STATE OF MINNESOTA
IN COURT OF APPEALS
A10-542

Hennepin County,
Respondent,

Amy S. Krell,
Respondent,

vs.
Lee Simmons,
Appellant

Filed May 3, 2011
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-PA-FA-000050089

Michael O. Freeman, Hennepin County Attorney, Catherine Terese Fridgen, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County)

Amy S. Krell, Minneapolis, Minnesota (pro se respondent)

Lee Simmons, Minneapolis, Minnesota (pro se appellant)

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

PETERSON, Judge

This appeal is from a district court order that affirms a child support magistrate's (CSM) order denying modification of appellant-father's child-support obligation. Because the district court's factual findings support its conclusions of law, we affirm.

FACTS

Pro se appellant Lee Simmons and respondent Amy Krell are the parents of two minor children, born in 1997 and 2002. The parties signed a recognition of parentage shortly after the birth of each child. The children live with respondent.

In March 2004, Hennepin County initiated an action against appellant seeking to establish child support, medical support, and child-care support for the children pursuant to Minn. Stat. §§ 256.87, .66, 518.551, subd. 5 (2002). After a hearing, a CSM issued an order on May 6, 2004. The CSM found that appellant was self-employed and that his gross annual income in 2003 was $26,000. The CSM also noted that verification of appellant's monthly income had been provided. Based on the parties' agreement, the CSM ordered appellant to pay $75 per month toward "the cost of ongoing medical support provided by medical assistance for so long as it is being provided." The CSM also found that "[t]he child support amount ordered is not a deviation from the Minnesota Child Support Guidelines." The issues of ongoing child support, medical insurance, and the unreimbursed medical and dental expenses of the minor children were reserved. There was no appeal from this order.

In September 2009, appellant moved to reduce his child-support obligation and also requested elimination of all arrears based on his decreased income. Following a hearing, a CSM denied appellant's motion to modify his child-support obligation. The CSM found that appellant, who claimed to be a full-time student unable to seek part-time employment, "receives $1200 - $1500 per month in student loan income over and above his tuition costs." The CSM also found that "[t]here is no evidence that [appellant] cannot pay the amount he agreed to pay in the 2004 order." Based on these findings, the CSM concluded that appellant "failed to prove that there has been a substantial change in circumstances that makes the prior order unreasonable and unfair."

Appellant sought review of the CSM's order in the district court, but he did not provide the district court with a transcript of the hearing before the CSM. On January 12, 2010, the district court issued an order affirming the CSM's order and the CSM's findings regarding appellant's ability to pay $75 per month in medical support. This appeal followed.

D E C I S I O N

When a district court affirms a CSM's decision, the CSM's decision becomes the district court's decision, and this court reviews the district court's decision. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). A child-support order may be modified when the moving party shows a substantial change in circumstances that makes the existing order unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a)(1)-(2) (2010); *Bormann v. Bormann*, 644 N.W.2d 478, 480-81 (Minn. App. 2002). The district court has broad discretion in deciding whether to modify a child-support order, and its

decision will not be reversed unless it is against logic and the facts on record. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002); *Moylan v. Moylan*, 384 N.W.2d 859, 864 (Minn. 1986).

"An appellant has the burden to provide an adequate record." *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995). When, as here, an appellant fails to provide a transcript, appellate review is limited to whether the findings of fact support the conclusions of law. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970).

I.

Appellant challenges the district court's finding that at the time of the May 2004 order, appellant "was self-employed with a gross income in 2003 of $26,000." Appellant argues that "[t]his amount is incorrect and overstated because it represented self-employed Revenue and not Gross Income as per [Minn. Stat. § 518A.30] for self-employed individuals." *See* Minn. Stat. § 518A.30 (2008) (defining income from self-employment "as gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation"). But the district court's finding was based on the May 2004 order, which states "[Appellant] is self employed. He earned $26,000.00 gross income in 2003."

If appellant believed that the calculation of his gross income was erroneous, the proper avenue for relief would have been to appeal that decision. Because appellant did not timely challenge the May 2004 order, that order became final. *See Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 765 (Minn. 2005) ("It is axiomatic that a judgment or

appealable order becomes final if a timely appeal is not taken."); *Dieseth v. Calder Mfg. Co.*, 275 Minn. 365, 370, 147 N.W.2d 100, 103 (1966) ("Even though the decision of the [district] court in the first order may have been wrong, if it is an appealable order it is still final after the time for appeal has expired.").

