, and that the attorney fees were not authorized by law. Because the district court did not abuse its discretion in granting attorney fees, we affirm the supplemental judgment. We also reject appellant's arguments pertaining to due process, the admissibility of documents, and changed circumstances. But because appellant should have received an evidentiary hearing where he could respond to respondent's posthearing submissions, we reverse in part and remand for further proceedings consistent with this opinion.

FACTS

Appellant and respondent had two children during their marriage, which lasted from 1989 to 1996. The dissolution judgment granted custody of the children to respondent and ordered appellant to pay child support, including $100 monthly in daycare expenses, and to pay half of the children's health insurance and other medical costs.

In April 2009, appellant moved for modification of child support on the ground that their "two children have not been in daycare for several years." On June 5, respondent moved for recalculation of appellant's basic support obligation, attorney fees and costs, and disclosure of all sources of appellant's income and disclosure of his loan application with Premier Bank (bank). Respondent conceded that their children were no longer in daycare, but alleged that appellant had understated his income.

On June 23, 2009, the parties appeared before the CSM for a hearing. Respondent acknowledged that she stopped incurring daycare expenses in September 2006. Respondent also claimed that appellant's income was significantly higher than he reported on his tax returns "[b]ecause of items he owns and can afford and from past experience." By contrast, appellant testified that he was in a state of financial ruin. Appellant stated that he was approved for a $150,000 loan in March 2009 but that he could not explain why; he was nonresponsive when asked what income he had claimed to the bank on his loan application. Some of appellant's testimony suggested that he previously made inconsistent statements about his ownership of various motor vehicles and of a boat.

On July 7, 2009, the CSM issued an order retroactively modifying appellant's child-care support obligation by suspending it effective September 1, 2006, finding that respondent stopped incurring child-care expenses at that time but did not report her termination of child care. The CSM also denied respondent's motions to modify appellant's basic support obligation and medical support obligation and for attorney fees.

Appellant moved for review of the CSM's order by the district court, which subsequently affirmed the order. On November 3, respondent moved for a retroactive and prospective increase in appellant's child-support obligations, alleging that he misrepresented his income and that his loan applications claimed additional income that he did not disclose to the court.[1] Respondent's November 3 notice of motion and motion was served on appellant, and it indicated that a hearing would be held before the CSM on December 1, 2009, at 10:00 a.m. Then, on November 13, a subpoena was issued, commanding the bank to appear for a 10:00 a.m. hearing on December 2; appellant received a copy of the subpoena.

Appellant did not appear at the scheduled hearing, which was held before the CSM on December 1. A hearing transcript was not made available, but the CSM evidently left the record open after the hearing to receive supplemental materials. Respondent submitted appellant's subpoenaed bank records, including statements of account activity, loan applications, personal financial statements, and tax returns that were different than the tax returns submitted to the court.

On January 4, 2010, the CSM issued an order granting respondent's motion to increase appellant's basic support obligation to $1,442 per month, effective June 1, 2009. The CSM also ordered medical support at $209 per month and payment of $4,527.54 in attorney fees and costs in connection with the June 23 and December 1 motion hearings. All other provisions of the July 7, 2009 order remained in effect. The CSM found that

[1] Appellant responded to this allegation by sending a letter dated December 15 to the CSM and to respondent and her attorney stating that he had lied on his loan applications and that his IRS tax returns accurately depicted his income.

the erroneous December 2 date on the subpoena to the bank was not an excuse for appellant's failure to appear at the December 1 hearing because he received proper notice.

The CSM rejected appellant's explanation that he lied to the bank to procure loans but was truthful with the court, finding that claim to lack credibility. The CSM noted that appellant paid numerous nonbusiness expenses from his business checking account, "possibly to hide his true earnings and/or to inflate his business expenses." The CSM noted: "Despite his claims of poverty and financial ruin at the June 23, 2009 hearing, [appellant's] bank account shows $8,443.15 in deposits in May 2009 and $7,000.14 in deposits in June 2009." Further, although appellant testified on June 23 that he did not own a boat, his financial records indicated that he paid taxes for the boat a week after that hearing. The CSM found that appellant's gross monthly income was $8,826. The CSM granted respondent's motion to modify as of the date of her original June 2009 motion based upon the disbelieved information provided to the court and because she was entitled to this relief by default. The CSM granted respondent's request for attorney fees for the same reasons and because of the disparity in the parties' incomes.

