STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1950

In re the Marriage of: Lonn J. Viele, petitioner,
Appellant,

vs.

Patti Ann Viele,
Respondent.

Filed June 8, 2010
Affirmed in part, reversed in part, and remanded
Larkin, Judge

St. Louis County District Court
File No. 69DU-F7-04-600777

Timothy A. Costley, The Costley Law Firm, P.C., Two Harbors, Minnesota (for appellant)

Timothy J. Helgesen, Legal Aid Service of Northeastern Minnesota, Duluth, Minnesota (for respondent)

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

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

LARKIN, Judge

In this child-support modification appeal, appellant claims that the district court clearly erred or otherwise misapplied the law by (1) finding that he continues to receive monthly income of $932 in the form of health-insurance premiums paid by his employer,

(2) finding that he receives cash income of $150 per month, (3) concluding that he has monthly income of $960 resulting from his use of a duplex owned by his parents, and (4) finding that he has total gross monthly income of $5,749. We affirm in part, reverse in part, and remand.

FACTS

Appellant Lonn J. Viele and respondent Patti Ann Viele were married in October 1990. Appellant initiated marriage-dissolution proceedings in August 2004. The case was tried on five days in January and May 2006. The district court issued a dissolution decree in August 2006, which established appellant's monthly child-support obligation of $1,350.

Appellant challenged the child-support determination on appeal, claiming that the district court erred by imputing income to him without evidentiary support and by improperly calculating his income. *Viele v. Viele*, No. A07-212, 2007 WL 2916557, at *1 (Minn. App. Oct. 9, 2007). Because the district court's calculation of appellant's income was not adequately explained, we reversed and remanded for the district court to make specific findings regarding his income, including the basis for any amount imputed to him. *Id.* at *7. On remand, the district court amended its finding of fact and found that appellant's net monthly income from all sources was $4,500. The district court also found that "[b]ased on the Court's finding regarding [appellant's] income," appellant's child-support obligation would remain at $1,350 as ordered in the original decree.

Approximately five months later, appellant appeared before the district court on a motion to modify his child-support obligation. A child support magistrate (CSM) denied the request, and the district court affirmed the CSM's order. This appeal follows.

D E C I S I O N

When a CSM's decision is affirmed by the district court on a motion for review, the decision is treated as that of the district court.[1] *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). On appeal, the standard of review is the same standard that would have been applied if the CSM's decision had been made by the district court in the first instance. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. App. 2002).

"The district court enjoys broad discretion in ordering modifications to child support orders." *Gully v. Gully*, 599 N.W.2d 814, 820 (Minn. 1999); *see also Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002) (stating that whether to modify child support is discretionary with the district court). A reviewing court will reverse an order regarding child support only 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*, 599 N.W.2d at 820 (quotation omitted). "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).

[1] We nonetheless refer to the CSM when discussing the modification proceeding to distinguish between the findings and order on remand and in the later modification proceeding.

I.

We first address appellant's claim that the CSM clearly erred by finding that he continues to receive monthly income of $932 in the form of health-insurance premiums paid by his employer. In its order on remand after the first appeal, the district court found that appellant's employer paid his health-insurance premiums of $932 per month and deemed this amount income for the purposes of child support. *See* Minn. Stat. § 518A.29(c) (2008) (including expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business as income if they reduce personal living expenses). In the modification proceeding, appellant asserted that his employer no longer paid his insurance premiums. In addition to his own testimony, appellant submitted the following evidence to support his assertion: (1) a September 2006 notice from BlueCross/BlueShield stating that his coverage was terminated for non-payment of billed charges; (2) an April 2009 letter from St. Luke's Clinics stating that "[appellant's] account record indicates there is no medical insurance, medical assistance[,] or third party liability for [his] outstanding balance;" (3) an April 2009 notice from St. Luke's stating that appellant qualified for an 80% reduction in bills incurred; and (4) a transaction list from St. Luke's detailing unpaid charges for medical services that appellant received between September 2007 and October 2008.

At the modification hearing, the CSM noted that income issues related to appellant's receipt of health-insurance benefits from his employer had been previously litigated and decided and that appellant would need to present compelling evidence to establish a change in circumstances. The CSM stated that appellant's "ability to tell the

truth" regarding his health-insurance benefits "is definitely in question." The CSM ultimately rejected appellant's assertion and found that he continues to receive health insurance from his employer valued at $932 per month. The CSM reasoned that appellant "ha[d] not submitted any information that was not available at prior hearings, to show that [his employer] no longer pays his insurance," and that "no *credible*, recent evidence ha[d] been provided to show [appellant] does not have some form of insurance provided by [his employer]." (Emphasis added.)

