STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1126

In re the Marriage of: Melodie Rae Boyer, n/k/a Melodie Rae, petitioner,
Appellant,

vs.

Paul Francis Boyer,
Respondent.

Filed May 28, 2013
Affirmed; motion granted in part
and denied in part.
Stauber, Judge

Hennepin County District Court
File No. 27FA000292864

Melodie Rae Boyer, Excelsior, Minnesota (pro se appellant)

Roselyn J. Nordaune, Nordaune & Friesen, P.L.L.C., Wayzata, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from a decision by the child support magistrate (CSM) modifying respondent-husband's child-support obligation, pro se appellant-mother argues that the CSM abused her discretion by (1) understating respondent's income for purposes of child

support by failing to consider his company's retained earnings; (2) imputing income to her for purposes of calculating child support; (3) refusing to reopen a prior order; (4) denying her request for attorney fees; and (5) denying her request for an upward deviation in child support to account for the child's purported gifted needs. Appellant also seeks a determination from this court as to the amount of unpaid medical expenses owed by respondent. Respondent filed a notice of review challenging the CSM's calculation of his income for purposes of child support, and moved to strike portions of appellant's brief and appendix. We affirm and grant respondent's motion to strike in part and deny it in part.

FACTS

Appellant Melodie Rae Boyer and respondent Paul Francis Boyer were married in 1986, and had three children during their marriage. The parties' marriage was dissolved in December 2005 and, pursuant to the judgment and decree, the parties were awarded joint legal custody of their children, with appellant awarded sole physical custody of the two youngest children. Respondent was awarded sole physical custody of the oldest child.

At the time of the dissolution, appellant was a full-time homemaker and was not employed outside the home. Respondent was then employed by, and is still, a one-fourth owner of Boyer Building Corporation (BBC), a home-construction business owned equally by respondent and his three siblings. Respondent's annual income varies, and the district court found that respondent's income for the years 2002, 2003, and 2004 was $189,508, $141,003, and $261,892, respectively, after pre-tax deductions. The district

court found that the "parties have agreed that respondent shall pay child support of $1,200 per month to [appellant for the two youngest children], beginning January 1, 2006, subject to biennial cost-of-living adjustments pursuant to Minn. Stat. § 518.641." The judgment and decree recognized that the support agreement "takes into consideration that respondent has physical custody of one of the three children of the parties and that [appellant] has a legal obligation for the support of [the oldest child]." Respondent was further ordered to pay 75% of the unreimbursed medical expenses for the children. Finally, respondent was ordered to pay spousal maintenance to appellant in the amount of $5,000 per month for a period of 72 months, with the term and amount non-modifiable pursuant to a *Karon* waiver.[1]

In December 2008, the CSM modified respondent's child-support obligation following the emancipation of the parties' oldest child. After considering the parties' incomes, the CSM ordered respondent to pay $1,416 per month in basic child support. Subsequent cost-of-living adjustments (COLA) increased respondent's basic child-support obligation to $1,424 per month and spousal maintenance to $5,030 per month.

In June 2011, respondent moved to modify his child-support obligation due to the emancipation of the parties' second child. Appellant brought a responsive motion seeking, inter alia, to (1) deny respondent's motions; (2) impute income to respondent in the amount of $12,522.10 per month; (3) maintain respondent's child-support obligation of $1,416 per month; (4) modify respondent's child-support obligation upward

[1] A *Karson* waiver is a waiver of the right to seek modification of spousal maintenance. *Grachek v. Grachek*, 750 N.W.2d 328, 331 (Minn. App. 2008), *review denied* (Minn. Aug. 19, 2008).

commencing January 1, 2012, upon termination of the spousal maintenance obligation; (5) require respondent to pay $200 per month for the remaining "child's gifted program"; (6) be awarded attorney's fees including fees for the December 2008 proceedings; (7) modify the individual parties' parental income for determining support; and (8) pay appellant for unreimbursed medical expenses of $672.60.