Appellant moved for review of the CSM's January 4 order by a district court judge. The judge subsequently issued an order remanding the matter to the CSM with instructions (1) to consider the exhibits attached to the affidavit supporting appellant's motion for review and (2) that the CSM had the discretion to reopen the record, hold an evidentiary hearing, or order further briefing on behalf of the parties. The judge rejected appellant's argument that the CSM improperly considered untimely exchanged

documents, reasoning that a CSM has discretion to determine whether untimely exchanged documents will be considered and that the subpoenaed records were not ex parte communications because the CSM left the record open following the hearing to receive the records. The judge reasoned, however, that fairness to the parties and a user-friendly construction of the expedited-process rules mandated that "in a case such as this where the record is left open following a default hearing, and the defaulting party has promptly proffered an adequate excuse for the default, the defaulting party should be given a similar opportunity to submit post hearing documents as the non-defaulting party."

On February 25, 2010, the CSM issued an order affirming her January 4 order. The CSM accepted appellant's submissions but did not otherwise reopen the record, concluding that additional pleadings and testimony were not required to resolve the issues on remand. The CSM noted that appellant's 2007 and 2008 income tax returns, which he sought to have considered, were already provided to the court and addressed in the January 4 order. The CSM reasoned: "Essentially, [appellant] has not submitted any substantially new information to the court. The essence of his argument seems to be that he might have been dishonest with the banks but he was not dishonest with the court or IRS." The CSM expressly relied on the 2006 and 2007 income tax returns submitted to the bank "to attempt to determine [appellant's] true income."

The CSM explained that, although the 2008 income tax return had been considered in her July 7, 2009 order, at the time "the pattern and practice of submitting different financial documents to the court and the banks had not been discovered. As a

result, the court can now look at the overall credibility of [appellant] in determining how to weigh the various pieces of evidence." Rejecting the 2008 income tax return as not credible because of its variance from the information that appellant provided to the bank in December 2008, the CSM found that appellant's gross monthly income was $8,826.

The district court entered a supplemental judgment on March 18, 2010, granting respondent $4,527.52 in attorney fees and costs in connection with the June 23 and December 1 motion hearings. Shortly thereafter, appellant moved for review of the CSM's February 25 order by a district court judge, which the judge denied. Appellant filed separate appeals from the supplemental judgment and from the judge's order denying review, which this court ordered consolidated.

D E C I S I O N

"The district court enjoys broad discretion in ordering modifications to child support orders." *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999). "A district court order regarding child support will be reversed only where a district court abused its discretion by resolving the matter in a manner that is against logic and the facts on the record. Misapplying the law is an abuse of discretion." *Bauerly v. Bauerly*, 765 N.W.2d 108, 110 (Minn. App. 2009) (citation omitted). We review questions of law de novo and findings of fact for clear error. *Ayers v. Ayers*, 508 N.W.2d 515, 518 (Minn. 1993).

I.

Appellant argues that the CSM based her decision on the bank records that were never served on him and to which he was given no opportunity to respond. Therefore, he contends, the January 4 and February 25 orders deprived him of his right to due process

and must be vacated.

The United States and Minnesota Constitutions prohibit the government from depriving individuals of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Minn. Const. art. I, § 7. Due process guarantees reasonable notice and an opportunity to be heard at a meaningful time and in a meaningful manner before a fair tribunal. *Nexus v. Swift*, 785 N.W.2d 771, 779 (Minn. App. 2010). Whether a person's due-process rights have been violated is a question of law. *In re Expulsion of N.Y.B.*, 750 N.W.2d 318, 327 (Minn. App. 2008).