Appellant contends that the CSM's finding that his evidence was available at prior hearings is clearly erroneous, arguing that none of the evidence was available when the trial was held in January and May 2006. But the trial was not the only "prior hearing" at which appellant's income and child-support obligation were at issue. Pursuant to our remand instructions, the district court was required "to make specific findings regarding [appellant's] income, including the basis for any amount imputed to [appellant], and to determine whether [appellant's] . . . child-support obligation[] should be altered due to a change in the calculation of [his] income." *Viele*, 2007 WL 2916557, at *7. And when the district court considered the case on remand in 2008, it received briefs from the parties and supporting documentation from appellant. While appellant is correct that the April 2009 documents from St. Luke's did not exist and were not available at the previous hearings, appellant fails to explain why he did not make the September 2006 notice from BlueCross/BlueShield available for the district court's consideration in the 2008 remand proceeding. Similarly, appellant does not explain why he did not submit that portion of the St. Luke's transaction list that details unpaid medical services that

predated the remand proceeding. These documents were available during the remand proceeding.

Moreover, the CSM's rejection of appellant's assertion that his employer no longer paid his insurance premiums was based on the CSM's determination that none of appellant's evidence was credible. The CSM relied on the district court's previous finding that appellant is not credible when it comes to representations regarding his income. Appellant contends that this reliance was improper, but appellant's lack of candor in this regard is well documented. In its November 2008 order on remand, the district court stated that appellant's "evidence concerning his income and expenses, particularly [his] own testimony, lacked credibility" and that "the lack of credibility fairly leaps off the page." The district court also stated that it was "disinclined to rely on any information received" from appellant regarding his actual income.

Approximately five months after the district court determined, on remand, that appellant was not a credible witness, appellant argued for modification, relying on evidence that predated the remand proceeding. On this record, the CSM did not err by considering appellant's evidence in the context of the district court's relatively recent credibility determination on an identical issue, and in the context of the district court's previous finding that appellant could use cash from his family's business on an as-needed basis to "evade taxes, qualify for need-based programs, and take unemployment benefits he would otherwise not be entitled to." This context explains why the CSM would reject evidence that otherwise appears to establish that appellant no longer received health insurance coverage from his employer. We will not second guess the CSM on this issue.

We defer to the CSM's determination that appellant's testimony was not credible. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts generally defer to the credibility determinations of the district court). And we will not reweigh appellant's documentary evidence on appeal. *See id.* (criticizing court of appeals for reweighing evidence on appeal). The CSM did not clearly err by finding that appellant failed to establish that he no longer received income in the form of compensation for health-insurance premiums from his employer valued at $932 per month.

II.

We next address appellant's claim that the CSM clearly erred by finding that he receives cash income of $150 per month. In its order on remand after the first appeal, the district court imputed monthly "cash income" of $131 to appellant based upon "lifestyle findings." The CSM increased this imputation to $150 per month. Appellant argues that there is no evidence in the record to support either a continuation or increase of the original cash-income imputation.

The burden was on appellant to prove that he no longer receives the $131 per month previously imputed to him. *See Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002) (stating that the moving party bears burden of proof in a child-support modification proceeding). The record does not indicate that appellant's lifestyle had changed such that $131 per month in cash income should no longer be imputed to him. Accordingly, the CSM did not err by continuing to impute monthly cash income of $131 to him. However, because the CSM refused to hear evidence regarding "whether or not

[appellant's] style of living has changed," there is also no evidence to support the CSM's decision to increase the imputed cash income from $131 to $150. This finding is therefore clearly erroneous. *See Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007) ("Findings of fact are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." (quotation omitted)), *review denied* (Minn. Aug. 21, 2007). But because, on this record, this $19 error is de minimis, it is not a basis for reversal. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (declining to remand for de minimis error); Minn. R. Civ. P. 61 (requiring that errors not affecting a party's substantial rights be disregarded).

III.

Appellant also claims that the CSM erred by concluding that he has monthly income of $960 resulting from his use of a duplex owned by his parents. The CSM found that appellant's parents, who own 80% of the corporation that employs appellant, provide appellant with rent-free use of a duplex and pay the utilities for the unit and concluded that "use of the duplex is income to [appellant] as it reduces his monthly living expenses." Whether a source of funds is income for child-support purposes is a legal question that we review de novo. *Sherburne County Soc. Servs. ex rel. Schafer v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992).

The calculation of gross income for child-support purposes is governed by Minn. Stat. § 518A.29 (2008). Subject to certain limitations not relevant here, gross income includes "any form of periodic payment to an individual," including but not limited to

salaries, wages, commissions, self-employment income, and unemployment benefits. *Id.* (a). In addition, "[e]xpense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business shall be counted as income if they reduce personal living expenses." *Id.* (c). Appellant argues that there is no evidence that the use of the duplex was part of his employment compensation.

