STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1269

Andrew Scott Fine, petitioner,
Appellant,

vs.

Sarah Nichole Schermer,
n/k/a Sarah Nichole Smith,
Respondent.

Filed May 14, 2012
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-PA-FA-08-339

Robert B. Fine, Edina, Minnesota (for appellant)

Daniel W. Schermer, Daniel W. Schermer, PA, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

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

HUDSON, Judge

On appeal from the grant of respondent-mother's motion to increase child support, appellant-father argues that (1) the child-support magistrate (CSM) abused her discretion by modifying father's child-support obligation based on unverified income; (2) the CSM clearly erred by finding that father is voluntarily underemployed; and (3) the CSM

abused her discretion by allowing oral testimony at the motion hearing and denying father a new hearing. Because father's investment income satisfied the statutory definition of income and his income had substantially increased since the prior order, the CSM did not abuse her discretion in finding changed circumstances that led to modifying father's child-support obligation. Additionally, the CSM did not clearly err by finding that father was voluntarily underemployed and properly exercised her discretion in allowing oral testimony and denying father a new hearing. We affirm.

FACTS

Appellant-father Andrew Fine and respondent-mother Sarah Schermer are the parents of a now four-year-old boy. A child-support order was issued May 28, 2009, ordering father to pay basic support of $405 per month, child-care support of $513 per month, and medical support of $53 per month. A cost-of-living adjustment subsequently increased father's basic support payment to $420 per month. Mother was required to maintain dependent health and dental insurance coverage for the child.

Less than a year later, father moved to decrease child support based on a substantial reduction in income and mother, three weeks later, filed a motion to dismiss and also moved to increase child support. In her motion to dismiss, mother claimed that father failed to provide financial information required under Minn. Stat. § 518A.28 (2010), including significant investment income for 2010. Mother also asserted that father had misrepresented his annual income. Father argued that he had supplied the information requested and only had $6,020.72 on which to live for most of 2010. Father further claimed that his assets had been reduced, and that his accounts at TD Ameritrade

and TCF Bank had been depleted because he had been "steadily draining [them] to keep up with support payments." Father also stated that he had vigorously pursued job openings.

The hearing date for both parties' motions was scheduled for February 4, 2011. Beforehand, father moved for oral testimony at the motion hearing. Mother responded that "if he testifies, there will be extended cross-examination as to his undisclosed assets and sources of income, as well as his lack of effort to secure employment." Father then responded by letter, stating that he waived his request for oral testimony and that he no longer needed to provide testimony beyond his written responses. Mother notified the district court that she had received father's attempt to waive his oral testimony and that "[e]ven if he waives direct testimony, we intend to cross examine him." The CSM found that both parties requested oral testimony.

At the hearing, father appeared without an attorney. Both father and mother made opening statements and testified. During the hearing, father "made it clear that he wished to expound on his testimony and [mother's] testimony." The CSM gave him a brief opportunity to respond. The CSM also allowed father to submit a written response, due February 16, 2011, and ordered father to provide his 2010 W-2s and 1099 forms for all sources of income, which were due on March 2, 2011.

The CSM found that father was laid off from his two previous reading-specialist jobs, in 2009 and in 2010. The CSM also found that in 2007, father's total gross income was $36,075, including $9,125 in unemployment-compensation benefits and $5,470 in investment income. His 2008 gross income was $30,269, including $10,985 in

investment income. When the original support order was issued in 2009, the CSM attributed gross monthly income to father of $2,522. In the 2011 order modifying child support, the CSM determined that father's gross annual income was $51,316, including income of $18,105 from employment as a reading specialist with the Lighthouse Academy, $2,211 from substitute teaching, $7,826 in unemployment benefits, $1,175 in verified investment income, and $22,000 in investment income that was deposited into his TD Ameritrade account.

The CSM found that father did not comply with the order to provide W-2s and 1099s for all income sources, submitting only partial verification of his investment income. In his post-hearing submission to the CSM, father stated that he provided all of the 1099 forms he had received as of February 14, 2011. Father also stated that it would take three to four weeks to procure records to verify that the $22,000 deposit into his TD Ameritrade account was, as he claimed, a transfer of non-income assets.

