STATE OF MINNESOTA
IN COURT OF APPEALS
A10-551

In re the Marriage of
Angela Gallwas, petitioner,
Respondent,

vs.

Douglas W. Gallwas,
Appellant.

Filed January 25, 2011
Reversed and remanded
Schellhas, Judge

Washington County District Court
File No. 82-F7-05-5621

Angela Gallwas, Mahtomedi, Minnesota (pro se respondent)

Patricia A. O'Gorman, Patricia A. O'Gorman PA., Cottage Grove, Minnesota (for appellant)

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

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

SCHELLHAS, Judge

Appellant father challenges a child-support magistrate's denial of his motion to establish respondent mother's child-support obligation, arguing that because an arbitrator had previously decided that mother's obligation was "reserved," the child-support

magistrate erroneously required him to show a change in circumstances. We agree and reverse and remand.

FACTS

Appellant-father Douglas Gallwas and respondent-mother Angela Gallwas were divorced by a judgment entered November 1, 2006. In a parenting plan incorporated into the judgment, the parties agreed, among other things, that they would maintain joint legal custody of their two minor children, mother would have primary physical custody of the children, and father would pay mother "guidelines child support" in the amount of $2,208 per month. The plan also provided that "[a]s additional child support, the parties shall equally share the cost of the children's agreed upon optional organized activities," and provided a framework for managing this provision.

In April 2008, the district court awarded father temporary custody of the children and later suspended his child-support obligation, effective October 1. On December 9, pursuant to the parties' stipulation, the court granted father primary physical custody of the children and granted the parties joint legal custody. The stipulation and order did not address child support.

On February 2, 2009, the parties agreed to binding arbitration to resolve certain "disputed financial issues." The binding-arbitration agreement is not in the record, nor does the record otherwise reflect the precise nature of the issues presented to the arbitrator. But, based on documents in the record, the issues appear to have included at least (1) whether father was entitled to reimbursement for child-support payments made after he filed his motion to suspend his child-support, (2) whether mother was entitled to

increased spousal maintenance due to the loss of child-support payments from father, (3) whether mother was entitled to a cost-of-living increase in spousal maintenance, and (4) whether either party was entitled to reimbursement from the other "for children's expenses" under the optional-activity expense-sharing agreement in the parenting plan. The record is silent about whether the parties agreed that the arbitrator would decide the issue of mother's child-support obligation to father after the change of physical custody to him.

In a February 20, 2009 order, the arbitrator found, among other things:

> The parties stipulated to a reservation of ongoing child support from [mother].[1] While the parties have had some difficulty dealing with sharing the children's expenses those difficulties are not a reason to modify the parties' previous agreement. [Father] testified that he would prefer to pay all the children's expenses (in exchange for that consideration in his expenses). There is nothing requiring either party to seek reimbursement.

The arbitrator accordingly ordered:

> [Mother's] obligation to pay child support/basic support to [father] is reserved. The parties shall continue to share expenses as set out in the Judgment and Decree. It is the choice of a party incurring an expense to determine if he or she wishes to seek reimbursement. If reimbursement is not requested, in writing, within 90 days of incurring the expense, reimbursement will be deemed forgiven.

[1] The stipulation to which the arbitrator referred is not in the record.

On November 5, 2009, father moved the district court to modify child support, requesting that "the court modify the support order dated 2/25/2009"[2] by "[m]odifying the Court's reservation of support and order[ing] support paid by [mother] to [father] in the amount of $954 per month." The child-support magistrate (CSM) treated father's motion as one to "modify the reservation of support" in the arbitrator's February 20, 2009 order, and to "establish a basic support obligation to be paid by [mother]."

The CSM issued an order on January 4, 2010, in which she stated that it was her "understanding" that "the issue of ongoing basic support had been reserved by stipulation of the parties" and that the parties have an "arrangement in which [they] share the children's expenses." The CSM found that the arbitrator had "reviewed the issue of whether [mother] should pay ongoing basic support" and had "declined to set a basic support obligation," instead stating in the February 20, 2009 order that mother's "obligation to pay child support/basic support to [father] is reserved" and that "[t]he parties shall continue to share expenses as set out in the Judgment and Decree." The CSM found that "[t]here was no agreement by the parties that ongoing basic support should be set" in lieu of this arrangement. The CSM concluded:

> The reservation of support in the February 20, 2009 Order was not a reservation of an issue for determination at a future time[;] support was reserved after the Arbitrator reviewed the circumstances of the parties and made a determination that the prior agreement of the parties should not be modified. The reservation of support under the circumstances of this case is like a $0 per month order.