A district court is not required to believe witness testimony, even if uncontradicted, if there are reasonable grounds to doubt its credibility. *Varner v. Varner*, 400 N.W.2d 117, 121 (Minn. App. 1987). The CSM found that "given the standing history in this case of [appellant] attempting to hide his income with the help of his parents and [his] total lack of credibility . . . , it is not believable that [appellant's use of the duplex] is not part of his compensation package as a way to avoid income." We defer to this credibility determination and the resulting conclusion that appellant's use of the duplex is compensation received in the course of employment. *See Sefkow*, 427 N.W.2d at 210 (stating that appellate courts generally defer to the district court's credibility determinations).

Appellant argues that his rent-free use of the duplex is a gift from his parents. But gifts that are regularly received from a dependable source must be used to determine the amount of a party's child-support obligation. *See Barnier v. Wells*, 476 N.W.2d 795, 797 (Minn. App. 1991) (stating that monthly payments of $833 that obligor received from his father and regular payments of $5,000 from his grandmother needed to be considered, as they were part of the "earnings, income and resources" of obligor). Appellant testified that he began using the duplex approximately 18 months before the modification hearing.

And the CSM implicitly found that appellant's parents are a dependable source, noting that appellant's parents "pay all his expenses, car, insurance, housing, utilities, attorney's fees and gas." Thus, even if the appellant's use of the duplex were classified as a gift, it could properly be used to determine the amount of appellant's child-support obligation. *See id.* (same).

Appellant also argues that because he only uses the duplex when he is exercising parenting time with his children every other weekend, the CSM should not have attributed 100% of the monthly rental value of the duplex to him as income. But the CSM rejected appellant's claim that his access to the duplex was limited to parenting time, finding that appellant keeps the majority of his personal belongings at the duplex; the duplex is available to appellant at all times; no one other than appellant uses the duplex; and appellant, who lives with his girlfriend when not with his children, "has no other home of his own." The CSM's determination regarding the extent of appellant's use of the duplex is based on credibility determination to which we defer. *See Sefkow*, 427 N.W.2d at 210 (stating that appellate courts generally defer to the credibility determinations of the district court). The CSM did not err by concluding that the monthly rental value of the duplex and the associated utility costs are income to appellant for child-support purposes.

IV.

Lastly, appellant claims that the CSM clearly erred by finding that he has total gross monthly income of $5,749. The CSM calculated appellant's gross monthly income as follows: $150 from utilities paid by his parents; $810 from his use of his parents'

duplex; $957 from his use of a company vehicle; $350 from employer-paid vehicle expenses (including gas, repairs, maintenance, and insurance); $150 from unreported cash payments; $932 from employer-paid health-insurance premiums; and $2,400 from actual wages.[2] Appellant argues that the gross-monthly-income finding is based on an erroneous calculation of his monthly wages.

In its order on remand after the first appeal, the district court found that appellant's wages and seasonal unemployment compensation resulted in approximate monthly net earnings of $2,200. At the modification hearing, appellant presented evidence that his unemployment compensation benefits had been reduced by $10,000 annually, because he and his parents own the company that employs him. *See* Minn. Stat. § 268.085, subd. 9 (2008) (stating wage credits from an employer may not be used for unemployment benefit purposes by any applicant who "individually, jointly, or in combination with the applicant's spouse, parent, or child owns or controls directly or indirectly 25 percent or more interest in the employer" once the applicant has been paid five times the applicant's weekly unemployment benefit amount in the current year). The CSM acknowledged this reduction at the modification hearing stating "there is black and white proof that he doesn't get unemployment anymore," and "I think that that is proven in the record."

Despite the prior finding that appellant had monthly net earnings of $2,200 from wages and seasonal unemployment compensation, and the evidence that appellant's unemployment compensation had been reduced by $10,000 per year, the CSM found that

[2] The CSM's finding mistakenly omitted appellant's employer-paid health-insurance premium from its list of income sources, but the total includes the $932 premium.

appellant's monthly wages had *increased* by $200 to $2,400. We cannot reconcile this finding with the record. The CSM reasoned that "[u]sing the last two quarters of 2008, [appellant] earned $14,398.08 or an average of $2400 per month." This extrapolation could be justified if the CSM had found that appellant has year-round employment at his family's corporation or had imputed income to appellant. But while the CSM found that appellant is employed by a "corporation . . . owned by [his] parents and they determine who is and is not laid off," we are not willing to interpret this statement as a finding that appellant's parents are financially offsetting his lost unemployment benefits, either through year-round employment or direct payments, because the CSM did not allow the parties to litigate this issue at the hearing. The CSM stated: "He's lost $10,000 worth of income. Now whether or not his, his parents have made up that income is obviously another argument, whether or not his style of living has changed, but in the half hour we had for this hearing, we can't address that issue."