II.

Appellant argues that the district court erred by including as income the amount of student-loan proceeds that he receives each month in excess of tuition. He contends that this amount cannot be deemed income for child-support purposes because student-loan proceeds are not considered income for tax or bankruptcy purposes. Whether a source of funds is income for support purposes is a legal question reviewed de novo. *Sherburne Cnty. Soc. Servs. v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992).

The statute governing child support defines income as "any form of periodic payment to an individual." Minn. Stat. § 518A.29(a) (2010). "The key word in the definition is 'periodic.' If the payment is periodic, it is income. If the payment is not periodic, it is not income." *Herrley v. Herrley*, 452 N.W.2d 711, 714 (Minn. App. 1990); *see also Duffney v. Duffney*, 625 N.W.2d 839, 843 (Minn. App. 2001) ("Generally, if a payment is periodic, it is income."). This court previously ruled that "excess student loan proceeds are a periodic and reliable source of income." *Gilbertson v. Graff*, 477 N.W.2d 771, 774 (Minn. App. 1991). Thus, the district court did not err by considering the student-loan proceeds in excess of educational expenses as income.

Appellant also argues that "[d]eeming federal guaranteed student loan proceeds as income for any purpose, also establishes the Appellant and similar students as a unique

class of citizens," which "is discriminatory and a violation of the U.S. Constitution." But appellant did not raise this argument in the district court. Generally, an appellate court will not address constitutional issues that were not raised before the district court. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on appeal). Because appellant did not make this constitutional argument before the district court, we will not address it on appeal.

III.

Appellant also argues for the first time on appeal that his "support requirement should be set at the statutory minimum pursuant to Minn. Stat. § 518A.42." *See* Minn. Stat. § 518A.42 (2010) (describing procedure to determine minimum amount of child support obligor has ability to pay). Because this issue was not presented to the district court, we will not consider it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate court will generally not consider matters not presented to and considered in district court).

IV.

Appellant asserts that the CSM erred by excluding evidence that appellant "is jointly responsible for two non-joint children one of which has a medically diagnosed disability for which she receives Supplemental Security Income (SSI)."[1] But because the record does not include a transcript of the hearing before the CSM, this court is unable to review this issue. *See Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 531

[1] Although appellant states that he is responsible for two nonjoint children, only one nonjoint child is mentioned in the record.

(1968) (requiring pro se appellants to provide "material necessary for an understanding of the issues").

V.

Appellant claims that "Hennepin County has fraudulently represented every material fact of this case, has misrepresented their cost of providing such services, denied the parties right to transfer to lower cost services such a[s] Minnesota Care." An appellate court cannot presume error in the absence of an adequate record. *See Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (declining to consider allegation of error in absence of transcript); *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (stating that error is never presumed on appeal), *review denied* (Minn. Oct. 31, 1997). Without a transcript, this court is unable to review this issue.

Appellant also asserts that the amount Hennepin County is seeking to collect as reimbursement for medical assistance exceeds the actual cost for which the county is responsible. But appellant does not cite any authority supporting an argument that setting medical support at an amount exceeding the costs for which the county is responsible is error or an abuse of discretion. An assignment of error based on "mere assertion" and not supported by argument or authority is waived. *State by Humphrey v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997). Because appellant's assertion is not supported by argument or citation to authority, this issue is waived.

In addition, appellant states in his brief: "The Joint-Children are currently covered by Minnesota Care at a monthly premium of $4.00 for each. Hennepin County has

provided no basis for it to collect any amount in excess of this premium." But at the time of the district court's decision, the children were not covered by MinnesotaCare. Appellant does not cite any authority indicating that a reviewing court is authorized to amend the child-support amount based on circumstances that have arisen since the entry of the district court's order. Therefore, we decline to address this issue.

Also, appellant's appendix includes documents that were not filed in the district court. Because these documents are not part of the district court record, we cannot consider them, and we have restricted our review to only documents that are part of the district court record. *See Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992) (stating that this court will strike documents included in appellate brief that were not filed in district court"), *aff'd*, 504 N.W.2d 758 (Minn. 1993).

Affirmed.