

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1080**

Russell D. Waletski, petitioner,  
Appellant,

vs.

Reem Waletski, n/k/a Reem Nazzal-Hajeer,  
Respondent.

**Filed January 14, 2013  
Affirmed  
Connolly, Judge**

Hennepin County District Court  
File No. 27-FA-000276953

Russell D. Waletski, Minnetonka, Minnesota (pro se appellant)

Sandra Connealy Zick, Tuzinski & Zick, L.L.C., Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Hooten, Judge.

**UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Appellant challenges the denial of his motion to modify child support, arguing that the district court abused its discretion by giving respondent a nonjoint-child deduction for a 19-year-old and by finding that appellant was voluntarily underemployed. Because

appellant was not prejudiced by the erroneous nonjoint-child deduction and the finding that he was voluntarily underemployed is not clearly erroneous, we affirm.

### **FACTS**

When the marriage of appellant Russell Waletski and respondent Reem Waletski was dissolved in 2002, respondent was given sole legal and physical custody of their child, four-year-old Z.

In 2009, appellant was earning \$3,747 monthly from his job at Northwest (later Delta) Airlines. He had remarried and had three nonjoint children, for whom he received a deduction of \$538, so his parental income for determining child support (PICS) was \$3,209. Respondent's gross monthly income was \$9,576, and she had a deduction of \$604 for a nonjoint child, so her PICS was \$8,972. The parties' joint PICS was \$12,181; their joint child-support obligation was \$1,537; respondent's share was 74%, or \$1,137, and appellant's share was 26%, or \$400. Appellant's parenting time was between 10% and 45%, so he was granted a 12% parenting-time-expense adjustment, resulting in a child-support obligation of \$352 monthly.

In 2011, appellant took early retirement from his job with Delta and began a part-time job with a company started by his wife, from which he earned \$1,800 monthly. He moved for a modification of child support on the ground that this decrease in monthly income (\$3,747 to \$1,800) was a change in circumstances because, with it, his nonjoint-children deduction was \$328, his PICS was \$1,472; the parties' joint PICS was \$11,981; their joint child-support obligation was \$1,511; and appellant's share was 15%, or \$227,

which, less his 12% parenting-time expense adjustment, made his monthly child-support obligation \$200 instead of the current \$352.

The district court denied his motion, finding that appellant was voluntarily underemployed and could be earning the income he had received from his job at Delta. The district court also found that respondent's income had increased from \$9,576 to \$10,509, so her nonjoint-child deduction was \$667 and her PICS was \$9,842. Respondent's nonjoint child was then 19. Because the parties' joint PICS had increased from \$12,181 to \$13,051, their joint child-support obligation was \$1,651, of which appellant's share was 25% and respondent's 75%. Appellant's child-support obligation therefore went from \$352 to \$363 (25% of \$1,651, or \$413, less 12% for parenting-time expense adjustment). The district court concluded that the \$11 increase does not meet the standard of a 20% or a \$75 change required by Minn. Stat. § 518A.39, subd. 2(b)(1) (2010).<sup>1</sup>

Appellant challenges the denial of his motion to modify child support, arguing that the district court abused its discretion in allowing respondent a deduction for a 19-year-old nonjoint child and erroneously found that appellant is voluntarily underemployed.<sup>2</sup>

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<sup>1</sup> This statute is identical to Minn. Stat. § 518A.39, subd. 2(b)(1) (2012).

<sup>2</sup> Appellant also challenges the constitutionality of Minn. Stat. § 518A.33, (b) and (c) (2010) (providing that deduction for nonjoint children from PICS is limited to two children and is 50% of the guideline amount) and of Minn. Stat. § 518A.32, subds. 1-3 (2010) (providing that a district court may determine and impute the potential income of a parent who is voluntarily underemployed). Appellant did not raise either of these issues to the district court, so they are not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Nor did appellant notify the attorney general of his constitutional issues as required by Minn. R. Civ. App. P. 144. Since the constitutional issues are not properly before us, we do not address them.

## DECISION

### I. Modification of Child Support

Whether to modify child support is discretionary with the district court, and its decision will be altered on appeal only if it 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). Whether a parent is voluntarily underemployed is a finding of fact, which this court reviews for clear error. *See Welsh v. Welsh*, 775 N.W.2d 364, 370 (Minn. App. 2009) (applying clearly erroneous standard in the context of a finding of voluntary unemployment).

