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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-599**

In re the Marriage of:
Ogonnaya V. Ofor, petitioner,
Appellant,

vs.

Chika Lisa Ofor,
Respondent,
Ramsey County, intervenor,
Respondent.

**Filed May 7, 2012
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File Nos. 62FA083576; 62DAFA101007

Ogonnaya Vincent Ofor, New Brighton, Minnesota (pro se appellant)

Lisa Lamm Bachman, Minneapolis, Minnesota (for respondent Ofor)

John J. Choi, Ramsey County Attorney, Jenese V. Larmouth, Assistant County Attorney,
St. Paul, Minnesota (for respondent county)

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

UNPUBLISHED OPINION

RODENBERG, Judge

Father Ogonnaya Ofor, acting pro se, challenges a child support magistrate's (CSM's) order filed February 28, 2011, denying father's motion for review of a December 16, 2010 order which denied, among other things, father's motion to modify his support obligation. The record supports the CSM's findings of fact, the findings of fact support the conclusions of law, and father has not otherwise shown that the CSM abused her discretion. We affirm.

FACTS

The parties married in 1996, and had three children. The parties separated on August 15, 2007, and dissolution proceedings followed. In an April 7, 2008 order, a CSM ruled that father was "voluntarily unemployed or underemployed," attributed income to him of 150% of minimum wage, and established father's support obligation. Father sought relief. A CSM found that father was unemployed, was carrying a "full credit load at Phoenix University, an online institution" and received public assistance, and that father and Ramsey County agreed to suspend father's support obligation based upon a substantial change in father's circumstances rendering his existing support obligation unreasonable and unfair. By order filed March 6, 2009, the CSM noted that mother made no appearance at the hearing. The support obligations set in the April 7, 2008 order were suspended, subject to a review hearing set for February 16, 2010.

After a dissolution trial at which father appeared pro se, a December 22, 2009 judgment awarded sole legal and physical custody of the children to mother, found father

to be unemployed, but also found that he previously had earned a gross monthly income of \$5,000, and was attending school to become a therapist. The judgment states that father's schooling "will not" lead to income exceeding \$5,000 per month and that the support issues would be addressed by separate order.

Two orders were filed on January 22, 2010. The first addressed support, finding that father "has a history of enrolling in graduate programs" and "not completing them," "has not made a bona fide career change," and "is voluntarily unemployed or underemployed." The order found that father could earn income "at least comparable to 150% of federal minimum wage[,]" and set his monthly basic and medical support obligations at \$758 and \$41, respectively. The second order relates to a motion by father for which relief is not presently at issue. Before making the motion culminating in this appeal, father made two other unsuccessful motions for relief.

On October 14, 2010, father, acting pro se, served and filed a document styled as a "Motion for Child Support Modification and Correction for erring against my rights. Minn. Stat. 518As." On December 16, 2010, after a hearing, the CSM found that father "continues to be unemployed and continues to attend school full-time," that while father "made some efforts to find employment since the prior order, they have been minimal," and that father "testified that he had not applied for any jobs in the last 3 to 4 months because he has been busy with his school work." The CSM then noted that the district court had already found that father's school-based limitation of his income "is voluntary unemployment," and ruled both that "[f]ailing to look for work in order to concentrate on school is not a valid excuse for not looking for work," and that father "has not established

that he cannot, with a valid job search, find employment at the income imputed to him [in the prior order].” Noting that father had not documented his allegations of neck and back problems, the CSM also rejected father’s assertion that he could not work because of neck and back pain. After setting out the terms of a payment agreement for father’s support arrears that would allow father to avoid suspension of his driver’s license, the CSM denied father’s motion to modify his support obligation.

Father sought review of the December 16, 2010 order and, after a hearing, the CSM filed an order rejecting father’s assertions that (1) he had a right to a jury trial; (2) the December 16, 2010 order had to be amended because father made a “mistake” in testifying that he had not sought a job; (3) the CSM failed to account for mother’s public assistance in its treatment of her income; (4) the payment plan was defective; (5) support should be based on father’s ability to pay at his actual rather than his potential income level; and (6) an additional hearing was necessary to address the effects of his violation of an order for protection (OFP) on his ability to get a job.

