STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2284

In re the Matter of:
County of Goodhue,
ex rel, Tarlochan Singh Turna, petitioners,
Respondents,

vs.

Amberjeet Kaur Gill
a/k/a Amberjeet Kaur Gill-Sabharwal,
Appellant.

Filed July 8, 2013
Affirmed in part, reversed in part, and remanded
Ross, Judge

Goodhue County District Court
File No. 25-FA-12-1065

David J. Grove, Assistant Goodhue County Attorney, Red Wing, Minnesota; and

Timothy K. Dillon, Dillon Law Office, Cannon Falls, Minnesota (for respondents)

Amberjeet K. Gill, Stockton, California (pro se appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

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

ROSS, Judge

Mother Amberjeet Gill appeals from the district court's judgment awarding father Tarlochan Turna monthly child-support payments, contending that the district court lacked jurisdiction to modify an unregistered North Dakota child-support order, that the district court abused its discretion by basing its finding of her income on her reported expenses and by ordering her to pay retroactive child support, and that the district court clearly erred by finding that she is in arrears on her child-support payments. Because the district court established a child-support obligation rather than modifying one, and because it had statutory authority to award retroactive child support, we reject the jurisdictional challenge and affirm in part. But because the district court used an impermissible method for determining Gill's income and because Gill could not be in arrears on a child-support obligation the moment it was established, we reverse in part and remand.

FACTS

Tarlochan Turna and Amberjeet Gill divorced in North Dakota in 2004. The North Dakota dissolution judgment awarded Gill physical custody of their sole child, A.T., and it also ordered Turna to pay Gill child support as long as A.T. resided with Gill. Turna took de facto physical custody of A.T. in May 2008, and a California court awarded him sole physical custody in 2010. The California order did not mention child support, but it transferred jurisdiction over custody matters to Minnesota.

In August 2012, a Minnesota child-support magistrate conducted a hearing on Goodhue County's motion to establish a child-support obligation for Gill. The magistrate proceeded using the Expedited Child Support Process because A.T. received nonpublic-assistance child-support services under title IV-D of the Social Security Act. At the hearing, the county reported that Turna had provided income documentation but that Gill had not. It said that she had reported monthly expenses of $3,127. Gill testified that she could not provide any income information because she had no income; her only funding source was student loans. Her financial affidavit claimed that she had zero income. She appended a social security statement from 2009 showing no income from 2000 to 2007, and a student-loan award letter indicating that she had been found eligible for financial aid based on a "student contribution" amount of $0. She asserted that she could not provide checking-account information because she was only an authorized user of a checking account but did not actually own it. Gill did not submit any tax returns or recent social security statements.

Turna submitted a report from a private investigator asserting that Gill had admitted that she was working as a property-rental agent and that she owned several properties in California. Gill denied owning any property, stating that her parents owned the property and that she pretended to be a rental agent while her parents were ill only to answer calls and say that no rental properties were available. The private investigators searched internet resources but found no links between Gill and the rental properties.

Turna highlighted an email from Gill, asserting that she had admitted owning an eight-bedroom house. But the email stated only, "I live in a new big 8 bedroom house," and Gill testified that it referred to her parents' home, not one that she owned.

The magistrate granted the county's motion to order Gill to pay child support. The magistrate's order found that "[Gill's] claim that she did not have any income was not credible," and it stated that "[Gill] did not cooperate in providing discovery information, including bank accounts." It found that her "testimony at the time of the hearing was inconsistent with regard to her involvement with her parents' rental property," and it speculated that "[Gill] may have an interest, or earn employment income in managing some or all of these rental properties." It also found that "[i]t is reasonable to base [Gill's] gross monthly income []on her scheduled monthly expenses." On this assumption and Turna's stated income, the magistrate ordered Gill to pay child support and medical support. The order also requires Gill to pay two years of back child support and medical support, specifying that Gill must make additional payments of 20% of her monthly child-support payments to cover her "arrearages." The order further found that "[Gill's] failure to comply with . . . discovery requests unreasonably contributed to the expense of this proceeding" and ordered Gill to pay $1,000 in attorney fees.