Following an evidentiary hearing, the CSM issued an order dated December 20, 2011, concluding that the second child's emancipation constituted a substantial change in circumstances warranting modification of the existing child-support obligation. The CSM then considered the parties' income for purposes of establishing child support. The CSM found that appellant "failed to establish a disability that prevents her from being fully employed." The CSM found that because appellant has no disabilities, she has "the ability to earn gross monthly income of $1,884.00 based on full time employment."

The CSM also found respondent to have a monthly income of $15,467.57 based upon respondent's average gross annual income from 2002 through 2008. In making this determination, the CSM rejected respondent's claim that his 2008 income was $147,251 rather than $247,251 because after receiving a year-end bonus of $182,000, respondent and the other owners loaned back to the corporation $100,000 in order to keep needed money in the business while reducing taxable corporate profit. The CSM noted that respondent received a 10% return on his loan to the corporation, which effectively meant that respondent was reinvesting his income. The CSM concluded that "the act of reinvestment does not convert income into non-income." Moreover, although the CSM found that respondent had income in 2009 and 2010 of $71,179 and $87,124,

respectively, the CSM specifically "disregarded" this income. The CSM found that respondent received no bonuses for 2009 and 2010, and that his income for those years was "unjustifiably self-limited since significant retained earnings were kept in [BBC] without a legitimate business reason and was contrary to the asserted business practice."

Based upon the emancipation of the second child, and the parties' incomes as found by the CSM, the CSM reduced respondent's child support obligation to $1,027 per month effective July 1, 2011, with an automatic increase to $1,492 per month upon termination of respondent's spousal maintenance obligation. The CSM also concluded that the "child support obligation is sufficient to meet the joint child's needs including participation in gifted programming." The CSM further ordered that appellant "shall file an affidavit regarding attorney's fees regarding the present motion within thirty days of this order and a separate order will address the issue of attorney's fees." The parties' remaining motions were denied.

Both parties sought review of the CSM's order. By order dated March 7, 2012, the district court denied appellant's requests for review because the issues were "well within the discretion of the CSM." The district court, however, found that the "CSM's finding that respondent self-limited his income in 2009 and 2010 is not supported by the record." Thus, the district court remanded the matter to the CSM for a new calculation of respondent's income with direction to either use respondent's 2011 income or an average of respondent's income over a period of years that must include the years of 2009 and 2010. The district court also noted that "[w]hen considering this issue on remand the CSM is free, in her discretion, to reassess the issues raised by [appellant]."

Following remand, the CSM extended the record "in order to address the remand provisions of the prior order dated March 7, 2012." But the CSM specified that "[n]o new exhibits other than an updated affidavit regarding attorney's fees should be provided."

On remand, the CSM found that respondent's income for 2011 was $80,977, which consisted of his base salary of $65,520, and $15,457 in interest from the corporate loan-back program. The CSM then found respondent's gross monthly income for purposes of calculating child support to be $12,821.30, based upon his average gross annual income from 2002 through 2011. Moreover, the CSM again found that appellant "failed to establish a disability that prevents her from being fully employed." Thus, the CSM imputed income to appellant in the amount of $1,844 per month.

Based upon the parties' incomes, the CSM ordered respondent to pay child support for the remaining minor child in the amount of $873 per month for the period of July 1, 2011 through December 2011. The CSM also required respondent to pay 55% of the unreimbursed and uninsured medical expenses for the minor child for that period. The CSM further ordered that beginning on January 1, 2012, respondent's child support obligation is modified to $1,423 per month, with respondent paying 89% of the child's unreimbursed and/or uninsured medical expenses. Finally, the CSM denied appellant's request for conduct- and need-based attorney fees and refused to modify the prior decision denying appellant's request for an upward deviation in child support based on

the child's purported gifted needs. Appellant subsequently filed this appeal and respondent filed a notice of related appeal.[2]

D E C I S I O N

I.

