STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0762

In re the Marriage of:
Lori Ann Jensen, petitioner,
Respondent,

vs.

Alan Frederick Jensen,
Appellant.

Filed December 3, 2012
Affirmed
Hudson, Judge

Beltrami County District Court
File No. 04-FA-09-4738

Lori Ann Jensen, Bemidji, Minnesota (pro se respondent)

Kevin T. Duffy, Thief River Falls, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

HUDSON, Judge

Appellant challenges the district court's denial of his motion to modify or suspend child support, arguing that the district court clearly erred by finding that he was

voluntarily unemployed, improperly calculated his potential income based on prior unemployment benefits, and failed to consider required statutory factors in determining that income. We affirm.

FACTS

The district court dissolved the 13-year marriage of appellant Alan Frederick Jensen and respondent Lori Ann Jensen in March 2012. The parties have three minor children, two of whom have special needs. Appellant has a work history as a pipeliner and a truck driver; respondent has a work history as an assembler and temporary worker.

Respondent initially moved for temporary child support; Beltrami County intervened because respondent received non-public assistance. In a February 2010 temporary order, the district court found that appellant had worked as a pipeliner, earning about $90,000 in 2009 and $82,000 in 2008, was currently receiving about $2,145 in monthly unemployment benefits, and expected to return to full-time work in May. By agreement, the district court referred the matter to a child-support magistrate (CSM), who set appellant's basic temporary support obligation at $981, based on his gross monthly unemployment income of $2,145 and respondent's gross monthly income of $0.

At a pretrial hearing in May 2010, the parties stated their agreement in principle on other issues and stipulated to permanent support as determined by the CSM's prior order. But appellant did not pay support, and respondent moved to hold him in contempt of court. In December 2011, appellant moved to suspend his temporary support obligation, claiming that he was currently unemployed, could not obtain union work, and was no longer receiving unemployment benefits.

At a district court hearing, appellant testified that he wants to work but there are no union jobs. He alleged that if he were to take a non-union job, he would lose his pension benefits, one half of which were awarded to respondent in the dissolution. The district court inquired about the availability of union pipeliner jobs, including in western North Dakota. Appellant responded that the only such jobs he knew of were non-union jobs, and it is a union requirement that he perform only union work in order to remain a union member. He stated that he had not received unemployment benefits for about eight months and was currently living with his parents. The district court asked appellant to provide confirmation from the union that non-union work would affect his pension rights, and appellant offered to submit such information within two weeks.[1] Respondent, appearing pro se, argued against the motion, citing appellant's previous income as a pipeliner and maintaining that appellant had the ability to obtain employment in that field or in his previous work as a truck driver.

A month later, having received no union documentation from appellant, the district court issued its order denying appellant's motion to reduce his temporary support obligation, finding that appellant had not met the burden to show a substantial change in circumstances, that he had "the experience and ability to earn substantial income as a pipeliner," and that he had voluntarily chosen to stay unemployed. The district court found that appellant voluntarily chose not to seek non-union pipeliner jobs, based on his unsubstantiated belief that his status as a union member precludes him from doing so, and

[1] Appellant also offered to obtain the current value of his pension, but the record does not contain that valuation.

that he had failed to submit union documentation to support that claim. The same day, the district court issued its dissolution judgment incorporating the terms of the temporary support order.

Appellant requested reconsideration under Minn. R. Gen. Pract. 115.11, submitting a notarized statement from a person in Texas, who alleged that he was a union oil-pipeline-construction heavy-equipment operator; that the pipeline industry had recently been "extremely slow"; and that a few non-union jobs existed, but taking those jobs would result in loss of union membership and previously earned benefits. Appellant also submitted a newspaper article about the difficulty of obtaining employment in western North Dakota. The district court denied reconsideration, stating that appellant's submissions did not constitute the requested evidence from the union supporting his claims. This appeal follows.

D E C I S I O N

I

Whether to modify child support is discretionary with the district court, and, on appeal, its decision will be reversed only 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). The district court declined to suspend or modify support on the basis that appellant had failed to show a substantial change in circumstances that rendered the existing order unreasonable and unfair under Minn. Stat. § 518A.39, subd. 2 (2010). But because appellant moved to modify a temporary order, we consider whether the district court abused its discretion in declining to modify that order under Minn. Stat. § 518.131,

subd. 9(b) (2010), which permits the district court to modify a temporary order "before the final disposition of the proceedings upon the same grounds and subject to the same requirements as the initial granting of the order."