Gill moved the district court to modify the magistrate's findings. The district court denied her motion except that it struck the magistrate's award of attorney fees. It ruled that Gill "is under a legal obligation to provide her income information" and that her failure to provide it necessitated the magistrate's imputation of her income based on her expenses. The district court specifically declined to "alter or amend the stayed judgments

for past due and unpaid child-support arrears," emphasizing that Gill "was required to make those payments and refused to do so."

Gill appeals.

D E C I S I O N

I

We first address Gill's jurisdictional argument. Gill argues that the district court lacked jurisdiction because the county's motion essentially sought modification of a prior North Dakota child-support judgment that had not been registered in Minnesota. *See* Minn. Stat. § 518C.609 (2012) (requiring that an out-of-state support judgment be registered in Minnesota before a Minnesota court can modify it). She cites numerous cases to support her jurisdictional argument. But Gill misunderstands the effect of the North Dakota child-support obligation. The North Dakota judgment set a child-support obligation for Turna, not for Gill. And by its terms, the child-support obligation existed only as long as the child resided with Gill. So when Turna took custody in 2008, the child-support element of the North Dakota judgment ceased to operate, marking the end of any party's child-support obligation. The county's motion therefore was designed to establish a child-support obligation; it was not a motion to modify the North Dakota judgment. Since the record contains no indication that any other state exercised jurisdiction over child support for A.T., the Minnesota court had authority to establish child support under Minnesota Statutes section 256.87, subdivision 5 (2010) ("A person . . . having physical custody of a dependent child not receiving public assistance . . . has a

cause of action for child support against the child's noncustodial parent[]. Upon a motion served on the noncustodial parent, the court shall order child support payments . . . .").

II

Gill also argues that the district court erred by setting her income based on her expenses. The argument has merit. When the district court affirms a child-support magistrate's decision, we treat it as a decision made by the district court. *Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009). And we review a district court's child-support decisions for abuse of discretion. *Id.* The district court abuses its discretion if it misapplies the law. *Id.* And we review statutory-interpretation issues de novo. *Id.*

We hold that the district court misapplied the law when it relied on Gill's expenses to find her income for support purposes. When a potential obligor in a child-support-establishment case fails to provide the required financial affidavit and supporting documentation for the district court to determine her income, "the [district] court shall set income for that parent based on credible evidence before the court or in accordance with [Minnesota Statutes] section 518A.32." Minn. Stat. § 518A.28(c) (2012). This section allows the district court to use either the party's *actual* income based on "credible evidence" or the party's *potential* income based on a process laid out in section 518A.32. The district court took a different approach. It first implicitly disregarded the credible-evidence process apparently because it disbelieved Gill's representation that she had no income and the only documentary evidence available was based on her having no income. The district court found specifically that the only evidence of Gill's actual income—her 2009 social security statement and her testimony—was not credible.

The district court's credibility determination was well within its discretion. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (holding that the appellate courts will defer to the magistrate's credibility determinations). "Credible evidence" of income "may include documentation of current or recent income, testimony of the other parent concerning recent earnings and income levels, and the parent's wage reports filed with the Minnesota Department of Employment and Economic Development." Minn. Stat. § 518A.28(c). The words "may include" indicate that the statutory credible-evidence list is non-exclusive, and the common feature of the listed items is that all are direct evidence of *income*. Here, the district court concluded that "there is insufficient information to determine [Gill's] gross monthly income." The district court's credibility assessment therefore left only the section 518A.32 potential-income approach. Our only question then is whether it correctly followed that approach.