"On appeal from a CSM's ruling, the standard of review is the same as it would be if the decision had been made by a district court." *Hesse v. Hesse*, 778 N.W.2d 98, 102 (Minn. App. 2009). The CSM therefore has broad discretion to decide an issue involving child support, and this court will uphold the decision unless it is "against logic and the facts of record." *Id.* However, this court's scope of review is limited when a party appeals directly from the decision of a CSM, and we will consider only whether the evidence supports the findings of fact and whether the findings support the conclusions of law and decision. *Kahn v. Tronnier*, 547 N.W.2d 425, 428 (Minn. App. 1996), *review denied* (Minn. July 10, 1996); *see* Minn. R. Gen. Pract. 378.01 advisory comm. cmt. (noting distinction in scope of review depending upon whether appeal is sought from district court decision or CSM decision).

Although the parties' one remaining minor child is now close to emancipation, both parties challenge the CSM's determination of respondent's income for purposes of

[2] Respondent filed a motion to strike portions of appellant's brief and appendix on grounds that they contain matters outside the record on appeal. We conclude that the challenged material pertaining to appellant's health crisis is outside of the record on appeal and, therefore, the motion with respect to this material is granted. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) ("An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below."). The motion with respect to the remaining material is denied as moot because we do not rely on the remaining challenged material in reaching our decision.

child support. Appellant claims that the CSM's order substantially deflates respondent's income for purposes of child support because it fails to consider the retained earnings of BBC, as well as respondent's other business ventures. Conversely, respondent filed a notice of related appeal arguing that the CSM's order inflates his income for purposes of calculating child support by taking a ten-year average of his income rather than a three-to-five year average.

A. Appellant's arguments

Setting child support requires findings of the gross income of the parents. Minn. Stat. § 518A.34(b)(1) (2012). Gross income is defined as "any form of periodic payment to an individual, including, but not limited to, salaries, wages, commissions, [and] self-employment income." Minn. Stat. § 518A29(a) (2012). Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business shall be counted as income if they reduce personal living expenses. Minn. Stat. § 518A.29(c) (2012). Whether a source of funds qualifies as gross income is a question of law, which is reviewed de novo. *Sherburne Cnty. Soc. Services Ex rel. Schafer v. Riedle*, 481 N.W.2d 111, 112 (Minn. App. 1992).

Appellant appears to argue that the CSM's determination of respondent's income was clearly erroneous because the CSM failed to include BBC's retained earnings when calculating respondent's income. Appellant contends that respondent's income "must include BBC's Retained Earnings because the profits of the Corporation that they have chosen not to distribute are ¼ his; whether held by the corporation or paid out in the form

of dividends/bonuses, those monies are added to his personal wealth [and] therefore ¼ his earnings."[3]

Retained earnings are a corporation's accumulated income that it retains as a corporate asset rather than distributes to its shareholders. *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 850 (Minn. 2003). The issue of whether a corporation's retained earnings constitute income for child-support purposes was recently addressed by this court in *Haefele v. Haefele*, 814 N.W.2d 65 (Minn. App. 2012), *review granted* (Minn. July 17, 2012). In that case, the issues before the court were whether a support obligor's gross income for support purposes included the distributions of an S-corporation to the shareholder made to allow the shareholder to transfer those funds to another business entity, and the distributions made to the shareholder to enable the shareholder to pay the shareholder's tax obligation on his share of the corporation's retained earnings. *Id.* at 68. This court concluded that corporate motive is a key factor in determining whether a distribution to a shareholder should be considered income for the purpose of calculating child support or whether the distribution is not income to consider in calculating child support. *Id.* at 70.

[3] We note that appellant challenges the CSM's failure to include, as part of respondent's income, BBC's retained earnings from the years 2004 through 2010. But respondent's income for the year 2007 and before was determined in the December 16, 2008 order. That order was not appealed and, therefore, is now final. *See Dieseth v. Calder Mfg. Co.*, 275 Minn. 365, 370, 147 N.W.2d 100, 103 (1966) (stating that an appealable order is final when the deadline to appeal has expired, even if the order is wrong in certain respects). Consequently, appellant's claim that BBC's retained earnings should be included in respondent's income is limited to the years 2008 through 2011.