Appellant has not cited, and we do not find, any law indicating that his notice was constitutionally insufficient. Appellant had the *opportunity* to be heard, of which he did not avail himself when he failed to appear at the December 1 hearing. On remand, the CSM reopened the record and accepted documents from appellant in support of his claims. Appellant stated his basic case at the June 23 motion hearing, and the January 4 and February 25 orders reflect the CSM's awareness and consideration of all of appellant's evidence and his positions in this matter. Appellant has not made out a due-process violation.

II.

Appellant argues that the district court's application of court rules and statutes was in error. First, appellant contends that his motion to vacate the CSM's orders was properly brought under Rule 60 of the Minnesota Rules of Civil Procedure. The district court judge's order remanding the matter to the CSM states that Minn. R. Gen. Pract. 377.01 "precludes post-decision relief" under Minn. R. Civ. P. 60 and Minn. Stat.

§ 518.145 (2010) under expedited child support process review procedures. Rule 60 provides that a district court may relieve a party from an order, on motion and upon such terms as are just, for mistake, excusable neglect, or any other reason justifying relief. Minn. R. Civ. P. 60.02. Section 518.145 authorizes similar relief. *See* Minn. Stat. § 518.145, subd. 2(1), (5); *see also* Minn. Stat. § 518A.38, subd. 6 (2010) (making section 518.45, subdivision 2, which applies to dissolution judgments, applicable to awards of child support).

Rule 377 provides: "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." Minn. R. Gen. Pract. 377.01. Rule 377 governs the procedure for all proceedings conducted in the expedited process in family court, regardless of whether the presiding officer is a CSM or a district court judge. Minn. R. Gen. Pract. 351.01; *see also* Minn. R. Gen. Pract. 301 (stating that Rules 351 through 379 are the expedited child support process rules). It is undisputed that these proceedings were part of the expedited family court process and that Rule 377 is therefore applicable.

Appellant asserts that the plain language of Minn. R. Gen. Pract. 377.01 provides that Minn. R. Civ. P. 60.02 is not precluded. But the rule clearly "includ[es]" Rule 60 motions in the category of "all other motions for post-decision relief," which are expressly precluded. Minn. R. Gen. Pract. 377.01. It follows that this legal conclusion by the district court judge was not in error.

Second, appellant argues that the bank records subpoenaed by respondent were not served on him and were therefore improper ex parte communications. The district court judge held that the CSM did not rely on ex parte communications by considering the bank records, reasoning that the rules gave the CSM discretion to accept documents that were not exchanged prior to the hearing, Minn. R. Gen. Pract. 364.09, subd. 3, and to leave the record open to accept post-hearing submissions, Minn. R. Gen. Pract. 364.14.

Rule 364.09 provides that the parties "shall" exchange copies of documents five days before the hearing. Minn. R. Gen. Pract. 364.09, subd. 3. But it goes on to explain that documents that were not timely exchanged shall be brought to the hearing and provided to the other party and to the CSM. *Id.* Further, the CSM "shall have discretion in determining whether evidence that was not timely exchanged prior to the hearing should or should not be admitted." *Id.* Appellant has not shown that the CSM abused her discretion by admitting documents that were not timely exchanged.

III.

Appellant argues that the CSM's finding of his monthly income is clearly erroneous. "A determination of the amount of an obligor's income for purposes of child support is a finding of fact and will not be altered on appeal unless clearly erroneous." *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

Appellant argues that the CSM erroneously relied on the 2006 and 2007 Schedule Cs that he provided to the bank rather than the Schedule Cs filed with his income tax returns filed with the IRS. He cites his own March 19 affidavit, which states that a bank

employee informed him that there was a discrepancy between the records on file with the IRS and the records he had provided to the bank. Appellant contends that the CSM's findings are manifestly contrary to the weight of the evidence because the CSM "provided no reasonable explanation" of why the Schedule Cs provided to the bank were credible but the Schedule Cs filed with the IRS were not. This evidence requires further exposition, and the evidentiary hearing that the CSM declined to hold would be appropriate to allow appellant to address it.