And the record does not support a conclusion that the $2,400 monthly wage finding is based on an imputation of income. When respondent's counsel suggested that the CSM should impute income to appellant, arguing that the previous finding regarding appellant's monthly income was not based on paid wages or stated income, the CSM rejected the suggestion, stating that appellant's income had been calculated "based on $2,200 of wages and unemployment." Given the CSM's acknowledgment that appellant had lost $10,000 worth of income and her statement that appellant's "salary [had] not changed; just how it's distributed," the CSM's finding that appellant's monthly salary had increased to $2,400 is clearly erroneous, as is the resulting gross-monthly-income

calculation of $5,749. *See Kampf*, 732 N.W.2d at 633 ("Findings of fact are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.").

We next determine whether the error requires reversal. A child-support order may be modified upon a showing of a substantial change of circumstances that makes the order "unreasonable and unfair." Minn. Stat. § 518A.39, subd. 2(a) (2008). A substantial change of circumstances includes a substantial decrease in the obligor's gross income. *Id.*, subd. 2(a)(1). Once the CSM's $200 wage error is accounted for, appellant is properly determined to have gross monthly income of $5,549—an increase from the district court's prior monthly income determination of $4,500. However, the modification statute also provides for a presumption of a substantial change in circumstances and a rebuttable presumption of unreasonableness and unfairness if "the application of the child support guidelines in section 518A.35, to the current circumstances of the parties results in a calculated court order that is at least 20 percent and at least $75 per month higher or lower than the current support order." *Id.*, subd. 2(b)(1) (2008). "When the 20% / $75 difference is shown, the presumption of substantial change arising therefrom is irrebuttable." *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009).

Application of the child-support guidelines to appellant's corrected gross monthly income of $5,549 yields a presumptive child-support obligation of $1,079 per month.[3]

[3] The CSM found respondent had a monthly income for child-support purposes of $1,364. This finding is not challenged on appeal.

Minn. Stat. §§ 518A.35, .36 (2008). This represents a $271 decrease from appellant's existing child-support obligation of $1,350 per month. Because this decrease is at least $75 and 20% lower than the current support order, an irrebuttable presumption of a substantial change in circumstances results. *See* Minn. Stat. § 518A.39, subd. 2(b)(1); *Rose*, 765 N.W.2d at 145 (stating that the presumption is irrebuttable).

In denying appellant's modification motion, the CSM found that the application of the guidelines to appellant's monthly gross income of $5,749 and respondent's monthly gross income of $1,364 resulted in a basic child-support obligation of $1,112 per month for appellant. Because this amount is not 20% higher or lower than appellant's current support obligation, the CSM concluded that there had not been a substantial change in circumstances. But this conclusion is based on the erroneous finding that appellant's monthly income is $5,749. The CSM's $200 monthly wage error was therefore prejudicial, and we reverse in part.

The record establishes an irrebuttable presumption of a substantial change in circumstances and a rebuttable presumption that the current child-support order is unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(b)(1). Because the CSM did not reach the issue of whether the current child-support order is unreasonable and unfair, a remand for that determination is necessary.

V.

Respondent claims that the CSM's calculation of appellant's gross monthly income was too low, arguing that the CSM should have calculated any income from expense reimbursements or in-kind payments that reduced appellant's personal living

expenses on a pre-tax basis. At the time of the appeal, Minn. R. Civ. App. P. 106 provided that "[a] respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with the clerk of the appellate courts."[4] Issues decided adversely to a respondent are not properly before this court when a notice of review is not filed. *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). Because respondent failed to file a notice of review, we do not consider respondent's challenge to the CSM's gross-monthly-income calculation.

Respondent also argues that sanctions should be imposed against appellant and his attorney. The CSM noted that respondent is free to bring a contempt action, but that such an order was beyond the authority of the CSM. Similarly, respondent's requests for sanctions are properly addressed to the district court, not this court.

Affirmed in part, reversed in part, and remanded.

Dated:

_____
Judge Michelle A. Larkin

[4] Rule 106 was amended effective January 1, 2010, abolishing the notice of review and replacing it with a notice of related appeal. "The new procedure is not intended to change the scope of appellate review." Minn. R. Civ. App. P. 106, 2009 advisory comm. cmt. Because the present appeal was filed before the effective date of the new rule, we base our decision on the rule that was in effect at the time of the appeal.