[2] No "support order dated 2/25/2009" is in the record. The parties appear to agree that the correct date is February 20, 2009, the date on which the arbitrator issued its findings and order.

The CSM therefore denied father's motion to modify mother's child-support obligation, stating that "[t]he issue of establishing ongoing basic support to be paid by [mother] has been determined by the Arbitrator" and that "[t]here has not been a change in circumstances since the February 20, 2009 Order which would allow the [CSM] to revisit the issue." Father moved the CSM for review, and she affirmed her order.

This appeal follows.

D E C I S I O N

On review of a CSM's order relating to child support, we apply the same standard of review that we would apply to an order of the district court. *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000). We review the district court's decision in a child-support matter for an abuse of discretion. *Davis v. Davis*, 631 N.W.2d 822, 826 (Minn. App. 2001). A district court abuses its discretion when its ruling is against logic and the facts on record, *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984), or when it misapplies the law, *Ver Kuilen v. Ver Kuilen*, 578 N.W.2d 790, 792 (Minn. App. 1998).

Minnesota law provides that "[t]he terms of an order respecting maintenance or support may be modified upon a showing of" a substantial change in circumstances rendering the existing order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2008). If a prior order included "an affirmative setting of a support amount, including the affirmative setting of support at an amount of zero, any subsequent change of the support obligation is a modification." *Eustathiades v. Bowman*, 695 N.W.2d 395, 399

(Minn. App. 2005). But if the prior order contained "only a reservation of support, a later setting of a support obligation is an initial setting of support."[3] *Id.*

In *Eustathiades*, the district court adopted a stipulation by the parties that transferred physical custody from the mother to the father and provided that "the issue of temporary child support shall be reserved." *Id.* at 397. The father later moved to establish the mother's support obligation, and the court denied the motion because the father failed to show a substantial change in circumstances since the stipulation. *Id.* This court reversed, noting that there was a distinction between a "reservation" of support and a decision that no support is to be awarded. *Id.* at 399. This court observed, "Child support is initially set on the basis of particular economic circumstances. A reservation might be prompted by economic circumstances, but those circumstances do not become factors in the way they would if an amount was to be set, even if the amount was set at zero." *Id.* (citation omitted).

Here, like in *Eustathiades*, the arbitrator found that "[t]he parties stipulated to a reservation of ongoing child support from [mother]" after the court awarded father primary physical custody. This stipulation is not in the record. But even if the reasons behind the stipulation related to the parties' economic circumstances, the arbitrator's

[3] In *Eustathiades*, this court noted that an exception to this "general rule" may apply if support was "reserved" as part of an agreement to modify custody that was "expressly conditioned on a promise by [one party] not to seek child support." 695 N.W.2d at 398, 399 (distinguishing *McNattin v. McNattin*, 450 N.W.2d 169 (Minn. App. 1990)). But 28 days after *Eustathiades* was released, this court reaffirmed that agreements to waive child support are not enforceable as contrary to public policy. *Maschoff v. Leiding*, 696 N.W.2d 834, 837 (Minn. App. 2005) (citing *Aumock v. Aumock*, 410 N.W.2d 420, 421 (Minn. App. 1987)). "Attempted waivers of a child's right to support are construed as a reservation of the support *issue*." *Id.* (emphasis added).

order that mother's basic support obligation was reserved and that the parties should continue to follow the expense-sharing plan was not an affirmative setting of a support obligation that would trigger a requirement to show a substantial change in circumstances for modification under section 518A.39, subdivision 2.

The CSM appears to have interpreted the arbitrator's decision as having affirmatively set child support exclusively in the form of the parties' expense-sharing agreement, stating that "the Arbitrator reviewed the circumstances of the parties and made a determination that the prior agreement of the parties should not be modified." But this interpretation is contrary to the plain language of the arbitrator's order and the expense-sharing provisions of the parenting plan. In the February 20, 2009 order, the arbitrator expressly reserved mother's "obligation to pay child support/basic support," and also ordered that the parties "continue to share expenses as set out in the Judgment and Decree," which incorporated the parties' parenting plan. But the parenting plan labeled the expense-sharing provisions only as "additional child support." The arbitrator's order that the parties continue to follow the expense-sharing plan therefore did not constitute the affirmative setting of a basic-support obligation.

We conclude that the CSM erred by denying father's motion to establish mother's support obligation on the basis that father did not demonstrate a substantial change in circumstances since the arbitrator's decision.

Reversed and remanded.