STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2300

In re the Marriage of: Victoria Lynn McDeid, petitioner,
Respondent,

vs.

Ricky Lee McDeid,
Appellant.

Filed September 17, 2012
Affirmed; motion granted
Hooten, Judge

Aitkin County District Court
File No. 01-FX-93-000574

Ricky Lee McDeid, Moose Lake, Minnesota (pro se appellant)

Victoria L. McNurlin (pro se respondent)

James P. Ratz, Aitkin County Attorney, Sara Winge, Assistant County Attorney, Aitkin, Minnesota (for respondent Aitkin County)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HOOTEN, Judge

Appellant father appeals the district court's affirmance of a child support magistrate's order requiring him to pay $100 per month towards child support arrears. Appellant, a civilly committed sex offender at the Minnesota Sex Offender Program (MSOP), argues that he does not have the ability to pay child support arrears in that amount. He also argues that Aitkin County should have been excluded from participating in the proceedings because it failed to timely file a formal notice of intervention. We affirm.

FACTS

Appellant challenges the district court order affirming the determination of a child support magistrate (CSM) that he has the ability to pay $100 per month towards his child support arrears. This determination was a modification of a November 15, 1999 child support order setting appellant's child support obligation at zero in light of his commitment to a mental health facility in St. Peter for an indeterminate time.[1] The earlier order concluded that appellant had no "real income" because he had "no present income other than minimum wage employment of thirty hours per month." Aitkin County, which had been assigned respondent mother's rights to child support, filed a

[1] Appellant was later transferred to the MSOP at Moose Lake Regional Treatment Center.

motion to modify appellant's child support on May 5, 2011, after learning of appellant's increased earnings through a "Work for Pay" program administered through MSOP.[2]

After a hearing, the CSM found that appellant owed basic support arrears of $5,631.26, medical support arrears of $539.59, and total support arrears of $6,170.85.[3] As payment for these arrears, the CSM found that appellant, who had a gross monthly income of $365, had the ability to pay $100 per month, even after deducting appellant's personal needs allowance of $90.[4]

Appellant then filed a motion for review by the district court. In conjunction with his motion for review, appellant also requested that he be allowed to submit his paychecks in support of his claim that 50% of his wages were deducted as fees for the MSOP,[5] and that Aitkin County be prohibited from participating in the proceedings. In response to appellant's motion, Aitkin County filed a formal notice of intervention on August 26, 2011. The district court, in an order dated October 6, 2011, allowed appellant

---

[2] As evidenced by orders dated June 19, 1996, September 10, 1996, February 13, 1997, and November 15, 1999, Aitkin County was involved in a number of proceedings involving appellant's child support obligations. According to the September 10, 1996 order, appellant's monthly child support obligations were to be paid to Aitkin County Family Service Agency.

[3] There was no request that appellant's obligations for ongoing child support be determined because appellant's children were no longer minors and were emancipated. Thus, Aitkin County's motion for modification only dealt with appellant's obligation for child support arrears.

[4] "Notwithstanding any law to the contrary," a personal needs allowance "for clothing and personal needs" is provided to "individuals receiving medical assistance while residing in any . . . intermediate care facility, or medical institution." Minn. Stat. § 256B.35, subd. 1(a) (2010).

[5] "The commissioner has the authority to retain up to 50 percent of any payments made to an individual participating in the vocational work program for the purpose of reducing state costs associated with operating the Minnesota sex offender program." Minn. Stat. § 246B.06, subd. 6 (2010).

to submit his paystubs and any evidence related to his income and denied appellant's motion to prohibit Aitkin County from participating as an intervenor, noting that the county had participated in the proceedings since at least 1995 and that such intervention was in the interests of justice.

On October 31, 2011, the district court signed an order affirming the CSM's finding that appellant had the ability to pay $100 per month towards his child support arrears. The district court reasoned that even if it accepted appellant's claims that he was only working 12 hours per week, this would equate to 51.96 hours per month at the minimum wage of $7.25 per hour for a gross monthly income of $376.71; after deducting $89 as the appellant's personal needs allowance, appellant would still have $287.71 available each month to pay child support.