The CSM made an adverse inference based on father's lack of verification of the additional investment income, finding that father failed to verify his claim that the $22,000 deposit was a transfer of bond sales proceeds rather than income. The CSM concluded that father had historically and consistently earned income from his investments, and therefore included his investment income in calculating child-support payments. The CSM also found that father was voluntarily underemployed because he had "not been vigorously seeking full-time employment." The CSM found that father worked as a substitute teacher for only 20 days in the last six months of 2010, had not applied to positions for which he was qualified, and "failed to demonstrate that he is

incapable of finding teaching employment and receiving income that is commensurate with his 2010 income." Additionally, the CSM found that father's income has "substantially increased since the prior order, justifying review of [father's] child support obligation." With respect to mother, the CSM found that mother had a gross annual salary of $38,138 with no basis to provide for bonus income. Because mother was pregnant and expecting to deliver a nonjoint child, the CSM found that mother was entitled to a nonjoint child deduction of $306 per month beginning June 1, 2011.

The CSM modified father's support obligations from February to May 2011 in addition to further modifying father's obligations beginning June 1, 2011. The June 2011 adjustments reflect a change in parenting time and mother's nonjoint child deduction. The CSM determined that father owed basic support of $564 per month from February through May and $512 per month beginning June 1, 2011; child care support of $642 per month from February through May and $563 per month beginning June 1, 2011; and medical support of $77 per month February through May and $81 per month beginning June 1, 2011. The CSM found that the modified amount of father's basic support obligation was at least 20 percent and $75 higher than the prior order's obligation. Finally, the CSM denied father's request to strike testimony at the hearing, denied father's request to claim the child-care tax credit, denied father's request for forgiveness of past child support, and denied father's request for a credit for overpayment of child care support. Father sought review of the CSM's ruling by the district court, and the district court confirmed the CSM's ruling.

This appeal by father follows.

D E C I S I O N

I

We review a district court's confirmation of a CSM's decision for an abuse of discretion.[1] *Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001). A CSM's child-support determinations are afforded broad discretion. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). This discretion is abused in modifying a child-support order when support is set in a manner that is against logic and the facts on record or when the law is misapplied. *Id.* Determination of an obligor's income for purposes of child support will be altered on appeal only if clearly erroneous. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002). A CSM's findings must be sufficient to "enable an appellate court to determine whether the [CSM] properly considered the requirements" of a governing statute. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989) (reversing and remanding because district court's findings were insufficient to determine whether district court properly applied statutory requirements for maintenance determination).

A child-support order may be modified if it is shown that a substantial change in circumstances makes the current order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2010). A substantial change will be presumed and an order's unreasonableness and unfairness will be rebuttably presumed when a party's circumstances would result in a guidelines support obligation of at least 20 percent and $75 per month higher or lower than the current support order. *Id.*, subd. 2(b)(1) (2010).

[1] The CSM's ruling becomes the ruling of the district court when affirmed by the district court. *Welsh v. Welsh*, 775 N.W.2d 364, 366 (Minn. 2009). We review the CSM's decision as if it was made by the district court. *Id.*

Father argues that the CSM, as affirmed by the district court, abused her discretion by finding his income to be $51,316, including a $22,000 deposit from his father into appellant-father's TD Ameritrade account. He contends that the $22,000 was simply a transfer of funds intended to achieve a higher rate of return. Alternatively, father argues that the $22,000 deposit was a gift from his father and, therefore, is not income. He also argues that the modification award was excessive.

Investment income

Income for child-support purposes is defined as "any form of periodic payment," including unemployment benefits, pension payments, annuity payments, and potential income. Minn. Stat. § 518A.29 (2010). The CSM is required to consider "all earnings, income, and resources of each parent" when modifying child-support obligations. Minn. Stat. § 518A.43, subd. 1(1) (2010). The party seeking modification bears the burden of proof. *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987). Whether a source of funds qualifies as income for child-support calculations is a legal question, which we review de novo. *Sherburne Cnty. Soc. Servs. ex rel. Schafer v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992). This court will not reverse a CSM's findings as to a parent's income unless they are clearly erroneous. *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005).