The district court found that appellant was voluntarily unemployed and implicitly found that he had potential income equal to his prior unemployment income. When making a child-support determination, if the court finds that a party is "voluntarily unemployed, underemployed, or employed on a less than full-time basis . . . child support must be calculated based on a determination of potential income . . . . [I]t is rebuttably presumed that a parent can be gainfully employed on a full-time basis." Minn. Stat. § 518A.32, subd. 1 (2010). "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).

Appellant acknowledges that he does not meet a statutory exception that would make his unemployment involuntary. *See* Minn. Stat. § 518A.32, subd. 3 (2010) (stating that a parent is not voluntarily unemployed, underemployed, or employed on less than a full-time basis if the unemployment or underemployment or employment on a less than full-time basis is temporary and will lead to increased income, represents a bona fide career change outweighing the adverse effect of parent's diminished income on the child, or is based on physical or mental incapacitation or incarceration). But appellant maintains that because the district court did not find that he was voluntarily unemployed at prior hearings, and it never found that he was unemployed in bad faith, its finding of voluntary unemployment was clearly erroneous.

We reject that argument. Appellant cites *Schneider v. Schneider*, 473 N.W.2d 329, 332 (Minn. App. 1991), in which this court concluded that, absent a finding of bad faith, the district court may not order support from an obligor who is unable to pay support due to unemployment. But since *Schneider*, the Minnesota legislature has modified the child-support statutes, and under Minn. Stat. § 518A.32, "courts are no longer required to find bad faith before considering an obligor's earning capacity." *Melius v. Melius*, 765 N.W.2d 411, 415 (Minn. App. 2009) (quotation and citations omitted). Therefore, the district court was permitted to assign potential income to appellant without a finding of bad faith.

Appellant also maintains that his existing pension would be adversely affected if he accepted non-union employment. But he did not submit confirmation from the union to support this claim. The district court did not find his untimely statement submitted by an individual—who had no apparent position of authority within the union—to be credible. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (deference must be given to the trial court's credibility determinations); *cf. Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998) (noting that appellate courts defer to district court determinations regarding the credibility of affidavits) (citing *Straus v. Straus*, 254 Minn. 234, 235, 94 N.W.2d 679, 680 (1959)). A fact-finder is not required to believe even uncontradicted evidence if the surrounding facts and circumstances provide reasonable grounds for doubting its credibility. *Varner v. Varner*, 400 N.W.2d 117, 121 (Minn. App. 1987). We conclude that the district court did not clearly err by finding that appellant was voluntarily unemployed.

II

Appellant challenges the district court's determination of his potential income for support, arguing that the district court assigned income to him based on his prior unemployment benefits without making adequate findings on his current potential income and failed to consider the required statutory factors in determining that income. When a parent is voluntarily unemployed, the district court "must" determine that parent's potential income in order to calculate child support. Minn. Stat. § 518A.32, subd. 1. This determination is made using one of three methods: (1) the parent's "probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community"; (2) the amount of unemployment compensation or workers' compensation benefits received, if any; or (3) the amount of income that a person could earn in full-time work at 150 percent of the current minimum wage. *Id*., subd. 2.

Although the district court in its temporary order based the determination of appellant's income for support on his unemployment benefits, once he no longer received those benefits, it appropriately calculated his potential income based on his probable earnings level. *See id*. Attributing potential income under this method requires consideration of the listed statutory factors. *Kuchinski v. Kuchinski*, 551 N.W.2d 727, 729 (Minn. App. 1996) (construing prior version of statute).

Appellant argues that the district court considered only his work history as a pipeliner, pointing out that the district court did not make specific findings on his recent work history, which showed that he had been unemployed for several months, his

education and job skills, or the availability of jobs in the Bemidji area. But this court does not presume error on appeal. *See Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464–65 (1944) (stating that "on 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"); *see also 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). Appellant does not allege that he is unable to perform full-time work as a pipeliner. He acknowledged that he had heard of non-union pipeliner jobs in western North Dakota and has not challenged the district court's previous finding that his previous pipeliner job took him away from home for substantial parts of each year. We conclude that, under these circumstances, the district court's findings sufficiently demonstrate consideration of the necessary statutory factors for calculating appellant's potential income based on probable earnings level. *See* Minn. Stat. § 518A.32, subd. 2 (1).

An appellate court will not reverse the district court's findings of a parent's income for child support unless they are clearly erroneous. *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). On this record, the district court's implicit finding, which assigned appellant potential income that was substantially less than his income as a pipeliner, was not clearly erroneous. *See Vettleson v. Special Sch. Dist. No. 1*, 361 N.W.2d 425, 428 (Minn. App. 1985) (applying clearly erroneous standard to an implicit finding of fact).

Affirmed.