Appellant now challenges the district court's order on the following grounds: (1) Aitkin County did not properly intervene and therefore did not have standing to pursue modification of appellant's child support payments; (2) his due process rights were violated because Aitkin County or respondent mother were improperly appointed an attorney at public expense under Minn. R. Gen. Pract. 357.03; (3) it was error for an improperly appointed attorney to be able to submit as evidence a copy of MSOP Policy 104.700; (4) the finding that appellant was able to pay monthly child support of $100 was erroneous as a matter of law due to the fact that he is indigent, mentally incapacitated, and incarcerated; and (5) in determining appellant's ability to pay, the district court erred by failing to deduct 50% of his earnings as a MSOP cost reduction fee and $100.99 for

his "cost of care" expenses.[6] In addition, in his brief to this court, appellant has requested that all amounts deducted from his wages for his child support arrearages be returned to him and that his interest payments on his arrears be retroactively suspended. He also requests removal of the state and federal tax refund offset program.[7]

D E C I S I O N

I. Aitkin County's Standing and Right to Counsel

Appellant's submissions to the district court and on appeal contest the legitimacy of Aitkin County's participation in the proceedings to modify his monthly child support obligation. "A reviewing court is not bound by and need not defer to a district court's decision on a legal issue." *Brazinsky v. Brazinsky*, 610 N.W.2d 707, 710 (Minn. App. 2000). "Standing is a legal requirement that a party have a sufficient stake in a justiciable controversy to seek relief from a court." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007).

Appellant contends that since Aitkin County did not file its formal notice of intervention until August 26, 2011, which was approximately four months after filing of the modification motion, it should not have been allowed to participate in the district court proceedings. "[T]he county agency may, as a matter of right, intervene as a party in any matter conducted in the expedited process" and "[i]ntervention by the county agency

[6] "The commissioner shall determine or redetermine, if necessary, what amount of the cost of care, if any, the civilly committed sex offender is able to pay." Minn. Stat. § 246B.07, subd. 1 (2010).

[7] After his brief was filed, appellant also moved to amend his brief to include a request that any funds recovered by the county through the state and federal offset programs be returned to him. Since there was no objection by respondents, we grant appellant's motion to amend his brief to include this request.

is effective when the last person is served with the notice of intervention." Minn. R. Gen. Pract. 360.01, subds. 1, 2.

However, the rule allowing intervention as a matter of right is directed at a county agency that is not already a real party in interest. Here, it is undisputed that Aitkin County was assigned respondent mother's child support rights. Accordingly, Aitkin County is a real party in interest and does not need to intervene since it is already, by operation of law, a party in the case. *See* Minn. Stat. § 518A.49(a)–(b) (2010) ("The public agency responsible for child support enforcement is joined as a party in each case in which rights are assigned under section 256.741, subdivision 2 . . . . The public authority is a real party in interest in any IV-D case where there has been an assignment of support."). As "the public authority responsible for child support enforcement" and a real party in interest, Aitkin County was authorized to bring a motion for modification of child support. Minn. Stat. § 518A.39, subd. 1 (2010).

In any event, even if Aitkin County had not been a real party in interest, appellant would not have been able to show that he was prejudiced by the "late" notice of intervention. *See SST, Inc. v. City of Minneapolis*, 288 N.W.2d 225, 230 (Minn. 1979) (in deciding whether a motion to intervene is untimely, the court should examine how far the litigation has progressed, the reason for the failure to previously intervene, and the prejudice that will result from granting intervention). Aitkin County has been involved in child support matters involving appellant since 1995. Because Aitkin County filed the original motion to modify child support and the formal notice of intervention was served months before the district court's de novo review of the CSM's order in October 2011,

appellant cannot credibly claim that he was unaware of Aitkin County's involvement in the proceedings.

There is also no merit to appellant's due process claims. Essentially, appellant argues that because the CSM and district court are allowed to appoint counsel at public expense for a party only in certain cases, an attorney should not have been appointed in this case involving a modification of child support. *See* Minn. R. Gen. Pract. 357.03 (allowing appointment of counsel in cases involving the "establishment of parentage" or in "contempt proceedings in which incarceration of the party is a possible outcome"). Contrary to appellant's argument, the assistant county attorney representing Aitkin County is not appointed by the CSM or the district court, but is an employee and agent of the county. In proceedings conducted in the expedited process, the county agency is required to appear through counsel. Minn. R. Gen. Pract. 369.01, subd. 2; s*ee also* Minn. Stat. § 518A.47, subd. 1(a) (2010) ("The provision of services under the child support enforcement program that includes services by an attorney or an attorney's representative employed by, under contract to, or representing the public authority does not create an attorney-client relationship with any party other than the public authority.").