The CSM found that father "has historically earned investment income which has been a periodic and consistent source of income to [father] and is therefore income that is included in calculating child support." The CSM noted that father listed investment income from eight companies, including TD Ameritrade, totaling $1,399.55 on his 2009

federal income tax return, even though father neglected to provide the 1099 forms related to this investment income. The CSM also found that father had received previous investment-related income, including $10,985 in 2008 and $5,470 in 2007. Furthermore, the CSM determined that father provided only partial verification of his investment income at the time of the hearing. Even after the CSM gave father additional time to verify his investment income, father's post-hearing submission did not include the required verification. The CSM apparently gave little weight to father's claim that he was unable to verify that the $22,000 was a transfer of non-income funds rather than a deposit of funds constituting income. A party may not complain of an error in the calculation of income when the party did not comply with an order to provide income verification. *Isanti Co. v. Formhals*, 358 N.W.2d 703, 706–07 (Minn. App. 1984).

We conclude that the CSM did not clearly err by finding that father has consistently earned periodic income through investments, which satisfies the statutory definition of income. *See* Minn. Stat. § 518A.29 (defining income as "any form of periodic payment"). Therefore, the CSM did not err by including father's investment income in her income calculation.

Gift

As to father's argument that the $22,000 deposit was a gift and not income, a gift may be used to determine the amount of a child-support obligation if the gift is regularly received from a dependable source. *Barnier v. Wells*, 476 N.W.2d 795, 797 (Minn. App. 1991). However, father did not raise this argument to the district court and, therefore, we will not consider it on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Excessiveness of modification award

Father argues that the CSM's modification of child support is excessive because it is beyond his ability to pay and, therefore, an abuse of discretion. But this argument is simply a recharacterization of his earlier disagreements with the CSM's income determination, which we concluded above was not clearly erroneous. Additionally, the CSM did not deviate from the guidelines and therefore set father's basic support obligation at the presumptively appropriate amount. The CSM did not abuse its discretion by modifying father's child support. *Putz*, 645 N.W.2d at 347 (affording broad discretion to make child-support determinations).

II

Father challenges the CSM's finding that he was voluntarily underemployed. Specifically, father asserts that the CSM failed to consider the evidence supporting his claim that the St. Paul and Minneapolis school districts refused to re-hire father. And father claims the CSM ignored evidence of the bad economic climate that has hindered his ability to procure full-time and substitute teaching positions.

"Whether a parent is voluntarily unemployed is a finding of fact, which we review for clear error." *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009). The CSM found that father was voluntarily underemployed because he failed to vigorously seek full-time employment. The CSM observed that father had worked as a substitute teacher for only 20 days in the last six months of 2010, refusing to submit applications to the Minneapolis and St. Paul school districts despite letters from both districts stating that

father's position with each was eliminated solely for budgetary reasons. And father had not applied for numerous vacant positions for which he was qualified.

The district court's finding that father is voluntarily underemployed is supported by the record. Father submitted evidence of ten education jobs for which he had applied and claimed that he had applied for multiple other jobs for which he could not provide records. Even so, father does not address the availability of numerous education positions for which the CSM found father did not apply. Additionally, the record shows that father did not apply to the St. Paul or Minneapolis school districts, where he had previously worked. The CSM did not clearly err by finding that father was voluntarily underemployed.[2]

III

Consideration of motions in family law matters may be restricted to nonoral testimony, unless a party moves for oral testimony. Minn. R. Gen. Pract. 303.03(d). The decision to allow oral testimony on a family law motion is reviewed for an abuse of discretion. *Sieber v. Sieber*, 258 N.W.2d 754, 756 (Minn. 1977).

