**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-1085**
**A10-1524**

In re the Matter of:
Olivia Jassah Cassell, petitioner,
Respondent,

vs.

Gabriel B. Cassell,
Appellant.

**Filed March 8, 2011**
**Affirmed**
**Schellhas, Judge**

Ramsey County District Court
File No. 62-FX-05-002034

Gabriel B. Cassell, Pottstown, Pennsylvania (pro se appellant)

Olivia J. Cassell, Coon Rapids, Minnesota (pro se respondent)

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

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

**SCHELLHAS**, Judge

In this consolidated appeal, pro se appellant-father argues that the district court erred by (1) denying him an evidentiary hearing on his motion to modify child custody, (2) concluding that he is voluntarily unemployed for child-support purposes,

(3) designating him a frivolous litigant, and (4) demonstrating bias against him. We affirm.

## FACTS

This matter is before this court on a second appeal. *See Cassell v. Cassell*, No. A07-1655, 2008 WL 2651425 (Minn. App. July 8, 2008), *review denied* (Minn. Sept. 23, 2008).

Appellant-father Gabriel Cassell and respondent-mother Olivia Jassah Cassell were married in 1993 and divorced in 2003. *Id*. at *1. The parties have one child together, L.A.C., who was born in 1998. *Id*. In March 2006, the district court granted joint legal custody of L.A.C. to the parties and sole physical custody to mother. *Id*. The district court ordered father to pay mother $412 per month in child support for L.A.C. *Id*. In July 2007, after an evidentiary hearing on father's motion to reconsider, the district court issued 35 pages of findings of fact, conclusions of law, order, and judgment. *Id*. at *4. The court again granted physical custody of L.A.C. to mother and ordered father to pay $412 per month in child support. *Id*. at *7, *11. Father appealed from the July 2007 order. This court reversed and remanded because, among other things, the district court's findings did not support its conclusion that father could pay $412 in child support when his monthly income was $1,648.10, and his monthly expenses were $2,868.82, including expenses for his current wife and subsequently born child. *Id*. at *11.

On remand, the district court issued an order, noting that father's monthly expenses of $2,868.82 included expenses related to his current wife and subsequently born child and finding that father's current wife had "not been shown to be disabled and

unable to work. . . . [T]herefore [she has] no barrier to . . . making a contribution to the monthly expenses for that household." The court also found that father's expenses and monthly debt were accumulated on credit cards and loan payments and incurred for father's own benefit and not for the benefit of the parties' child. The court noted that father had filed bankruptcy and discharged all of his previous debts since the issuance of the previous child-support order. The court therefore reduced father's expenses to $1,400, omitting the expenses attributed to his current wife, and ordered father to pay child support in the amount of $412 per month.

On January 15, 2009, father moved the district court to modify child support because he had left his full-time employment to attend school. In April 2010, a child-support magistrate (CSM) issued an order and amended order denying father's motion. The court found that because father's career change does not outweigh the adverse effect of the change in employment on the parties' child, father was voluntarily unemployed. *See* Minn. Stat. § 518A.32, subd. 3(2) (2008). The CSM also found that father's non-joint, subsequently born children would not be considered in the child-support-modification proceeding. On July 7, 2010, the district court affirmed the CSM's order.

On January 19, 2010, father moved the district court to modify custody. In an order dated May 21, 2010, the court denied father's motion and found "it appropriate to hold a hearing on the issue of 1) whether [father] is a frivolous litigant as defined by Rule 9.06 of the Minnesota General Rules of Practice, and 2) whether an order should be entered pursuant to Rule 9.01." The court ordered that: "A hearing on whether [father] is

a frivolous litigant will be held upon [mother's] written request to the Court that the hearing be scheduled."

Father appeals from the orders of July 7, 2010, and May 21, 2010.

## D E C I S I O N

*Child-Support Modification*

"When a CSM's decision is affirmed on a motion for review, the decision is treated as that of the district court." *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009). "The district court has broad discretion in deciding child-support issues and we will not reverse the court's determination absent a clear abuse of that discretion." *Id.* "A court abuses its discretion if it improperly applies the law." *Id.*

To modify an existing child-support obligation, the moving party must show (1) a substantial change in circumstances that (2) renders the existing support obligation unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2010). "The party who moves to modify an existing child-support order has the burden of demonstrating both a substantial change in circumstances and the unfairness and unreasonableness of the order because of the change." *Rose*, 765 N.W.2d at 145.