Appellant also objected to the admission of MSOP Policy 104.700 into evidence on the basis that Aitkin County was improperly appointed counsel and allowed to intervene. Since there is no merit to either of these grounds, we reject this argument.

II. Modification of Child Support Order

When a district court reviews a CSM's decision, the district court owes no deference to the CSM's original decision and addresses the matter de novo. *Kilpatrick v.*

Kilpatrick, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). "The district court has broad discretion when deciding child-support modification issues." *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009). "Its decision will be upheld unless it committed clear error and its decision is against logic and the facts of record." *Id.* "Misapplying the law is an abuse of discretion." *Bauerly v. Bauerly*, 765 N.W.2d 108, 110 (Minn. App. 2009). This court reviews de novo the application of a statute to undisputed facts. *Lefto v. Hoggsbreath Enters. Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

Relative to child support or the payment of child support arrears, "the court may from time to time, . . . on motion of the public authority responsible for support enforcement, modify the order respecting the amount of maintenance or support money." Minn. Stat. § 518A.39, subd. 1. "The terms of an order respecting maintenance or support may be modified upon a showing of" circumstances that make "the terms unreasonable and unfair," including "substantially increased or decreased gross income of an obligor or obligee." *Id.*, subd. 2(a)(1) (2010). "Remedies available for the collection and enforcement of support . . . apply to cases in which the child or children for whom support is owed are emancipated and the obligor owes past support or has an accumulated arrearage as of the date of the youngest child's emancipation." Minn. Stat. § 518A.60(a) (2010); *see also* Minn. Stat. § 518A.26, subd. 21(a)(2) (2010) (including in definition of "support order" an order "for a child and the parent with whom the child is living, that provides for monetary support, child care, medical support including expenses for confinement and pregnancy, arrearages, or reimbursement").

The district court, in finding that appellant was able to work a minimum of 51.96 hours per month at the minimum wage of $7.25 per hour for a gross monthly income of $376.71, did not abuse its discretion in affirming the CSM's order modifying appellant's payment of child support arrears. These wages represent substantially increased gross income and are more than a 20 percent increase over what appellant earned at time of the November 15, 1999 order, when he was working 30 hours per month at a lower minimum wage. Accordingly, this increase creates a presumption that the terms of the prior order are unreasonable and unfair, and creates a rebuttable presumption that this "substantial change in circumstances" renders the existing support obligation unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(b)(1) (2010).

Appellant complains that the district court simply deducted $89 for appellant's personal needs allowance and found that appellant had more than enough funds available to him to pay $100 per month in child support arrears without subtracting from his wages the MSOP reduction under Minn. Stat. § 246B.06, subd. 6 or the cost-of-care fee under Minn. Stat. § 246B.07, subd. 1. However, as noted by the district court, appellant failed to recognize that "the policy of MSOP is to reduce the amount of child support owed from his wages, prior to reducing any amounts for Cost Reduction."

Application of the MSOP policy for deductions results in the following calculation: the deduction of $100 in monthly child support from appellant's gross monthly income of $376.71 results in a balance of $276.71; application of the 50%

MSOP cost reduction results in a net monthly income of $138.36,[8] out of which appellant can satisfy his personal needs allowance[9] and any cost-of-care payment required under Minn. Stat. § 246B.07.[10]

Appellant raises several other objections to the requirement that he pay child support arrears. First, he argues that child support cannot be collected since he is mentally incapacitated, incarcerated, and only earning poverty level wages. While it is not clear from his submissions, appellant appears to be relying in part upon the language in Minn. Stat. § 518A.32, subd. 3, which prohibits the court from attributing potential income to a person who is unemployed because of "physical[] or mental[] incapacitat[ion] or due to incarceration." However, even if appellant were mentally incapacitated or incarcerated, this statute is inapplicable because there has been no attribution of potential income. The only issue considered by the CSM and the district court was appellant's actual gross income.

[8] Consistent with appellant's paystubs, this 50% deduction is applied to the balance of appellant's wages after the deduction for child support.

[9] Despite appellant's argument that his monthly expenses are higher than the amount of the personal needs allowance, there does not appear to be any authority for the proposition that a client in the MSOP is entitled to an increase beyond that allowed by law. There appears to be no dispute that in this case appellant's personal needs allowance is $89.