Here, unlike the S corporation in *Haefele*, BBC is a C corporation. *Compare Hubbard Cnty. Health and Human Services v. Zacher*, 742 N.W.2d 223, 225 (Minn. App. 2007) (stating that the earnings or losses of an S corporation pass through to its shareholders and are reported by the shareholders on their individual tax returns), *with Black's Law Dictionary* 391 (9th ed. 2009) (defining a C-corporation as "[a] corporation whose income is taxed through it rather than through its shareholders"). Appellant makes no argument that the reasoning in *Haefele* is applicable and cites no other persuasive authority stating that the retained earnings of a C corporation are available for purposes of calculating child support. Thus, appellant fails to establish that the retained earnings of BBC are available for purposes of calculating respondent's child-support obligation.

Even if we were to apply the reasoning in *Haefele* to this case, appellant must show that BBC did not have a legitimate business purpose for retaining its earnings. *See Haefele*, 814 N.W.2d at 69 (stating that corporate motive is the key factor in determining whether the distributions from an S corporation to a shareholder, to be transferred by the shareholder to another business entity, are not the shareholder's income for purposes of child support); *see also Zacher*, 742 N.W.2d at 227 (stating that corporate motive is the key factor in determining whether the retained earnings of an S corporation constitute income for purposes of child support). The record reflects that BBC's decision to retain earnings in 2009 and 2010 and not pay bonuses those years was consistent with the practice of the business to keep cash on hand. Therefore, appellant is unable to establish that the retained earnings of BBC should be included as income for purposes of calculating respondent's child-support obligation.

Appellant further argues that the CSM's order fails to consider income respondent receives from his other business ventures. But appellant's claim that respondent receives substantial income from his other business ventures is purely speculative. Respondent's tax returns were submitted to the CSM and do not include substantial income from other sources. The CSM reviewed the tax returns and calculated respondent's gross income based upon the information in the record. Appellant is unable to establish that the CSM's calculation of respondent's income for purposes of child support is clearly erroneous.

B. Respondent's argument

In his notice of review, respondent challenges the CSM's decision determining his income for purposes of child support. Respondent does not contend that the CSM erred by averaging his income. Instead, respondent argues that the "CSM abused her discretion in taking a ten year average rather than a three to five year average."

Where a child-support obligor's income fluctuates, an income-averaging method takes into account fluctuations and more accurately measures income. *Veit v. Veit*, 413 N.W.2d 601, 606 (Minn. App. 1987) (holding that when self-employed business income fluctuates, income averaging more accurately measures obligor's net income). Appellate courts have not set any standard time period for averaging income. *See, e.g., id.*, at 606 (three-and-a-half years); *Roehrdanz v. Roehrdanz*, 410 N.W.2d 359, 363 (Minn. App. 1987) (five years), *review denied* (Minn. Oct. 28, 1987). And an inclusion of an unusually good or bad year in the time frame is not necessarily erroneous. *See Veit*, 413 N.W.2d at 606 (holding that district court did not err in including "financially disastrous year" in calculating obligor's net monthly income).

Here, it is undisputed that, given the nature of respondent's work, his income varies each year depending on the economy and the success of the business. A ten-year average of respondent's income fairly reflects the "ebbs and flows" of respondent's business. If the CSM had used only a three-year average, as respondent requests, the average would only take into consideration the recent years when the company did poorly, and disregard the years when BBC was very successful. Although a five-year average would have taken into consideration two of BBC's more recent successful years, caselaw did not require the CSM to average only the most recent five years. Rather, respondent's income over the last ten years is in the record and has been used throughout the course of the proceedings to determine respondent's child-support obligation. Accordingly, respondent cannot establish that the CSM abused her discretion by calculating respondent's income based on a ten year average for purposes of child support.

II.

Appellant challenges the CSM's decision to impute income to her because she is voluntarily unemployed. This court applies the same standard of review to a CSM's decision as to a district court's decision. *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 445-46 (Minn. App. 2002). Appellate courts will not reverse the factual finding that a parent is voluntarily unemployed unless it is clearly erroneous. *See Butt v. Schmidt*, 747 N.W.2d 566, 574-75 (Minn. 2008) (whether a parent is voluntarily unemployed is a finding of fact); Minn. R. Civ. P. 52.01 ("Findings of fact . . . shall not be set aside unless clearly erroneous. . . ."). When reviewing factual findings, appellate courts view the

record in the light "most favorable to the findings." *Frauenshuh v. Giese*, 599 N.W.2d 153, 156 (Minn. 1999).