The calculation of a child-support obligation requires a determination of each parent's gross income. Minn. Stat. § 518A.34(b)(1) (2010). In the child-support context, "gross income includes any form of periodic payment to an individual, including . . . potential income under section 518A.32." Minn. Stat. § 518A.29(a) (2010). "If a parent is voluntarily unemployed, . . . child support must be calculated based on a determination of potential income." Minn. Stat. § 518A.32, subd. 1 (2010).

A parent is not considered voluntarily unemployed if the parent can show that the unemployment "represents a bona fide career change that outweighs the adverse effect of that parent's diminished income on the child." *Id*., subd. 3(2). "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).

Father argues that there has been a substantial change in circumstances because his gross income substantially decreased when he quit his job to attend school, and that the district court erred by finding that he is voluntarily unemployed. We disagree.

The district court's finding that father is voluntarily unemployed is supported by evidence in the record. Father voluntarily terminated his full-time employment on December 31, 2009, to pursue a bachelor's degree in secondary education. The parties' child, L.A.C., will be nearly 15 years old when father obtains his degree in December 2012, as planned. If father's child-support obligation is completely suspended, mother will receive no support for L.A.C. from January 1, 2010 through December 31, 2012, a period of three years. Assuming that father obtains his bachelor's degree in December 2012, immediately obtains employment that pays more than his last employment, and pays mother more child support than $412 per month, L.A.C. may receive three years of increased child support. But the possibility of L.A.C.'s receipt of three years of increased child support must be weighed against the reality of L.A.C.'s receipt of no child support for three years. We conclude that the district court did not abuse its discretion by finding no substantial change in circumstances because appellant is voluntarily unemployed. The facts support the district court's finding that the possible benefit that L.A.C. may reap

from father's additional education and career change is outweighed by the detriment of the downward child-support modification for three years.

Father also attempts to challenge the district court's January 2009 child-support order of $412 per month, arguing that the district court erred by considering his current wife's income. Father has not appealed from that order, which was issued on remand in accordance with this court's directive. *See Cassell*, 2008 WL 2651425, at *11. We lack jurisdiction over father's attempt to challenge his child-support obligation arising out of the January 2009 order. Timely filing of a notice of appeal with the clerk of the appellate courts and timely service on the adverse party are the jurisdictional steps required to initiate an appeal. Minn. R. Civ. App. P. 103.01 1998 advisory comm. cmt. Service of notice of filing of the January 2009 order occurred on February 3, 2009, and more than 60 days have passed since that date. *See* Minn. R. Civ. App. P. 104.01 (addressing appeal periods).

*Child-Custody Modification*

"Appellate review of custody determinations is limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *Goldman v. Greenwood*, 748 N.W.2d 279, 281–82 (Minn. 2008) (quotation omitted). "District courts have broad discretion in determining custody matters." *Id.* at 282 (quotation omitted). We will affirm a district court's findings of fact unless they are clearly erroneous. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985).

Father argues that the district court abused its discretion by denying his motion to modify custody. We disagree. The guiding principle in all child-custody determinations

is the best interests of the child. *Id*. at 711. A district court shall not modify a prior custody order unless it finds, upon the basis of facts that have arisen since the prior order or that were unknown to the court at the time of the prior order, "that a change has occurred in the circumstances of the child or the parties and that the modification is necessary to serve the best interests of the child." Minn. Stat. § 518.18(d) (2010). In applying these standards, the court shall retain the custody arrangement that was established by the prior order unless "the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." Minn. Stat. § 518.18(d)(iv). The party seeking modification of a custody order bears the burden of proof. *Goldman*, 748 N.W.2d at 286. "A district court . . . has discretion in deciding whether a moving party makes a prima facie case to modify custody." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 292 (Minn. App. 2007).

Here, father moved the district court to modify a child-custody order on the grounds of endangerment to L.A.C. The district court decided that appellant did not present a prima facie case for child-custody modification. The court's decision is supported by the record. Father alleged that mother "violated Minnesota law by intentionally making false allegations of child molestation against [him]," apparently based on an email that mother sent to father with a copy to her attorney. The district court presumed that the law to which appellant referred was Minn. Stat. § 609.507 (2008), which provides that falsely alleging child abuse with the intent to influence a custody proceeding constitutes a misdemeanor. But the district court aptly noted that:

(1) mother had never been charged with violation of Minn. Stat. § 609.507 and the referee did not have jurisdiction over criminal matters; (2) at the time father alleges that mother made the allegations, the issue of custody had long been decided; and (3) father did not allege that mother had formally reported the alleged abuse. Father also alleged that mother's child-care arrangements for L.A.C., which included overnights at the residence of a non-relative adult male, posed significant danger to L.A.C.'s emotional well-being and potential physical danger to her. But, as the district court noted, to support this allegation, father merely cited to purported statistics about the prevalence of sexual abuse of children by adults and admitted that he had no evidence whatsoever that L.A.C. was a victim of sexual abuse.