[10] There is no merit to appellant's argument that he is unable to pay child support arrears because he will have no funds available to pay for his cost-of-care expenses. Minn. Stat. § 246B.07 only requires that the civilly committed sex offender pay what he is "able to pay" and the commissioner is directed to determine and "redetermine" the appropriate amount of payment. According to MSOP policy, this payment for cost-of-care expenses is the lowest priority deduction from a client's wages, whereas child support deductions are the highest priority deduction.

In the alternative to his claim that he does not have to pay child support, appellant argues that he only has to pay $50 per month in child support because he only earns poverty level wages. If an obligor's gross income is less than 120 percent of the federal poverty guidelines, his or her ongoing basic child support obligation is $50 per month. Minn. Stat. § 518A.42, subds. 1 (b), (d), 2(a)(1) (2010). This statute is inapplicable because it only applies to ongoing child support obligations, not the payment of child support arrears. *See* Minn. Stat. § 518A.42, subd. 2(a) (conditioning the imposition of the minimum basic support obligation on application of "the basic support amount"); Minn. Stat. § 518A.26, subd. 4 (2010) (defining "basic support" as "the basic support obligation computed under section 518A.34"); Minn. Stat. § 518A.34(b) (2010) (reciting the calculation of "basic support" obligation); Minn. Stat. § 518A.26, subd. 3 (2010) (defining "arrears" as something other than a prospective "basic support" obligation). The current proceedings do not involve a determination of basic support under the child support guidelines.

The statute creates a rebuttable presumption that a "basic support" obligation should not exceed the obligor's ability to pay, and sets forth an adjustment so that an obligor can support himself. Minn. Stat. § 518A.42, subd. 1. Appellant, as a civilly committed sex offender, is supported by the state and does not need an adjustment for self-support. In fact, appellant is given an allowance by the state in order to meet his personal needs. Minn. Stat. § 256B.35, subd. 1. Moreover, this personal needs allowance is to be increased if there is a garnishment of the allowance for child support. *Id.*, subd. 1(c).

Second, appellant claims that, because the judgment from his unpaid child support obligations was docketed in 1999 and is therefore over ten years old, the county cannot try to recover on his child support arrears. The statute upon which appellant relies, Minn. Stat. § 256.87, subd. 1 (2010), provides that:

> The parent's liability [for public assistance furnished to a child] is limited to the two years immediately preceding the commencement of the action, except that where child support has been previously ordered, the state or county agency providing the assistance, as assignee of the obligee, shall be entitled to judgments for child support payments accruing within ten years preceding the date of the commencement of the action up to the full amount of assistance furnished.

However, this statute is inapplicable in this modification proceeding. "Section 256.87 has been identified as a cause of action totally separate from child support orders, available to the county for the purpose of recovering a portion of past assistance granted." *State ex rel. Hendrickson v. Hendrickson*, 403 N.W.2d 872, 874 (Minn. App. 1987). "[I]t is not a modification of a child support award." *Id.* Aitkin County's modification motion dealt only with appellant's child support obligations that had arisen out of his dissolution and subsequent child support proceedings.

Also, there is no evidence that Aitkin County filed affidavits in furtherance of entering and docketing judgments pursuant to section 548.091, subdivision 2a. *See* Minn. Stat. § 548.091, subd. 1a(a) (providing that unpaid child support obligations reduced to judgment by operation of law are "entitled to full faith and credit in this state" and "shall be entered and docketed by the court administrator on the filing of affidavits"); *id.*, subd. 3a ("Upon receipt of the documents filed under subdivision 2a, the court administrator

shall enter and docket the judgment in the amount of the unpaid obligation identified in the affidavit of default."); *In re Marriage of Opp*, 516 N.W.2d 193, 195 (Minn. App. 1994) (explaining that only the district court administrator may "enter" judgment, which then begins the ten-year limitation period), *review denied* (Minn. Aug. 24, 1994). Absent the entry and docketing of affidavits as set forth in section 548.091, subdivisions 2a and 3a, there is no authority that the time limitations relative to child support judgments are applicable.

Finally, appellant requests that this court order that his interest payments on his arrears be retroactively suspended and order the removal of the state and federal tax refund offset program. However, we do not address these requests as it does not appear that appellant raised these issues in the district court proceeding. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Affirmed; motion granted.