There is a rebuttable statutory presumption "that a parent can be gainfully employed on a full-time basis." Minn. Stat. § 518A.32, subd. 1 (2012). When a parent is "voluntarily unemployed, . . . child support must be calculated based on a determination of potential income." *Id.*

Appellant argues that the CSM's finding that she has no disabilities that prevent her from being fully employed is not supported by the record because she submitted documentation establishing that she has a disability. We disagree. The documentation referred to by appellant is not part of the record below and, as addressed above, has been stricken from appellant's brief and appendix. The only evidence in the record pertaining to appellant's disability claims is a letter from her doctor dated September 14, 2011, which states that appellant has a "painful condition" that "would have a significant impact on [appellant's] ability to work." The letter, however, did not specifically conclude that appellant has a disability that prevents her from being employed. Moreover, respondent testified as to his personal observations of appellant's activity level during their marriage; his understanding that her claimed injury occurred at age 18; her therapy and chiropractic care received during the marriage; and her current activities that indicate an active lifestyle. Accordingly, appellant cannot establish that the CSM clearly erred by imputing income to appellant.

III.

This court reviews a district court's decision not to reopen a dissolution judgment for an abuse of discretion. *Haefele v. Haefele*, 621 N.W.2d 758, 761 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001). The district court's findings as to whether the judgment was prompted by fraud on the court will not be set aside unless they are clearly erroneous. *Hestekin v. Hestekin*, 587 N.W.2d 308, 310 (Minn. App. 1998).

The statutory bases for relieving a party from a judgment and decree or order include fraud and "fraud upon the court." Minn. Stat. § 518.145, subd. 2 (2012). Caselaw in the area of family law does not make a clear distinction between mere "fraud" and "fraud upon the court." *See, e.g.*, *Maranda v. Maranda*, 449 N.W.2d 158, 165 (Minn. 1989) (rejecting narrow definition of "fraud upon the court" in family-law matters because court sits as third party to any stipulation, and noting "the difference between fraud and fraud on the court is primarily a difference of degree rather than kind"). The supreme court has stated that fraud in a marital dissolution consists of: (1) an intentional course of material misrepresentation; (2) having the result of misleading the court and opposing counsel; and (3) making the property settlement unfair. *Kornberg v. Kornberg*, 542 N.W.2d 379, 387 (Minn. 1996).

Appellant appears to argue that respondent committed fraud upon the court when, at the September 23, 2008 hearing, respondent presented evidence that his income in 2008 would be about the same as his 2007 income, but after the CSM issued her order, he received a substantial bonus at the end of the year. Thus, appellant appears to argue that the CSM abused its discretion by refusing to reopen the December 16, 2008 order.

Appellant's argument is without merit. The record reflects that the evidence and testimony pertaining to respondent's 2008 income was presented at the September 23, 2008 hearing, long before BBC's decision whether to pay employee bonuses was made at the end of the year. The record reflects that respondent submitted the relevant financial information to the CSM and there is no evidence that respondent intentionally withheld information or made false statements concerning his 2008 income. Although the CSM in a later order recognized that respondent's "assertion of his 2008 income was inconsistent significantly from his actual income," the CSM concluded that it "cannot determine at this point that respondent's actions constituted fraud upon the court." The CSM's finding is not inconsistent with the evidence in the record. Accordingly, appellant has not shown that the CSM abused her discretion by refusing to reopen the December 16, 2008 order.

IV.