D E C I S I O N

A district court may modify a child-support obligation if a party shows substantially changed circumstances rendering the existing obligation unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(a)(1) (2010); *Bormann v. Bormann*, 644 N.W.2d 478, 480–81 (Minn. App. 2002). The party seeking modification has the burden of showing the substantially changed circumstances. *Gorz v. Gorz*, 552 N.W.2d 566, 569 (Minn. App. 1996). Whether to modify support is discretionary with the district court, and, on appeal, its decision will be reversed if it misapplied the law or resolved the matter

in a manner that is against logic and the facts on record. *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). Appellate review of a CSM’s decision on a child support matter is similar to review of a district court’s decision. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445–46 (Minn. App. 2002).

It is the appellant’s duty to demonstrate that the district court erred. “[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it.” *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464–65 (1944); see *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949) (quoting *Waters* in a family-law appeal); *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999) (applying *Loth* in a family-law appeal); see also *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (quoting *Waters*). Even if an appellant shows error by a district court, that, by itself, is insufficient to allow a reversal. The error must also be shown to prejudice the complaining party. See Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) (stating that “[a]lthough error may exist, unless the error is prejudicial, no grounds exist for reversal”) (citing *Midway Ctr. Assocs*, 306 Minn. at 356, 237 N.W.2d at 78); *Loth*, 227 Minn. at 392, 35 N.W.2d at 546 (stating that “error without prejudice is not ground for reversal”) (quoting *Waters*, 216 Minn. at 495, 13 N.W.2d at 465); see also *Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) (stating that a district court will not be reversed if it reached an affirmable result for the wrong reason).

Father's arguments acknowledge neither a CSM's discretion in deciding support matters, nor his own obligation to show that the CSM's rulings are prejudicially erroneous. Father essentially asks this court to reconsider matters addressed by the CSM.

I.

Father asserts a right to a jury trial but cites no authority supporting his assertion. Father is not entitled to a jury trial.

The only use of the word "jury" in chapters 518 and 518A—addressing marriage dissolution and child support, respectively—is in section 518.168(c) (2010), which states: "The court without a jury shall determine questions of fact." Thus, father lacked a statutory right to a jury trial.

Whether a party has a right to a jury trial under the state constitution is reviewed *de novo*. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 148 (Minn. 2001). The right to a jury trial under the state constitution continues that right "as it existed in the Territory of Minnesota when our constitution was adopted in 1857." *Abraham v. Cnty. of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002); *see* Minn. Const. art. I, § 4 (stating that the right to a jury trial extends "to all cases at law without regard to the amount in controversy"). The right to a jury trial that existed when the state adopted its constitution "d[id] not extend to special proceedings." *State ex rel. Clapp v. Mn. Thresher Mfg. Co.*, 40 Minn. 213, 217, 41 N.W. 1020, 1022 (1889).

This proceeding is one to modify child support. Proceedings to modify child support are "special proceedings." *Angelos v. Angelos*, 367 N.W.2d 518, 520 (Minn. 1985).

Father has neither a statutory nor a constitutional right to a jury trial.

II.

Referring to section 518A.42, father asserts that his support obligation should be \$75 per month. The applicability and interpretation of a statute is reviewed de novo. *In re Basic Resolution 876 of Port Auth. of City of St. Paul*, 772 N.W.2d 488, 491 (Minn. 2009). Under section 518A.42, if a child support obligor's

income available for support calculated under [section 518A.42, subdivision 1(b)] is equal to or less than the minimum support amount under [section 518A.42, subdivision 2] or if the obligor's gross income is less than 120 percent of the federal poverty guidelines for one person, the minimum support amount under subdivision 2 applies.

Minn. Stat. § 518A.42, subd. 1(d) (2010). Under section 518A.42, subdivision 2, minimum basic monthly support for an obligor like father with three children, is \$75. *Id.*, subd. 2 (2010).

Under section 518A.42, subdivision 1(b) (2010), "income available for support" is the difference between a parent's "gross income" and 120 percent of the federal poverty guidelines (FPG) for one person. Subject to deductions not at issue here, "[g]ross income" includes "potential income under section 518A.32." Minn. Stat. § 518A.29(a) (2010). Under section 518A.32, subdivision 1, if a parent is voluntarily unemployed, support "must" be calculated based on the parent's potential income. *See* Minn. Stat. § 645.44, subd. 15(a) (2010) (stating that "[m]ust" is mandatory"). The January 22, 2010 order found father's decision to go back to school was not "a bona fide career change" and that father's attending school therefore constituted "voluntary

unemployment.” The intervening orders of December 16, 2010 and February 28, 2011 declined to alter this ruling. Thus, the CSM was required on these facts to use father’s “potential income” in determining his “income available for support.”¹

Father’s gross monthly income (\$1,884) is not less than 120% of the relevant FPG (\$1,083). Nor is his income available for support (\$801) less than the \$75 minimum support obligation of section 518A.42, subdivision 2(a)(2). Therefore, the CSM properly declined to set father’s monthly support obligation at \$75.