We conclude that the district court did not err by concluding that father failed to present a prima facie case that the child-care arrangements endanger L.A.C.'s physical or emotional health or impairs the child's emotional development to warrant a change in custody. And we therefore conclude that the court did not abuse its discretion by declining to hold an evidentiary hearing on the matter and denying father's motion to change custody. *See Nice-Petersen v. Nice-Petersen*, 310 N.W.2d 471, 472 (Minn. 1981) (concluding that the district court did not abuse its discretion by refusing to hold an evidentiary hearing on a custody-modification motion when the accompanying affidavit failed to set forth sufficient facts that, if true, demonstrated a prima facie case for modification).

*Frivolous Litigant*

Father argued that the district court erred by finding in its May 21, 2010 order that it would be appropriate to hold a hearing on the issue of whether father is a frivolous litigant. If found to be a frivolous litigant, the district court could enter an order "imposing preconditions on [his] service or filing of any new claims, motions or requests." Minn. Gen. R. Prac. 9.01. Father argues that the court's finding is precluded by collateral estoppel because the court ruled upon the issue in its January 30, 2009 order, then determining that father was not a frivolous litigant. But, as the district court noted in its May 21 order, mother again requested that the court find father to be a frivolous litigant in her counter-motion filed on August 19, 2009. The court also noted that the "motion was never heard or ruled on because the hearing on [father's] motion was stricken." The district court's May 21 order provides mother with the option of seeking a hearing on the issue of whether father is a frivolous litigant, and the order properly provides father with notice that a hearing may be held. *See* Minn. Gen. R. Prac. Rule 9.01 (requiring notice and hearing to determine whether to impose sanctions on a frivolous litigant).

Neither mother nor the district court is estopped from proceeding with a hearing under rule 9.01 simply because the court determined that father was not a frivolous litigant in its January 30, 2009 order. We reject the proposition that a litigant who was not frivolous in the past could not be found to be frivolous in the present or future.

The district court did not err with regard to the frivolous-litigant issue in its May 21 order.

*Judicial Bias*

This court takes allegations of bias very seriously because judicial impartiality is protected by both the Minnesota and United States Constitutions and is "the very foundation of the American judicial system." *Payne v. Lee*, 222 Minn. 269, 272, 277, 24 N.W.2d 259, 262, 264 (1946) (citing U.S. Const. amend. XIV, § 1 (requiring due process); Minn. Const. art. I, § 8 (requiring justice "completely and without denial")). In addressing claims of judicial bias, we consider the totality of circumstances. *State v. Morgan*, 296 N.W.2d 397, 404 (Minn. 1980). We presume that the judge discharged all judicial duties properly. *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). And we determine "whether the trial judge considered arguments and motions made by both sides, ruled in favor of a complaining [party] on any issue, and took actions to minimize prejudice to the [party]." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008); *see also State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006) (holding that there was no bias where the "record reflects that the district court carefully considered motions made by both sides; and the court ruled in favor of appellant on some very important motions").

Father argues that the district court "demonstrated extreme bias" and "prejudice against [him]" by its "decision to impose precondition on [his] filing of all future motions in the district court despite its earlier ruling." But father simply cites to multiple adverse rulings to support his claim that the district court was biased against him. And, with regard to his claim that the district court has decided that he is a frivolous litigant and has decided to impose preconditions on filing all future motions, he is wrong. As we earlier noted, at the time of father's appeal, the district court had not made a decision to impose

preconditions on father as a frivolous litigant. Although father cites to adverse and allegedly erroneous rulings, he does not offer any reasons to support his claim of bias. Prior adverse rulings do not constitute bias. *Greer v. State*, 673 N.W.2d 151, 157 (Minn. 2004).

After careful review of the record, we conclude that father's argument that the district court's orders show clear bias and prejudice against him are wholly without merit. The district court's findings and orders now challenged by father reflect both thoughtful and balanced consideration of the issues presented.

**Affirmed.**