Appellant challenges the CSM's denial of her request for conduct-based attorney fees. In proceedings under chapter 518 or 518A, a district court may, "in its discretion," award additional attorney "fees, costs, and disbursements against a party who unreasonably contributes to the length or expense of the proceeding." Minn. Stat. § 518.14, subd. 1 (2012). An award of conduct-based attorney fees under section 518.14 "rests almost entirely within the discretion of the [district] court and will not be disturbed absent a clear abuse of discretion." *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999). The party moving for conduct-based attorney fees must establish that the adverse party's conduct justifies such an award. *Geske v. Marcolina*, 624 N.W.2d 813, 818 (Minn. App. 2001).

Appellant appears to contend that she should be awarded conduct-based attorney fees for defending against "the ridiculous 2008 proceeding that respondent brought forward seeking a reduction in his child support payments." But respondent's motion to reduce his child support was premised on the second child's emancipation, which the CSM found to constitute a substantial change in circumstances warranting a modification of the child-support obligation. Moreover, to the extent that appellant claims that conduct-based attorney fees are warranted based upon respondent's representations of his income, the CSM specifically found that appellant's "request for an award of attorney's fees due to conduct is denied in light of the determinations contained in the Court order dated March 7, 2012." Therefore, appellant has not shown that she is entitled to conduct-based attorney fees.

Appellant also contends that the CSM abused its discretion by refusing to award her need-based attorney's fees. We disagree. Minn. Stat. § 518.14, subd. 1, also governs need-based attorney fees. The statute states that a district court "shall" award need-based fees in an amount that enables a party to carry on a proceeding if (1) the fees are necessary for a good-faith assertion of rights; (2) the payor has the ability to pay the fees; and (3) the recipient is unable to pay his or her own fees. Minn. Stat. § 518.14, subd. 1. The party seeking need-based attorney fees has the burden of establishing that the adverse party has the ability to pay the fees. *See In re Marriage of Sammons*, 642 N.W.2d 450, 458 (Minn. App. 2002) (refusing to award attorney fees because the party failed to establish "the existence of those elements required by section 518.14 that would entitle her to need-based attorneys' fees").

Here, the CSM concluded that appellant's request for "attorney's fees based upon need is denied since [appellant] has sufficient income after considering the receipt of spousal maintenance." This finding is supported by the record. The record reflects that throughout the proceedings, appellant has been receiving spousal maintenance in the amount of at least $5,000 per month. Moreover, the record reflects that, at the time of the judgment and decree, appellant was awarded a lump-sum payment in the amount of $220,000 from respondent. Appellant was also awarded the homestead as well as the parties' real property located in Colorado, and both properties appear to be unencumbered. Appellant's assets and the amount of spousal maintenance she receives refute appellant's claim that she should be awarded need-based attorney fees. The CSM did not abuse its discretion by denying appellant's request for attorney fees.

V.

A parent's presumptive child-support obligation is calculated pursuant to Minn. Stat. § 518A.34(b) (2012). A district court has discretion to deviate from the presumptive child-support obligation and establish a different amount. Minn. Stat. § 518A.37, subd. 2 (2012). When deciding whether a deviation from the presumptive child-support obligation is appropriate, the district court must consider several factors, including "all earnings, income, circumstances, and resources of each parent." Minn. Stat. § 518A.43, subd. 1 (2012).

Appellant argues that the CSM abused its discretion by denying her request for an upward deviation in child support of $200 per month to allow the parties' minor child to participate in programs for "gifted" children. But, as the CSM found, respondent's "child

support obligation is sufficient to meet the joint child's needs including participation in gifted programming." Moreover, the record reflects that appellant receives a substantial amount in spousal maintenance and was awarded substantial assets in the property distribution at the time of the judgment and decree. Therefore, the CSM did not abuse its discretion by denying appellant's request for an upward deviation in child support.

VI.

Finally, appellant appears to ask this court to determine the amount of medical expenses owed to appellant by respondent, as well as order respondent to reimburse appellant for these expenses. But the CSM's order specifically reserved the issue of unreimbursed medical and dental expenses. Because appellant filed this appeal before the issue was resolved, appellant's argument pertaining to medical-expense reimbursements is not properly before this court. *See Thiele*, 425 N.W.2d at 582 (stating that appellate courts generally address only questions presented to, and considered by, the district court).

Affirmed; motion granted in part and denied in part.