III.

A parent is not voluntarily unemployed if the unemployment “is because a parent is physically or mentally incapacitated or due to incarceration, except where the reason for incarceration is the parent’s nonpayment of support.” Minn. Stat. § 518A.32, subd. 3 (2010). Father asserts that the CSM misapplied this statute when she refused to alter the finding that he is voluntarily unemployed. Whether a parent is voluntarily unemployed is

¹ “Potential income” is set based on one of three statutory amounts, including 150 percent of minimum wage. See Minn. Stat. § 518A.32, subd. 2(3) (2010). Here, the January 22, 2010 order found father “voluntarily unemployed,” and set his monthly income at \$1,884, which is 150% of minimum wage. The 2009 FPG in effect when the district court filed its January 22, 2010 order, and the 2010 FPG in effect when father filed the motion culminating in this appeal, each show that the annual FPGs for one-person were \$10,830, or \$902.50 a month. Annual update of the HHS Poverty Guidelines, 74 *Fed. Reg.* 4199, 4200 (Jan. 23, 2009) available at [http://aspe.hhs.gov/poverty/09fedreg.shtml\(2009FPG\)](http://aspe.hhs.gov/poverty/09fedreg.shtml(2009FPG)); Delayed update of HHS Poverty Guidelines for the Remainder of 2010, 75 *Fed. Reg.* 45628, 45629 (Aug. 3, 2010) available at [http://aspe.hhs.gov/poverty/10fedreg.shtml\(2010FPG\)](http://aspe.hhs.gov/poverty/10fedreg.shtml(2010FPG)). One hundred twenty percent of \$902.50 is \$1,083. Father’s monthly potential income of \$1,884, less \$1,083, leaves income for support of \$801, more than the \$75 minimum monthly support obligation in section 518A.42, subd. 2(a)(2).

a finding of fact, which is reviewed for clear error. *Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009).

A. Incarceration

Father argues that his prior incarceration makes it difficult for him to get a job, and that he is therefore not voluntarily unemployed. But father was apparently released from his incarceration in August 2008, and he filed his current motion to modify support on October 14, 2010. Because father's incarceration status did not change between the filing of the January 22, 2010 order he seeks to modify and his October 14, 2010 motion to modify that order, his August 2008 incarceration cannot amount to a changed circumstance.

B. Neck and back pain

Father asserts that he is not voluntarily unemployed because he suffers from pain in his neck and back. The CSM rejected this argument, noting that father had not been told by medical personnel to limit his work "in any way." Father points to no evidence showing this finding is clearly erroneous. Further, the CSM determined that father's assertions on the subject are not credible. Appellate courts defer to district court credibility determinations. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)².

C. Economic condition

² Citing letters from medical personnel included in the appendix to his brief, father states that he has other medical problems. The letters in question are dated after father filed this appeal. Therefore, we decline to consider them. *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988) (stating that appellate courts do not consider new evidence on appeal).

Father asserts that the poor economy should preclude a finding that he is voluntarily unemployed. The December 16, 2010 order notes that the January 22, 2010 order found father's return to school to constitute voluntary unemployment. The CSM noted that father "continues to be unemployed and continues to attend school full-time," that father's efforts to find employment have been "minimal," and that father "testified that he had not applied for any jobs in the last 3 to 4 months because he has been busy with his school work."