#### A. Respondent's nonjoint-child deduction

Respondent concedes that someone who is over 18 and has graduated from high school does not qualify as a “nonjoint child” and that she is not entitled to a nonjoint-child deduction. *See* Minn. Stat. § 518A.26, subds. 5, 12 (2012). We agree that the district court erred in this determination. But no prejudice to appellant resulted from this error. If the district court had not given respondent a \$667 deduction for a nonjoint child, her PICS would have been \$10,509; the joint PICS would have been \$13,718; the joint child-support obligation would have been \$1,740; respondent's share would have been 77% and appellant's 23%, and appellant's child-support obligation would be \$352 (\$400.20 less 12%). Appellant's present child-support obligation is also \$352; therefore, with or without the nonjoint-child deduction for respondent, appellant cannot show the 20% change or the \$75 change required by Minn. Stat. § 518.39, subd. 2(b)(1) for a change in circumstances to support a modification of child support.

Appellant also argues that “The [d]istrict [c]ourt . . . calculated and ordered an increase in basic support obligation to \$363.” But appellant misreads the district court’s order, which denies appellant’s motion for modification and does not change his present \$352 obligation. Because there was no prejudice to appellant from the inclusion of respondent’s nonjoint-child deduction, there is no basis for reversal. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) (“[U]nless the error is prejudicial, no grounds exist for reversal.”).

### **B. The Finding of Appellant’s Voluntary Underemployment**

The district court’s denial of appellant’s motion to modify child support was based on a finding that appellant became voluntarily underemployed when he retired from his \$3,474-per-month full-time job with Delta and took an \$1,800-per-month part-time job with his wife’s company. Based on this finding, the district court imputed to appellant a monthly income of \$3,474 and concluded that his circumstances had not changed. *See* Minn. Stat. § 518A.39, subd. 2(b)(1) (stating that change in obligation must be at least 20% and \$75 to establish a presumption of a change in circumstances and a rebuttable presumption that the current child-support award is unreasonable and unfair).

A parent is presumed to be able to engage in full-time employment. Minn. Stat. § 518A.32, subd. 1 (2012). To overcome the statutory presumption, appellant must show either that his present part-time employment will ultimately lead to an increase in income or that he has made a bona fide career change that outweighs the adverse effect of his diminished income on Z. *See id.*, subd. 3 (1), (2) (2012).

Appellant argues that he will eventually be employed full time and that having lifetime flying privileges as a result of his early retirement will benefit Z. because appellant will be able to visit him. In regard to these arguments, the district court found that:

10. With respect to [appellant's] employment eventually becoming full-time, [he] submits that it will go full-time by the end of the year, but includes no details on how his income will be affected. . . . [T]here is a highly suspect element to [appellant]'s current employment [in his wife's company], which he started just days before moving for [a] reduction in his support obligation, in that [he] and his wife could set his current compensation at almost any arbitrary level determined by them to maximize the advantages to both of them by (1) minimizing *her* taxable income by claiming a salaried employee; and (2) reducing *his* gross income in order to drive down his child support obligation. The lack of credibility regarding this arrangement is furthered by the fact that [appellant] does not submit any qualifications on his part for this career change, does not identify how he has the requisite skills for it, and submits no record evidence regarding the market wage for other individuals who might have been hired to this position.

....

12. With respect to the benefits to [Z.] of the new, lesser-earning employment, [appellant] points to the retention of lifetime flying privileges by taking early retirement. Again, however, [appellant] submits general data regarding contraction in the [airline] industry, but nothing to establish he was facing imminent downsizing in a fashion that would lead to the elimination of [his] flight privileges. The record does not establish that but for free flying privileges, he would be unable to take advantage of monthly parenting time. Further, the record does not establish the market value cost of monthly flying privileges to Virginia such that this benefit can be quantified an[d] compared to the loss in gross income incurred as a tradeoff.

13. For similar reasons, the Court did not find the record persuasive that the job change by [appellant] is a bona fide

career change, the benefits of which to [Z.] will outweigh the negatives of reduced capacity to provide economic support.

The record supports these findings, and appellant does not refute them. He states only that his ability to be in Z.'s life by flying to visit him monthly is "equally important as financial support." But the statute says the advantage to the child must outweigh the *financial* loss; appellant offers no basis for concluding either that he could not visit Z. without free-flying privileges or that the advantage to Z. of appellant's visits is greater than the disadvantage to Z. of appellant's loss of income.

Appellant has not shown that the finding that he is voluntarily underemployed is clearly erroneous or that he was prejudiced by the district court's inclusion of a deduction for respondent's 19-year-old nonjoint child. The district court did not abuse its discretion in denying appellant's motion to modify child support.

**Affirmed.**