Appellant also argues that the CSM erred by relying on 2006 and 2007 income tax returns when setting child support in 2009 because child support must be determined based on *current* income. *See Thomas v. Thomas*, 407 N.W.2d 124, 127 (Minn. App. 1987) ("The court must determine *current* net income for purposes of setting child support."). But here, the CSM attempted to discern appellant's present income; his 2008 return was rejected as unreliable.

Appellant also argues that the CSM was not justified in relying on the personal financial statements to the bank because year-to-year variance in the value of the listed real estate shows that the financial statements were not reliable. But determining the weight and credibility to be accorded to evidence is exclusively the province of the fact-finder. *See Turner v. Suggs*, 653 N.W.2d 458, 465 (Minn. App. 2002).

In her January 4 order, the CSM noted that appellant claimed a gross monthly income of $1,667 but rejected this claim, instead finding that his gross monthly income was $8,826. The CSM "reviewed [appellant's] bank statements and canceled checks for the past 14 months." She observed that there were a number of business checks made out

to cash, business checks used to pay child support, and an $8,700 check made out to his sister-in-law. The CSM noted that this evidence could support an inference that appellant was attempting to hide his true earnings or to inflate his business expenses.

The CSM disallowed certain expenses from appellant's 2006 and 2007 income tax returns, noting that a deduction may be allowable for income-tax purposes but not child-support purposes. With these expenses excluded, appellant's business profit was $102,610 in 2006 and $109,223 in 2007. This averages to be $105,916.50 per year, or $8,826.38 per month, which supports the $8,826-per-month finding. The figures used in the CSM's calculations are consistent with those on the versions of appellant's income tax returns submitted by respondent. They are inconsistent with those in the versions of his income tax returns submitted by appellant. For example, the 2007 income tax return submitted by appellant does not include rental income and includes gross income in an amount tens of thousands of dollars lower; the 2006 return also claims gross income in an amount tens of thousands of dollars lower.

This discrepancy is specifically discussed in the CSM's February 25 order. The tax returns appellant provided to the court and to respondent claimed substantially lower incomes than those he provided to the bank. The CSM expressly relied on the 2006 and 2007 returns that appellant submitted to the bank; the returns submitted to the court were deemed not credible. Similarly, the CSM rejected appellant's 2008 return because it "radically . . . differ[ed]" from the information appellant provided to the bank in December 2008, which took the form of his personal financial statement since the year was not complete at that time.

Appellant argues that the returns provided to the IRS were accurate and that the self-prepared loan applications he gave to the bank were inaccurate. But this court defers to the CSM's credibility determinations. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (establishing standard for reviewing district court credibility determinations); *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. App. 2002) (explaining that standard of review for CSM's decision is the same as for district court's decision). Further, appellant cites no law indicating that one version of an income tax return is preferred over another, and it is not obvious that this should be the case. *See Bauerly*, 765 N.W.2d at 112 (rejecting an appellant's argument when he failed to cite authority and prejudicial error was not obvious).

Thus, we do not believe that appellant has shown the CSM's finding of his income to be clearly erroneous. But we conclude that the CSM should have held an evidentiary hearing, particularly after leaving the record open to accept further submissions by the parties after the December 1 hearing, which only respondent attended. While the finding of appellant's income might not ultimately be clearly erroneous, it is based on insufficient process. On remand, the CSM will reopen the record and hold a hearing to gather and assess the evidence offered by appellant in support of his version of events before making this determination. We express no opinion as to the amount of appellant's actual income but merely hold that further proceedings are required before this finding may be made.

We also note that appellant challenges the CSM's finding as an improper finding of imputed income. *See* Minn. Stat. § 518A.32 (2010) (distinguishing between actual income and potential income and requiring certain findings before a determination of

potential income may be made). Although the CSM's finding uses the word "potential," the CSM's calculations and other language in reference to the finding suggest that it is one of actual income. On remand, the CSM should clarify whether this finding is in fact one of actual income or of potential income; if it is one of potential income, the statutorily required findings must also be made.

IV.

Appellant argues that there was no evidence of a substantial change in circumstances, which is needed to modify a child-support order, and that the CSM therefore lacked jurisdiction to consider respondent's motion to modify child support.