The February 28, 2011 order addressing father's motion for review of the December 16, 2010 order notes father's new assertions that he made a "mistake" by testifying that he had not recently sought employment, and that he had been seeking employment daily, on the internet. The CSM ruled, however, that father's "desire to change testimony is not a basis for amendment of the [December 16, 2010] order or a new trial." Because the CSM did not request new evidence in connection with her review of the December 16, 2010 order, her refusal to accept father's new evidence is consistent with the rules for review of a CSM's ruling. *See* Minn. R. Gen. Pract. 377.09, subd. 4 (stating that, on a motion for review, parties "shall not" submit new evidence unless directed to do so by the reviewer).³

³ The February 28, 2011 order observes that father's allegation that he sought employment via the internet "is inconsistent with [his prior] testimony," and that he "offer[ed] no explanation" for why he was mistaken in his prior testimony. Thus, even if the CSM had considered father's job-search assertions, it seems exceedingly unlikely that she would have found them credible. As noted, appellate courts defer to a district court's credibility determinations. *Sefkow*, 427 N.W.2d at 210; *cf. Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (affirming when, from reviewing the file, it appeared that the

We affirm the CSM's rejection of father's assertion that the bad economy precludes a finding that he is voluntarily unemployed.

D. Public assistance

Father asserts that modification is necessary because he receives public assistance. Father's argument regarding public assistance has changed. Before the CSM, he argued that *mother's* public assistance should have been considered when setting his support obligation. He now asserts that *his own* receipt of public assistance should preclude a finding that he is voluntarily unemployed. Parties are not allowed to change legal theories on appeal. *Thiele*, 425 N.W.2d at 582.

E. School

Father asserts that he is in school to improve his future. This is a challenge to the finding in the January 22, 2010 order that he is voluntarily unemployed. Ignoring the facts that father did not appeal the January 22, 2010 order, and cannot now amend his notice of appeal to include that order, *In re Welfare of G. (NMN) M.*, 533 N.W.2d 883, 884 (Minn. App. 1995), whether a parent is voluntarily unemployed is a finding of fact. *Welsh*, 775 N.W.2d at 370. Father did not provide a transcript of the hearing which resulted in the January 22, 2010 order. Thus, this court lacks a record that would allow review of that finding in any event. *See Fritz v. Fritz*, 390 N.W.2d 924, 925 (Minn. App. 1986); *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995).

district court would reach the same result); *Tarlan v. Sorensen*, 702 N.W.2d 915, 920 n.1 (Minn. App. 2005) (declining to remand where doing so would be "futile").

F. Psychological evaluation

Citing his psychological evaluation, which shows that he is under stress due to the loss of his children, father asserts that he should not be considered voluntarily unemployed. Father's not having physical custody is not a basis for finding that he is not voluntarily unemployed. *Cf. Gales v. Gales*, 553 N.W.2d 416, 421–22 (Minn. 1996) (reversing an award of permanent maintenance based partially on the recipient's "emotional stress," because "[s]tress and depression are endemic in most marriage dissolutions").

Father also points to the portion of his psychological evaluation stating that he is under stress because he lacks a job and lacks funds as a reason he should not be deemed voluntarily unemployed. Because father's lack of a job and funds are the result of his decision to go to school rather than to work, and because we reject father's assertion that his schooling precludes a finding of voluntary unemployment, his argument on this point is without merit.

IV.

Whether to set support in an amount deviating from the presumptively appropriate guideline amount is discretionary with the district court. *See State ex rel. Rimolde v. Tinker*, 601 N.W.2d 468, 471–72 (Minn. App. 1999). Minn. Stat. § 518A.43, subd. 1 (2010), lists factors to be considered when a court addresses whether to deviate from the guideline child-support amount. None of those factors are present here. The CSM did not abuse her discretion in declining to deviate from the guidelines.

V.

Father makes several additional assertions briefly addressed below. Because these arguments lack citations to the record and authority, and are not supported by substantive argument, father has waived them. *Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997); *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007). Further, his assertions lack merit.

A. Payment plan

Father asserts that the payment plan he must satisfy to avoid suspension of his driver's license is unreasonable. It requires him to make timely prospective support payments, but does not require him to make payments on his arrears. Father's support obligation is set at the guideline level for a gross income of 150% of the FPG, and the record supports that obligation. The argument that the payment plan to avoid suspension of his license is unreasonable is without merit.

B. Custody

To the extent father argues that the children's dispositions have deteriorated while they have been in mother's care, his assertions go to the propriety of the custody award. The judgment and decree dated December 22, 2009, was not appealed. The CSM did not address custody. These arguments are therefore not properly before this court. *See Thiele*, 425 N.W.2d at 582 (stating that, generally, appellate courts address only matters presented to and considered by the district court).

Affirmed.