Father argues that the CSM abused her discretion by allowing oral testimony at the motion hearing. Although father initially made a demand for oral testimony pursuant to rule 303.03(d), he later withdrew the request. Because father believed that mother did not request oral testimony, and he had asked the CSM to "waive" his initial request for

[2] In any event, it does not appear that father was prejudiced by the CSM's finding that he was voluntarily underemployed because the CSM did not use the finding in determining father's support obligation. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

oral testimony, father asserts that he lacked notice that the hearing would include oral testimony and, as a result, was unprepared and prejudiced by the taking of direct testimony and cross examination.

The record reveals a series of letters sent by both parties to the CSM regarding requests for testimony, including letters from mother informing the CSM and father's attorney that she would cross-examine father pursuant to Minn. R. Gen. Pract. 303.03(d). The CSM found that both father and mother requested a hearing with oral testimony and that father could not subsequently withdraw his request. Additionally, the CSM found that father's withdrawal attempt appeared "to be motivated by his desire to avoid an increase in his child support obligation. The Petitioner may not withhold information regarding his income to avoid modification of his child support obligation." This court defers to a CSM's credibility determinations. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). In sum, the record supports the finding that both parties requested oral testimony, and any attempt by father to "waive" his request for oral testimony fell within the CSM's discretion. *Sieber*, 258 N.W.2d at 756 (reviewing oral testimony decision for abuse of discretion). Furthermore, the CSM attempted to ensure that father had an opportunity to testify and respond both during and after the hearing. During the hearing, father "made it clear that he wished to expound on his testimony and [mother]'s testimony." The CSM allowed father an opportunity to provide a brief oral response, in addition to a written response due 12 days after the hearing.

Nevertheless, father argues that, because he believed oral testimony would not be taken, he appeared pro se and was prejudiced by not having an attorney represent him.

Father asserts that he was unable to properly respond at the hearing or afterward because he was unable to recall all that occurred at the hearing as he was both a participant and his own attorney. Though pro se parties are afforded some leeway in complying with court rules, courts will not modify ordinary rules and procedures because a pro se party lacks the skills or knowledge of an attorney. *Carpenter v. Woodvale, Inc.*, 400 N.W.2d 727, 729 (Minn. 1987); *Gruenhagen v. Larson*, 310 Minn. 454, 460, 246 N.W.2d 565, 569 (1976). Furthermore, father was properly notified that he would be cross examined by mother who twice sent letters to father stating that she would seek testimony and the subjects on which the testimony would be sought. The CSM did not abuse her discretion by allowing oral testimony at the hearing.

IV

Father argues that the CSM abused her discretion in denying his request for a new evidentiary hearing. Whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *Mathias v. Mathias*, 365 N.W.2d 293, 296–97 (Minn. App. 1985). Father bases a portion of his new-hearing argument on the CSM's decision to allow oral testimony, which we addressed above and determined was not an abuse of discretion. In addition, father asserts that he is entitled to a new hearing because he was not afforded an adequate opportunity to respond during the first hearing.

Although father was allowed only a brief opportunity at the hearing to respond, the CSM provided father with 12 days to make a written submission addressing "anything in your testimony that you want to clarify that you haven't already clarified on the record."

We conclude that the CSM gave father ample opportunity to respond, which he did by submitting a four-page response ten days after the hearing.

Finally, father asserts that allowing an evidentiary hearing scheduled for 30 minutes to extend beyond that timeframe violates Minn. R. Gen. Pract. 303.03. Although the record is unclear, it appears that the parties were both operating under the assumption that the February 2011 evidentiary hearing was scheduled for 30 minutes. Prior to the hearing, mother requested either that the hearing be extended beyond 30 minutes or continued to a later date when more time could be allotted. The CSM denied the continuance but ultimately allowed a longer hearing. Father claims that because the CSM denied mother's motion for a continuance, he reasonably believed that the hearing would not exceed 30 minutes and was prejudiced by the extended length of the hearing. But the CSM may extend the hearing for fact-finding purposes. *See Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982) (stating district court "has great discretion to determine the procedural calendar of a case"). The CSM did not abuse her discretion by denying father a new hearing.

Affirmed.