A district court may modify a previous order respecting the amount of support. Minn. Stat. § 518A.39, subd. 1 (2010). The order may be modified if the terms are unreasonable and unfair based on, among other things, substantially increased or decreased gross income of the obligor or obligee, substantially increased or decreased need, or a change in either party's cost of living. *Id.*, subd. 2(a) (2010). If application of the child-support guidelines to the parties' current circumstances results in a calculated court order that is at least 20% and $75 per month higher or lower than the current support order, a substantial change in circumstances under Minn. Stat. § 518A.39, subd. 2(a), is presumed, and the terms of the current support order are rebuttably presumed to be unreasonable and unfair. *Id.*, subd. 2(b)(1) (2010).

Under the CSM's July 7 order, child support was calculated pursuant to the guidelines and was $343 per month. Under the January 4 order, it was $1,442. This is an increase of more than 20% and more than $75. Thus, a rebuttable presumption of a

change in circumstances and of unreasonable and unfair terms of the previous order is established. *See* Minn. Stat. § 518A.39, subd. 2. Appellant merely asserts that "there is no evidence of a significant change in circumstances." Error is not presumed on appeal, and reversible error must be shown by the party claiming it. *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999); Minn. R. Civ. P. 61. Because appellant has not rebutted the statutory presumption, he has not shown reversible error.

V.

Appellant argues that attorney fees were not authorized in this case. "The standard of review for an appellate court examining an award of attorney fees is whether the district court abused its discretion." *Gully*, 599 N.W.2d at 825.

A district court "shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding" if it finds that (1) the fees are necessary for the good-faith assertion of the party's rights in the proceeding, (2) the party from whom fees and costs are sought has the means to pay them, and (3) the party to whom fees and costs are awarded does not have the means to pay them. Minn. Stat. § 518.14, subd. 1 (2010); *see also* Minn. Stat. § 518A.39, subd. 2(h) (2010) (making section 518.14 applicable to an attorney-fees award based on a motion to modify a child-support order). The statutory requirement to make these findings may be satisfied if "the language used by the court reasonably implies that the court believed" that the requirements were met. *See Gully*, 599 N.W.2d at 825; *see also Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001).

Appellant argues that none of these findings were made or supported by the evidence in the record, and that attorney fees were therefore not allowed. But the statute also provides a district court discretion to award attorney fees against a party who "unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1. Conduct-based attorney fees may be awarded only for conduct occurring during litigation. *Geske*, 624 N.W.2d at 819.

The CSM's January 4 order required appellant to pay to respondent $4,527.54 for attorney fees and costs in connection with the June 23 and December 1 motion hearings. This is the order in which the CSM found that appellant hid relevant information pertaining to his financial status from both respondent and the court. The CSM concluded that "an award of fees and costs is appropriate due to the disparity in the parties' incomes" as well as appellant's failure to disclose information, and in the alternative that respondent was entitled to the requested attorney fees by default.

Appellant argues that conduct-based attorney fees are not justified in this case because respondent did not prove and the CSM did not find that appellant's conduct during litigation needlessly increased the cost of litigation. But respondent would not have needed to subpoena appellant's bank records if appellant had originally disclosed all of his financial information, and issues could have been resolved at the original June 23 hearing. At minimum, the CSM implicitly found that appellant's conduct increased the length of the litigation, thereby also increasing its expense. We find no abuse of discretion in awarding attorney fees on this basis, and we affirm that part of the decision.

VI.

Appellant raises two other issues for the first time on appeal. First, appellant argues that even if the CSM properly left the record open following the December 1 hearing, respondent was required to submit the additional documents within ten days. *See* Minn. R. Gen. Pract. 364.14. Second, appellant argues that the CSM lacked jurisdiction to consider respondent's November 3 motion to modify support because appellant did not appeal the CSM's July 7 order or the district court judge's August 24 order affirming it. Because we will not consider issues that were not presented to the district court, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), we hold that these arguments are waived and will not address them.

Affirmed in part, reversed in part, and remanded.