The district court's use of Gill's claimed expenses as a basis for setting her income did not comply with section 518A.32. That section requires that the "[d]etermination of potential income *must* be made according to one of three methods." (Emphasis added.) The word "must" indicates that the listed methods are the exclusive methods to determine potential income. *See Kuchinski v. Kuchinski*, 551 N.W.2d 727, 729 (Minn. App. 1996) (holding that the district court must consider the statutory factors in what is now section 518A.32 when setting imputed income). *Compare* Minn. Stat. § 645.44, subd. 15 (2012) (defining "may" as permissive language) *with id.*, subd. 15a (defining "must" as mandatory language).

The district court did not follow any of the three methods. The first method requires the fact-finder to determine "the parent's probable earnings level based on employment level, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community." Minn. Stat. § 518A.32, subd. 2(1). The record does not suggest that the district court considered Gill's probable earnings level, evaluated her work history or qualifications, or assessed her available job opportunities. The second method relates only to parents receiving unemployment assistance or workers' compensation, *see* Minn. Stat. § 518A.32, subd. 2(2), and it does not appear that either party fits the prerequisite. The third method requires the fact-finder to determine "the amount of income a parent could earn working full time at 150 percent of the current federal or state minimum wage, whichever is higher." Minn. Stat. § 518A.32, subd. 2(3). The district court did not apparently make or rely on this statutory calculation.

Since the district court used a method other than one of the exclusive statutory methods to determine Gill's potential income, we reverse the child-support order, and we remand for the district court to determine Gill's potential income by applying the statutory factors to the existing record.

III

We address next Gill's argument that the district court abused its discretion by ordering that she pay retroactive child support in the absence of a finding that it would benefit the child. We will reverse a district court's child-support order only when it abuses its discretion by basing the award on a clearly erroneous conclusion. *Gully v.*

Gully, 599 N.W.2d 814, 820 (Minn. 1999). It is generally inappropriate to order retroactive child support unless there is a previous child-support order. *Davis v. Davis*, 631 N.W.2d 822, 827 (Minn. App. 2001). But in an action under title IV-D of the Social Security Act, "[a] person or entity having physical custody of a dependent child not receiving public assistance . . . has a cause of action for child support against the child's non-custodial parents. . . . A non-custodial parent's liability may include up to the two years immediately preceding the commencement of the action." Minn. Stat. § 256.87, subd. 5 (2012). The district court implicitly relied on this statute when it noted that this was a title IV-D case and awarded 27 months' retroactive child support. *See* Minn. Stat. § 518A.26, subd. 10 (2012) (defining a title IV-D case as including recipients of public assistance as well as recipients of child-support services). Gill impliedly relies on subdivision 1 of the same statute, which states that the "parent of a child is liable for the amount of public assistance . . . furnished to and for the benefit of the child . . . . limited to the two years immediately preceding the commencement of the action." But while subdivision 1 may require a finding that the expenditure benefited the child, subdivision 5 does not. And because A.T. did not receive public assistance (though he did receive nonpublic-assistance child-support services), the magistrate's implicit reliance on subdivision 5 is not clearly erroneous. So the retroactive award of 27 months' child support was not an abuse of discretion.

IV

We finally address Gill's argument that the district court erred by finding that she was in "arrears." Her argument is persuasive. We review a district court's determination

that a child-support obligor is in arrears for clear error. *See, e.g.*, *Cavegn v. Cavegn*, 378 N.W.2d 636, 638 (Minn. App. 1985) (applying a clearly erroneous standard of review to an arrearage finding). And an arrearage occurs only when an obligor fails to comply with a previous child-support order. *See* Minn. Stat. § 518A.26, subd. 3 (2012) (defining "arrears"); *see also Cnty. of Nicollet v. Haakenson*, 497 N.W.2d 611, 616 (Minn. App. 1993) ("Retroactive child support constitutes an arrearage only if it is not paid when due."). The district court stated that Gill "was required to make [previous child-support] payments and failed to do so." But the record does not indicate that any previous order required Gill to pay child support. And the award of retroactive support reflects a new obligation, not a preexisting obligation that Gill failed to fulfill. We therefore reverse the district court's clearly erroneous finding that Gill was in arrears.

Affirmed in part, reversed in part, and remanded.